

# NEW YORK STATE BAR ASSOCIATION Journal



MAY 2020  
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## NEW YORK LAW: A View from the Bench

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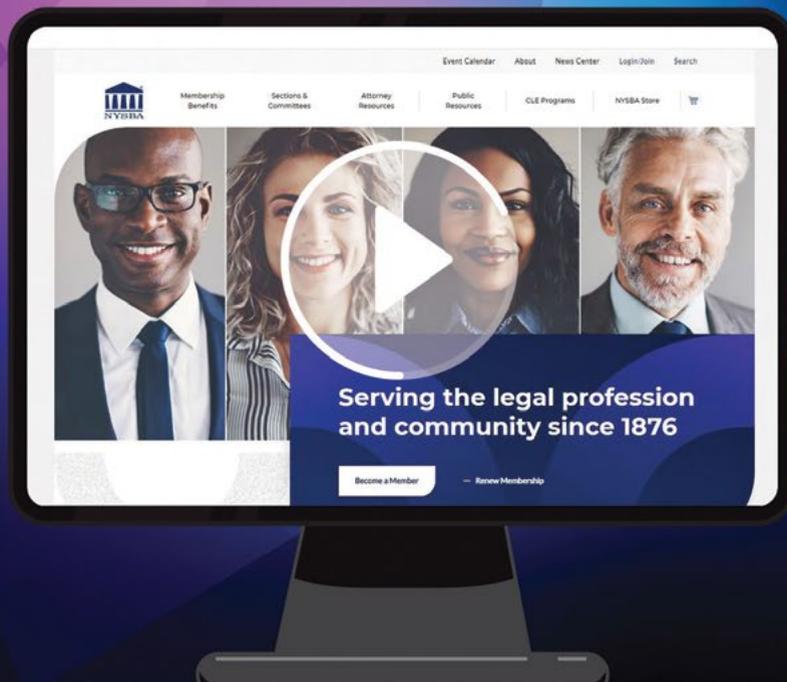
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# Meeting the Challenges of Our Times



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Today, as the state and nation reel from the threat of the coronavirus pandemic, NYSBA is there for our members, for state policymakers and all New Yorkers like never before, because of our technological capacity that is without equal among the organized bar.

Indeed, over the past year, NYSBA has gone through an extraordinary transformation. Last June, we set an ambitious goal: the construction of a Virtual Bar Center. The world and our members were quickly moving from physical to virtual platforms. We therefore had to embrace state of the art technologies to remain a national and global leader.

When we launched the initiative, it was not because of prophetic powers, but the timing served us well. Just a few weeks before COVID-19 struck, our Virtual Bar Center was completed. We overhauled our operating systems by creating a new website, adding state of the art e-commerce technology, enhancing the quality and reach of our communications capacity and digitizing all publications. Attorneys across the street and around the world are now just a click away from accessing NYSBA's services and benefits.

Thus, when we were forced to close the Bar Center at 1 Elk Street in Albany at 8:00 p.m. on March 22, we seamlessly moved to a remote platform to serve our membership. At the same time, we transformed our website and social media outlets into a clearinghouse of authoritative information from those leading the fight against COVID-19 – not just judges and attorneys but also medical professionals and political leaders, all of whom recognize that trustworthy information is an antidote for these times.

Likewise, responding to a call to service, we set in motion a digitally based pro bono response designed to assist more than one million unemployed and vulnerable New Yorkers suffering from the pandemic.

If that were not enough, on April 4 NYSBA held its first-ever all virtual House of Delegates meeting where 207 members – the highest number in that body's history – expressed their views and engaged in robust debate without a hitch. Following this success, bar associations around the country have reached out for our guidance.

## A LEGACY OF LEADERSHIP

We did not arrive at this moment by accident. It is the product of a storied 143-year history and legacy of leadership. Our members have included U.S. presidents, New York governors, and justices of the U.S. Supreme Court. With 70,000 members, 26 sections and 65 chapters that span the globe, we are the largest and oldest continuously operating voluntary state bar association in the nation.

Beyond the famous names and sheer numbers, NYSBA is one of the most forward-thinking and member-centered volunteer organizations in the world. From our beginnings, NYSBA has been at the forefront of efforts to defend and define the principles of justice and overcome barriers to equal rights for all. On the same day we were created, NYSBA moved to eliminate obstacles to women practicing law in New York. And since then – whether in government, in commerce, in the military, or at local gatherings of concerned citizens – our members have held positions of leadership, influence and responsibility, ever striving to do the public good.

That work has been fundamental and far-reaching. In 1896, NYSBA proposed the first global means for settling disputes among nations through the rule of law. This inspired vision and the relentless effort of our members resulted in the formation of what is now called the Permanent Court of International Justice in The Hague.

In 1950, NYSBA played a critical role in helping Congress create the Uniform Military Code of Justice, the first major revision of laws governing conduct in the military in over 150 years. Following the explosive riot at the Attica Correctional Facility in 1971, we sponsored the creation of legal services organizations to provide civil representation for inmates in New York's prisons. In 2001, after the terrorist attacks of September 11, thousands of our members provided pro bono assistance to survivors trying to rebuild their lives. And once again, in 2019, our members fought for immigrants who had been separated from their children at the Mexican border and sent to jails in New York to await deportation hearings.

**HENRY M. GREENBERG** can be reached at [hmgreenberg@nysba.org](mailto:hmgreenberg@nysba.org)

## LEADING INTO THE FUTURE

All of this, past and present, is but a glimpse of who we are and what we do. It also portends a future in which we continue to serve as a leader of the profession, by adapting to new challenges, in an ever-changing environment.

Change is the new normal in life and the law. The transformations wrought by the pandemic are too vast and rapid to master, but we must try to understand those that directly impact our practices and clients. NYSBA is now perfectly positioned to do this. We have become a nimble technological powerhouse. And that capacity will be indispensable this coming year, as we rise to meet the challenges of COVID-19.

It has been the highest honor of my professional life to serve as president of this great association. I have been blessed with extraordinary support from the officers, executive committee and House of Delegates. We are all fortunate as well to have a world-class staff that is laser focused on NYSBA's mission. During the pandemic, they have worked around the clock, especially Executive Director Pam McDevitt; General Counsel Kathleen Baxter; Chief Communications Strategist Susan DeSantis; Director of Human Resources Paula Doyle; Director of Marketing Gerard McAvey; Executive Assistant Kimberly McHargue; System Specialist Jessica Patterson; and Senior Director of Continuing Legal Education and Law Practice Management Katherine Suchocki.

You, the members of the association, have given me the most extraordinary gift for which any lawyer could hope. From the very bottom of my heart, I thank you all.

## COVID-19 Emergency Legal Relief

The New York Bar Foundation, the charitable arm of NYSBA, launched a charitable fund to assist those with urgent legal needs due to the COVID-19 pandemic. These funds will help law-related organizations serve those in need all across our state.

### Now more than ever we need your help.

Please give today online at <https://givetnybf.swell.gives> or by mailing your check to The New York Bar Foundation, 1 Elk Street, Albany, NY 12207

*We wish you and your loved ones health, safety, and comfort at this difficult time.*



# NEW YORK LAW: A View from the Bench

## Introduction

By Hon. Michael J. Garcia

Our legal history is a great New York narrative: Leading jurists, a vibrant bar, and a unique docket combine, generating prominence and influence well beyond our borders. As guest editor of this special section of the New York State Bar Association Journal, my goal was to create a forum for judges of diverse backgrounds and varied experiences to tell their part of the story. The topics are designed to capture a broad array of themes and to foster a deeper understanding of New York's judicial system – both in terms of where we come from, and where we want to go.

We begin with a historical view, highlighting giants of the New York judiciary and discussing landmark decisions of state constitutional law. We then underscore the global reach of our state jurisprudence, examining New York's preeminence in commercial litigation and the role of New York law in federal court. Finally, we turn to the trusted role of a judge's law clerk, and to the critical importance of diversity in the New York judiciary.

Credit for this remarkable achievement is due to many distinguished lawyers and judges. First, my thanks to NYSBA President Henry M. Greenberg and the outstanding Journal staff. NYSBA has flourished under Hank's leadership, spearheading historic initiatives, promoting equal access to justice, and demonstrating an unparalleled commitment to diversity and inclusion. Time and time again, Hank has proven himself to be a talented lawyer and a tremendous leader with a vision grounded firmly in New York's legal traditions. That he so readily entrusted me with this responsibility illustrates Hank's thoughtful and generous spirit – and perhaps a soft spot for a fellow former clerk to Judge Judith Kaye.

I am also profoundly grateful for the support of Chief Judge Janet DiFiore, whose remarkable leadership has invigorated the New York court system, and my exceptional colleagues at the Court of Appeals.

Finally, I am humbled by the generosity of the six esteemed judges who so willingly contributed to this edition, particularly in this time of immense hardship. Each of these respected jurists – Presiding Justice Rolando Acosta, Judge Ta-Tanisha James, Justice Barry Ostrager, Justice Erin Peradotto, Judge Albert Rosenblatt (Ret.), and Judge Richard Wesley – offers a wealth of knowledge, a depth of experience, and a unique perspective on the law. We are the lucky beneficiaries of their singular expertise.

To all of you, I am deeply grateful for your valuable time and invaluable insight. Thank you.

When this edition was first conceived, and when the contributing authors signed on, none of us could foresee the tragic health crisis that would soon engulf the state and the nation. The work that has been done in preparing this edition serves as a small reminder of the great resilience of the New York judiciary. New York's great legal tradition, stretching back to the 1777 New York Constitution, endures.



**Michael J. Garcia** is an Associate Judge of the New York Court of Appeals.

# From Jay to Kaye: A Portrait of New York's Giants

By Hon. Albert M. Rosenblatt



**Albert M. Rosenblatt**, who now teaches at NYU Law School, served as an Associate Judge of the New York Court of Appeals from 1999 to 2007.

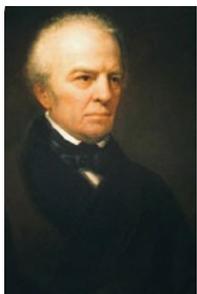
The task is a daunting one: to identify the historical “giants” of the state judiciary for this special edition featuring judicial perspectives on New York law. I imagined a bench – titans of the past – gazing down at the current legal landscape. But who to fill the chairs? I take some comfort in the broad grant of discretion that came with this assignment – and the charitable nature of my readers. With that in mind, here are my selections.



As with most judicial writings, I default to chronological order. We begin, of course, with John Jay, New York’s first Chief Judge. It is no surprise that Jay assumed this prestigious post, given his pivotal role in drafting New York’s first constitution, approved on April 20, 1777. Several weeks later, when Jay learned

of his “election” as Chief Justice, he remarked that being Governor would be “more respectable as well as more lucrative,” but that the “object in the course of the present great contest neither has been, nor will be, either rank or money.”<sup>1</sup> To this day, Jay’s ideal of service remains the touchstone of New York’s highest tribunal.

Chief Justice Jay opened the first session of New York’s high court in Kingston, New York, in September 1777.<sup>2</sup> For the next two years, Jay presided over a varied docket, including a number of criminal cases.<sup>3</sup> Although records of those proceedings are sparse, it has been said that Chief Justice Jay filled the bench with “great dignity” and “pronounce[d] the sentences of the court with becoming grace.”<sup>4</sup>



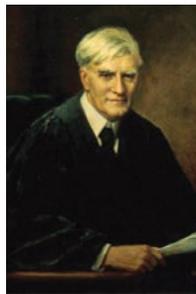
Next in line is America’s Blackstone, Chancellor James Kent, who served as Chief Justice of New York’s high court from 1804 to 1810, and as Chancellor of New York’s Chancery Court from 1814 to 1823. Though John Jay had a prominent role in drafting the state constitution – and breathing life into New York’s judiciary – Jay was primarily applying English and colonial

law; it was Kent who became the father of American law. *Kent’s Commentaries on American Law* (published 1826–1830) was the standard American legal text and remains a classic work to this day.<sup>5</sup>

In addition to his famous treatise, Kent was responsible for a more fundamental innovation: he “introduced to New York the custom of writing opinions on significant matters and collecting them in official, state-sponsored reports.”<sup>6</sup> Until that point, “[w]e had no law of our own and nobody knew what it was.”<sup>7</sup> Kent’s timeless writings demonstrate the lasting import of judicial opinions and

“contain the true portrait of the talents and learning” of this “sage[] of the law.”<sup>8</sup>

In 1923, 100 years after his retirement, a plaque was installed outside of the courtroom in Court of Appeals Hall honoring Chief Justice Kent.<sup>9</sup> The tribute to Kent was one of the first commemorative acts in the Court’s new home following its relocation from the State Capitol. As aptly noted on the plaque, we are indebted to Kent for giving “the common law in its new home fresh vitality and power.”



I am sure the ceremony in Kent’s honor, held in the Court’s new home, was attended by our next giant – then-Associate Judge Benjamin Nathan Cardozo. Cardozo sat on the Court of Appeals from 1914 to 1932, serving as its Chief from 1927 to 1932. Much has been written by and about Chief Judge Cardozo, and he is remembered for enduring phrases like, “[d]

anger invites rescue. The cry of distress is the summons to relief”<sup>10</sup> and “[a] trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.”<sup>11</sup>

But Cardozo’s legacy extends far beyond his memorable style. As Justice Felix Frankfurter said, “no judge in [Cardozo’s] time was more deeply versed in the history of the common law or more resourceful in applying the living principles by which it has unfolded.”<sup>12</sup> And, perhaps for that reason, Cardozo’s *Nature of the Judicial Process* will forever remain a classic. As he said in that “rhapsodic defense of judicial review,”<sup>13</sup> the process of judging is one “not of discovery, but creation; and the doubts and misgivings, the hopes and fears, are part of the travail of the mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born.”<sup>14</sup> Although Cardozo’s influence on the development of the law extends well beyond the New York Court of Appeals, his words certainly continue to resonate there, as the Court continues to engage in that “endless process of testing and retesting” to retain “whatever is pure and sound and fine.”<sup>15</sup>



The most recent of our judicial giants, Judith S. Kaye, was the first woman to serve on the Court and had the longest tenure of any of its Chief Judges. Kaye served as an Associate Judge from 1983 to 1993, when she was elevated to Chief Judge – a position she held until 2016. Though Jay was instrumental in drafting New York’s first constitution, Chief Judge Kaye

was the leading figure in the “reinvigoration of state con-

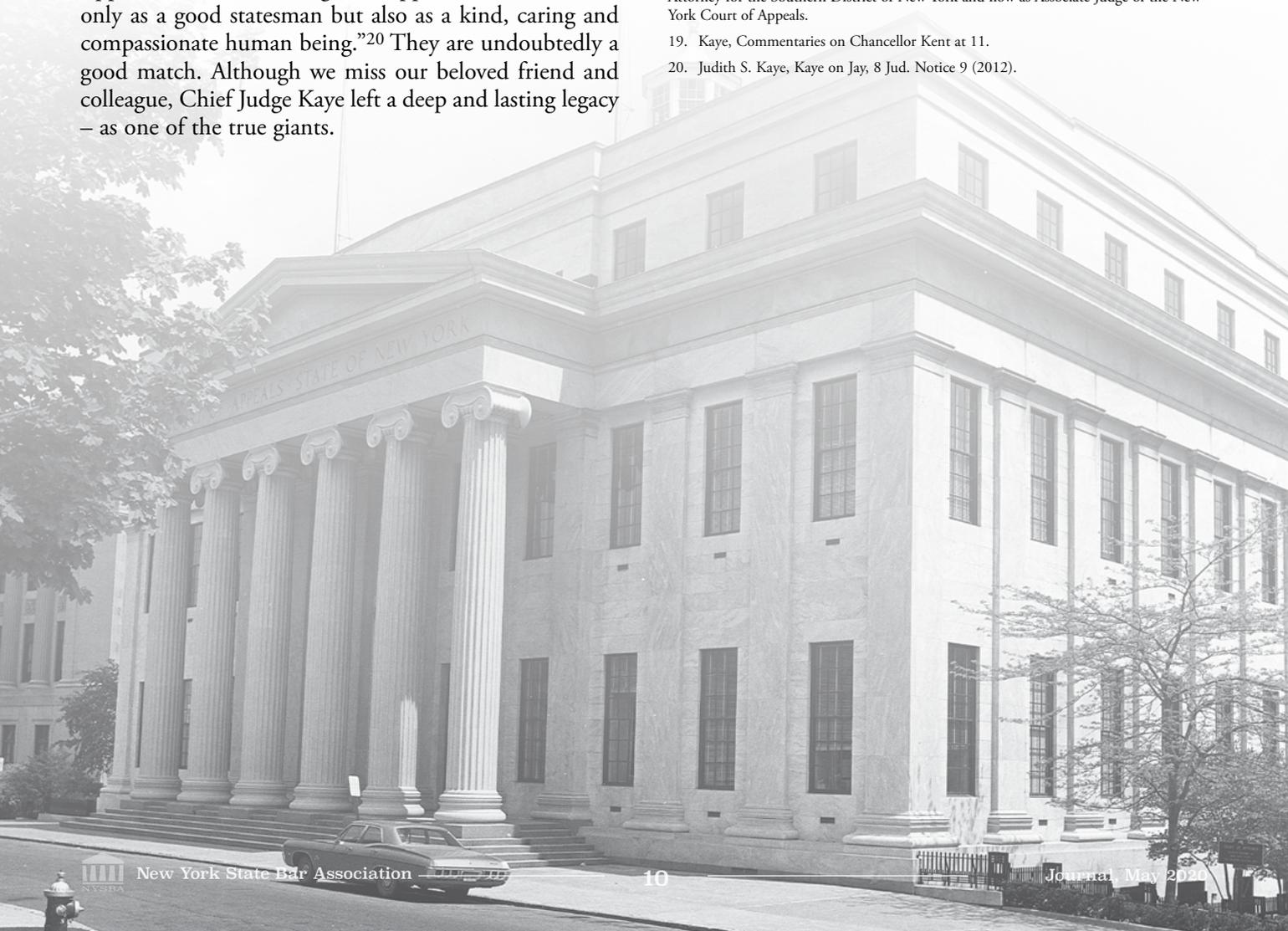
stitutional law.”<sup>16</sup> In this edition, Justice Erin Peradotto superbly highlights the Court’s 1991 decision, *Immuno AG v. Moor-Jankowski*,<sup>17</sup> one of Kaye’s many monumental state constitutional writings.

It often takes many years to appreciate the lasting impact of a judge’s tenure, but Kaye lived to see many of her efforts bear fruit. Chief Judge Kaye invigorated New York’s judiciary, molding it into a more proactive institution. She created specialized courts designed not only to deal with particular cases but to place emphasis on particular *people*. Kaye’s utmost humanity permeated her judging, enhancing the wisdom and brilliance of her scholarship. And, of course, she is all the more special because so many of us knew and loved her – for her talent, her leadership, and her historic innovations.<sup>18</sup>

The portraits reprinted here (with the kind permission of Historical Society of the New York Courts) all hang in Court of Appeals Hall – among many other giants of our judiciary – looking down as the current occupants of those prestigious seats hear the cases of the day. Chief Judge Kaye noted that she felt a “special connection” to Kent because “his portrait hangs directly over my shoulder as I sit on the bench of our magnificent courtroom in Albany.”<sup>19</sup> Years later, after leaving the bench, Kaye said: “[A]s my portrait faces John Jay’s at Court of Appeals Hall, I have a far greater appreciation of him, not only as a good statesman but also as a kind, caring and compassionate human being.”<sup>20</sup> They are undoubtedly a good match. Although we miss our beloved friend and colleague, Chief Judge Kaye left a deep and lasting legacy – as one of the true giants.

