

# NEW YORK STATE BAR ASSOCIATION Journal



August 2019  
VOL. 91 | NO. 6

# Wellness

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**A Big Firm  
Shouldn't Be Your  
Only Career Plan**  
Diane O'Connell

One Lawyer Living and Working  
With Depression  
Attorney Wellness in a Nutshell  
Your Weekly Planning Checklist  
for Effective Time, Task and Email  
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# TEST YOUR KNOWLEDGE

a) Most disabilities are a result of on-the-job injury and freak accidents.

TRUE or FALSE

b) The average long-term disability lasts less than a year.

TRUE or FALSE

c) Social Security covers the majority of long-term disability claims.

TRUE or FALSE

## DID YOU KNOW...

All three statements above are FALSE. And all three represent common — and potentially costly — myths about disability. The TRUTH is that the loss of income due to a sudden illness or injury happens more often, costs more and lasts longer than you might think.

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Answer key:

a) Musculoskeletal disorders and illnesses such as heart attack, cancer, and diabetes cause the majority of long-term disabilities, not freak accidents or injuries.<sup>1</sup>

b) 64% of initial Social Security Disability claims applications were denied in 2018.<sup>2</sup>

c) The duration of the average long-term disability claim is nearly 3 years (34.6 months).<sup>3</sup>

<sup>1,2</sup> <https://disabilitycanhappen.org/disability-statistic/> updated March 2018

<sup>3</sup> <https://disabilitycanhappen.org/overview/> viewed Feb 2019

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# Mental Health Challenges for Lawyers:

## Remove the Stigma, Expand Services

The New York State Bar Association's 29th president, Charles Evans Hughes, was one of the greatest public servants in American history. He served as chief justice of the United States, U.S. secretary of state, and a two-term governor of the state of New York. In 1916, he came within a hairsbreadth of becoming president of the United States, narrowly losing to incumbent Woodrow Wilson.

Unknown to the nation, Hughes suffered in silence with depression and anxiety. At least once he received electroshock treatments for his condition. Sometimes he required a day in bed to recuperate following an especially stressful workday.

For many decades in American society, mental illness was hidden in the shadows and stigmatized. Public disclosure of Hughes' condition and treatment would have ended his career. Indeed, several decades later, in 1972, then-U.S. Senator Thomas Eagleton withdrew as the Democratic party's vice-presidential candidate after it came to light that he had undergone electroshock therapy.

Thankfully, today public awareness about mental illness is on the rise. As well it should be. Fifteen percent of the adult population will suffer from depression at some point in their lifetime. Roughly half of those individuals will also have an anxiety disorder.

### NEARLY HALF OF ALL LAWYERS STRUGGLE WITH DEPRESSION

It is unlikely that any one of us is more than a degree of separation away from someone fighting this daily battle – a spouse, parent, sibling, other relative, or friend. Lawyers are no exception, especially given the stress and demands of the profession.

In fact, a recent survey of nearly 13,000 practicing attorneys and judges found that 46% had a problem with depression at some point during their career and 28% had in the previous year. Sixty-one percent suffered from anxiety

during their career and five percent reported having suicidal thoughts.

The legal profession suffers from the fifth most suicides by occupation.

Many high achieving lawyers like Charles Evans Hughes struggle to cope with depression, anxiety or other forms of mental illness. Many others are incapacitated by the effects of these conditions.

The problems wrought by mental illness are prevalent in law schools, too. A survey of 3,000 law students revealed that 17% suffered from depression and 21% seriously considered suicide at some point in their lifetime. Six percent indicated that they had seriously contemplated suicide within the past year.

Thus, far too many law students lead lives of quiet desperation. Worse, they are not seeking help, out of fear that doing so will endanger their ability to gain admission to the bar. An ABA study discovered that 42% of surveyed students believed they needed help for emotional or mental health issues in the past year, but only half sought assistance. That is because 45% of the respondents feared that seeking help could pose a threat to their bar admission.

While our society has made great progress in recognizing and addressing mental health issues, the disturbing reality is that stigma around mental illness remains a significant barrier to treatment within the legal profession.

NYSBA is fighting to remove the stigma that lawyers fear could haunt them during their career, for simply seeking out needed counseling or other assistance. The idea that bravely and smartly addressing one's personal challenges early on could have a negative impact on admission to the bar is violative of our profession's core values. Law



firms and other employers of lawyers should encourage and support those who seek help for mental health or substance abuse issues, just as we would for those who are treated for physical health issues such as heart trouble or cancer.

We are committed to fostering the next generation of healthy, competent, and dedicated lawyers. To that end, a NYSBA blue-ribbon multidisciplinary task force is now reviewing questions on the application for admission to the state bar that ask about the applicant's mental health status. The task force will examine whether such questions serve as a deterrent to an applicant obtaining mental health treatment, and, if so, call for their elimination.

## **NYSBA IS EXPANDING OUR LAP SERVICES, BUT NEW YORK STILL LAGS FAR BEHIND OTHER STATES**

NYSBA's Lawyer Assistance Program (LAP) assists attorneys, judges, and law school students. It also provides support services to families, law firms and others concerned about attorneys who suffer from substance abuse or mental health issues. It is not necessary to be a member of NYSBA to utilize these free services.

With support from the Office of Court Administration, NYSBA is expanding LAP services. But even with these additional services, New York will still lag far behind other states in the level of resources that are devoted to LAP and related programs.

States with far fewer attorneys – Massachusetts and North Carolina, for example – are devoting greater financial resources to LAP services than New York. Mental health and substance abuse programs will not be as available and effective without the financial resources to support them. New York law is pre-eminent across the country and around the world, and it is essential for us to recognize the value and importance of investing in the well-being of New York lawyers.

Mental illness is widespread in society, including the legal profession. It is as disabling as any physical disability. Here in New York, we have much work to do to remove the stigma associated with mental health treatment so our suffering colleagues can get the services and treatment that they need – without fearing the impact on their careers.

NYSBA is leading the way in this important work. We encourage the entire profession to join us.

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## NEW YORK STATE BAR ASSOCIATION

### **COMMITTEE ON ATTORNEY PROFESSIONALISM AWARD FOR ATTORNEY PROFESSIONALISM**

This award honors a member of the NYSBA for outstanding professionalism - a lawyer dedicated to service to clients and committed to promoting respect for the legal system in pursuit of justice and the public good. This professional should be characterized by exemplary ethical conduct, competence, good judgment, integrity and civility.

The Committee has been conferring this award for many years, and would like the results of its search to reflect the breadth of the profession in New York. NYSBA members, especially those who have not thought of participating in this process, are strongly encouraged to consider nominating attorneys who best exemplify the ideals to which we aspire.

Nomination Deadline: **October 11, 2019**

Nomination Forms: [www.nysba.org/AttorneyProfessionalism/](http://www.nysba.org/AttorneyProfessionalism/)





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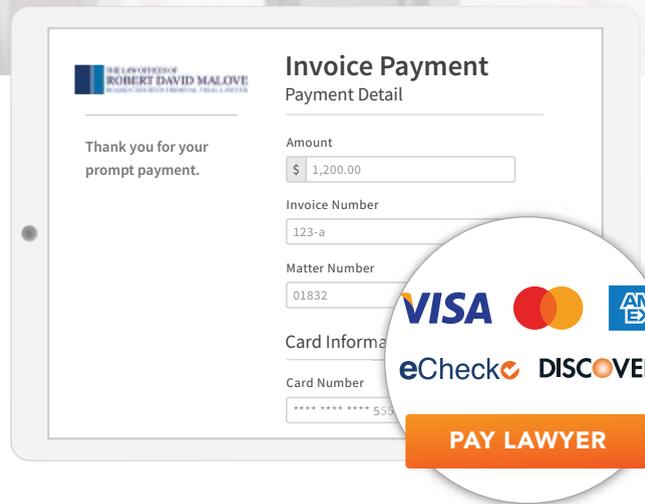
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# A Big Firm Shouldn't Career Plan

By Diane O'Connell



**Diane E. O'Connell** has been a Director at PricewaterhouseCoopers' Deals practice for the past eight years. Before that Diane was an attorney at Paul Hastings, Fragomen, Del Rey, Bernsen & Loewy, LLP and the New York Mercantile Exchange. Diane has experience in international business transactions, risk management, compliance, contract negotiations, international mobility, data privacy and business operations. Diane is the Chair of the NYSBA International Law Practice Section. She has extensive experience in business management and was an adjunct professor at New School University teaching business development courses. She also provides pro bono services assisting families in need with general legal matters and financial counseling. [Diane.oconnell@ocollegal.com](mailto:Diane.oconnell@ocollegal.com)



# Be Your Only

“Those whom the gods wish to destroy they first make mad.”

- Anonymous ancient proverb, wrongly attributed to Euripides. Quoted as a “heathen proverb” in *Daniel: A Model for Young Men* (1854) by William Anderson Scott

**W**hen we go to law school many of us dream of a career in Big Law. We dream of the exciting cases, the prestige, and of course the big salary that comes along with it. While some attorneys do land positions in Big Law, most will not. No matter where you land after law school, your career options are always wide open if your mind is open to exploring them. After all, your law degree has taught you how to think like a lawyer and that’s valuable in a wide range of careers.

The most important first step is understanding what it is you really want out of your career and out of life. Having a healthy mind, a *mens sana*, is your first step in making these decisions. So, if you are just graduating from law school or you are already working, put your ego, your desire for a big salary and your perceived societal expectations aside, and take some time to consider what you really want. Do you want to work excruciatingly long hours, have status, a big salary, do you want to make an impact in human rights or environmental matters, or do you want a better



balance between your career and your personal interests, or perhaps a combination thereof?

To reassure you, it's never too late to make a change, it just becomes scarier as time goes on. You feel stuck, you have obligations, you have too much going on. But if you are unhappy in your current situation, take heart, you are not alone. David Brooks' *The Second Mountain* is an example of how society's perspective is changing; making such a big life change is more widely accepted, and therefore easier to navigate than it used to be. While some will maintain their career path in a clear and straight trajectory, many others may become dissatisfied or be faced with an unexpected change that forces them to contemplate their career path. If you are in the latter group, you are not alone; the number of lawyers in this category is growing by the day. So take comfort in the fact that there is nothing wrong with you because you are feeling unsatisfied or unimpassioned; you are in good company.

## WHAT'S IT LIKE TO WORK IN A BIG FIRM?

What if you are not working at a big law firm, but really think that's where you should be if you are going to realize your dream of becoming the attorney you always admired on *The Practice*. However, you feel more like your career is synonymous with *Better Call Saul*. Take heart that, once again, you are not alone. However, chances are you didn't land that job in a Big Law firm for a reason. Working in Big Law requires a certain mindset. It is big, and it is structured. It is demanding in a way that only a few can rise to the occasion: billable hours, getting clients, working long hours. It is not for everyone and, keep in mind, only accounts for 20% of private practice lawyers, and that doesn't include all the attorneys who are working in other areas.

Big Law firms do offer prestige and large salaries, but there is that tradeoff; the average billable hour requirement is 1,930 per year<sup>1</sup> and in some cases can go as high as 2,400. "No worries" you say, that's only 37 hours/



*Big Law may be a good fit for some,  
but no matter what career path you're in, make sure  
there is room in your life for what is important to you.*

week; however, you need to work, on average, 135% of your billable hours target to reach this requirement. For a 2,200 billable hour requirement, that breaks down to 11 to 12 hours a day Monday-Friday and three Saturdays a month if you include vacations, holidays, administration, and non-client meetings.<sup>2</sup> This does not include commute, personal phone calls, bar association activities, training, etc. If you add these to the daily 12 hours of work, you are left with a choice of sleeping less, skipping dinner (or eating at your desk) or limiting your social interactions with friends and family, because as much as you may hear you can, you can't have it all.

Working in a Big Firm is not for the lighthearted. It takes grit, commitment and sacrifice. But if you want to specialize, receive a lot of perks, earn a high salary, make partner, have more opportunities available to you later in your career, and you are willing to sacrifice personal time, have a top law school degree and a high GPA, this may be the path you choose to take.

However, many law school graduates do not have or want the opportunity to work in Big Law, and many associates who are in Big Law want something different from the traditional "work hard" with a path toward partnership.

## SO WHAT ARE THE ALTERNATIVES?

There are many career alternatives to choose from, almost an infinite amount. A few of the traditional choices include:

- **Not as Big Law firms** such as a branch office, mid-sized or boutique firm. These hold a variety of pros and cons, depending on your perspective. There is a fantastic article by BCG Search<sup>3</sup> that goes into more detail, but in summary, the not as big law firms will generally provide less perks and lower salaries but also may provide better work-life balance, better technology and more opportunity to make lateral changes. So, this may be a case of less is more depending in your ambitions.
- **In House Counsel** is more generalized and has no billable hour requirements. The hours may be long,

depending on where you work, but the tradeoffs are worth it to many lawyers. However, you usually need some law firm experience. Entry level positions are far and few between.

- **Compliance, Investigations, and Risk Management** positions can be similar to in-house counsel and have significant impact on the organizations' operations, but cannot legally represent the organization, so while you are a lawyer, you are not technically practicing law. These can range from entry level through to experienced attorneys.

Other options include human resources, procurement, diversity, project management, coaching, consulting. Really, the sky is the limit (OK maybe space is the limit; after all, we are all attorneys).

The point is that if you are feeling dissatisfied, unhappy, dispassionate, stressed, isolated or bored, and if you feel like you've tried everything in your power to move past these feelings but to no avail, it doesn't mean there is something wrong with you; it also doesn't mean you can't cut it or you're not good enough; it just means it's time for a change and there are so many ways to make that change, you just need to accept the situation isn't a good fit for you and figure out how to move forward without judgment or feeling like a failure. Big Law may be a good fit for some, but no matter what career path you're in, make sure there is room in your life for what is important to you. If there isn't, move on and take heart that careers are like shoes; one size does not fit all and sometimes the sizes change. Once you accept this, you can make decisions on how you want to work, with confidence, whether that is in a Big Firm or not.

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# One Lawyer Living and Working with Depression

By Daniel T. Lukasik



**Dan Lukasik** has been a lawyer for over 30 years. He created the website [Lawyerwithdepression.com](http://Lawyerwithdepression.com) 10 years ago following his own diagnosis of depression. He continues to write about living and working with stress, anxiety, and depression. His work has been featured in *The New York Times*, *The Wall Street Journal*, *The Washington Post*, and many other national and international media outlets. Five years ago, he launched a life coaching and mentoring practice at [Yourdepressioncoach.com](http://Yourdepressioncoach.com), a service specifically designed to assist lawyers struggling with mental health issues in the legal profession. He travels the country giving presentations to law firms, at CLEs and legal conventions, and law schools including Harvard and Yale last year.



I was 40 years old when depression first struck. I was a trial lawyer and managing partner at my firm. From the outside, I was successful: a high-paying career, interesting work, a great family, and lots of friends. From the inside, however, something was terribly wrong. There was a deep sadness that wouldn't go away. Before this time, I had gone to therapists for stress-related issues. Therapy always worked. After a few months talking things through, I always felt better and stopped going. But this time, it was different. Things didn't get better.

Besides the deepening melancholy, I lost my ability to concentrate, to be productive at work. Sitting at my desk, a motion that generally took a day or two to punch out now took me over a week or more; requests for extensions were routine. Depositions? They often got canceled because I was emotionally incapable to do them. Keeping my door shut, others thought I did so because I was busy. The truth, however, was that I was immobilized by depression.

My sleep became fragmented in a way I had never experienced before. I was always tired, but couldn't sleep through the night. I went to bed early, exhausted from trying to make it through another day. Often waking at 3–4 a.m., I was unable to go back to sleep. I'd get up, watch TV, or read old magazines while my family slept upstairs. Other times, I would shower, shave, put on my suit and tie, and drive to an all-night coffee shop. I was the only customer that early in the morning. Sitting there with my coffee, I stared out into the night. I wondered when I would start feeling better, when things would get back to normal. I worried a lot. When the sun came up, I drove to work with no one the wiser about the anguish I was going through. At least for the time being.

I tried to hunker down and power through the depression. That didn't work. Things worsened. I didn't bounce back as I had before. I would find myself crying as I drove home, seemingly, for no particular reason. Sadness now haunted my days. Once, driving home on a snowy night, I was sobbing so hard I couldn't see the road ahead. I pulled off the expressway. Finding an empty store parking lot, I stopped my truck and sat there crying. It must have lasted 20 minutes. I then drove home. Sitting in the dark driveway, I could see my wife and daughter through a house window. They were laughing and chatting with each other as my cheerful wife cooked dinner. I steeled myself. I did not want them to know what a mess I was. Walking through the door, my wife said, "How was your day, honey?" "Just great," I replied.

My therapist, concerned about my welfare, said therapy alone wasn't working. He referred me to a psychiatrist. "You have major depression,<sup>1</sup> Mr. Lukasik," he said. "I am going to put you on an antidepressant. You should take 90 days off work." He gave me a script for the medication. I took it to my pharmacist and began taking the pills.

The next day, I told my partners. It did not go well. Sitting there in our conference room, I said, in a quaking voice, that I had been diagnosed with depression and needed to take three months off to recuperate.

"Go on a vacation, for Christ's sake!" one snapped. Little did he know that when on vacation, I was still severely depressed. I could not experience joy, a symptom, I later learned, of depression. *Disneyland* was no match for depression.

Another partner said, "You'll be fine in a few weeks and back to your old self, Dan." *Had he heard what I just said?* I later learned that disclosure of depression to someone can be met with the person trying to minimize the problem. I don't think he said this to be dismissive. He didn't have a frame of reference for what depression was. He had never experienced it. Like many, the closest thing he could think of was sadness. But depression isn't sadness. Sadness is an emotion. Depression is an illness.<sup>2</sup>

My third partner sat silent, not saying a word. Occasionally, he looked over at me. We had been friends for over 20 years and law partners for 10. Where were the words of support? His silence hurt the most. Only years later did I learn from him that he was worried about the financial implications to the firm. *Would I ever come back?* In addition to being managing partner, I brought a lot of business into the firm. How would this bad news affect his finances and the firm's?

*A 2016 survey of 3,300 law students from 19 law schools found that 17% experienced some level of depression – more than twice the rate seen in the general population.*

I took three months off. It was a hot summer. Some relief came from not working, but I also felt guilty. I felt I wasn't pulling my weight at the firm. The medication helped. But not as much as I thought it would. The three months flew by. When I came back to work, most people didn't say anything to me about my absence. *It was as if I had just been there yesterday.* I wondered if I had been absent because of a broken leg, they would have said, "Welcome back! We missed you. How are you feeling?" They might have even signed my cast. But those gestures of welcome didn't come. Not because they were uncaring people, necessarily. I think some didn't know what to say or wanted to respect my privacy. But it still hurt.

The only one who offered a kind word was my secretary. She closed the door, hugged me, and said she was happy to have me back. That meant the world to me. My partners said, "So, you feel better?" I really didn't. But what was I going to say? I also didn't think they truly wanted any dialogue with me about how I was continuing to struggle with depression. Their thinking on the matter was crystal clear: the "depression thing" was over, and it was back to business as usual.

I subsequently recovered from depression with a combination of therapy, medication, exercise, a good diet, and a support group. While I am not "cured," I have come to

successfully manage it like one would any other chronic illness like diabetes or heart disease. It still comes and goes. But now I have the tools and support to cope with it effectively. If I am depressed, it is not as deep, nor does it last as long, as it did when I was first diagnosed.

I had hoped, given the strides made in the destigmatizing of mental illness by society – particularly depression – and improved treatment options available in the past decade, that far fewer law students and lawyers would be stricken by depression and stigmatized for it.

I was wrong.

## THERE ARE TOO MANY LAW STUDENTS AND LAWYERS STRUGGLING WITH DEPRESSION

First, a bit about depression. Depression is a mood disorder with multiple symptoms that have a significant impact on a person's ability to work and enjoy life. It is the leading cause of disability worldwide, with some 350 million people afflicted.<sup>3</sup> An estimated 17.3 million American adults had at least one major depressive episode in the past year accounting for 7.1% of all U.S.

with 28%, 19%, and 20.6% experiencing symptoms of stress, anxiety, and hazardous drinking, respectively. Sadly, 11.5% of participants reported suicidal thoughts. According to the Centers for Disease Control and Prevention, lawyers rank fourth in suicide by profession.<sup>11</sup> Tragically, there have been many high-profile lawyers and law students who have committed suicide recently as reported by national media.<sup>12</sup> I wrote on my website of a law student in my community with depression who committed suicide.<sup>13</sup>

Why do lawyers suffer from such high rates of depression? There's no easy answer because depression can have so many causes. Some of the risk factors include a personal or family history of depression, major life changes, trauma, or stress, and certain physical illnesses and medications.<sup>14</sup> And there are others.

But there is something unique about lawyering that contributes to the markedly higher rates of poor mental health in those who practice law. Attorneys are, by training and experience, pessimistic people in an adversarial profession.<sup>15</sup> They also tend to be perfectionists,<sup>16</sup> another risk factor for depression.<sup>17</sup> Lawyering is not only full

*Aside from the economic reality that their lawyers' mental health problems cost firms money, firms have a moral responsibility to address this problem.*

adults.<sup>4</sup> Depression is the leading cause of disability<sup>5</sup> in the U.S. whose annual toll on businesses amounted to \$70 billion last year.<sup>6</sup> Only 2% of people with depression die by suicide, but of those that do, 60% of them have depression.<sup>7</sup>

Law students and lawyers have much higher rates of depression than those found in the general population.

A 2016 survey of 3,300 law students from 19 law schools found that 17% experienced some level of depression (more than twice the rate seen in the general population), 37% some level of anxiety, and 6% reported serious suicidal thoughts in the past year.<sup>8</sup> Binge drinking was also a big problem – especially for those in the profession for less than 10 years.<sup>9</sup>

A 2016 survey of 12,825 practicing lawyers and judges found 28% reported a problem with depression in the past 12 months of the date of the survey.<sup>10</sup> *This percentage is almost four times the rate found in the general population.* However, when asked over the course of their career whether they had experienced depression, *that number skyrocketed to 46%.* Levels of other mental health issues and substance abuse levels were also significant,

of stress, but chronic and unremitting stress that has negative effects on the areas of the brain associated with depression.<sup>18</sup> When you combine pre-existing risks with stressors unique to the practice of law, the legal profession creates a “perfect storm” for depression to develop.

## MY ATTEMPTS TO HELP OTHERS THAT STRUGGLE WITH DEPRESSION

Twelve years ago, I found myself thinking that there must be a way I could offer law students and lawyers more support. I didn't want others to go through depression by themselves as I had done years ago. That is when I created the website [lawyerswithdepression.com](http://lawyerswithdepression.com).<sup>19</sup> The site was built as a place where those in the law, and others who cared about them, could go and learn about depression, self-management tips to recover, and how and where to get outside help and find support. And above all, to know that things can and will get better.

Ten years ago, I founded a depression support group for lawyers in my community. We still meet weekly, and both I and others have found that there is healing and support when a group of lawyers gets together to share their triumphs and struggles in dealing with depression.<sup>20</sup>

Five years ago, I started speaking around the country at law firms, CLEs, and law schools, including Harvard and Yale last year, to not only educate people about depression, but also provide them with some self-management tips they can use in their daily lives.

Three years ago, I created a life coaching practice and website at [yourdepressioncoach.com](http://yourdepressioncoach.com), specifically designed to help lawyers and law students who struggle with mental health issues.<sup>21</sup> I like to think of myself as a mentor who offers a unique perspective: someone who has practiced law for over 30 years and known what it is like to manage high-stress loads, anxiety, and depression while trying to do one's job. I am there for those I work with to help them with the unique challenges of trying to get things done when they feel they can't get things done. This work is tremendously rewarding and meaningful to me.

