



June 4, 2021

To: Members of the House of Delegates

Re: June 12, 2021 meeting

Enclosed are the agenda and related background materials for the upcoming meeting of the House of Delegates scheduled to begin at **8:30 a.m.** on Saturday, June 12, 2021 via a Zoom webinar. Participation instructions have been forwarded to you by e-mail.

We look forward to seeing you virtually on June 12, 2021.

T. Andrew Brown
President

Sherry Levin Wallach
President-Elect



**NEW YORK STATE BAR ASSOCIATION
MEETING OF THE HOUSE OF DELEGATES
VIRTUAL MEETING
SATURDAY, JUNE 12, 2021 – 8:30 A.M.**

AGENDA

1. Call to order, Pledge of Allegiance, and welcome
– Ms. Sherry Levin Wallach 8:30 a.m.
2. Approval of minutes of April 10, 2021 meeting 8:35 a.m.
3. Installation of T. Andrew Brown as President – Hon. Janet DiFiore 8:40 a.m.
4. Report of President – Mr. T. Andrew Brown 8:50 a.m.
5. Report of Treasurer – Mr. Domenick Napoletano 9:10 a.m.
6. Report and recommendations of Lease Negotiation Committee and
Finance Committee– Mr. David P. Miranda and Ms. Sandra D. Rivera 9:20 a.m.
(*Twenty Minutes for Presentation; Forty Minutes for Comments*)

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BREAK

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7. Report and recommendations of Task Force on Racial Injustice and
Police Reform – Mr. T. Andrew Brown and Ms. Taa R. Grays 10:25 a.m.
(*Ten Minutes for Presentation; Fifteen Minutes for Comments*)
8. Report and recommendations of Task Force on Free
Expression in the Digital Age – Ms. Cynthia S. Arato and
Mr. David E. McCraw 10:50 a.m.
(*Ten Minutes for Presentation; Fifteen Minutes for Comments*)
9. Report and recommendations of Task Force on the New York
Bar Examination – Hon. Alan D. Scheinkman (Ret.) 11:15 a.m.
(*Ten Minutes for Presentation; Fifteen Minutes for Comments*)
10. Report and recommendations of Committee on Standards of
Attorney Conduct – Ms. Debra Raskin and Prof. Ellen Yaroshefsky 11:40 a.m.
(*Ten Minutes for Presentation; Fifteen Minutes for Comments*)

11. Report and recommendations of Task Force on Nursing Homes and Long-Term Care – Mr. Hermes Fernandez and Ms. Sandra D. Rivera
(Ten Minutes for Presentation; Fifteen Minutes for Comments) 12:05 p.m.
12. Report of Task Force on the Uniform Rules – Mr. Richard C. Lewis
(Seven Minutes for Presentation; Thirteen Minutes for Comments) 12:30 p.m.
13. Report of The New York Bar Foundation – Ms. Carla M. Palumbo 12:50 p.m.
14. Administrative Items – Ms. Sherry Levin Wallach 1:00 p.m.
15. Date and place of next meeting
October 30, 2021
Remote Meeting and The Otesaga, Cooperstown

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF HOUSE OF DELEGATES MEETING
VIRTUAL MEETING
April 10, 2021**

Present: Abneri; Adigwe; Agosto; Alcott; Alomar; Alsina; Asher; Bahn; Bascoe; Baum; Behrins; Beltran; Berman; Billings; Bladykas; Boston; Brown; Buholtz; Capone; Chambers; Chandrasekhar; Chang; Christopher; Citarella; Cohen, D.; Cohen, M.; Cohen, O.; Cohn; Coseo; Crawford; Dean; Degnan; Doerr; Doxey; Doyle; Eberle; Effman; Eng; England; Fallek; Fennell; Fernandez; Filabi; Filemyr; Finerty; Fishberg; Fox, G.; Fox, M.; Freedman; French; Friedman; Frumkin; Gayle; Genoa; Gerstman; Getnick; Gilmartin; Gold; Good; Grady; Griesemer; Griffin; Grimaldi; Gross; Gutekunst; Gutierrez; Ha; Hack; Harper; Hartman; Heath; Hill; Hobika; Hoffman; Hoffmann; Jaglom; James; Jimenez; Jochmans; Kamins; Kammjoz; Kapnick; Karson; Katz; Kean; Kelley; Kelly; Kendall; Kenney; Kiernan; Kimura; Kobak; Kretser; Kretzing; LaBarbera; Lara; Lau-Kee; Lawrence; Leber; Leo; Leventhal; Levin; Levin Wallach; Levy; Lewis; Lindenauer; Lorch; Lugo; Madigan; Marinaccio; Markowitz; Maroney; Marotta; Matos; McElwreath; McGinn; McNamara; Meulen; Meyer, H.; Meyer, J.; Miller, M.; Miller, R.; Milone; Minkoff; Miranda; Montagnino; Moreetti; Morressey; Mukerji; Muller; Mulry; Newman; Noble; Nolfo; O'Connell, B.; O'Connell, D.; Oppeneer; Owens; Palermo, A.; Palermo, C.; Pappalardo; Perlman; Pessala; Peter; Petro; Pitegoff; Pleat; Pruzansky; Purcell; Radick; Rangachai; Ravin; Reed; Riano; Richman; Richter; Robinson; Russ; Russell; Safer; Samuels; Santiago; Scheinkman; Schofield; Schraver; Scott; Seiden; Sen; Shafer; Champnoi; Shapiro; Shishov; Shoemaker; Sigmond; Silkenat; Simon; Slavit; Smith; Sonberg; Starkman; Stoeckmann; Strassler Rosenthal; Swanson; Sweet; Tambasco; Tarson; Taylor; Tesser; Triebwasser; Vaughn; Ventura; Vigdor; Wallace; Waterman; Weiss; Welden; Westlake; Wimpfheimer; Wolff; Woodley; Young; Younger.

Mr. Brown presided over the meeting as Chair of the House.

1. Approval of minutes of meeting. The minutes of the January 30, 2021 meeting were approved as distributed.
2. Report of President. Mr. Karson highlighted the items contained in his written report, a copy of which is appended to these minutes.
3. Report of Treasurer. Domenick Napoletano, Treasurer, reported on the association's operations for the first two months of 2021, including dues, CLE, and annual Meeting. The report was received with thanks.
4. Report of Finance Committee. John H. Gross, chair of the Finance Committee, presented an overview of financial projections for the next 10 years, including declining dues revenue and deficit budgets. The report was received with thanks.

5. Election of Nominating Committee and State Bar Delegates to ABA House of Delegates. Sharon stern Gerstman, Chair of the Nominating Committee, presented the report of the Nominating Committee.

a. Election of members of the Nominating Committee. The following were nominated for service on the 2020-2021 Nominating Committee:

District members and alternates of the Nominating Committee: First – Jai Chandrasekhar, Vincent Chang, Adrienne Koch, Stephen Lessard, Susan Lindenauer, Seth Rosner, Jay Safer, Kaylin Whittingham, Stephen P. Younger, 1st alternate Margaret J. Finerty, 2nd alternate Bridgette Ahn, 3rd alternate John Owens, Jr. Second – Andrea E. Bonina and Armena Gayle, with Judith Grimaldi as Alternate; Third - Elena DeFio Kean, David P. Miranda, Alternate Matthew Griesemer; Fourth – Tara Anne Pleat, Peter Coffey, Alternate Michelle Wildgrube; Fifth – Timothy J. Fennell and Michael E. Getnick, with Hon. James P. Murphy as Alternate; Sixth – Aaron Eberle, Kathryn Grant Madigan, Alternate Bruce McKeegan; Seventh – June Castellano, Amy Christensen, Alternate Eileen Buholtz; Eighth – Norman P. Effman and Leah Nowotarski, with Thomas O'Donnell as Alternate; Ninth – James L. Hyer, Jessica Parker, Claire J. Degnan, Alternate John A. Pappalardo; Tenth – to be submitted; Eleventh – Richard Gutierrez, Steven Wimpfheimer, Alternate Chanwoo Lee; Twelfth – Samuel M. Braverman, Renee C. Hill, Alternate Steven E. Millon; Thirteenth – Michael Gaffney, Robert Mulhall, Alternate Jonathan B. Behrins.

A motion to elect the foregoing was adopted.

b. Election of Delegates to ABA House: A motion was adopted to elect the following for a two-year term commencing in August 2021: Claire P. Gutekunst, Scott M. Karson, Bernice K. Leber, Michael Miller and Sherry Levin Wallach.

6. Report of President. Mr. Karson highlighted the items contained in his written report, a copy of which is appended to these minutes.

7. Presentation of 2020 Root-Stimson Award. Mr. Karson presented the award to Lawrence W. Golden for his work in bring attention to wrongful convictions.

8. Report of Committee on NYSBA Facilities. David P. Miranda, chair of the committee, updated the House regarding lease negotiations with The New York Bar Foundation for the facility at One Elk Street. The report was received with thanks.

9. Report of The New York Bar Foundation. Lesley Rosenthal, President of The Foundation, reported on The Foundation's lease negotiations with the Association and on The Foundation's activities. The report was received with thanks.

10. Report of Task Force on attorney Well-Being. M. Elizabeth Coreno, co-chair of the Task Force, provided an update on the work of the Task Force, including its nine working

groups. It expects to present its report at a meeting later this year. The report was received with thanks.

11. Report of Task Force on Racial Injustice and Police Reform. Task Force co-chairs T. Andrew Brown and Taa R. Grays updated the House on the Task Force's work and its planned recommendations. The report was received with thanks.
12. Report of Task Force Task Force on COVID-19 Immunity and Liability. A. Craig Purcell, co-chair of the Task Force, provided an update on the Task Force's work to date. The report was received with thanks.
13. Report and recommendations of Committee on Standards of Attorney Conduct. Joseph E. Neuhaus, past chair of the committee, reviewed the committee's proposed amendments to the comments to Rule 1.8(e) of the Rules of Professional Conduct. After discussion, a motion was adopted to approve the proposals.
14. Report of Task Force on the NYS Bar Examination. Hon. Alan D. Scheinkman, chair of the Task Force, reported on the remote administration of the bar examination and the Task Force's work in studying the future of the examination. The report was received with thanks.
15. Administrative items. Mr. Brown reported on the following:
 - a. Motions to approve the designation of delegates filed by the county and local bar associations for the 2021-2022 Association year and to approve the filed roster of the members of the House for the 2021-2022 year were requested and approved.
 - b. He noted that this meeting represents his last as Chair of the House and thanked the House for the opportunity to serve. He thanked the departing members of the Executive Committee and the House for their service and thanked the staff for their support. He introduced Ms. Levin Wallach as the next Chair of the House.
16. New Business.
 - a. Uniform Rules for the Supreme Court and the County Court. Mr. Lewis proposed a motion adopting a resolution to request that the Administrative Board of the Courts stay the implementation of the rules for one year in order to provide an opportunity to study their impact. After discussion, the following resolution was adopted:

Be it resolved that based upon the significant concern expressed by the membership of NYSBA, that the President, or his designees immediately reach out to the administrative judges, the OCA, or the Chief Judge as is appropriate, to request an immediate meeting to discuss the staying the rules adopted by the Administrative Order AO/270/2020 dated December 31, 2020 by Chief Administrative Judge Marks for a period of one year so that

all stakeholders can adequately examine and comment on the rules as well as the impact that the rules will have on attorneys and their clients especially the underserved portion of our population and further to examine the cost and impact that these rules will have on access to justice by all segments of our population but especially amongst the underrepresented portions. It is further resolved that a copy of this resolution will be immediately delivered to the administrative board of the courts.

- b. Certification of Supreme Court Justices. Mr. Behrins proposed resolutions regarding the certification of Supreme Court Justices. After discussion, the following resolutions were adopted:

Moved that: A Committee be formed promptly to:

1. Report to the Executive Committee and the House of Delegates at the June 2021 meetings in order to consider whether to file an amicus brief in the New York Court of Appeals in the *Gesmer* litigation challenging the denial of certification for forty-six otherwise eligible senior New York Supreme Court Justices (three Justices were granted certification) – such a brief would provide the opportunity to put before the Court the New York State Bar Association’s policy on judicial retirement as it relates to the issues in dispute in that *Gesmer* litigation;

And,

2. Consider whether to support legislation introduced in the Senate and the Assembly to eliminate the discretionary denial of re-certification of New York Supreme Court Justices and advise the New York State Bar Association in this regard in the next 30 days so it will be in time to be heard during the current 2021 legislative session.

17. Date and place of next meeting. Mr. Brown announced that the next meeting of the House of Delegates would take place on Saturday, June 12, 2021. He also announced that the Fall 2021 meeting would be held as an in-person meeting at The Otesaga in Cooperstown.
18. Adjournment. There being no further business to come before the House of Delegates, the meeting was adjourned.

Respectfully submitted,



Sherry Levin Wallach
Secretary



SCOTT M. KARSON

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**Report of President Scott M. Karson to the
NYSBA House of Delegates
April 10, 2021**

My fellow delegates, friends, and colleagues, when I assumed the presidency of the New York State Bar Association last June, we were roughly three months into the coronavirus pandemic that has fundamentally changed the way our Association, our profession – and the world at large – operates.

At that time, I had no way of knowing how long this disruption would last. In fact, by June the pandemic had already lasted longer than I had imagined it would. I have a vivid memory of that day in March 2020 when my law office down on Long Island closed pursuant to the Governor’s executive order, and I naively told my colleagues at the firm that we’d be back in the office within a week! I never considered the possibility that one year later, I would hold the distinction of being the Association’s first all-virtual president in its 144-year history.

What I did know was that everything I thought my leadership of the Association would entail in the months leading up to my presidency would be drastically different. But while uncertainty has plagued us all throughout the pandemic, one thing remained certain – NYSBA’s resiliency and preparedness for what lay ahead.

My term started in unprecedented fashion when I was afforded the unique and unforgettable privilege of being installed as president of the Association via Zoom by New York's distinguished Chief Judge Janet DiFiore. That honor was repeated several weeks later when I was virtually installed once again, this time by Senior Associate Judge Jenny Rivera during the June 2020 meeting of our House of Delegates.

Zoom meetings became the norm at NYSBA. While you have heard me lament on prior occasions that nothing replaces the collegiality and camaraderie of an in-person NYSBA event, the Association has experienced record setting attendance during the pandemic for its virtual House of Delegates meetings and perhaps, even more notably, for our two-week all virtual Annual Meeting in late January 2021. I am very pleased to report that the Annual Meeting was a tremendous success with over 4,500 attendees, including many first-time attendees. The Presidential Summit, which featured Dean Erwin Chemerinsky of UC Berkeley School of Law and Dr. Irwin Redlener of Columbia University – known affectionately as the “E(I)rwins” – was a thoughtful discussion on the legal and constitutional issues surrounding the COVID-19 crisis. Even the virtual piano bar was an entertaining – and amusing – event that helped bring our members closer together.

Also, NYSBA continuing legal education programs have not failed to attract members to engaging and informative webinars, many of them helping lawyers stay updated on COVID-19 and its impact on their practices. The Trial Academy, led by Secretary Sherry Levin Wallach, was a virtual success, as was the virtual International Estate Planning Institute. Our sections and committees continue their diligent work with our CLE Department to prepare and produce timely

programs. Indeed, on a lighter note, the “The Ten Zoom Lessons Learned from ‘I Am Not A Cat’” webinar had over 500 registrants!

It is incredibly positive to see how engaged our membership remains despite the isolation that easily can be felt during these uncertain times. Your support helped me persevere during a period where not only the presidency of NYSBA – but life in general – was anything but normal.

It has also been wonderful to see such a positive reaction to the Association’s message in the public sphere. I have attempted to maintain the Association’s focus on its bedrock principle, adherence to the rule of law, particularly in my statements to the media, which have covered a broad range of subjects including criticism of unlawful conduct on the part of governments, assailing recurring incidents of gun violence, criticizing unwarranted attacks on the members of our profession for simply doing their jobs, and weighing in on the horrific January 6, 2021 Capitol riots.

NYSBA’s message with regard to the pandemic also generated attention from mainstream and legal media alike, especially after the great work of NYSBA’s Health Law Section, which recommended that New York consider mandating a COVID-19 vaccine once a scientific consensus emerged that it was safe, effective and necessary. NYSBA’s recommendations struck a balance between government’s responsibility to protect the majority of New Yorkers while safeguarding personal freedoms prescribed by the Constitution. A story on the recommendation in the New York Law Journal was the publication’s best-read story for months, demonstrating how influential NYSBA has become.

In response to the pandemic, I appointed three new task forces. The first task force I'm sure you are all familiar with by now – the Task Force on Attorney Well-Being – whose work became even more important after the pandemic hit given the impact it has had on our mental and physical health. But what you might not know is that an in-depth survey conducted by the task force will provide the most comprehensive data on lawyer well-being ever gathered in New York. I'm looking forward to the task force presenting its report to the House of Delegates this year.

Another task force is investigating why a disproportionate number of residents died from COVID-19 in nursing homes and long-term care facilities across the state. The task force will recommend regulatory and statutory changes to prevent such loss of life from ever happening again. And a third task force is examining issues of tort and contractual liability, as well as immunity from such liability and related business concerns.

Unrelated to COVID-19 but also vitally important is the work of our Task Force on Racial Injustice and Police Reform. Created in the aftermath of the horrific killing of George Floyd while in police custody, this task force remains hard at work to understand the issues that contribute to police misconduct and to provide recommendations to policymakers, law enforcement and the judiciary to end harmful policing practices that disproportionately impact persons of color. The trial of former Minneapolis Police Officer Derek Chauvin, which began at the end of March and is continuing as we gather here, reminds us of the significance of the task force's work.

I am extremely proud of the hard work of all these task forces and am looking forward to the coming weeks and months when they release their comprehensive reports and recommendations.

Another major accomplishment that occurred during my tenure was passage of the law NYSBA advanced to simplify the power of attorney form in New York. When the law was signed in December, it represented the collective work of many years of NYSBA leadership and advocacy, including that of many of my predecessors, and I am proud that it became law during my watch.

On March 11, Congress advanced NYSBA's federal legislative priority, stemming from the report of the Task Force on Mass Shootings and Assault Weapons that the House adopted last November, calling for background checks for the purchases of firearms. These two bills now move to the Senate, where Majority Leader Chuck Schumer has vowed to bring them to the Floor for a vote – President Biden remains personally committed to addressing gun violence.

President Biden's infrastructure plan, which calls for investing dollars to build high-speed broadband infrastructure to reach 100 percent coverage in the United States, would likewise advance priorities of the Association as vested in the House's adoption last April of the report of the Task Force on Rural Justice and in the adoption last June of a resolution calling for expanded broadband across New York State.

I am immensely proud of our member's commitment to diversity and inclusion. The Committee on Diversity and Inclusions' 28-day racial equity challenge during February – Black History Month – had over 400 participants. I am likewise proud to report that as of this writing all

Sections of the Association have submitted or are finalizing the submission of their own Diversity Plans, as required by the Diversity Plan adopted by this very House in January 2020. NYSBA also made history at our November House of Delegates meeting when the LGBTQ Section was launched. The group was converted from a committee to a section, which gives all NYSBA members the opportunity to participate in the section's work and allocates additional resources to expand its initiatives. Established in 2008, the Committee on LGBTQ People and the Law has served as a critical voice for members of the LGBTQ community and its allies. It was the work of that committee, as a matter of fact, that led me on behalf of NYSBA to sign and file an amicus brief in the United States Supreme Court in *Fulton v. City of Philadelphia* arguing that a religious organization with a government contract to provide foster care services cannot discriminate against same sex couples who wish to become foster parents. This case has been argued before the Supreme Court and we await a decision.

When I began my term as president, I encouraged all my colleagues – from seasoned lawyers and leaders of the bar to newly admitted lawyers – to take on pro bono work in the coming year, particularly during this time when there are so many people truly in need of help. You stepped up and answered the call. And I'm proud to report that I kept myself true to my word and my campaign pledge, and I am now handling a pro bono appeal in the Appellate Division, Fourth Department through the NYSBA Pro Bono Appeals Program.

In fact, during Chief Judge DiFiore's "State of Our Judiciary" address, she said New Yorkers "owe a debt of gratitude" for the generous pro bono service provided by thousands of lawyers and law firms. She then highlighted the work of NYSBA's COVID-19 Pro Bono Recovery Task Force. The task force – implemented by Immediate Past President Hank Greenberg last year

when the pandemic began and continued during my term – has recruited over 1,000 pro bono lawyers to assist New Yorkers with various pandemic-related legal problems, including Unemployment Insurance Appeals and matters in the Surrogate’s courts to provide free legal assistance in probate matters to individuals and families who lost loved ones to COVID-19.

Against the backdrop of this unprecedented pandemic year, NYSBA faces some critical milestones in 2021. Chief among them is the fact that our lease at One Elk will expire on December 31st. The Association continues to have conversations with The New York Bar Foundation, which, as you know, owns One Elk, to explore all options. To date, the only formal proposal received from The Foundation was contained in a letter addressed to me from Foundation Vice-President Carla Palumbo dated March 11, 2021, wherein The Foundation proposed a three-year extension of the current lease at an annual rental of \$302,000 per annum (representing a rent freeze of the current base rent now in effect) and containing an expression of willingness on the part of The Foundation to come to terms regarding a greater contribution to the Association concerning The Foundation’s administrative expenses. The other terms of the current lease, including the Association’s responsibility for repairs and maintenance of the premise, would remain in full force and effect. Thus, The Foundation’s proposal amounted to a continuation of the status quo for three additional years. This proposal is contrary to the urgency to act now faced by the Association.

We are all deeply and emotionally connected to our current space and have made many positive memories there. However, the expiration of the lease presents an opportunity to reassess the Bar Center’s space needs within the context of changes wrought by the pandemic – both physical and

fiscal. There is also a financial reality to consider: One Elk requires millions of dollars in renovations and repairs in order to make it safe and accessible to our members, staff and visitors.

As I have mentioned, NYSBA was able to quickly shift to an almost entirely virtual operation not long after the pandemic caused widespread shutdowns last year. Our staff didn't miss a beat and continued to provide services and meet member needs while working remotely. We also had success with our online CLE programs, member engagement and our digital communications.

The current rent paid by the Association on One Elk is \$302,229 a year. In addition, the Association is responsible for maintaining insurance for physical loss, property damage and personal injury; all maintenance expenses – both exterior and interior; all taxes; and all utilities. In 2020 alone, these costs added up to more than \$1.1 million. Over the past decade, NYSBA has paid more than \$10 million in rent and lease-related costs for One Elk.

With the necessary repairs and renovations One Elk requires, which are not something we can overlook or forgo, this figure will be much higher over the next 10 years. Projections show that the Association would incur total annual costs of \$1.87 million for the coming decade. That is a total of over \$18 million dollars.

We must face facts. The Association has seen its revenue decline for several years now and has only been able to remain within its budget by making significant cuts on the expense side of its ledger – both in staff and programs. In 2017, the Association had 125 full-time employees. We currently have 89. Programs hit due to the fiscal crisis include two in which I have been involved and which are near and dear to me, Law, Youth and Citizenship and the Trial Academy. Over the

last 5 years, while we have made difficult cuts to staff, programming, and services for our members, the costs of renting and maintaining One Elk and funding business operations have increased.

How we choose to invest our members' dollars over the next several years as the post-pandemic economic recovery continues is critical. We have a responsibility to not only safeguard their investment in the Association, but also preserve NYSBA's ability to serve its members and the public well into the future. As we know all too well now, the future is both unpredictable and fraught with potential challenges. It is imperative that we make smart decisions that put our Association on sound fiscal footing.

As you may know, I have designated a lease negotiation team for the Association, chaired by former NYSBA President David Miranda and also including Sandra Rivera and Michael McNamara. The lease negotiation team chair, David Miranda, will update you all on the conversations the Association has had with the Foundation and its responses to date. The negotiation team has spent months working tirelessly on this issue, and I want to extend my deepest and most profound gratitude to them for their efforts.

On a personal note, I have been privileged to serve alongside a group of incredibly talented and hard-working officers, including President Elect T. Andrew Brown, Secretary Sherry Levin Wallach, who will become president-elect in June, Treasurer Domenick Napoletano and Immediate Past President Hank Greenberg. Each and every one of them has my respect and gratitude, and I am confident that their continuing leadership will serve our Association and its members well.

I also want to express my gratitude to the Association's dedicated staff, led by Executive Director Pamela McDevitt, for the support and assistance they have provided to me and their unwavering service to NYSBA during these unprecedented times.

I also thank and congratulate you, the members of the House of Delegates, for your service on this body – the heart and soul of our Association. I look forward to continuing to serve with you as a member of the House in the years to come.

My fellow members, as this is my final report to the House as your President, I can report to you without hesitation that my presidency has been one of the most rewarding experiences of my life – virtual though it was. Together, we have demonstrated once again how vital the work is that the Association does to support our profession and its most sacred ideals, the rule of law and democracy itself. I am looking forward to celebrating and continuing that work by your side once again when the pandemic subsides.

Thank you.

**NEW YORK STATE BAR ASSOCIATION
2021 OPERATING BUDGET
FOUR MONTHS OF CALENDAR YEAR 2021**

REVENUE

	2021 BUDGET	ADJUST- MENTS	2021 BUDGET AS ADJUSTED	UNAUDITED RECEIVED 4/30/2021	% RECEIVED 4/30/2021	2020 BUDGET	UNAUDITED RECEIVED 4/30/2020	% RECEIVED 4/30/2020
MEMBERSHIP DUES	8,764,295		8,764,295	8,995,561	102.64%	9,732,250	8,623,328	88.61%
SECTIONS:								
Dues	1,200,000		1,200,000	1,127,424	93.95%	1,321,800	1,175,912	88.96%
Programs	1,733,315		1,733,315	231,290	13.34%	3,123,430	682,478	21.85%
INVESTMENT INCOME	494,420		494,420	60,318	12.20%	500,800	61,863	12.35%
ADVERTISING	183,000		183,000	69,520	37.99%	250,000	51,709	20.68%
CONTINUING LEGAL EDUCATION	2,950,000		2,950,000	948,680	32.16%	3,220,000	1,475,438	45.82%
USI AFFINITY PAYMENT	2,154,000		2,154,000	714,548	33.17%	2,306,000	863,081	37.43%
ANNUAL MEETING	276,225		276,225	490,200	177.46%	1,312,000	1,596,946	121.72%
HOUSE OF DELEGATES & COMMITTEES	27,000		27,000	2,598	9.62%	174,750	20,331	11.63%
PUBLICATIONS, ROYALTIES AND OTHER	210,700		210,700	54,369	25.80%	216,200	84,884	39.26%
REFERENCE MATERIALS	1,300,000		1,300,000	167,883	12.91%	1,250,000	129,852	10.39%
TOTAL REVENUE	19,292,955	0	19,292,955	12,862,391	66.67%	23,407,230	14,765,822	63.08%

EXPENSE

	2021 BUDGET	ADJUST- MENTS	2021 BUDGET AS ADJUSTED	UNAUDITED EXPENDED 4/30/2021	% EXPENDED 4/30/2021	2020 BUDGET	UNAUDITED EXPENDED 4/30/2020	% EXPENDED 4/30/2020
SALARIES & FRINGE	8,334,264		8,334,264	2,487,393	29.85%	8,790,034	2,838,345	32.29%
BAR CENTER:								
Rent	284,000		284,000	82,137	28.92%	284,000	107,323	37.79%
Building Services	365,000		365,000	95,589	26.19%	397,000	100,120	25.22%
Insurance	164,000		164,000	63,721	38.85%	170,000	39,516	23.24%
Taxes	180,250		180,250	100,201	55.59%	7,750	81,490	1051.48%
Plant and Equipment	893,500		893,500	280,285	31.37%	890,500	236,428	26.55%
Administration	526,100		526,100	144,550	27.48%	537,600	219,316	40.80%
SECTIONS	2,920,715		2,920,715	185,948	6.37%	4,445,230	1,467,643	33.02%
PUBLICATIONS:								
Reference Materials	248,800		248,800	30,730	12.35%	312,800	32,650	10.44%
Journal	245,700		245,700	85,966	34.99%	396,500	116,354	29.35%
Law Digest	75,000		75,000	18,126	24.17%	156,000	40,671	26.07%
State Bar News	85,500		85,500	37,569	43.94%	122,300	29,945	24.48%
MEETINGS:								
Annual Meeting	24,250		24,250	38,811	160.05%	714,700	917,332	128.35%
House of Delegates, Officers and Executive Committee	309,000		309,000	80,336	26.00%	468,825	93,625	19.97%
COMMITTEES:								
Continuing Legal Education	435,000		435,000	37,367	8.59%	1,480,500	232,840	15.73%
LPM / Electronic Communication Committee	1,400		1,400	-	0.00%	38,100	18,072	47.43%
Marketing / Membership	850,000		850,000	183,651	21.61%	877,050	239,443	27.30%
Media Services	269,450		269,450	85,533	31.74%	144,720	89,774	62.03%
All Other Committees and Departments	2,590,135		2,590,135	768,621	29.67%	2,983,790	1,097,810	36.79%
TOTAL EXPENSE	18,802,064	0	18,802,064	4,806,534	25.56%	23,217,399	7,998,697	34.45%
BUDGETED SURPLUS	490,891	0	490,891	8,055,857		189,831	6,767,125	

**NEW YORK STATE BAR ASSOCIATION
STATEMENTS OF FINANCIAL POSITION
AS OF APRIL 30, 2021**

<u>ASSETS</u>	<u>UNAUDITED</u> <u>4/30/2021</u>	<u>UNAUDITED</u> <u>4/30/2020</u>	<u>UNAUDITED</u> <u>12/31/2020</u>
Current Assets:			
General Cash and Cash Equivalents	17,537,214	13,145,143	16,151,359
Accounts Receivable	89,635	139,146	30,527
Prepaid expenses	642,521	943,998	602,714
Royalties and Admin. Fees receivable	637,625	768,671	803,397
Total Current Assets	18,906,995	14,996,958	17,587,997
Board Designated Accounts:			
<u>Cromwell Fund:</u>			
Cash and Investments at Market Value	3,157,994	2,413,152	2,962,151
Accrued interest receivable	0	0	0
	3,157,994	2,413,152	2,962,151
<u>Replacement Reserve Account:</u>			
Equipment replacement reserve	1,117,863	1,117,733	1,117,826
Repairs replacement reserve	794,576	794,483	794,550
Furniture replacement reserve	220,008	219,982	220,000
	2,132,447	2,132,198	2,132,376
<u>Long-Term Reserve Account:</u>			
Cash and Investments at Market Value	32,304,925	24,300,345	30,108,641
Accrued interest receivable	0	0	117,962
	32,304,925	24,300,345	30,226,603
<u>Sections Accounts:</u>			
Section Accounts Cash equivalents and Investments at market value	4,037,480	3,991,634	4,046,948
Cash	1,172,766	390,748	229,979
	5,210,246	4,382,382	4,276,927
Fixed Assets:			
Furniture and fixtures	1,463,037	1,448,300	1,463,037
Leasehold Improvements	1,470,688	1,470,688	1,470,688
Equipment	3,995,201	10,410,562	3,906,126
Telephone	0	107,636	0
	6,928,926	13,437,186	6,839,851
Less accumulated depreciation	4,241,989	10,393,121	3,993,589
Net fixed assets	2,686,937	3,044,065	2,846,262
Total Assets	64,399,544	51,269,100	60,032,316
<u>LIABILITIES AND FUND BALANCES</u>			
Current liabilities:			
Accounts Payable & other accrued expenses	463,986	689,438	784,252
Deferred dues	0	233,582	6,165,151
Deferred income special	153,845	384,615	230,768
Deferred grant revenue	29,906	29,906	29,906
Other deferred revenue	214,606	55,887	888,104
PPP Loan Payable	1,482,957	0	0
Unearned Income - CLE	0	48,474	0
Payable To The New York Bar Foundation	1,585	9,142	19,965
Total current liabilities & Deferred Revenue	2,346,885	1,451,044	8,118,146
Long Term Liabilities:			
Accrued Other Postretirement Benefit Costs	8,826,735	8,165,883	8,706,735
Accrued Supplemental Plan Costs and Defined Contribution Plan Costs	127,377	120,000	299,674
Total Liabilities & Deferred Revenue	11,300,997	9,736,927	17,124,555
Board designated for:			
Cromwell Account	3,157,994	2,413,152	2,962,151
Replacement Reserve Account	2,132,447	2,132,198	2,132,376
Long-Term Reserve Account	23,350,813	16,014,462	21,102,232
Section Accounts	5,210,246	4,382,382	4,276,927
Invested in Fixed Assets (Less capital lease)	2,686,937	3,044,065	2,846,262
Undesignated	16,560,110	13,545,914	9,587,813
Total Net Assets	53,098,547	41,532,173	42,907,761
Total Liabilities and Net Assets	64,399,544	51,269,100	60,032,316

New York State Bar Association
Statement of Activities
For the Four Months Ending April 30, 2021

	<u>April 2021</u>	<u>April 2020</u>	<u>December 2020</u>
REVENUES AND OTHER SUPPORT			
Membership dues	8,995,561	8,623,328	9,339,925
Section revenues			
Dues	1,127,424	1,175,912	1,216,608
Programs	231,290	682,478	769,606
Continuing legal education program	948,680	1,475,438	3,043,386
Administrative fee and royalty revenue	776,203	941,378	2,594,862
Annual meeting	490,200	1,596,946	1,582,326
Investment income	141,580	216,940	1,469,869
Reference Books, Formbooks and Disk Products	167,883	129,852	1,032,334
Other revenue	64,831	109,101	236,995
	<u>12,943,652</u>	<u>14,951,373</u>	<u>21,285,911</u>
PROGRAM EXPENSES			
Continuing legal education program	239,413	528,311	1,260,881
Graphics	384,721	462,363	1,222,630
Government relations program	92,543	152,211	476,962
Law, youth and citizenship program	-	16	(185)
Lawyer assistance program	11,581	65,756	216,082
Lawyer referral and information services	-	6,620	14,518
Law practice management services	17,221	16,217	58,309
Media / public relations services	211,983	283,109	726,958
Business Operations	-	231,375	1,461,003
Marketing and Membership services	441,755	496,881	1,293,354
Pro bono program	60,732	60,212	187,586
Local bar program	-	28,545	41,105
House of delegates	80,317	79,887	198,716
Executive committee	19	13,738	14,020
Other committees	34,979	273,072	337,223
Sections	185,948	1,467,643	1,756,235
Section newsletters	80,855	57,356	192,810
Reference Books, Formbooks and Disk Products	209,107	214,549	726,284
Publications	141,661	186,969	462,750
Annual meeting expenses	38,811	917,332	958,195
	<u>2,231,646</u>	<u>5,542,162</u>	<u>11,605,436</u>
MANAGEMENT AND GENERAL EXPENSES			
Salaries and fringe benefits	1,065,304	1,021,256	2,607,343
Pension plans and other employee benefit plan costs	228,212	220,262	932,832
Rent and equipment costs	475,017	450,717	1,435,041
Consultant and other fees	558,854	424,950	1,379,868
Depreciation and amortization	248,400	200,000	657,511
Other expenses	2,569	142,572	215,728
	<u>2,578,356</u>	<u>2,459,757</u>	<u>7,228,323</u>
CHANGES IN NET ASSETS BEFORE INVESTMENT TRANSACTIONS AND OTHER ITEMS			
	8,133,650	6,949,454	2,452,152
Realized and unrealized gain (loss) on investments	2,057,138	(2,256,336)	3,590,055
Realized gain (loss) on sale of equipment	-	-	26,500
CHANGES IN NET ASSETS			
	10,190,788	4,693,118	6,068,707
Net assets, beginning of year	<u>42,907,759</u>	<u>36,839,052</u>	<u>36,839,052</u>
Net assets, end of year	<u>53,098,547</u>	<u>41,532,170</u>	<u>42,907,759</u>

**Report and Recommendation of the Lease Negotiation
Committee
on One Elk Street**

June 10, 2021

David P. Miranda, Chair
Michael J. McNamara
Sandra D. Rivera

House of Delegates Agenda Item #6

Whereas, the New York State Bar Association and The New York Bar Foundation are parties to a lease, as tenant and landlord respectively, for property at One Elk Street, Albany, New York, that ends on December 31, 2021; and

Whereas, the Association and Foundation have concluded negotiations regarding future use of One Elk Street; and

Whereas, the Association President signed a Memorandum of Understanding with the Foundation on May 20, 2021 calling for the transfer of One Elk Street from the Foundation to the Association subject to, inter alia, the approval of the Association's House of Delegates;

Now, therefore, it is

Resolved, that the House of Delegates hereby approves the May 20, 2021 Memorandum of Understanding, subject to the terms and conditions set forth therein and the provisions of this Resolution:

Further resolved, that the Association President is authorized to conduct necessary due diligence, including but not limited to obtaining the written opinions of counsel regarding any tax implications, fundraising matters, and approval of the Attorney General concerning the proposed transaction;

Further resolved, that the Association President is authorized to enter into a final agreement regarding the property transfer as outlined in the Memorandum of Understanding.

Report of the Lease Negotiation Committee on the Status of the Lease at One Elk Street and Necessary Renovations

David P. Miranda, Chair
Michael J. McNamara
Sandra D. Rivera



INTRODUCTION

The Association leases the Bar Center at One Elk Street from The New York Bar Foundation (Foundation). The current lease, which dates from 1991, and was amended and extended in 2007, expires on December 31, 2021 (*See Attachment 1, 1 Elk Lease Agreement Including 2007 Amendment*). In September 2020, President Scott M. Karson appointed a lease negotiation committee comprised of David P. Miranda, Michael McNamara, and Sandra Rivera. This committee was charged with reviewing the present lease, the current use of the Bar Center, the Association's needs going forward, and also was tasked with negotiating a long-term facilities plan.

HISTORY

Founded in 1876, the New York State Bar Association rented space in a number of Albany locations (its first official office was a room on the first floor of the State Capitol) before acquiring its own headquarters at 99 Washington Avenue in 1953 (*See Attachment 30 – New York State Bar Center Rededication Booklet 1990*).

The Association remained headquartered at 99 Washington Avenue until the planned building of One Commerce Plaza necessitated the demolition of the building and forced our relocation. The Association proceeded to purchase four townhouses two blocks away on Elk Street. Although the Association originally planned to demolish these buildings in favor of new construction, opposition from historic preservationists ultimately resulted in maintaining the facades of three of the townhouses with a modern building behind them. The rowhouse designated as 1 Elk Street. was not able to be saved and was demolished. The new Bar Center was dedicated in 1971.

The original Bar Center space occupied numbers 1 through 4 Elk Street and faces Academy Park. The design combines a new building with three 19th century town houses, welding them together to form a single, functional complex. This unique combination of historic architecture and award-winning contemporary design led former *New York Times* design critic, Ada Louise Huxtable, to write that the building “...is one of the neatest architectural achievements in the country...it is a sophisticated triumph in the most delicate, complex and poorly understood art of the environment: urban design” (*Id.*).

The project won the 1969 Progressive Architectural Award from the American Institute of Architects. It was formally dedicated on September 24, 1971. The Association has since received widespread acclaim for the preservation of a section of the historically significant Elk Street/Academy Park neighborhood. The result of the State Bar's civic-minded preservation led to the Department of Interior recognizing the Bar Center as worthy of inclusion in the National Register of History Places (*Id.*).

The uniqueness of the Bar Center's design was highlighted in a 1987 book written by Ms. Huxtable, entitled "Goodbye History, Hello Hamburger," in which she recounts the remarkable creation "of a building for the New York State Bar Association out of three row houses adjacent to the State Capital." As Huxtable tells it, "the preservation of three architecturally middling but urbanistically significant row houses occasioned a marshalling of many preservation interests. A classic case for historic district preservation resulted, to which the Bar Association and its architect, James Stewart Polshek, a fellow of the American Institute of Architects, responded successfully" (*Id.*). She writes, "the result is a demonstration project of how to use the past without turning it into a charade and how to extend its fabric functionally into the 20th century for the best kind of living environmental continuity" (*Id.*).

There was a need for additional space by the 1980's, as the Association grew in both membership and staff. In 1986, the Bar Center was transferred from the Association to the Foundation. The Foundation acquired the townhouses at 5 and 6 Elk St., and a capital campaign was planned to incorporate those townhouses and additional office space into the existing Bar Center. The expanded Bar Center was rededicated in 1990. No capital fundraising for building improvements has occurred in the 30 years since the rededication ceremony. The building and property were assessed at \$3,237,500 in 2020. (*See Attachment 5, 1 Elk Appraisal at 12*). An independent appraisal in 2021 valued the building and property at \$3.7 million, without considering necessary renovations. (*See Attachment, 1 Elk Appraisal*).

HISTORIC PRESERVATION

When the Bar Center was expanded, it was agreed that in order to address historic preservation concerns some of the ground floor areas of 5 and 6 Elk should maintain their historic character. While the ground floor of 5 Elk had been gutted by fire, the space could serve as a board room, with the current Peck Room featuring wall murals depicting the Elk Street area as it might have appeared at the time of the Association's founding. In 6 Elk, the front parlor was recreated as it had been in the 1880's, using a painting of the space at the Albany Museum of History and Art as a guide, with a dining room featuring a backlit stained-glass window. When 5 and 6

Elk were acquired, the latter still had its original four-story winding staircase with a stained-glass skylight at the top. While historic preservationists wanted to maintain the staircase in its entirety, the Albany Fire Department objected on the basis that it could cause a chimney effect in the event of a fire. One flight of stairs was retained as a compromise. Historic preservation restrictions remain in these areas of the Bar Center along with the building façade located on Elk Street.

ACCESSIBILITY

Because of the design, construction, and historic preservation restrictions of the building, full access for individuals with disabilities has always presented difficulties (*See Attachment 19, Correspondence Received from NYSBA Disability Rights Chair Regarding 1 Elk Accessibility Issues.*). The five townhouses do not have street-level access, requiring individuals with disabilities to use one of the rear entrances. There is no sidewalk directly behind the building, which means that visitors must park on the street and use the sidewalk and steps to reach an entrance. Any plan to improve street-level access in the front of the building would alter the historic appearance of the townhouses. There is limited on-site parking, with a total of 42 spaces allocated to employees and nothing available for guests, who must pay for parking either on the street or in a nearby garage.

Inside the building, there are several areas with split levels and stairs impeding access across the floors, as the original townhouses did not have floor levels at the same height. For example, it is difficult for an individual who has trouble walking to go from the main lobby to the Cromwell Room or the President's Office because there is a flight of several steps in the hallway. Most of the bathrooms and elevators at One Elk were constructed prior to 1991 (when the ADA was passed) and must be updated to meet current accessibility standards.

ASSOCIATION-FOUNDATION RELATIONSHIP

As the Association is a 501(c)(6) tax-exempt organization, donations to the Association are not tax-deductible. The Association's status as a 501(c)(6) organization enables it to engage in governmental relations activities that would otherwise not be permitted. The Foundation, by contrast, is a 501(c)(3) tax-exempt organization, and contributions it receives are tax-deductible. The Foundation was formed in 1950, as "Foundation of the New York Bar Association, Inc."

The purposes set forth in the 1950 Certificate of Incorporation included: [t]o apply its income ... to the use of the New York State Bar Association for the following charitable purposes ... (1) to facilitate and improve the administration of justice; (2) to facilitate the cultivation and diffusion of knowledge and understanding of the law

and the promotion of the study of the law ... through the maintenance of a law library, and the publication of addresses, essays, treatises, reports and other literary works ...; (3) to provide for the acquisition, preservation and exhibition of rare books and documents, sculptures, paintings and other objects of art and historical interest relating to the law, the courts, and the legal profession.

In 1975 the Foundation's Certificate of Incorporation was amended. It was renamed "The New York Bar Foundation," and its purposes were restated as the following: to advance legal research and education; to improve the administration of justice; to promote professional ethics and responsibility and service to the public; to cultivate the preservation of the history and traditions of the law, the courts and the legal profession; to encourage better public understanding of our legal heritage; to aid in making legal institutions more responsive to the public interest; and to sponsor studies, conferences, publications, and any and all other means of discourse, communication and exchange of ideas appropriate to the foregoing.

As noted in the January 1975 President's Message of then-President Whitney North Seymour, Jr., the amendment was intended to broaden the Foundation's outreach beyond the Association to also serve the profession generally. The connection with the Association is maintained in the membership of the Foundation, which consists

of the members of the Association's House of Delegates. Since the 1975 amendment, the Foundation created the Fellows of The New York Bar Foundation, who commit to financially support the Foundation; establish memorial gifts and matching gifts programs; and establish endowed and restricted funds. (*See Attachment 21, TNYBF Bylaws 2018-2019*).

Since the formation of the Foundation, two capital campaigns have been conducted for the Bar Center. From 1967-1971 the Foundation was instrumental in efforts to raise \$1,600,000 to build the Bar Center, and from 1986-90 \$6,800,000 for the Bar Center's expansion – a total of over \$24,000,000 in today's dollars. The historic financial support through the Foundation for building and expanding the Bar Center is important in understanding the basis for the 1991 facilities lease requiring NYSBA to pay the Foundation rent, and all utilities, expenses, upkeep repairs (internal, external, and structural), and taxes for premises owned by the Foundation.

The relationship between the Association and The Foundation has significantly evolved since the 1975 amendments to the Certificate of Incorporation, and in the thirty years since the expansion of the Bar Center in the late 1980s. Foundation revenue in recent years includes Association contributions of approximately 47.666% per annum (*See Chart – TNYBF Contributions and Other Revenue*). These

contributions include rental income from the Association to The Foundation (\$302,229 per annum); NYSBA member unrestricted contributions from dues renewal (\$171,237 in 2018, \$157,081 in 2019, and \$144,000 in 2020); and restricted fund contributions from the NYSBA Sections (\$66,200 in 2018, \$106,500 in 2019, \$82,000 in 2020) (*See Id.*). This 47.666% per annum figure also does not reflect the significant staffing and administrative support that the Association provides to The Foundation. This support includes, for the year 2020, human resources support of \$7,621; marketing and design services of \$30,707; print shop and graphics services of \$6,707; accounting services of \$138,312; and IT support and services of \$27,238, for a total \$210,585 of direct support and services in 2020. This total does not include any collateral support provided by other public facing NYSBA departments, including Executive Staff and Sections and Meetings Services, nor does it incorporate complete costs associated with the transition to a completely new association management system in 2020.

The New York State Bar Association and The New York Bar Foundation are organizations joined by the mutual ties of a shared membership, similar mission, and interconnected histories. The membership of The Foundation consists of the members of the House of Delegates, and The Foundation President is often invited to give a report at each meeting of the House of Delegates concerning the ongoing

charitable work of the organization. Thousands of NYSBA members make charitable contributions to The Foundation each year; and many of the Fellows and officers of The Foundation also occupy leadership roles within the Association, including within the various sections and committees.

The mission of the New York State Bar Association, as a non-for-profit membership organization, is centered on advocacy on behalf of the legal profession, the rule of law, and the science of jurisprudence. The Association's Bylaws acknowledge the importance of such goodwill as an integral part of NYSBA's purpose. Article II of the Bylaws expressly refers to several purposeful goals of the Association, including "to elevate the standard of integrity, honor, professional skill and courtesy in the legal profession; to cherish and foster a spirit of collegiality among members of the Association; [and] to apply its knowledge and experience in the field of the law to promote the public good." The Association's motto is "Do The Public Good" and its support of The Foundation furthers that goal.

The goals of The Foundation, in comparison, center on improving the administration of justice, advancing service to the public by the legal profession, and supporting legal research, education, and an understanding of our proud legal heritage here in New York State. The Foundation was established to function as the charitable arm

of the Association and help the legal profession of New York State meet the purposeful goals and “do the public good.”

The shared history of the two organizations is full of numerous examples of this strong partnership, including the production of educational and historical programming and events, the sponsorship of charitable drives on behalf of individual NYSBA sections, and, of course, the historic shared campaign to build and renovate the Bar Center at One Elk Street. This mutual partnership has enhanced the great work of our Association, and, if properly attended and nurtured, will advance the mission, meet the goals, and serve the members of both organizations into the future.

CURRENT LEASE

Under the current Foundation-Association lease, the Association pays the Foundation rent calculated based on a percentage increase in the Consumer Price Index for All U.S. Consumers, All Items, U.S. City Average (CPI-U) (*See Attachment 1, 1 Elk Lease Agreement Including 2007 Amendment*). The current rent is \$302,229 annually, with monthly payments in the amount of \$25,185.75.

There is no reduction in rent if there is a decrease in the CPI-U. The Association is responsible for maintaining insurance for physical loss, property damage and

personal injury, all maintenance expenses, both exterior and interior, all taxes, and all utilities. For 2020, these additional costs were \$864,335. Due to a change in enforcement of the laws of the City of Albany, the Bar Center lost its tax-exempt status in 2019, and in 2020 NYSBA paid approximately \$164,995 in taxes. (*See Attachment 4, NYSBA/Foundation Complaint on Real Property Assessment 2020 – Filing to grieve the denial of tax-exempt status of 1 Elk*). These total costs, including rent, taxes, maintenance, and utilities were about \$1.1 million for the 2020 fiscal year.

TAX ASSESSMENT

Under the current lease, the Association is responsible for the payment of taxes on the Bar Center. Until 2011, the Association paid regular property tax assessments to the City of Albany, having been advised that the property was not entitled to an exemption. In 2011, the Foundation submitted an application to the city for exemption from taxes pursuant to RPTL §420-a (mandatory exemption for property used for charitable purposes); the exemption was granted. In 2019, the City of Albany applied an ordinance providing that property being used for a bar association is not tax exempt and determined that the property is not entitled to an exemption based on RPTL §420-b (permissive exemption for not-for-profits). That determination is the subject of a current RPTL Article 7 proceeding in Supreme

Court, Albany County. When asked to share in the Association’s cost of the legal challenge the Foundation chose not to, noting correctly, they had no obligation to do so under the current lease. The Association is now paying property taxes of approximately \$165,000 per year, and incurring all costs related to the legal challenge.

NYSBA STAFFING AND BUDGET

In 2017, NYSBA had approximately 125 full time employees, and there were no remote employees. Currently, NYSBA has 89 full time employees (including 5 at the print shop in Green Island, NY). Several of these positions are remote. NYSBA expects to have a full-time staff of 95 by the end of 2021. However, some will be located outside of the Albany area and continue remote working permanently. Remote capabilities enable NYSBA to obtain employees with expertise necessary to its future success and also improve the diversity of its workforce.

In 2018, NYSBA outsourced its entire IT department to a Maryland-based company whose employees – working remotely – handled the entire data migration of NYSBA’s antiquated member data system to Salesforce, the new Association Management System (“AMS”). Having the flexibility to acquire talent from outside its immediate geographic area made the transition easier and provided NYSBA with

some security in that it had retained a group with the required expertise to implement the data migration and technological transition. NYSBA also retained a Chicago-based company to redesign the website. The locations of these respective companies were not an impediment to the projects, and in fact, the retention of these companies enabled NYSBA to ensure it was able to receive the best possible services for its money, uninhibited by the personnel confines of the Capital Region or New York State boundaries.

As a result of the pandemic, the traditional workday and in-person office requirements have been upended. According to some studies and reports, the pre-pandemic model will not return – perhaps ever – as many employees prefer at the very least a hybrid model of virtual and in-person work and have demonstrated that productivity has not been negatively impacted as a result. In fact, productivity has improved as workers are able to fit their work around their personal and familial responsibilities.

The Finance Committee has prepared revenue and expense projections based on trends over the past 10 years (*See Report of the Finance Chair – April 2021*). Current projections anticipate that the Association will incur a deficit budget in future years, regardless of its facilities location. A significant reason the Association is not

already in a deficit budget is because of substantial cuts in staffing and services made in 2017, when it faced a deficit of over a million dollars, and further cuts in 2020 due to the COVID-19 crisis. The pandemic, coming in the late winter of last year, impacted membership renewals and associated revenue projection.

FACILITY SPACE

The Bar Center has 60,119 square feet of available space, including the basement and the garage. There is about 42,000 square feet of above ground, professional work, and office space. Of the 60,119 square feet, 40% is not fully utilized and within the remaining 60% of the leased space, there are some inefficiencies (*See Attachment 11, MADesign Architecture – Space Needs Analysis and Memo*). Office space of approximately 300 square feet is allocated to the Foundation staff in the building.

Flexible work from home models (or some combination of work at the office and work from home) have grown and even when the pandemic ends will likely become more common. As a result of this trend, and considering the significant challenges presented by the current buildings, the role of the Bar Center and NYSBA's physical footprint should be examined. It is estimated that needs of the NYSBA workforce will require approximately 23,000-27,000 square feet professional office space, not

counting larger meetings such as the House of Delegates meetings and other large receptions that take place in the Great Hall. That leaves approximately 10-15,000 square feet of professional office space at One Elk potentially available for alternative uses.

PRINT SHOP

NYSBA also leases a 19,612 square footprint facility in Green Island, NY (*See Attachment 15, NYSBA Green Island Print Shop Lease Agreement 2009-2024*). The lease began on April 23, 2009 and will expire on December 31, 2024. The annual rent for the facility is \$231,814. Since 2015, NYSBA full time staff at the print shop has been reduced from 14 to 6. During that period, printing for CLE and section events was reduced by 42% from 2015 – 2020 and direct mail was reduced by 37% (*See Attachment 17, NYSBA Continuing Legal Education and Publications 2019-2020 – Production and Efficiency Comparison Pre and Post Pandemic*). Digital platforms have disrupted the print industry and NYSBA has invested a significant sum to acquire the technological tools necessary to improve the speed and accessibility of our content to our members. Print will remain an important communication tool, but the reduction in the amount of print will necessitate eliminating the print shop space when the lease ends in 2024. It is expected that by the time the print shop lease expires, NYSBA will be able to incorporate a more

modest print shop into One Elk Street in Albany, for additional savings. (*See Attachment 16, Analysis of NYSBA Print Shop Needs and Staffing 2015-2021*).

NEED FOR RENOVATIONS

In anticipation of the need to transition the NYSBA print shop capabilities out of the current print facility in Green Island, NYSBA retained the services of Synthesis Architects, LLP of Schenectady, New York, to see if it was possible to reconfigure the basement at One Elk Street to accommodate the necessary print shop equipment (*See Attachment 9, NYSBA Facilities Director's Listing of Improvements and Repairs Needed – Considerations and Costs to Remain at 1 Elk*). Synthesis also noted that the building's heating and ventilation systems were outdated and in need of renovation and that the building's restrooms and elevators are in need of repair and renovation in order to increase accessibility (*See Attachment 8, Informational Document from Synthesis Architects on Ventilation Improvements*). Because the One Elk Street facility consists of multiple, interconnected, independent buildings, it is challenging to easily provide access throughout the building to persons with difficulty walking (*See Attachment 13, Building Scan by Chase Pierson of Scan2Plan – Professional Blueprints of 1 Elk July 2020*). This challenge is further compounded by historical preservation requirements that prohibit any major structural changes to the front facade of the building on Elk Street.

Expert analysis confirms the need for substantial and significant renovations and repairs to the entire One Elk property. Synthesis advised that accessibility would be improved if the main entranceway to the building were located off Eagle Street, with a central system of elevators and restrooms, creating a new center hub of the building off of the new Eagle Street entrance. Synthesis provided initial architectural drawings and cost estimates of renovations required on Elk Street, to consolidate print shop operations, improve handicap accessibility, have appropriately accessible restrooms, upgrade the ventilation, heating, and cooling systems, and provide a centralized ADA compliant elevator system. NYSBA has looked into whether the renovations could be performed in phases, and it is estimated that the most urgent needs will cost approximately \$4.8 million over the next three years.

The Association retained the services of Metropolis Group, Inc. (“Metropolis”), to ascertain the current site conditions at the One Elk property. Two members of Metropolis’ staff visited One Elk on February 16, 2021, and spent several hours touring and examining the property. Additionally, the Metropolis consultants reviewed the property records available at the City of Albany’s Department of Buildings and Regulatory Compliance. Metropolis subsequently prepared a Due Diligence Report based on these findings. The Report addresses, among other considerations, code compliance, handicap (ADA) accessibility, accessible routes,

accessible parking, elevators, bathrooms, mechanical and electrical systems, and the fire alarm system (*See Attachment 26 – Metropolis Due Diligence Report – One Elk Street*). The findings contained in the Due Diligence Report, including challenges to making the premises fully accessible, warrant the attention of the Association, (*See Id. at 5*). As an association that promotes diversity and inclusion, there is a strong desire for its home to be fully accessible to all members, staff, and guests. Work on necessary renovations will naturally implicate compliance issues, and Metropolis concluded that any proposed alterations and repairs will address these issues. (*See Id. At 5-6*).

Metropolis further found that the mechanical and electrical systems at the property needed upgrades and replacements. The report states that “it is not a question of if, but a question of when this equipment will fail.” (*See Id. at 6*). The report additionally notes concerns about the Great Hall sprinkler, alarm, and emergency exits that require attention. (*Id.*).

Synthesis Architects has advised that the current HVAC systems do not meet ventilation requirements in many of the spaces at the One Elk property, and that certain units must be updated in terms of enclosure, fresh air intake, and safety controls” (*See Attachment 8 – Informational Document from Synthesis Architects*

on Ventilation Improvements). Necessary HVAC repairs are estimated at \$841,100 (See Attachment 10, 1 Elk Vendor Estimates for Building Improvements Needed). Nevertheless, the Due Diligence Report commends NYSBA for the “exceptional job keeping the space properly heated and ventilated with extremely old equipment” (See Attachment 26 - Metropolis Due Diligence Report – One Elk Street, at 6). The Finance Committee, after review of all renovation and repair, estimates approximately \$4.8 million in repairs and renovations will be necessary within the next three years (2021-2024).

NYSBA engaged with Inspiron Management, a New York City-based owner representative company specializing in the construction industry, to organize and proactively support any efforts related to possible renovations of the One Elk property. (See Attachment 32 – Inspiron Assessment – One Elk – March 29, 2021). Inspiron has reviewed over 600 pages of material related to the status of the property. This includes an estimated \$1,029,100 in heating and cooling renovations; \$280,768 in renovations to the exterior of the property; \$73,430 in alarm and security upgrades; \$221,332 in elevator and lift renovations; \$6,000 to replace the doors in the Great Hall; and \$956,486 to replace carpets, desks, and update restrooms.

FUTURE OF NYSBA

NYSBA serves members both domestically and internationally. Of the 320,000 New York admitted attorneys, 67,000 reside outside of the state, and more than 22,000 live outside the United States. The Association has members in 50 states and over 100 countries worldwide. NYSBA's International Section includes 65 chapters located in other countries.

New York is the economic and legal capital of the world. New York law, and New York lawyers and judges, are globally recognized as the gold standard in the profession. Likewise, the New York State Bar Association is a global force. We are widely regarded as the world leader among bar associations; our reputation is unmatched.

Over its 145-year history, NYSBA has frequently adapted to meet the needs of members and the legal profession and do the public good. Time and again, we have expanded operations and broadened our outlook, as dictated by the needs of the day. In the past, change meant expanding NYSBA's brick-and-mortar presence either through relocation of our headquarters or overhauling physical space. Major moves and ambitious renovations of the Bar Center on Elk Street signaled new beginnings

and an expansion of NYSBA's role as the leader for lawyers across the state and nation.

In 2017, MCI, a company that provides marketing and consulting services to NYSBA, surveyed international members and non-members, and found international members to be an area of potential exponential growth for NYSBA. Of the 26,000 New York attorneys out of the country only 3,600 were NYSBA members. MCI interviewed attorneys in Canada, Britain, Germany, France, China, Japan, Hong Kong, and Korea. The key finding was that NYSBA has no significant competition and is considered the global leader of bar associations.

NYSBA underwent a digital transformation during 2019 and 2020 to become a virtual bar center. Over \$2,000,000 was invested in technology and the personnel expertise to move the Association to new platforms – this investment included a new Association Management System (i.e., member database which connects to CLE registration, section and committee appointments, and member dues renewal); a completely new website; new accounting software; and the use of new telecommunication hardware and software (i.e., Zoom in place of WebEx or MeetingBridge). This complete technological transformation, and the necessary obtainment of skills and training to effectively use and implement the new

technology, required the complete attention of the entire Association staff amidst an already tumultuous year of change.

The completion of the initial stage of this transformation to a virtual bar center, the result of the vision of Past President Hank Greenberg, occurred just weeks before the COVID crisis hit New York. As a result, the Association has continued to seamlessly serve its members, to reach its members digitally and provide them with real-time information about developments related to the pandemic and other news pertinent to the legal community throughout this crisis.

CLE programming is a testament to the successful flexibility of the virtual bar center, as the Committee on Continuing Legal Education and CLE Department quickly pivoted to schedule hundreds of CLE webinars throughout 2020 and 2021. This adaptation and hard work should be commended, both as a member service during the COVID-19 pandemic and as a bright spot for 2020 finances despite projections anticipating both continued declining membership dues revenue and total revenue over the next decade (*See Report of the Finance Chair – April 2021*). CLE net revenue increased from \$614,144 in 2019 to \$1,778,676 in 2020 (*See April 2021 Treasurer’s Report at 3*). This almost triple increase in revenue would have been impossible without the prescient timing of the technological transition and advent of

the virtual bar center. Indeed, the quick move to virtual programming allowed NYSBA members to continue to receive timely updates and developments in the law during a period of seminal change in court operations, emergency orders, and indeed major shifts in the function of the practice of law itself. Additionally, NYSBA was able to quickly adapt to Zoom remote conferencing, including for NYSBA sections, committees, and Association governance meetings. The January 2021 House of Delegates meeting, which was held completely virtually, had the highest attendance of a House meeting in recent memory.

During the pandemic, NYSBA's virtual bar center has powered an unprecedented surge and enhancement in our CLE programming and delivery of services. NYSBA had the highest net revenue in CLE in over a decade, 34% increase in HOD attendance, over 40,000 CLE registrants (an increase of 15,000 over 2019), reduced travel expenses for staff and leadership of over \$2 million, 4,516 virtual attendees of the 2021 NYSBA Annual Meeting, and increase of over \$200,000 net revenue for the Annual Meeting.

STATUS OF LEASE NEGOTIATIONS

In September 2020 then President Scott Karson appointed the NYSBA lease negotiation committee to coordinate the facilities plan. On October 20, 2020, the

President of The Foundation advised President Karson that David Schraver, John Horan, and Bruce Lawrence would be The Foundation's team regarding lease negotiations. On October 23, 2020, the chairs of the respective lease negotiation teams, Mr. Miranda and Mr. Schraver, conferred. The need for a substantial investment for necessary repairs and improvements to One Elk, involving, accessibility, ventilation, restrooms, and ADA compliance was discussed. The Foundation was asked if it had the capacity and/or inclination to raise money through a capital campaign or to otherwise fund necessary renovations.

In order for The Foundation to understand the nature of the renovations and costs required, the Foundation lease negotiation team and Foundation officers were provided with confidential copies of the Synthesis architectural plans and estimates (*See Attachment 7, New York State Bar Association Lease Documents to the New York Bar Foundation December 2020*). Additional confidential information was provided regarding NYSBA's cost of maintenance, repairs, and utilities for the building, as well as supporting documentation for the free services that previously had been provided by the Association to The Foundation. On December 3, 2020, The Foundation was provided with confidential documents pertaining to the lease and estimated repairs to One Elk. The Foundation was asked to provide its position

regarding raising the funds necessary to keep One Elk viable as the Association's long-term home.

On December 31, 2020, the Foundation President advised that the Foundation was not "in any position to pay for renovations desired by the Association at the One Elk Street property." but that it was open to discussions regarding a possible joint capital campaign to raise necessary renovation funds.

With the understanding that The Foundation was not in a position to provide necessary funding for the renovations, NYSBA sought estimates for the cost of performing only the most immediate and necessary repairs, identified above, and determined that the cost will be approximately \$4.8 million in the next three years to make necessary repairs and renovations. In January 2021, the Finance Committee reviewed the financial data and offered resolutions prohibiting the use of the Association's Reserve Funds to pay for renovations for a property the Association did not own and provided cost estimates of remaining at One Elk under current lease requirements. (*See* Attachment 2, January 2021 Lease Presentation to NYSBA Finance Committee; Attachment 3, January 2021 Finance Committee Resolutions). An "Informational Presentation on NYSBA Facilities" was held on Saturday, January 23rd, 2021, and attended by the Executive Committee, members of the House

of Delegates, including past presidents, and committee, section, and task force chairs. The Lease Negotiation Committee gave an overview on the status of negotiations with the Foundation, the current state of the One Elk property and associated financial costs, and a summary of the current and future needs of the Association (*See Attachment 23, PowerPoint Presentation, January 23, 2021*). The Lease Negotiation Committee gave an additional update at the meeting of the House of Delegates held the following Saturday, January 30th, 2021 (*See Attachment 24, PowerPoint Presentation, January 30, 2021*).

At the House meetings, members were encouraged to send any questions about the One Elk negotiations to David Miranda in his capacity as chair of the NYSBA Lease Negotiation Committee. In response, several House members, including Past Presidents of the Association, raised questions concerning the status of the lease negotiations, and the feasibility and cost of renovations and repairs to the One Elk property. In light of these questions, and similar concerns expressed by several members at the House of Delegates meeting on January 30, 2021, the Association retained the services of Metropolis Group, Inc. (“Metropolis”), to ascertain the current site conditions at the One Elk Property. In order to understand the landscape for alternative available space in Albany, the Association authorized CBRE to issue

RFPs to four possible locations – three in Albany and one in a suburb of Albany (*See Attachment 14, MADesign Architecture Test Fits for Possible Properties*).

On February 5, 2021, President-Elect Brown sent a proposal to Foundation Vice President Palumbo, President Rosenthal, and Mr. Schrauer outlining a seven-point framework that would allow the Association to remain at One Elk, including a joint fundraising campaign to finance the necessary renovations, the formation of a joint renovations committee, The Foundation obtaining a mortgage on One Elk to help pay for renovations, the Association continuing to pay rent to The Foundation, as well as maintenance and taxes at One Elk and share in the cost of an outside appraisal. This proposal was not accepted by the Foundation (*See Attachment 18 – NYSBA Proposal by President- Elect Brown to the Foundation, correspondence February 2-10, 2021*).

On February 24, 2021, a completed questionnaire was sent to all Past Presidents of the Association, with responses to individual inquiries (*See Attachment 27 – Response to Past Presidents - Lease Negotiation Questions*). The Past Presidents were also given access to a DropBox account containing documents related to the lease negotiations, cost estimates for repairs and renovations, and the structural condition of the One Elk property. This information was also sent to Foundation

representative Carla Palumbo on March 1, 2021. Additionally, on February 24, the Association agreed to the Foundation's request to share in the cost of an appraisal of One Elk and asked that the appraisal be completed as quickly as possible. All of this information has been made available to House members and is part of this Report.

On March 11, 2021, the Foundation offered to have the Association renew its lease for three years under the current lease terms and conditions. Under this proposal the Association would remain responsible for rent, all maintenance, repairs, utilities, taxes, and all renovation costs. (*See Attachment 29 – Response from Foundation to President Karson – March 11, 2021*). This proposal was not accepted.

On March 22, 2021, NYSBA President-Elect Andrew Brown and Mr. Miranda were invited to address The Foundation Board. In addition to providing all reports related to necessary renovations, the NYSBA representatives addressed issues regarding renovations, cost estimates, the various reports produced, and information regarding alternative site costs. The Foundation questions included whether NYSBA would take the building back as a gift and NYSBA advised it would consider such an offer if made. The parties discussed the fact that because certain renovations were immediate and necessary that even a short-term lease extension beyond the end of the year would require a structure in place to pay for renovations.

Following the meeting, leadership of both organizations continued discussions on terms for transfer of ownership, and payment for necessary renovations. (*See Id.*) The Foundation also requested the opportunity to address the Association's Executive Committee and House of Delegates. On April 2, 2021, The Foundation was invited to address the Executive Committee on April 9, 2021, and time was allotted for The Foundation at the meeting of the House of Delegates on April 10, 2021.

After numerous additional meetings and discussions, the Association's Lease Negotiation Committee and the Foundation came to an agreement on terms for transfer of ownership from the Foundation to the Association on May 21, 2021. A Memorandum of Understanding (MOU) between the Association and the Foundation was executed by leaders of both organizations on May 20 and 21, 2021, agreeing that the Foundation will transfer One Elk to the Association subject to the following conditions, including approval by the Association's House of Delegates:

1. The Foundation will transfer ownership of One Elk to the association for consideration as enumerated hereafter. In this regard, the Association will cooperate with and assist the Foundation in securing necessary approvals for the transfer, including approval of the New York State Attorney General.
2. The Association will provide office space to the Foundation in accordance with its needs, using a benchmark that is comparable to the space currently

utilized by the Foundation, of no less than 300 square feet, for as long as the association owns One Elk or 15 years, whichever period is longer.

3. The Association will provide services to support the business operations of the Foundation up to \$300,000 per year for the years 2022 and 2023, after which the cap on services will be reassessed with the expectation that the cap will be reduced to \$250,000 per year. Services to be provided will include Accounting, Graphics (including printing, management of outside printing and mailing, office supply fulfillment, mail and package pick-up and delivery, meeting space set-up, and office cleaning and maintenance); Human Resources (including benefit administration, orientation and training, records maintenance, performance evaluations); Information Technology (including peripheral equipment such as printers and telephones, desktop support, Microsoft Office 365, internet access and Wi-Fi, telephone service, and security); and Marketing and Design (including creation of promotional pieces and e-mails). The value of such services will be computed as actual hours per staff member times each staff members pay rate, plus a 15% fringe rate covering employee benefits. The Association shall pay the Foundation Program Coordinator's salary and benefits. The Program Coordinator will be considered an employee of the Association, will continue to provide similar function and services to the Foundation as is currently provided, and such services and salary will be considered part of, and included in, the in-kind services. In the event an employee in that position needs to be replaced the Foundation will participate in the new hiring. This provision of services will continue as long as the Association owns One Elk or 15 years, whichever period is longer.
4. The Association will bear responsibility for all costs of renovating and maintaining One Elk.
5. No direct financial consideration will be paid by the Association to the Foundation in connection with the transfer of One Elk.
6. The Association considers the Foundation the philanthropic arm of the Association and intends to continue to work closely with Foundation fundraising in order to meet common goals of both organizations. The Association agrees to form and actively participate in a joint fundraising committee, in a form and manner to be determined jointly by leadership of both organizations.

7. The parties agree to develop a more detailed services agreement, and an amended loaned employee agreement, consistent with the terms set forth in paragraph 3.
8. This Memorandum of Understanding is contingent upon approval of the Association's House of Delegates and the Foundation's Board of Trustees; development of an appropriate contract of sale; and approval of any required governmental authorities.

The Foundation's Board of Directors approved the Memorandum of Understanding on May 20, 2021. The MOU is contingent on approval by the Association's House of Delegates, which is recommended by this Committee.

CONCLUSION

The Association and the Foundation have a long-standing relationship that is both physically and philosophically anchored by the Bar Center at One Elk. The Foundation, which is quite literally an offshoot of the Association, raised the funds to allow for the construction of the Association's current physical home from which it works to realize its mission and serve its members. The Association, in turn, as discussed at length above, provides financial support and space that enables the Foundation to continue to fulfill its own mission. In this way, the two entities are deeply intertwined with a shared history that is enshrined in the brick and mortar of One Elk, the preservation of which has become clear is a priority about which many on both sides feel passionately.

In an attempt to forge a way forward that meets the changing needs of both the Association and the Foundation, this committee has made multiple presentations to the House of Delegates, Executive Committee and Finance Committee - including special informational meetings regarding the necessary renovations at One Elk and negotiations with the Foundation. These meetings have involved many hours of discussion and hundreds of pages of financial reports, renovation estimates, and documents related to One Elk have been shared.

The preparation of this report, and the preparation for the corresponding series of presentations to the NYSBA membership over the last six months, include more than 900 pages of detailed financial data and expert assessments of the structural condition of One Elk and the need for renovations. The Committee has transparently provided information to the House throughout this process, to ensure that delegates, as members of NYSBA's governing body, have been equipped with the information to make an informed decision on this important issue regarding the home of the Association.

The Committee recognizes the necessity of preserving the Association's long-term financial health. Fiscal discipline will ensure that the Association fulfills its core

mission and can meet the evolving needs of its members. This Memorandum of Understanding, by returning ownership of One Elk from the Foundation to the Association, will relieve the Association of its rental payment obligations and enable it to use that money towards necessary renovations. Ownership of One Elk will make the costs of renovations more palatable as the Association will be investing in a building it owns and controls and from which it derives a clear benefit. This plan also permits a reevaluation of the use of the entire Bar Center, including the possibility of leasing, subletting, dividing portions of the property, creating co-working spaces or novel adaptations of segments of the building, and other bold options to revolutionize the Bar Center for the 21st Century. Importantly, our Association will remain at its long-term, historically significant home alongside New York's executive, legislative and judicial branches of government. The prominent address of One Elk and the size and scale of the Bar Center befits an organization that is growing in stature and in clout – both across the nation and around the world – though use of the ample space it provides will need to be reconceived as the years progress.

The proposed agreement also preserves the aforementioned relationship with the Foundation and establishes a joint fundraising mission that will help bring the two entities closer through the pursuit of a shared goal. In addition, it takes the first

steps toward repairing some of the difficult but necessary upheaval that occurred during the discussions about the best use of One Elk and future home of the Association as the life of the current lease nears an end. Approval of this MOU is a necessary first step in moving our Association forward. Its formal ratification is contingent on the approval of the New York State Attorney General and the execution of a contract of sale of One Elk from the Foundation to the Association. Nevertheless, this MOU, and the reinforced pledges of partnership and friendship between both organizations provide a blueprint for the Association to advance into the future while safeguarding its mission and the interests of its members for years to come. Though it will require continued planning and creative thinking by our leadership, this MOU sets us on a path for the Association to continue to work together with the Foundation towards common goals. We are gratified to have been able to overcome significant obstacles to forge an agreement that is amenable to both sides, and strongly believe that preserving both the Association's current home and its ongoing relationship with the Foundation is ultimately of significant benefit to merit approval.



Staff Memorandum

HOUSE OF DELEGATES Agenda Item # 7

REQUESTED ACTION: Approval of the report and recommendations of the Task Force on Racial Injustice and Police Reform.

The Task Force on Racial Injustice and Police Reform was appointed to examine the issues contributing to police brutality and to provide recommendations to policymakers, elected officials, members of law enforcement and the judiciary to end deleterious policing practices that disproportionately impact persons of color. The Task Force engaged a diverse group of stakeholders to study the issues and held four public forums. Areas reviewed by the Task Force included (1) the qualifications and training of police; (2) monitoring of police activities including the use of body cameras and other data-gathering techniques; (3) the role of civilian review boards, and community oversight bodies charged with the identification and investigation of police misconduct; (4) the prosecution of police misconduct cases; and (5) the role and impact of legislation in the reform of policing.

The Task Force's report is attached, making 35 recommendations in the areas of improved policing; additional accountability within the criminal justice system; additional accountability in the offices of district attorneys and public defenders; and additional accountability through the courts.

The report will be presented at the June 12 meeting by Task Force co-chairs T. Andrew Brown and Taa R. Grays.



NEW YORK STATE
BAR ASSOCIATION

A pair of dark grey scales of justice is shown against a light grey background. The scales are balanced, with a large, crumpled piece of black paper on the left pan and a large, crumpled piece of brown paper on the right pan. The central pillar of the scales is a dark grey, tapered column with a decorative finial at the top and a base. The pans are dark grey and have a slightly flared, bowl-like shape. The chains connecting the pans to the central pillar are also dark grey.

Report and Recommendations of the **Task Force on Racial Injustice and Police Reform**

June 2021

The views expressed in this report are solely those of the Task Force and do not represent those of the New York State Bar Association unless and until adopted by the House of Delegates.

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Executive Summary

Police officers, state troopers or members of sheriff's offices (hereinafter collectively referred to as "police officers" or "police") serve an integral role in protecting our communities from harm, preventing the commission of crimes and investigating and bringing to justice those that commit crimes.

Communities want and need the police. Communities also want police that do not unnecessarily harm, or even kill, the people the police are charged with protecting.

In many communities of color, the police are a double-edged sword. They are the legal remedy to address acts of violence, control dangerous situations and investigate crimes committed. Yet, these communities are often wary of police because the line between controlling and escalating situations during efforts to contain incidents seems to be too often crossed with tragic consequences. A Pew Center Research survey conducted a month prior to the murder of George Floyd "found that 78% of Americans overall—but a far smaller share of Black Americans (56%)—said they had at least a fair amount of confidence in police officers to act in the best interests of the public."¹

During an unprecedented pandemic, the nation in lockdown watched on May 25, 2020 as George Floyd was murdered by a Minneapolis Police Department training officer who knelt on his neck for approximately nine minutes while his trainee and other officers looked on.² A call for police to respond to the commission of an alleged non-violent crime of fraud unexpectedly and tragically ended in Floyd's death. A video taken by a bystander displayed a gross lack of humanity toward yet another Black man. Chauvin's action was so alarming that it captured the attention and outrage of people across the nation, and the globe. His action were also considered a crime: Chauvin was recently tried and convicted for the murder of George Floyd.

Floyd's unnecessary death was yet another instance of the police crossing the line between controlling and tragically escalating a situation. Floyd's death led to never-before-seen levels of protests by people of all races, backgrounds and economic levels. His tragic death was the catalyst for a nationwide call to action.

To communities of color, the conduct of Derek Chauvin came as no surprise: excessive use of force in policing has been a long-simmering issue. The tragic consequences of police misconduct disproportionately impact and result in serious harm and deaths of Black and Brown men. George Floyd's death was yet another instance in a long line of tragic deaths of Black and Brown men and women for alleged crimes that police unnecessarily escalated, deploying lethal force and unjustifiably killed during their arrests. On April 28, 1973, a plainclothes officer shot and killed 10-year-old Clifford Glover in Jamaica, Queens, believing he fit the description of a

¹ *A month before George Floyd's death, black and white Americans differed sharply in confidence in the police*, Pew Center Research (June 5, 2020), <https://www.pewresearch.org/fact-tank/2020/06/05/a-month-before-george-floyds-death-black-and-white-americans-differed-sharply-in-confidence-in-the-police/>.

² Evan Hill, Ainara Tiefertäler, Christiaan Triebert, Drew Jordan, Haley Willis and Robin Stein, *8 Minutes and 46 Seconds: How George Floyd Was Killed in Police Custody*, N.Y. Times (March 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>.

robbery suspect.³ On September 15, 1983, Michael Stewart was arrested for spraying graffiti in a Brooklyn train stop, beaten unconscious, and brought to Bellevue Hospital “bruised and hogtied . . . where he died without regaining consciousness.”⁴ On August 9, 1997, Officer Justin Volpe sodomized Abner Louima while he was in custody; Louima was arrested after an altercation outside of a Brooklyn club. On February 4, 1999, four Bronx NYPD Detectives killed Amadou Diallo as he was entering his home, believing that he was removing a gun from his coat when in fact it was a wallet. On March 13, 2020, Breonna Taylor was shot to death by police in Louisville, Kentucky, awakened from her bed⁵ by police executing a no-knock warrant.⁶ On March 23, 2020, officers in Rochester responded to a man’s call asking for mental health services for his brother.⁷ They placed a hood over Daniel Prude’s face and suffocated him to death. In November 2020, the Bronx County District Attorney’s Office released body-worn camera footage of police killing Kawaski Trawick in his apartment on April 14, 2019.⁸ His last words were, “Why are you in my home?” The repeated incidents of police brutality demonstrate that there is a far-reaching problem that must be addressed. Prior to Chauvin’s conviction, only one officer in these cases—Officer Volpe—was convicted of crimes for their actions.

Being a police officer is not an easy career. Though rewarding, it is challenging and stressful; it requires officers to make split-second decisions to use force to stop what they perceive to be a threat to themselves and others.

Communities need police. Good police want to protect the communities they serve. Yet, communities of color, particularly Black communities, bear the brunt of bad policing and the tragic consequences of excessive use of force. NYSBA Immediate Past President Scott Karson created the Task Force on Racial Injustice and Police Reform to amplify voices pushing for the disruption of the status quo.

³ Jim Dwyer, *A Police Shot to a Boy’s Back in Queens, Echoing Since 1973*, N.Y. Times (Apr. 16, 2015), <https://www.nytimes.com/2015/04/17/nyregion/fired-at-queens-boy-fatal-1973-police-shot-still-reverberates.html?searchResultPosition=6> (“The officer said he fired when Clifford, in flight, pointed a gun at him, which the mortally injured boy had then managed to toss or hand to his stepfather.”).

⁴ Isabel Wilkerson, *Jury Acquits All 6 Transit Officers In 1983 Death of Michael Stewart*, N.Y. Times (Nov. 25, 1983), <https://timesmachine.nytimes.com/timesmachine/1985/11/25/181103.html?pageNumber=1>.

⁵ Rukmini Callimachi, *Breonna Taylor’s Life Was Changing. Then the Police Came to Her Door*, N.Y. Times (Aug. 30, 2020), <https://www.nytimes.com/2020/08/30/us/breonna-taylor-police-killing.html>.

⁶ A New York Times analysis determined that “[a]s policing has militarized to fight a faltering war on drugs, few tactics have proved as dangerous as the use of forcible-entry raids to serve narcotics search warrants, which regularly introduce staggering levels of violence into missions that might be accomplished through patient stakeouts or simple knocks at the door.” These raids are also racist in application: In an ACLU study of 20 cities, “42 percent of those subjected to SWAT search warrant raids were black and 12 percent Hispanic. Of the 81 civilian deaths tallied by The Times, half were members of minority groups.” See Kevin Sack, *Door-Busting Drug Raids Leave a Trail of Blood*, N.Y. Times (Mar. 18, 2017), <https://www.nytimes.com/interactive/2017/03/18/us/forced-entry-warrant-drug-raid.html>.

⁷ Michael Gold, *What We Know About Daniel Prude’s Life and Death*, N.Y. Times (Dec. 4, 2020), <https://www.nytimes.com/article/what-happened-daniel-prude.html>.

⁸ Rosa Goldensohn, *Why Are You in My Home? Kawaski Trawick Never Got an Answer Before Police Fatally Shot Him*, The City (Nov. 17, 2020), <https://www.thecity.nyc/justice/2020/11/17/21572438/nypd-bodycam-bronx-shooting-kawaski-trawick-killed>.

The Task Force engaged a diverse group of stakeholders: police officers throughout the ranks, including chiefs, as well as elected officials, community organizers, and citizens most directly impacted by police misconduct, to study the issues leading to police misconduct and brutality and to provide recommendations to policymakers, law enforcement, and the judiciary to end these deleterious policing practices that disproportionately impact persons of color. Specifically, the Task Force examined five areas: (1) the qualifications and training of police; (2) monitoring of police activities including the use of body cameras and other data-gathering techniques; (3) the role of civilian review boards and community oversight bodies charged with the identification and investigation of police misconduct; (4) the role of attorneys and the courts in the prosecution of police misconduct cases; and (5) the role and impact of legislation in the reform of policing. The work of the Task Force and its five committees included: four public forums, meetings with various stakeholders and reviewing various publications relevant to the issue of racial injustice and police reform.

The Task Force's 23 recommendations are focused on achieving a 21st century approach to policing. The recommendations bring to bear learnings, best practices and technological advances that will enable the police to better serve a 21st century community that has significantly evolved since police departments were established in the 18th century. The Task Force's work and recommendations are discussed in five sections: (1) A Brief History of Policing and Police Misconduct, (2) An Overview of 21st Century Policing, (3) Recommendations that Improve Policing at Key Stages, (4) Recommendations that Provide Additional Accountability in the Criminal Justice System; and (5) Conclusions.

Below is an overview of the 23 recommendations:

I. Improving Policing at Key Stages

A. Hiring

1. Changing the educational hiring requirements to requiring a college degree
2. Adding obtaining a license to the hiring process
3. Adding obtaining professional liability insurance to the hiring process
4. Focus hiring efforts on recruiting women and people of color

B. Training

1. Increasing the duration and focus of Academy training for Police Officers
2. Implement the Active Bystandership Training from the [Active Bystandership for Law Enforcement Program](#) (ABLE)
3. Update training to help police handle persons with disabilities

C. Activities while “on the beat”

1. Enacting a duty to intervene law
2. Leveraging civilian oversight agencies to provide insight into policing practices that are improper

D. Monitoring

1. Requiring all members of New York State policing agencies to wear body cameras and for similar cameras to be installed in patrol vehicles, along with requisite training

E. Disciplining

1. Expand access to police disciplinary records through new state laws
2. Strengthen community oversight's role in disciplining officers

II. Additional Accountability within the Criminal Justice System

A. Additional Accountability Through Civilian Oversight

1. Give All Communities Control Over Police Discipline By Changing State Law
2. Require Large Cities to Create Strong, Independent Civilian Oversight Agencies
 - a. Require Agencies to Have Comprehensive Investigatory, Adjudicatory, and Disciplinary Powers
 - b. Require Agencies to Allow Anonymous Complaints
 - c. Require Agencies to Have an Independent and Victim-Centric Complaint Process
 - d. Require Implementing Governments to Ban Officers from Retaliating Against or Harassing Complainants
 - e. Require Agencies to Have Rule-Making Powers Over Police Departments
 - f. Require Sufficient Due Process Protections for Subject Officers
 - g. Require Agencies to Have Independence From Undue Influence
 - h. Require Minimum Training Standards for Board Members
 - i. Study the Creation of Regional or Inter-Municipal Civilian Police Oversight Agencies
 - j. Exempt Local Governments from Referendum Requirements
3. Provide State Funding to Support & Incentivize Strong Civilian Review Boards

B. Additional Accountability in the District Attorney's Office and County Public Defenders

1. Provide Implicit Bias Training to all of its employees, who hold positions in the Offices of the Attorney General, Inspector General, County District Attorney and County Public Defender in a consistent and uniform manner.
2. Foster diversity in recruitment, hiring, promotion and retention of personnel therein in a transparent, consistent and uniform manner

C. Additional Accountability in the Courts

1. Foster diversity in recruitment, hiring, promotion and retention of personnel therein in a transparent, consistent and uniform manner
 - i. Identifies the underlying reasons for the low rate of diversity with respect to judicial and non-judicial supervisory positions, as well as for non-judicial positions with higher Pay Grades
 - ii. OCA must take affirmative steps to train Black employees to hold such positions with a transparent grooming process
 - iii. Post openings and encourage candidates of color to apply for such positions
 - iv. Have a transparent hiring and selection process; and

- v. Provide institutional support once these employees obtain such positions
- vi. establish a duty on UCS to promote equal opportunities for minority
- 2. Periodic Audits to Determine Patterns of Implicit Bias
- 3. Implicit Bias Instructions Should Consistently and Uniformly Be Provided to Potential Jurors, During Jury Selection

D. Additional Accountability Criminal Justice System through Modifications

- 1. Implementing controls and guidelines for the gang databases
- 2. Reforming qualified immunity – creating a civil remedy for violations of a person’s rights under the Federal and State Constitutions
- 3. Amendments to the criminal procedure law
 - a. Prohibit prosecutors from unilaterally nullifying the Exclusionary Rule
 - b. Prohibit prosecutors from using appeal waivers in plea negotiations
 - c. Public defenders assigned for appellate defense
 - d. Preclude inadmissible statements induced by law enforcement by providing materially false information to defendants
 - e. Allow civil actions to proceed even if the underlying offense was resolved through an adjournment in contemplation of dismissal plea
- 4. Minimizing the influence of police unions on the disciplinary actions

Part 1: A Brief History of Policing and Police Misconduct in the United States

A. A Brief History of Policing

“The development of policing in the United States closely followed the development of policing in England. In the early colonies policing took two forms. It was both informal and communal, which is referred to as the ‘Watch,’ or private-for-profit policing, which is called ‘The Big Stick.’”⁹ These two forms of policing remained in place for the first 200 years of American history: “the small urban areas and little villages that dotted the countryside relied on trained militia and lowly paid, or volunteer, watchmen and constables for protection.”¹⁰ Generally “[a]s was the case in England, those who could afford to do so often hired others to serve their shifts, and those who served were not particularly effective.”¹¹

“The Dutch had appointed paid watchmen for New York from 1648, and the British took this over with the city in 1664.”¹² Bruce Chadwick, in his book *Law & Disorder: The Chaotic Birth of the NYPD*, stated that New York City’s, Boston’s or Philadelphia’s constable force were not “particularly effective.”¹³ Quoting a *New York Gazette* 1757 article, he states, “they were a ‘parcel of idle, drinking, vigilant snorers, who never quelled any nocturnal tumult in their lives . . . but would, perhaps, be as willing to join in a burglary as any thief in Christendom.”¹⁴

Troy, New York also had a constable force, though it was better respected than those in New York City. As described in Frederic T. Cordoze’s, *History of the Police Department, of Troy, N.Y. From 1786 to 1902*, the constable force were a part of “The Night Watch:”

The Night Watch, patterned after the vigilance system adopted in other cities, seems to have been the first instance of Police organization in Troy.

The following record of the duties of the Night Watch is to be found among the archives of 1786:

“The Night Watch, which patrolled the quiet streets of the village, were accustomed to cry, ‘all’s well !’ at the expiration of each hour. When a building was discovered to be on fire, the loud cry of ‘fire! fire!’ aroused the inhabitants, and hastened the steps of the firemen. When the fire was extinguished, those returning from it cried, ‘All out ! All out!’”

⁹ Gary Potter, *The History of Policing in the United States: Part 1*, Eastern Kentucky University (June 25, 2013), <https://plsonline.eku.edu/insidelook/history-policing-united-states-part-1>.

¹⁰ Bruce Chadwick, *Law & Disorder: The Chaotic Birth of the NYPD* (2017) at 17.

¹¹ Steven M. Cox, David Massey, Connie M. Koski, Brian D. Fitch, *Introduction to Policing* (Sage Publications, Jan. 2019), at 19.

¹² Clive Emsley, *A Short History of Police and Policing*, Oxford Scholarship Online (Jan. 2021), <https://oxford-universitypressscholarship-com.i.ezproxy.nypl.org/view/10.1093/oso/9780198844600.001.0001/oso-9780198844600-chapter-7>.

¹³ *Id.* at 13.

¹⁴ *Id.* at 20.

During the year 1791, a town meeting was held and the first officers of the town were elected. Among those officers were Constables and the following were elected: David Henry, William Hikok, Laurence Dorsit, Samuel Colamore.

The Police Force of Troy consisted of six Constables, at the time of the incorporation of the City in 1816, who were elected annually. For many years afterwards the men whose duty it was to preserve order by day were known by that name. The position was a dignified one and considerable authority was attached to it.¹⁵

In these early days, Black people were specifically policed. In the South, policing included slave patrols:

After American independence, the slaveholders paid substitutes to act in their place as patrollers, rather as some men in England had been paid to act as constables in the place of the individual chosen for the forthcoming year or so. In urban areas, paramilitary watches and city guards began to be recruited to look out for escaping slaves, or for blacks planning some form of insurrection. Indeed, it has been argued that the cities and towns of the Deep South were where formalized and ultimately military-style policing emerged in the United States. Charleston, Savannah, St Louis, and New Orleans are good examples of kinds [sic] of places with police emerging as a result of fears over large numbers of slaves assembling and over free blacks in general. The free blacks were often suspected of being runaways. These cities generally had smaller populations than those of the northeast, and some were seaports, where the fear of drunken, fighting sailors ran alongside the fear of blacks.¹⁶

In the North, the watch also kept an eye on Black people:

The watch, even in Northern cities, was issued specific instructions concerning the policing of the Black population. Boston, for example, instituted a curfew for Black people and Native Americans, beginning in 1703; in 1736 the watch was specifically ordered to “take up all Negro and Molatto [sic] servants, that shall be unseasonably Absent from the Masters [sic] Families, without giving sufficient reason therefore.” But while the watch was told to keep an eye on Black people along with numerous other potential sources for trouble, slave patrols . . . were more exclusively on the Black population.¹⁷

Increasing urbanization in the major cities across the US exposed the deficits of the night-watch system. As explained in Steven M. Cox, David Massey, Connie M. Koski, and Brian D. Fitch’s book *Introduction to Policing*:

As the nation’s cities grew larger and more diverse, voluntary citizen participation in law enforcement and order maintenance became increasingly less effective, and some

¹⁵ Frederic T. Cordoze, *History of the Police Department of Troy, N.Y.* (1902) at 14.

¹⁶ *Supra* note 12 at 1, 41–142.

¹⁷ Kristian Williams, *Our Enemies in Blue: Police and Power in America*, Oakland (AK Press, 2015) at 189–190.

other system was needed to replace it. In 1749, residents of Philadelphia convinced legislators to pass a law creating the position of warden. The warden was authorized to hire as many watchmen as needed, the powers of the watchmen expanded, and the city paid selected individuals from taxes. Other cities soon adopted similar plans. The wardens and their watchmen served warrants, acted as detectives, and patrolled the streets. But these wardens were not widely respected and were considered inefficient, corrupt, and susceptible to political interference.¹⁸

As the population of New York City grew, the ineffectiveness of the constable force became more troublesome as well. As described in Edwin G. Burrows & Mike Wallace's book *Gotham: A History of New York City to 1898*:

The police force was not inconsequential, to be sure. Jacob Hays, appointed high constable in 1802, was a seasoned enforcer of the law. During the 1830's disturbance he had plunged gamely into the thick of a crowd, armed only with his staff of office, and seized rioters with viselike grip. Hays, moreover, was backed by an expanded cadre of peace officers. By day these consisted of two dozen elected constables (two per ward) and scores of mayoral appointed marshals. By night hundreds of watchmen roamed the streets; though primarily on the lookout for fires, they were empowered to arrest any criminals they caught in the act. By 1834, New York's constabulary was among the largest and most efficient in the United States.

But not efficient enough. Old Hays, as he was known, was in sixties. The daytime men were unsalaried and often corrupt political appointees, more interested in earning fees than preventing crimes. The "leatherheads" (as watchmen were jeeringly known, after their leather helmets) were poorly paid moonlighters, scantily trained and ill respected.¹⁹

To address these issues, municipalities began to take control of policing.

In the United States in the early to middle 1800s, day watch systems were established in U.S. cities. Also by this time, the main structural elements of U.S. municipal policing had emerged. Watch and ward systems had been replaced—in the cities at least—by centralized, government-supported police agencies whose tasks included crime prevention, provision of a wide variety of services to the public, enforcement of "morality," and the apprehension of criminals. A large force of uniformed police walked regular beats, had the power to arrest without a warrant, and began to carry revolvers in the late 1850s. The concept of preventive policing included maintenance of order functions such as searching for missing children, mediating quarrels, and helping at fire scenes. Both municipal police and county sheriffs performed these tasks.²⁰

¹⁸ *Supra* note 11 at 20.

¹⁹ Edwin G. Burrows & Mike Wallace, *Gotham: A History of New York City to 1898* at 635–636.

²⁰ *Supra* note 11 at 20.

New York City has the 2nd oldest police force in the United States, organized in 1845.²¹ The creation of a formal police force was spurred by the unsolved death of Mary Rogers in 1841.²² In 1844, the New York Municipal Police Act abolished the constable system and replaced it with a police department modeled on London's Metropolitan Police.²³ The basic structure of the police department we know today was created by this law:

Each ward became a patrol district, with its own stationhouse [*sic*]. And each ward nominated its own candidates for police officers; if accepted by the mayor, they were required to live and serve in that ward. New York's police, beholden to politicians, would be inextricably enmeshed in local politics.

The new policemen were salaried . . . and each was expected to make policing his only and full-time job. Preventing crime became as important as apprehending criminals.

[They were required to wear] a star-shaped copper badge (hence "copper" or "cop") . . . a blue frock coat with covered buttons, a dark vest, blue pantaloons, and a standing coat-collar with the letters M.P and a number in woolen embroidery.²⁴

The police were charged with keeping the public order. In the North, control was focused on the newly arrived immigrants as well as Blacks.

And part of the context for early modern policing by the late 1840s was that the immigrant population of Europeans, particularly the Irish, were generating in their own way a similar kind of social anxiety, xenophobic, nativist, racist reaction . . . The populations that made up early police officers were, unlike the slave patrols, made up of lower-class men, often men who were first-generation Americans. There was an early emphasis on people whose status was just a tiny notch better than the folks who they were focused on policing. And so the Anglo-Saxons are policing the Irish or the Germans are policing the Irish. The Irish are policing the Poles. Black people are there. They're getting policed by everyone, but their numbers are fewer. And so this dynamic that's playing out is that police officers are a critical feature of establishing a racial hierarchy, even among white people.²⁵

At the same time, the late 19th century was the era of political machines, so police captains and sergeants for each precinct were often picked by local political party ward leaders, who often owned taverns or ran street gangs that intimidated voters. They then were able to use police to harass opponents of that particular political party, or provide payoffs for officers to turn a blind

²¹ The first publicly funded, organized police force with officers on duty full-time was created in Boston in 1838.

²² *Id.* at 637.

²³ *Id.* at 638.

²⁴ *Id.* at 638.

²⁵ Throughline, *American Police: Transcript*, Nat'l Pub. Radio (June 4, 2020), <https://www.npr.org/transcripts/869046127>.

eye to allow illegal drinking, gambling and prostitution.²⁶ In New York City, the police accommodated the spread of prostitution, for a price:

By 1876 the system of payoffs was so notorious that when police captain Alexander S. “Clubber” Williams was transferred to the 29th Precinct, he almost drooled with delight: “I’ve been having chuck steak ever since I’ve been on the force,” said Clubber, “and now I’m going to have a bit of tenderloin.”²⁷

During this time, the predecessor to the New York Patrolmen’s Benevolent Association (PBA) was created in 1892. In 1894, the PBA was not a union, its purpose was to support the widows of police officers; however, the support they provided to police officers were very similar to unions: “[T]he PBA became the main advocate for patrolmen, forging an alliance with Tammany Hall, negotiating salaries, and advocating for better pensions and benefits.”²⁸

In the early 20th century, corruption continued to plague police departments. The passage of the 18th Amendment ushering in the era of Prohibition only worsened corruption: “In many cities police became little more than watchmen for organized crime enterprises, or, on a more sinister vein, enforcement squads to harass the competition of the syndicate paying the corruption bill.”²⁹ A national commission was created by President Herbert Hoover to investigate the rise in crime and propose recommendations to address it.³⁰ Reform focused on professionalizing the police and creating the police departments that we see today. These reforms included standards for recruiting and training officers (“selection standards, training for new recruits, placing police under civil service, and awarding promotion as a result of testing procedures”), organizing departments with clear management and chain-of-command structures similar to the military and the use of technology to collect evidence and solve crimes.³¹ The police were also charged with enforcing the law and reducing the crime rate.³²

During this period, large numbers of Black people were leaving the South to the North for better economic opportunities and an escape from blatant racism. Though the North provided economic opportunity, these Black migrants also found racism:

[B]lack people are less than 5% of the populations of these big cities until the second and third decade of the 20th century, until the Great Migration period, which begins during World War I in the 1910s. And so, you begin to see populations doubling from

²⁶ Olivia B. Waxman, *How the U.S. Got Its Police Force*, Time (May 18, 2017), <https://time.com/4779112/police-history-origins/>.

²⁷ *Supra* note 19 at 959.

²⁸ Matthew Vaz, *How police unions got their power: The rise of the PBA and lack of accountability in the NYPD*, N.Y. Daily News (June 13, 2020), <https://www.nydailynews.com/opinion/ny-oped-how-police-unions-got-their-power-20200613-jgqaeq7l4bhvvgixsxx3psx434-story.html>.

²⁹ Gary Potter, *The History of Policing in the United States: Part 4*, Eastern Kentucky University (June 25, 2013), <https://plsonline.eku.edu/insidelook/history-policing-united-states-part-4>.

³⁰ *Supra* note 11 at 25.

³¹ *Id.* at https://plsonline.eku.edu/insidelook/history-policing-united-states-part-5#_ga=2.248104334.844811338.1619146536-1394501205.1619146536.

³² *Supra* note 11 at 25.

2% to 4% to 8%. Police officers receive African American migrants in the same way that their white neighbors and community peers did, which is with contempt and hostility.³³

By the 1960s, the benefits and the pitfalls of professionalizing the police were becoming clearer. Police were becoming better trained with improved education and training opportunities available.³⁴ Yet policing practices developed as part of this professionalism and deployed by a vastly white and male police force were repressive:

Professionalism antagonized tensions between the police and the communities they served and created rancor and dissension within the departments themselves. The crime control tactics recommended by the professionalism movement, such as aggressive stop and frisk procedures, created widespread community resentment, particularly among young, minority males who were most frequently targeted. Police professionalism and the military model of policing became synonymous with police repression. Furthermore, as Walker points out “a half century of professionalization had created police departments that were vast bureaucracies, inward looking, isolated from the public, and defensive in the face of any criticism”. In addition, professionalization had done nothing to rectify racist and sexist hiring practices that had been in effect since police departments had been created in the 1830s.³⁵

The 1960s was also a time of great social upheaval. “The crime rate per 100,000 persons doubled, the civil rights movement began, and antiwar sentiment and urban riots brought police to the center of the maelstrom.”³⁶ Police were seen using excessive force against Civil Rights and Vietnam War protesters. President Lyndon B. Johnson “declared a ‘war on crime’” and Congress subsequently passed and Johnson signed major legislation³⁷ to combat crime that significantly increased money and other resources provided to police departments across the country, including providing military-grade weapons used in Vietnam to local law enforcement. Funding from social programs was diverted to fund this increase.³⁸

As a result of this reinforcement of police departments, Black communities became more of a focus of law enforcement activities.

[T]he “frontline soldiers” in Johnson’s war on crime. . . spent a disproportionate amount of time patrolling Black neighborhoods and arresting Black people. Policymakers concluded from those differential arrest rates that Black people were prone to criminality, with the result that police spent even more of their time patrolling Black neighborhoods, which led to a still higher arrest rate. “If we wish to rid this country of

³³ *Supra* note 25 (NPR) at <https://www.npr.org/transcripts/869046127>.

³⁴ *Supra* note 11 at 26.

³⁵ Potter, *supra* note 31, <https://plsonline.eku.edu/insidelook/history-policing-united-states-part-5>.

³⁶ *Supra* note 11 at 25.

³⁷ The Law Enforcement Assistance Act in 1965 and Omnibus Crime Control and Safe Streets Act in 1968.

³⁸ Jill Lepore, *The Invention of the Police*, *The New Yorker* (July 13, 2020), <https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police>.

crime, if we wish to stop hacking at its branches only, we must cut its roots and drain its swampy breeding ground, the slum,” Johnson told an audience of police policymakers in 1966. The next year, riots broke out in Newark and Detroit. “We ain’t rioting agains’ all you whites,” one Newark man told a reporter not long before being shot dead by police. “We’re riotin’ agains’ police brutality.”³⁹

Increased funding and resources were not the key to winning the “war on crime.” By the 1980s, with the increase in drug use, crime rates continued to rise unabated. The nation sought more effective ways of controlling crime. At the national level, winning the war included more stringent sentencing requirements for offenses, first through mandatory sentencing with the Comprehensive Crime Control Act of 1984, and mandated life sentences if one was convicted of the same crime three times (the “three strikes” provision). This tactic was also followed at the state level. These laws exacerbated the trend of increased incarceration both at the federal and state level.⁴⁰

Some police departments sought a different approach to policing that recognized a community’s role in helping to prevent crime. “Community policing was intended to counter enhanced technology, specialization, and paramilitary organization and restore relationships that the police had lost with the citizenry they were sworn to serve and protect.”⁴¹ Part of this approach included a new focus on minor offenses to prevent more serious offenses from occurring, commonly known as the “Broken Window” approach. This approach has met with mixed results:

Law enforcement professionals embraced the broken-windows metaphor and readily folded it into the doctrine of community policing. Moving in this direction emphasized discretion at the street level and encouraged officers to use their authority to address individuals and situations that were “out of place” or “out of order” so that nothing more problematic or criminal would happen. Under the guise of community policing being practiced to both reduce crime and improve relationships with communities, proactive policing strategies and tactics have been legitimized in the eyes of many . . . When it comes to street-level policing, regardless of being in- or out-of-place, Blacks still disproportionately experience surveillance, stops, searches, detentions, arrests, and force that cannot be easily explained away by legal factors.⁴²

Many counties in New York State have focused on community policing, including Broome, Orange, the five counties of New York City, Cortland, Monroe (Rochester) and Erie (Buffalo). Though a step in the right direction, reports of police misconduct continue to be revealed.

Prior efforts to reform policing practices have not prevented police misconduct. The New York City Police Department (NYPD) is a cautionary tale. The NYPD is one of the best-trained, best-

³⁹ *Id.*

⁴⁰ James Cullen, *The History of Mass Incarceration*, Brennan Center (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration>.

⁴¹ *See supra* note 11 at 29.

⁴² Robert A. Brown, *Policing In American History*, 16 *Du Bois Rev.: Social Science Research on Race*, 189–195 (2019).

funded, and seemingly most progressive departments in the country. It is the size of the seventh-largest standing army in the world with a total budget of around \$11 billion.⁴³ NYPD headcount and funding will not have suffered for COVID-related budget cuts elsewhere,⁴⁴ with 900 new cops added to the force in January 2021. The costly implicit bias training received by NYPD officers is the most cutting-edge available, but it has failed to deliver any measurable results.⁴⁵ The NYPD Patrol Guide is thousands of pages long and has been written, rewritten, and amended to reflect every imaginable demand for police reform.⁴⁶ The City’s Administrative Code and official NYPD guidelines prohibit biased policing,⁴⁷ which still persists at staggering

⁴³ *Report: A look inside the New York City Police Department Budget*, Vera Institute of Justice, available at <https://www.vera.org/downloads/publications/a-look-inside-the-new-york-city-police-department-budget.pdf> (last accessed Feb. 1, 2021).

⁴⁴ *NYC Budget Justice*, Communities United for Police Reform, <https://www.changethenypd.org/nycbudgetjustice> (last accessed Jan. 20, 2021).

⁴⁵ A years-long study of the NYPD’s extensive training program showed no difference in enforcement behavior, serving only to improve officers’ articulable understanding of bias. See Martin Kaste, *NYPD Study: Implicit Bias Training Changes Minds, Not Necessarily Behavior*, N.P.R. (Sept. 10, 2020), <https://www.npr.org/2020/09/10/909380525/nypd-study-implicit-bias-training-changes-minds-not-necessarily-behavior>.

⁴⁶ The NYPD Patrol Guide is a publicly available document containing rules adopted by the Department and reflecting changes demanded and implemented after instances of violence and brutality. However, these rules are often flagrantly violated. For example, the Patrol Guide governs acceptable instances for use of force (Sections 221-01 and 221-02), requires NYPD personnel to intervene during instances of excessive force by other officers (221-02), and has strict reporting requirements (221-03). It also articulates limited circumstances for the use of pepper spray (221-07) and CEMs (aka TASERS) (221-08). The Guide governs appropriate contact with the public outside of arrests (203-09 and 203-10) and requires officers to provide their names and badge numbers in accordance with the Right to Know Act (203-09). The Guide governs police interactions with members of the press (212-49) and requires that NYPD personnel “cooperate with media representatives by not interfering or allowing others to interfere with media personnel acting in their news gathering capacity.” Patrol Guide Procedure No. 212-123 requires body-worn camera activation in almost every instance of a uniformed police officer’s interactions with the public. This regulation, created as a purported police reform during the 2014 Black Lives Matter Protests, specifically includes interactions during demonstrations and instances of civil disobedience. During a protest (213-05), the guide instructs NYPD personnel not to “‘punish,’ rather, be ‘professional’ at all times,” to “[b]e tolerant of verbal abuse uttered by civilians in crowd” and to “ensure that only minimum force is used to achieve objectives.” There are special rules for interacting with legal observers (213-11). Legal observers who are clearly identified are to be given “free access through police lines at the scene of any demonstration” and “all members of the service shall extend every courtesy and cooperation to observers,” and “observers shall be permitted to remain in any area or observe any police activity” unless their presence poses a safety threat. See NYPD Patrol Guide, available at <https://www1.nyc.gov/site/nypd/about/about-nypd/patrol-guide.page>.

⁴⁷ In 2014, the NYPD amended its Patrol Guide to expressly prohibit speech or conduct targeting a person’s actual or perceived protected status and implemented a process for investigating complaints of biased behavior by members of the Department. The NYPD had not previously tracked these complaints or had a specific process for investigating them, and this move was widely considered as a necessary reform. Over the next five years, about 2,500 of these complaints had been made by the public. Then, in 2019, a watchdog report by the Department of Investigation called out the NYPD for failing to substantiate any of these claims and for deficiencies in the investigatory process. In a striking demonstration of the inefficacy of such police “reforms,” as of January 2021 only one allegation of bias has been substantiated—against a school safety officer. See DOI Report on Deficiencies in NYPD’s Handling of Biased Policing Complaints https://www1.nyc.gov/assets/doi/reports/pdf/2019/Jun/19BiasRpt_62619.pdf; see also Yasmeen Khan, *The NYPD Substantiated its First Case of Biased Policing—But Not Against an Actual Officer*, WNYC (Dec. 11, 2020), <https://gothamist.com/news/the-nypd-substantiated-its-first-complaint-of-biased-policing-but-not-against-an-actual-officer>.

levels.⁴⁸ New York City sees the unabated abuse and even murder of New Yorkers and the ongoing protection of abusive police, including by the Mayor and the Commissioner who have full authority to fire them⁴⁹ without the constraints that exist elsewhere in the State.⁵⁰

The history of policing shows that crises spur the evolution of policing. We are at another crisis point in policing in the US and New York: deleterious policing practices resulting in misconduct that disproportionately impacts Black people and a culture that allows these practices to continue unchecked. It is again time to examine what policing should be for the 21st century.

B. Police Misconduct – The Problem

The unjustified killing of suspects by police is a form of misconduct that has received significant attention both nationally and within New York. More routine forms of misconduct also rob people of both freedom and dignity, ignite demonstrations, and underpin community demands more broadly. In the Task Force’s study of police misconduct, several key forms of harm emerged. False testimony, police reports and allegations,⁵¹ biased policing,⁵² physical and sexual abuse,⁵³ and harassment are all perpetrated by bad cops against people in New York State, often without any meaningful accountability response from their employer. Neighborhoods that are economically disadvantaged and predominantly people of color are subjected to constant police presence and surveillance and are home to community members

⁴⁸ We know based on years of data that police enforcement, as well as stop-and-frisk encounters, disproportionately target Black and Latinx people. Data from the Legal Aid Society from 2019 showed that nearly all people who were stopped and frisked by the NYPD—a practice that persists despite extensive litigation—were people of color, accounting for 90% of encounters. While other states were legalizing cannabis, Black people in New York were 15 times more likely to be charged with marijuana-related offenses in Manhattan than whites, despite accounting for about 17% of residents. In Brooklyn, a 2019 report showed that 86% of all people charged with crimes in the borough over a six-month period were people of color. *See* Noah Goldberg, *86% of Brooklynites in court are people of color: report*, The Brooklyn Eagle (Apr. 15, 2019), <https://brooklyneagle.com/articles/2019/09/17/86-percent-of-brooklynites-in-court-are-people-of-color-report/>.

⁴⁹ *See* Mollie Simon, Lena V. Groeger, Eric Umansky and Adrianna Gallardo, *What it Looks Like When the Police Commissioner has Unchecked Power*, ProPublica (Dec. 11, 2020), <https://projects.propublica.org/nypd-unchecked-power/>.

⁵⁰ *See* Brian Sharpe, *RPD reform proposal will seek to scrap union contract and start over, reduce size of force*, Rochester Democrat & Chronicle (Feb. 4, 2021), <https://www.democratandchronicle.com/story/news/2021/02/04/city-put-onus-state-draft-proposal-reforming-rpd/4386604001/>.

⁵¹ *See* Joseph Goldstein, *Testifying by Police: A Stubborn Problem*, N.Y. Times (Mar. 18, 2018), <https://www.nytimes.com/2018/03/18/nyregion/testifying-police-perjury-new-york.html>; John Kelly and Mark Nichols, *Tarnished Brass*, USA Today (Apr. 24, 2019), <https://www.usatoday.com/in-depth/news/investigations/2019/04/24/usa-today-revealing-misconduct-records-police-cops/3223984002/>.

⁵² *See* Steve Hughes, *Firm Corrects Albany Racial Bias Arrest Numbers*, Albany Times Union (Nov. 18, 2020), <https://www.timesunion.com/news/article/Firm-corrects-Albany-racial-bias-arrest-figures-15737785.php> (An independent audit showed that 65.7% of all arrests in Albany were made against Black people, who make up about 28% of Albany’s population).

⁵³ *See* Joshua Kaplan and Joaquin Sapien, *NYPD Cops Cash In on Sex Trade Arrests With Little Evidence, Black and Brown New Yorkers Pay the Price*, ProPublica (Dec. 7, 2020), <https://www.propublica.org/article/nypd-cops-cash-in-on-sex-trade-arrests-with-little-evidence-while-black-and-brown-new-yorkers-pay-the-price>.

who are most likely to be abused at the hands of police.⁵⁴ These communities are also frequently left out of serious discussions regarding police policies and practices.

Police misconduct persists because of institutional and cultural norms. As we discuss further in this report, the 20th century policing model focuses on a warrior mentality in which police deploy force to protect themselves and the community; when force is excessive and used inappropriately, the culture of policing, in contrast to the policies that may be in place, discourage holding that officer accountable for the inappropriate use. In addition, police are asked to deal with social issues that they are insufficiently trained to handle, also resulting in the use of force.⁵⁵ The question about how to address these issues has long been debated. Today, we are now living in a seminal moment of reckoning and the momentum must be seized by those in power to deliver transformative change.

This Task Force has examined methods to rein in police misconduct that have previously been tried and failed, and issues recommendations with the understanding that this moment demands more than platitudes or empty promises of reform. The changes that the people of this State need require taking some powers and authority away from police departments and vesting them within communities instead. The goal of protecting the lives and wellbeing of New Yorkers, and ensuring accountability in instances of police misconduct should outweigh other political considerations.

C. Why is Reform Needed Now?

The time is right for reform. The nation is receptive to reform. Governor Cuomo has created an incentive for police departments statewide to reform their practices. Lastly, and most significantly, if we do not do something now, the policing practices in place that result in the death of suspects, with a disproportionate impact on Black and Brown communities, will continue.

The brutal beating of Rodney King in 1995—which was one of the first police brutality cases captured on video and aired publicly for all to see—started the national dialogue about racial profiling and the disparate way police interacts with people of color (and, in particular, Blacks), in contrast to their interactions with whites.

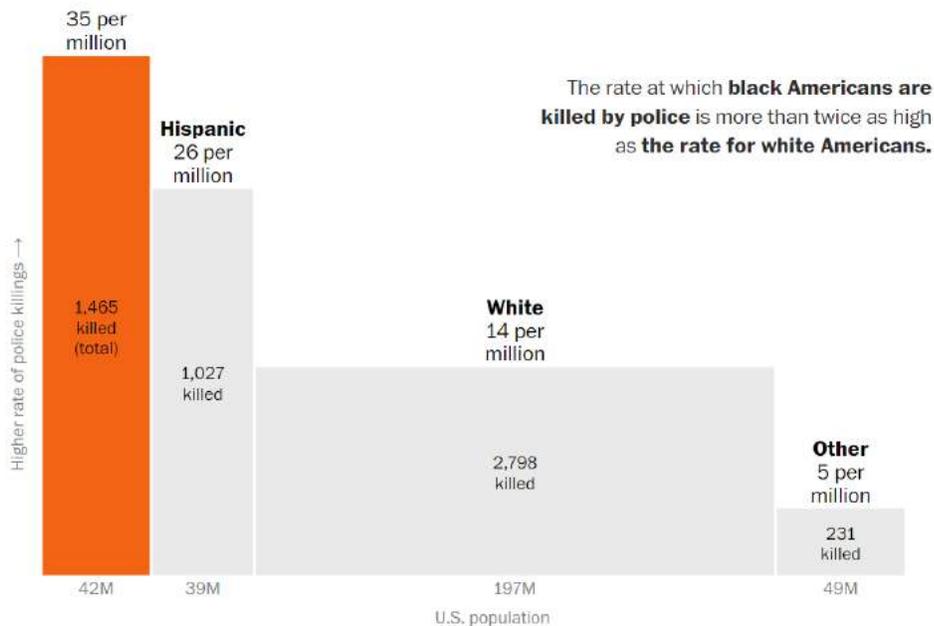
Sadly, the trend of fatal police interactions in the United States continues unabated. The Black Lives Matter Movement, formed in 2013 in response to the killing of Michael Brown by police in Ferguson, Missouri, has been a vocal part of the movement against police brutality in the U.S. by organizing “die-ins,” marches, and demonstrations in response to the killings of Black men and women by police. While Black Lives Matter has become a controversial movement within

⁵⁴ Justin M. Feldman, Sofia Gruskin, Brent A. Coull, and Nancy Krieger *Police-Related Deaths and Neighborhood Economic and Racial/Ethnic Polarization, United States, 2015–2016*, *Am. J. of Pub. Health* 109, 458–464 (2019), <https://doi.org/10.2105/AJPH.2018.304851>.

⁵⁵ See Alex S. Vitale, *The End of Policing*, (Verso, 2018) at 39.

the U.S., it has brought more attention to the number and frequency of police brutality against Blacks.⁵⁶

Research has proven conclusively that African Americans are killed at a much higher rate than white Americans by law enforcement. With respect to police shootings in particular, although half of the people shot and killed by police are white, Black Americans are shot at a disproportionate rate. They account for less than 13 percent of the U.S. population, but are killed by police at more than twice the rate of white Americans. Hispanic Americans are also killed by police at a disproportionate rate. Most victims are young males. An overwhelming majority of people shot and killed by police are male—over 95 percent. More than half the victims are between 20 and 40 years old.⁵⁷



According to 2019 census data, New York State has a population of approximately 19,453,561 people.⁵⁸ By ethnicity, 69.6% are white, 17.6% are Black, 19.3% are Hispanic and 9% are Asian. According to 2019 data from the NYS Division of Criminal Justice Services, police made 356,333 arrests across New York State of adults 18 years and older.⁵⁹ By ethnicity, the arrests are as follows: 118,952—white (33%), 136,319—Black (38%), 83,942—Hispanic (24%),

⁵⁶ Number of people shot to death by the police in the United States from 2017 to 2021, by race, Statista (May 3, 2021), <https://www.statista.com/statistics/585152/people-shot-to-death-by-us-police-by-race/> (last accessed May 18, 2021).

⁵⁷ Julie Tate, Jennifer Jenkins, and Steven Rich, *Fatal Force: Police Shootings Database*, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> (last accessed May 17, 2021).

⁵⁸ United States Census, New York QuickFacts, <https://www.census.gov/quickfacts/NY>.

⁵⁹ <https://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/Allcounties.pdf>.

11,885 (3.3%)—Asian and 5,235 (1.5%)—other/unknown. Though over a 10-year period crime has gone down in New York State, the demographics of those arrested has remained steady.

New York has not been forthcoming about releasing the race of individuals involved in police shootings.⁶⁰ However, the website [Mapping Police Violence](#) shows that New York follows the trend of the rest of the country in that Black Americans are disproportionately represented in people killed by the NYPD (please see graphic below).⁶¹

Between 2013 and 2021, the New York Police Department (NY) killed **83 people**.

Do you know their names?

ALL	RACE	SEX	ARMED STATUS	CAUSE OF DEATH	YEAR
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Black Unknown Race White Hispanic



⁶⁰ *NYCLU v. New York City Police Department*, No. 115928 (Sup. Ct., N.Y. Co. 2009) This case challenged the NYPD’s refusal to disclose information about the role of race in police shootings. In October 2007, the NYCLU filed a Freedom of Information Law request with the NYPD for records identifying the race of everyone shot by police officers since January 1997. After months of stalling, the NYPD ultimately denied the request in May 2008. The NYCLU filed an Article 78 petition in the State Supreme Court on Aug. 4, 2008. NYPD shooting reports released in 1996 and 1997 show that 89.5 percent of shooting victims during those two years were Black or Latino. The Department stopped reporting information about race in police shootings in 1998, after four white NYPD police officers killed Amadou Diallo, an unarmed Black man, in a hail of 41 bullets. At the same time, the Department started reporting the breed of dogs that officers shot.

The issue of race in police shootings reemerged in November 2006 after Department officers fired 50 bullets at Sean Bell, an unarmed Black man, killing him just hours before he was to get married. The NYCLU filed its FOIL request as part of an effort to determine if race is playing an inappropriate role in police shootings. In response to the lawsuit, the NYPD agreed to disclose the race of people who were shot by police officers between 1997 and 2006, but it refused to release racial data about people who had been shot at by police officers but not struck by the bullets. In an opinion dated Dec. 15, 2009, Supreme Court Judge Joan A. Madden ruled that the NYPD had not met its burden under the state’s Freedom of Information Law to withhold the data and ordered the Department to turnover racial data of people shot at, but not struck, by police gunfire.

The City appealed that decision. In June 2010, the First Department of the Appellate Division affirmed Judge Madden’s ruling requiring the NYPD to turn over information about the race of people shot at by police officers over the last 10 years. State Supreme Court, New York County, Index No. 08/110557.

⁶¹ [Mapping Police Violence](#) (chart is from the website using a filter to get statistics of New York).

D. Reform Efforts in the Wake of George Floyd’s Killing

Since Floyd’s death, community groups and states have proposed or enacted reforms. This section provides an overview of those efforts.

1. Call for Criminal Justice Reform and Defund the Police Movement

After the spate of killings of unarmed African Americans by law enforcement in 2020, there were clarion calls to “defund the police.”

While some have sought to paint the “defund the police” movement as a call to abolish law enforcement altogether, thereby allowing society to descend into anarchy and chaos, that is not what the movement calls for. Rather, it calls for reallocating or redirecting funding away from police departments to other government agencies that provide social services.⁶² A *Washington Post* study of 60 years of state and local funding of police showed that increasing funding for police departments did not correlate to a decrease in crime; however, increasing funding in education equity and teaching people skills to decrease unemployment did.⁶³

Data shows that 9 out of 10 “911” calls are for nonviolent situations.⁶⁴ Similarly, a Center for Constitutional Rights analysis of data of the NYPD’s “stop and frisk” program, for instance, showed that 90% of the stops did not result in officers finding any criminal activity or contraband.⁶⁵ Further, from 2005–2008, 80% of the stops made by NYPD were of African American and Latinx people, which only comprised 25% and 28% of the population, respectively. Whites were only 10% of those stopped and frisked, while comprising 44% of the population. *Id.*

“Defund the police” advocates also point to the outsized power yielded by police unions as a reason to deconstruct current law enforcement structures and to create a new policing mechanism where unions do not call the shots.⁶⁶ “Local governments most likely can drastically cut police budgets and reinvest in social services without needed to negotiate with police unions, which often have been criticized for resisting reform and accountability[.]”⁶⁷ Indeed, it has been said that rather than weed out bad officers, police unions protect officers who behave poorly

⁶² Rashawn Ray, *What does ‘defund the police’ mean and does it have merit?*, Brookings Institution (June 19, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/19/what-does-defund-the-police-mean-and-does-it-have-merit/>.

⁶³ Philip Bump, *Over the past 60 years, more spending on police hasn’t necessarily meant less crime*, Wash. Post (June 7, 2020), <https://www.washingtonpost.com/politics/2020/06/07/over-past-60-years-more-spending-police-hasnt-necessarily-meant-less-crime/>.

⁶⁴ Jeff Asher, *Numbers Racket*, Slate (Mar. 15, 2016), <https://slate.com/news-and-politics/2016/03/calls-for-service-data-are-the-best-way-to-analyze-crime-why-dont-cities-make-them-available.html>.

⁶⁵ *Racial Disparity in NYPD Stops-and-Frisks: Preliminary Report on UF-250 Data From 2005 through June 2008*, Ctr. for Const. Rights, available at https://ccrjustice.org/sites/default/files/assets/Report-CCR-NYPD-Stop-and-Frisk_3.pdf.

⁶⁶ Robert Iafolla, *Defunding Is One Place Police Unions See Vaunted Powers Limited*, Bloomberg Law (June 12, 2020), <https://news.bloomberglaw.com/daily-labor-report/defunding-is-one-place-police-unions-see-vaunted-powers-limited>.

⁶⁷ *Id.*

and impede reform that would improve police and police-community relations.⁶⁸ However, legislators are loath to place checks on the power of police unions because of their political power.⁶⁹

Unfortunately when police show up to respond to a call, they too often contribute to an escalation of a situation, rather than de-escalating. The “defund the police” advocates are also seeking criminal justice reform and greater accountability by law enforcement when officers kill or injure civilians: i.e. bans on chokeholds and certain other restraints, greater civilian oversight of police, and mandatory de-escalation training. In addition, advocates are concerned that a police officer’s “skillset and training are often out of sync with the social interactions that they have” such as individuals with mental health issues.⁷⁰ To that end, they advocate rerouting some police funding to create a department or hire personnel knowledgeable in ascertaining when an alleged perpetrator may be suffering a mental/psychological/psychiatric episode or is otherwise in distress and means no actual harm to law enforcement.

2. Reform Actions Taken by States

In the Midwest, legislation has been introduced in many state capitols since the May 25, 2020 death of George Floyd, including Minnesota. In July 2020, during its second special session of 2020, the Minnesota Legislature passed HF1.⁷¹ This comprehensive measure:

1. bans the use of chokeholds, except when a peace officer or other’s life is endangered;
2. prohibits “warrior” style training of officers;
3. establishes an independent unit within the Bureau of Criminal Apprehension to investigate officers when they kill someone or are accused of sexual misconduct;
4. adds two citizen members to the Peace Officer Standards and Training (POST) Board;
5. changes the arbitration system for officers accused of misconduct.
6. adopts use-of-force standards that make sanctity of life a core organization value and that include requirements for de-escalation; and

⁶⁸ Daniel DiSalvo, *The Trouble with Police Unions*, Nat’l Affairs (Fall 2020),

<https://www.nationalaffairs.com/publications/detail/the-trouble-with-police-unions>.

⁶⁹ *Id.* (“According to an investigation by the *Guardian*, police unions in Los Angeles, New York, and Chicago alone spent a combined \$87 million over the last decade on state and local politics.”)

⁷⁰ Rashawn Ray, *What does ‘defund the police’ mean and does it have merit?*, Brookings Institution (June 19, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/19/what-does-defund-the-police-mean-and-does-it-have-merit/>.

⁷¹ Minnesota Police Reform Bill HF-1, available at <https://iris.com/wp-content/uploads/2020/07/minnesota-police-reformbill.pdf>.

7. improves training and develops new models of response to de-escalate incidents involving individuals in a mental health crisis.

A month earlier, in June 2020, Iowa became the first state in the region to get a comprehensive police-reform measure from introduction to enactment. The bill places tougher restrictions on the use of chokeholds in arrests and prevents officers fired for misconduct from being hired in the state. Iowa Governor Kim Reynolds indicated that the bill adds ““additional accountability’ for law enforcement and that such accountability benefits both the community and the police.”⁷²

Three days after the death of George Floyd, Michigan Sen. Jeff Irwin introduced SB 945, which would require all incoming police officers to complete training on implicit bias, de-escalation techniques, and the use of procedural justice in interactions with the public. Additionally, the bill would require officers to complete 12 hours of continuing education annually. SB 945 passed the Michigan Senate in just one week. A near-identical measure, HB 5837, was passed by the Michigan House in June.

Months before George Floyd’s death, an 18-member working group in Minnesota (including two members of the Legislature) released 28 recommendations aimed at reducing deadly-force encounters with law enforcement. Among the ideas:

- Adopt use-of-force standards that make sanctity of life a core organization value and that include requirements for de-escalation, and
- Improve training and develop new models of response to de-escalate incidents involving individuals in a mental health crisis.

Other legislatures also passed legislation aimed at addressing police misconduct:⁷³

⁷² Veronica Stracqualursi, *Iowa governor signs police reform bill that was passed in one day*, CNN Politics (June 12, 2020), <https://www.cnn.com/2020/06/12/politics/iowa-police-reform-bill-trnd/index.html>.

⁷³ Mitch Arvidson, *After death of George Floyd, push for state-level change intensifies: Proposals seek new police training, protocols and ways to prosecute misconduct cases*, The Council of State Gov’ts (July 24, 2020), <http://knowledgecenter.csg.org/kc/content/after-death-george-floyd-push-state-level-change-intensifies-proposals-seek-new-police>.

	<p>Minnesota: Legislators take action on comprehensive measure</p> <p>In July, during its second special session of 2020, the Legislature passed HF 1. It bans the use of chokeholds by officers in nearly all instances; prohibits "warrior" style training of officers; establishes an independent unit within the Bureau of Criminal Apprehension to investigate officers when they kill someone or are accused of sexual misconduct; adds two citizen members to the Peace Officer Standards and Training (POST) Board; and changes the arbitration system for officers accused of misconduct.</p>		<p>Illinois: Trio of bills in committee</p> <p>Soon after the death of George Floyd, the sponsors of three bills in Illinois renewed their push for passage of their reform measures: take away the pensions for any police officer convicted of a felony (HB 4999); require a special prosecutor to be assigned to all death cases involving a law enforcement officer (HB 3926); and require local governments to provide mental and behavioral health professionals, instead of the police, to individuals who call 911 in mental or emotional distress (SB 3449).</p>
	<p>Ohio: Review bills' impact on racial groups</p> <p>Two Ohio resolutions introduced in June (SCR 14 and HCR 31) would declare racism a public health crisis and request the formation of a working group to promote racial equity. HB 690, meanwhile, would require that human impact statements be completed by Ohio's Legislative Service Commission on all criminal justice bills. The purpose: Determine if these measures would have a disparate impact on a racial or ethnic group. Finally, HB 703 would impose mandatory psychological testing of police officers and create a disciplinary database.</p>		<p>Iowa: Law changes police prosecutions</p> <p>HF 2847, signed into law in June, gives the state attorney general the power to prosecute cases involving the death of a civilian by a police officer, "regardless of whether the county attorney requests the assistance." In addition, the use of chokeholds by law enforcement is not allowed, except in cases when an officer "reasonably believes" that an individual will use deadly force and cannot be apprehended in any other way. (This is the same standard under Iowa law for use of deadly force by police.)</p>
	<p>Saskatchewan: Improve police oversight</p> <p>The Government of Saskatchewan introduced legislation in June to improve police oversight. One key provision: When someone suffers a serious injury or death while in police custody, or as a result of the actions of an officer, turn over the investigation to the province's Public Complaints Commission — a five-member, non-police body.</p>		<p>Kansas: Resolution 'condemning brutality'</p> <p>On June 3, HCR 5002 was introduced to condemn "all acts of police brutality, racial profiling and the use of excessive and militarized force throughout the country." The resolution died in committee when the Legislature adjourned the next day.</p>
	<p>Wisconsin: Governor unveils nine bills</p> <p>Gov. Tony Evers and Lt. Gov. Mandela Barnes released drafts of nine bills that, among other provisions, would ban chokeholds, establish statewide use-of-force standards, require de-escalation training by police, and prohibit no-knock warrants. Evers declined to convene a special session, so consideration of these bills must wait until 2021.</p>		<p>Michigan: Focus on de-escalation, training</p> <p>Under separate bills passed by the Michigan House and Senate (HB 5837 and SB 945), the state would require all incoming officers to complete training on implicit bias, de-escalation techniques and procedural justice. Procedural justice is described in these bills as prioritizing "legitimacy over deference in obtaining citizen compliance" and emphasizing "a fair process and respectful two-way communication." As part of their training, too, incoming officers would receive information on mental health resources available to them. Lastly, these bills mandate that officers complete 12 hours of continuing education every year.</p>

In September, California's Governor signed four police reform bills into law. AB 846 required police officers to be evaluated by a psychologist for potential bias against certain protected classes which included race or ethnicity. AB 1185 authorized counties to create a board to oversee the actions of the Sheriff's office. AB 1196 prohibits police officers from using a chokehold to restrain a person. AB 1506 requires state prosecutors to investigate incidents of an officer-involved shooting resulting in the death of an unarmed civilian.

Several California municipalities also acted to address police reform. Several, created some form of community review board over their respective police departments. Some voted to reduce or redirect police funding including Los Angeles which cut the police department budget by \$150 million. San Diego also removed its mandatory police staffing level under the city's charter. Los Angeles and San Francisco also created policies to replace police officers with non-armed professionals for non-violent, non-emergency crisis.

3. Reform Actions Taken by New York

In 2020, the New York State Legislature took up 12 bills focused on police reform, 10 of which passed both houses and were subsequently signed by Governor Cuomo. Additionally, the Governor issued an Executive Order that was aligned with the police reform package and a separate order that recognized Juneteenth as a state holiday. The New York state laws and

executive orders and Task Force recommendations—where relevant—for improving accountability are outlined below:⁷⁴

a. Executive Order No. 203

- Requires all municipalities within New York State with a police agency to establish a plan for reinventing and modernizing police strategies and programs. The process for developing the plan must incorporate the input of community stakeholders. In particular, the executive order requires municipalities to review current police force policies and procedures; develop a plan for improvement that addresses the needs of the communities they service; promote community engagement to foster trust, fairness, and legitimacy; and to address any racial bias and disproportionate policing of communities of color. The plan must be ratified or adopted by local law or resolution no later than April 1, 2021,⁷⁵ or the municipality risks losing state funding.

b. Disclosure of Police Disciplinary Records: A.10611/S.8496 | Signed into Law

- A.10611 repeals Section 50-a of the Civil Rights Law, which made personnel records of police officers, firefighters, correction officers, and peace officers confidential and not subject to inspection or review without the consent of the officer or mandated by court order. A.10611 amends Section 86 of the Public Officers Law, which codifies the New York Freedom of Information Law, to define and include law enforcement disciplinary records, disciplinary proceedings, agencies, and technical infractions. This legislation also adds certain exceptions to disclosure, such as requiring law enforcement agencies responding to requests for personnel records to redact certain sensitive information related to medical history, certain addresses and telephone numbers, social security numbers, and use of mental health services.

Prior to the enactment of this law, Section 50-a of the New York State Civil Rights Law permitted law enforcement officers to refuse disclosure of personnel records used to evaluate performance toward continued employment or promotion. This narrow exemption has been expanded in the courts to allow police departments to withhold from the public virtually any record that contains any information that could conceivably be used to evaluate the performance of a police officer.

The implementation of the law had been stayed pending litigation commenced by the police unions in opposition to it. However, as of February 2021, the Second Circuit held that the NYPD could not continue to refuse to disclose disciplinary records.

⁷⁴ Obiamaka P. Madubuko, New York State Police and Criminal Justice Reforms Enacted Following George Floyd's Death, Nat'l L. Rev. (June 24, 2020), <https://www.natlawreview.com/article/new-york-state-police-and-criminal-justice-reforms-enacted-following-george-floyd-s>.

⁷⁵ The plans have been filed. The Legislation Committee requires additional time to review these plans.

It is expected that the NYPD will continue its legal fight, up to and including the United States Supreme Court.⁷⁶

c. Eric Garner Anti-Chokehold Act: A.6144B/S.08539 | Signed into Law

- The “Eric Garner Anti-Chokehold Act” adds a new Section 121.13 to the New York Penal Law, making the crime of aggravated strangulation a Class C Felony. The bill was introduced in response to the 2014 death of Staten Island, New York resident Eric Garner by way of a police officer chokehold. While chokeholds were and currently are prohibited in the New York City Police Patrol Guide, this law makes it a crime to engage in one as a police officer throughout the State of New York.

d. Banning False, Protective Class-Based 911 Calls: A.01531B/S.0849 | Signed into Law

- This legislation amends subdivision 2 of Section 79-n of the Civil Rights Law to provide for civil penalties where any person who intentionally summons a police officer or peace officer without reason to suspect a criminal violation, in whole or in part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct.

e. Special Prosecutor Office for Police-Involved Deaths: A.1601c/S.02574-C | Signed into Law

- This bill adds a section to the Executive Law to establish a new Office of Special Investigation within the Office of the Attorney General. This Office is tasked with investigating and, if warranted, prosecuting, any alleged criminal offense(s) committed by a police or peace officer while on- or off-duty where that offense results in the death of another individual.
- Furthermore, the Office of Special Investigation is required to issue a public report for each incident where the office initiates an investigation but declines to prosecute, or where a grand jury declines to return an indictment as well as a report six months after the law takes effect, and annually thereafter, providing information on the matters investigated and recommendations for reforms.

f. Weapons Discharge Reporting: A.10608/S.2575-B | Signed into Law

- This legislation requires state and local law enforcement officers, as well as peace officers, to report, within six hours, when they discharge their weapon

⁷⁶ Josh Russell, *NYPD Loses Appeal to Keep Disciplinary Records Under Lock & Key*, Courthouse News Service (Feb. 16, 2021), <https://www.courthousenews.com/nypd-lose-appeal-to-keep-disciplinary-records-under-lock-key/>.

where a person could have been struck, whether they were on or off duty. It became effective on September 13, 2020.

While the law is couched as mandatory (“shall”), it indicates that the officer may refuse to provide additional information by invoking their Fifth Amendment right against self-incrimination.

g. Medical Attention for Persons Under Arrest: A.8226/ S.6601A | Signed into Law

- This act adds an amendment to the Civil Rights Law, establishing a cause of action for failure by law enforcement to provide proper medical treatment for people in their custody. Additionally, the bill creates a duty for police officers to respond in good faith in addressing the medical and mental health needs of people under arrest.

h. Right to Record Police Activity: A.1360a/S.3253B | Signed into Law

- This legislation clarifies the rights of a person not under arrest or in the custody of law enforcement to record police activity and to maintain custody and control of that recording, along with any property or instruments used to record such police activities.

i. Expanded Use of Law Enforcement Body Cameras: A.8674/S.8493a | Signed into Law

- The “New York State Police Body-Worn Cameras Program Act” directs the Division of State Police and the Metropolitan Transit Authority (MTA) Police to provide all agency police officers with body-worn cameras that are to be used any time an officer conducts a patrol and prescribes mandated situations when the camera is to be turned on and recording.

The entire text of the law—which became effective on April 1, 2021, reads as follows:

§ 234. New York state police body-worn cameras program

- 1. There is hereby created within the division of state police a New York state police body-worn cameras program. The purpose of the program is to increase accountability and evidence for law enforcement and the residents of the state by providing body-worn cameras to all state police officers while on patrol.*
- 2. The division of state police shall provide body-worn cameras, to be worn by officers at all times, while on patrol. Such cameras shall record:*
 - (a) immediately before an officer exits a patrol vehicle to interact with a person or situation, even if there is a dash camera inside such vehicle which might also be recording the interaction;*

- (b) all uses of force, including any physical aggression and use of a non-lethal or lethal weapon;*
 - (c) all arrests and summonses;*
 - (d) all interactions with people suspected of criminal activity;*
 - (e) all searches of persons and property;*
 - (f) any call to a crime in progress;*
 - (g) investigative actions where there are interactions with members of the public;*
 - (h) any interaction with an emotionally disturbed person; and*
 - (i) any instances where officers feel any imminent danger or the need to document their time on duty.*
3. *The attorney general may investigate any instance where body cameras fail to record an event pursuant to this section.*
 4. *At the discretion of the officer, body-worn cameras may not record:*
 - (a) sensitive encounters, including but not limited to speaking with a confidential informant, or conducting a strip search; or*
 - (b) when a member of the public asks such officer to turn off the camera; provided, however, such officer may continue recording if he or she thinks a record of that interaction should be generated.*
 5. *The division of state police shall preserve recordings of such body-worn cameras and perform all upkeep on equipment used in such body-worn cameras. Such duties shall include:*
 - (a) creating a secure record of all instances where there is recorded video or audio footage;*
 - (b) ensuring officers have sufficient storage capacity on their cameras to allow for the recording of interactions required by this section; and*
 - (c) ensuring officers have access to body-worn cameras for the recording of instances required by this section.*

N.Y. Exec. Law § 234 (McKinney)

Initially, the Task Force notes that this law applies only to State Police and Metropolitan Transit Authority police. As this law is an Executive Law, it can and should be expanded to all law enforcement within the State. This recommendation is discussed more fully later in the report in Part 3: Improving Policing at Key Stages, Section 4: Monitoring.

Additionally, the provision leaves it up to “the discretion of the officer” to decide when they will *not* record certain interactions. All public-facing police interactions should be recorded and should not be left to the discretion of the officer. We make this recommendation because of the critical importance of video in revealing police misconduct: if not for the video recordings of certain recent instances of police brutality and/or fatal interactions with the police, the public would not have become aware of the police misconduct. These instances include George Floyd’s murder and Breonna Taylor’s death (where the officers wrote in the report that there were no injuries, despite

the fact that she had been killed by their bullets⁷⁷). If police officers are to be held accountable for their actions, they cannot have the discretion to determine when this potential evidence is available.

In addition, this law indicates that the attorney general “may” investigate instances where the body camera fails to record. That is not strong enough. We recommend that the attorney general “shall” investigate any instance where the body camera fails to record, in order to ascertain that it was not deliberately disabled.

Further, the law has no consequences should law enforcement intentionally disable or turn off cameras.⁷⁸ Again, this leads to a continued lack of accountability on the part of law enforcement. While we understand that police departments, in conjunction with the law enforcement unions, decide how to discipline officers who may engage in conduct unbecoming an officer, inclusion of penalties within the statute would lead to greater transparency and accountability. Contrast this to the Eric Garner Aggravated Strangulation law which is housed in the Penal Law and which incurs penalties consistent with class C felonies. We leave it up to the Legislature to determine what those penalties should be, but we recommend that intentional tampering or disabling of body cameras should be made a criminal offense.

Other ancillary issues that should be raised here are cost and the potential loss of privacy by the officers wearing the body cameras. We have heard the arguments of police organizations who say that cameras that are always activated will lead to police officers feeling like they have no privacy and are constantly being surveilled, in addition to dampening confidence by informants who may wish to provide important information to law enforcement about criminal activity.⁷⁹ In response, we would note that footage from police cameras is not made publicly available. Indeed, even when a recording exists, police have fought its disclosure.⁸⁰ Thus, there is no real threat to police officers’ privacy through the use of body cameras.

The argument that storage of body camera footage would be cost-prohibitive is also unavailing.⁸¹ Cloud storage is becoming increasingly less expensive and police

⁷⁷ Audrey McNamara, *Louisville police release Breonna Taylor incident report – it lists her injuries as “none”*, CBS News (June 11, 2020), <https://www.cbsnews.com/news/louisville-police-breonna-taylor-death-incident-report/>.

⁷⁸ Megan Cassidy, *San Francisco police turned off body cameras before illegal raid on journalist, memo says*, S.F. Chronicle (June 18, 2020), <https://www.sfchronicle.com/crime/article/San-Francisco-police-turned-off-body-cameras-15349795.php>.

⁷⁹ Brendan del Pozo, *Body Cameras And Privacy—Where Do You Draw The Line?*, Nat’l Police Found., <https://www.policefoundation.org/body-cameras-and-privacy-where-do-you-draw-the-line/> (last accessed May 17, 2021).

⁸⁰ Laurent Sacharoff and Sarah Lustbader, *Who Should Own Police Body Camera Videos?*, 95 Wash. Univ. L. Rev. 267 (2017), https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=6274&context=law_lawreview.

⁸¹ *Police Body Camera Policies: Retention and Release*, Brennan Ctr. for Justice (Aug. 3, 2016, updated July 9, 2019), <https://www.brennancenter.org/our-work/research-reports/police-body-camera-policies-retention-and-release> (last accessed May 17, 2021).

departments would still need to retain all other “business records”—the body camera footage would be one such record.

j. Law Enforcement Misconduct Investigative Office: A.10002B/ S.3595 | Signed into Law

- This bill directs the State Inspector General, MTA Inspector General, and the Port Authority Inspector General to investigate allegations of corruption, fraud, use of excessive force, criminal activity, conflicts of interest, or abuse by officer agencies. Unlike the Special Prosecutor, which is only triggered following a law enforcement–related death, this law allows for an independent review of alleged misconduct by any local law enforcement agency.

k. Reporting Requirements of Chief Administrator of Courts: A.10609/ S.1830 | Signed into Law

- This bill expands reporting requirements of misdemeanors and violations charged by the Chief Administrator of the Courts and law enforcement agencies. The bill mandates the collection of data about the race, ethnicity, age, and sex of individuals charged, as well as the status of their cases, all of which must now be made publicly available online. It also requires the reporting and publication of deaths in police custody and those caused by any use of police force.

4. Federal Laws

The George Floyd Justice in Policing Act—which was first passed by the House of Representatives in 2020 but did not make it to the floor in the Senate—has been reintroduced for the 2021 legislative session. The George Floyd Justice in Policing Act aimed to bolster police accountability and prevent problem officers from moving from one department to another by creating a national registry to track those with checkered records. It also would end certain police practices that have been under scrutiny. The bill bans chokeholds and federal no-knock warrants, among other reform measures.⁸²

The reintroduced bill retains many of the original measures with some new ones: prohibit profiling based on race and religion and mandate training on profiling; ban chokeholds, carotid holds and no-knock warrants; require the use of federal funds to ensure use of body cameras; establish a National Police Misconduct Registry; amend the prosecution standard for police from “willfulness” to “recklessness” and reform qualified immunity; and require stronger data reporting on police use of force.

⁸² Jeanine Santucci and Deborah Barfield Berry, *For second time, House to take up police reform legislation named for George Floyd*, USA Today (Feb. 24, 2021), <https://www.usatoday.com/story/news/politics/2021/02/24/george-floyd-justice-in-policing-act-legislation-reintroduced-house/6804467002/>.

The Task Force believes this proposed law is a good first step towards federalizing law enforcement, thereby making police procedure more uniform. Further, it would drive more accountability, as police officers who are accused of misconduct in one jurisdiction would not be able to omit or fail to disclose prior complaints when seeking employment in other jurisdictions.

Part 2: Task Force Focus – 21st Century Policing

“This is an opportunity to reinvent law enforcement for the 21st century,” concluded Gov. Andrew Cuomo in his preface to the guidebook entitled, “New York State Police Reform and Reinvention Collaborative.”⁸³ The guidebook is the resource for New York State Police Departments to use in developing their policing plans to comply with Executive Order 203.

The murder of George Floyd was another flashpoint forcing Americans to critically examine policing practices and the role of police in our communities. The motto of most police departments is to serve and protect. How well are police practices enabling police officers to serve and protect their communities? Are they serving and protecting all members of their communities? Why does it seem that police officers use more force, especially lethal force, against Black and Brown citizens? Despite efforts to reform police practices after each highly publicized death due to excessive force, why do these deaths continue? Why is trust in police officers declining? Do we need to rethink what policing should be?

Yes, we do need to rethink what policing should be. Police are an integral component of protecting our communities, but the needs of our community have changed. The Task Force considered: what are the needs of communities with regard to the police in the 21st Century? In 2014, President Barack Obama created the Task Force on 21st Century Policing after the death of Michael Brown in Ferguson, MO to “identify[] best practices and offer[] recommendations on how policing practices can promote effective crime reduction while building public trust.”⁸⁴ The guidebook to comply with Executive Order 203 opens with the first paragraph in the introduction from the Task Force on 21st Century Policing report under the section “Part 1: Key Questions and Insights for Consideration:”

The purpose of the New York State Police Reform and Reinvention Collaborative is “to foster trust, fairness and legitimacy” within communities throughout our State and “to address any racial bias and disproportionate policing of communities of color.” The United States Department of Justice has emphasized the need for “trust between citizens and their peace officers so that all components of a community are treating one another fairly and justly and are invested in maintaining public safety in an atmosphere of mutual respect.”⁸⁵

The Task Force’s recommendations are based on four of six themes outlined in the report, excerpted in pertinent part below:

⁸³ Available at https://www.governor.ny.gov/sites/default/files/atoms/files/Police_Reform_Workbook81720.pdf.

⁸⁴ President’s Task Force on 21st Century Policing, 2015, *Final Report of the President’s Task Force on 21st Century Policing*, Washington, DC: Office of Community Oriented Policing Services, at 1.

⁸⁵ New York State Police Reform and Reinvention Collaborative at 5.

1. **Change the culture of policing:** Guardians versus warriors.
2. **Embrace community policing:** Community policing is a philosophy as well as a way of doing business.
3. **Ensure fair and impartial policing:** Procedural justice.
4. **Technology:** New and emerging technology improves efficiency and transparency.⁸⁶

Based on the information received, the Task Force envisioned achieving 21st Century policing in New York State to include the following four components:

1. aligning police professionals to other professions in terms of education, licensing and continuous substantive legal training;
2. inclusive and empowered community engagement in working with police departments to hold officers accountability for misconduct;
3. modifying criminal law procedures that hinder holding police officers accountable for misconduct as well increasing diversity and diversity training for the key actors in the criminal justice process—police, DA’s office, Public Defenders and Courts; and
4. leveraging technology to obtain data to improve monitoring and oversight and strengthen accountability.

The Task Force recommendations will be discussed in two general categories: (1) improving policing at key stages in Part 3 and (2) enhancing accountability in the criminal justice system in Part 4.

Part 3: Improving Policing at Key Stages

A key component of 21st century policing is rethinking the type of person who should be a police officer and how that officer’s career is managed from being a rookie to a senior leader in the department. Through our research, the Task Force identified 5 key stages of policing for enhancement to achieve a 21st policing model: (1) hiring, (2) training, (3) activities while “on the beat,” (4) monitoring, and (5) disciplining.

1. Hiring

Attracting the right kind of person to be a police officer is the focus of the hiring stage. At this point, you not only establish requirements but expectations of what is needed to be a successful police officer.

The hiring requirements to be a New York police officer generally include the following:⁸⁷

⁸⁶ Office of Community Oriented Policing Services. 2015. *The President’s Task Force on 21st Century Policing Implementation Guide: Moving from Recommendations to Action*. Washington, DC: Office of Community Oriented Policing Services at 2–3.

⁸⁷ “Join the State Police,” <https://joinstatepolice.ny.gov/process>; “Join the New York Police Department – Hiring Process,” <https://www1.nyc.gov/site/nypd/careers/police-officers/po-hiring.page>.

1. **Residency:** New York State Resident; NYPD—within 30 days of hiring reside in Queens, Kings, Richmond, Bronx, New York (Manhattan), Nassau, Suffolk, Rockland, Westchester, Putnam or Orange counties;
2. **Age:** 20–35; NYPD—Candidates may take the Police Officer’s Entrance Exam at age 17.5 years;
3. **Education:** High School Diploma/GED with 60 college credits of coursework (approximately 2 years for college education) with a minimum GPA of 2.0 (active military duty can take place of college credits);
4. **Valid New York State Driver’s License;** and
5. **Disqualifications:** “derogatory information from the background check”; “NYPD states “candidates will be disqualified if they have been convicted of a felony, domestic violence misdemeanor, or have been dishonorably discharged from the military [and] may also be disqualified if they demonstrate a history of disrespect for the law, a tendency toward violence, termination from a job for poor behavior, or not adjusting to discipline.”⁸⁸

The hiring process to become a New York police officer generally includes:⁸⁹

1. **Written Exam:** measures cognitive ability, observational skills, and mental acuity;
2. **Background Check:** areas examined include education, finances, employment history, and criminal history;
3. **Physical Test:** sit-ups, push-ups, running; NYPD also requires surmounting a barrier; climbing stairs; demonstrating the ability to physically restrain someone; dragging 175-pound mannequin 35 feet to simulate a rescue; and pulling the trigger of an unloaded firearm multiple times;
4. **Psychological Test:** includes self-evaluation, multiple choice questions and meeting with a psychologist; testing to assess the characteristics: “courage, honesty, impulse control, general intelligence, emotional intelligence, integrity, dependability, attitude toward sexuality, judgment and personal bias;”⁹⁰ and
5. **Drug/Alcohol Test.**

The Task Force recommends enhancing the hiring requirements⁹¹ and the hiring process in three ways: (a) changing the educational hiring requirements to require an associate’s college degree;

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *What You Should Know About the Psychological Screening of Police Officers*, Civil Service Success (Dec. 6, 2020), <https://www.civilservicesuccess.com/what-you-should-know-about-the-psychological-screening-of-police-officers/>.

⁹¹ Changing the residency hiring requirement for New York Police Department (NYPD) officers has been recommended as another way to minimize police misconduct. Though proposed by several of the New York City mayoral candidates and in the “Preliminary Report on the New York City Police Department’s Response to Demonstrations Following the Death of George Floyd” by the Office of the Attorney General, the Task Force did not find sufficient research or evidence that a change in this requirement would reduce police misconduct and, therefore, does not take a position on this proposal. Historically, police officers did live in the same city where they worked; however, concerns about corruption, discussed earlier in the report, led to many departments allowing officers to live outside of the city. In 2014, a FiveThirtyEight article stated 62% of police officers lived in New York City, noting that was comparatively high compared to comparable cities, stating that the majority of

(b) adding obtaining and maintaining a license; and (c) adding obtaining professional liability insurance. The Task Force further recommends that police departments focus hiring efforts on recruiting women and people of color.

a. Requiring at least an associate's college degree

In the early 1900s, police departments across the nation were viewed as corrupted by political and criminal influences. The enforcement of the 18th Amendment prohibiting intoxicating liquors was hobbled by corrupt police officers.⁹² President Herbert Hoover created the National Commission on Law Observance and Enforcement or commonly known as the Wickersham Commission to determine ways to address this issue. In Volume 14 accompanying its 1931 report, one of the recommendations was to include an educational requirement for police officers. Thirty years later, the tumultuous events of the 1960s, and the police response to those events, led President Lyndon B. Johnson to create the Commission on Law Enforcement and the Administration of Justice. A recommendation from this report was for police officers to be college-educated.⁹³

officers of color lived in the City and the majority of white officers lived outside of the City. Nate Silver, *Most Police Don't Live In The Cities They Serve*, FiveThirtyEight (Aug. 20, 2014), <https://fivethirtyeight.com/features/most-police-dont-live-in-the-cities-they-serve/>. An August 13, 2021 Washington Examiner article states the percentage is closer to 49%, with the largest percentage (17.1%) of officers living in Nassau County. Steve Bittenbender, *More than half of NYPD officers live outside city: Report*, Wash. Examiner (Aug. 13, 2020), <https://www.washingtonexaminer.com/politics/more-than-half-of-nypd-officers-live-outside-city-report>. A 2021 blog article found that the percentage is approximately 58% after reviewing pertinent data from NYPD. Labs Bell Blog, *Your neighborhood NYPD officer isn't likely to be your neighbor*, <https://blog.labsbell.com/blog/NYPDHomeZip> (last accessed May 17, 2021). Kesi Foster, an activist with Communities United for Police Reform and Make the Road New York, stated in a *City & State New York* April 19, 2021 article that, "I don't think there's anything that points to diversity getting at the root problems of policing in this country, . . . noting that Chicago has a police residency requirement, but it still continues to deal with police brutality . . . [i]nstead, he said lawmakers should focus more energy on police accountability and reducing the scope of police departments." Chicago has had a residency requirement for 100 years and continues to be plagued by police misconduct: on March 29, 2021, 13 year-old Adam Toledo was shot by a Chicago Police Officer shortly after complying with the officer's command to drop the gun. The same *City & State New York* article quotes David Pritchard, an adjunct criminal justice professor at the Wilder School of Government and Public Affairs at Virginia Commonwealth University, stating "My study, I would argue, shows on a neighborhood level that it reduces crime and on the neighborhood level that it reduces social disorganization, [noting] it would be difficult to conclude whether that would hold true in a large city like New York City, where officers may live in different boroughs than where they work." Only one NYC mayoral candidate, Dianne Morales, opposes the residency requirement. According to the same City and State New York article, Morales described it as a "distraction: There is no evidence that residency has a positive effect on police performance or community relations." The NYPD Patrol Guide prohibits police officers from living in the same precinct where they work.

⁹² *Report on the Enforcement of the Prohibition Laws of the United States*, U.S. Dep't of Justice Nat'l Comm. on Law Observance and Enforcement (July 7, 1931), <https://www.ojp.gov/pdffiles1/Digitization/44540NCJRS.pdf>, at 78 (stating "As to corruption, it is sufficient to refer to the reported decisions of the courts during the past decade in all parts of the country, which reveal a succession of prosecutions for conspiracies, sometimes involving the police . . .").

⁹³ *The Challenge of Crime in a Free Society*, U.S. Dep't of Justice Comm. on Law Enforcement and the Admin. of Justice (Feb. 1967), <https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/ncjrs/42.pdf>, at 109. ("The ultimate aim of all police departments should be that all personnel with general enforcement powers have baccalaureate degrees.")

Nationally, most police departments do not require more than a high school diploma. While 81.5% only require a high school diploma, 6.6% require some college credits, 10.5% require a two-year degree and 1.3% require a four-year degree.⁹⁴ A 2017 study entitled, “Policing around the Nation: Education, Philosophy, and Practice,” found that police leadership had differing opinions on the value of higher education on policing:

There is little consensus about which perceived advantages of hiring college-educated officers are actual benefits of hiring college-educated officers. The two perceived benefits that a majority of respondents agreed are actual benefits are that college-educated officers are better report writers (61.6%) and better able to use modern technology (46.1%). Respondent perceptions of college-educated officers was highly and significantly correlated with [department head] education level.⁹⁵

In addition, the survey found:⁹⁶

Small and medium sized agencies serving populations less than 100,000 have a higher proportion of officers with two-year degrees and larger agencies serving populations over 100,000 have a higher proportion of officers with four-year degrees.

Slightly more than half (51.8%) of sworn officers in the United States have at least a two-year degree, 30.2% have at least a four-year degree, and 5.4% have a graduate degree. This varies considerably by state, region, agency size, [department head] education level, union presence, and department type.

From a 21st century policing perspective with an emphasis on greater community engagement, recruiting future police officers with more in-depth training and broader socialization with a wider array of people will be advantageous. The 2017 study provided an overview of various studies that found benefits to having a college-educated police officer:

Research evidence on the value of a bachelor’s degree for police officers is not indisputable; some studies find positive benefits, but others find no correlation. On the whole, more research indicates positive effects than no correlation or negative consequences. Even though they typically receive higher salaries, research suggests that college-educated officers (those with a bachelor’s degree or higher) save departments money. This is because, according to research, college-educated officers take fewer sick days, have fewer on-the-job injuries and accidents, and have fewer individual liability cases filed against them (Carter & Sapp, 1989; Cascio, 1977; Cohen & Chaiken, 1972). They also may be better employees; research finds that college-educated officers are better report writers, more innovative, more reliable, more committed to the agency, more likely to take on leadership roles within the department, and more likely to be promoted than officers without a college degree (Carlan & Lewis, 2009; Cohen &

⁹⁴ Christie Gardiner, Ph.D., *Policing around the Nation: Education, Philosophy, and Practice*, Police Foundation (Sept. 2017), https://www.policefoundation.org/wp-content/uploads/2017/10/PF-Report-Policing-Around-the-Nation_10-2017_Final.pdf, at 2.

⁹⁵ *Id.* at 3.

⁹⁶ *Id.* at 4.

Chaiken, 1972; Krimmel, 1996; Trojanowicz & Nicholson, 1976; Whetstone, 2000; Worden, 1990). If degree-holding officers are truly better report writers, that could translate into better investigations, higher court case filings, fewer evidentiary constitutional challenges, fewer false confessions or wrongful convictions, and/or more successful prosecutions.

Research has also found that college-educated officers have fewer complaints and disciplinary actions against them, use force less often, and when they do use force they use lower levels of force than officers without a college degree (Chapman, 2012; Cohen & Chaiken, 1972; Fyfe, 1988; Kappeler et al., 1992; Lersch & Kunzman, 2001; Manis, Archbold, & Hassell, 2008; Roberg & Bonn, 2004; Rydberg & Terrill, 2010; Wilson, 1999). These particular benefits may be especially valuable for agencies which serve poor, majority-minority communities where police-community relations are more likely to be strained than wealthy, homogenous communities. Some research also suggests that college-educated officers may be less resistant to change and more likely to embrace new methods of policing (Roberg and Bonn, 2004); characteristics which might be particularly valuable in agencies committed to newer and more innovative policing strategies, such as community policing, problem solving, intelligence-led policing, democratic policing and procedural justice principles.⁹⁷(emphasis added)

Focusing on the finding concerning use of force, another study conducted in 2007 of police encounters in Indianapolis, Indiana and St. Petersburg, Florida, found that “encounters involving officers with a four-year degree result in significantly less physical force” being used.⁹⁸

Police officers are also increasingly asked to handle cases involving individuals with mental health issues. Police officers with college education were found to be more likely to handle these types of encounters by referring the individual to a mental health professional rather than trying to informally resolve the situation.⁹⁹

Compared to their counterparts in Europe, education requirements for police in the United States are far less onerous. Gary Potter, a professor at Eastern Kentucky University’s School of Justice Studies, further states that, “Police officers there have to go to three years of police college. It’s real college. And then two additional years where they don’t have arrest powers or guns. They have to work in the community and adapt to the community. That makes a huge difference.” According to the Council on Foreign Relations, “In Finland and Norway, recruits study policing in national colleges, spending part of the time in an internship with local police, and earn degrees in criminal justice or related fields.”

For these reasons, **the Task Force recommends that new recruits to police departments hold college degrees.**

⁹⁷ *Id.* at 11.

⁹⁸ Eugene Paoline and William Terrill, *Police Education, Experience and the Use of Force*, 34 *Criminal Justice and Behavior* 179, 179–196 (Feb. 2007).

⁹⁹ Teresa LaGrange, *The Role of Education in Police Handling Cases of Mental Disorder*, 28 *Crim. Justice Rev.* 1 (Spring 2003). The study was conducted by the Cleveland, Ohio police department from 1998–1999.

b. Police Officer Licensing

To ensure that high-quality and professional law enforcement services are provided to the community, police agencies should seek to ensure that officers are educated, certified and licensed. Studies have shown that well-educated and well-trained police officers are less likely than their colleagues to engage in misconduct or to be disciplined and more likely to enjoy successful police careers.¹⁰⁰ A professional licensing and certification scheme should include education, training, regulation, discipline, and decertification,¹⁰¹ as well as continuing law enforcement education, especially in the areas of use of force standards, implicit bias, intersectionality, and mental illness.

According to the National Conference of State Legislatures, a process involving the certification and decertification of police officers, under the auspices of a state entity, constitutes for all practical purposes a professional licensing structure.¹⁰² In most states, the agency to certify police officers is the peace officer standards and training (POST) board, which establishes guidelines and requirements for peace officer training and continuing education.¹⁰³ The POST board in New York State is the Municipal Police Training Council (MPTC) created under Executive Law § 839. The MPTC sets the minimally acceptable training standards for police officers in New York State and established the Basic Course for Police Officers. The curriculum consists of approximately 700 hours of training, covering such topics as ethics & professionalism, cultural diversity, bias-related incidents, professional communication, persons with disabilities, crisis intervention, use of physical force & deadly force, active shooter response and decision making.¹⁰⁴ In addition, recruits are required to participate in what is referred to as “Reality Based Training Scenarios to better prepare them for the situations they will encounter on the job.”¹⁰⁵

In addition to developing the basic police training program, the MPTC makes “recommendations regarding police training schools, instructor qualifications and categories/classification of in-service training.”¹⁰⁶ However, the Office of Public Safety of the New York State Division of Criminal Justice Services (DCJS), which administers the MPTC training program, does not require any further training after the basic training.

¹⁰⁰ James J. Fyfe and Robert Kane, *Bad Cops: A Study of Career-Ending Misconduct Among New York City Police Officers*, U.S. Dep’t of Justice, Nat’l Institute of Justice (February 2005), at 128.

¹⁰¹ Tatiana Follett, Suzanne Hultin, Amber Widgery and Lesley Kennedy, *Law Enforcement Certification and Discipline*, Nat’l Conf. of State Legislatures (Aug. 17, 2020), <https://www.ncsl.org/research/labor-and-employment/policing-oversight-and-new-legislation.aspx>.

¹⁰² *Law Enforcement Officer Decertification*, Nat’l Conf. of State Legislatures (Jan. 12, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/decertification.aspx>.

¹⁰³ *Supra* note 101.

¹⁰⁴ *Basic Course for Police Officers*, N.Y. State Div. of Crim. Justice Servs., <https://www.criminaljustice.ny.gov/ops/training/bcpo01.htm>.

¹⁰⁵ Yasmeen Serhan, *What the World Could Teach America About Policing*, The Atlantic (June 10, 2020), <https://www.theatlantic.com/international/archive/2020/06/america-police-violence-germany-georgia-britain/612820/>.

¹⁰⁶ *Law Enforcement Agency Accreditation Program Overview*, N.Y. State Div. of Crim. Justice Servs., <https://www.criminaljustice.ny.gov/ops/training/bcpo/index.htm>.

After successfully completing the New York basic training course, a police officer receives a certificate of completion. An officer maintains the certification so long as the officer remains on the force for more than two consecutive years and has no break in service lasting more than four years.¹⁰⁷

Society requires certain occupations and professions to be licensed as a means of protecting the public by ensuring that only competent and ethical individuals practice in the occupation or profession.¹⁰⁸ Cosmetologists, nail specialists, electricians, therapists, doctors, lawyers and other professionals must be licensed in order to work in New York State. Anne Levinson, a former Seattle police oversight official and municipal court judge, observed that, “We regulate hairdressers, barbers and a range of other professionals much more seriously than we regulate law enforcement, despite the fact that law enforcement can take your life or liberty.”¹⁰⁹ In an interview with *The Atlantic*, Saint Louis University law professor emeritus Roger Goldman, who has spent more than forty years studying the process of decertification of police officers, opined that, “When you think about licensing as a way to protect the public, then of all the professions that ought to be licensed, we should require law enforcement to meet those same professional standards—if not tougher standards.”¹¹⁰

A necessary component of a professional licensure/certification process is the ability to decertify, following, of course, a prescribed state-level due process hearing to ensure fairness. Decertification (or delicensing) prevents the individual from continuing to practice in the profession after a determination has been made that the individual engaged in conduct in violation of standards and norms of the particular profession. For police officers, decertification would entail taking away the officer’s badge and gun, thereby preventing the officer from continuing to be employed in law enforcement. There are numerous accounts from around the country of police officers in states without a decertification process being fired by one police agency for sometimes gross misbehavior and being hired by another police agency.¹¹¹

¹⁰⁷ *Police Refresher Course*, N.Y. State Div. of Crim. Justice Servs., <https://www.criminaljustice.ny.gov/ops/training/bcpo/bcpo02.htm>.

¹⁰⁸ *Does your current or new occupation require a license?*, CareerOneStop, <https://www.careeronestop.org/ExploreCareers/Plan/licensed-occupations.aspx#:~:text=Examples%20of%20occupations%20licensed%20in,state%20standards%20for%20that%20career> (last accessed May 17, 2021).

¹⁰⁹ Mike Reicher, *Fired, But Still a Cop: How Washington State’s Decertification Process Leaves Troubled Officers With Their Guns*, *The Seattle Times* (Aug. 23, 2020; updated Oct. 6, 2020), <https://www.seattletimes.com/seattle-news/times-watchdog/fired-but-still-a-cop-how-the-state-decertification-process-leaves-troubled-officers-with-their-guns/>.

¹¹⁰ Candice Norwood, *Can States Tackle Police Misconduct With Certification Systems?*, *The Atlantic* (Apr. 9, 2017), <https://www.theatlantic.com/politics/archive/2017/04/police-misconduct-decertification/522246/>.

¹¹¹ Saint Louis University School of Law, *The Long Fight for Police Certification Standards*, <https://www.slu.edu/law/news/2020/goldman-decertification.php>; Sarah Childress, *How States Are Moving to Police Bad Cops*, *Frontline PBS* (Apr. 8, 2016), <https://www.pbs.org/wgbh/frontline/article/how-states-are-moving-to-police-bad-cops/>; Laura Bowen, *Toughening Police Decertification: an Uphill Battle for States*, *The Crime Report* (Sept. 15, 2020), <https://thecrimereport.org/2020/09/15/toughening-police-decertification-an-uphill-battle-in-the-u-s/>.

New York is one of five states¹¹² that have no authority to decertify police officers, thereby allowing rogue officers to seek employment with other unsuspecting law enforcement agencies. While New York maintains a registry¹¹³ with information about police officers who have been fired for cause, the registry is ineffective because the fired officers are allowed to keep their certifications. As a solution, Professor Goldman recommends that “every state should enact a comprehensive law (license/certification/decertification) that takes away the ability for unfit officers to continue in law enforcement.”¹¹⁴

Critics of the notion of licensing police officers object to the idea on the ground that a large bureaucracy would be needed to implement and run the process. Instead, the critics suggest that many of the problems in law enforcement can be corrected by better training and by intensive supervision. Bad cops, according to the critics, should be fired quickly and other police departments should do more vetting before hiring fired officers.¹¹⁵ However, the critics appear to ignore the difficulty that police departments encounter in dismissing officers, chiefly because of collective bargaining agreements that keep many bad actors on the force.¹¹⁶ Moreover, the vetting by the new law enforcement agency is only as good as the information available to it. On many occasions, the information is ignored. Case in point is Officer Tim Loehmann, who was strongly encouraged to resign from the Cleveland Police Department following his involvement in the killing of 12-year-old Tamir Rice in 2014. Before hiring Officer Loehmann, the Cleveland Police Department failed to review the publicly available records from his former agency showing that the officer was clearly ill-suited for being a police officer. In accepting Officer Loehmann’s resignation in advance of a determination by the Cleveland Police Department to fire him, the deputy chief of the department wrote that, “I do not believe time, nor training, will be able to change or correct the deficiencies.”¹¹⁷ In 2018, Officer Loehmann sought employment with the Village of Bellaire (Ohio) police department. The Bellaire police chief determined that since Officer Loehmann was not fired, but resigned, it would be appropriate to hire him as a police officer. After public outrage surfaced, Officer Loehmann withdrew his application.¹¹⁸ If a licensing/decertification system was in place that could have

¹¹² The four states in addition to New York are: California, Hawaii, New Jersey and Rhode Island.

¹¹³ <http://www.criminaljustice.ny.gov/ops/>.

¹¹⁴ Roger Goldman, *Importance of State Law in Police Reform*, 60 Saint Louis Univ. L.J. 363, 382 (May 17, 2016).

¹¹⁵ The Chicago Tribune Editorial Board, *Licensing Cops is not the Answer to Police Misconduct*, Chicago Tribune (June 15, 2020), <https://www.chicagotribune.com/opinion/editorials/ct-editorial-license-police-lightfoot-raoul-20200615-jayyprcid5ho7axm6cagf6wyt4-story.html>.

¹¹⁶ Seth W. Stoughton, Jeffrey J. Noble and Geoffrey P. Alpert, *How to Actually Fix America’s Police*, The Atlantic, (June 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/how-actually-fix-americas-police/612520/>; Alex Ebert, *To Keep Bad Cops Off Streets, States Consider Police Licensing*, Bloomberg Law, (July 7, 2020), <https://news.bloomberglaw.com/daily-labor-report/to-keep-bad-cops-off-streets-states-consider-police-licensing>.

¹¹⁷ Adam Ferrise, *Cleveland Officer Who Shot Tamir Rice Had ‘Dismal’ Handgun Performance for Independence Police*, Cleveland.com (Dec. 3, 2014; updated Jan. 12, 2019), https://www.cleveland.com/metro/2014/12/cleveland_police_officer_who_s.html.

¹¹⁸ Nick Fouriezos, *Police Who Have Killed Black Americans: Where Are They Now?*, OZY (June 2, 2020), <https://www.ozy.com/news-and-politics/police-who-have-killed-black-men-where-are-they-now/334974/>.

removed Mr. Loehmann's license as a police officer, he would have been prevented from seeking and obtaining employment with a different law enforcement agency.

Until recently, the State of Massachusetts did not have a licensure/certification system for police officers. On December 31, 2020, the Massachusetts governor signed a massive police reform bill, establishing, foremost, a civilian-lead POST commission. The Massachusetts POST Commission oversees the certification and decertification of police officers, and investigates allegations of police misconduct. While the legislation falls short of eliminating completely the qualified immunity enjoyed by police officers, the law, nonetheless, sets minimum standards of training for police officers, imposes a duty to intervene and to de-escalate, establishes rules of engagement during mass protests/demonstrations, bans chokeholds, prohibits no-knock warrants unless officers can certify to the judge that their lives would otherwise be in danger, bans racial profiling, and creates a body-worn camera task force to promulgate rules on the use of such cameras. In addition, a police officer certified under the new law receives a three-year renewable license. Any police officer found to have committed one or more of the defined violations will have his or her license revoked and will be placed in the public database of decertified officers.

The Massachusetts law can be found at this link: [Bill S.2963 \(malegislature.gov\)](#). **The Task Force recommends that the New York State legislature adopt many of the provisions of the Massachusetts police reform measures to establish a licensure/certification system.** Except for the qualified immunity provision, the Massachusetts law seeks to achieve by order of magnitude a level of police reform suitable for the 21st century.¹¹⁹

c. Professional Liability Insurance

The rash of settlements by, and judgments against, municipalities and in favor of victims of police misconduct has put a strain on the budgets of many local governments.¹²⁰ The popular media is replete with stories about large cash settlements and judgments for police misconduct.¹²¹ Case in point is the recent \$27 million dollar settlement made by the City of

¹¹⁹ The qualified immunity protection under the Massachusetts law is eliminated only with regard to decertified police officers.

¹²⁰ Amelia Thomson-DeVeaux, Laura Bronner and Damini Sharma, *Cities Spend Millions on Police Misconduct Every Year. Here's Why It's So Difficult to Hold Departments Accountable*, FiveThirtyEight (Feb. 22, 2021), <https://fivethirtyeight.com/features/police-misconduct-costs-cities-millions-every-year-but-thats-where-the-accountability-ends/>; Scott Calvert and Dan Frosch, *Police Rethink Policies as Cities Pay Millions to Settle Misconduct Claims*, Wall St. J. (Oct. 22, 2020), <https://www.wsj.com/articles/police-rethink-policies-as-cities-pay-millions-to-settle-misconduct-claims-11603368002>; Cheryl Corley, *Police Settlements: How the Cost of Misconduct Impact Cities and Taxpayers*, Nat'l Pub. Radio (Sept. 19, 2020), <https://www.npr.org/2020/09/19/914170214/police-settlements-how-the-cost-of-misconduct-impacts-cities-and-taxpayers>; Brentin Mock, *How Cities Offload the Cost of Police Brutality*, Bloomberg CityLab (June 4, 2020), <https://www.bloomberg.com/news/articles/2020-06-04/the-financial-toll-of-police-brutality-to-cities>.

¹²¹ See note 120; see also, Rakim Brooks, Esq., *The Role Insurance Companies play in the Brutality Against Black Bodies*, The Grio (June 30, 2020), <https://thegrio.com/2020/06/30/police-brutality-insurance-companies/>; Rachel B Doyle, *How Insurance Companies Can Force Bad Cops Off the Job*, The Atlantic (June 10, 2017), <https://www.theatlantic.com/politics/archive/2017/06/insurance-companies-police/529833/>.

Minneapolis to the family of George Floyd.¹²² This spending has caused a rethinking of who, in addition to municipalities, should be responsible for these payouts.

Some believe that an individual police officer should at least be significantly responsible for a police misconduct settlement or judgment.¹²³ Since it is very unlikely that an individual police officer would have the financial wherewithal to pay a multimillion dollar settlement or judgment, it has been proposed that each officer be required as a condition of employment to carry personal liability insurance (PLI).¹²⁴ Requiring police officers to carry PLI would ease the burden on financially-strapped municipalities. Additionally, with the officers having a financial stake in the outcome of misconduct matters, they might be more inclined to modify their behavior when interacting with the public.

In the October 22, 2020 issue of the *Wall Street Journal*, it was reported that, between 2015 and 2020, New York City paid \$1.1 billion to settle police misconduct cases.¹²⁵ During the same time period, Nassau County paid \$55 million and Suffolk County paid \$16.8 million. Municipalities all across the country make large payouts annually.¹²⁶ Funds set aside to satisfy settlements and judgments are not available for use in obtaining other essential public services, like education, affordable housing, infrastructure repairs, safety net programs and similar services.¹²⁷

To begin holding police officers partly responsible will require legislation, which must include provisions modifying or eliminating the court-created police qualified immunity doctrine. One such legislative scheme is Colorado's Senate Bill 217,¹²⁸ signed by the governor on June 19, 2020. The Colorado law provides that police officers can be sued in their individual capacities and specifically states that qualified immunity is not a defense to liability under the section of the statute permitting civil actions against officers for deprivation of rights. If an officer in Colorado admits to, or is found liable for, the misconduct, the officer will pay 5% or \$25,000 of the damages, whichever is less.

¹²² Nicholas Bogel-Burroughs and John Eligon, *George Floyd's Family Settles Suit Against Minneapolis for \$27 Million*, N.Y. Times (Mar. 12, 2021, updated Mar. 22, 2021), <https://www.nytimes.com/2021/03/12/us/george-floyd-minneapolis-settlement.html>.

¹²³ Johanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Reform*, 63 UCLA L. Rev. 1144, 1208–1210 (2016), <https://www.uclalawreview.org/how-governments-pay-lawsuits-budgets-and-police-reform/>.

¹²⁴ Deborah Ramirez, *Policing the Police: Could Mandatory Professional Liability Insurance for Police Officers Provide a New Accountability?*, 45 Am. J. of Crim. L. 407, 407–59 (2019),

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3449415#; Stephen Wulff, *How Individual Professional Liability Insurance Could Reform US Policing*, The Society Pages (June 11, 2020), <https://thesocietypages.org/specials/how-individual-professional-liability-insurance-could-reform-us-policing/>.

¹²⁵ Scott Calvert and Dan Frosch, *Police Rethink Policies as Cities Pay Millions to Settle Misconduct Claims*, Wall St. J. (Oct. 22, 2020), <https://www.wsj.com/articles/police-rethink-policies-as-cities-pay-millions-to-settle-misconduct-claims-11603368002>.

¹²⁶ *Summary of Police Misconduct Settlement Amounts*, Thurgood Marshall Institute: National Police Funding Database, <https://policefundingdatabase.tminstitutelfd.org/misconductsettlements>.

¹²⁷ See note 125.

¹²⁸ https://leg.colorado.gov/sites/default/files/documents/2020A/bills/2020a_217_enr.pdf.

While the Colorado law is laudable, the better legislative approach would be to eliminate completely the doctrine of qualified immunity and to require police officers to carry PLI coverage. Under this scheme, the municipality would pay the basic annual insurance premium for each officer. The insurance carrier and/or reinsurer would assist the police department in developing best practices and a risk management framework. A police officer would be subject to a premium increase if it is determined that the officer failed to abide by departmental rules or otherwise engaged in misconduct while on duty. Any increase in the officer's annual premium would be borne exclusively by the officer. Bad cops, who tend to have numerous misconduct incidents, would pay higher premiums and could be in many instances priced out of policing. Imposing a financial cost on a person is one method of discouraging bad behavior. Such costs in the normal course of human events will tend to reorient the actor and cause the actor not to pursue a particular course of conduct that might cause harm.

There are several bills pending in the New York State legislature that, if passed, would require police officers to possess PLI (Senate Bill S.1064 [2021] by Biaggi;¹²⁹ Assembly Bill A.2464 [2021] by Hyndman¹³⁰) or would require the municipality to purchase PLI on behalf the officers (Assembly Bill A.2106 [2021] by Fernandez¹³¹). S.1064 and A.2464 are virtually identical for all practical purposes. Senator Biaggi's bill, first introduced in the Senate on July 6, 2020 (S.8676 [2020]) and reintroduced on January 6, 2021, provides that police officers must provide proof of PLI and must maintain PLI throughout their employment as an officer. The bill further provides that the municipality must pay the base rate for each policy, with the implication that an officer will pay any increase in the premium due to missteps on the officer's part.

One of the significant benefits of requiring police officers to carry PLI is that it provides a market-based solution to getting rid of bad cops by pricing them out of the market. An organization in Minneapolis called InsureThePolice.org reported that a local officer had five significant settlements against him in an 18-month period and asserted that the officer would be personally responsible for the estimated \$60,000 to \$70,000 increase in premium under this type of legislative scheme.¹³² This type of financial impact might propel, or at least compel, troubled police officers to leave the profession.

The threat of possibly having to pay a hefty premium to remain on the police force should provide sufficient motivation for most, if not all, officers to moderate their behavior. PLI will encourage police officers to limit unnecessary interactions with the public. On those occasions where interacting with the public is unavoidable, police officers will be more likely to exercise appropriate caution in carrying out their duties.

¹²⁹ <https://www.nysenate.gov/legislation/bills/2021/s1064>.

¹³⁰ <https://www.nysenate.gov/legislation/bills/2021/A2462>.

¹³¹ <https://www.nysenate.gov/legislation/bills/2021/A2106>.

¹³² Martin Kaste, *To Change Police Practices, A Push For Liability Insurance in Minneapolis*, Nat'l Pub. Radio (June 27, 2016), <https://www.npr.org/2016/06/27/483420607/to-stop-police-lawsuits-reformers-want-officers-to-get-insurance#:~:text=Organization-To%20Change%20Police%20Practices%2C%20A%20Push%20For%20Liability%20Insurance%20In.pay%20for%20their%20own%20insurance>.

Another benefit of PLI is that risk managers well-trained in policing practices will likely be deployed to assist police departments in developing law enforcement best practices.¹³³ For example, a good use-of-force policy put in place by risk managers could help reduce the use of excessive force.¹³⁴ Failure to adhere to the best practices could result in higher premiums or even a loss of coverage. In fact, Professor Joanna Schwartz of UCLA Law School found anecdotal evidence supporting the view that police departments make personnel and policy changes demanded by their insurers whenever possible.¹³⁵ The professor also notes that private insurers “. . . have a uniquely powerful position from which they can demand improvements in policing . . . [by] financially sanction[ing] individual officers who have violated department policies or the law.”¹³⁶ Sanctions, of course, would be the imposition of higher insurance premiums or the loss of coverage altogether.

Finally, requiring police officers to carry PLI would ease the burden on struggling municipalities. Taxpayers should not be required to carry the full weight of a settlement or a judgment. Funds not spent on settlements or judgments can be deployed toward other worthy needs of the municipalities.

Perhaps the major objection to PLI for police officers (or to insurance in general) involves the concept of moral hazard. In the context of insurance, moral hazard is the notion that an insured entity will take on more risk since potential losses will be covered by the insurer. For example, a person may leave his or her vehicle running while going into the coffee shop because if the vehicle is stolen, the loss (less any deductible) will be covered by insurance. It has been suggested that police officers covered by PLI will not have an incentive to modify their behavior and to reduce instances of misconduct because of the concept of moral hazard. However, Professor John Rappaport of the University of Chicago Law School posits that:

When the insurer assumes the risk of liability, it also develops a financial incentive to reduce that risk through loss prevention. By reducing risk, the insurer lowers its payouts under the liability policy and thus increases profits. An effective loss-prevention program can also help the insurer compete for business by offering lower premiums. In other words, an insurer writing police liability insurance may profit by reducing police misconduct.¹³⁷

The risk of paying higher insurance premiums or losing coverage altogether because of inability to pay the increase in premiums is counterbalanced by the notion of moral hazard. The requirement that police officers carry PLI in order to maintain their employment would provide sufficient incentive to modify their behavior.

¹³³ John Rappaport, *How Private Insurers Regulate Public Police*, 130 Harv. L. Rev. 1541, 1573–1586 (2017).

¹³⁴ John Rappaport, *An Insurance-Based Typology of Police Misconduct*, Univ. of Chicago Pub. L. & Legal Theory Working Paper No. 585 (2016).

¹³⁵ Schwartz, *supra* note 123, at 1204.

¹³⁶ *Id.* at 1207, 1209.

¹³⁷ Rappaport, *supra* note 133, at 1543.

Some have called into question the fairness of requiring all police officers in a department to carry PLI,¹³⁸ Not all police officers in a given precinct are walking a beat, or are otherwise interacting directly with the public. Many police officers work exclusively as desk officers, assignment officers, property clerks, school crossing guards, and other non-patrol officers. However, the fairness issue vis-à-vis non-patrol officers is of no moment if the legislative scheme of Senator Biaggi and Assemblyperson Hyndman is enacted. As noted above, the bills of Biaggi and Hyndman, respectively, provide that the basic premium for each officer is to be paid by the municipality. Unless the non-patrol officers engage in misconduct that causes their premiums to rise, there would be no cost to them at all.

The Task Force recommends that legislation modeled after the Biaggi/Hyndman bills be drafted to provide that police officers must carry PLI in order to maintain their employment. Taxpayers should not bear the sole responsibility of paying settlements or judgments arising out of police misconduct incidents. Moreover, and more importantly, the legislation should result in greater police accountability.

d. Reflecting the communities served

A 21st century police force must reflect the community it serves. **The Task Force recommends targeted recruitment efforts, keeping track of the efforts and engaging the community in refreshing the hiring criteria.**

Police departments across the state do not reflect the community they serve: they have insufficient numbers of women and people of color in their ranks.¹³⁹ Police departments in every jurisdiction should be under a mandate to actively recruit personnel of color, along with other diverse backgrounds, and to account for their efforts annually, similar to the framework set forth under Article 15-A of the Executive Law to promote participation by minority and women owned businesses in State contracts. State funding should be allocated to support this initiative. The New York Police Department in spring 2021 commenced a focused effort on recruiting women and people of color.

In the 2015 Report from President Obama’s Task Force on 21st Century Policing, the Task Force observed, “Building trust and legitimacy on both sides of the police-citizen divide is not only the first pillar of this task force’s report but also the foundational principle underlying this inquiry into the nature of the relations between law enforcement and the communities they

¹³⁸ Patrick Wraight, *Do Police Officers Need to Buy Professional Liability?*, Ins. J. (July 6, 2020), <https://www.insurancejournal.com/magazines/mag-features/2020/07/06/574234.html>.

¹³⁹ According to statistics from the New York State Division of Criminal Justice Services, the total number of police officers statewide is 62,998 as of April 19, 2021. The specific breakdown by ethnicity and gender is 42,213 (67%) white, 6,598 (11%) Black, 11,780 (11%) Hispanic and 2,407 (3%) Other – Non-Hispanic; 53,531 (85%) male and 9,462 (15%) female. See *Sworn Law Enforcement Personnel in 2020 by Race, Ethnicity and Sex* at 17, available at <https://www.criminaljustice.ny.gov/crimnet/ojsa/Sworn%20Officers%20Demogs%202020.pdf>.

serve.”¹⁴⁰ A way to build this trust and reflect the community served is to include the community in the hiring process. Specifically:

Examine hiring practices to better involve the community in recruiting and screening of recruits. Example: The Sarasota (Florida) Police Department involves the community in recruiting, selecting, and hiring officers as a way to encourage a more diverse workforce. The city works with residents to identify culturally responsive and qualified multilingual candidates for consideration. The community gives input into the hiring priorities considered in selection.¹⁴¹

2. Training

Training is a shield as well as a sword. Training also ensures that officers can be held accountable if they deviate from policies and procedures. Continuous training ensures that officers remain current on department policies and procedures, the latest developments in the law that impact their work as well as learn best practices. The Task Force has three recommendations concerning training: (1) increasing the duration and focus of Academy training for Police Officers, (2) implement the Active Bystandership Training from the [Active Bystandership for Law Enforcement Program](#) (ABLE) and (3) update training to help police handle persons with disabilities.

a. Increasing the Duration and Focus of Academy Training for Police Officers

Once a candidate is hired by a police department, the officer now must take Basic Course Training.¹⁴² The Municipal Police Training Council set a minimum training standard of over 700 hours.¹⁴³ Training topics include, but are not limited to, “Ethics & Professionalism, Cultural Diversity, Bias Related Incidents, Professional Communication, Persons with Disabilities, Crisis Intervention, Use of Physical Force & Deadly Force, Active Shooter Response and Decision Making . . . and numerous Reality Based Training Scenarios to better prepare them for the situations they will encounter on the job.”¹⁴⁴

A minimum of 700 training hours is approximately three months of training. To be a New York City Police Officer, you attend the Police Academy for six months, a time period equivalent to approximately 1040 training hours.

Is three months or even six months of training sufficient to prepare a person authorized to use lethal force to be ready to handle the various complex situations a police officer can handle? To

¹⁴⁰ Office of Community Oriented Policing Services. 2015. The President’s Task Force on 21st Century Policing Implementation Guide: Moving from Recommendations to Action. Washington, DC: Office of Community Oriented Policing Services, at 9.

¹⁴¹ *Id.* at 10.

¹⁴² *Basic Course Training*, N.Y. State Div. of Crim. Justice Servs., <https://www.criminaljustice.ny.gov/ops/training/bcpo/bcpo01.htm>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

put the training hours requirement in perspective, below are a few professions that have training hour requirements of about six months.

Profession	License Required	Training Hours
Massage Therapist	Yes	1,000 hours including training on a person ¹⁴⁵
Cosmetology	Yes	1,000 hours ¹⁴⁶
Certified Shorthand Reporter	Yes	1,300 hours ¹⁴⁷

A 2020 survey conducted by The Institute for Criminal Justice Training Reform of 100 countries found that the United States had the lowest training hours for police officers: the UK requires 2,250 hours, Australia 3,500 hours, Germany 4,050 hours and Dubai in the United Arab Emirates 5,400 hours.¹⁴⁸ Countries with lower training hours than the US included Iraq, Afghanistan, and Papua New Guinea.¹⁴⁹

A majority of police officers in larger departments say they did not receive sufficient training to do their job. According to a 2017 Pew Research Survey entitled “Behind the Badge:”

Police in larger agencies are considerably less likely to say their department has done very well in each of these aspects. For example, 29% of police in agencies with at least 1,000 officers say their department has done very well in training them adequately for their job, compared with 49% of police in agencies with fewer than 1,000 officers. Likewise, just 19% of police in agencies with 1,000 or more officers say their department has done very well in equipping them adequately to perform their job, compared with 41% of those in smaller agencies.¹⁵⁰

Legal training for New York police officers generally is a small portion of their training. Officers receive 53 hours on legal related topics or approximately 8.27% of the total training time.¹⁵¹ This training can be divided into three categories: (1) constitutional law topics (30 hours), (2)

¹⁴⁵ *Massage Therapist—License Requirements*, N.Y. State Ed. Dep’t – Office of the Professions, <http://www.op.nysed.gov/prof/mt/mtlic.htm#educ>.

¹⁴⁶ *How to Become a Cosmetologist in New York*, Cosmetology License.com, <https://www.cosmetology-license.com/new-york/>.

¹⁴⁷ *Certified Shorthand Reporter—License Requirements*, N.Y. State Ed. Dep’t – Office of the Professions, <http://www.op.nysed.gov/prof/csr/csrlic.htm>.

¹⁴⁸ *Not Enough Training*, The Institute for Criminal Justice Training Reform, <https://www.trainingreform.org/not-enough-training> (last accessed May 18, 2021).

¹⁴⁹ *Id.*

¹⁵⁰ *Behind the Badge: Amid protests and calls for reform, how police view their jobs, key issues and recent fatal encounters between blacks and police*, Pew Research Center (Jan. 11, 2017), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2017/01/Police-Report_FINAL_web.pdf, at 12.