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1. Walter Stahr, John Jay: Founding Father 80 (2005).
2. *Id.* at 82. In 2018, the Court of Appeals returned to its roots, convening in Kingston to mark the 200-year anniversary of the rebuilding of the historic courthouse.
3. Walter Stahr, John Jay as New York’s First Chief Justice, 5 Jud. Notice 1 (2007).
4. *Id.*
5. The 12th edition of Kent’s *Commentaries* was edited by Oliver Wendell Holmes, Jr., an Associate Justice of the United States Supreme Court from 1902 to 1932.
6. Judith S. Kaye, Commentaries on Chancellor Kent, 74 Chi.-Kent L. Rev 11, 17 (1998).
7. *Id.*
8. 1 James Kent, Commentaries on American Law at 496 (1826).
9. Francis Bergen, The History of the New York Court of Appeals, 1847-1932 11 (1985).
10. *Wagner v International Ry. Co.*, 232 NY 176, 180 (1921).
11. *Meinhard v Salmon*, 249 NY 458, 464 (1928).
12. Felix Frankfurter, Of Law and Men: Papers and Addresses of Felix Frankfurter, 1939-1956 198 (1956).
13. Andrew L. Kaufman, Cardozo 210 (1998).
14. Benjamin N. Cardozo, The Nature of the Judicial Process, 166-67 (1921).
15. *Id.* at 179.
16. Judith S. Kaye, The Brennan Lecture, 17 Green Bag 2d 133, 134 (2014).
17. 77 NY2d 235 (1991).
18. Our guest editor, Judge Michael J. Garcia, served as a law clerk to then-Associate Judge Kaye, launching his eminent career in public service – including as United States Attorney for the Southern District of New York and now as Associate Judge of the New York Court of Appeals.
19. Kaye, Commentaries on Chancellor Kent at 11.
20. Judith S. Kaye, Kaye on Jay, 8 Jud. Notice 9 (2012).



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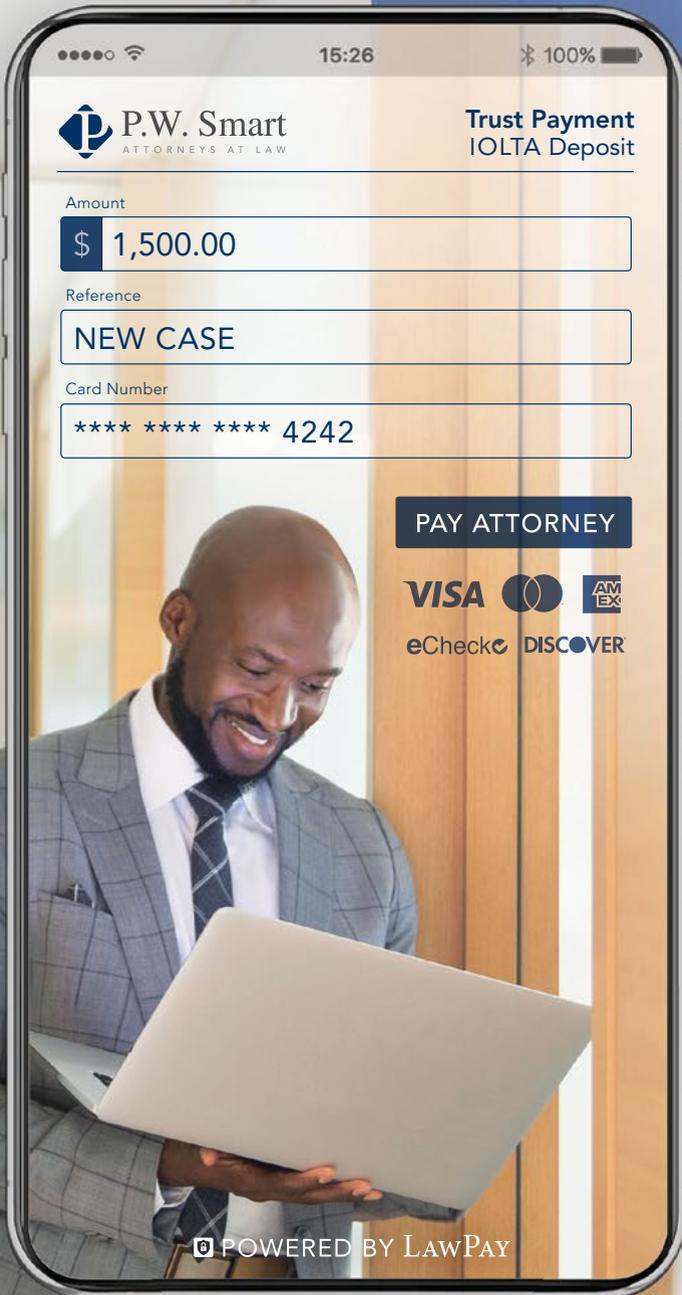
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# Safeguarding Freedom of Speech and of the Press in New York With Heightened State Constitutional Protection



By Hon. Erin M. Peradotto



**Erin M. Peradotto** is an Associate Justice of the Appellate Division, Fourth Department. Justice Peradotto gratefully acknowledges the valuable assistance of her confidential law clerk, Joseph Sroka, in the preparation of this article.

*“Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.”<sup>1</sup>*

As “the media capital of the country if not the world,”<sup>2</sup> New York has a long history and tradition of providing “a hospitable climate for the free exchange of ideas.”<sup>3</sup> This includes “providing the utmost protection of freedom of the press.”<sup>4</sup>

Thirty-six years ago, in *Beach v. Shanley*, then-Associate Judge Wachtler advocated using the State Constitution in addition to New York’s “Shield Law”<sup>5</sup> to quash subpoenas requiring a television reporter to appear before a grand jury and reveal confidential source information.<sup>6</sup> Invoking principles of federalism, he stated:

The fact that the [United States] Supreme Court has held the First Amendment applicable to the States does not eliminate the right or the need of this State to provide a distinct guarantee of freedom of the press under the State Constitution . . . It is often forgotten that diversity is the essence of federalism and that the Federal Constitution only guarantees minimum protections, leaving to the States the task of affording additional or greater rights under their Constitutions, tailored to the special needs and traditions of the various States.<sup>7</sup>

Judge Wachtler then explained why it was particularly appropriate for New York to provide enhanced rights under the State Constitution in cases involving freedom of expression:

There is probably no area in which State attitudes are more diverse, and thus where independent State constitutional rights serve their intended purposes, than in the area dealing with freedom of expression . . . In the 19th century a large portion of the publishing industry was established in New York and the State began to serve as a cultural center for the Nation. It still enjoys that status. It is consistent with that



tradition for New York to provide broad protections, often broader than those provided elsewhere, to those engaged in publishing.<sup>8</sup>

Almost 30 years later, the Court of Appeals in *Holmes* left no doubt that it would continue to use the State Constitution as a means of declaring expanded rights in New York in the area of free expression.<sup>9</sup>

It is, however, *Immuno AG. v. Moor-Jankowski* – decided seven years after *Beach* and over 20 years before *Holmes* – that had a lasting impact on the analytical approach used by the Court of Appeals in state constitutional law cases. *Immuno* arose from the publication by the defendant, the co-founder and editor of a scientific journal, of a letter to the editor critical of the animal research plans of the plaintiff, a multinational manufacturer of biologic products.<sup>10</sup> When *Immuno* first reached the Court of Appeals in 1989, the Court, in an opinion authored by then-Associate Judge Kaye, affirmed the order of the First Department granting the defendant’s motion for summary judgment based on the plaintiff’s failure to raise a question of fact as to the falsity of the alleged defamatory statements.<sup>11</sup> The Court also concluded that the letter

writer’s statements of opinion were “entitled to the absolute protection of the State and Federal constitutional free speech guarantees.”<sup>12</sup>

The United States Supreme Court thereafter granted certiorari on the plaintiff’s petition, vacated the judgment, and remanded the case to the Court of Appeals for further consideration in light of *Milkovich v. Lorain Journal Co.*,<sup>13</sup> which had been decided after the Court of Appeals first decided *Immuno*. On remand, the Court of Appeals, in an opinion again authored by Judge Kaye, adhered to its prior determination that summary judgment was properly granted in the defendant’s favor, this time “premising [its] decision on independent State constitutional grounds as well as the Federal review directed by the Supreme Court.”<sup>14</sup> The Court repeated its view regarding New York’s freedom of the press:

“The expansive language of our State constitutional guarantee (*compare*, NY Const, art I, §8, *with* US Const 1st Amend), its formulation and adoption prior to the Supreme Court’s application of the First Amendment to the States . . . the recognition in very early New York history of a constitutionally guaranteed liberty of the press . . . and the consistent tradition in this State of providing the broadest possible protection to ‘the sensitive role of gathering and disseminating news of public events’ . . . all call for particular vigilance by the courts of this State in safeguarding the free press against undue interference.”<sup>15</sup>

The Court opened its State constitutional law analysis by reiterating

that matters of free expression in books, movies and the arts . . . are particularly suited to resolution as a matter of State common law and State constitutional law, the Supreme Court under the Federal Constitution fixing only the minimum standards applicable throughout the Nation, and the State courts supplementing those standards to meet local needs and expectations.<sup>16</sup>

The Court recognized its role in the federal system but also its responsibility to settle the law in New York. On that point, it observed that the rule in *Milkovich* regarding the opinion privilege now seemed to limit First Amendment protection for statements that contained or implied provably false facts to loose, figurative, hyperbolic language.<sup>17</sup> At minimum, the rule seemed unsettled as a matter of federal law and the Court expressed concern that, “if indeed ‘type of speech’ is to be construed narrowly[,] insufficient protection may be accorded to central values protected by the law of [New York].”<sup>18</sup>

Drawing on New York’s unique constitutional text and history, as well as New York’s common law, the Court reaffirmed its view that, in deciding whether a reasonable person would read the challenged statements as expressing or implying facts about the plaintiff, those statements had to be read in context, with an analysis that looked



first at the content of the whole communication, as well as its tone and apparent purpose.<sup>19</sup> It concluded that this approach “accords with the central value of assuring full and vigorous exposition and expression of opinion on matters of public interest.”<sup>20</sup>

Although the *Immuno* Court was unanimous as to the result, it was divided as to the methodology that should be used in analyzing state constitutional cases. In one of three concurring opinions, Judge Simons criticized the majority’s “dual reliance” on the federal and state constitutions – he would have applied federal law first, resorting to the state constitutional analysis only if necessary.<sup>21</sup> In a compelling defense of the majority’s dual analysis, Judge Kaye stated that, “[i]n analyzing cases under the State Constitution, this Court has not wedded itself to any single methodology, recognizing that the proper approach may vary with the circumstances.”<sup>22</sup> She explained that a dual analysis was appropriate under the circumstances of *Immuno* because, among other things: the case involved liberty of the press, an area in which New York had its own “exceptional history and rich tradition”; the interests of finality and judicial economy favored resolving the case, given that the matter was before the Court on summary judgment presenting only questions of law and the State law issues had been fully briefed; and the federal analysis directed by the Supreme Court, with which the Court complied, did not compel it to ignore the developed, controlling State law issues.<sup>23</sup>

Fifteen months after *Immuno* was decided, Judge Kaye would make a strong and important statement on the nature of judicial decision-making in applying constitutional principles. In a concurrence foreshadowed by *Immuno*, Judge Kaye noted the philosophical differences in the approach to state constitutional law cases that “seemed to fracture the Court.”<sup>24</sup> She stated:

[H]owever much we might consider ourselves dispensing justice strictly according to formula, at some point the decisions we make must come down to judgments as to whether a particular protection is adequate or sufficient, even as to whether constitutional protections we have enjoyed in this State have in fact been diluted by subsequent decisions of a more recent Supreme Court . . . [W]here we conclude that the Supreme Court has changed course and diluted constitutional principles, I cannot agree that we act improperly in discharging our responsibility to support the State Constitution when we examine whether we should follow along as a matter of State law.<sup>25</sup>

In direct response to the dissent’s discomfort with the majority’s analysis, Judge Kaye stated emphatically:

A State court decision that rejects Supreme Court precedent, and opts for greater safeguards as a matter of State law, does indeed establish higher constitutional standards locally. But that is a perfectly

respectable and legitimate thing to do . . . Time and again in recent years, the Supreme Court as well as its individual Justices have reminded State courts not merely of their right but also of their responsibility to interpret their own Constitutions, and where in the State courts’ view those provisions afford greater safeguards than the Supreme Court would find, to make plain the State decisional ground so as to avoid unnecessary Supreme Court review. The Supreme Court is not insulted when we do so.<sup>26</sup>

Judge Kaye’s advocacy for a flexible approach to decision-making in state constitutional cases is one of the legacies of *Immuno*. Consistent with the principles that the State Constitution exists as an independent protector of individual rights and that state courts are the arbiters of their own constitutions,<sup>27</sup> Judge Kaye appreciated that being tied to a particular methodology in these cases could prevent the State Constitution from functioning and could hinder the Court in fulfilling its responsibility to interpret and apply the State Constitution to provide enhanced rights when appropriate in cases involving freedom of speech and of the press. *Immuno* ensured that there would be no such constraints.

1. NY Const art I, § 8.

2. *Matter of Holmes v. Winter*, 22 N.Y.3d 300, 316 (2013), cert denied 572 US. 1135 (2014).

3. *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 249 (1991), cert denied 500 US 954 (1991), citing *Beach v. Shanley*, 62 N.Y.2d 241, 255-256 (1984) (Wachtler, J., concurring).

4. *Holmes*, 22 N.Y.3d at 307.

5. Civil Rights Law § 79-h.

6. See *Beach*, 62 N.Y.2d at 255-256 (Wachtler, J., concurring).

7. *Id.* at 255.

8. *Id.* at 255-256.

9. See 22 NY3d at 316 [relying on New York Constitution article I, § 8 and New York’s Shield Law to deny subpoena application from another state seeking testimony from a reporter because of substantial likelihood that the reporter would be compelled to reveal confidential sources].

10. See 77 N.Y.2d at 240.

11. *Immuno AG. v. Moor-Jankowski*, 74 N.Y.2d 548 (1989).

12. *Id.* at 555; accord *Immuno AG.*, 77 N.Y.2d at 239.

13. 497 U.S. 1 (1990).

14. *Immuno AG.*, 77 N.Y.2d at 240.

15. *Id.* at 249, quoting *O’Neill v. Oakgrove Constr.*, 71 N.Y.2d 521, 528-529 (1988).

16. *Id.* at 248.

17. *Id.* at 245.

18. *Id.* at 250.

19. *Id.* at 250-252, 254-255; see *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 293 (1986).

20. *Immuno AG.*, 77 N.Y.2d at 255 (internal quotation marks omitted).

21. *Id.* at 262 (Simons, J., concurring).

22. *Id.* at 251.

23. *Id.* at 250-252.

24. *People v. Scott*, 79 N.Y.2d 474, 503 (1992, Kaye, J., concurring).

25. *Id.* at 504.

26. *Id.* at 504-505.

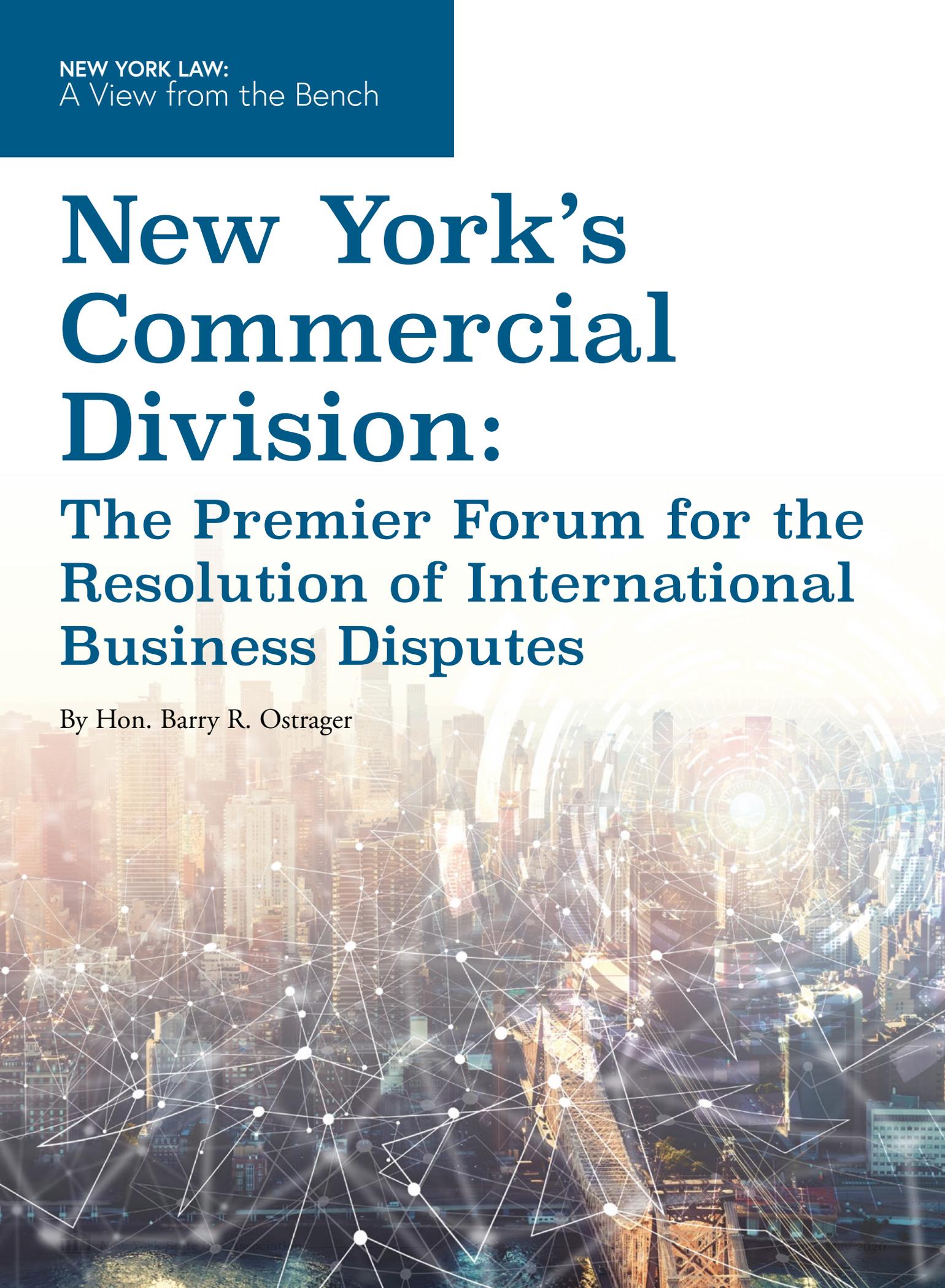
27. See Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 St. John’s L. Rev 399 (1987), reprinted from 42 Rec of Assn of Bar of City of NY 285 (1987).

**NEW YORK LAW:**  
A View from the Bench

# **New York's Commercial Division:**

## **The Premier Forum for the Resolution of International Business Disputes**

By Hon. Barry R. Ostrager



**A**s recently noted by Chief Judge DiFiore, New York is “the preeminent commercial center in the United States,”<sup>1</sup> and the Commercial Division of the Supreme Court of the State of New York provides an unparalleled forum for the resolution of international commercial disputes. Members of the global business community regularly designate New York as the forum for resolving their disputes and select New York law as the governing law in their contracts in order to bring predictability and certainty to their commercial arrangements. From the view of the Commercial Division bench, it is easy to see why New York is such a compelling venue for the international business community.

## THE COMMERCIAL DIVISION IS HIGHLY EXPERIENCED IN DEALING WITH FOREIGN LITIGANTS

New York’s courts are open to foreign commercial actors entering into international transactions. New York General Obligations Law § 5-1402 permits any party – including non-U.S. persons – to bring an action in New York courts where the parties have entered into an agreement that: (i) selects New York law to govern the contract; (ii) selects New York courts as the forum for the resolution of their dispute, or otherwise consents to the jurisdiction of the New York courts; and (iii) involves an amount in excess of \$50,000 U.S. dollars. So long as these requirements are satisfied, the parties and their transaction need not have any other connection to New York.

