NEW YORK STATE BAR ASSOCIATION
Journal
NYSBA
NOVEMBER 2020
VOL. 92 | NO. 8

CONNECT WITH NYSBA
VISIT NYSBA.ORG/BLOG

Technology's Role in Helping the Court System Survive a Pandemic
Christian Nolan

Who (or What) Is Liable for AI Risks?

Congress and Big Tech (Trump, Elections, Courts and Hearings)

Why the Courts Are Moving to Microsoft Teams

LAW PRACTICE MANAGEMENT: MARKETING AUTOMATION TOOLS LEVEL THE PLAYING FIELD

New York State Bar Association

NYSBA Membership 2021 Renewal Is Now Open

NYSBA membership grants you access to exclusive benefits and to be part of monumental change. Whether it's adapting to the new virtual environment, participating in health law discussions, or speaking out on racial injustice, we are always looking to increase involvement via leadership and task force opportunities.

Here's a list of existing benefits and partners…*with additional ones added throughout the year!*

- Complimentary CLE programs included with select Membership
- 25%+ discount on all additional CLE programs offered
- 25%+ discount on all NYSBA published books & forms
- Complimentary copies of the *NYSBA Journal*, *State Bar News*, *CasePrepPlus* and *NY Law Digest*

NYBSA Partners

ABA Retirement Funds
USI Affinity Insurance
ABACUSLAW
Clio
LawPay
JDL Group
Ruby Receptionists
UPS
Digital Age Marketing Group
Fastcase

Renew Online

NYSBA.ORG/RENEW2021
or by phone 800.582.2452

Don't forget!

Discounted entertainment, travel and activities.

New York Yankees
Brooklyn Nets
Barclays Center
Radio City Music Hall
Sightseeing Pass
NYC Zoos and Aquariums
AVIS/Hertz Rental Cars

**Select discounts and promotions will vary by partner*

NYSBA

From the NYSBA Bookstore

Best Sellers

Real Estate Titles: The Practice of Real Estate Law in New York, 4th Ed NEW RELEASE

This is an invaluable resource for all real estate practitioners. Written and edited by many leading real estate practitioners, this book updates and expands on the landmark publication originally edited by Jim Pedowitz.

Print: 421020 | eBook: 421020E | 1,723 pages | **Member $185** | List $235

Legal Manual for New York Physicians, 6th Ed NEW RELEASE

Written and edited by more than 70 experienced practitioners, this text is a must-have for physicians, attorneys who provide guidance and advice to physicians and anyone involved in the medical field.

Print: 413220 | eBook: 413220E | 1,266 pages | **Member $135** | List $175

LexisNexis® NYSBA's Surrogate's Forms (Powered by HotDocs™) NEW RELEASE

This automated set of forms contains all the official probate forms as promulgated by the Office of Court Administration (OCA) as well as the forms used specifically by the local Surrogate's Courts.

Downloadable: 6229E | **Member $705** | List $828

Estate Planning & Will Drafting in New York (w/2019-2020 Revision)

Written and edited by experienced practitioners, this comprehensive book is recognized as one of the leading references available to New York attorneys involved in estate planning. Includes Forms.

Print: 4095C | eBook: 4095CE | 946 pages | **Member $185** | List $220

Probate and Administration of New York Estates, 2d Ed

This comprehensive, practical reference covers all aspects of probate and administration, from the preparation of the estate to settling the account.

Print: 40054 | eBook: 40054E | 1,096 pages | **Member $185** | List $220

LexisNexis® NYSBA's Estate Planning System (Powered by HotDocs™)

This *Estate Planning System* is a fully automated, document assembly software that enables the user to draft customized estate planning documents for a client.

Downloadable: 6270E | **Member $1,182** | List $1,392

To sign up for a demo of this product, please send your contact information to estateplanningdemo@nysba.org

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total.

www.nysba.org/pubs

1.800.582.2452

NYSBA

Must-Have Titles

Virtual Lawyering: A Practical Guide NEW RELEASE

Whether you are a litigator, transactional attorney or in-house attorney, Virtual Lawyering: A Practical Guide will provide you with practical advice as you navigate through the virtual legal world and confront new issues.

eBook: 413720E | **Member $45** | List $60

NYSBA New York Rules of Professional Conduct NEW RELEASE

(As amended through June 24, 2020 with Commentary as amended through June 24, 2020)

A much-needed resource of every New York attorney's library, this title also includes a Preamble, Scope and Comments (not adopted by the Appellate Division). This version of the Rules is published solely by NYSBA.

Print: 403020 | eBook: 403020E | 276 pages | **Member $18** | List $28

New York State Public Health Legal Manual, 2d Ed. NEW RELEASE

The second edition of this Manual covers the updated laws governing the control of the spread of communicable diseases and laws concerning the abatement of nuisances that cause public health emergencies and the constitutional rights of those affected.

Print: 417920 | eBook: 417920E | 88 pages | **Member $17** | List $23

A Guide to Diversity and Inclusion in the 21st Century Workplace

This book is a guide for attorneys, judges, and businesspeople regarding the major issues of diversity and inclusion in the 21st Century.

Print: 415819 | eBook: 415819E | 236 pages **Member $22** | List $30

Attorney Escrow Accounts – Rules, Regulations and Related Topics, 4th Ed.

Fully updated, this is the go-to guide on escrow funds and agreements, IOLA accounts and the Lawyers' Fund for Client Protection. With CD of forms, ethics opinions, regulations and statutes.

Print: 40264 | eBook: 40264E | 436 pages **Member $60** | List $75

Evidentiary Privileges, 6th Ed.

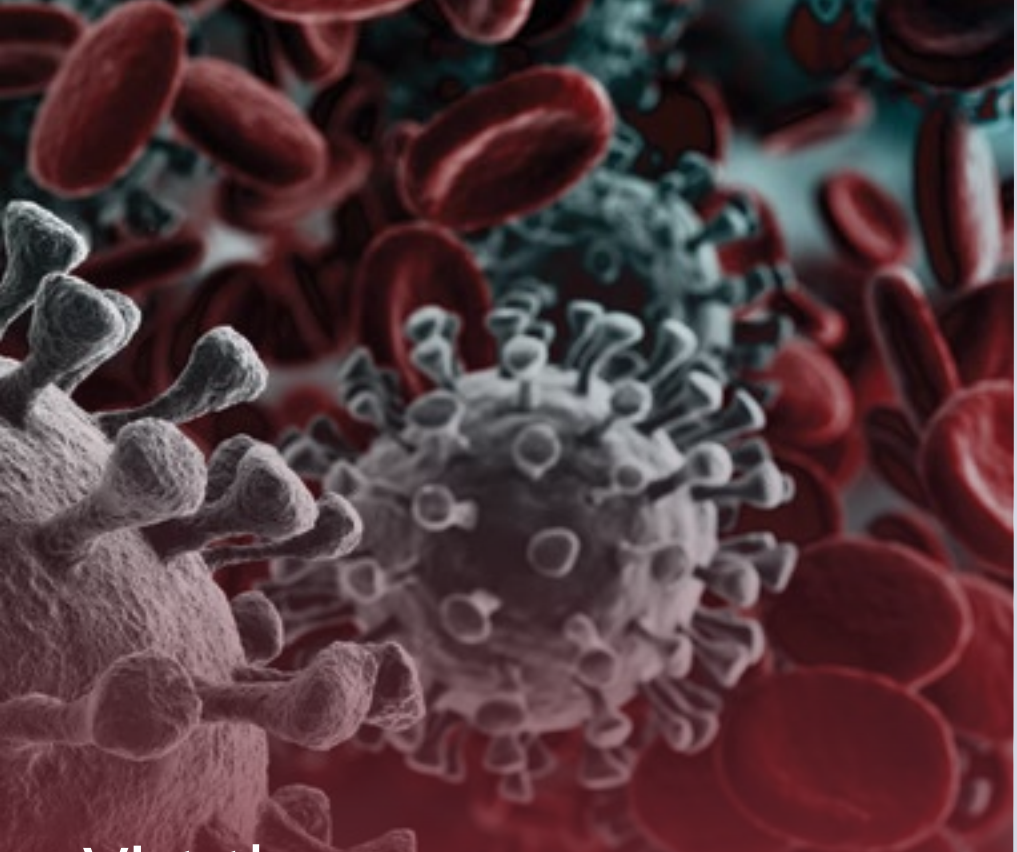
Covers the evidentiary, constitutional and purported privileges that may be asserted at the grand jury and at trial.

Print: 40996 | eBook: 40996E | 450 pages **Member $55** | List $75

Grow Your Practice: Legal Marketing and Business Development Strategies

A must-have for attorneys on marketing and management resources that focus on clients and complement today's dynamic legal practice.

Print: 41265 | eBook: 41265E | 302 pages **Member $50** | List $65



NEW YORK STATE BAR ASSOCIATION
Journal

PUBLISHER
Pamela McDevitt
Executive Director

NYSBA CHIEF COMMUNICATIONS STRATEGIST
Susan DeSantis

PRODUCTION EDITORS
Pamela Chrysler
Alyssa Colton

SENIOR WRITER
Christian Nolan

CONTRIBUTORS
Brendan Kennedy
Brandon Vogel

DESIGN
Lori Herzing
Erin Corcoran
Christine Ekstrom

COPY EDITORS
Alex Dickson
Reyna Eisenstark
Howard Healy

EDITORIAL OFFICES
One Elk Street, Albany, NY 12207
518.463.3200 • FAX 518.463.8844
www.nysba.org

NYSBA ADVERTISING
MCI USA
Holly Klarman, Account Executive
holly.klarman@mci-group.com
410.584.1960

SUBMISSIONS
Send articles to journal@nysba.org
Review submission guidelines at
nysba.org/journalsubmission

Contents

NEW YORK STATE BAR ASSOCIATION
Journal
NOVEMBER 2020 VOL. 92 | NO. 8

8 Technology's Role in Helping the Court System Survive a Pandemic

by Christian Nolan

In this issue:

13 More Reliable, Improved Screen Sharing, Enhanced Video Quality: Why the Courts Are Moving to Microsoft Teams
by Brandon Vogel

18 Who (or What) Is Liable for AI Risks?
by Vivian D. Wesson

24 Using Remote Technology in Legal Practice: Attorney-Client and Attorney-Staff Relationships
by Kelsey R. Ruszkowski and Samuel J. Blanton

30 Impertinent Questions: The Unusual Case of *Gorsuch v. Alito* and the Supreme Court's Textualist Approach to Judging
by Richard B. Ancowitz

35 Bail Reform: New York's Legislative Labyrinth
by Hon. David J. Kirschner

39 Lawyers Tell Us: Their Must-Have Tech Tools
by Brandon Vogel

42 What Makes a Virtual Lawyer Happy?
by Debbie Epstein Henry

45 Title America's Tech Giants: It's Back to the Drawing Board on European Data
by Davide Szép

49 Coops, Condos and COVID-19
by Richard J. Sobelsohn

54 From Euclid to Darwin: The Unavoidable Evolution of Zoning in the Post-COVID-19 World
by David S. Steinmetz, Daniel R. Richmond and Maximilian R. Mahalek

Departments:

5 President's Message

16 Hilary on the Hill
Congress and Big Tech (Trump, Elections, Courts and Hearings)
by Hilary Jochmans

58 Law Practice Management:
Marketing Automation Tools Level the Playing Field
by Carol Schiro Greenwald

61 Attorney Professionalism Forum
by Vincent J. Syracuse, Maryann C. Stallone, Carl F. Regelmann and Alyssa C. Goldrich

65 **State Bar News** in the *Journal*

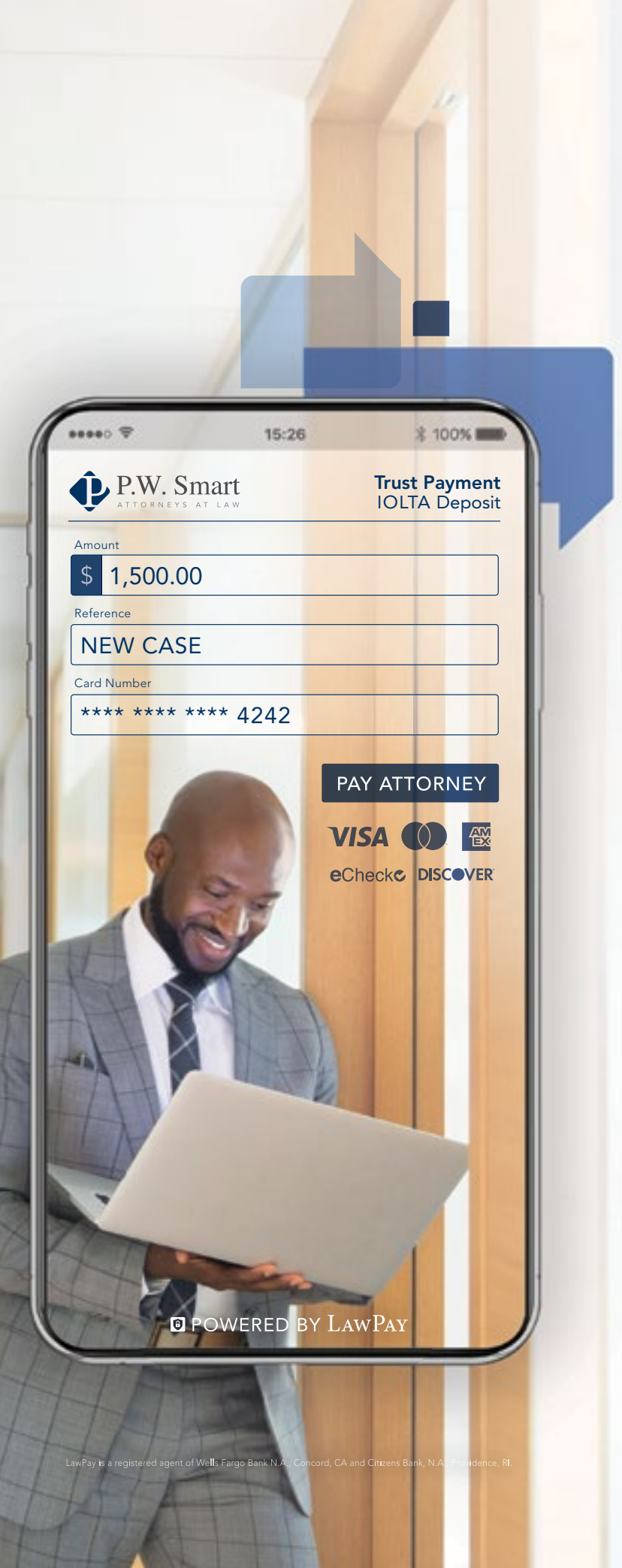
59 Classifieds

74 Marketplace

75 2020–2021 Officers

76 The Legal Writer
by Gerald Lebovits

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the New York State Bar Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. For submissions guidelines: www.nysba.org/JournalSubmission. The *Journal* ((ISSN 1529-3769 (print), ISSN 1934-2020 (online)), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January/February, March, April, May, June/July, August, September/October, November, December. Single copies $30. Library subscription rate is $210 annually. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.



LawPay

AN AFFINIPAY SOLUTION

POWERING PAYMENTS FOR THE LEGAL INDUSTRY

The easiest way to accept credit, debit, and eCheck payments

The ability to accept payments online has become vital for all firms. When you need to get it right, trust LawPay's proven solution.

As the industry standard in legal payments, LawPay is the only payment solution vetted and approved by all 50 state bar associations, 60+ local and specialty bars, the ABA, and the ALA.

Developed specifically for the legal industry to ensure trust account compliance and deliver the most secure, PCI-compliant technology, LawPay is proud to be the preferred, long-term payment partner for more than 50,000 law firms.

NYSBA

ACCEPT MORE PAYMENTS WITH LAWPAY

855-759-5284 | lawpay.com/nysba

Technology Is Great but I Miss Human Interaction

When I declared my intention to run for president-elect of the New York State Bar Association in 2018, it never crossed my mind that I might – if successful – assume the presidency two years later in the midst of a deadly pandemic that would wreak havoc upon the entire world and change the way we all conduct our business and our lives. Lawyers understand this as well as anyone, as it has become the norm for members of our profession to engage in virtual judicial proceedings, virtual meetings with clients and adversaries and all manner of virtual activities that were formerly conducted live and in person.

What started as a mere trend in the legal profession toward a greater reliance on electronic devices, the internet and novelties such as virtual meetings, e-courts and e-filing, has expanded exponentially. We were forced out of the familiar confines of our law offices into the law offices and courts of the future before many of us felt ready to do so.

NYSBA, too, was forced into a new normal. While our headquarters at One Elk Street in Albany was closed in the spring of 2020 during the worst of the pandemic in New York, the leadership and staff of the Association continued to work hard at the business of the Association. We found ways in which to serve our members remotely – 24/7 – with our new state-of-the-art website, important virtual meetings and programs on Zoom, and webinars and webcasts providing continuing legal education, current information and training to lawyers around the world.

However, while I am so very thankful that we have this great technology – and I don't know where any of us would be without it – I have concluded that Zoom, Skype and similar programs may not be the panacea that some may think they are.

Simply put, I miss live face-to-face human interaction. I miss all of you.

We have always touted networking as one of the most valuable benefits of bar association membership, yet networking seems to have been lost – or at least significantly diminished – in this era of technology. When you attend a live NYSBA event, not only are you presented with a highly informative (and sometimes entertaining) program, but you are also afforded the opportunity to meet with colleagues to discuss a point of law – or life in general – face-to-face. That kind of communication is not available in our current virtual reality.

As president-elect and chair of our House of Delegates, I was proud to have presided over NYSBA's first-ever virtual House meeting back in April 2020. It was an amazing accomplishment and achievement for the Association. The meeting attracted the largest number of delegates in the history of our Association to that point; reports and recommendations were presented and debated; motions were made and decided; votes were taken; and NYSBA policies were established. In short, the business of the Association continued unabated. Nevertheless, now I yearn to get back to the old-fashioned face-to-face House of Delegates meetings.

Since the pandemic struck, our Association's schedule of events has changed drastically. Many events that were previously held routinely every year like clockwork have been canceled, postponed, or changed from live to vir-

tual. The future of many events remains fraught with uncertainty, requiring new and creative approaches. As president, I was very much looking forward to the privilege of attending and speaking at NYSBA Section and committee events and local bar association events across the state. Additionally, I was anxious to spread NYSBA's message far and wide when traveling to the American Bar Association's Bar Leadership Institute and Annual Meeting in Chicago and the Mid-Atlantic Bar Conference in New Jersey. In fact, since taking office more than four months ago, all of these events were converted from live to virtual. I have had little opportunity to attend and speak at a live event: no programs; no award ceremonies; no conferences; no luncheons, dinners or receptions; no trips or destination events; the list goes on.

Even my installation as president on June 1, 2020 was also a NYSBA first in that it was held as a virtual event. I had been very much looking forward to that planned in-person celebration, with the oath of office to be administered by Chief Judge Janet DiFiore, and with my family, friends and colleagues in attendance. Alas, a traditional live installation was not meant to be. Chief Judge DiFiore administered the oath remotely, via Zoom, while I was in my home in Stony Brook, with my wife Joleen at my side. Don't get me wrong: it was a great honor to have been sworn into office by our state's Chief Judge under any circumstances – live or virtual – and I will always be grateful to her for participating in such an important event in my life. However, it was simply not the same as the live ceremony I had contemplated.

Likewise, my second installation ceremony which, following tradition, should have been held 13 days later at the House of Delegates meeting in Cooperstown, became a virtual event as well, with Senior Associate Judge Jenny Rivera administering the oath of office remotely via Zoom. Once again, I was deeply honored by Judge Rivera's participation, as well as her flattering remarks, but wouldn't it have been even more special had she delivered those remarks in my presence?

In my opinion, there are just certain things that are not well-suited for Zoom. Both of my installation speeches were delivered from my house with only one person (my wife) present. Normally when you make a speech, you can interact with and gauge how your audience is reacting. You hope to hear applause when they agree with you and you feed off of that energy. But when you neither see nor hear the people to whom you are speaking, it's an entirely different – and somewhat unsettling – experience.

I was also excitedly looking forward to our 2021 Annual Meeting in New York City, including the NYSBA annual gala, which we had already booked to be held "beneath the whale" at the American Museum of Natural History – the venue for the 2020 gala – in late January 2021. It is fair to say that the Annual Meeting is the highlight of a NYSBA president's term. It is a one-week whirlwind of activity with the president involved morning, noon and night. Make no mistake, we will still make the absolute best of our virtual 2021 Annual Meeting, but from a president's perspective, I'd be less than candid if I said I wasn't disappointed to not be able to spend the week at the New York Hilton interacting with our membership in person.

Four months into my term, there have been far too few instances where I was actually involved in live face-to-face interaction with others.

First, in August 2020, NYSBA's officers, including President-elect T. Andrew Brown, Secretary Sherry Levin Wallach, Treasurer Domenick Napoletano and Immediate Past President Hank Greenberg, joined me, along with members of NYSBA's senior staff, for a socially distant strategic planning retreat in Cooperstown.

Second, on September 21, 2020, I had the privilege of appearing at Court of Appeals Hall in Albany in connection with the Chief Judge's 2020 Hearing on Civil Legal Services in New York. The hearing panel included Chief Judge Janet DiFiore, Chief Administrative Judge Lawrence K. Marks, Presiding Justice Rolando T. Acosta of the Appellate Division, First Department, Presiding Justice Alan D. Scheinkman of the Appellate Division, Second Department, Presiding Justice Elizabeth A. Garry of the Appellate Division, Third Department, Presiding Justice Gerald J. Whalen of the Appellate Division, Fourth Department and, of course, your President.

I am hopeful that these two events are just a start and that I can join our members at future live NYSBA events before my term as president is completed, but we are far from saying with any certainty when or where those live events might take place.

In the meantime, I want all of our members to rest assured knowing that even though you're not seeing me in person on a regular basis, my fellow NYSBA officers, our dedicated and talented staff and I have been hard at work advocating for the profession on your behalf and providing the high level of service you have come to expect from the Association. Our world has changed dramatically this year, but the leadership and service provided by NYSBA has not.

Of course, I continue to remain just an email, phone call or Zoom conference away. As always, be well and stay safe.

SCOTT KARSON can be reached at skarson@nysba.org

MEMBER NYSBA BENEFIT

Who will if you can't?

Group disability coverage built for attorneys. Exclusive NYSBA rates.

Help protect yourself. Help protect your loved ones.

Think disability insurance is just for accidents?

90% of disabilities are caused by illness rather than accidents.

Source: Life Happens, Disability Insurance, 2019.

How long can you go without a paycheck?

Up to $10,000 a month in Group Long-Term Disability benefits at competitive member-only rates not available to the public.

Coverage built for attorneys.

Coverage includes "your own occupation" definition of disability. That means if you are unable to perform your normal duties, you will not be forced into a different line of work.

In light of this global pandemic, our commitment to protecting what's important is stronger than it's ever been. While social distancing directives remain in place, for a limited time through December 31st 2020, for members under age 50 applying for amounts through $4,000, in person medical exams or labs have been suspended by our carrier, New York Life Insurance Company, and your application may instead be processed through expedited underwriting using available medical records, written or tele-interview medical questions, and database information. For those applying for amounts over $4,000, every effort will be made to use alternate options for the medical underwriting process where paramedical exams are unavailable.

Visit **nysbainsurance.com/expedited** to get an **instant quote** or apply.
Questions? **Call 855-874-0140** weekdays from 8:30–4:30 p.m. (ET)

Administered by:

USI AFFINITY

USI Affinity
14 Cliffwood Avenue, Ste. 310
Matawan, NJ 07747

Underwritten by:

NEW YORK LIFE

New York Life Insurance Company
51 Madison Avenue
New York, NY 10010

*Contact the Administrator for current information including features, costs, eligibility, renewability, exclusions and limitations.

Underwritten by New York Life Insurance Company, 51 Madison Avenue, New York, NY 10010 on Policy Form GMR.

30-Day Free Look
Once coverage is approved, you will be sent a Certificate of Insurance summarizing benefits. If you are not completely satisfied with the terms of the Certificate, you may return it, without claim, within 30 days for a full refund. Your coverage will then be invalidated.

AR Insurance License #: 325944 CA Insurance License #: 0G11911 #1835315

Technology's Role in Helping the Court System Survive a Pandemic

By Christian Nolan

Skype for Business, Microsoft Teams, Elmo projectors, wireless transceivers and lots and lots of e-filing – welcome to the "new normal" for New York's virtual courtrooms during the coronavirus pandemic.

"Technology has played an important and integral role for us, allowing us to move our cases forward while at the same time limiting courthouse traffic and mitigating the spread of COVID," Chief Judge Janet DiFiore said. "So, as we creatively explore the many ways in which technology and virtual operations can appropriately become a permanent part of our operation, we are equally excited about the prospect of a new and even more productive normal."

The state court system never stopped operating during the pandemic thanks entirely to virtual courtrooms. Essential matters, such as arraignments, have been handled virtually, and then gradually other less essential hearings resumed regionally in conjunction with the governor's phased-in approach to reopening.

"I think we're all very proud of everything that's been accomplished in such a short period of time," said Tamiko Amaker, administrative judge for the New York City Criminal Court. "It was a bit of a nail biter at first because we were trying to make it all happen without a lot of advance notice but our IT people were phenomenal and the staff really learned the technology and mastered it."

Amaker said judges were provided laptops to use at home and were trained on videoconferencing technology for their virtual arraignments. Support staff were also trained on the software and were able to assist the parties in the cases, as they sent out the links for the hearings.

In New York City, Amaker said the court system handled over 25,000 virtual arraignments since the pandemic began and over 11,000 other types of proceedings including preliminary hearings in place of grand juries before they resumed during the summer.

GLITCHES

Up until October, the state court system utilized Skype for Business for their virtual proceedings. Amaker said there were glitches with the use of Skype for Business but nothing fatal to a proceeding. An individual might freeze on the screen, prompting a user to log out and log back in, but it wasn't frequent.

Craig Doran, an elected state Supreme Court justice and administrative judge for the Seventh Judicial District,


Meet
GoToMeeti
Teams
Zoom
FaceTime

Eric F. Grossman (executive vice president and chief legal officer, Morgan Stanley) speaks during the Chief Judge's Statewide Hearing on Civil Legal Services on September 21. Front L to R: Chief Administrative Judge Lawrence Marks, Chief Judge Janet DiFiore, NYSBA President Scott M. Karson. Top L to R: Presiding Justice of the Third Department; Elizabeth A. Garry; Presiding Justice of the First Department Rolando T. Acosta; Presiding Justice of the Second Department Alan D. Scheinkman; Presiding Justice of the Fourth Department Gerald J. Whalen. Courtesy New York State Unified Court System

which includes Monroe and seven other counties, agreed that glitches didn't hinder virtual proceedings. Doran said if a lawyer has trouble getting logged on to Skype, court personnel call him or her on the phone. He said many lawyers don't have the ability to link into a videoconference call, so they also provide a call-in number.

"Sometimes it's a little bit messy but if we keep our eye on the endgame and try to be flexible, we usually can work it out," said Doran. "I can't think of an adjournment over a tech matter."

Over the summer, the New York State Bar Association's Emergency Task Force for Solo and Small Firm Practitioners conducted a survey of just over 100 members regarding the virtual courts and client interactions. Nearly 65% said they rarely or never had trouble connecting virtually, 67% would consider participating in virtual appearances indefinitely and over 70% rarely or never had trouble meeting with their clients virtually.

Hoping for a better overall experience, more capabilities and fewer glitches, the court system switched to Microsoft Teams in October. Amaker explained that, unlike Skype, Microsoft Teams has breakout rooms, so even in the midst of a proceeding a defendant can privately talk to his or her lawyer. On Skype, such a conversation would require the other participants to log off.

ACCESS TO JUSTICE

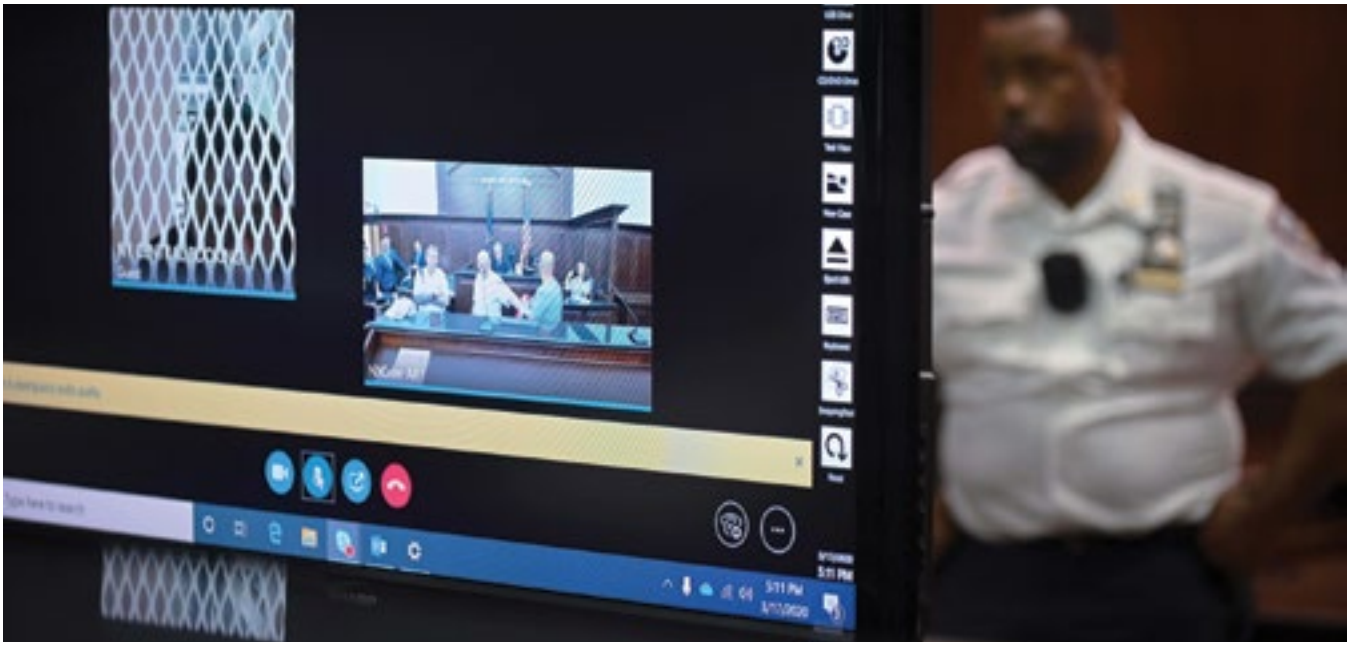
In late August, a joint state Senate committee hearing examined the reopening and operation of New York's courts during the COVID-19 pandemic. A common concern, especially amongst legal aid groups, was that some clients, especially those pro se, cannot access the court's videoconferencing or e-filing either due to a lack of broadband or equipment.

In addition to allowing pro se litigants to call in for a hearing by telephone, Doran said they can come to the courthouse and use the court system's equipment. They can sit in a room, have access to a computer and use the videoconferencing software.

In northern New York's Fourth Judicial District, virtual kiosks situated near the courthouse entrance offer self-represented litigants the opportunity to participate in virtual court proceedings and receive live videoconference assistance from court personnel. These kiosks are providing access to justice for litigants who lack necessary computer equipment or internet access, particularly in the rural areas of the state where internet service is often unavailable.

In the Capital Region's Third Judicial District, in-person help centers have been transformed into virtual help centers to provide remote assistance to hundreds of self-represented litigants, and they have even been expanded during the pandemic to include two new virtual Matrimonial and Surrogate's Court help centers.

"We're learning as we go. . . . We're not denying anyone access to justice," said Doran, who, along with Administrative Judge Anthony Cannataro of the New York City Civil Court, are leading the court system's statewide



reopening planning efforts. "Honestly, the judges have been remarkably willing and able to adapt, as have the attorneys who appear in our courts. None of us have been perfect – the process is far from perfect – but we have to keep our eye on the mission."

EMPHASIS ON E-FILING

Even with budgetary restrictions during the pandemic, there are some ways technology is making life a little easier for judges, attorneys, clients and jurors.

For instance, Elmo projectors are commonly used to enhance the size of evidence, including documents, that will be presented at trial so it can be viewed on a large screen for everyone socially distanced in the courtroom to see. This prevents passing around a piece of evidence touched by the litigants and the jurors. This may also bring back memories of the projectors on carts used by teachers in schools.

Also, during a pandemic when social distancing is required, a lawyer and client sitting at the table whispering during the trial is not possible. Amaker explained that the courts are using wireless transceivers, essentially earpieces, which allow people to communicate privately while still remaining distanced. She said up to six individuals can be connected to one conversation, and it is particularly handy when an interpreter is needed for the attorney-client communications.

Microphones are also very much in demand, as Amaker said, since with all the plexiglass barriers and people wearing masks, sound gets muffled. She said the court reporter and the jurors especially need to hear everything.

There has also been an even greater emphasis on e-filing during the pandemic. Previously, she said, the New

York City Criminal Court was primarily a paper court with people filing motions and other memorandums of law, but during this pandemic it is primarily an e-filing court.

Throughout the pandemic, the state court system has expanded the use of its New York State Electronic Filing System (NYSCEF), especially in high volume courts like the New York City Housing Court. Jurisdictions that don't have NYSCEF have utilized a new electronic document delivery system (EDDS). EDDS allows users in a single transaction to enter basic information about a matter on a court system website portal page, to upload one or more pdf documents and send those documents electronically to a court or clerk selected by the user.