¹⁵¹ Yuri R. Linetsky, *What the Police Don’t Know May Hurt Us: An Argument for Enhanced Legal Training of Police Officers*, 48 N.M. L. Rev. 1, 27 (2018), <https://digitalrepository.unm.edu/nmlr/vol48/iss1/2>.

statutory law or criminal offenses (5 hours), and (3) traffic law or traffic offenses (18 hours).¹⁵² In 30 hours of instruction, police officers learn approximately 19 constitutional law related topics including:

1. Constitutional Law / Bill of Rights / Constitutional Principles;
2. Fundamentals of the Criminal Justice System;
3. Laws of Arrest;
4. Miranda Warnings;
5. Laws of Search and Seizure;
6. Search Warrant Procedures;
7. Criminal Procedure;
8. Civil Rights;
9. Civil Liability;
10. Legal Considerations of Use of Force;
11. Courtroom Procedure, Demeanor, and Testimony;
12. Rules of Evidence;
13. Civil Procedure/Civil Process;
14. Law of Interrogations and Confessions;
15. Legal Components of Reports;
16. Pretrial Identification Procedures;
17. Prisoner Rights and Privileges;
18. Juvenile Law; and
19. Rights of Victim.

Police officers must have sufficient training to understand when it is legally appropriate to use lethal force as well as when it is appropriate to impinge on a person’s liberty. “Though society cannot expect police officers to be lawyers, officers must have more than a basic understanding of the elements of criminal statutes,” observes Yuri R. Linetsky in *The New Mexico Law Review* article entitled *What the Police Don’t Know May Hurt Us: An Argument for Enhanced Legal Training of Police Officers*. “Modern police officers must understand the theoretical underpinnings of our criminal justice system and the constitutional principles they must protect and apply to real-world situations. Police academies must produce graduates—new police officers—who can correctly apply legal concepts in their daily work.”¹⁵³

The Task Force recommends that the Municipal Police Training Council increase the statewide training minimum hours from 700 to 1,000 hours serving communities with populations below 500,000, 2,000 hours with populations between 500,000 and 1,000,000, and 3,000 hours with populations above 1,000,000. The Task Force further recommends that the curriculum devote at least 30% of the training hours to legal education.

¹⁵² *Id.* at 27–28.

¹⁵³ *Supra* note 151 at 3.

The Task Force further recommends that “in-service” training also includes additional training hours to legal education.

- b. Implement the Active Bystandership Training from the [Active Bystandership for Law Enforcement Program \(ABLE\)](#)

A major concern heard by the Task Force was why do officers not intervene when fellow officers commit misconduct. New York State does not impose a duty to intervene for police officers. Executive Law Section 840 encourages the adoption of these policies, stating in pertinent part the Municipal Police Training Council “may recommend to the governor rules and regulations with respect to:

(d)(1) Establish and regularly update a model law enforcement use of force policy suitable for adoption by any agency that employs police or peace officers.

(2) The model law enforcement use of force policy shall include, but is not limited to:

- (i) information on current law as it relates to the use of force by police and peace officers;
- (ii) guidelines regarding when use of force is permitted;
- (iii) requirements for documenting use of force;
- (iv) procedures for investigating use of force incidents;
- (v) guidelines regarding excessive use of force including duty to intervene, reporting, and timely medical treatment for injured persons;
- (vi) standards for failure to adhere to use of force guidelines;
- (vii) training mandates on use of force, conflict prevention, conflict resolution and negotiation, de-escalation techniques and strategies, including, but not limited to, interacting with persons presenting in an agitated condition; and
- (viii) prohibited uses of force.”¹⁵⁴

The Use of Force Policy promulgated by the Municipal Police Training Council in September 2020 specifically describes a Duty to Intervene, stating:

- A. Any officer present and observing another officer using force that he/she reasonably believes to be clearly beyond that which is objectively reasonable under the

¹⁵⁴ New York State Executive Order Section 840.

circumstances shall intercede to prevent the use of unreasonable force, if and when the officer has a realistic opportunity to prevent harm.

B. An officer who observes another officer use force that exceeds the degree of force as described in subdivision A of this section should promptly report these observations to a supervisor.¹⁵⁵

“The policy,” as stated in the purpose section of the Policy, “is designed to provide guidance to individual agencies as they develop their own use of force policies in accordance with Executive Law § 840(4)(d)(3).”¹⁵⁶

Police officers are very supportive of Duty to Intervene policies. A report issued by the Task Force on Policing created by the Commission on Criminal Justice in January 2021 citing a January 2017 Pew Research survey found that of 8,000 police officers surveyed, “84% believed officers should be required to intervene when they think another officer is using unnecessary force.”¹⁵⁷

What hampers the ability of officers to intervene is culture. The report very succinctly describes this problem:

Studies find that police officer compliance with mandatory reporting policies, a close relative of DtI [Duty to Intervene] policies, may be low because reporting the wrongdoing of peers involves violating the commonly understood code of silence (Rothwell and Baldwin 2007, Pershing 2003). Moreover, calling out misconduct on the part of superiors is challenging and frowned upon given the paramilitary structure and rigid hierarchy of police agencies (Kaptein, 2011). A survey of rank and file officers in several police agencies, however, found that officers are more likely to report on a colleague when they are familiar with rules prescribing the reporting of misconduct, they believe the misconduct to be of a serious nature, and/or they expect harsh discipline associated with noncompliance (Kutnjak, Haberfeld, and Peacock, 2016). *Another study found that perceptions of internal procedural fairness and departmental equity are necessary preconditions for officers to feel comfortable reporting wrongdoing on the part of their peers* (Wolfe and Piquero, 2011). [emphasis added]¹⁵⁸

The perceptions of police concerning departmental procedural fairness is mixed. The 2017 Pew Research Survey found:

¹⁵⁵ *Municipal Police Training Council policy*, N.Y. State Div. of Criminal Justice Servs. – Municipal Police Training Council (Sept. 2020), at 3, available at <https://www.criminaljustice.ny.gov/crimnet/ojsa/crimereporting/MPTC-Model-Policy-Use-of-Force-2020.pdf>.

¹⁵⁶ *Id.* at 1. Some cities in New York have adopted laws/policies requiring a duty to intervene, including Buffalo passing “Cariol’s Law” on October 28, 2020. Rochester adopted it as police policy on March 15, 2021, Tompkins County adopted it as policy on June 3, 2020, and Albany adopted it as policy in June 2020.

¹⁵⁷ Duty to Intervene – Policy Assessment, Comm’n on Crim. Justice – Task Force on Policing (Jan. 2021), at 2, https://assets.foleon.com/eu-west-2/uploads-7e3kk3/41697/pdf_-_duty_to_intervene.6e39a04b07b6.pdf.

¹⁵⁸ *Id.*

Officers give their departments mixed ratings for their disciplinary processes. About half (45%) agree that the disciplinary process in their agency is fair, while 53% disagree (including one-in-five who strongly disagree). When they are asked more specifically about the extent to which underperforming officers are held accountable, police give more negative assessments of their departments. Only 27% agree that officers who consistently do a poor job are held accountable, while 72% disagree with this.

The Task Force, consequently, concludes that for policies to be effective, officers must be trained on how to implement the policy, leadership must enforce the policy and, perhaps most importantly, the culture creates an atmosphere for compliance.

A well accepted best practice in training officers to intervene when other officers cross the line, and referenced by the Task Force on Policing, is the Active Bystandership Training from the [Active Bystandership for Law Enforcement Program \(ABLE\)](#). ABLE is a national hub for training, technical assistance, and research, all with the aim of promoting a police culture in which officers routinely practice peer-to-peer intervention as necessary to:

- ✓ Prevent misconduct,
- ✓ Avoid police mistakes, and
- ✓ Promoted officer health and wellness.

Building on training developed in consultation with the New Orleans Police Department to help police officers stop unnecessary harmful behavior by fellow officers in 2014, Project ABLE delivers practical, scenario-based training for police agencies in the strategies and tactics of peer intervention. The program is administered through a train-the-trainer methodology, equipping law enforcement professionals to take ownership and responsibility to train each other on peer intervention.

ABLE has found that the benefits of meaningful active bystandership training are significant and include reduced unnecessary harm to civilians; reduced unnecessary harm to officers; reduced risk of officers losing their jobs; reduced risk of lawsuits against departments, cities, and individual officers; improved police and community relations; improved officer health and wellness; improved officer job satisfaction; and improved citizen satisfaction with their law enforcement agency. These issues of unnecessary harm in policing, officer wellness and police relations with the civilian community are urgent. The benefits will undoubtedly result in considerable cost savings, which may better be used elsewhere.

The ABLE program has emerged as a best practice and as part of our listening tour we have identified the program as a potentially scalable best practice that we want to recommend for wider adoption in New York State. Indeed, this proposal coincides with the statements that Albany County Sheriff Craig Apple and NYPD Commissioner Ernest Hart made at a Task Force public forum in the fall of 2020 about how their teams have found the ABLE training transformational. The Task Force heard from law enforcement professionals around the country

about how this program has played a significant part in reducing harm to civilians and officers by creating a culture of peer intervention that redefines loyalty among officers.

To date, more than 70 law enforcement agencies across the US have completed the Train the Trainer certification program. The New Jersey Attorney General has mandated ABLE training statewide for each of New Jersey's roughly 550 law enforcement agencies. In New York, the NYPD as well as Westchester and Yonkers law enforcement agencies have formally committed to ABLE. The NYPD plans to certify 125 instructors who in turn will provide the training to the department's 35,000+ officers. While the training is typically provided at no cost to law enforcement agencies, law enforcement agencies and regional or state academies must commit to and are accountable for [minimum program standards](#) and creating a culture of active bystandership and peer intervention through policy, training, support and accountability.

The Task Force recommends that New York State require officially and expressly recommend that New York Law Enforcement Agencies commit to ABLE.

c. Update Training to Help Police Handle Persons with Disabilities

The Task Force's recommendations related to interaction between police and people with disabilities are twofold. First, the police must no longer be the default responders to calls for help when a person with serious mental illness (SMI) is in possible crisis. Time and again, it has been proven that when compared to other methods, police responses increase the chance of a violent or deadly outcome toward people with SMI. These outcomes can be avoided completely if this role is taken away from police officers and placed in the hands of trained professionals who hold experience working with people with SMI. **Second, police training must include peer-involved interaction and experiences with the disability community.** Even if the default model of having police respond to calls involving SMI is replaced, not all people with disabilities have SMI, and officers undoubtedly will need to interact with people of all abilities during their careers. Ensuring that such training includes a peer-driven perspective would help officers understand disability and the various ways in which it may manifest.

i. Replacing the Default Model

According to a *Washington Post* database which has tracked every fatal police shooting in the U.S. for the last six years, 5,709 people have been fatally shot by an on-duty police officer since January 1, 2015. Of those several thousand, 23% of people killed by the police—1,407 people, including 16 people in 2021 as of the end of February—have been identified as having a mental illness. Police kill people with autism, people who are deaf or cannot follow verbal commands, people who are neurodivergent, and other people with special needs at much higher rates than the general population; studies show that between 30% and 50% of all people killed by the police have a disability.¹⁵⁹ This stark disparity is also reflected in the numbers of people who are arrested by police and incarcerated. According to another study by the Bureau of Justice

¹⁵⁹ Abigail Abrams, *Black, Disabled and at Risk: The Overlooked Problem of Police Violence Against Americans with Disabilities*, Time (June 25, 2020), <https://time.com/5857438/police-violence-black-disabled/>.

Statistics, roughly 40% of people in jail and 32% of people in prison reported having at least one disability.¹⁶⁰

The Task Force repeatedly found that many instances of police misconduct and unjustified force could be avoided if police were not the ones responding to calls for help when they were neither equipped nor inclined to address the needs of the person before them. On January 29, 2021 in Rochester, the police responded to a call and found a nine-year-old girl in distress and reportedly contemplating self-harm.¹⁶¹ They rear-handcuffed her tiny arms, put her in the back of a squad car, and pepper sprayed her in the face. “Unbelievable,” one officer muttered as he shut the door on her screams.

Instances where the police respond to mental health crises often end in this type of abuse or even death, such as in the cases of Daniel Prude killed in Rochester and Kawaski Trawick killed in New York City. A 2015 report from the Treatment Advocacy Center found that one in four people killed by police had untreated SMI, and that one in every 10 calls to police were related to a person with untreated SMI.¹⁶² People experiencing mental health crises who survive their encounters with responding police are often criminalized and subjected to other forms of misconduct. According to the United States Department of Justice’s Bureau of Justice Statistics, roughly one out of every four people in jail met the threshold for severe psychological distress within the prior 30 days, as compared to just 5% of the general population.¹⁶³ According to the American Psychological Association, at least half of all incarcerated people struggle with mental health issues.¹⁶⁴ Similarly, people who are unhoused and/or struggling with substance use disorder are more likely to encounter the police and be incarcerated¹⁶⁵—without having their needs met.

The case has been made repeatedly that police should not be first responders to mental health crisis calls. Even so, enforcement is much more commonly dispatched in response to a 911 call than are social workers or mental health professionals. It’s been reported that 154,000 mental

¹⁶⁰ Jennifer Bronson, Ph.D., Laura M. Maruschak, BJS, and Marcus Berzofsky, Dr.P.H., *Special Report: Disabilities Among Prison and Jail Inmates*, U.S. Dep’t of Justice, Bureau of Justice Statistics, available at <https://bjs.gov/content/pub/pdf/dpji1112.pdf>.

¹⁶¹ Khaleda Rahman, *Rochester Police Union Chief Defends Pepper Spraying Girl—‘She Could Have Been Hurt Worse’*, Newsweek (Feb. 1, 2021) <https://www.newsweek.com/rochester-police-union-chief-defends-pepper-spraying-nine-year-old-girl-1565700#:~:text=U.S.-,Rochester%20Police%20Union%20Chief%20Defends%20Pepper%20Spraying%20Girl%E2%80%94%20She,Could%20Have%20Been%20Hurt%20Worse%20&text=The%20head%20of%20a%20police,nine%20year%20old%20g> [irl](https://www.newsweek.com/rochester-police-union-chief-defends-pepper-spraying-nine-year-old-girl-1565700#:~:text=U.S.-,Rochester%20Police%20Union%20Chief%20Defends%20Pepper%20Spraying%20Girl%E2%80%94%20She,Could%20Have%20Been%20Hurt%20Worse%20&text=The%20head%20of%20a%20police,nine%20year%20old%20g).

¹⁶² Doris Fuller & H. Richard Lamb, Michael Biasotti and John Snook, *Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters*, Off. of Research & Pub. Affairs, available at <https://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf>.

¹⁶³ Jennifer Bronson, Ph.D., *Report: Indicators of Mental Health Problems Reported By Prisoners and Jail Inmates*, U.S. Dep’t of Justice, Bureau of Justice Statistics, available at <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5946>.

¹⁶⁴ Lorna Collier, *Incarceration nation*, 45 Monitor on Psychology 56 (Oct. 2014), <http://www.apa.org/monitor/2014/10/incarceration>.

¹⁶⁵ *Criminal Justice Drug Facts*, Nat’l Institute on Drug Abuse (June 1, 2020), retrieved from <https://www.drugabuse.gov/publications/drugfacts/criminal-justice> (last accessed February 1, 2021).

health-related calls came through to 911 dispatchers in 2020 in New York City's five boroughs alone.

Studies focused on alternatives to traditional police response are currently lacking in both scope and breadth. However, the attention on police relations with the disabled and Black, Indigenous and People of Color (BIPOC) communities in the last several years have forced us to take an honest accounting of what has not worked, and what may work. For instance, Disability Rights New York (DRNY) and the John Jay College of Criminal Justice collaborated to form the RAASIC Project (Research and Advocacy Addressing Systems in Crisis). In their March 2021 paper, *Identifying Critical Issues in Response to Mental Health Crisis Calls*, the Project discusses the various disadvantages of having police respond to calls involving people with SMI; the alternative models being implemented; and guidance for communities seeking to establish the best model for them.

The Project emphasizes the fact that there is no one solution to the default policing model. But what is clear is that the status quo model is not working and needs replacing. Local communities must assess and choose for themselves which model(s) of mental health response work for them.

Although crisis intervention programs exist in some jurisdictions, there is no guarantee that such programs are effective in all instances in which a person with SMI is having a disability-related emergency. Moreover, the example mentioned above involving a nine-year-old girl in crisis shows that even when an alternative response is available, authorities may fail to engage it. The City of Rochester failed to involve its new "Person in Crisis" (PIC) program when the 911 call came in for help in response to the girl's threats of suicide.

Similarly, even if the PIC program existed in March 2020, Daniel Prude still would not have benefited from it because when 911 was called, injuries and a possible crime were reported. Per their policy as of February 2021, a report of injury, crime, or weapons nulls any request for the PIC Team, even if a disability is also reported. Last, there is never a guarantee that the call for assistance includes any indication at all of disability, even if there is one discovered at a later time (as in the cases of Elijah McClain and Mario Gonzalez).

These incidents help support the Project's conclusion that assessments need to be done on a local level to determine the best alternatives to the police response model.

ii. Peer-Based Training

All law enforcement personnel must develop an understanding of, and a working relationship with, people who have disabilities. This can be achieved via proper training, and should be provided to officers alongside any other required intersectionality and cultural competency training. To this end, the Task Force recommends that law enforcement agencies engage actively with people with disabilities, and seek out and tailor live training with the assistance of people with disabilities, so that officers are prepared for such interactions while on duty.

The disabled community makes up the largest minority population in the world, and in the United States. The population is incredibly varied, and different disabilities can manifest themselves in multiple different ways. Law enforcement personnel must strive to learn best practices for interacting with people with disabilities, and to mindfully engage in such practices in their fieldwork. And this mindfulness goes far beyond understanding SMI alone.

People often have multiple disabilities: a person with SMI can present with sensory impairments, or be on the autism spectrum, or have other diagnoses specifically affecting their processing of information. These diagnoses—when taken into account alongside intersecting identities and experiences such as age, race, ethnicity, language barrier, citizenship status, gender, sexual orientation, history of trauma, and more—all affect the way in which a person reacts during an encounter with police. A person who at first seems to be willfully “non-compliant” to an officer’s questions or commands may actually be manifesting the effects of a disability. It is possible that the person has a developmental disability and does not know how to comply, or that the person is exhibiting symptoms of severe hypoglycemia and is physically unable to comply. When other potential variables such as deafness, severe trauma, or citizenship status are accounted for, the police interaction becomes more complicated, and requires a mindful and compassionate approach.

In addition, intersectionality-focused training with a peer-driven component would help officers gain an understanding of their own potential biases while on and off the job. For instance, white officers have statistically been found to make arrests more often than non-white officers.¹⁶⁶ In addition, Black people, and Black people with SMI, have much higher rates of arrest than their white peers. (*Id.*) An officer’s ability to understand the varied nature of disability and the interplay between disability and other identities could mean the difference between life and death for the individual needing assistance and others involved.

In short, police must be prepared to handle interactions with the disabled community. Having officers engage meaningfully with people who have disabilities in their training is an effective way for officers to learn how to manage their expectations when responding to a call for help that may involve a person with a disability emergency.

3. “On the Beat”

Police misconduct results from improper policing practices while officers are “on the beat.” The Task Force recommends two ways to address improper policing practices: (1) enacting a duty to intervene law and (2) leveraging civilian oversight agencies to provide insight into policing practices that are improper.

a. The Duty to Intervene

When watching videos of police misconduct, a recurring question is “why didn’t the other officers intervene?” Although there may be many reasons why an officer would not intervene, a legal obligation does not exist for them to intervene. As discussed earlier in this report, police are generally supportive of a duty to intervene when another officer is using unnecessary force. They do not because challenging superiors or fellow officers is not supported by the culture. To create a culture of intervention, **the Task Force recommends that (1) New York State follow Buffalo’s lead and enact a law creating a duty to intervene and (2) all police departments adopt appropriate policies to implement the law.**

¹⁶⁶ Therese L. Todd and Preeti Chauhan, *Seattle Police Department and mental health crises: Arrest, emergency detention, and referral to services*, 72 J. of Crim. Justice 101718 (2021).

- b. Leveraging Civilian Oversight Agencies to Provide Insight into Policing Practices that are Improper

The Task Force recommends that New York should look to civilian oversight agencies for recommendations on how to improve police practices statewide. Civilian oversight agencies are keenly aware of what the gaps in police hiring, training, and practices are, which is why this Task Force recommends they have policy-making power over their respective law enforcement agencies. The state could also take advantage of this expertise by mandating staff or board members of civilian oversight agencies be appointed to statewide advisory bodies, such as the Municipal Police Training Council. The state could either require a certain number of appointees to those advisory bodies be staff or a board member of a civilian oversight agency, or permit a to-be-formed statewide voluntary association of civilian oversight agencies to nominate a certain number of members to those bodies. This would extend the principle of community control to the entire statewide institution of policing and help bridge the disconnect between local progress and statewide stagnation in reimagining policing.

Civilian oversight agencies should be required to send uniform data about complaints and investigations to the Division of Criminal Justice Services or the state Attorney General. State collection of data from various municipalities will aid in creating a centralized and uniform repository of information. This will allow the state to identify best practices for civilian oversight which should be replicated elsewhere, as well as local or statewide areas of concern to be addressed. Uniform reporting would also allow the state to randomly audit the operations of oversight agencies, which will improve agencies' performance. Giving the state immediate access to every agency's complaint and investigative records would also likely help to streamline any future decertification process, and give valuable data to state policymakers to further improve policing and civilian oversight statewide. Requiring the collection and reporting of this data will also encourage civilian oversight agencies to allocate resources towards proper data collection and management, which is essential for transparency.

At a minimum, the following data points should be required:

- a public tracking number for complaints;
- total number and types of complaints, delineated by category;
- information about the incident;
- age, race and gender of complainant; rank, gender and race of officers;
- witness information;
- number and types of use of force per complaint; and
- information about firearm use; and previous complaints against the officer.

If applicable, this information could also be broken down by police department divisions or sections.

The Task Force further recommends that New York should also require civilian oversight agencies to have accessible websites where agencies publish the state-mandated information from the previous section, as well as publish certain policies of their law enforcement agency, such as their use of force policy. Currently, many communities around the state and nation feel that their civilian oversight agencies lack transparency, notwithstanding the dedication of staff

and board members. Requiring public release of complaint and investigation data allows community members to review the work of their civilian oversight agencies and fosters an environment of openness to the community. It would also help reverse the decades-long resistance by police departments to public disclosure of important departmental and policy information.

4. Monitoring

Police departments have had to adapt over the decades to technological changes to investigate crimes and apprehend criminals. Technological advances can also help police to better protect themselves and the community from instances of misconduct. **The Task Force recommends requiring all members of New York State policing agencies to wear body cameras and for similar cameras to be installed in patrol vehicles, along with requisite training.**

Through the use of video recording on cellular phones, the public has become increasingly aware of heinous acts of police brutality against unarmed African American men, such as in the murders of George Floyd in 2020 and Walter Scott in 2015. Mr. Scott attempted to evade arrest for an alleged traffic and child support violation in South Carolina by running in an open field, when an officer shot him in the back five times.¹⁶⁷ After Mr. Scott was fatally wounded, the officer attempted to cover up his conduct by planting his Taser device near Scott's body.¹⁶⁸ Further, the officer falsely reported that Mr. Scott attempted to grab his Taser.¹⁶⁹ Fortunately, a bystander was present during these events and used his cellphone to record what he witnessed.¹⁷⁰ Ultimately, this officer pled guilty to violating Mr. Scott's federal civil rights in order to avoid having to face a second murder trial in state court, after a mistrial occurred due to a hung jury.¹⁷¹ The federal prosecutor who handled the proceeding for the civil rights violation recommended a sentence of twenty years in prison.¹⁷² The surviving family of Mr. Scott settled a civil lawsuit with the City of North Charleston, South Carolina in the amount of six and a half million dollars.¹⁷³

With respect to Mr. Floyd's killing, he was initially arrested for allegedly presenting a counterfeit \$20.00 bill at a convenience store in Minneapolis, Minnesota.¹⁷⁴ Multiple bystanders recorded police officer Derek Chauvin applying his knee against the neck of Mr. Floyd for

¹⁶⁷ John Eligon, Tim Arango, Shaila Dewan and Nicholas Bogel-Burroughs, *Derek Chauvin Verdict Brings a Rare Rebuke of Police Misconduct*, N.Y. Times (Apr. 20, 2021), <https://www.nytimes.com/2021/04/20/us/george-floyd-chauvin-verdict.html>.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ See Greg Botelho and Sonia Moghe, *North Charleston Reaches \$6.5 Million Settlement with Family of Walter Scott*, CNN Politics (Oct. 9, 2015), <https://www.cnn.com/2015/10/08/us/walter-scott-north-charleston-settlement/index.html>.

¹⁷⁴ See Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis and Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. Times (May 31, 2020, updated Apr. 20, 2021), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>.

approximately nine minutes, after he was handcuffed and lying on the ground.¹⁷⁵ Mr. Floyd repeatedly stated, over twenty times, “I can’t breathe.”¹⁷⁶ This officer was recently convicted of second and third degree murder, along with second-degree manslaughter.¹⁷⁷ Mr. Floyd’s family recently reached a settlement in a civil lawsuit with the City of Minneapolis in the amount of 27 million dollars.¹⁷⁸

These senseless deaths underscore that, during the course of an investigation or subsequent legal proceeding in response to this egregious misconduct, the circumstances of the factual events leading up to these fatal police-civilian encounters could not be captured and verified without this video-recording technology. But what if a bystander who sees a police officer acting in such a barbaric and unlawful manner does not have access to a cellphone with a camera? This routinely invites a credibility determination and potential dispute over what occurred. In the event that there are no eyewitnesses to such misconduct, an officer is empowered to falsely account for what happened.

The residents of New York State, particularly those of color, should not be at the mercy of chance during encounters with the police. They should have confidence that their interactions with police officers are being recorded and that these officers will not act in excess of their authority. Moreover, police officers who faithfully perform their duties as expected under law should have the added assurance that they can be insulated from unfounded claims of misconduct because their encounters are recorded. For the protection of both the police who dutifully serve and the public that live and travel in New York State, **the Task Force recommends that body-worn cameras should be a standard requirement for all uniformed and plain clothed officers as well as in the operation of their patrol vehicles.**

On June 16, 2020, Governor Cuomo signed legislation which required “New York State Police officers to wear body cameras while on patrol (S.8493/A.8674); and creat[ed] the Law Enforcement Misconduct Investigative Office (S.3595-C/A.10002).”¹⁷⁹ Without question, this legislation is certainly a step in the right direction, but it simply does not go far enough. According to the Census of State and Local Law Enforcement Agencies, 2008, there were a total of 514 police agencies in New York State, including the New York State Police.¹⁸⁰

¹⁷⁵ *Id.*

¹⁷⁶ See Maanvi Singh, *George Floyd Told Officers ‘I can’t breathe’ More than 20 Times, Transcripts Show*, The Guardian (July 9, 2020), <https://www.theguardian.com/us-news/2020/jul/08/george-floyd-police-killing-transcript-i-cant-breathe>.

¹⁷⁷ See Rochelle Olson, *What are the charges against ex-Minneapolis police officer Derek Chauvin in the killing of George Floyd?*, Minneapolis Star-Tribune (Mar. 18, 2021), <https://www.startribune.com/derek-chauvin-charges-trial-george-floyd-murder-manslaughter-police-minneapolis-minnesota/600030691/>.

¹⁷⁸ See Nicholas Bogel-Burroughs and John Eligon, *George Floyd’s Family Settles Suit Against Minneapolis for \$27 Million*, N.Y. Times (Mar. 12, 2021), <https://www.nytimes.com/2021/03/12/us/george-floyd-minneapolis-settlement.html>.

¹⁷⁹ See *Governor Cuomo Signs Legislation Requiring New York State Police Officers to Wear Body Cameras and Creating the Law Enforcement Misconduct Investigative Office*, N.Y. St. Off. of the Governor (Jun 16, 2020), <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-requiring-new-york-state-police-officers-wear-body-cameras-and>.

¹⁸⁰ See *Census of State and Local Law Enforcement Agencies*, U.S. Dep’t of Justice, Bureau of Justice Statistics (2008), <https://www.bjs.gov/content/pub/pdf/cslla08.pdf>.

Consequently, at that time, the Bureau of Justice Statistics within the U.S. Department of Justice, who conducted the census, reported that there were approximately 66,472 full-time police officers.¹⁸¹ With such a large police force, the Task Force further recommends that the legislature expand this mandate for body-worn cameras, under law, to include all local law enforcement agencies within the State. Moreover, every agency should be required to have cameras installed in their patrol vehicles.

According to the NYPD, it is “the largest and one of the oldest municipal police departments in the United States, with approximately 36,000 officers and 19,000 civilian employees.”¹⁸² After the NYPD was sued in federal court, its longstanding race-based “stop and frisk” practices were held to be unconstitutional in 2013.¹⁸³ A federal monitor (hereinafter “the Monitor”) was appointed by the trial court to oversee the necessary reforms to the NYPD’s illegal and discriminatory policies and practices, rooted in the “stop and frisk” program.¹⁸⁴ The NYPD was subsequently ordered “to institute a pilot project in which body-worn cameras will be worn for a one-year period by officers on patrol in one precinct per borough—specifically the precinct with the highest number of stops during 2012” as a remedial measure imposed by the Court.¹⁸⁵ In imposing this particular remedy on the NYPD, the Court carefully noted that “body-worn cameras are uniquely suited to addressing the constitutional harms at issue in this case” and further stated the following:

Video recordings will serve a variety of useful functions. First, they will provide a contemporaneous, objective record of stops and frisks, allowing for the review of officer conduct by supervisors and the courts. The recordings may either confirm or refute the belief of some minorities that they have been stopped simply as a result of their race, or based on the clothes they wore, such as baggy pants or a hoodie. Second, the knowledge that an exchange is being recorded will encourage lawful and respectful interactions on the part of both parties. Third, the recordings will diminish the sense on the part of those who file complaints that it is their word against the police, and that the authorities are more likely to believe the police. Thus, the recordings should also alleviate some of the mistrust that has developed between the police and the Black and Hispanic communities, based on the belief that stops and frisks are overwhelmingly and unjustifiably directed at members of these communities. Video recordings will be equally helpful to members of the NYPD who are wrongly accused of inappropriate behavior.¹⁸⁶

The Court further directed that the Monitor “will establish procedures for the review of stop recordings by supervisors and, as appropriate, more senior managers. The Monitor will also

¹⁸¹ *Id.*

¹⁸² See *About NYPD*, N.Y. City Police Dep’t, <https://www1.nyc.gov/site/nypd/about/about-nypd/about-nypd-landing-page#>.

¹⁸³ See *Landmark Decision: Judge Rules NYPD Stop and Frisk Practices Unconstitutional, Racially Discriminatory*, Ctr. for Const. Rights (Aug. 21, 2014), <https://cjrjustice.org/home/press-center/press-releases/landmark-decision-judge-rules-nypd-stop-and-frisk-practices>; See also <http://www.cjrjustice.org/ourcases/current-cases/floyd-et-al>.

¹⁸⁴ See <http://nypdmonitor.org/wp-content/uploads/2015/09/Floyd-Liability-Opinion-8-12-13.pdf>.

¹⁸⁵ See *id.*

¹⁸⁶ *Id.*

establish procedures for the preservation of stop recordings for use in verifying complaints in a manner that protects the privacy of those stopped. Finally, the Monitor will establish procedures for measuring the effectiveness of body-worn cameras in reducing unconstitutional stops and frisks. At the end of the year, the Monitor will work with the parties to determine whether the benefits of the cameras outweigh their financial, administrative, and other costs, and whether the program should be terminated or expanded. The City will be responsible for the costs of the pilot project.”¹⁸⁷ The Court thereafter ordered that the program be modified to allow for a “randomized” approach to the use of body-worn cameras throughout the precincts of the City of New York.¹⁸⁸

The Monitor has written a series of published reports to the Court in order to outline the course of action, undertaken by the NYPD, to comply with these remedial orders and implement the body-worn camera pilot program.¹⁸⁹ The most recent, dated November 30, 2020, is entitled, “The Monitor’s Twelfth Report: The Deployment of Body Worn Cameras (BWCs) on the New York City Police Department (NYPD) Officers.”¹⁹⁰ In this report, the Monitor indicated that it was prepared to “[describe] the evaluation of the NYPD’s BWC pilot program, as required by the Court’s Remedial Order and modified order.”¹⁹¹

After accounting, in great detail, for the scientific methods which were relied upon in conducting the study of the NYPD’s use of body-worn cameras during the one year period the Monitor conveyed the following findings:

In New York City and elsewhere, BWCs have been nominated as a potential technological solution (at least in part) to the problem of unlawful policing. This study finds that the placement of BWCs on officers can increase their compliance with department directives to document stops of citizens. These data can then be used to determine whether officers are adhering to the rule of law in their enforcement efforts. In addition to reducing the CCRB complaints against NYPD officers, BWCs could be useful in reducing persistent problems with unlawful citizen stops.

The results of this experimental evaluation suggest that the adoption of BWCs is not a panacea to problems of police-community relations. Although a 20% reduction in citizen complaints is a very positive development, there are relatively few citizen complaints, and a one-year reduction in an uncommon event does not seem powerful enough to change durable citizen perceptions of the NYPD and assessments of officer behaviors during specific encounters. The NYPD and other police departments may be best served if, in addition to adopting BWC, they double down on other programs that have solid scientific evidence of enhancing community attitudes towards the police. ... Police departments should be formally training their officers to embrace procedural justice

¹⁸⁷ *Id.*

¹⁸⁸ See <http://nypdmonitor.org/wp-content/uploads/2015/09/Torres-Order-Modifying-Remedial-Order.7.30.14.pdf>.

¹⁸⁹ See <http://nypdmonitor.org/wp-content/uploads/2016/02/2015-12-08FloydvCityofNY-TorresOrderModifyingRemedialOrderwrtBWCPilotProgram.pdf>

¹⁹⁰ See <http://nypdmonitor.org/wp-content/uploads/2020/12/12th-Report.pdf>.

¹⁹¹ *Id.*

principles during all interactions with the public and not just rely on technology to do so.

As stated, this study does not support the perspective that BWCs lead to short-term changes in the public perceptions of the police. However, it remains possible that the BWC technology could produce longer term benefits. When controversial events happen, the public expects to see video of the police-citizen encounter so they can judge whether officers acted lawfully and behaved appropriate[ly]. NYC residents are overwhelmingly in favor of the placement of BWCs on NYPD officers, and express hope that the technology may improve police-community relations. At the very least, the presence of BWCs on officers suggests to community members that mechanisms exist to ensure transparency and hold officers accountable when they misbehave. And, as a component of a broader set of evidence-based strategies to improve community perceptions, the placement of BWCs on officers could help to enhance the legitimacy of the police to the public that they serve. *Given the demonstrated benefits and absence of harmful outcomes, this study supports not only the use of body-worn cameras by the NYPD, but their use by the other departments as well.* (internal citations omitted) (emphasis added).¹⁹²

It should be further noted that prior to the conclusion of the pilot study program, the NYPD determined that it was more beneficial to use body-worn cameras before obtaining the actual results of the same.¹⁹³ In outlining its policy for the use of body-worn cameras, the NYPD's website states the following:

All Police Officers, Detectives, Sergeants and Lieutenants regularly assigned to perform patrol duties throughout the city are equipped with body-worn cameras. The NYPD body-worn camera program is the largest in the United States with over 24,000 members of the Department equipped with body-worn cameras. The rollout of these cameras was conducted in three phases.¹⁹⁴

Given the fact that the NYPD is already using body-worn cameras and the New York State Police began wearing these devices in 2020, a large segment of New York State's police force is already utilizing this technology and has established specific policies as well as procedures for the use of the same. Therefore, **the Task Force recommends that the current statute, requiring the New York State Police to use cameras, while on patrol, be amended to mandate that the smaller police agencies throughout the remainder of the State implement a similar body-worn camera program.**

5. Discipline

The area that has caused the greatest concern in addressing police misconduct is how officers are held accountable when misconduct is established. The Task Force offers three

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ See <https://www1.nyc.gov/site/nypd/about/about-nypd/equipment-tech/body-worn-cameras.page>.

recommendations concerning disciplining officers when misconduct is established: (1) expand access to police disciplinary records through new state laws, and (2) strengthen community oversight’s role in disciplining officers [this recommendation is discussed more fully in Part 4].

The Task Force recommends expanding access to police disciplinary records through New State Laws. It is a common police union–negotiated benefit to have police disciplinary records destroyed after a period of time has passed since the adverse determination imposing discipline on an officer.¹⁹⁵ This deprives an oversight agency of the ability to review the entire police disciplinary history of an officer as it reviews allegations of misconduct. State law should be passed requiring that all police disciplinary records are to be permanently maintained by the police agency.

Additionally, it is a common practice for police officers facing significant sanction for misconduct to resign to avoid the imposition of discipline. These officers gain employment in other agencies who may not be aware of the full scope of any prior misconduct. If these officers engage in future misconduct, the oversight agency has no ability to review the disciplinary history of the subject officer. A possible remedy would be the establishment of a central registry of all police disciplinary records, maintained by the New York State Division of Criminal Justice Services.

Another possible remedy would be a requirement that municipalities make police disciplinary records available online, rather than forcing members of the public to use the Freedom of Information Law to request them. Some departments have charged thousands of dollars for access to disciplinary records; the Manlius Police Department, for example, reportedly asked for \$47,504 when a media organization asked for its complete disciplinary files.¹⁹⁶ Other departments have claimed to be unable to separate disciplinary files from protected personnel files, or argued that requests are too broad. Actions like these have the potential to practically nullify the repeal of Civil Rights Law Section 50-a, and to undermine the community trust produced by full access to police disciplinary records.

Part 4: Recommendations that Provide Additional Accountability in the Criminal Justice System

“Through our criminal justice system,” said the former U.S. Attorney General Loretta Lynch on July 22, 2020 at the New York City Bar Association, “we show what is important to us and who is important to us.” The purpose of the criminal justice system is to dispense justice. Police officers are an integral part of this system—they are the first contact a person has with the system. When a person’s first contact as well as first impression of the system is one of bias, that impression casts a pall across the entire system and diminishes the credibility and integrity

¹⁹⁵ See, e.g., the recent contract between the City of Rochester and the union representing uniformed police officers. A contract provision required disciplinary records related to “command discipline” be destroyed after one year, and further that such discipline “will not be used against the member thereafter.” (Article 20, Section 2, G.) The contract may be found here: <http://rochester.indymedia.org/node/148063>.

¹⁹⁶ Beryl Lipton and Jon Campbell, *New York 50-a repeal: Months later, police find ways to shield disciplinary records*, WBFO (Jan. 11, 2021), <https://news.wbfo.org/post/new-york-50-repeal-months-later-police-find-ways-shield-disciplinary-records>.

of the system to achieve its purpose. Those bearing the brunt of the bias see a system where achieving justice for them is not important as it is for others.

“Majorities of both black and white Americans say black people are treated less fairly than whites in dealing with the police and by the criminal justice system as a whole,” observed a June 2020 Pew Center Research Report. “In a 2019 Center survey, 84% of black adults said that, in dealing with police, blacks are generally treated less fairly than whites; 63% of whites said the same. Similarly, 87% of blacks and 61% of whites said the U.S. criminal justice system treats black people less fairly.”¹⁹⁷

This same system is then responsible for prosecuting police misconduct cases. The perception and too many times the reality is that the law affords credulity to officers and treats the accounts of civilians they have abused with generalized mistrust. Much like the police department itself, the legal system can protect officers who commit acts of misconduct and abuse. The Task Force recommends implementing measures of additional accountability in the criminal justice system through civilian oversight, controls to minimize bias in the District Attorney’s Offices and the Courts, and revisions to the criminal justice process that will strengthen the integrity of the system.

A. Accountability Through Civilian Oversight

To understand the need for civilian review, and the role that civilian oversight entities play in promoting public safety and community trust in police, it is necessary to understand how civilian oversight agencies fit into the larger picture of police accountability and oversight. Over time, multiple mechanisms for police oversight have evolved, including discipline within police departments, processes for state certification of police officers, statutes that allow victims of police misconduct to file civil litigation, criminal investigations and prosecutions of police, oversight by legislative bodies, audits, and special oversight units like the New York Police Department’s Office of the Inspector General. Each mechanism has strengths and weaknesses. Civilian oversight entities are designed to fill in some of the gaps left by these other mechanisms. But legal, political, and practical constraints often prevent them from doing so.

1. Current Mechanism for police oversight

a. Internal Discipline

To begin with, police officers are employees, and as such they are subject to the same sanctions that any employer can impose on employees, including discipline, termination, and counseling. Police departments invariably have internal disciplinary processes by which supervising officers, and ultimately the police chief, can impose these employment-based sanctions. Like any employee, police officers are also subject to supervision, which sometimes involves strategies for preventing misconduct; for example, in some police departments, supervisors perform random audits of body camera footage to look for instances of misconduct (as well as any other behavior that may be worth addressing).

¹⁹⁷ *10 Things We Know about Race and Policing in the US*, Pew Research Center (June 3, 2020), <https://www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/>.

When a police department seeks to impose discipline on an officer, and the officer wishes to contest the discipline, most collective-bargaining agreements in New York State give the officer the choice of which procedure to invoke: they can either follow the procedures of the Civil Service Law, which involve a hearing before a state hearing officer, or they can choose arbitration. The vast majority of officers choose arbitration because it is generally more favorable to the officer.¹⁹⁸

Internal discipline has many limits. Because police supervisors and chiefs are themselves police officers, they may have a pro-police bias. Their worldview is shaped by the same factors that shape the worldview of the officers being disciplined; thus, internal discipline tends not to be effective in addressing cases where widespread police attitudes or practices are in conflict with the values of the community.

In several notable cases, police disciplinary procedures found no wrongdoing in cases where a community consensus later emerged against the conduct in question. For example, the Rochester Police Department’s internal investigation found no wrongdoing in the case of Daniel Prude.¹⁹⁹ Other mechanisms for accountability are often similarly limited in that they too do not reflect the values of the community being policed.

b. Civil Litigation

Another mechanism for police accountability is civil litigation: people who are victimized by police misconduct can file a lawsuit. Civil lawsuits can seek damages (monetary payments) or injunctions (orders that direct police departments to change their practices). Frequently, lawsuits end in settlements, which are agreements negotiated between the police and/or municipality and the person who files the lawsuit. The U.S. Department of Justice can also sue police departments for civil rights violations, and sometimes obtains a “consent decree”—a court order negotiated between the parties to resolve a lawsuit, under which the police agree to specific reforms and the court remains involved in overseeing the implementation of those reforms.

One other important aspect of civil litigation is the discovery process. Plaintiffs are entitled to information relevant to their case, which can in some cases significantly advance the public’s interest in transparency by forcing the disclosure of information that otherwise might have stayed secret.

Civil litigation, although a powerful tool, has significant limits. It only leads to a remedy when there is sufficient evidence that an officer’s misconduct violates specific statutes. But not all misconduct leaves evidence behind. And litigation may be unable to address problems that are apparent only in the aggregate, like over-policing—of communities of color or racial profiling. The litigation process requires significant resources and time. Moreover, legal doctrines like

¹⁹⁸ New York Times Editorial Board, *To Hold Police Accountable, Ax the Arbitrators*, N.Y. Times (Oct. 3, 2020), <https://www.nytimes.com/2020/10/03/opinion/sunday/police-arbitration-reform-unions.html>.

¹⁹⁹ Sarah Maslin Nir, *Rochester Officers Will Not Be Charged in Killing of Daniel Prude*, N.Y. Times, <https://www.nytimes.com/2021/02/23/nyregion/daniel-prude-rochester-police.html>.

qualified immunity²⁰⁰ (i.e., frivolous lawsuits are tossed if the officer was acting in good faith) and indemnification²⁰¹ (i.e., if the lawsuit settles or the officer is convicted of wrongdoing, the taxpayers pay out, not the individual officer) protects officers even when evidence of specific legal violations is available.

Decisions to pursue civil litigation are made by individuals who are victims of police misconduct. Some are deterred by the expense, the practical challenges, the unlikelihood of success, or by fear of retaliation. Moreover, civil litigation does not meaningfully engage the community in oversight of policing. It is designed to remedy individual acts of misconduct on a case-by-case basis, and although in unusual cases there may be consent decrees that cause systemic reform (and in some cases fail to effectuate reform²⁰²), litigation is best thought of as an individual remedy for legal violations, not a vehicle for engaging the community in designing a public safety approach that best expresses and serves the community's values.

c. Criminal Prosecutions

Another important tool for police accountability is criminal prosecutions. Some police misconduct is criminal, including assault, unjustified killing, accepting bribes, and so on. From 2005–2014, about 10,000 Americans were killed by police; about 153 officers were charged (about 1.5%), and of those cases, 55% led to convictions, most by guilty pleas.²⁰³ But there are several limits on the use of the criminal justice system as a tool of police accountability. One is simply that it applies only to a narrow range of the most egregious police misconduct, and thus can remedy at best only a small subset of the police actions that undermine community trust.

Another constraint on criminal prosecutions is that they are controlled by prosecutors, who often have close relationships with police, which may bias them against pursuing prosecutions. Federal prosecutors, for example, declined to prosecute in 96% of cases involving alleged crimes by police officers, as opposed to 23% of cases that did not involve police.²⁰⁴ Thus, some

²⁰⁰ Jay Schweikert, *Qualified immunity: A Legal, Practical, and Moral Failure*, Cato Institute (Jan. 29, 2021), <https://www.cato.org/policy-analysis/qualified-immunity-legal-practical-moral-failure>.

²⁰¹ Joanna C. Schwartz, *Police indemnification*, 89 N.Y. Univ. L. Rev. 885 (2014).

²⁰² Kevin Schofield, *It's time to face reality: the consent decree didn't work*, Seattle City Council Insight (June 9, 2020), <https://sccinsight.com/2020/06/08/its-time-to-face-reality-the-consent-decree-didnt-work/>; *Fired Oakland Police Chief, City Councilman Call For End To Federal Oversight Of Department*, CBS San Francisco (Mar. 2, 2020), <https://sanfrancisco.cbslocal.com/2020/03/02/fired-oakland-police-chief-city-councilman-anne-kirkpatrick-noel-gallo-federal-oversight/>.

²⁰³ Tom Jackman and Devlin Barrett, *Charging officers with crimes is still difficult for prosecutors*, Wash. Post (May 30, 2020), <https://www.washingtonpost.com/crime-law/2020/05/29/charging-cops-with-crimes-is-still-difficult-prosecutors/>; see generally The Henry A. Wallace Police Crime Database, (last accessed on June 1, 2021) <https://policecrime.bgsu.edu/>; and Amelia Thomson-DeVaux, Nathaniel Rakich, & Likhitha Butchireddygar, *Why It's So Rare For Police Officers To Face Legal Consequences*, FiveThirtyEight (June 4, 2020), <https://fivethirtyeight.com/features/why-its-still-so-rare-for-police-officers-to-face-legal-consequences-for-misconduct/>.

²⁰⁴ See *U.S. police escape federal charges in 96 percent of rights cases: newspaper*, Reuters (Mar. 13, 2016), <https://www.reuters.com/article/us-usa-police/u-s-police-escape-federal-charges-in-96-percent-of-rights-cases-newspaper-idUSKCN0WF0KM>.

laws exist to require prosecution by other officials, like the State Attorney General; a 2020 law provides that the Attorney General will prosecute crimes by police, but only those that result in death.²⁰⁵

Even when charges are brought, grand juries may decline to indict, as in the case of Eric Garner. Community members may perceive a decision not to indict as a vindication of the officer's conduct or a failure of the current system. Proceedings often remain secret, which can further undermine community faith in the process.

Finally, as with other mechanisms for police accountability, the criminal prosecution process does not give the community a significant voice in the oversight of police.

d. Decertification

Many professions require some sort of licensure or certification from a state-level entity that is empowered to investigate alleged misconduct or malpractice and take away practitioners' entitlement to practice their profession.²⁰⁶ If a lawyer or doctor engages in malpractice, their clients or patients can file complaints with state oversight entities that have authority over the practitioner's license. No such entity exists for the profession of policing.

New York State does require certification of police officers, but it is limited. To become a police officer, one must complete a training program; the Division of Criminal Justice Services then certifies the officer.²⁰⁷ DCJS maintains a registry of police officers.²⁰⁸ Employers must report officers who leave, resign, are removed, or are removed for cause.²⁰⁹ Employers must also submit a certification that the officer has completed training.²¹⁰ Removal or removal for cause invalidates the training.²¹¹ Officers can be excluded from the registry if they are no longer eligible.²¹²

Although decertification is powerful, in that it prevents officers from seeking employment at a different department, New York's decertification process is significantly limited. No one can file a complaint seeking decertification of a police officer who engages in misconduct, and the state conducts no investigations. DCJS merely maintains a registry.

Even the delicensing process is subject to significant limits, because officers can avoid decertification if they can avoid counting their termination as "for cause." Officers may be able to avoid a termination for cause by resigning before investigations are completed. In such cases, they remain able to work for other police departments.

²⁰⁵ See A.1601c/S.02574-C (2020) (adding Exec. Law § 70-b).

²⁰⁶ Roger L. Goldman *Importance of state law in police reform*, 60 Saint Louis Univ. L. J. 363 (2016).

²⁰⁷ Gen. Mun. Law § 209-q.

²⁰⁸ 9 N.Y.C.R.R. § 6056.1; Exec. Law § 845; Gen. Mun. Law § 209-Q; CPL § 2.30.

²⁰⁹ 9 N.Y.C.R.R. § 6056.4(c).

²¹⁰ 9 N.Y.C.R.R. § 6056.4(d).

²¹¹ 9 N.Y.C.R.R. § 6056.4(d).

²¹² 9 N.Y.C.R.R. § 6056.6.

In Albany, officer Cristofer Kitto shot a man who was trying to rob him while the officer was patronizing a sex worker.²¹³ He resigned from the Albany Police Department and says disciplinary charges were dropped. He is now suing the Albany Police Department for notifying DCJS of his status; he says he was not removed for cause. If successful, he will be eligible for employment elsewhere.

Like other mechanisms, the decertification process does not allow for significant community input. It depends entirely on actions by police departments, which are subject to the limits discussed above.

e. Other Accountability Mechanisms

Finally, other investigative mechanisms exist to ensure police accountability. The New York City Police Department has an Office of the Inspector General, and other jurisdictions have used auditors to investigate racial disparities and other issues. These entities, while they may prompt public conversation, do not generally provide for the community to play a role in overseeing police.

2. Barriers to Civilian Review Success

A number of barriers—structural, legal, and political—serve to prevent civilian oversight agencies in New York from operating as effectively as they could. One such barrier is a lack of true independence as an agency. This means not just a formal separation from the leadership structure of the police department it oversees, but also independence from broader political influence. For decades, New York City’s Civilian Complaint Review Board (CCRB) was housed within the New York Police Department (NYPD) and staffed by NYPD employees.²¹⁴ It was not until 1993 when the agency was formally severed from the NYPD and reconstituted as an independent, entirely civilian agency.²¹⁵ Even with this new structure, however, the mayor retained ultimate control over all appointments to the Board, and New York City mayors have used this control to reject proposed designees from the City Council and to unilaterally designate the CCRB’s chairperson.²¹⁶

The mayor’s control extends to the political sphere as well, limiting the ability of the oversight agency to engage in advocacy with policymakers. In October 2019, the mayor reportedly ordered the CCRB not to appear at a New York Senate committee hearing, at which the agency

²¹³ Brendan J. Lyons, *Ex-Albany officer who fatally shot robber sues to get his credentials back*, Alb. Times Union (Nov. 14, 2020), <https://www.timesunion.com/news/article/Ex-Albany-officer-who-fatally-shot-robber-sues-to-15727616.php?IPID=Times-Union-HP-CP-Spotlight>.

²¹⁴ New York City Civilian Complaint Review Board, *History*, <https://www1.nyc.gov/site/ccrb/about/history.page>.

²¹⁵ *Id.*

²¹⁶ 2019 New York City Charter Revision Commission, Final Report, 50, https://static1.squarespace.com/static/5bfc4cecf7fde7d3719c06/t/5d83dffbf8b08c5b3087ecc4/1568923645088/Final+Report_8.2.pdf.

chair was scheduled to testify in support of repeal of Civil Rights Law Section 50-a.²¹⁷ The chair subsequently appeared at a separate hearing later that month, but only in his personal capacity.²¹⁸ While a 2019 referendum expanded the CCRB and split appointment authority among other city officials, the mayor and the police commissioner—who is, of course, also chosen by the mayor—still retain control over the majority of the Board’s appointments.²¹⁹ And despite new Charter-mandated funding levels, the mayor retains the ability to set a lower budget for the oversight agency.²²⁰

In terms of their day-to-day operations, civilian oversight agencies also face immense barriers to simply accessing the information they need to conduct reviews or investigations. Police departments regularly do not provide civilian investigators with timely access to evidence, and agencies without subpoena power face limited recourse to compel a reluctant police department to turn over needed records.²²¹ Police unions have intervened to refuse to make individual officers available for meetings with investigators.²²²

Unsurprisingly, this delays the ability of oversight agencies to complete their investigations. In 2020, New York City’s CCRB took 11 months on average to complete an investigation that resulted in a substantiated complaint, with the agency blaming a lack of cooperation from the NYPD as among the reasons slowing down their investigators’ work.²²³ It should be noted that under New York law, investigators generally must commence disciplinary proceedings within 18 months of the alleged misconduct, so delays in investigations can ultimately push these cases beyond the statute of limitations.²²⁴

The inability to review evidence and interview officers have been cited as major factors contributing to the CCRB’s high rates of unsubstantiation, in which investigators are unable to reach any conclusion one way or the other on the underlying merits of a complaint.²²⁵ In the

²¹⁷ Craig McCarthy, et al, *De Blasio Muzzled NYPD, CCRB from Testifying on Planned Repeal of Records Law*, N.Y. Post (Oct. 17, 2019), <https://nypost.com/2019/10/17/de-blasio-muzzled-nypd-ccrb-from-testifying-on-planned-repeal-of-records-law/>.

²¹⁸ Bernadette Hogan and Craig McCarthy, *NYPD, CCRB Testify on Repeal of Law Shielding Cop Records*, N.Y. Post (Oct. 24, 2019), <https://nypost.com/2019/10/24/nypd-ccrb-testify-on-repeal-of-law-shielding-cop-records/>.

²¹⁹ See N.Y.C. Charter § 440.

²²⁰ Nolan Hicks, *De Blasio’s Budget Delays Expansion of NYPD Civilian Complaint Board*, N.Y. Post (June 5, 2020), <https://nypost.com/2020/06/05/de-blasios-budget-delays-expansion-of-nypd-civilian-complaint-board/>.

²²¹ Eric Umansky & Mollie Simon, *The NYPD is Withholding Evidence from Investigations into Police Abuse*, ProPublica (Aug. 17, 2020), <https://www.propublica.org/article/the-nypd-is-withholding-evidence-from-investigations-into-police-abuse>.

²²² Eileen Grench & Reuven Blau, *Police Say They’ll Refuse to Submit to Video Interviews for Misconduct Investigations*, The City (June 11, 2020), <https://www.thecity.nyc/justice/2020/6/11/21288820/police-say-theyll-refuse-to-submit-to-video-interviews-for-ccrb-investigations>.

²²³ David Brand & Rachel Vick, *CCRB Takes Longer to Close Cases as Cops and COVID Hinder Probes, Report Shows*, Queens Daily Eagle (Sept. 22, 2020), <https://queenseagle.com/all/ccrb-cases-take-11-months-to-close-as-cops-and-covid-hinder-probes-mayors-report-shows>.

²²⁴ See Civ. Serv. Law § 75(4).

²²⁵ David Cruz, *Why the Majority of NYPD Misconduct Complaints End Up “Unsubstantiated,” Gothamist* (Aug. 18, 2020), <https://gothamist.com/news/why-the-majority-of-nypd-misconduct-complaints-end-up-unsubstantiated>.

agency's 2019 report, it noted that 60% of complaints were closed without a finding on the merits in cases where investigators did not have access to video footage, while only 26% of complaints where body camera footage was provided yielded such outcomes.²²⁶

Ultimately, the greatest barrier to effective civilian oversight is the fact that these agencies simply are not empowered with any real authority to act on their findings and recommendations, and agencies that have attempted to expand their oversight authority have faced significant opposition. These barriers include questions about the proper scope of the agency's jurisdiction as well as their ability to act on their findings and recommendations. Jurisdictionally, some agencies are only designed to review and assess the sufficiency of police department-led investigations, where there is no real authority for independent action. Others, like the CCRB, have jurisdiction to independently investigate certain categories of misconduct, but face pushback when they seek to assert that authority in new ways. When the CCRB sought to begin investigating officer sexual misconduct under its jurisdiction to review police "abuse of authority," the agency was met with police union litigation successfully challenging its ability to do so without going through a more formal rule-making process.²²⁷ And despite arguments that acts of bias-based profiling should similarly fall under the agency's abuse of authority jurisdiction, the CCRB has never challenged the NYPD's full control over those investigations.²²⁸

Although the CCRB has the authority to prosecute charges and specifications against NYPD officers, it must do so within the NYPD's trial room, owing to a state law—Unconsolidated Law Section 891—that requires police disciplinary proceedings to take place within the agency that has ultimate disciplinary authority.²²⁹ Unlike other agencies, who can and do designate officials at the Office of Administrative Trials and Hearings to preside over misconduct hearings, the NYPD is legally required to control the process. This control makes the CCRB dependent on the NYPD's cooperation in scheduling trials and providing public access in high profile cases; in 2019, it was reported that the CCRB had been ready to begin its prosecution of the officer who killed Eric Garner, but that the NYPD had delayed its scheduling.²³⁰

Perhaps the most important factor, however, is whether the work of civilian oversight agencies actually translates into accountability for officers found to have engaged in misconduct. Here, the main barrier is the fact that disciplinary decision-making generally rests outside the oversight agency itself. In New York City, the NYPD commissioner has exclusive control over

²²⁶ New York City Civilian Complaint Review Board, 2019 Annual Report, 9, https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2019CCRB_AnnualReport.pdf.

²²⁷ Sydney Pereira & Josefa Velasquez, *NYPD's Oversight Agency Launches Do-Over on Police Sexual Misconduct Investigations*, Gothamist (Nov. 10, 2020), <https://gothamist.com/news/nypds-oversight-agency-launches-do-over-police-sexual-misconduct-investigations>.

²²⁸ See Office of the Inspector General for the NYPD, *Complaints of Biased Policing in New York City: An Assessment of NYPD's Investigations, Policies, and Training*, https://www1.nyc.gov/assets/doi/reports/pdf/2019/Jun/19BiasRpt_62619.pdf (recommending the CCRB adopt a policy to investigate biased policing allegations under its abuse of authority jurisdiction).

²²⁹ See *Lynch v. Giuliani*, 301 A.D.2d 351, 755 N.Y.S.2d 6 (2003).

²³⁰ Mira Wassef, *Eric Garner's Mother Wants All Officers Charged in Her Son's Death*, Staten Island Advance (July 26, 2018), https://www.silive.com/news/2018/07/eric_garners_mother_wants_all.html.

disciplinary outcomes and unlimited discretion to accept, reject, or modify disciplinary recommendations.²³¹ Low rates of concurrence between the commissioner and the oversight agency have long been an issue, with one recent analysis finding that the commissioner downgraded or outright rejected CCRB recommendations in about 71% of serious misconduct charges over the past twenty years.²³² In Rochester, where concerns about a lack of accountability for police misconduct led voters to approve transferring disciplinary authority to a new Police Accountability Board, reports similarly show patterns of a police chief rejecting disciplinary recommendations from the city's oversight agency.²³³ This transfer of authority, however, was quickly challenged in court by police unions.

State and local laws provide a confusing patchwork of provisions related to police disciplinary authority, collective bargaining, and the degree to which localities can implement new systems. Public employee discipline is generally governed by the Taylor Law and subject to collective bargaining, but that law notably did not displace pre-existing statutory provisions that vested police disciplinary decision-making power in local officials.²³⁴ If a locality had such a law in place, it ostensibly retains much greater control over police discipline, but questions remain as to whether the locality can substantially alter those disciplinary systems without upsetting this balance. New York City has had local control over police discipline since the 1870s, yet the City Council has called on the State Legislature to act in order to allow for the transfer of disciplinary authority outside of the NYPD.²³⁵ Rochester's attempt to make such a change at the local level will likely involve further litigation and perhaps a ruling from the Court of Appeals on the degree to which local governments can legislate on matters of disciplinary authority, but in the meantime, state law offers little practical guidance to communities and policymakers hoping to create or expand truly empowered oversight agencies.

New York must have the civilian oversight agencies necessary to make our state's public safety systems transparent and accountable. To do this, **the Task Force recommends moving away from the "civilian review" model of oversight to a model better characterized as civilian control of police oversight and contemplates both the ability to investigate and impose discipline but also policymaking.** Rochester,²³⁶ Oakland,²³⁷ and what was attempted in

²³¹ See N.Y.C. Charter § 434; N.Y.C. Admin. Code § 14-115.

²³² Ashley Southall, et al, *A Watchdog Accused Officers of Serious Misconduct. Few Were Punished*, N.Y. Times (Nov. 15, 2020), <https://www.nytimes.com/2020/11/15/nyregion/ccrb-nyc-police-misconduct.html>.

²³³ See Rochester Police Department Professional Standards Section, 2018 Annual Report on Police Complaints, <https://www.cityofrochester.gov/PSSAnnualReports/> (noting that the Rochester Police Chief did not concur with 18 findings of misconduct by the Civilian Review Board and imposing no penalties in two-thirds of these cases).

²³⁴ See *Patrolmen's Benevolent Ass'n of City of New York, Inc. v. New York State Pub. Emp. Rels. Bd.*, 6 N.Y.3d 563, 573 (2006).

²³⁵ Christopher Robbins & Yasmeen Khan, *City Council Aims to "Reduce the NYPD's Footprint" with Sweeping New Police Reforms*, Gothamist (Jan. 30, 2021), <https://gothamist.com/news/city-council-aims-reduce-nypds-footprint-sweeping-new-police-reforms>.

²³⁶ Charter of the City of Rochester art. XVIII Police Accountability Board, see <https://www.cityofrochester.gov/PAB/> to download the legislation from the right-aligned sidebar.

²³⁷ City of Oakland, Police Commission. Retrieved from <https://www.oaklandca.gov/boards-commissions/police-commission#documents>.

Newark, New Jersey²³⁸ are all examples of communities pushing for *direct* control over the people and institutions that police their neighborhoods (i.e., community control–type models of oversight). This type of model is independent of law enforcement and local politics; it has broad and direct powers to investigate, adjudicate, and discipline both officers and institutions for wrongdoing; it has the power to make policy changes and set community standards, while operating as a model of inspired government transparency.²³⁹ Most importantly, it has an administrative arm and community representation that drive the agency. **The Task Force further recommends that New York State pass legislation and adopt policy, as outlined below, to ensure that these civilian oversight agencies are widespread and fully empowered.**

3. *Give All Communities Control Over Police Discipline By Changing State Law*

As discussed above, existing New York State laws frustrate the ability of communities to implement effective civilian police oversight. A message the Task Force heard repeatedly is that communities who have experienced over-policing, police violence, and racist inequalities do not trust a disciplinary process that gives police final say over discipline. Civilian control of police discipline is a minimum requirement for communities to trust police. Thus, **the Task Force recommends that New York state laws should be amended to allow local municipalities to determine police disciplinary procedures as well as to directly discipline officers in response to civilian complaints that fall within the jurisdiction of the civilian oversight agency.**

New York’s Public Employees’ Fair Employment Act (colloquially known as the “Taylor Law”) was passed in 1967 and provided unions the power to negotiate disciplinary procedures (Civil Service Law Article 14). When given such power, police unions have uniformly created disciplinary frameworks that take control out of the public’s hands.²⁴⁰ As a result, it has become impossible for many New York municipalities to assert direct civilian control over police discipline.²⁴¹

New York civil service laws should be amended to prohibit police unions from negotiating disciplinary powers as part of union negotiations. Furthermore, civil service laws should be modified to allow disciplinary procedures to be devised, and hearings to be conducted, by an independent civilian police oversight agency.²⁴² The oversight agency’s policies and procedures

²³⁸ City of Newark, New Jersey Civilian Complaint Review Board. Retrieved from <https://www.newarknj.gov/departments/ccrb>.

²³⁹ Mir Usman Ali, & Maureen Pirog, *Social accountability and institutional change: The case of citizen oversight of police*, 79 Pub. Admin. Rev. 411, 411–26 (2019), available at <https://doi.org/10.1111/puar.13055>.

²⁴⁰ Catherine L. Fisk, L. Song Richardson, *Police Unions*, 85 Geo. Wash. L. Rev. 712, 740 (2017).

²⁴¹ There is an exception for municipalities that passed local laws asserting local control over police discipline prior to the passage of these statutes.

²⁴² Multiple bills have been introduced to remove police discipline from the collective-bargaining process, including [S.4334](#) (2021–2022 Session), [A.1278](#) (2021–2022), and S.8678 (2019–2020 Legislative Session). Senate Bill S.268 (2021–2022 Legislative Session) would repeal § 891 of the Unconsolidated Laws. Senate Bill S.5252 (2021–2022 Legislative Session) provides final discipline authority over civilian complaints to the civilian complaint review board.

for investigating complaints, providing notice to the police officer of pending discipline, and conducting hearings should provide the officer substantive due process protections. Importantly, police officers should be able to avail themselves of the appeals procedures outlined in Civil Service Law § 76.

4. Require Large Cities to Create Strong, Independent Civilian Oversight Agencies

As civilian oversight of police is an important component of policing, all police agencies in New York State should be subject to oversight by an independent civilian police oversight agency.²⁴³ Larger municipalities with large police agencies are in the best position to create effective civilian oversight agencies. However, smaller communities with police agencies may lack available resources or the political will to implement effective civilian oversight of the police.

Larger municipalities with concomitantly large police agencies should be mandated to create independent civilian oversight agencies.²⁴⁴ These municipalities, and the large police agencies contained therein, have sufficiently large financial resources to adequately fund effective civilian oversight agencies. Furthermore, these agencies often serve diverse communities whose members should be provided the opportunity to contribute to officer oversight, as well as provide feedback to the police agency on the community impact of police policies and procedures.

To ensure that these state-mandated agencies actually change policing, the Task Force recommends that they should have the following set of powers to ensure their strength and independence:

a. Require Agencies to Have Comprehensive Investigatory, Adjudicatory, and Disciplinary Powers

Oversight agencies in these large jurisdictions should have the following minimum, mandatory powers:

(1) The law enforcement agency and the local municipality shall provide to the oversight agency within fifteen (15) days except for all body worn camera video footage, which shall be immediately accessible to the oversight agency, as requested: other video or audio evidence, records of encounters created by uniformed officers, arrest reports, aided cards, digital memo-book entries, radio communications and calls for service, documents and evidence, including

²⁴³ There are existing civilian oversight agencies in New York City, Rochester, Albany, and smaller localities—but they all lack required financial resources, or the powers required to be effective.

²⁴⁴ Defining these as municipalities with police agencies whose geographical jurisdiction encompasses greater than 200,000 residents, or agencies with greater than 250 sworn officers, would include the New York State Police (5,152 sworn officers); sheriff offices in Suffolk County (271), Westchester County (293), Erie County (158), Monroe County (333), Onondaga County (241), Orange County (114), Rockland County (159), Albany County (146), Dutchess County (132), Oneida County (197), Saratoga County (153), and Niagara County (109); the New York City Police Department (36,563), Buffalo Police Department (729), Rochester Police Department (738), Yonkers Police Department (598), Syracuse Police Department (403), and Albany Police Department (296); as well as the Nassau County Police Department (2,357), the Suffolk County Police Department (2,518), and the Westchester County Department of Public Safety (293).

but not limited to personnel files, early warning system databases, all other databases, internal affairs section investigative case files, disciplinary case files, hearing minutes and/or recordings, disciplinary recommendations from the internal affairs section, criminal and civil case files, and all police agency policies, procedures, practices, patrol guides, manuals or its equivalent, and any other documents that pertain to policies, tactics, complaints, or charges against police employees (sworn and unsworn) and their subsequent investigation and adjudication, or other sources of information deemed appropriate by the oversight agency.

(2) Subpoenas may be issued at any time per the discretion of the oversight agency. Such subpoenas may compel the attendance of witnesses, police agency employees (sworn and unsworn) and/or other persons (e.g., medical personnel and health care facilities), and require the production of records and other materials, including all records of the police agency, other persons or other agencies. A copy of any subpoena served upon a police employee shall also be delivered to the chief executive of the police agency. Subpoenas are enforceable pursuant to relevant provisions of Article 23 of the New York Civil Practice Law and Rules. The chief executive of the police agency will promulgate new rules according to the municipality's charter or utilize existing rules regarding discipline and administration to ensure compliance with oversight agency procedure and applicable law.

(3) Have rulemaking authority to implement policies and procedures related to discipline based upon a civilian complaint, including a disciplinary matrix to be used by the agency in imposing discipline. The oversight agency may gather input from different constituencies and decision-makers on the disciplinary matrix, however, the oversight agency determines the final version of the matrix. A disciplinary matrix is a written, consistent, progressive, and transparent schedule or rubric used to determine discipline for misconduct. The disciplinary matrix shall determine a range of disciplinary action options for misconduct to be pursued by the oversight agency.

(4) Investigate allegations of misconduct, conduct fact-finding hearings, and issue direct discipline in accordance with the disciplinary matrix,²⁴⁵ including issuing discipline for failure to cooperate, or making a false statement during an interview, or retaliation against oversight agency volunteers and employees, complainants, or any person involved pursuant to an investigation;²⁴⁶ also, agencies should be able to initiate their own investigations into potential misconduct, because when the public is made aware of an incident of potential police misconduct and the agency is helpless to initiate its own investigation the public loses confidence in the agency;

²⁴⁵ See Appendix B, pp. 88–91 for information on disciplinary matrices as found in Lacker-Ware, B., & Forsyth, T. (2017). *The case for an independent police accountability system: transforming the civilian review process in Rochester, New York*. Rochester, NY: self-published; *see also* Jon M. Shane, *Police employee disciplinary matrix: An emerging concept*, 15 *Police Quarterly* 62, 62–91 (2012), available at <https://doi.org/10.1177/1098611111433026>.

²⁴⁶ Nothing herein should be construed to limit the police agency from conducting an investigation related to potential criminal conduct by the subject officer.

(5) Hire independent counsel or other expert witnesses necessary to investigate and resolve police complaints;

(6) The oversight agency should complete investigations within 90 days. Organizations run by a board should be permitted to delegate authority to decide the outcome of cases to staff rather than conducting reviews of each case. As a condition of employment with the police agency all sworn and unsworn personnel shall fully cooperate with the oversight agency.

b. Require Agencies to Allow Anonymous Complaints

Allowing for complainant anonymity is crucial for four reasons. First, many individuals feel unsafe putting their name on a complaint against police, especially members of marginalized and over-policed communities. Second, anonymity could serve as a whistleblower mechanism for police departments, allowing officers to file complaints about behavior they see and know is wrong. Third, anonymity allows officers' friends and family members the ability to complain about potentially dangerous behavior, which may help to address the high prevalence of domestic violence in policing. Lastly, complaint forms which require a signature under penalty of perjury or other similar procedures discourage people from filing complaints, as they may worry about facing punitive consequences when relying on the evidence of their experience.

c. Require Agencies to Have an Independent and Victim-Centric Complaint Process

Effective civilian police oversight is predicated on a civilian-complaint process that is as accessible as possible for victims of police misconduct. The complaint process should remain independent from police departments in order to prevent a potential victim from being required to re-confront an accused aggressor, or police in general. This would prevent unnecessary traumatic experiences, and further encourage complainants to come forward. Some civilian-oversight agencies employ victim advocates to guide complainants through the complaint process, which should be encouraged. In general, all efforts should be made so that complainants feel safe and at ease through what is an extremely difficult and sometimes time-consuming experience.

d. Require Implementing Governments to Ban Officers from Retaliating Against or Harassing Complainants

The state should uniformly ban all officers from targeting complainants and their friends and family. Although these types of activities would likely be covered under the jurisdiction of a civilian oversight agency, banning them would solidify the state's policy of ensuring an accessible and safe complaint process. The ban should extend to all officers, whether or not they were the subject of a particular person's complaint. Doing so could either trigger an investigation by the civilian oversight agency, the state Attorney General's office, or both. A finding of retaliation should lead to immediate termination and decertification.

e. Require Agencies to Have Rule-Making Powers Over Police Departments

In addition to exercising direct control over investigation of civilian complaints and the imposition of discipline, oversight agencies in larger municipalities should have the power to develop rules and procedures governing the interaction of police officers with the communities they serve.

In addition to the above mandatory powers, civilian oversight agencies ideally would have the following additional powers and responsibilities:

- (1) To assist the police agency in developing policies and procedures.
- (2) To solicit community feedback on proposed policy changes, and advise the police agency on implementation.

f. Require Sufficient Due Process Protections for Subject Officers

Sufficient protections to police officers to ensure that discipline imposed would not be done arbitrarily and without due process would be required. Ideally, the procedures developed to initiate disciplinary proceedings, provide notice to the officer, and conduct hearings would mirror the procedures outlined in Civil Service Law § 75. As police officers would still be protected under Civil Service Law § 76 there would be no need for civilian oversight agencies to develop procedures governing appeals from adverse determinations. Any hearing officer presiding over a hearing pursuant to Civil Service Law § 75 cannot be a current or former member of the police department.

g. Require Agencies to Have Independence From Undue Influence

Additionally, to ensure that the police oversight agency remained in civilian control, and responsive to the needs of the community, the governing body of the oversight agency must be composed of non-police officers, as well as inhabitants representing the diversity of the community served by the police agency or agencies. Members of the governing body must also have sufficient independence from the appointing authority to ensure that they may perform their duties without fear of reprisal. Finally, the agency should have budgetary authority that is based on firm metrics (police officer headcount, with a sliding scale of funding per officer based on department size) fully independent from the standard budgetary process.

Smaller municipalities should be encouraged to create civilian police oversight agencies. However, care should be taken that these agencies are provided the resources necessary to provide effective oversight.

h. Require Minimum Training Standards for Board Members

The state should mandate minimum training requirements for civilian oversight agency board members. Doing so would empower board members to make well-informed decisions on behalf of their community, as well as ensure a consistent process for officers. Training on jurisdiction-specific policies could be created by each agency, with the state requiring inclusion of certain

topics, such as a review of the department’s use of force policy. Board members could also be required to attend a more general policing and police oversight training, either provided by the state, or provided by a nationally recognized civilian oversight organization, such as the National Association for the Civilian Oversight of Law Enforcement (NACOLE). Available funding should be considered by the state to encourage and pay for board members to attend trainings.

i. Study the Creation of Regional or Inter-Municipal Civilian Police Oversight Agencies

As noted above, smaller municipalities lack the resources necessary to implement effective civilian oversight. However, financing a separate civilian oversight agency for each police agency in New York is beyond the financial resources of New York State, and requiring small (or even mid-size) municipalities to fund these agencies may result in the abolishment of the police agencies themselves.²⁴⁷

Thus, New York should study the concept of regionalizing civilian police oversight agencies or creating oversight agencies that are shared between multiple municipalities.²⁴⁸ Creating civilian oversight agencies that oversee multiple police agencies at the county or multiple-county level has several potential advantages. Economies-of-scale would allow ideal staff-to-complaint ratios and reduce the cost of providing oversight. Larger regional agencies would have larger budgets that would allow for greater independence from local municipal governing bodies. This would also result in greater insulation from undue influence from either individual police agencies, or political leaders.

However, regional offices have potential drawbacks. Ideally, oversight agencies would be overseen by inhabitants who reflect the diversity of the community in which the police agency operates. This may be difficult to accomplish in a regional oversight agency that has broad geographic jurisdiction. Additionally, a regional office with broad subject matter jurisdiction would necessarily need greater resources than an agency with limited subject matter jurisdiction (e.g., the NYC CCRB).

²⁴⁷ More than half of New York counties have fewer than 200 sworn officers (full and part time) in the entire county. The following counties have fewer than 200 sworn officers in the county: Allegany (115) ; Cattaraugus (192); Cayuga (111); Chemung (156); Chenango (80); Clinton (97); Columbia (181); Cortland (127); Delaware (96); Essex (44); Franklin (41); Fulton (108); Genesee (69); Greene (148); Hamilton (17); Herkimer (150); Jefferson (171); Lewis (40); Livingston (158); Madison (184); Montgomery (128); Ontario (163); Orleans (78); Otsego (68); Putnam (177); St. Lawrence (151); Schoharie (53); Schuyler (45); Seneca (80); Steuben (153); Sullivan (124); Tioga (68); Warren (120); Washington (147); Wayne (132); Wyoming (83); and Yates (46). There are 71 police agencies in New York with fewer than 10 sworn officers (full and part time).

²⁴⁸ Other professions are overseen by regional oversight agencies. For example, attorneys are overseen by the attorney grievance panels in each judicial department. Physicians are overseen by the Office of Professional Medical Conduct (OPMC); The literature around intergovernmental risk pools for police liability is similar to the proposal briefly outlined in this report; small municipalities pool resources and risk to cover liability and craft intergovernmental service agreements with insurance-like provisions that cover all member municipalities; likewise, a similar police oversight agency with representation from member municipalities supported by state funding could also exist. See John Rappaport, *How Private Insurers Regulate Public Police*, 130 *Harvard L. Rev.* 1539, 1539–1614 (2017); see also Peter C. Young & B.J. Reed, *Government Risk-Financing Pools: An Assessment of Current Practices*, 15 *Pub. Budgeting & Fin.* 96, 96–112 (1995), available at <https://doi.org/10.1111/1540-5850.01034>.

Regional oversight agencies raise questions that may need further study. The following are some of the issues that should be considered.

Subject Matter Jurisdiction. The civilian oversight agencies currently operating in New York have a variety of subject matter jurisdictions. For instance, the New York City Civilian Complaint Review Board (NYC CCRB) handles complaints that allege the use of excessive or unnecessary force, abuse of authority, discourtesy, or the use of offensive language.²⁴⁹ The jurisdiction of the Rochester Police Accountability Board (PAB) is much broader, allowing it to “investigate any and all conduct, acts, or omissions by any RPD officer” regardless of whether it is the subject of a filed complaint.²⁵⁰ The jurisdiction of these agencies were defined by legislative action influenced by community input as well as budgetary factors.

In addition to investigation and disciplinary authority (such as the Rochester PAB) or disciplinary recommendation (such as the NYC CCRB), both the PAB and NYC CCRB have the authority to review and recommend policy.

A regional oversight body overseeing multiple police agencies would need to balance the breadth of the agency’s subject matter jurisdiction against the resources available to accomplish its mission.

Geographic Jurisdiction. Similarly, the geographic boundaries of a regional oversight agency would need to be defined. Although larger geographic areas encompassing many smaller police agencies would result in efficiencies that would reduce the financial resources necessary to provide civilian oversight, there are drawbacks as well. Larger areas would impose possible hardships on witnesses should they be required to travel long distances to participate in hearings, potentially disincentivizing witnesses from participating.²⁵¹ Additionally, staffing the governing body of the agency with civilians that adequately reflect the diversity of the various communities served by the regional agency may be a challenge.

Policymaking Powers. Whether a regional civilian oversight agency should be vested with rule-making authority would need to be determined.

j. *Exempt Local Governments from Referendum Requirements*

The state should specifically grant local legislative bodies the power to transfer disciplinary, investigative, and policymaking authority to a civilian oversight agency without the referendum requirements in Municipal Home Rule Law. Clarifying this point would make it easier for

²⁴⁹ <https://www1.nyc.gov/site/ccrb/complaints/complaints.page>.

²⁵⁰ *Police Accountability Board: Establishment and Jurisdiction*, Charter of the City of Rochester, Article XVII, § 18-3, available at <https://ecode360.com/35278812#35278831>.

²⁵¹ This will likely impact civilian witnesses only as police witnesses (or the subject police officer) will usually be compensated for attending disciplinary proceedings.

communities to equip civilian oversight agencies with the requisite powers to ensure their success.

5. *Provide State Funding to Support & Incentivize Strong Civilian Review Boards*

Most agencies fail, in part, because they lack sufficient financial and staffing resources to do their jobs. Many smaller jurisdictions may not have an effective agency because of elected officials' budgetary concerns. **The Task Force recommends that New York State should promulgate legislation providing (1) for the necessary funding to municipalities that create agencies empowered with the abilities, protections, and tools; and (2) supplementing (and not supplanting) funding for existing, empowered agencies.** Funding should be allocated to existing police oversight agencies, or new agencies, with funding being apportioned each year on a per-officer-in-jurisdiction basis (with the jurisdiction being at either the municipal or regional level). Any direct state funding could be tiered to ensure that jurisdictions that gave agencies more power received more money (for example, "investigate only" agencies would receive \$1,000 per officer while "enforce discipline" agencies would receive \$3,000 per officer). Relatively small amounts of funding could dramatically change civilian review.²⁵²

New York State must commit sufficient resources to enhance existing independent civilian oversight agencies, and incentivize the creation of new oversight agencies in communities that lack effective civilian oversight. However, the costs of implementing civilian oversight of police agencies should also be borne by the municipality (or the police agency) as a necessary cost of providing police services.

Each municipality with a police agency could be assessed a yearly per officer fee in an amount determined by the state.²⁵³ The size of the fee to be imposed should take into account the total cost of providing the needed resources to support civilian police oversight agencies in New York State. Additionally, New York State should commit state funding to supplement the available funds to ensure that there are sufficient resources available for effective civilian oversight.

The fund would provide direct financial support to civilian police oversight agencies that currently exist so that they can meet the minimum standards outlined above, and such funds should supplement, and not supplant, existing funding provided by municipalities currently funding civilian police oversight agencies.²⁵⁴

²⁵² For example, if Rochester received \$5 million annually from the state fund, it would see its oversight staff increase from 3 people to 50. It would cost the state \$20 million to give every local jurisdiction outside of New York City (and the state police) \$1,000 per officer in state oversight funding.

²⁵³ In 2019 there were over 63,360 sworn full-time officers and 3,015 sworn part-time officers in New York State (some police agencies failed to report to the Division of Criminal Justice Services the number of officers in the agency). See *Law Enforcement Personnel in 2019*, N.Y. State Div. of Crim. Justice Servs., <https://www.criminaljustice.ny.gov/crimnet/ojsa/2019-le-personnel.pdf>.

²⁵⁴ As an example, if the fee imposed were \$500 per sworn officer (and \$250 for each part-time officer), this fund would generate almost \$32,000,000 for civilian police oversight agencies in New York State each year.

Funding should also be used to provide financial support for municipalities to create new civilian oversight agencies, provided those agencies meet minimum standards designed to ensure effective civilian oversight.

B. Accountability Measures in District Attorney’s Offices, Attorney General’s Office, Public Defenders

The Task Force recognizes that police misconduct does not occur in a vacuum. Further, acts of police brutality against unarmed civilians of color have been thoroughly documented in New York and beyond, well before the tragic killing of Mr. Floyd in 2020. Judges, jurors, prosecutors, and criminal defense attorneys play integral roles in the administration of justice in New York State’s criminal court system and uphold the rule of law when this happens.

Prosecutors serve as “an administrator of justice, a zealous advocate, and an officer of the court. . . . The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.”²⁵⁵

When courts fail to hold members of law enforcement fully appropriately accountable for known instances of misconduct, involving racial profiling, unlawful searches and seizures, and/or excessive force during police-civilian encounters, this not only serves to undermine the sacred trust that people have in our government, but also creates a “partnership [or an alliance] in official lawlessness.”²⁵⁶

1. Provide Implicit Bias Training (IBT) to all of its employees, who hold positions in the Offices of the Attorney General (hereinafter “AG”), Inspector General (hereinafter “IG”), County District Attorney (hereinafter “DA” or “CDA”) and County Public Defender (hereinafter “PD” or “CPD”) in a consistent and uniform manner

These offices comprise thousands of employees. They have a responsibility to promote an awareness of the existence of race-based bias within their workforces and should include mandatory implicit bias training, tailored to root out this insidious proclivity.

The governor has used his power in the past to issue an Executive Order to mandate training of New York State employees as follows:

Executive Order No. 19, issued by Governor Elliot Spitzer on October 22, 2007, required “[e]ach state agency, in formulating its Domestic Violence and the Workplace policy, shall give

²⁵⁵ See *Criminal Justice Standards: Prosecution Function (Fourth Ed.)*, Am. Bar Ass’n Crim. Justice Section (2017), available at https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.

²⁵⁶ See *Herring v. U.S.*, 555 U.S. 135, 152 (2009), citing *U.S. v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).

due regard to the importance of increasing awareness of domestic violence and informing employees of available resources for assistance; ensuring that personnel policies and procedures are fair to domestic violence victims and responsive to their needs; developing workplace safety response plans; complying with State and federal law including restrictions of possession of firearms by a person convicted of a domestic violence related crime or subject to an order of protection; encouraging and promoting domestic violence education *and training for employees*; and holding accountable employees who misuse state resources or authority or violate their job duties in committing an act of domestic violence.” (emphasis added)

Currently, employees of the State of New York are required to have mandatory training for sexual harassment, domestic violence prevention, among other topics. Hence, IBT should be readily incorporated into this requirement by executive action.

The Legislature should declare a public policy against systemic racism in the UCS of New York State and thereby acknowledge the influence of impermissible bias in criminal proceedings. By working in partnership with the Executive Branch, the Legislature must then allocate necessary funding for annual IBT of the employees of the aforesaid offices in order to combat this institutional ill.

a. **Suggested Content of Implicit Bias Training for Prosecutors and Consultation with Experts**

The Task Force found it instructive to conduct a review of the Vera Institute (hereinafter “Vera”) study of the New York County District Attorney’s Office (hereinafter “DANY”) performed in 2012. This review provides a summary of potential content of implicit bias training for prosecutors.

The following synopsis includes an examination of all three constituent parts of the Vera study of DANY, a brief discussion of the circumstances that precipitated this study, and various reform measures adopted by DANY upon its conclusion. This synopsis is not intended to be a comprehensive examination of the entire study but rather those aspects that pertain to training, more specifically, implicit bias training.

This synopsis also relies on information provided to Task Force member Nigel Farinha by several executives in DANY who were instrumental to the implementation and ultimate success of this study, including Chief Assistant District Attorney Nitin Savur and First Deputy Assistant District Attorney Audrey Moore.

b. **Synopsis**

A digest of the racial disparity that Vera found in DANY records:

1. No discernible racial bias found in the initial screening of cases.
2. Notable racial disparity found at arraignment—with African-American and Latinx persons are more likely to be held on bail.

3. Notable racial disparity in plea offers—with African-American and Latinx persons more likely to receive a less favorable offer.
4. Notable racial disparity in incarceration rates. African-American persons are more likely to receive more significant prison sentences.

Critical takeaways pertaining to the above disparities:

1. Vera found almost no identifiable racial disparity in the initial screening of cases during the intake process (known as ECAB). Initially, this would seem like good news, however DANY soon realized that this was not cause for celebration. It concluded that there was no discernable racial disparity in ECAB because essentially DANY was taking *almost all* cases that the NYPD brought to them. In other words, there was no disparate impact at the case assessment stage because DANY removed themselves, essentially, from any discretion in the intake process. This would ultimately prove problematic down the road for several reasons, most significantly in connection with cases that were ultimately dismissed when a disparate impact emerged in cases which arguably should not have been prosecuted in the first place.
2. At arraignment (the first opportunity for DANY to exercise discretion), we begin to see racial disparities occurring. Controlling for such factors as prior criminal history, prior warrant history, nature of the offense, etc., people of color were more likely to be held on bail than white defendants.
3. Ultimately, people of color were more likely to receive less favorable plea bargains, even though African-Americans were more likely to have their cases ultimately dismissed. DANY explained that what might seem like an obvious contradiction, wasn't. If you recall in paragraph one we spoke about DANY accepting all cases, with no instructions on how to be more discerning. So, as these cases progressed and the merits became more apparent, more of the cases involving African-Americans were dismissed. A deeper dive into those matters reveal they probably shouldn't have been prosecuted in the first place. As for the ultimate plea offers on the more viable cases that weren't dismissed, the disparate impact on certain races was clear.
4. And finally, the insistence on longer prison time, and incarceration generally, for African-Americans was also undeniable, across the life of all cases.

c. **Caveats**

There were some limitations to this study. For example, attempts to compare only similarly situated defendants across racial lines were made, however, Vera's lack of institutional knowledge left some gaps. For Vera, comparing white defendants with a bench warrant history to Black defendants with a bench warrant history during their bail analysis made perfect sense, however a defendant with ten prior bench warrants is far more likely to be held than a defendant with just one prior. Criminal law practitioners would easily appreciate that fact. Vera did not control for that. Also, not much attention was paid to socioeconomic status, skin coloring, use of a translator, country of origin, obvious drug use, homelessness, and other factors that could impact decisions by prosecutors and judges. This omission was not because Vera thought these factors irrelevant, but because DANY didn't maintain these records at that time. Also, at times,

factors other than race were more determinative of the ultimate outcome (for example, if someone had a private versus a court appointed attorney, they were far more likely to be released on bail) but those extrinsic factors did not negate the significant role race played in the ways described in this synopsis.

d. **Recommended Changes With Respect to Training**

1. Implicit bias training is not always just about race. Sometimes effective training measures address procedural justice initiatives and changing seemingly race neutral practices that have indirect and unfair impact on certain communities. As stated previously, DANY’s “blind” screening process rarely involved racial identification. Nevertheless, DANY was able to identify a racially disparate impact as a result of unnecessary prosecutions. For example, it was revealed that too many misdemeanor “fare beat” subway cases were having a negative racial impact, giving young minorities a criminal record. Young people of color were being introduced to the “system,” which in the long term caused loss of employment, public housing, and educational opportunities. DANY ultimately determined that the harm they were causing to these communities did not justify these prosecutions, so they stopped them.
2. Implicit Bias Training needs to be continuous and ongoing. Static changes or “one off lectures” were far less meaningful, especially with experienced lawyers who were used to doing things a certain way.
3. Lectures were far more productive when accompanied or followed by interactive “break-out” discussion groups—either as part of the same lecture or in a follow up session. The nature of implicit bias is that people are unaware of it. And so, through interaction, it becomes easier to tease out root causes and identify blind spots.
4. DANY concluded that training sessions provided by persons with a real understanding of criminal law (former ADAs, judges or defense attorneys) were better received than generalized implicit bias training, applicable to all professions. Criminal justice has nuances and unique concerns. It is far too easy for some to dismiss the entire training if it is not tailored specifically to prosecution.
5. Implicit bias training should not be a substitute for other race sensitivity training. There are still those in law enforcement who earnestly believe racial characteristics can be a strong indicator of particular criminal activity, and racially profile as a consequence. Law enforcement needs to be disabused of the notion that racial assumptions have investigatory value, and to fully understand the harm these practices cause to communities of color. Prosecutors must take the lead in discouraging police officers from relying on such assumptions when presenting cases for prosecution.
6. Finally, any implicit bias training must be accompanied by structural practice changes expressly outlined by leadership. Actual rules and regulations act as guardrails against pursuing certain practices or procedures, which may seem race-neutral on the surface, but produce racially disparate results.

Example: The practice of establishing certain prerequisites for receiving a particular “non-incarceratory” or “ATI” sentence (like completing school, having employment, avoiding certain locations) may seem perfectly reasonable on its face, however it is important to look at individual circumstances before adopting a precondition. Prosecutors must appreciate that certain persons with different socioeconomic backgrounds might have a harder time meeting those requirements.

e. **Conclusion**

The Vera report confirms that any real change to the culture, practice and philosophy of any District Attorney’s office must first begin with implicit bias training. That isn’t to say that diversity recruitment and retention strategies won’t have a profound impact on the office environment, or that implementing meaningful accountability standards within those offices won’t encourage better behavior. They will. But training is the first step. That training must begin with senior leadership. And this training should be ongoing. Finally, this training should be paired with structural changes, practice tweaks, checklists, rules, and courtroom mandates that will reinforce its meaning and purpose.

While this review focused on key aspects of IBT for prosecutors, the Task Force recognizes that criminal defense attorneys are not immune from race-based bias during the course of their representation of clients. IBT should be completed on an annual basis as a requirement for handling indigent defense assignment. As such, institutional providers of indigent criminal defense representation and assigned counsel pursuant to 18-B of the County Law should be included in this mandatory training. ILS should also be responsible for administering such training to Attorneys, investigators and support staff that provide legal representation through employment at the Legal Aid Society or assignment pursuant to 18-B of the County Law in accordance with any executive orders issued by the governor mandating such training.

Based on our examination of some of the research done, as described herein, the Task Force recommends that experts, such as researchers from the Vera Institute, Cornell Law Study and/or Jennifer Lynn Eberhardt of Stanford University, who served as a member of the Federal Monitor Team of the New York City Police Department Federal Stop and Frisk Litigation, should be consulted to determine the appropriate composition of such IBT for the various positions, such as attorneys, investigators, paralegals, and other administrative staff, within the offices of the AG, IG, CDA and CPD, situated throughout New York State.

2. **Foster diversity in recruitment, hiring, promotion and retention of personnel therein in a transparent, consistent and uniform manner**

The Task Force finds that the Executive Branch of New York State’s government is similarly situated as the Judicial Branch in terms of its status as a public employer. It shares the exact obligations to promote diversity in hiring, recruitment, promotion and retention of personnel in the offices of the AG, IG and County District Attorneys and Public Defenders throughout the State. Consequently, the New York State Legislature should declare a public policy against systemic racism and acknowledge that the lack of diversity in the composition of the workforce within the Offices of the AG, IG, CDA and CPD is a fundamental contributing factor to this

institutional ill. It must then allocate necessary funding for initiatives for recruitment and retention of personnel from racial and ethnic minority groups as well as other diverse backgrounds, similar to the framework set forth under Article 15-A of the Executive Law. If not already established, an ODI should be formed within each of these Offices (including ILS), with similar authority granted to it, as contemplated under Executive Law § 311 (Division of Minority and Women’s Business Development). The ODI should be allocated appropriate funding to implement protocols for uniform hiring, recruitment and promotions throughout the State, along with being tasked with oversight of the outreach undertaken to achieve any annual goals set to achieve increased diversity of personnel to ensure fairness and transparency in these decisions. Annual reports should be submitted to the governor to account for the efforts that have been made to augment the State’s workforce to reflect the diversity of the population, where these Offices are located throughout the state. The governor should then be tasked with providing updates about the State’s progress here in his or her annual State of the State address. Lastly, Article IV of the Civil Service Law, along with any concomitant regulations, should be amended as appropriate.

C. Accountability Measures in the Courts

The Task Force sought to carefully examine the role that New York State’s Unified Court System (“UCS”) often plays in criminal proceedings, in response to known instances of police misconduct, in order to advocate appropriately for necessary reforms. The influence from key stakeholders in the state’s criminal justice system, such as prosecutors and their counterparts, upon an assignment of defense counsel, was also evaluated.

As described on the website of the United States Supreme Court, “[it is] the final arbiter of the law [and], the Court is charged with ensuring the American people the promise of equal justice under law and, thereby, also functions as guardian and interpreter of the Constitution.” The Courts of New York are entrusted to serve and function in a similar manner on behalf of the residents and citizens of the State in preserving the fundamental rights enshrined both in the federal and its state Constitutions. However, the historical record of the United States State Supreme Court is replete with well-reasoned decisional authority that knowingly violated the Constitutional rights of Black or African Americans as a result of race-based chattel slavery, well after it was abolished in 1865.²⁵⁷

When Courts fail to hold members of law enforcement fully appropriately accountable for known instances of misconduct, involving racial profiling, unlawful searches and seizures, and/or excessive force during police-civilian encounters, this not only serves to undermine the sacred trust that people have in our government, but also creates a “partnership [or an alliance] in “official lawlessness.”

²⁵⁷ See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding the constitutionality of a statute requiring that “all railway companies carrying passengers in their coaches in [Louisiana], shall provide equal but separate accommodations for the white, and colored races.”); see also *Cumming v. Board of Ed. of Richmond County, State of Georgia*, 175 U.S. 528 (1899) (upholding the Georgia’s Constitution clause permitting “separate schools shall be provided for the white and colored races.”); see also *Swain v. Alabama*, 380 U.S. 202 (1965) (upholding the State of Alabama’s use of peremptory challenges by its Prosecutors to the exclusion of all black prospective jurors from the venire).

The Courts of New York State have vast power and a heightened responsibility to confront and end known race-based discriminatory patterns and practices, whether by local custom, agreement or under law within its workforce and criminal proceedings, which often involves police misconduct. Moreover, given the backdrop of the vast historical record of lawful racial discrimination in New York State from its formation until the Civil Rights Movements of the 1950s and 1960s, a mere 60 years ago, it is long overdue to acknowledge formally the impermissible influence of systemic racism in criminal proceedings in order to finally dismantle it.

Understandably, this begs the following question: **What is “Systemic?”**

The U.S. Equal Employment Opportunity Commission (hereinafter the “EEOC”), which is the governmental agency that is “responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, transgender status, and sexual orientation), national origin, age (40 or older), disability or genetic information, has expressly identified “systemic discrimination” on its website as follows:²⁵⁸

The EEOC defines systemic cases as “pattern or practice, policy and/or class cases where the discrimination has a broad impact on an industry, profession, company or geographic location.” “Systemic” has also been defined to mean “bias that is built into systems, originating in the way work is organized” and “refers to structures that shape the work environment or employment prospects differently for different types or workers.” “Systemic” also refers to “. . . patterns of behavior that develop within organizations that disadvantage certain employees and become harmful to productivity.” The purpose behind pursuing systemic enforcement is to dismantle the pattern, practice or policy that results in or facilitates decisions that are discriminatory. While systemic discrimination can affect significant numbers of employees or applicants, it can also impact small numbers as well.²⁵⁹

Hence, it is beyond appropriate to acknowledge the existence of lingering effects of past practices, patterns and/or policies, stemming from racial bias in the makeup of the personnel of the New York State Court at the time of its inception, which have persisted, in spite of landmark judicial decisions and legislation that have sought to prevent state actors from lawfully violating the federal and State Constitutions. Furthermore, it is fitting to recognize that impermissible bias has been built within the structure of the Courts of the State to such a degree that it can only aptly be termed “systemic.” Therefore, as determined by the EEOC, a “systemic enforcement” approach to eradicate the infrastructure, based upon racial bias in New York State’s Courts, is required.

In order to identify viable solutions to this extensive societal problem, in crafting the recommendations contained herein, the Task Force examined and consulted with a variety of sources, such as the Report of the Special Adviser on Equal Justice in New York State Courts

²⁵⁸ <https://www.eeoc.gov/overview>.

²⁵⁹ <https://www.eeoc.gov/systemic-enforcement-eeoc> (internal quotations and citations omitted).

(hereinafter “the Special Adviser’s Report” and the Report to the New York State Court’s Commission on Equal Justice to the Courts, authored by the Judicial Friends Association, Inc. (hereinafter “the Judges Report”). Our review of these reports and other research materials will be discussed more fully below. Thus, the Task Force sought to identify the most effective means of establishing root and branch reforms, as a matter of public policy and law, in New York State’s criminal justice system to ensure that it finally actualizes and embodies the truth that we are all created equal under law at every stage of a criminal proceeding.

The Task Force recommends that the UCS (1) take actions to increase diversity in court personnel per the recommendations from the Report to the New York State Court’s Commission on Equal Justice to the Courts, authored by the Judicial Friends Association, Inc. (“the Judges Report”) and (2) provide implicit bias instructions.

1. Take Actions to Increase Diversity in Court Personnel

The Courts should foster diversity in recruitment, hiring, promotion and retention of personnel therein in a transparent, consistent and uniform manner. On the career section of the UCS’s website, it prominently acknowledges that “[i]t is the policy of the UCS to ensure equal employment opportunity for all employees and applicants for employment, without regard to race, color, national origin, religion, creed, sex (including freedom from sexual harassment), sexual orientation, age, marital status, disability, or, in certain circumstances, prior criminal record.” However, a closer examination of the actual racial makeup of the personnel of UCS paints a different picture, which calls into question the efficacy of this policy. In the report of the Special Adviser, a rather comprehensive breakdown of the demographic information of the judges serving throughout the State of New York was provided as follows:

Today, judges of color are still underrepresented compared to the populations the courts serve. This is true both statewide and in New York City. New York City has a population that is approximately 31.7% white, 24.2% Black, 26.3% Latinx, and 14.1% Asian. However, the judiciary in New York City courts is 58.1% white, 21.5% Black, 12.4% Latinx, and 6.3% Asian. It is well known that counties upstate are, on the whole, less diverse than New York City . . .

However, across all Judicial Districts, the upstate judiciary is even less diverse than the population. In the Fourth, Fifth and Sixth Judicial Districts in the northernmost parts and center of the state, the population is over 80% white. However, the judiciary is well over 90% white. In the easternmost [sic] parts of the state, the Seventh and Eighth Judicial Districts are more diverse because they contain the cities of Rochester, Buffalo, and Syracuse. These districts are around 80% white, but white judges are about 86% and 88%, respectively, of the judiciary. Even in the Third, Ninth, and Tenth Judicial Districts, the more diverse jurisdictions in the southern part of the state, non-white judges are underrepresented. The Third Judicial District is around 10% Black, but less than 5% of its judiciary is Black; the Latinx community accounts for 8.3% of the population, but only 1.6% of the judges, and there are no Asian judges in the Third District. The Ninth Judicial District is over 40% non-white, but less than

20% of its judges are of color. The Ninth District is over 20% Latinx, but has less than 4% Latinx judges, and there are no Asian judges in this District. The Tenth Judicial District on Long Island is nearly 40% non-white, but over 85% of its judges are white. In the Tenth District, the Latinx and Asian communities are the most underrepresented on the bench.

With respect to non-judicial staff within the UCS, similar concerns about the lack of diversity in this class of personnel were specifically highlighted in the Judges Report. A chart of the number of Black employees holding non-judicial positions from 2015 to 2020 was included as an appendix (“M”) in the report and has been included herein as follows:

**UNIFIED COURT SYSTEM WORKFORCE DIVERSITY
NON-JUDICIAL BLACK EMPLOYEES
2015–2020**

TITLE	TOTAL EMPLOYEES	# BLACK	%
2015			
Professional	3919	482	12.7
Technicians	208	8	4.1
Admin Support	6534	1302	20.0
Skilled Crafts	1	0	0
2016			
Professional	3862	458	12.4
Technicians	236	16	7.4
Admin Support	6581	1326	20.3
Skilled Crafts	1	0	0
2017			
Professional	3917	460	12.4
Technicians	247	17	7.4
Admin Support	6510	1324	20.5
Skilled Crafts	1	0	0
2018			
Professional	3896	421	11.9
Technicians	282	17	7.3
Admin Support	6505	1283	20
Skilled Crafts	1	0	0

2019

Professional	3913	416	11.9
Technicians	282	17	7.6
Admin Services	6590	1369	20.4
Skilled Crafts	1	0	0

2020

Professional	3927	409	12.1
Technicians	280	17	7.6
Admin Support	6477	1285	20.3

In order to address the lack of diversity in both judicial and non-judicial positions held within the UCS, the Judges Report contained the following recommendations:

1. It is imperative that the court system identifies the underlying reasons for the low rate of diversity with respect to judicial and non-judicial supervisory positions, as well as for non-judicial positions with higher Pay Grades;
2. OCA must take affirmative steps to train Black employees to hold such positions with a transparent grooming process;
3. Post openings and encourage candidates of color to apply for such positions;
4. Have a transparent hiring and selection process; and
5. Provide institutional support once these employees obtain such positions.

The Task Force supports these recommendations, but finds that additional steps must be taken as a matter of public policy and law in order to root out longstanding patterns of racial discrimination in the hiring and retention process of personnel within the UCS. Thus, once again it is has determined that it is necessary for the New York State Legislature to declare a public policy against systemic racism in New York State Supreme, County and local courts with jurisdiction over criminal matters and thereby acknowledge that the lack of diversity in the composition of the workforce within the UCS, is a fundamental contributing factor to this institutional ill. It must then allocate necessary funding for initiatives for recruitment and retention of personnel from racial and ethnic minority groups as well as other diverse backgrounds, similar to the framework set forth under Article 15-A of the Executive Law.

Article 15-A of the Executive Law, entitled, "Participation by Minority Group Members and Women with Respect to State Contracts," was enacted in 1988 in recognition that the State of New York had an affirmative duty to promote the hiring of minority and women contractors for

the purposes of procuring goods and services on behalf of its agencies.²⁶⁰ The legislative findings and declaration of the statute states the following:

It is hereby found and declared that it has been and remains the policy of the state of New York to promote equal opportunity in employment for all persons, without discrimination on account of race, creed, color, national origin, sex, age, disability or marital status, to promote equality of economic opportunity for minority group members and women, and business enterprises owned by them, and to eradicate through effective programs the barriers that have unreasonably impaired access by minority and women-owned business enterprises to state contracting opportunities.

For the purpose of addressing these findings, therefore, it is necessary and proper that article fifteen-A of the executive law, concerning participation by minority group members and women with respect to state contracts, be enacted.²⁶¹

The statutory framework of Article 15-A provides for the formation of an Office of Minority and Women Business Development by the governor with the appointment of a Director to oversee the same.²⁶² One of the primary responsibilities of the Director is “to encourage and assist contracting agencies in their efforts to increase participation by minority and women-owned business enterprises on state contracts and subcontracts so as to facilitate the award of a fair share of such contracts to them.”²⁶³ Furthermore, the Director is charged with submitting an annual report to the governor and the Legislature regarding “the level of minority and women-owned business enterprises participating in each agency's contracts for goods and services and on activities of the office and effort by each contracting agency to promote employment of minority group members and women, and to promote and increase participation by certified businesses with respect to state contracts and subcontracts so as to facilitate the award of a fair share of state contracts to such businesses.”²⁶⁴

A duty is imposed on all State agencies to promote equal opportunities for minority and women business enterprises in the procurement context by requiring:

all state contracts and all documents soliciting bids or proposals for state contracts shall contain or make reference to the following provisions:

(a) The contractor will not discriminate against employees or applicants for employment because of race, creed, color, national origin, sex, age, disability or marital status, and will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination. For purposes of this article

²⁶⁰ See 1988 N.Y. Sess. Law Serv. 261.

²⁶¹ *Id.*

²⁶² *Id.* See also Executive Law § 311 (Division of minority and women's business development).

²⁶³ *Id.*

²⁶⁴ *Id.*

affirmative action shall mean recruitment, employment, job assignment, promotion, upgradings, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation.²⁶⁵

Additionally, the Director is tasked with promulgating regulatory standards for State contracting agencies to adhere to “which [set] forth measures and procedures to require all contracting agencies, where practicable, feasible and appropriate, to assess the diversity practices of contractors submitting bids or proposals in connection with the award of a state contract. Such rules and regulations shall take into account: the nature of the labor, services, supplies, equipment or materials being procured by the state agency; the method of procurement required to be used by a state agency to award the contract and minority and women-owned business utilization plans required to be submitted . . . and such other factors as the director deems appropriate or necessary to promote the award of state contracts to contractors having sound diversity practices.”²⁶⁶

Lastly, accountability for compliance with the dictates of the statute are ensured by mandating that “[each contracting agency shall be responsible for monitoring state contracts under its jurisdiction, and recommending matters to the office respecting non-compliance with the provisions of this article so that the office may take such action as is appropriate to ensure compliance with the provisions of this article, the rules and regulations of the director issued hereunder and the contractual provisions required pursuant to this article. All contracting agencies shall comply with the rules and regulations of the office and are directed to cooperate with the office and to furnish to the office such information and assistance as may be required in the performance of its functions under this article.”²⁶⁷

The Task Force finds that this legislation is useful and instructive in tailoring commensurate statutes to promote increased participation by racial and ethnic minorities for employment and promotional opportunities within the UCS. This statute was enacted in recognition that the State has an obligation to diversify the allocation of awards of contracting opportunities to minority and women businesses. This not only contemplated the need to recruit and hire individuals and/or organizations with diverse backgrounds to perform services and/or provide goods, but to create uniform protocols for this purpose. Thus, it provides a viable framework for implementing standards for the hiring and recruitment of personnel throughout the judicial districts of the UCS with diversity in mind. **Article 15-A of the Executive Law also provides insight into crafting a law that ensures greater accountability for such efforts made by the decision makers of the UCS to identify, recruit and promote qualified minority candidates for positions therein. The Task Force recommends that such legislation be enacted as soon as it is practicable.** It further recommends that the Office of Diversity and Inclusion (“ODI”) within the UCS should be granted similar authority as the Division of Minority and Women's Business development, formerly known as Office of Minority and Women Business Development. ODI should be allocated appropriate funding to implement protocols for uniform hiring, recruitment and promotions throughout the judicial districts of the UCS and tasked with

²⁶⁵ See Executive Law § 312 (Equal employment opportunities for minority group members and women).

²⁶⁶ See Executive Law § 313-a (Diversity practices of state contractors).

²⁶⁷ See Executive Law § 315 (Responsibilities of contracting agencies).

oversight of the outreach undertaken to achieve any annual goals set to achieve increased diversity of personnel to ensure fairness and transparency in these decisions. Annual reports should be submitted to the Chief Judge by the administrative judges of each county or Judicial District to account for the efforts that have been made to augment the UCS's workforce to reflect the diversity of the population within each County or District. The Chief Judge should, in turn, provide status updates concerning any progress being made during the annual State of the Judiciary address. Lastly, both Article 7-a of the Judiciary Law and Article IV of the Civil Service Law, along with any concomitant regulations, should be amended, as appropriate.

In relation to our work to recommend necessary improvement in the recruitment and retention protocols in New York State's Court system to ensure greater diversity of personnel of color, the Task Force met with members of the Tribune Society, Inc. of the Court in the State of New York on March 9, 2021. Founded in 1968 by a group of peace officers, the Tribune Society is a fraternal organization of African Americans and other minority judicial and non-judicial court personnel. Its chief objectives are to consistently improve the administration of justice and ensure equal opportunity for all who work in or whom the New York Unified Court System serves. This organization has contributed to both the Judges' Report of the Judicial Friends and Special Advisor's Report concerning its recommendations related to this issue.

Having worked within the UCS for several decades, these members graciously agreed to address the Task Force to share their experiences, along with others, concerning the institutional barriers that they have encountered in advancing their careers within the courts. They described encountering a "good old boy network" as it related to pursuing promotions. Oftentimes positions were discreetly filled prior to any announcements for vacancies being made, based on existing relationships with longstanding employees who are on the verge of retiring. As the Chief Clerk and Administrative Judge of the Supreme Court enjoy a great deal of discretion in personnel matters, employees' duties are typically reassigned with limited transparency and accountability for these decisions.

Additionally, they have observed a process of "grooming" or training of less experienced white employees for positions, which occurs before they are filled. This is as a consequence of some members having direct involvement in providing information technology support to these employees when their offices are reassigned or their access to certain systems is granted before they are selected to be interviewed, among other interested candidates for the position. The interview and hiring process thereby seems rigged once that individual gets the position over other qualified minority candidates. These members indicated that oftentimes there are no announcements for promotional opportunities. Moreover, there is no procedure in place for unsuccessful candidates to be informed of the basis of them not being selected for the position, which reinforces concerns about the lack of transparency and fairness when these decisions are made. Lastly, if there are known deficiencies in a candidate's background, these are typically not addressed in an annual performance evaluation in order to afford the employee an opportunity to further develop their skills. Thus, employees of color feel discouraged to even apply for positions within the UCS under the circumstances. Consequently, the Tribune Society Inc. supports the Task Force recommendations for legislative enactments to ensure greater transparency, fairness, uniformity, consistency and accountability in the recruitment, hiring and retention protocols within the UCS and to increase diversity of its workforce to reflect the population within each county or District therein.

2. Periodic Audits to Determine Patterns of Implicit Bias

As recommended in the Judges Report, a uniform system of data collection of demographic information, in all criminal proceedings, at the time of arrest and at sentencing, for auditing purposes, should be developed to evaluate the decisions of individual judges in order to determine whether they appear to be influenced by implicit or actual bias in making a bail determination and in the imposition of a sentence. The Task Force agrees that “periodic audits in these areas and others could determine whether they exhibit patterns that are indicative of implicit bias. Auditing could increase the available data regarding the extent to which bias affects judicial decision-making. Secondly, it could enhance accountability in judicial decision-making.”

Another key recommendation in the Judges Report to combat implicit or actual bias within New York’s criminal court system was outlined as follows:

A system of auditing should be developed to evaluate the decisions of individual judges in order to determine whether they appear to be influenced by implicit bias in areas such as bail setting, sentencing or even child custody allocation. Periodic audits in these areas and others could determine whether they exhibit patterns that are indicative of implicit bias. Auditing could increase the available data regarding the extent to which bias affects judicial decision-making. Secondly, it could enhance accountability in judicial decision-making.

The Task Force supports this recommendation. Consequently, the Task Force met with Jennie Brooks, Assistant Director of Data Outreach (“Jennie”) and Sema Taheri, Director of Research Operations (“Sema”) with Measures for Justice on March 4, 2021 to better understand what data is currently being collected.

Measures for Justice is a non-profit research organization founded in 2011. Its mission is “to make accurate criminal justice data available to spur reform. [This is accomplished by] showing people what criminal justice looks like nationwide; helping to standardize and improve criminal justice data nationwide; offering tools, services, and research to ensure people can use the data to best effect. [The] Bottom line: The only way our criminal justice system can improve is by monitoring its performance, isolating what works and what doesn’t, and developing interventions based on fact. For all this work, data are critical.”

Sema and Jennie described having worked with OCA during the years of 2011 and 2015 to collect data from the Bronx, New York, Queens, Kings and Richmond Counties of New York. They observed that there were inconsistencies between these counties in how data about criminal defendants is gathered and recorded. At the point of an arrest, law enforcement may be making racial and ethnic determinations for data entry purposes within the Division of Criminal Justice Services, without conferring with the person in custody. The courts are seemingly doing the same, if entering any data at all. They also noted that they had issues figuring out how bail was determined and the basis for pleas from the original charges brought against a defendant based on the information provided. While there are appropriate fields in the OCA’s computer system to collect this information about defendants, there are no standards for what should be obtained. Presently, the available data is not being analyzed.

Sema and Jennie agreed that in order to be able to determine whether there is implicit or actual bias at work in disparate sentences for persons of color versus white people (and in the imposition of bail) much more data must be collected. Moreover, there must be some consensus within OCA about the data to be garnered at the earliest point of contact with criminal defendants. There should be a distinction whether the data obtained about race and ethnicity is self-reported by the defendant or observed by the individual entering this information. Based on their research, when observations are made along these lines, there can be indicators of bias.

OCA should be charged with establishing uniform standards within the UCS to collect racial, ethnic and other demographical data at the time of arrest for auditing purposes, as described herein, as soon as possible. Such audits should occur periodically, with the findings therefrom being disseminated to the public in a written report.

In the past decade, significant social science research on implicit bias has established that every person harbors implicit biases that manifest themselves subconsciously during the decision-making process. Even individuals who report, and have, egalitarian racial attitudes may still harbor implicit biases that result in racially biased decisions.²⁶⁸ This is especially true in the judicial system, as implicit bias impacts judicial decision-making,²⁶⁹ as well as jurors during deliberations.²⁷⁰ “In the context of the American justice system, researchers now point to linkages between implicit racial bias and disparities in detention decisions, jury verdicts, capital punishment, and other sentencing outcomes.”²⁷¹

The New York court system (and other state court systems) has worked to address the impact of *actual bias* on the fairness of the court system. New York’s Franklin H. Williams Judicial Commission was formed in 1988 to study and report upon the “perception of fairness within the court system and to ensure equal justice in New York State.”²⁷² The Franklin Commission, and three other state commissions with similar mandates, created the National Consortium on Racial and Ethnic Fairness in the Courts.²⁷³ The consortium now has 37 members. Recognizing the impact of implicit bias on the fairness of the judicial system, the consortium has prepared resources and training materials to address implicit bias in the court system.²⁷⁴ However, these resources are designed to address *judicial* implicit bias, and not the impact of implicit bias on jurors.

²⁶⁸ Jennifer K. Elek & Paula Hanaford-Agor, *Implicit Bias and the American Juror*, 51 Court Review: The J. of the Am. Judges Ass’n 116, 117 (2015), n. 8.

²⁶⁹ *Achieving an Impartial Jury Toolbox*, Am. Bar Ass’n Crim. Justice Section, at 10, n. 38, available at <https://www.judges.org/wp-content/uploads/2020/03/Achieving-an-Impartial-Jury-Toolbox.pdf>.

²⁷⁰ See generally, Jery Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124 (2012).

²⁷¹ Jennifer K. Elek, Jennifer K. & Paula Hanaford-Agor, *First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making*, 49 Court Review: The J of the Am. Judges Ass’n 190, 191(2013), footnote omitted.

²⁷² <http://ww2.nycourts.gov/ip/ethnic-fairness/index.shtml>.

²⁷³ <http://www.national-consortium.org/about>.

²⁷⁴ <http://www.national-consortium.org/implicit-bias>.

Recently both the Judicial Friends Association, Inc.²⁷⁵ and the Special Adviser on Equal Justice²⁷⁶ in the New York State Courts in their respective reports acknowledged the impact of implicit bias on jury deliberations. In each report, the authors proposed several solutions to the issue of implicit bias during jury selection and trials, including a video presentation on juror bias during juror orientation, model jury instructions on implicit bias, and the potential implementation of court rules to allow *voir dire* on bias—actual or implicit.²⁷⁷

3. Implicit Bias Instructions Should Consistently and Uniformly Be Provided to Potential Jurors, During Jury Selection

Currently the Criminal Jury Instructions²⁷⁸ do not contain an instruction that specifically educates and addresses the impact of implicit bias on jurors. The Model Charges on Voir Dire,²⁷⁹ Preliminary Instructions,²⁸⁰ and Final Instructions²⁸¹ contain some language on “fairness,”²⁸² but none of the charges specifically provides instructions for jurors on what implicit bias is, and strategies to address it.²⁸³

It is important to note that the current literature, although supportive of attempts to reduce the impact of implicit bias through jury instructions, cautions that attempts to draft these instructions should be done in collaboration with subject-matter experts:

Crafting clear, effective jury instructions on the topic of implicit bias, however, requires extensive subject-matter expertise for two main reasons. First, subject-matter expertise is necessary to ensure that the language and strategies used in the instruction are accurate reflections of the state of the science. The high level of subject-matter expertise, necessary to leverage lessons learned from existing research and provide jurors with appropriate de-biasing strategies, may not be available among the law trained professionals who typically comprise committees that draft pattern jury instructions. Second, subject-matter expertise is also needed to ensure that the developed instruction intervention does not incorporate communication strategies known to exacerbate expressions of racial bias in certain subpopulations. For example, strategies that impress an extrinsic

²⁷⁵ Report to the New York State Court’s Commission on Equal Justice in the Courts at page 33 *et seq.*

²⁷⁶ Report from the Special Adviser on Equal Justice in the New York State Courts at page 83 *et seq.*

²⁷⁷ Recent studies have shown that potential jurors, through judicial questioning alone, often do not reveal explicit biases. See Achieving an Impartial Jury Toolbox, *supra* note 269, at 8–9, n. 25, 26.

²⁷⁸ Available at <http://www.nycourts.gov/judges/cji/5-SampleCharges/SampleCharges.shtml>.

²⁷⁹ Available at http://www.nycourts.gov/judges/cji/5-SampleCharges/CJI2d.Voir_Dire.pdf.

²⁸⁰ Available at http://www.nycourts.gov/judges/cji/5-SampleCharges/CJI2d.Preliminary_Instructions.pdf.

²⁸¹ Available at http://www.nycourts.gov/judges/cji/5-SampleCharges/CJI2d.Final_Instructions.pdf.

²⁸² In June 2019 the model language on “fairness” was modified to read:

Remember, you have promised to be a fair juror. A fair juror is a person who will not permit his or her verdict to be influenced by a bias or prejudice in favor of or against a person who appeared in this trial on account of that person’s race, color, national origin, ancestry, gender, gender identity or expression, religion, religious practice, age, disability or sexual orientation, and further, a fair juror will guard against the application of any stereotypes or attitudes a juror may harbor about people or groups that would lead to a biased decision based upon those stereotypes or attitudes.

²⁸³ Nor do the grand jury model impanelment instructions.

motivation to be non-prejudiced (i.e., mandates and other authoritarian language typical of jury instructions) may provoke hostility and resistance from some individuals, failing to reduce and perhaps even exacerbating expressions of prejudice. Instead, communications designed to foster intrinsic egalitarian motivations may more effectively reduce both explicit and implicit expressions of prejudice without eliciting such backfire or backlash effects. These and other research findings are important to consider for those looking to adopt a jury instruction to minimize expressions of implicit biases in juror judgment.²⁸⁴

The American Bar Association’s Achieving an Impartial Jury (AIJ) Project prepared a comprehensive report on the impact of implicit bias on juror decision-making.²⁸⁵ Contained within the “toolbox” is a useful explication on the basics of implicit bias and its impact upon the court system, suggested jury instructions, as well as suggested *voir dire* questions. The proposed instructions are attached.²⁸⁶ Additionally, several state and federal courts have prepared implicit bias instructions of varying quality.²⁸⁷ Those instructions are attached as well.

Based on a review of the relevant literature, **the Task Force recommends that the New York court system address the impact of implicit bias on jury decision making.** The specific recommendations are that:²⁸⁸

1. The court system educate potential jurors (both grand jurors and trial jurors) during jury orientation on what implicit bias is, and its impact on decision-making.
2. The judge empanelling grand jurors provide those jurors with an instruction that specifically addresses implicit bias, as well as provide tools for the grand jurors to prevent it from impacting their decisions.
3. Trial courts provide jury instructions that specifically address implicit bias, as well as provide tools for the jurors to prevent it from impacting their decisions. These instructions should be provided during the preliminary instructions as well as during the final instructions.²⁸⁹
4. The court system implement court rules to specifically allow questioning of potential jurors by the attorneys on actual and/or implicit bias, and expand the time available to the parties to *voir dire* the jury on these subjects.

²⁸⁴ Jennifer K. Elek & Paula Hanaford-Agor, *Implicit Bias and the American Juror*, 51 Court Review: The J. of the Am. Judges Ass’n 116, 118 (2015), notes omitted.

²⁸⁵ Achieving an Impartial Jury Toolbox, *supra* note 269.

²⁸⁶ The AIJ instruction is supported by social science studies and references to address the concern raised that any implicit bias jury instruction be prepared with the knowledge and assistance of those with the necessary subject matter expertise.

²⁸⁷ These states include Washington, Illinois, and Arkansas.

²⁸⁸ Although beyond the scope of this memo, there is research that establishes that more diverse juries are less susceptible to actual and implicit bias held by individual jurors. (See, generally, Elek and Hanaford-Agor, *First, Do No Harm*, at page 5, FN 33.) The court system should deploy resources necessary to ensure that juries are as diverse as possible, including proposing amendments to current laws that result in non-representative jury pools in city court cases.

²⁸⁹ It is incumbent upon trial judges to be trained on implicit bias as well so that the judge understands the principles of implicit bias and how it may impact jurors decision-making.

a. Juror Education on Implicit Bias

Studies have established that through education and motivation the impact of implicit bias on decision-making can be lessened.

To the extent that there is good news in the current science about stereotypes, it is that while we may be unable to do much about their automatic activation, we can nevertheless behave in substantially non-prejudiced ways if we are so motivated. The effects of motivation can be introduced in many different ways. What seems to matter most is whether antidiscrimination norms are activated, either directly or indirectly. This might be done by argument, by jury instruction, or by implicit invocation of anti-prejudice norms.²⁹⁰

As it is possible to ameliorate the impact of implicit bias on potential jurors through education, potential jurors should be instructed on implicit bias at the earliest opportunity—during juror orientation.²⁹¹ Effective videos that provide a basic instruction to potential jurors on implicit bias have been created. The United States District Court for the Western District of Washington created a video to show to potential jurors to educate them on the principles of implicit bias.²⁹² The video is 11 minutes long.²⁹³ Revising the New York juror orientation video to include implicit bias principles would not result in a video that is too long.²⁹⁴

Additionally, research has shown that “priming” or forewarning jurors may be more effective than attempting to address implicit bias during the jury instruction phase.²⁹⁵ Jurors who watch an orientation video in which the principles of implicit bias are provided will likely be more receptive to *voir dire* on this issue, as well as listening and applying the court’s instructions on implicit bias.

b. Jury Instructions on Implicit Bias

New York should modify the existing preliminary jury instructions and final jury instructions to incorporate instructions to address implicit bias. Furthermore, these instructions should also include “tools” to help jurors address implicit bias.

²⁹⁰ Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. Rev. 1241, 1276 (2002).

²⁹¹ Some researchers advance the argument that the Implicit Association Test (IAT) originally developed by researchers from Yale University and the University of Washington be given to all potential jurors. This seems impractical. See Anna Roberts, *(Re)Forming the Jury: Detection and Disinfection of Implicit Juror Bias The Evolving Temporality of Lawmaking*, 44 Conn L. Rev. 826 (2012); *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DePaul J. Soc. Just. 1, 27.

²⁹² <https://www.wawd.uscourts.gov/jury/unconscious-bias>.

²⁹³ A transcript of the video is attached.

²⁹⁴ The current petit jury orientation video displayed to New York potential jurors does not mention implicit bias. The video is only 14 minutes long.

²⁹⁵ See *Achieving an Impartial Jury Toolbox*, *supra* note 269, at 16, n. 64.

As noted above, the current New York criminal jury instructions do not adequately address implicit bias. Instead, those charges simply state that “a fair juror will guard against the application of any stereotypes or attitudes a juror may harbor about people or groups that would lead to a biased decision based upon those stereotypes or attitudes.” These charges instruct the juror not to allow actual biases to impact their decision, but do nothing to inform the juror about the potential impact of implicit bias on their decision-making.²⁹⁶

The Model CJI Preliminary Instructions notes that the Court of Appeals has endorsed trial judges providing preliminary instructions that include other instructions beyond those contained in CPL § 270.40.²⁹⁷ Thus, the model instruction includes topics on credibility of witnesses and test of credibility, and other related topics.

As implicit bias affects how jurors interpret evidence, jurors should be instructed on implicit bias before the trial begins.

Findings in the scientific research literature demonstrate how implicit bias can operate to distort a person’s interpretations of the evidence in a case. Racial stereotypes have been found to play a role in how people perceive and interpret otherwise ambiguous events. For example, one study found that people interpret ambiguously hostile behavior as more hostile when performed by a black compared with a white actor. Similarly, people who test high on implicit racial bias were found to be more likely to interpret ambiguous expressions in a negative manner (i.e., as angrier) on black faces (but not white faces) compared with those who test low on implicit racial bias. Another recent study found that presenting mock jurors with images of darker-skinned (compared to lighter-skinned) perpetrators biased their interpretations of ambiguous evidence. Biased interpretations of the evidence, in turn, predicted subsequent guilty verdicts.²⁹⁸

The American Bar Association’s *Principles for Juries and Jury Trials*, also endorses preliminary instructions that include implicit bias instructions. Principle 6-C²⁹⁹ states:

The court should:

1. Instruct the jury on implicit bias and how such bias may impact the decision making process without the juror being aware of it; and

²⁹⁶ Elek and Hannaford-Agor have noted that “[w]hen considering this mixed evidence [that standard jury instructions may actually enhance racially biased decisions] in combination with (a) research indicating that people may not be able to consciously correct for the effect(s) of their implicit biases because they are often unaware that these biases exist and (b) evidence of racial discrimination in actual jury trials, standard legal instructions do not appear to offer a complete or reliable solution.” *Implicit Bias and the American Juror*, 51 Court Review: The J. of the Am. Judges Ass’n 116, 118.

²⁹⁷ See CJI Model Preliminary Instructions, citing *People v. Newman*, 46 N.Y.2d 126 (1978).

²⁹⁸ See Elek and Hannaford-Agor, *Implicit Bias and the American Juror*, at 117, notes omitted.

²⁹⁹ Principle 6 – Courts Should Educate Jurors Regarding the Essential Aspects of a Jury Trial. The Principles may be found here:

https://www.americanbar.org/content/dam/aba/administrative/american_jury/2016_jury_principles.pdf.

2. Encourage the jurors to resist making decisions based on personal likes or dislikes or gut feelings that may be based on attitudes toward race, national origin, gender, age, religious belief, income, occupation, disability, marital status, sexual orientation, gender identity, or gender expression.

Not surprisingly, implicit bias also affects jurors during deliberations.³⁰⁰ Thus, final instructions should also include an instruction on implicit bias.

Additionally, jurors must be provided “tools” to assist them in ameliorating the impact of implicit bias on their decision-making. The AIJ Toolbox proposed instructions provides the following instructions to assist jurors:³⁰¹

Focus on individual facts, don’t jump to conclusions that may have been influenced by unintended stereotypes or associations.

Try taking another perspective. Ask yourself if your opinion of the parties or witnesses or of the case would be different if the people participating looked different or if they belonged to a different group?

You must each reach your own conclusions about this case individually, but you should do so only after listening to and considering the opinions of the other jurors, who may have different backgrounds and perspectives from yours.

Similarly, Professor Cynthia Lee³⁰² has proposed a de-biasing instruction referred to as a “race-switching” instruction to assist jurors in viewing evidence from a different perspective. This charge reads:

It is natural to make assumptions about the parties and witnesses based on stereotypes. Stereotypes constitute well-learned sets of associations or expectations correlating particular traits with members of a particular social group. You should try not to make assumptions about the parties and witnesses based on their membership in a particular racial group. If you are unsure about whether you have made any unfair assessments based on racial stereotypes, you may engage in a race-switching exercise to test whether stereotypes have colored your evaluation of the case before you. Race-switching involves imagining the same events, the same circumstances, the same people, but switching the races of the parties. For example, if the defendant is White and the victim is Latino, you would imagine a Latino defendant and a White victim. If your evaluation of the case before you is different after engaging in race-switching, this suggests a

³⁰⁰ See Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 *Duke L.J.* 345 (2007); see also *Achieving an Impartial Jury Toolbox*, *supra* note 254, at 18, N. 71.

³⁰¹ See AIJ Toolbox at 19–20.

³⁰² <https://www.law.gwu.edu/cynthia-lee>.

subconscious reliance on stereotypes. You may then wish to reevaluate the case from a neutral, unbiased perspective.³⁰³

c. Voir Dire on Implicit Bias

As noted in the Report from the Special Adviser on Equal Justice in the New York State Courts, there are areas of New York State where counsel are precluded by trial judges from questioning jurors on racial bias during *voir dire*.³⁰⁴ The Report recommended that the court system create uniform rules to explicitly permit addressing juror bias during *voir dire*.³⁰⁵

We endorse this recommendation, but would suggest that any promulgated rules require that attorneys be provided sufficient time to question jurors about actual or implicit bias.

Research has shown that judicial questioning does not always reveal juror bias and that attorney questioning may be more effective.³⁰⁶ Additionally, the amount of time attorneys are provided to explore racial bias must be sufficient. Currently, there exists substantial pressure upon trial attorneys by trial judges to complete *voir dire* within a prescribed period of time. This seriously impedes the ability of attorneys to reveal jurors' biases.

D. Accountability Measures in the Criminal Justice System

The Task Force identified other areas in the criminal justice system where additional accountability measures can provide fewer opportunities for misconduct to occur or strengthen the integrity of the system in handling police misconduct cases. The Task Force recommends: (1) implementing controls and guidelines for the gang databases; (2) reforming qualified immunity; (3) amendments to the criminal procedure law; and (4) minimizing the influence of police unions on the disciplinary actions.

1. Implementing Controls and Guidelines for the Gang Databases

The Task Force also determined that police misconduct was likely to occur when police were able to label groups of individuals as “other,” creating the pretense for routine harassment. Local police departments use gang databases akin to the “Criminal Group Database” utilized by the NYPD. The people on these lists are reportedly subjected to routine harassment by police regardless of the factual accuracy of their label. Police are able to avoid significant public scrutiny, and even smear and dismiss victims of abuse or misconduct if the mistreatment

³⁰³ AIJ Toolbox at 21–22; see also Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013).

³⁰⁴ Special Adviser Report, New York State Unified Court System at 74, available at <http://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf>.

³⁰⁵ Special Adviser Report at 83.

³⁰⁶ See Valerie P. Hans and Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 Chi. Kent L. Rev. 1179 (2003); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problem of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harvard L. & Policy Rev. 149 (2010); Susan E. Jones, *Judge-Versus Attorney-Conducted Voir Dire An Empirical Investigation of Juror Candor*, 11 Law & Hum. Behav. 131 (1987).

becomes public, by referring to them in court and in the press as “known gang members.” **The Task Force recommends increasing transparency concerning the rules surrounding such databases and implementing procedures that hold departments accountable to following the rules.**

Police forces around the country use various types of databases to keep track of people they suspect of gang affiliation. These databases are often lightly regulated, if at all. Individuals are often included solely for associating with others who are, or are suspected of being, affiliated with gang activity. In New York, the highest profile example is the NYPD’s Criminal Group Database, which is maintained internally by the Department, subject only to limited internal rules with no public oversight. While the NYPD claims that it conducts regular reviews of its database to remove inactive listings, there is no way to verify this claim, or to hold the department accountable if it fails to do so. The criteria—both for initial inclusion and for removal—are opaque and determined solely by members of the Department. Criteria for inclusion often include vague and racially biased factors such as “living in a known gang neighborhood.”

These databases often disproportionately target Black and Latinx people, specifically young people. Incredibly, NYPD officials testified in 2019 that the individuals in the database were nearly 99% non-white. They also testified that it included nearly 500 minors, with some as young as 13 and 14 years old, and others added when they were 12.³⁰⁷

Often these databases are secret, with little to no transparency, but investigations around the country have uncovered significant accuracy issues, among other flaws.³⁰⁸ Therefore, the Task Force recommends that rules be established to govern the criteria for inclusion, removal, and use of any information in such databases, as well as a mechanism to hold police departments externally accountable so that they are not solely responsible for self-policing.

2. Reforming Qualified Immunity

The New York State legislature is currently considering a bill that if passed would “[p]rovide[] a civil action for deprivation of rights which is caused by any person or public entity.” The Task Force supports this bill, and encourages the legislature to pass, and Governor Andrew Cuomo to sign, this bill.

At its core, the bill amends the Civil Rights Law to create a remedy for violation of a person’s rights under the Federal and State Constitutions, similar to the federal private rights of action delineated in 42 U.S.C. §§ 1983, 1985–86. A.4331/S.1991 allows for a civil action to be brought either by the injured party or by the Attorney. It should be noted that the bill is supported and co-sponsored by a legion of State Senators and Assemblypersons.

³⁰⁷ City Council, City of New York, Transcript of the Minutes of the Committee on Public Safety 39, 29–30 (June 27, 2019), <https://legistar.council.nyc.gov/View.ashx?M=F&ID=7538642&GUID=FC57AB60-3F54-4CEB-9D11-E202C24EA62F> (“2019 City Council Testimony”).

³⁰⁸ Chicago IG Review; Portland Audit.

In the most formal sense, “qualified immunity” is a federal doctrine available in federal lawsuits brought under U.S.C. § 1983. More explicitly, qualified immunity is an affirmative defense where the defense must provide evidence to negate one of two findings: (1) whether a public state official has violated a plaintiff’s constitutionally protected right; and (2) whether the particular right that an official state actor has violated was clearly established at the time of the violation. Only if both elements are met will qualified immunity be defeated. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), *Pearson v. Callahan*, 555 U.S. 223 (2009); It should be noted that the defense is only available for individuals sued in an individual capacity, and is a defense only to damages actions. If granted by the Court, the defendant is granted such immunity not just from liability, but from suit and burdensome discovery; thus, availability of interlocutory appeals at both 12(b)(6) and summary judgment.

In practice, qualified immunity often prevents officers from being held accountable for even the most egregious actions. For example, in *Crawford v. Cuomo*, the Second Circuit upheld the lower court’s dismissal of two inmates’ claim that a corrections officer fondled their genitals during pat-frisks because “[a] reasonable officer could . . . have believed that the sexual abuse here alleged, even if it might violate state criminal law or subject him to tort liability, did not violate the Eighth Amendment.” Similarly, in *Amore v. Novarro*, the Second Circuit held that an officer was entitled to qualified immunity for an arrest based on a statute that had been declared unconstitutional over twenty years ago. Such abuses should not be tolerated.

The proposed bill should be applauded for its breadth and ability to open the courtroom doors to those who have their constitutional rights violated. Similar bills have been enacted in Colorado, Connecticut and New Mexico. The bills from New York and New Mexico apply to any “person or public entity acting color of law.” Additionally, the New York bill improves upon the Colorado, and the Connecticut bills in significant ways. Unlike the Connecticut statute, it does not provide a loophole for “good faith” violations of constitutional rights, an exception which could swallow the rule. And similar to the Colorado statute, the New York bill provides for an award of attorneys’ fees for prevailing plaintiffs, as opposed to only those where the officer’s actions were “deliberate, willful, or committed with reckless indifference,” as is the case in Connecticut.

This well-drafted bill would increase access to the courts for those who have their constitutional rights violated and force courts to address the merits of plaintiffs’ claims instead of procedural pitfalls. Creating a state-sponsored right of redress for those facing constitutional deprivations by police officers or other state actors would also create a public record of malfeasance by officers who have committed misconduct and abused New Yorkers, in accordance with other moves toward transparency including the recent repeal of Section 50-a of the Civil Rights Law. The Task Force supports this effort to provide victims of police misconduct their day in court, to create legal causes of action when abuse occurs, and to move toward public transparency in cases of police misconduct.

It should be noted that, in March 2021, New York City enacted New York City Ordinance 2220-A, effectively ending qualified immunity for police officers, becoming the first municipality in the United States to do so. The passage of the ordinance created a set of civil rights in New York City, mirroring those conferred by the 4th and 14th Amendments of the U.S. Constitution, so that people in New York City can hold officers accountable if those officers violate their civil

rights. It eliminated the shield of qualified immunity to allow victims the opportunity to seek justice. More specifically, the ordinance newly established a local right of security against unreasonable search and seizure and against excessive force regardless of whether such force is used in connection with a search or seizure.

Additionally, under New York City Ordinance 2220-A, if a NYPD employee, or a person appointed by the Police Commissioner as a special patrolman, allegedly deprives a person of this right, the person would be able to bring a civil action against the employee or appointee, as well as against the employee or appointee's employer, within three years after deprivation of the right. The employee or appointee (or their employer) will not be allowed qualified immunity, or any substantially equivalent immunity, as a defense. The Law Department is required to post details of these kinds otherwise such that the defendant could not reasonably have been expected to know whether their conduct was lawful.

3. Proposed legislation which prohibits certain practices in criminal proceedings that have a disparate impact on persons of color and/or constructively sanction police misconduct should be enacted as follows:

- a. S.1281/A.5688 – A bill to prohibit prosecutors from unilaterally nullifying the Exclusionary Rule—a rule meant to deter police misconduct, as part of plea negotiations, in the use of appeal waivers for adverse suppression rulings. See <https://www.nysenate.gov/legislation/bills/2021/s1281>; <https://www.nysenate.gov/legislation/bills/2021/A5688>;
- b. S.1280/A.5687 – A bill to prohibit prosecutors from unilaterally hamstringing attempts to fight off mass incarceration and racial disparities in sentencing, as part of plea negotiations, in the use of appeal waivers for excessive sentences. See <https://www.nysenate.gov/legislation/bills/2021/s1280>; <https://www.nysenate.gov/legislation/bills/2021/A5687>;
- c. S.1279/A.5688 – Assist state trial-level public defenders and counsel assigned pursuant to Article 18B of the County Law in getting their clients assigned representation on appeal, an otherwise uncertain process. See <https://www.nysenate.gov/legislation/bills/2021/s1279>; <https://www.nysenate.gov/legislation/bills/2021/A5689>; and
- d. S.324 – Bill to preclude inadmissible statements induced by law enforcement by providing materially false information to defendants. Also requires data collection of recorded confessions. See <https://legislation.nysenate.gov/pdf/bills/2021/S324>.

The recent string of exonerations of men of color, who served lengthy prison sentences for crimes that they did not commit, suggests that they have not only been wrongfully targeted by the police, but they have also been subjected to tainted prosecutions when evidence, which established their innocence, is ignored. In 2013, Mr. Eric Glisson of the Bronx was released from prison, after 17 years, for a murder that he did not commit. The murder victim was a taxi driver, whose cell phone was apparently taken by the killer and used two minutes later. A review

of the victim's cell phone records would have established whether Mr. Gleeson was in possession of the cell phone of the victim. This exculpatory evidence was not examined and disclosed to the defense by the prosecutor in violation of the U.S. Supreme Court case *Brady v. Maryland*, 373 U.S. 83 (1963).

In March of this year, George Bell, Rohan Bolt and Gary Johnson were released from prison after they "were wrongfully convicted of a double murder in Queens and incarcerated for the last 24 years." The published accounting for what occurred here, as follows, is rather harrowing because

[n]o physical evidence connected any of the three men to the crime, not at the time of their arrests nor at any time since. For the last 24 years, Bell, Bolt and Johnson have maintained their innocence. When Bell's jury convicted him as being the shooter in the double homicide, Bell rejected the DA's plea offer and took the risk that a jury would sentence him to death rather than plead guilty to a crime that he did not commit. To compound this tragedy, the Queens DA cut a plea deal with a jailhouse informant in exchange for his perjured testimony implicating Bell and Johnson in the murders. Following his early release, the informant, Reginald Gousse, went on to murder a father of three in a robbery attempt.

Evidence existed at the time that pointed to other suspects, but prosecutors suppressed that evidence and withheld it from the defense teams and from the court. The evidence first started to come to light in October 2019, when defense attorneys for Bell, Bolt and Johnson learned that the Queens DA had concealed official police reports tying a criminal gang that committed several armed robberies in Queens to the Epstein/Davis murders. The suppressed reports came to light as part of the successful challenge by Robert Majors to his wrongful conviction as an accomplice in the May 9, 1997 armed robbery committed by the same Queens gang. Majors' post-conviction lawyer, Thomas Hoffman, won Majors' release when he proved that the prior Queens DA had wrongfully withheld evidence from Majors' defense attorneys establishing his innocence.

The most significant document, DD5 288, dated May 16, 1997, memorializes an NYPD interview of a member of the Queens armed robbery gang during which the gang member told officers that another member of the gang, Jamal Clark, had confessed to committing the Astoria Boulevard check-cashing robbery that resulted in the Epstein/Davis murders along with other gang members.

The Queens DA's Office was fully aware of this information before Bell, Bolt and Johnson's trials began, believed the information was credible and, despite this knowledge, tried the cases anyway, seeking the death penalty against Bell, and resulting in the wrongful convictions of these three innocent men.

These men will likely pursue a civil remedy against the City of New York for false arrest, malicious prosecution, denial of a right to a fair trial and other claims. But obtaining a civil

judgment against this municipality does not hold the prosecutor accountable for his or her misconduct. The establishment of a Commission for prosecutorial oversight and misconduct, would subject prosecutors to an investigation for how they handled these matters. Prosecutorial misconduct has a disparate impact on communities of color due to wrongful convictions, such as in the Central Park Five and the above-described cases.

That said, the Task Force agrees that improvements to the training, recruitment, retention, and development of better prosecutors are the best ways to ensure fair and just outcomes for criminal justice prosecutions. District Attorneys' offices must be prepared to police themselves and augment their own practices. Outside oversight at times may be necessary, but internal accountability from within the office is the best way to achieve lasting change.

In addition, the Task Force examined the role of Adjournments in Contemplation of Dismissal (Criminal Procedure Law § 170.55) in shielding police misconduct. As Supreme Court Justice Kennedy noted in *Missouri v. Frye* (566 U.S. 134 (2012)) plea bargains have become “so central to the administration of justice” that our criminal justice system is, in reality, a system of pleas. “That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system.” Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1912 (1992). (*Missouri v. Frye*, 566 U.S. 134, 144. (2012).)

The Task Force found that the current jurisprudence of the Court Appeals should be changed to permit civil actions for allegations of civil rights violations during police encounters to proceed even if the underlying offense is resolved by way of an adjournment in contemplation of dismissal, (hereinafter an “ACD” or “ACOD”) as per the plain language of subsection 8 of Criminal Procedure Law Section 170.55. Currently, in certain instances, this adjudication serves as a barrier to many of these claims.

Subsection 8 of Criminal Procedure Law Section 170.55 states that “[t]he granting of an adjournment in contemplation of dismissal shall not be deemed to be a conviction or an admission of guilt. No person shall suffer any disability or forfeiture as a result of such an order. Upon the dismissal of the accusatory instrument pursuant this section, the arrest and prosecution shall be deemed a nullity and the defendant shall be restored, in contemplation of law, to the status he occupied before his arrest and prosecution.”

Because ACDs lead to the ultimate dismissal of the charge or charges, they are an attractive plea bargain for any defendant who is offered the opportunity to accept an ACD. For that defendant, an ACD avoids having to incur the time and expense to litigate the underlying charges, and avoids the risk of a criminal conviction. Furthermore, once an ACD is granted and the case dismissed, the records of the arrest are sealed. Because of these obvious benefits, it is not uncommon for even the actually innocent to accept an ACD because the attendant risks of a criminal conviction are high, and the concomitant consequences of a criminal conviction are potentially devastating.

However, the New York Court of Appeals has held that defendants who accept an ACD are precluded from asserting a cause of action for malicious prosecution, as an ACD is not a termination of the criminal action in favor of the accused. (*Hollender v. Trump Vil. Coop.*, 58 N.Y.2d 420 (1983).) As a result, prosecutors commonly offer ACDs in cases where there are allegations of police misconduct to shield police officers, the police agency, and the

municipality from a civil lawsuit. Indeed, prior to a Court of Appeals case in 1989 (*Cowles v. Brownell*, 73 N.Y.2d 382 (1989)) which precluded conditioning plea offers on releases from civil liability for police misconduct, prosecutors often specifically required waivers of liability or acknowledgments that police conduct was proper before agreeing to an ACD. For example, it was the policy of the Monroe County District Attorney to condition all ACDs on the defendant executing a waiver of the right to pursue civil remedies against arresting officers. (See *Kurlander v. Davis*, 103 Misc. 2d 919 (1980).)

Post-*Brownell*, although such waivers of liability against police officers are no longer explicitly required as a condition of an ACD, in cases where police misconduct occurs ACD offers (especially ACDs without any conditions) are very common. As noted above, ACDs are a very attractive resolution for any criminal defendant, even those who are actually innocent. Prosecutors are keenly aware of this, and because they preclude a defendant from seeking civil damages for malicious prosecution, an ACD offer is often used by the prosecution to shield officers and municipalities from civil litigation. This shields the officer and municipality from not only potential damages, but also the civil discovery process and its likelihood of revealing the underlying police misconduct.

The ability of prosecutors to use ACDs as a vehicle to prevent an innocent defendant from pursuing a civil action operates to keep police or prosecutorial misconduct secret. Thomas Jefferson once said: “a criminal justice system that is secret and government-dictated invites abuse and even tyranny”. Barriers that prevent transparency in the criminal justice system, such as the use of ACDs to shield police misconduct should not be tolerated. The Task Force recommends a change in the law to prevent prosecutors from using adjournment in contemplation of dismissal pleas to keep police or prosecutorial misconduct secret.

4. Minimizing the Role of Police Unions in Disciplinary Actions

One of the biggest obstacles facing police reformers is the “Blue Wall of Silence,” which is an unwavering loyalty or an unspoken bond that police use to justify, in their mind, that they cannot stop another officer when they use excessive or deadly force or testify against another officer. It was painfully obvious in the murder of George Floyd.

Former Buffalo officer Cariol Horne has had firsthand experience dealing with the consequences of intervening when another officer was using excessive force. In 2008, while just months away from receiving her pension, she was fired from the Buffalo Police Department after stopping another officer who was using a chokehold on a suspect while he was handcuffed, for “disciplinary reasons.”

Police unions, whose leadership is vastly white, are the mortar that holds the Blue Wall of Silence together. For example, in the NYPD today people of color constitute slightly more than half the uniformed force. The leadership in each of the five different police unions for each rank are overwhelmingly white.

Many of the recommendations of this Task Force will likely be opposed by police unions throughout the state. According to the *New York Times*, “police unions have emerged as one of the most significant roadblocks to change. The greater the political pressure for reform, the more defiant the unions often are in resisting it.” Police unions often use their political clout by influencing lawmakers via campaign donations to derail police accountability and reform

efforts. In fact, NYPD's police unions have vocally opposed police reforms in Albany, including attempting to keep the disciplinary records of officers private.

Minneapolis Mayor Jacob Frey identified the most significant “nearly impenetrable barrier” to police reform—the union contract, which makes it extremely difficult to discipline and terminate officers. Frey noted that the “elephant in the room with regard to police reform is the police union” preventing a “culture shift” and making it difficult to make “the changes necessary to combat [. . .] institutionalized racism.”

Reuters reviewed 82 police union contracts in large cities and found their contracts often obstructed discipline, allowed discipline records to be erased and worked to shield rogue police officers from justice. Police contracts also limit officer interrogations after alleged misconduct, limit the length of internal investigations, ban civilian oversight, indemnify officers in civil suits and mandate the destruction of disciplinary records.

It is clear that municipalities need to renegotiate collective bargaining provisions in police contracts to clear the way for meaningful police reform, accountability and discipline.

In New York City, the Mollen Commission, which was created in 1992 to investigate police corruption, popularized a word for the false testimony of certain cops: “Testilying.” Officers also use the terms “articulating” or “getting their story straight.” Fortunately, this has become somewhat less of a problem with body worn cameras, surveillance cameras and ubiquitous cellphone cameras. However, there are still incidents that are not caught on video.

Another way to reduce union influence in assisting officers in “getting their story straight” is for internal investigators and criminal prosecutors to interview union representatives and ask what the subject officer told them. Historically, for some reason, this has been viewed as off-limits and taboo, with rare exceptions, one of which was the infamous Abner Louima incident. On the night of August 9, 1997, NYPD officers arrested Louima at the scene of a fight. On the ride to the station house, the arresting officers (including the PBA representative) beat Louima with their fists, nightsticks, and hand-held police radios. In potentially the most barbaric act of police brutality in NYPD history, Officer Justin Volpe kicked Louima in the testicles, and while Louima's hands were handcuffed behind his back, he forced a broken broomstick up his rectum. Volpe was later sentenced to 30 years in jail.

The officers involved met with union representatives who received incriminating admissions of criminal behavior. Instead of promptly reporting this information as required by NYPD's policy, the PBA members orchestrated an affirmative strategy of obstruction and falsification, including convening a meeting allegedly to devise a common story to cover up their actions and to defame and publicly humiliate Mr. Louima claiming to the news media and internal investigators that he had sustained his injuries, not as a result of the officers' vicious assault, but rather through “consensual homosexual activity.”

Federal prosecutors took a novel approach. They sought to interview the PBA officials, who initially claimed attorney-client privilege and the non-existent “delegate-member privilege to orchestrate cover-ups among co-conspirators and to identify and silence police witnesses who would otherwise give honest testimony.” Ultimately, Federal prosecutors subpoenaed PBA officials “to testify before a Federal grand jury investigating charges that officers brutalized

Abner Louima,” specifically seeking to have the union officials “tell the panel what the four officers charged in the case, and possibly other officers, told them about the Louima incident.”

Not surprisingly, the PBA moved to quash the subpoena. Eastern District Judge Reena Raggi ruled that New York City police union officials could not claim their conversations with four officers accused of the brutal attack were privileged and the PBA officials were forced to testify before the federal grand jury. This aggressive tactic broke the Blue Wall of Silence. Ultimately, the officers responsible for the attack were charged and convicted in Federal court, and Volpe is still in federal prison serving his 30-year sentence.

Another way to reduce the influence of the police unions is for municipalities to understand what police disciplinary powers they already have by virtue of their charters, and how those charters have been interpreted by the Court of Appeals. **The Task Force recommends studying existing laws to clearly define what authority municipalities currently have.** Many municipalities already have greater power to discipline police than they are utilizing, and we should make that known.

In 2006, the Court of Appeals held that “police discipline may not be a subject of collective bargaining under the Taylor Law when the Legislature has expressly committed disciplinary authority over a police department to local officials.” *Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v New York State Pub. Empl. Relations Bd.*, 6 N.Y.3d 563 (2006). The litmus test for whether police discipline is a permissible subject of bargaining lies in the charter powers granted to a municipality by the State Legislature. Where a city's charter reserves police disciplinary power, the ultimate power to discipline police lies with the city, regardless of the provisions of the collective bargaining agreement. In other words, where a city's charter grants the city (or one of its officers) the power of police discipline, Section 75 of the Civil Service Law is not controlling on disciplinary matters. Despite this ruling and others that have supported it (*see Matter of Town of Wallkill*, 19 N.Y.3d 1066 (2012), *see also Matter of City of Schenectady v. NYS PERB*, 30 N.Y.3d 109 (2017)), cities and towns throughout the state like Buffalo still allow arbitrators and CBA provisions to have the final word on police discipline when they aren't required to be bound by those decisions. For example Buffalo's charter has, since at least 1949, stated that the power to discipline police rests with the Police Commissioner. That power was given to the police commissioner by the Common Council, which was in turn given the power to discipline police by the State Legislature in the City Charter of 1914. Making municipalities aware of these powers could allow them to fire bad cops and discipline them more effectively instead of being forced to keep them on per provisions of collective bargaining agreements that the Court of Appeals has held are not controlling. These charter powers also support our recommendation for stronger civilian oversight of police.

CONCLUSION

Policing is an essential component of our democracy. While this report addresses many concerns and problems with policing in New York, and beyond, the Task Force nonetheless recognizes the dedicated men and women who faithfully serve in the policing ranks across the state. The problem is not with policing, but bad policing. It is our hope that the recommendations set forth herein will add to the search for answers to remedy the racial injustice we've long seen in policing. The killing of George Floyd started a movement across the country, and globe. As lawyers we must seize the opportunity to add our constructive voice to the need for change.

Adoption of this report and its recommendations will demonstrate a clear commitment to doing just that.

Members of the Task Force on Racial Injustice and Police Reform

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The Task Force thanks Megan McDevitt for her research contributing to the report, and thanks Alex Dickson and Tom Richards for helping the co-chairs complete the final review of the Report.

And finally, the Task Force thanks the following diverse bar associations who provided their feedback for the report:

1. Association of Black Women Attorneys
2. Asian American Bar Association of New York

3. Dominican Bar Association
4. Hispanic Bar Association – New York Region
5. Korean American Lawyers of Greater New York
6. Metropolitan Black Bar Association
7. Muslim Bar Association
8. National Bar Association – Region 2
9. Puerto Rican Bar Association
10. Rochester Black Bar Association
11. South Asian Bar Association of New York
12. Minority Bar Association of Western New York



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MEMORANDUM

FROM: Committee on Mandated Representation

RE: Report and Recommendations from the Task Force on Racial Injustice and Police Reform

DATE: May 27, 2021

The Committee on Mandated Representation strongly supports the Report and Recommendations of the Task Force on Racial Injustice and Police Reform. One of our committee’s missions is to advance and support measures that will increase access to the appellate courts by indigent criminal defendants, many of whom are Black and Latinx clients.

For that reason, we strongly support legislative recommendations, contained in Part 4(D), that would allow appellate courts to review excessive sentences and suppression rulings regardless of the usage of appeal waivers. We also support legislation that would streamline assignment of appellate counsel by allowing poor person status to continue on appeal upon an attorney certification, thereby preventing indigent defendants from going through an onerous application process.

Current provisions of the Criminal Procedure Law broadly allow the appellate courts to both reduce sentences in the interests of justice—to combat racial disparities in sentencing and reduce mass incarceration—and to review suppression rulings that may involve police misconduct. Indeed, the Legislature determined that these powers are so important that they may be exercised even when the defendant has pleaded guilty, and even where the sentence is the result of a plea bargain. However, this legislative purpose is thwarted when defendants are required to waive their right to appeal in exchange for a plea deal. As a result, those who plead guilty are unable to access appellate review of their cases for adverse suppression rulings and excessive sentences.

Similarly, we support the recommended legislation that would streamline assignment of appellate counsel for indigent criminal defendants by allowing assigned counsel at the trial level to certify continued poor person status. This same method of verification is used in Family Court and civil cases. It is only in criminal cases that defendants do not receive the same benefit when applying for appellate counsel.

Finally, current case law allows police interrogators to extract confessions from defendants using trickery and deceit. Although these ploys encourage false confessions, they are perfectly admissible under the current Criminal Procedure Law. We agree that the law should be amended, with a simple fix, to bar the use of such unreliable statements.

Enabling appellate review of criminal convictions, and preventing false confessions, will further justice for all defendants, including those of color, and we strongly support adoption of the Task Force's Report and Recommendations.

Respectfully submitted,

A handwritten signature in black ink that reads "Robert S. Dean". The signature is written in a cursive style with a large initial "R".

Robert S. Dean
Chair, Committee on Mandated Representation



Staff Memorandum

HOUSE OF DELEGATES Agenda Item # 8

REQUESTED ACTION: Approval of the report and recommendations of the Task Force on Free Expression in the Digital Age.

The Task Force on Free Expression in the Digital Age was appointed in 2019 to study the crisis in local journalism resulting from financial difficulties faced by news organizations. The report focuses on amendment of FOIL; the advancement of government transparency outside of FOIL; support of nonprofit journalism; and the expansion of legal services for news organizations.

The Task Force originally presented an earlier version of its report at the April 2020 House meeting. That version was tabled, and the current version narrows the topics for your consideration.

The Local and State Government Law Section has submitted comments on the current version of the report that it requests be incorporated in a final report. These comments relate to FOIL and the Open Meetings Law.

The report will be presented at the June 12 meeting by Task Force co-chairs Cynthia S. Arato and David E. McCraw.



NEW YORK STATE
BAR ASSOCIATION

Report and Recommendations of the Task Force on Free Expression in the Digital Age

June 2021

The views expressed in this report are solely those of the Task Force and do not represent those of the New York State Bar Association unless and until adopted by the House of Delegates.

**REPORT &
RECOMMENDATIONS
OF THE TASK FORCE ON
FREE EXPRESSION IN
THE DIGITAL AGE**

The Crisis in Local Journalism

APRIL 2021

The views expressed in this report are solely those of the Task Force and do not represent those of the New York State Bar Association unless and until adopted by the House of Delegates.

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* Hon. Rolando T. Acosta abstained from voting on Section III of the Report; Hon. Barbara Jaffe abstained from voting on Sections III, IV, and V of the Report.

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Introduction

EDITOR’S NOTE: The Task Force submitted an earlier version of this report to the House of Delegates at its June 2020 meeting. After delegates voted to amend a section dealing with New York’s anti-SLAPP law and had certain questions about other sections, that version of the report was tabled by the House. Since that time, New York has enacted two new laws relevant to the report—one concerning anti-SLAPP and the other concerning the Freedom of Information Law. This revised report thus narrows the topics for consideration by the House of Delegates.

In 2019, the Bar Association launched a new Task Force initiative to look at “Freedom of Expression in the Digital Age.” As its initial project, the Task Force took a deep look at the crisis in local journalism. Local journalism has been in a steady financial decline for at least the past decade, resulting in a dearth of journalists and publications to cover important issues impacting our daily lives and a growing number of “news deserts” (locales that are no longer served by a local newspaper). Much of the decline is attributable to the rise of digital platforms and their profound transformation of both America’s information ecology and its advertising markets. That technological revolution has come at a price for local news sources and the citizens who have historically depended on them.

The crisis is rarely viewed as a legal issue. Its roots are in the changing nature of advertising and in the revolutionizing aspects of digital media. The advertising market is now dominated by national and international digital platforms that allow advertisers to reach consumers without going through a local newspaper or broadcaster. Digital media can also target readers and viewers with few of the costs shouldered by traditional media.

Nonetheless, the Task Force recognized that the law and the organized bar have a role to play in alleviating the crisis. Local journalism remains the heartbeat of civic engagement in New York’s towns and cities. Local news organizations not only inform communities on the issues and events that have the most immediate impact on citizens’ lives, but they also play a vital role in holding governments accountable. In examining the current state of local journalism in New York, the Task Force recognized that financially weakened news organizations are susceptible to threats of libel suits and other claims that often silence important reporting. News organizations also encounter roadblocks and frustrations in trying to get at government information, obstacles that seem baked into the Freedom of Information Law (“FOIL”) and the FOIL request system, or arise from the law’s implementation by agencies, its interpretation by the courts, or a lack of resources for the government’s FOIL officers. Few struggling organizations have the resources to challenge in court improper denials of access or delays. Important as well is the body of law that dictates, independent of FOIL, what information should be available proactively to journalists and citizens. Technology empowers easy access to governmental data, but there needs to be a legal framework in place to ensure that information is available, up to date, and distributed as widely as possible. Increasingly, nonprofit news organizations are being formed to fill the gap left by the decline of traditional media,

and their development should be encouraged as a public good. In addition, these nonprofits, along with for-profit local news entities, would benefit from legal assistance to facilitate their formation and continued operation.

Over the course of its work, the Task Force convened forums and meetings on the reform of New York's libel laws; the reform of FOIL and access to court records and proceedings; the status of government transparency outside of FOIL and ways to encourage and increase the release of government records and data to the public; the rise of nonprofit news organizations; and initiatives designed to bring pro bono and low-cost legal services to news organizations. The Task Force met with Professor Penelope Abernathy of the University of North Carolina, a leading scholar in the field, to learn directly about her research on the decline of local journalism. The Task Force also heard from a range of journalists, media lawyers, nonprofit publishers, and public interest groups.

The focus of the Task Force's current report is on amendment of FOIL; the advancement of government transparency outside of FOIL; support of nonprofit journalism; and the expansion of legal services for news organizations. One overarching topic is not addressed here but was repeatedly referenced in our discussions: the role of digital platforms in destabilizing traditional news organizations, in both urban centers and smaller cities, by their dominance of the advertising market and their ability to "free-ride" on content developed by news organizations through links and aggregation, and whether that dominance could and should be addressed through legislation or antitrust enforcement. Necessarily, those concerns invoked a further discussion of what the platforms could do to support local journalism and provide local communities with the information necessary for self-governance. Because of time constraints, this report does not address either those concerns or those possible solutions, but they warrant the close attention of the Bar Association and all New Yorkers concerned about sustaining civic engagement and government accountability.

I. Executive Summary

Local journalism has been deeply harmed by an industry-wide financial crisis set in motion by the rise of digital media as a source of information and entertainment and as a vehicle for advertising. Vibrant local journalism, which has traditionally played a powerful role in government oversight and civic engagement, has grown increasingly rare throughout New York, in both rural and urban areas. "News deserts," places that lack independent news organizations to cover local government and politics, are on the rise. The law and the legal profession do not have the ability to alter the financial and technological forces reshaping American journalism, but the law and the legal profession do have a role to play in making certain that vital journalism remains vital and published in New York despite the disruptions in the industry.

The Task Force report focuses on four principal topics: (a) amendment of FOIL, (b) the advancement of government transparency outside of FOIL, (c) the growth of nonprofit journalism, and (d) the expansion of legal services for news organizations.

FOIL reform: New York’s Freedom of Information Law, enacted in 1974, has long been a valuable tool for journalists to use in their coverage of local and state governments. It was written with a presumption that governmental records should be public unless one of the statute’s enumerated exceptions applies, and that citizens would enjoy the benefits of a widely open government. The reality has become much different. The Task Force repeatedly heard from journalists and others about the flaws and failures of FOIL. Among the key problems: extended delays in getting agency responses, a lack of resources in both staffing and technology for FOIL units in their respective agencies, aggressive deployment of the exemptions to deny access at many agencies or local governmental bodies, and a weak statutory provision for shifting legal fees from the requester to the agency when the requester is forced to go to court to get documents. Because of the financial restraints most news organizations now work under, challenging FOIL denials through an Article 78 proceeding is increasingly rare. The Task Force recommends that FOIL be amended in several ways. Most significantly, FOIL should have a timetable for responses and administrative appeals that encourages more timely disclosure of public records. We also encourage further study of strengthening the fee-shifting provision so that news organizations with meritorious cases can challenge improper withholding without facing prohibitive financial costs. In its initial report, the Task Force also called for reform of Section 50-a of the Civil Rights Law, which exempted from FOIL and cloaked in secrecy much police misconduct and police disciplinary processes. The law had become a major obstacle for news organizations providing oversight to the activities of local police agencies. The Task Force’s initial report called for its elimination and advocated for the position that the release of the personnel records of the police should be governed by the statutory scheme set forth in FOIL. In June 2020, the State Legislature passed a bill, which was then signed by the governor, largely incorporating the changes being proposed by the task force.

Proactive transparency: New York has shown a commitment to make governmental data more readily available online. That is an important development for news organizations with limited resources and for citizens, because it frees journalists and citizens from the regimen of FOIL requests or visiting government offices to get information. The Task Force believes those efforts at proactive transparency can be enhanced. Journalists and public interest groups have expressed concerns that truly valuable information is not being included in the data portals and that many local governments have been notoriously slow to adopt transparency initiatives or lack the technology to facilitate access to information. The Task Force recommends that the Legislature enact laws to require local governments to make certain basic information readily available on governmental websites, that the open meetings law be amended to require the provision of key documents in advance of board or council meetings and that the agencies overseeing proactive disclosures at the state level work with journalists and public interest groups to foster “smart disclosure.” Disclosure initiatives should not be judged simply by the volume of data made public but by the value of the information being made available.

Encouragement of nonprofits: One of the most exciting and interesting developments the Task Force explored is the rise of nonprofit journalism organizations. Some nonprofits are issue-focused and cover topics like criminal justice or climate change; others are devoted to community journalism

in the same way as their traditional print counterparts. Much of what the Task Force says in its report about libel, FOIL, pro bono services, insurance, and other initiatives applies with equal or greater force to nonprofits. But the Task Force recommends that the Bar Association look deeper at the complex issue of government funding mechanisms that do not involve government content control (for instance, the model of the BBC).

Expansion of legal services: Outside of the national press, the journalism industry is populated today with startup news entities and traditional news outlets that have experienced significant financial troubles over the past decade. Both of those groups play a vital role in local democracy and the ability of citizens to have access to independent and comprehensive coverage of local government and politics. While journalism does not fall in any traditional category of need for the provision of legal services, the Task Force believes that providing legal assistance to news organization contributes to the public good. The Task Force recommends that the Bar Association create a legal referral network devoted to journalism clients and encourage practitioners to provide pro bono or discounted services to such clients. The needs of news organizations, especially nonprofit startups, extend beyond the usual areas of media law like libel and FOIA and encompass areas like employment, incorporation, and taxes. A NYSBA-sponsored referral service would not only assist in getting needed legal services to journalists and news organizations but stand as a distinguishing symbol of the Bar Association's commitment to a free press.¹

II. Background on Trends in Local Journalism

Local journalism has been in a state of crisis for the past 15 years, fueled by intense disruption and financial distress caused by the ascendancy of search engines and digital platforms that deliver news and entertainment in various forms. During this time, local news outlets have faced crushing competition from these platforms for both readers' attention and advertising revenue. While New York's local newspapers remain an important vehicle for advertising and publication of legal notices, the financial strain has caused local news organizations to shut their doors at alarming rates, leaving many U.S. communities without a daily news outlet, and creating so-called "news deserts."²

This trend has consequences for our nation, since local journalists are at the frontline of communities, investigating and delivering the news that matters most to residents, and which leads to greater civic engagement and community bonds.³

¹ The Task Force's initial report also focused on libel reform in the form of amendments to the State's anti-SLAPP laws, with the goal of reducing the "chilling effect" that threatened or actual, but meritless libel litigation can have on news organizations that wish to cover difficult but necessary stories. In November of 2020, while this revised report was being prepared for submission to the House of Delegates, Governor Cuomo signed into law amendments to the anti-SLAPP law that incorporated the main changes the Task Force had endorsed for inclusion in this report.

² Penny Muse Abernathy, "The Expanding News Desert," School of Media and Journalism, Center for Innovations and Sustainability in Local Media, UNC, 2018 at 16.

³ "Putting a Price Tag on Local News," Knight Foundation, <https://knightfoundation.org/wp-content/uploads/2019/11/Putting-a-Price-Tag-on-Local-News-final-updated.pdf>, at 1, n. 6.

A. Data on the Decline

Professor Abernathy’s landmark study, published by the Center for Innovation and Sustainability in Local Media at the University of North Carolina’s School of Media and Journalism, documents that:

- The nation has lost 2,300 newspapers since 2008, leaving only 1,700 dailies and 5,000 weeklies in existence.
- More than one in five newspapers has closed over the past 15 years. That has left half of the 3,143 counties in the country with only one newspaper.⁴
- Almost 200 of the 3,143 counties in the country have no newspaper at all, affecting 3.2 million people.⁵
- Many of the surviving newspapers are ghosts of their former selves with staffs so “dramatically pared back that the remaining journalists can’t adequately cover their communities.”⁶ It is estimated that staff has been cut in half at as many as 1,500 of the newspapers.⁷
- During a tumultuous decade and a half that saw a precipitous drop in print advertising, the largest 25 companies took control of newspapers at an astonishing pace. By 2018, these companies owned nearly one-third of all papers, up from 20 percent in 2004. When it comes to dailies, the numbers are even more striking—two out of three of all daily newspapers, accounting for 812 publications, are owned by the top 25 firms.⁸
- Chain ownership has led to publications managed by out-of-town editors with less knowledge of local issues or connection to residents’ concerns.
- Newspapers have retreated from outlying circulation areas that are less desirable to advertisers, helping expand news deserts across wide swaths of the nation.
- Cities with rival newspapers were once the norm, but now there are fewer than a dozen cities with competing publications.
- The nation has lost more newspaper jobs than coal-mining jobs.⁹

⁴ *Id.* at 8.

⁵ Abernathy, *supra* n. 2, at 24.

⁶ *Id.* (the analysis focuses on local newspapers and does not include The New York Times, Wall Street Journal, and USA Today or shopping circulars, magazines, or specialty publications.)

⁷ *Id.* at 14.

⁸ *Id.* at 31.

⁹ *Id.* at 27; *see also* American Society of News Editors, 2008 and 2015 Newsroom Diversity Survey Census, 2008, 2015, <https://www.asne.org/diversity-survey-2008>, <https://www.asne.org/diversity-survey-2015>; Bob Papper, “TV News Employment Surpasses Newspapers,” Radio Television Digital News Association/Hofstra University Newsroom Survey, April 16, 2018; Bureau of Labor Statistics, Employment Statistics Survey, 2018.

Here's how the economic collapse of newspapers played out in New York:

- There were only 303 newspapers (54 dailies and 249 weeklies) still publishing in the state in 2019 compared to 501 (62 dailies and 439 weeklies) in 2004, a 40 percent decrease.¹⁰
- New York has one county without a newspaper and 13 with just one newspaper, and most of those 13 are weeklies that don't cover all of the applicable counties.¹¹
- As of 2018, the top 25 newspaper chains owned 61 of New York's newspapers, which amounts to one in five.¹²
- In 2004, New York newspaper publishers distributed 9.3 million copies. By 2019, that was slashed to 3.4 million, a decrease of 63%.¹³
- New York lost 190 weekly newspapers between 2004 and 2019.¹⁴ Thus, one of the most populous states (with 20 million residents) was also one of the states that saw the most weeklies go out of business.

B. Why Newspapers Matter

Research dating back to the 1970s shows that strong newspapers foster a sense of geographic identity and nurture social cohesion and grassroots political activism.¹⁵ They do this by covering local developments over which communities can bond; informing citizens;¹⁶ demanding accountability from local leaders;¹⁷ and promoting fiscal responsibility and governmental efficiency.¹⁸ When local newspapers shrink, fewer candidates run for local office and voter turnout suffers.¹⁹ Even newspaper advertising performs an essential function: it helps a community's economy to grow by connecting businesses with consumers.²⁰

A 2011 report by the Federal Communications Commission found that local newspapers are the best medium to provide the public service journalism that (1) shines a light on the major issues confronting communities and (2) gives residents the information they need to solve their problems.²¹ These

10 Abernathy, *supra* n. 2, at <https://www.usnewsdeserts.com/states/new-york/#1536357227283-a4a9d6e4-ccf9>.

11 *Id.* at <https://www.usnewsdeserts.com/states/new-york/#1536357227273-1fd2118-6dc6>.

12 *Id.* at <https://www.usnewsdeserts.com/states/new-york/#1536357227283-a4a9d6e4-ccf9>.

13 *Id.* at <https://www.usnewsdeserts.com/states/new-york/#1536357227283-a4a9d6e4-ccf9>.

14 *Id.* at <https://www.usnewsdeserts.com/states/new-york/#1536357280470-403f9cb7-ca48> (these statistics do not include *The New York Times*, *Wall Street Journal* or *USA Today*).

15 *Id.* at 5.

16 Putting a Price Tag on Local News, <https://knightfoundation.org/wp-content/uploads/2019/11/Putting-a-Price-Tag-on-Local-News-final-updated.pdf>, at p.1, n. 6.

17 Why Local News Matters, and What We Can Do to Save It, https://www.nysba.org/Journal/2019/Dec/Why_Local_News_Matters,_and_What_We_Can_Do_to_Save_It/, at 9.

18 *Id.* at 11.

19 Putting a Price Tag on Local News, *supra* n. 16 at 1, n. 6; see also Sarah Cavanagh, "Measuring Metropolitan Newspaper Pullback and Its Effects on Political Participation," Retrieved from the University of Minnesota Digital Conservancy, 2016, <http://hdl.handle.net/11299/182213>; Lee Shaker, "Dead Newspapers and Citizen's Civic Engagement," Communication Faculty Publications and Presentations, 2014, https://pdxscholar.library.pdx.edu/comm_fac/17.

20 Abernathy, *supra* n. 2, at 5.

21 *Id.* at 8; see also Steven Waldman, "The Information Needs of Communities: The changing media landscape in a

impacts disproportionately affect our nation’s most vulnerable citizens, as studies have shown that residents of news deserts are poorer, older and less educated than the average American citizen,²² and that residents of low-income areas have less access to traditional publications or digital startups.²³

The loss of newspapers in one state can affect residents in neighboring states. Officials at the Centers for Disease Control and Prevention, for instance, say that it’s harder to track the spread of disease without thriving newspapers. That’s because news stories traditionally served as an early warning system for the agency, and social media has not done as well in providing that service. Without help from newspapers in identifying and publicizing public health risks, there could be more outbreaks and epidemics.²⁴ One Stanford University economist recently documented how investigative journalism saved lives and averted environmental disasters.²⁵

The decline in local news is accompanied by a decline in readership, and print readers are disappearing at an even faster rate than print newspapers. Over the past 15 years, weekday circulation of dailies and weeklies declined from 122 million to 73 million, or 40%,²⁶ and the pace of the decline is accelerating.²⁷ If circulation continues to drop at the same rate, one-half of the surviving newspapers will fold by 2021, according to Nicco Mele, director of the Shorenstein Center for Media, Politics and Public Policy at Harvard University.²⁸

C. Is There a Local News Crisis in the Media Capital of the World?

New York City is the media capital of the world, yet even in this city many communities lack sufficient local news coverage.²⁹ Here’s why:

- The *New York Daily News* (winner of 15 Pulitzer Prizes) was sold in 2017 to the news conglomerate Tribune Publishing (then named “Tronc”), the country’s fourth-largest newspaper chain. Tronc paid \$1 and assumed the newspaper’s liabilities. It cut the newsroom staff, which had already gone through many rounds of layoffs, leaving 50 journalists to cover the five boroughs.³⁰ By the time of its purchase, the publication’s circulation already had declined to 200,000 from a high of two million in the mid-

broadband age,” Federal Communications Commission, July 2011, https://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf.

22 Waldman, *supra* n. 21, at 16.

23 Waldman, *supra* n. 21, at 17.

24 Abernathy, *supra* n. 2, at 15; *see also* Helen Branswell, “As towns lose their newspapers, disease detectives are left to fly blind,” STAT, March 20, 2018, <https://www.statnews.com/2018/03/20/news-deserts-infectious-disease/>.

25 James T. Hamilton, *Democracy’s Detectives, The Economics of Investigative Journalism* (2016).

26 Abernathy, *supra* n. 2, at 10.

27 *Id.* at 14.

28 *Id.* at 14; *see also* Judith Miller, “News Deserts: No News Is Bad News,” Urban Policy, 2018, Manhattan Institute, October 2, 2018, <https://www.manhattan-institute.org/html/urban-policy-2018-news-deserts-no-news-bad-news-11510.html>.

29 Sara Rafsky, *Media Mecca or News Desert? Covering Local News in New York City*, CJR, Jan. 21, 2020, at 1, https://www.cjr.org/tow_center_reports/local-news-deserts.php.

30 Abernathy, *supra* n. 2, at 27.

twentieth century.³¹

- The *Wall Street Journal* eliminated its “Greater New York” section and the reporters who worked for the section were reassigned or laid off.
- The *New York Times* stopped publishing its standalone Metro Section in 2008 and cut the scope of its metro coverage substantially since then. The *Daily Beast* quantified what that meant: The *Times* published 153 metro stories in the last week of January in 2001; 102 in 2009; and just 48 in 2017.³²
- More than half of the staff at *AM New York* was laid off in October of 2019 after the newspaper was purchased by Schneps Media.³³ In December of 2019, Schneps also bought New York City’s other free daily, *Metro New York*.
- The Tow study, *Media Mecca or News Desert? Covering Local News in New York City*, found that criminal justice, civil courts, and healthcare were going unreported. Several news outlets said environmental and climate change coverage was also lacking. There is comparatively less coverage of Staten Island than the other boroughs. Government meetings go largely unreported.³⁴
- Hardly any of the news outlets in the Tow study said they had much time for investigative stories.³⁵

D. What’s the Bottom Line?

The nation’s largest newspaper organizations are ill-equipped to devote time and resources to coverage of local government meetings, investigative stories, and public service journalism. That means that the type of journalism that research shows is most crucial to our democracy is almost non-existent. And that’s as true in affluent parts of New York City as it is in rural upstate areas of New York State. Taken to its most extreme, the collapse of the news ecosystem leaves some residents without any source of credible news. And the crisis is only deepening.

E. Insurance

The ability of news organizations to withstand unwarranted litigation often depends on the adequacy of insurance coverage. For smaller news organizations facing difficult economic times, the price of policies needed to address the full scope of risk can itself be prohibitive. Lawyers who regularly represent news organizations repeatedly raised this concern to the Task Force.

31 Jaclyn Peiser, *Daily News Newsroom Cut in Half by Tronc as Top Editor Is Ousted*, The New York Times, July 23, 2018, <https://www.nytimes.com/2018/07/23/business/media/tronc-daily-news-layoffs.html>.

32 Paul Moses, *The New York Times Turns Its Sights Away from New York City*, The Daily Beast, Jan. 21, 2020, <https://www.thedailybeast.com/the-new-york-times-turns-its-sights-away-from-new-york-city>.

33 Marc Tracy, *A New Owner, and Layoffs, for amNewYork*, The New York Times, Oct. 11, 2019.

34 *Id.*

35 *Id.*

Many general liability policies exclude coverage for media liability. Specific media liability policies are typically expensive. Even when such coverage exists, coverage disputes can limit or eviscerate the value of such coverage.

A full investigation of the problem was beyond the Task Force’s mandate and capacity, but we believe the issue deserves serious consideration as a legal issue. Accordingly, the Task Force recommends that NYSBA Insurance Law Committee examine potential legal and commercial solutions to help local news organizations obtain affordable media liability coverage.

III. Freedom of Information Law

A. FOIL’s Purposes and Operation

The purpose of FOIL is to promote the public’s right to be informed about the processes of executive branch decision-making by affording access to government records.³⁶ The statute was enacted by the Legislature because access to governmental information “should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.”³⁷ In signing FOIL into law in 1974, then Governor Wilson stressed the importance of open government to a free society and the need for FOIL to engender public understanding and participation.³⁸ Accordingly, the Court of Appeals has consistently held “that FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government.”³⁹ The burden of proof rests upon the government agency claiming the exemption to establish that the requested material is exempt from disclosure.⁴⁰

The press—including community newspapers—has routinely relied on FOIL as a means of obtaining information from and reporting on the activities of a wide array of executive agencies at the State, county, and municipal levels of government. For example, FOIL requests have resulted in public access to booking logs and arrest reports from local police departments and the New York State Police; criminal prosecution records from County District Attorneys’ offices; public school board planning and personnel decisions; the dispensation of State tax benefits in connection with economic zone revitalization initiatives; Health Department investigation and oversight records, including restaurant inspection violation reports; real estate development applications and zoning approvals; and license and permit applications and permissions, for example.⁴¹

³⁶ *Capital Newspapers, Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 565 (1986); *Town of Waterford v. N.Y.S. Dep’t of Env’tl Conserv.*, 18 N.Y.3d 652, 656–67 (2012) (FOIL is premised “on the overriding policy consideration that the public is vested with an inherent right to know” government operations)

³⁷ Legislative Declaration, Public Officers Law § 84.

³⁸ Governor’s Memorandum 1974 N.Y. Laws, Chs. 578, 579, 580, 1974 Legis. Ann., at 392, *cited in Russo v. Nassau Community College*, 81 N.Y.2d 690, 697 (1993); *see also Capital Newspapers*, 67 N.Y.2d at 565–66 (FOIL ensures public oversight of the “day-to-day functioning of state and local government [,] thus providing the electorate with sufficient information to make intelligent, informed choices with respect to both the direction and scope of governmental activities”).

³⁹ *Newsday, Inc. v. Sise*, 71 N.Y.2d 156, 150 (1987), *cert. denied*, 486 U.S. 1056 (1988).

⁴⁰ Pub. Off. Law § 89(4)(b); *Russo v. Nassau Community College*, 81 N.Y.2d 690, 697–98 (1993).

⁴¹ *See, e.g., N.Y. Civ. Lib. Union v. City of Schenectady*, 2 N.Y.3d 657 (2004) (incident reports prepared by city police

B. Overview of FOIL's Deficiencies

New York State's community newspapers and the public they serve have a direct and vital interest in an effective and reliable Freedom of Information Law. In the course of the Task Force's public hearings, however, journalists and press lawyers complained about the ineffectiveness of FOIL. They pointed to undue delay and the aggressive use of exemptions by many agencies.⁴² At the same time, a lack of resources devoted by governmental bodies to FOIL offices and necessary technology to manage the information flow has compounded the problems, making it harder for requesters to get timely and considered responses even when FOIL officers are serious about disclosure. Requesters also contend with the reality that court decisions have broadened the authority of agencies to deny access to documents in a variety of circumstances.

The Task Force focused on two deficiencies in FOIL: (1) requesters' inability to get timely responses to FOIL requests and (2) the difficulty that requesters face in recovering attorneys' fees when prevailing in a FOIL action. In addition, certain court decisions have abetted the lack of disclosure. FOIL has long been understood to require agencies to redact documents and produce them to requesters once properly withheld information is removed. That was seen as the preferred, and in fact required, alternative to withholding an entire document. Court decisions have now cast doubt on the use of redaction to enable the partial release of documents. The Task Force also devoted significant time and discussion to Section 50-a of the Civil Rights Law, which shielded the personnel records of law enforcement officers, and was pleased when the Legislature revoked the statute and amended FOIL's provisions to ensure greater access to law enforcement disciplinary records. Those changes largely tracked the recommendations in the Task Force's original report.

1. The Absence of Enforceable Timetables for Disclosure

FOIL's provisions governing the timing of agency disclosures permit delays that can severely diminish if not extinguish altogether the topical news value of requested information. The procedures

officers pertaining to use of force); *Moore v. Santucci*, 151 A.D.2d 677, 677 (2d Dep't 1989); *Scarola v. Morgenthau*, 246 A.D.2d 417 (1st Dep't 1998) (documents used by District Attorney in prior criminal prosecution were subject to FOIL); *LaRocca v. Board of Education*, 220 A.D.2d 424 (2d Dep't 1995) (holding settlement agreement among school board and former principal); *Miracle Mile Associates v. Yudelson*, 68 A.D.2d 176 (4th Dep't 1979) (records relating to development of a shopping center); *West Harlem Bus. Group v. Empire State Dev. Corp.*, 13 N.Y.3d 882, 886 (2009) (documents related to Columbia University's construction of new 17-acre campus in West Harlem); *Kwitny v. McGuire*, 53 N.Y.2d 968, 969 (1981) (approved pistol permit license applications on file with the New York City Police Department).

⁴² Indeed, professional journalists in this State have described government agencies' all-too- frequent noncompliance and delay tactics in objecting to FOIL's ineffectiveness as a means of obtaining the release of non-exempt information. *See, e.g.*, Mark C. Mahoney, *Uphill Battle for Transparency in Government Continues*, The Daily Gazette, Mar. 15, 2019, <https://perma.cc/KFP6-SENH> (stating that government officials regularly decide not to follow FOIL and noting that "[a]lmost every day, journalists and citizens encounter public officials who routinely deny access to records without trying to comply with the law, who refuse to follow established deadlines for notification and compliance. Citizens routinely have to fight for basic public documents."); Jerry Moore, *Partly Cloudy on Sunshine Week*, Watertown Daily Times, Mar. 13, 2019, <https://perma.cc/KFP6-SENH> (stating that because "New York has an incredibly dysfunctional system when it comes to enforcing the state's FOIL . . . there's little incentive for government authorities in New York to adhere to FOIL").

governing an agency's response to a FOIL request are set forth in § 89(3)(a) of the statute. Under Pub. Off. Law § 89(3)(a), an agency must respond within five business days of receipt of a written request. That response must grant the request, deny the request in writing, or—in a particularly troublesome alternative—provide a statement of the *approximate* date by which the request will be granted or denied, which must be “reasonable under the circumstances.”⁴³ *Id.* This provision means that agencies never confront a firm deadline to make a determination in response to the request. If and when the agency decides to grant the request (in whole or in part), it must do so within 20 days or, if there are reasonable circumstances preventing the agency from complying with that deadline, inform the requester in writing of the reason the deadline cannot be met and provide a date certain “within a reasonable period” when access will be granted.⁴⁴ *Id.*

As a practical matter, the interplay of the above provisions has licensed some government agencies to respond to pending FOIL requests—whether discrete or voluminous—by periodically issuing standard form letters acknowledging receipt of the FOIL request and setting rolling deadlines for a response. Whether those delays are caused by a lack of resources at an agency or a willful and improper attempt by an agency to keep sensitive information out of the public domain, the effect for news organizations is the same: the public is denied timely access to potentially newsworthy information.⁴⁵

Unreasonable delays in disclosure effectively amount to denials of public access and contravene FOIL's premise that “the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government.”⁴⁶

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Courts have repeatedly recognized that temporal guarantees are indispensable to effective news reporting. As the Supreme Court reasoned in *Bridges v. California*, 314 U.S. 252, 269 (1941), a ban on reporting news “just at the time [the] audience would be most receptive” would equate to “a deliberate statutory scheme of censorship.” *See also United States v. Dickinson*, 465 F.2d 496, 512 (5th Cir. 1972) (“timeliness of publication is the hallmark of ‘news,’ and the difference between ‘news’ and ‘history’ is merely a matter of hours”); *Grove Fresh Distributors, Inc. vs. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (“The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression.”) *superseded on other grounds as recognized by Bond v. Utreras*, 585 F.3d 1061, 1068 n.4 (7th Cir. 2009); *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 561 (1976) (“As a practical matter . . . the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly.”); *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918) (“The peculiar value of news is in the spreading of it while it is fresh.”).

⁴⁶ *Matter of Capital Newspapers, Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 252 (1987) (citing *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979) (internal quotation marks omitted)). When former Governor George Pataki signed the current version of Pub. Off. Law § 89(3)(a) into law in 2005, he noted that avoiding delays in obtaining responsive documents would “ultimately [] result in a more open and accountable government. In addition, the new provision ensuring that records are timely disclosed after an agency determines to grant a FOIL request will prevent unjustified delays in turning over material that FOIL requires to be disclosed to the public.” Mem. filed with Assembly Bill No. 6714, at 3, Bill Jacket, 2005 N.Y. Laws, ch. 22. In practice, and as discussed above in the text, the 2005 amendment has resulted in exactly the opposite by facilitating agency delays in making records available to the public under FOIL.

2. Weak Provisions for Attorneys' Fees

When requesters are denied information, whether for legitimate reasons or otherwise, the most likely outcome is that the denial will never be challenged in court. In other words, a statutory system that contemplated having the courts be the impartial arbiter of FOIL instead has become a system where agency FOIL officers have the final say.

The statute's weak provisions for awarding fees to requesters when they prevail in FOIL litigation contribute to that reality. Requesters have no assurance of a fee recovery in even the most meritorious cases, making it financially perilous for requesters to initiate even plainly meritorious litigation. The Legislature recognized when adopting FOIL's current attorneys' fees provision in 1982, that a fee-shifting provision was needed to combat a "sue us" attitude within those governmental agencies that did not want to release records.⁴⁷

In its current form, the attorneys' fee provision has both a mandatory and discretionary component. Fees are mandatory where the requester "substantially prevailed" in a FOIL litigation and the agency had "no reasonable basis for denying access." Fees are discretionary when a requester denied access has "substantially prevailed" in a FOIL litigation and the agency's response was untimely. Pub. Off. Law § 89(4)(c)(i), (ii). Based on reports given at the Task Force's public hearings, reviewing courts appear reluctant to grant fee-shifting awards, even when the agency engaged in long delays.

3. Withholding Entire Documents In Lieu of Redactions

Recent judicial decisions have suggested that agencies can withhold all parts of an otherwise public document if any part of the document contains exempt information, even though standard practice under FOIL has been, when practicable, to redact the exempt material and release the remainder of the document. Accordingly, there is now significant doubt about the longstanding and fundamental principle that agencies should only refuse to disclose particular information that squarely falls within an exemption enacted by statute. In a 2018 decision, the Court of Appeals was asked to decide whether police personnel records, which are generally exempt from disclosure under Section 50-a of the Civil Rights Law, could be released once information identifying the officers was redacted.⁴⁸ The Court determined that a police agency was not required to use redaction to disclose police personnel records.

The Appellate Division, First Department, has taken the reasoning of the Court of Appeals a significant step further, holding that the use of redaction to allow for the disclosure of otherwise public documents is required in only one circumstance: "Redactions to records sought under FOIL are available only under the personal privacy exemption."⁴⁹ Under this decision, agencies can now

⁴⁷ See *N.Y. State Defenders Ass'n v. N.Y. State Police*, 87 A.D.3d 193, 195 n.2 (3d Dep't 2011) (quoting Assembly Mem. in Support, at 4, Bill Jacket, 1982 N.Y. Laws, ch. 73); see also S. Budget Report on Bills, at 11–12, Bill Jacket, 1982 N.Y. Laws, ch. 73.

⁴⁸ See *New York Civil Liberties Union v. New York City Police Dep't*, 32 N.Y.3d 556 (2018).

⁴⁹ *Judicial Watch, Inc. v. City of New York*, No. 160286/17 (1st Dep't Dec. 17, 2019).

withhold documents if the documents contain any information exempt from disclosure under a different FOIL exemption.

