NEW YORK STATE BAR ASSOCIATION
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JANUARY/
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by Christian Nolan

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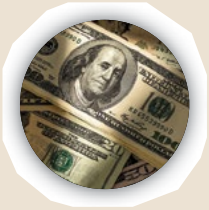

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NYSBA's Unique Role in Shaping State Law

For more than 144 years, the New York State Bar Association has shaped the development of the law, protected the citizenry's rights, and contributed to the history of our state. Indeed, from its inception, NYSBA has played a quasi-public role: Doing the public good by serving as a resource for all three branches of government.

Our connection to the State Capitol is fundamental, as NYSBA was incorporated by an act of the Legislature in 1877. The decision to establish NYSBA occurred the year before in the Assembly chamber of the old State Capitol in Albany. For years NYSBA was headquartered on the first floor of the new Capitol. Then, as now, we served as a "voluntary and public association, for the benefit of the people of the state, and of the bench and bar of the state."

Many groups advocate for lawmakers to act on proposals that reflect their beliefs and priorities. But NYSBA is different. No special pleader, we provide lawmakers with dispassionate analysis and recommendations that reflect the diverse perspectives of our membership and consider all sides of a given question.

The work of NYSBA's Task Force on the Parole System exemplifies our unique role.

New York reincarcerates more people on technical violations of parole – such as missing a curfew, changing one's residence without approval or failing to attend a mandated program – than all but one other state. Nearly 40% of persons sent to state prison in New York each year are incarcerated not for a new criminal conviction, but for a technical parole violation.

New York's parole failure rate is nearly twice the national average. These reincarcerations add an estimated $359 million annually to state prison costs and some $300 million to local jurisdictions' costs, yet do little to enhance public safety or to reduce recidivism. There are also huge human costs connected with the reincarceration of parolees for technical violations.

Periods of reincarceration can result in the loss of jobs and housing and interrupt schooling or community-based treatment. That can derail any progress parolees have made since their release and place them on a path to return behind bars.

New York requires anyone arrested on technical parole violations to be held without bail. The State Board of Parole reported in 2015 that these individuals were held for an average of 61 days before a final violation hearing. A 2018 Columbia University study found that in New York City alone, one-third of those held had parole violation warrants lifted and were released after an average of 53 days in local jail, while two-thirds were moved to state prison after an average of 60 days.

It is time to fix our broken parole system. There is no evidence that reincarceration on technical violations leads to positive outcomes. Despite the politics of the past, there is now widespread agreement that reform is sorely needed.

In June of this year, NYSBA empaneled an ideologically diverse group of experts – including prosecutors, defense lawyers, judges, victim rights advocates, and academics – to serve on a Task Force on the Parole System. The Task Force's mission was to look at how parole functions

in New York and make recommendations for changes that could be implemented quickly and would have an immediate impact.

The Task Force wanted to ensure its work would be useful for the Governor and Legislature during the coming 2020 legislative session. To that end, under the leadership of past NYSBA President Seymour James and William T. Russell, Jr., the Task Force worked diligently to complete its first report in time for consideration by NYSBA's policymaking body, the House of Delegates, on November 3, 2019.

The Task Force's report represents a careful and balanced analysis on an issue that avoids politicization. Its recommendations include:

- Eliminating mandatory pre-adjudication detention of a parolee for a non-criminal alleged technical parole violation, such as missing a meeting with a parole officer;
- Establishing a system of "earned good time credits" to incentivize good behavior while on parole, which would reduce a parolee's time under supervision; and
- Increasing the number of parole commissioners from 19 to 30, to alleviate the currently excessive case-to-commissioner ratio.

The Task Force's report – which can be viewed at www.nysba.org/parolereport – was unanimously approved by the House of Delegates and immediately shared with policymakers at the Capitol. The need for reform is indisputable; the human toll taken by the status quo indefensible.

Moreover, the State faces enormous fiscal challenges in the coming year. The savings associated with parole reform are significant. That, hopefully, will increase the chances the Task Force's proposed reforms will soon become law.

The legal profession can only survive and flourish if its energies and services are responsive to public needs. Helping to shape the law is part of NYSBA's mission. Our commitment to fulfill that mission is every bit as strong as it was when NYSBA held its first meeting 144 years ago in the Assembly chamber.

Henry M. Greenberg can be reached at hgreenberg@nysba.org

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An Historic Opportunity to Simplify New York State Courts

By Hon. Janet DiFiore

Since 2016, the state court system has been focused on the Excellence Initiative: speeding case management and improving the efficiency and quality of our justice services. Thanks to the hard work and commitment of judges, court staff and the Bar, we have made tremendous progress curbing court backlogs and delays in every jurisdiction of the state. We expect further progress as we work with the Bar to institutionalize early presumptive ADR into the civil case management process statewide.

These gains in productivity have been achieved despite the fact that we operate with the most convoluted, outdated and inefficient trial court structure in the nation – a structure that has not been modified in over half a century.

In our so-called "Unified Court System," one of our 11 different trial courts may be struggling with overwhelming filings and backlogs while another court nearby is underutilized. But there are entrenched practices and cultures and jurisdictional barriers that prevent us from quickly and efficiently moving resources to where they are most needed. This is a major contributor to backlogs and delays.

The inefficiencies inherent in this fragmented system harm all litigants in the state courts, especially families. A divorcing couple with children must commence their divorce action in Supreme Court, but if they have custody, visitation or support issues, they must proceed in Family Court, often in a different building and in front of a different judge unfamiliar with the family's legal history. The result is more court appearances, more lawyers' fees, more lost days at work, more childcare and transportation costs and more stress and frustration.

The Bench and Bar have an obligation to improve the quality, efficiency and affordability of our courts and our justice services. New Yorkers expect and deserve a modern court system that is easy to access, use and understand; that speeds rather than impedes the resolution of cases; that keeps litigation costs down for individuals and businesses; that gives judges and court staff flexibility to perform their job functions effectively; and that enables judges to decide cases in a more coordinated, cost-effective manner.

We have proposed an amendment to the State Constitution that would achieve these ends by streamlining our bewildering patchwork of 11 different courts into a simplified three-tier trial court structure consisting of: (1) a Statewide Supreme Court into which the Court of Claims, County Court, Family Court and Surrogate's Court will be merged; (2) a Statewide Municipal Court replacing the New York City Civil and Criminal Courts, Nassau and Suffolk District Courts and 61 upstate City Courts; and (3) the Justice Courts, which will not be affected by the proposal.

We are heartened by the steadfast support of NYSBA. President Hank Greenberg testified at last November's Joint Senate and Assembly Judiciary Committee Hearing on Court Consolidation and explained how the courts' outdated structure places intolerable burdens on real people and how our proposal will enable more efficient resolution of cases with fewer court appearances and less expense while making the best use of the courts' limited resources.

There are additional benefits to our proposal. Judicial diversity outside New York City would be improved by incorporating a significant number of county-level minority and women judges into the pool of Supreme Court Justices eligible for gubernatorial appointment to the Appellate Division. Just as important, upstate residents would benefit from having an elected Supreme Court Justice sitting in every county. Presently, in western New York's Seventh and Eighth Judicial Districts, for example, nearly all of the elected Supreme Court Justices hail from the most populous counties of Monroe (7th J.D.) and Erie (8th J.D.), leaving the other counties in those very large Districts with no sitting elected Supreme Court Justices.

Too many groups within the justice system have been focused on whether our proposal would adversely affect

Janet DiFiore was appointed Chief Judge of the Court of Appeals and of the State of New York in 2016. She served as an Assistant District Attorney in Westchester County and Chief of the Narcotics Bureau. She was elected to the Westchester County Court in 1998 and went on to sit by designation in the Family Court, Surrogate's Court and Supreme Court. In 2002, she was elected to the Supreme Court in the 9th Judicial District, and in 2003 was appointed to serve as the District's Supervising Judge for the Criminal Courts, in which capacity she led a collaborative effort involving judges, court staff and justice partners that completely eliminated the backlog of criminal cases in all five counties of the District. Judge DiFiore also played a leadership role in establishing several problem-solving courts, including the first Domestic Violence Court in Westchester County (and one of the first in the state).

Under the Excellence Initiative, Chief Judge DiFiore has spearheaded reforms to the New York State courts to work more efficiently. She continues to champion reforms in addressing opioid abuse, housing court, technology, and other efforts to expand access to civil justice for low-income New Yorkers.

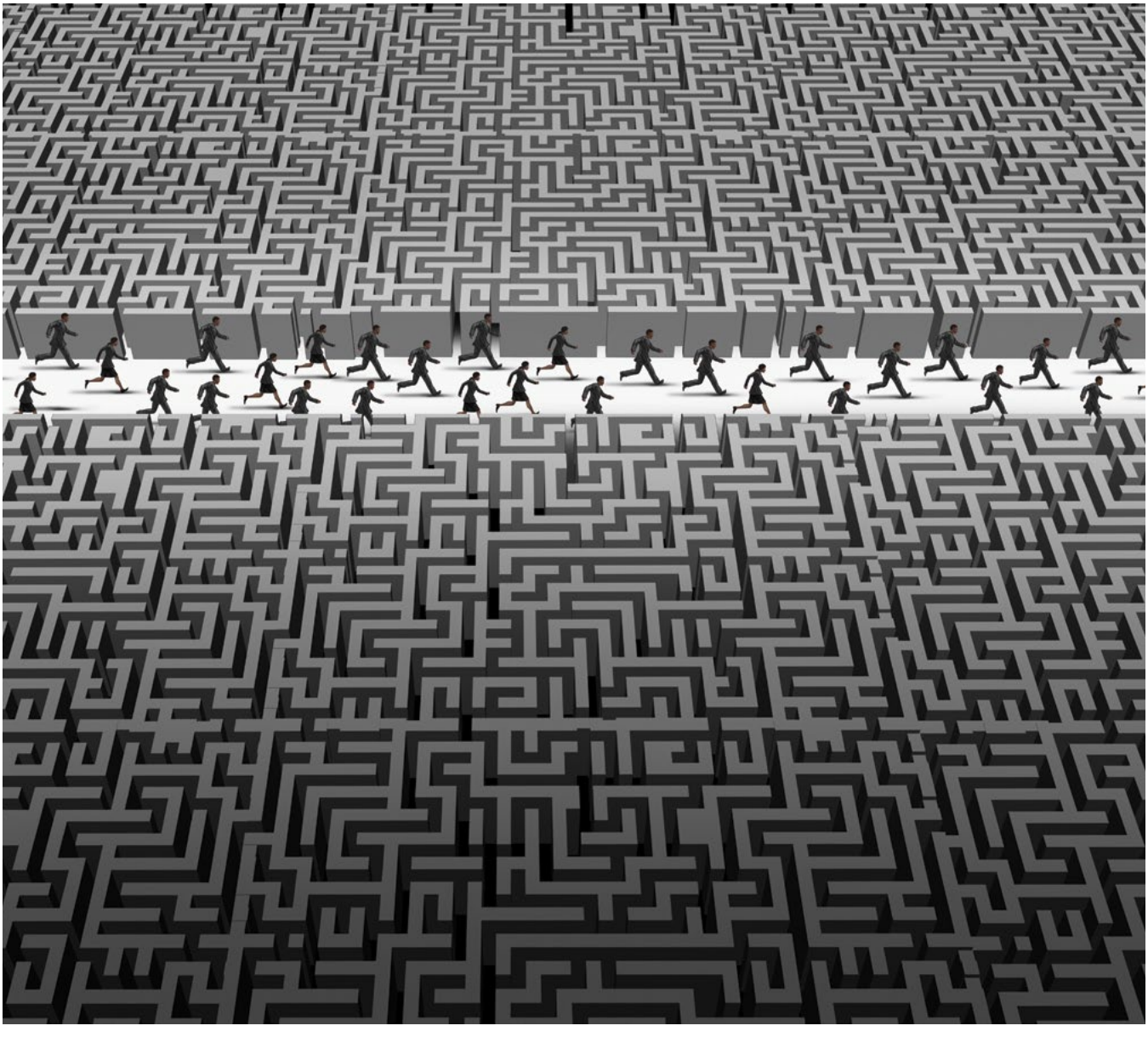
Chief Judge DiFiore is a graduate of C.W. Post College, Long Island University (B.A. 1977), and St. John's University School of Law (J.D. 1981). She lives in Bronxville with her husband Dennis E. Glazer, and they have three grown children and two grandchildren.

the status and prerogatives of their members. We have gone out of our way to avoid harm to any group. As an example, we have adopted a "merger-in-place" approach which preserves the status quo with respect to the politically sensitive questions of how different judges are selected and the terms that they serve. Such issues will remain unchanged, as court simplification is not about politics or judicial selection.

Change is never easy, however, and no proposal to streamline so massive and sprawling a structure as ours can please everyone. We are open to any comments and suggestions that will make the proposal better, but we must not allow parochial interests to stand in the way of this historic opportunity to improve the quality of justice in our state. Ultimately, we must pursue what is in the best interests of the millions of people who come through our courthouse doors seeking justice. The people we serve rightly expect and deserve a court system that is modern, accessible and affordable – a court system that is focused on their needs.

Putting the public interest first is something that is long overdue. We are the only state in the nation that operates with such a complicated, inefficient and outdated trial court structure. California, with double our population, has a single trial court. New Jersey and Pennsylvania, large states and close neighbors, have three each.

We look forward to working with NYSBA to amend the State Constitution. Together we can make sure that New York has a modern, streamlined court system capable of meeting the 21st century needs and expectations of the people and businesses we serve. Achieving this vital goal will require passage by the Legislature not just once, but twice, in 2020 and 2021, followed by the voters' approval at the ballot box in November 2021. We need your help and support.



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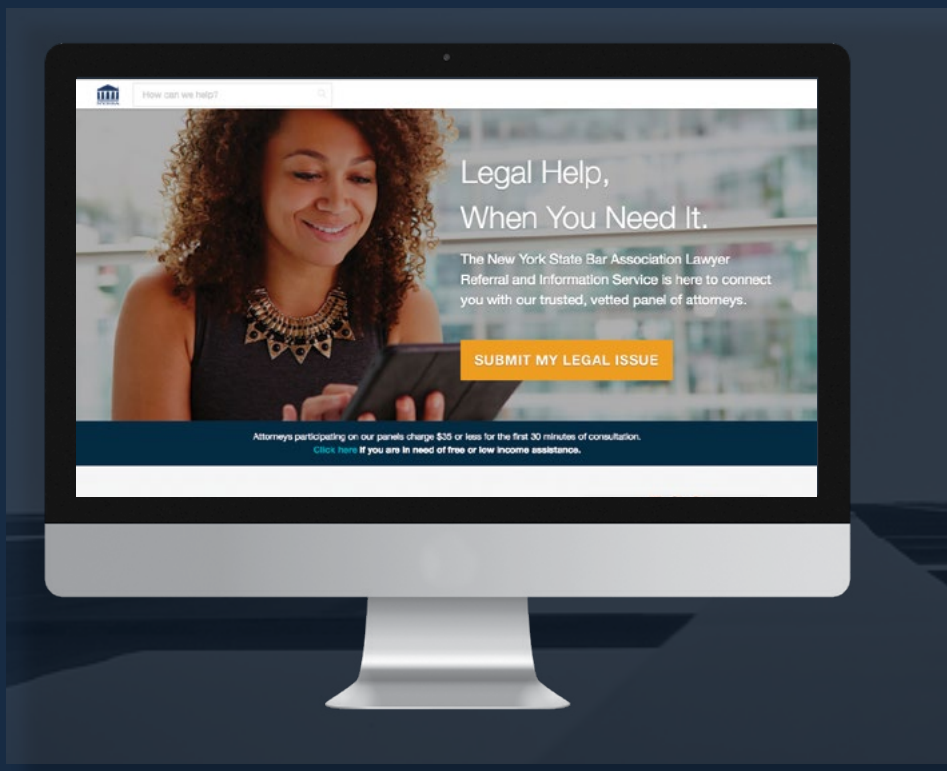

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A Growing Threat:

Violence Perpetrated by White Supremacists

Last year, hate crimes in the United State reached a 16-year high. The number of white nationalist groups surged nearly 50 percent, growing from 100 chapters in 2017 to 148 in 2018.

"What's even more troubling is that these figures are not comprehensive, and the situation is most likely even worse than the data shows," State University of New York Chancellor Kristina M. Johnson writes in an article on page 18 of this issue of the Journal. "The FBI does not require state and local police departments or municipalities to report these crimes and most experts agree that many victims often do not file formal complaints."

To examine this important issue, the New York State Bar Association will host an unprecedented panel of legal, national security and other experts entitled, "White Nationalism and Domestic Terrorism in America."

The extraordinary Presidential Summit panel event – a part of NYSBA's weeklong 143rd Annual Meeting at the New York Hilton Midtown in Manhattan – will take place Wednesday, Jan. 29 from 2 p.m. to 4 p.m.

The event will be moderated by **Craig M. Boise**, dean and professor of law at the Syracuse University College of Law.

The panelists are:

- **Hon. Jeh Charles Johnson**, partner, Paul, Weiss and former U.S. Secretary of Homeland Security
- **David D. Cole, Esq.**, national legal director, American Civil Liberties Union
- **Frank Figliuzzi, Jr.**, former FBI assistant director for counterintelligence, NBC News/MSNBC national security analyst
- **Hon. Nan Whaley**, mayor of Dayton, Ohio
- **Leonard Zeskind**, founder and president, Institute for Research and Education of Human Rights, author of *Blood and Politics: The History of the White Nationalist Movement from the Margins to the Mainstream*

"With the number of white nationalist groups surging in recent years and violent incidents becoming more and more frequent, law enforcement, our elected officials and the general public must work together to eradicate hate groups from our society," said NYSBA President Hank Greenberg. "On behalf of the State Bar Association, it is a great honor as well as an important duty to present such an esteemed panel to lead this timely and vital discussion."

