NEW YORK STATE BAR ASSOCIATION
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NYSBA
MARCH 2020
VOL. 92 | NO. 2

Social Equity in Cannabis Legalization

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"Thou Shalt Not Ration Justice"

Speaking at the Legal Aid Society of New York's 75th anniversary celebration in 1951, the immortal jurist Learned Hand observed: "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice."

Truer words in the law may never have been spoken. Yet here we are some 70 years later and universal access to justice is far from a reality.

The United States ranks 103rd out of 126 countries in the accessibility and affordability of civil legal services. Poor and most middle-income Americans receive inadequate or no legal assistance when facing civil legal challenges. A study of ten major urban areas revealed that an estimated 76% of civil matters had at least one self-represented party. The access to justice crisis is even more dire in rural communities, where there is an exodus of lawyers, fewer young lawyers are choosing to practice, and a majority of those who remain are at or near retirement age.

The situation is deteriorating for the poor charged with crimes. In 1963, the U.S. Supreme Court handed down *Gideon v. Wainwright,* requiring states to provide legal counsel to indigent defendants charged with a felony. The organized bar and judiciary in New York have fought to make real *Gideon's* promise, by securing passage of legislation in 2017 that requires full state funding of indigent criminal defense services in all 62 counties.

But this victory was incomplete. It did not increase assigned counsel rates in New York state courts. The last increase in those rates occurred more than 15 years ago — in 2004 — when they were raised to a meager $60 an hour for misdemeanors and lesser offenses, and $75 per hour for felonies and all other cases. The cost per case is capped at $4,400.

The assigned counsel rates are an affront to the administration of justice. By contrast, assigned counsel in federal courts receive $152 an hour for non-capital cases, and the federal Criminal Justice Act provides for annual rate increases. It is an outrage that New York's assigned counsel rates are less than half what the federal government deems appropriate to ensure the Constitutional right to counsel.

The state's woefully low (if not unconstitutional) assigned counsel rates have severe consequences. Attorneys are declining to serve on assigned counsel panels, which impacts civil as well as criminal proceedings. Since 2014, fully one-third of the attorneys serving on attorney-for-the-child panels across the state have dropped out of the program.

Even as so many dedicated lawyers continue to selflessly represent the poor on a pro bono basis and civil legal service providers do extraordinary work for their clients throughout the state, the justice gap widens every day. The New York State Bar Association is leading the way to address the ever-worsening crisis.

In addition to fighting in the Legislature for increased funding, we have launched important new initiatives. In June 2019, for example, we established a Rural Justice Task Force, composed of 30 distinguished members of the upstate bench and bar. The task force is already being looked to by other states as a national model for addressing the accelerating access to justice crisis in rural communities across the nation.

At the same time, we are calling on the Legislature and Governor to establish a first-in-the-nation statutory right to counsel in New York immigration proceedings. Great disparities exist in the outcomes of immigration cases depending on whether an immigrant is represented by counsel.

This past February, we played a key role in brokering the passage of a landmark access to justice resolution at the

American Bar Association's midyear meeting in Austin, Texas. The resolution calls for "state regulators and bar associations to continue to explore regulatory innovations that have the potential to improve the accessibility, affordability and quality of civil legal services." This is an historic first step to rethink how legal services are delivered to the poor and middle class.

In a democratic society, lawyers are necessities, not luxuries. The assistance of counsel is a prerequisite for meaningful access to justice. Legal representation levels the playing field when a person faces a powerful legal adversary, like the government or a major corporation. In such circumstances, the lack of counsel denies people the ability to effectively defend or pursue their rights.

For a profession dedicated to equal justice under the law, lawyers cannot accept a status quo where justice is rationed for the financially disadvantaged. New York is a state of progress and promise. The eternal ideal of justice for all is our profession's lodestar, our guiding light. We must redouble our efforts to ensure that everyone has equal access to justice.

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

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7 Networking Receptions Statewide

April 27 – 28
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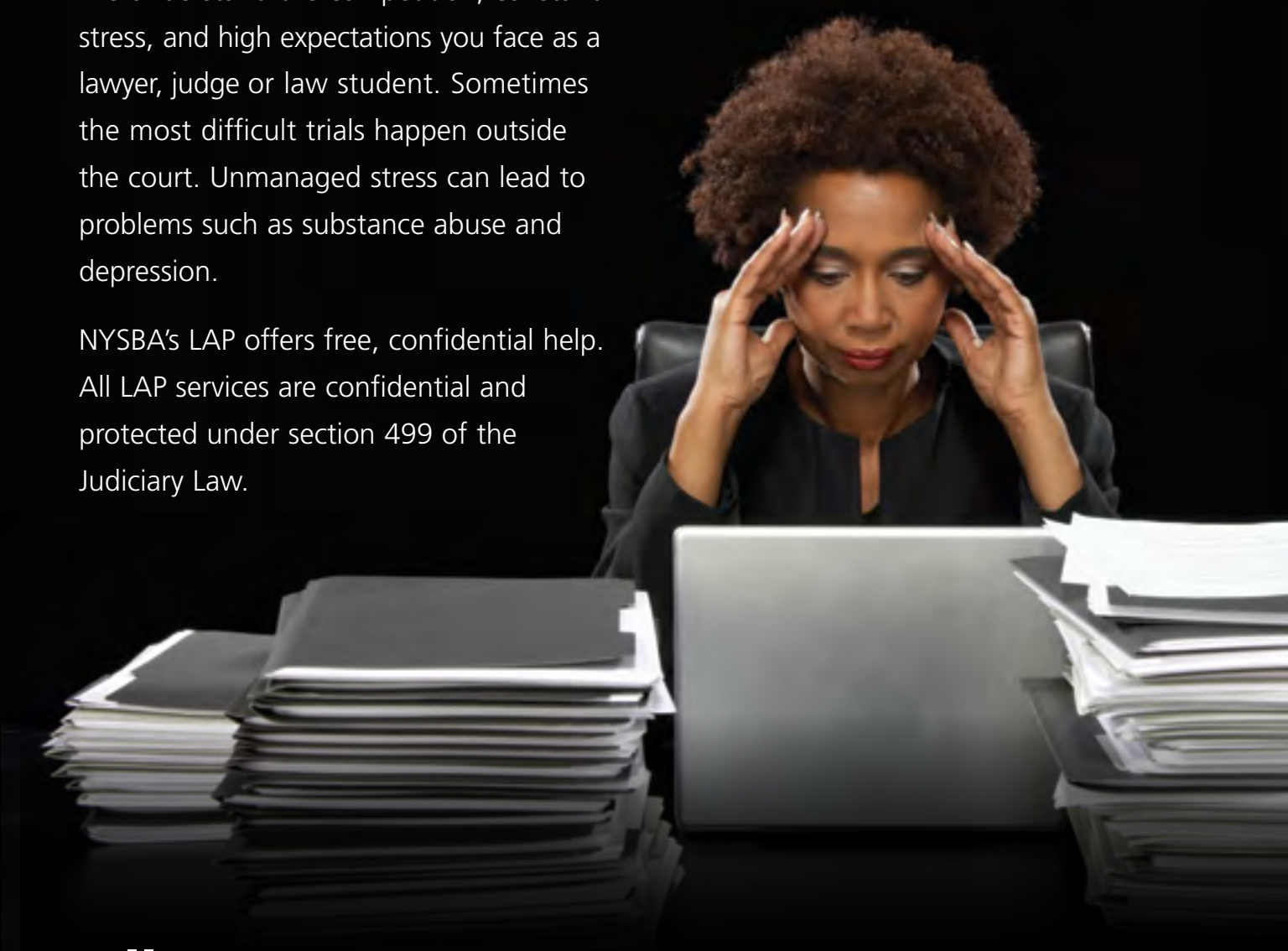

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NYSBA

Cannabis Legalization: Social Equity Provisions Are a Sticking Point and a Selling Point

By Aleece Burgio

Editor's Note: This article is adapted from the Initial Report of NYSBA's Committee on Cannabis Law Regarding Legalized Cannabis Legislation in New York State that was approved by the House of Delegates on January 31. The complete report can be viewed at www.nysba.org/cannabisreport/.

As more and more states across the U.S. legalize cannabis for adult use, social equity provisions have emerged as both a sticking point and a selling point. In New York, social equity has emerged as a central issue as Governor Andrew Cuomo and state legislators work this month to shape a legalization plan that would be included in the state budget that goes into effect on April 1.

In New York as in other states, businesses and deep-pocketed investors see the financial rewards of legal cannabis and are poised to take full advantage of lucrative markets. Social justice advocates – including state legislators working to advance legalization – want to ensure that minority communities with individuals who have been negatively and disproportionately impacted by cannabis prohibition will benefit from the newly legal industry.

Of the 18 states that have legalized medicinal or recreational cannabis since 2016, six have taken measures to increase diversity in their programs. Most of the first states to legalize cannabis, including Colorado and Washington in 2012, did not include provisions that state licenses to grow, process, or dispense marijuana would

Aleece Burgio is cannabis team leader at Barclay Damon in Buffalo. She began her legal career in Portland, Oregon at a boutique cannabis law firm, where she represented and advised cannabis businesses on medical and adult-use regulation issues. Her practice focuses on the complex process of structuring, licensing, and maintaining compliant cannabis businesses at the federal, state, and local levels. She has worked with a wide range of individuals and entities in the public and private sectors, including state regulatory agencies, financial institutions, and licensed businesses. aburgio@barclaydamon.com linkedin.com/in/aleece-burgio-47b263a5.

be distributed equitably or would positively impact disadvantaged communities.

States that have more recently enacted adult-use marijuana legislation, such as Massachusetts, have included social equity provisions.[1]

SOCIAL EQUITY PROVISIONS VARY FROM STATE TO STATE

In Massachusetts, a social equity program was created where applicants must either have lived for five of the last 10 years in an "area of disproportionate impact" and have an income under 400% of the federal poverty level, or they must have a past drug conviction or be a spouse or child of someone who does, and have lived in Massachusetts for the past year.

In addition, Massachusetts has an Economic Empowerment Priority Review Program, which prioritizes review and licensing decisions for applicants seeking retail, manufacturing, or cultivation licenses who are able to demonstrate business practices that promote economic empowerment in communities that have been disproportionately impacted by high rates of arrest and incarceration for marijuana possession offenses under state and federal laws.

Under Michigan's adult-use legislation, the state adopted social equity provisions that promote and encourage participation in the cannabis industry by individuals from communities that have been disproportionately impacted by cannabis prohibition and enforcement.[2] In addition, Michigan's marijuana regulatory agency established a social equity team, which provides one-on-one assistance with the social equity application, assistance preparing and completing the adult-use application, and education on marijuana rules and regulations as well as helping to connect participants with resources regarding the program.[3]

The most notable and controversial social equity program, however, was enacted by Illinois. Illinois' social equity program includes a range of provisions:

- Technical assistance and support are provided through the Illinois Department of Commerce and Economic Opportunity.
- Applicants from negatively impacted communities automatically receive 50 points out of a possible total of 250 on the application score.
- Extra points are provided for having a diversity plan or having a plan to engage the community, such as establishing an incubator program or contributing to local treatment centers.
- Diversity applicants have reduced application and license fees as well as options for low-interest loans.[4]

IMPLEMENTING SOCIAL EQUITY IN NEW YORK STATE

Both the Cannabis Regulation and Taxation Act (CRTA) proposed by Governor Cuomo and the Marijuana Regulation and Taxation Act (MRTA) sponsored by Assembly Majority Leader Crystal Peoples-Stokes and Senator Liz Krueger include mandated creation of a social and economic equity plan with components such as loans, business training, incentives for large companies to incorporate social justice into their business plans, and, to varying degrees, reinvesting tax revenues from cannabis sales into communities that have suffered under marijuana criminal enforcement.

However, neither contain a specific timeline for when the program would be implemented or how quickly license applications would be accepted after the bill becomes law.

The CRTA shares many similarities with the MRTA

marijuana sales. The MRTA sets aside 50% of tax revenue for community reinvestment in its social equity program, including grants to support job placement, adult education, and housing initiatives. The CRTA proposal contains no specific earmarks, but includes language noting that some money will be used for community reinvestment grants. That disparity has been cited as a large part of the reason that adult-use legalization failed to pass last year.[5]

NYSBA WEIGHS IN WITH DETAILED RECOMMENDATIONS

On January 31, 2020, the New York State Bar Association adopted the Committee on Cannabis Law's report that endorsed the legalization of adult-use marijuana in New York State with appropriate safeguards.[6]

The NYSBA report recommends that any recreational-use legislation include provisions for mandated testing, the creation of an office of cannabis management, opportunities for communities to opt out of sales, a social equity program, a state tax structure, advertising rules, and environmental protections.

For purposes of social equity, the NYSBA report recommends that New York State look to the six more recent states that have adopted social equity provisions to see which provisions have been effective in encouraging full participation in the regulated cannabis industry by individuals from communities that have been disproportionately harmed by marijuana prohibition and enforcement, and how to best use the tax proceeds from legalized cannabis in New York State to support those communities.

As part of that process, the report recommends that New York State commission an outside research entity to take a critical look at states with social equity programs for legalized marijuana to guide public policy decisions for what provisions to institute.

The NYSBA report recommends that New York should not adopt any specific social equity provisions until this analysis is complete, but that research should not prevent comprehensive regulation of legalized adult-use cannabis. However, to ensure that social equity measures be promptly considered and enacted, the report recommends that the comprehensive legislation expressly contain a two-year sunset and that a plan for social equity programs must be part of a recertification bill extending comprehensive cannabis regulations.

Specific provisions that the committee recommends New York State consider in its initial social equity programs and in ongoing analysis of legalization legislation include:[7]

- Developing incubator programs to provide direct support to small-scale operators who are marijuana license holders in the form of legal counseling services, education, small business coaching, and funding in the form of grants.
- Requiring licensees to use good-faith efforts in hiring employees who meet social equity eligibility criteria and certify annually that 25% of their employees meet the criteria or that they have use a good-faith effort to achieve that 25% threshold.
- Dedicating a percentage of local cannabis tax and non–licensing fee revenue to support a community reinvestment fund to, at a minimum, provide reentry services, job training, and criminal-record-change assistance to residents of disproportionately impacted areas.
- Banning local and state governments from discriminating against licensing applicants on the basis of their substance-use treatment history and convictions unrelated to honesty, and background checks can only be used to check for those convictions.
- Creating a basic framework for permitting cannabis-consumption lounges while leaving zoning to local governments. Local governments are authorized to regulate consumption lounges where cannabis may be used on site.
- Authorizing local governments to facilitate resentencing and expungement to restore the civil rights of prior cannabis arrestees and to fund these efforts through cannabis taxes. This can include automation, fee waivers, and funding legal fairs and lawyers to publicize and execute.

The NYSBA Committee on Cannabis Law report recognizes the importance of pursuing initiatives in New York State to reach individuals who have been economically disadvantaged and disproportionately impacted by the War on Drugs – and that that there is no "one size fits all" approach to addressing social equity in the implementation of legalized adult-use cannabis.

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1. Under Massachusetts Law, Part I Title XV, Chapter 94G, Section 4.

2. Michigan Regulation and Taxation of Marihuana Act., 333.27958 Rules; limitations., Sec. 8. 1.

3. Michigan.gov, Dep't of Licensing and Regulatory Affairs, Social Equity (Adult-Use Marijuana), https://www.michigan.gov/lara/0,4601,7-154-89334_79571_93535---,00.html.

4. Illinois Cannabis Regulation and Tax Act, Article 7.

5. *See* Rebecca C. Lewis, "Fight Over Marijuana Tax Revenue Ramps Up for Budget Season", City and State New York, https://www.cityandstateny.com/articles/policy/policy/fight-over-marijuana-tax-revenue-ramps-again-budget-season.html.

6. The committee is co-chaired by Aleece Burgio and Brian Malkin and is composed of members from the following NYSBA Sections, as well as other legal disciplines: Business Law; Commercial and Federal Litigation; Corporate Counsel; Criminal Justice; Elder Law and Special Needs; Entertainment, Arts and Sports Law Section; Food, Drug and Cosmetic Law, General Practice; Health Law; Intellectual Property Law; International Law; Labor and Employment Law; Real Property Law; Tax Law; Trusts and Estates Law; and Young Lawyers.

7. *See* " Minority Cannabis Business Association's Ten Model Municipal Social Equity Ordinances, https://cannabis.ca.gov/wp-content/uploads/sites/13/2019/07/MCBAs-Ten-Model-Municipal-Social-Equity-Ordinances.pdf.

NEW YORK STATE BAR ASSOCIATION
State Bar News

NYSBA Plays Key Role in National Access to Justice Measure

NYSBA President Hank Greenberg speaks at the American Bar Association Midyear Meeting in Austin in February.

By Christian Nolan

The New York State Bar Association played a crucial role in brokering the passage of an American Bar Association resolution that encourages state and local bar associations across the country to consider innovative approaches in expanding access to justice initiatives.

What was once a controversial proposal that NYSBA opposed, Resolution 115 was overwhelmingly supported by the ABA's 596-member House of Delegates on Feb. 17 following a weekend of negotiations.

Solving the Access to Justice Problem

"We know pro bono alone is not getting it done," NYSBA President Hank Greenberg told the ABA's governing body. "We know that indigent legal service providers alone are not getting it done to serve the poor and the middle class. The American Bar Association today stands tall, it stands proud . . . because this resolution gives us the opportunity today, tomorrow and in the years to come to be the leader in solving the access to justice problem, serving the public, our clients, and, yes our profession."

The resolution was initially proposed by the ABA Center for Innovation and supported by several standing committees of the ABA Center for Professional Responsibility. The measure calls for state regulators and bar associations to continue to explore regulatory innovations that have the potential to improve the accessibility, affordability and quality of civil legal services.

At least six states have proposed or adopted substantial regulatory changes that could loosen rules and others are considering similar proposals. For instance, California is considering allowing attorneys to share fees with nonlawyers and Utah has proposed allowing nonlawyers to invest in and own legal businesses.

NYSBA led the opposition to the initial resolution and accompanying 11-plus page report. In a letter sent to the ABA House of Delegates in late January, NYSBA–along with the state bar associations in Ohio, New

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NYSBA President Announces Massive Effort to Reach Out to World's Bar Associations

Hank Greenberg speaks to the International Section in January at NYSBA's Annual Meeting.

By Joan Fucillo

Over the next five months, New York State Bar Association President Hank Greenberg will reach out to every major bar association around the world.

"Our goal is to make connections and to enter into memoranda of understanding (MOUs) with as many international bar associations as possible," said Greenberg.

"This is the future of our association," he added. "There are 300,000 attorneys admitted to practice in New York. And 180,000 of them live and work outside of New York." Simply put, he noted, NYSBA needs to meet its members where they live.

Greenberg made the announcement at a luncheon meeting of NYSBA's International Section, part of the association's Annual Meeting, Jan. 27–31 in New York City.

An MOU memorializes the parties' intent to cooperate in areas of mutual benefit. It is an agreement to work to develop and strengthen relationships and to find areas for collaboration.

"Each MOU formally establishes our relationships with our international partners and allows us to work together with them to increase membership, provide resources to members of both organizations," Greenberg added. "Most important, it increases opportunities to provide support for the rule of law."

New MOUs

At a meeting in Seoul last fall, NYSBA representatives made connections with leaders of the Seoul Bar Association, Korea's largest. In November, when the International Section held its global conference in Tokyo, Greenberg met with leaders of Tokyo's major bar associations and its biggest law firms. Both meetings resulted in agreements to cooperate. Representatives from the Seoul Bar Association and the Dai-Ichi Tokyo Bar Association joined NYBSA leaders at the Annual Meeting, to formalize their relationships by signing MOUs.

Greenberg and Seoul Bar Association President JongWoo Park signed a memorandum of understanding between the two organizations on Wednesday, Jan. 29. The Seoul Bar Association is Korea's largest. With 20,500 members it represents nearly three quarters of the nation's lawyers.

At the signing, Greenberg expressed his pleasure at this new partnership.

"This agreement is enormously important to us, to the bar and to the International Section. It is the future of our membership," said Greenberg, noting that the largest segment of overseas

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NYSBA PRESIDENT ANNOUNCES MASSIVE EFFORT TO REACH OUT TO WORLD'S BAR ASSOCIATIONS

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attorneys being admitted in New York are from Asia.

President Park thanked President Greenberg and expressed his gratitude for the invitation to come to New York.

"We first met with NYSBA leaders in Seoul in 2018, and the document we signed today is a product of our discussions," said President Park, adding that among the goals is to have Korea-New York lawyer exchanges and to learn about each other's cultures and law.

On Thursday Greenberg and Kotaro Yamamoto, chairperson of the International Exchange Committee of the Dai-Ichi Tokyo Bar Association (DTBA), signed an MOU between the two organizations. The DTBA is one of the three largest bar associations in Tokyo.

"We are honored to meet such extraordinary leaders in the legal profession," said Greenberg. "When we met in Tokyo last fall, we knew we could work together. This is a great moment for our bar associations."

"This relationship is so prestigious for us too," said Mr. Yamamoto. "This is our tenth MOU. We have made an alliance with the American Bar Association and are happy to make a productive alliance with NYSBA."

Outreach effort

"This effort is critical to the association from a membership perspective, because one of our greatest opportunities for growth is international," said Greenberg. "It also is critical that we lawyers everywhere communicate and collaborate to fulfill our obligation to advance the rule of law around the world."

Section Chair Diane O'Connell observed that the section was on the cusp of a growth spurt.

"We have added a new chapter in South Africa and will see chapters in Texas and Chicago this year. We anticipate opening new chapters in Thailand and Uruguay in the future," said O'Connell. "Developing an understanding of each other's cultures and legal systems is key to good international relations and support for the rule of law throughout the world."

NYSBA now has MOUs with nine international bar associations. The International Section includes 65 chapters and members from more than 100 countries.

Fucillo, who recently retired, was NYSBA's senior messaging and communications specialist.

NYSBA PLAYS KEY ROLE IN NATIONAL ACCESS TO JUSTICE MEASURE

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Jersey, Delaware, Illinois and Pennsylvania–voiced their concerns with the initial proposal by arguing that it could lead to outside investment in law firms and unauthorized practice of law.

NYSBA Leads on Compromise Measure

"In New York state, the prohibition against nonlawyer ownership of law firms, the prohibition against fee splitting, the prohibition against the unauthorized practice of law is something akin to theology–it is a fundamental principle that has been affirmed and reaffirmed on countless occasions by the New York State Bar Association's governing body the House of Delegates," said Greenberg.