Advocates for requesters believe those decisions not only undermine public access but are at odds with the statutory language of FOIL's § 87(2), which states, "Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access records *or portions thereof* that" fall within a statutory exemption (emphasis added). In addition, they point to *Gould v. N.Y.C. Police Dept.*, where the Court said, "If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material."⁵⁰ If redaction is in fact no longer part of New York law, it puts the state at odds with the standard practice used under the federal Freedom of Information Act and under the open records law of multiple states.⁵¹ As Judge Rivera said in her dissent in *New York Civil Liberties Union*, the majority's opinion could mean that "redaction is unavailable even where it may be the sole method to effectuate the statutory goal of promoting government transparency to hold the governors accountable to the governed."⁵² (internal quotation marks omitted).

C. Recommendations for FOIL Reforms

1. Establish Clear Timetables to Remedy Delays

To prevent unjustifiable delays in the release of non-exempt government records, the Task Force supports an amendment establishing a clear and concise timeframe for agencies to respond to FOIL requests, as follows:

- A grant or denial of the right to inspect or copy records provided for under this article shall be made to the person or entity requesting the right by the agency official who has custody or control of the public record as soon as practicable but in no event more than 20 business days of the request. In the event of a denial, that official shall in writing give the specific reasons for the denial and indicate the procedures for appealing the denial. Except for good cause shown, any reason not specifically set forth in the denial shall be deemed waived by the agency.
- Failure to comply with a request to inspect or copy agency records within the 20-business-day period shall be deemed a constructive denial of the request and permit a requester to proceed to file an administrative appeal. However, an agency shall be exempted from the

⁵⁰ 89 N.Y.2d 267, 275 (1996)

⁵¹ See, e.g., *New York Times Co. v. NSA*, 205 F. Supp. 3d 374, 381 (S.D.N.Y. 2016) ("Even where a FOIA exemption applies, the withholding must be narrow, such that '[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt.'") (quoting 5 U.S.C. §552(b)); New Jersey's Open Public Record Act specifically requires a custodian to "delete or excise from a copy of the public record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record". *N.J.S.A.* 47: 1A-5(g).

⁵² 32 N.Y.3d at 573 (internal quotation marks omitted).

20-day requirement if it certifies to the requester that the request appears to call for production of more than 100 pages of records or that the agency is facing exceptional circumstances that go beyond predictable agency workload. Such a certification will extend the initial period of 20 business days to 40 business days. An amendment should also make clear that requesters are permitted to commence an Article 78 action following either (a) an agency's failure to make a timely determination of an administrative appeal or (b) a determination that does not result in the release of the documents requested. The latter provision is needed to remedy situations in which requesters receive no response to their requests, appeal, and are then told on appeal that the request has been sent back to the FOIL officer for a determination.

The proposed amendment expands the initial agency response time from the five business days in current law to a more practicable 20 business days. The goal is to promote more meaningful and informed agency responses at their inception, rather than the reflexive issuing of form acknowledgment-of-receipt letters.⁵³ Further, when FOIL requests for non-exempt records require the disclosure of extensive documents that may require redaction or are otherwise burdensome for an agency, the agency has the flexibility of extending the deadline by 20 business days. By establishing a controlling legal deadline of 40 business days for the production of responsive records, the proposed amendment lends clarification while accommodating the interest of the agency by providing a reasonable time period in which to comply with FOIL requests for even voluminous non-exempt records, as well as the interest of newsrooms in obtaining government information without protracted delays.⁵⁴

53 Notwithstanding the enlarged time for an initial agency response proposed by the amendment, the Task Force strongly recommends that agencies make documents routinely compiled in the course of performing their governmental responsibilities—e.g., meeting agendas and minutes—readily accessible by posting them on their official websites within five business days.

54 For examples of states that have adopted specific deadlines for responding to open records act requests, *see* ARK. CODE ANN. § 25-19-105(e) (“If a public record is in active use or storage and therefore not available at the time a citizen asks to examine it, the custodian shall certify this fact in writing to the applicant and set a date and hour within three (3) working days at which time the record will be available for the exercise of the right given by this chapter.”); MISS. CODE ANN. § 25-61-5(1)(a) (“a public record of the public body shall be provided within one (1) working day after a written request for a public record is made. No public body shall adopt procedures which will authorize the public body to produce or deny production of a public record later than seven (7) working days from the date of the receipt of the request for the production of the record.”), *see also* MISS. CODE ANN. § 25-61-5(1)(b) (“in no event shall the date for the public body’s production of the requested records be any later than fourteen (14) working days from the receipt by the public body of the original request.”); N.M. STAT. ANN. § 14-2-8(D) (“A custodian receiving a written request shall permit the inspection immediately or as soon as is practicable under the circumstances, but not later than fifteen days after receiving a written request. If the inspection is not permitted within three business days, the custodian shall explain in writing when the records will be available for inspection or when the public body will respond to the request. The three-day period shall not begin until the written request is delivered to the office of the custodian.”); R.I. GEN. LAWS. § 38-2-3(e) (“A public body receiving a request shall permit the inspection or copying within ten (10) business days after receiving a request. If the inspection or copying is not permitted within ten (10) business days, the public body shall forthwith explain in writing the need for additional time to comply with the request [and] may have up to an additional twenty (20) business days to comply with the request [under certain circumstances].”).

The import of these proposals is to provide options to requesters who often face extended delays. Many will decide to wait out delays. Others, however, will now have a clearer right to seek court relief when delays are problematic.

2. Engage in Further Review of the Fee-Shifting Provision

Fee shifts are important in FOIL to incentivize agencies and local governments to meet their obligations and to stop the practice of forcing journalists and other requesters to pay the costs of getting records that they are entitled to have and should have been given without litigation. Not all denials are the product of bad faith or governmental recalcitrance. Rather, many FOIL officers are committed to disclosure but limitations on resources often make it difficult for FOIL officers to meaningfully consider FOIL requests. For that reason, the Task Force advocates for the provision of greater resources to those government employees and officers on the front line of FOIL-processing (see below).

Nonetheless, in its initial report, the Task Force also proposed that a mandatory fee shift, requiring the awarding of fees to a prevailing requester, was needed to ensure an appropriate level of governmental transparency.

Following the tabling of the initial report by the House of Delegates, the Task Force has reconsidered its position. It does not seek an amendment of FOIL's fee provision at this time, given the financial hardship that has been visited upon the state's local governments as a result of the pandemic. Nonetheless, the Task Force recommends that the Bar Association continue to study how the fee-shifting provisions have been applied by the courts, other state's experiences with fee shifting, whether the judicial decisions have been consistent with the legislative intent of the provisions, and whether the Bar Association should recommend amendments to the provisions so that they appropriately incentivize agencies and local governments to implement FOIL's policy of broad disclosure and penalize those governmental bodies that are not living up to their transparency obligations under the law.

3. Explicitly Authorize Redaction

The recent court holdings cast doubt on the use of redaction, which has been an important device for releasing public documents that also contain some information that can be properly withheld. The key provision of FOIL provides that "Each agency shall . . . make available for public inspection and copying all records, except that such agency may deny access to records *or portions thereof*" that fall within an enumerated exemption.⁵⁵ To assure that the legislative intent is fully realized, the Task Force recommends that FOIL be amended to make clear that agencies have an obligation to segregate disclosable information from exempt information and release the material in redacted form when such segregation is practicable.

⁵⁵ Pub. Off. Law § 87(2) (emphasis added).

4. Provide Necessary Resources to FOIL Offices

In our public sessions, requesters often voiced their frustration with FOIL officers who engaged in foot-dragging or proffered inappropriate and meritless reasons to withhold a document. But we also met with government employees who impressed us with their concern about public access. However, a common refrain in the testimony was that many agencies and local governments are simply underfunding their FOIL offices or failing to make FOIL operations a budgetary priority. The root causes of FOIL's failures are many. But adequate funding and staffing of FOIL units and upgrading needed technology to manage agency information is the one step that could cure many of the problems facing FOIL requesters and strike a blow for real transparency. The Task Force urges the Legislature to show a real commitment to openness by earmarking funds specifically to finance expanded FOIL operations at the state agencies that are the leading recipients of FOIL requests.

IV. Proactive Transparency Efforts

A. Background

Proactive disclosures practices—that is, an agency's disclosure of information without waiting for a FOIL request—is an important ingredient in helping assure that necessary government information is available to journalists and to citizens.⁵⁶ In 2013, Governor Cuomo issued Executive Order 95, "Using Technology to Promote Transparency, Improve Government Performance and Enhance Citizen Engagement." The principal focus of the executive order was the creation of an open data website, which would allow New York citizens to access governmental data without the need for a FOIL request. Through the New York State Office of Information Technology and Services ("ITS"), the state launched OpenNY. The City of New York has undertaken a similar effort, launching NYC Open Data. The State Comptroller provides similar open data through Open Book New York. Agencies have been working to identify information that can be made available through these open sources.

As a result of these efforts, millions of data points about government in New York are available and are being accessed by New York citizens and businesses. At a time when news organizations have fewer resources to devote to reporting, the availability of data is critical to how the press operations as a watchdog on government spending and activities. The efforts undertaken by ITS, the City of New York, and the State Comptroller are valuable and should be encouraged and expanded.

⁵⁶ In its sessions seeking public input, the Task Force also heard about another vital area of proactive transparency: the ability of journalists and citizens to have access to both court documents and proceedings. Over the past decade, New York has significantly expanded the use of online dockets to provide remote access to those seeking information about court proceedings and access to judicial documents. With smaller newsroom budgets, regular coverage of the courts has declined in many parts of the state. Such coverage is a vital tool in enhancing the public's understanding of the courts and in ensuring that the courts administer justice fairly and efficiently. However, the Task Force heard of otherwise public documents not being placed on public court dockets. Full review of the court's transparency initiatives is beyond the scope of this report, but the Task Force endorses efforts to make court records more accessible digitally and to remove the procedural obstacles news organizations often encounter in challenging court sealing or closing in individual cases.

But in looking at the issue of proactive transparency, the Task Force discovered three significant gaps in the effort to make governmental information more freely available. First, many local governments lag far behind. They either lack sufficient technology or are not using the technology they have effectively. In some localities, finding basic information like a town code can be challenging for even veteran government watchers. Second, concerns were expressed that the information made available through the portals was often not the kind of information that journalists and local news organizations find most valuable in providing government oversight. As a result, they still had to resort to FOIL requests and face the problems discussed above. Third, the open meetings law (Pub. Off. Law, Article 7), which is designed to implement pro-active transparency, remains flawed and regularly unenforced. The law requires, for instance, that meeting notices go out one week in advance of a meeting. It also contains provisions for making meetings available through live streaming. The law also requires that resolutions, laws, and other materials to be discussed at a meeting be made available “to the extent practicable as determined by the agency or department.” The law also encourages records to be posted on the governmental website, but again only when “practicable as determined by the agency or department.” Because of the qualifying clause, local governments are free to make minimal effort or no effort to make materials available.

B. Recommendations

The Task Force encourages state and local governments to continue to fund initiatives to make data available proactively. But, in conjunction with such expansion, the Task Force has three recommendations.

1. Identify Necessary Information for Disclosure

State and local agencies should engage with activists and journalists to try to better define the kind of information that would be most useful in their efforts to provide real oversight to government. The agencies face problems in making sure protected personal information is not released and in identifying the kind of information that is most valuable to journalists and others. Nonetheless, releasing data for the sake of releasing data rarely leads to real transparency, despite the amount of money and effort spent on such disclosure regimes. “Smart release”—crafted disclosures that target the kinds of information citizens really want and need and are entitled to have—is both a better use of resources and a better approach to transparency.

2. Improve Disclosure at the Local Level

The Legislature should enact laws that require counties, towns, and villages to make certain basic information about governance, from meeting dates and meeting agendas to codes and board decisions, available online through the local government’s website in a format that prominently displays the links to the information. Journalists and citizens should be able to come to a municipal or county website and see immediately the most basic documents of governance. While we appreciate the financial constraints that small municipalities face, the proposals here represent small changes designed to ensure the transparency that is already contemplated by law. There is no question that

citizens have the right to these materials. By making them available via a website, municipalities avoid the more time-consuming practice of having employees respond one by one to requests from citizens for the same material.

3. Fix the Open Meetings Law

The Task Force recommends that the Legislature amend the Open Meetings Law in two ways: (1) the enumerated document disclosures set out in the statute should be mandatory, not elective, and (2) there should be meaningful deadlines for disclosures designed to put documents into the hands of citizens prior to meetings. As an enforcement mechanism, board and council decisions should be voidable if undertaken in violation of the notice requirements.

V. Nonprofit News Organizations

As traditional for-profit local journalism has declined over the past decade, nonprofit news organizations have worked to fill the void. Given the difficulty of finding robust revenue models to support for-profit efforts, nonprofit news organizations have seen a rapid expansion over the last decade and may offer the best chance to restore local coverage and to deliver news and information to communities in New York. While nonprofits can help alleviate the crisis in local journalism, these newer players require philanthropy, investment, and support to become sustainable.

A. The Growth of Nonprofit Journalism

There are now more than 200 nonprofit news organizations throughout the country, employing over 2,200 journalists and generating revenue of over \$350 million.⁵⁷ These nonprofit organizations have worked to fill critical gaps in news coverage and have made significant impact.

The nonprofit world of news is becoming increasingly complex, as nonprofit ventures seek different ways to engage with communities, funders, and philanthropic organizations and to reshape how local news is thought of and supported. Nonprofit models to meet local journalism needs have taken a variety of forms, at the national, state, and local level.

Nationally, a number of exciting initiatives have emerged to support local journalism, including (1) the American Journalism Project (<http://www.theajp.org/>), a venture philanthropy fund that invests in nonprofit local news startups and provides them with business and technical expertise; (2) the ProPublica Local Reporting Network (<https://www.propublica.org/local-reporting-network/>), an arm of the nationally known investigative reporting nonprofit ProPublica, brings its investigative resources to local reporting entities to help cover one topic in-depth; (3) Report for America (<https://www.reportforamerica.org/>), which places reporters in existing newsrooms in need, and funds half of their salaries, in order to foster reporting as public service; (4) NewsMatch

⁵⁷ INN Index, <https://inn.org/innindex/>; Gerry Smith, *Local News in America Is Dying. Charity Might Save It*, Bloomberg, Apr. 25, 2019, <https://www.bloomberg.com/news/articles/2019-04-25/silicon-valley-is-killing-local-news-can-charity-bring-it-back>.”

(<https://www.newsmatch.org/>), a national matching-gift campaign launched by the Knight Foundation to grow fundraising capacity in nonprofit newsrooms and promote giving to journalism among U.S. donors (available to members of the Institute for Nonprofit News); and (5) Philadelphia's Solutions Journalism project, which brought together 15 news organizations to report for one year on a single topic of prisoner re-entry into society and is premised on the idea of collaboration and creating local news ecosystems.⁵⁸

States and statewide organizations also are working to support local journalism. The Colorado Media Project (<https://coloradomediaproject.com/>) has engaged a broad-based coalition of civic leaders, students, academics, philanthropists, business leaders and journalists, among others, to strengthen Colorado's diverse local news ecosystem and to develop partnerships and programs designed to increase newsroom capacity, support collaboration, and engage community.

New Jersey enacted legislation to create the Civic Information Consortium, first-of-its-kind state-level public charity to support local news. The Consortium is charged with strengthening local news coverage and boosting civic engagement by funding innovative media and civic-technology projects throughout the state. The bill establishing the Consortium passed the New Jersey State Legislature with overwhelming bipartisan support in 2018 and was signed into law by Governor Murphy, although the state has struggled to fully fund the effort, with partial funding starting only in 2020.

At the local level, the *Salt Lake City Tribune* recently converted from a profit-seeking entity into a tax-exempt organization. The *Tampa Bay Times* transferred its ownership to a nonprofit organization while keeping the news organization as a taxable for-profit. *The Philadelphia Inquirer* is pursuing a hybrid model, where the news company was transferred to a newly formed public benefit corporation that operates alongside a separate endowment designed to encourage innovation. *The Seattle Times* partners with an existing community foundation to fund coverage of various local issues, and it has sparked the creation of similar partnerships in news organizations around the country.

In addition to these larger local news organizations, smaller local entities are also pursuing innovative nonprofit models.

The City is an independent, nonprofit, digital news outlet that debuted in April 2019. It is dedicated to hard-hitting and impact-oriented reporting covering local news in New York City. It is backed by almost \$10 million in starting capital from major philanthropies and individuals. <https://thecity.nyc/>.

The Akron Devil is a monthly arts and culture print magazine that broke new ground by transitioning to a cooperative ownership model that allows its readers to share ownership of the publication at various levels. <https://thedevilstrip.com/co-op/>.

Next City, a Philadelphia based nonprofit publisher with a focus on helping improve social, economic, and environmental change in cities launched an innovative pay-what-you-want-for- content model to view its webinars. <https://nextcity.org/>.

⁵⁸ See Philadelphia's Reentry Project, <https://thereentryproject.org>.

The New Jersey Sustainability Reporting Hub pursues collaborative journalism projects, including national/local partnerships and local outlets teaming up. <https://srhub.org/>.

B. The Challenges Facing Nonprofit News Organizations

Local journalism nonprofits and reporting collectives (nonprofit organizations that share resources in gathering news) face challenges to their success and sustainability.

1. Local journalism as a public good. Despite growing evidence that the crisis of local journalism is also a crisis of democracy, the public is accustomed to thinking about local news as a for-profit revenue product and not a public good. For nonprofit local journalism to succeed in a meaningful way over the long term, local journalism must be thought of as a public good and a civic service, akin to hospitals, libraries, and universities, which both communities and funders should support philanthropically as a cornerstone to our democracy. Journalism, however, is not on the list of causes and institutions that the public naturally thinks of when choosing philanthropic causes to support. Absent this cultural shift and growing of the philanthropic pie, it will remain challenging for nonprofit entities to obtain the financial support required to sustain nonprofit local journalism.

2. Complex legal landscape. Each of the nonprofit models highlighted above carries different legal liabilities. Transitioning from a for-profit to a nonprofit model is particularly challenging and requires expert legal advice to navigate successfully. The form the transition takes can vary, including (for example) an asset transfer or a merger with an existing 501(c)(3) organization as the surviving entity. There is the potential for significant tax liability depending on the structure of the organization and the way the assets are sold or converted to a tax-exempt vehicle. Nonprofit news organizations also need to comply with various laws and tax regulations that impact how a news entity can function (e.g., bars on endorsing political candidates or lobbying governments). There are also important corporate governance practices that nonprofit news organizations should follow, as mandated, for instance by New York's Not-for-Profit Corporation Law and the federal tax code.

3. Lack of resources to fund legal attacks and access to information. All news organizations need legal resources to defend against unfounded legal attacks and harassment and to protect public access to information. This need is especially acute for local news organizations lacking robust resources of their own.

4. Perceived First Amendment barriers to government assistance. Both journalists and the public at large may believe that governments must stay out of local journalism because governments cannot support journalistic efforts consistent with the First Amendment. There certainly are constitutional barriers to what government can do to help solve the crisis in local journalism, but we have seen both in the U.S. (with some public support for public broadcasting) and abroad (with organizations like the BBC) that government support can be undertaken without compromising journalistic independence. In addition, it is possible to

consider non-content-based legislative initiatives, like tax relief, that do not raise the same concerns about independence.

5. Insurance. Nonprofits face the same challenges regarding insurance coverage discussed above.

C. Ways in Which the Bar Association Can Assist

Rather than make unique recommendations in respect to nonprofits, the Task Force instead underscores that the recommendations identified throughout this report in regard to libel reform, amendment of FOIL, insurance, and pro bono initiatives, will enhance the burgeoning work of nonprofits. In addition, we believe NYSBA has a role to play in initiating an important public conversation about the viability of public funding of nonprofit news organizations (and, more broadly, news organizations however they are organized as incorporated entities). The issues are complicated, and for that reason the Task Force recommends that NYSBA launch a longer-term study of the feasibility of legislative support for local news, including whether New York State could replicate New Jersey’s Civic Information Consortium in some shape or form or provide unique tax incentives for subscribers to news outlets or to owners who donate community business assets and seed philanthropic trusts to meet local needs. There are a variety of proposals for governmental support that are actively being discussed.⁵⁹ NYSBA, as the preeminent association of lawyers in the state, is uniquely situated to help New York explore the possibility of public support because of its expertise in the areas of law that would be implicated and the association’s broader concern for civic engagement, checks and balances on government, and the imperative of honest government.

VI. Discount and Pro Bono Legal Services

One of the more direct ways that the legal profession can support “free expression in the digital age” is by providing legal services to underfunded news organizations on a free (pro bono) or discounted basis. The Task Force examined several existing methods and identified gaps.

A. Background

It is critical for a news organization to have access to adequate legal services, in order to serve its own needs as an organization, and to serve its audience. One lawsuit can put a news organization—even a large one—out of business, as we saw in the Gawker case. And one stonewalled Freedom of Information request can prevent a community from having access to important information about its government and elected officials.

However, it is not just high-profile or urgent matters that require legal support. While today’s news outlets tend to be less profitable than the media powerhouses of the past, they still have basic enterprise needs—contracts, tax, HR issues—that require legal support.⁶⁰ Thus, support is needed

⁵⁹ See Nicholas Lemann, *Can Journalism Be Saved?*, N.Y. Review of Books, Feb. 27, 2020.

⁶⁰ *The Legal Needs of Emerging Online Media: The Online Media Legal Network After 500 Referrals*, Digital Media

not just from the Bar’s media lawyers but from those with expertise in contracts, labor and employment, and other business areas.

Various models exist for providing free or low-cost legal services, and for connecting those in need of such services with those who provide them in various areas of the law. There are also similar efforts aimed at journalists. (*See* Appendix A.) The Student Press Law Center provides legal support for campus-based journalists. The Reporters Committee for Freedom of the Press (RCFP) recently launched the Local Legal Initiative, a foundation-funded initiative to embed legal resources in states most in need of them. However, this effort will only support five states initially, and New York is not among them. Moreover, there is only so much a single attorney can do to help an entire state’s worth of news outlets. In addition, law school clinics provide free legal services on a pro bono basis, in a variety of fields. In the last few years, a number of new clinics have launched with a focus on First Amendment free speech issues, some with funding from the Stanton Foundation; these include, in New York State, one at Cornell Law School⁶¹ and the Civil Liberties & Transparency Clinic at University of Buffalo School of Law. The Yale Law School houses the Media Freedom Information and Access Clinic. Such clinics typically function as a small private law firm. The advantage is that they are generally free to those who qualify and are selected as clients. However, clinics may be limited by geography and bar admissions in terms of representing individuals or organizations in court, and they are further limited by the constraints of a student-driven resource whose primary purpose is pedagogical (i.e., they are not fully resourced year-round and are limited by student schedules).

A common theme with law school clinics and other projects such as the RCFP’s Local Legal Initiative is their reliance on one or a few major funders. Like a poorly diversified stock portfolio, this can translate to risk and uncertainty for a project’s long-term sustainability, as they are vulnerable to shifts in funders’ priorities and resources, and funding is not guaranteed in perpetuity. As a result, those dependent on such gifts would be well advised to devote at least some time to fundraising to ensure their longevity.

B. Recommendation

The Task Force believes that there is a concrete step that the Bar Association can take to help connect smaller news organizations with legal resources: a NYSBA-sponsored referral network. The Task Force recommends that the Association investigate creating such a network aimed exclusively at services for journalists and news organizations. Such a dedicated network would be a visible

Law Project of the Berkman Center for Internet & Society at Harvard University (April 2014) at 15. “When the OMLN was launched [in 2009], the DMLP expected a majority of its work would involve urgent responses to legal threats. The DMLP was surprised to see how few matters required urgent referral, and how many matters were instead from clients proactively considering their legal needs.” And “. . . there remains much that has not changed in the nature and needs of journalism as it flourishes online. Rather, what has changed is journalists’ monetary ability to obtain counsel for the sorts of issues that these ventures have always faced.” *Id.* at 14.

⁶¹ Clinics have been established across the country, including at Vanderbilt, Duke, and Arizona State.

testament to the Association’s commitment to marshaling legal resources in the aid of transparency and democracy. There are models that the State Bar could draw upon in designing a network:

- The Institute for Nonprofit News, formerly known as the Investigative News Network (“INN”), has partnered with the nonprofit Media Law Resource Center (“MLRC”) to create a “Legal Connect” project that helps connect nonprofit news organizations that are members of INN with affordable counsel. INN membership is available to nonprofit news organizations.
- From 2009 to 2017, the now-defunct Online Media Legal Network provided a nationwide referral network to connect independent online journalists and journalism organizations with affordable legal services. The OMLN model is instructive. The referrals themselves were free; participating lawyers and firms were encouraged but not required to offer services pro bono. The network made over 500 referrals for over 260 clients. While the model was successful, it was forced to shut down when its funding was not renewed; however, the online portal still exists and could be reactivated if a new entity were willing to take it on.

The precise scope of the network, including the nature of services to be offered, the fee structure, and the eligibility of those who can access it, would require further study but such a network would fill an obvious need and play to traditional strengths of the Bar Association: connecting lawyers to New Yorkers with legal needs in pursuit of a greater good.

The Task Force also recommends that NYSBA develop programs and initiatives to provide pro bono legal representation to local news organizations defending against SLAPP suits or seeking access to information. The Bar Association can sponsor programs specifically designed to educate practitioners outside of New York City on basics of media law. It can also encourage the recognition of assistance to organizations as important pro bono work, especially within New York’s innovative Pro Bono Scholars Program for third-year law students. Such programs would allow the Bar Association to form alliances with existing press-freedom groups that provide support to news organizations.

VII. The New Laws

A. Libel and anti-SLAPP

In its initial report the Task Force paid special attention to libel law in considering the impact of law on local journalism. In particular, as local news organizations faced new and daunting economic challenges, the threat or reality of libel suits took on new significance. In simplest terms, the Task Force sought to study how the fear of legal liability can lead publishers to avoid controversial topics or decline to investigate issues that may offend powerful interests in the community.

At the time of its initial review, the Task Force found that New York’s libel law was largely sound—with one notable exception. New York lagged the nation in protecting news organizations,

journalists, and concerned citizens from vindictive lawsuits brought to stifle a speaker’s commentary, criticism, or dissent. These lawsuits—known as Strategic Lawsuits Against Public Participation or SLAPP suits—typically involve moneyed interests filing legal claims for libel, slander, or other professed torts against individuals or entities who have exercised their First Amendment rights to speak out on a topic. Although SLAPP plaintiffs profess to seek redress through the court system, these parties typically file legally flawed claims that cannot survive real judicial scrutiny and thus do not file their claims to obtain a legal victory. Rather, SLAPP plaintiffs bring their claims to burden their targets with expensive and time-consuming litigation and to weaken or silence the speakers.

The Task Force, in its initial report, expressed concern that New York’s anti-SLAPP laws (Civ. Rights Law §§ 70-a, 76-a and C.P.L.R. 3211[g], 3212[h]) covered vindictive lawsuits seeking to stifle speech in a just single very narrow area: government petitioning activities. The laws did not cover lawsuits seeking to stifle speech on other matters of general public importance. The Task Force also found that laws did not provide clear timetables for early resolution of SLAPP suits or for mandatory attorneys’ fees (or any other mandatory compensatory award) to a defendant that wins dismissal of the SLAPP suit.

The Task Force recommended, in its initial report, that New York amend the anti-SLAPP laws to address these areas.⁶² At its June 2020 meeting, the House of Delegates voted to amend the Task Force’s initial report by eliminating proposals for fee-shifting and for a mandatory stay of discovery. It then tabled the entire report because there were additional questions and time was short. In the weeks after the House meeting, the Legislature proceeded to pass an amendment to the anti-SLAPP laws. Governor Cuomo signed the bill into law in November 2020. Among other things, the new law expands the reach of New York’s anti-SLAPP rules to all matters of public concern and imposes mandatory fee-shifting. The Task Force applauds the Legislature and the governor for their decisive action on this important piece of legislation and believe that the law will provide needed protection to news organizations across the state.

B. Section 50- a

The Task Force heard of widespread concerns with Section 50-a of the Civil Rights Law, which had come to broadly impede local reporting on matters relating to police and law enforcement. Section 50-a provided that personnel records of law enforcement officials were confidential and therefore not subject to disclosure under FOIL. In practice, the exemption was being used to withhold most documents that would reveal a police officer’s disciplinary record and how the officer’s police force dealt with the matter.⁶³ As applied in that broad manner, the law impeded meaningful community-

⁶² The Task Force was not unanimous in all of these recommendations. One Task Force member dissented from the recommendations regarding mandatory attorneys’ fees, the discovery stay, and the right to an interlocutory appeal and his dissent was included in the initial report.

⁶³ See Report on Legislation, Civil Rights Committee and Committee on Criminal Courts, New York City Bar Association, May 2018 (<https://s3.amazonaws.com/documents.nycbar.org/files/2017285-50aPoliceRecordsTransparency.pdf>); 2018 Report to the Governor and Legislature, Committee on Open Government, December 2018 (<https://www.dos.ny.gov/coog/pdfs/2018%20Annual%20Report.pdf>).

based reporting on police activities and is out of step with laws in other large and diverse states that permit broad access to police disciplinary records.⁶⁴

In its initial report, the Task Force proposed that § 50-a be reformed so that it could no longer be invoked as an exemption to FOIL. The Task Force believed that access to law enforcement personnel records should instead be governed by FOIL's traditional exemptions dealing with privacy and sensitive law enforcement matters. After the House of Delegates voted to table the initial report in early June, the Legislature voted to repeal § 50-a and amend FOIL to set out new rules governing access to law enforcement personnel records. The new provisions largely address the concerns that were central to the Task Force's proposal about § 50-a. The new provisions are designed to significantly broaden access by the public and by journalists to law enforcement disciplinary records. While the courts' interpretation of the provisions will ultimately determine how effective the new law is in enhancing transparency, the Task Force applauds the Legislature and the governor for making this important change in the law.

⁶⁴ See, e.g., *Kalven v. City of Chicago*, 7 N.E.3d 741 (Ill. App. Ct. 2014).

Appendix A

Resources

There are numerous organizations and partnerships that provide legal services in support of local journalism. Below are listings of organizations that provide pro bono (free) legal services to news organizations; referral networks that help connect news outlets with media counsel, often on a discounted basis; and other resources.

Pro Bono Legal Services

- **The American Civil Liberties Union** and its local affiliates take on a variety of cases championing individual rights, including freedom of speech. <https://nyclu.org/>
- **The First Amendment Coalition** defends the public’s right to know and freedom of speech. <https://firstamendmentcoalition.org/>
- **The Knight First Amendment Institute at Columbia University** defends the freedoms of speech and the press in the digital age through strategic litigation, research, and public education. <https://knightcolumbia.org/>
- **The Press Freedom Defense Fund** provides essential legal support for journalists, news organizations and whistleblowers “targeted by powerful figures.” <https://www.pressfreedomdefensefund.org/>
- **Reporters Committee for Freedom of the Press** provides pro bono legal support for public interest journalism. <https://www.rcfp.org/feln-announcement/>
- **Law School Legal Clinics** operate like small, student-driven law firms, taking on selected clients pro bono. Clinics serving media clients in New York State include:
 - **Cornell Law School First Amendment Clinic** represents the interests of news outlets, journalists, researchers and other newsgatherers. <https://www.lawschool.cornell.edu/Clinical-Programs/first-amendment-clinic/About-us.cfm>
 - **University at Buffalo Law School - Civil Liberties & Transparency Clinic** defends free speech, privacy and other individual rights while pressing for greater transparency and accountability in government. <https://www.law.buffalo.edu/beyond/clinics/civil-liberties.html>
 - **Yale Law School Media Freedom & First Amendment Clinic** aims to support robust investigative journalism in the digital age and to advance the public’s right of access to information needed for democracy to function. <https://law.yale.edu/mfia>. The clinic recently launched a **Local News Initiative** to provide journalists at small and nonprofit news sites in New England with pro bono legal services to support their newsgathering and defend their publications. <https://law.yale.edu/mfia/projects/local-news-initiative>

(Other law schools with clinics devoted to First Amendment and freedom of expression legal matters include those at Arizona State University, Duke, George Mason University, Michigan State University, Southern Methodist University (launching fall 2020), Tulane, UCLA, the University of Georgia, the University of Virginia, Vanderbilt, and Washington University in St. Louis.)

Referral Networks

- **MLRC Legal Connect, in partnership with the Institute for Nonprofit News (INN)** – a referral service connecting nonprofit news organizations with affordable media law specialists. Available to INN member organizations. <https://inn.org/inn-support-services/legal/legal-connect-referral-services/>

Grant-Making Foundations

There are also a number of foundations that make grants to strengthen local journalism. For example:

- **Knight Foundation:** <https://knightfoundation.org/press/releases/knight-foundation-focuses-on-building-the-future-of-local-news-in-300-million-five-year-commitment/>



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Memorandum in Opposition

In January 2021, the Task Force on Free Expression in the Digital Age released its report and recommendations to address the crisis in local journalism. The Long Island Village Clerks & Treasurers Association has reviewed this report and strongly opposes the recommendations made as they relate to local government.

While the Long Island Village Clerks & Treasurers Association agrees that local journalism plays an important and fundamental role in keeping communities informed, we strongly disagree with the baseless sentiment that the crisis in local journalism is due in part to local governments denying timely access to newsworthy information (see “Report and Recommendations of the Task Force on Free Expression in the Digital Age,” p. 20). Specifically, the report asserts that New York’s Freedom of Information Law (hereinafter FOIL) lacks enforceable timetables for disclosure and, additionally, contains weak provisions for attorney’s fees in the event that a requester prevails on a claim, thereby contributing to the crisis in local journalism. These conclusions are false and mischaracterize the law; there are very specific timeframes in place, and the law was amended in recent years to allow for attorney’s fees in the event that the law is not complied with.

At the village and city level, the records access officer – often times the Village Clerk, an appointed official with many statutory duties – is charged with responding to FOIL requests. New York is a vast state, with 534 villages that range in population from 11 to nearly 53,891. The Long Island Village Clerks & Treasurer Association represent Long Island’s two cities, Long Beach and Glen Cove; as well as 64 villages in Nassau County and XX in Suffolk County, with a population range similar to that of New York State.

The Village Clerk or City Clerk generally serves as the records officer. Some Clerks have an expansive staff to assist with requests and broadband access to facilitate expeditious replies, while others operate alone, without access to high-speed internet; some even work part-time or for multiple municipalities. From the largest local governments to the smallest, the same principles apply: FOIL requests must be responded to in accordance with the Public Officers

Law and the villages' or city's own policy. The Long Island Village Clerks & Treasurers Association is confident in asserting that, under existing law, if a records access officer receives a FOIL request from the media, they will respond to the request within the statutory timeframes to the extent practicable and, if impossible, they will work with the journalist to ensure their documents are ultimately received in a timely fashion.

The recommendations suggested by the task force fail to consider that they will not only place an undue burden on already strained village and city governments but also, that they will "remedy" a problem that does not exist. That is, the report speaks to addressing "unjustifiable delays" in the release of non-exempt government records (see *id.* at p. 22), yet does not cite to any specific incidence of a denial or delay of local government records to local journalists – aside from sweeping hyperbolic statements from reporters (see *id.* at p 19, footnote 37). It is respectfully submitted that this report diminishes the work that records access officers engage in to ensure that the public is adequately informed and, additionally, that the statutory timeframes that already exist in the law are well-suited to ensuring both the timely access to governmental records and the awarding of attorney's fees if necessary. The recommendation that villages and cities make certain documents available online (see *id.* at p 26) is an unfunded mandate that fails to consider that many local governments lack the resources, both technological and staffing-wise, to comply.

Finally, it must be stated that local governments are not the enemy of local journalism that has led to its decline; indeed, the report does recognize the main contributor, that being digital journalism – yet still focuses on fixing a statute that isn't broken to solve a crisis not related to it. For the foregoing reasons, the Long Island Village Clerks & Treasurers Association strongly opposes the recommendations made in the Task Force's report and recommends that the House of Delegates vote no on the aforementioned recommendations.

MEMORANDUM

TO: NYSBA TASK FORCE ON FREE EXPRESSION IN THE DIGITAL AGE
FROM: LOCAL AND STATE GOVERNMENT LAW SECTION
RE: APRIL 2021 REPORT & RECOMMENDATIONS OF THE TASK FORCE ON FREE EXPRESSION IN THE DIGITAL AGE, THE CRISIS IN LOCAL JOURNALISM
DATE: May 28, 2021

Executive Summary

The members of the Local and State Government Law Section include the attorneys most likely to encounter FOIL and the OML in their daily practice, yet our section was not invited to participate in the study or creation of the Task Force's Report. Consequently, the proposals and recommendations set forth in the Report focus largely on difficulties faced by local journalists and do not adequately consider or reflect: 1) the practical realities of FOIL and OML administration; 2) the careful legislative balance between the administrators and beneficiaries of these laws; and 3) the insight and experience of those attorneys who are most closely associated with the administration of FOIL and OML in their day-to-day operations. **The Local and State Government Law Section requests that the Task Force consider and incorporate the comments provided herein in a revised report.**

1. The Report of the Task Force is a "solution in search of a problem," and the limited resources of NYSBA are better allocated to issues more relevant to the New York Bar as a whole, rather than an issue that is ancillary to the practice of most of its members, and antagonistic to half of those that do encounter FOIL and OML in their daily practice. (Pages 1, 2)
2. The practical realities of FOIL and OML administration are ignored in the Report. The rigid timelines for responding to a FOIL request are flawed and unrealistic. **The complexity, availability and clarity of a FOIL request are more determinative of the appropriate time for a response than page count.** (Pages 2-4)
3. Many local governments lack the human and technological resources necessary to comply with the proposed FOIL timelines. **A "one-size-fits-all" approach to FOIL is not feasible.** While the Report recognizes the additional cost to government for complying with its recommendations, it earmarks funds only to State agencies. (Pages 4-6)
4. The recommendations of the Task Force, in many respects, are counterintuitive and self-defeating, **and will result in more litigation and less access to records.** (Page 4)
5. The fee-shifting provisions in the **current law ensure transparency and adequately protect requesters** under FOIL and should continue post-COVID. The rigid timelines proposed in the Report could result in courts newly imposing fees upon taxpayers even without any direct change to the fee-shifting provisions. (Pages 4, 5, 6)

MEMORANDUM

TO: NYSBA TASK FORCE ON FREE EXPRESSION IN THE DIGITAL AGE

FROM: LOCAL AND STATE GOVERNMENT LAW SECTION

RE: JANUARY 2021 REPORT & RECOMMENDATIONS OF THE TASK FORCE ON FREE EXPRESSION IN THE DIGITAL AGE, THE CRISIS IN LOCAL JOURNALISM

DATE: MAY 28, 2021

The following is the position of the NYSBA Local and State Government Law Section concerning the April 2021 Report & Recommendations of the Task Force on Free Expression in the Digital Age, The Crisis in Local Journalism ("the Report"). The Report concerns a proposal to reform New York's Freedom of Information Law (FOIL) and the Open Meetings Law (OML).

As a preliminary matter, the recommendations contained in the Report directly relate on a daily basis to the practice of law by our Section members. Local and State Government Law Section members are public and private sector attorneys engaged in dealing in any capacity with legal issues concerning local or state government. Our Section's members are in-house municipal attorneys, and public and private sector counsel, who contend on a regular basis with FOIL and/or the Open Meetings Law. Some of our Section members also serve as Records Access Officers for local government agencies. Some Section members also file FOIL requests with government agencies.

As a result, we continue to believe that, had our Section been invited to participate in the Task Force study, the resulting recommendations would have considered, and reflected, not only the difficulties faced by local journalists, but also the practical realities of government agencies responding to the information requests made by journalists as well as those made by other citizens and entities. Indeed, upon first being notified in January 2021 of the revised report which was proposed to be made by the Task Force, representatives of our Section familiar with FOIL and the Open Meetings Law from varying perspectives met with Task Force representatives to seek common ground. Unfortunately, the report was soon thereafter issued without change.

We submitted written comments about that report on February 16, 2021. We did not hear further from the Task Force. Thereafter, the revised April 2021 report was issued, with some slight modifications purportedly in response to concerns raised by our Section. The revised report continues to woefully ignore the legitimate concerns of our Section.

At the outset, our Section recognizes that FOIL and the Open Meetings Law both serve important public policies by opening the processes and records of government where feasible. Municipalities throughout the State work in good faith every day, despite significant operational, staffing and budgetary constraints, to implement those policies. Current law also strikes a careful balance that seeks to recognize and reasonably accommodate those constraints. While that balance is always capable of refinement by the State Legislature, the Task Force Report essentially casts it aside. For the reasons set forth below, we have grave concerns about this aggressive approach.

During the last 10 years, municipalities have seen an increase in the volume and scope of FOIL requests, a substantial number of which do not relate to matters of broad public concern and only a relatively small number of which are made by the news media. The Committee on Open Government, in its 2020 Annual Report (at page 3) estimates that New York State entities now receive over 250,000 requests annually. The Task Force report fails to take this high volume into account in any manner, while focusing on recommendations apparently aimed at opening records without allowing adequate time to assure that the records do not contain non-public information. Many requests are from individuals; further, many are from non-local special interest groups, individuals or entities seeking to use this information for commercial, profit-making purposes, or attorneys seeking to supplement or circumvent pre-suit discovery. In addition, the demands on state and local government as a result of the pandemic have been enormous.

We believe it would be inappropriate for the State Bar to advance the types of reforms set forth in the Task Force Report given this backdrop, as well as the other concerns expressed herein. We submit that approving such reforms would not strike the proper balance among the attorneys comprising the membership of the State Bar Association or among the public policies that underlie the laws at issue. Adoption of this Report would, quite frankly, disenfranchise many members of our Section, a result that NYSBA and our Section can ill afford.

Task Force Recommendation III.C.1 – Amendment to FOIL

The Task Force's April 2021 proposal establishes a stringent time frame within which agencies must respond to FOIL requests. In general, the time frame is twenty business days, which may be extended to forty business days upon certification of the agency if there are more than 100 pages of records or if there are "exceptional circumstances that go beyond predictable agency workload." While this is an improvement over the Task Force's prior recommendation, it continues to be unrealistic and unduly burdensome upon government agencies.

Taken as a whole, the proposed scheme ignores the practical realities faced by a governmental agency responding to a FOIL request. The amount of labor and time (and associated expense) it takes to answer a FOIL request is not a function solely of the volume of pages that need to be produced. Documents may be far shorter than 100 pages but take significant amounts of time to locate, especially when they are archived, non-digitalized or require substantial redaction, or the holder of the record is unavailable. In many municipalities, outside IT firms must first identify, locate and retrieve the records potentially responsive to a FOIL request and then they must be reviewed by the municipality's records access officer, further making these time frames unrealistic. The Report also does not take into account that many FOIL requests are vague or overbroad, so that it is difficult at best to ascertain what record(s) are being sought.

The difficulty is not just with the volume of records that are requested, as records may be only a few pages, but also with the reality that each may be in a different location and may require days of searching to locate. It is also impossible for an agency to certify ahead of time that a request will result in more than 100 pages of records as the agency must first search its files to determine how many records are actually responsive.

The Task Force's proposed hard deadline of 40 business days for any FOIL response does not further clarify what constitutes a "reasonably described" request under Public Officers Law Section 89(3)(a), an area that is particularly problematic. A letter styled as a single FOIL request should not be able to seek multiple types of records from different categories or request lists of different items. Further, requests involving a search of emails or electronic records should be required to specify particular recipients or senders by name or at least by title, and provide search words and a time frame.

The Report's assumption that every request, no matter how broad, complex or arcane, can be answered within forty business days, is also deeply flawed, and simply does not reflect the content of these requests or the resources available to local governments. Smaller local governments often have just a few full-time employees, who must multi-task to accomplish all the essential functions of government and may also need to search through more paper records, while larger governments have a high volume of requests in proportion to the number of employees available to respond to them as well as a high volume of records that require review. Indeed, the Committee on Open Government has formally recognized in its existing regulations that the amount of time that is reasonable for answering a FOIL request is not amenable to a "one size fits all" approach, but is rather a function of multiple factors including not only the volume of the request, but also "the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed, the number of requests received by the agency, and similar factors." 22 N.Y.C.R.R. Section 1401.5(d). Far from being limited to "exceptional circumstances," these are the typical considerations that are faced by local governments

on a daily basis in responding to requests. Indeed, it is especially ironic that this report is brought to the State Bar for approval during the COVID crisis, which has placed strain on the ability to staff and respond to these requests and arguably constitutes a continuing “exceptional circumstance” that calls the proposed stringent time frames into question.

The practical result, then, if the Task Force’s recommendation is adopted, will be more unnecessary litigation, benefiting private attorneys, all at taxpayer expense. Ironically, the result may also be less access to records than would have been available under current law. Records Access Officers who are appropriately concerned about disclosing material that should not be disclosed or that even contains material that is protected by law will not have the time to engage in a full review that would be able to address such concerns and may instead feel compelled to deny requests, leading to costly litigation that could be avoided under the more practical approach permitted by current law.

These inflexible deadlines are at odds with both the letter and spirit of Public Officers Law § 87(2). That subdivision authorizes an agency to deny access to records for specific reasons that are of concern to municipalities, including that they are exempted from disclosure by state or federal statute, are law enforcement-related records the disclosure of which could harm investigations, judicial proceedings, rights of the accused, or protection of confidential sources, or are records that if disclosed could impair present or imminent collective bargaining negotiations. These are public interests important enough that the Legislature evidently intended that agencies consider them along with the rights of those seeking disclosure pursuant to FOIL. In many cases it will not be feasible for an agency to meaningfully analyze whether a request implicates an exemption or exception within 20 business days or even the proposed alternative 40-day time period.

Task Force Recommendation III.C.2 – FOIL Fee Shifting Provision

The Task Force recommends that NYSBA:

continue to study how the fee-shifting provisions have been applied by the courts, other state’s experiences with fee shifting, whether the judicial decisions have been consistent with the legislative intent of the provisions, and whether the Bar Association should recommend amendments to the provisions so that they appropriately incentivize agencies and local governments to implement FOIL’s policy of broad disclosure and penalize those governmental bodies that are not living up to their transparency obligations under the law:

(Report at 24). In so doing, it continues to ignore the concerns previously expressed by our Section in regard to this proposal.

The position of our Section continues to be that the fee-shifting provisions in the current law are adequate to protect requestors and ensure transparency, and that therefore there is no need for the Bar Association to continue to expend resources and energy on this issue at this time, or to revisit the issue after the effects of the pandemic have subsided. The Task Force's proposed revisions are inconsistent with long-standing Bar Association policy in opposition to mandatory fee-shifting provisions.

Currently, the FOIL provision for the award of attorney's fees and costs provides:

The court in such a proceeding: (i) *may* assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case ... in which such person has *substantially prevailed*, and when the agency failed to respond to a request or appeal within the statutory time; and (ii) shall assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has *substantially prevailed* and the court finds that the agency had no reasonable basis for denying access.

Public Officers Law Section 89(4)(c) (emphasis added).

In applying Section 89(4)(c), courts have not refrained from exercising their discretion to assess attorney's fees and costs in appropriate cases where the agency's failure solely involved not responding to FOIL requests in a timely manner.¹

It should also be noted that although the Report states (as described further below) that it is not recommending changes to the provisions governing award of attorney's fees and costs, it would in fact alter the effect and cost of these provisions. The provision quoted above generally requires that courts assess fees and costs where the agency "had no reasonable basis for denying access." The imposition of inflexible deadlines for responding to FOIL requests would invite courts to award fees under this mandatory provision by opining that an agency did not have a reasonable basis for violating a statutory mandate when it did not (or even could not practically) respond to a voluminous or complex request within the strict timeframe.

For these reasons, the Section continues to recommend against any further action by the New York State Bar Association seeking changes in the fee-shifting provisions of the

¹ E.g., *101CO, LLC v. N.Y.S. Dept. of Environmental Conservation*, 2020 NY Slip Op 07969 (3d Dep't, 12/24/20) (agency provided the requested records after the requestor filed an Article 78 proceeding, but was nonetheless ordered to pay attorney's fees and litigation costs incurred at every stage of the litigation, i.e., in the initial proceeding in Supreme Court, in an appeal to the Appellate Division from Supreme Court's denial of parts of the application for fees, and on remittal after the Appellate Division's decision.)

FOIL law, and cautions that even the current proposals in the Report could impose substantial new litigation expenses, including fees and costs, upon local governments and their taxpayers.

Task Force Recommendation III.C.3 – Explicitly Authorize Redaction of Documents

The Task Force “recommends that FOIL be amended to make clear that agencies have an obligation to segregate disclosable information from exempt information and release the material in redacted form when such segregation is practicable.” (Report at 24). In so doing, the Task Force continues to ignore the concerns previously expressed by our Section in regard to this recommendation.

The Task Force’s proposal on redaction does not respond to a widespread problem. The First Department decision in *Judicial Watch v. City of New York*, 178 A.D.3d 540 (1st Dep’t 2019), which the Task Force cites for the proposition that records can now be withheld in their entirety if only partially exempt from disclosure, does not reflect the FOIL practices of many municipalities and it does not apply throughout the State. It was also decided in the particular context of a law enforcement exemption with a specialized interpretation. Many municipalities generally seek to use redaction, except where state or federal privacy statutes, such as the former Civil Rights Law Section 50-a, the current Civil Rights Law Section 50-b or HIPAA, are implicated. This approach is consistent with *Gould v. NYPD*, 89 N.Y.2d 267 (1996). The Court of Appeals decision in *Matter of New York Civil Liberties Union v. New York City Police Department*, 32 N.Y.3d 556, 94 N.Y.S.3d 185 (2018), which the Task Force cites, was tied to the particular context of the now repealed Section 50-a and other privacy statutes. In general, the language of the statute itself (POL section 87(2)), contemplates that agencies will disclose records or parts of records.

Task Force Recommendation III.C.4 – Provide Necessary Resources to FOIL Offices

The “Task Force urges the Legislature to show a real commitment to openness by earmarking funds specifically to finance expanded FOIL operations at the state agencies that are the leading recipients of FOIL requests.” (Report at 25). This recommendation too ignores the concerns previously expressed by our Section. The Report does not provide for earmarking of funds to the multitude of other non-State agency public entities, including municipalities, that would be in dire need of substantial additional funding were the Task Force’s proposals to be adopted. Further, any earmarked funds for this purpose will have to come from somewhere and, given the current state and local budget difficulties, it is unlikely that funds could actually be diverted to this cause in the near future. If the Task Force wants the State to mandate a level of funding for FOIL offices and FOIL compliance by state and local government entities, then the State also should provide grants or other monetary assistance to local governments and non-State agencies,

while also appropriating sufficient funds to State agencies, for purpose of such compliance during this time when absent the temporary federal pandemic aid, local governments would be financially stretched to the brink.

Task Force Recommendation IV.B.1 – Identify Necessary Information for Disclosure

The Task Force's recommendations in this area are also unchanged from its prior recommendations, despite the concerns previously expressed by our Section. The Local and State Government Law Section recognizes the value of working with media and community groups to identify those records that are most responsive to community needs, and local governments have worked, within their limited resources, to enhance online access to many of these records. However, these efforts are voluntary, and reflect what can actually be accomplished. The adoption of this Report will not by itself change the difficult fiscal and operational environment in which these laudable voluntary efforts take place. By contrast, additional unfunded mandates threaten to inundate municipalities, preventing them from accomplishing their primary missions of protecting and enhancing the safety and welfare of their citizenry.

Task Force Recommendation IV.B.2 – Improve Disclosure at the Local Level

This recommendation too continues to ignore the basic reality faced by many small municipal entities; they simply do not have the resources to create and maintain the type of IT infrastructure needed to comply with this proposal. When there are limited resources, they should be utilized for the purposes determined by the community, which is best situated to make the difficult resource allocation decisions that are required. The needs of journalists, while legitimate, cannot supersede those difficult decisions. In addition, in some localities there is not yet access to broadband service.

Task Force Recommendation IV.B.3 – Fix the Open Meetings Law

The mandatory advance document disclosure proposed by the Report continues to be not workable, just as it was in the prior version of the Report. There are times where documents and contracts are exchanged up until the time of the meeting of the legislative body and it is neither practicable nor realistic for them to be shared in advance. It is similarly impractical to expect all local government bodies (many of which are in small municipalities, or are bodies which lack legal counsel) to prepare in advance resolutions regarding matters as to which the body has not yet had discussion or come to consensus.

Conclusion

While it is appropriate and even admirable that the New York State Bar Association has a Task Force to address the “crisis in local journalism,” the Association equally has a responsibility to safeguard the protection of taxpayer funds and to avoid expensive, unilateral, unfunded burdens on our State and local governments, to the detriment of other critical mandates and priorities that are imposed upon them. This is especially so given the already tremendous burden placed on government due to staggering COVID-19-related expenses and substantial actual and projected revenue losses.



COMMITTEE ON LEGAL AID

PRESIDENT'S COMMITTEE ON ACCESS TO JUSTICE

May 28, 2021

TO: Members of the House of Delegates

FROM: NYSBA Committee on Legal Aid
and President's Committee on Access to Justice

RE: Report of the Task Force on Free Expression in the Digital Age

Equal access to justice is nice to say, but only with a robust news media can justice be verified and sorted from injustice. However, news organizations no longer have the resources to take up what has become an increasingly litigious battle over New York's Freedom of Information Law. From Albany to small village police departments, agencies armed with taxpayer-funded lawyers are exploiting the press's inability to challenge improper denial for records leaving journalists without the tools to differentiate a lie from truth.

The members of the Committee on Legal Aid and President's Committee on Access to Justice are concerned for the rights of citizens who frequently have little access to freedom of information on their own. This is true in both the civil and criminal contexts. We support this report for precisely these reasons. The expansion of access to information of government operations is vital to poor people and their advocates because their lives are often entangled with government rules and regulations. This proposal will help expand access to justice by expanding access to information.

The Committees jointly support the report of the Task Force on Free Expression in the Digital Age.

WHEREAS, on May 28, 2021, the Local and State Government Law Section submitted an Executive Summary and a Memorandum with comments concerning the April 2021 Report and Recommendations of the Task Force on Free Expression in the Digital Age, The Crisis in Local Journalism (the “Report”); and

WHEREAS, Local and State Government Law Section members include in-house municipal attorneys, and public- and private-sector municipal counsel who routinely (many on a daily basis) deal with Freedom of Information Law (“FOIL”) requests and/or the Open Meetings Law (“OML”) on behalf local and state governments; some Section members also serve as Records Access Officers for local government agencies and others file FOIL requests with government agencies; and

WHEREAS, the report and its recommendations focus largely on the difficulties faced by journalists and do not adequately consider or reflect: 1) the practical realities of FOIL and OML administration; 2) the careful legislative balance between the administrators and beneficiaries of these laws; and 3) the insight and experience of those attorneys who are most closely associated with the administration of FOIL and OML in their day-to-day operations; and

WHEREAS, while it is appropriate and even admirable that the New York State Bar Association has a Task Force to address the “crisis in local journalism,” the Association equally has a responsibility to safeguard the protection of taxpayer funds and to avoid expensive, unilateral, unfunded burdens on our State and local governments, to the detriment of other critical mandates and priorities that are imposed upon them, especially given the already tremendous burden placed on government due to staggering COVID-19-related expenses and substantial actual and projected revenue losses; and

WHEREAS, it is the position of the Local and State Government Law Section that, despite previous comments having been submitted to the Task Force by the Section highlighting the numerous substantial concerns with the Task Force’s position, certain of the Task Force’s recommendations continue to be unrealistic and unduly burdensome upon government agencies and inconsistent with the concerns of our many Section members who encounter the OML and FOIL in their daily practice; and

WHEREAS, it would be inappropriate for the State Bar to advance the types of reforms set forth in the Task Force’s Report based on anecdotal claims of hinderance by existing FOIL and OML laws which are not in accord with the everyday experiences of government attorneys and FOIL officers, and without an analysis of the tremendous and unrealistic burden the recommendations would place on already taxed local and state governments, as well as the other concerns expressed in the Section’s Memorandum; and

WHEREAS, the FOIL and OML reforms recommended in the Task Force's Report are not material to the Task Force's mission to identify legal reforms which would assist local media to survive in the modern era; and

WHEREAS, the FOIL and OML reforms set forth in the Report do not recognize or strike the proper balance among the attorneys comprising the membership of the State Bar Association or among the public policies that underlie the laws at issue.

NOW, THEREFORE, BE IT RESOLVED, that the Report be amended to delete Recommendations III.C.1-4 concerning the Freedom of Information Law, and

BE IT FURTHER RESOLVED that the Report be amended to delete Recommendations IV.B.1-3 concerning the Open Meetings Law, and

BE IT FURTHER RESOLVED that the Report, as so amended, be received by the House and that the Task Force be thanked by the House for the completion of the Report.

MEMORANDUM

TO: NYSBA TASK FORCE ON FREE EXPRESSION IN THE DIGITAL AGE
FROM: LOCAL AND STATE GOVERNMENT LAW SECTION
RE: APRIL 2021 REPORT & RECOMMENDATIONS OF THE TASK FORCE ON FREE EXPRESSION IN THE DIGITAL AGE, THE CRISIS IN LOCAL JOURNALISM
DATE: May 28, 2021

Executive Summary

The members of the Local and State Government Law Section include the attorneys most likely to encounter FOIL and the OML in their daily practice, yet our section was not invited to participate in the study or creation of the Task Force's Report. Consequently, the proposals and recommendations set forth in the Report focus largely on difficulties faced by local journalists and do not adequately consider or reflect: 1) the practical realities of FOIL and OML administration; 2) the careful legislative balance between the administrators and beneficiaries of these laws; and 3) the insight and experience of those attorneys who are most closely associated with the administration of FOIL and OML in their day-to-day operations. **The Local and State Government Law Section requests that the Task Force consider and incorporate the comments provided herein in a revised report.**

1. The Report of the Task Force is a "solution in search of a problem," and the limited resources of NYSBA are better allocated to issues more relevant to the New York Bar as a whole, rather than an issue that is ancillary to the practice of most of its members, and antagonistic to half of those that do encounter FOIL and OML in their daily practice. (Pages 1, 2)
2. The practical realities of FOIL and OML administration are ignored in the Report. The rigid timelines for responding to a FOIL request are flawed and unrealistic. **The complexity, availability and clarity of a FOIL request are more determinative of the appropriate time for a response than page count.** (Pages 2-4)
3. Many local governments lack the human and technological resources necessary to comply with the proposed FOIL timelines. **A "one-size-fits-all" approach to FOIL is not feasible.** While the Report recognizes the additional cost to government for complying with its recommendations, it earmarks funds only to State agencies. (Pages 4-6)
4. The recommendations of the Task Force, in many respects, are counterintuitive and self-defeating, **and will result in more litigation and less access to records.** (Page 4)
5. The fee-shifting provisions in the **current law ensure transparency and adequately protect requesters** under FOIL and should continue post-COVID. The rigid timelines proposed in the Report could result in courts newly imposing fees upon taxpayers even without any direct change to the fee-shifting provisions. (Pages 4, 5, 6)

MEMORANDUM

TO: NYSBA TASK FORCE ON FREE EXPRESSION IN THE DIGITAL AGE

FROM: LOCAL AND STATE GOVERNMENT LAW SECTION

RE: JANUARY 2021 REPORT & RECOMMENDATIONS OF THE TASK FORCE ON FREE EXPRESSION IN THE DIGITAL AGE, THE CRISIS IN LOCAL JOURNALISM

DATE: MAY 28, 2021

The following is the position of the NYSBA Local and State Government Law Section concerning the April 2021 Report & Recommendations of the Task Force on Free Expression in the Digital Age, The Crisis in Local Journalism ("the Report"). The Report concerns a proposal to reform New York's Freedom of Information Law (FOIL) and the Open Meetings Law (OML).

As a preliminary matter, the recommendations contained in the Report directly relate on a daily basis to the practice of law by our Section members. Local and State Government Law Section members are public and private sector attorneys engaged in dealing in any capacity with legal issues concerning local or state government. Our Section's members are in-house municipal attorneys, and public and private sector counsel, who contend on a regular basis with FOIL and/or the Open Meetings Law. Some of our Section members also serve as Records Access Officers for local government agencies. Some Section members also file FOIL requests with government agencies.

As a result, we continue to believe that, had our Section been invited to participate in the Task Force study, the resulting recommendations would have considered, and reflected, not only the difficulties faced by local journalists, but also the practical realities of government agencies responding to the information requests made by journalists as well as those made by other citizens and entities. Indeed, upon first being notified in January 2021 of the revised report which was proposed to be made by the Task Force, representatives of our Section familiar with FOIL and the Open Meetings Law from varying perspectives met with Task Force representatives to seek common ground. Unfortunately, the report was soon thereafter issued without change.

We submitted written comments about that report on February 16, 2021. We did not hear further from the Task Force. Thereafter, the revised April 2021 report was issued, with some slight modifications purportedly in response to concerns raised by our Section. The revised report continues to woefully ignore the legitimate concerns of our Section.

At the outset, our Section recognizes that FOIL and the Open Meetings Law both serve important public policies by opening the processes and records of government where feasible. Municipalities throughout the State work in good faith every day, despite significant operational, staffing and budgetary constraints, to implement those policies. Current law also strikes a careful balance that seeks to recognize and reasonably accommodate those constraints. While that balance is always capable of refinement by the State Legislature, the Task Force Report essentially casts it aside. For the reasons set forth below, we have grave concerns about this aggressive approach.

During the last 10 years, municipalities have seen an increase in the volume and scope of FOIL requests, a substantial number of which do not relate to matters of broad public concern and only a relatively small number of which are made by the news media. The Committee on Open Government, in its 2020 Annual Report (at page 3) estimates that New York State entities now receive over 250,000 requests annually. The Task Force report fails to take this high volume into account in any manner, while focusing on recommendations apparently aimed at opening records without allowing adequate time to assure that the records do not contain non-public information. Many requests are from individuals; further, many are from non-local special interest groups, individuals or entities seeking to use this information for commercial, profit-making purposes, or attorneys seeking to supplement or circumvent pre-suit discovery. In addition, the demands on state and local government as a result of the pandemic have been enormous.

We believe it would be inappropriate for the State Bar to advance the types of reforms set forth in the Task Force Report given this backdrop, as well as the other concerns expressed herein. We submit that approving such reforms would not strike the proper balance among the attorneys comprising the membership of the State Bar Association or among the public policies that underlie the laws at issue. Adoption of this Report would, quite frankly, disenfranchise many members of our Section, a result that NYSBA and our Section can ill afford.

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on a daily basis in responding to requests. Indeed, it is especially ironic that this report is brought to the State Bar for approval during the COVID crisis, which has placed strain on the ability to staff and respond to these requests and arguably constitutes a continuing “exceptional circumstance” that calls the proposed stringent time frames into question.

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These inflexible deadlines are at odds with both the letter and spirit of Public Officers Law § 87(2). That subdivision authorizes an agency to deny access to records for specific reasons that are of concern to municipalities, including that they are exempted from disclosure by state or federal statute, are law enforcement-related records the disclosure of which could harm investigations, judicial proceedings, rights of the accused, or protection of confidential sources, or are records that if disclosed could impair present or imminent collective bargaining negotiations. These are public interests important enough that the Legislature evidently intended that agencies consider them along with the rights of those seeking disclosure pursuant to FOIL. In many cases it will not be feasible for an agency to meaningfully analyze whether a request implicates an exemption or exception within 20 business days or even the proposed alternative 40-day time period.

Task Force Recommendation III.C.2 – FOIL Fee Shifting Provision

The Task Force recommends that NYSBA:

continue to study how the fee-shifting provisions have been applied by the courts, other state’s experiences with fee shifting, whether the judicial decisions have been consistent with the legislative intent of the provisions, and whether the Bar Association should recommend amendments to the provisions so that they appropriately incentivize agencies and local governments to implement FOIL’s policy of broad disclosure and penalize those governmental bodies that are not living up to their transparency obligations under the law:

(Report at 24). In so doing, it continues to ignore the concerns previously expressed by our Section in regard to this proposal.

The position of our Section continues to be that the fee-shifting provisions in the current law are adequate to protect requestors and ensure transparency, and that therefore there is no need for the Bar Association to continue to expend resources and energy on this issue at this time, or to revisit the issue after the effects of the pandemic have subsided. The Task Force's proposed revisions are inconsistent with long-standing Bar Association policy in opposition to mandatory fee-shifting provisions.

Currently, the FOIL provision for the award of attorney's fees and costs provides:

The court in such a proceeding: (i) *may* assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case ... in which such person has *substantially prevailed*, and when the agency failed to respond to a request or appeal within the statutory time; and (ii) shall assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has *substantially prevailed* and the court finds that the agency had no reasonable basis for denying access.

Public Officers Law Section 89(4)(c) (emphasis added).

In applying Section 89(4)(c), courts have not refrained from exercising their discretion to assess attorney's fees and costs in appropriate cases where the agency's failure solely involved not responding to FOIL requests in a timely manner.¹

It should also be noted that although the Report states (as described further below) that it is not recommending changes to the provisions governing award of attorney's fees and costs, it would in fact alter the effect and cost of these provisions. The provision quoted above generally requires that courts assess fees and costs where the agency "had no reasonable basis for denying access." The imposition of inflexible deadlines for responding to FOIL requests would invite courts to award fees under this mandatory provision by opining that an agency did not have a reasonable basis for violating a statutory mandate when it did not (or even could not practically) respond to a voluminous or complex request within the strict timeframe.

For these reasons, the Section continues to recommend against any further action by the New York State Bar Association seeking changes in the fee-shifting provisions of the

¹ *E.g., 101CO, LLC v. N.Y.S. Dept. of Environmental Conservation*, 2020 NY Slip Op 07969 (3d Dep't, 12/24/20) (agency provided the requested records after the requestor filed an Article 78 proceeding, but was nonetheless ordered to pay attorney's fees and litigation costs incurred at every stage of the litigation, i.e., in the initial proceeding in Supreme Court, in an appeal to the Appellate Division from Supreme Court's denial of parts of the application for fees, and on remittal after the Appellate Division's decision.)

FOIL law, and cautions that even the current proposals in the Report could impose substantial new litigation expenses, including fees and costs, upon local governments and their taxpayers.

Task Force Recommendation III.C.3 – Explicitly Authorize Redaction of Documents

The Task Force “recommends that FOIL be amended to make clear that agencies have an obligation to segregate disclosable information from exempt information and release the material in redacted form when such segregation is practicable.” (Report at 24). In so doing, the Task Force continues to ignore the concerns previously expressed by our Section in regard to this recommendation.

The Task Force’s proposal on redaction does not respond to a widespread problem. The First Department decision in *Judicial Watch v. City of New York*, 178 A.D.3d 540 (1st Dep’t 2019), which the Task Force cites for the proposition that records can now be withheld in their entirety if only partially exempt from disclosure, does not reflect the FOIL practices of many municipalities and it does not apply throughout the State. It was also decided in the particular context of a law enforcement exemption with a specialized interpretation. Many municipalities generally seek to use redaction, except where state or federal privacy statutes, such as the former Civil Rights Law Section 50-a, the current Civil Rights Law Section 50-b or HIPAA, are implicated. This approach is consistent with *Gould v. NYPD*, 89 N.Y.2d 267 (1996). The Court of Appeals decision in *Matter of New York Civil Liberties Union v. New York City Police Department*, 32 N.Y.3d 556, 94 N.Y.S.3d 185 (2018), which the Task Force cites, was tied to the particular context of the now repealed Section 50-a and other privacy statutes. In general, the language of the statute itself (POL section 87(2)), contemplates that agencies will disclose records or parts of records.

Task Force Recommendation III.C.4 – Provide Necessary Resources to FOIL Offices

The “Task Force urges the Legislature to show a real commitment to openness by earmarking funds specifically to finance expanded FOIL operations at the state agencies that are the leading recipients of FOIL requests.” (Report at 25). This recommendation too ignores the concerns previously expressed by our Section. The Report does not provide for earmarking of funds to the multitude of other non-State agency public entities, including municipalities, that would be in dire need of substantial additional funding were the Task Force’s proposals to be adopted. Further, any earmarked funds for this purpose will have to come from somewhere and, given the current state and local budget difficulties, it is unlikely that funds could actually be diverted to this cause in the near future. If the Task Force wants the State to mandate a level of funding for FOIL offices and FOIL compliance by state and local government entities, then the State also should provide grants or other monetary assistance to local governments and non-State agencies,

while also appropriating sufficient funds to State agencies, for purpose of such compliance during this time when absent the temporary federal pandemic aid, local governments would be financially stretched to the brink.

Task Force Recommendation IV.B.1 – Identify Necessary Information for Disclosure

The Task Force's recommendations in this area are also unchanged from its prior recommendations, despite the concerns previously expressed by our Section. The Local and State Government Law Section recognizes the value of working with media and community groups to identify those records that are most responsive to community needs, and local governments have worked, within their limited resources, to enhance online access to many of these records. However, these efforts are voluntary, and reflect what can actually be accomplished. The adoption of this Report will not by itself change the difficult fiscal and operational environment in which these laudable voluntary efforts take place. By contrast, additional unfunded mandates threaten to inundate municipalities, preventing them from accomplishing their primary missions of protecting and enhancing the safety and welfare of their citizenry.

Task Force Recommendation IV.B.2 – Improve Disclosure at the Local Level

This recommendation too continues to ignore the basic reality faced by many small municipal entities; they simply do not have the resources to create and maintain the type of IT infrastructure needed to comply with this proposal. When there are limited resources, they should be utilized for the purposes determined by the community, which is best situated to make the difficult resource allocation decisions that are required. The needs of journalists, while legitimate, cannot supersede those difficult decisions. In addition, in some localities there is not yet access to broadband service.

Task Force Recommendation IV.B.3 – Fix the Open Meetings Law

The mandatory advance document disclosure proposed by the Report continues to be not workable, just as it was in the prior version of the Report. There are times where documents and contracts are exchanged up until the time of the meeting of the legislative body and it is neither practicable nor realistic for them to be shared in advance. It is similarly impractical to expect all local government bodies (many of which are in small municipalities, or are bodies which lack legal counsel) to prepare in advance resolutions regarding matters as to which the body has not yet had discussion or come to consensus.

Conclusion

While it is appropriate and even admirable that the New York State Bar Association has a Task Force to address the “crisis in local journalism,” the Association equally has a responsibility to safeguard the protection of taxpayer funds and to avoid expensive, unilateral, unfunded burdens on our State and local governments, to the detriment of other critical mandates and priorities that are imposed upon them. This is especially so given the already tremendous burden placed on government due to staggering COVID-19-related expenses and substantial actual and projected revenue losses.



Staff Memorandum

HOUSE OF DELEGATES Agenda Item # 9

REQUESTED ACTION: Approval of the report and recommendations of the Task Force on the New York Bar Examination.

The Task Force on the New York Bar Examination was appointed in 2019 to review the impact of New York's adoption of the Uniform Bar Examination on applicants, newly admitted attorneys, members of the bar, the courts, and diversity in the profession. Its report was approved by the House of Delegates in April 2020. A second report, relating to the impact of COVID-19 on the July 2020 administration of the bar examination, was prepared and considered simultaneously with the first report; it also was approved by the House in April 2020.

The Task Force's third report is attached, assessing the remote administration of the exam and the long-term future of the New York bar examination, particularly given the National Conference of Bar Examiners' proposed new examination.

The report will be presented at the June 12 meeting by Task Force chair Hon. Alan D. Scheinkman.



NEW YORK STATE
BAR ASSOCIATION

Third Report and Recommendations of the **Task Force on the New York Bar Examination**

June 2021

The views expressed in this report are solely those of the Task Force and do not represent those of the New York State Bar Association unless and until adopted by the House of Delegates.

I. BACKGROUND

The Task Force on the New York Bar Examination (the “Task Force”) was formed in April 2019 by then-President Michael Miller to investigate and report on the impact of New York’s adoption of the Uniform Bar Examination (the “UBE”) on applicants, on the qualifications and relevant legal knowledge of newly admitted New York attorneys, on potential employers, on members of the Bar, on the court system, and on diversity in the profession.

The Task Force delivered a Report (the “First Report”)¹ on March 5, 2020 which was approved by the Executive Committee on April 3, 2020 and adopted by the House of Delegates on April 4, 2020.² The key recommendations made by the Task Force in its First Report include:

- Eliminating the New York Law Examination (the “NYLE”);
- Requiring the passage of a rigorous examination on New York law as a prerequisite to admission to the New York Bar;
- Undertaking an independent psychometric analysis on the grading and scoring of the UBE;
- Requiring that law graduates who intend to practice exclusively in New York take (i) the Multi-State Bar Examination component (the “MBE”) and the Multistate

¹ Report of the New York State Bar Association Task Force on the New York State Bar Examination, March 5, 2020 (available at <https://nysba.org/app/uploads/2020/04/Report-of-the-NYSBA-Task-Force-on-the-New-York-Bar-Examination-amendment-1.pdf>).

² The First Report was endorsed by, among others, the New York County Lawyers Association, the Brooklyn Bar Association, the Nassau County Bar Association, the Erie County Bar Association, the Bronx County Bar Association and the Onondaga County Bar Association.

Performance Test component (the “MPT”) of the UBE; and (ii) a rigorous New York-based examination;

- Affording those law graduates who do not intend to practice in New York the opportunity to take the UBE so that they could have portability;
- Considering a New York Law Certification program under which students who graduate from law schools accredited by the American Bar Association (the “ABA”) with enough credits in courses with New York law content, earned with sufficient grades, would be permitted to forego the Bar Examination entirely; and
- Considering a program under which students who spend significant time during their second and third years of law school in supervised law practice in New York, and whose activities are monitored and graded by law school faculty, gain admission without examination.

Just as the First Report was being presented to the Executive Committee and the House of Delegates, the COVID-19 pandemic struck New York with full force. On March 7, 2020, Governor Andrew M. Cuomo issued an Executive Order declaring that a disaster emergency existed in New York State due to the novel coronavirus. On March 16, 2020, by order of Chief Administrative Judge Lawrence K. Marks, all courts of the State were limited to essential operations only. Recognizing that the pandemic was impacting the legal profession, law schools, and law students in unanticipated ways, then-President Henry M. Greenberg requested that the Task Force consider the impact of the public health crisis upon the July 2020 administration of the Bar Examination.

The Task Force issued a Second Report (the “Second Report”)³ on March 30, 2020, dealing with the Coronavirus and the Administration of the Bar Examination. The Second Report was presented to the Executive Committee and to the House of Delegates simultaneously with the First Report. Among the salient recommendations contained in the Second Report were:

- The July 2020 Bar Examination should be postponed, and the examination should be administered proximate to Labor Day 2020;
- The use of “student practice orders” should be expanded to give law graduates the opportunity to commence the practice of law without further undue delay in the event the Bar Examination could not be timely administered;
- The Court of Appeals should grant a general waiver of distance-learning limitations for all ABA-accredited law schools for the Spring 2020 semester;
- Online testing should not be implemented; and
- Law students should not be admitted based solely upon their having graduated from law school, *i.e.*, there should not be a “diploma privilege.”

As President Greenberg informed both the Executive Committee and the House of Delegates, the Court of Appeals adopted our recommendations within 48 hours, although, as will be discussed, some of the recommendations were overtaken by subsequent events. New York, and many other states, were unable to administer the Bar Examination on an in-person basis in September 2020 as we had hoped. Due to capacity constraints and uncertainty as to whether the

³ Report of the New York State Bar Association Task Force on the New York State Bar Examination, March 30, 2020 (available at <https://nysba.org/app/uploads/2020/03/Second-Report-of-the-Task-Force-on-the-New-York-Bar-Examination-April-2020.pdf>).

Bar Examination could be administered at all, applicants in some UBE states were encouraged to register for the Bar Examination in other UBE states.

Conflicts emerged as various states promulgated rules to restrict the pool of law graduates who could sit for the Bar Examination in their jurisdictions. As bar authorities struggled to devise an appropriate means for allowing 2020 law graduates to enter law practice, many law school deans and faculty, and thousands of law students, advocated for the adoption of a “diploma privilege,” meaning that law school graduates could gain admission without examination solely based on having graduated from a law school. Diploma privilege legislation was introduced in the New York Legislature.

The National Conference of Bar Examiners (the “NCBE”) agreed to produce a scaled-back iteration of the Bar Examination to be remotely administered in October 2020. Because the NCBE would not scale this unique examination as it customarily does, grades were not inherently portable, though many states banded together to grant reciprocity by agreement. The efficacy of the October 2020 remote examination was publicly questioned both before and after its administration.

The emergency created by the pandemic highlighted the vulnerabilities of a national testing regime. In June 2020, when the NCBE announced that it would allow jurisdictions to administer an October online exam as a precaution, it stressed that the online test would not be considered a UBE and thus would not offer candidates the same score portability between jurisdictions.⁴ In doing so, the NCBE also relieved itself of grading responsibilities.⁵

⁴ See *Daily Coronavirus Update: NY To Allow Transfer of Remote Bar Exam Scores*, Christian Nolan, NYSBA (Aug. 18, 2020), <https://nysba.org/daily-coronavirus-update-ny-to-allow-transfer-of-remote-bar-exam-scores/>

⁵ *Id.*

As a result, individual states were left to reach agreements with other states to accept their candidates' scores and grade the exams on their own. Additionally, several states initially made it clear that they would not allow New York residents to take the Bar Examination in their jurisdictions and limited the number of potential test-takers. Simultaneously, law school deans and students in other states objected to New York's efforts to limit the number of people it tests. Students moved between various jurisdictions -- not because they really intended to practice there -- but to take advantage of what they perceived to be the most favorable testing opportunities. States, including New York, encouraged this.⁶ When New York was still endeavoring to pursue an in-person September examination, it warned bar applicants that it might not be able to administer an examination at all and that they should look to other states for test seats.

These breakdowns make it clear that portability and reliance on the NCBE—the main reasons for adopting the UBE—are not guaranteed under the current bar exam format. New York, as a leading state which tests some 20% of all bar applicants, is particularly vulnerable.

At the request of President Scott Karson, the Task Force remained engaged with respect to the issues relating to the Bar Examination. President Karson charged the Task Force with the task of updating the First and Second Reports to consider the significant developments that occurred over the prior year. President Karson also requested that we study and report on the responses to the First Report made by the New York State Board of Law Examiners (“BOLE”) and by the NCBE.

⁶ Letter from Hon. Janet DiFiore, Chief Judge of the State of New York Court of Appeals, to Deans of New York Law Schools, dated April 30, 2020. In her letter to the deans, the Chief Judge stated it would be possible to seat only a fraction of the over 10,000 candidates that typically sit for its bar exam in the summer and, therefore, “all candidates are encouraged to consider sitting for the UBE at a later date or in other jurisdictions that may be better positioned to accommodate them at this time.”

The Task Force met several times over the past year to consider and evaluate both the short-term and long-term concerns with the Bar Examination. The Task Force monitored developments with the administration of the 2020 Bar Examination and the promulgation of student practice orders. The Chair of the Task Force participated, along with members from the Committee on Legal Education and Admission to the Bar, in a virtual forum with law students to discuss the student preference for diploma privilege and student concerns with the examination process and administration. The forum, organized by NYSBA President Scott Karon, provided a productive and useful exchange of ideas and information, and discussions with students, both virtually and via email, continued thereafter.

The Task Force evaluated the remote administration of the Bar Examination in October 2020 and has monitored the plans for the administration of the Bar Examination in February and July 2021.

The Task Force continued to focus on the long-term future of the Bar Examination, receiving a detailed presentation on a possible new New York examination from Professor Deborah Jones Merritt of the Moritz College of Law of The Ohio State University, one of the leading national experts on bar examination. Professor Merritt personally briefed the Task Force on her October 2020 report, *Building a Better Bar: The Twelve Building Blocks of Minimum Competence*, a work undertaken in collaboration with the Institute for the Advancement of the American Legal System. The Task Force has reviewed and discussed the Overview of Preliminary Recommendations for the Next Generation of the Bar Examination issued by NCBE in January 2021 (“Preliminary NCBE Recommendations”).

Having completed these activities, the Task Force herewith renders its Third Report. To avoid undue repetition, familiarity with the First and the Second Report is assumed.

II. UPDATED AND REVISED RECOMMENDATIONS

The Task Force reaffirms its central recommendation that applicants for admission to practice law in New York be required to demonstrate basic knowledge of New York law. It remains our view that, if passage of a Bar Examination is either the exclusive, or an alternative, pathway to practice in New York, that examination should include a rigorous test on matters of New York law. We strongly believe that persons seeking admission to practice law in New York must be required to demonstrate that they are able to do so competently. Given the unique complexities of the New York legal landscape, including an elaborate court structure, a complicated civil practice code, and distinctive rules governing evidence, family law, and trusts and estates, among a myriad of legal principles unique to New York, it is not enough that an applicant show competence solely with reference to the “law of nowhere.” Public protection requires that a person licensed to practice in New York demonstrate a basic working knowledge of key New York legal principles and concepts. Ironically, one of the frustrations expressed most strongly by law graduates taking the October 2020 remote examination in New York was that they were required to study for an examination that did not test them on their ability to practice in New York and, therefore, in their view, there was little to be gained by compelling them to take an untried test for the sake of having a test.

In the First Report, we expressed the belief that the development of a new New York Bar Examination could be undertaken either in conjunction with ongoing national bar-examination reform or as an entirely New York-centric enterprise. The possibility of working together with the NCBE to place a meaningful New York examination alongside an existing or revamped MBE has since been effectively foreclosed by the NCBE.

The Preliminary NCBE Recommendations contemplate the elimination of the present UBE and its replacement with a new test that further deemphasizes major aspects of state law. The new examination would no longer directly test family law, trusts and estates, secured transactions, and conflict of laws. The new examination would not consist of separately graded components, as the MBE, the MPT and Multi-State Essay Examination (the “MEE”). Test takers would take an integrated test which would resemble the existing performance test. The examination would still be administered over two days. However, a candidate would receive only a single score. The NCBE’s new examination would incorporate more material provided by the NCBE itself. The NCBE has advised that it will take four to five years to develop the new examination to allow time for law schools and law students to prepare for it. The NCBE would offer the new test twice a year, to be taken by law school graduates.

Of almost as much importance as the content of the proposed new NCBE examination is the format. The NCBE proposes that, while the examination would be proctored in-person, the examination would be delivered to, and completed by, test takers on computers without any hard copy distribution. We support the return to an in-person, proctored test as soon as public health conditions reasonably permit. There are serious issues with remote proctoring undertaken by facial recognition software. We are in complete agreement with the recent statement by the Oregon State Board of Law Examiners that “an-person exam provides the fairest and most equitable exam for all applicants.”⁷

On the other hand, putting aside our reservations as to the content of the test, we have grave concerns with the exclusive administration of a computer-based test. Even taking away

⁷ Statement of the Oregon State Board of Law Examiners, issued March 26, 2021, available at: <https://www.osbar.org/docs/admissions/2021-03-26BBXStatementJuly21Exam.pdf>.

the issues posed by on-line proctoring, there are serious questions as to the fairness of a test delivered and answered solely by computer. While we have no quarrel with allowing test takers to use computers to answer the test questions on computers, it is a very different concept to both: (a) require candidates to use only computers to view the test questions and materials; and (b) require, rather than permit, the answering of questions on computers.

Exclusive use of computer-based examinations may be unfair to persons with cognitive disabilities; indeed, aspects of a computer test, particularly performance questions, may be daunting for anyone (including non-disabled persons) to answer on a computer, without access to physical copies of test material. Ironically, the NCBE is proposing to increase the portion of the examination that consists of performance questions -- thus emphasizing the aspect of the examination that may be the most challenging to deal with solely in digital form. Moreover, unless applicants are to be given standardized computer equipment to use during a digital examination, applicants with better, more-up-to-date computers may have advantages over applicants with older, slower, and less efficient computers. The timed examination could become more of a test of one's computer skills than of one's legal knowledge.

The NCBE has left open whether its new examination would be administered at test centers and has not addressed whether candidates testing at such centers would be provided with, and required to use, the center's computers. We note that, in response to our suggestion that BOLE administer the New York Law Examination at test centers, BOLE stated that doing so would present significant challenges. It anticipated that there may not be enough test center capacity to host the number of candidates and that cost would be an issue.⁸

⁸ BOLE July 2020 Response to First Report at 19.

While we recognize that these concerns may be addressed, and technology is constantly advancing, we would not make the iron-clad commitment, as NCBE does now, to shift to a digital only test. Whether the format of a Bar Examination should be exclusively digital is a matter that requires much more study and thought. There are scientific studies indicating that reader comprehension is less when reading is done on some computer screens, as opposed to paper or some other forms of electronic presentation. Although the use of a digital examination was necessary in New York during the pandemic as an emergency measure, it should not become the routine absent appropriate assessment of its impacts on bar applicants and of its essential fairness. That assessment has not been made. Remote administration occurred only twice, once in October 2020 and once in February 2021. The October 2020 administration was not even of a full-bore UBE. The impact of using remote administration needs to be examined before it becomes the norm.

Additionally, as set forth in Section XIV, *infra*, NCBE has refused to meaningfully address our concerns about the way the UBE is scored. As discussed at length in the First Report, there are serious issues with NCBE's opaque scoring process, particularly as applied to examinees across state jurisdictions. We pointed out that the same person may be found "minimally competent" to practice law in one UBE jurisdiction and "not minimally incompetent" in another, even though it is the same person with the same skill level writing the same exam. BOLE acknowledged "a theoretical possibility that a candidate might receive different scores in two different UBE jurisdictions."⁹ And NCBE confirmed it: "[i]t is true that an examinee could get a different raw score on the written portion of the bar exam depending on which jurisdiction she sat

⁹ BOLE Letter, Appendix A: *Letter to Presiding Justice Alan D. Scheinkman*, New York State Board of Law Examiners, at 16 (Dec. 16, 2019).

in.”¹⁰ However, NCBE has refused to identify any means for correcting for this or give a logical reason for why such a bizarre result is acceptable. The NCBE has not indicated that it will change any of its scoring practices for its new examination.

We believe that the Bar Examination should be used to evaluate whether an individual possesses minimum competency for law licensure -- not whether that individual has knowledge that is stronger or weaker than another. Under the NCBE’s scoring process, a person can be the “strongest of the weak” candidates and still be found to be competent to practice law -- *vice versa*, someone can be the “weakest of the strong” candidates and still be found not competent to practice law. We continue to object to the NCBE’s scoring which may result in the grant or denial of a law license on grounds other than a determination of individual competency. This system renders the Bar Examination arbitrary and unfair.

Unfairness is enhanced by states setting their own, and different, passing scores, with the result that a candidate’s score can be considered a “pass” in one state but a “failure” in another, even though the same test and scoring system are used. Nine different cut scores are used by the various UBE states, ranging from a high of 280 in Alaska to a low of 260 in Alabama and four other states. As one law professor has put it, what is it about the practice of law that requires attorneys to score more points in one state than in another, though the content of the test is the same.¹¹

¹⁰ NCBE Response to First Report at 14.

¹¹ Skolnick, Bar Exams May Soon Be Easier to Pass, as States Eye Changes, March 29, 2021, available at: <https://news.bloomberglaw.com/business-and-practice/bar-exams-may-soon-be-easier-to-pass-as-states-eye-changes>.

Because of the NCBE's decision to plough ahead, New York now has a stark choice to make. If it does nothing, it will be stuck with whatever new examination the NCBE chooses to offer. Law schools and law students will be shifting their curricula to prepare for the new NCBE test. Since the UBE and its various components will be disappearing, states that are presently dependent on the UBE must act now to separate and create their own examinations or else be left with no choice but to use the revamped test constructed by the NCBE.

This is a far different circumstance from when New York adopted the UBE. When New York adopted the UBE, its form and content had been used in other jurisdictions and, for better or worse, New York knew what it was getting. The new NCBE examination is a work in progress and, unless New York acts now, it will have no choice but to accept whatever final product emerges from the NCBE.

We propose that New York use the four-to-five-year period to develop its own new New York Bar Examination and allow law schools, law students, and bar preparation courses, to prepare for the new New York test. We also believe that, through its proposed New York test, New York would rapidly become a national leader and many states would grant reciprocity to those passing the New York test, thus addressing student interest in portability while avoiding the problems associated with the NCBE's grading system and varying state cut scores. The experience during the pandemic reflects that portability can be achieved, not by relying on a putative "national" test, but by states working together to extend reciprocity under appropriate terms and conditions. Since there are only four jurisdictions that are commonly sought out by New York test takers as additional jurisdictions in which to practice (New Jersey, Connecticut, Massachusetts, and the District of Columbia), this task does not seem particularly daunting.

We agree with the NCBE that the Bar Examination needs to be updated to deemphasize rote learning, include more performance-based tests, and probe applicants' legal research, legal writing, and analytical skills. However, we do not agree that these matters should be tested by resort to fictional rules of the mythical state of "Franklin" (the "law of nowhere") but can and should be tested by resort to the governing legal principles of the State of New York. We also do not agree that a shift to performance-based testing should occur simultaneously with a shift to an all-digital examination.

While a new New York bar examination should be the primary pathway to practice, it also remains our view that New York should consider providing two alternative pathways to admission: (a) a pathway for admission through concentrated study of New York law while in law school; and (b) a pathway for admission through supervised practice of law in New York. Attainment of minimum competency to practice law in New York can, we believe, be demonstrated by law school achievement as well as by actual practice experience. An examination is not necessarily the exclusive means to judge minimum competence. Alternative pathways should be considered either as stand-alone alternatives or as complements to a written examination.

As to the first alternative pathway, we believe that an applicant for admission to the New York Bar may demonstrate proficiency in New York law by studying it extensively and successfully. ABA-accredited law schools would be encouraged to offer courses meeting defined criteria as to New York-law based content. For example, a course on New York Civil Procedure would be entirely credited towards a New York law certification, while a course on Evidence may generate partial credit based on the amount of specific New York law content presented during the course. Students would need to demonstrate their knowledge of these

materials by the attainment of a specified minimum number of credit hours and grades. Law schools would be required to maintain and enforce appropriately academic standards to assure that the course of study, and measure of student academic achievement, are rigorous.

Recognizing that not all law schools would make the necessary curricular adjustments and the investment in faculty, we would permit students attending law schools without New York-oriented courses to take New York-oriented courses at those law schools that do.

While we favor the development of a carefully crafted pathway for admission through concentrated study of New York law while in law school, we remain opposed to broad adoption of a diploma privilege by which any law school graduate from any law school, either inside or outside the country, may gain admission to practice in New York without any measurement of academic success or competency.

As to the second alternative pathway, we believe that an applicant for admission may be able to demonstrate proficiency in New York law by practicing it successfully. Students should be permitted, after successful completion of the first year of law school, to engage in supervised practice in New York, undertaking such activities as counseling clients, working with practicing lawyers, participating in court conferences and depositions, and negotiating business documents. These activities would be undertaken in the context of law school internship or externship programs, with a faculty member being responsible to evaluate and grade the student's performance, in addition to supervision by a practicing attorney. Law students would have the ability to create a portfolio of work to be assessed by a faculty member every semester and to provide to potential employers. This practice-oriented program could potentially be either a compliment to, or an expansion, of the existing Pro Bono Scholars Program in which third-year students participate. While the precise contours of this second pathway will need to be carefully

designed, the goal is to produce practice-ready attorneys and increase the legal service assistance available to underserved populations.

As part of the practice pathway, consideration should be given to allowing admission through participation in a Lawyers Justice Corps program in New York.¹² Lawyers Justice Corps programs are open to recent graduates of law schools who obtain jobs with legal services providers. The state determines what type of organizations qualify as “legal services providers.”¹³ Those providers hire recent graduates using their usual hiring practices and criteria. If a provider and graduate choose to participate in the Corps program, the recent graduate begins work shortly after graduation and practices under the kind of supervised practice rules that New York has already adopted.

Each participant in the Corps would commit to working for a full year for their hiring organization. For the first six months of the program, the participant would document their work and meet regularly with their supervisor for feedback.¹⁴ If the participant performs competently and in accordance with the state’s rules of professional conduct, the supervisor would certify the participant for bar admission at the end of that six-month period. If desired, BOLE could hire clinical professors to review the documentation, much as it hires graders for the traditional bar exam.

¹² The Lawyers Justice Corps is a licensing pathway developed by the Collaboratory on Legal Education and Licensing for Practice, a group of scholars who have studied the bar examination, licensing, and legal education for many years. Professor Kaufman (a member of the Task Force) and Professor Deborah Merritt, who spoke to the Task Force, are both members of the Collaboratory.

¹³ A list of approved placements already exists for the Pro Bono Scholars Program.

¹⁴ The Collaboratory is preparing templates for documentation and feedback that New York could choose to adopt. “Train the trainer” materials may also be available for supervisors participating in the program.

The Lawyers Justice Corps provides a rigorous, real-world test of lawyer competence, while also developing a cadre of new lawyers dedicated to serving underserved and vulnerable populations. Although the program would begin with existing positions at legal services organizations, foundations might provide funding for additional positions. There are also realistic opportunities for government funding in the post-COVID world, which has generated unprecedented demand for legal services within unrepresented communities.

If New York does accept the NCBE's new Bar Examination modalities, we believe that the two alternative pathways will better protect the public from incompetent lawyers gaining admission to the New York bar. We would have little confidence that the takers of a standardized, digitalized national examination, devoid of meaningful inquiries into important matters of state law, could be expected to have the minimum competency to practice law in New York. On the other hand, those who successfully studied New York law for two years or who successfully practiced it would surely meet that standard, if not surpass it.

There is growing recognition that a written examination can assess only some of the foundational knowledge and skills that new lawyers need to possess to practice competently. Written examinations can ascertain familiarity with rules of ethics, understanding of legal processes and sources of law, and the ability to interpret legal materials, among other things. However, no written examination can test listening skills, negotiation skills, seeing the big picture of the client problem, coping with stress, and communicating effectively with others. On the other hand, law school study alone or supervised practice alone will also fail to assess key skills. It may well be that, in the future, new attorneys should be admitted only after passage of both a written exam and completion of one of the two alternate pathways we propose.

As for a new New York Bar Examination, our viewpoint has been informed by a recent study by Professor Deborah Merritt of the Moritz College of Law of the Ohio State University, undertaken in conjunction with the Institute for the Advancement of the American Legal System. That study revealed that new lawyers work for many types of organizations and practice diverse kinds of law. This diversity means that a newly licensed lawyer could enter any of dozens of practice areas. The report made four important findings as to the work of new lawyers:

- State and local law played a prominent role in the work of young lawyers;
- Young lawyers rarely relied upon memorized rules;
- Young lawyers engaged frequently with clients; and
- Most young lawyers assumed substantial responsibility for client matters during their first year, with little or no supervision.

As will be discussed further in this report, the study disclosed that young lawyers were more likely to rely upon state and local law in their work than on federal law. About half reported that they worked exclusively with state and local law; most of the remainder worked with a mix of federal, state, and local law. Some lawyers needed to work with laws of multiple states, and some had clients whose matters involved multiple states. As result, there is a disconnect between what the NCBE tests -- federal law and selected generally applicable legal principles -- and what law new lawyers use -- state and local rules. This mismatch between testing and practice has led some new lawyers to make mistakes while representing clients. While a uniform, generic Bar Examination makes it easier for lawyers who move between states, it does not account for the fact that new lawyers are more likely to apply the laws of individual states -- which are often highly individualistic -- than federal law. The proposed new NCBE exam will only serve to accentuate this disconnect.

In short, the UBE places a premium on subject matter that new lawyers do not use and, to the extent that many law schools orient their curricula to what is tested on the UBE, law schools stress teaching young lawyers material they do not often use and are not teaching young lawyers what they need to know in their early years of practice.

Professor Merritt presented us with a proposal for a new New York Bar Examination, which she developed utilizing the results of her study. Her proposal envisions that New York develop its own examination which would consist of the following principal elements:

1. Two Performance Tests, each of 3 hours duration, based upon substantive principles of New York law (including federal constitutional and statutory principles), which would incorporate more client-centered tasks; these tests would be predicated upon a library of New York materials to be provided to the candidates;
2. A Research Test of 3 hours, in which candidates would be required to participate in research exercises based on New York law, with responses, derived from their research, taking the form of either short answers or multiple choice selections;
3. A multiple-choice test of New York Practice and Procedure in which candidates would be required to respond to 75 questions in 3 hours in a closed book format.

In a performance test, candidates are given a client file and a library file and are assigned to prepare a written document, such as a memorandum to a client or a legal brief. These tests closely approximate the entry-level work that young lawyers do. A research test would assess the ability of candidates for bar admission to do basic legal research – a key skill that must be found in the new lawyer’s toolbox. Lawyering is not always about knowing the answer off the bat; it is as much about knowing how to find the answer. A test on New York practice and procedure is vital because this is the most common subject for new lawyers.

We generally support Professor Merritt’s proposal and believe it provides a strong foundation upon which to construct the new New York bar examination. We call upon the New York Court of Appeals to support the development of a new New York test and to appoint a

working group to design the examination. In undertaking the design of the test, the working group should consider some modifications to Professor Merritt's proposal.

While we support the idea of performance tests, we are concerned that if students perceive that, when they take the bar examination, they will be provided with a library file of New York materials, they may not study the New York material during law school. Bearing in mind that most young lawyers in New York will be working with New York state and local law, performance tests must be carefully developed to ensure that law students will study New York legal principles during law school. For this purpose, we define New York legal principles to mean not just New York law but, more broadly, as the legal concepts of which New York lawyers should have a basic familiarity, even if those concepts are not derived from New York state law. Those concepts may include legal principles unique to New York, New York variations on generally accepted legal principles, and federal principles.

Regarding federal principles, we have pointed out that the UBE does not test subject matter that is important to newly admitted attorneys, such as health law, immigration, and cybersecurity. In designing its own test, New York needs to account, not only for state principles but also for emerging federal laws that young lawyers will be utilizing in their formative years. To make sure that the new examination reaches as many subject areas as possible, it may be appropriate to substitute traditional essays for one of the performance tests.

We are concerned that two lengthy performance tests may not be able to provide the requisite coverage of the broad areas of law that new lawyers should be expected to have familiarity. We agree that 90-minute test sessions are too short; however, we are concerned that a three-hour test session devoted to one performance test may be too long and that it may be appropriate to shorten each session to provide more questions that cover more subjects. While

requiring a procedure examination will encourage law schools to hire faculty to teach New York procedure and law students to study it, we want to also encourage instruction and study in important substantive New York law subjects, such as family law, trusts and estates, conflicts of law, landlord/tenant and the law of employment and discrimination.

In the First Report, we proposed that the new examination include four essays, each of 30-minutes duration. These would test New York Civil Practice, No-fault insurance, Workers' Compensation, Family Law, Professional Ethics, Trust and Estates and other subjects. We noted that it would not be difficult to combine subjects, for example, to combine a civil practice question with a family law or legal ethics problem. A single essay could cover three or four issues so that even four essays might reach as many as 16 subject areas. We would therefore consider modifying Professor Merritt's proposal by dropping one of the performance tests and substituting essay questions.

We are concerned that a closed-book, multiple choice examination on New York civil procedure may inappropriately encourage memorization and rote learning and perpetuate the discriminatory impact that the use of multiple-choice tests has on women. We agree that it is important to test prospective New York lawyers on New York civil procedure. Too many lawyers have been admitted in New York without knowing much, if anything, about our complicated court system. However, we would consider the use of either short-form or traditional essay questions on the procedural examination and permitting test takers access to statutory materials during the test.¹⁵

¹⁵ We note that the possibility exists that if the NCBE retained the MBE, either in its present form or in a modified fashion, it could be used as a basis for working with other jurisdictions to achieve reciprocity.

We urge the Court of Appeals to appoint a working group of law school faculty and practitioners, aided by a professional mathematician, to work with BOLE to develop the new test and to design the proposed alternative pathways to admission. The working group should formulate a test structure that is fair and equitable, seeks to encourage the study of New York law, promotes New York law within the broader legal community, and assures that attorneys admitted to practice here are competent to do so, with reference to the laws that they will be working with. In achieving these goals, the working group should assess both question formats (*e.g.*, performance tests versus essay questions) and testing conditions (*e.g.*, open or closed book) to ascertain the best formats for testing appropriate familiarity with New York law, taking into account a broad spectrum of perspectives on these complicated issues.

A return to a New York Bar Examination should bring about a renaissance in the study and development of New York law, which is the lodestar of common law legal principles both nationally and internationally. It would also restore luster to New York admission as it would no longer be a mere credential. Once again, the public would be assured that a New York-admitted lawyer has the minimum competence to practice in New York. The confusion between New York admittees who know New York law and those who do not will become a thing of the past.

We advise against shifting to an examination that is administered solely by computer, at least at the present time. While we would give candidates the option to use computers for all portions of the test, and computers would have to be used for the research component of the test, we would give candidates the option of completing as much of the examination as they wish in traditional pen-and-paper format. If nothing else, test takers should be able to read the test material in hard copy. While the NCBE would move to an exclusively computer-administered examination, we believe that the issue of computer-based exams requires much more study. We

are concerned that all candidates be on an equal footing and the Bar Examination not become a test of computer, rather than legal, skills.

At the 2021 midyear meeting of the American Bar Association House of Delegates, a resolution was adopted urging the bar admission authority of each UBE jurisdiction to amend its bar admissions rules to provide that the minimum number of years an applicant must have been primarily engaged in the active practice of law to be eligible for admission by motion be equal to the maximum age of a transferred UBE score that the jurisdiction has adopted for purposes of admission by UBE score transfer. In the First Report, we noted that UBE scores are portable for three years, while an attorney could waive into the state without examination after five years of practice. We are unaware of any principled policy reason for a two-year gap, between the end of the third year of portability and the beginning of the sixth year of practice, during which an attorney cannot gain admission in New York without having to take the UBE all over again.

While our proposal would eliminate admission through mere passage of a national examination, in the short-term, the existence of the two-year gap does not appear to serve any useful purpose. Yes, it is true that a UBE score goes stale and the longer a person is away from law school, the less likely it is that the person may be able to pass the test again without study. On the other hand, there is little reason to think that, in general, an attorney with five years of experience is likely to be significantly more qualified by practice than an attorney with three years. However, we reiterate our prior recommendation that attorneys who seek to gain admission in New York based on their admission and practice in other jurisdictions, no matter what the period of years, be required to take a course in New York law and pass a New York law test.

III. THE OCTOBER 2020 REMOTE EXAMINATION

The Task Force, in the Second Report, recommended that the July 2020 Bar Examination be postponed to a date in September 2020 proximate to Labor Day. The Court of Appeals accepted our recommendation and the NCBE thereafter agreed to provide examination materials for dates in both early September and in late September. BOLE then embarked on efforts to arrange for an early September in-person examination.

In April 2020, it was readily apparent that a September 2020 Bar Examination could not be administered in large venues, such as the Jacob Javits Convention Center, due to both social-distancing restrictions and the utilization of large venues as temporary health care centers. BOLE obtained the cooperation of all law schools located in New York State to provide for the administration of the examination at sites provided by the law schools. Seating priority was granted to the J.D. and LL.M. graduates of New York law schools. Guidance was issued cautioning that seating for the examination in New York could be limited and that candidates should inquire into other jurisdictions where they might be able to take the examination. Deans of out-of-state law schools voiced concerns and objections to these arrangements.

Similar controversies arose in other states which announced limitations on who could sit for the examination. Serious questions were presented as to whether states could effectively restrict eligibility for the limited seats perceived to be available based on residency or law school attended. These disputes would not have arisen prior to the adoption of the UBE. In an environment in which each state administered its own examination, each state would be dealing with only those applicants who truly sought admission within its borders. However, with the advent of the UBE, limitations on who could take the UBE in one state necessarily triggered a cascading impact on other UBE jurisdictions. A person shut out from taking the examination in

one place could seek to take the test elsewhere. Indeed, a central premise of the UBE is that persons who take the Bar Examination in one jurisdiction will seek to transfer their scores to other jurisdictions within three years. The vaunted portability of the UBE, enabling young attorneys to use a single bar examination as a basis for admission to multiple states, was undermined in the face of individual decisions by states to control who got to take the test in their locations, although this was redeemed in part by reciprocity agreements.

While it may be said that a global pandemic is a unique, once-in-a-generation episode that is not likely to recur, the fact remains that in our modern generation, we are experiencing, on a seemingly regular basis, unusual events that were thought unlikely to occur. In February 2021, just shortly before the February administration of the Bar Examination, Texas, a UBE jurisdiction, experienced an unusually harsh (for it) winter storm that entirely disrupted the state's stand-alone electrical grid. As it happens, ExamSoft, which is relied upon to administer remote Bar Examinations, is based in Texas. While ExamSoft expressed confidence that it could fulfill its national responsibilities in connection with the February 2021 examination, the problems with the Texas electric grid gave rise to concern among prospective test-takers, both inside and outside, Texas.¹⁶ It is evident that the possibility existed that if an individual test taker was without power, that test taker (such as a person from New York taking the UBE in

¹⁶See announcement of Texas Board of Law Examiners, available at <https://ble.texas.gov./news.action?id=2323>. The Texas board expressed its understanding that many bar applications were without power or water. It offered applicants the opportunity to defer taking the examination to July, the opportunity to take a makeup examination, and, if an applicant wished to take the February examination at a hotel, reimbursement of up to \$250 for the hotel expense.

Texas) might to try to make alternative arrangements to take the test in another jurisdiction, assuming the registration period was still open.¹⁷

In any event, by mid-July 2020, BOLE had managed to secure a sufficient number of seats as to permit all who had applied to take the UBE in New York in early September to be granted admission. However, around the same time, it became apparent that it would not be possible to administer an in-person examination. On July 23, 2020, the Court of Appeals announced that New York would administer a remote examination on October 5 and 6, 2020. The remote examination would not be the full UBE and would not be scaled by the NCBE. President Karson, on behalf of NYSBA, supported the decision to proceed with a remote examination. While the Task Force had opposed the use of a remote examination in the Second Report, it was recognized that events limited the available options to but three alternatives – a remote examination, broad diploma privilege, or indefinitely delayed admission for June 2020 law graduates. Given these realities, resort to a remote examination was the most appropriate choice. As NYSBA President Karson said at the time: “Chief Judge Janet DiFiore and the New York State Court of Appeals have wisely provided recent law school graduates with a measure of certainty at a time when they face mounting student debt and a slow job market brought on by the coronavirus pandemic... We agree that a remote exam is not a perfect solution, but also concur that the benefits outweigh the potential shortcomings in affording the Class of 2020 with a much-needed path to a law license, which they previously did not have.”

¹⁷ See letter from John McAlary to Member of Assembly Jo Anne Simon, dated February 19, 2021. With the NCBE’s intention to shift to an examination administered entirely by computer, it is not difficult to foresee that unexpected disruptions to electrical, heating, air conditioning, and water systems will create significant obstacles to the simultaneous admission of an examination across the country.

The Court of Appeals and BOLE performed admirably to adapt to the unusual circumstances created by the pandemic. However, the various changes, and announcements, made along the way led to confusion and uncertainty as to who could take the test, how the examination would be administered, when the test would be given, whether the novel means of administration would produce a fair result, and whether the scores would be portable.

Ultimately, the Bar Examination was remotely administered on October 5 and 6, 2020. Candidates were able to take the test in their homes or other locations of their choosing. Recognizing that some candidates might not have a quiet, isolated area suitable for test taking in their home, or that some candidates might not have reliable home internet access, the New York law schools helped those who needed a suitable testing venue.

The number of persons who took the test in New York in October 2020 was significantly lower than is customarily the case. In October 2020, 5,150 persons completed the examination. By contrast, in July 2019, 10,071 people took the test and 9,679 did so in July 2018. Thus, the October 2020 remote examination, which was a substitute for the customary July examination, was taken by only about one-half of the people who take the test in a normal year.

Several factors may account for the dramatic drop off in the number of test takers.

Some candidates reported having made the election to take the test in other jurisdictions. Some jurisdictions administered a test at an earlier date than New York; others administered the remote examination at the same time New York did. In July 2020, an in-person examination was administered in 23 jurisdictions to 5,678 examinees. In early September, when New York was scheduled to administer an in-person test, eight jurisdictions did so, with 1,811 persons taking the test. In late September, five jurisdictions administered an in-person test to approximately 500 examinees. The remote examination in early October was given in 20 jurisdictions to some

30,000 examinees.¹⁸ While it may be impossible to ascertain how many people elected to take an earlier test or take a test in a jurisdiction other than New York, at least some did.

Several candidates reported that they did not wish to take the remote examination due to concerns about the unproven remote technology and the fairness of the result. Others reported having difficulty obtaining accommodations for a disability. The Chair of the Task Force received the following email in late September 2020 from a June 2020 law graduate from a respected out-of-state law school, which sets forth the graduate's reasons for withdrawing from the test:

I decided weeks ago that I would not take this exam, for several reasons. I could no longer afford to study for a test I wasn't sure would happen, via ill-equipped software and with a number of material disadvantages to success. The prohibition on diagramming and the requirement that we memorize the same amount of material for only a fraction of the normal UBE were only the first of several cards stacked against us this year. I think we deserve, and New York is capable of, something better - - or, at least we deserve as good and as fair an exam as the one our predecessors have taken, with ability to annotate questions, paper to use as "scrap", peace and quiet, stable internet, and a modicum of security.

More importantly, though, I have a serious preexisting condition and my health insurance lapsed just before graduation. My employer postponed my start date (to March 1), further delaying my access to coverage (like many others, my employer did not embrace the Court's temporary practice order). To make ends meet and for the sake of health insurance, I decided to withdraw from the October test and get a non-legal job. Now, I am now working - but not as an attorney, even after having worked a combined 12 months in a law firm and another 4 months as a law student counselor, three years of law school, and a life devoted to achieving this dream.

I'm the first in my family of Cuban immigrants to make it this far. I promise you that I will achieve all I've worked so hard to place within my path. This is a roadblock, but I will rise, as I have always had to do.¹⁹

¹⁸*Press Release*, National Conference of Bar Examiners, issued October 7, 2020, available at www.ncbex.org/news.

¹⁹While the Chair of the Task Force urged this individual to reconsider, the person did not take the October 2020 test. However, the Chair was remained in contact with the candidate and reports having been advised that the person is registered for the February 2021 Bar Examination.

Of some interest, the number of takers who graduated from law schools located in New York State did not decline significantly. In October 2020, a total of 3,027 test takers earned their degrees from New York law schools, while in July 2019, that number was 3,513 and in July 2018, it was 3,431. The major reduction in the number of takers was seen in graduates from ABA-accredited law schools located out of state. In October 2020, a total of 1,135 such graduates took the test, while in July 2019, 2,994 did so and in July 2018, there were 3,009 test takers in this category.

The administration of the examination went relatively smoothly. According to NCBE, 98% of the applicants who downloaded the exam files started their exams as planned. Of the balance, only 0.3% had technical issues that required additional action, with the most common problem being user devices that did not meet the minimum published standards. The other 1.7% were “no-shows” or were ineligible to test. ExamSoft reported that most requests for assistance made by examinees were educational in nature, such as verifying that their answer files had been uploaded after the examination.²⁰

In New York, of the 5,167 applicants who downloaded the exam software, only 17 did not successfully complete the examination. It seems possible that at least some of the 17 who did not complete the examination were unable to do so for other than purely technological issues. It is not uncommon for candidates in traditional in-person examinations to leave without completing the examination. Nationally, ExamSoft reported that 98% of the 30,000 candidates who downloaded the examination were able to successfully start the test, with the majority of

²⁰ *Press Release*, National Conference of Bar Examiners, issued October 7, 2020, available at www.ncbex.org/news.

those who did not log in being “no-shows” or persons excluded by bar officials. Only 2% experienced technical issues that required action to rectify.²¹

From reports we have gathered, only about 10% of the test takers sought assistance with technical issues during the remote examination in New York. Similarly, a survey undertaken by members of the New York State Legislature, was completed by less than 500 people²², meaning that fewer than 10% of the test takers completed the survey. It is not unreasonable to assume that persons who had issues were more likely to complete the survey than persons who did not. It is submitted here that, at a minimum, there was not a broad groundswell of complaint following the administration of the test.

Of the respondents to the legislative survey, nearly 59% reported that they did not have any technical issues during the test, while 4.2% reported an internet disruption, 32% reported an issue with the testing software, and about 5% reported having both an internet and a software issue.²³

Most calls to ExamSoft during the examination were simply to confirm that answer files had been received, to otherwise assure that the candidates were proceeding properly, or to instruct candidates on how to use the software.²⁴ According to both ExamSoft and BOLE,

²¹ Coe, *Online Bar Exams Create Flurry of Frustrations Across US*, Law360, October 7, 2020, available at www.law360.com/articles/1317320/online-bar-exams-create-flurry-of-frustrations-across-us.

²² Sloan, *Test Takers Slam New York’s First Online Bar Exam in New Survey*, Law.com, October 16, 2020, located at www.law.com/newyorklawjournal/2020/10/16/test-takers-slam-new-yorks-first-online-bar-exam-in-new-survey/.

²³ *Id.*

²⁴ *See* Coe, *supra* note 21. While the exam software provides an electronic confirmation of receipt of an uploaded answer file, the anxiety experienced by Bar Examination takers induces some to obtain further confirmation.

technological issues were generally confined to those relating to the equipment of the test taker or other issue pertinent to the test taker, as opposed to having been attributable to a systemic failure. In this regard, the percentage of test takers who raised technical issues during the remote examination was comparable to the percentage of test takers have experienced technical issues while using exam software on their own computers during an in-person examination. Such issues may arise because a test taker's personal computer may be outdated or incompatible with the exam software or have insufficient memory. While the technological requirements are publicly disseminated, candidates may not digest that information or, lacking means to obtain better equipment, simply have hoped for the best in using their existing computers.

Most of the technical issues that were experienced during the examination were resolved through calls to ExamSoft, just as most technical issues that arise during an in-person exam are resolved through the assistance of an in-person assistant provided by BOLE. ExamSoft reported dealing with more than 1,500 support cases on the first day of the examination and some candidates reported frustration with long waits for assistance.²⁵

There were at least some isolated hitches. In one publicly reported incident, a test taker named Colin Darnell discovered, during an MPT portion of the examination, that the ExamSoft software was not video recording his session. He called ExamSoft and was told, erroneously, that he could finish the test unrecorded. He then called BOLE and was told that an unrecorded test would not be accepted. He decided to withdraw from the test but then tweeted about his experience. After his tweet was widely retweeted, Mr. Darnell received a telephone call from John McAlary, BOLE's executive director. Mr. McAlary advised Mr. Darnell that he could complete the test after the ExamSoft support team fixed the problem by accessing his laptop

²⁵ *Id.*

remotely. While Mr. Darnell was then able to finish the test, the story does not end there. Mr. Darnell was subsequently notified that he failed the test. After he inquired, it was discovered that his first, blank, MPT was graded, not his subsequent, completed one. BOLE then had the second MPT graded and Mr. Darnell was notified that he passed. According to Mr. McAlary, this problem occurred only with this one candidate and BOLE is working with ExamSoft to ensure that the problem will not be repeated.²⁶

Overall, the administration of the October 2020 remote examination went much better than at least some had expected and should be considered successful, given the need to resort to a new way to administer a bar examination, the time constraints under which NCBE, BOLE, and the candidates were operating, and the public health crisis that existed.

The results from the October 2020 remote examination reflect a substantially higher pass rate than is typical. Overall, 84% of all persons who took the October 2020 remote examination passed it. In comparison, the overall pass rate for the July 2019 examination was 65% and the overall pass rate for the July 2018 examination was 63%.

First time takers from New York law schools passed at an 87% rate, while first time takers from out-of-state law schools passed at a 93% rate. These passing rates are somewhat higher than is customary. In July 2019, 85% of first-time takers from New York law schools passed, while 87% of those from out-of-state law schools did so. The increase in the overall passage rate seems to be more attributable to there being fewer foreign-educated takers, and better performance from those who did take the examination, as well as there being few repeat takers. 70% of the foreign law graduate first-time takers passed the October 2020 remote

²⁶*See Man who was told he failed bar exam actually passed, and he blames software*, ABA Journal, January 26, 2021.

examination; in July 2019, 53% did so. In October 2020, there were no repeat foreign law graduates; in July 2019, there were 1,161 of whom only 22% passed. Indeed, while in July 2019, there were a total of 2,155 repeaters, of whom 24% passed, in October 2020, there were only 146 repeaters, of whom 45% passed. Since there were much fewer repeat takers, and repeat takers had a better pass rate, the overall pass rate was not significantly diminished.

The October 2020 remote examination was not scaled by the NCBE and the scores were not directly portable. However, BOLE entered into reciprocity agreements with 11 jurisdictions which permit certain candidates to transfer their scores: Connecticut, District of Columbia, Illinois, Maryland, Massachusetts, New Hampshire, New Jersey, Ohio, Oregon, Tennessee and Vermont. A candidate from one of these jurisdictions who earned a score of at least 266 is eligible to transfer the score to New York if: (i) the candidate graduated from an ABA-approved law school with a J.D. degree and had not previously sat for a bar exam in any U.S. jurisdiction; (ii) the candidate was foreign educated and graduated from an ABA-approved law school with an LL.M. degree and had not previously sat for a bar exam in any U.S. jurisdiction; (iii) the candidate graduated in 2018 with a J.D. degree from an ABA-approved law school and sat for one prior administration of the UBE but who had not sat for more than one prior bar exam in any U.S. jurisdiction; and (iv) the candidate graduated in 2019 or later with a J.D. degree from an ABA-approved law school and had not previously taken the UBE and failed more than two times. Candidates who do not meet one of these four criteria may submit a petition to BOLE for permission to transfer their score.

IV. THE FEBRUARY 2021 AND JULY 2021 BAR EXAMINATIONS

On October 19, 2020, the NCBE announced that it would make a full set of UBE examination materials available for purposes of the February 25-26, 2021 Bar Examination but

permitted participating jurisdictions to choose between an in-person or a remote examination. The Court of Appeals, on October 21, 2020, decided to conduct the February 2021 Bar Examination remotely. While it had originally anticipated that the October 2020 examination would be the only one administered remotely, the Court concluded that the threat posed by the pandemic had not sufficiently abated to permit BOLE to safely conduct an in-person examination. The examination went off as scheduled on February 25 and 26 and, apart from the concerns expressed about the Texas power outage, there was little pre-test public outcry and virtually no publicly expressed complaints. We understand that negative commentary was presented on various social media utilized by candidates. BOLE has declared that the New York February 2021 remote examination was administered successfully and that the results will be released by the end of April 2021.²⁷

On February 2, 2021, the NCBE announced that it would again offer jurisdictions the option to administer the UBE this summer either in-person or remotely. The examination is scheduled for July 27 and 28, 2021 and each jurisdiction will decide which delivery mode it will use. On March 5, 2021, BOLE announced that the July 2021 New York UBE would be administered remotely. BOLE determined to open the examination to all eligible applicants but to cap the number of applications at 10,000. The application period opens April 1, 2021 and continues until either April 30, 2021 or when the 10,000 cap is reached.²⁸ It appears that applications will be accepted on a rolling, first-come, first-served basis.

²⁷ See notice updated March 5, 2021 at <https://www.nybarexam.org> (last visited March 20, 2021).

²⁸ *Id.*

These examinations will be the full UBE and the NCBE will score these examinations, whether remotely administered or not, to permit the scores to be portable among UBE jurisdictions, without the necessity of reciprocity agreements.

V. ISSUES WITH REMOTELY ADMINISTERED EXAMINATIONS

The remote administration of the Bar Examination in October 2020 was successful in assuring that candidates had to pass a meaningfully rigorous test to gain admission to the Bar. Implementing a remote examination, in the face of a global pandemic and with the use of technology not previously adapted to this purpose, was a major achievement. There were those who doubted, prior to the examination, that it could be conducted at all or that it could be conducted in a fashion that would be perceived as fair and equitable. Nevertheless, there are significant issues and concerns with remote examinations.

A. The Use of Facial Imaging Technology

Concern has been expressed that existing facial imaging technology, used for identity verification purpose on remote Bar Examinations, adversely impacts persons of color and other discrete groups. Examinees are required to upload photographs of themselves prior to the test and computer cameras on test day match the images to the photographs in order to verify the identity of the test taker. However, critics assert that there are issues with the use of facial recognition technology when verifying the identities of women and nonwhite people.

In August 2019, the American Civil Liberties Union of Northern California released a study in which it applied facial recognition technology to photographs of all 120 members of the California State Legislature. The technology used was one marketed to law enforcement. According to the study, the technology mistakenly matched the faces of one out of every five lawmakers with those in an arrest database. More than one-half of those falsely identified were

lawmakers of color.²⁹ A study by the National Institute of Standards and Technology found that, when conducting database search known as “one to one” matching, many facial recognition algorithms falsely identified African American and Asian faces 10 to 100 times more than Caucasian faces.³⁰ It should be noted that facial imaging technology is different from facial recognition technology in that the former compares a baseline image of a given individual to verify his or her identity as the test taker while facial recognition software compares the image of an individual to a database of facial images.

A 2020 law graduate, Ian To, withdrew from California’s October 2020 remote Bar Examination because the technology failed to identify him. While the Lawyers’ Committee for Civil Rights has demanded that California desist from the use of such technology for the February 2021 examination³¹, California has asserted that insufficient information has been provided to show that its limited use of the technology to verify identifies of bar examinees results in an unlawful discriminatory impact.³²

There is anecdotal evidence of an issue. In early September 2020, a law student of color tweeted that he was unable to complete a mock New York examination because the ExamSoft software did not recognize him. The student reported that the software indicated it could not

²⁹See <https://www.aclunc.org/news/facial-recognition-technology-falsely-identifies-26-california-legislators-mugshots>.

³⁰ See <https://venturebeat.com/2019/12/20/u-s-government-study-finds-racial-bias-in-facial-recognition-systems>.

³¹ See letter dated February 10, 2021, from Noah Baron, Esq., found at <https://lawyerscommittee.org/wp-content/uploads/2021/02/Bar-Exam-FRT-Demand-Letter-to-State-Bar-Final.pdf>.

³² See letter dated February 16, 2021 from James Chang, Esq., found at <https://images.law.com/contrib/content/uploads/documents/400/2021-02-16-Letter-Chang-to-Baron.pdf>.

recognize him because of “poor lighting, even though he was sitting in a well-lit room (which he demonstrated through a photograph). A different student, a woman of color scheduled to take the October remote examination in California, reported that she planned to keep a light shining directly on her face during the two-day examination, a tactic she had learned about through other law school graduates with dark skin.³³ A Hispanic test taker of the October 2020 examination in California received a notice that the ExamSoft software deemed him “not present” during the exams that he completed. He was exonerated of any wrongdoing.³⁴

In December 2020, a group of six United States Senators (Richard Blumenthal, Ron Wyden, Chris Van Hollen, Tina Smith, Elizabeth Warren, and Cory Booker) wrote to ExamSoft regarding a litany of problems with remote proctored examinations. In the letter, the Senators recounted issues with the technology encountered by students of color and students wearing religious dress, such as headscarves. The Senators expressed concern as well with issues confronting students with disabilities, such as software that incorrectly flags their disability as cheating or software glitches that may impede or interrupt their performance. The Senators posed a series of questions, aiming to ensure that virtual testing systems do not leave students behind, particularly students of color and students with disabilities.³⁵

³³ See <https://venturebeat.com/2020/09/29/examsofts-remote-bar-exam-sparks-privacy-and-facial-recognition-concerns/>

³⁴ Skolnick and Holland, Cheating Scandal Aside, New Remote Bar Looks a Lot Like Old One, Bloomberg Law, Feb. 1, 2021, available at <https://news.bloomberglaw.com/business-and-practice/few-fixes-made-to-february-remote-bar-exams-after-cheating-snafu>.

³⁵ Letter dated December 3, 2020 to Sebastian Vos, Chief Executive Officer of ExamSoft.

B. Other Issues with Remote Proctoring

Because the Bar Examination is given without an in-person proctor, proctoring is done remotely. At the beginning of each session, after a candidate has logged in, Exemplify software is used to video and audio record the session. The examinee is required to remove all notes, papers, and other prohibited items (which include mobile phones) from the testing area. A “Monitoring” eyebrow appears at the top center of the examinee’s screen. Examinees are instructed to remain within the camera frame during the test session. Further, examinees are told to periodically check the “Monitoring” eyebrow at the top center of the screen to ensure that their face is visible within the camera frame for the recording.

In the event the software detects an issue with a candidate, the software “flags” the issue for review. Review may result in a determination to fail the candidate or may result in a determination that there was no issue at all or that any issue should be excused. While the number of “flags” issued in New York in October is not known, in California, over one-third of all takers of the remote test were “flagged.”³⁶ Of the 3,000 people “flagged” in California, only 429 were sent notices that they were being investigated for possible rule breaking. In the end, 47 test-takers were implicated in rules violation.³⁷ One California candidate was “flagged” because her eyes may have been outside the view of the webcam for a prolonged period during the test. She was insulted and shocked when she received a notice of the flag and was concerned that she might have to report the notice to the character and fitness committee.³⁸

³⁶ Ward and Moran, *Thousands of California bar exam Takers have video files flagged for review*, ABA Journal, December 18, 2020.

³⁷ Skolnick and Holland, *Cheating Scandal Aside, New Remote Bar Looks a Lot Like Old One*, Bloomberg Law, Feb. 1, 2021, available at <https://news.bloomberglaw.com/business-and-practice/few-fixes-made-to-february-remote-bar-exams-after-cheating-snafu>.

³⁸ *Id.*

Apart from whether individuals view remote proctoring as invasive, candidates have expressed concern and anxiety simply over the prospect of being “flagged”, not to mention actually being flagged. As evident from this discussion, being flagged does not by itself mean that a person has cheated. Rather, it reflects that the software has detected an anomaly which requires human intervention. The Task Force has been advised by BOLE that most flags are quickly resolved.

Flags may be issued because the examinee looked away from the computer for more than an expected amount of time, or because the examinee has a facial tic, or the lighting conditions in the testing area have prevented the computer from clearly seeing the examinee’s face. An examinee may be flagged if another person walks into the camera view, such as a young child entering a bedroom where a parent is taking the test. One person in California was flagged for being on the telephone with ExamSoft tech support when the examinee was having difficulty getting the exam to load on the computer.³⁹ In New York, where the examinee announced to the camera that he or she had an emergency and provided an explanation (including emergency use of a restroom), the Board lifted the flag and excused the temporary absence.⁴⁰

ExamSoft has indicated that it has improved how in-test attachments may be viewed. It is also now providing support for Apple devices using new processors and is implementing other

³⁹ See Pease, Remote proctoring services are invasive, biased and can’t stop cheating, critics say, The College Fix, Feb.18, 2021,, located at: www.thecollegefix.com/remote-proctoring-services-are-invasive-biased-and-cant-stop-cheating-critics-say/

⁴⁰ See letter from John McAlary to Assembly Member Jo Anne Simon, dated February 19, 2021.

user experience improvements.⁴¹ We do not yet have information on whether the facial recognition software fared better when used for the February 2021 test.

C. Impacts on Persons with Cognitive and Learning Disabilities

An applicant for bar admission who has a cognitive impairment that substantially limits a major life activity, reading, may be entitled to accommodation in the administration of the Bar Examination.⁴² A test that is delivered and completed entirely via computer is manifestly different from one that is delivered and completed in paper-and-pen or delivered in paper-and-pen but completed on computer. One author has expressed concern as follows:

Research has found that reading digital content is a different brain process that reading print material. In her 2018 book, “Reader Come Home: The Reading Brain in a Digital World”, University of California, Los Angeles, professor Maryanne Wolf [Harper Collins 2018], revealed that eye movements, sustained focus, and thus deep reading comprehension are different for digesting digital content, such as PDFs or online material.

Across languages, students tend to overestimate their comprehension of digital format, which she attributes to the complex neural networks that underlie comprehending advanced content. For learning-disabled students, these networks are awry and atypical, thus adding processing demands.

Meanwhile, the proverbial jury is out on how other aspects of computer-delivered tests, such as the clicking back and forth between content on different screens, a student’s ability to write or annotate by hand and easily refer to this material, and the shift toward likely increased working memory demands, affect those with attention, working memory, spatial analysis, executive function or visual memory gaps.

Because granular analyses of performance of disabled individuals on computerized tests have not been done, it is premature to assume that computer—delivered formats are equivalent to paper-delivered ones.

Factors such as increased anxiety further complicate the matter, particularly as parameters for using or excusing these new formats are considered

⁴¹ Skolnick and Holland, Cheating Scandal Aside, New Remote Bar Looks a Lot Like Old One, Bloomberg Law, Feb. 1, 2021, available at <https://news.bloomberglaw.com/business-and-practice/few-fixes-made-to-february-remote-bar-exams-after-cheating-snafu>.

⁴² See *Bartlett v. New York State Board of Law Examiners*, 226 F.3d 69 (2d Cir. 2000).

by test agencies. The time delays in advocacy and appeals to test agencies currently complicate the preparation process.⁴³

In two cases, California federal courts rejected claims that the remote October 2020 Bar Examination violated the Americans with Disabilities Act. *In Gordon v State Bar of California*,⁴⁴ three disabled law graduates sued to compel the state bar to accommodate their disabilities by providing paper tests, scratch paper, and bathroom breaks. The court held that these proposed accommodations would impose an undue burden on the state bar and were not feasible for the October examination.

Similarly, in *Kohn v State Bar of California*,⁴⁵ the court dismissed an action by a disabled law graduate who was not granted all of the accommodations he sought in connection with the October 2020 examination. The plaintiff was diagnosed with several physical and psychological conditions including autism and neurological/attention disorders, digestive system conditions and visual impairments. He was granted certain accommodations but was denied his requests to take the examination only on weekends, to test in a private room (rather than an exam center), to be allowed breaks at his discretion, and to be provided with an ergonomic workstation, a hotel room, and an experienced proctor. The court held that the plaintiff did not have a fundamental right to take the bar or practice law, that bar admissions policy was subject to only rational basis review, and that the plaintiff failed to present facts demonstrating that California's procedures and accommodations failed rational basis review.

⁴³ Mannis, *Remote Bar Exams Pose New Learning Disability Challenges*, Law 360, Feb.1, 2021.

⁴⁴ 2020 WL 5816580 (N.D. Cal. 2020).

⁴⁵ __ F. Supp.3d ___, 2020 WL 629038 (N.D. Cal. 2020).

The October 2020 remote examination was a response to a unique public health crisis and was the only feasible alternative to either delaying admission opportunities indefinitely or allowing for a diploma privilege. As was noted in *Gordon*, additional accommodations made by California included a lower passing score and the establishment of a provisional licensing program which allows law-school graduates who had not yet passed a Bar Examination to practice law until June 2022. It remains to be seen if the courts will be more receptive to disability-based objections to examinations delivered and responded to only digitally at a time when a paper examination was feasible.

As discussed further below, in three jurisdictions that offered both in-person and remote examinations, the remote test takers did not do as well as those who took the examination in person.⁴⁶

We are concerned that the issues experienced by persons with cognitive issues in the remote Bar Examination setting will be repeated by persons taking a computer-delivered and answered test in an in-person setting. Although having the examination administered in-person with proctors present will eliminate the problems associated with the use of facial recognition software, persons with cognitive issues may experience other obstacles in endeavoring to respond to an examination delivered and answered exclusively by computer. The problems associated with taking a digital test are considered further in this Report below.

⁴⁶ See Ward, *Did bar candidates who had a choice do better on in-person or remote exams?*, ABA Journal, Feb.9, 2021,

D. Bathroom Breaks

The issue of bathroom breaks, whether for the disabled or otherwise, was a controversial one. One anonymous Pennsylvania bar candidate stated that, because he understood that if he left the view of the camera he would fail, when he could not hold his need to urinate until the end of a 90-minute session, he elected to urinate on himself, rather than go to the bathroom. He said: “I was put in this position where I had to make this barbaric choice to either piss myself or fail the most important exam I’m ever going to take in my life. It’s an odd position to put an applicant in.”⁴⁷

Candidates with disabilities were granted accommodations for restroom breaks during the October 2020 MPT and will be given similar accommodations for the February 2021 UBE. Where a candidate has a condition that may not rise to the level of a disability, the candidate may request an administrative accommodation. These requests typically are made by candidates who are pregnant, who are nursing, or have a condition that requires frequent use of the bathroom. These candidates were either granted a four-day schedule (which provides for more but shorter test periods) or instructed to announce to the camera that they have an emergency and need to use the restroom.⁴⁸

Assembly Member Jo Anne Simon has urged BOLE to permit candidates to take restroom breaks at their discretion during the MPT, singling out the MPT portion of the test as it

⁴⁷ Hudgins, Pee-Soaked Pants to Cyberattacks: States’ Glitch-Filled Launch of Remote Bar Exams, Law.com, Dec. 21, 2020, located at www.law.com/legaltechnews/2020/12/21/pee-soaked-pants-to-cyberattacks-states-glitch-filled-launch-of-remote-bar-exams/ We are advised by BOLE that this would not have happened in New York as the examinee could have announced on camera that he needed to use the restroom and followed up, after the examination, with a letter to BOLE to explain the circumstances.

⁴⁸ Letter dated Feb.15, 2021 from John McAlary to Assembly Member Jo Anne Simon.

is a closed-universe question and cheating is thus impossible.⁴⁹ The Board did not accept this request, citing, among other things, security concerns.⁵⁰ While the Board did not specify the ground for its security concerns, it is possible that, during the MPT, an off-camera examinee could consult with a third person as to how to structure an answer. On the other hand, the Board did restate to candidates that should an emergency arise during the examination that requires them to leave the view of the camera they should make an announcement to that effect and then follow up after the exam with the Board in writing to explain the circumstances. The Board would then decide whether to excuse the temporary absence and has granted excuses based on necessity for emergency bathroom usage.⁵¹

We understand – and support – BOLE’s determination to maintain the integrity of the remote test by declining to permit test-takers to take breaks at their discretion. However, even though BOLE’s policy is not as inflexible as some have represented it to be, and BOLE has made significant efforts to explain its policy, its policy may not be fully understood by examinees. The administration of an on-line exam was, and remains likely, to alter and probably expand the population needing accommodation. The perception of the remote examination as being fair would undoubtedly be improved by continued efforts to make it clear that test takers who have health conditions requiring breaks (bathroom breaks and medication breaks) may obtain advance authorization in a fashion consistent with BOLE’s legitimate need for security and even-handed treatment. Candidates may view BOLE’s existing application process as cumbersome, time-consuming, and so exacting as to be rarely granted. A more user-friendly, somewhat more

⁴⁹ Letter dated Feb.18, 2021 from Assembly Member Jo Anne Simon to John McAlary.

⁵⁰ Letter dated Feb.19, 2021 from John McAlary to Assembly Member Jo Anne Simon.

⁵¹ *Id.*

flexible policy, would go far to reducing pre-test stress and anxiety, reduce the present level of student hostility towards BOLE, and improve the efficacy of remote testing.

E. Return to In-Person Examinations

In view of the issues seen with remotely administered examinations, we are in complete agreement with the recent statement by the Oregon State Board of Law Examiners that “an-person exam provides the fairest and most equitable exam for all applicants.”⁵² We urge the Court of Appeals and BOLE to provide for an in-person examination as soon as possible, hopefully, with the February 2022 examination.

VI. NEW YORK’S STUDENT PRACTICE ORDER PROGRAM

When the decision was made to postpone the September 2020 Bar Examination, the Court of Appeals, to provide a mechanism for recent law graduates to obtain employment, amended Part 524 of its Rules, effective July 22, 2020, to establish a program by which eligible graduates of ABA-approved law schools could apply for temporary authorization to practice law under the supervision of an attorney who is admitted to practice in New York State. The program is intended to meet the needs of law graduates who are employed in New York, pending their admission to the bar. Pursuant to the amended rules of the Court of Appeals, temporary authorization to practice may be granted by order of the Appellate Division upon application by an eligible applicant. The Appellate Division, in turn, recognized the unique challenges that are confronting recent law graduates and joined the Court of Appeals in seeking to provide an impactful means of assisting these graduates in pursuing legal employment in New York pending their admission to the bar.

⁵² Statement of the Oregon State Board of Law Examiners, issued March 26, 2021, available at: <https://www.osbar.org/docs/admissions/2021-03-26BBXStatementJuly21Exam.pdf>.

To be eligible to apply for temporary authorization, an applicant must: (i) have received a J.D. or an LL.M. degree from a law school that is approved by the American Bar Association; (ii) be employed to engage in the practice of law in the State of New York; (iii) be qualified to take the New York State bar examination, pursuant to the Rules for the Admission of Attorneys and Counselors-at-Law; and (iv) not have previously failed a bar examination administered in New York or any other state or territory of the United States, or in the District of Columbia. Applications are made on simplified forms, consisting of an employer supporting affirmation and an affirmation from the applicant.

Since the inception of the program, the Second Department issued 104 temporary practice orders and denied 22 applications. The First Department issued 55 orders, the Third Department 28 orders (none since November 2020) and the Fourth Department issued 43 orders. All Departments report that the program was easy for applicants to navigate.

It appears that the temporary practice order program was underutilized, particularly in the First, Third and Fourth Departments. It is possible that the small level of participation is accounted for by limited, or non-existent, hiring of recent graduates by private sector attorneys and law firms. It also may be accounted for by reliance by public sector employers (such as District Attorney offices and legal services organizations) upon traditional, statutory-based student practice order programs. It has been observed that at least some of the temporary practice authorizations went to recent graduates who were being employed by relatives, such as parents and siblings. Nevertheless, the courts should be commended for developing and implementing the program as it provided opportunity to practice to 230 law graduates who otherwise would not have been able to.

VII. BUILDING A BETTER BAR

In October 2020, Professor Deborah Jones Merritt and Logan Cornett issued a ground-breaking report on how to construct an improved bar exam. Professor Merritt is a nationally recognized expert on bar admissions and examinations. She is a Distinguished University Professor and the holder of the John Deaver Dinko/Baker & Hostetler Chair in Law at the Moritz College of Law, The Ohio State University. Logan Cornett is the Director of Research at the Institute for the Advancement of the American Legal System (“IAALS”). Their report is entitled, “Building a Better Bar: The Twelve Building Blocks of Minimum Competence” (referred to below as “Building a Better Bar”). A complete copy of their report is attached hereto as Appendix A.

As Building a Better Bar explains, the Bar Examination professes to distinguish between those law graduates who have attained minimum competence to practice law from those who have not attained such competence. There is, however, no accepted, evidence-based definition of minimum competence. Without understanding what minimum competence is, and how to test for it, it impossible to know if the examination is a valid measurement of minimum competence or simply an artificial barrier to entry. To gain insight into what new lawyers do, and therefore what they need to know in order to practice law competently, 50 discrete focus groups were conducted involving over 200 new and supervisory lawyers. The focus groups were held in 18 different areas of the country, including Manhattan, Queens and rural New York. All practice settings were involved.

The data derived from looking at what new lawyers do was assessed as comprising 12 interlocking components or “building blocks.” These 12 building blocks are:

- The ability to act professionally and in accordance with the rules of professional conduct;
- An understanding of legal processes and sources of law;
- An understanding of threshold concepts in many subjects;
- The ability to interpret legal materials;
- The ability to interact effectively with clients;
- The ability to identify legal issues;
- The ability to conduct research;
- The ability to communicate as a lawyer;
- The ability to see the “big picture” of client matters;
- The ability to manage a law-related workload responsibly;
- The ability to cope with the stresses of legal practice; and
- The ability to pursue self-directed learning.

Building a Better Bar reported new lawyers work for many types of organizations and practice diverse kinds of law. This diversity means that a newly licensed lawyer could enter any of dozens of practice areas. However, the report made four important findings as to the work of new lawyers:

- State and local law played a prominent role in the work of young lawyers;
- Young lawyers rarely relied upon memorized rules;
- Young lawyers engaged frequently with clients; and
- Most young lawyers assumed substantial responsibility for client matters during their first year, with little or no supervision.

To elaborate on the first of these findings, the focus group members reported that they were more likely to rely upon state and local law in their work than on federal law. About half reported that they worked exclusively with state and local law; most of the remainder worked with a mix of federal, state, and local law. Some lawyers needed to work with laws of multiple states, and some had clients whose matters involved multiple states.⁵³

This finding has important implications for the content of the Bar Examination. The UBE tests only federal law and generally applicable legal principles. But new lawyers more often apply state and local rules. As Building a Better Bar found, this mismatch between testing and practice has led some new lawyers to make mistakes while representing clients. While a uniform, generic Bar Examination makes it easier for lawyers who move between states, it does not account for the fact that new lawyers are more likely to apply the laws of specific states – which are often highly individualistic – than federal law.⁵⁴

To address these issues, Building a Better Bar makes several recommendations.

A. The Limitations of a Written Examination

Written examinations assess only about one-half of the 12 identified building blocks. It is difficult to measure others using written tests. Issue-spotting on exams is quite different from issue spotting in real life. Written exams do not effectively evaluate basic listening comprehension nor do they evaluate project management skills, the ability to see the big picture in client matters, and coping with stress. Therefore, written examinations should be complimented by other forms of assessment.⁵⁵

⁵³ Building a Better Bar at 29-30.

⁵⁴ *Id.* at 30.

⁵⁵ *Id.* at 94.

B. Limit the Use of Multiple-Choice Tests

While multiple choice tests are efficient to grade and may be more reliable, multiple choice tests are inconsistent with the cognitive skills that lawyers use in practice. Constructed-response questions which require test-takers to answer a question in their own words offer a more authentic assessment of lawyering skills.⁵⁶

C. Eliminate Essay Questions and Use More Performance Tests

Essay questions were found to not parallel the written forms that examinees use in practice, while performance tests allow for assessment of the test taker's understanding of legal processes and sources of law, ability to interpret legal materials, and other building blocks. Performance tests can be adapted to measure research ability. Rather than providing closed universe case files for every performance test question, jurisdictions could require candidates to conduct research on one or more of these exercises.⁵⁷

D. Multiple Choice and Essay Questions Should be Open Book

Lawyers use threshold concepts to find more detailed, jurisdiction-specific rules that they apply to the problem. An exam which tests the application of concepts should make more detailed rules available. Allowing candidates to use outlines, rule books and other sources would test their knowledge of threshold concepts, while also replicating the type of recall, research and rules application that lawyers use in the real world.⁵⁸

⁵⁶ *Id.* at 95. The Task Force has previously noted that, in a multiple-choice test, the examinee must only identify which of the alternative answers is most correct, rather than having to produce an answer without a prompt.

⁵⁷ *Id.* at 95.

⁵⁸ *Id.* at 96.

E. More Time to Answer Questions

New lawyers should work carefully, taking time to check and reflect, and should not rush through their assignments. Current Bar Examinations place a premium on speed. Even performance tests place unrealistic time constraints. In practice, even an experienced lawyer would not absorb a new problem, analyze sources in a novel field, and develop a cogent written analysis in 90 minutes.⁵⁹

F. Law Course: Client Interaction Credits

While in law school, candidates should be required to successfully complete three academic credits of course work that develops their ability to interact effectively with clients.⁶⁰

G. Law Course: Negotiation Credits

While in law school, candidates should be required to successfully complete three academic credits of course work that develops their ability to negotiate.⁶¹

H. Law Course: Citizen Credits

While in law school, candidates should be required to successfully complete three academic credits of course work that is focused on the lawyer's role as a public citizen having special responsibility for the quality of justice.⁶²

⁵⁹ *Id.* at 97.

⁶⁰ *Id.* at 98.

⁶¹ *Id.*

⁶² *Id.* at 99.

I. Law School Clinical Work

While in law school, candidates should be required to successfully complete at least four credits of closely supervised clinical work, as well as at least four academic credits of additional clinical or externship work.⁶³

J. Create a Working Group

Jurisdictions should create a diverse workgroup of legal educators, judges, practitioners, law students and clients to design an evidence-based licensing system that is valid, reliable and fair to all candidates.⁶⁴

VIII. TOWARD A NEW NEW YORK BAR EXAMINATION

Professor Merritt urged New York to create its own 21st century New York Bar Examination and made a presentation to the Task Force in support of her proposal. A copy of her slide presentation is annexed as Appendix B to this Report.

Professor Merritt notes that New York is a leader in the legal profession and, by itself, tests more than one-fifth of all candidates for Bar admission in the country. New York has the expertise to undertake this task, as well as the ability to persuade other states to grant admission within their jurisdictions to those admitted in New York.

For the reasons outlined in *Building a Better Bar*, Professor Merritt maintains that the UBE falls short of what is needed to measure minimum lawyer competency. It pays inadequate attention to state and local law; it does not test research skills; issue spotting is artificial; it does not sufficiently test statutory and contract interpretation; the essay writing style does not match

⁶³ *Id* at 99-100.

⁶⁴ *Id* at 102.

styles needed in practice; and no attention is paid to client counseling, negotiation, and other essential skills.

Professor Merritt cited a study which involved 16 licensed attorneys who took a 100-question simulated MBE. No one came close to passing. The highest score was 52% and half of those tested scored below 40%. Participants even failed portions connected to their practice areas and participants failed even when they had passed the examination within the previous year.

Professor Merritt argues that, to best protect the public, we need lawyers to have coursework preparation, clinical experience, and a Bar Examination.

The new New York Bar Examination that she proposes would have three elements:

- (i) two New York Performance Tests (3 hours each);
- (ii) a New York research examination (3 hours); and
- (iii) a test on New York Practice and Procedure (3 hours).

Candidates would be able to take the examination all at once, over two days, or else take one component each quarter starting in law school.

In a performance test, candidates receive a client file and a library file and proceed to prepare a written document, such as a legal memorandum or a brief. These tests are authentic representations of what new lawyers do and closely approximate entry-level work. A performance test can assess multiple building blocks and can be graded reliable.

Professor Merritt advocates that, in contrast to the approach (both currently and as projected) of the NCBE, New York use performance tests that are based on New York law, as opposed to law of a fictional jurisdiction which consists of general legal principles. She would incorporate more client-centered tasks into the test and would allow much more time to complete each performance test (three hours) than the NCBE presently allows (90 minutes).

Professor Merritt argues that more time should be given to complete each answer to avoid the test being simply a measurement of who can read or type the fastest. Speedy questions teach the wrong lessons about quality. Haste harms clients. While lawyers work under time constraints, the 90-minute exam timing is unrealistic.

The ability to research is a key legal skill that new lawyers need to have. Lawyering is generally not about knowing immediately what the answer is to a legal question; lawyering is knowing how to find the answer. Therefore, it is appropriate to require candidates for bar admission to demonstrate their legal research skills on the Bar Examination. They can be given 3 hours of exercises – across multiple subject matter areas – using straightforward problems. Answers can be in short answer form or multiple choice. The questions would be based on New York law. Grading would be objective.

Professor Merritt believes that the Bar Examination should include a test on practice and procedure. It is the most common subject for new lawyers, while the performance and research tests would cover the substantive subjects. She proposes that New York test New York practice and procedure, using 75 multiple choice questions, in a closed book, three-hour examination.

As an alternative component, Professor Merritt suggests that candidates be given the option of choosing a subject matter area for a three-hour test of doctrine. This portion of the examination would be open book.

In addition, Professor Merritt proposes that the written Bar Examination be complemented with an open-book Multi-State Professional Responsibility Examination (an “MPRE”), courses in client counseling and negotiation, and clinical work.

She maintains that, in adopting such a new New York Examination, New York would have the first evidence-based examination to admit lawyers. Other states could be persuaded to

emulate it, if not adopt it. The skills tested on the performance and research tests are transferrable. The UBE tests on the law of nowhere. Why not test candidates on proficiency with the law of a leading state? The new examination would be research-based and would embrace best practices.

Instead of being a follower of the NCBE, New York would become the leader in attorney licensure. Based on extensive research she has done into the necessary building blocks to test minimum competency on the bar exam, Professor Merritt has crafted a proposal for New York to take advantage of its status as a leader in the legal profession and create its own bar exam based on New York law principles that would truly measure competency to practice law in New York.

While we generally support Professor Merritt's proposal, we have reservations regarding aspects of it and suggest consideration of some modifications.

While we support the idea of performance tests, we are concerned that if students perceive that, when they take the bar examination, they will be provided with a library file of New York materials, they will not study the New York material during law school. Bearing in mind that most young lawyers in New York will be working with New York state and local law, performance tests must be carefully developed to ensure that law students will study New York legal principles during law school. For this purpose, we define New York legal principles to mean not just New York law but, more broadly, as the legal concepts of which New York lawyers should have a basic familiarity, even if those concepts are not derived from New York state law. Those concepts may include legal principles unique to New York, New York variations on generally accepted legal principles, and federal principles.

Regarding federal principles, we have pointed out that the UBE does not test subject matter that is important to newly admitted attorneys, such as health law, immigration, and

cybersecurity. In designing its own test, New York needs to account, not only for state principles but also for emerging federal laws that young lawyers will be utilizing in their formative years. To make sure that the new examination reaches as many subject areas as possible, it may be appropriate to substitute traditional essays for one of the performance tests.

We are concerned that two lengthy performance tests would not be able to provide the requisite coverage of the broad areas of law that new lawyers should be expected to have familiarity. We agree that 90-minute test sessions are too short; however, we are concerned that a three-hour test session devoted to a single performance test may be too long and that it may be appropriate to shorten each session to provide more questions that cover more subjects. While requiring a procedure examination will encourage law schools to hire faculty to teach New York procedure, we want to also encourage instruction and study in important substantive New York law subjects, such as family law, trusts and estates, conflicts of law, landlord/tenant and the law of employment and discrimination.

In the First Report, we proposed that the new examination include four essays, each of 30-minutes duration. These would test New York Civil Practice, No-fault insurance, Workers' Compensation, Family Law, Professional Ethics, Trust and Estates and other subjects. We noted that it would not be difficult to combine subjects, for example, to combine a civil practice question with a family law or legal ethics problem. A single essay could cover three or four issues so that even four essays might reach as many as 16 subject areas. We would therefore consider modifying Professor Merritt's proposal by dropping one of the performance tests and substituting essay questions.

We are concerned that a closed-book, multiple choice examination on New York civil procedure may inappropriately encourage memorization and rote learning and perpetuate the

discriminatory impact that the use of multiple-choice tests has on women. We agree that it is important to test prospective New York lawyers on New York civil procedure. Too many lawyers have been admitted in New York without knowing much, if anything, about our complicated court system. However, we suggest consideration of the use of either short-form or traditional essay questions on the procedural examination and permitting test takers access to statutory materials during the test.⁶⁵

We call upon the Court of Appeals to appoint a working group of law school faculty and practitioners, aided by a professional mathematician, to work with BOLE to develop the new test and to design the proposed alternative pathways to admission. The working group should formulate a test structure that is fair and equitable, seeks to study of New York law, promotes New York law within the broader legal community, and assures that attorneys admitted to practice here are competent to do so, with reference to the laws that they will be working with.

A return to a New York Bar Examination should bring about a renaissance in the study and development of New York law, which is the lodestar of common law legal principles both nationally and internationally. It would also restore luster to New York admission as it would no longer be a mere credential. Once again, the public would be assured that a New York-admitted lawyer has the minimum competence to practice in New York. The confusion between New York admittees who know New York law and those who do not will become a thing of the past.

IX. THE NCBE'S PROPOSED NEW EXAMINATION

On January 28, 2021, the NCBE Board of Trustees voted to approve the preliminary recommendations of its Testing Task Force for the next generation of the Bar Examination. A

⁶⁵ We note that the possibility exists that if the NCBE retained the MBE, either in its present form or in a modified fashion, it could be used as a basis for working with other jurisdictions to achieve reciprocity.

copy of the Overview of the NCBE Preliminary Recommendations is attached hereto as Appendix C.

The recommendations call for the elimination of the existing separate tests – the MBE, the MEE, and the MPT and their replacement with a single, integrated examination that would be administered over two days. Candidates would receive a single grade, derived from their responses on both days, given at or near the point of licensure (*i.e.*, after completion of law school). Each day will not be graded separately.

The integrated examination would use both stand-alone questions and item sets, as well as a combination of formats (*e.g.*, “selected-response,” short answer and “extended constructed-response” items). Selected response questions include multiple choice and true/false items. Extended constructed response questions have been traditionally called essay questions.

The integrated examination would test on “foundational concepts and principles”, which the NCBE deems to be “legal subjects that are common to numerous practice areas, which is consistent with the regulatory framework of a general license.”⁶⁶ These foundational principles are: civil procedure (including constitutional protections and proceedings before administrative agencies); contracts (including Article 2 of the Uniform Commercial Code); Evidence; Torts; Business Associations (including Agency); Constitutional Law (excluding principles separately covered under civil procedure and criminal law); Criminal Law and Constitutional Protections Impacting Criminal Proceedings (excluding criminal procedure outside of constitutional protections); and real property. The integrated examination would also seek to cover the foundational skills of legal research, legal writing, issue spotting and analysis, investigation and

⁶⁶ Overview of Preliminary Recommendations for the Next Generation of the Bar Examination, at 4.

analysis, client counseling and advising, negotiation and dispute resolution, and client relationship and management.

The examination would be a “computer-based” test, administered either on the candidates’ laptops at facilities supplied by the testing jurisdictions or at computer testing centers.

The revamped examination would not test family law, trusts and estates, the Uniform Commercial Code (except for Article 2), and conflict of laws. While the recommendations call for less rote memorization, the examination would continue to be closed book. Professor Merritt welcomes the NCBE’s proposal to shift to a more skills-based test but questions whether the NCBE can deliver on its reform. She noted that the present exam purports to test fundamental legal principles, rather than detailed rules, but many have criticized the current examination as requiring too much rote memorization.⁶⁷

X. CONCERNS WITH A COMPUTER-BASED TEST

Apart from the issues related to the content of the proposed revamped NCBE examination, the Task Force is greatly concerned with the NCBE’s intention to shift to an examination which is administered solely by computer. In addressing this issue, we have been informed by the experience on the October 2020 remote examination. Although the October 2020 remote examination was not a full UBE and the February 2021 remote examination was, there has not been any publicly available reaction to the February 2021 administration.

While we support the use of computers to administer a remote examination during a pandemic which makes in-person proctoring impossible, in looking forward, we assume, as does

⁶⁷ Sloan, “*A Dream Come True Instead of a Nightmare*”: *Will the Bar Exam Revamp Go Far Enough*, N.Y.L.J., January 12, 2021.

the NCBE, that, after the pandemic has passed, future Bar Examinations will be conducted with candidates and proctors personally present at jurisdiction provided facilities (such as law schools or the Jacob Javits Center) or at computer testing centers. As we have previously stated in this Report, we wholeheartedly agree with the Oregon State Board of Law Examiners that an in-person test is the fairest and most equitable form of administration. We are advised that BOLE supports a return to in-person testing as well.

Having the examination administered in an in-person setting will eliminate the issues identified, and previously discussed, with the use of facial recognition technology. It will also mitigate the concerns about restroom breaks needed by certain categories of candidates. It would also eliminate the distractions that candidates may have experienced when taking examinations in their own homes. However, significant issues remain which, in our view, should preclude New York from committing, either affirmatively or by inaction, to the exclusive use of a computer-based test.

There are scientific studies which have reported that the shift from distributing text materials from print to digital (in the form of pdf files) has negatively impacted comprehension. Perhaps due to characteristics of the computer screen (refresh rate, high levels of contrast, fluctuating luminance), comprehension derived from computer-based reading is not great as it is when derived from paper-based reading.⁶⁸ A study of 15 to 16 year old female students in Norway reported that students who read texts on paper performed significantly better than those who read the texts on the computer screen.⁶⁹ The study suggested that the difference in

⁶⁸Mangen, Walgermo, and Brønnick, 58 *International Journal of Educational Research* at 61-62 (2013).

⁶⁹*Id.* at 65.

comprehension performance could be related to issues of navigation within the document. Specifically, reading on a computer screen, the reader must scroll the document (unless the document is short and fits entirely on the screen). Scrolling hampers reading “by imposing a spatial instability which may negatively impact the reader’s mental representation of the text and, by implication, comprehension.”⁷⁰ Some of the differences between print and screen media may relate to the different lighting conditions in the two modalities. LCD computer screens are known to cause visual fatigue while e-book technologies based on electronic ink, like Kindle, are merely reflecting ambient light and are more reader friendly.⁷¹ This suggests that computer reading of pdfs on screens may result in reduced reader comprehension as compared to either computer reading of an “e-book” or traditional paper reading.

Taking a Bar Examination on a computer is very different and, at least to some, more difficult, than taking the same test in a pen-and-paper environment. For the performance test, for example, a candidate will be required to open the library attachments and view and digest the materials on the screen. A space for virtual scrap paper is provided. Multiple screens are not permitted. While both the library and the answer can be viewed on the computer and the candidate can enlarge the size of one window, doing so will necessarily decrease the size of the other windows. Material in the library cannot be highlighted but parts of questions can be. A candidate can “cut and paste” from the virtual scrap paper to the answer but cannot do so between the library and the answer. Thus, a candidate cannot “cut and paste” the key portion of a statute or case set out in the library but would have to re-type it in the answer.

⁷⁰ *Id.* at 65.

⁷¹ *Id.* at 66.

The process of compiling an answer is as much a test of computer skills as it is a test of legal knowledge. A library file in a performance test can span at least two dozen printed pages. A candidate will need to navigate back and forth among those pages as well as between the library, the scrap papers, and the answer, while responding. For at least some non-disabled candidates, the inability to simply look at a printed copy of the material will make the examination considerably more challenging.

In the belief that a picture (or in this case a video) is worth a thousand words, we provide the following link to a demonstration made by an academician to show other academicians what their candidates experience when taking the Bar Examination by computer⁷²:

https://umassd.zoom.us/rec/share/0M4erlOA3YCKEBiAYGokTGpnz_bUYIToTtYctxffdiCYy5W_to-l-miMohslD114.Qk4J87SEWG25b-PV?startTime=1612880403000

Not all millennials are comfortable with technology to the level required for comfort in taking the bar exam solely by computer. While the current generation may be the first to grow up with computers, so-called “digital natives”, we should not confuse how those computers have been used and what the bar exam is asking them to do. It is one thing to be adept on social media and quite another to use the technology for learning and high stakes licensing exams with major written components. It is also the case that not all bar candidates are millennials or will be for many years to come. Law students come in all ages and with all backgrounds. Many are more comfortable with reading materials, especially complex materials, in hard copy.

A law professor in Texas, where a remote examination was administered in October 2020 observed that the remote examination involved a fair amount of screen scrolling. “The act of writing in a booklet and taking notes the way people have been practicing to do, it’s so much

⁷² Laurel A. Albin, Esq., Program Director of Bar Success, University of Massachusetts School of Law – Dartmouth, Zoom Presentation, February 9, 2021.

more efficient. For a typical essay, students might spend 10 minutes planning how to write an answer. Online, they might spend up to 15 minutes, including the scrolling back and forth”.⁷³ She observed that, in writing practice essays for the online examination, students prepared shorter, less detailed answers than students did preparing for a paper examination. Also, she observed that many students were slower with practice essays when using the online platform.⁷⁴

Ironically, the shift to performance-based testing (which we favor) may well contribute to making the test more a test of computer skills than a test of legal knowledge, particularly if the NCBE maintains its 90 minute-per-test session time limits. If candidates are to take a computer-administered test on their own laptops, persons with bigger and more modern equipment will be at an advantage of those who have slower and more outdated computers. While the playing field could be leveled if all candidates are required to take the test at test centers using equipment provided by the centers (rather than their own equipment), there is reason to doubt the practicality of this approach in New York. There may not be enough capacity in test centers to accommodate the large number of New York candidates and the cost could be significant. In response to our proposal to administer the NYLE at test centers, BOLE asserted that doing so “at test centers presents a number of challenges, including test center capacity and cost.”⁷⁵ If capacity and cost would be an issue for a test given four times a year, the challenges would be greater for a test administer only twice a year, with many more candidates each test.

⁷³Zoe E. Niesel, associate professor at St. Mary’s Law School, quoted in Ward, *Did bar candidates who had a choice do better on in-person or remote exams?*, ABA Journal, February 9, 2021.

⁷⁴Ward, *Did bar candidates who had a choice do better on in-person or remote exams?*, ABA Journal, February 9, 2021.

⁷⁵BOLE Response to First Report, July 2020, at 19.

Furthermore, as set out earlier in this Report, serious issues, both legal and as to fairness, are posed by requiring persons with cognitive disabilities to use computer-based examinations.

Although the situation with the Texas power grid in February 2021 did not ultimately cause a significant disruption in the national administration of the February 2021 examination, with the NCBE's intention to shift to an examination administered entirely by computer, it is not difficult to foresee that unexpected disruptions to electrical, heating, air conditioning, and water systems will create significant obstacles to the simultaneous admission of an examination across the country. There is no indication as to what, if any, plans are being developed to address such occurrences.

We believe that, at best, it is premature to commit to an irrevocable shift to a computer-administered Bar Examination. There have only been two instances of such an exam being given – the October 2020 and February 2021 remote examinations. While the complaints regarding the October 2020 administration are now known and are being addressed, there is no available information yet as to the experience with the February 2021 examination. The July 2021 examination will be remote in New York and is anticipated to involve more candidates than either of the two earlier remote examinations. The experiences with these examinations should be carefully studied and evaluated prior to deciding to make the shift away from pen-and-paper examinations. We are, therefore, quite surprised, and disappointed that NCBE decided to make the shift, rendering its decision in early January 2021, without any apparent assessment of the efficacy of the October 2020 remote examination. Nor does it appear that NCBE has examined the issues relating to comprehension differences when material is presented by computer or by paper or even as to how a computer examination might be delivered (pdf v. e-book).

The limited information available now suggests that with respect to those candidates who had a choice between taking an in-person examination and a remote examination, the candidates who opted for the in-person examination did better. These results are in line with the scientific studies indicating that comprehension is better when material is read by print than by computer.

Texas had an in-person September 2020 examination with 1,037 candidates, with a pass rate of 76.66%. Texas had a remote October 2020 examination which was taken by 1,116 candidates of whom 60.13% passed.⁷⁶ Arizona had 399 test takers in-person, of whom 80.7% passed; 189 people took the remote exam, which had a pass rate of 44%. In Idaho, 120 people took the in-person examination, with 76.7% passing, while 28 people took the remote examination, with a 32.1% pass rate.⁷⁷

The differences in pass rate between in-person and remote examinations may not be entirely related to the different mode of test administration. The tests themselves were different; in Texas, the in-person examination was a NCBE-provided UBE while the Texas remote examination was drafted locally. It is also possible that October remote examination may have been graded harder in these three jurisdictions, just as it is possible that the examination may have been graded more leniently in others. It is also possible that the candidates who took the September examination were collectively stronger than the candidates who took the remote examination in October. The candidate pool could have also been influenced to the extent that candidates who had jobs may have had an incentive to take the exam earlier. It is also possible

⁷⁶ *Id.*

⁷⁷ *Id.*

that some candidates were drawn to the September examination because it was a full UBE, while the October examination was not.⁷⁸

XI. THE CONTENT AND SCORING OF THE NCBE'S PROPOSED NEW EXAM

Apart from the form of delivery, we are concerned with the substantive content of the proposed new NCBE examination.

Contrary to our view that New York should require candidates for admission to its Bar to demonstrate meaningful knowledge of New York law, the NCBE is doubling down on its deemphasis on state and local law. Despite the finding in *Building a Better Bar* that most new lawyers work on matters of state and local law, as opposed to federal (or, unsurprisingly, fictional law), the NCBE proposes to reduce testing on three key components of state law – family law, trusts and estates and conflict of laws.

Family law and trust and estates are fields to which many new lawyers gravitate. These are matters that are highly relevant to the future lives of the lawyers themselves. The divorce rate in the United States has historically been approximately 50%; at least half of new lawyers, not being immune to family conflict, will likely be involved a divorce themselves and will certainly have friends and relatives who are going through divorce. Lawyers should also be familiar with issues of domestic violence, what causes it and how to address it – again, for their own personal benefit, if not for the betterment of their clients. We know from experience in New York that if a subject is not on the Bar Examination, most students will shy away from taking it in favor of taking a subject that is tested. Discouraging generations of future lawyers from learning about family law and domestic violence would be unfortunate. Incentivizing them

⁷⁸ *Id.*, quoting Vice Dean Adam Chodorow, Arizona State University Sandra Day O'Connor College of Law.

to learn it should be the route taken. Similar concerns apply to trusts and estates. Mortality is a basic fact of the human condition. Whether a lawyer intends to practice trusts and estates, a lawyer should have a foundation in its basic principles.

Conflict of laws, the third subject to be eliminated, is a foundational concept with which lawyers should be familiar. Portability of licensure has been the predominant feature of the UBE and would continue to be predominant in the new examination. If lawyers flit from one jurisdiction to another, we submit they need to understand which jurisdiction's laws apply under what circumstances. Absent this being a subject that is tested on the Bar Examination, students will eschew taking a conflicts course.

By eliminating state law subjects, the NCBE is increasing its focus on federal law, yet it shows no sign of recognizing that young lawyers are increasingly inclined to work in immigration, health care and cybersecurity. Federal law predominates in these fields, but these disciplines have never been tested on the Bar Examination. While many law school graduates may hope and expect to practice in federal courts exclusively, Building a Better Bar shows that most lawyers' initial careers are more prosaic.

We welcome the NCBE's decision to shift away from its current forms of testing to performance-based tests. However, like Professor Merritt and the several recent test-takers we have heard from, we do not see the benefit for law students to be tested on the generic law of a fictional state, rather a leading state such as New York.

As discussed below in Section XII, the NCBE has not addressed the concerns we have previously raised with the scoring of the UBE, leaving us concerned that the NCBE will perpetuate its scoring regime with the new examination.

XII. UPDATE ON PORTABILITY

The benefit of “portability” was most frequently cited to justify the change to the UBE. Proponents argued that what was important was the ability of law graduates to practice in multiple jurisdictions without having to take multiple examinations. In the First Report, the Task Force analyzed the information then available to determine whether the UBE was, in fact, being used to obtain licensure in multiple states without having to take multiple examinations. We concluded portability provided only a small benefit to a minority of test takers.⁷⁹ We found that the portability issue was relevant only to two subsets of test takers: (1) those who seek to come to New York to practice within the first three years after taking the test in another UBE jurisdiction; and (2) those who decided, within the first three years after the test in New York, to seek to practice in another UBE jurisdiction.⁸⁰ We stated that, because the majority of New York UBE test takers stay in New York, New York was failing to protect the public by ensuring that these lawyers know New York law.

In connection with the preparation of the First Report, BOLE informed us that it had no information on whether candidates used their New York UBE scores to obtain admission in other UBE jurisdictions. Such information resides with the NCBE but the NCBE does have information on what law school candidates attended. On transfers into New York, BOLE told us it had no information on where candidates attended law school until the candidates demonstrate that they have satisfied New York’s educational eligibility requirements.

In connection with this Report, BOLE was able to provide us with additional information. In its submission, BOLE, which has maintained its support for the UBE, argues that portability of

⁷⁹ First Report, at 65.

⁸⁰ *Id.* at 66.

scores between UBE jurisdictions “saves examinees considerable time and expense required to prepare for and take multiple bar examinations, expedites their admission and permits them to compete for employment opportunities that they may not have been able to do if they had to retake a bar exam in another jurisdiction.⁸¹ BOLE asserts that portability also benefits the lawyers’ who engage in business in multiple jurisdictions.⁸² In looking at portability as an unqualified positive, BOLE assumes that legal skills are fungible across state lines, even though state and local law, which most new lawyers practice, vary considerably. In other words, BOLE assumes that new lawyers who can pass a generic national examination are equally qualified to practice in any of the UBE jurisdictions. But as Building a Better Bar reports, the law that most new lawyers work with is state and local law, which are not tested on the UBE.

As we noted in the First Report, that there are complexities to an analysis of the available data. A person who attends law school in New York may not intend to seek admission here or even practice here; conversely, a person who attends law school outside New York may be intending to become a New York attorney. BOLE adds to this the fact that some candidates may take the UBE in the state where they went to law school, or where they live permanently, rather than bear the expense of travel to New York to take the UBE here. BOLE also states that some candidates may elect to take the UBE here because the exam fee of \$250 is the lowest in the country.⁸³ In other words, the selection of a testing jurisdiction may be, at least for some, a matter of personal convenience.

⁸¹ Letter dated March 24, 2021 from John J. McAlary, Executive Director of BOLE, to Hon. Alan D. Scheinkman (“McAlary Letter”) at 1.

⁸² *Id.* at 2.

⁸³ *Id.*

BOLE does not permit people to take the UBE in New York unless they certify that they are *bona fide* candidates for admission here. Because candidates must so “certify”, BOLE argues that we “should presume that most of those transferring UBE scores out of New York are intending to be New York lawyers authorized to practice in other jurisdictions.”⁸⁴ If we assumed that this was so, and adopted BOLE’s presumption, we believe that it would be all the more important to require that these New York lawyers, practicing in New York at least some extent, establish that they have at least minimum competence in New York law. While BOLE does not require candidates to certify that they intend to practice here, and such a certification would be unenforceable as a practical matter, those who seek New York licensure are either seeking to practice here or, if not, seeing New York admission as a credential. If the former, knowledge of New York should be required; if the latter, the use of New York admission as a mere credential should be discouraged.

But we do not believe that BOLE’s presumption should be accepted. The candidate certifications of intention to practice in New York are not policed and there is no apparent means by which to do so, even if enforcement was desired. Once a person has taken the UBE in New York and gains admission, the person cannot be compelled to practice here. Indeed, many do not – we know that foreign law graduates, who comprise roughly one-third of the number of test-takers, tend to return to their home counties. Further, an intention to practice could be stated truthfully predicated on an intention to practice here either completely, partially, or only sporadically. A person can always assert that his or her intentions changed. Indeed, if one accepts BOLE’s statement that the UBE has made it easier for law graduates to seek employment in

⁸⁴ *Id.* at 1.

multiple states, a law graduate who took the UBE here may not intend to practice here anymore because she accepted a position in another state.

BOLE's presumption that persons transferring UBE scores out of New York are still intending to practice here, as well elsewhere, is unwarranted given BOLE's acknowledgement that some people opt to take the test wherever they find it convenient to do so, regardless of whether they truly intend to practice in the testing jurisdiction. BOLE concedes that at least some people take the test where they went to law school, or where they reside, rather than where they really intend to practice full-time. BOLE also acknowledges that some who take the UBE in New York are doing so because the fee is low. We note that, according to the information provided by BOLE, between 59 and 93 graduates of New York law schools transferred their scores into New York, indicating that, for whatever reason, these graduates did not take the UBE in New York, though they obtained their legal education here.

Amid the pandemic, people may have chosen to take the test wherever they thought it was healthiest or safest to do so or where they thought the test was most likely not to be canceled. The February 2021 examination was, and the forthcoming July 2021 examination will be, full UBEs and scores will be portable. The October 2020 remote administration was not a full UBE but was portable through state reciprocity agreements. With these three examinations being administered remotely, it is at least plausible that candidates elected to take the test in the most convenient location available to them, rather than the jurisdiction where they intended to practice. It is also important to consider the issue of foreign law graduates, who comprise roughly one-third of the candidates in a normal year. Many, if not most, of these do not intend to physically practice in New York and take the UBE in New York because, as BOLE acknowledges, they are not eligible to seek admission in many jurisdictions in the United States.

BOLE reports that the most common jurisdictions for the transfer of UBE scores (and the scores from the October 2020 remote examination) in and out of New York are New Jersey, Connecticut, Massachusetts, and the District of Columbia.⁸⁵ These same four jurisdictions were also the most common places for transfers of MBE scores prior to the adoption of the UBE.⁸⁶ This strongly suggests to us that the portability arrangements decided by most law graduates could be accomplished through reciprocity arrangements with those four jurisdictions, without having to adhere to NCBE's total regimen. Florida and California, two other states which would seem to be attractive alternative jurisdictions for lawyers from New York or might produce lawyers seeking to come to New York, are not UBE jurisdictions.

Because there are myriad reasons why a person would opt to take the UBE in New York, we do not agree with BOLE's suggestion that a presumption be applied that all who take the test in New York intend to stay here to practice.

With this background, the following chart provided by BOLE⁸⁷ reflects the score transfer requests to and from New York processed annually by NCBE since New York adapted the UBE.

Year	UBE Scores Transferred OUT of New York	UBE Scores Transferred INTO New York
2020	1,987	882
2019	2,165	799
2018	1,663	747
2017	1,373	517
2016(July only)	526	270
TOTAL	7,714	3,215

⁸⁵ *Id.* at 3.

⁸⁶ *Id.* at 3.

⁸⁷ *Id.* at 2.

The number of persons who transfer their scores into New York is relatively small as compared to the number of people who take the UBE. In 2019, for example, 34,377 people earned a UBE score, including 14,200 who took the UBE in New York⁸⁸. If a bar passage rate of only 50% is assumed⁸⁹, that would mean that some 10,138 people passed the UBE outside of New York⁹⁰, of whom 799 transferred their score into New York. Since only a relative few who take the UBE outside of New York seek to transfer their score into New York, it would not cause a significant disruption to require these individuals to take a New York test and learn New York law. This, of course, assumes the premise that what is important is the ease of admission by law graduates, as opposed to protection of the public from lawyers lacking minimum competency.

BOLE reports that nearly all examinees who transfer a UBE score into New York are Juris Doctor graduates of ABA-approved law schools.⁹¹ A chart, again provided by BOLE⁹², reflects this information:

⁸⁸ <https://thebarexaminer.org/2019-statistics/the-uniform-bar-examination-ube/#step3>.

⁸⁹While the actual overall passage rate is not known, the NCBE has reported a passage of 58% for all 68,305 people taking a bar examination in 2019. Since all but 1,655 of those reported taking a test took the UBE, assuming a 50% pass rate seems reasonable, if not conservative.

⁹⁰ This figure is derived from subtracting 14,200 from 34,377 and then dividing the result by 2 to reach 10,138.

⁹¹ *Id.* at 2. BOLE does not, however, know the identity of these examinees or have any demographic information regarding them.

⁹² *Id.* at 2.

Year	UBE Scores Transferred OUT of NY	UBE Scores Transferred INTO NY	UBE Score Transfers Into NY Certified by BOLE to Appellate Division	Number of Foreign-Educated	% Foreign-Educated	Number of ABA Juris Doctor Graduates	% ABA Juris Doctor Graduates	Graduates of NY Law Schools Transferring Score into NY	Graduates of Out of State Law Schools Transferring Score into NY
2020	1,987	882	831	11	1%	820	99%	93	727
2019	2,165	799	639	7	1%	632	99%	68	564
2018	1,663	747	590	5	1%	585	99%	76	509
2017	1,373	517	457	7	2%	450	98%	61	389
2016 (July only)	526	270	255	3	1%	252	99%	59	193
	7,714	3,215	2,772	33	1%	2,739	99%	357	2,382

“All UBE scores are transferred through NCBE. We know who transfers a score into NY (and the school they attended) because they must apply for admission in NY. But we do not have demographics on the examinees that transfer scores out of NY because the score is transferred through NCBE. NCBE was able to provide us the annual numbers of examinees transferring scores in and out of NY.”

The number of individuals who transfer their scores out of New York is more significant.

The BOLE submission states:

Most UBE jurisdictions require a passing score of 266 or greater although a small number of jurisdictions require a passing score of 260 or greater (Alabama, Minnesota, Missouri, New Mexico, and North Dakota). In 2019, the 2,165 scores transferred out of New York represented roughly one-third of the number of Juris Doctor graduates from ABA-approved law schools who earned a UBE score of 260 or greater on the New York bar examination. In 2020, that percentage was 42% although the number of examinees who took the bar exam in 2020 was lower due to the limitations placed on the number of examinees for the October 2020 remote bar examination.

The 1,987 UBE scores that were transferred out of New York in 2020 did not include the October 2020 Remote Bar Exam, which was not recognized as UBE due to its abbreviated testing components. The Board processed requests from 1,640 examinees from the October Remote Bar Exam to transfer their score to one or more of the 11 other remote bar exam jurisdictions pursuant to reciprocity agreements entered into between those jurisdictions (all of the remote bar exam jurisdictions required a passing score of 266 or greater). The 1,640 examinees who requested the transfer of their New York Remote Bar Exam score represented nearly 40% of the examinees who passed the October

2020 Remote New York bar Exam. The Board also received 455 requests to transfer the October 2020 Remote Bar Exam score to New York from examinees who took and passed the October 2020 Remote Bar Exam in one of the other 11 remote bar exam jurisdictions.

The most common jurisdictions for the transfer of UBE scores (as well as the October 2020 Remote Bar Exam scores) in and out of New York are New Jersey, the District of Columbia, Connecticut, and Massachusetts. These were also the most common jurisdictions that examinees used to transfer MBE scores to and from New York prior to the adoption of the UBE. The number of score transfers suggest that examinees are benefitting from the portability of UBE scores by not having to take and pass multiple bar examinations to obtain admission in more than one jurisdiction. As noted earlier, this saves examinees valuable time and financial resources and will benefit their clients engaging in business in multiple jurisdictions.⁹³

BOLE provided us with information showing the total number of people who were eligible to transfer their scores out of New York, inclusive of all ABA Juris Doctor graduates who obtained a sufficiently high enough score (260 or greater) to transfer a score out to another UBE jurisdiction. The overwhelming majority achieved a passing score on the New York UBE (266 or higher) but because there are five states that accept scores of 260 or higher, BOLE included people who scored between 260 and 265 even though they were not successful on the New York UBE. However, BOLE does not know the total number of people who were eligible to transfer scores into New York as that number consists of the total number of people who earned a UBE score of 266 or greater in all other UBE jurisdictions.

The chart provided by BOLE is set forth as follows:

⁹³ *Id.* at 3.

Year	UBE Scores Transferred OUT of NY	NY Candidates Eligible to Transfer Out a score (ABA grads with a score of 260 or greater)**	Percentage Transferred OUT a Score
2020	1,987	4,763	42%
2019	2,165	6,567	33%
2018	1,663	6,116	27%
2017	1,373	6,887	20%
2016 (July only)	526	5743	9%
<p>“**For each year we included all ABA JD graduates who earned a score of 260 or greater on the NY Bar Exam. Although a score of 266 is required to pass the NY Bar Exam there are a few states that have a cut score of 260 where some applicants transfer a score (i.e., AL, MN, MO, ND & NM). <i>We only included ABA graduates because we know that foreign-educated applicants rarely transfer a UBE score because they are not eligible to seek admission in many U.S. jurisdictions.</i> “⁹⁴</p>			

BOLE’s chart increases the number of potential transferors by including in that category persons who failed the New York UBE but achieved a high enough score (260 to 265) to be admitted elsewhere. It also increases the percentage of transfers out by eliminating from foreign law graduates from the base, on the theory that they cannot transfer their scores in any event.

We do not agree.

In assessing the efficacy of a bar examination, we do not agree that it is appropriate to include the potential benefit to be derived by persons who fail the examination in the jurisdiction in which they take it. Nor is there any indication that any significant number of candidates who achieve a failing score of between 260 and 265 in New York are interested in gaining admission to Alabama, Minnesota, Missouri, New Mexico, and North Dakota, which are the 5 states which would accept their scores. As for foreign law graduates, if other states do not accept them and,

⁹⁴ Email of March 31, 2021 from John J. McAlary, Executive Director of BOLE, to Brendan Kennedy, NYSBA Staff Liaison to the Task Force (emphasis added).

therefore, there is no portability for them, it seems incongruous to exclude them from the count to enhance an argument argue in favor of portability.

Our chart reflects the following:

Year	UBE Scores Transferred OUT of NY	ALL PASSING NY CANDIDATES
2020	1,987	1,430 (February only)
2019	2,165	8,380
2018	1,663	7,516
2017	1,373	8,624
2016 (July only)	526	6,577

In sum, while a minority of law graduates benefit from portability (whether inward or outward), we maintain that New York, rather than prioritizing ease of interstate practice, should be protecting its public by insisting that New York lawyers establish their knowledge of New York law before they may practice it in New York. We maintain, as we did in the First Report, the purpose of a bar examination is to assure that lawyers practicing in the jurisdiction are qualified to do so. That purpose is not served by simply requiring would-be lawyers to pass a generic national test, supplemented only by a facile CLE-style course and a weak, and virtually impossible to fail, “examination”.

XIII. REPLY TO BOLE’S JULY 2020 RESPONSE TO THE FIRST REPORT

The First Report identified serious concerns regarding the current New York bar exam and recommended, among other things, that passage of a rigorous examination on New York law should be a prerequisite to admission to the New York bar and that the NYLE should be eliminated. While the members of the Task Force believed that there were significant issues

with the UBE, the First Report made it clear that regardless of whether the UBE was retained going forward, the New York law component (the NYLE) need to be revamped. We offered a number of suggestions for how that might be accomplished. In our judgment, this is not only consistent with what was promised when New York adopted the UBE, it is what is required to ensure that New York retains its status as a leader in the legal field and, most importantly, that clients receive the legal representation they deserve.

In July 2020, BOLE issued a response to the Report (the “BOLE Response”) that staunchly defended the current testing regime and criticized us for various purported “misconceptions” and labelling our recommendations as “impossible.”⁹⁵

We are not surprised that BOLE has strongly urged the maintenance of the *status quo*. However, we are disappointed in the stridency of BOLE’s response and its failure to truly engage in a meaningful discussion of the points in contention. We view BOLE’s response as largely a rehash of assertions made by BOLE in its written and oral presentations to us, which were fully considered and addressed in the preparation of our First Report.

We do not perceive the need, in this Report, to address every item raised in the BOLE Response or attempt to correct the considerable number of statements that we believe are not accurate. Instead, we will highlight our substantial differences regarding the importance of testing New York law on the New York bar exam, how we see the future of the bar exam in New York and, in the process, correct the record where appropriate.

As explained fully in the First Report, as we have discussed above and will discuss again below, the Task Force envisions a New York bar exam that includes a rigorous New York law

⁹⁵ We note that the present Chair of BOLE took office after the BOLE Response was issued.

component. Making that a reality begins with obtaining agreement on the importance of testing a candidate's understanding of New York law for lawyers seeking to practice here. This is perhaps the subject of the most fundamental disagreement between the Task Force and the BOLE: in the view of BOLE, the New York portion of the bar exam should not be a "significant hurdle" to admission, and it is not necessary for a lawyer who wants to practice here to first demonstrate "minimum competency" in New York law.

Even if we were to assume that only a short CLE-type course and limited open book examination is what is appropriate, we were, and still are, of the view that the NYLE is woefully inadequate and must be abandoned in favor of a rigorous New York examination. Unfortunately, despite its acknowledgement of numerous issues with the NYLE, BOLE resisted any meaningful change, flatly rejecting the proposals by the Task Force for how that might be accomplished and refusing to implement several possible steps BOLE itself identified. BOLE has chosen to basically stand behind its product, the NYLE, which we have documented, and BOLE has not disputed, has been widely disrespected by those required to take it, by academicians, and by the New York legal community at large. The Task Force continues to believe its prior recommendations merit consideration and would substantially improve the New York Bar Examination.

A. The New York Bar Examination must include a rigorous New York law component

A fundamental tenet of the First Report is that New York must deliver on Chief Judge Lippman's promise at the time the UBE was adopted of having a bar exam with a thorough and rigorous New York law component. The First Report concluded that the current bar exam fails to protect New Yorkers by not requiring attorneys seeking the right to practice within this state to demonstrate minimum competence in this state's law. The Task Force would have hoped this

point would not be highly controversial and, perhaps, even mark the start of a constructive dialogue to improve the bar exam for the benefit of all New Yorkers. But BOLE does not share this belief.

While acknowledging that “[t]here is room for debate as to whether or not adoption of the UBE was right for New York”⁹⁶ and “initial iterations of the [NYLE] were insufficiently rigorous,”⁹⁷ BOLE insists that the UBE, as complemented by the New York Law Course (“NYLC”) and the NYLE, is a valid and reliable test of minimum competence to practice law. BOLE’s position has since, in our view, been undermined by the Preliminary NCBE recommendations to entirely recast the UBE.

According to BOLE, we “misunderstand” the intent of the NYLC and NYLE, which BOLE states was not designed to be a test of minimum competence,⁹⁸ but rather an attempt to comply with the “directive” that the NYLE not be a “significant barrier to admission.”⁹⁹ We find this statement troubling on several levels. As we pointed out in the First Report, Chief Judge Lippman, in proclaiming the move to the UBE, specifically and publicly stated in his May 2015 Law Day address that there would still be a “thorough and rigorous” portion of the bar examination that would cover “[i]mportant and unique principles of New York law”.¹⁰⁰ Thus, a direction that the New York portion of the bar examination is not rigorous is plainly contrary to Chief Judge Lippman’s documented public statement. BOLE has not identified the source of the directive nor

⁹⁶ BOLE Response at 1.

⁹⁷ *Id.* at 5.

⁹⁸ BOLE Response at 3.

⁹⁹ *Id.* at 6.

¹⁰⁰ First Report at 7, n14, quoting Jonathan Lippman, Chief Judge of the New York State Court of Appeals, Law Day 2015 Address (May 5, 2015) (transcript available at: <https://www.nycourts.gov/ctapps/news/LawDay2015.pdf>).

provided any documentation of it. Further, a directive that the New York portion of the bar examination is not rigorous is not acceptable to those who think that applicants should not be licensed to practice in New York without meaningful knowledge of New York law. Additionally, BOLE does not indicate a willingness to adjust the NYLE if a different “directive” is given and, instead, suggests that it is not feasible to make any changes that would make the NYLE more rigorous.

Over the course of 11 months, the Task Force endeavored to investigate and report on the impact of New York’s adoption of the UBE. While studying the issue, the Task Force heard from law school deans, law school faculty, admitted attorneys, and attorney applicants themselves that the current New York component of the exam is not taken seriously.

The shift away from a meaningful New York exam has led to a de-emphasis on New York law in the classroom and disadvantages in practice. Once prevalent, law school courses focusing on New York law and New York law distinctions are now in decline, along with student enrollment in those courses. New York law topics have been displaced by material that does not benefit students once they begin to practice law in New York. The results have been readily apparent, as practitioners and judges alike have provided accounts of newly admitted attorneys who do not demonstrate the requisite familiarity with New York law to practice in New York. The proposed revamp of the Bar Examination by NCBE will only accelerate this development. If family law and trusts and estates are no longer key Bar Examination subjects, students will gravitate to the subjects that are tested on the bar exam. Scholarship by faculty in the discarded subjects, and the number of faculty in the law schools who focus on these subjects, will continue to decline. Law schools are like businesses in the sense that they will cater to their customers and their customers want to know what they need to learn to pass the bar. Law students are practical – they want to be

able to gain admission to the bar above all else. And they certainly do not want to spend additional funds after law school on learning subjects that were not taught in law school.

These realities continue to surface because—unlike the previous NYBE that was “designed to assess minimum competence” in several subjects, including New York law¹⁰¹—the current UBE only gauges minimum competence on the “law of nowhere.” As such, it is not enough to have a state-specific component in place that BOLE describes as a low hurdle to admission and the equivalent of a notice test.¹⁰² Instead, ensuring the integrity of the state’s licensing system and protection of clients requires a state-specific exam that for which candidates need to learn and demonstrate minimum competency in New York law.

BOLE criticizes the Task Force’s reliance on “anecdotal evidence” of a problem and claims there is no “widespread clamoring” for change.¹⁰³ However, the viewpoints expressed by relevant stakeholders during our study, the various bar associations that supported the Report, and the NYSBA House of Delegates unanimous vote in favor of adopting the Report demonstrate that these issues are real and make it clear that there is widespread concern about the current New York bar exam. Moreover, as BOLE is well aware, the concerted effort undertaken by thousands of law students during the summer of 2020 for the adoption of a diploma privilege, included a compelling argument that it was unfair and arbitrary to require them to take a slimmed-down remote examination in order to practice in New York since the examination did not test their knowledge of New York law. Perhaps BOLE did not hear this clamor because of its own clamoring to retain the *status quo*.

¹⁰¹ *Id.* at 10.

¹⁰² *Id.* at 8, 58.

¹⁰³ BOLE Response at 7.

B. There are numerous problems with the NYLC/NYLE that must be remedied

As detailed in the First Report, there are myriad problems with the NYLE: it is not taken seriously by candidates, there are disturbing reports of cheating, it does not require candidates to demonstrate minimum competence in New York law and it is detrimental to law school curriculum. BOLE's response to these criticisms is disappointing, to say the least.¹⁰⁴

As explained in the Report, the NYLE is widely disparaged by applicants and is viewed as a mere speed bump on the road to admission. This general sentiment was expressed by law school deans, professors, and students. Applicants themselves have shared these sentiments with Task Force members at Character and Fitness interviews. Moreover, the Task Force's student survey found that fewer than a quarter of the students surveyed thought that the NYLE was challenging.¹⁰⁵ BOLE itself concedes that initially the NYLE was not sufficiently challenging and further acknowledges that the NYLE could be made more rigorous, listing several steps that could be taken to improve the exam. But it has taken any of these steps and has not indicated a willingness to do so.

In addition, there have been troubling reports of impropriety on the exam: applicants have taken the NYLE in groups, shared their responses to the questions, used multiple computer screens, and taken screen shots of previously searchable NYLC outlines to assist them.

While BOLE claims that they have not heard about instances of impropriety on the exam—a prior concern of the Advisory Committee—it has not investigated the matter. Despite the Task Force's identification of the various methods that could be used to cheat on the NYLE, it remains that the only safeguards against improper conduct regarding the NYLE are the scrambling of the

¹⁰⁴ First Report at 43-44.

¹⁰⁵ First Report at 28.

question sequences and a certification—both of which have proven inadequate. BOLE rules out any proposed remedy as cost prohibitive, without explaining what that is so. Even though the New York bar examination fee is the lowest in the Nation, BOLE does not address the possibility of increasing the fee to cover the cost of additional NYLE security.

A comparison between the recent steps taken to ensure the accuracy and reliability of the October remote bar exam and the steps, or lack thereof, previously taken on the NYLE highlights the need for change. For example, the remote Bar Examination featured a technology called ExamID to verify an applicant’s identity before the start of each exam session. The exam was also administered using remote proctoring through a software called ExamMonitoring. This software ensured reliability by recording applicants, via audio and video, throughout each exam session. After the conclusion of each session, the recordings were then uploaded to ExamSoft and an artificial intelligence program analyzed the recordings to flag any unusual behaviors, movements, or sounds.¹⁰⁶ New York must ensure that the results of the state-specific portion of the bar exam are at least as reliable as the portion of the bar exam testing knowledge of the “law of nowhere.”

More fundamentally, the NYLC and NYLE do not supply the necessary foundation for lawyers to practice in New York because they are purposefully designed only to give candidates some exposure to New York law, not to require “minimum competency” or act as a “significant hurdle” to admission. We find it curious that, on one hand, BOLE defends the NYLE’s lack of difficulty by saying that it was never meant to be a barrier to admission, and, on the other hand, BOLE proclaims that the NYLC and NYLE “do more to require candidates to identify and apply

¹⁰⁶ See FAQs for October 5-6. 2020 Remote Exam in New York (Revised Oct. 2, 2020), https://www.nybarexam.org/Docs/Revised%20FAQs%20NY%20Remote%20Exam_10.02.2020.pdf.

specific principles of New York law than did the former NYBE.”¹⁰⁷ Those claims are inconsistent. It is also quite surprising that BOLE argues that NYBE, which it administered for years, did not attempt to question candidates about New York law. BOLE’s assertion that, in formulating the NYBE, it “made no specific effort to determine whether or not the rules of law to be applied in answering the questions were unique to New York,”¹⁰⁸ is not supported by review of the bar exam topics and questions before the UBE’s adoption.¹⁰⁹ Nor is it supported by the substantial testimony we received from admitted attorneys and law faculty that BOLE drew its essay questions from recent Court of Appeals decisions, a fact that was well-known and caused New York Court of Appeals decisions to be carefully studied by bar applicants – something that does not happen today.