To be assigned to the Commercial Division, a case must meet certain threshold requirements. For instance, the amount in controversy must meet a specified monetary threshold, ranging from \$50,000 in Albany County to \$500,000 in New York County. In addition, the Commercial Division has authority to adjudicate disputes concerning specified subject matters, including breach of contract or fiduciary duty, fraud, misrepresentation, business tort, statutory and/or common law claims arising out of business dealings, business transactions involving commercial banks and other financial institutions, internal affairs of business organizations, commercial insurance coverage, environmental insurance coverage, dissolution of business entities, and applications to stay or compel arbitration or to affirm or disaffirm arbitration awards, among others.



**Barry R. Ostrager** is a Justice of the New York State Supreme Court assigned to the Commercial Division. This article could not have been written without the work of the Commercial Division Advisory Council, from which the author borrowed liberally.

Accordingly, a merger agreement between a Chinese company and a Brazilian company could be subject to New York law – and resolved in the Commercial Division – even if neither party has any New York operations, and the transaction otherwise does not concern New York, provided that the parties clearly express their consent to the Commercial Division as the forum for resolution of any disputes concerning their transaction. Appendix C of the Commercial Division Rules includes sample “choice of forum” clauses that parties can insert into their contracts to clearly express their consent to the jurisdiction of the Commercial Division.

Foreign businesses entering into international transactions may not think to designate a U.S. jurisdiction in their agreements, but selecting the Commercial Division as the designated forum in an agreement between two non-U.S. parties provides a neutral forum for the resolution of any disputes that arise. Ensuring neutrality, especially in the context of high-profile international disputes, is especially important, and a neutral third-country adjudicator brings greater legitimacy and certainty to the outcome.

## JUSTICES OF THE COMMERCIAL DIVISION ARE DEDICATED COMMERCIAL SPECIALISTS

International business actors are assured that Justices of the Commercial Division will treat their matters with precision and utmost professionalism. Justices of the Commercial Division are sophisticated and experienced jurists with deep experience handling complex commercial disputes. These justices maintain a specialized docket, dedicated exclusively to business disputes. Since these justices focus on commercial matters – without a general caseload including, for example, criminal or family law matters – they can devote their full attention to understanding the intricacies of complex agreements and transactions, and keeping up to date on the latest legal developments impacting business relations. Due to the specialized nature of the Commercial Division, its judges can foresee issues before they happen and can even suggest proactive approaches to litigants. Commercial Division judges are globally minded and comfortable tackling foreign business and foreign law matters.

## THE COMMERCIAL DIVISION RULES MAXIMIZE EFFICIENCY AND ENSURE PROMPT RESOLUTION

The preamble to the Commercial Division Rules states that “[f]rom its inception, the Commercial Division has had as its primary goal the cost-effective, predictable and fair adjudication of complex commercial cases.” That mission remains true today, and the dedicated procedural rules for the Commercial Division, located at 22

N.Y.C.R.R. § 202.70, are engineered to ensure the most efficient, prompt, and fair adjudication of the most complex disputes, including those of an international nature. Certain aspects of the Commercial Division Rules may be particularly attractive to foreign parties who select the Commercial Division as the designated forum in international transaction documents.

Rule 9(a), for example, provides for an accelerated adjudication process by which a case may be ready for trial in nine months, if not less. Parties may consent to accelerated adjudication by using express language in their contract, including the model language set forth in Rule 9(a). When a matter proceeds in the accelerated adjudication process, all pre-trial proceedings (i.e., discovery, pre-trial motions, and mediation) will be completed within nine months from the date that the initial Request for Judicial Intervention is filed.

The Commercial Division Rules are focused on providing for a reasonable and measured discovery process to ensure quick and cost-effective litigation. Foreign parties, especially from civil law jurisdictions, may be under a misapprehension that U.S.-style discovery is unduly lengthy and costly. The Commercial Division Rules address this concern. Rule 11-d, for instance, sets limitations on depositions. Unless otherwise stipulated by the parties or ordered by the court, depositions taken by plaintiffs, defendants, and any third-party defendants, are limited to 10, and each deposition is capped at seven hours per deponent. In addition, Rule 11-a limits interrogatories to 25, and Rule 11-b requires parties to meet and confer regarding the scope of privilege review, expressing a clear preference for categorical privilege designations rather than a document-by-document approach. In the event a requesting party will not agree to a categorical approach to privilege logs, the court may allocate related costs to the requesting party. The Commercial Division Rules on discovery thereby maximize the fact-finding aspects of discovery while minimizing time demands and expense.

If a matter before the Commercial Division proceeds to trial, Rule 26 permits the judge to limit the trial length. At least 10 days prior to trial, the parties to the litigation will provide to the presiding justice an estimated trial length. In necessary circumstances, the court may extend the total number of trial hours, but the parties will generally be held to the estimates they provide to the court. Enabling the justices of the Commercial Division to limit the length of trials ensures an efficient adjudication of the ultimate liability issues before a judge or jury. In non-jury trials or in evidentiary hearings, Rule 32-a permits the judge to require that direct testimony of a party's witnesses be submitted in affidavit form. Permitting written testimony may be especially convenient to foreign litigants and may streamline the time spent providing testimony in a foreign proceeding.

Dozens of foreign countries have sent delegations to New York to visit and learn about the success of the Commercial Division. It proudly serves as a model for specialized commercial courts globally.

## **NEW YORK LAW UPHOLDS INTENT AND PROMOTES PREDICTABILITY IN INTERNATIONAL TRANSACTIONS**

New York provide a stable and reliable body of law for business contracts, and especially for international transactions. New York case law on contracts and commercial relations has a rare breadth and depth on a wide variety of specialized fields, ranging from mergers and acquisitions to insurance coverage, and from real estate transactions to international arbitration. New York case law covers virtually every type of business transaction.

It is a well-established principle of New York commercial law that courts will take a text-based approach to interpreting contracts. Judges applying New York law focus on the intent of the parties as expressed by the words they select in their agreements. New York is thus considered a "strict enforcement" jurisdiction, which provides stability to business parties. New York law also recognizes a covenant of good faith and fair dealings in contracts, and courts guard against abusive or dishonest conduct that violates the contract. In light of the foregoing, selecting New York law to govern international transactions ensures that the words of the parties' contract are honored and that any disputes will be resolved predictably.

## **THE COMMERCIAL DIVISION IS TECHNOLOGICALLY EQUIPPED FOR OVERSEAS LITIGANTS TO MONITOR PROCEEDINGS**

The Commercial Division operates a signature Courtroom 2000 technology platform, which includes the latest technology to facilitate efficient resolution of disputes and enable lawyers to communicate closely with their clients. Key aspects of the Courtroom 2000 platform include real-time court reporting capabilities that enable voice-to-text transcription of electronic transcripts that can easily be distributed to foreign clients. Overseas parties can therefore be kept apprised of court proceedings in the Commercial Division without having to attend in person. Additionally, Courtroom 2000 includes personal computer docking stations for counsel, enabling all parties to communicate with their clients and colleagues while proceedings are ongoing and have real-time access to research and resources. The Commercial Division is currently considering a new amendment to its Rules that would enable counsel to participate in certain court proceedings remotely via videoconferencing. Videoconferencing would further reduce the costs associated with

court attendance and increase the speed with which proceedings can be held.

### THE COMMERCIAL DIVISION ADVISORY COUNCIL PROVIDES REGULAR FEEDBACK FROM BUSINESSES

The Commercial Division benefits from a dedicated Advisory Council, appointed by the Chief Judge of the State of New York. The Council advises the judiciary on how to make the Commercial Division the most attractive forum in the world for the resolution of com-

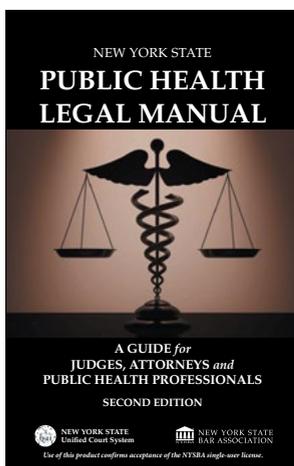
plex commercial disputes. The Council is composed of current and former members of the judiciary, in-house counsel from some of the world's leading companies, and respected members of the New York commercial bar. The Council provides regular recommendations to enhance the Commercial Division and make it even more responsive to the needs of the global business community. Despite achieving renown as a preeminent forum for parties to resolve complex disputes, the Commercial Division remains in a constant quest for self-improvement.

1. 159 MP Corp. v Redbridge Bedford, LLC, 33 N.Y.3d 353, 359 (2019).



## PUBLICATIONS

# New York State Public Health Legal Manual: A Guide For Judges, Attorneys and Public Health Professionals, 2nd Ed.



In times of public health emergencies, including the current coronavirus outbreak, state and local governments and public health professionals are able to respond more effectively and efficiently if they understand the lines of authority and the diverse roles that governments and individuals play, and the governing laws that affect their actions. This important resource clarifies these issues by sorting through the myriad statutes and rules governing public health. The New York State Public Health Legal Manual is the result of a collaboration between the New York State Unified Court System, the New York State Bar Association, the New York State Department of Health and the New York City Department of Health and Mental Hygiene.



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# New York Law in Federal Court: A Brief Word on Certification

By Hon. Richard C. Wesley

A few years ago, I was pleased to read in a *New York Law Journal* article that the Second Circuit certifies more questions to state high courts than any other Circuit.<sup>1</sup> Frankly, that statistic didn't surprise me. Having served on both the New York Court of Appeals and the Second Circuit Court of Appeals, I know from experience that these two great courts enjoy an exceptionally cohesive and collegial working relationship.<sup>2</sup>

This is, of course, not entirely voluntary. Under *Erie Railroad Co. v. Tompkins*,<sup>3</sup> federal courts sitting in diversity must apply state substantive law. The problem prior to the certification process was “state law according to whom” – learned judges at 60 Centre Street in Manhattan Supreme Court or equally learned (and perhaps at times a bit too willing) federal judges (district and circuit) at 40 Centre Street, right next door.

The interests of justice are not well served if New York law does not enjoy consistency in both state and federal courts. Fortunately, through effective (and frequent) use of the certification process over the last 20 years, the Second Circuit and the Court of Appeals have minimized the possibility of competing views on New York law in *Erie* analyses.<sup>4</sup> The availability of certification helps us

immensely; it has become a reliable friend in doing our work.

Ironically, the same day I sat down to write this article, the Second Circuit *nostra sponte* certified to the Court of Appeals a question about general liability insurance coverage.<sup>5</sup> In *Brooklyn Ctr. for Psychotherapy, Inc. v. Philadelphia Indem. Ins. Co.*, the question was whether an insurance carrier is responsible for its insured's defense costs in a lawsuit that alleges that its insured engaged in failure-to-accommodate discrimination.<sup>6</sup> The court recognized that each of the factors we normally consider in determining whether certification is appropriate applied, including that resolution of the case required a value judgment and public policy choice that the Court of Appeals should make – specifically, “whether New York public policy bars the defense of a failure-to-accommodate claim.”<sup>7</sup>

The court noted that the New York courts and even the (then) State Superintendent of Insurance have spoken at length about similar issues, including whether a general carrier is responsible for defense costs in disparate-treatment and disparate-impact discrimination lawsuits. Thus, we sent our cousins on the New York high court a question that was logically related to issues about which the State cares, presumably because the answer impacts the interpretation of an unknown number of New York insurance policies.

But state law questions are not just reserved for diversity cases like *Brooklyn Center*. There is a wide array of decidedly federal cases that have a state law twist to them<sup>8</sup>



**Richard C. Wesley** is a Judge of the United States Court of Appeals for the Second Circuit and a former Associate Judge of the New York Court of Appeals.



– questions, in other words, that are uniquely situated for the state to answer but essential to the resolution of a federal lawsuit. Neither a defendant’s valid forum choice nor the presence of a federal question should deprive the plaintiff (or the State) of having these important policy questions answered in the first instance by the more appropriate decision-making body.

Certifying a question does entail some delay in the resolution of the case for the parties, but the New York Court of Appeals has been extraordinarily vigilant in calendaring certified question cases and publishing opinions in a timely fashion. The judges at 40 Centre (and 500 Pearl) will continue to chart the course of New York law in their daily endeavors.<sup>9</sup>

Certification is an important tool in federal judging and a necessary tool in federalism. It recognizes the distinct role that state courts play in resolving novel and difficult issues of state law that prove determinative in federal litigation. The certification process has had an additional benefit. It has brought the two courts closer together through mutual respect for the work with which each is tasked.<sup>10</sup> What was once thought of as revolutionary is now a part of everyday life at 40 Centre and 20 Eagle Street.

1. Scott A. Chesin, Karen W. Lin, *Certification From the Second Circuit to the N.Y. Court of Appeals: A Guide*, New York Law Journal (April 10, 2017), <https://www.law.com/newyorklawjournal/almID/1202783229410/Certification-From-the-Second-Circuit-to-the-NY-Court-of-Appels-A-Guide/>.

2. I suspect my prior service on the New York high court had something to do with why my dear friend Judge Michael J. Garcia asked me to write this piece. I am the only judge in our Circuit (I’m not sure about the nation) who has both asked and answered a certified question! See, e.g., *Carvel Corp. v. Noonan*, 350 F.3d 6, 8 (2d Cir. 2003); *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 231 (2001).

3. 304 U.S. 64, 78–79 (1938).

4. See, e.g., *DeWeerth v. Baldinger*, 38 F.3d 1266, 1273–74 (2d Cir. 1994) (“The very nature of diversity jurisdiction leaves open the possibility that a state court will subsequently disagree with a federal court’s interpretation of state law.”). In *DeWeerth*, the Second Circuit predicted how the Court of Appeals would decide an issue related to the applicable statute of limitations for claims involving stolen artwork. We declined to certify the question, and after we decided the case, the Court of Appeals answered the same question in a different case and determined that we were wrong.

5. *Brooklyn Ctr. for Psychotherapy, Inc. v. Philadelphia Indem. Ins. Co.*, No. 19-2266-cv, 2020 WL 1777211, at \*5 (2d Cir. April 9, 2020).

6. As the Court explained in *Brooklyn Center*, discrimination claims based on a failure-to-accommodate theory “involve allegations that a disability makes it difficult for a plaintiff to access benefits to which she is legally entitled.” 2020 WL 1777211, at \*3 (internal quotation marks, citations, and alteration omitted). Discrimination claims based on disparate treatment involve allegations that a defendant “treats some people less favorably than others because of” a protected characteristic, and discrimination claims based on disparate impact involve allegations of facially neutral practices that result in one protected group being treated more harshly than others without justification. *Id.* Disparate treatment claims require a showing of discriminatory intent, and New York law prohibits insurers from covering them; disparate impact claims do not require a showing of discriminatory intent, and at least one New York court has found that state law and policy permits insurers to provide coverage. *Id.* at \*4. Because failure-to-accommodate claims also do not require proof of discriminatory intent, *Brooklyn Center* give the Court of Appeals an opportunity to close the loop here and explain whether these types of claims are more akin to disparate-treatment or disparate-impact claims vis-à-vis the State’s policy on insurance coverage.

7. *Id.*

8. See, e.g., *Expressions Hair Design v. Schneiderman*, 877 F.3d 99, 107 (2d Cir. 2017); *Makinen v. City of New York*, 857 F.3d 491, 496 (2d Cir. 2017).

9. This judge in particular looks on that task fondly, as it brings up memories of rewarding conversations held around the consultation table at Court of Appeals Hall in Albany in days gone by.

10. Much of the credit for the close working relationship of the two courts goes to Chief Judge Judith Kaye of the New York Court of Appeals and Judge John Walker during his tenure as Chief at the Circuit.

# Reflections of a Former Law Clerk

By Hon. Ta-Tanisha D. James

No discussion of judges or judging would be complete without acknowledging the role of law clerks in our court system. I am honored, in this special edition of the *Journal*, to represent the law clerks who do so much to shape New York law, from our trial courts to our court of last resort.

It was 20 years ago that I first understood what it meant to have a professional family. I had the distinct privilege of serving as Senior Court Attorney to the Hon. George Bundy Smith, an associate judge of the New York State Court of Appeals. The years that I spent with Judge Smith were marvelously challenging, professionally gratifying, and unquestionably life-changing. His keen intellect, fierce passion, and love of the law were palpable and remain evident today in his writings. As a law clerk, I admired Judge Smith, and today, as a judge, I seek to emulate him. I am guided by his intellectual strength and his profound commitment to fairness, inclusiveness, and equality.

Clerking for the Court of Appeals was also an enriching opportunity to work with great legal minds that hailed from across the state. Every few weeks, when the Court was in session, legal scholars of diverse professional and personal backgrounds convened in Albany to analyze issues of statewide importance. But perhaps the most enduring lessons of my clerkship came from my colleagues and the career clerks at the Court. Together, we discussed cases, debated issues, and contemplated the effect of decisions to be applied by courts of lower jurisdictions. Our impassioned discussions occurred over dinners and on trains traveling along the Hudson River to Albany, where we huddled together around small television screens to hear (and critique) the lawyers presenting legal arguments to our judges. We reveled in the indescribable thrill of hearing a question that we had framed in our bench reports. It was an exhilarating, enlightening, and often exhausting experience – and an intellectual highlight of my career.

The collaborative experience of working in Albany played a formative role in my career, defining me as a lawyer and a judge. I never hesitate to reach out to colleagues to discuss a legal issue I have encountered. I view spirited debate as an important means of testing my own views and sharpening my analysis. And I understand the immense value of the institutional knowledge of career



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court personnel. In my service as a judge, I rely almost daily on skills learned from my professional family.

My years as a law clerk also structure my relationship with my own court attorney. In selecting a court attorney, I sought someone with a desire to continually grow and who would be comfortable challenging my view. As a judge, I question *everything* that is presented to me – including by my court attorney – and I expect her to do the same of me. I push my court attorney to think of the legal arguments presented by counsel as the starting part of her analysis and then to dig deeper. I expect her to find legal arguments that were missed by counsel – to hear what the parties say and to recognize what they omit. I ask her to be cognizant of the inherent predispositions that we all bring to cases. I press her to challenge the foundations of arguments, to reach the core of issues, and to question her own analysis regularly – not because it is flawed, but because it can always be strengthened. I allow her to form her own opinions, just as Judge Smith did with me, and I strive never to dismiss her views, even when they are diametrically opposed to mine.

As a junior attorney, I cherished my time as law clerk. Now, as a judge, that appreciation has only deepened. I can only hope to provide my own court attorney the same challenging, thrilling, and rewarding experience that Judge Smith gave to me.

# The State of Diversity in New York's Judiciary

By Hon. Rolando T. Acosta



**M**y colleagues have expertly captured the significance of New York law and recounted our state's storied progression to legal prominence. They rightfully recognize the remarkable history of our jurisprudence, and the role of New York law, and New York judges, at the forefront of some of the most substantial issues and emerging legal questions facing our nation. But that history has, for the most part, fallen short of accurately or adequately reflecting one of the most unique and powerful facets of our legal community – and the public we serve.

Any meaningful view of New York law from the bench requires an honest discussion of *who* is on that bench – the composition of the judiciary empowered to interpret and apply New York law. Diversity and inclusion are not just abstract concepts that warrant lip service in the legal profession; they are at the heart of promoting justice and respect for democratic institutions and the rule of law. It is, therefore, difficult to overstate the importance of ensuring that our judiciary reflects the makeup of the citizenry.

For one thing, diversity on the bench lends credibility to a justice system that underrepresented groups, such as women and people of color, have historically viewed with suspicion and distrust. It is tremendously important for citizens to see themselves reflected in the judges who serve them, because “[a] diverse judiciary engenders confidence that courts – the last bastion of justice – have the requisite moral authority to dispense justice to all.”<sup>1</sup> As former Chief Judge Judith Kaye put it, “a diverse bench gives the public a feeling of inclusion in the justice system, willing to place its trust and faith in it, not alienated from it.”<sup>2</sup> NYSBA President Henry M. Greenberg has echoed that sentiment, noting that “[i]f the judiciary doesn't change [along with demographic changes], we risk undermining the public's confidence in our justice system and respect for the rule of law.”<sup>3</sup> I wholeheartedly agree.