Greenberg explained that the ABA's initial report could be construed as contrary to what NYSBA believes are core principles of the profession. He said each and every concern was addressed, and the 11-plus page report was shrunk to just a page-and-a-half.

The ABA's final resolution and report does not embrace any individual state's single efforts. Rather, it encourages states to continue these endeavors and "ensure that changes are effective in increasing access to legal services and are in the interest of clients and the public."

Key Provision in Amended Resolution

The amended resolution also added the following key provision, which was negotiated by Greenberg with the resolution's proponents as a condition of NYSBA's support: "Nothing in this resolution should be construed as recommending any changes to any of the ABA Model Rules of Professional Conduct, including Rule 5.4, as they relate to nonlawyer ownership of law firms, the unauthorized practice of law or any other subject."

Rule 5.4 limits sharing of legal fees with nonlawyers as well as bars nonlawyer equity in law firms.

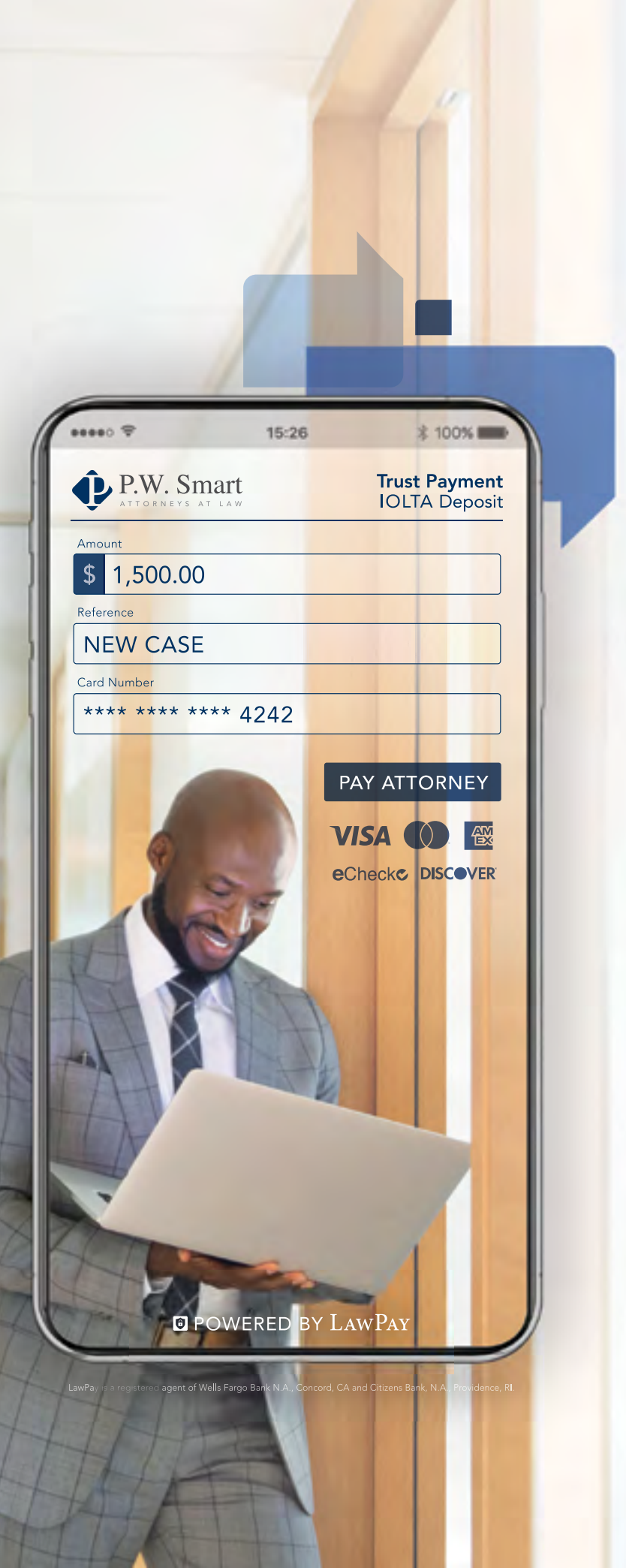
The end result was a resolution to which NYSBA proudly gives its "full-throated support," Greenberg said.

"We are left with a resolution all of us must embrace," said Greenberg. "Not as a debatable proposition but a simple fact - a fact that in America today, in New York and across the nation, access to justice is in crisis dimensions…"

ABA President Judy Perry Martinez told Bloomberg Law that attorneys need to work to come together on the access to justice issue.

"This is what lawyers do best. We have varying perspectives, but we listen to each other," Martinez told Bloomberg Law. "This was a significant day for the ABA."

Nolan is NYSBA's senior writer



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Domestic Violence Survivor-Defendants: New Hope for Humane and Just Outcomes

By Cynthia Feathers

Cynthia Feathers is the Director of Quality Enhancement for Appellate and Post-Conviction Representation at the New York State Office of Indigent Legal Services. Previously, she clerked at the Appellate Division – Third Department and thereafter handled civil appeals at the State Attorney General's Office in Albany, criminal appeals at the Center for Appellate Litigation in New York City, criminal and Family Court appeals at the Rural Law Center of New York in Castleton, and a range of appeals as a solo practitioner. Feathers has co-chaired the NYSBA Committee on Courts of Appellate Jurisdiction and served as Director of the NYSBA Pro Bono Affairs Department.

Over time, a community's sense of justice and fairness can shift, and such cultural changes can impact criminal sentencing laws. In New York, such a dynamic played out regarding drug crime sentencing laws. More than a decade ago, a movement coalesced to revamp Rockefeller Drug Laws, which required long prison terms for many people convicted of drug offenses and were ultimately deemed draconian and not in the best interests of society. A series of major changes included the elimination of mandatory prison sentences for some offenses; the reduction of minimum prison terms for others; and judicial discretion to offer treatment alternatives to people whose substance abuse was a contributing factor to their convictions for nonviolent crimes.

Now a critical shift is happening in the treatment of domestic violence victims who commit crimes due to their own victimization. The change is long overdue. The relevant numbers are staggering. Family violence is the number one cause of injury to women in the United States; attacks by abusers result in more injuries requiring medical treatment than rapes, muggings, and motor vehicle accidents combined.[1] Three out of four women serving sentences in New York prisons suffered severe physical violence at the hands of an intimate partner during adulthood.[2] Further, two out of three women serving time in a New York prison in 2005 for killing a person close to them were abused by the victim of the crime.[3]

TRAUMA AND SENTENCING

Criminal justice laws in New York have not kept up with the social sciences. In other realms, effective trauma-informed approaches have been developed. For example, in the past decade, to develop appropriate treatment models, the federal government has studied how trauma, substance abuse, and mental health interact; and trauma-informed practices have also been attempted in child welfare and juvenile justice contexts. When it comes to how to respond to domestic violence survivors who commit crimes, New York's Penal Law has not reflected a real recognition of the impact of such trauma. The new law takes an important step in that direction.

It is well-established that trauma – or an individual's response to events experienced as threatening, terrifying or overwhelming – reshapes that person's world view and affects all aspects of life, including health, self-worth, and behavior. People who experience the trauma of domestic violence often report self-blame, extreme fear, a sense of betrayal, and a view of the world as a dangerous place. Every thought and act is about survival – the victim's and her children's. New York laws are moving past outmoded notions that severely punish domestic violence victims who do protect themselves by acts against their abusers, or who commit crimes as a result of the coercion of the abuser. In other circumstances, survivors may turn to drugs or alcohol to cope with the effects of trauma and subsequently commit crimes connected to their substance abuse. An informed view is that, because these survivors' decisions and actions are driven by trauma, in appropriate cases, the emphasis should be on rehabilitation and treatment, not punitive imprisonment and prolonged separation from family and society.[4]

The first attempt by New York to show compassion and mercy for domestic violence victims who committed crimes was a failure, for numerous reasons.[5] An exception to Jenna's Law (the 1998 Sentencing Reform Act), codified in Penal Law § 60.12, was designed to provide sentencing relief to some survivor-defendants. But the exception was too narrowly drawn, applying only to certain homicides and assaults committed against the abuser, even though domestic violence victims commit a range of crimes due to abuse. The law also did not provide for meaningful sentence reductions, nor did not it permit alternatives to incarceration. After 12 years on the books, the exception had been applied to only one defendant.

COALITION'S CRUSADE

Last year, significant progress was finally achieved. A decade-long crusade by the Coalition for Women Prisoners – a broad group including legislators, judges, survivors, currently and formerly incarcerated persons, defense lawyers, and domestic violence advocates – resulted in the overhaul of sentencing laws for domestic violence survivors. Signed into law in May 2019, the Domestic Violence Survivors Justice Act (DVSJA) gives judges discretion to sentence certain survivors to much shorter prison terms, and in some cases, to community-based alternatives to incarceration.[6] The new law also makes resentencing available for some previously sentenced survivors. While covering people of all genders, the DVSJA is expected to benefit mainly women and transgender individuals, because of the highly disproportionate impact of domestic violence on them.

Like the drug law reforms, the DVSJA signifies a recognition that prior sentencing statutes were too harsh and inflexible. Shorter sentences and treatment options should be offered, and retroactive relief should be available. Unlike the drug law reforms, however, the DVSJA provides only for discretionary, not mandatory, relief.

While the new law holds significant potential to bring survivor-defendants home sooner to their families, discretionary relief cannot be granted unless a three-part test is met: (1) that at the time of the offense, the survivor was a victim of substantial physical, sexual or psychological abuse by an intimate partner or relative;

(2) that the abuse was a significant contributing factor to the crime; and (3) that a sentence under standard sentencing provisions would be unduly harsh. The test applies for both prospective sentencing and retroactive resentencing. Four categories of crimes are excluded: first-degree and aggravated murder, terrorism, and sexual offenses.

Individuals seeking resentencing must be currently incarcerated and serving a sentence of at least eight years. An important feature of the new law is that, where these applicants meet threshold eligibility requirements, they have the right to assigned counsel throughout the resentencing litigation.

As to the "unduly harsh" element, for both sentencing and resentencing, the re-traumatizing impact of lengthy incarceration may be one of the relevant factors, given the parallels between the conditions inherent in incarceration and domestic violence: for example, a lack of autonomy, a lack of privacy, punishment inflicted for minor infractions, and privileges earned through compliant behavior.

For resentencing candidates, the question appears to be whether the sentence originally imposed was excessive, in light of the abuse suffered and myriad other factors, which might include evidence of an applicant's good record achieved while in State prison. Finally, it may well be that our evolving standard regarding appropriate punishment for survivors, and our rising consciousness about the plight of criminalized survivors, will cause judges to find some original sentences to be "unduly harsh" and the result of outdated sentencing notions.

LEGISLATORS AND JUDGES

Three State legislators are widely lauded by advocates for their leadership in the passage of the legislation. Assembly Member Jeffrion Aubry (D-Queens) long championed and sponsored the Assembly bill, along with former State Senator Ruth Hassell-Thompson (D-Bronx), who fought for the Senate version from the early days. More recently, Senator Roxanne Persaud (D-Brooklyn) led the charge in the Senate in sponsoring the DVSJA.

The broad coalition seeking reform in the sentencing of domestic violence victims also included New York judges. One such judge was the Honorable Marcy L. Kahn, whose legal career has included nearly three decades as a judge in New York City Criminal Court and Supreme Court, and more recently, several years as an associate justice at the Appellate Division, First Department. She is now retired from the bench.

Judge Kahn became involved in the DVSJA as a result of her role as a chair and a member of the Women in Prison Committee of the New York Chapter of the National Association of Women Judges. In offering insights regarding the drafting of the DVSJA legislation, she drew upon her experience with drug law reform and in visiting many domestic violence survivors in prison. "The DVSJA is a good law in part because it is the product of the perspective of so many stakeholders, and it affords protection not only for crimes against abusers, but also for crimes committed at the behest of the abuser," she asserted. Judge Kahn opined that the law would not have passed if not for the leadership of the two women who led the Women in Prison Project of the Correctional Association of New York (CANY), a nonprofit advocacy organization.

ADVOCATES' ROLE

Those advocates, Jaya Vasandani and Tamar Kraft-Stolar – who in turn emphasize the invaluable leadership of many other individuals and groups – now serve as co-directors of the Women & Justice Project, a nonprofit that partners with women impacted by incarceration. Vasandani and Kraft-Stolar observed that a primary aim of the DVSJA was to broaden the narrow scope of the prior Penal Law § 60.12 exception, including by providing for relief where the defendant's crime was not against the abuser. They noted that this aspect of the DVSJA is one of many indications that the new law does not require the abuse to the simultaneous to the offense.

In 2012, prosecutors raised concerns that, by providing for relief as to crimes not committed against the abuser, the proposed law would not adequately consider the rights of innocent victims. There were two responses to such concerns. First, abusers often coerce or compel survivors to commit a range of crimes – through threats, violence, manipulation, and creating a culture of fear. Second, survivor-defendants are also victims. Both types of victims deserve compassion and justice. Further, some innocent victims might well support lenience toward perpetrators upon learning that their criminal acts flowed from abuse and coercion.

Prosecutors also expressed concerns in 2012 about the potential impact of the bill on public safety. The CANY explained that such fears are unfounded. The vast majority of survivors convicted of crimes directly related to their abuse have no prior felony convictions, no history of violent behavior, and extremely low recidivism rates.[7] As to the final factor, out of 38 women convicted for murder and released from 1985 to 2003, not a single one returned to prison for a new crime within three years of release.[8]

Advocates have noted that the criminal justice landscape has changed since the DVSJA was opposed in 2012. A deeper understanding about survivors by all participants in the criminal justice system could mean that humane treatment of these victims will not end when they com-

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mit crimes because of their abuse. When appropriate, perhaps no charges or lesser charges will more often be brought. Surely, in some worthy cases (more than one in the first 12 years), severe abuse will be deemed an appropriate mitigating factor, and alternative sentences will be imposed on survivor-defendants.

SURVIVORS' STORIES

A striking feature of the Coalition's DVSJA efforts was the central role played by survivors of domestic violence who had been, or still were, in State prison for their crimes. Two survivors who were leaders in the DVSJA campaign testified before the State Senate in 2012. Both women were charged in the killing of their abuser, and both exemplified a truth set forth in the Assembly Memorandum in Support of the DVSJA: that survivors who have suffered abuse often become involved in the criminal justice system in part because of inadequate protection, intervention, and support.

One survivor, Kim Dadou Brown, who served 17 years in prison before she was paroled, detailed harrowing years of brutality she endured – and failures by police, the courts, and also defenders to take her accusations seriously. She declared that the DVSJA is essential so that the criminal justice system will protect victims of abuse, not turn against them, and will not condemn survivors who protect themselves, but will instead give them a real opportunity to rebuild their lives.

Another survivor, LadyKathryn Williams-Julien, also described years of severe abuse; the lack of protection from police and hospitals that treated her after beatings; and the lack of insight shown by a prosecutor who disparaged her for not leaving her abuser. Thanks to the intervention of domestic violence advocates, her case had a far more positive outcome than that of Ms. Brown. After the first jury could not reach a verdict, advocates persuaded prosecutors to reconsider their position.

The District Attorney reduced the charges, and the survivor was sentenced to five years of probation and an alternative-to-incarceration program. Such alternatives may include mental health treatment, drug and alcohol rehabilitation, and community service programs. The services this survivor received built her confidence and helped her find her voice and reclaim her life. She urged that courts should have the discretion to consider what led to survivors' crimes and give domestic violence victims a second chance.

A window into how women survivors have reacted to the DVSJA was provided by Juli Kempner, who has spent two years as part of a volunteer visiting project at Bedford Hills, New York's only maximum security prison for women. She has had contact with scores of domestic violence survivors, whose offenses stemmed from their histories of abuse, many of whom face sentences of 25 years to life. Some are in their 30s and have been behind bars since age 16, while others are in their 50s and will not be eligible for parole until they are in their 70s. Most of these women had no previous history of crime.

When the DVSJA was enacted, there was "a ripple of hope" in State prisons for women. Survivors who had lost hope suddenly changed their thinking. The new law quickly became the talk of survivors and their families. "Everyone I've been able to communicate with looks forward to the opportunity to come home and make meaningful contributions to their communities," Kempner reported.

DVSJA IMPLEMENTATION

Even before the DVSJA was enacted, four appellate defender offices in New York City took the lead in the implementation of the resentencing provisions. They reached out to the Mayor's Office of Criminal Justice about the role they could play and strategized together. Drawing upon lessons learned from implementation of drug law reforms, they developed a strategy for outreach to clients to inform them about the new law; prepared pro se packets of materials for other resentencing candidates; and developed protocols to connect incarcerated individuals with appropriate provider offices in the county of conviction. In addition, the New York City appellate providers have provided a training curriculum on sentencing and resentencing under the DVSJA.

The New York State Department of Corrections and Community Supervision (DOCCS) was helpful in providing lists of nearly 500 incarcerated women and 12,000 incarcerated men who met threshold eligibility requirements, and in allowing for the provision of pro se packets in prison libraries, according to Kate Skolnick, a Supervising Attorney at the Center for Appellate Litigation. She said that early implementation challenges have included obtaining prison, court, and police records, and dealing with differing procedures among the criminal courts.

One of the most proactive upstate legal communities has been Onondaga County, where the Assigned Counsel Program (ACP) of the county bar association and the Hiscock Legal Aid Society (HLAS) have collaborated to develop a DVSJA program to provide effective resentencing representation, according to Kathleen Dougherty and Linda Gehron, Executive Directors of the ACP and HLAS, respectively.

These Syracuse-based offices contacted all of the potentially eligible women in prison who had been convicted and sentenced in Onondaga County; and they made, or plan to make, in-person prison visits to all resentencing clients. Further, given the demanding nature of the

resentencing applications and hearings, the ACP will assign two private trial attorneys from its panel to every applicant, whereas HLAS has full-time attorneys available for such representation.

To achieve efficiency in representation, the ACP and HLAS collaborated to develop resources and protocols for the private attorneys involved. These attorneys had a special interest in the DVSJA, volunteered to serve, and agreed to undergo a DVSJA training regimen. Dougherty said that the county judges were supportive and understanding of the need for a first and second chair and the benefits of representation by a cadre of specially trained attorneys. In addition, investigators, experts, mitigation specialists, and social workers will be necessary for many resentencing applications.

Gehron noted that the HLAS resentencing representation process starts with an initial in-house legal and social work assessment regarding the merits of each claim and then proceeds to gathering necessary documentation and making a resentencing motion, followed by hearings and, if necessary, appeals.

Onondaga County is a "*Hurrell-Harring* county." When the state was sued for denying effective representation to criminal defendants in *Hurrell-Harring v. State of N.Y.*, Onondaga and four other counties were added to the suit. After the Court of Appeals allowed the lawsuit to go forward,[9] a settlement approved by Albany County Supreme Court in 2015 resulted in state funding to the five subject counties to improve the quality of representation to criminal defendants, with guidance by the State Office of Indigent Legal Services. Because the state has fully funded Settlement implementation, the aforementioned DVSJA resources are available to private attorneys who take these cases on an assigned basis. More recently, state funding has been provided to all other counties to supplement local funding for the mandated defense of criminal defendants unable to afford counsel.[10]

Both New York City and upstate providers have focused initially on incarcerated women, in part because of the far more manageable numbers; and they are developing strategies for advising incarcerated men of their rights and providing resentencing representation where needed. Syracuse attorney Alan Rosenthal, who has four decades of criminal defense experience, developed the Onondaga County training materials. He opined that the biggest implementation hurdle will not be addressing certain thorny phrases or silences in the DVSJA, but in shifting the consciousness of prosecutors, defense attorneys, and judges about victims, trauma, and sentencing.

STATEWIDE AND PRO BONO EFFORTS

To coordinate and support statewide efforts, a 19-member DVSJA Statewide Defender Task Force was established by the New York State criminal defense bar in January 2020. Co-chairs Skolnick and Rosenthal plan to focus on analyzing DVSJA challenges for sentencing and resentencing and developing strategies to meet those challenges; drafting legal memoranda regarding relevant issues; staying abreast of DVSJA trial and appellate-level litigation around the State; developing and sharing practice materials statewide on relevant websites[11] and listservs; and establishing a DVSJA training program for criminal defense attorneys. Pro bono programs have been launched to support this effort.

Defender agencies and pro bono groups are supporting resentencing applicants in a variety of ways, including in helping to prepare the required initial request for permission to make a resentencing motion and to be assigned counsel. The resentencing applicants must meet threshold eligibility criteria for permission to apply and be assigned counsel. To clear this hurdle, many incarcerated survivors need assistance. Working with Kate Mogulescu, Assistant Professor of Clinical Law at Brooklyn Law School, the New York City law firm of Cleary Gottlieb launched a pro bono project to provide the needed assistance.

Lawyers visit the Bedford Hills Correctional Facility to assist women with determining eligibility for resentencing and complete the necessary paperwork, and then they file the documents with the sentencing court. Cleary lawyers have met with numerous survivor-defendants since the December 2019 launch of the project, according to Jennifer Kroman, Cleary's Director of Pro Bono Practice and leader of the project.

TRAINING JUDGES AND LAWYERS

As an essential element of effective DVSJA implementation, Judge Kahn highlighted the need for training judges about the DVSJA. "Trauma-informed sentencing is not a familiar concept to many criminal judges. There needs to be a greater understanding about the effects of abuse over a long period of time and what the impact of trauma looks like." She noted that sometimes a male defendant will receive a far more lenient sentence than a female defendant who committed the same crime – perhaps because the crime by the woman who protects herself may provoke greater outrage and offend our sensibilities. Moreover, sometimes not enough consideration is paid to the low risk of recidivism by survivor-defendants and to the fact that the criminal acts were an aberration, committed due to abuse, Judge Kahn observed.

A former prosecutor herself, the judge asserted that training is also needed for prosecutors in domestic vio-

lence and the DVSJA. Prosecutors should not be too quick to seek lengthy sentences for survivors and should instead consider whether justice and society would be better served by lenience, rehabilitation, and reintegration of the survivors into society, she reflected.

Rosenthal noted that many victims do not recognize their own victimization. "They are so traumatized that they do not know how wrong the abuse is and don't pursue relevant defenses." He emphasized the importance of DVSJA training for criminal defense attorneys, many of whom do not have extensive experience in representing domestic violence victims or others suffering from trauma, including how to sensitively conduct interviews to elicit salient information.