The New York principles that BOLE considers merely “idiosyncratic rules,”¹¹⁰ certainly are important to a client whose case or cause is lost because, for example, a newly admitted attorney did not learn New York’s Civil Practice Law and Rules and filed a case in the wrong court, or, not having learned the Estates Powers & Trusts Law, improperly drew a will. BOLE discounts the amount and type of preparation that went into studying for the NYBE—when students were required to learn and remember New York law and distinctions to pass the exam. New York law was stressed in law schools, both inside and outside New York; bar preparation classes focused on New York law as well. Now both law schools and bar preparation courses

¹⁰⁷ First Report at 28.

¹⁰⁸ *Id.* at 2.

¹⁰⁹ *See* First Report Appendices G-H. Contrary to the BOLE’s assertion, our First Report expressly acknowledged that NYBE did not test exclusively on New York law distinctions. However, we also explained the benefit of the New York distinctions and principles that were tested on the NYBE. *See* Report at 57-62.

¹¹⁰ BOLE Response at 5.

teach, virtually exclusively, federal law and the law of nowhere. This, even though Professor Merritt's *Building a Better Bar* informs us that young lawyers rely upon primarily upon state and local law in their formative work, not federal law.

As we pointed out in the First Report, because law schools are measured by the bar passage rates of their students, many law schools have adapted to the UBE by orienting their curricula to it. Law schools, whether they like it or not, teach esoteric matters, such as the Uniform Probate Code, a model statute which has not been adopted in its entirety anywhere, with significant state-to-state variations among the states that have adopted parts of it.¹¹¹ Some familiarity with the model Uniform Probate Code, without awareness of state variations, may be harmful to clients.¹¹²

Given the current bar exam's lack of emphasis on New York law, it is also not surprising that the law school curriculum has moved away from focusing on New York law—a correlation that was well-documented by most law school deans and professors from whom the Task Force has heard.¹¹³

¹¹¹ The proposal by the NCBE to remove trusts and estates from the subjects listed will likely have the indirect effect of reducing interest in the Model Probate Code.

¹¹² In one case, plaintiffs obtained a default judgment against a Florida domiciliary in a Michigan federal court. After the defendant died, the plaintiffs timely filed a claim with the defendant's Florida estate. Thereafter, the Michigan court set aside the default judgment but allowed the suit to proceed further in Michigan. The estate successfully moved in Florida to strike the claim against the estate. That order was not appealed, with the plaintiff's Michigan-based attorney perceiving that the pending federal lawsuit was adequate, under the Model Probate Code, to protect his clients' rights. The plaintiffs recovered a \$3.76 million verdict in their action and filed a new claim against the estate. The Florida courts struck the claim, holding that it was untimely. While the Florida appellate court recognized that this was a harsh result, particularly since the estate was not prejudiced as it had known about the claim along, "[w]e cannot rewrite Florida probate law to accommodate a Michigan attorney more familiar with the Uniform Probate Code." *Payne v. Stalley*, 672 So.2d 822, 823 (Fla. Dist. Ct. App. 2d Dist. 1995).

¹¹³ First Report at 62-63.

Yet BOLE disputes any direct connection between the content of the bar exam and law school curriculum. Instead, to explain the drop in New York law courses, BOLE points the finger elsewhere rather than concede that the format of the Bar Examination shapes law school curriculum. First, BOLE insists, without pointing to any evidence, data, or survey, and contrary to our prior findings, and to common sense, that students are not motivated to take courses based on the content of the Bar Examination. BOLE downplays the documented evidence that curriculum has been altered as a direct result of New York's transition to the UBE.¹¹⁴ BOLE's overlooks that many law schools are teaching to the Bar Examination because a paramount goal of law students is passing the Bar Examination—something that was widely agreed upon during the Task Force's investigation—and many law schools have significant interests in having a high percentage of their students achieve a passing score. BOLE then faults law schools for not offering more New York law courses to prepare practice-ready graduates.¹¹⁵ BOLE faults employers for not telling law schools to offer more New York law courses or being willing to devote more time to training new lawyers.¹¹⁶

Law schools are not going to offer more New York courses unless students are incentivized to, and do, take them. The Task Force, which includes members who are or have been full-time law faculty, recognize the fact that law schools in general are not going to offer courses that students are not taking; law schools are not going to hire and compensate faculty to teach courses that students are not taking. Similarly, to fault employers for not training new lawyers more extensively ignores today's economic reality. Small firms and sole practitioners simply do not

¹¹⁴ BOLE Response at 12, 16.

¹¹⁵ *Id.* at 16.

¹¹⁶ *Id.*

have the economic foundation to hire young lawyers and then pay them while they learn to practice. Middle-class clients and small businesses cannot afford to pay legal bills for time spent by new lawyers learning the basics of practice. Even larger firms are under client pressure to moderate billing for young lawyers. It is ironic that BOLE would advocate that the UBE helps clients who operate in multiple jurisdictions but impliedly criticizes those clients for being unwilling to pay to further the training of the newly admitted, multiple-jurisdiction attorneys. BOLE should not be permitted to shift the buck – it is the bar examination that is supposed to test whether young lawyers are minimally practice-ready. And it is BOLE’s job to assure that the examination does that.

The plain truth is that UBE incentivizes law schools to teach, and law students to study, the law of “nowhere” since that is the law that is tested on the bar, with the results of the bar being critical to the futures of students and many law schools.

An essential ingredient to a capable newly admitted attorney is a foundation of law school courses that prepare him or her for the legal issues that they will experience in practice. Anything less is a disservice to the public. When law school curricular are shaped by a bar exam that places no real emphasis on New York law, even the best efforts of law school deans and professors simply cannot achieve the twin aims of preparing students for success on the bar exam and in practice.

C. The benefits of fixing the New York portion of the bar exam far outweigh any costs associated with implementing necessary changes

Building a Better Bar, the Merritt study, indicates that almost half of newly admitted lawyers rely *exclusively* on state and local law in practice, and a similar proportion rely on a mix of state, local, and federal law.¹¹⁷ It is undisputed that the UBE pays no attention to state or local

¹¹⁷ Building a Better Bar, *supra*, a copy of which is annexed to this Report as Appendix A.

law. In addition, and as discussed above, the NYLE does not adequately cover these crucial subjects either. The NCBE, is moving to reduce the content of state law tested even further by removing family law, conflict of law, and trusts and estates from the subjects tested. As such, fixing the New York portion of the Bar Examination, first and foremost, is a matter of protecting the public.

In this regard, the First Report ultimately recommended “design[ing] a new New York Bar Examination, one that better measures the competence of applicants to practice law in New York.”¹¹⁸ It further concluded that “[t]he development of a new New York Bar Examination may be undertaken in conjunction with on-going national bar exam reform efforts or as an entirely New York enterprise.”¹¹⁹ New York has an opportunity to be a leader in this field. After all, New York already tests more than a fifth of all candidates.¹²⁰ Yet, the BOLE outright rejects the Task Force’s proposals for improving the existing NYLE as “administratively and economically impossible.”¹²¹

Curiously, BOLE does not provide any cost/benefit analysis before rejecting our proposals for change on economic grounds. Further, BOLE assumes that the only way to improve the NYLE would be to administer an in-person proctored exam, four times per year—something that the First Report did not recommend. Again, BOLE is, in essence, simply repeating its prior statements to the Task Force when we asked if BOLE would consider changing the way the test is administered. BOLE answered that “[c]ontinuing the test on-line is the only feasible way it can be

¹¹⁸First Report at 72.

¹¹⁹ *Id.* at 73.

¹²⁰ *See* Building a Better Bar, *supra*.

¹²¹ *See* BOLE Response at 13.

administered.”¹²² BOLE asserts that “administratively and cost-wise, adding a third day to the bar exam is not feasible” and “to administer the test at test centers presents a number of challenges, including test center capacity and cost.”¹²³ We suggest that surely there are other ways to design and administer a test that BOLE has thus far been unwilling to explore.

While BOLE criticizes the First Report for not fleshing out all of the details for exactly how its recommendations would be implemented, it does not offer any analysis as to how to effectively implement any of the recommendations. To be sure, the menu of available options was meant to start a conversation and help guide the Court of Appeals. Our proposals were intended to start the process and were not intended to be fully detailed regulations ready for implementation. The nuances of administering a specific test fall within BOLE’s expertise, and it would be presumptuous to assume that the Task Force can flesh out the intricacies surrounding its proposals better than the body responsible for administering the exam. We are hopeful that the ultimate decision-maker, the Court of Appeals, will give appropriate direction to BOLE and consider the formation of a working group to help guide the process.

There are several less burdensome ways to implement the Report’s recommendations. For instance, if the NYLE is eliminated, that frees up one extra day to use to offer its replacement. So, it is disingenuous to say that *replacing* the NYLE is *adding* a third day of testing. The tests could be broken up into stages that are administered during and after law school, or a more rigorous New York test could be worked into the existing exam structure, as we ultimately propose in this Report.

¹²² First Report at 44.

¹²³ BOLE Response at 19. This then raises the question as to whether BOLE would have similar reservations about the NCBE’s proposal to administer its next generation of the Bar Examination at test centers.

Any additional costs necessary to make the bar exam more rigorous and reliable—which, again is something that BOLE has only assumed at this point—would be well spent. As the First Report detailed, an exam that does not require attorneys to demonstrate minimum competence in New York law has numerous consequences. It is a disservice to the public at large, a disservice to the profession, and a disservice to the future New York lawyer who is put at a disadvantage. Any cost of improving the exam will undoubtedly pay dividends in the future. In that regard, as noted above, we strongly recommend the Court of Appeals and other interested stakeholders consider the Report’s recommendations as well as Professor Merritt’s proposal for a true 21st century New York Bar Examination.

D. The changes necessary to combat COVID-19 present a prime opportunity to address the issues identified by the Report

The COVID-19 pandemic has forced us all to adapt to a “new normal,” and the bar exam is not immune from this reality. When the Court of Appeals was forced to reschedule the September 2020 bar exam to protect the well-being of thousands of law school graduates and proctors, it had to rethink the very nature of the bar exam. In many ways, the remote exam that was held in October is an example of how innovative thinking can effectively respond to immediate challenges.

The emergency created by the pandemic also highlighted the vulnerabilities with a national testing regime. In June 2020, when the NCBE announced that it would allow jurisdictions to administer an October online exam as a precaution, it stressed that the online test would not be considered a UBE and thus would not offer candidates the same score portability between

jurisdictions.¹²⁴ The NCBE also relieved itself of grading responsibilities,¹²⁵ although it did provide jurisdiction with grading analysis for the MEE and MPT questions so that the same grading scale could be used. As a result, individual states were left to reach agreements with other states to accept their candidates' scores and grade the exams on their own. Additionally, several states took actions to limit the ability of New York residents to take the bar exam in their jurisdictions, while out-of-state law student deans and students objected to New York's efforts to limit the number of bar applicants its tests. As noted previously, students moved between various jurisdictions – not because they really intended to practice there – but to take advantage of what they perceived the most favorable testing opportunities to be. These breakdowns make it clear that portability and reliance on the NCBE—the main reasons for adopting the UBE—are not guaranteed under the current bar exam format and that New York is particularly vulnerable.

As New York continues to consider the necessary adjustments required to administer an effective bar exam in this “new normal,” it must rethink the Bar Examination, as we now have a stark choice between accepting the new computer-based examination to be developed by NCBE that further deemphasizes state law or forging our own path. We should take advantage of this opportunity, as the die is about to be cast.

XIV. REPLY TO NCBE'S RESPONSE TO OUR REPORT

As with BOLE, we are extremely disappointed by the tone and substance of NCBE's reply to the First Report. Much of the NCBE's response is unprofessional and inappropriate. This is most unfortunate because we had thought that NCBE's intent was to provide the best possible

¹²⁴ See *Daily Coronavirus Update: NY to Allow Transfer of Remote Bar Exam Scores*, Christian Nolan, NYSBA (Aug. 18, 2020), <https://nysba.org/daily-coronavirus-update-ny-to-allow-transfer-of-remote-bar-exam-scores/>

¹²⁵ *Id.*

exam process for candidates seeking law licensure. Instead, perhaps perceiving that their attempt to monopolize the Bar Examination market was threatened, they reacted, as did BOLE, by attempting to circle the wagons and to refuse to professionally deal with criticism, except by *ad hominem* attack that NCBE would not tolerate from a prospective lawyer.

We identified serious problems with the UBE and the NYLE in the First Report. The identification of these problems was among the outcomes from its charge to investigate and report on the impact of New York's adoption of the UBE. By necessity, such an investigation required a full evaluation of every aspect of the UBE, including its content and scoring, uniformity and portability. Over the course of 11 months, we applied as much diligence as we could to comprehensively evaluate the UBE's impact in New York. It was only after a thorough review of the available data and consideration of the various recommendations proposed by experts and stakeholders across the state that the Task Force made eight recommendations, one of which was an independent psychometric analysis of the scoring and scaling of the UBE.

We raised many questions in the First Report. We may not have asked all the right questions or even all the questions that need to be asked about the UBE's grading and scaling practices. Thus, we asked for a review by independent psychometric experts experienced in high-stakes licensing exams. The purpose of the recommendation for a third-party review is to create a process that all stakeholders can trust.

We are committed to fact-finding and not fault-finding, no useful purpose would be served by a detailed response to the many baseless and accusatory statements in the NCBE White Paper. Instead, we will address only the most contentious statements.

We begin with the NCBE's misinterpretation of the Task Force's questions to be an assault on NCBE itself. We are not questioning the NCBE's expertise or credentials when we ask whether

the current set of licensing exams achieves its objectives for the State of New York. Nor is it a critique of the NCBE for the Task Force to recommend an independent review when the test products involve high-stakes testing for law-licensure. We perceived our recommendation as adding value by bolstering the process and confidence in it. Plainly, the fact that a person or an organization is an expert does not *ipso facto* mean that they are correct or that their assertions should go unchallenged.

The NCBE places great weight on the fact that, after New York adopted the UBE, other states did as well. We are fully aware of this development. Indeed, we have asserted that New York, which tests approximately 20% of the nation's law graduates, is perceived as a leader in this field. However, simply because other jurisdictions elected to follow New York's lead does not mean that New York is frozen from reassessment of its prior determination. Indeed, NCBE would permanently lock New York into its orbit, notwithstanding its own determination to entirely revamp the UBE. Our primary consideration was, and remains, what is best for the State of New York and its people.

It is a matter of great concern that until adoption of the UBE, admission to the New York Bar certified that the attorney had the competence and fitness to practice, not just anywhere, but in New York, the veritable mothership of American law. With the adoption of the UBE, it is no longer necessary for an attorney to demonstrate meaningful knowledge of New York law to gain admission.” The Task Force's inquiry into the content, structure, and grading of New York's licensing law exams — the UBE and the NYLE — is about whether these exams serve the interests of all New York's stakeholders in the legal profession.

NCBE objected to the Task Force Report for including critics of the Bar Examination who argue that the exam is flawed because it does not test some key skills that lawyers need.¹²⁶ The NCBE responded by stating that no licensure exam could possibly test every skill a professional needs and that “this impossibility does not represent a fatal flaw in the bar exam or other licensure exams.”¹²⁷

The NCBE’s reaction is misplaced and misguided. When the Task Force reports that some stakeholders question the current licensure process because it fails to test some key skills and knowledge that newly admitted New York lawyers should possess,¹²⁸ the comment reflects our viewpoint which we are entitled to express. The Task Force is charged with making recommendations regarding the future content and form of New York’s bar exam and that is precisely what the Task Force has done. It made eight recommendations, including consideration of a licensing avenue that does not even include a bar exam — a New York Law Certification program.¹²⁹ It is worthy of note that Building a Better Bar has since called the UBE to task for failing to test on matters of state and local law, notwithstanding that is the law that most young lawyers practice, not federal law or law of a fictional jurisdiction.

We now turn to specific criticisms made by the NCBE.

A. Uniformity Issues

NCBE attempts to deflect attention from the Task Force’s inquiry into the validity of a portable UBE score by comparing branches of the United States military with the UBE’s test

¹²⁶ NCBE Response, p. 3

¹²⁷ *Id.*

¹²⁸ First Report, p. 22.

¹²⁹ *Id.*, at 4.

questions.¹³⁰ While we fundamentally disagree with the applicability of this analogy, we note more specifically that the Task Force does not question the uniformity of the individual UBE components, but rather questions the meaning of its resulting score when the purpose is portability.

A key point in this regard is that, while the individual exam components (MBE, MEE, MPT) are the same in each exam administration and assigned the same weights and graded in accord with the same grading materials in every jurisdiction, the applicant pool taking the exam is different. The written components (MEE, MPT) are relatively graded and then scaled to the MBE mean for that particular jurisdiction. This results in a local score that is then transported to another UBE jurisdiction that was graded and scored, albeit using the same uniform instruments, but against a completely different group of test takers.

We note that the NCBE, as part of its Preliminary Recommendations, has indicated that it is eliminating the three distinct components (MBE, MEE, MPT) and their separate grades in favor of a single integrated score. It is readily apparent the NCBE, then, was not as entirely satisfied with its existing format as it professed to be.

The issue is not about the test instrument, grading materials, or how carefully the graders are calibrated. It is about whether a “local” score, dependent on the applicant pool that took that exam in a particular jurisdiction, is a reliable “portable” score for the State of New York. Notably

¹³⁰ NCBE Report, p. 5. “The Task Force Report claims that the UBE is not uniform because the passing score varies from jurisdiction to jurisdiction and the grading is not consistent. Differences in passing scores do not, however, make the exam itself non-uniform. Different branches of the US military, for example, have different height and weight requirements, but no one would take those differences in *standards* to imply that the *instruments* (scales or measuring tapes) are not uniform. The UBE includes the same test questions (MBE, MEE, MPT), which are assigned the same weights and graded in accord with the same grading materials, in every jurisdiction that administers it. It is unclear how the test instrument itself could be made more uniform.” However, while the instrument may be uniform, the notes that come out of it are not uniform.

the NCBE has not stated that it intends to score its new examination uniformly, no matter the jurisdiction in which it is given. Thus, the issue remains trenchant, both for the present and for the future.

Because of the locality of the portable score as confirmed by BOLE when it stated that “[s]caling related to putting written scores onto a distribution of the same mean and standard deviation as the MBE scores of a given group of test-takers,”¹³¹ we questioned, we believe rightfully, what this means for a score transported from a UBE jurisdiction into New York. Because the Task Force has such questions, it recommended an independent psychometric evaluation. This recommendation reflects a quest for answers from an outside independent source. Further, seeking an outside independent evaluator is simply a recognition of the plain fact that NCBE wears multiple hats; sometimes it is a provider of assessment products and sometimes it is not.¹³² The NCBE generates income from its sales of its products and has an economic interest in maintaining, if not expanding, its sales.

Another concerning issue for the Task Force is the possibility that the same person may be found “competent” to practice law in one UBE jurisdiction and “incompetent” in another, even though it is the same person with the same skill level writing the same exam. BOLE answered this question when it acknowledged that it is “a theoretical possibility that a candidate might receive different scores in two different UBE jurisdictions.”¹³³ And NCBE confirmed it: “It is true that an

¹³¹ BOLE Letter, Appendix A: Letter to Presiding Justice Alan D. Scheinkman, New York State Board of Law Examiners, at 23 (Dec. 16, 2019 (hereinafter “BOLE Letter”).

¹³² See The National Conference of Bar Examiners, Our Mission, <https://www.ncbex.org/about/> (last visited Aug. 21, 2020).

¹³³ BOLE Letter, Appendix A: Letter to Presiding Justice Alan D. Scheinkman, New York State Board of Law Examiners, at 16 (Dec. 16, 2019).

examinee could get a different raw score on the written portion of the bar exam depending on which jurisdiction she sat in.”¹³⁴

And herein lies the heart of the matter: the Task Force questions whether this is the right result for New York whereas NCBE accepts this as an acceptable possible outcome. NCBE explains that “[g]iven the relatively high correlation between MBE scores and scores on the written portion, if an examinee sits in a jurisdiction with a relatively low mean MBE score, the raw score that examinee receives on the written portion is, indeed, likely to be higher than it would be if she sat in a jurisdiction with a higher MBE mean. However, the fact that different jurisdictions could or would award different raw written scores does not mean that the examinee will ultimately get a different scaled written score and, by extension, a different total UBE score.”¹³⁵

Clearly, the Task Force’s and the NCBE’s basic perspectives are different. The Task Force is concerned with finding a pathway to law licensure in the State of New York that assures the public that its newly admitted attorneys are prepared to practice law in New York that includes New York law, while also assuring the candidate that the bar exam he or she takes is a fair and reliable assessment of that individual’s minimum competency to practice law. NCBE is concerned with the validity and reliability of its exam products and scoring practices.

B. Reducing the Number of Scored MBE Items and the Changing Proficiency of Examinees

The NCBE reduced the number of live (scored) items on the MBE beginning in February 2017 from 190 to 175, while the number of equator items remained the same.¹³⁶ The number of

¹³⁴ NCBE Response, p. 14.

¹³⁵ *Id.*

¹³⁶ NCBE Response, p. 10.

live test items was reduced to increase the number of unscored items being pretested for future use. We questioned the reduction of live items; the NCBE again mischaracterized the First Report.

The First Report did not claim that there were a “number of negative effects”¹³⁷ in decreasing the number of live MBE items, but questioned the effect of reducing the number of items by about 8%. The Task Force could not possibly know if there were actual “negative effects” because such data is not available to it. It could only question and draw inferences from the facts presented. The facts are that the number of MBE test items were reduced from 190 to 175 items commencing with the February 2017 administration of the bar exam while the number of equator items remained the same. As Nancy Luebbert, Director of Academic Success at the University of Idaho College of Law, observed, “[o]ne doesn’t have to be a mathematician to recognize that the effect of one wrong answer is magnified when the number of test items goes down, and that this effect is most pronounced for those near the pass line.”¹³⁸

At the time this change went into effect, former NCBE President Erica Moeser advised law-school deans that while the MBE will consist of only 175 scored items, “MBE scores will continue to be expressed on a 200-point scale. Because MBE scores are equated and scaled, scores will be comparable to those earned when there were more scored questions. The change was made in consultation with our testing and measurement staff with the goal of further strengthening the

¹³⁷ *Id.*

¹³⁸ Posting of Nancy Luebbert to asp-1@chicagokent.kentlaw.edu (Aug. 31, 2016, 1:46 p.m. EST) (The subject heading of this email is [ASP-L:6281] *Re: ASP Response to concerns with the NCBE*) (on file with the Task Force).

MBE.”¹³⁹ There is nothing in this statement to explain how a change to 25 pre-test items in an exam with only 200 items raises no issues as to instrument efficacy. The Task Force finds it insufficient to rely on President Moeser’s bare and unverified assertion that because NCBE checked these changes with its own testing and measurement staff, the question is settled.

Furthermore, in response to the Task Force Report, NCBE now informs us that it ensured that no changes would result from an 8% decrease in the number of MBE test questions because its psychometricians went back and rescored old exams as though they had 15 fewer scored non-equator items, not expecting “to see more than negligible effects via this modeling on individual scores or on mean scores for the group” and found that “subsequent exam administrations bore out the prediction....”¹⁴⁰

We continue to question whether the reduction in live items has an effect and do not find NCBE’s explanation reassuring. Perhaps rescoring old exams as though they had 15 fewer scored non-equator items was the appropriate methodology, but this raises a question about the equator items. Once again, the Task Force’s recommendation for an independent psychometric review is the reasonable and appropriate response.

¹³⁹ Memorandum from Erica Moeser, President, NCBE, to Law School Deans (at all American Bar Association-accredited law schools) (August 31, 2016) [hereinafter Moeser, Letter to Law School Deans, Aug. 31, 2016]; (Memorandum on file with the Task Force).

¹⁴⁰ NCBE Response, p. 11. “NCBE modeled the impact the reduction in the number of scored items would have on scaled scores using prior MBE exams. This modeling was conceptually straightforward: psychometricians went back and rescored old exams as though they had 15 fewer scored non-equator items. NCBE research/ psychometric staff did not expect to see more than negligible effects via this modeling on individual scores or on mean scores for the group. Results of the February 2017 and subsequent exam administrations bore out the prediction of the modeling and confirmed that the change had a negligible effect.

NCBE expected to find no more than “negligible effects” in reducing the number of test items and then found none. This result is the opposite one from what Dr. Susan Case, former Director of Testing for the NCBE, repeatedly stated: “the more questions you ask, the higher the reliability.”¹⁴¹ She also stated: “The broader the content domain, the more questions are required.”¹⁴² And just to be sure that the concept was clear, Dr. Case added: “[i]f more questions provide greater reliability, it follows that reliability is reduced when fewer questions are used.”¹⁴³

In questioning the effects of reducing the number of live test items, we relied on these statements and explanations by the NCBE’s own Director of Testing as reported in NCBE’s June 2012 edition of the *Bar Examiner*. It seems disingenuous for NCBE to dismiss our reliance on one of its own experts by limiting all that Dr. Case stated above and reducing it to four words: “[o]ther things being equal.” And why is this article in the *Bar Examiner* no longer available to the public on NCBE’s website? Did the NCBE decide that Dr. Case was wrong or has it decided that Dr. Case’s explanations should not be available for public consideration?

What meaning *should* we have given to Dr. Case’s statement that “[b]ut for a given topic or set of topics, all else being equal, the larger the sample of questions the more likely you are to have a good estimate of knowledge and skills”?¹⁴⁴ Dr. Case placed the limiting words — “other

¹⁴¹ Dr. Susan Case, *The Testing Column, What Everyone Needs to Know About Testing, Whether They Like It Or Not, The Bar Examiner*, June 2012, at 29 [hereinafter Case, *What Everyone Needs To Know*]; this Article is on file with the Task Force; it is no longer available on NCBE’s website for *The Bar Examiner*. (last visited August 22, 2020); https://thebarexaminer.org/?search=&authername=Case%2C_Susan_M.%2C___Ph.D.&publishedate=&action=my_posts_request_filter&post_type=article&submit=Search.

¹⁴² *Id.*

¹⁴³ *Id.* at 29-30.

¹⁴⁴ *Id.* at 29.

things being equal” — in the middle of the sentence, both here and in another instance. The words were not at the beginning of the sentence to indicate to the reader that whatever follows is limited by these words. Now, however, in rewriting Dr. Case’s explanation, NCBE begins with these words and deflects Dr. Case’s emphasis that “more questions provide greater reliability” with the following:

Other things being equal, the longer the exam, the greater the reliability, and vice versa. But the key point here is “other things being equal.” Besides test length, score reliability can also be affected by item discrimination (Traub, 1994)—that is, the ability of items to distinguish between different levels of examinee proficiency. *Other things being equal*, a test consisting of items with higher discrimination values would lead to a higher reliability, so test length and item discrimination are compensatory in nature; increasing one can offset a reduction in the other.¹⁴⁵

If these words of limitation were so critical to understanding sample reliability, one would reasonably expect Dr. Case to have made this clear by beginning each of her statements with the limiting words. Yes, she used them, but they were in the middle of the sentence. How would the average reader be expected to understand the critical importance of these words and the variables to be considered in determining “what other things are needed to be equal”?

In sum, we continue to believe that our recommendation for an independent psychometrician to review this matter is a necessary and sound one. There is no other way to know what meaning to give to NCBE’s explanations: should we believe what NCBE told us in the Bar Examiner in 2012 or what they are telling us now. Importantly, if the NCBE had confidence in its viewpoints, one would think it would welcome independent confirmation. And the prospective change in examination formats would not moot these questions since the NCBE has not indicated that it plans to change the way it scores the examination.

NCBE addresses the Task Force’s concern with reliability and its possible effect on equating the exam by explaining that although NCBE reduced the number of live MBE items, “the

¹⁴⁵ NCBE Response at 11 (emphasis added]

number of equators remained the same.”¹⁴⁶ According to the NCBE, its number of equators used on the MBE far exceeds the guidelines for best practices in psychometrics.¹⁴⁷ NCBE further explains that equator items are carefully selected and refers to a comprehensive list of criteria in selecting these items.

Since the Task Force is not composed of mathematicians, we do not have the expertise to know what significance to attach to such general descriptions: “content representation, date of most recent use, placement from most recent use, and statistics from most recent use.”¹⁴⁸ For example, does “content representation” or any of the stated criteria include an examination of “whether changes in average MBE scores over time correspond to changes in the same candidates’ average scores on other relevant measure of candidate ability, such as by investigating whether variation in mean MBE scores over time parallel changes in mean scores on the Law School Aptitude Test (the “LSAT”) ?”¹⁴⁹

We believe that this is a reasonable inquiry: these embedded test questions are used to compare “the performance of the new group of test takers on those questions with the performance of prior test takers on those questions. The embedded items are carefully selected to mirror the content of the overall test and to effectively represent a mini-test within a test.”¹⁵⁰ This means that if there has been a change in the examinee population, then it might affect the equating

¹⁴⁶ *Id.* at 10.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Stephen P. Klein, GANSK & Associates, *Summary of Research on the Multistate Bar Examination*, at 11.

¹⁵⁰ Erica M. Moeser, *President’s Page, The Bar Examiner*, December 2014, at 4.

process. Has the NCBE accounted for this change in its statement that it considered “content representation”? Since the NCBE claims that their standardization process means that a 135 on the MBE last year is the same as a 135 achieved now and a 135 achieved ten years ago,¹⁵¹ then it is necessary to ask how the change in the examinee population has affected the equating process. Standardization of the MBE assumes that the populations who originally answered the anchor items are the same in the terms of their underlying ability as the current population. If they differ in that ability, then the standardization may be unreliable.

And the populations differ in that ability because NCBE President Erica Moeser has told us so. They differ in that all indicators “point to the fact that the group that sat in July 2014 was less able than the group that sat in July 2013.”¹⁵² According to Ms. Moeser, “It is telling that between fall 2012 and fall 2013 the law school entering class that emerged in 2016 was reduced from 43,155 to 39,674. That figure dropped to 37,892 first-year students in the fall of 2014, the class that will graduate in 2017 and test that July.”¹⁵³ Not only are there far fewer candidates sitting for the bar exam, but today’s bar candidates are different from previous bar candidates for

¹⁵¹ Case, *What Everyone Needs To Know*, at 31. Dr. Case explains that “[s]caling written-component scores to the MBE involves an algebraic process that places the written-component scores on the same scale as the MBE. This process “equates” the written-component scores and assures that the scores mean the same thing across test administrations.” Erica Moeser states that “[t]he result is that a scaled score on the MBE this past summer—say 135—is equivalent to a score of 135 on any MBE in the past or in the future.” Moeser, *President’s Page, The Bar Examiner*, Dec. 2014, at 4.

¹⁵² Memorandum from Erica Moeser, President National Conference of Bar Examiners to Law School Deans on Two Matters (Oct. 23, 2014) [hereinafter, Moeser, Letter to Law School Deans, Oct. 23, 2014]. Ms. Moeser defended the MBE scores from the July 2014 test administration, and informed law school deans, that “[b]eyond checking and rechecking our equating, we have looked at other indicators to challenge the results. All point to the fact that the group that sat in July 2014 was less able than the group that sat in July 2013.” (Memorandum on file with the Task Force).

¹⁵³ *Id.*

many reasons, not least of which is that they are “less able” because law schools are admitting less qualified students.¹⁵⁴ The determination of “less qualified” is based on entering class data for scores marking the 25th percentile level of the LSAT. The data for the class that entered law school in fall 2015 and will graduate in 2018 are “still discouraging.”¹⁵⁵ Further, Ms. Moeser claims that the downward spiral was “not unexpected” since “[w]e are in a period where we can expect to see some decline, until the market for going to law school improves.”¹⁵⁶

In addressing the Task Force’s concern with the changing examinees, NCBE explains that “[r]eliability indicates the degree of consistency in the quality (precision) of measurement; it does not require that the measurement itself is constant. A thermometer does not become less reliable because the temperature changes.”¹⁵⁷ We find this analogy rather unhelpful. The reliability of the temperature in the thermometer is only as reliable as the calibration of the thermometer. We have

¹⁵⁴ Moeser, Letter to Law School Deans, Oct. 23, 2014.

¹⁵⁵ Moeser, *President’s Page*, *The Bar Examiner*, March 2016, at 5. See charts on pages 11 and 12: Change in Enrollment and LSAT Score at the 25th Percentile from 2010 to 2015 and Changes in First-Year Enrollment and Average LSAT Score at the 25th Percentile, 2010-2015, respectively. Although NCBE does not provide the total number for how many law schools provided data for the charts, the scatterplot analysis indicates that “[m]ost of the schools appear in the lower left quadrant; this quadrant contains schools that have experienced decreases in both the LSAT score at the 25th percentile and their enrollment numbers.” <https://thebarexaminer.org/article/march-2016/presidents-page-march-2016-2/> (last visited Aug. 23, 2020). See also, Paul L. Caron, TAXPROF BLOG, *Law School Applicants From Top Colleges Increased 1% In 2016 (But Down 48% Since 2010)*, March 1, 2017 (noting that “for the first time since 2010, the total number of graduates from the nation’s top universities increased instead of continuing to decline.” While only a slight increase, it may be a sign that top university students are considering law school once again; http://taxprof.typepad.com/taxprof_blog/2017/03/law-school-applicants-from-top-colleges-increase-1-in-2016-but-down-48-since-2010.html (last visited Aug. 23, 2020).

¹⁵⁶ Natalie Kitroeff, *Bar Exam Scores Drop to Their Lowest Point in Decades: Unprepared Students Can’t Handle a Harder Test* BLOOMBERG (Sept. 17, 2015, 2:32 PM) <https://www.bloomberg.com/news/articles/2015-09-17/bar-exam-scores-drop-to-their-lowest-point-in-decades>.

¹⁵⁷ NCBE Response, p. 12.

questions regarding the NCBE's equating design of the "thermometer" and hence its recommendation for independent verification is relevant.

The Task Force is not the first and only party to question the efficacy of reducing the number of live test items. Following NCBE's announcement about the increase in the number of pre-test items, the Association of Academic Support Educators ("AASE") wrote to Ms. Moeser and Robert A. Chong, Chair of the Board of Trustees, to express concerns on behalf of its membership:

We are concerned about the expansion of the pre-test items from ten (10) questions to twenty-five (25) questions. As an initial matter, we cannot evaluate this change in a meaningful way without knowing why the change was made. In addition, the change to 25 pre-test items for an exam that has only 200 items seems likely to raise some issues with respect to the efficacy of the MBE instrument in measuring minimum competency. As Dr. Susan M. Case suggested, a reduction in the number of items used to measure performance --- in this case from 190 graded questions to 175 graded questions --- negatively impacts the accuracy of the sampling measurements used within one exam to necessarily generalize from a smaller subset of questions to the larger question of minimum competency. Susan M. Case, *The Testing Column*, 81 Bar Examiner 29, 29 (2012). In her words, "for a given topic or set of topics all else being equal, the larger the sample of questions the more likely you are to have a good estimate of knowledge and skills." *Id.* In addition, the decrease in the number of items is likely to distort the reliability of the MBE exam instrument especially given the recent addition of Federal Civil Procedure material, as likewise explained by Dr. Case. *Id.* Lastly, this change conveys disrespect to bar applicants nationwide by compelling individuals who are taking likely the single-most-important test of their career to spend one-eighth of their exam time (forty-five minutes out of their six hours) and considerable mental effort on unscored work.

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¹⁵⁸ Letter from Jamie A. Kleppetsch, President, Association of Academic Support Educators, to Robert A. Chong, Chair of the Board of Trustees, National Conference of Bar Examiners and Erica Moeser, President & Chief Executive Officer, National Conference of Bar Examiners (Sept. 23, 2016) [hereinafter, Kleppetsch, AASE Letter] (on file with the Task Force). AASE is an organization comprised of more than 200 academic support and bar preparation professors representing law schools throughout the country. The concerns were three-fold: public revelation of a change without explanation, failure to solicit comments and advice from law school administrators, faculty, staff, and other stakeholders, and being informed only after the decision had been implemented.

AASE identified the identical concerns that the Task Force raised in its First Report. Just as the Task Force questioned the conclusory explanation reducing the number of test-items, AASE wrote, “though the NCBE memorandum relates that the change in the number of pre-test items will not have any effects (either negative or positive), because the NCBE does not provide evidentiary support for its conclusion, we are concerned about the basis for this assertion.”¹⁵⁹ While AASE raised concerns about the NCBE’s actions, the Task Force actively questioned them and asked for the State of New York to conduct its own psychometric review.

AASE raised another critical concern:

[A]s Dr. Case addresses in her 2012 column, because of the inherent sampling, reliability, and validity issues with respect to the written portions of the bar exam (the MEE and MPT questions), we are concerned that changes in the MBE without accompanying changes in the scaling methodology used by the NCBE (and apparently by most jurisdictions) to adjust written scores to the same scale of the MBE based on jurisdictional mean, standard deviation, and range data, might result in further degradation of the efficacy of the entire exam. And unless this change was conveyed to state bar associations previously, we are also concerned that the NCBE has not given those entities time to study this change and adjust accordingly.¹⁶⁰

NCBE’s response when it added a whole other content domain to the MBE — Federal Civil Procedure — was that “[o]ur research is solidly convincing that the addition of Civil Procedure had no impact on the MBE scores earned on the February and July 2015 MBE administrations.”¹⁶¹ This response stands in contrast to Dr. Case’s statement that “[b]ut for a given topic or set of topics, all else being equal, the larger the sample of questions the more likely you are to have a good estimate of knowledge and skills.”¹⁶² Notably, like the Task Force, AASE

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Erica M. Moeser, *President’s Page, The Bar Examiner*, December 2015, at 4.

¹⁶² Case, *What Everyone Needs to Know*, at 29.

referred to Dr. Case's statements in her column when it raised concerns about changes in the MBE and the impact on scoring. Apparently, AASE did not know or appreciate the power of the limiting words, "other things being equal" because AASE did not account for them.

This phrase, "other things being equal" would seem to indicate that the addition of a seventh subject to the MBE, by decreasing the number of test items in each of the other six subjects to make room for Civil Procedure, would detract from the "good estimate of knowledge and skills" being assessed because they are no longer equal. Maybe this is where we need to learn the nuanced language of instrument design. As lawyers, judges, practitioners, and educators, we are just going by the words on the page and the logical inferences to be drawn from them. For example, on its face, when you reduce the number of Contracts questions from 34 to 25, one would think that there might be an impact, but maybe this, too, falls under the heading of "other things being equal." Perhaps this is where Ms. Moeser found the answer when she stated that: "Our research is solidly convincing that the addition of Civil Procedure had no impact on the MBE scores earned on the February and July 2015 MBE administrations."

The NCBE mentions nothing about the burden placed on examinees by an increase in time spent under exam conditions on test questions. It is not insignificant. According to Professor Merritt, an increase from 18 minutes to 45 minutes is "a substantial amount of time, especially when 'volunteered' in the midst of a stressful, tiring experience."¹⁶³ It is not simply a matter of adding more time to the test: pre-test questions add stress. They add stress because the new questions "may be more ambiguous or difficult than well-tested ones." Further, and perhaps most important, "exam-takers ...can't skip over challenging pre-test questions and focus on the 'real'

¹⁶³ Deborah J. Merritt, *The Latest Change in the MBE*, LAW SCHOOL CAFÉ, (Sept. 5, 2016), <http://www.lawschoolcafe.org/2016/09/05/the-latest-change-in-the-mbe/> (last visited Aug. 23, 2020).

questions... [because] they don't know which are which. Answering flawed pre-test items can absorb disproportionate amounts of time and raise stress levels.”¹⁶⁴

NCBE's statement that the change in the number of pre-test items had but a “negligible effect” on test scores remains unacceptable to this Task Force. Nor is a statement from Ms. Moeser that “our research is solidly convincing” enough to convince the Task Force without independent verification. The public's interest in a fair and transparent licensing process outweighs the interests of any entity. Only a review by a disinterested party will serve the public's interest.

C. Relative Grading

The Task Force Report does not question the professionalism or calibration of the graders, but rather questions a grading process that favors context over competence. As the NCBE has said, “an essay of average proficiency will be graded lower if it appears in a pool of excellent essays than if it appears in a pool of poor essays. Context matters.”¹⁶⁵ As Dr. Case explains:

So what is the outcome of such fluctuation in the meaning of written test scores? An individual of average proficiency may have the misfortune of sitting for the bar with a particularly bright candidate pool. This average individual's essay scores will be lower than they would have been in a different sitting. The same individual's MBE score will reflect his genuine proficiency level (despite sitting with a group of particularly bright candidates), but without scaling, his essay scores may drag him down. An unscaled essay score may be affected by factors such as item difficulty or the average proficiency of the candidate pool that do not reflect the individual candidate's performance.¹⁶⁶

This is where scaling the written scores to the equated MBE scores is supposed to assure us that the final results are valid and reliable, even though an “average” candidate happened to be

¹⁶⁴ *Id.*

¹⁶⁵ Susan M. Case, *The Testing Column, Frequently Asked Questions About Scaling Written Test Scores to the MBE*, *The Bar Examiner*, Nov. 2006, at 43.
http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Farticles%2F2006%2F750406_Testing.pdf.

¹⁶⁶ *Id.*

unlucky enough to take the exam with more proficient candidates and is graded lower. Dr. Case assures us that this process does not disadvantage those who perform poorly on the MBE because “[s]caling written scores to the MBE does not change the rank-ordering of examinees on either test. A person who had the 83rd best MBE score and the 23rd best essay score will still have the 83rd best MBE score and the 23rd best essay score after scaling.”¹⁶⁷

None of this addresses the Task Force’s primary concern which is to determine whether an individual possesses minimum competency for law licensure and not whether that individual has knowledge that is stronger or weaker than another. You can be the “strongest of the weak” candidates and still not be competent to practice law. And vice versa, you can be the “weakest of the strong” candidates and still be competent to practice law. Still, in this case, the individual may be denied a law license on grounds other than a determination of individual competency.

This is because if all the candidates are weak, then the strongest of the weakest sets the “bar.” If Sarah is 70 years old and eligible for maximum Social Security benefits and considered a senior citizen by all governmental and cultural measures, she is “relatively young” when in a group of octogenarians. Does this make Sarah “young” or even “younger” than she is because she appears younger when in a group of older people? Is a bar candidate more or less competent because of the group with whom the candidate happens to take the bar exam? Minimum competence of practice law is not relative.

We were not the first to question such practices. In March 2016, Oklahoma changed its scoring model when it recognized that some examinees may have failed the bar exam when they should have passed. Oklahoma Supreme Court Chief Justice John F. Reif explained that the court’s decision came after learning that several individuals who took the bar exam in July 2015

¹⁶⁷ *Id.*

may have passed if it were not for the scaling system. According to Judge Reif, “[o]nce the scaling and adjustment took place, they no longer had a passing grade.” Further, “it didn’t have anything to do with what they had demonstrated in the way of knowledge on the essay portion. It happened to be the scaling of that score brought it below the passing grade.”¹⁶⁸

Still, the Oklahoma Board of Bar Examiners remained firm in its commitment to the scaling system. Board member Donna Smith told the Tulsa World that “scaling was meant ‘to take out the bumps in the road’ when the difficulty of essay questions or skill level of test-takers vary.”¹⁶⁹ Then she added: “If you have 10 really good papers and then a paper that’s more average, generally that average paper will get a lower score if it’s graded among really good papers, and vice-versa.”¹⁷⁰ This statement is very telling: it shows that bar examiners are very well aware that examinees may fail the bar exam not because they lack the requisite knowledge, but because they appear weaker when in the company of stronger candidates — and that they nonetheless find the practice acceptable.

D. UBE Portability and New York Candidates

NCBE misinterpreted the concern we expressed in our First Report about “forum shopping”: it is not about whether examinees might take advantage of how relative grading and scaling impacts bar scores such that an examinee might find a more “favorable” cohort jurisdiction,

¹⁶⁸ Arianna Pickard, *High failure rate on Oklahoma bar exam prompts change to state test*, TULSA WORLD (Apr. 8, 2016, 12:00 AM and updated on Apr. 11, 2016 at 11:49 AM, updated Feb 19, 2019) http://www.tulsaworld.com/news/education/high-failure-rate-on-oklahoma-bar-exam-prompts-change-to/article_b73f0e5b-0075-531a-a39e-f06e8ecad0ee.html. (last visited Sept. 18, 2020).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

but the fact that it is even possible. It is an unacceptable situation where the same person taking the same exam can pass in one UBE jurisdiction and fail in another.

We respectfully suggest that the NCBE reread BOLE’s own statements, which we quoted in the First Report, as those statements confirm that a “portable” UBE score is the product of the time and place in which it was taken: “The problem is that when a candidate goes to another jurisdiction and takes the test, the performance is judged in that context — meaning the written performance is evaluated with the specific group of papers produced for that exam. It can’t be assumed that the written score achieved on one exam would be the same as a written score achieved on another. It would be mere speculation to assume that a written score would increase by a given amount because of the perceived ability of the population with which the test was taken.”¹⁷¹

The “portable” score is just a “local” score, dependent on the pool that took that exam—and it is also “relative.” This is because of NCBE’s practice of scaling the written component to the MBE,¹⁷² which comes only from that jurisdiction. BOLE confirmed the locality of the “portable score” when it stated that “[s]caling relates to putting written scores onto a distribution of the same mean and standard deviation as the MBE scores of a given group of test-takers.”¹⁷³

¹⁷¹ BOLE Letter, at 23.

¹⁷² See Susan M. Case, *The Testing Column, Demystifying Scaling To the MBE: How’d You Do That?*, *The Bar Examiner*, May 2005, at 46. According to Dr. Case, the Director of Testing for the NCBE until November 2013, “[s]caling the essays to the MBE is an essential step in ensuring that scores have a consistent meaning over time. When essay scores are not scaled to the MBE, they tend to remain about the same: for example, it is common for the average raw July essay score to be similar to the average February score even if the July examinees are known to be more knowledgeable on average than the February examinees. Using raw essay scores rather than scaled essay scores tends to provide an unintended advantage to some examinees and an unintended disadvantage to others.”

¹⁷³ BOLE Letter, at 23.

While NCBE sees its scaling formula as necessary to “compensate for such differences and for variations among graders,” the Task Force sees it as essential to question whether scaling and scoring practices that can result in different scores for the same individual represents a fair and reliable assessment of that candidate’s minimum competency to practice law. It is not the Task Force’s intent for NCBE to feel threatened by its recommendation for an independent assessment but only part of its mission to review and assess the licensure process in New York. Whether to continue using a scaling system that ranks exams where it is a possibility that examinees may fail the bar exam not because they lack the requisite knowledge but because they appear weaker when in the company of stronger candidates is not ours to make.

E. Scoring Practices

The NCBE claims that “[Task Force Member Suzanne] Darrow-Kleinhaus...misrepresents the purposes of relative grading, stating that [t]he objective of the bar exam is not to rank-order examinees for entrance into the profession but to determine whether a particular examinee meets the requirement for minimum competency.”¹⁷⁴ According to the NCBE, we are to believe that “rank ordering of examinees is not the end of the grading process; rather, a relative grading approach that uses rank ordering is one step in a process that also includes scaling the written score to the MBE. Scaling the written score to the MBE produces a written score that harnesses the power of the equating done to the MBE.”¹⁷⁵

NCBE is deflecting attention from the main issue by dismissing a genuine concern for this Task Force — and not just for Professor Darrow-Kleinhaus — about the problem with a grading

¹⁷⁴ NCBE citing to Suzanne Darrow-Kleinhaus, *A Reply to the National Conference of Bar Examiners: More Talk, No Answers, So Keep on Shopping*, Ohio Northern University Law Review, Vol. 44, Issue 2, at 177 (2018).

¹⁷⁵ NCBE Response, p. 13.

system that ranks candidates. Apparently, the “misrepresentation” is the failure to consider the entire process where rank ordering is then scaled to the MBE to “harness the power of the equating done to the MBE.” We considered the entire process and still find it problematic.

It is unfortunate that NCBE has chosen to claim that one is misrepresenting its grading practices when one attempts to question them. Just because NCBE claims that its scaling of the written component to the MBE “harnesses” its power does not make the legitimacy of the resulting score beyond question. In fact, quite the opposite: it requires nothing less than an independent, unbiased assessment of NCBE’s scoring and scaling practices to make that determination. The use of an *ad hominem* style of reply on the part of the NCBE is, in our view, an attempt to mask the lack of substance in their reply.

Moreover, independent assessment is essential since the NCBE has decided to make its response to the Task Force a personal attack on the integrity one of its members, Professor Darrow-Kleinhaus. In questioning the validity of correlating the MEE and the MPT to the MBE, NCBE accuses Professor Darrow-Kleinhaus, and the Task Force by extension since it cites to her work, that it “use[d] false information to discredit the validity of scaling the written score to the MBE.”¹⁷⁶ The NCBE asserts that the First Report “erroneously states that correlations between the MBE score and the written score are low, falsely claiming that ‘NCBE acknowledges that there is a low correlation of the written component score with the MBE scaled score.’ NCBE made no such acknowledgement in the article referenced by the Task Force.”¹⁷⁷ Fortunately, the article by Dr. Mark Albanese in *The*

¹⁷⁶ *Id.* at 18.

¹⁷⁷ Mark A. Albanese, *The Testing Column, Let the Games Begin: Jurisdiction-Shopping For the Shopaholics (Good Luck With That)* *The Bar Examiner*, Sept. 2016, at 50, 52 -53 [hereinafter Albanese, *Let the Games Begin*], See sections entitled “The Reliability of the Written Component Total Score”, and “The Correlation of the Written Component Score with the MBE Scaled Score”).

Bar Examiner to which NCBE refers is available to the public on NCBE’s website, unlike that of Dr. Case’s earlier-cited article (which NCBE has taken down), so all interested readers can decide for themselves what NCBE has “acknowledged.”

In *The Testing Column*,¹⁷⁸ Dr. Albanese addresses the issue of forum-shopping and, in so doing, explains NCBE’s basis for assuring the reliability of the bar exam’s written component total score.¹⁷⁹

The first index we use is the reliability of the written component total score. (As a reminder, reliability estimates the extent to which a group of examinees would be rank-ordered the same if a second similar test was administered.) This index ranges from 0 to 1.0, with 1.0 meaning that there is consistent performance across the different essay questions and MPTs. If the reliability is 1.0, we could swap out different essay questions and MPTs and the score would not change for any examinee. A 0 reliability means that there is no consistency in performance from one essay question or MPT to the next. If we were to swap one essay question or MPT for another, the examinee’s score could change dramatically: theoretically, an examinee could move from having the lowest score to the highest score or vice versa if different questions were selected.

From here, Dr. Albanese provides additional information about the reliability of scores:

The reliability of the written component total score becomes larger as more scores contribute to creating the total score, because it reflects a larger sample of performance. *For comparison purposes, the 190-item MBE for recent administrations has a reliability of 0.92; for the July 2016 administration, it had a reliability of 0.93.4 For an examination like the written portion of the bar exam with only eight different scores in UBE jurisdictions (one for each of the six MEEs and two MPTs), the reliability will be much lower.* In fact, if we project the MBE reliability of 0.92 to an eight-item multiple-choice test, the reliability of such a test would be only 0.33. However, because each MEE question is a 30-minute exercise and each MPT is a 90-minute exercise, we would expect the written component total score to be substantially more reliable than the score from a handful of

¹⁷⁸ *Id.*

¹⁷⁹ We acknowledge the extensive technical nature of this portion of our Report. However, we felt it to be necessary to provide context for the proper assessment of the NCBE’s assertions.

multiple-choice items that we expect would take only about 15 minutes to answer. (The MBE has 100 questions per three-hour session, allowing 1.8 minutes to answer each question; projecting the same amount of time to answer each question in an eight-item MBE results in a session lasting about 15 minutes) (emphasis added).

And the following reliability data and explanations:

In July 2015, the reliabilities of the written component total scores for the 14 UBE jurisdictions ranged from 0.62 to 0.82 and averaged 0.73. In February 2016, the reliabilities of the written component total scores for the 17 UBE jurisdictions ranged from 0.48 to 0.77 and averaged 0.72. So, there is variability in the reliability of the written component total scores generated in the different UBE jurisdictions. *A bigger problem is that even the highest reliability achieved in any jurisdiction (0.82) does not reach 0.90, the minimum level normally considered adequate for high-stakes testing purposes. (italics added)*

At this point, a recap is necessary, if a bit repetitive, but just to be clear: Dr. Albanese reports that there is variability in the reliability of the written component total scores generated in the different UBE jurisdictions but “[a] bigger problem is that even the highest reliability achieved in any jurisdiction (0.82) does not reach 0.90, the minimum level normally considered adequate for high-stakes testing purposes.” In short, even the highest reliability achieved in any jurisdiction does not reach the minimum level normally considered adequate for high-states testing purposes.

Dr. Albanese then explains the correlation of the written component score with the MBE scaled score:

The second index we examine to monitor possible variation in grading practices is the correlation of the written component score with the MBE scaled score. Both the written component and the MBE are designed to assess knowledge, skills, and abilities required of the newly licensed lawyer. The MBE has the advantage of covering a broad range of content in the somewhat limited manner available in the multiple-choice format, while the MEE and MPT cover a more limited range of content but have the advantage of doing so by requiring the examinee to demonstrate the ability to express thoughts in writing, a critical skill for the newly licensed lawyer. *Although they have obvious differences, the two parts of the exam do fundamentally measure similar abilities, so the consistency of the two*

scores may be considered an indicator of consistency of grading of the written component. (emphasis added).

He provides the following correlations and explanations:

In July 2015, the correlations of the written component score with the MBE scaled score ranged from 0.44 to 0.81 and averaged 0.66 across the 14 UBE jurisdictions. In February 2016, the correlations ranged from 0.51 to 0.67 and averaged 0.60 across the 17 UBE jurisdictions. (When these correlations are adjusted for their less-than-perfect reliability, they are generally above 0.60, indicating that the MBE and written components “assess some shared aspects of competency, and that each method also assesses some unique aspect of competency.”)¹⁸⁰ As was the case for the reliability of the written component total score, there is variability between jurisdictions in the correlation of the written component score with the MBE scaled score. But is it a difference that makes a difference? And further, does it reflect meaningful differences in the average preparedness of examinees within a jurisdiction on particular subject areas?

And the final component about scaling the written component scores to the MBE:

The two key variables used to scale the written component scores to the MBE are the mean and the standard deviation (SD) of the MBE in the jurisdiction. (As a reminder, the mean is the sum of scores divided by the number of scores; the standard deviation can be thought of as the average deviation of scores from the mean.) In July 2015, the mean MBE scores for the 14 UBE jurisdictions ranged from 134.94 to 147.18, and the SD ranged from 12.88 to 17.62. In February 2016, the mean MBE scores for the 17 UBE jurisdictions ranged from 126.55 to 146.20, and the SD ranged from 12.68 to 16.39. Thus, UBE jurisdiction mean MBE scores varied by 12.2 points in July 2015 and by 19.7 points in February 2016. There clearly is jurisdiction variability in the mean MBE scores and the SDs as well.

While Dr. Albanese cites Dr. Case in discussing the relationship among bar exam component scores, it is helpful to consult her work to provide a more complete picture. For example, Dr. Albanese, citing to Dr. Case, informs us that when “these correlations are adjusted for their less-than-perfect reliability, they are generally above 0.60.” Dr. Case provides context

¹⁸⁰ Dr. Albanese, citing to Susan M. Case, Ph.D., *The Testing Column: Relationships Among Bar Examination Component Scores: Do They Measure Anything Different?*, *The Bar Examiner* 31–33 (August 2008).

and explanation for the numbers by sharing that in her data set from nine jurisdictions in the February 2009 bar exam, “the correlation with the MBE is 0.55 for local essay questions, 0.58 for the MEE, and 0.38 for the MPT. This shows a moderate correlation for both the locally developed essay questions and the MEE, but a weaker correlation for the MPT, indicating that the MPT is measuring different skills than the MBE, and that the MPT skills are less like those measured by the MBE than are the skills measured by the MEE”¹⁸¹ On the other hand, “[i]f two components measured exactly the same thing, the correlation would be 1.00 (perfectly related).”¹⁸²

Dr. Case explains that :

we know we are not measuring these skills with perfect precision. The MBE is long enough (i.e., contains sufficient questions) so that MBE scores are very precise (i.e., reliable). Scores on the MPT, with only two cases, and scores on the essays, with only a few questions, are less precise. However, there are statistical techniques that may be applied to estimate what the relationships would be if the scores were perfectly reliable. Our data show that, when corrected for the lack of perfect reliability, the correlation with the MBE is 0.76 for local essay questions, 0.78 for the MEE, and 0.58 for the MPT. These results show a moderately strong relationship between the MBE and the local essay questions, as well as between the MBE and the MEE, and a weaker relationship between the MBE and the MPT, as expected.¹⁸³

Some clear points emerge from this technical discussion:

First, there seems to be a difference between the experts in their evaluations of the strengths and weaknesses of the relationship between the components for reliability purposes. Dr. Albanese states that “[a]s was for the reliability of the written component total score, there is variability

¹⁸¹ *Id.* at 31.

¹⁸² *Id.*

¹⁸³ *Id.* at 32.

between jurisdictions in the correlation of the written component score with the MBE scaled score. But is it a difference that makes a difference?" This seems to be a rhetorical question where the answer is supposed to be "Of course it does not make a difference." We would answer, "well, maybe it does."

On the other hand, Dr. Case provides data and analysis that seems to indicate that there is a very real difference. She identifies a correlation of 0.38 for the MPT from her data set, "indicating that the MPT is measuring different skills than the MBE, and that the MPT skills are less like those measured by the MBE than are the skills measured by the MEE and local essay questions."¹⁸⁴

Second, that there are statistical techniques that can be applied to "correct for the lack of perfect reliability." Dr. Case advises us that "[o]ur data show that, when corrected for the lack of perfect reliability, the correlation with the MBE is 0.76 for local essay questions, 0.78 for the MEE, and 0.58 for the MPT. These results show a moderately strong relationship between the MBE and the local essay questions, as well as between the MBE and the MEE, and a weaker relationship between the MBE and the MPT, as expected."¹⁸⁵

A reasonable person reading these articles would most likely have questions. It is only reasonable to ask what it means to have correlations "adjusted for their less-than-perfect reliability." Is that an acceptable practice for a high stakes licensing exam? Is it an acceptable practice for this exam? Just because NCBE tells us that it is an acceptable practice does not make it so. If the MEE and the MPT measure different abilities and skills from the MBE — as we have been told and shown by their weaker correlations — then why are they scaled to the MBE? And

¹⁸⁴ *Id.* at 31.

¹⁸⁵ *Id.* at 32.

even if scaling and adjusting the written scores to the MBE “fixes” less than perfect reliability, this depends on the reliability of the MBE itself. Is that not to be questioned when it, too, has changed over time in the number of live questions and the populations taking the exam?

We believe it appropriate to ask these questions. The concern is whether NCBE’s grading practices might negatively impact those candidates who hover around the pass mark. Consequently, the Task Force remains firm in its recommendation for an outside, independent evaluation of these practices to determine whether candidates who should pass the bar exam are not passing because of such processes — and vice versa.

F. Some Concluding Thoughts About the NCBE’s Response

It is entirely unproductive and unnecessary to respond further to NCBE’s hostile and over the top criticisms of the Task Force and Professor Darrow-Kleinhaus for alleged lack of understanding of the intricacies of advanced psychometric practices. As Shakespeare famously said, “the lady doth protest too much, methinks.” Since NCBE’s attempts to explain the transformational process by which it scales, scores, and equates the numbers to arrive at a valid and reliable bar score are either so confusing or wanting — or both — so as to make that process clear to the practitioners, judges, and professors on the Task Force and other stakeholders, then the answer is obvious: have an outside psychometrician provide an independent assessment. We do not understand why NCBE would resist such an opportunity to have its metrics and processes evaluated and, if warranted, validated.

To make one final analogy, NCBE provides a product.¹⁸⁶ New York State purchases that product. As the purchaser, New York State has the right to inspect the goods. We believe that those law graduates who take the test, and the public which is to be served by a rigorous licensing system, may reasonably demand that inspection.

XV. CUT SCORES

In July 2020, California, which was one of two states with the highest pass score for its Bar Examination, permanently reduced its passing score from 1440 to 1390, effective as of California's October 2020 examination.¹⁸⁷ California is not a UBE jurisdiction, though California uses the MBE as part of its examination (just as New York did prior to the adoption of the UBE). Reducing the score led to a roughly 15% increase in the bar passage rate. The reduction in bar passage rate led to increases in the numbers of minority test takers succeeding on the examination. As compared to July 2019, 28.5% more Hispanics, 25.8% more Asians, 23.9% more Blacks, and 20.8% more Whites passed in October 2020.¹⁸⁸

¹⁸⁶ NCBE's Mission: "NCBE promotes fairness, integrity, and best practices in admission to the legal profession for the benefit and protection of the public. We serve admission authorities, courts, the legal education community, and candidates by providing high-quality assessment products, services, and research character investigations; and informational and educational resources and programs." See <https://www.ncbex.org/about/> (last visited September 18, 2020).

¹⁸⁷ See letter dated July 16, 2020 from Jorge E. Navarrette, Clerk and Executive Officer of the California Supreme Court, to Alan K. Steinbrecher, Chair, State Bar of California, Board of Trustees, available at: https://newsroom.courts.ca.gov/sites/default/files/newsroom/document/SB_BOT_7162020_FIN_AL.pdf.

¹⁸⁸ Skolnick, Bar Exams May Soon Be Easier to Pass, as States Eye Changes, March 29, 2021, available at: <https://news.bloomberglaw.com/business-and-practice/bar-exams-may-soon-be-easier-to-pass-as-states-eye-changes> (hereinafter "Skolnick").

Rhode Island is a UBE jurisdiction and it recently reduced its UBE cut score from 276 to 270, effective with the February 2021 UBE.¹⁸⁹ This reduction was made on recommendation of the Rhode Island Board of Law Examiners. One justice dissenting, stating: “In view of the fact that the professional services of lawyers are often sought by members of the public, who come from a wide diversity of backgrounds, I believe that society is better served by the maintaining of demanding (but nevertheless reasonable) standards for entry into the legal profession.”¹⁹⁰ Even with the reduction to 270, Rhode Island’s cut score remains higher than New York’s, which is pegged at 266.

In the wake of reductions in cut scores by California and Rhode Island, other states have expressed an interest in considering reducing their passing scores. The primary benefits to be derived from such a reduction are said to be a narrowing of the “achievement gap” between white and minorities and an increase in the number of newly admitted minority attorneys.¹⁹¹ States said to be willing to consider a reduction in cut scores include New York, Pennsylvania, Connecticut, North Carolina, Idaho, and Utah.¹⁹² No person is identified as the source of the information concerning New York’s interest in reducing cut scores.

The Task Force notes the existence of this issue and believes that it warrants further study. We remain concerned that the scoring practices of the NCBE -- equating scores against persons taking the test in the same locale, as opposed to equating the scores of all persons taking

¹⁸⁹Order of the Rhode Island Supreme Court, In re the Rhode Island Bar Examination (Reduction of Minimum Passing Score), dated March 25, 2021, available at [https://www.courts.ri.gov/Supreme Court/SupremeMiscOrders/RIBarExamination-ReductionMinimumPassingScore3-25-21.pdf](https://www.courts.ri.gov/SupremeCourt/SupremeMiscOrders/RIBarExamination-ReductionMinimumPassingScore3-25-21.pdf).

¹⁹⁰ *Id.* (Robinson, J., dissenting at 5).

¹⁹¹ Skolnick, note 191, *supra*.

¹⁹² *Id.*

the test – and the divergent cut scores of the various states make the scoring of the UBE arbitrary and unfair. We are also concerned that there are indications, discussed in Section XIV (B), *supra*, that students taking the bar examination today are “less able” because law schools are admitting less qualified students.

If New York stays with a national test, the issue of how to score that test fairly must be carefully evaluated. We should not be content with simply taking whatever score the NCBE gives and applying it. There should be a serious conversation about how to be sure that the minimum passing grade truly reflects that the examinee has at least the minimum competency to practice law.

XVI. CONCLUSION

Based on the consideration of the matters previously set forth in this Report, and as set out in more detail in Section III, *supra*, we propose that New York adopt its own bar examination. We advise against following the NCBE blindly down its seemingly irrevocable choice to create a new entirely-computer delivered bar examination. Rather than leave New York in the lurch by not planning for the day, which is coming, when the NCBE abandons the UBE, we call upon the Court of Appeals to appoint a working group of law school faculty and practitioners, aided by a professional psychometrician, to work with BOLE to develop the new test.

The new New York Bar Examination should foster the study of New York law, promote New York law within the broader legal community, and assure that attorneys admitted to practice here are competent to do so, with reference to the laws that they will be working with. A return to a New York Bar Examination should bring about a renaissance in the study and development of New York law, which is the lodestar of common law legal principles both

nationally and internationally. It would also restore luster to New York admission as it would no longer be a mere credential. Once again, the public would be assured that a New York-admitted lawyer has the minimum competence to practice in New York. The confusion between New York admittees who know New York law and those who do not will become a thing of the past. New York should use the four-to-five-year period during which the NCBE is working to replace the UBE to develop its own examination, to work with the law schools to facilitate their transition to the new New York test, and to reach out to other states (New Jersey, Connecticut, Massachusetts, and the District of Columbia in particular) to explore arrangements for reciprocity under appropriate terms and conditions.

Dated: April 12, 2021

Respectfully submitted,

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Staff Memorandum

HOUSE OF DELEGATES Agenda Item # 10

REQUESTED ACTION: Approval of the report and recommendations of the Committee on Standards of Attorney Conduct (COSAC).

Attached is a report from COSAC recommending amendments to Rule 8.4(g) of the Rules of Professional Conduct relating to discrimination in the practice of law. The report notes that COSAC began its study of Rule 8.4(g) in 2017, after the ABA amended Model Rule 8.4(g) in 2016. In October 2020, COSAC solicited and received comments on the rule from a number of NYSA sections and committees.

COSAC's proposal differs significantly from ABA Model Rule 8.4(g), which the Office of Court Administration published for public comment in April 2021. The amendments address four elements of the rule:

- Prohibit improper behavior in the practice of law.
- Expand the protected classes to conform to New York anti-discrimination law.
- Define and prohibit "harassment."
- Eliminate the requirement to exhaust administrative remedies.

The current report was circulated for comment in April 2021. Comments were received from the Trial Lawyers section (finding the rule to be vague and unnecessary), the Committee on Legal Aid/President's Committee on Access to Justice (supporting adoption of the ABA Model Rule rather than COSAC's proposal) and the Women in Law Section (supporting amendment of the rule but opposing the "severe and pervasive" standard and the use of the term "unlawful" discrimination).

The report will be presented at the June 12 meeting by COSAC subcommittee chair Prof. Ellen Yaroshefsky and consultant Debra Raskin.

MEMORANDUM

June 4, 2021

COSAC Proposal to Amend Rule 8.4(g) of the New York Rules of Professional Conduct

The New York State Bar Association’s Committee on Standards of Attorney Conduct (“COSAC”) is engaged in a comprehensive review of the New York Rules of Professional Conduct. In this memorandum, COSAC is proposing amendments to New York Rule of Professional Conduct Rule 8.4(g), which governs discrimination in the practice of law. COSAC’s proposed amendments differ significantly from ABA Model Rule 8.4(g), which the Office of Court Administration (“OCA”) circulated for public comment in March 2021. In submitting this memorandum, COSAC has considered numerous submissions received in response to COSAC’s April 16, 2021 report soliciting public comment on these proposals.

We first set out a clean version of COSAC’s proposed New York Rule 8.4(g) and related Comments (which would replace most of existing New York Rule 8.4(g) and current Comment [5A]). We then discuss (i) COSAC’s consideration of Rule 8.4(g) and recent developments; (ii) COSAC’s reasons for proposing amendments to current New York Rule 8.4(g); (iii) how COSAC’s proposal would improve current New York Rule 8.4(g); (iv) COSAC’s specific proposals for key segments of the rule; (v) a summary of COSAC’s proposed amendments to the text of current New York Rule 8.4(g); (vi) a summary of COSAC’s proposed new and amended Comments to Rule 8.4(g); (vii) a summary of how COSAC’s proposal differs from ABA Model Rule 8.4(g); and (viii) a summary of public comments received in response to COSAC’s April 16, 2021 report; and (viii) proposed changes to COSAC’s April 16 proposal in response to public comments. An Appendix of primary sources reprints the full text of ABA Model Rule 8.4(g) and related Comments, the full text of current New York Rule 8.4(g) and Comment [5A], and a redline version of COSAC’s proposed Rule 8.4(g) and related Comments. Exhibit A to this report summarizes by topic the public comments received in response to COSAC’s April 16, 2021 report, and Exhibit B sets forth all of those public comments in full.

Proposed New York Rule 8.4(g)

A lawyer or law firm shall not:

(g) engage in conduct in the practice of law that the lawyer or law firm knows or reasonably should know constitutes:

(1) unlawful discrimination, or

(2) harassment, whether or not unlawful, on the basis of one or more of the following protected categories: race, color, sex, pregnancy, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, gender expression, marital status, status as a member of the military, or status as a military veteran.

(3) “Harassment,” for purposes of this Rule, means conduct that is:

- a. directed at an individual or specific individuals in one or more of the protected categories;
- b. severe or pervasive; and
- c. either (i) unwelcome physical contact or (ii) derogatory or demeaning verbal conduct.

(4) This Rule does not limit the ability of a lawyer or law firm to, consistent with these Rules:

- a. accept, decline, or withdraw from a representation;
- b. express views on matters of public concern in the context of teaching, public speeches, continuing legal education programs, or other forms of public advocacy or education, or in any other form of written or oral speech protected by the United States Constitution or the New York State Constitution; or
- c. provide advice, assistance, or advocacy to clients.

(5) “Conduct in the practice of law” includes:

- a. representing clients;
- b. interacting with witnesses, coworkers, court personnel, lawyers, and others, while engaging in the practice of law;
- c. operating or managing a law firm or law practice; and
- d. participating in bar association, business, or professional activities or events in connection with the practice of law.

COMMENT

[5A] Discrimination and harassment in the practice of law undermines confidence in the legal profession and the legal system and discourages or prevents capable people from becoming or remaining lawyers or reaching their potential as lawyers.

[5B] “Unlawful discrimination” refers to discrimination under federal, state and local law.

[5C] Petty slights, minor indignities and discourteous conduct without more do not constitute harassment. However, severe conduct can consist of a single instance. Verbal conduct includes written as well as oral communication.

[5D] A lawyer’s conduct does not violate Rule 8.4(g) when the conduct in question is protected under the First Amendment of the Constitution of the United States or under Article I, Section 8, of the Constitution of the State of New York. This Rule is not intended to discourage and does not prohibit free expression, no matter how popular or unpopular the speaker’s views.

[5E] This Rule is not intended to prohibit or discourage lawyers or law firms from engaging in conduct undertaken to promote diversity, equity, and/or inclusion in the legal profession, such as by implementing initiatives aimed at (i) recruiting, hiring, retaining, and advancing employees in one or more of the protected categories, or (ii) encouraging or assisting lawyers and law students to participate in organizations intended to promote the interests of persons in one or more of the protected categories.

[5F] A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. Moreover, no violation of paragraph (g) may be found where a lawyer exercises a peremptory challenge on a basis that is permitted under substantive law.

[5G] Nothing in Rule 8.4(g) is intended to narrow or limit the scope or applicability of Rule 8.4(h) (prohibiting a lawyer from engaging in conduct, whether in or outside the practice of law, that “adversely reflects on the lawyer’s fitness as a lawyer”). Thus, Rule 8.4(h) may sometimes reach conduct that is not covered by Rule 8.4(g).

New York’s Consideration of Rule 8.4(g) and Recent Developments

In 2017, COSAC began an extensive in-depth study of Rule 8.4(g). In September 2019, COSAC preliminarily discussed Rule 8.4(g) and determined that the best course regarding the rule was to solicit broad input from outside COSAC. On October 8, 2020, COSAC’s Rule 8.4(g) Subcommittee solicited input from NYSBA committees and sections, as well as other relevant bar association groups in New York, on whether New York should amend existing New York Rule 8.4(g) to conform more closely to ABA Model Rule 8.4(g) (which the ABA adopted in August 2016). In light of comments received and COSAC’s own continued study and discussion, COSAC developed proposed amendments to Rule 8.4(g) and circulated those proposed amendments for public comment on April 16, 2021. Several other key developments in connection with the rules governing anti-bias, anti-discrimination, and anti-harassment also occurred during 2020 and 2021, including these:

- On July 15, 2020 the ABA Standing Committee on Ethics and Professional Responsibility issued ABA Formal Opinion 493, which provides guidance on the purpose, scope, and application of ABA Model Rule 8.4(g).

- In October 2020, the NYC Bar issued a Report by the City Bar’s Professional Responsibility Committee proposing amendments to New York Rule 8.4(g) that largely track ABA Model Rule 8.4(g).
- In September 2020, the New York City Bar ethics committee issued N.Y. City Bar Ethics Opinion 2020-4, which analyzed current New York Rule 8.4(g) and its weaknesses.
- In June 2020, the Supreme Court of Pennsylvania approved amendments to Pennsylvania Rule 8.4(g) that were scheduled to take effect on December 8, 2020. However, on December 7, 2020 the United States District Court for the Eastern District of Pennsylvania held that Pennsylvania’s version of Rule 8.4(g) violated the Free Speech Clause of the First Amendment, and the court granted an injunction that temporarily enjoined the Disciplinary Board of the Pennsylvania Supreme Court from enforcing the rule. Specifically, the district court held that the amendments to Rule 8.4(g) and two new explanatory Comments “consist of unconstitutional viewpoint discrimination in violation of the First Amendment.” The Pennsylvania Bar filed a notice of appeal in the Third Circuit, but in March 2021 the Bar voluntarily dismissed the appeal (and presumably started the drafting process again).
- In Fall 2020, the Connecticut Bar Association submitted proposed amendments to Connecticut Rule 8.4(7) to the Connecticut Supreme Court for consideration.
- On March 19, 2021, the New York Unified Court System’s Office of Court Administration circulated a “Request for Public Comment on the Proposal to Adopt ABA Model Rule 8.4(g) in New York’s Rules of Professional Conduct,” with a comment deadline of June 18, 2021.

COSAC’s Reasons for Proposing Amendments to Current New York Rule 8.4(g)

COSAC believes that it is important to amend New York Rule 8.4(g) to increase the public’s confidence in the legal system and to increase opportunities for capable people of all kinds to become lawyers, to remain lawyers, and to reach their full potential as lawyers. COSAC’s proposed amendments would make clear that the legal profession can responsibly regulate itself, which improves the public perception of lawyers and increases perceived and actual fairness in the legal system. In addition, COSAC’s proposed rule promotes diversity, equity, and inclusion in the legal profession.

In connection with diversity, equity, and inclusion, the ABA Commission on Racial and Ethnic Diversity in the Profession recently published its first report on diversity, equity and inclusion in law firm practice. *See 2020 ABA Model Diversity Survey* (2021) (available at <https://bit.ly/3ggU9Fe>). The ABA survey describes itself as “the tool to monitor, validate, and hold each other accountable for reaching the diversity, equity, and inclusion in the profession that we all profess to want and understand to be necessary.” An ABA article summarized the diversity survey as follows: “Minorities are getting hired as associates, but law firm leadership is mostly white and male because of a diversity ‘bottleneck’ and higher rates of minority attrition.” *See* Debra Cassens

Weiss, *Diversity ‘Bottleneck’ and Minority Attrition Keep Firm Leadership Ranks White and Male, New ABA Survey Says*, ABA Journal (Feb. 17, 2021) (available at <https://bit.ly/3ajCQ2K>).

Equally important, the legal profession should aspire to be more diverse, more equitable, and more inclusive of its own members. The Connecticut Bar Association, while considering whether to recommend amendments to its current version of Rule 8.4(g), cited a national survey of women lawyers. See *Women Lawyers on Guard, Still Broken: Sexual Harassment and Misconduct in the Legal Profession - A National Study* (2020) (available <https://bit.ly/3dkGGKO>), cited in letter from Connecticut Bar Association to Hon. Justice Andrew J. McDonald, Connecticut Supreme Court, in Dec. 4, 2020 (available at <https://bit.ly/3ad5thS>). Out of 578 total respondents to the national survey, 293 respondents reported that they had experienced discrimination, harassment, or sexual harassment, based on membership in a protected class, in conduct related to the practice of law. In addition, 252 survey respondents reported *witnessing* discrimination, harassment, or sexual harassment, based on membership in a protected class, in conduct related to the practice of law.

Furthermore, in November 2020, the New York State Judicial Committee on Women in the Courts published an extensive report, entitled *Gender Survey 2020* (available at <http://ww2.nycourts.gov/ip/womeninthecourts/publications.shtml>) that included questions about sexual harassment. Responses from more than 5,300 attorneys showed (among other things) that male respondents believed harassment in law practice occurred less frequently than women believed. For example, the Gender Survey said:

The answers to the question of whether female attorneys experience unwelcome physical contact varied widely by which group were the actors in such harassment. The group of most concern was other attorneys; 10% of female attorney responders reported that unwelcome physical contact by other attorneys occurred very often or often, and another 36% reported it sometimes happened. Therefore, for too many of the female responders, unwelcome physical contact from other attorneys was to some degree part of the court environment. Male attorneys also reported this occurring, though to a lesser extent: 3% reported this happened very often/often, and another 16% said this occurred sometimes.

For more information about *Gender Survey 2020*, see Debra Cassens Weiss, *Survey finds sexual harassment still a problem in New York courts, and lawyers are worst offenders* (ABA Journal Nov. 25, 2020).

How COSAC’s Proposal Improves Current New York Rule 8.4(g)

COSAC believes that New York’s current version of Rule 8.4(g) has several limitations that render it inadequate for its intended purpose. Initially, the current New York rule applies only if an attorney’s conduct constitutes “unlawful discrimination” – it does not prohibit harassing conduct that is not a violation of discrimination law. (The current rule does not mention harassment at all.) Second, the focus of the current rule is on employment discrimination. Third, the rule requires a complainant to exhaust administrative remedies before filing a grievance. Fourth, the New York Rule does not address use of sexual and racial epithets or biased conduct and harassment directed at opposing parties, lawyers, and others in the practice of law.

Taking into consideration (a) the various public comments that COSAC has received in response to its reports during the past two years, including the comments summarized below, as well as comments submitted earlier to COSAC in support of or opposition to adopting ABA Model Rule 8.4(g), (b) the limitations of New York’s current version of Rule 8.4(g), and (c) the overall goal of reducing or eliminating discrimination and harassment in the legal profession, COSAC has endeavored to draft a proposed rule that incorporates and expands on the objectives of current New York Rule 8.4(g), fixes the weaknesses of New York’s current rule, and alleviates some of the concerns of those opposed to the language of ABA Model Rule 8.4(g). COSAC has also proposed specific language in the black letter text and the Comments to provide guidance to practitioners to regarding what conduct is and is not sanctionable under Rule 8.4(g). Accordingly, COSAC’s proposal to amend Rule 8.4(g) includes the following features:

- Eliminates the current requirement to exhaust administrative remedies before filing a grievance alleging discrimination;
- Adds and defines a prohibition on “harassment”;
- Expands the protected classes to conform to New York State anti-discrimination laws; and
- Extends the rule to cover activities in the practice of law beyond the terms and conditions of employment.

COSAC’s Specific Recommendations for Key Elements of Rule 8.4(g)

This section addresses COSAC’s specific recommendations regarding four discrete elements of Rule 8.4(g).

1. Prohibit improper behavior “in the practice of law” (and provide concrete examples).

It seemed odd to COSAC to prohibit conduct while a lawyer is working in a law office, but not when a lawyer is attending CLE programs or law firm events or other places where lawyers interact with others. We also recognized (based on research cited by the ABA) that a majority of

the misbehavior occurred in non-litigation matters and in locations other than the law office or courtroom.

Anticipating the challenges that would have been raised if we had recommended the ABA’s “related to the practice of law” language, we attempted to draft language that would narrow the scope of the ABA Model Rule, yet capture the intent to prohibit conduct beyond the law office or courtroom, and also provide examples in order to avoid concerns that the rule is overbroad. We suggest defining “conduct in the practice of law” as follows:

Conduct in the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaging in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or professional activities or events in connection with the practice of law.

2. Expand the protected classes to conform to New York State anti-discrimination laws.

The intent of COSAC’s proposal is to target discrimination and harassment on the basis of a protected status. We tried to mirror federal and state anti-discrimination laws as much as possible because those laws provide a baseline to evaluate conduct. We considered the protected categories and determined that the protected classes referenced in New York’s current version of Rule 8.4(g) should be expanded to include “ethnicity,” “gender expression,” “gender identity,” “status as a member of the military” and “status as a military veteran.”

However, COSAC does *not* recommend adding “socioeconomic status” to the protected categories, as the ABA Model Rule does. Questions were raised about the definition of socioeconomic status. COSAC believed it best to have the protected categories mirror the protected classes identified in federal and state anti-discrimination laws.

3. Prohibit harassment (lawful and unlawful) and define “harassment.”

The current version of New York Rule 8.4(g) does not cover harassment at all. Recognizing that harassment is a construct of anti-discrimination laws and does not have its own independent cause of action under federal and state anti-discrimination laws, we determined it should be defined as (a) conduct directed at an individual or specific individuals in a protected category, (b) that is severe *or* pervasive, and (c) is either unwelcome physical conduct or derogatory or demeaning verbal conduct. We determined that the intent of the rule should be to prohibit conduct directed at those in the protected categories, and we have further limited the proposed rule by adding the requirement that the conduct be severe or pervasive.

4. Eliminate the requirement to exhaust administrative remedies.

COSAC proposes to eliminate the New York requirement that “[w]here there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance.” COSAC recognizes the cost and difficulty in pursuing and exhausting administrative remedies pertinent to a discrimination complaint, and believes that requirement could prevent or deter complainants from filing meritorious grievances under Rule 8.4(g). In addition, the exhaustion requirement is a creature of the Appellate Divisions – it was never recommended by COSAC in 2008 (or before that). Nevertheless, COSAC also believes that if an administrative agency (such as EEOC or NYDHR) finds that a lawyer has engaged in unlawful discrimination, that should continue to be prima facie evidence of a violation of Rule 8.4(g), as under New York’s current rule, so this is reflected in a Comment. The complainant would thus be able to benefit from a finding by an administrative agency but would not be required to pursue an administrative complaint before filing a grievance.

**Summary of COSAC’s Proposed Amendments to the
Text of Current New York Rule 8.4(g)**

- Preserve in Rule 8.4(g)(1) the existing prohibition on engaging in conduct that is “unlawful discrimination”;
- Add Rule 8.4(g)(2) to provide that a lawyer shall not engage in conduct that is lawful or unlawful harassment against protected classes, and add pregnancy, religion, ethnicity, status as a veteran and gender identity or expression to the list of protected classes;
- Add Rule 8.4(g)(3) to define “harassment;”
- Add Rule 8.4(g)(4) to specify conduct that would *not* violate the rule; and
- Add Rule 8.4(g)(5) to define the scope of “conduct in the practice of law.”

Summary of COSAC’s Proposed Comments to New York Rule 8.4

COSAC also recommends amending and substantially expanding the Comments to Rule 8.4. Currently, only one short Comment – Comment [5A] – pertains to paragraph (g), and it adds nothing to the text of the current rule. COSAC’s proposed Comments to NY Rule 8.4(g) go much further and may be fairly summarized as follows:

- Replace existing Comment [5A], which merely repeats the text of the current rule, by adding language stating that discrimination and harassment in the practice of law undermine confidence in the legal profession and the legal system, and discrimination and harassment also discourage or prevent capable people from becoming or remaining lawyers or reaching their potential as lawyers.

- Add a new Comment [5B], which defines “unlawful discrimination” to encompass discrimination under federal, state, and local law.
- Add a new Comment [5C], which clarifies that (i) petty slights, minor indignities and discourteous conduct without more do not constitute harassment, (ii) “severe” conduct can consist of a single instance, and (iii) verbal conduct includes written as well as oral communication.
- Add a new Comment [5D] which provides guidance regarding the scope of the rule and adds that a lawyer’s conduct does not violate Rule 8.4(g) when the conduct in question is protected under the First Amendment to the United States Constitution or under Article I, Section 8, of the New York State Constitution. This language is intended to clarify that the Rule is not meant to censor or curtail free speech, no matter how popular or unpopular the speaker’s views.
- Add a new Comment [5E] to clarify that Rule 8.4(g) is not intended to prohibit or discourage lawyers or law firms from engaging in conduct to promote diversity, equity, and inclusion in the legal profession. The Comment also describe certain examples of permissible conduct.
- Add a new Comment [5F], drawing upon language from ABA Model Rule 8.4(g), stating that a judge’s finding that peremptory challenges were exercised on a discriminatory basis or on another basis that is permitted by law does not, standing alone, establish a violation of Rule 8.4(g).
- Add a new Comment [5G] clarifying that Rule 8.4(g) as amended is not intended to narrow or limit the scope or applicability of Rule 8.4(h), which has been invoked to address instances of discrimination or harassment that occur separate from “conduct in the practice of law.”

How COSAC's Proposal Differs from ABA Model Rule 8.4(g)

COSAC’s proposed amendments differ from the ABA Model Rule in two key ways. First, COSAC’s proposal limits the Rule’s scope to conduct “in the practice of law,” a limitation not found in ABA Model Rule 8.4(g) (which reached conduct “related to” the practice of law). Second, COSAC’s proposal limits and defines “harassment” to avoid overbreadth.

Public Comments to COSAC’s April 16, 2021 Report

During April and May 2021, COSAC received written comments from many entities and individuals, including NYSBA committees and sections, professors of law, legal foundations and societies, and individual practitioners. Specifically, the following people and groups commented on COSAC's proposals:

- William T. Barker
- Professor Alberto Bernabe (Professional Responsibility Blog)
- Brian Faughnan (Faughnan on Ethics blog)
- Professors Josh Blackman, Eugene Volokh and Nadine Strossen
- Philip A. Byler
- Christian Legal Society

- Janice DiGennaro
- Professor Stephen Gillers and Professor Barbara S. Gillers
- Zachary Greenberg
- Richard Hamburger
- William Hodes
- National Legal Foundation
- NYSBA Committee on Diversity and Inclusion
- NYSBA Committee on Legal Aid and the President’s Committee on Access to Justice (jointly)
- NYSBA Trial Lawyers Section
- NYSBA Women in Law Section
- Pacific Legal Foundation
- Professor James Philips

Due to the volume of comments received, we summarize the key points raised by commentators in favor and in opposition to COSAC’s proposal below. The full text of all of the public comments received on COSAC’s proposals are included in Exhibit A and Exhibit B to this report.

1. Should Rule 8.4(g) be limited to “unlawful” discrimination (as opposed to “discrimination” whether lawful or unlawful)?

Proponents of limiting Rule 8.4(g) to “unlawful” discrimination supported how this distinction recognizes that there can be discrimination that is not unlawful and defers to governing legal authorities, as well as how this mitigates against constitutional concerns that the rule would regulate protected speech. In contrast, one commentator opposed limiting actionable discrimination to what is “unlawful” and argued that, as an ethics rule, Rule 8.4(g) should provide greater protection than a legal statute.

Certain commentators noted that, in addition to raising choice of law issues, the limitation to “unlawful” discrimination would require disciplinary committees to reach a legal conclusion on what discrimination is unlawful, or would in practice end up reinstating the exhaustion requirement because the disciplinary committee may choose to defer to other tribunals while the legal question is litigated. Those opposed also noted that the gap in discrimination law coverage outside of the

employment context might result in the rule failing to cover discrimination against clients or potential clients, and might result in inconsistent application where individual states have different ethics rules.

2. Should Rule 8.4(g)'s scope reach conduct "related to the practice of law," or only conduct "in the practice of law"?

Proponents of COSAC's formulation governing conduct "*in* the practice of law" (as opposed to the ABA Model Rule's broader formulation governing conduct "*related to* the practice of law") noted that COSAC's formula limited concerns about overbreadth and properly kept the rule's scope within the bar's core competency of regulating the "practice of law." Proponents also noted the generally accepted idea that rules may constitutionally abridge an attorney's constitutional rights when the attorney is engaged in the practice of law, as opposed to the attorney's personal spheres outside the practice of law, and that COSAC's formulation works in parallel with those parameters.

The primary focus of comments opposed to COSAC's language (as well as comments opposed to the ABA model rule) was the application of the rule to circumstances outside the traditional practice of law, such as social events, CLE presentations, bar association dinners, etc. Commentators raised constitutional concerns that lawyers would be subject to discipline based on actions in circumstances with little connection to their actual practice of law.

3. What kinds of "harassment" should be prohibited under Rule 8.4(g)?

Comments in support of COSAC's definition of harassment as conduct that is "severe or pervasive" and directed at specific individual(s) in protected categories noted that this formulation bolstered the argument for the rule's constitutionality by avoiding the interpretation that it can be used to regulate protected, but offensive, more generalized speech. However, other commentators opposed the "severe and pervasive" limitation given the disparate views among different groups (particularly between men and women) regarding what behavior constitutes harassment. These comments expressed concern that a "severe or pervasive" standard would require complainants to meet a Title VII standard for abusive workplace environments and would not address isolated incidents that, although severe, may not recur (*e.g.*, misconduct during a deposition). These commentators also noted that because Rule 8.4(g) is more specific than Rule 8.4(h), COSAC's proposals would result in a more restricted scope for the application of Rule 8.4(h) as well. In addition, one commentator noted that the "severe and pervasive" standard was recently removed from New York State Human Rights Law and is not a part of the definition of harassment under New York City Human Rights Law. This commentator offered that a potential substitute standard could be the following from the current version of the New York State law: conduct that "rise[s] above the level of what a reasonable victim of discrimination with the same protected characteristic or characteristics would consider petty slights or trivial inconveniences." NYS Executive Law Section 296(1)(h).

Various commentators opposed COSAC’s proposed definition of harassment—particularly the language that harassment includes “derogatory or demeaning” or “degrading, repulsive, abusive and disdainful” conduct—on the grounds that this language constitutes unconstitutional “viewpoint discrimination” under recent Supreme Court precedent. Other commentators opposed defining “harassment” to reach beyond developed federal, state and local statutory and decisional law, especially in light of the plaintiff-friendly nature of New York state and city anti-discrimination laws.

4. Does COSAC’s proposal raise free speech or other constitutional concerns?

Various commentators argued that implementing COSAC’s proposed Rule 8.4(g) would chill attorney free speech. These commentators noted that, even if a grievance against a lawyer has a low likelihood of success or is ultimately unsuccessful, the rule would still chill speech by failing to protect a lawyer from an investigation and from the expense of defending his or her protected speech. However, other commentators opined that COSAC’s limitation (regulating only speech that is directed at specific individual(s) in one or more protected categories and COSAC’s black letter text and Comment [5D] excluding protected speech from the scope of the rule) obviated many of the free speech concerns.

One commentator raised due process concerns about subjecting a lawyer to professional discipline for conduct that is not actionable civilly.

5. Other comments.

Various commentators expressed support for COSAC’s decision not to add “socioeconomic status” as a protected class. COSAC also received comments both in favor of and opposed to adding pregnancy and gender expression as protected categories. One commentator recommended that “color” as a protected class be expanded to “skin color” for the sake of clarity.

One commentator expressed support for eliminating the existing requirement to exhaust administrative remedies requirement, while another commentator was opposed to eliminating the exhaustion requirement.

Certain commentators raised concerns about the inconsistent application of the rule to attorneys practicing in different parts of New York—*i.e.*, because applicable local laws differ from place to place, what is misconduct under the rule for a lawyer in New York City might not be misconduct for a lawyer practicing upstate. Another commentator stated that the proposed amendments to New York’s current version of Rule 8.4(g) were vague and not needed.

Other commentators opined that using a standard that the lawyer “knowingly” harassed or discriminated—as opposed to using COSAC’s (and the ABA’s) standard of “knows or reasonably should know”—would mitigate some concerns about the constitutionality of the rule.

One commentator sought confirmation that attorneys who, in the course of their practice, may need to use materials that are harassing or discriminatory because such materials are evidence in a case (*e.g.*, in depositions, negotiations, court filings, or otherwise, especially in employment and family law cases) would not be engaging in “harassment” actionable under COSAC’s proposed amendments. The same commentator suggested that this protection may be available under the following language in proposed Rule 8.4(g)(4): “This Rule does not limit the ability of a lawyer or law firm ... (iii) to provide advice, assistance or advocacy to clients consistent with these Rules.”

With respect to the definition of harassment, one commentator questioned why the actionable conduct in Rule 8.4(g)(3)(c)(ii) was framed as derogatory or demeaning “verbal conduct” given that “verbal conduct” is defined in Comment [5C] to include both oral and written communication. Instead, this commentator suggested that the actionable conduct in Rule 8.4(g)(3)(c)(ii) be changed to “oral or written” conduct.

COSAC’s Response to Public Comments

COSAC received a significant number of comments regarding almost all of the amendments proposed in its April 16, 2021 report, including comments supporting COSAC’s proposals, opposing COSAC’s proposals, and supporting the proposals with modifications. COSAC carefully read and considered all of the public comments received. Many of the public comments related to policy issues and considerations that COSAC had already considered during preparation of its April 16, 2021 proposal. After further careful consideration in light of the public comments, COSAC made a number of changes to the language of the proposed Rule and Comments. Those changes are as follows:

1. Modified Rule 8.4(g)(4)(b) to specify that continuing legal education programs, education or other forms of written or oral speech protected by the United States Constitution or the New York State Constitution are not limited by the proposed Rule.
2. Deleted the sentence that “Severe or pervasive derogatory or demeaning conduct refers to degrading, repulsive, abusive, and disdainful conduct.” from proposed Comment [5C] as unnecessary, confusing, and potentially giving rise to unconstitutional viewpoint discrimination.
3. Clarified in Comment [5C] that a single instance of conduct can be “severe.”
4. Added to Comment [5D] that the Rule is not meant to discourage and does not prohibit free expression, no matter how popular or unpopular the speaker’s views.

5. Clarified in Comment [5G] that Rule 8.4(g) does not narrow or limit the scope of conduct subject to discipline under Rule 8.4(h).

Contents of the Appendix to this Report

The Appendix to this report contains the full text of ABA Model Rule 8.4(g), the full text of current New York Rule 8.4(g), and a redline showing how COSAC’s proposal would revise the current New York rule. Exhibit A to this report aggregates public comments received on certain areas of common discussion. Exhibit B to this report sets forth the full text of all public comments received in response to COSAC’s April 16, 2021 report.

APPENDIX

ABA Model Rule 8.4(g) and Related Comments

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

COMMENT

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are

unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

Current New York Rule 8.4(g) and Related Comment

Below is New York's current version of Rule 8.4(g), as well as the sole Comment to Rule 8.4 (Comment [5A]) relating to paragraph (g).

Rule 8.4. Misconduct

A lawyer or law firm shall not:

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.

COMMENT

[5A] Unlawful discrimination in the practice of law on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation is governed by paragraph (g).

COSAC's Redlined Proposal to Amend Current New York Rule 8.4(g) and Related Comments

(Additions to current New York Rule 8.4(g) are underscored in blue and deletions are ~~stricken through in red.~~)

Current New York Rule 8.4. Misconduct

A lawyer or law firm shall not:

~~(g) unlawfully discriminate the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex,~~

~~disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding~~

(g) engage in conduct in the practice of law that the lawyer or law firm knows or reasonably should know constitutes:

(1) unlawful discrimination, or

(2) harassment, whether or not unlawful, on the basis of one or more of the following protected categories: race, color, sex, pregnancy, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, gender expression, marital status, status as a member of the military, or status as a military veteran.

(3) “Harassment,” for purposes of this Rule, means conduct that is:

- a. directed at an individual or specific individuals in one or more of the protected categories;
- b. severe or pervasive; and
- c. either (i) unwelcome physical contact or (ii) derogatory or demeaning verbal conduct.

(4) This Rule does not limit the ability of a lawyer or law firm to, consistent with these Rules,

- a. accept, decline or withdraw from a representation,
- b. express views on matters of public concern in the context of teaching, public speeches, continuing legal education programs, or other forms of public advocacy or education, or in any other form of written or oral speech protected by the United States Constitution or the New York State Constitution; or
- c. provide advice, assistance or advocacy to clients.

(5) “Conduct in the practice of law” includes:

- a. representing clients;
- b. interacting with witnesses, coworkers, court personnel, lawyers, and others, while engaging in the practice of law;
- c. operating or managing a law firm or law practice; and
- d. participating in bar association, business, or professional activities or events in connection with the practice of law.

COMMENT

[5A] ~~Unlawful discrimination in the practice of law on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation is governed by paragraph (g).~~ Discrimination and harassment in the practice of law undermines confidence in the legal profession and the legal system and discourages or prevents capable people from becoming or remaining lawyers or reaching their potential as lawyers.

[5B] “Unlawful discrimination” refers to discrimination under federal, state and local law.

[5C] Petty slights, minor indignities and discourteous conduct without more do not constitute harassment. However, severe conduct can consist of a single instance. Verbal conduct includes written as well as oral communication.

[5D] A lawyer’s conduct does not violate Rule 8.4(g) when the conduct in question is protected under the First Amendment of the Constitution of the United States or under Article I, Section 8, of the Constitution of the State of New York. This Rule is not intended to discourage and does not prohibit free expression, no matter how popular or unpopular the speaker’s views.

[5E] This Rule is not intended to prohibit or discourage lawyers or law firms from engaging in conduct undertaken to promote diversity, equity, and inclusion in the legal profession, such as by implementing initiatives aimed at (i) recruiting, hiring, retaining, and advancing employees in one or more of the protected categories or (ii) encouraging or assisting lawyers and law students to participate in organizations intended to promote the interests of persons in one or more of the protected categories.

[5F] A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. Moreover, no disciplinary violation may be found where a lawyer exercises a peremptory challenge on a basis that is permitted under substantive law.

[5G] Nothing in this Rule 8.4(g) is intended to narrow or limit the scope or applicability of Rule 8.4(h) (prohibiting a lawyer from engaging in conduct, whether in or outside the practice of law, that “adversely reflects on the lawyer’s fitness as a lawyer”). Thus, Rule 8.4(h) may sometimes reach conduct that is not covered by Rule 8.4(g).

Exhibit A

Aggregated Public Comments to COSAC Proposal Circulated April 16, 2021 Regarding Rule 8.4(g) of the New York Rules of Professional Conduct

Given the number and length of comments received to COSAC's April 16, 2021 report soliciting public comment on COSAC's proposed amendments to Rule 8.4(g), this Exhibit A proceeds by aggregating comments received on common topics of discussion, as well as includes a section of comments that address other subjects. The full text of comments received is included as Exhibit B. Exhibits A and B do not include comments received that focus solely on support for or opposition to ABA Model Rule 8.4(g) or the proposal promulgated by the Administrative Board of the New York Unified Court System.

1. Comments discussing whether the scope of Rule 8.4(g) should be limited to “unlawful discrimination” (as opposed to “discrimination”).

- a. **Professor Alberto Bernabe**: But the most important improvements over the Model Rule are in the way the proposed rule refers to or defines the type of conduct it regulates. For example, the proposed rule starts by adding the word “unlawful” to the word discrimination. Thus, the drafters of the rule recognize that there can be discrimination that is not unlawful and that the legal authorities that define that distinction are going to be relevant to determine how to apply the rule. This simple addition of one word also guards against the possible unconstitutional application of the rule. Because the Model Rule does not make that distinction, it is possible to interpret it to allow regulation of protected speech. By limiting the application of the rule to “unlawful discrimination” the authority of the state to regulate speech is more limited, and presumably will be understood to allow only regulation of speech that is not constitutionally protected.
- b. **Professor Stephen Gillers and Professor Barbara S. Gillers**: We oppose the word “unlawful” in paragraph (g)(1) for several reasons. Preliminarily, we note that discrimination can occur in a variety of settings, including but not only employment and toward clients or potential clients.

First, the presence of “unlawful” would require disciplinary committees to reach a legal conclusion, which they traditionally do not do. Or to avoid that, they could choose to defer while the parties litigated the legal question elsewhere, thereby reinstating the exhaustion requirement.

³ See City Bar Report (at 6) attached as Exhibit B to the March 19, 2021 Memo issued by the NYS Unified Court System “Re: Request for Public Comment on the Proposal to Adopt ABA Model Rule 8.4(g) in New York’s Rules of Professional Conduct.

Second, and related, the word may require a disciplinary committee to decide which jurisdiction’s laws apply. Imagine a New York law firm that discriminates against persons based on gender identity and expression in its Houston office. Assume Texas does not forbid that discrimination but New York law does (which it does, see Executive Law sec. 296(1)(a)). New York Rule 8.4 applies to a lawyer and “a law firm.” Rule 8.4(g)(5)(c) of your draft defines “[c]onduct in the practice of law” to include “operating or managing a

law firm or law practice.” Would the discrimination in Houston be “unlawful” under your draft? Or do you mean to say that a New York law firm does not violate your rule if it discriminates in hiring based on a characteristic forbidden in New York but allowed where the firm’s employee works? Allowing that discrimination in the Texas office of a New York firm would be inconsistent with the entity responsibility of law firms recognized both in your draft and in the introductory language to Rule 8.4. Federal anti-discrimination law does not apply to employers with fewer than 15 employees and in any event does not identify some of the characteristics in your draft (e.g., gender identity, gender expression, ethnicity).

Third, apart from employment discrimination, your discussion does not take account of when discrimination against clients or potential clients based on the listed characteristics would not be “unlawful.” If it would not be unlawful, then the provision has no effect. For instance, New York Executive Law sec. 296(2)(a) does not include “age” or “ethnicity” in its prohibition against discrimination in places of public accommodation, and let us assume that a law firm is such a place. So unless federal or another state law forbids this type of discrimination, your draft language has no effect. Law firms are not included as a place of public accommodation under federal law. 42 U.S.C. sec. 2000a(b).

If a law firm is *not* a place of public accommodation, and there is no state or federal law that forbids law firms to discriminate against clients or potential clients based on the characteristics in your draft, then the prohibition of “unlawful discrimination” is meaningless when the discrimination is directed at clients or potential clients.

Fourth, the reference to “local law” in comment 5[B] can result in different ethics rules for lawyers in different parts of the state. If, for example, New York City law forbids certain discrimination that federal and state law and local law elsewhere in the state does not, New York lawyers outside the city will be free to discriminate where lawyers in the city cannot. We think a professional conduct rule for the state should apply the same way statewide.

Fifth, your draft would tolerate discrimination outside employment or public accommodation situations, but within the practice of law, when discrimination is not unlawful. Examples might include the decision, when a firm cannot accept a matter, not to refer the potential client to a Black lawyer; the decision to retain only white lawyers as local counsel; the decision not to use a Muslim court reporter for the deposition of a Jewish client; and the decision to retain only men when a client needs a private investigator or an expert witness. In each instance the firm may or may not be responding to the client’s preferences.

- c. **William Hodes:** Third, explicitly adopting existing definitions of what is and is not “lawful” discrimination, rather than using existing law to merely inform new definitions inserted in the ABA Comments, is also obviously huge.

(This will not end contentious debate, but it will “remand” it to the confines of existing debates. In particular, I wonder if disparate impact analysis will or will not be imported into the special world of legal employment. If so, law firms that pay bonuses and compete for former Supreme Court law clerks are going to be in big trouble, because the number of

non-white clerks has been minuscule, no matter the judicial or political philosophy of any of the justices who have served on the Court.)

- d. **NYSBA Women in Law Section:** Notwithstanding this endorsement, the majority of the WILS' Executive Committee members who reviewed and voted on the proposed amendments objects . . . the use of the phrase “unlawful discrimination” rather than “discrimination” in paragraph 8.4(g)(1). . . . The reason for removing the word “unlawful” from the rule against discrimination is that, as an ethics rule, New York Rule 8.4(g) should provide greater protection than a legal statute. Some members of the WILS Executive Committee suggested that the amended Rule 8.4(g) should include a standard, but a lower standard than “unlawful” for finding discriminatory conduct in violation of the ethics rule.

2. Comments discussing whether the scope of Rule 8.4(g) should be framed as conduct “related to the practice of law” or conduct “in the practice of law.”

- a. **Janice J. DiGennaro:** I also object to the expansive definition of the “practice of law” sweeping within its scope events without any genuine nexus to the lawyer’s legal practice or work.
- b. **Professor Alberto Bernabe:** First, the proposed rule rejects the Model Rule’s language of “conduct related to the practice of law” and instead applies to “conduct in the practice of law” which is much more limited. This simple change addresses the possible issue of overbreadth in the Model Rule.
- c. **Philip A. Byler:** The phrase “conduct in the practice of law” is explained in the COSAC Memorandum (p.7) as COSAC’s effort to expand the reach of the lawyer disciplinary rules without adopting what is the overly broad language “related to the practice of law” that the American Bar Association uses in its Model Rules of Professional Conduct. COSAC is right not to propose using the “related to the practice of law” language that the American Bar Association uses in its Model Rules of Professional Conduct. But, as raised above, problems arise if proposed amended Rule 8.4(g) applies to lawyers at Bar Association functions and legal associations arguing positions contrary to what is recognized as protected classes in proposed amended Rule 8.4(g).
- d. **Christian Legal Society:** COSAC’s Proposed Rule 8.4(g) has basically the same scope as ABA Model Rule 8.4(g) and, therefore, will similarly chill New York attorneys’ free speech. ABA Model Rule 8.4(g) applies to “conduct related to the practice of law,” while COSAC’s Proposed Rule 8.4(g) applies to “conduct in the practice of law.” Despite the minor difference in language, ABA Model Rule 8.4(g) defines “conduct related to the practice of law” virtually identically to the way in which COSAC’s Proposed Rule defines “conduct in the practice of law.” That is, COSAC’s Proposed Rule defines “conduct in the practice of law” to “include[]”:
 - a. “representing clients;”
 - b. “interacting with witnesses, coworkers, court personnel, lawyers, and others, while engaging in the practice of law;”
 - c. “operating or managing a law firm or law practice;” and
 - d. “participating in bar association, business, or professional activities or events in connection with the practice of law.”

ABA Model Rule 8.4(g) defines “conduct related to the practice of law,” in its Comment [4], to “include[]”:

- a. “representing clients”—(same as COSAC’s Proposed Rule);
- b. “interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law”—(same as COSAC’s Proposed Rule);
- c. “operating or managing a law firm or law practice”—(same as COSAC’s Proposed Rule); and

- d. “participating in bar association, business or social activities in connection with the practice of law”—(COSAC’s Proposed Rule exchanges “social” for “professional” and inserts “or events” after “activities”).

Given that these two definitions are nearly identical, it is unclear how the scope of COSAC’s Proposed Rule differs from the scope of ABA Model Rule 8.4(g). Both apply to the same range of conduct. A primary criticism leveled at ABA Model Rule 8.4(g) is that its scope is far too broad, a criticism equally applicable to COSAC’s Proposed Rule. (See May 18 Letter at 10-19.)

- e. **Christian Legal Society**: The following comment addresses Comment [5E] of COSAC’s proposed rule, but because it is related the scope of conduct covered it is aggregated here.

Both ABA Model Rule 8.4(g) and COSAC’s Proposed Rule would make it professional misconduct for attorneys to engage in hiring practices that favor persons because they are women or belong to racial, ethnic, or sexual minorities. Both proposed rules have “savings provisions” in Comment [4] and Comment [5E], respectively, to try to preserve practices aimed at increasing diversity among law firms’ employees. But these “savings provisions” blatantly contradict the black-letter text, and text trumps comments.

A highly respected professional ethics expert has concluded that ABA Model Rule 8.4(g) “prohibits such discrimination as women-only bar groups or networking events, minority-only recruitment days or mentoring sessions, etc.” (See May 18 Letter at 3 n.8, 32-34.) As he explains, language in the comments is only guidance and not binding. Besides, the drafters of the rule “clearly knew how to include exceptions to the binding black letter anti-discrimination rule” because the black letter rule itself actually contains two exceptions: “If the ABA wanted to identify certain discriminatory conduct permitted by the black letter rule, it would have included a third exception in the black letter rule.”

These consequences for New York lawyers’ and their firms’ efforts to promote diversity, equity, and inclusion provide yet another reason to reject COSAC’s Proposed Rule. The substantial value of firms’ programs to promote diversity, equity, and inclusion, as well as the importance of affinity legal groups based on gender, race, sexual identity, or other protected classes, would seem to far outweigh any practical benefits likely to come from either COSAC’s Proposed Rule or ABA Model Rule 8.4(g).

- f. **Professors Josh Blackman, Eugene Volokh and Nadine Strossen**: (*Certain sections of this comment submission comparing and contrasting the text of the current New York Rule, the proposed ABA rule, and the proposed COSAC rule are omitted from this summary but are set forth in the full comments at the end of this document*).

The current version of New York Rule 8.4(g) extends to “the practice of law.” In contrast, the ABA Model Rule and the Administrative Board proposal extend to “conduct related to the practice of law.” And the COSAC proposal extends to “conduct in the practice of law.” The decision to expand the scope of Rule 8.4(g) is the root cause of many constitutional difficulties. Traditionally, the bar’s core competency was regulating the “practice of law.” And when an attorney is engaged in the practice of law, such as in court or in other forums,

his constitutional rights can be abridged. But as the state deviates from this traditional function, it begins to intrude on an attorney's personal spheres. And in those spheres, attorneys have robust individual rights that cannot be abridged. New York Rule 8.4(g) should remain limited to "the practice of law."

The proposal from the Administrative Board explains that "conduct related to the practice of law" can occur in "bar association, business or *social* activities." The COSAC proposal uses slightly different language: "bar association, business, or *professional* activities or events in connection with the practice of law." The word "social" was changed to "professional." But this change is immaterial, because the COSAC proposal also extends to all "events in connection with the practice of law." This broad category is broad enough to embrace "social activities." With these changes, the New York Bar would expand the range of its jurisdiction to social functions. Presentations at a CLE debate would be covered by this rule. Private table conversations at a bar dinner would be covered by the rule. These contexts have little connection to the actual practice of law, but could give rise to discipline.

The government does not have an "unfettered power" to regulate the speech of "lawyers," simply because they provide "personalized services" after receiving a "professional license." *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2375 (2018) (*NIFLA*). To be sure, *NIFLA* recognized that there are two categories of lawyer speech that may sometimes be more restrictable. First, the Court has "applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Id.* at 2372 (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)). The proposals, however, are not limited to "commercial speech" (which generally means commercial advertising), and do not simply "require professionals to disclose factual, noncontroversial information." Moreover, the Court noted that "States may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* at 2372. But the state cannot flip this rule by regulating speech on the grounds that it incidentally involves professional conduct—indeed, the *NIFLA* Court declared unconstitutional this sort of regulation.

The Administrative Board proposal included the constitutional analysis from ABA Formal Opinion 493. But this opinion failed to even discuss *NIFLA*.⁴

- g. **William T. Barker**: I don't think that the change from "related to the practice of law" to "in the practice of law" makes as big a difference as Bill does. In part, that is because I don't see Model Rule 8.4(g) reaching the substance of CLE presentations (or law review articles for that matter), a point on which ABA 493 agrees with me. I see that subject covered by the exclusion for "legitimate advocacy" (which I do not see as limited to advocacy on behalf of a client). Moreover, as I have argued before, prohibitions in the rule must be interpreted narrowly and exclusions broadly where necessary to avoid constitutional questions.
- h. **William Hodes**: First, changing from "conduct related to the practice of law" to "conduct in the practice of law" is huge. The ABA language can (easily) be stretched to cover (almost) everything that a lawyer does, and therefore doesn't do much of anything to

contribute to the meaning of the Rule. (The same problem attends Model Rule 1.6, BTW. As many of us have pointed out, protecting all information "relating to the representation" is so broad that it can lead to strained and even absurd results.)

By contrast, "in the practice of law" is both more focused and connects more readily with existing legal ideas. This change will remove from regulation much that should not be regulated by the Bar at all, but worked out by courageous friends and colleagues in the real world at large--at least that is what I argue in a little piece that will be in the next (electronic) issue of *The Professional Lawyer* shortly: "See Something, Say Something; Model Rule 8.4(g) is Not OK."

I don't think the drafters in New York or Connecticut intended this, BTW, but I think the change will take CLE presentations right out of the picture. (If I give a talk about legal ethics or civil rights injunctions or workers compensation, am I engaged in "conduct in the practice of law?" If so, law professors who are not admitted in the state in which they teach, or who are not lawyers at all, should be pressing the panic button!)

(Yes; there is a Black Letter definition in the New York version that includes some Bar activities, but the fit with the rest of the text is poor, and it might cover some Bar activities, but not others.)

- i. **NYSBA Women in Law Section:** WILS endorses the COSAC proposal to amend New York Rule 8.4(g) to align it more closely with ABA Model Rule of Professional Conduct 8.4(g) ("ABA Rule 8.4(g)") and specifically with the proposed amendments that would (i) include, as unethical conduct by attorneys, discriminatory and harassing conduct in the practice of law (not only discrimination in the context of the employment relationship)

3. Comments discussing whether Rule 8.4(g) should target “harassment” or “unlawful harassment.”

- a. **Janice J. DiGennaro**: The proposal goes too far, is an overreach and will subject lawyers to retaliatory harassment claims for acts that do not rise to level of any civil violation. I do not believe that we should be amending the rule to address harassment claims differently than a developed body of federal, state and city statutory and decisional law has already aggressively addressed such claims. New York city and state has some of the most pro-plaintiff discrimination statutes in the country I fail to see why they are not sufficient. The enforcement of this new rule will make grievance committees jurors in the inevitable “he said she said” which takes place in an harassment suit. The disciplinary system is neither designed nor equipped for that exercise nor are there the same burden shifting procedural safeguards that exist at law to protect the rights of the lawyer.
- b. **Professor Alberto Bernabe**: In addition, the proposal provides a good definition of harassment, which also limits the application of the rule, thus, also making it less vulnerable to constitutional attacks. The proposed rule defines harassment as conduct, whether physical or verbal, that is severe or pervasive and directed at an individual or specific individuals in one or more of several specific protected categories. Again, this description limits the application of the rule tremendously when compared to the Model Rule. And that is a good thing. By limiting the notion of “verbal conduct” to speech directed at specific individuals, the proposal avoids the interpretation that it can be used to regulate protected speech that is offensive but constitutionally protected.
- c. **Philip A. Byler**: In the proposed amended New York Rule 8.4(g), subsection (2) states that a lawyer may not engage in “Harassment, whether or not unlawful, on the basis of one or more of the following protected categories: race, color, sex, pregnancy, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, gender expression, marital status, status as a member of the military, or status as a military veteran.” What that means is that a New York lawyer is subject to discipline for what is deemed to be “harassment” even though it is not unlawful. The proposed amended New York Rule 8.4(g), subsection (3) defines “Harassment” as “conduct that is: a. directed at an individual or specific individuals in one or more of the protected categories; b. severe or pervasive; and c. either (i) unwelcome physical contact or (ii) derogatory or demeaning verbal conduct.”

While the scope of unlawful harassment may be determined to a certain degree by reviewing how agencies and courts have defined and treated unlawful harassment in actual cases, the definition of “harassment” has the general language of “unwelcome physical contact” and “derogatory or demeaning verbal conduct” that may be connected to “not unlawful” harassment. The COSAC Memorandum (p. 8) states that the intent of the rule should be to prohibit conduct for protected classes, with the “severe” and “pervasive” language serving to limit the scope of proposed amended Rule 8.4(g). Presumably, “unwelcome physical contact” that can become harassment if “severe” or “pervasive” is, for example, a male boss hugging a female employee (or vice versa); however, that kind of unwelcome physical contact would be unlawful. So, what is “unwelcome physical contact” that can become harassment if “severe” or “pervasive” but still not unlawful?

More importantly, is the intent of the “severe” and “pervasive” language accomplished as to “derogatory or demeaning verbal conduct”? Concretely, what is harassment that involves severe, derogatory verbal conduct and is not unlawful? Concretely, what is harassment that involves pervasive, demeaning verbal conduct and is not unlawful? COSAC’s Memorandum provides no concrete fact examples. COSAC’s Memorandum thus does not shed light on the answers to these questions, even though a New York lawyer is not to engage in such conduct.

Pages 2 and 3 of the COSAC Memorandum does show that there would be a “Comment” section appended to proposed amended Rule 8.4(g) that contains seven statements, and these statements are an apparent attempt to allay concerns about the potential reach of proposed amended Rule 8.4(g). But the seven statements do not provide such assurance and leaves unanswered much.

1. The first statement is that discrimination and harassment in the practice of law is said to undermine confidence in the legal system. The statement is a general truism, but it does not necessarily translate into promulgating a disciplinary rule prohibiting lawyers from engaging in “not unlawful” “harassment,” whatever that might be, and does not define what is “not unlawful” “harassment” involving “derogatory or demeaning verbal conduct.”

2. The second statement is that “unlawful discrimination” refers to discrimination under federal, state and local law. The statement is a near tautology, and it does not necessarily translate into promulgating a disciplinary rule prohibiting lawyers from engaging in not unlawful harassment, whatever that might be, and does not define what is “not unlawful” “harassment” involving “derogatory or demeaning verbal conduct.”

3. The third statement is that “[p]etty slights, minor indignities and discourteous conduct without more do not constitute harassment.” The statement would seem to deal with arguable examples of “not unlawful” harassment, which raises the question of when do slights and indignities become significant enough to constitute proscribed “not unlawful” harassment? COSAC’s Memorandum provides no concrete fact examples.

4. The fourth statement is that a lawyer’s conduct does not violate proposed amended Rule 8.4(g) if it is protected by the First Amendment and Article I, Section 8 the New York State Constitution. But saying that free speech, free exercise of religion, petitioning and the right to speak freely are not violative of proposed Rule 8.4(g) does not establish whether in individual cases the subject conduct or speech is protected by the First Amendment and Article I, Section 8 the New York State Constitution. Disputes regularly arise and will inevitably arise over whether certain speech or conduct is constitutionally protected. Some hypothetical questions should be considered to make concrete the problem:

At a function for the local bar association, an attorney expresses opposition to transgender bathroom accommodations and calls for the repeal of laws protecting transgenderism.

A Federalist society chapter holds a debate on immigration in which an attorney expresses support for former President Trump’s immigration policies and immigration law enforcement.

A professor in a class on the First Amendment denounces Political Islam as a totalitarian ideology and not a religion that should receive the protection of the Free Exercise clause.

An attorney presents an accredited CLE program in which he advocates against campus policies regulating hate speech.

An attorney attending an accredited CLE program on gender and racial bias, when the attending attorneys are asked if they have questions or perspectives to offer on the subject matter, stands up and denounces the program as constituting ideological Marxist propaganda lacking in substantive legal content.

An attorney does work for and is a member of an Evangelical Protestant Church or Catholic Church in which its members believe that homosexuality and transgenderism are sins and should not be legally protected.

5. The fifth statement is that proposed Rule 8.4(g) is not intended to prohibit or discourage lawyers or law firms from conduct undertaken to promote diversity, equity and/or inclusion in the legal profession. This statement does not address what is “not unlawful” “harassment” and what is “derogatory or demeaning verbal conduct.”

6. The sixth statement is that a trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of the proposed Rule 8.4(g). This statement should go without saying; that it is said is concerning with respect to the reach of the proposed amended Rule 8.4(g).

7. The seventh statement is that nothing in Rule 8.4(g) is intended to affect the scope or applicability of Rule 8.4(h) prohibiting a lawyer from engaging in conduct, whether inside or outside the practice of law, that “adversely reflects on the lawyer’s fitness as a lawyer.” This statement does not define limits on proposed amended Rule 8.4(g), and Rule 8.4(h) has its own problematic coverage if used as a stand-alone provision. A former First Department Disciplinary Chief Counsel has co-authored an article, H.R. Lieberman & H. Prager, “New York Catch-All Rule: Is It Needed?” New York Legal Ethics Reporter (Sept. 18, 2017), noting that New York is only one of five states that have Rule 8.4(h) and criticizing Rule 8.4(h) for the lack of notice of what is proscribed behavior.

The most criticized case involving a stand-alone use of Rule 8.4(h) is *Matter of Elizabeth Holtzman*, 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39 (1991). There, the New York Court of Appeals upheld a Letter of Reprimand issued to Kings County District Attorney Elizabeth Holtzman for sending a letter to the Administrator of the New York State Commission on Judicial Conduct and releasing that letter to the media containing the opinion that during a trial on sexual misconduct, Kings County Trial Judge Irving Levine had acted improperly in ordering in the robing room, with counsel and court officers present, a witness to get down on her knees and demonstrate the position in which she was raped. The letter directed to be sent by District Attorney Holtzman was based on a report

from the head of District Attorney Holtzman's Sex-Crimes Bureau, and the report was confirmed by a memorandum and sworn affidavit of the male Assistant District Attorney who had tried the case and purportedly witnessed the rape demonstration. District Attorney Holtzman was charged under the old Code of Professional Responsibility with conduct that reflected adversely on her fitness to practice law based on her making allegedly false accusations against Judge Levine. This charge was subject to hearings before a subcommittee of the Grievance Committee, which submitted findings to the whole Grievance Committee, and the Grievance Committee sustained the charge. The Appellate Division-Second Department affirmed, and the New York Court of Appeals also affirmed, calling District Attorney Holtzman's false attacks unwarranted and unprofessional and not what a reasonable attorney would do.

The premise of the disciplinary prosecution, however, was that the accusation against the trial judge was false; a true accusation of judicial misconduct directed toward a rape victim would have been in the public's interest to know and certainly not a proper matter for discipline of the reporting attorney. The determination of falsity and lack of reasonableness in conduct on District Attorney Holtzman's part was made after a privately held hearing; and neither the Appellate Division-Second Department in its short opinion nor the New York Court of Appeals discuss what was the evidence supporting the determination of falsity. The New York Court of Appeals, instead of focusing on berating District Attorney Holtzman, should have in fairness and for the public's edification stated what the evidence was objectively supporting falsity and thus the lack of reasonableness on Ms. Holtzman's part. But the New York Court of Appeals didn't, and neither did the Appellate Division-Second Department. So, we are left to wonder why should District Attorney Holtzman have known that the accusation was false and thus the accusation should not have been responsibly made when it had been reported to her by the Sex-Crimes Bureau and supported by the sworn affidavit of the Assistant District Attorney who tried the case in question before the Brooklyn trial judge?

Reference to Rule 8.4(h) by the Comment to proposed amended Rule 8.4(g) is therefore unsettling. What happened to District Attorney Holtzman for reporting a case of apparent judicial misconduct toward an alleged rape victim should serve as a caution against entrusting discrimination and harassment cases to private disciplinary hearings with no requirement for administrative exhaustion.

- d. **Christian Legal Society**: Because of their equally broad scope, both COSAC's Proposed Rule and ABA Model Rule 8.4(g) violate New York attorneys' free speech because they are viewpoint discriminatory. Both proposed rules define "harassment" using terms that are viewpoint discriminatory. As the Supreme Court made clear in *Matal*, a law or regulation that penalizes speech that is "derogatory or demeaning" is viewpoint discriminatory. 137 S. Ct. at 1753-54, 1765 (plurality op.); *id.* at 1766 (Kennedy, J., concurring). In its Comment [3], ABA Model Rule 8.4(g) defines "harassment" to include "derogatory or demeaning verbal . . . conduct."

In its subsection (3)(c)(ii), COSAC's Proposed Rule defines "harassment" to include "derogatory or demeaning verbal conduct." Its Comment [5C] further provides that "[s]evere or pervasive derogatory or demeaning conduct refers to degrading, repulsive,

abusive, and disdainful conduct.” This additional definition simply compounds the viewpoint discriminatory nature of the Proposed Rule for the same reasons that Justice Kagan, writing for the Court in *Iancu*, explained that the terms “immoral” and “scandalous” were facially viewpoint discriminatory. 139 S. Ct. 2294, 2300. (See May 18 Letter at 24-25.) Separately and individually, the terms “degrading,” “repulsive,” or “disdainful” make COSAC’s Proposed Rule viewpoint discriminatory. Government officials do not possess the authority to determine when speech is “degrading,” “repulsive,” or “disdainful.” Such line-drawing would rely too much on the subjective viewpoints of the government officials and, therefore, would violate the First Amendment.

Finally, Comment [5C] raises further concerns when it states that “[p]etty slights, minor indignities and discourteous conduct *without more* do not constitute harassment.” Rather than reassure, Comment [5C] actually suggests that “petty slights, minor indignities, and discourteous conduct” will sometimes be the basis for a finding of professional misconduct in certain circumstances in which “more”—however modest that “more” may be—occurs.

The existing Rule of Professional Conduct 8.4(g) covers unlawful harassment. The April 16, 2021, memorandum states that “[t]he current version of New York Rule 8.4(g) does not cover harassment at all.” COSAC Memorandum at 8. But to the contrary, certain forms of harassment are unlawful under federal and state antidiscrimination laws and, therefore, are “unlawful discrimination” for purposes of existing New York Rule 8.4(g). Existing New York Rule 8.4(g) is looked to as a model of reasonableness and clarity by bar committees in many other states. A broader rule is unnecessary because current New York Rules of Professional Conduct 8.4(d) and 8.4(h), respectively, provide for discipline if a lawyer or law firm “engage[s] in conduct that is prejudicial to the administration of justice” or “engage[s] in any other conduct that adversely reflects on the lawyer’s fitness as a lawyer.” As the Connecticut Office of Chief Disciplinary Counsel and the Statewide Grievance Committee recently observed, a rule like 8.4(d) makes ABA Model Rule 8.4(g) unnecessary if the current rules of professional conduct are “applied robustly” by committees and courts “to limit and deter [] conduct, bias or prejudice.”⁶

- e. **Professor Stephen Gillers and Professor Barbara S. Gillers**: COSAC identifies various studies and polls confirming the ongoing problem of discrimination and harassment in law practice. Recently, the New York State Judicial Committee on Women in the Courts reported that women lawyers continue to be a target of physical and verbal harassment and, most dramatically, that male respondents viewed the occurrences as much less frequent. For example:

The answers to the question of whether female attorneys experience unwelcome physical contact varied widely by which group were the actors in such harassment. The group of most concern was other attorneys; 10% of female attorney responders reported that unwelcome physical contact by other attorneys occurred very often or often, and another 36% reported it sometimes happened. Therefore, for too many of the female responders, unwelcome physical contact from other attorneys was to some degree part of the court environment. Male attorneys also reported this occurring, though to a lesser extent: 3% reported this happened very often/often, and another 16% said this occurred sometimes.¹

¹ New York State Judicial Committee on Women in the Courts Gender Survey 2020 at 8 available here: <http://ww2.nycourts.gov/ip/womeninthecourts/publications.shtml>.

Studies like these, of which there are many, in part inform our response to COSAC’s draft.

For several reasons, we oppose the requirement that the harassment be “severe or pervasive,” a phrase that appears to have been taken from the entirely different milieu of Title VII cases, where the issue is whether a plaintiff has proved “an abusive working environment.” *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993)(“When the workplace is permeated with ‘discriminatory intimidation, ridicule, and insult’ that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment’. . . Title VII is violated”).

The addition of this requirement makes “unwelcome physical contact” and “derogatory or demeaning verbal conduct” not forbidden by themselves. The conduct must also be “severe or pervasive,” implicitly of the type that would render a workplace environment abusive under Title VII law.

Further, the addition of the “severe or pervasive” language weakens the New York prohibition on harassing conduct as now construed under Rule 8.4(h). The proposed language will become the test for all alleged violations including under Rule 8.4(h). It is no answer to say, in the comment to the draft, that Rule 8.4(h) remains available. The court does not adopt the comments. And although Rule 8.4(h) will remain, the addition of a requirement of severity or pervasiveness in the more specific language of Rule 8.4(g) will, as a matter of statutory construction, limit the general language of Rule 8.4(h). COSAC’s draft actually worsens the situation. We urge COSAC fully to address the issues of discrimination and harassment in this rule without punting to another rule.

A separate problem with the draft’s treatment of harassment is the contradiction or inconsistency between the comments and the rule. The rule, as stated, does not prohibit “derogatory or demeaning verbal conduct” unless it is also “severe or pervasive.” Yet comment [5C] offers a “definition” of “severe or pervasive derogatory or demeaning conduct” with different words -- “degrading, repulsive, abusive, and disdainful.” So conduct that is degrading, repulsive, abusive, or disdainful would be severe or pervasive under the definition in the comment, while conduct that is derogatory or demeaning would, by itself, not be severe or pervasive under the text of the rule.

The problem here, among others, is that you have chosen two adjectives in the rule and four other adjectives in comment [5C] and treated the two sets of adjectives differently through the comment’s definition. In addition, “pervasive” implies multiple times but the definition does not include any reference to frequency.

Finally, taking the phrase “severe or pervasive” from the employment context and using it to define harassment in law practice fails to appreciate the temporal and spatial differences

² Compare the text of the proposed rule with proposed comment [5C]. See also paragraph 3 under the title “COSAC’s Specific Recommendations for Key Elements of Rule 8.4(g)” in COSAC’s April 16, 2021 Memo.

between these two environments. The workplace is a space where the same people repeatedly encounter each other, which means that the harassment of one or more persons by one or more other persons in that space could recur on a daily or weekly basis – i.e., it is possible for it to be pervasive. But the reported discipline for harassment of which we are aware arises in a single or limited setting, such as in a deposition, offering less or no opportunity for the behavior to be repetitive enough to become pervasive, thereby limiting the utility of your rule.

COSAC’s goal of not making “petty slights” or instances of “discourteous conduct” a basis for discipline can be achieved with the language in proposed comment [5C]’s first sentence, or if COSAC believes a comment is inadequate to achieve its goal, appropriate language can be raised to the text of the rule.

We recommend that COSAC consider the language in comment [3] to ABA Rule 8.4, or that comment as slightly modified by the Professional Conduct Committee of the New York City Bar Association. We suggest that either version adequately addresses your objectives (and ours) and, as important, avoids litigation about the overly restrictive phrase “severe or pervasive.” The City Bar language reads:

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Harassment includes harmful, derogatory, or demeaning verbal or physical conduct that manifests bias or prejudice towards others and includes conduct that creates an environment that a reasonable person would consider intimidating, hostile, or abusive. Typically, a single incident involving a petty slight, unless intended to cause harm, would not rise to the level of harassment under this paragraph. Harassment also includes sexual harassment, which involves unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.³

- f. **William T. Barker:** I do not favor a limitation to prohibition of conduct already prohibited by other law. In particular, I oppose limiting the prohibition to “severe and pervasive” conduct. Given the other limitations, including both those in Model Rule 8.4(g) and those in the NY proposal, I see no reason why that limitation is necessary. The severity of the conduct should simply affect whether charges are brought and the discipline imposed.
- g. **William Hodes:** Second, limiting situations calling for discipline to those involving "severe or pervasive" conduct was not only rejected by the ABA, but was given as a chief reason why federal and state civil rights provisions were insufficient, and had to be augmented by "lawyer only" provisions. The worry that bad actors could too easily "get away with" conduct that wasn't severe or pervasive enough was explicit in the materials accompanying the House of Delegates package.
- h. **NYSBA Women in Law Section:** Of the WILS Executive Committee members who responded . . . A majority voted in favor of deleting the “severe and pervasive” standard from the definition of harassment in paragraph 8.4(g)(3) and one (1) voted in favor of replacing “severe and pervasive” with a lower standard for finding harassing conduct in violation of the ethics rule The reason for removing “severe and pervasive” from the

amended rule 8.4(g) is that the “severe and pervasive” standard is not the law in New York. That standard was removed from the definition of harassment in the most recent amendments to the New York State Human Rights Law (“NYS HRL”). In addition, that standard is not part of the definition of harassment under the New York City Human Rights Law.

We note that the NYS HRL does provide a new standard for harassing conduct, which is conduct that “rise[s] above the level of what a reasonable victim of discrimination with the same protected characteristic or characteristics would consider petty slights or trivial inconveniences.” NYS Executive Law Section 296(1)(h). This standard could be incorporated into the amended Rule 8.4(g)(3).

4. Comments discussing other constitutional or statutory arguments relating to the scope of proposed Rule 8.4(g).

- a. **Janice J. DiGennaro:** I am opposed to the proposed amendments to R.P.C.8.4(g). I do not believe that lawyers should be held to a higher standard than other people regarding harassment claims than exists in the statutory and decisional law on these issues. The due process implications are quite extensive in my view relative to making conduct which is not actionable civilly an act of misconduct for which discipline can be imposed. A dissatisfied plaintiff who loses a discrimination suit in court gets another bite at the apple by filing a grievance against that same lawyer because the harassment standard is different. I believe the rule as currently constructed satisfies the goal of making it clear to lawyers that harassment and other forms of discriminatory conduct is not only a violation of law, when properly proven, but is an ethical violation.
- b. **Christian Legal Society:** Because of their equally broad scope, both COSAC's Proposed Rule and ABA Model Rule 8.4(g) will chill New York attorneys' speech. The United States Supreme Court has issued three recent decisions with analyses that make clear that ABA Model Rule 8.4(g) is an unconstitutional content-based and viewpoint-based restriction on attorneys' speech. Those decisions are *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018); and *Matal v. Tam*, 137 S. Ct. 1744 (2017). (See May 18 Letter at 20-26.)

Proponents of ABA Model Rule 8.4(g) often rely on ABA Formal Opinion 493, but this reliance is misplaced. For reasons that are hard to fathom, Formal Opinion 493 not only fails to distinguish these recent Supreme Court decisions; *it fails to mention them at all*. And, of course, Formal Opinion 493 was issued before the federal district court's decision in *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020), which renders Formal Opinion 493 obsolete. (See May 18 Letter at 21-23.)

In *Greenberg*, the Eastern District of Pennsylvania held that Pennsylvania's Rule 8.4(g), was facially unconstitutional because it violated attorneys' freedom of speech.¹ Pennsylvania had derived its rule from ABA Model Rule 8.4(g), with modifications aimed at narrowing it. In striking down the rule, the federal district court in *Greenberg* explained:

[The rule] will hang over Pennsylvania attorneys like the sword of Damocles. This language will continuously threaten the speaker to self-censor and constantly mind what the speaker says and how

¹ *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020), *appeal voluntarily dismissed*, No. 20-3602 (3d Cir. Mar. 17, 2021). The Disciplinary Board of the Pennsylvania Supreme Court initially appealed the decision but subsequently voluntarily dismissed its appeal.

the speaker says it or the full apparatus and resources of the Commonwealth may be engaged to come swooping in to conduct an investigation. Defendants dismiss these concerns with a paternal pat on the head and suggest that the genesis of the disciplinary process is benign and mostly dismissive. . . .

*Even if the disciplinary process does not end in some form of discipline, the threat of a disruptive, intrusive, and expensive investigation and investigatory hearing into the Plaintiff's words, speeches, notes, written materials, videos, mannerisms, and practice of law would cause Plaintiff and any attorney to be fearful of what he or she says and how he or she will say it in any forum, private or public, that directly or tangentially touches upon the practice of law, including at speaking engagements given during CLEs, bench-bar conferences, or indeed at any of the social gatherings forming around these activities. The government, as a result, de facto regulates speech by threat, thereby chilling speech.*²

Many scholars concur that ABA Model Rule 8.4(g) should not be adopted because it will violate attorneys' freedom of speech. (See May 18 Letter at 6-9.) For example, Professor Michael McGinniss, Dean of the University of North Dakota School of Law, "examine[s] multiple aspects of the ongoing Model Rule 8.4(g) controversy, including the rule's background and deficiencies, states' reception (and widespread rejection) of it, [and] socially conservative lawyers' justified distrust of new speech restrictions."³ Michael McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol'y 173 (2019).

Professor Margaret Tarkington, who teaches professional responsibility at Indiana University Robert H. McKinney School of Law, has raised strong concerns about ABA Model Rule 8.4(g)'s impact on attorneys' speech. She stresses that "[h]istorically it has been disfavored groups and minorities that have been negatively affected—and even targeted—by laws that restrict lawyers' First Amendment rights, including African Americans during desegregation, alleged terrorists following 9/11, communists in the 1950s, welfare recipients, debtors, and criminal defendants."⁴ She insists that "lawyer speech, association, and petitioning" are "rights [that] must be protected" because they "play a major role in checking the use of governmental and non-governmental power in the United States."⁵

Because lawyers frequently are the spokespersons and leaders in political, social, religious, or cultural movements, a rule that can be employed to discipline a lawyer for his or her speech on controversial issues should be rejected as a serious threat to a civil society in which

² *Id.* at 24-25 (emphasis supplied).

³ <https://law.und.edu/files/docs/features/mcginniss-expressingconsciencewithcandor-harvardjlp-2019.pdf>.

⁴ Margaret Tarkington, *Throwing Out the Baby: The ABA's Subversion of Lawyer First Amendment Rights*, 24 Tex. Rev. L. & Pol. 41, 80 (2019).

⁵ *Id.*

freedom of speech, free exercise of religion, and freedom of political belief flourish. In a time when respect for First Amendment rights seems to diminish by the day, lawyers can ill-afford to wager their licenses on a rule that may be utilized to punish their speech. (See May 18 Letter at 3-6).

Christian Legal Society comments continued:

The basic presumption underlying both ABA Model Rule 8.4(g) and COSAC’s Proposed Rule is that the government may regulate all attorneys’ speech as long as it provides carve-outs for “protected speech;” but the Supreme Court made clear the opposite is true in *NIFLA v. Becerra*. The *NIFLA* Court firmly rejected the idea that professional speech is less protected by the First Amendment than other speech. The Court stressed that “*this Court has not recognized ‘professional speech’ as a separate category of speech. Speech is not unprotected merely because it is uttered by ‘professionals.’*”⁷ It rejected the idea that “professional speech” was an exception “from the rule that content-based regulations of speech are subject to strict scrutiny.”⁸ A State’s regulation of attorney speech would be subject to strict scrutiny to ensure that any regulation is narrowly tailored to achieve a compelling interest. The Court reaffirmed that its “precedents have long protected the First Amendment rights of professionals” and “has applied strict scrutiny to content-based laws that

⁶ Email from Brian B. Staines, Chief Disciplinary Counsel, to Rules Committee of the Superior Court (Dec. 31, 2020), <https://www.jud.ct.gov/committees/rules/pdfs/2020-012%20ggg%20-%20Comments%20from%20Chief%20Disciplinary%20Counsel.pdf>. See also, Email from Michael Bowler, Statewide Bar Counsel, Statewide Grievance Committee, to Rules Committee for the Superior Court (Dec. 29, 2020), <https://www.jud.ct.gov/committees/rules/pdfs/2020-012%20fff%20-%20Comments%20from%20Statewide%20Grievance%20Comm.pdf>.

⁷ 138 S. Ct. at 2371-72 (emphasis added).

⁸ *Id.* at 2371.

regulate the noncommercial speech of lawyers.”⁹ Subsequently, in striking down Pennsylvania’s Rule 8.4(g), the *Greenberg* court relied on *NIFLA* to “find[] that Rule 8.4(g) does not cover ‘professional speech’ that is entitled to less protection” but instead “[t]he speech that Rule 8.4(g) regulates is entitled to the full protection of the First Amendment.”¹⁰

COSAC’s Proposed Rule flies in the face of the Supreme Court’s decision in *NIFLA*. Its assertion in subsection (4)(ii) that the rule does not limit a lawyer’s ability “to express views on matters of public concern in the context of teaching, public speeches, or other forms of public advocacy” merely underscores that the proposed rule believes it can regulate a lawyer’s expression of views on matters that are not “of public concern.” But that turns the First Amendment on its head. Free speech about private matters is just as protected as free speech about public matters. Protection for lawyers’ speech is not limited to “matters of public concern.” (See May 18 Letter at 20-26.)

Despite its nod to speech concerns, COSAC’s Proposed Rule will chill speech and cause lawyers to self-censor in order to avoid grievance complaints. COSAC’s proposed rule itself recognizes its potential for silencing lawyers when Comment [5D] states that “[a] lawyer’s conduct does not violate Rule 8.4(g) when the conduct in question is protected under the First Amendment of the Constitution of the United States or under Article I, Section 8 of the Constitution of the State of New York.” Comment [5D] affords no

substantive protection for attorneys' speech but merely asserts that COSAC's Proposed Rule does not do what it in fact does.

Nor is it enough for government officials to promise to be careful in their enforcement of a rule that lawyers have reason to fear will suppress their speech. As the Supreme Court has observed, "The First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."¹¹ Instead, the Court has rejected "[t]he Government's assurance that it will apply [a statute] far more restrictively than its language provides" because such an assurance "is pertinent only as an *implicit acknowledgment of the potential constitutional problems* with a more natural reading."¹²

The *Greenberg* court likewise rejected such assurances by observing that "[government officials] dismiss these concerns with a paternal pat on the head and suggest that the genesis of the disciplinary process is benign and mostly dismissive." But given "the threat of a disruptive, intrusive, and expensive investigation and investigatory hearing into the [lawyer's] words, speeches, notes, written materials, videos, mannerisms, and practice of law," the government is "de facto regulat[ing] speech by threat, thereby chilling speech."¹³

⁹ *Id.* at 2374.

¹⁰ *Greenberg*, 491 F. Supp. 3d at 27-30.

¹¹ *United States v. Stevens*, 599 U.S. 460, 480 (2010).

¹² *Id.* (emphasis added).

¹³ *Greenberg*, 491 F. Supp. 3d at 24-25.

In the landmark case, *National Association for the Advancement of Colored People v. Button*,¹⁴ the Supreme Court ruled that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights," explaining:

If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights. Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.¹⁵

COSAC's Proposed Rule fails to protect a lawyer from complaints being filed against her based on her speech or from the investigations that will frequently follow such complaints. The provision fails to protect a lawyer from the expense of protracted litigation to defend her speech as protected speech. Litigation in free speech cases often lasts for years. It extracts great personal expense and a significant emotional toll. Even if the investigation or litigation eventually concludes that the lawyer's speech was protected by the First Amendment, the lawyer has had to inform courts that a complaint has been brought when she applies for admission to another bar or seeks to appear *pro hac vice*. In the meantime, her personal reputation and practice likely will suffer damage through media reports.

The process is the punishment. This brings us to the real problem with COSAC's Proposed Rule. Rather than risk a prolonged investigation with an uncertain outcome and potential lengthy litigation, a rational, risk-averse lawyer will self-censor. Because a lawyer's loss of her license to practice law is a staggering penalty, the calculus is entirely predictable: Better to censor one's own speech than to risk a grievance complaint. The losers are not just the legal profession, but our free civil society, which depends on lawyers to protect—and contribute to—the free exchange of ideas that is its lifeblood.

- c. **Professor James Philips**: First, the proposal violates the First Amendment because it is viewpoint discriminatory. See *Matal v. Tam*, 137 S. Ct. 1744, 1753-54(2017); *Iancu v. Brunetti*, 139 S. Ct. 2294, 2300 (2019). Second, it is overbroad and will chill attorney's speech. And third, its attempts to just regulate professional speech and not private speech do not withstand constitutional scrutiny in light of *NIFLA v. Becerra*, 138S.Ct. 2361, 2371-72 (2018).
- d. **Zachary Greenberg**: The proposed amendment would violate the First Amendment rights of New York attorneys by unduly restricting their expressive freedoms. The proposed rule suffers from the same constitutional defects as the 8.4(g) rule variant adopted by the Disciplinary Board of the Supreme Court of Pennsylvania, which was struck down by a federal district court last year in my response to my lawsuit. I urge you and the COSAC to read about this litigation, especially the court's decision, and refrain from enacting this limitation on attorney free speech rights. Your failure to do so may result in another successful First Amendment lawsuit against you and all those responsible for promulgating this rule, to the detriment of the New York Bar Association and all those it claims to represent.
- e. **Professors Josh Blackman, Eugene Volokh and Nadine Strossen**: The COSAC proposal advances a three-factor test to define "harassment." First, the speech must be "directed at an individual or specific individuals in one or more of the protected categories." We think this element would obviate some of our concerns. Merely speaking about a contentious topic, in the abstract, would not give rise to liability, because it would not be "directed at an individual." The second element obviates other concerns. Off-hand remarks at a bar function would likely not give rise to liability. The speech must be "severe or pervasive."

Alas, the third element suffers from the same problem as the ABA Model Rule, the Administrative Board proposal, as well as the unconstitutional Pennsylvania rule: it imposes viewpoint discrimination against "derogatory or demeaning verbal conduct." No rule with this language can pass constitutional muster. The first two factors cannot overcome this deficiency.

Comment [5C] of the COSAC proposal attempts to mitigate these constitutional concerns. But in the process, it introduces additional grounds of vulnerability. First, it states "Petty slights, minor indignities and discourteous conduct without more do not constitute harassment." What is a "petty slight" to some may be a "severe intrusion" to others. Second, the phrase "minor indignities" is not much more helpful--just another way of defining offensiveness. The third category simply adds further constitutional problems:

“discourteous conduct.” Attempts to police civility in this fashion will simply impose another form of viewpoint discrimination, as well as being potentially unconstitutionally vague. Fourth, the comment defines “severe or pervasive derogatory or demeaning conduct” as “degrading, repulsive, abusive, and disdainful conduct.” These synonyms suffer from the same problems under *Matal v. Tam*: they impose a viewpoint discrimination. And again they would likely be unconstitutionally vague, since all of them (with the possible exception of “abusive”) are not familiar legal terms of art.

The Administrative Board proposal also attempts to narrow the definition of harassment. The Administrative Board proposal states: “Typically, a single incident involving a petty slight, unless intended to cause harm, would not rise to the level of harassment under this paragraph.” The Administrative Board proposal, however, falls *far* short of the “severe or pervasive” requirement that the COSAC proposal adopts. The word “typically” is a hedge, and suggests that rule will not always apply. Moreover, the phrase “petty slight” is unclear. What may be “petty” to one person can be “severe” to another. Finally, the mens rea requirement in this sentence (“intended to cause harm”) seems to be at odds with the mens rea element in the rule (“lawyer knows or reasonably should know”).

Greenberg v. Haggerty declared unconstitutional Pennsylvania’s Rule 8.4(g), which was premised on the ABA Model Rule. That opinion stated:

There is no doubt that the government is acting with beneficent intentions. However, in doing so, the government has created a rule that promotes a government-favored, viewpoint monologue and creates a pathway for its handpicked arbiters to determine, without any concrete standards, who and what offends. This leaves the door wide open for them to determine what is bias and prejudice based on whether the viewpoint expressed is socially and politically acceptable and within the bounds of permissible cultural parlance. Yet the government cannot set its standard by legislating diplomatic speech because although it embarks upon a friendly, favorable tide, this tide sweeps us all along with the admonished, minority viewpoint into the massive currents of suppression and repression. Our limited constitutional Government was designed to protect the individual’s right to speak freely, including those individuals expressing words or ideas we abhor. *Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 32 (E.D. Pa. 2020).

The definition of harassment in the Administrative Board Proposal and the COSAC proposal are unconstitutional for the same reasons.

- f. **Professors Josh Blackman, Eugene Volokh, and Nadine Strossen**: The drafters of the ABA Model Rule and the Administrative Board proposal recognized an obvious problem: promoting various diversity and inclusion measures could run afoul of Rule 8.4(g). For example, advocating for the use of affirmative action for certain racial groups could constitute “harmful verbal . . . conduct that manifests bias or prejudice towards other” racial groups. To avoid this problem, both the ABA Model Rule and the Administrative Board proposal create several exemptions: it is not misconduct to “promote diversity and inclusion.” Likewise, the COSAC proposal uses similar language.

Yet these rules thus create an explicit form of viewpoint discrimination. Those who speak in ways that promote diversity and inclusion efforts, such as affirmative action policies, are protected. Those who criticize the same diversity and inclusion efforts are not protected. In theory, it would be possible to strip this sentence from the Administrative Board proposal. But that change would be a poison pill. In the absence of this protection for diversity and inclusion efforts, many lawyers and law firms would face potential liability.

- g. **Professors Josh Blackman, Eugene Volokh, and Nadine Strossen**: The COSAC proposal includes two express protections for the freedom of speech. First, the Comment explains that this rule would not prohibit speech protected by the federal or state Constitutions. This comment, though helpful, doesn't add much. Of course a state ethics rule cannot violate the federal or state Constitutions.

Second, the rule would not “limit the ability of a lawyer or law firm . . . to express views on matters of public concern in the context of teaching, public speeches, or other forms of public advocacy.” This rule would obviate some of our concerns with respect to speaking or presenting at CLE or bar functions. But it would still allow punishment for dinnertime conversation at one of these events. A presenter would be safe to discuss a controversial idea. But if an attendee repeated the same exact remarks to colleagues afterwards, he could be held liable.

We recognize that the rule is designed to prohibit sexual harassment in social functions that are related to the practice of law. But the current rule sweeps too broadly. The draft could be improved by protecting the expression of “views on matters of public concern” in *all* contexts.

- h. **National Legal Foundation**: The NLF opposes adoption of the Committee’s proposed amendments, which share many characteristics with the deeply flawed and much criticized ABA Model Rule 8.4(g) (“model rule”). We agree with much of what the Christian Legal Society (CLS) expressed in its comment letter, dated May 25, 2021. Those comments note the substantial body of scholarly and professional criticism focusing on the model rule’s constitutional deficiencies. CLS also ably summarizes the negative track record of the model rule to date, its potential for censoring speech and debate that undergird a free society, its embrace of unconstitutional viewpoint discrimination, and its difficulty gaining traction because of its constitutional infirmities. Given these deficiencies, it is not surprising that several state attorneys general have concluded that the model rule *is* unconstitutional; and most states that have considered proposals to adopt the model rule or its variants have declined to adopt it. We fear that the proposed amendments would impose potentially career-ending sanctions for transgressions that are vaguely and subjectively defined and therefore are subject to abuse and manipulation.
- i. **Pacific Legal Foundation**: A wide variety of First Amendment and Constitutional Law scholars have also written criticizing Model Rule 8.4(g) for its potential to stifle or censor attorney speech.²

This scholarship raises a series of overlapping concerns which apply to Proposed Rule 8.4(g). First, the rule might penalize speech if it is seen as “derogatory,” or

“demeaning”—highly subjective terms that provide little guidance to New York attorneys.³ COSAC’s Proposed Rule 8.4(g) includes several additional vague terms such as “degrading,” “repulsive,” and “disdainful.” This might include, for instance, a presentation arguing against race-based affirmative action due to the impact of “mismatch theory,” or a speaker who argues that “low- income individuals who receive public assistance should be subject to drug testing.”⁴

¹ ABA Model Rule of Professional Conduct 8.4(g) and Louisiana State Bar Association proposed Rule 8.4(g) violate the First and Fourteenth Amendments of the United States Constitution, La. Att’y Gen. Op. 17-0114 (Sept. 8, 2017), <https://perma.cc/9TWR-8GY9>; S.C. Att’y Gen. Op. Letter to Hon. John R. McCravy III, S.C. House of Representatives (May 1, 2017), <https://perma.cc/ED72-3UGM>; American Bar Association’s New Model Rule of Professional Conduct 8.4(g), Tenn. Att’y Gen. Op. 18-11 (Mar. 16, 2018), <https://perma.cc/DZY2-YG23>; whether adoption of the American Bar Association’s Model Rule of Professional Conduct 8.4(g) would constitute violation of an attorney’s statutory or constitutional rights (RQ-0128-KP), Tex. Att’y Gen. Op. KP-0123 (Dec. 20, 2016), <https://perma.cc/M248-HKGG>.

² Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting ‘Diversity’ But Not Diversity of Thought*, The Heritage Foundation (Oct. 6, 2016), <http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf>; Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(G): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. Legal. Prof. 201, 257 (2017).

³ Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g) The First Amendment and ‘Conduct Related to the Practice of Law,’* 30 Geo. J. Legal Ethics 241, 245 (2017).

Second, the rule will apply to CLE presentations, academic symposia, and even to conversations at a local bar dinner, which will stifle conversations about significant legal topics of controversy.⁵ As Professor Eugene Volokh put it, the rule could be applied to dinner conversations “about such matters — Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on.”⁶ COSAC’s proposed rule similarly applies to attorneys when they are “participating in bar association, business, or professional activities or events in connection with the practice of law.”

Third, the rule penalizes attorneys for speech that they “reasonably should know” would cause offense.⁷ This mens rea requirement places attorneys at risk of discipline for speech that they were not aware would or could cause any offense, further exacerbating the chilling effect on attorney speech.⁸

These are just a few of the many well-founded criticisms of the ABA rule.

COSAC’s Proposed Rule 8.4(g) does attempt to remedy some of the shortfalls of ABA Model Rule 8.4(g). In particular, the rule states that it does not “limit the ability of a lawyer or law firm to accept, decline, or withdraw from representation. “And that the rule places no limits on a lawyer’s ability “express views on matters of public concern in the context of teaching, public speeches, or other forms of public advocacy.” The inclusion of this language is a significant improvement. The definition of harassment included in the rule is also an improvement as it tracks much more closely with federal harassment law which requires severe and pervasive conduct.

⁴ *Id.* at 246.

⁵ Eugene Volokh, *A speech code for lawyers, banning viewpoints that express ‘bias,’ including in law-related social activities*, Volokh Conspiracy (Aug. 10, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?noredirect=on>.

⁶ *Id.*

⁷ Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J.L. & Pub. Pol’y 173, 205 (2019).

⁸ *Id.*

Unfortunately, because the Proposed Rule still relies on highly subjective concepts such as “offensive” and has an extremely lax mens rea requirement, there is still significant risk that the Proposed Rule will create uncertainty and stifle speech on important matters of public policy.

These caveats also fail to protect a lawyer from investigation for protected speech and would require lawyers to suffer reputational harm and a prolonged process before constitutional rights could be vindicated.

- j. Pacific Legal Foundation:** But even more troublingly, the current version of Model Rule 8.4(g) contains a carve out wide enough to swallow up all of these improvements. Specifically, Model Rule 8.4(g) contains no definition for the crucial term “unlawful discrimination.” Instead, this term is to be defined “under federal, state and local law.”

In New York in particular this is an enormous First Amendment problem. New York City is known for having one of the nation’s most expansive anti-discrimination laws. New York City Human Rights Law defines harassment in a fashion that is far broader and more burdensome on speech than federal anti-discrimination standards. Under federal law, an employer or public accommodation can only be liable where there is discriminatory conduct or severe and pervasive harassment that creates a hostile work environment. In contrast, under the NYCHRL, anything that is more than a “petty slight or trivial inconvenience” can result in liability if it is intended to “demean, humiliate, or offend a person.” *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 79–80, 872 N.Y.S.2d 27, 40–41 (2009). And the burden is on the employer or public accommodation to prove that its actions were just a “petty slight or trivial inconvenience,” which may unduly burden and chill expressive activity. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964) (concluding that a defense of truth in defamation cases was inadequate to protect First Amendment freedoms, because fear of liability would “dampen[] the vigor and limit[] the variety of public debate”).

Indeed, cases involving provisions of the NYCHRL have found discrimination based on little more than stray remarks or jokes based on protected characteristics. For instance, in *Benzinger v. NYSARC, Inc. New York City Chapter*, 385 F. Supp. 3d 224, 229 (S.D.N.Y. 2019), a security services provider was found liable because one of its security guards laughed at racist comments made by the building porter, because the laughter “could constitute an indirect declaration that Plaintiff’s patronage . . . was unwelcome or

objectionable.” The services provider was found liable even without any independent evidence of intent to demean, and solely because of the subjective impact that the laughter had. *In the Matter of Commission on Human Rights ex. rel. Christina Spitzer and Kassie Thorton v. Mohammed Dahbi*, 2016 WL 7106071, at *1 (taxi driver asked gay couple to stop kissing in his vehicle).⁹ See also *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 80, 872 N.Y.S.2d 27, 41 (2009) (“One can easily imagine a single comment that objectifies women being made in circumstances where that comment would, for example, signal views about the role of women in the workplace and be actionable.”); *Golston-Green v. City of New York*, 184 A.D.3d 24, 123 N.Y.S.3d 656, 670 (2020) (“A single comment being made in circumstances where that comment would, for example, signal views about the role of women in the workplace may be actionable under the City Human Rights Law” (internal quotation marks omitted)).

The New York City Human Rights Commission has gone even further in guidance documents interpreting New York City civil rights law. For instance, a September 2019 document declared that even a single usage of the words “illegal alien” could be considered unlawful discrimination if it is determined to have been done with the intent to demean, humiliate, or offend.¹⁰ This could include “comments or jokes.” Indeed, any inquiry at all into immigration status might constitute discrimination because such inquiries can make an individual feel “unwelcome, objectionable, or not acceptable.” The NYCHRC has imposed a similarly expansive interpretation against the misgendering of individuals. And the NYCHRC has investigated companies merely for using images in advertising that it deemed offensive.¹¹

Incorporating such an expansive interpretation of discrimination into the New York Rules of Professional Conduct would chill attorney speech throughout the State of New York and especially in New York City. Attorneys would be reasonably worried that their words might be seen as demeaning, humiliating or offensive.

- k. **Pacific Legal Foundation**: To illustrate some of the problems with the Proposed Rule, consider the following hypothetical scenarios. How would the proposed rule apply if someone who was offended by an attorney’s speech filed a complaint? And how would a New York attorney reading the vague and overly broad rule ever know?

1. A public interest lawyer in New York brings a lawsuit on behalf of Asian high school students student who argues that Mayor de Blasio discriminated against them by changing the admissions policies at the city’s selective high school based on racial stereotypes and a belief that Asians are over represented.¹² As part of that lawsuit, the New York attorney also argues that the use of affirmative-action creates a “mismatch” and that therefore “racial preference policies often stigmatize minorities, reinforce pernicious stereotypes, and undermine the self-confidence of beneficiaries,”¹³ which results in minority students performing worse in the selective schools. In arguing the case, the attorney writes an op-ed and appears in radio and television interviews arguing that the Supreme Court should outlaw all forms of affirmative action because these

¹² <https://pacificlegal.org/case/christa-mcauliffe-ptv-de-blasio/>

¹³ Richard Sander and Stuart Taylor Jr., *The Painful Truth About Affirmative Action*, *The Atlantic* (Oct. 2, 2012).

policies violate the ideal of equal protection under the law. How does the prohibition against discrimination on the basis of race in the Proposed Rule apply to this speech?

2. Another New York attorney intervenes on behalf of a group of African-American high school students who are likely to benefit from the affirmative action policies. He argues that because of the legacy of slavery and segregation that it is necessary for African-American students to be the beneficiaries of affirmative action policies, and affirmative action is needed to counteract systemic racism which favors white Americans. How does the prohibition against discrimination on the basis of race in the Proposed Rule apply to this speech?

3. At a CLE event, two New York attorneys agree to debate whether the state of New York should introduce rent control legislation. The speaker arguing in favor of rent control argues that absentee landlords are profiteering off the poor and that rent control is needed to mitigate their greed. The speaker arguing against rent control extols the virtues of private property ownership and entrepreneurship and argues that renters need to work harder in order to meet the rising cost of rent rather than demand subsidies from landlords. How does the prohibition against discrimination on the basis of socioeconomic status in the Proposed Rule apply to either attorney's statements?

4. A New York attorney files an amicus brief arguing that the President has plenary authority to exclude individuals from admission to this country on the basis of their ethnicity or religion. How does the prohibition against discrimination on the basis of religion and national origin in the Proposed Rule apply to this speech?

5. Relatedly, another New York attorney writes an op-ed critiquing the attorney by name and calling her a racist and an islamophobe. How does the prohibition against discrimination on the basis of race and religion in the Proposed Rule apply to this speech?

6. A New York attorney represents the KKK when their petition to hold a rally in a town in New York is denied. How does the prohibition against discrimination on the basis of race in the Proposed Rule apply to this speech?

7. Relatedly, a New York attorney represents Antifa when their counter protest at the KKK rally is shut down due to security concerns. How does the prohibition against discrimination on the basis of race in the Proposed Rule apply to this speech?

8. A New York attorney attends a pro-life rally and shares a picture of her attending the rally on her social media feed which includes several other New York attorneys that she knows are strongly pro-choice. How does the prohibition against discrimination on the basis of sex in the Proposed Rule apply to this speech?

9. A New York attorney who is a member of the Boomer generation shares an article on social media which calls Millennials lazy and entitled. The following day in his law firm's lunch room the attorney discusses the article with another attorney within earshot of

several young associates. How does the prohibition against discrimination on the basis of age in the Proposed Rule apply to this speech?

10. A New York attorney wears a MAGA hat to a social event hosted by the New York State Bar Association and refuses to take the hat off even after another attorney informs him that she is offended because she sees the hat as a symbol of racism and sexism. How does the prohibition against discrimination on the basis of race and sex in the Proposed Rule apply to this speech?

Whatever the answers to each of these real-world-based hypotheticals, they show that the broad and unclear scope of the Proposed Rule threatens to stifle attorney speech on a wide variety of important issues of public concern. The Proposed Rule should accordingly be rejected.

1. **William Hodes**: Another big change is the clarification that verbal attacks must be aimed at specific individuals in order to be disciplinable. That will remove most of the chilling effect of the most "out there" claims of being "unsafe" and the like. And I think there is a good chance that the ABA will see the wisdom of making that change, at least (because it came up at the online discussion and was greeted favorably by Barbara Gillers and others.)

5. Other Comments

- a. **Professor Alberto Bernabe:** (*COSAC framing of protected categories*): In terms of the protected categories, the proposed rule in New York adds a few but eliminates the most problematic of the one in the Model Rule (socio-economic status). Thus, the proposed rule adds pregnancy, gender expression, status as a member of the military, and status as a military veteran, none of which I have a problem with; but it also adds the word “color” which I am not sure is needed since the rule already mentions race and ethnicity. For the sake of clarity, I would at least suggest to say “skin color” rather than just “color.”
- b. **Philip Byler** (*No exhaustion of administrative remedies*): The first change is stated to be “Elimination of the current requirement to exhaust administrative remedies before filing a grievance alleging discrimination.” What this practically means is that the disciplinary forum may become a preferred forum in which to adjudicate claims of harassment and discrimination, a development which would not advance the fair administration of justice. Disciplinary proceedings are special actions in which respondents have limited rights as to discovery and respondents do not have the right to take depositions. Disciplinary hearings are conducted in private, and there is no jury trial. Claims of sexual harassment and discrimination, for example, frequently involve “he said/she said” conflicts, and those conflicts will be resolved in the disciplinary forum where, after limited opportunities for a respondent attorney to develop a fact record in defense, a single referee, who may or may not follow the rules of evidence, will decide the matter.

The experience of universities and colleges with sexual misconduct tribunals should give serious pause to moving sexual misconduct and harassment cases to the disciplinary forum. The Obama Administration issued on April 4, 2011, a “Dear Colleague Letter,” calling upon universities and colleges to use their disciplinary procedures to deal with complaints of sexual misconduct, and universities and colleges did so. In justification of calling upon universities and colleges to so use their disciplinary procedures, the April 4, 2011 Dear Colleague Letter premised the need for universities to discipline sexual misconduct, using a preponderance of the evidence standard, with the statistic that 1 in 5 *women* on campus were victims of sexual assault, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>. While the real number of college women assault victims is .03 in 5. *Rape and Sexual Assault Victimization among College Age Females, 1995-2013* (Special Report), U.S. Department of Justice, December 2014, <http://www.bjs.gov/content/pub/pdf/ravcaf9513.pdf>, the 1 in 5 statistic propelled the establishment of campus sexual misconduct tribunals to protect women.

Soon enough, lawsuits were brought by male respondents complaining about the denial of due process and sex discrimination in the issuance of erroneous and career-destructive disciplinary decisions against them. See, e.g., *Doe v. Columbia*, 831 F.3d 46 (2d Cir. 2016) (Leval, J.). In 2017, then U.S. Education Secretary Betsy DeVos denounced the campus tribunals as involving wholly un-American denials of due process: Remarks, Sept. 7, 2017, www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement. The September 22, 2017 Dear Colleague Letter (<https://www.cmu.edu/title-ix/colleague-title-ix-201709.pdf>) criticized the April 2011 Dear Colleague Letter for directing that schools use sexual misconduct procedures with reduced protections for the accused. Lawsuits

continued, with a significant decision in *Doe v. Purdue*, 928 F.3d 652 (7th Cir. 2019) (Barrett, J.), which was one of the main decisions inspiring the new Title IX regulations that were announced on May 6, 2020 and that went in effective on August 14, 2020 to mandate due process. “*Secretary DeVos Announces New Title IX Regulation*,” <https://www.youtube.com/watch?v=hTb3yfMNGuA>; U.S. Department of Education Press Release, “Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students,” May 6, 2020; U.S. Department of Education Press Release, “U.S. Department of Education Launches New Title IX Resources for Students, Institutions as Historic New Rule Takes Effect” (August 14, 2020); 34 Code of Federal Regulations 106.45.

As noted above, the rationales in the COSAC Memorandum on the Proposed Amendments to Rule 8.4(g) are stated to be to promote public confidence in the legal system and to promote diversity, and the COSAC Memorandum cites to a Connecticut Bar survey finding a high incidence of sexual harassment -- based on what women but not men voluntarily answered. A review of the cited source, however, shows an unscientific methodology that included an overly broad definition of harassment (asking for unwanted dates, offensive jokes and perceived ogling were included) and that seems similar in kind to the false 1 in 5 statistic in the April 4, 2011 Dear Colleague Letter justifying universities and colleges using their disciplinary procedures to deal with sexual assault and harassment. With the issues and problems that will arise in making the confidential disciplinary process a preferred forum for adjudicating sexual discrimination and harassment, the proposed amended Rule 8.4(g) will not promote public confidence in the legal system and will not promote diversity.

COSAC’s Memorandum (p.8) argues that the exhaustion of administrative remedies requirement could prevent or deter complainants from filing grievances under the current Rule 8.4(g). What COSAC wrongly does not take into account at all are the limitations and undesirable features of the disciplinary forum as the place for adjudicating discrimination and harassment complaints as discussed above.

- c. **Philip A. Byler**: (*Expansion of protected classes*): The third change is stated to be “Expands the protected classes to conform to New York anti-discrimination laws.” What that means is a long list of protected classes is imported into the proposed amended Rule 8.4(g)’s prohibition of discrimination and/or harassment without any requirement of administrative exhaustion for complaints. As raised above, there are limitations and undesirable features of the disciplinary forum as the place for adjudicating sexual discrimination and sexual harassment complaints, and the expansion of protected classes means there will be more such complaints, some of which undoubtedly present novel issues.

There is a developed body of law for outlawing discrimination and harassment on the basis of race, color, sex, pregnancy, religion, national origin, ethnicity, disability, age and even sexual orientation; however, the prohibition of proposed amended Rule 8.4(g) covers “not unlawful” harassment, whatever that might be, which would not be defined in the case law. Further, there should be no doubt that a lawyer should be able, without running afoul of proposed amended Rule 8.4(g), to represent a Christian baker or a Christian florist who on

religious grounds refuses to perform special services for a gay wedding (as opposed to being required to serve them in the regular course of business in the shop), and a lawyer should be able to engage in public advocacy for a Christian baker or a Christian florist in those cases. But with proposed amended Rule 8.4(g), is there a doubt?

On other hand, not permitting discrimination or harassment of members of the military, military veterans and married people or single people for being married or single, seems a very salutary provision. Also, COSAC is right in its Memorandum (p.7) in justifying not adding “socioeconomic status,” as in the American Bar Association’s Model Rules of Professional Conduct, because of the practical problems such inclusion would bring to providing legal services.

Where difficulties may arise, however, come from the inclusion of gender identity and gender expression as protected classes. Transgenderism is contrary to many people’s religion and/or morality. Would a lawyer not hiring, as an employee, a male identifying and dressing as a female (or vice versa) be a disciplinary matter under proposed amended Rule 8.4(g)? COSAC’s Memorandum does not provide an answer, as COSAC’s Memorandum provides no concrete fact examples.

- d. **Christian Legal Society:** (*Inconsistent application*): Under COSAC’s Proposed Rule, New York lawyers would be subject to different restrictions based on the locality in which they practice. COSAC’s Proposed Rule will not apply uniformly to all New York attorneys. The inclusion of local statutes or ordinances means that COSAC’s Proposed Rule 8.4(g) will apply to New York lawyers differently depending on where they live in New York. That is, speech spoken by a New York lawyer might or might not constitute professional misconduct, depending on whether the lawyer practices in New York City with its expansive nondiscrimination laws, or Geneseo with a less broad nondiscrimination ordinance.

A good rule promotes consistency in its application. But COSAC’s Proposed Rule’s application, by its very terms, will vary depending on the locality in which a lawyer practices. Such a rule is neither consistent nor fair to New York lawyers.

- e. **Richard Hamburger:** (*“Verbal conduct” vs. “oral or written”*) “Verbal conduct includes written as well as oral communication.” Comment 5(c). ??? The commonly understood meaning of “verbal” is “spoken words,” although I admit being surprised to see some dictionary definitions that would encompass written communications. Why not say “oral or written” instead of “verbal” in 3(c)?
- f. **NYSBA Trial Lawyers’ Section:** (*Proposed amendments are vague and not needed*) On behalf of the Chair of the Trial Lawyers Section, William Friedlander (copied) please note that at a special meeting of the Trial Lawyers Executive Committee on May 4th, 2021, the Committee has voted to not take a position on the Proposed Amendments to Rule 8.4 of the New York Rules of Professional Conduct due to it being vague and unneeded.
- g. **Professor Stephen Gillers and Professor Barbara S. Gillers:** (*Rule 1.16*). We urge you to insert “in accordance with Rule 1.16” at the end of paragraph (g)(4)(i). This is the

language of the ABA rule. In our view, Rule 1.16 would not permit a lawyer to decline to represent a client or to withdraw on discovering that the client or potential client was gay, or Muslim, or Jewish, or in the military. Without the insertion, the rule as drafted could be read to expand Rule 1.16 and allow withdrawal even if Rule 1.16 would not because in context the current language is stated as an *exception* to the prohibition in Rule 8.4(g), creating a further basis for permissive withdrawal. In other words, as drafted, a firm could withdraw from a matter when allowed under Rule 1.16 *or*, citing your language, because of the client’s race, sex, religion, etc. even if not allowed by Rule 1.16. This textual ambiguity should be eliminated.

- h. Professors Josh Blackman, Eugene Volokh, and Nadine Strossen: (*Support for the elimination of socioeconomic status as a protected class*). The COSAC proposal eliminates socioeconomic status. We think the elimination of socioeconomic status is prudent: There is no basis for the rules to categorically ban discrimination based on “socioeconomic status”—a term not defined by the rule, but which is commonly used to refer to matters such as income, wealth, education, or form of employment. A law firm, for instance, may prefer more-educated employees—both as lawyers and as staffers—over less- educated ones. Or a law firm may contract with expert witnesses and expert consultants who have had especially prestigious educations or employment. Or a firm may prefer employees who went to high-”status” institutions, such as Ivy League schools. Yet each of these commonplace actions would constitute discrimination on the basis of socioeconomic status under the new rule.**
- i. Professors Josh Blackman, Eugene Volokh, and Nadine Strossen: (*Mens rea*). All three proposals adopt the same mens rea requirement: “knows or reasonably should know.” We previously commented on a draft proposal from COSAC in February 2021. That draft stated that a “lawyer shall not *knowingly* engage in conduct “ COSAC seems to have reduced the mens rea requirement from “knowingly” to “knows or reasonably should know.” A requirement of “knowingly” would mitigate some of the constitutional problems with this rule. Scierter would avoid unknowing harassment, however that phrase is defined.**
- j. NYSBA Women in Law Section: (*Expansion of protected categories and elimination of exhaustion requirement*) WILS endorses the COSAC proposal to amend New York Rule 8.4(g) to align it more closely with ABA Model Rule of Professional Conduct 8.4(g) (“ABA Rule 8.4(g)”) and specifically with the proposed amendments that would . . . (ii) expand the list of protected categories; and (iii) eliminate the requirement to bring a complaint to an administrative tribunal prior to a disciplinary proceeding.**
- l. NYSBA Women in Law Section: (*Protection for use of harassing or discriminatory materials as evidence*) WILS’ Executive Committee members also raised concerns about whether the proposed amended New York Rule 8.4(g) provides sufficient protections for attorneys who, in the course of their practice (for example, employment law or family law), may need to use materials that are harassing or discriminatory because such materials are evidence in a case. The concern is whether, by using the materials in depositions, negotiations, filings or otherwise would be considered harassment under amended Rule 8.4(g). One answer suggested by members of WILS’ Executive Committee is that protection is provided by the language in ABA Rule 8.4(g) and the amended New York**

Rule 8.4(g)(4) as follows: “This Rule does not limit the ability of a lawyer or law firm . . . (iii) to provide advice, assistance or advocacy to clients consistent with these Rules.” The WILS members who raised this concern suggest that, if subparagraph (4) does provide the protection sought, then the comments to the proposed amended rule should so state, but if subparagraph (4) does not provide the protection sought, that the rule be further amended to provide such protection.

Exhibit B

Full Text of Public Comments Received to COSAC's April 16, 2021 Report Proposing Amendments to Rule 8.4(g) of the New York Rules of Professional Conduct

Tab	Commentator
1.	Comment from Janice DiGennaro
2.	Comments from Professor Alberto Bernabe (Professional Responsibility Blog)
3.	Comments from Richard Hamburger
4.	Comments from Professor Stephen Gillers and Professor Barbara S. Gillers
5.	Comments from Philip A. Byler, Esq.
6.A.	Comments from Christian Legal Society to COSAC Report
6.B.	Comments from Christian Legal Society to ABA Report
7.	Comments from Professors Josh Blackman, Eugene Volokh and Nadine Strossen
8.	Comments from National Legal Foundation
9.	Comments from NYSBA Committee on Diversity and Inclusion (in support of ABA Model Rule 8.4(g))
10.	Comments from NYSBA Committee on Legal Aid and the President's Committee on Access to Justice
11.	Comments from NYSBA Trial Lawyers Section
12.	Comments from Pacific Legal Foundation
13.	Comments from Professor James Philips
14.	Comments from Zachary Greenberg
15.	Comments from Willaim T. Barker
16.	Comments from William Hodes
17.	Comments from NYSBA Women in Law Section



Roy Simon <roy.d.simon@gmail.com>

FW: COSAC proposed Rule 8.4(g)

1 message

Janice J. DiGennaro <Janice.DiGennaro@rivkin.com>
To: "Roy D. Simon (roy.d.simon@gmail.com)" <roy.d.simon@gmail.com>

Tue, May 18, 2021 at 8:19 PM

Roy,

I am opposed to the proposed amendments to R.P.C.8.4(g). I do not believe that lawyers should be held to a higher standard than other people regarding harassment claims than exists in the statutory and decisional law on these issues. The due process implications are quite extensive in my view relative to making conduct which is not actionable civilly an act of misconduct for which discipline can be imposed. A dissatisfied plaintiff who loses a discrimination suit in court gets another bite at the apple by filing a grievance against that same lawyer because the harassment standard is different. I believe the rule as currently constructed satisfies the goal of making it clear to lawyers that harassment and other forms of discriminatory conduct is not only a violation of law, when properly proven, but is an ethical violation.

The proposal goes too far, is an overreach and will subject lawyers to retaliatory harassment claims for acts that do not rise to level of any civil violation. I do not believe that we should be amending the rule to address harassment claims differently than a developed body of federal, state and city statutory and decisional law has already aggressively addressed such claims. New York city and state has some of the most pro-plaintiff discrimination statutes in the country I fail to see why they are not sufficient. The enforcement of this new rule will make grievance committees jurors in the inevitable "he said she said" which takes place in an harassment suit. The disciplinary system is neither designed nor equipped for that exercise nor are there the same burden shifting procedural safeguards that exist at law to protect the rights of the lawyer.

I also object to the expansive definition of the "practice of law" sweeping within its scope events without any genuine nexus to the lawyer's legal practice or work.

While I am sure I am a minority among the New York Bar, I could not allow this amendment to pass without voicing my strenuous objection. This amendment goes too far.

**Janice J. DiGennaro**

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From: Roy D. Simon [mailto:Roy.D.Simon@hofstra.edu]

Sent: Wednesday, April 21, 2021 6:53 PM

To: O'Clair, Melissa

Cc: rhamburger@hmylaw.com; Sarah Diane McShea; Kathy Baxter; Margaret J. Finerty; wllarson@gmail.com; Richards, Thomas; Lawrence Hausman; Sam Levine; pconn@albanylaw.edu; Janice J. DiGennaro; beverley.s.braun@us.hsbc.com; Michael J. Lingle; Brenda Dorsett; jtowns44@gmail.com; jameswalker@perkinscoie.com; Ralph L. Halpern; Gerard E Harper; mwhiteman@woh.com; Marjorie E. Gross; cherylsmithfisher@gmail.com; bgreen@law.fordham.edu; krantzbar@gmail.com; Joe Neuhaus; Hand, Michella; Marian C. Rice; klgartner@lgdlaw.com; steven.dean@brooklaw.edu

Subject: [EXTERNAL] COSAC proposed Rule 8.4(g)

Dear Ethics Committee Members — As I mentioned at the end of our meeting today, last Friday COSAC circulated its proposed version of Rule 8.4(g) for public comment (see attached memo). Many of you commented (anonymously) a few months ago when COSAC circulated ABA Model Rule 8.4(g) for public comment, and those comments were helpful to COSAC, but COSAC's own proposal is quite different from the ABA Model Rule, and COSAC hopes you will take the time to comment (in your individual capacity) on COSAC's proposal, which is attached. Please send all comments directly to me at roy.simon@hofstra.edu. The deadline for comments is Friday, May 28.

Comments pointing out specific changes to the proposal that you would like to see, or specific features of the proposal you particularly like, will be especially valuable, but even very short comments saying (for example) that you support the proposal, oppose the proposal, or favor keeping New York's current version of Rule 8.4(g) will be helpful in assessing the level of public support. Thank you in advance for your thoughts.

Professor Roy D. Simon

Chair of NYSBA Committee on Standards of Attorney Conduct ("COSAC")

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Professional Responsibility Blog

Professor Alberto Bernabe - The University of Illinois at Chicago John Marshall Law School

Sunday, April 18, 2021

New York State Bar Committee proposes new anti-discrimination rule akin to Model Rule 8.4(g), but it is very different and the best yet

As I am sure you know, I have been writing about Model Rule 8.4(g) since way back when it was first proposed. [See here](#). Over time, I have expressed my concerns about its vulnerability to attack under First Amendment principles, and my concern was proven valid when recently a similar rule was declared unconstitutional in Pennsylvania. See [here](#), [here](#) and [here](#), for more on that story in particular.

But that is not what I want to talk about today. Today I am more optimistic.

On Friday afternoon the New York State Bar Association Committee on Standards of Attorney Conduct ("COSAC") posted for public comment a proposed version of Rule 8.4(g). Comments are welcome until May 28 deadline and they want comments from inside and outside of New York. I am trying to find a link, and will post it here when I do.

You can read the [proposal here](#) and its accompanying [report here](#).

In my opinion, this version of the rule is much better than the Model Rule originally adopted by the ABA. It is carefully drafted to limit the reach of the Model Rule, and to avoid the potential problems regarding its constitutional validity.

First, the proposed rule rejects the Model Rule's language of "conduct related to the practice of law" and instead applies to "conduct in the practice of law" which is much more limited. This simple change addresses the possible issue of overbreadth in the Model Rule.

But the most important improvements over the Model Rule are in the way the proposed rule refers to or defines the type of conduct it regulates.

For example, the proposed rule starts by adding the word "unlawful" to the word discrimination. Thus, the drafters of the rule recognize that there can be discrimination that is not unlawful and that the legal authorities that define that distinction are going to be relevant to determine how to apply the rule.

This simple addition of one word also guards against the possible unconstitutional application of the rule. Because the Model Rule does not make that distinction, it is possible to interpret it to allow regulation of protected speech. By limiting the application of the rule to "unlawful discrimination" the authority of the state to regulate speech is more limited, and presumably will be understood to allow only regulation of speech that is not constitutionally protected.

In addition, the proposal provides a good definition of harassment, which also limits the application of the rule, thus, also making it less vulnerable to constitutional attacks.

The proposed rule defines harassment as conduct, whether physical or verbal, that is severe or pervasive and directed at an individual or specific individuals in one or more of several specific protected categories. Again, this description limits the application of the rule tremendously when compared to the Model Rule. And that is a good thing. By limiting the notion of "verbal conduct" to speech directed at specific individuals, the

Professor Alberto Bernabe

UIC John Marshall Law School, Chicago

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- [Disciplinary procedures](#)
- [Dishonesty](#)
- [Duty of Candor](#)

proposal avoids the interpretation that it can be used to regulate protected speech that is offensive but constitutionally protected.

In terms of the protected categories, the proposed rule in New York adds a few but eliminates the most problematic of the one in the Model Rule (socio-economic status). Thus, the proposed rule adds pregnancy, gender expression, status as a member of the military, and status as a military veteran, none of which I have a problem with; but it also adds the word "color" which I am not sure is needed since the rule already mentions race and ethnicity. For the sake of clarity, I would at least suggest to say "skin color" rather than just "color."

All told, the proposed new rule in New York is the best version of an anti-discrimination Model Rule 8.4(g) type rule I have seen yet.

If you want to send comments to the committee, you can contact Professor [Roy Simon](#) directly.

Posted by [Professor Alberto Bernabe](#) at [8:58 PM](#)
Labels: [ABA Model Rules](#), [Conduct outside the practice of law](#), [Freedom of Speech](#), [Model Rule 8.4\(g\)](#), [New York](#), [Regulation of the profession](#)

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From: **Richard Hamburger** rhamburger@hmylaw.com
Subject: Proposed New York Rule 8.4(g)
Date: April 22, 2021 at 10:22 AM
To: Roy D. Simon Roy.D.Simon@hofstra.edu



EXTERNAL MESSAGE

Hi Roy,

“Verbal conduct includes written as well as oral communication.” Comment 5(c). ??? The commonly understood meaning of “verbal” is “spoken words,” although I admit being surprised to see some dictionary definitions that would encompass written communications. **Why not say “oral or written” instead of “verbal” in 3(c)?**

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May 27, 2021

Roy Simon
Chair, NYSBA Committee on Standards of Attorney Conduct (COSAC)
Via email to: roy.simon@hofstra.edu

Dear Roy:

This letter responds to COSAC's Memorandum dated April 16, 2021, which invites comments on COSAC's proposals for amendments to New York Rule of Professional Conduct 8.4(g). Thank you for this opportunity.

We assume the final version of COSAC's report to the House of Delegates will be publicly available before the House meets. We look forward to seeing it. If COSAC intends to treat its report to the House as private, we would appreciate knowing that.

Harassment

COSAC identifies various studies and polls confirming the ongoing problem of discrimination and harassment in law practice. Recently, the New York State Judicial Committee on Women in the Courts reported that women lawyers continue to be a target of physical and verbal harassment and, most dramatically, that male respondents viewed the occurrences as much less frequent. For example:

The answers to the question of whether female attorneys experience unwelcome physical contact varied widely by which group were the actors in such harassment. The group of most concern was other attorneys; 10% of female attorney responders reported that unwelcome physical contact by other attorneys occurred very often or often, and another 36% reported it sometimes happened. Therefore, for too many of the female responders, unwelcome physical contact from other attorneys was to some degree part of the court environment. Male attorneys also reported this occurring, though to a lesser extent: 3% reported this happened very often/often, and another 16% said this occurred sometimes.¹

¹ New York State Judicial Committee on Women in the Courts Gender Survey 2020 at 8 available here: <http://ww2.nycourts.gov/ip/womeninthecourts/publications.shtml> .

Studies like these, of which there are many, in part inform our response to COSAC's draft.

For several reasons, we oppose the requirement that the harassment be "severe or pervasive," a phrase that appears to have been taken from the entirely different milieu of Title VII cases, where the issue is whether a plaintiff has proved "an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) ("When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment' ... Title VII is violated").

The addition of this requirement makes "unwelcome physical contact" and "derogatory or demeaning verbal conduct" not forbidden by themselves. The conduct must also be "severe or pervasive," implicitly of the type that would render a workplace environment abusive under Title VII law.

Further, the addition of the "severe or pervasive" language weakens the New York prohibition on harassing conduct as now construed under Rule 8.4(h). The proposed language will become the test for all alleged violations including under Rule 8.4(h). It is no answer to say, in the comment to the draft, that Rule 8.4(h) remains available. The court does not adopt the comments. And although Rule 8.4(h) will remain, the addition of a requirement of severity or pervasiveness in the more specific language of Rule 8.4(g) will, as a matter of statutory construction, limit the general language of Rule 8.4(h). COSAC's draft actually worsens the situation. We urge COSAC fully to address the issues of discrimination and harassment in this rule without punting to another rule.

A separate problem with the draft's treatment of harassment is the contradiction or inconsistency between the comments and the rule. The rule, as stated, does not prohibit "derogatory or demeaning verbal conduct" unless it is also "severe or pervasive." Yet comment [5C] offers a "definition" of "severe or pervasive derogatory or demeaning conduct" with different words -- "degrading, repulsive, abusive, and disdainful." So conduct that is degrading, repulsive, abusive, or disdainful would be severe or pervasive under the definition in the comment, while conduct that is derogatory or demeaning would, by itself, not be severe or pervasive under the text of the rule.²

The problem here, among others, is that you have chosen two adjectives in the rule and four other adjectives in comment [5C] and treated the two sets of adjectives differently through the comment's definition. In addition, "pervasive" implies multiple times but the definition does not include any reference to frequency.

Finally, taking the phrase "severe or pervasive" from the employment context and using it to define harassment in law practice fails to appreciate the temporal and spatial differences

² Compare the text of the proposed rule with proposed comment [5C]. See also paragraph 3 under the title "COSAC's Specific Recommendations for Key Elements of Rule 8.4(g)" in COSAC's April 16, 2021 Memo.

between these two environments. The workplace is a space where the same people repeatedly encounter each other, which means that the harassment of one or more persons by one or more other persons in that space could recur on a daily or weekly basis – i.e., it is possible for it to be pervasive. But the reported discipline for harassment of which we are aware arises in a single or limited setting, such as in a deposition, offering less or no opportunity for the behavior to be repetitive enough to become pervasive, thereby limiting the utility of your rule.

COSAC’s goal of not making “petty slights” or instances of “discourteous conduct” a basis for discipline can be achieved with the language in proposed comment [5C]’s first sentence, or if COSAC believes a comment is inadequate to achieve its goal, appropriate language can be raised to the text of the rule.

We recommend that COSAC consider the language in comment [3] to ABA Rule 8.4, or that comment as slightly modified by the Professional Conduct Committee of the New York City Bar Association. We suggest that either version adequately addresses your objectives (and ours) and, as important, avoids litigation about the overly restrictive phrase “severe or pervasive.” The City Bar language reads:

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Harassment includes harmful, derogatory, or demeaning verbal or physical conduct that manifests bias or prejudice towards others and includes conduct that creates an environment that a reasonable person would consider intimidating, hostile, or abusive. Typically, a single incident involving a petty slight, unless intended to cause harm, would not rise to the level of harassment under this paragraph. Harassment also includes sexual harassment, which involves unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.³

Discrimination

We oppose the word “unlawful” in paragraph (g)(1) for several reasons. Preliminarily, we note that discrimination can occur in a variety of settings, including but not only employment and toward clients or potential clients.

First, the presence of “unlawful” would require disciplinary committees to reach a legal conclusion, which they traditionally do not do. Or to avoid that, they could choose to defer while the parties litigated the legal question elsewhere, thereby reinstating the exhaustion requirement.

³ See City Bar Report (at 6) attached as Exhibit B to the March 19, 2021 Memo issued by the NYS Unified Court System “Re: Request for Public Comment on the Proposal to Adopt ABA Model Rule 8.4(g) in New York’s Rules of Professional Conduct.

Second, and related, the word may require a disciplinary committee to decide which jurisdiction's laws apply. Imagine a New York law firm that discriminates against persons based on gender identity and expression in its Houston office. Assume Texas does not forbid that discrimination but New York law does (which it does, see Executive Law sec. 296(1)(a)). New York Rule 8.4 applies to a lawyer and "a law firm." Rule 8.4(g)(5)(c) of your draft defines "[c]onduct in the practice of law" to include "operating or managing a law firm or law practice." Would the discrimination in Houston be "unlawful" under your draft? Or do you mean to say that a New York law firm does not violate your rule if it discriminates in hiring based on a characteristic forbidden in New York but allowed where the firm's employee works? Allowing that discrimination in the Texas office of a New York firm would be inconsistent with the entity responsibility of law firms recognized both in your draft and in the introductory language to Rule 8.4. Federal anti-discrimination law does not apply to employers with fewer than 15 employees and in any event does not identify some of the characteristics in your draft (e.g., gender identity, gender expression, ethnicity).

Third, apart from employment discrimination, your discussion does not take account of when discrimination against clients or potential clients based on the listed characteristics would not be "unlawful." If it would not be unlawful, then the provision has no effect. For instance, New York Executive Law sec. 296(2)(a) does not include "age" or "ethnicity" in its prohibition against discrimination in places of public accommodation, and let us assume that a law firm is such a place. So unless federal or another state law forbids this type of discrimination, your draft language has no effect. Law firms are not included as a place of public accommodation under federal law. 42 U.S.C. sec. 2000a(b).

If a law firm is *not* a place of public accommodation, and there is no state or federal law that forbids law firms to discriminate against clients or potential clients based on the characteristics in your draft, then the prohibition of "unlawful discrimination" is meaningless when the discrimination is directed at clients or potential clients.

Fourth, the reference to "local law" in comment 5[B] can result in different ethics rules for lawyers in different parts of the state. If, for example, New York City law forbids certain discrimination that federal and state law and local law elsewhere in the state does not, New York lawyers outside the city will be free to discriminate where lawyers in the city cannot. We think a professional conduct rule for the state should apply the same way statewide.

Fifth, your draft would tolerate discrimination outside employment or public accommodation situations, but within the practice of law, when discrimination is not unlawful. Examples might include the decision, when a firm cannot accept a matter, not to refer the potential client to a Black lawyer; the decision to retain only white lawyers as local counsel; the decision not to use a Muslim court reporter for the deposition of a Jewish client; and the decision to retain only men when a client needs a private investigator or an expert witness. In each instance the firm may or may not be responding to the client's preferences.

