NEW YORK STATE BAR ASSOCIATION
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Can Local Newspapers Survive in the Digital Age?

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NEW YORK STATE BAR ASSOCIATION
Journal

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Law Firms' Obligation to the Profession and Community

Law firms hold great power over the fate and future of the legal profession. The decisions law firms make today will impact the profession tomorrow, especially for young lawyers.

As the economy has risen, so too has the profitability of many law firms. All too often, however, an obsessive focus on short-term economic success has come at the expense of law firm associates. Take, for example, the relentless increase in the number of billable hours expected from associates.

When I graduated law school in the mid-1980s, the average goal for an associate was 1,200 billable hours per year. In 2010, the average goal was around 1,700 hours for larger firms and 1,500 hours for smaller firms. Today, two-thirds of firms with 700 or more attorneys report 2,200 or more hours worked. Law firms with fewer than 250 lawyers average around 1,970 hours per year.

Imposing excessive work demands on a young lawyer's life come at a cost — personal, professional and communal. Expecting associates to work long hours six or seven days a week, every week, without respite, denies them the ability to build relationships, attend family events, take vacations, and maintain their physical and mental health. Women attorneys have cited the difficulty they experience meeting excessive billable hour requirements as a reason for leaving the law.

Owing to the demands of work, young lawyers often lack the time and energy to develop their skills and build relationships through bar association activities. They are also unable to undertake pro bono work or get involved in civic affairs, politics and not-for-profit work, among other things.

Worse, the billable hour model has mutated into a threat to lawyers' mental health. A 2015 study titled "What Makes Lawyers Happy?" found that higher billable requirements resulted in lawyers experiencing less internal motivation and satisfaction and increased levels of alcohol abuse. Likewise, a 2013 survey in the journal *Psychiatry, Psychology and Law* found that lawyers who billed the highest number of hours experienced psychological problems.

As Supreme Court Justice Stephen Breyer aptly observed, "[t]he profession's obsession with billable hours is like drinking water from a fire hose, and the result is that many lawyers are starting to drown."

A law firm is a unique entity that straddles the worlds of business and professionalism. Profit maximization is not a law firm's primary objective. No less than lawyers — who are bound by codes of ethics — law firms have a responsibility to contribute to society and the rule of law. Lawyers' duties go well beyond their obligations to clients, encompassing duties to their communities. So too law firms.

The business of law has undergone watershed change over the past few decades. The marketplace is more competitive than ever. But the leaders of law firms must resist letting the business of law overwhelm professional commitment. A proper balance must be struck between law firms' responsibilities to their clients, lawyers and doing the public good.

The law is the most influential, impactful and consequential profession in American life. That exalted stature is due, in significant part, to the contributions of law firms. The history and legacy of law firms as an institution is a proud one. Today, as before, we need law firms to be guided by the highest and noblest ideals of our profession. I am confident that they will.

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Why Local News What We Can Do

By Penny Muse Abernathy

Penelope (Penny) Muse Abernathy, a former executive at *The Wall Street Journal* and *The New York Times*, is the Knight Chair in Journalism and Digital Media Economics at the University of North Carolina. A journalism professional with more than 30 years of experience as a reporter, editor and senior media business executive, she specializes in preserving quality journalism by helping news organizations succeed economically in the digital environment. Her research focuses on the implications of the digital revolution for news organizations, the information needs of communities and the emergence of news deserts in the United States. She is author of *The Expanding News Deserts* (usnewsdeserts.com), a 2018 report that documents the decline and loss of local news organizations in the U.S., and lead co-author of *The Strategic Digital Media Entrepreneur* (Wiley Blackwell: 2018), which explores in-depth the emerging business models of successful media enterprises. Twitter: @businessofnews

Matters, and to Save It

Editor's Note: Earlier this year, NYSBA President Hank Greenberg announced the formation of the Task Force on Free Expression in the Digital Age, to look at the crisis currently facing local journalism and make recommendations for how to address it. Penny Muse Abernathy, Knight Chair in Journalism and Digital Media Economics at the University of North Carolina and a noted expert on the nationwide local news crisis, addressed the task force in September. This article is adapted from her writings and includes many details from her presentation to the task force.

Over the past 15 years, the United States has lost one-fourth of its local newspapers – 2,100 publications including 70 dailies and more than 2,000 weeklies. As a result, hundreds of communities – inner city neighborhoods, suburban towns and rural counties – are without reliable sources of local news and information.

Compounding the problem, over the past 10 years, we've lost more than half the journalists on our surviving papers. That means there are many fewer reporters to cover routine government meetings and breaking news or to produce the investigative pieces that save lives and tax dollars and hold our public officials at all levels accountable.

Abundant research in recent years has found that strong local journalism builds social cohesion, encourages political participation, and improves the efficiency and decision-making of local and state government. However, the business model that supported local newspapers throughout the 20th century has collapsed, leaving start-up and legacy news operations to reach for new models – for-profit, non-profit, and, perhaps even publicly funded – as they attempt to fill the void. Those local news organizations that survive and thrive in this digital age will be led by journalistic entrepreneurs who are creative and disciplined strategists, willing and able to invest for the long-term to serve the information needs of their communities.

THE COST TO SOCIETY, DEMOCRACY

The void created when we lose a local newspaper has significant political, social and economic implications for our society and our democracy. Historically, newspapers have been the prime, if not sole, source of credible and

comprehensive news and information that affects the quality of life of residents living in the thousands of small and mid-sized communities that dot this country.

To understand the consequences, consider my hometown in rural, eastern North Carolina. It is located in the Ninth Congressional district, which is gerrymandered across eight counties, some the poorest in the state. For almost a year, residents of the Ninth District were deprived of representation in Congress because of significant election fraud in 2018 that flew under the radar of severely understaffed local and state newspapers, as well the state's broadcast and digital outlets. It was a political science professor at a small college miles away – not a journalist – who first discovered how the fraud was perpetrated.

Important local news also goes unreported. A member of my local city council recently asked me, "How do you correct a story on Facebook?" As it turns out, no reporter had showed up to cover an unexpectedly contentious council meeting. The mayor's rather one-sided Facebook post about the meeting was the only account of what had transpired – and it had been shared hundreds of times.

My research has focused on two overlapping areas: Documenting areas of this country at risk of becoming "news deserts," and researching sustainable business strategies for local news organizations so they can continue to provide us with news that educates and informs us as citizens in a democracy.

WHAT IS A NEWS DESERT?

Early on in our research, we defined news desert as a community without a newspaper. Recently, we have updated and expanded that definition to be a community, either rural or urban, with limited access to the sort of credible and comprehensive news and information that feeds democracy at the grassroots level.

Across the country today, there are less than 7,000 surviving newspapers, the vast majority under 15,000 circulation. Most of the communities that have lost newspapers are struggling economically. But, increasingly, affluent and well-educated communities are losing their papers. Two years ago, for example, Chapel Hill, a city of nearly 60,000 and home of the University of North Carolina, lost its storied 100-year-old paper.

During the past decade, large investment entities such as hedge funds and private equity firms have swooped in to purchase hundreds of the remaining 6,700 dailies and weeklies at rock-bottom prices. Most employ a standard formula for managing their newspapers – aggressive cost-cutting and financial restructuring, including bankruptcy – that erodes the quality and quantity of local news. Many of these papers have become ghosts of their former selves, both in terms of the quality and quantity of their editorial content and the reach of their readership in the print and digital realms.

LOCAL NEWS ISN'T JUST ABOUT NEWS

The fate of communities and local news organizations are intrinsically linked, journalistically and economically. From our very beginnings as a nation, newspapers have played a vital role in both educating us and building community. Researchers in disciplines such as political science, sociology and economics have identified three ways newspapers historically built a sense of community and trust in grassroots democracy. Each is under economic assault.

First, newspapers have helped set the agenda for debate of important public policy issues, and, as a result, influenced the course of history. They accomplished this journalistically through the stories they published, the extended coverage they provided certain topics, and their editorials that recommended specific actions.

Today, there are 50% fewer newspaper journalists than in 2008, resulting in a decrease in quality and quantity of public service journalism. Often, no reporter shows up at town council meetings, nor do the journalists at many newspapers receive the time or encouragement to produce in-depth analytical pieces that illuminate and inform. As a result, Facebook has become the default medium for sharing local news.

Second, strong local newspapers have built community by encouraging regional economic growth and development. Through advertising, newspapers have helped local businesses connect with local consumers. However, print newspaper advertising, which has historically furnished 75 to 90% of total revenue, is at an all-time low and continues to decline. Making matters worse, as much as 75% of the dollars devoted to digital advertising in even the smallest markets go to Facebook and Google, leaving all other media outlets – radio, television, online and print – to fight over the remainder.

Third, strong community newspapers have encouraged social cohesion and political activism. Just as all politics is local, all news that matters is ultimately local. Readers of local newspapers are residents not only of a county, but also of a region, a state and a nation. Strong news organizations put into local context issues that may seem to be national or regional ones, such as health care, gun control, or the opioid crisis.

In his recent book, *Democracy's Detectives*, Stanford economist Jay Hamilton attached a price tag to the lives saved and environmental disasters averted through investigative journalism produced by news organizations large and small. But that sort of journalism requires the financial wherewithal to withstand the legal challenges that arise when a local news organization has to sue to obtain pub-

lic records, for example. As profit margins have declined from double to single digits, many publishers now think twice before giving the go-ahead on potentially controversial and time-consuming investigations.

REVIVING TRUST IS CRUCIAL

Trust and credibility suffer as local news media are lost or diminished. Reviving and restoring trust in media starts at the local level. If we can figure out how to craft and implement sustainable news business models in our smallest, poorest markets, we can then empower journalistic entrepreneurs to revive and restore trust in media from the grassroots level up, in whatever form – print, broadcast or digital.

Here are four lessons we've learned from a decade of studying and advising dozens of local news operations:

- Successful business models will be directly tied to the needs of each individual community. Our research has found that strong local newspapers typically enjoy significant loyalty from both current readers and advertisers – at rates as much as twice that of our national and regional papers. But advertisers follow audiences, so news organizations need to follow the technology and follow their customers if they are going to follow the money.
- Instead of one business model that works for most news organizations, as has historically been the case, we will have many. Business models that work for large national and regional news organizations will probably not work in small and mid-sized markets.
- Smaller news organizations have less room for error. With profit margins in the single digits, a bad quarter can force a sale or bankruptcy. Therefore, small news outlets must be *very* disciplined about prioritizing cost-cutting, as well as investment. Our latest research focuses on how local news organizations can identify and fully utilize their human, as well as financial, capital.
- Finally, news organizations that succeed are forward-looking and invest for the long-term. Both start-up and legacy news operations need to have a strategy in place for transforming at least a third of their business model every five years. They need to develop five-year financial goals for costs, revenue, and profitability and then work backwards to build a business plan – identifying and prioritizing endeavors most likely to lead to long-term profitability and sustainability. For the most part, local news outlets that have pursued integrated business plans and disciplined strategies based on the specific needs of their communities have begun to reap the fruits of their digital investments.

But there are still many forces that remain beyond the control of individual publishers, editors and founders of local news organizations – especially those in communities that are struggling economically, where the loss of a major employer or advertiser, for example, can tip the balance.

There are a range of potential solutions, including encouraging partnerships among and between news organizations and institutions, funding civic engagement and journalistic coverage of under-represented communities and "flyover regions" of the country that are in danger of becoming news deserts, and updating government policies and regulations to reflect digital realities and encourage news competition.

In an age of economic and technological disruption, the fate of thousands of communities – and our democracy – is at stake. Through their journalism, strong local news organizations have the ability to not only educate us as citizens, but also show us how we're connected to people we may not know we're connected to. We need to make sure that whatever replaces the 20th century version of local newspapers serves the same educational and community-building functions.

This must be a collaborative effort, including journalists, local activists and residents, educators, business leaders, media owners, nonprofit groups, regulators and legal experts. It will take a community of individuals and institutions working together to nurture the sort of strong local journalism that revives trust in our local media, engenders strong attachment to our communities, and feeds our democracy at the grassroots level.

Storm in Progress: The Best Defense You Never Heard Of

By Robert J. Connor Jr. and Finney Raju

Under New York law, a property owner is under a duty to maintain the property in a reasonably safe condition.[1] This includes the necessity of keeping the property free of slippery conditions or tripping hazards. Most attorneys practicing in the field of premises liability know these basic precepts.

Robert J. Connor, Jr. is an associate at McGivney, Kluger, & Cook, P.C. specializing in insurance defense litigation. He works on a wide array of cases involving, among others, asbestos litigation, premises liability, motor vehicle accidents, products liability, Labor Law, construction site, and professional malpractice suits. His Juris Doctor was awarded, cum laude, from the University at Buffalo in 2016. Mr. Connor was a finalist in the 2016 National Ethics Trial Competition and received the Robert J. Connelly Award for excellence in trial advocacy. Mr. Connor is admitted to practice in New York and the Northern District of New York.

Finney Raju is an associate at McGivney, Kluger & Cook., P.C. He defends companies and individuals against lawsuits over breach of contract and tort claims, and was recently awarded summary judgment on his motion brought on behalf of a sporting goods company on the storm in progress defense. Finney received a Bachelor of Arts in English Literature from the City University of New York at Baruch College and a Juris Doctor from Hofstra University. He was nominated to the Super Lawyers in 2019 as a Rising Star. He is a member of the New York State Bar Association and South Asian Bar Association. He lives as an NYC expatriate in Syracuse, New York where, as always, "winter is coming."

However, many attorneys are unaware of a strong defense to premise liability claims: the storm in progress defense. Moreover, attorneys who have heard of it are unaware of how useful the defense is. This article is meant to: (1) introduce the basics of the storm in progress defense; (2) provide some key case law; and (3) iterate the necessary information and evidence required for a successful motion premised on the defense.

From the outset, it is important to note there are some key differences in how the four Departments treat the storm in progress defense. While this topic will be discussed in more detail, in general upstate New York (that is to say the Third and Fourth Departments) is more receptive to this defense than downstate New York (the First and Second Departments).

WHAT IS THE STORM IN PROGRESS DEFENSE?

The storm in progress defense holds a property owner's duty to reasonable measures to remedy a hazardous condition caused by a storm is suspended while that storm is in progress.[2] "Reasonable measures" in this context includes corrective measures (e.g., clearing snow and salting) as well as providing warnings. For example, in *Strickland v. Long Is. Rail Rd.* the plaintiff fell due to a change in elevation between a sidewalk and abutting train tracks (a change which was obscured by nine inches of freshly fallen snow). In addition to rejecting the claim that the defendant should have cleared the snow, the Second Department held it "did not have a duty to place

any additional markers to warn pedestrians of the change in elevation between the sidewalk and the tracks."

The landowner's duty to correct the hazardous conditions related to the storm is not reinstated until the storm has ended.[3] Once the storm is over, the landowner must remedy the condition within a reasonable period of time.[4]

Furthermore, the storm in progress defense applies to interior surfaces as well as exterior surfaces such as sidewalks, parking lots, driveways, etc.[5] The scope of the doctrine reflects the common sense policy that landlords "are not required to provide a constant, ongoing remedy when an alleged slippery condition is said to be caused by moisture tracked indoors during a storm."[6] However, the defense is limited to snow or moisture which has been tracked into interior surfaces from outside.[7]

Importantly, a lull or break in the storm does not constitute a complete cessation and does not trigger the resumption of the property owner's duty to remediate the condition.[8] However, the accident must be caused by a condition or defect created by the storm. Defendants are not protected from liability for failing to clear precipitation which pre-existed the storm. In *Perez v. Raymours Furniture Co., Inc.*, the defendant store's associate saw ice on the ground a week before the subject storm began. The court denied a motion for summary judgment brought on the ground of the storm in progress, holding it was unclear whether plaintiff's accident was due to pre-existing icy conditions.[9]

An epistemological difficulty can arise where there are overlapping storms driven by different weather patterns. This situation is a common occurrence in central and upstate New York, and raises the question as to when one storm ended and the other began. It also presents the related question of whether a break is a "lull" or a "cessation". Thus, litigants should consult with weather experts to evaluate the source, direction, and type of weather patterns which persisted in the region.

HOW BAD DOES THE WEATHER HAVE TO BE FOR STORM IN PROGRESS TO APPLY?

One of the most common misconceptions regarding the storm in progress defense is it requires a significant storm or weather event. On the contrary, the defense does not require heavy lake effect snow or monsoon levels of rain. Specifically, the Third and Fourth Departments have held light snow and/or drizzle is sufficient to trigger the protections of storm in progress.[10]

Downstate courts have offered somewhat conflicting guidance on the type of precipitation that qualifies as a storm and when a defendant is required to respond. In *Powell v. MLG Hillside Assocs., L.P.*, the First Department denied summary judgment where only "trace amounts of precipitation" fell in the two hours preceding the accident.[11] The court emphasized there was heavier snowfall earlier in the prior evening, but it had sharply declined in the hours leading to the accident.

Just a year later, however, the First Department dismissed a claim against the New York City Housing Authority based on evidence that "trace precipitation in the form of freezing rain and ice pellets, accompanied by heavy fog and widespread glaze" fell before and after plaintiff's accident.[12] The court also noted the precipitation caused "numerous bridge and roadway closures, public transit interruptions, accidents and injuries, and was preceded by a month of predominantly above-freezing temperatures that had no snow or ice."

The First Department's apparently conflicting decisions could be reconciled in that *Powell* showed a sharp decline of precipitation in the hours leading to the accident, which is suggestive of cessation, but in *Prince v. N.Y. City*

Hous. Auth. the weeks prior to the accident saw no snow or ice, indicating a recent and ongoing snowfall. Also, in *Prince*, the court took into consideration the effects of the precipitation on the surrounding areas, including traffic and roadway conditions and declined visibility. More recently, the First Department denied a defendant summary judgment noting only "trace amounts" of precipitation fell at the time of the accident.[13] The First Department further noted heavier precipitation fell the day before the accident than on the day of.

Based on the above, plaintiffs seeking to oppose storm-in-progress motions should look at data for the week leading up to the accident in order to develop an argument that the precipitation that fell during the accident was relatively inconsequential. Parties should also look at qualitative data, such as the effects of the snowfall on, e.g., traffic and roadway conditions, as well as quantitative data like the recorded measurements. Quality matters as much as quantity – especially when we're dealing with only "trace amounts" of snow.

Downstate attorneys should also be mindful of local regulations and administrative codes which may impose specific duties on property owners to clear their sidewalks. In New York City, property owners are obligated to clear "snow or ice, dirt, or other material" from abutting sidewalks and gutters within four hours of snow fall.[14] However, the Code exempts property owners from clearing the conditions between 9:00 p.m. and 7:00 a.m. The Code, by its terms, only applies to precipitation created by snowfall. It also creates a bright-line four hour "grace period" for property owners.

WHAT IS THE BEST WAY TO UTILIZE THE STORM IN PROGRESS DEFENSE?

Storm in progress is a complete defense to a defendant's liability. It is a technical and legal argument best fit for dispositive motions rather than arguments for a jury. On summary judgment, a defendant's burden may be established by presenting evidence there was a storm in progress when the injured plaintiff allegedly slipped and fell.[15]

The timing of a motion pursuant to the storm in progress defense is also important. Because this defense is heavily based on facts, the more evidence, including records and testimony, demonstrating the presence of inclement weather at the time of the incident, the better. Therefore, the storm in progress defense is much better suited to a summary judgment motion at the close of discovery rather than an early or pre-answer motion to dismiss.

WHAT EVIDENCE DO YOU NEED FOR A STORM IN PROGRESS DEFENSE?

It should become standard practice when handling a premises liability matter to ascertain the location, date, and time of the alleged incident and immediately obtain a weather report. Note that in New York, weather records are only admissible if they are certified by the National Climatic Data Center (NCDC), a part of the National Oceanic and Atmospheric Administration (NOAA). The public has free access to the information available from the NCDC website. The search tool is intuitive and easy to use.[16] However, there is a cost for ordering certified records, which depends on the size of records sought. Bear in mind, these certified weather records are a necessity for any motion based on the storm in progress defense, and the lack of these records is sufficient for a denial of the motion.

In addition to the certified weather records, a party's other witness's testimony regarding the weather is very useful. Questions regarding the weather before, during, and after the incident should asked during interviews and depositions. If a plaintiff testifies it was snowing or raining when she fell, her attorneys have virtually no means to counteract that testimony. For this reason, in-house counsel for property owners, or attorneys who represent them regularly, should request the inclusion of weather conditions in any standard accident or incident reports under their purview.

WHAT EXPERTS ARE NEEDED?

While not strictly required, the affidavit of an expert, most commonly a meteorologist or climatologist, can substantially strengthen a storm in progress defense. Courts have held a defendant is not required to submit the affidavit of a licensed meteorologist to interpret the data contained in certified weather records or to otherwise opine the storm in progress defense applies.[17]

There are many services which provide weather experts. However, do not overlook the possibility of retaining the weatherman from your local news station. These individuals usually offer meteorology consultation services, are well known in their areas, and are usually comfortable in front of a jury given their daily television broadcasts. Be aware the meteorologist may also order them from the NCDC. It may be more cost effective to order the records yourself rather than the expert. To assess this, you will need to consult their fee schedule.

WHY IS STORM IN PROGRESS THE BEST DEFENSE I NEVER HEARD OF?

What makes the storm in progress defense such a powerful tool is it narrows the case to one singular issue. Was a storm occurring at the time of the incident? If it was, then there is no liability because it completely negates a vital element of the plaintiff's case: duty. Without this element, a plaintiff cannot succeed.

Moreover, this is a fact which is objective, easily ascertainable, and has very little room for argument. Additionally, the defense also has a low cost to it: mainly the

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records and one expert to provide an affidavit. The certified weather records are not overly expensive and expert meteorologists are relatively inexpensive when compared to the cost of other experts. Plus the information is only available from one source, the NCDC, so even if there is a case of dueling expert interpretations, there is no disagreement on the underlying data. As such, even though this is a fact-dependent defense, it is not as complicated as others such as the serious injury threshold in a motor vehicle matter.

CONCLUSION

Whether representing a plaintiff or defendant, any attorney involved in a premises liability case should consider the usefulness and impact of the storm in progress defense. A well prepared and crafted motion based on storm in progress is very likely to result in dismissal. Even when a motion is denied at the trial level, there is a strong trend towards granting them on appeal – so long as there is undisputed meteorological evidence as to the type of precipitation and time of accident.

However, the process for obtaining that dismissal starts at the very beginning of the case: (1) weather records should be reviewed at the offset and certified weather records obtained shortly thereafter; (2) parties and witnesses should be questioned regarding weather conditions at every deposition; and (3) a meteorologist should be retained at the earliest opportunity. Follow these steps and, with the right facts, complete victory can be yours.

1. *See Basso v. Miller*, 40 N.Y.2d 233 (1976).

2. *See Sherman v. N.Y.S. Thruway Auth.*, 27 N.Y.3d 1019, 1020–21 (2016) (holding a defendant "will not be held liable in negligence for a plaintiff's injuries sustained as the result of an icy [or slippery] condition occurring during an ongoing storm"); *see also Pippo v. City of New York*, 43 A.D.3d 303, 304 (1st Dep't 2007); *Cerra v. Perk Dev.*, 197 A.D.2d 851 (4th Dep't 1993) (holding when a "snowstorm was in progress at the time of plaintiff's fall there can be no recovery against defendant"); *and Strickland v. Long Is. Rail Rd.,* 175 A.D.3d 635 (2d Dep't 2019).

3. *See Hilsman v. Sarwil Assocs., L.P.*, 13 A.D.3d 692 (3d Dep't 2004).

4. *See Parker v. Rust Plant Servs.*, 9 A.D.3d 671, 673 (3d Dep't 2004); *Montes v. City of N.Y.*, 140 A.D.3d 1036 (2d Dep't 2016).

5. *See Boarman v. Siegel, Kelleher & Kahn*, 41 A.D.3d 1247, 1248 (4th Dep't 2007) (holding the "Storm in Progress rule may apply despite the allegation of plaintiff that she slipped inside the bus rather than in an outdoor area").