TWO EARLY CASES

To date, few applications for sentencing or resentencing have been decided under the DVSJA. The Legal Aid Society of New York City has reported that in January 2020, upon the consent of the prosecutor, a defendant was resentenced under the DVSJA in a Brooklyn case. For her conviction for first-degree manslaughter, this defendant had originally been sentenced to 10 years of imprisonment, followed by five years of post-release supervision. She was resentenced to time served, or five years of imprisonment, followed by three years of post-release supervision. This resulted in the survivor, who had been released to community supervision, being discharged from her sentence.

In a Poughkeepsie case, *People v. Addimando,* the defense presented extensive evidence regarding the abuse of the defendant by her partner – the homicide victim. In April 2019, the jury rejected a justification defense and convicted the defendant of second-degree murder. A mother of two young children, the defendant had no prior record of crime or violence. While the proof of abuse was not deemed to constitute self-defense, it was relevant as sentencing mitigation. At a September 2019 hearing to determine the defendant's eligibility for a DVSJA sentence, defense attorneys John Ingrassia and Ben Ostrer relied upon the trial proof of abuse, as well as additional testimony presented.

A domestic violence expert was called to address many myths, including that abusers have an anger management problem and should be easily identifiable, or that it is inexplicable that a victim does not leave her abuser. The expert explained that domestic violence is complicated, abusers act out of a need for control, and victims often feel conflicted. Despite the abuse, they may still love the abuser, do not want to break up the family, and want the abuse to stop, but not to lock up the abuser. Further, trying to leave can be very dangerous, and in fact often proves fatal, the expert explained. The defendant's treating therapist also testified and detailed the injuries she observed, the defendant's contemporaneous reports about the abuse by her partner, her fears, and her many attempts to leave him.

In a decision rendered February 5, the trial court held that the defendant would not be sentenced under the DVSJA, because there was insufficient proof that abuse allegedly perpetrated by the victim against the defendant was a significant contributing factor to the crime.

NATIONAL MODEL

The DVSJA is unique and can inform advocacy efforts nationwide, according to Andrea Yacka-Bible, a Supervising Attorney at the Legal Aid Society in New York City, who previously served as a legal advocate at the National Clearinghouse for the Defense of Battered Women, a nonprofit based on Philadelphia. She also noted that, in the past decade, there has been a growing acknowledgement that incarceration can be re-traumatizing to survivor-defendants.

"It is enormous progress that the New York State Legislature and the Governor have recognized that, if you show that substantial abuse was a significant contributing factor in committing the crime, there should be the possibility of a lesser sentence, and that there is a right to counsel for resentencing motions," she observed. In sum, the DVSJA represents an important step forward in achieving justice for victims of domestic violence. The new law places New York in the lead nationwide in recognizing the role abuse can play in crime, Yacka-Bible concluded.

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1. Stark and Flitcraft, *Violence among Inmates, an Epidemiological Review,* Handbook on Family Violence (1988); Uniform Crime Reports, Special Report: Violence among Family Members and Intimate Partners, FBI (2003, rev. Jan. 2005).

2. Browne, Miller, and Maguin, *Prevalence and Severity of Lifetime Physical and Sexual Victimization among Incarcerated Women,* Int'l. J. of Law & Psychiatry 22 (3–4) (1999).

3. New York State Department of Correctional Services, *Female Homicide Commitments: 1986 vs. 2005*, 14 (July 2007).

4. This more informed view is consistent with an amendment to Penal Law § 1.05 (6) (2006 N.Y. Laws, ch. 98), which states that the purpose of sentencing statutes includes: "To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, *the promotion of their successful and productive reentry and reintegration into society,* and their confinement when required in the interests of public protection" [emphasis added].

5. Kraft-Stolar et al., *From Protection to Punishment: Post-Conviction Barriers to Justice for Domestic Violence Survivor-Defendants in New York State*, Cornell Legal Studies Research Paper No. 11-21, June 1, 2011, at 11–13.

6. 2019 N.Y. Laws, ch. 31.

7. Canestrini, *Follow-up Study on Bedford Hills Family Violence Program*, NYS DOCS Research Unit (1994), at 4.

8. Kraft-Stolar, *From Protection to Punishment*, *supra*, at n.22.

9. 15 N.Y.3d 8.

10. *See* Executive Law § 832 (4). NYSBA strongly supported state funding for mandated representation of criminal defendants throughout New York State.

11. One website containing DVSJA resources for resentencing applicants and criminal defense attorneys is found at https://www.ils.ny.gov/content/domestic-violence-survivors-justice-act.

Administration of Sp
Development of an Improved

By Edward V. Wilcenski and Tara Anne Pleat

This is the second installment of an article that appeared in the March 2019 Issue of the NYSBA Journal.

The authors wish to express thanks to NAELA Fellow Ron M. Landsman for his willingness to offer insight and comment on the ideas expressed in this article. His article in the Spring 2014 issue of the NAELA Journal*, When Worlds Collide: State Trust Law and Federal Welfare Programs, NAELA* Journal *Vol. 10, No. 1 (Spring 2014), remains one of the most important writings in the area of special needs trust practice in many years.*

In Part I we discussed the different standards of review courts use to assess the work of supplemental needs trust (SNT) trustees. One derives from guardianship practice (a "best interest" assessment), another from benefit program eligibility (a "government benefit" assessment). Both incorporate important considerations when analyzing a distribution from a supplemental needs trust, but neither represents an appropriate standard for judicial review in determining whether a trustee properly exercised its discretion.

The appropriate standard of review for a distribution from a supplemental needs trust is the same one that applies to any discretionary trust: abuse of discretion. That standard provides the flexibility and protection afforded the trustees of other discretionary trusts so long as the trustee follows the commonly accepted rules of fiduciary conduct, as supplemented by additional steps that acknowledge the beneficiary's disability and eligibility for government benefits.

To obtain the protection afforded to trustees of other discretionary trusts, the SNT trustee should acknowledge and address three aspects of SNT administration that are

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Tara Anne Pleat, Esq., is a member of the law firm of Wilcenski & Pleat PLLC. She is currently the Chair of NYSBA's Elder Law and Special Needs Section and a Member of the Board of Directors of the Special Needs Alliance, a national network of leading special needs planning attorneys. Tara is also a Fellow of the American College of Trust and Estate Counsel (ACTEC) and recently received the designation of Certified Elder Law Attorney (CELA)* from the National Elder Law Foundation. She represents professional trustees and other fiduciaries who administer funds for individuals living with a disability as well as families that are preparing for the future of their loved ones with special needs.

*This certification is not granted by any governmental authority within the State of New York.

ecial Needs Trusts: Approach (Part II)

not at issue in the administration of other discretionary trusts:

1. A beneficiary's cognitive disability may prevent reliable communication with the trustee;
2. Programs and services available to support the beneficiary in the community represent an additional resource to be considered before using trust funds to purchase a good or service; and
3. Traditional, informal means of settling accounts may be insufficiently protective.

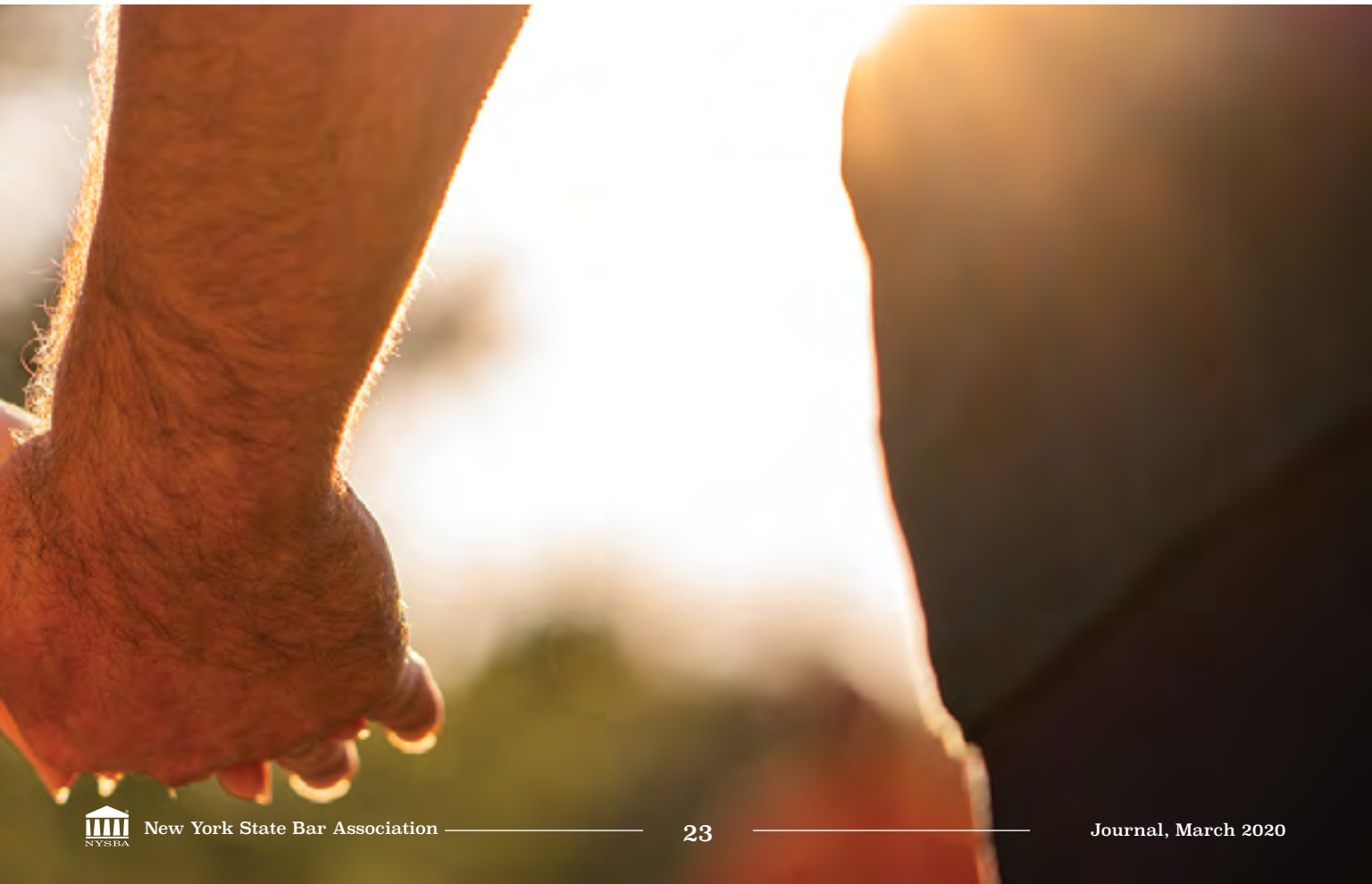
Effective SNT administration requires the trustee to establish a means of communication with the beneficiary or a beneficiary's representative, a protocol for assessing programs and services, and a plan for regular accounting and periodic settlement. If followed, and presuming that the trustee has satisfied the other, traditional obligations of fiduciary conduct, the trustee's reasonable exercise of discretion should be supported upon judicial review under an abuse of discretion analysis, even if the court would have made a different decision on the same set of facts.

BASIC RULES OF FIDUCIARY CONDUCT APPLICABLE TO ALL TRUSTEES

All trustees must follow the basic rules of fiduciary conduct, requiring them to apply income and principal in accordance with the terms of the governing document,[1] account for the application of principal and income,[2] invest prudently and in accordance with the terms of the trust,[3] prepare and file tax returns,[4] and keep beneficiaries informed of how trust funds are being invested and/or utilized.[5]

EXERCISING DISCRETION

Trustees of discretionary trusts must exercise judgment when making distribution decisions. In New York, case



law follows a few common lines of inquiry in determining whether a trustee properly exercised discretion:

1. Does the trustee have an established process for review and consideration of beneficiary requests?[6] In other words, is there evidence that the trustee is making *informed* decisions?
2. Did the trustee follow its own established policies in making distribution decisions, and did it document the basis for those decisions?[7]
3. Did the trustee exercise independent judgment rather than deferring to a beneficiary or a beneficiary's representative?[8]
4. Does the document require the trustee to consider whether the beneficiary had other assets and resources that could be used in lieu of using funds from the trust, and if so, did the trustee do so?[9]
5. For significant or long-term expenditures, did the trustee balance the immediate needs of the beneficiary with probable future needs?[10]

If the trustee can answer these questions in the affirmative, courts will typically support the trustee's discretionary decisions even if the judge or another party to the proceeding might have made a different decision on the same set of facts. In the realm of discretionary trusteeship, the *process* of proactive administration protects the fiduciary and beneficiary alike. When the trustee follows the *process* of communication, investigation, consideration and documentation, the beneficiary receives the benefits of the fiduciary arrangement. In exchange, the trustee is protected from later challenge to its distribution decisions simply because another might have reached a different conclusion.

This *quid pro quo* assumes that both the trustee and the beneficiary are capable of self-advocacy. But when a beneficiary has a cognitive disability, she is at a disadvantage. Courts struggle to find the correct balance between oversight for the benefit of those who cannot fully advocate for themselves and the well-established body of law that protects a fiduciary's authority to make discretionary decisions.

DISABILITY AND DISCRETION

Supplemental Needs Trusts are discretionary trusts[11] for a reason. These trusts often have to last for the lifetime of a beneficiary with a disability. Circumstances change, and the authority to exercise discretion allows the trustee to respond to changes in need.

Where a beneficiary is unable to adequately advocate for herself because of a cognitive disability, courts have a responsibility to provide oversight.[12] In proceedings for the *establishment* of supplemental needs trusts in New York, this equitable authority is often cited as justification for imposing administrative obligations on the trustee that are above and beyond what the federal and state statutes would otherwise require.[13] So, for example, even though there is no statutory or regulatory or administrative requirement that the trustee of a supplemental needs trust prepare annual accountings, guardianship courts often impose such a requirement in order to protect a beneficiary who is incapable of self-advocacy.

No one would question the courts' *parens patriae* responsibility to protect the interests of those who cannot protect themselves. But simply reciting the obligation does not provide any practical *administrative* guidance to the trustee of a discretionary trust. In the context of SNT *administration,* the question is not whether a court has the authority to protect the interests of a beneficiary with a disability. The question is how that protection is provided.

COURT RELUCTANCE TO SUBSTITUTE JUDGMENT

Courts typically do not substitute their judgment for that of a trustee so long as the trustee's exercise of discretion was reasonable, consistent with the terms of the trust, and made in good faith.[14] Courts often refuse to provide guidance when the trust document gives the trustee the responsibility to make a discretionary decision.[15] This narrow role for the courts is codified by statute in New York, where courts render "advice and direction" in a limited number of enumerated situations.[16]

This structure breaks down when cognitive disability enters the picture. Courts are reluctant to defer to the discretion of the trustee and often substitute their judgment when reviewing discretionary distributions.[17] The net effect is that trustees – unsure of how their discretionary decisions will be measured – are often reluctant to make any significant distributions, or refuse to do so without regular input from a court.

This is precisely the type of micromanagement that a discretionary trust is intended to avoid.[18] A beneficiary's disability is no reason to deviate from the standard practice of deferring to the trustee's judgment, so long as the trustee has not abused its discretion. Under an "abuse of discretion" analysis, if the trustee of an SNT follows the traditional rules governing trustee conduct, the trustee's exercise of discretion should be upheld even if a court would have made a different decision on the same set of facts.

ESTABLISHING A PROTOCOL FOR COMMUNICATION WITH A BENEFICIARY

Trustees need information to make *informed* discretionary decisions. In a typical administration, the trustee can communicate directly with an adult beneficiary, and in the case of a minor a trustee can communicate with a

legally responsible adult such as a parent. Communication is relatively straightforward and unencumbered.

SNT beneficiaries may lack the ability to communicate. They may not have court-appointed guardians or voluntarily designated agents under power of attorney. They may lack informal supports like family members and friends, or those informal supports may be unreliable or dishonest.

These practical challenges defy simple solution. If a beneficiary with a developmental disability needs a winter coat, the trustee may have the authority to purchase the coat, and the purchase may be an appropriate exercise of discretion. But how would the trustee know that the beneficiary needs a coat? How does the trustee buy an appropriate coat? How does the trustee get the information it needs to appropriately exercise its discretion and facilitate the purchase?

Family members might be able and willing to do so. But what if the beneficiary has no reliable family members (or no *honest* family members), no court appointed guardian, and no other reliable, informal advocates?

SNT beneficiaries might have Medicaid-funded staff to provide this information, but the continued erosion of Medicaid funding for this type of service has made this a less reliable option. Medicaid-funded care managers have increased caseloads, and disability provider agencies face high staff turnover (or are simply unable to locate staff in the first place). As a result, the trustee's affirmative obligation to make informed discretionary decisions[19] often cannot be met through communication with Medicaid-funded staff alone.

If there are no credible family supports, no court-appointed guardian, and no reliable Medicaid-funded staff, the trustee should consider retaining a private care manager, social worker or other advocate to serve as its "boots on the ground" to obtain information that the trustee can consider when making a distribution decision.

Recommendation

In determining whether a trustee of a supplemental needs trust reasonably exercised discretion, judicial review should consider whether the trustee established an effective protocol for communication and a credible means of obtaining reliable information about the beneficiary's needs.

Upon being appointed, the trustee should undertake the following analysis:

1. Is the beneficiary competent to correspond and advocate directly? Many SNT beneficiaries with physical disabilities are fully capable of communicating directly with the trustee.
2. If the beneficiary cannot communicate directly, is there a court-appointed guardian or agent under power of attorney who is able to speak reliably on behalf of the beneficiary and provide important information and documentation?[20]
3. Is the beneficiary supported by reliable[21] family members, friends or other informal advocates? While the trustee may be precluded from sharing information about the trust with individuals who lack legal authority to access it, the trustee is free to *receive* information from any credible source, supplementing whatever other information the trustee receives.
4. Does the beneficiary have program staff who could help communicate requests for goods and services to supplement what government benefit programs provide?
5. Can the trustee hire a private care manager or other advocate to provide periodic assessments and recommendations for distributions.?[22]

DEVELOPING A PROCESS FOR ASSESSING AND REVIEWING PROGRAMS AND SERVICES

Professional trustees are required to have a basic knowledge and understanding of the rules governing investments, income taxes, and other financial issues common to all fiduciary appointments. Most institutions have a process in place to review these issues on a regular basis.

When an issue falls outside of a trustee's traditional area of expertise, trust documents are typically written to allow the trustee to retain outside professionals and to pay those professionals with trust funds. For example, fiduciaries often retain outside professionals to address complicated tax questions. The reasonableness of the fee paid is always subject to review on an accounting, but the authority to retain outside expertise is well established.[23]

SNTs – by their terms and by statute – require a trustee to consider factors that are outside the traditional realms of trustee expertise: the availability of public benefits and the means-tested goods and services they provide, the adequacy of those goods and services, and the potential impact of a distribution on continuing eligibility.[24]

This requirement is a variation on a common theme found in cases analyzing a trustee's exercise of discretion. Government benefit programs represent a valuable source of funding for goods or services that the trustee must consider before making a discretionary distribution.[25] To adequately consider these other sources, the trustee must answer a few questions.

Determining whether Medicaid (or another program) pays for a good or service

This requires more than simply asking, "Is the beneficiary Medicaid eligible?" Medicaid is a payment source

for certain goods and services, but the question for the trustee is whether Medicaid will pay for the specific good or service that the beneficiary needs. It is not uncommon for a beneficiary to be eligible for Medicaid (meaning that the Medicaid program is willing to pay for a good or service), but the good or service itself may be *unavailable*. This dilemma is often seen in the area of Medicaid funded staffing, where the hourly rate paid to community-based staff is so low that service providers either cannot find people to fill the positions, or they are forced to hire individuals with minimal experience.[26]

Medicaid-funded waiver[27] programs offer a broad range of services to beneficiaries, some with more generous housing supports, and others with better hourly reimbursement rates for staff. But it is the responsibility of the beneficiary (or the beneficiary's family or staff) to ensure that those services are being fully utilized. In our experience, parents and other family members spend so much time and effort simply managing the affairs of the person with the disability that they have neither the time nor the inclination to develop a comprehensive understanding of program requirements. And if staff are overworked, underpaid or inexperienced, they will be minimally resourceful. Available services often go underutilized.

Assessing whether the government-funded option is adequate, or whether trust funds should be used to supplement or replace it

In order to comply with the terms of the trust and (in New York) the language of the governing statute, the trustee of a supplemental needs trust must determine whether funds in the trust should be used to *supplement* (or supplant) an available good or service.

Consider a beneficiary in need of a wheelchair. Medicaid pays for a basic wheelchair, but the beneficiary might do better with a more expensive wheelchair that is a better fit for her needs – safer, more comfortable, with more sophisticated positioning systems and other controls. The trustee might be able to acquire the chair immediately and without having to go through the Medicaid program's administrative review and approval process. The trustee has the discretion to pay for the better chair.

Consider a beneficiary with Medicaid-funded staffing in the home. A beneficiary may be approved for three hours per day, two days per week. But the beneficiary and her family would rather not work with inexperienced Medicaid-funded staff, or they may want more hours of coverage. If there are funds in the trust to pay, then the trustee has the discretion to purchase those extra hours, or hire other, more experienced staff.

Before using trust assets to *supplement* (or supplant) a government-funded good or service, the trustee should have some process in place to confirm what the program is providing, and some means of documenting that the beneficiary would benefit from other or additional goods or services.

Determining whether using trust funds used to pay for a good or service will negatively impact benefit program eligibility

Programs such as the Supplemental Security Income (SSI) and Supplemental Nutritional Assistance Program (SNAP) provide direct financial benefits to their participants. Others – like Medicaid – provide a payment source for goods and services, but do not make payments directly to a beneficiary.

The same distribution from an SNT can impact different programs in different ways. For example, the payment of rent from a trust will have no impact on Medicaid[28] but may result in a reduction in a monthly SSI payment and an increase in the rent paid for HUD-subsidized housing.[29]

The trustee is charged with knowing which benefit programs a beneficiary is participating in *at the time of the distribution,* understanding that many beneficiaries migrate in and out of different benefit programs based on changes in family composition, financial condition, and other circumstances, and knowing how the proposed distribution might impact those benefits.[30]

If a trustee exercises discretion and uses funds in the trust to pay rent so that the beneficiary can move into a nicer neighborhood, the trustee must understand the impact of its discretionary distribution on the SSI benefit, and document why the beneficiary would be better off with less monthly income but a better place to live.

Recommendation

In determining whether a trustee of a supplemental needs trust has reasonably exercised discretion, judicial review should consider whether the trustee developed a protocol for assessing government benefits and available services, and a process for periodic review and update.