Letter, Stephen Gillers and Barbara S. Gillers to Roy Simon
Re COSAC recommendations on Rule 8.4(g)
May 27, 2021

Rule 1.16. We urge you to insert “in accordance with Rule 1.16” at the end of paragraph (g)(4)(i). This is the language of the ABA rule. In our view, Rule 1.16 would not permit a lawyer to decline to represent a client or to withdraw on discovering that the client or potential client was gay, or Muslim, or Jewish, or in the military. Without the insertion, the rule as drafted could be read to expand Rule 1.16 and allow withdrawal even if Rule 1.16 would not because in context the current language is stated as an *exception* to the prohibition in Rule 8.4(g), creating a further basis for permissive withdrawal. In other words, as drafted, a firm could withdraw from a matter when allowed under Rule 1.16 *or*, citing your language, because of the client’s race, sex, religion, etc. even if not allowed by Rule 1.16. This textual ambiguity should be eliminated.

Thank you for your attention to this letter.

Yours sincerely,

/s/

Stephen Gillers

/s/

Barbara S. Gillers

**COMMENTS OF PHILIP A. BYLER, ESQ. ON COSAC
PROPOSED NEW YORK RULE OF PROFESSIONAL CONDUCT 8.4(g)**

A career and personal background statement on Philip A. Byler, Esq. follows the below comments made in response to the Memorandum dated April 16, 2021, to members of Bar and the Public from the NYSBA Committee on Standards of Attorney Conduct (“COSAC”) requesting comments on proposed amendments to Rule 8.4(g) of the New York Rules of Professional Conduct. The comments and opinions expressed here are Mr. Byler’s own and are not provided on behalf of his law firm or of any Bar Association or Bar Association Committee of which he is a member.

A review of COSAC’s Memorandum dated April 16, 2012, concerning proposed amendments to Rule 8.4(g) of the New York Rules of Professional Conduct reveals a striking fact: no cases are discussed at all, much less cases that would reflect gaps in the existing New York Rules of Professional Conduct calling for curative amendments. Instead of real situations arising in cases in which the coverage of the New York Rules of Professional Conduct was apparently deficient, there is a general discussion at pages 5 and 6 of the COSAC Memorandum about the importance of increasing the public’s confidence in the legal system and the need to promote diversity in the practice. While such virtue signaling may cause lawyers to feel good about their intentions, without a discussion of case law and real fact situations, there are serious justifiable concerns as to what concretely would be

accomplished by COSAC's proposed amendments and how those proposed amendments would work -- or not work well.

On page 6 of the COSAC Memorandum, there is an identification of the four changes contained in the proposed amended Rule 8.4(g) of the New York Rules of Professional Conduct that are said by COSAC to improve the current New York Rule 8.4(g). An examination of those four changes is in order.

1. No Exhaustion of Administrative Remedies Requirement.

The first change is stated to be "Elimination of the current requirement to exhaust administrative remedies before filing a grievance alleging discrimination."

What this practically means is that the disciplinary forum may become a preferred forum in which to adjudicate claims of harassment and discrimination, a development which would not advance the fair administration of justice. Disciplinary proceedings are special actions in which respondents have limited rights as to discovery and respondents do not have the right to take depositions. Disciplinary hearings are conducted in private, and there is no jury trial. Claims of sexual harassment and discrimination, for example, frequently involve "he said/she said" conflicts, and those conflicts will be resolved in the disciplinary forum where, after limited opportunities for a respondent attorney to develop a fact record in defense, a single referee, who may or may not follow the rules of evidence, will decide the matter.

The experience of universities and colleges with sexual misconduct tribunals should give serious pause to moving sexual misconduct and harassment cases to the disciplinary forum. The Obama Administration issued on April 4, 2011, a “Dear Colleague Letter,” calling upon universities and colleges to use their disciplinary procedures to deal with complaints of sexual misconduct, and universities and colleges did so. In justification of calling upon universities and colleges to so use their disciplinary procedures, the April 4, 2011 Dear Colleague Letter premised the need for universities to discipline sexual misconduct, using a preponderance of the evidence standard, with the statistic that 1 in 5 *women* on campus were victims of sexual assault, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>. While the real number of college women assault victims is .03 in 5. *Rape and Sexual Assault Victimization among College Age Females, 1995-2013* (Special Report), U.S. Department of Justice, December 2014, <http://www.bjs.gov/content/pub/pdf/ravcaf9513.pdf>, the 1 in 5 statistic propelled the establishment of campus sexual misconduct tribunals to protect women.

Soon enough, lawsuits were brought by male respondents complaining about the denial of due process and sex discrimination in the issuance of erroneous and career-destructive disciplinary decisions against them. See, *e.g.*, *Doe v. Columbia*, 831 F.3d 46 (2d Cir. 2016) (Leval, J.). In 2017, then U.S. Education Secretary Betsy DeVos denounced the campus tribunals as involving wholly un-American denials of

due process: Remarks, Sept. 7, 2017, www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement. The September 22, 2017 Dear Colleague Letter (<https://www.cmu.edu/title-ix/colleague-title-ix-201709.pdf>) criticized the April 2011 Dear Colleague Letter for directing that schools use sexual misconduct procedures with reduced protections for the accused. Lawsuits continued, with a significant decision in *Doe v. Purdue*, 928 F.3d 652 (7th Cir. 2019) (Barrett, J.), which was one of the main decisions inspiring the new Title IX regulations that were announced on May 6, 2020 and that went in effective on August 14, 2020 to mandate due process. “Secretary DeVos Announces New Title IX Regulation,” <https://www.youtube.com/watch?v=hTb3yfMNGuA>; U.S. Department of Education Press Release, “Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students,” May 6, 2020; U.S. Department of Education Press Release, “U.S. Department of Education Launches New Title IX Resources for Students, Institutions as Historic New Rule Takes Effect” (August 14, 2010); 34 Code of Federal Regulations 106.45.

As noted above, the rationales in the COSAC Memorandum on the Proposed Amendments to Rule 8.4(g) are stated to be to promote public confidence in the legal system and to promote diversity, and the COSAC Memorandum cites to a Connecticut Bar survey finding a high incidence of sexual harassment -- based on what women but not men voluntarily answered. A review of the cited source,

however, shows an unscientific methodology that included an overly broad definition of harassment (asking for unwanted dates, offensive jokes and perceived ogling were included) and that seems similar in kind to the false 1 in 5 statistic in the April 4, 2011 Dear Colleague Letter justifying universities and colleges using their disciplinary procedures to deal with sexual assault and harassment. With the issues and problems that will arise in making the confidential disciplinary process a preferred forum for adjudicating sexual discrimination and harassment, the proposed amended Rule 8.4(g) will not promote public confidence in the legal system and will not promote diversity.

COSAC's Memorandum (p.8) argues that the exhaustion of administrative remedies requirement could prevent or deter complainants from filing grievances under the current Rule 8.4(g). What COSAC wrongly does not take into account at all are the limitations and undesirable features of the disciplinary forum as the place for adjudicating discrimination and harassment complaints as discussed above.

2. The Prohibition of "Harassment," Unlawful and Not Unlawful.

The second change is stated to be "Adds and defines a prohibition on harassment."

In the proposed amended New York Rule 8.4(g), subsection (2) states that a lawyer may not engage in "Harassment, whether or not unlawful, on the basis of one or more of the following protected categories: race, color, sex, pregnancy, religion,

national origin, ethnicity, disability, age, sexual orientation, gender identity, gender expression, marital status, status as a member of the military, or status as a military veteran.” What that means is that a New York lawyer is subject to discipline for what is deemed to be “harassment” even though it is not unlawful. The proposed amended New York Rule 8.4(g), subsection (3) defines “Harassment” as “conduct that is: a. directed at an individual or specific individuals in one or more of the protected categories; b. severe or pervasive; and c. either (i) unwelcome physical contact or (ii) derogatory or demeaning verbal conduct.”

While the scope of unlawful harassment may be determined to a certain degree by reviewing how agencies and courts have defined and treated unlawful harassment in actual cases, the definition of “harassment” has the general language of “unwelcome physical contact” and “derogatory or demeaning verbal conduct” that may be connected to “not unlawful” harassment. The COSAC Memorandum (p. 8) states that the intent of the rule should be to prohibit conduct for protected classes, with the “severe” and “pervasive” language serving to limit the scope of proposed amended Rule 8.4(g). Presumably, “unwelcome physical contact” that can become harassment if “severe” or “pervasive” is, for example, a male boss hugging a female employee (or vice versa); however, that kind of unwelcome physical contact would be unlawful. So, what is “unwelcome physical contact” that can become harassment if “severe” or “pervasive” but still not unlawful? More importantly, is the intent of

the “severe” and “pervasive” language accomplished as to “derogatory or demeaning verbal conduct”? Concretely, what is harassment that involves severe, derogatory verbal conduct and is not unlawful? Concretely, what is harassment that involves pervasive, demeaning verbal conduct and is not unlawful? COSAC’s Memorandum provides no concrete fact examples. COSAC’s Memorandum thus does not shed light on the answers to these questions, even though a New York lawyer is not to engage in such conduct.

Pages 2 and 3 of the COSAC Memorandum does show that there would be a “Comment” section appended to proposed amended Rule 8.4(g) that contains seven statements, and these statements are an apparent attempt to allay concerns about the potential reach of proposed amended Rule 8.4(g). But the seven statements do not provide such assurance and leaves unanswered much.

1. The first statement is that discrimination and harassment in the practice of law is said to undermine confidence in the legal system. The statement is a general truism, but it does not necessarily translate into promulgating a disciplinary rule prohibiting lawyers from engaging in “not unlawful” “harassment,” whatever that might be, and does not define what is “not unlawful” “harassment” involving “derogatory or demeaning verbal conduct.”

2. The second statement is that “unlawful discrimination” refers to discrimination under federal, state and local law. The statement is a near tautology,

and it does not necessarily translate into promulgating a disciplinary rule prohibiting lawyers from engaging in not unlawful harassment, whatever that might be, and does not define what is “not unlawful” “harassment” involving “derogatory or demeaning verbal conduct.”

3. The third statement is that “[p]etty slights, minor indignities and discourteous conduct without more do not constitute harassment.” The statement would seem to deal with arguable examples of “not unlawful” harassment, which raises the question of when do slights and indignities become significant enough to constitute proscribed “not unlawful” harassment? COSAC’s Memorandum provides no concrete fact examples.

4. The fourth statement is that a lawyer’s conduct does not violate proposed amended Rule 8.4(g) if it is protected by the First Amendment and Article I, Section 8 the New York State Constitution. But saying that free speech, free exercise of religion, petitioning and the right to speak freely are not violative of proposed Rule 8.4(g) does not establish whether in individual cases the subject conduct or speech is protected by the First Amendment and Article I, Section 8 the New York State Constitution. Disputes regularly arise and will inevitably arise over whether certain speech or conduct is constitutionally protected. Some hypothetical questions should be considered to make concrete the problem:

- At a function for the local bar association, an attorney expresses opposition to transgender bathroom accommodations and calls for the repeal of laws protecting transgenderism.
- A Federalist society chapter holds a debate on immigration in which an attorney expresses support for former President Trump’s immigration policies and immigration law enforcement.
- A professor in a class on the First Amendment denounces Political Islam as a totalitarian ideology and not a religion that should receive the protection of the Free Exercise clause.
- An attorney presents an accredited CLE program in which he advocates against campus policies regulating hate speech.
- An attorney attending an accredited CLE program on gender and racial bias, when the attending attorneys are asked if they have questions or perspectives to offer on the subject matter, stands up and denounces the program as constituting ideological Marxist propaganda lacking in substantive legal content.
- An attorney does work for and is a member of an Evangelical Protestant Church or Catholic Church in which its members believe that homosexuality and transgenderism are sins and should not be legally protected.

5. The fifth statement is that proposed Rule 8.4(g) is not intended to prohibit or discourage lawyers or law firms from conduct undertaken to promote diversity, equity and/or inclusion in the legal profession. This statement does not address what is “not unlawful” “harassment” and what is “derogatory or demeaning verbal conduct.”

6. The sixth statement is that a trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a

violation of the proposed Rule 8.4(g). This statement should go without saying; that it is said is concerning with respect to the reach of the proposed amended Rule 8.4(g).

7. The seventh statement is that nothing in Rule 8.4(g) is intended to affect the scope or applicability of Rule 8.4(h) prohibiting a lawyer from engaging in conduct, whether inside or outside the practice of law, that “adversely reflects on the lawyer’s fitness as a lawyer.” This statement does not define limits on proposed amended Rule 8.4(g), and Rule 8.4(h) has its own problematic coverage if used as a stand-alone provision. A former First Department Disciplinary Chief Counsel has co-authored an article, H.R. Lieberman & H. Prager, “New York Catch-All Rule: Is It Needed?” *New York Legal Ethics Reporter* (Sept. 18, 2017), noting that New York is only one of five states that have Rule 8.4(h) and criticizing Rule 8.4(h) for the lack of notice of what is proscribed behavior.

The most criticized case involving a stand-alone use of Rule 8.4(h) is *Matter of Elizabeth Holtzman*, 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39 (1991). There, the New York Court of Appeals upheld a Letter of Reprimand issued to Kings County District Attorney Elizabeth Holtzman for sending a letter to the Administrator of the New York State Commission on Judicial Conduct and releasing that letter to the media containing the opinion that during a trial on sexual misconduct, Kings County Trial Judge Irving Levine had acted improperly in ordering in the robing room, with counsel and court officers present, a witness to get

down on her knees and demonstrate the position in which she was raped. The letter directed to be sent by District Attorney Holtzman was based on a report from the head of District Attorney Holtzman's Sex-Crimes Bureau, and the report was confirmed by a memorandum and sworn affidavit of the male Assistant District Attorney who had tried the case and purportedly witnessed the rape demonstration. District Attorney Holtzman was charged under the old Code of Professional Responsibility with conduct that reflected adversely on her fitness to practice law based on her making allegedly false accusations against Judge Levine. This charge was subject to hearings before a subcommittee of the Grievance Committee, which submitted findings to the whole Grievance Committee, and the Grievance Committee sustained the charge. The Appellate Division-Second Department affirmed, and the New York Court of Appeals also affirmed, calling District Attorney Holtzman's false attacks unwarranted and unprofessional and not what a reasonable attorney would do.

The premise of the disciplinary prosecution, however, was that the accusation against the trial judge was false; a true accusation of judicial misconduct directed toward a rape victim would have been in the public's interest to know and certainly not a proper matter for discipline of the reporting attorney. The determination of falsity and lack of reasonableness in conduct on District Attorney Holtzman's part was made after a privately held hearing; and neither the Appellate Division-Second

Department in its short opinion nor the New York Court of Appeals discuss what was the evidence supporting the determination of falsity. The New York Court of Appeals, instead of focusing on berating District Attorney Holtzman, should have in fairness and for the public's edification stated what the evidence was objectively supporting falsity and thus the lack of reasonableness on Ms. Holtzman's part. But the New York Court of Appeals didn't, and neither did the Appellate Division-Second Department. So, we are left to wonder why should District Attorney Holtzman have known that the accusation was false and thus the accusation should not have been responsibly made when it had been reported to her by the Sex-Crimes Bureau and supported by the sworn affidavit of the Assistant District Attorney who tried the case in question before the Brooklyn trial judge?

Reference to Rule 8.4(h) by the Comment to proposed amended Rule 8.4(g) is therefore unsettling. What happened to District Attorney Holtzman for reporting a case of apparent judicial misconduct toward an alleged rape victim should serve as a caution against entrusting discrimination and harassment cases to private disciplinary hearings with no requirement for administrative exhaustion.

3. Expansion of Protected Classes.

The third change is stated to be "Expands the protected classes to conform to New York anti-discrimination laws."

What that means is a long list of protected classes is imported into the proposed amended Rule 8.4(g)'s prohibition of discrimination and/or harassment without any requirement of administrative exhaustion for complaints. As raised above, there are limitations and undesirable features of the disciplinary forum as the place for adjudicating sexual discrimination and sexual harassment complaints, and the expansion of protected classes means there will be more such complaints, some of which undoubtedly present novel issues.

There is a developed body of law for outlawing discrimination and harassment on the basis of race, color, sex, pregnancy, religion, national origin, ethnicity, disability, age and even sexual orientation; however, the prohibition of proposed amended Rule 8.4(g) covers "not unlawful" harassment, whatever that might be, which would not be defined in the case law. Further, there should be no doubt that a lawyer should be able, without running afoul of proposed amended Rule 8.4(g), to represent a Christian baker or a Christian florist who on religious grounds refuses to perform special services for a gay wedding (as opposed to being required to serve them in the regular course of business in the shop), and a lawyer should be able to engage in public advocacy for a Christian baker or a Christian florist in those cases. But with proposed amended Rule 8.4(g), is there a doubt?

On other hand, not permitting discrimination or harassment of members of the military, military veterans and married people or single people for being married or

single, seems a very salutary provision. Also, COSAC is right in its Memorandum (p.7) in justifying not adding “socioeconomic status,” as in the American Bar Association’s Model Rules of Professional Conduct, because of the practical problems such inclusion would bring to providing legal services.

Where difficulties may arise, however, come from the inclusion of gender identity and gender expression as protected classes. Transgenderism is contrary to many people’s religion and/or morality. Would a lawyer not hiring, as an employee, a male identifying and dressing as a female (or vice versa) be a disciplinary matter under proposed amended Rule 8.4(g)? COSAC’s Memorandum does not provide an answer, as COSAC’s Memorandum provides no concrete fact examples.

4. In The Practice of Law.

The fourth change is stated to be “Extends the rule to cover activities in the practice of law beyond the terms and confines of employment.”

The phrase “conduct in the practice of law” is explained in the COSAC Memorandum (p.7) as COSAC’s effort to expand the reach of the lawyer disciplinary rules without adopting what is the overly broad language “related to the practice of law” that the American Bar Association uses in its Model Rules of Professional Conduct. COSAC is right not to propose using the “related to the practice of law” language that the American Bar Association uses in its Model Rules of Professional Conduct. But, as raised above, problems arise if proposed amended

Rule 8.4(g) applies to lawyers at Bar Association functions and legal associations arguing positions contrary to what is recognized as protected classes in proposed amended Rule 8.4(g).

Background of Philip A. Byler, Esq.

Philip A. Byler in 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020 and 2021 was selected for inclusion in the Thomson Reuters New York Metro Super Lawyers.

Mr. Byler received his J.D. degree in 1976 from the Harvard Law School. From 1976 to 1978, Mr. Byler was law clerk to the Honorable Judge John W. Peck of the U.S. Court of Appeals for the Sixth Circuit. In 1978, Mr. Byler began the private practice of law as an associate in the Litigation Department of Cravath, Swaine & Moore in New York City working on antitrust, securities, First Amendment and civil rights litigations. Mr. Byler was at the Cravath firm until 1984 when he moved to Weil Gotshal & Manges in New York City, where he worked on international trade, accounting fraud, First Amendment, RICO, ERISA, breach of contract and commercial litigations. In 1990, Mr. Byler established his own practice.

Mr. Byler is currently and has since 2002 been Senior Litigation Counsel at Nesenoff & Miltenberg LLP where he has practiced in federal court and complex state court practice, specializing in appeals and trials. He has tried cases in New York state court and in federal court. He has orally argued cases in the U.S. Court of Appeals for the First Circuit, the U.S. Court of Appeals for the Second Circuit, the U.S. Court of Appeals for the Third Circuit, the U.S. Court of Appeals for the Seventh Circuit, the U.S. Court of Appeals for the Eighth Circuit, the U.S. Court of Appeals for the Ninth Circuit, the U.S. Court of Appeals for the Tenth Circuit, the Arizona Supreme Court, the New York Court of Appeals and the New York Appellate Divisions for the First and Second Departments. Mr. Byler's current practice is in Title IX law, constitutional litigation, defamation, copyright and trademark law and breach of contract.

Mr. Byler argued and won in the New York Court of Appeals the constitutional case of *Immuno A.G. v. Dr. Jan Moor-Jankowski*, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, *cert denied*, 500 U.S. 954 (1991); *see* Anthony Lewis, "Abusing The Law," May 10, 1991, *New York Times* ("Philip A. Byler, the winning lawyer"). Mr. Byler successfully briefed and orally argued in the U.S. Court of Appeals for the Second Circuit the appeal of what has been said to have nationwide significance in *Doe v. Columbia*, 831 F.3d 46 (2d Cir. 2016) (Leval, J.), obtaining the reinstatement of a Title IX discrimination suit for a male student. Mr. Byler successfully briefed and orally argued in the U.S. Court of Appeals for the Seventh Circuit the appeal in an even more significant Title IX case in *Doe v. Purdue*, 928 F.3d 652 (7th Cir. 2019) (Barrett, J.), given the author of the Court opinion, again obtaining the reinstatement of another Title IX

discrimination suit for a male student. Mr. Byler tried and won in 2012 in *O'Brien v. Golden*, Index No. 11889/08 (Sup.Ct. Suffolk Co.), a two-week property jury trial in New York Supreme Court-Suffolk County. He tried and won in *Delshah Group LLC v. Atit Javeri, et al.*, 09-Civ-6909 (KBF), 2013 WL 2322488, Fed. Sec. L.Rep.. P 97,504 (S.D.N.Y. May 28, 2013), a two-month federal securities bench trial in the U.S. District Court for the Southern District of New York (Katherine Forrest, J.). Mr. Byler argued and won in the New York Appellate Division-First Department in *AJ Holdings Group LLC v. IP Holdings LLC, et al.*, 129 A.D.3d 504, 11 N.Y.S.3d 55 (1st Dep't 2015), the reversal of the award of discovery sanctions for alleged spoliation of electronic evidence. Mr. Byler argued and won in the New York Appellate Division-First Department in *Miller v. Ross*, 43 A.D.3d 730, 841 N.Y.S.2d 586 (1st Dep't 2007), the unwinding of a conversion of a New York limited partnership into a Delaware limited liability company as a legal nullity.

Mr. Byler is a member of the Bars of, among others, the States of New York and Ohio, the U.S. District Courts for the District of Columbia and the Southern and Eastern Districts of New York, the U.S. Courts of Appeals for the First, Second, Third, Sixth, Seventh, Eighth, Ninth and Tenth Circuits and the U.S. Supreme Court.

Mr. Byler is active in Bar Associations. He is a member of the American Bar Association, the New York State Bar Association, the New York City Bar Association and the Republican National Lawyers Association. He is and has been since 2007 a member of the Professional Discipline Committee of the New York State Bar Association, its current Secretary (since 2015), its current Chair of its Subcommittee on Fitness To Practice and its past Chair of its Subcommittee on Discovery in Disciplinary Proceedings; the whole State Bar Professional Discipline Committee adopted the Subcommittee's report providing a 51-jurisdiction review of the discovery procedures in each State's disciplinary system and made recommendations for reform. When Mr. Byler served on the Trial Evidence Committee of the New York State Bar Association, he was the Chair of the Subcommittee on comparing the Federal Rules of Evidence and New York state court evidence rules. Mr. Byler has been a member of the Professional Discipline Committee of the New York City Bar Association since 2008, and he was a member of the International Security Committee of the New York City Bar Association in the years 2007 to 2011, serving as its Secretary from September 2009 to May 2011. Mr. Byler did election law lecturing for the Republican National Lawyers Association – in 2016, for the training of deployment attorneys for New Hampshire and Pennsylvania on behalf of the Republican National Lawyers Association and in 2017 and 2018, for the deployment of lawyers in New York State elections. In 2019, Mr. Byler did ethics law lecturing for the Republican National Lawyers Association.

Mr. Byler is active in political and community affairs, including: Republican Party Committeeman for Town of Huntington, Long Island, New York and Suffolk County, New York (2009-present); Delegate, 10th Judicial District Republican Nominating Convention (2009-present); New York State Republican Party; Delegate, 2008 Republican National Convention; Federalist Society; Trustee and former Recording Secretary, Long Island Ronald Reagan Republican Club (2007-present); Marine Corps League - Affiliate Member, Huntington, Long Island; Director and Legal Advisor to Huntington Tri-Village Little League/Senior League Baseball Association (1997-present); Manager, numerous Huntington Tri-Village Little League and Senior League youth baseball teams, including the 1997 American Charter Williamsport Little

League Tournament team and the 2003 District 34 Williamsport Big League Tournament team; Commissioner, Long Island Stan Musial Adult Baseball League (2010-present); Player-Coach, Stan Musial Huntington Tri-Village Reds (2002-2017); Elder, Central Presbyterian Church of Huntington, Long Island (2005-present); Community Service Award, DePauw University (2008).

The foregoing credentials, however, mean nothing to Mr. Byler compared to the fact that he is “Dad” to two hero sons. John, a Purdue graduate (Class of 2005) is now a U.S. Army Lieutenant Colonel who served four combat tours of duty, two in Iraq, the first as an infantry platoon leader during the surge there when he earned a Bronze Star, and two in Afghanistan. James, also a Purdue grad (Class of 2008), is now a Wounded Warrior U.S. Marines Captain (retired) who served as an infantry platoon commander in Afghanistan in the 3/5 Marines in Sangin District, Helmand Province, Afghanistan when he earned a Purple Heart and who has since earned an M.B.A. from New York University-Stern School of Business (2015) and is working as a trader at Barclay’s Bank. Mr. Byler has been married to his wife Janet for 40 years.



May 25, 2021

Professor Roy Simon
Chair, Committee on Standards of Attorney Conduct
New York State Bar Association

By email (roy.simon@hofstra.edu)

Dear Professor Simon:

Thank you for taking comments on COSAC's proposed amendments to current New York Rule 8.4(g). As you will recall, Christian Legal Society (CLS) submitted comments in February 2021 regarding COSAC's earlier proposal. Unfortunately, the current COSAC Proposal remains constitutionally problematic and should not be imposed on New York attorneys for the reasons below and in the attached letter dated May 18, 2021.

COSAC's Proposed New York Rule 8.4(g) ("COSAC's Proposed Rule") does not differ significantly from ABA Model Rule 8.4(g). For that reason, this comment letter on COSAC's Proposed Rule is augmented by CLS's comprehensive comment letter of May 18, 2021, to the Administrative Board of the Courts of the New York State Unified Court System's Office of Court Administration. That letter addresses the Administrative Board's proposal to substitute ABA Model Rule 8.4(g) for existing New York Rule of Professional Conduct 8.4(g). The numerous reasons for rejecting ABA Model Rule 8.4(g) that CLS discusses in its letter to the Administrative Board equally apply to COSAC's Proposed Rule which also would impose the substance of ABA Model Rule 8.4(g) on New York attorneys. Both rules will chill attorneys' free speech, despite wishful claims to the contrary.

This letter provides additional reasons why COSAC's Proposed Rule specifically should not be adopted, including:

1. COSAC's Proposed Rule 8.4(g) has basically the same scope as ABA Model Rule 8.4(g) and, therefore, will similarly chill New York attorneys' free speech. ABA Model Rule 8.4(g) applies to "conduct related to the practice of law," while COSAC's Proposed Rule 8.4(g) applies to "conduct in the practice of law." Despite the minor difference in language, ABA Model Rule 8.4(g) defines "conduct related to the practice of law" virtually identically to the way in which COSAC's Proposed Rule defines "conduct in the practice of law." That is, COSAC's Proposed Rule defines "conduct in the practice of law" to "include[]":

- "representing clients;"
- "interacting with witnesses, coworkers, court personnel, lawyers, and others, while engaging in the practice of law;"
- "operating or managing a law firm or law practice;" and
- "participating in bar association, business, or professional activities or events in connection with the practice of law."

ABA Model Rule 8.4(g) defines “conduct related to the practice of law,” in its Comment [4], to “include[]”:

- “representing clients”—(same as COSAC’s Proposed Rule);
- “interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law”—(same as COSAC’s Proposed Rule);
- “operating or managing a law firm or law practice”—(same as COSAC’s Proposed Rule); and
- “participating in bar association, business or social activities in connection with the practice of law”—(COSAC’s Proposed Rule exchanges “social” for “professional” and inserts “or events” after “activities”).

Given that these two definitions are nearly identical, it is unclear how the scope of COSAC’s Proposed Rule differs from the scope of ABA Model Rule 8.4(g). Both apply to the same range of conduct. A primary criticism leveled at ABA Model Rule 8.4(g) is that its scope is far too broad, a criticism equally applicable to COSAC’s Proposed Rule. (See May 18 Letter at 10-19.)

2. Because of their equally broad scope, both COSAC’s Proposed Rule and ABA Model Rule 8.4(g) will chill New York attorneys’ speech. The United States Supreme Court has issued three recent decisions with analyses that make clear that ABA Model Rule 8.4(g) is an unconstitutional content-based and viewpoint-based restriction on attorneys’ speech. Those decisions are *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018); and *Matal v. Tam*, 137 S. Ct. 1744 (2017). (See May 18 Letter at 20-26.)

Proponents of ABA Model Rule 8.4(g) often rely on ABA Formal Opinion 493, but this reliance is misplaced. For reasons that are hard to fathom, Formal Opinion 493 not only fails to distinguish these recent Supreme Court decisions; *it fails to mention them at all*. And, of course, Formal Opinion 493 was issued before the federal district court’s decision in *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020), which renders Formal Opinion 493 obsolete. (See May 18 Letter at 21-23.)

In *Greenberg*, the Eastern District of Pennsylvania held that Pennsylvania’s Rule 8.4(g), was facially unconstitutional because it violated attorneys’ freedom of speech.¹ Pennsylvania had derived its rule from ABA Model Rule 8.4(g), with modifications aimed at narrowing it. In striking down the rule, the federal district court in *Greenberg* explained:

[The rule] will hang over Pennsylvania attorneys like the sword of Damocles. This language will continuously threaten the speaker to self-censor and constantly mind what the speaker says and how

¹ *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020), *appeal voluntarily dismissed*, No. 20-3602 (3d Cir. Mar. 17, 2021). The Disciplinary Board of the Pennsylvania Supreme Court initially appealed the decision but subsequently voluntarily dismissed its appeal.

the speaker says it or the full apparatus and resources of the Commonwealth may be engaged to come swooping in to conduct an investigation. Defendants dismiss these concerns with a paternal pat on the head and suggest that the genesis of the disciplinary process is benign and mostly dismissive. . . .

*Even if the disciplinary process does not end in some form of discipline, the threat of a disruptive, intrusive, and expensive investigation and investigatory hearing into the Plaintiff's words, speeches, notes, written materials, videos, mannerisms, and practice of law would cause Plaintiff and any attorney to be fearful of what he or she says and how he or she will say it in any forum, private or public, that directly or tangentially touches upon the practice of law, including at speaking engagements given during CLEs, bench-bar conferences, or indeed at any of the social gatherings forming around these activities. The government, as a result, de facto regulates speech by threat, thereby chilling speech.*²

Many scholars concur that ABA Model Rule 8.4(g) should not be adopted because it will violate attorneys' freedom of speech. (See May 18 Letter at 6-9.) For example, Professor Michael McGinniss, Dean of the University of North Dakota School of Law, "examine[s] multiple aspects of the ongoing Model Rule 8.4(g) controversy, including the rule's background and deficiencies, states' reception (and widespread rejection) of it, [and] socially conservative lawyers' justified distrust of new speech restrictions."³ Michael McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol'y 173 (2019).

Professor Margaret Tarkington, who teaches professional responsibility at Indiana University Robert H. McKinney School of Law, has raised strong concerns about ABA Model Rule 8.4(g)'s impact on attorneys' speech. She stresses that "[h]istorically it has been disfavored groups and minorities that have been negatively affected—and even targeted—by laws that restrict lawyers' First Amendment rights, including African Americans during desegregation, alleged terrorists following 9/11, communists in the 1950s, welfare recipients, debtors, and criminal defendants."⁴ She insists that "lawyer speech, association, and petitioning" are "rights [that] must be protected" because they "play a major role in checking the use of governmental and non-governmental power in the United States."⁵

Because lawyers frequently are the spokespersons and leaders in political, social, religious, or cultural movements, a rule that can be employed to discipline a lawyer for his or her speech on controversial issues should be rejected as a serious threat to a civil society in which

² *Id.* at 24-25 (emphasis supplied).

³ <https://law.und.edu/files/docs/features/mcginniss-expressingconsciencewithcandor-harvardjlp-2019.pdf>.

⁴ Margaret Tarkington, *Throwing Out the Baby: The ABA's Subversion of Lawyer First Amendment Rights*, 24 Tex. Rev. L. & Pol. 41, 80 (2019).

⁵ *Id.*

freedom of speech, free exercise of religion, and freedom of political belief flourish. In a time when respect for First Amendment rights seems to diminish by the day, lawyers can ill-afford to wager their licenses on a rule that may be utilized to punish their speech. (See May 18 Letter at 3-6).

3. Because of their equally broad scope, both COSAC’s Proposed Rule and ABA Model Rule 8.4(g) violate New York attorneys’ free speech because they are viewpoint discriminatory. Both proposed rules define “harassment” using terms that are viewpoint discriminatory. As the Supreme Court made clear in *Matal*, a law or regulation that penalizes speech that is “derogatory or demeaning” is viewpoint discriminatory. 137 S. Ct. at 1753-54, 1765 (plurality op.); *id.* at 1766 (Kennedy, J., concurring). In its Comment [3], ABA Model Rule 8.4(g) defines “harassment” to include “derogatory or demeaning verbal . . . conduct.”

In its subsection (3)(c)(ii), COSAC’s Proposed Rule defines “harassment” to include “derogatory or demeaning verbal conduct.” Its Comment [5C] further provides that “[s]evere or pervasive derogatory or demeaning conduct refers to degrading, repulsive, abusive, and disdainful conduct.” This additional definition simply compounds the viewpoint discriminatory nature of the Proposed Rule for the same reasons that Justice Kagan, writing for the Court in *Iancu*, explained that the terms “immoral” and “scandalous” were facially viewpoint discriminatory. 139 S. Ct. 2294, 2300. (See May 18 Letter at 24- 25.) Separately and individually, the terms “degrading,” “repulsive,” or “disdainful” make COSAC’s Proposed Rule viewpoint discriminatory. Government officials do not possess the authority to determine when speech is “degrading,” “repulsive,” or “disdainful.” Such line-drawing would rely too much on the subjective viewpoints of the government officials and, therefore, would violate the First Amendment.

Finally, Comment [5C] raises further concerns when it states that “[p]etty slights, minor indignities and discourteous conduct *without more* do not constitute harassment.” Rather than reassure, Comment [5C] actually suggests that “petty slights, minor indignities, and discourteous conduct” will sometimes be the basis for a finding of professional misconduct in certain circumstances in which “more”—however modest that “more” may be—occurs.

4. The existing Rule of Professional Conduct 8.4(g) covers unlawful harassment. The April 16, 2021, memorandum states that “[t]he current version of New York Rule 8.4(g) does not cover harassment at all.” COSAC Memorandum at 8. But to the contrary, certain forms of harassment are unlawful under federal and state antidiscrimination laws and, therefore, are “unlawful discrimination” for purposes of existing New York Rule 8.4(g). Existing New York Rule 8.4(g) is looked to as a model of reasonableness and clarity by bar committees in many other states. A broader rule is unnecessary because current New York Rules of Professional Conduct 8.4(d) and 8.4(h), respectively, provide for discipline if a lawyer or law firm “engage[s] in conduct that is prejudicial to the administration of justice” or “engage[s] in any other conduct that adversely reflects on the lawyer’s fitness as a lawyer.” As the Connecticut Office of Chief Disciplinary Counsel and the Statewide Grievance Committee recently observed, a rule like 8.4(d) makes ABA Model Rule 8.4(g) unnecessary if the current rules of professional conduct

are “applied robustly” by committees and courts “to limit and deter [] conduct, bias or prejudice.”⁶

5. Both ABA Model Rule 8.4(g) and COSAC’s Proposed Rule would make it professional misconduct for attorneys to engage in hiring practices that favor persons because they are women or belong to racial, ethnic, or sexual minorities. Both proposed rules have “savings provisions” in Comment [4] and Comment [5E], respectively, to try to preserve practices aimed at increasing diversity among law firms’ employees. But these “savings provisions” blatantly contradict the black-letter text, and text trumps comments.

A highly respected professional ethics expert has concluded that ABA Model Rule 8.4(g) “prohibits such discrimination as women-only bar groups or networking events, minority-only recruitment days or mentoring sessions, etc.” (See May 18 Letter at 3 n.8, 32-34.) As he explains, language in the comments is only guidance and not binding. Besides, the drafters of the rule “clearly knew how to include exceptions to the binding black letter anti-discrimination rule” because the black letter rule itself actually contains two exceptions: “If the ABA wanted to identify certain discriminatory conduct permitted by the black letter rule, it would have included a third exception in the black letter rule.”

These consequences for New York lawyers’ and their firms’ efforts to promote diversity, equity, and inclusion provide yet another reason to reject COSAC’s Proposed Rule. The substantial value of firms’ programs to promote diversity, equity, and inclusion, as well as the importance of affinity legal groups based on gender, race, sexual identity, or other protected classes, would seem to far outweigh any practical benefits likely to come from either COSAC’s Proposed Rule or ABA Model Rule 8.4(g).

6. The basic presumption underlying both ABA Model Rule 8.4(g) and COSAC’s Proposed Rule is that the government may regulate all attorneys’ speech as long as it provides carve-outs for “protected speech;” but the Supreme Court made clear the opposite is true in *NIFLA v. Becerra*. The *NIFLA* Court firmly rejected the idea that professional speech is less protected by the First Amendment than other speech. The Court stressed that “*this Court has not recognized ‘professional speech’ as a separate category of speech. Speech is not unprotected merely because it is uttered by ‘professionals.’*”⁷ It rejected the idea that “professional speech” was an exception “from the rule that content-based regulations of speech are subject to strict scrutiny.”⁸ A State’s regulation of attorney speech would be subject to strict scrutiny to ensure that any regulation is narrowly tailored to achieve a compelling interest. The Court reaffirmed that its “precedents have long protected the First Amendment rights of professionals” and “has applied strict scrutiny to content-based laws that

⁶ Email from Brian B. Staines, Chief Disciplinary Counsel, to Rules Committee of the Superior Court (Dec. 31, 2020), <https://www.jud.ct.gov/committees/rules/pdfs/2020-012%20ggg%20-%20Comments%20from%20Chief%20Disciplinary%20Counsel.pdf>. See also, Email from Michael Bowler, Statewide Bar Counsel, Statewide Grievance Committee, to Rules Committee for the Superior Court (Dec. 29, 2020), <https://www.jud.ct.gov/committees/rules/pdfs/2020-012%20fff%20-%20Comments%20from%20Statewide%20Grievance%20Comm.pdf>.

⁷ 138 S. Ct. at 2371-72 (emphasis added).

⁸ *Id.* at 2371.

regulate the noncommercial speech of lawyers.”⁹ Subsequently, in striking down Pennsylvania’s Rule 8.4(g), the *Greenberg* court relied on *NIFLA* to “find[] that Rule 8.4(g) does not cover ‘professional speech’ that is entitled to less protection” but instead “[t]he speech that Rule 8.4(g) regulates is entitled to the full protection of the First Amendment.”¹⁰

COSAC’s Proposed Rule flies in the face of the Supreme Court’s decision in *NIFLA*. Its assertion in subsection (4)(ii) that the rule does not limit a lawyer’s ability “to express views on matters of public concern in the context of teaching, public speeches, or other forms of public advocacy” merely underscores that the proposed rule believes it can regulate a lawyer’s expression of views on matters that are not “of public concern.” But that turns the First Amendment on its head. Free speech about private matters is just as protected as free speech about public matters. Protection for lawyers’ speech is not limited to “matters of public concern.” (See May 18 Letter at 20-26.)

7. Despite its nod to speech concerns, COSAC’s Proposed Rule will chill speech and cause lawyers to self-censor in order to avoid grievance complaints. COSAC’s proposed rule itself recognizes its potential for silencing lawyers when Comment [5D] states that “[a] lawyer’s conduct does not violate Rule 8.4(g) when the conduct in question is protected under the First Amendment of the Constitution of the United States or under Article I, Section 8 of the Constitution of the State of New York.” Comment [5D] affords no substantive protection for attorneys’ speech but merely asserts that COSAC’s Proposed Rule does not do what it in fact does.

Nor is it enough for government officials to promise to be careful in their enforcement of a rule that lawyers have reason to fear will suppress their speech. As the Supreme Court has observed, “The First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”¹¹ Instead, the Court has rejected “[t]he Government’s assurance that it will apply [a statute] far more restrictively than its language provides” because such an assurance “is pertinent only as an *implicit acknowledgment of the potential constitutional problems* with a more natural reading.”¹²

The *Greenberg* court likewise rejected such assurances by observing that “[government officials] dismiss these concerns with a paternal pat on the head and suggest that the genesis of the disciplinary process is benign and mostly dismissive.” But given “the threat of a disruptive, intrusive, and expensive investigation and investigatory hearing into the [lawyer’s] words, speeches, notes, written materials, videos, mannerisms, and practice of law,” the government is “de facto regulat[ing] speech by threat, thereby chilling speech.”¹³

⁹ *Id.* at 2374.

¹⁰ *Greenberg*, 491 F. Supp. 3d at 27-30.

¹¹ *United States v. Stevens*, 599 U.S. 460, 480 (2010).

¹² *Id.* (emphasis added).

¹³ *Greenberg*, 491 F. Supp. 3d at 24-25.

In the landmark case, *National Association for the Advancement of Colored People v. Button*,¹⁴ the Supreme Court ruled that “a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights,” explaining:

If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights. Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.¹⁵

COSAC’s Proposed Rule fails to protect a lawyer from complaints being filed against her based on her speech or from the investigations that will frequently follow such complaints. The provision fails to protect a lawyer from the expense of protracted litigation to defend her speech as protected speech. Litigation in free speech cases often lasts for years. It extracts great personal expense and a significant emotional toll. Even if the investigation or litigation eventually concludes that the lawyer’s speech was protected by the First Amendment, the lawyer has had to inform courts that a complaint has been brought when she applies for admission to another bar or seeks to appear pro hac vice. In the meantime, her personal reputation and practice likely will suffer damage through media reports.

The process is the punishment. This brings us to the real problem with COSAC’s Proposed Rule. Rather than risk a prolonged investigation with an uncertain outcome and potential lengthy litigation, a rational, risk-averse lawyer will self-censor. Because a lawyer’s loss of her license to practice law is a staggering penalty, the calculus is entirely predictable: Better to censor one’s own speech than to risk a grievance complaint. The losers are not just the legal profession, but our free civil society, which depends on lawyers to protect—and contribute to—the free exchange of ideas that is its lifeblood.

8. Under COSAC’s Proposed Rule, New York lawyers would be subject to different restrictions based on the locality in which they practice. COSAC’s Proposed Rule will not apply uniformly to all New York attorneys. The inclusion of local statutes or ordinances means that COSAC’s Proposed Rule 8.4(g) will apply to New York lawyers differently depending on where they live in New York. That is, speech spoken by a New York lawyer might or might not constitute professional misconduct, depending on whether the lawyer practices in New York City with its expansive nondiscrimination laws, or Geneseo with a less broad nondiscrimination ordinance.

A good rule promotes consistency in its application. But COSAC’s Proposed Rule’s application, by its very terms, will vary depending on the locality in which a lawyer practices. Such a rule is neither consistent nor fair to New York lawyers.

¹⁴ *NAACP v. Button*, 371 U.S. 415 (1963).

¹⁵ *Id.* at 438-39.

We thank the Committee for its consideration of our views.

Respectfully submitted,

/s/ David Nammo

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Attachment: Christian Legal Society Letter of May 18, 2021, to Ms. Eileen D. Millett, Esq.



Seeking Justice with the Love of God

May 18, 2021

Ms. Eileen D. Millett, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004

By email (rulecomments@nycourts.gov)

Re: In Opposition to the New York City Bar's Professional Responsibility Committee's
Proposed Amendment to New York Rule of Professional Conduct 8.4(g)

Dear Ms. Millett:

This letter is respectfully submitted in response to the request of the Office of Court Administration for public comment on a proposal to impose the deeply flawed, highly criticized ABA Model Rule 8.4(g) on all members of the New York State Bar. Specifically, the New York City Bar's Professional Responsibility Committee has proposed that current New York Rule of Professional Conduct 8.4(g) be replaced by the much broader ABA Model Rule 8.4(g) with only minor modifications. The New York City Bar's proposal should be rejected for the reasons detailed below.

Summary

Deeply flawed and highly criticized, ABA Model Rule 8.4(g) should not be imposed on New York attorneys. Leading scholars have determined ABA Model Rule 8.4(g) to be a speech code for lawyers.¹ A thoughtful recent analysis of ABA Model Rule 8.4(g) by Professor Michael McGinniss, Dean of the University of North Dakota School of Law, entitled *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol'y 173 (2019), "examine[s] multiple aspects of the ongoing Model Rule 8.4(g) controversy, including the rule's background and deficiencies, states' reception (and widespread rejection) of it, [and] socially conservative lawyers' justified distrust of new speech restrictions."²

As the United States District Court for the Eastern District of Pennsylvania held in December 2020, Pennsylvania's Rule 8.4(g), derived from ABA Model Rule 8.4(g), was facially

¹ Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017), <https://www.youtube.com/watch?v=AfpdWmlOXbA>. See *infra* Part I, pp. 6-9 (scholars' criticisms of ABA Model Rule 8.4(g)); Part III, pp.20-26 (recent United States Supreme Court free speech decisions regarding regulation of professional speech and viewpoint discrimination).

² Michael McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J.L. & Pub. Pol'y 173, 173 (2019), https://law.und.edu/_files/docs/features/mcginniss-expressingconsciencewithcandor-harvardjlp-2019.pdf.

unconstitutional because it violated attorneys' freedom of speech.³ In striking down the rule, the federal district court in *Greenberg v. Haggerty* explained:

[The rule] will hang over Pennsylvania attorneys like the sword of Damocles. This language will continuously threaten the speaker to self-censor and constantly mind what the speaker says and how the speaker says it or the full apparatus and resources of the Commonwealth may be engaged to come swooping in to conduct an investigation. Defendants dismiss these concerns with a paternal pat on the head and suggest that the genesis of the disciplinary process is benign and mostly dismissive. . . .

Even if the disciplinary process does not end in some form of discipline, the threat of a disruptive, intrusive, and expensive investigation and investigatory hearing into the Plaintiff's words, speeches, notes, written materials, videos, mannerisms, and practice of law would cause Plaintiff and any attorney to be fearful of what he or she says and how he or she will say it in any forum, private or public, that directly or tangentially touches upon the practice of law, including at speaking engagements given during CLEs, bench-bar conferences, or indeed at any of the social gatherings forming around these activities. The government, as a result, de facto regulates speech by threat, thereby chilling speech.⁴

In the nearly five years since ABA Model Rule 8.4(g) was first urged upon state supreme courts, thirteen state supreme courts or state bar committees have rejected or abandoned it.⁵ Two states have adopted it (Vermont and New Mexico), and two states (Maine and Pennsylvania) have adopted modified versions with Pennsylvania's rule struck down as unconstitutional.⁶

By contrast, current New York Rule of Professional Conduct 8.4(g) is looked to as a model of reasonableness and clarity by bar committees in several other states. The current rule allows a lawyer to be disciplined for unlawful employment discrimination if a tribunal determines that her conduct was unlawful and the appeals process has been completed. But if the New York City Bar Proposal is adopted, any lawyer and law firm which has been found by a tribunal not to have engaged in unlawful discriminatory conduct could nonetheless be subject to discipline. Indeed, ABA Model Rule 8.4(g) subjects a lawyer or law firm to discipline for any conduct related to the practice of law, including social activities.

³ *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020), *appeal voluntarily dismissed*, No. 20-3602 (3d Cir. Mar. 17, 2021). The Disciplinary Board of the Pennsylvania Supreme Court initially appealed the decision but subsequently voluntarily dismissed its appeal.

⁴ *Id.* at 24-25.

⁵ See *infra* Part V, pp. 28-32 (describing states' responses to ABA Model Rule 8.4(g)).

⁶ *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020).

A broader rule is unnecessary because current New York Rules of Professional Conduct 8.4(d) and 8.4(h) respectively provide for discipline if a lawyer or law firm “engage[s] in conduct that is prejudicial to the administration of justice” or “engage[s] in any other conduct that adversely reflects on the lawyer’s fitness as a lawyer.” As the Connecticut Office of Chief Disciplinary Counsel and the Statewide Grievance Committee recently observed, a rule like 8.4(d) makes ABA Model Rule 8.4(g) unnecessary if the current rules of professional conduct are “applied robustly” by committees and courts “to limit and deter [] conduct, bias or prejudice.”⁷

Most importantly, the United States Supreme Court has issued three recent decisions that make clear that ABA Model Rule 8.4(g) is an unconstitutional content-based and viewpoint-based restriction on attorneys’ speech. Those decisions, which were relied upon by the *Greenberg* court, are *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018); and *Matal v. Tam*, 137 S. Ct. 1744 (2017). See *infra* pp. 20-26. Proponents of ABA Model Rule 8.4(g) often rely on ABA Formal Opinion 493, but this reliance is misplaced. For reasons that are hard to fathom, *Formal Opinion 493* not only fails to distinguish these recent Supreme Court decisions; it fails to mention them at all. But ignoring Supreme Court precedent does not make it go away.

ABA Model Rule 8.4(g) will inevitably chill New York attorneys’ speech regarding political, ideological, religious, and social issues to the detriment of New York attorneys, their clients, and society in general. But a free society depends on attorneys being able to speak their minds freely without fear of losing their license to practice law.

Both liberal and conservative lawyers should be concerned about ABA Model Rule 8.4(g)’s disturbing implications for their ability to practice law. For example, attorneys who serve on their firms’ hiring committees and make employment decisions in which, in order to achieve diversity goals, even modest preference in hiring or promotion is given based on race, sex, religion, or sexual orientation would be in violation of ABA Model Rule 8.4(g).⁸ Or an

⁷ Email from Brian B. Staines, Chief Disciplinary Counsel, to Rules Committee of the Superior Court (Dec. 31, 2020), <https://www.jud.ct.gov/committees/rules/pdfs/2020-012%20ggg%20-%20Comments%20from%20Chief%20Disciplinary%20Counsel.pdf>. See also, Email from Michael Bowler, Statewide Bar Counsel, Statewide Grievance Committee, to Rules Committee for the Superior Court (Dec. 29, 2020), <https://www.jud.ct.gov/committees/rules/pdfs/2020-012%20fff%20-%20Comments%20from%20Statewide%20Grievance%20Comm.pdf>.

⁸ Thomas Spahn, a highly respected professional ethics expert, has concluded that ABA Model Rule 8.4(g) “prohibits such discrimination as women-only bar groups or networking events, minority-only recruitment days or mentoring sessions, etc.” He further concluded that ABA Model Rule 8.4(g) would prohibit any discrimination in hiring practices:

Many of us operating under the old ABA Model Rules Comments or similar provisions either explicitly or sub silentio treated race, sex, or other listed attributes as a “plus” when deciding whom to interview, hire, or promote within a law firm or law department. That is discrimination. It may be well-intentioned and designed to curry favor with clients who monitor and measure law

attorney who tweets a common but hurtful sexual term aimed at a presidential spokeswoman could be subject to discipline under the proposed rule.⁹ Or a law professor whose comments to the media employ racial and gender stereotypes to describe the critics of ABA Model Rule 8.4(g) could be subject to discipline under the proposed rule.¹⁰ Because the terms “harassment” and “discrimination” are difficult to define and hold greatly dissimilar meanings for different people, ABA Model Rule 8.4(g) threatens lawyers’ speech across the political, ideological, social, and religious spectrum.

Sadly, we live at a time when many people, including lawyers, are increasingly willing to suppress the free speech of those with whom they disagree. Some lawyers purportedly have filed bar complaints in order to harass officeholders whose political views they dislike.¹¹ Yale law students have described significant harassment by fellow law students simply because they hold religious or conservative ideas.¹²

In July 2020, the Judicial Conference Committee on Codes of Conduct withdrew a draft advisory opinion that had said it was improper for judges to be members of the Federalist Society or the American Constitution Society, but permissible to belong to the American Bar Association. A comment letter signed by 210 federal judges took exception to the opinion’s

firms’ head count on the basis of such attributes – but it is nevertheless discrimination. *In every state that adopts the new ABA Model Rule 8.4(g), it will become an ethics violation.*

The District of Columbia Bar, Continuing Legal Education Program, *Civil Rights and Diversity: Ethics Issues 5-7* (July 12, 2018) (emphasis supplied). *See infra*, Part VI, pp. 32-34 (why diversity programs cannot be protected).

⁹ Debra Cassens Weiss, *Big Law Partner Deletes Twitter Account after Profane Insult Toward Sarah Huckabee Sanders*, ABA Journal, Oct. 1, 2018 (lawyer, honored in 2009 by the ABA Journal “for his innovative use of social media in his practice,” apologized to firm colleagues, saying no “woman should be subjected to such animus”), https://www.abajournal.com/news/article/biglaw_partner_deletes_twitter_account_after_profane_insult_toward_sarah_hu.

¹⁰ Eugene Volokh, *Professor Stephen Gillers (NYU) Unwittingly Demonstrates Why ABA Model Rule 8.4(g) Chills Protected Speech*, The Volokh Conspiracy, June 17, 2019, <https://reason.com/2019/06/17/professor-stephen-gillers-nyu-unwittingly-demonstrates-why-aba-model-rule-8-4g-chills-protected-speech/>. The article explains that in a media interview regarding ABA Model Rule 8.4(g), a proponent of the Rule stereotyped critics of the Rule by race and gender. The article suggests that the same comment made in the context of a bar association debate might be grounds for discipline under ABA Model Rule 8.4(g).

¹¹ *See* Brian Sheppard, *The Ethics Resistance*, 32 Geo. J. Legal Ethics 235, 238 (2018):

Ordinary ethics complaints have the capacity to ruin individual law careers and serve as cautionary examples to other lawyers. Ethics Resistance complaints have the additional capacity to prompt official action, alter staffing decisions at the highest levels of government, influence high-ranking lawyers’ willingness to comply with investigations, and terminate or preempt relationships between lawyers and the politically powerful.

Most importantly, they can change public perception regarding the moral integrity of an administration. And they can do this even if they do not result in a sanction.

¹² *See, e.g.*, Aaron Haviland, “I Thought I Could Be a Christian and Constitutionalist at Yale Law School. I Was Wrong,” The Federalist (Mar. 4, 2019), <https://thefederalist.com/2019/03/04/thought-christian-constitutionalist-yale-law-school-wrong/> (student president of Yale Law School chapter of the Federalist Society describing significant harassment by other Yale Law students and student organizations because they did not like the ideas that they ascribed (accurately or inaccurately) to Federalist Society members and guest speakers).

underlying “double standard” and “untenable” “disparate treatment” as reflected in “the Committee[’s] oppos[ing] judicial membership in the Federalist Society while permitting membership in the ABA.”¹³ In withdrawing its proposal, the Judicial Conference Committee noted that “judges confront a world filled with challenges arising out of emerging technologies, deep ideological disputes, a growing sense of mistrust of individuals and institutions, and an ever-changing landscape of competing political, legal and societal interests.”¹⁴ Far less sheltered than judges from these competing interests, lawyers daily confront such an environment.

Many proponents of ABA Model Rule 8.4(g) sincerely believe that the Rule will only be used to punish lawyers who are bad actors. Unfortunately, we have recently witnessed too many times when people have lost their livelihoods for holding traditional religious views. For example, the Fire Chief of Atlanta, an African-American man who had been appointed National Fire Marshal by President Obama, was fired because he wrote a book that briefly referred to his religious beliefs regarding marriage and sexual conduct.¹⁵ The CEO of Mozilla lost his position because he made a contribution that reflected his religious beliefs to one side of a political debate regarding marriage laws.¹⁶

Merely expressing support for freedom of speech has itself become controversial. In July 2020, several well-known liberal signatories to a public letter in support of freedom of speech were publicly pressured to recant their support for free speech and its concomitant corollary of tolerance for others who hold different beliefs.¹⁷

Given the current climate, lawyers who hold classical liberal, conservative, libertarian, or religious viewpoints are understandably unwilling to support a black letter rule that could easily be misused to deprive them of their license to practice law. As a nationally recognized First Amendment expert has explained, ABA Model Rule 8.4(g) is a speech code that threatens lawyers’ speech.¹⁸

Perhaps this is why after nearly five years of deliberations by state supreme courts and state bar associations in many states across the country, only two states have adopted ABA

¹³ Letter from 210 Federal Judges to Robert P. Deyling, Ass’t Gen. Counsel, Administrative Off. of the U.S. Courts (Mar. 18, 2020), <https://int.nyt.com/data/documenthelper/6928-judges-respond-to-draft-ethics/53eaddfaf39912a26ae7/optimized/full.pdf>.

¹⁴ Memorandum from James C. Duff, Director, Administrative Office of the United States Courts to All United States Judges, “Update Regarding Exposure Draft – Advisory Opinion No. 117 Information” (July 30, 2020), <https://aboutblaw.com/SkA>,

¹⁵ *Testimony Before the House Committee on Oversight and Government Reform on Religious Freedom & The First Amendment Defense Act*, 114th Cong. (July 12, 2016) (statement of Kelvin J. Cochran).

¹⁶ “Did Mozilla CEO Brendan Eich Deserve to Be Removed from His Position?” *Forbes* (Apr. 11, 2014), <https://www.forbes.com/sites/quora/2014/04/11/did-mozilla-ceo-brendan-eich-deserve-to-be-removed-from-his-position-due-to-his-support-for-proposition-8/#483d85c02158>.

¹⁷ “J.K. Rowling Joins 150 Public Figures Warning Over Free Speech,” *BBC* (July 8, 2020), <https://www.bbc.com/news/world-us-canada-53330105>.

¹⁸ Volokh, *supra* note 1.

Model Rule 8.4(g). In contrast, at least thirteen states have concluded, after careful study, that ABA Model Rule 8.4(g) is unconstitutional or unworkable. Those states have opted for the prudent course of letting other states experiment with ABA Model Rule 8.4(g) in order to evaluate its actual effect on the lawyers in those states before imposing it on lawyers in their states. See *infra* pp. 28-32.

This memorandum explains the numerous reasons why ABA Model Rule 8.4(g) should not be recommended for adoption, including:

1. Scholars' analysis of ABA Model Rule 8.4(g) as a speech code for lawyers (pp. 6-9);
2. ABA Model Rule 8.4(g)'s overreach into attorneys' lives, particularly its chilling effect on lawyers' speech and religious exercise, which is exacerbated by its use of a negligence standard (pp. 10-19);
3. ABA Model Rule 8.4(g)'s unconstitutionality under the analyses in three recent United States Supreme Court decisions, which ABA Formal Opinion 493 ignored, but the federal court decision in *Greenberg v. Haggerty* relied upon (pp. 20-26);
4. The fact that only Vermont and New Mexico have adopted ABA Model Rule 8.4(g), contrary to the inaccurate claim that 24 states have a similar rule (pp. 26-27);
5. The fact that official bodies in Arizona, Idaho, Illinois, Montana, New Hampshire, North Dakota, South Carolina, South Dakota, Tennessee, and Texas have rejected ABA Model Rule 8.4(g), and Louisiana, Minnesota, and Nevada have abandoned proposals to adopt it (pp. 28-32);
6. ABA Model Rule 8.4(g)'s unintended consequence of making it professional misconduct for law firms to engage in many diversity-oriented employment practices (pp. 32-34);
7. Its ramifications for lawyers' ability to accept, decline, or withdraw from a representation (pp. 34-35); and
8. The strain ABA Model Rule 8.4(g) would place on the scarce resources of the attorney grievance committees to process the increase in complaints against attorneys and firms (pp. 35-37).

I. Scholars have explained that ABA Model Rule 8.4(g) is a speech code for lawyers.

For four years before the *Greenberg* decision, a number of scholars had accurately characterized ABA Model Rule 8.4(g) as a speech code for lawyers. For example, Professor Eugene Volokh of UCLA School of Law, a nationally recognized First Amendment expert, has

summarized his view, in a two-minute video, that ABA Model Rule 8.4(g) is a speech code that will have a serious impact on attorneys' speech.¹⁹ Professor Volokh also explored its many flaws in a debate with a proponent of the model rule.²⁰

Professor Margaret Tarkington, who teaches professional responsibility at Indiana University Robert H. McKinney School of Law, has raised strong concerns about ABA Model Rule 8.4(g)'s impact on attorneys' speech. She stresses that “[h]istorically it has been disfavored groups and minorities that have been negatively affected—and even targeted—by laws that restrict lawyers’ First Amendment rights, including African Americans during desegregation, alleged terrorists following 9/11, communists in the 1950s, welfare recipients, debtors, and criminal defendants.”²¹ She insists that “lawyer speech, association, and petitioning” are “rights [that] must be protected” because they “play a major role in checking the use of governmental and non-governmental power in the United States.”²²

The late Professor Ronald Rotunda, a deeply respected scholar in both constitutional law and legal ethics, warned that ABA Model Rule 8.4(g) threatens lawyers’ First Amendment rights.²³ Regarding the new rule, he and Professor John S. Dzienkowski wrote, in the 2017-2018 edition of *Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility*, “[t]he ABA’s efforts are well intentioned, but . . . raise problems of vagueness, overbreadth, and chilling protected speech under the First Amendment.”²⁴ They observed that “[t]he language the ABA has adopted in Rule 8.4(g) and its associated Comments are similar to laws that the Supreme Court has invalidated on free speech grounds.”²⁵ In a *Wall Street Journal* commentary entitled *The ABA Overrules the First Amendment*, Professor Rotunda explained:

In the case of Rule 8.4(g), the standard, for lawyers at least, apparently does not include the First Amendment right to free speech. Consider the following form of “verbal” conduct when one lawyer tells another, in connection with a case, “I abhor the idle

¹⁹ Volokh, *supra* note 1.

²⁰ *Debate: ABA Model Rule 8.4(g)*, The Federalist Society (Mar. 13, 2017), <https://www.youtube.com/watch?v=b074xW5kvB8&t=50s>.

²¹ Margaret Tarkington, *Throwing Out the Baby: The ABA’s Subversion of Lawyer First Amendment Rights*, 24 Tex. Rev. L. & Pol. 41, 80 (2019).

²² *Id.*

²³ Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting ‘Diversity’ But Not Diversity of Thought*, The Heritage Foundation (Oct. 6, 2016), <http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf>. Professor Rotunda and Texas Attorney General Ken Paxton debated two proponents of Rule 8.4(g) at the 2017 Federalist Society National Lawyers Convention. *Using the Licensing Power of the Administrative State: Model Rule 8.4(g)*, The Federalist Society (Nov. 20, 2017), <https://www.youtube.com/watch?v=V6rDPjqBcQg>.

²⁴ Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility*, ed. April 2017 [hereinafter “Rotunda & Dzienkowski”], “§ 8.4-2(j) Racist, Sexist, and Politically Incorrect Speech” & “§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise” in “§ 8.4-2 Categories of Disciplinable Conduct.”

²⁵ *Id.* at “§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise.”

rich. We should raise capital gains taxes.” The lawyer has just violated the ABA rule by manifesting bias based on socioeconomic status.²⁶

Professor Josh Blackman has explained that “Rule 8.4(g) is unprecedented, as it extends a disciplinary committee’s jurisdiction to conduct merely ‘related to the practice of law,’ with only the most tenuous connection to representation of clients, a lawyer’s fitness, or the administration of justice.”²⁷

Professor McGinniss, Dean of the University of North Dakota School of Law, who teaches professional responsibility, warns against “the widespread ideological myopia about what it truly means to have a diverse and inclusive profession” that seems to be an impetus for ABA Model Rule 8.4(g).²⁸ He explains that a genuinely “diverse and inclusive profession . . . does not mean silencing or chilling diverse viewpoints on controversial moral issues on the basis that such expression manifests ‘bias or prejudice,’ is ‘demeaning’ or ‘derogatory’ because disagreement is deemed offensive, or is considered intrinsically ‘harmful’ or as reflecting adversely on the ‘fitness’ of the speaker.”²⁹

In a thorough examination of the rule’s legislative history, practitioners Andrew Halaby and Brianna Long conclude that ABA Model Rule 8.4(g) “is riddled with unanswered questions, including but not limited to uncertainties as to the meaning of key terms, how it interplays with other provisions of the Model Rules, and what disciplinary sanctions should apply to a violation; as well as due process and First Amendment free expression infirmities.”³⁰ They recommend that “jurisdictions asked to adopt it should think long and hard about whether such a rule can be enforced, constitutionally or at all.”³¹ They conclude that “the new model rule cannot be considered a serious suggestion of a workable rule of professional conduct to which real world lawyers may be fairly subjected.”³²

²⁶ Ron Rotunda, “*The ABA Overrules the First Amendment: The legal trade association adopts a rule to regulate lawyers’ speech*,” *The Wall Street Journal*, Aug. 16, 2016, <http://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418>.

²⁷ Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 *Geo. J. Legal Ethics* 241, 243 (2017). See also, George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, 32 *Notre Dame J.L. Ethics & Pub. Pol’y* 135 (2018).

²⁸ McGinniss, *supra* note 2, at 249.

²⁹ *Id.*

³⁰ Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 *J. Legal. Prof.* 201, 257 (2017).

³¹ *Id.*

³² *Id.* at 204.

In adopting ABA Model Rule 8.4(g), the ABA largely ignored over 480 comment letters,³³ most opposed to the new rule. Even the ABA's own Standing Committee on Professional Discipline filed a comment letter questioning whether there was a demonstrated need for the rule and raising concerns about its enforceability, although the Committee dropped its opposition immediately prior to the House of Delegates' vote.³⁴

A recurrent concern in many of the comments was the threat that ABA Model Rule 8.4(g) poses to attorneys' First Amendment rights.³⁵ But little was done to address these concerns. In their meticulous explication of the legislative history of ABA Model Rule 8.4(g), Halaby and Long conclude that "the new model rule's afflictions derive in part from indifference on the part of rule change proponents, and in part from the hasty manner in which the rule change proposal was pushed through to passage."³⁶ Specifically, the rule went through five versions, of which three versions evolved "in the two weeks before passage, none of these was subjected to review and comment by the ABA's broader membership, the bar at large, or the public."³⁷ Halaby and Long summarized the legislative history of the rule:

Model Rule 8.4(g) and its associated comments evolved rapidly between the initial letter from the Goal III entities in July 2014, through initial circulation of Version 1 in July 2015, to final adoption of Version 5 the following August. There was solicitation of public input only on Version 2, with only one public hearing, and ultimately with no House debate at all.³⁸

These scholars' red flags should not be ignored. ABA Model Rule 8.4(g) would dramatically shift the disciplinary landscape for New York attorneys.

³³American Bar Association website, Comments to Model Rule 8.4, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html.

³⁴ Halaby & Long, *supra* note 30, at 220 & n.97 (listing the Committee's concerns as including: lack of empirical evidence of need for Rule; vagueness of key terms; enforceability; constitutionality; coverage of employment discrimination complaints; mens rea requirement; and potential limitation on ability to decline representation), *citing* Letter from Ronald R. Rosenfeld, Chair ABA Standing Committee On Professional Responsibility, to Myles Lynk, Chair ABA Standing Committee On Ethics and Professional Responsibility, Mar. 10, 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MABA%20MODEL%20RULE%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf.

³⁵ Halaby & Long, *supra* note 30, at 216-223 (summarizing concerns expressed at the only public hearing on an early version of ABA Model Rule 8.4(g), as well as the main concerns expressed in the comment letters).

³⁶ *Id.* at 203.

³⁷ *Id.*

³⁸ *Id.* at 233.

II. ABA Model Rule 8.4(g) Would Greatly Expand the Reach of the Rules of Professional Conduct into New York Attorneys' Lives and Chill Their Speech.

A. ABA Model Rule 8.4(g) would regulate lawyers' interactions with anyone while engaged in conduct related to the practice of law, including when participating in business or social activities in connection with the practice of law.

ABA Model Rule 8.4(g) would make professional misconduct *any* conduct related to the practice of law that a lawyer “knows *or reasonably should know* is harassment or discrimination” on eleven separate bases (“race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status”) whenever a lawyer is: “1) representing clients; 2) interacting with witnesses, coworkers, court personnel, lawyers *and others* while engaged in the practice of law; 3) operating or managing a law firm or law practice; or 4) participating in bar association, business *or social activities in connection with the practice of law.*”

Simply put, ABA Model Rule 8.4(g) would regulate a lawyer’s “conduct . . . while . . . *interacting with . . . others* while engaged in the practice of law . . . or participating in . . . bar association, business *or social activities in connection with the practice of law.*” Proponents of ABA Model Rule 8.4(g) candidly observed that they sought a new black letter rule precisely because they wanted to regulate nonlitigating lawyers, such as “[a]cademics, nonprofit lawyers, and some government lawyers,” as well as “[t]ax lawyers, real estate lawyers, intellectual property lawyers, lobbyists, academics, corporate lawyers, and other lawyers who practice law outside the court system.”³⁹

The compelling question becomes: *What conduct doesn't ABA Model Rule 8.4(g) reach?* Virtually everything a lawyer does can be characterized as conduct while interacting with others while engaged in the practice of law.⁴⁰ Much of a lawyer’s social life can be viewed as business development and opportunities to cultivate relationships with current clients or gain exposure to new clients.

The Rule’s scope is of particular concern when “conduct” is euphemistically defined to include “harmful verbal conduct,” which is speech. As ABA Model Rule 8.4(g) and its accompanying Comment [3] state, “[d]iscrimination and harassment” include “harmful verbal or physical conduct.” Thus, ABA Model Rule 8.4(g) would regulate pure speech.

³⁹ ABA Commission on Sexual Orientation and Gender Identity, *Memorandum to Standing Committee on Ethics and Professional Responsibility: Proposed Amendment to ABA Model Rule of Professional Conduct 8.4*, at 5, 7 (Oct. 22, 2015), <https://www.clnet.org/document.doc?id=1125>.

⁴⁰ See Halaby & Long, *supra* note 30, at 226 (“The proposed comment of Version 3 expanded the ambit of ‘conduct related to the practice of law’ to include virtually anything a working lawyer might do.”)

ABA Model Rule 8.4(g) is a minefield for New York lawyers who frequently speak to community groups, classes, and other audiences about current legal issues of the day. Lawyers frequently participate in panel discussions, present CLEs, write op-eds, or tweet regarding sensitive social and political issues. Their commentary is sought by the media regarding controversial issues in their community, state, and nation. Lawyers are asked to speak *because they are lawyers*. A lawyer's speaking engagements often have a dual purpose of increasing the lawyer's visibility and creating new professional opportunities.

ABA Model Rule 8.4(g) raises numerous questions about whether various routine expressive activities could expose a lawyer to potential disciplinary action, including:

- Is a lawyer subject to discipline for her discussion of hypotheticals while presenting a CLE course?⁴¹
- Is a lawyer subject to discipline when participating in legal panel discussions that touch on controversial political, religious, and social viewpoints?⁴²
- Is a law professor or adjunct faculty member subject to discipline for a law review article or a class discussion that explores controversial topics or expresses unpopular viewpoints?
- Must lawyers abstain from writing blogposts or op-eds because they risk a bar complaint by an offended reader?
- Must lawyers forgo media interviews on topics about which they have some particularly insightful comments because anyone hearing the interview could file a complaint?⁴³

⁴¹ The *Greenberg* case was a facial challenge to Pennsylvania's version of ABA Model Rule 8.4(g) by a lawyer who regularly presents CLEs on controversial freedom of speech topics. The court found his concerns legitimate and his speech unconstitutionally chilled. 491 F. Supp. 3d at 16, 20-21. *Cf.*, Kathryn Rubino, *Did D.C. Bar Course Tell Attorneys That It's Totally Cool to Discriminate If that's What the Client Wants?*, Above the Law (Dec. 12, 2018) (reporting on attendees' complaints regarding an instructor's discussion of a hypothetical about sex discrimination and the applicability of the ethical rules during the mandatory D.C. Bar Professional Ethics course for newly admitted D.C. attorneys), <https://abovethelaw.com/2018/12/did-d-c-bar-course-tell-attorneys-its-totally-cool-to-discriminate-if-thats-what-the-client-wants/>.

⁴² *Whether adoption of the American Bar Association's Model Rule of Professional Conduct 8.4(g) would constitute violation of an attorney's statutory or constitutional rights (RQ-0128-KP)*, Tex. Att'y Gen. Op. KP-0123 (Dec. 20, 2016) at 3, <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf>. ("Given the broad nature of this rule, a court could apply it to an attorney's participation in a continuing legal education panel discussion, authoring a law review article, or informal conversations at a bar association event."); *ABA Model Rule of Professional Conduct 8.4(g) and LSBA proposed Rule 8.4(g) violate the First and Fourteenth Amendments of the United States Constitution*, 17 La. Att'y Gen. Op. 0114 (Sept. 8, 2017) at 4, <https://lalegalethics.org/wp-content/uploads/2017-09-08-LA-AG-Opinion-17-0114-re-Proposed-Rule-8.4f.pdf?x16384>, at 6 ("[A] lawyer who is asked his opinions, thoughts, or impressions on legal matters taking place in the news at a social function could also be found to be engaged in conduct related to the practice of law.").

⁴³ See *Basler v. Downtown Hope Center, et al.* Case No. 18-167, Anchorage Equal Rights Com'n. (May 15, 2018) discussed *infra* note 51.

- Can a lawyer lose his license to practice law for a tweet calling a female public official a derogatory sexist term?⁴⁴
- Is a lawyer subject to discipline for employment decisions made by religious or other charitable nonprofits if she sits on its board and ratifies its decisions or employment policies?⁴⁵
- May a lawyer participate in a panel discussion only if all the lawyers on the panel speak in favor of the inclusion of various groups as protected classes in a nondiscrimination law being debated in the state legislature?
- Is a lawyer at risk if she provides legislative testimony in favor of adding new protected classes to state or local civil rights laws, but only if religious exemptions (which some consider “a license to discriminate”) are also added?⁴⁶
- Is a lawyer subject to discipline for comment letters she writes as a lawyer expressing her personal views on proposed Title IX regulations, immigration issues, census questions, re-districting proposals, or capital gains tax proposals?
- Is a lawyer who is running for public office subject to discipline for socio-economic discrimination if she proposes that college loans be forgiven only for graduates earning below a certain income level?
- Is a lawyer subject to discipline for failing to use “preferred” pronouns or names that she believes are not objectively accurate?⁴⁷
- Is a lawyer subject to discipline for serving on the board of an organization that discriminates based on sex, such as a social fraternity or sorority?
- Is a lawyer at risk for volunteer legal work for political candidates who take controversial positions?
- Is a lawyer at risk for any pro bono work that involves advocating for or against controversial socioeconomic, religious, social, or political positions?

Professor Eugene Volokh has explored whether discipline under ABA Model Rule 8.4(g) could be triggered by conversation on a wide range of topics at a local bar dinner, explaining:

⁴⁴ Debra Cassens Weiss, *BigLaw Partner Deletes Twitter Account after Profane Insult Toward Sarah Huckabee Sanders*, ABA Journal, Oct. 1, 2018 (noting that the lawyer had been honored in 2009 by the ABA Journal “for his innovative use of social media in his practice”), http://www.abajournal.com/news/article/biglaw_partner_deletes_twitter_account_after_profane_insult_toward_sarah_hu.

⁴⁵ See D.C. Bar Legal Ethics, Opinion 222 (1991) (punting the issue of whether a lawyer could be disciplined for arguably discriminatory employment decisions made by his church or a religious nonprofit while he was on its board), <https://www.dcbare.org/bar-resources/legal-ethics/opinions/opinion222.cfm>.

⁴⁶ The Montana Legislature passed a resolution expressing its concerns about the impact of ABA Model Rule 8.4(g) on “the speech of legislative staff and legislative witnesses, who are licensed by the Supreme Court of the State of Montana to practice law, when they are working on legislative matters or testifying about legislation before Legislative Committees.” See *infra* notes 144.

⁴⁷ See, e.g., *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021) (tenured professor’s free speech implicated when he was disciplined by university for violating its nondiscrimination policies because he refused to address a transgender student using the student’s preferred gender identity title and pronouns).

Or say that you're at a lawyer social activity, such as a local bar dinner, and say that you get into a discussion with people around the table about such matters — Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on. One of the people is offended and files a bar complaint.

Again, you've engaged in "verbal . . . conduct" that the bar may see as "manifest[ing] bias or prejudice" and thus as "harmful." This was at a "social activit[y] in connection with the practice of law." The state bar, if it adopts this rule, might thus discipline you for your "harassment."⁴⁸

Professor Josh Blackman similarly has a thought-provoking list of CLE topics that would expose their presenters to grievance complaints by persons who disagree with the ideas or beliefs that a lawyer expresses.⁴⁹

Sadly, we live at a time when many people, including lawyers, are willing to suppress the free speech of those with whom they disagree.⁵⁰ Such a troubling situation arose in Alaska when the Anchorage Equal Rights Commission (AERC) filed a complaint against an Anchorage law firm, alleging that the firm violated a municipal nondiscrimination law. The firm represented a religiously affiliated, private nonprofit shelter for homeless women, many of whom had been abused by men. The firm represented the shelter in a proceeding arising from a discrimination complaint filed with the AERC, alleging that the shelter had refused admission to a biological male who identified as female. The shelter denied the complaint, explaining that it had denied shelter to the individual because, among other things, of its policy against admitting persons who were inebriated, but acknowledging that it also had a policy against admitting biological men. The law firm responded to an unsolicited request for a media interview. When the interview was published providing the shelter's version of the facts, the AERC brought a discrimination claim

⁴⁸ Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' including in Law-Related Social Activities*, The Washington Post, Aug. 10, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?tid=a_inl&utm_term=.f4beacf8a086.

⁴⁹ Blackman, *supra* note 27 at 246.

⁵⁰ See, e.g., Aaron Haviland, "I Thought I Could Be a Christian and Constitutionalist at Yale Law School. I Was Wrong," The Federalist (Mar. 4, 2019), <http://thefederalist.com/2019/03/04/thought-christian-constitutionalist-yale-law-school-wrong/> (student president of Yale Law School chapter of the Federalist Society describing significant harassment by other Yale Law students and student organizations because they did not like the ideas that they ascribed (accurately or inaccurately) to Federalist Society members and guest speakers).

against the law firm alleging it had published a discriminatory policy. The AERC complaint was eventually dismissed, but only after several months of legal proceedings.⁵¹

Because lawyers frequently are the spokespersons and leaders in political, social, religious, or cultural movements, a rule that can be employed to discipline a lawyer for his or her speech on controversial issues should be rejected because it constitutes a serious threat to a civil society in which freedom of speech, free exercise of religion, and freedom of political belief flourish. In a time when respect for First Amendment rights seems to diminish by the day, lawyers can ill-afford to wager their licenses on a rule that may be utilized to punish their speech.

At bottom, ABA Model Rule 8.4(g) has a “fundamental defect” because it “wrongly assumes that the only attorney speech that is entitled to First Amendment protection is purely private speech which is entirely unrelated to the practice of law. But the First Amendment provides robust protection to attorney speech.”⁵² ABA Model Rule 8.4(g) creates doubt as to whether particular speech is permissible and, therefore, will inevitably chill lawyers’ public speech.⁵³ In all likelihood, it will chill speech on one side of current political and social issues, while simultaneously creating little disincentive for lawyers who speak on the opposing side of these controversies.⁵⁴ If so, public discourse and civil society will suffer from the ideological straitjacket that ABA Model Rule 8.4(g) will impose on lawyers.

C. Attorneys could be subject to discipline for guidance they offer when serving on the boards of their congregations, religious schools and colleges, or other nonprofit charities.

Many lawyers sit on the boards of their congregations, religious schools and colleges, and other religious nonprofit organizations. These organizations provide incalculable good to people in their local communities, as well as nationally and internationally. They also face innumerable legal questions and regularly turn to the lawyers serving as volunteers on their boards for pro bono guidance.⁵⁵

⁵¹ *Basler v. Downtown Hope Center, et al.* Case No. 18-167, Anchorage Equal Rights Comm’n (May 15, 2018).

⁵² Tenn. Att’y Gen. Letter, Letter from Attorney General Slatery to Supreme Court of Tennessee (Mar. 16, 2018) at 7 (hereinafter “Tenn. Att’y Gen. Letter”), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf>. The letter is incorporated into Tennessee Attorney General Opinion 18-11; however, for purposes of quoting the letter, we cite to the page numbers of the letter rather than the opinion. (“[T]he goal of the proposed rule is to *subject* to regulatory scrutiny all attorney expression that is in any way connected with the practice of law. That approach is wholly inconsistent with the First Amendment.”) (Emphasis in original.)

⁵³ *Id.* at 8 (“Even if the [Board of Professional Responsibility] may ultimately decide not to impose disciplinary sanctions on the basis of such speech, or a court may ultimately invalidate on First Amendment grounds any sanction imposed, the fact that the rule on its face would apply to speech of that nature would undoubtedly chill attorneys from engaging in speech in the first place.”)

⁵⁴ McGinniss, *supra* note 2, at 217-249 (explaining the “justified distrust of speech restrictions” such as Model Rule 8.4(g), in light of its proponents’ stated desire “for a cultural shift . . . to be captured in the rules of professional conduct”).

⁵⁵ Tex. Att’y Gen. Op., *supra* note 42, at 4 (“Model Rule 8.4(g) could also be applied to restrict an attorney’s religious liberty and prohibit an attorney from zealously representing faith-based groups.”).

As a volunteer on a charitable institution's board, a lawyer arguably is engaged "in conduct related to the practice of law" when serving on the risk management committee or providing legal input during a board discussion about the institution's policies. For example, a lawyer may be asked to help craft her congregation's policy regarding whether its clergy will perform marriages or whether the institution's facilities may be used for wedding receptions that are contrary to its religious beliefs. A religious college may ask a lawyer who serves on its board of trustees to review its housing policy or its student code of conduct. Drafting and reviewing legal policies may qualify as "conduct related to the practice of law," but surely a lawyer should not fear being disciplined for pro bono legal work that she performs for her church or her alma mater.⁵⁶ By making New York lawyers hesitant to serve on these nonprofit boards, ABA Model Rule 8.4(g) would do real harm to religious and charitable institutions and hinder their good works in their communities.

D. Attorneys' membership in religious, social, or political organizations could be subject to discipline.

ABA Model Rule 8.4(g) could chill lawyers' willingness to associate with political, cultural, or religious organizations that promote traditional values regarding sexual conduct and marriage. Would ABA Model Rule 8.4(g) subject lawyers to disciplinary action for participating with their children in youth organizations that teach traditional values regarding sexual conduct or marriage?⁵⁷ Would lawyers be subject to disciplinary action for belonging to political organizations that advocate for laws that promote traditional values regarding sexual conduct and marriage?

The late Professor Rotunda and Professor Dzienkowski expressed concern that ABA Model Rule 8.4(g) would subject lawyers to discipline for attending events sponsored by the St. Thomas More Society, an organization of Catholic lawyers and judges who meet together to share their faith.⁵⁸ State attorneys general have voiced similar concerns.⁵⁹ Several attorneys general have warned that "serving as a member of the board of a religious organization,

⁵⁶ See D.C. Bar Legal Ethics, Opinion 222, *supra* note 45. See also, Tenn. Att'y Gen. Letter, *supra* note 49, at 8 n.8 ("statements made by an attorney in his or her capacity as a member of the board of a nonprofit or religious organization" "could be deemed sufficiently 'related to the practice of law' to fall within the scope of Proposed Rule 8.4(g)").

⁵⁷ For example, in 2015, the California Supreme Court adopted a disciplinary rule that prohibited all California state judges from participating in Boy Scouts. Calif. Sup. Ct., Media Release, "Supreme Court Eliminates Ethics Exception that Permitted Judges to Belong to Nonprofit Youth Organizations that Discriminate," Jan. 23, 2015, http://www.courts.ca.gov/documents/sc15-Jan_23.pdf.

⁵⁸ Rotunda & Dzienkowski, *supra* note 24, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."

⁵⁹ Tex. Att'y Gen. Op., *supra* note 42, at 5 ("Many attorneys belong to faith-based legal organizations, such as a Christian Legal Society, a Jewish Legal Society, or a Muslim Legal Society, but Model Rule 8.4(g) could curtail such participation for fear of discipline."); La. Att'y Gen. Op., *supra* note 42, at 6 ("Proposed 8.4(h) could apply to many of the faith-based legal societies such as the Christian Legal Society, Jewish Legal Society, and Muslim Legal Society.").

participating in groups such as Christian Legal Society or even speaking about how one’s religious beliefs influence one’s work as an attorney” could “be deemed conduct ‘related to the practice of law.’”⁶⁰ Attorneys should not have to choose between their faith and their livelihood.

E. ABA Model Rule 8.4(g)’s potential for chilling New York attorneys’ speech is compounded by its use of a negligence standard rather than a knowledge requirement.

The lack of a knowledge requirement is a serious flaw: “[T]he proposed rule would subject an attorney to professional discipline for uttering a statement that was not actually known to be or intended as harassing or discriminatory, simply because someone might construe it that way.”⁶¹ Professor Dane Ciolino, an ethics law professor at Loyola University New Orleans College of Law, has explained:

[ABA Model Rule 8.4(g)] subjects to discipline not only a lawyer who *knowingly* engages in harassment or discrimination, but also a lawyer who *negligently* utters a derogatory or demeaning comment. So, a lawyer who did not *know* that a comment was offensive will be disciplined if the lawyer *should have known* that it was. It will be interesting to see how the ‘objectively reasonable lawyer’ will be constructed for purposes of making this determination.⁶²

ABA Model Rule 8.4(g) is perilous because the list of words and conduct deemed “discrimination” or “harassment” is ever shifting, often in unanticipated ways. Phrases that were generally acceptable ten years ago may now be critiqued as discriminating against or harassing a person in one of the eleven enumerated categories.

F. ABA Model Rule 8.4(g) does not preclude a finding of professional misconduct based on a lawyer’s “implicit bias.”

This negligence standard makes it entirely foreseeable that ABA Model Rule 8.4(g) could reach communication or conduct that demonstrates “implicit bias, that is, conduct or speech that the lawyer is not consciously aware may be discriminatory.” As Dean McGinniss notes, “this relaxed mens rea standard” might even be used to “more explicitly draw lawyers’ speech reflecting unconscious, or ‘implicit,’ bias within the reach of the rule.”⁶³ Acting Law Professor Irene Oritseyinmi Joe recently argued that while ABA Model Rule 8.4(g) “addresses explicit attorney bias, . . . it also provides a vehicle for those tasked with governing attorney behavior to

⁶⁰ Tenn. Att’y Gen. Letter, *supra* note 52, at 10.

⁶¹ *Id.* at 5. See Halaby & Long, *supra* note 30, at 243-245.

⁶² Prof. Dane S. Ciolino, *LSBA Seeks Public Comment on Proposed Anti-Discrimination Rule of Professional Conduct*, Louisiana Legal Ethics (Aug. 6, 2017) (emphasis in original), <https://lalegaethics.org/lsba-seeks-public-comment-on-proposed-anti-discrimination-rule-of-professional-conduct/>.

⁶³ McGinniss, *supra* note 2, at 205 & n.135.

address implicit bias.”⁶⁴ She explains that “the rule’s use of ‘knows or reasonably should know’ arguably includes an understanding and reflection of unconscious bias and its effects.”⁶⁵

Proponents of ABA Model Rule 8.4(g) often are likewise proponents of the ABA’s “Implicit Bias Initiative.”⁶⁶ On its webpages devoted to its “Implicit Bias Initiative,” the ABA defines “implicit bias” and “explicit biases” as follows:⁶⁷

Explicit biases: Biases that are directly expressed or publicly stated or demonstrated, often measured by self-reporting, *e.g.*, “I believe homosexuality is wrong.” A preference (positive or negative) for a group based on stereotype.

Implicit bias: A preference (positive or negative) for a group based on a stereotype or attitude we hold that *operates outside of human awareness* and can be understood as a lens through which a person views the world that automatically filters how a person takes in and acts in regard to information. Implicit biases are usually measured indirectly, often using reaction times.

One can agree that implicit bias exists and still believe that bias “outside of human awareness” should not be grounds for a lawyer’s loss of licensure or her suspension, censure, or admonition.⁶⁸ But nothing would prevent a charge of discrimination based on “implicit bias” from being brought against an attorney under ABA Model Rule 8.4(g).⁶⁹ Such charges are foreseeable given that ABA Model Rule 8.4(g)’s “proponents repeatedly invoked that concept [of implicit bias] in arguing against any knowledge qualifier at all.”⁷⁰

⁶⁴ Irene Oritseweyinmi Joe, *Regulating Implicit Bias in the Federal Criminal Process*, 108 Calif. L. Rev. 965, 975 (2020) (ABA Model Rule 8.4(g) “addresses explicit attorney bias, but I argue that it also provides a vehicle for those tasked with governing attorney behavior to address implicit bias.”).

⁶⁵ *Id.* at 978 n.70.

⁶⁶ See Halaby & Long, *supra* note 30, at 216-217, 243-245. Halaby and Long eventually conclude that implicit-bias conduct probably would not fall within the “reasonably should know” standard. *Id.* at 244-245. We are not so certain.

⁶⁷ ABA Section on Litigation, *Implicit Bias Initiative, Toolbox, Glossary of Terms* (Jan. 23, 2012), <https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/implicit-bias-toolbox/glossary/#23>

⁶⁸ Halaby & Long, *supra* note 30, at 245 (“Even crediting the existence of implicit bias as well as corresponding concerns over its impact on the administration of justice, one recoils at the dystopian prospect of punishing a lawyer over unconscious behavior.”). See also, McGinnis, *supra* note 2, at 204-205; Dent, *supra* note 27, at 144.

⁶⁹ See, *e.g.*, Irene Oritseweyinmi Joe, *supra* note 64 (ABA Model Rule 8.4(g) “addresses explicit attorney bias, but I argue that it also provides a vehicle for those tasked with governing attorney behavior to address implicit bias.”); *id.* at 978n.70 (“[T]he rule’s use of ‘knows or reasonably should know’ arguably includes an understanding and reflection of unconscious bias and its effects.”).

⁷⁰ Halaby & Long, *supra* note 30, at 244 (“When a new anti-bias rule proved unsaleable without a knowledge qualifier, one was added, but only with the alternative ‘reasonably should know’ qualifier alongside. That addition was not subjected to comment by the public or by the bar or the ABA’s broader membership.”) (footnote omitted).

G. Despite its nod to speech concerns, ABA Model Rule 8.4(g) will chill speech and cause lawyers to self-censor in order to avoid grievance complaints.

ABA Model Rule 8.4(g) itself recognizes its potential for silencing lawyers when it asserts that it “does not preclude legitimate advice or advocacy consistent with these rules.” This provision affords no substantive protection for attorneys’ speech: It merely asserts that the rule does not do what it in fact does. And what qualifies as “legitimate” advice or advocacy? Or what “legitimate” advice or advocacy is not “consistent with these rules”? And who makes that determination?

This is a constitutional thicket. Because enforcement of proposed ABA Model Rule 8.4(g) gives government officials unbridled discretion to determine which speech is permissible and which is impermissible, the rule clearly invites viewpoint discrimination based on government officials’ subjective biases. Courts have recognized that giving any government official unbridled discretion to suppress citizens’ free speech is unconstitutional viewpoint discrimination.⁷¹

Proponents of ABA Model Rule 8.4(g) often try to reassure its critics that the rule actually will only rarely be used and to trust that its use will be judicious. But it is not enough for government officials to promise to be careful in their enforcement of a rule that lawyers have reason to fear will suppress their speech. As the Supreme Court has observed, “The First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”⁷² Instead, the Court has rejected “[t]he Government’s assurance that it will apply [a statute] far more restrictively than its language provides” because such an assurance “is pertinent only as an *implicit acknowledgment of the potential constitutional problems* with a more natural reading.”⁷³

The *Greenberg* court likewise rejected such assurances by observing that “[government officials] dismiss these concerns with a paternal pat on the head and suggest that the genesis of the disciplinary process is benign and mostly dismissive.” But given “the threat of a disruptive, intrusive, and expensive investigation and investigatory hearing into the [lawyer’s] words, speeches, notes, written materials, videos, mannerisms, and practice of law,” the government is “de facto regulat[ing] speech by threat, thereby chilling speech.”⁷⁴

Moreover, in the landmark case, *National Association for the Advancement of Colored People v. Button*,⁷⁵ which involved a First Amendment challenge to a state statute regulating

⁷¹ See, e.g., *Child Evangelism Fellowship v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 384 (4th Cir. 2006); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 572-574 (7th Cir. 2001).

⁷² *United States v. Stevens*, 599 U.S. 460, 480 (2010).

⁷³ *Id.* (emphasis added).

⁷⁴ *Greenberg*, 491 F. Supp. 3d at 24-25.

⁷⁵ *NAACP v. Button*, 371 U.S. 415 (1963).

attorneys' speech, the Supreme Court ruled that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights," explaining:

If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights. Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.⁷⁶

ABA Model Rule 8.4(g) fails to protect a lawyer from complaints being filed against her based on her speech. It fails to protect a lawyer from an investigation into whether her speech is "harmful" and "manifests bias or prejudice" on the basis of one or more of the eleven protected categories. The provision fails to protect a lawyer from the expense of protracted litigation to defend her speech as protected speech. Litigation in free speech cases often lasts for years. It extracts great personal expense and a significant emotional toll. Even if the investigation or litigation eventually concludes that the lawyer's speech was protected by the First Amendment, the lawyer has had to inform courts that a complaint has been brought and she is under investigation whenever she applies for admission to another bar or seeks to appear pro hac vice in a case. In the meantime, her personal reputation may suffer damage through media reports.

The process is the punishment. This brings us to the real problem with ABA Model Rule 8.4(g). Rather than risk a prolonged investigation with an uncertain outcome, and then lengthy litigation, a rational, risk-averse lawyer will self-censor. Because a lawyer's loss of her license to practice law is a staggering penalty, the calculus is entirely predictable: Better to censor one's own speech than to risk a grievance complaint under ABA Model Rule 8.4(g), as the federal judge warned in *Greenberg*.⁷⁷ The losers are not just the legal profession, but our free civil society, which depends on lawyers to protect—and contribute to—the free exchange of ideas that is its lifeblood.

⁷⁶ *Id.* at 438-39.

⁷⁷ 491 F. Supp. 3d at 24-25.

III. ABA Formal Opinion 493 Ignores Three Recent Supreme Court Decisions that Demonstrate the Likely Unconstitutionality of Rules Like ABA Model Rule 8.4(g) and Predates the Federal Court Decision in *Greenberg v. Haggerty*.

Since the ABA adopted Model Rule 8.4(g) in 2016, the United States Supreme Court has issued three free speech decisions that make clear that it unconstitutionally chills attorneys' speech: *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018); and *Matal v. Tam*, 137 S. Ct. 1744 (2017). The *Becerra* decision clarified that the First Amendment protects "professional speech" just as fully as other speech. That is, there is no free speech carve-out that countenances content-based restrictions on professional speech. The *Matal* and *Iancu* decisions affirm that the terms used in ABA Model Rule 8.4(g) create unconstitutional viewpoint discrimination. In *Greenberg v. Haggerty*, the federal district court relied on these three Supreme Court cases to hold Pennsylvania's version of ABA Model Rule 8.4(g) unconstitutional on its face because it invites viewpoint discrimination.⁷⁸

A. *NIFLA v. Becerra* protects lawyers' speech from content-based restrictions.

Under the Court's analysis in *Becerra*, ABA Model Rule 8.4(g) is an unconstitutional *content*-based restriction on lawyers' speech. The Court held that government restrictions on professionals' speech – including lawyers' professional speech – are generally subject to strict scrutiny because they are content-based speech restrictions and, therefore, presumptively unconstitutional. That is, a government regulation that targets speech must survive strict scrutiny – a close examination of whether the regulation is narrowly tailored to achieve a compelling government interest.

The Court explained that "[c]ontent-based regulations 'target speech based on its communicative content.'"⁷⁹ "[S]uch laws 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.'"⁸⁰ As the Court observed, "[t]his stringent standard reflects the fundamental principle that governments have 'no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"⁸¹

The Court firmly rejected the idea that professional speech is less protected by the First Amendment than other speech, which is the operative assumption underlying ABA Model Rule 8.4(g). In striking down Pennsylvania's Rule 8.4(g), the district court relied on *Becerra* to "find[] that Rule 8.4(g) does not cover 'professional speech' that is entitled to less protection" but

⁷⁸ *Id.*

⁷⁹ *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018), quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

⁸⁰ *Id.*

⁸¹ *Id.*, quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

instead “[t]he speech that Rule 8.4(g) regulates is entitled to the full protection of the First Amendment.”⁸²

To illustrate its point, the Supreme Court noted three recent federal courts of appeals that had ruled that “‘professional speech’ [w]as a separate category of speech that is subject to different rules” and, therefore, less protected by the First Amendment.⁸³ The Court then abrogated those decisions, stressing that “*this Court has not recognized ‘professional speech’ as a separate category of speech. Speech is not unprotected merely because it is uttered by ‘professionals.’*”⁸⁴ The Court rejected the idea that “‘professional speech’ was an exception “from the rule that content-based regulations of speech are subject to strict scrutiny.”⁸⁵

Instead, the Court was clear that a State’s regulation of attorney speech would be subject to strict scrutiny to ensure that any regulation is narrowly tailored to achieve a compelling interest. The Court reaffirmed that its “precedents have long protected the First Amendment rights of professionals” and “has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers.”⁸⁶

B. ABA Formal Opinion 493 and Professor Aviel’s article fail to address the Supreme Court’s decision in *NIFLA v. Becerra*.

1. ABA Formal Opinion 493 fails even to mention *Becerra*.

The ABA Section of Litigation recognized *Becerra*’s impact. Several section members understood that the decision raised grave concerns about the overall constitutionality of ABA Model Rule 8.4(g):

Model Rule 8.4(g) “is intended to combat discrimination and harassment and to ensure equal treatment under the law,” notes Cassandra Burke Robertson, Cleveland, OH, chair of the Appellate Litigation Subcommittee of the Section’s Civil Rights Litigation Committee. While it serves important goals, “*the biggest question about Rule 8.4(g) has been whether it unconstitutionally infringes on lawyers’ speech rights—and after the Court’s decision in *Becerra*, it increasingly looks like the answer is yes,*” Robertson concludes.⁸⁷

⁸² *Greenberg*, 491 F. Supp. 3d at 27-30.

⁸³ *NIFLA*, 138 S. Ct. at 2371.

⁸⁴ *Id.* at 2371-72 (emphasis added).

⁸⁵ *Id.* at 2371.

⁸⁶ *Id.* at 2374.

⁸⁷ C. Thea Pitzen, *First Amendment Ruling May Affect Model Rules of Professional Conduct: Is Model Rule 8.4(g)*

But two years after *Becerra*, in July 2020, the ABA’s Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 493, “Model Rule 8.4(g): Purpose, Scope, and Application.” *Formal Opinion 493 does not even mention the Supreme Court’s Becerra decision*, even though it was handed down two years earlier and has been frequently relied upon to identify ABA Model Rule 8.4(g)’s constitutional deficiencies. This lack of mention, let alone analysis, is inexplicable. Formal Opinion 493 has a four-page section that discusses “Rule 8.4(g) and the First Amendment, “ yet never mentions the United States Supreme Court’s on-point decisions in *Becerra*, *Matal*, and *Iancu*.⁸⁸ Like the proverbial ostrich burying its head in the sand, the ABA adamantly refuses to see the deep flaws of Model Rule 8.4(g). But New York attorneys deserve honest scrutiny of a rule that would “hang over [New York] attorneys like the sword of Damocles.”⁸⁹

Instead, Formal Opinion 493 serves to underscore the breadth of ABA Model Rule 8.4(g) and the fact that it is intended to restrict lawyers’ speech. The Opinion reassures that it will only be used for “harmful” conduct, which the Rule makes clear includes “verbal conduct” or “speech.”⁹⁰ Formal Opinion 493 explains that the Rule’s scope “is *not* restricted to conduct that is severe or pervasive.”⁹¹ Violations will “*often* be intentional and *typically* targeted at a particular individual or group of individuals.” This merely confirms that a lawyer can be disciplined for speech that is not necessarily intended to harm and that does not necessarily “target” a particular person or group.⁹²

Formal Opinion 493 claims that “[t]he Rule does not prevent a lawyer from freely expressing opinions and ideas on matters of public concern.” But that is hardly reassuring because “matters of public concern” is a term of art in free speech jurisprudence that appears in the context of the broad limits that the government is allowed to place on its employees’ free speech. The category actually provides *less*, rather than more, protection for free speech.⁹³ And it may even reflect the alarming notion that lawyers’ speech is akin to government speech, a topic

Constitutional?, ABA Section of Litigation Top Story (Apr. 3, 2019), <https://www.americanbar.org/groups/litigation/publications/litigation-news/top-stories/2019/first-amendment-ruling-may-affect-model-rules-prof-cond/> (emphasis added).

⁸⁸ American Bar Association Standing Comm. on Ethics and Prof. Resp., Formal Op., 493, *Model Rule 8.4(g): Purpose, Scope, and Application* (July 15, 2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-493.pdf.

⁸⁹ *Greenberg*, 491 F. Supp. 3d at 24.

⁹⁰ *Id.* at 1.

⁹¹ *Id.* (emphasis added).

⁹² *Id.*

⁹³ *Garcetti v. Cabellos*, 547 U.S. 410, 417 (2006) (“the First Amendment protects a public employee’s right, in certain circumstances, to speak as a citizen addressing matters of public concern”); *id.* at 418 (“To be sure, conducting these inquiries sometimes has proved difficult.”).

that Professor Aviel briefly mentions in her article.⁹⁴ If lawyers' speech is treated as the government's speech, then lawyers have minimal protection for their speech.

Formal Opinion 493 claims that ABA Model Rule 8.4(g) does not "limit a lawyer's speech or conduct in settings unrelated to the practice of law," but fails to grapple with just how broadly the Rule defines "conduct related to the practice of law," for example, to include social settings.⁹⁵ In so doing, Formal Opinion 493 ignores the Court's instruction in *Becerra* that lawyers' *professional* speech – not just their speech "unrelated to the practice of law" – is protected by the First Amendment under a strict scrutiny standard.

Formal Opinion 493 concedes that its definition of the term "harassment" is not the same as the EEOC uses,⁹⁶ citing *Harris v. Forklift Systems, Inc.*, which ruled that "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview."⁹⁷ ABA Model Rule 8.4(g)'s definition of "harassment" in Comment [3] includes "derogatory or demeaning verbal or physical conduct." Of course, this definition runs headlong into the Supreme Court's ruling that the mere act of government officials determining whether speech is "disparaging" is viewpoint discrimination that violates freedom of speech. In Formal Opinion 493, the ABA offers a new definition for "harassment" ("aggressively invasive, pressuring, or intimidating") that is not found in ABA Model Rule 8.4(g). Formal Opinion 493 signifies that the ABA itself recognizes that the term "harassment" is the Rule's Achilles' heel.

2. The Aviel article fails to mention *Becerra* and, therefore, is not a reliable source of information on the constitutionality of ABA Model Rule 8.4(g).

Professor Rebecca Aviel's article, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 Geo. J. L. Ethics 31 (2018), should not be relied upon in assessing ABA Model Rule 8.4(g)'s constitutionality because it too fails to mention *Becerra*. It seems probable that the article was written before the Supreme Court issued *Becerra*.

Of critical importance, Professor Aviel's article rests on the assumption that "regulation of the legal profession is legitimately regarded as a 'carve-out' from the general marketplace" that "appropriately empowers bar regulators to restrict the speech of judges and lawyers in a

⁹⁴ Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 Geo. J. L. Ethics 31, 34 (2018) ("[L]awyers have such an intimate relationship with the rule of law that they are not purely private speakers. Their speech can be limited along lines analogous with government actors because, in a sense, they embody and defend the law itself"). The mere suggestion that lawyers' speech is akin to government actors' speech, which is essentially government speech that is unprotected by the First Amendment, is deeply troubling and should be soundly rejected.

⁹⁵ Formal Op. 493, *supra* note 89, at 1.

⁹⁶ *Id.* at 4 & n.13.

⁹⁷ 510 U.S. 17, 21 (1993)

manner that would not be permissible regulation of the citizenry in the general marketplace.”⁹⁸ But this is precisely the assumption that the Supreme Court *rejected* in *Becerra*. Contrary to Professor Aviel’s assumption, the Court explained in *Becerra* that the First Amendment does not contain a carve-out for “professional speech.”⁹⁹ Instead, the Court used lawyers’ speech as an example of protected speech.

Because she wrote without the benefit of *Becerra*, compounded by her reliance on basic premises repudiated by the Court in *Becerra*, her free speech analysis cannot be relied upon as authoritative. Interestingly, even without the *Becerra* decision to guide her, Professor Aviel conceded that the “expansiveness” of ABA Model Rule 8.4(g)’s comments “may well raise First Amendment overbreadth concerns.”¹⁰⁰

C. Under *Matal v. Tam* and *Iancu v. Brunetti*, ABA Model Rule 8.4(g) fails viewpoint-discrimination analysis.

As the federal district court held in *Greenberg*, under the Court’s analysis in *Matal*, ABA Model Rule 8.4(g) is an unconstitutional *viewpoint*-based restriction on lawyers’ speech. In *Matal*, a unanimous Court held that a federal statute was facially unconstitutional because it allowed government officials to penalize “disparaging” speech. In his concurrence, Justice Kennedy, joined by Justices Ginsburg, Sotomayor, and Kagan, observed that it is unconstitutional to suppress speech that “*demeans* or offends.”¹⁰¹ The Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is blatant viewpoint discrimination and, therefore, unconstitutional.¹⁰²

In *Matal*, all nine justices agreed that a provision of a longstanding federal law, the Lanham Act, was unconstitutional because it allowed government officials to deny trademarks for terms that may “disparage or bring into contempt or disrepute” living or dead persons. Allowing government officials to determine what words do and do not “disparage” a person “offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.”¹⁰³ Justice Alito, writing for a plurality of the Court, noted that “[s]peech that *demeans* on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”¹⁰⁴

⁹⁸ Aviel, *supra* note 95, at 39 (citation and quotation marks omitted); *see also id.* at 44.

⁹⁹ *Becerra*, 138 S. Ct. at 2371.

¹⁰⁰ Aviel, *supra* note 95, at 48.

¹⁰¹ *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring)(emphasis supplied).

¹⁰² *Id.* at 1753-1754, 1765 (plurality op.).

¹⁰³ *Id.* at 1751 (quotation marks and ellipses omitted).

¹⁰⁴ *Id.* at 1764, quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)(emphasis supplied).

In his concurrence, joined by Justices Ginsburg, Sotomayor, and Kagan, Justice Kennedy stressed that “[t]he danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate,” particularly “if the ideas or perspectives are ones a particular audience might think offensive.”¹⁰⁵ Justice Kennedy closed with a sober warning:

A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government’s benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.¹⁰⁶

Justice Kennedy explained that the federal statute was unconstitutional viewpoint discrimination because the government permitted “a positive or benign mark but not a *derogatory* one,” which “reflects the Government’s disapproval of a subset of messages it finds offensive,” which is “the essence of viewpoint discrimination.”¹⁰⁷ And it was viewpoint discriminatory even if it “applies in equal measure to any trademark that *demeans* or offends.”¹⁰⁸

In 2019, the Supreme Court reaffirmed its rigorous rejection of viewpoint discrimination. The challenged terms in *Iancu* were “immoral” and “slanderous” and, once again, the Court found the terms were viewpoint discriminatory because they allowed government officials to pick and choose which speech to allow.

In her opinion for the Court, Justice Kagan explained that “immoral” and “scandalous” insert a “facial viewpoint bias in the law [that] results in viewpoint-discriminatory application.”¹⁰⁹ The Act was unconstitutional because:

[I]t allows registration of marks when their messages accord with, but not when their messages defy, society’s sense of decency or propriety. Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. The statute favors the former, and disfavors the latter.¹¹⁰

¹⁰⁵ *Id.* at 1767 (Kennedy, J., concurring).

¹⁰⁶ *Id.* at 1769 (Kennedy, J., concurring).

¹⁰⁷ *Id.* at 1766 (Kennedy, J., concurring)(emphasis supplied).

¹⁰⁸ *Id.* (emphasis supplied).

¹⁰⁹ *Iancu v. Brunetti*, 139 S. Ct. 2294, 2300 (2019).

¹¹⁰ *Id.*

D. ABA Model Rule 8.4(g)'s terms "harassment" and "discrimination" are viewpoint discriminatory.

Because ABA Model Rule 8.4(g) would punish lawyers' speech on the basis of viewpoint, it is unconstitutional under the analyses in *Matal* and *Iancu*. As Comment [3] explains, under ABA Model Rule 8.4(g), "discrimination includes *harmful* verbal . . . conduct that manifests bias or prejudice towards others." And harassment includes "*derogatory* or *demeaning* verbal . . . conduct."

Under the *Matal* and *Iancu* analyses, these definitions are textbook examples of viewpoint discrimination. In *Matal*, the Supreme Court unanimously held that a federal statute was facially unconstitutional because it allowed government officials to penalize "disparaging" speech. The Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is blatant viewpoint discrimination and, therefore, unconstitutional.¹¹¹ A rule that permits government officials to punish lawyers for speech that the government determines to be "harmful" or "derogatory or demeaning" is the epitome of an unconstitutional rule.

As explained earlier, viewpoint discrimination occurs when government officials have unbridled discretion to determine the meaning of a statute, rule, or policy in such a way that they can favor particular viewpoints while penalizing other viewpoints. The provision of ABA Model Rule 8.4(g) that exempts "*legitimate* advice or advocacy *consistent with these rules*" permits such unbridled discretion, as do the terms "harmful" and "derogatory or demeaning."¹¹²

Finally, in addition to unconstitutional viewpoint discrimination, the vagueness in the terms "harassment" and "discrimination" will necessarily chill lawyers' speech. The terms further fail to give lawyers fair notice of what speech might subject them to discipline. At bottom, ABA Model Rule 8.4(g) fails to provide the clear enforcement standards that are necessary when the loss of one's livelihood may be at stake.

IV. The ABA's Original Claim that 24 States have a Rule Similar to ABA Model Rule 8.4(g) Is Not Accurate Because Only Vermont and New Mexico have Fully Adopted ABA Model Rule 8.4(g).

When the ABA adopted Model Rule 8.4(g), it claimed that "as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers."¹¹³ But this claim has been shown to be factually incorrect. As the 2019 edition of the *Annotated Rules*

¹¹¹ 137 S. Ct. at 1753-1754, 1765 (plurality op.); *see also, id.* at 1766 (unconstitutional to suppress speech that "demeans or offends") (Kennedy, J., concurring, joined by JJ. Ginsburg, Sotomayor, and Kagan).

¹¹² *See supra*, at p. 18 & n.72.

¹¹³ *See, e.g.*, Letter from John S. Gleason, Chair, Center for Professional Responsibility Policy Implementation Committee, to Chief Justice Pleicones, Chief Justice, Supreme Court of South Carolina, September 29, 2016, https://www.sbar.org/media/filer_public/f7/76/f7767100-9bf0-4117-bfeb-c1c84c2047eb/hod_materials_january_2017.pdf, at 56-57.

of Professional Conduct states: “Over half of all jurisdictions have a specific rule addressing bias and/or harassment – *all of which differ in some way from the Model Rule [8.4(g)] and from each other.*”¹¹⁴

No empirical evidence, therefore, supports the claim that ABA Model Rule 8.4(g) will not impose an undue burden on lawyers. As even its proponents have conceded, ABA Model Rule 8.4(g) does not replicate any black letter rule adopted by a state supreme court before 2016. Twenty-four states, including New York, had adopted some version of a black letter rule dealing with “bias” issues before the ABA promulgated Model Rule 8.4(g) in 2016; *however, each of these black letter rules was narrower than ABA Model Rule 8.4(g).*¹¹⁵ Thirteen states had adopted a comment rather than a black letter rule to deal with bias issues. Fourteen states had adopted neither a black letter rule nor a comment.

A proponent of ABA Model Rule 8.4(g) observed that “[a]lthough courts in twenty-five American jurisdictions (twenty-four states and Washington, D.C.) have adopted anti-bias rules in some form, these rules differ widely.”¹¹⁶ He highlighted the primary differences between these pre-2016 rules and ABA Model Rule 8.4(g):

Most contain the nexus “in the course of representing a client” or its equivalent. Most tie the forbidden conduct to a lawyer’s work in connection with the “administration of justice” or, more specifically, to a matter before a tribunal. Six jurisdictions’ rules require that forbidden conduct be done “knowingly,” “intentionally,” or “willfully.” Four jurisdictions limit the scope of their rules to conduct that violates federal or state anti-discrimination laws and three of these require that a complainant first seek a remedy elsewhere instead of discipline if one is available. Only four jurisdictions use the word “harass” or variations in their rules.¹¹⁷

¹¹⁴ Ellen J. Bennett & Helen W. Gunnarsson, Ctr. for Prof. Resp., American Bar Association, *Annotated Model Rules of Professional Conduct* 743, (9th ed. 2019) (emphasis supplied).

¹¹⁵ *Working Discussion Draft – Revisions to Model Rule 8.4 Language Choice Narrative* (July 16, 2015), App. B, *Anti-Bias Provisions in State Rules of Professional Conduct*, at 11-32, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf.

¹¹⁶ Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 *Geo. J. Legal Ethics* 195, 208 (2017) (footnotes omitted).

¹¹⁷ *Id.* at 208.

V. Official Entities in Arizona, Idaho, Illinois, Montana, New Hampshire, North Dakota, South Carolina, South Dakota, Tennessee, and Texas have Rejected ABA Model Rule 8.4(g), and Louisiana, Minnesota, and Nevada have Abandoned Efforts to Impose it on Their Attorneys.

Federalism's great advantage is that one state can reap the benefit of other states' experience. Prudence counsels waiting to see whether states, besides Vermont and New Mexico, adopt ABA Model Rule 8.4(g), and then observing the effects of its real-life implementation on attorneys in those states. This is particularly true when ABA Model Rule 8.4(g) has failed to survive close scrutiny by official entities in many states.¹¹⁸

A. Several State Supreme Courts have rejected ABA Model Rule 8.4(g).

The Supreme Courts of **Arizona, Idaho, Montana, New Hampshire, South Dakota, Tennessee, and South Carolina** have officially rejected adoption of ABA Model Rule 8.4(g). In August 2018, after a public comment period, the **Arizona** Supreme Court rejected a petition from the Central Arizona Chapter of the National Lawyer Guild urging adoption of ABA Model Rule 8.4(g).¹¹⁹ In September 2018, the **Idaho** Supreme Court rejected a resolution by the Idaho State Bar Association to adopt a modified version of ABA Model Rule 8.4(g).¹²⁰ The **Montana** Supreme Court considered but chose not to adopt ABA Model Rule 8.4(g).¹²¹

In April 2018, after a public comment period, the Supreme Court of **Tennessee** denied a petition to adopt a slightly modified version of ABA Model Rule 8.4(g).¹²² The petition had been filed by the Tennessee Bar Association and the Tennessee Board of Professional Responsibility. The Tennessee Attorney General filed a comment letter, explaining that a black letter rule based on ABA Model Rule 8.4(g) "would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct."¹²³ In June 2017, the Supreme Court of **South Carolina** rejected adoption of ABA Model Rule 8.4(g).¹²⁴ The Court acted after the state

¹¹⁸ McGinniss, *supra* note 2, at 213-217.

¹¹⁹ Arizona Supreme Court Order re: No. R-17-0032 (Aug. 30, 2018), https://www.clsreligiousfreedom.org/sites/default/files/site_files/Rules%20Agenda%20Denial%20of%20Amending%208.4.pdf.

¹²⁰ Idaho Supreme Court, Letter to Executive Director, Idaho State Bar (Sept. 6, 2018), [https://www.clsreligiousfreedom.org/sites/default/files/site_files/ISC%20Letter%20-%20IRPC%208.4\(g\).pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ISC%20Letter%20-%20IRPC%208.4(g).pdf).

¹²¹ *In re Petition of the State Bar of Montana for Revision of the Montana Rules of Professional Conduct*, AF 09-0688, at 3 n.2 (Mar. 1, 2019) ("the Supreme Court chose not to adopt the ABA's Model Rule 8.4(g)"), https://www.clsreligiousfreedom.org/sites/default/files/site_files/MT%20Petition%20and%20Memo.pdf.

¹²² The Supreme Court of Tennessee, *In Re: Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g)*, Order No. ADM2017-02244 (Apr. 23, 2018), https://www.tncourts.gov/sites/default/files/order_denying_8.4g_petition_.pdf.

¹²³ Tenn. Att'y Gen. Letter, *supra* note 52, at 1.

¹²⁴ The Supreme Court of South Carolina, *Re: Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct Appellate Case No. 2017-000498*, Order (June 20, 2017),

bar's house of delegates, as well as the state attorney general, recommended against its adoption.¹²⁵ In July 2019, the **New Hampshire** Supreme Court "decline[d] to adopt the rule proposed by the Advisory Committee on Rules."¹²⁶ In March 2020, the Supreme Court of **South Dakota** unanimously decided to deny the proposed amendment to Rule 8.4 because the court was "not convinced that proposed Rule 8.4(g) is necessary or remedies an identified problem."¹²⁷

In May 2019, the **Maine** Supreme Court announced that it had adopted a modified version of ABA Model Rule 8.4(g).¹²⁸ The Maine rule is narrower than the ABA Model Rule in several ways. First, the Maine rule's definition of "discrimination" differs from the ABA Model Rule's definition of "discrimination." Second, its definition of "conduct related to the practice of law" also differs. Third, it covers fewer protected categories. Despite these modifications, if challenged, the Maine rule will likely be found unconstitutional because it overtly targets protected speech.

In June 2020, the **Pennsylvania** Supreme Court adopted a modified version of ABA Model Rule 8.4(g) to take effect December 8, 2020.¹²⁹ A federal district court, however, issued a preliminary injunction on the day it was set to take effect. In *Greenberg v. Haggerty*, the court ruled that Pennsylvania Rule 8.4(g) violated lawyers' freedom of speech under the First Amendment.¹³⁰

In September 2017, the Supreme Court of **Nevada** granted the request of the Board of Governors of the State Bar of Nevada to withdraw its petition urging adoption of Model Rule

<http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01> (if arrive at South Carolina Judicial Department homepage, select "2017" as year and then scroll down to "2017-06-20-01").

¹²⁵ South Carolina Op. Att'y Gen. (May 1, 2017), <http://www.scag.gov/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf>.

¹²⁶ Supreme Court of New Hampshire, Order (July 15, 2019), <https://www.courts.state.nh.us/supreme/orders/7-15-19-order.pdf>. The court instead adopted a rule amendment that had been proposed by the Attorney Discipline Office and is unique to New Hampshire.

¹²⁷ Letter from Chief Justice Gilbertson to the South Dakota State Bar (Mar. 9, 2020), [https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4\(g\)/Proposed_8.4_Rule_Letter_3_9_20.pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4(g)/Proposed_8.4_Rule_Letter_3_9_20.pdf).

¹²⁸ State of Maine Supreme Judicial Court Amendment to the Maine Rules of Professional Conduct Order, 2019 Me. Rules 05 (May 13, 2019), https://www.courts.maine.gov/rules_adminorders/rules/amendments/2019_mr_05_prof_conduct.pdf. Alberto Bernabe, *Maine Adopts (a Different Version of) ABA Model Rule 8.4(g)-Updated*, Professional Responsibility Blog, June 17, 2019 (examining a few differences between Maine rule and ABA Model Rule 8.4(g)), <http://bernabepr.blogspot.com/2019/06/maine-becomes-second-state-to-adopt-aba.html>. See The State of New Hampshire Supreme Court of New Hampshire Order 1, July 15, 2019, ("As of this writing, only one state, Vermont, has adopted a rule that is nearly identical to the model rule. Maine has adopted a rule that is similar, but is not nearly identical, to Model Rule 8.4(g)."), <https://www.courts.state.nh.us/supreme/orders/7-15-19-order.pdf>.

¹²⁹ Supreme Court of Pennsylvania, Order, *In re Amendment of Rule 8.4 of the Pennsylvania Rules of Professional Conduct* (June 8, 2020), <http://www.pacourts.us/assets/opinions/Supreme/out/Order%20Entered%20-%20104446393101837486.pdf?cb=1>.

¹³⁰ 491 F. Supp. 3d 12 (E.D. Pa. 2020).

8.4(g).¹³¹ In a letter to the Court, the State Bar President explained that “the language used in other jurisdictions was inconsistent and changing,” and, therefore, “the Board of Governors determined it prudent to retract [the Petition] with reservation to refile [it] when, and if the language in the rule sorts out in other jurisdictions.”¹³²

B. State Attorneys General have identified core constitutional issues with ABA Model Rule 8.4(g).

In December 2016, the **Texas** Attorney General issued an opinion opposing ABA Model Rule 8.4(g). The Texas Attorney General stated that “if the State were to adopt Model Rule 8.4(g), its provisions raise serious concerns about the constitutionality of the restrictions it would place on members of the State Bar and the resulting harm to the clients they represent.”¹³³ The opinion declared that “[c]ontrary to . . . basic free speech principles, Model Rule 8.4(g) would severely restrict attorneys’ ability to engage in meaningful debate on a range of important social and political issues.”¹³⁴

In 2017, the Attorney General of **South Carolina** determined that “a court could well conclude that the Rule infringes upon Free Speech rights, intrudes upon freedom of association, infringes upon the right to Free Exercise of Religion and is void for vagueness.”¹³⁵ In September 2017, the **Louisiana** Attorney General concluded that “[t]he regulation contained in ABA Model Rule 8.4(g) is a content-based regulation and is presumptively invalid.”¹³⁶ Because of the “expansive definition of ‘conduct related to the practice of law’” and its “countless implications for a lawyer’s personal life,” the Attorney General found the Rule to be “unconstitutionally overbroad as it prohibits and chills a substantial amount of constitutionally protected speech and conduct.”¹³⁷

In March 2018, the Attorney General of **Tennessee** filed Opinion 18-11, *American Bar Association’s New Model Rule of Professional Conduct Rule 8.4(g)*, attaching his office’s comment letter to the Supreme Court of Tennessee, opposing adoption of a proposed rule closely modeled on ABA Model Rule 8.4(g).¹³⁸ After a thorough analysis, the Attorney General

¹³¹ The Supreme Court of the State of Nevada, *In the Matter of Amendments to Rule of Professional Conduct 8.4*, Order (Sep. 25, 2017), <https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf>.

¹³² Letter from Gene Leverty, State Bar of Nevada President, to Chief Justice Michael Cherry, Nevada Supreme Court (Sept. 6, 2017), <https://www.clsnet.org/document.doc?id=1124>.

¹³³ Tex. Att’y Gen. Op., *supra* note 42, at 3.

¹³⁴ *Id.*

¹³⁵ South Carolina Att’y Gen. Op., *supra* note 125, at 13.

¹³⁶ La. Att’y Gen. Op., *supra* note 42.

¹³⁷ *Id.* at 6.

¹³⁸ *American Bar Association’s New Model Rule of Professional Conduct 8.4(g)*, 18 Tenn. Att’y Gen. Op. 11 (Mar. 16, 2018), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2018/op18-11.pdf>.

concluded that the proposed rule “would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct.”¹³⁹

In May 2018, the **Arizona** Attorney General filed a comment letter urging the Arizona Supreme Court to heed the opposition of other states, state attorneys general, and state bar associations to adoption of ABA Model Rule 8.4(g). He also noted the constitutional concerns that ABA Model Rule 8.4(g) raises as to free speech, association, and expressive association.¹⁴⁰

In August 2019, the **Alaska** Attorney General provided a letter to the Alaska Bar Association during a public comment period that it held on adoption of a rule modeled on ABA Model Rule 8.4(g). The letter identified numerous constitutional concerns with the proposed rule.¹⁴¹ The Bar Association’s Rules of Professional Conduct recommended that the Board not advance the proposed rule to the Alaska Supreme Court but instead remand it to the committee for additional revisions, noting that “[t]he amount of comments was unprecedented.”¹⁴² A second comment period closed August 10, 2020.

C. The Montana Legislature recognized the problems that ABA Model Rule 8.4(g) poses for legislators, witnesses, staff, and citizens.

On April 12, 2017, the **Montana** Legislature adopted a joint resolution expressing its view that ABA Model Rule 8.4(g) would unconstitutionally infringe the constitutional rights of Montana citizens, and urging the Montana Supreme Court not to adopt ABA Model Rule 8.4(g).¹⁴³ The impact of Model Rule 8.4(g) on “the speech of legislative staff and legislative witnesses, who are licensed by the Supreme Court of the State of Montana to practice law, when they are working on legislative matters or testifying about legislation before Legislative

¹³⁹ Tenn. Att’y Gen. Letter, *supra* note 52, at 1.

¹⁴⁰ Attorney General Mark Brnovich, *Attorney General’s Comment to Petition to Amend ER 8.4, Rule 42, Arizona Rules of the Supreme Court* (May 21, 2017), <https://www.clsnet.org/document.doc?id=1145>.

¹⁴¹ Letter from Alaska Attorney General to Alaska Bar Association Board of Governors (Aug. 9, 2019), <http://www.law.state.ak.us/pdf/press/190809-Letter.pdf>

¹⁴² Letter from Chairman Murtagh, Alaska Rules of Professional Conduct to President of the Alaska Bar Association (Aug. 30, 2019), [https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4\(g\)/Report.ARPCmte.on8_.4f.pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4(g)/Report.ARPCmte.on8_.4f.pdf). A subsequent public comment period on a revised proposed rule closed August 10, 2020.

¹⁴³ *A Joint Resolution of the Senate and the House of Representatives of the State of Montana Making the Determination that it would be an Unconstitutional Act of Legislation, in Violation of the Constitution of the State of Montana, and would Violate the First Amendment Rights of the Citizens of Montana, Should the Supreme Court of the State of Montana Enact Proposed Model Rule of Professional Conduct 8.4(G)*, SJ 0015, 65th Legislature (Mont. Apr. 25, 2017), <http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf>.

Committees” greatly concerned the legislature.¹⁴⁴ The Montana Supreme Court chose not to adopt ABA model Rule 8.4(g).¹⁴⁵

D. Several state bar associations or committees have rejected ABA Model Rule 8.4(g).

On December 10, 2016, the **Illinois** State Bar Association Assembly “voted overwhelmingly to oppose adoption of the rule in Illinois.”¹⁴⁶ On September 15, 2017, the **North Dakota** Joint Committee on Attorney Standards voted not to recommend adoption of ABA Model Rule 8.4(g), expressing concerns that it was “overbroad, vague, and imposes viewpoint discrimination” and that it might “have a chilling effect on free discourse by lawyers with respect to controversial topics or unpopular views.”¹⁴⁷ On October 30, 2017, the **Louisiana** Rules of Professional Conduct Committee, which had spent a year studying a proposal to adopt a version of Model Rule 8.4(g), voted “not to recommend the proposed amendment to Rule 8.4 to either the House of Delegates or to the Supreme Court.”¹⁴⁸

VI. ABA Model Rule 8.4(g) Would Make it Professional Misconduct for Attorneys to Engage in Hiring Practices that Favor Persons Because they are Women or Belong to Racial, Ethnic, or Sexual Minorities.

A professional ethics expert has explained that “ABA Model Rule 8.4(g)’s flat prohibition covers any discrimination on the basis of race, sex, or any of the other listed attributes” and “extends to any lawyer conduct ‘related to the practice of law,’ including ‘operating or managing a law firm or law practice.’”¹⁴⁹ In written materials for a CLE presentation, the expert concluded that ABA Model Rule 8.4(g) “thus prohibits such discrimination as women-only bar groups or networking events, minority-only recruitment days or mentoring sessions, etc.”¹⁵⁰

¹⁴⁴ *Id.* at 3. The Tennessee Attorney General similarly warned that “[e]ven statements made by an attorney as a political candidate or a member of the General Assembly could be deemed sufficiently ‘related to the practice of law’ to fall within the scope of Proposed Rule 8.4(g).” Tenn. Att’y Gen. Letter, *supra* note 52, at 8 n.8.

¹⁴⁵ See *supra* note 121.

¹⁴⁶ Mark S. Mathewson, *ISBA Assembly Oks Futures Report, Approves UBE and Collaborative Law Proposals*, Illinois Lawyer Now, Dec. 15, 2016, <https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals>.

¹⁴⁷ Letter from Hon. Dann E. Greenwood, Chair, Joint Comm. n Att’y Standards, to Hon. Gerald E. VandeWalle, Chief Justice, N.D. Sup. Ct. (Dec. 14, 2017), at <https://perma.cc/3FCP-B55J>.

¹⁴⁸ Louisiana State Bar Association, *LSBA Rules Committee Votes Not to Proceed Further with Subcommittee Recommendations Re: ABA Model Rule 8.4(g)*, Oct. 30, 2017, <https://www.lsba.org/BarGovernance/CommitteeInfo.aspx?Committee=01fa2a59-9030-4a8c-9997-32eb7978c892>.

¹⁴⁹ The District of Columbia Bar, Continuing Legal Education Program, *Civil Rights and Diversity: Ethics Issues 5-6* (July 12, 2018) (quoting Comment [4] to ABA Model Rule 8.4(g)). The written materials used in the program are on file with Christian Legal Society and may be purchased from the D.C. Bar CLE program. See *supra* note 8.

¹⁵⁰ *Id.* at 6.

He further concluded that ABA Model Rule 8.4(g) would impose a *per se* discrimination ban in hiring practices:¹⁵¹

*[L]awyers will also have to comply with the new per se discrimination ban in their personal hiring decisions. Many of us operating under the old ABA Model Rules Comments or similar provisions either explicitly or sub silentio treated race, sex, or other listed attributes as a “plus” when deciding whom to interview, hire, or promote within a law firm or law department. That is discrimination. It may be well-intentioned and designed to curry favor with clients who monitor and measure law firms’ head count on the basis of such attributes – but it is nevertheless discrimination. **In every state that adopts the new ABA Model Rule 8.4(g), it will become an ethics violation.***

The ethics expert dismissed the idea that Comment [4] of ABA Model Rule 8.4(g) would allow these efforts to promote certain kinds of diversity to continue. Even though Comment [4] states that “[l]awyers may engage in conduct undertaken to promote diversity and inclusion . . . by . . . implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations,” as the ethics expert explained, “[t]his sentence appears to weaken the blanket anti-discrimination language in the black letter rule, but on a moment’s reflection it does not—and could not—do that.”¹⁵²

He provided three reasons to support his conclusion that efforts to promote certain kinds of diversity would violate the rule and, therefore, would be grounds for disciplinary complaints. *First*, the language in the comments is only guidance and not binding. *Second*, the drafters of the rule “clearly knew how to include exceptions to the binding black letter anti-discrimination rule” because two exceptions actually are contained in the black letter rule itself, so “[i]f the ABA wanted to identify certain discriminatory conduct permitted by the black letter rule, it would have included a third exception in the black letter rule.” *Third*, the comment “says nothing about discrimination” and “does not describe activities permitting discrimination on the basis of the listed attributes.” The references could be to “political viewpoint diversity, geographic diversity, and law school diversity” which “would not involve discrimination prohibited in the black letter rule.”

ABA Model Rule 8.4(g)’s consequences for New York lawyers’ and their firms’ efforts to promote diversity, equity, and inclusion provide yet another reason to reject the proposed rule.

¹⁵¹ *Id.* at 7 (emphasis supplied).

¹⁵² *Id.* at 5. *See also, id.* at 5-6 (“Perhaps that sentence was meant to equate ‘diversity’ with discrimination on the basis of race, sex, etc. But that would be futile – because it would fly in the face of the explicit authoritative prohibition in the black letter rule. It would also be remarkably cynical, by forbidding discrimination in plain language while attempting to surreptitiously allow it by using a code word.”)

The substantial value of firms' programs to promote diversity, equity, and inclusion, as well as the importance of affinity legal groups based on gender, race, sexual identity, or other protected classes, would seem to far outweigh any practical benefits likely to come from ABA Model Rule 8.4(g).

VII. ABA Model Rule 8.4(g) Could Limit New York Lawyers' Ability to Accept, Decline, or Withdraw from a Representation.

The proponents of ABA Model Rule 8.4(g) generally claim that it will not affect a lawyer's ability to refuse to represent a client. They point to the language in the rule that it "does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16." But in one of the two states to have fully adopted ABA Model Rule 8.4(g), the Vermont Supreme Court explained in its accompanying Comment [4] that "[t]he optional grounds for withdrawal set out in Rule 1.16(b) must also be understood in light of Rule 8.4(g). They cannot be based on discriminatory or harassing intent without violating that rule." The Vermont Supreme Court further explained that, under the mandatory withdrawal provision of Rule 1.16(a), "*a lawyer should withdraw if she or he concludes that she or he cannot avoid violating Rule 8.4(g).*"¹⁵³

As Professor Rotunda and Professor Dzienkowski explained, Rule 1.16 actually "deals with when a lawyer must or may *reject* a client or *withdraw* from representation."¹⁵⁴ Rule 1.16 does not address *accepting* clients.¹⁵⁵ Moreover, as Professor Rotunda and Professor Dzienkowski have observed, Comment [5] to ABA Model Rule 8.4(g) would seem to limit any right to decline representation, if permitted at all, to "limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations."¹⁵⁶

Dean McGinniss agrees that "[d]espite its ostensible nod of non-limitation, Model Rule 8.4(g) offers lawyers no actual protection against charges of 'discrimination' based on their *discretionary* decision to decline representation of clients, including ones whose objectives are fundamentally disagreeable to the lawyer."¹⁵⁷ Because Model Rule 1.16 "addresses only when lawyers *must* decline representation, or when they may or must *withdraw* from representation" but not when they "are *permitted* to decline client representation," Model Rule 8.4(g) seems only

¹⁵³ Vermont Supreme Court, *Order Promulgating Amendments to the Vermont Rules of Professional Conduct*, July 14, 2017, at 3, [https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4\(g\).pdf](https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4(g).pdf) (emphasis supplied).

¹⁵⁴ Rotunda & Dzienkowski, *supra* note 24, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise" (emphasis supplied by the authors).

¹⁵⁵ A state attorney general concurs that "[a]n attorney who would prefer not to represent a client because the attorney disagrees with the position the client is advocating, but is not required under Rule 1.16 to decline the representation, may be accused of discriminating against the client under Proposed Rule 8.4(g)." Tenn. Att'y Gen. Letter, *supra* note 52, at 11.

¹⁵⁶ See Rotunda & Dzienkowski, *supra* note 24.

¹⁵⁷ McGinniss, *supra* note 2, at 207-209.

to allow what was already required, not declinations that are discretionary. Dean McGinniss warns that “if state bar authorities consider a lawyer’s declining representation . . . as ‘manifest[ing] bias or prejudice,’ they may choose to prosecute the lawyer for violating their codified Model Rule 8.4(g).”¹⁵⁸

The New York State Bar Association Committee on Professional Ethics issued an opinion in January 2017 that concluded that “[a] lawyer is under no obligation to accept every person who may wish to become a client *unless the refusal to accept a person amounts to unlawful discrimination.*”¹⁵⁹ The facts before the Committee were that a lawyer had been requested to represent a claimant against a religious institution. Because the lawyer was of the same religion as the institution, he or she was unwilling to represent the claimant against the institution. Calling the definition of “unlawful discrimination” for purposes of New York’s Rule 8.4(g) a question of law beyond its jurisdiction, the Committee declined to “opine on whether a lawyer’s refusal to represent a prospective client in a suit against the lawyer’s own religious institution constitutes ‘unlawful discrimination’” for purposes of New York’s Rule 8.4(g).¹⁶⁰ Of course, ABA Model Rule 8.4(g)’s reach goes beyond “unlawful discrimination.”

In *Stropnick v. Nathanson*,¹⁶¹ the Massachusetts Commission Against Discrimination found a law firm that specialized in representing women in divorce cases had violated state nondiscrimination law when it refused to represent a man.¹⁶² As these examples demonstrate, reasonable doubt exists that Rule 1.16 provides adequate protection for attorneys’ ability to accept, decline, or withdraw from a representation if ABA Model Rule 8.4(g) were adopted.

VIII. Do the Attorney Grievance Committees and Their Staffs have Adequate Resources to Process an Increased Number of Discrimination and Harassment Claims?

Concerns have been expressed by some state bar disciplinary counsel as to whether bar disciplinary offices have adequate financial and staff resources for adjudicating complex harassment and discrimination claims, particularly employment discrimination claims. For example, the Montana Office of Disciplinary Counsel (ODC) voiced concerns about the breadth of ABA Model Rule 8.4(g).¹⁶³ The ODC quoted from a February 23, 2016, email from the

¹⁵⁸ *Id.* at 207-208 & n.146, citing Stephen Gillers, *supra* note 117, at 231-32, as, in Dean McGinniss’ words, “conceding that the United States Conference of Catholic Bishops’ concerns about religious lawyers’ loss of freedom in client selection under Model Rule 8.4(g) are well founded, though not a basis for objecting to the rule.”

¹⁵⁹ N.Y. Eth. Op. 1111, N.Y. St. Bar Assn. Comm. Prof. Eth., 2017 WL 527371 (Jan. 7, 2017) (emphasis supplied.).

¹⁶⁰ *Id.*

¹⁶¹ 19 M.D.L.R. 39 (M.C.A.D. 1997), affirmed, *Nathanson v. MCAD*, No. 199901657, 2003 WL 22480688, 16 Mass. L. Rptr. 761 (Mass. Super. Ct. 2003).

¹⁶² Rotunda & Dzienkowski, *supra* note 24, in “§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise.”

¹⁶³ Office of Disciplinary Counsel, *In re the Model Rules of Professional Conduct: ODC’s Comments re ABA Model Rule 8.4(g)*, filed in Montana Supreme Court, No. AF 09-0688 (Apr. 10, 2017), at 3, https://www.clsreligiousfreedom.org/sites/default/files/site_files/MT%20Letter%20of%20Chief%20Disciplinary%20Counsel%20Opposing%208.4.pdf.

National Organization of Bar Counsel (“NOBC”) to its members explaining that the NOBC Board had declined to take a position on then-proposed ABA Model Rule 8.4(g) because “there were a number of simple regulatory issues, not the least of which is the possibility of diverting already strained resources to investigate and prosecute these matters.”¹⁶⁴

The Montana ODC thought that “any unhappy litigant” could claim that opposing counsel had discriminated on the basis of “one or more of the types of discrimination named in the rule.”¹⁶⁵ The ODC also observed that ABA Model Rule 8.4(g) did not require “that a claim be first brought before an appropriate regulatory agency that deals with discrimination.”¹⁶⁶ In that regard, the ODC recommended that the court consider “Illinois’ rule [that] makes certain types of discrimination unethical and subject to discipline” because it required that “the lawyer disciplinary process cannot be initiated until there is a finding to that effect by a court or administrative agency” and required that “the conduct must reflect adversely on the lawyer’s fitness as a lawyer.”¹⁶⁷ The Illinois rule is quite similar to New York’s Rule 8.4(g).

Increased demand may drain the resources of the attorney grievance committees as they serve as tribunals of first resort for an increased number of discrimination and harassment claims against lawyers and law firms, including employment claims. Serious questions arise about the evidentiary or preclusive effects that a state bar proceeding might have on other tribunals’ proceedings. State bar tribunals have their own rules of procedure and evidence that may be significantly different from state and federal court rules. Often, discovery is more limited in bar proceedings than in civil court. And, of course, there is no right to a jury trial in state bar proceedings.

The staff of the attorney grievance committees may feel ill-equipped to understand complicated federal, state, and local antidiscrimination and antiharassment laws well enough to understand how they interact with discriminatory and harassment complaints brought under ABA Model Rule 8.4(g). Comment [3] instructs that “[t]he substantive law of antidiscrimination or anti-harassment statutes and case law may guide application of [the rule].” (Note the permissive “may” rather than “shall.”) To avoid this new burden on the staff of the disciplinary and grievance committees, the Montana ODC commended the Illinois rule’s requirement that “the lawyer disciplinary process cannot be initiated until there is a finding to that effect by a court or administrative agency.”¹⁶⁸ The Illinois rule further requires that “any right of judicial review has been exhausted” before a disciplinary complaint can be acted upon.¹⁶⁹ New York’s current 8.4(g), of course, incorporates these guardrails.

¹⁶⁴ *Id.* at 3-4.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 3.

¹⁶⁷ *Id.* at 5.

¹⁶⁸ *Id.* (referring to ILCS S. Ct. Rules of Prof. Conduct Rule 8.4(j)).

¹⁶⁹ ILCS S. Ct. Rules of Prof. Conduct Rule 8.4(j).

Moreover, under ABA Model Rule 8.4(g), an attorney may be disciplined regardless of whether her conduct is a violation of any other law. Professor Rotunda and Professor Dzienkowski warn that ABA Model Rule 8.4(g) “may discipline the lawyer who does not violate any statute or regulation [except Rule 8.4(g)] dealing with discrimination.”¹⁷⁰ Nor is “an allegedly injured party [required] to first invoke the civil legal system” before a lawyer can be charged with discrimination or harassment.¹⁷¹

The threat of a complaint under ABA Model Rule 8.4(g) could also be used as leverage in other civil disputes between a lawyer and a former client. It even may be the basis of an implied private right of action against an attorney. Professor Rotunda and Professor Dzienkowski noted this risk:

If lawyers do not follow this proposed Rule, they risk discipline (e.g., disbarment, or suspension from the practice of law). In addition, courts enforce the Rules in the course of litigation (e.g., sanctions, disqualification). Courts also routinely imply private rights of action from violation of the Rules – malpractice and tort suits by third parties (non-clients).¹⁷²

Unsurprisingly, Professor Rotunda and Professor Dzienkowski disagree with the rule’s proponents that lawyers “should rely on prosecutorial discretion because disciplinary boards do not have the resources to prosecute every violation.” Instead, the scholars warn that “[d]iscretion, however, may lead to abuse of discretion, with disciplinary authorities going after lawyers who espouse unpopular ideas.”¹⁷³

A lawyer’s loss of his or her license to practice law is a staggering penalty and demands a stringent process, one in which the enforcement standards are clear and respectful of the attorneys’ rights, as well as the rights of others. ABA Model Rule 8.4(g) simply fails to provide the clear enforcement standards that are necessary when the loss of one’s livelihood is at stake.

Conclusion

Because ABA Model Rule 8.4(g) will drastically chill lawyers’ freedom to express their viewpoints on political, social, religious, and cultural issues, and for the additional reasons given in this letter, it should be rejected. At a minimum, there should be a pause to wait to see whether the widespread prediction that ABA Model Rule 8.4(g) will operate as a speech code for attorneys is borne out—if and when it is adopted in several other states. There is no reason to subject New York attorneys to the ill-conceived experiment that ABA Model Rule 8.4(g)

¹⁷⁰ Rotunda & Dzienkowski, *supra* note 24 (parenthetical in original).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

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represents. A decision to not recommend ABA Model Rule 8.4(g) can always be revisited, but the damage its premature adoption may do to New York attorneys would be less easily remedied.

Respectfully submitted,

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Comment of Professors Josh Blackman, Eugene Volokh, and Nadine Strossen

We are constitutional law professors. One of us teaches at a New York law school. Two of us have commented on ABA Model Rule 8.4(g),¹ and have submitted letters to several jurisdictions that have considered adopting Rule 8.4(g).²

Currently, there are two proposals to revise New York Rule 8.4(g). First, on March 19, 2021, the Administrative Board of the New York Unified Court System requested public comment on a proposal to adopt ABA Model Rule 8.4(g), with certain modifications, to replace New York Rule 8.4(g). Second, on April 16, 2021, the New York State Bar Association’s Committee on Standards of Attorney Conduct (“COSAC”) sought public comment to replace New York Rule 8.4(g) with a rule it claims “differ[s] significantly from ABA Model Rule 8.4(g).”

Recently, the U.S. District Court for the Eastern District of Pennsylvania declared unconstitutional Pennsylvania’s version of the ABA Model Rule.³ The Pennsylvania Bar chose not to appeal that ruling. That decision casts serious doubt on the proposals from the Administrative Board and COSAC. We do not think either proposal will pass constitutional muster.

In this joint statement, we will compare and contrast ABA Model Rule 8.4(g), the Administrative Board’s proposal, and the COSAC proposal across nine dimensions: (1) the scope of the rule, (2) the locations where “the practice of law” can occur, (3) the list of prohibited activities, (4) the definition of “discrimination,” (5) the definition of “harassment,” (6) the protected classes, (7) the mens rea requirement, (8) diversity and inclusion, and (9) protection for speech. We will conclude with our recommendations. We also include the text of the proposals in the appendix.

I. Scope of the rule

- **Current NY Rule 8.4(g):** “A lawyer or law firm shall not . . . unlawfully discriminate *in the practice of law.*”
- **ABA Model Rule:** “engage . . . in *conduct related to the practice of law*”
- **Administrative Board Proposal:** “. . . engage in *conduct related to the practice of law*”
- **COSAC Proposal:** “. . . A lawyer or law firm shall not . . . *engage in conduct in the practice of law*”

¹ Josh Blackman, ABA Model Rule 8.4(g) in the States, 68 Catholic University Law Review 629 (2020); Josh Blackman, Reply: A Pause for State Courts Considering Model Rule 8.4(g), 30 Geo. J. Legal Ethics 241 (2017); Eugene Volokh, A Nationwide Speech Code for Lawyers?, The Federalist Society (May 2, 2017), <https://www.youtube.com/watch?v=AfpdWmlOXbA>.

² <http://bit.ly/8-4g-letters>

³ *Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 32 (E.D. Pa. 2020).

The current version of New York Rule 8.4(g) extends to “the practice of law.” In contrast, the ABA Model Rule and the Administrative Board proposal extend to “*conduct related to the practice of law.*” And the COSAC proposal extends to “*conduct in the practice of law.*” The decision to expand the scope of Rule 8.4(g) is the root cause of many constitutional difficulties. Traditionally, the bar’s core competency was regulating the “practice of law.” And when an attorney is engaged in the practice of law, such as in court or in other forums, his constitutional rights can be abridged. But as the state deviates from this traditional function, it begins to intrude on an attorney’s personal spheres. And in those spheres, attorneys have robust individual rights that cannot be abridged. New York Rule 8.4(g) should remain limited to “the practice of law.”

II. Locations where “the practice of law” can occur

- **ABA Model Rule:** “Conduct related to the practice of law includes [a] representing clients; [b] interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; [c] operating or managing a law firm or law practice; and [d] participating in *bar association, business or social activities in connection with the practice of law.*”
- **Administrative Board Proposal:** “Conduct related to the practice of law includes [a] representing clients, [b] interacting with witnesses, co-workers, court personnel, lawyers, and others while engaged in the practice of law; [c] operating or managing a law firm or law practice; and [d] participating in *bar association, business or social activities in connection with the practice of law.*”
- **COSAC Proposal:** “Conduct in the practice of law includes . . . [a] representing clients; [b] interacting with witnesses, coworkers, court personnel, lawyers, and others, while engaging in the practice of law; [c] operating or managing a law firm or law practice; and [d] participating in *bar association, business, or professional activities or events in connection with the practice of law.*”

The proposal from the Administrative Board explains that “conduct related to the practice of law” can occur in “bar association, business or *social* activities.” The COSAC proposal uses slightly different language: “bar association, business, or *professional* activities or events in connection with the practice of law.” The word “social” was changed to “professional.” But this change is immaterial, because the COSAC proposal also extends to all “events in connection with the practice of law.” This broad category is broad enough to embrace “social activities.” With these changes, the New York Bar would expand the range of its jurisdiction to social functions. Presentations at a CLE debate would be covered by this rule. Private table conversations at a bar dinner would be covered by the rule. These contexts have little connection to the actual practice of law, but could give rise to discipline.

The government does not have an “unfettered power” to regulate the speech of “lawyers,” simply because they provide “personalized services” after receiving a “professional license.” *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2375 (2018) (*NIFLA*). To be sure, *NIFLA* recognized that there are two categories of lawyer speech that may sometimes be more restrictable. First, the Court has “applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their ‘commercial speech.’” *Id.* at 2372 (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)). The proposals, however, are not limited to “commercial speech” (which generally means commercial advertising), and do not simply “require professionals to disclose factual, noncontroversial information.” Moreover, the Court noted that “States may regulate professional conduct, even though that conduct incidentally involves speech.” *Id.* at 2372. But the state cannot flip this rule by regulating speech on the grounds that it incidentally involves professional conduct—indeed, the *NIFLA* Court declared unconstitutional this sort of regulation.

The Administrative Board proposal included the constitutional analysis from ABA Formal Opinion 493. But this opinion failed to even discuss *NIFLA*.⁴

III. Prohibited activities

- **ABA Model Rule:** “. . . harassment or discrimination . . .”
- **Administrative Board Proposal:** “. . . harassment or discrimination . . .”
- **COSAC Proposal:** “. . . unlawful discrimination, or harassment, whether or not unlawful . . .”

The ABA Model Rule and the Administrative Board proposal would prohibit the same activities: “. . . harassment or discrimination . . .” The COSAC proposal uses slightly more precise language. Harassment would be prohibited, whether lawful or unlawful. But only unlawful discrimination would be prohibited.

IV. Definition of “discrimination”

- **ABA Model Rule:** “discrimination”
 - Comment [3] “Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. . . . The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).”
- **Administrative Board Proposal:** [No definition of discrimination]

⁴ <https://reason.com/volokh/2020/07/15/aba-issues-formal-opinion-on-purpose-scope-and-application-of-aba-model-rule-8-4g/>

- **COSAC Proposal:** “‘Unlawful discrimination’ refers to discrimination under federal, state and local law.”

The ABA Model Rule defines “discrimination” as “harmful verbal or physical conduct that manifests bias or prejudice towards others.” And anti-discrimination law “may” provide a guide. The Administrative Board did not define “discrimination.” (There is a lengthy definition of “harassment,” which we will discuss below.) The COSAC proposal only includes “unlawful discrimination.” And that phrase “refers to discrimination under federal, state and local law.” In some cases, these three categories of discrimination laws may be in conflict. The most restrictive law will control. Generally, federal, state, and local discrimination laws would only govern relationships in the workplace.

The prohibition of “discrimination” is unlikely to run afoul of the First Amendment. The prohibition of “harassment,” however, does raise serious constitutional concerns.

V. Definition of “harassment”

- **ABA Model Rule:** “harassment”
 - Comment [3]: “Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).”
- **Administrative Board Proposal:** “harassment”
 - Comment [5B]: “Harassment includes harmful, derogatory, or demeaning verbal or physical conduct that manifests bias or prejudice towards others and includes conduct that creates an environment that a reasonable person would consider intimidating, hostile, or abusive. Typically, a single incident involving a petty slight, unless intended to cause harm, would not rise to the level of harassment under this paragraph. Harassment also includes sexual harassment, which involves unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.”
- **COSAC Proposal:** (3) “Harassment,” for purposes of this Rule, means conduct that is: a. directed at an individual or specific individuals in one or more of the protected categories; b. severe or pervasive; and c. either (i) unwelcome physical contact or (ii) derogatory or demeaning verbal conduct.
 - Comment [5C]: Petty slights, minor indignities and discourteous conduct without more do not constitute harassment. Severe or pervasive derogatory or demeaning conduct refers to degrading, repulsive, abusive, and disdainful conduct. Verbal conduct includes written as well as oral communication

Under the ABA Model Rule, the word “harassment” includes “derogatory or demeaning verbal . . . conduct.” The Administrative Board proposal adds an additional adjective: “*harmful*, derogatory, or demeaning verbal . . . conduct.” These words are, in practice, likely to end up being mere synonyms for speech that is offensive and disparaging. And *Matal v. Tam* held that exclusion (even from a government-run benefit program) of “disparag[ing]” or “contempt[uous]” speech was unconstitutionally viewpoint-based. 137 S.Ct. 1744, 1750 (2017). ABA Formal Opinion 493 also did not discuss *Matal v. Tam*.

The Administrative Board proposal includes an additional definition of harassment: “conduct that creates an environment that a reasonable person would consider intimidating, hostile, or abusive.” But by its terms, that proposal merely “includes” such conduct, rather than being limited to it.

The COSAC proposal advances a three-factor test to define “harassment.” First, the speech must be “directed at an individual or specific individuals in one or more of the protected categories.” We think this element would obviate some of our concerns. Merely speaking about a contentious topic, in the abstract, would not give rise to liability, because it would not be “directed at an individual.” The second element obviates other concerns. Off-hand remarks at a bar function would likely not give rise to liability. The speech must be “severe or pervasive.”

Alas, the third element suffers from the same problem as the ABA Model Rule, the Administrative Board proposal, as well as the unconstitutional Pennsylvania rule: it imposes viewpoint discrimination against “derogatory or demeaning verbal conduct.” No rule with this language can pass constitutional muster. The first two factors cannot overcome this deficiency.

Comment [5C] of the COSAC proposal attempts to mitigate these constitutional concerns. But in the process, it introduces additional grounds of vulnerability. First, it states “Petty slights, minor indignities and discourteous conduct without more do not constitute harassment.” What is a “petty slight” to some may be a “severe intrusion” to others. Second, the phrase “minor indignities” is not much more helpful--just another way of defining offensiveness. The third category simply adds further constitutional problems: “discourteous conduct.” Attempts to police civility in this fashion will simply impose another form of viewpoint discrimination, as well as being potentially unconstitutionally vague. Fourth, the comment defines “severe or pervasive derogatory or demeaning conduct” as “degrading, repulsive, abusive, and disdainful conduct.” These synonyms suffer from the same problems under *Matal v. Tam*: they impose a viewpoint discrimination. And again they would likely be unconstitutionally vague, since all of them (with the possible exception of “abusive”) are not familiar legal terms of art.

The Administrative Board proposal also attempts to narrow the definition of harassment. The Administrative Board proposal states: “Typically, a single incident involving a petty slight,

unless intended to cause harm, would not rise to the level of harassment under this paragraph.” The Administrative Board proposal, however, falls *far* short of the “severe or pervasive” requirement that the COSAC proposal adopts. The word “typically” is a hedge, and suggests that rule will not always apply. Moreover, the phrase “petty slight” is unclear. What may be “petty” to one person can be “severe” to another. Finally, the mens rea requirement in this sentence (“intended to cause harm”) seems to be at odds with the mens rea element in the rule (“lawyer knows or reasonably should know”).

Greenberg v. Haggerty declared unconstitutional Pennsylvania’s Rule 8.4(g), which was premised on the ABA Model Rule. That opinion stated:

There is no doubt that the government is acting with beneficent intentions. However, in doing so, the government has created a rule that promotes a government-favored, viewpoint monologue and creates a pathway for its handpicked arbiters to determine, without any concrete standards, who and what offends. This leaves the door wide open for them to determine what is bias and prejudice based on whether the viewpoint expressed is socially and politically acceptable and within the bounds of permissible cultural parlance. Yet the government cannot set its standard by legislating diplomatic speech because although it embarks upon a friendly, favorable tide, this tide sweeps us all along with the admonished, minority viewpoint into the massive currents of suppression and repression. Our limited constitutional Government was designed to protect the individual’s right to speak freely, including those individuals expressing words or ideas we abhor. *Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 32 (E.D. Pa. 2020).

The definition of harassment in the Administrative Board Proposal and the COSAC proposal are unconstitutional for the same reasons.

VI. Protected classes

- **ABA Model Rule:** “on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status . . .”
- **Administrative Board Proposal:** “on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity *or expression*, marital status or socioeconomic status . . .”
- **COSAC Proposal:** “. . . on the basis of one or more of the following protected categories: race, color, sex, pregnancy, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, gender *expression*, marital status, *status as a member of the military, or status as a military veteran* . . .”

The Administrative Board proposal adds one protected category to the list from the ABA Rule: “gender expression.” The COSAC proposal also includes “gender expression,” as well as “status as a member of the military, or status as a military veteran.”

The COSAC proposal eliminates socioeconomic status. We think the elimination of socioeconomic status is prudent: There is no basis for the rules to categorically ban discrimination based on “socioeconomic status”—a term not defined by the rule, but which is commonly used to refer to matters such as income, wealth, education, or form of employment. A law firm, for instance, may prefer more-educated employees—both as lawyers and as staffers—over less-educated ones. Or a law firm may contract with expert witnesses and expert consultants who have had especially prestigious educations or employment. Or a firm may prefer employees who went to high-“status” institutions, such as Ivy League schools. Yet each of these commonplace actions would constitute discrimination on the basis of socioeconomic status under the new rule.

VII. The mens rea requirement

- **ABA Model Rule:** “. . . engage in conduct that the lawyer *knows or reasonably should know* . . . in conduct related to the practice of law. . . .”
- **Administrative Board Proposal:** “. . . engage in conduct related to the practice of law that the lawyer *knows or reasonably should know*”
- **COSAC Proposal:** “. . . engage in conduct in the practice of law that the lawyer or law firm *knows or reasonably should know* constitutes”

All three proposals adopt the same mens rea requirement: “knows or reasonably should know.” We previously commented on a draft proposal from COSAC in February 2021. That draft stated that a “lawyer shall not *knowingly* engage in conduct...” COSAC seems to have reduced the mens rea requirement from “knowingly” to “knows or reasonably should know.” A requirement of “knowingly” would mitigate some of the constitutional problems with this rule. Scierter would avoid unknowing harassment, however that phrase is defined.

VIII. Diversity and inclusion

- **ABA Model Rule:** “Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.”
- **Administrative Board Proposal:** “Paragraph (g) does not prohibit conduct undertaken to promote diversity and inclusion by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.”

- **COSAC Proposal:** “This Rule is not intended to prohibit or discourage lawyers or law firms from engaging in conduct undertaken to promote diversity, equity, and/or inclusion in the legal profession, such as by implementing initiatives aimed at (i) recruiting, hiring, retaining, and advancing employees in one or more of the protected categories, or (ii) encouraging or assisting lawyers and law students to participate in organizations intended to promote the interests of persons in one or more of the protected categories.”

The drafters of the ABA Model Rule and the Administrative Board proposal recognized an obvious problem: promoting various diversity and inclusion measures could run afoul of Rule 8.4(g). For example, advocating for the use of affirmative action for certain racial groups could constitute “harmful verbal . . . conduct that manifests bias or prejudice towards other” racial groups. To avoid this problem, both the ABA Model Rule and the Administrative Board proposal create several exemptions: it is not misconduct to “promote diversity and inclusion.” Likewise, the COSAC proposal uses similar language.

Yet these rules thus create an explicit form of viewpoint discrimination. Those who speak in ways that promote diversity and inclusion efforts, such as affirmative action policies, are protected. Those who criticize the same diversity and inclusion efforts are not protected. In theory, it would be possible to strip this sentence from the Administrative Board proposal. But that change would be a poison pill. In the absence of this protection for diversity and inclusion efforts, many lawyers and law firms would face potential liability.

IX. Express protection of speech

- **ABA Model Rule:** [No express protection]
- **Administrative Board Proposal:** [No express protection]
- **COSAC Proposal:** “This Rule does not limit the ability of a lawyer or law firm . . . to express views on matters of public concern in the context of teaching, public speeches, or other forms of public advocacy . . .”
 - Comment [5D]: A lawyer’s conduct does not violate Rule 8.4(g) when the conduct in question is protected under the First Amendment of the Constitution of the United States or under Article I, Section 8, of the Constitution of the State of New York.

The COSAC proposal includes two express protections for the freedom of speech. First, the Comment explains that this rule would not prohibit speech protected by the federal or state Constitutions. This comment, though helpful, doesn’t add much. Of course a state ethics rule cannot violate the federal or state Constitutions.

Second, the rule would not “limit the ability of a lawyer or law firm . . . to express views on matters of public concern in the context of teaching, public speeches, or other forms of public

advocacy.” This rule would obviate some of our concerns with respect to speaking or presenting at CLE or bar functions. But it would still allow punishment for dinnertime conversation at one of these events. A presenter would be safe to discuss a controversial idea. But if an attendee repeated the same exact remarks to colleagues afterwards, he could be held liable.

We recognize that the rule is designed to prohibit sexual harassment in social functions that are related to the practice of law. But the current rule sweeps too broadly. The draft could be improved by protecting the expression of “views on matters of public concern” in *all* contexts.

Conclusion

It is our opinion that the Administrative Board proposal would be declared unconstitutional for the same reasons that the Pennsylvania rule was declared unconstitutional: it imposes an unconstitutional form of viewpoint discrimination. The COSAC proposal is an improvement, but still permits the imposition of liability for “derogatory or demeaning verbal conduct.” We do not think this element is valid under *Matal v. Tam* (2017).

We recognize that the New York courts, and the attorneys of New York, are eager to take some form of action to address perceived problems in the profession. But the way to resolve these issues is not through adopting an unconstitutional rule. If adopted, Rule 8.4(g) will lead to years of litigation and acrimony. A better course is to adopt a more modest rule on firm constitutional grounding. For example, the rule could only extend to formal “discrimination,” rather than the nebulous term of “harassment.” The rule could be limited to “the practice of law” rather than ancillary conduct. The rule would not extend to social functions. These suggestions could address some of the perceived need for a change, without raising difficult constitutional questions. But in its present form, both proposals will likely meet the same unconstitutional fate.

It would be our pleasure to provide any further insights to inform your deliberations.

Sincerely,

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Appendix

Current ABA Rule 8.4(g)

It is professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Pertinent comments to this section of the rule

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

Current NY Rule 8.4(g)

A lawyer or law firm shall not: (g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding;

Pertinent comments to this section of the rule

[5A] Unlawful discrimination in the practice of law on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation is governed by paragraph (g).

ABA Model Rule 8.4(g)

It is professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Pertinent comments to this section of the rule

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

Administrative Board's Proposed Rule 8.4(g)

A lawyer or law firm shall not:

(g) engage in conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity or expression, marital status or socioeconomic status. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Pertinent comments to this section of the rule

[3] Discrimination and harassment by lawyers in violation of paragraph(g) undermine confidence in the legal profession and the legal system. Harassment includes harmful, derogatory, or demeaning verbal or physical conduct that manifests bias or prejudice towards others and includes conduct that creates an environment that a reasonable person would consider intimidating, hostile, or abusive. Typically, a single incident involving a

petty slight, unless intended to cause harm, would not rise to the level of harassment under this paragraph. Harassment also includes sexual harassment, which involves unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.

[4] Conduct related to the practice of law includes representing clients, interacting with witnesses, co-workers, court personnel, lawyers, and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Paragraph (g) does not prohibit conduct undertaken to promote diversity and inclusion by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations. A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

COSAC Proposed Rule 8.4(g)

A lawyer or law firm shall not:

(g) engage in conduct in the practice of law that the lawyer or law firm knows or reasonably should know constitutes:

- (1) unlawful discrimination, or
- (2) harassment, whether or not unlawful, on the basis of one or more of the following protected categories: race, color, sex, pregnancy, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, gender expression, marital status, status as a member of the military, or status as a military veteran.
- (3) "Harassment," for purposes of this Rule, means conduct that is:
 - a. directed at an individual or specific individuals in one or more of the protected categories;
 - b. severe or pervasive; and
 - c. either (i) unwelcome physical contact or (ii) derogatory or demeaning verbal conduct.

(4) This Rule does not limit the ability of a lawyer or law firm (i) to accept, decline or withdraw from a representation, (ii) to express views on matters of public concern in the context of teaching, public speeches, or other forms of public advocacy, or (iii) to provide advice, assistance or advocacy to clients consistent with these Rules.

(5) “Conduct in the practice of law” includes:

- a. representing clients;
- b. interacting with witnesses, coworkers, court personnel, lawyers, and others, while engaging in the practice of law;
- c. operating or managing a law firm or law practice; and
- d. participating in bar association, business, or professional activities or events in connection with the practice of law.

Pertinent comments to this section of the rule

[5A] Discrimination and harassment in the practice of law undermines confidence in the legal profession and the legal system and discourages or prevents capable people from becoming or remaining lawyers.

[5B] “Unlawful discrimination” refers to discrimination under federal, state and local law.

[5C] Petty slights, minor indignities and discourteous conduct without more do not constitute harassment. Severe or pervasive derogatory or demeaning conduct refers to degrading, repulsive, abusive, and disdainful conduct. Verbal conduct includes written as well as oral communication.

[5D] A lawyer’s conduct does not violate Rule 8.4(g) when the conduct in question is protected under the First Amendment of the Constitution of the United States or under Article I, Section 8, of the Constitution of the State of New York.

[5E] This Rule is not intended to prohibit or discourage lawyers or law firms from engaging in conduct undertaken to promote diversity, equity, and/or inclusion in the legal profession, such as by implementing initiatives aimed at (i) recruiting, hiring, retaining, and advancing employees in one or more of the protected categories, or (ii) encouraging or assisting lawyers and law students to participate in organizations intended to promote the interests of persons in one or more of the protected categories.

[5F] A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. Moreover, no

violation of paragraph (g) may be found where a lawyer exercises a peremptory challenge on a basis that is permitted under substantive law.

[5G] Nothing in Rule 8.4(g) is intended to affect the scope or applicability of Rule 8.4(h) (prohibiting a lawyer from engaging in conduct, whether in or outside the practice of law, that “adversely reflects on the lawyer’s fitness as a lawyer”).



National Legal
FOUNDATION

May 28, 2021

Professor Roy D. Simon
Chair, Committee on Standards of Attorney Conduct, New York State Bar Association
Via email only: Roy.Simon@hofstra.edu

Re: Proposed Amendments to NY Rule 8.4(g)

Dear Professor Simon:

I am the President of The National Legal Foundation (NLF), a public interest law firm dedicated to the defense of First Amendment liberties that has had a significant federal and state court practice since 1985, including representing numerous parties and *amici* before the Supreme Court of the United States and the supreme courts of several states. I write this letter on behalf of NLF and its donors and supporters, including those in New York.

The subject of this letter is the proposed amendments to Rule 8.4(g) of the New York Rules of Professional Conduct (“Rule 8.4(g)”). We understand that the Committee on Standards of Attorney Conduct of the NY State Bar Association is considering these amendments and has requested comments on these proposed changes be addressed to you.

The NLF opposes adoption of the Committee’s proposed amendments, which share many characteristics with the deeply flawed and much criticized ABA Model Rule 8.4(g) (“model rule”). We agree with much of what the Christian Legal Society (CLS) expressed in its comment letter, dated May 25, 2021. Those comments note the substantial body of scholarly and professional criticism focusing on the model rule’s constitutional deficiencies. CLS also ably summarizes the negative track record of the model rule to date, its potential for censoring speech and debate that undergird a free society, its embrace of unconstitutional viewpoint discrimination, and its difficulty gaining traction because of its constitutional infirmities. Given these deficiencies, it is not surprising that several state attorneys general have concluded that the model rule *is* unconstitutional; and most states that have considered proposals to adopt the model rule or its variants have declined to adopt it. We fear that the proposed amendments would impose potentially career-ending sanctions for transgressions that are vaguely and subjectively defined and therefore are subject to abuse and manipulation.

Thank you and the Committee for the opportunity to provide these comments and for your consideration of them.

Sincerely,

Steven W. Fitschen, President
The National Legal Foundation



New York State Bar Association

One Elk Street, Albany, New York 12207 • 518/463-3200 • <http://www.nysba.org>

Mirna M. Santiago
Co-Chair, Committee on Diversity & Inclusion

Violet E. Samuels
Co-Chair, Committee on Diversity & Inclusion

Dear Ellen C. Yaroshefsky,

The NYSBA Committee on Diversity and Inclusion offers its strong support for adopting the ABA Model Rule 8.4(g). We attach our detailed report to the COSAC, urging that they recommend this proposal. Our comments were endorsed by the Committee on Legal Aid, the President's Committee on Access to Justice, the Committee on Disability Rights, the Committee on Leadership Development, and the Women in Law Section.

The Committee on Diversity and Inclusion continues to enthusiastically recommend this expansion. It provides a necessary expansion to regulate conduct by attorneys beyond our employment practices, to regulate harassment by attorneys and it eliminates the stringent requirement of exhaustion of remedies. It adopts a reasonable standard that all attorneys are familiar with. The ABA Rule provides people with protection from unlawful misconduct and harassment – this is a standard we should all believe in. We hope the Administrative Board will adopt ABA Model Rule 8.4(g), We believe that doing so will aid the Court in fulfilling its strong commitment to eliminating race bias in New York's courts.

If we can provide you with any additional information, please do not hesitate to contact us.

Sincerely,

Mirna M. Santiago and Violet E. Samuels
Co-Chairs, Committee on Diversity and
Inclusion
On behalf of the Committee



New York State Bar Association

One Elk Street, Albany, New York 12207 • 518/463-3200 • <http://www.nysba.org>

Mirna M. Santiago
Co-Chair, Committee on Diversity & Inclusion

Violet E. Samuels
Co-Chair, Committee on Diversity & Inclusion

November 19, 2020

Draft of comments of NYSBA Committee on Diversity and Inclusion in Support of Adoption of the ABA Model Rule of Professional Conduct 8.4(g)

I. ABA Model Rule of Professional Conduct 8.4 Misconduct.

The Committee on Diversity and Inclusion strongly urges COSAC to recommend adoption, in every respect, of the current ABA Model Rule of Professional Conduct 8.4(g), which reads as follows:

A lawyer or law firm shall not:

(g) engage in conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Comments

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Harassment includes harmful verbal or physical conduct that manifests bias or prejudice towards others and includes

conduct that creates an environment that a reasonable person would consider intimidating, hostile, or abusive. Petty slights, annoyances, and isolated incidents (unless of a substantial nature) do not rise to the level of harassment under this paragraph. Harassment also includes sexual harassment, which involves unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.

[4] Conduct related to the practice of law includes representing clients, interacting with witnesses, co-workers, court personnel, lawyers, and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Paragraph(g) does not prohibit conduct undertaken to promote diversity and inclusion without violating this Rule, by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations. A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

II. Changes required to bring New York Rules of Professional Conduct Rule 8.4(g) in line with ABA Model Rule of Professional Conduct 8.4(g).

~~It is professional misconduct for a~~ A lawyer ~~to~~ or law firm shall not:

(g) engage in conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status ~~in conduct related to the practice of law~~. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in

accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Comments

[3] Discrimination and harassment by lawyers in violation of paragraph(g) undermine confidence in the legal profession and the legal system. ~~Such discrimination~~ Harassment includes harmful verbal or physical conduct that manifests bias or prejudice towards others and includes conduct that creates an environment that a reasonable person would consider intimidating, hostile, or abusive. Petty slights, annoyances, and isolated incidents (unless of a substantial nature) do not rise to the level of harassment under this paragraph. Harassment also includes sexual harassment ~~and derogatory or demeaning verbal or physical conduct. Sexual harassment includes, which involves~~ unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. ~~The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).~~

[4] Conduct related to the practice of law includes representing clients; ~~;~~ interacting with witnesses, ~~coworkers~~ co-workers, court personnel, lawyers, ~~;~~ and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. ~~Lawyers may engage in~~ Paragraph(g) does not prohibit conduct undertaken to promote diversity and inclusion without violating this Rule, ~~;~~ by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations ~~in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and~~

~~their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c).~~ A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

III. Rationale for Proposed Changes.

Expanding the language of New York Rules of Professional Conduct Rule 8.4(g) by adoption of ABA Model Rule of Professional Conduct 8.4(g) will strengthen ethics protections for all protected classes and advance the goal of eliminating harassment and discrimination in the legal profession. These goals are the essence of the mission of the Committee on Diversity and Inclusion and, indeed, are core to every leader of the New York State Bar Association. Our Association has long stated "its commitment to enhancing diversity at every level of participation". As this Association noted on the death of George Floyd, government officials, and this Association's officials, "bear a grave and immense responsibility to comport themselves judiciously and with respect for all concerned in their every word and deed"; we are "richer and more effective" because of our diversity and because of the respect that each diverse member of our profession receives.

The current New York Rules of Professional Conduct Rule 8.4(g) is flawed due to its limitations:

A. The current rule requires that an attorney's conduct be "unlawful". This excludes some types of discrimination and harassment that should be prohibited but may not be unlawful.

B. The current New York Rules of Professional Conduct Rule 8.4(g) is also inadequate because of its focus on employment discrimination. The Committee on Diversity and Inclusion knows that there are many other instances where harmful discrimination or harassment on the basis of being a member of a protected class occurs within the practice of law.

By way of example, the Special Advisor on Equal Justice in the New York State Courts, Secretary Jeh Johnson, concluded in his report dated October 1, 2020 (<http://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf>), "that almost

every attorney of color we spoke with...reported incidents in which they were mistaken for someone other than an attorney or otherwise subjected to disparate treatment.” “...These instances take several forms...” and highlight the different contexts in which these arise:

- Being mistaken for a criminal defendant
- Being mistaken for an interpreter
- Being mistaken for another attorney of color
- Being asked to show identification to enter the courthouse while white attorneys are not
- Being questioned about sitting in the front row of the courtroom reserved for attorneys and comments from judges and court officers on how they carry themselves or are dressed.” Id. p. 66

While the circumstances in each instance would require examination, they highlight the different contexts in which the issue might arise.

In far more graphic terms, consider the complaints gathered by tenant advocates in the Bronx Housing Court and reported to the Courts in 2018, and again to Secretary Johnson in 2020 (attached). These include:

- A white male landlord’s attorney referred to women “he’d like to finger” to a queer, female attorney of color.
- A white male attorney refers to a female attorney of color as an “attorney” (using air quotes, as if not really an attorney) when referring to her.
- Landlord’s attorney makes paralegals in hallway take out cameras to take video of tenant in tight fitting clothing.
- As my opponent and I approached the bench to argue a motion, I realized that the court interpreter for my client was not present. I informed the judge that we had to wait for the interpreter to return before we could start the argument. The landlord's lawyer groaned and audibly sucked her teeth. She slammed her papers and stomped away from the bench. I interpreted her body language and behavior as that of an angry person. I asked her, "why are you so angry, because we have to wait for an interpreter?" The landlord's lawyer responded, in open court, in front of an entire congregation, "NO! I'm angry because SHE [pointing to my client] does not know how to speak English! How long has she been here!?"

- A white male attorney tells a queer female attorney of color that she is on his “to-do” list but knows he “can’t have it.”

- A landlord’s attorney followed me in the elevator to make fun of what I was wearing and tried to get other landlord’s attorneys to join her in on it. She started saying that there was something wrong with millennials (of which I am a part) and that I should learn that the world is not a nice place. I did not even have a case on with her that day and the attack was completely unprovoked.

See also American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 493, July 15, 2020, Model Rule 8.4(g): Purpose, Scope and Application (Exhibit B), offering an excellent discussion of such examples.

Again, depending upon the specific circumstances in each instance, many of these examples are offensive and harmful yet not prohibited by the current New York Rules of Professional Conduct Rule 8.4(g) Misconduct. Now is the time for our Rules of Professional Conduct to regulate ongoing, continuous acts, comments, and words of discrimination or harassment on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.

C. The current New York Rules of Professional Conduct Rule 8.4(g) is inadequate because it requires exhaustion of all other remedies -- even if, under the circumstances, it would be unreasonable to expect the victim of one or two acts of discriminatory conduct to file a lawsuit or pursue other administrative proceedings.

D. The current New York Rules of Professional Conduct Rule 8.4(g) is inadequate because it does not specifically proscribe harassment. Our rules, specifically, should prohibit attorneys from harassing people while engaged in the practice of law, whether it be harmful, derogatory, or demeaning verbal or physical conduct towards a person on the basis of a protected attribute, or sexual advances, requests for sexual favors, unwelcome verbal or physical conduct of a sexual nature and other such behavior.

IV. The Necessary Standard.

The Committee on Diversity and Inclusion believes that it is necessary and appropriate to hold lawyers to the standard of what the lawyer knows, or reasonably should know, constitutes

discriminatory or harassing conduct in connection with the practice of law. Our failure to hold ourselves to this standard makes the public skeptical and distrusting of attorneys. We are among the guardians of justice for all; when we are not held to this standard, it damages confidence in the rule of law and trust in our profession for allowing such behavior.

As indicated in the October 8, 2020 Memorandum from the COSAC 8.4(g) Subcommittee and the July 15, 2020 Formal Opinion 493 of the ABA Standing Committee On Ethics And Professional Responsibility, the proposed modifications to Rule 8.4(g) reaffirm that the conduct to be regulated is confined to that which occurs in the course of the practice of law. Most significantly, however, the proposed modifications would eliminate the current requirements that the proscribed conduct be unlawful or, to the extent applied in the employment context, severe or pervasive. At the same time, ABA Formal Opinion 493 makes clear, “only conduct that is found harmful will be grounds for discipline,” and the discipline to be imposed, if any, “will depend upon a variety of factors, including, for example, (1) severity of the violation; (2) prior record of discipline or lack thereof; (3) level of cooperation with disciplinary counsel; (4) character or reputation; and (5) whether or not remorse is expressed.” Further, in the context of harassment or discrimination on the basis of race, sex and the other above-defined categories, it is proposed that the existing Rule be amended to proscribe as professional misconduct such conduct that the accused attorney “knows or reasonably should know” to be harassment or discrimination.

Subject to the below clarifications and cautionary considerations, on their face these modifications are entirely necessary to the ethical and professional standards by which attorneys should be governed in the conduct of their legal practice and the state’s regulation of the legal system and the administration of justice.

More specifically, the proposed modifications, as noted in COSAC’s preliminary memo and ABA Formal Opinion 493, also cite valid examples of conduct which, if established, would constitute legitimate concerns worthy of regulation under the New York Rules of Professional Conduct, even if not, as currently required, unlawful or in certain instances, severe or pervasive. The key, in each instance, is not merely the allegations, but whether and on what basis such allegations, if contested, can be, and are, established by the evidence presented. Toward that end, ABA Formal Opinion 493 makes clear, “Whether conduct violates the Rule must be

assessed using a standard of reasonableness”; “[t]he Model Rules are rules of reason, and whether conduct violates Rule 8.4(g) must necessarily be judged, in context, from an objectively reasonable perspective.” That standard of reasonableness is reflected in the proposed addition of the alternative requirement that the accused attorney either must know or “reasonably should know” that the conduct ascribed to him or her constitutes the alleged harassment or discrimination contemplated by the Rule.

It would not suffice if the Rule simply required that the accused attorney “knows” the conduct in question constitutes harassment or discrimination. Why? The proposed modifications, as noted, eliminate the current standard that the conduct be illegal. If we accept that, and we do, we would be left merely with the standard that the individual knew – at the time(s) in question -- the conduct amounted to harassment or discrimination. That, it can be argued, would leave the door open to an accused’s refutation of the allegation simply on the basis he or she was unaware the conduct could be so construed. The Bar cannot minimize the seriousness of allegations of harassment or discrimination by an attorney in the course of his or her practice. The proposed modification is, as it must be, more demanding: whether an accused attorney was aware or unaware of the import of his or her conduct will not suffice in this context; rather, the Rule should be regarded as breached as to this element if the evidence establishes either that the accused knew the conduct to constitute harassment or discrimination, or that he or she reasonably should have known it was improper:

A. “Reasonably Should Know” is the accepted standard of the ABA Model Rules of Professional Conduct and New York Professional Rules of Conduct. Both the U.S. Supreme Court and courts in New York have also upheld this standard in court decisions and disciplinary hearings.

As further expressed in the ABA’s Standing Committee of Ethics and Professional Responsibility’s Formal Opinion 493, “whether conduct violates the Rule must be assessed using a standard of objective reasonableness, and only conduct that is formally harmful would be grounds for discipline.” ABA Comm. On Ethics & Prof’l Responsibility, Formal Op. 493 (2020). As articulated in the ABA Model Rules of Professional Conduct, “reasonably should know” when used in reference to a lawyer means that a lawyer of reasonable prudence and competence would ascertain the matter in question (MODEL RULES OF PROF’L CONDUCT r.1.0 (j)).

(2020)); "reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer (MODEL RULES OF PROF'L CONDUCT r.1.0 (h). (2020)); "knowingly", "known" or "knows" denotes actual knowledge of the fact in question (MODEL RULES OF PROF'L CONDUCT r.1.0 (f). (2020)). Such knowledge may be inferred from circumstances. *Id.*

Similarly, under the New York Rules of Professional Conduct, "reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question (N.Y. RULES OF PROF'L CONDUCT r.1.0 (s). (2018)); "reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer (N.Y. RULES OF PROF'L CONDUCT r.1.0 (q). (2018)). When used in the context of conflict of interest determinations, "reasonable lawyer" denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation. *Id.* "Knowingly", "known", "know" or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. N.Y. RULES OF PROF'L CONDUCT r.1.0 (k). (2018).

B. The Standing Committee of Ethics and Professional Responsibility has stated, "the Model Rules are rules of reason, and whether conduct violates Rule 8.4(g) must necessarily be judged, in context, from an objectively reasonable perspective. ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 493 (2020).

C. The U.S. Supreme Court has held that "one of the fundamental tenets of the professional responsibility of a lawyer is that he should maintain a degree of personal and professional integrity that meets the highest standard." *Cleveland Bar Assoc. v. Stein*, 29 Ohio St. 2d 77, 81, 278 N.E.2d 670 (1927). Conduct that "creates an objectively hostile or abusive work environment" is conduct that "a reasonable person would find hostile or abusive." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

D. New York courts, in various circumstances, have articulated their justification for such standards. As long ago articulated by the Court of Appeals, "The power to compel attorneys to adhere to their professional obligations is of a continuous nature which may be exercised at any time when the occasion arises." *Leviten v. Sandbank*, 291 N.Y. 352, 357 (1943). See also

Matter of In re Hennessey, 155 AD3d 1425, 1426 (3d Dept 2017), where the court upheld a decision to disbar an attorney after he “engaged in intentionally deceptive conduct that adversely reflected on his fitness as a lawyer and was prejudicial to the administration of justice”; Revson v. Cinque & Cinque, 70 F. Supp. 2d 415, 416 (SDNY 1999), where the court held that the attorney’s “Rambo” tactics (including repeated attacks in an “offensive and demeaning fashion,” calling the attorney “a disgrace to the legal profession,” seeking “a conviction that [is] invariably in your interest to make life miserable for your opponent”) constituted a “pattern of offensive and overly aggressive conduct” toward opposing counsel and his law firm, inconsistent with the need to practice civility as a lawyer.

E. More than ever, including in these times of racial inequality, the ABA must continue to hold lawyers to the necessary “reasonably should know” standard. The Bar has “a responsibility to maintain public confidence in the legal profession.” *Dorsainvil v. Parker*, 14 Misc. 3d 397, 400 (Sup. Ct. 2006). The “reasonably should know” standard is necessary to hold a lawyer to a professional standard and maintain the public’s confidence in attorneys and their integrity.

V. A Cautionary Note.

The serious impact of any allegation on an attorney’s career or reputation also cannot be ignored or underestimated and, accordingly, the mere allegation that he or she was or should have been aware of the import of the conduct alleged, devoid of the facts to support that allegation, is not enough. What cannot be lost in the analysis is not merely the import of the conduct alleged, but the need of the disciplinary body to establish the facts – the evidence – of what, if anything, occurred. While that may seem obvious, there are reasons for this concern. Two such reasons in particular warrant discussion: Implicit Bias; and Artificial Intelligence.

Implicit Bias:

- Does the proposed modification eliminating the requirement that the conduct in question be unlawful open the door to the establishment of a claim of discrimination based upon an assertion of implicit bias – a term that, generally, heretofore has been defined as “unconscious” bias?
 - Particularly where perhaps the leading creator and proponent of the concept, Anthony Greenwald, and his colleague Calvin K. Lai, as recently as this year, have

questioned the very definition and underpinnings of the concept of implicit bias, and concluded the “*theory needed to confidently guide [its] applications remains insufficiently developed?*” Annual Review of Psychology, Implicit Social Cognition, 2020, 71: 419-445,<https://doi.org/10.1146/annurevpsych.2020.71.419> (emphasis added).

- Where, accordingly, Dr. Greenwald and fellow creators of the testing designed to measure such implicit bias now have come not only to disclaim the reliability of such tests as accurate predictors of an individual’s behavior and propensity to discriminate, but emphatically, and unequivocally, have declared that such testing “should not be used ... to make decisions about others, to measure somebody else’s automatic racial preference, or to decide whether an individual should or should not serve on a jury,” and expressly have cautioned that “[u]sing [such testing] as the basis for making significant decisions about self or others could lead to undesired and unjustified consequences”? Greenwald, Banaji and Nosek, Understanding and Interpreting IAT Results, Project Implicit,<https://implicit.harvard.edu/implicit/demo/background/under-standing.html> (emphasis added).

- Where these creators of the testing now additionally have warned -- “attempts to diagnostically use such measures for individuals risk undesirably high rates of erroneous classification”? Id. (emphasis added).

- Where these and other quotes have stressed a more recent consensus among many social psychologists that, if anything, the use of such tests as a basis for “social framework evidence” will be regarded as an improper substitution of one stereotype for another – particularly where the individual in question (here, the accused attorney) has not even taken the test in question and no such proffer is made – and no correlation, let alone the prerequisite causation, is established between the circumstances of the testing and those of the facts at hand?)” See, e.g., Greenwald and Lai, “Annual Review of Psychology, Implicit Social Cognition,” p. 10 supra, “In the last 20 years, research on implicit social cognition has established that social judgments and behavior are guided by attitude and stereotypes of which the actor may lack awareness,” and, as above noted, cannot accurately be measured.

- What of the proposed addition of the requirement that the attorney “knows or reasonably should know” of the impropriety of his or her conduct? As we understand this modification, an accused attorney could not simply avoid responsibility for his or her actions, as established by the evidence, simply by denying his or her awareness –“didn’t know”-- that the actions established were improper. But, are we also correct in our understanding that the Rule, even as so modified, quite appropriately, would not recognize a claim that the accused reasonably should know of the impropriety of his or her actions if predicated solely upon an alleged stereotypical assumption, devoid of any evidence that he or she in fact “acted” or otherwise “relied” upon that stereotypical assumption, e.g., no evidence, but, rather, only a stereotypical assumption that there is an inherent bias, generally, on the part of all males against females as to a female’s inability to assert herself in a leadership capacity? See, in this connection, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989), where the Supreme Court made clear a stereotypical assumption, absent evidence of reliance upon that stereotypical assumption, will not suffice; (as the Court put it, “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”) To conclude otherwise, we believe, would be to warrant disciplinary action against a male attorney simply on the assumption that he knew or must have known of this stereotypical assumption, despite the absence of any evidence that he acted or otherwise relied upon that assumption or that the assumption in any other way was even a factor in the conduct or decision at issue.

Artificial Intelligence:

- In addressing the issues posed by the proposed modifications in the Rule, we cannot ignore the possible impact of, and concerns raised by, the increased utilization of artificial intelligence and its algorithms as predictors of behavior, traits, qualifications or performance, ostensibly to promote diversity and inclusion or otherwise to mitigate the possibility of unlawful bias or other such conduct – conduct that ultimately well may fall within the purview of a Rule 8.4(g) inquiry.

- These concerns were raised by David Lopez, former and longest-serving General Counsel of the U.S. Equal Employment Opportunity Commission when testifying on March 4, 2019 before a Congressional Subcommittee: “Bad data input leads to bad results,” and “these digital tools present an even greater potential for misuse if they lock in and exacerbate our

country's long-standing disparities based on race, gender, and other characteristics" (House Subcommittee on Consumer Protection and Commerce of the U.S. House Committee on Energy and Commerce: "Inclusion in Tech: How Diversity Benefits All Americans").

- Mr. Lopez, citing "mishaps," "abuses" and even "horrors," offered an abundance of "cautionary tales ... about the failure of predictive analytics to live up to our ideals of nondiscrimination, opportunity, and privacy." He noted "an alarming number of mishaps with employment screening emanating from the elevation of statistical correlation between some variable" and "purported job performance, qualifications or qualities" and the "tendency of such results themselves to reflect stereotypes and bias." "Algorithms," he stressed, are often predicated on data that amplifies rather than reduces the already present biases in society - - racial, ethnic, and socio-economic - in part because these issues may not be noticed or a consideration to the people creating the technology" or might even produce results reflective of their own individual "[s]ubjective judgments" and "innate biases."

- How these considerations may impact upon determinations to be made in the course of a Rule 8.4(g) inquiry remains to be seen. However, it is important to remember and remain aware of these considerations where pertinent to that inquiry in a given case.

- To the extent implicit bias, stereotypical assumptions and the analytics may be at issue in such an inquiry,, Mr. Lopez - notwithstanding the serious concerns about the reported "mishaps," "abuses" and "horrors" he himself recounted -- nonetheless testified: while the "science of implicit bias" is predicated upon "the more subtle" and "automatic association of stereotypes or [subjective] attitudes about particular groups," [p]eople can have conscious values that are still betrayed by their implicit biases," and those unconscious biases "are frequently better at predicting discriminatory behaviors than people's conscious values and intentions."

- Mr. Lopez's optimism notwithstanding, as noted above, Dr. Greenwald and fellow creators of the concept, have now acknowledged, after all these years, the foundational theoretical definition, "unconscious" bias, no longer is viable and "seems unlikely to be established in the near future, " and that the testing devised to date is unable to serve, and should not serve, as a reliable predictor of discriminatory behavior. [Citation to be supplied.]

VI. An Expanded New York Rules of Professional Conduct Rule 8.4(g) is Critical.

When lawyers fail to regulate their own conduct by outlawing discriminatory and harassing conduct, others become skeptical and distrustful of our profession. ABA Formal Opinion 493 notes that, “Enforcement of Rule 8.4(g) is therefore critical to maintaining the public’s confidence in the impartiality of the legal system and its trust in the legal profession as a whole.” ABA Formal Opinion 493 examines the typical concerns raised against Model Rule 8.4(g). It notes that “courts have consistently upheld professional conduct rules similar to Rule 8.4(g) against First Amendment ... and other constitutional challenges based on vagueness and overbreadth...”; that “Rule 8.4(g) promotes a well-established state interest by prohibiting conduct that reflects adversely on the profession and diminishes the public’s confidence in the legal system and its trust in the lawyer (*id.* p. 11), and that it affords attorneys notice of the behavior it proscribes. The Rule, it points out, is not overly broad and is similar to rules that the courts have consistently upheld to regulate behaviors of attorneys. Finally, as emphasized above and noted by the ABA’s Standing Committee on Ethics and Professional Responsibility, Model Rule 8.4(g) is needed to maintain the public’s confidence in the justice system.

VII. Why We Can’t Wait.

The Committee on Diversity and Inclusion urges COSAC to issue a report recommending adoption of the ABA Model Rule 8.4(g) in its entirety as New York Rules of Professional Conduct 8.4(g). The Committee notes that COSAC has studied Model Rule 8.4(g) many, many times. COSAC is well familiar with the arguments in favor of and against adopting all terms of ABA Model Rule 8.4(g). Like the court’s review of race equity in its own system, COSAC’s review of 8.4(g) “comes at a particularly tense moment for race relations in America. Black Americans watch an unrelenting parade of video images of their people’s lives snuffed out like animals at the hunt, at the hands of law enforcement in this jurisdiction and beyond. ...this is a moment that demands a strong and pronounced rededication to equal justice under law by the New York State Court system.” How we as attorneys govern ourselves within our court system is central to eliminating race equity issues in New York’s justice system.

After years of study, we believe that COSAC should be prepared to issue a report in support of this Association’s adoption of the ABA Model Rule of Professional Conduct 8.4(g) in time for consideration at the April 10, 2021 House of Delegates meeting. This meeting will be

about six weeks before the anniversary of George Floyd’s death on May 25, 2020. Under our rules, your report would have to be issued by January 24, 2021. The time to act is now.