In another way to avoid traffic in the courthouses, the court system developed a new tool that allows court staff to send group text messages to attorneys and litigants notifying them of when their cases are ready to be heard. This allows them to wait in more spacious areas of the courthouse or even outside of the courthouse, rather than everyone congregating in courtrooms waiting for their cases to be called.


Microsoft Teams

More Reliable, Improved Screen Sharing, Enhanced Video Quality: Why the Courts Are Moving to Microsoft Teams

By Brandon Vogel

New York's Unified Court System is transitioning to Microsoft Teams in place of Skype for Business.

General deployment is happening through November within each Judicial District. Skype for Business will continue to be available during this period, but it will be phased out entirely by December 31.

Microsoft Teams is an easy to use communication and collaboration platform that the courts will use, which currently allows up to 300 people to participate in an online meeting. The New York Unified Court System has a Microsoft enterprise licensing agreement that includes Teams and the entire court system will use Teams.

Nearly 800 attorneys attended a recent webinar, "New Platform To Communicate With the Courts: Microsoft Teams!"

"It's a better product," said Valerie Buzzell, principal local area network (LAN) Administrator, 9th Judicial District Technology Department. "We have been testing Teams for some time and Teams delivers a more reliable experience for online meetings."

Buzzell added that Teams offers the same functionality of Skype for Business with a range of new and improved features.

For example, Teams includes the ability to share your desktop and include system audio seamlessly, whereas Skype required external speakers and microphones to share any evidence.

"The process could be a little complicated," said Buzzell.

The National Center for State Courts met in April and recommended features for virtual hearing platforms.

"Teams ticks most of the boxes they recommended," said Buzzell.

Although some capabilities are not available yet, some are coming soon, including enhanced video quality. Teams currently allows for nine video feeds but is expanding to 49 feeds this fall.

Buzzell emphasized that it is appropriate to use for confidential information and proceedings, unlike some competitors. It includes built-in security controls, communication is encrypted end-to-end, and is Health Insurance Portability and Accountability Act (HIPAA) compliant. It also runs in the Microsoft Government cloud, with servers entirely based in the United States.

Here are some answers to frequently asked questions from lawyers.

DO I NEED TO HAVE A MICROSOFT TEAMS ACCOUNT TO PARTICIPATE?

You do not need your own Teams license or sign-in to participate.

WHAT DO I NEED TO PARTICIPATE?

A computer with internet access and a webcam and/or a microphone (built-in or USB headset); or you can also use your smartphone.

WHAT IF I AM ON AN APPLE DEVICE?

You can download the free Microsoft Teams app when prompted from the meeting link. As long as you have the app, it doesn't matter if you are on a Mac and the court is on Windows.

DO I NEED TO DO ANYTHING FOR MY CURRENT WINDOWS COMPUTER?

There are hardware requirements (https://docs.microsoft.com/en-us/microsoftteams/hardware-requirements-for-the-teams-app) but most computers should work. However, it is recommended that you have Windows 10 installed.

DOES TEAMS WORK ON MY VIRTUAL PRIVATE NETWORK (VPN)?

Yes, but Teams works best when not connected to a VPN.

CAN I DIAL IN INSTEAD?

It depends on how the clerk set up the meeting. Contact the clerk to see if a phone number and pin is available.

HOW WILL I BE NOTIFIED OF A VIRTUAL APPEARANCE?

The court staff will mail or e-mail you an invite, which they will always initiate. The timing of invites also varies; you may get a notice shortly before an emergency matter.

CAN I SET UP A TEST RUN WITH THE COURTS?

Yes, the courts are amenable to practice sessions.

DOES TEAMS WORK BETTER IN A PARTICULAR WEB BROWSER?

Although Edge and Chrome will work, use the Desktop app for optimal use. Download it in advance of your meeting. Restart your computer before your hearing. Try to avoid using a Chromebook.

WHEN I JOIN A TEAM MEETING AS A GUEST, THE APP ASKS ME TO ENTER A NAME. WHAT SHOULD I ENTER?

It is recommended to enter your full name with your role (John Doe, attorney for the child; Jane Smith, attorney for plaintiff). At-risk witnesses should be protected as much as possible.

IS THERE A WAITING ROOM FEATURE LIKE IN ZOOM?

In Teams, it's called a lobby. In a virtual court hearing, you wait in the "lobby" until the judge is ready to hear your case.

ARE THERE BREAKOUT ROOMS LIKE IN ZOOM?

Breakout rooms are coming in late fall.

HOW DO I PRESENT MATERIAL?

First, speak to the judge or clerk about their procedure for presenting materials. From there, you may need to be given presenter rights to share your screen or files. Attendees can only speak and share video, participate in meeting chats, and privately view a PowerPoint shared by the organizer or presenter.

WHAT ABOUT RECORDING?

The courts continue to use court reporters and other audio recording software currently in place for arraignments, hearings and at the judge's discretion.

When there is a preliminary felony hearing and a witness is testifying virtually, the witness portion of the proceeding will be recorded in Teams and provided through the Electronic Document Delivery System. Recording, broadcasting or streaming of the proceedings is not permitted.

WILL TEAMS BE USED FOR FILING DOCUMENTS?

No. Attorneys must use the filing methods in place for delivering papers to the court, such as NYSCEF or the Electronic Document Delivery System.

CAN I INVITE OTHER PARTIES TO TEAMS MEETING?

Assuming they should be included and with permission of the court, you can forward the meeting invite or copy and paste the link. You can also invite more participants if the meeting has already started.

Congress and Big Tech (Trump, Elections, Courts and Hearings)

As Americans have socially distanced since March, social media and the online platforms Google, Facebook, Amazon and Apple, colloquially referred to as "big tech," have further advanced their reach into all aspects of our daily lives. We haven't been going to physical stores, so we shop online. We haven't seen our friends in person, so we keep up with them through Facebook posts. We haven't gone to movie theaters, so we stream entertainment. And as we learned how to sew masks, homeschool children and cook three meals a day, we relied on search engines to gain this knowledge.

In this column, I examine how Washington has exercised its power in the technology space and what to look for after Election Day.

Congress has been critically looking at big tech issues for the past two years, specifically antitrust, liability protection and social media platforms.

In July, the Antitrust Subcommittee of the House Judiciary Committee held the first-ever hearing with the four CEOs of the big tech companies. This marathon six-hour hearing, which ironically was held virtually, was the latest action in a year of investigations by the committee into the tech companies' business practices and whether they were harmful to consumers, small businesses and other tech companies. A final report is due in the fall.

Section 230 of the Communications Decency Act, 470 U.S.C. § 230, generally grants immunity from liability to online platforms for content of user-posted material. This provision has been critical to the growth of the internet over the past 25 years. Members on both sides of the aisle have raised the possibility of revisiting this law to examine how tech platforms handle the content, but Republicans have been particularly interested in this, as they say conservative views are being censored. Senator Josh Hawley (R-MO) has introduced legislation that would require Google, Facebook and others to cease selling targeted ads if they want to keep this legal protection.

There are several bills pending in the House and Senate addressing social media usage and advertising. To address the perceived societal ill of endless screen time, Hawley has also introduced the SMART Act. This bill would ban infinite scroll and other features, except in limited circumstances. It would also require social media platforms to include "natural stopping points" for users, which would essentially terminate a user's ability to scroll after a certain amount of content. At the opposite end of the political spectrum in the Senate, Ed Markey (D-MA) has introduced the CAMRA Act, which would direct the National Institutes of Health to research the effects of technology and the media on children, with a focus on social media addiction.

At the other end of Pennsylvania Avenue, President Trump's war on TikTok played out in media headlines this summer. For those readers over the age of 16, TikTok is the wildly popular and lucrative short-form video app known for users posting silly dances and other forms of personal expression. With over 100 million users in the U.S. alone, the Chinese-owned app has come under fire for allegedly not safeguarding the personal information of its users and potentially sharing the information with the Chinese government. TikTok has repeatedly stated that it does not store U.S. users' information on servers in China and that it would not give U.S. data to the Chinese government, despite a law which can compel Chinese internet companies to provide user data to their government.

Over the summer, Trump claimed he would "ban" TikTok, citing national security concerns and vulnerability of U.S. user information. There are three legal mechanisms he could employ to accomplish this goal. The first is CIFIUS, the governmental interagency Committee on Foreign Investment in the U.S., which is charged

Hilary Jochmans is the policy director for the New York State Bar Association and a member of the House of Delegates. She is also the founder of Jochmans Consulting, a boutique government affairs business. Previously, Jochmans was the director of the New York State Governor's Office in Washington for both Andrew Cuomo and David Paterson. She has spent a dozen years on Capitol Hill working in the House and Senate.

with reviewing foreign investment and purchases of U.S. companies if there could be a threat to national security. Since 2017, CIFIUS has been investigating TikTok's parent company ByteDance for its purchase of Musical.ly.

The second tool is the Commerce Department's "Entity List." This nondescript structure is essentially a blacklist for certain foreign companies and individuals. It would be very difficult for U.S. companies to do business with, and provide technology to, these entities. In terms of TikTok, Apple and others would not be able to facilitate the app on their platforms.

On August 7th, Trump acted on his third option, which was to issue an Executive Order (EO), a power granted to him by the Constitution to carry out the business of government. The EO banned TikTok's operations in 45 days if it was not sold. The ban could be averted if TikTok was sold to "a very American company." As of the writing of this article, TikTok had just announced it agreed to sell its U.S. operations to Oracle. This sale will need to be reviewed by CIFIUS.

While the Supreme Court has yet to weigh in explicitly on many tech issues, they did acknowledge in *Packingham v. North Carolina* (137 S. Ct. 1730, 1735–36 (2017)), that the internet, particularly social media sites, are "important places" to "speak and listen" and that "social media users employ these websites to engage in a wide array of protected First Amendment activity." Lower courts have ruled on targeted issues, such as the unauthorized practice of collecting, storing and sharing certain personally identifiable information without the user's consent, particularly in the case of minors. If cases continue, and there a circuit split, we may well see the Supreme Court take up these topics in future sessions.

What impact will the elections have on big tech? If Trump wins reelection, he will likely continue to wage his anti-China war where the key battle is tech. Ownership of tech companies, along with any perceived censorship of conservative views, will likely dominate his tech agenda. In addition, we can expect the Justice Department to continue their antitrust investigations. However, if Joe Biden is elected he will have to balance competing interests within his party. While he has been critical of liability protections for online platforms, he has not gone as far as the more liberal wing of his party which has called for breaking up what they consider "monopoly power" of big tech. Another component of Biden's political base is comprised of social media savvy millennials who grew up with the internet, and others who utilize technology constantly professionally and personally, particularly during the pandemic. Also impacting a Biden administration's tech policy would be vice president nominee Kamala Harris, who has represented Silicon Valley in the U.S. Senate and is perceived to have close relationships with the industry.

Regardless of who wins the election, there will be attacks on what role technology had in the outcome. Were security measures lax which allowed foreign hackers to influence the election? Were conservative voices silenced in the on-line debates? Were candidates held accountable for the truth of their political rhetoric? We can expect the 117th Congress, the next president and possibly the Supreme Court to look at these issues in 2021.

Who (or What) Is Liable for AI Risks?

By Vivian D. Wesson

Vivian D. Wesson serves as Chief Intellectual Property Counsel to Marsh & McLennan Companies, for which she manages and protects the IP assets of its businesses, as well as advises on data strategy. Ms. Wesson is also Chair of the New York State Bar Association's Committee on Attorney Professionalism and its Technology Subcommittee.

On a clear, bright day in early May four years ago, Joshua Brown cruised down a Florida highway, relaxed behind the wheel of his Tesla Model S set to autopilot mode. As Mr. Brown approached a highway intersection, a white 18-wheel tractor-trailer was in the process of making a left-hand turn. Nearing this intersection, Mr. Brown's Tesla did not reduce speed or attempt to stop. The Tesla proceeded as if the intersection was clear, maintaining its current speed. The collision resulted in Mr. Brown's death, the first autopilot fatality in 130 million miles of Tesla-driven vehicles.[1] Why? Although this Level 3[2] autonomous vehicle had performed safely under most driving conditions, its sensors failed to distinguish the large white truck from the bright spring sky. The Tesla did not "see" the truck and, therefore, continued its normal operation.

The risk of fatality from operating a motor vehicle is not new. In fact, the National Highway Traffic Safety Administration reported 36,560 motor vehicle deaths in 2018 alone.[3] Autonomous vehicles, though, pose a new risk due to the technology involved. In a driverless vehicle, whose duty is it to anticipate and prevent accidents: the auto manufacturer, the sensor producer, the software engineer, or the driver? Who should bear liability for this risk? Can these new risks be insured and at what price?

Revolutions in computing power, distributed computing, data storage, and data science have fostered the next generation of artificial intelligence (AI) technologies, including natural language processing, robotics, blockchain, and the Internet of Things. Tesla's autonomous car is really a platform of numerous experimental AI technologies. The error that caused Mr. Brown's collision was as much a machine learning data training fault as a car accident.

The question of "Who is liable?" in the digital age is a good one and raises several insurance implications. For a self-driving car, is it the driver, the manufacturer, the provider of the training data, or any of the numerous academics, software engineers, programmers, universities, or open source libraries that contributed to the algorithm that is liable? In evaluating the new risks posed by digital technological marvels such as self-driving cars, insurance underwriters face a daunting challenge. On the surface, the risks seem very familiar, but upon closer inspection, present themselves differently from technological, physical, social, and legal perspectives.

AUTONOMOUS VEHICLES

Statistically, autonomous vehicles (AV) are safer than driver-controlled vehicles. Very few fatalities have been publicized to date.[4] According to a 2018 report from Axios, the lion's share of self-driving vehicle accidents were caused by vehicles with motorists operating the wheel.[5] Notwithstanding the data, AV-related accidents are more sensationalized and perceived as risker when a human driver is not controlling the vehicle.[6]

Sensationalism aside, the responsibility for risks that AVs impose – personal injury, death, and property damage – must rest with someone (the driver) or some party (the manufacturer). As AVs approach Level 5 autonomy, it has been suggested that human driver responsibility may be completely removed from the risk equation.[7] Could this signal a shift of liability to the AV manufacturer alone? Would the AV manufacturer now require private passenger auto insurance in addition to products liability and commercial general liability? What about the third-party-owned sensors and software deployed in the AV or the AV's satellite access? Does the AV manufacturer's responsibility extend to those features, which would likely trigger a need for cybersecurity insurance as well?

In analyzing these exposures, insurers will have to consider the likelihood and magnitude of these risks. Contractual allocations of risk among the AV's component owners will also need to be factored. As with other new exposures (e.g., terrorism), regulation will become part of the equation.[8] New York's AV law requires that: (i) a natural person holding a valid driver's license be present in the AV while it is operated on any public highways; and (ii) any AV utilized in demonstrations and tests on public roads has in place at least $5 million of financial security.[9] "Financial security" used here generally translates to some form of insurance, whether surety bonds, third-party insurance, or self-insurance.[10]

ROBOTICS

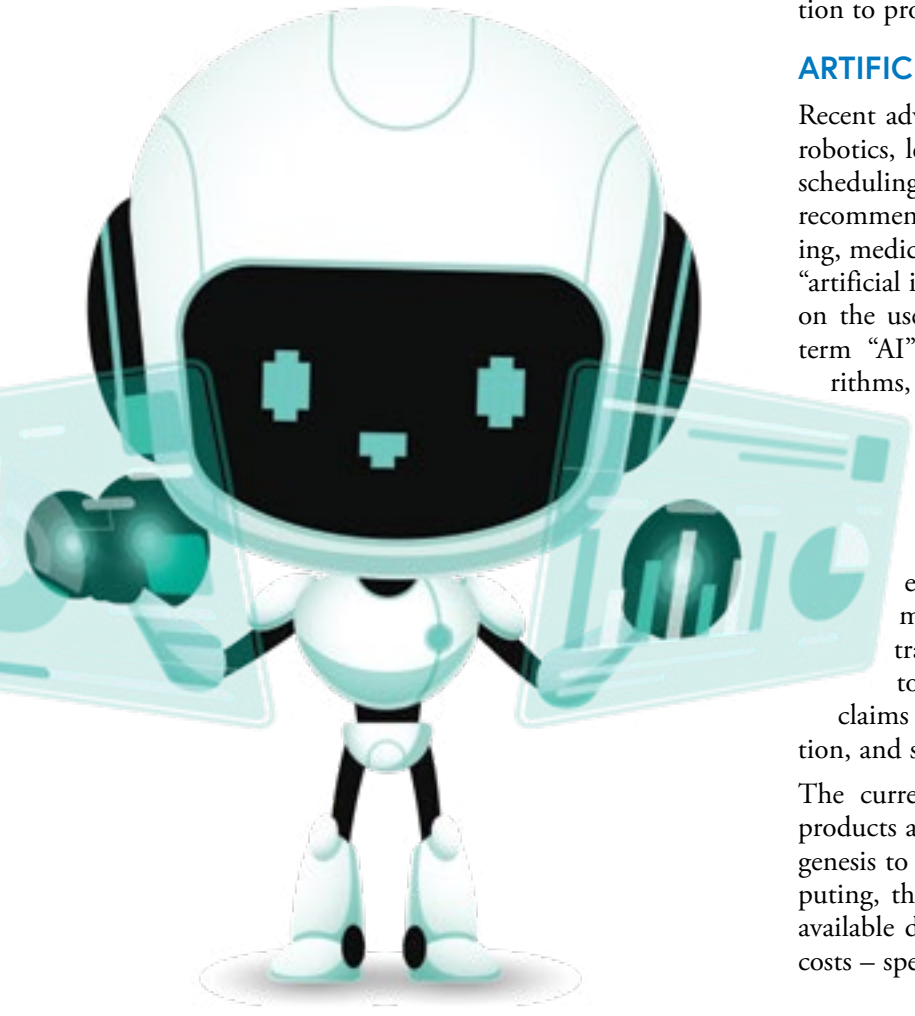
In January 2016, the World Economic Forum predicted that more than five million jobs could be lost to robots in some developed and emerging economies by 2021.[11] A more recent Oxford Economics report projected that many "millions of additional manufacturing jobs are likely to be displaced by robots by 2030."[12] However, job displacement due to automation is not limited to the blue collar sector. Automation will impact white collar occupations as well, including insurance sales representatives.[13]

Although "repetitive, standardized tasks of many current jobs will be soon all be done by robots and algorithms,"[14] task automation will generate new jobs, some of which are not currently envisioned.[15] As the insurance industry evolves to overcome *Baumol's disease* (the "difficulty of introducing automated methodologies to human-based intellectual activities[, which] has long been recognized as a root cause of stagnant productivity in many industries"),[16] it must also focus on new hazards that the robotic revolution generates. First, insurers will need to define what a "robot" means within an insurance policy – not an easy task when there is no set definition.[17] Secondly, the question of liability assessment

arises – is each contributor (i.e., manufacturers, software designers, or operators) liable for any defective products manufactured? In addition, insurers will need to question whether the employer correctly followed instructions to install and operate the robot – raising the potential for employer's liability claims for failure to address workplace safety.[18]

ADDITIVE MANUFACTURING AND 3D PRINTING

One of the fastest growing digital technology fields involves 3D printing, also known commercially as "additive manufacturing." The 3D printing process synthesizes a three-dimensional object by forming successive layers of material with the aid of a computer. This technology has been deployed in various industries, including automotive, aerospace, construction, food, and health care. For most manufactured goods, strict liability applies if the product is defectively designed or manufactured or if the manufacturer failed to warn the consumer about using the product. Would strict liability also apply to the manufacturer of a 3D-printed good? What about the manufacturer of the 3D printer itself? Is the software designer of the CAD[19] file also liable? Should liability extend to the supplier of the material used to create the 3D-printed object?



Insurance risks can be substantial for those involved in additive manufacturing. Compounding the known risks, the foreseeable misuse doctrine can give rise to indefinite layers of product liability. Under the foreseeable misuse doctrine, a manufacturer is liable for the foreseeable uses of its products. With 3D printing, the range of foreseeable uses will undoubtedly evolve over time. Future litigation may even center around products that should not have been manufactured but for the capability of 3D printing.[20]

While 3D printing may democratize goods manufacturing, it may also lead to substantial disruption of retail manufacturing, resulting in extensive job loss for both manufacturers and laborers.[21] For the insurance industry, the increased risks from lack of regulation and product liability may necessitate a change in how these exposures are underwritten. On the flip side, having insureds with 3D printing capability could lead to a more efficient claims process if the policyholder can generate the parts needed for replacement or repair.[22] In any event, those involved in additive manufacturing should review their coverages for business interruption, cybersecurity, intellectual property, and workers' compensation,[23] in addition to product liability.

ARTIFICIAL INTELLIGENCE

Recent advances in AI include self-driving cars, drones, robotics, legged locomotion, autonomous planning and scheduling, machine translation, speech recognition, recommendations, game playing, imaging understanding, medicine, and climate science.[24] The umbrella term "artificial intelligence" means different things depending on the user. Academics and technologists may use the term "AI" when referring to machine learning algorithms, deep learning, neural networks, and/or generative adversarial networks.[25] At the 2016 World Economic Forum Annual Meeting in Davos, AI was labeled as the "fourth industrial revolution."[26] AI has indeed revolutionized almost every aspect of our lives – from education and research to travel and entertainment. AI, in its numerous manifestations, has transformed financial services and is beginning to transform insurance company operations, claims handling, underwriting, marketing, distribution, and sales.[27]

The current digital technological revolution and the products and services that rely on AI owe much of their genesis to increased computing power, distributed computing, the ubiquitous use of sensors, the explosion of available data, and a substantial decline in data storage costs – specifically, cloud storage.[28] The ephemeral term

cloud storage is a misnomer. "Cloud" computing and storage occur within a pool of land-based servers owned by a third party that are accessed through the internet.[29] While cloud storage has a number of benefits,[30] it also involves new risks for the cloud user and cloud provider. What happens if a data breach or denial of service attack occurs at the cloud computing site? Who should be liable if the cloud user is unable to access its data or applications?

These new exposures have challenged the insurance industry, especially when trying to evaluate the new cyber-related risks. The cyber peril is unique and presents an underwriting challenge. Hackers have arisen globally from nation states, cyber militias, criminal cartels, independent organizations, terrorist groups, and talented private individuals. They take advantage of unwary users, disgruntled employees, errors and faults in the software code, software obsolescence, technology maturity, and manufacturers' inattention to cybersecurity. The hacker community also has access to "grey" or "black" organizations that rent, sell, and support an array of tools, products, and services that make hacking more effective. In addition, cyberattacks are fast, occur in real-time, and are difficult to detect. In April 2020, Self-Key reported that at least 8 billion records, including "credit card numbers, home addresses, phone numbers and other highly sensitive information, have been exposed"[31] over the previous 15 months.

Exacerbating the issue, during the transition from the Third Industrial Revolution to the Fourth Digital Revolution, insurance policies predicated on a 20th century industrial and commercial business model did not contemplate the risks associated with a 21st century digital world or "hacking" as a transnational catastrophic risk. Recently, some courts have held that insurance policies without explicit cyber coverage (or explicit cyber exclusions) would cover claims for privacy and data breach – the "silent" or non-affirmative cyber insurance issue.[32]

In London, insurers have convened a panel to study "silent" cyber clauses in insurance contracts.[33] Regulators are also wading into this space, enacting cybersecurity and data privacy laws. The National Association of Insurance Commissioners recently adopted the Insurance Data Security Model Law.[34] In 2017, New York enacted the NYDFS Cyber Security Regulation.[35] Although the New York law does not specify insurance as required in the cybersecurity program of a "Covered Entity," many entities will rely on insurance to assist in recovery from a cybersecurity event.[36]

CONCLUSION

"Technology is a threat and an opportunity, a rival and a partner, a foe and a friend."[37] While self-driving cars can mean the end of vehicular fatalities, the risk that these cars are subject to cyberattacks remains. Robots may greatly simplify and increase the production of goods but raise questions as to responsibility for potentially harmful products. Additive manufacturing can reduce dependence on imported goods but may spur unregulated weapon production, resulting in increased personal injury or death. Cloud storage may solve a company's IT capacity constraints but exposes the company to ransomware attacks and potential data loss. As technology continues to develop, new and unforeseen risks will arise. For insurers, such new risks will continue to present novel underwriting challenges.

---

1. Danny Yadron & Dan Tynan, *Tesla driver dies in first fatal crash while using autopilot mode*, The Guardian (Jun. 30, 2016).

2. The Society of Automotive Engineers has created a six-level scale, from zero to five, to classify a vehicle's autonomy, which scale has been adopted by the National Highway Traffic Safety Administration. *See* U.S. Dep't of Transp., *Automated Vehicles for Safety*, https://www.nhtsa.gov/technology-innovation/automated-vehicles#topic-road-self-driving.

3. Although this represents a 2.4% decline from 2017 fatalities, there have been back-to-back increases in U.S. roadway deaths in recent years. *See* U.S. Dep't of Transp., Nat'l High. Traffic Safety Admin., *2018 Fatal Motor Vehicle Crashes: Overview* (Oct. 2019).

4. *See Yadron*, *supra* note 1; *see also* Sara Ashley O'Brien, *Uber operator in fatal self-driving vehicle crash was likely streaming 'The Voice,'* CNN (Jun. 22, 2018, 12:07 PM), https://money.cnn.com/2018/06/22/technology/uber-self-driving-crash-police-report/index.html and Janelle Shane, *You Look Like a Thing and I Love You* 58-59 (2019).

5. Kia Kokalitcheva, *People cause most California autonomous vehicle accidents*, Axios (Aug. 29, 2018), https://www.axios.com/california-people-cause-most-autonomous-vehicle-accidents-dc962265-c9bb-4b00-ae97-50427f6bc936.html.

6. *See* Complaint, *Oscar Willhelm Nilsson v. General Motors LLC*, No. 3:18-cv-00471 (N.D. CA) (2018) (complaint involved a motorist struck by a Chevy Bolt Cruise Automation car, alleging negligence on the part of the vehicle and the driver); *see also* Geoffrey Wyatt, *Manufacturers Won't Bear All Liability For Driverless Vehicles*, Law360 (Aug. 26, 2019, 3:40 PM), https://www.law360.com/articles/1191712/print?section=cybersecurity-privacy.

7. *See* Peter H. Diamandis & Steve Kotler, *The Future Is Faster Than You Think: How Converging Technologies Are Transforming Business, Industries, and Our Lives* 184 (2020) ("If you're riding in an autonomous car as a service, and there is no driver, do you need insurance?").

8. To date, 29 states and Washington D.C. have enacted legislation related to AVs (states include Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maine, Michigan, Mississippi, Nebraska, New York, Nevada, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Vermont, Washington, and Wisconsin). *See* Nat'l Conf. of State Legis., *Autonomous Vehicles: Self-Driving Vehicles Enacted Legislation* (Feb. 18, 2020), https://www.ncsl.org/research/transportation/autonomous-vehicles-self-driving-vehicles-enacted-legislation.aspx (last visited Apr. 9, 2020). *See also* U.S. Dep't of Transp., Nat'l High. Traffic Safety Admin., A*utomated Driving Systems 2.0: A Vision for Safety*, at ii (Sept. 2017) (guidelines introduced to "support the safe introduction of automation technologies").

9. S.B. 2005-C (N.Y. 2017). Note that, in New York, the minimum amount of liability coverage to operate a motor vehicle is: (a) $25,000 for bodily injury and $50,000 for death of one person in an accident; (b) $50,000 for bodily injury and $100,000 for death of two or more people in an accident; and (c) $10,000 for property damage; all considerably less than the $5,000,000 required for AVs.

10. *Id.*

11. James Manyika et al., McKinsey Global Inst., *A Future That Works: Automation, Employment, and Productivity* 29 (Jan. 2017). But *see* Oxford Economics, *How Robots Change the World: What Automation Really Means for Jobs and Productivity* 19 (Jun. 2019), http://resources.oxfordeconomics.com/how-robots-change-the-world?source=recent-releases.pdf ("the value created by robots across the economy more than offsets their disruptive impact on employment") and Shane, *supra* note 4, at 220 ("[I]t's unlikely that AI-powered automation will be the end of human labor as we know it. A far more likely vision for the future, even one with widespread use of advanced AI technology, is one in which AI and humans collaborate to solve problems and speed up repetitive tasks.").

12. Oxford Economics, *supra* note 11, at 21.

13. Manyika et al., *supra* note 11, at 32.

14. Anastassia Lauterbach & Andrea Bonime-Blanc, *The Artificial Intelligence Imperative: A Practical Roadmap for Business* 225 (2018).

15. *See* Terrence J. Sejnowski, *The Deep Learning Revolution* 22 (2018) ("[A]s jobs that now require human cognitive skills are taken over by automated AI systems, there will be new jobs for those who create and maintain these systems.").

16. Richard D'Aveni, *The Pan-Industrial Revolution: How New Manufacturing Titans Will Transform the World* 91 (2018).

17. Swiss Re, *The robots are here: what that means for insurers* (2017), https://www.swissre.com/dam/jcr:d0c55abb-3e1a-4bfd-8fe9-e6bf914a5184/2017_11_TechRobots_trend_spotlight.pdf.

18. *Id.*

19. "CAD" means "computer-aided design." In 3D printing, the CAD files could be considered the entire product itself. *See* Tabrez Y. Ebrahim, *3D Printing: Digital Infringement & Digital Regulation*, 14 Nw. J. Tech. & Intell. Prop. 37 (2016), https://scholarlycommons.law.northwestern.edu/njtip/vol14/iss1/2.

20. Andy Crowder & Alex Fenner, *What You Need to Know About 3-D Printing & Product Liability* (Apr. 19, 2017).

21. D'Aveni, *supra* note 16, at 169.

22. Cindy Donaldson & Rick Morgan, *How Will 3D Printing Impact Insurance?*, IA Mag. (Aug. 23, 2017), https://www.iamagazine.com/strategies/read/2017/08/23/how-will-3d-printing-impact-insurance.

23. In its 3D marketing report, insurance carrier Zurich noted that a 3D printing manufacturer could be exposed to workers' compensation claims, because new materials in the 3D printing process, such as powdered metals like chromium and formaldehyde, present exposures to workers. Further, "high heat sources used in the process and toxic fumes that are being emitted from melting and decomposition of materials could also be sources of worker health issues and claims." Zurich Am. Ins. Co., The Disruptive Technology of 3D Printing: Could It Disrupt Your Business Risk? 5 (2016), https://www.zurichna.com/-/media/project/zwp/zna/docs/kh/3dprinting/whitepaper_the-disruptive-technology-of-3d-printing.pdf?la=en.

24. Stuart J. Russell & Peter Norvig, *Artificial Intelligence: A Modern Approach* 28–30 (4th ed. 2021).

25. Shane, *supra* note 4, at 8. *See also* Sejnowski, *supra* note 15, at 135–137.

26. Noa Gafni, Davos 2016: *Where will the fourth industrial revolution impact us most?*, Think at London Business Sch. (Jan. 27, 2016), https://www.london.edu/think/davos-2016-fourth-industrial-revolution.

27. Lauterbach & Bonime-Blanc, *supra* note 14, at 32.

28. Nick Polson & James Scott, *AIQ: How People and Machines are Smarter Together* 6 (2018).

29. Amazon Web Services (AWS) describes its cloud storage offering as follows: "Cloud storage is a cloud computing model that stores data on the Internet through a cloud computing provider who manages and operates data storage as a service. It's delivered on demand with just-in-time capacity and costs, and eliminates buying and managing your own data storage infrastructure. This gives you agility, global scale and durability, with 'anytime, anywhere' data access." Amazon Web Serv., Inc., Cloud Storage, https://aws.amazon.com/what-is-cloud-storage/ (last visited Apr. 25, 2020).

30. *Id.* (AWS notes the following benefits from cloud storage use: (1) lowering the total cost of ownership; (2) accelerating the time of IT solution deployment; and (3) centralizing information management).

31. Selfkey, *All Data Breaches in 2019 & 2020 – An Alarming Timeline*, Blog (May 7, 2020), https://selfkey.org/data-breaches-in-2019.

32. *See* Scott Godes et.al, *The Cloud: Selected Benefits, Risks and Insurance Coverage Issues, Cloud Computing 2018: Key Issues & Practical Guidance* (Feb. 26, 2018).

33. *See* Martin Croucher, *Panel Studies 'Silent' Cyber Clauses in Insurance Contracts*, Law360 (Mar. 16, 2020), https://www.law360.com/articles/1253507/print?section=insurance-uk.

34. Nat'l Ass'n of Ins. Comm'rs & The Ctr. for Ins. Pol'y & Res., The NAIC Insurance Data Security Model Law, State Legis. Brief (Dec. 2019). To date, only eight states have adopted this model law: Alabama, Connecticut, Delaware, Michigan, Mississippi, New Hampshire, Ohio, and South Carolina.

35. *See* N.Y. Comp. Codes R. & Regs. tit. 23, § 500 (2017) for the New York Department of Financial Security's Cyber Security Regulation.

36. *Id.* at § 500.02.

37. Daniel Susskind, *A World Without Work: Technology, Automation, and How We Should Respond* loc. Ch. 1 (2020) (ebook).