In addition to strengthening public trust in our institutions, a diverse judiciary improves the adjudicative process, as the presence of jurists of various backgrounds “can introduce traditionally excluded perspectives and values into judicial decision-making.”<sup>4</sup> In other words, “judicial diversity brings a variety of experiences and views to the bench, which . . . trickles down to the [legal and] factual decisions that [judges] make and ultimately to the quality of justice that we dispense.”<sup>5</sup> At bottom, diversity on the

bench not only legitimizes the third branch of government in the eyes of its citizens, it also brings us closer to achieving true, impartial justice in every case.

So, how is New York doing? By way of illustration, when I became a lawyer in the early 1980s, there were very few judges in New York who looked like me. A photograph I keep in my chambers depicts all the Latino judges in our state in 1985; there are only 13 judges in that photograph. Now, nearly 35 years later, there are approximately 90 Latino judges in New York.

This is progress, but it is not enough – for Latinos or for other underrepresented groups. Though New York is one of the most diverse states in the country, as of December 2014 our state ranked 24th in judicial representativeness with respect to ethnic and racial diversity and 14th with respect to the proportion of women on the bench.<sup>6</sup> At present, according to statistics collected by the New York State Unified Court System's Office of Court Administration, Latinos represent nearly 20% of the population in New York but only 7% of the judiciary (of the more than 1,270 judges, there are 90 Latinos). Similarly, African Americans make up approximately 18% of the state's population but only 13.7% of its judges, and Asians make up 9% of the population but only 2.7% of judges. Women make up 51% of the population but only 41% of judges, and LGBT people make up only 4.3% of the judiciary. By contrast, Caucasians make up approximately 55% of the state population, yet Caucasian judges make up 76.3% of New York's judiciary.

Upstate, the numbers are startling. Among Supreme Court Justices outside New York City, for example, only 29% are women, 6.5% are African American, 1.4% are Latino, and zero are Asian. By contrast, 91% are Caucasian. Additionally, 100% of Surrogate's Court judges outside New York City are Caucasian, and 75% are men.

In courts to which judges are appointed rather than elected, some historically underrepresented groups fare better, while others do not. At the Court of Appeals (a court of only seven judges), 43% are women, 29% are Latino, 14% are African American, zero are Asian, and 57% are Caucasian. At the Court of Claims (which has 83 Judges), 35% are women, 7% are African American, 8% are Latino, 2% are Asian, and 82% are Caucasian. The Appellate Division is slightly more reflective of the population in New York than the trial courts, but is still not fairly representative of the population it serves. Of the 53 Appellate Division Justices, 27 are women (51%), six are Latino (11%), eight are African American (15%), two are Asian (3.8%), and 37 are Caucasian (70%). Despite recent progress in this regard, it is not uncommon to have appeals decided by all-white panels of appellate judges (particularly in the Third and Fourth Departments, where there are still no Latino or Asian Justices) – something we would never tolerate on state



**Rolando T. Acosta** is the Presiding Justice of the Appellate Division, First Department. This article has been adapted from Rolando T. Acosta, *Court Consolidation: An Opportunity to Increase Judicial Diversity*, NYLJ, Jan. 24, 2020, at 9 (hereinafter *Court Consolidation*).

juries, especially in our more diverse parts of the state, like Albany, Buffalo and Rochester.

Simply put, despite significant progress, our great state still does not have a fairly representative, sufficiently diverse court system. Or, as the NYSBA noted in 2014, “New York State has one of the most diverse populations in the United States, but the rich multiracial, multicultural tapestry of New York’s people is not adequately reflected in its judiciary.”<sup>7</sup> Unfortunately, that description of our state still holds true today.

What can we do about this?

First, Chief Judge Janet DiFiore’s court-consolidation proposal, which I have openly endorsed, would be a tremendous stepping stone towards greater judicial diversity. That proposal would not only make the courts more navigable for everyday New Yorkers – many of whom are underrepresented minorities and poor litigants who attempt to navigate the justice system without an attorney – but would also enlarge the pool from which Appellate Division judges are appointed, creating an opportunity to further diversify the appellate bench. While Governor Cuomo has a solid track record of appointing diverse judges, his successors should be similarly encouraged – by, for instance, a clear policy statement in the consolidation proposal’s preamble that unequivocally recognizes the value of diversity, and a biennial reporting requirement or other mechanism to increase account-

ability for achieving the goal of increasing diversity in the courts.<sup>8</sup>

Beyond that, all of us – judges, attorneys, and legal scholars – should seek out ways to further judicial diversity in New York. We should expand and promote educational opportunities to increase awareness on relevant issues – implicit bias, for instance – in order to ensure fairness and impartiality in our justice system. We should improve outreach efforts to women and minority bar associations in order to explain the judicial vetting process. And we should consider creating a statewide Commissioner or Ombudsman of Judicial Diversity.

We have made measurable progress towards greater diversity, but there is much more work to be done. If we continue supporting measures – like the Chief Judge’s court-consolidation proposal – to ensure our “gorgeous mosaic” is fairly represented, we will improve the quality of judicial decision-making while enhancing the legitimacy of the third branch of government in the eyes of everyday New Yorkers. The pursuit of justice demands it.

1. Rolando Acosta, *Justice’s “Gorgeous Mosaic,”* NYLJ, Nov. 14, 2005, at 4 (hereinafter *Justice’s “Gorgeous Mosaic”*).

2. Archibald R. Murray, Judith S. Kaye, et al., *The Road to the Judiciary: Navigating the Judicial Selection Process*, 57 Alb. L. Rev. 973, 975 (1994).

3. *Court Consolidation: Joint Hearing Before the New York Senate and Assembly Standing Committees on the Judiciary* (Nov. 13, 2019) (hereinafter *Court Consolidation Hearing*) (statement of Henry M. Greenberg, President, New York State Bar Association).

4. Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 Wash & Lee L. Rev. 405, 410 (2000).

5. *Justice’s “Gorgeous Mosaic,” supra.*

6. Tracey E. George and Albert H. Yoon, American Constitution Society, *The Gavel Gap: Who Sits in Judgment on State Courts?* 21, 24.

7. New York State Bar Association, *Judicial Diversity: A Work in Progress* 3 (2014).

8. Shortly after the publication of my article proposing a diversity reporting requirement (see *Court Consolidation, supra*), Senators Brad Hoylman and Luis R. Sepúlveda introduced a bill that would codify a similar requirement (S.7703).



# The Legal World Will Never Be the Same After COVID-19

By Kathleen Lynn



**T**he changes forced on New Yorkers and the legal profession by COVID-19 have been more radical than anyone could have imagined, and they're likely to last longer than anyone first expected. Because of social distancing measures, courts and lawyers are doing business by video, lawyers and legal staff are losing jobs, and new graduates can't start their careers – and these effects will probably persist for months, maybe years.

And even when workplaces and public spaces are reopened, it's likely to happen gradually, with fewer people allowed to gather at offices and restaurants, and a regimen of testing to see who's immune from the coronavirus.

"The realization is sinking in that this is going to last longer than we expected," said June Castellano, a solo practitioner in Rochester and co-chair of the NYSBA Emergency Task Force for Solo Practitioners and Small Firms, created in response to COVID-19.

Brad Karp, chairman of Paul, Weiss, Rifkind, Wharton and Garrison, sees no relief anytime in 2020.

"I don't expect life to fully return to normal until there's an effective vaccine," he said. And the medical com-

munity does not forecast a comprehensive vaccine until spring 2021 at the earliest.

Since the virus first erupted, the pain has quickly spiraled, both medically and economically. Tens of thousands of people have died and more than 26 million Americans have filed for unemployment. Economists now predict that the national and global economies will shrink this year at rates not seen since the Great Depression.

In the legal profession, there are almost daily reports of layoffs, pay cuts, and other cost-cutting at large firms. The situation may be even more dire at small firms.

"I've heard from attorneys who haven't had a single dollar come through the door in weeks," Castellano said.

The situation is different from the 2007–09 recession, she said, because "this is a life-and-death issue."

"People are saying, 'Okay, we want to be able to go back to court and meet with clients again . . . Well, wait a second, is that going to kill somebody?'" she said. "The stakes are very different than they were in the great recession."

With attorneys forced to work from home, the legal profession has increasingly turned to technology. Although for the most part courts are closed to prevent the spread of the virus, New York's Unified Court System in March began to implement a system of virtual courts to handle essential and emergency matters. That system has been gradually expanded to include some non-essential matters as well.

Even the U.S. Supreme Court has announced that it will hear arguments by teleconference.

NYSBA had already improved its technology and website to create a "Virtual Bar Center" before COVID-19 hit. The new digital platform has put NYSBA's services, information and benefits in easy reach of attorneys who are now forced to work remotely, said NYSBA President Henry M. Greenberg.

Since the COVID-19 shutdown, NYSBA has moved all continuing legal education programs online and recently held its first-ever videoconference House of Delegates (HOD) meeting, which drew 207 members – the largest turnout ever for an HOD meeting.

Once the legal profession makes it to the other side of the virus, most



observers agree, there'll be much greater use of technology.

"We're going to see judges who are comfortable with video conferencing," said Mark Berman of Ganfer Shore Leeds and Zauderer, co-chair of NYSBA's Committee on Technology. "Court conferences and hearings may be done remotely."

Berman said he recently took part in a remote mediation, with seven participants joining a videoconference group meeting, then periodically dropping out to speak one-on-one with other parties by phone or videoconference.

One lesson of the pandemic, Berman said, is that lawyers need to be able to work entirely from home, by having billing records and legal documents available digitally.

"If you tell a client, 'I can't get to my documents because they're in the office,' the client is going to go to a lawyer who can get their documents 24/7," he said.

Although many law firms are already feeling the pain, the effects of the virus and the recession will not be spread equally across practice areas. Estate lawyers, for example, are expected to see a bump in activity.

"Many people are wanting wills these days, for obvious reasons, especially people who work in health," Castellano said.

"With the unfortunate rise in deaths, you're going to see a lot of trust and estates work, a lot of wills to probate," said Patricia Salkin, provost for the graduate and professional divisions at Touro College in Central Islip. Salkin is also a law professor and former dean of Jacob D. Fuchsberg Law Center at Touro.

Karp expects an increase in legal work related to financing and restructuring, as companies stressed by the recession assume additional debt, causing some to file for bankruptcy. He also expects litigation as parties invoke force majeure to avoid contractual obligations and material adverse event clauses to scuttle deals, lawsuits concerning the scope of insurance coverage for coronavirus-related losses, and borrower/lender disputes.

Karp also said that private equity firms with billions of dollars of cash are purchasing distressed debt and looking to acquire companies at more reasonable prices as the result of the market downturn.

Aside from COVID-19, Karp expects increased regulatory oversight over corporations and financial markets if the Democratic candidate wins the White House in November, leading to more work for lawyers.

Even so, many law firms expect that the economic downturn and limits on in-person court activity will sharply curtail many types of legal work in the coming

months. As a result, a number of large firms have laid off or furloughed employees, cut salaries for employees and partners, and frozen contributions to employee retirement plans.

Solo practitioners and small firms have applied for unemployment insurance, as well as federal aid programs to small businesses, but many find the process very frustrating, Castellano said. The two major federal programs – the Payroll Protection Program and the Economic Injury Disaster Loan program – were quickly swamped with requests for help. As of mid-April, Castellano didn't know of anyone who had received any federal assistance.

"These programs that were supposed to help folks have not helped; they have just given false hope," she said. And they took up time, since "smaller firms don't have accounting or finance departments who could take care of the paperwork."

The pandemic and recession are hitting just as graduating law students were preparing to study for the bar and start their careers. But the New York State bar examination has been postponed until September.

"There's a lot of uncertainty with the class of 2020," said Salkin. "Job offers are being rescinded and start dates for class of 2020 are being delayed."

There have been calls for alternative routes to license, such as practicing under supervision for 12 to 18 months.

Students still in law school are affected, too, with summer associate programs being canceled or delayed. And after the March LSAT was canceled, law school applications dropped, Salkin said.

"Everybody is nervous about what's going to happen with fall enrollment," she said.

To help people hurt by the pandemic and economic lockdown, NYSBA and the state court system have established a pro-bono network of lawyers, being coordinated by former Chief Judge Jonathan Lippman, of counsel at Latham & Watkins.

The network has started by assisting New Yorkers who need help securing unemployment benefits through the appeals process (see page 42), and Lippman expects that there will be a need for legal help with issues like foreclosures, insurance, consumer credit and domestic violence.

"As courts start to ramp up, there's going to be a tremendous surge in cases," Lippman said. "Our obligation as lawyers is to help people and think about all the vulnerable and poor who have been traumatized by the pandemic. It doesn't have anything to do with the bottom line. It has to do with our moral obligation as lawyers."

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*Kathleen Lynn is a freelance writer.*

# The Legal Industry's Rapid Transition to the Cloud

By Jack Newton



**Jack Newton** is the CEO and Cofounder of Clio and a pioneer in cloud-based legal technology. He has spearheaded efforts to educate the legal community on the security, ethics, and privacy issues surrounding cloud computing, and has become a nationally recognized writer and speaker on these topics. He cofounded and is President of the Legal Cloud

Computing Association (LCCA), a consortium of leading cloud-computing providers with a mandate to help accelerate the adoption of cloud computing in the legal industry, and is the author of *The Client-Centered Law Firm*, a bestseller that is helping law firms thrive in today's experience-driven era.

As 2020 began, many law firms were still hesitant to move to the cloud. By March, that had all changed. A technological transformation of the legal industry, originally expected to take place over the next five to 10 years kicked into overdrive and started to take place in weeks due to COVID-19.

The flexibility of a cloud-based practice has long been incredibly important for lawyers and legal professionals, and at no time has that been truer than in today's world. Firms that have already transitioned to the cloud are



finding innovative ways to navigate this even more rapidly changing legal market to succeed. But if your firm has yet to make the switch, and if you're not yet set up to work remotely, there's still time to get your cloud-based practice running – with the right processes, the right tools, and most important, the right mindset in place.

In her book *Mindset*,<sup>1</sup> Stanford University psychologist Carol Dweck discusses the differences between fixed and growth mindsets. Those who hold a fixed mindset believe that their abilities are fixed – i.e., that they don't have

much control over them – which leads to a fear of failure. However, people with a growth mindset embrace failure as a learning opportunity and believe in their capacity to grow and learn new things constantly.

A growth mindset is the key to a law firm's success in today's reality: transitioning to a cloud-based law firm won't happen right away. You won't get everything right the first time, and there will no doubt be minor setbacks as your firm moves to a cloud-based way of operating. The main factor in your law firm's success will be your

determination as you navigate these setbacks, taking steps to transform your cloud-based practice into an efficient, tech-savvy, modern law firm.

Perhaps the next most important factor in the success of a distributed firm is its people. The lawyers, paralegals, administrative staff, and others who work with you *are* your firm, and they deserve to feel human even while they're working from their own homes and facing personal challenges amidst a crisis. This is true even if you're a true solo practitioner and it's only you at the firm.

*There's still time to get your cloud-based practice running – with the right processes, the right tools, and most important, the right mindset in place.*

Invest in the mental health of everyone at your firm and create a culture of trust and connectedness. This might be simpler than you think. Schedule video lunches with each other, have regular team check-ins over video, or create fun, non-work-related challenges for everyone to engage in (anecdotally, short fitness challenges appear to be popular amongst remote teams these days).

If you're a solo practitioner, take time every day to chat with friends or family, have virtual coffee with a colleague, get a bit of exercise, meditate, or otherwise engage in an activity that keeps you connected to others and prioritizes your mental health. Do this if you feel you have a few minutes to spare every day – you'll thank yourself later and so will the clients you'll be able to continue serving.

Of course, you'll also need the right processes and tools for you and your team to succeed in a cloud-based remote environment. What's right for every person and every law firm will differ, but in general a few things hold true. First, invest what you can into your home office setup. The right environment, and the right computer and scanner, will be key to your productivity, not to mention your physical health. Don't forget to talk to your team about what they need as well.

In terms of software, choose tools that are cloud-based with rigorous security standards so that everyone at your firm can securely access and collaborate on important case files from wherever they are. The precise tech stack you'll need will depend on your firm's specific requirements. In general, you'll likely need a phone provider, some sort of internal communication provider, and a cloud-based practice management system.

Your practice management software will be the central hub where your firm keeps cases and documents organized, tracks time and expenses, creates calendar invites, and approves invoices. It might be possible to fulfill your case management needs with a group of individual tools for each function, but this leads to duplicate data entry, wasted time, and room for error. A powerful central platform in the form of practice management software will keep everything in one place and will be the backbone your cloud-based law firm needs to adapt and thrive.

Also, you'll likely want to consider an online payment provider to keep your law firm's cash flow healthy. Frankly, accepting payment via credit card is the only sustainable option in the current environment. The situation surrounding COVID-19 has shown that what was once a minor inconvenience for clients – mailing a check or coming to the office to drop one off – can, in some cases, become nearly impossible, which means it becomes impossible for your law firm to get paid. Choose a legal-specific credit card processor that lets lawyers operate in compliance with trust accounting rules. Bonus: certain practice management software solutions allow clients to pay bills quickly and easily – electronically, online – via an email that includes a secured payment link.

Finally, as much as lawyers and law firms have struggled as a result of COVID-19, your clients have struggled as well. Now more than ever, it's important to maintain a good client experience – but this isn't about wowing your clients; it's about meeting their expectations and meeting them where they are. Be open, and communicate deliberately about upcoming changes your firm may be introducing as you move to the cloud. Likely, it will put them at ease, and they'll appreciate the convenience of a cloud-based practice during this time.

The time to move to the cloud is now. We won't need to work remotely forever, but the adaptability the cloud provides is crucial to the long-term success of the legal industry. By moving your law firm to the cloud now, you're not just bolstering your own business's ability to succeed in the current environment; you're contributing to a positive future for the entire legal industry and for the clients we all serve.

1. <https://www.amazon.com/Mindset-Psychology-Carol-S-Dweck/dp/1400062756>.



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# Coronavirus Highlights Unequal Access to Legal Services in Rural Communities

By Matthew Krumholtz

**S**ocial distancing and stay-at-home orders are effectively reducing the spread of coronavirus in New York, but the impacts of these protocols are not being felt equally across the state. The crisis has put a particular strain on legal services in rural communities, where there is limited access to technologies that are necessary to work remotely.

“What’s ironic is the impact of COVID-19 itself, as a pernicious disease, is less in rural areas because of the remoteness and the lack of concentration of people,” said Associate Justice Stan L. Pritzker of the Appellate Division, Third Department. “On the other hand, the impacts of COVID-19 on the justice system may be even worse because of the lack of technology and infrastructure.”

The coronavirus pandemic is raising new concerns about the unequal access to legal services in New York’s rural counties. Judge Pritzker co-chaired NYSBA’s Task Force for Rural Justice, which developed a report and recommendations that were adopted by the House of Delegates at its first ever virtual meeting on April 4. The report spotlighted both the declining number of legal practitioners serving rural areas and the dearth of broadband internet access to support rural lawyers and their clients.

These obstacles to legal services plagued New York’s rural counties long before the COVID-19 pandemic, but this outbreak is compounding the access-to-justice crisis in rural areas of the state, as lawyers in remote counties scramble to find the resources they need to keep in touch with their clients and keep their businesses afloat.

“COVID-19 is really highlighting the inequity of the situation,” said Taier Perlman, co-chair of the Task Force and staff attorney at Legal Services of the Hudson Val-

ley. “It’s going to increase the need for poverty law services, which is going to be a greater barrier in rural communities where there’s already a shortage of attorneys.”

The vast majority of New York counties are rural, and 44 out of 62 counties in the state have populations of less than 200,000. The majority of New York lawyers, however, are located in the urban centers of the state, with only about 4% of the state’s legal practitioners working in rural areas.

The economic downturn resulting from the coronavirus crisis is especially hard on rural law practices, since many are small businesses with tight margins. In fact, roughly 80% of rural law practices are solo practices or small firms.