Upon being appointed, the trustee should promptly develop a plan to confirm government benefit eligibility and available goods and services, to assess whether those services and supports are adequate, and to review that information on a regular basis. The trustee should consider the following resources and suggestions:

1. For beneficiaries participating in a waiver program, disability service providers prepare periodic reports (called Service Plans or Life Plans in New York)[31] which include information on a beneficiary's preferences, health, family supports, and professional providers. Different programs have different reporting requirements, but most publicly funded programs will require a summary report of some type. These reports can often provide useful information on what services might be available through a govern-

ment benefit program.[32] The trustee should regularly obtain these reports.

2. If a beneficiary has proactive and well-informed family members, they may be able to provide the trustee with information needed to determine whether a government benefit program is providing an adequate level of goods and services.
3. The trustee can hire a private care manager or other advocate to conduct a comprehensive review of benefit eligibility and available services and provide options for supplementing those benefits and supports.[33]

PREPARING ANNUAL ACCOUNTINGS AND PERIODICALLY SEEKING JUDICIAL SETTLEMENT

At some point, every trustee seeking to be discharged must account to its beneficiaries. If those beneficiaries are competent and willing, they can "settle" the trustee's accounting voluntarily and without court order. This is often not an option for SNT trustees.

What is an "accounting"?

We use the term "accounting" to refer to a summary of financial activity over a given time period, presented to the beneficiaries of a trust to keep them informed about trust activity. Sometimes they are filed with a court, sometimes not.

Some courts provide forms that trustees must use in summarizing financial activity. Some court forms are very simple, requesting only opening and ending balances and a summary of distributions made over the accounting year. Others are more elaborate and track unrealized gain and loss, allocate expenses to principal and income, and allow the trustee to provide additional information on explanatory schedules.

Used here, the term "informal accounting" refers to accountings which are filed with a court or presented to a beneficiary for informational purposes. In some cases, they are required by statute, by court order or by the terms of the trust document. In others they are not required but are prepared voluntarily by a trustee to keep the beneficiaries informed of trust activity.

In New York, many SNT trustees are required to file annual informal accountings when the trusts were established and funded by court order in a guardianship proceeding or personal injury action. These informal accountings are reviewed by an examiner or fiduciary clerk, but they will not receive formal judicial review. We refer to them as informal accountings even though they are filed with a court.

The format used for an informal accounting can vary. A year-end financial statement that a trustee provides to a beneficiary could be considered an informal accounting. A checkbook ledger and accompanying bank statements might be appropriate in some circumstances. If a trustee is required to account by court order and the court has a preferred form, then the trustee will use that form. If there is no court filing requirement, a trustee wishing to keep its beneficiaries informed of trust activity can use whatever form it deems appropriate. Some trustees may send financial statements, others may use a more elaborate format similar to what would be used in an estate accounting.

A proceeding for "judicial settlementa' involves a petition to a court asking for review and approval of the trustee's accounting. These proceedings are filed with notice to all interested parties. In New York, the form of the accounting that must accompany the petition is promulgated by the Chief Administrator of the State of New York and is comprehensive.[34]

Accounting requirements for SNTs vary by state

There is no requirement under the federal or many state supplemental needs trusts statutes that a trustee prepare annual accountings of any type or with any frequency. Such is the case in New York, where there is no statutory, regulatory or administrative requirement that a trustee of an SNT prepare annual accountings.[35] As a result, many first party and third party SNTs in New York and elsewhere are administered without ongoing oversight. If the trustee wants to resign during the beneficiary's life or seeks to have its accounts settled upon the beneficiary's death, the trustee's discretionary decisions will be subject to second-guessing inherent in proceedings for judicial settlement of multi-year accountings, a process familiar to trustees of discretionary trusts.

The proactive trustee can mitigate the risk of belated challenge by keeping the beneficiaries regularly informed of trust activity, but the effectiveness of this approach will be determined in part by the accounting format used, the frequency of the disclosure, and the capacity of the beneficiary.

Financial statements alone provide insufficient disclosure

In a traditional trust administration, the trustee provides a beneficiary with monthly, quarterly or annual financial statements. These statements keep the beneficiaries informed and can serve as the basis for an informal settlement of the trustee's accounts when the trust terminates or when a trustee is otherwise seeking to be released.

This level of informality is inappropriate in the context of SNT administration for at least four reasons:

1. A beneficiary with a cognitive disability may not have the ability to review and understand financial statements and therefore would be unable to provide informed consent to the settlement of a trustee's account. While a trust could be drafted to allow a third party (like a parent or guardian) to review and approve a trustee's accounts, courts tend to frown on informal settlements by guardians,[36] especially in cases where the guardian has a conflict (such as when the parent-guardian resides in a home owned by and financially supported by the trust).
2. Evidence that a fiduciary has provided all beneficiaries with copies of financial statements, tax returns and other trust activity will not preclude a later challenge in a proceeding for settlement of the fiduciary's account, especially where a beneficiary has a cognitive disability.[37]
3. Relying solely on the delivery of financial statements presents even greater risk for the trustee of a first party supplemental needs trust, where the Medicaid program is entitled to be repaid upon the death of the beneficiary and is thus an interested party in any proceeding for settlement of the trustee's accounts. Financial statements reviewed as part of a Medicaid application or redetermination do not bind the agency and do not preclude a later proceeding to recover incorrectly paid Medicaid.[38] Nor do they address the prospect that the trust remainder may not be sufficient to satisfy the Medicaid claim upon the beneficiary's death to recoup correctly paid Medicaid. Medicaid program representatives insist on formal judicial settlement for a fiduciary to be released when a trust is terminating, payment of the Medicaid recovery is due, and the recovery cannot be fully satisfied by the trust remainder.
4. Information presented on complex financial statements can be confusing and difficult to understand. If the information is not clear and complete, a release based on that information may be unenforceable.[39]

Traditional accountings do not address the unique responsibilities associated with SNT administration

Some trustees provide informal accountings to their beneficiaries on an annual or other periodic basis. The format and level of detail vary, but these informal accountings rarely identify and address issues that would be the subject of inquiry by the agencies administering the Medicaid or SSI programs. [40]

Accountings prepared by corporate trustees frequently combine reimbursements for various items into a single "discretionary distribution" rather than separate them by category. Thus, a reimbursement to a family member might include items that would impact SSI (such as groceries) as well as items that would not (such as a

cell phone bill). Supplemental needs trust accountings should segregate distributions by the type of expense and use the informational schedules to identify distributions that may impact public benefits.

Similarly, these informal accountings may not identify transactions that provide a derivative benefit to third parties or may not address those transactions in the explanatory schedules.[41]

Consider a trustee who, after consulting with a beneficiary and her guardian, decides to use funds in an SNT to pay rent so that the beneficiary and her guardian can move into a decent apartment. That payment would be reflected on the informal accounting. An accompanying note in the explanatory schedule would confirm that the guardian is paying his portion of the rent, that payment from the trust is being made with the understanding that there will be an offset to the beneficiary's monthly SSI payment, and that the beneficiary and her guardian have reported the ongoing payment to the SSI program in anticipation of the adjustment. By doing so, the informal accounting will reflect that the trustee has made an informed decision and that the trustee has considered the impact of the distribution on government benefits.

Filing an informal accounting is not the same as petitioning for judicial settlement

When an SNT is funded by court order, the order will often require that an annual accounting be filed with the court for review by an examiner or fiduciary clerk. Accounting format varies, and the review is more of a financial reconciliation to ensure that the accounts balance and that distributions were made in compliance with any restrictions or limitations that may have been imposed by the court.

This administrative review does not formally settle the trustee's accounting.[42] As such, these ex parte submissions do not protect a trustee from later challenge by a remainder beneficiary or, in the case of a first party SNT, by the Medicaid program.[43] In order for the trustee to be formally released from any further liability for information contained in the accounting it would have to petition for judicial settlement with service on all interested parties.[44]

This lack of a binding determination presents a particular risk for trustees of first party supplemental needs trusts. Eventually these trusts will terminate and the trustee will need to formally account, a process that includes the determination of the Medicaid program's repayment amount. Increasingly, state Medicaid programs are hiring national for-profit entities known as "Medicaid Recovery Audit Contractors" to pursue their recovery rights.[45] These companies have their own proprietary procedure for review and interpretation of the responsibilities of the trustee of a supplemental needs trust and would not be bound by informal filings with a state court.

Finally, the scope of a trustee's responsibility to the Medicaid program upon the death of the beneficiary remains unclear. The Social Security Administration takes the position that the trustee of a trust where the beneficiary is receiving an SSI benefit is responsible to ascertain and resolve repayment obligations to every state in which a beneficiary has ever resided,[46] although the language of the federal supplemental needs trust statute contains no such affirmative obligation. If a deceased beneficiary lived in a number of states, will service on the Medicaid program representative in the state where the beneficiary last received Medicaid be sufficient to bind the Medicaid program? There are apparently no reported decisions on this issue.[47]

Annual proceedings for advice and direction or judicial settlement would be impractical and cost ineffective

The aspects of SNT administration highlighted here – communication challenges, unfamiliar government benefit programs, and the inability to informally settle accounts – present unique risks for SNT trustees.

Given these risks, a prudent trustee might be inclined to seek judicial approval of its actions on a regular – and perhaps an annual – basis. The trustee could petition for judicial settlement of its accounting or could seek "advice and direction" on a proposed distribution plan. Both proceedings present risks of their own, and neither approach – if undertaken annually - would be cost effective.

A trustee could present a formal accounting for judicial settlement on an annual basis.[48] Where the beneficiary has a cognitive disability, and regardless of whether a property guardian has been appointed, most courts will appoint a guardian *ad litem,* especially where a court-appointed guardian resides with the beneficiary and has indirectly benefitted from the use of trust funds. Some guardians *ad litem* are attorneys with significant experience in special needs planning and disability benefits, but many are not. Inexperienced guard*i*ans *ad litem* can complicate a proceeding for settlement.

Because the Medicaid program is considered to have a remainder interest in a first party supplemental needs trust,[49] the Medicaid program representative will be a necessary party to the proceeding for judicial settlement. The Medicaid program representative will then have an unfettered opportunity to challenge discretionary distributions appearing on the accounting, focusing on distributions which would have an impact on "benefit eligibility"[50] or reduce the amount available for post-mortem recovery.

Alternatively, a trustee could seek "advice and direction" on an annual basis: court approval for a distribution

plan developed in conjunction with the beneficiary (or the beneficiary's guardian), a care manager, or others involved in the beneficiary's life. By having a distribution plan approved in advance, the trustee would be insulated from challenge so long as a later accounting showed that distributions were made in compliance with the court approved plan.

Yet courts regularly refuse to entertain petitions for advice and direction when a matter is considered to be within the discretion of a trustee or guardian.[51] Moreover, this approach would require a return to court whenever a plan needed to be modified based on changes in health, household composition or other factors that are impossible to predict with certainty. And as with a petition for judicial settlement of the trustee's accounting, the Medicaid agency will be a necessary party to the proceeding and will have standing to dispute the proposed plan of care or the budgeted amount, or otherwise seek to limit distributions and increase the amount available to satisfy the Medicaid program's recovery upon the beneficiary's death.[52]

Recommendation

In order to manage and mitigate risk, the trustee should take the following steps:

1. The trustee should prepare an informal accounting of trust activity on an annual basis, and provide copies of the accounting to the beneficiary with the disability (if competent, or to the court-appointed guardian or agent under power of attorney if not) and to the Medicaid program representative if the trust is a first party SNT.[53] If the beneficiary is a minor, the beneficiary's parents should also receive a copy.

   The informal accounting should clearly delineate distributions which would have an impact on benefit eligibility or which provide a derivative benefit to third parties, and should include clarifying information in the explanatory schedules as appropriate.

   Finally, the informal accounting should be prepared in the same format that would be required in a proceeding for judicial settlement so that the trustee can move quickly to have its accounts settled if any party receiving a copy raises an issue. This is especially important for first party supplemental needs trusts where the Medicaid program will be a necessary party to any settlement proceeding.

2. On a periodic basis, the trustee's accounts should be judicially settled. Even if a trustee is providing comprehensive informal accountings on an annual basis to all beneficiaries and none of the beneficiaries raise an issue, the trustee should nonetheless petition for judicial settlement after a number of years in order to wipe the slate clean. Frequency will depend on a number of factors. If a trustee is making regular and significant distributions from a well-funded trust, it might petition for judicial settlement every few years. If the trust is modestly funded and relatively inactive, it might petition less frequently.

   This recommendation is not limited to SNT trustees. Circumstances that can complicate the settlement of a trustee's accounting (whether informally by agreement or by court order) are familiar to attorneys who represent trustees in contested accounting proceedings. Older financial records are lost or unavailable, a common occurrence in an era of bank consolidation. Trust officers retire, taking with them the first-hand knowledge of a beneficiary's circumstances and the basis for certain discretionary distributions. Relationships with beneficiaries may sour over time, increasing the likelihood of objections.

   For trustees of SNTs, there are additional variables and uncertainties. Government benefit program rules change over time, and a distribution that might have had no impact on a particular benefit under a prior policy may now result in a penalty. New programs might emerge that provide funding for services the trustee has been paying for with trust funds for many years. Finally, attorneys who represent the Medicaid program in proceedings for judicial settlement also retire, and their replacements may take a much more adversarial approach in settlement proceedings. Periodically seeking judicial settlement puts all parties on notice – the beneficiary with the disability, the Medicaid program (for first party SNTs), and the remainder beneficiaries – and requires them to present their objections for review by the court.

3. For significant transactions or transactions that would clearly result in a derivative benefit to someone other than the beneficiary, the trustee should seek prior court approval. In New York, this is typically done through a petition for advice and direction.

Acknowledging the deviation from standard practice

This approach – comprehensive informal annual accountings, regular petitions for judicial settlement, and periodic applications for court approval - is antithetical to traditional estate planning, where attorneys try to limit administrative expense and judicial oversight when drafting trusts, and where trustees try to avoid interaction with the courts. Disability advocates may be concerned over the financial impact of this approach on individuals with disabilities who have trusts of more limited amounts. We understand these concerns.

On the other hand, attorneys and other advocates do a disservice to SNT beneficiaries and trustees when they fail to explain the level of exposure faced by the trustee of an SNT (especially a first party SNT), or when they try to draft around the formalities associated with trust administration. If all trust beneficiaries are competent and capable of self-advocacy, estate planners can draft documents to minimize administrative responsibilities

and the associated costs. If a trustee cuts corners in keeping records, providing financial statements, or filing tax returns, the beneficiaries may decide to look the other way rather than endure the time and expense of a formal accounting.

But such informal settlement is typically not an option for SNTs, especially first party SNTs where the Medicaid program is one of the interested parties. Medicaid's priorities are contrary to those of the beneficiary with the disability and the remainder beneficiaries. The less the trustee spends during the beneficiary's life, the more that this statutory creditor will recover upon the beneficiary's death.

Informal accountings prepared and presented on an annual basis create a record of full disclosure that may serve as a basis to defend against objections in a proceeding for judicial settlement,[54] periodic judicial settlement limits the trustee's ongoing risk, and petitions for advice and direction protect future distributions from later challenge.

PART III: REVISITING *IN RE J. P. MORGAN* AND *IN RE LIRANZO*

The next and final installment of this article will review how the courts in two important and highly publicized New York cases involving supplemental needs trust administration approached the standard of review, and will consider whether the implementation of some of the procedural recommendations outlined here might have impacted the decisions.

1. New York Estates Powers & Trusts Law (EPTL) 11-1.1(a)(2).
2. *In re Francis*, 19 Misc. 3d 536 (Sur. Ct., Westchester Co. 2008).
3. EPTL 11-2.3 ("Prudent Investor Act").
4. New York Tax Law § 651(a)(2).
5. *In re Spacek*, 45 Misc. 3d 1210(A) (Sur. Ct., Nassau Co, 2014), *aff'd.* 155 A.D.3d 747 (2d Dep't 2017).
6. *In re Ralph Manny*, 2010 N.Y.L.J. LEXIS 4508 (Sur. Ct., Westchester Co. 2010).
7. *In re: Judicial Settlement of the Account of Bank of Am., N.A.*, 2013 N.Y.L.J. LEXIS 2388 (Sur. Ct., N.Y. Co. 2013).
8. *In re Hammerschlag*, 2001-3772, N.Y.L.J. 1202597358371 (Sur. Ct., N.Y. Co. 2013).
9. *In re Levison's Will*, 29 Misc. 2d 697 (Sur. Ct., Rockland Co. 1961); *In re McDonald (Luppino)*, 100 A.D. 3d 1349 (2012).
10. *Estate of T. Harry Glick*, 2005 N.Y. Misc. LEXIS 7336 (Sur. Ct., Kings Co. 2005).

11. New York's statute defines a supplemental needs trust as "a discretionary trust established for the benefit of a person with a severe and chronic or persistent disability." EPTL 7-1.12(a)(5).

12. *In re Goldblatt*, 162 Misc. 2d 888 (Sur. Ct., Nassau Co. 1994); *Cano v. Shmonie Corp.*, 2004 N.Y.L.J. LEXIS 3059 (Sup. Ct., Bronx Co. 2004). The decision in *Cano* is a good illustration of the difficulty that courts have in drawing a line of demarcation between guardianship oversight and discretionary trusteeship.

13. *In re Morales*, 1995 N.Y. Misc. LEXIS 726 (Sur. Ct., Kings Co. 1995); *Cano v. Shmonie Corp.*, *supra* n.13.

14. "The rule is so well established that it may be said to be fundamental and elemental that courts will not substitute their judgment for the discretion fairly exercised which is lawfully reposed in officials, courts or tribunals. This rule has long been applied to the office of executor and trustee." *In re Estate of Messer*, 34 Misc. 2d 416 (Sur. Ct., Cattaraugus Co. 1962) at p. 8; *see* also *Estate of T. Harry Glick*, *supra* n. 10; *In re William M. Kline Revocable Trust*, 196 Misc. 2d 66 (Sur. Ct. Fulton Co. 2003); *In re: Judicial Settlement of the Account of Bank of Am., N.A.*, *supra* n.7.

15. *In re Sheppard*, 147 A.D.3d 1239 (3d Dep't 2017).

16. New York Surrogate's Court Procedure Act (SCPA) 2107.

17. *See Cano v. Shmonie Corp*, *supra* n.12. *See also Liranzo v. LI Jewish Education / Research* (N. Y. Sup. Ct., Kings Co. No. 28863/1996, June 25, 2013). In *Liranzo*, the court did not specifically articulate a standard of review; rather, the authors read the decision as applying a substituted judgment analysis, as various criteria are cited in the decision. One may also read decisions allowing for the review of counsel fees paid by trustees of SNTs as undermining the trustee's discretion because of a beneficiary's disability. *See, e.g.*, *In re Examination of the Annual Inventory & Account of Susan Felice & the Bank of N.Y.*, 2003 N.Y. Misc. LEXIS 990 (Sup. Ct., Suffolk Co. 2003).

18. Some transactions should require court approval, such as the use of funds in a trust for a minor to purchase a home where the minor will live with the family. But in New York, this transaction is contemplated in our advice and direction statute, based on the potential conflict of interest.

19. "Once the trustees were required to make themselves knowledgeable about [the beneficiary's] condition and his needs, and the availability of services that would enable them to provide for those needs, they began, and continue to use funds from his trust for the purposes [the testator] anticipated and so deeply desired. . ." *In re JP Morgan Chase Bank N.A. (Marie H.)* (also referred to herein as "*In re JP Morgan*"), 38 Misc. 3d 363 (Sur. Ct., N.Y. Co. 2012) at 376.

20. If all else fails, a trustee has the authority (in New York) to apply to a court for the appointment of a professional guardian who would have authority to obtain information and provide documentation that a trustee would need to make informed decisions. N.Y. Mental Hygiene Law 8 1.06(a)(4).

21. Whether a family member is "reliable" is also a judgment call.

22. This was the recommendation of the court in *In re JP Morgan*, *supra n.*19. It is important to note that the beneficiary resided in a residential program with 24-hour Medicaid-funded staffing. *JP Morgan*, 38 Misc. 3d at 369. The case illustrates the fact that a trustee's obligation to remain informed goes beyond simply ensuring that a beneficiary is participating in a Medicaid funded program, and requires independent assessment and review.

23. *In re U.S. Bank N.A.*, 51 Misc. 3d 273 (2015).

24. New York's statute defines a supplemental needs trust as a discretionary trust which, by its terms prohibits the trustee from expending or distributing trust assets in any way which may supplant, impair or diminish government benefits or assistance for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving; provided, however, that the trustee may be authorized to make such distributions to third parties to meet the beneficiary's needs for food, clothing, shelter or health care but only if the trustee determines . . .that the beneficiary's basic needs will be better met if such distribution is made . . . EPTL 7-1.12(a)(5)(ii).

25. *In re Levison's Will*, *supra* n.9. Decisional law in this area focuses on the trust creator's intentions in determining whether the trustee should consider a beneficiary's other resources when making a discretionary distribution. There is no ambiguity with an SNT, as the requirement to consider other resources (government benefits) is written into the New York statute and the language of the document.

26. In New York the issue has reached critical proportions. *See* testimony of Mark Van Voorst, Executive Director of NYSARC, before the New York State Legislature warning of the impending crisis, https://bfair2directcare.com/2019/02/07/the-arc-new-york-executive-director-mark-van-voorst-asks-new-york-state-do-we-need-a-tragedy-to-occur-before-you-will-fund-a-living-wage-for-direct-support-professionals/.

27. Medicaid Waiver programs provide services to people who would otherwise be in an institution, nursing home, or hospital, allowing them to receive Medicaid-funded long-term care in the community, https://www.medicaid.gov/medicaid/hcbs/authorities/1915-c/index.html.

28. 18 N.Y.C.R.R. § 360-4.3(e).

29. POMS SI 01120.200E.1.b; *see also The Impact of Special Needs Trusts on Eligibility for Subsidized Housing*, The Voice, Volume 5, Issue 4 (March 2011), https://www.specialneedsalliance.org/the-voice/the-impact-of-special-needs-trusts-on-eligibility-for-subsidized-housing-2/.

30. New York's statute makes clear that "neither principal nor income held in trust shall be deemed an available resource to the beneficiary under any program of government benefits or assistance; however, *actual distributions from the trust may be considered to be income or resources of the beneficiary to the extent provided by the terms of any such program*." EPTL 7-1.12(b)(3) (emphasis added).

31. For individuals served by the NYS Office of People With Developmental Disabilities, see Administrative Directive 18 ADM 06, "Transition to People First Care Coordination" (June 26, 2018).