Using Remote Technology in Legal Practice: Attorney-Client and Attorney-Staff Relationships

By Kelsey R. Ruszkowski and Samuel J. Blanton

INTRODUCTION

Even before the spread of COVID-19, the use of technology has quickly become an integral part of our everyday lives and has shaped the way we communicate with one another. Communicating remotely is a new societal norm, whether through social media, video conferencing, phone calls, or text messages. This form of communication has extended beyond the social realm and into the professional world. Even though remote technology is widely used, business executives generally prefer to meet in person rather than through some form of technology.[1] These executives prefer in-person communication because they believe that it helps them build stronger relationships and enables them to read the body language of the person with whom they are communicating.[2] In the legal realm, nearly three-fourths of attorneys report using some form of telecommuting in their legal practice, meaning that they use technology to communicate while outside their office.[3] However, these statistics do not provide information concerning the extent to which technology is used by attorneys when communicating with their clients. While remote communication is rapidly increasing in the legal field and society in general, in part because the pandemic has left little other choice, there has been very little study on how remote technologies influence the practice of law. We studied the effects of remote technology on relationships between attorneys, their clients, and other staff members in a setting outside of criminal law.

PAST STUDIES

Due to the limited nature of our study, past research concerning relationship formation, whether between two peers, a therapist and their patient, or an attorney and their client, can inform research on attorney-client relationships outside the courtroom.

I. TECHNOLOGY IN INTERPERSONAL RELATIONSHIPS

Research has been conducted concerning how different modes of communication influence interpersonal relationships.[4] In one study researchers reviewed the interpersonal relationships formed between unacquainted college students when communicating either through text message, audio, video, or face-to-face. Students then met a second time using Skype.[5] After having a conversation, participants would rate how much they liked the other person, the level of connection they felt, how much they enjoyed the interaction, and how responsive they felt the other person was.[6] The conversations involved asking predetermined questions and had a time limit.[7]

For the first interaction, communicating via text message resulted in a significantly weaker relationship than when using other modalities; the face-to-face condition resulted in the most positive interaction.[8] Interestingly, participants in the audio condition overall rated their experience slightly more positive than those participants in the video condition.[9] This suggests that, at least in regards to brief interactions, communicating using only audio can result in near identical or improved interpersonal relationship strengths as when using video communication.[10] When participants met for a second time using Skype the strengths of the relationships in all conditions increased to similar levels with a range of .15 out of seven. [11] This suggests that the modality used in the initial interaction does not influence future communication.[12] The results further suggest that over time, the strengths of interpersonal relationships formed over video or audio communication can reach the same level as those relationships formed face-to-face.

When video conferencing is used to communicate some of the nonverbal cues involved in communication are lost.[13] Consequently, the level of trust developed between two speakers may be distorted.[14] For example, video conferencing speakers are less capable of detecting sincerity but are also less capable of detecting deception.[15] Further, in negotiation tasks individuals trust each other less when more visual cues are available.[16] This finding actually makes remote communication more appropriate for negotiation-type tasks as it limits the social cues available to the parties. When parties use remote communication while negotiating, many of the negative cues they expect

Kelsey R. Ruszkowski is an associate with Gibson, McAskill & Crosby, LLP in Buffalo, NY. Her practice focuses on asbestos and toxic tort defense. She is a former fellow of William & Mary's Center for Legal and Court Technology, an affiliate of the National Center for State Courts.

Samuel J. Blanton is an associate attorney with Tune, Entrekin & White, P.C., in Nashville, Tennessee. Samuel enjoys a diverse practice and works in the areas of copyright, trademark, eminent domain, real estate, and civil litigation. Prior to beginning to practice, Samuel served as a fellow with the Center for Legal and Court Technology.

This research was completed at the Center for Legal & Court Technology. The authors would like to express their gratitude to the Cyberjustice Laboratory of the Université de Montréal for providing a grant to support this research.

in a traditional negotiation setting to confirm their preconceived connotations are no longer available.[17]

II. REMOTE THERAPY

A relationship similar to that experienced by an attorney and their client is that of a therapist and his or her client. Both involve repeated exposure and require strong interpersonal relationships. While there has been little study of the attorney-client relationship, there has been some research into the therapist-client relationship. Therefore, research into the therapist-client relationship may inform rapport development in the attorney-client relationship.

When comparing in-person to internet therapy there was no significant difference in treatment effectiveness.[18] In regards to the interpersonal relationship between therapists and their clients, there was no significant difference when clients rated their working alliance with their therapists between the in-person and videoconferencing conditions.[19] The same was true when the therapists rated their working alliance with their clients.[20] Working alliance included such factors as: understanding, common goals, trust, and confidence in a therapist's ability to help.[21] This suggests that there is no significant difference in a counseling relationship when remote communication is used as compared to in-person communication. These findings may be transferable to the relationship formed between an attorney and their client.

REMOTE COMMUNICATION IN THE COURTROOM

Even in ordinary circumstances it may be difficult for a client to retain an attorney, whether due to geographic limitations, lack of funding, etc. Although an attorney may be available, they might not have the skillset appropriate for the particular case. Using remote technologies provides a solution to this problem. When utilized in the courtroom, video conferencing tools allow attorneys, clients, and judges to appear from remote locations. Based on a survey from the National Center for State Courts conducted in 2010, approximately 60% of state courts used video conferencing in criminal proceedings.[22] In some criminal trials defendants have even appeared remotely in court.[23] However, this arrangement can be less than ideal.

As expected, there are limitations experienced when lawyers communicate with their clients remotely in a courtroom. For example, when a defendant is appearing remotely the attorney no longer has the ability to pass notes or to inconspicuously signal a client to adjust his or her behavior while in court.[24] This in effect limits an attorney's ability to advise a client and limits a defendant's ability to consult an attorney while in the courtroom.[25] Further, appearing in court remotely influences how a defendant behaves, although the change in behavior is difficult to predict.[26] Some may appear more relaxed while others appear more nervous due to the thought of an "invisible audience" watching them.[27]

There is no significant difference in criminal defendant ratings of their relationship with their attorney while communicating via video conference as compared to in person.[28] Additionally, modality has no significant effect on defendants' perceived level of participation in their case nor on their level of trust in their attorney.[29] In a recent study only 10% of defendants reported that they would be reluctant to communicate with their attorney through video conferencing in the future.[30]

Of primary concern are the privacy interests of the defendant as well as the potential negative biases that may be introduced when the defendant is not physically present in the courtroom.[31] Additionally, if an attorney and client try to communicate remotely there is an increased risk of others overhearing their conversation. This may inadvertently waive the attorney-client privilege and threaten the defendant's right against self-incrimination. Therefore, both attorneys and their clients must be more aware of their surroundings when communicating remotely.

PRESENT STUDY

I. REMOTE ATTORNEY-CLIENT RELATIONSHIPS OUTSIDE THE COURTROOM

Although remote communication such as emails, phone calls, and video conferencing are commonly used in the legal profession, exactly how this influences the working relationship between an attorney and their clients has yet to be studied outside the courtroom.[32]

A. Potential Problems

Without previously being acquainted with clients, communicating remotely may limit an attorney's ability to develop rapport with their client due to the limited number of visual cues available to each party as compared to in-person communication. Fortunately, this difference may not be significant if the people communicating are already familiar with each other.[33] However, there have not been studies that address this concern when it comes to attorney-client interaction in a transactional setting. Further, using remote technology runs the additional risk of hindering communication due to technological difficulties.[34] Like in the context of the courtroom, a remote attorney-client relationship outside of court bears the same problem of risking an unintentional waiver of the attorney-client privilege.[35] Therefore, in order to study the effect that remote representation has on rapport we must be cognizant of confidentiality and privilege concerns.

In real world situations, clients may live in remote areas and may not have access to an attorney's office with a remote technology setup as used in this study. This study's use of an office-to-office setup aimed to control for clients who may not be comfortable using technology and to ensure confidentiality. Confidentiality may be the biggest concern after client comfort when it comes to remote representation. When using a video conferencing platform, it is important to inform the client about the nature of confidentiality so that it is understood that there should not be other people off-screen who can hear or see the communication.

A lawyer's ethical responsibilities requires the lawyer to take reasonable steps to ensure confidential information is protected.[36] When it comes to selecting what technology to use, lawyers should be aware of how a firm's system stores communications. The platform used here, Omnijoin, contains communications to the individual session and, unless saved by either party, all communications are deleted when the meeting concludes. In contrast, Skype keeps an ongoing chat history that remains until deleted. Regardless of the platform used, as long as the attorney is aware of how that platform stores communications and is able to control what happens to confidential data, there should be little fear regarding leftover confidential data. If a communication platform uses a password, it is important that the firm use a strong password to ensure left-over data from a communication is not accessible.

If an attorney and client try to communicate remotely there is an increased risk of others overhearing their conversation. This may inadvertently waive the attorney-client privilege and threaten the defendant's right against self-incrimination.

B. Method

In order to examine how communicating remotely influences rapport with a client, we developed a survey that asked clients to rate the degree of comfort they felt when interacting with their attorney, their level of satisfaction with their attorney's commitment to their case, and their likelihood of retaining the attorney in the future. Additionally, clients were asked if they experienced any technical difficulties while working with their attorney. The survey was administered electronically to participants through email. Clients were contacted by their attorney through email, phone, video conference, and in person.

To minimize the occurrence of technical difficulties experienced by clients while video conferencing, the law office designated a private room for video conferencing and set up the necessary technology for clients to use. This method not only allowed for more consistent experiences for the clients employing the video conferencing modality but also minimized the chance of a confidentiality breach.

C. Technology Used

Besides normal phone and email, a basic video conferencing setup was used for this study. The attorney's remote office had a webcam set up with a built-in microphone and a standard monitor display. The main office also had a basic webcam with a built-in microphone as well as a monitor display. Because the video conferencing environment was controlled in this way (that is, it was insulated from client manipulation), the choice of video conferencing software was influenced by the need for ease of use from the broadcaster's perspective. The direct set-up eliminated concerns about a client's potential technological limitations.[37] This office-to-office setup also functions to minimize the risks of a compromise to confidentiality. Omnijoin works well for remote client interactions because it has, amongst other features, an integrated document editor. The attorney was able to mark up a document (be it contract or will) to highlight and explain various parts to a client.

The video quality was not an issue and there was no reported lag or other technical problems with the stream. The results indicate that high-definition video conferencing is not needed for positive results. It does follow, however, that a high-definition video conferencing setup in an office may be more impressive to a client and at least clearer in regard to social cues. The cost effectiveness of such a setup would of course depend on the frequency of use and if new clients were met for the first time remotely.

D. Results

Overall, regardless of the form of communication used, all clients were "extremely satisfied" with the legal work performed on their behalf. The number of times the client had worked with the attorney in the past did not influence the level of satisfaction with the attorney's work nor the level of comfort when communicating with an attorney. There was one client who was only

"somewhat comfortable" when communicating via email rather than in person. However, all other clients were "very comfortable" with every communication modality used. All clients expressed that they were either "very likely" to or would "definitely" recommend this attorney to their friends and would use this attorney again if the opportunity presented itself. This suggests that the clients had a high level of trust in their attorneys' ability and commitment. No clients experienced any technical difficulties while communicating and one client praised the efficiency that came with communicating remotely.

II. REMOTE CO-WORKERS

Although attorneys may work remotely, they will still have to communicate with their coworkers. The key characteristics necessary for a successful relationship between a remote worker and those in the office are trust and flexibility.[38] Concerns that are often expressed in regard to remote workers include that the worker will not work as efficiently or will complete less work than if they were in the office. In fact, the opposite has been shown to be true.[39] Additionally, remote workers who spend 60–80% of their time outside the office actually report feeling more engaged with and valued by their companies than traditional employees working onsite.[40]

A. Problems Commonly Experienced by Remote Workers

Many remote workers fail to effectively separate their work and home life. While both types of workers experience distractions, whether from coworkers or family members, remote workers are more likely to work longer hours.[41] However, they may also lack the relief that comes from the physical separation of home and work life.[42] Trust is often built through frequent interaction and familiarity.[43] However, too much contact from an employer may be construed as having excessive oversight and being overbearing. A common situation where this occurs is when an employer uses electronic monitoring software.[44] While there are many benefits that come with a remote working environment, it may also have the potential to agitate the cohesiveness between an attorney and their colleagues.

B. Method

A similar survey to the one administered to clients was also given to three members of the office staff. This survey asked staff members to rate their level of trust they had that the attorney would complete their work both in and outside the office, how often they communicated with the remote attorney and by what means, how communicating remotely influenced their collaboration, as well as any technical difficulties they experienced. The attorney who we worked with communicated with the same staff members regardless of whether the attorney was physically present in the office or communicating remotely. Previously, the attorney and his staff primarily communicated in person, through phone, and through email. For this study, video conferencing was added to the modes of communication used.

C. Results

All staff members preferred using phone calls when communicating with the attorney when he was outside the office. Two of the staff members reported that communicating remotely did not influence their ability to collaborate with the attorney effectively while one member reported that communicating remotely actually improved their ability to work effectively. Additionally, the level of trust staff members had that the attorney would timely complete their work was the same regardless of whether the attorney was working at the office or remotely. No staff members experienced any difficulties while communicating remotely and did not have any concern related to using remote technology in a legal office.

ETHICAL CONSIDERATION

The same ethical considerations apply to remote offices as those that apply to physical offices.[45] Attorneys are required to use reasonable care when protecting the confidentiality of their clients regardless of their methods of communication.[46] With this in mind, in order to protect client files that are stored, online encryption software would need to be utilized. Additionally, steps would have to be taken to ensure that various forms of remote communication are used securely, keeping in mind the caveats of confidentiality.[47] Attorneys must be conscious of the attorney-client privilege and should take precautions to ensure that exchanges with their client are secure.

BENEFITS

Regardless of how often attorneys use remote technologies, many benefits can be derived from doing so. Small firms or solo practitioners who utilize remote technologies can work from home offices and save the overhead cost of renting office space. Also, a larger pool of clients is available, particularly those in secluded areas who would have found it difficult to reach a qualified attorney. Using remote technologies to communicate also reduces travel time and costs associated with commuting. Additionally, remote communication can help non-native English speakers or foreign citizens navigate the American legal system by giving them access to attorneys who speak their native language or who are familiar with the client's cultural background. Attorneys who are more experienced in handling cases involving foreign participants can be reached more easily. For example, in deportation cases immigrants have a right to an attorney.[48] However, the government is not required to fund this representation.[49] As a result, half of those immigrants facing deportation do so without the aid of an attorney.[50] Using

remote technologies can give these people easier access to pro bono attorneys willing to help them who otherwise would have been limited by geographic constraints.

CONCLUSION

Research suggests that attorneys can communicate effectively with their clients and other staff members while working remotely, demonstrating that remote technologies have a place in the transactional, criminal, and civil realms of legal practice. The present study suggests that even while communicating remotely, attorneys can develop rapport and trust with their clients and staff. With remote technology, clients and attorneys gain the efficiency and safety of not having to meet at a physical office and clients may gain the additional benefit of having access to an attorney who can better meet their needs than one located nearby. Further, using remote communication gives attorneys access to clients in rural areas and can also reduce overhead costs of running an office as well as travel expenses. In the current era, it is easier than ever for firms of all sizes to take advantage of remote communication technologies. With the precautions merited by COVID-19, legal offices have been forced to modernize at an unprecedented rate. However, attorneys must realize that for this technology to be utilized in the legal setting, extra precautions have to be taken to ensure that confidential client information remains secure. With this concern in mind, incorporating remote technologies can bring immense benefits to the modern legal office.

---

1. Jeff Koyen, *Business Meetings: The Case for Face-to-Face Forbes Insights* (2009), images.forbes.com/forbesinsights/StudyPDFs/Business_Meetings_FaceToFace.pdf.

2. *Id.*

3. Joshua Poje, *Virtual Law Practice*, ABA Techreport 2014 (2014), http://www.americanbar.org/publications/techreport/2014/virtual-law-practice.html.

4. Susan Sprecher, *Initial Interactions Online-Text, Online-Audio, Online-Video, or Face-to-Face: Effects of Modality on Liking, Closeness, and Other Interpersonal Outcomes*, 31 Computers in Human Behavior 190–97 (2014).

5. *Id.* at 194.

6. *Id.* at 193 (Scores ranged from one, meaning "not at all", to seven, meaning "a great deal").

7. *Id.* at 193.

8. Susan Sprecher, *Initial Interactions Online-Text, Online-Audio, Online Video, or Face-to-Face: Effects of Modality on Liking, Closeness, and Other Interpersonal Outcomes*, 31 Computers in Human Behavior 190–97 (2014).

9. *Id.* at 195.

10. *Id.*

11. *Id.* at 193.

12. *Id.* at 196.

13. Eric T Bellone, *Private Attorney- Client Communications and the Effect of Videoconferencing in the Courtroom*, 8 J. of Int'l Commercial L. & Tech. 24, 33 (2013), http://www.jiclt.com/index.php/jiclt/article/viewFile/176/173.

14. *Id.*

15. *Id.*

16. Cameron Teoh et. al., *Investigating Factors Influencing Trust in Video-Mediated Communication*, 312, 318 (2010), http://portal.acm.org/dl.cfm.

17. *Id.*

18. Daniel R Stubbings et al., *Comparing In-Person to Videoconference-Based Cognitive Behavioral Therapy for Mood and Anxiety Disorders: Randomized Controlled Trial*, 15 J. of Med. Internet Research (2013).

19. *Id.*

20. *Id.*

21. *Id.*

22. Brendan R. McDonald et al., *Attorney--Client Working Relationship: Videoconferencing Versus In-Person Consultations*, 22 Psychol. Pub. Pol'y & L. 200, 201 (2016).

23. Gerald G Ashdown & Michael A Menzel, *The Convenience of the Guillotine?: Video Proceedings in Federal Prosecutions*, 80 Denv. U. L. Rev. 63 (2002) (discussing the use of video conferencing in federal and state prosecutions).

24. Eric T Bellone, *Private Attorney- Client Communications and the Effect of Videoconferencing in the Courtroom* , 8 J. of Int'l Commercial L. & Tech. 24, 29 (2013).

25. *Id.*

26. Anne Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 Tul. L. Rev. 1089, 1167, n. 155 (2004).

27. *Id.*

28. McDonald, *supra* note 22, at 206.

29. *Id.* at 205–06.

30. *Id.* at 206.

31. Poulin, *supra* note 26, at 1126.

32. For a short overview of the different forms of remote communication used in the legal field, *see* Wells H Anderson & Seth G. Rowland*, How to Choose the Right Tools for Any Client Communication,* 31 GP Solo (2014), https://www.americanbar.org/publications/gp_solo/2014/may_june/how_choose_right_tools_any_client_communication.html.

33. Cameron Teoh et. al., *Investigating Factors Influencing Trust in Video-Mediated Communication*, 312, 314 (2010), http://portal.acm.org/dl.cfm.

34. Difficulties may include such common occurrences as buffering, lag time between speech and lip movement, weak connections, etc. Note, however, that the use of in house HD video conferencing solutions, instead of a basic set-up like the one used here, should resolve these concerns.

35. Paula Schaefer, *Technology's Triple Threat to the Attorney-Client Privilege*, J. of the Prof'l'. Law. 171 (2013), http://www.abanet.org/cpr/pubs/symposium.html.

36. Model Rules of Prof'l Conduct R. 1.6(c) (2016); see *id.* at Comment [18], [19].

37. Potential limitations could have included the client's operating system, strength of internet connection, etc.

38. Christine A. Grant, Louise M. Wallace & Peter C. Spurgeon, *An Exploration of the Psychological Factors Affecting Remote E-Worker's Job Effectiveness, Well-Being and Work-Life Balance* 35 Employee Relations 527, 535 (2013).

39. *Remote Workers Log More Hours and Are Slightly More Engaged*, Gallup News, (July 12, 2013), http://www.gallup.com/opinion/gallup/170669/remote-workers-log-hours-slightly-engaged.aspx.

40. Niraj Chokshi, *Out of the Office: More People Are Working Remotely, Survey Finds,* N.Y. Times (Feb. 15, 2017), https://www.nytimes.com/2017/02/15/us/remote-workers-work-from-home.html.

41. Gallup News, *supra* note 39.

42. *Id.* (revealing how remote workers feel more connected to their company and log more hours).

43. L.Y.-Y. Kwan et al. *Mere Exposure Affects Perceived Descriptive Norms: Implications for Personal Preferences and Trust*, 129 Org. Behavior & Hum. Decision Processes 48, 53 (2015), http://ac.els-cdn.com/S0749597814001174/1-s2.0-S0749597814001174-main.pdf?_tid=77af2188-98c1-11e7-8b4e-00000aab0f6c&acdnat=1505334416_2442004ad967cc147975a91ae9be52f3 ("Individuals might have greater trust in more well-known employees.").

44. Nick Nykodym & Robert Taylor, *Communication: A Vital Tool to Combat Cyber Crime*, 2 J. of Int'l Com. L. & Tech. 185, 186–87 (2007).

45. Seth L Laver & Jessica L Wuebker, *Home Is Where the Office Is- Ethical Implications of the Virtual Office*, ABA Section of Litigation (Nov. 2, 2014), https://apps.americanbar.org/litigation/committees/professional/articles/spring2014-0314-home-is-where-office-is-implications-virtual-office.html.

46. *Id.*

47. *See generally*, Michael D. Fielding, *You Need To Know This: Bankruptcy and Attorney-Client Privilege in the Electronic Age*, 25 Am. Bankr. Inst. J. 62 (Dec. 2006/Jan. 2007) (discussing inadvertent waivers of the attorney-client privilege through email).

48. Lucas Guttentag & Ahilan Arulanantham, *Extending the Promise of Gideon: Immigration, Deportation, and the Right to Counsel*, 39 Hum. Rts. Magazine, 2013, http://www.americanbar.org/publications/human_rights_magazine_home/2013_vol_39/vol_30_no_4_gideon/extending_the_promise_of_gideon.html.

49. *Id.*

50. *Id.*

Impertinent Questions: The Unusual Case of *Gorsuch v. Alito* and the Supreme Court's Textualist Approach to Judging

By Richard B. Ancowitz

Richard B. Ancowitz is Counsel to Helene E. Weinstein, Chair of the New York Assembly Ways and Means Committee. The views expressed here are his own.

In their recent holding in *Bostock v. Clayton Cty.,*[1] the Supreme Court held that use of the word "sex" in Title VII of the Civil Rights Act of 1964[2] allows for court actions to redress gender-based discriminatory acts. In a majority opinion by Justice Neil Gorsuch, the Court held:

> The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. . . . We agree that homosexuality and transgender status are distinct concepts from sex. But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.[3]

Dissenting in *Bostock*, Justice Samuel Alito fiercely proclaimed that the majority's decision represented judicial legislation at its worst. But was it really? Conversely, was Justice Alito's opinion itself an example of judicial legislation – or at the very least an *attempt* to judicially legislate? Let's explore these possibilities, and others.

Justice Alito wrote that the statute at hand did not actually prohibit discrimination-based homosexuality or transgender status, but he went further, referring to the majority opinion as simply "legislation":

> There is only one word for what the Court has done today: legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive.[4]

The *Bostock* opinions, both Justice Gorsuch's majority opinion and Justice Alito's dissenting opinion, are on their face remarkable in their congruence. The opinions find these two Justices each claiming for himself the mantle of legislative interpretation – "textualism," made popular by the late Justice Antonin Scalia. Specifically, both opinions claim precisely the same inspiration in coming to their respective judicial conclusions. Yet their opinions come to precisely *opposite* conclusions. Let us dig deeper to determine what these two justices were really up to. Were either of these opinions simply the application of a Scalia-like formulaic approach to textualism? Did either represent an attempt at judicial legislation? Or was either – gasp – motivated by extra-judicial or political concerns?

Clearly, the life experiences that judges bring to the court can easily be confused with judicial biases. As anyone who has ever decided or perhaps even argued a case would likely admit, we are all prone to biases, both realized and unrealized.[5] This is especially true of confirmation bias, e.g., believing what we *want* to believe, and in the case of judging, believing selected facts to achieve a desired result.[6] With apologies to George Orwell, we are all human, albeit some of us more human than others, and that, of course, includes judges.[7]

Back to *Bostock*: this was obviously not the first time a justice of the Supreme Court has complained about legislating from the bench. In numerous opinions, and especially in concurrences and dissents, Justice Scalia was well known for advocating for a textualist approach to statutory review,[8] going back to his first term on the bench[9] and beyond.[10] Justice Clarence Thomas, the only other justice to join Justice Alito's dissenting opinion in *Bostock*, has done likewise on numerous occasions. Indeed, one observer's 2018 analysis of the Court's opinions from 2013 to 2016 has found that Justice Thomas followed an overtly textualist approach more than any other justice.[11]

But just what exactly is textualism, and what does it have to do with the charge of judicial legislation leveled here by Justice Alito? A good astrophysical analogy concerning Justice Scalia's textualist approach relates to the beginning of the universe – it matters not *how* the universe was formed, only that it *was*. Big bang theory? Not important. So too with legislation: Justice Scalia professed not to be concerned with what was discussed or debated *before* enactment; as far as he was concerned, a statute's life begins only at the moment of conception, e.g., enactment.[12]

So, was the *Bostock* construction of a 1964 statute a form of "retroactive legislation," something which Justice John Paul Stevens, with a tip of his hat to Justice Scalia, had roundly condemned in his 1994 majority opinion in *Landsgraf v. USI Film Products?*[13]

And what shall we make of Justice Alito's complaint that Justice Gorsuch's majority opinion in *Bostock* was actually a judicial farce, a masquerade?[14] And what about the comment by Justice Alito accusing Justice Gorsuch's majority opinion of "considerable audacity" in using Justice Scalia's textualist holdings in support?[15]

And what of Justice Alito's further complaint that because *subsequent* Congresses failed to pass legislation that specifically included homosexuality and transgender status, it would be a mistake to read that into the statute now?[16]

Perhaps to enhance his textualist bona fides, Justice Gorsuch parried that particular broadside as "particularly dangerous"[17] and referenced a concurrence from Justice Scalia that stated: "Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote."[18]

And what does the phrase "judicial legislation" even refer to? Judges make law all the time, i.e., the doctrine of standing has minimal, if any, legislative basis. What about the "harmless error" doctrine? Was this doctrine not made up of judicial cloth? Most recently, what about the four-part test that Chief Justice Roberts announced in *Trump v. Mazars USA, Ltd.* for determining when Congress has a right to subpoena presidential papers?[19] Perhaps "judicial legislation" simply means whatever any particular judge says it means in the context of any given case.

Although textualists typically profess to a pro-democratic deference to elected legislative bodies, it is also reasonable to consider that there may be an arrogance to textualism that smacks of scolding of legislatures for not doing their jobs properly, as if it is somehow the Court's job to do that.[20]

This is made all the more interesting by pre-*Bostock* criticism of Justice Gorsuch as himself being anti-democratic.[21] No doubt some of these criticisms were motivated by the irony of Justice Gorsuch's own words before taking the bench on the Circuit Court of Appeals, in a 2005 article entitled *Liberals 'N' Lawsuits:*

> [T]he politicization of the judiciary undermines the only real asset it has – its independence. . . . American liberals have become addicted to the courtroom, relying on judges and lawyers rather than elected leaders and the ballot box, as the primary means of effecting their social agenda on everything from gay marriage to assisted suicide to the use of vouchers for private-school education.[22]

With this as background, it is perhaps remarkable that Justice Alito decided to strongly rebuke his fellow justice as being, in essence, a hypocrite – one who talks the judicial talk, but doesn't walk the judicial walk:

> The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated – the theory that courts should "update" old statutes so that they better reflect the current values of society. See A. Scalia, A Matter of Interpretation 22 (1997). If the Court finds it appropriate to adopt this theory, it should own up to what it is doing [footnote omitted].[23]

Was this criticism fair? Or was Justice Alito merely waving the textualist flag himself to get to his *own* desired quasi-legislative result? Further, much has been written about the supposed ideological make-up of the Roberts Court.[24] But then was the *Bostock* holding really ideologically based? Or was a heaping dash of textualism simply thrown into the majority opinion by Justice Gorsuch in order to shield from a charge of judicial legislation, as was leveled by Justice Alito? Or was textualism used to hide an otherwise desired *political* result, as a form of confirmation bias? And what do we make of this blunt battle of words between two justices otherwise usually thought to be of the same ideological stripe?

And so does Justice Alito have a point in his complaint that this represents judicial legislation at its worst? Yet perhaps both this holding and Justice Alito's dissent can be seen as nothing more than after-the-fact rationalizations designed to reach a desired outcome. Suffice to say,

this is not what we learned in law school about how the giants of the bench came to their judicial conclusions. And it might not even be the calling of "balls and strikes" judicial umpiring that Justice Roberts famously referred to as his preferred judging approach.[25] It may well just be that *both* the so-called "conservatives" and "liberals" on the bench will sometimes fashion a textualist argument to arrive at their desired result. In fact, all nine justices here, including Justice Gorsuch in his majority opinion, appear to fly the textualist flag proudly.

So what does this battle for the soul of textualism portend concerning the future direction of the Court? Will 5 to 4 decisions continue at the same rate as they always have in the Roberts Court? Or has the bloom come off the rose for the so-called conservative wing of the Court, and does *Bostock* portend future similar squabbles between the justices on textualism or on anything else?

The answer may well be that intra-Court squabbling will still take a back seat to the justices' individual ideological and world-view biases. This has been the case in the past where other justices have been sharply critical of one another,[26] and there is no reason to think that past patterns will not continue. Moreover, Justices Gorsuch and Alito have aligned themselves on the same side of the judicial fence far more than they have differed from one another.[27] Indeed, despite a sizeable age difference – 17 years – they are essentially cut out of the same Federalist Society cloth, and there is of yet no reason to believe that this textualism-related schism shall affect other cases to come. How will this determine the future battleground cases to come, on reproductive rights, on voting rights, on criminal and civil justice? There is no easy way to prognosticate, but it can be reasonably assumed that the judicial philosophy of each justice will find its way toward each justice's desired result.

Likewise, what does this legal warfare between these two justices tell us about the process for Senate confirmation of future presidential nominees to the Supreme Court? Will pitched and heightened questioning take place over a nominee's views of textualism? Will each nominee be asked if he or she agrees with the judicial philosophy of Justice Scalia?

Time will tell, but the Gorsuch v. Alito split on textualism can probably best be explained by a "means to an end"-type analysis. Both justices presumably knew the result they wished to obtain, and both used a textualist analysis to land in two different places.

Yet if Chico Marx were somehow a justice of the United States Supreme Court, he might have parsed Title VII of the Civil Rights Law of 1964 by saying: "Who are you going to believe, me or your own eyes?"[28] In other words, is Justice Gorsuch telling us we should just believe *him*

or our own eyes (i.e., the printed text of the statute on the page)? And is Justice Alito effectively paraphrasing another great sage, Yogi Berra,[29] in telling us "no, the statute doesn't really say what it says"?

Like beauty, the answer to these impertinent questions likely lies in the eyes of us, the opinion-reading beholders. Loaded as we are with our own cognitive and political biases as well as – perhaps – our own guiding principles of statutory interpretation, we must decide for ourselves where we land in this back and forth between the justices about the art of judging. As concerns the principles by which we view these cases, the last word goes to another propagandist of Marxist dogma, Groucho: "These are my principles. If you don't like them, I have others."[30] Indeed, we all have our "principles," and the justices of our highest court have their own too.

---

1. 140 S. Ct.1731 (2020).

2. 42 U. S. C. § 2000e-2(a)(1) (Employers may not "fail or refuse to hire or . . . discharge any individual, or otherwise . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex.").

3. *Bostock*, 140 S. Ct. at 1741, 1746–47.

4. *Id.* at 1754 (dissenting op.).

5. *See, e.g.* "Do Judges Contribute to Injustices? A Conversation with Judge Jed Rakoff," ABA Journal, April 13, 2017; https://www.abajournal.com/news/article/judge_jed_rakoff_joel_cohen_broken_scales.

6. *Id.*

7. *See* "Animal Farm" (1945) ("All animals are equal, but some animals are more equal than others").

8. Among other appellations, Justice Scalia has been referred to as a "text maniac," no doubt referable to his dogmatically textualist approach to statutory interpretation. https://dictionary.reverso.net/english-spanish/nominalist.

9. Justice Scalia spoke approvingly of "the venerable principle that if the language of a statute is clear, that language must be given effect – at least in the absence of a patent absurdity." *INS v. Cardoza-Fonseca,* 480 US 421,452 (1987) (J.Scalia, concurring in the judgment).

10. *See, e.g. Block v. Meese*, 793 F. 2d 1303, 1309–10 (1986) ("To legislate is to generalize, and a law motivated by a desire to eliminate a particular abuse often sweeps within its reach activities that do not themselves display that abuse. . . . More fundamentally, however, both the abstract speculation and the reality of the legislative history are beside the point. We do not sit to rewrite laws so that they may address more precisely the particular problems Congress had in mind. There is simply no language within the text of the present enactment that would enable importation of the limitation appellants suggest").

11. Adam Feldman, "A New Era in SCOTUS Textualism," Empirical SCOTUS, Jan. 3, 2018, https://empiricalscotus.com/2018/01/03/scotus-textualism.