## CAUTIOUS OPTIMISM AND SIGNS OF CHANGE

Positive change is in the air and moving in the right direction as evidenced by the ABA publication of "National Task Force on Lawyer Well-Being: Creating a Movement to Improve Well-Being in the Legal Profession" in 2017.<sup>22</sup>

The report rightly stated that both the law school and lawyer survey results referenced above are "incompatible with a sustainable legal profession, and raise troubling implications for many lawyers' basic competence."<sup>23</sup>

The report further noted that "legal employers can play a large role in contributing to lawyer well-being."<sup>24</sup> The task force makes specific recommendations for law firms to create, among other things, a "Lawyer Well-Being Committee."<sup>25</sup> Some law firms have responded well and are making a large investment in lawyer well-being initiatives.<sup>26</sup> Over 100 large law firms have signed a Well-Being Pledge to promote well-being.<sup>27</sup> Given that there are thousands of large law firms in the U.S., however, it is fair to say that that progress has been very slow

I am concerned that many firms feel little or no responsibility for the mental health of the attorneys – or support staff – they employ. Following some of my presentations at large law firms, I had some junior partners and associates who told me that leadership did not want to seriously invest the money or time into addressing mental health. Depression, they seemed to rationalize, was an individual's responsibility to cope with outside of work – not a law firm's. There is a measure of truth in this: a person must take responsibility to get better. However, to say firms do not have a significant role to play is misguided and just flat-out false. Aside from the economic reality that their lawyers' mental health problems cost firms money (e.g., lost productivity, grievances, and malpractice claims), firms have a moral responsibility

to address this problem. If they turn a blind eye to this moral obligation, nothing will happen, or things will only get worse. There is only so much self-management one can do to get better. The work environment also plays a significant role.

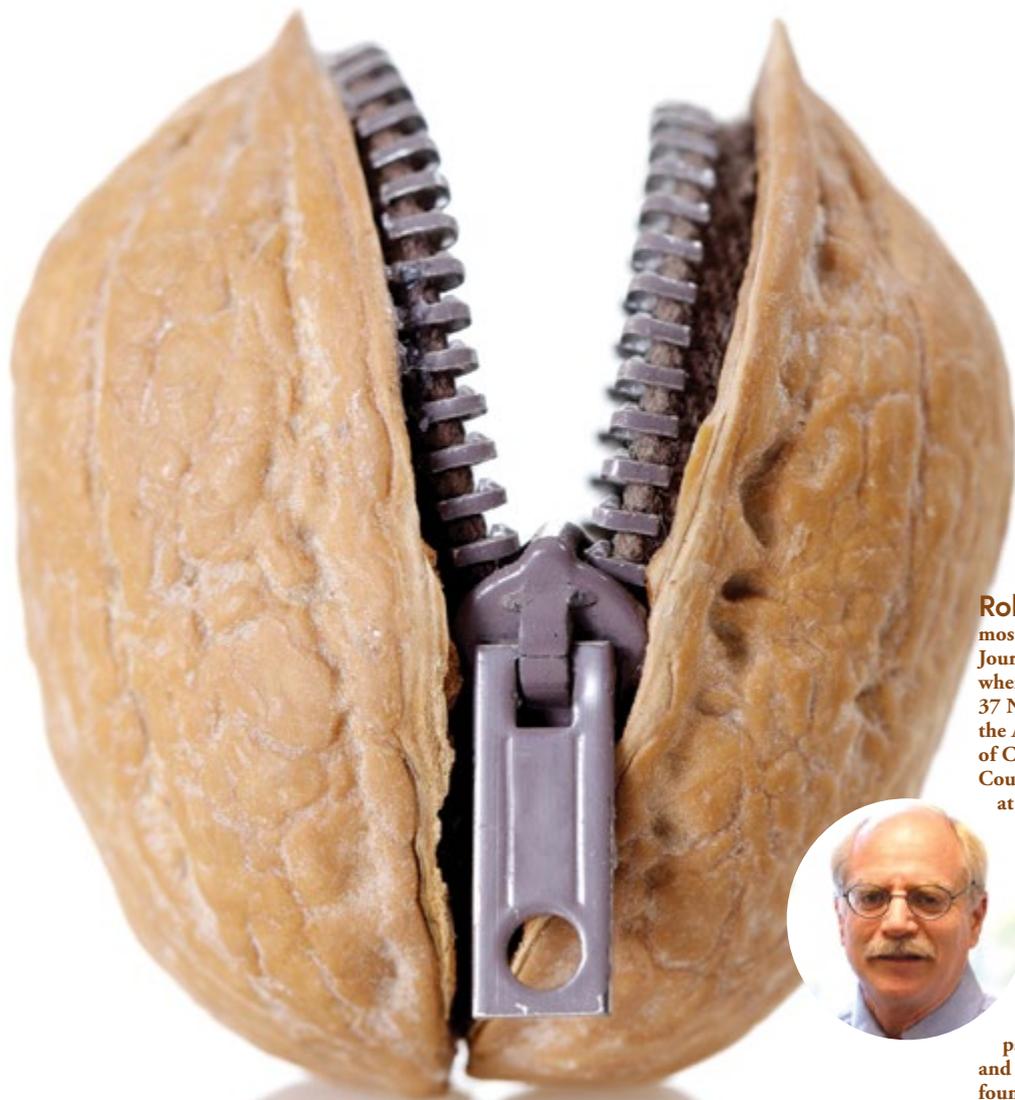
Lawyers are problem solvers. Depression, however, cannot be "solved" by oneself. A sufferer needs a team of others to help and support them in their recovery, including a good therapist, a circle of friends and colleagues, a law firm, their family, and others. It's a team effort.

### *Join the team.*

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# Attorney Wellness in a Nutshell

By Robert Herbst



**Robert Herbst** has been called “New York’s most powerful lawyer” by the New York Law Journal because of his exploits as a powerlifter, where he has won 19 World Championships and 37 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 and 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](http://www.nysba.org/gpcorpuswellness). Learn more about Robert at [www.w8lifterusa.com](http://www.w8lifterusa.com).



**W**e can take judicial notice that the law is a stressful profession. Lawyers work long hours juggling multiple matters, often under short deadlines. Clients present them with bad facts, opponents belittle their arguments, and courts disagree with them. Their carefully drafted deal documents come back from the counterparty marked up with comments. On top of that, lawyers are expected to bring in business and then must actually collect their fees from the clients they find. Along the way, they are expected to work for free *pro bono* and otherwise be involved in community activities. This does not even include the normal stresses of life from having a mortgage or raising a family.

All that stress takes its toll. Humans are still designed to be hunter gatherers and stress sets off the fight or flight reaction. When our ancestors saw a saber-toothed tiger, their blood pressure would rise, their heart rate would increase, their bodies would release the stress hormones adrenaline and cortisol, and their blood sugar level would go up to have extra energy available. They would then either fight the tiger or run from it. If they escaped the threat, the stress would be released and their bodies would calm down.

Now, while we no longer face saber-toothed tigers, our body perceives the stress of having a brief due or 20 e-mails to answer the same way and the fight or flight mechanism kicks in – but it is not released by fighting or running. We sit and write the brief or answer the e-mails and then move on to the next pressing matter. The perceived threat never ends. The stress builds up and we become anxious, irritable, and depressed. We can develop high blood pressure and heart disease, as well as diabetes from high blood sugar. Our body craves calories to keep its energy level up so we turn to calorie dense junk food which can lead to our becoming obese. Obesity presents its own health problems such as heart disease, certain types of cancer, and even arthritis.

The nature of lawyers' work adds to the health problems caused by stress. Hunter gatherers got exercise by walking around all day hunting and gathering and carrying their prey back to camp. Lawyers sit all day typing on the computer, talking on the phone, and attending meetings. Unfortunately, research has shown that people who sit for more than eight hours a day with no physical activity have a risk of dying similar to the risks posed by obesity and smoking. Sitting too much itself also causes heart disease, cancer, and diabetes.

To make matters worse, most lawyers are probably dehydrated. Sitting in a heated or air-conditioned office can cause dehydration well in excess of 1.5% as we lose water while our lungs moisten the dry air we breathe. Severe dehydration can lead to effects such as muscle weakness, cramping, lowered blood volume, higher blood pressure, and decreased mental function. Even a 1.5% water loss

leads to fatigue, difficulty concentrating, headaches, and impaired memory, none of which are good if you are wading through deal documents.

Also, most lawyers probably do not get enough sleep. Studies have shown that people who do not get between seven and nine hours sleep a night have a higher risk of developing high blood pressure, heart disease, diabetes, and obesity. Not getting enough sleep has also been found to impair attention, alertness, concentration, reasoning, and problem solving and cause anxiety, depression, and suicidal thoughts.

In some professions where there are high levels of stress such as police, firefighters, and the military, people can retire after 20 years and get a pension. For most lawyers, 20 years is only halfway into their careers. They have not even reached their peak of responsibility or seniority. Instead of retiring and getting a pension, they are faced with seemingly endless stress as they age.

*In some professions where there are high levels of stress such as police, firefighters, and the military, people can retire after 20 years and get a pension. For most lawyers, 20 years is only halfway into their careers.*

Many lawyers have turned to drugs, alcohol, or worse to cope. According to a 2017 survey by an ABA working group, 21% of lawyers reported problematic alcohol use. 28% reported depression. A survey by 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. It seems like everything lawyers do leads to high blood pressure.

It does not have to be this way. While we may not be able to eliminate the sources of stress such as opposing counsel who serve an order to show cause on a Friday afternoon, there are easily achievable ways you can reduce or eliminate many of the health effects of stress. First, you have to take on one new client: yourself.

### **MAKE YOURSELF YOUR OWN CLIENT**

You must make yourself your own client and improve your approach to exercise, hydration, nutrition, and sleep. Instead of putting all your other clients ahead of your own health, make yourself your number one priority. While lawyers have been trained to put their work above everything, as the statistics show, that model does

not work. If you take care of yourself, however, you will be healthier, happier, and more productive in the long run.

## STAND AND MOVE

For better health and wellness, first go after the low-hanging fruit. The cure for sitting too much is to stand and move, so build standing and moving into your day. Stand during phone calls. Set the alarm on your phone or computer and stand for five minutes every hour. Get a standing desk. Walk down the hall to speak with a colleague instead of sending an e-mail. Take the stairs instead of the elevator. Park across the parking lot and walk in instead of using a reserved spot near the door. Hold walking meetings and improve the health of your whole team. You don't have to run a marathon. All that simple movement adds up to counter the effects of too much sitting.

## DRINK WATER

The simple cure for dehydration is to drink more water. You should make hydration part of your routine and drink throughout the day, not just when you are thirsty. While you may have heard that you should drink X glasses of water a day, there is no one set amount that works

are chemically similar to opiates and stimulate the brain's pleasure centers, so you will feel happier and less anxious. You will be less stressed.

You should exercise at least three days a week in a well-rounded exercise routine which involves weightlifting for strength, stretching for flexibility, and some aerobic exercise for cardiovascular health. In addition to alleviating the effects of stress, exercise will improve your overall health. It will help to prevent obesity by raising your metabolism so you will burn fat. It will also cause you to build more muscle and bone, slowing or reversing the natural loss of muscle and bone density that occurs as people get older. You will be stronger and have more stamina to deal with the demands of being a lawyer.

Your first thought may be how are you going to exercise three times a week when you are already billing 2,500 hours, attending functions to meet potential clients, and want to watch your children's Little League games. It can be done if you commit with the same discipline that got you through the bar exam and enables you to work long hours. If you commit to client service by returning phone calls the same day, commit to serving yourself and exercising. If you commit to billing eight hours a day, commit to exercising one hour a day, three times a week. The time is there, you just have to use it efficiently. Maybe cut back on social media.

*Instead of putting all your other clients ahead of your own health, make yourself your number one priority.*

for everyone because different people are affected by different factors such as bodyweight, activity level, and even the weather. Instead, you should take in enough fluids so that your urine is clear or slightly yellow-tinged. If you eat a balanced diet, fluids can also come from a variety of sources such as juicy meat and fish and fruits and vegetables. A smoothie with whey protein and fruit checks a lot of boxes by giving you protein, carbohydrates, fiber, and water. You should avoid sugary or diet sodas as they have been linked with obesity and diabetes. Sports drinks may be helpful in replacing electrolytes such as sodium and potassium, although they may also contain sugar.

## EXERCISE

Once you have started to move more and hydrate, you need to exercise to reverse the effects of the fight or flight reflex. Lifting weights or going for a run after drafting a contract or brief acts as a substitute for an encounter with a saber-toothed tiger. Afterwards, your blood pressure, heart rate, and blood sugar will be lower. Exercise will also cause your brain to produce endorphins, which

To aid you, develop an efficient workout routine. For example, you could stretch as part of your warmup before lifting weights, which will take care of both flexibility and strength. You could use the rowing machine, which improves both cardio and strength. You can also adopt a sliding Monday, Wednesday, Friday, Sunday schedule. If you have to miss Monday because of a work commitment, go to the gym Tuesday. If you can't make Wednesday because you have a brief due, go Thursday. Even if people are going to work all weekend on a deal, they usually take Friday evening off, so go to the gym before dinner. Sunday is always good to catch up.

To help you keep exercising, come up with a trigger that will reinforce your going to the gym. For example, you could post a picture of your children because you want to be healthy for them or a picture of a park you want to be in shape to hike on vacation. You can collect inspirational quotes and read them. Or you can use money as a motivator. Buy a premium gym membership or an expensive pair of sneakers. You will feel guilty if you do not use them and will want to get your money's worth.

Another strategy is to exercise with a colleague and hold each other accountable. You can enter a 10K or a Bench Press meet and train for it. Enter a Spartan race and test your mettle.

Another way to stay motivated is to set realistic goals. If you want to lose 20 pounds, break it up into smaller milestones. Losing that much weight is difficult and can take a long time and you may get frustrated. You can keep the 20 pounds as your ultimate goal, but to start say you want to lose two pounds a month. That is achievable and as you accomplish it month after month, you will stay excited and motivated. Also, at some point you will suddenly realize you have lost 20 pounds.

The more you exercise, the easier it will be to keep at it, because your body will want to move. Your body will develop a positive feedback loop and you will start to feel logy and edgy if you miss a day. Your brain will want the endorphins. Soon you will find yourself scheduling meetings and calls around the gym.

## EAT WELL

To be well you have to eat well. There are many diets out there, low carb, no carb, paleo, Bronze Age, and lots of seemingly conflicting advice. The best diet is one you can follow without being a slave to it and which will give you the energy to get through a busy day of law and exercise and be well and fit at the end of it. You should eat a balanced diet of protein, carbohydrates, and fats. You need protein because your muscles and organs are made of protein. You should eat about 1g of protein for every 2 pounds of bodyweight daily from lean meat, chicken, and fish spaced out over three meals and a healthful afternoon or post exercise snack. Try a filling whey protein smoothie or peanut butter on whole wheat bread instead of a 500 calorie Grande latte.

You need carbohydrates for energy. Your muscles need carbs for glycogen to burn during exercise. More importantly, the brain runs on glycogen and being a lawyer puts lots of energy demands on the brain. That is why you crave those conference room sticky buns during a long meeting. Instead, give your brain and body the fuel they need with good carbs such as fruits, vegetables, and pasta.

Your body also needs fat for fuel and to maintain the brain, nerves, and other organs. Your brain is made of fat. Eat good fats such as from olive oil and oily fish like salmon.

When you eat a balanced diet, you will not feel like you are denying yourself and it will become part of your routine, like exercise. Also, when paired with exercise, 80%–90% compliance is enough. There is room for pizza and wings at a Super Bowl party or hot dogs at a summer cookout. As with exercise, your body will develop a positive feedback loop and will feel logy if

you eat too much junk and you will want to go back to wholesome food again.

To help you eat well, always eat a breakfast of protein, carbs, and fat such as eggs with toast or oatmeal and fruit. This will keep your blood sugar level and give your brain the fuel it needs so you won't crave sugary junk later. Stay away from fast food. It is just empty calories. Be wary of those premium coffeehouses. Some of their drinks have as many calories as eating 10 Oreo cookies. Try an exotic tea with lemon instead.

## SLEEP WELL

The final piece to support your wellness is to get seven-and-a-half hours of sleep a night. Sleep helps in so many ways from enabling your body to recuperate from exercise to improving memory to preventing obesity. You will be sharper the next day. Getting five hours or less a night causes the same impairment as having two drinks.

To doctors, it is hornbook medicine that people should not sit too much, stay hydrated, exercise regularly, eat a balanced diet, and get enough sleep. If we make it hornbook law that lawyers should follow those principles, it will enable us to cope with the effects of stress. We will be happier and healthier and better able to serve our clients, including ourselves.

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# Your Weekly Planning Checklist for Effective Time, Task and Email Management

Get Your Technology in Order and Get Organized!!

By Paul Unger

**W**eekly planning is critical if you want to change your life *and* change your habits. Daily planning is equally important! If your current routine doesn't include weekly planning, that routine must be broken and reconstructed! Sound familiar? It should! In a previous issue (Oct. 2018), I wrote about the importance of 5–10 minutes of daily planning. Just as important is weekly planning and getting your digital (and paper) files in order.

The reality is that very few legal professionals engage in a weekly planning deep dive session. This is an essential step to become intimately familiar with your task list and to truly get your arms around all your tasks and deadlines. Most people just “show up” to work and are reactive to fires instead of being strategic and on top of everything that we have on our plate. This leads to poor

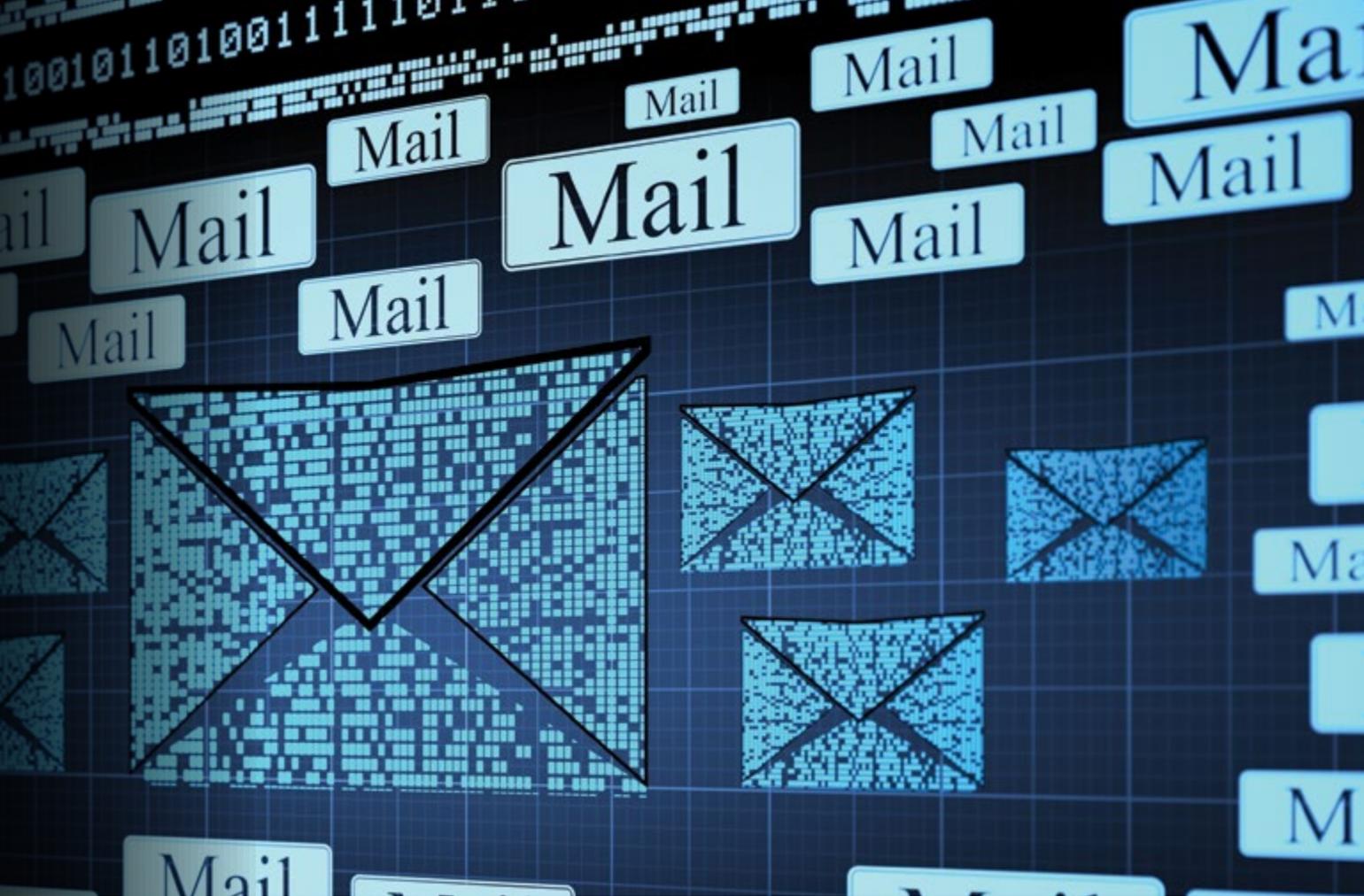
leadership, time management, and fosters an environment of anxiety and stress.

## HOW TO DO A WEEKLY DEEP-DIVE PLANNING SESSION

1. **Do your weekly deep dive planning session on the same day and time each week.** That's right . . . same time, place and channel! Plan 60 minutes for this session, one day a week. Performing this one-hour ritual at the same day and time each week will make it infinitely easier to develop a habit of engaging in this important planning. Moreover, it is proof to your team (and yourself) about how important and sacred this practice is to your organization.
2. **Think about the using “buddy system.”** Learning new healthy time management habits is very much like learning new dietary habits! Team up with a colleague and do your own weekly deep-dive planning sessions at the same as each other. Let me be clear, you are not talking to each other or planning with each other. It is admittedly a little awkward, but just get on the phone or a web meeting and do your own planning in dead silence. In fact, commit to *not* disturb each other. The idea here is something



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similar to having a workout partner to lose weight. One study found that 95 percent of those who started a weight-loss program with friends completed the program, and those who used a friend in their program was also 42 percent more likely to maintain their weight loss.<sup>1</sup> In my office, about 10 of us get together every Friday morning at 8:30 and we all do our own weekly planning. Those of us who do this regard this as “sacred” planning time. We schedule around this sacred time as much as possible.

### 3. The Weekly Deep Dive Checklist

- Calendar – 2 weeks Forward
- Calendar – 2 weeks Back
- Project/Case List
- Task List and Follow-Up Folder
- Email (Delete, Delegate, Delay)
- Loose Papers & Notes
- Time Report (1 week back)

**Two-Weeks Forward.** Open up your calendar and touch every single appointment on your calendar. Stop – Pause – Think about what you have to do to prepare for this appointment. Can you move forward with it? Do you have to do any research? Do you need to time-block (make an appointment with yourself on your calendar) to prepare? If so, block out your preparation time. If you need to look out further than two-weeks (or less), adjust your look-forward time. For example, I look two-weeks forward at every appointment and then I look at four additional weeks to find appointments that require travel arrangements so I book travel arrangements (flights, hotel rental car) in time.

**Two-Weeks Back.** Open up your calendar and touch every single appointment on your calendar going two weeks back. Stop – Pause – Think about whether you did everything that you promised people in those appointments. If not, schedule time to do those things and update your task list.

**Case/Matter/Project Review.** Whether you work with cases, matters or projects (or all of the above), you better have a list of all your active cases, matters or projects! If you don't, you absolutely should. Learn how to run a report from your time, billing and accounting system. Review this list for the following:

- Does your list have all new cases, matters, or projects that landed on your plate this week?