32. A word of caution is warranted here. Those with experience reviewing Life Plans (formerly called "Individualized Service Plans" or "ISPs") know that these documents often contain outdated and inaccurate information, largely a result of staff having too many reports to prepare and not enough time and experience to prepare them in a thorough and detailed fashion.

33. In 2016, the New York State Bar Association Trusts and Estates Section Subcommittee Reviewing Changes to EPTL 7-1.12 recommended that the statute be modified so as to require the trustee of a supplemental needs trust to investigate the need for a case manager, to retain a case manager where necessary, and to pay the case manager from trust funds. *See* Memorandum dated March 30, 2016, from Nina P. Silfen, Esq. Stephanie Hamberger, Esq., and Jonathan Byer, Esq. to Michael Schwartz, Esq., Chair of the Trust and Estate Administration Committee of the Trusts and Estates Section of the New York State Bar Association.

34. SCPA 106; Official Form JA-4, "Trust Accounting With Instructions."

35. In re Kaidirmouglou, N.Y.L.J., Nov. 5, 2004, p. 28 (Sur. Ct. Suffolk Co. 2004); *In re KeyBank*, 58 Misc. 3d 235 (Sur. Ct., Saratoga Co. 2017); *In re Feuerstein*, 147 A.D.3d 688 (1st Dep't 2017).

36. 7 Warren's Heaton on Surrogate's Court Practice § 94.02(2)(a) (2019).

37. In determining whether an informal account by a trustee is adequate, "the court must consider that [the beneficiary] is an adult under no disability." In re Spacek, supra n.5 at 8.

38. N.Y. Soc. Serv. L. § 366(2)(b)(2)(v); Oxenhorn v. Fleet Trust Co., 94 N.Y.2d 110 (1999).

39. *In re Spacek*, *supra* n.5.

40. Lewis, Kristen M., Esq. and Lowder, Janet L., Esq., SNT Beneficiaries on the Move: Issues with SNT Portability, at p. 7 (Stetson University College of Law 2017 National Conference on Special Needs Planning and Special Needs Trusts).

41. See recent revisions to the Social Security Administration's Program Operations Manual System (POMS) SI 01120.200–203, effective April 30, 2018, which adopted the "primary benefit" test for SNT distributions. New York has utilized the primary benefit test since 1996. *See* OBRA 93 Provisions on Transfers and Trusts, NYS Department of Social Services Administrative Directive, 96 ADM 8 (March 1996), at (IV)(7)(b)(ii).

42. In some counties the examiner's approval will be accompanied by an order acknowledging its submission and approving the examiner's fee, but the informational accounting is still an *ex parte* submission and will not have the same legal effect as an order obtained in a proceeding for judicial settlement of the trustee's accounts.

43. *In re Salvati*, 90 A.D.3d 406 (lst Dep't 2011).

44. *Comm'r. of the NYC Dept of Social Services v. New York Presbyterian Hospital, Chi Young Lee and BNY Mellon*, N.A., 47 Misc. 3d 1204(A) (Sup. Ct., N.Y. Co. 2015).

45. Lewis and Lowder, *supra* n. 41. See also http://hms.com/special-needs-trust-recovery-services/.

46. POMS SI 01120.203(B)(10).

47. The POMS are not statute or regulation, and the agency's interpretation of this statutory reimbursement requirement should be given limited weight in a state court proceeding for the settlement of a trustee' s accounts.

48. SCPA 2208(3)(b).

49. N.Y. Soc. Serv. L. § 366(2)(b)(2)(v).

50. *See In re Tinsmon (Lasher)*, 169 A.D.3d 1305 (3d Dep't 2019), where a representative from New York's Medicaid program argued against an otherwise permissible distribution from an SNT based on its interpretation of the SSI program rules, a program that the agency had no authority to administer, and no particular expertise to interpret. Both the lower court and the appellate court disposed of the agency's arguments in short order, but the trustee still had to spend the time and money in litigation.

51. *In re Hagadorn*, 176 Misc. 233 (Sup. Ct., N.Y. Co. 1941); *In re Meenan*, 46 N.Y.S.2d 282 (Sur. Ct., Westchester Co. 1944); *In re William M. Kline Revocable Trust,* 196 Misc. 2d 66 (Sur. Ct., Fulton Co. 2003).

52. *In re Tinsmon* (Lasher), *supra* n.50.

53. In our first party supplemental needs trust practice we provide copies of annual accountings to the Medicaid program representatives, and to other remainder beneficiaries when possible and practical.

54. In New York, the failure to object may be considered 'ratification' and serve as a basis for a motion to dismiss the objections of an informed remainderman. *Rajamin v. Deutsche Bank Nat'l Trust Co.*, 757 F.3d 79 (2d. Cir. 2014). Would the Medicaid program be similarly bound? One might argue that a government agency cannot be estopped. *See Oxenhorn v. Fleet*, *supra* n.38. This position fails to recognize that in New York, the Medicaid program is named as a beneficiary by statute (N.Y. Soc. Serv. L. § 366(2)(b)(*2*)(v)). In a state court proceeding for settlement of a trustee's accounts, the Medicaid program's interest should be no greater and no less than that of any other remainder beneficiary.

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New European Court Rulings Provoke Uncertainties

An Update to Our March 2019 Article– The Right to Be Forgotten: Are Europe and America on a Collision Course?[1]

By Victor P. Muskin

Victor P. Muskin is an international lawyer. He is a member of the International Section of NYSBA, has served as Chair of the European Affairs Committee of the New York City Bar Association, and is a Director of the French-American Bar Association and a member of the American Foreign Law Association.

On September 24, 2019 the European Court of Justice (ECJ) issued its long-awaited judgment in the case of *Google v. CNIL*[2] (the French Data Protection Authority).[3] The Court ruled that while the GDPR and its predecessor EC Directive 95/46 require erasure of contested material from all EU-based versions of a search engine and not merely those within the member state of origin (as Google had originally contended), EU data protection law does not require the deletions to be carried out on a global basis as the CNIL and the French court had ordered.[4]

Google had appealed from a judgment of the French Conseil d'Etat (France's highest administrative court) fining it 100,000 euros for failing to comply with the CNIL's order, under the EU's right to be forgotten, to erase contested links from all versions of its search engine anywhere in the world, not merely those accessible from within the European Union. No decision had been rendered at the time of original publication in March 2019.

The judgment has been widely interpreted as a victory for Google, and it is undoubtedly at least a partial success as it vacated the fine and limited the erasure order. Google's victory may not be complete, however, as the ECJ ruling included several ambiguities. The first is that the GDPR nevertheless requires a search engine operator to implement, "where necessary, measures which . . . effectively prevent or, at the very least, seriously discourage" internet users within the EU from accessing unblocked links to the information which is the subject of the erasure request.[5] No guidance is provided as to what such measures should be, leaving open the possibility of further litigation on this point. The ECJ also noted that legislation requiring worldwide de-referencing would be justified,[6] and even suggested that an order to that effect would not be prohibited by current law in a proper case.[7] These points leave the door open to future global erasure requests. They can also be read as an invitation to the EU legislature to expand the GDPR erasure requirements as well as an advisory opinion that such an expansion would generally be upheld.

To add to the uncertainties, just a few days later, October 3, 2019, the ECJ issued its judgment in the case of *Eva Glawischnig-Piesczek v. Facebook Ireland*.[8] Ms. Glawischnig-Piesczek is an Austrian public official and chair of the Green Party. She has been vilified in some elements of the Austrian press. She demanded that Facebook take down a user's links to a particularly offending article which she contended was defamatory. The Austrian court ruled that the article was in fact defamatory and asked the ECJ for guidance on the geographic scope of the erasure to be required. The ECJ judgment held that nothing in EU law precludes the national courts of a member state from ordering the deletion, *on a global basis*, of content that has been ruled unlawful.[9] The implications of an order for worldwide erasure are obviously very broad, as its scope could easily include jurisdictions such as the U.S. where content that offends in Europe may be constitutionally protected.

Glawischnig-Piesczek thus seems at first glance to contradict *Google,* which appears to limit the deletion requirement to EU based access. There are several distinctions between the two cases, however, which may explain the different results. *Glawischnig-Piesczek* was based on European regulation EC 2000/31, the Directive on Electronic Commerce, and not on the data protection rules of the GDPR or its predecessor directive as was *Google*. In addition, *Glawischnig-Piesczek* addressed content that had been adjudicated to be unlawful, a circumstance not present in *Google*. Furthermore, *Glawischnig-Piesczek* involved a social network host, Facebook Ireland, rather than search engine operator.

The bottom line of these two cases seems to be that under the right to be forgotten, absent compelling circumstances, only an EU-wide, not a global, deletion of objectionable content can be required, but in the case of content adjudicated to be unlawful, an order for global erasure may be obtainable within any EU member state under its national law. Both cases deal with injunctions only but do not exclude the possibility of damages in a proper case. The rulings are final and not subject to further appeal.

The extraterritoriality issues initially posed by France's global erasure order in *Google* and now by Austria's potential worldwide injunction in *Glawischnig-Piesczek* are thus far from settled. Given the free speech implications of *Glawischnig-Piesczek* and the absence of a right to be forgotten in U.S. law, these latest developments may only add to the potential European-American legal conflicts to come.

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1. 91 N.Y. St. B.J. 36 (Mar. 2019).
2. Commission Nationale de l'Informatique et des Libertés.
3. Judgment of 24 Sept. 2019, *Google* (Portée territoriale du déréférencement) (C-507/17) EU:C:2019:772.
4. *Id.*, ¶¶ 64–66.
5. *Id.*, ¶ 73 and Conclusion.
6. *Id.*, ¶¶ 57–58.
7. *Id.*, ¶ 72.
8. Judgment of 3 October 2019, *Glawischnig-Piesczek* (C-18/18) EU:C:2019:821.
9. *Id.*, ¶¶ 49, 50, 53.

Stare Decisis, Precedent and Dicta

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Lawyers and judges regularly treat dicta like a case holding.[1] In this article we attempt to distinguish a holding that is precedent from dicta.

"Stare decisis et non quieta movere" means to stand by things decided and not to disturb settled points.[2] The doctrine of stare decisis provides that once a court has decided a legal issue, subsequent cases presenting similar facts should be decided in conformity with the earlier decision.[3] Stare decisis is the doctrine of precedent, the "rule that precedents must be followed when similar circumstances arise."[4]

Stare decisis requires that the decisions of the Court of Appeals which have not been invalidated by changes in statute, decisional law, or constitutional requirements must be followed by all lower appellate courts, such as the appellate division and the appellate term,[5] and by all courts of original jurisdiction.[6] The doctrine of stare decisis requires trial courts in one department to follow precedents set by the Appellate Division of another department until the Court of Appeals or the Appellate Division in that Department pronounces a contrary rule. These considerations do not apply to the Appellate Division. While an Appellate Division should accept the decisions of sister departments as persuasive it is free to reach a contrary result.[7] Trial courts within a Department must follow the determination of the Appellate Division in another Department until such time as the Appellate Division of their own Department or the Court of Appeals passes on the question.

Where a question has not yet been decided by an Appellate Division, inferior courts in that Department must follow the determinations of the Appellate Division in any other Department until such time as their own Appellate Division or the Court of Appeals passes upon the question.[8] Where there is no applicable decision from the Court of Appeals or from the Appellate Division in the trial court's Department and the decisions from other Appellate Divisions are conflicting, the trial court is left to fashion its own decision. A court will give appropriate weight and consideration to the views expressed by the Justices of the Appellate Divisions and, where statutory interpretation is involved, developing a view that

is consistent with the overall objective of the statute.[9] A judgment of a trial court will not receive stare decisis treatment by an appellate court.[10]

Findings are a determination by a judge, or jury, of a fact supported by the evidence in the record.[11] A holding is a court's determination of a matter of law pivotal to its decision; a principle drawn from a decision. It is also a ruling on evidence or other questions presented at trial.[12] A precedent is a holding that must be followed when similar circumstances arise.[13]

Dicta are opinions of a judge that do not embody the determination of the court; opinions which are not on the point in question.[14] Statements made that are not essential to a decision on the questions presented are the dicta, and not the decision of the court. A judicial opinion "is only binding so far as it is relevant; and, when it wanders from the point at issue, it no longer has force as an official utterance."[15]

In *In re Fay,*[16] the Court of Appeals wrote, with regard to the question of what is precedent, "it cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the . . . consideration of the cause, something else was found . . . which disposed of the whole matter."

In *40 West 67th Street Corp. v. Pullman,*[17] defendant was a shareholder-tenant in the plaintiff cooperative building. At a special meeting called by the shareholders, the shareholders in attendance passed a resolution declaring defendant's conduct "objectionable" and directing the Board to terminate his proprietary lease and cancel his shares. The cooperative terminated defendant's tenancy in accordance with a provision in the lease that authorized it to do so based on a tenant's "objectionable" conduct." Defendant remained in the apartment, prompting the cooperative to bring this suit for, inter alia, possession and ejectment. Defendant challenged the cooperative's action and asserted, that his tenancy could be terminated only upon a court's independent evaluation of the reasonableness of the cooperative's action. The primary issue in the Court of Appeals was the proper standard of review to be applied when a cooperative exercises its

agreed-upon right to terminate a tenancy based on a shareholder-tenant's objectionable conduct.

The Court of Appeals held that the proper standard of review to be applied was the business judgment rule. The rule could be applied consistently with RPAPL 711 (1), which applied to this termination and required competent evidence to show that a tenant was objectionable. Under the business judgment rule, a court should defer to a cooperative board's determination so long as the board acts for the purposes of the cooperative, within the scope of its authority, and in good faith. Here, plaintiff was under a fiduciary duty to further the collective interests of the cooperative, whose shareholders overwhelmingly voted in favor of terminating defendant's tenancy, and it followed the procedures contained in the lease for doing so. There was no evidence of any bad faith by plaintiff's that would trigger further judicial scrutiny.

In *Pullman* the shareholders acted to terminate the defendant's tenancy – not the Board. Were the Court of Appeals' statements about granting business-judgment deference to board votes directly related to the issue before the Court? Were they dicta? Does *In re Fay* support the conclusion that the statements were not dicta?[18]

In re McDermott v. Bale[19] was a Family Court custody proceeding, where the Attorney for the Children (AFC) appealed from an order which incorporated the terms of a written stipulation executed by the parties granting the parties joint custody of their two children, with primary physical residence to the mother and visitation to the father. The AFC refused to join in the stipulation, which Family Court approved over his objection. The Appellate Division affirmed.

The opinion in *McDermott* stated, in relevant part: "

> We reject the AFC's contention that the court erred in approving the stipulation. Although we agree with the AFC that he "'must be afforded the *same opportunity as any other party to fully participate in* [*the*] *proceeding*'". . . , and that the court may not "relegate the [AFC] to a meaningless role" . . . , the children represented by the AFC are not permitted to "veto" a proposed settlement reached by their parents and thereby force a trial . . . .
>
> We cannot agree with the AFC that children in custody cases should be given full-party status such that their consent is necessary to effectuate a settlement. The purpose of an attorney for the children is "to help protect their interests and to help them express their wishes to the court" (Family Ct. Act § 241). There is a significant difference between allowing children to express their wishes to the court and allowing their wishes to scuttle a proposed settlement. We note that the court is not required to appoint an attorney for the children in contested custody proceedings, although that is no doubt the preferred practice . . . Thus, there is no support for the AFC's contention that children in a custody proceeding have the same legal status as their parents, inasmuch as it is well settled that parents have the right to the assistance of counsel in such proceedings . . . .[20]
>
> In sum, we conclude that, where the court in a custody case appoints an attorney for the children, he or she has the right to be heard with respect to a proposed settlement and to object to the settlement but not the right to preclude the court from approving the settlement in the event that the court determines that the terms of the settlement are in the children's best interests . . . ."[21]

What was the holding? What was precedent? What was dicta? It appears to us that the holdings were (1) that when an AFC is appointed in a custody case, he has the right to object to a settlement but not to preclude the court from approving it and (2) children do not have full party status in a custody case.[22] These holdings are precedent in the Fourth Department. Everything else was dicta. No other portion of this brief opinion was "necessary to the result."

In *In re Newton v. McFarlane,*[23] the Family Court held a hearing, without first determining if there had been a change of circumstances, and then modified the custody order to give the mother sole custody of the child. Its three-line decision stated its conclusions that there were changed circumstances and awarding her custody was in the best interest of the child, but did not state any findings or its reasoning. The Second Department reversed the order and dismissed the petition, for the reasons stated in the opening paragraphs of its opinion. There, it stated:

> This appeal raises several important issues pertinent to child custody determinations. We conclude that: (a) the attorney for the child has the authority to pursue an appeal on behalf of the child from an order determining the custody of the child; (b) the child is aggrieved, for appellate purposes, by an order determining custody; (c) the Family Court should not have held a full custody hearing without first determining whether the mother had alleged and established a sufficient change in circumstances to warrant an inquiry into whether the child's best interests were served by the existing custodial arrangement; and (d) the Family Court erred in failing to give due consideration to the expressed preferences of the child, who is a teenager.

There can be no doubt the paragraph quoted above contains the four holdings of the Appellate Division, which it denominated as its conclusions. Are these holdings precedent or just limited to the facts of this case? Did the court hold that the attorney for "a child" or "the child" has the authority to pursue an appeal on behalf of the child from an order determining the custody of the child? Did it hold that "a child" or "the child" is aggrieved by an order determining custody? Did it reverse and dismiss the petition because there were no findings, and no demonstration of a change of circumstances, or because the wishes of the child were not considered?

Not all cases are precedents. A close reading of the opinion will make it clear that the court was referring to this child and this set of circumstances. It held that the attorney for "the child" had the authority to pursue the appeal on behalf of the child from the order determining the custody of the child. It also held that "the child" was aggrieved by the order determining custody.

Assuming the opinion was not limited to this child, the Newton opinion indicates that the court based its conclusion that the attorney for the child has the authority to pursue an appeal on behalf of the child from an order determining the custody of the child on the language of Family Court Act §1120 (b). It provides that whenever an attorney has been appointed by the Family Court to represent a child, the appointment continues where the attorney files a notice of appeal on behalf of the child or where one of the parties files a notice of appeal. Because there is no requirement in the Domestic Relations Law or Family Court Act that the court to appoint an attorney for the child in a custody case, the holding must be limited to a case where an AFC is appointed, and would not precedent in the Second Department beyond its holding.

CONCLUSION

It is not easy to distinguish dicta from precedent in an opinion. The easiest way to determine what is dicta is by the process of elimination. Work backwards from the holding or holding(s) of the court, which are usually prefaced by the words 'We hold "or "We conclude." Everything that is not necessary for the court to reach the holding is dicta. Remember, not all holdings are precedent.

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1. See Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 Brook. L. Rev. 219 (2010).
2. *People v. Taylor*, 9 N.Y.3d 129 (2007).
3. *People v. Bing*, 76 N.Y.2d 331, 337–38 (1990).
4. Doctrine of Precedent, Black's Law Dictionary (11th ed. 2019).
5. *Warnock v. Duello*, 30 A.D.3d 818 (3d Dep't 2006),
6. *Battle v. State*, 257 A.D.2d 745 (3d Dep't 1999).
7. *Mtn. View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663 (2d Dep't 1984).
8. *Stewart v. Volkswagen of America, Inc.*, 181 A.D.2d 4 (2d Dep't 1992), *order rev'd on other grounds*, 81 N.Y.2d 203 (1993).
9. *Summit Const. Services Grp., Inc. v. Act Abatement, LLC*, 34 Misc. 3d 823 (Sup. Ct., Westchester Co. 2011).
10. *In re Bull*, 235 A.D.2d 722 (3d Dep't 1997); *Samuels v. High Braes Refuge, Inc.*, 8 A.D.3d 1110 (4th Dep't 2004).
11. Finding of Fact, Black's Law Dictionary (11th ed. 2019).
12. Holding, Black's Law Dictionary (11th ed. 2019).
13. *See* Doctrine of Precedent, Black's Law Dictionary (11th ed. 2019).
14. *See Rohrbach v. Germania Fire Ins. Co.*, 62 N.Y. 47 (1875).
15. See *Colonial City Traction Co. v. Kingston City R.R. Co.*, 154 N.Y. 493, 495 (1897).
16. *In re Fay*, 291 N.Y. 198 (1943).
17. 100 N.Y.2d 147, 149–50 (2003).
18. In *London Terrace Towers v. Davis*, 6 Misc. 3d 600, 612–13 (N.Y. City Civ. Ct., 2004) the Court held that the additional statement was dicta.
19. 94 A.D.3d 1542 (4th Dep't 2012).
20. *Id.* Citations omitted.
21. Citations omitted.
22. *See* also *Kessler v. Fancher*, 112 A.D.3d 1323 (4th Dep't 2017); *Lawrence v. Lawrence*, 151 A.D.3d 187 (4th Dep't 2017); and *Kanya J v. Christopher K*, 175 A.D.3d 760 (3d Dep't 2019) each holding that a child in a custody matter does not have full party status.
23. 174 A.D.3d 67 (2d Dep't 2019).

The Case for Attorney Wellness

By Robert Herbst

Attorney wellness has been like Mark Twain's view of the weather, everyone was talking about it, but no one was doing anything about it. At last, that is changing.

It is generally agreed that lawyers are stressed. *See* Herbst, *Attorney Wellness in a Nutshell*, NYSBA Journal 16–19 (Aug. 2019), https://www.nysba.org/Journal/2019/Aug/Attorney_Wellness_in_a_Nutshell/. It is also beyond dispute that stress can cause a wide range of psychological and physical problems such as anxiety and depression, high blood pressure, heart disease, diabetes, and obesity. *Id.* To escape this stress, many lawyers turn to substance abuse. According to a 2017 survey by an ABA working group, 21% of lawyers reported problematic alcohol use. Some cannot bear the stress under any condition. The National Institute for Occupational Safety and Health found that the suicide rate for lawyers is 1.33 times the norm, higher than for the military or veterans. Suicide is the third leading cause of death for lawyers after cancer and heart disease. The top three causes of death for lawyers can be attributed to stress. *See* Herbst, *Attorney Wellness in a Nutshell,* at 17.

After generations of working under stress, lawyers are finally talking about the elephant in the room. The American Bar Association has established a National Task Force on Attorney Well-Being ("ABA Task Force") and the Law Practice Management Section of the New York State Bar Association has an Attorney Wellness page on its website [www.nysba.org/wellness]. Scott M. Karson, the NYSBA's President-elect, intends to make initiatives on attorney wellness and physical fitness an important part of his presidency and is creating a task force on attorney wellness to make recommendations. The Joint Rules of the Appellate Divisions specifically provide that CLE credits may be granted for programs on Law Practice management that "encompass…stress management," 22 N.Y.C.R.R. 1500.2(e).