12. "Under the big bang theory of creation, the universe is the product of a gigantic explosion, before which there was neither time nor space. It is meaningless to ask what produced the big bang." This is also Antonin Scalia's view of the United States Code. The statute exists – it is meaningless to ask what produced it. History begins only with the big bang, just as a statute's history begins only with its enactment. "Legislative history" thus does not exist. Or perhaps the more precise analogy is to the formation of matter in the initial chaos: matter and statutes are both the product of a disordered, incoherent, unconscious, anarchic sequence of events. Justice Scalia trusts statutory text, not the process of its creation." Michael Herz, "Textualism and Taboo: Interpretation and Deference for Justice Scalia," Cardozo L. Rev., 1990, p. 1663. https://heinonline.org/HOL/LandingPage?handle=hein.journals/cdozo12&div=69&id=&page=.

13. *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) ("As Justice Scalia has demonstrated, the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Kaiser*, 494 U. S. at 855 (Scalia, J., concurring).")

14. *Bostock v. Clayton Cty.*. 140 S. Ct. at 1774 (Alito, J., dissenting).

15. *Id.* (Alito, J., dissenting).

16. *Id.* at 1834 (Alito, J., dissenting).

17. *Id.* at 1747; *Pension Benefit Guaranty Corporation v. LTV Corp.,* 496 U. S. 633, 650 (1990).

18. *Sullivan v. Finkelstein*, 496 U. S. 617, 632 (1990) (Scalia, J., concurring).

19. 140 S. Ct. 2019, 2024 (2020).

20. *See, e.g.*, Andrei Marmor, "The Immorality of Textualism," LAL Rev., 2004, p. 2063, 2069–70, https://heinonline.org/HOL/LandingPage?handle=hein.journals/lla38&div=60&id=&page= ("Why should it be the business of the courts to educate the legislatureon how to draft statutes and enact laws? Is it because nobody else is there to do it? Surely that is false. Countless interest groups, watchdogs, lobbyists, the general press, and eventually, the public at large scrutinize legislators during campaigns and elections But surely, clarity is only one of the virtues of good legislation. Legislation often has to reach a compromise between conflicting considerations, and then other institutions, like agencies and courts, should fill in the gaps. In any case, it is surely false to assume that the courts are the only institution that scrutinizes legislative drafting. Many other institutions fulfill a similar function, and they all have an important advantage over the courts: they do not need to sacrifice the interest of individuals in order to make their point. Note that this question about the courts' role in educating the legislature is even more pressing when considered on textualism's own political grounds. If textualists are so concerned about respect for democratic procedures, it must be because they attach a high value to the respect we owe to the authority of legislative institutions. But one does not normally express respect for the authority of another by trying to educate the latter. In this respect, textualism displays a certain arrogance towards the legislature that is not easy to reconcile with its alleged respect for the authority of democratic institutions.").

21. Mark B. Baer, *Should Supreme Court Justices Believe in Democracy? Neil Gorsuch's Comments Indicate That He Is Extremely Biased and Anti-Democracy,* Psychology Today, Feb. 3, 2017, https://www.psychologytoday.com/us/blog/empathy-and-relationships/201702/should-supreme-court-justices-believe-in-democracy.

22. Neil Gorsuch, *Liberals 'N' Lawsuits*, National Review, Feb. 7, 2005, https://www.nationalreview.com/2005/02/liberalsnlawsuits-joseph-6.

23. *See also Bostock v. Clayton Cty.*. 140 S. Ct. at 1784, in which Justice Alito closes his opinion by stating: "But the authority of this Court is limited to saying what the law is. The Court itself recognizes this: 'The place to make new legislation . . . lies in Congress. When it comes to statutory interpretation, our role is limited to applying the law's demands as faithfully as we can in the cases that come before us.' Ante, at 31. It is easy to utter such words. If only the Court would live by them. I respectfully dissent."

24. The facile left vs. right breakdown of the Court is sometimes intellectually lazy, and – as in *Bostock* – sometimes doesn't account for textualist reasoning. And then sometimes this facile breakdown is simply not so, e.g. *Daimler v. Bauman*, 134 S. Ct. 746 (2014), where the court unanimously, with Justice Sotomayor concurring in the result, favored an unprecedented pro-big business/anti-consumer interpretation of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), which broadened due process protections for non-domiciliary corporations in a personal jurisdiction context.

25. During his confirmation hearings in 2005, Justice Roberts testified: "My job is to call balls and strikes and not to pitch or bat." CNN.com, Sept. 12, 2005, https://www.cnn.com/2005/POLITICS/09/12/roberts.statement.

26. *See, e.g.,* Lance N. Long and William F. Christensen, *When Justices (Subconsciously) Attack: The Theory of Argumentative Threat and the Supreme Court* Or. L. Rev., 2012, https://heinonline.org/HOL/LandingPage?handle=hein.journals/orglr91&div=31&id=&page= ("This Article argues that in their briefs and opinions, lawyers and judges seem to react linguistically to a perceived threat. This section first addresses current theories of linguistic response to threat. It then presents the Authors' study of Supreme Court opinions as an example of argumentative threat and shows how the Supreme Court Justices' response to argumentative threat is consistent with other social psychology theories. In essence, the Justices may respond to perceived threats just like everybody else.").

27. For example, Justices Gorsuch and Alito were aligned in 78% of cases decided in the October 2019 Term, and 10 of the 14 five to four decisions during this term featured Roberts, Thomas, Alito, Gorsuch, and Kavanaugh in the majority, and Breyer, Ginsburg, Kagan, and Sotomayor in dissent. https://www.scotusblog.com/2020/07/final-stat-pack-for-october-term-2019.

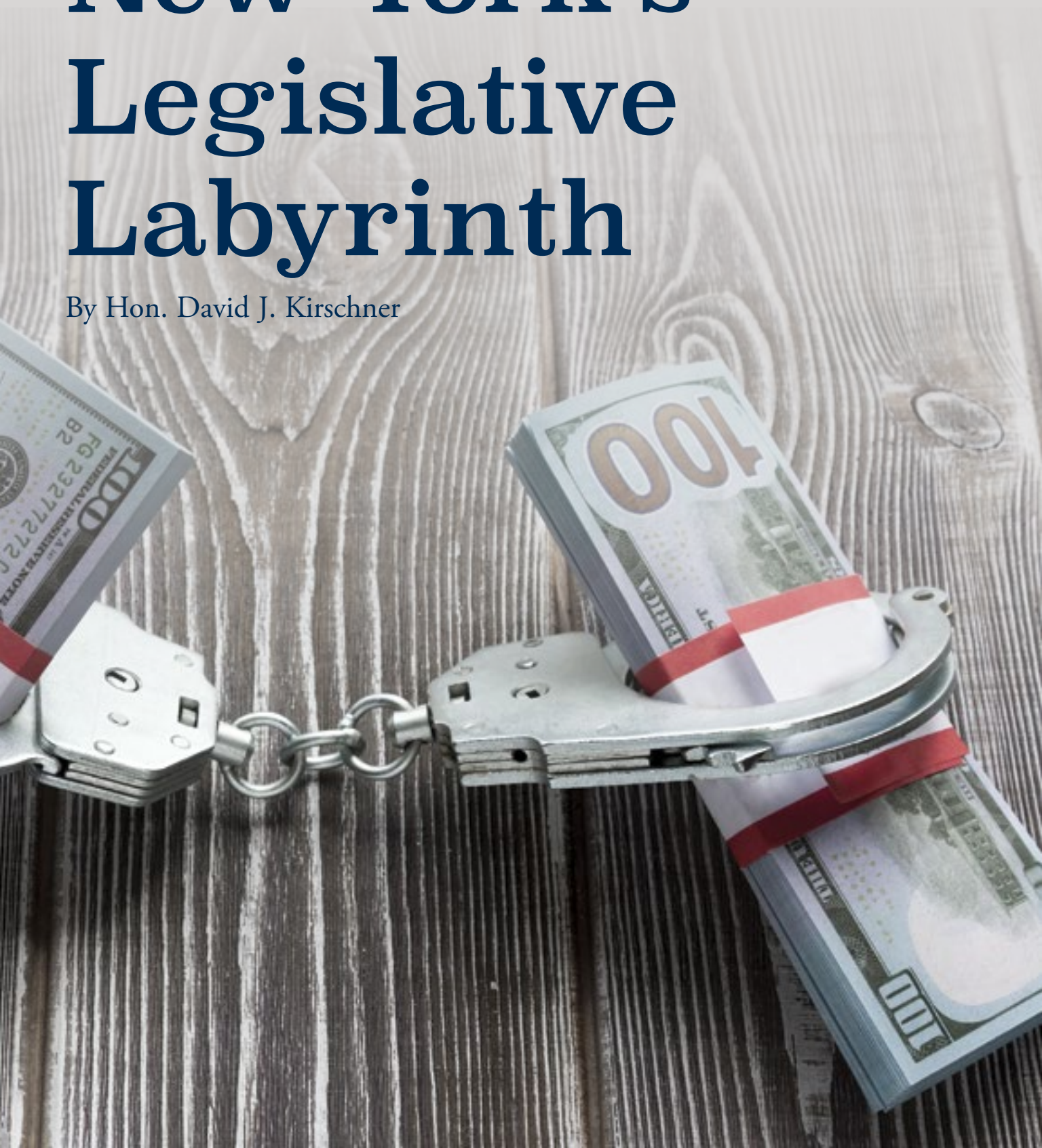
28. From the 1932 Marx Brothers movie, *Duck Soup*: Teasdale: Your Excellency, I thought you left. Chicolini: Oh no. I no leave. Teasdale: But I saw you with my own eyes. Chicolini: Well, who ya gonna believe me or your own eyes? https://quoteinvestigator.com/2018/07/31/believe-eyes/.

29. "I really didn't say everything I said." *See, e.g.,* Steve Marcus, *Color Yogi a Happy Guy; Now wearing Astros' rainbow uniform, Berra's relaxed, popular,* Newsday (Nassau and Suffolk Edition), February 24, 1985, p. 92, https://quoteinvestigator.com/2012/12/30/yogi-didnt-say. Contrast this Berra quote to one recently incorrectly attributed to Mr. Berra by Ambassador John Bolton in his otherwise interesting book, The Room Where It Happened, p. 489, "Don't nobody here know how to play this game?" However, Yogi Berra never said this, which was famously stated by Casey Stengel in 1962 as the manager of the New York Mets. https://www.baseball-almanac.com/quotes/quosteng.shtml.

30. Fred R. Shapiro, The Yale Book of Quotations, 2006, Section Julius Henry 'Groucho' Marx, p. 498, Yale University Press, New Haven. But see https://quoteinvestigator.com/2010/05/09/groucho-principles/#note-237-1.

Bail Reform: New York's Legislative Labyrinth

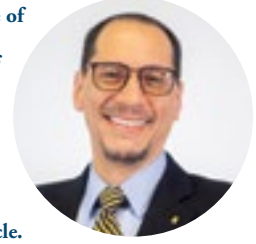
By Hon. David J. Kirschner



As part of the 2020 budget, the New York State Legislature enacted comprehensive statutory changes to the criminal justice system.[1] While a portion focused on overhauling discovery and speedy trial laws, much of it was designed to equalize the socio-economic inequities associated with cash bail. Both the governor, in his State of the State agenda,[2] and Senator Michael Gianaris, through the Bail Elimination Act,[3] sought to end cash bail. Instead, the legislature opted for a ubiquitous labyrinth of often vague and confusing mandates, conditions and prohibitions aimed at curtailing the imposition of bail. Immediately – well in advance of its effective date – it triggered vociferous clamor that judicial discretion would be marginalized and public safety jeopardized. Consequently, within months of the statute becoming effective, legislators were constrained to amend it.[4] Still, minor adjustments aside, the legislature left it intact, neither eliminating cash bail nor authorizing consideration of whether an individual poses a danger to the community.

Holistically, the legislation was intended to eliminate pre-trial detention of persons unable to afford modest bail for offenses that will eventually be resolved in non-incarceratory (e.g., probation, community service, rehabilitation programs or fines) or negligible jail sentences because extended incarceration jeopardizes employment, housing and other life circumstances. It distinguishes between crimes unlikely to result in substantial prison sentences (non-qualifying offenses) and those that are (qualifying offenses) based largely on their classification as misdemeanors or felonies[5] and designation as either non-violent or violent. Such designation, however, has little to do with the characterization of the offense or whether the prohibited conduct appears violent. Rather, it is based on the legal gravity of the conduct. It is no surprise, then, that virtually all violent felonies enumerated in section 70.02 of the Penal Law are bail-qualifying offenses.[6] Some non-violent crimes were also designated as qualifying offenses; the amended legislation added approximately 20 others, including several misdemeanors.[7] Regardless of whether an offense qualifies for bail, though, judges must select the least restrictive conditions – monetary or otherwise – to reasonably assure a person will appear in court.[8]

Hon. David J. Kirschner is a judge of the New York City Criminal Court, Queens County and an adjunct assistant professor of law at Queens College. Previously, he served as a principal law clerk with the New York State Supreme Court, an assistant district attorney and defense counsel. He gratefully acknowledges the assistance of Ramandeep Singh, an attorney with the New York State Unified Court System, in preparing this article.



But this legislation has yielded several perplexing results. Robbery in the second degree (aided by another)[9] and burglary in the second degree (dwelling),[10] both violent felony offenses,[11] are specifically excluded from bail eligibility.[12] As amended, burglary in the second degree is a qualifying offense if an individual is "charged with entering the living area of a dwelling."[13] The legislation provides no guidance, however, as to what constitutes the living area, e.g., whether or not it includes a vestibule, roof or lobby.[14] Oddly, though, an attempt of these crimes is a qualifying offense and the amended legislation did not correct this.[15] Making a terroristic threat, also a violent felony offense,[16] is specifically exempted from the list of qualifying offenses under one subsection yet explicitly included by reference in another.[17] This, too, was not addressed. And, under the initial legislation, bail was inexplicably prohibited for the crime of bail jumping, an offense charged for failing to return to court. Wisely, the amendments now make bail jumping a qualifying offense.

The legislation also indiscriminately handles prior felony convictions. Predicate felons, meaning persons charged with a felony after having previously been convicted of a felony within the past 10 years plus any time spent in jail, are subject to a mandatory state prison term. If both the previous and charged felonies are designated as violent, state prison exposure is substantially enhanced. And, two prior violent felony convictions within 10 years render a person subject to life in prison as a mandatory persistent felon. In such circumstances, monetary conditions may be imposed since violent felonies are qualifying offenses. But since this legislation exempts second-degree robbery and burglary (non-living areas of a dwelling) as bail-qualifying, predicate, violent and mandatory persistent felons *must* be released when charged with these offenses.[18] Nothing in the amended legislation changes this.

Discretionary persistent felony offenders – persons also exposed to life sentences – were not subject to monetary conditions under the initial legislation. Unlike violent and mandatory persistent felons, however, the amended legislation permits the imposition of bail in such cases.[19] The amended legislation also permits bail for individuals charged with a felony offense while serving a sentence of probation or term of post-release supervision.[20] Still, it provides no exemption or discretion to consider bail for predicate, violent predicate, or mandatory persistent felons when charged with non-qualifying offenses.

Unlike felonies, misdemeanors have no predicate designation and may not serve as a basis for sentence enhancement. For instance, 36, 78, or 103 prior misdemeanor convictions would have little or no effect on yet another misdemeanor conviction. While this remains, the amended version permits bail when an individual is charged with two sequential crimes (class A misdemean-

ors or felonies) "involving harm to an identifiable person or property."[21] Before doing so, however, the prosecutor must establish probable cause to believe both the instant and underlying crimes were committed. But the statute neither defines "harm" nor provides any guidance as to how, when, and where the prosecutor must make such a showing.

Arguably the most controversial issue precipitated by this legislation, though, is that dangerous people will be summarily released. Perhaps so, but it can hardly be attributed to the new law. New York has never permitted consideration of whether a person charged with a crime poses a danger to the community or risk of re-offending (*see* Criminal Procedure Law § 510.30).[22] CPL § 510.30 does not, in either its initial or amended form, include danger as a factor in bail determinations.[23] Understandably, this causes one pause. Indeed, it seems strange and counterintuitive. It is also rare. In fact, of the 50 states, only New York, Arkansas[24] and Pennsylvania preclude its consideration.[25] Of the reasons offered, the most prevalent is that it has disparate racial and socioeconomic application. Another is that it is tantamount to preventive detention – incarceration prior to conviction to eliminate the risk of re-offending. Preventative detention, in its purest form, is a constitutional anathema. Bail, as it were, is intended solely to insure a person's return to court, not a vehicle to indiscriminately incarcerate people as a means of preventing recidivism.

Even in conjunction with other factors, authority governing bail decisions does not permit consideration of a person's danger or risk of re-offending.[26] Rather, bail determinations have been and continue to be exclusively based on the likelihood a person charged with a crime will return to court. Factors to be considered in making such determinations include the nature of the charges, a person's record of criminal convictions, record of failing to return to court, financial ability to post bail, violation of family orders of protection, prior possession or use of firearms, and overall activities and history.[27] Whether societal threat should be a factor to consider in bail decisions is a continued source of debate. But unless and until the legislature includes it in CPL § 510.30 – and they have declined to do so – bail determinations must be based solely on the likelihood of returning to court.[28] As such, imposition of bail is not necessarily a foregone conclusion even for qualifying offenses.

That said, mandatory release from custody without bail for non-qualifying offenses does not necessarily mean release without any conditions. If a judicial determination is made that certain measures are necessary to reasonably assure a person will return to court, several non-monetary conditions may be imposed. Non-monetary conditions include pre-trial supervision (e.g., a probation-type monitoring and reporting program), electronic monitoring,[29] passport surrender, and travel restrictions. But failure to comply with non-monetary conditions, even repeatedly, may be met with only more conditions – never bail.

Bail could be set on non-qualifying offenses, however, upon clear and convincing evidence that a person failed to appear in court, intimidated or tampered with a witness, or violated domestic or family protective orders. And, though bail may be subsequently imposed on a non-qualifying felony upon the commission of another felony, inexplicably bail may not be set on the new non-qualifying offense.[30] The statute further provides for the imposition of monetary conditions upon reasonable cause to believe an individual committed "one or more specified class A or violent felony offenses or intimidated a victim or witness" while at liberty.[31] Regarding failed appearances, a court may order a bench warrant but must stay it for 48 hours to provide the opportunity for a voluntary return.[32] And, upon return, monetary conditions may only be imposed if such failure was "persistent and willful," although this is undefined and unclear.[33]

Arguably the most controversial issue precipitated by this legislation is that dangerous people will be summarily released.

Before monetary conditions may be imposed, however, the statute requires that a hearing be conducted.[34] Its notice and timing are unspecified, and the distinctive significance between clear and convincing evidence and reasonable cause is elusive. Further underscoring such confusion is whether a hearing is always required before revoking recognizance, release under non-monetary conditions or bail, or only for non-qualified offenses. Given the statutory construction, ostensibly it is. But by any standard, it would be an anathema to require greater stringency in imposing subsequently that which could been done initially. Arguably the most confounding aspect, though, is that except for a 72-hour remand hold on a violent felony offense, the statute provides no mechanism to hold an individual for the purpose of conducting it.[35] Such a dearth of clarity renders compliance arduous and untenable, particularly at an arraignment.

The advent of this legislation has certainly sparked public debate that has yet to wane. Whether the objective of eliminating monetary release conditions will be realized remains to be seen, but the controversy and confusion it generated continues.

1. 2019 N.Y. Laws, ch. 56, eff. Jan 1, 2020.

2. https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2019StateoftheStateBook.pdf (p.140).

3. 2019 N.Y. Senate Bill S7506B, https://www.nysenate.gov/legislation/bills/2019/s2101.

4. 2020 N.Y. Laws, ch. 56, as amended, eff. July 2, 2020.

5. "Violations" comprise a third category of offense but are not crimes and do not result in criminal convictions.

6. Criminal Procedure Law § 510.10(4)(a).

7. The legislation initially designated all drug offenses – possession, sale and trafficking – as non-qualifying except for operating as a major trafficker, more commonly referred to as the "drug kingpin" statute (Penal Law § 220.77). Section 510.10(4) of the Criminal Procedure Law contains a complete list of qualifying offenses and notably includes:

> Any offense resulting in death (CPL 510.10 [4] [j]),
>
> A-1 drug felonies (CPL 510.10 [4] [d], as amended),
>
> All Penal Law section 70.80 sex offenses and section 255 incest offenses (CPL 510.10 [4] [e]),
>
> Facilitating or promoting a sexual performance by, use or luring of a child (CPL 510.10 [4] [i],
>
> Article 130 misdemeanor crimes – sexual abuse in the second and third degrees, sexual misconduct, forcible touching (CPL 510.10 [4] [e]),
>
> Failure to register as a sex offender (CPL 510.10 [4] [p]),
>
> Aggravated vehicular assault (CPL 510.10 [4] [l]),
>
> Criminal obstruction of breathing or blood circulation (CPL 510.10 [4] [k]),
>
> Unlawful imprisonment of a family member (CPL 510.10 [4] [k]),
>
> Violation of protective orders if committed again against a family member (CPL 510.10 [4] [h]),
>
> Assault in the third degree and arson in the third degree if committed as a hate crime (CPL 510.10 [4] [m]),
>
> Money laundering in support of terrorism (CPL 510.10 [4] [g]),
>
> Enterprise corruption (CPL 510.10 [4] [o]),
>
> Witness intimidation (CPL 510.10 [4] [b]),
>
> Witness Tampering (CPL 510.10 [4] [c]).

8. Criminal Procedure Law § 510.10(1).

9. Penal Law § 160.10(1).

10. Penal Law § 140.25(2).

11. Penal Law § 70.02(1)(b).

12. Criminal Procedure Law § 510.10(4)(a) provides that a qualified offense is "a felony enumerated in section 70.02 of the penal law, other than robbery in the second degree as defined in subdivision one of section 160.10 of the penal law."

13. Criminal Procedure Law § 510.10(4)(a) provides that "burglary in the second degree as defined in subdivision two of section 140.25 of the penal law shall be a qualifying offense only where the defendant is charged with entering the living area of the dwelling."

14. *See People v. McCray* (23 N.Y.3d 621 (2014)), which held that the non-residential part of a building used partly for residential purposes should not be treated as a dwelling for purposes of a burglary.

15. *People ex rel. Castano v Fludd*, 179 A.D.3d 1087 (2d Dep't 2020).

16. Penal Law § 70.02(1)(c).

17. Criminal Procedure Law § 510.10(4)(g) provides that a person is charged with a qualifying felony offense when charged with "a felony crime of terrorism as defined in article four hundred ninety of the penal law, other than the crime defined in section 490.20 of such law" (making a terroristic threat). Subsection (4)(a), however, designates a qualifying felony offense as "a felony enumerated in section 70.02 of the penal law," which, in defining a violent felony offense, includes class D violent felony offenses and specifically delineates "making a terroristic threat as defined in section 490.20" (Penal Law § 70.02(1)(c]).

18. Criminal Procedure Law § 510.10(4)(a).

19. Criminal Procedure Law § 510.10(4)(s).

20. Criminal Procedure Law § 510.10(4)(r).

21. Criminal Procedure Law § 510.10(4)(t).

22. "Although the criteria were never specified in statutory form in New York before the advent of the CPL in 1971, they are, by and large, the same as have been employed by courts for many years" (Peter Preiser, Practice Commentary, McKinney's Cons Laws of NY, CPL § 510.30) (citations omitted).

23. *Id.*

24. Ark. R. Crim. P. 9.2.

25. 234 Pa. Code § 523 (domestic violence).

26. *People ex. Rel. Lobell v McDonnell*, 296 N.Y. 109 (1946); *People v. Saulnier*, 29 Misc. 2d 151 (Sup. Ct., N.Y. Co.Co. 1985).

27. Criminal Procedure Law § 510.30 provides:

> 1. With respect to any principal, the court in all cases, unless otherwise provided by law, must impose the least restrictive kind and degree of control or restriction that is necessary to secure the principal's return to court when required. In determining that matter, the court must, on the basis of available information, consider and take into account information about the principal that is relevant to the principal's return to court, including:
>
> (a) The principal's activities and history;
>
> (b) If the principal is a defendant, the charges facing the principal;
>
> (c) The principal's criminal conviction record if any;
>
> (d) The principal's record of previous adjudication as a juvenile delinquent, as retained pursuant to section 354.21 of the family court act, or, of pending cases where fingerprints are retained pursuant to section 306.1 of such act, or a youthful offender, if any;
>
> (e) The principal's previous record with respect to flight to avoid criminal prosecution;
>
> (f) If monetary bail is authorized, according to the restrictions set forth in this title, the principal's individual financial circumstances, and, in cases where bail is authorized, the principal's ability to post bail without posing undue hardship, as well as his or her ability to obtain a secured, unsecured, or partially secured bond;
>
> (g) Where the principal is charged with a crime or crimes against a member or members of the same family or household as that term is defined in subdivision one of section 530.11 of this title, the following factors:
>
> (i) any violation by the principal of an order of protection issued by any court for the protection of a member or members of the same family or household as that term is defined in subdivision one of section 530.11 of this title, whether or not such order of protection is currently in effect; and
>
> (ii) the principal's history of use or possession of a firearm; and
>
> (h) If the principal is a defendant, in the case of an application for a securing order pending appeal, the merit or lack of merit of the appeal.

28. Though the legislature did not provide a "dangerousness" factor in either the initial or amended legislation, the amended version permits the setting of bail when an individual is charged with two sequential crimes (class A misdemeanors or felonies), "involving harm to an identifiable person or property" (Criminal Procedure Law § 510.10 (4)(t).

29. While the initial legislation authorized electronic monitoring as a condition of release, the amendment provides that an individual not be required to pay for it. And, although counties and municipalities may contract with private companies to supply the monitoring devices, only their employees – not the private companies – may interact with monitored individuals (Criminal Procedure Law §§ 500.10(3-a);),510.40(4)(c).

30. Criminal Procedure Law § 530.60(2)(b).

31. Criminal Procedure Law § 530.60(2)(a); Robbery in the second degree (aided by another) and burglary in the second degree (dwelling), while violent felony offenses, are specifically designated as non-qualifying. As such, they remain bail ineligible even if committed while at liberty after having been charged with a felony. Criminal Procedure Law § 510.10(4).

32. Criminal Procedure Law § 510.50(2).

33. As with numerous provisions contained in this legislation, the inherently vague "persistent and willful" standard is neither defined nor explained. Thus far, there is a paucity of cases compelled to address it. Arguably, though, failing to make one court appearance is insufficient, and at least one court determined three missed appearances is required (*People v. Chensky*, 67 Misc. 3d 373 (Sup. Ct., Nassau Co. 2020, Bogle, J.)). Still, whether it means a defendant must refuse to appear, choose to attend work, see a doctor, sleep late or specifically intend to avoid prosecution is unclear.

34. Criminal Procedure Law § 530.60(2)(c) provides that "[b]efore revoking an order of recognizance, release under non-monetary conditions, or bail . . . the court must hold a hearing and shall receive any relevant, admissible evidence." It may, but need not, be conducted simultaneously with a felony preliminary (probable cause) hearing.

35. Criminal Procedure Law § 530.60(2)(e) provides that an individual may be remanded to custody for seventy-two hours for a determination whether recognizance or bail status should be revoked.

Lawyers Tell Us: Their Must-Have Tech Tools

By Brandon Vogel

With many lawyers shifting to remote work this past spring, legal technology needs changed overnight. Some lawyers relied on their tried-and-true technology, while others discovered new technology that improved their practices.

But we wanted to know what they considered their must-have tech tools. Here are their answers, some of which have been edited for clarity and length.

ALL-IN-ONE PRINTER

Working remotely is seamless with a secure wireless all-in-one printer. It can print in black–and-white or in color for graphs, copy large documents that come via "snail" mail using a sheet feeder, and scan documents to my mobile device or to an email. It can print and copy double-sided to save paper, as you need to be parsimonious with paper when working from home. As it is small, it slides into a cabinet so it can be out of sight. I could not be as efficient working remotely without it.

– Mark Berman (Ganfer Shore Leeds & Zauderer), Executive Committee Member-at-Large

EVERNOTE

It saves notes and time; it is a note-taking app also helpful for making checklists, keeping copies of articles and more. Similar products are Microsoft's OneNote and Google's Keep.

For me, the key benefits of a note-taking app are certainty, ease of use and organization:

1. Certainty: These products are a great place to store information. For example, if you write about an issue consistently, as you see relevant information in emails, NYSBA publications, etc., you can keep a master topic outline, with links, in Evernote.

2. Ease of use: These products synch across your phone, laptop and the cloud. If you have a good idea while waiting in line you can update a note instantly and access it later. These products also have browser extensions that allow you to copy and sort useful sites in a few clicks.

3. Organization/Search: They also allow you to create multiple, meaningful labels for each note (e.g., "Standing") and feature word search so you can find relevant information. I recently searched "scarf" to find an article I read several years ago and related pleadings.

– Scott L. Malouf (Law Office of Scott L. Malouf), Co-Chair, Commercial and Federal Litigation Section's Social Media and New Communication Technologies Committee

FOCUS@WILL

Though I have a very extensive music collection and access to multiple streaming services, the pandemic prompted me to check out and use Focus@Will to enhance my concentration and focus.

– James F. Gesualdi, (James F. Gesualdi), former Chair, Committee on Animals and the Law

IPAD MINI

My iPad Mini is the one tool I use all the time and cannot live without. It acts as a computer on the fly, is my library for all reading material, and allows me to keep up with email, news, text messages, meetings, recipes – you name it. It is large enough to read everything and small enough to fit in a handbag.

– Diane O'Connell (Law Office of Diane O'Connell), Immediate Past Chair, International Law Section

IPAD PRO

The one thing I cannot be without, especially since the pandemic, is my iPad Pro with the writing capability (which has improved tremendously in the last few years). I take all notes on my iPad and have the ability to mark up documents and share them. The split screen feature is terrific, allowing me to review documents and keep an eye on my email. One final point: the detachable lightweight keyboard is a must.

– Jeffrey T. Zaino (American Arbitration Association), Dispute Resolution Section

MACBOOK AIR

My MacBook Air is invaluable to my practice. It gives me the flexibility to work from pretty much anywhere. My most recent tech addition is a Logitech multi-device keyboard that connects (via Bluetooth) to my MacBook Air, my iMac and my iPad. It enables me to use one keyboard to type on these three devices and to move from one device to another by pressing a button (instead of moving from the laptop keyboard, to the desktop keyboard, to the keyboard on the tablet touchscreen).

– Gail Gottehrer, (Law Office of Gail Gottehrer), Co-Chair, Committee on Technology and the Legal Profession

MICROSOFT TEAMS

My firm has started using Microsoft Teams. We were already using Microsoft 365 but had not yet used Teams. Working in the cloud became indispensable when we were unexpectedly asked to work from home. Our concern became the preservation of attorney-client privilege. Our understanding is that we are under an obligation to take reasonable steps to keep privileged conversations confidential or risk the privilege being destroyed.

– Anne LaBarbera (Thomas LaBarbera Counselors At Law,) Young Lawyers Section Chair-Elect

REMOTE DESKTOP CONNECTION

The pandemic has highlighted the importance of a law firm's versatility and ability to, on a moment's notice, seamlessly and cohesively transition its attorneys and support staff from a "work from work" environment to a "work-from-home" virtual office. As a result, one of the most essential pieces of technology for any law firm is a secure, solid and reliable remote desktop connection (RDC). In the virtual office context, an RDC enables lawyers to remotely access their office computer as if physically present in the office. There are a number of different RDC options/programs available, including ones that support multiple platforms (e.g., Windows, Mac) and work with multi-screen displays. Speak with your IT specialist to find out what RDC option would work best for you and to ensure that your RDC is set up with the proper security protocols.

– Alyssa Zuckerman (Lamb & Barnosky), Labor and Employment Law Section

TWITTER

Yes, I understand it's not a traditional legal tech app like a document management system or a legal research tool, but I've found it's the best way to keep up with the newest decisions from the New York courts and updates on policy and rule changes that affect legal practice. I set up alerts each time the courts release new decisions and can scroll through them quickly to see how the newest cases affect what I'm working on. With court rules changing frequently in response to the pandemic, Twitter is also extremely helpful in knowing what rules have to be followed when filing papers in court and how my next appearance is going to be handled. And it can be a great place to build a community of other lawyers like #AppellateTwitter, who are interested in the same nerdy things like appellate jurisdiction and practice.

– Robert S, Rosborough IV (Whiteman Osterman & Hanna), Committee on Courts of Appellate Jurisdiction

ZOOM (FORMERLY THE SOUND THAT FAST CARS MAKE)

When public health concerns required social isolation, our trusts and estates practices changed overnight. I learned of the online video conferencing platform Zoom soon thereafter. I attended a few meetings and it seemed pretty simple. Feeling confident, I scheduled client consultations. It was seamless and nice to "see" each other. Thereafter, with newfound bravado, I invited our NYSBA Trusts and Estates Law Section colleagues to meet on Zoom to discuss the executive orders permitting remote notarizations and document witnessing. From those beginnings, our weekly T&E Zoom study group was born. I daresay my clients and colleagues would agree; we cannot imagine how we functioned before we Zoomed.

– Linda Maryanov (Zimmerman & Maryanov) Trusts and Estates Law Section member

What Makes a Virtual Lawyer Happy?