The Presidential Summit is a complimentary program open to all. Annual Meeting participants can receive 2.0 CLE credits. Non-members are welcome, but advance registration is required. For more information, visit https://www.nysba.org/am2020president.

Leonard Zeskind believes the key factor behind the actions of white nationalists is that the Census Bureau has projected that white people will officially become a minority in a nation of minorities by the middle part of this century.

"I believe that your children and grandchildren will be fighting this fight," said Zeskind, who is profiled on page 22. "And the objective conditions of that battle will depend on what we all do today."

Mayor Whaley of Dayton has confronted these issues in real time. Last May, white supremacists rallied in downtown Dayton. Just over two months later, on Aug. 4, a mass shooting left nine people dead and 17 others wounded. The mayor writes on page 14 in this issue of the *Journal* that the government needs to do more to combat this growing problem.

"I am proud of how Daytonians have responded to these crises, but I am frustrated that our state and federal governments have not acted to stop them from happening in the first place," said Whaley. "We have seen a frightening national resurgence of white supremacy that has received little condemnation from the highest levels of our federal government."

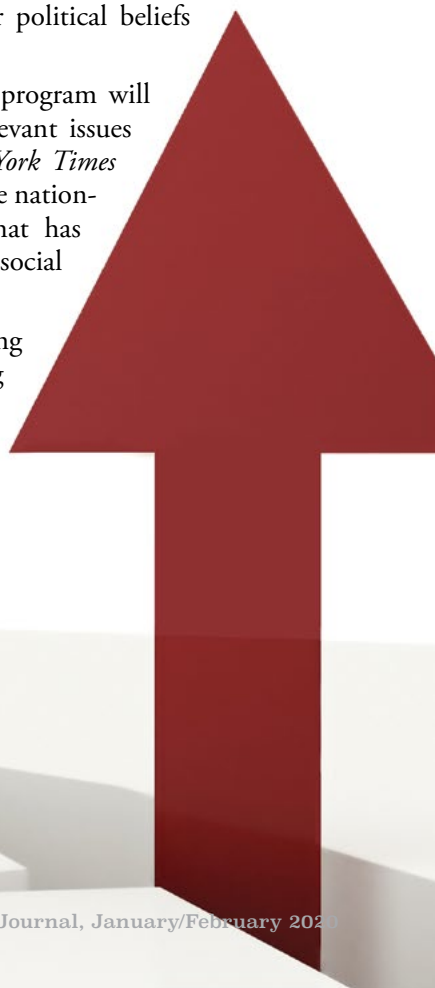
Law enforcement, however, is paying increased attention to the home-grown extremists, including radicalized white nationalists, who have been responsible for the rising number of hate incidents and mass shootings in the United States.

Furthermore, the desire to keep the public safe also has another side that isn't often discussed – concerns about potential civil liberties violations when law enforcement agencies conduct surveillance of groups and individuals based on their political beliefs and orientations.

The Presidential Summit program will explore this and other relevant issues raised by what the *New York Times* has referred to as the "white nationalist terrorist problem" that has resulted in a "brand of social media-fueled bloodshed."

We look forward to seeing you at the Annual Meeting January 27-31, and we encourage you to join us for the Presidential Summit on January 29.

– Christian Nolan

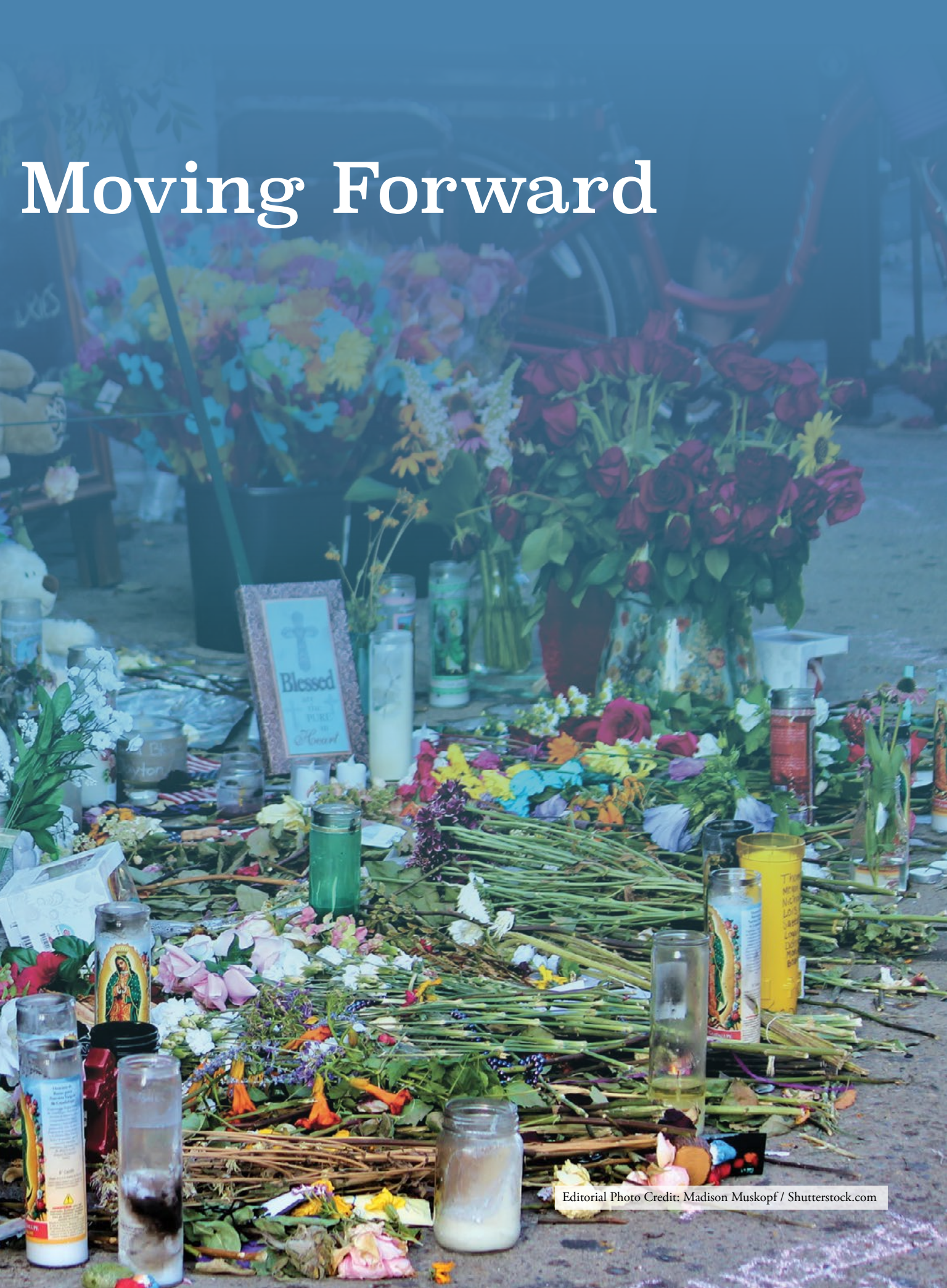


Dayton's Mayor: Facing Challenges and

By Nan Whaley

Nan Whaley is the mayor of Dayton, Ohio. She was first elected to the position in 2013, and was re-elected in 2017. She serves on the board of trustees for the U.S. Conference of Mayors and is the chair of the Conference's International Committee. She is a Vice Chair for the National League of Cities, Council on Youth, Education and Families, and a founding board member for the Ohio's Mayor Alliance, a bipartisan coalition of Ohio's 30 largest cities. She also currently serves as the vice chair of the National Conference of Democratic Mayors. Twitter: @NanWhaley

Moving Forward



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On August 4th at about 4 a.m, I woke up to a knock at my front door. I went downstairs, thinking it may be a neighbor who needed help. Instead, it was a city attorney, who told me there had just been a mass shooting in our city.

A gunman had opened fire in the crowded Oregon District, a trendy neighborhood of bars and restaurants that is the center of Dayton's nightlife. Armed with an AR-15 style pistol variant with a 100-round magazine, the gunman was able kill nine people and shoot 17 more before police killed him in 32 seconds. Dozens more were wounded in the chaos as people fled for their lives, some of them running out of their shoes.

The Oregon District shooting was a terrible inflection point in a year of crises for Dayton. On Memorial Day weekend, a group of white supremacists held a rally in our downtown, trying to incite hatred and fear. After Charlottesville, we could not take any chances, and had to shut down our entire downtown to avoid violence. Ohio is an open carry state, meaning both the white supremacists and counter-protestors were visibly armed and we were concerned that the smallest scuffle could quickly escalate to carnage. Thankfully, the day ended with no arrests, citations, or use of force, but the city had to spend hundreds of thousands of dollars on police staffing and equipment to make sure the community remained safe.

Less than 48 hours after the hate group left, dozens of tornadoes ripped through our community, flattening neighborhoods and businesses. Miraculously, there were no deaths caused directly by the damage, but hundreds of families were displaced and the property damage totaled in the millions of dollars. The severity of the storms took out the quadruple-redundant electric feeds to both of the city's water treatment plants, creating a secondary crisis as the city water department scrambled to restore service.

And in November, a 30-year veteran of the Dayton Police was shot and killed while serving a search warrant on a DEA raid. Detective Jorge Del Rio, who immigrated from Mexico as a child, helped to curb the supply of deadly fentanyl that has plagued our community for years. Detective Del Rio's murder was the first on-duty death the Dayton Police had experienced in decades, adding another painful blow to a department that had already carried a heavy load this year.

This year has tested Dayton to our very core. It has tested our city staff's ability to simultaneously respond to crisis and meet residents' daily needs. It has tested our first responders as they must continue to come to the community's aid in crisis again and again. It has tested our residents as they are called to care for their neighbors while managing their own reactions to traumatic events.

I believe that Dayton has risen to each one of these challenges. As our city has endured horrible times, we have learned about each other and what is most important to us. People who never would have crossed paths have helped each other in our most painful moments.

The weekend after the tornadoes, thousands of people with rakes and shovels – whatever they could find - volunteered to clean up neighborhoods that weren't their own. Within days of the shooting, the Oregon District was covered in small, handmade signs of encouragement. Tens of thousands of people came out to a benefit concert raising money for the victims' families. And on a cold day in November, schools and businesses throughout the county closed early so that mourners could line up for miles along the funeral procession route for Detective Del Rio.

"So many of the challenges we faced this year are local manifestations of national problems, and Dayton has been left to foot the bill."

I am proud of how Daytonians have responded to these crises, but I am frustrated that our state and federal governments have not acted to stop them from happening in the first place. So many of the challenges we faced this year are local manifestations of national problems, and Dayton has been left to foot the bill.

We have seen a frightening national resurgence of white supremacy that has received little condemnation from the highest levels of our federal government. But Dayton is a welcoming city – no matter where you're from, who you love, or what you believe, you are welcome in Dayton. So when the white supremacists came to town in May, we didn't let them divide us – we brought our community together to have the real, and tough, conversation about the legacy of racism in our city and how we can continue to work past it, together.

Both the August 4th mass shooting and Detective Del Rio's murder point to the ongoing national crisis of gun violence. Yet these shootings are simply the ones that make national news. Our community, like many others, experiences gun violence on a nearly daily basis. Local governments' ability to regulate access to guns has been stripped away by the Ohio legislature, so Daytonians

must look to our state and federal governments to keep them safe. When Gov. DeWine took the stage at a vigil hours after the shooting, hundreds of people shouted in frustration, "Do something!"

Fortunately, it seems Governor DeWine heard this call and is working to pass real gun safety reforms in Ohio. Yet this remains an uphill battle. And despite promises made after the August shootings in Dayton and El Paso, the federal government remains deadlocked on passing universal background checks or other measures.

It became quite clear this summer that no one else is coming to solve our problems. With gridlock in Washington and Columbus, our state capital, we must do what we can locally. Time and again this summer, Daytonians have demanded action in the wake of these crises, and we must work to heed their call.

City leadership is a small, scrappy team that is dedicated to our residents and our employees. We have spent years building a team of leaders who live up to our city's history of ingenuity and resiliency. While we may lack resources in Dayton City Hall, we do have the ability to create a culture and build a team that can make our city succeed. This is the only way to keep pushing ahead. Without leadership from state and federal governments to tackle critical issues, we in Dayton must instead rely on nurturing our own talent to foster creativity and risk taking. This is how we keep moving forward, no matter the challenge – including the many we have faced this year.

Editorial Photo Credit: Madison Muskopf / Shutterstock.com

Hate Crimes, Hate Speech and Freedom of Speech on College Campuses

By Kristina M. Johnson

The American political experiment was built on a foundation of radical ideals, none more so, perhaps, than the individual liberties enshrined in our Constitution's First Amendment.

The concept is deceptively simple: To allow every individual to freely express their beliefs without government infringement. However, the practical application of what we have come to know as "freedom of speech" is actually anything but.

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Justice Wendell Holmes argued a century ago that an individual does not have the right to "falsely shout fire in a theatre and cause a panic." Such language is not only inaccurate, but dangerous, he reasoned. In the modern age, things have become considerably less clear, and the tension between unabridged freedom of expression and a necessary limitation on speech in the interest of public safety is now a legitimate political question.

Higher education sits directly in the middle of this delicate intersection. College campuses are by design hotbeds of intellectual stimulation, youthful energy, and idealism. They are home to a diverse range of individuals of varying backgrounds. That is a perfect recipe of ingredients to foster both meaningful debate and moments that are ripe for controversy.

This presents the academic community with a unique opportunity, and with it a significant challenge. We must lead the way in demonstrating that it is possible to debate a wide variety of views without devolving into chaos or hatred. As such, it is time to put in place a new, forward-thinking and inclusive plan to assure that these debates occur in an accepting, constructive environment.

First, we must take a step back to get a clearer sense of the national situation and to understand why getting this right is so important.

According to the FBI, hate crimes – defined as personal attacks motivated by bias or prejudice – reached a 16-year high in 2018, and physical assaults against individuals rose, while crimes against property declined. This phenomenon is taking place even in areas as diverse and progressive as New York City, where police data also revealed a surge in such incidents.

What's even more troubling is that these figures are not comprehensive, and the situation is most likely even worse than the data shows. The FBI does not require state and local police departments or municipalities to report these crimes and most experts agree that many victims often do not file formal complaints.

This much is clear: It is an increasingly dangerous time for many people living in this country who find themselves the targets of displays and acts motivated by intolerance and hate.

College campuses, public and private alike, are a microcosm of society at large. As such, it should come as no surprise that they are experiencing a similar trend. And as is the case in communities across the nation, it is clear that the academic community still has work to do when it comes to responding to these incidents.

At Syracuse University, for example, graffiti with racial slurs was found in a dormitory on campus. The State Police Hate Crimes Task Force and the state Division of Human Rights were called into action, and the university was widely chastised for its slow-footed response. Students protested, calling for more transparency and action.

By contrast, the administration of Indiana University was recently praised for condemning remarks made on Twitter by one of its professors as "vile and sexist" while also declining to fire him, citing his First Amendment rights.

The unpredictable landscape is attracting attention at the highest levels of American government and will no doubt continue to be an issue for campuses moving forward. Finding the proper balance between protecting freedom of speech and condemning and even punishing hate speech is therefore a top priority.

For public systems like SUNY, these issues are even thornier. There are public dollars and public spaces in play, further heightening public interest and scrutiny. However, there is a way forward.

First, we must differentiate between actual hate crimes and otherwise controversial speech. It is an essential responsibility of institutions of higher learning to foster vigorous intellectual debate. Hate crimes are just that – crimes – and will not be tolerated.

Sometimes that will mean bringing together thinkers with different perspectives on controversial issues, even those with whom students, faculty and staff may vehemently disagree. These intellectual battles must be encouraged, not shied away from, and there must be clear rules of engagement established beforehand, and then rigorously enforced. A recent incident at Binghamton University centered around promotion of a conservative speaker will eventually be discussed in a productive manner on campus; however, at the time of the event only emotion and anger prevailed.

Second, we must remember that fostering an environment where individuals who hold views on the political left, the political right, and everywhere in between is not necessarily an endorsement of those views. Rather, it is our duty as educators to bring these ideas together. It is fundamental to our mission.

Recognizing the fact that we do not discriminate against individuals or restrict their fundamental right to the free expression of ideas, American college campuses can be a welcoming, inclusive environment – without sacrificing free speech.

Third, speech that is bigoted, biased and hateful should be condemned, swiftly and directly by campus's leadership. Not all ideas are created equal. Indeed, some are repugnant, repulsive, and have no place on a college campus.

Lastly, it is important that our colleges and universities stand for tolerance and inclusivity. Such a culture is strengthened and reinforced by having in place clear policies and procedures that remind us what we stand for and our foremost values

These are difficult questions and the answers must be discovered together in a comprehensive, open approach. Recognizing the fact that we do not discriminate against individuals or restrict their fundamental right to the free expression of ideas, American college campuses can be a welcoming, inclusive environment – without sacrificing free speech.