6. *See Hussein v. New York City Transit Auth.,* 266 A.D.2d 146 (1st Dep't 1999).

7. *See Dubensky v. 2900 Westchester Co., LLC*, 27 A.D.3d 514 (2d Dep't 2006) (holding where snow or moisture is tracked into an entranceway or vestibule, landowners are under no obligation to "cover all of their floors with mats, nor continuously mop up all moisture resulting from tracked in precipitation").

8. *See Gilbert v. Tonawanda City School Dist.,* 124 A.D.3d 1326, 1327 (4th Dep't 2015); *see also Powell v. MLG Hillside Assocs., L.P.*, 290 A.D.2d 345 (1st Dep't 2002).

9. *See Perez v. Raymours Furniture Co., Inc.,* 173 A.D.3d 597 (1st Dep't 2019).

10. *See Alvarado v. Wegmans Food Markets, Inc.,* 134 A.D.3d 1440 (4th Dep't 2015) (finding defendant not liable for plaintiff's injuries in a slip and fall where it was "snowing lightly" at the time of the accident stating the defense "is not limited to situations where blizzard conditions exist, [rather] it also applies where there is some type of less severe, yet still inclement, winter weather"); *see also Boynton v. Eaves,* 66 A.D.3d 1281 (3d Dep't 2009) (finding a storm was in progress as a matter of law where approximately one inch of snow accumulated at the time of plaintiff's fall).

11. 290 A.D.2d at 345.

12. *See Prince v. N.Y. City Hous. Auth.,* 302 A.D.2d 285, 285 (1st Dep't 2003).

13. *See Haraburda v. City of New York,* 168 A.D.3d 485 (1st Dep't 2019).

14. *See* N.Y.C. Administrative Code § 16-123(a).

15. *See Smith v. Christ's First Presbyterian Church of Hempstead*, 93 A.D.3d 839, 839 (2d Dep't 2012). In fact, New York courts have held evidence of a storm in progress presents a prima facie case for dismissal. *See Powell*, 290 A.D.2d at 345; *see also Mangieri v. Prime Hosp. Corp.,* 251 AD2d 632 (2d Dep't 1998).

16. https://www.ncdc.noaa.gov/cdo-web/.

17. *See, e.g., Dowden v. Long Is. R.R.*, 305 A.D.2d 631, 631 (2d Dep't 2003).

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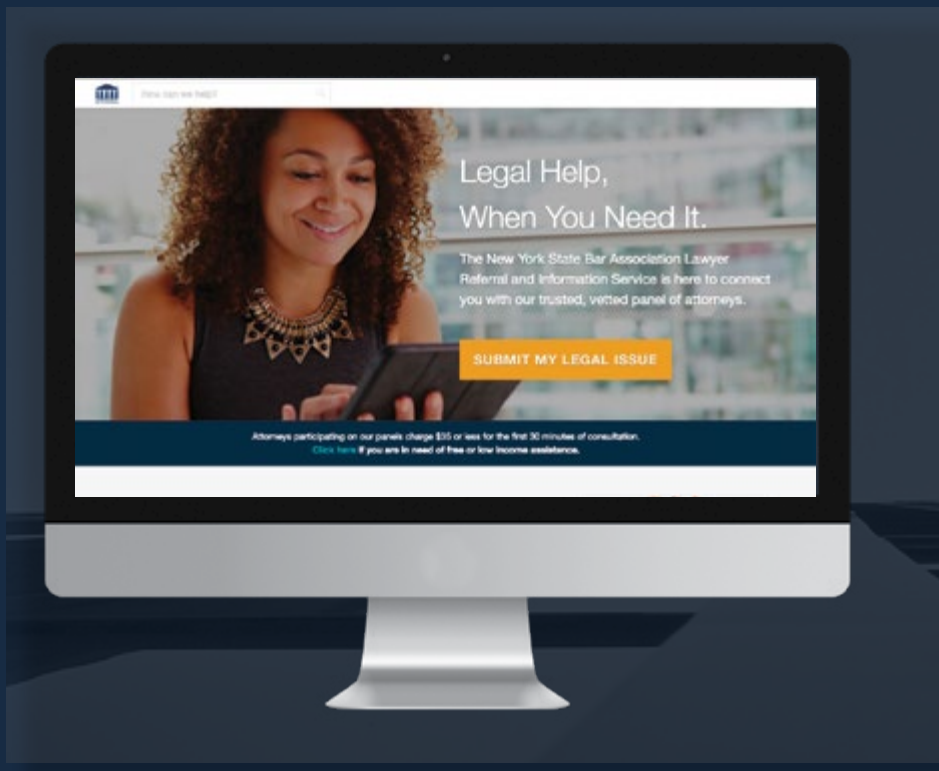

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Keeping Your New Year's Wellness Resolutions

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

Regular gymgoers hate the first week of January. The gym is suddenly flooded with Resolutionistas, those people who have resolved to get fit and lose weight in the New Year and who wander around the gym seemingly without a plan and take up the equipment and fill up the parking lot. Yet the gym veterans know from experience that almost all of the Resolutionistas will be gone by Super Bowl Sunday, leaving them to work out in peace for another year. If you have resolved to get fit or lose weight, you do not have to suffer the fate of the Resolutionistas. Instead, you can successfully keep your wellness resolutions.

Most people fail in trying to begin a wellness program because they try to do too much too soon. The new year is 365 days long. It matters more what you are still doing

in May and August than what you do the first week of January. Our hunter gatherer body wants to maintain the status quo. After a holiday season of eating sweets and treats, if you suddenly start eating only salads, your body will notice the decrease in caloric intake and by the third day will go into famine mode. It will tell you to go find calories and you will be hungry and irritable and want junk food. After being inactive, if you hit the gym and road hard beginning on January 1, by the end of the week you will be sore and maybe injured. While you may have started your fitness regimen with the best of intentions, within two weeks you will be hungry and beat up and more likely to head back to the couch than to the gym.

A better strategy is to start slowly and ease into things so that your body does not feel shocked. Getting fit is all about adaption as your body adjusts to the stresses of exercise and a different diet to become stronger and leaner. As anyone who has spent too much time in the sun on the first day of a beach vacation will attest, it is much easier and more enjoyable if you allow your body to adapt gradually to new conditions.

Enjoy the New Year's ball drop festivities and watch a lot of football the next day. On January 2, start to clean up your diet. Cut out fast food and aim to eat a balanced diet of protein, carbohydrates, and good fats. You can still have an occasional treat to appease your mind, but junk should not be a staple. Going forward, a few days a week, especially on workout days, substitute a whey protein drink for a 500 calorie grande latte. The protein will make you feel satisfied and will support the exercise you are doing. Eat a breakfast every day of protein, carbs, and fat such as eggs with toast or oatmeal and fruit. This will keep your blood sugar balanced and give your brain the fuel it needs so you won't crave sugary junk later.

On January 2, go to the gym. Ignore the Resolutionistas, because you have a plan. A well-rounded exercise routine should include weight lifting for strength, stretching for flexibility, and some aerobic exercise for cardiovascular health. Start slowly with some stretching, body weight exercises, and a walk or light jog on a treadmill. Take January 3rd off and come back on the 4th and do the same thing. Over the next two weeks build up to exercising three days a week, moving to barbells and machines while gradually increasing the weight and number of sets as well as the distance and pace on the treadmill. Depending on your fitness background and knowledge, you may want to have a session or two with a personal trainer to set you up with a program to accomplish your goals and to teach you proper form and how to use the equipment. You should always use correct form to get the most out of each exercise and prevent injury.

As you move through January, set things up so that you are exercising at least three times a week. Weekend days are good, and during the week you can follow a sliding schedule in case you have pressing work commitments. For example, you can adopt a sliding Monday, Wednesday, Friday, Sunday schedule. If you have to miss Monday because of a late meeting, go to the gym Tuesday. If you can't make Wednesday because you have a brief due, go Thursday. Even if you are going to work all weekend on a deal, there is usually time Friday evening to go to the gym before dinner – you will be more productive over the weekend if you do. Sunday is always good to catch up.

Along the way, continue to improve your diet. To support the exercise and build muscle you should up your protein intake so that you are eating about 1g for every 2 pounds of bodyweight daily. This should come from lean meat, chicken, and fish spaced out over three meals and a healthful afternoon or post-exercise snack such as that whey protein drink.

To help you keep your New Year's resolutions, break up your goals into smaller, more easily achievable ones. If you resolve to lose 20 pounds, break it up into smaller milestones such as saying you want to lose two pounds a month. While the Resolutionistas are getting frustrated because they cannot hit a big number, you will stay excited and motivated as you accomplish your two pound goal every month. The milestones will add up and you will lose 20 pounds. For a more complete discussion of how to carry out a well-rounded wellness program S*ee* Herbst, *Attorney Wellness in a Nutshell*, N.Y. St. Bar Ass'n J. 16–19 (Aug. 2019), https://www.nysba.org/Journal/2019/Aug/Attorney_Wellness_in_a_Nutshell/.

By starting slow and taking things step by step, you will allow your body to adjust and you will enjoy exercising and feeling fit. As the Resolutionistas begin to disappear, you will smugly congratulate yourself and keep going. When next January rolls around, the newer healthier you will join your fellow gym goers in complaining why there is suddenly no parking.

New York's Anti-SLAPP Law Is Only a Slap on the Wrist. Will New Legislation Make It Sting?

By Julio Sharp-Wasserman

Julio Sharp-Wasserman is a recent graduate of Columbia Law School, where he was a Harlan Fiske Stone Scholar. He has worked as a policy analyst for the Public Participation Project, where he helped to draft federal anti-SLAPP legislation. Julio currently works as a public interest litigator in Manhattan and anticipates a federal clerkship in New York in 2020. He has published articles on anti-SLAPP and other topics in the *First Amendment Law Review*, the *Columbia Science and Technology Law Review*, and the New York State Bar Association *Labor and Employment Law Journal*. He authored an amicus brief that several public interest organizations joined in *Asnani v. Materio*, discussing a matter of interpretation of Florida's anti-SLAPP statute.

Anti-SLAPP laws provide procedural mechanisms that deter meritless suits filed to chill speech or petitioning activity – "Strategic Lawsuits Against Public Participation," or "SLAPPs."[1] The classic narrative of a SLAPP is that a public figure or corporation files a frivolous lawsuit against a less powerful critic for expressing her opinion through journalism, political organizing, or protest.[2] The object of such a suit is to intimidate and silence someone by disrupting their life and forcing them to expend money and time. State anti-SLAPP statutes typically permit a defendant to file a motion for expedited dismissal, upon which a pre-trial hearing must be held within a statutorily defined time period. If, at that hearing, a judge determines both that the suit is meritless and that it targets specifically First Amendment-related conduct, the suit is dismissed, with costs imposed on the plaintiff.

Unfortunately, despite being a hub of media, entertainment, and protest movements, New York has some of the weakest anti-SLAPP protections in the nation. State anti-SLAPP statutes vary in how broadly they define protected First Amendment-related activity, and in whether they make the imposition of costs mandatory. New York's current anti-SLAPP law[3] is relatively weak in two ways. First, it defines protected activity so narrowly that most First-Amendment related conduct remains vulnerable to retaliatory litigation. And even in the narrow category of situations in which anti-SLAPP protection is available, the protection is illusory, because the imposition of costs on a SLAPP-filer is discretionary rather than mandatory.

Senate Bill S.52 amends New York's anti-SLAPP law to fix both of these defects, and in this, it is a welcome legislative change. The proposed revisions would align New York with a growing number of jurisdictions, such as Texas, California, Oregon, and Washington, D.C., that have adopted broad anti-SLAPP protections backed by mandatory sanctions.

But Senate Bill S.52 goes too far, albeit in an easily correctable way. Lawmakers should add certain exemptions to the bill's broad definition of protected activity. California and other states have codified exceptions to their respective statutes' broad definitions of protected activity that preclude the use of anti-SLAPP in consumer class actions and non-profit public interest litigation. These exemptions prevent the perverse use of anti-SLAPP protections by well-resourced defendants against public interest legal advocacy.

NEW YORK'S CURRENT ANTI-SLAPP LAW

New York's anti-SLAPP statute provides insubstantial protections in a narrow and arbitrary category of circumstances. New York's anti-SLAPP statute only offers protection against SLAPPs brought by individuals or entities seeking permits or applications from a government body.[4] To prevail on an anti-SLAPP motion in New York, a SLAPP target must show that the plaintiff is a "public applicant or permittee," and that the plaintiff's claim is "materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission."[5] Because SLAPPs occur in a variety of contexts that do not implicate permitting processes, New York's ant-SLAPP law is of limited use.[6]

Most lawsuits that fit the philosophical definition of a SLAPPs nevertheless do not fit into New York's narrow definition of protected activity. For instance, SLAPP tactics are sometimes employed by businesses to silence online consumer reviewers, as when a Manhattan dentist sued a former patient for posting negative online reviews allegedly in violation of a confidentiality agreement.[7] SLAPP tactics are also employed by individuals accused of sexual assault, as when a New York comic sued a fellow comedian for a Facebook post referencing accusations against him, and sued a Manhattan theater for refusing to book his acts.[8] Neither of these genres of SLAPPs typically implicate permitting processes.

Moreover, even if a defendant can establish that the suit arises from protected activity, the court is not required to award legal fees. The imposition of costs and attorneys' fees is discretionary in New York,[9] as opposed to being a necessary consequence of granting an anti-SLAPP motion, as in many other states.[10] This makes New York's anti-SLAPP law less effective as a deterrent to SLAPPs, because financial penalties are a less certain result of filing a SLAPP.

The uncertain availability of legal fees prevents defendants of limited means from hiring counsel on contingency.[11] As Evan Mascagni, Policy Director at the Public Participation Project, which advocates for the passage of anti-SLAPP legislation, recounted in an interview:

> When I was an anti-SLAPP litigator in California, the first thing a potential client would often tell us was that they could not afford to hire counsel. The promise of fee-shifting allowed us to take those cases. Even now, when a SLAPP victim contacts PPP for help, it is much easier for me to make a referral if they're in a state with automatic fee-shifting.[12]

Especially given that the main ill targeted by anti-SLAPP legislation is the litigation tactic of leveraging wealth to outspend a defendant, the inaccessibility of anti-SLAPP protections to people of modest means is an essential defect of New York's statute.

A 2003 New York case simultaneously exemplifies the type of action that qualifies as a SLAPP in New York and illustrates the frustration of absorbing the costs of a SLAPP despite a successful defense on the merits. In *New Line Realty Corp. v. United Comms. of Univ. Heights*, a realty company sued the Northwest Bronx Community and Clergy Coalition in response to their advocacy on behalf of tenants in several buildings in the Bronx.[13] The realty company claimed trespass, libel and tortious

interference with prospective economic advantage.[14] The defendants had been reporting housing code violations to the Department of Housing Preservation and Development, which the court held amounted to challenging the defendant's fitness to hold certain government-issued permits for its buildings and thus was protected.[15]

The court, however, did not award attorney's fees.[16] Unsurprisingly, given that the case reached resolution after three years of litigation,[17] the SLAPP was effective at inhibiting the NWBCCC's advocacy. The NWBCCC accumulated over $1 million in legal costs in mounting a defense. As one staffer recounted, "we basically stopped working in most of the buildings we were involved in because we were afraid they would be added on [to the lawsuit]."[18]

SENATE BILL S.52'S STRONGER ANTI-SLAPP PROTECTIONS

Senate Bill S.52 amends New York's anti-SLAPP to bring it in in line with a growing chorus of jurisdictions that have codified broad protections backed by mandatory sanctions.[19] California, for example, defines protected activity to include "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest."[20] Protected activity also includes a broad category of petitioning activity – "any written or oral statement or writing" that is either "made before a legislative, executive or judicial proceeding" or made "in connection with an issue under consideration or review" by any such body or "any other official proceeding recognized by law."[21] This capacious definition encompasses a varied list of activities, from statements assailing the character of a government official,[22] to criticisms of the manager of a homeowner's association,[23] to online consumer reviews,[24] to statements in a hospital's state-mandated peer review proceedings.[25] And the award of legal fees to a defendant who prevails on an anti-SLAPP motion is mandatory.[26]

The new definition proposed would be broad in an analogous manner to those in statutes like California's. Under S.52, protected activity is now defined as "(1) any communication in a place open to the public or a public forum in connection with an issue of public concern; or (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition."[27] This definition mirrors definitions of speech activity in statutes like California's and protects an expansive category of First Amendment-related conduct that undoubtedly encompasses all manner of petitioning activity. Moreover, attorney's fees are now a mandatory rather than a discretionary sanction.[28]

RECOMMENDED CHANGES TO S.52

While a narrow definition of protected activity lets many SLAPPs slip through the cracks, a broad one, like California's and like the one in New York's proposed new law, can deter certain types of legitimate legal advocacy that do not implicate First Amendment concerns. In order to prevent the latter extreme, it is necessary for the New York legislature to include certain exemptions to the definition of protected activity.

Ten years after the passage of its anti-SLAPP law, California added two important exemptions to the definition of protected activity: the "commercial speech" exemption and the "public interest" exemption. The commercial speech exemption prevents corporate defendants from using anti-SLAPP protections in the context of consumer litigation. The "public interest" exemption precludes the use of anti-SLAPP in the context of public interest litigation of the type a non-profit would file, principally seeking equitable relief and bought to advance a moral goal.

In California, prior to the addition of a commercial speech exemption to California's anti-SLAPP law,[29] anti-SLAPP motions were often filed by corporate defendants in class action suits targeting deceptive or fraudulent business practices. In the false advertising context, for instance, it is typically easy to argue that speech in advertisements is of public concern because the speech concerns a mass-produced good.[30] The provision precluded the use of anti-SLAPP in "any cause of action" that is "brought against a person primarily engaged in selling or leasing goods or services," and "arises from" speech or conduct related that pertains to the goods and services and is directed at consumers.[31] Subsequent to the enactment of the commercial speech exemption, California courts have denied corporate defendants the benefit of anti-SLAPP protection in false advertising cases,[32] and have generally confined the application of this exemption to the false advertising context.[33]

Several states have followed California's lead in adopting a commercial speech exemption,[34] and New York should join this movement as well. Such an exemption is justifiable, fist, because consumer class actions are a form of a petitioning activity that, like an anti-SLAPP law, advances the democratic goal of imposing equal legal accountability on powerful interests.[35] Moreover, denying protections to defendants in consumer class actions coheres with the limited nature of Constitutional protections for commercial speech in comparison to political speech.[36]

At the same time that California codified the commercial speech exemption, it also added a "public interest" exemption, which prevents defendants from using anti-SLAPP protection in the context of "public interest" litigation, as defined in the statute. The provision exempts "any action brought solely in the public interest or on behalf of the general public" if certain further conditions are met,

including that the plaintiff not seek relief "greater than or different from the relief sought for the general public or a class of which the plaintiff is a member."[37] California courts have interpreted this exception narrowly, so that it essentially applies only to non-profit litigation in pursuit of equitable relief.[38] At least one other state has adopted this exemption.[39]

This exemption is justifiable because class action cases or test cases seeking equitable relief are unlikely vehicles for legal harassment. Such suits are typically brought by non-profit lawyers who lack a financial incentive to engage in frivolous litigation, against large institutions that are not intimidated by the threat of legal costs. Moreover, impact litigation often involves novel legal claims and theories whose likelihood of success is uncertain for the right reasons – not because the suit is frivolous but because its purpose is to change the law. Applying anti-SLAPP protection to such actions would chill legitimate public interest advocacy, which after all seeks the same goal as anti-SLAPP legislation, of holding powerful private interests accountable.

CONCLUSION

Through the lens of the values underlying anti-SLAPP legislation, the new anti-SLAPP regime proposed in S.52 is superior to the current one but also has unique defects. In order to encompass the diverse and unexpected factual settings and substantive areas of law in which SLAPPs occur, protected activity must be defined abstractly, as in S.52. The downside of abstract language is that it begets unforeseen applications. Nonetheless, two simple additions to the bill, the well-tested "commercial speech" and "public interest" exemptions to anti-SLAPP protection, would preclude unintended applications that undermine the policies underlying the law.

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1. The term "SLAPP" was coined by Professors George Pring and Penelope Canan. *See* George W. Pring & Penelope Canan, Getting Sued for Speaking Out, 8–9 (1996).

2. *See, e.g.*, *Trump v. Chi. Tribune Co*., 616 F. Supp. 1434 (S.D.N.Y. 1985) (libel suit against the Chicago Tribune by a celebrity real estate magnate in response to an article characterizing one of his buildings as unattractive).

3. *See* N.Y. Civ. Rights Law §§ 70-a, 76-a; Civil Practice Law and Rules §§ 3211(g), 3212(h) (CPLR).

4. N.Y. Civ. Rights Law § 76-a(1).

5. *Id.* at § (a)(1)(a); *see also Edwards v. Martin*, 158 A.D.3d 1044, 1046 (3d Dep't 2018).

6. New York also provides for "SLAPP-back" actions, in which a SLAPP victim can file a separate action for damages. *See* N.Y. Civ. Rights Law § 70-a. Because this remedy requires the defendant to endure a lawsuit to resolution before seeking relief, it is useless to a defendant who lacks the resources to litigate.

7. Julianne Hill, *Legal challenges over online reviews seek to separate facts from fiction*, Am. Bar Ass'n J. (Jul. 1, 2016), http://www.abajournal.com/magazine/article/legal_challenges_over_online_reviews_seek_to_separate_fact_from_fiction/; *see also Albert v. Yelp, Inc.*, No. G051607, 2016 Cal. App. LEXIS 5262 (July 15, 2016) (suit by lawyer against Yelp and former client in connection with negative review).

8. Ellie Shechet, *A Comedian Called Out an Alleged Rapist—and Was Sued for $38 Million*, Jezebel (Nov. 2, 2017), https://jezebel.com/a-comedian-called-out-an-alleged-rapist-and-was-sued-fo-1819818078/; Gabriella Paiella, *Comic Kicked Out of UCB for Alleged Sexual Assault Sues for Gender Discrimination*, The Cut (Feb. 5, 2018), https://www.thecut.com/2018/02/comic-sues-ucb-after-being-banned-for-alleged-sexual-assault.html/; *see also* Alyssa Leader, *A "SLAPP" in the Face of Free Speech: Protecting Survivors' Rights to Speak up in the "Me Too" Era*, 17 First Am. L. Rev 441 (documenting the national trend).

9. N.Y. Civ. Rights Law §70-a(1)(a) ("[C]osts and attorney's fees *may* be recovered") (emphasis added).

10. *See, e.g.*, Cal. Civ. Proc. Code § 425.16(c)(1); Or. Rev. Stat. § 31.152(3); Tex. Civ. Prac. & Rem. Code § 27.000(b).

11. *See Ketchum v. Moses*, 17 P.3d 735, 741 (Cal. 2001) (noting that mandatory fee-shifting "encourages private representation in SLAPP cases, including situations when a SLAPP defendant is unable to afford fees or the lack of potential monetary damages precludes a standard contingency fee arrangement."); *see also* Samantha Brown & Mark Goldowitz, *The Public Participation Act: A Comprehensive Model Approach to End Strategic Lawsuits Against Public Participation in the USA*, Review of European Community and International Environmental Law 19(1):3-13 (Apr. 2010) ("The single most important component of anti-SLAPP legislation is the ability of a defendant to recover attorney's fees. The ability to recoup fees allows a defendant who otherwise could not afford an attorney to secure one on a contingency basis.").

12. Telephone Interview with Evan Mascagni, Policy Director, Public Participation Project (Sept. 17, 2019).

13. No. 1021/2004, 2006 N.Y. Misc. LEXIS 2872, *3–4 (Sup. Ct., Bronx Co. 2006).

14. *See id.* at *3.

15. *See id.* at *9–10

16. *Id.* at *10.