By Debbie Epstein Henry

Prior to the onset of the coronavirus pandemic, most lawyers had not worked exclusively from home. While the newfound family time, flexibility and elimination of long commutes were readily apparent gains of remote work, once the indefinite term of remote work became a reality, it lost its luster for some. Those with space constraints and a less productive work setup at home and those who are compartmentalizers, who like a separate locale for work, were frustrated by the protracted time away from the office.

Regardless of whether you see remote work as a plus, a minus or something in between, many of us will be working remotely or on a hybrid basis well into 2021. For that reason, we need to figure out how to maximize our happiness while doing so. What follows are my top 10 tips to gain both happiness and productivity in a remote and hybrid work world.

1. **Find your rhythm and routines.** Know your most productive time of the day and allocate your work projects so that you're doing them when you are the least distractible and the most focused. Set up a daily schedule that builds in the necessary breaks for exercise, family time, meals and anything else that you need and want to prioritize each day. Given the monotony of the current work environment, build in more buffers and anticipate more distractions than might be typical in an ordinary workday. And when you are transitioning back from a distraction, choose a less challenging task to get you back into your work. As part of setting up your daily routine, establish a reasonable number of hours you plan to work, and determine your daily start and stop times. Recognize that your routines and expectations may change, so reevaluate if necessary and be sure to create parameters around each aspect of your day.
2. **Organize and prioritize.** Being organized is always important, but when you're working from home or when you're only in the office part-time, being systematic in your approach is that much more important. That's because all of the natural segmenting of your day through commuting, in-person meetings, events and travel is not being imposed. With everyone having more time behind their screens, email traffic is mounting and you need to be organized to manage your output rather than having your productivity dictated solely by your sent emails. Part of that organization requires prioritizing what is important among your work and home responsibilities. Undoubtedly, your priorities have shifted. Taking an inventory of what is on your to do lists – both at work and at home – and reordering and rejiggering will be necessary. Also, it's critical to ensure that the time you allocate to your responsibilities accurately reflects the importance of each of these tasks.
3. **Create boundaries and transitions.** If you have the luxury of space, make your work space separate from your other living space. For non–time-sensitive communications, avoid weekends and late nights. Create rituals for weekends that are separate from those during the weekdays. Commit to others at the end of your workday, as it often will help you to honor your commitment to stop working. Establish transitions to your day – similar to the ones that were automatic when you worked in a conventional office. Build in breaks in your calendar to recharge, similar to the time you formerly spent commuting or taking breaks at the coffee station or water cooler. If you are able to go outside for breaks, that can help give you a fresh perspective.
4. **Listen and overcommunicate.** These are very challenging times and the difficulties that people are facing vary tremendously. Listen to what people are experiencing and don't presume that you know or understand or can resolve the issues they are going through. Overcommunicate your support, humility and empathy and be careful not to burden others to educate you in areas where you are less informed.
5. **Be responsive and accessible.** Colleagues and clients who are unaccustomed to working with people remotely are anxious because they worry that if they can't see you, you are not working. Ease up these concerns by promptly responding and confirming receipt of inquiries, even if it will take you time to identify an answer. This shifts the worry so that the sender knows you have received the request and you'll be back in touch when you have a more complete response.
6. **Connect through informality and shared interests.** Many people feel isolated, as if they are working in a vacuum. Reach out to colleagues and

Debbie Epstein Henry is an expert, consultant, best-selling author, and public speaker on careers, workplaces, women and law. She runs DEH Consulting, Speaking Writing, where she consults and speaks internationally. Debbie conceived of Best Law Firms for Women, a benchmarking survey and competition she ran for a decade with *Working Mother*. She wrote two ABA best-selling books, *Law & Reorder* (author, 2010) and *Finding Bliss* (co-author, 2015). In 2011, Debbie co-founded Bliss Lawyers to employ lawyers to work in temporary roles for in-house and law firm clients. In 2020, her company was acquired by Axiom, the global leader in high-caliber, on-demand legal talent, and she now serves as their executive consultant. On October 14, 2020, Debbie will launch her new podcast, Inspiration Loves Company.™ Debbie is Vice President of The Forum of Executive Women, a nomination-only, membership organization of the top 500 women in business in the Philadelphia region.

clients on non-substantive matters to connect informally and invest more in getting to know them as individuals. Through sharing interests and relating in broader contexts, it will help you feel more engaged in your work and the people with whom you're working. When you have a scheduled call with a colleague or client, be sure to allocate time for casual conversation so that you can connect beyond the agenda items.

7. **Have fun and prioritize self-care.** Be thoughtful about what makes you happy outside of work given the current constraints. Whether it's socially distant socializing, hobbies, exercise, extra sleeping, reading, movies, community work, games, crafts, meditation, writing, outdoor activities, new skills or new projects, it's important to know what brings you joy and what revives you. Prioritizing these outlets each day and each week is more important than ever as a means to not only recharge you but also differentiate your work contributions from the rest of your life.

8. **Invest in your communities.** The pandemic has accelerated a lot of decisions and instincts that people have and don't readily act upon in ordinary circumstances. Many people report having more clarity about who and what is important in their life. If you have gained this clarity, invest in the communities that you care about and that give you purpose. Volunteering to assist those in need is a way to give back and also can give you a greater sense of meaning and control at a time when many things feel out of control.

9. **Show compassion and adjust expectations.** Happiness, at times, requires adjusted expectations. Being able to minimize your demands and show compassion for yourself and others can go a long way.

10. **Be flexible and agile.** Being flexible in how you approach your work and life and being receptive to new ideas, is valuable in today's work environment. By being creative and open to new practice areas and ways of working, your insights will be valued more and you will be able to make a greater impact with your contributions.

In sum, there are a lot of limits to working in a remote and hybrid environment, but there are also a lot of valuable lessons that we've all learned in working under different constraints. As we emerge and evolve into a new way of working, challenge yourself to take the most positive aspect of your work-at-home experience and commit to incorporating it into your future work mode. Even if the most positive experience needs to be modified in its future iteration, be sure you attempt to do so. Bridging the happiness gap from what you developed at home to what you establish going forward will be an important link to ensure you are a happier lawyer in the future.

America's Tech Giants: It's Back to the Drawing Board on European Data

A Top Court Strikes Down the Privacy Shield

By Davide Szép

Following the recent landmark ruling of the top EU court, which struck down the mechanism that had been used by companies such as Google, Microsoft, and Facebook to collect EU personal data, Big Tech must find alternative ways to keep doing business in Europe.

THE TRANSFER OF EU PERSONAL DATA TO THE U.S.

European Union data protection legislation prohibits the transfer of personal data outside Europe unless the transferee country has been deemed by the European Commission, the EU's executive body, to provide an adequate level of protection for the transferred personal data, or one of the alternative mechanisms set out in the legislation has been put in place. Since the United States has not received an adequacy decision from the European Commission (the only countries that have so far received it are Andorra, Argentina, Canada, the Faroe Islands, Guernsey, Israel, the Isle of Man, Japan, Jersey, New Zealand, Switzerland, and Uruguay), U.S. organizations seeking to collect European personal data must choose one of the alternative mechanisms. The main alternative mechanisms are the inclusion in the data transfer agreements of Standard Contractual Clauses (SCCs) established by the European Commission, Binding Corporate Rules (BCRs) adopted by the organization and approved by the competent data protection authority in the EU, and certification mechanisms that the European Commission deem adequate to enable data transfers under EU law.

The latter were first developed – limited to transfers to the U.S. – through the so-called Safe Harbor Privacy Principles, which regulated the way that U.S. companies could export and handle the personal data of European data subjects and were based on seven core principles: notice, choice, onward transfer, security, data integrity, access, and enforcement. Such principles were deemed adequate by the European Commission to protect personal data transfers to the U.S.

However, less than five years ago, the Court of Justice of the European Union (CJEU), the highest EU court in matters relating to the interpretation of EU law, invalidated the European Commission's "Safe Harbor" Decision (Case C-362/14, *Maximillian Schrems v. Data Protection Commissioner*–"Schrems I"). The Safe Harbor was deemed unfit to assure that the personal data received from Europe were sufficiently protected; therefore, a new framework needed to be negotiated in order to strengthen the safeguards to the European individuals whose data are transferred to the U.S.

This framework was the Privacy Shield, under which about 5,000 U.S. organizations, including major companies such as Facebook, Google, and Microsoft, self-certified. The core principles of the Privacy Shield were substantially the same as those of the Safe Harbor regime. However, they added more specific obligations for companies that decided to self-certify (in particular with regard to Privacy Policy, onward transfers to controllers or sub-processors, data integrity and access, data subject's enforcement ability, and regulatory oversight).

Nevertheless, in a landmark decision issued on July 16th (Case C-311/18, *Data Protection Commissioner v. Facebook Ireland and Maximillian Schrems* – "Schrems II"), the CJEU ruled that the Privacy Shield is inadequate to assure a standard of protection "substantially equivalent" to that offered in Europe. In a decision that feels like déjà vu of October 6th, 2015, the day of the Safe Harbor invalidation, the Luxembourg Court held that the Privacy Shield does not include appropriate limitations to assure the protection of European personal data from access and use by U.S. public authorities on the basis of U.S. law. In fact, per the CJEU, U.S. surveillance programs are not limited to that which is strictly necessary and proportional, as is required under Article 52 of the Charter of Fundamental Rights of the European Union (the "Charter"), and the newly introduced Ombudsperson mechanism (i.e., an official within the U.S. Department of State who can take inquiries from European data subjects who are concerned about what happens to their personal data once in the United States) does not provide safeguards equivalent to those required by European law (in particular, an actionable judicial redress, as provided for under Art. 47 of the Charter), as the CJEU questions its independence and notes a lack of authority to make binding decisions on U.S. intelligence services. In other words, in a proud assertion of identity (or European data imperialism, as some call it)[1] the Court ruled that any European individual must be granted the same protections that she or he would enjoy in Europe, regardless of who collects her or his personal data and where.

WHAT NOW FOR U.S. ORGANIZATIONS?

On August 10th, the U.S. Department of Commerce and the European Commission issued a joint press statement informing that they had begun talks to "evaluate the potential" for a new EU-U.S. Privacy Shield.[2] While some call it *papier-mâché*, claiming that the only reliable measure to render EU-U.S. data transfers secure would be changes in U.S. privacy and surveillance law,[3] it is still too early to predict whether and when Privacy Shield 2.0 will be fashioned.

Davide Szép is a Data Protection Officer and Regulatory Compliance Officer at GroundLink in New York City. He writes on privacy and data protection in the U.S. and Europe.

In the meantime, since the July ruling, tech giants such as Google and Amazon, which had self-certified under the Privacy Shield, are availing themselves of the SCCs.[4] As briefly stated above, the SCCs are a set of European Commission pre-approved terms that private parties can incorporate into their own agreements and, as with the Privacy Shield, constitute a commitment by private parties to follow certain standards in the handling of personal data. However, while the CJEU has upheld the SCCs' validity, the Court has also found that whether they can constitute a lawful basis for the transfer of personal data to a jurisdiction without an adequacy decision depends on whether the recipient is in a jurisdiction that affords a "level of protection essentially equivalent" to that guaranteed in Europe. Significantly, this necessitates an assessment of any potential "access by the public authorities of that third country" by the data exporter. Such an evaluation is quite complex and delicate and implies further responsibility for platforms with the difficult dual status of hosting provider and data controller. Attributing this responsibility to the data exporter – a private party – is consistent with the current trend, fostered by the GDPR and CJEU, of making providers accountable for content disseminated online. (Significant private power accrues with significant – and public-like – duties.) With specific regard to the U.S., since the EU had previously ruled that the country does not offer an adequate level of protection, due mainly to the broad scope of U.S. surveillance programs, transfers based on the SCCs will be difficult, if not impossible, to justify, and U.S. organizations might have to turn to different mechanisms. One of these mechanisms is the BCRs: data protection policies drafted by the organization and approved by the competent EU data protection authority that must include all general data protection principles and enforceable rights to ensure appropriate safeguards for data transfers and be legally binding and enforceable. However, since U.S. law would have primacy over the tool, the Court's SCCs assessment also applies in the context of BCRs, and U.S. surveillance programs will make it hard for it too to be deemed as ensuring a level of protection essentially equivalent to that in Europe.

The Luxembourg Court also asserted that whether or not one can transfer data on the basis of the SCCs or BCRs will depend on the supplementary measures one could put in place. While the CJEU highlighted that such measures would have to be provided on a case-by-case basis (taking into account all the circumstances of the transfer and following the assessment of the law of the third country) and it is the responsibility of the data exporter to decide on such supplementary measures, the European Data Protection Board (EDPB) – an independent body whose purpose is to ensure consistent application of the GDPR and promote cooperation among EU's data protection authorities – has stated that it will provide more guidance.[5]

As the dimension of power is turning from "transcendent" to "immanent," the Court's decision entails that private negotiations do not offer sufficient protections to the right to privacy, hence, public-law safeguards need to be established as well. Data protection, mentioned in the Treaty of Nice as a fundamental right to freedom, cannot

be segregated to the private sphere because it represents an integral part of the public discourse and future of democracy.

The Extraterritorial Reach of the EU Data Protection Regime

The above considerations all stem from one principle: the applicability of European data protection law outside Europe. The CJEU has confirmed that EU standards of data protection must travel with the data when they go overseas. This is one of the most significant changes brought about by the GDPR compared to the previous framework.[6]

While critiques have been raised on the extraterritoriality of EU data protection law[7] – specifically on the unilateral expansion of EU's jurisdiction to non-EU businesses – one must consider that, not long ago, processing of personal data seemed easy to understand: data controller, data processor, data subject, and all the means used for data processing operations were usually located in the same country, and so were subject to a single legal regime. However, jurisdiction based solely on the territoriality principle is becoming less evident in the digital age. The borderless domain of the internet requires a borderless application of the law.

Moreover, the unilateral expansion of jurisdiction out of its borders is not a rare phenomenon and has been carried out by numerous countries. However, when doing so, jurisdictions, including the EU and its institutions, are bound to public international law.[8] The most authoritative outline of the sources of international law is Article 38 of the Statute of the International Court of Justice.[9] Under this article, the legitimacy of the extraterritorial claim may be assessed in light of "international conventions [...] establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; (and) the general principles of law recognized by civilized nations [...]." While no international convention or treaty is directly related to data protection, custom and the general principles of law recognized by the international community allow a better understanding of the public law that jurisdictions are bound to as far as data protection is concerned. The so-called "effects doctrine," which has been recognized by the U.S. Supreme Court[10] and bases jurisdiction upon the fact that conduct that took place outside the state has effects within the state, appears to be the international custom followed by the GDPR in its expansion of the EU's data protection jurisdiction. In fact, the focus is on the location of the potential harmful effects rather than the processing. It is worth mentioning that the GDPR applies regardless of the nationality or residence of the data subject (Recital 2). The decisive factor is instead the physical presence of the data subject within the territory of the European Union. As a result, while the territorial scope of EU data protection laws is indeed expanded outside the EU, such laws protect not only EU citizens and residents, but any individual who is even temporarily visiting an EU Member State (and do not protect EU citizens and residents outside the EU), thus maintaining a territorial scope as far as the data subjects are concerned. Lastly, an assessment based on "general principles of law recognized by civilized nations" implies mapping the domestic laws of different countries and, more specifically, their respective jurisdictional scope. (Such an assessment is indicative of the degree of legitimacy, i.e. authority, of the GDPR.) Regarding data privacy, extraterritorial claims can be found, inter alia, in the Australian 1988 Privacy Act, the Singaporean Personal Data Protection Act of 2012, and the U.S. Children's Online Privacy Protection Act of 1998. U.S. reference can also be made, outside the data protection field, to the Foreign Corrupt Practices Act, whose scope has been extended by the courts to issuers of securities on the U.S. markets, and even acts of bribery committed through the use of a U.S.-based email provider. Several countries, including the U.S., seem to have acknowledged the need to apply their rules outside their borders in certain cases. Therefore, the extraterritorial scope of EU data protection law cannot be considered an exception.

---

1. *See* Oskar Josef Gstrein, *Right to be Forgotten: EU-ropean Data Imperialism, National Privilege, or Universal Human Right?*, 1 Rev. of Eur. Admin. Law 125 (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3530995.

2. *See* Joint Press Statement from U.S. Secretary of Commerce Wilbur Ross and European Commissioner for Justice Didier Reynders, Aug. 10, 2020, https://www.commerce.gov/news/press-releases/2020/08/joint-press-statement-us-secretary-commerce-wilbur-ross-and-european.

3. Section 702 of the Foreign Intelligence Surveillance Act allows for the mass collection of non-Americans' personal data from big tech firms.

4. *See* Google Cloud's Commitment to EU International Data Transfers and the CJEU Ruling, Google Cloud, July 17, 2020, https://cloud.google.com/blog/products/identity-security/google-clouds-commitment-to-eu-international-data-transfers-and-the-cjeu-ruling and EU-US Privacy Shield, Amazon Web Services, https://aws.amazon.com/compliance/eu-us-privacy-shield-faq/?nc1=h_ls.

5. *See* European Data Protection Board, Frequently Asked Questions on the judgment of the Court of Justice of the European Union in Case C-311/18 - Data Protection Commissioner v. Facebook Ireland Ltd and Maximillian Schrems, July 23, 2020, https://edpb.europa.eu/sites/edpb/files/files/file1/20200724_edpb_faqoncjeuc31118_en.pdf, n. 10.

6. Such change is stated in Art. 3(2), GDPR, which can be considered "*one of the more important 'achievements' of the reform.*" See P. DE HERT, M. CZERNIAWSKI, *Expanding the EU Data Protection Scope Beyond Territory: Article 3 of the General Data Protection Regulation in its Wider Context*, 238.

7. *See, inter alia*, S. BU-PASHA (2017), *Cross-Border Issues under EU Data Protection Law with Regards to Personal Data Protection*, Information & Communications Technology Law, 26:3, 213-228 and S. LEE, *A Study on the Extraterritorial Application of the General Data Protection Regulation with a Focus on Computing* (October 2018),. available at SSRN, https://ssrn.com/abstract=3442428.

8. *See* CJEU Case C-366/10 , *Air Transp. Ass'n of Am. and Others v. Sec'y of State for Energy and Climate Change*, 2011, §101.

9. D. J. B. SVANTESSON, *The Extraterritoriality of EU Data Privacy Law – Its Theoretical Justification and Its Practical Effect on U.S. Businesses*, (2014) 50 Stanford Journal of International Law 53, 76.

10. *See Strassheim v. Daily*, 221 U.S. 280, 285 (1911).

Coops, Condos and COVID-19

By Richard J. Sobelsohn

Richard J. Sobelsohn has practiced real estate law for 22 years with a sub-specialty in sustainable building law. He has worked as a solo practitioner, General Counsel to a real estate developer, in the law firms Stroock, Stroock & Lavan and Kaye Scholer, Moses & Singer and is currently Vice President, Legal, at Cohen Brothers Realty Corporation. Sobelsohn is an adjunct professor of law at Brooklyn, Columbia, Cardozo, Fordham and New York law schools, is a Green Globes Professional, LEED A.P., a member of the Fellows of the American Bar Foundation, and a Fellow of the American College of Real Estate Lawyers.

For condominiums, cooperatives and homeowner's associations, the novel coronavirus has presented myriad legal issues. However, dealing with COVID-19 has provided one benefit. There is now an opportunity to develop a blueprint for condominiums and cooperatives to follow when, and if, the next similar crisis occurs. It is therefore incumbent upon practitioners to set forth for their clients plans for the future so that they are readily accessible when needed. To understand the basic foundation of what concerns many of these properties have, we should understand that, at a minimum, there is typically a statutory requirement to protect the health and welfare of residents.[1]

COVID-19 ISSUES THAT NEED ATTENTION

1. How to Keep the Building Operating

a. Employees who keep the building operating are considered "essential employees,"[2] and as such they are permitted to work in the condo/coop. However, what happens when one or more of them becomes ill (either with the coronavirus or

something else)? Should others on staff be required to work overtime to take up the slack? Should temporary workers be hired, and if they are, will the union (if the employees of the building work under a union contract) require those temporary workers to become hired as permanent employees if they are needed for more than the typical union maximum working days? All these are issues with which the condo/coop must grapple.

b. How to deal with deliveries of food (either take-out meals or groceries). Some boards have required residents to pick up food deliveries in the lobby or immediately outside the building entrance to avoid having a delivery person possibly infect the building surfaces or residents/employees.[3]

c. Package deliveries are also an issue. In some buildings, large packages, or a delivery of multiple large boxes, are now delivered directly to the resident's apartment soon after arriving at the building so as to keep the potentially infected boxes out of the common areas.[4]

d. Wearing masks has also become a building entrance and common area requirement. Those residents not wearing a mask may be given a mask if they are not wearing one when entering the building, and furthermore, guests may be prohibited from entering the building at all if they refuse to wear a mask. Similarly, restrictions on elevator usage (no more than a maximum number of unrelated persons per elevator cab) are now the norm.[5] New York State imposed a mandatory 14-day quarantine for those individuals entering the state from designated "hot spot" states and countries and even imposes fines for failure to satisfy this obligation.[6] Those required to be quarantined may also need additional building services, such as having staff assist with trash collection and food delivery, and the condo or coop may have to plan for this.

e. Employees of residents (whether full-time or part-time) also need to be accounted for. These workers could include housekeepers, dog walkers and nannies. Many state governors promulgated executive orders with minimum guidelines for buildings (both commercial and residential).[7] Clearly condominiums and cooperatives have to comply with these directives, but most executive orders included (as they did in New York State) the proviso that building owners have the latitude to add to the orders as they see fit (of course, in a legal, non-discriminatory fashion). A questionnaire asking the employee or recently arrived resident about exposure to the novel coronavirus or a statement regarding recent travel is now typical, and some buildings are even taking the temperature of workers and unknown individuals before permitting entrance to the property.

2. Social Distancing and Amenities

Due to the novel coronavirus, social distancing has become the norm to protect others from catching the virus. And relating this to a resident's use of the common areas and amenities of their buildings is something with which Boards have recently grappled. For example, the utilization of a health club, gym or pool must now be considered when formulating social distancing regulations. Children's playrooms, racquetball, squash and basketball courts are also part of the discussion. Even the use of elevators, common hallways, trash rooms, lobbies, laundry rooms and outside areas of the property are all in the mix. In many cases there are different rules for those who tested positive for COVID-19 versus those who did not get tested or after testing were found to be negative. Building concierges' health protection must also be addressed. In many buildings, plexiglass screens have been installed to provide a barrier between residents and employees, and many buildings have even installed tape on the floor delineating six feet for social distancing from concierge stations. Required mask and social distancing signage located on the building façade, elevator banks and lobbies have also become commonplace (even in the fanciest buildings). Additional expenditures on masks, hand sanitizers and disinfectants are also something for which boards must plan.

Before COVID-19, the package of amenities that enticed people to want to live in condominiums and cooperatives helped sell and rent the apartments located therein. Yet after the outbreak, condo and coop boards alike have had to weigh priorities and to determine whether protecting residents and employees of the building outweighs facilitation of sales and rentals. Therefore, new responsibilities for employees, such as doorpersons wiping down elevator buttons, front doors and keeping delivery people outside of the building, have been added to the scope of work, as well as having building staff deliver packages to residents instead of those residents coming to the lobby to retrieve them. Bringing in cleaning services for extra deep-cleaning/disinfecting is also common in many buildings. Balancing these added costs against resident and employee health has also become an issue. Furthermore, more vigilant HVAC filter changes and higher MERV rating filters[8] have become the norm, which have the added benefit of preventing sick building syndrome[9] and Legionnaires' disease.[10]

3. Disclosure of Infected Persons

Although not codified in statute or addressed specifically in case law, if a resident of a condo or coop is known to be infected with the coronavirus, disclosing that an indi-

vidual resides in the building has been generally accepted to be appropriate, provided, however, that that person's name and apartment number is not to be released.[11] But because the infected person(s) live near others and potentially share the property's common areas (including where the mailboxes are situated) and share the buildingwide HVAC[12] and water systems, condos and coops should have set protocols to deal with this. Due to the concern of the virus spreading and a healthy occupant of a building being infected by someone that has the virus, many condominiums and cooperatives have put the following measures in place:

a. Notifying residents that there is someone in the building that has the coronavirus puts them on notice that they could be susceptible to catching the virus unless other actions are not taken (most of those actions, however, are already described in this article and below). The general consensus is that if a building has a known infected person, there may be additional individuals residing in the property who also have COVID-19 but are asymptomatic or unaware that they are sick. Of course, if the infected person gives consent to disclose their identity, that might be advantageous since at this point the state of the law is unclear.[13]

b. With a COVID-19-identified resident, a condo and coop could arrange for the following to (1) permit that person to self-quarantine and (2) prevent that person from spreading the virus:

   (i) Picking up and disposing the trash left outside the infected person's apartment;

   (ii) Delivering the mail from the infected person's mailbox to outside their apartment;

   (iii) If the infected person must leave the apartment to go to the doctor, managing the elevator operation so that the person is the only one in the elevator when using it, uses a mask, does not touch the floor buttons, and is escorted out from and back into the building.

   (iv) Providing the infected person with names and numbers of grocery stores, laundry/dry cleaners and pharmacies that deliver, and when the items are delivered, facilitating the drop-off outside the apartment.

   (v) Informing the local health department and the CDC that an infected person resides in the building.

   (vi) Requiring all persons entering the building that have not recently resided in the building to complete a questionnaire stating from where they may have traveled, if they are infected or have been in contact with someone infected, etc., and to prevent access if the questionnaire discloses a COVID-19 connection.

4. Monthly/Annual Board Meetings

Condominium and cooperative annual meetings and monthly board meetings are now being conducted virtually. However, what should the condo or coop board do if the bylaws do not speak to this? New York State law[14] and new policies suggested by the Real Estate Finance Board and the New York State Department of Law help here by permitting a relaxing of bylaws to facilitate these types of virtual meetings.[15] In planning for the future, a practitioner might want to suggest that condominium or cooperative bylaws be modified to permit these types of meetings on the occurrence of an event such as COVID-19.

5. Payment of Common Charges/Maintenance

Condominiums and cooperatives are dealing with not only additional COVID-19-related costs, but the failure of some unit owners in paying their monthly common charges/maintenance. Here the boards have to figure out how to respond to those owners who state that they do not have the funds to pay what is due. This is a much easier issue with which to deal when there are a limited number of issues, but with the current pandemic it is different. The funds to pay for regular operating expenses (real estate taxes for cooperatives) and coronavirus-added costs have to come from someplace. Although there are various groups suggesting that enforcement of payment obligations should be relaxed[16] and that there be a waiver of late fees, penalties and foreclosures for an owner's failure to satisfy their monetary obligations, a board's fiduciary duty remains constant, i.e., to insure that the best interests of the condo/coop are paramount. This is not an easy issue, and the boards must use a formula that is applied equally and fairly to all unit owners. One question that arises is: Should there be different rules for owner-occupied units as opposed to those that are merely owned as investment properties? Since it is not unusual nowadays to see rentals vacated and the owners of those apartments unable to pay their monthly maintenance/common charges, a condo or coop's board will need to have in place certain protocols to deal with such a situation.

6. Sales and Rentals

Cooperatives and condominiums are also faced with the issue of how to deal with shareholders/owners wishing to market their apartments for sale or rental.[17] No longer are in-person open houses the norm. With COVID-19, due to market jitters, local or state prohibitions[18] and condo/coop COVID-19-related rules, "virtual viewings" abound. This alleviates the concerns that too many "strangers" would enter a building to see an apartment and possibly transmit the virus if they have it. Another modification in the selling/leasing process has been adopted.

For a coop sale, it is typical for the purchaser to submit an application to the board of directors and to take part in an interview by the board or a committee of the board. During the pandemic, live face-to-face interviews are not happening, and instead they are now taking place online with Zoom, Skype or another online medium.

7. New York State Relaxes Requirements for Sponsors

New York State requires sponsors of condominiums and cooperative to file amendments to offering plans when there are financial updates and price changes for the sale of apartments.[19] Due to COVID-19, the New York State Real Estate Finance Bureau (REF) has stated that during the relief period, REF does not intend to pursue enforcement actions against sponsors or principals based solely upon the marketing or sale of units/apartments/homes pursuant to an expired or "stale" offering plan. . . . . Therefore, until further notice, sponsors do not need to submit amendments to REF that principally serve to extend the term of the offering plan (i.e., financial update amendments).[20]

However, the suspension of the requirement to file is dependent upon there being no adverse and material changes to the offering plan. Furthermore, Governor Cuomo's Executive Order 202.55 provides for (x) a tolling of (i) the 15-month statutory residential coop/condo conversion deadline; (ii) the required date for the first closing of shares of a cooperative or a condominium unit and recission rights; and (iii) the updated budget requirements; and (y) extending sponsor's time to recover from purchasers the mortgage recording tax it paid allocated to the apartment/unit purchased.[21]

8. Construction Issues

Depending upon the jurisdiction, but generally seen throughout the country, most "non-essential" construction work was halted by executive or agency order due to the pandemic. Unless a project was "necessary to protect health and safety of the occupants, or to continue a project if it be unsafe to allow to remain undone" (i.e., "essential construction"), the construction was not permitted.[22] The problem for a condominium or cooperative is that if a construction job was commenced prior to the outbreak of COVID-19, the delay in completing the job affects not only the current residents but also any sales and rentals in the building. Exceptions, however, are available in some cases and some jurisdictions. For example, in New York, essential construction also includes affordable housing construction, public housing work and essential business construction.[23]

a. Building-Wide. The projects under this scheme are generally for the benefit of all residents of the building. These could include renovations to lobbies, hallways, elevator cabs, etc. Normally, during the performance of construction, condominium and cooperative owners understood that there would be a temporary period of time in which their building would not look pristine and the services usually afforded to those living in the building might be curtailed. However, with the current situation, those projects that began before the pandemic and the many executive orders have been delayed (in many cases, for months). Furthermore, once the "stop-work" directive is removed, challenges will also abound, as there will probably be an overwhelming number of construction jobs that need to be completed or started. It is possible that the original contractors may no longer be in business, much less have the resources to handle all of the work in the market. But the work, nevertheless, needs to go on.

b. Unit/Apartment Specific. The individual apartment construction job that either was to begin at the time of the pandemic or was commenced prior thereto presents additional issues for condominiums and cooperatives. Not only do boards have to deal with their own building-wide construction jobs, they also need to manage unit owner construction jobs. Although the same restrictions on building-wide work applies to apartment construction, the staging of work for when the restrictions are lifted presents its own set of issues. What work has priority other than the condominium/cooperative building-wide work? Should a board permit resumption of construction in an apartment based on when the original job began or the scope of the work itself? In other words, if the job was a complete "gut" renovation, should that have priority over a kitchen cabinet replacement? Furthermore, in making a decision regarding permitted work resumption, a board would be well-advised to confirm with counsel if there might be any legal issues relating to deciding which jobs can start first. Clearly, any unit-specific work would be second in priority to the building-wide construction work. Pursuant to the governor's executive order, boards can impose stricter rules as they deem necessary.[24] Additional issues presented are how to screen construction workers for COVID-19 infection, making sure that common areas are kept clean and possibly imposing additional cleaning fees on unit owners/shareholders having construction performed for them, and fining shareholders/unit owners or even stopping the construction work altogether if those owners do not abide by the rules.

9. Budgets

The many issues relating to COVID-19 have now forced coop and condo boards to modify previously well-

thought-out budgets. There are myriad increased costs with which buildings have thus far not had to deal, and the money to pay for them has to come from somewhere. The good thing (if one can call it a good thing) is that the unforeseen costs relating to COVID-19 are no different than any other unforeseen costs that a board must face. For example, when an emergency repair or replacement is required in a building and for which the board did not provide in its budget, assessments to unit owners or increases in common charges/maintenance is a typical new imposition. For coops and some condos, borrowing funds from a lender is another route that could be taken. In either situation, the added expenses are real, and a board's fiscal duty to its shareholders/unit owners is paramount and must be addressed.[25]

10. Protection for the Boards

Followed in most jurisdictions, the Business Judgment Rule[26] protects a condo or coop board's actions as they will be presumed to be valid, absent fraud, self-dealing and illegality, and courts will be highly deferential to those actions. Case law typically shows that as long as a board acted in good faith, for a legitimate purpose and in the best interests of the shareholder/unit owners, it will not be reviewed by the court. This is true even when a board makes mistakes that cause the condo or coop to expend additional monies for a project that their shareholders/unit owners thought was extravagant or in excess of the benefit from such spending. As long as a board exercises "honest business judgment," their decisions are not second-guessed.[27] When a condominium's board of managers or a cooperative's board of directors decides to implement new rules to deal with COVID-19, they will probably go unquestioned by the court.

11. Summary

So where are we left in advising our condominium and cooperative board clients? The first suggestion may be to develop a blueprint for them to follow upon the occurrence of the next coronavirus-like event. Unlike dealing with the aftermath of a situation like Superstorm Sandy and even the events following 9/11, the ramifications of the novel coronavirus pandemic may prove to last much longer. It is therefore incumbent upon the practitioner to foresee some of the legal pitfalls with which our clients must deal to help them navigate successful outcomes. With proper planning, we can prepare for the known "unknown."

---

1. *See* New York State Multiple Dwelling Law, Article 1, Section 2, https://www1.nyc.gov/assets/buildings/pdf/MultipleDwellingLaw.pdf. *See also* Majestic Hotel v. Eyre, 53 A.D. 273, (1st Dep't 1900).