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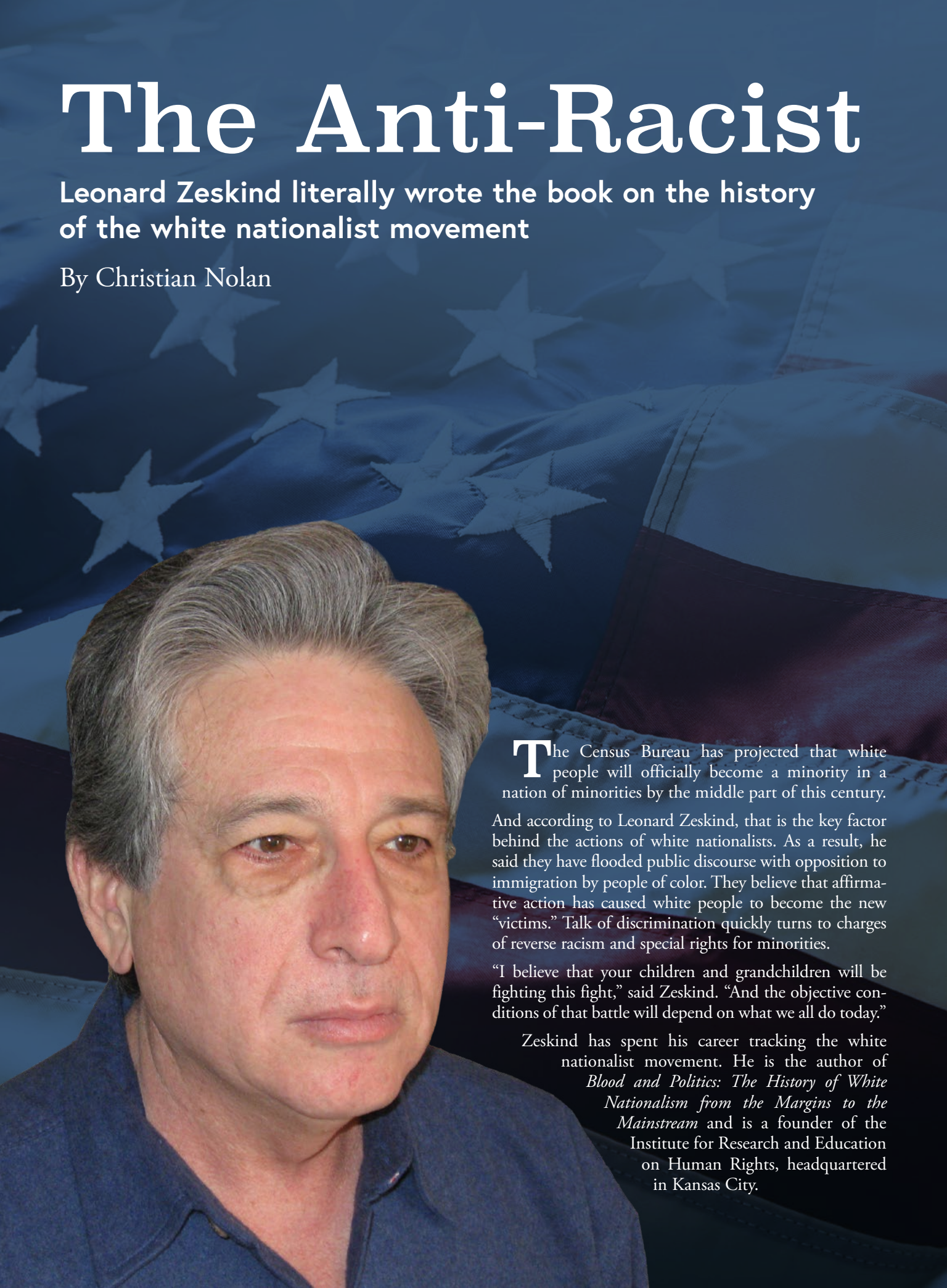
The Anti-Racist

Leonard Zeskind literally wrote the book on the history of the white nationalist movement

By Christian Nolan



The Census Bureau has projected that white people will officially become a minority in a nation of minorities by the middle part of this century.

And according to Leonard Zeskind, that is the key factor behind the actions of white nationalists. As a result, he said they have flooded public discourse with opposition to immigration by people of color. They believe that affirmative action has caused white people to become the new "victims." Talk of discrimination quickly turns to charges of reverse racism and special rights for minorities.

"I believe that your children and grandchildren will be fighting this fight," said Zeskind. "And the objective conditions of that battle will depend on what we all do today."

Zeskind has spent his career tracking the white nationalist movement. He is the author of *Blood and Politics: The History of White Nationalism from the Margins to the Mainstream* and is a founder of the Institute for Research and Education on Human Rights, headquartered in Kansas City.

At the Presidential Summit, Zeskind will share insight from his lifetime of research on the white nationalist movement.

For his efforts, Zeskind's been honored by the John D. and Catherine T. MacArthur Foundation with a MacArthur Fellowship "genius grant" and over the years, he's received numerous other awards including the NAACP "Legacy Award" from the Olathe, Kansas branch.

For Zeskind, it all began at the age of 17, when he became a human rights activist.

"I was an anti-racist activist and also against the Vietnam war," Zeskind, 70, told the *Journal* during a recent interview. "That's where my origin is."

Zeskind also worked on the assembly line at a Chevrolet plant in Kansas City and later became a skilled welder. But his real passion was activism. He said he started paying attention to right-wing white supremacists around 1978, when they again began attacking civil rights activists in the South.

By the early 1980s, he helped found the Institute for Research and Education on Human Rights, he had his own printer and began publishing *The Hammer: Anti-Racist, Anti-Fascist News and Analysis*. The grassroots publication caught the attention of the Center for Democratic Renewal. They hired him to be the director of research and he's occasionally served as the acting executive director.

Whenever possible, Zeskind would monitor these hate groups firsthand, read their magazines, and talk to defecting members. He had done so much research, he had enough information to write a book.

"I had something to say and wanted to say it," said Zeskind, who had contributed articles on the topic to publications across the country, including the *Los Angeles Times*, *New York Times*, *Kansas City Star* and *Rolling Stone* magazine.

Zeskind admitted writing the book was a challenge, since he didn't have a college education, but he polished his skills over time. He also continued researching while writing, and finally his roughly 700-page book was published in 2009 after 15 years of hard work.

'White Dispossession'

Zeskind explained that the white supremacist movement of the 1970s and the white nationalist movement since the 1990s have been built on the issue of "white dispossession." He said its leadership consists of various professionals, including doctors, lawyers, and people with one or more university degrees. They are located in all parts of the country.

"The membership is cross-class, and like most white Americans, working class," said Zeskind. "And it is everywhere … membership is concentrated, but in no discernible pattern. It is not all Southern working-class men who work in gas stations."

According to Zeskind, in 1972 a man calling himself Wilmot Robertson published a 550-page book entitled *The Dispossessed Majority* that became one of the central texts of the white supremacist movement in the 1970s and 1980s when the movement was first forming.

In the 1990s, they began looking at the changing demographics around the time that the census started talking about when white people will become a minority in a nation of minorities.

That date is 2042, according to the preface of Zeskind's book.

"Unfortunately, this false belief in white dispossession spread from the white nationalist movement to the larger population," said Zeskind.

According to a Robert Wood Johnson Foundation poll from August 2017, 55% of non-Hispanic whites said that discrimination against their group existed today.

"That is compared to 92% of African Americans who more accurately believed they were discriminated against," said Zeskind. "Sixty-one percent of those white believed it was individual discrimination they experience, rather than government policies. So they thought black- and brown-skinned people were discriminating against them. Philosophers used to call this 'false consciousness.'"

Stand up

Zeskind said the internet is not to blame for white nationalism. In the past, he said they had numerous publications. Now, he said the internet simply speeds up their message and provides another outlet to reach people.

He also said the movement is larger than any one politician or movement.

"Today they use the internet, pretty much in the same way progressive organizations do," said Zeskind. "It is wrong to describe them as born or based on the Internet. This phenomenon was not born when Trump became president. And it certainly will not die when Trump leaves the presidency."

Solutions need to start at the local level, Zeskind explained. When white nationalists infiltrate college campuses, he said anti-racists need to "speak out and not be quiet." He said allowing them their First Amendment right to free speech does not mean the anti-racists should give up theirs.

"I think the major thing that has to happen is that people have to stand up in their own hometowns," said Zeskind. "If we all stand up and oppose it, it will shrink. It will decline. We can beat it back. If we just let it sit there, then it grows."

M&A, IP, the FCC and Due Diligence in Entertainment, Media, and Telecommunications Deals

By Barry Skidelsky

Editor's Note: As part of NYSBA's Annual Meeting, on Tuesday, January 28, the Entertainment, Arts and Sports Law Section will present a CLE program on "The Digital Distribution Revolution" and "Attorneys, Agents and Managers: Changing Roles." For more information and registration, visit www.nysba.org/AM2020EASL

Today's evolving convergence of entertainment, media and telecommunications presents a challenge to all of us in the legal world, including organizations such as the New York State Bar Association, to adapt and re-invent ourselves in a digital world.

Unfortunately, some M&A dealmakers, and the lawyers who advise them, do not fully appreciate how traditional due diligence in all types and sizes of deals requires more focus on Intellectual Property (IP) and Federal Communications Commission (FCC) issues.

Failure to consider or conduct such specialized due diligence or regulatory compliance analysis – in advance and at the earliest opportunity – has the potential to materially impact the structure and value of a contemplated transaction, as well as the timing of its closing, or if one will in fact occur.

This article attempts to increase awareness of some often overlooked IP and FCC issues in M&A that apply to entertainment, media, telecom and other deals, so that the ownership, management and financial goals of the respective parties, including their equity or debt holders, may be better protected or advanced, while deal failures, delays and expense may be avoided.

REGULATORY CONSIDERATIONS IN M&A DUE DILIGENCE

Of course, a wide variety of regulatory considerations can be implicated in any M&A or other significant transaction. Among the regulatory issues generally applicable to all sizes and types of such deals are those involving antitrust, securities, tax, and employee benefits matters.

More specific regulatory issues affect only certain types of transactions in certain industries. Among those are IP and FCC issues, some of which have not been, and still may not be, immediately apparent to many involved with M&A.

INTELLECTUAL PROPERTY

Except for deals involving the licensing or sale and purchase of technology, copyrights, trademarks and patents, historically many dealmakers and their advisors have given little if any attention to due diligence issues relating to IP. Today, however, intellectual property is frequently the key value driver for far more businesses and deals.

Those in the know are already familiar with IP due diligence issues such as those relating to chain of title, patent, trademark and copyright applications and registrations, copyright assignments and statutory rights of termination, infringement caused or suffered by the parties, outbound or inbound licenses, financial and other material contracts, cybersecurity, data privacy, and more.

As businesses and business models emerge and evolve in today's digital era, awareness of these and other IP issues in M&A has dramatically increased.

FEDERAL COMMUNICATIONS COMMISSION

Less obvious to many in M&A are issues involving the Federal Communications Commission. Unlike the standards of antitrust or merger review used by both the Department of Justice and the Federal Trade Commission, the FCC has broader powers to determine whether a proposed transaction is in the public interest, or whether divestiture and other conditions should be imposed. The FCC's public interest determinations are not limited to competition and economic considerations.

No M&A deal involving any FCC license or other authorization may be consummated without *prior* application to and approval by the FCC. Key factors considered relate to the identity, citizenship, financial and other qualifications not only of the parties and their owners, but also of any investors or lenders.

Security interests and bankruptcy filings raise additional FCC concerns, as I have frequently warned investors and lenders with whom I have collaborated, whether as an attorney, consultant, compliance officer, bankruptcy trustee or FCC trustee.

While FCC-related issues primarily concern the ownership and operation of telecommunications and broadcast businesses, as well as those who produce, license and/or distribute information or entertainment content through traditional or digital media, online and mobile platforms, they also concern other businesses holding FCC licenses that are not considered to be "core assets."

Barry Skidelsky is a New York-based corporate attorney and chair of NYSBA's Entertainment, Arts and Sports Law Section. He has a national practice providing diverse legal representation, co-counsel, strategic consulting, and related services for entities and individuals involved with, *inter alia*, entertainment, media and telecommunications. His background includes work as a radio broadcasting executive, FCC divestiture trustee, bankruptcy trustee, arbitrator and mediator. He is former chair of the New York Chapter of the Federal Communications Bar Association, whose members in part practice before the FCC in Washington. He has also served as in-house general counsel and corporate secretary for several venture capital and private equity backed companies, including a publicly traded digital media business. He is currently of-counsel to Jin and Koppell PLLC. He can be reached at bskidelsky@mindspring.com.

FCC law presents traps for the unwary, even for those in telecom and media, and M&A oversights involving FCC authorizations are both common and costly.

VERIZON WIRELESS AND STRAIGHT PATH

Consider, for example, the relatively recent acquisition of Straight Path by Verizon Wireless (VZW). Pursuant to a Consent Decree made with the FCC by the well-known national wireless carrier to obtain requested approval of that deal, VZW paid $614 million to the federal government last year to settle an investigation regarding failure to timely or properly construct certain telecom facilities.

Highlighting the need for M&A and other corporate lawyers to pay more attention to FCC issues, including non-core FCC authorizations held by a target company, is the fact that, in October 2014, Marriott paid $600,000 to the federal government to settle an investigation of allegations that Marriott had interfered with and disabled the Wi-Fi networks at its Opryland Hotel and Convention Center in Nashville.

That investigation followed a consumer complaint that Opryland was jamming mobile hotspots, so that they could not be used in the convention space to connect to the internet through the mobile data network to which

No M&A deal involving any FCC license or other authorization may be consummated without prior application to and approval by the FCC.

The lesson painfully learned is that M&A due diligence to merely confirm the existence of FCC authorizations to be acquired is insufficient. Attention also must be paid to construction deadlines and other applicable FCC regulations, including those regarding so-called "warehousing" of spectrum and unauthorized operations.

MARRIOTT HOTELS

Pursuant to a different Consent Decree made with the FCC last year by Marriott, the well-known national hotel company paid $504,000 to the federal government and committed to a burdensome three-year compliance program in order to settle an FCC enforcement action resulting from Marriott closing on its acquisition of the Starwood hotel chain (which included some wireless radio licenses acquired as part of that deal) without first obtaining *prior* FCC approval of that deal.

Many non-telecom and non-media businesses across the United States such as Marriott hold FCC licenses for two-way radios used in connection with security, groundskeeping, maintenance, transportation, and other internal communications needs, all of which are a peripheral or non-core parts of the business being acquired. Nonetheless, this exposes such businesses to substantial financial penalties for unauthorized assignments or unauthorized transfers of control.

Marriott and Starwood voluntarily disclosed (*after* the closing) that they did not seek prior FCC approval due to an alleged administrative oversight that occurred as part of a larger transaction, but this excuse was rejected and their request for retroactive consent was denied by the FCC.

the consumer had subscribed. Most smartphones today come with built-in Wi-Fi hotspot capabilities, which allow consumers to create their own personal Wi-Fi network virtually anywhere, including to stream what we somewhat anachronistically still refer to as TV.

STREAMING MEDIA

The audiovisual streaming wars are heating up, and the television landscape in the United States is about to experience one of the most disruptive periods in its history. Over the last several months, a half dozen new streaming services have entered the market (e.g., Disney+, Apple TV +, HBO Max, NBCU's Peacock, Discovery Streaming and Quibi).

As a new frontier of direct-to-consumer content delivery takes hold while cable TV viewers are cutting the cord, there are more M&A and other deal opportunities than ever for content creators, and the prospects for a further consolidated and converged industry loom large. Audio-only podcast businesses, as well as digital advertising networks, are also taking off.

Key to this brave new world of digitally distributed content, and the perhaps more valuable data that users provide, is the long anticipated current rollout of so-called 5th Generation (5G) advanced wireless technology. With its increased bandwidth and speed, coupled with interactivity and artificial intelligence, this converged digital ecosystem has the great potential to offer businesses, consumers and even democracy unprecedented public interest benefits. Keep in mind that word "potential," however, as the currently pending $26 billion mega-

merger of Sprint and T-Mobile illustrates, significant concerns are at stake that can disserve the public interest.

SPRINT AND T-MOBILE MEGA-MERGER

The DOJ last summer, and the FCC in the following fall, both cleared the proposed mega-merger between Sprint and T-Mobile, two of the four major nationwide wireless carriers, albeit with a package of divestiture requirements that satellite operator and pay-TV provider Dish Network hopes will enable it to become a new nationwide wireless operator. T-Mobile needs Sprint's wireless spectrum licenses for its own 5G network plans, and Sprint, as the neediest party in this deal, has a large debt load and a money-losing business.

The DOJ and the FCC approved this deal despite objections or concerns expressed by several consumer advocate organizations, including that Dish may not timely build out its network and compete aggressively in the public market. For years, Dish has been known to industry insiders as a spectrum hoarder (remember, warehousing spectrum is contrary to the public interest).

In turn, a coalition of more than a dozen state attorneys general, led by New York State Attorney General Letitia James, has sought to block this merger. They commenced litigation in the United States District Court for the Southern District of New York (S.D.N.Y.), which as of this writing is currently pending before Judge Victor Marrero, who, after hearing from the plaintiffs, has just begun to hear from the defendants. While it's too early to tell which way that the judge may rule, no decision is expected until next February or March, and, in any event, appellate litigation is probable.

A four-to-three consolidation is a big deal in any industry, which might not matter so much if it were in an industry where a new competitor could get up and running in a matter of months. That is not the case here. Wireless companies require very substantial investment funds and years to implement their plans, assuming that there are no bumps in the road (which there usually are).

The state AGs are concerned about the loss of competition and consumer choice, as well as higher prices for consumers and the loss of (or lower paying) jobs for workers. Some lawmakers, including House Judiciary Committee Chairman Jerry Nadler of New York, have also expressed these same concerns, citing a "troubling lack of transparency and an apparent lack of appropriate process" by both the DOJ and the FCC (with the FCC Commissioners having approved this merger on a contested 3–2 vote along political party lines).

This particular proposed merger has been unprecedented in a number of ways, including having states arguing against a deal that two federal agencies have already approved. Most recently, T-Mobile has suggested that, in light of the foregoing litigation delays and pursuant to the parties' agreement, it might seek to renegotiate the price of its deal with Sprint. Again, this case illustrates how significant FCC issues can be to those in M&A.

CONCLUSION

These and other cautionary tales, which can involve a broad range of industries or businesses, serve as reminders that M&A lawyers should add possible FCC issues to their due diligence checklists and consult with knowledgeable FCC counsel as early as possible in the transaction process.

Costly M&A oversights involving FCC licenses are common. For businesses outside of the telecommunications and media industries, FCC licenses and associated equipment are not core assets. They rarely are material to valuation. Moreover, business executives and in-house lawyers are often unlikely to be aware that the target or one of its subsidiaries hold any FCC licenses.