17. *See New Line Realty V Corp. v. United Comms. of Univ. Heights*, No. 1021-2004, 2008 N.Y. Misc. LEXIS 4867, at *8 (Sup. Ct., Bronx Co. 2008) (proceeding two years later).

18. *See* Betsy Morais, *Anti-SLAPP Ruling Cheers Tenant Advocates*, City Limits (Aug. 18, 2008), https://citylimits.org/2008/08/18/anti-slapp-ruling-cheers-tenant-advocates/.

19. *See, e.g.*, Cal. Civ. Proc. Code § 425.16.; Or. Rev. Stat. §§ 31.150–155.; Tex. Civ. Prac. & Rem. Code §§ 27.001–27.011. ; D.C. Code §§ 16–5502–5505.

20. Cal. Civ. Proc. Code § 425.16(e)(3).

21. *Id.* at (e)(1), (e)(2).

22. *Vogel v. Felice*, 127 Cal. App. 4th 1006, 1015 (2005).

23. *See Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468 (2000).

24. *See, e.g.*, *Navarro v. Cruz*, No. B216885, 2010 WL 2183227 (Cal. Ct. App. June 2, 2010).

25. *See Kibbler v. N. Inyo Cty. Local Hosp. Dist.*, 39 Cal. 4th 192 (2006).

26. *See* Cal. Civ. Proc. Code § 425.16(c)(1).

27. N.Y. Legis. S. S-52. Reg. Sess. 2019-2020, § 1.

28. *Id.* at § 2.

29. Cal. Civ. Proc. Code § 425.17(c).

30. *See, e.g.*, *Metabolife Int'l v. Wornick*, 72 F. Supp. 2d 1160, 1172 (S.D. Cal. 1999) ("Because the safety of Metabolife 356 remains an open question of substantial public importance, contributions to the debate are protected by the First Amendment."); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1109 (9th Cir. 2003).

31. Cal. Civ. Proc. Code § 425.17(c).

32. *See, e.g.*, *Physicians Comm. for Responsible Med. v. Tyson Foods, Inc.* 119 Cal. App. 4th 120, 130 (2004) (misrepresentations in advertisements for chicken products); *Metcalf v. U-Haul Int'l, Inc.*, 118 Cal. App. 4th 1261, 1266 (2004) (misrepresentations in advertisements about the size of storage units).

33. *See, e.g.*, *New.net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1103-1104 (C.D. Cal. 2004); *Troy Group, Inc. v. Tilson*, 364 F. Supp. 2d 1149, 1155 (C.D. Cal. 2005).

34. *See, e.g.*, Tex. Civ. Prac. & Rem. Code § 27.010(b); Okla. Stat. tit. 12, § 1439 (2); D.C. Code §§ 16–5505(1).

35. The legislative history indicates reliance on the opinion of Professor Penelope Canan, who coined the term "SLAPP": "Wealthy corporate defendants, some with their own legal departments, simply do not suffer the chilling effect on their rights when faced with a lawsuit claiming, for example, false advertising or fraud or illegal business practices, that common citizens suffer when sued for speaking out." Report of Senate Judiciary Committee on Senate Bill No. 515 (2003).

36. Content-based regulation of speech is normally subject to strict scrutiny. *See, e.g.*, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655 (1990); *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 573 (1987). But regulation of commercial speech must withstand intermediate scrutiny. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980); *Bd. of Tr. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

37. Cal. Civ. Proc. Code § 425.17(c) (2012).

38. *See Club Members for an Honest Election v. Sierra Club*, 196 P.3d 1094, 1099 (2008) (The "public interest" referred to in section 425.17(b), does not simply describe topics that members of the public might find interesting. Instead the term "public interest" is used to define suits brought for the public's good or on behalf of the public. To qualify under section 425.17(b)'s exception, suits must be brought *solely* to secure this public benefit.").

39. *See* Colo. Rev. Stat. § 13-20-1101(8)(a)(II).

Annual Review of New Legislation

By Barry Kamins

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No legislative session in recent memory produced as many significant changes in the criminal justice system as the session that ended in June. For the first time in a half century, New York has approved a set of sweeping reforms to the State's criminal justice system that will limit the setting of monetary bail, expand discovery in criminal cases, and enhance the right to a statutory speedy trial.[1] In addition, the Legislature enacted a number of other important changes to the Penal Law and Criminal Procedure Law. It is recommended that the reader review the new legislation for specific details as the following discussion will primarily highlight key provisions of the new laws. In some instances, as of this writing, legislation enacted by both houses has not yet been sent to the Governor for his signature.

The new bail bill drastically reduces the use of monetary bail and, according to a statement made by Governor Andrew Cuomo, under the new statute, approximately 90% of people who are arrested will be subject to mandatory release. Under the new law, unless a person is charged with a "qualifying offense" (see below) a court has no authority to set monetary bail, and must release the person on his or her own recognizance.[2]

If a defendant is not charged with a qualifying offense but, in the opinion of the judge, poses a flight risk, the court still cannot set monetary bail but can select the least restrictive non-monetary alternative conditions to ROR that will reasonably assure the defendant's return to court.[3] These conditions include supervision by a pretrial services agency, reasonable restrictions on association or travel or, as a last resort, electronic monitoring.

Electronic monitoring can only be imposed, however, if the defendant is charged with a felony, and certain specified misdemeanors and no other non-monetary condition will suffice to assure reasonably a defendant's return to court.[4] A court can impose this condition for a maximum of 60 days with the option of continuing only upon a *de novo* review before a court. Finally, a person released on electronic monitoring is deemed to be "in custody" for purposes of release for an untimely conversion to a misdemeanor information

(CPL § 170.70), or an untimely felony hearing (CPL § 180.80).[5]

Monetary bail can still be set by a court when a defendant is charged with a "qualifying offense." That term is defined as a "violent felony" under Penal Law § 70.02 (except for robbery in the second degree (aiding another) and burglary in the second degree (in a dwelling) although an *attempt* to commit these crimes would still appear to constitute a "qualifying offense"; any Class A (non-drug felony) except Penal Law § 220.77 (operating as a major trafficker); any felony sex offense (Penal Law § 70.80) or misdemeanor sex offense (Article 130); and about a dozen other specified crimes.[6] When the qualifying offense is a felony, a court can also remand the defendant.

When bail is set for these offenses, a court must set *three* forms of bail, one of which must be either an unsecured or partially secured surety bond.[7] In determining the appropriate amount of bail, the new law eliminates certain criteria that a court previously had to consider, and enumerates certain new criteria. For example, instead of a defendant's reputation, employment, family ties, and length of residence in any community, a court must now take into account a defendant's "activities and history." Instead of a defendant's "criminal history," a court must now consider the defendant's "criminal conviction record." While a court can still consider the defendant's record of flight to avoid prosecution, it can no longer consider a defendant's record "in responding to court appearances when required to." And a court must now consider a defendant's individual financial circumstances including his ability to post bail without it being "a hardship."[8]

New procedures have also been adopted for desk appearance tickets (DAT) to divert people from the formal arrest process (and the police precinct). In the past, the issuance of a DAT for certain offenses was discretionary. Under the new law, a police officer *must* issue a DAT when a defendant is charged with an E felony (with the exception of certain escape-related offenses and sex offenses), or a misdemeanor unless one of eight excep-

tions apply. For example, a police officer is not obligated to issue a DAT when the defendant has an outstanding bench warrant; has failed to appear in court in the last two years; cannot provide a verifiable method of identity, including a driver's license, passport, or public benefit card; has been charged with a domestic violence crime, sex offense or a crime for which a court can revoke or suspend a driver's license; or appears to need medical or mental health care.[9]

Although the issuance of a DAT is not permitted if the above exceptions exist, a police officer will later, under certain circumstances, have the *discretion* to issue a DAT. Thus, for example, if one of the exceptions mentioned above precludes the issuance of a DAT at the scene, a police officer must detain the defendant and take him to the stationhouse; while there, however, the officer may resolve the disqualifying factor by, for example, obtaining sufficient identification of the defendant. Although this procedure requires the initial warrantless arrest of the defendant, it does permit the issuance of a DAT at the stationhouse in lieu of bringing the defendant through the court system to appear at arraignment.

A DAT must now be returnable no later than 20 days from the date it is issued.[10] If the return date is more than 72 hours after its issuance, a court must have "appearance reminders" sent to any defendant who gave his contact information to the police officer. The court can delegate a pretrial services agency to issue these reminders.[11] The problem, however, is that there is no legislative mandate that counties have such agencies in place and no funding is provided in the State budget to support their establishment. In addition, the court is given the responsibility of notifying a defendant of any future court appearance by "text message, telephone call, electronic or first-class mail"; the defendant has the option of selecting the method of notification.[12] Each year there are approximately four million appearances by defendants in criminal cases; the burden placed on the court to notify defendants may well be unmanageable.

The new discovery law is even more sweeping. The current discovery statute is one of the most regressive in the nation, and it has now been repealed – a new CPL Article 245 will supersede it. Initially, the obligation to disclose information is no longer timed to the date of trial – it is timed to the date of arraignment. Thus, the prosecutor's "initial discovery obligations" must be performed within 15 calendar days of a defendant's arraignment date. If the discoverable material is "exceptionally voluminous," the prosecutor can take an additional 30 calendar day period to disclose. The prosecution must also disclose any statements made by the defendant no later than 48 hours before the defendant testifies in the Grand Jury.[13]

In general, the prosecutor has a duty to make a "diligent good faith effort to ascertain the existence" of discoverable material, and any discoverable material in the possession of law enforcement, is "deemed to be in possession" of the prosecution for disclosure purposes (a codification of case law).[14] Although the Court of Appeals had previously held that New York courts lack inherent authority to compel pretrial discovery (*People v. Colavito*, 87 N.Y.2d 423), the new statute overrules that doctrine. Upon the defendant's application that he or she cannot obtain certain discovery "without undue hardship," a court may *order* the prosecution to disclose certain material.[15]

The initial discovery obligation consists of approximately 21 categories of information, including material that the prosecution had not previously been required to disclose automatically. This includes the Grand Jury testimony of the victim, and the defendant; police reports; the names of witnesses (other than confidential informants) and "adequate contact information," although "physical addresses" do not have to be disclosed; search warrants and affidavits in support of the warrants; a record of the defendant's convictions and prosecution witnesses; the existence of any pending criminal action against prosecution witnesses; and electronically stored information from computers, cell phones, social media accounts seized by or obtained on behalf of law enforcement.[16]

The prosecution is now required to disclose *Rosario* material as part of the "initial discovery obligation."[17] This new and earlier deadline for *Rosario* material dramatically changes the timeline for disclosure by timing it to the arraignment instead of the date of trial. The failure of the prosecutor, however, to disclose the information shall not constitute grounds to set aside or reverse a conviction unless the defendant can establish that there is "reasonable possibility that the non-disclosure materially contributed to the result of the trial."[18]

The prosecution also has a "supplemental discovery obligation" to disclose, no later than 15 calendar days before trial, the defendant's prior bad acts that will be offered under either *Molineux* or *Sandoval*.[19]

The prosecution has two other new disclosure deadlines. When a defendant is charged with a felony, and the prosecution makes a pre-indictment plea offer to a crime (not a violation), the prosecutor must disclose all discoverable items not less than three calendar days prior to the expiration date of any plea offer or any deadline imposed by the court for acceptance of the plea offer. This shorter period is designed to accommodate CPL § 180.80 deadlines. If a prosecutor does not comply with this requirement, the defendant can file a motion alleging a violation of this requirement. If the court finds that the violation "materially affected" the defendant's decision not to plead guilty, the court can order the prosecution to reinstate the lapsed or withdrawn plea offer. If the prosecution refuses, the court must preclude the admis-

sion at trial of any evidence disclosed.[20] A guilty plea offer may not be conditioned on a defendant's waiver of these rights.

After a defendant has been indicted, and a plea offer has been made to a crime (not a violation), the prosecution must disclose all discoverable information not less than seven calendar days prior to the expiration date of any plea offer or any deadline by the court for acceptance of the guilty plea offer. A violation of this requirement can result in the sanctions for discovery violations relating to pre-indictment guilty pleas.[21]

After the filing of an accusatory instrument under the new statute, a prosecutor can now make a motion for a defendant to provide certain non-testimonial evidence, e.g., requiring the defendant to appear in a lineup, be fingerprinted, provide samples of blood, hair, etc. This section comports with *In re Abe A.*[22]

After the People have complied with their discovery obligations, the prosecutor must file a certificate of compliance upon the defendant and the court. The certificate must contain a statement that the prosecutor has exercised due diligence, and made reasonable inquiries to "ascertain the existence of material and information subject to discovery". The certificate must also identify the items that were disclosed to defense counsel. The court cannot sanction a prosecutor for filing a certificate in good faith when the certificate is inaccurate. The court, however, can impose certain sanctions, including the ordering of a mistrial; dismissal of charges; excluding evidence or giving an adverse inference instruction.[23] The People shall not be deemed ready for trial for purposes of CPL § 30.30, until a proper certificate of compliance has been filed.

Under a reciprocal discovery doctrine, the defendant is required to disclose certain information (previously required under the prior discovery statute) within 30 calendar days after service of the People's certificate of compliance. In addition, the defense must now also disclose the name, address and birthdate of witnesses the defense intends to call, including any prior witness' statements. The defendant is not required, however, to disclose the name and address of a witness being called solely to impeach a prosecution witness until after the People's witness has testified at trial. When disclosure is complete, the defense must file a certificate of compliance upon the prosecution and court.[24]

The new law also addresses the "flow of information" between the prosecutor handling a case and the police agency generating the arrest. Absent a court order, the police *must* make a complete copy of its file available for the prosecution. The arresting officer or assigned detective shall notify the prosecution *in writing* of the existence of all known 911 call recordings or video or audio recordings from a police body-worn camera; the prosecution shall then take steps to preserve these recordings. If a defendant makes a specific request regarding a recording, the prosecutor must take reasonable steps to ensure that it is preserved.[25]

Over the years, prosecutors had opposed discovery reform because of concerns that witnesses, and victims, would not cooperate if their identities were disclosed at early stages of the proceedings; concerns were raised that witnesses would be intimidated or harmed to prevent them from cooperating. The new discovery law provides broad authority for a court to issue a protective order to address these concerns. Thus, prosecutors can request a protective order to deny the disclosure of any information provided under the new discovery law. A court must conduct a hearing within three business days to determine whether "good cause" has been established to issue the order.[26]

The initial discovery obligation consists of approximately 21 categories of information, including material that the prosecution had not previously been required to disclose automatically.

In determining whether good cause has been shown, a court may consider, among other factors, the risk of physical harm or intimidation to any person; the danger to any witness stemming from factors such as an affiliation with a criminal enterprise; and whether the defendant has a history of witness intimidation. In the event a court rules adversely to the prosecutor, an appeal of the ruling must be sought within two business days of the ruling by filing an order to show cause at the Appellate Division. This type of interlocutory appeal is a rarity in criminal cases and the statute is silent on the procedures that will be followed at the appellate level – the return date for the motion, the timing of the decision, etc.

In order to address the concerns of the prosecution, a court also has the discretion to impose conditions upon the disclosure of information by the prosecution. For example, the court can order that material be disclosed only to counsel for the defendant (in which case the defendant must be so advised on the record). In addition, a court may order that counsel cannot disclose physical copies of documents to the defendant but that the defendant can inspect redacted copies of the documents at a prosecutor's office.[27]

Finally, there has been a change in the procedure for obtaining a subpoena *duces tecum* on government agencies. The new law dispenses with the requirement of a 24 hour notice on the agency as well as any requirement of

service on the prosecutor. The agency will have three days to produce the documents, but a court can dispense with the three day period in cases of an emergency.[28] Upon a motion to quash, a defendant need only show that the item sought is "reasonably likely to be relevant and *material* to the proceedings." Previously, defense counsel had to establish that the material was likely to be "relevant and *exculpatory.*" See *People v. Kozlowski*, 11 N.Y.3d 223 (2008).[29]

The speedy trial statute has been amended significantly. Initially, when the People state that they are ready for trial under the new law, a court must make an inquiry on the record as to the prosecution's actual readiness. If the court finds the statement to be illusory, the court can reject it. Any statement of readiness must be accompanied or preceded by a certificate of compliance with the discovery requirement, described above. Finally, in misdemeanor cases, a prosecutor can no longer state that he is ready on only some of the charges. In addition, a statement of readiness is only valid if the prosecutor certifies that all charges have been converted, or he dismisses those charges that have not been converted.[30]

The speedy trial statute will now apply to Vehicle and Traffic Law infractions although the new law does not set a time period by which the People must be ready. Thus, this amendment will address cases in which certain VTL infractions have remained after charges of VTL §§ 1192 or 509 were dismissed.[31]

In the past, a dismissal motion pursuant to the speedy trial statute could not be appealed after a plea of guilty. Under the new law, the denial can now be appealed, unless there has been a valid waiver of appeal.[32]

Finally, when a defendant seeks his release pursuant to CPL § 30.30(2), the motion can now be made *orally* without prior notice to the prosecutor.[33] Although the statute requires a court to "promptly conduct a hearing" when periods of readiness are in dispute, the statute is silent on certain procedural issues, e.g., whether the People's response can be oral, and whether the People must be given, or are entitled, to an adjournment to respond to a motion for which they received no notice. In addition, oral motions will be difficult to track for purposes of establishing an orderly record for appeal. The lack of sworn allegations to support the motion will undermine the reliability of the record.

There is no question that the new legislation, described above, will make sweeping and dramatic changes to New York's law on discovery, bail and the right to a speedy trial. At the same time, certain provisions do not provide sufficient procedural guidelines while others create burdens for the court that seem difficult if not impossible to manage. It is hoped that the Legislature can address these issues by the end of this legislative session.

Beyond the above legislation, the Legislature enacted numerous substantive and procedural changes to the Penal Law and Criminal Procedure Law.

As in the past, the Legislature enacted several new crimes. One new crime addresses what has been referred to as "revenge porn." Individuals in intimate relationships frequently share sexually explicit photographs and, on occasion after the relationship is over, the recipient of the images disseminates the images on the Internet. A new crime, Unlawful Dissemination of Publication of an Intimate Image, a class A misdemeanor, criminalizes the publication of these images.[34] New York joins 45 other states in outlawing this behavior, but is the first state to allow victims to seek a court-ordered injunction to require websites to remove the offending image.

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Under the new law, prosecutors must establish that the defendant intended to cause harm to the emotional, financial or physical welfare of another person and displayed the image without the other person's consent. In addition, prosecutors will have to prove that the defendant knew or reasonably should have known that the victim wanted the image to remain private. The new law also gives the victim the right to sue the defendant for damages for up to three years after the image is shared, or one year after the victim discovers or should have discovered the dissemination of the image. A victim can choose to proceed under the criminal law, civilly, or in both forums.

Another new crime, Staging a Motor Vehicle Accident, addresses the practice engaged in by criminals who intentionally cause a vehicular collision and then file fraudulent insurance claims to fleece insurance companies and their policy holders.[35] The new crime is a class E felony and, if serious physical injury or death is caused to another person, it is elevated to a class D felony.

The Legislature enacted several new laws to increase protection for tenants who are being harassed by their landlords. First, a new law provides statewide protection that had previously been afforded to New York City tenants under the Administrative Code. Under a new class A misdemeanor, Unlawful Eviction, a landlord can be

prosecuted for engaging in various acts designed to force or induce a tenant of more than 30 consecutive days to vacate the dwelling.[36]

A second new law increases protection for rent regulated tenants. The drafters of the bill noted that, under the existing statute, Harassment of a Rent Regulated Tenant, no landlord has ever been convicted because prosecutors were faced with a difficult burden of proof. They needed to prove not only that the offending landlord intended to cause the tenant to vacate his or her home, but that the tenant sustained physical injury as a result of the landlord's actions and that the landlord intended to cause the injury.

As a result, a new class A misdemeanor, Harassment of a Rent Regulated Tenant in the Second Degree was enacted.[37] The prosecutor must establish that the landlord engaged in various acts designed to evict the tenant but is not obligated to prove the infliction of physical injury. The former crime is now elevated to an E felony and, in addition to its current provisions, i.e., causing physical injury, it is expanded to include landlords who engage in a "systemic ongoing course of conduct" against two or more rent regulated tenants.

The Legislature has also decriminalized certain conduct. Gravity knives are no longer "*per se*" criminal weapons and the mere possession of a gravity knife is now lawful.[38] In approving the bill, Governor Cuomo noted that the state ban on gravity knives was held to be unconstitutional in the federal court (*Cracco v. Vance*, 376 F. Supp 304 (2019)). The court reasoned that the existing ban on gravity knives could result in arbitrary and discriminatory enforcement.

The Legislature has also decriminalized the possession of marijuana and reduced the penalties for possession of small amounts of marijuana.[39] The crime of Criminal Possession of Marijuana in the Fifth Degree (a class B misdemeanor) has been downgraded to Unlawful Possession of Marijuana in the First Degree (a violation). This would apply to amounts of one or two ounces of marijuana. It should be noted that the current class B misdemeanor crime for smoking marijuana in public has been eliminated. Similarly, Unlawful Possession of Marijuana (a violation) is now Unlawful Possession of Marijuana in the Second Degree (also a violation) but only carries a fine of up to $50.00. This would apply to amounts of less than an ounce of marijuana.

As part of the bill, individuals who had previously been convicted of the above marijuana crimes and other marijuana-related offenses under Article 220 of the Penal Law, can now move to vacate their convictions under Article 440 of the Criminal Procedure Law. In addition, the records of those cases can now be "expunged," a term that has now been added to the Criminal Procedure Law. If a record has been "expunged," the individual is not "required to divulge information pertaining to the arrest, prosecution and/or disposition of such a matter" (CPL § 1.20(45)). Over the next year, the Office of Court Administration will work with the Division of Criminal Justice Services to erase these records manually. The records will be expunged automatically although, it has been argued, a motion by defense counsel will help to speed the process.

Finally, the Legislature has removed "abortion" from sections of the Penal Law and Criminal Procedure Law to conform with state and federal cases upholding a woman's right to safe, legal abortions.[40]

The Legislature has also expanded the definition of certain crimes. For example, "gender identity or expression" has been added as a protected class under the crimes of Aggravated Harassment in the First and Second Degree and Hate Crimes. The term includes, but is not limited, to the status of being transgender.[41] In addition, a person can now be charged with Unlawfully Dealing with a Child in the Second Degree if he or she sells cigarettes to a person less than 21 years of age; previously the limit was 18 years of age.[42]

As in past sessions, the Legislature has enacted a number of significant procedural changes. One group of bills relates to changes in statutory deadlines. To address the societal issue of sexual abuse against minors, the Legislature enacted the Child Victims Act.[43] The new law expands opportunities for child victims of sexual abuse to bring civil claims. On the criminal side, the law changes the point at which the statute of limitations begins to run for crimes committed against minors.

Prior to the new law, class B felony sex offenses had no statute of limitations and for other sex crime felonies, a five-year statute of limitations began to run when the victim turned 18. For misdemeanors, there was a two-year statute of limitations that also began to run when the victim turned 18. The new law applies to all sex crimes (felonies and misdemeanors) which have a statute of limitations and the statute now begins to run when the victim reaches 23, instead of 18 years of age.