Fortunately, we have what is the closest thing to a magic bullet to alleviate the effects of practice-induced stress: exercise. Exercise releases the fight or flight reflex triggered by stress and lowers your blood sugar, heart rate and, blood pressure. It also causes your brain to produce endorphins, which are chemically similar to opiates, and endocannabinoids, which are similar to the active ingredient in marijuana. These stimulate the brain's pleasure centers and dull feelings of pain or fatigue. Exercise will also reduce your levels of the stress hormone cortisol, so you will feel less anxious and depressed. As a result, you will feel less stressed and not need to turn to drugs or alcohol. *See* Herbst, *Attorney Wellness in a Nutshell,* at 18; Herbst, *A Winter Wellness Wonderland*, NYSBA Journal 35 (Jan. 2020), https://www.nysba.org/Journal/Jan/A_Winter_Wellness_Wonderland.

So why aren't more lawyers exercising? Perhaps it is reflective of the general public, whereas reported by health club industry group IHRSA, only about 14% of the U.S. population have a gym membership and of those 80% go unused. Lawyers are highly educated and have great self-discipline. We should be doing better than that.

Or is it because lawyers have been trained to put their clients first and that the key to success is to outwork everyone else, whether to win a case or to bill more hours? It has been urged that lawyers make themselves their own client and make their own health their top priority instead of putting all their other clients ahead of

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

them. *See* Herbst, *Attorney Wellness in a Nutshell,* at 17. Doing so is not self-indulgence. If a lawyer is reluctant to exercise for their own health, they should exercise for the health of their practice. A firm whose lawyers are overstressed, ill or impaired by substance abuse will not be able to give the best client service and will be at a competitive disadvantage.

A lawyer who exercises will be a better lawyer. In addition to reducing stress, preventing disease, giving you increased strength and stamina, and making you feel good, it has been scientifically proven that exercise improves brain function by bringing oxygen to the brain and causing the building of new neural connections. You may find that when you let your mind go free during exercise, you will come up with creative thoughts and new ideas on matters you are handling. Also, if you stay hydrated, you will not suffer from the fatigue, inability to concentrate, impaired memory, and headaches that dehydration can cause. If you get enough sleep, your memory, concentration, and ability to learn will improve. Small changes pay off big. If you exercise, hydrate, and sleep, you will be able to work more efficiently and longer, as the legal culture requires. You will be a lean, keen law machine.

To promote wellness, law firms are taking different approaches. White & Case has built a wellness center in its New York office. It includes a full gym with free weights and cardio equipment, personal trainers, guest instructors, and a nurse. In addition to improved morale, the firm has seen improved productivity and saved millions of dollars in prevention and insurance-related costs. Kirkland & Ellis is taking a more clinical approach and has created a wellness program led by a licensed therapist who is a former practicing attorney. She has created firm-wide CLE programs aimed at destigmatizing lawyers' seeking help.

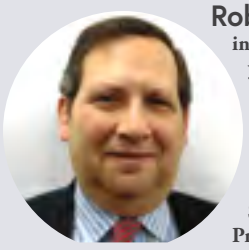
Having a wellness program will also aid in the recruitment and retention of younger lawyers. Colleges now have wellness centers instead of gyms and many law schools offer wellness programs that show law students ways to handle stress. Polls show that millennials value work-life balance over increased compensation. Young associates will come to expect firms to have wellness programs and show concern for their wellbeing. To take advantage of that, White & Case gives tours of its wellness center to candidates and Kirkland has a one-pager describing their wellness program, which it distributes when it recruits at law schools.

A wellness program can also protect firms from malpractice costs and reputational risk. The ABA Task Force found that "40 to 70 percent of disciplinary proceedings and malpractice claims against lawyers involved substance abuse or depression, and often both." How many of those proceedings and claims would have been prevented if the attorneys involved had turned to exercise instead of numbing themselves with drugs and alcohol? It is much better to represent clients when you are alert and energized from a workout than while impaired.

People do not become lawyers for their health. They do it to become part of a learned profession that enables them to effect social change, protect people's rights, and provide representation to ensure an ordered world. Lawyers can provide the best representation if they are fit and they are entitled to enjoy good health themselves. It is the least they deserve for maintaining the rule of law.

Everyone Is Entitled to an Opinion... but Not to This One

By Robert Kantowitz



Robert Kantowitz has been a tax lawyer, investment banker and consultant for almost 40 years. He is responsible for the creation of a number of widely used capital markets products, including "Yankee preferred stock" and "trust preferred," as well as numerous customized financial solutions and techniques for clients. He is a longtime member of the New York State Bar Association Committee on Attorney Professionalism; he co-authored the Committee's 2015 Report on Attorney Ratings and as Chair of the Civility Subcommittee helped lead the initiative resulting in the adoption by the New York courts in 2020 of revised Standards of Civility. Over the past several years, he has contributed articles to the *Journal* on a variety of subjects.

I. INTRODUCTION[1]

Closing conditions

Any lawyer who has worked on a transaction in which one company is acquiring all or part of another enterprise is familiar with the basic architecture of a merger agreement or acquisition agreement. These agreements all have certain parts in common, like the head, thorax and abdomen of the insects that we dissected (ugh!) in high school biology. One of those parts, generally in the middle of the agreement, is the parade of sections reciting representations and warranties, covenants, closing conditions, termination rights and indemnities.

The list of closing conditions for an acquisition can be fairly standard: board approvals and shareholder approvals, regulatory approvals where relevant, confirmation of

the material accuracy of representations and often legal opinions on certain matters.[2] There may also be a condition that there not have been a material adverse change in the financial condition of the target between the date on which the agreement is executed and the closing.

I am going to deal here with one particular closing condition that can cause a lot of trouble if one is not careful – a "tax treatment condition." Some of the recommendations that I am going to make run against the usual grain. That is intentional.

By "tax treatment condition," I am referring to a requirement for the delivery of an opinion of counsel to the effect that *the transaction itself has particular tax consequences*.[3] For example, the seller may want to be sure that neither it nor its shareholders will be taxed on the gain from the transaction, or, conversely, a purchaser might want to be sure that in what is supposed to be a taxable acquisition, it will get a basis step-up and be entitled to depreciate or amortize the assets. The condition may be stated tersely and may refer to the particular section of the Internal Revenue Code that is intended to govern the transaction,[4] or it may incorporate by reference a form of opinion that enumerates many specific consequences.[5]

II. TAX TREATMENT CONDITIONS: ETE-WILLIAMS AS A CAUTIONARY TALE

Why is this condition different from all other conditions?

Perhaps, now that a few years have passed, it is time to shed light on this matter by recalling the fiasco of the intended merger of Energy Transfer Equity LP (ETE) and The Williams Companies ("Williams"). There is insufficient space here to review and examine what happened in as much detail as the Delaware law considerations merit; suffice it to say the following:

- The Merger Agreement set out as a closing condition that ETE's own counsel had to provide an opinion at closing that they called the "721 Opinion," specifically that one of the elements of the transaction "'should' be treated by the tax authorities as a tax-free exchange under Section 721(a) of the Internal Revenue Code."[6]
- There was a representation in the Merger Agreement to the effect that there was nothing known that would prevent the issuance of the 721 Opinion. ETE's tax counsel said that they believed they could deliver the 721 Opinion and that they considered the issue "fairly straightforward."[7]
- Then all hell broke loose. Over the course of the several months between the signing and the expected closing, the price of oil went further south than wherever hell is located, so that (i) the value of the acquisition to ETE was several billion dollars less than the agreed-upon acquisition price and (ii) it appeared that it would be difficult for ETE to raise the anticipated necessary debt financing.
- Naturally, ETE was (and in the interests of its owners properly so) looking for ways not to close the transaction. Enter ETE's internal tax counsel. He announced that a new potential issue had occurred to him for the first time: whether, with the lower price of oil, it might no longer be true that the consideration that holders were receiving was entirely for their equity, but rather might be for something else, and might therefore be taxable.
- Outside counsel responded that they could not give the 721 Opinion. Another law firm that was brought in said that, for an entirely different reason, they would not have given the 721 Opinion on these facts even had the price of oil not changed. Williams's counsel thought that they could give the 721 Opinion with the necessary level of comfort (barely), but that was of no avail in any event, since the condition in the agreement was that ETE's counsel provide the 721 Opinion to ETE.
- The Delaware courts let ETE off the hook.[8]

III. RECOMMENDATIONS

I am looking mainly to point out what parties might do to avoid something like this in the future. Here are my recommendations. I will concede in advance that some of these recommendations are "off market," but sometimes it needs to be pointed out that an emperor's clothes are threadbare.

A. Do your homework

Acquire a complete command of the facts and tax analysis; make sure you understand the intended tax consequences to all parties, not just your own; and do not ignore nuances and risks, for tax is not an exact science. Make sure that you are convinced that every tax discussion properly recites the relevant facts and at least on its face applies the law to them, without anything that strains belief and without ignoring anything that seems important.

Even if a tax opinion condition relates to another party, read it with a critical eye, and discuss with your tax people both what is entailed and whether they believe that the opinion can be rendered.

If there is any doubt as to whether a tax treatment opinion makes sense, do not allow the delivery of that opinion to be a closing condition, or you may be signing on to an unpleasant self-fulfilling prophecy.

B. Consider the alternatives as to who will issue a tax treatment opinion

If the delivery of a tax treatment opinion is one of the closing conditions, consider who has to issue that opinion and what the alternatives might be.

- ETE's intended reliance on their own counsel was appropriate, but the issue was central enough to the entire exercise that there should have been a "Plan B," lest there arise the possibility, or at least the appearance, of a "free option" to ETE. Perhaps there could have been a requirement that ETE consult with at least three firms from a pre-specified acceptable panel or from the pool of lawyers that had previously advised ETE, or perhaps a tie-breaker firm could have been designated at the outset.
- The ETE-Williams merger agreement "required the parties to use 'commercially reasonable efforts' to obtain the 721 opinion and to use 'reasonable best efforts' to consummate the transaction."[9] Those formulations were nonetheless insufficient to absorb the sudden blow to the transaction. Phrases like these would appear to connote a rather high standard, just below an unqualified "best efforts," and yet the Delaware courts found that ETE had not fallen short of their duty even though there appeared to be alternative ways to "get to yes." Take heed of that, and specify in as much detail as possible what each of the parties will be expected to do if the designated counsel cannot deliver the anticipated opinion. Must other counsel be consulted, and if so, whom? Must the transaction be restructured, and if so what are the limits or parameters, which elements are sacrosanct and which ones can be changed, and at what cost to whom to reach the desired result?

C. "Just say no"

Here is a suggestion that will raise eyebrows in some quarters: don't require a tax treatment opinion as a closing condition when the tax consequences can and should be known at the outset. The tax lawyers should do *all* the heavy lifting of the Code, the Regulations and those impressive numbered case law tomes up front and should be able to say what they believe the consequences will be. If you are happy, proceed, but do not leave open issues or unfinished analysis.

Why? Because tax is too sensitive and complex to leave the "clean up" for later. Too many times, the confident "I'm pretty sure we're OK," or "I'm just tying up a few loose ends," deteriorates into "I have a last-minute problem and cannot get there," or "I woke up in a cold sweat when I remembered the *Hutzenklutz*[10] case," or "I forgot to consider that the market price of tea in China might change." If the work is done up front and then it does turn out that a tax lawyer made a mistake, that would not be a happy situation for that lawyer, the client or the malpractice carrier, perhaps, but why should that be the other party's risk?

Almost every rule has an exception. Where there is a high-pressure situation, as where a white knight is coming in to stave off a hostile tender offer, if the issues appear straightforward it might be appropriate to do as much of the work as possible within the time constraints and hope to be right, leaving the confirmation as an opinion condition. The facts on the ground are sometimes messy. But even so, be careful to stay on the muddy ground and not climb a tree and go too far out on a limb.

D. Rely as much as possible on facts known at the outset

To the extent possible – and this requires serious thought and tax research – base the tax analysis on what is known when the contract is signed and as little as possible on facts that relate to the transaction itself that might change between then and closing. Try to limit variables relating to tax to matters that are *extrinsic to the transaction and to the economic environment*, rather than the correctness of the analysis were it to be re-done in light of changed economic conditions. These extrinsic conditions include changes in law and not much else. Conditions of the parties and the economy are relevant, of course, in a big-picture sense to whether a transaction should be completed or called off, but that should not invade any tax analysis.

The tax law is written as if everything in a transaction happens in one instant, but the tax law also has come to recognize that there can be a delay between when a contract is signed and when a transaction closes, and so it sometimes makes allowances and permits reliance on the facts as they were when a binding contract was signed (sometimes allowing for later approvals) even if things have changed between then and closing. Space limitations preclude my setting out comprehensive examples of when this applies and when not. [11]

E. "Just say no" (again)

Consider leaving some tax risks in the transaction if the difficulty in dealing with them exceeds the value of dealing with them and the potential collateral damage. Rather than merely confirming a representation that was made at the time of signing that there was no known impediment to the issuance of the tax treatment opinion – which could conceivably be defeated by further research discovering a problem even if no facts had changed – consider three alternative formulations:

1. Unless any of [*list certain specified hypothetical events*] happens, it does not matter whether the opinion can or cannot be issued at closing.
2. The following [*list certain events, such as a change in commodity prices or stock market indexes*] shall have no relevance even if one or more of them has some

impact or gives second thoughts to the lawyers who have to write the opinion.

3. The transaction shall close unless a change of law – including a new Revenue Ruling or a court case, but not a private ruling (or maybe even a private ruling) – is released between signing and closing.

Any of those alternatives could reduce or eliminate the guesswork, subjectivity and questions of good faith, as well as any incentive or ability to scuttle the transaction by invoking tax mumbo-jumbo as a smokescreen to obscure exogenous considerations.

F. Consider tax insurance

Space does not permit me to explore the developing alternative of transactional tax insurance, but there are certain situations where it may be possible to obtain coverage for the treatment of one or more aspects of the transaction. This should not be viewed as a universal solution. Insurance traditionally has been used for well understood low to medium risks that the parties cannot agree how to allocate between themselves; the more novel or risky the issue, the harder it may be to obtain insurance.

G. Numbers are our friend

Be clear about who is supposed to be benefiting from every condition, and put numbers on anything and everything, using the actual numbers if they are known and estimates or plausible numbers if the actual numbers are not known with certainty. Look up market rates and valuations in public sources, and ask the parties to the extent that non-public numbers can be shared.

There are at least two distinct ways in which numbers can be helpful, in assisting in the overall analysis and separately in devising ways of dealing with problems.

1. Stress-testing the tax analysis

Use numbers to construct examples to test the tax analysis, and ask whether the examples make sense and whether they raise additional tax or non-tax issues.

It is important, as noted above, to use known or realistic numbers in each example where what is being tested or "stressed" is something else, but it is also important to stretch the range of a number in testing the element to which that very number relates. If foreign currency is involved, consider what happens if the exchange rate or the values of the assets change; consider changes in each of the variables individually (holding everything else constant) and in combination with the other variables.

Could the precipitous change in the price of oil that doomed the ETE-Williams transaction have been anticipated at the start? Maybe, maybe not, but lots of people regret that no one appears to have asked, "What if . . . ?"

2. Numbers and relative numbers can suggest solutions

Numbers can be useful in suggesting solutions to apparent problems.

Imagine, hypothetically, that the ETE outside tax counsel had come back and said, "Hey, you know, we really can't deliver this opinion because we re-thought the matter and we were wrong at the time of signing when we thought we could." But suppose, further, that the price of oil had actually skyrocketed, and that the transaction had turned out to be an attractive one for ETE and its equity holders even if there was some chance, or even a high likelihood, that the latter would have to pay tax on some or all of the consideration. Well, it probably would have been within ETE's power to waive the closing condition, which they would have done had the transaction been sufficiently lucrative to enough of the equity holders even with worse tax consequences.

Sometimes it is manifestly clear whom a condition benefits. In other cases, however, it might not be obvious, or a provision might benefit both parties, one to a very great degree and another to a very small degree, or relatively equally. It is important to be clear which party, if any, might be able to waive a condition unilaterally.

H. Asymmetry can be a good thing

Understand that often the issues are not symmetrical and that an equitable and sensible contract need not mechanically reflect reciprocal treatment on every issue. When that is true, you can replace the yes-or-no binary effect of an opinion with a potential damages adjustment.

1. Suppose a legitimate concern arises that the tax treatment could be the wrong one, that the transaction is not tax-free to the seller's shareholders, for example. Suppose, further, that the after-tax effect on the shareholders of having the wrong treatment rather than the intended tax-free treatment is a maximum loss of $100, while the overall detriment to the acquirer of losing the transaction, due to the change in commodity prices, is $1,000. In retrospect, making the receipt of an opinion that the transaction is tax-free to the shareholders an absolute condition to closing turns out to be an instance of a very small tail's wagging a very large dog. The appropriate resolution would have been for the condition to state that the transaction could close but with an adjustment to indemnify the shareholders against some or all tax.

2. Relative benefits might also dictate what should be said in the documentation about waiver. For example, if there is any doubt whatsoever that the condition benefits only one party, but it is highly likely that it does benefit only that one party, then the documentation should explicitly say that that party has a right to waive the condition.[12] It might

also say that to the extent that another party can demonstrate that a waiver hurts it, then perhaps that other party is entitled to some compensation or to a price adjustment to make it more or less whole but is not allowed to block the transaction.

3. More generally, any time a condition is imposed, the other side should be able to "buy out" that condition with an appropriate payment. It may sometimes take a considerable amount of thought to decide just what that kind of buyout is, how to calculate it and how far to extend the potential consequences, but the principle is clear. It is imperative to consider the possibilities up front and draft the contracts accordingly, rather than hoping that courts will imply this fix if a problem comes up later.[13] It is also important to realize, as will emerge in the process of thinking about this in any given situation, that there is not always enough fabric available to upholster the furniture and that sometimes a failure to achieve the desired tax treatment really must be treated as a deal-breaker.

IV. CONCLUSION

Now, my answer to the iconic question, "Why is this condition different from all other conditions?"

Much of what I have written in this article is applicable in principle to closing conditions generically, but it is rare to encounter other closing conditions that actually fit the criteria the way that tax treatment conditions often do. Thus, a company either does or does not have legal authority to do what a contract says, and shareholders either did or did not vote in favor. These are not areas where it likely matters who is giving the opinion or where a cash payment can be calculated or could be an appropriate cure.[14] Financial conditions and representations usually incorporate either some standard of materiality or specific carve-outs, hurdles, and relatively small escrows to cover uncertainties, but generally require binary "yes or no" determinations. A "no material adverse change" condition might at first seem to be susceptible to the "how much money does it take?" approach, but upon reflection is not. A material adverse change often represents not only a major quantitative change but a qualitative one as well, either reflecting a sea change in the numbers or an independent alteration of the entire perspective on the company. Hence a "no material adverse change" condition is *intended* to have a cliff effect of stopping the deal in its tracks, not to set an amount below which some shortfall has to be brought.

On the other hand, tax treatment closing conditions deal with matters that can be inherently murky and uncertain but ultimately can be quantified in monetary terms. It's time to reconsider how to deal with them.

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1. I express thanks to Andrew Oringer, who reviewed this article and made helpful suggestions.

2. Each party may be required, for example, to deliver an opinion of its counsel that it is legally constituted and that it has the legal power to consummate the transaction.

3. I am *not* discussing the ubiquitous and non-controversial representations and warranties averring that the target is a corporation or is a partnership for tax purposes, has paid all required taxes and has not been a member of an affiliated group filing consolidated returns (because then it could have liability for the taxes of the entire group). These assurances relate to the state of the balance sheet and finances of the target, in that an unpaid tax obligation is similar to any other unpaid and unrecorded obligation. The issues involved are generally limited and conceptually unremarkable even though they require careful due diligence. I also am not addressing the possibility of applying to the Internal Revenue Service for a private letter ruling; the potential for delay, cost and uncertainty until closing that that entails; or the fact that certain kinds of tax issues are "no ruling" areas.

4. Examples: "a tax-free contribution to a corporation under section 351"; "a reorganization described in section 368."

5. Related to this expectation, there may be a clause that obligates both parties to take a particular tax position consistently with each other or to use agreed-upon valuations in filing their respective tax returns.

A clause like that requires special attention. When the prescribed course of action reflects (i) what the parties firmly believe is the correct position, (ii) a permissible election or (iii) the best estimate as to valuation, the agreement serves the salutary purpose of ensuring that neither party will set off the Internal Revenue Service's "whipsaw" alarm. The same can usually be said where the parties have adverse interests in the treatment and so the agreement as to the treatment likely represents a compromise that was not necessarily the product of doing what benefits both together the most at the government's expense. In almost every taxable asset acquisition, for example, the parties commit to getting together and agreeing on the allocation of the consideration to assets, although technically there is no requirement that they agree on the details.

By contrast, trying to use a collusive consistency agreement to transform a dubious or wishful conclusion about the treatment of a transaction into a valid one just compounds the error.

6. *Williams Companies v. Energy Transfer Equity, L.P.*, C.A. Nos. 12168 & 12337 (Del. Ch., June 24, 2016) at 2, *aff'd*, 159 A.3d 264 (Del. 2017).

7. Slip Op., *supra* n.6, at 16.

8. *See* n.6 *supra*. Chief Justice Strine dissented vigorously (and in my view convincingly) from the decision in the Delaware Supreme Court.

9. 159 A.3d at 267 (citations omitted).

10. Note to readers: do not try to look this one up. It took some doing to find a snappy name that was not the same as that of any of the taxpayers who have appeared before the federal courts.

11. One worth mentioning is "continuity of proprietary interest," one of the requirements for certain tax-free reorganizations, reflecting a situation in which shareholders of an acquired target have a sufficient continuing equity interest in the target represented by consideration received in the form of equity of the acquiring corporation. Treas. Reg. § 1.368-1(e)(2)(i) provides:

> In determining whether a proprietary interest in the target corporation is preserved, the consideration . . . shall be valued on the last business day before the first date such contract is a binding contract . . . if such contract provides for fixed consideration.

12. Fiduciary duties can play a role here. Suppose that a transaction is intended to be a tax-free reorganization in which neither the selling corporation nor its shareholders are taxable. Thought should be given to – and ideally the agreement should specify – the extent, if any, to which the selling corporation, in deciding whether to waive that condition, must consider not only tax to itself but also tax to shareholders (which may vary widely shareholder to shareholder).