“We’re feeling the pain right now,” said Michael Shultes, whose law office is located in Cobleskill. “We all understand that this is bigger than us and that safety is the most important thing for everyone, but this is hurting us just like any other small business.”

Perlman expressed concern about what the economic impacts to small law firms will do to the lopsided ratio of residents to attorneys in rural areas. “How many will decide ‘I can’t bear to run this business anymore, I’m going to find legal work elsewhere,’ thus taking away another very needed attorney in a rural area where there are fewer attorneys?”

“I’ve had to lay off my two employees; they’re on unemployment right now,” said Judith Pareira, who owns a solo practice in Saranac Lake. “I can’t put in my bills to the state for my representation of children until the cases are finished. If the cases aren’t moving, they don’t finish, so I can’t get any income.”



Dwindling income is not the only shortfall facing rural law practices during this crisis. As lawyers across the state figure out how to work remotely, rural practitioners face particular challenges, since broadband internet access is not uniformly available or reliable in rural counties.

In 2015, Gov. Andrew M. Cuomo launched a \$500 million program, Broadband for All, to bring high-speed internet access to the roughly 30% of New Yorkers living mostly in rural areas without broadband. The Task Force on Rural Justice recommended an expansion of the program.

“The lack of access to communication technology translates readily to a lack of access to justice,” said Presiding Justice Elizabeth Garry of the Appellate Division, Third Department.

The lack of broadband access in rural areas is a significant obstacle to lawyers who are now forced to conduct their businesses remotely, in compliance with social distancing guidelines. The Task Force report pinpointed the problem: “[Y]our cellphone, probably the most important article in an attorney’s bag, becomes a worthless brick without a cell phone signal to back it up. Travel through upstate New York with some of your colleagues to find out how important that fickle signal can be.”

The Task Force recommended that the Office of Court Administration should encourage and promote remote video conference appearances in town and village court systems and expand e-filing options for lawyers and litigants.

“The way that the Unified Court System is rolling out e-filing and virtual teleconference hearings across their network of courts is not the way that it’s being rolled out in the town and village courts,” said Perlman. “They have fewer resources and less funding to do that in a consistent, uniform manner, and so it basically creates an uneven distribution of access to justice.”

Just as courts and attorneys in rural areas are not uniformly equipped with the technology needed for remote work, clients are experiencing significant setbacks to their cases in areas without reliable internet.

For example, Perlman said, she has clients who can’t send her the documents she needs for their cases because they don’t have the technology to scan or fax at their homes.

“I just had a conversation with Essex County Mental Health Services regarding one of my clients, and the mental health provider told me that she wasn’t able to have a conversation with my client because she didn’t have the internet that she needed at her home,” said Julie Garcia, the former Essex County District Attorney, who has a solo practice in Port Henry.

“The people in the North Country are no strangers to making lemonade out of lemons,” said Garcia. “We can’t really sit back during this time where New York State is on pause and not be planning for what lies ahead. If we approach this the right way, I think we will come out better, as a more just society.”

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*Matthew Krumboltz is a freelance writer.*



# Brave New Legal World: Working Face-to-Face but Not in Person

By Sarah Gold



**L**awyers already know what an enormous impact COVID-19 is having on their clients, their workload, and their businesses. The public health crisis and the social distancing measures that have been put in place to limit the spread of the coronavirus have also led to significant changes in the way the tasks that lawyers handle in the course of their daily work are executed – from making court appearances to executing documents with notarized signatures.

For some attorneys, this “new” technology isn’t so new. For others, it takes some getting used to. Either way, there is no choice: Clients continue to have pressing legal matters that need to be addressed without delay.

Observers of the legal world are already predicting that some measures put in place to allow attorneys to handle certain matters virtually via videoconference or other technology will remain even after the public health emergency eases. So, in this brave new legal world, mastering

these technologies could turn out to be a smart long-term strategy for attorneys.

On the following pages, we take a look at the new videoconference-based procedure for obtaining a notarized signature and offer tips for how to conduct a virtual execution of an estate plan.

**Sarah Gold** founded Gold Law Firm in 2011 as a way to work locally with small for-profit and not-for-profit businesses. She forms companies, drafts and negotiates employment contracts, and helps businesses exercise their legal rights. She is also a lecturer at Rensselaer Polytechnic Institute on business law and ethics and the advisor to the Rensselaer Pre-Law Association. She is the past chair of NYSBA’s Business Law and Young Lawyers Sections, spent two years on the NYSBA Executive Committee, and is a fellow of the New York State Bar Foundation. She is the co-chair of the Law Practice Management Committee. She is also chair of the Small and Solo Committee of the Albany County Bar Association.



# Working Face-to-Face but Not in Person: Tips on How to Virtually Execute an Estate Plan

By Brandon Vogel



**T**he COVID-19 pandemic has prompted an increasing number of people to think about estate planning, and many are reaching out to attorneys to prepare and execute the documents that spell out their final wishes. Of course, these documents need to be signed, witnessed, and notarized – tasks that are difficult to complete in person with so many of us staying home or maintaining social distancing to prevent the spread of the coronavirus.

When Governor Andrew M. Cuomo issued Executive Order 202.7 in March, allowing notarized signatures and other matters to be executed via videoconference – and in April extended the order through May 7 with Executive Order 202.14 – lawyers found that they quickly had to master new processes and new technology.

Estate planners discussed how to effectively execute a will via videoconference during a recent NYSBA CLE webinar attended by more than 600 participants.

## EXECUTIVE ORDER SPELLS OUT BASIC GUIDELINES

“The problem we are having while we are in this pandemic, while we are self-isolated, while we may be in the hospital and not able to see anyone: how are we able to execute wills if we can’t be in the presence of witnesses?” said Jeffrey A. Asher (Law Offices of Jeffrey A. Asher). He explained that by removing the requirements that witnesses have to be in the presence of the testator, “we have a path forward to execute wills and other documents as long as we follow the rules of the executive orders.”

Nicole Clouthier (Cioffi Slezak Wildgrube) explained that remote witnessing must be done via interactive video conference: “It cannot be pre-recorded. You need to be able to speak back and forth with the person who is signing.”

As detailed in the executive order, clients must know the witnesses. If they do not, the witnesses must present

valid ID, which must be shown during the videoconference. “They must hold up their drivers’ license and show you the ID at some point during the videoconference.” Clouthier says her firm uses screenshots to handle this part of the process.

## ATTORNEYS SHOULD DEVELOP THEIR OWN BEST PRACTICES

Asher recommended that attorneys develop their own best practices for their offices, with the understanding that there may be a time when these documents will be probated. “Besides developing your own best practices, consistency is your best friend,” he said. “If you interpret it one way and do it that way, say ‘this is what I’ve done for every will that I have recorded under 202.14.’”

Under the executive order, witnesses may sign the transmitted copies of the signature pages but it is not a requirement. Asher explained, “Don’t look at the language as ‘may’ and say, ‘Well, I don’t have to.’ Do it. You don’t want to be the person who has to defend an unsigned, unwitnessed, unnotarized document, and when the question is ‘Why isn’t this witnessed or signed?’ and you say, ‘Well I didn’t have to. It said “may” so I didn’t do it.’ Do it.”

## CONDUCTING SECURE AND EFFECTIVE VIDEOCONFERENCES

“This is 50 percent legal and 50 percent logical. Make sure you prepare your client beforehand to ensure that they are ready,” said Michael Dezik (Wilcenski & Pleat).

First step: make sure that the attorney and client are using the same videoconferencing platform.

If using Zoom, Dezik suggested upgrading from the basic level to ensure that you are not restricted to a time limit. He noted that Zoom crosses multiple platforms, such as Android, Apple, and Desktop, and is easily accessible. Apple’s Facetime only works on Apple products. “The upgrade enables you to have a waiting room,” he said, adding that the waiting room lets him know who the participants are, so he doesn’t have to admit anyone that he doesn’t recognize.

Dezik recommends having a good set of headphones to ensure privacy from anyone hearing confidential information. He also uses random meeting codes, rather than his personal meeting ID, to minimize the risk of security breaches. WiFi can present technical disruption risks, so he uses a hard-wired connection to ensure continuity.

## SIGNING THE DOCUMENTS

On the videoconference, the lawyer will serve as the host and use the waiting room to ensure that the witnesses are ready and can verbally commit to serving as witnesses.

The lawyer will go over the will, confirm with the client, and then give detailed instructions on where to sign.

Upon signing, the client can transmit the signature pages directly to the witnesses or to the lawyer, who can in turn send them to the witnesses. Dezik said there are a number of apps that lawyers can use for this task. He uses ScannerPro to transmit; it can convert a smartphone photo into a PDF for transmission.

“What we see often in will contests is the publication requirement,” noted Deborah Kearns, chief clerk of Albany County Surrogate’s Court. “Make sure that the testator publishes and says, ‘This is my will.’”

Angelo M. Grasso (Greenfield Stein & Senior) advised against recording the videoconferencing of wills. “I would be judicious about recording these by video or audio,” he said.

“The videos will often do more harm than good. It may give rise to an undue influence objection,” added Grasso. He cautioned that audio recordings are worse, because they contain “disembodied voices without any context.”

Executive orders currently allow remote notarization of documents through May 7, although that date could be extended. The executive orders and helpful summaries are can be found online in NYSBA’s coronavirus information center: <https://nysba.org/covid-19-information-updates>.

## ATTORNEY CHECKLIST

### *The day before the videoconference:*

- ✓ Confirm your client and witnesses have internet connection and have downloaded the agreed-upon videoconferencing service.
- ✓ Email client and witnesses a secure link to your meeting with security details.
- ✓ Email client the copy of the will and go over any last-minute changes.
- ✓ Confirm that client can transmit a copy of the signature page to the witnesses or the lawyer who will send them to the witnesses.

### *The day of the videoconference:*

- ✓ Confirm that the client has the printed final version of the estate plan.
- ✓ Begin the videoconference and admit participants as need.
- ✓ Confirm that the client is ready to sign and that the pages of the printed will are in order.
- ✓ Confirm client has valid identification.

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*Brandon Vogel is NYSBA’s social media and web content manager.*

# Working Face-to-Face but Not in Person: E-Notarization



Based on directives outlined in Executive Order 202.7 signed by Governor Andrew M. Cuomo on March 19. Please note that this information is subject to change based on subsequent executive orders. For more information, visit [nysba.org/covid-19-information-updates](https://nysba.org/covid-19-information-updates).

# Amid Crisis, Voting Rights Focus of Virtual Law Day

By Christian Nolan

**W**ith the global pandemic placing an unprecedented strain on the institutions that have kept America free for over two centuries, it seemed fitting that this year's Law Day theme was "Your Vote, Your Voice, Our Democracy: The 19th Amendment at 100."

In order to maintain social distancing due to the novel coronavirus, New York's Law Day event May 1 was held virtually at the New York Court of Appeals with Chief Judge Janet DiFiore, NYSBA President Hank Greenberg and state Attorney General Letitia James all delivering prerecorded speeches.

"While we are disappointed by the physical distance between us, we are delighted and proud to continue our annual tradition," said DiFiore.

Each of the speakers reflected on pioneering suffragettes, like Elizabeth Cady Stanton and Susan B. Anthony, whose movement for equality and justice began in New York with the 1848 Seneca Falls Women's Rights Convention. This ultimately led to the 19th Amendment granting women the right to vote.

From there, the speakers all opined that the public health crisis underscores that our right to vote is even more vitally important.

"Our upcoming elections will be critical to the nation's destiny," said DiFiore. "We will be called upon to elect competent national and local leaders who will be charged with guiding our recovery and implementing the safe, smart and effective policies necessary to restart our stalled economy and prevent future outbreaks."

Greenberg said the greatest immediate threat to our right to vote is the pandemic itself, as voting laws and systems were not designed to conduct elections in the midst of public health crises.

"Voters must not have to choose between disease or democracy, between risking their health or exercising a civic duty," Greenberg said. "Our state Legislature, after

several members tested positive for COVID-19, changed its own rules to allow for remote voting. So, too, lawmakers can and should take steps to ensure that all of us can vote safely and securely this November."

State Attorney General Letitia James said the stakes of the 2020 election are higher than they have been in half a century due to threats of voter suppression and the need for voter protection.

"It is an American tragedy that 100 years after the passage of the 19th amendment, 56 years after the passage of the Civil Rights Act, and 55 years after Lyndon Johnson signed the voting rights act into law, we face renewed attempts to deny the basic American right to vote, especially in communities of color," said James. "That is why we must prepare for the 2020 election with the largest education, mobilization, and voter protection campaign in modern history."

Greenberg concluded his remarks by stating that New York's response to the crisis has proven "we are strong, innovative and determined in the face of adversity."

"As we struggle with fear and uncertainty, this much is clear: giving up on democracy is not an option," Greenberg continued. "We will meet this challenge."

The Law Day ceremony also recognized the efforts of the court system's judges, clerks, court officers, IT staff and managers who, almost overnight, implemented New York's virtual court system.

As part of the virtual Law Day ceremony, state Court Officer Sgt. Jessica Hernandez from the Bronx Supreme Court's Criminal Term was prerecorded singing the national anthem in front of the New York County Supreme Courthouse at 60 Centre Street in lower Manhattan. The event kicked off with the Pledge of Allegiance led by New York City Criminal Court Senior Court Clerk Regan Williams.

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*Christian Nolan is NYSBA's senior writer.*

# State Bar News

## New Pro Bono Initiative Helps Jobless New Yorkers Secure Unemployment Benefits

By Susan DeSantis

New Yorkers who need help securing unemployment benefits through the appeal process will be matched with attorneys provided by the pro bono partnership launched by the NYSBA and the state court system.

Hundreds of lawyers are available to assist clients. A new innovative website, [www.nysba.org/legalhelp](http://www.nysba.org/legalhelp), provides resources for filing an unemployment claim and will match attorneys – free of charge – with those whose claims are unsuccessful.

“Hundreds of thousands of New Yorkers are out of work due to the coronavirus, and we know that some of them will need help to obtain the unemployment benefits to which they are entitled,” said Chief Judge Janet DiFiore. “We are pleased to partner with NYSBA to offer this vital assistance and we thank all the generous lawyers who are giving of their time so selflessly.”

“Becoming unemployed is one of the most stress-inducing things that can

happen in a person’s life, and we are dedicated to reducing that anxiety any way we can. This program will help ensure New Yorkers can access the benefits they need and deserve,” said New York State Department of Labor Commissioner Roberta Rear-don. “I’d like to personally thank the bar association, the court system, and the hundreds of lawyers who have stepped up to help their neighbors during this difficult time.”

### **“UNEMPLOYMENT BENEFITS ARE A LIFELINE FOR MANY FAMILIES”**

“This is an unprecedented moment for New York and the legal community alike,” said NYSBA President Hank Greenberg. “It’s gratifying to see so many lawyers willing to put their expertise at the disposal of those who are suffering. We know that unemployment benefits are a lifeline for many families, and we welcome the opportunity to provide assistance.”

Former Chief Judge Jonathan Lippman, of counsel at Latham & Watkins and coordinator of the network, praised everyone involved for getting the pro bono network up and running in such a short time.

“Ensuring access to justice is paramount right now,” Lippman said. “This project will help unemployed New Yorkers get the benefits they need and are entitled to.”

### **ONLINE FORM SIMPLIFIES PROCESS TO REQUEST ASSISTANCE WITH DENIED CLAIMS**

The site provides guidance both on filing unemployment claims and how to find help if those claims are denied. Participants detail their Unemployment Insurance or Pandemic Unemployment Assistance claims using an intake form developed by Clio, a legal tech provider.

Once complete, NYSBA will use Clio’s client intake software to match

Lawyers who are interested in volunteering should go to [nysba.org/covidvolunteer](http://nysba.org/covidvolunteer).

the participants with pro bono attorneys onboarded and made available through Paladin's online portal of volunteers. To ensure efficiency and ease, pro bono attorneys will be given free access to Clio's secure case management software to manage the appeal process.

"We're honored to use our software to help NYSBA streamline access to justice for so many who need it," said Jack Newton, CEO and co-founder of Clio.

"By creating one central place for New York attorneys to find, learn about, and sign up for COVID-related pro bono work, we'll be able to connect more individuals in need with qualified attorneys, faster," said Kristen Sunday, Paladin's co-founder.

More than 26 million Americans – including over 1.4 million New Yorkers – have filed unemployment claims in recent weeks. More than 1,500 attorneys attended NYSBA's recent training program, "Applying for Unemployment: Client Counseling Under the CARES Act."

### PRO BONO PARTNERSHIP GEARING UP TO PROVIDE HELP ON OTHER ISSUES

New York's existing network of pro bono and public defense attorneys was strained prior to COVID-19. The state court system and NYSBA established the pro bono partnership to ensure that all New Yorkers can exercise their right to legal counsel

at a time when the need for legal services will likely be higher than ever before, and fewer people will be able to afford representation.

While the pro bono network's first task is handling unemployment benefit denials, it is quickly gearing up to also address a range of other issues – from evictions to domestic violence to job and housing discrimination.

Lawyers who are interested in joining this cause should go to [nysba.org/covidvolunteer](https://nysba.org/covidvolunteer) to sign up. If you have specific questions about volunteering, please contact NYSBA via e-mail: [covidvolunteer@nysba.org](mailto:covidvolunteer@nysba.org).

## 2020 JOBLESS CLAIMS

# FEBRUARY

# MARCH

# APRIL

# Task Force Focuses on Advocacy and Information for Solo Practitioners and Small Firms

By Dan Weiller

From advocating for interim payments to assigned counsel when cases are not yet concluded to providing practical information on grant programs and communications technology, the NYSBA task force assisting solo practitioners and small firms facing economic challenges due to the

The Task Force to Assist Solo Practitioners and Small Firms is chaired by solo practitioners Domenick Napolitano of Brooklyn and June Castellano of Rochester. More than half of all NYSBA members work as a solo practitioner or in a firm with fewer than 10 attorneys.

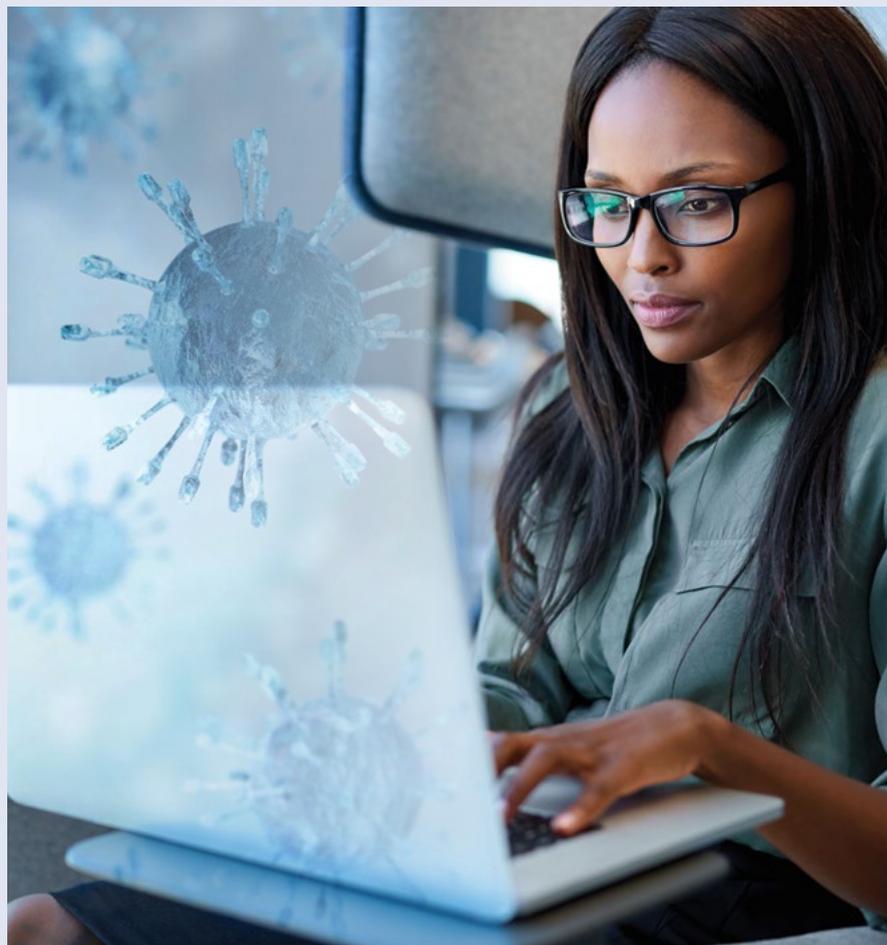
carefully at the impacts on attorneys who work independently or for small firms, and at what we can do to address those impacts,” said Castellano.