Another new law extends the statute of limitations for certain sexual offenses that fall below a B felony (there is no statute of limitations for a class B sexual felony). The bill would extend the statute of limitations to 20 years for rape in the second degree and criminal sexual assault in the second degree and to 10 years for rape in the third degree and criminal sexual act in the third degree. It would eliminate any statute of limitations for incest in the first degree.[44]

A third bill addresses the time constraints on a trial judge when suspending jury deliberations. Under the prior law, a court could only suspend jury deliberations for a "reasonable period of time", not to exceed 24 hours (excluding weekends and holidays). The new law allows the

court to suspend jury deliberations and separate the jury until the close of business on the second day following such recess or, for "good cause" shown, until the close of business on the third day following the recess (excluding weekends and holidays). This will allow courts to deal with emergencies that arise from time to time. Requiring "good cause" for any suspension longer than two business days, ensures that lengthy suspensions of jury deliberations will not become a routine matter.[45]

A new law allows women to postpone jury duty for up to two years if they present a note from a physician that they are breastfeeding.[46]

In a major revision of civil forfeiture procedures, the Legislature has curtailed a prosecutor's authority to seize a defendant's assets. For example, the new law eliminates a prosecutor's ability to obtain a pre-trial money judgment. Money judgments are still available but only after trial and only if a prosecutor secures a judgment against specific property proven to be tainted. In addition, *untainted* property may no longer be restrained before trial. A prosecutor can only restrain property prior to trial if he can satisfy a court that there is a substantial probability that he will be able to demonstrate at trial that the property is traceable to criminal activity. Finally, when a defense counsel seeks the release of restrained funds to pay his or her legal fees or the defendant's living expenses, a prosecutor can no longer object on the grounds that the funds should not be released because they were illegally obtained.[47]

Some new laws will be of great interest to defense counsel. The Legislature has eliminated an affirmative defense to murder; a defendant can no longer claim that he suffered from extreme emotional distress in committing murder when he discovered the victim's sexual orientation, sex or gender.[48] This defense, known as the "gay panic" defense, was eliminated because it was recognized to be homophobic (see N.Y.L.J., Aug. 5, 2019). Another bill authorizes counsel, who are assigned by the court to perfect an appeal, to assist clients more effectively by also handling any post-conviction collateral attacks.[49] Assigned lawyers in New York, unlike their counterparts in at least eight other states, have not been statutorily entitled to be compensated to investigate and pursue collateral motions, including claims of ineffective assistance of counsel. The new law addresses that issue.

Finally, a new law will provide public defense counsel (public defenders, legal aid societies and assigned counsel administrators) with direct access to criminal history reports of their clients from the Division of Criminal Justice Services.[50] Previously, public defense providers had to rely on prosecutors and judges for access to these reports.

A number of new laws will impact on court programs. For example, under current law, a defendant in a substance abuse treatment program, supervised by a drug court, is eligible to receive a two year period of interim probation, between the date of a guilty plea and the date of sentencing. That two-year period is now also available to defendants in other types of treatment courts, e.g., mental health court or veterans court.[51] Another bill allows any county outside of a city with a population of one million or more to transfer a case in a local criminal court to a "problem solving" court.[52]

Finally, an accessible magistrate, sitting in an arraignment courtroom during off-hours, now has the authority to remove the case of a juvenile offender or adolescent offender to Family Court, with the consent of the prosecutor.[53]

Other procedural changes were made in the last legislative session. A new law closes a loophole in the double jeopardy statute and ensures that state prosecutors will be able to prosecute an individual who has received a pardon, reprieve or other form of clemency from the President of the United States pursuant to Act II, § 2 of the Federal Constitution.[54]

Another bill clarifies an issue related to the sealing statute; all cases that result in only a conviction for a petty offense will now be sealed, regardless of the original arrest charge. In the past, law enforcement agencies sealed files where the arrest charge was a misdemeanor or felony, and the defendant was later convicted only of a traffic infraction or violation. The agencies, however, would not routinely seal cases in which the accused was only arrested for a violation or traffic infraction. That distinction has now been eliminated.[55]

The Legislature also clarified a conflict that had arisen in appellate decisions dealing with parking tickets. Some courts had held that, while a parking ticket is the functional equivalent of an appearance ticket, it is not an accusatory instrument and its filing does not confer jurisdiction over a defendant.[56] The Criminal Procedure Law has now been amended to define an appearance ticket issued for a parking infraction, as an "accusatory instrument."[57]

Finally, a new law expands the ability of charitable bail organizations to offer assistance to an increased number of indigent defendants. The law raises the monetary amount that such organizations may provide, from $2,000 to $10,000; allows organizations to post bail in any county; and reduces the certification fee from $1,000 to $500.[58]

During the last session the Legislature enacted an unusual number of bills to address issues relating to the unlawful possession and use of weapons. The most notable bill is the Red Flag bill, which has also been called the extreme risk protection order bill.[59] New York joins 17 other states which have approved laws of this nature and which authorize courts to issue special orders, allowing

the police to temporarily confiscate firearms from people who are found by a judge to be a danger to themselves or others. It should be noted that, under the new law, New York became the first state to permit school officials to apply for court intervention under these circumstances.

Under the new law, a petitioner can first apply for a temporary order to prohibit an individual (respondent) from possessing a weapon upon a finding that there is probable cause to believe that the respondent is likely to cause harm to himself or others. A hearing must be scheduled within three to six days although more time can be requested by the respondent.

Upon serving the temporary order, law enforcement officials can take possession of all weapons that are in "plain sight" and may conduct a search for weapons consistent with the search warrant provisions of the Criminal Procedure Law.

Within three to six days after service of the temporary order, a hearing will be held to determine whether a final order should be issued. If no temporary order is issued, the hearing will be held within ten business days after service of the initial application. The respondent can request additional time to prepare for the hearing.

At the hearing, the petitioner has the burden, by clear and convincing evidence, to establish that the respondent is likely to engage in conduct that would result in serious harm to himself or others. A final order, which can last up to one year, can prohibit the respondent from purchasing or possessing any firearms and can require the respondent to surrender any other firearms in his possession. Upon service of the order, law enforcement officials can seize any firearms in "plain sight" and can conduct a search consistent with the search warrant provisions of the Criminal Procedure Law.

During the effective period of the final order, the respondent can request a hearing to set aside the provisions of the order, based upon a change of circumstances; the burden is upon the respondent to establish any change by clear and convincing evidence.

Other weapon-related laws were enacted as well. It is now a class A misdemeanor to possess an "undetectable knife" with the intent to use it unlawfully against another.[60] An undetectable knife is one which does not utilize components that are detectible by a metal detector. It is also a class A misdemeanor to possess a "rapid-fire modification device" that can accelerate the firing rate of a semi-automatic weapon, rifle or shotgun.[61] It is now a class E felony to possess an "undetectable firearm, rifle or shotgun"; these weapons are not detectable by a magnetometer.[62]

In response to the tragic deaths of children who had access to guns owned by their parents, New York joins three other states in imposing criminal liability on a gun owner for failure to store a gun safely when a child may gain access to it. The Legislature created two new offenses: Failure to Safely Store Rifles, Shotguns and Firearms in the First and Second Degree.[63] It is a class A misdemeanor to fail to lock a weapon securely in an appropriate storage depository, where the gun owner resides with an individual under the age of 16. An amendment to the bill would permit a person who is under 16 years of age to have access to the weapon if he or she has a hunting license and is supervised by a parent or guardian.[64]

Other weapon-related laws will create an extension of up to 30 calendar days for a national background check;[65] require an investigation of the mental health records of another state where the applicant is domiciled there;[66] and permit law enforcement access to application information of firearm licenses.[67] Finally, schools are now prohibited from issuing written authorization to carry a firearm to anyone who is not primarily employed as a security guard, peace officer or police officer; this will ensure that teachers are not permitted to be armed while in school.[68]

Several new laws will impact on sentencing. The most notable is the Domestic Violence Survivors Justice Act,[69] which will serve to reduce sentences of both male and female survivors of domestic violence who are punished for acts taken to protect themselves from an abuser's violence.

The bill provides relief for two categories of defendants. First, a court can grant a reduced sentence if, after a hearing, the court determines that the defendant was a victim of domestic violence; the abuse was a significant contributing factor to the defendant's criminal behavior; and a sentence of imprisonment would be unduly harsh. Defendants serving a sentence can also apply for resentencing pursuant to this statute. The reader should consult the statute for specific alternate sentences available to first time felony offenders, second felony offenders, and class A felony drug offenders.

Under another new law, the maximum sentence for a class A misdemeanor has been changed from one year to 364 days.[70] It has been argued that this change could prevent federal immigration authorities from pursuing deportation proceedings because the sentence is no longer a "sentence of one year." The law permits an individual who has previously been sentenced to a definite sentence of one year to move to vacate the conviction; upon a vacatur of the conviction, the defendant can replead and be sentenced to a term of 364 days.

Other sentencing laws permit a judge to order shock incarceration for defendants convicted of burglary and robbery in the second degree[71] and allow state prison inmates entering solitary confinement in special housing units to make a telephone call upon admission to the unit, and at least once a week thereafter.[72]

Each year the Legislature enacts bill designed to protect crime victims. One new law authorizes a domestic violence victim to make a complaint to any local law enforcement agency in the state regardless of where the crime took place.[73] Other bills allow domestic partners of homicide victims to be eligible for compensation for out-of-pocket losses[74] and simplify the language in the notice given to domestic violence victims, which informs them of their legal rights and remedies.[75]

Finally, when a defendant has been convicted of offering a false instrument for filing, in connection with a written instrument that transferred title to property, e.g., a deed, the prosecutor may now file a motion on behalf of the victim to void the instrument that was the subject of the defendant's conviction.[76]

In an effort to remove certain barriers to reentry by those who have been convicted of crimes, the Legislature has enacted certain measures. In the area of employment, the Legislature has removed certain restrictions for those with felony convictions to obtain licenses to become real estate brokers, check cashiers, insurance adjustors, etc. In addition, it is now unlawful for any person to act adversely to an individual whose criminal action resulted in an adjournment in contemplation of dismissal. The Legislature has also repealed the mandatory suspension of a driver's license for certain speeding convictions and adjudications as a youthful and juvenile offender.[77]

Finally, the Legislature has enacted new laws to address the regulation of electric bicycles, electric scooters and stretch limousines. It is now a class B misdemeanor to leave the Scene of an Accident Involving an Electric Scooter if the operator is aware that serious physical injury has been caused.[78] A person who operates a stretch limousine after the vehicle has failed an inspection, shall now be guilty of an A misdemeanor.[79]

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1. 2019 N.Y. Laws ch. 59, eff. Jan. 1, 2020.
2. 2019 N.Y. Laws ch. 59, (amending Criminal Procedure Law § 510.10(1)), eff. Jan. 1, 2020.
3. 2019 N.Y. Laws ch. 59, (adding Criminal Procedure Law § 500.10(3-a)), eff. Jan. 1, 2020.
4. 2019 N.Y. Laws ch. 59, (adding Criminal Procedure Law § 510.40(4)), eff. Jan. 1, 2020.
5. *Id.*
6. 2019 N.Y. Laws ch. 59, (amending Criminal Procedure Law § 510.10), eff. Jan. 1, 2020.
7. 2019 N.Y. Laws ch. 59, (amending Criminal Procedure Law § 520.10), eff. Jan. 1, 2020.
8. 2019 N.Y. Laws ch. 59, (amending Criminal Procedure Law § 510.30), eff. Jan. 1, 2020.
9. 2019 N.Y. Laws ch. 59, (amending Criminal Procedure Law § 150.20), eff. Jan. 1, 2020.
10. 2019 N.Y. Laws ch. 59, (amending Criminal Procedure Law § 150.30), eff. Jan. 1, 2020.
11. 2019 N.Y. Laws ch. 59, (adding Criminal Procedure Law § 150.80), eff. Jan. 1, 2020.
12. 2019 N.Y. Laws ch. 59, (adding Criminal Procedure Law § 510.43), eff. Jan. 1, 2020.
13. 2019 N.Y. Laws ch. 59, (adding Criminal Procedure Law § 245.10), eff. Jan. 1, 2020.
14. 2019 N.Y. Laws ch. 59, (adding Criminal Procedure Law § 245.20(2)), eff. Jan. 1, 2020.
15. 2019 N.Y. Laws ch. 59, (adding Criminal Procedure Law § 245.30(3)), eff. Jan. 1, 2020.
16. 2019 N.Y. Laws ch. 59, (adding Criminal Procedure Law § 245.20), eff. Jan. 1, 2020.
17. 2019 N.Y. Laws ch. 59, (adding Criminal Procedure Law § 245.20(1)(e)), eff. Jan. 1, 2020.
18. 2019 N.Y. Laws ch. 59, (adding Criminal Procedure Law § 245.80(3)), eff. Jan. 1, 2020.
19. 2019 N.Y. Laws ch. 59, (adding Criminal Procedure Law § 245.20(3)), eff. Jan. 1, 2020.
20. 2019 N.Y. Laws ch. 59, (adding Criminal Procedure Law § 245.25), eff. Jan. 1, 2020.
21. 2019 N.Y. Laws ch. 59, (adding Criminal Procedure Law § 245.25), eff. Jan. 1, 2020.
22. 2019 N.Y. Laws ch. 59, (adding Criminal Procedure Law § 245.40), eff. Jan. 1, 2020.
23. 2019 N.Y. Laws ch. 59, (adding Criminal Procedure Law § 245.50), eff. Jan. 1, 2020.
24. 2019 N.Y. Laws ch. 59, (adding Criminal Procedure Law § 245.10), eff. Jan. 1, 2020.
25. 2019 N.Y. Laws ch. 59, (adding Criminal Procedure Law § 245.55), eff. Jan. 1, 2020.
26. 2019 N.Y. Laws ch. 59, (adding Criminal Procedure Law § 245.70(3)), eff. Jan. 1, 2020.
27. 2019 N.Y. Laws ch. 59, (adding Criminal Procedure Law § 245.70(1)), eff. Jan. 1, 2020.
28. 2019 N.Y. Laws ch. 59, (amending Criminal Procedure Law § 610.20(3), eff. Jan. 1, 2020.
29. 2019 N.Y. Laws ch. 59, (adding Criminal Procedure Law § 610.20(4)), eff. Jan. 1, 2020.
30. 2019 N.Y. Laws ch. 59, (adding Criminal Procedure Law § 30.30(5)), eff. Jan. 1, 2020.
31. 2019 N.Y. Laws ch. 59, (amending Criminal Procedure Law § 30.30(1)), eff. Jan. 1, 2020.
32. 2019 N.Y. Laws ch. 59, (adding Criminal Procedure Law § 30.30(5)), eff. Jan. 1, 2020.
33. 2019 N.Y. Laws ch. 59, (adding Criminal Procedure Law § 30.30(8)), eff. Jan. 1, 2020.
34. 2019 N.Y. Laws ch. 109, (adding Penal Law § 245.15), eff. Sept. 21, 2019.
35. 2019 N.Y. Laws ch. 151, (adding Penal Law § 176.75, 176.76), eff. Nov. 1, 2019.
36. 2019 N.Y. Laws ch. 36, (adding Real Property Actions and Proceedings § 768), eff. June 14, 2019.
37. A.6188, awaiting the Governor's signature.
38. 2019 N.Y. Laws ch. 34, (amending Penal Law § 265.01), eff. May 30, 2019.
39. 2019 N.Y. Laws ch. 131, 132, (amending Penal Law § 221.05, Criminal Procedure Law § 440.10), eff. Aug. 28, 2019.
40. 2019 N.Y. Laws ch. 1, (amending Penal Law § 125.00, *et. al.*), eff. Jan. 9, 2019.
41. 2019 N.Y. Laws ch. 8, (amending Penal Law § 485.05), eff. Nov. 1, 2019.
42. 2019 N.Y. Laws ch. 100, (amending Public Health Law § 1399-aa(4)), eff. Nov. 13, 2019.
43. 2019 N.Y. Laws ch. 11, (amending Criminal Procedure Law § 30.10), eff. Aug. 14, 2019.
44. 2019 N.Y. Laws ch. 315, (amending Criminal Procedure Law § 30.10), eff. Sept. 18, 2019.
45. A.7751, awaiting the Governor's signature.
46. 2019 N.Y. Laws ch. 38 (amending Judiciary Law § 517(a), eff. Oct. 21, 2019.
47. 2019 N.Y. Laws ch. 55, (amending Penal Law § 480.10), eff. Oct. 9, 2019.
48. 2019 N.Y. Laws ch. 45, (amending Penal Law § 125.25), eff. June 30, 2019.
49. 2019 N.Y. Laws ch. 446, eff. Nov. 8, 2019.
50. S.2198, awaiting the Governor's signature.
51. 2019 N.Y. Laws ch. 279, (amending Criminal Procedure Law § 390.30), eff. Nov. 12, 2019.
52. S.3889, awaiting the Governor's signature.
53. 2019 N.Y. Laws ch. 240, (amending Criminal Procedure Law §§ 722.20 and 722.21), eff. Aug. 30, 2019.
54. 2019 N.Y. Laws ch. 374 (adding Criminal Procedure Law 40.51), eff. Oct. 16, 2019.
55. 2019 N.Y. Laws ch. 359 (amending Criminal Procedure Law 160.55), eff. Jan. 5, 2020.
56. *See, e.g.*, *People v. Carillo*, 55 Misc. 3d 147A (App. Term 2d Dep't 2017).
57. 2019 N.Y. Laws ch. 450, eff. Nov. 8, 2019.
58. S.494, awaiting the Governor's signature.
59. 2019 N.Y. Laws ch. 19 (adding Article 63-A, CPLR), eff. Aug. 14, 2019.
60. 2019 N.Y. Laws ch. 146, (adding Penal Law § 265.00(5-d)), eff. Nov. 1, 2019.
61. 2019 N.Y. Laws ch. 130, (adding Penal Law § 265.01-c), eff. Nov. 27, 2019.
62. 2019 N.Y. Laws ch. 134, (adding Penal Law § 265.50, 265.55), eff. Jan. 26, 2019.
63. 2019 N.Y. Laws ch. 135, (amending and adding Penal Law §§ 265.45 and 265.50), eff. Sept. 28, 2019.
64. 2019 N.Y. Laws ch. 133, (amending Penal Law § 265.45), eff. Sept. 28, 2019.
65. 2019 N.Y. Laws ch. 129, (amending Penal Law § 400.00), eff. Sept. 12, 2019.
66. 2019 N.Y. Laws ch. 242, (amending Penal Law § 400.00), eff. Dec. 2, 2019.
67. 2019 N.Y. Laws ch. 244, (amending Penal Law § 400.00), eff. Sept. 3, 2019.
68. 2019 N.Y. Laws ch. 138, (amending Penal Law § 265.01-a), eff. June 6, 2019.
69. 2019 N.Y. Laws ch. 31, (amending Penal Law § 60.12), eff. May 14, 2019.
70. 2019 N.Y. Laws ch. 55, (amending Penal Law § 70.15), eff. April 13, 2019.
71. 2019 N.Y. Laws ch. 55, (adding Penal Law § 60.05), eff. May 12, 2019.
72. 2019 N.Y. Laws ch. 261, (adding Correction Law § 137(6)), eff. Sept. 13, 2019.
73. 2019 N.Y. Laws ch. 152, (adding Executive Law § 646), eff. Oct. 18, 2019.
74. A.2566, awaiting the Governor's signature.
75. A.7395, awaiting the Governor's signature.
76. 2019 N.Y. Laws ch. 167, (adding Criminal Procedure Law § 420.45), eff. Aug. 14, 2019.
77. 2019 N.Y. Laws ch. 55 and 59, (amending Executive Law § 296, repealing Vehicle and Traffic Law § 510(2)(v)–(vii), and amending various licensing statutes), eff. April 12, 2019.
78. S.5294, awaiting the Governor's signature.
79. 2019 N.Y. Laws ch. 59, (amending § 140 Transportation Law), eff. April 12, 2019.

New York's Housing Stability and Tenant Protection Act of 2019:

WHAT LAWYERS MUST KNOW–PART III

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In Parts I and II of our series, we discussed how the Housing Stability and Tenant Protection Act of 2019 (HSTPA[1]) has dramatically altered New York's residential-rental landscape. Part I (91 N.Y. St. B.J. 35 (Sept./Oct. 2019)) outlined the law before and after HSTPA. Part II (91 N.Y. St. B.J. 26 (Nov. 2019)) focused on rent regulation. This concluding part of our three-part series covers the rest of HSTPA.

Historically, changes in New York landlord-tenant law focused on the rent-regulation scheme. Only here and there did the Legislature amend laws pertaining to unregulated units or how courts must adjudicate eviction actions and proceedings. HSTPA has changed that history. To the tenants' benefit and the landlords' burden, the Legislature has amended many parts of the Real Property

Law (RPL), the Real Property Actions and Proceedings Law (RPAPL), and the General Obligations Law (GOL), starting with how tenancies are created and ending with how tenants may be restored to possession after eviction.

SECURITY DEPOSITS AND PRE-PAID RENT ARE LIMITED TO ONE MONTH'S RENT

Although security deposits have long been limited to one month's rent for rent-stabilized tenants, HSTPA amended the GOL effective June 14, 2019, to extend this limit to unregulated tenants statewide. The practice of requiring pre-paid rent, typically as the "first and last months' rent," is now prohibited. The broad language of the new limitation includes "advances" as well as deposits. Some landlords argue, however, that with the word "or" in GOL § 7-108 referring to "deposit or advance," first and last months' rent are still allowed, because it is payment for current use and occupancy

The amended GOL now also provides for a mandatory inspection procedure. Landlords must give tenants an opportunity to inspect the premises before they take occupancy. The parties "shall" then execute a written agreement noting any conditions. The law limits the admissibility of this agreement to a tenant's action to recover a security deposit and only as evidence of conditions at the start of the tenancy. Tenants may not use the agreement to establish the existence of violations in an HP (repair) proceeding or to assert a warranty-of-habitability breach in a nonpayment proceeding. Similarly, a landlord may not use the agreement to impeach a tenant's testimony at an abatement hearing asserting a habitability breach.

A landlord must again notify the tenant of the right to inspect the premises with the landlord 1–2 weeks before the tenant vacates. For a landlord to retain any portion of the security deposit, the landlord must, after the vacatur inspection, give the tenant an itemized statement specifying any repairs or cleaning needed to give the tenant an opportunity to cure the conditions.

Under the former law, landlords had to return a security deposit within a "reasonable time," meaning a month or two. The law now provides that if any portion of the security deposit is retained, the landlord must provide (i) an itemized statement of the claimed conditions within 14 days after the tenant vacates and (ii) any remaining portion of the deposit. A landlord that fails to comply forfeits any claim to the deposit.[2] The new law also narrows what may be withheld from the deposit to include "reasonable" costs due to nonpayment of rent or utility charges, damage beyond ordinary wear and tear, and moving and storage of the tenant's belongings. Notably excluded are additional rents such as late and legal fees. Landlords have the burden of proof to justify their retention of a security deposit, and the GOL now provides for punitive damages of up to twice the amount of the deposit for any willful violation of its provisions.

These changes are welcomed by tenants, who have long flooded the halls of small-claims courts with complaints that their landlords wrongly withheld their security deposits or inflated and fabricated repair costs to retain their deposits. But prospective tenants with no or poor credit history, newcomers to New York, and students enrolled in New York's many universities might be collateral damage of the new laws. Landlords might be unwilling to rent to them without the additional protection of an increased deposit or pre-paid rent. Business reasons often deter landlords from accepting a guarantor rather than security deposits and pre-paid rent. Landlords are already testing alternative security measures, such as requiring that tenants provide a bond to ensure payment of rent and a guarantor to pay an additional security deposit. The Division of Housing and Com-

munity Renewal (DHCR) has issued guidance since HSTPA's passage prohibiting landlords from demanding that a guarantor "or any third party" pay more than one month's security,[3] but this guidance applies only to rent-stabilized tenants. Time will tell whether courts follow the DHCR's lead in determining that the amended GOL prohibits using these security measures with unregulated tenants.

Landlords maintain that 14 days is too short to inspect the premises, prepare an itemized statement, and return any uncontested portion of a deposit. Landlords also argue that the inspection procedure is unworkable, because HSTPA requires that the landlord and tenant reach an agreement specifying conditions in the premises but provides no guidance about the form or content of the agreement or how the parties can proceed if they cannot agree. The statute requires that the initial inspection occur after the lease is signed, thus binding the parties to a contentious landlord-relationship from its inception. Some landlords will try to avoid this dilemma by holding the inspection before the lease is executed, but that might cause tenants to avoid raising conditions rather than risk having the landlord decide not to rent to them. Some landlords and tenants, we hear, are already contracting around GOL § 7-108(c) with language in which the tenant waives this inspection.