13. The Delaware Supreme Court has addressed this issue in a recent case. Reading a contract literally, certain small holders had a right to block an exit sale if their cumulative financial return had not reached a certain level; the issue was whether this veto right might be overridden by an implied right to top up the small holders' shortfall to reach the hurdle. Even though a lot had changed over time since the contract had been executed, the court refused to modify the contract when the parties could have anticipated the issue and could have drafted to deal with it but did not. *Oxbow Carbon & Minerals Holdings v. Crestview-Oxbow Acquisition, LLC*, No. 536-2018 (Del. Jan 17, 2019) at 42–45 (concluding that "we reiterate that the implied covenant [of good faith] should not be used as 'an equitable remedy for rebalancing economic interests'—particularly where, as here, the parties are sophisticated business persons or entities") (internal footnotes and citations omitted). I have made a similar point previously about the limitations on the implied duty of good faith dealing, in *Ruff! Ruff! ROFR!*, 90 N.Y. St. B.J. 26, 28, n.14 (June 2018).

14. One has to operate within the strictures and limitations of the corporate law and securities laws, so I am certainly not suggesting that proponents of a deal bribe shareholders to vote in favor or treat some investors better than others. Of course, there are numerous instances where, completely legally and completely above-board, pricing has been adjusted or sweeteners added to a deal to secure approval, but that is, in essence, striking a new deal, not invoking a predetermined remedy to cure a defect.

Presumptive ADR in New York State

By Lee Chabin

Lee Chabin, Esq., is a longtime mediator working in New York City and Long Island. Much of his work focuses on separation/divorce and family matters, but he also handles cases falling under other areas of law. He has worked pro bono as a mediator and negotiator. From 2011 to 2017, Lee wrote a separation/divorce column on nyparenting.com that delved into legal, parenting and conflict management/resolution matters. Lee started and administers the Facebook group "Say NO to Antisemitism." You can reach him at lee_chabin@lc-mediate.com.

A man is badly hurt in an automobile accident.

A wife files for divorce to end a bitter and unhappy marriage.

Adult children battle over the validity of their father's will.

Company "X" sues company "Y" accusing it of breach of contract.

A patient alleges medical malpractice against her doctor.

What do these disparate legal matters, involving various areas of law and different types of injury, have in common? Perhaps the most obvious answer is that overwhelmingly all such cases are litigated, resulting in lengthy and expensive court battles that would leave one party (at least) dissatisfied with the outcome. Another commonality, generally most pronounced in family and matrimonial cases, is a high likelihood of strained and damaged relationships that are difficult if not impossible to repair.

But now, with the advent of Presumptive Alternative Dispute Resolution (ADR) in New York State, this will be changing. That is, civil cases, including commercial, personal injury, estate, matrimonial, surrogate court proceedings, small claims, housing and labor law cases will no longer be litigated – at least at first. These cases and others will be "presumed" to be appropriate for other methods of conflict resolution, most notably mediation. The ramifications can be expected to be widespread.

Mediation, for anyone unfamiliar, is a process where a neutral third party, the mediator, works with disputants to manage[1] or resolve the issues between them. While mediation can take different forms (for instance, in

matrimonial cases couples are usually in the same room together with the mediator throughout; but in commercial cases 'shuttle diplomacy' happens frequently), the mediator encourages parties to communicate with one another directly, helps them to gather and share information, discuss wants and needs, and develop options to meet the needs of the parties.

In New York, mediation has long been available. But the "presumption" that practically all kinds of civil cases will go to ADR here is new.

Significantly, perhaps famously, mediation endeavors to replace inefficient "positional bargaining" with the identification and negotiation over the "needs" of the parties.[2] In most definitions of mediation, and the one used here, it is the parties who make the decisions, and not the mediator. For example, in a divorce case, the wife and husband decide whether one will move out of the home, where their children will live and how to best make decisions for them. The spouses decide whether to reach agreements or not. And whether to engage in mediation at all. More on this point later.

Why is Presumptive ADR being introduced in New York? And why now? I was able to ask the Honorable George J. Silver, Deputy Chief Administrative Judge for the Courts Inside New York City, these and other ques-

tions. Judge Silver, who is responsible for implementing the new ADR Program in the New York City Courts, told me that in her 2019 State of the Judiciary Address, Chief Judge Janet DiFiore stated:

> The time is right to provide litigants and lawyers with a broader range of options to resolve disputes without the high monetary and emotional costs of conventional litigation. We consider this vision of ADR to be an integral part of the Excellence Initiative, and we are excited to work with the Bar to make it a reality.

Judge Silver added:

> The Chief Judge has directed us to provide ADR in civil cases and I am excited to carry out her vision. There is extensive data that shows that litigants who participate in ADR are more satisfied with their outcomes, as well as corresponding data that prove it is more time and cost efficient and provides better outcomes for everyone involved. This data can be accessed in the ADR Advisory Committee's Report.[3]

Professor Lela Love, Director of the Kukin Program for Conflict Resolution at the Benjamin N. Cardozo School of Law, believes that implementation of Presumptive ADR at this time is largely practical on the part of the judiciary.

> The courts are burdened by large caseloads, and mediation has been shown effective in settling cases and thereby relieving the courts. At the same time, it is difficult to get parties to volunteer for mediation. There is extensive data on the success rates of mediated cases, and I hope data will be collected in regard to new initiatives.

To be sure, New York is not the first state requiring mediation; mandatory mediation has been part of the landscape in many places, including California and Florida for many years. Even in New York, mediation has long been available. But the "presumption" that practically all kinds of civil cases will go to ADR here is new.

In addition to criminal cases, which will not be presumed appropriate for mediation, certain civil cases will fall outside the ADR umbrella, according to Judge Silver, such as ones

> involving domestic violence[4] or an order of protection; cases involving child abuse and neglect; cases involving an extreme imbalance of power; uncontested matrimonials; adoptions; or any case where the presiding judge, in his or her discretion, believes that mediation would not be effective.

Do parties realize better outcomes using ADR rather than through litigation? Often, they do, and the reason – though some litigators disagree – is due largely to the ability of participants to create their own agreements. Judges, often buried by their caseloads, generally will (and can) not explore the unique circumstances surrounding the parties before them. In mediation, the opposite is true.

In litigation, parties may rarely speak with each other directly, in court or out. Not uncommonly, litigators tell clients not to speak with their "adversaries." In mediation, direct communication is often the norm, and many neutrals encourage parties to see "the other side" as a partner to work with in solving problems, and advise clients that by helping to meet the needs of the other party, each moves closer to reaching agreements that will satisfy their own needs.

ADR, mediation included, is not a panacea, and New York State itself recognizes this fact. But the earlier parties engage in mediation, the higher the chances of reaching mutually satisfying agreements. Having parties mediate relatively early is one of the goals of presumptive ADR. In practice, this approach might mean assigning the parties a mediator (or allowing parties to agree on a mediator they want to work with them) shortly after a lawsuit is brought, rather than a year or two into litigation.

Why is mediation more likely to succeed earlier in the process? Take a bitter divorce as a stark example. To win custody, one spouse must show that s/he is the "better parent." That the other parent is "worse" or "unfit". After sometimes vicious (not to mention exaggerated or false) allegations against one another, the fear and anger of parties grow, and the chance to work together diminishes.

In mediation (again, not a cure all),[5] the mediator can work with parties from the outset to problem solve on a more collaborative track. Consider matrimonial cases, of which I am most familiar. Often (but certainly not always), it takes little prodding for parents to acknowledge that both have important contributions to make to the lives of their children. That their children need both of them. That the question to consider is not "Who will have the children?" (as if they were property), but "What decisions can we make to be the best parents possible, and to make sure that our children are well taken care of and that their needs are met?"[6]

What of cases where ADR fails? Litigation will then proceed, with little loss of time (expended in mediation) and money (paid to the mediator).

What exactly will programs look like? Different courts and parts of the state are enacting their own programs with their own rules, and so there is no one answer. In terms of the cost to parties, some programs are likely to allow for 90 minutes, let's say, of free mediation, then payment to mediators for the additional hours they work with the parties.

As noted above, a large benefit of presumptive ADR is expected to be smaller caseloads for judges, as many cases will be mediated successfully. In turn, it is hoped that regard for the judicial system will be heightened, as more

parties, having more control over their cases, and having them dealt with more quickly and less expensively, are more satisfied; and that those litigating will have fewer delays as judges will have more time for the (fewer) cases before them.

In Judge Silver's words,

> The courts will benefit with a reduction in pending cases and the public at large will benefit from a system that runs more efficiently and doesn't require them to wait four or five years for justice to be served.

Do parties realize better outcomes using ADR rather than through litigation? Often, they do, and the reason – though some litigators disagree – is due largely to the ability of participants to create their own agreements.

Significantly,

> [L]itigants who participate in ADR express higher satisfaction levels with the outcome of their proceedings. They feel that they have meaningfully participated in the process, were heard by the court, and brought the matter to a conclusion without further emotional stress, expenditure of time, and financial costs.

Judge Silver offered:

> One of the biggest misconceptions about the ADR Program is that most of the cases will be sent to outside mediators. This is incorrect. The bulk of the program will rest on the shoulders of our very capable judges and court staff who have been ably settling and conferencing cases for decades. This initiative merely captures those settlement proceedings for what they are – ADR. Judges will continue to attempt to settle these matters, although these attempts will occur earlier in the proceedings. For instance, there is no need to go through 12 months of discovery in a motor vehicle accident where there is no question of liability and the plaintiff's injuries are not disputed. Everyone involved in this type of case knows what it is worth and so that settlement conference should happen either at the preliminary conference or very shortly after it, with no need for expensive depositions and no wasteful adjournments.

But isn't there a fundamental tension, a conflict, between essentially mandating what is – at least in the case of mediation – often considered a voluntary process? As a longtime mediator and lawyer, I think there is, and elsewhere have shared my belief that mandatory education about ADR is appropriate, but not necessarily mandatory mediation.[7] Judge Silver, not surprisingly, offered a very different view:

> There isn't a tension at all in requiring people to try some sort of ADR. Yes, they are required to try, but what they do during a settlement conference or at a mediation session is completely voluntary. We certainly can't mandate them to settle their case. But research has shown that satisfaction levels are just as high, maybe even higher, among litigants who initially did not want to mediate as it is among litigants who willingly go to mediation. Sometimes your biggest adversaries turn out to be your greatest advocates.

Professor Love voiced a similar opinion, saying, "All that is mandatory is that [participants] listen to the opening statement of the neutral and engage in some discussion."

Given that there are studies suggesting comparable settlement rates with mandatory and voluntary mediation, a conclusion that mandatory mediation will help the courts reduce their caseloads is justified. Love noted,

> [t]he effort (of this initiative) is very much worth a try. A nudge into [trying] ADR makes a lot of sense because of the huge [financial] costs of litigation to the litigants and the cost to the courts of having took many cases. By having more people engage in ADR, the public will become better educated about it and perhaps consider ADR differently – and more thoughtfully and favorably – in the future.

Both Silver and Love acknowledged challenges to the implementation of Presumptive ADR, though their opinions differed.

"Cost" in Love's view, "is the greatest obstacle."[8] It is a "big initiative" and the "courts will need more administrators." (Administrators are being hired at this time.)

"The biggest obstacle we face," according to Silver,

> is changing the culture of the legal community, both attorneys and judges. For too long, the courts have abdicated their role of providing litigants the best opportunities to settle their cases and resolve their disputes without full-blown litigation. This has created a culture in the courts and in attorney circles where settlement, mediation, arbitration and other

> types of ADR were seen only as a recourse when your case was weak. We need to change this mentality and remember that all of us, attorneys and judges, are here to help guide people through one of the most difficult times in their lives and ADR is a legitimate tool for doing just that.

At this time, "[t]he Administrative Judges for each county have submitted their plans, which were reviewed by myself and approved by Chief Administrative Judge Larry Marks," Judge Silver told me.[9] "[W]e are currently rolling out certain parts of the plans that are ready to go."

As someone with mixed feelings about mandating mediation, do I support New York State's presumptive mediation efforts? I do. In a more ideal world, all litigators would inform potential clients about ADR in an unbiased manner, and let their clients make informed decisions about how to proceed. But many clients (and strangers, upon learning that I am a mediator) have told me their attorneys never mentioned mediation. Further, I recognize that in the "real world" parties will learn much more about mediation by being required to engage in it for an hour, let's say, than they would by participating in a class about it. Quickly, parties will be able to opt out.

What do other lawyers say about the Presumptive ADR initiatives? I reached out to lawyers on a popular listserv, and very few responded with concerns about it.

Two who did shared the following with me. Diana Mohyi, a family law attorney practicing in New York City, said, "I'm not in favor of it. I think it would make cases go on longer. Litigants need time limits imposed by courts scheduling a trial, etc."

Steven Fried, a general counsel for a number of small businesses, based in New York City, has litigated and arbitrated in federal courts around the country, though he is not currently doing so. He holds a positive view of mediation, but a generally negative one of arbitration. "I used mediation whenever possible because good mediators put the clients in charge of solving their own problems. They give litigants control over the process, or at the very least provide a fresh perspective they can't get from their own lawyers. Plus, it's cost-effective..." Fried's experiences with one organization is particular have made him wary of arbitration.

> One client [I had] was billed $12,000.00 for what amounted to a 90-minute scheduling-conference phone call with the arbitration panel (the case settled in mediation shortly thereafter). [W]e refused to pay it (we wound up settling for … $800.00). In another case, the assigned arbitrator – for whom we were paying – was[n't competent], not because we didn't like the ruling, she just [was lacking in the necessary experience] and the [arbitration organization] refused to appoint a replacement.

Fried added, however:

> In fairness to the arbitration process, I did have one arbitration with a FINRA panel that went very smoothly. We lost that case, but the process was excellent and the fees very reasonable.

In summing up his perspective, Fried said, "I have had several really bad experiences with arbitration…. I was an ADR advocate for a long time and still encourage mediation because litigation is so wasteful, but after dealing with [a particular organization] I encourage my clients to avoid arbitration like the plague."

For myself, the introduction of ADR somehow reminds me of the introduction of seat belts in automobiles. Like seat belts, one might argue that ADR will be imposed on citizens by the government. Both can be said to limit freedom of choice, though minimally. Yet each can be accepted due to the far greater good they offer, as opposed to the real, but relatively small, drawbacks. In a decade, more or less, we may well wonder how courts once did not require ADR in the way that we question how there could have been a time where seat belts were optional in our cars.

1. Bernard Mayer, in his book, Staying with Conflict: A Strategic Approach to Ongoing Conflict, discusses the "managing" of conflict as opposed to "resolving" conflict. Often, the focus of Alternative Dispute Resolution is on "resolution." It is enough to say here that there are many instances (think of armed conflicts) where managing a conflict is feasible but resolving it probably is not. Mediators, alert for opportunities to manage conflicts where resolution is elusive, can often help clients reach valuable agreements; otherwise, mediation may well break down, leaving the parties to turn to litigation. Further, parties themselves may (for good reason) be skeptical that their disputes can be solved, and so skeptical of ADR altogether; but when put in terms of managing their conflicts, they may believe a mediated settlement to be possible and realistic.

2. Roger Fisher and William Ury, Getting to Yes: Negotiating Agreement Without Giving In, Penguin Books, 1983.

3. https://ww2.nycourts.gov/sites/default/files/document/files/2019-05/PR19_09_0.pdf.

4. It is important to note that there are different opinions regarding mediating cases where there has been domestic violence. A brief overview of the question can be found in the article Divorce and Domestic Violence at https://www.newyorkfamily.com/divorce-and-domestic-violence/.

5. Cases involving deep mistrust and/or intractability are unlikely to be successful in mediation, but caution is warranted here. A spouse can have broken trust in the spousal relationship by having an affair, but still be trusted as a fit – or even excellent – parent, allowing for successful mediation. But if the spouse is (suspected of) hiding assets, or isn't trusted to carry out agreements after they are reached, agreements are unlikely to be reached, or at least fulfilled. Concerning intractability, a party who will not compromise is a poor mediation candidate; but here, too, caution should be shown. I have worked with any number of clients who began mediation with uncompromising positions, but after starting mediation, learning that they are being heard by the mediator, and maybe becoming less fearful, experience a shift and show the ability to move away from inflexible positions.

6. I first learned of the question being posed to parents in this manner from The Family Mediation Casebook: Theory and Process, Stephen K. Erickson and Marilyn S. McKnight Erickson, Brunner/Mazel, Inc. 1988.

7. In that same article, I argue that attorneys who fail to educate potential clients about ADR are violating an ethical duty, https://www.newyorkfamily.com/is-mandatory-mediation-a-good-idea/).

8. There will be the cost of mediation itself, and there are plans calling for "ADR to be offered [by mediators] for free, in part." For instance, mediators might work with clients pro bono for the first ninety minutes; after that, if the clients were to continue with mediation, they would pay the mediator's fee directly (a fee that the mediator would have set beforehand).

9. Judge Silver added:

> Judge Marks, who has been guiding and leading this initiative and providing significant support for both Judge Caruso and myself, suggested some edits for certain parts of the plans and those are currently being incorporated. Many parts of these plans needed little editing so they are currently being rolled out. For instance, in the Bronx, we have already completed some very successful "Blockbuster" settlement days with a certain insurance company (where we settled 60% of the cases that were on the calendar) and we just recently scheduled five "Blockbuster" days with another insurance company in Queens.

LAW PRACTICE
MANAGEMENT
THE BUSINESS OF LAW

Transactional Skills: Contract Preparation and Negotiating (What to Do — and What Not to Do)

By Peter Siviglia, Carolina Academic Press 2019

Review and Commentary by Richard K. Neumann Jr.

Imagine a young lawyer, an associate in a firm and fresh out of law school, summoned to a partner's office. "Here's the Schermerhorn deal," says the partner, handing the associate a big pile of papers. "Go through everything, including the contract the other side wrote and wants our client to sign. Find all the problems and suggest ways of fixing them. Can you finish it before lunch?" "Yes," says the associate, hiding dread and wondering how to start.

A good way for the young associate to start might already have happened if the associate has read Peter Siviglia's *Transactional Skills*. It would have been an eye-opening read because the book explains much of how transactional lawyers think while doing their work. And it would have been an enjoyable read because Mr. Siviglia knows how to explain things concisely, in just 150 pages, with irreverence and wit.

The associate would have benefitted and will benefit in two ways. The first would have been when reading the book initially and learning how to be generally effective in transactional work. The second will be now with the Schermerhorn deal. Back in her office, the associate opens *Transactional Skills* for a three-minute review of some of the things that can go wrong in deals. This is both a book to read and a book to refer to.

The basic problem for a young transactional lawyer is the litigation focus in legal education. Law is studied through lawsuits in casebooks, and most skills and writing courses teach in litigation frameworks. Students learn to think the way litigators think.

But the legal profession has two branches. A litigator works to make the client a winner, and someone else a loser, by persuading a court to pass judgment on what went wrong in the past. A transactional lawyer, however, builds a deal for the future, accomplishing a client's goals while preventing things from going wrong in the future; normally both parties become better off, and there is no loser. To do their jobs well, litigators and transactional lawyers can't think the same way.

If asked to describe a contract, most law students and many graduates would say that it's a document, full of murky wording, that parties sign and courts enforce. Mr. Siviglia explains why that's not an effective way for a lawyer to think about contracting. A contract is "a set of instructions," unlike other forms of writing (Chapter 3). Chapters 4 through 7 explain some of the thinking needed to design the instructions and express them so clearly that everybody involved will know exactly what to do. Chapters 8 through 13 introduce details such as organizing the contract, handling representations and warranties, and writing and vetting general provisions. Chapters 14 through 21 introduce some issues that occur in particular types of contracts such as confidentiality agreements. Chapters 22 and 23 provide some valuable advice on negotiation.

Some readers might wish for a more thorough treatment of those subjects. But that's what treatises are for. This book has a different purpose. And it isn't only a book for new lawyers. It also includes some wisdom which more experienced lawyers might appreciate. (I learned a few things.)

Mr. Siviglia has been a deal lawyer for more than five decades and has written several other books, among them *Commercial Agreements*, a multi-volume treatise.

Richard K. Neumann Jr. is a professor of law at the Maurice A. Deane School of Law at Hofstra University. He teaches Contracts as well as Drafting & Negotiating Contracts and Statutes.

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

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DEAR FORUM,

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

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

Very truly yours,
Carmela S.

DEAR CARMELA S.,

Your situation reminds us of a popular *Sopranos* episode where Tony Soprano goes out of his way to conflict out lawyers who might possibly represent his wife. *The Sopranos*: "Whitecaps" (HBO television broadcast Dec. 8, 2002). Answering your question requires a close look at numerous sections of the New York Rules of Professional Conduct RPC) in addition to well-established legal precedent in New York State.

At the outset, it is important to note that although your client's spouse met with your firm only briefly, attorneys owe certain duties to prospective clients under the RPC.

A prospective client is defined in RPC 1.18(a) as "[a] person who consults with a lawyer about the possibility of forming a client lawyer relationship with respect to a matter . . . ." With regard to the confidential information that the prospective client has communicated to the attorney, Rule 1.18(b) states: "even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client." Rule 1.9 does not identify the specific duties owed to prospective clients. It tells us that: "a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." *See* Vincent J. Syracuse & Matthew R. Maron, Attorney Professionalism Forum, N.Y. St. B.J., June 2012, Vol. 84, No. 5.

In essence, the duties owed to a prospective client under the RPC are similar to those owed to a former client. What this means is that even though your client's spouse may have only briefly met with the former attorney at your firm years ago, your firm has an obligation to protect any confidential information it may have received.

RPC 1.18(c) further provides:

> [a] lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d) [of Rule 1.18].

Pursuant to RPC 1.18(d), where an attorney who has received disqualifying information is still employed at the firm, it is permissible for a firm to represent a conflicted client if:

> (1) both the affected client and the prospective client have given informed consent, confirmed in writing; or (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (ii) written notice is promptly given to the prospective client.

RPC 1.18(e) creates an important exception that seems to be applicable to your situation. Pursuant to RPC 1.18(e), a person is not deemed a prospective client if the person "communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter." *See* Vincent J. Syracuse & Matthew R. Maron, Attorney Professionalism Forum, N.Y. St. B.J., February 2013, Vol. 85, No. 2. Accordingly, if you can establish that your client's spouse intended to provide your firm with confidential information so that he/she could subsequently seek to have you and your firm disqualified from representing his/her spouse in the event either of them filed for divorce, then your former client is not entitled to the protection given to prospective clients under RPC 1.18.