“We have already been successful in getting courts to allow assigned counsel to submit interim payment vouchers, for example, and we are advocating for the court system to expand virtual courts to permit non-essential filings, which would help solos and small firm attorneys get back to doing some of their usual legal work,” she added.

Napolitano noted that another important function of the task force is to act as a clearinghouse for information and to get it out to NYSBA members. “Task force members are collaborating closely with NYSBA staff to monitor developments at the state and federal level and to get timely details to our members through the NYSBA website and social media and via email,” he said.

“We are also helping to provide clarity for NYSBA members regarding the Governor’s executive orders, and to disseminate specific information attorneys need about how the executive orders are being interpreted in different jurisdictions,” Napolitano added.

In addition, the task force is tracking issues that concern all small businesses, such as when and how the “New York on Pause” rules will be lifted, the availability of federal grants and loans, and proposals for commercial rent or property tax deferrals.



coronavirus pandemic has been hard at work over the past month addressing the wide range of issues impacting attorneys throughout the state.

“Every part of our legal system is affected by the COVID-19 public health emergency, and we are looking

# Coping With COVID-19 and Avoiding the “COVID 19”

By Robert Herbst

After staying home for a month eating comfort food, we have heard the nervous jokes about putting on the “COVID-19,” those extra pounds like the “freshman 15” students are said to gain in college. With more weeks of sheltering at home to come, we need to be serious about exercise and healthy eating.

This is not just the usual advice to be fit for general wellness. We need to avoid gaining extra weight in order to avoid the underlying conditions of high blood pressure, heart disease, diabetes, and obesity, which the Centers for Disease Control and Prevention warn could make infection with the coronavirus more severe.

In these uncertain times, we need to control what we can control, and we can control what we eat and how we exercise.

There are many reasons why we are under stress – including economic uncertainty, trying to meet client needs while working remotely, or being in close quarters with your children or partner who are dealing with their own needs. That stress causes our body to crave high-calorie food to keep our blood sugar up as we stay on red alert under the “fight-or-flight” reflex.

We may also be eating more out of boredom while we binge-watch season four of anything to keep us occupied while theaters and restaurants are closed and there are no live sporting events anywhere. It is no wonder that we are eating too many carbs, fats, and calories.

On the other side of the equation, we are not burning those calories. Sheltering in place, we are much less active than normal and are missing all the

exercise that is normally built into our day just from commuting and walking around an office. With gyms closed, even if you have been diligent about following at-home workouts from the internet, that is just a stop-gap, and after several weeks your body is adjusting and becoming more efficient, so you are burning fewer calories. It then

the energy it craves by eating fruits, vegetables, and whole grains. Eat an apple while you are glued to Netflix. As an added bonus, the vitamins will boost your immune system.

Next, ratchet up your exercise. Go outside for a run or walk. Experts tell us that the coronavirus disperses in the wind, but you should still keep your



becomes a matter of simple math, more calories eaten and fewer calories burned, and your body stores the excess as fat. Gaining fat plus inactivity leads directly to developing the whole list of underlying conditions.

To counter this, we need to change both parts of the equation. It may take some effort and self-discipline, but it is certainly worth it. Just as you may wear a mask outside to protect others, you can take some simple steps to protect yourself.

First, improve your diet. Eat fewer empty calories, such as snacks and junk food. You can still give your body

social distance. If someone tries to pass you, let them. If you pass someone, give them a wide berth. If you run with someone other than one you live with, stay six feet apart, and don't huff and puff on each other when you are done.

You can also follow an outdoor exercise routine to build strength and raise your metabolism. There are many examples on line. A good routine is to run or walk, do some calisthenics, and then run or walk some more. Being active outdoors will also lower your stress level, which will help curb your

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# No One Is Untouched: Help-Averse Lawyers Meet Helplessness in COVID-19

By Brandon Vogel

When Libby Coreno attended a meeting during the Great Recession, a fellow attorney asked several attorneys how they were doing, given the unbelievable impact to the economy. Nearly everyone answered with a bland, “I’m doing okay.”

This man stopped and wondered aloud why were they so afraid to talk about how they really felt. Twelve years later, in the midst of the coronavirus pandemic, Coreno says, “We should be able to talk to each other.”

Coreno, chair of the Attorney Well-Being Committee, points out that “whether you are the managing partner of a Top 100 Firm or an assigned counsel in Essex County, everyone is going through this together.” She explained, “No one is untouched. Everyone is affected. So, how do we create a framework where we can turn to each other and acknowledge everyone is going through this?”

## ASKING FOR HELP

Coreno has surmised two hard truths in the wake of the coronavirus: lawyers have difficulty asking for help and are now forced to confront realities previously ignored.

“Lawyers are notoriously help-averse,” said Coreno. She explained that lawyers know how to be fixers. “We are called upon when others need help. It is hard to admit our own need for help.”

She pointed out that “incredibly capable” attorneys will need to ask for help or guidance. “It is bringing up a lot of difficulty and vulnerabilities about where to go for help.

Lawyers have a hard time admitting how much it weighs on us.”

Coreno also sees that lawyers are now facing facts about their lives with the change in routine. “Suddenly, our work/life schedule is allowing us to look at things that may have been ignored,” she said. “It is forcing people to slow down and feel a discomfort.”

meet via Zoom and confidentially discuss their challenges, feelings, fears, and successes. Coreno describes the attendees as an “effective, well-attended, vocal group sharing information and ideas.” For more information, visit [nysba.org/attorney-well-being](https://nysba.org/attorney-well-being).

Stacey Whiteley, director of NYSBA’s Lawyer Assistance Program, said the program has received calls about per-



## ROAD TO EMPOWERMENT

NYSBA launched a well-being podcast series in April hosted by Coreno and her colleague Dr. Kerry O’Hara, PsyD, a clinical psychologist. Coreno has more than 10 years of experience being a well-being workshop leader, teacher, and mentor. The five-episode series will look at the case for attorney well-being, the culture of law, mindfulness, tips for senior lawyers to stay connected, as well as the physical addiction to stress. It will be available on Apple Podcasts, Spotify, Google Play, and the NYSBA Website.

NYSBA has also created a Lawyer to Lawyer Wellness Roundtable, held every Thursday at 4 p.m. Attorneys

sonal health, the safety of family members, and concerns about the pace of change. “Since things change so quickly, there’s worry about keeping up with the changes,” she said.

Whiteley also has received calls from government and public service attorneys about the stresses experienced working from home and homeschooling children. “Of course, there’s just the overlying anxiety and uncertainty about what’s going on in the world in general as we move through this,” she said.

A common theme heard in the roundtables and throughout NYSBA’s

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# COVID-19 Impacts State Budget Process, Clouds Spending Plan

By Ronald Kennedy and Adriel Colon-Casiano

The New York State Legislature approved a \$177 billion state budget on April 3. The spending plan – which also included actions on a range of policy issues – was adopted shortly after the April 1 deadline, and the process by which it is developed and adopted were heavily impacted by the effects of the COVID-19 public health crisis.

The final budget is the product of a complex four-month negotiation between the executive and the 213 members of Legislature, and the fiscal implications of the COVID-19 pandemic added huge complications in the last and most pivotal month of discussions.

Even before the public health crisis, the Governor's initial budget proposal cut state operational spending and programs in response to initial figures in January indicating a deficit in the billions of dollars. As the budget process unfolded, it became increasingly clear that the economic fallout from the coronavirus will add considerably to the state's budget deficit. In order to address potential funding shortfalls in the coming year, the enacted budget gives unprecedented authority to the state budget director to make spending reductions.

The public health crisis also had a huge impact on the budget process, during which legislators typically work together in close quarters to develop and finalize budget language. Some legislators cited these challenges when issues on which consensus seemed imminent were dropped from the final agreement. In response to the practical problem of in-person voting, the State Senate and Assembly amended their rules to allow for remote voting by legislators.



## CHANGES IN BAIL REFORM, DISCOVERY LAWS

Several matters of particular interest to NYSBA members were addressed in the enacted budget. Historic bail reform measures adopted in 2019 were amended to add sex trafficking, money laundering, child pornography, repeat offenders, and crimes that result in death to the list of offenses that are bail-eligible. Bail can now be conditioned on a mental health referral. Crucially, however, these amendments did not add an element of judicial discretion, a point that Assembly supporters of the initial reforms appeared unwilling to concede.

The enacted budget also extended the period of time in which a prosecutor must provide discovery documents to the defense and appropriated \$40 million for costs associated with enhanced discovery measures adopted in 2019.

A new domestic terrorism law will classify an act of domestic terrorism motivated by hate as an A-1 felony punishable by life in prison with-

out parole. A prohibition on gender-pricing discrimination was enacted. Also enacted was a requirement that employers with over five employees must provide paid sick leave.

The final budget legalized gestational surrogacy in New York. Forthcoming regulations will establish rules to hire a surrogate and to guarantee all parties are fully informed and consent. Additionally, the law will create a surrogate's Bill of Rights to ensure surrogates have control over health-care decisions, and will streamline the non-birth parents' path to adopting children delivered by surrogates.

## MEDICAID CHANGES

As part of the budget process, Governor Cuomo in January convened the Medicaid Redesign Team II, which proposed cost-saving changes to the state's Medicaid program. One significant new provision included in the final spending plan relates to Medicaid eligibility and will allow a 30-month look back relating to

*continued on page 49*

# Remembering Henry Miller, “Larger Than Life” Trial Lawyer and Past NYSBA President

By Christian Nolan

Remembered fondly in the legal profession as a premier trial lawyer and teacher, past NYSBA President Henry G. Miller passed away on April 16 from COVID-19. He was 89.

NYSBA issued a statement that read, in part, “Henry was a brilliant advocate, a larger than life personality and a giant in the profession. For decades he was one of the state’s preeminent trial lawyers, and as a teacher he shared those skills with generations of lawyers. He was gentle and kind and patient. He will be truly missed.”

At the time of his death, Henry was the senior member of the White Plains law firm of Clark, Gagliardi & Miller where he practiced since 1966.

Miller was renowned as one of New York’s most distinguished trial attorneys, handling all types of cases for over five decades, including personal injury, commercial and mass tort cases.

He won many multimillion-dollar awards for his clients, including the largest verdict ever in New York for a loss of nurture case in which a single mother was struck and killed by a drunk driver, leaving behind a two-year-old.

John Rand, Miller’s son-in-law who practiced law at his firm with him for the past 23 years, described his courtroom presence as commanding, controlling of witnesses, emotional on some matters and humorous when appropriate.

Rand recalled the time Miller’s opening argument during a federal trial in Westchester caused a juror to cry so hard the court had to take a break.

“His presentations were powerful,” said Rand.

Rand said the defense decided during that break “we better settle this case.” The trial never resumed.

Miller also enjoyed sharing his knowledge of the law by giving continuing legal education programs for NYSBA and many other organizations. One such NYSBA CLE course was aptly titled “The Trial.”

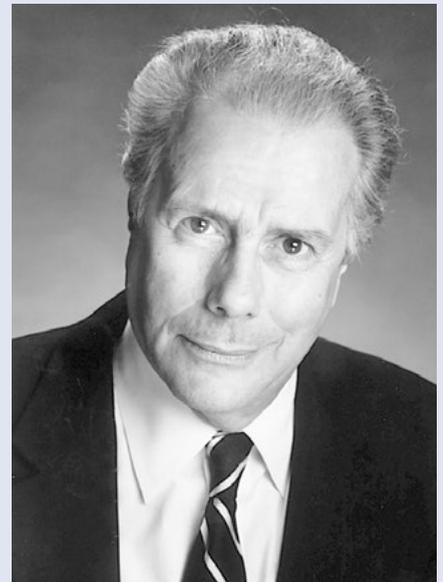
“His CLEs were something you wanted to go to,” said Judge Jonah Triebwasser, a justice of the town and village courts in Red Hook. Triebwasser described attending Miller’s CLEs as a “privilege” and said Miller was “a natural born showman” who was also generous of his time with young lawyers.

“He always said that the trial was a search for truth but had to be done ethically,” said Triebwasser. “He was almost Central Casting’s idea of being a trial lawyer.”

Miller wrote and performed many of his own plays, including his one-man show, *All Too Human*, about the life of Clarence Darrow. He performed this off Broadway at the 45th Street Theatre and originally at the White Plains Performing Arts Center, of which he was a member of the board.

Retired Court of Appeals Judge Albert M. Rosenblatt said his friend Miller’s renditions of Clarence Darrow displayed artistry and “an extraordinary humanity that embodied what Henry was all about.”

Rosenblatt said Miller was “a brilliant lawyer and a raconteur who could



have after-dinner audiences falling off their chair with laughter.”

Miller wrote articles for the NYSBA *Journal* and was a past columnist for the *New York Law Journal*. His book, *On Trial – Lessons from a Lifetime in the Courtroom*, garnered national attention. Johnnie Cochran described it as a “must read.”

NYSBA Past President Justin L. Vigdor (1985-86) served as president the year after Miller did. They worked closely at times on important issues of that era for the legal profession. They were also classmates at St. John’s Law School.

“He could have been with any major law firm in New York City but preferred practicing in a small firm in White Plains,” said Vigdor. “He was an all-around fine person, very intelligent. He made a presence when he entered a room . . . had great people skills, very warm, caring. He’ll be missed in the profession.”

## NO ONE IS UNTOUCHED: HELP-AVERSE LAWYERS MEET HELPLESSNESS IN COVID-19

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Lawyer Assistance Program is financial worry, particularly from solo and small-firm practitioners. Whiteley said, “This is the number one thing that is discussed by far: from very basic paying rent [concerns] to making sure their staff is taken care of. There’s no work coming in the door.”

Coreno explains, “Lawyers are saying ‘I don’t know how I am going to pay my staff.’ It is a very humbling and painful moment for people who are used to being accomplished. It is about borrowing money, getting a loan, making tough decisions and feeling like we might look less effective.”

A lot of this stems from anticipatory anxiety, said Coreno. She explained that lawyers are trained to envision the worst-case scenario for clients and

how to protect them. “The question is how do we support each other to break the cycle,” she said. “We break that with community, resources and tools. We have tools to help clients that we can use to help each other.”

She said that when she has met with clients, including landlords wondering if they are going to receive rent checks, “the goal is to become laser-focused on the road to empowerment.”

With lawyers, the same skill set applies. “We have the ability to empower our clients and make decisions. We need to apply that to ourselves. That’s the key.”

**THE ROLE OF THE BAR**

Elizabeth Eckhardt, director of the Nassau County Bar’s Lawyer Assis-

tance Program, said she has found that lawyers are looking for a sounding board right now. She sees bar associations as a “place for lawyers to go for facts and insight as well as a family for them to be connected to and talk to.” She pointed out, “Attorneys are trying to figure this out themselves and mentally prepare for what they tell their clients. This is hitting them in a personal way.”

Coreno explained, “Bar associations, to a large degree, are the cultural and community leaders for the profession.” The role is to level an issue with hope, empowerment, resources, and dialogue. “The heart and soul of the legal profession stops and starts with the association of lawyers themselves,” added Coreno.

## COPING WITH COVID-19 AND AVOIDING THE “COVID 19”

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appetite. The exercise will also boost your immune system.

Being outside will improve your mood, as people feel better around nature, and being in the sun will raise your level of vitamin D, which will also help your immune system. One caveat: if you are prone to allergies, see a doctor or take your antihistamines to reduce potential lung inflammation. Also, go outdoors early in the morning or in the evening, when pollen levels are lowest.

To make sure you exercise, schedule it in like you would a client videoconference. When it is time to exercise, exercise. There are no excuses.

As always, you should stay hydrated. Drinking water will improve your mood and your immune system. It will also make you feel fuller so you will not want to eat as much.

Make sure you adopt a regular sleep schedule and get 7.5 hours sleep a night, which has been found to reduce the chance of obesity. Do not stay up late binge-watching television, as the blue light from the screen can affect the quality of sleep. Read a book before bed instead. Better sleep will reduce stress and improve your immune system.

If you eat better, sleep better, and exercise more, you will have more energy and a better outlook and be better able to deal with stress. You will also have a better chance of resisting the coronavirus or having a mild case. You spent three months studying for the bar exam. You can spend three months flattening the curve.

*Robert Herbst is a member of NYSBA’s Task Force on Attorney Well-Being and chair of its Subcommittee on Attorney Physical Fitness and Health.*

## COVID-19 IMPACTS STATE BUDGET PROCESS, CLOUDS SPENDING PLAN

*continued from page 47*

asset transfers prior to application for Medicaid-funded community care.

The final budget also included statutory changes to limit the liability of health care providers in the context of the COVID-19 crisis. The new provisions increase the standard of liability to willful or intentional criminal misconduct, gross negligence, reckless misconduct or intentional infliction of harm.

Legislative leaders have stated that they are willing to return to session later this year in order to consider other legislation, but at this time the legislative calendar for the coming months is unclear.

*Ronald Kennedy is NYSBA’s director of government relations. Adriel Colon-Casiano is an assistant director of government relations.*

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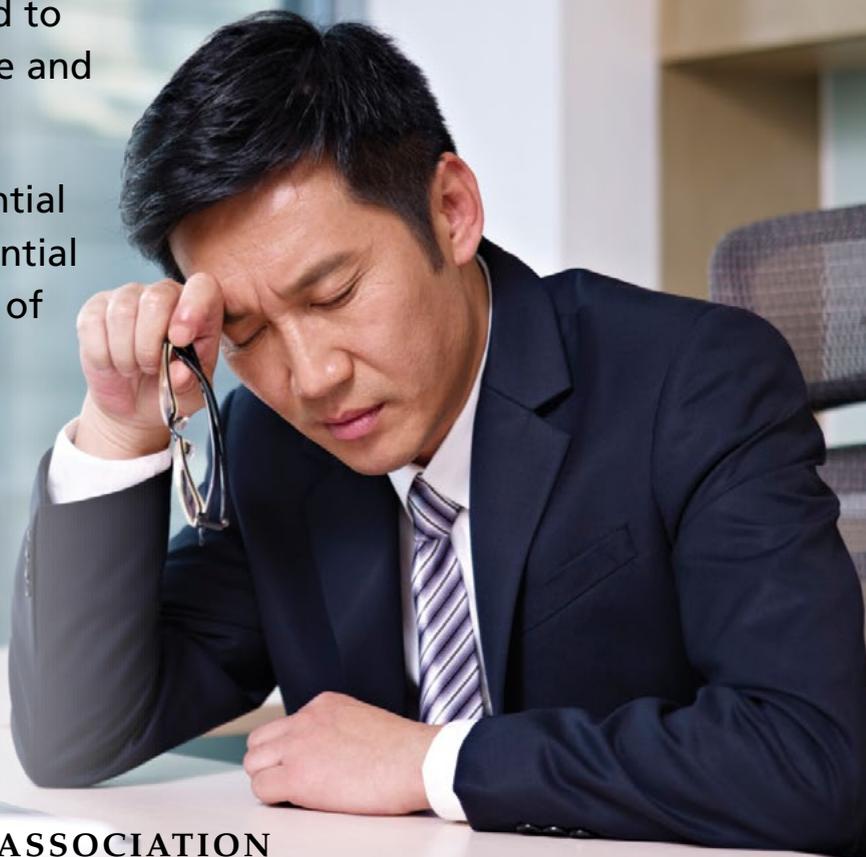
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# Marketing in the COVID-19 Era

By Carol Schiro Greenwald

It's scary out there. Every day the rules change. Many of us have no active clients, while others are being overcome with clients' questions. So, what's a lawyer to do? Let's acknowledge the magnitude of this pandemic and the stressful anxiety it causes. Then let's choose: On the one hand, you can be a Chicken Little. On the other, you can take the opportunity to focus on what you can control, which is yourself, your mindset, your practice, and your relationship with clients.