Landlords also object that the penalties for violating the new law are not limited to failing to return a security deposit but also seem to apply to any lesser violation, such as scheduling the final inspection outside the statute's one-week window. because no distinction is made between security deposits and pre-paid rent in imposing punitive damages, moreover, the potential liability could be high. In the case of a foreign resident, for example, in which a landlord requires a year's pre-paid rent, this practice could result in liability equal to two years' rent.

Under RPL § 235-e, once a tenancy is in effect, a tenant who demands rent receipts must get them. The receipt must include the date, amount paid, identity of the premises, and period covered. If the payment is made personally, the receipt must be given immediately. If the rent is paid in another manner, the receipt must be provided within 15 days. Once a receipt is demanded, the obligation to provide receipts continues for the life of the tenancy. Landlords must maintain records of cash payments for three years.

THE RETALIATORY EVICTION PRESUMPTION HAS BEEN EXPANDED

RPL § 223-b protects tenants exercising their right to complain to governmental agencies, enforce their lease rights, and join a tenants' organization. Before HSTPA, landlords who commenced a holdover proceeding against a tenant within six months of exercising these rights created a rebuttable presumption that the proceeding was commenced in retaliation for the tenant's action.

HSTPA expands the scope and enforcement of RPL § 223-b, enlarging the time period during which the presumption applies from six months to a year and extending the presumption from holdover proceedings to nonpayment proceedings and also to "unreasonable" rent increases. Previously, the law covered only complaints of housing-code violations to enforcement agencies. HSTPA now covers habitability complaints, too. And tenant complaints are now protected if they are made to the landlord or its agent. Once a tenant raises a retaliatory-eviction claim, the landlord bears the burden of establishing a non-retaliatory motive for an eviction proceeding or raising rent. The prior law required simply that the landlord provide a "credible explanation." A landlord that fails to rebut the presumption of retaliation can be required to offer a new lease or lease renewal of

up to a year with only a "reasonable" rent increase. Additionally, a landlord could be liable for attorney fees if the tenant seeks damages in a civil action.

Tenants applaud the extension of RPL § 223-b. They argue that the former statute assumed, incorrectly, that tenants, including those who do not speak English, were informed of their rights and somehow knew about governmental agencies tasked with enforcing their rights. The reality is that many tenants without heat or hot water know no option but complaining to a landlord. HSTPA now bars unscrupulous landlords from retaliating against these tenants. Similarly, tenants argue that by including complaints of the breach of the warranty of habitability, HSTPA recognized that although the Housing Maintenance Code establishes *minimum* housing standards, New York law affords tenants the broader assurance that the premises be "fit and habitable."

Opponents of the new statute decry it as a capricious extension of RPL § 223-b that prevents one wrong by perpetrating another. Landlords argue that protections against unethical landlords are warranted but that HSTPA punishes landlords for exercising legitimate rights. By requiring a landlord to prove a non-retaliatory motive for a nonpayment proceeding, HSTPA rejects the notion that not paying rent is inherently a sufficiently non-retaliatory motive to commence a nonpayment proceeding. Landlords also believe that HSTPA will incentivize tenants to make frivolous habitability claims. Under the new law, a tenant might complain about a noisy refrigerator to immunize them against an eviction proceeding for a year. Because a landlord is not always notified of a tenant complaint to a governmental agency, particularly if the complaint does not result in a violation, landlords might also be saddled with a presumption of retaliation if it commences an unrelated eviction proceeding, even if the landlord had no knowledge of the complaint. Landlords argue against what they say is the inequity of a statute that permits a finding of retaliation without knowledge of the conduct against which the landlord is presumed to have retaliated. This inequity flows from an alleged double standard in the new law, which requires only a "good faith" complaint by a tenant, without mandating an equivalent inquiry into the landlord's "good faith" intent in bringing the eviction proceeding *before* the presumption of retaliation attaches.

Ambiguities abound in the amended RPL § 223-b. The statute provides no guidance about how landlords may rebut the presumption or whether, in addition to the underlying basis for the eviction proceeding, a second non-retaliatory motive is required. It is also unclear what role the timing of the complaint plays in triggering the presumption of retaliation. Will the presumption apply if the tenant fails to pay rent or is guilty of objectionable conduct, but makes a habitability claim before the landlord can commence an eviction proceeding? By requiring only a "good-faith" complaint, the statute focuses on the tenant's subjective intent in complaining without addressing whether the complaint is objectively valid. Tenants might believe, incorrectly but in good faith, that they are entitled to choose the paint color when the landlord repaints the apartment. Does the tenant nonetheless get the benefit of the presumption of retaliation if the landlord commences a nonpayment proceeding after the tenant withholds rent in objection to the paint color? Finally, offering a new lease with an "unreasonable" rent increase is now a prohibited retaliation, but HSTPA does not specify a standard or whether the standard should be determined from the perspective of landlord or tenant. Tenants will argue that any increase be limited to a percentage of the current rent, but landlords will retort that it should be set by the market, even if it results in a large increase over the existing rent. The courts will grapple with the amended RPL § 223-b for years.

The practice of requiring pre-paid rent, typically as the "first and last months' rent," is now prohibited.

BLACKLISTS HAVE BEEN BANNED

The abusive use of so-called tenant blacklists in leasing practices has been widely publicized. Blacklists are lists of tenants named as respondents in Housing Court litigation. Landlords have used the lists to screen potential applicants.[4] These lists were often misleading; they provided minimal information about the proceeding or its outcome, including whether the tenant essentially prevailed or had a legitimate basis for litigating. Tenant advocates found these blacklists appalling because they came from data compiled and sold by the Unified Court System. HSTPA seeks to curb the use of blacklists by forbidding the denial of a rental application on the basis of past or present landlord-tenant actions or RPAPL Art. 7. summary proceedings. A rebuttable presumption arises that HSTPA has been violated if a landlord seeks information from a tenant-screening website or inspects court records. The landlord has the burden to provide an alternative reason for rejecting a tenancy. HSTPA now also forbids the Unified Court System from selling residential tenancy and eviction data.

While tenants' reception to the ban has been favorable, tenants are concerned that enforcement will be ineffective. New York's Attorney General has enforcement pow-

ers, and using a blacklist carries fines of between $500 and $1,000 per violation. But no private cause of action is available. Tenants worry that the AG's resources will be insufficient to stop what they believe is the widespread use of blacklists. Additionally, tenant advocates complain that blacklists will still apply out-of-state.

In the meantime, landlords have voiced their concern that HSTPA has hamstrung them from filtering prospective tenants who have histories of objectionable behavior or who chronically fail to pay rent. Landlords also argue that HSTPA blindfolds from examining information regarding potential threats or nuisances that tenants may pose to other tenants while exposing them to liability to other occupants if the tenant deals drugs from the apartment, throws loud parties late at night, sets fires in the building, or is hostile to neighbors. Furthermore, landlords argue that nothing is wrong in refusing a tenant based on past defaults in paying rent.

To the extent that the blacklist ban addresses real abuses, landlords maintain that HSTPA has provided a remedy ill-fitted to the problem and that a better solution would have permitted using records of holdover proceedings if the tenant was evicted for objectionable conduct or a judgment was entered against a tenant in a nonpayment proceeding without a finding that the tenant was entitled to an abatement. HSTPA was intended to protect tenants involved in Housing Court disputes because they needed repairs. But its actual effect, landlords say, is to prevent them from considering court records showing that the tenant was evicted for illegal activity or other legitimate reasons.

NOTICE IS NOW REQUIRED TO RAISE THE RENT FOR UNREGULATED APARTMENTS; NEW TIME PERIODS TO TERMINATE MONTH-TO-MONTH TENANCIES

Prior to HSTPA, a month-to-month tenancy could be terminated with a 30-day notice. If a tenant held over at the end of a fair-market lease, a proceeding could be commenced without a predicate notice if no rent was accepted after the lease expired. HSTPA amends the RPL to require that if a residential landlord does not intend to renew a lease, or intends to raise the rent by 5% or more, the landlord must notify the tenant of the rent increase or vacate date. The notice required is determined by the length of the tenancy or occupancy: up to a year, the tenant must be given 30 days' notice; between a year and two years, the tenant must be given 60 days' notice; and two years or more, the tenant must be given 90 days' notice. If a landlord fails to provide the notice, the tenancy will continue on the same terms until the proper notice is given and the required time passes.

In New York City, delivery of the notice must be made by service under RPAPL 735.[5] HSTPA does not set forth a service requirement outside New York City, but some landlords will deem it prudent to effectuate RPAPL 735 service to avoid motion practice on the issue.

Under current and prior law, New York City tenants are not required to provide written notice before vacating. Outside New York City, a tenant must give a month's notice to terminate a month-to-month tenancy, but the notice need not be in writing. The effective date for these provisions is October 12, 2019. Some landlords and tenants are using their right to contract to waive or modify RPL § 232-b with lease clauses allowing tenants to terminate their tenancies with at least two month's written notice.

Landlords, particularly smaller landlords, complain that the new law forces them to choose between regaining an apartment and receiving rent. It is common for a tenant served with a termination notice not to pay rent. If a 90-day notice is required, the rent will not be paid for the next three months. Given HSTPA's other provisions, in which tenants have a right to adjourn a proceeding, it might be five months or more in some parts of New York before a landlord can seek a deposit of prospective rent. As to the five months not paid, a landlord might obtain a money judgment, but it might be from a judgment-proof tenant. Landlords will still be able to bring a nonpayment proceeding, but landlords argue that this adds to the burden and expense of removing tenants.

EXPANDED TENANTS PROTECTIONS AND AMENDMENTS TO THE RPAPL INCREASE PAUSES BEFORE, DURING, AND AFTER EVICTION PROCEEDINGS

I. Pauses Getting to Court

Changes to the RPL expand the notice requirements to terminate month-to-month tenancies and provide significant notice requirements for unregulated tenants. But HSTPA simultaneously passed comprehensive reforms to the RPAPL, the statutory authority governing summary-eviction proceedings. The Legislature enacted these pauses (landlords might call them "delays") to prevent evictions or to slow them down — or at least to postpone the life-crushing consequences of an eviction.

Before HSTPA, service of a holdover petition had to be made 5–12 days before the first court appearance. As amended, RPAPL 733 provides that holdover proceedings must be made returnable 10–17 days after the petition is served. Additionally, HSTPA eliminated the provision of RPAPL 733 that permitted a landlord in a holdover proceeding to demand an answer 3 days before the initial court date if the petition was served at least 8 days before the trial date. Landlords argue that this hollows out the operating assumption of summary proceedings. Although already rare in practice before HSTPA,

the RPAPL provided that a summary proceeding could go to trial on the first court appearance. But the summary nature of a proceeding is undermined if the landlord does not have a meaningful opportunity to review the answer and prepare for trial. The practical effect is that tenants will receive an automatic adjournment of the first court appearance.

HSTPA has similarly enlarged time periods in nonpayment proceedings. Previously, if a tenant did not pay rent, RPAPL 711 required that the tenant be given a written three-day rent demand or an oral demand (an oral demand did not have to give three days) before a landlord could commence a nonpayment proceeding. HSTPA amended RPAPL 711 to abolish oral rent demands and to increase the notice period for written rent demands to 14 days. HSTPA also amended RPL § 235-e to require that tenants be notified, by certified mail, if rent is not received within five days of the due date. If the landlord fails to serve this reminder notice before commencing a nonpayment proceeding, a tenant may raise that failure as an affirmative defense. RPAPL 732 has also been amended to increase from 5 to 10 days the time tenants have to answer a nonpayment proceeding. And if the tenant defaults in answering, the court still has the discretion to stay issuance of the warrant for five days.

It is also unclear whether the rent demand must give the new "reminder" notice in. Until the courts resolve the matter, conservative landlord-side practitioners will conclude that they should do so (to avoid motion practice). The practical result is that a rent demand can be made no earlier than the fifth day after the rent is due. Assuming that rent is due on the first, this would be the sixth day.

Under prior law, a landlord could make an oral rent demand and serve a nonpayment petition the next day. Now there will now likely be a nearly three-week delay when the time to effect service is added to the 14 days' notice required for a rent demand. Accounting for the additional 10 days a tenant has to answer the petition and, in New York City, the additional 3–8 days before the initial court appearance, another month's rent will come due before the parties ever get to court. Landlords complain that every tenant knows without being reminded that rent is due on the first of the month and that a "reminder" notice serves no function other than to graft a mandatory five-day grace period onto every New York lease. Landlords also complain about the cost of the required mailings.

Landlord advocates additionally contend by requiring that notice be issued by a landlord or agent "authorized to receive rent," HSTPA appears to preclude a landlord's attorney from giving notice. Additionally, HSTPA is silent about whether a reminder must be sent each month that rent is late or whether a single reminder for a number of months of arrears will suffice.

Tenant advocates offer that lengthening the time necessary to commence a nonpayment proceeding gives tenants living paycheck to paycheck time to pay rent arrears and perhaps avoid a nonpayment proceeding altogether. If a tenant has difficulty paying rent, missing work to make a court appearance is counterproductive, too. The reminder notice further alerts tenants before a proceeding is started if their rent check was lost in the mail or received and not accounted for by the landlord's managing agent.

Commercial landlords respond that these arguments might be relevant for residential tenants but have no bearing in the commercial context. They say that a reminder notice should not be required for a commercial tenant (the statute does not state that the reminder is required only for residential tenants) and that although a residential tenant paying $1,500 a month will benefit from a slower eviction process, the landlord of a commercial tenant paying $150,000 a month should not be forced to wait until $300,000 in arrears accrues before their first court appearance. Landlords argue that this is an issue that pervades much of HSTPA. Many policy objectives underlying the new laws are irrelevant to commercial tenants; businesses are less vulnerable to an imbalance in bargaining power, and evicting a business poses less of a societal concern than evicting a family. But HSTPA, business interests argue, fails in many instances to draw a meaningful distinction between residential and commercial matters.

HSTPA has also opened the floodgates to competing interpretations by providing that the failure to give a rent-reminder notice may be raised as an affirmative defense but giving no guidance about its application or consequences. On its face, HSTPA suggests that the mere failure to remind a tenant of a pre-existing, contractual obligation waives forever the obligation to pay rent, a draconian result. It could also act as a procedural bar, much like a failure to make a proper rent demand will result in a dismissal of the proceeding without prejudice to a landlord's ability to recover rent once the reminder is given. Alternatively, the affirmative defense, if established, could result in the landlord's being barred from recovering rent in a summary proceeding, but the claim could be asserted in a plenary action. Some landlords, however, are positing that the New York State Legislature has not prohibited modifications to RPL § 235-e. They are using their right to contract to waive or modify that section.

Additionally, RPAPL § 711 previously provided that if a tenant died during a term of the lease and the rent had not been paid, no representative or person has taken occupancy, and no administrator or executor had been appointed within three months of the tenant's death, a proceeding could be commenced against a surviving

spouse or, if none, then a surviving issue or distribute. HSTPA provides that when a tenant dies, rent is not paid, and the apartment is occupied by a person with a claim of possession, a proceeding may be commenced naming the occupants of the apartment seeking a possessory judgment against the estate. Entry of the judgment shall be without prejudice to the occupants' possessory claims, and any warrant shall not be effective against the occupants. Any succession claim will be litigated in a holdover proceeding.

II. Pauses in Court

HSTPA has altered the pace of summary proceedings by reforming the limits and disincentives to adjournments. Before HSTPA, RPAPL 745 discouraged excessive adjournments. It provided that after two adjournments by the tenant, or 30 days, the court was required to direct a tenant to deposit rent or use and occupancy that had come due since the petition was served. While often disregarded in practice, the law also limited adjournments to a maximum of 10 days, except with the parties' consent. RPAPL 745 has been amended to provide that an application for a rent deposit cannot be made until a tenant's second request for an adjournment or until the proceeding has been on the calendar for 60 days, where no delay is attributable to a landlord. The 10-day limit for adjournments has been replaced with a 14-day minimum. The first request for an adjournment by a respondent unrepresented by counsel does not count toward the 60-day limit, likely extending as a practical matter the minimum to 90 days or more. And although a court was required to grant use and occupancy under the prior law if the conditions were met, doing so is now discretionary.

Another change to RPAPL 745 that will generate pauses is that HSTPA has eliminated the practice of making an oral application for a rent deposit or use and occupancy. A written motion is now required. That creates the potential for additional adjournments of the motion itself and to brief the motion, in addition to any time a court takes to decide the motion. Furthermore, rent-deposit orders are prospective, requiring payment only of rent and use and occupancy accruing after the order issues. The tenant may not be required to pay any rent already due or which accrues while the motion is pending.

A tenant or occupant can also defend against a rent-deposit application by raising one of the following grounds or defenses: (i) the petitioner is not a proper party to the proceeding; (ii) actual, partial, or constructive eviction if the tenant has vacated the premises; (iii) a Social Services Law § 143-b (Spiegel Law) defense; (iv) a hazardous or immediately hazardous Housing Maintenance Code violation in the apartment or the building's common areas; (v) a colorable rent-overcharge defense; (vi) the apartment violates the certificate of occupancy

or is illegal under the Multiple Dwelling Law or Housing Maintenance Code; or (vii) the court lacks personal jurisdiction over the tenant or occupant.

The new law has greatly reduced, if not eliminated, the penalties for a respondent's failure to comply with a rent-deposit order. Under prior law, if the tenant failed to comply with a rent-deposit order, the court could dismiss the tenant's defenses and counterclaims and grant the landlord a money and even possessory judgment. Under HSTPA, a tenant's defenses or counterclaims are no longer stricken and no judgment may be granted. At the court's discretion, the tenant's time to comply may be extended for good cause, or the court may refer the matter for an "immediate" trial. Still, the urgency suggested by the word "immediate" is belied by HSTPA's statement that this means only that there will be no further adjournments at the respondent's sole request and that the case shall be assigned to a trial-ready part with the trial to commence "as soon as practicable."[6] In reality, the "immediate" trial might be held weeks or months later.

In setting the use and occupancy or rent to be paid, a court may not exceed the regulated rent or the tenant's share under a subsidy program (in effect or expired) unless the tenant has entered into a new agreement to pay the full rent. If the tenant or occupant is on a fixed income, the amount required to be deposited may not exceed 30% of income. Department of Social Services (DSS) and other government housing subsidies are not considered income under this section.

Tenants welcome the amendments to RPAPL 745. They are necessary, they argue, because the prior law thwarted tenants' basic right to invoke the warranty of habitability and withhold rent to compel urgent and necessary repairs to their apartments. The prior law was unjust, they argue, in that it required tenants exercising the right to withhold rent to begin paying rent soon after they began to withhold it, eliminating their only leverage to compel their landlords to fix uninhabitable apartments.

Landlords maintain that RPAPL 745 has been eviscerated. They argue that the bar has been set too low for tenants, who are required only to show that the defense has been "properly" raised, and that the qualifying grounds to defeat a rent-deposit application now encompass nearly all the defenses tenants typically raise. They contend, furthermore, that landlords have little reason to invoke RPAPL 745. Even if a landlord gets a rent-deposit order after months and motion practice, HSTPA penalties will be insufficient to compel tenant compliance. Landlords also note that although the amendments to RPAPL 745 are geared toward residential tenants, the amended RPAPL 745 conflates residential and commercial tenancies, arguably overlooking essential differences relevant to the law's core objectives. The nature of a commercial tenant's relationship to their commercial premises is different from the relationship residential tenants have to their homes, and commercial tenants need less protection. By not compelling commercial tenants to pay rent accruing during the pendency of a proceeding, HSTPA allows commercial tenants to weaponize summary proceedings against commercial landlords. Landlords emphasize the injustice of the Legislature's favoring the tenant's business interests over the landlord's business interests. Some landlords are positing that the Legislature has not prohibited modifications to RPAPL 745 and are modifying their leases accordingly. Whether these lease terms are valid remains to be seen.

III. Pauses at the Close of Eviction Proceedings

Under prior law, if a landlord won a holdover proceeding based on a lease breach against a New York City residential tenant, the tenant had an automatic stay for 10 days under RPAPL 753 to cure the breach. The courts were also empowered to stay the issuance of the warrant for up to six months. HSTPA revised RPAPL 753 to expand to 30 days the automatic post-trial period on breach-of-lease holdovers. It also doubled the length of the discretionary stay to one year and made it available for nonpayment proceedings across New York State.

In exercising its discretion to stay an eviction, the courts may now consider a number of factors, including health, exacerbation of an ongoing condition, a child's enrollment in school, and any other extenuating circumstance affecting the ability of the applicant or the applicant's family to relocate and maintain quality of life. In determining whether to grant the stay or in setting the length or other terms of the stay, a court is also required to consider any substantial hardship the stay might impose on the landlord. The prior law carved out exceptions to the court's authority to grant the stay if the landlord intended in good faith to demolish the building and build a new one, or if the landlord established that the occupant is objectionable. HSTPA eliminated the demolition exception, but the exception for objectionable occupants remains. The stay must be conditioned on payment of the amount that will come due during the stay, but HSTPA permits payment by installment. The prior iteration of RPAPL 753 made mandatory the payment of all rent unpaid before a stay could be granted. The amended RPAPL 753 makes this requirement discretionary.

Tenants believe that HSTPA's additional protections are a small but necessary bulwark against New York's housing-affordability crisis.

Before HSTPA, the law did not address a tenant's payment of all or some portion of the rent on the disposition of a nonpayment proceeding. By conditioning a New York City stay on the respondent's payment or deposit of the judgment amount prior to execution of the warrant, however, RPAPL 747-a limited the courts' discretion in a nonpayment proceeding to stay issuance or execution of a warrant of eviction or re-letting the premises. HSTPA repealed RPAPL 747-a and enacted RPAPL 731(4), which provides that if a tenant pays the full amount of rent due to the landlord "prior to the hearing of the petition," the payment "shall be accepted by the landlord and renders moot the grounds on which the special proceeding was commenced."

Many landlords view this as codifying the practice in many courts. Courts generally dismissed these cases, or the parties discontinued them. Nonetheless, landlords question the application of the provision and whether it permits a tenant to make payment before the first court appearance or any later court appearance and whether a tenant must pay the petition amount or the amount that has accrued at the time of payment.

That provision must also be considered in conjunction with the amendments to RPAPL 702, which redefines "residential rent" narrowly to exclude fees, charges, and other penalties. Some argue that although HSTPA precludes a demand for attorney fees allegedly due prior to

the proceeding, attorney fees incurred in connection with the proceeding itself are still recoverable. Others argue that because RPAPL 702 provides that "[n]o fees . . . other than rent may be sought in a summary proceeding," a landlord is relegated to a plenary action to recover its attorney fees. Some courts, we hear, allow attorney fees in a separate, nonpossessory money judgment. Other courts, we are told, believe that landlords may not seek attorney fees in a summary proceeding but that tenants may. Still other courts, we understand, believe that attorney fees may not be awarded as part of a claim or counterclaim but only when fashioning an equitable remedy to restore a tenancy after an eviction or in the context of sanctions. No published opinion has addressed these important questions yet. And RPAPL 702 provides that attorney fees may not be granted on a default judgment, even when a respondent is served personally.

This aspect of HSTPA might lead landlords to eliminate from their leases the right of a prevailing party to collect attorney fees. It might also cause landlords to bring plenary ejectment actions, in which attorney fees may be sought and (for market tenancies) be part of a possessory judgment.

RPL § 238-a now limits late fees to 5% or $50, whichever is less. Fees for background checks are limited to $20 or the actual cost, whichever is less, and the landlord is required to give a tenant a copy of the background check and a receipt for payment and may not charge a fee for a background check if a tenant provides a copy of a background or credit check less than 30 days old. Controversies abound over this new rule, because background checks exceed $20 and because the courts must resolve whether a third party like a real-estate broker may accept fees a landlord may not accept.