- Can you remove any cases, matters, projects that closed this week?
- Ask yourself with each item on that list, “Am I on-track or off-track?” If you are off-track, block off time on your calendar to do a deep dive into that case, matter or project! Do not do a deep dive into it now, or your weekly deep dive will take a half-day!

*We too-often forget to check our strategic planning or quarterly or long-term lists and then these items never get done! It is vital that we have a routine/system in place that makes us review all items on all task lists.*

#### **Review Your Task List(s) and Follow-Up Email Folder.**

Review each and every item on your task list(s). Stop – Pause – Really think about each item. Just like with the calendar above, you are not skimming. You are thinking about each item. Ask yourself:

- Is the task complete? If so, mark it complete.
- Is the task still relevant? If not, delete it.
- Is the task overdue, urgent or about to become urgent? If so, block off time on your calendar to get it done!
- Do you need to provide a status update to anyone?
- Do you need to follow-up with anyone in order for you to complete this task (are you waiting on someone else)?

If you maintain a follow-up folder in Outlook or Gmail, check that folder for anything that you are expecting from someone or anything that you delegated to anyone.

Finally, and this is important, remember to check *all* of your task lists, including any “Some-day” or “Bucket” lists. We too-often forget to check our strategic planning or quarterly or long-term lists and then these items never get done! It is vital that we have a routine/system in place that makes us review all items on all task lists.

#### **Batch Process Email (Only Delete, Delegate & Delay).**

Process your inbox to **Delete** any emails that you can. Also, **Delegate** any emails that you need to delegate. (Please also see [www.nysba.org/chaosstrategy](http://www.nysba.org/chaosstrategy) on creating a Follow-up Items Rule in Outlook.) Finally, if you need to **Delay** acting on an email, be sure to record it on your task list, create an appointment with yourself to do it (time block), and then save the email into the case/matter/project folder so you can delete it from your inbox.

Remember, your inbox is a terrible task list. Stop using your inbox as a task list!

***Note:** If you are familiar with batch processing emails, you will note that I removed the Do from batch processing during the weekly deep dive (you typically Delete, Do, Delete & Delay). This is intentional. If you do the “Do” during the weekly deep-dive, it will not take you 60 minutes to complete. It will take you half a day. For the weekly deep dive, focus on Delete, Delegate & Delay.*

**Clean Your Desk, Piles, Stickies and Notes.** During the week as life happens, it would be ideal to enter all tasks and do all your time blocking on your calendar immediately when the task surfaces. We all know that this doesn’t happen perfectly that way. You may be running out the door when the phone rings and someone asks you to do something. So you jot it down on a sticky note and slap it on your keyboard. Likewise, maybe someone sent you a pile of paper and that is sitting on your desk as a reminder to do it. All these things are really tasks and appointments that should be entered and then you should scan and save those papers or notes, or throw away the sticky notes. The end-result is that (1) you have a single place where you need to look and manage your tasks (not 10 or 20 notes, stickies, etc.), and (2) you have a clean desk, which will help you concentrate.

**Weekly Time Report.** Review your billable time sheets for the week. Learn how to run a report from your time billing & accounting system (or have someone run it for you). For this information, again, stop, pause and think about each time entry and ask yourself:

- Did I do everything that I promised relating to the activity that I performed for this time entry? If not, update your task list and/or schedule time on your calendar to do it.
- Are there any follow-up items that I should pursue relating to this time entry?

By performing this each week, you kill three birds with one stone:

1. You proof your time entries for grammar and accuracy, preventing you from having to do a massive review once a month.
2. You remember tasks that you need to perform that you failed to do.
3. You will also stumble across time entries that you forgot to enter, thereby billing more time . . . and who doesn’t want that!?

In conclusion, while no system is perfect, this weekly deep dive, following the above checklist each week, will definitely help you get massively organized for the week, as well as help you find “things that slip between the cracks” because we always have more on our plates than we can chew!

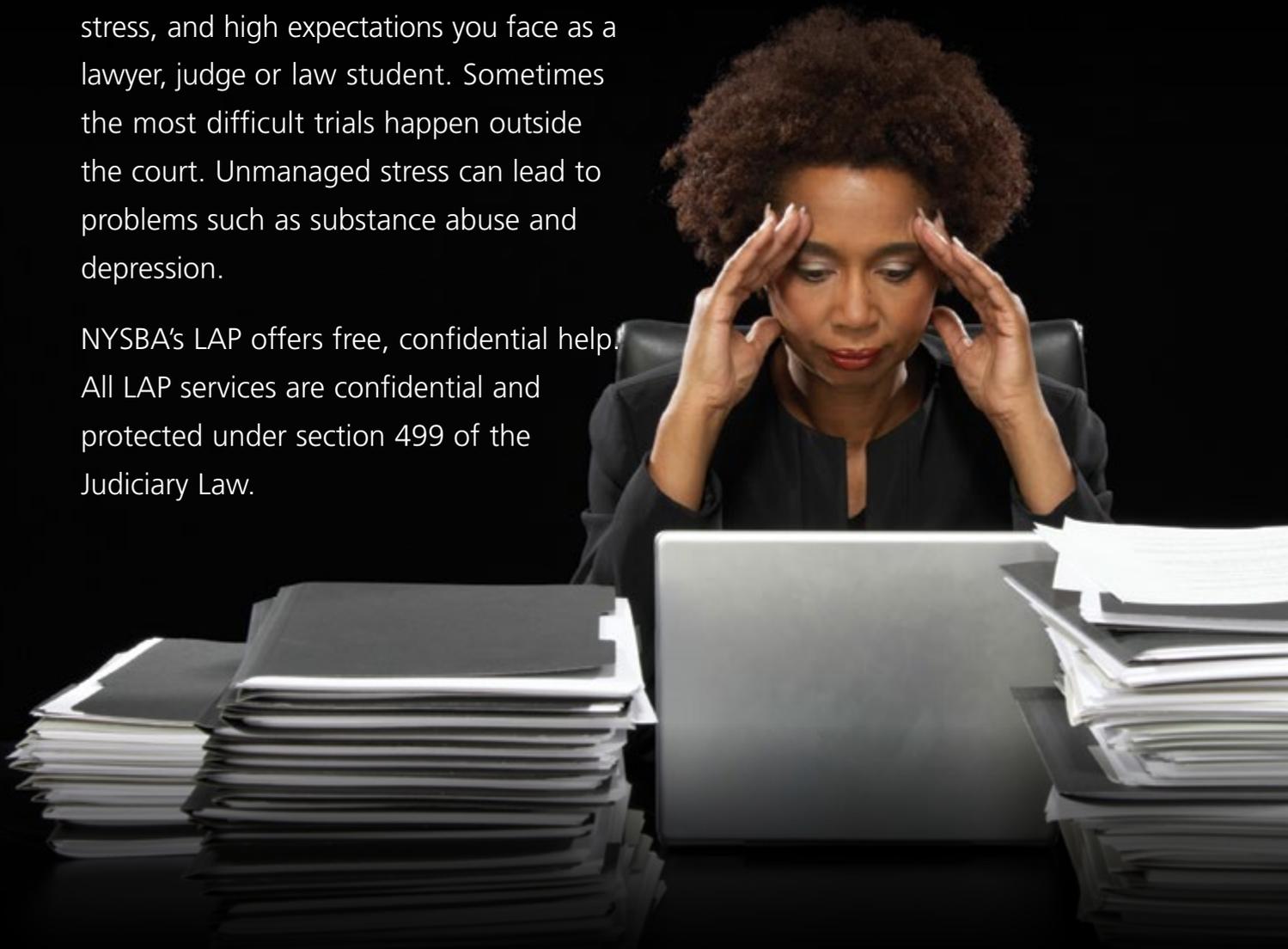
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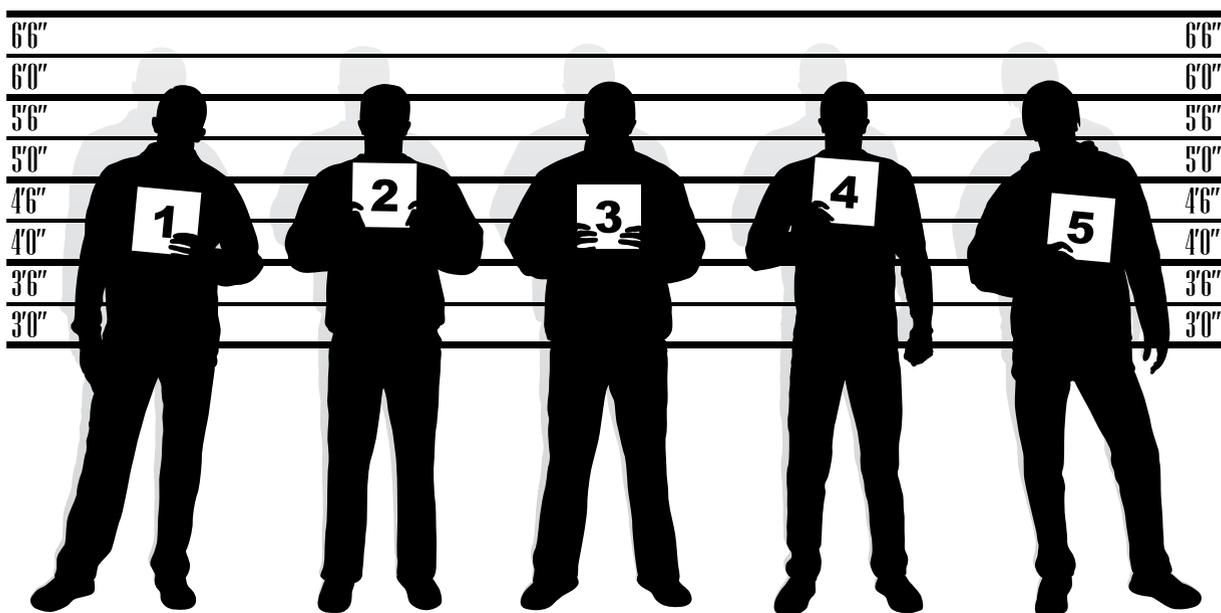
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# From the Central Park 5 to the Exonerated 5: Can It Happen Again?

By Elizabeth Vulaj



**T**hirty years ago, a 28-year-old jogger named Trisha Meili was beaten, raped and left for dead in New York City’s Central Park, and it wasn’t long before five teenagers—African-American and Hispanic, dubbed by the press as the Central Park 5—were arrested, tried and convicted of a crime they didn’t commit. It wasn’t until 2002 when another young man, Matias Reyes, confessed on videotape to being Ms. Meili’s sole assailant, and DNA testing confirmed his account.

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Even at that, it took until 2014 before the five wrongly convicted men prevailed in a \$41 million claim against the City of New York, and later still in a \$3.9 million suit against the State of New York. And yet their story might well have ended there were it not for *When They See Us*, a hit Netflix miniseries that has reignited a national conversation about race, our criminal justice system, and the role of police, prosecutors and the press in the treatment and depiction of these men. More than that, the series has sparked public awareness about false confessions (a key factor in convicting the Central Park 5) and New York’s changing laws and reforms on interrogation tactics, identifications, and prosecutions. The key question, of course, is whether these laws and reforms will be enough to prevent future miscarriages of justice, or if there is more work to be done. This article will examine that question.

“We got something here with this (Netflix) series that is most certainly going to be a tectonic shift as it relates to the criminal justice system,” says Yusef Salaam, who was

15 when he was arrested along with Kevin Richardson, Raymond Santana Jr., Antron McCray, and Corey Wise, as police moved swiftly to solve what was known as the Central Park jogger case.

All five young men, who were among the group of over 30 teenagers hanging out in the park that night, were apprehended. In the beginning, detectives intended to bring them in and question them about a series of more minor crimes that occurred earlier that night and issue a desk appearance ticket for them to report to family court at a later date.<sup>1</sup> Yet, once prosecutor Linda Fairstein heard of the attack on Meili, she instructed detectives to detain the teenagers and begin questioning them about the rape, a process which the teenagers initially described as seemingly professional, yet quickly turned aggressive and forceful.<sup>2</sup> According to the teens, the detectives reportedly used various tactics in order to get them to confess to these crimes, utilizing techniques such as physical force, aggressive questioning, shouting, threats, and lies, to coerce a false confession on videotape (the questioning prior to the confessions was not put on camera).<sup>3</sup>

So many people in New York City are vulnerable and susceptible to this type of behavior from police officers, investigators, and detectives, even in 2019, 30 years after the Central Park jogger case. Just earlier this year, a man named Huwe Burton, 46, was exonerated after serving 20 years in prison for the death of his mother in 1989, which was the same year of the jogger case. At the time, a then 16-year-old Burton arrived at his home in the Bronx after school one day and discovered his mother's body, but then later falsely confessed to the murder after detectives had interrogated him for hours.<sup>4</sup> Burton was charged with murder, despite a lack of physical evidence, his timeline not matching up to the details of the crime, and his coerced confession,<sup>5</sup> and was only recently exonerated, after leaving jail in 2009. Further, this past May, Keith Bush was recently exonerated after DNA evidence revealed that he did not commit the crime he was charged with as a 17-year-old in the 1970s: the murder and sexual assault of a 14-year-old girl in Bellport, NY.<sup>6</sup> Mr. Bush stated he gave a false and coerced confession to police and served 33 years until he was released on parole in 2007.<sup>7</sup>

Cases like this make it clear why it is so critical for individuals to know and understand their rights during the interrogation process, especially people who may not know the options they have during interrogations, such as young children, teenagers, people of color, minorities, immigrants, or people who do not speak English as a first language.

Many efforts have been made to address this problem, including studies that have been conducted, new proposed legislation, and overseeing commissions. In 2009, the New York State Bar Association issued the Final

Report of the New York State Bar Association's Task Force on Wrongful Convictions, which detailed cases of wrongful convictions in New York.<sup>8</sup> The report stated that one of the main causes of wrongful convictions was the use of false confessions, and in 23% (12 of 53) of the wrongful convictions analyzed by the Task Force, the accused had falsely confessed. This is troubling, as the report detailed that a "[c]onfession is likely the most potent evidence of guilt, and often sufficient in and of itself to secure a conviction."<sup>9</sup> The report suggested numerous proposed reforms to address this issue, such as (i) implementing specific training about false confessions to police, prosecutors, judges, and defense attorneys, (ii) advocating for further studies on false confessions, and (iii) urging for electronic recordings of custodial interrogations of felony-level crimes.<sup>10</sup>

*While it appears that the tactics that detectives and police use when interrogating people have remained the same in the past three decades, it seems that change is on the horizon, in many ways thanks to the efforts of the men who were exonerated of the crimes that took place on that night in 1989.*

Many other activists, attorneys, and other individuals are working to implement some of these suggestions, both within New York and across the country. While it appears that the tactics that detectives and police use when interrogating people have remained the same in the past three decades, it seems that change is on the horizon, in many ways thanks to the efforts of the men who were exonerated of the crimes that took place on that night in 1989.<sup>11</sup> Kevin Richardson, Yusef Salaam, and Raymond Santana launched the #EndNYWrongfulConviction campaign in partnership with the Innocence Project in 2016, "which pushed for mandatory recording of the interrogations and eyewitness identification reforms – two of the top contributors to wrongful convictions in New York."<sup>12</sup> In April 2017, the New York Legislature passed the FY18 budget, which incorporated numerous reforms in an effort to reduce wrongful convictions in New York.<sup>13</sup> On April 1, 2018, one of those reforms in that bill, a New York state law that mandates law enforcement agencies "statewide to video record interrogations of people accused of serious non-drug felonies, such as homicides and violent sex offenses," was implemented, and this is a

new requirement that applies to “all custodial interrogations that occur in police stations, correctional facilities, prosecutors’ offices and holding areas.”<sup>14</sup> Many advocate for this because a recording will offer “a permanent record of what was said and done, how suspects acted, and how officers treated suspect”<sup>15</sup> and “those who may be inclined to use improper tactics cannot do so because their actions and words are being recorded.”<sup>16</sup> Advocating of recordings of custodial interrogations has been one

fact, involved in a crime. This helps to protect innocent people from arrest and conviction, and holds guilty individuals accountable.”<sup>24</sup> It has “been widely recognized that photo arrays offer the best opportunity to obtain fair and accurate identifications,”<sup>25</sup> and if there are no other means of identifying the perpetrator, a photo array would be the most reliable option in allowing police and detectives to track down a suspect. The only potential downside would be if a victim does not accurately remember

*It is clear that the effort of the Commission is to lessen the corruption that exists within certain prosecutorial conduct, and there can still be oversight of this behavior without interfering with prosecutors being able to do their jobs properly.*

of the most popular choices for criminal justice reform of false confessions, because it offers multiple benefits: accuracy (“a videotaped rights-waiver and confession will be more accurate and completed than a signed sworn statement by the investigator”),<sup>17</sup> judging credibility (“a fact-finder who observes an accused’s gestures and facial expressions, and hears an accused’s own words, will be better able to judge the credibility of the accused”),<sup>18</sup> and most important, assessing voluntariness. Further, many believe that if detectives know and understand that their behavior and questioning will be recorded, it will serve as “not only as a deterrent to improper behavior, but also as a tool to critique his performance and improve his technique.”<sup>19</sup> However, one drawback many point to is that if a recording is eventually mandated by law, then “a failure to record in violation of that law makes an otherwise lawful and voluntary confession inadmissible in court.”<sup>20</sup> Yet bearing in mind the future effects of a law like this, it is clear that most of the benefits outweigh the cons and concerns, and recording interrogations will bring many positive changes to the criminal justice system, including lessening the amount of false confessions that are elicited from individuals.

Aside from mandating recording of interrogations, in July 2017, New York state began to allow juries to consider photo arrays shown to a witness by police officers, often viewed as “the most reliable evidence that identified the perpetrator of a crime,”<sup>21</sup> as evidence in criminal trials.<sup>22</sup> Before, New York had been the only state that prohibited the introduction of photo arrays<sup>23</sup> and, particularly, blind photo arrays (which is when police detectives do not know who the suspect is) that would allow for a less biased means of attempting to identify potential perpetrators. When a crime occurs, if a victim gets a good look at the perpetrator, then “photo arrays can be highly effective at confirming whether a person was, in

the perpetrator of a crime, the victim may misidentify him in a photo array, but that is a risk that has always been present, and allowing photo arrays would not do anything to increase that possibility. Most of the time, photo arrays will be able to allow for correct identifications, and therefore the pros by far outweigh the cons.

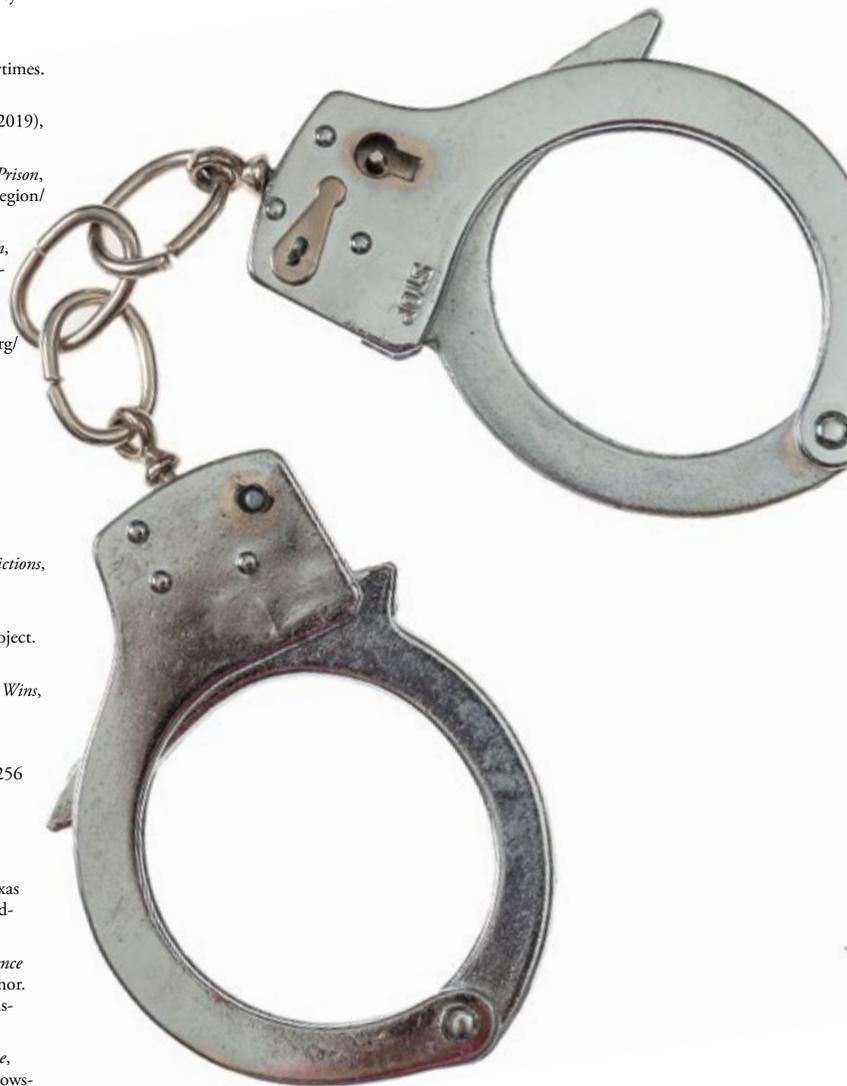
Finally, in August 2018, Governor Andrew Cuomo signed legislation to establish the first State Commission on Prosecutorial Conduct in the nation,<sup>26</sup> which is designed to “review and investigate prosecutorial conduct to address allegations of misconduct which lead to among other things including malicious prosecutions and wrongful convictions, frequently impacting people of color and marginalized communities.”<sup>27</sup> The Commission was formed on January 1, 2019 and is tasked with overseeing New York State’s 62 district attorneys and their assistant district attorneys, investigating prosecutorial misconduct, and looking into prosecutors’ qualifications and professional fitness.<sup>28</sup> While many applauded this initiative, many of the state’s district attorneys initially moved to block the commission, arguing that the legislation is unconstitutional and “impermissibly intrudes on core law enforcement functions.”<sup>29</sup> The attorneys also tried to argue that the Commission would “expand the power of certain judicial officers” and “deny due process and equal protection rights to the state’s prosecutors.”<sup>30</sup> Despite these voiced concerns, Governor Cuomo signed this bill in March 2019 in an effort to closely monitor prosecutors’ actions and motives when working on various criminal cases.<sup>31</sup> It is clear that the effort of the Commission is to lessen the corruption that exists within certain prosecutorial conduct, and there can still be oversight of this behavior without interfering with prosecutors being able to do their jobs properly.

While it is clear that many injustices have occurred and still sometimes occur during police interrogations, many

are relieved to see the reform that has begun to be implemented in New York to prevent wrongful convictions in the future. This represents a hopeful turning point for criminal law in New York, which has had the third largest number of wrongful convictions in the U.S. for years.<sup>32</sup> Legal reform like this and the conversations that have been sparked by the miniseries regarding wrongful convictions, police interrogations, and knowing your rights could ensure that the world will never see a case like this again. In fact, that is the hope that many of the men now known as the Exonerated 5 have, particularly Kevin Richardson, who stated in a televised interview with Oprah Winfrey: “I’m so happy and ecstatic that we can start the conversation now and to make sure that there will never be another Central Park Five.”<sup>33</sup>

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# Beware: Does Your Law Firm Website Violate the ADA or State Accommodations Law?