When large disruptions like COVID-19 burst upon the scene they create a vacuum in everyday life. This vacuum pulls in many parts of our lives, creates chaos, and spits out a recognizable but changed reality. Anticipate this future reality. Think ahead to what you want your career and practice to be when the "new normal" arrives. In an April 2, 2020 blog post, Susan Duncan, a Strategy and Business Development Consultant at RainMaking Oasis LLC, summed up the take-charge position: "As market conditions and client's needs change, this is a time to reassess where your practice is, where it will be in six months, and how to stay visible/on the radar, relevant, appreciated and in demand."

Are you thinking about where to begin such a seemingly daunting task? Let's begin with the most important component of your practice – your clients. Here we will review ideas for staying connected, becoming reconnected, and solidifying your marketing position as the go-to lawyer in your practice area for your target clients.

## STAYING IN TOUCH

The forced separation of stay-at-home restrictions has made everyone more desperate for authentic connection. This is the chance to ramp up your advisor skills and be the trusted confidante that your clients need.

Most clients value proactive advice from their lawyers. Pertinent advice puts their problems into a larger perspective, offers solutions from a different point of view, and suggests legal options that the client may not have considered.

Today, when people feel so vulnerable, shattered by the daily litany of COVID-19 cases and deaths, they may

want someone to be a good ear: just listen, comfort, empathize. Just being in the trenches together solidifies the trust foundation of your relationship.

Outreach becomes the thrust of your basic business development program. Begin by creating a planned approach to client touches:

- Why are you doing this?
- Whom should you call first?
- What is the rationale behind your prioritization?
- How many will you call every day?
  - Will you connect via telephone or videoconferences?
  - What will the setting be?
- What is the content of your basic outreach?
  - How will you customize your points to make them appropriate to each person?
- What will your follow-up be?
- How will you define success?

## WHY ARE YOU DOING THIS?

It is important to return to your goals before embarking on a major business development initiative. Write down what you want to communicate about yourself and your practice. Consider if you want to offer any of your expertise for free to specific client or community segments.

Think about how you want the person on the other end of the call to respond. How do you want them to feel afterwards?



### Carol Schiro Greenwald, Ph.D.

is a marketing and management strategist, coach and trainer. She works with professionals and professional service firms to structure and implement targeted, practical growth plans. Her book, *Strategic Networking for Introverts, Extroverts and Everyone in Between* (American Bar Association, Law Practice Division, 2019) explains how to create and implement an effective strategic networking plan.

## WHOM SHOULD YOU CALL FIRST?

You will want to segment your clients into tranches. Possible segments include favorite people you work with, “80/20” clients, newest clients, clients in an area you want to expand, and inactive clients. You may want to create a call list that is tied to the subject matter of your practice area, i.e., learn from the first people you speak to and pass those learnings on in subsequent calls.

## WHAT IS THE RATIONALE BEHIND YOUR PRIORITIZATION?

Tie the connect sequence back to your goals for growth in 2021. Think about how hard this will be for you to do. If you think you want to practice with people who can help you come across in a positive way, call clients who are friends. If you are confident that these calls will be easy to do, begin with the most important ones.

## HOW MANY WILL YOU CALL EVERY DAY? HOW WILL YOU CONNECT?

One of the most important practices to put in place during this strange time is a daily schedule. Working from home can blur the lines between work and play. By setting distinct periods for each activity, you can restore some of the stability you took for granted in your pre-COVID-19 routine.

You may want to use the phone for some clients but suggest videoconferences with others. You may also want to add in a bit of networking and suggest a three- or four-person videoconference coffee. You can then invite people with similar concerns or suggest that you each invite another person whom you think would be of interest to both of you.



## WHAT IS THE CONTENT OF YOUR BASIC OUTREACH? HOW WILL YOU CUSTOMIZE YOUR POINTS TO MAKE THEM APPROPRIATE FOR EACH PERSON?

As a client advisor and confidante, you will want to connect with them where they are, i.e., “walk a mile in their shoes.” Begin by asking about them, their situation, their hopes and fears, their most pressing concerns. Ask how you can help them. Sometimes just a shoulder to lean on is enough; other times they will have a specific need you can fill.

One employment lawyer says her daily calls personalize these dreadful times as she watches tragedy happen to her clients. Rules are changing so fast it leads to uncertainty that ends in frustration as people try to meet the changing environment. Another lawyer, calling former small business clients to see how they are, has uncovered so many business-breaking problems that she is working with them at no charge.

## WHAT WILL YOUR FOLLOW-UP BE?

Think ahead to follow-up options. Obviously, you will want to note any important information about the client in your contacts database. If this is a program, it should have what marketers call “strings”; that is, it should not be a one-shot deal. Think about asking clients if they would like another check-in call in a few weeks. Invite them to a videoconference, webinar or roundtable focused on their issues. Of course, use your own expertise to help them move forward or make introductions to other professionals who can be of assistance.

## HOW WILL YOU DEFINE SUCCESS?

After a call, success could be the good feeling you will have after an authentic connection. Or immediate work to resolve clients’ problems, or the sense that you have solidified a relationship.

After producing auxiliary marketing materials you may define success in terms of the number of people who read or comment on each piece, or what you feel is a growing appreciation of your expertise within your client base and among connections in the larger community.

## AUXILIARY ACTIVITIES

You should think about adding thought leader content to your touch plan. When creating this auxiliary piece, again go back to your goals and make a plan. Planning will help you to keep focused on your brand: how you

want people to view you. It becomes a funnel to distill topics that can position you as a solution from the myriad stories that appear every day. Then take the time to drill down into the details so that what you offer will showcase your substantive knowledge, professional attention to detail, and understanding of your clients’ needs going forward.

Content can appear in new blog posts, white papers, client advisories, and/or videos. Content could feature:

- Answers to recurring issues uncovered in your client calls.
- Your take on the relevance of new guidelines, laws, and regulations to your client base. Show how each new imperative will impact your clients.
- Sharing interesting articles with appropriate segments of your client base. Personalize the contact with an introductory note explaining why you are sending it and which parts are most applicable to them.
- Interview experts on topics of interest of your client base. Ask the interviewee to share the interview with his or her contact list.

Maximize your visibility beyond your clients by posting your outreach on LinkedIn, Facebook, and any other online sites favored by your colleagues, prospects, and clients. Bring up the subjects in videoconference networking meetings.

## CONCLUDING THOUGHTS

A client touch program can create a platform for “new normal” growth in many ways. It can guide restructuring and prioritization of your practice offerings to meet the immediate needs of clients emerging from this crisis. It will certainly help you answer your emotional need to connect in meaningful ways and, hopefully by connecting, reinforce their concept of you as their trusted advisor.

The auxiliary materials you produce will strengthen and expand your brand in the marketplace. It will keep you in front of people who can make introductions for you, hire you, and support you.

Think of the program as an easy way to keep in touch with people you care about while showcasing your human side and your professional expertise. Go forth, connect, learn, and relish the good feelings that come from helping others.

**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](mailto:journal@nysba.org).**

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## DEAR FORUM,

I am trying to diversify and expand my matrimonial practice by coming up with a flat rate structure that might appeal to couples working towards filing for an uncontested divorce. My thought was that I would charge a flat rate for mediation services with the intention of filing an uncontested divorce packet at the conclusion of the mediation. My contract with the couple would provide, however, that if the parties discontinue my services before resolving all of their issues, I would be paid at an hourly rate for my mediation services performed, and any unused amounts would be returned to the couple. Is this permissible under the Rules of Professional Conduct? For example, am I allowed to file legal papers on behalf of the couple if they both agree to it? Are there any issues I should consider if I do pursue

this plan when it comes to advertising? Also, when I was discussing this idea with my wife, she said that her psychiatry practice does a lot of couples counseling and they could offer a free counseling session to couples if it looked like they were going to try to stay together. Can I ethically refer that couple to my wife?

*Very truly yours,  
Mary Split*

## DEAR MARY SPLIT,

It is no secret that Alternative Dispute Resolution (ADR) has become an increasingly important part of litigation that helps the parties reduce costs and resolve their disputes. Lawyers should be aware of the unique issues they face when they serve as a third-party neutral instead of the client's counsel. The New York State Bar Association



(NYSBA) Committee on Professional Ethics has opined that lawyers acting as mediators are not engaged in the representation of a client and are not providing legal services to the parties to the mediation. *See* NYSBA Comm. on Prof'l Ethics, Op. 999 (2014); *see also* NYSBA Comm. on Prof'l Ethics, Op. 1026 (2014). In other words, an attorney-client relationship is not established when the lawyer is acting as a third-party neutral. Consequently, the Rules of Professional Conduct (RPC) that apply when a lawyer represents a client including, for example, Rule 1.5 concerning fees, do not automatically apply in the context of a lawyer providing mediation services. *Id.* However, certain other rules will apply to lawyer-mediators even in the absence of an attorney-client relationship. *See* RPC 5.7, Comment [4].

For example, RPC 2.4 specifically governs an attorney's ethical obligations when acting as a third-party neutral. The Rule states, "a lawyer serves as a 'third-party neutral' when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter." RPC 2.4(a). Subsection (b) of RPC 2.4 requires the lawyer-mediator to inform unrepresented parties that the lawyer is not representing them and explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client. *See* RPC 2.4(b). Therefore, unless all mediating parties are represented by counsel, it is imperative for the lawyer-mediator to adequately explain the boundaries of his or her role to assure there is no confusion. *See* NYSBA Comm. on Prof'l Ethics, Op. 878 (2011). However, the extent of explanation required under RPC 2.4(b) will depend on the particular sophistication and bargaining power of the parties involved, the subject matter of the proceeding, as well as the particular features of the dispute resolution process selected. *See* RPC 2.4, Comment [3].

While attorneys are permitted to act as third-party neutrals in the matrimonial context, it is generally more difficult for the lawyer-mediator in matrimonial matters to provide an effective explanation regarding the difference between their role as a lawyer-mediator compared to their role when representing a client, particularly where the parties are not represented by counsel. *See* NYSBA Comm. on Prof'l Ethics, Op. 736 (2001). Specifically, the NYSBA Committee has recognized that:

the complex and conflicting interests involved in a particular matrimonial dispute, the difficult legal issues involved, the subtle legal ramifications of particular resolutions, and the inequality in bargaining power resulting from differences in personalities

or sophistication of the parties make it virtually impossible to achieve a result free from later recriminations or bias or malpractice, unless both parties are represented by separate counsel. In the latter circumstances, [simply] informing the parties that the lawyer "represents" neither and obtaining their consent, even after a full explanation of the risks, may not be meaningful; the distinction between representing both parties and not representing either, in such circumstances, may be illusory. *Id.*

Therefore, for matrimonial matters, the lawyer-mediator must carefully consider the above considerations before deciding whether to undertake, or possibly end, the mediation, because a party's interests cannot be fairly protected without obtaining independent legal advice or because a party needs a lawyer's assistance to protect against overreaching by his or her spouse. *Id.*

In addition, a lawyer-mediator should be aware of the confidentiality obligations that apply even in the absence of an attorney-client relationship. While Rule 2.4, by itself, imposes no duty of confidentiality upon the lawyer-mediator, Comment [3] to Rule 1.12 provides that lawyers who serve as third-party neutrals typically owe the parties a duty of confidentiality under the codes of ethics governing third-party neutrals. *See* RPC 1.12 Comment [3]; *see also* NYSBA Comm. on Prof'l Ethics, Op. 1026 (2014). In light of the guidance given by Comment [3] to RPC 1.12, a prudent lawyer acting as a third-party neutral should become familiar with RPC 1.6, which governs the confidentiality of information. Likewise, in addition to the obligations imposed by the RPC, a lawyer acting as a third-party neutral also may be subject to court rules or other laws of their particular jurisdiction that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. *See* RPC 2.4 Comment [2]. As such, we recommend that any lawyer serving as a third-party neutral research the substantive law and ethics codes that may apply to him/her in his or her capacity as a mediator. *Id.*

Accordingly, as long as you comply with RPC 2.4 and any applicable state laws, the lawyer-mediator is generally free to conduct the mediation as the lawyer-mediator sees fit, including contracting for and structuring his or her fee however the lawyer-mediator would like. *See* NYSBA Comm. on Prof'l Ethics, Op. 1178 (2019). Therefore, in response to your question, you are permitted to charge a flat fee for mediation services with the caveat that you will charge an hourly rate for such services in the event the parties discontinue your services before resolving their dispute. The fee arrangement should, of course, be spelled out in writing in a pre-mediation agreement.

Should you succeed in helping the parties reach an agreement, you are also permitted to assist them in the

preparation of a writing memorializing the terms of their agreement during the mediation and file an uncontested divorce packet. *Id.* The NYSBA Committee on Professional Ethics has averred that a lawyer-mediator is permitted to file legal papers on behalf of the couple if they both agree to it. *See* NYSBA Comm. on Prof'l Ethics, Op. 736 (2001). The NYSBA Committee has stated: “[a]n attorney-mediator may prepare divorce documents incorporating a mutually acceptable separation agreement and represent both parties only in those cases where mediation has proven entirely successful, the parties are fully informed, no contested issues remain, and the attorney-mediator satisfies [the applicable conflict rules].” *Id.*

In some cases, a lawyer who serves as a third-party neutral, particularly in the context of matrimonial mediation, may be subsequently asked to serve as a lawyer representing a client in the same matter. RPC 1.12(b) permits the lawyer-mediator to represent one party in filing a divorce action in court at the conclusion of the mediation, so long as the other party gives informed consent, confirmed in writing. *See* NYSBA Comm. on Prof'l Ethics Op. 1178 (2019). It might be advisable to address this possibility in a pre-mediation agreement. Under these circumstances, if the former mediator ends up representing one of the parties, the lawyer, of course, owes all duties accompanying an attorney-client relationship under the RPC to the represented party. *Id.* However, under no circumstances (even with informed consent) will the former-mediator be able to represent both parties in a divorce proceeding. *See* RPC 1.7(b)(3).

On the issue of advertising your mediation services, RPC 7.1 governs attorney advertisements, and RPC 1.0(a) defines the term “advertisement” as “any public or private communication made by or on behalf of a lawyer . . . the primary purpose of which is for the retention of the lawyer or law firm.” RPC 7.1(a) prohibits any advertisement that is false, deceptive, misleading or that violates any of the other RPC. Comment [3] to RPC 7.1 further notes, “[a] truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer’s services, or about the results a lawyer can achieve, for which there is no reasonable factual foundation.” RPC 7.1 Comment [3]. As such, a lawyer-mediator may advertise its mediation services so long as the lawyer-mediator is truthful and not misleading when advertising or otherwise communicating the mediator’s qualifications, experience, services, and fees. *See* RPC 7.1. You should be careful, for example, not to tout your success rate on such matters. RPC 7.1(e) requires that the information contained in the advertisement be factually supported as of the date on which the advertisement is

published or disseminated, and contain the disclaimer “Prior results do not guarantee a similar outcome,” and in the case of a testimonial or endorsement from a client for a matter still pending, the client must give informed consent confirmed in writing. *See* Rule 7.1(e).

Lastly, turning to whether you are ethically permitted to refer the couples you work with to your wife’s psychiatry practice for a free consultation, you should be mindful of RPC 8.4(c), which provides that an attorney “must not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” Thus, pursuant to RPC 8.4(c), you are required to make clear disclosures that the psychiatrist is your spouse, that the free session might not be sufficient to resolve every issue between the parties, and that there is a possibility that you may derive an indirect benefit from fees charged to the parties by your spouse for work beyond the free consultation session. *See* NYSBA Comm. on Prof'l Ethics, Op. 999 (2014).

*Sincerely,*  
*The Forum by*  
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## QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

### DEAR FORUM:

I am the managing partner of a general practice law firm of approximately 40 lawyers and 20 staff members. In response to the recent pandemic, all firm employees are required to work from home. While the safety of the firm’s employees is always a top priority, our management team has concerns about how our employees remain in compliance with their ethical obligations during this time. Specifically, with many of our attorneys working in close quarters to other family members, how can they best ensure they are safeguarding client’s confidentiality?

Additionally, our firm has implemented a number of practices to facilitate a seamless transition when working from home. For example, we provide remote access to our work applications. We also provide a firm-hosted cloud-based file-sharing service so that our employees can transfer multiple and high-volume files to clients, as

well as one another, throughout the workday. Are there any specific ethical obligations we should be aware of with respect to the technology and working from home? How can our firm ensure that we are using technology safely, effectively, and in compliance with our ethical obligations?

Given that face-to-face communications are severely limited, and individual accessibility is uncertain, what are our ethical obligations with respect to the supervision of subordinate attorneys and staff? Are they lessened in any way due to the circumstances?

Separately and surprisingly, we have reached out to adversaries requesting extensions of deadlines, and one adversary in particular was obstinate, refusing to give us an extension, despite the fact that my client was one of the many individuals who fell ill during the public health crisis. As a result, we were forced to make an application to the court. Is our adversary's conduct ethical? Does this conduct rise to the level of notifying the grievance committee?

*Sincerely,  
Patty Partner*



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# MARKETPLACE

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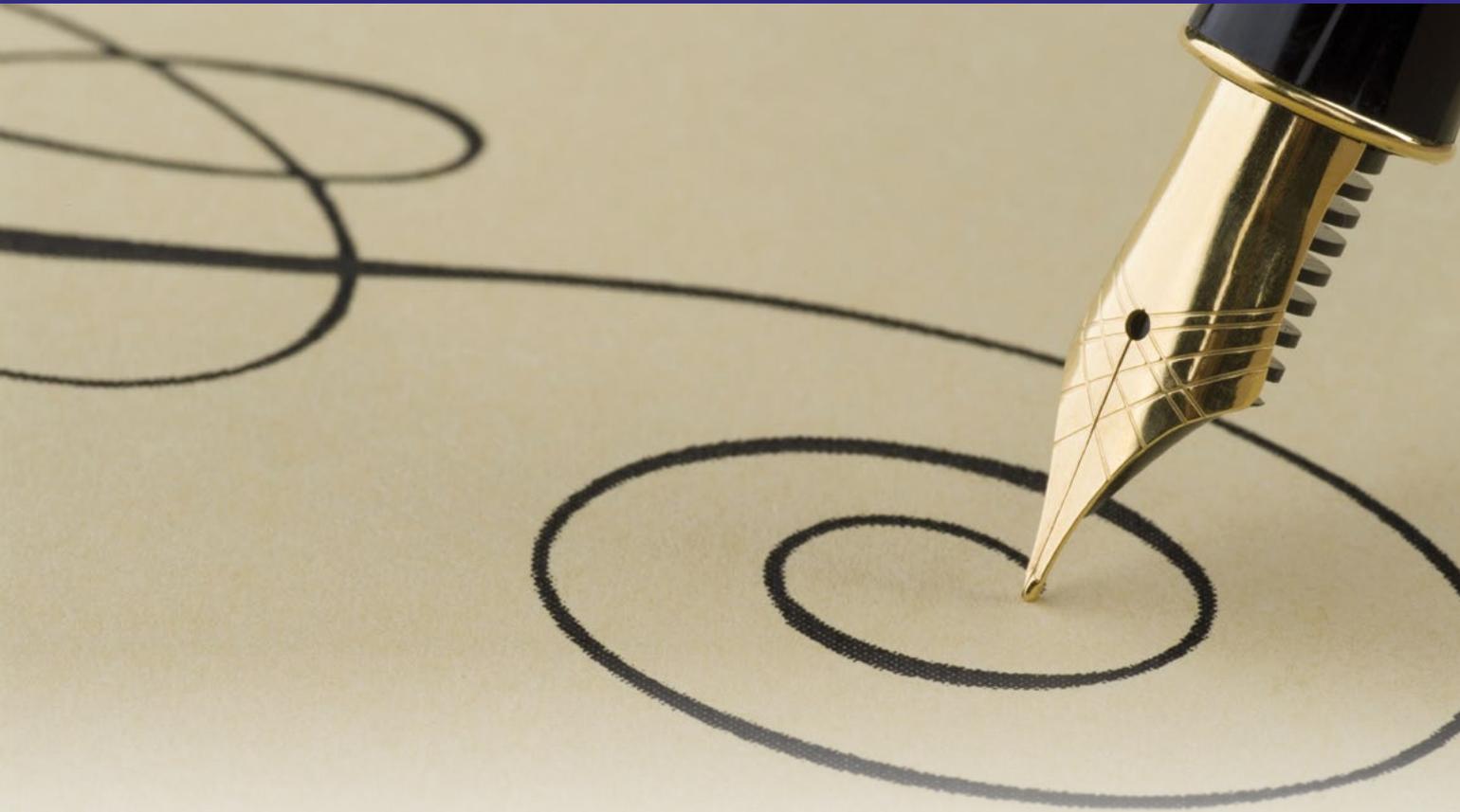
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# Thoughts on Legal Writing From the Greatest of Them All: Joseph M. Williams— Part II

**T**he Legal Writer continues its series on what we can learn from the great teachers of writing. In the last issue of the *Journal*, we addressed the late Joseph M. Williams’s advice on clarity in his authoritative work, *Style: Lessons in Clarity and Grace*’s, now co-authored by Boston University Professor Joseph Bizup. In this second

part of this two-part column, we focus on Williams’s advice on writing gracefully.