2. Essential employees work for "Essential Businesses," more fully defined in Executive Order 202.6, at https://esd.ny.gov/guidance-executive-order-2026.

3. *See Best Practices for Residential Property Managers*, Real Estate Board of New York, at https://rebny.com/content/dam/rebny/Documents/PDF/Resources/CoronavirusResources/Best%20Practices_ResidentialPropertyManagers.pdf.

4. *See COVID-19: FAQ for Residential Buildings*, NYC Health Department, https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-residential-buildings-faq.pdf.

5. *See COVID-19 Guidance for Shared or Congregate Housing*, CDC, Updated April 24, 2020 at https://www.cdc.gov/coronavirus/2019-ncov/community/shared-congregate-house/guidance-shared-congregate-housing.html.

6. *See* "COVID-19 Travel Advisory," NYS Dep't of Health, https://coronavirus.health.ny.gov/covid-19-travel-advisory.

7. *See* Karen Schwartz, "Thinking of Traveling in the U.S.? These States Have Travel Restrictions," N.Y. Times, July 10, 2020, https://www.nytimes.com/2020/07/10/travel/state-travel-restrictions.html.

8. *See* "Filtration/Disinfection," ASHRAE, https://www.ashrae.org/technical-resources/filtration-disinfection, showing why a higher MERV rating fights the spread of COVID-19.

9. *See* "Air Filters," Second Nature, https://www.secondnature.com/science/air-filters.

10. *See* "Quick Facts: How to take care of HVAC systems and prevent disease," Bluestone & Hockley, https://www.bluestonehockley.com/quickfacts-how-to-take-care-of-hvac-systems-and-prevent-disease/.

11. The question arises if a resident of the building lives in close proximity to the infected person, if there is a duty to disclose the apartment number. *See* Adam Leitman Bailey and John M. Desiderio "Residential Building Laws of the COVID-19 Pandemic," N.Y Law J., June 9, 2020, https://www.law.com/newyorklawjournal/2020/06/09/residential-building-laws-of-the-covid-19-pandemic/.

12. Heating, Ventilation and Air Conditioning systems. The EPA states that because it is possible that the coronavirus can be transmitted via airborne particles traveling through a HVAC system, the following can reduce COVID-19 spreading from one individual to another: "increasing ventilation with outdoor air and air filtration as part of a larger strategy." *See* "Indoor Air and Coronavirus (COVID-19)," EPA, https://www.epa.gov/coronavirus/indoor-air-and-coronavirus-covid-19.

13. *See* Adam Leitman Bailey and John M. Desiderio "Residential Building Laws of the COVID-19 Pandemic," N.Y Law J., June 9, 2020, https://www.law.com/newyorklaw-journal/2020/06/09/residential-building-laws-of-the-covid-19-pandemic.

14. *See* M. Blankenship, J. Eric Johnson and Sey-Hyo Lee, "Temporary Relief for NY Corporations to Hold Virtual-Only Shareholders' Meetings," Winston & Strawn, LLP, https://www.lexology.com/library/detail.aspx?g=6203dafe-d58a-4ec3-94cf-46f82d4a0d74, which states "New York governor's executive order issued March 20, 2020, suspending the application of certain statutory provisions in light of the coronavirus (COVID-19) pandemic temporarily permits corporations incorporated in New York to hold virtual-only shareholders' meetings. Specifically, the executive order suspends the provisions of Sections 602(a), 605(a) and 605(b) of the New York Business Corporation Law (NYBCL) with respect to the location and notice requirements for shareholders' meetings "to the extent that they require meetings of shareholders to be noticed and held at a physical location" initially until April 19, 2020."

15. Leslie R. Byrd, Joy Baskin and Ross F. Moskowitz, *NY Issues Condo and Co-op Plan Guidance Amid COVID-19 Pandemic*, Stroock, March 31, 2020, https://www.stroock.com/publication/ny-issues-condo-and-co-op-plan-guidance-amid-covid-19-pandemic.

16. *See COVID-19 & Community Associations Statement of Foreclosure Actions Moratorium*, Community Associations Institute, https://www.caionline.org/Pages/covid-19foreclosures.aspx.

17. The Real Estate Board of New York has an informative brochure providing guidance to real estate professional during the pandemic entitled *Best Practices for Conducting Residential Real Estate Rental Transactions During the Coronavirus (COVID-19) Crisis*, June 25, 2020, https://rebny.com/content/dam/rebny/Documents/PDF/Resources/ConductingResidentialRentalTransactions.pdf.

18. *See* NYS Executive Order 202.6, which was later lifted as real estate showings were redefined as "essential work."

19. *See* 13 N.Y.C.R.R. § 25.5.

20. *See* "Temporary Suspension and Review Policies and Procedures Due to COVID-19 State of Emergency," Real Estate Finance Bureau Memorandum, May 1, 2020, https://ag.ny.gov/sites/default/files/temporary_submission_and_review_policies_and_procedures_due_to_covid-19_state_of_emergency_5-1-2020.pdf.

21. *See* https://www.governor.ny.gov/news/no-20255-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency.

22. *See* https://esd.ny.gov/guidance-executive-order-2026, Section 9.

23. *Id.*

24. *See* Rhonda Kaysen *My Co-op Is Letting Workers in Again. How Do I Know They're Doing It Safely?* N.Y. Times, July 25, 2020, https://www.nytimes.com/2020/07/25/real-estate/coronavirus-reopening-workers-in-buildings-rules.html.

25. NYS Article 9-B, New York Consolidated Real Property Laws, subsection 339 permits condominiums to raise common charges if the board chooses to do so. Cooperatives have this right as well, providing their bylaws permit it.

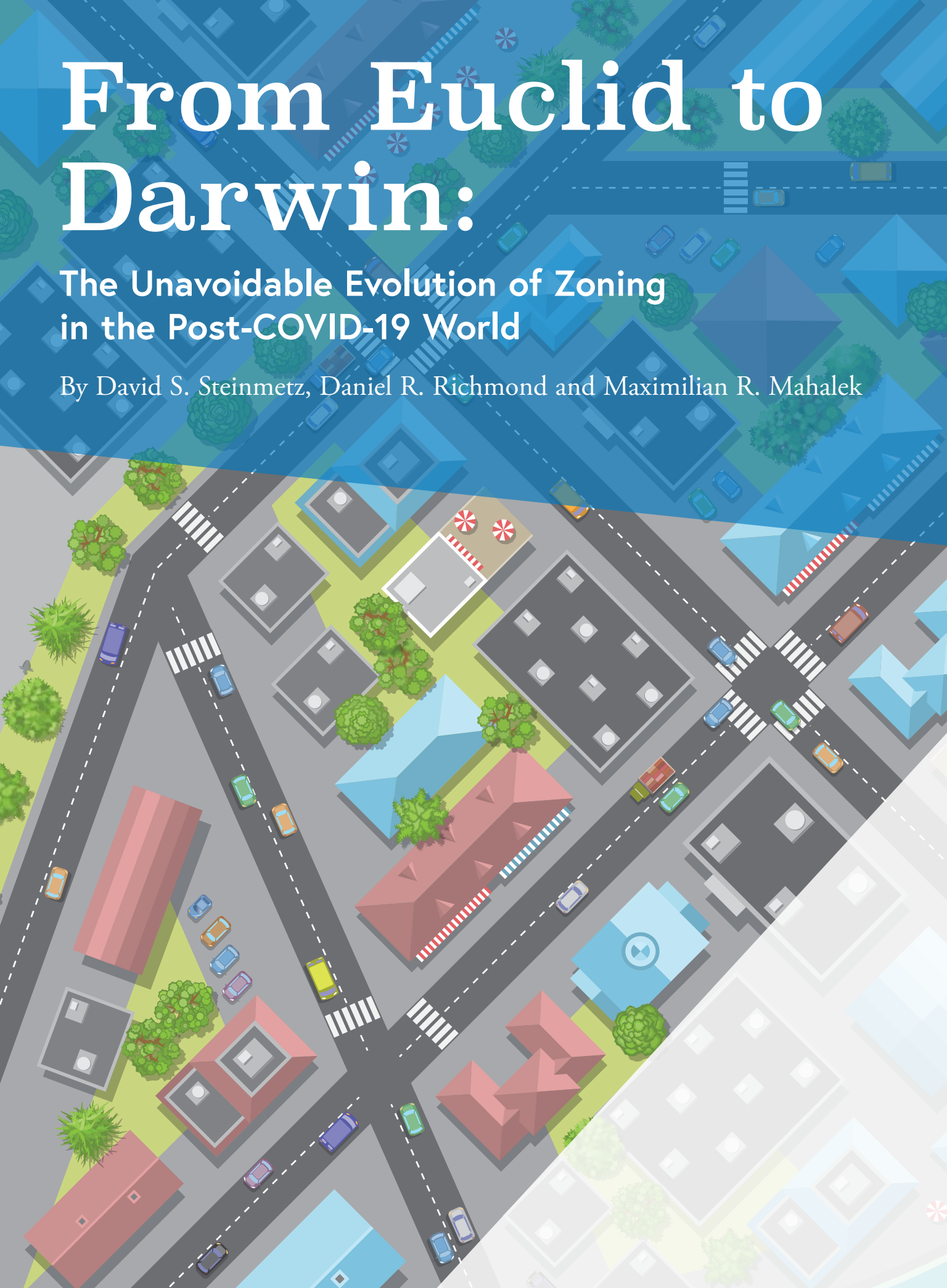
26. *See Ritter & Ritter, Inc. Pension & Profit Plan v. Churchill Condominium Ass'n*, 166 Cal. App. 4th 103, 123 (2008); *Harhen v. Brown*, 431 Mass. 838, 845 (2000); *Otis & Co. v. Pennsylvania R. Co.*, 61 F. Supp. 905 (D.C. Pa. 1945).

27. *Otis & Co. v. Pennsylvania R. Co.*,61 F. Supp. 905 (D.C. Pa. 1945).

From Euclid to Darwin:

The Unavoidable Evolution of Zoning in the Post-COVID-19 World

By David S. Steinmetz, Daniel R. Richmond and Maximilian R. Mahalek



David S. Steinmetz is a founding member and managing partner of Zarin & Steinmetz. He concentrates his practice in the areas of zoning, land use, real estate, environmental law and litigation. He regularly appears before municipal boards processing land development applications. David has also successfully litigated numerous complex cases in state and federal court at the trial and appellate levels. Currently, David is involved as lead counsel in several adaptive reuse and mixed-use projects, as well as multiple senior assisted living applications. David has secured an "AV" peer rating and has been designated as a "SuperLawyer" from 2015 through the present.

Daniel R. Richmond is a partner with Zarin & Steinmetz. He counsels private and municipal clients on permitting and entitlements, SEQRA, zoning, the National Environmental Policy Act, public-private partnerships and watershed regulations. Dan represents clients in administrative proceedings before state and local land use boards. Dan received his Juris Doctor, *cum laude*, from Vermont Law School, where he served as editor-in-chief of the Vermont Law Review. He received a Bachelor of Arts in History from Williams College. Dan is LEED®-accredited and serves as co-chair of the Land Use Committee of the Environmental and Energy Law Section of the NYSBA.

Maximillian R. Mahalek is an associate with Zarin & Steinmetz. He received his Juris Doctor, *magna cum laude*, from the Elisabeth Haub School of Law at Pace University in 2019, where he served as an article groups editor at the Pace Environmental Law Review. While in law school, Maximillian worked as a research assistant with the Pace Land Use Law Center. In addition, he interned with the Corporation Counsel of the Village of Ossining, N.Y., and with Johnson, Haslun & Hogeman. Maximillian received Master's and Bachelor's degrees in Urban Planning from the University of Illinois at Urbana-Champaign.

Zoning, like all other bodies of law, evolves in response to changing societal needs and demands. Through a process akin to natural selection, smart communities continually reassess and update their public policies and programs, comprehensive plans, and land use laws to guide and incentivize development and, importantly, to enable the strongest, most promising development scenarios to thrive. The COVID-19 pandemic presents a unique set of challenges to municipalities seeking to utilize their regulatory powers to promote safe, economically viable and effective planning policies in their communities.

Notably, zoning regulations, including both use and bulk regulations, emerged in significant part in response to the epidemics that ravaged society during the 19th and early 20th centuries. Public officials needed to address concerns that inferior construction and crowded, dark and damp living arrangements contributed to the spread of disease, resulting in the New York State Tenement House Act of 1901, which contained many of the regulations now common in building and zoning codes requiring access to sunlight and air.[1] Furthermore, the separation of distinct uses was seen as a tool to promote the public health, including fighting the spread of disease. This purpose was specifically identified by the U.S. Supreme Court in its 1926 decision *Village of Euclid, Ohio v. Ambler Realty Co.*, in which the Court noted that "the danger of fire and [] contagion are often lessened by the exclusion of stores and factories from areas devoted to residences, and, in consequence, the safety and health of the community may be promoted."[2]

EVOLVING VARIATION IN ZONING

The success of these early measures soon led to the implementation and evolution of what is now commonly known as Euclidean zoning, which generally refers to

the division of municipalities into geometric or mapped districts that allow (or disallow) various uses, and which are generally accompanied by area or bulk restrictions. The zoning at issue in *Euclid* divided the municipality into six classes of use districts, which were cumulative, in that the uses in the second use district included those in the first, and the uses in the third district included those in the first and second, and so on.[3]

Foreshadowing the continuing evolution of zoning, in ruling on the constitutionality of the Village of Euclid's zoning law, the Supreme Court wrote "while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation."[4] As the *Euclid* Court wrote, "a degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles."[5]

Similarly, while at its core zoning relies on the lawful application of a local government's police powers to uphold the morals, health, welfare and safety of the community,[6] the particulars of zoning laws continuously change to meet the new and different conditions that are presented to municipalities, using elasticity to advance and improve communities. Much like Charles Darwin's theory of natural selection, in which species with adaptive traits are best positioned to weather climate changes and other challenges,[7] some municipalities have adopted flexible zoning regulations that position them to better respond to changing markets and unexpected events. These municipalities are more likely to survive and thrive, and their regulations and other development programs become best practices that are replicated throughout the country.

With the emerging recognition of the importance of incorporating flexibility into zoning regulations, some municipalities branched out to explore novel tools beyond classic Euclidean zoning. These tools have included form-based codes which, rather than simply regulating through the segregation of uses, regulate the physical development of communities, including how buildings relate to the street, the integration of the public and private spheres, and building appearance.[8] Other municipalities began invoking Planned Urban Development districts (PUDs) and/or floating zones, which allowed for more flexible bulk and use regulations in targeted areas predicated upon legislative discretion.

ZONING'S FUTURE EVOLUTION IN RESPONSE TO COVID-19

The current pandemic presents its own unique challenges. Inevitably, there will be a discernible market response. It can already be felt, with growth in suburban real estate markets.[9] Local and regional governmental bodies quickly need to confront the same questions that are being asked by the development community as it analyzes the new marketplace environment: what changes are needed, what land uses are desired and where and how do we ensure that zoning will evolve to properly shape the advancement of a community in a safe, responsible and economically productive fashion? Those municipalities that can adapt their zoning regulations to changing conditions within their own unique environments are best positioned to survive and thrive in a post-COVID-19 world – much like the tortoises Darwin studied in the Galapagos Islands, which underpinned his theory of Natural Selection.

Issues such as density, circulation, common area utilization and efficient design will undoubtedly be encountered in both residential and non-residential development contexts. How the marketplace and local governments confront these concerns will likely dictate the strength of the real estate market for years. These expected market trends and related best practices may include the following:

Adaptive Reuse

The concept of reusing and repurposing existing buildings may take on a lot more significance in light of the pandemic. Many storefronts, secondary and tertiary malls, business properties and institutions simply will not survive.[10] Municipalities should consider how they can facilitate and incentivize the adaptive reuse of buildings to avoid community blight and to promote social and economic growth. The amendments to the New York State Environmental Quality Review Act (SEQRA) that became effective in 2019 created an express "Type II exemption" for the reuse of residential, commercial or mixed-use structures where those uses are permitted and no Type I threshold is surpassed.[11] Municipalities can build on this template, such as by expediting the review of projects that involve adaptive reuse when certain criteria are met mitigating adverse environmental impacts and by providing density bonuses for such projects.

Emerging Residential Trends

While it may still be too early to assess the degree to which the pandemic will affect and/or alter residential development, it appears likely to do so on multiple levels. At least some migration of people out of dense urban areas to more suburban or rural areas is likely and is seemingly already underway.[12] Municipalities should evaluate their zoning codes to determine if they accommodate the different types of housing these new arrivals will desire. While some suburbs will inevitably experience increased interest in the development of standalone single-family homes, young professionals, who may lack the resources or the interest in owning such homes, may

have a preference for townhouse developments, which provide for some outdoor private space. Others may seek out rental projects with flexible leasing policies, as long-term acquisitions or the commitment of a down payment becomes less desirable, as well as seek designs that incorporate social distancing. Private or semi-private gardens may become more important than other amenities that do not as easily accommodate social distancing, such as common rooms, clubhouses and gyms.

Logistics/Distribution Centers

One particularly strong candidate for a new use is the supply chain distribution center, which promotes the efficient functioning of delivery services that have rapidly grown in popularity during the pandemic, in addition to providing jobs and other economic benefits. While Euclidean orthodoxy may no longer be in vogue, municipalities may want to proactively target and designate areas within their borders where larger uses in this category with excellent access and vehicular circulation can be accommodated. Smaller uses in this category could likewise be accommodated in proximity to residential areas through less traditional form-based codes and hybrid codes incorporating traditional zoning regulations and form-based codes.

Home-Occupation Rules

The pandemic has caused many workers to become familiar with working from home, and a significant portion will likely desire to continue to work in this format. In response, municipalities must now consider relaxing antiquated home-occupation restrictions in their codes, which are often strict and the product of Euclidean rigidity. Absent empirical data demonstrating adverse local impacts, the time may now be right to expand the range and intensity of home-occupations, since having folks sit in front of their computers, accepting deliveries, producing deliverables, participating in conference calls and otherwise conducting business from home may actually be prudent, environmentally sensitive and economically beneficial.

Changing Parking Requirements and Traffic Projections

If more people are working and shopping from home in a post-COVID-19 world, municipalities may wish to explore allowing for reduced or creative parking arrangements, such as implementing maximum parking limits, permitting the payment of fees in lieu of parking spaces, using shared parking lots or allowing parking spaces to be land banked (i.e., designating a portion of a site that would be required for parking to be preserved as open space which can be used in the future for parking if found to be needed by the official charged with enforcing the zoning code). Parking and driveway areas may also need to be reevaluated to better accommodate delivery drivers. Reduced traffic counts may also impact traffic projections.

Indoor Design Requirements

Although this article focuses on changes to land use controls that will enable municipalities to adjust, if not thrive, in a post-COVID-19 world, there are also numerous changes to the internal design of structures that will likely come into play as a result of the pandemic. Such changes may include the use of individual HVAC systems for each unit within multifamily buildings; additional exterior entrances within multifamily complexes; the use of no-touch technology (i.e., automatic doors and voice-activated technology); an increase in elevators to reduce crowds; and fewer requirements for common spaces. These changes can also be accommodated through adjustments to zoning and building codes. The awareness, if not need, for better separation and social distancing will inevitably change the floorplans of the future.

As Darwin theorized over 160 years ago, species that have the traits that enable them to adapt to changes in their environment will survive and flourish. Those that do not, will perish. Similar precepts should inform municipalities as they urgently contemplate their next steps in what will likely be an accelerated evolution of their respective communities.

---

1. *See Tenement House Reform*, www.vcu.edu, https://socialwelfare.library.vcu.edu/issues/poverty/tenement-house-reform.
2. *Id.* at 392.
3. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 381 (1926).
4. *Id.* at 387.
5. *Id.*
6. *See Cornell University v. Bagnardi*, 68 N.Y.2d 583, 594 (1986).
7. *See* Charles Darwin, On the Origin of Species (1859).
8. *See* What Are Form-Based Codes, https://formbasedcodes.org.
9. *See* C.J. Hughes, *It's Time to Get Out of Dodge*, N.Y. Times, May 10, 2020, at Real Estate, page 1.
10. *See* Patrick Sisson, *The Dying Mall's New Lease on Life: Apartments*, Bloomberg.com, June 30, 2020. (An article in Bloomberg News noting that it is predicted that "[m]ore than half of U.S. department stores in malls will be gone by 2021," citing to an analysis by Green Street Advisors, and that adapting vacant malls to residential use is a growing trend that will likely prove successful in the age of COVID-19; further noting that the federal government has proposed re-using vacant retail space to accommodate affordable housing).
11. 6 N.Y.C.R.R. § 617.5(c)(18).
12. *See* Hughes, *supra* note 9; *see also* Douglas Elliman, Elliman Report, April 2020 (Market Report from Douglas Elliman showing the number of new leases signed in Manhattan, Brooklyn, and Queens fell 70.9% from April 2019), https://www.elliman.com/resources/siteresources/commonresources/static%20pages/images/corporate-resources/rental-mar/rental%2003_2020.pdf.

Marketing Automation Tools Level the Playing Field

By Carol Schiro Greenwald

As a solo lawyer or member of a small firm you already wear many hats: rainmaker, administrator, filing clerk, accountant and, of course, practicing attorney. You think, "I have no time to add another responsibility. I don't need marketing. I have clients."

Your "note to self" is understandable but wrong. Everyone needs to market their services in order to be found. Potential clients need to be able to locate you in order to vet you before they make contact or to validate their choice after they have chosen you to be their advocate. Potential referral sources need to know you and trust you.

In today's "new normal" people are feeling isolated, facing uncertainty for an unknown length of time. Desperate to connect, people are turning to social media and virtual conferencing as a substitute for in-person connections. Online has become the go-to place for entertainment, conversation with friends, shopping and education. Now is the perfect time for you to become part of your clients' and prospects' online conversations.

Professionals need to be visible in person through networking and visible online through their website and activities on social media sites. You should have a coordinated, continuous, targeted presence in both worlds. According to the ABA's LTRC 2019 Legal Technology Survey Report, most solos and small firms don't practice this kind of strategic marketing. Sixty percent of solos do their own marketing, 30% don't market at all. Those who do usually don't have a marketing plan or budget. Their efforts are mostly sporadic because marketing can be time-consuming when done correctly as a planned, targeted, goal-oriented sequence of activities.

For those who know it is important and want to do it better, technology provides software, like marketing automation systems, that can help. Marketing automation is an umbrella term for a host of applications that, as explained by HubSpot, "automate marketing activities under a single digital roof like blog hosting, email marketing, landing pages, lead collection forms, automatic email workflows, social media publishing and scheduling, and so on."

These programs can be as simple as just using Microsoft's Outlook, Calendar and To-Do List apps together or as complex as Salesforce's system. NYSBA's Committee on Technology and the Legal Profession and the ABA's Legal Technology Resource Center (LTRC) offer articles and assessments about specific products.

In this article we look at some of the technology tools that can help you be more effective and efficient in marketing to clients and at some of the preparations you should make before selecting any digital assists.

BEGIN BY ASSESSING WHAT YOU HAVE

New technology will have to meld into your current technology setup. So, first you will need to make a list of all your current technology. You need to budget for training time so that all the users can get the most out of the technology additions. And, of course, you need to factor both time and money costs into your growth

Carol Schiro Greenwald, Ph.D. is a marketing and management strategist, trainer and coach. She works with professionals and professional service firms to structure and implement growth programs that are targeted, strategic and practical. Her book, *Strategic Networking for Introverts, Extroverts and Everyone In-between* (Law Practice Division, American Bar Association, January 2019) provides a training and coaching guide for linking networking activities with both personal and firm goals. Her book, *Build Your Practice the Logical Way – Maximize Your Client Relationships* (with Steven Skyles-Mulligan, American Bar Association, 2012) provides a guide to creating a client-centric practice. The result is a firm differentiated from the competition by its client-centric core and the ability to attract and keep better clients.

strategy and budget. The good news is that many marketing automation systems have basic packages that are free. Often these are perfectly suited to the solo lawyer's or small firm's needs.

You need to answer **marketing questions** related to your audience and the results you want.

- What are your marketing goals?
  - » Do you want people to go to your website?
  - » Do you want help with content creation or ad targeting or analysis of leads?
  - » Do you want metrics and analysis of your social media presence?
- What/who are your communications targets? Targets could be a subset of your clients or prospects, a practice area, geographic location, specific industry or service, or specific action triggers such as illness, accident or a business crisis.
- On which social media sites do you plan to participate and share content?
- What are the marketing activities you perform currently? Do you send regular information emails, blog, write thought leader pieces? Do you use infographics, newsletters, videos, podcasts, webinars? Do you have a website?

QUESTIONS TO ASK BEFORE PURCHASE

As you begin to review the myriad available technology tools, you need to ask:

- Will the software fit my needs?
- Will it synch with my other software?
- How much can it be customized to my kind of client?
- Is it easy to learn? Easy to use?

CLIENT-FACING TECHNOLOGY

You might want to begin with client-focused technology because law firm success is built on client relationships. These relationships need to be cultivated. Clients need to feel that their lawyer knows them, understands them and connects whenever something relevant to them comes to the attention of the lawyer. This kind of attention can be difficult to track and implement. Current client needs tend to blot out past clients' concerns. Technology can help you produce personalized targeted content and track each client's reaction to it.

Client Relationship Management (CRM) software can help you remember what clients want and schedule client interactions such as meetings, blog posts, emails, etc. According to Wikipedia, "Customer relationship

management (CRM) is one of many different approaches that allow a company to manage and analyze its own interactions with its past, current and potential customers. It uses data analysis about customers' history with a company to improve business relationships with customers, specifically focusing on customer retention . . . ."

At its most basic level a CRM is an expanded email contacts list – think Microsoft's Outlook. At its most elaborate it is integrated into a 360º marketing automation system that manages, tracks, analyzes and reports on every aspect of your marketing, sales and client-service activities. Many of the legal practice management software packages have a CRM component. There are also standalone CRMs designed specifically for law firms.

TASK-ORIENTED TECHNOLOGY SOLUTIONS

If a CRM sounds too overwhelming, consider adding task-specific apps. For example,

- Email and text communication software can customize mailings by adding touches such as the recipient's first name. It can handle scheduling and also track and analyze recipients' responses to each communication.
- Virtual assistants/receptionists for your office or your website or both can be empowered to screen prospects and schedule new client interviews.
- Chatbots can answer basic consumer questions while people are in the lawyer research stage.
- AI can be used to create interactive questionnaires.
- Apps can simplify service to smartphone users by managing text message dialogue – sending appointment reminders, retaining important messages, etc.
- Apps can help you make your website mobile friendly by adding immediate online scheduling, AI assisted contact information forms and voice-activated search.

These ideas are just the tip of the technology helper iceberg. The wide variety of options available for every skill level and every client service or client interface opportunity means that there is no excuse for busy lawyers to ignore marketing because they don't have time. By saving time with technology, any lawyer can plan a structured program to reach the connections they care about with appropriate content.

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.**

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

TO THE FORUM:

After many years of practicing with Firm A, I have decided to strike out on my own. During my tenure at the firm, I have brought in clients with various needs that were serviced by other lawyers at Firm A. Given my lack of expertise in some of these areas, I do not feel comfortable representing these clients in my new practice. Some of these clients desire to come with me to my new firm despite my protestation. Others do not wish to remain at Firm A after I leave because of their longstanding relationship with me. What are my obligations to these clients?

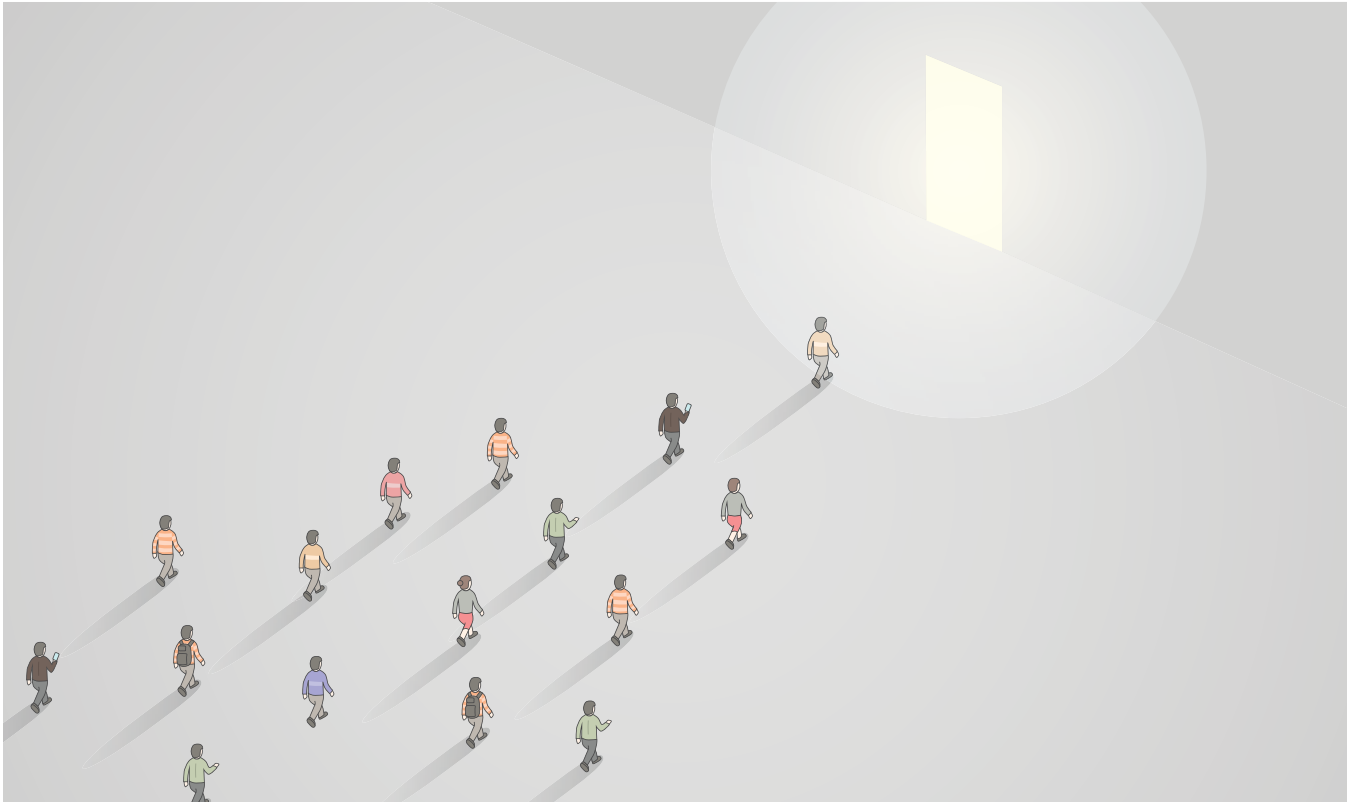
Sincerely,
Larry Lateral

DEAR LARRY,

There are several ethical and professional obligations that apply when lawyers change firms and bring clients with them.

Duty of Communication and a Client's Right to Choose

First and foremost, a lawyer has an ethical obligation to promptly inform his or her clients that the lawyer is changing firms. As discussed in a prior *Forum*, this obligation stems from Section 1.4 of Rules of Professional Conduct (RPC) which requires that lawyers promptly communicate relevant information to clients. *See* Vincent J. Syracuse, Carl F. Regelmann, Richard W. Trotter & Amanda M. Leone, Attorney Professionalism Forum, N.Y. St. B.J., September 2017, Vol. 89, No. 7. This is not



as simple as it may seem, since law firms are a business and those who remain at the firm may have concerns about losing a client.

Formal Opinion 489 tells us that it is proper for departing lawyers to unilaterally inform a client that the lawyer is changing firms; however, that said, in our view it is preferable that the firm and the departing lawyer work out a "joint communication" to all clients with whom the departing lawyer has had significant contact. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 489 (2019). Proper planning in this area is in the best interests of clients and is also likely to reduce the risk of disputes that often occur when a lawyer leaves a firm. The opinion emphasizes that prompt communication of an attorney's plans to change firms is important because, put in basic terms, clients have a fundamental right to choose counsel. *Id.* The RPC gives great deference to the client's right to choose its counsel and, as a result, there are very few circumstances where a client is prohibited from moving to the new firm with the lawyer. Thus, attorneys must give careful consideration to the client's desire to move to the new firm and should examine such desires in the light of the ethical rules outlined below.

In the end, the decision to move firms is up to the client and you should work with your client if it wants to make the transition with you to your new firm.

As an initial matter, in considering the client's desire to retain the attorney's new firm, attorneys must not overlook RPC 1.1, which requires that attorneys provide competent representation to a client. The plain language of RPC 1.1(b) explicitly prohibits a lawyer from representing a client in a legal matter that "the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it." RPC 1.1(b). In determining whether a lawyer has the requisite competence to handle a matter, the lawyer should consider factors such as "the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to associate with a lawyer of established competence in the field in question." RPC 1.1 Comment [1]. However, inexperience in a certain area of the law will not automatically bar an attorney from representing a client at his or her new firm. Rather, Comment 2 to RPC 1.1 states that "a lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar . . . Competent representation can also be provided through the association of a lawyer of established competence in the field in question." RPC 1.1 Comment [2]. Thus, if one of your colleagues at your new firm has the relevant experience and knowledge in the area of the law that is required to properly represent the client, competent representation may be provided to the client by your association with your colleague.

