NEW YORK STATE BAR ASSOCIATION
Journal
NYSBA
JANUARY/
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Edited by Susan Harper

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THE NEW YORK BAR FOUNDATION
Advancing Justice and Fostering the Rule of Law

The Century of the Woman?

Progress for Women, but Much Is Still to Be Done

The Voting Rights Act of 1963 did not end voting improprieties in the United States. The Civil Rights Act of 1964 did not eliminate racism in America. The 2015 Supreme Court decision affirming the right for same-sex couples to marry did not end bias against lesbians and gay men. But in American social and political history, all represented enormous steps toward a more just society.

Similarly, we have taken many steps toward equality for women in our nation and in the legal profession. To be sure, glass ceilings for women still exist. Unfairness and inequities still prevail in many situations and across many professions. But there has been more progress toward gender equality in the past five decades than in the previous thousands of years.

I recognize that I say this as a man, and that only a woman can truly appreciate the impact of gender inequities. But we are clearly moving in the right direction, and the empirical evidence shows that progress is accelerating. Women are playing leading roles in businesses and professions as never before. And this is good news for all of us.

It may seem counterintuitive, but in Dr. Amanda Weinstein's article in the January 31, 2018 issue of the *Harvard Business Review* entitled, *When More Women Join the Workforce, Wages Rise – Including for Men*, she shows that having more women working has raised median wages for all. Also, Dr. Weinstein notes:

> The increase of women in the paid workforce was arguably the most significant change in the economy in the past century. In the U.S., women's participation in the labor market has nearly doubled, from 34 percent of working age women (age 16 and older) in the labor force in 1950 to almost 57 percent in 2016. When it passed 50 percent in 1978, working women became the norm.

The National Association of Women Lawyers' 2017 *Survey on Promotion and Retention of Women in Law Firms* found that there has been considerable progress in our profession. As of 2017, women accounted for 25 percent of firm governance roles, nearly doubling in the last decade.

The Minority Corporate Counsel Association reported in 2017 that the results of its annual general counsel survey reflect that that there are more women general counsels in Fortune 500 companies than ever before. In 2000, only 43 women were general counsels in these settings. As of the winter of 2017, the Association reports that 57 minorities and 132 women serve as general counsels. The number of women leading legal departments of the biggest corporations in America has gone up every year since 1999, the first year of the general counsel survey.

In the New York State Unified Court System, the number of women serving on New York's bench has increased exponentially since the beginning of the 21st century. At every level of the judiciary other than the Court of Appeals, where there were and still are three female judges of a total of seven, there have been substantial increases in both the number and percentage of female judges.

In 2001, there were 305 female judges out of a total of 1,207 judges in the Unified Court System – 25.3 percent. In 2018, there were 507 female judges out of a total of 1,275 judges – 39.8 percent. This represents an extraordinary 60.2 percent increase in the number of female judges in New York in less than two decades.

Throughout the court system, women have made considerable progress. In 2001, there were nine female Appellate Division justices, or 19.6 percent. Today there are 27 female justices, a three-fold increase to 47.4 percent. Elected female Supreme Court justices statewide increased from a total of 60 in 2001 to 93 in 2018, more than a 50 percent increase.

It is important to note that the increases have been greatest for what are considered entry-level judicial offices, from which many women will rise to higher-level positions in the system. For instance, in 2001, there were 54 female Family Court judges throughout the state, or 39.1 percent of the total. Today, 94 Family Court judges are women, 61.8 percent of the total. In 2001, 25 of 76 New York City Criminal Court judges – 32.9 percent – were women. By 2018, the number had more than doubled to 51 of 103, or 49.5 percent. In the Civil Court of the City of New York, the number of female judges has gone from 49 in 2001 – 47.1 percent – to 80 – 66.1 percent.

While significant, substantial, and historic gains have been made for women in the legal world, there is clearly much work still to be done. There is no question that the legal profession still lags behind our society in some ways, but there has also been undeniable progress for women, and the progress continues.

I see the State Bar Association's new Women in Law Section, one of the fastest growing Sections in our 142-year history, as a symbol both of the progress we have made and the hard work that still lies ahead. NYSBA remains committed to this hard work. Through the efforts of our Women in Law Section, we will continue to advocate forcefully for gender equality in law firms, in courtrooms and in all other settings.

Our 2017 report encouraging law firms, members of the judiciary, corporate clients and alternative dispute resolution (ADR) providers to provide women lawyers with opportunities to gain trial experience, participate in the courtroom and all aspects of litigation, and be selected as neutrals in ADR has had an impact. I am proud to point out that the report inspired groundbreaking rules changes by Senior District Judge Jack B. Weinstein of the Eastern District of New York to encourage greater courtroom opportunities for women – rules that other judges are now adopting.

It can be difficult to perceive societal changes as they are occurring. I believe that the evidence is overwhelming that we are in the throes of an historic transformation and that history will remember the 21st century as the century of the woman. There are certain to be setbacks, frustrations, disappointments and problems, but it is undeniable that, from corporate boardrooms to politics to startups, women play increasingly important and powerful roles in business and political leadership.

I also believe that the staying power of the #MeToo movement is compelling evidence that there has truly been a seismic shift in our society. The forceful response to every new accusation or revelation of a powerful man who took advantage of his position and acted inappropriately or worse reminds us of the historic changes brought about by #MeToo.

Of course, there are powerful cultural biases, and there continues to be strong resistance. Some is institutional, borne of the inherent reluctance and fear of change in any long-lasting structure. Some is borne of fear by men who are threatened by the evolving power dynamic. Some has its roots in age-old psychological underpinnings. I am not making excuses for it – just recognizing that the resistance has multiple foundations.

Ultimately, whether men like it or not, the fact is that times have changed inexorably, and we will never return to the male-female roles of bygone days. It is futile to resist, as the powerful tides of history will not be altered. With or without men's support, gender equity is inevitable.

Men have a vitally important role to play in achieving true gender equality. We need to support and embrace these important societal changes and not resist or be frightened by them. It is the right thing, not just because our wives, daughters, sisters and mothers will be better off, but because it will benefit all women and men – and make our society stronger.

MICHAEL MILLER can be reached at mmiller@nysba.org

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THE MOMENT

The past two years have ushered in a historic period for women and our country.

Women are claiming their power and a new era in women's rights has arrived.

Following the largest women's march in the history of the world in January 2017, women with the support of other women – and armed with new communication channels – have organized, amplified their voice, leveraged their power at the ballot box, and shed sunlight on #MeToo workplaces.

No longer satisfied to sit along the sidelines and accept the status quo, women are setting their own course to take their seat at the table in order to have a say in the issues that impact their lives and work. From pay equity to paid leave, work-life balance, career advancement, and constitutional gender equality, women more than ever are placing themselves front and center and embracing their moment.

Exercising such power has altered our country's institutions and empowered women from all points on the political spectrum. Our new freshman U.S. Congress is more diverse and has more female legislators than ever before. Workplace issues such as sexual harassment, which many have silently endured, are in the forefront of our national conversations and thoughts. New laws have been passed and legislation introduced to support women as workers and breadwinners for families.

As members of the bar, we are in unique position to lead, advocate and use our power individually and collectively to support this transformative moment and to be in the forefront of the development and implementation of innovative ideas, policy and legislative reforms and workplace solutions that will help women.

Thanks to the leadership of President Michael Miller, President-Elect Hank Greenberg, the NYSBA Executive Committee and the House of Delegates, the State Bar Association is doing just that.

NYSBA affirmed our request last June to convert our 50-person Committee on Women in the Law to what is now the full-fledged Women in Law Section with 615 members as of this writing. NYSBA members – both women and men – now have more opportunities than ever before to be part of the solution and the change they want to see for women in our profession and society.

The mission of the Women in Law section is to be an active voice and catalyst for change to advance opportunities for women in the legal profession and for all women under the law. More than a dozen committees have been developed within the Section to achieve this: Annual Meeting, Awards & Programming, Champions: Men Advancing Women, Communications, Equity in the Legal Profession, Gender Issues, General Counsels, Partners, Legislative Affairs, Membership and Engage-

IS NOW

By Susan L. Harper

ment, Reports, Surveys and Publications, Sponsorship, Women in the Association, and Emerging Lawyers.

The concerns we will take on are not new to us. We have been in the forefront of issues impacting women – including pay equity, paid family leave, salary disclosures, women's health care, child care, legal representation, sexual harassment, sexual assault and domestic violence, the Equal Rights Amendment (ERA) and female prisoners' rights, to name a few – for many years.

We seek to secure your seat at the table, whether that seat is in a law firm, deal room, courtroom or legislative table.

The gender gap persists. Barriers for women lawyers exist. However, we stand at this unique moment to come together to lead and use our advocacy powers to expand opportunities and support equality in our profession and for all under the law.

We welcome your participation.

The moment is here. The taking is yours.

Your seat at the table awaits you. Take it.

Susan L. Harper, Esq., is the Managing Director NY/NJ of Bates Group, a financial services litigation, regulatory investigations and compliance consulting firm. She is the Founding Chair of the New York State Bar Association's Women in Law Section.

Secure Your Seat at the Table
Women in Law Section at Annual Meeting

Join members of the Women in Law Section at NYSBA's Annual Meeting on January 15 for a dynamic CLE program – Secure Your Seat at the Table: Becoming a Leader and an Indispensable Lawyer Who Champions Women – or stream it online at a later date.

Champions Brad Karp, chairman of Paul, Weiss and City of New York Corporation Counsel Zachary Carter will join New York State Supreme Court Justice Lucy Billings and Laurie Robinson Haden, senior vice president and assistant general counsel of CBS Corporation and founder and CEO of Corporate Counsel Women of Color, to provide insights on how their organizations are shaping the conversation regarding gender inequities.

Activist and Co-President of the ERA Coalition Carol Robles-Román will share with us the renewed state of the ERA movement. Lisa Friel, the former chief of the Manhattan District Attorney's Sex Crimes Unit and currently special counsel for investigations with the National Football League, will share with us the latest legal and policy developments in employment law.

Former general counsel to New York Gov. Andrew Cuomo; Mylan Denerstein, now a partner at Gibson Dunn & Crutcher LLP; will discuss women at the legislative table and recent legislation supporting women.

Finally, ethics expert Pery Krinsky, Krinsky PLLC; Patrick J. Brennan, Esq., founding partner, Furman, Kornfeld & Brennan LLP; J. David Canton, Esq., partner, Aaronson, Rappaport, Feinstein & Deutsch, LLP; Christine Champey, Esq., associate, Turken & Heath, LLP; and Rose M. J. Charles, Esq. of Sompo International Insurance will review live enactments of ethical issues ripped from recent headlines, issues that female and male attorneys may encounter while securing their seat at the table. The panel will consider whether lawyers' conduct may be "legal" but not ethical.

Stories from the

Women in the Law, 1950s to Today

Women in the law have compelling stories to tell. Here are some from 10 lawyers admitted to the New York bar from the 1950s to the present. They are our colleagues in public service, the judiciary, the private sector, and the legal academy. Their journeys reflect discrimination and inspiration, blazing intellect and fierce drive, great strides and unmet goals.

Cynthia Feathers is the Director of Quality Enhancement for Appellate and Post-Conviction Representation at the New York State Office of Indigent Legal Services.

Front

By Cynthia Feathers

HON. BETTY WEINBERG ELLERIN ADMITTED 1953

At the age of 12, Betty Weinberg decided she wanted to be a lawyer. She went to NYU Law School, which was "ahead of the curve" with 22 women in a class of about 500. When Judge Ellerin started there, she was asked whether she just wanted to find a husband. She responded, "Actually yes, but when I saw what was available, I decided to get a degree instead." She took no prisoners, but was not belligerent and had a sense of humor.

Upon graduation, her job search was "demoralizing and demeaning." Firms said "no," because they assumed she would marry and have children. Eventually, Judge Ellerin landed a job at a maritime law firm. She took it in stride whenever judges assumed she was a secretary when she entered a courtroom. Next came a lengthy trial court clerkship, when being a woman helped. "People thought so poorly of women lawyers that when you showed that you were competent, you were seen as brilliant or unusual." In that position, she was able to balance her career with raising three children. Her husband was "ahead of his time" in sharing parenting. She later became a Supreme Court Justice, and many "firsts" followed. She was the first woman Deputy Chief Administrative Judge for the NYC Courts; the first woman Associate Justice in the Appellate Division, First Department; and the first woman to serve as Presiding Justice of that court. While there, Judge Ellerin sought to "elevate the sensibilities" of her male colleagues on gender and matrimonial law issues.

When she retired from the bench in 2005, she became a senior counsel at Alston & Bird, where she has taken many young lawyers under her wing. A visit to the firm's Atlanta office helped seal her decision. "They were so enlightened. They had many female associates and partners and an onsite children's center. That resonated with me." Judge Ellerin's many roles – at the firm, as a JAMS mediator, and serving on committees and boards – have been diverse and rewarding. They include having served as President of the National Association of Women Judges and continuing to serve as Chair of the New York State Judicial Committee on Women in the Courts, as Chair of the New York State Continuing Legal Education Board, and as a Vice-Chair of the First Department's Committee on Character and Fitness. She is particularly proud of having received the ABA's Margaret Brent Women of Achievement Award in 1993 as one of six recipients that included Justice Ruth Bader Ginsburg and then-U.S. Attorney General Janet Reno.

Judge Ellerin recently recounted that she had to smile when she attended a luncheon for past and present justices of the First Department. She had been the sole woman member for more than 10 years, so it was a joy to see that so many of the justices now on the bench are women.

SUSAN B. LINDENAUER ADMITTED 1965

In her teens, when *Brown v. Board of Education* came down, Susan Lindenauer decided she wanted to be a lawyer. "I thought, if lawyers can do that, then I want to be a lawyer." Smith College followed. An all-women's school, Smith instilled confidence and helped students find their voice. Susan was one of only three females in her class who went directly to law school. When she attended Columbia Law School, only about 10 out of 280 students were women. She had just married her husband, now of 57 years, who was an "unabashed feminist."

Upon graduation, Susan sought a job in the private sector and recalled being asked what type of birth control she used. "Until then, I did not have a sense of how complicated things might be." At her first job, at Cleary Gottlieb, she received excellent training, but not the litigation opportunities she sought. Susan soon joined the Legal Aid Society of New York City, where she enjoyed a broad range of work and a welcoming environment for women attorneys. Things were different in the courtroom, where few women appeared, and courts often were not respectful. She wanted more responsibility and found it when she was named Legal Aid Society's first general counsel, a position she held for 20 years.

A driving force throughout her career has been her many leadership positions at the State Bar Association, including being on the Executive Committee, and other bar groups. Bar activities continue unabated during her so-called retirement. Susan's mission is to bring justice system reform, ensure that clients of limited means receive quality representation, and advance the profes-

sion. "The profession is very different today. Women were an oddity, but not now," she observed, noting that the attorneys-in-charge of NYC Legal Aid Society's three practice areas – civil, criminal, and juvenile rights – are all women.

HON. CARMEN BEAUCHAMP CIPARICK ADMITTED 1967

Judge Ciparick planned to teach social studies, but a Hunter College professor inspired her to choose the law. During the day, she taught junior high school classes, and at night she attended St. John's Law School, which had only eight women students. The night students were not allowed to be on law review. There was only one woman on the faculty, and professors generally called the students "gentlemen." When female students were called upon, the attention was not always welcome. For example, one torts professor grilled Judge Ciparick about whether an evening gown was inherently dangerous and quipped that it was what was inside that was dangerous. After graduation, during her brief stint as a Legal Aid staff attorney, one trial judge always referred to her as "princess."

Judge Ciparick then served as assistant counsel to the precursor of the Office of Court Administration. She replaced the only other woman who had ever worked for that office. "Apparently one woman at a time was enough." In 1972, she became the first woman chief law assistant of the New York City Criminal Court. Soon thereafter, she and her husband had a daughter. When Judge Ciparick applied for a judgeship in 1978, she was asked if she planned to have more children and if that would interfere with judicial duties. At age 36, she was named a Criminal Court Judge – the first Puerto Rican woman to serve on the New York bench. She loved the job, but did encounter some ageism and sexism. One attorney declared about a decision she made, "In all my years, I've never seen such a ruling!" Judge Ciparick coolly replied, "Well, you've seen it now."

During her subsequent tenure as a Supreme Court Justice sitting in Manhattan, the number of women judges grew. In 1993, she was appointed as the second woman, and first Latina woman, to sit on the Court of Appeals. She joined Judge Judith Kaye, who became a friend, mentor, and role model. Judge Ciparick wrote some of the high court's most significant decisions while serving there for 19 years.

Upon reaching mandatory retirement, she also entered the Big Law realm, becoming of counsel to Greenberg Traurig, where she co-chairs the national appellate practice group. She also finds great gratification in extensive public service activities, including as chair of the Board of Trustees of the Historical Society of the New York Courts and co-chair of the New York State Justice Task Force. As chair of the Mayor's Advisory Committee on the Judiciary, Judge Ciparick is "very conscious of the need for diversity." She remarked, "Women are doing well in the judiciary, especially in New York City, and in the public sector. But we have a way to go in the private sector, where there still are not women equity partners in sufficient numbers or enough women named to governing boards."

SUSAN HORN ADMITTED 1975

Two factors drew Susan Horn to the law. Her cousin, Hon. Rosemary Pooler – a Second Circuit judge for 20 years – was a role model. In addition, while attending college, Susan admired lawyer-heroes of the civil rights, anti-war, and women's movements. She became involved in politics, including in the campaign of lawyer-Congresswoman Bella Abzug. "I saw how people could use the law and court system to change the world."