By Prof. Michael L. Fox

## INTRODUCTION

By now, most are well aware that federal anti-discrimination law includes the Americans with Disabilities Act (ADA),<sup>1</sup> as well as the Americans with Disabilities Act Amendments Act of 2008 (ADAAA),<sup>2</sup> which offer substantial protections for those with qualifying disabilities in areas including public accommodation, commercial facilities, telecommunications, and employment.<sup>3</sup> “As a result of . . . bipartisan efforts, on July 26, 1990, President George H.W. Bush signed the [ADA] into law. Upon doing so, [he] remarked that the [ADA] ‘represents the full flowering of our democratic principles’ and ‘promises to open up all aspects of American life to individuals with disabilities.’”<sup>4</sup> The ADA is

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enforced by the U.S. Equal Employment Opportunity Commission (EEOC), although the Department of Justice and the U.S. Attorney General are responsible for creating and publishing rules and regulations concerning Title II (State and Local Governments) and Title III (Public Accommodations and Commercial Facilities).<sup>5</sup> Some states, such as New York, have similar protections for those with qualifying disabilities.<sup>6</sup> In New York, the Division of Human Rights has responsibilities very similar to the EEOC.<sup>7</sup>

The topic of numerous articles and cases in recent years has been the expansion of protections to include the accessibility of web pages and internet resources when it comes to those with qualifying disabilities under the ADA or relevant state laws<sup>8</sup> – an area complicated by the fact that there is currently no uniform guidance, and no specific rules for websites promulgated by the Department of Justice.<sup>9</sup> This article collects cases and commentaries, with a particular eye toward informing attorneys, managing partners and law firm administrators/marketing directors. The question explored: If your law firm utilizes a website, but that website is not accessible to those with a certain disability – for instance, it is not enhanced and accessible to the hearing impaired (if there is an audio component) or the visually impaired (lacking a screen-reader function) – is the firm, through its website, in violation of the ADA or New York State law, and potentially subject to litigation and liability?<sup>10</sup>



Title III of the ADA applies to commercial and private websites, particularly if they affect interstate commerce.<sup>11</sup>

### THE RELEVANT GUIDANCE – A DIVIDE IN NEED OF A BRIDGE

According to *A Guide to Disability Rights Laws*, published by the U.S. Department of Justice, Civil Rights Division, Disability Rights Section, in July 2009:

To be protected by the ADA, one must have a disability or have a relationship or association with an individual with a disability. An individual with a disability is defined by the ADA as a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment. The ADA does not specifically name all of the impairments that are covered.

Title III covers businesses and nonprofit service providers that are public accommodations, privately operated entities offering certain types of courses and examinations, privately operated transportation, and commercial facilities. Public accommodations are private entities who own, lease, lease to, or operate facilities such as restaurants, retail stores, . . . [professional] offices, . . . and recreation facilities including sports stadiums and fitness clubs. Transportation services provided by private entities are also covered by title III.

Public accommodations must comply with basic nondiscrimination requirements that prohibit exclusion, segregation, and unequal treatment. They also must comply with specific requirements related to architectural standards for new and altered buildings; reasonable modifications to policies, practices, and procedures; **effective communication with people with hearing, vision, or speech disabilities**; and other access requirements.<sup>12</sup>

Given recent caselaw, it appears that two general categories may be carved out at the beginning of the analysis: (a) one having a business/service that is operated solely online via website/internet, or (b) a website business/service that has some “nexus” to a brick-and-mortar location. This distinction exists because of a very real, and troublesome, Circuit split.<sup>13</sup> In *Haynes v. Hooters of Am., LLC*, the plaintiff, a blind business patron, attempted to utilize the website of the restaurant operator utilizing screen reader software. However, the website was not compatible with the software plaintiff used. Plaintiff thereafter brought suit, alleging violations of Title III of the ADA<sup>14</sup>. Defendant argued that another lawsuit had already been filed against it on nearly identical grounds, and that it was already updating its website to bring it into legal compliance. Because of that, the U.S. district court dismissed plaintiff Haynes’ suit. On appeal, the 11th Circuit vacated and remanded. Not only did the court hold that Haynes was not a party to the prior suit, and therefore could not monitor or enforce the agreement for updating of the website, there was

nothing in the record showing that Hooters had updated its website. Therefore, the issues were still “live.”<sup>15</sup> Furthermore, the 11th Circuit held that “Haynes requested in his complaint that the district court direct Hooters to continually update and maintain its website to ensure that it remains fully accessible. Accordingly, even if Hooters’ website becomes ADA compliant, Haynes seeks injunctive relief requiring Hooters to maintain the website in a compliant condition. Thus, . . . there is still a live controversy about whether Haynes can receive an injunction to force Hooters to make its website ADA compliant or to maintain it as such.”<sup>16</sup> In *Haynes*, the business in question had brick-and-mortar locations, supplemented by the website at issue, and plaintiff’s action challenging the lack of ADA compliance by that website presented “live” questions in the opinion of the 11th Circuit.

public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.<sup>18</sup>

Similarly, in the U.S. District Court for the District of New Hampshire (in an unpublished opinion), the court denied a defendant’s motion to dismiss a challenge to its website wherein defendant argued it lacked a “nexus with a physical ‘brick-and-mortar’ location” and therefore did “not constitute a ‘public accommodation.’”<sup>19</sup> However, the same court acknowledged the deepening Circuit split, between those decisions in the First and Seventh Circuits on the one hand, and those in the Third, Fifth, Sixth and Ninth Circuits on the other,<sup>20</sup> wherein “the majority of Courts of Appeals that have addressed this issue require a ‘public accommodation’ to be an actual, physical space or have a nexus to an actual, physical

*New York courts have held that provisions of the New York State Human Rights Law “must be liberally construed to accomplish the purposes of the statute”; and indeed the provisions of both the State and New York City laws are “construed ‘broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible.’”*

However, in *Morgan v. Joint Admin. Bd., Ret. Plan of the Pillsbury Co.*, the lawsuit was filed under the ADA by retired disabled persons challenging a retirement plan negotiated to include differing benefits depending upon whether one retired “early” at age 55, at the “normal” retirement age of 65, or “early” due to disability. Among the holdings of the 7th Circuit Court of Appeals, for purposes of this article, was the following:

The plaintiffs have, however, another string to their bow. They appeal to the public accommodations provisions of the Act (Title III), which forbid discriminating against disabled persons with respect to access to places of public accommodation . . . . The defendant asks us to interpret “public accommodation” literally, as denoting a physical site, such as a store or a hotel, but we have already rejected that interpretation. An insurance company can no more refuse to sell a policy to a disabled person over the Internet than a furniture store can refuse to sell furniture to a disabled person who enters the store . . . . The site of the sale is irrelevant to Congress’s goal of granting the disabled equal access to sellers of goods and services. What matters is that the good or service be offered to the public.<sup>17</sup>

The 7th Circuit had previously held, in *Doe v. Mutual of Omaha*, that:

The core meaning of [Title III, section 302(a)], plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist’s office, travel agency, theater, **Web site**, or other facility (whether in physical space or in electronic space) . . . that is open to the

space, such that stand-alone websites may not be considered ‘public accommodations.’”<sup>21</sup> It is important to note, though, that *even those courts requiring the establishment of a “nexus” do thereafter hold that websites having such nexus must be compliant with Title III of the ADA, for use by persons with and without disabilities alike.*<sup>22</sup>

In New York State, while there appears to be little case law directly on point, the cases that exist line up with the holdings of the federal courts in the First, Second and Seventh Circuits.<sup>23</sup> First, New York courts have held that provisions of the New York State Human Rights Law “must be liberally construed to accomplish the purposes of the statute”; and indeed the provisions of both the State and New York City laws are “construed ‘broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible.’”<sup>24</sup> Furthermore, as recently as August 2017, it was stated that “[w]hether a website itself is a ‘place of public accommodation’ or an ‘accommodation, advantage, facility or privilege’ of a retail store appear[ed] to be an issue of first impression under the NYSHRL.”<sup>25</sup> The *Andrews* court made clear, though, that “[o]ver time, the New York State Legislature has ‘repeatedly amended the statute to expand its scope,’ specifying that the list of places of public accommodation ‘is illustrative, not specific.’ . . . ‘This history provides a clear indication that the Legislature used the phrase place of public accommodation in the broad sense of providing conveniences and services to the public and that it intended that the definition of place of accommodation should be interpreted liberally.’”<sup>26</sup>

The *Andrews* court, citing to both the *U.S. Power Squadrons* case in New York, and the case of *National Organization for Women, Essex County Chapter v. Little League Baseball, Inc.*, in New Jersey, held that a place of “public accommodation” need not have a fixed location or real estate, such that in New York, “place” is “a ‘term of convenience, not limitation.’”<sup>27</sup> Ultimately, in *Andrews*, the U.S. District Court for the Eastern District of New York, looking to New York law as construed and interpreted consistent with the ADA, determined that “[t]hrough plaintiff’s assertion that he is unable to use the website due to his disability, he has stated a claim that [defendant] . . . violated the NYSHRL,” and defendant’s motion to dismiss the discrimination claim was denied.<sup>28</sup>

## CONCLUSION – A “COMPLIANT” WEBSITE?

If your law firm – like virtually all 21st Century law firms – utilizes a website as part of your business and marketing activities, what then can we take from the above discussion in this area that has deeply divided courts across the nation? In the opinion of this author, there are two very important points not to be ignored or minimized.

- (1) If your firm has a brick-and-mortar physical location, as many if not most do, then the law appears clear across all jurisdictions under the ADA (and those applying New York law) that your website must be fully compliant with Title III of the ADA and the provisions of the New York State Executive Law (Human Rights Law) and Civil Rights Law for unimpeded use by all persons regardless of disability.<sup>29</sup> Your website must, for instance, be compatible with screen readers for the visually impaired, or with similar services and products for the hearing impaired, as but one example for compliance.<sup>30</sup> Some would argue that the benefits to law firms extend beyond avoidance of liability – “There is a strong business case to be put forward for pursuing web accessibility for your law firm in 2018. The benefits go beyond minimizing litigation risk, to include corporate social responsibility, financial returns, and benefits to the technical aspects of your firm’s digital presence.”<sup>31</sup>
- (2) If your law firm is completely virtual, and has no “nexus” to a physical real estate or brick-and-mortar location, then you should be certain to identify the holdings of the courts (and the provisions of the state/local statutes) in your jurisdiction/Federal Circuit, such that you do not run afoul of the protections of the ADA when it comes to users qualifying for accommodations when accessing your website and web services.

The above is meant to provide food for thought and consideration, at least until some future time when the Supreme Court of the United States might resolve the

enduring Circuit split, or the Department of Justice re-starts rule-making under the ADA to specifically address websites. In the meantime, owners of websites may look to the Web Content Accessibility Guidelines (WCAG 2.0) provided by the World Wide Web Consortium (W3C). The WCAG is purely advisory in nature, and provides four Principles of Guidance for law firms, including: “**WCAG Principle 3: Understandable:** The information and operation of the website’s user interface must be understandable. This means that the content on your site should appear in a predictable and standard way that is intuitive for readers, and readable and understandable for assistive devices.”<sup>32</sup> Employing all of the WCAG Principles may simply not be cost effective for solo, small and medium size firms, but again the Principles are not mandatory – and, indeed, courts have held that the WCAG 2.0 can be utilized as an equitable remedy for non-compliance, but not as a basis for initial liability in the case of an alleged ADA violation; it is guidance in the absence of DOJ rule-making.<sup>33</sup> One may also look to the supplementary WCAG 2.1 (June 5, 2008) for further guidance (WCAG 2.1 augments, but does not replace or supersede, WCAG 2.0).<sup>34</sup> While advisory, the WCAG are considered by some to be the “gold standard,”<sup>35</sup> and perhaps may be thought of in a similar fashion to the Sedona Conference principles and best practice guidelines issued prior to the Federal Rules of Civil Procedure and Federal Rules of Evidence amendments that specifically addressed eDiscovery and electronically stored information.<sup>36</sup>

In closing, keep one final issue in mind: Acting contrary to (1) or (2) *supra*, or the guidance of WCAG – resulting in discriminatory impact on some Internet users – might not only result in violations of law and concomitant civil liability, but also in violations of ethical rules possibly resulting in professional discipline in those jurisdictions having adopted the specific language of ABA Model Rule 8.4(g).<sup>37</sup> Be forewarned, be cautious, and beware.

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1. 104 Stat. 327 – Americans with Disabilities Act of 1990; Pub. Law 101-336 (101st Congress), see <https://www.govinfo.gov/content/pkg/STATUTE-104/pdf/STATUTE-104-Pg327.pdf>; see <https://www.govinfo.gov/app/details/STATUTE-104/STATUTE-104-Pg327/context/>; see 42 U.S.C. §§ 12101, *et seq.*
2. 122 STAT. 3553; Pub. Law 110-325 (110th Congress), see <https://www.govinfo.gov/content/pkg/PLAW-110publ325/pdf/PLAW-110publ325.pdf>. Of note, President George H.W. Bush signed the original ADA into law in 1990 (<https://www.eeoc.gov/eeoc/history/35th/milestones/1990.html>), and his son, President George W. Bush signed the ADAAA into law in 2008 (<https://adata.org/ada-timeline/ada-amendments-act-adaaa-signed>).
3. “Nearly 1-in-5 people have a disability.” L. Foley & C. McNamara, *Why Law Firms Should Make Web Accessibility a Priority in 2018*, THE NAT’L LAW REV. (June 4, 2018) (online), <https://www.natlawreview.com/article/why-law-firms-should-make-web-accessibility-priority-2018> (citing U.S. Census Bureau Report (2016)). In contrast, it is reported that one-half of 1% of law firm partners and associates have disabilities. J. Tashca, *For Law Firms on the Web, Online Accessibility for the Disabled Is Good Business*, ABA JOURNAL (May 21, 2019, online). This is offered as one potential reason for why the issue of law firm website accessibility is usually not a top-of-the-agenda issue in the legal profession. *Id.*
4. <https://www.eeoc.gov/eeoc/history/45th/ada20/celebrating.cfm>.
5. See [https://www.ada.gov/2010\\_regs.htm](https://www.ada.gov/2010_regs.htm).
6. See New York State Human Rights Law (Executive Law), §§ 290, *et seq.*
7. See <https://dhr.ny.gov/law#HRL293>.

8. For 2018, it was reported that 1,471 lawsuits were filed in the federal courts of just New York State claiming that websites violated provisions of the ADA. That was out of 2,285 total lawsuits challenging the ADA compliance of websites in just seven states that year – California, Florida, Georgia, Massachusetts, New York, Pennsylvania, and Texas. As a comparison, in those same states in 2017, only 814 cases were filed alleging ADA violations by websites. See J. Grant, *ADA Website Accessibility Suits Flood NY Federal Courts, Report Says*, N.Y.L.J. at 1 (Jan. 18, 2019).
9. See M. Stark, *Navigating the Murky Waters of ADA Compliance in the Internet Age*, N.Y.L.J. at 4 (May 22, 2019) (with reference to 42 U.S.C. § 12181(7); 28 C.F.R. § 36.104). See also 28 C.F.R. § 36.302.
10. “To state a claim under Title III, [plaintiff] must allege (1) that she is disabled within the meaning of the ADA; (2) that defendants own, lease, or operate a place of public accommodation; and (3) that defendants discriminated against her by denying her a full and equal opportunity to enjoy the services defendants provide.” *Camarillo v. Carrols Corp.*, 518 F.3d 153, 156 (2d Cir. 2008) (citing, *inter alia*, 42 U.S.C. § 12182(a); *Molski v. M. J. Cable, Inc.*, 481 F.3d 724, 730 (9th Cir. 2007); *Powell v. Nat’l Bd. of Med. Exams.*, 364 F.3d 79, 85 (2d Cir. 2004)); see also *Juscinska v. Paper Factory Hotel, LLC*, 2019 WL 2343306 at \*3 (S.D.N.Y. June 3, 2019).
11. See *Del-Orden v. Bonobos, Inc.*, 2017 WL 6547902 at \*7–\*10 (S.D.N.Y. Dec. 20, 2017).
12. U.S. Dep’t of Justice, *A Guide to Disability Rights Laws* (July 2009), <https://www.ada.gov/cguide.htm#anchor62335> (emphasis added) (although not specifically enumerating websites).
13. See, *inter alia*, *Haynes v. Hooters of Am., LLC*, 893 F.3d 781 (11th Cir. 2018). Cf. *Morgan v. Joint Admin. Bd., Ret. Plan of the Pillsbury Co.*, 268 F.3d 456 (7th Cir. 2001).
14. See 42 U.S.C. §§ 12181, *et seq.*; *Haynes*, 893 F.3d at 783.
15. *Haynes*, 893 F.3d at 784.
16. *Id.*
17. *Morgan*, 268 F.3d at 459 (citing, *inter alia*, 42 U.S.C. § 12182(a); *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 558–59 (7th Cir. 1999); *Carparts Distr. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc.* 37 F.3d 12, 19 (1st Cir. 1994)).
18. *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999) (citing *Carparts*) (emphasis added). See also *Nat’l Fed. of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565 (D. Vt. 2015); *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012).
19. *Access Now, Inc. v. Blue Apron, LLC*, 2017 WL 5186354 (D.N.H. Nov. 8, 2017) (unpublished) (citing *Carparts* and *Morgan*).
20. Although the *Blue Apron* court did not specifically include the Second and Eleventh Circuits in the breakdown, we know that the courts in the Second Circuit have aligned with the First and Seventh, while the courts in the Eleventh Circuit have aligned with the Third, Fifth, Sixth and Ninth. See J. Tashea, *supra*, ABA JOURNAL. Furthermore, the American Bar Association House of Delegates (of which this author is a former member) passed Resolution 116C at the 2018 Annual Meeting – aligning itself with the First, Second and Seventh Circuits, and “urg[ing] all courts and other appropriate government entities to interpret Titles II and III of the Americans with Disabilities Act (ADA) to apply to technology, and goods and services delivered thereby, regardless of whether the technology exists solely in virtual space or has a nexus to a physical space, subject to all statutory requirements, limitations, exceptions, exemptions, and defenses . . . .” See L. Rawles, *House Resolutions Decry Over-Discipline in Schools, Urge Tech Access for Those with Disabilities*, ABA JOURNAL (Aug. 7, 2018, online); text of ABA Revised Resolution 116C (2018) (emphasis added), <https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/116c.pdf>.
21. *Blue Apron, LLC*, 2017 WL 5186354 at \*4 (citing, *inter alia*, *Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530, 534 (5th Cir. 2016); *Earll v. eBay, Inc.*, 599 Fed. Appx. 695, 696 (9th Cir. 2015) (“We have previously interpreted the term ‘place of public accommodation’ to require ‘some connection between the good or service complained of and an actual physical place’”); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612–14 (3d Cir. 1998) (“rejecting the reasoning in *Carparts* and holding that ‘public accommodation’ does not refer to non-physical access”); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1013–14 (6th Cir. 1997)).
22. See *Fuller v. Smoking Anytime Two, LLC*, 2018 WL 3387692 (S.D. Fla. July 11, 2018) (“Plaintiff . . . adequately alleged a nexus between Defendant’s website and its physical stores because the website is ‘heavily integrated with’ and ‘operates as a gateway to’ those stores,” such that defendant’s motion to dismiss was denied). See also *Gil v. Winn Dixie Stores, Inc.*, 242 F. Supp. 3d 1315 (S.D. Fla. 2017).
23. Note that while under New York law damages awarded to successful plaintiffs challenging limitations to website accessibility are reportedly limited (capped at \$500), there is no limit on the attorneys’ fees awarded to a prevailing plaintiff. See J. Grant, *supra*, N.Y.L.J. As anyone involved in litigation is aware, attorneys’ fees alone can embody a substantial sum. There is also the matter of equitable, injunctive relief and concomitant costs.
24. *Cabill v. Rosa*, 89 N.Y.2d 14, 20 (1996) (citing, *inter alia*, N.Y. Exec. Law § 300; *U.S. Power Squadrons v. State Human Res. Appeal Bd.*, 59 N.Y.2d 401 (1983)); *Williams v. N.Y.C. Trans. Auth.*, 171 A.D.3d 990, 992, 97 N.Y.S.3d 692, 695 (2d Dep’t 2019); see also *Mohammed v. Great Atlantic & Pacific Tea Co., Inc.*, 44 Misc. 3d 396, 398, 986 N.Y.S.2d 796, 798 (Sup. Ct. N.Y. Co. 2014) (looking to N.Y. Exec. Law §§ 291, *et seq.*, and N.Y.C. Admin. Code §§ 8-107, *et seq.*). See also N.Y. Civil Rights Law § 40-c. Federal cases have likewise held that “[i]n general, the ADA must be broadly construed as it was designed to ‘provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.’” *Juscinska*, 2019 WL 2343306 at \*2 (citing *Noel v. N.Y.C. Taxi & Limousine Comm’n*, 687 F.3d 63, 68 (2d Cir. 2012)).
25. *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381 (E.D.N.Y. 2017).
26. *Id.* (citing *Cabill*).
27. *Id.* at 399–400 (citing *U.S. Power Squadrons*, 452 N.E.2d at 1203; *Nat’l Org. for Women, Essex Cty. Ch. v. Little League Baseball, Inc.*, 127 N.J. Super. 522, 318 A.2d 33, 37 (N.J. App. Div. 1974)).
28. *Id.* at 400. Cf. *Price v. City of Ocala, Fla.*, 375 F. Supp. 3d 1264, 1269, 2019 WL 1811418 at \*3 (M.D. Fla. Apr. 22, 2019).
29. In the very recent *Juscinska* case, a plaintiff with cerebral palsy brought suit against a hotel owner/operator alleging violations of Title III of the ADA, as well as the N.Y.S. and N.Y.C. Human Rights Laws, alleging that the hotel’s website did not provide room accessibility information for disabled guests, but provided full online service to the non-disabled. The Court, in denying defendant’s motion to dismiss, noted:
- Here, as alleged in the Complaint, Plaintiff was not able to browse Defendant’s website and make a reservation with the same efficiency, immediacy, and convenience as those who do not need accessible guest rooms . . . . Plaintiff was unable to discern the accessible features of rooms that would meet her needs . . . . Defendant’s website did not provide Plaintiff with the opportunity to evaluate the suitability of common areas and the amenities Defendant provides to its guests . . . . Taking the facts in the Complaint as true, it is plausible that, at the time Plaintiff visited Defendant’s website, it was not compliant with the ADA as interpreted by the DOJ.
- Juscinska*, 2019 WL 2343306 at \*3.
- Furthermore, the Court disagreed with defendant that the hotel’s 24/7 telephone line, to which prospective guests could pose questions, was an acceptable auxiliary aid and service that would moot plaintiff’s claims. *Id.* at \*4 (“at this stage, the mere availability of a phone service does not mean that Plaintiff has or is treated the same as other individuals. The ability and ease in which someone can research and reserve a room in a hotel is a service. In her Complaint, Plaintiff sufficiently alleges that she was denied that service based on her disability”). But cf. *Price v. Escalante - Black Diamond Golf Club LLC*, 2019 WL 1905865 at \*7–\*8 (M.D. Fla. Apr. 29, 2019):
- [A]t least this much appears clear: websites themselves are not “places of public accommodation,” and a plaintiff must allege a nexus between a website and a “place of public accommodation.” . . . So the Court rejects without further discussion Price’s argument that Black Diamond’s website is a place of public accommodation . . . . Instead, the crux of this issue is whether Price alleged that the inaccessible portions of the website “hinders the full use and enjoyment” of Black Diamond’s facilities . . . . The answer to that question is no . . . . Price has not alleged how the inability to access the July 2017 newsletter in December 2018 hinders Price’s full use and enjoyment of Black Diamond’s facilities. Absent such allegations, the Court concludes that Price failed to state a claim. (citations omitted).
30. There are opinions by commentators concerning how a firm might make its website compliant with the law. Some argue that there is no such thing as “ADA compliant law firm websites” because there is currently no rule or regulation under the ADA specifically speaking to ADA compliance by websites. D. Jaffe, *Law Firm Website Accessibility and ADA Compliance*, LAWLYTICS, <https://www.lawlytics.com/blog/ada-compliance/> (Jan. 26, 2019). While that is technically true, the author of this article would at least caution readers that compliance with caselaw/common law requirements set forth in particular jurisdictions for website accessibility under state and federal law is mandatory, and failure to comply in those jurisdictions may well result in liability. Even so, it is not an insurmountable obstacle for a website to become compliant in most circumstances, and many times an easy fix may be employed – particularly because if the website is compliant with the relevant jurisdiction’s caselaw guidance and the text of the ADA statute, the website owner/operator has flexibility in the specific measures taken. *Id.* (citing Sept. 25, 2018 letter from U.S. Dep’t of Justice to Members of Congress).
31. L. Foley & C. McNamara, *supra*, THE NAT’L LAW REV. (June 4, 2018).
32. D. Jaffe, *supra*, LAWLYTICS (the article also provides guidance on 22 points of interest with which all attorneys should be familiar concerning website accessibility).
33. See *id.*; *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 904–08 (9th Cir. 2019). See also L. Foley & C. McNamara, *supra*, THE NAT’L LAW REV. (June 4, 2018).
34. See <https://www.w3.org/TR/WCAG21/>; M. Stark, *supra*, N.Y.L.J.
35. See J. Tashea, *supra*, ABA JOURNAL.
36. <https://thesedonaconference.org/publications>.
37. See American Bar Association Model Rule of Prof’l Conduct 8.4(g) (“It is professional misconduct for a lawyer to: . . . (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.”) (emphasis added); N.Y. Rule of Prof’l Conduct 8.4(g), (h) (although N.Y.’s Rule 8.4(g) appears to have slightly altered the wording from the ABA Rule to specifically address discrimination in the practice of law and employment contexts, N.Y. Rule 8.4(h) speaks to an attorney engaging “in any other conduct that adversely reflects on the lawyer’s fitness as a lawyer.” Clear violation of the ADA or N.Y.S./N.Y.C. Human Rights Law by an attorney discriminating against users of a firm’s website may fall dangerously close to that line – if not over it).