The Committee on Diversity and Inclusion stands ready to aid COSAC in its support for expanding Model Rule 8.4(g) to ensure that New York’s lawyers act equitably towards each other and towards all stakeholders of New York’s justice system.

Very truly yours,

Mirna M. Santiago

Mirna Martinez Santiago
Co-Chair, Committee on Diversity & Inclusion

Violet E. Samuels

Violet E. Samuels
Co-Chair, Committee on Diversity & Inclusion

On behalf of the New York State Bar Association’s Committee on Diversity and Inclusion

BRONX SOLIDARITY!

Bronx Housing Court Culture, Bias & Incivility – Examples from Bronx Solidarity!/Tenant Representatives 2017-2018

While leaving the bench after argument in front of a Judge, landlord’s attorney (who is a white, middle-aged man), repeatedly berated his tenant advocate adversary (who is a women of color, law graduate). He stated she was unqualified, needed to go back to law school, called her a “little girl” and who needed to talk to her “mommy” (supervisor), does not know how to practice in Housing Court and a number of other disparaging remarks. This was in the courtroom- with no reprimand from the Judge, court officer or any other court personnel. This continued in the hallway, where attorney got close to law graduate’s face, screamed at her, pointed his finger at her and accused her of making misrepresentations.

.....
While attempting to negotiate a case in the hallway in front of Part K, a female tapped the arm of a white male landlord’s attorney. The male landlord’s attorney then shouted "You're lucky you're a woman, or I would hit you. If you weren't a woman, I would hit you. If you were a man, I would hit you. My instinct when I feel someone touch me is to just" He then made a quick half-punch gesture towards the female's face, as if half-punching her, then punched his right fist into his left fist several times.

.....
While serving a male landlord’s attorney with a motion to dismiss in court, he told me “you fuck me on all my cases, you fucked me so hard on that other case we had together.”

.....
A white male attorney tells a queer female attorney of color that she is on his “to-do” list, but knows he “can’t have it.”

.....
While discontinuing a case in housing court, male landlord’s attorney began yelling at attorney, “You fucked my client! You fucked my client out of \$40,000!” and went on to say that based on this case and a previous case with the same tenant’s attorney, he would never give the attorney any adjournments or do any favors for the attorney in the future.

.....
While trying to settle a pending Order to Show Cause during a court appearance, an experienced female landlord’s attorney got upset and called attorney "a little piece of shit."

.....
A client, an African American male, overheard a landlord’s attorney call another tenant the "n-word" under his breath as the landlord’s attorney was walking out of the courtroom. Client tried to file a formal complaint with the court but was unable to do so.

.....
While waiting in the attorney line to get a court file, an attorney observed a white male landlord’s attorney try to cut the line. Several people protested and the landlord’s attorney stated "I'm an attorney." Someone else said, "We're all attorneys." The landlord’s attorney then turned to the first person in line, a black woman, and said, "Really? You're an attorney?"

.....
A landlord's attorney screamed at me for using the attorney room and told me multiple times to "get the fuck out." This same attorney has called me “emotional”, “bitchy” and “a cunt.”

.....
A white male landlord’s attorney referred to women “he’d like to finger” to a queer, female attorney of color.

.....
A while male landlord’s attorney told a female attorney that he could not describe male attorneys but could identify any female in the courthouse “by her ass.”

BRONX SOLIDARITY!

An Arabic speaker from Morocco was frustrated that the interpreter provided by the court was from Yemen and their dialects were mutually unintelligible, and he attempted to explain his frustration to the court attorney in conference. Suddenly the judge exclaimed "YOU'RE SCARING ME!"

.....
On several occasions a landlord's attorney refused to speak to me without conferencing with court attorney, and walks away. When I have a white male co-worker cover the same case, that landlord's attorney is very civil with my colleague.

.....
Landlord's attorney was menacing and threatening to my client in court. He got in the tenant's face and said "Go ahead, hit me! I know you want to."

.....
A landlord's attorney who I worked with for the first time immediately started being aggressive with me upon my asking for a zero balance breakdown. Immediately refused to speak to me outside of the presence of the judge, then made misrepresentation to the judge about our interaction and negotiations that never occurred. The next time on, she refused to speak to me again despite many attempts to speak about the case, and made misrepresentations (lied) in front of the judge a second time. She was extremely aggressive, and yelled at her own client and the judge in addition to me.

.....
Landlord's attorney made disparaging remarks about my client, saying that he was a "dirtbag, a lowlife, and a deadbeat."

.....
I have been questioned by court staff repeatedly whether I'm actually an attorney and whether I speak English.

.....
While in housing court, a landlord's attorney pointed at a tenant in the hallway and said "whoa, look there, that's weird." I asked "what" and the landlord's attorney responded, "she's white, you don't see that often here."

.....
Male landlord's attorney completely refused to deal with a case that was on the calendar and repeatedly yelled at me (female tenant's attorney) that he would not be doing anything on this case and for her to go away. Finally after approaching him for a third time, he yelled at me "I'm going to buy you a dictionary, so you can look up the word "nothing" when I tell you I'm doing nothing on the case!" Multiple attempts by the court attorney and court officers to have the landlord's attorney deal with the case were unsuccessful.

.....
A white male ADA in part Z stated to woman of color tenant attorney: "I feel bad for your boyfriend or husband, you are so inflexible. You don't compromise. You are so difficult."

.....
A male landlord's attorney in front of Judge's court attorney and ADA to female tenant attorney: "we should discuss this settlement over drinks this evening."

.....
Landlord's attorney made disparaging remarks about my client, saying that he and his wife were disgusting.

.....
Landlord's attorney called my client a "cuckoo bird," a "nut job," and "crazy."

.....
Landlord's attorneys have commented on my appearance and it has made me feel very uncomfortable.

.....
In the hallway outside the courtroom, landlord's attorney said to tenant attorney that the tenant "should go back to where she came from." The tenant is a lawful permanent resident who was born in Trinidad.

BRONX SOLIDARITY!

In the housing court attorney room, a landlord's attorney commented that tenants "should learn to speak English."

Two landlord's attorneys nearly come to blows over counter space, threaten to "take this outside."

A male judge asked his female court attorney and court officer to stand up so that the gallery could compliment their looks.

A landlord's attorney told a tenant attorney that the tenant was a fucking scumbag and the tenant attorney was a fucking scumbag for representing the tenant.

I once witnessed a landlord's attorney shout and berate a woman of color tenant attorney for over a half hour loudly in the court hallway.

A landlord's attorney complains to a court attorney about adjourning the case for an ELS attorney to assess the case for conflicts and appear. The court attorney says take it up with the mayor. The landlord's attorney says loud enough for everyone in the courtroom to hear: "you know what I wish? I wish the mayor was bike riding two days ago." (Referring to the driver who plowed a truck down the Hudson River bike path, killing eight people and injuring eleven people.)

Landlord's attorney takes settlement off the table to a tenant attorney on ELS intake for "interfering" with the landlord-attorney's cases and refuses to provide a rent breakdown

While being shown photos of pet dogs, a male landlord's attorney "joked" about only kissing the female dogs on the mouth.

A male attorney "guided" a female attorney out of the courtroom by putting his hands on her arm and the small of her back.

A white male attorney refers to a female attorney of color as an "attorney" (using air quotes, as if not really an attorney) when referring to her.

Court attorneys regularly ask a female attorney of color if she is a paralegal.

A female attorney is regularly referred to as "honey," "sweetie," and "baby" by male attorneys.

A male attorney asks to see photos of a female attorney in traditional cultural attire/dress in order to settle a case favorably.

A white male attorney referred to a female court officer as a pedophile when she walked down the stairs with two little girls trying to find their mother.

A female landlord's attorney substantially more experienced than me was making comments about the way the ELS process works. Hoping to have a productive conversation, I started, "I understand where you are coming from" but she cut me off immediately, saying, "you can't possibly understand. You don't. I have been practicing for far longer than you, so you can't understand!" Needless to say, I was no longer interested in having a productive conversation.

While negotiating in the hallway, landlord's attorney called my client a piece of shit and said my client always wheels in his wheelchair and begs for rent just because he is in a wheelchair.

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A landlord's attorney refused to acknowledge a tenant by her preferred name – which reflected her gender – and insisted on calling the tenant by the name given to the tenant because of the tenant's sex at birth.

A landlord's attorney called a tenant a bitch.

A landlord's attorney yelled at another attorney at court using profanity, including "fuck you."

Landlord's attorney yells at female attorney in hallway, then as she walked away called her a "cunt."

Landlord's attorneys yell at opposing counsel in hallway and courtrooms.

Landlord's attorney said opposing counsel was dumb but sexy.

Landlord's attorney makes paralegals in hallway take out cameras to take video of tenant in tight fitting clothing.

Landlord's attorneys engage in uncivil and unprofessional behavior in court and in hallways, yelling at staff, opposing counsel, and tenants. They rip up stipulations and throw them on the ground, and tell paralegals and other attorneys that they don't know what they are talking about.

Landlord's attorney yelled at a *pro se* tenant who tapped him on the arm to get his attention and told her "don't fucking touch me."

Landlord's attorney, unhappy with ruling by judge, packs up all his papers, says he is done, and starts to walk out on trial. Judge says, "we are going to go ahead without you." He argues for another 10 minutes until 4:25 pm, and then the case is adjourned.

Landlord's attorney physically pushed opposing counsel.

Landlord's attorney says slanderous things about tenants in front of judges – snide asides accusing tenants of engaging in illegal activities, sex work, child abuse – when such allegations are unfounded and irrelevant to the proceeding.

Landlord's attorney told *pro se* tenant that she didn't care if the tenant's brother had died.

Landlord's attorney threatened to file frivolous sanctions motion.

I have witnessed landlord's attorneys treat attorneys of color in an unprofessional manner (using micro-aggressions, questioning their professionalism, using hostile behavior) compared to their white counterparts.

After the conclusion of aggressive negotiation, the male landlord's attorney patted the female supervising attorney on her shoulder without any warning.

While working on a case in housing court, a male landlord's attorney asked tenant attorney if they were a client and went on to say, "you look like a client or a paralegal." The tenant attorney identifies as Latino/a.

Landlord's attorney calls female tenant attorney sweetie, sweetheart.

Landlord's attorney makes reference to a tenant attorney identifying as Latino/a as 'looking spicy.'

BRONX SOLIDARITY!

.....
Landlord's attorney screams and refuses to speak about a case because they have a high volume of cases, and are unprepared and unaware of the case.
.....

Tenant attorneys have to chase landlord's attorneys and wait until they are ready to come to the part after telling them that the judge called the case.
.....

A female tenant's attorney was bullied and berated in court and on record by a male landlord's attorney and called "arrogant" and "rude." Tenant's attorney asked if landlord's attorney had a breakdown, he said no, attorney asked him why not, and he scoffed at attorney, didn't answer, went into the courtroom and put the case up for conference without informing attorney. He refused to answer questions about the breakdown, said he wanted to settle or have a judgment despite not providing proof of missing rent. While Judge was off bench and attorneys of the parties were in conference with court attorney, the landlord's attorney said "I thought I was dealing with an attorney." Both attorneys were forced to come back after lunch, unnecessarily, at which time the landlord's attorney pleasantly provided a breakdown as if nothing had happened. His berating continued on the record, for example when the Judge asked tenant attorney a question, he interrupted tenant attorney's attempt to answer with "You see Judge, you can't get any answers out of her, she never any answers." Judge barely asked him to stop.
.....

White woman is tenant attorney, White Man is landlord's attorney, and Black African American woman is the client. In the hallway before an appearance in court the landlord's attorney called the client a "bitch" and calls the tenant attorney a "piece of shit."
.....

I made an application to adjourn my order to show cause because there was no interpreter for my client. The landlord's lawyer opposed the adjournment and said something to the effect, on the record, "If Legal Aid did not take non-English-speaking clients, we wouldn't have this problem".
.....

As my opponent and I approached the bench to argue a motion, I realized that the court interpreter for my client was not present. I informed the judge that we had to wait for the interpreter to return before we could start the argument. The landlord's lawyer groaned and audibly sucked her teeth. She slammed her papers and stomped away from the bench. I interpreted her body language and behavior as that of an angry person. I asked her, "why are you so angry, because we have to wait for an interpreter?" The landlord's lawyer responded, in open court, in front of an entire congregation, "NO! I'm angry because SHE [pointing to my client] does not know how to speak English! How long has she been here!?"
.....

Judges and landlords frequently ask tenant attorneys of color if they are tenants/will not refer to them as attorneys.
.....

A landlord's attorney, who is male, asked me, a female, if I would tell his wife that he is talking to me because I was so beautiful that she would consider it cheating.
.....

A male landlord's attorney repeatedly refers to female tenant attorneys as "honey" and "sweetie" after being asked to stop.
.....

Court interpreter (approximately 60 year old Latino male) discussing case with landlord's attorney (30 year old black male) and tenant (young Latina). Landlord's attorney asks about settling the case. The court interpreter, instead of translating what tenant is saying, states "she's saying the usual stuff about repairs." Totally dismissing and silencing tenant's concerns. There was no court attorney there or other neutral party. Interpreter before/ after conference continued personal conversation with landlord's attorney laughing and joking
.....

BRONX SOLIDARITY!

I overheard an exchange between a landlord's lawyer and a *pro se* litigant. The landlord's lawyer was a middle-aged woman. The *pro se* litigant was a man of African descent. He could have been American, Caribbean or African. I do not know. The exchange began calmly but the landlord's lawyer quickly became nasty and passive-aggressive when the tenant disputed the alleged amount owed. She insulted the man and suggested that he did not know what he was talking about because he was crazy. The man reacted to the landlord's lawyer's insults and passive-aggressive behavior by raising his voice at her. His message was basically, "stop doing what you are doing", although he did not use those exact words. But because he began yelling, a couple of court officers appeared. One officer was a white man. The other officer was an African-American woman. The white lawyer began talking to white officer. "That man is acting crazy... I think he is crazy... maybe he's off his meds... maybe he's on drugs...." Thankfully, the white officer did not react to her words. But I think he did not react because of the presence and tactics employed by the African-American officer.

The African-American officer talked to the man. She asked him if he was ok. His initial response was, "NO! I'M NOT OK!" and he described to the African-American officer what the landlord's lawyer said to him." The African-American officer chided the white attorney. The African-American officer asked the man again if he was ok. He said, "Yeah, I'm ok". "You sure you good?" "Yeah, I'm calm now." And the officers returned to their parts and no one was arrested.

I believe the white lawyer intentionally antagonized the man in an attempt to get him arrested. I believe that was the white attorney's intent because she said things like, "I think he's crazy and might be on drugs". This suggests that the man was erratic and uncontrollable and needed to be subdued. In other words, it played off of the angry Black man trope. I am confident that that man would have been arrested but for the presence and tact of the female African-American court officer. I also believe this anecdote highlights the importance of having diversity in every layer of the court/justice system. This is an easily attainable way to change the culture of Bronx Housing Court.

.....
A landlord's attorney followed me in the elevator to make fun of what I was wearing and tried to get other landlord's attorneys to join her in on it. She started saying that there was something wrong with millennials (of which I am a part) and that I should learn that the world is not a nice place. I did not even have a case on with her that day and the attack was completely unprovoked.

.....
I can think of 2 landlord's attorneys (one is 70 year old white male attorney, the other is 50 year old white male attorney). Every time there is a case with them, they ask me, 30 year old white woman tenant's attorney, to procure them photocopies of the motion, the stipulation and the HPD report. I have repeatedly told them they can't ask opposing counsel to make them copies- they both have paid staff at housing court with them.

.....
I overheard a landlord's attorney screaming at a *pro se* tenant saying over and over again in a very loud voice that she was illiterate and could not read. I calmly approached him and asked him not to speak to her that way. Then he started screaming at me and asking me why I cared. I informed him that we had a duty of professionalism as attorneys. I then tried to walk away and he followed me down the hallway screaming at me and asking me why it was my business until a court officer told him to stop.

.....

BRONX SOLIDARITY!

A month after Tenant advocate started (in May 2017) and made a small error on a stipulation, and the landlord's attorney started yelling at advocate in the middle of the hallway, asking if the tenant advocate even graduated from law school and promising to get advocate disbarred. The yelling continued into the court room, where the court attorney asked that advocate get supervisor. Supervisor came. The landlord's attorney asked to meet in the judge's chambers the next day. In the meeting the next time, she made incredible accusations against tenant advocate saying that advocate maliciously made an error on the stipulation, even though she knew for a fact the advocate had been working there for less than one month. She also, for absolutely no reason, accused advocate of signature fraud because she said advocate had a different signature on a motion than on stipulations. She insisted that advocate apologize to her again, despite apologizing several times. Once attorneys were done in the judge's chambers, she followed advocate outside yelling at advocate to apologize again. She even waited for advocate outside the bathroom in which advocate was crying so she could continue to yell at advocate about apologizing to her.

.....
In the hallway, 60 year old white woman attorney calls 30 year old woman tenant's attorney a "piece of shit" when dispute arose about tendering checks without a signed receipt.

.....
60 year old white man landlord's attorney calls 30 year old white woman tenant's attorney, "why do you have to be such an asshole" following negotiation discussions where tenant's attorney pointed out defenses and counterclaims would not be waived.

.....
While discussing a motion that a female tenant attorney was not served with, a male landlord's attorney screamed that he doesn't want to have anything to do with the female attorney's organization anyway because they are all a bunch of assholes. This happened in a quiet court room. No court personnel said anything to the landlord's attorney.

.....
A landlord's attorney told me that she was going to get me fired because I separated a stipulation which she apparently wanted so ordered but had not told me. She made a huge scene in the court room to take down my name to call the head of the legal organization I work for and promised that I would get fired.

.....
At the court attorney's table waiting to be called before judge. White woman is tenant attorney, and two middle-age white men representing landlord are at the table as well. The Latina court attorney asks attorneys to move twice so she can conference cases. The landlord's attorneys refuse to move and don't break eye contact with their cell phone screens. One other chair is pulled in so clerk can conference and continue to do her job, ignoring landlord's attorneys.

.....
As a tenant's attorney (30 year old white woman) I have regularly emailed one opposing counsel (60 year old white male attorney, sole owner at his firm of 3 associates) about cases for the past two years. The majority of emails are fine, or go unanswered, or the response is a simple: yes those terms are fine, or no. I can count perhaps 3-4 occasions when this owner has responded by email accusing me of "jerking him around" and "being difficult" and "lying" or "why can't you be nice." I remember feeling personal boundaries were crossed when he sends me these emails from his personal device late at night.

.....
In court hallway, 60 year old male attorney calls 30 year old female attorney a leech for requesting a rent ledger on first appearance with counsel.

.....
When male attorney advised LL attorney in court that a new attorney would appear and argue a motion on the return date, LL attorney said that the new attorney could "suck my d**k." The male attorney recited that commentary in his reply affirmation. At hearing on the motion, the new attorney pointed out that

BRONX SOLIDARITY!

paragraph of the reply affirmation to the judge, who brushed it off without addressing LL attorney's unprofessional conduct.

.....
When tenant's (T) attorney was late to court due to train trouble, a colleague checked in for her. LL attorney was not in the Part or on the floor when T attorney arrived. T attorney then conferenced two cases on other floors and returned to the Part. About that time, LL attorney appeared and told T attorney that she was in trouble because the supervising judge was on her way. The supervising judge then appeared in the Part (which was not her Part) with the court file in her hand – given to her by LL attorney. The supervising judge asked to speak with T attorney behind closed doors. She then asked why T attorney was late and other irrelevant questions. Concluding the exchange the supervising judge observed, "I don't even know why I was brought down here" (presumably by the LL attorney) and then left.

.....
While in housing court, a male landlord's attorney put his hand on a tenant attorney's back while calling her "sweetie."

.....
A Judge, on numerous occasions, would ask tenant questions about their case and before tenant could answer or while attempting to answer, would tell tenant to be quiet or shut up because he thought tenant did not understand his question, when in fact tenant did (related this afterwards). The same judge would also ridicule tenant and chuckle at tenant. This caused tenant to dread going in front of the judge, never knowing what to expect from his behavior.

.....
When a male tenant attorney asked a male landlord's attorney to discuss a contentious case with him, the landlord's attorney refused. The tenant attorney insisted, which resulted in the landlord's attorney dismissing him and making a hand gesture appearing to mimic a sexual act.
.....

Concurring Opinion, Michael I. Bernstein:

I wholeheartedly agree with, and endorse, the need for the above recommended changes in the Committee's Report, mindful of their implementation subject to the standards and precedent there discussed. I do so, moreover, in the belief application of such changes, once made, will not be insensitive to legitimate First Amendment issues, as appropriate. That said, certain comments no doubt included in good faith in the Committee's Report, for reasons I state below, prompt concerns I cannot ignore. Those concerns involve critical issues of due process and fundamental issues of fairness, however articulated, to which any attorney who may be subject to accusations of the kind expressed in the report necessarily would be entitled. They are concerns, I respectfully submit, that cannot and should not be compromised. We cannot forget we are submitting our report in our capacity as objective representatives of the Bar and of the NYSBA, focused on the ethical and professional standards by which attorneys are to be governed in the conduct of their legal practices, and sensitive to the state's needs for regulation of the legal system and the administration of justice. No matter what "hat" we may wear in our respective legal practices, or in our capacity as citizens, I would hope these are concerns we all share.

In Sections III and VII of the Committee Report, references are made to the "death of George Floyd" as a reminder of the need to act now on the recommended changes, particularly with respect to "race equity" and "race relations" issues. Discussion was had as to whether the term "death" was inadequate and should be replaced either by the terms "murder" or "killed" – even though there had yet to be an adjudication in the case at hand. Also discussed was the passage in Section VII: "Like the court's review of race equity in its own system, COSAC's review of 8.4(g) 'comes at a particularly tense moment for race relations in America. Black Americans watch an unrelenting parade of video images of their people's lives snuffed out like animals in the hunt, at the hands of law enforcement in this jurisdiction and beyond' How we as attorneys govern ourselves within our court system is central to eliminating race equity issues in New York's justice system." As one horrified by the videos that have been shown on public media, I was and remain truly concerned by what I saw and heard of the circumstances of Mr. Floyd's death. I also know, however, various issues have been raised in this case and, as noted above, no adjudication has yet been reached. While careful and detailed analysis of Mr. Floyd's and these other cases well might be elsewhere appropriate, I find their inclusion and the vague reference to "the hands of law enforcement" in this report highly inappropriate in the context of the report and our mission, particularly in the form of the above-quoted passage with its broad-scale generalizations and imagery, devoid of identification, concrete analysis or specific factual correlations. If anything, inclusion of the passage may even undermine confidence on the part of some in the recommendations of the Committee.*

* In examining these concerns, we must remember, as the Committee's Report emphasizes (p. 7), "the proposed modifications [in Rule 8.4(g)] would eliminate the current threshold requirements that the prescribed conduct be unlawful or, to the extent applied in the employment context, severe or pervasive," or to the requirement that there first be an exhaustion of all other remedies before an 8.4(g) complaint can be filed (p. 6).



New York State Bar Association

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Committee on Disability Rights

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December 3, 2020

Dear President Karson and Delegates:

On behalf of the NYSBA Disability Rights Committee we write to support the adoption of the ABA Model Rule of Professional Conduct 8.4(g) as recommended.

First, we applaud the efforts of the NYSBA, President Karson, and the Committee on Diversity and Inclusion. The Broad initiatives seeking to expand diverse and inclusive equal opportunities for historically disenfranchised segments of society is empowering. As a Committee, the DRC appreciates the initiatives that encompass disability rights and meaningful participation. It is a privilege to have NYSBA leadership reach out to our committee for consideration and comment.

The Rule as proposed reiterates clearly obligations inherent in the ethical practice of law. The Rule recognizes that as lawyers our responsibility extends beyond what we "argue" to how we act. Our profession is first and foremost recognizing the equal rights and dignity of the people we work with and represent. While it is unfortunate there remains a need to codify professionally what is espoused in the Declaration of Independence and Constitutions, it is laudable the need is recognized and appropriately addressed. The NYSBA has always been a leader in the advancement of human and civil rights. The good works of the Committee on Diversity and Inclusion as well as leadership in taking affirmative action to address continuing inequities demonstrates the fortitude that has been a hallmark of this Association.

Wherefore, the NYSBA Disability Rights Committee supports and strongly recommends adoption of the Committee of Diversity and Inclusion Report and Recommendation.

Thank you for your time, attention and consideration of this matter.

Respectfully,

Joseph J. Ranni, Co-Chair

Alison Morris, Co-Chair



COMMITTEE ON LEGAL AID
PRESIDENT'S COMMITTEE ON ACCESS TO JUSTICE

May 28, 2021

TO: Members of the House of Delegates

FROM: NYSBA Committee on Legal Aid
and President's Committee on Access to Justice

RE: Report of the Committee on Standards of Attorney Conduct

The Committee on Legal Aid and President's Committee on Access to Justice jointly urge the House of Delegates to approve policy in support of ABA Model Rule 8.4(g), with the inclusion of additional protected statutes and with incorporation of language on harassment, rather than the proposed amendments to ABA Model Rule 8.4(g) as recommended by the Committee on Standards of Attorney Conduct.



Roy Simon <roy.d.simon@gmail.com>

RE: Proposed amendments to NY Rule 8.4

1 message

Bartosiewicz, Gina <GBartosiewicz@nysba.org>
To: Roy Simon <roy.d.simon@gmail.com>

Wed, May 5, 2021 at 11:30 AM

Hi Roy,

Thank you for reaching out for clarification.

The Trial Lawyers are commenting on the COSAC Report on Rule 8.4(g) which prohibits a lawyer or law firm from "unlawfully discriminating in the practice of law". The section's position is that the amendments to the existing Rule are not needed.

I hope this helps!

Thanks,

Gina

From: Roy Simon <roy.d.simon@gmail.com>
Sent: Wednesday, May 5, 2021 10:42 AM
To: Bartosiewicz, Gina <GBartosiewicz@nysba.org>
Subject: Proposed amendments to NY Rule 8.4

Gina -- Tom Richards forwarded the comments (below) from the Trial Lawyers Section on proposed amendments to Rule 8.4. I am the Chair of COSAC and I just want to clarify something. Two sets of proposed amendments to Rule 8.4 are currently circulating. One proposal was circulated by the New York Courts and would adopt ABA Model Rule 8.4(g) verbatim. The other proposal was circulated by COSAC and is much more specific than the ABA Model Rule. Which one was the Trial Lawyers Section commenting on?

If you were commenting on the COSAC proposal (circulated April 16, 2021), can you elaborate on which parts are vague and unneeded? Is it the TLS position that we should eliminate existing Rule 8.4(g), which prohibits a lawyer or law firm from "unlawfully discriminating in the practice of law"? Or is the position simply that amendments to existing Rule 8.4(g) are not needed? COSAC would like to improve its proposal and your clarification would help us to do that. Many thanks. Be well.

--

Professor Roy D. Simon

Chair, NYSBA Committee on Standards of Attorney Conduct ("COSAC")

From: Bartosiewicz, Gina <GBartosiewicz@nysba.org>
Sent: Wednesday, May 5, 2021 9:19 AM
To: Richards, Thomas <TRICHARDS@NYSBA.ORG>
Cc: William S. Friedlander <wsf@friedlanderlaw.com>
Subject: Proposed Amendments to Rule 8.4 of the New York Rules of Professional Conduct | Trial Lawyers Section

Good morning,

On behalf of the Chair of the Trial Lawyers Section, William Friedlander (copied) please note that at a special meeting of the Trial Lawyers Executive Committee on May 4th, 2021, the Committee has voted to not take a position on the Proposed Amendments to Rule 8.4 of the New York Rules of Professional Conduct due to it being vague and unneeded.

Thank you,



Gina Bartosiewicz, Sections and Meetings Liaison

New York State Bar Association

One [Elk Street](#), Albany, NY 12207

direct: 518.487.5671 | **main:** 518.463.3200 | **email:** gbartosiewicz@nysba.org | www.nysba.org



May 28, 2021

New York State Bar Association
Committee on Standards of Attorney Conduct (COSAC)
By email (roy.simon@hofstra.edu)

Re: Comment Letter Opposing Proposed Rule 8.4(g)

Pacific Legal Foundation submits this comment letter in response to the COSAC's request for public comment regarding Proposed Rule 8.4(g).

Pacific Legal Foundation writes to express concerns regarding the First Amendment implications of Proposed Rule 8.4(g). The rule would impair freedom of speech and freedom of expression in the legal profession, and particularly penalize public interest lawyers who engage in litigation concerning controversial topics such as race and sex discrimination.

The Rejection of ABA Model Rule 8.4(g)

The Proposed Rule is modeled after ABA Model Rule 8.4(g), a proposal that has been rejected by nearly every state to consider it.

In 2016, the American Bar Association proposed Model Rule 8.4(g), which makes it professional misconduct to “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.” Model Rules of Prof'l Conduct R.8.4: Misconduct (Am. Bar Ass'n 2016). The rule utilizes a broad definition of “conduct related to the practice of law,” which includes not only “representing clients; interacting with witnesses” and other in court activities, but also “participating in bar association, business, or social activities in connection with the practice of law.” *Id.* Comment 4.

After many years of intense deliberation, only two states—Vermont and New Mexico—have adopted Model Rule 8.4(g) in full into their own Rules of Professional Conduct, and Pennsylvania and Maine have adopted variations of the rule. Maine adopted a variation of Model Rule 8.4(g), which does not bar discrimination on the basis of marital status or socio-economic status and which does not extend to participation in bar association, business, or social activities. Pennsylvania's stripped down version of Model Rule 8.4(g) was nevertheless enjoined by the federal district court. *Greenberg v. Hagerty*, 2:20-cv-03822 (filed Aug. 6, 2020).

On the other hand, many other states have expressly rejected the adoption of Model Rule 8.4(g). The Attorneys General of several states published opinions arguing that the rule would violate the Constitution.¹ For instance, Alaska Attorney General Kevin Clarkson filed a comment letter urging the Alaska Bar Association Board of Governors to reject Model Rule 8.4(g). Attorney General Clarkson raised a variety of serious First Amendment concerns, including the potential for the rule to intrude on freedom of association by penalizing lawyers who participate in private associations with exclusive membership practices or who advocate for policies that may be deemed discriminatory. Kevin Clarkson, Letter Re: Proposed Rule of Professional Conduct 8.4(f) submitted to the Alaska Bar Association (Aug. 9, 2019), <http://www.law.state.ak.us/pdf/press/190809-Letter.pdf>.

Problems with the Rule

A wide variety of First Amendment and Constitutional Law scholars have also written criticizing Model Rule 8.4(g) for its potential to stifle or censor attorney speech.²

This scholarship raises a series of overlapping concerns which apply to Proposed Rule 8.4(g). First, the rule might penalize speech if it is seen as “derogatory,” or “demeaning”—highly subjective terms that provide little guidance to New York attorneys.³ COSAC’s Proposed Rule 8.4(g) includes several additional vague terms such as “degrading,” “repulsive,” and “disdainful.” This might include, for instance, a presentation arguing against race-based

¹ ABA Model Rule of Professional Conduct 8.4(g) and Louisiana State Bar Association proposed Rule 8.4(g) violate the First and Fourteenth Amendments of the United States Constitution, La. Att’y Gen. Op. 17-0114 (Sept. 8, 2017), <https://perma.cc/9TWR-8GY9>; S.C. Att’y Gen. Op. Letter to Hon. John R. McCravy III, S.C. House of Representatives (May 1, 2017), <https://perma.cc/ED72-3UGM>; American Bar Association’s New Model Rule of Professional Conduct 8.4(g), Tenn. Att’y Gen. Op. 18-11 (Mar. 16, 2018), <https://perma.cc/DZY2-YG23>; whether adoption of the American Bar Association’s Model Rule of Professional Conduct 8.4(g) would constitute violation of an attorney’s statutory or constitutional rights (RQ-0128-KP), Tex. Att’y Gen. Op. KP-0123 (Dec. 20, 2016), <https://perma.cc/M248-HKGG>.

² Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting ‘Diversity’ But Not Diversity of Thought*, The Heritage Foundation (Oct. 6, 2016), <http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf>; Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(G): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. Legal. Prof. 201, 257 (2017).

³ Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g) The First Amendment and ‘Conduct Related to the Practice of Law,’* 30 Geo. J. Legal Ethics 241, 245 (2017).

affirmative action due to the impact of “mismatch theory,” or a speaker who argues that “low-income individuals who receive public assistance should be subject to drug testing.”⁴

Second, the rule will apply to CLE presentations, academic symposia, and even to conversations at a local bar dinner, which will stifle conversations about significant legal topics of controversy.⁵ As Professor Eugene Volokh put it, the rule could be applied to dinner conversations “about such matters — Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on.”⁶ COSAC’s proposed rule similarly applies to attorneys when they are “participating in bar association, business, or professional activities or events in connection with the practice of law.”

Third, the rule penalizes attorneys for speech that they “reasonably should know” would cause offense.⁷ This mens rea requirement places attorneys at risk of discipline for speech that they were not aware would or could cause any offense, further exacerbating the chilling effect on attorney speech.⁸

These are just a few of the many well-founded criticisms of the ABA rule.

COSAC’s Proposed Rule 8.4(g) does attempt to remedy some of the shortfalls of ABA Model Rule 8.4(g). In particular, the rule states that it does not “limit the ability of a lawyer or law firm to accept, decline, or withdraw from representation.” And that the rule places no limits on a lawyer’s ability “express views on matters of public concern in the context of teaching, public speeches, or other forms of public advocacy.” The inclusion of this language is a significant improvement. The definition of harassment included in the rule is also an improvement as it tracks much more closely with federal harassment law which requires severe and pervasive conduct.

⁴ *Id.* at 246.

⁵ Eugene Volokh, *A speech code for lawyers, banning viewpoints that express ‘bias,’ including in law-related social activities*, Volokh Conspiracy (Aug. 10, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?noredirect=on>.

⁶ *Id.*

⁷ Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J.L. & Pub. Pol’y 173, 205 (2019).

⁸ *Id.*

Unfortunately, because the Proposed Rule still relies on highly subjective concepts such as “offensive” and has an extremely lax mens rea requirement, there is still significant risk that the Proposed Rule will create uncertainty and stifle speech on important matters of public policy. These caveats also fail to protect a lawyer from investigation for protected speech and would require lawyers to suffer reputational harm and a prolonged process before constitutional rights could be vindicated.

Reliance on Local Law Raises Constitutional Concerns

But even more troublingly, the current version of Model Rule 8.4(g) contains a carve out wide enough to swallow up all of these improvements. Specifically, Model Rule 8.4(g) contains no definition for the crucial term “unlawful discrimination.” Instead, this term is to be defined “under federal, state and local law.”

In New York in particular this is an enormous First Amendment problem. New York City is known for having one of the nation’s most expansive anti-discrimination laws. New York City Human Rights Law defines harassment in a fashion that is far broader and more burdensome on speech than federal anti-discrimination standards. Under federal law, an employer or public accommodation can only be liable where there is discriminatory conduct or severe and pervasive harassment that creates a hostile work environment. In contrast, under the NYCHRL, anything that is more than a “petty slight or trivial inconvenience” can result in liability if it is intended to “demean, humiliate, or offend a person.” *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 79–80, 872 N.Y.S.2d 27, 40–41 (2009). And the burden is on the employer or public accommodation to prove that its actions were just a “petty slight or trivial inconvenience,” which may unduly burden and chill expressive activity. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964) (concluding that a defense of truth in defamation cases was inadequate to protect First Amendment freedoms, because fear of liability would “dampen[] the vigor and limit[] the variety of public debate”).

Indeed, cases involving provisions of the NYCHRL have found discrimination based on little more than stray remarks or jokes based on protected characteristics. For instance, in *Benzinger v. NYSARC, Inc. New York City Chapter*, 385 F. Supp. 3d 224, 229 (S.D.N.Y. 2019), a security services provider was found liable because one of its security guards laughed at racist comments made by the building porter, because the laughter “could constitute an indirect declaration that Plaintiff’s patronage ... was unwelcome or objectionable.” The services provider was found liable even without any independent evidence of intent to demean, and solely because of the subjective impact that the laughter had. *In the Matter of Commission on Human Rights ex. rel. Christina Spitzer and Kassie Thorton v. Mohammed Dahbi*, 2016 WL 7106071, at *1 (taxi driver

asked gay couple to stop kissing in his vehicle).⁹ See also *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 80, 872 N.Y.S.2d 27, 41 (2009) (“One can easily imagine a single comment that objectifies women being made in circumstances where that comment would, for example, signal views about the role of women in the workplace and be actionable.”); *Golston-Green v. City of New York*, 184 A.D.3d 24, 123 N.Y.S.3d 656, 670 (2020) (“A single comment being made in circumstances where that comment would, for example, signal views about the role of women in the workplace may be actionable under the City Human Rights Law” (internal quotation marks omitted)).

The New York City Human Rights Commission has gone even further in guidance documents interpreting New York City civil rights law. For instance, a September 2019 document declared that even a single usage of the words “illegal alien” could be considered unlawful discrimination if it is determined to have been done with the intent to demean, humiliate, or offend.¹⁰ This could include “comments or jokes.” Indeed, any inquiry at all into immigration status might constitute discrimination because such inquiries can make an individual feel “unwelcome, objectionable, or not acceptable.” The NYCHRC has imposed a similarly expansive interpretation against the misgendering of individuals. And the NYCHRC has investigated companies merely for using images in advertising that it deemed offensive.¹¹

Incorporating such an expansive interpretation of discrimination into the New York Rules of Professional Conduct would chill attorney speech throughout the State of New York and especially in New York City. Attorneys would be reasonably worried that their words might be seen as demeaning, humiliating or offensive.

The Rule is Incompatible with Recent Supreme Court Precedent

In the last few years, the Supreme Court has issued several decisions which make it clear that the Proposed Rule would be presumptively unconstitutional and would likely be invalidated as a content-based and viewpoint-based restriction of professional speech. Its 2018 decision in

⁹ Other examples include: the New York Department of Education being fined after a middle-school vice principal showed a group of teachers a transphobic meme, <https://www1.nyc.gov/site/cchr/enforcement/2019-settlements.page>; see also <https://nypost.com/2016/12/13/assistant-principal-accused-of-sharing-transphobic-meme/m>; and a Home Depot was fined after an employee became upset and used racist language at a black customer. <https://www1.nyc.gov/site/cchr/enforcement/2019-settlements.page>.

¹⁰ <https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/immigration-guidance.pdf>.

¹¹ https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/Prada_Settlement_Press_Release.pdf

National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018), is particularly on point. In that case, the Supreme Court invalidated a law which imposed speech requirements on clinics offering services to pregnant women. The Court explained that content-based regulations of professional speech “pose[] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information” and are accordingly subject to strict scrutiny. *Id.* at 2374. The Court emphasized that attorney speech cannot be regulated to impose “invidious discrimination of disfavored subjects.” *Id.* at 2375.

In *Matal v. Tam*, 137 S. Ct. 1744 (2017), and *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), the Supreme Court invalidated restrictions on the registration of “offensive,” “immoral,” and “scandalous” trademarks. The Court emphasized that “the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers,” and that such restrictions are viewpoint-based and strongly disfavored. *Matal*, 137 S. Ct. at 1763. The First Amendment does not tolerate a “happy-talk” requirement. *Id.* at 1765.

If it was not clear beforehand, these cases make clear that a restriction on professional speech, merely because some may find it offensive, is unconstitutional.

The Rule Risks Stifling a Wide Variety of Lawyer Conduct and Expression

To illustrate some of the problems with the Proposed Rule, consider the following hypothetical scenarios. How would the proposed rule apply if someone who was offended by an attorney’s speech filed a complaint? And how would a New York attorney reading the vague and overly broad rule ever know?

1. A public interest lawyer in New York brings a lawsuit on behalf of Asian high school students student who argues that Mayor de Blasio discriminated against them by changing the admissions policies at the city’s selective high school based on racial stereotypes and a belief that Asians are over represented.¹² As part of that lawsuit, the New York attorney also argues that the use of affirmative-action creates a “mismatch” and that therefore “racial preference policies often stigmatize minorities, reinforce pernicious stereotypes, and undermine the self-confidence of beneficiaries,”¹³ which results in minority students performing worse in the selective schools. In arguing the case, the attorney writes an op-ed and appears in radio and television interviews arguing that the Supreme Court should outlaw all forms of affirmative action because these

¹² <https://pacificlegal.org/case/christa-mcauliffe-ptv-de-blasio/>

¹³ Richard Sander and Stuart Taylor Jr., *The Painful Truth About Affirmative Action*, *The Atlantic* (Oct. 2, 2012).

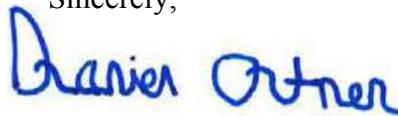
- policies violate the ideal of equal protection under the law. How does the prohibition against discrimination on the basis of race in the Proposed Rule apply to this speech?
2. Another New York attorney intervenes on behalf of a group of African-American high school students who are likely to benefit from the affirmative action policies. He argues that because of the legacy of slavery and segregation that it is necessary for African-American students to be the beneficiaries of affirmative action policies, and affirmative action is needed to counteract systemic racism which favors white Americans. How does the prohibition against discrimination on the basis of race in the Proposed Rule apply to this speech?
 3. At a CLE event, two New York attorneys agree to debate whether the state of New York should introduce rent control legislation. The speaker arguing in favor of rent control argues that absentee landlords are profiteering off the poor and that rent control is needed to mitigate their greed. The speaker arguing against rent control extols the virtues of private property ownership and entrepreneurship and argues that renters need to work harder in order to meet the rising cost of rent rather than demand subsidies from landlords. How does the prohibition against discrimination on the basis of socioeconomic status in the Proposed Rule apply to either attorney's statements?
 4. A New York attorney files an amicus brief arguing that the President has plenary authority to exclude individuals from admission to this country on the basis of their ethnicity or religion. How does the prohibition against discrimination on the basis of religion and national origin in the Proposed Rule apply to this speech?
 5. Relatedly, another New York attorney writes an op-ed critiquing the attorney by name and calling her a racist and an islamophobe. How does the prohibition against discrimination on the basis of race and religion in the Proposed Rule apply to this speech?
 6. A New York attorney represents the KKK when their petition to hold a rally in a town in New York is denied. How does the prohibition against discrimination on the basis of race in the Proposed Rule apply to this speech?
 7. Relatedly, a New York attorney represents Antifa when their counter protest at the KKK rally is shut down due to security concerns. How does the prohibition against discrimination on the basis of race in the Proposed Rule apply to this speech?
 8. A New York attorney attends a pro-life rally and shares a picture of her attending the rally on her social media feed which includes several other New York attorneys that she knows are strongly pro-choice. How does the prohibition against discrimination on the basis of sex in the Proposed Rule apply to this speech?
 9. A New York attorney who is a member of the Boomer generation shares an article on social media which calls Millennials lazy and entitled. The following day in his law firm's lunch room the attorney discusses the article with another attorney within earshot

of several young associates. How does the prohibition against discrimination on the basis of age in the Proposed Rule apply to this speech?

10. A New York attorney wears a MAGA hat to a social event hosted by the New York State Bar Association and refuses to take the hat off even after another attorney informs him that she is offended because she sees the hat as a symbol of racism and sexism. How does the prohibition against discrimination on the basis of race and sex in the Proposed Rule apply to this speech?

Whatever the answers to each of these real-world-based hypotheticals, they show that the broad and unclear scope of the Proposed Rule threatens to stifle attorney speech on a wide variety of important issues of public concern. The Proposed Rule should accordingly be rejected.

Sincerely,



Daniel Ortner
Attorney*

** Licensed to practice law in the Commonwealth of Virginia and in the State of California.*



Roy Simon <roy.d.simon@gmail.com>

Comment on COSAC's proposed amendments to 8.4(g)

1 message

Phillips, James <jcphillips@chapman.edu>
To: "roy.simon@hofstra.edu" <roy.simon@hofstra.edu>

Thu, May 27, 2021 at 12:20 PM

EXTERNAL MESSAGE

Dear Professor Simon,

I wholeheartedly agree that harassment is unbecoming of the legal profession and has no place in our field. However, the cure should not be worse than the disease. I therefore oppose COSAC'S proposed amendments in to 8.4(g) in their current form for several reasons.

First, the proposal violates the First Amendment because it is viewpoint discriminatory. *See Matal v. Tam*, 137 S. Ct. 1744, 1753-54 (2017); *Iancu v. Brunetti*, 139 S. Ct. 2294, 2300 (2019). Second, it is overbroad and will chill attorney's speech. And third, its attempts to just regulate professional speech and not private speech do not withstand constitutional scrutiny in light of *NIFLA v. Becerra*, 138 S.Ct. 2361, 2371-72 (2018).

Sincerely,

James Phillips

Assistant Professor of Law

Fowler School of Law

Chapman University

**** CAUTION: This email originated from outside of Hofstra University. Do not click links or open attachments unless you recognize the sender and know the content is safe. ****



Roy Simon <roy.d.simon@gmail.com>

Opposition to proposed COSAC 8.4(g) rule

1 message

Zachary Greenberg <zgreenb1@gmail.com>

Thu, May 27, 2021 at 3:43 PM

To: roy.simon@hofstra.edu

EXTERNAL MESSAGE

Dear Professor Simon,

I write to register my opposition to the New York Bar Association's Committee on Standards of Attorney Conduct's Proposed Amendments to Rule 8.4(g) of the New York Rules of Professional Conduct.

The proposed amendment would violate the First Amendment rights of New York attorneys by unduly restricting their expressive freedoms. The proposed rule suffers from the same constitutional defects as the 8.4(g) rule variant adopted by the Disciplinary Board of the Supreme Court of Pennsylvania, which was [struck down](#) by a federal district court last year in my response to [my lawsuit](#).

I urge you and the COSAC to read about [this litigation](#), especially the [court's decision](#), and refrain from enacting this limitation on attorney free speech rights. Your failure to do so may result in another successful First Amendment lawsuit against you and all those responsible for promulgating this rule, to the detriment of the New York Bar Association and all those it claims to represent.

(The views expressed in this message are my personal views and do not represent those of any organization.)

I'd be happy to discuss further. Thank you for your consideration.

Best,
Zach

Zachary Sam Greenberg

New York Attorney Registration Number: 5534334

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BT

APRL Listserv <APRL@LISTSERV.APRL.NET>

on behalf of

Barker, William T. <00000005c1dd3518-dmarc-request@LISTSERV.APRL.NET>

Sat 4/24/2021 8:42 PM

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To:

- APRL@LISTSERV.APRL.NET

EXTERNAL MESSAGE

I have now had a chance to look at the New York and DC proposals in light of Bill’s comments, and I have a few thoughts to offer.

I agree that that the requirement that the discrimination or harassment be directed at another person is an improvement, though the interpretation in ABA 493 gets somewhat close to the same result.

I don’t think that the change from “related to the practice of law” to “in the practice of law” makes as big a difference as Bill does. In part, that is because I don’t see Model Rule 8.4(g) reaching the substance of CLE presentations (or law review articles for that matter), a point on which ABA 493 agrees with me. I see that subject covered by the exclusion for “legitimate advocacy” (which I do not see as limited to advocacy on behalf of a client). Moreover, as I have argued before, prohibitions in the rule must be interpreted narrowly and exclusions broadly where necessary to avoid constitutional questions.

I do not favor a limitation to prohibition of conduct already prohibited by other law. In particular, I oppose limiting the prohibition to “severe and pervasive” conduct. Given the other limitations, including both those in Model Rule 8.4(g) and those in the NY proposal, I see no reason why that limitation is necessary. The severity of the conduct should simply affect whether charges are brought and the discipline imposed.

T.

Barker

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From: APRL Listserv <APRL@LISTSERV.APRL.NET> **On** **Behalf** **Of** William Hodes
Sent: Sunday, April 18, 2021 7:54 PM
To: APRL@LISTSERV.APRL.NET
Subject: Re: NY proposal for Rule 8.4(g) - This is much bigger deal than noted so far

[WARNING: EXTERNAL SENDER]

Many have noted the good work that Ellen Yaroshefsky and Roy Simon and other Empire Staters have done, aided and abetted by Marcy Stovall and other Nutmeg Staters. But describing it as "clarifying" or "simplifying" or "tightening up" the Model Rule version doesn't do the project justice.

Instead, along a couple of the key axes, the New York version of Rule 8.4(g) is the Anti-Model Rule, specifically rejecting or replacing the most problematic aspects of the ABA version that have caused so much controversy (and litigation).

First, changing from "conduct related to the practice of law" to "conduct in the practice of law" is huge. The ABA language can (easily) be stretched to cover (almost) everything that a lawyer does, and therefore doesn't do much of anything to contribute to the meaning of the Rule. (The same problem attends Model Rule 1.6, BTW. As many of us have pointed out, protecting all information "relating to the representation" is so broad that it can lead to strained and even absurd results.)

By contrast, "in the practice of law" is both more focused and connects more readily with existing legal ideas. This

change will remove from regulation much that should not be regulated by the Bar at all, but worked out by courageous friends and colleagues in the real world at large--at least that is what I argue in a little piece that will be in the next (electronic) issue of *The Professional Lawyer* shortly: "See Something, Say Something; Model Rule 8.4(g) is Not OK."

I don't think the drafters in New York or Connecticut intended this, BTW, but I think the change will take CLE presentations right out of the picture. (If I give a talk about legal ethics or civil rights injunctions or workers compensation, am I engaged in "conduct in the practice of law?" If so, law professors who are not admitted in the state in which they teach, or who are not lawyers at all, should be pressing the panic button!)

(Yes; there is a Black Letter definition in the New York version that includes some Bar activities, but the fit with the rest of the text is poor, and it might cover some Bar activities, but not others.)

Second, limiting situations calling for discipline to those involving "severe or pervasive" conduct was not only *rejected* by the ABA, but was given as a chief reason why federal and state civil rights provisions were insufficient, and had to be augmented by "lawyer only" provisions. The worry that bad actors could too easily "get away with" conduct that wasn't severe or pervasive enough was explicit in the materials accompanying the House of Delegates package.

Third, explicitly adopting existing definitions of what is and is not "lawful" discrimination, rather than using existing law to merely inform new definitions inserted in the ABA Comments, is also obviously huge.

(This will not end contentious debate, but it will "remand" it to the confines of existing debates. In particular, I wonder if disparate impact analysis will or will not be imported into the special world of legal employment. If so, law firms that pay bonuses and compete for former Supreme Court law clerks are going to be in big trouble, because the number of non-white clerks has been minuscule, no matter the judicial or political philosophy of any of the justices who have served on the Court.)

Another big change is the clarification that verbal attacks must be aimed at specific individuals in order to be disciplinable. That will remove *most* of the chilling effect of the most "out there" claims of being "unsafe" and the like. And I think there is a good chance that the ABA will see the wisdom of making *that* change, at least (because it came up at the online discussion and was greeted favorably by Barbara Gillers and others.)

My prediction: within 3 years, most states rejecting or not adopting Model Rule 8.4(g) will adopt something much closer to the New York version, AND within 5 years, the ABA will go along with most of it.

Bill Hodes

--

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MEMORANDUM

From: NYSBA Women in Law Section (“WILS”)
To: NYSBA Committee on Standards of Attorney Conduct (“COSAC”)
Date: May 28, 2021
Re: Proposed Amendments to Rule 8.4(g) of the New York Rules of Professional Conduct

Introduction

The NYSBA Women in Law Section (“WILS”) submits this memorandum in response to the April 16, 2021 memorandum (the “April 16 Memo”) by the NYSBA Committee on Standards of Attorney Conduct (“COSAC”) regarding its proposed amendments to Rule 8.4(g) of the New York Rules of Professional Conduct (“New York Rule 8.4(g)”) and its request for comments. We respectfully refer COSAC to its April 16 Memo for the text of its proposed amended rule and related materials.

WILS endorses the COSAC proposal to amend New York Rule 8.4(g) to align it more closely with ABA Model Rule of Professional Conduct 8.4(g) (“ABA Rule 8.4(g)”) and specifically with the proposed amendments that would (i) include, as unethical conduct by attorneys, discriminatory and harassing conduct in the practice of law (not only discrimination in the context of the employment relationship); (ii) expand the list of protected categories; and (iii) eliminate the requirement to bring a complaint to an administrative tribunal prior to a disciplinary proceeding.

Notwithstanding this endorsement, the majority of the WILS’ Executive Committee members who reviewed and voted on the proposed amendments objects to (i) the inclusion of the “severe and pervasive” standard in the definition of harassment in paragraph 8.4(g)(3); and (ii) the use of the phrase “unlawful discrimination” rather than “discrimination” in paragraph 8.4(g)(1).

Background

In or about November 2020, the NYSBA Committee on Diversity and Inclusion circulated its memorandum urging COSAC to adopt the language of ABA Rule 8.4(g) to replace New York Rule 8.4(g). The Committee on Diversity and Inclusion’s memorandum included examples of discriminatory and harassing conduct by attorneys that might be deemed unethical under the language of the ABA rule but not under the then-current New York Rule 8.4(g).

WILS' Executive Committee supported the recommendation of the Committee on Diversity and Inclusion that COSAC adopt the language of ABA Rule 8.4(g) to replace New York Rule 8.4(g).

Current Proposal and WILS' Response

In its April 16 Memo, COSAC does not propose adopting ABA Rule 8.4(g) but proposes a different set of amendments to New York Rule 8.4(g).

WILS' Executive Committee circulated the April 16 Memo for comments and sought votes on two key questions: (i) should the "severe and pervasive" standard be removed from the definition of harassment in paragraph 8.4(g)(3); and (ii) should the word "unlawful" be removed from "unlawful discrimination" in paragraph 8.4(g)(1).

More than 75% of WILS Executive Committee – 23 of 26 members -- consented to addressing the COSAC report and these issues in particular pursuant to email and responded to the issues.

Of the WILS Executive Committee members who responded,

- (i) A majority voted in favor of deleting the "severe and pervasive" standard from the definition of harassment in paragraph 8.4(g)(3) and one (1) voted in favor of replacing "severe and pervasive" with a lower standard for finding harassing conduct in violation of the ethics rule; and
- (ii) a majority voted in favor of removing the word "unlawful" from the rule against discrimination in paragraph 8.4(g)(1).

The reason for removing "severe and pervasive" from the amended rule 8.4(g) is that the "severe and pervasive" standard is not the law in New York. That standard was removed from the definition of harassment in the most recent amendments to the New York State Human Rights Law ("NYS HRL"). In addition, that standard is not part of the definition of harassment under the New York City Human Rights Law.

We note that the NYS HRL does provide a new standard for harassing conduct, which is conduct that "rise[s] above the level of what a reasonable victim of discrimination with the same protected characteristic or characteristics would consider petty slights or trivial inconveniences." NYS Executive Law Section 296(1)(h). This standard could be incorporated into the amended Rule 8.4(g)(3).

The reason for removing the word "unlawful" from the rule against discrimination is that, as an ethics rule, New York Rule 8.4(g) should provide greater protection than a legal statute. Some members of the WILS Executive Committee suggested that the amended Rule 8.4(g) should include a standard, but a lower standard than "unlawful" for finding discriminatory conduct in violation of the ethics rule.

WILS' Executive Committee members also raised concerns about whether the proposed amended New York Rule 8.4(g) provides sufficient protections for attorneys who, in the course of their practice (for example, employment law or family law), may need to use materials that are harassing or discriminatory because such materials are evidence in a case. The concern is whether, by using the materials in depositions, negotiations, filings or otherwise would be considered harassment under amended Rule 8.4(g). One answer suggested by members of WILS' Executive Committee is that protection is provided by the language in ABA Rule 8.4(g) and the amended New York Rule 8.4(g)(4) as follows: "This Rule does not limit the ability of a lawyer or law firm . . . (iii) to provide advice, assistance or advocacy to clients consistent with these Rules." The WILS members who raised this concern suggest that, if subparagraph (4) does provide the protection sought, then the comments to the proposed amended rule should so state, but if subparagraph (4) does not provide the protection sought, that the rule be further amended to provide such protection.

Subject to the foregoing, WILS endorses the COSAC proposal to amend New York Rule 8.4(g).

We are submitting this memorandum today, as required by COSAC, but will advise COSAC if we receive any additional or supplemental responses from our Executive Committee.

Thank you.

Terri Mazur, Chair, Women in Law Section

Sheryl Galler, Chair-Elect, Women in Law Section

Linda Redlisky, Secretary, Women in Law Section



Staff Memorandum

HOUSE OF DELEGATES Agenda Item # 11

REQUESTED ACTION: Approval of the report and recommendations of the Task Force on Nursing Homes and Long-Term Care.

The Task Force on Nursing Homes and Long-Term Care was appointed in 2020 to review the long-term care sector's pandemic experience. The Task Force reviewed the statutory and regulatory framework under which nursing homes and other long-term care facilities operate and examine the effects of COVID-19 on these facilities and their residents. In the course of its work, the Task Force consulted with a number of individuals and organizations with expertise in the effects of the pandemic and assigned members to three subcommittees: Nursing Homes, Other Long-Term Care Settings, and Government/Regulatory Structure.

As a result of its study, the Task Force is making recommendations in the following areas:

- Protecting public health.
- Preparing for emergencies.
- Providing clear guidance.
- Preventing the spread of communicable diseases.
- Collecting and disseminating information.
- Allocating resources.

Comments on this report were received from the Committee on Disability Rights, Elder Law & Special Needs Section and House member Steven Richman.

The report will be presented at the June 12 meeting by Task Force co-chairs Hermes Fernandez and Sandra Rivera.



NEW YORK STATE
BAR ASSOCIATION

Report and Recommendations of the **Task Force on Nursing Homes and Long-Term Care**

June 2021

The views expressed in this report are solely those of the Task Force and do not represent those of the New York State Bar Association unless and until adopted by the House of Delegates.

New York State Bar Association
Task Force on COVID-19 in New York
Nursing Homes and Long-Term Care

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Co-Chair

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Thomas J. Richards, Esq.

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Acknowledgements

The Task Force extends its thanks to the individuals who helped the Task Force complete its work and prepare this Report. We want to thank Elin Gursky, Sc.D., M.Sc., IDHA, who functioned as a Task Force member, and provided valuable advice on the epidemiology of the virus and issues the Task Force should consider.

Craig Anderson, now with Reed, Smith, and formerly with Bond, Schoeneck & King, PLLC, volunteered to assist the Task Force at its inception, and provided valuable assistance in compiling the applicable law and regulations.

Caitlin Anderson and Catherine Graziose, associates with Bond, Schoeneck & King, graciously provided assistance with the hundreds of footnotes in this Report.

We must also thank Forest Melcher, a student at Pace Law School, for her assistance in compiling source material and footnotes. Our thanks also go to Krystal Macharie, a student at Albany Law School, and Michael R. Jorolemon, DO, FF/EMT-P, FACEP, FAAEM, FAEMS, who is also a student at the Syracuse University College of Law, for the work they did in compiling the facility-specific information found in Appendix IV regarding nursing homes.

Finally, we want to thank Thomas Richards, NYSBA's Deputy General Counsel, for all the support he provided in multiple ways to the Task Force.

Introduction

The COVID-19 pandemic – a public health crisis unmatched in a hundred years – has been a devastating ordeal. As of this writing, more than 569,000 Americans have died, including more than 40,000 New Yorkers. The virus has been particularly devastating to older individuals. Nursing home residents, an older and more vulnerable

population, including older people of color and those living with disabilities, have been disproportionately impacted by the pandemic. As members of the New York State Bar Association and the larger legal community, we are committed to ensuring that laws and policies adequately protect vulnerable populations and guarantee equitable access to high quality care.

The challenge of unraveling the complex picture presented by the intersectionality of age, race, ethnicity, neighborhood, income inequality, disability, chronic illness, and place of residence in the long-term care system as affected by the pandemic is a daunting one. Nursing homes, as well as other long-term care settings, have emerged as sites of suffering, isolation and loss of loved ones. The Task Force has been asked to examine what has happened during the pandemic to those receiving long term care. Further, the Task Force examines whether the adverse events suffered by those receiving long-term care in New York systems could have been avoided. The Report focuses first on those in New York's nursing homes. There, the level of death from COVID-19 has been greatest. The Report also examines what has occurred in other long-term care settings: namely, adult care facilities, facilities and residences operated or certified by the State Office for Developmental Disabilities, facilities and residences licensed by the Office of Mental Health, and in-home care.

Pre-existing structures account at least in part for the catastrophic nature of the pandemic we have experienced over the last year. A range of issues that the Task Force have identified as critical and integral components of the pandemic experience and outcomes are addressed in this Report. The issues span structural, governmental, and provider level systems. Allocation of resource decisions at all levels impacted the

provision of care, particularly in allocations to the hospital systems before allocations were made to nursing facilities and then to other levels of long-term care. Pre-existing resource allocations to infection control, staffing and training at the provider level all affected the pandemic's impact upon long-term care recipients. Although considerable evidence documenting the pandemic's impacts across multiple domains is available, including certain systems data and data analyses, the evidence available for review is by no means complete. The Report is written as the numbers of individuals becoming ill continues to rise and fall, throughout the State, nation and the world. The virus continues to mutate. The advent and distribution of effective vaccines is cause for great optimism. Thankfully, vaccines seem to have curbed further virus outbreaks in the State's nursing homes, though vaccination reluctance among staff is a cause for concern. The virus continues as a threat, and may even threaten the vaccinated. But for the successful vaccine development, nursing home and other long-term care residents would still be at grave risk.

The history of the virus is still being created, and it is far from being fully written. Further in-depth studies will need to be conducted to glean insights into the multiple and variegated dimensions of COVID-19.

Although the Task Force was unable to resolve all questions, or perhaps even most questions, the Task Force has been able to identify certain linkages, and does make certain recommendations based upon existing evidence, including systems reforms. We can say with certainty that major policy changes will be necessary to address the needs of those affected by the present pandemic and minimize the consequences of future emergent diseases.

A. Task Force Appointment and Mission

The Long-Term Care Task Force of the New York State Bar Association was appointed by current President Scott Karson in July 2020. The mission of the Task Force is to systematically review the long-term care sector pandemic experience. In particular, the Task Force undertook a review of the statutory and regulatory framework under which nursing homes and other long-term care providers operate in New York State; examined the effects of the COVID-19 crisis on institutional and community-based providers and the individuals they serve; and now makes recommendations for change including to applicable statutes, policies, and regulations where needed.

The Task Force commenced its work in August 2021 and conducted biweekly meetings over seven months. The Task Force heard from representatives of a number of organizations who were involved in or with expertise in the impact of the pandemic in different long-term care settings.

They were:

Richard Mollot, Long Term Care Community Coalition

Bryan O'Malley, Consumer Directed Personal Assistance Association of New York State

James Clyne, LeadingAge NY

Stephen Hanse, NYS Health Facilities Association

Christina Towne, Sivan Rosenthal, NYS Nurses Association

Claudette Royal, NYS Nursing Home Ombudsman

Ruth Heller, Todd Hobbler, Service Employees International Union (SEIU) Local 1199

J.R. Drexelius, Developmental Disabilities Alliance of Western New York

Bill Hammond, Empire Center for Public Policy

Task Force member Sheila Shea also made a presentation to the Task Force on the systems operated and governed by the Office of Mental Health and Office for People with Developmental Disabilities.

After hearing from most of the experts, Task Force members were assigned to one of three committees to prepare the Report:

- Examination of Nursing Homes – to review what occurred in nursing homes.
- Examination of Other Long-Term Care Settings – to review what occurred in other long-term care settings such as community-based care, and care in facilities overseen by the Office for Mental Health and the Office for People with Developmental Disabilities.
- Government/Regulatory Structure – to review the role of government and the current laws, regulations and guidance, including guidance developed in response to COVID-19, related to nursing homes and other long-term care settings.

This Report is based on the period from the onset of the pandemic through the end of April 2021. As such, the Task Force recognizes that it is attempting to review and provide recommendations while the pandemic is still ongoing. The charge ahead is to better manage the remainder of the pandemic and emerge from the COVID-19 crisis better prepared for future public health emergencies and disasters – both those foreseen and unforeseen.

B. Descent Into the Pandemic¹

1. Recognition of COVID-19²

The novel coronavirus, what we now commonly refer to as COVID-19, is a new disease. COVID-19 is itself an acronym for Coronavirus disease 2019, meaning that this form of coronavirus was discovered in 2019. COVID-19 is caused by the severe acute respiratory syndrome coronavirus-2 (“SARS CoV-2”). The disease first appeared in Wuhan, China in late 2019.³ On the third of January, 2020, the BBC ran a story about a mystery virus in Wuhan that had infected 44 people.⁴ The Chinese government made little public comment.⁵ Nevertheless, the Taiwanese government, alarmed by what it was observing in Wuhan, sent an email to the International Health Regulations (“IHR”) focal point under the World Health Organization (“WHO”), informing WHO of its understanding of the disease and also requesting further information from the WHO.⁶ Taiwan activated enhanced border control measures that day. On January 11th, China announced its first death.⁷

² Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (Mar. 17, 2021), <https://www.nytimes.com/article/coronavirus-timeline.html>.

³ The first identifiable case of what is now known as COVID-19 appeared in Wuhan, China on November 17, 2019. Susie Neilson & Aylin Woodward, *A Comprehensive Timeline of the Coronavirus Pandemic at 1 Year, From China’s First Case to the Present*, BUS. INSIDER, (Dec. 24, 2020), <https://www.businessinsider.com/coronavirus-pandemic-timeline-history-major-events-2020-3>.

⁴ *China Pneumonia Outbreak: Mystery Virus Probed in Wuhan*, BBC (Jan. 3, 2020), <https://www.bbc.com/news/world-asia-china-50984025>.

⁵ On December 31, 2019, Chinese health officials informed the World Health Organization of a cluster of forty-one pneumonia patients in Wuhan. *Archived: WHO Timeline - COVID-19*, WORLD HEALTH ORG, (Apr. 27, 2020), <https://www.who.int/news/item/27-04-2020-who-timeline---covid-19>.

⁶ The Facts Regarding Taiwan’s Email to Alert WHO to Possible Danger of COVID-19, TAIWAN CTR FOR DISEASE CONTROL, (Apr. 11, 2020), https://www.cdc.gov.tw/En/Bulletin/Detail/PAD-lbWDHeN_bLa-viBOuw?typeid=158.

⁷ See Derrick Bryson, *supra* note 2.

On January 23rd, China shut down Wuhan.⁸ People were not allowed in or out of the city. At the same time, we watched in amazement as a hospital city was built seemingly overnight, with rows of long white buildings covering a large open area in Wuhan.

In the United States, the Centers for Disease Control (“CDC”) issued its first advisory regarding the virus on January 16th.⁹ On January 21st, the first case reported in the United States – in Washington State – was announced. The WHO announced a Public Health Emergency of global concern on January 30th.¹⁰ On January 31st, President Donald Trump announced a partial ban on travel to and from China.¹¹

2. Early Spread of COVID-19

By the end of January, the virus had been identified in four countries on three continents, China, Thailand, Italy, and North America – in Washington State. Clearly, the virus was spreading. The focus, though, remained on China.

On February 4th, the CDC announced that it had developed a test to identify individuals who were positive for COVID-19.¹² Notably, South Korea announced it had developed a test for COVID-19 the same day.¹³ Testing was crucial to the plans to keep COVID-19 in check. The plan at its core was very simple. Individuals showing

⁸ *Id.*

⁹ *Id.* The CDC was issuing statements at this time that the risk to the public was low. “For the general public, no additional precautions are recommended at this time” *CDC Confirms Person-to-Person Spread of New Coronavirus in the United States* CTRS. FOR DISEASE CONTROL (Jan. 30, 2020), <https://www.cdc.gov/media/releases/2020/p0130-coronavirus-spread.html>.

¹⁰ See World Health Organization, *supra* note 5.

¹¹ Geoff Whitmore, *When Did President Trump Ban Travel from China? And Can You Travel To China Now?*, FORBES (Oct. 19, 2020), <https://forbes.com/sites/geoffwhitmore/2020/10/19/when-did-president-trump-ban-travel-from-china-and-can-you-travel-to-china-now/?sh=627f29f97484>.

¹² *Shipping of CDC 2019 Novel Coronavirus Diagnostic Test Kits Begins*, CTRS. FOR DISEASE CONTROL (Feb. 6, 2020), <https://cdc.gov/media/releases/2020/p0206-coronavirus-diagnostic-test-kits.html> [hereinafter “CDC”].

¹³ Victor Cha, *A Timeline of South Korea’s Response to Covid-19*, CTR. FOR STRATEGIC AND INT’L STUDIES (Mar. 26, 2020), <https://www.csis.org/analysis/timeline-south-koreas-response-covid-19>.

symptoms of COVID-19 would be tested. Those testing positive would be isolated until they were no longer symptomatic, which was regarded as being no longer contagious. The intent was to stay ahead of the disease to manage the disease.

The plan collapsed within a week. On February 8th, the CDC announced problems with the test it had developed. On February 11th, the CDC shut down testing. At that time, CDC did not authorize any other entity to develop alternative tests. CDC believed keeping centralized control of the testing process was crucial to managing the response to COVID-19.¹⁴

Further signs appeared that the State and the nation were not well prepared for COVID-19. On February 6th, in a letter to health care executives, NYS Health Commissioner Howard Zucker warned of expected shortages of Personal Protective Equipment (“PPE”).¹⁵ That warning was a strong indication that the State’s public health authorities were expecting difficulties in meeting the challenge of COVID-19. The WHO issued its own warning the next day of expected worldwide PPE shortages.¹⁶

The warning bells began to ring louder. On February 24th, Italy locked down eleven towns.¹⁷ What had been seen as an authoritarian response to a public health problem in China was now being used in the liberal West. Italy, left with no other effective measure, had revived the medieval measure of quarantine.

¹⁴ Shawn Boburg et al., *Inside the Coronavirus Testing Failure: Alarm and Dismay Among the Scientists Who Sought to Help*, WASH. POST (Apr. 3, 2020),

<https://www.washingtonpost.com/investigations/2020/04/03/coronavirus-cdc-test-kits-public-health-labs/>.

¹⁵ N.Y. ST. DEP’T OF HEALTH, DEAR ADMINISTRATOR LETTER 20-3 (Feb. 6, 2020), https://coronavirus.health.ny.gov/system/files/documents/2020/03/2020-02-06_ppe_shortage_dal.pdf.

¹⁶ Lisa Schnirring, *WHO Warns of PPE Shortage; nCoV Pace Slows Slightly in China*, CTR. FOR INFECTIOUS DISEASE RES AND POL’Y (Feb. 7, 2020), <https://www.cidrap.umn.edu/news-perspective/2020/02/who-warns-ppe-shortage-ncov-pace-slows-slightly-china>.

¹⁷ Angela Giuffrida, *Italians Struggle with ‘Surreal’ Lockdown as Coronavirus Cases Rise*, THE GUARDIAN (Feb. 24, 2020), <https://www.theguardian.com/world/2020/feb/24/italians-struggle-with-surreal-lockdown-as-coronavirus-cases-rise>.

Almost at the same time, a COVID-19 outbreak began in a nursing home in King County, Washington. The first COVID-positive resident was identified there on February 27th. By March 9th, there had been 129 cases and 23 people had died in that one nursing home.¹⁸

The first confirmed case in New York was announced on March 1st.¹⁹ On March 2nd, Governor Cuomo very confidently stated that New York was ready to meet the pandemic, that New York had faced epidemics successfully before and would do so again.²⁰ “This isn’t our first rodeo. We are fully coordinated, and we are fully mobilized, and we are fully prepared to deal with the situation as it develops.”²¹ The Governor went on to say: “Excuse our arrogance as New Yorkers – I speak for the mayor also on this one – we think we have the best health care system on the planet right here in New York. So, when you’re saying, what happened in other countries versus what happened here, we don’t even think it’s going to be as bad as it was in other countries.”²² The Governor was not alone in his confidence. That same day, alongside the Governor, New York City Mayor DeBlasio said, “The facts are reassuring. We have

¹⁸ Temet M. McMichael et al., *COVID-19 in a Long-Term Care Facility- King County, Washington, February 27–March 9, 2020*, CDC (Mar. 18, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e1.htm>.

¹⁹ Joseph Goldstein & Jesse McKinley, *Coronavirus in N.Y.: Manhattan Woman is First Confirmed Case in State*, N.Y. TIMES (Mar. 5, 2020), <https://www.nytimes.com/2020/03/01/nyregion/new-york-coronavirus-confirmed.html>.

²⁰ Press Release, N.Y. ST. OFF. OF THE GOVERNOR, *At Novel Coronavirus Briefing, Governor Cuomo Announces State is Partnering with Hospitals to Expand Novel Coronavirus Testing Capacity in New York*, (Mar. 2, 2020), <https://www.governor.ny.gov/news/novel-coronavirus-briefing-governor-cuomo-announces-state-partnering-hospitals-expand-novel>.

²¹ *Id.* See also Ella Torres, *A Timeline of Cuomo’s and Trump’s Responses to Coronavirus Outbreaks*, ABC NEWS (April 3, 2020), <https://abcnews.go.com/US/timeline-cuomos-trumps-responses-coronavirus-outbreak/story?id=69914641>.

²² J. David Goodman, *How Delays and Unheeded Warning Hindered New York’s Virus Fight*, N.Y. TIMES (Apr. 8, 2020), <https://www.nytimes.com/2020/04/08/nyregion/new-york-coronavirus-response-delays.html>; see also *Watch a Timeline of Disease Expert Dr. Anthony Fauci’s Comments on Coronavirus*, CNBC (Mar. 26, 2020), <https://www.cnn.com/video/2020/03/26/watch-a-timeline-of-disease-expert-dr-anthony-faucis-comments-on-coronavirus.html>.

a lot of information now, information that is actually showing us things that should give us more reason to stay calm and go about our lives.”²³ The Mayor added this on March 5th: “We’ll tell you the minute we think you should change your behavior.”²⁴

Despite that confident statement, on that same March 2nd, Governor Andrew Cuomo asked for and was granted emergency powers by the Legislature to meet the expected epidemic.²⁵ Seemingly, the Governor knew that the threat was grave, was bracing for an onslaught, and had convinced the Legislature that New York was facing an unprecedented risk.

The warning signs continued to mount. By March 6th, there were confirmed COVID-19 cases in twelve states.²⁶ Secretary of State Mike Pompeo said the United States was “behind the curve.”²⁷ Colleges and universities were closing their study abroad programs, bringing their students home.²⁸ The nation of Italy quarantined on March 9th.

²³ Chris White, *De Blasio, NYC Officials Downplayed COVID-19 Threat After Trump Restricted Travel to China. Here Are 5 Examples*, DAILY CALLER (Mar. 29, 2020), <https://dailycaller.com/2020/03/29/de-blasio-coronavirus-trump-response/>.

²⁴ See *supra*, note 23.

²⁵ Press Release, N.Y. ST. OFF. OF THE GOVERNOR, *During Coronavirus Briefing, Governor Cuomo Signs \$40 Million Emergency Management Authorization for Coronavirus Response*, (Mar. 3, 2020), <https://www.governor.ny.gov/news/during-coronavirus-briefing-governor-cuomo-signs-40-million-emergency-management-authorization>; Chapter 23 of the Laws of 2020.

²⁶ Will Feuer et al., *NBA, NHL Owners Oppose Playing Games Without Fans, NY Coronavirus Cases Quadruple in 48 Hours*, CNBC (Mar. 6, 2020), <https://www.cnbc.com/2020/03/06/coronavirus-latest-updates-outbreak.html>.

²⁷ *Id.*

²⁸ Melissa Korn, *Colleges Shutter Study-Abroad Programs Amid Coronavirus Fears*, WALL ST. J. (Feb. 27, 2020), <https://www.wsj.com/articles/colleges-shutter-study-abroad-programs-amid-coronavirus-fears-11582821434>.

3. The Virus Continues to Spread

On March 7th, the Governor first invoked his emergency powers.²⁹ On the 14th, New York had its first death.³⁰ Four days before New York's first death, on March 10th, the Governor declared the "New Rochelle Containment Zone", and identified a New Rochelle resident, a lawyer with a Manhattan practice, as "Patient Zero".³¹ By March 25th, there had been 234 positive cases in New Rochelle.³²

To meet the crisis in New Rochelle, a mobile drive-through testing site was established. The mobile testing site was initially expected to test up to 200 people a day, rising to 500. According to the Governor: "The single most important thing we can do to combat and contain the novel coronavirus is test for it, and while the federal government was caught flatfooted in the midst of this crisis, New York has stepped up to fill in the gaps and ramp up testing capacity . . . As we run our own test and test more people, the number of people that we find with the virus is going to keep going up, but New Yorkers should continue to remain calm and remember that the more positive tests we find, the more we can limit the virus and reduce its spread."³³

²⁹ N.Y. Exec. Order 202 (Mar. 7, 2020), <https://www.governor.ny.gov/news/no-202-declaring-disaster-emergency-state-new-york>.

³⁰ Melanie Grayce West & Jimmy Vielkind, *New York State Has First Coronavirus Deaths*, WALL ST. J. (Mar. 14, 2020), <https://www.wsj.com/articles/new-york-state-has-first-coronavirus-death-11584198758>.

³¹ Press Release, N.Y. ST. OFF. OF THE GOVERNOR, *Governor Cuomo Accepts Recommendation of State Health Commissioner for New Emergency Measures to Contain Novel Coronavirus Cluster in New Rochelle* (Mar. 10, 2020), <https://www.governor.ny.gov/news/governor-cuomo-accepts-recommendation-state-health-commissioner-new-emergency-measures-contain>.

³² Zak Failla, *COVID-19: New Rochelle Containment Zone Ends*, DAILY VOICE (Mar. 26, 2020), <https://dailyvoice.com/new-york/newrochelle/news/covid-19-new-rochelle-containment-zone-ends/785602>.

³³ Press Release, N.Y. ST. OFF. OF THE GOVERNOR, *Governor Cuomo Opens the State's First Drive-Through COVID-19 Mobile Testing Center in New Rochelle* (Mar. 13, 2020), <https://www.governor.ny.gov/news/governor-cuomo-opens-states-first-drive-through-covid-19-mobile-testing-center-new-rochelle-0>. New York had also secured approval from the Food and Drug Administration to develop and implement its own COVID-19 test. M. Hill, *New York Gets Green Light to Test for COVID-19 Virus*, ASSOCIATED PRESS (Feb. 29, 2020), <https://apnews.com/article/2eacb3ac17c9bdd10f2a314515a2a3c1>.

Events continued to accelerate. The NBA shut down and other sports quickly followed.³⁴ Offices and schools began to close. Closings became a flash point between Governor Cuomo and Mayor DeBlasio, with the Mayor moving to shut down New York City and its schools, only to be delayed by the Governor.³⁵ Looking back, that delay had consequences. In northern California, where a COVID-19 outbreak was also occurring, the San Francisco Bay area shut down on March 16th.³⁶ The Governor, perhaps to build public acceptance, perhaps for other reasons, closed New York over three days, with the full shutdown taking effect on March 22nd.³⁷ San Francisco fared better than New York City in the first surge.³⁸

The hope that testing could control the virus was soon dashed. The number of identified positive cases exploded. According to the New York Forward, a web site maintained by the New York State government, on March 8, 2020, the first date the site reports, out of 307 individuals tested, 28 tested positive, a positivity rate of 9.1%. By March 14th, the date of New York's first death, the number of individuals tested was up to 1,293; 131 were positive. The numbers continued to climb to a one-day positivity

³⁴ Scott Cacciola & Sopan Deb, *N.B.A. Suspends Season After Player Tests Positive for Coronavirus*, N.Y. TIMES (Mar. 11, 2020), <https://www.nytimes.com/2020/03/11/sports/basketball/nba-season-suspended-coronavirus.html>; see also *NCAA Cancels Men's and Women's Basketball Championships Due to Coronavirus Concerns*, N.Y. TIMES (Mar. 17, 2020), <https://www.nytimes.com/2020/03/17/sports/basketball/nba-season-suspended-coronavirus.html>.

³⁵ Bernadette Hogan & Julia Marsh, *Cuomo, de Blasio Clash Over Possible Shelter-in-Place System for NYC*, N.Y. POST (Mar. 17, 2020), <https://nypost.com/2020/03/17/cuomo-de-blasio-clash-over-possible-shelter-in-place-system-for-nyc/>; see also Luis Ferre-Sadurni, *New York Schools, Restaurants and Bars Are Shut Down Over Coronavirus*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/15/nyregion/coronavirus-nyc-shutdown.html>.

³⁶ Erin Allday, *Bay Area Orders 'Shelter in Place,' Only Essential Businesses Open in 6 Counties*, S.F. CHRON. (Mar. 19, 2020), <https://www.sfchronicle.com/local-politics/article/Bay-Area-must-shelter-in-place-Only-15135014.php>.

³⁷ N.Y. Exec. Order 202.8 (Mar. 20, 2020).

³⁸ Joe Sexton & Joaquin Sapien, *Two Coasts. One Virus. How New York Suffered Nearly 10 Times the Number of Deaths as California*, PROPUBLICA (May 16, 2020), <https://www.propublica.org/article/two-coasts-one-virus-how-new-york-suffered-nearly-10-times-the-number-of-deaths-as-california>.

peak of 48.6% on April 2nd, and a seven-day rolling average peak of 48.2% on April 4th. In raw numbers, 10,841 New Yorkers tested positive on April 3rd, a number that would not be surpassed until December 11th, during New York's second surge, when 11,129 New Yorkers tested positive, but the positivity rate was only 4.6%.³⁹ In little more than a month, New York went from one case to 10,841 new cases in a single day. New York was in a health care emergency unknown in living memory.

Hospitalizations tracked those numbers. There were six people hospitalized in New York for COVID-19 on March 14th.⁴⁰ Only twelve days later, 6,481 COVID-19 patients were in the State's hospitals, a mind-boggling increase;⁴¹ 1,583 of those patients were in intensive care units. By April 13th, hospitalizations had almost tripled, peaking at 18,825, and patients in ICU beds had more than tripled to 5,225. Notably, and showing how the epidemic was centered in the New York metropolitan area, 16,292 of the hospitalizations on April 13th were in New York City and Long Island, 86.5% of the State's total. By contrast, during New York State's second surge, which occurred in December and January, 2020–21, hospitalizations peaked at the far lower number of 8,888 on January 15, 2021, and those hospitalizations were spread throughout the State, with 5,051 in New York City and Long Island, 56.8% of the total.⁴²

³⁹ New York Forward, *Percentage Positive Results by Region Dashboard* (Apr. 26, 2021), <https://forward.ny.gov/percentage-positive-results-region-dashboard>.

⁴⁰ *Tracking Coronavirus in New York: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/us/new-york-covid-cases.html> (last visited Apr. 27, 2021).

⁴¹ The data reported by the New York Times states the hospitalization number as 926 for that date, significantly below the number reported on NY Forward. The Times also reports peak hospitalization at 14,126, lower, but proportionately much closer to the peak number of 18,825 reported on NY Forward. The Times does state that "Hospitalization numbers early in the pandemic are undercounts due to incomplete reporting by hospitals to the federal government." *Id.*

⁴² Deaths, too, had begun their meteoric rise. From the first death reported on March 14th, the daily death count had risen to 117 on March 25th. The number of daily deaths reported reached its tragic peak on April 14th. The New York Times reports the peak number as 1,003. *Id.* The Governor reported the peak as 799 on April 8th. <https://www.wamc.org/post/coronavirus-daily-death-toll-ny-increases>. Either number is a staggering loss of life.

4. The Need for Sufficient Hospital Capacity.

As COVID-19 exploded in New York in March of last year, the almost singular health care focus of Governor Andrew Cuomo, and, therefore, of the State government, was on assuring that there would be sufficient hospital capacity to meet the expected surge of patients in need of hospital care for COVID-19. To that end, the Governor ordered that hospitals in the State cease all elective procedures⁴³ The Jacob Javits Convention Center, a 1,800,000 square foot facility, was converted to a field hospital with a bed capacity of 2,000.⁴⁴ The Governor began his repeated calls to bring the U.S. Navy Hospital ship, the USNS Comfort, to New York. The Comfort arrived to much fanfare and relief on March 30th.⁴⁵ The calls began for retired and out-of-state physicians, nurses, and other health care professionals to come to New York and make themselves available to meet this centennial emergency.⁴⁶ Patients, including COVID-19 patients, were transferred to hospitals with capacity, sometimes at great distance.

Because of the anticipated need for large numbers of hospital beds, the Governor, in his first Executive Order issued under his emergency powers, authorized hospitals to “rapidly discharge” patients⁴⁷. An especially important event in terms of the State’s health care capacity occurred on March 23rd. On that date, Governor Cuomo

⁴³ N.Y. Exec. Order 202.10 (Mar. 23, 2020).

⁴⁴ C. Todd Lopez, *Corps of Engineers Converts NYC’s Javits Center Into Hospital*, U.S. DEP’T OF DEFENSE (Apr. 1, 2020), <https://www.defense.gov/Explore/News/Article/Article/2133514/corps-of-engineers-converts-nycs-javits-center-into-hospital/#:~:text=The%20New%20York%20District%20of,non%2DCOVID%2D19%20patients>.

⁴⁵ Erin Durkin, *USNS Comfort Arrives in New York City*, POLITICO (Mar.30, 2020), <https://www.politico.com/states/new-york/albany/story/2020/03/30/usns-comfort-arrives-in-new-york-city-1269589>.

⁴⁶ Press Release, N.Y. ST. OFF. OF THE GOVERNOR, *During Coronavirus Briefing, Governor Cuomo Announces New Mass Gatherings Regulations* (Mar. 12, 2020), <https://www.governor.ny.gov/news/during-novel-coronavirus-briefing-governor-cuomo-announces-new-mass-gatherings-regulations>.

⁴⁷ N.Y. Exec. Order 202 (Mar. 7, 2020).

issued an Executive Order requiring that all hospitals cancel elective surgeries to free up hospital beds,⁴⁸ and urged that hospitals go beyond the order and increase their capacity by 100%. Health officials said that day that New York had 53,000 hospital beds with an anticipated need due to COVID-19 of 113,000. Officials also stated that New York had 3,000 ICU beds with an anticipated need due to COVID-19 of 18,000.⁴⁹

Two days later, on March 25th, the Department of Health issued the now infamous Advisory to nursing homes. The Advisory was explicitly issued out of concern for hospital capacity. It said so in its second sentence. “There is an urgent need to expand hospital capacity in New York State to be able to meet the demand for patients with COVID-19 requiring acute care.”⁵⁰ The Advisory went on to state the expectations for nursing homes.

During this global health emergency, all NHs must comply with the expedited receipt of residents returning from hospitals to NHs. Residents are deemed appropriate for return to a NH upon a determination by the hospital physician or designee that the resident is medically stable for return. Hospital discharge planners must confirm to the NH, by telephone, that the resident is medically stable for discharge. Comprehensive discharge instructions must be provided by the hospital prior to the transport of a resident to the NH. No resident shall be denied re-admission or admission to the NH solely based on a confirmed or suspected diagnosis of COVID-19. NHs are prohibited from requiring a hospitalized resident who is determined medically

⁴⁸ N.Y.Exec. Order 202.10 (Mar. 23, 2020).

⁴⁹ Bill Chappell, *Cuomo Orders All Hospitals to Add Beds as New York Confirms 20,000 Coronavirus Cases*, NPR (Mar. 23, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/03/23/820150795/cuomo-orders-all-hospitals-to-add-beds-as-new-york-confirms-20-000-coronavirus-c#:~:text=New%20York%20currently%20has%2053%2C000%20hospital%20beds%3B%20it,Equipment%20%26%20Supplies%20at%20Javits%20Center%20Temporary%20Hospital.>

⁵⁰ N.Y. ST. DEP’T OF HEALTH, DEAR ADMINISTRATOR LETTER (Mar. 25, 2020), https://skillednursingnews.com/wp-content/uploads/sites/4/2020/03/DOH_COVID19_NHAdmissionsReadmissions_032520_1585166684475_0.pdf.

stable to be tested for COVID-19 prior to admission or readmission.

As always, standard precautions must be maintained, and environmental cleaning made a priority, during this public health emergency. Critical personal protective equipment (PPE) needs should be immediately communicated to your local Office of Emergency Management, with the appropriate information provided at the time of request.

Thankfully, New York never did exceed its pre-COVID-19 Statewide hospital capacity, although many individual hospitals saw their capacity exceeded. New York's pre-COVID-19 statewide ICU capacity was exceeded by over sixty percent.⁵¹

C. The Pandemic Comes to Nursing Homes

Less than two weeks before the issuance of the March 25th directive, the State Department of Health had closed nursing homes to visitors.⁵² This was to prevent the introduction of COVID-19 into the facilities.

Although the Governor would later describe the March 25th directive as in accordance with CDC guidance, there appears to be significant difference between then-current CDC guidance and the March 25th directive. The CDC guidance emphasized that a nursing home should admit residents with COVID-19 only if able to follow CDC guidance for transmission-based precautions. If the nursing home could not do so, "it must wait until these precautions are discontinued"⁵³ before admitting

⁵¹ The on-line publication Gothamist has published comprehensive and useful data, which it updates, about the course of the pandemic in New York, especially New York City from the start of the outbreak in March 2020 until the present. The data is broken down in a number of ways, including by race, poverty, gender, and zip code. J. Dobkin, C. Diaz, Z. Gottehrer, *Coronavirus Statistics, Tracking the Epidemic in New York*, GOTHAMIST, <https://gothamist.com/news/coronavirus-statistics-tracking-epidemic-new-york> (last visited May 6, 2021).

⁵² N.Y. Exec. Order 202.1 (Mar. 12, 2020).

⁵³ *Guidance for Infection Control Prevention of Coronavirus Disease 2019 (COVID-19) in Nursing Homes, CTRS. FOR MEDICARE & MEDICAID SERVS.* (Mar. 13, 2020), <https://www.cms.gov/files/document/3-13-2020-nursing-home-guidance-covid-19.pdf>.

residents with COVID-19. The Centers for Medicare and Medicaid Services (“CMS”) had also issued infection control guidance, including a self-assessment checklist that long-term care facilities could use to determine their compliance with these crucial infection control actions.⁵⁴

There were several directives or mandates imposed upon nursing homes during the course of the pandemic, some of which have been previously mentioned. Some had greater impacts than others.

The Executive Order closing nursing homes to visitors was obviously intended to check the spread of the virus. Whatever that order’s efficacy in controlling the introduction of the virus, the order had certain, unavoidable negative consequences. Visitors benefit nursing home residents in a number of ways. There are the emotional benefits of continued connection to friends and family. Visitors also provide care support, supplementing the efforts of staff, and sometimes identifying care shortcomings. There is at least anecdotal evidence that the loss of visitation has had a negative impact on the well-being of many nursing home residents. The complete bar on visitation has been removed through a number of orders, but open visitation has not yet been fully restored.⁵⁵

While the March 25th Department of Health directive remained in place, and seemingly in response to criticism of that directive, the Department issued an order requiring that nursing home employees be tested for the virus twice weekly.⁵⁶ A

⁵⁴ *Prioritization of Survey Activities*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Mar. 20, 2020), <https://www.cms.gov/files/document/qso-20-20-allpdf.pdf-0> .

⁵⁵ N.Y. ST. DEP’T OF HEALTH, DEAR ADMINISTRATOR LETTER (Mar. 25, 2021), https://coronavirus.health.ny.gov/system/files/documents/2021/03/updated_nursing_home_visitation_guidance.pdf.

⁵⁶ N.Y. Exec. Order 202.30 (May 10, 2020). See also N.Y. ST. DEP’T OF HEALTH, *Executive Order 202.30-Nursing Home and Adult Care Facility Staff Testing Requirement FAQ* (June 24, 2020),

subsequent order reduced the testing frequency to weekly.⁵⁷ Because the receipt of testing results often took as many as ten days, these testing orders were of dubious usefulness. They did, however, greatly increase nursing home costs.

As the March 25th directive began to receive public attention, the Department also ordered that nursing homes secure and maintain a sixty day supply of PPE.⁵⁸ When the Department issued this order, PPE was in short supply and expensive. No one would argue with the need for nursing homes to maintain adequate levels of PPE, but this was an order to stockpile PPE at the moment of highest cost and least supply. The order did nothing for patient care at the time, but did increase nursing home costs.

a. The March 25th Directive

The order that has received the most attention is the now infamous March 25th Advisory to New York's nursing homes calling for the admission of COVID-19 positive residents. This Advisory was controversial from the start. The consequences of the Advisory have been far reaching, and unexpected, including investigation of the Governor himself. Remarkably, the Advisory was so controversial that the State Department of Health issued a report that was in effect a direct rebuttal to the criticism. The Department did so in July 2020, with a report entitled, "*Factors Associated with Nursing Home Infections and Fatalities in New York State During the COVID-19 Global*

https://coronavirus.health.ny.gov/system/files/documents/2020/06/nursinghome_stafftestingrequirementfaq_0624.pdf.

⁵⁷ Press Release, N.Y. ST. DEP'T OF HEALTH, *Statement from New York State Health Commissioner Dr. Howard Zucker on Successful Nursing Home Testing Program* (June 10, 2020), https://www.health.ny.gov/press/releases/2020/2020-06-10_nursing_home_testing_program.htm.

⁵⁸ *Codified at* 10 N.Y.C.R.R. § 405.19. The Department issued this regulation after the Commissioner had testified before the State Legislature that nursing homes had had sufficient supplies of PPE. 10 N.Y.C.R.R. § 405.191; see also Bernadette Hogan, *Health Department Mandates PPE Supply for Nursing Homes Ahead of 'Second Wave'*, N.Y. POST (Aug. 21, 2020), <https://nypost.com/2020/08/21/ny-health-department-mandates-ppe-supply-for-nursing-homes/>.

*Health Crisis.*⁵⁹ The report concluded that nursing homes had admitted “approximately 6,326 COVID-positive residents” between March 25, 2020 and the May 8th withdrawal of the advisory, but that the March 25 directive “could not be the driver of nursing home infections or fatalities.”⁶⁰ The report took the position that the admission of COVID-positive residents did not introduce COVID-19 into nursing homes or contribute to nursing home infections and subsequent fatalities.⁶¹

On August 3 and August 10, 2020, the Legislature held joint hearings on the issue of COVID-19 in nursing homes. In his appearance before the Legislature on August 3rd, the Commissioner of Health declared that the advisory should not have been read as prohibiting the denial of admission to COVID-19 positive residents, but that nursing homes always had the right to deny admission to individuals for whom they could not provide adequate care. Notably, despite concerns raised while the advisory was in effect, the Department had not issued any such clarification.

b. The Attorney General Report

On January 28, 2021, the Office of the Attorney General (“OAG”) released a report entitled *Nursing Home Response to the COVID-19 Pandemic*.⁶² The report directly challenged the Department of Health’s conclusions regarding the number of deaths that had occurred in the State’s nursing homes. The Attorney General’s report

⁵⁹ Press Release, N.Y. ST. DEP’T OF HEALTH, *Factors Associated with Nursing Home Infections and Fatalities in New York State During the Covid-19 Global Health Crisis* (Feb. 11, 2021), https://www.health.ny.gov/press/releases/2020/docs/nh_factors_report.pdf.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See Press Release, N.Y. ATT’Y GEN., *Attorney General James Releases Report on Nursing Homes’ Response to COVID-19*, (Jan. 28, 2021), <https://ag.ny.gov/press-release/2021/attorney-general-james-releases-report-nursing-homes-response-covid-19>. [hereinafter *Press Release*]; see also *Nursing Home Response to COVID-19 Pandemic*, N.Y. ATT’Y GEN. (Jan. 30, 2021), <https://ag.ny.gov/sites/default/files/2021-nursinghomesreport.pdf> [hereinafter *Attorney General Report*].

concluded that the Department of Health had been undercounting nursing home deaths and estimated that the full toll was 50% higher than what the Department had reported. The Attorney General’s report also found that New York’s “guidance requiring the admission of COVID-19 patients into nursing homes may have put residents at increased risk of harm in some facilities and may have obscured the data available to assess that risk.”⁶³

Immediately following the release of the OAG report, Health Commissioner Zucker released a statement with revised COVID-19 mortality data.⁶⁴ According to the Health Commissioner’s statement, from March 1, 2020 to January 19, 2021, there were: (i) 9,786 confirmed fatalities associated with skilled nursing facility residents, including 5,957 fatalities within nursing facilities, and 3,829 within hospitals; and (ii) 2,957 additional “presumed” COVID nursing home fatalities, that is, fatalities that occurred when testing was scarce and lack confirmed evidence the deceased had COVID.

The Department of Health further revised the numbers following a Freedom of Information (“FOIL”) request and litigation with the Empire Center for Public Policy. On February 8, 2021, the Department of Health posted updated facility-level death counts in nursing homes, assisted living residences and other adult-care facilities, including 5,596 deaths that had occurred in hospitals.⁶⁵ The update pushed the known COVID-19 toll in long-term care facilities to almost 15,000. On February 10, 2021, the Department of Health released the dates and locations of more than 14,000 deaths

⁶³ *Id.*

⁶⁴ Press Release, N.Y. ST. DEP’T OF HEALTH, *Statement from New York State Health Commissioner Dr. Howard Zucker* (Jan. 28, 2021), <https://www.governor.ny.gov/news/statement-new-york-state-health-commissioner-dr-howard-zucker-1>.

⁶⁵ Press Release, EMPIRE CTR. FOR PUB. POL., *Cuomo Administration Releases FOIL-Requested Nursing Home Data* (Feb. 10, 2021), <https://www.empirecenter.org/publications/cuomo-administration-releases-foil-requested-nursing-homes-data/>.

involving residents of nursing homes and assisted living facilities, including 4,775 residents who died outside of the facilities from confirmed cases of COVID-19. Omitted from the data were: 671 residents who died outside the facilities with presumed cases of COVID-19, and approximately 1,000 deaths in adult-care facilities that were not categorized as “assisted living.”⁶⁶

II. The Role of Government in Responding to a Pandemic

In preparing for and responding to an emergency, various levels of government have extensive authority, to take action to protect the health, safety and welfare of the population. Some of the responsibilities are discussed below and include:

- protecting the public health;
- preparing for emergencies;
- responding to emergencies;
- preventing the spread of communicable disease;
- collecting and disseminating information; and
- allocating scarce resources.

In New York, State government, in conjunction with New York City and county governments, has taken on responsibilities to check the spread of contagious diseases. In response to the COVID-19 epidemic, the State government has taken on the responsibility to protect individuals from exposure, to provide access to testing, diagnosis, treatment and, as available, immunization. The effective discharge of government’s role involves balancing a wide variety of competing considerations,

⁶⁶ Press Release, EMPIRE CTR. FOR PUB. POL., *Update on DOH compliance with the Empire Center’s nursing home FOIL request* (Feb. 17, 2021), <https://www.empirecenter.org/publications/update-on-doh-compliance/>.

objectives and constituencies, as well as coordination among numerous government agencies at the federal, state and local level.

III. Responsibilities of Government in Responding to a Pandemic

A. Protecting the Public Health.

At the federal, state and local levels, government plays an essential role – before, during and after an emergency – in protecting the health and safety of the public.

Through its superior spending power, the federal government has substantial resources to respond in the event of an emergency. Individual states, hold the police power, which gives them broad authority over public health matters within their borders.⁶⁷

Under the New York State Constitution, “[t]he protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine.”⁶⁸ The New York State Department of Health has broad authority under the Public Health Law to protect and promote public health.⁶⁹ New York is one of 26 states with a decentralized public health system: At the local level, 57 county health departments and the New York City Department of Health and Mental Health have the major responsibility for provision of public health services.⁷⁰ The NYC Health Department, one of the largest and oldest

⁶⁷ See Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745 (2007), <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1250&context=jcl>.

⁶⁸ N.Y. Const., Art. 17, § 3.

⁶⁹ N.Y. Pub. Health Law §§ 201, 206, 225.

⁷⁰ Press Release, N.Y. ST. DEP’T OF HEALTH, *Strengthening New York’s Public Health System for the 21st Century*, https://www.health.ny.gov/press/reports/century/phc_nyssystem.htm (last visited Apr. 28, 2021).

public health agencies in the world, has a mission to protect and promote the health and mental health of a population of more than eight million in the five boroughs.⁷¹ The protection of public health depends on an effective collaboration between and among the federal, state and local governments.

B. Preparing for Emergencies.

Before a crisis develops, various statutes impose responsibilities on various levels of government to anticipate potential disasters, to prepare plans to prevent disasters and, when disasters occur, to minimize their effects, and for guiding the public in taking actions to prevent and mitigate disasters. Disaster preparedness can also include preparing for emergencies.

At the federal level, the Department of Homeland Security has general operational responsibility for U.S. federal disaster response,⁷² and the Department of Health and Human Services (“HHS”) has medical responsibility for federal preparedness and disaster response efforts.⁷³ There are at least fourteen federal departments and agencies responsible for the administration of dozens of programs related to disaster preparedness, response, and recovery.

Within the Department of Homeland Security, the Federal Emergency Management Agency (“FEMA”) is responsible for coordinating responses to disasters that occur in the U.S. and overwhelm the resources of local or state authorities.⁷⁴ To

⁷¹ See *About the NYC Department of Health and Mental Hygiene*, NYC HEALTH, <https://www1.nyc.gov/site/doh/about/about-doh.page>.

⁷² Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 68 § 5121 et seq.; See also *Disaster Authorities*, FEMA, <https://www.fema.gov/disasters/authorities#>.

⁷³ The Office of the Assistant Secretary for Preparedness and Response, the Centers for Disease Control and Prevention and National Institutes of Health are within HHS. See <https://www.phe.gov/about/aspr>.

⁷⁴ 6 U.S.C. § 313 (creates FEMA to “reduce the loss of life and property and protect the Nation from all hazards, including natural disasters, acts of terrorism, and other man-made disasters, by leading and

trigger FEMA assistance, the governor of the state in which the disaster occurs must declare a state of emergency and request from the President that FEMA and the federal government respond to the disaster.

In New York, the Executive Law establishes a Disaster Preparedness Commission, consisting of 29 State agencies and the American Red Cross.⁷⁵ The statute requires the Disaster Preparedness Commission to prepare a State comprehensive emergency management plan;⁷⁶ to direct and coordinate State disaster operations in a State disaster emergency; to assist in the coordination of federal recovery efforts; and to provide for periodic briefings, drills and exercises.⁷⁷ For nursing homes and assisted living facilities, the statute specifically requires the Commission to establish standards for disaster preparedness⁷⁸ and to assist these facilities in establishing a disaster preparedness plan addressing the maintenance of food, water and medication supplies; access to a generator, and the establishment of an evacuation plan for residents and disaster staffing plans.⁷⁹

C. Responding to Emergencies.

When an emergency develops, various levels of government have responsibility for responding, controlling and mitigating its impact on the population.

In the event of an emergency that severely challenges state or local response capabilities, the federal government has broad authority to provide surge capacity to support state and local efforts to control and mitigate the emergency. A Presidential

supporting the Nation in a risk-based, comprehensive emergency management system of preparedness, protection, response, recovery, and mitigation”).

⁷⁵ N.Y. Exec. Law Art. 2-B (State and Local Natural and Man-made Disaster Preparedness).

⁷⁶ N.Y. Exec. Law Art. 22.

⁷⁷ N.Y. Exec. Law § 21; see NYS Comprehensive Emergency Management Plan.

⁷⁸ N.Y. Exec. Law § 23-B(1).

⁷⁹ N.Y. Exec. Law § 23-B(2).

declaration of a major disaster or emergency (a Stafford Act declaration),⁸⁰ a declaration from the Secretary of HHS of an Incident of National Significance, or a request from another federal department or agency may trigger the federal response.⁸¹ Federal public health and medical assistance can consist of medical materiel, personnel, and technical assistance.⁸² In addition, the federal government has authority to waive or to temporarily modify normal operating requirements of federal programs during a major emergency or disaster.

In New York, the Executive Law authorizes the governor to issue an executive order declaring a disaster emergency upon finding that a disaster has occurred or may be imminent for which local governments are unable to respond adequately.⁸³ When the disaster is beyond the capabilities of the State and affected jurisdictions, the governor has authority to request federal assistance and may make available sufficient funds to provide the required state share of grants made under any federal program for meeting disaster related expenses including those available to individuals and families.⁸⁴ The Executive Law also permits the governor to suspend laws as he deems necessary for the duration of the emergency.⁸⁵ As discussed above, the Legislature expanded that authority in March of last year to permit the Governor for the duration of

⁸⁰ Under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, a presidential disaster declaration or an emergency declaration triggers federal financial and physical assistance through the Federal Emergency Management Agency (FEMA). Additionally, the National Emergencies Act, 50 U.S.C. § 1601-1651, provides a framework for declaring national emergencies and for the exercise of emergency powers and authorities.

⁸¹ See *generally Congressional Primer on Responding to and Recovering from Major Disasters and Emergencies*, CONG. RES. SERV. (June 3, 2020), <https://fas.org/sgp/crs/homesecc/R41981.pdf>.

⁸² Section 319 of the Public Health Service Act, 42 U.S.C. § 247d, allows the HHS Secretary, after consultation with public health officials, to take action to respond, including making grants, entering into contracts and conducting and supporting investigations into the cause, treatment, or prevention of a disease or disorder and establishes the Public Health Emergency Fund).

⁸³ N.Y. Exec. Law § 28(1).

⁸⁴ N.Y. Exec. Law § 28(4).

⁸⁵ N.Y. Exec. Law § 29-a.

the emergency to declare rules by Executive Order.⁸⁶ That further authority has now been repealed, but the Governor can continue for the duration of emergency to extend the Executive Orders previously issued, subject to legislative invalidation.⁸⁷

These federal and state emergency response systems are interdependent, and each relies heavily on the active participation of the other for effective implementation.

D. Preventing the Spread of Communicable Disease.

The states have primary responsibility under their police powers for protecting the public's health by taking action to control and prevent the spread of communicable disease. Under the Public Health Law, the NYS Department of Health is responsible for supervising the reporting and control of disease; producing, standardizing and distributing diagnostic, prophylactic and therapeutic products; conducting laboratory examinations for the diagnosis and control of disease; promoting education in the prevention and control of disease; advising local units of government and their public health officials in the performance of their official duties, and regulating the financial assistance granted by the State in connection with all public health activities, among many other public health-related activities.⁸⁸ Authority under the Public Health Law includes, in certain instances, quarantine⁸⁹ and mandatory treatment.⁹⁰ Federal law authorizes the federal government to make regulations necessary to prevent communicable diseases from foreign countries from entering into the states and from one state to another.⁹¹ This federal authority does not supersede state law and

⁸⁶ Chapter 23 of the Laws of 2020.

⁸⁷ Chapter 71 of the Laws of 2021 (Mar. 7, 2021).

⁸⁸ N.Y. Pub. Health Law §§ 201, 206, 225.

⁸⁹ 10 N.Y.C.R.R. § 2.13.

⁹⁰ N.Y. Pub. Health Law. § 2120(3).

⁹¹ 42 U.S.C. § 264.

regulations, “except to the extent that such a provision conflicts with an exercise of Federal authority.”⁹²

Although an individual state has primary responsibility, a pandemic knows no boundaries. Therefore, an effective response requires not only federal-state coordination, but also interstate cooperation to minimize disruption and limit the spread of disease. We have seen during the pandemic several instances of interstate cooperation between New York and neighboring states, especially with New Jersey and Connecticut.⁹³

E. Collecting and Disseminating Information.

One of the most important roles of government, before, during, and after an emergency, is to collect information and use it effectively to guide policy decisions.

At the federal level, HHS sponsors a variety of public health and health care data systems and activities. For example, the CDC coordinates case surveillance, that is, information on individuals with the infection in a population, to provide information needed for taking public health action to prevent cases and the spread of disease and to control outbreaks. The CMS collects administrative data on the Medicare and Medicaid programs and conducts healthcare provider surveys. Other federal agencies also collect data that are important for public health purposes.⁹⁴

⁹² *Id.*

⁹³ ‘Worst is Over,’ Cuomo Says as 7 States Ally to Reopen Economy, N.Y. TIMES (Apr. 13, 2020), <https://www.nytimes.com/2020/04/13/nyregion/coronavirus-new-york-update.html>; New York Governor Cuomo and Other Governors Coronavirus News Conference, C-SPAN (Apr. 13, 2020), <https://www.c-span.org/video/?471176-1/york-gov-cuomo-governors-announce-coordinated-reopening-effort>.

⁹⁴ On April 19, CMS announced that it would issue a rulemaking requiring nursing homes to report data, through the CDC’s National Health Safety Network (NHSN) system, about residents or staff with suspected or confirmed COVID-19, residents with severe respiratory infection resulting in hospitalization or death, or three or more residents or staff with new onset respiratory symptoms within 72 hours of each other. *Upcoming Requirements for Notification of Confirmed COVID-19 (or COVID-19 Persons Under Investigation) Among Residents and Staff in Nursing Homes*, QSO-20-26-NH, CTRS. FOR MEDICARE &

In New York, the Health Electronic Response Data System, HERDS, is a statewide electronic web-based data collection system that allows healthcare providers to relay resources or needs to the State Department of Health during emergencies and to respond immediately to rapid request surveys in preparedness planning efforts.⁹⁵

F. Allocating Scarce Resources.

In fulfilling mutual responsibilities, federal and state governments must anticipate and respond to supply chain disruptions, which may create shortages in crucial supplies.

At the federal level, a federal emergency declaration enables the Secretary of Health and Human Services to take appropriate actions, consistent with other authorities, to control and mitigate the emergency. This may include supporting investigations into the cause, treatment, or prevention of the emergency; accessing the Public Health Emergency Fund and other funds to facilitate a response; and adjusting the requirements to meet the needs of individuals who benefit from government-funded insurance programs. Under the Defense Production Act⁹⁶ the President has authority to expedite and expand the supply of materials and services from the U.S. industrial base to promote the national defense. In New York, the declaration of an emergency authorizes the governor to request federal assistance, as well as access State governmental emergency funds.

MEDICAID SERVS. (Apr. 19, 2020), <https://www.cms.gov/files/document/qso-20-26-nh.pdf>. Prior to that time, neither CMS nor CDC nor FEMA collected that information.

⁹⁵ *HERDS Quick Reference Card*, [WADSWORTH CTR., https://www.wadsworth.org/sites/default/files/WebDoc/HERDS_QuickReferenceCard%20%28002%29.pdf](https://www.wadsworth.org/sites/default/files/WebDoc/HERDS_QuickReferenceCard%20%28002%29.pdf)

⁹⁶ 50 U.S.C. §§ 4501–4568. The federal government also maintains the Strategic National Stockpile, which contains medications and medical equipment available for distribution to states.

IV. A State and Nation Unprepared

In this section of the Report, we will examine the multiple considerations that weighed in the balance and the confluence of decisions that may have created the perfect public health storm in this first quarter of the twenty first century.

a. Conceptual Framework: Syndemic Theory and Paradigmatic Example of Nursing Homes

The nursing home pandemic crisis is a paradigmatic example of syndemic theory⁹⁷ at work. The syndemic integrative conceptual framework helps us make sense of patterns of disease interaction and disease concentration among clustered epidemics, and their underlying social, political, and economic driving forces.⁹⁸ In the current pandemic, the novel coronavirus has interacted with chronic illness and comorbidities, especially in older adult populations. These patterns of interaction are both shaped by, and shaping and exacerbating, pre-existing social inequities, including structural racism. We add the critical importance of structural ageism and age discrimination as pre-existing social inequities shaped by social, economic, and political forces.⁹⁹ In addition, at least one research study has documented the relationship between race and virus cases and deaths in nursing homes during the pandemic.¹⁰⁰ The cumulative disadvantage and struggle that accompany growing old at the intersection of age, race, ethnicity, and gender calls attention to the social and economic determinants of health, especially for those living at the margins of society.

⁹⁷ Clarence C. Gravelee, *Systemic Racism, Chronic Health Inequities, and COVID-19: A Syndemic in the Making?*, AM. J. HUM. BIOLOGY (Aug. 4, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7441277/>.

⁹⁸ *Id.*

⁹⁹ Morrissey, *Pandemic Threats to Older Women: Government's Policy Failures*, United Nations Commission on Status of Women (Mar. 17, 2021).

¹⁰⁰ Rebecca J. Gorges & R Tamara Konetzka, *Factors Associated with Racial Differences in Deaths Among Nursing Home Residents with COVID-19 Infection in the US*, NIH (Feb. 1, 2021), <https://pubmed.ncbi.nlm.nih.gov/33566110/>.

Institutionalized older adults have been hit hard during the pandemic because of the convergence of historical policy failures at both the federal and state levels. Available study data on nursing home deaths during the pandemic reflect patterns of structural ageism and racism in the formulation and implementation of health policy in the United States¹⁰¹ and, more specifically, long-term care policy.

b. Convergence of Historical Policy Failures: Federal Policymaking

Any meaningful analysis of the vulnerability of the nursing home population to the syndemic force of the pandemic would be incomplete without careful attention to the history of long-term care policymaking in the United States. The most glaring void in that history at the federal level has been the failure to enact a comprehensive long-term care policy itself, including long-term care financing outside of the Medicaid program.¹⁰² The last attempt to correct this gap, at least in piecemeal fashion, was as a part of the Affordable Care Act,¹⁰³ but that provision was repealed in 2011 as policymakers had not been successful in designing a funding plan to ensure its viability.¹⁰⁴

The failure to enact a comprehensive long-term care policy in the United States must be contextualized in the larger picture of health policy failures at the federal level. The highly fragmented U.S. health care delivery and financing systems undermine the possibility of achieving meaningful access to long-term care services for older adults and other vulnerable persons.

¹⁰¹ Woolhandler et al, 2021.

¹⁰² Joe Caldwell & Howard Bedlin, *Beyond the CLASS Act: The Future of Long-Term Care Financing Reform*, 24 THE GERONTOLOGICAL SOC'Y OF AM. 55 (Mar. 16, 2014), <https://heller.brandeis.edu/community-living-policy/images/pdfpublications/2014marchbeyondtheclassact.pdf>.

¹⁰³ Letter from Kathleen Sebelius to The Honorable John A. Boehner (Oct. 14, 2011), <https://www.kff.org/wp-content/uploads/sites/2/2011/10/boehner-.pdf>.

¹⁰⁴ *Id.*

Compounding the failures are other major federal policy gaps. While certain steps had been taken at the federal level post-Katrina to strengthen preparedness, including The National Response Framework (“NRF”); National Incident Management System; and The Post-Katrina Emergency Management Reform Act (“PKEMRA”),¹⁰⁵ these frameworks did not go far enough in strengthening the public health infrastructures needed to deal with a pandemic of the magnitude of COVID-19. This has been all too evident, for example, in breakdowns in the supply chain.

Underinvestment in public health workforce education and training, as well as appropriate education and training for other health care workers, has left the workforce ill-equipped to respond to the public health crisis. Further, the direct care workforce, largely comprising people from racial and ethnic minorities, has historically been marginalized through both low wages and lack of appropriate training.¹⁰⁶

c. State Policymaking, Lack of Emergency Preparedness and Crisis Standards, and Public Health Infrastructure Failures

The State’s reluctance to take timely preparatory steps, such as in failing to enact crisis standards of care and adopt uniform triage guidelines for allocation of scarce resources in crisis conditions, left State and local government scrambling as the virus descended upon New York. The lack of these preparatory statutory and regulatory structures contributed to the State’s default reliance on executive orders during the pandemic.

¹⁰⁵ Pets Evacuation and Transp. Standards Act, Pub. L. No. 109-308, 120 Stat. 1725 (2006); Pub. L. No. 109-295, tit. VI, 120 Stat. 1355, 1394 (2006);

¹⁰⁶ *New Public Health Policy Statements Adopted by APHA 2020*, AM. PUB. HEALTH ASS’N (Oct. 25, 2020), <https://apha.org/News-and-Media/News-Releases/APHA-News-Releases/2020/2020-APHA-policy-statement>.

The Medicaid funding level of the State’s nursing homes also placed stress on the system before the arrival of the virus. Of the State’s nursing home residents, 67% were Medicaid recipients in 2017.¹⁰⁷ Medicaid revenue accounted for just over 56% of the State’s nursing home revenues in 2016.¹⁰⁸ Although there is some dispute as to the adequacy of Medicaid reimbursement rates, nursing home representatives contend that Medicaid reimbursement rates compensate less than two-thirds of the cost of care of those residents.¹⁰⁹ That funding gap has contributed to a reduction in the number of publicly operated and not-for-profit nursing homes in favor of for-profit homes. It has also contributed to low wage rates and staffing levels.¹¹⁰ In addition to staffing and wage rates, such underfunding affects every level of service in a nursing home, including staff training, infection control, the availability of system-wide palliative care, provision of PPE, and other critical resources and supports. These resources are essential not only to reduce risk of infection, but to assure humane care.

Compounding the State’s lack of attention to emergency preparedness and its necessary legal pillars, New York has not developed a comprehensive plan for long term care. There have been various efforts, such as the Delivery System Reform Incentive Payment Program (“DSRIP”)¹¹¹, but more often than not, the State has been

¹⁰⁷ *Medicaid’s Role in Nursing Home Care*, KAISER FAM. FOUND. (June 20, 2017), <https://www.kff.org/infographic/medicaids-role-in-nursing-home-care/>.

¹⁰⁸ *Regional Payor Mix – Revenue*, LEADINGAGE NY, <https://www.leadingageny.org/linkservid/A68E4BB4-FE50-B80C-9A9896DBFC7857B1/showMeta/0/>.

¹⁰⁹ Statements of James Clyne, Executive Director, LeadingAge NY and of Stephen Hanse, President, NY Healthcare Facilities Association to this Task Force in their respective appearances

¹¹⁰ Halley Bondy, *39% of Covid-19 Deaths Have Occurred in Nursing Homes- Many Could Have Been Prevented: Report*, NBC NEWS (Dec. 8, 2020), <https://www.nbcnews.com/health/39-covid-19-deaths-have-occurred-nursing-homes-many-could-ncna1250374>.

¹¹¹ As described by the State Department of Health, DSRIP is intended to fundamentally restructure the health care delivery system. *Delivery System Reform Incentive Payment (DSRIP) Program*, N.Y. ST. DEP’T OF HEALTH, https://www.health.ny.gov/health_care/medicaid/redesign/dsrip/ (last visited Apr. 28, 2021).

reactive, with its seeming focus on how to control spending, or efforts at coordination have been siloed. Despite the United States Supreme Court decision in *Olmstead v. L.C.*¹¹² and calls for a shift to community care paradigms, and the use of non-institutionalized settings with expanded social services and supports and integrated palliative medical and social care, the State has been resistant. The number of nursing home deaths suggests that the reliance on institutional care had consequences for the pandemic.

V. The Impact on Nursing Homes and their Residents

Before going into what has occurred in the State’s nursing homes, it is useful to understand what a nursing home is. Under the New York Public Health Law, a nursing home is a residential setting providing skilled nursing care and services and residential health-related care and services to residents who need skilled nursing or other professional services but who do not require the services of a general hospital.¹¹³ A similar definition applies under federal law. A “skilled nursing facility” is an institution primarily engaged in providing skilled nursing care and related services for residents requiring medical or nursing care, or rehabilitation services for injured, disabled, or sick persons (but not primarily for the care and treatment of mental diseases), which meets

¹¹² *Olmstead v. L.C.*, 527 U.S. 581 (1999).

¹¹³ N.Y. Pub. Health Law § 2801(2)–(4); 10 N.Y.C.R.R. §§ 415.1(b)(2), 415.2(k).

statutory requirements relating to: (a) quality of life;¹¹⁴ (b) resident rights;¹¹⁵ and (c) administration and other matters and which has a transfer agreement with one or more hospitals. All nursing homes provide the basic services, and some also provide specialized services, such as long-term ventilator care, specialized services for neurobehavioral disorders or involving behavioral interventions, long-term inpatient rehabilitation or extended care for brain injuries, and care for acquired immune deficiency syndrome.¹¹⁶

The legal definition of a nursing home is admittedly dense. Stepping back from the statutory definitions, a nursing home can be most easily understood as a hospital extender. Residents typically are in need of twenty-four-hour nursing care. Unlike patients in hospitals, nursing home residents are medically stable. Residents fall into two broad categories: long-term residents and patients receiving rehabilitation services. Rehabilitation patients are typically recovering from an injury and expect to be discharged when the recovery from their injury has been completed. Long-term residents typically do not expect to be discharged. There is little likelihood of recovery from their condition.

¹¹⁴ These include: (1) the delivery of care in a manner and an environment to promote the maintenance or enhancement of each resident's quality of life; (2) the "delivery of services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident; (3) the conduct of a comprehensive, accurate, standardized, reproducible assessment of each resident's functional capacity meeting specified requirements; (4) the provision of services and activities; (5) the provision of nurse aide training; (6) the provision of medical care under physician supervision; (7) to have at least one social worker (in a facility with more than 120 beds); and (8) the posting of information on nurse staffing. Soc. Security Act § 1819(b), 42 U.S.C. § 1395i-3(b).

¹¹⁵ These include, among others, the right to freedom of choice; freedom from restraints; privacy; confidentiality; accommodation of needs; to voice grievances; to participate in resident and family groups; to participate in other activities; to examine facility survey results; to refuse certain transfers; and other rights established by the Secretary. Soc. Security Act § 1819(c), 42 U.S.C. § 1395i-3(c).

¹¹⁶ 10 N.Y.C.R.R. §§ 415.36–415.41.

According to the Kaiser Family Foundation, there were 89,775 residents in New York's nursing homes in 2019. CDC data compiled by the NHHS show that 85% of nursing home residents are over the age of 65, and over 40% are over the age of 85.¹¹⁷ Nursing home residents typically have numerous comorbidities.

The modern nursing home arose from the enactment of Medicare and Medicaid in 1965 and related legislation of that period.¹¹⁸ Prior to those enactments, nursing homes were more in the nature of old age homes, rest homes, and boarding houses. The Medicare Act did three things. First, it established a financing mechanism for the building of nursing homes. Second, it ensconced nursing homes in a medical model, authorizing Medicare payments for skilled nursing care following a period of hospitalization for those over the age of 65. Third, it enacted Medicaid, health insurance for the poor¹¹⁹. Medicaid provides payment for long-term care for qualified Medicaid beneficiaries. Medicare and Medicaid fueled the development of the modern nursing home industry.

Nursing homes do not have operating or emergency rooms, but resident units look remarkably like hospital wards. The residential area of nursing homes are centered on nursing stations, as is a hospital ward. Resident rooms, although they may have personal touches, look much like hospital rooms. As in hospitals, rooms are usually doubles, filled with two residents. Nursing home residents may eat in common

¹¹⁷ 2004 NNHS Tables – Estimates - Demographics, CDC, https://www.cdc.gov/nchs/data/nnhsd/Estimates/nnhs/Estimates_Demographics_Tables.pdf#Table05 (last visited Apr. 28, 2021).

¹¹⁸ See J. Hoyt, *Senior Living History: 1960–1969* for a summary of events.

¹¹⁹ Public Law 89–97, 79 Stat. 286, Title XIX (1965)

dining rooms, and they may enjoy common activities, but when they return to their rooms, the experience is hospital-like.

In New York, nursing homes may be for-profit or not-for-profit entities.¹²⁰ New York, though, prohibits publicly traded corporations from owning or operating nursing homes.¹²¹ When a not-for-profit nursing home is established, the New York Public Health and Health Planning Council must approve the original members of the Board of Directors.¹²² For for-profit nursing homes, that same council must approve any individual that owns ten percent or more of the nursing home entity.¹²³

A. The Regulatory Structure for Nursing Homes in New York

1. The Federal-State Regulatory Structure

The delivery of care and services in a nursing home is subject to pervasive regulation at the state and federal level. The Department's regulations at 10 N.Y.C.R.R. Part 415 set out the New York nursing home operational requirements.

To qualify to receive payment under the Medicare or Medicaid program, a nursing home must comply with the federal requirements of participation. The SSA authorizes the Secretary of Health and Human Services (the Secretary) to promulgate implementing regulations, and the Secretary has delegated that authority to the Centers for Medicare and Medicaid Services ("CMS").¹²⁴ The CMS nursing home regulations are at 42 C.F.R. Part 483, Subpart B.

¹²⁰ N.Y. Pub. Health Law § 2801-a.

¹²¹ N.Y. Pub. Health Law § 2801-a(4)(d),(e),(f).

¹²² N.Y. Pub. Health Law § 2801-a(1).

¹²³ *Id.*

¹²⁴ 42 C.F.R. § 1819(h)(2).

2. The Nursing Home Inspection Process

To oversee nursing home compliance, CMS contracts with state agencies – in New York, the Department of Health – to conduct periodic surveys, i.e. inspections, to determine whether nursing homes are in substantial compliance with federal participation requirements.¹²⁵ Under federal law, the state agency must survey each nursing home annually, with no more than 15 months elapsing between surveys, and must survey them more often, if necessary, to ensure the correction of identified deficiencies.¹²⁶ The state agency must also investigate all complaints.¹²⁷

CMS’s regulations differentiate among deficiencies, that is, violations of a participation requirement,¹²⁸ according to three levels of scope – whether the deficiencies are isolated, constitute a pattern, or are widespread – and four levels of severity – from (i) relatively minor conditions presenting no actual harm with a potential for minimal harm; to (ii) no actual harm with a potential for more than minimal harm but not immediate jeopardy; to (iii) actual harm that is not immediate jeopardy; to (iv) immediate jeopardy to resident health or safety.¹²⁹

CMS and the states have the authority to impose enforcement remedies against a nursing home that is not in substantial compliance with federal participation requirements.¹³⁰ CMS is authorized to impose a civil monetary penalty (“CMP”) for the

¹²⁵ Soc. Security Act § 1864(a) (42 U.S.C. § 1395aa(a)); 42 C.F.R. §§ 488.10, 488.20, 488.10–488.28, 488.300–488.335.

¹²⁶ Soc. Security Act § 1819(g)(2)(A); 42 C.F.R. §§ 488.20(a), 488.308.

¹²⁷ Soc. Security Act § 1819(g)(4).

¹²⁸ Soc. Security Act § 1819(b)–(d); 42 C.F.R. Part. 483, subpart B.

¹²⁹ 42 C.F.R. § 488.404.

¹³⁰ 42 C.F.R. § 1819(h)(2).

number of days of noncompliance – a per-day CMP – or for each instance of noncompliance – a per-instance CMP.¹³¹

Under Section 12 of the Public Health Law, the Department has authority to assess a civil penalty not to exceed \$2,000 for every violation. The penalty may be increased to an amount not to exceed \$5,000 for a subsequent violation if the person committed the same violation, with respect to the same or any other person or persons, within 12 months of the initial violation for which a penalty was assessed pursuant to paragraph (a) of this subdivision and if the violations were a serious threat to the health and safety of an individual or individuals, or to an amount not to exceed \$10,000 if the violation directly results in serious physical harm to any patient or patients.

3. The CMS Five-Star Rating System

CMS maintains a website¹³² which features a quality rating system that gives each nursing home a rating of between one and five stars. The rating system is intended to aid the public in choosing a nursing home. Nursing homes with five stars are considered to have substantially above average quality and nursing homes with one star are considered to have quality much below average. There is one overall five-star rating for each nursing home, and a separate rating for each of the following three categories:

- **Health Inspections** – The health inspection rating contains the three most recent health inspections and investigations due to complaints. The results are

¹³¹ 42 C.F.R. § 488.430.

¹³² Previously, the CMS website was known as the Nursing Home Compare. On December 1, 2020, CMS retired its Nursing Home Compare website and replaced it with Care Compare, which can be accessed at <https://www.medicare.gov/care-compare/> (last visited Apr. 28, 2021).

weighted, with the most recent survey findings receiving more weight than those from prior years.

- **Staffing** – The staffing rating has information about the number of hours of nursing staff care the facility provides on average to each resident each day. The staffing rating is based on two measures: (1) Registered Nurse (RN) hours per resident per day; and (2) total nurse staffing (including RN, licensed practical nurse (LPN), and nurse aide) hours per resident per day. CMS adjusts reported staffing ratios to account for resident condition using the Resource Utilization Group (RUG-III) case-mix system.

- **Quality Measures** – The quality measure rating has information on 15 different physical and clinical measures for short-stay¹³³ and long-stay nursing home residents.¹³⁴ There are three short-stay measures: pressure ulcers; moderate to severe pain; and delirium. There are seven long-stay measures: activities of daily living (ADL) decline; mobility decline; catheter use; high-risk pressure ulcers; physical restraints; urinary tract infections; and moderate to severe pain.

For the health inspections and quality measure domains, the top 10% of nursing homes get five stars, the bottom 20% get one star, and the middle 70% receive two, three or four stars, with equal proportions (23.33%) in each category. For the staffing

¹³³ Long-stay resident quality measures show the average quality of care for certain care areas in a nursing home for those who stayed in a nursing home for 101 days or more. Residents in a nursing home for a long-stay are usually not healthy enough to leave a nursing home and are unable to live at home or in a community setting. See *Long-Stay Quality of Resident Care Measures, Quality of Resident Care*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://data.cms.gov/provider-data/topics/nursing-homes/quality-of-resident-care#long-stay-quality-of-resident-care-measures> (last visited Apr. 28, 2021).

¹³⁴ Short-stay resident quality measures show the average quality of resident care in a nursing home for those who stayed in a nursing home for 100 days or less or are covered under the Medicare Part A skilled nursing facility benefit. These residents often are those who are recovering from surgery or being discharged from a hospital stay and who receive care in a nursing home until they're able to go back home or to the community. See also *Short-Stay Quality of Resident Care Measures*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://data.cms.gov/provider-data/topics/nursing-homes/quality-of-resident-care#short-stay-quality-of-resident-care-measures> (last visited May 6, 2021).

measures, the facility receives a five-star rating based on where the nursing home ranks compared to the adjusted staffing hours for all freestanding nursing homes and where the nursing home ranks compared to optimal staffing levels. To earn five stars on the staffing rating, the nursing home must exceed the CMS staffing study thresholds for both RN and total nursing hours per resident day.

B. Pre-Existing Issues in Nursing Homes

1. Infection Control

The pandemic shed light on pre-existing issues in nursing homes. The United States Center for Medicare and Medicaid Services (CMS) has noted that infection is the leading cause of morbidity and mortality in nursing homes.¹³⁵

Nursing homes must have an infection control program that includes a system for preventing, identifying, reporting and controlling infections and communicable diseases for all residents, staff, volunteers, visitors and other individuals providing services, and precautions to prevent the spread of infections. There must be an annual review of the plan. The Nursing Home Code also requires nursing homes to establish and maintain an infection control program to investigate, control and take actions to prevent infections at facilities, determine what procedures such as isolation and universal precautions should be utilized and maintain a record of incidents and corrective actions related to infections.¹⁰ N.Y.C.R.R. § 415.19. The regulations go on to require that the nursing home assure that all equipment and supplies are cleaned and properly sterilized and stored in a manner that will not violate the integrity of the sterilization. The regulation further provides that the facility must prohibit persons known to have a communicable

¹³⁵ *Updates and Initiatives to Ensure Safety and Quality in Nursing Homes*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Nov. 22, 2019), <https://www.cms.gov/files/document/qso-20-03-nh.pdf>.

disease or infected skin lesions from direct contact with residents or their food. Finally, the regulations provide standards for hand washing and linen handling and storage. Further, 10 N.Y.C.R.R. § 81.1(c) defines patient neglect to include the failure to provide sanitary clothing and surroundings. The infection control procedures in both the state and federal regulations added COVID-19-specific standards in 2020 and both the New York State Department of Health and the CDC provided additional guidance concerning infection control after the outbreak of the pandemic.

2. Staffing

A license to operate a nursing home comes with a special obligation to the residents who depend upon the facility to meet every basic human need.¹³⁶ Federal and state requirements express expectations for the operation of a facility with respect to performance and outcomes rather than by dictating structure and process.¹³⁷ Staffing is a structural measure that affects the processes and outcomes of care in nursing facilities.¹³⁸

Federal law mandates that nursing homes have sufficient nursing staff with the appropriate competencies and skill sets in order to assure residents safety and to attain or maintain the highest practicable level of physical, mental, and psychosocial well-

¹³⁶ Edward Livingston et al., *Sourcing Personal Protective Equipment During the COVID-19 Pandemic*, 323 J. AM. MED. ASS'N 1912 (2020), <https://jamanetwork.com/journals/jama/fullarticle/2764031>; see also Jennifer Abbasi, "Abandoned" Nursing Homes Continue to Face Critical Supply and Staff Shortages as COVID-19 Toll Has Mounted, 324 J. AM. MED. ASS'N 123 (2020), <https://jamanetwork.com/journals/jama/fullarticle/2767282> [hereinafter "Abandoned"]; Jordan Rau, *Nursing Homes Run Short Of COVID-19 Protective Gear As Federal Response Falts*, NPR (June 11, 2020), <https://www.npr.org/sections/health-shots/2020/06/11/875335588/nursing-homes-run-short-of-covid-19-protective-gear-as-federal-response-falters>.

¹³⁷ *Id.*

¹³⁸ Gooloo S. Wunderlich et al., *Nursing Staff in Hospitals and Nursing Homes: Is It Adequate?*, INST OF MED. (US) COMMITTEE ON THE ADEQUACY OF NURSING STAFF IN HOSPITALS AND NURSING HOMES (1996), <https://pubmed.ncbi.nlm.nih.gov/25121200/>.

being of each resident.¹³⁹ This is determined by resident assessments and individual plans of care with consideration of the number, acuity and diagnoses of the facility's resident population in accordance with the facility assessment.¹⁴⁰

Federal law also requires that the facility have sufficient numbers of Certified Nursing Assistants (CNAs),¹⁴¹ Licensed Vocational Nurse/Licensed Practical Nurses (LVNs/LPNs),¹⁴² and Registered Nurses (RNs)¹⁴³ on a 24-hour basis to provide nursing care to all residents including a charge nurse on each shift, an RN for at least eight consecutive hours a day, seven days a week, and a designated RN to serve as the director of nursing on a full-time basis unless the facility has a CMS waiver.¹⁴⁴ The director of nursing may serve as a charge nurse only when the facility has an average daily occupancy of 60 or fewer residents.¹⁴⁵

Nursing homes are also required to post daily nurse staffing data on the total number and type of staff and the actual hours worked by nursing staff by shift.¹⁴⁶ In addition, facilities must ensure that nursing staff have the competency and skill sets to care for residents.¹⁴⁷

¹³⁹ 42 C.F.R. § 483.70(e).

¹⁴⁰ 42 C.F.R. § 483.70(e).

¹⁴¹ CNAs provide assistance with activities of daily living, such as ambulation, transfers to/from bed, feeding, hygiene, toileting, bathing, dressing, bed cleaning and adjustments, turning and positioning of immobile patients, and other care and comfort

¹⁴² Primarily focus on medication administration, monitoring vital signs, and providing certain treatments

¹⁴³ Primarily focus on acute care needs, complex treatments, compliance with medical orders, communication with physicians and specialists, record-keeping, and complex health assessments.

¹⁴⁴ *State Operations Manual - 7014.1.1 Waiver of 7-Day Registered Nurse (RN) Requirement for Skilled Nursing Facilities* CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/Downloads/R97SOMA.pdf> (last visited Apr. 29, 2021).

¹⁴⁵ 42 C.F.R. § 483.35.

¹⁴⁶ 42 C.F.R. § 483.35.

¹⁴⁷ *Staffing Data Submission Payroll Based Journal (PBJ)*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/NursingHomeQualityInits/Staffing-Data-Submission-PBJ.html> (last visited Apr. 28, 2021).

Federal regulations require the following steps be taken into consideration when a staffing model is determined for any nursing home:¹⁴⁸

- (a) determine the collective resident acuity and care needs,¹⁴⁹
- (b) determine the actual nurse staffing levels,¹⁵⁰
- (c) identify appropriate nurse staffing levels to meet residents care needs,¹⁵¹
- (d) examine evidence regarding the adequacy of staffing¹⁵², and
- (e) identify gaps between the actual staffing and the appropriate nursing staffing levels based on resident acuity.¹⁵³

Federal regulations require nursing homes to conduct a facility self-assessment regarding the resources and qualified staff needed to meet patient care needs. This assessment must consider “the number, acuity and diagnoses of the facility’s resident population” and must be updated at least annually.¹⁵⁴ The facility assessment should define the facility’s strategy and resource allocation decisions.¹⁵⁵ Although corporate input may be included, the assessment must be conducted at the facility using many sources of information such as the residents, families, councils, and representatives.¹⁵⁶ Facility assessment is meant to be a thorough process and surveyors may issue a deficiency if the assessment is generic or designed to justify preexisting or budgeted staffing levels and not based on resident acuity.¹⁵⁷

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (indicating that Resident care needs differ depending on the acuity level (or case mix) of the facility residents. Higher acuity rates require higher staffing levels.)

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ 42 C.F.R. § 483.70(e).

¹⁵⁵ *Id.*

¹⁵⁶ 42 C.F.R. § 483.35.

¹⁵⁷ *Id.*

The regulation goes on to state that the collective resident acuity and care needs are based on an aggregation of individual resident assessments and care needs and are the basis for the resident's plan of care.¹⁵⁸ Federal law further requires nursing homes to conduct a comprehensive resident assessment of each individual resident on admission, annually, and when a significant change in status occurs.¹⁵⁹ CMS developed a standardized resident assessment instrument using the Minimum Data Set ("MDS") to document resident's needs, strengths, goals, functional and health status, life history, and preferences.¹⁶⁰ The MDS data are reported electronically by each facility to CMS and are used by facilities to develop a comprehensive care plan that determines appropriate resident services, needs, and preferences.

A majority of states have established their own minimum staffing requirements for nursing homes.¹⁶¹ For example, California requires all nursing homes to provide at least 3.5 nursing hours per resident day, although some waivers are allowed.¹⁶² The New York State Legislature is actively considering legislation establishing minimum staffing levels for New York nursing home, though the bill's prospects are unknown as of this writing.¹⁶³

Finding nursing staff has been challenging for administrators and directors of nursing homes even with substantial recruitment efforts including providing H1B visas¹⁶⁴

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Appropriateness of Minimum Nurse Staffing Ratios*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Dec. 24, 2001), <https://theconsumervoicework.org/uploads/files/issues/CMS-Staffing-Study-Phase-II.pdf>.

¹⁶² CAL. HEALTH & SAFETY §1276.5.

¹⁶³ See S.6346/A.7119 (2021). The bills have now passed both houses and are awaiting gubernatorial action.

¹⁶⁴ The H1B visa is an employment-based, non-immigrant visa for temporary workers. For this visa, an employer must offer a job in the US and apply for your H1B visa petition with the US Immigration

for nurses trained overseas. Aside from recruitment abroad, nursing staffing agencies and registries for supplemental staffing and overtime accrual were frequently used pre-pandemic.¹⁶⁵

Studies of nursing homes have shown that there is a strong positive relationship between the number of nursing home staff who provide direct care to residents daily and the quality of care and quality of life of residents in the nursing home.¹⁶⁶ Poor staffing is known to have a negative impact on the quality and outcome of care in that it increases the likelihood of negligence, harm to residents and staff, poor infection control compliance and errors.¹⁶⁷ “In nursing homes, quality and staffing are important factors, and there already exists system-wide disparities in which facilities with lower resources and higher concentrations of socio-economically disadvantaged residents have poorer health outcomes”¹⁶⁸ At least one study has found that long-term care facilities with higher concentrations of disadvantaged residents, including Medicaid residents and racial and ethnic minorities, lower nurse staffing levels (particularly RNs), and lower scores on CMS five-star quality measures, had higher rates of confirmed COVID-19

Department. This approved petition is a work permit which allows the recipient to obtain a visa stamp and work in the U.S. for that employer.

¹⁶⁵ The outcomes of nursing home care include changes in health status and conditions attributable to the care provided or not provided. Outcomes of long-term care are “most fairly expressed in terms of the relationship between expected and actual outcomes.” For some nursing home residents, realistic expectations for the outcomes of care may be maintained levels of health or slower-than-expected rates of decline, rather than improved health (R.L. Kane, 1995, p. 1379). The currently used measures of outcome include global measures such as mortality rates and rehospitalization rates (Lewis et al., 1985; GAO, 1988a, b; Spector and Takada, 1991) *Staffing and Quality of Care in Nursing Homes*, in NURSING STAFF IN HOSPITALS AND NURSING HOMES, IS IT ADEQUATE? (Gooloo S. Wunderlich, Frank Sloan, & Carolyne K. Davis eds., Nat’l Acad. Press, 1996), <https://www.ncbi.nlm.nih.gov/books/NBK232672/>.

¹⁶⁶ John F. Schnelle et al., *Relationship of Nursing Home Staffing to Quality of Care*, 39 HEALTH SERV. RES. 225 (Apr. 2004), <https://pubmed.ncbi.nlm.nih.gov/15032952/>.

¹⁶⁷ *COVID-19 Toll in Nursing Homes Linked to Staffing Levels and Quality*, UNIV. OF ROCHESTER MED. CTR. (June 18, 2020), <https://www.sciencedaily.com/releases/2020/06/200618073538.htm>.

¹⁶⁸ Yue Li, Ph.D., professor in the University of Rochester Medical Center (URMC), Department of Public Health Sciences, *Journal of the American Geriatrics Society*. “These same institutional disparities are now playing out during the coronavirus pandemic.” *Id.*

cases and deaths. Higher nurse staffing ratios was strongly associated with fewer cases and deaths¹⁶⁹.

Low or poor staffing is usually considered amongst the strongest causes of poor quality in nursing homes.¹⁷⁰ Poor staffing can cause staff to build in shortcuts to alter the amount of time needed to perform basic tasks, such as: not washing hands sufficiently as they move from one patient to the next,¹⁷¹ failing to don masks, gloves and gowns when in the rooms of contagious patients in isolation,¹⁷² partially dressing residents to cover only the obvious body areas,¹⁷³ not offering basic hygiene to residents,¹⁷⁴ engaging in improper disposal of items used for residents in isolation,¹⁷⁵ and failing to attend to the needs of the residents in isolation in a timely manner.¹⁷⁶ Low

¹⁶⁹ *Id.*

¹⁷⁰ Charlene Harrington, RN, PhD, professor emeritus of sociology and nursing at the UCSF School of Nursing. Harrington also is director of the UCSF National Center for Personal Assistance Services. Adding that, "Poor quality of care is endemic in many nursing homes, but we found that the most serious problems occur in the largest for-profit chain." See Charlene Harrington, *supra* note _____. "Of the 401 for-profit facilities, more than two-thirds have the lowest possible CMS Staffing rating of 1-Star or 2-Stars. Similarly, of the 100 facilities in New York state with a CMS 1-Star overall rating, 82 are for-profit facilities." See *Attorney General Report*, *supra* note 62.

¹⁷¹ Jordan Rau, *Coronavirus Stress Test: Many 5-Star Nursing Homes Have Infection-Control Lapses*, KHN (Mar. 4, 2020), <https://khn.org/news/coronavirus-preparedness-infection-control-lapses-at-top-rated-nursing-homes/>.

¹⁷² *Id.*, reporting that inspectors also watched another nursing home employee work in the room of a patient with pneumonia without wearing a mask, gown and gloves as required by a sign outside the room. They noted in their report that the facility had experienced two outbreaks of influenza that year, affecting at least 17 residents and seven staff members.

¹⁷³ *Id.* In April 2019, it was reported that during inspection at the Kirkland nursing home the inspectors there observed a registered nurse treating a patient whose feet were touching the floor, even though one heel had a pressure sore. The resident's daughter also said she feared the heel was infected. "It was unhygienic," the daughter told inspectors. *Id.*

¹⁷⁴ *Id.* Reporting that during an interview, Hunter, the Washington state Ombud, said that during her recent visits to 14 nursing homes in three Northwestern states reporting that that aides were generally good about using hand sanitizer but rarely washed residents' hands. Not every resident room had a sink, she said. "I haven't seen one resident have their hands washed during lunchtime or dinnertime," she said. *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

or poor staffing can lead to errors.¹⁷⁷ Not every error is life threatening, but an error in infection control could cause serious harm to a patient or staff member.

Long before the novel coronavirus, the nation's nursing homes were struggling to comply with basic infection prevention protocols.¹⁷⁸ According to a Kaiser Health News analysis of federal records in the beginning of 2017, government health inspectors cited more nursing homes for failing to ensure that all workers follow infection prevention and control rules than for any other type of violation.¹⁷⁹

Since 2017, more than 9,300 nursing homes nationally have been cited for failing to follow prevention and control rules. These violations were more common in facilities that received low ratings for staffing levels from the Centers for Medicare & Medicaid Services. Sixty-five percent (65%) of 1-star nursing homes have at least one infection.

3. Ownership and Other Facility Characteristics

Numerous studies have been done to determine whether there is a relationship between cases and deaths in nursing home facilities and factors such as infection control, staffing levels and shortages, community spread, and facility characteristics including ownership, urban or non-urban location, racial/ethnic composition of population, and Medicaid funding.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Jordan Rau, *As Coronavirus Looms, Many Nursing Homes Fall Short On Infection Prevention*, NPR (Mar. 4, 2020), <https://www.npr.org/sections/health-shots/2020/03/04/812162416/as-coronavirus-looms-many-nursing-homes-fall-short-on-infection-prevention>.

A literature review of 30 published studies done by the Kaiser Family Foundation¹⁸⁰ reported the following findings using cases, deaths, and severity of outbreak, as well as other measures in long-term care facilities:

- Nursing homes with relatively high shares of Black or Hispanic residents were more likely to report at least one COVID-19 death than nursing homes with lower shares of Black or Hispanic residents.
- Among nursing homes that had at least one case of coronavirus, nursing homes with relatively high shares of Black or Hispanic residents reported more severe case outbreaks than nursing homes with low shares of Black or Hispanic residents, as measured by confirmed or suspected cases as a share of nursing home beds.
- National patterns of COVID-19 deaths and cases in nursing homes with relatively high shares of Black or Hispanic residents generally persist at the state level, based on data from 21 states.

Other facility-level characteristics findings were also reported based upon a literature review of 30 published studies:¹⁸¹

- Long-term care facilities that are for-profit, have a higher share of residents who are people of color, are located in urban areas, and have more beds are more likely to have COVID-19 cases and deaths.
- For-profit nursing facilities are at higher risk for COVID-19 cases and deaths, while nursing facilities with labor unions are less likely to have COVID-19 deaths.
- Long-term care facilities with higher shares of residents who are people of color are more likely to experience COVID-19 cases and/or deaths.

¹⁸⁰ Priya Chidambaram et al., *Racial and Ethnic Disparities in COVID-19 Cases and Deaths in Nursing Homes*, KAISER FAM. FOUND. (Oct. 27, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/racial-and-ethnic-disparities-in-covid-19-cases-and-deaths-in-nursing-homes/>.

¹⁸¹ Nancy Ochieng, *Factors Associated With COVID-19 Cases and Deaths in Long-Term Care Facilities: Findings from a Literature Review*, KAISER FAM. FOUND. (Jan. 14, 2021), <https://www.kff.org/coronavirus-covid-19/issue-brief/factors-associated-with-covid-19-cases-and-deaths-in-long-term-care-facilities-findings-from-a-literature-review/>.

- Urban location may be associated with cases in long-term care facilities.
- Facilities with more beds and higher occupancy rates are more likely to have COVID-19 cases and/or deaths.
- There is some association between the share of residents covered by Medicaid as a primary payer and COVID-19 burden.

While the KFF report is neither exhaustive nor definitive and additional research will be necessary, the findings do give a preliminary picture of the issues and relationships that merit further study and examination.

C. The New York Nursing Home Experience During the Pandemic

Nearly 40% of the COVID deaths in the United States have occurred in nursing homes. As of March 3, 2021, it was reported that 13,625 residents of New York nursing homes had succumbed to the virus.¹⁸² No single explanation will account for the dire and unjust outcomes, and no single actor bears responsibility for the tragedy we have witnessed. In this section of the Report, we will examine the multiple considerations that weighed in the balance and the confluence of decisions that may have created the perfect public health storm.

Things went strikingly wrong. They went wrong for a variety of reasons. They went wrong due to a failure to recognize the depth and scope of the problem early. They went wrong because information was suppressed, in China and at the hands of the President. They went wrong because too much faith was placed in the ability of the health care system to check the epidemic. They went wrong because elements of the public health structure had been weakened. They went wrong because early efforts to

¹⁸² See *New York COVID-19 Fatality Data: Nursing Homes & Adult Care Facilities*, LONG TERM CARE CMTY. COAL. (Mar. 3, 2021), <https://nursinghome411.org/ny-nursinghome-covid-data/>.

check the virus' spread were ineffectual. They went wrong because testing failed. They went wrong because warning signs, big, flashing warning signs, were missed. They went wrong because the virus was not understood – especially that asymptomatic spread was a feature of this virus, unlike other recent viruses. They went wrong because there was not enough PPE. And, they went wrong because the virus arrived so quickly in New York and with so much virulence that adjustments could not be made in time to avoid catastrophic consequences.

This is not to overlook the performance of nursing homes. As discussed throughout this Report, collectively, nursing homes were poorly prepared for the onslaught. Already thin staffing became worse for nursing homes during the coronavirus pandemic.¹⁸³ During the COVID-19 pandemic, nursing homes, at least initially, were under pressure to maintain staff levels with limited access to PPE.¹⁸⁴ Nursing home caregivers were and are unable to social distance, as their job requires close contact with residents.¹⁸⁵ During the initial surge, the shortage of PPE put staff at increased risk of contracting the virus. Staff were lost for at least 14 days for

¹⁸³ See Harrington et al., *Nursing Home Staffing*, *supra* note 170; see Ari Min & Hye Chong Hong, *Effect of Nurse Staffing on Rehospitalizations and Emergency Department Visits Among Short-Stay Nursing Home Residents: A Cross-Sectional Study Using the US Nursing Home Compare Database*, 40 GERIATRIC NURSING 160 (2019), <https://pubmed.ncbi.nlm.nih.gov/30292528/> [hereinafter *Effect of Nurse Staffing*]; see also Sophie Quinton, *Staffing Nursing Homes Was Hard Before the Pandemic. Now It's Even Tougher*, STATELINE (May 18, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/05/18/staffing-nursing-homes-was-hard-before-the-pandemic-now-its-even-tougher> [hereinafter *Even Tougher*].

¹⁸⁴ See Edward Livingston et al., *Sourcing Personal Protective Equipment During the COVID-19 Pandemic*, 323 JAMA 1912 (2020); see also Abbasi, “Abandoned”, *supra* note 136; Jordan Rau, *Nursing Homes Run Short Of COVID-19 Protective Gear As Federal Response Falts*, NPR (June 11, 2020), <https://www.npr.org/sections/health-shots/2020/06/11/875335588/nursing-homes-run-short-of-covid-19-protective-gear-as-federal-response-falts>.

¹⁸⁵ *Long-Term Care Nursing Homes Telehealth and Telemedicine Tool Kit*, CTRS. FOR MEDICARE AND MEDICAID SERVS. (2020).

quarantine due to illness or exposure¹⁸⁶ Other factors exacerbated staff pressures, including meeting the COVID protocols and isolating residents who were suspected of having the virus.

The ban on visitors also reduced the availability of informal care provided to residents by visiting family and friends. This created a situation in which time and effort needed from nursing home staff increased, yet structural factors made it more difficult to address exacerbating staff shortages.¹⁸⁷ Pandemic-induced staff shortages meant federal staffing standards were not met.

With all these problems, the experience in nursing homes cannot be separated from the State and nation's overall experience with COVID-19. Early opportunities to check the spread were missed, denied, or fumbled.

The missed opportunities start with China. Although China did release the genetic map of the virus (which actually triggered the ultimately successful efforts of BioNTech and Moderna to develop vaccines),¹⁸⁸ China refused to allow the Chinese Center for Disease Control to speak to the United States Centers for Disease Control.¹⁸⁹ Thus, the CDC was denied the chance to learn from the Chinese experience.

Even before the virus arose in China, public health resources had been allowed to weaken. This weakening had occurred over the years in a number of ways. Most

¹⁸⁶ Alex Spanko, *Nursing Home Staffing Strain Could Hit 'High Point' This Week as COVID-19 Crisis Rages*, SKILLED NURSING NEWS (Apr. 12, 2020), <https://skillednursingnews.com/2020/04/nursing-home-staffing-strain-could-hit-high-point-this-week-as-covid-19-crisis-rages/>.

¹⁸⁷ Abbasi, "Abandoned," *supra* note 136.

¹⁸⁸ [China releases genetic data on new coronavirus, now deadly | CIDRAP \(umn.edu\)](https://www.cidrap.umn.edu/news-perspective/2020/02/china-releases-genetic-data-on-new-coronavirus-now-deadly).

¹⁸⁹ Donald G. McNeil Jr. and Zolan Kanno-Youngs, *C.D.C. and W.H.O. Offers to Help China Have Been Ignored for Weeks*, N.Y. TIMES (Feb. 7, 2020), <https://www.nytimes.com/2020/02/07/health/cdc-coronavirus-china.html>.

directly related to COVID-19, the United States CDC staff in China had been cut by more than two-thirds, from 47 to 13.¹⁹⁰ The National Security Council's Directorate for Global Health and Security and Biodefense had been disbanded in 2018. The Directorate had responsibility for pandemic preparation.¹⁹¹

Then there was the failure of testing. The CDC took exclusive authority to develop a diagnostic test. Its efforts failed, costing a crucial month as the disease was beginning its spread in the United States.¹⁹² New York State, after some weeks, was able to develop its own test, but the supply was insufficient, and the testing turnaround time was too long.¹⁹³ Too few people were able to be tested, and the results, by the time they were received, were often of little use. In this, our national experience can be compared to that of South Korea. South Korea was able to develop an early, successful testing regimen, which supported the all-important contact tracing effort. Even today, South Korea largely has been able to keep the spread of the virus largely in check.¹⁹⁴

There was also the speed of the pandemic, lack of recognition, political tensions and short-term delays. The virus was here in New York quickly, too quickly for the body

¹⁹⁰ M. Taylor, *U.S. Slashed CDC Staff in China Prior to Coronavirus Outbreak*, REUTERS (Mar. 25, 2020), <https://www.reuters.com/article/us-health-coronavirus-china-cdc-exclusiv-idUSKBN21C3N5>.

¹⁹¹ Deb Riechmann, *Trump disbanded NSC pandemic unit that experts had praised*, ASSOC. PRESS (Mar. 14, 2020), <https://abcnews.go.com/Politics/wireStory/trump-disbanded-nsc-pandemic-unit-experts-praised-69594177>.

¹⁹² Carolyn Y. Johnson and Laurie McGinley. *What went wrong with the coronavirus tests in the U.S.*, THE WASH. POST (Mar. 7, 2020). https://www.washingtonpost.com/health/what-went-wrong-with-the-coronavirus-tests/2020/03/07/915f5dea-5d82-11ea-b29b-9db42f7803a7_story.html.

¹⁹³ Joseph Goldstein and Michael Gold, *City Pleads for More Coronavirus Tests as Cases Rise in New York*, N.Y. TIMES (Mar. 6, 2020), <https://www.nytimes.com/2020/03/06/nyregion/coronavirus-new-york.html?searchResultPosition=2>.

¹⁹⁴ In fact, South Korea had a national plan for responding to an epidemic and began implementing that plan in January 2020 as soon as the first case was recognized in that nation. June-Ho Kim, et al., *Emerging COVID-19 Success Story: South Korea Learned the Lessons of MERS*, EXEMPLARS IN GLOB. HEALTH (Mar. 5, 2021), <https://ourworldindata.org/covid-exemplar-south-korea>.

politic to respond. There was the mistaken belief, or at least mistaken public statements, that New York was ready to control the virus. There were the political tensions between Governor Cuomo and Mayor DeBlasio, which interfered with communication between the State and City Departments of Health. And finally, there was the delay in shutting down New York's economy. That delay was only a matter of a few days, and it would be unfair to suggest any sort of criticism for a public official's brief delay in issuing such a significant order, but hindsight (and published reports) shows that the delay of a mere few days greatly contributed to the virus' spread and number of deaths.¹⁹⁵

The speed with which the virus arrived in New York also adversely affected nursing homes. Nursing homes needed PPE. There was far from enough. The federal government in February had undertaken an effort to purchase PPE, only to find that China had cornered the market, having purchased all equipment available at the time to meet its own needs as the first nation impacted by the virus.¹⁹⁶

Face masks, shields, gloves, and other protective items quickly became the most wanted items for households and healthcare alike. The public was discouraged from wearing masks, originally being told masks were not useful protection from the virus.¹⁹⁷

That rationale quickly changed – masks and PPE had to be preserved to be available

¹⁹⁵ See J. David Goodman, *How Delays and Unheeded Warning Hindered New York's Virus Fight*, N.Y. TIMES (Apr. 8, 2020), <https://www.nytimes.com/2020/04/08/nyregion/new-york-coronavirus-response-delays.html>; see also *Watch a Timeline of Disease Expert Dr. Anthony Fauci's Comments on Coronavirus*, CNBC (Mar. 26, 2020), <https://www.cnbc.com/video/2020/03/26/watch-a-timeline-of-disease-expert-dr-anthony-faucis-comments-on-coronavirus.html>.

¹⁹⁶ *China's Epic Dash for PPE Left the World Short on Masks*, BLOOMBERG BUSINESSWEEK (Sept. 17, 2020), <https://www.bloomberg.com/news/articles/2020-09-17/behind-china-s-epic-dash-for-ppe-that-left-the-world-short-on-masks>.

¹⁹⁷ *How Mask Guidelines Have Evolved*, N.Y. TIMES (April 27, 2021), <https://www.nytimes.com/2021/04/27/science/face-mask-guidelines-timeline.html>.

for health care workers.¹⁹⁸ Thus, at the time the virus was quickly spreading, what later became recognized as one of the most effective means to check the virus' spread -- mask-wearing, was being discouraged.

At the same time, PPE was in short supply for nursing homes. Hospitals came first. All other health care providers came after. PPE items' cost increased several times over at the pandemic's heights, if a provider could even get them.¹⁹⁹ Massively increased consumption rates rapidly sapped providers' stored supplies and led to high competition levels for available shipments.²⁰⁰ Orders frequently did not arrive or were appropriated and redistributed by federal agencies on behalf of state-level emergency responses.²⁰¹ Scarcity was made worse by slow, sometimes, international supply lines, and limited raw materials.²⁰² After its initial efforts, the federal government withdrew from pursuing PPE, leaving the states, including New York, on their own.²⁰³

¹⁹⁸ *Id.*

¹⁹⁹ Daniella Diaz, Geneva Sands and Cristina Alesci, *Protective equipment costs increase over 1,000% amid competition and surge in demand*, CNN POLITICS (Apr. 17, 2020), <https://edition.cnn.com/2020/04/16/politics/ppe-price-costs-rising-economy-personal-protective-equipment/index.html>.

²⁰⁰ Erin Schumaker, *How did the US come up so short on PPE?*, ABC NEWS (Apr. 14, 2020), <https://abcnews.go.com/Health/us-short-ppe/story?id=70093430>; Tucker Doherty and Brianna Ehley, *Trump called PPE shortages 'fake news.' Health care workers say they're still a real problem*, POLITICO (Apr. 26, 2020), <https://www.politico.com/news/2020/04/26/trump-ppe-fake-news-207523>.

²⁰¹ Terry Nguyen, *How the Trump administration has stood in the way of PPE distribution*, VOX (Apr. 4, 2020), <https://www.vox.com/2020/4/4/21208122/ppe-distribution-trump-administration-states>; Diana Falzone, *"Like a Bully at the Lunchroom": How the Federal Government Took Control of the PPE Pipeline*, VANITY FAIR (May 6, 2020), <https://www.vanityfair.com/news/2020/05/how-the-federal-government-took-control-of-the-ppe-pipeline>; Mia Jankowicz, *Officials in at least 6 states are accusing the federal government of quietly diverting their orders for coronavirus medical equipment*, BUSINESS INSIDER (Apr. 8, 2020), <https://www.businessinsider.com/coronavirus-federal-govt-fema-accused-taking-states-masks-ventilator-orders-2020-4>.

²⁰² ADB Briefs, *Global Shortage of Personal Protective Equipment amid COVID-19: Supply Chains, Bottlenecks, and Policy Implications*, ASIAN DEV. BANK (Apr. 2020), <https://www.adb.org/sites/default/files/publication/579121/ppe-covid-19-supply-chains-bottlenecks-policy.pdf>.

²⁰³ *Trump administration tries to narrow stockpile's role for states*, ASSOC. PRESS (Apr. 3, 2020), <https://www.latimes.com/world-nation/story/2020-04-03/trump-admin-tries-to-narrow-stockpiles-role-for-states>.

Federal and New York State government responses were intended to help and did provide some relief during the winter and spring of 2020. For example, the federal medical assistance percentage (“FMAP”) of state assistance expenditures was boosted due to increased operating costs; however, that increase was terminated in mid-2020.²⁰⁴ The imposition and enforcement of New York’s 60-day required PPE reserve for nursing homes, meant to prevent a second scramble for PPE, was mistimed and added local stress to the situation. Many New York providers were suddenly competing for huge amounts of the same supplies when PPE was in extremely short supply. Once providers met the required standard, they were required to maintain that level of PPE reserves, although the period of greatest need may have passed.²⁰⁵

What was most devastating for nursing homes was asymptomatic spread. In March 2020, asymptomatic transmission was not yet well-recognized. It was because asymptomatic spread was not recognized that the public authorities had believed the virus could be controlled.²⁰⁶ Instead, the virus had spread through the New York metropolitan area and was present in its nursing homes. Staff was infected. Residents were infected.

At least through New York’s first surge, the greatest determinant of COVID-19 results spread appears to have been location. A nursing home located in a

²⁰⁴ On March 18, 2020, the President signed into law H.R. 6021, the Families First Coronavirus Response Act (FFCRA) (Pub. L. 116-127). Section 6008 of the FFCRA provided a temporary 6.2 percentage point increase.

²⁰⁵ See Note 59, *supra*.

²⁰⁶ See Daniel Jernigan, *Update: Public Health Response to the Coronavirus Disease 2019 Outbreak – United States, February 24, 2020*, CDC (Feb. 24, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6908e1-H.pdf>; Andrew Romano, *Fauci Once Dismissed Concerns About ‘Silent Carriers’ of Coronavirus. Not Anymore.*, YAHOO!NEWS (Apr. 7, 2020), <https://news.yahoo.com/fauci-once-dismissed-concerns-about-silent-carriers-of-coronavirus-not-anymore-161718057.html>; see also *Older Adults*, CDC (April 16, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.

neighborhood with a high number of COVID-19 cases was much more likely to have a COVID-19 outbreak than a nursing home in a neighborhood with a lower level of cases.²⁰⁷ That is not surprising. The largest proportion of a nursing home's staff are low-paid direct care aides, food service workers and custodian staff. These workers are typically drawn from areas in close proximity to the nursing home. Thus, especially in the early days of the epidemic in New York, when asymptomatic spread was not yet recognized, there was a close correlation between nursing home location and COVID-19 cases.

Nursing home residents were in harm's way. The CDC posted guidance on March 5th advising people over 60 to take special precautions.²⁰⁸ The first recognized outbreak in the United States occurred at a nursing home in Washington State. Experience with the virus thus far has shown that virus has been most dangerous for older individuals. Almost 96% of deaths have occurred in individuals over the age of 50, with over 88% in those over 60, and over 70% in those over 70.²⁰⁹ The comorbidities are also striking, as are their relationships to age. Of those who have passed away due to the virus in New York State, 92% have had at least one known comorbidity, and these are comorbidities typically associated with aging including hypertension, diabetes, dementia, coronary artery disease, and Chronic Obstructive Pulmonary Disorder.²¹⁰

²⁰⁷ Margaret Sugg et al., *Mapping Community-Level Determinants of COVID-19 Transmission in Nursing Homes: A Multi-Scale Approach*, NAT'L INST. OF HEALTH (Aug. 25, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7446707/>.

²⁰⁸ Elizabeth Cohen, *New CDC guidance says older adults should 'stay at home as much as possible' due to coronavirus*, CNN POLITICS (Mar. 6, 2020), <https://www.cnn.com/2020/03/06/health/coronavirus-older-people-social-distancing/index.html>.

²⁰⁹ *COVID-19 Fatality Tracker*, N.Y. ST. DEP'T OF HEALTH, <https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Fatalities?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n> (last visited Apr. 28, 2021).

²¹⁰ *Id.*

The virus had an immediate impact on nursing home staffing. Nursing homes, which were already leanly staffed, found themselves with missing staff. Staff became ill. Staff stayed away from work to care for their own families. And some staff simply became afraid. This is not a criticism. Health care workers, including nursing home staff, have performed heroically through the epidemic. Nevertheless, there were staffing shortages. Operators reacted with forced overtime, hazard pay and bonuses.²¹¹

Into this toxic mix came the March 25th Department of Health directive that required nursing homes to accept COVID-19-positive returning and prospective residents, and specifically barred testing of those individuals. As will be discussed further in this report, how many individuals were admitted into nursing homes as a result of this directive is not yet clear.

The Governor and the State Department of Health were focused on readying the State's hospitals. The same focus was not placed on preparing the State's nursing homes for the onslaught of the virus. It is also not clear to the Task Force that the State's nursing homes took sufficient meaningful steps to prepare for the arrival of the virus. The Task Force saw no evidence that the State's nursing homes prepared for the virus by increasing staffing, or providing staff training that had any meaningful impact, or stocking up on PPE. After the virus arrived, there were nursing homes that created COVID-19-only floors or wings. There was also hazard pay.

There is one other event to mention. In March of 2020, the Governor, via Executive Order, granted immunity against ordinary negligence to health care

²¹¹ Noelle Denny-Brown, Denise Stone, Burke Hays, and Dayna Gallagher, *COVID-19 Intensifies Nursing Home Workforce Challenges*, U.S. DEP'T OF HEALTH & HUMAN SERVS., OFF. OF THE ASST. SEC. FOR PLANNING & EVAL. (Oct. 19, 2020), <https://aspe.hhs.gov/basic-report/covid-19-intensifies-nursing-home-workforce-challenges>.

professionals, and certain health care entities, including nursing homes.²¹² That immunity was codified a short time later.²¹³

The grant of immunity was controversial from the start. Immunity stripped the protections provisions under the New York State Public Health Law that protected nursing home residents from abuse and neglect. The argument for immunity was that it shielded health care workers from the uncertainty of an overwhelmed system facing an unknown disease with to-be-discovered treatments. In nursing homes, the principal beneficiaries of the grant of immunity were operators. The principal argument against immunity was that it would allow nursing home operators to inadequately staff, or otherwise fail to meet their obligations with impunity.

The immunity grant was partially repealed in August.²¹⁴ As modified, any health care facility or health care professional was shielded from any liability, civil or criminal, for any harm or damages, so long as the following conditions were met:

- The health care facility or health care professional is providing health care services in accordance with applicable law, or where appropriate pursuant to a COVID-19 emergency rule;
- The act or omission occurs in the course of providing health care services and the treatment of the individual is impacted by the health care facility's or health care professional's decisions or activities in response to or as a result of the COVID-19 outbreak and in support of the state's directives; and
- The health care facility or health care professional is providing health care services in good faith.

²¹² Executive Order 202.10 (Mar. 23, 2020).

²¹³ 2020 N.Y. Laws ch..56, part GGG (April 3, 2020).

²¹⁴ 2020 N.Y. Laws ch. 134 (Aug. 3, 2020).

The immunities did not apply if the harm or damages were caused by an act or omission that was willful or arose out of intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm by the health care facility or health care professional providing health care services. However, decisions resulting from a resource or staffing shortage would not be considered to be willful or intentional and thus, could not fall within the exceptions (i.e., immunity applied to decisions resulting from resource or staffing shortages).

The immunity provision has now been repealed.²¹⁵

There are those who argue that the grant of immunity caused nursing home operators to act recklessly. This is not a theory that the Task Force was able to examine. There is not yet any data or reports on whether nursing homes behaved differently because of the grant of immunity. With vaccines and the reopening of nursing homes to visitations, we may soon have a real sense of how nursing home residents fared regarding their other care needs. We do know that there were some nursing home operators who more readily accepted COVID-19 patients. A large part of the reason for the grant of immunity was to encourage just that, the acceptance of COVID-19 individuals. During the six-plus weeks that the March 25th directive was in place, no encouragement should have been needed as a mandate to accept those patients was in place. As the Task Force learned, though, there were nursing homes that refused to accept COVID-19 patients before and even while the directive was in place. As New York moved past the first surge, and nursing home occupancies dropped, immunity may have been a boon to operators anxious to fill empty beds. The

²¹⁵ 2021 N.Y. Laws ch. 96.

directive may also have encouraged operators to continue short staffing while it was in place. Immunity may also have provided a level of comfort to the professional staff, encouraging them to remain in place.

One would think that staffing shortages resulted in worse outcomes for nursing home residents. The Task Force would not dispute that insufficient numbers of staff does result in a diminution of care and jeopardizes residents. Insufficient numbers of staff can also make infection control more difficult. As staff move quickly, more quickly than they should, from one resident to another, corners can be cut, and those corners can include steps critical to infection control, such as hand-washing or changing of gloves.

Nevertheless, the research available to the Task Force at this time is inconclusive regarding whether better-staffed nursing homes had better outcomes regarding COVID-19 than poorly staffed nursing homes. There is a report that found that residents of unionized nursing homes suffered fewer deaths than nursing homes where unions were not present.²¹⁶ According to that report, unionized nursing homes had more staff, better trained staff, and more PPE. Other reports have not found a clear correlation between COVID-19 deaths and staffing levels.²¹⁷ As discussed above, the federal Center for Medicare and Medicaid Services utilizes a five-star system for rating nursing home quality. These reports have found no different COVID-19 outcomes between one and five star rated nursing homes.

²¹⁶ Adam Dean et al., *Mortality Rates For COVID-19 Are Lower in Unionized Nursing Homes*, 39 HEALTH AFFAIRS 1993 (2020), <https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2020.01011>.

²¹⁷ Rebecca J. Gorges & R. Tamara Konetzka, *Staffing Levels and COVID-19 Cases and Outbreaks in U.S. Nursing Homes*, 68 JAGS 2462 (2020), <https://agsjournals.onlinelibrary.wiley.com/doi/10.1111/jgs.16787>.

The Task Force also looked at whether a nursing home's for-profit or not-for-profit status was a determinant of COVID-19 results. The published reports, thus far, have not shown that for- or not-for-profit status was a COVID-19 determinant.²¹⁸

Once New York was past the first surge, and asymptomatic spread was understood, COVID-19 outbreaks continued to occur throughout the State.²¹⁹ As discussed above, beginning in May, nursing homes were required to routinely test their staffs. Nursing homes were also closed to visitors. The mandate to accept COVID-19 residents had also been rescinded. Adequate supplies of PPE became available. Nevertheless, virus outbreaks continued to occur in nursing homes throughout the State, and continued until the wide-spread vaccination of the State's nursing home residents. COVID-19 spreads through the air. An aerosol disease in a facility filled with individuals particularly vulnerable to the disease is simply a recipe for disaster.²²⁰ Even with widespread testing, due to asymptomatic spread, an individual can be COVID-19 positive, and an unknown carrier for a period of time.

1. The Impact of the March 25th Directive

The March 25th directive to New York's nursing homes regarding the admission of COVID-19-positive residents has become so central to the public narrative of New York's first surge experience that it must be discussed separately. "No resident shall be

²¹⁸ Attached as an Appendix to this Report is a Table identifying New York's nursing homes, their bed capacity, number of COVID-19 deaths among residents, not- or for-profit status and their CMS star staffing rating.

²¹⁹ M. Hill, *Some NY nursing homes proved helpless in face of virus surge*, ASSOC. PRESS (Mar. 20, 2021), <https://apnews.com/article/us-news-new-york-coronavirus-pandemic-nursing-homes-08cd2ed9c308d30f7de28b9f5ae7a83b>; L Brody, T. McGinty, *N.Y. Nursing Homes See Surge in COVID-19 Deaths as Officials Hope Vaccinations Will Curb Spread*, WALL STREET JOURNAL (Jan. 13, 2021), <https://www.wsj.com/articles/new-york-nursing-homes-see-surge-in-covid-19-deaths-as-officials-hope-vaccinations-will-curb-spread-11610573476>.

²²⁰ To a certain extent, nursing home representatives have argued that containing COVID-19 in nursing homes was simply beyond their abilities. See [NYS Health Facilities Association: 'Outbreaks of COVID-19 are not the result of inattentiveness or shortcomings in our facilities' \(wnypapers.com\)](https://www.wnypapers.com).

denied re-admission or admission to the NH solely based on a confirmed or suspected diagnosis of COVID-19. NHs are prohibited from requiring a hospitalized resident who is determined medically stable to be tested for COVID-19 prior to admission or readmission.” (underlining in original). The Advisory drew almost immediate criticism,²²¹ caused the Governor to lash out at nursing homes, spurred a congressional inquiry, and, ultimately, an investigation of the Governor himself. What the directive did not do, as is often claimed, is cause 15,000 deaths. The 15,000 number that has been bandied about is the approximate total number of New York long-term care facility residents who have succumbed to the virus. This figure includes nursing home residents who passed away long after the directive had been rescinded. It includes residents who were unaffected by the order.

This is not to say that the directive did not result in any additional deaths. Although a determination of the number of additional nursing home deaths is beyond the capacity of the Task Force, there are credible reviews that suggest that the directive, for the approximately six weeks that it was in effect, did lead to some number of additional deaths. The Department of Health issued a report in 2020 in which it argued unconvincingly that the admission of 6,326 COVID-positive residents during the period the Health directive was in effect had no impact. That cannot be the case, and has now been shown not to be the case.²²² As we have seen, once the virus came into

²²¹ See Associated Press, *More Than 1,700 New, Unreported Deaths at Nursing Homes in NY*, Fox5 N.Y. (May 5, 2020), <https://www.fox5ny.com/news/more-than-1700-new-unreported-deaths-at-nursing-homes-in-ny>; see also Luis Ferré-Sadurní & Amy Julia Harris, *Does Cuomo Share Blame for 6,200 Virus Deaths in N. Y. Nursing Homes?*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/07/08/nyregion/nursing-homes-deaths-coronavirus.html>.

²²² The Empire Center, in its report dated February 18, 2021, specifically disputes the Department’s contention, but agrees that the Department’s advisory was not the sole or primary cause of most nursing home deaths. Bill Hammond & Ian Kingsbury, *COVID-positive Admissions Were Correlated with Higher*

a nursing home, it was hard to control. The Department of Health's report, however, does correctly state that on March 25th the virus was already in many of metropolitan New York's nursing homes, and that the COVID-19 fuse had been lit.

That there were additional deaths does not mean the Department of Health directive was issued in error. The emergency circumstances of March 25th must be remembered. On March 25th, the State believed that it was in need of thousands more hospital beds. ICUs were filling up. The hospital system appeared to be fully overwhelmed and in danger of collapse. Difficult decisions were being made.

The State was also burdened with the insufficiencies of the federal response. The federal response was hopelessly politicized. What can kindly be called mixed messages and stops and starts were coming from the federal government. Then-President Donald Trump repeatedly down-played the scope of the problem.²²³ President Trump ordered, but ultimately retreated from firing a CDC official who, in late February, had stated that a COVID-19 epidemic in the United States was inevitable.²²⁴

There were federal policy failures. The federal government had been unsuccessful in getting complete information from China about the virus. The federal government failed to marshal sufficient supplies of PPE. PPE shortages caused the

Death Rates in New York Nursing Homes, EMPIRE CTR. FOR PUB. POL. (Feb. 18, 2021), <https://www.empirecenter.org/publications/covid-positive-admissions-higher-death-rates/>.

²²³ D. Wolfe, D. Dale, "It's Going to Disappear:" A Timeline of Trump's Claims That COVID-19 Will Vanish, CNN, Oct. 31, 2020, <https://www.cnn.com/interactive/2020/10/politics/covid-disappearing-trump-comment-tracker/>.

²²⁴ Grace Panetta, *Trump reportedly threatened to fire a top doctor at the CDC for sounding the alarm about the coronavirus in February*, BUSINESS INSIDER (Apr. 22, 2020), <https://www.businessinsider.com/trump-wanted-to-fire-cdc-doctor-for-raising-alarm-on-coronavirus-wsj-2020-4>.

discouragement of mask-wearing. Finally, testing was almost completely unavailable. By the end of March, testing was still limited to symptomatic individuals.²²⁵

At least facially, nursing homes should have been able to meet the needs of stable COVID-19 residents just as they are expected to be able to meet the needs of other residents with communicable diseases. Nursing homes are required to maintain an infection prevention and control program designed to provide a safe, sanitary, and comfortable environment and to help prevent the development and transmission of communicable diseases and infections.²²⁶ Nursing homes also must be designed, constructed, equipped, and maintained to protect the health and safety of residents, personnel and the public.²²⁷ Given the overwhelming dimensions of the epidemic – that the virus is spread through the air, asymptomatic spread, and the vulnerability of the elderly – expecting nursing homes to have been able to shield all their residents from the virus was probably too much to ask. But at the time, seeing nursing home beds as hospital extender beds when hospital beds were not expected to be available was not an unreasonable decision.

What was unreasonable was the failure to recognize that nursing homes were just as much in need of substantial help as general hospitals. Nursing homes were given little help with securing PPE. In fact, in at least one press conference, Governor

²²⁵ C. Johnson, L. Sun, L. McGinley, *In Hard-Hit Areas, Testing Restricted to Health Care Workers, Hospital Patients*, WASH. POST (Mar. 21, 2020), <https://www.washingtonpost.com/health/2020/03/21/coronavirus-testing-strategyshift/>; see also R. Patel, *et al.*, *Report from the American Society of Microbiology COVID-19 International Summit* (Mar 23, 2020), <https://mbio.asm.org/content/11/2/e00722-20>.

²²⁶ 42 C.F.R. § 483.80; 10 N.Y.C.R.R. § 415.19.

²²⁷ 42 C.F.R. § 483.90; 10 N.Y.C.R.R. § 415.29.

Cuomo roundly criticized suggestions that nursing homes should have been aided.²²⁸

Nursing homes also could have used assistance in putting together infection control sufficient to meet the virus, if that were even possible in late March 2020.

Also unreasonable was the absoluteness of the directive. Under the applicable regulations, a nursing home is to accept only individuals the nursing home is able to care for properly.²²⁹ That, in essence, is the promise every nursing home makes to residents and their families – we admit you because we can properly care for you. The directive did not explicitly override the regulation, but it was commonly read as though it did. The directive came at a time when regulations were routinely being overridden. Providers were told to follow the Department of Health’s instructions. The language of the directive was absolute: “No resident shall be denied admission” The language should be compared with a similar directive that was issued to adult care facilities two weeks later. That directive told adult care facilities that they could not deny admission to COVID-positive individuals, but expressly restated the exception for those individuals for whom the facility could not provide appropriate care.²³⁰ The March 25th directive placed nursing homes on the wrong footing.

Finally, it was unreasonable to leave the directive in place for so long after it was necessary. Hospitalizations peaked on April 14th.²³¹ The hospital beds at the Javits Center were barely used, and the USNS Comfort sat empty in the Hudson River. The

²²⁸ Bernadette Hogan and Bruce Golding, *Nursing homes have ‘no right’ to reject coronavirus patients, Cuomo says*, N.Y. POST (Apr. 23, 2020), <https://nypost.com/2020/04/23/nursing-homes-cant-reject-coronavirus-patients-cuomo-says/>.

²²⁹ 10 N.Y.C.R.R. § 415.1.

²³⁰ See 18 N.Y.C.R.R. § 487.5(a)(3)(xii).

²³¹ *Tracking Coronavirus in New York: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/us/new-york-covid-cases.html> (accessed Apr. 28, 2020).

Comfort set sail from New York City on April 23rd. The March 25th directive could have been rescinded on or about the date the Comfort set sail, if not sooner.

VI. Impact of COVID-19 in Other Long-Term Care Settings

A. Adult Care Facilities

1. Regulatory Structure

Adult homes and enriched housing programs are residential facilities designed to meet the needs of persons with physical or mental impairments who do not require the higher level of care associated with nursing homes.²³² Adult homes and enriched housing programs are sometimes referred to collectively as adult care facilities, or ACFs. An assisted living program (ALP) is an adult home or enriched housing program with an associated licensed home care services agency (LHCSA) that can provide nursing and other ancillary health care services.²³³ Adult homes or enriched housing programs may be licensed as assisted living residences (ALRs), with or without enhanced or special needs certification.

The Department of Health licenses and governs adult care facilities under a detailed regulatory scheme that covers all aspects of their operations, from food service²³⁴ and medication distribution²³⁵ to resident recreational activities.²³⁶ The standards for adult homes and enriched housing programs are found in 18 N.Y.C.R.R.

²³² N.Y. Soc. Servs. Law § 2(21)–2(28).

²³³ See 18 N.Y.C.R.R. § 494.5.

²³⁴ See 18 N.Y.C.R.R. §§ 487.8, 488.8.

²³⁵ See 18 N.Y.C.R.R. §§ 487.7(f), 488.7(d).

²³⁶ See 18 N.Y.C.R.R. § 487.7(h) (requiring a diversified program of at least 10 hours per week of cultural, spiritual, diversional, physical, political, social and intellectual activities, including all of the following: (i) individual, small group and large group activities; (ii) facility-based and community activities; (iii) physical exercise or other physical activities; (iv) intellectual activities; (v) social interaction; and (vi) opportunities for both active and passive resident involvement, offered during evenings and weekends as well as during the weekday); see *also* 18 N.Y.C.R.R. § 488.7(f).

Parts 487 and 488. These standards, among other things, include detailed admission standards, including that ACFs may not admit anyone with a medical condition which requires continual skilled observation²³⁷ or who suffers from a communicable disease.²³⁸

The Department's regulations also protect the rights of residents, including, among others, their absolute right to leave and return to the facility at any reasonable time,²³⁹ and their right to invite guests into the facility without restriction,²⁴⁰ and the right not to be restrained or locked in a room at any time.²⁴¹ Residents also must be encouraged to collectively organize.²⁴²

Admission standards for assisted living programs allow for the admission of persons who need more care and services than in an adult home, but still prohibit the admission of anyone who requires continual nursing or medical care, or whose medical impairment endangers the safety of other residents.²⁴³

The Department enforces these regulations through on-site inspections.²⁴⁴ Any regulatory violations can result in fines and the potential of license revocation.²⁴⁵ The Department's inspectors protect resident rights.

Significantly, adult homes and enriched housing programs are residential, not medical or nursing facilities. They do not provide medical or nursing care directly. Rather, all medical and nursing care, including both routine appointments and treatment

²³⁷ 18 N.Y.C.R.R. §§ 487.4(c)(6), 488.4(c)(6).

²³⁸ 18 N.Y.C.R.R. §§ 487.4(c)(12), 488.4(c)(12).

²³⁹ 18 N.Y.C.R.R. § 487.5(a)(3)(xii)

²⁴⁰ 18 N.Y.C.R.R. § 485.14(b)(1).

²⁴¹ 18 N.Y.C.R.R. § 487.5(a)(3)(x).

²⁴² 18 N.Y.C.R.R. § 487.5(b).

²⁴³ See 18 N.Y.C.R.R. Part 494.

²⁴⁴ See 18 N.Y.C.R.R. § 486.2.

²⁴⁵ See 18 N.Y.C.R.R. § 486.4.

for acute conditions, is performed by outside providers, either through on-site appointments or at a hospital or other outside medical facility. As this regulatory structure implies, the residents are typically healthier and more independent than nursing home residents.

Prior to the coronavirus pandemic, ACFs had no history of dealing with infection control and were in fact prohibited from admitting or retaining residents with communicable diseases. 18 N.Y.C.R.R. §§ 487.4(c)(12), 488.4(c)(12). The only PPE requirement applied during flu season; licensed home care personnel without a current flu shot were required to wear masks when treating residents.²⁴⁶ ACFs were not required to maintain any inventory of PPE, and at the start of the pandemic, most had only a very small number of masks on hand.

2. The Coronavirus Pandemic and the Experience of Adult Care Facilities²⁴⁷

Because adult care facilities are confined spaces with numerous persons living and working in close proximity, including many who are particularly vulnerable due to age or medical condition, when the coronavirus pandemic emerged as a significant threat, preventing the introduction of the virus into adult care facilities should have been a top priority. The existing regulatory structure governing ACFs created obstacles to limiting two potential routes by which the coronavirus might enter the facilities: visitors and staff carrying the virus into the facilities and residents themselves bringing the virus into the facilities after becoming infected outside.

²⁴⁶ See 10 N.Y.C.R.R. § 2.59.

²⁴⁷ The narrative is based on the Executive Orders, Dear Administrator Letters, and other written communications with adult care facilities, as well as interviews with the operators of adult care facilities about their experience, particularly during the early months of the pandemic.

When adult care facilities, in response to the virus' threat, sought to restrict or temporarily bar visitors from their facilities, the State's initial response was to leave existing regulations in place, including the residents' right to entertain visitors. 18 N.Y.C.R.R. § 485.14(b)(1). In a March 11, 2020 Dear Administrator Letter, the Department of Health instructed adult care facilities to screen all visitors for symptoms of COVID-19. Although the memorandum suggested that adult care facilities should consider modifying visiting hours, it implicitly discouraged such modifications by advising that any limitations on visiting hours would need to be immediately reported to the Department.²⁴⁸ Two days later, in a Health Advisory issued on March 13, 2020,²⁴⁹ the Department abruptly reversed course, effectively barring all visitors from the facilities. This was one day after visitors were barred from nursing homes.

Although visitors were barred and then heavily restricted,²⁵⁰ throughout the entirety of the pandemic, residents have remained free to leave the facilities at will. Once residents leave the building, the facility has no ability to control where they go or with whom they come into contact. Although the Department advised adult care facilities to discourage residents from going outside,²⁵¹ facilities remained legally obligated to

²⁴⁸ N.Y. ST. DEP'T OF HEALTH, DEAR ADMINISTRATOR LETTER 20-10 (Mar 11, 2020), https://coronavirus.health.ny.gov/system/files/documents/2020/03/adult_care_guidance.pdf [hereinafter DAL 20-10].

²⁴⁹ N.Y. ST. DEP'T OF HEALTH BUREAU OF HEALTHCARE ASSOCIATED INFECTIONS ("BHA"), HEALTH ADVISORY TO NURSING HOMES AND ADULT CARE FACILITIES (Mar. 13, 2020), <https://coronavirus.health.ny.gov/system/files/documents/2020/07/revised-march-13-guidance-07.10.2020-final.pdf>.

²⁵⁰ See N.Y. ST. DEP'T OF HEALTH, *Health Advisory: Visitation in Adult Care Facilities* (Sept. 9, 2020), https://coronavirus.health.ny.gov/system/files/documents/2020/09/health-advisory_adult-care-facilities-visitation-9-9-2020.pdf; see also N.Y. ST. DEP'T OF HEALTH, *Health Advisory: Revised Adult Care Facilities Visitation* (Mar. 25, 2021), https://coronavirus.health.ny.gov/system/files/documents/2021/03/updated_adult_care_facility_visitation.pdf.

²⁵¹ See DAL 20-10, *supra* note 248.

allow residents to come and go as they please.²⁵² Even during the height of the lockdown in New York City, adult homes had no ability to limit residents' right to leave the facilities at will. This is in contrast to nursing home residents, who have been prohibited from leaving their facilities.

By late March 2020, adult care facility operators had become concerned that they were being asked to readmit residents who had been hospitalized for COVID despite the fact that these individuals may still have been COVID positive and presumably highly contagious. Adult care facilities informed the Department of these concerns and noted that they had no practical ability to quarantine residents effectively. This occurred during a time when adult care facilities were still suffering from serious PPE shortages and were being advised to conserve and reuse PPE.²⁵³ As it had done with nursing homes, the Department informed the adult homes that they were prohibited from refusing readmission on the basis of a COVID infection. This was confirmed in an Advisory to adult care facilities on April 7, 2020, which not only stated that adult homes could not refuse readmission on the basis of COVID, but also expressly prohibited adult homes from requiring a COVID test of any returning resident.²⁵⁴ Unlike the nursing home advisory, the advisory to adult care facilities did advise adult care facilities that they were not to accept residents for whom they could not provide appropriate care.

²⁵² 18 N.Y.C.R.R. § 487.5(a)(3)(xii).

²⁵³ N.Y. ST. DEP'T OF HEALTH BHA1, *Health Advisory: Options when Personal Protective Equipment (PPE) is in Short Supply or Not Available* (Apr. 2, 2020), https://coronavirus.health.ny.gov/system/files/documents/2020/04/doh_covid19_ppeshortages_040220.pdf [hereinafter PPE SHORT SUPPLY].

²⁵⁴ N.Y. ST. DEP'T OF HEALTH, *Advisory: Hospital Discharges and Admissions to ACFs* (Apr. 7, 2020), https://coronavirus.health.ny.gov/system/files/documents/2020/04/doh_covid19_acfreturnofpositiveresidents_040720.pdf.

Even with that proviso, the advisory stymied efforts adult care facilities were making through screening and entry restrictions to keep the coronavirus out of their facilities.

As noted above, ACFs had no experience with infection control and lacked the appropriate equipment and personnel to contain contagious disease. Until the April 7th advisory, ACFs had been prohibited by regulation from admitting or retaining any person who “suffers from a communicable disease or health condition which constitutes a danger to other residents and staff.”²⁵⁵ Although this regulation exists for the express purpose of protecting adult home residents from communicable disease, the Department chose to interpret the regulation to apply only to symptomatic individuals,²⁵⁶ contrary to CDC guidance about the transmission of the novel coronavirus.²⁵⁷

This mandate to readmit COVID-positive residents and prohibition on testing remained in place until the Governor issued Executive Order 202.30 on May 10, 2020. This order prohibited hospitals from discharging a patient to a nursing home unless that patient first tested negative for COVID and the nursing home certified that it was capable of properly caring for that individual. Although the Executive Order applied only to nursing homes, the Department applied an identical standard to adult care facilities.²⁵⁸

In a sharp change of course from the earlier directive to admit COVID-19 positive residents, in response to concerns that residents of adult care facilities might carry the

²⁵⁵ 18 N.Y.C.R.R. §§ 487.4(c)(12), 488.4(c)(12).

²⁵⁶ See Appendix E; see also, *supra* note 254, April 7, 2020 Advisory.

²⁵⁷ *Discontinuation of Transmission-Based Precautions and Disposition of Patients with SARS-CoV-2 Infection in Healthcare Settings*, CDC (Feb. 16, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-hospitalized-patients.html>.

²⁵⁸ See N.Y. ST. DEP'T OF HEALTH, DEAR ADMINISTRATOR LETTER 20-14 (May 11, 2020), https://www.health.ny.gov/professionals/hospital_administrator/letters/2020/docs/dal_20-14_covid_required_testing.pdf [hereinafter DAL 20-14].

coronavirus into the facilities after spending holidays with family members outside, the Governor imposed a requirement by Executive Order in early May 2020 that any resident who leaves his/her facility must be quarantined for 14 days.²⁵⁹ Although many nursing homes responded to this requirement by restricting or eliminating passes for residents to leave the premises, adult care facilities, which have no legal authority to prevent residents from leaving at will, were left with a mandate instructing them to quarantine every resident who set foot outside the facility, but without legal means to effectuate quarantine, other than to report violators.²⁶⁰

Early in the pandemic, the Department did not answer requests from adult care facilities for assistance in procuring PPE. Adult care facilities were first instructed to obtain PPE through their normal sourcing process. This presented two problems. First, non-ALP facilities, which do not provide on-site nursing services, did not have any established sourcing for medical products. Second, there were nationwide PPE shortages.