The catch is that in the absence of adequate evidence establishing that your client's spouse provided attorneys at your firm with confidential information for the *sole* purpose of disqualifying your firm from representing his spouse, you will need to demonstrate that you do not have conflict that prevents representation of your client. RPC 1.10 governs the imputation of conflicts of interest. RPC 1.10(b) provides "when a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that the firm knows or reasonably should know are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm if the firm or any lawyer remaining in the firm has information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter." *Id.*

Nevertheless, the devil is in the details and application of RPC 1.10(b) is not always clear. The general rule in New York is that a party seeking to disqualify his or her adversary's counsel on the basis of having been previously represented by that counsel must establish that: (1) an attorney-client relationship existed; (2) the matters involved are substantially related; and (3) the interests of the present and former client are materially adverse. *Dudhia v. Agarwal*, 66 Misc. 3d 206 (Sup. Ct. 2019), *citing In re Janczewski*, 169 A.D.3d 795 (2d Dep't 2019).

Where all three prongs have been established, there is a presumption of disqualification. The question then becomes whether the presumption is rebuttable or irrebuttable which, in turn, is based on whether the appropriate applicable standard is "imputed" disqualification or "per se" disqualification.

Dudhia v. Agarwal offers a thorough analysis of the two relevant standards on a disqualification motion, and addresses facts close to yours. In *Dudhia*, the court explained that under the "per se" disqualification standard, even the mere appearance of a conflict occasioned by a client having met just briefly with a lawyer in a professional setting may be enough to create an irrebuttable presumption in favor of disqualifying that lawyer's firm from representing an adverse party under any circumstance. *Id.* However, the court opined that the per se rule of disqualification – the more traditional approach – is "unnecessarily preclusive because it disqualifies all members of a law firm indiscriminately, whether or not they share knowledge of former client's confidences and secrets . . . . [and] conflicts with public policies favoring client choice and restricts an attorney's ability to practice." *Id.* at 206.

Conversely, the "imputed" disqualification standard creates a rebuttable presumption in favor of disqualification. Under the "imputed" standard, courts will analyze whether members of the firm have actual knowledge of a former client's confidences and have taken all steps necessary to reasonably assure the former client that his or her expectations of confidentiality have been protected. In other words, the imputed disqualification standard requires the court to engage in a more fact specific analysis.

The *Dudhia* court reasoned that imputed disqualification was the appropriate standard in cases where the "principally involved" attorney had left the law firm whose disqualification is sought. *Id.* at 206. Where the attorney who was principally involved in the prior representation has left the firm, the presumption of disqualification may be rebutted by the non-movant by providing facts establishing that the law firm's remaining attorneys do not possess confidences or secrets of the former client. *See St. Barnabas Hosp. v. New York City Health & Hosps. Corp.*, 7 A.D.3d 83 (1st Dep't 2004).

Applying the imputed disqualification standard, the court held that a law firm that briefly represented a wife in a divorce action should not be disqualified from representing the husband where the law firm demonstrated that there was no reasonable risk that the firm possessed

confidential information relevant to the matter. *Id.* In doing so, the court rejected the movant's argument that only large firms are entitled to the benefit of the rebuttable presumption that comes with imputed disqualification, reasoning there was neither legal authority nor compelling rationale to support such a bright line demarcation.

Therefore, the simple answer to your first question whether you have a basis for opposing the disqualification motion is yes. Based on the holding in *Dudhia*, we believe that you have a strong argument that the imputed disqualification standard, and not the per se disqualification standard, applies to your case. You can rebut the presumption of disqualification with proof that your firm or anyone currently employed there does not possesses confidential information that is significant or material that could be prejudicial to plaintiff in this litigation. *Dudhia*, 66 Misc. 3d at 206. To this end, you should demonstrate to the court that your firm has conducted an internal investigation and concluded that none of the attorneys at the firm remembers the consultation or has retained confidential information about your client's spouse.

Additionally, there are other actions you may take to demonstrate to the court that your firm should not be disqualified. For example, if another attorney who is still employed by your firm was present at the meeting with this former client or has any confidential information about the former client, you may avoid disqualification by putting in place "adequate screening" measures around the lawyer who is personally disqualified so that that lawyer cannot share any confidential information with the rest of the firm or react to any confidential information from the firm. *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 630 (2019 ed.); *see also Dudhia*, 66 Misc. 3d at 206.

RPC 1.0(t) defines "screening" as the "isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or the firm is obligated to protect." The purpose of screening is to ensure that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 631. Similarly, other lawyers in the firm who are working on the matter should promptly be informed that the screening is in place and they may not communicate with the personally disqualified lawyer with respect to the matter. *Id.*

In deciding whether screening procedures will be effective to avoid imputed disqualification, a firm must consider factors such as how the size, practices and organization of the firm will affect the likelihood that any confidential information acquired about the matter can be protected. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 633 citing RPC 1.18 Comment [7B]. If the firm is large and organized into separate departments, or maintains offices in multiple locations, or for any reason the structure of the firm facilitates preventing the sharing of information with lawyers not participating in the particular matter, it is more likely that the requirements of RPC 1.18 will be met and imputed disqualification will be avoided. The size of a firm may be significant and small firms may need to exercise additional precautions and vigilance to maintain effective screening. *Id.* Moreover, in order to be effective, screening measures must be implemented as soon as practicable after a lawyer or law firm knows or reasonably should know that there is a need for screening and written notice should be promptly provided to the prospective client. *Id.* at 631.

While New York's version of Rule 1.10 has no provision allowing screening to overcome a client or former client's involvement in a matter, New York courts nevertheless honor screens and allow them to stave off disqualification in certain circumstances. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 632. For example, the Court of Appeals in the leading New York case involving disqualification held that the party seeking to avoid disqualification must prove that any information acquired by the disqualified lawyer is not material to the litigation. In that factual scenario, with the presumption rebutted, the court held that putting in place ethical wall around the disqualified lawyer was sufficient to avoid firm disqualification. *Kassis v. Teacher's Ins. & Annuity Ass'n*, 93 N.Y.2d 611 (1999). In accordance with the requirements set forth in *Kassis*, rebutting the presumption of disqualification requires the firm to employ "adequate screen measures" to eliminate any access or involvement of the potentially conflicted attorney.

We recommend that your firm take several steps to establish a solid and successful screen in the event your firm's investigation determines that an attorney currently at your firm was present at the initial meeting with your client's spouse or possibly obtained confidential information about the spouse. *Id.* at 618; *see also* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 631.

First, your firm should send a memorandum to the disqualified attorney as soon as the firm learns about the conflict of interest. *Id.* This memo should advise the personally disqualified attorney not to discuss the matter with anyone else at the firm in any manner. Next, the firm should send the same screening memorandum to the appropriate attorneys and staff members in the firm. *Id.* Determining the appropriate personnel depends on the size of your firm. In a small firm, the memorandum

should be sent to all attorneys and staff members. In a large firm, the memorandum should be sent to all attorneys and staff who are likely to communicate with or come into contact with the disqualified lawyer. *Id.* The screening memo shall advise recipients of three points: (1) not to discuss the matter in the presence of the disqualified attorney; (2) not to show or let the disqualified attorney have access to any documents related to the matter; and (3) not to communicate with the disqualified attorney about the screened-off matter in any fashion. *Id.*

Additionally, the screening memo should be sent to all new attorneys and staff members who join the firm while the screen remains in place if the newcomers are likely to communicate with or come into contact with the disqualified lawyer. Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 632. If your firm maintains paper files with respect to the matter in question, it should place all related files in a designated area, ideally, outside the firm's central file room. *Id.* The paper files should clearly identify that they are protected and shall not be accessible to the disqualified attorney or shown to them. *Id.* It is best practice to keep such files under lock and key, although courts generally understand this is not always practical. *Id.* Electronic and digital files should be protected by a password that is known only to computer personnel and those in the firm working on the screened matter. *Id.* In satisfaction of this requirement, ensure that your firm walls off the rest of the firm and has had their computer servers searched by a forensic expert to confirm that no relevant emails or related files remain on the firm's on-site servers. Your firm should also take all steps necessary to insure that any archives that may be located on off-site servers cannot be accessed by the disqualified attorney. *Kassis*, 93 N.Y.2d at 617. Finally, to the extent possible, the disqualified attorney's office should be as far as practical from the offices of the attorneys working on the matter. *Id.*

You are correct in thinking that your client's right to choose counsel of its choice is an important factor to highlight in your opposition to the disqualification motion. It is a factor that the court certainly will consider and weigh alongside the other factors discussed. Indeed, in resolving issues of disqualification, courts will typically employ a delicate balance between the interests of the client, who desires to retain an attorney of his or her choice, against the interests of the opposing party to be free from any risk of opposition by an attorney who had been privy to that litigant's confidence. *See* RPC 1.10(b) Comment [4A]; *see also Dudhia*, 66 Misc. 3d at 206. The commentary to Rule 1.10(b), instructs that it is critical that the courts consider "public policies favoring client choice." For this reason, New York courts have routinely denied motions to disqualify firms where, among other considerations, the former client's purpose in contacting multiple experienced matrimonial attorneys was to disqualify them from handling his wife's defense of the action. *See, e.g., Bernacki v. Bernacki*, 47 Misc.3d 316 (Sup. Ct., N.Y. Co. 2015).

In conclusion, based on the limited facts we have, we believe there are several solid arguments that can be made to show that disqualification is unwarranted here.

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

DEAR FORUM,

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Thoughts on Legal Writing from the Greatest of Them All: James W. McElhaney

The Legal Writer continues its series on what we can learn from the great teachers of writing, both lawyers and non-lawyers. In this column, we highlight the teachings of distinguished trial lawyer and law professor, James McElhaney (1938–2017).

Gerald Lebovits (GLebovits@aol.com), an acting Supreme Court justice in Manhattan, is an adjunct at Columbia, Fordham, and NYU law schools. For his research, he thanks Oliver Ness (Fordham University School of Law), his judicial intern.

After graduating from Duke Law School in 1962, McElhaney served in the Army's Judge Advocate General Corps for four years.[1] In 1966, he began his academic career at the University of Maryland School of Law, before joining the law faculty of Southern Methodist University, and then moving to Case Western Reserve University School of Law in 1976, where he was the Joseph Hostetler Professor Emeritus of Trial Practice and Advocacy until his retirement from teaching in 2002.[2] McElhaney is remembered as a masterful teacher and is

credited, together with Irving Younger,[3] for pioneering trial-practice instruction in American legal education.[4]

Besides his accomplishments as a teacher, McElhaney is also remembered as a writer — and as an influential teacher of legal writing. From 1975 to 2011, he wrote over 260 columns, mostly on trial advocacy but a number on legal writing, for the journal *Litigation* and the *ABA Journal*.[5] McElhaney infused his columns with his imagination and creativity, often using a cast of fictional characters who discussed trial-practice issues and offered advice on how to address them.[6]

To McElhaney, good lawyering requires good story telling.[7] He emphasized that it's not enough that legal writing be accessible, clear, and straightforward. Legal writing is judged on its visceral impact on its audience.[8] McElhaney taught his students that juries and judges are, foremost, people.[9] Lawyers must appeal to hearts, not just minds.[10]

This column focuses on McElhaney thoughts on legal writing, compiled from his trial and legal-writing columns.

LEGAL WRITING THAT WORKS

"Good legal writing is good writing. It's also good lawyering. Good writing and good lawyering both involve taking risks."[11]

Every Point Should Count. According to McElhaney, "It's not that you've got to say something — it's that you've got something to say. The distinction is important."[12] He explained that legal writing requires the writer to make risky choices about what to include and what to remove. For example, the writer must select best arguments while discarding the weak or implausible. Legal writers must also decide between inconsistent legal theories. Everything included and sparse. It's powerful because nothing unnecessary ties it down. It's the product of risky decisions that give the writer something to say. McElhaney explained that this way of thinking runs counter to traditional law-school assessment, in which students are rewarded for identifying and articulating every conceivable legal issue. In the real world of legal practice, McElhaney argued, discussing every possible legal issue produces a mishmash of slow, directionless writing.

Take Advantage of Context. McElhaney observed that legal rules have meaning only in the context of real events. The legal writer's task is to convey the facts of the story in a way that persuades the reader to apply the legal rule in the writer's favor. The facts of the story and the way the story is told are crucial.

Everything in the Law Is a Story. According to McElhaney, humans always use stories to understand facts and resolve issues. The winning brief therefore needs to tell a persuasive story. Judges admit that they begin to take sides as early as the facts section of a brief. That's why, he said, the statement of facts "is the most important part of the brief because it points the way to elemental justice."[13]

McElhaney proposed two tests to determine whether a statement of facts is effective. First, it stands alone. Anyone reading the statement of facts should be able to understand what the entire case is about. Second, the statement of facts should persuade the reader to take your side. Here, McElhaney recommended that the statement of facts be persuasive without being argumentative: facts, not opinions, are what ultimately persuade the reader. McElhaney suggested that writers resist the temptation to characterize or evaluate facts; they should leave that to the reader. Writers should merely guide their readers through the story, rather than impart their own opinions. Avoid excessive use of adjectives and adverbs. They get in the way of succinctly telling the story. Instead, use nouns and verbs to deliver the essence of the story. Last, understate rather than overstate the facts to earn the reader's trust and confidence.

Write for the Ear. McElhaney's simple and plain-spoken writing style belies how meticulously he edited his work. He described lawyers as "professional communicators"[14]hired to write and speak effectively. It's the lawyer who must take ultimate responsibility for communication and not allow an audience to strain to understand. McElhaney told legal writers continuously to polish their work to the extent that writing can be read seamlessly and also sounds right. Writers should read their writing aloud. Their ears will catch awkwardness, mistakes, and omissions that their eyes won't pick up.

STYLE MATTERS

"Most legal writing is abysmal – stiff, abstract, stuffy. Why do we write that way in the first place?"[15]

Find the Right Tone. McElhaney believed that good legal writing must be clear and simple. He advised writers to remove anything that prevents immediate understanding. According to McElhaney, legal writing suffers when practitioners use legalese to convey legal concepts. He instead encouraged legal writers to stop trying to sound like lawyers — to drop the "verbal pomposity."[16] The goal of legal writing is to communicate with real people. Don't attempt to imitate the tone and style of a judicial opinion, McElhaney wrote. This isn't to say that legal writing should be informal. The key is to identify the right level of formality that fits the situation. Most legal writing is too stuffy, and "few judges ever complain that writing is too casual or too informal."[17] Use simple sentences and simple words. One idea per sentence is enough. Simple and direct assertions are powerful. They

command the reader's attention. Get rid of compound and complex sentences. Remember McElhaney's maxim: "You want everything you say to command instant understanding."[18]

Show; Don't Tell. McElhaney stressed that verbs and nouns are better than adjectives and adverbs. He described verbs and nouns as the legal writer's "workhorses"[19] that constitute the heart of the written piece. In contrast, overuse of adverbs and adjectives makes it obvious that the legal writer is trying to tell the reader what to think and feel. McElhaney pointed out that the legal writer hasn't earned the right to tell the reader how to respond to writing. Instead, McElhaney advised the legal writer to use writing to show an idea. That'll make the reader more likely to go along with the writer's conclusions. But when the legal writer tries to force the reader to adopt a point of view, the reader becomes suspicious and resists. As McElhaney noted, "The difference between showing and telling is, whose idea is it? People like their own ideas. That is part of your persuasive power."[20]

Make Every Page Attractive. McElhaney advised the legal writer to make writing appear attractive to the reader. Never send the message to the reader that "this is going to be a chore to read," he wrote.[21] McElhaney noted that when courts impose page limits on motions and briefs, practitioners sometimes resort to cramming their writing. This results in legal documents with text-heavy pages unappealing to the reader. Large paragraphs are daunting, so break them up, he said. Use intriguing titles and subheadings to stimulate the reader's interest. Avoid unfamiliar acronyms and abbreviations; they're obstacles to immediate understanding. Limit footnotes; they interrupt the flow of the text. As McElhaney pointed out, "If the point is worth making, it is worth putting in the text."[22]

Don't Be Awkward. McElhaney advises legal writers that their "words should be transparent vehicles that let the reader see your ideas without straining to grasp your meaning."[23] To do that, the legal writer should use the active voice unless there's a particularly good reason to use the passive voice. McElhaney also advised against using words common in legal writing. The first are "manifestly," "plainly," and "obviously." If something really is obvious, then the writer doesn't need to highlight it. Let the writing speak for itself. The second are "egregious," "outrageous," and "outstandingly bad." Same principle: If something really is that bad, then the writer shouldn't need to highlight it. The third are "submit," "argue," "contend," and "maintain." These words imply that whatever position is being argued isn't necessarily true. Use these words only when you discuss your opponent's position, not your own. McElhaney also urged avoiding double negatives and "the former" and "the latter."

Make It Come Alive. McElhaney advised legal writers to keep their readers engaged and interested. To accomplish this, they should write in the present tense whenever possible, he says. They should also aim to vary the pace, intensity, and tone of their writing. McElhaney suggests using rhetorical questions occasionally to focus the reader's attention. Is this risky? Yes, but only if the rhetorical question is used the wrong way. Never use a rhetorical question as a substitute for argument . *E.g.*, "Can anyone doubt that the bar association has utterly failed to do anything for solo practitioners?"[24] The point of a rhetorical question is not to challenge the reader to come up with arguments that refute your position. Instead, use a rhetorical question to focus an issue. *E.g.*, "What has the bar association done for solo practitioners?"[25] By doing this, the reader feels invited to engage in the legal writer's train of thought and participate in developing the writer's argument.

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. *See* James Podgers, *The World of McElhaney: Jim McElhaney Closes the Book on a Storied Career, But Angus Lives On*, ABA J. (Oct. 1, 2012), http://www.abajournal.com/magazine/article/the_world_of_mcelhaney_jim_mcelhaney_closes_the_book_on_a_storied_career_bu.
2. *Id.*
3. The Legal Writer featured Professor Younger in *Thoughts on Legal Writing from the Greatest of Them All: Irving Younger — Part I*, 91 N.Y. St. B.J. 61 (Mar. 2019) and in *Thoughts on Legal Writing from the Greatest of Them All: Irving Younger — Part II*, 91 N.Y. St. B.J. 62 (Apr. 2019).
4. Podgers, *supra* note 1.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. 2 James L. McElhaney, McElhaney's Litigation 152 (2014).
12. *Id.*
13. *Id.* at 153.
14. *Id.* at 550.
15. *Id.* at 156.
16. *Id.*
17. *Id.* at 539.
18. *Id.* at 554.
19. *Id.* at 157.
20. *Id.*
21. *Id.* at 540.
22. *Id.* at 536.
23. *Id.* at 535.
24. *Id.* at 540.
25. *Id.* at 541.

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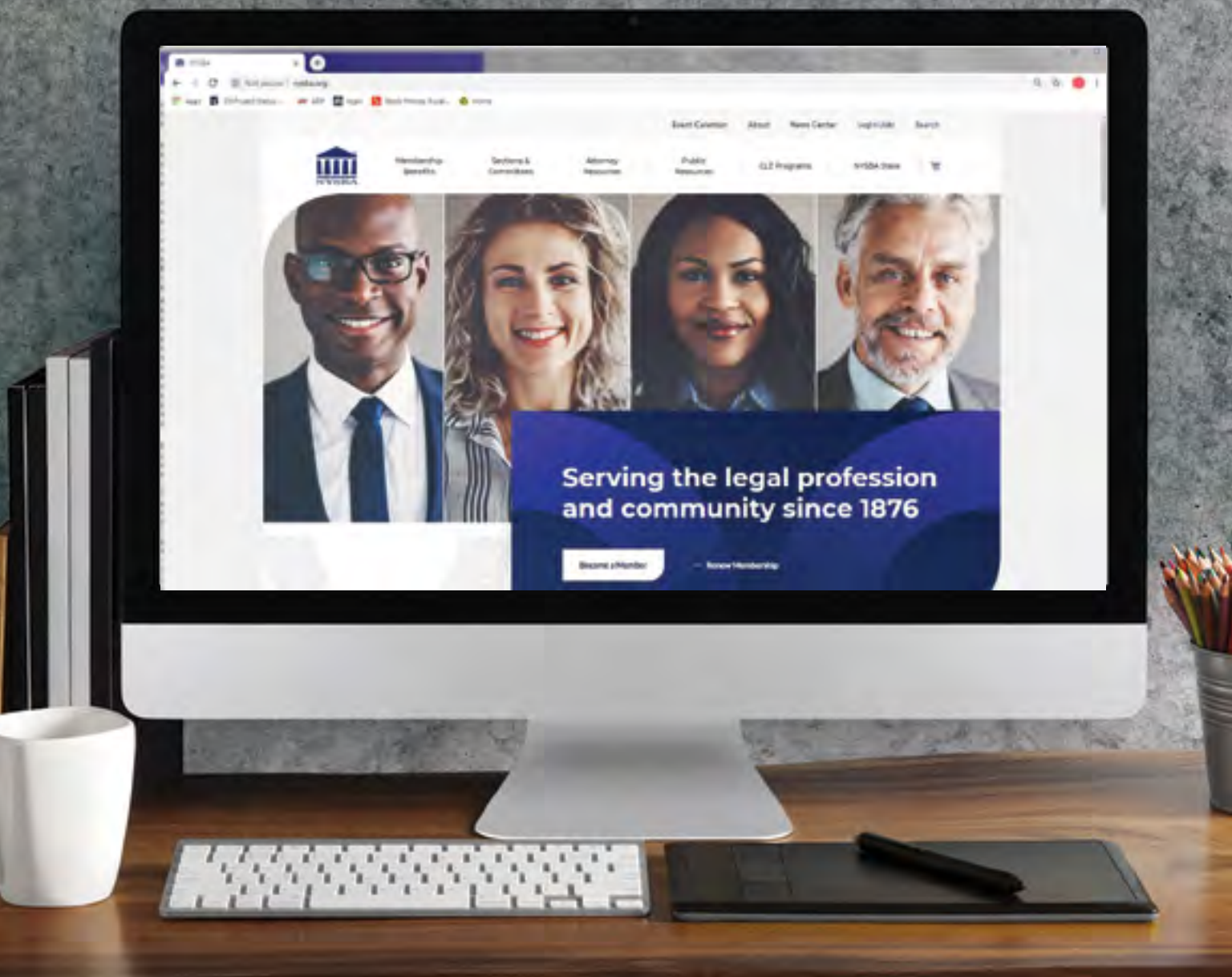

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