They also may not be aware of the need to apply for FCC consent before any M&A closing or any other relevant corporate reorganization or financing occurs, or that foreign ownership or investment warrants heightened due diligence efforts. It is wise to address all of this as early as possible in the process, and to conduct annual audits.

The Role of the Temporary Receiver in Foreclosure Proceedings

By Michael Miller

The appointment to serve as a Temporary Receiver in a foreclosure proceeding in New York State Court can be interesting, challenging and rewarding. Referred to as a "temporary receiver" in the statute,[1] such a fiduciary is commonly referred to simply as a "receiver." A foreclosure action is a many-faceted proceeding that can involve real property law, complex financing, both commercial and residential landlord and tenant law, torts, debtor-creditor law and many other areas of law. Receiverships can impact residential and commercial tenants and licensees in rental properties, and proprietary leasees and tenants in co-ops. This article will focus solely on the role, duties and authority of the Receiver.[2]

Michael Miller is the Immediate Past President of the New York State Bar Association and a Past President of the New York County Lawyers Association. His practice includes the representation of fiduciaries. He has served as Temporary Receiver in complex foreclosure proceedings involving large residential, commercial and mixed-use properties in New York City. The author acknowledges the judges who have entrusted him with interesting and challenging assignments on receivership matters over the years, as well as the lawyers, managing agents, accountants and others with whom he has worked on receiverships and from whom he has learned a great deal.

RECEIVER'S RELATIONSHIP WITH THE COURT

Although generally appointed pursuant to the application of the mortgagee (the plaintiff/lender/mortgage holder), a Receiver is not the mortgagee's agent. A Receiver is responsible to the Court and must always remember that such an appointment is an expression of confidence in her or his ability, professionalism and ethical standards by the appointing judge. A Receiver's conduct and performance will not only reflect upon her or his professionalism and ability, but it will also reflect upon the judgment of the appointing judge, so it is especially important for a Receiver to be vigilant in the performance of her or his duties.

A Receiver is a fiduciary with many tasks similar to those of an executor or trustee. As the late United States Supreme Court Associate Justice Benjamin Cardozo so eloquently put it when he was Chief Judge of the New York State Court of Appeals, a fiduciary is held to a very high standard of conduct: "A trustee [fiduciary] is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior … the

level of conduct for fiduciaries [has] been kept at a level higher than that trodden by the crowd."[3]

RECEIVER'S PRIMARY ROLE, INVESTIGATION AND "QUALIFICATION"

Fiduciary appointments by the Court are governed by Part 36 of the Rules of the Chief Judge and appointees should review the Rules carefully.[4] At the outset, generally the Court will consult the list of candidates for appointment, which is compiled by the Office of Court Administration,[5] and will call to inquire about availability to serve as a Receiver. Under Part 36 of the Rules of the Chief Judge, there are a number of circumstances which disqualify one from appointment, such as: being a judge, hearing officer, employee or family member of an employee of the Unified Court System; having already received an appointment in the calendar year in which anticipated compensation is greater than $15,000; having received an aggregate of more than $75,000 in compensation awarded from all appointments in the preceding calendar year; and several other disqualifiers.[6]

If available and permitted to accept such an appointment under Part 36 of the Rules of the Chief Judge, it is important to learn as much as possible concerning the property in question and the precise provisions in the Order Appointing Receiver that the plaintiff has presented to the Court. The primary role of a Receiver is to manage the property and maintain the value of plaintiff's mortgage collateral during the pendency of the foreclosure proceeding. This will prevent the deterioration of the property during the foreclosure action and avoid the potential of the mortgagor (the borrower/landlord) to exploit, make off with or otherwise take advantage of the rent collections. It also ensures that the rental income will be used appropriately, to maintain the property. But a Receiver has another important role: to ensure as best as possible that tenants and residents receive the services to which they are entitled.

Upon commencing a foreclosure action, the mortgagee (lender) is entitled to have a Receiver appointed on an *ex parte* basis, without notice,[7] provided that the mortgage instrument contains a standard covenant "that the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver." A Receiver's authority is limited by the provisions in the order of appointment. Therefore, it is critical that the Receiver carefully review the order and if supplementary authority is required, such as the authority to retain a managing agent, accountant, counsel, undertake substantial repairs, etc., then a supplemental order of the Court making the

necessary secondary appointments should be obtained promptly upon qualifying to serve. A Receiver may not retain counsel absent a provision in the order of appointment or a subsequent order permitting such retention.[8]

It is important for a Receiver to know what she or he may be getting into. Is this a residential, commercial or mixed-use property, does the property require substantial repairs, are there tenants, is a rent roll available, will the Receiver require counsel, a managing agent, or contractors, is a bond required (almost always), will the Receiver have the right to institute eviction and other proceedings? Are rents, common charges and other obligations being paid by the tenants and residents? Without revenue, it will be difficult to provide services, pay vendors and maintain the property. Is the plaintiff willing to cover necessary expenses if the revenue flow is insufficient? Also, Receiver commissions are generally calculated based upon revenues received and disbursed.

Where there are little or no revenues, absent an order fixing the Receiver's compensation and legal fees and directing the moving party to pay them or an agreement with the plaintiff to pay them, there may be no commissions or fees payable.[9]

"Qualifying" for appointment entails filing UCS Form 872: Notice of Appointment & Certification of Compliance, and an Oath with the undertaking (the bond) required under the Order of Appointment.[10] Before qualifying, it is imperative that the Receiver be added to all liability and fire insurance policies as an additional insured and that a certificate of insurance is obtained confirming this. The Receiver immediately steps into the shoes of the owner/landlord and may be named in any claim for damages, so this is very important. Therefore, it is strongly suggested that before qualifying as Receiver, one should make certain she or he is added as an additional insured. Often, a Receiver can be added to an existing insurance policy as an additional insured. The plaintiff and defendant should be requested to provide information concerning all relevant insurance policies. It is in their interests to cooperate, as should they fail to comply, the Receiver will have to obtain separate policies, resulting in unnecessary additional expense.

It is advisable to contact counsel for the plaintiff as soon as a prospective Receiver learns from the Court that she or he may be appointed Receiver. The more information one obtains, the better the ability to make an informed decision whether to accept the appointment. For instance, if there are no rents to collect, as indicated above, unless there is an agreement to the contrary or an order fixing compensation and directing the plaintiff to pay, a Receiver is compensated solely based upon revenues collected and disbursed. If there are no rents, or there is a rent strike, will the plaintiff agree to fund management of the property, necessary repairs, and a compensation arrangement? Would the Court permit such an arrangement? Receivership duties can often require a great deal of time and effort. It is important to know that there will be a source of funds to manage the property and provide compensation, especially for solo and small firm practitioners. As Abraham Lincoln noted long ago, "An attorney's time and knowledge are his [and her] stock in trade."

A Receiver is responsible to the court and must always remember that such an appointment is an expression of confidence in her or his ability by the appointing judge. A Receiver's conduct and performance will not only reflect upon her or his professionalism and ability, but it will also reflect upon the judgment of the appointing judge, so it is especially important for a Receiver to be vigilant in the performance of her or his duties.

As noted above, once the UCS Form 872: Notice of Appointment & Certification of Compliance, Oath and bond are filed, a Receiver has "qualified" and has legal authority "to take possession" of the property and begin collecting rents, maintenance fees and all other charges from tenants and residents. Often, the Order presented by the plaintiff is taken from a form book and will not include authority to retain other professionals necessary to effectively manage the property (referred to as secondary appointments). Upon qualifying and assessing the property and its needs, as discussed later in this article, it may be necessary to submit an application to the Court for expanded authority to take certain actions and retain the necessary professionals to meet the duties involved in the appointment.

NOTICE TO ATTORN

In order to collect rents, maintenance fees or other fees, the Receiver must serve upon tenants and residents a document called a Notice to Attorn, with a copy of the Order of Appointment attached. An attornment notice informs tenants, leasees or other occupants that the Court has appointed the Receiver, that they are required to make all further payments to the Receiver, the details concerning where to make those payments, and that they are enjoined from making such payments to anyone other than the Receiver.

Receipt of the Notice to Attorn will be very unsettling for most tenants, whether residential or commercial. Imagine being served with a formal legal notice and Order without any advance information. It is important to promptly assuage tenants' concerns. Tenants pay their rent and just want to receive the services to which they are entitled and be left alone. Life is stressful, and that stress is greatly enhanced when tenants and residents receive a legal notice directing that rent be paid to a stranger. They will be concerned about potential or already existing service interruptions and whether there will be staff reductions or changes. It is suggested that the Receiver include a cover letter explaining briefly that she or he has been appointed by the Court to manage the property during the pendency of a foreclosure action and that all reasonable efforts will be made to provide building services and maintenance.

MEET WITH TENANTS AND STAFF

I have found it very helpful to include an invitation to a meeting in the cover letter to tenants which accompanies the Notice to Attorn. Having a meeting will help calm concerns and demystify the process. Such a meeting also affords the Receiver the opportunity to learn about tenants' concerns and building problems. It also provides an opportunity for the Receiver to introduce the managing agent, explain the process to the tenants and establish a line of communication. It is always unsettling for tenants when a building is foreclosed upon. If the property has been properly maintained and there is sufficient revenue, the Receiver will be able to assure the tenants that all services to which they are entitled will continue to be provided and tenants will notice little, if any, changes in the management of the property. If the property has not been properly maintained, the Receiver will be able to assure them that efforts will be made to provide all services to which they are entitled.[11]

Just as tenants will be deeply concerned, so too will staff. Staff will be concerned about job security and will be worried that they may lose their jobs. And an unsettled or frightened staff will invariably cause tenants' concerns to heighten. As soon as possible, a Receiver should hold a staff meeting with the managing agent present and inform building employees that the Receiver will do everything possible to avoid disruption. Calming the staff's concerns will go a long way to help the Receiver with tenant relations. If it's a union shop, promptly contacting the union shop-steward is recommended.

SECONDARY APPOINTMENTS: COUNSEL AND OTHERS

Care must be taken: "secondary appointees," such as attorneys, accountants, managing agents, real estate brokers, auctioneers and appraisers may only be retained upon order of the Court.[12] It is preferred that secondary appointees be on the Office of Court Administration's fiduciary list. However, the Court may appoint a non-list person or entity with a written finding of good cause which must be filed with the fiduciary clerk and the Chief Administrator.[13] It is important to note that a Receiver may not be appointed as her or his own counsel, and no person associated with a Receiver's law firm may be appointed as counsel to that Receiver unless there is a compelling reason to do so.[14]

A Receiver may seek approval of secondary appointments *ex parte* pursuant to the Rules of the Chief Judge, Part 36, § 36.1(a)(10);[15] however, to avoid conflicts or objections down the road, the far better practice is to make such applications on notice to all parties. Additionally, it is best practice for a Receiver to include with the application for secondary appointments copies of all proposed retainer agreements reflecting the compensation and duties of the respective secondary appointees. With regard to retaining counsel, it is advisable to seek broad authority to take such actions as are necessary and appropriate and that the order include specific language if initiating legal proceedings is contemplated or possible in the course of the Receiver's duties:

> ORDERED, that the Temporary Receiver be and hereby is authorized to retain _____ as legal counsel to represent the Receiver in all legal proceedings necessary to enforce the provisions of this Order and preserve the property; and it is further
>
> ORDERED that the Receiver be and hereby is authorized to institute and prosecute all legal proceedings necessary or desirable for the proper care and protection of the mortgaged property.

MANAGEMENT RESPONSIBILITIES

In reviewing the Order of Appointment, the Receiver should make certain that there is authority to execute leases and that there are no restrictions that will hinder the ability to function effectively. There are significant differences between residential and commercial leases, and it is important to have sufficient flexibility, particularly regarding commercial properties. It is common that residential leases are limited to a maximum of two years, but commercial leases are frequently longer and often there are various financial concessions that a landlord (in this case the Receiver) will need to make. The parties may have concerns or objections and to avoid criticism, unless the parties consent, it is advisable to seek consent of the Court, on notice, before making any commercial lease.

The management of funds is an important aspect of any receivership. Typically, there is a provision in the Order Appointing Receiver that imposes significant restrictions on the circumstances under which withdrawals may be made. Some forms provide a banking provision requir-

ing that the surety countersign all checks. This is problematic and will invariably cause unacceptable delays in processing payments to vendors, employees, and service providers. Additionally, such a requirement may impede the Receiver's ability to make emergency repairs promptly. Those delays may also impact the delivery of services at the premises. When such a provision is present, it is advisable to request that the Court and the bonding company agree to eliminate this requirement or, alternatively, to limit it to checks above a certain amount. A typical bank provision may include language similar to the following:

> ORDERED, that the Receiver deposit all monies received by him/her in his/her own name as Receiver in any New York commercial bank, that such account shall show the name of this action and that no withdrawals be made therefrom (apart from the payment of ordinary recurring expenses) except as directed by the Court or by draft or check signed by the Receiver or countersigned by the Receiver's surety and that said depository provide monthly statements to the Receiver and also to the attorneys for Plaintiff.

In order to open the receivership bank account, the bank will require a copy of the Order Appointing Receiver, a copy of the Bond and Oath with proof of filing, and an employer identification number as Receiver. The Receiver should be the only signatory on all checks and should not delegate that authority to the managing agent. Where a Receiver engages a managing agent, the managing agent will generally want authority to sign checks, as they do for other buildings they manage. Only the Receiver should sign checks. Most property owners permit their managing agents to sign checks – it is standard practice in the industry. Nevertheless, the Receiver should insist that she or he sign all checks. Only the Receiver has been appointed as fiduciary by the Court. Reviewing invoices and making payment to vendors, providers of services and employees are among a Receiver's fundamental responsibilities. Therefore, whether it's a large commercial building in Manhattan or a small multi-family property in Brooklyn, only the Receiver should sign checks.

In order to ensure that the Receiver is able to take control of the property promptly, it is also important that the order contain a provision vis-à-vis the defendant's responsibilities and obligations:

> ORDERED, that the Temporary Receiver be and hereby is authorized to receive, and the defendant be and hereby is directed to turn over to the Temporary Receiver all rent lists, rent rolls, security deposits, and any and all records, service contracts, orders, leases, correspondence, registration statements, and agreements related to the management, operation, occupancy, insurance, maintenance, or service of or construction upon the mortgaged property held by said defendants, to and including the date upon the which the Temporary Receiver files with the Clerk of the Court his/her oath and bond as set forth above.

A Receiver needs to take whatever measures necessary to obtain the information required to meet her or his duties. Without the property's financial records, it may be impossible for the Receiver to determine obligations which must be addressed and to know who is obligated to pay rent, common charges or make other payments to the Receiver. Should the defendant/landlord fail to comply after reasonable efforts are made, the Receiver should not hesitate to make a motion to hold the defendant/landlord in contempt.

COMMISSIONS

The receiver is entitled to a commission as fixed by the Court in an amount not exceeding 5% of amounts received and disbursed.[16] Unless there is an order of the Court authorizing interim or partial payment of commissions, fiduciary commissions are paid upon submission and approval of a final account. This can be many months (sometimes years) after appointment. Therefore, in the application for approval of secondary appointments, it may be useful to seek authority to submit interim accountings, and permission to pay commissions and fees of the secondary appointees on account, subject to approval of the interim accountings. If possible, it is helpful to distribute drafts of the interim accountings to the parties and obtain their consents prior to submission to the Court. It is improper for a Receiver to pay herself or himself commissions or secondary appointees' fees absent permission from the Court to do so.

RECORDKEEPING AND ACCOUNTING

It is critically important that the Receiver maintain copious records from the outset. While a managing agent and accountant may be employed (if authorized by the Court), it is the Receiver's responsibility to maintain proper and accurate records and ultimately, to account for all transactions. It is the Receiver's responsibility – not the managing agent's or the accountant's – to maintain necessary books and records, file with the appropriate governmental agencies, and file all required tax returns (real estate, fiduciary income tax, etc.) in her or his fiduciary capacity. Fiduciary tax returns are somewhat different than other types of returns, so it is important to retain an accountant with knowledge of this highly nuanced area.

From the inception of the appointment, the Receiver should make certain that there are appropriate invoices and receipts which the Receiver reviews and approves or rejects for each and every transaction. This will help in assuring that the final account is accurate. It is not

enough merely to sign all checks. The Receiver is responsible for the review and approval of all transactions and expenditures and must account for them. It is advisable to establish protocols from the outset to include copies of all invoices with the draft checks submitted for approval. Without the backup information, accounting will be considerably more challenging at the conclusion of the proceeding. If there are any questions by the Court, the parties or the fiduciary clerk, it may be difficult to explain certain transactions which occurred one or two years earlier without proper recordkeeping from the outset and sufficient documentation, especially if there were hundreds, or thousands, of transactions.

The final account is often where an inexperienced Receiver encounters considerable difficulty. To avoid problems, accurate recordkeeping is critical. As mentioned above, the Receiver is responsible to ensure that all records and receipts are maintained.[17] The final account is the reconciliation of everything that occurred during the course of the receivership. It is very similar in structure to a formal estate or trust judicial account of proceedings. Among the schedules included in the final account will be every transaction, principal collected, income received from all sources (including bank interest, security account dividends and income,[18] lawsuit settlements, rents, common charges, and all other sources of revenue), and all disbursements, losses, and declines in value. Submitting periodic interim accounts is most helpful, as the preparation of the final account is then likely to be much less burdensome.

DISCHARGE

A foreclosure may conclude with a judgment in favor of the plaintiff,[19] a judgment in lieu of foreclosure, a settlement agreement, or on rare occasion, a dismissal of the action. Query: When does the Receiver's obligation to collect rent end? At execution of the deed? Upon ratification of the Final Account? When discharged by the Court? Look to the Order of Appointment for guidance.[20] The filing and approval by the Court of the final account is not quite the end of a Receiver's duties. Upon conclusion of a receivership, any security deposits received must be turned over to the new owner and a notice should be sent to the respective tenants and occupants with any accumulated interest, if they are so entitled to such interest.[21] It is important to obtain an order discharging the Receiver and the surety. Until there is such an order, the surety bond continues, as does the Receiver's obligation to pay the premiums for the bond.