It may well be that the RPC prohibits you from representing the client at your new firm if there is no lawyer at your new firm equipped to handle your client's matter competently and you do not believe you will be able to develop the requisite knowledge through sufficient preparation. Nevertheless, given the client's fundamental right to choose their counsel, it is of upmost importance to communicate this fact to your client and discuss all of their available options.

Conflict Checks

It should be no surprise that when a lawyer joins a firm with clients from a former firm, it is necessary for the new firm to run a conflict check under RPC 1.10(e)(3). This is especially true in the context of a lateral hiring where the newly associated lawyer's former clients become the new law firm's former clients. *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 663 (2019 ed.), citing NYSBA Comm. on Prof'l Ethics, Op. 720 (1999).

RPC 1.9 governs an attorney's ethical obligations to former clients and provides, among other things, that a lawyer may not represent a client adverse to a former client in a matter that is the same or substantially related to the matter in which the transitioning attorney represented the former client. *See* RPC 1.9(a). In addition, RPC 1.9 prohibits a lawyer from revealing the confidential

information of former clients protected by RPC 1.6. *See* RPC 1.9(c). A former client may waive the protections of RPC 1.9(c) provided the waiver is based on informed consent and is confirmed in writing. *See* NYSBA Comm. on Prof'l Ethics, Op. 1061 (2015). If the client does not waive the conflict, the transitioning attorney and the new firm have a conflict that may prevent them from representing the client, an issue that we have previously covered in several prior *Forums*. *See* Vincent J. Syracuse & Matthew R. Maron, Attorney Professionalism Forum, N.Y. St. B.J., June 2012, Vol. 84, No. 5; *See* Vincent J. Syracuse, Carl F. Regelmann, and Alexandra Kamenetsky Shea, Attorney Professionalism Forum, N.Y. St. B.J., November/December 2018, Vol. 90, No. 9; *See* Vincent J. Syracuse, Carl F. Regelmann, and Alexandra Kamenetsky Shea, Attorney Professionalism Forum, N.Y. St. B.J., January/February 2019, Vol. 91, No. 1.

When running conflict checks, disclosure of limited information may be necessary to resolve conflicts of interest pursuant to Rule 1.10 and to address financial, staffing, operational and other practical issues. *See* RPC 1.6, Comment [18A]. This can get tricky because the need to determine the existence of a conflict does not automatically allow the attorney to disregard its confidentiality obligations to clients. RPC 1.6(a) requires lawyers and law firms to protect their clients' confidential information, so lawyers and law firms may not disclose such information for their own advantage or for the advantage of third parties absent a client's informed consent or some other exception to Rule 1.6. *Id.* If the transitioning attorney does not have the client's consent to disclose confidential information when considering a possible lateral move, the attorney may only disclose information that is not "confidential information" within the meaning of RPC 1.6, such as: "(i) the identities of clients or other parties involved in a matter; (ii) a brief summary of the status and nature of a particular matter, including the general issues involved; (iii) information that is publicly available; (iv) the lawyer's total book of business; (v) the financial terms of each lawyer-client relationship; and (vi) information about aggregate current and historical payment of fees." RPC 1.6 Comment [18B]. Conversely, if the information is ordinarily protected by RPC 1.6(a), 1.9(c) or 1.18(b), disclosure without client consent is *not* permitted. *See* RPC 1.6 Comment [18C]. This includes information that a lawyer knows or reasonably believes is protected by the attorney-client privilege, or is likely to be detrimental or embarrassing to the client, or is information that the client has requested be kept confidential. *Id.*

Comment [18F] to RPC 1.6 gives important guidance to attorneys considering a possible lateral move. "Before disclosing information regarding a possible lateral move or law firm merger, law firms and lawyers moving between firms – both those providing information and those receiving information – should use reasonable measures to minimize the risk of any improper, unauthorized or inadvertent disclosures, whether or not the information is protected by Rule 1.6(a), 1.9(c), or 1.18(b)." RPC 1.6 Comment [18F]. Under RPC 1.6, such steps might include: "(1) disclosing client information in stages; initially identifying only certain clients and providing only limited information, and providing a complete list of clients and more detailed financial information only at subsequent stages; (2) limiting disclosure to those at the firm, or even a single person at the firm, directly involved in clearing conflicts and making the business decision whether to move forward to the next stage regarding the lateral hire or law firm merger; and/or (3) agreeing not to disclose financial or conflict information outside the firm(s) during and after the lateral hiring negotiations or merger process." RPC 1.6 Comment [18F].

Conflicts of Interest

If it turns out that the transitioning attorney's former client was, or is, adverse to a client at the new firm, a conflict of interest may be imputed to the new firm under RPC 1.10(c). Much like RPC 1.9(c), RPC 1.10(c) provides that, "[w]hen a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client whose interests are materially adverse to the prospective or current client unless the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter." RPC 1.10(c) is triggered whenever a new attorney joins or otherwise becomes associated with a firm and overlaps with RPC 1.10(e)(3), requiring conflict checks. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 642. RPC 1.10(c) applies whenever the newly associated lawyer "personally represented" a client that the firm is currently opposing or has been asked to oppose. *Id.* However, RPC 1.10(c) may also apply if the newly associated lawyer did not personally represent the person that the firm is currently opposing or has been asked to oppose, but the firm where the newly associated lawyer used to work did represent that person. *Id.*

When read in isolation, RPC 1.10(c) appears to place an outright ban on representing the transitioning attorney's clients in the presence of a conflict of interest. That is certainly not the goal of rule. A strict reading of RPC 1.10 could be detrimental to the right of clients to choose counsel, and the rights of attorneys to generate

business. Comment [4A] to RPC 1.10 reminds us that: "[t]he principles of imputed disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after leaving a firm. In this connection, it should be recognized that today most lawyers practice in firms, that many limit their practice to, or otherwise concentrate in, one area of law, and that many move from one association to another multiple times in their careers. If the principles of imputed disqualification were defined too strictly, the result would be undue curtailment of the opportunity of lawyers to move from one practice setting to another, of the opportunity of clients to choose counsel, and of the opportunity of firms to retain qualified lawyers. For these reasons, a functional analysis that focuses on preserving the former client's reasonable confidentiality interests is appropriate in balancing the competing interests." RPC 1.10, Comment [4A]. Nevertheless, RPC 1.10(d) permits waiver of the potential conflict under certain circumstances. Specifically, RPC 1.10(d) provides: "[a] disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7." For example, RPC 1.7(b)(4) requires that each affected client give informed consent to waive the conflict.

In the end, the decision to move firms is up to the client and you should work with your client if it wants to make the transition with you to your new firm. The rules that we have outlined will keep you on your proper course.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com)
Maryann C. Stallone, Esq.
(stallone@thsh.com)
Carl F. Regelmann, Esq.
(regelmann@thsh.com)
Alyssa C. Goldrich, Esq.
(goldrich@thsh.com)
Tannenbaum Helpern Syracuse & Hirschtritt LLP

UPDATE TO THE JAN./FEB. 2020 FORUM ON FEE SHARING IN RETIREMENT

We wanted to update you on a recent ethics opinion regarding our January/February 2020 *Forum* on fee sharing (Vincent J. Syracuse, Carl F. Regelmann & Alyssa C. Goldrich, Attorney Professionalism Forum, N.Y. St. B.J., January/February 2020, Vol. 92, No. 1). In our January/February 2020 *Forum*, we discussed NYSBA Comm. on Prof'l Ethics, Op. 1172 (2019), which opined that an attorney can assume joint responsibility for a representation *only* where the lawyer opts for continued registration upon retirement. The Committee recently revisited this issue and has modified its 2019 opinion. In NYSBA Comm. on Prof'l Ethics, Op. 1201 (2020), the Committee opined that when analyzing the fee sharing rules with respect to OCA-retired lawyers, RPC Rule 5.4(a) (sharing fees with non-lawyers) is inapposite and, as long as the attorney remains licensed to practice, an OCA-retired lawyer may meet the "joint responsibility" requirements of RPC 1.5(g) (fee sharing with a lawyer who is not associated with the firm). Attorney fee sharing arrangements in retirement should be carefully considered and, based upon the lack of clear guidance in the Rules of Professional Conduct, is an area that may be ripe for future clarification. Stay tuned. . . .

QUESTION FOR NEXT ATTORNEY PROFESSIONALISM FORUM:

TO THE FORUM:

I have owned and operated my own practice for the last 25 years. Last year, I hired a partner to help service my clients and to generate additional business so that the practice can live on long after my retirement. The partner I hired has an impressive background in computer programming and suggested that we create an online platform to assist *pro se* litigants with the filing of legal documents through an automated system called U-Dox. U-Dox would be owned and operated by a new entity that is separate and apart from my legal practice, although it would be advertised on my firm's website. The service would offer two options for assistance in filing *pro se* papers. The first and cheapest option gives users access to generic templates to be filled in with the general assistance of an automated program and provides no direct access between the user and the lawyer specific to the user's needs. The second and more expensive option provides all of the features of option one, but the final product would be reviewed by an attorney to check for compliance, totality, etc. Of course, if users are happy with the automated system, they are always permitted to retain us for our full legal fee to obtain the entire gamut of our legal services.

Am I ethically permitted to offer such services to clients? If so, what are my ethical obligations with respect to advertising said services and retaining clients who have used these services?

Very Truly Yours,
Alott A. Business

NEW YORK STATE BAR ASSOCIATION
State Bar News

Panelists Call for Police Overhaul at NYSBA's First Racial Injustice Forum

By Christian Nolan

When it comes to racial injustice and police misconduct and brutality, Rochester City Councilman Willie Lightfoot thinks reform is no longer the answer. Instead, he's looking for an "overhaul." "We've had reforms in the past and they've just seemed to not work," said Lightfoot, who is vice president of the City Council and chairs its public safety committee.

Lightfoot said government officials are "getting ready to have conversations about how we can look at our system and have an overhaul of our entire Rochester Police Department system and their policy, practices and procedures."

Lightfoot's remarks came as part of the New York State Bar Association Task Force on Racial Injustice and Police Reform's first public forum. The mission of the task force is to understand the issues leading to police brutality and to provide recommendations to policymakers, law enforcement and the judiciary to end deleterious policing practices that disproportionately impact people of color.

The two-hour virtual forum – the first of three such scheduled events – focused on Rochester in response to the death of Daniel Prude, a mentally ill Black man who died of suffocation in March after police officers placed his head in a hood and pressed his face into the pavement. His death, which preceded the suffocation death of George Floyd at the hands of Minneapolis police, was not disclosed to the public for five months, sparking widespread protests and condemnation.

NYSBA President-Elect T. Andrew Brown, co-chair of the Task Force on Racial Injustice and Police Reform, moderated the first public forum with Liz Benjamin, managing director of the Albany office of Marathon Strategies.

After video footage of the police encounter was released, Rochester Mayor Lovely Ann Warren fired the police chief, and the rest of the department's highest-ranking officers either resigned or were demoted.

Rev. Lewis Stewart, a longtime civil rights activist in Rochester and president of the United Christian Leadership Ministry of Western New York, through which he launched the Coalition for Police Reform, delivered the keynote speech at the event.

"The need for justice and police reform must emanate from the federal government," said Stewart. "There needs to be national standards for policing for all 18,000 police agencies in America.

"Now is the time for the communities and municipalities to shift to a new re-envisioned model of policing," continued Stewart. "Policing which is non-racist, policing which will treat all individuals mainly with respect, policing which protects the civil and human rights of all, policing which disregards race, policing that is transparent and accountable, and policing that will dismantle an archaic and racist police culture. . . . "

Stewart credits smartphones for raising awareness to a problem that's always existed.

"It was the camera and people's personal cameras with the video recording in it that began to highlight and show what's taking place in our cities between residents and police," said Stewart. "Body-worn cams and the cameras that people carry made a difference in showing the disparity in how police treat black people."

Lightfoot agreed, noting that the evidence allows the current generation of Black Lives Matter protesters to not be afraid to speak up and hold truth to power.

"Now they have the proof," said Lightfoot. "So before, others were fed up but they had no proof. They had no evidence. They had nothing to back them up. Now . . . they're saying, 'Look, here it is . . . How can you deny the facts in front of your face, and so that is very powerful."

Panelist Rachel Barnhart, a Monroe County legislator who has championed good government, transparency, accountability and ethics, spoke about her experience at a Rochester protest against Prude's death on Sept. 5, where she was hit in the head by pepper balls fired by police. She said she suffered a concussion and did not feel well for over a week. She believes the officers knew who she was.

"I don't know who was in charge," said Barnhart. "I don't know who did that order. I don't know if they were targeting us." She continued, "I'm a privileged person. I'm a very well-known person in Rochester. I'm a white woman and an elected official. If you're going to fire on me what the hell else are you doing?"

Barnhart said many injuries were reported, including the loss of eyes. She said police know how to de-escalate tensions, so the fact it was not done in that situation shows there are serious problems that go beyond just the police.

Panelist Mary Lupien, a Rochester City Councilmember who was with Barnhart at the protest and was also hit by pepper balls, has taken on police accountability, institutional racism and affordable housing. As a former community activist, Lupien moved to a lower income Rochester neighborhood and said she witnessed institutional racism firsthand in how police treated residents there, not unlike the way they treated Prude.

"It's how the police talked to me about my neighborhood. How could you live there? As if it's not a wonderful place to live, which it is," said Lupien. "They come in as if it were a war zone and that my neighbors are the enemy."

Attorney Robert Brown, formerly a police captain with the New York Police Department, where he supervised nearly 200 officers, supports residency requirements for police officers to live in the communities they work in. For instance, he pointed to Buffalo's former policy requiring that officers live in the city for the first seven years that they work there. Brown, a member of NYSBA's task force, said it leads to a good relationship with the community that the officers serve.

Buffalo police, however, were against the policy, and it was removed in the Police Benevolent Association's most recent contract. In response to the George Floyd killing, the debate of residency requirements has resurfaced there as well as with state lawmakers in Albany.

Danielle Ponder, a Monroe County public defender and local activist who has played a visible and outspoken role in the protests against police treatment of Prude and Floyd, supports defunding of the police.

"What we're looking for is a radical overhaul of how we respond to public safety," said Ponder, who is the special public defender in charge of diversity and inclusion and chair of the hiring committee. "I truly believe there are two things you have to do – you either have to disband the police department because the collective bargaining agreements and the contracts leave you in a place as a citizen where you are disempowered and beholden to this agency, or you have to disempower this agency through their pocketbooks."

Also on the panel was Adam Fryer, who spoke about his personal experience advocating on behalf of New York residents who have severe mental illness, developmental disabilities or have been negatively affected by the criminal justice system. He worked with community organizers in Geneva, N.Y., his hometown, on peaceful protests in support of the Black Lives Matter movement.

Rounding out the panel in providing firsthand experiences was Frank Liberti, president and chief executive officer of the Center for Dispute Settlement in Rochester, an independent nonprofit that advocates for resolving conflicts without litigation. The organization provides civilian oversight to the Rochester Police Department.

The task force is chaired by NYSBA President-Elect T. Andrew Brown and Taa Grays, a former association vice president from the First Judicial District. Brown, vice chancellor of the New York State Education Department's Board of Regents, moderated the discussion along with Liz Benjamin, managing director of the Albany office of Marathon Strategies.

30 Years of the LAP: Countless Lives Saved and Careers Resurrected

By Brandon Vogel

On the surface, Jeffrey (not his real name) was a leading litigator who had won many criminal and civil cases and argued before the Court of Appeals. Underneath, he harbored a dark secret.

Raised in an affluent Jewish family on Long Island, Jeffrey's father routinely and intensely abused him, starting at the age of 5.

"It wasn't until I decked him at 16 that it stopped," said Jeffrey. "I have handled Family Court cases with way less abuse than I dealt with. My mother went into 'Sophie's Choice' mode.

The abuse may have stopped at age 16 but the torment did not. It hung over him as he grew into adulthood, infecting all aspects of his life physically, mentally and emotionally. And it eventually took a huge toll on his promising law career, turning success into failure.

"I was a long-distance runner, a martial artist, a natural debating champion," Jeffrey continued. "You don't come out unscathed. I had a tremendous professional failure and lost all of the prominence I had. It ultimately came out on the front page of the newspaper and I was stripped of armor."

Jeffrey was initially suspended and agreed to be monitored by a prominent judge, whom he initially resented for her "tough love approach." He started going to the New York State Bar Association Capital District Lawyers Helping Lawyers (CDLHL) meetings not long after.

Jeffrey is just one of many lawyers whose career and life the Lawyer Assistance Program and its outreach programs have saved. Now celebrating 30 years of helping lawyers face challenges, its work is more varied and perhaps more relevant than ever.

"The pioneering effort of the Lawyer Assistance Program has saved the lives of countless struggling lawyers, helping them restore their good health and resurrect their careers," said NYSBA President Scott M. Karson. "Over the past three decades, we have seen many clients of the program completely rebuild their lives – both personally and professionally.

"I extend my sincere thanks to the volunteers and staff of the program for their tireless and noble work," Karson continued. "We all must recognize that the mental and physical well-being of attorneys is critical to the effective practice of law, protection of the public trust and the vibrancy of our profession."

"When I first started going, I was so choked up. It is difficult for me to speak about what I went through; I kept it inside," said Jeffrey. "I thought, these people are drug addicts and alcoholics, but there's a universality of human experience. People have some very, very different experiences. The great thing is they are all lawyers and we can relate on that level. It is a profoundly amazing group of very smart, supportive good people."

Now that Jeffrey has been involved for a few years he speaks readily and is in a capacity to help people, despite his survival mechanism to bottle it up. He also has learned to forgive himself.

HOW IT BEGAN

The history of the New York Lawyer Assistance Program starts in 1978, when then-NYSBA President Hon.

Robert P. Patterson, Jr. asked his law partner Raymond O'Keefe to chair a new NYSBA committee, originally called the NYSBA Special Committee on Lawyer Alcoholism. O'Keefe agreed to chair the committee, which began with a dozen attorneys.

Meetings were held frequently to discuss the structure and future plans of the committee and how its members could most effectively deliver the hope of recovery to suffering attorneys. Buffalo attorney David Pfalzgraf relates that it was generally agreed that the original purpose was and continues to be to bring all lawyers who suffer from alcoholism or drug addiction the hope of sobriety and a better life through practicing the principles of 12-step programs. Within two years, the special committee become a standing NYSBA committee, the Committee on Lawyer Alcoholism and Drug Abuse.

O'Keefe wrote a letter to all of the 62 county bar associations in New York urging each to form similar local committees consisting of lawyers who had found a way out and to urge local volunteers to attend the NYSBA Committee meetings. At the beginning, Pfalzgraf says, the effort was "strictly a volunteer operation with no professionals involved."

By 1983, O'Keefe had moved to Florida to become a professor and dean of faculty at St. Thomas Law School. Westchester attorney Jack Keegan assumed chairmanship of the NYSBA Committee, serving until 1990 when he became chair of the ABA Commission on Impaired Attorneys (later called the Commission on Lawyer Assistance Programs). By 1984, there was a local committee or contact person in 33 counties.

At Keegan's urging, in 1989 NYSBA began the process of hiring a full-time staff professional to head a stand-alone Lawyer Assistance Program. "It was clear to Jack that we volunteers needed the assistance of a professional to assist us in our efforts to identify those addicted, coordinate interventions and place lawyers in appropriate treatment programs," said Pfalzgraf.

The committee put together a proposal to allocate funds for a full-time director and administrative assistant, which the Executive Committee approved. Three committee members and three State Bar staff members interviewed six candidates and chose Ray Lopez, who served as director until his retirement in 2005. Lawyer Assistance Program Assistant Linda McMahon has been with the program since its inception in 1990. Stacey Whiteley is the current program director.

WHO IT SERVES

Today, the program serves attorneys dealing with issues ranging from alcoholism to drug abuse to depression and anxiety and other mental health struggles.

"You meet so many men and women in and out of recovery who need hope and a path to recovery. That is what has given me the most gratitude. It helps me remain an active and sober member," said Pfalzgraf. "The AA 12 Steps Program is to carry the message of recovery to another person, another alcoholic. It looks like it's designed for the new person, but it's really for the person in recovery. The truth of the matter is that it's part of what I have to do to maintain my sobriety"

Tom Nicotera experienced severe depression after the suicide of his son and lost his practice as a result. After he was reinstated to the bar, he got involved in the Capital District Lawyers Helping Lawyers. A friend suggested he join the Lawyer Assistance Committee, to which he agreed. Nicotera is grateful to work with people who are facing difficulties and having the ability to make a difference.

"The Lawyer Assistance Program is a fabulous resource; it covers everything from soup to nuts. If you have an issue you are dealing with, a resource will be there or a resource will be found," he said.

He noted that for attorneys it is confidential, unless you choose to make it public. "It doesn't go on your sleeve if you reach out," he said.

Elaine Turley got involved through Suffolk County Lawyers Helping Lawyers and then got involved with the NYSBA Lawyer Assistance Program. Sober for decades, Turley became a lawyer later in life.

"The most rewarding thing is to see people's lives change," said Turley. "There are some lawyers who followed me who have been with us, who have struggled terribly and talk about a tremendous improvement in the quality of their lives. There's a total turnaround. Not only is it manageable, they have happy successful lives and that's what I love seeing."

Lawyer Assistance Committee Chair Tom Schimmerling first got involved in 1991. Jack Keegan asked him to serve on the committee after he had been sober for six years.

"It is a great way to give back," said Schimmerling. "What is most gratifying is watching attorneys, new to the program, come in and throw the shackles off addiction and get involved in recovery and reestablish themselves giving good client service, rather than dying,"

Schimmerling is rightly proud of the committee and the program. Even with COVID-19, the group is still going strong virtually.

If an attorney needs help, Schimmerling said: "There is another way. I would tell them my story and what I did about it. There are alternatives. If they try to get into recovery, chances are they will succeed."

If you need help, please call the NYSBA Lawyer Assistance Program at 1-800-255-0569 or email lap@nysba.org.

NYSBA and Albany Law School Collaborate on Technology and the Law Course

By Brandon Vogel

Lawyers need to have a solid understanding of data and analytics to succeed in today's legal marketplace. This is doubly true for litigators.

Continuing with its pioneering Technology and the Law course first held at the City University of New York (CUNY) Law School and Syracuse University College of Law, the New York State Bar Association's Committee on Technology and the Legal Profession and Albany Law School launched a Technology and the Law course for the fall 2020 semester.

"Technology has sped up litigation and made it more efficient so the class is important because it teaches what technology is out there, what it can do, how to use it ethically and to spot the issues and problems with its use," said Mark A. Berman, founding chair of the Committee on Technology and the Legal Profession.

Berman notes that it takes a bar association to offer such a survey class as law schools do not have the faculty to teach so many different areas of technology. "That is what makes NYSBA's courses unique," Berman said.

This two-credit course is offered in the evening with eight students participating. Classes feature weekly guest speakers, including many NYSBA members. The textbook was NYSBA's e-book entitled *Virtual Lawyering: A Practical Guide*, the first book of its kind to be published by a bar association in the United States.

The goal of the course is to provide students with an understanding of the fundamentals of how technology intersects with the law. No particular technology skill or expertise was required.

The course covers the fundamentals of technology and the law, with a focus on what new lawyers need to know to practice competently. Topics include: artificial intelligence and algorithms, big data and automatic decision making, social media legal ethics, procuring technology and technology contracting, biometrics and facial recognition/autonomous vehicles and drones and cybersecurity.

Questions raised include whether a client should delete incriminating social media posts or if a transactional counsel is ethically permitted to scrub the redline of a contract looking for hidden metadata. "Not in New York," said Berman.

Berman said the class had a robust discussion on these questions. "There are no clear-cut answers," he explained. "That's why this course is so important." He added that holding the class over Zoom allowed for more interactive participation, rather than having a remote webinar piped into a law school lecture hall.

New York is one of a growing number of states that have adopted a professional duty of technology competence. Comment 8 to Rule 1.1 of the NY Rules of Professional Conduct states that a lawyer should "keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information."

FROM THE TEACHER'S DESK

Maura Grossman, a member of the NYSBA Committee on Technology and the Legal Profession who is help-

ing to teach the class, said that the goal is to introduce students to the technologies that they will encounter once they come out of law school. She explained that most law schools do not offer technology-related courses, and those that do tend to focus on the law, such as intellectual property, versus how to use social media properly or understand artificial intelligence.

Grossman has taught classes on the fundamentals of AI and issues of bias, as well as on electronic discovery and technology-assisted review (TAR) in litigation. "The students have been pleasantly surprised and find the area interesting and very different from most law school curricula. It opens their eyes to the possibility of careers and employment in other areas than just at a law firm," said Grossman. "From cybersecurity to social media, technology is coming into play in the legal arena."

Most law students, she said, have mainly thought about practicing law as generalists, going into litigation, tax law or real estate. "There are other roles they can play that are highly valuable," said Grossman, citing positions involving data and analytics. "They will be well positioned to have careers in those areas."

Grossman previously worked at a law firm in New York City and found her niche in technology and the law, particularly e-discovery. "It has been a very satisfying career," she said.

Technology is changing the way we litigate, said Cynthia Conti-Cook, a former legal aid litigator. "There should be space in the law curriculum on how technology is impacting various areas of the law. It is hard to cover every aspect of it. It is changing the way we litigate."

Conti-Cook discussed big data and automatic decision-making with the class. She spoke about digital surveillance and how police investigations and prosecutions will likely result in more criminalization as people obtain digital devices.

As an example, she discussed the case of Latice Fisher, a Mississippi woman indicted for second-degree murder, after she arrived at a hospital with a stillborn fetus in her third trimester. Prosecutors obtained her Google search history and found terms including "abortion pills" and "how to induce a miscarriage." This was used as evidence to show criminal intent.

"Everything related to our medical treatment and reproductive health is somehow captured in the digital device," said Conti-Cook.

FROM THE STUDENTS

In recent weeks, Albany Law School students have written substantive essays on technology and the law, building upon the course.

Tyler Rexhouse and Meghna Srikanth wrote about smartphones as a surveillance tool for the government. Rachel Meyer, Ashley Fischer and Wyatt Greth examined voice-assisted technology concerns while working remotely. Olive Marine, Daniel Wesibard and Laura Jurewicz looked at algorithms in the criminal justice system.

Member Spotlight: D'Bria Bradshaw

Who are your heroes in the legal world?

My muses are Thurgood Marshall, Johnnie Cochran and Willie Gary. I admire them for their social justice work and for using their platform to encourage and assist the next generation of Black attorneys.

If you didn't become an attorney, what career path would you have pursued and why?

Journalism. I have a passion for fact-finding and history and a natural ability to interview, write stories about and build relationships with people of all backgrounds and walks of life.

If you could dine with any lawyers – real or fictional – from any time in history, who would it be and what would you discuss?

I would dine with Charles Hamilton Houston. While growing up, my mom always instilled in me a sense of pride for my history – Black History. I was part of a Black History & Culture Brain Bowl in high school, and one of the books we had to read was "Eyes on the Prize," by Juan Williams. I learned a lot about Charlie Houston and his being an integral part of the Civil Rights movement and becoming known as the lawyer who dismantled Jim Crow laws. I would want to talk with him about how he became interested in the legal field, what was it like mentoring Thurgood Marshall, what it was like arguing in front of the Supreme Court and what it was like challenging the separate-but- equal doctrine that had become the law after *Plessy v. Ferguson*.

What is your favorite book, movie and television show?

I don't have just one of each, so I'll give you three: My favorite books are "The Great Gatsby," "The Autobiography of Malcolm X" and "The Mamba Mentality," by Kobe Bryant; my favorite movies are "Friday," "Do the Right Thing" and "Why Did I Get Married?"; and my favorite television shows are "Catfish," "My 600-lb Life" and "Black-ish."

Bradshaw is currently director of Business & Legal Affairs for Curastory, a start-up media company, and a document review attorney at Consilio. She lives in Miami and works in Miramar, Florida.

How did you decide on your practice area?

I'm still what most would call a baby lawyer – I was just sworn in, in January 2020. I've had a love of sports since high school. Nelson Mandela once said, "Sport has the power to change the world." I knew from an early age that I was going to be a lawyer, my passion for working in sports developed in high school and heightened during my time at the University of Central Florida (UCF), where I minored in Sports Management. Merging two passions – law and sports – is an easy decision for me, but breaking into the sports industry as a young professional and not as a student trying to get an internship isn't cut-and-dried.

What is the best life lesson that you have learned?

Marcus Sedberry, a colleague when I was in undergrad at UCF, said, "A setback is a set up for a step up."

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

The New York State Bar Association provides attorneys with opportunities to not only network with other attorneys but to grow in the field and build relationships. Whether you are in the Young Lawyers division or intellectual property division, NYSBA is always working to provide their members the best programming and opportunities to be the best lawyers that they can be.

Lawyers Resource Directory

Medical Expert In Thoracic and Vascular Surgery, Non-Invasive Vascular Testing and Wound Care

I have practiced thoracic and vascular surgery since 1991. I maintain an active practice and am Medical Director of Champlain Valley Physicians Hospital Wound Center. I am certified by the American Board of Thoracic Surgery and am a Registered Physician in Vascular Interpretation.

I review for the New York State Office of Professional Medical Conduct and have had over ten years of experience in record review, determinations of standard of care, deposition and testimony in medical malpractice cases.

Craig A. Nachbauer, M.D.
North Country Thoracic and Vascular, PC
12 Healey Avenue
Plattsburgh, NY 12901
Phone: (518) 314-1520
Fax: (518) 314-1178

LAWSPACEMATCH.COM

Working from home not cutting it? Find sanitized law offices with empty LawSpace for lease. www.LawSpacematch.com is exclusively for lawyers sharing LawSpace. Search for LawSpace by zip code and let us do the work. Sign up and save your search. Receive email notifications when LawSpace becomes available in your desired area.

Roy M. Warner

PRESSED FOR TIME? Experienced NY Counsel, peer-reviewed author and CLE Lecturer offering consultations and extensive services for pleading, discovery, appeals, motions, trial preparation and more. I personally and confidentially review your underlying documents, research points of law and draft what is needed. Visit www.coveringcounsel.com for details.

t. 561-504-2414

e. roy.warner@coveringcounsel.com

Lawyer to Lawyer Referral

FLORIDA ATTORNEY | TITLE COMPANY

STRALEY | OTTO & ACTION TITLE COMPANY over 38 years' experience in Real Estate, Title Insurance, Probate, Guardianship, Estate Planning, Business Transactions, and Community Association Law.

Dedicated to providing superior service and quick turnaround time for Legal and Title Work. For Co-Counsel or Referral contact: 954-962-7367; SStraley@straleyotto.com

www.Straleyotto.com
www.ActionTitleco.com

Neuropsychological Independent Medical Examination (IME) in Chinese

Angeles Cheung, Ph.D., ABPP
Board Certified Clinical Neuropsychologist
Licensed Psychologist

IME services available in NY, NJ, MA and other locations. Expert Witness and Testimony Available in English, Mandarin and Cantonese. Call or email for your free initial phone consultation.
Work: (646) 256-1195
Email: Angeles.Cheung@gmail.com
Website: www.NeuropsychologicalEval.com

Studebaker Paralegal Services, LLC

Freelance senior litigation paralegal services, ranging from initial stage of case through trial and appeals. Experienced at document review and greatly welcomes this work, legal writing, research and discovery. Services are virtual, and available to travel and in office work. NY experience. Contact Brenda (480) 634-8639, Brenda@StudebakerParalegalServices.com or visit StudebakerParalegalServices.com.

STOCKBROKER FRAUD, SECURITIES ARBITRATION & LITIGATION

Law Office of Christopher J. Gray, P.C.

360 Lexington Avenue, 14th Floor

New York, New York 10017

Phone: (212) 838-3221

Fax: (212) 937-3139

Email: newcases@investorlawyers.net

www.investorlawyers.net

Attorneys- refer stockbroker fraud or other securities and commodities matters to a law firm with a history of obtaining significant recoveries for investors. Christopher J. Gray, P.C. has substantial experience representing investors in arbitration proceedings before the Financial Industry Regulatory Authority and the National Futures Association and in litigation in the state and federal courts. Cases accepted on contingent fee basis where appropriate. Referral fees paid, consistent with applicable ethics rules. Call or email Christopher J. Gray to arrange a confidential, no-obligation consultation.

The New York State Bar Association thanks the 200 Attorney Volunteers who have taken a Client through the Unemployment Insurance and Surrogate's Court Pro Bono programs. Your extraordinary service exemplifies the best of the legal profession to do the public good.

Visit **nysba.org/covidvolunteer** to view the list of Attorney Volunteers and for more information on the COVID-19 Pro Bono Network.