Landlords fear that if a residential tenant can pay the rent sought in the petition after many court appearances and many months into the proceeding, and thereby avoid both eviction and any late fees, interest, or legal fees incurred by the landlord in prosecuting the proceeding, they will effectively become interest-free lenders to tenants. The inequity of the situation will be exacerbated if tenants successfully argue that RPAPL 731(4) requires that the tenant pay only the petition amount. That would force landlords to commence another proceeding to recover rent arrears that accrued while the first proceeding was pending.

Although the exclusion of attorney fees applies only to residential tenants, if a commercial tenant in a nonpayment proceeding pays rent under RPAPL 731(4), the landlord may lose its claim for attorney fees, because the matter was not litigated to conclusion, such that the landlord can claim to be the prevailing party, a requirement to recover attorney fees.

Before HSTPA, RPAPL 749 provided that the issuance of a warrant of eviction operated to cancel the lease and annul the landlord-tenant relationship, depriving the court of the authority to vacate the warrant. The issuance of a warrant of eviction no longer annuls the tenancy. The court may, for good cause, stay or vacate a warrant, stay reletting or renovation, and restore a tenant to possession unless the landlord establishes that the tenant withheld the rent due in bad faith. And, profoundly, the new RPAPL now requires vacatur of the warrant if the tenant pays everything prior to execution.

RPAPL 749 now also changes the marshal's notice of eviction from a 72-hour notice to a 14-day notice, thus giving tenants more time to move before an eviction and more time to file an order to show cause to stay an eviction.

RESIDENTIAL LANDLORDS NOW HAVE A DUTY TO MITIGATE

Before HSTPA, landlords did not have an obligation to mitigate damages if a tenant broke the lease by vacating early. Following time-honored precedents like *Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc.*,[7] New York courts permitted landlords to leave the apartment vacant for the remainder of the lease. The tenant would be liable for rent through the end of the term. HSTPA now provides in RPL § 227-e that landlords of residential units must "in good faith and according to the landlord's resources and abilities, take reasonable and customary efforts to rent the premises at fair market value or at the rate agreed to during the tenancy, whichever is lower." Any lease provision to the contrary is void as against public policy.

Landlords and tenants speculate about the standard courts will apply to determine whether a landlord has exercised a "reasonable and customary effort." With HSTPA's recent passage, no frame of reference determines what constitutes a "customary" effort at mitigation. It is an open question whether a landlord must accept a prospective tenant's first rent offer or whether it is reasonable to continue to market the property to obtain a higher rent if doing so will cause the apartment to remain unrented. In the case of rent-stabilized tenancies, it also remains to be seen whether, given that a preferential rent becomes the maximum rent that can be charged, it is reasonable for a landlord to delay renting an apartment to avoid becoming locked into a long-term tenancy at a reduced rate. It is similarly unclear what impact a landlord's failure to carry the burden of proving damages has on a tenant's liability. A court could find that a landlord's failure to carry the burden excuses the tenant from all liability, or the tenant could be excused from only that portion that accrued before the landlord re-rented the unit.

Landlords and tenants are divided on the fundamental fairness of RPL § 227-e. Landlords argue that HSTPA

has turned the tables on a bedrock assumption negotiated into every residential New York lease for decades. The Court of Appeals made the case against a mitigation rule 25 years ago in *Holy Properties*, stating in that commercial case that "[p]arties who engage in transactions based on prevailing law must be able to rely on the stability of such precedents. . . . This is perhaps true in real property more than any other area of the law, where established precedents are not lightly to be set aside."[8]

Tenants point to the injustice of a tenant's rent continuing to accrue each month even though the tenant is no longer in possession, while landlords need do nothing to reduce the tenant's financial burden. At a time in New York when there is an affordability crisis, tenants say that the new mitigation rule advances New York's overarching housing policy goals. The rent arrears owed to a prior landlord will make it even more difficult for a tenant already in financial distress to find housing. This perpetuates the cycle of dislocation whose elimination is central to HSTPA.

LANDLORDS MAY BE LESS WILLING TO SETTLE GARDEN-VARIETY CASES

Most landlord-tenant disputes are resolved through "hallway justice," when the parties reach an agreement on settlement terms before the case reaches trial. This is often the parties' pragmatic decision to avoid the cost, delay, and uncertainty of going to trial. Courts encourage settlements; they lack the resources to try every landlord-tenant case. An essential feature of many settlement agreements is that the tenant consents to a judgment of possession and the issuance of a warrant of eviction to enforce the tenant's agreement to resolve the claimed default. This allows the landlord promptly to recover possession if the tenant violates the terms of the agreement. Rather than go back to court on a motion to enforce the agreement, the landlord can notify the Marshal of the default, and an eviction will be scheduled.

HSTPA, however, has revised RPAPL 749 to require that warrants state the first date on which an eviction can occur, with the result that the "pay out" stipulations used to resolve many nonpayment proceedings must now provide for execution of the warrant on the last payment date (or such earlier date specifically approved by the court), rather than the first payment date, as was the common practice. Under the new law, if the tenant fails to make an earlier payment, the landlord must return to the court to request enforcement of the agreement and accelerate execution of the warrant. It remains to be seen whether the increased costs and pauses in enforcing settlement agreements will discourage landlords from entering into these stipulations. And that will slow the rate of settlement and inundate court calendars. Given HSTPA, some courts outside New York City now allow a landlord's attorney to submit a letter, on notice to the tenants or their attorney, specifying the default, and then the court issues the judgment and warrant without further appearances. And the State Court System is struggling to account for eviction dates for default judgments, for which no stipulation of settlement can provide an eviction date.

The revised RPAPL 749 also provides that a warrant permits eviction only of persons "named in the proceeding." In many cases, occupants' identities are unknown to the landlord and cannot be ascertained. That has led to the nearly universal practice of naming a "John Doe" or "Doe #1" in a summary proceeding to account for unknown occupants or known but unnamed occupants. HSTPA's ramifications on the practice of naming "Doe" respondents is unclear — what will happen when a Marshal or Sheriff will evict name someone not named at all? — but landlords might now provide for heightened surveillance of the people entering and leaving their buildings so they can now name the occupants' children in the eviction petition and warrant. This raises privacy concerns the Legislature did not intend.

To make sure that landlords comply with HSTPA, a new RPAPL 768 makes unlawful evictions a Class A misdemeanor throughout New York State. This carries a criminal connotation and civil penalties from $1,000.00 to $5,000.00 per violation. Conduct constituting an unlawful eviction include using threatening force; interfering or intending to interfere with an ability to use the dwelling; and engaging or threatening to engage in any conduct that prevents or is intended to prevent an occupant from lawful occupancy or to induce vacatur of lawful occupant. If there is a determination that an unlawful eviction occurred, the occupant must be restored to possession.

COOPERATIVES: THE UNWILLINGLY PROTECTED

Cooperatives have been among HSTPA's most vocal opponents, because HSTPA makes no distinction between tenants in a traditional landlord-tenant relationship and shareholders who are the proprietary lessees of apartments in which they have an ownership interest.

Like other tenants, shareholders must get 30–90 days' notice under RPL § 226-c if the coop board intends to raise maintenance by more than 5%. A shareholder who fails to pay maintenance must be given a RPL § 235-e reminder notice. Failure to provide this notice gives rise to an affirmative defense for the shareholder, with all the open questions and issues associated with this new provision. If a shareholder fails to pay maintenance, the courts may grant a stay of eviction for up to a year, a potential hardship to buildings that rely on maintenance fees to pay a mortgage, real-estate taxes, and other expenses to maintain a building. Boards are also concerned that they

might be limited by the maximum of 5% or $50 for late fees under RPL § 238-a. Similarly, the automatic post-trial period under RPAPL 753 on breach-of-lease holdover proceedings applies to shareholders, extending the time period neighbors must deal with odors, noise, or dangerous or illegal conduct, even if management has been successful in proving that the shareholder's conduct is objectionable. And, like any other landlord, boards are now arguably unable to recover their attorney fees in a summary proceeding. Similarly, because of the new definition of "rent," many cooperatives will likely opt to revise their bylaws to remove additional rents unrecoverable in a summary proceeding under HSTPA. Moreover, coop disputes will be increasingly heard in Supreme Court ejectment actions (in which added rent and attorney fees may be sought) and *Pullman* actions (in which the court might enforce a board vote to evict a shareholder).[9]

Other provisions that seem likely to have been intended for traditional tenants, but which also cover cooperatives, include restrictions on taking more than one month's maintenance as a security deposit or requiring pre-paid maintenance, both of which the amended GOL now prohibits.

CONCLUSION: DE FACTO RENT REGULATION FOR FAIR MARKET TENANTS, UNENDING PAUSES PREDICTED FOR HOUSING COURTS – LANDLORDS WARN OF DIRE CONSEQUENCES AND FINANCIAL RUIN FOR SMALL LANDLORDS; TENANTS CALL IT A STEP IN THE RIGHT DIRECTION

Many landlords claim that HSTPA's new laws, from the expanded notice requirements and the anti-retaliation provisions of RPL § 223-b to the courts' broad discretion to grant a stay of up to a year and the lengthy delays under the revised RPAPL, create a form of *de facto* rent regulation for unregulated apartments.

The aggregate impact of the many pauses HSTPA created is that many landlords will be unable to traverse a summary proceeding from commencement to warrant in less than a year. This, according to landlords, is an optimistic approximation when the court's nearly unlimited discretion to grant a year-long stay is factored in. HSTPA takes the pauses endemic to the system and makes it a defining, central feature of the eviction process itself.

In the past, the daunting prospect of late and legal fees, as well as a black mark next to the name of a tenant when renting in the future, deterred a tenant's capitalizing on systemic delays. These inherent safeguards have been swept away, landlords say. A tenant will likely face no late or legal fees, even if the tenant loses decisively in court after a protracted legal battle, and future landlords are now barred from basing leasing decisions on blacklists.

Institutional landlords may be able to withstand HSTPA's rules, but small landlords might not. Devastating consequences can befall small landlords deprived of rental income they need to offset the financial burden of a mortgage, taxes, insurance, utilities, and the many costs of property ownership. Small landlords warn that the net effect of these laws will undermine the summary nature of summary proceedings. Summary proceedings were originally enacted to replace the common-law ejectment action, an expensive and dilatory proceeding that can lead to denials of justice. And whereas good-government advocates prefer simple, quick, and inexpensive litigation, landlord advocates worry that HSTPA has turned landlord-tenant litigation into an even more complex, time-consuming, and expensive debacle.

HSTPA's supporters, on the other hand, argue that a landlord will still be able to obtain a judgment for arrears owed, even if obtaining the judgment is postponed. With close to 70,000 homeless in New York City alone, two-thirds of whom are families, and the steady, year-by-year hemorrhaging of rent-stabilized apartments through deregulation, estimated to be approximately 170,000 to date, tenants believe that HSTPA's additional protections are a small but necessary bulwark against New York's housing-affordability crisis. Landlords respond that mitigating the housing affordability crisis is a worthwhile goal, but one that rests with the State of New York to achieve, and that HSTPA abdicates state responsibility for creating affordable housing. Landlords wonder whether the same concern shown for tenants' financial struggles will apply to them if they default on their mortgage.

And in response, tenants say that, some way, somehow, landlords will find a way to make money in New York real estate. They always have.

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1. It is "HSTPA," not "the HSTPA." A definite article (*the*) does not go before an acronym (a short form that one can pronounce). One can pronounce HSTPA as "HISTPAH." But no one would pronounce the initialized "F-B-I" as "Fibee." Thus, a "the" must precede "FBI" but not "HSTPA."

2. *See Asquith v. Redevelop Albany LLC*, 2019 N.Y. Slip Op. 29295, 2019 WL 4666210, at *2 (City Ct., Albany Co.) (granting tenant's claim for return of security deposit based on landlord's failure to provide itemized statement within 14 days of vacatur).

3. DHCR Fact Sheet #9 Renting an Apartment —Security Deposits and Other Charges (Revised 10/19).

4. *See, e.g.*, Gerald Lebovits & Jennifer M. Addonizio Rozen, The Use of Tenant Screening Reports and Tenant Blacklisting — 2019, LEGALEase Pamphlet, N.Y. St. Bar Ass'n (2019), *available at* https://works.bepress.com/gerald_lebovits/345/.

5. *See* RPL § 232-a.

6. *See, e.g.*, *151 Realty LLC v. Alava*, 2019 N.Y. Slip Op. 29311, 2019 WL 5058609, at *2 (Civ. Ct., Bronx Co.).

7. 87 N.Y.2d 130, 87 N.Y.S.2d 964 (1995)

8. *Id.* at 134 (internal citations omitted).

9. *40 W. 67th St. v. Pullman*, 100 N.Y.2d 147, 760 N.Y.S.2d 1174 (2003); *13315 Owners Corp. v. Kennedy*, 4 Misc. 3d 931, 782 N.Y.S.2d 554 (Civ. Ct., N.Y. Co. 2004); *London Terrace Towers, Inc. v. Davis*, 6 Misc. 3d 600, 790 N.Y.S.2d 813 (Civ. Ct., N.Y. Co. 2004).

'Guardian of the Institution'

New book depicts Chief Justice John Roberts' style as a person, a lawyer and a jurist

The Chief: The Life and Turbulent Times of Chief Justice John Roberts, by Joan Biskupic, Basic Books, New York 2019

Review and Commentary by Joseph W. Bellacosa

At his Senate confirmation hearing for the post of Chief Justice of the United States, John Roberts memorably testified that he would simply "call balls and strikes." That quip left out that, once confirmed, he would also manage every aspect of the game – under the master playbook of rules – the Constitution.

Joan Biskupic's fine biography is necessarily an unfinished work, as her subject has now entered a new stage in the center-chair stewardship after 14 years in that role. The book title *The Chief* is apt, but I quibble with the subtitle: *The Life and Turbulent Times of Chief Justice John Roberts***.** It is a tad melodramatic, as his life and time seem more buttoned-up, than "turbulent."

The book depicts Roberts' style as a person, lawyer, and jurist who is intellectually curious and deeply analytical; and it suggests his jut-jawed confidence in handling his vast portfolio of judicial and management responsibilities. He is regarded by all who know him as exceedingly well-prepared, with an obsessive thoroughness to his method.

Joseph W. Bellacosa, retired Judge, New York State Court of Appeals; Retired Dean and Professor of Law, St. John's University School of Law.

Stories from friends and associates illustrate the diligence with which he approached appellate arguments during his career as a public and private lawyer, and during his brief stint on the District of Columbia Circuit Court.

His style remains coolly affable, with an enigmatic diffidence, as the book shows from descriptions of his friends. These characteristics have carried over to the way he comports himself in his judicial demeanor, with a disciplined style that rarely falters. Yet Biskupic's thoroughness teases out a couple of rare instances when he shows his all-too-human side, as when he interrupted Justice Stephen Breyer when the Chief sensed some overt "spin" in the questioning of counsel during oral arguments; and with Justice Sonia Sotomayor, due perhaps to awkwardness from their different styles, upbringing, and backgrounds.

He exudes professionalism "to the nines," as the book demonstrates from his youth, education, and advocacy career as a highly ambitious individual, stretching himself to succeed on an upward track to the highest levels of the legal profession, with rare disappointments. He is not impulsive, though he flashes his own subtle and even sharp sense of humor. He plays his moves close to the vest like a multi-level chess master, according to friends.

John Roberts, as "Chief," strikes me as the ultimate "Guardian of the Institution." His most admired predecessor, John Marshall, (he liked to touch the foot of the

bronze statue of the Great Chief on the ground floor at the Court before he argued cases) has been dubbed the "Maker" of the Supreme Court, through its overarching review powers. (*see* John Marshall: "*The Man Who Made the Supreme Court"* by Richard Brookhiser, an excellent complementary book-end to Biskupic's biography of Chief Justice Roberts (reviewed in the N.Y.L.J., May 24, 2019, p. 6, col. 4)). Notably, Marshall accomplished that intriguing coup by harvesting powers nowhere explicitly conferred in the words and phrases of the Rulebook Constitution.

Intergovernmental structure is a touchstone for John Roberts. Biskupic's book broadly sketches and interweaves a narrative of cases and themes that help to identify a jurisprudential principle that defines this Chief Justice's appreciation of his unique role. The book organizes many subject themes (but not all, see *infra*) around summarized case stories – a favorite trope of lawyer John Roberts that every case has a story to tell.

Interestingly, I discern that the overall theme is not necessarily "conservatism," whatever that "ism" is, means, or however it is variously defined. Instead, his bedrock framework emerges that the Founders' genius for the governance of this nation is the distribution of authority under a system of counter-balanced checks and balances. Roberts, like Marshall before him, sensed that the calibration, above all, must be sensitively preserved. The taut tension among the tripartite and interlocking governance structure is something that is explicitly organized in the Constitution by Articles I, II, and III. The third pillar, thought of as the "weakest," was ingeniously embedded and animated, case by building block case, by Chief Justice Marshall's judicial work during the foundational decades of the nation's history.

The "first real Chief," (though technically the fourth) and the present Chief Justice thus seem to share a common view of the Institution entrusted to their charge, to wit: the only practically available Guardian of the nation's values, as deposited in the ultimate Umpire's Rule Book – the Constitution.

In this regard, a highlighted feature that Biskupic does a very good job of laying out is an articulation of some confirmed facts, speculations and inferences as to how the belatedly switched vote and pivotal role of the Chief Justice evolved in the ACA Health Care Act case (The *NFIB* case in 2012). It became a *bete noire* for which the Chief was loudly applauded and bitterly criticized at the same time – once the shock of the surprise twist of the bottom-line decision was absorbed. This biographer quotes a pithy appraisal from former Solicitor General, Harvard Professor Charles Fried, to the effect that to reach the institutional right result in the appeal, Roberts "was willing to pay the price in the esteem of those with whom he was closest in political, doctrinal and tempera-

mental agreement." At the end of the day of the deliberative decisional process, he was willing to sacrifice that comfort zone for a higher value – the Institution – but he did so, some argue, by casting an un-Solomonic vote in that he actually split the decisional baby.

A key feature of his bifurcated vote seems not well-appreciated (though my view is not entirely original, just enhanced) due to a blindness in political and ideological disputation that is not part of this commentary. The huge national health policy initiative was the product of a very complicated process, albeit bitter and partisan. But it was, in the end, *an enactment into law by the duly elected Congress and was approved by the President*. However elementary that proposition may sound, and despite *Marbury*'s awesome review power over legislation, there is something humbly magisterial in the Supreme Court's preservation of respect for that Constitutional distribution of the unique law-making authority under Article I. That feature, I believe, weighed heavily and definitively into the Chief Justice's institutional calibration in casting his final vote.

To be sure, this Chief Justice has shown an overall consistent "conservative" bent in many subsets of the jurisprudence of the Court. The biographer unfolds how that is consistent with who he is and how he and his career have evolved to date. But that tendency does not totally define him, nor does it diminish the "Chief Institutionalist" role and attitude he displays with regard to the overarching structural governmental principle of distribution of power among the branches, as described above. From that singular perch, the Chief Justice rises above the label of "conservative." There, he can breathe a bit freer in hopes that he can lead and well-serve the Institution**,** fulfilling his unique role with intellectual integrity and a clarity of higher purpose.

To be sure, the book forthrightly exposes some of the inevitable tension within him, reflected in his various critical votes in contentious and controversial policy subject areas and appeals. The book lays out the examples: political financing – *Citizens United*; affirmative action cases; gerrymandering cases; Voting Rights Act cases; religion, and gender equality cases; the ever-contentious abortion issues; union power and dues cases; *habeas corpus* and terrorist challenges, including the highly controversial one during his brief tenure on the District of Columbia Circuit Court while he was under active consideration for Supreme Court vacancies of Justice O'Connor and, suddenly, Chief Justice Rehnquist. The list covers a lot of territory and the more detailed and critical analysis is left for work from others when the record is complete at some uncertain future date with fresh historical perspective.

Chief Justice Roberts' most recent decisive fifth vote at the end of this past term may help to pinpoint the duality under which he serves as Chief with only one unweighted vote. The citizenship questionnaire case could not be referenced in the book because it was published before the Census questionnaire case reached the Court. The deft ruling as to whether to allow a citizenship question on the 2020 Questionnaire constituted a judicial issue that was ripe was left for another day. Prudentially, the disposition to remand and thus sidestep this sticky-wicket at this time concerning the legitimacy of that Executive Branch action was brilliant and supportable. Avoiding the necessity of resolving the delicate balance under the distribution of authority among the three branches in this contest at this time comes off as a judicious chess move – something that Chief Justice Marshall might have applauded, as he occasionally operated with avoidance techniques; indeed, Marshall used it in his ingenious *Marbury vs Madison* disposition.

Chief Justice Roberts also surely knows how to bide his time in the larger public arena. Consider how he held his fire for a propitious moment to deliver some push-back, using his rarely used bully-perch against the President's attacks on judges and the judicial process. The Chief Justice protectively rebutted the President's unwise and unfair trash talk implications of political partisanship in the administration of the neutral judicial process of the Institutional Branch**.**

Biskupic's book offers another intriguing early-career insight about the Chief, emanating out of his first victory at the Supreme Court as a private lawyer in *U.S. v. Halper*. The win provoked an early manifestation of an innate skepticism concerning governmental overreach. During his formative year as a law clerk to then-Chief Justice Rehnquist, Roberts wrote to his first judicial mentor, Judge Henry Friendly, back in New York, that he was sensing a growing cynicism about the workings of Washington D.C.

Promptly after that *Halper* victory, Roberts expressed that lingering concern again with respect to the Government's tactic of adding a civil penalty against his client that was disproportionate to and had no legal correlation to an underlying criminal offense. The ruling was unanimous in an opinion by Justice Blackmun and, according to Biskupic's research, Roberts was – not surprisingly – quite pleased with his lawyerly success, adding a postscript hint about his formative skepticism by replying to the Washington Times that "the ruling would force prosecutors to alter their strategy" about such tactics in the future.

That early unease may be stirring anew, decades later, in a fresh prosecutorial phenomenon. The legislative delegation of specific authority to investigate, prosecute, and punish criminal conduct must emanate from Congress, within the oversight of the Big Rule Book – the Constitution, overseen by the Chief Umpire. Prosecu-

torial authority is not a depository carrying with it a discretionary prerogative for amplifying the arsenal by the interpretive method. Their portfolios do not enjoy some *Chevron*-like special judicial deference of hands-off – a doctrine in its own administrative regulatory sphere that is currently under fresh scrutiny (see, *Kisor v. Wilkie* decided June 26, 2019 and *Gundy* opinions, decided June 20, 2019 at end of last Term of the Supreme Court).

Biskupic's biography, surprisingly, does not cover or allude to the 2016 case *U.S. v. McDonnell* that is illustrative of this revitalized concern. To be sure, the book does not purport to be a comprehensive study of the Chief's entire judicial work thus far, nor a casebook. But, *McDonnell* hints at something bigger within the Chief's longtime range of concerns. Indeed, another more recent addition may be percolating, too, in the recent grant of certiorari in *Kelly v. U.S.* (the New Jersey G.W. Bridge–gate case). The generic subject seems to fall neatly within the purview of the Judicial Branch to scrutinize Executive Branch entities within the framework of real cases and controversies, concerning prescribed – and limited – authority that is duly and specifically delegated by the Legislative Branch.

McDonnell is remarkably a unanimous determination authored by the Chief Justice, without a single extra word or line of concurrence. (*Mirabile Non Dictu!*) It has the feel and tone of Chief Justice John Marshall's commanding voice. The case put a firm foot down against overzealous criminalization of political activities that had not been "specifically" (a key word permeating the rationale of the opinion) declared criminal by Congress. Eager prosecutors were found to have ventured beyond their assigned portfolio concerning "tawdry" political activities of the Governor of Virginia and his wife. The word "distasteful" was also used – (many more vivid synonyms spring to mind, but I borrow descriptive ones from the opinion itself). The Virginia Governor ultimately ducked a scarlet "C" of criminality.