When Susan attended Syracuse University College of Law, 20 out of 200 students in her class were women. While women's rights efforts were gaining steam, there was still overt discrimination. One manifestation of that was that a day would be set aside as "Women's Day," and only then would the professors call on women. A seminal event that influenced the direction of Susan's legal career was the 1971 Attica Prison Rebellion and her involvement in a student project assisting in the defense of the mostly poor, black inmate survivors, leading to a lifelong commitment to criminal justice and public defense reform.

She pursued private practice at two junctures, including for five years at an all-women firm, which handled varied and interesting cases. But Susan found her true professional home at Hiscock Legal Aid Society in Syracuse. She began as a staff attorney and later became the President and CEO, a position she held for 27 years until her retirement. Susan's public service continues through community and bar group involvement. She recently attended a joint meeting of State Bar Association's Access to Justice and Legal Aid Committees. "It used to be that women in leadership were a small minority in civil legal services and public defense. At that meeting, it was wonderful to see the overwhelming number of women in charge."

SHARON STERN GERSTMAN ADMITTED 1981[1]

At Brown University, Sharon Gerstman had a brilliant professor who taught a course on the law. "I ate

it up, I loved it." She decided to go to law school and obtained her JD at the University of Pittsburgh and her LLM at Yale. At Pittsburgh, only 10 percent of the students were women; it was right before an explosion in the enrollment of women. There was only one woman on the faculty; female students were admonished that they were taking the place of a man with a family to support, and the placement director asked the women students if they knew how to type.

When Sharon taught at the University of Missouri-Kansas City Law School, she was the only woman on the regular faculty and became the "show girl," being named to every committee. After marrying and moving to Buffalo, she worked for a law firm with no pregnancy leave policy and an unpromising track record toward female lawyers. She decided to join the court system and stayed for 29 years, working as a court attorney/referee and principal law clerk in State Supreme Court in Buffalo. Sharon and her husband had one child, and her husband's job allowed him to provide a lot of coverage on the home front. After leaving Supreme Court, she became counsel to the Buffalo law firm of Magavern Magavern Grimm, where she concentrates in mediation, arbitration, and appellate practice.

Early on during her court attorney role, Sharon began her profound, enduring commitment to bar association work and leadership at all levels. She is the immediate past president of the State Bar Association and sits in the ABA House of Delegates. "I wanted to feel like I could make a difference." She also wanted to help foster the success of women in the law. "Our generation overperformed, so that women would be looked at the same as men in the workplace." Sharon observed that women can "find a place," but still have to operate at a higher level than men. While law schools have moved toward equality for women, "we haven't seen the same progress in the workplace," Sharon noted, citing studies revealing pay gaps,[2] sexual harassment at law firms, and a high attrition rate among women fatigued and frustrated by institutional barriers.

CHERYL KORMAN ADMITTED 1991

When Cheryl Korman attended St. John's Law School, half of the students were women. Gender issues were not the concern; the economy was. Students who did not graduate in the top 10 percent of the class did not land a job. As graduation approached, she applied for a position at the Second Department, got the job, and "loved every minute" of her three-year tenure. She then joined Rivkin Radler and found a career home in the Appeals Practice Group. Today she is a general partner, based in the Uniondale office. The attorney who hired her became a mentor and is now managing partner. "He did not see attorneys as male or female. He just looked for talented attorneys."

A concentration in appeals brought more flexibility than trial litigation. "It is easy to bring the record home at night." The firm had no maternity policy when Cheryl's son was born, but by the time her daughter was born, the Family Medical Leave Act required three months' leave. Her husband would arrive home first and take over from the nanny. Even with "an amazing support system," attorneys who are parents "cannot have it all; you have to sacrifice something." Early on, Cheryl made the decision that it was not critical that she be home every evening to cook dinner or eat with the family, and it was okay to not go to every soccer game or dance class. Going to work some weekends allowed her to stay ahead of things at the office.

She sees the need for flexibility regarding family issues as not only a women's issue, since many couples rely on dual incomes and many young fathers want to have a hands-on role. Despite the challenges of work and family, Cheryl has found time to become active in bar association work and currently co-chairs the NYSBA Committee on Courts of Appellate Jurisdiction. That work has presented an opportunity to identify and support talent. Early on in her committee role, she was impressed by a young attorney who had clerked at the Court of Appeals. She invited him to interview at her firm. Now five years later, he was just named a limited partner at the firm.

CHRISTINA SWARNS ADMITTED 1994

When Christina grew up in Staten Island, "race relations were not at their finest," and Howard University provided "four years of peace" and a safe, uplifting place that nurtured her drive to advance social justice. The University of Pennsylvania Law School was an elite school, but a welcoming place for women, and it offered a faculty that included giants in civil rights law. While gender issues were not a concern, the Socratic method was not favorable for women, who felt less comfortable than men in being publicly cross-examined.

Christina did not acutely feel the difference gender could make until working at a capital defender's office, where the handful of women were called upon to handle the client visits and mitigation work, while their male counterparts did the legal work. Further, in her unit, the female lawyers would "work up the cases in state court," and then the male attorneys would be given the prime opportunities to do the federal habeas litigation. She opened the eyes of the organization's chief defender to the inequities. Christina's outspokenness and successes led to exceptional opportunities for her, but her goal had

been to improve the situation for all women attorneys at the office.

In 2003, Christina was named director of the Criminal Justice Project at the NAACP Legal Defense and Education Project. She later became litigation director in 2014. Inside the organization, she did not experience gender issues, but in the world at large she did. Women were often underestimated and "talked over" by men. The women attorneys wanted to be heard and not let others diminish them, but without becoming those attorneys who always demanded to be the center of attention.

In 2016, in the U.S. Supreme Court, Christina argued the case of *Buck v. Davis*, concerning a Texas death row inmate whose trial was tainted by racially discriminatory expert testimony. She thus joined the tiny group of black women lawyers to have argued in what continues to be largely a white male bastion. There to watch her argument were her then 8-year-old daughter, whom she adopted as an infant, and Thurgood Marshall's widow. Christina won the case (137 S. Ct. 759). Arguing in the Supreme Court was both a dream and a nightmare, as she had to rely heavily on a support network for child care while she did the grueling work to prepare. "There is no end to how hard it is to be a single parent and a full-time lawyer. You have to compromise on both ends." Since 2017, Christina has been the president and attorney-in-charge of the Office of the Appellate Defender in New York City. Young lawyers there talk about wanting to have a career and a family. "It is fantastic that we are having these big open conversations." She advises attorneys that they can be both serious attorneys and good parents, "but don't expect it to be easy."

JANE YOON
ADMITTED 2002

Growing up, whenever Jane Yoon was told that she could not do something, she never took it as a gender issue. She took it as a challenge, and said, "Why not?" She does not want to be seen as a woman lawyer or as a Korean-American lawyer. "I don't want to be singled out in a category. I just want to be recognized for my own individual talents or faults." The primary tension she has experienced has not necessarily been gender-related, but rather between her parents' Korean values – which are often restrictive toward women – and American values. Still, it was not until Jane spent the year after college teaching conversational English to young students in Korea that she fully realized the disparate treatment there between men and women, who were not even allowed to smoke in public.

Soon after returning to the states, she enrolled in Benjamin N. Cardozo School of Law, where a number of students in her section were returning to school after having taken time off to pursue other endeavors. Jane's passion for public interest work was born through internships with the Attorney General's Civil Rights Bureau and the Legal Action Center. After law school, Jane worked in both the public and private sectors and ultimately determined that a life of billable hours was not for her. One of her stints in the private sector was with a small, women-owned civil litigation practice, where she got a taste for the appellate work that she would settle into almost a decade later.

Jane thrived on the front lines at a Rochester nonprofit representing low-income clients in housing issues. When the opposing side sought unreasonable settlement terms, she litigated those cases and won warranty-of-habitability and Section 8 denial cases, as well as overturning the denial of a professional license due to a prior conviction. Jane could recall only one instance where she felt belittled because of gender and/or age. An older landlord talked down to her as if she were "a little girl," even though she "knew the RPAPL inside out." She beat him in court, too.

Jane was surprised to find herself "in her element" upon joining the Monroe County Public Defender's Office, where she arrived with no experience in criminal defense. In her early days at the office, that sometimes meant dealing with "cowboy" and conservative town justices, but she was able to navigate the apparent "old boys' club" and earn the respect of judges. Jane eventually moved to the office's appellate bureau and stayed there for several years. About a year ago, she seized the opportunity to help elevate public defense in New York when she joined the Statewide Implementation team at the State Office of Indigent Legal Services. "I wanted to become part of the exciting efforts to recreate public defense throughout the state."

SARAH ROGERSON
ADMITTED 2004

As a 10-year-old, Sarah Rogerson was a "huge government nerd," decided to become a lawyer, and never let go of the idea. Attending Seton Hall Law School in Newark was a transformative experience, because her work in local politics and low-income housing awakened her to issues of gender, class, and race. Law school was also a positive experience, with many female professors and a 50-50 representation of women and men among students. During early years in private practice, "the real world hit." After an unsuccessful settlement conference, for example, opposing counsel declared, "Welcome to the big leagues, sweetie." At her firm, efforts were made to bring attractive women to meetings. There was excitement about a job applicant whose resume included cheerleading experience and

disappointment upon finding that the applicant with a gender-neutral name was male.

Sarah is a tenured clinical professor of law and director of the immigration law clinic at Albany Law School, which provides a supportive environment for attorneys with families. Having two young children has taught her to delegate, trust others, and say "no" for the first time. She was able to time her pregnancies to give birth during the summer and took standard leaves of six to eight weeks. She would have preferred longer leaves and is excited to see the trend toward paid child care leave for both women and men. The young students she talks with have a healthy outlook about the tradeoffs between career and family. Sarah reminds them that their careers will be long and they will need to make short-term sacrifices, build their skills and connections, and opt to live on less and adjust their lifestyle. "You can't have it all, so you have to decide what you want most at a given time."

Sarah's early passion about the government continues. She took joy in the gains by women in their House races, so that a record number of nearly 100 women, many with progressive agendas, will serve in the 116th Congress come January 2019. She is worried about the direction the U.S. Supreme Court might take on issues of reproductive rights that could be "damaging to society and send the wrong message to young women." But she is encouraged that women are pressing the government for family-friendly changes in the workplace.

REBECCA WAGER
CLASS OF 2019

Rebecca Wager decided she wanted to go to law school when, in a student affairs job at a western New York college, she assisted students who made sexual assault allegations. She saw how important it was to respond with information and support at an overwhelming time of crisis and how the law can be used to protect people's rights. The desire to help vulnerable persons continued when she co-chaired the Albany Law School Women's Law Caucus last year and helped to plan the school's annual Domestic Violence Vigil to bring awareness about issues of violence against women. The Caucus also focused on organizing events to reflect the experience of all women in the law, "not just white cisgender women," by partnering with the many affinity groups on campus. "Individuals have many different intersections to their identities, and the identities of lawyers should reflect the clients and communities they serve."

There are many women on the faculty, and they are very supportive of women students, but the same cannot always be said of Rebecca's peers. She has observed how students unfairly respond to classmates who have young children or are expecting children. "Mothers definitely face an extra layer of scrutiny from their own peers." For example, one male student skeptically questioned why a classmate with a 3-year-old was applying for a Big Law job in New York City. Rebecca has observed that, in fact, often "mothers do very well in school – they are way up there in performance. It seems like being a parent makes them more focused, more motivated, and better as students."

Her career goals are clear. Rebecca wants to practice in family law and employ both legal acumen and empathy for clients. Currently, she is thriving as a part-timer at a local law firm that concentrates in custody and divorce cases. One attractive feature of the firm is that it is women-owned. "That allows me to focus on what matters – the clients and the work. I don't have to worry about being underestimated just because I am a woman in the firm setting, and I feel fortunate to be surrounded by the mentorship of strong women lawyers as I develop my professional identity."

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1. Admitted in Pennsylvania in 1975.

2. According to *A Current Glance at Women in the Law* (ABA, Jan 2018), women lawyers have salaries that are slightly more than three-fourths those of male lawyers. While about half of law students are women, only about a quarter of law firm partners and Fortune 500 general counsel are women. Women hold more than a quarter of state and federal judgeships and about a third of law school deanships.

Going Solo

Women Share Insight on Why They Started Their Own Law Practices

By Christian Nolan

Instead of waiting around in hopes of making partner one day, women lawyers are increasingly trying their luck on their own and having great success.

"Best thing I've ever done," said one female New York lawyer about her decision to start her own practice.

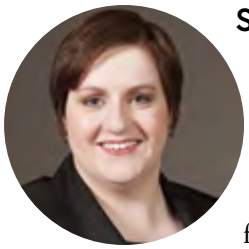
"My only regret was not doing it five years earlier. It's been great," said another.

The odds may have been in their favor, after all. In 2017, women accounted for 46 percent of law firm associates but just 30 percent of non-equity partners, according to the National Association of Women Lawyers. Even worse, only 19 percent of women were equity partners.

While the specific reasons vary for every female lawyer who starts their own law practice, one thing remains consistent – women are steadily leaving law firms in order to be their own boss.

Of the New York State Bar Association (NYSBA) members interviewed for this article, the reasons varied from control over their practice areas and caseload, to having a family and better work-life balance. One member did so out of necessity after getting laid off during the economic meltdown a decade ago.

The following profiles highlight four of the women's decisions to go solo as well as some tips for those who may be considering a similar move.



SARAH GOLD

When the stock market crashed in 2008, Gold knew she was in trouble. Business was quickly drying up for the small firm she worked at in Latham, which specialized in hedge funds. She was laid off in early 2009.

Gold began collecting unemployment benefits and was one of about 7 million "99ers," who received the benefit for 99 weeks as part of the American Recovery and Reinvestment Act passed by Congress in February 2009.

She sent out a couple hundred resumes during the economic downturn and had just a few interviews. Nothing materialized. Out of necessity, she decided to start her own practice. But since you cannot collect unemployment benefits while starting your own business, she waited until the 99 weeks were up. Then on 7/11/11, a date she vividly remembers, she walked down to the court clerk's office and filed the necessary paperwork.

"It was slow. I'm not going to lie," Gold recalled. "How do you start when you don't know anything about anything?"

Other than her law school classmates, she did not know anyone in the legal community. She knew she needed to

"network like hell." So she networked on social media, including Facebook, to attract some clients and she crashed a meeting of NYSBA's Young Lawyers Section at the Bar Center on 1 Elk St. in Albany.

"I'm an unemployed attorney. I need stuff to do. What can you have me do?" she told them.

NYSBA welcomed her with open arms and she's remained devoted to the State Bar Association ever since, having chaired the Young Lawyers Section, Business Law Section and is now a member of NYSBA's Executive Committee.

Her active membership paid dividends. Not only did she learn the skills necessary to survive with her own practice, she made connections that have opened doors to new opportunities, such as her job teaching business law at Rensselaer Polytechnic Institute.

Gold, whose firm name is the Gold Law Firm, focuses on business law in the Capital Region. She said initially

You're starting from scratch. Don't be afraid to admit you don't know what you don't know.

she worked from home, bought a laptop and printer, used Skype and scheduled meetings with clients in coffee shops. Gold now shares office space in Colonie with another attorney.

"Wait until you get some clients, then buy (professional liability) insurance," said Gold. "Take it as it comes. Don't jump into the deep end right off the bat."

As a transactional attorney rather than litigator, Gold still keeps expenses down.

"Even now I still try to keep the overhead pretty low," said Gold. "I don't have staff. Malpractice insurance and rent are the biggest costs."

If going out on your own, Gold recommends patience and to not be afraid to admit what you don't know or need help with.

"It's not going to happen overnight unless you're bringing clients in from another firm," said Gold. "You're starting from scratch. Don't be afraid to admit you don't know

what you don't know. Don't make assumptions and hope they work out. Ask the question, whether to court staff, or another attorney.

"Chances are you know someone . . . Call them up and ask them the question or draft them an email," continued Gold. "Nothing will get you in trouble faster than assuming you know and screwing it up. Someone will figure it out and it will come down on your head."

MARTHA E. "MEG" GIFFORD

Gifford says that when she meets other lawyers who find out she's a solo, "I've discovered there is an immediate reaction of surprise but also admiration when they find out what I do and how I do it."

"Honestly, there's a great sense of accomplishment when you pull off this kind of a move," said Gifford.

Gifford, of Brooklyn, got her start at Donovan, Leisure, Newton & Irvine in New York City before landing a job at the Department of Justice Antitrust Division's New York field office. From there, during George H.W. Bush's term, she went to Proskauer (at the time known as Proskauer, Rose, Goetz & Mendelsohn). There she practiced nearly 20 years and at various points either chaired or co-chaired their antitrust practice.

"There was not one day during the first 10 years when I did not have some criminal investigation that I was working on," said Gifford. "For most of my clients, my relationship started out in an investigation or litigation or a merger and I ended up turning that into a counseling relationship. It was very rewarding."

In 2006, Gifford became very sick with Lyme disease.

"After I recovered I was constantly exhausted," said Gifford. "It was hard to get myself the time I needed to really get better when I was plunged back into my very busy practice."

Additionally, Gifford has always been very involved with bar associations, having chaired NYSBA's Antitrust Section (from which she has since received the William T. Lifland Distinguished Service Award) and served as president of the Women's Bar Association of the State of New York and of its Manhattan chapter.

"I had built up a reputation among the antitrust community. It was a good moment to consider the rest of my career and my life. I thought I needed some time to myself and also wanted to practice law in a different way," Gifford recalled. "I wanted to have the time to really contemplate the issues that were brought to me . . . without being pushed constantly by everything else that was on my to-do list.

"At the firm, I can't say 'No, I won't take that on or take that client.' It just doesn't happen," Gifford continued. "I realized the only way I could get control of my time and schedule was to limit the number of clients I work for and that meant practicing on my own."

Gifford admitted the decision was a little scary initially and she was sad to leave her colleagues behind. She said she was anxious about the unknown, such as not having an IT department or other support staff like an administrative assistant. But she made the decision that she would do everything herself unless a complex case required her to hire someone for a short time.