NYSBA

UNITED STATES POSTAL SERVICE®

Statement of Ownership, Management, and Circulation (Requester Publications Only)

1. Publication Title	2. Publication Number	3. Filing Date
NYSBA Journal	1529-3769	9/29/20
4. Issue Frequency	5. Number of Issues Published Annually	6. Annual Subscription Price (if any)
Monthly except for 3x/year	9	$210

7. Complete Mailing Address of Known Office of Publication (Not printer) (Street, city, county, state, and ZIP+4®): NYSBA, 1 Elk Street, Albany NY 12207 — Contact Person: Alyssa Colton; Telephone (Include area code): 518-487-5672

8. Complete Mailing Address of Headquarters or General Business Office of Publisher (Not printer): same

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor (Do not leave blank)

Publisher (Name and complete mailing address): The New York State Bar Association, 1 Elk Street, Albany NY 12207

Editor (Name and complete mailing address): Susan DeSantis, NYSBA (same)

Managing Editor (Name and complete mailing address): Alyssa Colton/Pam Chrysler, Production Editors, NYSBA (same)

10. Owner (Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.)

Full Name	Complete Mailing Address
NYSBA	1 Elk Street, Albany NY 12207

11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box. → ☐ None

Full Name	Complete Mailing Address

12. Tax Status (For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one)
The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes:
☑ Has Not Changed During Preceding 12 Months
☐ Has Changed During Preceding 12 Months (Publisher must submit explanation of change with this statement.)

PS Form **3526-R**, July 2014 (Page 1 of 4 (See instructions page 4)) PSN: 7530-09-000-8855 **PRIVACY NOTICE:** See our privacy policy on www.usps.com

13. Publication Title			14. Issue Date for Circulation Data Below	
15. Extent and Nature of Circulation			Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies (Net press run)				
b. Legitimate Paid and/or Requested Distribution (By mail and outside the mail)	(1)	Outside County Paid/Requested Mail Subscriptions stated on PS Form 3541. (Include direct written request from recipient, telemarketing, and Internet requests from recipient, paid subscriptions including nominal rate subscriptions, employer requests, advertiser's proof copies, and exchange copies.)	49,977	45,396
	(2)	In-County Paid/Requested Mail Subscriptions stated on PS Form 3541. (Include direct written request from recipient, telemarketing, and Internet requests from recipient, paid subscriptions including nominal rate subscriptions, employer requests, advertiser's proof copies, and exchange copies.)		
	(3)	Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Paid or Requested Distribution Outside USPS®		
	(4)	Requested Copies Distributed by Other Mail Classes Through the USPS (e.g., First-Class Mail®)	20	20
c. Total Paid and/or Requested Circulation (Sum of 15b (1), (2), (3), and (4)) ▶			49,997	45,416
d. Non-requested Distribution (By mail and outside the mail)	(1)	Outside County Nonrequested Copies Stated on PS Form 3541 (include sample copies, requests over 3 years old, requests induced by a premium, bulk sales and requests including association requests, names obtained from business directories, lists, and other sources)		
	(2)	In-County Nonrequested Copies Stated on PS Form 3541 (include sample copies, requests over 3 years old, requests induced by a premium, bulk sales and requests including association requests, names obtained from business directories, lists, and other sources)		
	(3)	Nonrequested Copies Distributed Through the USPS by Other Classes of Mail (e.g., First-Class Mail, nonrequestor copies mailed in excess of 10% limit mailed at Standard Mail® or Package Services rates)	1	1
	(4)	Nonrequested Copies Distributed Outside the Mail (Include pickup stands, trade shows, showrooms, and other sources)	79	97
e. Total Nonrequested Distribution (Sum of 15d (1), (2), (3) and (4))			80	98
f. Total Distribution (Sum of 15c and e) ▶			50,0076	45,611
g. Copies not Distributed (See Instructions to Publishers #4, (page #3)) ▶			339	97
h. Total (Sum of 15f and g)			50,777	45,931
i. Percent Paid and/or Requested Circulation (15c divided by 15f times 100) ▶			99.8	99.3

* If you are claiming electronic copies, go to line 16 on page 3. If you are not claiming electronic copies, skip to line 17 on page 3.

PS Form **3526-R,** July 2014 (Page 2 of 4)

UNITED STATES POSTAL SERVICE®

Statement of Ownership, Management, and Circulation (Requester Publications Only)

16. Electronic Copy Circulation	Average No. Copies Each Issue During Previous 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Requested and Paid Electronic Copies ▶	0	0
b. Total Requested and Paid Print Copies (Line 15c) + Requested/Paid Electronic Copies (Line 16a) ▶		
c. Total Requested Copy Distribution (Line 15f) + Requested/Paid Electronic Copies (Line 16a) ▶	49,997	45,416
d. Percent Paid and/or Requested Circulation (Both Print & Electronic Copies) (16b divided by 16c × 100) ▶		

☑ **I certify that 50% of all my distributed copies (electronic and print) are legitimate requests or paid copies.**

17. Publication of Statement of Ownership for a Requester Publication is required and will be printed in the Nov. 2020 issue of this publication.

18. Signature and Title of Editor, Publisher, Business Manager, or Owner — Date: 9/29/20

I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).

PS Form **3526-R,** July 2014 (Page 3 of 4) **PRIVACY NOTICE:** See our privacy policy on www.usps.com

MARKETPLACE

TO ADVERTISE WITH NYSBA, CONTACT:
MCI USA
Attn: Holly Klarman, Account Executive
307 International Circle, Suite 190
Hunt Valley, Maryland 21030
holly.klarman@mci-group.com
410.584.1960

MARKETPLACE DISPLAY ADS:
$565
Large: 2.22" x 4.44"

Please go to nysba.sendmyad.com to submit your PDF file.

Payment must accompany insertion orders.

www.nysba.org/MemberBenefits
800.582.2452/
518.463.3200

THE NEW YORK BAR FOUNDATION

JOURNAL BOARD MEMBERS EMERITI

2020-2021 OFFICERS

Scott M. Karson
President
Melville

T. Andrew Brown
President-Elect
Rochester

Domenick Napoletano
Treasurer
Brooklyn

Sherry Levin Wallach
Secretary
White Plains

Henry M. Greenberg
Immediate Past President
Albany

VICE-PRESIDENTS

First District
Diana S. Sen, New York
Carol A. Sigmond, New York

Second District
Aimee L. Richter, Brooklyn

Third District
Robert T. Schofield Iv, Albany

Fourth District
Marne Onderdonk, Saratoga

Fifth District
Jean Marie Westlake, Syracuse

Sixth District
Richard C. Lewis, Binghamton

Seventh District
Mark J. Moretti Rochester

Eighth District
Norman P. Effman, Warsaw

Ninth District
Hon. Adam Seiden, Mount Vernon

Tenth District
Donna England, Centereach

Eleventh District
David L. Cohen, Kew Gardens

Twelfth District
Michael A. Marinaccio, Bronx

Thirteenth District
Jonathan B. Behrins, Staten Island

MEMBERS-AT-LARGE OF THE EXECUTIVE COMMITTEE

Mark Arthur Berman
John P. Christopher
Margaret J. Finerty
Jean F. Gerbini
Sarah E. Gold
Richard M. Gutierrez
Drew Jaglom
Ronald C. Minkoff
William T. Russell, Jr.
Mirna M. Santiago
Tucker C. Stanclift

MEMBERS OF THE HOUSE OF DELEGATES

First District
* Alcott, Mark H.
Baum, Simeon H.
Ben-Asher, Jonathan
Berkey, David L.
Berman, Mark Arthur
Billings, Hon. Lucy
Bloom, Allan S.
Boston, Shelia
Chandrasekhar, Jai K.
Chang, Vincent Ted
Cohn, David
Dean, Robert S.
Eng, Gordon
Farber, Michael S.
Filabi, Azish
Filemyr, Edward J. IV
Finerty, Margaret J.
First, Marie-Eleana
Foley, Jenifer J.
* Forger, Alexander D.
Fox, Glenn G.
Freedman, Hon. Helen E.
Friedman, Richard B.
Graves-Poller, Barbara Jeane
Hack, Jay L.
Hamid, Jyotin R.
Harvey, Peter C.
Heller, Meredith Stacy
Holtzman, Robert N.
Jaglom, Andre R.
†* James, Seymour W., Jr.
Jones, Shawndra
Kapnick, Hon. Barbara R.
Kenney, John J.
Kiernan, Peter J.
Kobak, James B. Jr.
LaBarbera, Anne Louise
Land, Stephen B.
* Lau-Kee, Glenn
†* Leber, Bernice K.
Lessard, Stephen Charles
Lindenauer, Susan B.
MacLean, Ian William
Martin Owens, Deborah
McElwreath, Suzanne
†* Miller, Michael
Millett, Eileen D.
Minkoff, Ronald C.
Newman, Charles M.
Nolfo, Matthew J.
O'Connell, Diane E.
Owens, John A. Jr.
Paul, Deborah
Pitegoff, Thomas M.
* Pruzansky, Joshua M.
Radding, Rory J.
Rangachari, Rekha
Russell, William T., Jr.
Safer, Jay G.
Scott, Kathleen A.
Sen, Diana S.
† Shishov, Natasha
Shoemaker, Paul T.
Sigmond, Carol Ann
Silkenat, James R.
Skidelsky, Barry
Slavit, Ira S.
Smith, Asha Saran
Sonberg, Hon. Michael R.
†* Standard, Kenneth G.
Stoeckmann, Laurie
Swanson, Richard P.
van der Meulen, Robin A.
Warner, S. Andre
Waterman, Hon. Kathleen
Weiss, Mira B.
†* Younger, Stephen P.

Second District
Chambers, Hon. Cheryl E.
Cohn, Steven D.
Fallek, Andrew M.
Gayle, Armena D.
Grimaldi, Judith D.
Jimenez, Hon. Sergio
Kamins, Hon. Barry
Klass, Richard A.
Lugo, Betty
Middleton, Tyear
Napoletano, Domenick
Richter, Aimee L.
Richman, Steven H.
Yeung-Ha, Pauline

Third District
Barclay, Kathleen Anne
Bauman, Hon. Harold J.
Burke, Jane Bello
Donovan, Hon. Ryan T.
Fernandez, Hermes
Gerbini, Jean
Gold, Sarah
†* Greenberg, Henry M.
Griesemer, Matthew J.
Hartman, Hon. Denise A.
Heath, Hon. Helena
Kean, Elena DeFio
Kearns, Deborah S.
Kehoe, Peter R.
Kelly, Matthew J.
Kretser, Hon. Rachel
Matos, Maria
McDermott, Michael Philip
†* Miranda, David P.
Onderdonk, Marne L.
Rivera, Sandra D.
Ryba, Hon. Christina L.
Schofield, Robert T., IV
Silverman, Lorraine R.
Teff, Justin S.
Woodley, Mishka
* Yanas, John J.

Fourth District
Betz, Edward Allen
Breding, Alice M.
Coffey, Peter V.
Coseo, Matthew R.
Gilmartin, Margaret E.
Horan, Michael Timothy
Meyer, Jeffrey R.
Montagnino, Nancy K.
Pleat, Tara Anne
Simon, Nicole Marie
Sise, Hon. Joseph M.
Stanclift, Tucker C.

Fifth District
Doerr, Donald C.
Engel, Paula Mallory
Fennell, Timothy
Fogel, Danielle Mikalajunas
* Getnick, Michael E.
Hobika, Joseph H., Jr.
LaRose, Stuart J.
Radick, Courtney S.
Reed, Prof. LaVonda Nichelle
* Richardson, M. Catherine
Shafer, Robert M.
Spicer, Graeme
Westlake, Jean Marie

Sixth District
Adigwe, Andria
Eberle, Aaron Kyle
Gutenberger Grossman, Kristin E.
Lanouette, Ronald Joseph, Jr.
Lewis, Richard C.
†* Madigan, Kathryn Grant
May, Michael R.
Miller, Rachel Ellen

Seventh District
Bascoe, Duwaine T.
Brown, T. Andrew
Buholtz, Eileen E.
* Buzard, A. Vincent
Galvan, Jennifer L.
Getz, Jon P.
Kammholz, Bradley P.
Kelley, Stephen M.
Kendall, Amy K.
Lawrence, C. Bruce
* Moore, James C.
Moretti, Mark J.
Nussbaum, Carolyn G.
* Palermo, Anthony Robert
Paperno, Jill
Ryan, Kevin F.
* Schraver, David M.
Schwartz-Wallace, Amy E.
* Vigdor, Justin L.

Eighth District
Bennett, Ericka N.
Doxey, Deborah Anne
* Doyle, Vincent E., III
Effman, Norman P.
* Freedman, Maryann Saccomando
†* Gerstman, Sharon Stern
Kimura, Jennifer M.
Meyer, Harry G.
Mohun, Hon. Michael M.
O'Connell, Bridget Maureen
O'Donnell, Thomas M.
Redeye, Lee M.
Russ, Hugh M. III
Saleh, David J.
Sweet, Kathleen Marie
Young, Oliver C.

Ninth District
Battistoni, Jeffrey S.
Beltran, Karen T.
Caceres, Hernan
Calderón, Carlos M.
Carbajal-Evangelista, Natacha
Cohen, Mitchell Y.
Degnan, Clare J.
Enea, Anthony J.
Forger, Alexander D.
Fox, Prof. Michael L.
Frumkin, William D.
Griffin, Mark P.
†* Gutekunst, Claire P.
Kessler, Leonard
Kirby, Dawn
Lara-Garduno, Nelida
Levin Wallach, Sherry
Marinaccio, Michael A.
Milone, Linda A.
Morrissey, Mary Beth
Muller, Arthur J., III
Mukerji, Deepankar
* Ostertag, Robert L.
Palermo, Christopher C.
Pappalardo, John A.
Perlman, David B.
Reed, Michael Hyden
Santiago, Mirna M.
Scheinkman, Hon. Alan D.
Seiden, Hon. Adam
Shampnoi, Elizabeth Jean
Shapiro, Jay
Starkman, Mark T.
Tarson, Derek
Tesser, Lewis F.
Triebwasser, Hon. Jonah
Welch, Kelly M.

Tenth District
Abneri, Michael D.
Bladykas, Lois
Christopher, John P.
DiFalco, Michael Drew
England, Donna
Fishberg, Gerard
Genoa, Hon. Marilyn
Gross, John H.
† Karson, Scott M.
Kretzing, Laurel R.
Leo, Hon. John J.
Leventhal, Steven G.
* Levin, A. Thomas
Levy, Peter H.
Lisi, Gregory Scot
Markowitz, Michael A.
Penzer, Eric W.
Pessala, Hon. Elizabeth D.
Poster-Zimmerman, Lynn D.
Purcell, Craig Arthur
* Rice, Thomas O.
Robinson, Hon. Derrick J.
Rosenthal, Elisa Strassler
Tambasco, Daniel
Taylor, Zenith T.
Welden, Clifford M.
Wicks, James M.

Eleventh District
Alomar, Hon. Karina
Cohen, David Louis
Gutierrez, Richard M.
Katz, Joshua Reuven
Rivera, Jorge Luis
Samuels, Violet
Ventura, Hon. Lourdes M.
Wimpfheimer, Steven
Taylor, Zenith T.

Twelfth District
Hill, Renee Corley
Millon, Steven E.
* Pfeifer, Maxwell S.
Sheldon, Adam J.

Thirteenth District
Behrins, Jonathan B.
Cohen, Orin J.
Crawford, Allyn J.
Lamberti, Anthony J.
Marotta, Daniel C.
Mcginn, Shelia T.

Out of State
Alsina, Neysa
Bahn, Josephine
* Bracken, John P.
Gilbreath Sowell, Karen
Grady, Colleen M.
Harper, Susan L.
Jochmans, Hilary
Ravin, Richard L.
Vaughn, Anthony, Jr.
Wolff, Brandon Lee

† Delegate to American Bar Association House of Delegates * Past President

The Notorious R.B.G.: Lessons on Legal Writing from the Legendary Ruth Bader Ginsburg

Gerald Lebovits, an acting Supreme Court justice in Manhattan, is an adjunct at Columbia, Fordham, and NYU law schools. He thanks Arabella Colombier (Columbia Law School), his judicial fellow, for her research.

NY County Supreme Court at 60 Centre Street. Photo credit: Hon. Nancy M. Bannon

Ruth Bader Ginsburg reached a level of notoriety unparalleled by any other Supreme Court Justice. She served as the main litigator and legal strategist to dismantle gender discrimination in the law and inspired countless women to pursue legal careers. Ginsburg is considered "the most important woman lawyer in the history of the Republic."[1]

Born in Brooklyn in 1933, Ginsburg graduated from Cornell University with a B.A in Government.[2] She attended Harvard Law School, where she joined eight other women in a class of 552 students.[3] She transferred to Columbia Law School for her final year; she was one woman out of 12.[4] After graduating (and tying for first in her class), Ginsburg served as a judicial clerk to Judge Edmund Palmieri, U.S. District Court for the Southern District of New York.[5] She taught at Rutgers Law School from 1963 until 1972, when she became the first woman to serve as a tenured faculty member at Columbia Law School.[6]

In 1972, Ginsburg cofounded the Women's Rights Project at the American Civil Liberties Union.[7] As the director, she carefully crafted a litigation strategy "to build brick upon brick . . . to create a stable structure" demonstrating the unconstitutionality of gender discrimination.[8] She often picked cases involving discrimination against men to show that gender discrimination hurt everyone, not only women, and to elicit sympathy from the Justices, all of whom were men.[9] Ginsburg won five of the six cases she argued before the Supreme Court and contributed to 34 additional Supreme Court arguments.[10]

In 1980, President Jimmy Carter appointed Ginsburg to the United States Court of Appeals for the District of Columbia Circuit, where she earned a reputation for building consensus between the court's conservative and liberal members.[11] President Bill Clinton referenced this skill when he announced her appointment to the Supreme Court.[12] Ginsburg became the second women to serve in this position.[13] In her confirmation hearing, she described her approach to judging as "neither 'liberal' nor 'conservative.'"[14] But as the Court became more conservative over the next 27 years, "Justice Ginsburg's powerful dissenting voice emerged."[15]

In the last decade of her life, Ginsburg became a cultural icon known as the Notorious R.B.G.[16] The moniker — a play on the name of the rapper, the Notorious B.I.G. — originated as an online joke created by New York University law student Shana Knizhnik, who later co-wrote the biography *Notorious RBG: The Life and Times of Ruth Bader Ginsburg*.[17] Ginsburg's notoriety spawned a documentary, a Hollywood biopic called *On the Basis of Sex*, and *Saturday Night Live* skits. Children dress up as Justice Ginsburg for Halloween.[18] Her face and nickname appear on T-shirts and tattoos.[19]

When Ginsburg died on September 18, 2020, hundreds gathered outside the Supreme Court for an impromptu vigil.[20] Throughout the weekend, people across the country came together to honor her.[21] That she died on the first night of Rosh Hashanah, the last day of the Jewish year, "is powerfully symbolic."[22]

Cindy Rowe, executive director of the Jewish Alliance for Law and Social Action in Boston, explained that "[t]he fact that God waited until the very last day to take their life away means that that person was so righteous and so holy that God wanted to hold on to that person for as long as possible."[23] She added, "This was such a moment of holiness that it was the last moment she was taken from us."[24]

Instead of being buried as soon as possible after death, in accordance with Jewish tradition, Ginsburg became the first woman — and Jew — to lie in state in the Capitol.[25] Her family "chose a memorial that infused Judaism into America's rituals of mourning."[26]

Ginsburg's success as a champion for equality can be attributed, in part, to her legal writing skills. Many considered Justice Ginsburg the Court's best writer.[27] While the public mainly knew her "fierce" and "fiery" dissents, she was known in the legal profession as a "lawyer's lawyer," in the words of Columbia Law School professor Jamal Greene.[28] She wrote clear and concise prose that was as restrained and persuasive as her litigation strategy.[29] When Ginsburg litigated cases to challenge gender discrimination, she knew she needed to educate the Justices to persuade them.[30] She aimed to "giv[e] them a perspective that had probably never occurred to some of them."[31] Her persuasive writing style aided her ability to build consensus.

Ginsburg believed that "lawyers have a professional obligation to become the best writers they can be" — for the sake of their clients and also because she believed that lawyers have an obligation to serve the public.[32] She explained that "[t]he more effective a lawyer can be in speech and writing, the better professional he or she will be."[33] Ginsburg elaborated on this idea in the foreword to an anthology of essays, *Garner on Language and Writing*: "Lawyers serve their clients best when their readers can read quickly and firmly grasp their points."[34]

Because "[r]eaders of legal writing, on and off the bench, often work under the pressure of a relentless clock," Ginsburg explained, "[t]hey may lack the time to ferret out bright ideas buried in complex sentences, overlong paragraphs, or too many pages."[35] She added that "[s]trong arguments can escape attention when embedded in dense or Delphic prose. Lucid, well-ordered writing can contribute immeasurably to a lawyer's success as an advocate and counselor."[36]

Underlying Ginsburg's understanding of what it means to be a good legal writer was her conviction that "law should be a literary profession," noting that "the best legal practitioners do regard law as an art as well as a craft."[37]

Ginsburg's literary approach can, in part, be credited to her European Literature professor at Cornell — Vladimir Nabokov — who changed how she read and wrote.[38] He taught her that "[w]ords could paint pictures" and showed her that "[c]hoosing the right word, and the right word order . . . could make an enormous difference in conveying an image or an idea."[39]

Ginsburg also admired Jane Austen for her word pictures, though she claimed that her writing style was not

directly related to Austen's.[40] But Ginsburg, too, could paint word pictures. One of her most memorable lines comes from her dissent in the Voting Rights Act case, *Shelby County v. Holder*, when she wrote that "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[41]

Although Ginsburg also claimed her writing style had no direct relationship with Tolstoy's, we can see his influence as a "strong writer"[42] in the fierceness that punctuates her dissents. Her explicit call to Congress in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* — "the ball is in Congress's court"[43] — worked. In direct response to her remark, Congress enacted the Lilly Ledbetter Fair Pay Act, which overturned the Court's "parsimonious reading" of Title VII of the Civil Rights Act of 1964.[44]

In addition to these musings on her own writing style, Ginsburg shared several tips for legal writing with Bryan Garner, notable legal scholar and author of many books on legal writing.[45]

BE SCRUPULOUSLY HONEST

Ginsburg was known for her honesty: The slogan "You Can't Spell Truth Without Ruth" adorns t-shirts and bumper stickers.[46] She emphasized the importance of being "scrupulously honest," explaining that judges will distrust a brief if they notice the writer has slanted or miscited an authority.[47] She added that most appellate judges first read the decision they're reviewing. If they discover that a brief has unfairly characterized the decision, they "will tend to be impatient with that advocate."[48]

BE CONCISE

According to Ginsburg, "[a] lawyer's skill is not to dump the kitchen sink before the judge but to refine the arguments to the ones that a judge can accept."[49]

Ginsburg credited her undergraduate constitutional law professor at Cornell, Robert Cushman, for teaching her to "make [her] compositions as spare as [she] could" and to eliminate unnecessary adjectives after he suggested that her writing style was "a bit elaborate."[50]

She also advised that it's not necessary to use all the space allotted for briefs.[51] For most single-issue cases, Ginsburg suggested using only about half the pages allowed.[52] She cautioned that "eye-fatigue and even annoyance will be the response they get for writing an overlong brief."[53]

BE FAIR

Despite Ginsburg's "fiery" dissents, she suggested that legal writers be dispassionate and let their argument speak for itself.[54] She cautioned against disparaging the opposite side or, if writing an appellate brief, the judge who wrote the decision under review.[55]

Ginsburg added that ad hominem attacks are not useful: "If the other side is truly bad, the judges are smart enough to understand that themselves."[56] The best method of persuasion for lawyers is to focus on their own reasoning.

KNOW YOUR AUDIENCE

Ginsburg wrote "innumerable drafts" because she aimed to write opinions that people could understand without having to read any sentence twice.[57]

Although Ginsburg understood her readers to be primarily judges and lawyers, she also knew she was communicating with the public. Trying to be as clear and concise as possible, Ginsburg began her opinions with a "press-release account" to explain to a lay audience "what the case is about, what legal issue the case presents, how the Court decides it, and the main reason why."[58]

WRITE AFFIRMATIVELY

Although petitioners should anticipate how respondents will likely react and incorporate rebuttals within the body of their briefs, Ginsburg explained that respondents should avoid writing a brief that merely responds to points raised by the petitioner and the lower court(s).[59] Instead, she suggested that when lawyers are representing a respondent, they should draft a brief before they receive the brief from the petitioner.[60] Only after they tell their side affirmatively should they respond to points from the petitioner, by putting their answers mainly in footnotes.[61]

WRITE SIMPLY

"If you can say it in plain English, you should," Ginsburg advised.[62] She disliked legalese and legal Latin, particularly given the importance of communicating clearly with the public. Ginsburg understood that eliminating legal jargon would help the public better understand what judges and lawyers do and why.[63]

READ ALOUD

Ginsburg described Nabokov as "a man who was in love with the sound of words."[64] She used the "read aloud" test to determine whether she succeeded in using the right words in the right order.[65]

Similarly, she advised lawyers look at their writing. When Ginsburg was litigating sex-discrimination cases in the 1970s, her secretary at Columbia said to her, "I'm typing all these briefs and articles for you and the word sex, sex, sex, is on every page."[66] Her secretary explained, "These judges are men, and when they read that they're not going to be thinking about what you want them to think about."[67] She suggested that Ginsburg use the word "gender" instead.[68]

DON'T WRITE LIKE YOU'RE WRITING FOR A LAW REVIEW

Ginsburg disliked three- or four-prong tests — a sign of a law clerk's work, she believed — because they give "a false sense of security that you have to go down a certain litany in one, two, three, four rank order. But often the decision is made on other grounds and then fitted into the prongs."[69] Understanding how judges decide will improve how lawyers craft their arguments to make them persuasive.

Justice Ginsburg's commitment to clear communication was foundational to her success. Her meticulous approach to legal writing enabled her as a litigator to persuade judicial readers and as a judge to build consensus on the bench. The care she put into writing — to make sure everyone would understand what she wrote — helped her become the beloved icon she'll always be.

This column continues in the next issue of the *Journal* with what the great writers can teach legal writers.

---

1. "'The Most Important Woman Lawyer in the History of the Republic': How Did Ruth Bader Ginsburg Change America? More Than a Dozen Legal Thinkers Weigh In," Politico, Sept. 18, 2020, https://www.politico.com/news/magazine/2020/09/18/tktk-418191.
2. Ruth Bader Ginsburg, My Own Words 18 (2018) (ebook); Beth Saulnier, "Justice Prevails: A Conversation with Ruth Bader Ginsburg '54," Cornell Alumni Mag. (Nov./Dec. 2013), http://cornellalumnimagazine.com/justice-prevails/.
3. Ginsburg, *supra* note 2, at 19; Linda Greenhouse, "Ruth Bader Ginsburg, Supreme Court's Feminist Icon, is Dead at 87," N.Y. Times (Sept. 18, 2020), https://www.nytimes.com/2020/09/18/us/ruth-bader-ginsburg-dead.html.
4. Ginsburg, *supra* note 2, at 19.
5. *Id.*
6. *Id.*
7. "Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff," ACLU, https://www.aclu.org/other/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff.
8. Anthony D. Romero, "In Memory of Justice Ruth Bader Ginsburg (1933-2020)," ACLU, Sept. 19, 2020, https://www.aclu.org/news/civil-liberties/in-memory-of-justice-ruth-bader-ginsburg-1933-2020.
9. *Id.*
10. *Id.*
11. Ginsburg, *supra* note 2, at 19; Greenhouse, *supra* note 3.
12. Greenhouse, *supra* note 3.
13. Ginsburg, *supra* note 2, at 19.
14. Greenhouse, *supra* note 3.
15. *Id.*
16. Romero, *supra* note 8.
17. Irin Carmon & Shana Knizhnik, Notorious RBG: The Life and Times of Ruth Bader Ginsburg (2015).
18. Romero, *supra* note 8.
19. *Id.*
20. Gary Grumbach & Adela Suliman, "Hundreds Mourn Ruth Bader Ginsburg in Vigil Outside Supreme Court," NBC News, Sept. 19, 2020, https://www.nbcnews.com/politics/supreme-court/hundreds-mourn-ruth-bader-ginsburg-vigil-outside-supreme-court-n1240531.
21. "Mourners Gather at Vigils Across the County in Ginsburg's Honor," N.Y. Times, Sept. 19, 2020, https://www.nytimes.com/2020/09/19/us/politics/supreme-court-ruth-bader-ginsburg-live.html.
22. *Id.*
23. *Id.*
24. *Id.*
25. Julie Zauzmer, "'Blessed is God, the True Judge': Ginsburg Memorialized in Hebrew in the Halls of the Supreme Court," Washington Post, Sept. 23, 2020, https://www.washingtonpost.com/religion/2020/09/23/ginsburg-memorial-rabbi-jewish/.
26. *Id.*
27. Bryan A. Garner, "Interviews with United States Supreme Court Justices: Ruth Bader Ginsburg," 13 Scribes J. of Legal Writing 134 (2010).
28. "The Most Important Woman Lawyer in the History of the Republic," *supra* note 1.
29. *See* Greenhouse, *supra* note 3; Ross Guberman, "Justice Ginsburg the Writer: Something in Between," SCOTUSblog, Sept. 23, 2020, https://www.scotusblog.com/2020/09/justice-ginsburg-the-writer-something-in-between/.
30. Greenhouse, *supra* note 3.
31. "Stanford Law Faculty on Justice Ruth Bader Ginsburg's Legacy," SLS Blogs: Legal Aggregate, Sept. 18, 2020, https://law.stanford.edu/2020/09/18/stanford-law-faculty-on-justice-ruth-bader-ginsburgs-legacy/.
32. Garner, *supra* note 27, at 144.
33. *Id.*
34. Ruth Bader Ginsburg, Foreword to Bryan A. Garner, Garner on Language and Writing xiii (2009).
35. *Id.*
36. *Id.*
37. Garner, *supra* note 27, at 133.
38. *Id.* at 135.
39. Ruth Bader Ginsburg, "Ruth Bader Ginsburg's Advice for Living," N.Y. Times, Oct. 1, 2016, https://www.nytimes.com/2016/10/02/opinion/sunday/ruth-bader-ginsburgs-advice-for-living.html.
40. Garner, *supra* note 27, at 139.
41. *Shelby County v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting).
42. Garner, *supra* note 27, at 139.
43. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting).
44. Greenhouse, *supra* note 3.
45. Garner, *supra* note 27.
46. Greenhouse, *supra* note 3.
47. Garner, *supra* note 27, at 137.
48. *Id.*
49. *Id.* at 134.
50. *Id.* at 135.
51. *Id.* at 137.
52. *Id.*
53. *Id.*
54. *Id.* at 142.
55. *Id.*
56. *Id.*
57. *Id.* at 134.
58. *Id.*
59. *Id.* at 143.
60. *Id.*
61. *Id.* at 141.
62. *Id.*
63. *Id.*
64. *Id.* at 135.
65. Frances Katz, "How Vladimir Nabokov Helped Ruth Bader Ginsburg Find Her Voice at Cornell," Medium, Mar. 19, 2018, https://medium.com/@francesk/how-vladimir-nabokov-helped-ruth-bader-ginsburg-find-her-voice-at-cornell-e87e68f49f71.
66. Catherine Crocker, "Ginsburg Explains Origin of Sex, Gender: Justice: Supreme Court's Newest Member Speaks at Her Old Law School and Brings Down the House with Her History Lesson About Fighting Bias," L.A. Times (Nov. 21, 1993), https://www.latimes.com/archives/la-xpm-1993-11-21-mn-59217-story.html.
67. *Id.*
68. *Id.*
69. Garner, *supra* note 27, at 138.

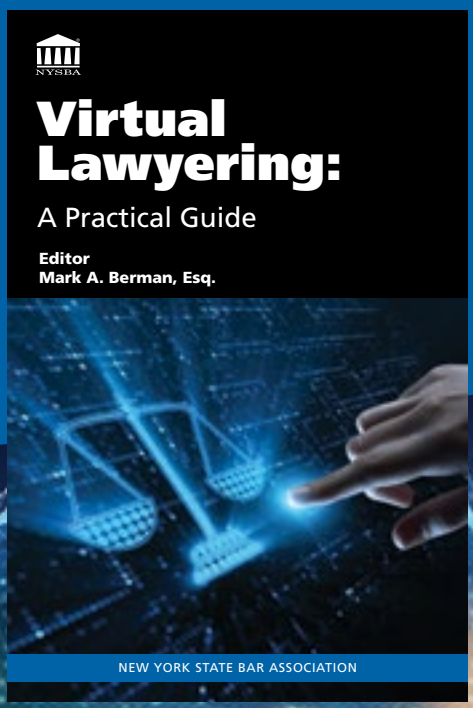
NYSBA PUBLICATIONS

Now Available!

Virtual Lawyering:

A Practical Guide

Editor: Mark A. Berman, Esq.



As a result of the public health crisis created by COVID-19, the legal profession is operating virtually more and practicing in person less. The legal profession will never be the same: attorneys will be litigating, arguing, closing transactions, and counseling individuals and corporate clients over virtual platforms, from the most commonplace tasks, such as a virtual notarization or executing a will, to holding virtual hearings before a court or closing on multi-million dollar transactions. Whether you are a litigator, transactional attorney or in-house attorney, *Virtual Lawyering: A Practical Guide* will provide you with practical advice as you navigate through the virtual legal world and confront new issues.

eBook (413720E)

NYSBA Members $45.00

Non-Members $60.00

ORDER ONLINE: NYSBA.ORG/PUBS | ORDER BY PHONE: 800.582.2452

Periodicals

ADDRESS CHANGE – Send To:
Member Resource Center
New York State Bar Association
One Elk Street
Albany, NY 12207
(800) 582-2452
e-mail: mrc@nysba.org