# **NYSBA Attorney Day at Yankee Stadium**

New York Yankees vs. Los Angeles Angels  
September 18 | Tickets Starting at \$80

## **NYSBA Attorney Day at Yankee Stadium**

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# Iffy About 50-50: How to Better Apportion Custody Arrangements

By Peter J. Favaro

“Fifty-Fifty” visitation has become a major bone of contention in custody battles. I have seen plenty of cases go to trial over mere percentages of difference from “mathematically equal” distributions of parenting time. But is 50-50 as fair as proponents argue? What standards exist for any apportionment of time? And if 50-50 isn’t always fair, what are courts to do when asked to assign parenting time? Rely on experts? Guess? Actually, there is a better way, as this article will show.

But first, the reasons why “fair is fair” isn’t always, well, fair.

Often, when in conflict, litigants use reductionistic or regressive strategies to arrive at what they believe is a “fair” outcome, and what they arrive at is “fair is half and half – equal, ‘samesies.’” However, psychologists and evaluators are hard pressed to support 50-50 distributions of parenting time (or any distribution proportion) because there is no outcome research that provides guidance as to how children adjust to various schedules and under what circumstances. In fact, the circumstances of each individual case are so diverse and complex that no research study could possibly take into account enough variables to make the outcome of that research applicable to the fine-tooth divisions of time that often dominate custody disputes – and evaluators do not possess the

tools or the data to predict which access proportions best benefit kids. For instance, where do you find a study that takes into account: the child’s age, gender, and emotional adjustment, as well as the personality characteristics of the parents, their parenting style, whether they are still in the same house or in different houses, the distance between them, whether they live with a significant other, the degree of availability because of work schedules, and the presence and influence of extended family members. Give me five minutes more and I’ll come up with a dozen more variables.

Judges might also see 50-50 as “fair outcomes” for children, even infants, on grounds that they should be with each of the most important people in their lives equally. But when judges apportion access time without the help of an expert, they are making educated guesses based on the evidence adduced at trial (or the interim arguments they hear on control dates prior to trial, where problem solving is often as agile as it is futile). When they apportion parenting time *with* the help of an expert, they are making educated guesses based on the educated guesses of their experts. If I am a consumer of the expert services ordered by the court, which is costing me thousands, tens of thousands, or in some cases hundreds of thousands of dollars, and I was convinced that this was one big guessing game, I would be unsure of whether I am getting my money’s worth.

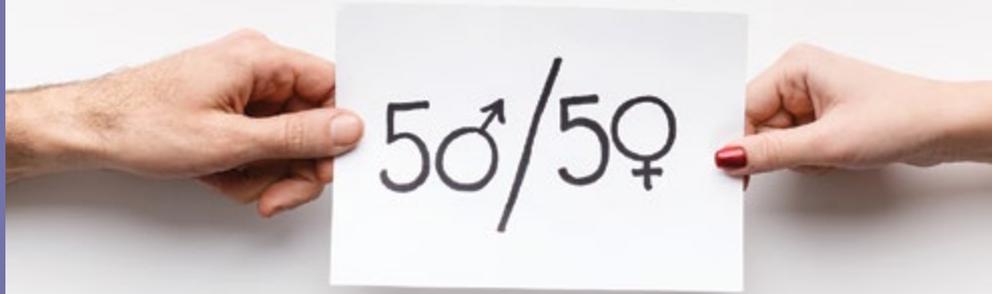
So what to do? Actually there is a way out of this quandary. Since there is no way to avoid guessing and no good research to improve our guessing, I go back to what happens pre-trial and conclude that while we might not call it “experimenting with parenting access arrangements,” there is absolutely no shame in doing just that, except for the fact that the law is not always so friendly to the notion that visitation schedules can often not be modified so easily (without consent) absent a hearing. But here is where a qualified mental health experts might give some real assistance to the court – not as predictors



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more than a dozen books concentrating on the topics of child development, civility, conflict resolution and divorced parenting. Dr. Favaro’s current interest is in developing innovative programs to help establish civility protocols for high conflict parents.

# Parental



of what access arrangements work in the post-trial uncertain future that occurs outside the watchful eyes of the court, but as data gatherers who can report on how children adjust to changes in access *while a case is ongoing*.

The data gathering role that competent methodologists can play, and that might very well assist judges, is that every case becomes an “N of one,” meaning every case is a behavioral experiment in and of itself where the initial protocols for access reflect a “baseline,” and changes in access reflect comparisons to the baseline and a new baseline. Judges can choose a top-down approach and add more time to the less apportioned parent, or they can take a bottom-up approach and start with equal apportionment. Either way, those are starting points and they force litigants to do what they should be doing anyway, which is to be flexible. Measures tied to best interests – school grades, teacher reports, behavioral adjustment, co-parenting attitudes, intensity of conflict – can be tracked over blocks of time and compared to the baseline.

Critics will ask if it is wise to put kids through these types of “experiments,” which might have an adverse influence on their adjustment, and that’s a fair criticism. However, that’s precisely what we do in every case where children’s lives change after a trial or hearing, with no information which informs us if the decision at trial actually mattered to kids.

Modern information-gathering technologies allow behavioral scientists to collect and analyze more information than that which would be collected in face-to-face interviews, psychological testing or “traditional” custody evaluation methodology. Data gathering concerning children’s adjustment, co-parenting disputes, civility, academic performance, etc., can be gathered on a daily basis (through channels like the internet where people can supply information from home) and can be examined. These are valuable data for problem solving (in and out

of litigation) and even more valuable as evidence that can be produced at trial.

For example, not all infants are alike. We really don’t know if all fathers can handle all infants for overnight visits or 50-50 visitation. Some fathers can and some can’t. Some infants can bear the separation from mothers and some can’t. The “attachment people” who say infants cannot be separated from their mothers to visit overnight with their fathers have their zealots. The fathers’ rights activists who say that fathers offer unique benefits to children that mothers cannot provide to infants take their zealous positions.

As a theoretical debate it is all interesting, but in the real world, doesn’t anyone want to see how an infant-to-three-year-old actually reacts to overnight visits? Why shouldn’t they? Kids have different temperaments. Parents have different skill levels. Experts sitting in their comfy consultation chairs should not opine without seeing – and seeing once or twice might not be enough.

Today’s technology offers remote real time viewing that operates from the palm of your hand (from your phone). Why don’t we employ this to look at how kids fall asleep at the other parent’s home, or whether they calm down five minutes after throwing a fit at visitation transition. My point is that when data like this are available I don’t care much about what Scale 6 on the MMPI-2 is reading.

Technology and improved remote data-gathering techniques are not beyond criticism and will not answer every question about access percentages. What I do believe is the way data are gathered in “traditional evaluations” is so limited in utility that we need to look at some type of alternative. The tools used for the typical custody evaluation are rusty. If we don’t start exploring the use of new ones, we can’t possibly get it even half right.

A photograph of three business professionals sitting around a conference table in a modern office setting. A woman on the left is gesturing while speaking to a woman in the middle and a man on the right. A laptop and glasses of water are on the table. The background shows large windows with a view of a city.

# Shall We Take a Course in How to Negotiate?

**Peter Siviglia** ([psiviglia@aol.com](mailto:psiviglia@aol.com)) has practiced transactional law for more than 50 years. He has represented clients both domestic and foreign, public and private, and has served as correspondent and special counsel to major international law firms on contract matters and negotiating. Peter is the author of *Commercial Agreements - A Lawyer's Guide to Drafting and Negotiating* (Thomson Reuters), and of two new works that will be published this year by Carolina Academic Press: a revised and expanded second edition of *Exercises in Commercial Transactions*, and *Transactional Skills - Contract Preparation and Negotiating*.

## OVERTURE

This article is a reprint of the introduction to Chapter 23 of *Transactional Skills - Contract Preparation and Negotiating*, Carolina Academic Press (2019). It is reprinted here with the permission of Carolina Academic Press.

I dedicate the article to Justice Gerald Lebovits, who diligently, tirelessly, and relentlessly strives to improve the writing of the members of our profession.

I hope the article addresses the complaint voiced in the quotation that introduces Justice Lebovits' article in the June/July 2019 issue of the *Journal*.

*There are two things wrong with almost all legal writing. One is style. The other is content.* Fred Rodell, *Goodbye to Law Reviews*, 23 Va.L. Rev. 38 (1936-1937).

For me, three principles govern the proper execution of a good essay, and legal briefs, articles and other legal writings that are not contracts are no more than essays:

1. Premise;
2. Development, comprising exposition and support;
3. Conclusion.

\* \* \*

Some time ago, a neighbor of mine, a businessman, told me that he was taking a course in negotiating. The course had mock negotiating sessions, and my neighbor said, with smug confidence, that the one principle he had learned was that after the parties establish their positions, the person who opens his mouth first loses. That observation is true in such a limited number of situations that it would be misleading to raise it to the level of an axiom. Further, the idea of taking a course in negotiating strikes me as absurd, for *like sex, negotiating is not something you can learn from a book or in a classroom.*

A person learns to negotiate by negotiating. And the human being, of necessity, begins to learn the technique from childhood, seeking from the earliest ages to get what it wants by whining, squealing and screaming.

The pressure of time cannot be created in the classroom. The reality of negotiating cannot be simulated there. In a staged negotiation, nothing is at stake. No one is at risk; there are no financial consequences. An actual job does not hang in the balance. An acquisition, a financing, a contract for the construction of an \$80 million ship does not depend on the outcome. The parties to the classroom negotiation leave the table as they arrived. Beyond the classroom, parties' leaving the table as they arrived can only happen when the negotiation fails. All participants maneuver to gain as much as possible without losing the deal. The desire for gain and the fear of losing an oppor-

tunity are the centripetal forces that keep the parties in orbit, that keep them searching for solutions. For example, when the publisher and I negotiated the contract to publish my first book, we quickly reached agreement on all but one of the points. On this one issue I could not accept what the publisher wanted, and what I proposed was unacceptable to the publisher. But the publisher wanted the book enough and I wanted that publisher to publish it enough to make us jostle and jostle until we fashioned a solution.

The desires and fears that drive the parties toward agreement cannot be engendered by simulation. They can only be experienced when an opportunity is at stake. Yet sometimes the differences on one or more fundamental issues are too great. In those situations, it is natural and best not to conclude an agreement. But it is essential that the parties be imaginative and flexible, so that if agreement is not reached, the failure is due to genuinely incompatible positions and not to stubbornness or a lack of creativity.

*The desires and fears that drive the parties toward agreement cannot be engendered by simulation. They can only be experienced when an opportunity is at stake.*

Another reason mock negotiating sessions are deceptive caricatures is they cannot realistically duplicate an entire transaction. The acquisition of a company, a financing, the arrangements to form a business or joint venture, a contract to publish a book: all of these do not begin and end within a classroom period. Depending on size and complexity, they take days, weeks, and even months to conclude. And they are continuous, without scheduled breaks as there are between classes.

Just before writing this chapter, I closed a management buyout that tested the patience of the participants for over nine months. The situation was quite desperate for my client, the seller, because his wife was terminally ill, and unknown to me, so was he.

When management could not perform the terms originally agreed, a relatively simple transaction was renegotiated and became more complex. These new arrangements, though, raised problems with the company's bank that could not be resolved; so the management team had to change banks to conclude the deal. Now, points negotiated once and renegotiated had to be negotiated again; and the transaction became still more complex.

Not unexpectedly, participants from time to time threatened to abandon the deal. But these gestures were merely feints from frustration to accelerate the process. As the transaction developed and evolved, the parties, as they often do, became more involved, more committed (like being drawn into a vortex) and were less likely to quit. With so much time and energy invested, the alternative – i.e., not closing – usually becomes more distasteful. Now, at 5:00 p.m. on the day before the closing, the management team called to tell me of a last minute impasse with the new bank that would kill the deal. “Peter,” they asked, “could you agree to a new arrangement that would solve the problem and save the deal?”

not closing at this stage would have been a disaster for the business and so for the futures of all concerned. The decision to decline the invitation was a tactical risk far less than the risk involved in accepting it.

My wife complained that I did not sleep well that night, flapping around like a flounder out of water. But when I returned to my office in the morning, I found a fax timed 12:48 a.m. (ah, yes, this was still before creation of the internet) confirming that the closing would take place as scheduled.

No classroom simulation can create these pressures or impart the knowledge necessary to deal with them effectively.

*The acquisition of a company, a financing, the arrangements to form a business or joint venture, a contract to publish a book: all of these do not begin and end within a classroom period. Depending on size and complexity, they take days, weeks, and even months to conclude.*

I said that I would have to think about any new arrangement, explaining that even if agreement could be reached, it would require changes in the documents, would delay the closing, and would make the lawyers even richer. “I’m going home,” I said, declining an invitation to join the discussions, knowing that if I did join, my client would only lose. Experience had taught that the management team would have to accommodate the bank, because

actively. No matter how powerful the intellect, no matter how many negotiating techniques it devours, without sufficient experience programmed into the data base, the individual will not possess the judgment required to assess a situation properly and to know with confidence what to do and when to do it. And a lack of confidence makes a person a weaker and less effective negotiator.

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# NYSBA Launches Inaugural Tech Summit

Earn up to two years' worth of CLE credit by attending

By Christian Nolan

**N**eed to learn how to prevent hackers from compromising your client's confidential information? Or want to know how the latest Macs, iPhones and iPads can be used effectively in your law practice?

This and so much other timely and cutting-edge information will be available at the New York State Bar Association's first-ever technology summit at Crowne Plaza in Times Square, Sept. 19 and Sept. 20, 2019.

The tech summit will bring together national speakers and key New York attorneys from large and small firms, including members of the NYSBA Committee on Technology and the Legal Profession and the Committee on Law Practice Management.

The experts will explore ways new technologies are affecting law firms and client information. Meetings and other breakout sessions will cover an array of topics including cybersecurity and ways to improve office efficiency. Panelists will provide attendees the information they need to stay abreast of recent tech cases, legislation and what is on the horizon.

During this special day-and-a-half-long program, attendees will be able to earn 12 MCLE credits. The programs will also be recorded, and in-person participants will receive access to all the program recordings, including two bonus online archives. In total, they will receive 24 credit hours satisfying the New York MCLE requirement.

Get answers to tech questions, learn about new areas of law and learn to become more efficient in your practice. Gain key practical skills, save time and money.

Keynote, plenary and breakout session topics include:

- Cybersecurity and Ethical Pitfalls of Everyday Law Office Computing

- The Latest on How Macs, iPhones and iPads Can Be Used Effectively in a Law Practice
- Cybersecurity – Law Firm Hackers: Just Because You're Cyber-Paranoid, Doesn't Mean the Hackers Aren't Out to Get You!
- Word Master Class Power Hour and PDF Master Class Power Hour
- Cyber Insurance Demystified – Necessary, Expensive and Confusing
- Hey Siri, Hey Alexa . . . Is This Admissible?
- Cybersecurity and Ethical Considerations
- How to Start Up or Start Over with Tech ... in the Cloud and on the Ground
- Who's Reading Your Email, Who Owns Your Social Media and Data?
- Legal Tech Tips, Tricks, Gadgets and Cool Stuff – Your Technology Action Plan

The two-day event will begin Thursday, Sept. 19 from 9 a.m. to 5 p.m. and continue Friday, Sept. 20 from 9 a.m. to 1 p.m.

Don't miss this special opportunity. Continental breakfasts, a generous lunch buffet and premium reception are included. Register today and guarantee your seat at the program.

To register, please visit [www.nysba.org/2019techsummit/](http://www.nysba.org/2019techsummit/). If you have any questions about this program, please contact Katherine Suchocki at [ksuchocki@nysba.org](mailto:ksuchocki@nysba.org) or 518-487-5590.

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*Can't get enough tech? The September/October NYSBA Journal will feature a specially themed tech issue.*

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## Greenberg Announces Groundbreaking Public Policy Initiatives

By Christian Nolan



Hank Greenberg was sworn in as NYSBA's 122nd president in June and launched several groundbreaking public policy initiatives for the coming year. Here is a quick look at five of these important initiatives.

### *Task Force on Autonomous Vehicles and the Law*

This task force, led by Dean and Professor of Law Aviva Abramovsky, of University at Buffalo School of Law, will study and understand the seismic impact that autonomous vehicles will have on our legal system and society, and make recommendations

on how New York state and its legal institutions can prepare for this revolutionary technological change. The initiative will focus on, among other things:

- Studying the potential impact autonomous vehicles may have on lawyers, their clients, courts and the civil justice system
- Assessing what laws and regulations may need to be enacted
- Reviewing potential privacy and data protection issues
- Analyzing safety concerns
- Considering the potential

impact on injury and insurance law, and licensing

“Autonomous vehicles are already being tested in some areas of the country and their role in our transportation systems will continue to grow, but there has been little discussion about what laws and regulations need to be put in place, and the potential impacts on our justice system and our everyday lives,” said Greenberg. “NYSBA is proud to lead the national discussion and begin the necessary work to understand this immense technological innovation.”

*continued on page 42*

## GREENBERG ANNOUNCES GROUNDBREAKING PUBLIC POLICY INITIATIVES

*continued from page 41*

### *Task Force on Free Expression in the Digital Age*

The decade-long decline in local journalism has been driven by dramatic changes in technology and the economics of advertising. There is a compelling need to consider whether there are appropriate legal responses to this crisis.

The task force will be co-chaired by David McCraw, deputy general counsel for The New York Times, and Cynthia Arato, a partner at Shapiro Arato Bach, and will examine how changes in the law may help assure local government transparency and accountability even as the economic landscape of local journalism is fundamentally altered. The task force will make recommendations on how to maintain and strengthen the public's ability to engage in appropriate oversight of the institutions of local government amidst the challenges of our ever-changing digital age.

"The rapid and ever-growing rise of social media as a source of news has triggered a substantial decline in local journalism. This places at risk First Amendment values and a vibrant, fearless free press. Now more than ever, our local news outlets need the support to hold truth to power," said Greenberg. "The future of local journalism is in jeopardy, but there has been no major effort to find ways to provide support. NYSBA is taking the critical first step in trying to address this problem."

### *Task Force on Rural Justice*

The task force will investigate the impact of rural attorney shortages on access to justice, challenges in delivering legal services in rural areas, and the unique practice needs of rural

practitioners. The task force will also make recommendations for potential changes in law and public policy and will identify viable solutions to support rural law practice and greater access to justice in New York's rural communities.

Taier Perlman, staff attorney at Albany Law School's Government Law Center and who leads their Rural Law Initiative, and State Supreme Court Justice Stan L. Pritzker, Third Judicial Department, will co-chair the task force.

"Research confirms what many attorneys in upstate New York already know – that there is an access to justice crisis in rural areas throughout New York and across the country," said Greenberg. "NYSBA remains committed to ensuring access to justice for all New Yorkers, regardless of where they live, and the important work of this task force will go a long way toward enacting the necessary reforms to achieve that goal."

### *Task Force on the Parole System*

The mission of this task force will be to study the current parole system with a focus on release practices as well as revocation and reincarceration. It will seek to identify problems in the current system and propose policy solutions, including new concepts in the administration of the parole system and changes in the law.

The task force will be co-chaired by past NYSBA President Seymour W. James, Jr., a longtime criminal defense lawyer who is currently a partner at Barket Epstein Kearon Aldea & LoTurco in New York City, and William T. Russell, Jr., a NYSBA Executive Committee member and partner at Simpson Thacher & Bartlett in New York City.

"The state Legislature has undertaken wide-ranging criminal procedure reform in areas of bail, speedy trial guarantees, and the discovery

process," said Greenberg. "However, these reforms have focused on issues that arise prior to the trial, conviction, and sentencing. The task force will examine our state's parole system, as it continues to present problems of fairness and due process for the thousands of parolees statewide."

### *Working Group to Review NY Bar Admission Questionnaire*

Greenberg has established a blue-ribbon multidisciplinary work group to review New York state's bar application questionnaire to ensure mental health treatment will not be a deterrent to gaining admission to the profession.

Recent studies have shown that law school students are experiencing anxiety, depression, stress, and other mental health issues at alarming rates and are not seeking the help they need because they are concerned that doing so will negatively impact their bar admission. In fact, one study discovered that 42% of surveyed law students believed they needed help for emotional or mental health issues in the past year, but only half sought assistance. That is because 45% of the respondents feared that seeking help could pose a threat to their bar admission.

NYSBA's workgroup will review the potential removal of questions from the questionnaire that address an applicant's mental health issues. The workgroup is composed of representatives from NYSBA's Young Lawyers Section, Committee on Disability Rights, Committee on Legal Education and Admission to the Bar, Law Practice Management's Attorney Wellness Sub-Committee, and Lawyer Assistance Committee.

# 8 questions and a closing argument

## Member spotlight with Xavier Donaldson



Donaldson is a partner at Donaldson & Chilliest in New York City. He lives in Montclair, NJ.

a *just* society requires that the accused be accorded zealous counsel and, more importantly, can you imagine a *just* society without criminal defense attorneys? I cannot.”

*If you could practice in a different area of the law, what would it be?*

I absolutely love the courtroom and all the preparation leading up to a good old-fashioned courtroom battle. Give me any case involving any type of law and I really like my chances in the courtroom!

*What is your passion outside of work and the law?*

Aside from my family, it would have to be sports. Any sport. Similar to the adversarial nature of a courtroom, I simply love the competitiveness of sports! I think I have tried to play and win just about every sport possible.

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

The legal industry continues to lag in diversity and inclusion in leadership positions and the recognition of implicit bias as it relates to hiring and appointments. It has been my experience, however, that NYSBA is fully committed to ensuring that all lawyers have the opportunity to hold leadership positions, present at CLE courses on cutting-edge issues and fully participate on the executive committees and operations of the sections that are the backbone of the Association. Moreover, NYSBA offers amazing opportunities to expand your legal network and diverse and informative continuing legal education classes.