As it turned out, she has represented clients in significant DOJ, Federal Trade Commission and state Attorney General investigations by working with the clients to put together teams of discovery experts, small litigation boutiques, local counsel or large firm co-counsel, tailored to the needs of each matter.

News of her starting her own practice made it through the grapevine before she even formally announced it. A number of clients followed her.

"Will you still be able to do our antitrust work?" they asked. "It was really a thrill to say to them 'If that's your choice, the answer is yes,'" Gifford said.

Between the clients that came with her and referrals, Gifford maintained a successful solo practice until recently becoming "semi-retired." Gifford recommends getting a sense of what your clients might do before you decide to go out on your own.

"I don't mean breaking the firm's rules or soliciting clients in violation of ethical obligations, but certainly being sure you know your clients well enough," said Gifford. "If you go out with the confidence that you've got some base that makes all the difference in the world."

JILL M. CICERO

When Cicero began practicing law in 1984 at what is now known as Nixon Peabody, the firm had an associate rotation program where first-year associates switched departments every six months. After spending time in the estates department, she knew that was the area of law she wanted to focus on.

From early in her career, Cicero was active in the community, serving on various boards and having since served as president of the Monroe County Bar Association. It was clear that the firm's emphasis on the billable hour would not allow her to commit the time she wanted to professional and charitable causes.

"I had done very well as an associate but in 1990 I told myself, 'You know what, I cannot square my personal goals as an attorney and the person I want to be with the attorney that the firm needs me to be,'" said Cicero. "I had never previously been entrepreneurial. People just didn't start their own boutique firms back then."

Cicero said a confluence of factors made it possible for her to make the leap: the development of personal computers, law libraries accessible by computer enabling her to practice at a high level without being at a big firm and the gradual acceptance by clients that not every good lawyer was with a big firm.

"Had it been five years earlier, I don't think I could have done it," Cicero said.

"If you go out with the confidence that you've got some base that makes all the difference in the world."

Cicero took her administrative assistant from Nixon Peabody with her, hired a paralegal less than two years later and obtained a loan to open an office at Rochester's Linden Oaks Office Park. She was the first lawyer to move into the new development on the east side of Monroe County. Numerous lawyers have since opened law offices there.

"To be successful, especially in the area of practice I was in, I believed I needed to have a certain image," said Cicero. "I was able to borrow enough to tastefully furnish my office, purchase state-of-the-art equipment, and hit the ground running. Although I assumed I wouldn't bill any time for three months, I was paying expenses by 60 days in, and went from there. Now I have 2,000 clients."

Because she didn't litigate, she needed fewer resources. She used good periodicals and Continuing Legal Education (CLE) courses to improve her expertise and keep current with changes in the law. She said she went into

her practice with the full intent to compete against her old firm for high-end estates clients. Conversely, given that era, she said they did not view her as a threat when she left, even holding a nice luncheon for her.

Cicero believes she received important training at Nixon Peabody that prepared her to practice on her own at a high level. It helped her understand what it meant to practice "in a first class way" and she couldn't imagine starting from scratch out of law school without training or mentoring.

Cicero, a longtime member of NYSBA's Trusts and Estates Law Section and 2009 recipient of NYSBA's Attorney Professionalism Award, said the best advice to give anyone starting their own practice is to "just put yourself out there." Cicero said that she agreed to speak at any event or seminar that invited her, and joined several additional boards and bar associations.

"Every single person out there is a potential client and you learn how to make sure people understand what you do," said Cicero. "I don't think I have ever served on a board that I didn't get clients from it even if I wasn't specifically looking for that."

Because Cicero was a trailblazer when it came to starting her own practice, she said many attorneys have consulted with her since. She's been happy to help them.

"I would encourage people to think about what it is they want out of their professional lives and how it meshes with their personal lives," said Cicero. "They have options. I worked at building my professional reputation both within and outside the firm so that when I did make the decision to leave, I had a presence and was already known in the community."

LINDA REDLISKY

Redlisky left a mid-sized New York City firm in 2005 "to follow her passion."

"Unfortunately when you are at a firm, oftentimes you can't pursue your passion if that's not an area practiced by the firm," explained Redlisky. "I wanted my work to directly impact the elder population, and the path to that service was to go out on my own."

Redlisky was introduced to elder law at her firm but they had no Medicaid planning practice. Through her involvement with NYSBA's Elder Law and Special Needs Section, she soon learned she had a strong interest in serving the elder population "not only with respect to guardianships but also advanced directives and Medicaid planning in order to make sure seniors were able to age at home in a manner that is consistent with their wishes and preserve their dignity."

Another factor for Redlisky was her family, as she had a baby the year prior to leaving her firm. Telecommuting was not nearly as prevalent then as it is now, and felt she needed to be at the office.

Redlisky decided to partner up with her husband, Robert G. Rafferty, who had his own solo practice. Together they formed Rafferty & Redlisky, based in Pelham. They employ a paralegal, administrative assistant and various per diem attorneys.

"I wanted the flexibility of setting my hourly rates and not have to discuss it with 30 other partners," said Redlisky. "We meet monthly to discuss cases, business development and other firm business. We're transparent with each other regarding our fiscal budget and our revenues. However, we both respect each other's business decisions with regard to hourly billing and retainers. That's the beauty of running your own firm. Of course we have to get the bills paid but it's gratifying to help a client and reduce your rate when you feel it's warranted."

Redlisky had numerous tips for other women considering starting their own practice.

She said first make sure your finances are in order and recommended giving yourself six months cushion when starting out. Also, familiarize yourself with Interest on Lawyer Accounts (IOLA) and all relevant ethical rules.

"NYSBA offers a wide variety of programs throughout the year. There's always a CLE on managing your IOLA accounts and tips for small practitioners/solos," said Redlisky. "I think I've taken at least three courses as a small firm owner, and learn something new each time."

Speaking of bar associations, she also said to join the bar that's right for you and then participate in a section related to your concentration like she did with elder law.

"As a woman practitioner, the women's bar has been a tremendous resource for me," said Redlisky. "I owe much of my success to the women I have met in the Women in Law Section who have promoted me."

She admits it's a daunting task to balance your time but marketing yourself and networking is especially important when starting your own practice. She credited others for helping her along the way and tries to pay it forward now.

"You learn how to promote yourself in a way that you're comfortable with and doesn't feel inauthentic," said Redlisky. "People need to know what you do and what your skills are for referrals to come through the door."

Nolan is NYSBA's senior writer.

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Women Attorneys in Te Four Industry Leaders

By Mark A. Berman

In my law practice and in my work for the New York State Bar Association, I am fortunate to work with some of the most well-respected thought leaders and visionaries in our nation on technology issues and how these issues relate to and impact the law and our justice system.

I recently spoke with four of the top women attorneys in North America who practice in the digital space, and our conversations are presented here. All four offer fascinating insights on how women can succeed in technology-related law.

Each of these women makes clear that one does not need to have taken computer courses or need a technology background to become successful in the digital space. They provide a roadmap on how to successfully enter the tech field regardless of your gender.

All four talk about their paths to success and leadership, and how they have marketed themselves is a lesson in creativity, hard work and perseverance. Each speaks to the importance of having a mentor or sponsor who can provide guidance and give advice on career development.

All of these women have been prescient in seeing how technology will change our world and in adapting to this ever-changing field. All stress the importance of seeking out new opportunities and note how becoming involved in bar association committees and trade organizations has been critical to their professional development and advancement in the technology world.

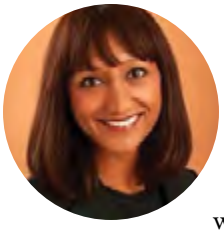
Mark A. Berman chairs NYSBA's Technology and the Legal Profession Committee and is a member of NYSBA's Executive Committee. He is a partner in the commercial litigation department of Ganfer Shore Leeds & Zauderer, LLP, representing clients in state and federal courts as well as in arbitral forums and in mediations. He is also the 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/.

SHOSHANAH BEWLAY

I oversee the Division of Legal Affairs (DLA) within the New York State Office of Information Technology Services (ITS). ITS as a New York State agency provides statewide IT strategic direction, directs IT policy and delivers high-quality IT services to 53 New York State agencies that serve more than 19 million New Yorkers. The ITS DLA includes attorneys, legal staff and technical staff assigned to the departments of house counsel, litigation and eDiscovery, and investigations. As Chief Counsel, in addition to my general duties to my client ITS, I provide advice and guidance to state agency executives concerning: legal and regulatory compliance with state and federal requirements for technology procurement and contracting; statewide technology policy; statewide IT strategy alignment; and IT audit and internal controls.

GAIL GOTTEHRER

I'm the Co-Chair of the Privacy, Cybersecurity and Emerging Technologies Practice at Akerman LLP. My practice focuses on the legal issues created by our increasingly data-driven and connected world, and potential legal and regulatory obstacles to emerging technologies. I provide advice on data ownership and data privacy laws, such as the GDPR and the CCPA, cyber-risk and security, and emerging technologies including autonomous vehicles, biometrics, and smart cities.

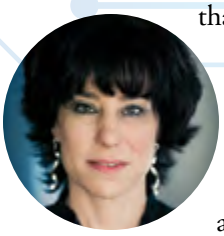


SANDRA RAMPERSAUD

I am Co-Head of the global eDiscovery and Data Analytics function at UBS AG, and the Global head of the Litigation and Investigation Services within that function. I am responsible for the integrity and quality of the bank's data needs in the context of internal and regulatory investigations, and litigations, across the globe. I have

ch:
Talk About Their Work

regional teams set up in the Americas, Europe, and APAC who are specialists in their region and manage the requirements regionally, and collaborate with their counterparts across the globe to meet demands that have global data requirements.



MAURA GROSSMAN

I wear a number of different hats in the technology space. As a professor at the University of Waterloo and at Osgoode Hall Law School, both in Ontario, I bring together graduate computer science and upper-class law students to study *Artificial Intelligence: Law, Ethics, and Policy*. It is the only course in the legal tech space that I am aware of that is both cross-institution and cross-discipline. In my New York law and consulting practice, I serve as a special master overseeing electronic discovery issues in several high-profile federal court cases. I also serve as an eDiscovery expert and provide technology-assisted review (TAR) services for matters both in the U.S. and Canada

HOW DID YOU FIRST GET INVOLVED IN THE DIGITAL SPACE AND HOW HAS IT CHANGED OVER TIME?

Maura Grossman: I first became involved in technology in late 2006, when the Federal Rules of Civil Procedure

were first amended to incorporate the concept of electronically stored information or ESI. I was then counsel at the New York law firm, Wachtell, Lipton, Rosen & Katz, and my mentor there, Meyer G. Koplow, astutely foresaw that eDiscovery was going to become a significant and increasingly important part of litigation and encouraged me to pursue this as an area of specialization. Since then, my practice has focused almost exclusively on electronic discovery and legal technology.

Gail Gottehrer: Through handling class action cases involving large volumes of documents, I've had the opportunity to use the cutting-edge technology of the time for discovery. As the information generated by litigants and sought in discovery has shifted from being in hard copy to being primarily digital, that technology has evolved from document scanning to technology-assisted review and tools that recover data from phones and other devices. My focus in the digital space has expanded to emerging technologies such as autonomous vehicles, drones, robots, biometrics and wearables, and data privacy and security.

Sandra Rampersaud: Serendipity. I graduated law school in 2003 and, after a year as a federal law clerk, my first assignment at big law was to lead the discovery in a matter with complex electronic data needs. It was the first of its magnitude at the firm, and I had to become an "expert" very quickly. At that time, technology was relatively unsophisticated offering basic linear review capabilities, and it was unfamiliar to many since hard-copy review was still occurring and terms like "metadata" were frightening to lawyers. I viewed the opportunity as a chance to learn something new that might differentiate me from the rest. Little did I know at the time how true that would be, and that instead just complementing my skills as a big law commercial litigator, eDiscovery would become a specialty in itself.

In the past 15 years, significant changes have taken place in the development of legal technology, and even with the impact that eDiscovery has on the day-to-day operations of how a business manages its data. The law has developed from a place where there was no guidance to where today businesses and lawyers can consider discovery requirements in the context of what is reasonable and proportionate. That has been a critical development from a business perspective because costs of eDiscovery in larger matters had been increasing at alarming rates. Technology, also, has come leaps and bounds, with algorithm-based and artificial intelligence functionality being made available to improve our ability to find the data we need, within a reasonable time at a reasonable cost, and defensibly. And today, eDiscovery subject matter experts are now required to have a seat at the information governance/records management/data disposal table because eDiscovery is recognized as an important stage in the lifecycle of business data.

Shoshanah Bewlay: I began my law career in private practice in law firms in New York City and San Francisco, where I worked on the defense of large corporations in securities and tender offer litigation. In that role, I quickly became familiar with electronic review of large-scale discovery – the practice that has become known as "eDiscovery." This specialty introduced me to the management of not only legal staff, but also the vendors and technicians who support the IT systems that run eDiscovery platforms. I managed multiple eDiscovery vendors over the years and was fascinated by the speed and accuracy with which technology rendered large amounts of material – which would previously have been stored in mountains of boxes in a bleak warehouse in the middle of nowhere – into a form that could be easily aggregated, sorted, searched and meaningfully and comprehensively reviewed at my desk in the office. As I grew into managing both legal and non-legal teams and entered New York government service, the opportunities to manage and advise in the technology field increased, and I broadened my experience with technology into a more general IT practice.

In the past 15 years, significant changes have taken place in the development of legal technology, and even with the impact that eDiscovery has on the day-to-day operations of how a business manages its data.

WHAT WOULD YOU RECOMMEND TO A WOMAN IF SHE IS INTERESTED IN BECOMING INVOLVED IN THE DIGITAL SPACE?

Gail Gottehrer: I encourage women, and especially women lawyers, to pursue careers in technology-related fields. Because it's an area that is constantly evolving, practicing in this space requires the ability to think outside the box and assess potential risks despite uncertainty,

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all of which enables an attorney to be a valuable asset to her clients. I recommend that women research the technologies that interest them, learn as much as they can, and then seek out opportunities to develop their expertise. This can be by approaching a partner at your law firm who is working on a technology-related case and asking to be staffed on that case, by volunteering to help a colleague who is writing an article or giving a presentation on a technology-related topic, or by getting involved with a bar association or affinity group committee that focuses on that area of the law, such as the New York State Bar Association, the American Bar Association, and the National Association of Women Lawyers.

Sandra Rampersaud: I don't think being a woman in the digital space is much different than any industry. Around the globe in all areas of work, we have to keep striving for an equal work environment, but that should not deter anyone from pursuing their passions. The digital space, in particular, is important because many jobs in the future will be impacted by technology so the more you know about legal technology and the laws governing it, the better positioned you will be to grow professionally.

DO YOU NEED A COMPUTER SCIENCE DEGREE OR TO HAVE TAKEN COURSES IN COMPUTER SCIENCE IN ORDER TO BECOME INVOLVED IN THE DIGITAL SPACE?

Shoshanah Bewlay: I did not take a single technology related course in law school! I fell into technology through my work in a large law firm's commercial litigation practice – being at the right place at the right time, just as eDiscovery was exploding as a practice.

Gail Gottehrer: It's not necessary to have a computer science degree or a computer science background to get involved in the digital space. You need strong reasoning skills, the ability to apply existing legal concepts to new technologies and situations, and a willingness to ask questions and learn.

Maura Grossman: I do not believe that someone needs a computer science degree, or to have taken computer science courses, to become involved in or successful in the technology space. One does, however, need to have at least a basic understanding of data, analytics, statistics, and machine learning. I did not take my first computer programming course until this past year, but having knowledge of what is involved in programming, how technologists think and how to communicate with them, and understanding how to properly evaluate the output of machine learning systems and other technologies is essential. Most of these can be learned through some combination of reading, attending CLE programs, and experience. That said, if one has the opportunity and the chops to study and excel both in law and computer science, one should go for it, because that combination of skills is rare and would be highly sought after in this day and age.

WHAT ADVICE WOULD YOU GIVE JUNIOR WOMEN LAWYERS WHO WANT TO PURSUE A LEGAL CAREER IN TECHNOLOGY?

Maura Grossman: I would advise them not to be afraid to specialize. Becoming a "go-to" person in a particular area can make the difference in your career. Read everything available in your area of interest, look for opportunities to speak and write, and seek out mentors in your field. Often, thought leaders are more than happy to correspond, meet for coffee, and make suggestions or introductions. Be persistent and reliable, and don't be discouraged by naysayers or negativity. Tune out the noise and follow your passions rather than the bandwagon.

Shoshanah Bewlay: Technology is a fun and exciting field that is rapidly changing. That makes it a bit dif-

I did not take a single technology related course in law school! I fell into technology through my work in a large law firm's commercial litigation practice – being at the right place at the right time, just as eDiscovery was exploding as a practice.

ferent from other practice areas that have not changed much since the Magna Carta. Technology is ubiquitous now, and as technology continues to advance, people increasingly will have to grapple with the governance and other issues this phenomenon raises. The field is wide open. Don't be intimidated by the language of technology: embrace it. Like any language, you can learn it through immersion, osmosis, context and practice.

YOU ARE ALL AT THE TOP OF YOUR FIELD. WHAT OBSTACLES HAVE YOU ENCOUNTERED IN GETTING TO THIS POINT IN YOUR CAREER?

Maura Grossman: The obstacles I have faced are probably no different than those faced by many successful, driven women working in male-dominated professions. They can include a variety of negative reactions for being outspoken and choosing to defy roles and stereotypes typically assigned to the female gender.

It has been noted by some that women often have to be at least twice as good as their male counterparts to succeed because they are held to a higher standard. It is not uncommon for a woman to express an idea at a meeting only to have it ignored and later attributed to a male colleague as "brilliant." Despite these kinds of obstacles, there are plenty of men and women who are more than willing to help and to promote women on the merits, and those are the individuals to seek out as you maneuver around the others.