The Department instructed adult care facilities that, should they be unable to obtain PPE on their own, they should inform the local Office of Emergency Management of their PPE needs.²⁶¹ This instruction, however, did little or nothing to alleviate the problem. The New York City Office of Emergency Management, for example, expressly informed adult homes that they were not considered high priority facilities, and therefore

²⁵⁹ See N.Y. Exec. Order 202.77 (Nov. 23, 2020); N.Y. ST. DEP'T OF HEALTH, *Health Advisory: Universal Use of Eye Protection* (Nov. 24, 2020), https://coronavirus.health.ny.gov/system/files/documents/2020/11/hcp_eye_protection_guidance_112520.pdf.

²⁶⁰ See 18 N.Y.C.R.R. § 487.5(a)(3)(x) (“A resident shall not be restrained nor locked in a room at any time.”).

²⁶¹ N.Y. ST. DEP'T OF HEALTH, *Guidance Regarding ACF Operations during COVID-19 Outbreak* (Mar. 22, 2020) [hereinafter ACF OPERATIONS].

would not be provided with any PPE. In early April 2020, the Department provided facilities with guidance on calculating future PPE needs.²⁶² At the time the calculation was an academic exercise due to the severe, ongoing nationwide PPE shortages.

It was not until mid-April 2020 that the Department began to provide PPE to adult care facilities. Only in May 2020, when PPE began to be provided to adult care facilities along with regular COVID tests, did the severe shortages begin to be alleviated.

The Department also displayed inflexibility with respect to other preexisting regulatory requirements. For example, the Department required facilities to maintain a full resident activity calendar,²⁶³ even as the Department was instructing adult care facilities to advise their residents to stay in their rooms. This did not change throughout the course of the pandemic.²⁶⁴

Adult care facilities were required to report to the Department of Health on the COVID status of all of their residents. Executive Order 202.18, issued on April 16, 2020, also required adult care facilities to “notify family members or next of kin if any resident tests positive for COVID-19, or if any resident suffers a COVID-19 related death, within 24 hours of such positive test result or death.” Executive Order 202.19, issued the following day, imposed a \$2,000 per day fine for noncompliance with this reporting requirement. These Orders were of limited effectiveness due to delays in the reporting of results.²⁶⁵

²⁶² PPE SHORT SUPPLY, *supra* note 253.

²⁶³ See 18 N.Y.C.R.R. § 487.7(h).

²⁶⁴ See ACF OPERATIONS, *supra* note 261.

²⁶⁵ See N.Y. ST. DEP’T OF HEALTH, DEAR ADMINISTRATOR LETTER C20-01 (Apr. 19 2020), https://coronavirus.health.ny.gov/system/files/documents/2020/04/doh-covid_acf-nh_communicationpractices_041920.pdf.

Just as it had with nursing homes, as the order regarding the admission of COVID-positive individuals drew public scrutiny, the Governor issued orders that seemed to be intended to shift attention from the admission orders to the performance of long-term care facilities. Executive Order 202.23, issued on April 24, 2020, authorized the Commissioner of Health to suspend or revoke the operating certificate of any nursing home or adult care facility on 24 hours' notice "if it is determined that such facility has not adhered to any regulations or directives issued by the Commissioner of Health." This was followed by a May 11, 2020 Dear Administrator Letter requiring the operator or administrator of each facility to certify, subject to criminal penalties, that the facility was in compliance with all applicable Executive Orders and directives of the Commissioner of Health.²⁶⁶

The new mandates on adult care facilities, including the regular testing of employees and residents, increased staffing needs due to in-room meal and medication delivery, and PPE requirements, but were not accompanied by increased financial support. Executive Order 202.30, issued on May 10, 2020, required adult care facilities to arrange for all personnel to be tested for COVID-19 twice per week.²⁶⁷ These tests alone imposed thousands of dollars per week in unreimbursed costs on adult homes.

Many states publicly report COVID-19 surveillance data across various types of facilities. An article available on the CMS website relied on data systematically retrieved from health department websites to characterize COVID-19 cases and deaths

²⁶⁶ See DAL 20-14, *supra* note 258.

²⁶⁷ See *id.*; see also N.Y. Exec. Order 202.40 (June 10, 2020) (reducing testing to once weekly).

in and among assisted living residents and residents and staff members.²⁶⁸ Limited data was available for 39 states. By October 15, 2020, among 28,623 assisted living facilities in those 39 states, 6,440 (22%) had at least one COVID-19 case among residents or staff members. Among the states with available data, the proportion of COVID-19 cases that were fatal was 21.2% for residents, 0.3% for staff members, and 2.5% overall for the general population of these states.²⁶⁹ As of October 15, 2020, an average of one death occurred among every five assisted living residents with COVID-19, compared with one death among every 40 persons in the general population with COVID-19 in states with available data. The disproportionate share of deaths among assisted living facility residents underscores the need for ongoing surveillance of nationwide COVID-19 data and more robust infection prevention and control activities to protect this population, according to the authors of the study.

The Department of Health, reports that, as of May 3, 2021, 989 residents of adult care facilities had died from COVID-19.²⁷⁰ Those numbers reflect the typically lower age and better health of adult care facility residents vis-à-vis nursing home residents.

The authors of the recent study mentioned above concluded that to prevent the introduction and spread of virus that causes COVID-19, assisted living facilities should: (1) identify a point of contact at the local health department; (2) educate residents, families, and staff members about COVID-19; (3) have a plan for visitor and staff member restrictions; (4) encourage social (physical) distancing and the use of masks,

²⁶⁸ See Sarah Yi et al., *Characterization of COVID-19 in Assisted Living Facilities — 39 States, October 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1730 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6946a3-H.pdf>.

²⁶⁹ *Id.*

²⁷⁰ *Other Adult Care Facility COVID Related Deaths Statewide*, N.Y. ST. DEP'T OF HEALTH, https://www.health.ny.gov/statistics/diseases/covid-19/fatalities_other_acf.pdf (last visited May 4, 2021).

as appropriate; (5) implement recommended infection prevention; (6) rapidly identify and properly respond to residents and staff members with suspected or confirmed COVID-19; and (7) conduct surveillance of COVID-19 cases and deaths, facility staffing, and supply information.

B. Home Care

1. Regulatory Structure

Home care has enabled many individuals who are otherwise eligible for nursing home services to remain in their homes.²⁷¹ More New Yorkers receive home care than reside in nursing homes. According to a report published by the Home Care Association of New York State, approximately 500,000 New Yorkers were receiving home care in 2019.²⁷² The greatest limiting factor to receive home care is not eligibility, but workforce availability. Personal care aides are in such short supply that home care agencies frequently turn away prospective patients because they lack the aides to serve them.²⁷³ These workforce challenges preceded the pandemic.

Home care takes many forms. It is delivered through Certified Home Health Agencies and Licensed Home Care Services Agencies, both licensed under Article 36 of the Public Health Law,²⁷⁴ and under the Consumer Directed Personal Assistance Program organized under the Social Services Law.²⁷⁵ The Office for People with

²⁷¹ See Joanne Lynn, *The Challenges of Caring for the Growing Elderly Population*, 41 BIFOCAL 225, 228, (2020).

²⁷² *State of the Industry 2019*, HOME CARE ASS'N OF N.Y. ST. (Feb. 2019), <https://hca-nys.org/wp-content/uploads/2019/02/HCA-Financial-Condition-Report-2019.pdf> [hereinafter *Home Care Report*].

²⁷³ *Id.*

²⁷⁴ See Pub. Health Law §§ 3605, 3606.

²⁷⁵ The Consumer Directed Personal Assistance Program (“CDPAP”) has been less affected by staffing issues than other types of home care. Unlike other forms of home care, individuals receiving CDPAP services may hire most family members as personal assistants. See Social Services Law § 365-f(3).

Developmental Disabilities also has a small but growing program of home care called Consumer Self-Direction.²⁷⁶ Home care is authorized under federal Medicaid rules under the Medicaid home and community-based (“HCBS”) waiver.

Home care may be paid for by individuals out-of-pocket, through health insurance, and under Medicare and Medicaid.²⁷⁷ Medicare, as in a nursing home, pays for a limited amount of home care.²⁷⁸ Medicaid, as in a nursing home, will pay for a temporally extended period of home care, which is commonly regarded as custodial care.²⁷⁹

Home care is popular. As the name implies, individuals receiving home care receive care in their homes.²⁸⁰ Although some recipients of home care eventually are admitted to nursing homes, many are not. Conversely, some nursing home residents, usually rehabilitation patients, receive home care after their nursing home stay.

The COVID-19 pandemic affected home care in ways similar to nursing homes, and differently. Especially in the devastating first months of the pandemic in New York City, home care was disrupted. Many individuals receiving home care declined services, at least for a time, in order to minimize their risk of infection. Others were unable to receive services because home care workers, either due to their own illness or the illness of a family member, kept them away from work. And others, just as in

²⁷⁶ *Self-Direction Guidance for Providers*, N.Y. OFF. FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES (“OPWDD”) (Apr. 6, 2020), https://opwdd.ny.gov/system/files/documents/2020/04/sd_guidance_040620.pdf.

²⁷⁷ According to the Home Care Association report, 87% of home care in New York is paid for under the State Medicaid program. *Home Care Report*, *supra* note 272.

²⁷⁸ *Home Health Services Coverage*, Medicare.gov, <https://www.medicare.gov/coverage/home-health-services>.

²⁷⁹ See, e.g., 18 N.Y.C.R.R. §§ 505.14, 505.28,

²⁸⁰ Individuals in adult care facilities may receive home care. Individuals in nursing homes may not, nor may individuals residing in OPWDD-operated or certified residences.

nursing homes, stopped working out of fear that they would become ill themselves or bring the illness to their families.

In terms of State assistance, home health care was treated as a lower priority than hospitals or nursing homes for the receipt of PPE. Within home care, the Consumer Directed Personal Assistance Program came behind Certified Home Health Agencies and Licensed Home Care Services Agencies. All were left to fend for themselves in finding gloves, masks, shields and gowns in the opening months of the pandemic.²⁸¹

COVID-19 deaths and illnesses among home care patients have not been separately reported. What we do know, though, is that without the concentration of individuals, home care was not the vector for contagion that institutionalized care was. A positive home care worker or home care patient simply was not exposed to or could expose the number of individuals who would be present in institutionalized care.²⁸²

According to a recent study completed in Connecticut, people receiving community-based long-term care had better COVID-19 outcomes than residents of skilled nursing facilities.²⁸³ As noted by the authors of the study (which compared data acquired from March to July in 2020), home care recipients have comparable medical

²⁸¹ The pandemic exacerbated fears among CDPAP participants that they were at risk of being institutionalized, they faced challenges obtaining PPE, and there was a dramatic impact on the ability of recipients to staff their services. See *The Impact of COVID-19 on Consumer Direction in New York State*, CONSUMER DIRECTED PERSONAL ASSISTANCE ASS'N OF N.Y. ST., <http://cdpaanys.org/wp-content/uploads/2020/06/CDPAANYS-COVID-19-Impact-Survey.pdf> (last visited Apr. 28, 2021).

²⁸² Although not much has yet been published about the impact of COVID-19 on those receiving home care, there is at least one peer reviewed study published on the impact of COVID-19 on the home care work force. See Madeline Sterling *et al.*, *Experiences of Home Health Care Workers in New York City during the Coronavirus Disease 2019 Pandemic*, 180 JAMA INTERNAL MEDICINE 1453 (2020), <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2769096>.

²⁸³ Julie Robinson *et al.*, *Community-Based Long-Term Care has Lower COVID-19 Rates and Improved Outcomes Compared to Residential Settings*, 22 JAMDA 256 (2020), <https://www.jamda.com/action/showPdf?pii=S1525-8610%2820%2931050-1>.

vulnerability to nursing home residents and perhaps more than some assisted living residents. Nevertheless, their COVID-19 positivity rate during the first five months of the pandemic in Connecticut was considerably lower than residents of either congregate setting.²⁸⁴

From the other side, according to a report by the Visiting Nurse Society of New York, only 11% of hospitalized COVID-19 patients were discharged to home care.²⁸⁵ That may have been a lost opportunity as the outcomes for those discharged patients were generally positive.²⁸⁶

COVID-19 has also significantly impacted those people with developmental disabilities living independently or with family care givers. Although no studies are available, factors that have been cited anecdotally by advocates include illness and death from exposure to the virus; difficult or nonexistent access to services; closed day programs and job sites; ill-equipped families responsible for more daily care and supervision; and the withholding of funds in anticipation of budget cuts.

The CDC has a webpage devoted to COVID as it relates to disability. The agency identifies the following three groups at greatest risk of infection: people who have limited mobility or who cannot avoid coming into close contact with others who may be infected, such as direct support providers and family members; people who have trouble understanding information or practicing preventive measures, such as

²⁸⁴ *Id.*

²⁸⁵ See Robert Holly, *COVID-19 Patients Discharged from Home Health Care Often Have 'Excellent' Symptom Improvement, Functional Outcomes*, HOME HEALTH CARE NEWS (Nov. 23, 2020), <https://homehealthcarenews.com/2020/11/covid-19-patients-discharged-from-home-health-care-often-have-excellent-symptom-improvement-functional-outcomes/>; see also Kahryn Bowles *et al.*, *Surviving COVID-19 After Hospital Discharge: Symptom, Functional, and Adverse Outcomes of Home Health Recipients*, 174 ANNALS OF INTERNAL MEDICINE 316 (2021), <https://www.acpjournals.org/doi/10.7326/M20-5206>.

²⁸⁶ *Id.*

hand washing and social distancing; and people who may not be able to communicate symptoms of illness.²⁸⁷

a. Special Considerations for Palliative Care

Hospice and palliative care have much in common. Both are for people with serious illnesses. Both follow treatment goals that aim to relieve pain, increase comfort, and improve quality of life for patients and their families. Both are sensitive to a patient's personal, cultural and religious values, beliefs, practices, and preferences. Palliative care and hospice, however, are offered to different types of patients. Palliative care relieves pain from serious illness and alleviates the side effects of treatments. Palliative care physicians and nurses work with patients to identify their goals, including symptom relief, counseling, spiritual comfort, or whatever a patient believes will enhance their quality of life. Compared to palliative care, the primary difference in hospice care is that hospice is for patients with a limited lifespan. Hospice care is a **type** of palliative care – given to address the unique needs of people with a terminal illness and their families.

Surges in demand for healthcare, including end-of-life care, during the pandemic have exposed and exacerbated underlying gaps in access to specialty-trained physicians and teams, palliative care medications, and bereavement support for patients and families. These gaps jeopardize the quality of care for seriously ill and at-risk patients, including those whose prognosis is uncertain and those with diseases other than COVID-19.²⁸⁸ The pandemic reduced patients' contact with their families,

²⁸⁷ *People with Disabilities*, CDC (Mar. 16, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-disabilities.html> (last visited Apr. 28, 2021).

²⁸⁸ Moira McCarthy, *No Hugs: How the COVID-19 Pandemic Has Impacted Palliative, Hospice Care*, HEALTHLINE (Oct. 1, 2020), <https://www.healthline.com/health-news/no-hugs-how-the-covid-19-pandemic-has-impacted-palliative-hospice-care>.

directly or by phone, increasing the need for care that goes beyond symptom relief. Family is also important to setting care goals, encouraging their loved ones, and providing support to care staff. Also, studies show that Medicaid enrollees, an important patient population, underutilize hospice leading to unnecessary suffering at the end of life. Patients who die in inpatient settings have greater distress and poorer quality of life than those who die at home, and their bereaved caregivers have worse mental health throughout their loved ones' dying process. Hospice use, particularly in-home, is associated with better symptom control and quality of life near death.²⁸⁹

C. Office for Mental Health–Operated and Licensed Facilities

The Office for Mental Health (OMH) provides individuals with mental illness supports and services in a wide range of contexts, both in facilities and the community. The public mental health system in New York State is vast and estimated to reach over 775,000 people.²⁹⁰ Males and females are served at approximately the same rate (39.0–39.1 per 1,000 males/females in the population). The highest annualized service utilization by age falls within the 25-4 age group (42.3 per 1,000). For people over the age of 65, service utilization is 19.6 per 1,000.²⁹¹ Service utilization rates by race and

²⁸⁹ See Jean Abbott, et al., *Ensuring Adequate Palliative and Hospice Care During COVID-19 Surges*, 324 JAMA 1393 (2020), <https://jamanetwork.com/journals/jama/fullarticle/2771025?questAccessKey=dca5fc8d-1f4e-49d3-8e36-92e7413c1857>; see also Jennifer W. Mack, et al., *Underuse of Hospice Care by Medicaid-Insured Patients With Stage IV Lung Cancer in New York and California*, 31 J. OF CLINICAL ONCOLOGY 2569 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3699723/>; Gail Gazelle, *Understanding Hospice—An Underutilized Option for Life’s Final Chapter*, 357 NEW ENGLAND J. OF MEDICINE 321 (2007), <https://www.nejm.org/doi/full/10.1056/NEJMp078067>.

²⁹⁰ The demographic characteristics of people served in the public mental health system is from data derived from the OMH Patient Characteristics Survey (PCS). The survey encompasses people who receive services from programs the agency operates, funds or licenses. Data is captured during a one-week period on a biennial basis. To annualize the data, OMH employs an algorithm developed at the Nathan Kline Institute.

²⁹¹ *Id.* By race and ethnicity, African Americans have the highest annualized service utilization (52.8 per 1,000) as compared to other racial and ethnic groups.

ethnicity show the highest annual service utilization rates among Black/African Americans (52.8 per 1,000), Pacific Islanders (51.6), Hispanic/Latino (47.8), and Multi-Racial (36.0), as compared to lower utilization rates for Whites (29.5), Native American/Alaskan (22.2), and Asians (9.1).²⁹²

As a provider of service, OMH operates 24 inpatient facilities for civil, forensic and research purposes.²⁹³ There are approximately 3,000 adult and children's beds in the OMH system and 700 forensic beds for people referred for admission from the criminal justice system.²⁹⁴ In addition, OMH licenses over 100 acute care psychiatric units in general hospitals that have an aggregate capacity of 5,000 beds.²⁹⁵ In 2019, there were 120,830 admissions to hospitals licensed or operated by OMH.²⁹⁶ Under the model of care developed by OMH, acute inpatient admissions are directed to the article 28 hospitals with psychiatric units. Longer term care is delivered by OMH state hospitals. Lengths of stay in OMH hospitals can be years in duration, particularly when a patient is referred from the criminal justice system.²⁹⁷ Overall, OMH reports that nearly

²⁹² OMH states that its rate of service utilization data by race and ethnicity should be read with caution because of the small size of some racial groups in the general population and fluctuation in the analyses of past PCS data.

²⁹³ N.Y. Mental Hyg. Law § 7.15; Statewide Comprehensive Plan, at 10,

<https://omh.ny.gov/omhweb/planning/docs/507-plan.pdf>.

²⁹⁴ Statewide Comprehensive Plan at 10.

²⁹⁵ *Id.* at 12.

²⁹⁶ As reported to the Mental Hygiene Legal Service ("MHLS"). MHLS is an auxiliary agency of the Appellate Divisions of State Supreme Court that provides legal services and assistance to patients and residents of mental hygiene facilities pursuant to article 47 of the Mental Hygiene Law. See N.Y. Mental Hyg. Law § 9.11.

²⁹⁷ See N.Y. Crim. Pro. Law ("CPL") art. 730; N.Y. CPL § 330.20. An article that analyzes length of stay for individuals found not responsible by reason of mental disease or defect is found at: Richard Mirgaglia & Donna Hall, *The Effect of Length of Hospitalization on Re-arrest among Insanity Plea Acquittes*, 39 J. AM. ACAD. PSYCHIATRY & LAW 524 (2011).

half of the patients on its inpatient census have been hospitalized for over one year and a large percentage for more than several years.²⁹⁸

As its inpatient census ages, OMH, effective April 1, 2016, instituted a SNF project designed to expand and intensify OMH's ongoing efforts to refer and place long stay patients in skilled nursing facilities.²⁹⁹

There are also over 600 residential programs in the community serving 40,000 people with mental illness in New York State.³⁰⁰ Included in this category of service are supported housing beds (46% of the total) and community residences (14% of the total).³⁰¹ A community residence is defined as: "any facility operated by or subject to licensure by the office of mental health [or the office for people with developmental disabilities] which provides a supervised residence or residential respite services for individuals with mental disabilities and a homelike environment and room, board and responsible supervision for the habilitation or rehabilitation of individuals with mental disabilities as part of an overall service delivery system."³⁰²

OMH also serves people with forensic involvement and renders long-term care in institutional and secure facilities. People served include those committed to hospitals under article 730 and section 330.20 of the Criminal Procedure Law. In addition, OMH operates a hospital for sentence serving inmates at the Central New York Psychiatric Center. Admission to this facility is pursuant to Correction Law § 402. OMH and the Department of Corrections and Community Supervision also jointly operate and serve

²⁹⁸ Statewide Comprehensive Plan at 49.

²⁹⁹ Statewide Comprehensive Plan at 54.

³⁰⁰ Statewide Comprehensive Plan at 13.

³⁰¹ The remaining beds are classified as Apartment/Treatment; Community Residence/Single Room Occupancy; Supported Single Room Occupancy. Statewide Comprehensive Plan at 13.

³⁰² N.Y. Mental Hyg. Law § 1.03(28).

approximately 10,000 people serving sentences in 29 satellite mental health units located within prisons.³⁰³

In addition, OMH houses people convicted of sex offenses who are judicially adjudicated as having a “mental abnormality” and committed pursuant to article 10 of the MHL.³⁰⁴ The commitment authorized by Article 10 is indefinite, so people committed could potentially remain in these facilities for the balance of their lives, subject to periodic judicial review.³⁰⁵

1. Regulatory Structure

Facilities operated or licensed by OMH are subject to extensive oversight and regulation. As a foundational principle, the New York State Constitution provides: “The care and treatment of persons suffering from mental disorder or defect and the protection of the mental health of the inhabitants of the state may be provided by state and local authorities and in such manner as the legislature may from time to time determine.”³⁰⁶

Significantly, OMH has the responsibility for seeing that mentally ill persons are provided with care and treatment, that such care, treatment, and rehabilitation is of high

³⁰³ Li-Wen Lee, *Forensic Mental Health Services*, N.Y. ST. OFF. OF MENTAL HEALTH, <https://omh.ny.gov/omhweb/forensic> (last visited Apr. 29, 2021).

³⁰⁴ The statutory predicate for these programs is found at Mental Hygiene Law § 7.18. The law provides: (a) “There shall be in the office secure treatment facilities, as defined in subdivision (o) of section 10.03 of this title, as designated by the commissioner for the care and treatment of dangerous sex offenders requiring confinement, as described in article ten of this title.” Such secure treatment facilities may be created on the former grounds of hospitals operated by OMH, but shall be considered separate and distinct facilities and shall not be considered or defined as hospitals.

³⁰⁵ N.Y. Mental Hyg. Law § 10.09. The media reported on COVID-19 outbreaks on at the Central New York Psychiatric Center SOTP in April of 2020. Rick Karlin, *Residents, Guards Say Marcy Psychiatric Center is Coronavirus Hothouse*, ALB. TIMES UNION (Apr. 14, 2020), <https://www.timesunion.com/news/article/Residents-guards-say-Marcy-psychiatric-center-is-15200056.php>.

³⁰⁶ N.Y. Const., Art 17, § 4.

quality and effectiveness, and that the personal and civil rights of persons receiving care, treatment, and rehabilitation are adequately protected.³⁰⁷

OMH regulations are found at title 14 of the New York Code of Rules and Regulations. OMH regulations cover the spectrum of services rendered by the agency and its oversight activities. Regulations that govern residential services are found in the following parts: Part 580 – Operation of Psychiatric Inpatient Units of General Hospitals; Part 582 – Operation of Hospitals for Persons with Mental Illness; and Part 595 – Operation of Residential Programs for Adults. As a general rule and across service settings, OMH regulations governing residential services provide for a description of the program mission, the population to be served; admission and discharge criteria; a description of the specific service needs of the defined target population; a description of the goals and anticipated outcomes of the program, including the anticipated average length of stay for residents, resident rights, governance, and quality assurance.

Prior to the COVID-19 public health crisis, OMH also had in place regulations governing the use of telemental health. Originally adopted in 2016, the regulations are found at part 596 and define telemental health as “the use of two-way real-time interactive audio and video equipment to provide and support mental health services at a distance.”³⁰⁸

The rights of people receiving services from the facilities licensed or operated by OMH, OPWDD and OASAS are protected by statutes and regulations. Article 33 of the MHL is entitled “rights of patients” and each agency under the Department of Mental

³⁰⁷ N.Y. Mental Hyg. Law § 7.07(c).

³⁰⁸ 14 N.Y.C.R.R. § 596.1(a).

Hygiene has implementing regulations. OMH's regulations provide each person residing in a hospital or community-based residential program has the following rights, among others, to:

- a safe and sanitary environment;
- freedom from abuse and mistreatment by employees or other residents of the facility;
- receive visitors at reasonable times, to authorize those family members and other adults who will be given priority to visit, to have privacy when visited, and to communicate freely with persons within or outside the facility;
- appropriate medical and dental care for residents of hospitals;
- an individualized plan of treatment or services and to participate in the development of that plan including the opportunity for a person, 16 years of age or older, to request a significant individual to himself or herself, including any relative, close friend or individual otherwise concerned with such person's welfare, to participate in the development of such plan; and
- bring any questions or complaints, including complaints regarding any orders limiting such persons' rights, to the facility director, the Mental Hygiene Legal Service, the board of visitors if applicable, and the Commission on Quality of Care and Advocacy for Persons with Disabilities.³⁰⁹

a. Oversight

OMH's Office of Quality Improvement (OQI) oversees the development of an incident management system that is designed to protect the health and safety of consumers and enhance the quality of care provided.³¹⁰

³⁰⁹ 14 N.Y.C.R.R. § 527.5. The Commission of Quality of Care and Advocacy for Persons with Developmental Disabilities was subsumed in the Justice Center for the Protection of People with Special Needs. Specifically, in 2012, the Legislature enacted the Protection of People with Special Needs Act, N.Y. Exec. Law § 550, et seq., to protect individuals "who are vulnerable because of their reliance on professional caregivers to help them overcome physical, cognitive and other challenges," 2012 N.Y. Laws ch. 501, §§ 1, 2, by creating a new state agency, the Justice Center for the Protection of People with Special Needs.

³¹⁰ *The Division of Quality Management (DQM)*, N.Y. ST. OFF. OF MENTAL HEALTH, <https://omh.ny.gov/omhweb/dqm/> (last visited Apr. 29, 2021). The Justice Center and the National

External oversight and advocacy for patients within the OMH system is provided by the Justice Center for the Protection of People with Special Needs,³¹¹ the Board of Visitors,³¹² the Mental Hygiene Legal Service,³¹³ and the federally funded protection and advocacy agency, Disability Rights New York.³¹⁴

OMH has few specific regulations governing infection control. One regulation, Part 509, is entitled “Prevention of Influenza Transmission”, and was adopted “in response to [the] increased public health threat . . . of seasonal influenza.”³¹⁵ The OMH Policy Manual also has policies governing the employee vaccination program for Hepatitis B (Policy OM-400) and a policy governing occupational exposure to bloodborne pathogens (Policy OMH-403).³¹⁶ However, TJC has developed extensive materials on infection control and prevention.³¹⁷

2. The Coronavirus Pandemic

Individuals who live in OMH congregate care residential settings are – like those who live in nursing homes – subject to risk of being infected with COVID-19, a risk generally perceived to be higher than the rest of the population. However, there has

Association of Psychiatric Health Systems (NAPHS), the National Association of State Mental Health Program Directors (NASMHPD) and the NASMHPD Research Institute, Inc. (NRI) collaborated on the development of a set of core performance measures for Hospital-Based Inpatient Psychiatric Services (HBIPS). Measures in the HBIPS set were re-endorsed by the National Quality Forum (NQF) on February 18, 2014. See *Hospital-Based Inpatient Psychiatric*, JOINT COMM’N, <https://www.jointcommission.org/measurement/measures/hospital-based-inpatient-psychiatric/> (last visited Apr. 29, 2021).

³¹¹ N.Y. Exec. Law § 550 et seq.

³¹² N.Y. Mental Hyg. Law § 7.33.

³¹³ N.Y. Mental Hyg. Law §§ 47.01, 47.03.

³¹⁴ Disability Rights New York is the designated federal Protection and Advocacy System (“P&A”) for individuals with disabilities in New York State. The Protection and Advocacy Act for Individuals with Mental Illness is codified at 42 U.S.C. § 10801 et. seq.

³¹⁵ See *OMH Official Policy Manual*, N.Y. ST. OFF. OF MENTAL HEALTH, <https://omh.ny.gov/omhweb/policymanual/contents.htm> (last visited Apr. 29, 2021).

³¹⁶ *Id.*

³¹⁷ *Infection Prevention and Control*, JOINT COMM’N, <https://www.jointcommission.org/resources/patient-safety-topics/infection-prevention-and-control/> (last visited Apr. 29, 2021).

been no public reporting of COVID -19 infection and death rates by OMH facilities. According to media reports, however, as of February 10, 2021, 846 patients in State hospitals contracted the virus and 58 patients died.³¹⁸ Age was a salient factor contributing to COVID deaths in State hospitals as 41 of the 58 patients who perished from the virus were over 65.³¹⁹ Patients at State mental hygiene facilities may not always be able to wear or tolerate a mask or adhere to safety protocols.³²⁰ Impeding a further examination of the impact of the virus among people living in OMH congregate care settings, such as community residences, is a lack of reporting. OMH does not require certified residential programs or not-for-profit providers to track COVID infection.³²¹

OMH maintains a COVID page on its website devoted to guidance issued during the pandemic.³²² Generally, the COVID policies are grouped into the following sections: FAQs for program providers; Program Guidance; Infection Control; Fiscal/Contract Guidance and State Hospital Guidance. On November 12, 2020, New York State also published an Infection Control Manual for Public Mental Health Programs that is available on the OMH website. In addition, federal guidelines on infection control were issued during the public health crisis. For instance, the federal Substance Abuse and

³¹⁸ Ethan Geringer-Sameth, *Covid Toll at State Psychiatric Facilities Has Remained Disproportionately High*, GOTHAM GAZETTE (Feb. 26, 2021), https://www.gothamgazette.com/state/10207-covid-new-york-state-psychiatric-facilities-disproportionately-high?mc_cid=7b4e367861&mc_eid=1a5d3a1f3d.

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ See N.Y. ST. OFF. OF MENTAL HEALTH, INCIDENT REPORTING AND NIMRS UPDATE, Apr. 21, 2020, <https://omh.ny.gov/omhweb/guidance/covid-19-guidance-nimrs-incident-reporting-updates.pdf>. NIMRS is an acronym for the Incident Management and Reporting System utilized by state hospitals, article 28 hospitals and licensed provider agencies. This guidance instructed hospitals and providers that they were not required to track COVID infections. *Id.* Deaths attributed to COVID were to be reported using a new subtype COVID-12 related. *Id.*

³²² COVID-19 Resources, N.Y. ST. OFF. OF MENTAL HEALTH, <https://omh.ny.gov/omhweb/covid-19-resources.html> (last visited Apr. 29, 2021); <https://omh.ny.gov/omhweb/guidance/covid-19-guidance-infection-control-public-mh-system-sites.pdf>.

Mental Health Services Administration (SAMHSA) issued a report on May 8, 2020 entitled: *COVID19: Interim Consideration for State Psychiatric Hospitals*.

An analysis of COVID-19 impact upon the OMH population should also include responses by the Office of Court Administration (OCA) because many people in the OMH system are subject to involuntary commitment and treatment. A detailed statutory framework for the admission and retention of patients is codified at article 9 of the MHL and provides largely for a medical model of admission subject to judicial review.³²³ OCA issued a series of Administrative Orders during the public health crisis, closing courtrooms and instituting virtual hearings.³²⁴ Mental hygiene proceedings were considered “essential proceedings” and continued throughout the pandemic, through the present time, largely in virtual environments.³²⁵ Threats to liberty and due process should be recognized as having significant (if not immediately quantifiable impact) upon a substantial population of people already marginalized and at risk of infection and death from the spread of the virus in institutions where they lived or in the communities they came from.

Nine months into the pandemic, on December 8, 2020, OMH conducted a virtual town hall meeting to discuss its response to the public health crisis. OMH identified its priorities as maintaining access to clinics and ambulatory care with a major shift to telehealth and telephonic services; ensuring safety of people in residential services by using best practice infection control practices, enabling mental health beds to be

³²³ See N.Y. Mental Hyg. Law § 9.01–9.58; see also *Project Release v. Prevost*, 722 F. 2d, 960 (2d Cir. 1983); *Rivers v. Katz*, 67 N.Y.2d 485 (1986).

³²⁴ See *Latest STATEWIDE Administrative Orders*, N.Y. ST. UNIFIED COURT SYS., <https://www.nycourts.gov/latest-Ao.shtml> (last visited Apr. 29, 2021).

³²⁵ Admin. Order of Chief Admin. Judge of Cts. AO/78/20.

repurposed for a COVID surge; and making approximately 280 beds available on State hospital campuses receive patients upon discharge or transfer from general hospitals.

³²⁶ For infection control measures, there was daily screening of employees, required mask wearing for all employees in common areas and when rendering direct patient services and developing an inventory and stockpile of PPE.

OMH issued various guidance and directives to its own providers and the providers it regulates in relation to COVID-19. This included guidance on infection control, telehealth and regulatory changes made in response to COVID.³²⁷ OMH also issued written guidance addressing a range of topics including: testing of patients and staff, restrictions on visitation, patient education, PPE protocols, discontinuation of congregate meals and group meals, and expansion of telehealth tools in efforts to quell the spread of the virus in OMH operated facilities.³²⁸ With the advent of vaccines, OMH maintained that it had been successful in vaccinating 2,757 patients in facilities operated by the agency.³²⁹ Thus, OMH patients – just as nursing home residents – with the loss of congregate meals and visitation were subjected to isolation, and all the impacts that entails, in order to be protected from the virus.

Public Health Law article 28 acute care psychiatric units similarly must follow DOH infection control guidelines when delivering mental health services in their

³²⁶ *OHM Statewide Virtual Town Hall*, N.Y. ST. OFF. OF MENTAL HEALTH, Dec. 8, 2020, <https://omh.ny.gov/omhweb/planning/507/>.

³²⁷ Dr. Sullivan's written budget testimony is included in the appendix to this report.

³²⁸ *COVID-19 Resources*, N.Y. ST. OFF. OF MENTAL HEALTH, <https://omh.ny.gov/omhweb/covid-19-resources.html> (last visited Apr. 29, 2021).

³²⁹ Amanda Fries, *State to Vaccinate Older Inmates*, ALB. TIMES UNION (Feb. 5, 2021), <https://www.pressreader.com/usa/albany-times-union/20210205/281530818707928>. OMH officials also reported to the press that 908 patients had refused the vaccine. *Id.*

facilities.³³⁰ OMH operated and licensed inpatient facilities adopted policies to isolate patients with COVID and prevent further spread of the virus. For example, Northwell Health, a large health care system which includes several article 28 hospitals with inpatient psychiatric units in the New York City and on Long Island, decided to transfer all of its COVID-positive patients to a single unit as an infection control response. In the hardest hit areas of New York City certain hospitals, such as Bellevue and Bronx Care, devoted entire units to patients who had tested positive. Facilities also had to adapt to the public health crisis by canceling therapeutic group activities while offering programming in smaller, more private settings. Columbia Presbyterian Hospital provided isolated patients with tablets and internet connections to allow them to videoconference with their families.³³¹

Early media reports explained the impact of the virus on State hospitals, particularly the Rockland Psychiatric Center in Orange County.³³² As the public health crisis continued unabated and community infection spread, OMH State hospitals faced challenges to their efforts to protect their patients from infection and death. Inpatient beds were closed in psychiatric hospitals licensed by OMH and operated by Public Health Law article 28 hospitals in order to create additional beds for a potential COVID

³³⁰ *Key Infection Control Practices in Inpatient and Outpatient Medical Care Settings*, N.Y. ST. DEP'T OF HEALTH, https://www.health.ny.gov/professionals/diseases/reporting/communicable/infection/key_infection_control_practices.htm (last visited Apr. 29, 2021).

³³¹ The narrative offered is from staff of the Mental Hygiene Legal Service describing their experiences during the public health crisis. Other evidence of how the pandemic impacted providers can be found in a survey conducted by The Justice Center. See Katie Bronk, *Joint Commission Questionnaire Identifies COVID-19 Impact, Challenges and Needs Among Health Care Organizations*, JOINT COMM'N (Dec. 17, 2020), <https://www.jointcommission.org/resources/news-and-multimedia/news/2020/12/joint-commission-questionnaire-identifies-covid-19-impact/>.

³³² See Danny Hakim, *'They Want to Forget Us': Psychiatric Hospital Workers Feel Exposed*, N.Y. TIMES (Apr. 24, 2020), <https://www.nytimes.com/2020/04/24/nyregion/coronavirus-new-york-psychiatric-hospitals.html?action=click&module=Top%20Stories&pgtype=Homepage>.

surge.³³³ For example, the Health Alliance campus in Ulster County closed its entire inpatient psychiatric unit during the crisis.³³⁴ The New York State Nurses Association, among other organizations, has criticized closure of inpatient psychiatric beds.³³⁵ There is no guarantee that these beds will return post-COVID-19 and this, in turn, adversely impacts people and communities that depend on essential acute care psychiatric services.³³⁶

Well before COVID-19, community-based mental health and substance abuse disorder/addiction agencies have struggled for years to address increasing rates of overdose and suicides in communities across New York State. A now familiar and distressing refrain is that the public health crisis exposed and exacerbated existing problems in the mental health arena.³³⁷

The stresses of the pandemic have compounded the need for mental health services. Elevated levels of adverse mental health conditions, substance use, and

³³³ See Bethany Bump, *Albany Psychiatric Unit Under Quarantine After Coronavirus Outbreak*, ALB. TIMES UNION (Dec. 9, 2020), <https://www.timesunion.com/news/article/Quarantines-ordered-at-Albany-psychiatric-center-15787982.php>.

³³⁴ See William J. Kemble, *Lawmakers Push for Return of Inpatient Mental Health Services for Ulster County*, KINGSTON DAILY FREEMAN (Jun. 20, 2020), https://www.dailyfreeman.com/news/local-news/lawmakers-push-for-return-of-inpatient-mental-health-services-to-ulster-county/article_f7954ac8-b31a-11ea-b080-6b51947f8e2f.html?utm_medium=social&utm_source=email&utm_campaign=user-share.

³³⁵ See *Closures Are Causing a Full-Blown Mental Health Emergency in New York*, N.Y. ST. NURSES ASS'N (Aug. 20, 2020), <https://www.nysna.org/blog/2020/08/20/closures-are-causing-full-blown-mental-health-emergency-new-york#.YANKmLNOnd4>.

³³⁶ *A Crisis in Inpatient Psychiatric Services in NYS Hospitals*. N.Y. ST. NURSES ASS'N (2020), <https://www.nysna.org/sites/default/files/attach/ajax/2020/08/Psych%20Whitepaper%20NYSNA.pdf>. The report notes that the median number of psychiatric beds per 100,000 people in 2014 was 68. *Id.* at 6. Factors that effect this range include the percentage of the population with serious mental illness, the availability of alternative treatment modalities such as assisted outpatient treatment, the overall length of stay in psychiatric hospitals and the flexibility in financing inpatient beds. *Id.* According to the National Association of State Mental Health Program Directors, New York State only had 55.3 beds per 100,000 people in 2014 and the situation only appears to be growing worse. *Id.*

³³⁷ See *Behavioral Health Advocates Raise Grave Concerns on Proposed Cuts in Today's Budget Hearing*, MHANYS (Feb. 5, 2021), <https://mhanys.org/mh-update-2-5-21-behavioral-health-advocates-raise-grave-concerns-on-proposed-cuts-in-todays-budget-hearing/>.

suicidal ideation were reported by adults in the United States in June 2020. The prevalence of symptoms of anxiety disorder was approximately three times those reported in the second quarter of 2019 (25.5% versus 8.1%), and prevalence of depressive disorder was approximately four times that reported in the second quarter of 2019 (24.3% versus 6.5%).³³⁸ Mental health conditions are disproportionately affecting specific populations, especially young adults, Hispanic persons, Black persons, essential workers, unpaid caregivers for adults, and those receiving treatment for preexisting psychiatric conditions.³³⁹ It has been long understood that people living with mental illness often face substantial obstacles to improving their mental health and participating fully in their communities and societies.³⁴⁰ They have been subjected to discrimination, stigmatization, and other indignities, as well as social and economic barriers that limit their opportunities.³⁴¹ The pandemic exacerbated these pre-existing conditions for people confined in institutions and those dependent upon community based mental health services. The potential that community beds and services may be further eroded foreshadows continuing hardship for this already vulnerable population.

D. Office for People with Developmental Disabilities

The Office for People with Developmental Disabilities (“OPWDD”) is responsible for ensuring that New Yorkers with developmental disabilities “are provided with

³³⁸ Mark Czeisler et al., *Mental Health, Substance Use, and Suicidal Ideation During the COVID-19 Pandemic — United States, June 24–30, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1049 (2020), <http://dx.doi.org/10.15585/mmwr.mm6932a1external.icon>.

³³⁹ *Id.*

³⁴⁰ Lance Gable & Lawrence Gostin, *Mental Health as a Human Right*, 3 SWISS HUMAN RIGHTS BOOK 249 (2009), <https://ssrn.com/abstract=1421901>.

³⁴¹ *Id.* As noted by the authors, the closure of large psychiatric institutions and the promise of deinstitutionalization was undercut by ineffective planning and meager economic support. *Id.* (citing Robert Burt, *Promises to Keep, Miles to Go: Mental Health Law Since 1972*, in *THE EVOLUTION OF MENTAL HEALTH LAW* 11 (Lynda Frost & Richard Bonnie eds., 2001).

services including care and treatment, that such services are of high quality and effectiveness, and that the personal and civil rights of persons receiving such services are protected.”³⁴² The services provided by OPWDD are designed to promote and attain independence, inclusion, individuality and productivity for persons with developmental disabilities.³⁴³ The agency describes itself as being responsible for coordinating services for New Yorkers with developmental disabilities, including intellectual disabilities, cerebral palsy, Down syndrome, autism spectrum disorders, Prader-Willi syndrome and other neurological impairments.³⁴⁴ OPWDD provides services directly and through a network of approximately 500 not-for-profit service providing agencies, with about 80% of services provided by the private nonprofits and twenty percent provided by state-run services.³⁴⁵ Ninety-five percent of the people accessing OPWDD services and supports have Medicaid provided under the Home and Community Based Services (“HCBS”) waiver.³⁴⁶ In 2019, nearly 120,000 people received OPWDD Medicaid services and supports.³⁴⁷ The OPWDD system is largely community-based.³⁴⁸ Over one-half of Medicaid enrollees from the OPWDD system live

³⁴² N.Y. Mental Hyg. Law § 13.07(c).

³⁴³ *Id.*

³⁴⁴ See OPWDD, N.Y. ST. OFF. FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, <https://opwdd.ny.gov/> (last visited Apr. 29, 2021).

³⁴⁵ *Id.*

³⁴⁶ *Home and Community Based Services Waiver*, N.Y. ST. OFF. FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, <https://opwdd.ny.gov/providers/home-and-community-based-services-waiver> (last visited Apr. 29, 2021).

³⁴⁷ *By the Numbers*, N.Y. ST. OFF. FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, <https://opwdd.ny.gov/data> (last visited Apr. 29, 2021).

³⁴⁸ OPWDD still operates two developmental centers located in Franklin County and Chenango County. They are the Sunmount Developmental Center and the Valley Ridge Center for Intensive Treatment. Identified as “schools” by definition, see N.Y. Mental Hyg. Law § 1.03(11), OPWDD now refers to these inpatient centers as “Intensive Treatment Options” in its continuum of care. People are admitted on an inpatient status pursuant to article 15 of the Mental Hygiene Law or article 730 and section 330.20 of the Criminal Procedure Law. Capacity at these two facilities combined is approximately 200 beds.

at home or with family care givers.³⁴⁹ Those people needing residential placement live in community residences licensed or operated by OPWDD.³⁵⁰ There are approximately 6,100 community residences operated or certified by OPWDD.³⁵¹ These include Individualized Residential Alternatives (“IRAs”) which may have up to 14 residents and provide room, board and individualized service options.³⁵² Approximately 54% of these IRAs are designed to serve more than four residents and near 11% are designed to serve 10 or more residents. In 2019, approximately 33,000 individuals resided in IRAs. Community residences also include Intermediate Care Facilities, a residential option for individuals with specific medical or behavioral needs whose disabilities severely limit their ability to live independently. In 2019, OPWDD served 4,553 individuals in ICFs, 30,530 individuals in supervised IRAs and 2,276 individuals in supportive IRAs.³⁵³

1. Regulatory Structure

Facilities operated or licensed by OPWDD are subject to extensive oversight and regulation. OPWDD regulations are found at title 14 of the New York Code of Rules and Regulations. Regulations that govern residential services include: Part 636- Services and Supports for Individuals with Developmental Disabilities; Part 681 –

³⁴⁹ *By the Numbers*, N.Y. ST. OFF. FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, <https://opwdd.ny.gov/data> (last visited Apr. 29, 2021).

³⁵⁰ See N.Y. Mental Hyg. Law § 1.03(28) (definition of community residence); see also *Facts about OPWDD*, N.Y. ST. OFF. FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES (2020), https://opwdd.ny.gov/system/files/documents/2020/03/002_facts_about_opwdd_342020.pdf. Agencies licensed by OPWDD to provide services are referred to as “voluntary providers.” There are over 500 non-profit OPWDD providers in New York State. *Id.*

³⁵¹ *New York State HCBS Settings Transition Plan Executive Summary*, N.Y. ST. DEP’T OF HEALTH 100-01 (2018), https://www.health.ny.gov/health_care/medicaid/redesign/hcbs/docs/2018-11-07_hcbs_final_rule.pdf; *Understanding Primary Diagnosis*, N.Y. ST. OFF. FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, <https://opwdd.ny.gov/understanding-primary-diagnosis> (last visited Apr. 29, 2021).

³⁵² 14 N.Y.C.R.R. § 686.16; *Facts about OPWDD*, N.Y. ST. OFF. FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES (2020), https://opwdd.ny.gov/system/files/documents/2020/03/002_facts_about_opwdd_342020.pdf.

³⁵³ *Id.*

Intermediate Care Facilities; Part 686 – Operation of Community Residences and Part 687 – Operation of Family Care Homes. The rights of individuals receiving services are protected by federal and state law. The federal Developmental Disabilities Assistance and Bill of Rights is codified at 42 U.S.C. § 15001. Congress found, among other things, that people with developmental disabilities are at greater risk than the general population for abuse, neglect, financial and sexual exploitation, and the violation of legal and human rights.³⁵⁴ The federal bill of rights provides among other things that federal and state governments are obligated to ensure that public funds are provided to programs that meet minimum standards relating to the provision of care that is free from abuse and neglect and that individuals receive appropriate medical care.³⁵⁵

OPWDD's implementing regulations provide that people receiving services have a right to, among other things:

- a safe and sanitary environment;
- freedom from physical or psychological abuse;
- written individualized plan of services (see glossary) which has as its goal the maximization of a person's abilities to cope with his or her environment, fosters social competency (which includes meaningful recreation and community programs and contact others who do not have disabilities), and which enables him or her to live as independently as possible.
- the opportunity to object to any provision within an individualized plan of services, and the opportunity to appeal any decision with which the person disagrees, made in relation to his or her objection to the plan;
- the opportunity to receive visitors at reasonable times; to have privacy when visited, provided such visits avoid infringement on the

³⁵⁴ 42 U.S.C. § 15001 (a)(4-5).

³⁵⁵ 42 U.S.C. § 15009(a)(3)(B)(i); 42 U.S.C. 15009.

rights of others, and to communicate freely with anyone within or outside the facility.³⁵⁶

OPWDD certifies more than 7,500 sites and programs (operated by more than 500 not-for-profit and state providers) and conducts on-site visits to ensure the provision of quality services and compliance with applicable regulatory requirements. If OPWDD identifies deficient practices, providers are expected to remedy the concerns and submit plans of corrective action.³⁵⁷ In addition, those programs certified as ICFs are subject to oversight by CMS which contracts with DOH to survey OPWDD licensed and operated ICFs, including the remaining State-operated developmental centers.³⁵⁸ This is similar to the nursing home survey process. External oversight and advocacy for patients within the OPWDD system is provided by the Justice Center for the Protection of People with Special Needs,³⁵⁹ the Board of Visitors,³⁶⁰ the Mental Hygiene Legal Service³⁶¹ and the federally funded protection and advocacy agency, Disability Rights New York (“DRNY”).³⁶² Pursuant to the Permanent Injunction to settle the Willowbrook litigation, Willowbrook Class Members enjoy advocacy and assistance from the Consumer Advisory Board (“CAB”) and representation by Class Counsel, the New York Civil Liberties Union and New York Lawyers for the Public Interest (“NYLPI”).³⁶³

³⁵⁶ See 14 N.Y.C.R.R. § 633.4 (a)(4).

³⁵⁷ See *Provider Stability and Performance*, N.Y. ST. OFF. FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, <https://opwdd.ny.gov/providers/provider-stability-and-performance> (last visited Apr. 29, 2021).

³⁵⁸ See *Methodology and Source*, N.Y. ST. DEP’T OF HEALTH, https://profiles.health.ny.gov/nursing_home/pages/methodology (last visited Apr. 29, 2021).

³⁵⁹ See 14 N.Y.C.R.R. Part 700.

³⁶⁰ N.Y. Mental Hyg. Law § 13.33

³⁶¹ N.Y. Mental Hyg. Law §§ 47.01, 47.03

³⁶² The federal Developmental Disabilities Assistance and Bill of Rights Act (“DD Act”) requires states to establish P&A systems in order to receive federal funding. 42 U.S.C. § 15041.

³⁶³ The Willowbrook case, bearing the caption *New York State Assoc. for Retarded Children v. Cuomo*, 393 F. Supp. 715 (E.D.N.Y. 1975) (the “Willowbrook Litigation”), is still pending in the United States District Court before the Hon. Raymond J. Dearie. The goals of the litigation were then virtually unheard of – deinstitutionalization, normalization, and community integration – but they have been effectuated through a series of orders entered in the Willowbrook Litigation, culminating in a March 1993 Permanent

According to guidance issued by OPWDD on March 11, 2020, staff at OPWDD-licensed congregate settings were, prior to COVID-19, required to receive training on infection control, use of PPE, cleaning, activity restrictions and isolation, and symptom identification. There is a regulatory foundation for the guidance, as section 633.4(a)(4)(i) of the OPWDD regulations requires that people receiving services for a developmental disability shall not be denied a safe and sanitary environment. Most of the pre-COVID guidance was directed at environmental/facility standards like maintenance and general cleanliness provisions and were not geared towards identification and prevention of infectious disease.³⁶⁴ Importantly, section 690.5(b)(2)(vi) of the OPWDD regulations, governing day treatment services, required (and still requires) day treatment facilities to ensure that “there is a standing committee, or comparable mechanism, to address the issue of infection control.”

2. The Impact of the Coronavirus Pandemic

Individuals served by the OPWDD-operated or regulated system faced hardships akin to those suffered by the State’s nursing home residents. Between March 17 and 19, 2020, OPWDD closed day programs and suspended visitation at OPWDD operated and certified congregate care facilities, including community residences. These were essentially preemptive quarantines to prevent the introduction of the virus. Just as in nursing homes, this effectively cut off the individuals residing in these residences from their families, from their communities, and from their usual activities. OPWDD also

Injunction. The NYCLU continues to monitor the State’s compliance with that 1993 injunction on behalf of over 2,600 individuals with intellectual and/or developmental disabilities living all across New York State. See *Agency Protocol Manual*, N.Y. ST. OFF. FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES (2019), https://opwdd.ny.gov/system/files/documents/2019/11/agency_protocol_manual_provider_copy_2-2019.pdf.

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ordered the shut-down of off-site day habilitation programs. The disruption of usual activities and the lock down of community residences caused many individuals to regress. These programs supported their well-being. Families, and the staff within community residences, could not duplicate fully the lost activities that are so crucial for these individuals' developmental and mental support. According to research conducted during the pandemic, restrictions on usual activities are likely to induce mental stress, especially among those who are autistic, leading to an escalation in challenging behaviors, risk of placement breakdown and increased the use of psychotropic medication.³⁶⁵

As will be discussed below, the lockdown of community residences and shut down of day habilitation programs was overall successful in preventing the spread of the virus, but at terrible cost. And even with that cost, the virus came.

OPWDD took certain steps in response to pandemic.³⁶⁶ OPWDD created COVID-19-specific data reporting that was later expanded to include mandatory reporting through a 24-hour hotline.³⁶⁷ OPWDD also assigned 100 staff in the OPWDD system to contact tracing efforts. Over 80 guidance documents were issued by OPWDD for providers and mitigation and containment efforts resulted in visitation restrictions and program suspensions. OPWDD also convened regular "stakeholder" meetings with selected OPWDD providers, family groups and advocates to provide them with information about OPWDD efforts to manage the public health crisis and

³⁶⁵ K. Courtenay & B. Perera, *COVID-19 and People with Intellectual Disabilities: Impacts of a Pandemic*, 37 IRISH J. OF PSY. MEDICINE 231 (2020).

³⁶⁶ *Joint Legislative Public Hearing on 2021 Executive Budget Proposal: Topic Mental Hygiene*, 2021 Leg. (NY 2021) (testimony of Dr. Theodor Kastner, Commissioner of OPWDD). Dr. Kastner's budget testimony is included in the appendix to this report.

³⁶⁷ OPWDD's data reporting mandates are in contrast to those of OMH which did not require providers to track COVID infections.

safeguard its population. There are 36,256 OPWDD-certified residential beds and 42,956 total community beds.³⁶⁸ As of February 10th, 2021, there had been 9,267 cases of COVID-19 among individuals receiving OPWDD services. 6,698 cases occurred in residential settings. 618 residents had died from the virus by that date. There were also 12,414 confirmed cases among staff.³⁶⁹ As in nursing homes, residents in the New York metropolitan area were most affected in the initial surge. Since that time, residents and staff have been affected throughout the State, largely tracking the rise and fall of infection rates regionally throughout the State.

Studies demonstrate that individuals with developmental disabilities have a higher incidence of co-occurring medical conditions than the general population that put them at greater risk of death should they contract COVID-19.³⁷⁰ In addition to the heightened risk of serious medical outcomes, residing in congregate care settings puts residents at higher risk of contracting COVID-19 for several reasons.³⁷¹ These include the extreme difficulty of social distancing in a congregate care setting where individuals are sharing bathrooms, bedrooms, and other living spaces. In addition, many people with developmental disabilities receive high levels of personal care assistance from direct support personnel, who may come in and out of the residence or work at multiple

³⁶⁸ Individuals with developmental disabilities may reside in certified or non-certified beds.

³⁶⁹ This data has been collected and provided to the Task Force by the New York Alliance for Inclusion and Innovation. See also *COVID-19 Data Project*, N.Y. ALLIANCE FOR INCLUSION & INNOVATION, https://nyalliance.org/COVID-19_Data_Project (last accessed Apr. 29, 2021).

³⁷⁰ See Margaret Turk et al., *Intellectual and Developmental Disability and COVID-19 Case-Fatality Trends: TriNetX Analysis*, DISABILITY & HEALTH J. (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7245650/pdf/main.pdf> (using database of medical records to compare COVID-19 death rates and comorbidities between individuals with and without IDD, and confirming that people with IDD have higher prevalence of comorbid risk factors (i.e., hypertension, heart disease, respiratory disease, and diabetes) which are often associated with poorer COVID-19 outcomes).

³⁷¹ See Scott Landes et al., *COVID-19 Outcomes Among People with Intellectual and Developmental Disability Living in Residential Group Homes in New York State*, DISABILITY & HEALTH J. (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7311922/pdf/main.pdf>.

program sites. Many individuals with developmental disabilities may also be unable to wear face coverings, or adhere to other infection control protocols.

OPWDD providers were under great fiscal strain during the pandemic due to loss of revenue and enormous and unexpected expenditures required to maintain the safety of residents and staff. Perhaps the greatest challenge encountered by providers was that OPWDD-licensed and operated community residences were not afforded the same priority as skilled nursing facilities and other congregate care settings for allocations of PPE.³⁷² Further, the State Department of Health, as the State Medicaid agency, initially set COVID policies for people residing in OPWDD-certified settings. Thus, OPWDD did not establish the priorities for their constituents despite having greater knowledge and expertise about the needs of people with developmental disabilities. For example, visitation at hospitals was suspended by DOH without considering how this suspension impacted people with disabilities who must rely upon family and staff support when they are hospitalized. Considerable advocacy was required for DOH to address this need and amend its visitation policies.³⁷³

Furthermore, while some data have been collected and released to the public about the rate of infection and fatalities among staff and residents in skilled nursing facilities, data have not been publicly released concerning the rate of infections and

³⁷² Statement of J.R. Drexelius, Governmental Affairs Counsel, Developmental Disability Alliance for Western New York, to the Task Force.

³⁷³ OPWDD has substantially altered and adapted its service delivery system during the pandemic as reflected in the State's Medicaid HCBS Appendix K emergency funding application. See https://www.health.ny.gov/docs/2020-04-07_appendix_K. Thus, for example, OPWDD sought and obtained approval from the federal government to permit day services and residential habilitation services to be delivered at alternative sites. Telehealth services were also expanded and DQI reviews were postponed. However, unlike some other states, DOH and OPWDD did not seek to amend Appendix K so that reimbursement could be awarded under Medicaid to cover staff who accompanied persons with developmental disabilities to hospitals.

fatalities among staff and residents in OPWDD-operated or certified settings. The lack of data transparency impedes an objective assessment of the impact of the pandemic upon a very vulnerable population and the people who provide services and supports to them. This, in turn, obstructs informed discussions toward mitigating the potentially devastating impacts of future infectious disease outbreaks. Part of the gap in data collection is now filled following the March 2021 release of an investigatory report by DRNY, the New York Civil Liberties Union, and New York Lawyers for the Public Interest, entitled *New York State's Response to the Protect People with Intellectual and Developmental Disabilities in Group Homes During the COVID-19 Pandemic*.³⁷⁴ To determine how many people with developmental disabilities were exposed to infection and death, the report relied on data received from the Justice Center for the Protection of People with Special Needs³⁷⁵ and OPWDD reports relayed on periodic telephone conference calls with selected stakeholders.

According to the investigative report, as of November 4, 2020, 3,906 New Yorkers with developmental disabilities had a confirmed COVID-19 diagnosis. Of those individuals, 3,107 resided in OPWDD-certified beds. 477 deaths attributable to confirmed COVID-19 occurred. Of the staff working in OPWDD-certified programs, 4,911 had tested positive for COVID-19 through November 4, 2020.³⁷⁶ Individuals with developmental disabilities residing in OPWDD-certified group homes were three times more likely to contract COVID-19 than members of the general population in New York

³⁷⁴ *New York State's Response to Protect People with Intellectual and Developmental Disabilities in Group Homes during the COVID-19 Pandemic*, DISABILITY RIGHTS N.Y. (2021), <https://www.dropbox.com/s/e4ym4d1s2zwmbf2/2021.03.05%20Investigatory%20Report%20on%20State%27s%20Response%20to%20People%20with%20IDD.pdf?dl=0>.

³⁷⁵ *Id.* at 8.

³⁷⁶ *Id.*

State and nearly three times as likely to perish if they contracted the virus.³⁷⁷ The data trended worse through the balance of the calendar year 2020 through to February of 2021. According to an OPWDD provider association that participates in periodic OPWDD stakeholder meetings, through March 24, 2021, there were 10,113 confirmed COVID-19 positive cases reported to OPWDD statewide. Of those people that tested positive, approximately three-quarters resided in OPWDD-certified residential programs. A total of 642 individuals statewide who tested positive died. In addition, 12,414 staff were reported as confirmed COVID-19-positive. There is greater geographic impact in the OPWDD system, as well, with the downstate region accounting for 76% of the total COVID cases.³⁷⁸

While the hardships endured by people with developmental disabilities and their families during this public health crisis has been devastating, deaths and rates of infection on the scale seen in nursing facilities were likely avoided because of the model of service delivery. That is, people with developmental disabilities who reside in OPWDD certified settings generally live in family settings and in small residences, not in large institutions.

³⁷⁷ *Id.* Beyond quantitative analysis the investigative report published by the three attorney advocacy agencies found, among things that, OPWDD group homes did not have timely access to PPE, testing should have been mandatory for staff supporting residents in group homes and clearer guidance and greater coordination was required retarding quarantines in group homes. Other compelling topics addressed by the report are staffing challenges during the pandemic, issues that arose when people with developmental disabilities were hospitalized during the pandemic and the lack of transparency related to the release of data and essential information to service recipients and stakeholders.

³⁷⁸ The DRNY/NYCLU/NYLPI investigative report indicates that one-half of the total COVID fatalities in the OPWDD system occurred in the five boroughs of New York City and that New York City and Long Island accounted for 70% of the fatalities in group homes. *Id.*

VII. Conclusion

The Task Force's review of the impact of COVID-19 on nursing homes and long-term care, including in OMH and OPWDD providers, reveals that COVID-19 has been most dangerous for residents of nursing homes, and others in congregate care settings. In this regard, we cannot say that New York's experience has varied in a meaningful way from that of other states. COVID-19 has been most dangerous for the aged and those with certain comorbidities, most prominently cardiovascular and pulmonary conditions, and individuals with disabilities. To be a nursing home resident is to be an individual with comorbidities.

Given the nature of COVID-19, the physical condition of individuals residing in congregate settings, and their close living conditions, some level of death was inevitable. This is especially true in nursing homes, due to their size and configuration, the level of close contact, and the age and comorbidities of their residents. The sheer number of deaths was not. At-risk nursing home residents were compromised by a number of factors: community spread, insufficient staffing – pre-existing and/or exacerbated by the pandemic, insufficient training, insufficient PPE, insufficient State support, and insufficient preparation. We think there was another factor, especially applicable to the early days of the pandemic, when COVID-19 seemingly appeared overnight in metropolitan New York. There was a lack of foresight; really, a lack of imagination.

We usually think of imagination as the conception of an idea, as conceiving something better. Imagination is also necessary to conceive of risk and response. In the late winter of 2020, New York and the United States had no experience with COVID-

19. We had seen Wuhan, China, and its lockdown. We had seen the building there of rows of hospitals, seemingly overnight. But that was far away. It was not us. Our experience had been that new viruses may develop overseas, but they will be largely contained overseas. That had been our collective experience with SARS, with MERS, with Zika, and even with Ebola. What seemed terrifying was less so when it reached our shores, if it even reached our shores.

COVID-19 was different. Despite the obvious scope of the problem in China there was disbelief that the epidemic could be that bad. This was for three reasons. To borrow the phrasing of former Secretary of Defense Donald Rumsfeld, there were unknown unknowns. China wasn't sharing what it had learned regarding the virus. The President had been briefed, but he chose to downplay the danger. The virus was known to be highly contagious, but that it spread asymptotically was unknown. Then, there was a certain pridefulness. There was a belief that America and New Yorkers could handle it. This wasn't our first rodeo, in the words of Governor Cuomo. Finally, there was a lack of imagination, not just about how bad the virus could be, but how quickly it could be upon us. As the warnings came – China, Kirkland, Washington, Italy – and as the directives came from the CDC and State Department of Health, there was a failure to recognize just how bad things could be, and how quickly that could happen. By the time public health professionals were warning of impending, overwhelming danger, the danger had arrived. Collectively, New York's health care institutions, including nursing homes in metropolitan New York, were not ready. The warnings had come too late, and the expectations regarding what we faced had been too small. The CDC issued a directive on February 26th for nursing homes to prepare.

The Governor declared a State of Emergency on March 7th. The State Department of Health issued nursing home directives on March 12th.

Yet, by March 25th, the State's hospitals were so overwhelmed that the Department of Health issued its now infamous directive that nursing homes must accept stable COVID-19 patients, and were barred from testing for COVID-19. By the time the directives came, could anyone say that there was enough time to find and hire sufficient staff, to train sufficient staff, to corral sufficient PPE?

In the best of circumstances, time was short. But the State's nursing homes were not in the best of circumstances. COVID-19 exposed that. This Task Force does not aim to resolve whether the funding of nursing homes has been inadequate, or whether for-profit-operators are better or worse than not-for-profit providers. The important points for the Task Force's work are that the system in which nursing homes were operating did not adequately account for a pandemic of the magnitude of COVID-19 – staffing was too lean to accept any stress to the system, too little PPE was on hand, and the infection control procedures in place were too weak to meet the virus. And, because of a lack of recognition of what was at hand – a lack of imagination about how bad the pandemic could be – there was a lack of preparation, if preparation had even begun. We saw no evidence that the State's nursing homes, overall, had done additional hiring in anticipation of COVID's arrival, no evidence that the State's nursing homes had undertaken needed staff training, no evidence that the State's nursing homes had begun purchasing PPE. We also cannot say that the guidance to nursing homes or other long-term care providers from public health authorities was sufficient.

What is worse, all that happened in New York's nursing homes happened after the nation's first COVID-19 outbreak occurred – in a Washington State nursing home. That should have set off alarm bells that nursing home residents were at high risk. If the bells were ringing, they went unheard.

Perhaps worst of all has been the experience in the State's nursing homes since the initial outbreak. Even after the initial impact, many months into the epidemic, COVID-19 continued to ravage nursing homes across the State until effective vaccines were administered. A high percentage of the State's deaths continued to occur in the State's nursing homes. The nursing home proportion of the State's deaths has been about 30%. In this, the State's experience has varied little from the rest of the nation. The proportion of COVID-19 deaths in the State's nursing homes is not meaningfully different than the proportion in nursing homes in other states. This suggests that New York's nursing homes are no better and no worse than the nation at large. More importantly, this suggests that nursing homes are not well-suited to manage an airborne, highly infectious disease.

The experience in nursing homes has been different than that experienced by other long-term care providers. Individuals receiving Medicaid-funded home care must be eligible for nursing home level care. Many individuals in OPWDD-certified community residences have exceedingly complex health care needs. Residents of these facilities suffered during the pandemic and experienced infection and death at rates much higher than the general population. Nevertheless, the incidence of death and disease from COVID-19 has not been as devastating for those served by other long-term care providers. Some of that difference may reflect differences in age, some

of it may reflect differences in comorbidities. But the primary difference appears to be place. Nursing homes are institutional by design. Nursing homes are larger. Nursing homes bring large numbers of susceptible individuals together.

There are no quick fixes. But there can be improvements. Our recommendations are both short-term and long-term. Some may be implemented quickly, some will require a process, and some are long-term solutions for long-term improvement.

We must also recognize the dynamic nature of the epidemic and the response to it. We are fortunate that as our Task Force has undertaken its work and this Report is being written highly effective vaccines have become available. More vaccines are expected to be available in the next few months. These vaccines are changing the impact of COVID-19 on long-term care. Vaccines are being administered to nursing home residents as this is being written, and are available to other long term care recipients. As these vaccines are administered, the danger to nursing home and other long term care recipients thankfully is diminishing, though the high percentage of staff members yet to be vaccinated presents a risk of the virus' return. The imminent end of the epidemic in long-term care may be near, but that does not diminish the need for reforms. Communicable diseases will continue to be a threat in long term care, especially in nursing homes. The flu is an annual danger, and new contagious diseases – SARS, MERS and now COVID-19 – continue to emerge.

VIII. Recommendations

Government at the federal, state and local levels have various responsibilities to the public, especially the most vulnerable, during emergencies. Application of these

responsibilities to the pandemic response in nursing homes and other long-term care settings may offer some context to explain why the situation became so dire and to hopefully prevent future occurrences.

A. Protect Public Health

1. Rethink the Delivery of Long-Term Care

One of the most basic responsibilities of government is to protect public health. The experience with COVID-19 compels a rethinking of the delivery of long-term care. Through the course of the COVID-19 epidemic, nursing homes have been dangerous places for their residents. That statement is not intended as an indictment of nursing homes. It is simply a reflection of the overwhelming impact COVID-19 has had in nursing homes. Nursing homes, as a whole, have had difficulty in containing an aerosol-based virus. COVID-19 has been a challenge for congregate care providers, but nursing homes have faced the most challenges.

State and federal regulations recognize that, for many, nursing homes will be their final home. That is unacceptable. Nursing homes are institutional care. Human beings do not want to end their days in institutions. There must be a lessened dependence on nursing homes. Individuals being discharged from hospitals in need of further care must be offered home care options just as they are offered nursing home options. Individuals finishing their rehabilitation time in nursing homes in need of further care must be offered other long-term care as well as continued nursing home placement. Those individuals should be offered the full range of services that may meet their needs, whether institutional or community based. Home care, in its several forms, must be available to the same extent as nursing home care.

There will be a continued need for nursing home services. There will be those in need of inpatient rehabilitation. There will also be those in need of care that simply cannot be offered at home. But, as we have seen, in many instances nursing homes became hothouses for COVID-19. And, as studies from this pandemic are beginning to reveal a connection between the impact of COVID-19 in nursing homes based on race and ethnicity of patients, nursing homes serving these populations were disproportionately impacted. Not everyone in need of care needs to end their days in a hospital extender. Serious consideration must be given to whether the physical structure of nursing homes themselves can change. A systemic preference for institutionalized care should not be in place when there is agreement, and, under *Olmstead*, a requirement, that individuals should live in the community when that is their preference

Before nursing homes developed in their current form, convalescent care, old-age care, was often provided in small settings, including caregiver's homes. As people aged and their health care needs became more complex, that informal model became obsolete, succeeded by the institutional model dominant today. Consideration should be given to the whether the non-institutional, smaller-sized model of times past could be replicated today and altered to meet individuals' needs. There is such a model, though not perfectly equivalent. Services for people with developmental disabilities were once highly institutionalized. That system, despite the complex needs of many service recipients, has long since moved to a community-based system. That system dispenses medication, arranges medical care, and otherwise is responsible for meeting residents' needs, all in home-like settings. In addition, because its residences are so

much smaller, contagion can be more easily contained. A serious examination should be made to determine how much of the nursing home system can be transformed into a community-based system. Further, consideration should be given to whether current nursing home facilities can be transformed from hospital-like wards to something more akin to home-like apartments.

As consideration is given to transformation of the system of long-term care, there is a need to improve the delivery of care while nursing homes remain the dominant long-term care providers. To that end, more immediate reforms are needed to protect residents in long term care.

2. Meaningful Agency Enforcement

Meaningful enforcement of nursing home and adult care facility regulations can play an important role in limiting the further spread of this coronavirus, and the possibility of future emerging pandemics. Toward that end, however, we recommend certain changes in DOH enforcement policies and practices.

a. Review Regulatory Standards

The regulation of nursing homes and adult care facilities by DOH is characterized by hundreds to thousands of standards that regulate the minutiae, and which have little to no impact on residents' quality of life or protection from contagion. Too often, however, the focus of DOH surveyors is on this minutiae rather than on the big picture – the quality of life and protection of resident safety and rights. Required rigid adherence to less-important regulatory standards can not only take the focus of surveyors away from the bigger picture, but also stifle initiative from operators when they are having to deal with emerging threats like COVID-19. DOH is also seen in the industry as having moved away from an advisory and supportive role to one much more prosecutorial in

nature. This has inhibited the open dialogue that may prove critical in dealing with and containing emerging outbreaks. Contagious diseases and pandemics are not spread in long-term care facilities by the failure to adhere perfectly to the minutiae, but rather by failure to focus on what is needed to enhance infection control, to increase and train staffing, to supply PPE, and to empower operators to make timely and critical decisions based on their immediate needs and situations.

b. Survey Process

The survey process must be reformed to better measure intended outcomes. Too often, the survey process becomes the application of a checklist that does little to measure actual quality and real risks to residents. Infection control must be a central part of the survey process. So, too, should staffing levels. The survey process should include a review of whether nursing facilities meet whatever the pre-determined staffing standard has established.

c. Address Under-Performers

The State's nursing homes have usually operated at very high occupancies. Overall occupancy rates usually exceeded 95%. There was no excess capacity. Since COVID-19, overall occupancy rates have fallen significantly, to below 85%. When the system was performing at capacity, the State's nursing home regulator – the State Department of Health – could find its options constrained in dealing with the worst performers. Excess capacity provides the Department of Health an opportunity to deal with operators who have a history of failing to meet their residents' needs, whose performance jeopardizes the health of their residents. The Department should use it.

B. Prepare for Emergencies

The COVID-19 epidemic is a once-in-a-hundred-year event. Preparation for such an event is difficult. Communicable disease outbreaks, however, are not unusual. Proper planning for those outbreaks would meet many of the issues that have emerged in this epidemic. As noted above, a properly trained, properly empowered infection control officer developing and implementing an infection control plan would be a key to proper preparation.

Preparation is also necessary on the macro level. The pandemic has revealed that the federal and state public health support structures were not what they should be. National stockpiles of equipment, for example, had withered. More importantly, human capital, especially at the federal level had withered. The CDC's international reach had lessened. The National Security Council no longer had a position dedicated to health issues. Public health requires attention and capabilities, as much as any other element of national defense.

1. Support for Staffing

Another key to preparation is adequate staff, adequately trained. Staff members stretched beyond their capabilities inevitably will have to cut corners. Proper care of residents takes time. Following infection control procedures takes time. Properly donning PPE takes times. Proper hand sanitation takes time. There must be enough staff. Minimum staffing standards are highly controversial. Adequate staffing, though, could be addressed in other ways. Nursing homes could be required to disclose their staffing ratings at the time of each resident's admission. The prominent posting of staffing ratings could be required. DOH regulations could require a monthly certification of adequate staffing, including a statement of how the determination of adequate

staffing was reached. Those statements could be publicly available on the Department's web site.

Even when fully staffed, staff members must be properly trained so that they have a full understanding and commitment to infection control, including the basics of hand-washing, PPE wear, and disinfection techniques.

There may be some disagreement about what is an appropriate funding level for long-term care providers, but there can be no dispute that direct care staff are low-paid. This is true in nursing homes, in OPWDD-certified group homes, and in home care. There also can be no dispute that most funding for long-term care comes from government, principally Medicaid. Those Medicaid funding rates presume (or drive) wage rates for direct care workers to or near minimum wage standards, even if those wage standards are described as "living wages". Low wages correlate with high staff turnover. High staff turnover increases training needs and costs. High staff turnover leads to less familiarity with residents. High staff turnover correlates to lower quality care. Means must be established to increase direct staff wage rates.

Infection control also requires that contagious staff not be at the worksite. New York has addressed this problem in regard to COVID-19 by requiring paid leave to those subject to quarantine or isolation orders. Paid staff sick leave must become a permanent fixture in long-term care. Medicaid funding levels must be adjusted to fully support the costs of that sick leave.

2. Visitation and Home Visits

One of the most unfortunate effects of the COVID-19 epidemic has been the severe restrictions that have been placed upon visitation and home visits. Those restrictions have caused depression and regression for residents of nursing and group

homes. When the only effective means to stop the spread is to isolate, those restrictions are understandable. The immense collateral damage they cause, however, must be recognized, constantly monitored, and minimized, if possible. Means of contact must be established. Video-conferencing works for business. It can help in congregate care. Whether the use of PPE can adequately minimize the risk of visits must also be considered. Finally, the restrictions themselves must be continuously reviewed for continued necessity, and altered as appropriate.

C. Clear Guidance

During an emergency, clear and consistent guidance from the various levels of government is important to ensure the safety of the public. The guidance should be understandable to the intended audience and should not conflict with other government requirements. When the Governor issued the March 25th directive, many nursing homes believed this meant they could not deny admittance or readmittance of a COVID-19-positive patient. Additionally, at this time the CDC guidance was different from the March 25th directive which put nursing homes in the untenable position of attempting to determine what they were supposed to do in order to be in compliance.

D. Prevent the Spread of Communicable Diseases

1. Empowered Infection Control Officers

Under current regulations, every nursing home must have an infection control plan. An employee must be responsible for the plan. Given the primacy of infection control, we think the position must be upgraded. Nursing homes must have a designated infection control officer reporting directly to the governing body. Subject to the governing body, the infection control officer must be responsible for development, implementation, and oversight of an infection control plan. The infection control officer

also must be responsible for identifying emergent infection risks and adapting the infection control plan as needed, especially in light of the lessons learned from COVID-19.

2. COVID-19 Nursing Homes and Wards

In some states, COVID-only nursing homes were established. In New York, some nursing homes established COVID-only floors or wards. These COVID-only solutions are disruptive to residents, but seem to have been effective in limiting the spread of COVID-19. State regulations should permit their further use if necessary, and require their use if necessary to control other serious epidemics.

E. Collect and Disseminate Information

The controversy over the reporting of COVID-related deaths in skilled nursing facilities is well known. There was also a complete lack of public reporting of COVID-19-related infection and deaths in facilities licensed or operated by OMH and OPWDD. Data transparency, in particular demographic data with respect to individuals living in long term care settings and the staff employed in these settings, is essential for syndemic analysis on public health and must be assured by New York State agencies going forward.

F. Allocate Resources

Plans must be made in advance for the identification, acquisition, and allocation of resources necessary to meet the needs of the health care delivery system. There must be a willingness to use already granted statutory authority, such as the Defense Production Act, in order to produce and allocate necessary supplies.

Funding is always an issue. In a nation that spends 17.7% of its gross domestic product on health care, an average of \$11,852 per person,³⁷⁹ it is difficult to say that more should be spent. There is, nevertheless, a lack of investment in certain areas of the healthcare system over decades that has caused significant misallocation compared to the need, and that must be addressed. The pandemic has exposed underinvestment, and the devastating impact on poor communities, which, in New York, are primarily communities of color. Funding must go where it is most needed, through structures that allow that funding to be used appropriately and efficiently. The pandemic has also exposed underinvestment and under-attention to public health. These must be corrected.

G. Long-Term Care Needs as a Priority

One of the public policy shortcomings that occurred as COVID-19 exploded in the dark days of March and April was the near absolute focus on the needs of hospitals, to the near exclusion to all other levels of care. This shortcoming was most glaring in the allocation of PPE. We recognize that PPE was in short supply in the early days of the epidemic, but there does not appear to have been a convincing reason to place the need for PPE in hospitals over the need in nursing homes. It was no answer to say that nursing homes should have had an adequate stock of PPE in place. The same was equally true of hospitals.

The health care system is a system of interlocking parts. Hospitals are the center of the system, attracting the most attention and money. But they do not stand

³⁷⁹ *National Health Expenditure Data*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsHistorical#:~:text=The%20data%20are%20p,resented%20by,spending%20accounted%20for%2017.7%20percent> (last visited Apr. 29, 2021).

alone. Nursing homes act as hospital extenders. Many nursing home residents are indistinguishable from hospital patients, but for the fact that for many nursing home residents, their respective conditions will not improve. And, as we have seen, nursing home residents were highly susceptible to the virus. That does not mean in all circumstances that the need in nursing homes is the same as in hospitals. It does mean that policymakers must take a broader view, especially when dealing with shortages. Like must be treated as like, and there must be consideration of what is alike.

Other long-term care providers faced even greater difficulties in securing PPE, and less help from State government in accessing PPE. In an instance of extreme shortage, priorities must be established. Nevertheless, in establishing priorities, some recognition must be made of other long-term care providers, including a recognition of the risk that the failure to address their needs portends.

H. Remove Politics from the Equation

Neither COVID-19 nor communicable or infectious diseases discriminate on the basis of political affiliation. These viruses do not care who is elected President, Governor, Mayor, or federal or state legislators. Politics, however, appears to have played an overly large and counterproductive role in dealing with this pandemic, especially on the federal level. Whether to mandate or advocate testing, vaccinations, mask-wearing and social distancing became political footballs, and not doing so became rallying cries, although largely after the first surge in New York. This led, at a minimum, to lack of acceptance among many about the virus and how to slow its spread, and this did impact the subsequent surges. Accurate data were not reported or

were presented in misleading fashion at the federal and state levels. Political rivalry between the Governor and the NYC Mayor created tensions and delays in efforts to halt the spread. In the end, the best advice of our public health experts was not timely followed. Effectively dealing with pandemics and major health crises requires putting political differences and ambitions aside, and relying upon the advice of experts who have been put in the positions they hold to prepare for and give that advice. .

Appendices

Appendix I: Executive Orders relating to Nursing Homes and Adult Homes

EO No.	Applicability
<p>EO 202 Issued: 03/07/2020</p>	<p>ALL; Hospitals and NHs: suspends certain transfer and affiliation agreement requirements to permit rapid discharge, transfer and receipt of patients.</p>
<p>EO 202.5 Issued: 03/18/2020</p>	<p>NHs: suspends or modifies regulations relating to resident assessment and care planning; physician approvals for admission; admission policies and practices to facilitate resident transfer.</p>
<p>EO 202.5 Issued: 03/18/2020</p>	<p>NHs: suspends or modifies regulations relating to resident assessment and care planning; physician approvals for admission; admission policies and practices to facilitate resident transfer.</p>
<p>EO 202.10 Issued: 03/23/2020</p>	<p>All healthcare providers: relief from recordkeeping requirements and immunity relating to same.</p>
<p>EO 202.18 Issued: 04/16/2020</p>	<p>Hospital or Nursing Home: temporarily suspends licensure requirements to permit recent nurse practitioner graduates to practice in a hospital or nursing home.</p> <p>SNF, NH, and ACFs: Directs notification to family members or next of kin within 24 hours if any resident tests positive for COVID-19 or suffers a COVID-19 related death</p>
<p>EO 202.19 Issued: 04/17/2020</p>	<p>SNF, NH or ACF: Directs the imposition of penalty for non-compliance with EO 202.18 of \$2,000 per violation per day.</p>
<p>EO 202.23 Issued: 04/24/2020</p>	<p>SNF or ACF: authorizes the Health Commissioner to suspend or revoke SNF or ACF operating certificate for failure to adhere to Commissioner's regulations or directives and to appoint a receiver to continue operations on 24 hours' notice</p>
<p>EO 202.30 Issued: 05/10/2020</p>	<p>NHs and ACFs: requires nursing homes and adult care facilities to test or make arrangements for the testing of all personnel twice per week pursuant to a plan [to be] developed by the facility administrator and filed with the Department of Health by 05/13/2020 and to report positive test results by</p>

	5:00 pm on the day following receipt of the test results; authorizes the Commissioner to suspend or revoke the operating certificate of a nursing home or adult care facility for noncompliance with EO 202.30 or any regulations or directives issued by the Commissioner and to appoint a receiver to continue operations on 24 hours' notice; makes a false statement in the attestation punishable under Penal Code 210.45; subjects nursing home or adult care facility to a penalty for non-compliance of \$2,000 per violation per day for noncompliance.
EO 202.32 Issued: 05/21/2020	Clinical Labs, NHs and ACFs: allows clinical laboratories to accept and examine specimens and test for COVID-19 specimens for NH and ACF personnel without a prescription and to report the results to operators and administrators; and facility administrators to contact the local health department for follow up for all facility personnel who test positive.
EO 202.40 Issued: 06/10/2020	NHs and ACFs: continues the testing requirements in EO 202.30 and amends it to require nursing homes and adult care facilities in Phase Two reopening regions to test or make arrangements to test all personnel for COVID-19 once per week.
EO 202.44 Issued: 06/21/2020	Clinical Labs, NHs and ACFs: allows clinical laboratories to accept specimens and test for COVID-19 for NH and ACF personnel without a prescription and to report the results to operators and administrators and requires facilities to report positives to the local health department for follow up for treatment and isolation orders; authorizes the Commissioner to suspend or revoke the operating certificate of a skilled nursing facility or adult care facility for noncompliance with any regulations or directives issued by the Commissioner and to appoint a receiver to continue the operations on 24 hours' notice.

<p>EO 202.60 Issued: 09/04/2020</p>	<p>Coroner, NHs, Hospitals, Hospice Agencies: Directs the coroner or medical examiner to administer a COVID-19 and influenza test to a deceased person upon a reasonable suspicion that COVID-19 or influenza was a cause of death, where no such tests were performed within 14 days prior to death in a nursing home or hospital or by the hospice agency and to report the cause of death only after receiving the test results.</p>
<p>EO 202.73 Issued: 11/09/2020</p>	<p>NHs (does not refer to ACFs): Extends and modifies EO 202.30 and 202.40 to require nursing homes in red, orange, or yellow zones (under EO 202.68) to test or make arrangements for testing for COVID for all personnel.</p>
<p>EO 202.77 Issued: 11/23/2020</p>	<p>NHs or ACFs: Requires nursing homes and adult car facilities to comply with guidance for patients released for a leave of absence to visit friends or relatives (i.e., for the Thanksgiving holiday) upon the resident's return.</p>
<p>EO 202.88 Issued: 01/04/2021</p>	<p>NHs: Modifies EO 202.73, which modified EO 202.30, and 202.40, to require nursing homes to test all personnel at the facility in any area of the state irrespective of location in a micro-cluster zone as provided in EO 202.68.</p>

Appendix II: New York State Regulatory Activity relating to Nursing Homes and COVID

Notice No./ Regulation	Issued	Subject of proposed rule
HLT-08-20-00001	02/26/2020 Emergency/ Proposed 05/27/2020 Emergency 07/01/2020 Finalized	Communicable Diseases Reporting and Control - Adding Severe or Novel Coronavirus: To require physicians, hospitals, nursing homes, D&TCs and clinical laboratories to report instances of severe or novel coronavirus
HLT-12-20-00004	03/25/2020 Emergency	Investigation of Communicable Disease; Isolation and Quarantine: Control of communicable disease.
HLT-17-20-00004	04/29/2020 Emergency	Immunizations and Communicable Diseases: To control and promote the control of communicable diseases to reduce their spread.
HLT-25-20-00002	06/24/2020 Emergency	Investigation of Communicable Disease; Isolation and Quarantine: Control of communicable disease.
HLT-30-20-00001	07/29/2020 Emergency	Enforcement of Social Distancing Measures: To control and promote the control of communicable diseases to reduce their spread.
HLT-31-20-00013	08/05/2020 Emergency 02/03/2021 Emergency	Hospital Personal Protective Equipment (PPE) Requirements: To ensure that all general hospitals maintain a 90-day supply of PPE during the COVID-19 emergency.
HLT-32-20-00001	08/12/2020 Emergency 02/03/2021 Emergency	Nursing Home Personal Protective Equipment (PPE) Requirements: To ensure that all nursing homes maintain a 90-day supply of PPE during the COVID-19 emergency.
HLT-34-20-00002	08/26/2020 Emergency	Surge and Flex Health Coordination System: Provides authority to the Commissioner to direct certain actions and waive certain regulations in an emergency. (Full text is posted at the following State website: www.health.ny.gov/Laws&Regulations/Emergency

		<p>Regulations): Although the Governor retains authority to issue Executive Orders to temporarily suspend or modify regulations and issue directives pursuant to the Executive Law, these proposed regulatory amendments would provide an expedient and coherent plan to implement quickly the relevant temporary suspensions, modifications, and directives. The proposed regulatory amendments would permit the State Commissioner of Health or designee to take specific actions, as well as to temporarily suspend or modify certain regulatory provisions (or parts thereof) in Titles 10 and 18 of the NYCRR during a state disaster emergency, where such provisions are not required by statute or federal law. These proposed amendments would also permit the Commissioner to take certain actions, where consistent with any Executive Order (EO) issued by the Governor during a declared state disaster emergency. Examples include issuing directives to authorize and require clinical laboratories or hospitals to take certain actions consistent with any such EOs, as well as the temporary suspension or modification of additional regulatory provisions when the Governor temporarily suspends or modifies a controlling state statute. The proposed regulatory amendments would also require hospitals to: develop disaster emergency response plans; maintain a 90-day supply of personal protective equipment (PPE); ensure that staff capable of working remotely are equipped and trained to do so; and report data as requested by the Commissioner.</p>
<p>HLT-37-20-00007</p>	<p><u>09/16/2020</u> Emergency</p>	<p>Confirmatory COVID-19 and Influenza Testing: To require confirmatory COVID-19 and influenza testing in several settings to improve case statistics and contact tracing.</p>
<p>HLT-38-20-00001</p>	<p><u>09/23/2020</u> Emergency</p>	<p>Investigation of Communicable Disease; Isolation and Quarantine: Control of communicable disease. These regulations clarify the authority and duty of the New York State Department of Health (“Department”) and local health departments to protect the public in the event of an outbreak of communicable disease, through appropriate public health orders issued to persons diagnosed with or exposed to a communicable disease. These regulations also require hospitals to report syndromic surveillance</p>

		data to the Department upon direction from the Commissioner and clarify reporting requirements for clinical laboratories with respect to communicable diseases. Full text is posted at: https://regs.health.ny.gov/regulations/emergency.
HLT-43-20-00001	10/28/2020 Emergency	Enforcement of Social Distancing Measures: To control and promote the control of communicable diseases to reduce their spread.
HLT-44-20-0000	11/04/2020 Emergency	Hospital Personal Protective Equipment (PPE) Requirements: To ensure that all general hospitals maintain a 90-day supply of PPE during the COVID-19 emergency.
HLT-44-20-00011	11/04/2020 Emergency	Nursing Home Personal Protective Equipment (PPE) Requirements: To ensure that all nursing homes maintain a 90-day supply of PPE during the COVID-19 emergency.
HLT-47-20-00001	11/25/2020 Emergency	Surge and Flex Health Coordination System: Provides authority to the Commissioner to direct certain actions and waive certain regulations in an emergency. (Full text is posted at the following State website: www.health.ny.gov/Laws&Regulations/Emergency Regulations): Although the Governor retains authority to issue Executive Orders to temporarily suspend or modify regulations and issue directives pursuant to the Executive Law, these proposed regulatory amendments would provide an expedient and coherent plan to implement quickly the relevant temporary suspensions, modifications, and directives. The proposed regulatory amendments would permit the State Commissioner of Health or designee to take specific actions, as well as to temporarily suspend or modify certain regulatory provisions (or parts thereof) in Titles 10 and 18 of the NYCRR during a state disaster emergency, where such provisions are not required by statute or federal law. These proposed amendments would also permit the Commissioner to take certain actions, where consistent with any Executive Order (EO) issued by the Governor during a declared state disaster emergency. Examples include issuing directives to authorize and require clinical laboratories or hospitals to take certain actions consistent with any such EOs, as well as the temporary suspension or modification of additional regulatory provisions when the Governor temporarily suspends or modifies a controlling state statute. The

		proposed regulatory amendments would also require hospitals to: develop disaster emergency response plans; maintain a 90-day supply of personal protective equipment (PPE); ensure that staff capable of working remotely are equipped and trained to do so; and report data as requested by the Commissioner.
HLT-50-20-00001:	12/16/2020 Emergency	Enforcement of Social Distancing Measures: To control and promote the control of communicable diseases to reduce their spread.
HLT-50-20-00003	12/16/2020 Emergency	Confirmatory COVID-19 and Influenza Testing: To require confirmatory COVID-19 and influenza testing in several settings to improve case statistics and contact tracing.
HLT-51-20-00001	12/23/2020 Emergency	Investigation of Communicable Disease; Isolation and Quarantine: Control of communicable disease. These regulations clarify the authority and duty of the New York State Department of Health (“Department”) and local health departments to protect the public in the event of an outbreak of communicable disease, through appropriate public health orders issued to persons diagnosed with or exposed to a communicable disease. These regulations also require hospitals to report syndromic surveillance data to the Department upon direction from the Commissioner and clarify reporting requirements for clinical laboratories with respect to communicable diseases. (Full text is posted at: https://regs.health.ny.gov/regulations/emergency)

Appendix III: COVID-Era Sub-Regulatory Guidance

A. Federal Nursing Home Guidance

Date	Title	
02/06/2020	CMS QSO 20-09-ALL, re Information for Healthcare Facilities Concerning 2019 Novel Coronavirus Illness (2019-nCoV)	For 2019 novel coronavirus, CDC is currently advising adherence to Standard, Contact, and Airborne Precautions, including the use of eye protection (for more information, see CDC's Interim Infection Control Recommendations for 2019-nCoV). In addition to the review of CDC information by healthcare facilities, we encourage the review of appropriate personal protective equipment (PPE) use and availability, such as gloves, gowns, respirators, and eye protection. Medicare participating healthcare facilities should also have PPE measures and protocols within their emergency plans, especially in the event of potential surge situations.
03/04/2020	CMS QSO-20-12-All, re " Suspension of Survey Activities "	Effective immediately, survey activity is limited to the following (in Priority Order): all immediate jeopardy complaints and allegations of abuse and neglect; complaints alleging infection control concerns, including facilities with potential COVID-19 or other respiratory illnesses; statutorily required recertification surveys (Nursing Home, Home Health, Hospice, and ICF/IID facilities); any re-visits necessary to resolve current enforcement actions; initial certifications; surveys of facilities/hospitals that have a history of infection control deficiencies at the immediate jeopardy level in the last three years; surveys of facilities/ hospitals/ dialysis centers that have a history of infection control deficiencies at lower levels than immediate jeopardy.
03/04/2020	CMS QSO-20-14-NH, re " Guidance for Infection Control and	Per CDC, prompt detection, triage and isolation of potentially infectious patients are essential to prevent unnecessary exposures

[Prevention of Coronavirus Disease 2019 \(COVID-19\) in nursing homes](#)”

among patients, healthcare personnel, and visitors at the facility. Therefore, facilities should continue to be vigilant in identifying any possible infected individuals. Facilities should consider frequent monitoring for potential symptoms of respiratory infection as needed throughout the day. A nursing home can accept a patient diagnosed with COVID-19 and still under Transmission-based Precautions for COVID-19 as long as it can follow CDC guidance for transmission-based precautions. If a nursing home cannot, it must wait until these precautions are discontinued.

03/13/2020 CMS QSO-20-14-NH REVISED, re [“Guidance for Infection Control and Prevention of Coronavirus Disease 2019 \(COVID-19\) in nursing homes \(REVISED\)”](#)

CMS is providing additional guidance to nursing homes to help them improve their infection control and prevention practices to prevent the transmission of COVID-19, including revised guidance for visitation.

03/23/2020 CMS QSO-20-20-All, “Prioritization of Survey Activities:”

During this three-week timeframe [from the declaration of the PHE on 3/13/2020], only the following types of surveys will be prioritized and conducted: complaint/facility-reported incident surveys, triaged at the immediate jeopardy level;

Targeted infection control surveys (using a streamlined review checklist).

04/02/2020 CMS and CDC COVID-19 Long-Term Care Facility Guidance

Nursing Homes should immediately ensure that they are complying with all CMS and CDC guidance related to infection control. • In particular, facilities should focus on adherence to appropriate hand hygiene as set forth by CDC.

CMS has also recently issued extensive infection control guidance, including a self-assessment checklist that long-term care

facilities can use to determine their compliance with these crucial infection control actions. • Facilities should also refer to CDC’s guidance to long-term care facilities on COVID-19 and also use guidance on conservation of personal protective equipment (PPE) when unable to follow the long-term care facility guidance. 2. As long-term care facilities are a critical part of the healthcare system, and because of the ease of spread in long-term care facilities and the severity of illness that occurs in residents with COVID-19, CMS urges State and local leaders to consider the needs of long-term care facilities with respect to supplies of PPE and COVID-19 tests. State and local health departments should work together with long-term care facilities in their communities to determine and help address long-term care facility needs for PPE and/or COVID-19 tests. • Medicare is now covering COVID-19 testing when furnished to eligible beneficiaries by certified laboratories. These laboratories may also choose to enter facilities to conduct COVID-19 testing.

04/13/2020

CMS QSO-20-25-NH, re 2019 Novel Coronavirus (COVID-19) Long-Term Care Facility Transfer Scenarios

CMS is waiving requirements in 42 CFR 483.10(c)(5); 483.15(c)(3), (c)(4)(ii), (c)(5)(i) and (iv), (c)(9), and (d); and § 483.21(a)(1)(i), (a)(2)(i), and (b) (2)(i) (with some exceptions) to allow a long term care (LTC) facility to transfer or discharge residents to another LTC facility solely for the cohorting purposes: transferring residents with symptoms of a respiratory infection or confirmed diagnosis of COVID-19 to another facility that agrees to accept each specific resident, and is dedicated to the care of such residents; transferring residents without symptoms of a respiratory infection or confirmed to not have COVID-19 to another facility that agrees to accept each specific resident, and is dedicated to the care of such residents to

prevent them from acquiring COVID-19; or transferring residents without symptoms of a respiratory infection to another facility that agrees to accept each specific resident to observe for any signs or symptoms of a respiratory infection over 14 days.

04/19/2020

CMS QSO-20-26-NH, re “Upcoming Requirements for Notification of Confirmed COVID-19 (or COVID-19 Persons under Investigation) Among Residents and Staff in Nursing Homes”

Facility Reporting

Current requirements at 42 CFR 483.80 and CDC guidance specify that nursing homes notify State or Local health department about residents or staff with suspected or confirmed COVID-19, residents with severe respiratory infection resulting in hospitalization or death, or ≥ 3 residents or staff with new-onset respiratory symptoms within 72 hours of each other. At present, these data are not collected by CMS, CDC, or the Federal Emergency Management Agency (FEMA). CMS and CDC will soon provide nursing homes with specific direction on standard formatting and frequency for reporting this information through the CDC’s National Health Safety Network (NHSN) system. Currently, this information is provided optionally by nursing homes. The required collection of this information will be used to support surveillance of COVID-19 locally and nationally, monitor trends in infection rates, and inform public health policies and actions. This information may be retained and publicly reported in accordance with law.

Resident and Resident Representative Reporting In addition to requiring reporting to CDC, *in rulemaking that will follow*, we will also be requiring that facilities notify its residents and their representatives to keep them informed of the conditions inside the facility.

In rulemaking that will follow this memorandum, failure to report resident or

		staff incidences of communicable disease or infection, including confirmed COVID-19 cases (or Persons Under Investigation for COVID-19), or provide timely notification to residents and their representatives of these incidences, as required, could result in an enforcement action against the nursing home by CMS.
04/24/2020	CMS QSO-20-28-NH, re “Nursing Home Five Star Quality Rating System updates, Nursing Home Staff Counts, and Frequently Asked Questions”	Is a negative test for COVID-19 (SARS-CoV-2) required before a hospitalized patient can be discharged to a nursing home? A: No. For patients hospitalized with COVID-19, decisions about discharge from the hospital should be based on their clinical status, the ability of the accepting facility to meet their care needs and the infection control requirements specified below. Decisions about hospital discharge are distinct from decisions about discontinuation of Transmission-Based Precautions. (Additional guidance follows.)
05/06/2020	CMS QSO-20-29-NH , re “Interim Final Rule Updating Requirements for Notification of Confirmed and Suspected COVID-19 Cases Among Residents and Staff in Nursing Homes”	On May 8, 2020, CMS will publish an interim final rule with comment period: COVID-19 Reporting Requirements: CMS is requiring nursing homes to report COVID-19 facility data to the Centers for Disease Control and Prevention (CDC) and to residents, their representatives, and families of residents in facilities.
05/18/2020	CMS CMS QSO-20-30-NH, “ Nursing Home Reopening Recommendations for State and Local Officials ”	Recommendations for State and Local Officials: CMS is providing recommendations to help determine the level of mitigation needed to prevent the transmission of COVID-19 in nursing homes. The recommendations cover the following items: <ul style="list-style-type: none"> o Criteria for relaxing certain restrictions and mitigating the risk of resurgence: Factors to inform decisions for relaxing nursing home restrictions through a phased approach. o

06/01/2020

CMS QSO-20-31-All
REVISED re

[“COVID-19 Survey Activities, CARES Act Funding, Enhanced Enforcement for Infection Control deficiencies, and Quality Improvement Activities in Nursing Homes”](#)

Visitation and Service Considerations:
Considerations allowing visitation and services in each phase. o Restoration of Survey Activities: Recommendations for restarting certain surveys in each phase.

- CMS has implemented a new COVID-19 reporting requirement for nursing homes, and is partnering with CDC’s robust federal disease surveillance system to quickly identify problem areas and inform future infection control actions.
- Following the March 6, 2020 survey prioritization, CMS has relied on State Survey Agencies to perform Focused Infection Control surveys of nursing homes across the country. We are now initiating a performance-based funding requirement tied to the Coronavirus Aid, Relief and Economic Security (CARES) Act supplemental grants for State Survey Agencies. Further, we are providing guidance for the limited resumption of routine survey activities.

CMS has revised the criteria requiring states to conduct focused infection control surveys due to the increased availability of resources for the testing of residents and staff and factors related to the quality of care.

CMS is providing Frequently Asked Questions related to health, emergency preparedness and life-safety code surveys.

CMS is also enhancing the penalties for noncompliance with infection control to provide greater accountability and consequence for failures to meet these basic requirements.

06/04/2020

CMS QSO 20-32-NH,
re [“Release of COVID-19 Nursing Home Data”](#)

Nursing Home COVID-19 Information: CMS will post COVID-19 data submitted by facilities via the Centers for Disease Control and Prevention (CDC) National Healthcare Safety Network (NHSN). The information will

		also be available at https://data.cms.gov/Covid19-nursing-home-data .
06/04/2020	CMS QSO 20-33-NH, dated " Posting of Nursing Home Inspections "	Nursing Home Inspections: CMS will post health inspection (i.e., surveys) results that were conducted on or after March 4th, 2020, which is the first date that CMS altered the way that inspections are scheduled and conducted. This includes inspections related to complaints and facility-reported incidents (FRIs) that were triaged at the Immediate Jeopardy (IJ) level, and the streamlined Infection Control inspection process that was developed based on the guidance for preventing the spread of COVID-19. • The information will be available in the "Spotlight" section of the Nursing Home Compare home page on June 4th, 2020.
06/25/2020	CMS QSO 20-34-NH, " Changes to Staffing Information and Quality Measures Posted on the Nursing Home Compare Website and Five Star Quality Rating System due to the COVID-19 Public Health Emergency "	Changes to the Nursing Home Compare Website and Five Star Quality Rating System: • Staffing Measures and Ratings Domain: On July 29, 2020, Staffing measures and star ratings will be held constant, and based on data submitted for Calendar Quarter 4 2019. o Also, CMS is ending the waiver of the requirement for nursing homes to submit staffing data through the Payroll-Based Journal System. Nursing homes must submit data for Calendar Quarter 2 by August 14, 2020. • Quality Measures: On July 29, 2020, quality measures based on a data collection period ending December 31, 2019 will be held constant.
07/09/2020	CMS QSO-20-28-NH REVISED re: " Nursing Home Five Star Quality Rating System updates, Nursing Home Staff Counts,	• Nursing Home Compare website & Nursing Home Five Star Quality Rating System: We are announcing that the inspection domain will be held constant temporarily due to the prioritization and suspension of certain surveys, to ensure the rating system reflects fair information for consumers. • Posting of

[Frequently Asked Questions, and Access to Ombudsman \(REVISED\)](#)”

surveys: CMS will post a list of the surveys conducted after the prioritization of certain surveys, and their findings, through a link on the Nursing Home Compare website. •

Nursing Home Staff: CMS is publishing a list of the average number of nursing and total staff that work onsite in each nursing home, each day. This information can be used to help direct adequate personal protective equipment (PPE) and testing to nursing homes. • Access to Ombudsman: We are reminding facilities that providing ombudsman access to residents is required per 42 CFR § 483.10(f)(4)(i) and per the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). • Frequently Asked Questions (FAQ): We are releasing a list of FAQs to clarify certain actions we have taken related to visitation, surveys, waivers, and other guidance.

08/17/2020

CMS QSO-20-35-ALL, dated [“Enforcement Cases Held during the Prioritization Period and Revised Survey Prioritization”](#)”

• CMS is revising guidance on the expansion of survey activities to authorize onsite revisits and other survey types. • CMS is providing guidance to State Survey Agencies (SAs) on resolving enforcement cases: CMS is providing guidance on resolving enforcement cases that were previously directed to be held, and providing guidance on Civil Money Penalty (CMP) collection. • Expanded Desk Review Authority: CMS is temporarily expanding the desk review policy to include review of continuing noncompliance following removal of Immediate Jeopardy (IJ), which would otherwise have required an onsite revisit from March 23, 2020, through May 31, 2020. • CMS is also issuing updated guidance for the re-prioritization of routine SA Clinical Laboratory Improvement Amendments (CLIA) survey activities, subject to the SA’s discretion, in addition to lifting the restriction on processing CLIA enforcement actions, and issuing the

08/26/2020

CMS QSO-20-38-NH re [“Interim Final Rule \(IFC\), CMS-3401-IFC, Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency related to Long-Term Care \(LTC\) Facility Testing Requirements and Revised COVID-19 Focused Survey Tool”](#)

Statement of Deficiencies and Plan of Correction (Form CMS-2567).

• On August 25, 2020, CMS published an interim final rule with comment period (IFC). This rule establishes Long-Term Care (LTC) Facility Testing Requirements for Staff and Residents. Specifically, facilities are required to test residents and staff, including individuals providing services under arrangement and volunteers, for COVID-19 based on parameters set forth by the HHS Secretary. This memorandum provides guidance for facilities to meet the new requirements. • Revised COVID-19 Focused Survey Tool -To assess compliance with the new testing requirements, CMS has revised the survey tool for surveyors. We are also adding to the survey process the assessment of compliance with the requirements for facilities to designate one or more individual(s) as the infection preventionist(s) (IPs) who are responsible for the facility's infection prevention and control program (IPCP) at 42 CFR § 483.80(b). In addition, we are making a number of revisions to the survey tool to reflect other COVID-19 guidance updates.

08/26/2020

CMS QSO-20-37-CLIA,NH re [“Interim Final Rule \(IFC\), CMS-3401-IFC, Updating Requirements for Reporting of SARS-CoV-2 Test Results by \(CLIA\) of 1988 Laboratories, and Additional Policy and Regulatory Revisions in Response to the](#)

• On August 25, 2020, an interim final rule with comment period (IFC) went on display at the Federal Register. • CLIA regulations have been updated to require all laboratories to report SARS-CoV-2 test results in a standardized format and at a frequency specified by the Secretary. • Failure to report SARS-CoV-2 test results will result in a condition level violation of the CLIA regulation and may result the imposition of a Civil Money Penalty (CMP) as required under §§ 493.1804 and 493.1834. • Long-Term Care (LTC) Enforcement requirements at 42 CFR part 488 have been revised to include requirements specific to the imposition of a

[COVID-19 Public Health Emergency](#)”

CMP for nursing homes that fail to report requisite COVID-19 related data to the Centers for Disease Control and Prevention (CDC) National Healthcare Safety Network (NHSN) per §483.80(g)(1) and (2). • LTC Facility Testing Requirements for Staff and Residents- Facilities are required to test staff and to offer testing to all nursing home residents.

09/17/2020

CMS QSO-20-39, re [“Nursing Home Visitation - COVID-19”](#)

• Visitation Guidance: CMS is issuing new guidance for visitation in nursing homes during the COVID-19 PHE. The guidance below provides reasonable ways a nursing home can safely facilitate in-person visitation to address the psychosocial needs of residents. • Use of Civil Money Penalty (CMP) Funds: CMS will now approve the use of CMP funds to purchase tents for outdoor visitation and/or clear dividers (e.g., Plexiglas or similar products) to create physical barriers to reduce the risk of transmission during in-person visits.

10/05/2020

CMS QSO-21-02-NH re [“Compliance with Residents’ Rights Requirement related to Nursing Home Residents’ Right to Vote”](#)

• The Centers for Medicare & Medicaid Services (CMS) is affirming the continued right of nursing home residents to exercise their right to vote. • While the COVID-19 Public Health Emergency has resulted in limitations for visitors to enter the facility to assist residents, nursing homes must still ensure residents are able to exercise their Constitutional right to vote. • States, localities, and nursing home owners and administrators are encouraged to collaborate to ensure a resident’s right to vote is not impeded.

Appendix III: COVID-Era Sub-Regulatory Guidance (cont'd)

B. New York State Department of Health

03/6/2020	“Visitor Signage for Posting at Nursing Homes”	Sign states, “ATTENTION ALL VISITORS DO NOT VISIT if you have fever, shortness of breath, cough, nasal congestion, runny nose, sore throat, nausea, vomiting and/or diarrhea.”
03/8/2020	“Notification Regarding Visitor Restrictions for New Rochelle-Area Nursing Homes and ACFs”	<p>Many asymptomatic individuals can carry COVID-19 (“coronavirus”), and there have been confirmed coronavirus cases in your local community.</p> <p>Effective immediately, to minimize resident exposure, all nursing homes and adult care facilities (ACFs) in the New Rochelle area must suspend all visitation, including by family and other resident guests. Only staff, residents, and staff of the local and State Health Departments should be permitted access to your facility, except in an emergency, through March 22, 2020.</p>
03/11/2020	“Revised COVID-19 Guidance for Nursing Homes”	Provides guidance on preventing exposure to and spread of illness at the nursing home; requires screening, signage addressing visitation restrictions; precautionary or mandatory quarantine, based on symptoms, for staff who have been potentially exposed to someone with confirmed COVID-19, or to someone who is a person under investigation (PUI) for COVID-19 and furlough for 14 days following the exposure; provides guidance for Standard, Droplet and Contact precautions (applicable for the care of all residents) at: https://www.cdc.gov/coronavirus/2019-ncov/healthcare-facilities/prevent-spreadin-long-term-care-facilities.html and procedures for donning/ doffing PPE at: https://www.cdc.gov/hai/pdfs/ppe/ppe-sequence.pdf ; hand hygiene practices and respiratory hygiene/cough etiquette; daily; frequent cleaning and disinfection of

03/13/2020	COVID-19 Cases in Nursing Homes and ACFs	<p>commonly touched environmental surfaces; conservation of PPE, including “administrative controls on the availability of masks by centrally holding and allocating masks to staff as necessary.”</p> <p>Provides guidance to prevent the introduction of COVID-19 into NHs and ACFs, including the immediate suspension of all visitation except when medically necessary (i.e. visitor is essential to the care of the patient or is providing support in imminent end-of-life situations) or for family members of residents in imminent end-of-life situations, and those providing hospice care; the provision of other methods to meet the social and emotional needs of residents, such as video calls; signage notifying the public of the suspension of visitation and proactively notify resident family members; health checks for all healthcare personnel and other facility staff at the beginning of each shift; use of a facemask while within 6 feet of residents. Extended wear of facemasks is allowed; facemasks should be changed when soiled or wet and when HCP go on breaks. Facilities should bundle care and minimize the number of HCP and other staff who enter rooms to reduce the number of personnel requiring facemasks.</p>
03/20/2020	Recommendations to Protect Nursing Home Residents	<p>Recommendations to support resident physical health, including cancellation of communal dining and group activities; restriction of visitors and non-essential health care personnel, except for certain compassionate care situations, such as imminent end-of life situation; allow all provisional employees of nursing homes to work with supervision; implement active health screening every shift, at least every eight hours or as needed of residents and staff for fever and respiratory symptoms; implement health care worker daily alerts;</p>

review and revision of processes for interacting with vendors and others; creating/increasing listserv communication to update families, with staff to serve as the primary contact to families for inbound calls and conducting regular outbound calls to keep families up to date; advising visitors and others entering the nursing home to monitor for signs and symptoms of respiratory infection for at least 14 days after exiting the facility.

03/21/2020

[Respiratory Illness in Nursing Homes](#) and ACFs in Areas of Sustained Community Transmission of COVID-19

Recent testing of residents and healthcare workers (HCWs) of nursing home and adult care facilities in New York City, Long Island, Westchester and Rockland counties has revealed that symptoms of influenza-like illness are very often determined to be COVID-19 in facilities located in areas with sustained community transmission. As a result, ANY febrile acute respiratory illness or clusters of acute respiratory illness (whether febrile or not) in NHs and ACFs in New York City, Long Island, Westchester County, or Rockland County should be presumed to be COVID-19 unless diagnostic testing reveals otherwise. Testing of residents and HCWs with suspect COVID-19 is no longer necessary and should not delay additional infection control actions.

All facilities in areas of the state with sustained community transmission of COVID-19 including New York City, Long Island, Westchester and Rockland with residents who have febrile acute respiratory illness or with clusters of acute respiratory illness should follow the guidance from the NYSDOH advisory issued on March 13, 2020 for COVID-19 Cases in Nursing Homes and Adult Care Facilities in the section entitled “If there are confirmed cases of COVID-19 in a NH or ACF”.

03/25/2020

[Hospital Discharges](#)
and Admissions to
Nursing Homes

NHs and ACFs outside of these areas should continue to pursue testing of residents and HCWs with suspect COVID-19 to inform control strategies.

COVID-19 has been detected in multiple communities throughout New York State. There is an urgent need to expand hospital capacity in New York State to be able to meet the demand for patients with COVID-19 requiring acute care. As a result, this directive is being issued to clarify expectations for nursing homes (NHs) receiving residents returning from hospitalization and for NHs accepting new admissions.

Hospital discharge planning staff and NHs should carefully review this guidance with all staff directly involved in resident admission, transfer, and discharges.

During this global health emergency, all NHs must comply with the expedited receipt of residents returning from hospitals to NHs. Residents are deemed appropriate for return to a NH upon a determination by the hospital physician or designee that the resident is medically stable for return.

Hospital discharge planners must confirm to the NH, by telephone, that the resident is medically stable for discharge. Comprehensive discharge instructions must be provided by the hospital prior to the transport of a resident to the NH.

No resident shall be denied re-admission or admission to the NH solely based on a confirmed or suspected diagnosis of COVID-19. NHs are prohibited from requiring a hospitalized resident who is determined medically stable to be tested for COVID-19 prior to admission or readmission.

03/26/2020	March 26th COVID-19 Infection Control Guidance for Nursing Homes and ACFs Webinar Slides	Powerpoint presentation.
03/31/2020	Updated Protocols for Personnel in Healthcare and Other Direct Care Settings to Return to Work Following COVID-19 Exposure or Infection (Nursing Homes Only – Superseded by July 24th Guidance for Other Settings/Services)	<p>This advisory supersedes guidance from the New York State Department of Health to Hospitals, Nursing Homes (NHs) and Adult Care Facilities (ACFs) pertaining to the COVID-19 outbreak, released on March 16, 2020, and further clarifies the updated guidance issued on March 28, 2020.</p> <p>Provides guidance to circumstances under which entities may allow healthcare personnel (HCP) to work after exposure to confirmed or suspected case of COVID-19, or who have traveled internationally in the past 14 days, whether healthcare providers or other facility staff.</p>
04/03/2020	COVID-19 Guidance for Inpatient, Rehabilitation, and Skilled Nursing Facilities and Other Health Care Providers on Suspension of Health Plan Utilization Review Requirements	
04/04/2020	“Guidance for Resident and Family Communication in ACFs and Nursing Homes”	Strongly encourages the implementation of a communication protocol for both residents and their families, loved ones, and guardians unable to visit the resident during the COVID-19 pandemic and offers best practices to consider.
04/04/2020	“In Response to COVID-19, CMS Has Released 1135 Waivers to Address an Adequate Supply	Provides guidance and recommendations relating to CMS’s temporary waiver of nurse aide training and certification requirements to assist with potential staffing challenges during the COVID-19 pandemic.

	of Workforce Staff and Facilities”	
04/11/2020	“Nursing Home COVID-19 Preparedness Self-Assessment Checklist”	
04/19/2020	DAL: BFD 20-04, Updated COVID-19 Guidance for Health Care Facilities Regarding Management of Decedent Personal Effects	In response to multiple inquiries regarding the management of decedent personal effects during the COVID-19 public health emergency, the NYS Department of Health (the Department) Bureau of Funeral Directing is distributing the following guidance from the Office of the Chief Medical Examiner’s (OCME) Biological Incident Fatality Surge Plan for Managing In- and Out-of-Hospital Deaths, to assist health care facilities in New York City (NYC).
04/19/2020	“ Discontinuation of Isolation for Patients with COVID-19 Who Are Hospitalized or in Nursing Homes, Adult Care Homes, or Other Congregate Settings with Vulnerable Residents”	Provides guidance on the discontinuation of isolation for patients with COVID-19 when they meet the specified conditions. <ul style="list-style-type: none"> •
04/19/2020,	CPSO DAL 20-01 “ Guidance for Nursing Homes on Managing Resident Deaths During the COVID-19 Outbreak”	Due to the COVID-19 public health emergency, the New York State Department of Health (DOH) is distributing the following guidance to assist nursing homes in processing the removal of decedents. This guidance is intended for nursing homes that may be experiencing an increase in resident deaths, as well as nursing homes that may be relying upon new staff to perform this sensitive responsibility.
04/19/2020,	DAL 20-01, Guidance for Resident and Family	Provides guidance and offers “best practices” on innovative ways to keep residents connected to their families and communities.

[Communication in ACFs and Nursing Homes](#)

04/29/2020

[Infection Control and Cohorting Requirements](#)

This letter is intended to serve as a reminder of facility obligations under the Public Health Law and regulations to ensure that all residents receive the care they need. Specifically, pursuant to 10 NYCRR section 415.26, nursing homes must only accept and retain those residents for whom the facility can provide adequate care.

04/29/2020

[Extension of COVID-Related Work Exclusion Period for Nursing Home Staff](#)

On March 16, 2020, the Centers for Disease Control and Prevention (CDC) issued guidance to address employees of healthcare facilities, including nursing homes, suspected of or confirmed to be positive for the COVID-19 virus (Criteria for Return to Work for Healthcare Personnel with Confirmed or Suspected COVID-19 (Interim Guidance)). Under the CDC guidance workers could return to work at a nursing home: "At least 3 days (72 hours) have passed since recovery defined as resolution of fever without the use of fever-reducing medications and improvement in respiratory symptoms (e.g., cough, shortness of breath); and, At least 7 days have passed since symptoms first appeared." The CDC updated their guidance to address asymptomatic workers thereafter.

New York State Department of Health's guidance mirrored the CDC's position – however, going forward we will no longer adhere to CDC's standard on this issue, and will instead require that nursing home employees who test positive for COVID-19 but remained asymptomatic are not eligible to return to work for 14 days from first positive test date in any situation and will no longer adhere to the shorter CDC timeframe. Symptomatic nursing home employees may

not return to work until 14 days after the onset of symptoms, provided at least 3 days (72 hours) have passed since resolution of fever without the use of fever-reducing medications and respiratory symptoms are improving.

For those nursing homes facing staffing difficulties the State of New York has established an online portal that currently includes more than 95,000 healthcare workers across New York State and nation. Four hundred nursing homes have been invited to access the portal, and more than 200 have used the portal to date. Many nursing homes are also working with partner organizations, like SEIU-1199, to recruit staff from the portal. We have also provided 400 nursing homes the opportunity to access for free the full recruiting tools of Indeed, the world's largest job search engine, which has identified 1,500 nurses who immediately available to work in New York State. If your nursing home needs additional assistance, please contact CovidStaffingPortal@exec.ny.gov or call 518-474-2012.

05/06/2020

["Pediatric Multi-System Inflammatory Syndrome Potentially Associated with COVID-19 in Children"](#)

The purpose of this health advisory is to (1) ensure providers are aware of the pediatric multi-system inflammatory syndrome potentially associated with COVID-19 and (2) provide guidance on reporting of cases to NYS DOH and testing of patients who present with this disease.

05/11/2020

["Hospital Discharges and Admissions to Nursing Homes and ACFs \(Addendum to May 11th DAL - Required COVID-19 Testing for All Nursing"](#)

This Directive supplements the prior Department of Health Advisory concerning hospital discharges to nursing homes (NHs) and adult care facilities (ACFs), as well as the DAL sent on April 29, 2020.

To this end, hospital discharge planners must confirm to the facility to which the patient is being discharged (whether NH or

Home and ACF Personnel)”

ACF), by telephone, that the resident is medically stable for discharge. Comprehensive discharge instructions must be provided by the hospital prior to the transport of a resident to the NH or ACF, and all discharge planning requirements must be followed.

In accordance with 10 NYCRR 415.26, NHs must only accept and retain those residents for whom the facility can provide adequate care. ACFs have an obligation to provide care to residents and ensure their life, health, safety and welfare are protected, pursuant to Social Services Law § 461-c(2-a) and 18 NYCRR 487.7 and 488.7. Therefore, no hospital shall discharge a patient to a NH or ACF unless the facility administrator has first certified that they are able to provide that patient with adequate care. In addition, hospitals must test any patient who may be discharged to a NH or ACF for COVID-19, using a molecular test for SARS-Cov-2 RNA. No hospital shall discharge a patient who has been diagnosed with COVID-19 to a NH or ACF, until that patient has received one negative test result using such testing method.

If a NH or ACF is not able to provide adequate care to a resident at any time during that resident’s stay, the NH or ACF must call their respective regional office of the Department of Health to provide necessary information and assist with any relocation needs, including but not limited to assistance with arranging transportation to an alternate facility that can provide adequate care for the resident.

However, with the exception of patients of hospitals who have not yet tested negative, a NH or ACF cannot deny admission of a

		<u>resident based solely on a resident's COVID-19 diagnosis.</u>
05/11/2020	“Required COVID-19 Testing for All Nursing Home and Adult Care Facility Personnel”	Provides guidance on EO 202.30, which requires periodic COVID-19 testing of all personnel in nursing homes and adult care facilities. This DAL explains the requirements of the Executive Order and provides additional direction and guidance on how to implement its requirements.
05/12/2020	“Nursing Home and ACF Staff Testing Requirement FAQ #1 – May 12, 2020”	
05/13/2020	Nursing Home Cohorting FAQs	Provides guidance on resident cohorting.
05/19/2020	“Nursing Home and ACF Staff Testing Requirement FAQ Update – May 19, 2020 (Superseded by June 24, 2020 Update)”	
05/19/2020,	“DOH Issues FAQ on “Cohorting” of Residents”	Nursing home members encouraged to review and operationalize guidance.
06/24/2020	“Nursing Home and ACF Staff Testing Requirement FAQ Update – June 24, 2020”	
07/10/2020	“COVID-19 Cases in Nursing Homes and ACFs (Revised July 10, 2020)”	
07/17/2020	“Civil Monetary Penalty Reinvestment Funds:	

	Communication Devices”	
07/17/2020	“Notification of Non-emergent Resident Transfers to the Hospital and SNFs”	
07/20/2020	“Civil Monetary Penalty Reinvestment Funds Available to Nursing Homes”	Grant awards would aid in purchasing devices for resident communication.
07/20/2020	“DOH Issues Guidance on Resident Transfers”	DOH requires notification prior to certain nursing home transfers.
07/20/2020	“DOH Issues Guidance on Resident Transfers”	DOH requires notification prior to certain nursing home transfers.
08/20/2020,	“Required Annual Pandemic Emergency Plan for All Nursing Homes”	
09/01/2020	“Amended PPE Requirements for Nursing Homes”	

Appendix III: COVID-Era Sub-Regulatory Guidance (cont'd)

C. Office of Mental Health

Date	Title	Addressee(s)	Summary/important points
03/10/2020	Interim Guidance for Cleaning and Disinfection of Public and Private Facilities for COVID-19 (Note: NYSDOH Guidance)	Unspecified.	How to perform cleaning and disinfection in “high risk locations,” in public and private facilities.
03/11/2020	Guidance for NYS Behavioral Health Programs (funded, operated, licensed, regulated, or designated providers) (Note: This guidance was referenced in the Consolidated Telemental Health Guidance issued 3/30/2020).	Unspecified.	This guidance is based on CDC and NYSDOH guidelines for COVID-19 infection prevention and control and management of Persons Under Investigation (“PUI”). Outlines screening protocol for patients (international travel, contact with people suspected or confirmed of COVID-19, whether they are currently exhibiting COVID-19 symptoms such as cough, fever, sore throat, or shortness of breath) and what to do when patients do not clear the screening process. Outlines the visitation process for any program setting (pre-screening process and procedure for handling visitors who do not clear the screening process, unscheduled visitation procedures, etc.)
03/13/2020	Provider Memo – Maintaining Continuity of	Unspecified.	Encourage all providers to develop or revise their continuity of operations plans in light of COVID-19, particularly considering the ability of individuals to

[Operations Plans and Reporting Disruptions in Services](#)

03/14/2020

COVID-19 Guidance for Health Homes

(Note: NYSDOH Guidance)

Medicaid Health Homes Serving Adults and Children, Care Coordination Organization/ Health Homes and Care Management Agencies

obtain medications, access to mental health and substance use disorder treatment, and access to other required services.

Face-to-face requirements for Health Home providers are temporarily waived until rescinded by the NYSDOH, unless medically necessary. Instead, Health Home providers may use telehealth services.

In the event of face-to-face visits, members must be screened for COVID-19 symptoms (fever, cough, shortness of breath), their travel or their close contacts' travel outside of the United States in the last 14 days, their contact within the last 14 days with people with suspected or confirmed COVID-19. If the member screens positive, they should be referred to the appropriate medical personnel. If the member screens negative, the face-to-face visit may continue.

Agencies should implement policies to screen staff for COVID-19 symptoms and contacts before face-to-face visits with members. Staff who are ill upon screening should be sent home and should either contact their primary care physician or seek immediate care, if necessary. Staff with symptoms of illness should not return to work until they have completely recovered. Agencies must strictly enforce their illness and sick leave policies. Staff with suspected or confirmed COVID-19 exposure may be placed under movement restrictions by public health officials.

03/14/2020	OMH Psychiatric Center Visitor Restriction Guidance (Visitor, volunteer, and student restrictions at Psychiatric Centers)	Facility Directors, Clinical Directors, Chief Nursing Officers	<p>Effective immediately, all visitors to adults in Psychiatric Center civil and forensic inpatient units, as well as all students and volunteers who have no clinical responsibilities, are restricted. This does not apply to children and adolescents living in Psychiatric Center inpatient units, who may have visitors who are subject to previously issued screening protocols. Staff must notify families of staff of these restrictions as soon as possible. Psychiatric Centers must identify protocols for exceptions to these restrictions.</p> <p>Psychiatric Centers “must ensure that patients have easily available means to stay in contact with family and others. This includes ready access to phones, either through cellular or land lines. Additionally, patients who are deemed appropriate for the use of internet social media accounts should have the means to access them as needed. Every inpatient unit must identify multiple ways for patients to communicate.”</p> <p>These restrictions do not apply to residential care units on Psychiatric Center grounds.</p>
03/18/2020	Addendum OMH Psychiatric Visitor Volunteer Restrictions (addendum to visitor, volunteer, and student restrictions at Psychiatric Centers with	Child and Adolescent Inpatient Program Facility Directors, Clinical Directors, Chief Nursing Officers	Limits visitors to children and adolescents on inpatient units to “only those who are essential to the care and wellbeing of the patient.” Visitors who are approved must be screened, limited to no more than two at a time, and must be educated about infection control and mitigation precautions. Social distancing measures must be implemented in visiting spaces and visiting spaces must be cleaned and disinfected in between visits. As stated above, psychiatric centers must ensure multiple, easily

	focus on visitors to child and adolescent patients)		accessible methods of communication, including access to social media accounts when appropriate.
03/20/2020	Admissions and Continuity of Care Advisory	Unspecified.	<p>The State expanded the definition of “telemental health,” allowing essentially all staff in OMH licensed, funded, and designated programs and services to provide service using telemental health. This includes a waiver of the in-person initial assessment requirement in 14 NYCRR Part 596.6(b)(1), which can now be completed via telemental health during the COVID-19 emergency.</p> <p>Housing providers should screen and accept new admissions where there are vacancies to support the discharge of individuals from more intensive facilities.</p> <p>Allowed verbal consent for admissions and treatment/service plans and waived face-to-face requirements for behavioral health services. Ability to provide face-to-face services should be maintained for when it is safe and necessary to do so.</p>
03/20/2020	Essential Business Letter	Unspecified.	<p>OMH authorized, operated, licensed, designated, or funded service providers are essential businesses that are exempt from the in-person workplace restrictions imposed on businesses and nonprofit entities by Governor Cuomo’s Executive Order 202.7 (effective March 21, 2020 at 8:00 p.m.), and should therefore remain operational to provide mental health services for those under its care and custody, including administrative offices and employees performing essential agency functions.</p>

03/25/2020	Frequently Asked Questions from Supportive Housing Providers Re: COVID-19	Not-For-Profit Supportive Housing Providers	Provides answers to questions regarding: state contract requirements; resident screening protocols; quarantine protocol for single room occupancy (“SRO”) residents; provision of personal protective equipment (“PPE”); screening visitors; telemental health guidance; sending clients for testing; cleaning supplies
03/30/2020	OMH COVID-19 Consolidated Telemental Health Guidance (Use of Telephone and Two-way Video Technology by OMH-Licensed, Funded or Designated Providers and Clients Affected by the COVID-19 Pandemic)	Unspecified.	Applies to OMH licensed, funded, or approved programs/agencies. Includes expanded definitions for the terms “telemental health” and “telemental health practitioner” (section 4), billing modifiers (section 5), guidance for service delivery and billing for OMH-licensed programs and OMH-designated services (section 6), OMH-licensed or funded residential programs (section 7), service delivery for OMH-funded programs (section 8), Comprehensive Psychiatric Emergency Programs (“CPEP”) and Inpatient Programs (section 9), guidance for the prescription of controlled substances (section 10), and consent for treatment and client signatures on treatment plans.
03/30/2020	Self-Attestation of Compliance to Offer Telemental Health Services	Unspecified.	Must certify: “1. That the practitioner(s) will possess a current and valid license, permit, limited permit or other credential to the extent required in NYS to deliver the service. 2. That transmission linkages on which Telemental Health Services will be performed, will be dedicated, secure, and meet minimum federal and NYS requirements.

3. That confidentiality will be maintained as required by New York State Mental Hygiene Law Section 33.13 and 45 CFR Parts 160 and 164 (HIPAA Privacy Rules). (HIPAA confidentiality requirements have been relaxed to permit service delivery via telehealth. NYS confidentiality requirements found in MHL 33.13 remain in effect and apply to all programs and services regulated by OMH, but do not prohibit service delivery via telehealth.)

4. That claim modifiers “95” or “GT” will be used on each claim line that represents a service via telemental health.

5. An understanding that this approval is time-limited and effective only during the disaster emergency, and once the disaster emergency has ended the formal approval process will go back into effect.”

04/17/2020	Interim Background Check (Guidance for Implementation of Executive Order 202.13 Provisions Regarding Background Checks)	Unspecified.	<p>Modifies background check process for OMH licensed, funded, or approved programs. The purpose of the guidance is to respond to staff shortages, but any OMH provider can still maintain the standard background check process.</p> <p><u>Staff Members Currently Employed by an OMH Provider:</u></p> <p>Current OMH employees may bypass a new Criminal Background Check, Staff Exclusion Check, or Statewide Central Register Check. Authorized programs must complete the Executive Order (“EO”) 202.13 Criminal Background Check Request form for the prospective employee and send this form to OMH. OMH will then send this form to the Justice Center, who will review the</p>
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information and advise OMH (within one business day unless additional information is requested) about whether the individual may be hired under EO 202.13. If they are not hired under EO 202.13, they should be treated as a new staff member (see below). After hearing from the Justice Center, OMH must communicate the decision within 24 hours to the authorized program via phone or email. Employees who continue to work in the authorized program on a regular basis will be required to complete an updated criminal background check as soon as practicable.

Staff Members Currently Employed by a Provider of Another State Oversight Agency:

Current employees of Office of Addiction Services and Supports (“OASAS”) certified, funded, or authorized programs, Office for People with Developmental Disabilities (“OPWDD”) or their approved providers, or Office of Children and Family Services (“OCFS”) operated, licensed, or certified programs may bypass a new Criminal Background Check, Staff Exclusion Check, or Statewide Central Register Check. These providers should follow the process outlined above, and regular employees are also subject to an updated criminal background check.

New Staff Members Not Otherwise Employed by an Approved Provider
(those who have not completed a background check)

These employees may work unsupervised as long as they do not appear on the Staff Exclusion List and

04/19/2020

[Discontinuation of Isolation for Patients with COVID-19 Who Are Hospitalized or in Nursing Homes, Adult Care Homes, or Other Congregate Settings with Vulnerable Residents](#)

(Note: NYSDOH Guidance)

Hospitals, Nursing Homes, Adult Care Homes, and Other Congregate Settings Where Populations Vulnerable to COVID-19 Reside

have completed the Executive Order 202.13 Criminal History Information Attestation form. Unsupervised contact should be limited as much as possible. Article 23-A of the NYS Correction Law will be considered in the hiring process. These employees are still required to complete all other pre-employment checks.

The NYSDOH suggests two testing strategies.

The Non-Test-Based Strategy:

Requires individuals to meet three criteria:

1. At least 72 hours have passed since recovery (e.g., no temperature greater than or equal to 100.0 without the use of fever-reducing medication);
2. Improvement of respiratory symptoms (e.g., cough, shortness of breath); and
3. At least 14 days have passed since the onset of COVID-19 symptoms.

Patients who meet these criteria but remain symptomatic should be placed in their own rooms or be cohorted with other recovering residents of confirmed COVID-19. These patients must remain in their rooms and wear a facemask when caregivers enter their rooms.

The test-based strategy (recommended for severely immunocompromised people):

To discontinue isolation, patients must meet three criteria:

1. They must not have a fever without the use of fever-reducing medication (time is not specified);

2. Their respiratory symptoms must have improved; and

3. They must have two negative test results that are taken at least 24 hours apart.

For patients who were asymptomatic at the time of their first positive test and continue to be asymptomatic, evaluation for discontinuation of isolation may begin 7 days after the first positive test.

04/20/2020	Effective Date of OMH COVID-19 Disaster Emergency Telemental Health and Program Guidance	Unspecified.	<p>The effective date for COVID-19-related disaster emergency relief issued by OMH is March 7, 2020.</p> <p>All telemental health and program, documentation, and billing guidance discussed may be operationalized retroactive to March 7, 2020.</p>
04/21/2020	Incident Reporting and NIMRS Updates	NYS Article 31 Mental Health Provider Agencies; NYS Article 28 Hospital Provider Facilities; OMH-Operated Psychiatric Center Executive Directors, Quality and Risk Management Directors	<p>New York State Incident Management and Reporting System (NIMRS) has been updated to include a new subtype (“COVID-19 Related”) when reporting client deaths which can be attributed to, or are suspected to be related to, COVID-19. This only applies to deaths that occurred since March 1, 2020 (this subtype cannot be used for deaths that occurred prior to March 1, 2020). Incident reports that are closed should be reopened and amended as necessary.</p> <p>OMH is not requiring providers to report suspected or confirmed COVID-19 cases.</p> <p>Providers should adhere to 14 NYCRR Part 524 regulations for all incident reporting requirements.</p>

04/26/2020	DOH COVID-19 Revised Testing Protocol (Updated Interim Guidance: Protocol for COVID-19 Testing Applicable to All Health Care Providers and Local Health Departments)	Health Care Providers, Health Care Facilities, and Local Health Departments	<p>Testing is authorized by a health care provider when:</p> <ol style="list-style-type: none"> 1. An individual is symptomatic or has a history of symptoms of COVID-19, especially if the individual is 70 years of age or older, is immunocompromised, or has underlying health conditions; 2. An individual had close (within six feet) or proximate contact with another individual who is positive with COVID-19; 3. An individual was under precautionary or mandatory quarantine; 4. An individual is a healthcare worker, first responder, or another essential worker who has direct contact with the public while working; or 5. The facts and circumstances surrounding an individual warrant testing as determined by the treating clinician and state/local department of health officials. <p>Testing prioritization (in accordance with Executive Order 202.19).</p> <ol style="list-style-type: none"> 1. Symptomatic individuals in high-risk populations (people who are immunocompromised, people over 70 years of age, people with underlying health conditions, patients in hospitals, congregate care settings such as nursing homes and long-term care facilities, etc.). 2. Individuals who have had close (within 6 feet) or proximate contact with another individual who is COVID-19 positive. 3. Healthcare workers, first responders, or personnel in nursing
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			homes, long-term care facilities, or other congregate care settings
			4. Essential employees who directly interact with the public while working
05/01/2020	NYS Department of Health Essential Worker COVID-19 Testing	Unspecified.	Poster notifying essential workers to get tested. Includes health care workers, first responders, and workers in any position within a nursing home, long-term care facility, or other congregate care settings and essential employees who directly interact with the public while working.
05/14/2020	OMH PC COVID-19 Screening State PC Admissions Form	Unspecified.	Asks about: <ul style="list-style-type: none"> • Whether the patient was tested for COVID; • For patients with confirmed COVID: fever in the last 72 hours, improvement of respiratory symptoms, 14 days since symptoms first appeared, follow up negative test if tested; • Direct contact with a person suspected or confirmed with COVID-19; • If patient (in the last 72 hours) experienced a fever, respiratory and other symptoms (such as cough, headaches, sore throat, etc) and whether they have comorbidities; • Date(s) of COVID-19 virus diagnostic PCR test if patient was transferred from an article 28/31 hospital inpatient settings to a state psychiatric center.
06/05/2020	Temporary Amendment to OMH Part 524 Deadlines	NYS Article 31 Mental Health Provider Agencies; NYS Article	To address staffing shortages, OMH is temporarily waiving certain regulatory provisions within 14 NYCRR Section 524.

		28 Hospital Provider Facilities; OMH-Operated Psychiatric Center Executive Directors, Quality and Risk Management Directors	“Effective June 4, 2020, the 45-day deadline for submission of investigative findings for Allegations of Abuse or Neglect and Significant Incidents, as well as the holding of Incident Review Committee (IRC) meetings, will be temporarily extended to 60 days. This will allow for 15 additional days to submit final reports and organize IRC. This temporary amendment shall expire on July 31, 2020, unless extended or terminated before such date.”
6/5/2020	Updated Treatment Planning and Documentation Standards for Article 28/31 Hospital Psychiatry Providers	NYS Article 28/31 Hospital Psychiatry Providers	<p><u>Mental Health Treatment Standards:</u></p> <p>“During the COVID-19 emergency period, hospital-based mental health programs may modify their inpatient treatment programming as follows:</p> <ol style="list-style-type: none"> 1. Hospital mental health programs should follow their hospital-wide policies regarding visitors. 2. Programs should cancel all therapeutic, rehabilitative, and recreational groups that do not align with physical distancing and other mitigation recommendations. 3. During individual sessions, if in-person, clinicians and patients should remain six feet apart. 4. Patients should be allowed to remain in their rooms during the day and should not be asked to remain in shared settings. Programs should maximize the space patients can occupy while on the unit. 5. Programs should continue to provide and even increase, where feasible, time for outside activities. Patients should be reminded to maintain at least six feet of

distance from all other individuals while outside.”

Prior guidance regarding use of telemental health for removal and retention pursuant to Article 9 of the Mental Hygiene Law remains in effect (evaluations or examinations may be conducted using telemental health and the use of telemental health for Article 9 removals will be considered the equivalent to face-to-face evaluations or examinations for the purposes of meeting statutory requirements).

Prior guidance regarding seclusion and restraint remains in effect (“the requirements in NYCRR 526.4 requiring a physician for the order and the in-person, face-to-face examination of the patient for restraint or seclusion may temporarily be fulfilled by an order and an in-person, face-to-face examination by a licensed nurse practitioner or physician assistant.”

Prior guidance regarding the use of video and telephone technology for treatment of patients remains in effect (telemental health should be used for routine treatment planning on hospital inpatient mental health units”).

Prior guidance modifying documentation requirements and discharge planning is rescinded effective 6/8/2020.

06/25/2020	COVID-19 Infection Control in Reopening Public Mental Health System Sites	NYS Public Mental Health Programs	Aimed at helping programs assess how to resume some in-person services. Encourage providers to follow CDC guidelines on infection control and prevention and post educational materials for patients and staff about social distancing, hand and respiratory
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hygiene, face coverings, cleaning and disinfection, etc.

Infection Control Practices for Outpatient, Support, and Certain Emergency Programs (see guidance for applicable programs and services)

Telemental Health: Encourages utilization of HIPAA and 14 NYCRR 596-compliant telemental health services, but urges that programs maintain capacity for in-person services for individuals who cannot utilize telemental health services or who need in person services. All individuals should be screened for COVID-19 like illnesses at every telemental health appointment and educated about infection control.

Guidance also includes general information for in-person encounters, such as information about screening prior to appointments and protocol for clinical services that are tailored to each region's phase of reopening.

For Phase 1 and 2 regions, this guidance addresses:

Telecommuting/working from home for staff; client screening protocol; whether to take clients' temperatures prior to entering the facility and what to do if a client has a fever of at least 100 degrees Fahrenheit; protocol for providing services (physical distancing, wearing a mask, meeting clients in well-ventilated spaces); face masks or face masks in the facility (all clients should wear a mask or cloth face covering and staff should provide a surgical mask to clients who do not bring a face covering); client accompaniments/escorts; administration of medications that require close

physical contact; cleaning and disinfecting of frequent-contact surfaces and office space; physical distancing in waiting rooms; provision of hand sanitizer; how to safely maintain peer socialization if necessary for clients' well-being.

For Phase 3 and 4 regions, this guidance also notes:

Groups of ten clients or fewer can meet indoors in a large, well-ventilated area for at most an hour if they maintain appropriate social distancing, wear appropriate face coverings, and no participant has COVID-19 like symptoms. Larger groups may meet outdoors if all participants wear appropriate face coverings and maintain social distancing. If COVID-19 infections rise locally, these programs shall be suspended until the number of local infections fall.

Scheduled appointments should be prioritized. Programs that continue drop-in hours should maintain screening procedures and physical distancing in the facility.

Staff who must visit clients in their homes must wear a mask or cloth face covering during the visit, and the client should be educated to wear a cloth face covering. If the client lives with individuals who are at high-risk of COVID-19, staff may consider acceptable alternatives such as taking a walk with the client or having the visit take place outside, if possible. Staff may disengage from the contact if the client or their family members refuse to physically distance.

Other recommendations are included, such as instituting occupancy and physical distancing policies for elevators, tight workspaces, public bathrooms, etc.

Infection Control Practices for Residential and Site-Based Programs
(see guidance for full list of applicable programs)

1. General Guidance for mental health housing programs:

Educate residents on infection control and prevention measures such as encouraging residents to stay in the residence as much as possible, maintaining six feet of distance from others, proper hand and respiratory hygiene, and wearing appropriate masks or cloth face coverings; cancel social or recreational outings where appropriate social distancing cannot be maintained; institute medical appointments via telehealth services; limit all visitation that is not necessary “to the direct support of a resident’s health and wellness” and institute visitor screening protocol; encourage client reporting of COVID-19 like symptoms; etc.

2. Guidance on accepting new clients including screening protocol; accepting clients from Article 28 or Article 31 inpatient settings (“may require a negative COVID-19 diagnostic PCR test within 72 hours prior to transfer. Programs may require the test result to be sent prior to transfer”); how to handle clients who previously tested positive for COVID-19; what facilities may not require as a condition of admission (“programs may not require a negative test result for clients coming from non-inpatient hospital settings” and

“programs may not require results of serum antibody tests as a condition of admission”); and isolation of new clients.

3. Guidance on responding to clients who develop symptoms including isolation, meal provision, bathroom designation, staff support, notification to local health department and how to obtain testing, when to transport clients to the hospital, how to handle other clients who are high risk (older age and who have comorbidities), cleaning and disinfection, etc.

4. Guidance on responding to clients who are returning from the hospital.

5. Guidance for Scattered-Site Programs including visitation, cleaning and disinfection, physical distancing, telehealth to replace face-to-face visitation, proper staff protocol when face-to-face visits are necessary, etc.

6. Guidance for Child and Youth Serving Residential Programs for when home-time leave is appropriate.

Infection Control Practices for Programs Based in Article 28 Hospitals

Follow the policies and protocols of hospital’s infection control departments.

Infection Control Practices for Article 31 Private Psychiatric Inpatient Hospitals

Contact local OMH Field Office to discuss infection control concerns.

Infection Control Best Practices During Non-Emergent Transportation (applies to all programs)

Includes appropriate face coverings for staff and clients, preference for larger vehicles to increase distance between

staff and client, keeping windows open for ventilation purposes, cleaning and disinfection of the vehicle, provision of hand sanitizer with at least 60% alcohol, how to transport clients with confirmed or suspected COVID-19 (when it is unavoidable).

Guidance for Staff (applies to all programs)

Includes staying home when sick; wearing face coverings while at the facility; in the event of staffing shortages, when staff who have had direct contact with suspected or confirmed cases of COVID-19 may continue to work (lists 14 conditions); when symptomatic or COVID-19 positive staff can return to work; when to notify clients that they had prolonged contact with staff and need to be quarantined for 14 days, and providing the local health department with the names and contact information of staff who are suspected or confirmed with COVID-19.

06/30/2020 [OMH-OASAS Ambulatory and Residential Program COVID-19 Testing, Record Keeping, and Notification Instructions](#) Unspecified.

Requirements of all OMH and OASAS Operated, Licensed, and Funded Programs:

When a client is either confirmed with COVID-19 or is suspected of having a COVID-like illness (“CLI”), staff must notify the local health department (“LHD”). If feasible, newly symptomatic clients should be tested to determine whether isolation or quarantine is necessary. If a staff member has confirmed or suspected CLI, the program must notify the LHD and the staff member must be referred to their healthcare provider for evaluation and possible testing.

Guidance for OMH and OASAS
Outpatient Programs

- “1. Individuals who have known or suspected COVID-like illness must be reported to their LHD.
2. Notify the individual that they may be contacted by their LHD to help determine with whom they might have come into contact.
3. Notify the LHD of all individuals (staff and clients) who the agency is aware of who had a close or proximate contact with the individual within the agency setting. Agency staff are not responsible for determining any contacts outside of the agency setting and are also not responsible for calling individuals identified as having contact in the agency setting. Names of these individuals should be given to the LHD, which will conduct the formal contact investigation and tracing. Agency staff may need to help the LHD communicate with clients.”

Guidance for Behavioral Health
Programs based in Article 28 Hospitals

Follow the contact tracing policies and protocols of the hospital’s infection control departments.

Guidance for Residential Programs
(OMH/OASAS operated, licensed,
and/or funded), Inpatient Programs in
licensed Article 31 hospitals, Addiction
Treatment Centers, and State-Operated
Psychiatric Centers

1. For each person with CLI or who tests positive for COVID-19, record the following, if possible: their name; symptoms; the date their symptoms

begin; whether they were in contact with anyone who tested positive for COVID-19; whether they have traveled outside of their home/residence within the last 14 days (if yes, where); if hospitalized, what hospital was the individual in and what is the date of hospitalization; if tested, what were the results, where was the test done, what is the date the test was administered, and when were the results received; where is the individual currently located; are they currently in isolation or quarantine; whether the individual has their own room and whether they have had a roommate in the last 14 days; and name and contact of other individuals who may have come into contact with the individual over the last 14 days or who live and work in the hospital or residence.

“2. Notify the individual that they will be contacted by their LHD to help determine with whom they might have come into contact. Provide the collected information to LHD staff.

3. For individuals who are too symptomatic or cognitively impaired to report their contacts, staff should do their best to obtain as accurate information as possible or assist LHD staff in interviewing client. 4. Follow appropriate program-specific guidance for managing COVID-19 exposure in facility.

5. Program staff are not expected to identify or conduct outreach to possible exposed contacts outside the program but should help LHD staff as much as possible during LHD interviews to obtain needed information.

6. Work with the LHD to determine next steps and roles/responsibilities of the

			LHD and the Program to determine which entity will monitor clients and staff for the duration of time they are expected to remain under isolation or quarantine.”
07/07/2020	New York State Office of Mental Health COVID-19 Disaster Emergency FAQ	Unspecified.	Provides answers to questions including but not limited to: new referrals to community based behavioral providers; service provision in areas impacted by COVID-19; notification to patients in residential programs or clinics if a staff member developed COVID-19 symptoms; transporting COVID-19 patients; training new and current staff for restraint application while maintaining social distancing in resident treatment facilities (“RTFs”); housing programs/supported housing; background checks; new staff; telemental health guidance; etc.
11/12/20	NYS Infection Control Manual for Public Health System Programs	Unspecified	22 page manual with infection control recommendations for OMH operated and licensed providers.
12/08/2020	Strategy for OMH patient and staff testing In Inpatient and Residential Settings	Facility Directors, Clinical Directors, Chief Nursing Officers	Requires among other things that all psychiatric centers must immediately begin to implement rapid testing procedures.
12/10/2020	Updated Guidelines for Isolation Status, Quarantine	Facility Directors, Clinical Directors,	Memo supercedes earlier guidance. Psychiatric centers should not have policies delaying or canceling admissions or discharges based solely

	State and COVID-free units for Patients in Psychiatric Cents and Staff PPE policies	Chief Nursing Officers	<p>upon a patient's COVID-19 status. Changes are:</p> <p>DOH instructions regarding prioritization of PPE in case of supply shortages:</p> <p>Instructions for Disinfection of face shields.</p> <p>Expanded requirement for universal eye protection in all patient-facing areas, including COVID-free units, residences, and outpatient settings.</p>
12/20/2020	DOH Guidance	OPWDD, OMH & OASAS	Prioritization of Essential Health Care and Direct Support Personnel as well as High Risk Populations for COVID-19 Vaccinations.

Appendix III: COVID-Era Sub-Regulatory Guidance (cont'd)

D. Office for People with Developmental Disabilities

Date	Item	Summary
03/11/2020	OPWDD Guidelines for Implementation of Quarantine and/or Isolation Measures at State-Owned and Voluntary Providers in Congregate Settings	focuses on actions to be taken to address prevention and preparedness, recommendations for quarantine and isolation approaches per NYSDOH guidelines, and reporting and notification
03/14/2020	Health Advisory: COVID-19 Cases in Intermediate Care Facilities for Individuals with Intellectual Disabilities	Suspended all visitation except when medically necessary (i.e. visitor is essential to the care of the patient or is providing support in imminent end-of-life situations) or for family members of residents in imminent end-of-life situations, and those providing Hospice care
03/18/2020	EO 202.5	Waiver enacted to permit restriction of community outings for residents of such facilities to reduce the spread of COVID-19
03/18/2020	EO 202.5	Waiver enacted to allow for temporary deviations of/from an individual's service plan, which would otherwise outline participation in day programming and other community based served, and the temporary relocation of individuals, in order to maintain the health and safety of that individual during this emergency period and to the extent necessary
03/25/2020	Article 16 Clinic Considerations	Encouraged clinics to develop a plan on education of staff, screening, use of telehealth, and use and supply of PPE
03/25/2020	General Management of Coronavirus (COVID-19) in Facilities or Programs Operated and/or Certified by OPWDD	Explained that OPWDD would be following DOH recommendations and guidance for management of quarantine/isolation (activity restrictions) and addressed exposure mitigation and cleaning

04/10/2020	Guidance for Resident and Family Communication in Adult Care Facilities (ACFs) and Nursing Homes (NHs)	OPWDD adopted these DOH regulations for all OPWDD operated, certified, and funded residences. This required facilities, among other things, to: 1) report confirmed cases of COVID-19 in the residence; 2) send period status reports; and 3) maintain updated information on website.
04/10/2020	Advisory: Hospital Discharges and Admissions to Certified Residential Facilities	Guidance issued by OPWDD explaining that all Certified Residential Facilities must have a process in place to expedite the return of asymptomatic residents from the hospital and that “No individual shall be denied re-admission or admission to a Certified Residential Facility based solely on a confirmed or suspected diagnosis of COVID-19.”
04/29/2020	COVID-19 PROCEDURES AND PRACTICES	OPWDD-issued poster identifying COVID-19 prevention and exposure mitigation strategies (hand hygiene, environmental hygiene/disinfection, and use of PPE).
06/18/2020		Revised visitation guidance to allow for additional visitation so long as specific conditions
07/10/2020	Home Visits for Individuals Residing in OPWDD Certified Residential Facilities	Allowed for additional visits to the extent that safe social distancing, masks, and “meticulous” hand washing were done.
09/15/2020	COVID-19: Interim Guidance for Non-Emergency Site Visits of Certified Facilities	Placed requirements on visits by outside employees, including use of PPE, log of all visitors and staff, social distancing, and screening.
10/28/2020	COVID -19: Interim Visitation Guidance for Certified “Supportive” Residential Facilities	Allowed for visitation in supportive residences

Appendix IV

N.Y. Nursing Homes: Facility-Specific Detail Including COVID-19 Deaths, Staffing Levels

NH Facility	NH PFI	County	COVID Confirmed Deaths at NH	COVID Confirmed Out of Facility Deaths of NH Residents (Hospital, Other)	COVID Presumed Deaths at NH	For Profit/ Not-for-profit Status	Number of Beds in the Facility	Staffing Levels
A Holly Patterson Extended Care Facility	000534	Nassau	11	32	5	Not-for-profit	589	2 stars
Aaron Manor Rehabilitation and Nursing Center	000431	Monroe	20	0	0	For-Profit	140	2 stars
Absolut Center for Nursing and Rehabilitation at	000073	Cattaraugus	3	1	0	For-Profit	37	2 stars
Absolut Center for Nursing and Rehabilitation at	000278	Erie	42	23	0	For-Profit	370	2 stars
Absolut Center for Nursing and Rehabilitation at	000056	Broome	18	1	0	For-Profit	160	3 stars
Absolut Center for Nursing and Rehabilitation at	000588	Niagara	2	0	0	For-Profit	83	3 stars
Absolut Center for Nursing and Rehabilitation at	001658	Steuben	15	4	0	For-Profit	120	2 stars
Absolut Center for Nursing and Rehabilitation at	003370	Chautauqua	7	0	0	For-Profit	120	2 stars
Acadia Center for Nursing and Rehabilitation	000941	Suffolk	19	19	1	For-Profit	181	3 stars
Achieve Rehab and Nursing Facility	000962	Sullivan	4	7	0	For-Profit	140	
Adira At Riverside	006250	Westchester	0	4	0	For-Profit	120	2 stars

Rehabilitation and Nursing								
Affinity Skilled Living and Rehabilitation Center	006460	Suffolk	10	9	6	For-Profit	280	2 stars
Alice Hyde Medical Center	000326	Franklin	3	3	0	Not-for-profit	135	
Alpine Rehabilitation and Nursing Center	000364	Herkimer	12	2	0	For-Profit	80	3 stars
Amsterdam Nursing Home Corp (1992)	001605	New York	14	18	45	Not-for-profit	409	3 stars
Andrus On Hudson	001126	Westchester	7	4	10	Not-for-profit	197	2 stars
Apex Rehabilitation and Care Center	000919	Suffolk	32	6	2	For-Profit	195	2 stars
Atrium Center for Rehabilitation and Nursing	001430	Kings	5	13	9	For-Profit	380	1 star
Auburn Rehabilitation & Nursing Center	000091	Cayuga	2	1	0	For-Profit	92	2 stars
Aurelia Osborn Fox Memorial Hospital	000740	Otsego	10	0	0	Not-for-profit	130	
Autumn View Health Care Facility, LLC	002956	Erie	41	6	0	For-profit	230	2 stars
Avon Nursing Home, LLC	000387	Livingston	5	0	1	For-Profit	40	3 stars
Bainbridge Nursing & Rehabilitation Center	001227	Bronx	3	8	8	For-Profit	200	2 stars
Baptist Health Nursing and Rehabilitation Center	000843	Schenectady	5	2	0	Not-for-profit	262	2 stars
Bayberry Nursing Home	001073	Westchester	2	0	0	For-Profit	60	4 stars
Beach Gardens Rehab and Nursing Center	003401	Queens	8	11	6	For-Profit	163	4 stars

Beach Terrace Care Center	000496	Nassau	3	2	0	For-Profit	182	
Beacon Rehabilitation and Nursing Center	001736	Queens	5	13	7	For-Profit	120	3 stars
Bedford Center for Nursing and Rehabilitation	001409	Kings	9	2	8	For-Profit	200	3 stars
Beechtree Center for Rehabilitation and Nursing	000983	Tompkins	6	1	0	For-Profit	120	
Beechwood Homes	000288	Erie	25	12	0	Not-for-profit	272	3 stars
Belair Care Center Inc.	000533	Nassau	6	1	2	For-Profit	102	5 stars
Bellhaven Center for Rehabilitation and Nursing Care	003423	Suffolk	7	15	0	For-Profit	240	2 stars
Bensonhurst Center for Rehabilitation and Healthcare	001406	Kings	10	7	27	For-Profit	200	2 stars
Berkshire Nursing & Rehabilitation Center	000877	Suffolk	2	4	1	For-Profit	175	2 stars
Beth Abraham Center for Rehabilitation and Nursing	001218	Bronx	9	29	16	For-Profit	448	1 star
Bethany Gardens Skilled Living Center	000594	Oneida	4	0	0	For-Profit	100	2 stars
Bethany Nursing Home and Health Related Facility	001255	Chemung	5	4	0	Not-for-profit	120	
Bethel Nursing & Rehabilitation Center	007278	Westchester	5	12	7	Not-for-profit	200	3 stars
Bethlehem Commons Care Center	000027	Albany	9	4	0	For-profit	120	2 stars
Bezalel Rehabilitation and Nursing Center	003156	Queens	8	11	1	Not-for-profit	120	2 stars

Bishop Rehabilitation and Nursing Center	000656	Onondaga	26	20	22	For-Profit	440	2 stars
Boro Park Center for Rehabilitation and Healthcare	001403	Kings	10	41	22	For-Profit	504	3 stars
Briarcliff Manor Center for Rehabilitation and Nursing	001128	Westchester	0	7	1	For-Profit	120	1 star
Bridge View Nursing Home	001673	Queens	9	7	12	For-Profit	200	2 stars
Bridgewater Center for Rehabilitation & Nursing, LLC	000050	Broome	26	15	0	For-Profit	356	2 stars
Brighton Manor	000446	Monroe	3	1	1	For-Profit	80	2 stars
Bronx Center for Rehabilitation and Healthcare	001251	Bronx	5	13	13	For-Profit	200	1 star
Bronx Gardens Rehabilitation and Nursing Center	004887	Bronx	6	23	14	For-Profit	199	2 stars
Bronx Park Rehabilitation & Nursing Center	001246	Bronx	7	16	14	For-Profit	240	1 star
Bronxcare Special Care Center	004501	Bronx	7	20	1	Not-for-profit	240	Not available
Brookhaven Health Care Facility, LLC	003928	Suffolk	7	10	0	For-Profit	160	5 stars
Brookhaven Rehabilitation & Health Care Center, LLC	001703	Queens	1	19	6	For-Profit	298	2 stars
Brooklyn Center for Rehabilitation And Residential	001395	Kings	4	6	11	For-Profit	281	3 stars
Brooklyn Gardens Nursing & Rehabilitation Center	007069	Kings	1	6	7	Not-for-profit	240	2 stars
Brooklyn United Methodist Church Home	001368	Kings	2	0	13	Not-for-profit	120	2 stars

Brooklyn-Queens Nursing Home	000277	Kings	3	3	5	For-Profit	140	1 star
Brookside Multicare Nursing Home	000949	Suffolk	8	4	4	For-Profit	353	Not available
Brothers of Mercy Nursing Home & Rehabilitation Center	000296	Erie	19	4	0	Not-for-profit	240	3 stars
Buena Vida Continuing Care & Rehab Center	006248	Kings	0	14	5	For-Profit	240	1 star
Buffalo Center for Rehabilitation and Nursing	003012	Erie	18	7	2	For-Profit	200	2 stars
Buffalo Community Healthcare Center	000633	Erie	2	10	0	For-Profit	95	3 stars
Bushwick Center for Rehabilitation and Health Care	004037	Kings	7	1	4	For-profit	225	2 stars
Campbell Hall Rehabilitation Center INC	002544	Orange	5	5	1	For-Profit	134	2 stars
Cantebury Woods	007789	Erie	6	8	0	Not-for-profit	50	5 stars
Capstone Center for Rehabilitation and Nursing	000488	Montgomery	15	0	0	For-Profit	120	2 stars
Carillon Nursing and Rehabilitation Center	000920	Suffolk	27	6	19	For-Profit	315	2 stars
Caring Family Nursing and Rehabilitation Center	003948	Queens	5	3	13	For-Profit	183	2 stars
Carmel Richmond Healthcare and Rehabilitation Center	001755	Richmond	61	19	2	Not-for-profit	300	2 stars
Carthage Center for Rehabilitation and Nursing	000381	Jefferson	15	1	0	For-Profit	90	2 stars
Casa Promesa	005567	Bronx	0	11	0	Not-for-profit	108	4 stars

Canton Park Rehabilitation and Nursing Center, LLC	001380	Kings	2	4	3	For-Profit	119	
Catskill Regional Medical Center	000840	Sullivan	3	0	0	Not-for-profit	64	
Cayuga Nursing and Rehabilitation Center	000984	Tompkins	2	0	0	For-Profit	144	
Cedar Manor Nursing & Rehabilitation Center	001087	Westchester	5	20	9	For-Profit	153	2 stars
Center Island Healthcare	000560	Nassau	5	5	21	For-Profit	202	2 stars
Central Park Rehabilitation and Nursing Center	000654	Onondaga	11	6	4	For-Profit	160	2 stars
Chapin Home for The Aging	001715	Queens	1	5	2	Not-for-profit	220	4 stars
Charles T Sitrin Health Center INC	000620	Oneida	1	0	0	Not-for-profit	187	4 stars
Chasehealth Rehab and Residential Care	000126	Chenango	23	2	0	Not-for-profit	80	
Chautauqua Nursing and Rehabilitation Center	000099	Chautauqua	24	0	0	For-Profit	216	2 stars
Chemung County Health Center Nursing Facility	000123	Chemung	1	0	0	Not-for-profit	200	
Church Home of The Protestant Episcopal Church	000444	Monroe	33	5	0	Not-for-profit	182	4 stars
Cliffside Rehabilitation & Residential Health Care Center	001676	Queens	22	0	0	For-Profit	218	3 stars
Clifton Springs Hospital and Clinic Extended Care	000677	Ontario	0	1	0	Not-for-profit	108	
Clove Lakes Health Care and	001750	Richmond	17	24	25	For-Profit	576	4 stars

Rehabilitation Center, IIN								
Cobble Hill Health Care, INC.	001381	Kings	6	1	50	Not-for-profit	364	2 stars
Cold Spring Hills Center for Nursing and Rehabilitation	000558	Nassau	15	13	20	For-Profit	588	2 stars
Coler Rehabilitation and Nursing Care Center	001600	New York	13	17	1	Public-Municipality	815	5 stars
Colonial Park Rehabilitation and Nursing Center	000592	Oneida	5	4	0	For-Profit	80	2 stars
Comprehensive Rehabilitation and Nursing Center at	000274	Erie	10	4	0	For-Profit	142	2 stars
Concord Nursing and Rehabilitation Center	001404	Kings	5	3	9	Not-for-profit	140	2 stars
Concourse Rehabilitation and Nursing Center, INC.	001253	Bronx	7	2	16	For-Profit	240	Not available
Conesus Lake Nursing Home	000392	Livingston	9	0	0	For-Profit	48	2 stars
Cooperstown Center for Rehabilitation and Nursing	000749	Otsego	0	2	0	For-Profit	174	
Corning Center for Rehabilitation and Healthcare	000867	Steuben	28	5	0	For-Profit	120	
Cortland Park Rehabilitation and Nursing Center	000160	Cortland	20	1	0	For-Profit	120	
Cortlandt Healthcare	001041	Westchester	13	9	0	For-Profit	120	2 stars
Creekview Nursing and Rehab Center	000470	Monroe	3	15	0	For-Profit	124	2 stars
Crest Manor Living and Rehabilitation Center	000481	Monroe	19	2	0	For-Profit	80	2 stars

Crouse Community Center INC	004494	Madison	36	7	0	Not-for-profit	120	
Crown Heights Center for Nursing and Rehabilitation	001407	Kings	1	2	6	For-Profit	295	2 stars
Crown Park Rehabilitation and Nursing Center	000161	Cortland	15	1	0	For-Profit	200	
Cypress Garden Center for Nursing and Rehabilitation	001709	Queens	5	7	5	For-Profit	268	2 stars
Daleview Care Center	000524	Nassau	1	2	3	For-Profit	142	2 stars
Daughters of Sarah Nursing Center	000022	Albany	7	2	0	Not-for-profit	210	4 stars
Degraff Memorial Hospital-Skilled Nursing Facility	000582	Niagara	4	0	0	Not-for-profit	80	
Delhi Rehabilitation and Nursing Center	010108	Delaware	1	0	0	For-Profit	176	
Diamond Hill Nursing and Rehabilitation Center	000772	Rensselaer	8	9	0	For-profit	120	3 stars
Ditmas Park Care Center	001576	Kings	3	3	11	For-Profit	220	3 stars
Downtown Brooklyn Nursing & Rehabilitation Center	001408	Kings	11	27	5	For-Profit	320	2 stars
DR Susan Smith McKinney Nursing and Rehabilitation	007279	Kings	4	15	18	Public-Municipality	320	5 stars
Dry Harbor Nursing Home	001705	Queens	14	25	20	For-Profit	360	3 stars
Dumont Center for Rehabilitation and Nursing Care	002575	Westchester	2	9	2	For-Profit	196	2 stars
East Haven Nursing and	001277	Bronx	7	15	7	For-Profit	200	2 stars

Rehabilitation Center 001277								
East Neck Nursing & Rehabilitation Center	003307	Suffolk	23	28	10	For-Profit	300	2 stars
East Side Nursing Home	001156	Wyoming	16	6	0	For-Profit	80	
Eastchester Rehabilitation and Health Care Center	001231	Bronx	0	6	2	For-Profit	200	1 star
Eddy Heritage House Nursing and Rehabilitation Center	004549	Rensselaer	7	11	0	Not-for-profit	120	4 stars
Eddy Memorial Geriatric Center	003293	Rensselaer	7	0	0	Not-for-profit	80	2 stars
Eddy Village Green	004000	Albany	7	0	0	Not-for-profit	192	4 stars
Eden Rehabilitation & Nursing Center	003910	Erie	11	1	0	For-Profit	40	3 stars
Edna Tina Wilson Living Center	004808	Monroe	14	6	29	Not-for-profit	120	3 stars
Eger Healthcare and Rehabilitation Center	001748	Richmond	27	9	29	Not-for-profit	378	4 stars
Elcor Nursing and Rehabilitation Center	000124	Chemung	37	26	0	For-Profit	305	
Elderwood At Amherst	000232	Erie	22	8	0	For-Profit	92	4 stars
Elderwood at Cheektowaga	004474	Erie	18	1	0	For-Profit	172	3 stars
Elderwood at Grand Island	000299	Erie	5	1	0	For-Profit	90	3 stars
Elderwood at Hamburg	003295	Erie	26	3	0	For-Profit	166	4 stars
Elderwood at Hornell	003902	Steuben	3	2	0	For-Profit	112	
Elderwood at Lancaster	000272	Erie	10	6	0	For-Profit	96	4 stars
Elderwood at Liverpool	003243	Onondaga	14	4	0	For-Profit	160	3 stars

Elderwood at Lockpart	000571	Niagara	4	2	0	For-Profit	126	3 stars
Elderwood at Waverly	000973	Tioga	28	4	1	For-Profit	200	
Elderwood at Wheatfield	005774	Niagara	4	0	0	For-Profit	123	4 stars
Elderwood at Williamsville	002815	Erie	3	1	0	For-Profit	200	3 stars
Elderwood of Lakeside at Brockport	000469	Monroe	9	0	0	For-Profit	120	
Elizabeth Church Manor Nursing Home	000048	Broome	28	3	0	Not-for-profit	120	4 stars
Ellicott Center for Rehabilitation and Nursing	000254	Erie	11	13	0	For-Profit	140	2 stars
Ellis Residential & Rehabilitation Center	004148	Schenectady	2	1	0	Not-for-profit	82	5 stars
Elm Manor Nursing and Rehabilitation Center	000682	Ontario	13	4	0	For-Profit	46	3 stars
Elmhurst Care Center, INC	007745	Queens	11	31	14	For-Profit	240	3 stars
Emerge Nursing and Rehabilitation at Glen Cove	000492	Nassau	8	5	1	For-Profit	102	3 stars
Epic Rehabilitation and Nursing White Plains	010353	Westchester	1	4	0	For-Profit	160	Not available
Essex Center for Rehabilitation and Healthcare	000305	Essex	11	3	0	For-Profit	100	
Evergreen Commons Rehabilitation and Nursing Center	007268	Rensselaer	1	1	0	For-Profit	240	3 stars
Excel at Woodbury foe Rehabilitation and Nursing, LLC	000559	Nassau	24	5	5	For-Profit	123	3 stars
Fairport Baptist Homes	000459	Monroe	6	1	0	Not-for-profit	142	4 stars

Fairview Nursing Care Center INC	001678	Queens	9	5	6	For-Profit	200	2 stars
Far Rockaway Center for Rehabilitation and Nursing	001679	Queens	2	6	0	For-Profit	100	Not available
Father Baker Manor	004898	Erie	81	28	0	Not-for-profit	160	4 stars
Ferncliff Nursing Home Co INC	000194	Dutchess	17	5	1	Not-for-profit	326	2 stars
Fiddlers Green Manor Rehabilitation and Nursing Center	000282	Erie	7	0	0	For-Profit	82	2 stars
Fieldston Lodge Care Center	001233	Bronx	1	0	14	For-Profit	200	3 stars
Fishkill Center for Rehabilitation and Nursing	000201	Dutchess	7	5	0	For-Profit	160	2 stars
Foltsbrook Center for Nursing and Rehabilitation	000360	Herkimer	10	0	0	For-Profit	163	2 stars
Fordham Nursing and Rehabilitation Center	001258	Bronx	3	18	0	For-Profit	240	2 stars
Forest Hills Care Center	001681	Queens	7	4	5	For-Profit	100	2 stars
Forest View Center for Rehabilitation & Nursing	001682	Queens	4	2	1	For-Profit	160	3 stars
Fort Hudson Nursing Center, INC	001018	Washington	13	0	0	Not-for-profit	196	2 stars
Fort Tryon Center for Rehabilitation and Nursing	001585	New York	13	0	7	For-Profit	205	2 stars
Four Seasons Nursing and Rehabilitation Center	003227	Kings	4	1	5	For-Profit	270	2 stars
Fox Run at Orchard Park	008555	Erie	3	0	0	Not-for-profit	60	3 stars
Franklin Center for Rehabilitation and Nursing	001708	Queens	7	2	52	For-Profit	320	2 stars

Friedwald Center for Rehabilitation and Nursing, LLC	000787	Rockland	11	22	3	For-Profit	180	2 stars
Fulton Center for Rehabilitation and Healthcare	000337	Fulton	16	21	2	For-Profit	176	2 stars
Fulton Commons Care Center INC	006312	Nassau	6	5	35	For-Profit	280	2 stars
Garden Care Center	000538	Nassau	16	6	0	For-Profit	150	2 stars
Garden Gate Healthcare Facility	000294	Erie	25	10	0	For-Profit	184	3 stars
Ghent Rehabilitation & Nursing Center	004551	Columbia	14	2	0	For-Profit	120	
Glen Arden INC	007016	Orange	2	2	1	Not-for-profit	40	3 stars
Glen Cove Center for Nursing and Rehabilitation	000493	Nassau	11	13	1	For-Profit	154	4 stars
Glen Island Center for Nursing and Rehabilitation	001078	Westchester	3	0	0	For-Profit	182	2 stars
Glendale Home-Schdy Cnty Dept Social Services	000846	Schenectady	6	0	0	Public-County	200	3 stars
Glengariff Rehabilitation and Healthcare Center	000491	Nassau	6	14	18	For-Profit	262	3 stars
Glens Falls Center for Rehabilitation and Nursing	001009	Warren	19	4	5	For-Profit	117	3 stars
Gold Crest Care Center	001226	Bronx	4	15	7	For-Profit	175	1 star
Golden Gate Rehabilitation & Healthcare Center	001757	Richmond	14	17	4	For-Profit	238	2 stars
Golden Hill Nursing and Rehabilitation Center	000998	Ulster	21	8	0	For-Profit	280	2 stars
Good Samaritan Nursing and	003041	Suffolk	21	1	0	Not-for-profit	100	3 stars

Rehabilitation Care Center								
Good Shepherd Village at Endwell	009135	Broome	5	1	0	Not-for-profit	32	4 stars
Good Shepherd-Fairview Home INC	000049	Broome	5	0	0	Not-for-profit	54	4 stars
Grand Manor Nursing & Rehabilitation Center	000856	Bronx	3	2	0	For-Profit	240	2 stars
Grandell Rehabilitation and Nursing Center	000497	Nassau	14	9	17	For-Profit	278	
Granville Center for Rehabilitation and Nursing	001022	Washington	1	1	0	For-Profit	122	2 stars
Greene Meadows Nursing and Rehabilitation Center	000350	Greene	18	8	0	For-Profit	120	2 stars
Greenfield Health & Rehab Center	007711	Erie	18	2	0	Not-for-profit	160	3 stars
Groton Community Health Care Center Residential care	002550	Tompkins	3	3	0	Not-for-profit	80	
Gurwin Jewish Nursing and Rehabilitation Center	003989	Suffolk	34	10	19	Not-for-profit	460	3 stars
Guthrie Cortland Medical Center	004799	Cortland	4	0	0	Not-for-profit	80	
Hamilton Park Nursing and Rehabilitation Center	004285	Kings	2	12	12	For-Profit	200	3 stars
Harlem Center for Nursing and Rehabilitation	001604	New York	4	4	29	For-Profit	200	2 stars
Harris Hill Nursing Facility, LLC	003455	Erie	117	19	2	For-Profit	192	2 stars

Haven Manor Health Care, LLC	003256	Queens	4	5	5	For-Profit	240	1 star
Haym Solomon Home for the Aged	001361	Kings	7	2	40	For-Profit	240	2 stars
Hebrew Home for the Aged at Riverdale	001212	Bronx	21	19	40	Not-for-profit	843	2 stars
Hempstead Park Nursing Home	000508	Nassau	2	12	10	For-Profit	251	2 stars
Henry J. Carter Skilled Nursing Facility	001601	New York	0	1	0	Public-Municipality	164	3 stars
Heritage Green Rehab & Skilled Nursing	002574	Chautauqua	12	1	0	Not-for-profit	134	2 stars
Heritage Village Rehab and Skilled Nursing, INC	000112	Chautauqua	8	0	0	Not-for-profit	120	2 stars
Highfield Gardens Care Center of Great Neck	000547	Nassau	25	10	0	For-Profit	200	2 stars
Highland Care Center	001711	Queens	5	27	24	For-Profit	320	2 stars
Highland Park Rehabilitation and Nursing Center	000041	Allegany	19	3	0	For-Profit	80	1 star
Highland Rehabilitation and Nursing Center	000691	Orange	8	10	3	For-Profit	98	2 stars
Highpointe on Michigan Health Care Facility	003182	Erie	4	1	0	Not-for-profit	300	4 stars
Hilaire Rehab & Nursing	000917	Suffolk	7	0	2	For-Profit	76	4 stars
Hill Haven Nursing Home	000479	Monroe	48	16	0	Not-for-profit	288	4 stars
Hillside Manor Rehab & Extended Care Center	001714	Queens	24	15	11	For-Profit	400	3 stars
Hollis Park Manor Nursing Home	003258	Queens	1	2	7	For-Profit	80	3 stars
Holliswood Center for	001712	Queens	21	6	42	For-Profit	314	1 star

Rehabilitation and Healthcare								
Hope Center for HIV and Nursing Care	004329	Bronx	0	2	0	For-Profit	66	4 stars
Hopkins Center for Rehabilitation and Healthcare	005546	Kings	5	38	15	For-Profit	288	2 stars
Horizon Care Center	001731	Queens	5	9	23	For-Profit	280	1 star
Hornell Gardens, LLC	000871	Steuben	11	4	1	For-Profit	114	
Houghton Rehabilitation & Nursing Center	000651	Allegany	16	1	0	For-Profit	160	
Hudson Park Rehabilitation and Nursing Center	000021	Albany	11	1	0	For-Profit	200	2 stars
Hudson Pointe at Riverdale Center for Nursing and	001232	Bronx	3	6	12	For-Profit	159	2 stars
Hudson Valley Rehabilitation & Extended Care Center	001003	Ulster	15	17	0	For-Profit	203	3 stars
Humboldt House Rehabilitation and Nursing Center	000244	Erie	6	6	0	For-Profit	173	2 stars
Huntington Hills Center for Health and Rehabilitation	007786	Suffolk	35	6	36	For-Profit	320	3 stars
Huntington Living Center	004286	Seneca	28	17	0	Not-for-profit	160	
Ideal Senior Living Center	000059	Broome	11	3	0	Not-for-profit	150	3 stars
Ira Davenport Memorial Hospital SNF/HRF	004156	Steuben	28	4	1	Not-for-profit	120	
Iroquois Nursing Home INC.	004555	Onondaga	43	5	0	Not-for-profit	160	2 stars
Isabella Geriatric Center INC.	001569	New York	25	34	43	Not-for-profit	705	3 stars
Island Nursing and Rehab Center	006324	Suffolk	7	11	16	Not-for-profit	120	3 stars

Jamaica Hospital Nursing CO INC.	001710	Queens	3	34	1	Not-for-profit	228	3 stars
James G. Johnston Memorial Nursing Home	003242	Broome	3	1	0	Mot-for-profit	120	4 stars
Jefferson's Ferry	006313	Suffolk	11	2	1	Not-for-profit	60	5 stars
Jennie B. Richmond Chaffee Nursing Home Company INC.	000281	Erie	0	1	0	Not-for-profit	80	
Jewish Home of Central New York	000647	Onondaga	8	4	0	Not-for-profit	132	Not available
Jewish Home of Rochester	003385	Monroe	2	0	0	Not-for-profit	328	4 stars
Katherine Luther Residential Health care and	000604	Oneida	27	10	0	Not-for-profit	280	1 star
Kendal on Hudson	006745	Westchester	2	1	0	Not-for-profit	26	5 stars
King David Center for Nursing and Rehabilitation	001364	Kings	9	2	25	For-Profit	271	3 stars
King Street Home INC.	001093	Westchester	2	7	0	For-Profit	120	4 stars
Kings Harbor MultiCare Center	001250	Bronx	54	3	8	For-Profit	720	2 stars
Kingsway Arms Nursing Center	000841	Schenectady	4	1	0	For-Profit	160	3 stars
Kirkhaven	003164	Monroe	37	7	4	Not-for-profit	147	3 stars
Laconia Nursing Home	001248	Bronx	1	12	8	For-Profit	240	1 star
Latta Road Nursing Home East	000475	Monroe	3	13	0	For-Profit	40	4 stars
Latta Road Nursing Home West	000473	Monroe	1	2	0	For-Profit	40	3 stars
Lawrence Nursing Care Center INC.	001707	Queens	5	3	1	For-Profit	200	1 star
Leroy Village Green Nursing	002974	Genesee	23	9	0	For-Profit	140	2 stars

and Rehabilitation Center								
Lewis County General Hospital Nursing Home Unit	0003884	Lewis	1	3	0	Public-County	160	3 stars
Linden Center for Nursing and Rehabilitation	007685	Kings	7	1	19	For-Profit	280	2 stars
Living Center at Geneva- North	000672	Ontario	11	1	0	Not-for-profit	160	
Living Center at Geneva- South	000674	Ontario	6	2	0	Not-for-profit	103	
Livingston County Center for Nursing and Rehabilitation	000390	Livingston	5	5	0	Public-County	266	
Livingston Hills Nursing and Rehabilitation Center	000156	Columbia	1	2	0	For-Profit	120	1 star
Lockport Rehab & Health Care Center	000568	Niagara	19	3	0	For-Profit	82	3 star
Long Beach Nursing and Rehabilitation Center	000498	Nassau	14	10	5	For-Profit	150	
Long Island Care Center INC.	001685	Queens	20	4	5	For-Profit	200	3 stars
Long Island State Veterans Home	003421	Suffolk	77	35	8	Public-State	350	5 stars
Loretto Health and Rehabilitation Center	000648	Onondaga	41	5	0	Not-for-profit	583	3 stars
Lutheran Center at Poughkeepsie, Inc.	007643	Dutchess	13	7	0	Not-for-profit	160	2 stars
Luxor Nursing and Rehabilitation at Mills Pond	000953	Suffolk	7	8	20	For-Profit	250	1 star
Luxor Nursing and Rehabilitation at Sayville	004552	Suffolk	10	5	15	For-Profit	180	2 stars
Lynbrook Restorative	000520	Nassau	10	9	0	For-Profit	100	2 stars

Therapy and Nursing								
M.M. Ewing Continuing Care Center	000681	Ontario	1	1	0	Not-for-profit	178	
Manhattanville Healthcare Center	003993	Bronx	6	22	2	For-Profit	200	2 stars
Maplewood Nursing Home INC	000462	Monroe	15	0	0	For-Profit	72	5 stars
Margaret Tietz Nursing and Rehabilitation Center	001669	Queens	16	13	6	For-Profit	200	3 stars
Maria Regina Residence INC	006334	Suffolk	23	4	10	Not-for-profit	188	4 stars
Martine Center for Rehabilitation and Nursing	001059	Westchester	9	12	18	For-Profit	200	2 stars
Mary Manning Walsh Nursing Home CO INC.	001571	New York	34	2	4	Not-for-profit	362	3 stars
Masonic Care Community of New York	000606	Oneida	9	4	0	Not-for-profit	320	3 stars
Massapequa Center for Rehabilitation and Nursing	000881	Suffolk	9	11	21	For-Profit	320	2 stars
Mayfair Care Center	000509	Nassau	3	1	2	For-Profit	200	2 stars
Mcauley Residence	000268	Erie	2	2	0	Not-for-profit	160	5 stars
Meadow Park Rehabilitation and Health Care Center LLC	001687	Queens	1	5	0	For-Profit	143	2 stars
Meadowbrook Care Center INC.	006009	Nassau	25	9	19	For-Profit	280	2 stars
Meadowbrook Healthcare	000140	Clinton	7	1	0	For-Profit	287	3 stars
Medford MultiCare Center for Living	006462	Suffolk	8	12	7	For-Profit	320	2 stars

Menorah Home & Hospital for Aged & Infirm	002539	Kings	22	30	48	Not-for-profit	436	3 stars
Methodist Home for Nursing and Rehabilitation	001221	Bronx	11	3	0	Not-for-profit	120	3 stars
Middletown Park Rehabilitation & Healthcare Center	002533	Orange	12	17	0	For-Profit	230	3 stars
Midway Nursing Home	001704	Queen	2	10	18	For-Profit	200	2 stars
Momentum at South Bay for Rehabilitation and Nursing	000934	Suffolk	31	3	0	For-Profit	160	3 stars
Monroe Community Hospital	000440	Monroe	6	6	0	Public-County	566	2 stars
Montgomery Nursing and Rehabilitation Center	000710	Orange	10	9	14	For-Profit	100	2 stars
Morningside Nursing and Rehabilitation Center	001252	Bronx	9	26	11	For-Profit	314	3 stars
Morris Park Rehabilitation and Nursing Center	001235	Bronx	3	10	20	For-Profit	191	1 star
Mosholu Parkway Nursing and Rehabilitation Center	001236	Bronx	1	6	18	For-Profit	122	2 stars
MVHS Rehabilitation and Nursing Center	006057	Oneida	11	3	0	Not-for-profit	202	1 star
Nassau Rehabilitation & Nursing Center	005710	Nassau	1	2	34	For-Profit	280	1 star
Nathan Littauer Hospital Nursing Home	000331	Fulton	2	0	0	Not-for-profit	84	3 stars
New Carlton Rehab and Nursing Center LLC	001379	Kings	1	12	1	For-Profit	148	1 star

New East Side Nursing Home	001578	New York	2	8	1	For-Profit	58	3 stars
New Glen Oaks Nursing Home, INC	001697	Queens	5	9	5	For-Profit	60	2 stars
New Gouverneur Hospital SNF	001606	New York	20	4	3	Public-Municipality	295	5 stars
New Paltz Center for Rehabilitation and Nursing	001001	Ulster	4	2	0	For-Profit	77	3 stars
New Roc Nursing and Rehabilitation Center	000448	Monroe	10	5	0			
New Vanderbilt Rehabilitation and Care Center INC	001752	Richmond	3	2	24	For-Profit	320	1 star
New York Center for Rehabilitation & Nursing	006384	Queens	2	19	27	For-Profit	280	4 stars
New York State Veterans Home at Montrose	006300	Westchester	15	9	23	Public-State	252	5 stars
Newark Manor Nursing Home INC	001031	Wayne	7	0	0	For-Profit	60	
Newfane Rehab & Healthcare Center	000586	Niagara	23	3	7	For-Profit	165	
Niagara Rehabilitation and Nursing Center	000580	Niagara	5	5	0	For-Profit	160	2 stars
North Gate Health Care Facility	001583	Niagara	9	6	0	For-Profit	200	3 stars
North Shore LIJ Orzac Center for Rehabilitation	004066	Nassau	1	16	0	Not-for-profit	120	5 star
North Westchester Restorative Therapy and Nursing	001150	Westchester	11	8	4	For-Profit	120	3 stars
Northeast Center for Rehabilitation and Brain Injury	007758	Ulster	0	1	0	For-Profit	280	2 stars
Northern Dutchess Res	000193	Dutchess	1	1	0	Not-for-profit	100	4 stars

Health Care Facility								
Northern Manhattan Rehabilitation and Nursing Center	005907	New York	16	20	12	For-Profit	320	2 stars
Northern Manor Geriatric Center INC	000784	Rockland	7	9	7	Not-for-profit	231	2 stars
Northern Metropolitan Residential Health Care Facility	000797	Rockland	4	4	0	Not-for-profit	120	3 stars
Northern Riverview Health Care Center, INC.	000774	Rockland	3	12	8	Not-for-profit	180	2 stars
Northwell Health Stern Family Center for	004089	Nassau	7	6	0	Not-for-profit	256	5 stars
Norwegian Christian Home and Health Center	001374	Kings	1	7	6	Not-for-profit	135	3 stars
Norwich Rehabilitation & Nursing Center	004522	Chenango	1	1	0	For-Profit	80	
NY Congregational Nursing Center Inc	001369	Kings	4	23	32	Not-for-profit	200	2 stars
Nyack Ridge Rehabilitation and Nursing Center	000786	Rockland	1	11	8	For-Profit	160	2 stars
NYS Veterans Home	000133	Chenango	6	2	0	Public-State	242	
NYS Veterans Home in NYC	004815	Queens	11	8	24	Public-State	250	5 stars
Oak Hill Rehabilitation and Nursing Care Center	0000982	Tompkins	10	3	0	For-Profit	60	
Oasis Rehabilitation and Nursing, LLC	000910	Suffolk	12	22	0	For-Profit	100	3 stars
Oceanside Care Center INC	000537	Nassau	7	6	1	For-Profit	100	2 stars

Oceanview Nursing & Rehabilitation Center, LLC	001688	Queens	2	12	3	For-Profit	100	2 stars
Oneida Center for Rehabilitation and Nursing	005790	Oneida	3	5	0	For-Profit	120	4 stars
Oneida Health Rehabilitation and Extended Care	000398	Madison	2	0	0	For-Profit	160	
Ontario Center for Rehabilitation and Healthcare	000683	Ontario	6	12	0	For-Profit	98	
Orchard Rehabilitation & Nursing Center	000721	Orleans	20	7	1	For-Profit	160	
Our Lady of Consolation Nursing and Rehabilitative Care	000935	Suffolk	41	27	1	Not-for-profit	345	3 stars
Our Lady Mercy Life Center	004755	Albany	11	2	1	Not-for-profit	160	3 stars
Our Lady of Peace Nursing Residence	006528	Niagara	22	3	0	Not-for-profit	250	2 stars
Oxford Nursing Home	001391	Kings	5	0	6	For-Profit	235	1 star
Ozanam Hall of Queens Nursing Home INC	001670	Queens	35	7	29	Not-for-profit	432	4 stars
Palatine Nursing Home	000489	Montgomery	6	3	0	For-Profit	70	2 stars
Palm Gardens Center for Nursing and Rehabilitation	001392	Kings	3	9	1	For-Profit	240	2 stars
Park Avenue Extended Care Facility	007823	Nassau	3	10	11	For-Profit	240	
Park Garden Rehabilitation & Nursing Center LLC	001238	Bronx	4	15	2	For-Profit	200	2 stars
Park Nursing Home	001689	Queens	1	4	0	For-Profit	196	2 stars

Park Ridge Nursing Home	000474	Monroe	2	1	0	For-Profit	120	5 stars
Park Terrace Care Center	001698	Queens	0	31	3	For-Profit	200	3 stars
Parker Jewish Institute for Health Care & Rehab	001671	Queens	83	32	0	Not-for-profit	527	4 stars
Parkview Care and Rehabilitation Center, INC.	000557	Nassau	1	4	11	For-Profit	169	1 star
Peconic Bay Skilled Nursing Facility	003826	Suffolk	20	0	0	Not-for-profit	60	5 stars
Peconic Landing at Southold	006518	Suffolk	6	2	3	Not-for-profit	60	5 stars
Pelham Parkway Nursing Care and Rehabilitation Facility	001245	Bronx	3	8	12	For-Profit	200	1 star
Penfield Place	000478	Monroe	1	0	0	For-Profit	48	2 stars
Peninsula Nursing and Rehabilitation Center	001672	Queens	4	22	3	For-Profit	200	2 stars
Penn Yan Manor Nursing Home INC	001162	Yates	9	2	0	Not-for-profit	46	
Pine Haven Home	000152	Columbia	7	6	4	For-Profit	120	
Pine Valley Center for Rehabilitation and Nursing	000778	Rockland	4	5	8	For-Profit	160	4 stars
Pinnacle MultiCare Nursing and Rehabilitation Center	001260	Bronx	2	16	0	For-Profit	480	2 stars
Pontiac Nursing Home	000732	Oswego	10	3	0	For-Profit	80	2 stars
Premier Genesee Center for Nursing and Rehabilitation	000344	Genesee	13	0	0	For-Profit	160	
Presbyterian Home for Central New York INC	000621	Oneida	16	10	1	Not-for-profit	236	2 stars

Promenade Rehabilitation and Health Care Center	001690	Queens	3	10	12	For-Profit	240	2 stars
Providence Rest, INC.	001216	Bronx	11	0	10	Not-for-profit	200	2 stars
Putnam Nursing & Rehabilitation Center	000754	Putnam	14	7	0	For-Profit	160	2 stars
Putnam Ridge	006171	Putnam	5	2	0	For-Profit	160	3 stars
Quantum Rehabilitation and Nursing LLC	000912	Suffolk	11	3	1	For-Profit	120	3 stars
Queens Boulevard Extended Care Facility	005904	Queens	4	19	3	For-Profit	280	3 stars
Queens Nassau Rehabilitation Center	001702	Queens	2	3	4	For-Profit	200	3 stars
Rebekah Rehab and Extended Care Center	001223	Bronx	5	9	19	Not-for-profit	213	1 star
Regal Heights Rehabilitation and Health Care Center	007875	Queens	9	20	5	For-Profit	280	3 star
Regeis Care Center	001242	Bronx	3	7	6	For-Profit	236	2 stars
Regency Extended Care Center	001103	Westchester	5	13	32	For-Profit	315	3 stars
Rego Park Nursing Home	001693	Queens	21	22	1	For-Profit	200	2 stars
Renaissance Rehabilitation and Nursing Care Center	000203	Dutchess	8	13	0	For-Profit	120	2 stars
Resort Nursing Home	001694	Queens	3	14	2	For-Profit	280	3 stars
Richmond Center for Rehabilitation and Specialty	004823	Richmond	1	13	12	For-Profit	372	3 stars
River Ridge Living Center	000485	Montgomery	14	3	0	For-Profit	120	2 stars
River View Rehabilitation and	000976	Tioga	11	8	0	For-Profit	77	Not available

Nursing Care Center								
Riverdale Nursing Home	001241	Bronx	1	13	4			
Riverside Center for Rehabilitation and Nursing	000767	Rensselaer	3	6	0	For-Profit	80	3 stars
Robinson Terrace Rehabilitation and Nursing Center	000169	Delaware	15	7	0	For-Profit	120	
Rockaway Care Center	001666	Queens	2	30	1	For-Profit	228	2 stars
Rockville Skilled Nursing & Rehabilitation Center, LLC	000517	Nassau	0	1	1	For-Profit	66	2 stars
Rome Memorial Hospital, Inc-RHCF	000590	Oneida	15	3	1	Not-for-profit	80	4 stars
Rosa Coplon Jewish Home and Infirmary	004772	Erie	17	3	0	Not-for-profit	180	3 stars
Rosewood Rehabilitation and Nursing Center	003920	Rensselaer	1	3	0	For-Profit	80	2 stars
Ross Center for Nursing and Rehabilitation	000932	Suffolk	7	0	7	For-Profit	120	2 stars
Rutland Nursing Home, INC.	001316	Kings	16	18	33	Not-for-profit	466	3 stars
Safire Rehabilitation of Northtowns, LLC	000266	Erie	4	6	5	For-Profit	100	3 stars
Safire Rehabilitation of Southtowns, LLC	003084	Erie	11	1	0	For-Profit	120	2 stars
Saint Joachim & Anne Nursing and Rehabilitation Center	004418	Kings	0	0	27	Not-for-profit	200	2 stars
Salamanca Rehabilitation & Nursing Center	000081	Cattaraugus	0	1	0	For-Profit	120	2 stars
Salem Hills Rehabilitation and Nursing Center	003765	Westchester	12	16	3	For-Profit	126	2 stars

Samaritan Senior Village, INC.	009472	Jefferson	2	2	0	Not-for-profit	167	Not available
San Simeon By the Sound Center for	000892	Suffolk	1	3	0	Not-for-profit	120	2 stars
Sands Point Center for Health and Rehabilitation	000546	Nassau	12	12	2	For-Profit	180	3 stars
Sans Souci Rehabilitation and Nursing Center	001106	Westchester	1	4	9	For-Profit	120	3 stars
Sapphire Center for Rehabilitation and Nursing of Central Queens, LLC	001680	Queens	4	1	50	For-Profit	227	2 stars
Sapphire Nursing and Rehab at Goshen	003407	Orange	15	5	4	For-Profit	120	2 stars
Sapphire Nursing at Meadows Hill	000696	Orange	15	16	0	For-Profit	190	2 stars
Sapphire Nursing at Wappingers	000191	Dutchess	0	1	0	For-Profit	62	2 stars
Schaffer Extended Care Center	001081	Westchester	4	7	0	Not-for-profit	150	5 stars
Schenectady Center for Rehabilitation and Nursing	000839	Schenectady	4	3	0	For-Profit	240	2 stars
Schervier Nursing Care Center	001224	Bronx	4	17	37	For-Profit	364	3 stars
Schervier Pavilion	005670	Orange	18	8	1	Not-for-profit	120	
Schoellkopf Health Center	000579	Niagara	25	2	0	Not-for-profit	120	2 stars
Schofield Residence	000269	Erie	26	3	0	Not-for-profit	120	3 stars
Schulman and Schachne Institute for Nursing and	001376	Kings	28	14	20	Not-for-profit	448	2 stars
Schuyler Hospital INC and Long Term Care Unit	000859	Schuyler	4	1	0	Not-for-profit	120	
Sea Crest Nursing and Rehabilitation	001401	Kings	14	27	10	For-Profit	305	3 stars

Sea View Hospital, Rehabilitation Center and Home	001749	Richmond	10	1	20	Public-Municipality	304	4 stars
Seagate Rehabilitation and Nursing Center	001373	Kings	5	0	31	For-Profit	360	1 star
Seneca Health Care Center	000300	Erie	14	6	0	For-Profit	160	3 stars
Seneca Hill Manor INC	007734	Oswego	18	0	0	Not-for-profit	120	
Seneca Nursing & Rehabilitation Center, LLC	000863	Seneca	2	2	0	For-Profit	120	3 stars
Seton Health at Schuylar Ridge Residential Healthcare	004826	Saratoga	4	2	0	Not-for-profit	120	3 stars
Shaker Place Rehabilitation and Nursing Center	000030	Albany	10	5	0	Public-County	250	3 stars
Sheepshead Nursing & Rehabilitation Center	001398	Kings	6	50	3	For-Profit	200	2 stars
Shore View Nursing & Rehabilitation Center	001399	Kings	28	29	2	For-Profit	320	3 stars
Silver Lake Specialized Rehabilitation and Care Center	001753	Richmond	2	6	37	For-Profit	278	2 stars
Silver Crest	004407	Queens	10	4	0	Not-for-profit	320	2 stars
Sky View Rehabilitation and Health Care Center, LLC	001120	Westchester	14	40	0	For-Profit	192	2 stars
Slate Valley Center for Rehabilitation and Nursing	004217	Washington	9	1	0	For-Profit	88	3 stars
Smithtown Center for Rehabilitation and Nursing Care	003433	Suffolk	24	8	4	For-Profit	162	2 stars

Sodus Rehabilitation & Nursing Center	001038	Wayne	2	2	0	For-Profit	124	
Soldiers and Sailors Memorial Hospital Extended Care	001159	Yales	5	3	0	Not-for-profit	150	
South Shore Rehabilitation and Nursing Center	000504	Nassau	5	12	3	For-Profit	100	3 stars
Split Rock Rehabilitation and Health Care Center	001243	Bronx	5	13	9	For-Profit	240	2 stars
Sprain Brook Manor Rehab	001114	Westchester	8	17	5	For-Profit	121	3 stars
Spring Creek Rehabilitation & Nursing Care Center	001400	Kings	2	4	11	For-Profit	188	1 star
ST Anns Community	000476	Monroe	17	4	0	Not-for-profit	470	2 stars
ST Anns Community	000477	Monroe	3	2	0	Not-for-profit	72	3 stars
ST Cabrini Nursing Home	001125	Westchester	16	9	8	Not-for-profit	304	2 stars
ST Camillus Residential Health Care Facility	000655	Onondaga	39	29	0	Not-for-profit	284	3 stars
ST Catherine Laboure Health Care Center	000252	Erie	2	2	0	Not-for-profit	80	4 stars
ST Catherine of Siena Nursing and Rehabilitation Care	003422	Suffolk	5	23	0	Not-for-profit	240	4 stars
ST Johnland Nursing Center, INC	000951	Suffolk	20	3	21	Not-for-profit	250	3 stars
ST Johns Health Care Corporation	000442	Monroe	35	7	0	Not-for-profit	455	4 stars
ST Luke Residential Health Care Facility INC	000735	Oswego	21	4	0	Not-for-profit	200	2 stars
ST Mary Center INC	004533	New York	0	2	0	Not-for-profit	40	5 stars

ST Patricks Home	001217	Bronx	26	0	14	Not-for-profit	264	3 stars
ST Vincent Depaul Residence	004543	Bronx	22	12	0	Not-for-profit	120	Not available
ST James Rehabilitation & Healthcare Center	000950	Suffolk	31	14	0	For-Profit	230	2 stars
ST Josephs Place	003914	Orange	7	1	1	Not-for-profit	46	
ST Peter's Nursing and Rehabilitation Center	000017	Albany	15	0	0	Not-for-profit	160	
Staten Island Care Center	001756	Richmond	2	4	16	For-Profit	300	1 star
Suffolk Center for Rehabilitation and Nursing	000888	Suffolk	2	9	1	For-Profit	120	2 stars
Sullivan County Adult Care Center	000963	Sullivan	5	1	0	Public-County	146	
Sunhabor Manor	000548	Nassau	26	17	10	For-Profit	266	4 stars
Sunnyside Care Center	000664	Onondaga	4	0	0	For-Profit	80	
Sunrise Manor Center for Nursing and Rehabilitation	000931	Suffolk	3	16	3	For-Profit	84	2 stars
Sunset Nursing and Rehabilitation Center, INC.	000613	Oneida	9	1	0	For-Profit	120	
Surge Rehabilitation and Nursing LLC	000909	Suffolk	9	4	4	For-Profit	149	3 stars
Susquehanna Nursing & Rehabilitation Center, LLC	000060	Broome	16	3	1	For-Profit	160	2 stars
Sutton Park Center for Nursing and Rehabilitation	001080	Westchester	7	17	7	For-Profit	160	3 stars
Syracuse Home Association	004323	Onondaga	2	1	0	Not-for-profit	120	4 stars
Tarrytown Hall Care Center	001115	Westchester	3	7	0	For-Profit	120	3 stars

Ten Broeck Center for Rehabilitation & Nursing	004710	Ulster	32	0	0	For-Profit	258	2 stars
Terence Cardinal Cooke Health Care Center	003089	New York	24	23	9	Not-for-profit	559	3 stars
Teresian House Nursing Home CO INC	000023	Albany	21	7	0	Not-for-profit	300	3 stars
Terrace View Long Term Care Facility	001739	Erie	7	6	0	For-Profit	390	4 stars
The Amsterdam at Harborside	009186	Nassau	3	0	0	Not-for-profit	56	5 stars
The Baptist Home at Brookmeade	000195	Dutchess	8	0	0	For-Profit	120	2 stars
The Brightonian, INC	000463	Monroe	11	1	0	For-Profit	54	1 star
The Brook at High Falls Nursing Home and Rehabilitation	000434	Monroe	2	3	0	For-Profit	28	Not available
The Chateau at Brooklyn Rehabilitation and Nursing	001383	Kings	9	4	20	For-Profit	189	3 stars
The Citadel Rehab and Nursing Center at Kingsbridge	001234	Bronx	9	3	49	For-Profit	385	2 stars
The Commons on St. Anthony, A Skilled Nursing & Short	000092	Cayuga	48	9	0	Not-for-profit	300	2 stars
The Cottages at Garden Grove, A Skilled Nursing	000657	Onondaga	1	0	0	Not-for-profit	156	3 stars
The Emerald Peek Rehabilitation and Nursing Center	001042	Westchester	3	8	2	For-Profit	96	1 star
The Enclave at Rye Rehabilitation and Nursing Center	001094	Westchester	4	7	17	For-Profit	160	

The Five Towns Premier Rehabilitation & Nursing Center	000539	Nassau	8	10	2	For-Profit	280	3 stars
The Friendly Home	000464	Monroe	14	1	0	Not-for-profit	200	3 stars
The Grand Pavilion for Rehab & Nursing at Rockville	000516	Nassau	19	15	14	For-Profit	158	2 stars
The Grand Rehabilitation and Nursing at Barnwell	000154	Columbia	13	9	0	For-Profit	236	2 stars
The Grand Rehabilitation and Nursing at Batavia	000343	Genesee	6	1	0	For-Profit	62	
The Grand Rehabilitation and Nursing at Chittenango	000403	Madison	3	0	0	For-Profit	80	2 stars
The Grand Rehabilitation and Nursing at Great Neck	000521	Nassau	18	10	9	For-Profit	214	3 stars
The Grand Rehabilitation and Nursing at Guilderland	000033	Albany	3	7	0	For-Profit	127	2 stars
The Grand Rehabilitation and Nursing at Mohawk	000357	Herkimer	11	3	0	For-Profit	120	2 stars
The Grand Rehabilitation and Nursing at Pawling	000189	Dutchess	4	6	8	For-Profit	122	3 stars
The Grand Rehabilitation and Nursing at Queens	001675	Queens	3	21	0	For-Profit	179	2 stars
The Grand Rehabilitation and Nursing at River Valley	006232	Dutchess	3	0	0	For-Profit	160	2 stars

The Grand Rehabilitation and Nursing at Rome	000593	Oneida	9	5	7	For-Profit	160	2 stars
The Grand Rehabilitation and Nursing at South Point	000564	Nassau	1	3	0	For-Profit	185	
The Grand Rehabilitation and Nursing at Utica	000609	Oneida	12	6	0	For-Profit	220	Not available
The Grove at Valhalla Rehabilitation and Nursing Center	007605	Westchester	5	6	5	For-Profit	160	2 stars
The Hamlet Rehabilitation Healthcare Center at	003230	Suffolk	8	7	8	For-Profit	240	2 stars
The Hamptons Center for Rehabilitation and Nursing	006871	Suffolk	7	1	14	For-Profit	280	2 stars
The Heritage Rehabilitation and Health Care Center	001393	Kings	1	5	2	For-Profit	79	2 stars
The Highlands at Brighton	005538	Monroe	21	5	0	Not-for-profit	145	4 stars
The Hurlbut	000465	Monroe	10	0	7	For-Profit	160	3 stars
The Knolls	006519	Westchester	0	1	1	Not-for-profit	20	5 stars
The New Jewish Home, Manhattan	001603	New York	48	6	13	Not-for-profit	514	2 stars
The New Jewish Home, Sarah Neuman	001113	Westchester	51	4	0	Not-for-profit	300	3 stars
The Osborn	001134	Westchester	8	2	6	Not-for-profit	84	5 stars
The Paramount at Somers Rehabilitation and Nursing	001148	Westchester	14	11	20	For-Profit	300	2 stars
The Pavilion at Queens Rehabilitation & Nursing	007298	Queens	4	15	11	For-Profit	302	1 star

The Phoenix Rehabilitation and Nursing Center	001405	Kings	29	7	37	For-Profit	400	2 stars
The Pines at Catskill Center for Nursing & Rehabilitation	000349	Greene	11	7	3	For-Profit	136	2 stars
The Pines at Glens Falls Center for Nursing &	001010	Warren	5	2	2	For-Profit	120	4 stars
The Pines at Poughkeepsie Center for Nursing &	000186	Dutchess	13	15	1	For-Profit	200	3 stars
The Pines at Utica Center for Nursing & Rehabilitation	000608	Oneida	5	2	0	For-Profit	117	3 stars
The Pines Healthcare & Rehabilitation Centers Machias	000083	Cattaraugus	0	1	0	Public-County	115	3 stars
The Plaza Rehab and Nursing Center	001225	Bronx	27	12	49	For-Profit	744	2 stars
The Riverside	001370	New York	50	16	18	For-Profit	520	1 star
The Shore Winds, LLC	000437	Monroe	20	1	1	For-Profit	229	
The Valley View Center for Nursing Care and	000702	Orange	53	16	3	Public-Country	360	2 stars
The Villages of Orleans Health and Rehabilitation	000716	Orleans	23	7	1	For-Profit	120	
The Wartburg Home	001068	Westchester	22	11	13	Not-for-profit	210	3 stars
The Willows at Ramapo Rehabilitation and Nursing	000780	Rockland	8	1	18	For-Profit	203	
Throgs Neck Rehabilitation & Nursing Center	004814	Bronx	7	1	36	For-Profit	205	1 star
Tolstoy Foundation	000785	Rockland	7	3	3	Not-for-profit	96	Not available

Rehabilitation and Nursing Center								
Townhouse Center for Rehabilitation & Nursing	006050	Nassau	10	5	8	For-Profit	280	2 stars
Triboro Center for Rehabilitation and Nursing	001249	Bronx	3	16	12	For-Profit	405	2 stars
Troy Center for Rehabilitation and Nursing	000762	Rensselaer	5	5	0	For-Profit	78	3 stars
Union Plaza Care Center	006037	Queens	21	6	29	For-Profit	280	2 stars
United Hebrew Geriatric Center	001077	Westchester	5	0	6	Not-for-profit	294	4 stars
United Helpers Canton Nursing Home	000810	Saint	13	3	0	Not-for-profit	96	
United Helpers Nursing Home	000802	Saint	21	1	0	Nott-for-profit	180	
Unity Living Center	003392	Monroe	5	6	0	Not-for-profit	120	4 stars
University Center for Rehabilitation and Nursing	001244	Bronx	2	1	2	For-Profit	46	3 stars
Upper East Side Rehabilitation and Nursing Center	001582	New York	18	51	11	For-Profit	499	3 stars
Utica Rehabilitation & Nursing Center	000607	Oneida	6	2	0	For-Profit	120	2 stars
Valley Health Services INC	003170	Herkimer	10	0	0	Not-for-profit	160	3 stars
Valley View Manor Nursing Home	000131	Chenango	10	0	0	For-Profit	82	
Van Duyn Center for Rehabilitation and Nursing	000650	Onondaga	45	8	1	For-Profit	513	2 stars
Van Rensselaer Manor	000761	Rensselaer	2	3	0	Public-County	362	2 stars
Verrazano Nursing Home	001754	Richmond	7	1	13	For-Profit	120	2 stars

Vestal Park Rehabilitation and Nursing Center	009514	Broome	7	2	2	For-Profit	160	2 stars
Victoria Home	001090	Westchester	2	4	4			
Villagecare Rehabilitation and Nursing Center	001599	New York	2	0	0	Not-for-profit	105	5 stars
Warren Center for Rehabilitation and Nursing	001008	Warren	5	2	0	For-Profit	80	2 stars
Washington Center for Rehabilitation and Healthcare	001026	Washington	5	1	0	For-Profit	122	2 stars
Waters Edge Rehab & Nursing Center at Port Jefferson	000899	Suffolk	6	8	2	For-Profit	120	2 stars
Waterview Hills Rehabilitation and Nursing Center	001144	Westchester	11	9	1	For-Profit	130	3 stars
Waterview Nursing Care Center	001677	Queens	2	2	5	For-Profit	200	2 stars
Waterville Residential Care Center	000618	Oneida	4	1	0	For-Profit	92	2 stars
Wayne Center for Nursing & Rehabilitation	001257	Bronx	0	1	0	For-Profit	243	2 stars
Wayne County Nursing Home	001034	Wayne	2	2	0	Public-County	192	
Wayne Health Care	001029	Wayne	15	2	0	Not-for-profit	180	
Wedgewood Nursing and Rehabilitation Center	000457	Monroe	2	1	0	For-Profit	29	Not available
Wells Nursing Home Inc	000335	Fulton	2	2	0	For-Profit	100	4 stars
Wellsville Manor Care Center	002589	Allegany	9	8	0	For-Profit	120	2 stars
Wesley Garden Corporation	000449	Monroe	3	5	0	For-Profit	200	4 stars
Wesley Health Care Center INC	000822	Saratoga	29	4	0	Not-for-profit	342	3 stars

West Lawrence Care Center LLC	001726	Queens	8	20	2	For-Profit	215	1 star
Westchester Center for Rehabilitation & Nursing	001069	Westchester	5	14	0	For-Profit	240	2 stars
Western New York State Veterans Home	005751	Genesee	18	5	0	Public-State	126	
Westhampton Care Center	005638	Suffolk	23	10	0	For-Profit	180	2 stars
White Oaks Rehabilitation and Nursing Center	003872	Nassau	33	13	8	For-Profit	200	2 stars
White Plains Center for Nursing Care	001058	Westchester	5	0	0	For-Profit	88	Not available
Wilkinson Residential Health Care Facility	000483	Montgomery	15	4	0	Not-for-profit	160	4 stars
Williamsbridge Center for Rehabilitation and Nursing	001247	Bronx	2	6	1	For-Profit	77	2 stars
Williamsville Suburban LLC	001378	Erie	8	15	0	For-Profit	220	2 stars
Willow Point Rehabilitation and Nursing Center	000064	Broome	35	15	0	Public-County	300	2 stars
Windsor Park Nursing Home	001699	Queens	9	3	0	For-Profit	70	2 stars
Wingate at Beacon	006237	Dutchess	19	2	0	For-Profit	160	3 stars
Wingate at Dutchess	005760	Dutchess	3	4	0	For-Profit	160	3 stars
Wingate at Ulster	007064	Ulster	7	3	0	For-Profit	120	4 stars
Woodcrest Rehabilitation & Residential Health Care	001700	Queens	5	18	0	For-Profit	200	2 stars
Woodhaven Nursing Home	000908	Suffolk	6	12	0	For-Profit	143	2 stars
Woodland Pond at New Paltz	009136	Ulster	0	1	0	Not-for-profit	40	5 stars
Workmen's Circle Multicare Center	001219	Bronx	17	36	12	For-Profit	524	2 stars

Wyoming County Community Hospital SNF	001154	Wyoming	4	3	0	Public- County	138	
Yonkers Gardens Center for Nursing and Rehabilitation	001109	Westchester	7	8	12	For-Profit	200	3 stars
Yorktown Rehabilitation & Nursing Center	0003630	Westchester	7	6	5	For-Profit	125	2 stars

The numbers displayed are provided by ACF and NH facilities and capture COVID-19 presumed deaths at NHs and ACFs, and COVID-19 confirmed out of facility (hospital/other) deaths of NH facility residents, as reported by NHs. Retrospective data reporting dates back to March 1, 2020 and data is updated as fatality reports are confirmed and validated by DOH.