Upon ratification and approval of the final account and distribution of all funds on hand, the Receiver should promptly file an *Ex Parte* Order of Discharge which indicates that the Receiver has fully complied with the prior Order of the Court approving the Receiver's Final Account, has duly issued the Court-approved payments required thereunder of the total balance on hand with proof of compliance (such as copies of checks or wire transfers) and therefore, the Court discharges the Receiver and the surety. Upon issuance of the Order of Discharge, the Receiver should serve a copy of the Order upon all appropriate administrative and governmental agencies, insurance companies, tenants, vendors, etc., with a cover letter notifying them that the Receiver has been discharged.

CONCLUSION

The role played by a Receiver is an incredibly important one. A Receiver represents the Court in a profound way, as a Receiver manages a property and helps to preserve the value of the property during the pendency of a foreclosure proceeding. Equally important, a successful Receiver ensures stability for tenants, staff, vendors, lenders, the community and others who may be impacted by the proceeding.

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1. *See* CPLR § 6401(a).

2. There are many articles, books and treatises exploring various aspects of mortgage foreclosure in New York which can be readily found with a simple Google search. For a comprehensive treatise on such actions, s*ee, Bergman on New York Mortgage Foreclosures,* Bruce J. Bergman, LexisNexis Mathew Bender.

3. *Meinhard v. Salmon*, 249 N.Y. 458 at 464.

4. Part 36 of the Rules of the Chief Judge and relevant forms may be found at: https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=68214; the official site for the Rules may be found at: http://ww2.nycourts.gov/rules/chiefjudge/36.shtml.

5. Rules of the Chief Judge, Part 36, § 36.3(b).

6. Rules of the Chief Judge, Part 36, § 36.2(3)(c) & (d).

7. *See* Real Property Law § 254(10).

8. CPLR 6401(b).

9. CPLR 8004(a).

10. UCS Form 872: Notice of Appointment & Certification of Compliance may be found on the following link at page 16: https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=68214.

Generally, the bond required is approximately one-third of the annual rent roll.

11. Where revenue is insufficient, the Receiver should seek to have the plaintiff fund necessary services and needed repairs.

12. *See* CPLR 6401(b).

13. Rules of the Chief Judge, Part 36 § 36.2 (b)(2)

14. Rules of the Chief Judge, Part 36 § 36.2 (c)(8).

15. *See* Sample *Ex Parte* Secondary Appointment Forms found on pages 21 & 22 of the following link: https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=68214.

16. CPLR 8004(a).

17. If the managing agent does not keep records to the Receiver's satisfaction, then the Receiver is well-advised to discharge that managing agent and hire a managing agent that does.

18. Any security deposits turned over to the Receiver must be kept in a segregated account. Those funds are not income, but rather are a form of escrow funds and therefore, are not commissionable.

19. Where there is judgment in favor of the plaintiff, a referee to compute and a referee to sell will be appointed, which may be the Receiver, and a referee's deed will be executed.

20. Plaintiff submits an order to confirm referee's report of sale. Plaintiff has the opportunity at the outset of a foreclosure proceeding to provide in the order of appointment that upon certain events (such as judgment in lieu of foreclosure or execution of a referee's deed) the Receiver shall be relieved of responsibility to collect any further rents. If there is no direction in the order of appointment, the plaintiff has the opportunity to place appropriate language in the order to confirm referee's report of sale directing that the Receiver shall be released from responsibility to collect any further rents.

21. *See* General Obligations Law - § 7-105.

A Winter Wellness

Robert Herbst

As Simon and Garfunkel wrote in their song "I Am a Rock":

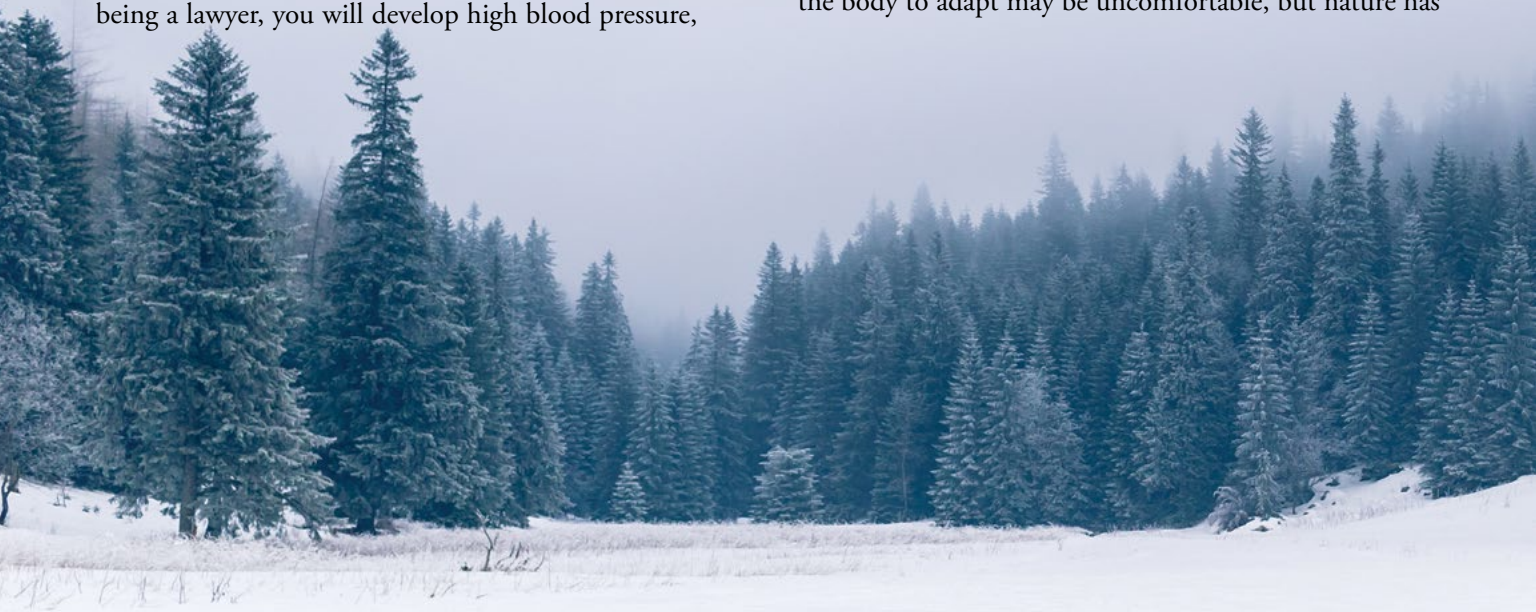
A winter's day
In a deep and dark
December
I am alone…
I am a rock
I am an island…

If you are following through on a New Year's wellness resolution, those lines may describe how you are feeling as you continue to exercise into the deep and dark of winter. The glow of the holidays has faded and the Resolutionistas have disappeared from the gym, leaving only the truly committed. You may be feeling like you are facing an endless string of workouts with no end in sight.

You should take heart because you are exactly where you should be, doing exactly what you should be doing. Health and fitness is a journey, not a destination, and you must embrace the process. Exercise only works if it makes you uncomfortable because you are forcing the body to adapt to the demands of the exercise. The human body is mercilessly efficient. It only spends energy on what is necessary and seeks to maintain the status quo. If you don't use a muscle, the body will not spend the energy to maintain it and the muscle will atrophy. If the body sees extra calories, it will bank them as fat in case of a future famine. If you don't exercise, you will age, losing muscle mass and bone density and putting on fat. If you layer on the effects from the stress of being a lawyer, you will develop high blood pressure, heart disease, and diabetes and become more obese. Obesity will lead to additional health problems such as more heart disease, certain types of cancer, and even arthritis. *See* Herbst, *Attorney Wellness in a Nutshell*, N.Y. St. B. J. 16–19 (Aug. 2019), https://www.nysba.org/Journal/2019/Aug/Attorney_Wellness_in_a_Nutshell/.

Yet that same merciless efficiency enables the body to respond to physical demands by building strength and stamina to perform efficiently what it was evolutionarily designed to do. Our body was intended to travel long distances, sprint after prey, fight it, and then carve it up and carry it back to camp. While that is no longer how we shop for dinner, the same principles apply. If you walk or run, your body will improve its cardiovascular capacity so that you can walk or run more easily. Your heart and lungs will become more efficient in delivering oxygen and nutrients. If you lift weights and use your muscles, your body will burn calories and spend the energy to build new muscle and make denser bones to make you stronger. As a result, you will slow or reverse the effects of aging and store less fat. You will also release the effects of stress from being a lawyer and will reduce your chances of developing stress related diseases such as high blood pressure, heart disease, diabetes, and obesity. *Id.*

To enjoy these benefits, it is a simple question of physics. You have to put some energy (exercise) in to end the inertia and jumpstart your system so that your body will respond and spend its stored energy (fat) and make improvements. Putting in that initial energy and causing the body to adapt may be uncomfortable, but nature has



Wonderland

come up with a remedy for that. As you exercise, your body will produce endorphins, which are chemically similar to opiates. You will also produce endocannabinoids, which are similar to the active ingredient in marijuana. These stimulate the brain's pleasure centers and dull feelings of pain or fatigue. Exercise will also reduce your levels of the stress hormone cortisol, so you will feel less anxious and depressed. As a result, during exercise, you will feel a euphoric sense of wellbeing. Runners call this runners' high. Devotees of weight training refer to this as pump, when they get a tight feeling as their muscles fill with blood. Arnold Schwarzenegger in the movie "Pumping Iron" famously likened the pump to having sex. If exercise feels like drugs and sex, why would you not want to work out?

The more you exercise, the more you will want to exercise. You will develop a general sense of wellbeing from being fit. You will just feel good. If you miss a session, you will start to feel stiff and edgy and your body will want to move. Your brain will tell you it misses getting high. Like a car that has been parked too long whose oil clots and battery dies, you will need to get your motor running.

In the deep and dark of January, stick with your fitness program and head towards the joy and beauty of Spring. Simon and Garfunkel concluded

I am a rock
I am an island

And a rock feels no pain
And an island never cries.

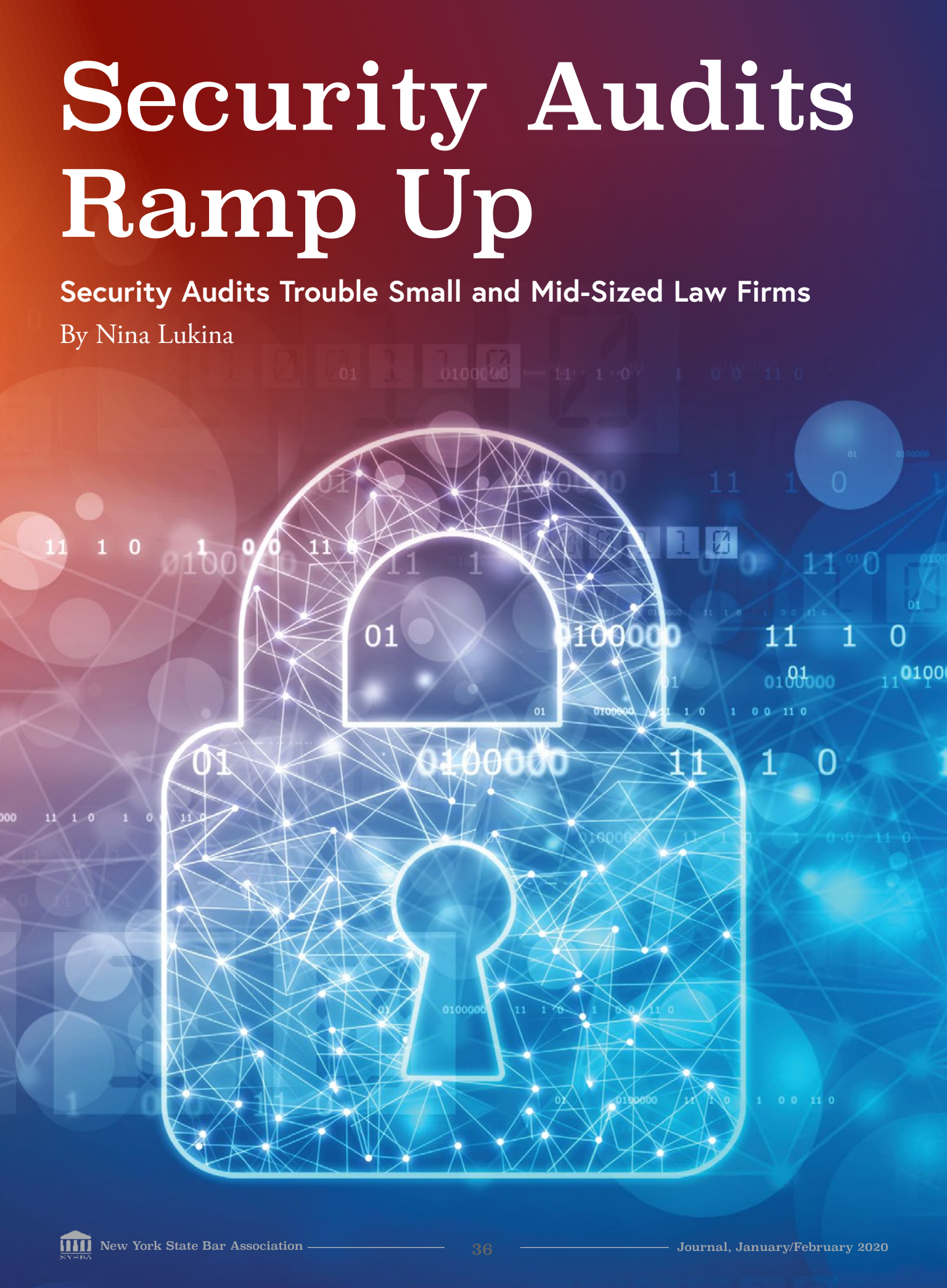
With runners' high and a good pump, you will feel no pain. You will be as strong as a rock and you will rock.

Robert Herbst has been called "New York's most powerful lawyer" by the *New York Law Journal* because of his exploits as a powerlifter, where he has won 19 World Championships and 38 National Championships and is a member of the AAU Strength Sports Hall of Fame. A graduate of Columbia Law School, he has been the General Counsel of several companies as well as a partner at Beller & Keller and an associate at White & Case. He also supervised the drug testing at the Rio 2016 Olympics. He is a past Chair of the NYSBA Committee on Courts of Appellate Jurisdiction. Robert is an internationally known expert on fitness and wellness, is quoted frequently in publications and has appeared on numerous radio shows and podcasts. Along with the NYSBA, Mr. Herbst has created a video on attorney wellness as part of an effort by the Bar to improve the health and wellbeing of its members. The video can be found at www.nysba.org/gpcorpuswellness. Learn more about Robert at www.w8lifterusa.com.

Security Audits Ramp Up

Security Audits Trouble Small and Mid-Sized Law Firms

By Nina Lukina



"Now they want screenshots."

"Longtime clients are asking for them."

"There's just no way."

These were some of the things we heard recently in conversations at a conference for leaders of small law firms.

As cybersecurity audits from corporate clients become commonplace, smaller firms are feeling the brunt.

Security audits are not exactly new. Clients have been asking law firms to prove that they are taking security seriously for about a decade. A 2014 article in *The New York Times* entitled, "Law Firms Are Pressed on Security for Data" reported even then:

> Wall Street banks are pressing outside law firms to demonstrate that their computer systems are employing top-tier technologies to detect and deter attacks from hackers bent on getting their hands on corporate secrets either for their own use or sale to others, said people briefed on the matter who spoke on the condition of anonymity. Some financial institutions are asking law firms to fill out lengthy 60-page questionnaires detailing their cybersecurity measures, while others are doing on-site inspections.

But as more industries beyond Wall Street have become concerned about the safety of their data, the scrutiny has intensified, becoming widespread.

The International Legal Technology Association's (ILTA) recently released 2019 Technology Survey, which polled 537 firms, revealed that a quarter of law firms were subject to audits in the past year, up from 16% in 2016. (Accordingly, in answer to the question "What are your three biggest law firm security challenges?" 24% cited "client security requirements," up from 14% in 2016). And the statistic seems poised to keep going up.

What Do the Audits Want?

As they shore up their own defenses to avoid a potentially disastrous, high-profile data breach, corporations are looking to their legal representation to do the same. To continue working with their favorite outside attorneys, companies have to ensure those law firms will not constitute a weak link in their data privacy programs.

Security audits ask for proof that the latest defensive technology and processes are in place. The detailed questionnaires, which started appearing within the last five years, have lengthened in that time, often running to 90 pages or more. They now request more evidence and granularity, including questions about specific configurations. On-site inspections are also increasingly part of the deal.

On a basic level, these are some of the defenses clients are requesting:

- Managed firewall
- Intrusion detection
- Anti-virus and malware protection
- Modern firewall
- Regular vulnerability testing
- Endpoint tracking and modeling
- Incident remediation
- Documented security policies and procedures
- User security awareness training
- Email targeted threat protection
- Web filtering

Security Audits Intensify Competition

The legal industry's giants have dedicated entire units to answering security audits, which typically come from Wall Street and healthcare companies, as well as from technology companies concerned about their intellectual property. These security departments provide state-of-the-art security defenses in response to client demands, including certified security analysts tasked with round-the-clock intrusion detection.

The situation has become dire for smaller firms as clients threaten to withdraw work if security requirements aren't met. Longstanding relationships are on the line. In some cases, clients are also requesting that firms purchase pricey insurance for data breaches to add to their malpractice coverage.

Managed Security Services Offer a Solution

What are smaller firms to do? Their legal work may be stellar, but they simply do not have the resources to build out an on-site security center.