Gail Gottehrer: An obstacle I've encountered is the reticence of lawyers to embrace technology, the important role it plays in the practice of law, and the need for law firms to implement technological innovations in order to remain relevant. That has begun to change, as clients have become increasingly focused on data security, artificial intelligence, and analytics, which has led many law firms, and lawyers, to become more tech-savvy.

Sandra Rampersaud: Many. However, I tend to be a bit philosophical about the "obstacles" I have encountered. I view events and crossroads that have taken place on my professional journey as key moments, which, even if disappointing, can enrich who I am personally and professionally depending on how I chose to respond. So long as I don't allow those events to define my perspective and drive, I remain master of my decisions. Getting to the top of any field requires maintaining confidence in yourself and your abilities, and continuing to demonstrate critical thinking that sees beyond just today and deliver high quality results no matter the challenge or setback.

Shoshanah Bewlay: Early in my career, I was not paying any attention to who else was working in the eDiscovery field; it seemed to be "all hands on deck" at all times! As I specialized and moved into New York government service as the New York State Attorney General's eDiscovery Counsel, I found that my ability to "translate between IT and legal" was my most valuable asset and skill. Now, having parlayed my general legal experience and my ability to translate IT to lawyers, executives and other stakeholders into a role heading the legal department of the state's consolidated IT agency supporting more than 120,000 New York State employees, I know that my gender has not been an issue at all.

HAVE YOU FOUND ORGANIZATIONS LIKE BAR ASSOCIATIONS AND INDUSTRY TRADE GROUPS USEFUL IN YOUR CAREER DEVELOPMENT AND WHAT ABOUT MENTORS?

Shoshanah Bewlay: Yes, absolutely. Through such groups, I have made contacts that have allowed me to publish articles, participate on important committees, and be considered for awards. Working with and among like-minded attorneys has led me to this point in my career. As discussed above by some of my fellow interviewees, one sure way to meet role models and mentors is through such groups. Get involved; you never know where it might lead. I have had several mentors over the years, both male and female. Early in my career, my mentor was an experienced securities litigator who taught me to triple check everything, exploit every legal weakness in my adversary's case, and make decisions confidently and as quickly as possible. Later mentors focused on instilling concepts of servant leadership and employee advocacy to enable the best work from the people working on teams you lead. This training has proven invaluable in my cur-

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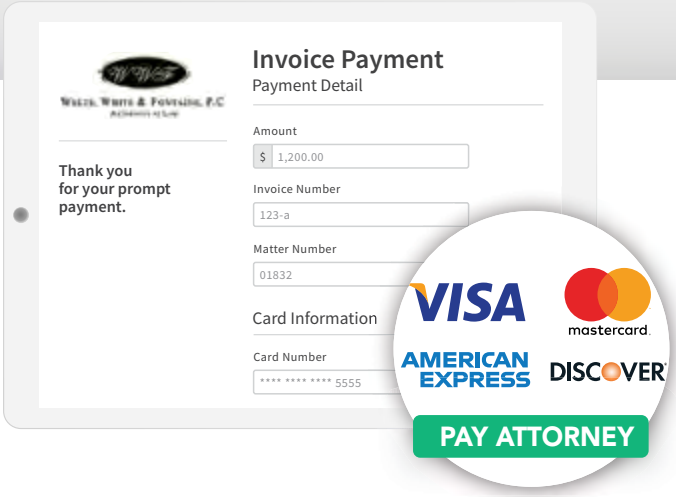

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rent role where the volume of work requires delegation of important tasks to trusted team members, and where making quick, dependable and accurate decisions is crucial. Technology is not just about bits and bytes; rather, the IT employees I advise every day support IT systems essential to public safety, child welfare, and the mental and physical health of New York's citizens. I believe that it is imperative that the state's technology professionals get the best possible legal advice, so they can fulfill their important roles enabling the critical missions of the agencies ITS supports.

Maura Grossman: I have found industry and bar organizations to be invaluable throughout my career. When I first started learning about eDiscovery and technology, I joined the Sedona Conference, the preeminent think tank in the area of electronic discovery. I was able to learn from and network with the top thought leaders in the field. Through bar associations, both at the state and city level, I met people who were helpful in securing me speaking invitations, and who wanted to collaborate on writing and other projects. These contacts and opportunities undoubtedly contributed to establishing me as an expert in my field.

An obstacle I've encountered is the reticence of lawyers to embrace technology, the important role it plays in the practice of law, and the need for law firms to implement technological innovations in order to remain relevant.

HOW ARE YOU INVOLVED IN BAR ASSOCIATIONS?

Gail Gottehrer: I'm very involved in the New York State Bar Association, and am a member of the Committee on Technology and the Legal Profession, the Blockchain and Cryptocurrency Subcommittee, the Social Media and New Communication Technologies Committee, as well as the Transportation Law Committee. Working with NYSBA, I organize and speak at CLE programs that are designed to help lawyers stay up to date with technology and to give them practical guidance on topics such as the GDPR, the Internet of Things, biometrics, data governance, vetting vendors, and workplace technology. In addition to NYSBA, I'm actively involved with the American Bar Association, where I hold leadership positions in the Woman Advocate Committee, the Judicial Intern Opportunity Program, the Pretrial Practice and Discovery Committee, and the TIPS Automobile Litigation Committee. Participation in NYSBA and the ABA, and in think tanks like the Sedona Conference, is a way to provide education to attorneys on important topics and to promote diversity and inclusion in the legal profession.

Sandra Rampersaud: Bar associations provide excellent training and networking opportunities for all, but especially for the young lawyer. They provide opportunities to remain in touch with colleagues and friends that you make over the years, and keep abreast of developments in the law that you may not have had time to research yourself. Of equal importance are the opportunities to engage in discussions relating to the practice of law, such as how to build a book of business, how to network effectively, how to be recognized and promoted, how to be a successful woman of color in the legal profession, etc. Over the years, I have had many roles. I have been a member of the Antitrust and Trade Regulation Committee of the Bar Association of the City of New York, Co-chair of the eDiscovery Committee of the NYSBA Commercial and Federal Litigation Section, and Treasurer and Executive Committee Member of NYSBA's Commercial and Federal Litigation Section. Each of these experiences has been incredibly valuable in enabling me to be where I am today.

ARE THERE ANY ISSUES YOU HAVE ENCOUNTERED TEACHING LAW STUDENTS OF THIS GENERATION THAT ARE DIFFERENT FROM WHEN YOU WERE A LAW STUDENT?

Maura Grossman: It remains a challenge to convince most law students that they need a technical education. Many remain focused on securing employment at prestigious Wall Street firms and do not understand how critical technical fluency is and will continue to be moving forward in whatever size firm a young lawyer joins. Social media – which did not exist when I went to law school – has led students to have far shorter attention spans, sometimes resulting in struggles with communicating thoughts clearly, which is critical to exceling as a lawyer regardless of whether one practices in the technology space.

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[1] Council for Disability Awareness 2018
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Women and the Law – New York's Inspiring Judicial Trailblazers

I was admitted to the New York State bar in 1983, only six years after the Court of Appeals gained its first ever female judge. Judith S. Kaye, a true visionary and remarkable court leader who would remain its only woman until 1994, when the trailblazer Carmen Beauchamp Ciparick became the first Latina to serve on the state's highest court.

At the time, New York had still never had a female Chief Administrative Judge. And before Justice M. Dolores Denman of Buffalo broke through the proverbial glass ceiling in 1991 to become the first female Appellate Division Presiding Justice in state history, only a handful of women sat on the Appellate Division.

This was the landscape when I entered the legal profession nearly three decades ago. Women were a rarity at the highest – or even the higher – levels of New York's courts, but those first women leaders made a tremendous impact, not only by expanding the opportunities available to women in law but also by bringing a diversity of perspectives into the judiciary.

Today, there are three women on the Court of Appeals: Chief Judge Janet DiFiore and Associate Judges Jenny Rivera and Leslie Stein. For many recent years, women have held a majority on the high court. In 2013, our beloved Sheila Abdus-Salaam made history as the first African-American woman judge to serve on the Court of Appeals. Two of the last three Chief Judges have been women – Judith Kaye was appointed Chief Judge in 1993 and our current inspiring Chief Judge Janet DiFiore has served since 2016. Two of the last three Chief Administrative Judges – Ann Pfau and A. Gail Prudenti – were women who led our courts with great distinction. All four Appellate Division departments have had female presiding justices, including the unstoppable Betty Weinberg Ellerin, whose lists of "firsts" is unending, and recently "retired" Karen K. Peters, who continues to lead court initiatives with great impact. Women judges currently hold 11 of our top administrative posts, and thanks to Chief Judge DiFiore and Chief Administrative Judge Lawrence K. Marks, I am honored and proud to be one of them, as the Deputy Chief Administrative Judge for Justice Initiatives.

Hon. Edwina Mendelson is New York's deputy chief administrative judge.

The team that I lead, the Office for Justice Initiatives, promotes our Chief Judge's Excellence Initiative and seeks to ensure meaningful access to justice for all who pass through the doors of the civil, criminal, family and housing courts in each of New York State's 62 counties – regardless of income, background, or special need. We oversee development of court-based pro bono attorney and other volunteer programs, self-help services, and Help Centers, located in courts throughout the state where people can get free legal information and assistance with the court process. We also arrange community events to talk about our court system and how people can get help from the courts, and use technology to assist the unrepresented. Additionally, we are engaged in leading exciting child welfare and juvenile justice initiatives, including the implementation of the historic law raising the age of criminal responsibility in New York State. Much of this meaningful work is performed by the highly capable and hard-working women with whom I am honored to work every day.

In my Access to Justice role, I follow in the footsteps of two exceptional women judicial leaders, both mentors to me: Juanita Bing Newton and Fern Fisher. I have learned so much from them, growing from their example as judge and court leader. I am thankful to them, and all the women before them who forged new roles for women in law. I have been afforded opportunities in my life that were simply unimaginable to my African-American forbearers, even those of recent generations, and even to me when I graduated law school. My long work days at the Office for Justice Initiatives begin and end in deep gratitude. I am a very fortunate woman, and I know it.

The list of inspiring women who persevered against great obstacles does not begin and end with those I have named in this article. I think back to Justine Wise Polier, who became the very first female judge in New York State when she was appointed in 1935 to what is now the Family Court, and her dear colleague on that court, the amazing Jane Bolin. Jane Bolin was the first black woman to graduate from Yale Law School, the first black woman appointed to the New York City Law Department, the first black woman permitted to join the New York City Bar Association, and at age 31, the very first black woman judge in the entire United States. Please join me in paying homage to and reflecting on the remarkable women who blazed the trail before us and have opened the door for all who followed.

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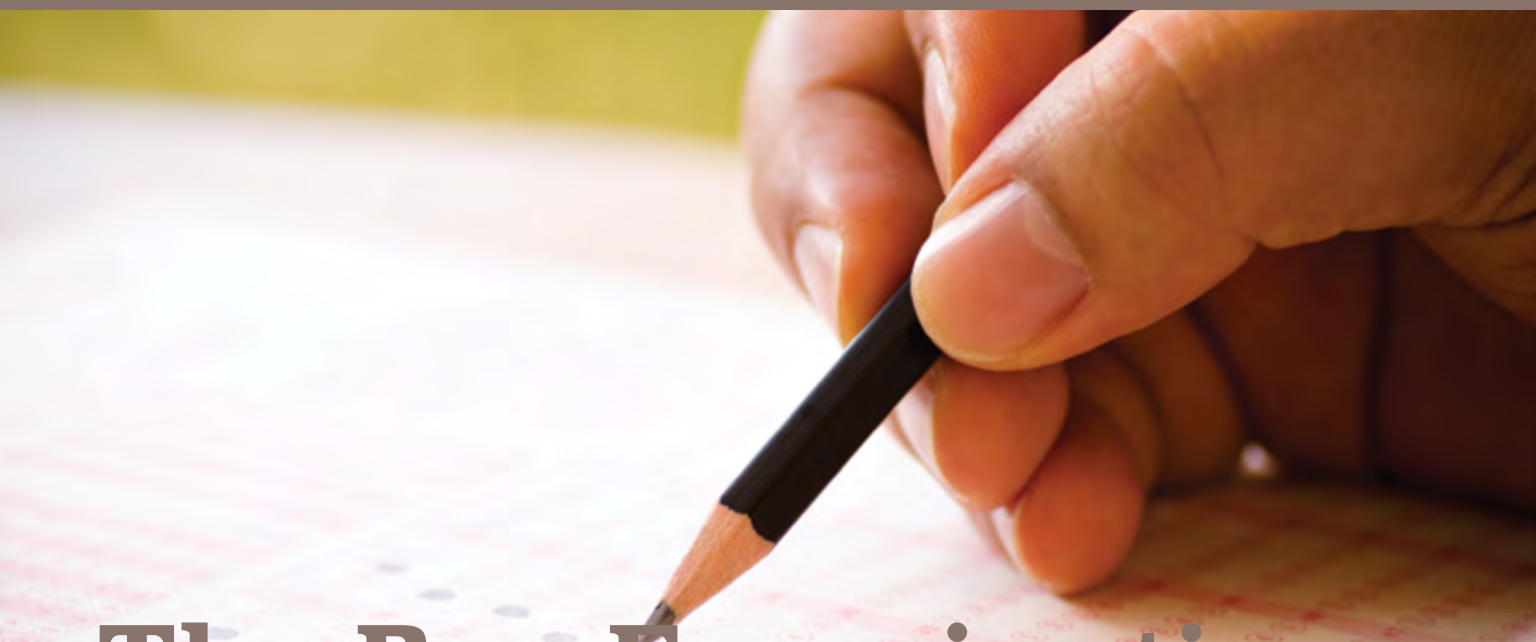


The Bar Examination: Three Fundamental Principles

Several articles in the September issue of the NYSBA *Journal* raise questions about the bar examination. Some of these questions are concerned with the examination in its current form, while others focus on what possible future versions might look like. The bar examination is, of course, just one part of a licensure process intended to ensure that new lawyers are minimally competent to practice law. To be useful in this process, the examination must test the appropriate content, and it must do so in a way that is fair, objective, and consistent – for every candidate and across every administration.

This article presents three fundamental principles upon which any discussion of the bar examination should be based to help ensure that the examination achieves these goals, both now and in the future. These principles are the foundation of the current bar examination components developed by the National Conference of Bar Examiners (NCBE). They also underlie the future-focused study[1] of the bar examination currently being conducted by NCBE's Testing Task Force. The Task Force, appointed in January 2018, is undertaking a three-year study to ensure that the bar examination continues to test what is necessary for competent entry-level legal practice in the 21st century.

Judith A. Gundersen is President and CEO of the National Conference of Bar Examiners. Previously, she worked for 18 years in NCBE's Testing Department.

THE EXAM SHOULD PROVIDE INFORMATION ABOUT WHETHER CANDIDATES ARE QUALIFIED

First and foremost, the bar examination must test the knowledge, skills, and abilities that are required for competent practice by newly licensed lawyers. To determine this information, it is important to periodically conduct a practice analysis: a well-designed, systematic study of the nature of the job of the newly licensed lawyer. NCBE last conducted a practice analysis in 2012; a new, future-focused practice analysis will be a substantial part of the Testing Task Force's study.

At the same time, it is also important to keep to a minimum any testing of knowledge or skills that are *not* necessary for minimal competence by avoiding questions that are unnecessarily ambiguous or require unnecessary cognitive work. Many of the changes NCBE has made to the questions on the Multistate Bar Examination (MBE) over the years (for example, eliminating questions with options like "both A and C" or "all of the above") have been made with this concern in mind. And it is worth noting that sometimes it is precisely those aspects of a question that make it seem more realistic that can actually cause it to be less successful as a measure of the competency it is supposed to be testing. As NCBE's research staff noted in a recent *Bar Examiner* article: "Sometimes, extra material is

intended to make the item appear more realistic . . . but it can contribute to making items more confusing, messy, and distracting for examinees."[2]

THE EXAM SHOULD MAKE IT POSSIBLE TO DIFFERENTIATE BETWEEN CANDIDATES

The purpose of the bar examination is to help jurisdictions determine competence by distinguishing between those candidates who do and do not have the necessary knowledge, skills, and abilities for entry-level practice. In other words, the bar examination needs to function as a source of information for jurisdictions about candidates, and a test that is able to make distinctions between candidates who have different levels of competence provides a wealth of such information, while a test on which every candidate received the same score would provide little to no useful information. As a recent article in the *Bar Examiner* explains, it is important to "avoid questions that 100% of examinees would answer correctly because (a) such questions provide no information separating examinees who are minimally competent from those who are not; [and] (b) upon further review, extremely easy questions are often found to have flaws providing clues that point to the correct answer, thereby requiring little or no legal knowledge to answer the question correctly."[3]

THE EXAM SHOULD PRODUCE COMPARABLE SCORES ACROSS ADMINISTRATIONS AND OVER TIME

In order to be fair to examinees and useful to jurisdictions, examination scores need to have consistent meaning across administrations and not be affected by differences in question difficulty or grader stringency. In the case of a multiple-choice test like the MBE, grader variation is not a factor, and scores can be statistically adjusted (equated) to account for possible differences in difficulty.

For other examination formats, such as essays, performance tests, or examinations involving simulated clients, maintaining consistent score meaning across administrations is more complex. And, while testing formats that reflect what are perceived as real-world skills can certainly be valuable, the question of grading consistency cannot simply be ignored. It should not matter to examinees whether they are graded by grader A or grader B, or whether they are graded first of 890 examinees or last. Grader training and support can help improve the consistency of grading in these cases; this is why NCBE sponsors a Grading Workshop for jurisdiction graders after every bar examination administration. But, because of differences in test content or grader variation, the grades for this type of examination format will never be entirely consistent across administrations.