*What do you find most rewarding about being an attorney?*

I love the euphoria, the sense of accomplishment and the hugs of gratitude after securing favorable results in complex federal cases, state murder trials and multi-defendant conspiracy matters. But for me, there is nothing more rewarding than when young people of color from challenged, trauma-induced neighborhoods, very similar to where I was reared, appear inspired when they see me enter or exit a federal or state courthouse, or when an elder person gives me a genuine smile of “you make us proud.” These brief encounters remind me that my presence as a litigator is welcomed and necessary in courtrooms across this country.

*What do you find most challenging about being an attorney?*

As a criminal defense attorney, my challenge is ensuring that every judge understands the “why” before any of my clients are sentenced. The statistics clearly provide evidence of the correlation between the failure of the “birth lottery” and criminal conduct. Yet, oftentimes, the goal of punishment usurps the “why” related to criminal conduct. In my opinion, if the “why” is not thoroughly considered prior to sentencing a defendant, then *justice* is not served.

*Who is your hero or heroine in the legal world?*

I admire attorneys and jurists who exhibit courage under fire by doing what’s right simply because it’s the right thing to do. From the late, great civil rights attorney O.T. Wells to Anthony Ricco’s intellectual yet unabashedly

personal commitment to the representation of death-eligible clients to Judge Shira Scheindlin’s courageous decision in *Floyd*, which ended the New York City Police Department’s stop-and-frisk policies. These giants continually remind me of my responsibilities as an attorney to bring truth to power when representing my clients.

*What advice would you give young lawyers just starting their career?*

Young lawyers should be true to themselves, distinguish themselves at whatever they are doing, and find someone they trust that has experience and success in similar pursuits. The people instrumental to my growth are those who provided honest, enlightening and sage advice regarding career choices, strategies and work/life balance.

*What or who inspired you to become a lawyer?*

I became a lawyer because my older brother, Thomas, also a lawyer, explained to me the importance of attorneys and judges and how they are the bedrocks of change in this country.

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

There is an erroneous belief that to be a criminal defense attorney you must support your client’s alleged conduct, and are not simply representing your clients’ and society’s interests. Criminal defense representation, however, is guaranteed by the Constitution as a necessary safeguard against the power of the government. People often inquire, “How can that lawyer represent that type of person?” My first response is always “because

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### Questions?

Tom Richards, Director, Pro Bono Services, NYSBA  
[trichards@nysba.org](mailto:trichards@nysba.org)



# Online Reputation Management for Attorneys and Law Firms

By Shannon Wilkinson

Imagine this: you run a boutique law firm with an engaged client base and public visibility. It is hit with an employee discrimination lawsuit, landing your firm's name in the news and across social media outlets with hundreds of mentions in a matter of weeks. Some of what is published truthfully reports on the situation, but much of the attention is malicious in nature, in some cases promoting false information. These materials dominate the first page of your practice's Google results for weeks, then months. Your prospects and revenues drop.

This type of reputation crisis happens every day. Depending on the size of your firm and its area of specialization, the reasons differ. If yours is a white shoe firm that has managed to stay out of the news except as an expert commentator, that situation can quickly change if your files are hacked. If yours is a criminal defense firm and represents controversial clients, you may be as newsworthy as they are . . . and attract as much reputational damage.

If you are like many attorneys, your closest association with reputation management may be referring your clients to firms that specialize in it. Increasingly, though, you may find you need such a provider yourself. Common reasons are:

- Hacking of your database or files, with confidential materials made public
- Invasive media coverage about your firm
- Unwanted publicity about your personal life, perhaps resulting from a divisive divorce or a DUI
- Bad reviews on "Google My Business," AVVO, or other platforms

Compounding this potential damage is Section 230 of the Communications Decency Act, which spares website owners from legal responsibility regarding material published on their sites. It has not been updated to accommodate today's platforms since its passing in 1996. Whereas in the EU there is a Right to Be Forgotten, there is no such analog in the U.S.

In most such reputation crises, there is often only one solution: to strategically publish substantial content

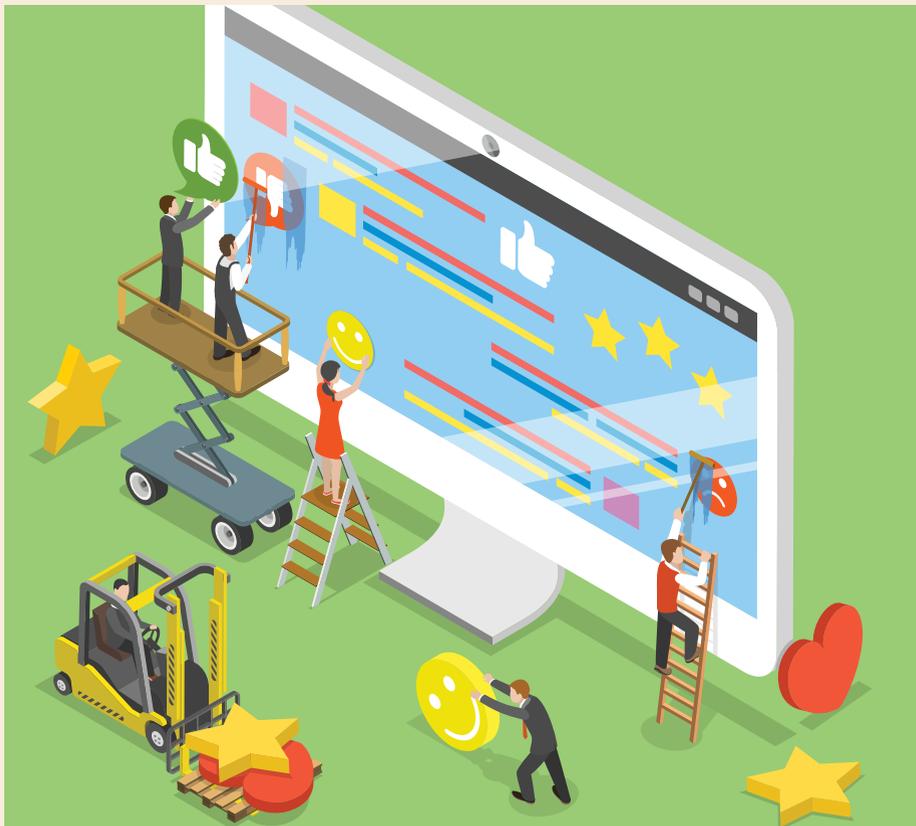
online that will rank higher than the offending material. There is rarely a quick way to do this. New content placed online must organically rise high enough to reach the first page of Google and other search engines. There are tools to help it move up faster, but few work at warp speed. Like having insurance, your best play is to have such content and review management programs in place before you need it. Few law firms do.

Building an intentional online reputation management (ORM) strategy is essential for shaping public perception and "owning" the Google and other search engine results that appear when your practice is researched. It's vital for attorneys and their firms to showcase facts and examples of their expertise before it is attacked or damaged, so they have a dominant role in the information that is found about them online.

Although conventional wisdom may suggest deliberately keeping a low profile online, this is not an effective solution in the digital world. It makes you vulnerable to what any third party says about you. Without a strong digital footprint—an accurate and informative body of content that is associated with your name on the internet—your defense is weakened against online threats to your reputation. The average Google page has 10 entries. How many of those do you and your practice own or manage? Too often, the answer is 1 to 3. That leaves lots of room for defamatory, inaccurate, and unwanted content that third parties can intentionally publish about you. Your results are also vulnerable to being flooded by social media and mainstream media commentary about your crisis.

## BUILDING DIGITAL ASSETS: RESERVE YOUR WEBSITES

Our firm has worked on ORM cases where "hate sites" (malicious websites created about and/or impersonating attorneys and law firms) have been hosted on website addresses that mimic the firm's name, causing the content to appear on the first page of Google when anyone runs a search of the firm. The purpose of such sites is to denigrate and attract inappropriate attention, to your practice.



ed on LinkedIn will rise to the top of Google search results. Adding a “Publications” section with entries that link to your citations will help boost your profile online and add to your “digital firewall.” Publishing articles on LinkedIn can also serve this purpose.

- Publish content on a scheduled, consistent basis:** Include articles in legal journals and Op-Ed “thought-leadership” pieces in local or mainstream news outlets. Publicize your pro bono work. This type of content is not only essential for owning your brand online but is also a strong marketing tool that will enhance your revenues while building that all-important online profile.

## MANAGING RISK ON REVIEW SITES: GOOGLE MY BUSINESS AND AVVO

You can minimize the risk of this kind of unwanted information showing up on the first page of Google by proactively securing your name online. Purchasing all the appropriate domain extensions (“.com’s”) for your firm is the single most important step you can take to establish, build, and protect your and your firm’s reputation online. This may entail buying 10, 25 or many more domains in a multitude of iterations if your firm is large and potentially a target for a variety of attacks.<sup>2</sup> Every attorney should undertake such a protective action. That is what “owning” your brand online is all about.

### BUILDING DIGITAL ASSETS: OTHER WAYS TO RAISE YOUR PROFILE

There are several other steps you can take to minimize the risk of negative or inaccurate information populating search results on you or your firm’s name.

- Take control of your image, in a literal sense:** Start by ensuring photos that appear of you online are accurate and represent yourself in a way that supports the leadership image you wish to convey. They will safeguard against dissatisfied clients or political operatives raising the profile of unflattering or doctored pictures of you. Video can also be an invaluable tool when posted on high-ranking sites like YouTube and Vimeo.
- Use LinkedIn as your main information hub:** As a highly ranked platform on Google, content post-

Unsubstantiated sources can publish negative feedback about your firm across online review sites. Competitors, dissatisfied employees, media sources, and “trolls” are all capable of obscuring the truth about your firm. Many law firms don’t have the time to manage or maintain review platforms where this commentary may appear. The end result is that when a bad review appears, there is often no buffer of positive reviews to counterbalance it.

This issue often occurs with anonymous reviews on Google My Business, a free service from Google where anyone with a Gmail address can post reviews. Google My Business is the square block of information, typically with a description of your firm and a photograph of the building in which your practice is housed, that appears in the top right corner when many law firms are Googled. If you have a publicly listed phone number, Google sim-

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ply publishes that platform whether you want it or not. Once it is live, anyone can post a review there.

Review management platforms have been developed specifically for that reason: unhappy clients are far more likely than satisfied ones to post reviews, so these subscriber-based platforms provide an interface that enables firms to invite clients' feedback which can be posted as reviews on a variety of platforms. Google My Business has how-to tips for using the platform and inviting colleagues and clients to share reviews. If this does not pose an ethics violation for you, it is worth looking into.

An AVVO profile contributes to your search engine results. As a high-ranking website, it often appears on the first or second page of a Google search. For SEO (search engine optimization) reasons, the more comprehensive your AVVO profile is, the higher it will appear. So, while recent ethics rules keep attorneys from proactively using AVVO's review feature, if you are comfortable using it for a profile, know that doing so will add to your digital assets online.

## CONCLUSION

The best thing you can do to protect the online image of yourself and your firm is to be proactive in expanding your digital assets to safeguard against negative or defamatory material and reputational crises. Reserving domains in your name, creating content on high-ranking sites, and protecting sensitive personal information are all excellent processes you can initiate before someone else sabotages your image, and they are essential steps for any attorney and/or law firm to take. Monitoring what is said about you on social media and review platforms will keep you on the same page as your audience. Publishing consistently and strategically enables you to manage the conversation—and lead it. For attorneys, that is the optimum place you want to be.

1. Note that it can be difficult to prove whether an online reputation issue meets the legal requirements of "defamatory" that would justify legal intervention.
2. To see if website domain addresses are available in your name, you can run a check on your name at [www.knowem.com](http://www.knowem.com).

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# Professional Obligations for Lawyers: Tax Returns!

By Sarah Diane McShea

**L**awyers, famous for their dedication and zeal on behalf of grateful clients and in the service of many meritorious causes, sometimes neglect their own personal and professional obligations. This is the second article in a two-part series for lawyers who procrastinate. Part One addressed the consequences of failing to keep up with attorney registration requirements—not filing mandatory registration forms, not completing CLE courses or not paying the \$375 biennial fee. Part Two explores the potentially serious consequences of failing to file personal income tax returns and other tax-related offenses. Most lawyers were obliged to file their 2018 personal income tax returns in April. With an automatic extension, that deadline is now October 15, 2019. If you have not yet filed your 2018 tax returns, did you request an extension? Do you have all the paperwork you need to file by the October 15th deadline? Are there other tax years involved? Do you know other lawyers who have fallen behind on filing their tax returns? Lawyers who fail to file personal income tax returns risk having their law licenses suspended. If you are a delinquent or late filer or know someone who is, take note.

New York disciplinary courts treat failure to file personal income tax returns as a serious professional violation, even though it is unrelated to the practice of law and does not involve any clients. Lawyers who fail to file their returns for several years (generally three or more) may be prosecuted criminally and, if convicted, are likely to face serious public discipline. The Appellate Divisions routinely censure and suspend lawyers convicted of fail-

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ing to file income tax returns and, even when there is no criminal conviction, have disciplined lawyers who fail to file returns or pay taxes.

Lawyers can find themselves in difficulties in a variety of ways and with surprising ease. Some non-filers have been partners in large law firms earning substantial income. While it might seem that paying taxes if you have significant revenue is easy, lawyers can quickly get behind and in serious trouble. Many law firms pay their partners a monthly or quarterly “draw” against year-end profits. However, most firms do not withhold taxes from those distributions, but leave it to the individual partners to manage and pay their quarterly estimated taxes. When lawyers fall behind, the struggle to catch up with mounting tax obligations can be daunting. Some lawyers respond by postponing filing their returns, hoping to catch up. The situation can spiral out of control. After several years of not filing returns or not paying taxes (or both), lawyers face possible criminal prosecution and serious professional discipline. That is exactly what occurred in *Matter of Eppner*. The Appellate Division described Eppner’s thinking:

[He] believed that, because he did not have the money to pay the taxes, he could not file his returns. Thus, he failed to file his tax returns for 2001, and finding himself in a similar situation the following year, he again chose to forgo filing his taxes for 2002, 2003 and 2004. Upon turning 65 years old in 2004, respondent was required to retire pursuant to the informal policy of the law firm where he worked. Although he remained as counsel, he suffered an even greater decrease in income, and did not file his taxes for 2005.<sup>1</sup>

Almost all non-filing lawyers report feeling overwhelmed by their predicaments. They have not been able to pull together their documents or organize their reporting. W-2s, 1099s, bank and brokerage statements, and expense receipts may be sitting in various piles on their desks, while more pressing problems abound. Family obligations, illnesses, trial schedules and financial problems are often cited. The lawyers may begin with the best of intentions, but after the extension deadlines pass, the returns no longer have due dates—they are just late, often very late. It can be a scary and unnerving situation



and typically it is one that lawyers do not discuss with their colleagues or their families. What are the potential consequences for lawyers who procrastinate?

### THE GORY DETAILS

The most serious situations involve criminal prosecutions, usually for failure to file income tax returns or failure to pay income taxes. Setting aside tax evasion and tax fraud cases, which are an entirely different kettle of disciplinary fish, a lawyer convicted of a misdemeanor-level tax offense is likely to be publicly censured or suspended. Here is how it happens.

### "SERIOUS CRIME" PROCEEDINGS

A New York lawyer convicted of the willful failure to file income tax returns is guilty of a "serious crime" under New York law. Judiciary Law § 90(4)(d). The statute applies to federal and state convictions, which must be reported to the Appellate Division and appropriate Grievance Committee within 30 days.<sup>2</sup> The Grievance Committee commences a "serious crime" disciplinary proceeding in the Appellate Division, which directs the lawyer to show cause why the lawyer should not be interimly suspended pending the conclusion of the matter.<sup>3</sup>

Although interim suspensions are the norm in many "serious crime" cases, they are not often imposed in "failure to file" convictions. The Judiciary Law provides that the courts may set aside the statutory interim suspension "when it appears consistent with the maintenance of the integrity and honor of the profession, the protection of the public

and the interest of justice."<sup>4</sup> Lawyers convicted of failing to file personal income returns are often first-time offenders, without a prior disciplinary history. They tend to be excellent practitioners, otherwise ethical and highly respected, devoted to their clients' matters, honest and trustworthy. Their continuation in practice pending the conclusion of the matter is unlikely to threaten the public. When an interim suspension is imposed, it generally reflects the Court's conclusion that the lawyer's actual conduct is more serious and that the final sanction will be more severe than public censure or a short suspension, which is the usual sanction range for failure to file convictions.<sup>5</sup>

The next step is the consideration of mitigating and aggravating evidence bearing on the final disciplinary sanction. The lawyer may request a mitigation hearing or may submit mitigating evidence directly to the court. Notwithstanding the Uniform Rules for Attorney Disciplinary Matters, which were intended to even out procedural and substantive differences in disciplinary proceedings between the four departments, significant variations remain. In some departments, evidentiary hearings before a referee are routine, while in others, lawyers are limited to paper submissions and, occasionally, oral argument before the Appellate Division. After a mitigation hearing or submission of evidence, the Appellate Division imposes "such discipline as it deems proper under the facts and circumstances."<sup>6</sup> If there was a hearing before a referee, the court considers the hearing record and the referee's report and sanction recommendation, but makes a *de novo* determination.

The relevant mitigating and aggravating factors in failure to file cases are the number of years of actual non-filing, the dollar amount of the tax liability (plus interest and penalties), whether the lawyer “lived large” while not paying taxes, the consequences of the conviction (loss of livelihood, adverse publicity, public shame and humiliation), character and professional reputation, health and family complications, substance abuse and psychological factors, as well as the lawyer’s candor, remorse and full cooperation. So, what are the typical disciplinary sanctions imposed?

## APPELLATE DIVISION, FIRST DEPARTMENT

Over the past 45 years, the Appellate Division, First Department, has disciplined more than 40 lawyers convicted of failing to file personal income tax returns. The overwhelming majority of them were publicly censured or suspended for periods ranging from three months to one year. Until 2009, public censure was the “default” sanction, although, between 1990 and 1996, at least seven lawyers received private reprimands.

In 2009, the Appellate Division disciplined four lawyers convicted of failing to file their income tax returns. Two lawyers were publicly censured, while the other two received one-year suspensions.<sup>7</sup> This was an unusual number of non-filers coming before the court in a single year and it seems to have resulted in a course adjustment in the First Department. Since *Eppner*, the Appellate Division has meted out only suspensions to lawyers convicted of failure to file tax returns.<sup>8</sup> While several lawyers have been suspended for as little as three months, there have not been any more public censures in the First Department in the last decade.

## APPELLATE DIVISION, SECOND DEPARTMENT

The Second Department has, in the past 40 years, disciplined at least 26 lawyers convicted of failing to file federal or state income tax returns. Nineteen of them received public censures,<sup>9</sup> while seven lawyers were suspended for periods ranging from one to three years.<sup>10</sup> There does not appear to be a particular trend in the discipline of non-filing lawyers as recent cases have involved both suspensions and censures.

In 2015, in *Matter of Duthley*, the court censured an attorney who failed to file and pay taxes “for multiple years,” noting, among other mitigating factors, the attorney’s lack of prior disciplinary history, good reputation, the absence of venality, his custody as a single parent of three children and his modest income as a public interest attorney.<sup>11</sup>

But for lawyers who failed to file returns for many years or engaged in deceptive conduct, the Second Department has not hesitated to mete out substantial suspensions. For example, in *Matter of Eagan*, the court imposed a two-year suspension on a lawyer who failed to file New York State tax returns for a period of ten years and was convicted of misdemeanor failure to file New York State tax returns, with intent to evade. The court noted that although respondent had suffered personal and financial problems, he attempted to maintain his “lifestyle,” which included running a horse farm, and made a calculated decision to pay his federal taxes, but not his state taxes.<sup>12</sup>

## APPELLATE DIVISION, THIRD DEPARTMENT

The Appellate Division, Third Department, has disciplined at least 15 lawyers over the past 43 years for misdemeanor convictions for failing to file income tax returns. Most of the lawyers received three-month suspensions.<sup>13</sup>

In *Matter of Whiting*, the court imposed a three-month suspension on an attorney who failed to file federal income tax returns for four years, noting that the attorney had been previously censured for professional misconduct, but that he was remorseful and had already been punished by the adverse publicity resulting from his conviction.<sup>14</sup>

However, the following year, in *Matter of Kolodziej*, the court adopted an approach that has been extremely successful in cases involving other types of professional misconduct, namely, a stayed suspension, with conditions. The court suspended Kolodziej, who pled guilty to failure to file his 2008 New York State income tax return in satisfaction of a multi-count indictment, but stayed the suspension on condition that he submit proof of timely filing and payment of income taxes during the period of suspension as well as proof of payment of, or an agreement to pay, all state and federal income taxes owed for the period 2002 through 2010.<sup>15</sup>

The Third Department’s innovative approach has worked extremely well in cases involving escrow account violations and is likely to work with non-filers as well. Rather than removing an otherwise ethical lawyer from practice and impeding the lawyer’s ability to repay back taxes, the court’s approach allows lawyers to demonstrate their financial and professional responsibility and remain in practice, provided they repay their back taxes and file their tax returns or make a good faith effort to do so.

## APPELLATE DIVISION, FOURTH DEPARTMENT

The Appellate Division, Fourth Department, has disciplined at least 12 lawyers over the past 47 years following

their convictions of failure to file tax returns. Most of them received six-month suspensions.<sup>16</sup>

In the past five years, however, the court has adopted a more nuanced approach, imposing stayed suspensions on two lawyers. In *Matter of Ianacone*, in which an attorney was convicted of failing to file a New York State personal income tax return for one year, the court imposed a three-year stayed suspension with the condition that the lawyer document the filing and payment of income taxes during the period of suspension.<sup>17</sup>

Last year, in *Matter of Burke*, the court imposed a three-year suspension on an attorney convicted of “attempted

which are misdemeanor offenses, will face disciplinary charges that must be proved by a grievance committee. Liability may be established by the record of conviction, and the hearings will turn on issues of mitigation or aggravation. Most cases are ultimately referred to the Appellate Division for public discipline.

In *Matter of Schnall*, the First Department imposed a six-month suspension on an attorney convicted of failing to pay his New York State taxes. Schnall failed to file returns or pay federal and NYS income taxes for eight years and owed \$360,000 in back taxes. The court noted the mitigation: Schnall was negotiating a payment plan

*Lawyers fortunate enough to avoid criminal prosecution may nonetheless face serious professional discipline for failure to file income tax returns or pay their taxes.*

repeated failure to file income tax returns,” a New York State misdemeanor. The court balanced the mitigating and aggravating factors, payment of all state taxes due (but not interest and penalties) and an unblemished prior disciplinary record, but noted that the attorney had not filed state or federal returns for a “lengthy” period prior to 2016. The court permitted Burke to apply, after one year, to stay the suspension upon condition that he retain financial professionals to file his tax returns, remaining current with tax filings and have payment plans in place with the tax authorities.<sup>18</sup>

The conditional sanctions recently imposed on non-filers in the Third and Fourth Departments may presage a more enlightened approach to attorney discipline, particularly in matters in which client protection and the public interest are unlikely to be adversely affected. Conditional sanctions for non-filers leave otherwise ethical lawyers in practice, continuing to represent clients effectively and enhancing the likelihood that such lawyers will be able to repay their back taxes and be rehabilitated.