First, it is imperative to review the state of your systems from top to bottom. You need to make sure there are no easy ways in, that you have not been penetrated already and that there are a number of basic tools that have been incorporated and operational to address intrusion, access to certain areas within your network, etc. You need to have a strong password policy as well as an on-going review of your systems 24x7, together with frequent backups, among other things. After you have all of that taken care of, you still need a service to monitor your environment and run periodic tests. The key is to understand this is not one and done. It is on-going and must be accompanied by continual user education.

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Acquisitions: Some Warranty Considerations

There are three ways to acquire a company: purchase the business and assets of the company; purchase the stock of the company; and by merger with the company to be acquired, often referred to as the "target."

The method by which parties choose to accomplish the transaction depends on many factors, not the least of which is tax considerations. An asset purchase has a benefit over a stock purchase or merger in that the buyer assumes only identified liabilities while in a stock purchase or merger the buyer acquires the target with all of its labilities, both known and unknown.[1] On the other hand, an asset purchase is a much more complicated transaction. For example: (i) the transfer of assets and contracts can be a large, complicated undertaking, especially when intellectual property is involved; (ii) sales and transfer taxes must be considered; and bulk sales laws must be consulted.

In any event, regardless of the method chosen to accomplish the transaction, an essential and crucial part of any acquisition agreement is the warranties, and the various methods of accomplishing an acquisition can have different results in respect of the warranties attendant to the transaction.

A. Purchase of Business and Assets vs. Purchase of Stock

In an asset acquisition, the buyer of the assets is the beneficiary of the warranties and, therefore, has a claim based directly on the asset affected by the breach. However, in a stock purchase the beneficiary of the warranties does not become the owner of the assets. The owner of the assets remains the company being acquired, and that company is not the beneficiary of the warranties and, therefore, has no claim because of a breach. Instead the buyer's injury is indirect: the buyer would have to prove a loss in value of its investment, which would be a more difficult loss to prove. A refinement for buyers to consider is to require the warranties and indemnities to run not only in favor of the buyer but also in favor of the company that is being acquired. A provision to that effect, though, *must* be accompanied by a clause stating that knowledge by the company being acquired of any matter will not impair any of the warranties in its favor or any of its rights and remedies.

A further refinement would be to merge the company that is being acquired – i.e., the target company – into the buyer or into a subsidiary of the buyer, with the representations of the selling shareholders running directly to the surviving entity. This arrangement results in the warranties having the same effect as those in an asset purchase because the beneficiary of the warranties is the surviving entity which, by virtue of the merger, acquires the assets of the target.

Sometimes a buyer, to avoid the complications of an asset acquisition, will, with seller's consent, purchase the stock of a company and then liquidate that company under Section 338(h)(10) of the Internal Revenue Code. That section treats the transaction as an asset acquisition, allowing the buyer to get a step-up in the basis of the assets of the company it is acquiring. In this type of transaction, the buyer should consider adding to the contract of sale a provision along the following lines:

> Seller acknowledges that Buyer will liquidate the "Target" following completion of the sale. Seller's representations and warranties and its indemnities

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will apply – and Buyer will be entitled to enforce them – as if buyer had purchased directly the assets of the Target, not the Target's stock.

B. Mergers

In the case of a merger in which the shareholders of the participating companies become shareholders of the surviving entity, the result would be the same as an asset acquisition *provided* the participating companies merge into a new entity, and their shareholders give the warranties to that new, surviving entity, and, if desired, to each other.

If, on the other hand, the surviving entity is one of the companies participating in the merger (as opposed to a newly-formed company into which they are merged) and the participating companies give warranties to one another, then the warranties would be meaningless because in a merger the participating companies become one and the same, resulting in no remedy, since the surviving company would be suing itself.

C. Conclusion

Surely, the effect on the warranties that the method of accomplishing an acquisition has should not be a determining – or even an important – factor in deciding how to accomplish the transaction. The considerations and suggestions discussed above merely provide ways for a buyer, if the buyer so wishes, to alter the effect of warranties in stock acquisitions and mergers.

This article is based on materials found in *Transactional Skills – Contract Preparation and Negotiating* (Carolina Academic Press, 2019).

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1. One liability risk, though, that an asset acquisition does not eliminate, and one which even thorough due diligence might not detect, is a hidden defect in an asset that is being purchased such as a flaw in machinery or software, or in inventory that is purchased for resale. Product liability insurance offers protections against this risk.

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NEW YORK STATE BAR ASSOCIATION
State Bar News

NYSBA Makes Progress in Effort to Remove Mental Health Question From Bar Application

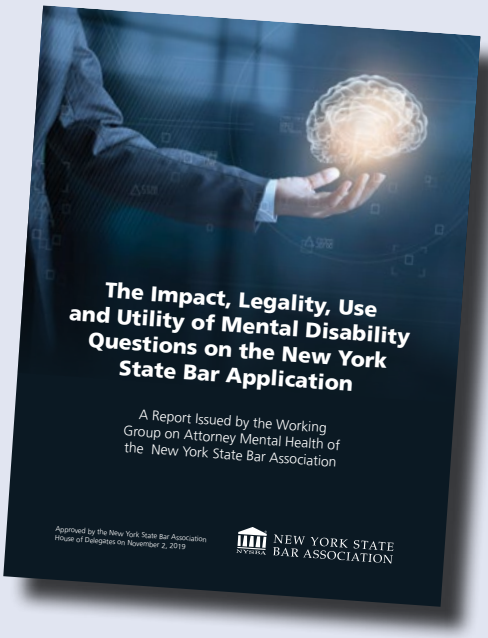
By Brendan Kennedy

In response to a campaign by the New York State Bar Association to protect the well-being of law school students, a controversial question about mental health treatment on the application for the state bar will hopefully be removed.

The Office of Court Administration has referred the matter to the Chief Judge's Committee on Admission to the Bar, chaired by Court of Appeals Associate Judge Jenny Rivera. If the committee decides to remove the question, as is expected, New York would be the 11th state to do so.

Realizing a Change Is Needed

In February 2019, the Conference of Chief Justices passed a resolution asking that "any questions that ask about mental health history, diagnosis or treatment" be replaced by questions that only focus on the applicant's conduct.



The resolution prompted then-President-elect Hank Greenberg to establish a Multi-Disciplinary Working Group to review the New York Bar Admission questionnaire and report to the House of Delegates. The working group was asked to determine whether the New York questionnaire complies with the chief justices' recommendations.

"The Working Group on Attorney Mental Health was unique in NYSBA history," said Greenberg. "It was a multi-disciplinary body, drawing on the strengths of multiple NYSBA committees and a section, and working with extraordinary speed and skill to assist policymakers solve a serious problem."

Engaging Key Stakeholders

Lauren Sharkey, the new chair of NYSBA's Young Lawyers Section, was asked to assemble a diverse group that could lead on this issue.

"Personally, it was rewarding having our voice being sought out by leadership and it has engaged our members to be more active within the State Bar," Sharkey said.

Sharkey began the outreach by asking members of her section's Executive Committee and members of other committees to participate. The Working Group took shape with 16 NYSBA members, from the Young Lawyers Section, Lawyer Assistance Committee, Committee on Disability Rights and two law students.

NYSBA Young Lawyers Section Chair Lauren Sharkey led the Working Group on Attorney Mental Health.

The announcement of the Working Group struck a chord with legal media, and outlets like the *New York Law Journal*, *Law360* and *Bloomberg Law* reported on the group's creation and goals. Separately, a change.org petition created by second-year Columbia Law School student Samantha Braver began circulating on social media and Sharkey, as did many of her colleagues in the Young Lawyers Section, lent their signatures to the petition. It has now been signed by more than 1,300 people.

"The Working Group's report and recommendations drew praise from within and without the legal profes-

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Scheindlin Awards Event: Advancing Women, Emphasizing Diversity

By Joan Fucillo

Accomplished women litigators and high-achieving women associates were honored by NYSBA's Commercial & Federal Litigation Section on Nov. 13 with the Hon. Shira A. Scheindlin Award for Excellence in the Courtroom and the Hon. Judith S. Kaye Commercial Litigation Academy Scholarships.

Section Chair Laurel Kretzing hosted the annual event, which coincides with the anniversary of women gaining voting rights in New York, Nov. 6, 1917. The 2019 awards were presented at a ceremony in New York City where speakers included U.S. District Court Judge Laura Taylor Swain, Jonathan Fellows, section chair-elect and Daniel Wiig, section vice chair.

Five Kaye scholars and two Scheindlin honorees were recognized at the event. Scheindlin awardees are top litigators who have demonstrated a strong commitment to mentoring women lawyers. The Judge Kaye scholarships fully fund the scholars' attendance at the section's two-day Commercial Litigation Academy, where they can hone their trial skills and develop the techniques needed to be first chair in a litigation. All award winners are women.

Judge Shira Scheindlin addresses the Kaye scholars and Sheindlin honorees during the event at the Daniel Patrick Moynihan U.S. Courthouse.

Scheindlin honorees

Calling the event the "night of the Sharons," Judge Scheindlin praised award winners Sharon Porcellio (member, Bond Schoeneck & King, Rochester) and Sharon Nelles (partner, Sullivan & Cromwell, NYC).

Porcellio, she noted, served with her on a team of women – all former Commercial & Federal Litigation Section chairs – that produced a groundbreaking report entitled "If Not Now, When?" on the lack of equality for women in the courtroom.

Nelles, an influential securities litigator, works extensively on issues that affect female and LGBTQ+ lawyers, and recently sponsored a forum on women in the legal profession.

Judge Scheindlin talked about the progress women lawyers have made while acknowledging the need for improvement. She also had another message.

"I would be remiss if I didn't discuss what I think has become a major issue, not just in the legal profession but in our society – and that is the lack of civility," said Judge Scheindlin. She listed a number of personal attacks routinely made by politicians on people with whom they disagree, including an accusation of treason, "so-called" judges and appearance-based smears. She worried that "we have become so accustomed to this kind of conduct that we are no longer shocked or shaken."

"We are trained as lawyers to begin an argument by saying 'I respectfully disagree,'" Judge Scheindlin noted, adding that she "truly" hoped that her grandchildren didn't hear the U.S. senator who publicly said of the House speaker "it must suck to be so dumb."

"How can I explain that conduct," she asked, and still expect her grandchildren "to behave like grown-ups?"

Judge Scheindlin thanked the attendees who "are committed to improving our profession and, I have no doubt, to improving the tone and quality of our public discourse. I am grateful for that."

Kaye scholars

NYSBA President Hank Greenberg presented the Judge Kaye scholarships to Erica Barrow, Melissa Gerecci Meyler, Joanna Chen, Sarah Washington and Gabriela Wolfe, associates at law firms across New York state.

In brief remarks, Greenberg observed that their applications had shared two themes: the need for role models and

continued on page 44

9 questions
and a closing argument

Member spotlight: Brandon Lee Wolff

Wolff is an associate at Day Pitney LLP in Parsippany, NJ. He lives in West Orange.

What is your practice area?

I practice complex commercial, creditors' rights and commercial tenancy litigation. I also have experience in healthcare law.

What is your role within NYSBA?

I am the secretary of the Young Lawyers Section (YLS) and serve on NYSBA's House of Delegates as a delegate from the section.

What advice would you give young lawyers just starting their careers?

I would encourage them to consider taking a bar exam in more than one state. I practice in New York, New Jersey and Florida, which has given me opportunities to participate in cases and be involved in multiple bar associations.

I also recommend that they get involved in bar associations like NYSBA. In particular, the YLS provides a great opportunity to network with other young lawyers throughout the state. However, the key is to not just join but to get involved and be an active participant in the association. In order to get the most out of your membership, volunteer to write an article or serve on a committee. The YLS is always looking for new members to serve on its executive committee. In addition to the YLS, you can join a substantive section and even be a liaison from that section to the YLS. This allows you to work directly with experienced lawyers across the state in that practice area.

Finally, young lawyers who are involved with NYSBA can then serve as a delegate from New York at the American Bar Association Young Lawyers Division (ABA YLD) Assembly. This is a great opportunity to network with young lawyers from across the country at exciting conferences. I have been very involved with the ABA YLD.

Recently, I worked on presenting a resolution at the last Assembly, which expanded the eligibility criteria for a young lawyer. Demographics have changed and college graduates are taking time to pursue other interests before starting law school. The resolution, co-sponsored by NYSBA's YLS, expanded the eligibility from lawyers under 36 years of age or in their first five years of practice to under 36 or in their first 10 years of practice. This is more inclusive and more in line with NYSBA's definition, which is the first 10 years of practice. Please feel free to reach out to me if you are interested in getting involved with NYSBA's YLS or if you would like to be a New York delegate at a future ABA YLD Assembly.

Who are the happiest lawyers?

Lawyers that balance their work, involvement with community/bar associations and time with family and friends.

What is the most gratifying part of your job?

Achieving great results for my clients and then receiving thank-you emails after sharing updates with colleagues and clients.

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

I was in a movie when I was five years old.

What is your passion outside of work and the law?

I enjoy spending time with my family and traveling to explore new places.

What is the best life lesson you have learned?

Do not underestimate the importance of spending quality time with your family.

What is your favorite television show?

I have two: *Seinfeld* and *Curb Your Enthusiasm*.

Lawyers should join the New York State Bar Association because . . .

NYSBA provides an invaluable opportunity to attend top-notch programs with distinguished lawyers throughout the state. I have attended fun and informal events like a CLE followed by a baseball game at Yankee Stadium.

I also recently participated in the U.S. Supreme Court Admission Pro-

continued on page 44

NYSBA MAKES PROGRESS IN EFFORT TO REMOVE MENTAL HEALTH QUESTION

continued from page 41

sion," said Greenberg. "It has already been cited by policymakers as a catalyst and blueprint for change."

A Cross Section of Support From the Legal World

The Working Group's report, which recommends the elimination of all mental health inquiries from the application for admission to the New York State Bar, was adopted by the House of Delegates at its most recent meeting in November.

Once again, the legal media as well mental health publications were there to report on the adoption of the group's recommendations. Just two days after the recommendation were approved, state Sen. Brad Hoylman, chair of the Senate Judiciary Committee, introduced a bill that would bar the state from asking prospective attorneys about their mental health.

In a show of solidarity, deans from 14 of New York's 15 law schools submitted a letter to Chief Administrative Judge of the Court Lawrence K. Marks urging the Administrative Board of the Office of Court Administration to remove question 34 from the state bar's application.

"The deans of New York State law schools responded swiftly to my invitation to go on the record supporting the report's recommendation to remove the question on mental health," said CUNY School of Law Dean Mary Lu Bilek. "Law school deans take seriously both their obligation to support the professional development of their students – including their physical, emotional and mental health – and their role in the maintenance of the integrity of the profession through vigilant regulation."

Sharkey continues to advocate on this issue, having recently written an article for the American Bar Association's Before the Bar Blog, where she notes that "many states have already removed questions like these from applications, so why not New York too?"

"The legal profession talks a lot about how we can make others feel 'whole' through providing a discrete remedy – whether that's damages, an injunction, a change in policy," wrote Columbia Law School student Samantha Braver in a recent NYSBA Blog post. "Why aren't we asking this question to ourselves? How can we ensure we are getting the support we need as we help others cross the moats in front of them?"

MEMBER SPOTLIGHT: BRANDON LEE WOLFF

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gram, sponsored by the Young Lawyers Section. This was an incredible experience. Our YLS chair, Lauren Sharkey, moved for my admission to the Supreme Court Bar as my mom and grandmother watched from the back of the courtroom. Our group of admittees sat in the first row, right in front of the justices as we were sworn in. After the ceremony, Chief Justice John Roberts spoke just to our NYSBA group and posed for a group picture. This was an excellent program that NYSBA will be running again in 2021, and I encourage you to participate. It was unforgettable.

SCHEINDLIN AWARDS EVENT: ADVANCING WOMEN, EMPHASIZING DIVERSITY

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their desire to be mentors to and role models for other women.

"That is the heart of the Kaye scholarships," said Greenberg.

Keynote on Diversity

Greenberg also gave the evening's keynote address, which focused on diversity. He began by noting that ratification of the 19th Amendment to the U.S. Constitution "marked the largest expansion of democracy in American history." Despite the strides women have made, he noted, the section's report on women litigators revealed that women still face seemingly intractable barriers. Most important, it is not just women.

"The hard truth is that the law remains one of the least diverse professions in the nation. The data, frankly, are discouraging," Greenberg said, adding that efforts to retain and promote women and people of color to leadership in law firms, courtrooms and boardrooms appear to be stalled.

Worse, he noted, public officials are using "ethnicity, race, religion, national origin, gender and faith" to divide our citizens, not to bring them together, undermining the foundational idea of America: *E pluribus unum* – out of many one.

"We must confront what Martin Luther King Jr. called 'the fierce urgency of now,'" said Greenberg, urging lawyers to lead in diversifying the profession and in educating their communities.

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Networking, Marketing, and Ethics: What You Need to Know

Carol Schiro Greenwald

It's a myth that the *NYS Rules of Professional Conduct* curtail ethical business development activities. They actually encourage truthful, transparent, knowledge-focused marketing initiatives. As the Preamble to the Rules states:

> A lawyer should further the public's understanding of and confidence in the rule of law and the justice system because, in a constitutional democracy, legal institutions depend on popular participation and support to maintain their authority.
>
> Lawyers are tasked with the responsibility to educate the public to recognize legal problems, and select lawyers intelligently. Advertising can be used to educate and attract business. [Rule 7.1, Comments 2,3]

Networking is the primary marketing technique lawyers use to build personal relationships that help them achieve their economic, social and emotional goals. Networking provides an opportunity for potential clients to see, talk to and get a sense of a lawyer before they engage the person to handle personal or business issues of major importance.

When we meet new people in a networking environment, the "halo effect" takes over and we assume that their networking behavior is analogous to their work behavior. The halo effect refers to the brain's tendency to subsume all they learn about a person under their initial impression of the person. First impressions color all subsequent impressions.