Nor is it generally feasible to equate this type of examination, because the process of equating requires something in common (typically a group of examinees or a set of questions) from one administration to the next. For example, equating the MBE works by reusing a subset of questions over many administrations, and it is not feasible to do this in cases where a particular examination contains only a few questions; the questions are just too memorable to be reused. For these reasons, NCBE strongly recommends that jurisdictions using written examination components scale their written scores to MBE scores. It would be very difficult to ensure the comparability of scores and fairness in passing decisions across time for an examination comprised exclusively of this type of question.

Finally, it is important to avoid placing an unreasonable burden on those administering or taking the examination; while time and cost should never drive the examination development process, they also cannot be ignored. An examination that is too costly or takes too much time can pose an unnecessary barrier to admission.

These are just some of the crucial considerations that should drive the development of a high-quality bar examination. It is because of these principles that all of the current bar examination components developed by NCBE have the following characteristics in common:

1. All questions are written by committees of subject-matter experts composed of law professors, judges, and practicing attorneys.
2. All questions are written to be at the level of minimum competence for the newly licensed lawyer.
3. All questions are reviewed by practitioners for relevance and appropriateness for the newly licensed lawyer before they appear on a test.
4. All questions are pretested before appearing as scored items on the bar examination.

It is with these principles in mind, as well, that NCBE's Testing Task Force has retained two research consulting firms to support its study[4] and will also make use of an independent panel of measurement experts to ensure that any possible changes to the bar examination are evaluated in a rigorous and systematic way.

We can all agree that the world and the legal profession are changing quickly, and that legal licensure must keep up with those changes. But a test as important as the bar examination should not be designed – or redesigned – without careful consideration of the issues discussed here. Since its founding, NCBE has been committed to maintaining and improving the quality of the bar examination, and this commitment continues today as we look toward the future of legal licensure.

1. https://www.testingtaskforce.org/research/.
2. See *Bar Exam Q&A: 13 Questions from Inquiring Minds*, The Bar Examiner, National Conference of Bar Examiners, Fall 2018, p. 19, http://www.ncbex.org/publications/the-bar-examiner/.
3. *Id.* at p. 21.
4. *Supra* note 1.

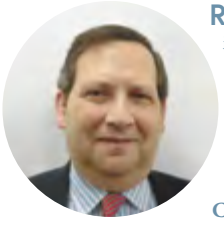
Grand *Larsony*

By Robert Kantowitz

The last thing readers of the *Journal* might want to see when they turn the page is a tax article ("yipes!"). But this article is not really a tax article. While we discuss and debate the merits of last year's tax reform and its economic and political ramifications, it is good to remember that there are some issues lurking in the tax law that have less to do with substance and more to do with procedure, less to do with tax *per se* and more to do with how we like to think of ourselves as a society.

The Internal Revenue Service laments the effect of budget cuts, and in truth the government has often found itself outmanned and outsmarted – and as a result outraged – by the tax practitioners of the private sector. The tax scandal *du jour* usually centers on allegations that some person or company has been hiding money or assets from Uncle Sam or misinterpreting or misusing the tax law. Nevertheless, I write this article as a reminder that there are times when a taxpayer caught in the government's snare can wonder whether this is really the United States of America in the 21st century. Few readers will feel that they are likely to find themselves in anything near the same position as the taxpayer described in this article, but all readers should view it as a cautionary tale.

Several months ago, the Second Circuit Court of Appeals addressed the predicament of one John Larson,[1] who is facing a $61 million fine for failing to register tax shelters that he had organized. In other words, he is being punished because he failed to tattle on himself as required by the tax law.[2] The court held that he cannot have his objections to the imposition of the fine heard in a federal court unless he first pays the fine. The judges conceded that this forecloses judicial review because Larson cannot afford to pay, but they felt that their hands were tied by the judiciary law,[3] as interpreted by the Supreme Court in a case called *Flora*[4] way back when Ike was the President, when life and the tax law were far simpler than they are today.



Robert Kantowitz has been a tax lawyer, investment banker and consultant for more than 35 years. He is responsible for the creation of a number of widely used capital markets products, including "Yankee preferred stock" and "trust preferred," as well as numerous customized financial solutions and techniques for clients. He is a longtime member of the New York State Bar Association Committee on Attorney Professionalism.

The three judges were not oblivious to the import of the drama in which they were participating:

> We close with a final thought. The notion that a taxpayer can be assessed a penalty of $61 million or more without any judicial review unless he first pays the penalty in full seems troubling, particularly where, as Larson alleges here, the taxpayer is unable to do so. But, "[w]hile the *Flora* rule may result in economic hardship in some cases, it is Congress' responsibility to amend the law."[5]

"Troubling" is an understatement; "travesty" is more like it. Regardless of which side one took regarding the travel ban ultimately upheld this past June by the Supreme Court, one cannot help but observe that lower court judges who were offended by what they considered the discriminatory elements of the ban did whatever they thought necessary to try to distinguish Supreme Court precedent. That is what the Second Circuit should have done here knowing that something very wrong was happening. Tax cases are usually not very attention grabbing, but in their own ways they can be important in the scheme of civil liberties.

So, I will do what the good judges did not, and point out why the *Flora* precedent was different.

First, *Flora* was a typical tax case regarding how much tax a taxpayer owed in respect of income he had earned. *Flora* forecloses a taxpayer's access to the district courts and the Court of Federal Claims unless the taxpayer first pays the tax, but in general a taxpayer still has the alternative of having his or her case heard in the Tax Court without paying first.[6] Larson, by contrast, does not have that safety valve because the Tax Court has no jurisdiction over his penalty. In *Flora,* the Supreme Court referred to the Tax Court alternative mostly in passing,[7] and the *Larson* panel observed that "Tax Court availability was not essential to the Supreme Court's conclusion in either

opinion."[8] Maybe so, but nonetheless the stark difference dilutes the force of the precedent.

Second, the "pay first" requirement as applied in *Larson* in connection with a *tax shelter penalty* is indefensible as a matter of rational tax law and policy because it gives more weight to a *secondary* consideration than to a *primary* consideration.

The Second Circuit recognized that the Internal Revenue Service has a "substantial interest in protecting the public purse."[9] Obviously, the core concern is the collection of the tax that is owed on income earned. In that determination, the taxpayer may go to the Tax Court without first paying the tax.

But what can we say about tax shelters? Well, tax shelters that do not work offend the government because they waste everyone's time and energy by inducing taxpayers to attempt to pay less tax than they owe, only to pay the right amount plus interest and penalties eventually after a lot of fuss. Tax shelters that actually do work irritate the government because they reduce the Treasury's take, albeit legally, below what was expected or because they give an advantage to the clever and the well advised over those who are neither. But regardless of how distasteful some tax shelter activity may be, and however large are the penalties that are enacted to deter it, we must not lose sight of the fact that the interest of the IRS in discovering and tracking tax shelter activity *is peripheral to and supportive of* the core concern of collecting the tax that is owed from those who owe it. Given the statutory concession that the fisc can wait to collect actual taxes on actual income until a court decides what is owed, one cannot logically contend that the imposition of a penalty for not bowing to coercion to provide useful information cannot also withstand delay.

Third, there is a fundamental difference between the typical tax case (like *Flora*) and this one. In the typical case, the Internal Revenue Service tells a taxpayer something like, "You made $100 more than you said you did on your return, and the tax rate is 37 percent, so pay us $37," or "You said it was a $100 long-term capital gain on which the tax is $20, but we say it was a short-term gain or ordinary income, so pay us another $17." In a case like that, if the government is correct at least as to the allegation that the taxpayer made $100 in the first place, it is not implausible to expect that the taxpayer who wants to get into a court other than the Tax Court might well have the money or assets to cover payment of the tax up front subject to a judicial determination to sort things out later. In Larson's case, by contrast, the penalty bears no arithmetical relationship to any tax owed by Larson or anyone else on any income earned but rather is based on the amount that had allegedly been invested in his tax shelters by others.[10] In addition, quantitatively, the amount at issue in *Flora* was $28,000 – more than enough back then to have bought nine shiny new Cadillacs for the nine justices but a pittance as compared to the staggering and preclusive $61 million assessed against Larson.

Monumental tax shelter penalties unrelated to the amount of tax owed by anyone reflect Congress's frustration with the proliferation of such transactions,[11] but they look awfully similar to the criminal punishments expressed in large round numbers throughout Title 18 of the United States Code. In a criminal case, of course, the government could never condition the right of the defendant to a trial on his first paying the fine to which he would be subject if convicted. It is true that the civil penalty elements of the tax law (such as additions for negligence and substantial understatements) generally do not to implicate the panoply of concerns and protections of the criminal law, but that proposition deserves reexamination from time to time. Here, we are faced with a putatively civil penalty that looks a lot like a criminal fine in both form and function. To deny independent judicial review to a taxpayer who cannot pay up front begins to smell more than faintly unconstitutional.

Mr. Larson may be far from the most attractive plaintiff. The court noted that he had been convicted of crimes in connection with fraudulent tax shelters. But neither the Constitution nor how we feel about our tax system distinguishes between saints and scoundrels. I am not sanguine about Larson's prospects for Supreme Court review, since there appears to be no split among the lower courts and no pressing nationwide issue (hopefully, tax shelter cases are rare). But there is a miscarriage of justice here, a real wrong of the kind that federal courts are supposed to have no trouble righting.

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1. *Larson v. United States*, 888 F.3d 578, (2d Cir. 2018), *reh. denied*, July 18, 2018.

2. I.R.C. § 6011(a) and Treas. Reg. § 1.6011-4 require registration of a variety of transactions. The penalty at the relevant time, for failure to register, was equal to the greater or $500 or 1 percent of the aggregate amount invested. *Larson*, 888 F.3d at 581. In Larson's case, the relevant figure was the 1 percent. Lawyers reading this should not get too smug, for since the late 1990s the tax law has also required lawyers make disclosures to the IRS relating to certain client transactions. *See* I.R.C. § 6111(a). How this affront to the attorney-client relationship is tolerated, and even sanctimoniously celebrated in certain quarters of the tax bar, is a separate issue.

3. 28 U.S.C. § 1346(a)(1).

4. *Flora v. United States*, 357 U.S. 63 (1958), *aff'd on rehearing*, 362 U.S. 145 (1960).

5. *Larson*, 888 F.3d at 589.

6. There are often strategic reasons why a taxpayer might want to be in a court other than the Tax Court, but explaining those would make this a real tax article.

7. 357 U.S. at 75; 362 U.S. at 175.

8. *Larson*, 888 F.3d at 584.

9. *Id*. at 586-87 (citing *Flora*).

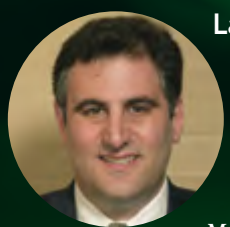
10. The current version of the penalty section, I.R.C. § 6707, on its face relates the penalty to what the violator may have earned from the activity, although "draconian" would be an understated way to characterize a penalty that can be as high as 50 or 75 percent of gross income from the transaction.

11. The fault is often laid at the feet of Congress for enacting such a complicated tax law that invites taxpayers to engage in self-help. It may be too early to say for certain, but some of the changes in 2017, especially the reduction of the corporate tax rate from 35 percent to 21 percent and diminished opportunities for the deferral of tax on overseas income, might remove incentives.

Gotcha!

Common Traps to Avoid in Vendor Agreements

By Laurence Beckler



Laurence Beckler primarily practices corporate law, focusing on post formation vendor agreements, secured lending, licenses, and general business and commercial matters for the private equity, alternative investment and hedge fund industries. Mr. Beckler also registers copyrights and trademarks, manages real estate leases, technology licenses, and employment agreements.

Mr. Beckler represents a broad range of clients, both domestic and international, including funds having AUM $100M to AUM $2B, publicly held companies, small to mid-sized businesses, and sole proprietorships.

INTRODUCTION

Third-party vendors typically provide products and services that enable an investment firm to plot a trading strategy and conduct daily operations. Typical engagements include, but are not limited to, subscription agreements, trading and risk management systems, software licenses, and risk management tools. The contracts that govern the terms and conditions of these transactions are not particularly sexy or exciting, but potential land mines within the documents can trap unsuspecting firms by locking them into unfavorable terms.

This article hopes to inform and educate a consumer of vendor services of 13 common traps that may lock an investment firm into an unfavorable legal position.

AUTOMATIC RENEWAL

Vendors love nothing more than to keep clients on the hook for services or licenses based on an automatic annual renewal, particularly if that client agrees to pay the vendor's fee in full and in advance. Though vendors do provide clients with an opportunity to cancel the automatic renewal provision, they generally require the client to provide notice of cancellation between 60 and 90 days prior to the commencement of the renewal term (the "Notice Period"). Unfortunately, an operations manager may be so busy with other issues related to the firm's growth and management needs that he or she forgets to comply with a Notice Period notification requirement, missing the opportunity to cancel the renewal for services the client no longer intends to use. The failure to give notice results in the client's obligation to pay the vendor another annual fee. *Gotcha!*

FEE INCREASES

Vendors occasionally insert language that imposes automatic fee increases on a firm that may be extraordinary or contrary to the firm's interests. Specifically, vendors may try to trap managers by (i) automatically increasing fees pursuant to a specific stated annual increase or a predefined metric such as 5 percent over the CPI for the most recent 12 months, (ii) retaining the right to increase fees at the vendor's sole discretion (sometimes citing "in conjunction with increased costs to the vendor"), or (iii) having the right to increase fees more often than once per annum. *Gotcha!* Though a firm may intend to renegotiate the fee for a renewal term at a later date, a vendor may be disinclined to renegotiate if its customer is locked into a specific renewal price.

INDEMNITY

The specter of patent trolls remains ever present. Trolls are third parties that obtain the rights to a patent in

order to profit through licensing or litigation, rather than through a company that produces its own goods and services. More than threats of actual operating companies that make a claim against a competitor and its clients for infringement, patent trolls are a threat to any investment firm or hedge fund that licenses technology. Because patent trolls view these businesses as cash cows, they will not hesitate to send a firm a demand letter seeking compensation for the alleged use of its technology, which the firm had licensed or purchased from a third party vendor. Firms can protect themselves by demanding that vendors insert comprehensive indemnity provisions in all vendor agreements, requiring the vendor to "indemnify, defend, and hold harmless" the firm from any third party claim alleging infringement of the third party's intellectual property rights. Without the indemnity clause, investment firms and hedge funds would have no recourse against a third party claim of intellectual property infringement. *Gotcha!*

LIMITATION OF LIABILITY

Clients should be concerned with two separate issues with respect to limitation of liability: (1) whether liability should be restricted to a specific strategy within an investment firm, and (2) how much of a cap should the client accept on a vendor's limitation of liability, if any. In the first instance, a firm may license an electronic trading system to execute transactions at the investment level, rather than by and among the firm's different managers and strategies. Although each individual manager must have rights to use the platform, the contract should also specify that liability should be restricted to only the specific strategy responsible for a particular trade, isolating liability from the rest of the firm. Second, vendors generally try to impose a very limited cap on liability for their breach of the vendor agreement. *Gotcha!*

TERMINATION

Many vendors don't include a client's right to terminate for any reason or for no reason, holding the client hostage through the entire term regardless of whether the client is satisfied with the vendor's service. *Gotcha!* A firm's right to terminate an existing contract for convenience is a powerful incentive to get the vendor to perform its duties. Unfortunately, the majority of vendors will not permit a convenience clause to be inserted into their agreements. As a result, managers should focus their attention to clauses that provide the right to terminate for a vendor's breach of its obligations. Depending on the type of service being provided, a firm should have the right to terminate the agreement for an uncured breach of contract 30 days after notice is given to a vendor, specifying the breach. Upon termination for breach, the vendor should be obligated to provide the firm with a pro rata refund of any prepaid fees from the date of the claim.

LIQUIDATED DAMAGES

Vendors may try to slip a clause into their agreements obligating a firm to pay a specific fee if the firm terminates the contract for any reason other than for the vendor's breach. *Gotcha!* By requiring a firm to pay a negotiated, set amount upon termination, a liquidated damages clause acts as a deterrent to a firm's termination options. For example, should a firm wind down operations, a vendor should not have the right to profit off the firm's investors by claiming a right to a portion of the firm's fees through the end of the term. But if the vendor will not relent, a manager should ensure that the amount being claimed has a legitimate basis with respect to the overall fees being paid to the vendor rather than an amount that is extravagant or unconscionable.

INTELLECTUAL PROPERTY

Vendors rightfully claim ownership of the proprietary tools used to create deliverables for their clients. But managers should be wary of the following issues: (1) entering into a license that is overly restrictive; (2) ownership of the firm's proprietary information used by the vendor to develop its own charts and analytical tools; and (3) rights to customized deliverables created by the vendor. In some cases, vendors overreach on ownership of intellectual property assets. *Gotcha!* On the first issue, managers should fight for the right to distribute vendor output internally or in excerpts in reports, presentations and graphs to current and prospective clients. For fund data used in the creation of a new vendor product, managers should specifically retain the rights to the information and state that a license is being granted to the vendor to use the data, even if such usage is to be perpetual and irrevocable. Finally, to the extent that a firm hires a vendor to create a specific, customized deliverable, the firm should acquire all rights, title and interest in and to such deliverable.

REPRESENTATIONS AND WARRANTIES

Vendors generally disclaim (or would prefer to disclaim) any and all liability related to all of their products and services, (*Gotcha!)* and furthermore, they disclaim liability for trading decisions based on their products and services. While we are not opposed to the disclaimer of liability for a fund's trading decisions based on information from a vendor product, we think vendors should stand behind their products and services, at least for some defined term. In the absence of a tight indemnity provision, a comprehensive representations and warran-

ties clause is the best possible defense to a claim against the originality of a vendor's products and services.