## GRACE

*“The effect of elegance follows from the principles of clarity and coherence, deftly applied and adapted.”<sup>1</sup>*

**Gerald Lebovits** (GLEbovits@aol.com), an acting Supreme Court justice in Manhattan, is an adjunct at Columbia, Fordham, and NYU law schools. For her research he thanks Jingru Li (NYU School of Law), his judicial fellow.

**Be concise.** Concision is the first feature of graceful writing. Williams asked writers to “use just enough words to say what you mean.”<sup>22</sup> “[N]ot too much, not too little, but just right.”<sup>23</sup> To turn wordy sentences into concise ones, he advised writers to “delete meaningless words,”<sup>24</sup> “delete doubled words,”<sup>25</sup> “delete what readers can infer,”<sup>26</sup> “replace a phrase with a word,”<sup>27</sup> “change negatives to affirmatives,”<sup>28</sup> and “delete adjectives and adverbs.”<sup>29</sup>

Williams also railed against metadiscourse. He defined “metadiscourse” as “language that refers to the writer’s intentions, directions to the reader, and the structure of the text.”<sup>10</sup> In his view, writers must limit their metadiscourse; metadiscourse buries their ideas.<sup>11</sup> Metadiscourse that attributes ideas to a source, announces topics, or describes structure such as *have been observed*, *this section introduces*, and *firstly* can be eliminated without any loss of meaning.<sup>12</sup> But Williams also reminded writers that they shouldn’t go too far in cutting wordiness. Concision is good; terseness isn’t.<sup>13</sup>

**Start a sentence with its point.** The shapely structure of sentences features graceful writing.<sup>14</sup> Williams’s first piece of advice on forming a shapely sentence is to state your point upfront.<sup>15</sup> Williams suggested beginning sentences “with something short and direct that frames the more complex information that follows.”<sup>16</sup> Doing that allows writers to offer readers context upfront to help readers manage the coming complexity more easily.<sup>17</sup> To make a point near the sentence’s beginning, writers must shorten openings and start the sentence quickly. Williams proposed two rules for that purpose. One is to “get to the subject quickly.”<sup>18</sup> Long introductory phrases and clauses frustrate readers. Avoid them.<sup>19</sup> The other is to “get to the verb and object quickly.”<sup>20</sup> That requires writers not only to avoid long, abstract subjects, but also to avoid interruptions between the subject-verb and the verb-object connections.<sup>21</sup>

**Control sprawling endings.** Williams noted that a sentence, even one well started, won’t be graceful if it sprawls.<sup>22</sup> A sentence sprawls if it keeps tacking clauses or phrases of the same kind onto another. Williams suggested four things to cure sentence sprawl.<sup>23</sup>

- Reduce relative clauses to phrases by deleting *who/that/which* and *is/was*, and then adjust the remaining verb properly, such as by adding *-ing*.<sup>24</sup> A sprawling sentence might read like this: “No scientific advance is more exciting than genetic engineering, **which** is a new way of manipulating the elemental structural units of life itself, **which** are the genes and chromosomes **that** tell our cells how to reproduce to become the parts **that** constitute our bodies.”<sup>25</sup> Rewrite it: “Of the many areas

of science important to our future, few are more promising than genetic engineering, **which** is a new way of manipulating . . . , **which** are the genes and chromosomes that tell . . . .”<sup>26</sup>

- “Turn subordinate clauses into independent sentences.”<sup>27</sup> Rewrite the above sprawling sentence: “Many areas of science are important to our future, but few are more promising than genetic engineering. It is a new way of manipulating the elemental structural units of life itself, the genes and chromosomes that tell . . . .”<sup>28</sup>
- “Extend a sentence with a resumptive, summative, or free modifier.”<sup>29</sup>
  - › A resumptive modifier is a modifier that repeats a key word and then adds descriptive details about that word. *Example*: “Since mature writers often use resumptive modifiers to extend a line of thought, we need a word to name what I am about to do in *this sentence*, a sentence that I could have ended at that comma, but extended to show you how resumptive modifiers work.”<sup>30</sup>
  - › A summative modifier is a modifier that summarizes the substance of the main clause going before. *Example*: “Economic changes have reduced the region’s population growth to less than zero, a demographic event that will have serious social implications.”<sup>31</sup>
  - › A free modifier is a modifier that comments on the subject of the closest verb. *Example*: “Free modifiers resemble resumptive and summative modifiers, letting you extend the line of a sentence while avoiding a train of ungainly phrases and clauses.”<sup>32</sup>
- Extend a sentence with well-formed coordination after verbs.<sup>33</sup> Williams defined coordination as the “foundation of a gracefully shaped sentence.”<sup>34</sup> He recommended paralleling the elements “both in grammar and in sense”<sup>35</sup> and ordering them “from shorter to longer, from simpler to more complex.”<sup>36</sup> *Example*: “No civilization has experienced such rapid alterations *in* their spiritual and mental lives *and in* the material conditions of daily existence.”<sup>37</sup>

**Construct balance and symmetry.** In Williams’s opinion, “the most striking feature of elegant prose is balanced sentence structure,”<sup>38</sup> one of its parts “echoing another in sound, rhythm, structure, and meaning.”<sup>39</sup> To balance one part of a sentence against another, writers can coordinate elements grammatically with conjunctions like *and*, *but*, (*n*)*or*, *both X and Y*, *not only X but*

also *Y*, (*n*)*either X (n)or Y*.<sup>40</sup> They can also balance phrases and clauses that aren't grammatically coordinate.<sup>41</sup>

Williams illustrated non-coordinated balance with this example: "Were I trading scholarly principles for financial security, I would not be writing short books on minor subjects for small audiences."<sup>42</sup> Here, a subordinate clause "*Were I trading*" balances the main clause "*I would not be writing*"; the object of the subordinate clause "*scholarly principles*" balances the object in the prepositional phrase "*financial security*"; and the object in the main clause "*short books*" balances objects in two prepositional phrases: "*minor subjects and small audiences*."<sup>43</sup>

Williams encouraged writers to build up balance patterns. It's hard work, but it's worth the effort. Balance patterns "don't just shape your thinking; they generate it."<sup>44</sup> Writers trying to create a balanced unit must find an element echoing a part that's already in their minds.<sup>45</sup>

**End sentences with emphasis.** Williams stressed that how writers end a sentence determines whether the sentence has rhythm and grace.<sup>46</sup> Good writers end a sentence with words that deserve stress, all to fulfill their readers' expectations to find new, long, and complex information toward the end of a sentence.<sup>47</sup> Williams offered six devices to help writers shift emphatic words to the right and toward the end of a sentence, where they'll get particular emphasis.

- **There shift.** Use "there be" constructions to shift a subject to the right to emphasize it.<sup>48</sup> *Example:* "There are several syntactic devices that let you manage where in a sentence you locate units of new information."<sup>49</sup>
- **Passive shift.** Use a passive verb to "flip a subject and object to get old and new information in the right order."<sup>50</sup> *Example:* "Some claim that aspects of behavior that we think are learned are in fact influenced by our genes. Our genes, for example, seem to determine. . . ."<sup>51</sup>
- **What shift.** Use a what-clause to shift a part of the sentence to the right to emphasize it.<sup>52</sup> *Example:* "What we need is a monetary policy that would end fluctuations in money supply, unemployment, and inflation."<sup>53</sup>
- **It shift.** Start a sentence with an "it" and move a subject consisting of a long noun clause to the right.<sup>54</sup> *Example:* "It once seemed inevitable that oil prices would be set by OPEC."<sup>55</sup>
- **Not only X, but (also) Y (as well).** The *but* will emphasize the last element of the pair. *Example:* "We must not only clarify these issues but also develop trust."<sup>56</sup>

- **Pronoun substitution and ellipsis.** Use a pronoun or ellipsis instead of repeating a word at the end of a sentence to avoid a flat end caused by repeated words.<sup>57</sup> *Example:* "A sentence will seem to end flatly if at its end you use a word that you used just a few words before, because when you repeat that word, your voice drops. Instead of repeating the noun, use a *pronoun*. The reader will at least hear emphasis on the word just before it."<sup>58</sup> Williams also illustrated five categories of emphatic words that can create strength in a sentence's stress position, namely, its end.
- **Weighty words.** Williams weighed nominalizations the heaviest, followed by other nouns, adjectives, adverbs, and prepositions.<sup>59</sup>
- **Of + Weighty words.** "The light *of* (followed by a lighter *a* or *the*) quickens the rhythm of a sentence just before the stress of the climactic monosyllable."<sup>60</sup>
- **Echoing salience.** A sentence ends with special emphasis "when a stressed word or phrase balances the sound or meaning of an earlier one."<sup>61</sup>
- **Chiasmus.** "Chiasmus balances elements in two parts of a sentence, but the second part reverses the order of the elements in the first part."<sup>62</sup> *Example:* "A concise style can improve not only our own thinking but the understanding of our readers."<sup>63</sup>
- **Suspension.** Instead of always starting a sentence with a short clause, sometimes writers can "open a sentence with a series of parallel and coordinated phrases and clauses"<sup>64</sup> — a suspension — to "heighten a sense of climax."<sup>65</sup> But don't overuse this device. "The less it's used, the bigger its bang."<sup>66</sup>

**Clarity trumps elegance.** Williams admitted that there's no rule for writing elegantly.<sup>67</sup> Compared to clarity and coherence, the qualities of elegance are more varied and harder to master.<sup>68</sup> Nevertheless, he summarized three characteristics of an elegant passage: "the simplicity of characters as subjects and actions as verbs; the complexity of balanced syntax, meaning, sound, and rhythm, and the emphasis of artfully stressed endings."<sup>69</sup> He also believed that "for a sentence or passage to be elegant, it must first be clear and coherent."<sup>70</sup> Thus, he urged writers to start by learning how to write clearly and mastering the major principles of clear writing, such as "characters as subjects, actions as verbs, old before new, short before long, and topic then stress."<sup>71</sup> Then, to approach elegance, writers must "read those who write elegantly and, through that apprenticeship, develop an elegant style of your own."<sup>72</sup>

## THE ETHICS OF STYLE

*“Write to others as you would have others write to you.”<sup>73</sup>*

At the end of *Style*, Williams emphasized the importance of writing ethically. He argued that writers owe readers a duty to write precise and nuanced prose. He outlined the core principle of ethical writing: Writers write honestly when they would willingly experience what their readers do when they read what the writers have written.<sup>74</sup> And then, they create “a style that is no simpler than our ideas require but also no more difficult than it has to be.”<sup>75</sup> Williams also explained that unclear writing can be the result of unintended obscurity or intentional misdirection. Unintended obscurity is an innocent shortfall.<sup>76</sup> Writers can correct their innocently unclear writing by using by the skills Williams shared in his lessons on clarity. Intended misdirection, however, is an intentional deception to disguise writers’ own interests and knowingly deflect readers’ feelings. That might raise a serious ethical issue.<sup>77</sup>

## CONCLUSION

Unlike clarity, “elegant writing is a matter not of rules but of technique, taste, and talent.”<sup>78</sup> But Williams believed that “techniques can be learned and practiced, and taste and talent can be educated and exercised.”<sup>79</sup> Thus, emulate, rewrite, and rewrite again. You’ll find your way.

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. Joseph M. Williams & Joseph Bizup, *Style: Lessons in Clarity and Grace* 174 (12th ed. 2016).  
 2. *Id.* at 123.  
 3. *Id.* at 135.  
 4. *Id.* at 123.  
 5. *Id.*  
 6. *Id.* at 124.  
 7. *Id.* at 125.  
 8. *Id.* at 126.  
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 10. *Id.* at 128.  
 11. *Id.*  
 12. *Id.* at 129.  
 13. *Id.* at 132.  
 14. *Id.* at 137-38.  
 15. *Id.* at 138.  
 16. *Id.* at 139.  
 17. *Id.*  
 18. *Id.* at 140.  
 19. *Id.*  
 20. *Id.* at 141.  
 21. *Id.* at 141-43.

22. *Id.* at 144.  
 23. *Id.* at 145.  
 24. *Id.*  
 25. *Id.* at 144.  
 26. *Id.* at 145.  
 27. *Id.*  
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 29. *Id.* at 158.  
 30. *Id.* at 146.  
 31. *Id.* at 147.  
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 33. *Id.* at 148.  
 34. *Id.*  
 35. *Id.* at 159.  
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 40. *Id.*  
 41. *Id.* at 162.  
 42. *Id.* at 163.  
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 52. *Id.* at 85.  
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 67. *Id.* at 161.  
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 70. *Id.* at 171.  
 71. *Id.*  
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 75. *Id.*  
 76. *Id.* at 177-78.  
 77. *Id.* at 177-81.  
 78. *Id.* at 161.  
 79. *Id.*

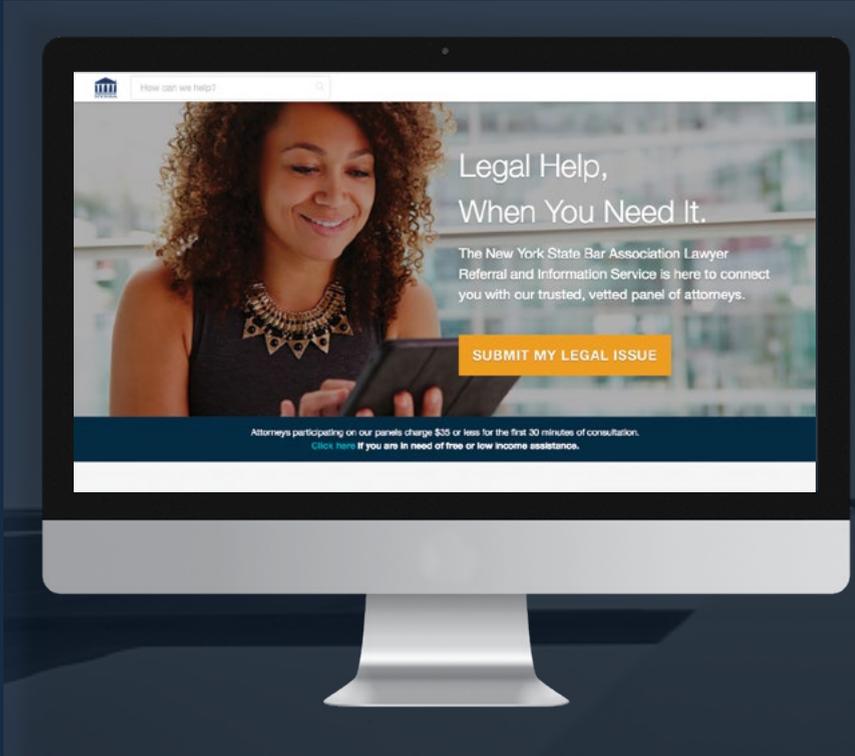


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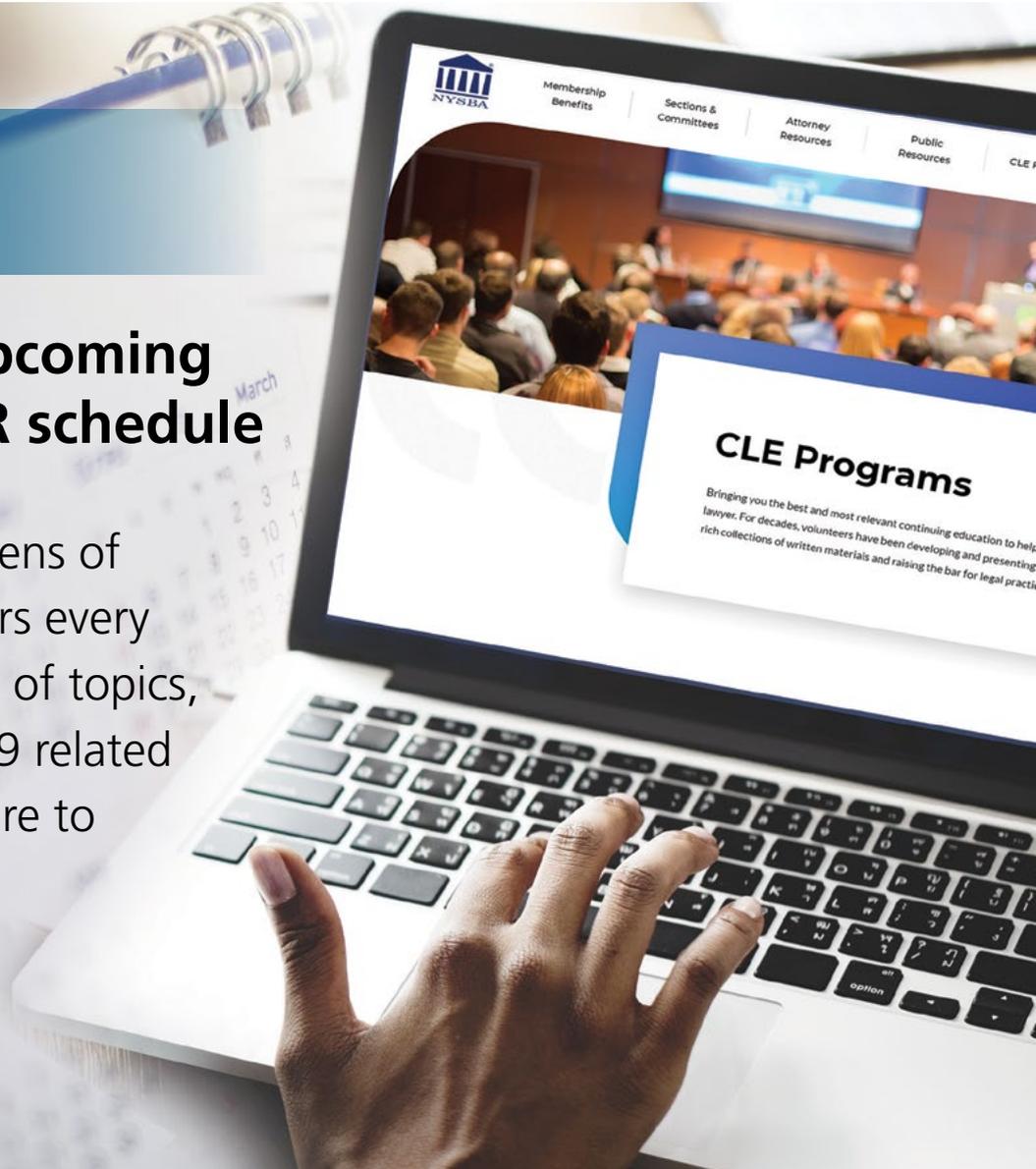
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