So, if you ask interesting questions while networking, we assume you will ask insightful questions about our legal issues.

If you are late for a networking meeting or fail to follow-up on promises made, we assume you will be late for meetings if we hire you and lax about sending out work documents in a timely fashion.

It behooves lawyers to adhere to their code of ethics in order to ensure that they are always seen as professional. This means that lawyers need to be cognizant of the Rules related to their conduct in the following areas:

> Fees and Division of Fees: Rule 1.5(a)(b)(c)(d)(g);
>
> Confidentiality of Information: Rule 1.6(a);
>
> Professional Independence of a Lawyer: Rule 5.4(c);
>
> Advertising: Rule 7.1(a);
>
> Payment for Referrals: Rule 7.2;
>
> Solicitation and Recommendation of Professional Employment: Rule 7.3;
>
> Identification of Practice and Specialty: Rule 7.4;
>
> Professional Notices, Letterheads, and Signs: Rule 7.5.

In this article the focus is on the requirements in Rule 7 of the NYS Rules of Professional Conduct as they pertain to networking for the purpose of building your business.

THE LOGIC OF RULE 7

Rule 7 sets parameters for lawyer communications with clients, prospects, colleagues, friends, family, referral sources and the general public. Let's begin with the most important and most basic of the Rules – Rule 7.1(a):

> Rule 7.1(a): "A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that: (1) contains statements or claims that are false, deceptive or misleading;"
>
> The definition of advertising (Rule 1.0(a) Terminology): "'Advertisement' means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, *the primary purpose of which is for the retention of the lawyer or law firm*. It does not include communications to current clients or other lawyers."

This requirement covers any activities related to growing a practice through referrals or meetings with prospects. It covers in person and online activities. Online activities are detailed in the broad definition of "computer-accessed communication" (Rule 1.0(c)) which defines these as:

> any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.

The need to be truthful sounds obvious. Most lawyers wouldn't think of lying on purpose to clients or prospects. But it is easy to cross the line into misleading or deceptive. A statement is false or misleading if it:

> Contains a material misrepresentation of fact or law,
>
> Omits a necessary fact, or
>
> Leads to an unjustified expectation.

It is fairly easy to slip into the gray area of misleading just in normal conversation. As explained in Rule 7.1, Comment [12]: "Descriptions of characteristics of the law firm that compare its services with those of other law firms and that are not susceptible of being factually supported could be misleading to potential clients. Accordingly, a lawyer may not advertise that the lawyer is 'Best,' 'Most Experienced,' or 'Hardest Working.' Similarly, some claims that involve results obtained are not susceptible of being factually supported and could be misleading to potential clients. Accordingly, a law firm may not advertise that it will obtain 'Big $$$,' 'Most Money,' or 'We Win Big.'"

CONVERSATIONAL FAUX PAS

At the same time, the Rules assume you need to say something about your work so they permit general statements about likely results and service quality comparisons as long as they are true and can be supported by data. (Rule 7.1(d)(e)) When comparisons such as better, best, more than, cheaper than, larger than, most, hardest

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working often come up in conversation they can mislead. If, in fact, you can show data that factually back up your assertions that your fees are the cheapest or you work longer hours than anyone else, you can use the claim.

Lawyers often want to use cases as the basis for stories that will communicate what they do in a way that listeners will remember. Marketers applaud the use of stories because they usually evoke an emotional response which may be more relevant to their audience. But Rule 7.1(b)(2) says you need a client's written consent to the use of their name or the facts of their specific case.

To still use stories that are interesting and relevant to your listeners, change facts such as location and gender, combine legal details from several matters and specify the result in general terms. For example:

> **Situation**: The client was injured on a construction work site when a piece of siding came loose and hit him.
>
> **Legal action**: We were able to show that it was the contractor's fault that the siding fell.
>
> **Result**: The settlement took into account not only the pain and suffering but also the accident's impact on our client's future ability to continue in his occupation. He received four times the amount initially offered by the insurance company.

Often while networking people want to ask about their specific problem. It is the duty of the lawyer to answer in generalities to avoid inadvertent establishment of an attorney-client relationship. Matter-specific advice to an individual is prohibited unless an attorney-client relationship has been established. (Rule 7.1(q)(r)) Instead, lawyers are encouraged to publish and speak publicly in general terms on legal topics.

It is important to note that the advertising rule limitations do not apply when talking to clients or other lawyers even if the purpose is retention. The language limitations are there to protect uninformed people from being unduly influenced by a lawyer's eloquence or confused by their superior reasoning. (Rule 7.1Comment [6],[7],[9])

ENDORSEMENTS OR TESTIMONIALS

Many online sites, including LinkedIn and Avvo, offer opportunities to endorse or rate lawyers. Rule 7.1(c)(1) forbids paid testimonials unless the fact that the person is paid is disclosed. However, NYSBA Ethics Opinion 1052 (3/25/15) said it is permissible for a lawyer to offer to take $50 off his fee if a client writes an online endorsement or testimonial for his services as long as he has no input into its content.

The Rules (Rule 7.1(k)) also require lawyers to approve any advertising content in handouts at networking events, online content, newsletters, blogs, etc. This provides a way for the lawyer to ensure that third party ratings or endorsements are factually correct. For example, if a divorce lawyer on LinkedIn is endorsed for M&A expertise, they need to remove the inaccurate endorsement.

REFERRALS

Rule 7.2(a) says "A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client." This statement is then qualified by saying a lawyer may pay for referrals from a qualified legal aid or public defender office or a bar association lawyer referral service. (Rule 7.2(a)(b)).

Lawyers can establish reciprocal referral relationships with others provided they are not exclusive, do not interfere with the lawyer's professional judgment and the client knows about the arrangement. (Rule 7.2 Comment [4]) These kinds of relationships are established through both in person and online networking activities.

In person it is relatively easy to stay within the guidelines. Most successful networkers go along with the mantra, "It is better to give than receive." They want to help others in their network meet people they think can help them attain their goals. There may be an expectation of reciprocity but there is no exchange of money.

Yet, by its very nature, a referral contains a recommendation. "A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities." (Rule 7.2 Comment [1]) Good referrals contain recommendations when the introductions specify the reasons for suggesting a relationship between the two people.

Problems rarely arise when lawyers make or receive in person referrals. Problems may arise when their online activities engender paid work. The question was considered and decided in NYSBA Ethics Opinion 1132 (8/8/17) which held that it was unethical to use Avvo's referral service because it implied a recommendation and selection of a specific lawyer to meet a specific prospect's needs.

A companion NYSBA Ethics Opinion 1131 (8/8/17) said lawyers can pay an online for-profit company for leads as long as four conditions ensuring impartiality and transparency are met. "A lawyer may pay a for-profit service for leads to potential clients obtained via a website on which potential clients provide contact information and agree to be contacted by a participating lawyer, as long as:

the lawyer who contacts the potential client has been selected by transparent and mechanical methods that do not purport to be based on an analysis of the potential client's legal problem or the qualifications of the selected lawyer to handle that problem;

the service does not explicitly or implicitly recommend any lawyer; and

the website of the service complies with the requirements of Rule 7.1.

SUMMARY

In person networking, complemented by online activities, is the most effective business development technique for individual lawyers. It allows people to create trust relationships that lead to referrals, new work and resources in various other fields.

Keeping within the ethical rules is a key aspect of professionalism. Adherence to your own system of ethics is what makes the practice of law a profession instead of a trade. Lawyers need to always conform to the professionalism tenets expressed in the *N.Y. Rules of Professional Conduct*. You need to make sure that you communicate within the principles established in Rule 7.1 and seek referrals within the guidelines established by Rule 7.2.

The rules emphasize straightforward communication that doesn't overpromise. By adhering to them, the networking lawyer can establish an effective personal brand centered around professional honesty and public education.

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 am a solo practitioner and planning to retire (or at least semi-retire) sometime next year. My plan has always been to sell my practice and ride off into the sunset. Now that the time to close shop is impending, however, I don't think I am quite ready to hang up my spurs altogether. I am planning to move to the south where I have a vacation home and am admitted to practice. I think I might do some part-time private practice work there or possibly even volunteer for some not-for-profit legal service groups.

Since my plans are changing from complete retirement to only partial retirement, I am trying to figure out how to navigate my ethical responsibilities to my current clients as well as my ethical obligations as a semi-retired member of the New York State bar. At the same time, however, I also want to make sure that I have enough in my retirement savings to be financially stable in the future. For example, I drafted hundreds of wills over the years and have a regular flow of estate matters as a result. Is selling my practice the only option I have if I am not completely retiring, or do I have other options? If I do continue part-time private practice work in the south, can I continue to list my New York admission in my advertising even though I am shutting down my New York office? Any advice on how to handle semi-retirement issues would be appreciated.

Sincerely,
Hopalong Semi-Retiree

DEAR HOPALONG SEMI-RETIREE,

Your inquiry is an interesting one and raises issues that we have discussed over the years. Whether you decide to

formally retire or simply relocate, a number of ethical obligations under New York's Rules of Professional Conduct ("RPC") must be considered.

For starters, you should notify your clients that you intend to close your New York practice and relocate to the south. *See* Vincent J. Syracuse and Amy S. Beard, Attorney Professionalism Forum, N.Y. St. B.J., January 2012, Vol. 84, No. 1. You also need to consider formally terminating attorney-client relationships and your professional responsibilities regarding the disposition of the clients' files. We addressed this in our January 2017 *Forum*. *See* Vincent J. Syracuse, Maryann C. Stallone, & Carl F. Regelmann, Attorney Professionalism Forum, N.Y. St. B.J., January 2017 Vol. 89, No. 1.

"Retirement" Options

Attorneys can take three paths when they decide to cease the active practice of law in New York. NYSBA Comm. on Prof'l Ethics, Op. 1172 (2019). The first option is for the attorney to continue their biennial registration ("continued registration") by filing the required form, paying the required fee, and completing the mandatory CLE requirement. *Id.* This option allows the attorney to continue to undertake representation in New York, subject to additional ethical obligations discussed below. *Id.* A second option allows attorneys to change their registration status to "retired" under section 118.1(g) of the Rules of the Chief Administrative Judge, 22 N.Y.C.R.R. §118.1(g). *Id.* As stated in RPC 1.17(a), "[r]etirement shall include the cessation of the private practice of law in the geographic area, that is, the county and city and any county or city contiguous thereto, in which the practice to be sold has been conducted." An attorney choosing to retire as described in RPC 1.17(a) is exempt from payment of the biennial registration fee and from compliance with the mandatory CLE requirements, but is only permitted to render legal services in New York *pro bono*. *See*, NYSBA Comm. on Prof'l Ethics, Op. 1172 (2019). The third and most restrictive option is to voluntarily resign by filing an amendment to the attorney's registration form withdrawing the registration. *Id.* This option completely bars an attorney from practicing law in New York regardless of whether they receive compensation for their services. *Id.*

Selling Your Law Practice

Attorneys who decide to "retire" from active practice in New York and sell their practice must satisfy certain ethical obligations. The sale of a law practice in New York is governed by RPC 1.17, which provides that "[a] lawyer retiring from a private practice of law . . . may sell a law practice, including goodwill, to one or more lawyers or law firms, who may purchase the practice." *See* RPC 1.17(a). Rule 1.17 requires that the seller's entire practice be sold so as to protect clients "whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee generating matters." *See* RPC 1.17 Comment [6].

Moreover, depending on how you structure the purchase and sale agreement, selling your practice is often a good way to ensure that you will have enough retirement savings to be financially stable in the future. For example, an attorney selling a practice is permitted to make the sale contingent upon receiving a percentage of legal fees collected by the purchaser if the payment is in proportion to the services performed by the selling lawyer prior to the sale or if the payment fairly represents the value of the "goodwill" of the retiring lawyer. *See* NYSBA Comm. on Prof'l Ethics, Op. 961 (2013). "Goodwill" refers to the "going value of a law practice" that arises from the reputation of a business and its relations with its clients. Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 870–71 (2019 ed.). In a law firm context, goodwill reflects, among other things, "the likelihood that satisfied existing clients will use the firm again when new matter arise" and "the likelihood that new clients will come to the lawyer or firm because of the firm's reputation." *Id.* at 870. The inclusion of "goodwill" in a sale of a law practice anticipates a likely income stream of future legal fees that the buyer is expecting to receive in the future. *Id.*

It is important to note that an attorney's duty to preserve confidential information remains in effect even after the representation concludes. *See* RPC 1.6. When engaging in preliminary negotiations regarding the sale of your practice, you should exercise caution to ensure that you do not violate attorney-client privilege. *Id.* RPC 1.17(b)(2), however, specifically allows a seller to provide a prospective buyer with information as to individual clients including the identity of the clients, the status and general nature of the matters, material available in public court files, and the financial terms and payment status of the clients' accounts. *See* RPC 1.17(b)(2). Absent the informed consent of the client, an attorney is prohibited from revealing any further confidential information that would violate the attorney-client privilege. *See* RPC 1.6, RPC 1.17(b)(1), (5).

One thing to consider in selling your law practice is that under RPC 1.17(a), the purchasing attorney may insist that you agree to a non-competition covenant thereby surrendering your ability to provide future legal services to your former clients. Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 872 (2019 ed.). Rule 1.17(a) permits the purchasing attorney to negotiate "reasonable" restrictions on the selling attorney's ability to practice following the sale of the practice. *See* RPC

1.17(a). Based on the facts provided in your inquiry, a non-competition clause may not significantly affect your plans as such covenants are generally limited to restricting a lawyer's ability to service clients in the same geographic region as the practice to be sold. If the restrictive covenants are too broad in scope, however, they are less likely to be considered "reasonable." *Simon's New York Rules of Professional Conduct Annotated*, at 873 (2019 ed.). Moreover, RPC 1.17(a) governs an attorney's retirement from the private practice of law and does not apply where the attorney volunteers for a not-for-profit legal service group or obtains an in-house position. RPC 1.17 Comment [3].

Fee Sharing

Now we turn to the portion of your question regarding wills you previously drafted. If you do not wish to sell your entire practice, you have the option of asking another attorney whom you trust to maintain possession of your estate documents for the benefit of your clients so long as the client consents to such transfer or that the custodial attorney will only read the wills to the extent to notify the testators and ask for further instructions. *See* NYSBA Comm. on Prof'l Ethics, Op. 1172 (2019), citing NYSBA Comm. on Prof'l Ethics, Op. 1035 (2014). Although the division of fees for legal services with another lawyer is generally prohibited under the RPC, Rule 1.5(g) offers an exception to the general prohibitions where: "(1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation; (2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and (3) the total fee is not excessive." *See* RPC 1.5(g).

In NYSBA Comm. on Prof'l Ethics, Op. 1172 (2019), the New York State Bar Association Committee on Professional Ethics considered Rule 1.5(g) and discussed the factual circumstances under which a "retiring lawyer" is empowered to ask for or accept a referral fee from the custodial attorney safeguarding wills if holding the wills results in a new representation for the custodial attorney. The Committee concluded that such a referral fee to the retiring lawyer is only appropriate where the retiring lawyer assumes joint responsibility for the representation within the meaning of Rule 1.5(g). *See* NYSBA Comm. on Prof'l Ethics, Op. 1172 (2019). Comment [7] to RPC 1.5 provides: "[j]oint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership." *Id.*; *see also* NYSBA Comm. on Prof'l Ethics, Op. 1172 (2019).

As noted above, a lawyer whose registration status is "retired" or has voluntarily resigned from the practice of law in New York is prohibited from providing legal services to a client for compensation. *Id.* As such, in NYSBA Comm. on Prof'l Ethics, Op. 1172 (2019), the Committee opined that whether a retiring attorney could assume joint responsibility depended on whether the attorney maintained the ability to practice law for compensation. *Id.* Given that RPC 5.4(a) generally prohibits a lawyer from sharing legal fees with a non-lawyer, the Committee further opined that an attorney can assume joint responsibility for a representation *only* where the lawyer opts for continued registration upon retirement. *Id.*, citing RPC 1.5(g), 5.4(a). Similarly, in NYSBA Comm. on Prof'l Ethics, Op. 1160 (2019), the Committee noted that it is improper for a New York attorney to share fees with a lawyer who is not admitted to practice in New York if the sharing of fees as a matter of law would constitute the unauthorized practice of law. Accordingly, the Committee further opined that an attorney could satisfy the joint responsibility requirement of RPC 1.5(g)(1) if the attorney's status is "continued registration" at the time the custodial attorney provides services to the client. *See*, NYSBA Comm. on Prof'l Ethics, Op. 1172 (2019). Therefore, if you are going to consider a fee-sharing arrangement along these lines, you must continue to maintain your attorney registration.