CONFIDENTIALITY

Proprietary business information containing highly sensitive data is one of the most important assets that a firm owns. As a result, extra attention should be given to confidentiality provisions both within vendor agreements and in stand-alone non-disclosure agreements. Agreements submitted by vendors may omit specific types of business information such as strategies and investor lists that a firm should lock down. *Gotcha!* In addition a confidentiality provision within a vendor agreement may not cover clients' non-public information; therefore, the firm should insert appropriate language if the vendor will have access to investor information. *Another Gotcha!* Finally (and this recommendation may seem counterintuitive), investment firms should consider inserting an expiration of its confidentiality obligations. Generally, the value of confidential information erodes over time in comparison to the resources that are needed to maintain the confidentiality of that information; therefore, depending on the information being exchanged with a vendor, the firm should consider whether an expiration date for its confidentiality obligations after termination of the vendor engagement is appropriate.

PUBLICITY

The issue of publicity goes hand in hand with confidentiality, though the issue is tangential in nature. Generally, a firm prefers to conduct its business practices under the radar. In many vendor agreements, though, the vendor desires visibility and may insert a provision in its contracts enabling the vendor to publicize the relationship with its client, particularly on the vendor's website. *Gotcha!*

BARRING A CLAIM

In some agreements, vendors impose a time limit on a firm's ability to prosecute a claim against the vendor. *Gotcha!* If the firm cannot negotiate a deletion of this private "statute of limitations," the firm should extend the time period in which it can bring a suit against the vendor for as long as the parties can agree.

GOVERNING LAW AND VENUE

Each vendor agreement should include a clause covering the law and venue governing the resolution of disputes. Firms should review the clause to ensure that the governing law and venue are fair for both parties. For example, a contract for services to be performed in New York should probably use the laws and courts located in New York, rather than the law of some far-flung city or country (*Gotcha!)* that disproportionally favors one party over the other or uses a different legal system entirely.

ASSIGNMENT

A vendor can make life difficult for a firm if it retains the right to assign the agreement to third parties without the firm's consent. *Gotcha!* Third party assignees may not have the expertise or the financial backing to service the client adequately. Clients should negotiate the assignment provision by including any or all of the following concepts: (1) retain the right to require consent to any assignment of the contract by the vendor, (2) require the vendor to guarantee third party obligations, and/or (3) permit the firm to terminate the agreement immediately.

CONCLUSION

Paying attention to detail when reviewing a vendor agreement should enable an investment firm or hedge fund to avoid any of the vendor traps presented above. As a general recommendation a firm may may be able to avoid being tied to unfavorable terms with the insertion of a "Most Favored Nations" clause." A Most Favored Nations clause enables a client to take advantage of the best terms a vendor has to offer to its clients. The insertion of such a clause rarely happens, but when it does, the benefit to the firm is substantial in that many of the *Gotcha!* issues go away.

Some investment firms and hedge funds have the mistaken impression that the large vendors are not willing to budge on terms, citing that they cannot deviate from standard provisions. We have had contrary experiences on this issue, negotiating vendor agreements with Thomson Reuters, Bloomberg, Moody's, MSCI Barra and many, many others. But it is a truth that if a firm doesn't request a concession, it will definitely not get one. So negotiate terms in order to avoid *Gotcha!* situations.

Non-compete Clauses: Supplemental

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LES PRÉLUDES

A. Your writing is your mind walking naked across the page.

B. What the wheel is to the world of mechanics, grammar is to the world of writing – especially the writing of contracts.

C. The two certainties in life: death and taxes. Well it's time to add a third: mistakes. To stimulate and perhaps frighten you to write well and to edit well. (Only Mozart got it right on the first try.)

D. The task of transactional attorneys is to place commercial litigators on the endangered species list.

* * *

The February 2018 issue of the *Journal* contains an article at page 44, "Non-Compete Clauses: A Reasoned Approach." This article supplements that one, adding some suggestions and alternatives.

Recently I had lunch with the owner of a music business that hires musicians to give music lessons to its clients. The owner complained that often musicians whom he hired would after their engagement with the company ended, and notwithstanding their non-solicitation covenant, give lessons to students with whom they came in contact through their work for the company.

I explained that those non-compete clauses were difficult to enforce (a) because the defense would be that the student came to the former employee on his or her own initiative, (b) because of the difficulty to defeat the defense, and (c) because the cost of litigation would be prohibitive, especially if only a small amount was involved.

So I suggested an alternative. Instead of a non-solicitation clause and a restriction on engaging in competitive activities within a specific geographical area, require the former employee to pay the company a fee for a specified period on compensation that the employee receives from students whom the employee taught while engaged by the company.

My luncheon companion liked the idea so much that I drafted a provision for him to consider.

I also drafted a similar provision for the medical practice of my doctor, who also complained about the same problem. Below are samples of each, which may be applicable to other service enterprises such as physical therapy and dental practices. Of course, the models below must be adapted to each particular situation. And please note the qualifications in each for the fee to apply.

As with non-solicitation clauses, enforcement depends on keeping track of the former employee's activities. However, on the other hand, there is no need to prove a breach of contract.

For additional protection, consider a clause requiring the former employee to pay the employer's legal fees and other costs to enforce the provisions.

* * *

SAMPLE CLAUSE RE DIVERSION OF CUSTOMERS BY FORMER EMPLOYEES OF BUSINESSES PROVIDING SERVICES SUCH AS INSTRUCTION OR THERAPY

Following termination of your [employment // affiliation // other arrangement] with us, regardless of the reason for the termination, you will pay us a fee of _____ percent (___%) of any compensation you receive from any person to whom you give lessons or for whom you provide other music-related services provided that (i) during your [employment // affiliation // other arrangement] with us you gave lessons or provided other music-related services to that person for which we received a fee, or (ii) we introduced you to that person. Your obligation to pay us this fee will apply to any compensation earned, regardless of when received, for lessons given or other music-related services provided during the two-year period following termination of your [employment // affiliation // other arrangement] with us.

Further, if during your [employment // affiliation // other arrangement] with us you receive any compensation from any person to whom you give lessons or for whom you provide other music-related services and if we introduced you to that person and that person does not pay us [a // our standard] fee for those lessons or other services, you will pay us a fee of _____ percent (___%) of any compensation you receive from that person for lessons given or other music-related services provided during your [employment // affiliation // other arrangement] with us.

* * *

SAMPLE CLAUSE RE DIVERSION OF PATIENTS BY FORMER EMPLOYEES OF MEDICAL PRACTICES AND SIMILAR BUSINESSES

NOTE: This sample assumes that the employee performs his or her services only through the practice.

Following termination of your [employment // affiliation // other arrangement] with us, regardless of the reason for the termination, you will pay us a fee of _____ percent (__%) of any compensation you receive from any person to whom you provide medical services provided that during your [employment // affiliation // other arrangement] you provided medical services to that person. Your obligation to pay us this fee will apply to any compensation earned, regardless of when received, for services performed during the two-year period following termination of your [employment // affiliation // other arrangement] with us. Your obligation does not apply to persons who were patients of yours prior to commencement of your [employment // affiliation // other arrangement] with us.

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State Bar News

Preview of Annual Meeting 2019

Each year thousands of attorneys gather at the New York State Bar Association's Annual Meeting for five days of programming, networking events and celebrations of our colleagues and our profession. It is where lawyers come to meet, connect with, learn from and be inspired by some of the top lawyers in the state, the nation and the world. The meeting will be held at the New York Hilton Midtown in New York City, January 14–18.

The heart of Annual Meeting is Wednesday's Presidential Summit. This year's features three timely and important topics: #MeToo, wrongful convictions, and whistleblower laws and the fight against fraud.

Wrongful Convictions and the Role of Prosecutors promises a lively discussion. A new state Commission on Prosecutorial Conduct is already being challenged in court. Representatives from all sides of the debate will be on the panel: Retired Supreme Court Justice Barry Kamins; retired Appellate Division, Third Department Presiding Justice Karen Peters; Albany County District Attorney and President of the District Attorneys Association of the State of New York David Soares; and Barry Scheck from the Innocence Project.

Listening to #MeToo will examine the laws regarding sexual harassment and the role of attorneys in prevention and in supporting gender equity in the profession and society. ***Enlisting the Public in the Fight Against Fraud*** will review the evolution and impact of whistleblower laws and how success can come at a considerable cost to the whistleblowers themselves.

The Summit is followed by the President's Reception, a complimentary event for all Annual Meeting registrants.

Other program highlights:

On Monday, the International Section will examine the question of what is discrimination and diversity in a global market. The Committee on Diversity and Inclusion will host its annual Celebrating Diversity in the Bar program.

Tuesday features the Committee on Cannabis Law meeting, which will cover border crossing and the role of New York lawyers in a state where cannabis is still illegal. The General Practice Section and Committee on Professional Discipline joint meeting will cover *The Ethical Obligations of a Lawyer to Learn the* True *Facts.*

Wednesday's Committee on Animals and the Law will look at issues surrounding animals affected by natural disasters; the Committee on Law, Youth and Citizenship will discuss student free speech rights on school grounds; and the Committee on Legal Education and Admission to the Bar will debate teaching New York law in light of the switch to the Uniform Bar Exam.

On Thursday, the Committees on Civil Rights and Immigration Representation will offer a joint program on the impact of Immigration and Customs Enforcement in the courtrooms. The Family Law Section will look at legal issues in LGBT families in light of *Brooke S.B.* There will be a free networking reception at the Cyber Café.

Friday's Environmental and Energy Law Section meeting will cover environmental justice, and Bronx Borough President Ruben Diaz, Jr., will serve on that panel. Former U.S. Attorney for the Southern District Preet Bharara will be the featured guest at the Judicial Section luncheon.

For more information about all the programs throughout the week, visit www.nysba.org/am19.

Miller Receives NYCLA's President's Medal

New York State Bar Association President Michael Miller was presented with the Boris Kostelanetz President's Medal by New York County Lawyers Association President Michael J. McNamara on Dec. 10. The award recognizes a NYCLA member with a distinguished record of dedication to the legal profession.

New York Bar Foundation to Focus Grant-Making on Rule of Law

The New York Bar Foundation (TNYBF), the charitable arm of the New York State Bar Association, will focus its grant-making in the coming year on access to justice projects providing essential legal services to economically disadvantaged New Yorkers, setting in motion its recently adopted strategic plan focused on adherence to the rule of law throughout New York State.

"The basic idea of the rule of law is that democratic governments evenhandedly apply a well-publicized set of laws and provide a level playing field," said Foundation President Lesley Rosenthal, who is chief operating officer of The Juilliard School. "The U.S. is a leading global proponent and beacon of the rule of law, but unfortunately here at home we fall short by several measures. In fact, in access and affordability of civil justice, we compare unfavorably to every other high-income nation in the world. By funding civil justice programs serving urgent legal needs throughout New York State, the foundation not only helps individuals with the essentials of life, it also underscores that our society is grounded in the rule of law."

Using data from the state's Permanent Commission on Access to Justice, the foundation will focus its 2019 grants on the precise types of legal help that are needed the most in New York State, and has pinpointed the areas where that help is most needed:

- Child support
- Consumer debt
- Housing, including evictions, foreclosures, and homelessness
- Family matters, including domestic violence, children, and family stability
- Access to health care
- Access to education
- Subsistence income (including wages, disability and other benefits)

By concentrating on these matters for which the vast majority of poor New Yorkers are still without representation, the foundation will maximize its impact, helping make access to justice a reality for all New Yorkers, and enhancing understanding of and respect for the rule of law.

5 questions and a closing argument

Member Spotlight with Kimberly Wolf Price

Wolf Price is director of Externship Programs at Syracuse University College of Law and Faculty Advisor for Pro Bono Initiatives. She lives in Manlius, N.Y.

What do you find most rewarding about being an attorney?

Working with law students. Experiential learning is how students not only gain skills, but also gain confidence. Watching a student who has struggled develop this confidence is quite a privilege. I have encountered students who were truly questioning whether they should practice law in the traditional sense whose entire view of the profession – and more important, their own skills – was changed by an externship.

What or who inspired you to become a lawyer?

Inspiration comes from many places, but I would say my mother, Jean Wolf. When I was a kid, the school board placed our little elementary school in Utica, N.Y., on a possible closure list. My mom became active, organized people – and then ran for a school board seat, and won! She showed me that if we want things to change, we have to get to work. I saw a law degree as a tool to effect change, big or small.

If you could dine with any lawyer – real or fictional – from any time in history, who would it be and what would you discuss?

I am going to take some liberties with this dining question. I am looking forward to dinner with my husband, Fred Price (member, Bond Schoeneck & King), in 20 years to reminisce about our sons, our life and our careers.

What do you think that most people misunderstand about lawyers and the legal system?

There is a perception that a lawyer's most important skill is talking and oral advocacy. But quite often, our most important skill is listening.

What is something that most people don't know about you?

I am not only the first person in my family to earn a Juris Doctor, I am also the first person in my extended family to earn a Bachelor's Degree. This is why chairing the Youth Law Day subcommittee for NYSBA's Diversity and Inclusion Committee is so meaningful to me. I was a kid who didn't know lawyers. Now I can help students realize a professional degree is possible for them – no matter what their background.

Lawyers should join the New York State Bar Association because…

Membership in the bar association provides a plethora of opportunities to learn, partner and network with other attorneys. Through NYSBA, I have had the chance to organize interesting programs, support legislative comments and discuss what may lie ahead for our profession.

My work with the Women in Law Section, Committee on Diversity and Inclusion, and Committee on Lawyers in Transition has certainly provided me with an ever-growing network of colleagues and friends. It has been professionally rewarding and provided me with amazing opportunities to develop relationships with attorneys from a variety of practice areas and markets. It keeps me engaged in our profession.

For example, I co-chair Women on the Move, a program of the Women in Law Section. At the end of this year's program, I had the chance to sit back during the networking reception and watch the room for a minute. It was filled with incredibly smart, talented attorneys who were sharing ideas, laughing and making connections. It was truly energizing.

As I tell my students, membership in NYSBA is good, but true involvement in the bar association has tremendous rewards.

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Preventing and Handling Sexual Harassment at Law Firms

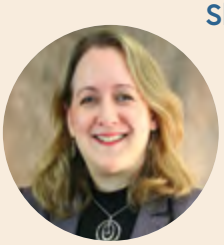
By Sheryl B. Galler

Sexual harassment is illegal under federal, state and local law, and may even violate criminal law.[1] Retaliation is illegal too, and the law protects persons who complain about, or who participate or cooperate in the complaint or investigation of, alleged sexual harassment or discrimination.[2]

When lawyers engage in sexual harassment, they are violating not only the law, but the rules of professional conduct.[3]

Yet surveys, research studies and anecdotal evidence show that sexual harassment has occurred and continues to occur at law firms, big and small.

Sexual harassment in the legal profession, as in other businesses, most often involves a power imbalance between the harasser, most likely a male partner, and the harassed, most likely a female junior associate. Of course, unlawful sexual harassment is not limited to situations in which the harasser is male and the harassed



Sheryl B. Galler practices employment law in New York City. She is a member of the Executive Committees of the New York State Bar Association's Labor and Employment Law Section and Women in Law Section. Ms. Galler has chaired panels and presented continuing legal education courses for both the Labor and Employment Law Section and the Women in Law Section. She is the author of *Know New York State's New Paid Family Leave Benefits Law*, published in the May 2017 edition of the New York State Bar Association *Journal*.

person is female. Either one can be, or identify as, a man or woman. Unlawful sexual harassment can also occur between persons of the same sex and can include comments or conduct directed at persons because of their sex, sexual orientation, gender identity, gender expression or transgender status.

As in other industries, most incidents of harassment in law firms are likely not reported. A harassed junior attorney may be reluctant to report the harassment for fear that she will not be believed, that she will face retaliation from a partner with control over her assignments, compensation and partnership track, and/or that she will be risking or ruining her career chances while the alleged harasser may face no repercussions.

Indeed, partners accused of harassment have most often managed to keep the accusations quiet, keep their jobs and keep their reputations. Law firms, like other employers, have tended to deal with claims through proceedings that were confidential and settlement agreements that likely included non-disclosure clauses. At least one high profile move over the past year revealed that when rainmakers facing harassment allegations were asked to leave their firms, they often had little trouble moving on to other firms, leaving the allegations behind.

The existence of unlawful harassment in the legal profession, whether or not disclosed, is a problem, and not only for the harasser and the harassed. Unlawful harassment is a problem for the firm's partners, who potentially can be held financially liable for the unlawful conduct of their partner or employee. Unlawful harassment at a firm can depress morale and productivity, dissuade law school graduates and lateral hires who may have been interested in the firm, and encourage the departure of employees, associates and partners. Unlawful harassment also can have a negative impact on the firm's ability to attract and retain clients.

In recent years, following the lead in Hollywood, the entertainment industry, the advertising industry and accounting firms, more and more women in the legal profession have been reporting their stories of harassment by partners and judges. As more and more women reported their stories, others were inspired or emboldened to report theirs. Hopefully, such disclosures, the spotlight of the #MeToo movement and recent changes in the law will lead to changes in the culture. Meanwhile, as employers, what can or should law firms do to prevent sexual harassment within their ranks?

Here are five recommendations:

1. ADOPT WRITTEN POLICIES ON SEXUAL HARASSMENT AND RETALIATION

It has always been best practice for employers to have written, comprehensive policies on sexual harassment and retaliation. By clearly prohibiting sexual harassment and retaliation, and stating that there will be consequences for violating the rules, employers hopefully prevent employees from engaging in such illegal conduct. Further, by setting requirements and procedures for employees to report sexual harassment, employers give themselves the opportunity to investigate allegations and, if appropriate, take corrective action. Finally, in the event that sexual harassment or retaliation occurs, the existence of written, comprehensive policies may provide employers with an affirmative defense against liability.