The *McDonnell* case lays out substantive building blocks to its foundational rationale: (a) the theoretical underpinning of due process – federalism concerns that go the heart of the Institutional primacy that is the overriding theme of this commentary; and (b) a jurisprudential realism about prosecutorial overreach that is concerning in that it might inhibit and chill legitimate political activities that are part and parcel of the nation's history and ordinary course of civic affairs and conduct – *unless and until Congress expressly forbids them with specificity, not through interpretive long legs of prosecutorial agendas and media encouragement.*

The legal headline and lead are simple: *it takes Congress to authorize the use of the awesome power to prosecute specifically defined crimes.* There can be no end run, open sesame or *ultra vires* means to an end. The laws must be executed as they are specifically enacted, not as some might like them to be enforced by their own lights and agendas.

The Holmesian School of experiential jurisprudence may help to understand this approach – a judicial scrutiny not with theoretical heads stuck up in the clouds, but rather with feet firmly planted on *terra firma*. The Chief Justice's rationale forthrightly showed this refreshing awareness with a cognizance of *real-politique*, worthy of Henry Kissinger.

Make no mistake, a number of important caveats and reservations about legitimate prosecutions of specifically defined criminal activities are also expressed, whether they fall into the political arena or any other realm of life's courses of actions. The opinion is not a blanket immunity for criminal conduct; rather, it is a string of straight lines in the dirt showing the players where to stay within the base lines, or the umpires will call some outs – a notch and order of remedy higher than just balls and strikes.

In sum, it should also come as no surprise that Chief Justice Roberts, a diligent student of history, is likely aware of the wise voice of then-Attorney General Robert Jackson when he exhorted all prosecutors to abide by a gold-standard of conduct:

> The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the **abuse of power**, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility. ("The Federal Prosecutor", address to the Nation's U S Attorneys in 1940 (emphasis added); (Jackson, interestingly, was recently identified in a Wall St Journal story as "The Patron Saint of the Rule of Law," Wall St. J., July 13, 2019)):

In ensuing decades, the entreaty from Jackson to prosecutors to listen to their better angels may sound old-fashioned. My bet, however, is that the current Chief Justice is well aware of its staying power and modern relevance. (A small biographical footnote is that Roberts clerked for Justice Rehnquist who, of course, clerked for Justice Jackson. Thus, I am confident that Justice Jackson's legendary contributions to this nation's jurisprudence and governance, and the standards of integrity, decency and excellence he espoused, would have been part and parcel of his in-Chambers inculturation that lasts a lifetime).

NEW YORK STATE BAR ASSOCIATION
State Bar News

NYSBA's Global Reach Takes Center Stage at International Section Conference in Tokyo

By Joan Fucillo

NYSBA is reinventing itself as a bar association that serves all lawyers, whether they are around the corner or across the world. Throughout the association, there is a heightened emphasis on building a global community and expanding and improving digital tools so all NYSBA members are never more than a click away from their colleagues and all the services NYSBA offers.

The early results of this comprehensive effort were on display Nov. 5-8 at the NYSBA International Section 2019 Global Conference in Tokyo. It was NYSBA's largest International Section event ever and featured a massive outreach effort by NYSBA leadership to connect with conference-goers and the leaders of Japan's largest law firms and bar associations, including the nationwide Japan Federation of Bar Associations.

"Lawyers around the world are more interdependent and deeply connected than ever, and we must act upon that," said President Hank Greenberg. "It is incumbent upon us to reach out to all our colleagues to build relationships and deepen our mutual understanding. This conference was an opportunity to communicate NYSBA's vision of the future of the law and of lawyers: The world needs lawyers everywhere to come together."

NYSBA President Hank Greenberg brings a gift to his meeting with partners at Nagashima Ohno & Tsunematsu law firm. Partner Kenichi Fujinawa accepts the gift as partner Fumihide Sugimoto looks on.

Building connections with law firms and bar associations

In addition to attending conference events, Greenberg held productive meetings with managing partners and leaders of some of the largest law firms in Japan, all of which have many lawyers who are admitted to the bar in New York or have degrees from U.S. law schools. Greenberg and these Japanese legal leaders discussed the need for lawyers worldwide to develop and maintain strong connections and emphasized the utility of a global organization where lawyers can come together.

One of the firms had opened a New York City branch and others were contemplating doing so. Greenberg offered NYSBA as a resource to help establish their New York homes. All looked forward to collaborating on future endeavors.

Greenberg also met with leaders of the Japan Federation of Bar Associations, the umbrella organization for all Japanese bars, as well as three major bar associations in Tokyo: the Tokyo Bar Association; Dai-Ichi Bar Association and the Daini Tokyo Bar Association.

Differences, diversity and inclusion

Greenberg lauded International Section Chair Diane O'Connell and conference co-chairs Ed Lenci, Miriam Rose Ivan Pereira and Tsugu Watanabe for their outstanding work.

O'Connell said that Greenberg's outreach efforts were much appreciated by the 200 conference attendees and the lawyers he met with privately. She noted significant conference achievements that will expand NYSBA's global presence including

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NYSBA'S GLOBAL REACH TAKES CENTER STAGE AT INTERNATIONAL SECTION CONFERENCE IN TOKYO
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the formation of an International Section Chapter in South Africa and the launch of the Asian Bar Council, which brings together all of the section's chapters across Asia into one overarching entity, becomes a steady point of contact for participants and is open to any NYSBA International Section member.

As NYSBA increases its connections with international lawyers and asserts a greater global role for itself, there is a need to help lawyers understand each other's differences, noted O'Connell.

"The theme of the conference was 'A World of Many Voices, United in Our Diversity,' and this was the first time our conference focused on diversity and inclusion in the international legal community," said O'Connell. "The potential for substantive and cultural misunderstandings, or an unintentional insult or violation of protocol, are real issues in cross-border lawyering."

"Diversity is humanity," she said, adding that diverse groups are more creative than homogeneous ones. "An environment of inclusion will help the legal community to provide better legal structures and services."

The meetings, plenaries and panel discussions, including a plenary with representatives from 11 arbitration centers, an international mock arbitration and advocacy workshop, and a plenary on how to behave in a foreign court, wove in the conference theme.

Friday's human rights plenary tackled diversity and inclusion head-on, discussing cross-cultural challenges and the laws and other legal developments associated with the LGBTQ+ community, marriage, gender and religion in Asia, the United States, Europe and Latin America.

Daikagura is an ancient form of entertainment that combines feats of juggling, balance and comic banter among the performers. The performers posed with International Section members: Front row (L to R): Tsugu Watanabe, conference co-chair; performer. Back row (L to R): Ed Lenci, conference co-chair; Diane O'Connell, section chair; Miriam Pereira, conference co-chair; performer.

"The conference theme was very much front and center throughout the meeting," said Co-chair Ed Lenci. "The International Section is the ideal medium for this dialogue." He noted that the 2020 Global Conference in London, Oct. 14-16, will expand on the theme.

Speakers and other highlights

Hon. Kunio Hamada, former Justice of the Supreme Court of Japan and founding partner, Mori Hamada & Matsumoto, Tokyo, and Chargé d'Affaires Joseph M. Young, U.S. Embassy in Japan, gave keynote addresses. Yutaro Kikuchi, president of the Japan Federation of Bar Associations, welcomed NYSBA to Tokyo during Wednesday's president's reception. BARBRI International representatives were on hand to speak with lawyers about qualifying to practice in other jurisdictions, including the U.S.

Growing interest

Greenberg noted a growing interest in the Asian legal community to connect with New York and NYSBA. At the Third Department admissions ceremony in June 2019, of the 142 foreign attorneys admitted to New York practice 41 were from Asia. For the first time, NYSBA joined the International Bar Association's September conference in Seoul, holding a successful membership drive and a reception that attracted 100 conference-goers.

"There is a consensus in the international legal community that New York law is the gold standard and that lawyers around the world benefit from a New York connection," said Greenberg. "NYSBA is uniquely situated to serve them."

NYSBA Selects 2020 Legislative Priorities

NYSBA legislative priorities are developed by the Committees on State Legislative Policy and Federal Legislative Priorities and reviewed by NYSBA member leadership. The Executive Committee approved the plan on November 1. Here are state legislative priorities for 2020:

Integrity of New York's justice system

An independent, well-functioning judicial system that is accessible to all is a bedrock principle of our democracy. The Governor and the Legislature must appropriate adequate resources, which should be wisely and clearly administered by the courts to ensure that they fulfill their essential role.

Reorganize the state court system

The state court system of 11 different trial courts has been described as "the most archaic and bizarrely convoluted" in the nation. Each of the 11 trial courts has its own filing system and administrative staff. NYSBA supports the amendment of antiquated provisions in our state Constitution to reorganize and modernize the system. NYSBA President Hank Greenberg delivered testimony to a joint legislative hearing on this matter on Nov. 13.

Reform statutory power of attorney

NYSBA has developed an affirmative legislative proposal to:

- Simplify the current power of attorney form;
- Prevent third parties from improperly refusing to accept a consumer's valid power of attorney;
- Provide protection for third parties who follow the process for accepting a power of attorney; and,
- Authorize language in the power of attorney form that substantially conforms with the statutory language, in order to prevent the form being invalidated because of harmless errors and resulting negative impacts on consumers.

Legal representation for persons in immigration matters

New York State should establish a right to counsel for immigrants facing deportation. In the face of increased and indiscriminate immigration enforcement by the federal government and given the complexities of our current immigration system, guaranteeing access to counsel is the only way to ensure that all New Yorkers have access to justice, equal protection, and due process under the law.

Permit attorneys admitted in New York to practice in the state without a residency or office within the state

Judiciary Law Section 470 was enacted in its current form more than a century ago, following predecessor statutes dating from the Civil War era. A central concern at the time was the difficulty in serving documents attorneys not located in New York. The current statutory prohibition serves no purpose in today's global environment. Repeal of Section 470 would not create any significant difficulties arising from the lack of an attorney's physical office within the state.

Increase the rate of compensation for attorneys who provide mandated representation

The last increase in assigned counsel rates was in 2004, when rates went to $75 per hour regarding felonies and $60 per hour for representation of a person charged with a misdemeanor or lesser offence. After 16 years, these rates should be increased to prevent further exodus of practitioners from the assigned counsel program across the state. The resulting shortage of lawyers to represent indigent defendants undermines the constitutional mandate that everyone is entitled to legal representation in the criminal justice system.

Support for the legal profession

A core mission of the New York State Bar Association is to represent the interests of the legal profession. NYSBA will work to ensure that attorneys are able to protect their clients' interests and effectively engage in the practice of law.

For more information regarding NYSBA legislative priorities, visit nysba.org/NYSBAGovRelations.

5 questions and a closing argument

Member spotlight: Kristen A. Wagner

Wagner is a staff attorney at Legal Services of the Hudson Valley (LSHV), Kingston, NY. Prior to joining LSHV, Wagner was NYSBA's director of Pro Bono Services. She lives in Albany.

What do you find most rewarding about being an attorney?

As a legal services immigration attorney for crime victims, I give people advice and assistance that they cannot get anywhere else. My clients experience significant barriers to accessing justice (language barriers, lack of financial resources, and lack of information and knowledge), so I know that I am making a difference in my clients' lives simply by being able to give them advice. I can truly impact and, in some cases, help save their lives when I am able to provide them with full scope representation.

What advice would you give a young lawyer just starting her or his career?

Follow your heart. Paying student loans and having financial stability is important, but your job takes up most of your life. You should do something you truly enjoy doing.

What or who inspired you to become a lawyer?

When I was in college, I did a summer internship at a local law firm where there was an immigration attorney. He had me assist him with an asylum appeal. I enjoyed the subject matter and the work so much, I decided to go to law school to become an immigration attorney.

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

I get the impression that people think all lawyers know everything about the law. These days, I think it is more common for lawyers to specialize than to have general legal knowledge.

What kind of music do you listen to or who is your favorite musician?

I listen to a wide variety of indie/rock/alternative music. The musicians I have most recently seen in concert include A Perfect Circle, Pixies, Weezer, Spoon, Cage the Elephant and Jenny Lewis.

Lawyers should join the New York State Bar Association because…

It's a great way to get access to up-to-date CLE programming and networking opportunities. When you take a training from NYSBA, you know the presenters are experts in their fields and networking with other attorneys across the state is invaluable for your growth and development as a practitioner.

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5 Tips for Better Time Management

By Allison C. Shields

Despite the term, "time management," unfortunately, it isn't actually possible to "manage" time. But it is possible to control what you do with your time so that you get more done in less time. This article covers five simple strategies for managing your activities to help improve productivity.

1. USE YOUR CALENDAR TO GET WORK DONE

The old saying, "When you fail to plan, you plan to fail" is never truer than when applied to a law office. It is far too easy to allow the priorities of others to take precedence when we do not make a conscious effort to plan what needs to be done next. All too often, lawyers fall into the trap of constantly reacting to emails, telephone calls, or other interruptions instead of deciding in advance where to spend their time and energy. When you have a plan, it's much easier to say no to interruptions.

Your calendar is an excellent planning tool. Most lawyers have a calendar that records court dates, closings, client meetings and other appointments. That calendar also probably includes deadlines, such as the last day to file a motion or brief. But although many lawyers record when their work is *due*, they fail to use their calendar as a tool to help them *do* the work.

First, decide what activities you need to accomplish. Then estimate the amount of time each activity will take to accomplish. Don't be stingy with your estimate; estimating too little time will add stress and confusion to your schedule. Finally, take a look at your calendar and choose a time when you will perform that activity and physically schedule it by blocking out the time on your calendar.

You don't need to block all the time necessary to complete the task at once; try simply blocking time to complete the first step necessary to move the project forward. When that is complete, schedule the next step, and so on. Treat each time block as you would an appointment with a client. Don't allow interruptions. If necessary, leave your office to accomplish this, or tell people you are unavailable for a specified period. If something more pressing arises that you *must* do during the time

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scheduled to complete the task, move the appointment to another place on your calendar to ensure it gets done.

Make sure you leave some empty space or downtime on your calendar to account for unexpected emergencies or just to give yourself a break.

2. CREATE A "DON'T DO" LIST

If you're one of those people with a never-ending to-do list, this tip is for you.

Long to-do lists that just keep getting longer are frustrating, exhausting and ultimately, completely unproductive. The answer may be a don't do list. Every once in a while, it is helpful to step back and analyze the many tasks you perform each day to determine whether some of them should be delegated to others, outsourced, or eliminated entirely.

Law school education trains lawyers to spot issues, but this issue spotting behavior isn't the most efficient way to run a law practice. Issue spotting can lead to analysis paralysis by creating the feeling that every issue must be at least considered, if not addressed. This creates additional distractions.

The don't do list counteracts this by narrowing your options so that you're not overwhelmed by so many choices every time something new arises.

Having a 'don't do' list lets you identify tasks you don't want to do or that you shouldn't be doing because they distract you and prevent you from accomplishing more important tasks; if it's already on the don't do list, it's easy to immediately recognize it and move on to more productive endeavors.

Anything that distracts you from your main goals and most important tasks belongs on the list. It can include day to day activities, specific types of clients or matters or behaviors that don't serve you. Individual strengths and weaknesses should also be taking into consideration. For example, if you are a great speaker but a poor writer, perhaps writing articles, motions, briefs, etc. should go on your 'don't do list. You can use a ghostwriter, hire a contract lawyer to do the writing for you, or give the task to someone else in the firm with excellent writing skills. Then you can focus your energies on trying cases, giving seminars or presentations, or other activities where you can showcase your speaking skills.

Identifying the 'don't dos' can be an effective tool for managing your time and reducing your stress. Knowing in advance what things you won't do lets you move on quickly, without wasting additional time analyzing everything that comes to your attention. It's a shorthand way of cutting through all of the clutter of what needs to be done so you can get back to providing great service to your clients.

3. GIVE UP MULTITASKING

If you multitask, you probably think that you're being productive. But the truth is that you can't accomplish two things which require you to expend mental energy at once; you can only do one at a time. When you "multitask," what you are really doing is constantly switching back and forth between activities. In his book *The Myth of Multitasking*, author Dave Crenshaw calls this "switchtasking."

Instead of saving time, switchtasking actually costs you time; studies show that switching increases the time it takes to finish the original task by 25% or more. Switchtasking also increases errors and can harm relationships with clients, colleagues and others.

Here are some strategies to help avoid switchtasking:

- Set specific times when you are available for meetings or to check in with those you supervise
- Ask others if there is a convenient time when you can meet so you don't interrupt them; this will also give you both an opportunity to prepare for the meeting
- Plan ahead, prioritize and ensure you have the materials and information available before you begin a task
- Work uninterrupted for a block of time on high-level priorities
- Turn off your computer screen or closing your email program when you take a phone call to limit distractions
- Turn off popup email notifications on your computer and your mobile phone

The next time you're in the middle of a task, before you decide to answer that phone or wave that staff member into your office, consider the potential cost to your productivity.

4. DON'T LET EMAIL BE A DISTRACTION

Email can be an effective communication tool, but it can also be one of the worst time wasters in your practice. Use these tips to help you get more control over your inbox and ensure that important messages don't get lost.

1. **Don't be afraid to delete.** Junk messages, coupons or advertisements should be deleted immediately if you are not ready to act on them now; new offers and coupons will arrive tomorrow. Remove yourself from one email list per day until you're only on lists

that you actively participate in or routinely derive valuable information from. If you find that you miss being on a list you've deleted, you can always re-subscribe.

2. **Separate tasks from emails.** If an email represents a task that you need to complete, move it out of your inbox and into your tasks folder, add it to a to-do list or action folder, or schedule it immediately onto your calendar. In Outlook, you can drag and drop an email message directly to your Tasks folder.
3. **Move appointments to your calendar.** If an email represents a deadline or appointment reminder, get the information into your calendar right away and toss the email. (In Outlook, just drag and drop the message to your calendar and all of the information in the email will stay with the appointment.)
4. **Delegate.** If the email requires action by someone else, forward it to that person right away with your instructions. Then delete the email from your inbox, move it to an alternate folder for follow-up, or convert it into a task for follow-up.
5. **Keep only business email in your business email account.** Don't clutter your regular email inbox with newsletters and subscriptions. Create a separate account for them on a service such as Gmail so they're not in the way of your most important messages. Make a separate shopping account for email for online shopping so that sales promotions and shipping confirmations stay out of your business inbox.
6. **Don't read emails first thing in the morning.** For most lawyers, urgent messages don't arrive via email overnight or first thing in the morning. But if you're in the minority in that regard, schedule a specific time to blast through email after you've already tackled your most important task of the day. If your clients *do* tend to send urgent emails before you arrive at the office, limit yourself to a quick skim of your inbox to ensure no urgent messages have arrived and then move on to another task.
7. **Schedule time for email.** Don't create more work for yourself and risk losing important client messages by going through your email messages multiple times throughout the day. Turn off email notification sounds and pop-up boxes; they are too distracting. Schedule specific times during the day to review email and stick to it. Be sure to leave sufficient time to review *and respond immediately* to email messages whenever possible. If you are waiting for something particularly urgent or your practice is truly emergency based, don't get caught in the constant email trap; simply scan periodically for the one message you are waiting for and leave the rest for your designated email time.
8. **Keep your emails short and request a specific action or response.** If you're brief, those who respond to you are likely to be brief as well. When you give others good instructions and tell them what you expect, your email becomes much more efficient.
9. **Flag important emails.** Some emails are more important than others. As a result, it can be helpful to flag messages that require immediate attention or that might otherwise get lost in your cluttered inbox. You can create rules to automatically flag or color-code emails from specific people so that those messages stand out in your inbox.
10. **Know when email is not the appropriate medium for your communication.** Sometimes picking up the phone to speak with a client or walking down the hall to see a colleague is a much more efficient way to accomplish a task or to get the answer you need than ending up in an endless back-and-forth exchange of email messages.

5. HARNESS THE POWER OF THREE

The human brain easily grasps and remembers ideas in threes. More than that can get overwhelming, as we have already seen with the never-ending to-do list. While it can be helpful to maintain a master list of projects or tasks, it is unproductive to work off of a massive list every day.

Instead, consider limiting your daily to-do list to three main items. By doing so, you are more likely to cross everything off of your list and leave your office at the end of the day with a feeling of accomplishment rather than a feeling if disappointment. That feeling of accomplishment is translates into higher productivity.

To use the Power of Three, ask yourself every day, "What 3 things will I do today so that, if I accomplish nothing else, I will feel that I had a productive day?" Write down your three daily goals or tasks to help focus your attention on those tasks and enhance your commitment to getting them done. Do those three tasks first whenever possible so that even if the rest of your day doesn't go according to plan, you will have completed your three main tasks.

Implementing these five strategies can help you improve your productivity and reduce your daily stress level so you can focus on providing the best possible service to your clients.

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

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DEAR FORUM:

My firm is advising a client on a large and sensitive commercial transaction. Early one day, at an hour when few people are in the office, I overheard a loud speaker-phone conversation between Portier (the partner in our firm who is leading this assignment) and Neuergedanke (a well know personality in the finance field), who had called Portier. Neuergedanke was excitedly describing the outlines of a significant additional idea that he has to enhance the value of the transaction for our client. Portier cut Neuergedanke off and told him to get lost and not to get anywhere near the transaction, the parties or their advisers. I was surprised because Neuergedanke's innovations are known generally to have real value. Then, later that day, I heard Portier casually mention to another of our own lawyers in the firm's cafeteria that he needed to sit down with him to try to reverse-engineer something.

It bothers me that we may not be serving the client's interests as well as we should, and it bothers me that Portier may be taking advantage of Neuergedanke if the reverse-engineering is designed to steal the idea. What duties do I have to the client and to my firm, both as things stand now and if I am asked later to work on this transaction? If I should be speaking up, how do I handle the matter of just how I heard about all this?

Sincerely,
Les Ismore

DEAR LES:

Welcome to the pressures that attend high-stakes complex transactions at the intersection of finance and law. The influence of legal and tax innovations in modern finance cannot be understated. People who do what you describe Neuergedanke as doing have played major roles in some very significant and visible transactions over the years. Sometimes they are hired by clients to "work their magic," but occasionally, as appears to be the case here, they parachute in seemingly from out of nowhere, and then the obvious question for everyone else is how to react.

A. What duties do you have, and to whom?

A lawyer owes a duty of care and competent representation to clients, and owes to clients, to his employer or firm (if he does not practice alone), to himself and to the profession a duty not to violate, and not to countenance a violation of, the Rules of Professional Conduct (RPC). *See* Rule 8.4.

It is not clear from the facts that you have provided what the transaction is, how much about it is already known in the market or how Neuergedanke came to hear about it, what his new idea is, whether his idea is really novel or whether it even has any value. Some of that information is required in order to determine (i) whether Portier is doing anything wrong and (ii) if Portier is doing something wrong, whether it is a violation of the RPC. As I will explain more fully in Section B below, Portier's actions may lie anywhere on the spectrum from perfectly appropriate to poor judgment to worse.

From the tone of your question, I will infer that you are not Portier's equal or superior in the firm's hierarchy. On that basis, the general standard to which you must adhere under the RPC is expressed in Rule 5.2:

Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by these Rules notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate these Rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

At the same time, Rule 5.1(d) states as follows:

A lawyer shall be responsible for a violation of these Rules by another lawyer if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and

   i. knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

   ii. in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

These two rules, taken together, do not seem clearly to impose a duty on you to ring the alarm bell.[1] And yet, there is some ambiguity because words like "arguable," "reasonable" and "ratifies" are malleable and with the benefit of hindsight could expand or contract like an accordion.[2] If you are already a partner in your firm, you come *ipso facto* under clause (d)(2)(i).[3] It is also worth noting that you need to continue to reevaluate your duties as time goes by and as facts evolve.[4]

This kind of situation cannot be handled lightly or haphazardly. Start by discussing your concerns with Portier. You should air and explore the considerations that I will outline in Section B below.

If that leads you nowhere, or if you are uncomfortable doing that, does your firm have some kind of ombudsman or other committee or procedure to deal with a situation in which a lawyer at the firm feels that someone is not properly handling client representations? If your firm has such a process, use it. If your firm does not have a mechanism for this, you are, I am afraid, very exposed should the client learn of events and seek to hold the firm and its partners accountable. If your firm is organized as a limited liability entity, that and a favorable interpretation of the RPC may shield you from personal financial risk – and I say perhaps because you are already in this at least up to your ankles, so to speak – but protection from direct personal liability may be of little comfort if the finances and reputation of the firm as a whole are impaired.