New York Attorney Admission on Letterhead

A fundamental principle for all forms of attorney advertising and communications with the public is that they must not be "false, deceptive or misleading." RPC 7.1(a)(1). RPC 7.5(a) permits a lawyer to use letterhead and business cards so long as they "do not violate any statute or court rule and are in accordance with Rule 7.1." *See* RPC 7.5(a). In that respect, the NYSBA Committee on Professional Ethics opined that "a letterhead accurately stating that a lawyer is a 'Member of the Bars of [X State] and New York[']' is not engaged in false, deceptive or misleading conduct." *See* NYSBA Comm. on Prof'l Ethics, Op. 1173 (2019). The Committee, however, opined that a lawyer listing admission in New York on letterhead, but lacking an office located in the state, "must explain to prospective and existing clients the limits that the absence of a New York office imposes on the lawyer to engage in practice in New York." *See* NYSBA Comm. on Prof'l Ethics, Op. 1173 (2019). Attorney advertising listing an office address where attorneys cannot actually meet with clients for appointments is likely to be considered deceptive and misleading to potential clients under RPC 7.1(a)(1). *Id.*

Judiciary Law § 470 requires that a lawyer practicing in New York must have a physical office located within the

state and this requirement was upheld as constitutional by the Second Circuit Court of Appeals in *Schoenfeld v. Schneiderman*, 821 F.3d 273 (2d Cir. 2016). Should you choose to continue practicing in New York in some form, as we discussed in a recent *Forum*, you may consider the option of operating your New York practice out of a "virtual law office" (VLO) if you want to relocate without selling your practice. *See* Vincent J. Syracuse, Carl F. Regelmann & Alexandra Kamenetsky Shea, Attorney Professionalism Forum, N.Y. St. B.J., August 2019 Vol. 91, No. 6; *see also* NYCBA Comm. On Prof'l and Jud. Ethics, Op. 2019-2 (2019). A VLO can be defined as "a facility that offers business services and meeting and work spaces to lawyers on an 'as needed' basis." *Id.*

Should you decide to continue your attorney registration in New York as part of the referral fee arrangement discussed above, you may be permitted to list the address of a VLO on your letterhead if the VLO qualifies as an "office" for the transaction of law business under the Judiciary Law § 470. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1501 (2019 ed.); *see also* Vincent J. Syracuse, Carl F. Regelmann & Alexandra Kamenetsky Shea, Attorney Professionalism Forum, N.Y. St. B.J., August 2019 Vol. 91, No. 6; NYCBA Comm. On Prof'l and Jud. Ethics, Op. 2019-2 (2019). But since this is a rapidly evolving area of the law, you should make sure to stay current on this issue and ensure that any VLO you set up is in compliance with the law. *See Marina Dist. Dev. Co., LLC v. Toledano*, 174 A.D.3d 431, 432 (1st Dep't 2019) (Days after our August Forum went to press, the First Department held that an attorney did not sufficiently use a VLO program's services to meet the Judiciary Law § 470 requirement because there was no evidence that he used the physical New York office space and his letterhead directed replies to his Philadelphia office.)

Sincerely,
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UPDATE TO THE JULY/AUGUST 2018 FORUM ON MARIJUANA ETHICS FOR LAWYERS

We wanted to update you on a recent ethics opinion regarding our July/August 2018 *Forum* on Marijuana Ethics for Lawyers (Vincent J. Syracuse, David D. Holahan, Carl F. Regelmann & Alexandra Kamenetsky Shea, Attorney Professionalism Forum, N.Y. St. B.J., July/August 2018, Vol. 90, No. 6). In our July/August 2018 *Forum*, we discussed how the Department of Justice's (DOJ) 2018 rescission of a memo regarding enforcement of criminal marijuana laws created some ambiguity with respect to a 2014 NYSBA ethics opinion (NYSBA Comm. on Prof'l Ethics, Op. 1024 (2014)) that explicitly relied on the now rescinded memo. *Id.* The NYSBA Committee on Professional Ethics has now reaffirmed its 2014 opinion that a New York lawyer may ethically assist a client in conduct designed to comply with New York's medical marijuana law. *See* NYSBA Comm. on Prof'l Ethics, Op. 1177 (2019). The Committee opined that in light of the continued renewal of the congressional Rohrabacher-Farr amendment, which prohibits the DOJ from using congressionally appropriated funds to prevent states from implementing their own state medical marijuana laws, the Committee's 2014 conclusion is reaffirmed. *See id.* Stay tuned to this rapidly evolving area of the law.

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

DEAR FORUM,

I am a matrimonial attorney and represent a very wealthy client who is going through a messy divorce. We just received a motion to disqualify our firm because my client's spouse is represented by an attorney who previously worked at our firm and met briefly with our client's spouse years ago while an associate at our firm. No one currently at our firm has any recollection of meeting or communicating with our client's spouse and we don't have any of the spouse's records. Our client is furious with the spouse because a few other law firms were conflicted out from representing our client before we were engaged because the spouse evidently consulted with a number of prominent divorce attorneys in the area before finally engaging our former associate. Although our client's spouse likely won't admit to it, it seems like the consultations with so many prominent attorneys in this relatively niche high end divorce legal field was intended to prejudice our client.

Do we have a basis to oppose the disqualification motion? Are there any actions we should be taking to demonstrate to the court that our firm should not be disqualified? Are there any other factors we should be considering to protect our client's right to choose counsel?

Very truly yours,
Carmela S.

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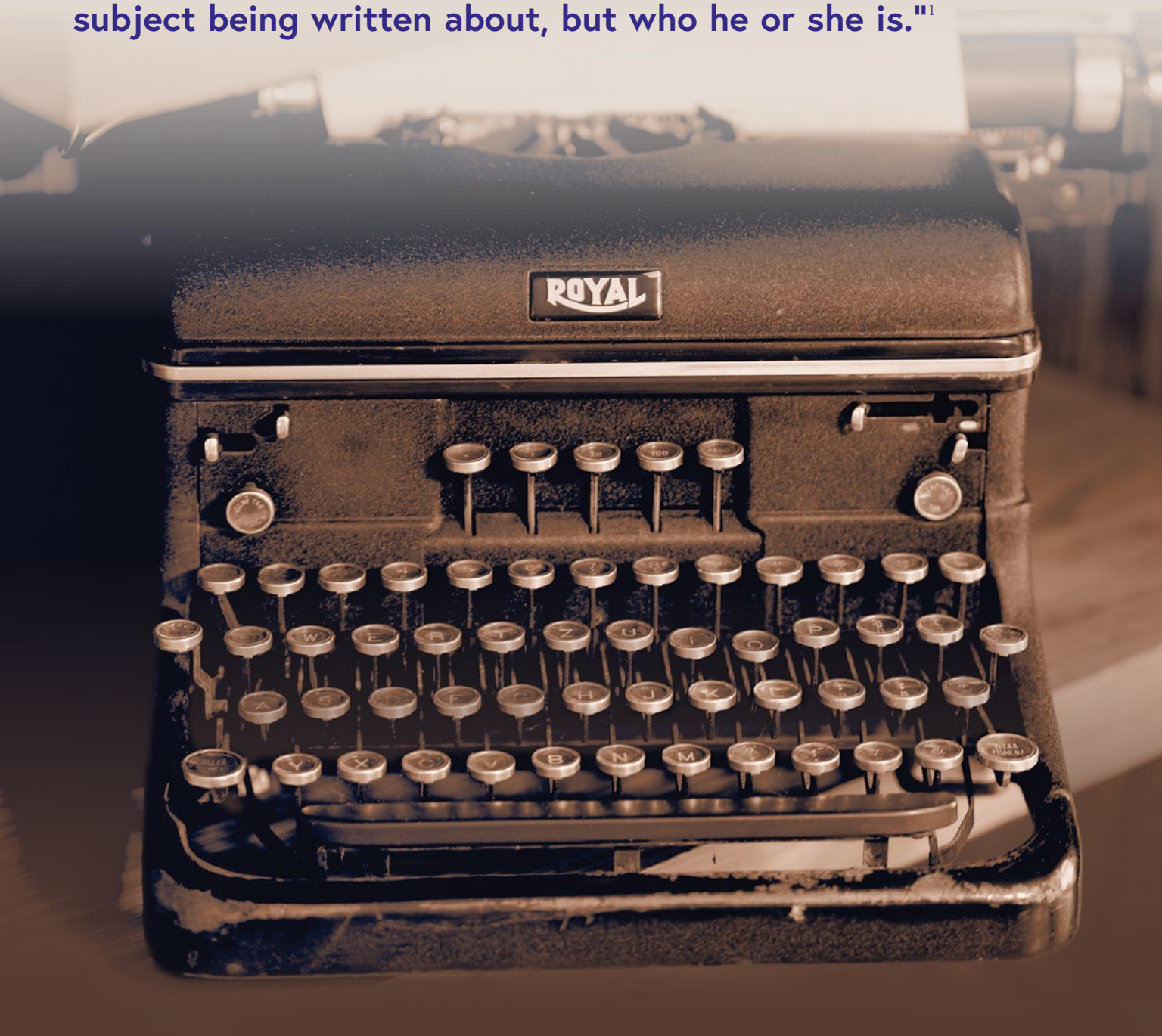
Thoughts on Legal Writing from the Greatest of Them All: William Zinsser

Gerald Lebovits

"The ultimate product that any writer has to sell is not the subject being written about, but who he or she is."[1]



William Zinsser, a lifelong journalist and writing teacher, was born in 1922 in New York City.[2] He attended Deerfield Academy and Princeton University, and served as a sergeant in North Africa and Italy in World War II.[3] He started his career as a writer at the *New York Herald Tribune*, serving as a feature writer and editor for 14 years.[4] During his long and illustrious career, he published numerous articles for America's premier publications and 19 books.[5] Zinsser also taught writing at Yale, the New School, and Columbia's Graduate School of Journalism.[6] He died in 2015.

Zinsser's most influential book, *On Writing Well*, has sold more than 1.5 million copies.[7] In it, he advocates a writing style that prizes brevity, clarity, humanity, and simplicity.[8]

Zinsser had mainly journalism in mind when he wrote *On Writing Well*. But his classic oeuvre gives abundant tips on good writing in general. Legal writers will advance their writing skills by reading it.

Zinsser believed that because writing is an intimate transaction between a writer and reader, warmth and humanity are at the center of good writing. This type of warmth and humanity can be achieved only when writers are being themselves when writing. And that, in turn, requires the writer to eliminate linguistic clutter and achieve clarity and strength. Even for writers in a business or legal setting, it's to the writer's advantage to write as a human and thus "stand out . . . among the robots."[9]

Here's a sampling of his advice:

PRINCIPLES

Be Who You Are. For Zinsser, the ultimate product of a nonfiction writer is more a matter of who the writer is than the subject matter of the writing.[10] And "[t]his is the personal transaction that's at the heart of good nonfiction writing."[11] Although this principle seems counterintuitive for attorneys who view logical objectivity and detachment as a touchstone of correct legal writing, this principle applies in the legal context: Zinsser equates who the writer is with the writer's ability to "use the English language in a way that will achieve the greatest clarity and strength."[12]

When writers are under pressure to write, "they don't just write what comes naturally."[13] The "problem is to find the real man or woman behind the tension."[14] Finding this person is crucial. It's the writer's personality and humanity that offers "a liveness that keeps the reader reading from one paragraph to the next."[15]

Simplify, simplify, simplify. Zinsser wrote that one of the biggest challenges to achieving clarity and strength is language clutter, "the disease of American writing."[16] Unnecessary words, circular constructions, pompous frills, and meaningless jargon distract readers and reflect the writer's lack of clear thinking. "[T]he secrecy of good writing is to strip every sentence to its cleanest components," Zinsser suggested.[17]

To remove clutter, a writer must be ruthless. Zinsser asked: "Is every word doing new work? Can any thought be expressed with more economy? Is anything pompous or pretentious or faddish? Are you hanging on to something useless just because you think it's beautiful?"[18]

Draft writing in the first person. To achieve humanity and warmth and be persuasive, the fundamental rule is to be yourself.[19] Writers are at their most natural selves "when they write in the first person."[20] Zinsser realized that in many professions, I-ness is forbidden. His advice for writers in these professions is to think "I" while they write, or "write the first draft in the first person and then take the 'I' out."[21]

METHODS

Keep your readers hooked by filling in details. Zinsser underscored the importance of writing a strong lead and ending. A strong lead will attract readers; an excellent ending that sneaks in slight surprises create a lasting impression on readers, like "the curtain line a theatrical comedy."[22]

To maintain an attractive flow of a narrative, Zinsser advocated "a progression of sentences, each tugging the reader forward until he is hooked,"[23] and a buildup of paragraphs, each "amplify[ing] the one that preceded it."[24]

To achieve this seamless and effortless flow, Zinsser emphasized the importance of "adding solid detail" to the starting and ending sentences of a paragraph.[25] This is how a writer can "[c]oax the reader a little more; keep him inquisitive."[26]

Cut adverbs and adjectives. Use Verbs! Although "[m]ost adverbs are unnecessary" and "[m]ost adjectives are also unnecessary," Zinsser stated that "[v]erbs are the most important of all your tools."[27] Verbs give sentences a momentum and push writing forward.[28] Zinsser suggested that, first, "[u]se active verbs unless there is no comfortable way to get around using a passive verb," because active verbs are crucial to the clarity and vigor of writing.[29] Second, he wrote, take advantage of vast supply of verbs that English has to offer, and use short and precise verbs. "Don't set up a business that you can start

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or launch," Zinsser remarked, and "[d]on't say that the president of the company stepped down. Did he resign? Did he get fired?"[30]

Be cautious of concept nouns. For Zinsser, people often use nouns in a problematic way. He was especially doubtful of the use of concept nouns and "creeping nounism."[31]

Zinsser argued that "[n]ouns that express a concept are commonly used in bad writing instead of verbs that tell what somebody did."[32]

Worse for Zinsser is the use of four or five concept nouns together "like a molecule chain," or a creeping nounism.[33] Zinsser complained that "[i]t no longer rains; we have precipitation activity or a thunderstorm probability situation."[34] He thus begs: "Please, let it rain."[35]

Use proper punctuation. The rule of thumb, Zinsser wrote, is that the period is encouraged; the exclamation point shouldn't be used unless absolutely necessary; the em dash (—) is an invaluable tool; and the semicolon and the colon are "Victorian antiques" that should be used with discretion.

"If you find yourself hopelessly mired in a long sentence, it's probably because you're trying to make the sentence do more than it can reasonably do."[36]

"Don't use [the exclamation point] unless you must to achieve a certain effect."[37]

The em dash is valuable because it offers an excellent way to supplement the main idea of a sentence with side thoughts or explanations. When a single dash is used in a sentence, the second part is used "to amplify or justify" the first part.[38] When two dashes are involved, the part in between represents a parenthetical thought indirectly related to the main structure.[39] For attorneys, the em dash is especially useful because legal reasoning is usually complicated and frequently demands aiding explanations.

Colons and semicolons bring sentences to a halt, or "at least to a pause."[40] Because their functions are largely replaced by the period and the dash, they should be used with discretion, "remembering that it will slow to a Victorian pace the early-21st-century momentum you're striving for."[41]

The quickest fix is to remove the troubled part. When you face a stubborn problem in a sentence and have tried every possible way in an attempt to solve it, step back and consider whether the problem is necessary all along. Zinsser suggested that, more often than we'd expect, the reason we reach an impasse is that the troubled phrase doesn't fit in the sentence. "Remove it and watch the afflicted sentence spring to life and breathe normally."[42]

Keep paragraphs short, but don't go berserk. According to Zinsser, "[w]riting is visual — it catches the eye before it has a chance to catch the brain."[43] Short paragraphs are inviting, while long ones are discouraging for a reader. A succession of tiny paragraphs, however, is "as annoying as a paragraph that's too long" because it makes "the reader's job harder by chopping up a natural train of thought."[44]

Read your first draft aloud before rewrite. "[W]riting is an evolving process, not a finished product."[45] Rewriting consists of "reshaping and tightening and refining the raw material on your first try," and, therefore, is crucial in producing a clear and strong final product.[46] Zinsser recommended reading a draft aloud before you rewrite. By reading aloud, "you'll hear a dismaying number of places where you lost the reader, or confused the reader, or failed to tell him the one fact he needed to know, or told him the same thing twice: the inevitable loose ends of every early draft."[47]

ATTITUDE

Wanting to be a better writer. "Unlike medicine or other sciences, writing has no new discovery to spring on us."[48] All writers know the same rules and principles of writing. What's the edge that sets you apart? Zinsser's answered: "If you would like to write better than anybody else, you have to want to write better than everybody else."[49] A writer must obsess over every detail of a draft and be able to defend against people who edit the draft with a different insight or a lower standard.[50]

Zinsser was proud to claim that "my 'style' — the careful projection onto paper of who I think I am — is my main marketable asset, the one possession that might set me apart from other writers."[51] To form a unique style, writers must establish a standard for themselves. Zinsser regretted that "[t]oo many writers are browbeaten into settling for less than their best."[52]

The Legal Writer will continue its series on what we can learn from the great writing teachers – lawyers and non-lawyers.

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1. William Zinsser, *On Writing Well* 5 (7th ed. 2006).
2. William Zinsser, Biography, William Zinsser, http://www.williamzinsserwriter.com/william-zinsser-biography.html (last visited Oct. 1, 2019).
3. *Id.*
4. *Id.*
5. *See id.*
6. Mallary Jean Tenore, *William Zinsser's 5 Tips for Becoming a Better Writer* (Jan. 4, 2011), https://www.poynter.org/reporting-editing/2011/william-zinssers-5-tips-for-becoming-a-better-writer/ (last visited Oct. 2, 2019).
7. Douglas Martin, *William Zinsser, Author of "On Writing Well," Dies at 92*, N.Y. Times (May 12, 2015), https://www.nytimes.com/2015/05/13/arts/william-zinsser-author-of-on-writing-well-dies-at-92.html (last visited Oct. 1, 2019).
8. *Id.*
9. Zinsser, *supra* note 1, at 177.
10. *Id.* at 5.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id*
16. *Id.* at 6.
17. *Id.*
18. *Id.* at 16.
19. *Id.* at 19.
20. *Id.* at 20.
21. *Id.* at 21.
22. *Id.* at 54, 64.
23. *Id.* at 54.
24. *Id.* at 55.
25. *Id*
26. *Id*
27. *Id.* at 68, 69.
28. *Id.* at 68.
29. *Id.* at 67.
30. *Id.* at 68.
31. *See id.* at 75-76.
32. *Id.* at 75.
33. *Id.* at 76.
34. *Id*
35. *Id.*
36. *Id.* at 71.
37. *Id.*
38. *Id.* at 72.
39. *Id.*
40. *Id.* at 72-73.
41. *Id.* at 72.
42. *Id.* at 79.
43. *Id.*
44. *Id*
45. *Id.* at 84.
46. *Id.*
47. *Id.* at 87.
48. *Id.* at 297.
49. *Id.* at 298.
50. *Id.*
51. *Id*
52. *Id.*

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White Nationalism and Domestic Terrorism in America

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