In February 2018, the American Bar Association (ABA) put this best practice in writing by adopting Resolution 302, which urges all employers, including law firms, "to adopt and enforce policies and procedures that prohibit, prevent, and promptly redress" harassment and retaliation "based on sex (including gender, gender identity and sexual orientation) and the intersection of sex with race and/or ethnicity."[4]

Later in 2018, New York State went even further, by turning this best practice into a mandate.

Under the recently amended New York State Labor Law, effective October 9, 2018, all employers in New York State must have a written sexual harassment prevention policy.[5]

In order to comply with the law, a sexual harassment prevention policy must, at a minimum:

- "prohibit sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;
- provide examples of prohibited conduct that would constitute unlawful sexual harassment;
- include information concerning the federal and state statutory provisions concerning sexual harassment, remedies available to victims of sexual harassment, and a statement that there may be applicable local laws;
- include a complaint form;
- include a procedure for the timely and confidential investigation of complaints that ensures due process for all parties;
- inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;
- clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue; and
- clearly state that retaliation against individuals who

complain of sexual harassment or who testify or assist in any investigation or proceeding involving sexual harassment is unlawful."[6]

To this end, the State Department of Labor has issued a model sexual harassment prevention policy.[7] Employers may adopt the model policy or adopt a sexual harassment prevention policy that meets or exceeds the minimum standards required under the law.

Law firms should consider that the model policy may not be "one size fits all." Just as attorneys customize legal forms to meet their clients' particular needs, they should carefully review the model policy, perhaps in consultation with an employment attorney, to customize it to meet their firm's needs. For example, a law firm whose employees spend significant amounts of time in court, at their clients' homes or offices, or at bar association or networking events may want to make clear that the firm's sexual harassment prevention policy applies not only at the firm's offices but at any other location where employees are engaged in work-related functions. Law firms may also want to include policies that specifically address firm social events such as holiday parties.

Law firms may also need to customize the list of prohibited conduct to address specific issues that can arise based on their practice areas. Attorneys may be required to read, view or transmit testimony or evidence of a sexual nature as part of their representation of a client. For example, the intimate details of a couple's life may be part of a divorce proceeding, a pornographic image posted in a workplace may be part of an employment law matter, or the details of a sexual assault may be part of a client's criminal defense. Law firms may choose to clarify that employees who handle such materials in the ordinary course of the law firm's business are not engaged in harassment, but that employees who display, discuss or otherwise use such materials with the intent to make another employee uncomfortable may be engaging in unlawful conduct.

Law firms and other employers may also want to consider adopting policies on romantic relationships between employees, or between partners and employees, recognizing that some consensual relationships can sour and give rise to claims of harassment.

Law firms and other employers should also note that effective April 12, 2018, employers may be liable for sexual harassment of non-employees, such as independent contractors, vendors and consultants at the firm's workplace.[8]

Further, in conjunction with the amendments to the New York Human Rights Law, the state recently amended the New York Civil Practice Law and Rules and General Obligations Law to restrict the use of arbitration proceedings and non-disclosure agreements to resolve sexual harassment claims.[9]

Finally, small law firms and solo practitioners should note that New York State and New York City sexual harassment laws apply to all employees, regardless of the size of the employer.[10] As such, unless otherwise provided, the law requires even a law firm with only one employee to comply with the state and city sexual harassment laws.[11]

2. COMMUNICATE TO EMPLOYEES THE LAW AND POLICIES

Law firms, like all employers, should provide the firm's written sexual harassment policy to its owners, managers and employees. They also should hold multiple meetings to explain the firm's sexual harassment policy and methods for reporting complaints.

New York City law also requires employers to distribute to new employees a fact sheet, and to post in the workplace a notice, about the New York City Human Rights Law.[12]

3. CONDUCT TRAINING ON PREVENTING SEXUAL HARASSMENT

New York State law requires all employers to provide their employees with annual training in how to prevent sexual harassment.[13] The first annual training must be completed on or before October 9, 2019.[14]

Employers may use the model training developed by the New York State Department of Labor and Division of Human Rights.[15] Alternatively, New York State employers may provide other training as long as it is interactive, which means that the individuals being trained must respond to questions, provide feedback or otherwise participate in the training. The training also must also:

- "include an explanation of sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;
- include examples of conduct that would constitute unlawful sexual harassment;
- include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment;
- include information concerning employees' rights of redress and all available forums for adjudicating complaints; and
- include information addressing conduct by supervisors and any additional responsibilities for such supervisors."[16]

The amended New York City law, which will go into effect as of April 1, 2019, requires employers with 15 or more employees to provide annual training on preventing sexual harassment.[17]

The training under New York City law must include, at a minimum:

- "An explanation of sexual harassment as a form of unlawful discrimination under local law;
- A statement that sexual harassment is also a form of unlawful discrimination under state and federal law;
- A description of what sexual harassment is, using examples;
- Any internal complaint process available to employees through their employer to address sexual harassment claims;
- The complaint process available through the New York City Commission on Human Rights, the New York State Division of Human Rights and the United States Equal Employment Opportunity Commission, including contact information;
- The prohibition of retaliation, pursuant to subdivision 7 of section 8-107, and examples thereof;
- Information concerning bystander intervention, including but not limited to any resources that explain how to engage in bystander intervention; and
- The specific responsibilities of supervisory and managerial employees in the prevention of sexual harassment and retaliation, and measures that such employees may take to appropriately address sexual harassment complaints."[18]

As of this writing, the New York City Commission on Human Rights was in the process of developing online sexual harassment training, and indicated that employers may use alternative training that meets the minimum requirements set by the law.[19]

The New York City Commission on Human Rights, the New York State Division of Human Rights and the New York State Department of Labor are coordinating their efforts so that New York City-based employers who use the New York City online training will meet the requirements of both State and City laws.[20]

4. RESPOND PROMPTLY AND THOROUGHLY TO COMPLAINTS

Employers, including law firms, should respond promptly to all reported or suspected incidents of harassment, no matter how minor. By responding promptly, even to minor incidents, managers signal to their employees that they hear their complaints and take them seriously. Employees, in turn, will feel more confident reporting issues. The firm may be able to stop inappropriate behavior before it escalates into serious harassment.

The person in charge of handling sexual harassment complaints at a firm may be a managing partner, a member of the firm's executive committee, or a human resources administrator. The designated person must, and should, have the authority and ability to speak with anyone at the firm who is accused of harassment, discrimination or retaliation, regardless of whether the accused is a senior partner, major rainmaker or other powerful member of the firm. Indeed, there may be times when the designated person may be able to quickly resolve an issue by speaking with the accused, explaining the offending conduct and asking him or her to stop. In the event that the designated person is unable to speak with the accused, due to power structures within the firm or for other reasons, then it may be best to bring in an outside consultant. The consultant would then speak with the accused and, as needed, conduct additional training in preventing sexual harassment, discrimination and retaliation, and review the firm's policies and procedures to suggest updates and revisions.

At times, the best or only course of action in response to a harassment complaint is to conduct an investigation. As noted above, New York State law requires employers, in their sexual harassment prevention policies, to "include a procedure for the timely and confidential investigation of complaints that ensures due process for all parties."[21] The investigation should be thorough, well-documented and conducted by someone independent of the firm or accepted as credible and unbiased.

Law firms may want to designate one of their own members to conduct the investigation. This may work, if the designated person is accepted as credible and unbiased. However, if the accused is a senior partner, major rainmaker or other powerful member of the firm, then the accuser and other employees may not believe that an attorney or staff member of the firm can act in an independent, unbiased manner. In such case, to preserve the integrity of the process and the confidence of the employees in the investigation, it may be best for the employer to bring in investigators from outside the firm.

In the event that the accused is found to have engaged in unlawful activity, the law firm should impose sanctions against the accused. New York State law does not mandate any form of sanctions or discipline. It merely requires that the employer clearly state that sexual harassment is misconduct that will have consequences, both for anyone who engages in sexual harassment and for any supervisor or manager who knowingly allows such behavior.[22] The law leaves it to the employer or, where appropriate, the manager or supervisor, to choose the sanction, at their discretion.

A law firm or other employer need not, and should not, specify in its policies any particular sanction or discipline for any specific violation. Rather, the firm should follow the law and leave it up to the particular facts of the case. That being said, the firm should apply its policies and practices in a uniform manner, again to preserve the integrity of the process and the confidence of the employees in the process and the outcome.

Once the law firm has investigated the complaint, determined if sanctions are warranted and, if so, imposed them, the responsibility does not yet end. Rather, the law firm, like any employer, must consider ways to prevent further incidents of harassment and retaliation, in order to protect the accuser, the accused and its own reputation. Follow-up steps may include additional training for employees and managers, a review of policies and procedures to determine where they could be revised or tightened, and communications with the accuser, the accused and perhaps other employees to show the firm's commitment to preventing sexual harassment and retaliation.

5. ESTABLISH A CULTURE THAT DOES NOT TOLERATE SEXUAL HARASSMENT

Policies and training are important, and are required by law, but at the end of the day, they are just words. Investigations and sanctions are important too, but they are responses and remedies to incidents that never should have occurred.

The best practice is to create a culture where everyone knows that sexual harassment is not tolerated.

The culture starts at the top, with senior partners, managing partners, and others in firm governance roles who lead by example. Through their behavior and language, they set the tone for what is acceptable in the workplace.

The culture is maintained by firm leaders who meet on a regular basis with their partners, associates and staff to learn about their issues or needs in the workplace, and to check on firm morale.

The culture is fostered by an open door policy that encourages employees to ask questions, speak up about concerns, and feel comfortable communicating with management. When lines of communication are open, employees are more likely to feel that they can report problems, such as harassment, and find management willing to listen, believe them and take action. The firm, in turn, can then respond to problems, if any, at the early stages, before they can affect the firm's reputation or bottom line.

CONCLUSION

The legal profession has become more and more aware in recent years that law firms are a business, like any other. Unfortunately, law firms are not immune from sexual harassment and discrimination. As such, each law firm must look at itself as a business and take to heart the legal and practical advice that it would give its own clients. Regarding sexual harassment, law firms should (1) adopt written policies on sexual harassment and retaliation; (2) communicate to employees the law and policies; (3) conduct training on preventing sexual harassment; (4) respond promptly and thoroughly to complaints; and (5) establish a culture that does not tolerate sexual harassment. Moreover, like any business in New York State, law firms should consult with counsel regarding the details and implementation of the new laws and best practices.

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a); N.Y. Executive Law §§ 296.1, 296-d; Administrative Code of the City of New York § 8-107(1); N.Y. Penal Code, Article 130.

2. 42 U.S.C. § 2000e-3; N.Y. Executive Law § 296.7; Administrative Code of the City of New York § 8-107(7).

3. The American Bar Association's Model Rule 8.4(g) specifies that it is professional misconduct for a lawyer to engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

Section 8.4 of the NYSBA Rules of Professional Conduct provides

> [a] lawyer or law firm shall not ... (g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation.

4. https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/302.pdf.

5. N.Y. Labor Law § 201-g.

6. https://www.ny.gov/sites/ny.gov/files/atoms/files/MinimumStandardsforSexualHarassmentPreventionPolicies.pdf. The guidance issued by the New York State Department of Labor is at: https://dhr.ny.gov/sites/default/files/pdf/guidance-sexual-harassment-employers.pdf.

The New York State model complaint form is at: https://www.ny.gov/sites/ny.gov/files/atoms/files/CombatHarassmentComplaint%20Form.pdf.

7. The New York State model sexual harassment prevention policy is at: https://www.ny.gov/sites/ny.gov/files/atoms/files/SexualHarassmentPreventionModelPolicy.pdf.

8. N.Y. Executive Law § 296-d.

9. N.Y. Civil Practice Law and Rules §§ 5003-b, 7515; N.Y. General Obligations Law § 5-336.

10. N.Y. Executive Law § 292.5; Administrative Code of the City of New York, § 8-102.

11. *Id.*

12. Administrative Code of the City of New York, §8-107(29); https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/SexHarass_Factsheet.pdf; https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/SexHarass_Notice-8.5x14.pdf.

13. N.Y. Labor Law § 201-g.

14. https://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions#for-employers.

15. https://www.ny.gov/combating-sexual-harassment-workplace/employers.

16. https://www.ny.gov/sites/ny.gov/files/atoms/filesMinimumStandardsforSexualHarassmentPreventionTraining.pdf.

17. https://www1.nyc.gov/office-of-the-mayor/news/243-18/mayor-de-blasio-signs-legislation-strengthening-protections-against-sexual-harassment#/0.

18. https://www1.nyc.gov/site/cchr/law/stop-sexual-harassment-act-faqs.page.

19. *Id.*

20. https://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions#for-employers.

21. https://www.ny.gov/sites/ny.gov/files/atoms/filesMinimumStandardsforSexualHarassmentPreventionPolicies.pdf.

22. *Id.*

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.**

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DEAR FORUM:

I represent lenders in foreclosure actions and have access to a lot of information about real estate that is regularly advertised for sale to the public either through auctions or through short sales from borrowers in default. A few of my friends started buying distressed properties, doing some construction, and then flipping them for a profit. When they learned that I was dealing with properties in foreclosure every day, they started peppering me with questions about the properties and asking for tips on upcoming sales. My initial reaction was that I may not be permitted to disclose any information on the properties to my friends because it would be a violation of my confidentiality obligations to my clients. I know one of my clients likes to discuss the status of the properties in detail but then say, "That info is just between you and me. Just put the bare bones in the papers unless you think it is really necessary. Then you can feel free to use it."

But then I started to think about it more and I realized that the information that is most important to my friends, such as addresses, prices, and dates for auctions, is all in publicly filed court documents or is information that I talked about in open court and on the record. In other words, all the really important information is already available to the public. Does this clear me of any confidentiality issues permitting me to discuss the properties with my friends? What if I e-filed court documents with that information? While they haven't offered me any money yet, I suspect that if my friends acquire and flip a property I tell them about, they will give me a small portion of their profit as a thank you. Does this affect my ability to discuss the properties and can I accept such a gift?

Sincerely,

Luce Lips

DEAR LUCE LIPS:

The maintenance of client confidences is one of our most important obligations as lawyers. Our duty of confidentiality encourages clients to seek legal assistance and to communicate fully and honestly with their lawyers, even when discussing a legally detrimental or embarrassing subject matter. *See* New York Rules of Professional Conduct (RPC) 1.6 Comment [1]. Clients must be free to communicate openly and frankly with their lawyers; effective representation is dependent on confidentiality. *See id.* With client's information and documents regularly available to the public on court websites today, some attorneys may think that they no longer have an obligation to consider the information disclosed in those filings as confidential. As we discuss below, however, attorneys still need to be careful to preserve client confidentiality even *after* such information is made available to the public.

RPC 1.6(a) tells us that a lawyer shall not knowingly reveal confidential information or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless: (1) the client gives informed consent; (2) the disclosure is impliedly authorized to advance the best interests of the client and is reasonable under the circumstances or customary in the professional community; or (3) the disclosure is permitted pursuant to 1.6(b). The rule prohibits lawyers from using information gained during the representation of a client for the lawyer's benefit or a third party, such as another client, absent informed consent. *See* RPC 1.6 Comment [4B]. For example, if a lawyer learns that a client intends to develop real estate, the lawyer is prohibited from using the information concerning the real estate development to purchase their own neighboring land or to recommend to other clients that they purchase neighboring land (with the assumption that property values will increase because of the real estate development by the client) without the client's informed consent. *See id.* Impliedly authorized disclosures contemplated by RPC 1.6(a)(2) include disclosure

to associated lawyers at a lawyer's firm. *See* RPC 1.6 Comment [5]. A client may, however, specifically direct that certain information should be confined to particular lawyers if they do not want the information shared amongst associated lawyers. *See id.*

Disclosure of a client's confidential information is permitted under RPC 1.6(b) only under the following circumstances: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent a client from committing a crime; (3) to withdraw a written or oral representation or opinion given by a lawyer and believed by the lawyer to still be relied upon by a third person, where the lawyer discovered that the opinion or representation was based upon inaccurate information or is being used to further a crime or fraud; (4) to obtain legal advice about compliance with the RPC or other law by the lawyer; or (5) to defend the lawyer, lawyer's employees or associates against an accusation of wrongful conduct or to establish or collect a fee. *See* RPC 1.6(b). Under your circumstances, it appears that informed consent for "confidential information" would be necessary under RPC 1.6(a)(1). So we must turn to whether the information you want to disclose is considered "confidential information."

"Confidential information" is defined as "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." *See* RPC 1.6(a). RPC 1.6(a) protects factual information "gained during or relating to the representation of a client." *See* RPC 1.6 Comment [4A]. The prohibitions in RPC 1.6(a) not only prohibit a lawyer from knowingly revealing confidential information, but they also apply to any disclosure that could reasonably lead to the discovery of confidential information by a third person. *See* RPC 1.6 Comment [4]. For example,

sharing a hypothetical to discuss issues relating to a representation is acceptable as long as there is no reasonable likelihood that the identity of the client can be ascertained from the facts provided. *See id.* Information "relates to" the representation of a client if it has any possible relation to the representation or is received as a result of the representation. *See* RPC 1.6 Comment [4A]. Legal knowledge that a lawyer acquires or legal research that a lawyer performs in the ordinary course of practice, however, is not usually considered client information protected by RPC 1.6(a). *See id.*

The duty of confidentiality also extends to former clients and is governed by RPC 1.9(c). We briefly discussed the duty of confidentiality to former clients in last month's *Forum. See* Vincent J. Syracuse, Carl F. Regelmann, and Alexandra Kamenetsky Shea, *Attorney Professionalism Forum*, N.Y. St. B.J., November/December 2018, Vol. 90, No. 9. RPC 1.9(c) generally prohibits a lawyer from using or revealing the confidential information of a former client, protected by RPC 1.6, without an expiration date. *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 676-80 (2016 ed.), citing NYSBA Comm. on Prof'l Ethics, Op. 1032 (2014). RPC 1.9(c), however, carves out an exception to revealing a former client's confidential information when the information is "generally known." *See* RPC 1.9 (c)(1).