At this stage, you are not yet *formally* involved in this matter. That distinguishes the situation from the one we addressed in *The Forum* several years ago.[5] In that situation, the client had already asked a junior attorney for advice, and the junior attorney was being directed by firm management to deliver what he considered biased and legally incorrect advice. You may conclude that you are already in a comparable position, and certainly, if and

when you are asked to work on this matter you will then more clearly owe a direct duty to the client, who will be relying on you expecting you to provide the best advice. In the words of RPC 1.3(a) & (b), "[a] lawyer shall act with reasonable diligence and promptness in representing a client," and "[a] lawyer shall not neglect a legal matter entrusted to the lawyer."

You may be asking yourself whether you need to do more homework on the situation and the details. Perhaps you are thinking of engaging in some reverse-engineering yourself. Feel free to do your *own* research and thinking – quickly – if and to the extent that can help you evaluate what might lie behind Neuergedanke's idea and Portier's reaction, considering the factors I will lay out in Section B below. But resist any temptation to consult with other legal or finance professionals regarding the substance, even on what you think is a no-names basis. Exhilarating as that might be, you have nothing to gain from it, and if you go beyond the general information you have given me and speak with anyone outside your firm about the specifics of this transaction or what you think Neuergedanke's proposal is, you are courting potential disaster. That gambit tends to yield dramatic positive results only on television. Should your frolic and detour come to light or even should you be asked explicitly by management in your firm whether you have discussed it with anyone before coming to them, you will be in a very unpleasant position.

Whatever your duty to the client, to the extent that that might trump your duties to your firm, you cannot justify benefiting another party at the expense of your firm or of the client.

B. Substantive considerations: is there malfeasance?

Whether there is something wrong here depends on developing further information regarding what is really going on, specifically why Portier is so intent not to allow Neuergedanke to get involved in the transaction and what, if anything Portier intends to do. As in the *Let's Make a Deal* television show, there are three doors, but the difference is that you do not get to choose which one will be opened for you:

- Portier may be making a rational decision that this transaction is so sensitive and that the structure as it stands is adequate enough, that any additional agitation, even from an idea that might have been a good one if presented earlier, could topple the whole thing and leave the client worse off. A considered decision along those lines by a seasoned corporate deal lawyer who has a lot more experience in the trenches than you have might well be defensible or even the only appropriate course of action, reflected by the aphorism of not letting the perfect be the enemy of the very good.
- Might Portier be trying only (or mostly) to maximize your firm's economic position, and more than anything else trying to make sure that the client does not view your firm in a negative light for not having come up with whatever it is that Neuergedanke has invented? In that case, Portier and your firm are not serving the client. Experience suggests that in most instances this strategy is penny-wise and dollar-foolish. When clients eventually find these things out – as they often do – they can end badly for the firm.
- Is Portier intent on using the Neuergedanke innovation by passing it off as his own? (Your suspicion regarding reverse-engineering might very well implicate this. Perhaps Portier is only trying, in a clumsy way, to get ahead of the curve before inviting Neuergedanke back into the mix, but that seems unlikely.) If Portier is trying to pilfer someone else's intellectual property, there is a serious issue of misbehavior that goes beyond this transaction that your firm's management needs to address. Apart from the risks of litigation and professional discipline for all involved, lawyers and other professional advisers who do this are not treated kindly by clients or by the financial community, which wields a certain degree of power and influence over which lawyers are allowed to work on transactions.

C. How do you explain your knowledge of the situation?

Let me start by assuming that you just happened to be at the office early, or earlier than usual, and overheard a loud conversation that you could not help but overhear, and that you were not holding a stethoscope to the wall. Let me further assume that in the cafeteria, Portier was being extremely careless, perhaps a bit arrogant, in not suspecting that anyone already had the first "2" to put together with another "2" to get "4."

With those caveats, just be honest and completely open about all this. This is another reason not to muddy it up with additional conversations with others outside the firm.

D. What if the worst turns out to be true?

Finally, if your firm is not responsive, or if Portier goes berserk that you even question his judgment, you have to decide on your own whether their evaluation of the situation makes sense from a client service perspective. If and only if you are convinced under the standard noted above of RPC 5.2(b) that the firm is doing something wrong, you probably do have to inform the client directly.

Be careful, however, that you do not go to other parties in the transaction or their representatives. Whatever your duty to the client, to the extent that that might trump your duties to your firm, you cannot justify benefiting another party at the expense of your firm or of the client. You might be tempted to contact Neuergedanke; after all, he may be as much an aggrieved party as the client. Stop. Don't do it. The details of your firm's representation of the client include confidential information that belongs to the client. Arguably, your merely confirming to Neuergedanke that Portier might be thinking of using the idea falls in this category, as does a suggestion that the deal is likely to proceed without it, which also conveys timing information. The New York exception to the confidentiality rule under RPC 1.6(b)(2) to prevent the commission of a crime is too narrow to apply here. Apart from the limitation that it applies only prospectively, not to a crime that has already been committed, it clearly does not allow disclosure of the *client's* information to prevent *someone else* (Portier) from committing the crime of theft from Neuergedanke. Even if you were to argue that you are preventing the client from utilizing Portier's assistance, perhaps unwittingly, to steal from Neuergedanke, you do not know for sure that the idea is really proprietary or that the use of the idea would even be criminal. Finally, remember that the exception that allows disclosure is permissive rather than mandatory, leaving you the freedom to concentrate your effort where it belongs, for the benefit of the client. If action needs to be taken, the sensible course of action is just to go to the client.

In parallel, if Portier and your firm are violating the RPC, you may incur an obligation to report that to a disciplinary committee under RPC 8.4, but at this point you are still a long way from that.

If despite your best efforts to navigate these hills and valleys you encounter obstinacy or resistance, you may have some other choices to make as well, including getting your own ethics counsel to guide you in a much more comprehensive way.

For The Forum,
Robert Kantowitz, Esq.
(robert.kantowitz@gmail.com)

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

DEAR FORUM,

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

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

Sincerely,
Hopalong Semi-Retiree

1. *See* Andrew J. Seger, *Marching Orders: When to Tell Your Boss "No"*, 87 Fla. Bar Journal, No. 2, 34 (2013).

2. *See* Andrew M. Perlman, *The Silliest Rule of Professional Conduct: Model Rule 5.2(b)*, 19 The Professional Lawyer, No. 3, 14 (2009). For a more extended discussion, including analysis and references as to what the words mean in this context, *see* Roy D. Simon, Simon's Rules of Professional Conduct Annotated §§ 5.1:23, 5.2:5 (2019).

3. Under RPC 1.0(m): "[p]artner denotes a member of a partnership, a shareholder in a law firm organized as a professional legal corporation or a member of an association authorized to practice law. Even very junior partners and non-equity partners would appear to be included in this definition." Roy D. Simon, *supra* note 2, § 5.1:24. This is not professional baseball, where one of the limited partners in the New York Yankees was said to have observed, "There is nothing in life quite so limited as being a limited partner of George Steinbrenner."

4. *See, e.g.*, *In re Alexander*, 232 Ariz. 1, 300 P.3d 536 (2013) (*en banc*).

5. *Attorney Professionalism Forum*, N.Y. St. Bar Ass'n J. 50 (Jan. 2015).

The Role of A Mentor

By Adeline Antoniou and Barry A. Wadler

ADELINE ANTONIOU:

Through my three years of law school and even as my career started, Barry Wadler, a solo practice commercial litigator and transactional attorney, has been, and continues to be, my mentor. This mentoring relationship shaped and strengthened my legal education and career path beyond measure. I can firmly say I would not be where I am today if Mr. Wadler was not there by my side. But we didn't plan this relationship, it just evolved.

When I was a 1L at CUNY Law School, the school hosted a NYSBA event called "Pathway to the Profession" at which practicing attorneys from various NYSBA Sections came to the school for an informal evening opportunity to meet and speak with students. I was able to speak briefly to several attorneys that night. However, when I introduced myself to Mr. Wadler, we had a longer, engaging conversation. He explained with enthusiasm why he loved practicing law and spoke in depth about what he does for a living on a daily basis. He answered all of my questions and told me stories. I specifically recall that, as he talked about being an attorney, he said, "You know, I am notorious for worrying. But remember, worrying just means you're being conscientious." This was reassuring as I, too, am a perpetual worrier when it comes to my work product.

BARRY WADLER:

I have been in private practice for over 40 years. I am a member of NYSBA and have taught a few CLE courses. I love to teach. Through NYSBA, I volunteered to visit a few law schools for "meet and greet" programs so I have met many students who have no clue what their future law career will be or what it truly is like to be an attorney.

That night at CUNY Law School, as at other schools, many students came over for a few moments to say "hello" and ask simple questions, mostly, "How did you get your first job?" or "Do you need an intern?" I like to ask, "Why did you decide to go to law school?" "What area of law are you interested in?" I try to explain that there are many career paths in law and the attorney's life experience varies widely depending on the path taken.

What impressed me about Adeline was that she listened. She asked and listened. She talked about herself, her experiences and her unknowns. It was immediately clear she was not being shallow. Indeed, she engaged with me for perhaps 45 minutes and I gave her my card. I probably gave out 20 cards that evening, but Adeline reached out and thanked me the next day by email. That led to some telephone conversations which led to a small project writing a demand letter and then some legal research projects.

Adeline Antoniou, CUNY Law School 2019, is now a law clerk at London Fisher LLP and a member of NYSBA.

Barry A. Wadler is a member of both the ComFed and the Business Law Sections of NYSBA.

AA:

Through my law school years, Mr. Wadler gave me some legal research, told me about cases he was handling, often he challenged me to think about the arguments he was making and explained the opposing arguments he had to confront. Once, when I confessed I was unsure of the law on some issue, he responded, "Lawyers don't have to know all the answers. Lawyers just have to know the questions. Then we can look up the answers." This offered me a new and reassuring perspective on handling legal issues.

Over the years, I had the privilege of listening to Mr. Wadler think out loud and in return, got an authentic, unfiltered understanding of what it would be like to practice law. I understood the need to plan ahead, to anticipate deadlines, to be familiar with the law and the file documents. I learned the importance of being practical and of staying in touch with clients. There are things you just don't learn in school. Having a mentor didn't just mean having a teacher, it meant having a role model. As a law student, it meant having a preview of day-to-day law practice.

BW:

Adeline loved to listen as much as I love to tell stories. She became the ear of a litigator. One thing I wanted her to learn was not to be afraid. On one occasion, I invited her to come to court with me for a Commercial Part Preliminary Conference. I wanted her to see how I met my adversary for the first time. "Some clients don't understand when you are friendly with the adversary" I explained, "but you walk right up to them and speak to them and you let them know you are not afraid. Be professional and it pays off." Many months later, I was relating to her how that adversary and I extended courtesies when needed.

AA:

In numerous ways, my lawyering skills were developed, and my confidence grew. Though I was never employed by Mr. Wadler, in my second and third years of school, I took some part-time jobs. I came to see that some employers are better than others at explaining what their work is about and what they want done. One office was devoted to real estate, specifically, coop and condo closings, but I was unfamiliar with the practice and the employer was not helpful at instruction. When I related this to Mr. Wadler, he directed me to a set of books (McKinney's Forms, Real Property Practice) and showed me there were detailed checklists of what to do when representing a buyer or seller. I came to understand that, no matter what new project or task is thrown at you for the first time, there is a place or a way to learn how to do it. During my second semester, we had an oral argument assignment. Mr. Wadler listened to me practice several times and coached me on my presentation, including when to pause for effect, and when to repeat a phrase for emphasis. On the day of my presentation, I was prepared and self-assured. These are just a couple of examples of when Mr. Wadler came to my rescue.

BW:

At her graduation, I was given the honor of hooding her as she was awarded her diploma. I gush with pride at the thought that I might have had something to do with enabling her to secure a position at such a respected law firm as London Fischer LLP. She has told me that, from day one, she comfortably transitioned from student to lawyer.

While Adeline benefited from our relationship, I did as well. Our frequent telephone conversations reminded me how far I had come as an attorney. She embodied the young, overwhelmed student that I once was, unable to imagine being able to handle all the complex matters that would someday be thrown at me. Now I was speaking to and reassuring my younger self.

Mentoring is a beneficial two-way street.

Having a mentor didn't just mean having a teacher, it meant having a role model.

AA:

Thanks to Mr. Wadler, I am more confident in the field than I ever would have been, absent the guidance my mentor provided. My advice to students seeking a mentor: show interest, don't be afraid to ask questions, and listen! I promise only positive results will follow.

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Thoughts on Legal Writing from the Greatest of Them All: Stephen King

Stephen King, the King of Horror[1] and master of supernatural fiction, is one of the greatest and most prolific storytellers of our time. He's written more than 60 novels, including *Carrie*, *The Shining*, *Misery*, and *It*, plus 200 short stories and several motion-picture screenplays.

In 2000, after a near-death car accident, King finished *On Writing: A Memoir of the Craft*.[2] In this part memoir, part writing manual, King tells us that most people have at least "some talent as writers and storytellers, and that those talents can be strengthened and sharpened"[3] by learning the writing fundamentals and with "lots of hard work, dedication, and timely help."[4]

King wrote *On Writing* with fiction writers in mind. But legal writers can benefit from his book. In this column, we focus on King's advice on writing and storytelling — and applying his advice to legal writing.

"WHAT WRITING IS"[5]

To King, writing is telepathy,[6] the transmission over time and distance of messages from sender to receiver. Unless sender and receiver visualize the world through the same eyes, the effect of transmitting the message will create ambiguity and leave room for interpretation.[7] Do all

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details matter? No. Overzealous attention to details not only distracts from the message itself but also "takes all the fun out of writing"[8] and reading. A meeting of the minds can occur only when the writer can transmit the story's essential elements. For telepathy to operate, writers must take writing seriously. "Do not come lightly to the blank page," says King.[9]

THE WRITER'S TOOLBOX

Aspiring writers must work on the fundamentals of writing. King tells writers to build custom tool boxes — their writing skills — to carry their tools. Writers should keep their tools current, he says, revisiting and updating them as they progress. These tools include vocabulary, grammar, usage, and style.

1. Vocabulary

- Vocabulary is "the bread of writing."[10] Some writers have expansive vocabularies; others don't. The depth of vocabulary matters less than how writers use it.[11] By way of example, King quotes Steinbeck in the *Grapes of Wrath*: "Some of the owner men were kind because they hated what they had to do, and some of them were angry because they hated to be cruel, and some of them were cold because they had long ago found that one could not be an owner unless one were cold."[12]
- Use plain English. Don't "dress up vocabulary looking for long words because you're maybe too ashamed of using short ones."[13] For lawyers, that means avoiding legalese and foreign and uncommon words and phrases.
- If it's appropriate and colorful, use the first word that comes to mind.[14] Overthought words means stilted writing. Meaning is critical for writers. Thus, King would tell lawyers to be direct and not to risk confusing the judge, counsel, your client, or yourself by using words that replace your own.

2. Grammar

- Grammar, King explains, organizes speech in ways readers expect. You mislead them if you violate conventions: "Bad grammar produces bad sentences."[15]
- Must all sentences be complete? No. Sentence fragments? Try 'em. Variety makes writing interesting, and sometimes writers do well to disregard rules. But, King counsels, follow the rules unless you're sure your unconventional writing will succeed.[16]
- "Grammar is not just a pain in the ass; it's the pole you grab to get your thoughts up on their feet and walking."[17] There's a simplicity at the core of the American-English language. A noun and a verb suffice to make a sentence. Too many simple sentences in a row sound angry, impatient, or childish. But they "provide a path you can follow when you fear getting lost in the tangles of rhetoric."[18]

3. Usage

An endless topic of debate among writers is how to use language. Controversies over usage abound. We all have our preferences. Sharing some of his own pet peeves, King rails against these:

- Meaningless and verbose phrases. For lawyers, these include "at this point in time," "at the end of the day," "it is clear that," "it goes without saying that," "it is important to remember that," "needless to say," "in our opinion," and "we believe that."
- The passive voice. It's for timid writers.[19] Unsure writers are tempted to use passive verbs to give their work authority and prestige. But passive structures are heavy and indirect. And they make readers work too hard. To prove you care about your readers, "energize your prose with active verbs."[20]
- Adverbs. They express the writer's fear of not being taken seriously.[21] Good writing is often about letting go of fear.[22] Dare to be direct, King tells us.

4. Style

- *The Elements of Style* by William Strunk and E.B. White[23] offers the best tools on style, according to King, and gives writers clear rules and guidance.[24]
- Paragraphs are almost as important for how they look as for what they say.[25] Short paragraphs are easy to read; dense ones, which require more effort, belong in serious works. Paragraphs act as "maps of intent."[26] Their appearance sends a message to the reader.
- In expository prose, paragraphs must be "neat and utilitarian."[27] They should contain a topic sentence followed by sentences that explain or amplify the paragraph's point. This technique lets writers organize their thoughts and prevents them from wandering from the topic.[28]
- A paragraph can be a word long or run for pages.[29] King instructs writers to alternate paragraph length to vary the pace and keep their reader alert. What's important is to "learn the beat."[30]
- "[S]hort doesn't always mean sweet."[31] Brevity adds power and reduces ambiguity and inconsistency, but writing shouldn't sound clipped or abrupt. Writing should enhance readability, meaning, and persuasion. Clarity is more important than concision.

"ON WRITING"[32]

To build their tool boxes and strengthen their writing muscles, serious writers must practice relentlessly. "There is a muse, but he's not going to come fluttering down into your writing room and scatter creative fairy-dust all over your typewriter or computer station."[33] Below are some of King's suggestions to turn competent writers into good ones.

1. "If you want to be a writer, you must do two things above all others: read a lot and write a lot."[34]

- Writers must read. Reading good fiction teaches "style, graceful narration, plot development, the creation of believable characters, and truth-telling."[35] Reading bad fiction teaches what to do and what not to do.[36]
- Learn writing by writing. Commit to a writing schedule. Write every day. Once you start a project, don't stop or slow down unless you must. Writing, says King, is "a kind of inspired play for the writer."[37] If you wait too long, writing will feel like work.
- When it's time to write, chose a quiet place where you can close the door. The door keeps the world out and you focused on your project.[38]
- Write about anything, but tell the truth.[39] Stylistic imitation is unavoidable. Yet "the truth as it is understood by the mind and the heart" cannot be imitated.[40] Be brave. Write from your perspective and experience. Share what you know.

2. The Story Elements: Narration, Characters, Description

- Stories "pretty much make themselves."[41] The writer's job is to give stories room to grow.[42] For legal writers, this means that lawyers must present the facts accurately, clearly, and completely; give correct citations to records; and prove cases without distraction and overpromising.
- King tells us that "the best stories always end up being about the people rather than the event, which is to say character-driven."[43] Be honest about your characters. No one is a fully "good guy" or a "bad guy" in real life.[44]
- Use techniques of description to bring your story to life. "Description begins with visualization of what it is you want the reader to experience. It ends with your translating what you see in your mind into words on the page."[45] Too little description leaves the reader nearsighted.[46] But don't bury your story in unnecessary details and images. Determine what needs description and what can be left alone.
- King encourages writers to use similes, comparisons, and metaphors.[47] They help present something old in a new and vivid way. Clichéd similes, metaphors, and images sound funny and stale.[48]

- Research is indispensable to writers, including legal writers. But, as King says, there's "a difference between lecturing about what you know and using it to enrich the story."[49]
- Avoid conclusions. The rule is "never tell us a thing if you can show us."[50]

3. Reviewing and Rewriting

- Reviewing and rewriting are key components of the writing process. King urges writers to have at least two drafts: "the one you do with the study door closed and the one you do with it open."[51] Write your first draft alone. Once you're done, set it aside for a while until it's almost forgotten.[52]
- Reviewing should be done, if possible, in one sitting.[53] Track misspellings, but most of all ask yourself these questions: "[I]s this story coherent?" "[W]hat will turn it into a song? What are the recurring elements? Do they entwine and make a theme?"[54] Most of all, look for what you meant, because in your second draft you'll want to reinforce that meaning.[55] Once you finish reading and feel confident that your work is reader-friendly, get your friends and supervisors to comment on it.[56]
- Clarify your themes in your second draft. They help bring "clearer focus and a more unified story."[57] Themes dictate which facts to present, in which order, and whether to emphasize or deemphasize them. Keep editing to make your themes stand out clearly.
- "Call that one person you write for Ideal Reader. He or she is going to be in your writing room all the time."[58] Thinking of your Ideal Reader will also set the pace of your work.[59] To find the right pace, ask yourself the following questions: "Is I.R. going to feel there's too much pointless talk in this place or that?"[60] Have you underexplained a situation or overexplained it?[61] Ask those questions again to friends and colleagues with whom you've shared your first draft.[62] In your second draft, simplify your writing by omitting the unnecessary. Cut clutter, redundancies, and extraneous words. King's rewrite formula is this: "2nd Draft = 1st Draft – 10%."[63] And, King explains, be prepared to "kill your darlings, even when it breaks your egocentric little scribbler's heart."[64]

CONCLUSION

King teaches that good writing is in everyone's reach. It's first about seeing clearly and clearly transmitting thoughts to readers. Then it's about practice and honesty. Writing isn't about getting rich or famous. It's "about enriching the lives of those who will read your work, and enriching your own life."[65] "It's about getting up, getting well, and getting over. Getting happy, okay? Getting happy."[66]

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

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1. K.S.C., *Why Stephen King's Novels Still Resonate*, Economist (Sept. 7, 2017), https://www.economist.com/prospero/2017/09/07/why-stephen-kings-novels-still-resonate.
2. Stephen King, On Writing: A Memoir of the Craft (Scribner ed., 2d ed. 2010) (hereinafter *On Writing*).
3. *Id.* at 18.
4. *Id.* at 142.
5. *Id.* at 103.
6. *Id.*
7. *Id.* at 105.
8. *Id.* at 106.
9. *Id.*
10. *Id.* at 114.
11. *Id.*
12. *Id.* at 116 (quoting John Steinbeck, The Grapes of Wrath 13 (Penguin Classics 2006)).
13. *Id.* at 117.
14. *Id.* at 118.
15. *Id.* at 120.
16. *Id.* at 121.
17. *Id.*
18. *Id.*
19. *On Writing*, *supra* note 2, at 123.
20. *Id.* at 128.
21. *Id.* at 124.
22. *Id.* at 128.
23. *See* William Strunk & E.B. White, The Elements of Style (Test Editor ed., 4th ed. 1999). The *Legal Writer* will cover Strunk and White in a future *Greatest* column.
24. *On Writing*, *supra* note 2, at 129.
25. *Id.* at 130.
26. *Id.*
27. *Id.*
28. *Id.* at 131.
29. *Id.* at 134.
30. *Id.* at 135.
31. *Id.* at 135.
32. *Id.* at 139.
33. *Id.* at 144.
34. *Id.* at 145.
35. *Id.* at 146.
36. *Id.*
37. *Id.* at 153.
38. *Id.* at 156.
39. *Id.* at 158.
40. *Id.* at 160.
41. *Id.* at 163.
42. *Id.*
43. *Id.* at 190.
44. *Id.*
45. *Id.* at 173–74.
46. *Id.* at 174.
47. *Id.* at 178.
48. *Id.* at 179.
49. *Id.* at 161.
50. *Id.* at 180.
51. *Id.* at 209.
52. *Id.* at 212.
53. *Id.*
54. *Id.* at 214.
55. *Id.*
56. *Id.* at 196.
57. *Id.* at 201.
58. *Id.* at 219.
59. *Id.* at 221.
60. *Id.*
61. *Id.*
62. *Id.* at 222.
63. *Id.* at 282.
64. *Id.* at 222.
65. *Id.* at 269.
66. *Id.*

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