## CONVICTIONS FOR FAILURE TO PAY TAXES

Convictions for failure to *pay* taxes, as opposed to failure to *file* tax returns, typically result in lower disciplinary sanctions. As discussed above, a misdemeanor conviction for failure to file tax returns is defined as a “serious crime” under Judiciary Law § 90(4)(d). However, a conviction for failure to pay taxes is not a serious crime. It is professional misconduct and will result in professional discipline, but the procedural path is strikingly different. A lawyer convicted of failure to pay state or federal taxes,

with the IRS; had begun paying his state tax liability at a modest rate of \$200 per month; did not live extravagantly; and had spent most of his career representing indigent children and adults. In addition, it bears mention that Schnall’s reasons for not filing for so many years were insupportable – he claimed to have doubts about the entire taxation system.<sup>19</sup> Interestingly, the Appellate Division conditioned Schnall’s reinstatement upon his providing regular reports to the grievance committee concerning his progress in reaching a payment plan agreement with the tax authorities.<sup>20</sup>

Similarly, in *Matter of Sullivan*,<sup>21</sup> the court imposed a six-month suspension on an attorney convicted of four counts of willful failure to pay federal income tax, notwithstanding a significant aggravating factor, namely, a prior stayed three-year suspension.<sup>22</sup>

## FAILURE TO FILE RETURNS OR PAY TAXES – NO CRIMINAL CONVICTION

Lawyers fortunate enough to avoid criminal prosecution may nonetheless face serious professional discipline for failure to file income tax returns or pay their taxes. In *Matter of Rogoff*, the Fourth Department publicly censured an attorney who had failed to pay almost all of his federal and state income tax for 28 years and was not the subject of any criminal proceeding. The court noted in mitigation that the attorney had filed all of his tax returns in a timely manner.<sup>23</sup>

In two recent First Department cases, *Matter of Bartley* and *Matter of Penkovsky*, the Court imposed three-month suspensions on attorneys who have failed to file returns

and pay New York State taxes for several years. The attorneys were not criminally prosecuted (or even charged), but admitted to the Grievance Committee, in the course of investigations of ordinary client complaints, that they were delinquent in filing their tax returns.<sup>24</sup>

In *Matter of Liberti* and *Matter of Holliday*, the Fourth Department, imposed public censures on lawyers who failed to file returns or pay taxes, but were not criminally prosecuted.<sup>25</sup>

These cases illustrate the willingness of the disciplinary committees and the Appellate Divisions to prosecute lawyers for the non-filing of personal tax returns and the non-payment of personal tax liability, even when the tax authorities themselves have not brought criminal charges against the lawyers. There is a disturbing aspect here, in that most non-filers are otherwise entirely ethical lawyers, properly and effectively representing their clients and well-respected by colleagues, adversaries and the bench. In the absence of any indicia of dishonesty or deceit, disciplining such lawyers should not be done without further and thorough consideration. Is this a productive use of limited disciplinary and judicial resources? What are the public policy goals which are furthered by such disciplinary prosecutions? There are good arguments to be made for deferring disciplinary prosecutions of non-filers who have not been convicted of any crime.

The personal and professional distress that is evident in almost all non-filing cases is serious evidence of the need for a different approach by the disciplinary authorities—indeed, the carrot and stick approach used by the Third and Fourth Departments for lawyers who have been convicted would work equally well with the non-filers who have not been criminally prosecuted. Surely we should encourage lawyers to file and help them do so when they have fallen behind.

In the meantime, lawyers who have not filed their returns for multiple years should consult counsel about the wisest course of action. Lawyers who are delinquent for a year or two should probably file their tax returns soon, whether or not they can pay their taxes. Lawyers who are not yet late—file by the deadline.

1. *Matter of Eppner*, 62 A.D.3d 151, 874 N.Y.S.2d 435, 436 (1st Dep't 2009).

2. Judiciary Law § 90(4)(c); 22 N.Y.C.R.R. § 1240.12(a).

3. Judiciary Law § 90(4)(f), (g); 22 N.Y.C.R.R. § 1240.12(b)(2).

4. Judiciary Law § 90(4)(f).

5. See, e.g., *Matter of Burke*, 159 A.D.3d 1507, 70 N.Y.S.3d 145 (4th Dep't 2018) (interim suspension imposed on attorney who pled guilty to "attempted repeated failure to file state income tax returns"), *three-year suspension imposed with leave to apply for stay after one year*, 163 A.D.3d 64, 76 N.Y.S.3d 457 (4th Dep't 2018); *Matter of O'Brien*, 98 A.D.3d 60, 946 N.Y.S.2d 174 (1st Dep't 2012) (interim suspension imposed on attorney who pled guilty to failing to file federal income tax returns and willfully failing to pay income taxes, four years involved in all counts), *three-year suspension imposed*, 136 A.D.3d 95, 22 N.Y.S.3d 55 (1st Dep't 2015).

6. Judiciary Law § 90(4)(h).

7. See *Matter of Clark*, 60 A.D.3d 159, 870 N.Y.S.2d 353 (1st Dep't 2009) (censure); *Matter of Eppner*, 62 A.D.3d 151, 874 N.Y.S.2d 435, 436 (1st Dep't 2009) (censure);

*Matter of Howley*, 70 A.D.3d 218, 893 N.Y.S.2d 1 (1st Dep't 2009) (one-year suspension); *Matter of Goldman*, 71 A.D.3d 9, 892 N.Y.S.2d 324 (1st Dep't 2009) (one-year suspension).

8. See, e.g., *Matter of Bradshaw*, 169 A.D.3d 200, 94 N.Y.S.3d 99 (1st Dep't 2019) (three-month suspension for attorney who failed to file New York State tax returns for three years and pled guilty to NYS tax fraud, a misdemeanor); *Matter of Rich*, 157 A.D.3d 73, 67 N.Y.S.3d 213 (1st Dep't 2017) (one-year suspension for lawyer convicted for failing to file New York State return who failed to file for 7 years); *Matter of Andrews*, 128 A.D.3d 197, 6 N.Y.S.3d 473 (1st Dep't 2015) (three-month suspension for misdemeanor conviction for failure to file NYS tax return); *Matter of Racht*, 120 A.D.3d 156, 987 N.Y.S.2d 392 (1st Dep't 2014) (six-month suspension for attorney convicted of misdemeanor criminal tax fraud for failing to file New York State returns or pay income taxes); *Matter of Roisman*, 89 A.D.3d 164, 931 N.Y.S.2d 571 (1st Dep't 2011) (one-year suspension for lawyer convicted of failure to file returns, who did not file returns for seven years; court rejected financial difficulties and depression as mitigating factors and found in aggravation that the at-torney had substantial income and met all of his other financial obligations during the relevant period); *Matter of Rosenberg*, 82 A.D.3d 85, 918 N.Y.S.2d 20 (1st Dep't 2011) (one-year suspension for attorney who failed to file state tax returns and pay taxes for five years; aggravating evidence included the attorney's substantial income and financial resources).

9. See e.g., *Matter of Wechsler*, 66 A.D.3d 277, 886 N.Y.S.2d 35 (2nd Dep't 2009); *Matter of Clayton*, 290 A.D.2d 177, 736 N.Y.S.2d 264 (2nd Dep't 2002); *Matter of Dornbush*, 241 A.D.2d 260, 672 N.Y.S.2d 366 (2nd Dep't 1998).

10. See, e.g., *Matter of Tanaglia*, 66 A.D.3d 10, 883 N.Y.S.2d 561 (2nd Dep't 2009) (one-year suspension for attorney who pled guilty to failure to file a NYS tax return, in satisfaction of felony charges; prior admonition and three prior letters of caution); *Matter of Tenzer*, 285 A.D.2d 116, 726 N.Y.S.2d 711 (2nd Dep't 2001) (one-year suspension for attorney who pled guilty to four counts of failure to file federal tax returns); *Matter of Gilbert*, 85 A.D.2d 19, 447 N.Y.S.2d 288 (2nd Dep't 1982) (three-year suspension for lawyer convicted of willful failure to file a federal tax return; one prior suspension).

11. *Matter of Duthley*, 125 A.D.3d 126, 998 N.Y.S.2d 643 (2nd Dep't 2015). See also, *Matter of Stella*, 120 A.D.3d 153, 987 N.Y.S.2d 852 (2nd Dep't 2014) (censure for failure to file and pay income taxes for multiple years; mitigation included remorse, acceptance of responsibility, good reputation in the legal community and serious illness).

12. *Matter of Eagan*, 142 A.D.3d 182, 34 N.Y.S.3d 630 (2nd Dep't 2016); See also *Matter of Gamliel*, 122 A.D.3d 125, 992 N.Y.S.2d 107 (2nd Dep't 2014) (two-year suspension for attorney who failed to honor personal income tax obligations for over two decades and owed approximately \$800,000 to state and federal authorities; court noted attorney had no explanation for his misconduct).

13. See, e.g., *Matter of Troue*, 166 A.D.2d 871, 564 N.Y.S.2d 201 (3rd Dep't 1990) (three-month suspension); *Matter of Gray*, 166 A.D.2d 870, 564 N.Y.S.2d 200 (3rd Dep't 1990) (three-month suspension); cf. *Matter of McCoy-Jacien*, 167 A.D.3d 1414, 90 N.Y.S.3d 367 (3rd Dep't 2018) (reciprocal one-year suspension for attorney suspended for nine months in Vermont for failure to file and pay income tax in that state for four years); *Hess v. Committee on Professional Standards*, 67 A.D.2d 750, 411 N.Y.S.2d 720 (3rd Dep't 1979) (two-year suspension for attorney who pled guilty to willful failure to file federal tax return; prior three-month suspension for failing to file tax return).

14. *Matter of Whiting*, 79 A.D.3d 1359, 911 N.Y.S.2d 681 (3rd Dep't 2010).

15. *Matter of Kolodziej*, 84 A.D.3d 1584, 922 N.Y.S.2d 816 (3rd Dep't 2011).

16. See e.g., *Matter of Kohn*, 158 A.D.2d 87, 557 N.Y.S.2d 825 (4th Dep't 1990) (six-month suspension for at-torney convicted of failing to file New York State tax returns for two years); *Matter of Baisch*, 120 A.D.2d 72, 507 N.Y.S.2d 945 (4th Dep't 1986) (six-month suspension for attorney convicted of willful failure to file federal tax returns); cf. *Matter of Resti*, 188 A.D.2d 8, 599 N.Y.S.2d 467 (4th Dep't 1993) (three-month suspension for lawyer convicted of failure to file federal tax return).

17. *Matter of Lanacone*, 120 A.D.3d 88, 987 N.Y.S.2d 275 (4th Dep't 2014).

18. *Matter of Burke*, 163 A.D.3d 64, 76 N.Y.S.3d 457 (4th Dep't 2018).

19. *Matter of Schnall*, 146 A.D.3d 81, 42 N.Y.S.3d 109 (1st Dep't 2016).

20. *Matter of Schnall*, 2017 NY Slip Op 93493(U) (1st Dep't 2017).

21. 35 A.D.3d 955, 824 N.Y.S.2d 572 (3rd Dep't 2006).

22. See also *Matter of Sossen*, 85 A.D.3d 25, 921 N.Y.S.2d 589 (4th Dep't 2011) (censure for attorney convicted of misdemeanor failure to pay state income tax for three years); *Matter of Scott*, 47 A.D.3d 41, 844 N.Y.S.2d 765 (4th Dep't 2007) (censure for attorney convicted of failure to pay state income tax).

23. *Matter of Rogoff*, 147 A.D.3d 13, 42 N.Y.S.3d 917 (4th Dep't 2016).

24. *Matter of Bartley*, 151 A.D.3d 1, 53 N.Y.S.3d 643 (1st Dep't 2017) (three-month suspension for attorney who admitted to the Grievance Committee during a deposition that he failed to file personal income tax returns or pay income taxes for five years); *Matter of Penkovsky*, 159 A.D.3d 1, 68 N.Y.S.3d 77 (1st Dep't 2017) (three-month suspension for attorney who admitted to the Attorney Grievance Committee that he failed to file federal and state income tax returns for six years).

25. *Matter of Liberti*, 108 A.D.3d 123, 967 N.Y.S.2d 850 (4th Dep't 2013) (public censure for lawyer who failed to file returns or pay taxes for 6 years, no conviction); *Matter of Holliday*, 93 A.D.3d 86, 937 N.Y.S.2d 918 (4th Dep't 2012) (public censure for lawyer who failed to file state and federal returns and failed to pay income tax for 16 years, no conviction).

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

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#### DEAR FORUM:

**M**y partner and I have a two-person firm that we have operated out of a small shared office for many years. With the advances in technology over the last two decades, such as e-filing, video conferencing, file transfer programs, high speed internet, and email, we decided that we don't really need our office space as much as we did only 20 years ago. And it isn't just our office technology that has reduced the need for our office space. Our clients prefer to conduct most of their communications with us electronically and they aren't interested in spending time traveling to our office if they can avoid it. We meet with clients periodically in the office for certain matters, like the signing of wills and deposition preparation, but when we don't have client meetings scheduled, we usually just work from home to avoid our commutes. Our office lease is about to expire and we are seriously considering alternatives to our traditional office space.

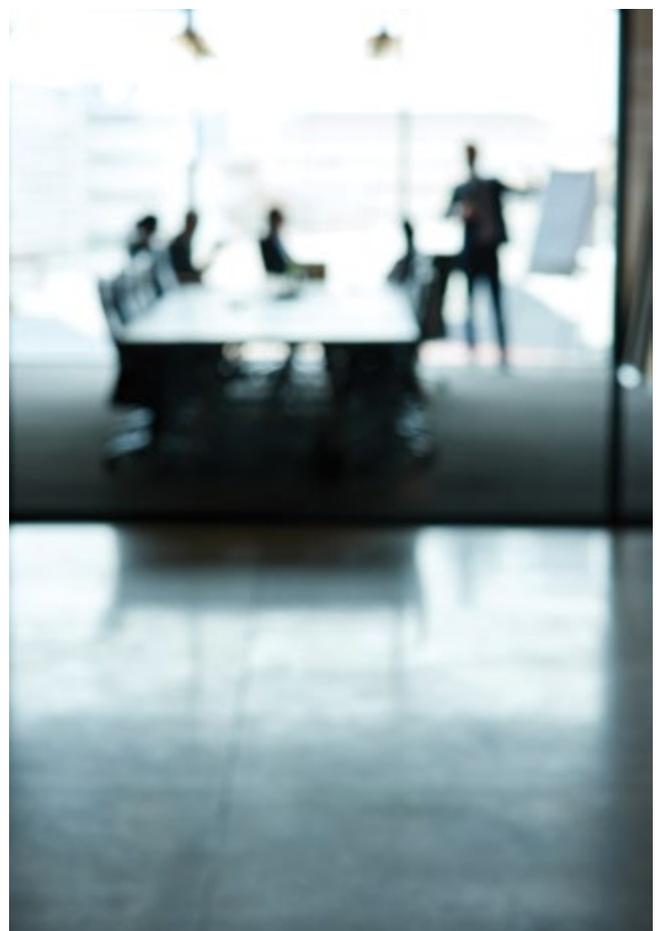
One option I have read about is a "virtual office." As I understand the virtual office business model, we could pay a fee to have access to a meeting space as we need it. My preliminary research suggests that it would be a significant reduction of our overhead costs and I don't think it will impact our business significantly as long as we have a reliable location where we can meet with clients when we need to schedule a face-to-face meeting.

I know that there are restrictions on how attorneys maintain their offices and I don't want to run afoul of my ethical obligations. I think it will also be beneficial to our clients since many of the virtual offices are centrally located and it will be easier for many of our clients to travel to our "virtual" office space when we do meet in person. What issues do I need to consider if we decide to transfer to a virtual office? For instance, what address can we put on our letterhead and our website?

*Sincerely,  
Neo*

#### DEAR NEO:

While your question is relatively straightforward, the answer is rather complicated and requires that we chart a course through rapidly evolving areas of both law and technology. Many lawyers do not want to maintain large (and expensive) physical offices when work is often done remotely and communication with clients frequently happens by phone, videoconference, email, or text message. The days of having to meet one's client in a physical office are about as frequent as communicating with adversaries solely by facsimile or, perhaps worse, snail



mail. The legal office space landscape has changed (as it has for many industries). The problem, as some have observed, is that the rules governing attorney practice have not kept pace with the practicalities of the legal profession in 2019.

A “virtual law office” (VLO) can be defined as “a facility that offers business services and meeting and work spaces to lawyers on an ‘as needed’ basis.” See NYCBA Comm. on Prof’l and Jud. Ethics, Op. 2019-2 (2019). Often these workspaces do not provide a lawyer with a dedicated office space and the lawyer shares the amenities with other subscribers. *Id.* The New York Rules of Professional Conduct (RPC) do not specifically address the use of VLOs, but they do prohibit attorneys from advertising or engaging in conduct that is deceptive or misleading. See RPC 7.1(a)(1), 8.4(c). Our discussion should begin with an advertising requirement under RPC 7.1(h).

RPC 7.1(h) tells us that all attorney advertisements “shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.” Attorney advertising is an issue that we have discussed in several prior Forums. See Vincent J. Syracuse, Jamie B.W. Stecher & Matthew R. Maron, Attorney Professionalism Forum, N.Y. St. B.J., September 2013, Vol. 85, No. 7; Vincent J. Syracuse, Carl F. Regelman, Richard W. Trotter & Amanda M. Leone, Attorney Professionalism Forum, N.Y. St. B.J., February 2018, Vol. 90, No. 2. The reference to “principal law office address” in RPC 7.1(h) means the advertising firm’s “main office in New York State.” See Roy Simon, *Simon’s New York Rules of Professional Conduct Annotated*, at 1698 (2016 ed.). Professor Simon has commented that the requirement that the law firm include the firm’s principal office on the advertisement is designed to prevent law firms from advertising offices that are sparsely staffed or unstaffed. *Id.* at 1699. If a lawyer creates an advertisement that lists an office where attorneys cannot actually meet with clients for an appointment, then listing that office would likely be considered deceptive and misleading to potential clients. *Id.* While law firms are certainly permitted to list their branch offices where lawyers see clients by appointment only, the advertisement should specify that meetings at that location only occur by appointment. *Id.* If a law firm does not maintain a “principal office,” a law firm may list one or more of their offices “where a substantial amount of the law firm’s work is performed.” See RPC 7.1(h) Comment [17].

Various ethics opinions have also identified several purposes for RPC 7.1(h)’s “principal law office” requirement, including: (1) to assist a client’s ability to make an intelligent selection of a lawyer; (2) a physical office location allows a client to meet with a lawyer, contact a

lawyer by mail and effectuate service of process; and (3) the absence of a physical office could be misleading as to the physical proximity of the lawyer to the client or the ability of the lawyer to work in a jurisdiction which the firm or lawyer is not qualified to practice. See NYCBA Comm. on Prof’l and Jud. Ethics, Op. 2019-2 (2019) citing NYSBA Comm. on Prof’l Ethics, Op. 756 (2002).

The issue whether RPC 7.1(h) applies to a VLO was first addressed by the New York City Bar Association (NYCBA) Committee on Professional Ethics five years ago. See NYCBA Comm. on Prof’l and Jud. Ethics, Op. 2014-2 (2014). The Committee opined that a lawyer may comply with RPC 7.1(h) by listing the street address of the VLO on law firm advertising. *Id.* This opinion, however, was recently withdrawn by the Committee and replaced with NYCBA Comm. on Prof’l and Jud. Ethics, Op. 2019-2 (2019) which we discuss below. Another 2014 ethics opinion by the New York State Bar Association (NYSBA) Committee on Professional Ethics went even further and concluded that a VLO with no street address may use its website address *alone* to comply with RPC 7.1(h) if the lawyer’s office otherwise complied with Judiciary Law § 470. See NYSBA Comm. on Prof’l Ethics, Op. 1025 (2014). NYSBA Opinion 1025 modified prior NYSBA Committee on Professional Ethics opinions 756 and 964 where the committee opined that a New York lawyer was required to maintain a physical office space. See Simon, *Simon’s New York Rules of Professional Conduct Annotated*, at 1699 (2016 ed.). The inquiring attorney involved in Opinion 1025 advised that she could securely communicate with clients and would appoint an agent to accept deliveries and service of process. *Id.* at 1700. See also NYSBA Comm. on Prof’l Ethics, Op. 1025 (2014). The committee found these factors persuasive in determining that a physical office space was not required. *Id.*

The landscape has changed since the issuance of Opinion 1025 due to various decisions interpreting Judiciary Law § 470 which provides that “[a] person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transition of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state.” After the United States Court of Appeals for the Second Circuit certified a question to the New York Court of Appeals seeking clarification of the minimum requirements necessary to satisfy Judiciary Law § 470, the New York Court of Appeals held that Judiciary Law § 470 indeed requires that lawyers admitted in New York, but who reside in another state, maintain a *physical* law office in New York. See NYCBA Comm. on Prof’l and Jud. Ethics, Op. 2019-2 (2019) citing *Schoenefeld v. New York*, 25 N.Y.3d 22 (2015) and *Schoenefeld v. New*

*York*, 821 F.3d 273 (2d Cir. 2016). The Second Circuit upheld the constitutionality of that interpretation. *Id.*

In light of the *Schoenefeld* decisions from the New York Court of Appeals and the Second Circuit, the NYCBA Committee on Professional Ethics formally withdrew its prior opinion 2014-2 concerning RPC 7.1(h) and issued Opinion 2019-2. *Id.* Prior to the *Schoenefeld* opinions, it was unclear whether a non-resident attorney was required to maintain a *physical* office in New York; many lawyers were taken by surprise by the courts' decisions. See NYCBA Comm. on Prof'l and Jud. Ethics, Op.

committee said that in light of the *Schoenefeld* decisions, any "law office" listed on attorney advertising as contemplated by RPC 7.1(h) must also comply with Judiciary Law § 470. *Id.* Ultimately, the committee opined that a "lawyer may use the VLO address on business cards, letterhead and law firm website" and "[a] New York lawyer may designate the street address of a VLO as the 'principal law office address' for the purposes of Rule 7.1(h) *provided the VLO qualifies as an office for the transaction of law business under the Judiciary Law.*" *Id.* (emphasis added). Notably, in Opinion 2019-2, the committee



2019-2 (2019). While the committee noted that RPC 7.1(h) and Judiciary Law § 470 indeed govern different attorney behaviors (RPC 7.1(h) regulates *advertising* of all New York-admitted attorneys, while Judiciary Law § 470 applies to the *practice of law* by those New York admitted attorneys *residing outside* the State of New York), the committee declined to interpret the term "law office" as used in Rule 7.1(h) differently from how the courts interpret the term "office for the transaction of law business" in Judiciary Law § 470. *Id.* The committee reasoned that the required offices serve a similar function and the same state judiciary that interpreted Judiciary Law § 470 also adopted the RPC. *Id.* Therefore, the

declined to comment on whether the VLO described by the inquirer met the minimum standards for a law office in New York pursuant to Judiciary Law § 470. *Id.* The committee also opined that "[e]ven when business cards and letterhead are not used for advertising purposes, however, they must not be deceptive or misleading" pursuant to RPC 8.4(c). *Id.*

Since the committee's opinion is largely dependent on whether a VLO satisfies the law office requirements of Judiciary Law § 470, it is important to look at the case law. The few New York State courts tackling the issue have held that VLOs *do not* comply with the requirements of Judiciary Law § 470. See *Law Office of Angela*

*Barker, LLC v. Broxton*, 60 Misc. 3d 6 (App Term, 1st Dep’t 2018) citing *Schoenefeld*, 25 N.Y.3d 22 (2015) and *Schoenefeld*, 821 F.3d 273 (2d Cir. 2016) (“The term ‘office’ as contained in section 470 ‘implies more than just an address or an agent appointed to receive process ... [a]nd the statutory language that modifies ‘office’ – ‘for the transaction of law business’ – may further narrow the scope of permissible constructions.”). In a 2018 New York State Supreme Court decision, the court rejected an attorney’s argument that his membership at a VLO associated with the NYCBA qualified as a law office under Judiciary Law § 470. See *Marina Dist. Dev. Co., LLC v. Toledano*, 60 Misc. 3d 1203(A) (N.Y. Sup. Ct. 2018). The court noted at the outset that a VLO cannot comply with Judiciary Law § 470 because, put plainly, by basic definition, a VLO is *not* an actual office. *Id.* The court went on to consider numerous fact specific circumstances highlighted in the papers filed by the attorney arguing that his VLO complied with the requirements of Judiciary Law § 470. *Id.* The VLO at issue would take telephone messages, forward mail, and make meeting rooms available to the attorney, but the attorney admitted that he did not want mail sent to the City Bar address and directed all of his correspondence to his office outside the state. *Id.* The attorney did not list the VLO telephone number on the papers submitted to the court and the attorney did not advise the court that he had ever actually used the facilities offered by the VLO for any purpose. *Id.* The court found that all of the factors militated in favor of finding that the VLO did not comply with Judiciary Law § 470. *Id.*

This is undoubtedly a grey area and there is simply not enough jurisprudence on VLOs to give you absolute guidance. Based upon the courts’ recent interpretations of Judiciary Law § 470 as it relates to VLOs, it is unclear whether use of a VLO as your exclusive office will comply with the requirements of RPC 7.1(h) and Judiciary Law § 470. Further, depending on the circumstances of how you describe your VLO, you could run afoul of RPC 8.4(c) if your descriptions could be considered a misrepresentation or deceitful. Should you proceed with your VLO plan, you should accurately describe how your VLO operates to your clients and consider including a VLO disclaimer on documents if you are concerned that the VLO address alone could be misleading.