With regard to your concern about sharing publicly available client information with your friends, it is not unreasonable for you to question where the line of client confidences ends and the realm of "generally known" information begins. This is an issue many attorneys face routinely. Confidential information does not usually include a lawyer's legal research or "information that is generally known in the local community or in the trade, field or profession to which the information relates." *See* RPC 1.6(a). While it may not seem intuitive, information is not considered "generally known" merely because it is available in the public domain. *See* RPC 1.6 Comment [4A]. RPC 1.0(k) defines "known" as having actual knowledge "of the fact in question," but a person's knowledge may be inferred from the circumstances. *See* RPC 1.0(k). "Generally known," therefore, means more than publicly available, "[i]t means that the information has already received widespread publicity." *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 679. Professor Roy Simon, in his discussion of what constitutes "generally known," gives an example that once a corporation's merger is reported by the *Wall Street Journal* that means it is generally known and the lawyer then may tell the world. *See id.* If a client was once convicted of a crime or fired from a public job, however, the lawyer is not permitted to share that information even though it may be available in public records. *See id.*

The N.Y. Court of Appeals has taken a more expansive view of the "generally known" exception with respect to corporations in *Jamaica Public Service Co. v. Aiu Insurance Co.,* 92 N.Y.2d 631 (1998). *See id.* The Court held that information about the corporate structure of a business was generally known because it was available in trade periodicals and filings with state and federal regulators. *See Jamaica Public Service,* 92 N.Y.2d at 637–38. Professor Roy Simon opines that in his view, information is not generally known unless it has gained considerable public notoriety. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 679.

The New York State Bar Association Committee on Professional Ethics has also addressed the "generally known" exception to client confidences in its opinions. In one such opinion, an inquiring lawyer asked the Committee if he would be permitted, in his request to withdraw as counsel to the court, to submit documents filed by his client in a separate federal court action, even if the documents may reveal his client to be incompetent or unstable and thereby prejudice his client. *See* NYSBA Comm. on Prof'l Ethics, Op. 1057 (2015). The Committee opined that the lawyer would not be permitted to use the documents filed in the federal court action, unless the federal lawsuit was reported in the public media, or the client himself widely publicized the other lawsuit. *See id.* The Committee reasoned that if the matter was not widely publicized, the documents would not be considered "generally known" and the lawyer would be prohibited from disclosing or using such information pursuant to RPC 1.6. *See id.* It is noted that the Committee cited *Jamaica Public Service*, but did not follow its expansive view of the phrase "generally known." *See id.*

The Committee also addressed a situation similar to the issue you are presenting to the *Forum* where the lawyer represented lenders in foreclosure matters and some of the lawyer's friends had a business where they would invest in properties facing foreclosure. *See* NYSBA Comm. on Prof'l Ethics, Op. 991 (2013). Friends of a lawyer asked that information acquired during representation of the lenders be used to provide leads on properties facing foreclosure as possible business targets. *See id.* The Committee opined that the information gained by the lawyer in representing the lender concerning the potential profitability of the properties at issue is not "generally known" because given the number of homes that are in foreclosure in any locale at any one time, the identity of certain properties that would make profitable investments would not be "generally known."

See id., citing RPC 1.6 Comment [4A]. Since the information would not be generally known, the lawyer would not be permitted to share the information with anyone without his client's informed consent. *See id.* The Committee emphasized a 2011 change to RPC 1.6 Comment [4A], due to criticism that it was inaccurate. *See id.* The comment previously stated, "[i]nformation that is in the public domain is not protected unless the information is difficult or expensive to discover." *See id.* In 2017, the American Bar Association's Committee on Ethics and Professional Responsibility followed the NYSBA's Committee on Professional Ethics Opinion 991 and noted, "[u]nless information has become widely recognized by the public (for example by having achieved public notoriety), or within the former client's industry, profession, or trade, the fact that the information may have been discussed in open court, or may be available in court records, in public libraries, or in other public repositories does not, standing alone, mean that the information is generally known for Model Rule 1.9(c)(1) purposes." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 479 (2017).

Your instinct that you may not be permitted to disclose information on the properties to your friends is, in our view, correct especially in light of your client's comment that the information is just between you and him. The information about the properties you have acquired or gained during or relating to your representation of the lenders in the foreclosure action cannot be disclosed or used to help further your friends' business without your client's informed consent since the information is not "generally known," even if such information is available to your friends in public records. Since your client may be happy to have additional potential buyers for property, you could advise your client of your situation and ask for his informed consent. But, even here, we suggest extreme caution as asking for consent may very well create a "client relations" problem as there are many clients who believe that information gained during the course of a representation is something that should be kept private and get sensitive when their lawyers want to use that information for purposes unrelated to the client.

Disclosure of confidential information aside, acceptance of "gifts" from your friends may be problematic and subject to the RPC. If you are advising your friends concerning profitable investments and providing them with general advice, you may be viewed as acting as a lawyer creating an attorney-client relationship. Although RPC 1.8(c)(1) prohibits a lawyer from soliciting any gifts from clients, a lawyer is permitted to accept a gift from a client "if the transaction meets general standards of fairness." *See* RPC 1.8(c); RPC 1.8 Comment [6]. Before accepting such a gift, however, you should urge your clients to get disinterested advice about whether the gift is appropriate from an independent person familiar with the circumstances. *See* RPC 1.8 Comment [6]. A lawyer is prohibited from suggesting that a gift be made to the lawyer or for the lawyer's benefit because of concerns about overreaching and imposition on clients. *See id.* Therefore, in a situation where a client offers you a gift, it is important to ensure that you have not requested this gift and that it meets the general standards of fairness. However, if you believe that the funds provided by your friends are really a "fee" or a "bonus" in exchange for your advice, we note that you should be guided by RPC 1.5, which governs these types of payments. *See* RPC 1.8 Comment [6A].

Sincerely,
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am a patent attorney at a large firm with a background in chemical engineering. Although I enjoy practicing law, I would prefer to spend more of my time on traditional engineering work. My firm, however, only wants me to focus on my legal work and they have no interest in me doing any non-legal engineering work for clients. So I decided that I am going to leave the firm and start my own practice where I could advise clients not only on legal matters, but also provide engineering consulting services. In forming this practice, I realized there were some ethics issues that I needed to iron out before I open my new practice.

For instance, do I need to form separate business entities for my engineering work and legal work or can I have one business entity to operate both? If I am able to create a single entity, which I would prefer to do, can I reference my engineering services in the name of the company? When I am performing work for my clients, do I have to delineate which work is legal work and which work is solely non-legal engineering work? Are there any other issues I should be wary of in operating this practice to ensure that I am complying with my ethical obligations as well as protecting my clients?

Sincerely,
Molly Cule

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Cite-Seeing Part III: The Indigo Book, ALWD, Lexis, and Westlaw

In the last issue of the *Journal*, the Legal Writer discussed the Bluebook at length. In this third and final part of our three-part series on citing, the Legal Writer gives an update on some resources for citing in addition to the Bluebook and the Tanbook and provides a chart illustrating the differences in each source's rules.

THE INDIGO BOOK

Another citing resource for students and lawyers is the Indigo Book. In 2016, the renewal of the copyright of the Bluebook was contested. Professor Christopher Jon Sprigman at New York University School of Law assembled an open-source, online version of legal citation initially entitled Baby Blue. After some controversy, the resource was changed to The Indigo Book.[1] When Professor Sprigman was asked what motivated this project, he responded that he

> thought about all the people who had an interest in citations — practicing lawyers, academics, law students — who had no ability, if they're not on the Harvard Law Review, to actually say what the rules should be. I thought that's odd. . . . [we] can work with it [this system], to change it, to streamline it, to improve it. That was the reason why I decided to do this.[2]

Despite its dramatic face-off with the Bluebook, the Indigo Book doesn't correct the Bluebook's errors in New York citations. But it links to the Tanbook under "State and Jurisdiction-Specific Legal Citation Guides."[3]

ALWD

The ALWD Guide to Legal Citation,[4] previously the ALWD Citation Manual, is designed to be more simple

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than the Bluebook. First published in 2000, ALWD's purpose was consistency in legal and academic documents.[5] But the fifth and sixth editions have diverged from that purpose, and the rules now match the Bluebook.[6] Still, readers will notice ALWD's user-friendly format. The sixth edition has expanded its appendices, "sidebars" of explanation, and "Fast Formats" that list citing essentials.

ALWD does a better job than the Bluebook at pointing readers to local court rules. ALWD rule 12.4(b)(1), "Selecting reporter for citation in court document," provides that "[i]n court document such as motion and briefs, cite the reporter(s) required by the court's local rule, if any," and refers readers to Appendices 2(A) and 2(B). Rule 12.4(b)(5), "Selecting publication source for state case," also tells us not to "cite a state-specific unofficial reporter unless you are submitting a court document to a court that requires or prefers citation to West's state-specific reporters." Appendix 2 contains Local Court Citation Rules. For New York, it lists the New York court website (nycourts.gov) and CPLR 5529 (e), which provides that New York citations should follow the New York Official Reports. It also lists the Tanbook as a resource.

Since these are outside resources, a New York practitioner cannot use only the ALWD Manual; they have to follow the resources listed. The manual still has the abbreviation wrong for the Appellate Division. In Appendix 4(B), it lists "N.Y. App. Div." instead of telling readers to list which appellate department decided the case.

Despite the ALWD Guide's easy-to-read format, it hasn't gained much popularity over the years. Although the early 2000s had the legal-writing field questioning whether the ALWD would ever rival the Bluebook, ALWD hasn't

Citations Compared

CASES

Bluebook	*DiLucia v. Mandelker*, 493 N.Y.S.2d 769 (App. Div. 1985), *aff'd*, 501 N.E.2d 32 (1986).[14]
ALWD	*DiLucia v. Mandelker*, 493 N.Y.S.2d 769 (N.Y. App. Div. 1st Dept. 1985), *aff'd*, 501 N.E.2d 32 (N.Y. 1986).
Tanbook	(*DiLucia v Mandelker*, 110 AD2d 260 [1st Dept 1985], *affd* 68 NY2d 844 [1986].)
St. John's	The Rules of Citation notes that "App. Div." is insufficient. It provides that "the department [should] always [be] included in the citation"[15]

STATUTES

Bluebook	N.Y. Unconsol. Law § 751 (McKinney 2000).[16]
ALWD	N.Y. Unconsol. Law § 751 (McKinney 2000).
Tanbook	McKinney's Uncons Laws of NY § 751, as added by L1939, ch 927, § 1.
St. John's	According to the Rules of Citation, "the Unconsolidated Laws are selectively published in the McKinney's and CLS versions of the Consolidated Laws. . . . Except for those published in McKinney's, they are cited by chapter number."[17]

RULES

Bluebook	N.Y. Comp. Codes R. & Regs. tit. 22, § 500.11.[18]
ALWD	N.Y. Comp. Codes, R. & Regs. tit. 22, § 500.11.
Tanbook	Rules of Ct of Appeals (22 NYCRR) § 500.11.
St. John's	N.Y. Comp. Codes, Rules & Regs. § 500.11.

SECONDARY SOURCES

Bluebook	*See New York County Lawyers Association: Edwin M. Otterbourg to Represent the Association in House of Delegates of American Bar Association*, 124 N.Y. L.J. 1221 (1950).[19]
Tanbook	(*See* Tom Perrotta, *Panel Upholds Sanctions Against Union Over Strike*, NYLJ, Oct. 6, 2006, at 1, col 3.)[20]
St. John's	According to the Rules of Citation, "[d]o not include the column number in the citation. For articles by columnists, cite to the articles' title, not that of the column." *Example:* Stuart A. Schlesinger, *Federal Preemption: Discovery Abuses*, N.Y. L.J., Oct. 20, 1993, at 3.

increased in popularity.[7] Still, some hope that while ALWD has "conceded the battle over the rules themselves . . . [A] choice between [the] two books that present[s] the rules in different ways. . . . is a contest that the ALWD Guide can and should win."[8]

LEXIS INTERACTIVE WORKBOOK

Another resource for New York practitioners is a LexisNexis publication. In 2015, Lexis published the Interactive Citation Workbook for the Bluebook: A Uniform System of Citation and Interactive Citation Workbook for ALWD guide to legal citation, New York.[9] The Workbook notes that the New York practitioner shouldn't always follow The Bluebook or ALWD.[10]

The Workbook gets some things right. It tells New York practitioners to use the official reports, note the Appellate Division department, omit the section symbol and database for most statutes, and abbreviate some case names and administrative rules.[11]

But the Workbook also gets things wrong. The Workbook overlooks punctuation altogether. Its example of a correct citation is *Hernandez v. Robles*, 26 A.D.3d 98 (1st Dep't 2005), *rev'd*, 7 N.Y.3d 338 (2006). But the citation shouldn't have the excess periods and apostrophes. Written correctly according to the Tanbook, the citation is *Hernandez v Robles*, 26 AD3d 98 (1st Dept 2005), *affd* 7 NY3d 338 (2006).

There are also some slight differences between the Tanbook and the Workbook in terms of abbreviating and punctuating. The Appellate Term abbreviation is "App Term," not "App. T." The Workbook example is *Carrano v. Castro*, 12 Misc. 3d 5 (App. T. 2d Dep't 2d & 11th Dists. 2006). The correct Tanbook citation is *Carrano v Castro*, 12 Misc 3d 5 (App Term, 2d Dept, 2d & 11th Jud Dists 2006).

NOTE ON WESTLAW AND LEXIS

Westlaw and Lexis users should note that when copying and pasting quotations from cases or statutes online, they can change the "Copy with Reference" option from "Standard"[12] to "New York." Making this change will provide the case, statute, or rule in Tanbook format, or something close. Users should always double-check automated citations. Too often the automated function gives the New York format incorrectly.

Also, headnotes are useful, but they should be used only as a guide, and not be relied on as authority. One California practitioner noticed that "[v]ery often a case published in West's California Reporter will have more headnotes than the same case published in the official reports. This is because the unofficial reports have a tendency to place language in an opinion that sounds like black-letter law into a headnote even though the proposition of law is fairly far removed from the ratio decidendi."[13]

Most attempts to correct New York citations, or at least acknowledge the differences, are promising. But still no resource except the Tanbook gives practitioners concrete formatting advice. When practicing in a New York State court, cite using the Tanbook and nothing else. Your judge will thank you. If you're lucky, your client will, too.

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1. Jon Sprigman et al., *The Indigo Book: A Manual of Legal Citation*, Public Resource (2016), https://law.resource.org/pub/us/code/blue/IndigoBook.html (last visited July 17, 2018).

2. Interview by Daryl Steiger, *Indigo Book: A Manual of Legal Citation*, 5 NYU J. of Intell. Prop. & Ent. L. 513, 516 (2016).

3. *Id.* at Table 19.3.

4. Ass'n of Legal Writing Directors & Coleen M. Barger, ALWD Guide to Legal Citation (6th ed. 2017).

5. The First Edition notes in its preface that "a single and consistent set of rules for all forms of legal writing, avoiding the needless confusion and complexity inevitable when there are separate and inconsistent systems for law review footnotes and for practical writing such as memoranda and briefs." Ass'n of Legal Writing Directors & Darby Dickerson, ALWD Citation Manual: A Professional System of Citation, Preface at xxiv (1st ed. 2000).

6. Indeed, the publisher's website notes that "[n]o differences between components, abbreviations, and typeface of ALWD and the 20th edition of Bluebook confronting the misplaced perception that students who use ALWD don't know how to 'Bluebook.'" About the Book, Aspenlawschool.com, http://www.aspenlawschool.com/books/alwd_barger6e/default.asp (last visited July 17, 2018).

7. ALWD's website lists 72 law schools, 47 paralegal schools, and four courts that have adopted ALWD Guide to Legal Citation, but the list itself hasn't been updated since 2002. *See* http://www.alwd.org/publications/adoptions/ (last visited July 17, 2018).

8. Stephen Paskey, *Conveying Titles Clearly: Thoughts on the Fifth Edition of the ALWD GUIDE TO LEGAL CITATION*, 15 J. App. Prac. & Process 273, 274 (2014), *available at* https://digitalcommons.law.buffalo.edu/

book_reviews/25 (last visited July 17, 2018).

9. Tracy Mcgaugh Norton et al., Interactive Citation Workbook for the Bluebook: A Uniform System of Citation and Interactive Citation Workbook for ALWD Guide to Legal Citation, New York, LexisNexis Law School Publishing Advisory Board, at 1 (LexisNexis 2015).

10. The *Workbook* is available online in PDF form: https://www.lexisnexis.com/documents/pdfstore/New_York_Bluebook_and_ALWD_Final.pdf.

11. *Id.* at Introduction. (Noting that New York courts "require the citation of New York decisions from the official reports . . .").

12. "Standard" is the default on both Westlaw and Lexis. It's the Bluebook format. However, the Bluebook charges royalties to use its name, which is why it doesn't say "Bluebook."

13. Robert G. Scofield, *The Distinction Between Judicial Dicta and Obiter Dicta*, 25 L.A. Law. 17, 20–21 (Oct. 2002).

14. *See* Bluebook at 106. The "affirmed" citation is added in order to show more differences in the citation formats.

15. *New York Rules of Citation* 28 (St. John's L. Rev., 6th ed 2011).

16. *See* Bluebook at 124.

17. *New York Rules of Citation*, *supra* note 15, at 12.

18. Bluebook R12.3.1, at 124.

19. *Id.* R16.9, at 170.

20. Tanbook at 64.

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