Judiciary Law § 470 has been the subject of significant criticism by many attorneys who see it as an anachronistic relic that restricts a client’s ability to choose counsel and makes hiring a lawyer more expensive. NYCBA Comm. on Prof’l and Jud. Ethics, Op. 2019-2 (2019). Significantly, on January 18, 2019, the New York State Bar Association’s House of Delegates passed a resolution

calling for the repeal of Judiciary Law § 470. *Id.* Only time will tell where this all ends and we will have to look to the courts (and perhaps eventually an amendment to the RPC) for guidance on this issue as VLOs continue to face challenges. We should all be on the lookout for the inevitable changes that we expect will occur as this area of the law continues to evolve and hopefully responds to our profession’s modern day needs and the New York legal community’s interest in providing competent legal representation and access to justice for all.

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## QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am an attorney practicing civil and criminal law here in New York. I have been approached by my millennial client who is employed by a large bank. She suspects, but is not sure, that her employer, in conjunction with government authorities, is conducting an investigation of her and others in her division for potential violations of banking laws. In an effort to prepare for the defense of my client who may be facing both civil and criminal exposure, I have asked her to try and obtain information regarding the full scope of the investigation. Naturally, I have advised her to avoid creating any “paper trail” of her efforts and so have instructed her to stick to just spoken conversations with her various professional colleagues in an effort to “see what they know and have heard.”

My client suggested that she could also communicate using a message app that would auto self-delete the text as soon as it is read by the recipient. I never heard of such a thing but my client showed me one of these apps and it worked great. I am concerned that one might say that using such an app intentionally is a way to destroy evidence. However, it would seem to me that such an app is just like spoken communication, unless it’s recorded, leaving no record other than the parties’ recollections. Please give me some guidance.

*Sincerely,*  
*Teki Challenged*

# Outline for Survival: A First-Year Law Student Tip Sheet

by Kayla D. Allgeier, Carl Raffa and Brianna A. Vaughan,  
as told to Joan Fucillo

*These interviews took place several years ago, but the insights still hold up. Since the interviews, Kayla, Carl and Brianna graduated from Albany Law School, passed the bar and are now practicing lawyers.*

**L**aw school is starting up again, and the 1Ls are gathered at orientations across the state. They start out eager, but by the end of the day, they look confused and seem to be gasping for air. So much information is packed into one day. No one ever comes out of one of these events feeling “oriented.”

And all that advice, all those tips and all that information is almost immediately lost in space. And 10 months later, after you’ve learned everything the hard way in your 1L year, you’re thinking, “Why didn’t they tell me any of this?!” Maybe you just couldn’t remember any of it.

The New York State Bar Association is here to help. We want you to get through your 1L year with as little pain as possible, although it might be painful. So, we’ve put together a cheat sheet full of tips and advice from people whose memories of their 1L year are still raw and fresh.

A rising 2L and two rising 3Ls at Albany Law School were asked: What do I wish I’d known when I started law school?

## SELF-CARE:

We start here, because you have to stay alive to get through law school, which can seem problematic the first year.

1. Remember to eat and to eat good food.
2. Remember to sleep. It’s ok to close the books.
3. Remember to exercise. It will help you breathe.
4. Mental health.
  - a. You will cry. That’s ok – carry tissues.
  - b. Find one person on faculty or staff that you can go to, but do not necessarily trust them with your deepest secrets.

- c. Maintain your support network. Call the folks back home, frequently.
  - d. Do not ever, ever try to tough it out. You will have to be tough, but not that kind of tough. (See a, b, c.) You are not alone.
  - e. Depression. A number of law students experience bouts of depression for the first time in their lives. It’s part of the nature of studying the law. There are so many “what-ifs” and pressures to deal with it can seem as if there is nothing in life that is “true.” Recognize and accept the law for what it is, but that doesn’t have to be the only thing you are. (See a, b, c, d.)
  - f. Your school has a counseling/mental health center. Use it. (See d.)
  - g. Talk to 2Ls and 3Ls. They’ve been there, and they are not in competition with you.
  - h. Have something that you do that has nothing to do with law school, whether it’s a hobby, a TV show or cat videos on the internet. Every Thursday at 9:00 p.m., your show is on. Watch it.
5. Unless there is absolutely no alternative, do not take a job during your first year. You will make yourself crazy and probably sick. You will be flat out as it is.

## SELF-KNOWLEDGE:

1. Know how you learn. Are you hands-on or do you read the entire instruction manual before putting in fresh batteries? You are probably a combination.
  - a. Note-taking for hands-on learners. Use a spiral notebook and take notes by hand. This helps “imprint” the information in your brain. It can be very effective; you can transcribe them later (a form of studying), and a spiral notebook never crashes (but always bring two pens in case one runs out of ink).
  - b. Book learners. By all means use your laptop for taking notes, but only if you DO NOT GET DISTRACTED by the internet, your email, an unbeat-

able deal on sneakers. You can lose entire classes down that rabbit hole.

c. Outline. Outlining does not work for everybody and does not help everyone learn. That said, if your professor demands one, produce one.

2. What do you like? You already “know” you want family law. That’s ok – try other things. Take all core courses seriously. You don’t know what might click, and all areas of law feed into and inform each other.

3. What do you dislike? You already “know” you’d hate contracts. (See 2.)

4. You need to be on journal to get ahead. No, you don’t. It might not be a good fit for how you learn or what you would like to do.

5. You need to be on moot court to get ahead. (See 4.)

6. Try things. A little volunteer work goes a long way. Being a witness at moot court lets you see 2Ls and 3Ls in action.

### SELF-ACCEPTANCE:

1. You were the high school valedictorian and *summa cum laude* in college. You are no longer the smartest person in the room. Not even close. It’s ok.

2. You will have problems. There is always one class (at least) where you will feel you are floundering. Go to office hours. Talk to the professor. Insist on it; it is your right. It’s your education, take control of it.

3. You are no longer the smartest person around – STUDY.

a. Be prepared.

b. Be alert and attentive; be ready to be “cold-called” in class at any time.

c. Use the writing center. Get feedback; get help. You need it.

4. It’s ok to say “no,” you can’t do this or that if you have to study. It’s your education.

5. You are learning a new language – the language of the law. It’s hard, and it will be hard to switch back and forth between law language and the language back home. Most people will not understand you. You will laugh at strange times, and the only people who will laugh with you are fellow students.

6. Law school is today. There’s a world out there. You are more than a law student. Life goes on.

### WORKLOAD:

1. You know there’s going to be a lot of reading and writing. Your imagination does not even come close.

2. Learning the law language: You will be reading books, statutes and cases in this new language before you are fluent in it. Expect to read, re-read and re-re-read, until you get the point. It will get better.

3. Join one club and volunteer for one thing.

4. Do not take a job your first year. (See Self-care, item #5.)

### COMPETITION:

1. Law school IS very competitive. It can be cutthroat.

2. You probably will not be in the top tier of your class. That’s ok. But that doesn’t mean it’s impossible. And remember, 90 percent of lawyers did not graduate in the top 10 percent of their class, and they are doing fine.

3. It’s your education. It’s not about the other students, so don’t let yourself be controlled by what they do.

### YOUR LAW CAREER HAS ALREADY STARTED:

1. Be nice to everyone.

2. Go to events and receptions. These are great networking opportunities.

3. Invest in a black, navy blue or dark gray conservative suit for interviews and events. Self-expression is earned, it’s not a given.

4. Character and fitness are already factors.

a. Go through your social media and delete anything you wouldn’t want your professors or your advisor to see. They will Google you and look at your Facebook profile.

b. Do not go out and party like you did in college. When you do go out, you might run into professors, staff or someone who might in the future give you a job offer, or someone who’s on the character and fitness committee. Act accordingly.

5. Use the career center. Do mock interviews.

6. Make a LinkedIn profile. Employers look at them.

7. Your cover letter and resume are important. Start now.

### LAST WORDS:

You are in law school, in training to be an advocate. It’s what lawyers do. So, if there is something you need to change, do your research and advocate for yourself. It’s good practice.

Your first year of law school is a marathon. Pace yourself. This too shall pass, and life will still be there, waiting for you. Good luck!

**TO ADVERTISE WITH NYSBA, CONTACT:**

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# Thoughts on Legal Writing from the Greatest of Them All: Antonin Scalia and Bryan A. Garner—Part I

The Legal Writer continues its series on what we can learn from the great teachers of writing. In this column, we highlight two masters: Antonin Scalia and Bryan A. Garner. In particular we focus on the advice they give in their preeminent book, *Making Your Case: The Art of Persuading Judges*. In Part I of this column we'll address the principles of persuasion. In Part II, we'll address persuasive-writing techniques and style. No one's better to teach the skills of effective appellate and trial advocacy than Scalia and Garner. These two legal-writing powerhouses teamed up to offer invaluable advice to advocates in *The Art of Persuading Judges*.

Since publication in 2008, *The Art of Persuading Judges* has consistently received positive feedback from lawyers and scholars. One reviewer described it as akin to Strunk and White's seminal *Elements of Style*.<sup>1</sup> Another reviewer wrote that the book is like "a first-rate continuing legal education program."<sup>2</sup>

Antonin Scalia, former Associate Justice of the Supreme Court of the United States, is best known for his straightforward and engaging writing style. Before taking the bench as a Justice, Scalia had a notable career as an assistant attorney general, University of Chicago law professor, and United States Court of Appeals for the District of Columbia Circuit judge. In 2016, Scalia passed away at 79. His legacy as one of the Court's greatest writers lives on.

Bryan A. Garner, the world's leading English-language legal-writing expert, is a lawyer, teacher, and lexicographer. A former director of the Texas/Oxford Center for

Legal Lexicography at the University of Texas School of Law, Garner founded LawProse Inc., a nationwide provider of CLE training in legal writing, editing, and drafting for lawyers and judges. In 1995, Garner became the editor in chief of Black's Law Dictionary, America's most widely used law dictionary. Throughout his prominent career, Garner has authored many classics on legal writing, including *The Winning Brief* and *Legal Writing in Plain English*.

## PRINCIPLES OF PERSUASION

"Lawyers possess only one tool to convey their thoughts: language."<sup>3</sup>

All of Scalia and Garner's 21 pieces of advice on argumentation stand out. They teach the basics — that lawyers must know their audience, their adversary's case, and their most defensible terrain. Below are some of Scalia and Garner's expert suggestions that go beyond the basics.

### *Attend to the standard of decision*

Advocates should pay close attention when varying presumptions and burdens of proof govern issues. For example, in a criminal trial the prosecution must prove the defendant's guilt beyond a reasonable doubt. When the applicable standard favors your case, emphasize that to the court. Remind the court that you and your adversary are on unequal playing fields. Advocates shouldn't treat the standard of review as boilerplate. They should point out that the appellant is applying an incorrect standard. State this clearly in your standard-of-review, introduction, and summary-of-argument sections.

### *Don't overstate your case*

"[S]how the merits of [your] case and the defects of [your] opponents' case — and let the object of the weak-

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

ness of the latter speak for itself.”<sup>4</sup> Overstating your case can directly harm your credibility. “So err, if you must, on the side of understatement, and flee hyperbole.”<sup>5</sup> Avoid stating an unqualified “never” unless you’re 100 percent certain of a fact.

### ***Stick to the age-old rule of advocacy***

“[T]he first to argue must refute in the middle, not at the beginning or end.”<sup>6</sup> By refuting first, you’ll be on defense. If you refute last, the judge will “focus on your opponent’s arguments rather than your own.”<sup>7</sup> But don’t refute an argument your opponent might not have thought of.

### ***Make space for the judge to read your argument***

If you’re arguing after your adversary, “design the order of positive case and refutation to be most effective according to the nature of [your] opponent’s argument.”<sup>8</sup> Leave room for the judge to listen to your main argument, especially when your opponent makes a convincing case. First, quickly demolish your opponent’s compelling argument. Then, deliver “*your* take on the case, *your* major premise, and *your* version of the central facts.”<sup>9</sup>

### ***“Don’t try to defend the indefensible.”***<sup>10</sup>

When a legal rule doesn’t favor your case, don’t spend an undue amount of time defending it. You don’t want to convey to the judge that you’re unreasonable. That can damage your whole case. Rather, “fess up at the outset.”<sup>11</sup> There are two advantages to fessing up. First, the judge won’t think that you tried to sweep “unfavorable factors under the rug.”<sup>12</sup> Second, the judge will think that you’re reasonable and you’ve “carefully considered these matters but don’t regard them as significant.”<sup>13</sup>

### ***Be strategic about which arguments to advance***

This is one of the most important steps in effective advocacy. “A mediocre advocate defending a good position will beat an excellent advocate defending a bad position nine times out of ten.”<sup>14</sup> Don’t stick to a rejected point. Doing so might “color [your] judgment about which rulings lend themselves to effective challenge.”<sup>15</sup> When strategizing, consult your associates.

### ***Avoid disorganized arguments***

Instead, pick three independent reasons why you should win, and develop them fully. Making 10 different arguments will tell the judge that you’re making scattershot arguments. On the surface, 10 different arguments might seem as if the lawyer overanalyzed something, but “in reality, it has been under analyzed.”<sup>16</sup> Under analyzed because “counsel has not taken the trouble to determine which arguments are strongest or endured the pain of eliminating those that are weakest.”<sup>17</sup>

### ***“Never, never waste the court’s time.”***<sup>18</sup>

Make arguments as clear and concise as possible. Minimize the risk of irritating the judge. Once you’ve conveyed your argument, don’t linger “over [it] like a fine glass of port.”<sup>19</sup> Successful legal arguments rarely contain



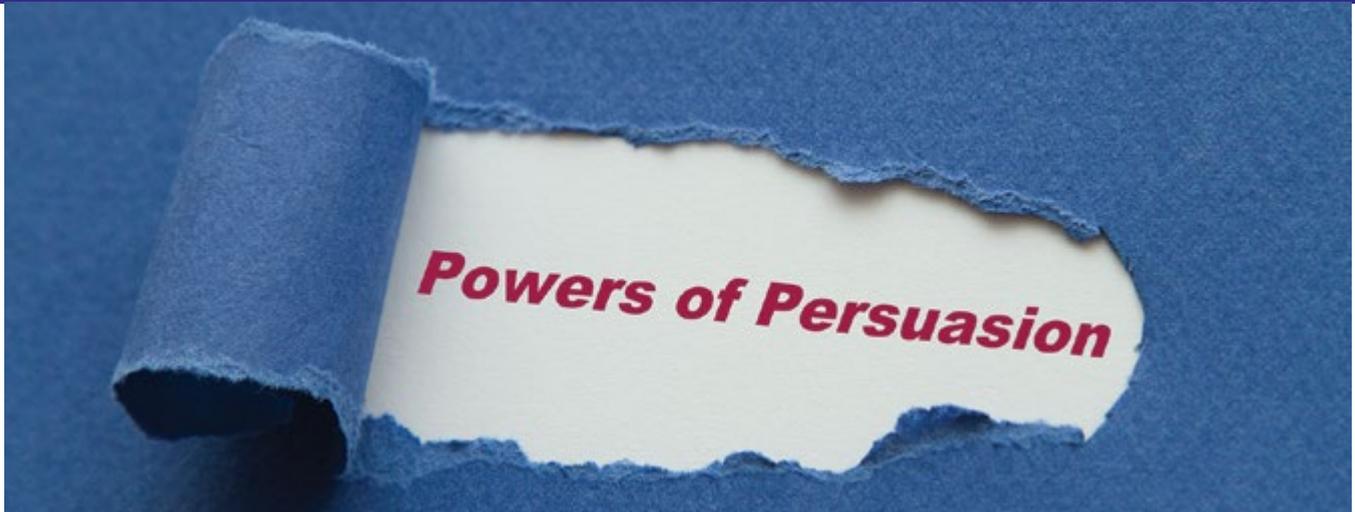
“iteration and embellishment.”<sup>20</sup> Don’t assess the brevity of your arguments on a page or word count, either. It’s good to have a “reputation as a lawyer who often comes in short of the limits.”<sup>21</sup> The judge knows that the writing contains no padding.

### ***Show how your client prevails under the law and this result is reasonable***

“Explain why it is that what might seem unjust is in fact fair and equitable.”<sup>22</sup> Some judges might decide based on their “moral sense” favoring a change in the law. But most will decide based on governing authorities.<sup>23</sup> How a judge ultimately decides is never certain. So strive to both convey to the court that you prevail under the law and that the result you seek is rational. Make it easy for the judge to explain its rationale to a non-lawyer friend.

### ***Don’t attempt emotional appeals***

An emotional appeal is “misguided because it fundamentally mistakes [the judge’s] motivation.”<sup>24</sup> Avoid making a “jury argument” before a judge. But there’s a difference between an overt appeal to emotion and presenting facts



in a way that might unintentionally appeal to emotion. For example, “you may safely work into your statement of facts that your client is an elderly widow seeking to retain her lifelong home.”<sup>25</sup>

### *Close powerfully*

Tell the court what you think it should do. Don't use trite phrases like “for all the foregoing reasons.” Treat the conclusion as a reminder to the judge of your principal arguments on the rule of law, and why the judge should rule in your favor. Argue that a court's ruling otherwise would leave lower courts with uncertainty or produce frivolous litigation in the future.

## LEGAL REASONING

“Leaving aside emotional appeals, persuasion is possible only because all human beings are born with a capacity for logical thought.”<sup>26</sup>

### *The most persuasive and rigorous form of logic is syllogism*

The clearer the syllogism, the better. The winning party is the one who can convince the judge that its syllogism is closer to the main legal issue. Identify the main legal issue and convince the court of it. Don't spend time arguing for a rule that applies to a subordinate issue.

### *Master the weight of precedent*

It's impossible to cite case law without knowing its precedential weight.<sup>27</sup> Governing authorities strengthen an advocate's persuasiveness. At the appellate level, the most important decisions to a case will be the ones decided by that same court. At the trial court level, the most important decisions will be the ones immediately superior to that trial court.<sup>28</sup>

## DON'T IGNORE DICTA

“The most persuasive nongoverning case authorities are the dicta of governing courts . . . and the holdings of

governing courts in analogous cases.”<sup>29</sup> Moreover, the most persuasive cases will be the ones in which a litigant who's similar to your client lost at the trial level but won on appeal.<sup>30</sup>

This column continues in the next edition of the *Journal* with Part II. The *Legal Writer*, in which we address Scalia and Garner's techniques and style of persuasive writing.

1. David F. Herr, Making Your Case: The Art of Persuading Judges By Antonin Scalia and Bryan A. Garner, 56 Fed. Law. 61, 62 (2009) (book review).

2. Catherine M. Grainger, Making Your Case: The Art of Persuading Judges By Antonin Scalia and Bryan A. Garner, 40 Colo. Law. 89, 89 (2011) (book review).

3. Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges 61 (4th ed. 2008).

4. *Id.* at 13.

5. *Id.*

6. *Id.* at 15.

7. *Id.*

8. *Id.* at 17.

9. *Id.* at 18 (emphasis in the original).

10. *Id.* at 20.

11. *Id.* at 21.

12. *Id.*

13. *Id.*

14. *Id.* at 22.

15. *Id.*

16. *Id.* at 23.

17. *Id.*

18. *Id.* at 24.

19. *Id.*

20. *Id.*

21. *Id.* at 25.

22. *Id.*

23. *Id.* at 27.

24. *Id.* at 32.

25. *Id.*

26. *Id.* at 41.

27. *Id.* at 52.

28. *Id.* It's useless to argue to a trial court that Supreme Court case sustained your point if the “intermediate appellate court to which an appeal would be taken has already rejected that reading. Of course, when the intermediate appellate court has not spoken on that point, supreme-court opinions will be the most important.” *Id.*

29. *Id.*

30. *Id.*



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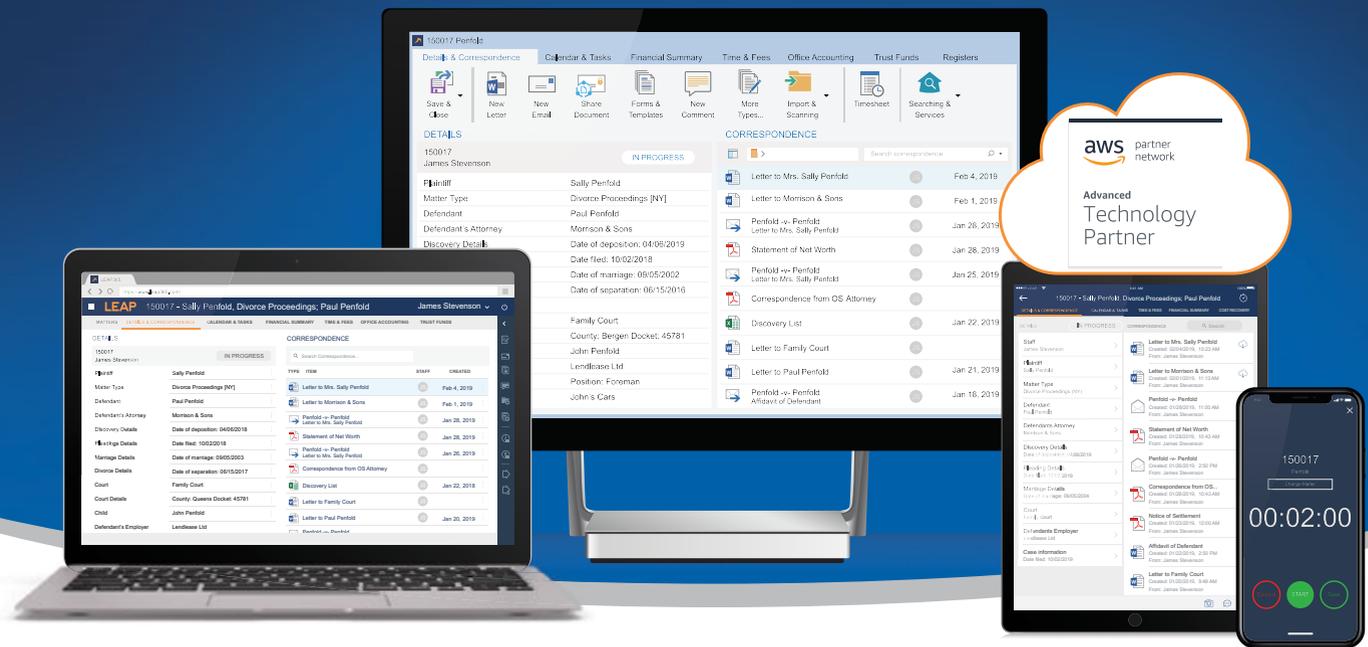
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