Sources: NYS Department of Health, Center for Medicare and Medicaid Services.



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PROPOSED COMMENTS UPON TASK FORCE ON NURSING HOMES

AND LONG-TERM CARE

As Co-Chair of the Committee on Disability Rights I strongly applaud the comprehensive analysis performed by the Task Force on Nursing Homes and Long-Term Care. The report demonstrates not only the breath of the impact from the pandemic, but how a progressive institutionalization system has been created over decades that was ill-equipped for the pandemic as a result of living environments that had an almost equal detrimental effect upon quality of life. Frank discussions are now occurring about how we live as we die that have been avoided for decades and are now being addressed forthrightly. The Task Force has bravely advanced these discussions and on behalf of the Committee on Disability Rights I am grateful to the Task Force members and our representatives Sheila Shea, Mary Morrissey and Simeon Goldman.

Recognition must be given to Association leadership and particularly President Karson for expeditiously creating the Task Force to address ramifications from the pandemic. The work of the Task Force was clearly a collaborative effort. Special mentioned must be given to Chair Hermès Fernandez. After one brief voicemail message asking for the CDR to be included Hermes' response was immediate and meaningful. This is merely an example of the foresightful efforts of the Task Force to have diversity inclusion which is reflected throughout the Report.

This Task Force report has been a pinion in moving forward to address the problems and create a format to discuss solutions. None of the members involved had expertise in all areas addressed but collaboratively created a report addressing the broad dynamic and coalescing similarities instead of solely being focused on criticism and differences.

The nursing home industry, or indeed all large-scale congregate care, are not “villains” in the least. This system has been a societal creation and for some reason our society has repeatedly created these systems. State Hospitals are a living memory and were deconstructed to a community-based system. The pandemic has exposed similar systemic fractures in congregate care which may have similar solutions.

The Report provides an excellent analysis of the broad similarities in how our “system” addresses disabilities based upon age, type, program and payor source and the need to redirect towards appropriate community-based residences with supports and services to facilitate quality of life in the least restrictive living environment regardless of age.

There are many community programs that can be extended and enhanced to provide oversight and assistance as they currently do in programs for different types of persons with disabilities. Examples are Community Medicaid; Home and Community Based Services; “Open Door” (Money Follows the Person); Nursing Home Transition and Diversion; TBI; and Mental Health Enriched Housing. Note these examples further demonstrate the segmentation and silos that exist despite all have the same ultimate purpose.

The Report demonstrates the stark contrast between how we address aging related developmental disabilities and other types of disability, particularly where the age onset is as a child instead of as an adult. People with disabilities largely age in place. Group Homes are an example that includes persons who are part of the Willowbrook Class and continue to reside in place despite now developing age related disabilities. However, our aging population is shuffled between home, Adult Homes, Senior Housing, Assisted Living, Nursing Homes and Hospice. All occurring while they are least capable to control their destiny and while they are aware of their decreasing physical and mental capabilities. The lack of psychological supports and mental health services are abysmal.

Part of the reason why large-scale congregate care has been created is a result of the need to create housing that can accommodate disability and provide appropriate services. Many primary homes and residences are unsuitable as a result of the curse of stairs and small bathrooms or that a person needs 24-hour care requiring “overnights”. While the Report correctly points out most New Yorkers continue to live home, they also correctly point out the severe staffing problems with historically low wages and no benefits have deterred individuals from performing these often-demanding jobs. Who can blame a staff member without benefits refusing work during the height of the pandemic? Yet, as this legislative session ends that problem will necessarily persist. Care givers continue to have low wages and no benefits despite the physical, emotional and very personal demands of the job.

The Report first and foremost recommends we “Rethink the Delivery of Long-Term Care” and provides examples how this can be accomplished. The Report demonstrates how our system of caring for people with disabilities, regardless of age, arises from a lack of accommodative community housing with appropriate service delivery.

The attached Proposal began in concept amongst an ad hoc group of disability and elder professionals including attorneys looking for solutions while learning Zoom. From there, the collaborative network branched out and continues to grow. NYSBA was instrumental in the development and should take pride in the professionalism and collegiality among our members. The Proposal is non-proprietary and a work in progress. Like this Report, it is an effort to meaningfully address the crisis and inspire solutions not only to the current environment but the embedded pre-existing challenges.

As the Report demonstrates, solutions exist but are unrecognized. Already a majority of the older persons are aging in place. We already have community-based service delivery. We have existing programs that provide for congregate care avoidance. While the Proposal is not unique in method or manner, it appears unique as there is no similar program that allows primary residence condominium home ownership as a Community Medicaid exempt asset; utilizing Community Exempt income to maintain monthly expenses while remaining qualified to receive licensed and appropriate care services. Importantly, people can live with their spouse, child or caregiver and never have to move. They will remain in their home with an appropriate and comforting living environment through their passing.

Continuing discussions need to occur among the diverse perspectives reflected by the Task Force membership and resulting Report. It has been a privilege for CDR to have participated in the creation of this report and we look forward to continuing collaborations.

I WHOLLY RECOCOMMEND ACCEPTANCE OF THE REPORT WITH GRATEFUL APPRECIATION.

Joseph J. Ranni
Co-Chair Committee on Disability Rights

The opinions expressed are those of the author and do not reflect endorsement or position of the Association or any Section or Committee.

Accommodative Residences Utilizing Community Medicaid Exemptions for Older Persons and Persons with Disabilities

A Multi-Disciplinary Collaborative Effort

Executive Summary Overview

The singular goal of the following non-proprietary proposal is to provide a person centered cost-effective alternative approach for individuals who may not need to be or can avoid being in a skilled nursing facility. Embodied in the Nursing Home Medicaid system, there are predispositions toward congregate care when daily care exceeds 12 hours and are directed towards Nursing Homes instead of being provided supportive assistance that would enable them to remain at home or in alternative accommodative housing fully interwoven into the fabric of community living.

A significant reason people can't remain home are architectural barriers such as stairs and small bathrooms. A lack of accommodative housing for older persons and persons with disabilities is historic and largely the reason people with disabilities, regardless of age are compelled to large scale congregate care. Medicaid thereby ultimately became the payor while the individual becomes impoverished. In effect, a disability penalty and a living environment few choose.

Community Medicaid, a quite different program from Nursing Home Medicaid, was originally developed as a nursing home and congregate avoidance program – patterned from the Willowbrook Decree that deinstitutionalized state hospitals. In that instance, scaled-down community-based group homes were developed as an alternative to permanent institutional confinement, creating an array of modestly sized residences supported by an elaboration of integrated programs and services.

The congregate care system evolved over centuries in an attempt to address the complex and presumptively 'burdensome' issues commonly associated with aging and disability. The need for changes in both policy and practice is undeniable as events over the recent year have caused many of us to rethink the reasons and economies for the existing system. In fact, there are many programs that currently exist with the same purpose. Essentially, this proposal provides a method for an individual to choose and provide for their own accommodative housing without the need to depend on public funds for their housing and monthly support. The individual preserves their assets or uses their money otherwise lost to Medicaid impoverishment requirements for a primary home-like residence in their local community. Medicaid will save money as they are no longer responsible for room and board as well as

solving the “overnights” problem and fluid care delivery with small economies of scale.

This proposal offers an alternative that is humane and cost effective, that restores connection, dignity, and hopefulness to our most vulnerable citizens. It develops accommodative housing that embraces a holistic, person-centered approach to addressing the long-term care needs identified by each individual, one that focuses on core health determinants, leverages the strength of existing health care and social service providers (consistent with existing Community Medicaid, Nursing Home Waiver, Redirection and Avoidance programs). Importantly the proposal preserves personal resources and yields Medicaid savings through the benefits of co-located individuals requiring care. Regardless, as congregate facilities are being challenged by the costs of maintaining large facilities, this proposal provides an opportunity for integrating accommodative environment options consistent with or beyond those currently being provided.

We are all familiar with the seemingly hopeless progression from home... to senior housing... to assisted living... to nursing home... to hospice, yet little attention is given to the transfer trauma. Virtually no one likes to move from safe familiar surroundings yet doing so has become an integral part of aging in our state and nation. As a state and nation, we have willingly if reluctantly embraced this shuffle as unalterable, a march towards death that strips us of our freedom, our sense of purpose and our connections with family and community. They are replaced with a pattern of institutional diversions designed to provide momentary distractions and to cajole loved ones into thinking they have made the right decision.

Health care providers and systems are becoming increasingly aware of the importance of caregiving approaches that promote continuing wellness by addressing both medical needs and social determinants of health – conditions directly associated with where people live, learn, work, and play that affect a wide range of health and quality-of-life risks and outcomes. Often, these are a key driver to ensuring health equity, where everyone can attain their full wellness potential regardless of social position or other socially determined circumstance. Moreover, multiple studies have found that approximately 60 percent of the factors that influence health and wellness are nonmedical social, behavioral, and environmental, while only 20 percent are genetic, and the remaining 20 percent are associated with health care. The studies are numerous that demonstrate appropriate transitions between hospitals and homes reduce readmissions and health care costs, increases satisfaction with care, and achieve better outcomes.

Revealing the limitations inherent in the nursing home model of care is not intended as a challenge to the dedication of caregivers, medical professionals and administrators caught up in a broken system. They more

than anyone have personally witnessed the tragedy imposed by the pandemic. Instead, this proposal is an opportunity to revisit the question of care for older persons and people with significant disabilities. Collaboratively we can find transformational solutions that redefine how best to apply our resources to the challenge of "building back better"; to replacing isolation with family and community contact, despair with hope, distraction with purposeful activity, and to make aging in place a reality for members of our community at all stages of life.

Proposal Description

The proposal is to develop a community condominium residence consisting of 10-12 fully accessible suites with accompanying amenities, each being connected directly with interior and exterior common areas. The direct access to interior common areas could be through a foyer, but not a hallway. Suites would be large enough to accommodate an individual or couple; disabled child for whom an adult is a caregiver or adult child who is a caregiver to their parent; in-home service providers as needed; or visiting family members. The suite would be of universal design with private bedroom, possibly a second bedroom; accommodative bath, sitting area, and hazard-free kitchenette while exterior areas would include porches and patios, with easy access to secure courtyards offering lawn and garden areas, a playground (for visiting children) and barrier-free walkways.

All homes would be resident owned, enabling them to preserve financial resources permissible through the Community Medicaid primary residence exemption of \$906,000. The suite and common non-care services would be sustained through the monthly income exemption of \$884 and potentially additional exempt excess income expended consistent with existing Community Medicaid regulations through currently well utilized Pooled Trusts.

Medicaid requires near complete impoverishment since a person is only allowed non-exempt assets of \$15,750 and \$884 of income per month. If a spouse also requires Medicaid, then non-exempt assets are \$23,400 and income limit of \$1,300. If the spouse does not need Medicaid, they are entitled to a supportive Minimum Monthly Needs Allowance of at least \$3,259.50 or maintain their own income and contribute 25% of the excess above \$3,259.50 for the care and support of their spouse. The spouse is also able to retain non-exempt resources up to \$130,380.

For the individual, "excess income" which most people have beyond \$884 (pensions, 401ks, IRAs, annuities; etc.) can be deposited in a "pooled" trust that is professionally managed consistent with Medicaid guidelines and pays for supports, services, and luxuries Medicaid does not. The categories are very broad and can include any self-benefitting expense. For example, proper expenses for art or music "therapy"; appropriate furniture; or lightweight wheelchairs and other durable medical equipment to facilitate not only the person but those who assist them. The individual retains maximum independence and enjoys the benefit of using *their own* money as long as they personally benefit from the expenditure. In fact, *all of the money* to create and operate the residence is using the persons own resources and income. Public benefits would provide the same service delivery as currently exists for persons on Community Medicaid and residing home. Medicaid should experience *decreased expenditures* from not having to provide housing and benefitting from small economies of scale to deliver care. Congregate care does have its benefits and few would argue different as long as it is a personal choice and amongst options that aren't Hobson's Choices. However, as we now see, the large economies of scale are now dis-economic and there is a clear policy and demand shift away from what was previously acceptable.

A person is eligible and qualifies for Community Medicaid when they are below the above asset and income thresholds and need "hands-on" or "arm's reach" with at least three (3) Activities of Daily Living and a *filed* application. The "spend downs" and elder planning *must* be done before the application.

An assessment is performed through a state designated entity which evaluates the needs, care and supports as well as personal assistance resources available (ex. family members). From the care plan established, services can be obtained either through a MLTCP or CDPAS as the individual may choose. If a person chooses a MLTCP they typically have a choice amongst several companies who perform another assessment and "offer" what services, they will provide.

Most people receive services based upon "hours a day" correlated to need and a schedule to address those needs. Requiring more than 12 hours (overnights) is a logistical challenge to remain home. While most advocates argue the "per capita" rate paid MLTCPs encourages them to compel "high needs" transfer to congregate care, there is also the reality of industry-wide staff shortages. Small congregate care as proposed provides the opportunity to achieve a small economy of scale.

Notably, as CDPAS programs allow people to self direct care providers who are providing the needed services, traditional "licensing" of aides is not required. Consequently, the program provides the opportunity to expand the labor pool. All care givers under CDPAS must be properly vetted with payments monitored through a Fiscal Intermediary (FI). The FI is responsible to make sure the person is trained, able to perform the services and actually performs the services. While government costs are not increased by persons utilizing this program compared to Managed Long Term Care Plans (MLTCP), the ability to "self-direct" the care services and person providing them facilitates more appropriate care.

As previously stated, typical elder planning occurs *prior* to the filing of Medicaid application regardless of whether the planning is for Nursing Home or Community Medicaid. Both Medicaid programs were created to provide necessary supports and services for poor people. Elder planning seeks to protect assets while rendering individuals "poor" to qualify for benefits. If the assets aren't protected, they indeed will lack necessary resources due to the very low Medicaid limits and often drag their spouse with them into poverty. Beyond calculating the different "lookback periods" for Nursing Home Medicaid and Community Medicaid related to "gifting" money away from the person are strategies to "spend down" a person's assets to get under the Medicaid "resource" limit and preserve assets consistent with Medicaid guidelines.

For Community Medicaid planning, the primary home is always the initial "go to" for spending money on an exempt asset that provides an appropriate and comfortable environment that is then preserved through the primary residence exemption. Typical planning seeks to provide accommodative housing that will facilitate the needs of the individual through death and preserve assets to access in times of need.

Any money not properly preserved or transferred will be lost to Medicaid to pay for the services Medicaid provided during life. Most are familiar with spousal refusal where a spouse protects assets by refusing to make those resources available to the needy spouse. Upon the Medicaid individual's death, Medicaid has a right to recover those expenses from remaining assets with certain exemptions. Contrary to popular belief, the primary goal of elder law is *preserving* assets for an individual's benefit and preparing for the most difficult transition we have in life. Regardless, most of us have witnessed the depression and discouragement of a couple facing the loss of their life's savings and the evaporation of their hopes of providing for progeny.

Special note should be made of the impact the current system has upon the “well” spouse, often compromised as well. First, our system separates spouses and the lack of appropriate housing is the primary reason. They both can’t be where they are and can’t be together where the other has to go. Additionally, they are compelled to “refuse” their spouse and a notably sickening elder planning strategy of divorce. This proposal addresses these issues as spouses will never have to part; be rendered poor; or struggle without assistance because they will not separate.

Amazingly, despite older persons and persons with disabilities facing the most challenging aspects of life there is a dearth of psychological supports, services, or treatment. There are few things more disturbing to witness than a person with a dementia realizing their loss of mental acuity. Yet, what assistance exists? In the community there are mental health programs, peer supports, family, friends, religious and social communities.

During the discussions in the crowdsourcing of this proposal staffing and workforce issues came up continuously. Indeed, the lack of available workforce was a chronic problem before the pandemic and worse now as many caregivers have left the industry, some tragically. Of course, nursing home occupancy rates have been drastically reduced, and more people are remaining home requiring substantial assistance. It would be to deny the obvious that 24-hour at home care stretches the available workforce even thinner.

The proposal can expand the workforce available to perform this important work as some non-caregiving services are being provided by the residence, the most important being fresh food, security and housekeeping of common areas. Additionally, there would be a reduced need for some services as family, friends and community relationships are more readily available. Community Medicaid currently considers available informal, volunteer and family services as part of their assessment. Current community service programs can be expanded for support, assistance, and oversight.

Optimally, Community Medicaid would waive any right of recovery against the primary residence providing a further incentive so that suite occupant/owners could pass the primary residence value to beneficiaries. Notwithstanding, this proposal is not dependent upon such a waiver and traditional elder planning could still occur.

Some have commented on the potential desirability for a non-disabled person to want to reside in a residence. For some residences, that may be true and desirable creating a more integrated setting. However, for

residences dominated by older persons, compelled to move there from home, and the serious care giving most would be receiving, it is doubtful the issue would be a problem though it would be a testament that the goal of the proposal was achieved for the persons to whom it is directed.

Additionally, there is the potential that community residences could be established for separate purposes that individuals would find attractive to invest their personal funds, such as for young disabled adults or parents with disabled children. Hopefully, these residences wouldn't necessarily be standalone structures or clustered but integrated with affordable housing, workforce housing or perhaps even a golf community.

How creative might the free market be? The proposal would not require any more capital to develop than a small housing development. There is not the need for the capital-intensive system and basic utilitarian environment that exists due to a dependency upon the Medicaid monthly billing and large numbers of "beds" to create the necessary large economies of scale.

Developing a condominium plan per project would impose significant costs that would inhibit development of single residences in rural areas where there is the most need. In Western NY for instance the closest nursing home could be more than 30 miles away. The goal of this proposal is to reach all communities and the legal expenses are daunting relative to a single project. Consequently, additional collaborative efforts are needed to address how to streamline costs and approval. An acknowledgement needs to be made to the NYS Attorney General's Office who have been informative and gracious.

Small economies of scale demonstrably exist. While this proposal can certainly provide an alternative to Group Homes, Group Homes demonstrate small economies of scale are achievable. Viability is further demonstrated by alternative community-based housing innovations such as the Green House Project (<https://thegreenhouseproject.org/>) which is based upon being a small-scale nursing home of design consistent with this proposal. However, there is no reason this small community based accommodative residence couldn't be created and operated consistent with Community Medicaid exemptions described above with services provided through existing long term care programs. Another notable current grassroots example is people renovating their large homes to accommodate several similarly situated persons and achieve a small economy of scale to receive more appropriate services. A common planning practice in elder law is to co-locate family members who need services. Additionally, religious

communities facing the issues of aging are also good examples of truly aging in place.

This community-based solution seeks to provide permanent long-term housing for older persons and people with disabilities that would offer the array of collateral benefits typically associated with providing fully accessible home ownership. First, unlike the current system, spouses would remain together. Certainly, there are enhanced opportunities for contact with friends, family members and religious communities. Expanded services can be provided by community-based, multi-sector organizations that include individually aligned health and social interventions aimed at addressing the whole person.

This proposal seeks to achieve a better overall quality of life, providing the least restrictive living environment and promoting the self-management of chronic health conditions – which is particularly important as the health care sector transitions to value-based payment models.

Smaller economies of scale can provide for the overnights economically and provide more appropriate service delivery over the course of a day instead of a rigid schedule often currently required for home care. Additionally, as MLTCP benefit from providing services to people co-located there would be the greater potential of obtaining more or better-quality services than would be available at home.

With the goal of creating and sustaining independent environments that comprehensively facilitate aging in place, the residence would be supported by a number of on-site services including building management, food services, housekeeping, and maintenance services of common areas. The monthly excess income exemption allowed by Community Medicaid could be used to offset non-Medicaid housing and cost of living related expenses. Regardless, the home's equity could still be accessed for any purpose, sufficient funds would need to be available to offset monthly common charges, perhaps mortality + 5 years to determine necessary reserves.

Questions arose in collaboration as to what type of licensing, if any, would be appropriate. While a detailed analysis of the scope of existing licensing provisions for nursing homes, assisted living, adult homes, enhanced adult homes and Continuing Care Retirement Communities is beyond the scope of this Overview, simplistically it is a tiered hierarchy based upon the functional needs of the individual and insuring appropriate personal care services are provided by licensed individuals. In the proposal, those care giving services are provided not by the residence but by licensed care givers as would occur

if they lived at home. The residence would be providing services more aligned with the hospitality industry which also provides food, common facilities and housekeeping with the oversight and inspections common to that industry.

Notwithstanding, oversight is also enhanced as the residence would be located within or close to the community of their choice, assumedly close to family and friends. Additionally, community programs exist that could be expanded. There are many innovative proposals in NY and nationwide to expand community services and oversight.

Proposal Development

The proposal is designed to serve all populations who may need any long-term services and supports. At its core, this proposal embodies a new vision... one that acknowledges and respects the right of all individuals to live with dignity in the home of their choosing, and to play *the* central role in decision-making that effects where they reside, the care they receive as well as their participation in family and community living.

There is also opportunity to integrate with existing "self-help" and supported living initiatives that have long existed in assisting persons with disabilities. The potential exists for a person on public benefits to invest exempt assets, which like Community Medicaid typically exist in these types of programs, in an exempt primary residence which facilitates the economic ability to transition out of a supported program. The studies are numerous as to the uplifting effect of home ownership for persons in transition.

There is no reason that persons with assets should be inhibited from accessing a viable option as their economic situation may provide. A common denominator of poverty is abhorrent. Our society is full of talented builders, architects and entrepreneurs who can exercise creativity in development. One benefit *is* that this proposal provides a local solution, whether urban or rural, and is not dependent upon financing large complexes. Notwithstanding, existing programs for the economically disadvantaged can be expanded consistent with this proposal with similarly potential reduced government expenditures.

There is near universal recognition of the demand and policy shifts away from large scale congregate care and institutionalization towards small community-based housing. This proposal provides a free market non-

governmental solution that will allow people to live with their spouse in an accommodative environment of their choosing in their local community. They will never be shuffled or transferred while preserving their resources and liquidity. Medicaid will save money through small economies of scale and more appropriate service delivery. Halcyon? Not at all, this proposal could be developed tomorrow and should be. This a combination of existing programs, nothing in it is truly unique.

Conclusion

The time has come to move away from the institutional model that has governed the way people live as they are dying. How WE will live as we die. The pandemic has created a tragic opportunity to address long standing festering issues at their root and create appropriate and accommodative living environments for all persons.

Respectfully Submitted,

Joseph J. Ranni, Esq.

May 28, 2021

The opinions expressed are those of the author and do not reflect any endorsement or position of any person, legal or professional Association, Organization, or entity.

Joseph Ranni is the Co-chair of the Disability Rights Committee, a member the Health Law Section Long Term Care Planning Committee and Public Health Committee, and the Elder Law/Special Needs Section and Committee on Long Term Care Reform. He is also Board President of the non-profit Independent Living, Inc. He received his JD from Brooklyn Law School ('87) and LL.M.- Elder Law from Stetson College of Law ('15)

Doug Hovey, a Contributing Editor, is the Founder and Executive Director of Independent Living Inc. (ILI) which provides community supports, services and accommodative housing in the Hudson Valley. He is a noted statewide advocate and testifies frequently before the NYS Legislature.

Assistance in drafting by A.J. Abrams is gratefully acknowledged.

Additional Recognition

Substantial feedback, guidance and encouragement from members of the New York State Bar Association Health Law Section, Public Health Committee and Long Term Care committee; the Elder Law/Special Needs Section and Long Term Care Reform Committee and the Committee on Disability Rights which were critical to the development of this proposal. Notwithstanding, contributions from elder rights advocates; Independent Living Organizations and grassroots disability rights organizations are recognized as well.

Accommodative Residences Utilizing Community Medicaid Exemptions for Older Persons and Persons with Disabilities

Executive Summary

May 11, 2021

PROPOSAL: Facilitate the development of accommodative housing for persons with disabilities regardless of their age. Personal resource preservation and service delivery would occur concurrently with existing Community Medicaid, Nursing Home Waiver, Redirection and Avoidance programs. Medicaid savings would occur through small economies of scale and expanded community-based service programs currently existing.

CONCEPT: Purpose built small condominium community residences with 10-12 suites of accommodative design for persons with disabilities to age in place with spouses while preserving financial resources exemption for primary home ownership consistent with the Community Medicaid Resource Exemption. The Community Medicaid monthly income exemption (and excess income) allows for the payment of monthly common charges for food, utilities, housekeeping, maintenance, landscaping etc.

PURPOSE: Provide home ownership for individuals from which they would never have to move who are otherwise eligible for congregate care. The community residence would provide maximum independence for residents regardless of physical or mental health challenges throughout the remainder of their lives. As the residence could be in any small town or urban neighborhood, access for family and friends can be maximized. Additionally, existing community supports, and services programs can be expanded.

METHOD: Utilizing Community Medicaid resource and income exemptions to allow the purchase and provide monthly expenses of a residential suite with fully accommodative direct access to common interior and exterior areas. Personal care services would be provided through existing Consumer Directed Personal Assistance Services (CDPAS) programs and/or licensed Managed Long Term Care Plan entities (MLTCP's). Medicaid costs are reduced through smaller service delivery economies of scale and nursing home avoidance. Additionally, "overnights" and more fluid care delivery for residents can occur as service delivery would be shared by Consumer Directed program residents or MLTCP's who would be able to provide services to multiple clients.

COMPOSITION: Small community residence condo apartments consisting of suites directly opening to common interior and exterior areas. Suites would be of universal design with private bedroom, accommodative bath, sitting area, and hazard-free kitchenette. The suites could also have 2 bedrooms such that a parent, child, or caregiver could co-reside. Exterior spaces would include porches and patios, grass and gardens, a playground, and walkways.

OWNERSHIP: Condominium residence ownership in a structure built consistent with nursing home construction specifications. The ownership interest is an exempt resource asset under Community Medicaid eligibility rules. While Medicaid has many rules and some exemptions, preserving assets through home investment is a typical “spend down” strategy in current elder planning to preserve resources in the primary residence otherwise lost pursuant to Nursing Home Medicaid poverty requirements. Unfortunately, many people live in homes that cannot accommodate their disabilities and must move. Since Community Medicaid allows a principal residence up to \$906,000 to be exempt, residences could be simple or complex, and the purchase funds preserved. A significant incentive would be for Medicaid to waive any right of recovery against the primary residence asset. Notwithstanding, current financial Medicaid planning strategies would apply to protect assets according to existing law.

Residents retain all exclusive ownership rights and responsibilities typical of primary homeownership for their individual condo suite. At any time, the resident can sell their interest as is typical of any condominium interest. Notwithstanding, while the equity may be accessed for any purpose, sufficient balances must be preserved to provide an uninterrupted income stream (ex. SSI, SSDI, pension, 401(k) etc.) such that monthly common charges through the age of mortality +5 years can be paid.

MONTHLY EXPENSES: The residence would have a building manager, cook, housekeeping, maintenance, and common environmental non-care services. Community Medicaid allows an individual a monthly income exemption of \$884 with excess income to be used for non-Medicaid housing and costs of living. Consequently, the typical SS, pension, IRA etc. income can be used to pay a monthly expense that would be utilized for the maximum benefit and discretion of the individual.

ADDITIONAL EXEMPT RESOURCES:

Again, Medicaid has many rules concerning “allowable” exempt resources beyond the home. An individual is allowed assets of only \$15,900; with

Medicaid dependent spouse, \$23,400; and non-Medicaid spouse is permitted up to \$130,380 of assets. Consequently, while the individual limits are very low, an individuals with or without their spouse would be able to provide for their needs suitably as the residence provides for basic "room and board".

SERVICE DELIVERY: Currently, people living home on Community Medicaid receive services inside the home through either a Managed Long Term Care Plan (MLTCP) or Consumer Directed Personal Assistance Services (CDPAS) programs as they may choose. They typically have a choice amongst MLTCPs who perform an assessment and "offer" a menu of services. Most people receive services based upon "hours a day" correlated to need. Requiring more than 12 hours (overnights) is a logistical challenge to remain home.

Smaller service delivery economies of scale can provide for the overnights and provide more appropriate service delivery over the course of a day instead of a rigid schedule often currently required for home care. The concept would provide greater flexibility to facilitate care needs for persons over the course of a day. Additionally, as MLTCPs benefit from providing services to people co-located, there would be the greater potential of obtaining more or enhanced services than would be available at home.

Each resident would have the right to choose their care services provider or arrange services through a CDPAS as currently exists. Notwithstanding, all care givers must be properly trained, licensed if necessary, and compliant with the obligations consistent with any program pursuant to which services are provided.

LICENSING and INSPECTIONS: All care giving through MLTCP or CDPAS would be through licensed or approved entities, however, no licensing for the residence specifically would be necessary except usual and customary hospitality industry inspections and oversight for the common services and facilities that would be provided. The residence is providing accommodative design and services that if currently being provided to someone in their home would not need separate licensing.

COMMUNITY SUPPORTS and SERVICES: Currently there are broad community supports and services for persons with disabilities across a wide spectrum. These include transportation, peer counseling services, visitation and linking people to community-based services. There would also be greater access to faith-based services. Notwithstanding, innovative community-based programs are aggressively being considered and would dovetail well with this proposal by providing oversight and services access.

BROAD APPLICATION: While the proposal can be most helpful to the current middle class, there are also possibilities for low-income individuals through a set aside program whereby 20% of units may be available as rentals using subsidies from a sponsoring agency. Perhaps an individual could use exempt resources to invest in the exempt residence and “buy-out” the state which can provide a bootstrap to transition out of the public program.

Since these are small residences, they could be built for special purposes for which people may *want* to socialize in their living situation. Whether religious reasons, disability related or just similar interests they can accommodate personal independence of choice for people in need of accommodative housing.

Low or no interest loans could be offered to non-profits for build-out. There are many possibilities using current programs. There are existing and new policy efforts for greater community integration with other types of affordable or workforce housing into which the concept could easily be incorporated. While the residences can be operated standalone, optimally they would be integrated into every community seamlessly. There is no reason a residence could not be included in retirement or recreational communities as well.

POSSIBLE INCENTIVE:

Medicaid Waiver of Recovery. NYS Medicaid currently retains a right of recovery against the primary residential resource after the death of the resident and potentially the surviving spouse. Should Medicaid waive such right, and allow the resource to pass to beneficiaries, a significant financial incentive would be created for this type of nursing home avoidance.

ADDITIONAL FEATURES

To provide the most integrated setting, no more than 5 residences should be grouped on any building lot unless co-located with other forms of housing with the residence comprising no more than 20% of the total units on the lot.

Maximum 12 units per suite of accommodative design which must at minimum consist of a bedroom, sitting area, kitchenette (hazard-free) and bathroom. The sitting area must be large enough to provide for a pull-out queen bed if no second bedroom.

Each suite must open directly to the common area. While the suite entry can be a foyer, it should not be a hallway, though recognizing urban design may require otherwise.

Each residence shall maintain common exterior spaces directly accessible from the common areas into which each suite opens directly and exterior areas are accessible directly from an elevator.

Each residence should provide suitable space for use by visiting medical professionals; therapists; and telehealth.

Each residence should provide residence based freshly prepared meals and food service available a minimum of 12 hours per day and accessible 24/7.

Each residence would provide common area security, housekeeping services and premises maintenance.

Each residence would provide for all common charges for utilities, water, sewer, physical plant (not including interior suites), common areas both interior and exterior.

CONCLUSION: The proposal provides an opportunity for individuals with disabilities regardless of age, whether living in rural or urban settings, to enjoy an appropriate living environment with improved quality of life while having their support and care needs met. Most importantly they will continue to reside in the community with their spouse, parent, child with a disability or caregiver with direct access to friends and family. Lastly, Medicaid will save money through more appropriate economies of scale while also providing more appropriate community-based care.

There is nothing truly unique about this proposal. The goal is to provide a transitional plan allowing people to live in the community rather than be displaced. It seeks to incorporate existing programs across the elder and disability spectrums, all of which have the same purposes and goals to create supportive environments. Utilizing free market principles that will facilitate local solutions can benefit communities throughout the state both humanistically and economically. The question is not whether this proposal is achievable, but how it may be developed aggressively now and improved and refined over time.

Respectfully Submitted.

Joseph J. Ranni, Esq

Lead Collaborator

From: [New York State Bar Association](#)
To: [O'Clair, Melissa](#)
Subject: Steven Richman commented on the "Report and recommendations of the Task Force on Nursing Homes and Long-Term Care" library entry
Date: Wednesday, May 19, 2021 2:56:27 PM

[Steven Richman](#) commented on the '[Report and recommendations of the Task Force on Nursing Homes and Long-Term Care](#)' library entry

I recommend that Section H of the Recommendations be modified to refer to State and Local Governments (page 121) as well as the Federal Government. Pending allegations under review by both the NYS Attorney General and the State Assembly Impeachment Inquiry include that politics played a significant role in the State's response or lack thereof. I agree that political considerations should not play a role in these vital issues on any government level. The language should be revised to include... [View More](#)

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MEMO

TO: NYSBA LONG TERM CARE TASK FORCE

FROM: ELDER LAW AND SPECIAL NEEDS SECTION

RE: REPORT FOR HOUSE OF DELEGATES

DATE: May 27, 2021

The Elder Law and Special Needs Section appreciates the opportunity to comment on the NYSBA Long Term Care Task Force (the “Task Force”) report. We commend the Task Force on the time and effort that it devoted to these critical issues and wish to offer our commentary in the spirit of expanding the dialogue, as it certainly cannot end here. Rather than to look at the tragic consequences of the pandemic as the result of an anomaly, we consider the events to have exposed a system in desperate need of an overhaul.

While we appreciate the efforts that the Task Force clearly put into its report, the Section feels that the group in general did not do enough to develop recommendations to improve the quality of care and life for older adults and people with disabilities living in nursing homes and other settings such as adult care facilities. In our view, the Task Force issued general recommendations that fall short of offering concrete laws and regulations in New York State (or at the federal level) to “adequately protect vulnerable populations and guarantee equitable access to high quality care.”

The Task Force declined to offer specific policy changes or comments on legislation and regulations. Compare, for example, the Federal Independent Coronavirus Commission for the Safety and Quality in Nursing Homes report.¹ See also the work the Elder Law & Special Needs Section’s Task Force, and now Committee on Long-Term Care Reform.

Our comments pertaining to some of the recommendations and themes of the report are as follows:

March 25th DOH Advisory

We appreciate the focus on the March 25th DOH Advisory and its comparison to the CDC March 12, 2020 guidance document. However, the Task Force did not place any weight on the fact that nursing homes still had the authority to deny admission to new residents. While the Task Force refers to nursing homes as an extension of hospitals, nursing homes are not hospitals, nor are they emergency departments required to treat every resident that seeks admission. Nursing homes, if short staffed, short on PPE, and other supplies, could have denied admittance to new residents during the pandemic and the Task Force should have taken a stance on this point.

¹ <https://edit.cms.gov/files/document/covid-final-nh-commission-report.pdf>

Financial Situation of Operators

With respect to the funding of nursing homes and the financial stress before the pandemic, operators have been stating they have been underpaid for years. Yet, nursing homes continue to be purchased by for profit corporations, which we agree comes with problems. The Task Force missed an opportunity to take a hardline approach when it comes to financing. If more monies are needed, then this can and should be addressed. But nursing homes should first prove that they have a record of providing quality care and demonstrate how each government dollar is spent. We cannot continue to spend money on a system that often does not work well and can result in a serious lack of care and neglect to occur for older adults and people with disabilities.

Rethink the Delivery of Long-Term Care

We agree with the statement that nursing homes have been dangerous places for residents throughout the course of the COVID-19 pandemic. However, in its report, we feel that the Task Force missed an opportunity to directly acknowledge and address the long-standing quality of care issues and the failures of nursing homes in NYS. While the Task Force did not outrightly state there is a bias towards placing our older adults and people with disabilities into nursing homes (institutions), we appreciate the insinuation and we support the Task Force's recommendation to rethink the delivery of long-term care. We also support the recommendations of the Task Force, but again are concerned that the Task Force missed its opportunity to offer recommendations on specific laws and regulations.

Meaningful Agency Enforcement-Review Regulatory Standards

We respectfully disagree with the Task Force's statement that "regulation of nursing homes (and adult care facilities) by DOH is characterized by hundreds to thousands of standards that regulate the minutiae, and which have little to no impact on residents' quality of life or protection from contagion." First, regulation of nursing homes stems from the federal regulatory system, which sets forth minimum standards, and second, if the industry did a better job of self-regulating quality and resident rights, the regulations would not be needed. The laws and regulations exist because too many operators failed to ensure resident rights and meet quality care standards.

While we agree with the Task Force statement that "the focus of DOH surveyors is on the minutiae rather than on the big picture," we disagree with the Task Force's insinuation that the standards are too much on operators, and "stifle initiative from operators" when dealing with emerging threats. For example, while a pandemic such as COVID-19 was a shock/surprise to many, basic infection control protocols, procedures, and requirements have existed long before the pandemic (something the Task Force acknowledged.)

In addition, while we agree that DOH needs to look at the "big picture" when investigating nursing homes, it needs to do so at the operator level.

We also respectfully disagree with the Task Force's insinuation that DOH is 'too hard' on nursing home operators and is moving away from an advisory and supportive role. DOH is the enforcement entity of the federal and state nursing home laws and regulations. If anything, DOH routinely under enforces the laws and regulations. When discussing the role of DOH and whether it is 'too hard' on operators, the Task Force should have remembered that operators have the ability to appeal citations and fines. Residents, however, are not afforded an option to appeal a situation when the DOH fails to enforce the laws and regulations. The majority of residents are not harmed enough to pursue remedy/justice in the court system and many are prevented from accessing the court system due to pre-dispute arbitration agreements. As a result, it is imperative DOH does its job as the enforcement entity.

Furthermore, prior to and throughout the pandemic, DOH had meetings with industry representatives and issued numerous guidances to operators. Residents and their advocates however, were not, and are not, afforded such transparency.

Meaningful Agency Enforcement-Survey Process

Again, the Task Force missed its opportunity to offer constructive feedback to both the state and federal governments and regulators. The report nicely outlined the survey requirements and the role of federal oversight, but the Task Force's recommendations do not make any reference or comment on improving the process.

Meaningful Agency Enforcement-Address Under-Performance

We are disappointed that the Task Force used the word "under-performance" to describe serious deficiencies in the provision of substandard resident care and did not directly call out operators who routinely violate resident rights and safety conditions. Under-performance means neglect of older adults and people with disabilities who rely on staff to meet their basic care needs. In addition, DOH, even when occupancy rates exceeded 95% could have done more to ensure resident safety. Including, for example, more closely enforcing resident assessments and discharge planning to ensure that residents who do not want to live in a nursing home were prioritized to live in a lower level of care or the community with services.

In summary: the members of the Task Force clearly put in a lot of time and energy into the report, including an overview of the pandemic, responsibilities of government in responding to a pandemic, and the federal-state regulatory structure. However, the final product and recommendations are diluted and offer many excuses for the failures of nursing home operators. Older adults and people with disabilities have been inappropriately warehoused and harmed for years prior to the pandemic. While we recognize operating a nursing home, especially during the pandemic, is difficult, at the end of the day excuses are not acceptable and true reform is necessary. This report offered general statements but no specific reform recommendations.

PRELIMINARY REPORT OF THE TASK FORCE ON UNIFORM RULES

June 7, 2021

Opinions expressed are those of Task Force preparing this Report and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

I. INTRODUCTION

On December 29, 2020, Chief Administrative Judge Lawrence Marks issued an order adopting 29 new rules into the Uniform Rules for the Supreme Court and the County Court, effective February 1, 2021, based upon rules of the Commercial Division. These new rules were not subject to a comment period, although in 2019, the OCA Advisory Committee on Civil Practice was asked to study all of the rules of the Commercial Division, and that Committee's report was posted for comment. (See Section II., below). Notice of these changes did not reach the leaders of the New York State Bar Association until mid-January, 2021. NYSBA immediately launched a series of CLE programs to familiarize the lawyers of the state with the new rules shortly after the rules became effective.

As lawyers became familiar with the new rules, NYSBA leaders began hearing comments about the unwelcome changes imposed by the new rules. In addition to complaints about the lack of substantial notice and opportunity to comment on proposed rules, there were specific comments regarding the difficulty of applying many of rules, where were created for large commercial cases, to the broad panoply of actions and proceedings in Supreme and County Courts.

On April 12, 2021, the first meeting of the NYSBA House of Delegates following the effective date of the new rules, the following resolution was passed by an overwhelming majority of the House:

“Be it resolved that based upon the significant concern expressed by the membership of NYSBA, that the President, or his designees immediately reach out to the administrative judges, the OCA, or the Chief Judge as is appropriate, to request an immediate meeting to discuss the staying the rules adopted by the Administrative Order AO/270/2020 dated December 31, 2020 by Chief Administrative Judge Marks for a period of one year so that all stakeholders can adequately examine and comment on the rules as well as the impact that the rules will have on attorneys and their clients especially the underserved portion of our population and further to examine the cost and impact that

these rules will have on access to justice by all segments of our population but especially amongst the underrepresented portions. It is further resolved that a copy of this resolution will be immediately delivered to the administrative board of the courts.

This resolution also had the support of a number of Sections of NYSBA, including the Judicial Section.

In accordance with the resolution, then President Scott Karson contacted Chief Administrative Judge Marks to urge the imposition of an immediate stay of enforcement of the new rules to permit NYSBA to comment fully upon them. Shortly thereafter, Mr. Karson created this Task Force to coordinate the efforts of NYSBA in furtherance of the resolution.

The Task Force elicited input regarding the rules in two major ways. First, all NYSBA Sections and Committees were invited to send comments to the Task Force by July 1, 2021. Second, the Task Force created four open forums on May 14 and 15, 2021, inviting all NYSBA members, all local and specialty bars, and any New York lawyer to attend in order for the Task Force to hear their comments. Despite relatively short notice, and the difficulties of finding time within work schedules to attend a two hour forum, approximately 400 lawyers registered for the forums. The Task Force heard many comments from them—some representing themselves, and some representing local bar associations—and many of them participated in a survey launched during the forum. The survey results are set forth in Section IV, below. The comments received from the forums are covered in the substantive sections of this report: Sections V – VIII, below.

On June 1, 2021, Chief Administrator Marks informed NYSBA leaders that the Administrative Board had declined to issue a stay, but was willing to make appropriate changes in the rules, and invited NYSBA to make any such recommendations. The leadership is considering appropriate response to this news.

This is a preliminary report. The final report awaits input from NYSBA Sections and Committees. The final report will also include specific language changes, where appropriate, to individual rules.

II. HISTORY OF “NEW RULES”

In 2018, the Advisory Committee on Civil Practice (“Advisory Committee”) was asked to evaluate the rules of the Commercial Division (202.70) to discern which of the rules should be adopted for use in all civil cases. The Advisory Committee spent several months studying the rules and seeking input from judges and court personnel in addition to their members who have expertise in procedural laws and rules. In July, 2018, the Advisory Committee released its report. In the report, it made the following recommendations: 1) that “wholesale adoption of the rules statewide is not warranted,”¹ 2) that some of the rules may “add to the costs of litigation and/or place an added burden on the already strained resources of the courts,”² 3) that “statewide application of some rules would be inappropriate given the disparate caseloads among the various courts,”³ and 4) that some of the rules “would be unworkable in the many cases where the amount at issue may not justify the more attorney-intensive efforts that are expended in large commercial cases.”⁴

The Advisory Committee then recommended adopting nine of the Commercial Division rules for general use and recommended against adopting the remaining Commercial Division rules. The report addresses each rule, setting forth the reasons for recommending either the

¹ Report of the Advisory Committee on Civil Practice on the Commercial Division Rules [hereinafter Advisory Committee Report], July 2018, p.1.

² Advisory Committee Report, p. 1-2.

³ Advisory Committee Report, p. 2.

⁴ Advisory Committee Report, p. 2.

adoption or rejection of the rule's application to all civil matters. The Advisory Committee's Report is attached as Appendix 1.

On October 15, 2018, John W. McConnell, then Counsel to OCA, disseminated the Report with a request for public comment. The request for public comment was titled "Request for Public Comment on the Proposed Adoption of Certain Rules of the Commercial Division in Other Courts of Civil Jurisdiction." The memorandum seeking public comment states that the Advisory Committee recommended nine Commercial Part rules. The final sentence of the memorandum is "The Administrative Board is now seeking public comment on the recommendations set forth in the Advisory Committee's Report." A copy of the Memorandum is attached as Appendix 2.

It is not clear how the request for comment was disseminated, other than the posting on the New York Courts website. In November, 2018, the New York State Bar Association's CPLR Committee ("CPLR Committee") addressed the Request for Comment. It is not known how the CPLR Committee became aware of the Advisory Committee Report; it may have been through the staff liaison, Ron Kennedy, or it may have been through one of the members of the CPLR Committee who also serve on the Advisory Committee.⁵ The CPLR Committee only addressed the nine rules recommended by the Advisory Committee, understanding that the request to comment related to the adoption of "certain rules of the Commercial Division" and the direction was to comment directly on the Advisory Committee's Report and its recommendations. The CPLR Committee did not understand the request for comment to require the evaluation of all of the rules of the Commercial Division.

⁵ James Blair, Sharon Stern Gerstman and Thomas Gleason are active members of both the CPLR Committee and the Advisory Committee.

The CPLR Committee issued two Memoranda. The first, on January 11, 2019, supported the Advisory Committee's recommendations with respect to 8 of the 9 provisions. With respect to Rule 19-a, concerning motions for summary judgment, the CPLR Committee requested additional time in order to receive a report from a subcommittee and then vote at a meeting on January 18, 2019. On January 24, 2019, the CPLR Committee issued its second Memorandum, which opposed the application of Rule 19-a to all civil cases. The CPLR Committee also urged that if such a rule were to be adopted, that the imposition of the requirement for a statement of undisputed facts be left to the discretion of the judge, as the Commercial Division rule provides, and not mandatorily imposed on all cases, as the Advisory Committee recommended. Both Memoranda were issued by NYSBA's Government Affairs Office on letterhead that clearly shows that the views are those of the CPLR Committee, and which includes the standard language for a report of a section or committee: "Opinions expressed are those of the Section/Committee preparing this memorandum and do not represent those of the New York State Bar association unless and until they have been adopted by its House of Delegates or Executive Committee." In accordance with NYSBA by-laws, and the usual practice of the Government Affairs Office, the memoranda would also have been sent to the Association president. A copy of the CPLR Committee's Memoranda are attached as Appendix 3.

Four other entities provided comments:

1. On January 28, 2019, the New York City Bar commented on some (but not all) of the nine rules recommended by the Advisory Committee, and also commented on seven rules which were rejected by the Advisory Committee for statewide application, but only sought adoption of two of them.

2. On December 11, 2018, the Matrimonial Practices Advisory and Rules Committee commented on the nine recommendations and indicated that a number of these rules were in conflict with existing rules concerning matrimonial actions.
3. On January 28, 2019, an organization, “Managing Attorneys and Clerks Association, Inc.”⁶ commented on some (but not all) of the nine rules recommended by the Advisory Committee, and also commented on several other provisions which were rejected by the Advisory Committee, seeking the adoption of five of them, and opposing the adoption of four of them.
4. On January 14, 2019, the Corporation Counsel for the City of New York commented on one rule recommended by the Advisory Committee: Rule 11-b concerning privilege logs.

A copy of the comments of these four entities is attached as Appendix 4.

After the comment period in January 2019, there was no further request for comment or any notification to NYSBA or any other bar association that the Administrative Board was considering a broad adoption of 29 of the Commercial Division Rules, until January 2021, after the Administrative Board had acted, announcing that the rules would become effective February 1, 2021.

⁶ Managing Attorneys and Clerks Association, Inc. was incorporated in 2012, but may have been in existence for a longer period of time. According to a 2013 law.com article (<https://www.law.com/corpcounsel/almID/1365753527511/New-Group-Brings-Together-Legal-Dept-Managing-Attorneys/>), it is made up of Managing Attorneys and Managing Clerks of New York City law firms and legal departments. Many of their officers and directors are non-lawyers, who work as managing clerks, overseeing non-attorney staff at the constituent firms.

III. CONFLICTS BETWEEN COURT RULES and the CPLR

When the CPLR was enacted in 1962, some of its provisions were designated with section numbers (laws) and some were designated with the letter “R” (rules). Amendment to the laws was reserved to the legislature, but amendment to the rules could be effected by either the legislature or by the Judicial Conference, established under the Judiciary Law, subject to legislative approval.¹ In 1978, the power of the Judicial Conference to so amend the rules was rescinded,² and amendment of both the laws and rules of the CPLR was made within the exclusive control of the legislature. There have been attempts to empower the Chief Administrator of the Courts with the ability to amend the rules of the CPLR, without success.³

The Courts are empowered to adopt rules concerning the conduct of court proceedings, subject to the limitations of the Constitution, Article 6, §30.⁴ Any rules adopted cannot impair substantive rights and must be consistent with existing legislation. Rules which enlarge or abridge rights, or which impose procedural burdens which impair statutory rights or remedies may be stricken or limited.⁵ The rule-making authority of the Courts is not subject to the Administrative Procedure Act; it is thus limited only by these principles as set forth in the Constitution and the Judiciary Law, as delineated by the Court of Appeals.

Since the adoption of the first set of Uniform Rules for Trial Courts in 1986, there has been an increase in the number of rules, many of which have substantive effect. Some rules have become the only source of procedure for a significant aspect of the case.⁶ This trend makes it

¹ Judiciary Law §229(3).

² L. 1978, ch 156, *eff.* May 19, 1978

³ *See, e.g.*, 1983 Legislative Program of the Office of Court Administration.

⁴ *See*, Judiciary Law §211(1)(b), empowering the Chief Judge; Judiciary Law §212 empowering the Chief Administrator with respect to powers delegated by the Chief Judge, and Judiciary Law §213 establishing the requirement of advise and consent by the Administrative Board.

⁵ *People v. Ramos*, 85 N.Y.2d 678, 687-8 (1995); *see also*, *A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y.2d 1 (1986).

⁶ *See, e.g.*, 202.15 regarding the Videotaping of civil depositions; 202.21 (e) regarding striking the note of issue.

increasingly difficult for practitioners, particularly those who do not litigate frequently or whose practice is primarily in another jurisdiction, who would likely turn to the CPLR for the source of procedure. This is particularly true where the relevant CPLR provision is extensive (e.g. CPLR 3212 on Summary Judgment) and includes a detailed list of the documents which must be included in any submission to the court (e.g. CPLR 3212(b) which sets forth all of the documents which are required to be attached to a motion for summary judgment; a “statement of material facts” is not included.).

A proliferation of rules adds cost to the proceeding. The time necessary to ensure compliance with all rules is either passed on as cost to the client or is to be borne by the lawyer. Unless additional rules are necessary in order to ensure that civil actions proceed efficiently and fairly, the additional rules are harmful to the process.

Even worse is when the rules either encroach or conflict with rules within the CPLR. At least five of the “new rules” do so:

A. §202.20-a. Privilege Logs (based upon Commercial Division Rule 11-b(a))⁷ This rule allows the party requesting documents to specify whether the privilege log may cover categories of documents or must provide for a document by document review. If the party insists upon a document by document privilege log, the rule provides for cost-shifting. CPLR 3122(b) clearly provides for a document by document privilege log, without any additional burden to be placed upon the party seeking disclosure. Thus, the cost-shifting provisions of §202.20-a encroach upon a party’s rights as set forth in CPLR 3122(b).

⁷ This will be covered in greater depth within Section V below.

B. §202.20-f. Disclosure Disputes (based upon Commercial Division Rule 14)⁸. This rule limits the ability of a party to make a motion regarding a discovery dispute. It requires the movant to first consult with other counsel to resolve the dispute, and the failure to so consult, “may result in the denial of a discovery motion...or in such motion being held in abeyance until the informal resolution procedures of the court are conducted.” It should be noted that §202.7(a) and (c) require the moving party in a discovery dispute to include an affirmation that either a good faith effort to resolve the dispute was made, or an indication of “good cause why no such conferral with counsel for opposing parties was held.” In contrast, §202.20-f relieves the moving party from conferral only in “exigent circumstances.” While a motion may be denied without the requisite affirmation,⁹ a strict requirement to “meet and confer” before a motion may be heard, is tantamount to seeking permission from the court to calendar the motion, and it is in conflict with the CPLR.¹⁰

C. §202.8-d. Orders to Show Cause (based upon Commercial Rule 19).¹¹ This rule limits Orders to Show Cause to instances where “there is a genuine urgency,a stay is required or a statute mandates so proceeding.” This standard is contrary to the provision of the CPLR governing Orders to Show Cause (CPLR 2214(d)), which permits an order to show cause in any “proper case.”

⁸ This will be covered in greater depth within Section V below.

⁹ *Barnes v. NYNEX, Inc.*, 274 AD2d 368 (2d Dept. 2000).

¹⁰ *See, Costigan & Co., P.C. v. Costigan*, 304 AD2d 464 (1st Dept. 2003) which found the enforcement of prior Commercial Division Rule 24(a), requiring the parties to “meet and confer” improper.

¹¹ This will be covered in greater depth within Section VI below

D. §202.8-g. Motions for Summary Judgment: Statements of Material Facts (based upon Commercial Rule 19-a).¹² This rule requires the inclusion by the moving party of a “short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.” It also requires the opposing party to include “a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party.” The rule specifies what must be included in both the statement and response to the statement, and also provides in subsection c: “Each numbered paragraph in the statement of material facts required to be served by the moving party will be deemed to be admitted unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.” This particular provision is contrary to the CPLR in a number of ways. First, the statement of material facts acts as a “Notice to Admit,” the procedure for which is covered in CPLR 3123. Among other provisions, CPLR 3123(b) allows for a limitation on any deemed admission, and an opportunity to reverse the admission. §202.8-g does not so provide. The effect of the admission provided for in subsection (c) may result in the grant of summary judgment despite the fact that the opponent of the motion has “shown facts sufficient to require a trial of [an] issue of fact.” CPLR 3212(b) provides that in such a case, summary judgment is to be denied.

E. §202.8-e Temporary Restraining Orders (based on Commercial Rule 20).¹³

This rule provides that a temporary restraining order cannot be made *ex parte*, without a showing of “significant prejudice by reason of giving notice, or that notice could not be given despite a good faith effort.” This is in direct conflict with CPLR 6313, which provides that in a motion for

¹² This will be covered in greater depth within Section VII below

¹³ This will be covered in greater depth within Section VI below.

preliminary injunction, upon a showing of immediate and irreparable injury, a temporary restraining order may be granted without notice.

When there is a possible or actual conflict with the CPLR, not only must the practitioner be aware of the CPLR and the Uniform Rules, but also the application of the case law pertaining to the conflict, as it develops. While the law is clear that a direct conflict must be resolved in favor of the existing statute,¹⁴ practitioners are put in a no-man's land if there is not yet case law particular to the CPLR provision and the rule in potential conflict. For this reason, it is important that the rules avoid any possibility of such a conflict or encroachment. Perhaps, it is reason alone to rescind each the rules which create the direct or potential conflict.

IV. GENERAL COMMENTS TO THE NEW RULES

The Committee received comments from a variety of attorneys including those in solo or small firms and those in large firms and practitioners from rural areas of the state as well as the large metropolitan areas. Comments were received from practitioners who were familiar with the Commercial Division Rules and those whose practices (ex. Legal aid, matrimonial, personal injury) had not previously dealt with Commercial Division Rules. We also received comments from court attorneys and judges.

While there were a few comments which were either wholly in favor of all the new rules or wholly against all the new rules, the majority of comments received were directed against certain rules. While some of the comments against some of the rules were very specific, many of the comments raised similar concerns. These general concerns included:

- 1) Time and cost involved in compliance with the new rules;

¹⁴ *People v. Ramos*, 85 N.Y.2d 678 (1995); *A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y.2d 1 (1986).

- 2) Unnecessary sanctions;
- 3) Tone of rules; and
- 4) General comments on rules.

A. TIME AND COST ISSUES

With regard to time and cost issues, commenters noted the inability to take on smaller cases due to the added time required to handle the case and the added cost to the client occasioned by the additional hours of attorney time necessary to complete the task. By way of example, a practitioner in Westchester County commented he would now be reluctant to represent a client whose case may have a value of \$30,000. Whereas the rules previous applied only to cases in the commercial part, where the monetary threshold for Westchester County is \$100,000, the application of these rules to all cases renders the smaller cases "not worth the time and effort" for the amount the client may ultimately recover after attorney's fees and added costs.

Similar comments were received from practitioners in the matrimonial field who commented that their clients are "people not corporations" on whom the new rules have a significant monetary impact. Commenters also indicated their inability to take on the number of pro bono cases they would typically accept due to added time and cost issues. Legal services providers commented on their inability to obtain the services of outside attorneys to assist their indigent clients as a result of the new rule requirements. One rural commenter stated that due to his inability to take on smaller cases for clients who could not afford added costs, he was considering early retirement. This must be viewed in conjunction with the NYSBA Report and Recommendations of the Task Force on Rural Justice (April 2020) which addressed the access to justice issues prevalent in rural areas of the state (existing before the advent of the new rules). A

copy of the Report of the Task Force on Rural Justice is annexed as Appendix 5. See also Section D, below, for survey results on the cost of the new rules.

B. UNNECESSARY SANCTIONS

Comments on sanctions primarily concerned **§ 202.1 – Appearance by counsel with knowledge and authority (based upon Commercial Division Rule 1(a) and (c))**. Comments supported the provision requiring that counsel be familiar with the case and be fully prepared and authorized to discuss and resolve the issues which are "scheduled to be the subject of the appearance." Most commenters, however, felt the sanctions, granting a default judgment under Uniform Rule 202.27, or the imposition of financial sanctions under 130.21 were unduly harsh and unnecessary.

Concerns were raised from small practitioners who use the services of a per diem attorney who, although provided with case information, may not be fully prepared if the judge decides to discuss issues which were not anticipated to be the subject of the appearance (i.e., settlement demand or settlement authority at a discovery conference). For the same reason, experienced counsel felt this rule would inhibit sending new, less experienced attorneys to discovery (or status) conferences to gain experience appearing before the Court. Notably Rule 202.1 was not recommended by either the OCA Advisory Committee on Civil Practice and was never commented upon by NYSBA's CPLR Committee, or any other entity providing comments.

Sanction concerns were also raised in connection with **§202.20-e Discovery Schedules (based upon Commercial Division Rule 13(a) and (b))** which requires strict compliance with discovery orders. Noncompliance may result in imposition of "an appropriate sanction" or other relief under CPLR 3126.

Comments on **§202.23 Consultation Prior to Preliminary and Compliance Conferences (based upon Commercial Division Rule 8(a))**, included concerns as to whether the sanctions found in Section 202.21 would be applicable due to the language of the rule stating counsel "shall" consult on a variety of issues prior to each conference.

Overly harsh sanctions were also raised in connection with **§202.20-c – Responses and Objections to Document Requests (based upon Commercial Division Rule 11-e)**.

C. TONE OF RULES

Language used in some Rules was seen as unnecessary and even demeaning to experienced practitioners. One example is § 202.1 which advises counsel that it is important to be on time for scheduled appearances.

Comments also addressed §202.20-f and the requirement that counsel attest to the date, time and length of the in-person or telephonic conference held to discuss discovery disputes before resorting to court intervention. The rule requiring attorneys to actually time phone calls or personal discussions with opposing counsel was seen as unnecessary since attorneys are already required to attest to good faith efforts to resolve a discovery dispute in connection with a Motion to Preclude or Compel (CPLR 3105 and §202.7). Additional comments on §202.20-f included the inability to attempt discovery dispute resolution using email, a common practice when opposing counsel is not available for a phone call or personal meeting. One commenter indicated the inability to sign an affirmation of good faith as the new section requires attestation to the length of time and date of the phone call or personal meeting and does not permit attempts at resolution by email.

D. COMMENTS ON THE RULES, IN GENERAL

In addition to the above, some general comments included:

1. Lack of necessity for the rules in certain geographic areas of the state. These rules appear to be a statewide resolution to problems encountered in the downstate metropolitan counties
2. Issues facing rural practitioners including lack of access to broadband and cell phone service, the limited number of practicing attorneys and the number of aging attorneys with limited knowledge of or access to technology were also addressed.
3. The necessity of certain rules was also questioned as commenters felt they could work out their own discovery schedules and issues by communicating with other counsel and that they could do so on a timely basis without the threat of harsh sanctions for lack of strict compliance.

Finally, a series of general questions was posed in a poll administered during four forums conducted by this Committee. Not everyone who participated in the forum necessarily took part in the poll. The results of that poll are as follows:

- a) Overall, are you in favor of the Administrative Board's adoption of the New Rules?

Yes	16% (24 votes)
No	71% (105 votes)
No Opinion	13% (19 votes)

- b) What impact do you feel the New Rules will have on the efficient adjudication of cases?

Positive	14% (19 votes)
Negative	67% (92 votes)
No Impact	4% (7 votes)

Unsure 15% (20 votes)

- c) What impact do you think the New Rules will have on the cost of litigation in New York Civil Courts?

Reduce 5% (7 votes)

Increase 86% (126 votes)

No Change 3% (5 votes)

Unsure 6% (9 votes)

- d) What impact do you think the New Rules will have on access to justice for underserved populations?

Positive 3% (4 votes)

Negative 76% (113 votes)

No Impact 10% (15 votes)

Unsure 11% (16 votes)

- e) What impact do you think the New Rules will have on the practice of law in New York Civil Courts?

Positive 14% (21 votes)

Negative 66% (98 votes)

No Impact 3% (4 votes)

Unsure 17% (25 votes)

V. DISCOVERY RULES

The New Rules impose a number of changes concerning discovery. The Committee heard many comments on these rules. The clear feeling of numerous commenters on the subject

is that these changes are not necessary and are frequently overly burdensome and costly. In addition, the “one size fits all” approach is seen as being extremely disconcerting to practitioners in areas of law where these rules were previously inapplicable and in cases where the claims are not large enough to warrant the additional costs.

One of the difficulties that was frequently brought up was that even though the application of these rules is frequently left to the discretion of the Court, discretion in procedural issues, unlike substantive issues, is frequently applied unevenly, and frankly often works to the disadvantage of the more vulnerable party.¹ While substantive discretion is very much needed in our system of justice, having discretion in procedural issues creates a lack of uniformity, and leaves attorneys and pro se litigants without a clear understanding of what is expected of them on a consistent basis. In the cited study, it is found that by applying discretion, which creates a lack of uniformity, the underrepresented are actually put at a greater disadvantage, and that clearly results in an impediment to access to justice. Procedural discretion is a “vulnerability amplifier.”

Another issue that constantly came up from the commenters was the issue of superfluosity. Throughout this discussion of discovery, it will be observed that a number of the new rules are already covered by the CPLR, or are in conflict with the CPLR. In those situations, the practitioner is put in a position requiring extra steps which results in extra costs to clients and further uncertainty.

The general feeling with regard to these various rules is that a great deal of additional work needs to be done to refine them in a way that will not create an adverse impact upon underrepresented litigants, and further will not act to increase the work required by lawyers and

¹ See “The Limits of Procedural Discretion: Unequal Treatment and Vulnerability in Britain’s Asylum Appeals” 27 *Social and Legal Studies* 49-78, 2018.

additional expense to clients which would, by its very nature, increase the number of people who will be financially excluded from our justice system.

A. §202.20 – INTERROGATORIES (based upon Commercial Division Rule 11-a)

The amendment to §202.20 creates a limitation of interrogatories “to 25 in number, including sub-parts, unless the Court orders otherwise.” In addition, this limitation applies to not only sub-parts but also to consolidated actions.

The intent of this Rule seems to be to mimic Federal Rule 33. In receiving comments from an extraordinary number of NYSBA members, it is clear that a general criticism of the rules is that Federal Rules are not appropriate in State Court cases. In addition, in this particular situation, the Federal Rules are not imitated because the Federal Rules differentiate between “discreet” sub-parts rather than just “sub-parts”. In Federal cases, follow up questions are permitted without counting them towards the number of interrogatories permitted, so long as the sub-parts are not “discreet.” In New York under the amended rules, that does not appear to be the case.²

While the purported purpose of this rule is to streamline litigation, making it more efficient, the limitations that are created may be unduly restrictive as they are in addition to the limitations in CPLR §3130 which indicates that, except in matrimonial actions, a party cannot serve Interrogatories and a Demand for Bill of Particulars under CPLR §3041. The CPLR already limits the scope of use of Interrogatories. Further, the rules under DRL 236(b)(4), the law governing matrimonial actions, may create a further contradiction.

² See Perez v. AirCom Management Corp., Inc., US Dist. Lexus 136140 (SDFLA September 24, 2012, No. 12-60322 Civ. 2012).

In order to expand the number of interrogatories, one would require a Court Order. The Members and Sections that commented believe that it would be more appropriate to go to Court only in the event that there was a concern that the number of interrogatories was excessive, or that the content of information requested was not germane, or was intended to be abusive. In most cases, that is not going to be the case, and thus this rule would essentially create an additional step where the parties can usually agree without Court involvement. In the event that interrogatories are seen as being abusive, an attorney would certainly have the recourse of involving the Courts under CPLR §3103 by seeking a protective order.

The various commenters felt that the amendment additionally created a limitation deviating from the concept of broad discovery called for under CPLR §3101, and in addition created the additional burdens indicated above. The general tone was that these limitations were not necessary but in addition would create additional work for lawyers and greater expense to their clients. It was felt that the extra steps called for would add, in many cases, to the time necessary to prepare discovery and thus to the cost passed down to clients.

B. §202.20-a PRIVILEGE LOGS (based upon Commercial Division Rule 11-b)

The amendments to the provisions regarding privilege logs was also commented upon by the Membership. The general belief was that these amendments are superfluous as the provisions therein are generally covered by the CPLR. These new steps create additional burdens and uncertainties resulting in increased costs.

Sub-section (a) calls for the parties to “meet and confer at the outset of the case, and from time to time thereafter, to discuss the scope of the privilege review, the amount of information to be set out in the privilege log, the use of categories to reduce document by document logging,

whether any categories of information may be excluded from the logging requirement...”. From the outset, there is a concern that this section is potentially in conflict with CPLR §3122(a) and (b) which essentially prescribes a document by document approach to privilege logs as opposed to this categorical approach. The rule calls for the shifting of costs to the party requiring a document by document log rather than a categorical one which clearly conflicts with CPLR §3122(b) and impinges on the rights of the party seeking the document by document log as called for by the CPLR. This penalty discourages the very activities called for by the CPLR. The new rule also calls for legal grounds for withholding documents, etc., all of which are stated in the CPLR as well. In order to withhold the document, it is already clear that there needs to be a showing of a legal reason for withholding the documents.

While §202.20-a purports to create greater efficiency in the litigation process, these amendments actually call for meetings between the parties. It is hard to expect that there would not be regular communication between litigating attorneys, and a determination as to whether they agree and/or disagree as to what will be logged and what should be deemed privileged. The commenters were clearly of the opinion that the sub-section was superfluous and increased lawyers’ workloads and expenses which inure to the clients.

§202.20-b calls for an agreement to be reached, and then to convert this into an Order rather than just a stipulation of the parties. The stipulation should not require the involvement of the Courts, unless of course there is disagreement, at which point it is very easy to involve the Courts by motion or otherwise.

In addition, the reference to certification by a “responsible attorney” was thought to be vague and overly narrow. Another comment was that there is no clear definition as to what is privileged, and there needed to be greater clarity relating thereto. Lastly, the necessity of logging

work product after commencement of litigation or communications with litigation counsel after such comment was seen by many of the commenters as having no practical use. Essentially, the amendments to the rules with regard to privilege logs is superfluous and burdensome.

C. §202.11 DISCOVERY OF ELECTRONICALLY STORED INFORMATION FROM NON-PARTIES (based on Commercial Division Rule 11-c)

This rule appears to be an almost direct restatement of rules 3111 and 3122(d) of the CPLR. The appendix sets forth a number of suggestions, using the word “should”. It is not that these suggestions are bad, but they seem to be covered by CPLR §3122(d) and §3111. The additional rules are superfluous and burdensome.

CPLR §3122(d) indicates that absent a demand for original documents, copies can be provided and “the reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery”. This clearly obviates the necessity of an additional rule with regard to this.

The general consensus was that this is a burdensome and superfluous rule.

D. §202.20-b - LIMITATIONS OF DEPOSITIONS (based upon Commercial Division Rule 11-d) The limitations of depositions again were an issue of significant concern to members and Sections commenting. The amendment calls for a limitation to 10 depositions by a defendant or by third-party defendants and that the depositions are limited to 7 hours per deponent. The rule goes on to distinguish between fact witnesses as opposed to entity witnesses and further explains in sub-section (f) that, “for good cause the Court may alter the limits on the number of depositions or the duration of examination.”

Since there is a lack of clarity as to the standards as to what is “good cause,” the result may be anything but uniform, and considering the broad standards of CPLR §3101, may be prejudicial to the person seeking discovery. In addition, sub-paragraph (g) calls for a fall back to the CPLR. Clearly, it appears that the intent would be that the CPLR be followed, and it doesn’t appear that there is a necessity for an additional rule indicating that.

One of the concerns is that this limitation of depositions can be highly prejudicial in cases that are heavily document dependent, in employment cases where there is a need for vast quantities of information, or in cases where there are multiple parties, such as medical malpractice cases, where dividing up 7 hours among the various defendants, each of whom may have different concerns or questions, it unfair. Putting the onus on multiple defendants to seek court permission, in order to avoid the limits, is also unfair. The necessity of having to consult a Judge to ask for his or her blessing to expand on the depositions would create an additional expense. In contrast, in the event that a party feels that the number of depositions or the length of depositions is becoming abusive, a protective order can surely be sought. The result of having to go to Court every time you would like to have lengthier depositions or a greater number of depositions will create an additional burden on the Court as well as the litigants.

Traditionally, where broad discovery is called for, it would seem contradictory to have to go to a Judge to obtain an Order allowing you to discover information that is essential to your ability to litigate a claim. It also appears that the affected population may include a vulnerable population, and it is clear that they would not have the abilities nor the wherewithal to afford the extra steps. It was the position of most commenters that this limitation is uncalled for in the State Courts and the Rule was generally opposed.

E. §202.20-e ADHERENCE TO DISCOVERY SCHEDULE (based upon Commercial Division Rule 13(a) and (b)) This particular rule calls for the strict compliance with discovery obligations by the date set forth in a Scheduling Order. This is not unlike what is required by any Order. Upon the issuance of an Order, which in the case of Scheduling Orders, is normally stipulated to, the parties are required to abide by said Order unless an extension is granted.

In the case of the new rules, the discovery deadlines shall be made as soon as practical. Sometimes those deadlines cannot be met because of exigent circumstances. However, the new rule indicates that “non-compliance with the Order may result in imposition of appropriate sanction against the party, or for relief pursuant to CPLR 3126.” It is thought that these sanctions could be overly harsh, and unevenly imposed.

In addition, §202.20-e(b) provision of preclusion for failure to produce certain documents is a penalty that the Court can already impose under CPLR 3126. This is again nothing new. Based upon the comments made, this section appears to be superfluous, and its sanctions overly harsh.

F. §202.20-c – RESPONSES AND OBJECTIONS TO DOCUMENT REQUESTS (based upon Commercial Division Rule 11-e) §202.20-c (a) and (b) certainly have merit; however, these provisions are already covered under the CPLR. A quick review of CPLR 3122a indicates what is required in the event that a party or a person is served with a notice or Subpoena Duces Tecum if there is an objection to the demand. CPLR 3122a (2) becomes more specific with regard to medical providers. It would appear that sub-sections (a) and (b) of the new rule are superfluous, as the requirements set forth are already covered under CPLR 3122a.

Subsection (c) of the rule states that “In each response, the responding party shall verify, for each individual request: (i) whether the production of documents in its possession, custody or control and that are responsive to the individual requests, as propounded or modified, is complete; or (ii) that there are no documents in its possession, custody or control that are responsive to the individual request as propounded or modified.” Verification is a specific term within the CPLR, with its requirements set forth in CPLR 3020. It is specified for certain types of pleadings, but until the adoption of this rule, there has never been a requirement of verification of responses to discovery. Clearly, to be required to prepare a separate verification for each individual request will create a significant burden. This is especially true considering the continuing obligation to provide modifications or supplements as is necessary and will presumably call for even more verifications.

The encouragement to use efficient means to review documents set forth in subsection (e) is clearly superfluous.

The lack of clarity with the regard to the use of “good cause” in subsection (f) leaves questions as to whether documents that were not revealed because of exigent factors will be able to be used at trial, though produced at the earliest convenience of the responding party.

Clearly, there seems to be a bit of a disconnect with regard to this rule and the CPLR particularly in connection with subparagraph (c), and a lack of clarity or superfluosity with regard to other aspects of this rule.

G. §202.20-d DEPOSITIONS OF ENTITIES IDENTIFICATION OF MATTERS
(based upon Commercial Division Rule 11-f) This rule sets out provisions with regard to notices to take depositions or subpoenas. The rule essentially reiterates much of what is

addressed by the CPLR throughout Article 23. There are requirements of particularity, and one of the concerns would be that this particularity may in fact limit questioning on a broad scale as is encouraged by the CPLR.

Based upon all of the information that is provided in Article 23, it would appear that this rule is superfluous and liable to create confusion.

H. §202.20-f DISCLOSURE DISPUTES (based upon Commercial Division Rule 14)

In this rule, the Court again encourages parties to resolve their disputes informally. However, the concern is that there is a limitation that conflicts with the CPLR. While the moving party in a discovery dispute is required to provide an affidavit indicating that a good faith effort was made to resolve the problems that exist, the absence of such a showing would deprive a moving party from actually having his or her motion heard.

This appears to be directly contrary to the CPLR. While motions should always have a clear basis in law, to require the Court's blessing to bring the motion based upon interactions between the parties is a clear limitation of the moving party's rights under the CPLR.

I. §202.20-g RULINGS AT DISCLOSURE CONFERENCES (based upon Commercial Division Rule 14-a)

Rule 14-a sets forth a procedure for all resolutions at a Judicial Conference to be reduced to an Order. While it is good practice to reduce all of the determinations, stipulations and rulings at a disclosure conference to writing, it would seem that a simple stipulation, or a less formalized procedure could be followed very effectively as it has been followed for many years in the State Courts. It would appear that based upon a lack of need to so formalize the procedure, that this rule is superfluous.

VI. MOTION PAPERS

The New Rules contain a number of provisions affecting motion practice. It should be noted that none of these rules, based upon Commercial Division Rules 16-19, was recommended by the OCA Advisory Committee on Civil Practice. We heard a number of comments regarding the difficulty that these rules present for all practitioners, but especially for those in small or solo practices and those in rural areas.

A. **§202.8-a Motion in General (based upon Commercial Division Rule 16)**

This motion rule requires that the movant must submit “copies of all pleadings and other documents as required by the CPLR and as necessary for any informed decision on the motion”. The Rule also requires that the proponent set forth “the exact relief sought.” CPLR 2214(a) currently addresses the notice of motion. The CPLR does not require a description of “the exact relief sought” but just sets forth that the notice shall specify “the relief demanded and the grounds therefor.”

This particular section is contrary to the statute in three places. First, it requires the notice of motion to specify the “exact relief sought,” even where the motion papers are explicit as to all relief. Second, it describes additional papers “as necessary for an informed decision on the motion.” That elastic language seems to support the submission of all sorts of documentation, in addition to all of the pleadings for each and every motion. Where the court requires hard copies, this means including what could be voluminous papers, despite the availability of these documents in the electronic file. This does not seem to be an amendment that will make things more efficient.

This rule addresses an additional requirement for attorneys. It requires proposed orders to be submitted with motions, and even describes the type of motion for which the order should be supplied as “etc.” (202.8-a(b)). Except in the case of ex parte motions, preparing a proposed order at the outset of a motion is usually superfluous. Proposed orders, after decision, will be aired with all parties, and will recite papers submitted in support and in opposition, and the appearance of parties. This cannot be known at the time the motion is made. Requiring a proposed order at the outset is extremely inefficient.

This rule also limits adjournments. (202.8-a(c)) Adjournments, of course, are sought frequently by parties who have time constraints on other matters, unrelated personnel or personal issues that require adjournments, and negotiations that have begun to hold promise. All of these are a genuine and good reasons to adjourn motions, without having any limitations on them. If adjournments become too cumbersome for the court, the court may limit them on a case by case basis.

B. §202.8-b Length of Papers (based upon Commercial Division Rule 17)

This rule would limit papers to certain word counts. The Court seeks to limit submissions to 7,000 words and reply affidavits to 4,200 words. We heard comments that the rule itself creates confusion in that it is not always clear whether papers are “in chief” or “in response,” in the case of, for example, a cross-motion. In addition, not all word processing programs count words in the same way. The rule does not specify whether captions, tables of cases, tables of contents, etc. are included in the word count.

We also heard comments regarding the efficacy of a page count in some complicated motions. While it is admirable to have some reasonable page and word limits, some motions,

involving multiple causes of action or multiple parties may clearly require more pages and words, in order to do justice to a full recitation of the facts, the law and appropriate argument.

We also heard that the time (and money) it takes to either seek permission for a longer submission or to cut the document down to the appropriate size, may be extensive, and does not advance the assistance to the court or be fair to the client.

C. §202.8-c Sur-Reply and Post Submission Papers (based upon Commercial Division Rule 18) This rule is a new addition to civil practice and it is debatable as to whether it resolves an issue or creates one. CPLR 2214 creates no right to sur-reply, and such a submission would be considered only if the court so rules.

D. §202.8-d Orders to Show Cause (based upon Commercial Division Rule 19) This rule establishes a new standard indicating that orders to show cause can only be brought when there is “genuine urgency, a stay is required or a statute mandates so proceeding.” This of course, would limit the grounds upon which orders to show cause can be brought. CPLR 2214(d) says that “The Court in a proper case may grant an order to show cause.” This rule would infringe upon that statutory grant, as to a proper case and requires that the proper case have genuine urgency. This rule ignores those circumstances where an order to show cause is appropriate because of the non-represented status of certain parties, where the relief sought will not be opposed, and for other good causes.

E. §202.5(a)(1) and (2) Form of Papers (based upon Commercial Division Rule 6(a)). This rule imposes “bookmarking” (“providing a listing of the document’s contents and

facilitating easy navigation by the reader within the document”) on all electronic documents in excess of 4500 words. It is true that “bookmarking” may make navigation for the reader easier, and for those attorneys and litigants that use pdf creation software and have either staff or attorney facility with bookmarking, bookmarking may not be onerous. However, it ignores the fact that many attorneys, as well as pro se litigants, do not use pdf software. Instead, they create the fileable documents by use of a scanner. For these attorneys and litigants, bookmarking is impossible. Even some attorneys who do have pdf creation software, may have neither the staff nor the attorney ability to provide bookmarking. This rule creates a hardship for many solo and small firm attorneys as well as rural attorneys.

VII. SUMMARY JUDGMENT: STATEMENT OF MATERIAL FACTS

New rule §202.8-g, based upon Commercial Division Rule 19-a, imposes additional requirements upon the movant in any motion for summary judgment (other than a motion under CPLR 3213 where the motion is in lieu of complaint) and also imposes additional requirements upon any party opposing the motion for summary judgment. Specifically, the movant is required to annex to the notice of motion a “separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue of fact,” and each such numbered paragraph must be followed “by citation to evidence submitted in support of...that motion.”¹ The opponent is required to include a “correspondingly numbered paragraph” for each of the movant’s numbered paragraphs, and “additional paragraphs containing a separate short and concise statement of the material facts as to which it is contended

¹ §202.8-g(a) and (d).

that there exists a genuine issue to be tried.” Each such paragraph or statement must also be followed by “citation to evidence submitted in...opposition to the motion.”² Failure of the opponent to do so is severe: Any numbered paragraph which is not “specifically controverted” is deemed admitted, presumably for the entire action, not just the motion.³

It should be noted at the outset that §202.8-g differs from Commercial Division Rule 19-a in one important respect: Rule 19-a provides that the requirements of the rule are imposed only when “the court may direct.” §202.8-g applies to all summary judgment motions. The only entities which commented on Rule 19-a, the New York City Bar Association and the New York State Bar Association CPLR Committee, both commented that any such provision should not be mandatory, but instead should be limited to the judge’s discretion.

During the four forums conducted by the New York State Bar Association, there were a considerable number of comments regarding §202.8-g. Most of the comments were in opposition to the rule based upon the additional attorney time (and client cost) that compliance would impose. Even where some comments were in favor of having a “statement of material facts,” they were always prefaced by “in the right case.” In fact, one commenter, perhaps unaware of the mandatory nature of §202.8-g, spoke about how well the rule worked in the Commercial Division (where his practice was based) because the rule left whether or not to require it to the judge’s discretion. The New York City Bar Association’s comments also included that in the experience of its members within the Commercial Division, the rule was rarely imposed by some of the judges, recognizing that the rule may have limited benefit to the judges while adding substantial cost.

² §202.8-g(b) and (d).

³ §202.8-g(c).

Imposition of this rule, in addition to requiring papers other than those specified in CPLR 3212(b), will have a significant impact on the law of summary judgment as set forth in CPLR 3212 and relevant case law. The rule's impact is set explained below.

A. Effect on opponent's defense based upon timeliness

Where the motion for summary judgment is beyond the time limit provided by CPLR 3212(a), because the motion is made after the expiration of the period 120 days after the filing of the note of issue, or some other time period set by the court, the opponent may oppose the motion on timeliness grounds, without opposing the motion on the merits. Nonetheless, under a strict reading of §202.8-g(c), such opposing party would have been deemed to have admitted each and every numbered statement made by the movant. §202.8-g(c) does not limit the imposition of such admission to the motion. Thus, the rule would require the opponent to also respond on the merits, not only by responding to the statement of material facts, but also with all admissible proof, in that the opposing statement must cite to the proof submitted by the opposing party. By failing to do so, the opposing party, even if prevailing by the denial of summary judgment on timeliness grounds, would suffer an admission of each and every fact set forth in the movant's statement of material facts. The time limit imposed by CPLR 3212(a) was to prevent the heavy burden of opposing a motion for summary judgment while preparing for trial. §202.8-g(b), (c) and (d) would negate that.

B. Effect on opponent's defense based upon failure of movant to meet its burden

The party moving for summary judgment bears a burden to demonstrate a prima facie showing entitling a judgment as a matter of law. If the movant fails to do so, summary judgment

must be denied.⁴ An opponent may choose not to put in any proof in opposition, and still prevail based upon the movant's failure to meet its burden.⁵ However, under §202.8-g(c), such opposing party would have been deemed to have admitted each and every numbered statement made by the movant. §202.8-g(c) does not limit such admission to the motion. Thus, the rule would require the opponent to respond on the merits, not only by responding to the statement of material facts, but also with all admissible proof, in that the opposing statement must cite to the proof submitted by the opposing party. By failing to do so, the opposing party, even if prevailing by the denial of summary judgment on movant's failure to meet its burden, would suffer an admission of each and every fact set forth in the movant's statement of material facts.

C. Effect on opposition based upon CPLR 3212(f)

Where facts to oppose a motion for summary judgment are in the control of the moving party, and the opposing party has not had a fair opportunity to discover the facts, the court may either deny summary judgment or may order a continuance to permit disclosure under CPLR 3212(f). However, the granting of relief under CPLR 3212(f) does not address the deemed admission contained in §202.8-g(c). §202.8-g(c) provides for deemed admission as to each and every paragraph in the movant's statement of material facts unanswered by the opponent. There is no stated exception where summary judgment is denied based upon a CPLR 3212(f) defense.

⁴ See, *Holtz v. Niagara Mohawk Power Corp.*, 147 AD2d 857 (3d Dept. 1989); *Lacagnino v. Gonzalez*, 306 AD2d 250 (2d Dept. 2003).

⁵ *Stelick v. Gangl*, 47 AD2d 789 (3d Dept. 1975).

D. Issues regarding materiality

In order to meet its burden, the movant must demonstrate the lack of a genuine issue of material regarding each element of the claim or defense, or must demonstrate that the opponent lacks an element of its claim or defense as a matter of law. Motions for summary judgment often concern disputes over what constitutes the material facts necessary for the claim or defense.⁶ Nowhere in §202.8-g is this addressed. For example, suppose that the movant's statement of material facts leaves out one of the elements of the defense which is the basis for the summary judgment motion. Adequate papers in opposition to the motion under CPLR 3212 would simply point out the missing element, and would include, perhaps, some proof in evidentiary form that there is a dispute as to the missing element. It would not be necessary for the opposing party to introduce proof to show a dispute as to other material facts, the absence of one element is fatal. Yet §202.8-g(c) would militate in favor of a longer set of opposition papers, opposing each and every paragraph in the movant's statement of material facts, as the absence of such proof and response would be deemed an admission. Similarly, if some of the facts listed by the movant are not material, the opposing party may not wish to go to the expense of demonstrating an issue of fact, yet does not wish to admit them either. §202.8-g would not streamline the process, in such a case, but would instead make it more complicated and confusing.

E. Issues regarding expert opinion and other testimony

Some motions for summary judgment require reliance upon expert affidavits to support and oppose the motion. In such cases, the opinions of the experts speak for themselves. Translating them into statements of material facts in any manner other than by using the expert

⁶ See, e.g., *Devlin v. Sony Corp. of America*, 237 AD2d 216 (1st Dept. 1995).

opinions verbatim can often result in disputes over whether the resulting statement is a fair representation of what the expert has stated. Even where the affiant or deponent is not an expert, the statement of facts concerning their affidavit or testimony may deviate from what is actually said. The statements contemplated by §202.8-g are written by attorneys who have neither the expertise (in the case of experts) nor first-hand knowledge; they are hearsay. The statements by the lawyers may be supported by actual evidence, but the statements as worded by the lawyers are not admissible evidence. To give them evidentiary value by having them “deemed admitted” as is required by §202.8-g(c) is contrary to the rules of evidence.

CPLR 3212(b) and hundreds of cases⁷ make it quite clear that affidavits must be from persons with actual knowledge of the matter presented, not lawyers. Yet the statements in §202.8-g are from lawyers, and they are elevated to admissible evidence as a deemed admission whenever they are not properly responded to by the opponent.

F. Evidence related to physical injuries

The injuries in personal injury actions are often the subject of summary judgment motions. For example, there are summary judgment motions on “serious injury threshold” in many (if not most) motor vehicle cases. There may be hundreds of facts concerning prior injuries and conditions, treatment immediately given, treatment given at a later time, prognosis, limitations on the plaintiff’s ability to engage in normal daily functions, etc. Each of these facts is material to the question of threshold and setting them forth in numbered paragraphs in addition to medical records, medical reports and physician affidavits, is difficult, cumbersome and burdensome. The court will have to review all of the records, reports and affidavits in order to

⁷ See, e.g., *Zuckerman v. City of New York*, 49 N.Y.2d 595 (1980).

determine whether there is a serious injury as a result of the accident, in any event. It is questionable whether the required statements are helpful at all, but it is unquestionable that they will be time consuming and expensive. Applying this rule to all cases involving personal injuries is not beneficial to the court, and it is an undue burden to the attorneys.

G. Inadvertence and abuse

A party opposing the motion for summary judgment may inadvertently fail to address one or more numbered paragraphs in the movant’s statement of material fact, while submitting adequate proof in admissible form to contradict the fact stated. Nonetheless, under §202.8-g(c) that fact is deemed admitted. Even if such admission does not result in the granting of the motion, the admission remains throughout the case and may be of serious consequence. And, there is no escape hatch. While CPLR 3123, governing Notices to Admit, allows for the correction of any admission,⁸ §202.8-g does not.

This seemingly invites abuse. While §202.8-g(a) contemplates “a short and concise” statement, there is no limit to the number of “numbered paragraphs” included, and each such statement must be followed by citation to evidence submitted. Conclusory statements are not appropriately the basis for summary judgment⁹; it is likely that the statements of material fact will be more specific and detailed than “short and concise.” The more detailed and lengthy the statement of material fact, the greater burden placed on the opponent and the greater opportunity of inadvertent failure to properly address each numbered paragraph. The rule invites gamesmanship.

⁸ CPLR 3123(b)

⁹ See, e.g., *Mobley v. Riportella*, 241 AD2d 443 (2d Dept. 1997).

The one instance where §202.8-g could be effective is where the movant or the opponent seeks relief under CPLR 3212(g). This section permits the court, when denying or granting in part the motion for summary judgment, to limit the issues for trial. The use of CPLR 3212(g) is entirely discretionary; initiative by one of the parties is helpful, but not required.¹⁰ In cases where one of the parties has requested relief under CPLR 3212(g) or where the court is denying or granting in part summary judgment and is contemplating granting relief under CPLR 3212(g), the use of the rule in §202.8-g may be effective and appropriate. Its use should be limited to that circumstance. It should not be required in every motion for summary judgment.

VIII. TRIAL AND SETTLEMENT

A. **§202.34 PRE MARKING EXHIBITS (based upon Commercial Division Rule 28).**

This Rule provides for the pre-marking of exhibits at trial. Counsel are required to consult prior to trial and attempt to agree upon exhibits that will be admitted on consent. All exhibits then must be pre-marked. Exhibits not consented to are marked for identification only.

Commercial division cases normally involve a great number of exhibits, particularly documentary exhibits (contracts, correspondence, emails, etc.). In light of the number of exhibits normally involved in such cases, Commercial Division Rule 28, requiring the attorneys to consult and take affirmative steps to pre-mark exhibits, makes sense.

In most other types of civil cases, there are normally fewer exhibits. In routine civil trials (slip and fall, automobile accident cases, etc.) the handling, marking and introduction of exhibits is handling relatively seamlessly at trial. Of course, the parties are always free to consult and consent to the introduction of certain exhibits. And trial judges have the inherent authority to direct the pre-marking of exhibits in appropriate cases involving significant numbers of exhibits.

¹⁰ *Launt v. Lopasic*, 189 AD3d 1740 (3d Dept. 2020).

But in light of the lack of evidence that marking exhibits at trial interferes with the efficient administration of most civil trials, there does not seem to be a need to enact a rule that requires counsel to do extra work in every civil trial. The requirements of this Rule, especially considered in connection with the requirements of Section 202.20-h(b) (requirement of submission of a indexed binder of the trial exhibits before trial), seems unnecessary.

B. §202.20-h PRE TRIAL MEMOS (based upon Commercial Division Rule 31(a), (b) and (c)). This Rule requires each party to submit a pre-trial memorandum, exhibit book and request for jury instructions before or at the beginning of every civil trial. Subdivision (a) requires counsel to submit a pre-trial memorandum no longer than 25 pages at the pre-trial conference. Subdivision (b) requires that counsel submit an indexed binder of trial exhibits for the court's use, with copies for each other attorney and a binder of the originals for witnesses to use. Subdivision (c) requires that counsel submit requests to charge on the first day of trial.

The requirement that counsel submit a pre-trial memorandum is new. The prior civil Rule (§ 202.35(c)) allowed the court to order trial memoranda, but did not mandate them as the new Rule does. In the majority of civil trials such memoranda are not requested or provided. By the time of trial, the trial judge has often presided over the case for years, through multiple conferences and motions. In light of the fact that pre-trial memorandum are rarely requested, it appears that trial judges believe themselves to be sufficiently knowledgeable about the cases without the need for memorandum. A rule which requires such memorandum simply requires lawyers to do unnecessary work at their clients' expense.

As discussed above, the requirements that exhibits be pre-marked and an indexed binder be provided to the court, other counsel and the witnesses is, again, generating additional work for attorneys that seems unnecessary in the vast majority of civil cases.

C. §202.37 SCHEDULING OF WITNESSES (based upon Commercial Division Rule 32). This Rule requires that at the commencement of the trial the attorneys must identify in writing the witnesses they intend to call, the order in which they shall testify, and the estimated length of their testimony. The Rule provides that a court may permit testimony from a witness who is not identified on the witness list, but only “for good cause shown and in the absence of substantial prejudice.” The Rule further provides that the estimates of the length of testimony provided are advisory only, and that the court may permit testimony beyond the time. The Rule does not address whether the party may call witnesses in an order different than that listed in the schedule.

Through the discovery process in civil cases, the parties are obligated to identify potential witnesses. Where a case is tried in front of a jury, the normal voir dire process includes announcing the names of the witnesses to the jurors. Thus, the identify of the witnesses is well-known to the parties before most trials begin. Nothing in the CPLR requires the parties to identify the specific witnesses who will be called at trial and in what order. The witnesses an attorney will call, and their order, is not always known by that attorney at the beginning of the trial. Sometimes a particular witness’s testimony is deemed to be unnecessary by the lawyer based on the testimony that has preceded it. Some witnesses testify longer or shorter than expected. Some witnesses have limited windows of availability. Thus, a mandatory Rule requiring parties to identify in writing the witnesses they intend to call, and the order in which

they testify, may pose some issues in application, particularly where that Rule does not explicitly provide that the court may excuse a change in the order of the witnesses.

D. §202.20-i TESTIMONY BY AFFIDAVIT (based upon Commercial Division Rule 32-a). This Rule provides that in a non-jury trial, a court may “require” that a party submit the direct testimony of its witnesses in affidavit form. The Rule provides that the opposing party shall have the right to object to statements in the affidavit as if the statements had been made orally in open court. The Rule further provides that the submission of direct testimony in affidavit form “shall not affect any right to conduct cross-examination or re-direct examination of the witness.”

Although there are times when the submission of direct testimony in a non-jury trial or hearing by affidavit may make sense, the Rule provides that it is at the court’s direction, without input of the offering attorney. In other words, the Rule allows the court to require the submission of testimony by affidavit, even over the objection of the offering party. There are times when the offering party may want the judge to see and hear from the witness directly in order to aid in its assessment of credibility. In addition, live testimony by a witness seems more likely to reflect the witness’s own recollections and testimony than an affidavit, which naturally will be crafted with counsel’s input. A Rule that allows the court to request the testimony be submitted in affidavit form, but gives the ultimate decision to the party offering the testimony, would be preferable.

IX. CONCLUSION

Based upon comments received, there are significant issues with many of the new rules. Our final report will include specific language to effect necessary changes. These will be significant, and the Task Force continues to urge for a stay of enforcement until such changes can be effected.

Respectfully submitted,

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**Appendix 1 – Report of the Advisory Committee on Civil Practice
on the Commercial Division Rules, July 2018**

**Report of the
Advisory Committee on
Civil Practice on the
Commercial Division Rules**

to the Chief Judge of the
Courts of the State of New York

July 2018



Introduction

This Committee has been charged with evaluating the Commercial Division Rules and Amendments and recommending which should be adopted broadly throughout our civil courts, with the goal of streamlining civil litigation, improving efficiency, and reducing litigation costs.

The Committee's recommendations are based on the members' broad collective experience in practicing throughout the State representing clients in all types of civil litigation including administrative, commercial disputes, civil rights, class actions, construction, consumer debt, contracts, employment, foreclosures, insurance coverage, landlords and tenants, land-use, property disputes, medical malpractice, personal injury, and other types of intentional and negligent tort litigation.

Additionally, Committee members met with a number of judges and court personnel to gain the courts' perspective.

After careful consideration, the Committee recommends adopting broadly, or in principle, the following Commercial Division Rules:

Rule 3(a) Appointment of a court-annexed mediator, as amended.

Rule 3(b) Availability of a settlement conference before a judge not assigned to the case.

Rule 11-a Limitations on interrogatories.

Rule 11-b Privilege logs, in part.

Rule 11-d Limitations on depositions.

Rule 11-e Responses and objections to document requests, as amended.

Rule 19-a Statement of material facts for summary judgment motions.

Rule 20 Temporary restraining orders.

Rule 34 Staggered Court Appearances

The Commercial Division Rules were thoughtfully drafted and have continually evolved to help streamline litigation and reduce costs in a complex area of practice.

As effective as the rules have been in the commercial parts, it is the sense of the Committee that wholesale adoption of the rules statewide is not warranted. Many of the general rules are already in place in one form or another. Some of the specific rules do not lend themselves to broader application as they may well add to the costs of litigation and/or place an added burden on

the already strained resources of the courts. Further, statewide application of some rules would be inappropriate given the disparate caseloads among the various courts.

In addition, the Committee believes that some of the rules, however effective they are in the commercial divisions, would be unworkable in the many cases where the amount at issue may not justify the more attorney-intensive efforts that are expended in large commercial cases.

A general recommendation of the Committee, as noted under Rule 7, is that the court consider making greater use of the New York State Courts Electronic Filing System (NYSCEF) to decrease in-court appearances for pro-forma matters, thus allowing the resources of the courts to be directed toward matters in dispute or instances of non-compliance. The Committee also urges the adoption of mandatory e-filing in all cases throughout the State.

The Committee believes that adoption of some of its proposals would require amendments to the CPLR. In most instances, however, adoption of new or revised uniform rules or a change in administrative practice would be sufficient to implement the proposed rule.

Finally, even though many of the Commercial Division rules have not been recommended for adoption, the Committee has found that a thorough analysis of those rules has been a useful way of reviewing the litigation process as a whole and has generated reconsideration of many long-standing assumptions about how cases should be handled in the court system. This review has resulted in several recommendations that do not exactly parrot the Commercial Division Rules, but nonetheless follow the spirit of those Rules.

Below is the Committee's analysis of each Rule.

RULE 1 - Appearance by Counsel with Knowledge and Authority

This Rule requires counsel who appear at conferences to be fully familiar with the case and fully authorized to enter into substantive and procedural agreements on behalf of their clients.

The Committee agrees that counsel who appear at conferences should be familiar with the issues anticipated to be addressed at the conference, including pending motions, and that counsel should be on time for all scheduled appearances. No rule change is required since such language is already incorporated in most conference orders.

RULE 2 - Settlements and Discontinuances

This Rule requires attorneys to inform the court of the settlement or discontinuance of an action. It provides that notice must be given “immediately” to the clerk of the part and to the judge’s chambers. The Committee does not recommend adoption of this rule.

The Committee agrees that attorneys should immediately notify the part clerk that a case has settled, or an issue is resolved, in instances where the matter is actively before the court such as a pending motion or a trial date.

In most other instances the filing of a stipulation of discontinuance is sufficient and no purpose would be served by routinely notifying a part clerk that a matter has settled.

RULE 3 - Alternative Dispute Resolution (ADR); Settlement Conference Before a Justice Other Than the Justice Assigned to the Case

This Rule provides that a judge may direct, or counsel may request, the appointment of an uncompensated mediator. Similarly, it allows counsel for all parties to stipulate to having the case determined by a summary jury trial. The Committee recommends adoption of Paragraph (a), with a minor amendment, as follows:

(a) At any stage of the matter, the court may [direct] **advise** or counsel may seek the appointment of a court-annexed mediator for the purpose of mediating a resolution of all or some of the issues presented in the litigation. Additionally, counsel for all parties may stipulate to having the case determined by a summary jury trial pursuant to any applicable local rules or, in the absence of a controlling local rule, with permission of the court.

The Committee recommends adoption of Paragraph (b) of this rule, which states that counsel can request a settlement conference before another judge who is not the judge assigned to the case. If another judge is available, this does not seem to create serious problems, though in some downstate counties there may not be the resources available.

The Committee also recommends that greater use be made of experienced attorneys as court-approved mediators who would be modestly compensated for their time by the parties.

RULE 4 – Electronic Submission of Papers

This Rule is divided into two parts. Subdivision (a) deals with papers sent by fax. The Committee favors use of electronic communications rather than facsimile and does not support the rule's adoption.

Subdivision (b) deals with methods of communication in cases where papers are not filed by electronic means. It gives the court discretion to permit electronic communications between counsel as well as between counsel and the court.

The Committee believes that counsel can decide for themselves how they communicate with each other. There is no need for judicial direction. As for communications with the court, the Committee believes that judges can direct the method or methods to be used without the necessity of a rule. Many state court judges already encourage counsel to communicate with the court through email. The Committee strongly supports greater use of electronic communications with the court and urges judges to voluntarily adopt that practice.

RULE 5 – Information on Cases

This Rule is applicable only in the First and Second Departments. It provides that the schedule of court appearances and decisions can be found on the court system's website. It concludes by providing that where circumstances require, notice will be furnished directly by the court's chambers. This last sentence implies that it is the responsibility of the attorneys to follow the case on the court's website, as notice of events requiring a court appearance will be given only in limited circumstances. However, the rule does not give any specific direction to attorneys.

The Committee does not recommend adoption of this rule, but the Committee nonetheless believes that an on-line notice of the status of the action, including the status of pending motions, would be useful to the practice.

RULE 6 – Form of Papers

This Rule deals with the form of papers. The Committee believes that there is no problem within the court system with regard to papers and their form, and it would not adopt this Rule. There already are rules that seem to work well (See, for example, CPLR 2101 and Section 130-1.1-a of the Rules of the Chief Administrator).

There is an additional requirement imposed by this rule - - electronically filed memoranda and “where appropriate” affidavits and affirmations must be bookmarked to help the court. This is useful in long, complex documents, which are often submitted in cases in the Commercial Division. However, documents submitted elsewhere in the court system are often simple and straightforward. Bookmarking would constitute a burden on the attorneys with little or no benefit. Thus, the requirement of bookmarking these documents should not be imposed beyond the Commercial Division.

RULE 7 - Preliminary Conference; Request

This Rule sets times within which to hold a preliminary conference. Many preliminary conferences throughout the State are held in hallways or packed courtrooms where forms are filled out by counsel and handed in to a clerk to be later “So Ordered.” Although courts often provide counsel with the opportunity to fill out a preliminary conference order ahead of time and file it with the court instead of appearing, it is our experience that most lawyers do not utilize that option.

It is our recommendation that the courts utilize NYSCEF and other technology to avoid in-court appearances for “pro forma” matters such as setting discovery dates or to report that discovery is proceeding on schedule.

As an example, in the Motor Vehicle Part in Manhattan, the preliminary conference order is issued via NYSCEF after a request for judicial intervention has been filed. The order sets forth discovery dates based on preset criteria. This process obviates the need for a court appearance except in those cases where there is a dispute requiring court intervention.

Similarly, counsel should be required to e-file a statement as to whether discovery is proceeding per the scheduling order, to obviate the need for an in-court conference where there is no dispute or non-compliance.

It is further our recommendation that, in overseeing discovery, the resources of the court be directed toward those cases where there are disputes or noncompliance with a previous order.

RULE 8 - Consultation Prior to Preliminary and Compliance Conferences

This Rule requires counsel for all parties to confer prior to a preliminary or compliance conference about resolution of the case; discovery; alternative dispute resolution; voluntary, informal exchange of information; and issues of electronic discovery.

It is the opinion of the Committee that this rule is not necessary in the majority of civil cases where the issues can be addressed expeditiously at the conference, or through the adoption of a court-approved scheduling form that obviates the need for an in-person preliminary conference.

RULE 9 – Accelerated Adjudication Actions

Rule 9 incorporates a number of unrelated concepts into a package of accelerated adjudication procedures available on written consent of the parties in any action pending in the Commercial Division. As written, these procedures and practices must be adopted in their entirety, although there is no explicit prohibition on the parties by written consent adopting some part of these procedures.

Rule 9(a) provides for the adoption of the accelerated adjudication procedures by written consent in any action that qualifies for Commercial Division jurisdiction other than class actions brought under CPLR Article 9. Rule 9(b) sets a nine-month period for the action to be ready for trial, measured from the date of filing of a request for judicial intervention.

Rule 9(c) states that in any action governed by Rule 9, the parties are deemed to have “irrevocably waived” objections based on lack of personal jurisdiction or forum non conveniens, trial by jury, punitive or exemplary damages, interlocutory appeals, and discovery, except as agreed or as provided in Rule 9(c)(5). The discovery limitations are quantitative, such as seven interrogatories, five requests to admit, and seven depositions per side limited to seven hours each. Document discovery is limited to documents relevant to a claim or defense in the action and restricted by time frame and subject. Rule 9(d) sets forth procedures for electronic discovery that are applicable unless otherwise agreed. These include providing documents in searchable form and using a narrowly tailored list of custodians. Rule 9(d) also includes a proportionality limitation, stating that the court will deny disproportionate discovery or condition such discovery on the party seeking that discovery advancing its additional cost.

There is no express limitation in Rule 9 on when an agreement for accelerated adjudication may be entered into. Theoretically, such a provision could be a term unknowingly agreed to by one of the parties to a contract that is later the subject of litigation. Particularly where there is a large disparity in bargaining power, requiring acceptance of accelerated adjudication and consequent waiver of jury trial, jurisdictional defenses, punitive damages, and interlocutory appeal

can fundamentally change the opportunity of a party to retain historic and constitutional safeguards on their legal rights. To reduce this risk, the Committee recommends that the option to proceed on an accelerated adjudication track should only be made available after an action is commenced.

The Committee understands, from anecdotal evidence, that this procedure is rarely, if ever, used. A voluntary package of devices intended to simplify the judicial process and reduce costs is salutary but the risk is that important rights may be sacrificed if accelerated adjudication is imposed on a party from the outset, or before the disadvantages are fully appreciated. The Committee does not believe that general adoption of Rule 9 would be beneficial at this time.

RULE 10- Submission of Information; Certification Relating to Alternative Dispute Resolution

This Rule adds to the submissions at the preliminary conference, a certification that counsel have discussed with their client the ADR opportunities and a statement as to whether they are willing to pursue mediation at some point in the litigation. The Committee believes that such a requirement invades the attorney-client relationship and therefore does not recommend adoption of the rule.

RULE 11 - Discovery

This Rule sets forth certain requirements for the contents of the preliminary conference order to be issued after the preliminary conference. In particular, the rule requires that the preliminary conference order contain specific provisions about the early disposition of the case; a comprehensive schedule for disclosure, motion practice, compliance conference, filing of note of issue, pretrial conference and trial; and any limitations on interrogatories and other discovery. The rule also requires the court to determine whether discovery will be stayed pending the determination of any dispositive motion.

The Committee does not recommend adoption of this rule. The Uniform Civil Rules already contain detailed requirements for preliminary conferences, *see* Uniform Rule § 202.12, which for the most part duplicate the provisions in this Commercial Division Rule. The Uniform Civil Rules also require the court to make a written order, or otherwise record the directions of the court and stipulations of counsel, following the conference. *See* § 202.12(d). Adoption of Commercial Division Rule 11 would therefore not significantly alter current practice in other

courts or promote efficiency. In addition, as the reference in the rule itself indicates, the court already determines, pursuant to CPLR 3214(b), whether discovery will be stayed pending the determination of any dispositive motion.

RULE 11-a – Interrogatories

This Rule sets forth presumptive limitations on interrogatories. Specifically, interrogatories are limited to twenty-five (25) in number, including subparts, "unless another limit is specified in the preliminary conference order." The rule also limits interrogatories to certain topics, such as the names of witnesses with knowledge of information material and necessary to the subject matter of the action; computation of each category of damage alleged; and the existence, custodian, location and general description of material and necessary documents. Interrogatories seeking information not specified in the rule are permitted only on consent of the parties or by order of the court, for good cause shown. Finally, the rule permits claims and contention interrogatories thirty (30) days before the close of discovery, unless the court orders otherwise.

The Committee believes that the presumptive limitations set forth in this rule on the number and content of interrogatories would result in increased efficiency and streamlined litigation, and should be adopted. There are currently no such limitations in CPLR 3103, which provides only that, except in matrimonial actions, a party cannot both serve interrogatories and demand a bill of particulars under CPLR 3041; and that, in personal injury, injury to property, and wrongful death actions, a party cannot pursue both interrogatories and a deposition of the same party without leave of court. Nor is there any limit on the scope of interrogatories in CPLR 3131, which permits interrogatories to relate to any matters embraced by the general discovery requirements of CPLR 3101, and allows answers to interrogatories to be used to the same extent as answers given at a deposition. Notably, the presumptive limitations in the Commercial Division rule are not absolute. If circumstances warrant, the preliminary conference order may provide for more or less than the twenty-five (25) interrogatories set forth in Commercial Division Rule 11-a(a), and likewise, if circumstances warrant, the parties may agree, or the court may order, for good cause shown, that the limits on the content of interrogatories set forth in 11-a(b), be changed. See 11-a(c). In the Committee's view, the presumptive boundaries set forth in the rule will serve as a useful guideline for limiting unnecessary, burdensome or abusive discovery practices in appropriate circumstances.

RULE 11-b – Privilege Logs

This Rule governs the review of documents for privilege and the creation of privilege logs. The rule, which requires the parties to meet and confer regarding the scope of privilege review, contains a heavy bias in favor of a categorical approach to privilege logs, whereby the parties are encouraged to use categorical designations, where appropriate, to reduce the time and costs associated with preparing privilege logs. Parties who refuse to permit a categorical approach, and who insist instead on a document-by-document listing on the privilege log, may be required, upon application of the producing party, to bear the costs, including attorneys' fees, of preparing the document-by-document log. The rule also details how uninterrupted e-mail chains are to be treated on privilege logs, and provides that the parties may engage a Special Master to help them efficiently generate privilege logs, with costs to be shared.

CPLR 3122 prescribes a document-by-document approach to privilege logs, whereby the producing party is required to state, for each document, the legal ground for withholding the document, along with the type of document, the general subject matter of the document, and such other information as is sufficient to identify the document. *See* CPLR § 3122(b). The Committee believes that the provisions of Commercial Division Rule 11-b, with its preference for a categorical approach to privilege logs, as opposed to the document-by-document approach in CPLR 3122, should generally be adopted, especially for cases with heavy document discovery. The categorical approach outlined in Section 11-b(b)(1) of the rule is more efficient and cost-effective for the parties, helps to streamline litigation and facilitates expeditious court review. Requiring the parties to meet and confer, *see* 11-b(a), to discuss privilege logs and related issues is also sensible. Likewise, the rule's provisions regarding email chains, which are treated as one document on a document-by-document privilege log, *see* 11-b(b)(3), are sound.

The Committee is not in favor, however, of the rule's provision regarding cost allocation, *see* 11-b(b)(2), which permits a party required to produce a document-by-document privilege log (because the other side refused to consent to the categorical approach) to apply to the court for costs associated with that log. The Committee instead recommends that, where the parties disagree about which approach to follow, the court should determine whether the categorical approach or CPLR 3122 will be used. The Committee also does not recommend adopting the rule's requirement that a "responsible attorney," that is, someone who has supervisory responsibility over the privilege review, be actively involved in establishing and monitoring privilege review

procedures, see 11-b(d), and then provide a "certification" that the review was properly conducted, see 11-b(1). In the Committee's view, this requirement is not necessary, as it goes without saying that privilege reviews must be conducted in a lawful, reasonable and good faith manner.

The Committee recommends the approach taken by some federal courts which, by local rule, eliminate the requirement that attorney-client communications and attorney work product created after the filing of the complaint be included in the privilege log, unless otherwise ordered by Court. *See e.g.* Local Rule 26.1(e)(2)(c) of the Southern District of Florida.

RULE 11-c – Discovery of Electronically Stored Information from Non-Parties

This Rule requires parties to adhere to the Commercial Division's Guidelines for Discovery of Electronically Stored Information (ESI) from nonparties. The Committee does not recommend adopting this rule, as such discovery is already adequately governed by the CPLR and the Uniform Civil Rules and adopting this rule would not significantly promote efficiency or reduce the burdens of litigation.

RULE 11-d – Limitations on Depositions

This Rule sets forth limits on the number of depositions that may be taken by the parties. In particular, unless the parties stipulate or the court orders otherwise, the parties are limited to ten (10) depositions of seven (7) hours per deponent. The rule further provides that the deposition of an entity through one or more representatives shall be treated as a single deposition even though more than one person may be designated to testify on the entity's behalf. Moreover, each deposition of an officer, director, principal or employee of an entity who is also a fact witness, as opposed to an entity representative pursuant to CPLR 3106(d), counts as a separate deposition. Finally, the deposition of an entity is treated as a single deposition, even though more than one person may be designated to testify on the entity's behalf, and the cumulative presumptive durational limit may be enlarged by agreement of the parties or upon application for leave of court, which is to be freely granted.

The Committee believe that this rule's limitations on the number of depositions, and length of each of those depositions, should be broadly adopted. Adopting such limitations, which mirror federal practice, will obviously lead to more efficient and streamlined discovery, and reduce the costs and burdens of litigation in appropriate circumstances. Notably, the presumptive limitations

in the rule can be altered "for good cause shown," see 11-d(f), so this Commercial Division Rule, while providing useful boundaries, does not serve as a straightjacket. Nevertheless, parties will need to consider carefully what depositions they actually need.

RULE 11-e - Responses and Objections to Document Requests

This Rule is similar to CPLR 3122 with an additional directive in subsection (d) for the responding party to state whether the production of documents is complete, that there are no responsive, non-privileged documents in its custody or explain why the production is not complete.

The Committee supports this requirement, with the amendment that the statement be made at the time of disclosure rather than at the close of discovery.

RULE 11-f - Deposition of Entities; Identification of Matters

This Rule sets forth specific proceedings for notices of depositions and subpoenas and specifically provides a procedure for noticing corporate representations for deposition. Depositions pursuant to subpoena and notice are adequately addressed in CPLR Articles 23 and 31, respectively. The Committee does not see the need to adopt further language.

RULE 11-g - Proposed Form of Confidentiality Order

This Rule requires that any proposed confidentiality agreement conform to the form in Appendix B of the rules unless the parties seek permission from the court to deviate from that form. The Committee does not see the need to adopt this rule for all confidentiality orders. However, the Committee has reviewed the form in Appendix B and commends it to practitioners seeking to draft such an order.

Rule 12 - Non-Appearance at Conferences

This Rule provides a sanction for failure to appear at a conference. It is duplicative of language already contained in the Uniform Rules and therefore the Committee does not recommend adoption of this rule.

RULE 13 – Adherence to Discovery Schedule, Expert Disclosure

This Rule contains three subdivisions, which address, respectively, adherence to discovery schedules, document production in advance of depositions, and expert disclosure. The Committee's view is that none of these subdivisions should be adopted beyond the Commercial Division.

Subdivision (a), which addresses compliance with discovery schedules, does not impose any significant or meaningful change over the current rules and requirements, which are codified in Rule 202.12(f), including the imposition of sanctions for failures to comply. Therefore, adoption of this subdivision could not be expected to result in any improvements in civil litigation.

Subdivision (b) would permit a party seeking documents in preparation for a deposition to seek preclusion of any such documents that are not timely produced. This appears to be an effort to address the situation of depositions being adjourned because the parties do not have all documents necessary to prepare for and conduct the deposition. While this remedy may be well suited to commercial litigation, it is view of the Committee that it is not suitable for personal injury cases. Unlike commercial litigation, which typically involves documents that are in the possession of the parties, documents pertinent to personal injury cases (i.e., medical and employment records) are often in the possession of non-parties and preclusion would be inappropriate in such circumstances. The Committee is of the view that CPLR 3126 provides a more flexible rule that is effective in addressing failures to comply with orders directing the production of documents, without requiring mandatory preclusion of evidence that could lead to unjust results.

Subdivision (c), addresses expert disclosure in three respects. First, it would require the parties to confer regarding the timing of expert disclosure within thirty (30) days of the completion of factual discovery and would require all expert disclosure to be completed before the Note of Issue is filed. The Committee finds that a state-wide "one size fits all" time requirement is neither warranted nor appropriate. Rather, courts should be free to fashion schedules most suited to their caseloads and the needs of each specific case. The Committee further notes that adoption of this timing requirement would lead to delays in filing Notes of Issue and increase litigation costs by forcing parties to retain experts in cases that would otherwise settle before such costs are incurred. The Committee is also concerned that rigid timing mandates without regard to prejudice would prevent cases from being decided on their merits. For these reasons, the Committee is of the view that the timing requirements of Rule 13(c) would be counterproductive. Finally, the Committee

does not recommend expanded expert disclosure beyond that currently required by CPLR 3103(d)(1)(i).

RULE 14- Disclosure Disputes

This Rule requires parties to send a letter to the court raising any existing discovery disputes before making a formal motion., and notes that discovery disputes are preferred to be resolved through court conferences as opposed to motion practice. Many judges have implemented such a procedure, but statewide application may not be feasible, depending on caseload volume.

The rules for noncommercial division cases already require that discovery disputes first be attempted to be resolved between the parties before any party makes a motion. An affidavit of a good faith attempt to resolve the matter must be attached to every motion for discovery (Rule 202.7). Therefore, the Committee does not recommend adoption of this rule.

RULE 14-a – Rulings at Disclosure Conferences

This Rule sets forth a procedure for the memorialization of decisions made at disclosure conferences. The Committee does not recommend the procedures set forth in this rule. However, the Committee recommends that all decisions or agreements at disclosure conferences be reduced to writing and either stipulated to or so ordered by the court.

RULE 15- Adjournments of Conferences

This Rule provides that adjournments on consent are permitted with the approval of the court for good cause and that adjournment of a conference will not change any subsequent date in the preliminary conference order unless directed by the court. There is no comparable provision in the Uniform Rules. Nonetheless, granting of adjournments is solely within each judge's discretion. The Committee believes it should remain within judicial discretion and therefore does not recommend adoption of this rule.

RULE 16 - Motions in General

This Rule specifies the content and form for notices of motion and orders to show cause, requires that proposed orders accompany any dispositive motion, and sets forth criteria for

adjournments of both dispositive and non-dispositive motions. Current CPLR and Uniform Rule provisions substantially address the items in this rule and an additional rule is not needed. See CPLR 2214 (a); 3212(b); and Uniform Rule 22 NYCRR 202.8 (e)(1).

RULE 17 - Length of Papers

This Rule limits to twenty-five (25) pages the length of memoranda of law, affidavits, and affirmations and to fifteen (15) pages any reply memoranda. The Committee does not recommend adoption of this rule because there are some cases that simply require more extensive analysis, and justice would not be served by making parties move for permission to present that analysis.

RULE 18 - Sur-Reply and Post-Submission Papers

This Rule, absent express permission in advance of the motion, bars sur-replies and post-motion-submission papers, except permits a letter that notes any post-submission court decision relevant to the pending issues. The Committee does not recommend adoption of this rule because it should be left to judicial discretion whether to allow sur-reply and post-submission papers. When counsel includes new arguments or cases in reply papers, justice would not be served by having a presumption of no response.

RULE 19 - Orders to Show Cause

This Rule allows orders to show cause only when there is a genuine urgency and further bars the submission of reply papers on orders to show cause. The Committee does not recommend adoption of this rule because, currently, different judges and courts have practices that make a uniform rule difficult to apply. Additionally, a general prohibition of reply papers would not further the resolution of motions on the merits.

RULE 19-a. - Motions for Summary Judgment; Statements of Material Facts

This Rule sets forth that in summary judgment motions, the court may direct that the movant annex to the papers a short and concise numbered list of the material facts with respect to which there is no genuine issue of fact. The opponent must respond to each numbered fact and state whether there is a disputed question. Both movant and opponent must provide record citations. The Committee recommends this rule, as it is likely to greatly assist in narrowing and

clearly setting forth the material issues. Indeed, the Committee recommends that a statement of material facts not in dispute should be required in all cases and not just where the court directs. The rule is also consistent with federal practice and may curtail summary judgment motions where there are material issues of fact.

RULE 20 - Temporary Restraining Orders

This Rule requires notice to an adverse party of any application for a temporary restraining order, unless the moving party can demonstrate that significant prejudice would ensue from such notice. The Committee recommends adoption of this rule because it advances a just result by giving all parties notice of the issues and an opportunity to comment. This rule expands the requirements of Uniform Rule 202.7(f) in that it specifically requires the moving party to provide copies of the papers to the opposing parties unless prior notice would prejudice the moving party's rights.

RULE 21 – Courtesy Copies

This Rule bars courtesy copies to the court on motions submitted in hard copy and requires courtesy copies on motions submitted via electronic filing. This rule states that courtesy copies of pleadings shall not be submitted unless requested but goes on to state that such copies shall be submitted in electronically filed cases. The Committee does not recommend this rule, as it is contrary to the goals of paperless electronic litigation.

RULE 22- Oral Argument

This Rule permits any party to a motion to request oral argument by letter or by so stating on the face of the motion or opposition papers. The rule goes on to state that the judge will have the discretion whether to hear oral argument and to set the timeframe for such argument with notice of the date being given, if practicable, at least 14 days in advance. Many judges outside of the Commercial Part have specific rules regarding oral argument that are governed by their caseloads and case types. Therefore, the Committee does not recommend adoption of this rule except for the language: "Any party may request oral argument on the face of its papers," which has the salutary effect of avoiding additional letters and applications.

RULE 23- 60-Day Rule

This Rule provides that, if there is no decision on a motion within 60 days of submission, movant’s counsel is required to send a letter to the court alerting it to that fact. The Committee does not recommend adoption of this rule. Judges are presumed to be aware of standards and goals.

RULE 24- Advance Notice of Motions

This Rule provides that, except for discovery motions, or motions to dismiss, or motions for summary judgment, including summary judgment motions in lieu of a complaint, or motions to be relieved as counsel, or motions for pro hac vice admission, or motions for reargument, or motions in limine, parties must file a motion notice letter in advance of making any other type of motion that will be followed by a motion conference. The Committee does not recommend the adoption of this rule.

RULE 25 - Scheduling of Trial

This Rule provides, *inter alia*, that where a party seeks adjournment of the trial date “for any reason,” the application must be made in the absence of “extraordinary circumstances” within ten days of the setting of the trial date.

The Committee does not recommend adoption of this rule, as it may result in substantial injustice.

RULE 26 - Length of Trial

This Rule requires that “[a]t least ten days prior to trial or such other time as the court may set, the parties ... shall furnish the court with a realistic estimate of the length of the trial.”

The Rule is silent as to what may occur when the trial exceeds its anticipated length. Also, in many counties, a judge is not assigned until after jury selection is completed. At that time, a judge may inquire as to the estimated length of the trial.

The Committee does not recommend the adoption of this rule.

RULE 27 - Motions In Limine

This Rule requires that “parties shall make motions in limine no later than ten days prior to the scheduled pre-trial conference date ... unless otherwise directed by the court.” The Committee does not recommend adoption of this rule.

This rule would constitute a drastic change from current practice. Presently, while making such motions later rather than sooner carries its own inherent penalty (*i.e.*, the court is less likely to view the motion with favor), there is no deadline *per se*. More than that, the case law holds that a motion *in limine* need not be made in writing absent a court rule that provides to the contrary. *Wilkinson v Br. Airways*, 292 AD2d 263, 264 [1st Dept 2002] (“Contrary to plaintiff’s contentions, there is no requirement that an *in limine* motion be made in writing and be in accordance with CPLR 2214. The court, therefore, properly considered defendant’s oral application”).

Good practice usually dictates that motions in limine be made in writing and that they be early enough so as to afford the adversary adequate time to respond and the court adequate time to make a careful ruling. Nonetheless, there may be parties who find it cost-prohibitive to make such motions in writing in every instance. There may also be instances in which the application is made orally because the right to the ruling is so clear that the movant does not anticipate opposition. Additionally, there may be instances where the need for a motion in limine cannot be anticipated until the offer of proof is made.

Further, the rule does not indicate what consequence, if any, should follow when a party fails to timely move for preclusion of proof. The Committee is concerned that the rule could lead to admission of proof that would otherwise be clearly inadmissible, in some instances altering the substantive result of the trial.

RULE 28 - Pre-Marking of Exhibits

This Rule requires that the exhibits each side intends to offer in evidence be marked for identification at the pre-trial conference. The rule further requires that the objections, if any, to the adversary’s proof be lodged at that time. The Committee does not recommend adoption of this rule. In many courts there is no pre-trial conference that would allow for this practice.

RULE 29 - Identification of Deposition Testimony

This Rule requires that each party furnish “[a]t least ten days prior to trial or such other time as the court may set” “a list of deposition testimony to be offered by it as to which objection has not been made and, identified separately, a list of deposition testimony as to which objection has been made.” The Committee does not recommend adoption of this rule.

This rule would arguably be inconsistent with CPLR 3117, governing use of depositions at trial. For example, CPLR 3117(a)(1) provides that “any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness,” not that the deposition may be used only if the proponent notifies the court of the proposed use at least ten days prior to trial. Similarly, CPLR 3117(a)(3)(i) permits use in certain circumstances of the deposition of a deponent who has died, again without any caveat concerning pre-trial notification of the proponent’s intent. Additionally, this rule would add to the cost of litigation, without furthering judicial economy.

RULE 30- Settlement and Pretrial Conferences

Rule 30(a) provides that the court may schedule a settlement conference at any time after the discovery cutoff date. The Committee recommends adoption of this rule.

Rule 30(b) provides that counsel shall confer prior to a pre-trial conference, and be prepared to discuss uncontested and contested facts. The Committee does not recommend adoption of this portion of the rule to the extent that it assumes that the trial court judge will be known prior to trial.

Rule 30(c) provides that prior to a pre-trial conference, counsel for the parties to consult in good faith regarding their respective experts’ anticipated testimony that is in dispute. The Committee does not recommend adoption of this rule because the requirements in CPLR 3101(d) adequately address areas where there are no disputes between experts.

RULE 31 - Pre-Trial Memoranda, Exhibit Book and Requests for Jury Instructions

Rule 31(a) provides that “[c]ounsel shall submit pre-trial memoranda at the pre-trial conference, or such other time as the court may set” and that “[a] single memorandum no longer than 25 pages shall be submitted by each side.” Under the current rules, section 202.35[c] of the

Uniform Rules provides that when ordered to do so, the parties “shall submit to the court, before the commencement of trial, trial memoranda which shall be exchanged among counsel.” The Committee does not recommend adoption of this portion of the rule beyond what is currently provided in the uniform rules.

Rule 31(b) requires that counsel “submit an indexed binder or notebook of trial exhibits for the court’s use,” and, in addition, an extra copy “for each attorney on trial” and for the use of the witnesses. The Committee does not recommend adoption of this portion of the rule for all trials, as it is with the discretion of the trial judge to manage such matters as warranted by the case.

Rule 31(c) requires, where the trial is by jury, that the parties submit “case-specific requests to charge and proposed jury interrogatories” either “on the pre-trial conference date or such other time as the court may set.” The Committee does not recommend adoption of this portion of the rule for all trials, as it is within the discretion of the trial judge to determine the timing of the submission of the request to charge and the jury interrogatories.

RULE 32- Scheduling of Witnesses

This Rule would require each party to “identify in writing for the court the witnesses it intends to call, the order in which they shall testify and the estimated length of their testimony.” The list would have to be provided “[a]t the pre-trial conference or at such time as the court may direct ...”, with a copy to the adversary.

This rule would greatly alter New York practice. There is currently no requirement that each side provide the other with a list of all the witnesses that will be called. Siegel, N.Y. Prac. § 349 [5th ed., January 2017 Update] (“The caselaw under the CPLR has confirmed that parties must reveal the name of anyone they know of who witnessed the event at issue. This does not mean that upon demand each party must serve on the other a list of all witnesses she intends to use at the trial”).

The Committee does not recommend adoption of this rule. First, while one could argue that pre-trial disclosure of all witnesses would better serve to combat “trial by ambush,” the Committee believes that the added requirements are unnecessary to achieve that end and are more likely to frustrate disposition on the merits. As matters now stand, the case law already requires disclosure of those witnesses (including eyewitnesses and notice witnesses) whose testimony could otherwise unfairly surprise the adversary. To the extent that this rule could be used to preclude

calling of a witness whose testimony would not be surprising, the rule achieves no end except for frustration of the merits.

The Committee is also concerned with what could occur when, for example, the trial reaches the third hour of the testimony of a fully disclosed witness whose testimony was estimated to last only two hours. Again, the concern is that procedure could trump merits.

RULE 32-a - Direct Testimony by Affidavit

This Rule states, “The court may require that direct testimony of a party’s own witness in a non-jury trial or evidentiary hearing shall be submitted in affidavit form, provided, however, that the court may not require the submission of a direct testimony affidavit from a witness who is not under the control of the party offering the testimony.”

Although the rule is not mandatory (the operative word is “may”) and would not impair the parties’ right to conduct “live” cross-examination and re-direct examination of the witnesses, the Committee does not recommend adoption of this rule.

Even assuming that the provision makes sense in a large commercial case in which teams of lawyers will have ample opportunity to carefully draft the “direct testimony” affidavits of all the witnesses — and one can argue that such mechanism is even in that setting more likely to result in counsel’s version of the witness’s testimony than that of the witness — the same quantum of legal resources will not necessarily be available in other kinds of actions involving lesser sums of money.

RULE 33 - Preclusion

This Rule provides that “[f]ailure to comply with Rules 28, 29, 31 and 32 may result in preclusion pursuant to CPLR 3126.” The Committee believes that this rule is vague and, depending on how it is construed, could lead to substantial injustice, and does not recommend its adoption.

Currently, preclusion is only one of the penalties authorized by CPLR § 3126. The statute also authorizes “striking out of pleadings or parts thereof,” staying of proceedings, and “an order that the issues to which the information is relevant shall be deemed resolved” in the adversary’s favor. This gives rise to the question of whether the rule’s mention of only one of the statutorily listed sanctions, preclusion, means that the others cannot be appropriately imposed. If that is so and the only, or even primary, penalty is preclusion, such may unfairly impact the party with the

burden of proof. Beyond that, the Committee questions whether it makes sense to posit that preclusion is the only possible sanction for such transgressions as calling a disclosed witness out of order, miscalculating the duration of the witness' testimony, or failing to pre-mark an exhibit.

More fundamentally, the Committee believes that the current rules adequately deal with the non-compliance of pre-trial and trial procedures and orders.

RULE 34- Staggered Court Appearances

This Rule is intended to encourage court staggered appearances by providing specific time slots for parties to appear whatever the nature of the appearance. For example, judges generally have specific motion and conference days and, in accordance with this rule, each judge on such a motion or conference day would schedule a specific time slot in which each motion or conference would proceed, including the length of time allotted for each. It has not been unusual for courts to schedule all appearances on any given day at, for example, 9:30 AM, only to have very crowded courtrooms at that time and parties often waiting hours to be heard.

The preamble to this Rule notes the need for cooperation among the members of the bar and parties if the rule is to succeed in accomplishing its goal of reducing congestion among cases, attorneys and parties in courtrooms and eliminating inordinate wait time to be heard. Our committee believes that the efficiencies to be gained with staggered court appearances are significant and accordingly the Committee recommends expanding the application of this rule to all action types.

Respectfully submitted,

George F. Carpinello, Esq., Chair

Prof. Vincent C. Alexander, Esq.

James N. Blair, Esq.

Helene E. Blank, Esq.

Robert M. Blum, Esq.

Hon. James M. Catterson (ret.)

Lance D. Clarke, Esq.

Kathryn C. Cole, Esq.

Prof. Patrick M. Connors, Esq.

Edward C. Cosgrove, Esq.

Hon. Betty Weinberg Ellerin (ret.)
Myrna Felder, Esq.
Lucille A. Fontana, Esq.
Matthew Gaier, Esq.
Sharon Stern Gerstman, Esq.
Thomas F. Gleason, Esq.
Jeffrey E. Glen, Esq.
Barbara DeCrow Goldberg, Esq.
Philip M. Halpern, Esq.
Hon. John R. Higgitt
David Paul Horowitz, Esq.
Lawrence S. Kahn, Esq.
Celeste L. M. Koeleveld, Esq.
Lenore Kramer, Esq.
Harold A. Kurland, Esq.
Fay Leoussis, Esq.
Burton N. Lipshie, Esq.
Richard B. Long, Esq.
Holly Nelson Lütz, Esq.
Catherine Nagel, Esq.
Thomas R. Newman, Esq.
James E. Reid, Esq.
Richard Rifkin, Esq.
Jay G. Safer, Esq.
Robert J. Smith, Esq.
Brian Shoot, Esq.
Richard M. Steigman, Esq.
John F. Werner, Esq.
Mark C. Zauderer, Esq.
Oren L. Zeve, Esq.
Jessica M. Cherry, Esq., Counsel

**Appendix 2 -
Memorandum – Request for Public Comment on the Proposed
Adoption of Certain Rules of the Commercial Division in Other
Courts of Civil Jurisdiction - October 15, 2018**

MEMORANDUM

October 15, 2018

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on the Proposed Adoption of Certain Rules of the Commercial Division in Other Courts of Civil Jurisdiction

=====

Earlier this year, at the request of the Administrative Board, the Unified Court System’s Advisory Committee on Civil Practice conducted a detailed examination of the practice rules of the Commercial Division of Supreme Court (22 NYCRR 202.70[g]), to assess the suitability of those rules for broader promulgation in other courts of civil jurisdiction. In its July 2018 report to the Chief Judge on this subject (Exh. A), the Advisory Committee recommended the broader application of nine Commercial Division rules:

- Rule 3(a) - Appointment of a court-annexed mediator (as amended).
- Rule 3(b) - Settlement conference before a judge not assigned to the case.
- Rule 11-a - Limitations on interrogatories.
- Rule 11-b - Privilege logs (in part).
- Rule 11-d - Limitations on depositions.
- Rule 11-e - Responses and objections to document requests (as amended).
- Rule 19-a - Statement of material facts for summary judgment motions.
- Rule 20 - Temporary restraining orders.
- Rule 34 - Staggered court appearances.

The Committee concluded that other rules, though highly suitable for Commercial Division practice, were less appropriate for statewide adoption for one of various reasons: they were duplicative of existing rules or would lead to added litigation costs or administrative burdens, or addressed issues exclusively relevant to Commercial Division practice (Exh. A, p. 1-2).

The Administrative Board is now seeking public comment on the recommendations set forth in the Advisory Committee’s Report.

=====

Persons wishing to comment on the Report should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court

Administration, 25 Beaver Street, 11th Fl., New York, New York, 10004. Comments must be received no later than January 15, 2019.

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

**Appendix 3 -
Public Comments -
Memoranda of the New York State Bar Association Committee on
Civil Practice Law and Rules**

New York State Bar Association

One Elk Street, Albany, New York 12207 • 518/463-3200 • <http://www.nysba.org>



Memorandum in Partial Support

COMMITTEE ON CIVIL PRACTICE LAW AND RULES

CPLR #1

January 11, 2019

Via Email: rulecomments@nycourts.gov

John W. McConnell, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004

Re: Proposed Adoption of Certain Rules of the Commercial Division in
Other Courts of Civil Jurisdiction

The Committee on Civil Practice Law and Rules studied the proposal of the Unified Court System's Advisory Committee of Civil Practice to adopt certain rules of the Commercial Division in other courts of civil jurisdiction. The proposal included adoption of the following rules of the Commercial Division:

- Rule 3(a) – Appointment of a court-annexed mediator (as amended)
- Rule 3(b) – Settlement conference before a judge not assigned to the case
- Rule 11-a – Limitations on interrogatories
- Rule 11-b – Privilege log (in part)
- Rule 11-d – Limitation on depositions
- Rule 11-e – Responses and objections to document requests (as amended)
- Rule 19-a – Statement of material facts for summary judgment motions
- Rule 20 – Temporary restraining orders
- Rule 34 – Staggered court appearances

With the exception of Rule 19-a, the Committee unanimously approved the proposal at its November 16, 2018.

As to Rule 19-a, a subcommittee was formed to further study the rule and its findings will be presented at the full committee meeting on January 18, 2019, which is after the January 15, 2018 deadline for comment. We, therefore, kindly request that the committee be given until January 28, 2019 to submit its comment concerning Rule 19-a. Kindly advise whether the CPLR Committee could have until January 28, 2019 to submit its comment concerning Rule 19-a. Your professional courtesy is appreciated.

Co-Chairs of the Committee

Souren A. Israelyan

Domenick Napoletano

New York State Bar Association

One Elk Street, Albany, New York 12207 • 518/463-3200 • <http://www.nysba.org>



Memorandum

COMMITTEE ON CIVIL PRACTICE LAW AND RULES

CPLR #2

January 24, 2019

Via Email: rulecomments@nycourts.gov

John W. McConnell, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004

Subject: Recommendation by the Unified Court System’s Advisory Committee on Civil Practice as to Rule 19-a of the practice rules of the Commercial Division of Supreme Court

We thank the OCA for extending the time for comment to January 28, 2019, which allowed the NYSBA CPLR Committee to meet and discuss its concerns about the proposal to extend Rule 19-a of the practice rules of the Commercial Division of Supreme Court to all civil cases in all New York State civil courts and make the service of the statements specified in the rule mandatory.

Rule 19-a of the practice rules of the Commercial Division of Supreme Court provides that Commercial Division justices may direct a party moving for summary judgment to provide a paragraph by paragraph statement of the material facts as to which there are no genuine issues to be tried (with citations to the record) and the party opposing the motion to provide a paragraph by paragraph response thereto (admitting or controverting the “facts” cited by the movant and citing to the record where a fact listed by the movant is disputed). At subsection (c), the Rule provides that

Each numbered paragraph in the statement of material facts required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.

In its recommendations to adopt certain Commercial Division Rules throughout the civil courts (July 2018), the Unified Court System’s Advisory Committee on Civil Practice (“Advisory Committee”) recommends that Rule 19-a apply to any motion for summary judgment in all types of civil cases in all of New York’s civil courts but that the submission of the movant’s statement and the responding statement by the party opposing the motion, as specified in the rule, be mandatory rather at the direction of the court.

After report and discussion, and upon vote by its members at its January 18, 2019 meeting, the NYSBA Committee on the Civil Practice Law and Rules (“CPLR Committee”) opposes the Advisory Committee recommendation as to Rule 19-a.

Considerations raised in the CPLR's meeting included the following.

The recommendation of the Advisory Committee would engraft on CPLR 3212 an additional document to be submitted in support of a motion for summary judgment. CPLR 3212 provides what are the necessary factual documents to be served by the movant. Specifically, 3212 (b) provides:

A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit.

Nowhere does CPLR 3212 mention any of the documents described in Rule 19-a. Only the State legislature with the approval of the Governor can amend the CPLR to provide another document that must be filed in support of, and in opposition to a motion for summary judgment.

Additionally, if the recommendation of the Advisory Committee was accepted, the party opposing a motion for summary judgment may be unfairly prejudiced as follows: the party opposing the motion (a) provides by affidavit facts which dispute a purported fact which the movant contends in its Rule 19-a is a material fact as which there is no genuine issue to be tried, but (b) inadvertently fails to dispute the "fact" in its Rule 19-a response. Under Rule 19-a, the purported fact is deemed admitted by the party opposing the motion, despite its affidavit disputing the "fact."

Such a result would contradict the following terms of CPLR 3212(b):

the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

While the possibility of such an inadvertent failure is unlikely where the movant serves a simple, straightforward Rule 19-a statement, the risk is heightened where the movant has served a long and complex statement under Rule 19-a.

Additionally, if Rule 19-a is extended to all civil cases as the Advisory Committee proposes, such would add undue and costly burdens to summary judgment motions which already require care in preparing affidavits in support and opposition and supporting, opposing, and reply memoranda of law.

Finally, while the CPLR Committee opposes any extension of Rule 19-a beyond the Commercial Division, if the Advisory Committee decides to promote such extension, the CPLR Committee urges that any such extension does not include making the service of the statement and responding statement described in the rule mandatory but, as Rule 19-a currently reads, only upon instruction of the court handling the case. The judge handling a case should have the flexibility of deciding that he or she would not benefit from the filing of the statements described in Rule 19-a.

Co-Chairs of the Committee

Souren A. Israelyan

Domenick Napoletano

**Appendix 4 -
Public Comments -
New York City Bar, Matrimonial Practices Advisory and
Rules Committee, Managing Attorneys and Clerks
Association, Inc., and the Corporation Counsel for the City
of New York**



NEW YORK
CITY BAR

**COUNCIL ON JUDICIAL
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By Email

John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 100041
rulecomments@nycourts.gov

January 28, 2019

Re: New York City Bar Association Comments on the Proposed Adoption of Certain Rules of the Commercial Division in Other Courts of Civil Jurisdiction

Dear Mr. McConnell:

Thank you for the opportunity to comment on the proposed adoption of certain rules of the [Commercial Division](#) in other courts of civil jurisdiction.

The New York City Bar Association (the “Association”) commends the Advisory Committee on Civil Practice (the “Advisory Committee”) for undertaking this analysis and for its thoughtful discussion of each of the rules of the Commercial Division, upon which it bases its recommendations – both with respect to those rules that the Advisory Committee recommends adopting and those that it does not.

The Association supports the adoption of Rules 3(b), 11-a, 11-d, 20, and 34 of the Commercial Division in other courts of civil jurisdiction as proposed by the Advisory Committee. In the interest of brevity, we do not further comment on these rules. The Association also supports the Advisory Committee’s recommendations with respect to Rules 22 and 30(a), which the Advisory Committee recommends the adoption of (at least in part), but which do not appear in the Advisory Committee’s covering memorandum listing the rules that it recommends adopting.

With respect to several other Commercial Division rules, however, the Association disagrees in some respect with the recommendation of the Advisory Committee. Specifically, the

Association opposes the adoption of several rules that the Advisory Committee recommended adopting, recommends the adoption of certain rules that were *not* recommended for adoption by the Advisory Committee, or otherwise has comments on the recommendations made by the Advisory Committee. The Association's comments on these rules are as follows:

I. RULE 3(a)

The Association agrees with the Advisory Committee's recommendation that Rule 3(a) of the Commercial Division be adopted. However, we do not believe that changing the word "direct" to "advise," is consistent with or furthers the recommendation expressed by the Advisory Committee in the last paragraph of its comment, "that greater use be made of experienced attorneys as court-approved mediators who would be modestly compensated for their time by the parties." If the goal is to take steps that result in the greater use of mediation, we believe that can be best achieved by allowing a court to *direct* the parties to mediation where appropriate. Moreover, the Advisory Committee's reason for its proposed amendment is not explained in its report.

Further, although the Commercial Division rule refers to an "uncompensated" mediator, as correctly noted by the Advisory Committee, we agree with the Advisory Committee's recommendation, which refers to the appointment of a "court-annexed mediator," leaving out the word "uncompensated." This recommendation is in fact consistent with the practice of the Commercial Division in some counties, where mediators are compensated after the first few hours of a mediation.

While we support the increased use of mediation in cases that the court deems appropriate, we reiterate and adopt here an important recommendation made in the [June 2018 report of the City Bar's Committee for the Efficient Resolution of Disputes](#): "[I]f mediation is to be an important factor in changing the litigation culture, administrators of court-annexed mediation programs and dispute resolution providers will need to take significant steps to assure that capable mediators are available in sufficient numbers. To increase the number of effective mediators, it should become accepted practice – encouraged by the courts – for advocates to serve regularly as mediators throughout their careers. Among other things, that would increase advocate experience with the mediation process and awareness of the benefits of early case evaluation and the informal exchange of facts."

II. RULE 5

The Association agrees with the Advisory Committee's recommendation *not* to adopt Rule 5. We also agree that on-line notices of the status of actions and motions would be useful and note that the e-courts notices received by counsel who have appeared in an action provide that information.

III. RULE 7

The Advisory Committee does not recommend the adoption of Rule 7, but instead makes certain recommendations, without proposing a specific rule, concerning improvements of the

methods by which “pro forma” court conferences, especially concerning discovery, can be conducted.

The Association notes that one of the most common complaints raised by counsel and the courts is the inefficiencies attendant to “pro-forma” court conferences, such as preliminary and compliance conferences, often resulting from the volume of cases that appear on a court’s conference calendar. Accordingly, the Association agrees with the Advisory Committee’s recommendation that the courts utilize NYSCEF and other technology to avoid in court appearances for “pro-forma” matters, such as setting discovery dates or to report on discovery. We also agree that counsel should be required to e-file a statement as to whether discovery is proceeding as per the scheduling order, to obviate the need for an in-court conference where there is no dispute or non-compliance. Conferences can then be reserved for instances where there are active discovery disputes or non-compliance issues to address. We recommend that the Advisory Committee consider whether this approach can be implemented as a matter of practice or whether, instead, a rule would be advisable.

IV. RULE 8

The Association respectfully disagrees with the Advisory Committee’s opinion that Rule 8 should not be adopted.

The Advisory Committee correctly describes Rule 8 as requiring counsel for all parties to confer prior to a preliminary or compliance conference about such matters as the resolution of the case, discovery, alternative dispute resolution, voluntary informal exchange of information, and issues of electronic discovery. However, the Advisory Committee opines that the “rule is not necessary in the majority of civil cases where the issues can be addressed expeditiously at the conference, or through the adoption of a court-approved scheduling form that obviates the need for an in-person preliminary conference.”

We note that, at present, the rules do not provide for the electronic submission of preliminary and compliance conference orders in lieu of attendance by counsel at court conferences. Accordingly, we believe that the rules should address the procedures extant.

The experience of many attorneys is that, all too often, issues are not addressed or resolved expeditiously at court conferences. Moreover, some law firms have a practice of sending people to attend court conferences who may not be working on or familiar with the case, which often makes it difficult for counsel to address outstanding issues or agree upon a scheduling order that makes sense given the facts of the case. Presumably, the counsel that would take part in a required pre-hearing consultation, which is usually conducted by telephone, would be knowledgeable about the case and the issues. Accordingly, the Association believes that consultation between counsel prior to court conferences would result in greater efficiency at those conferences and, therefore, recommends the adoption of Rule 8 of the Commercial Division in other courts of civil jurisdiction. Rule 8 should, however, be harmonized with Uniform Rule 202.12(b) and (c), which govern preliminary conferences in all civil courts.

V. RULE 11-b

The Advisory Committee recommends the adoption of Commercial Division Rule 11-b, except that (i) instead of providing that a party who insists on a document-by-document privilege log may be required (upon application of the opposing party, with “good cause” shown) to reimburse the costs associated with producing it, the Advisory Committee recommends that in the event of a disagreement the court should determine “whether the categorical approach or CPLR 3122 will be used”; (ii) the Advisory Committee does not recommend adopting the rule’s requirement that a “responsible attorney” (as defined in the rule) certify that the privilege review was properly conducted; and (iii) the Advisory Committee recommends the addition of a specification that attorney-client communications and attorney work product created after the filing of the complaint need not be included in the log unless otherwise ordered by the court. The Association has the following comments on these aspects of the Advisory Committee’s recommendation.

On the question of how to handle a dispute over whether a categorical approach should be used, while we agree that it might be most efficient to allow the court to direct that approach in proper cases, we question whether a rule providing as much would require an amendment to the CPLR. Under CPLR 3122(b), a party who has requested documents that are being withheld on any ground is entitled to certain information on a document-by-document basis unless the requirements for a protective order under CPLR 3103 are met. An agreement between the parties to instead produce categorical logs constitutes a waiver of that right. The rule attempts to provide an incentive for parties to enter into such an agreement by providing that, “unless the court deems it appropriate to issue a protective order under CPLR 3103,” a party who insists on a document-by-document log will receive one but acts at its own peril in terms of possible cost-shifting. To the extent that the Advisory Committee’s recommendation would allow a court to require a party to waive its right to a document-by-document log under circumstances that do not otherwise warrant a protective order, the Association questions whether this can be done by court rule.

Regarding certification by a “Responsible Attorney,” it is not clear how much of the rule’s certification provision the Advisory Committee would delete. The Association agrees that the definition of “Responsible Attorney” contained in the rule seems unnecessarily narrow, and that it would be enough to provide that a certification signed by any attorney acting on behalf of the producing party’s law firm binds both the attorney and the firm. We also note that when this rule was originally proposed, the Association’s Council on Judicial Administration expressed the view that the representations of specific facts set forth in the rule’s certification were necessary to provide the type of information that a receiving party would want to review before accepting the categories designated by the producing party. The Association stands by that view.

Finally, the Association agrees that in most cases there is little or no purpose to be served by logging work product prepared after the commencement of litigation or communications with litigation counsel after such commencement. We believe, however, that this is generally addressed through objections and/or agreed-upon limitations, such that as a practical matter parties usually can avoid that burden in appropriate circumstances. We suggest that a blanket rule exempting all post-commencement attorney-client communications and work product from the logging

requirement may sweep too broadly, particularly insofar as such an exemption would appear to apply to communications with counsel other than litigation counsel.

VI. RULE 11-c

The Advisory Committee does not recommend the adoption of this Rule, which provides that where electronically stored information (“ESI”) is requested from non-parties, the parties should adhere to certain Guidelines that have been promulgated for such discovery. The Advisory Committee cites the existence of adequate rules in the CPLR and the Uniform Civil Rules as its reason for declining to recommend such adoption, but does not specify which rules it views as adequately covering the matters that the Guidelines address. The Association is of the view that the Guidelines promote efficiency and reduce the burden of litigation, particularly on non-parties. Among other things, they help to settle expectations about what should and should not be required of non-parties, and may thereby reduce the need for court intervention. Moreover, given that the Guidelines are just that – Guidelines, to which the rule specifies that the parties “should” adhere – the Association believes that the rule contains enough flexibility to allow the Guidelines to be bypassed in whole or in part in cases where they would not serve their intended purposes.

Accordingly, the Association respectfully disagrees with the Advisory Committee’s conclusion and suggests that it be reconsidered.

VII. RULE 11-e

The Advisory Committee recommends the adoption of this rule, except that it proposes one modification to subsection (d), which requires each party to state, no less than one month prior to the close of fact discovery or at such other date as the court directs, (i) whether production of responsive documents in its possession, custody, or control is complete, or (ii) that there are no responsive documents in its possession, custody, or control. Specifically, the Advisory Committee would require the statement to be made at the time of disclosure rather than at or near the close of fact discovery.

The Association respectfully disagrees with the Advisory Committee’s proposed modification of this rule and believes it should be adopted as is.

The disclosure obligation is ongoing, and requires a party to supplement its disclosures if, as, and when new material becomes available to it. Requiring a statement of completeness to be made (or reconfirmed) at or near the end of fact discovery ensures that disclosure is complete at the most critical point: when the period provided for it is ending.

Accordingly, the Association believes that if such a statement is to be required only once (as both the rule and the Advisory Committee’s proposed amendment seem to contemplate), requiring it to be made near the close of fact discovery is more appropriate than requiring it to be made sooner. The Association notes, however, that counsel, throughout the discovery process, including at the time document productions are made, should be advising each other (whether orally or in writing) of the status of their document productions, including as to completeness, as part of the overall obligation to confer in good faith.

VIII. RULE 11-g

The Advisory Committee does not recommend adopting this rule, which requires the parties, “in those parts of the Commercial Division where the presiding justice so elects,” to use a particular form for any proposed confidentiality order and to provide an explanation for any proposed deviations from that form. The Advisory Committee does, however, commend the form to practitioners seeking to draft such an order. The Association respectfully suggests that, given the Advisory Committee’s expressed view about the form, it reconsider its position about the rule. The rule itself gives every individual judge the flexibility to elect to use the form or not. It also gives practitioners the flexibility to agree to variations where the circumstances so warrant; the requirement that the variation be explained is reasonable and not onerous. And it gives parties a baseline that will likely streamline the process of drafting proposed confidentiality orders. For these reasons, the Association believes that the rule should be adopted.

IX. RULE 14-a

Although the Advisory Committee recommended that all decisions or agreements at disclosure conferences be reduced to writing, the Advisory Committee nevertheless does not recommend the procedure set forth in Rule 14-a. The Advisory Committee did not provide any reasoning as to why the Commercial Division’s procedure was not recommended. The Association agrees with the Advisory Committee that all decisions should be memorialized and believes that the Rule 14-a procedures are sufficient to accomplish this goal. The Association therefore believes that Rule 14-a should be adopted.

X. RULE 17

The Advisory Committee does not recommend the adoption of Rule 17, which sets limits on the length of memoranda of law, affidavits, and affirmations.¹

The Association disagrees with the reasoning of the Advisory Committee in recommending that Rule 17 not be adopted. The Advisory Committee reasons that there are some cases “that simply require more extensive analysis,” and that the parties in those cases should not be arbitrarily limited in terms of the length of their papers. But that is surely also the case in the Commercial Division, in which cases are often complex, both legally and factually, and may be document intensive. Moreover, the Advisory Committee recommends against the adoption of certain other rules outside of the Commercial Division specifically because those rules were deemed unnecessary, and potentially burdensome, for what are often *less* complex cases. Accordingly, the Association recommends the adoption of Rule 17.

XI. RULE 19-a

¹ The Association notes that Rule 17 no longer sets a page limit, but rather has been amended to set word limits. Specifically, Rule 17 limits briefs, memoranda of law, affirmations, and affidavits to 7,000 words, with reply briefs limited to 4,200 words.

In the case of Rule 19-a, the Advisory Committee not only recommended the adoption of Rule 19-a, but in fact recommended that it be mandatory in all cases rather than only those where the court directs. Rule 19-a requires that a numbered list of undisputed material facts be annexed to all summary judgment motions, to which the opposing party can then respond.

Although the Association believes that such statements can be helpful to the parties and the judge in certain cases, the Association also recognizes that there are certain cases in which requiring a statement of undisputed facts will add an additional cost and burden without adding any value. Further, as some Commercial Division judges over the years have not required the submission of a Rule 19-a statement, it is clear that the preparation and submission of such a statement, in certain cases, before certain judges, would serve no purpose. The Association therefore recommends that Rule 19-a be adopted in its original form, such that a Rule 19-a statement of undisputed facts would be required only where the court believes that it will genuinely increase efficiency.

Very truly yours,

Hon. Carolyn E. Demarest (Ret.)
Council on Judicial Administration, Chair

Michael P. Regan
State Courts of Superior Jurisdiction Committee, Chair

Barbara L. Seniawski
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JEFFREY S. SUNSHINE
 Statewide Coordinating Judge for
 Matrimonial Cases

John W. McConnell, Esq
 Counsel
 Office of Court Administration
 25 Beaver Street
 New York, NY 10004

December 11, 2018,

**Re: Matrimonial Practice and Rules Committee
 Response to Request for Comment on the Proposed
 Adoption of Certain Rules of the Commercial Division in
 other Courts of Civil Jurisdiction**

Dear Mr. McConnell:

The Matrimonial Practices Advisory and Rules Committee (the "Committee") has concerns about the adoption of certain rules and recommendations of the Commercial Division of the Supreme Court to matrimonial cases.

After a discussion and analysis of the recommendations, the Committee has concluded that many of these rules are inapplicable and inappropriate in matrimonial litigation, and that matrimonial cases should continue to be governed by the provisions of 22 NYCRR Sections 202.16 and 202.16-a and 202.16-b. We have the following comments regarding specific rules:

Rules 3(a) and 3(b) Appointment of a court-annexed mediator and settlement conference before a judge not assigned to the case

Matrimonial cases have their own protocols for mediation which must consider issues of allegations or findings of domestic violence or power imbalances. There are no (summary) jury trials in matrimonial cases. In fact, with the enactment of DRL 170 (7), most divorces are resolved on the grounds of an irretrievable breakdown in the marital relationship for a period more than 6 month. The only issue that a jury can be demanded on is the issue of grounds, and there are few if any jury trials statewide. Certainly, trials on the issues of custody, parenting time, orders of protection, child support and maintenance would not be appropriate for summary jury trials.

Referring cases to a different Judge in a matrimonial action for a conference would defeat the one judge/one family concept, especially in a non-jury case where the Judge has handled the matter from inception to trial. The additional strain on judicial resources would make the rule impracticable in matrimonial actions.

Rule 7 Preliminary Conferences

There are specific rules contained in 22 NYCRR Section 202.16(f)(1) regarding attendance at Preliminary Conferences. As required by said court rule, many judges in matrimonial actions require the parties to appear given the emotional, personal nature of the litigation and the need for the parties to participate in the conference and hear from the Judge.

Rules 11-a and 11-d Limitations on interrogatories and depositions.

These rules are contrary to the fundamental principles of broad discovery in matrimonial actions governed by DRL Section 236(B)(4), where the goal is to obtain as much information as possible about the parties' financial circumstances. Additionally, interrogatories are particularly important in cases with self-represented litigants who are better able to access this discovery tool because it is easier and less expensive. In the First and Second Departments, there is no discovery on the issue of grounds, custody or orders of protection absent special circumstances. A limitation on depositions would lead to longer trials and fewer settlements. Certainly, trial judges should have the right to limit discovery if it is a fishing expedition, and for the most part, that has been successful.

Rule 11-b Privilege Logs

Privilege logs are rarely if ever used in matrimonial litigation.

Rule 11e- Responses and Objections to Document Requests

This rule is inapplicable to matrimonial discovery in that broad and complete disclosure is already mandated.

Rule 19-a Motions for Summary Judgment; Statement of Material Facts

Summary judgment motions for the most part are not utilized in contested matrimonial cases.

Rule 20 Temporary Restraining Orders- Copies of Papers

The Committee believes this rule can be useful in matrimonial litigation and recommends the application of this rule with a limitation that only the Order to Show cause portion of the application need be provided in advance and continuing the exception in Uniform Rule 202.7(f) for requests for Orders of Protection. Often in matrimonial litigation, the supporting affidavit is signed at the Courthouse when the papers are submitted. Pre-arranged times for these application with judges and parts where practicable should be encouraged.

Rule 34 Staggered court appearances

The committee notes that most matrimonial judges allow for staggered court appearances as the needs of any case or attorneys dictate. However, given that many

matrimonial practitioners also practice in the Family Courts, where in some Counties the cases have specific time requirements and cannot be delayed, the efficacy of this rule would be lost in a matrimonial part. Family Court cases are often scheduled on short notice due to a 1028 or 1029 application or the arrest of a juvenile and take precedence over a divorce case. We believe this calendar management tool should be left to the sound discretion of the judges and local practice.

Rule 21 – Courtesy Copies

Lastly, contrary to the recommendation of the Advisory Committee on Civil Practice, the Committee agrees with Commercial Division's Rule 21 which bars courtesy copies on motions submitted in hard copy and requires courtesy copies on motions submitted by electronic filing. This rule is consistent with the needs and practices of the matrimonial bar and judges generally, but additionally, the Committee believes this can also be left to the discretion of the judge.

Very truly yours,



Jeffrey S. Sunshine

cc: Susan Kaufman, Esq.



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January 14, 2019

By Email

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Re: Proposed Adoption of Commercial Division Rule 11-b in Other Courts of Civil Jurisdiction

Mr. McConnell:

We write on behalf of the New York City Law Department (the “Law Department”) in response to the Administrative Board’s Request for Public Comment on the Proposed Adoption of Certain Rules of the Commercial Division in Other Courts of Civil Jurisdiction. The Law Department strongly supports the Advisory Committee’s recommendations to:

1. Adopt the provisions of Commercial Division Rule 11-b that encourage the use of a categorical approach rather than a document-by-document approach to privilege logs; and
2. Eliminate the requirement that attorney-client communications and attorney work product created after the filing of the complaint be included in the privilege log, unless otherwise ordered.

With the proliferation of email and other forms of electronically stored information (“ESI”), the volume of material that litigants must collect, review, and produce during discovery has increased dramatically. As a result, discovery costs in many cases have skyrocketed, particularly when it comes to reviewing documents and asserting privilege. The Sedona Conference recognizes that “[privilege] logging is arguably the most burdensome and time consuming task a litigant faces during the document production process.” 17 Sedona Conf. J. 155, Commentary on Protection of Privileged ESI (2016).

A categorical privilege log permits common documents to be grouped in different classes rather than requiring all the details about each document to be separately logged. Our experience

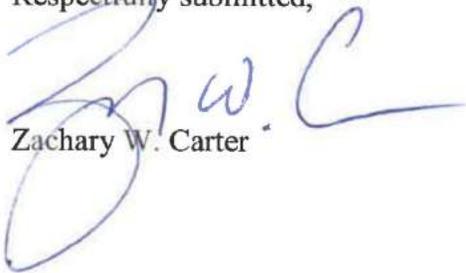
substantially reduce the time and cost of preparing privilege logs in cases with large document productions while continuing to provide sufficient information to the litigants and the courts. The use of categorical logs allows for a more efficient document review process, letting the parties devote more of their resources to identifying and producing relevant documents and less to logging massive amounts of detail that is ordinarily unnecessary.

The Law Department also supports the Committee's recommendation that post-litigation attorney-client communications and attorney work product do not need to be logged unless otherwise ordered by the court. Too often requesting parties are unwilling to agree to limit discovery to documents that predate the complaint and insist that post-litigation attorney-client communications and work product continue to be logged. This, in our view, results in a great deal of inefficiency by forcing the responding party to either contest the issue before the court or undertake the burden and expense of logging an inordinate number of clearly privileged documents that ultimately provide no benefit to the requesting party. It not only wastes valuable court resources, but also interferes with the producing party's ability to quickly and efficiently review and produce documents.

In sum, these two proposals, if enacted, will significantly reduce the costs and burdens of large e-discovery cases without diminishing the utility of the discovery process.

We thank the Administrative Board for this opportunity to comment.

Respectfully submitted,


Zachary W. Carter

MANAGING ATTORNEYS AND CLERKS ASSOCIATION, INC.

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January 28, 2019

John W. McConnell, Esq.
 Counsel, Office of Court Administration
 25 Beaver Street, 11th floor
 New York, NY 10004

Proposed Adoption of Certain Rules of the Commercial Division in Other Courts of Civil Jurisdiction

Dear Mr. McConnell,

On behalf of the Managing Attorneys and Clerks Association, Inc. ("MACA") and its Rules Committee, we write to comment on the Proposed Adoption of Certain Rules of the Commercial Division in Other Courts of Civil Jurisdiction, published October 15, 2018. We welcome this opportunity and thank the Office of Court Administration for soliciting the views of the bar on this important subject.

MACA is comprised of more than 125 law firms with litigation practices (primarily large and mid-sized firms) as well as the Attorney General's Office. Our members' positions within our respective firms and concomitant responsibilities afford us a breadth of understanding of the day to day operations of the various state and federal court systems. In particular, our members have extensive experience with the Statewide Rules of the Commercial Division and as well as practice in non-commercial Parts of the New York Supreme Court.

Agreement with Advisory Committee Recommendations

We generally support consideration of rules that have been tested in the Commercial Division for application in other civil cases, and we agree with the recommendations of

the Advisory Committee on Civil Practice to adopt Rules 2 (to the extent of requiring counsel immediately to inform the Court of settlements when a motion is pending or trial date has been set), 3(a) (with the amendment proposed by the Advisory Committee), 3(b), 11-b, 14-a (to the extent of requiring that all decisions or agreements at conferences be reduced to writing and either stipulated to or so ordered), 19-a, 20, 22 (to the extent of its authorization of parties to request oral argument on the face of their motion papers) and 34, substantially for the reasons articulated by the Advisory Committee in its July 2018 Report. We note, however, that we do not support the Advisory Committee's suggestion that Rule 19-a statements be made mandatory for summary judgment motions in all actions; not all judges find them useful and the costs to the parties of preparing such statements may be disproportionate to their value and to the amount in controversy.

Com. Div. Rule 6: Bookmarking

The Advisory Committee declined to recommend adoption of Rule 6 for civil cases outside of the Commercial Division, including its provision for filing bookmarked memoranda and affidavits, on the ground that bookmarking is too burdensome. In our experience, filing an affidavit with its exhibits as a single, bookmarked PDF often is more efficient than filing the affidavit and each exhibit as a separate PDF, as is required for NYSCEF filings outside of the Commercial Division, *see* NYSCEF User Manual at 16. Accordingly, we recommend that parties in all types of civil actions have the option—but not be required—to file a bookmarked PDF.

Com. Div. Rule 8: Consultation Before Conferences

The Advisory Committee also declined to recommend Rule 8 for application to civil cases outside the Commercial Division. Rule 8 requires counsel to consult about settlement, disclosure, ADR and e-discovery issues prior to conferences. Notably, while Uniform Rule 202.12 specifies that such issues are to be addressed at the preliminary conference, it does not require advance consultation. We recommend that Rule 8's advance consultation requirement be incorporated into Uniform Rule 202.12 because we believe that in all case types the conference process is more efficient when the parties already have conferred to identify points of agreement and what they disagree about—and in some instances, parties can come to agreement through that procedure and end up not having to take up the Court's time with a conference. We note that Fed. R. Civ. P. 26(f) requires parties to confer prior to the federal equivalent of the preliminary conference, and in our experience that requirement makes the process of establishing a plan for discovery and other steps in the pre-trial process more efficient.

Com. Div. Rule 11-a: Limitations on Interrogatories

We agree with the Advisory Committee's recommendation that Rule 11-a be adopted for use outside the Commercial Division, but we note that subsection (b) needs to be amended by adding to the list of permitted topics expert disclosure pursuant to CPLR 3101(d)(1). The Advisory Committee has recommended against adoption of Com. Div.

Rule 13(c)'s expert disclosure provisions, and without them a party needs to be able to propound interrogatories pursuant to CPLR 3101(d)(1) in order to be able to prepare for an expert's testimony at trial.

Com. Div. Rule 11-e: Responses & Objections to Document Requests

We also support the adoption of Rule 11-e to apply in other civil cases, but without subsections (c) or (d) of the rule. Subsection (c) requires that the parties agree to a date by which document discovery will be completed, and that they reach such agreement by the commencement of depositions; subsection (d) requires that the producing party certify—for each individual document request—either that production is complete or that the party has no responsive documents. These provisions are widely regarded as unduly burdensome and in our experience parties tend either to stipulate around them or simply to ignore them. We believe that subsection (c) has not appreciably improved the timeliness or orderliness with which pretrial disclosure proceeds in Commercial Division cases. And outside of the Commercial Division, Uniform Rule 202.12(c)(2) already provides for the establishment of a timetable for the completion of various aspects of disclosure, which can be revisited in the course of compliance conferences scheduled pursuant to Uniform Rule 202.12(j).

Subsection (d) of Rule 11-e is disfavored among practitioners because in essence it requires the producing party to prove a negative fact: that there are no more responsive documents. A witness can only represent with personal knowledge what he or she knows, but in the case of negative facts any representation always is subject to the limits of the witness's knowledge. The risks of representing that a document production is complete were famously illustrated by a Florida court in *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*, CA 03-5045 AI (Fla. 15th Jud. Cir. Mar. 23, 2005). In *Coleman*, when a representation that document production was complete was rendered inaccurate by the subsequent identification of additional responsive records that had not been produced, the court granted a default judgment as a sanction (later vacated on appeal). Just as the Advisory Committee concluded that the certification requirement stated in Com. Div. Rule 11-b(d) was unnecessary, given counsel's obligation to conduct privilege reviews in a lawful, reasonable and good faith manner, so too is the certification requirement in Rule 11-e(d) unnecessary to parties' proper performance of their obligations to object or produce under CPLR 3122.

Com. Div. Rule 12: Non-Appearance at Conference

The Advisory Committee found Rule 12 to be duplicative of existing rules and did not recommend its adoption for that reason. We note that Com. Div. Rule 12 goes beyond other rules in its express authorization of the Court to impose an appropriate non-monetary sanction other than those itemized in Uniform Rule 202.27, and that Rule 130–2.1 provides only for monetary sanctions. We believe Justices are best able to enforce compliance with rules when they have flexibility to determine what is likely to be the

most effective yet fair sanction in a given situation. Accordingly, we support a rule that recognizes that power in Justices outside of the Commercial Division, and note that amendment of Rule 130–2.1 is likely the most expedient means to that end.

Com. Div. Rule 13(b): Documents Sought as Condition Precedent to Deposition

The Advisory Committee recommends against adoption of this provision for sanctions when records are requested in advance of a deposition but not timely produced, on the ground that CPLR 3127 adequately empowers the Court to address such compliance failures. We disagree. We frequently see litigation delayed when a party unjustifiably fails to produce its documents in advance of its deposition and Rule 13(b) is unique in specifically addressing the problem. The Advisory Committee also saw a potential for problems that could result from application of the rule when the required documents are in the possession of non-parties. The introductory clause of Rule 13(b) could be revised to address that concern: “If a party seeks documents from another party as a condition precedent to a deposition, the documents are not produced by the date fixed and the party of whom they are requested is later determined to have had such documents in its custody or control, the party seeking disclosure may ask”

Com. Div. Rule 29: Identification of Deposition Testimony

The Advisory Committee did not recommend adoption of this rule because it saw inconsistencies between the rule and CPLR 3117, particularly with regard to use of deposition testimony for impeachment purposes. We agree that deposition testimony should be available to use for impeachment purposes without having to be identified prior to trial, but believe this defect in Rule 29 can easily be remedied with the addition of a sentence to the end of the rule: “The rule shall not be construed in a manner that affects the ability of a party to use deposition testimony at trial in accordance with CPLR 3117(a).” We recommend adoption of Rule 29, with that amendment, for use in other civil matters.

Com. Div. Rule 32: Scheduling of Witnesses

The Advisory Committee did not recommend adoption of this rule on grounds that it would greatly alter New York practice by introducing a pre-trial witness list when the “trial by ambush” it guards against already is adequately regulated. We disagree. We believe that the device of a pre-trial witness list better enables the assigned Justice to manage the trial as well as the rest of his or her court schedule, and similarly assists the parties and their witnesses. We do not see a danger that the Court would cut off a witness’s testimony when it exceeds the estimated length disclosed on the witness list, contrary to the Advisory Committee’s concerns. We recommend adoption of Rule 32 for use in other civil matters.

Revisiting Other Com. Div. Rules

The Advisory Committee observed that a number of the Commercial Division Rules are unnecessary. We believe these findings should prompt a re-evaluation of the burdens associated with those rules and the benefits they confer, because in our experience some of the Commercial Division rules have been more burdensome and/or less beneficial in practice than originally may have been believed; and because, in our experience, extra rules tend to complicate procedure rather than make it more efficient. We believe the following rules are worthy of such review:

- Rule 1: Uniform Rule 202.12(b) already requires counsel to appear at conferences “thoroughly familiar with the action and authorized to act.” It would be more efficient to eliminate from Rule 202.70(g) the language that makes Uniform Rule 202.12 inapplicable to the Commercial Division.
- Rule 2: The Advisory Committee aptly observed that “no purpose would be served” by taking a step in addition to filing discontinuance papers to notify the Part, except when a motion is pending or trial scheduled.
- Rule 4: The Advisory Committee suggested that sending papers by fax is inconsistent with the increasingly prevalent e-filing, and we would note that Uniform Rule 202.5-a is adequate for use in the Commercial Division in cases that are not e-filed; accordingly, Rule 4(a) is superfluous. The Advisory Committee also opined that counsel generally don’t need a rule or other judicial direction to decide among them how to communicate and we agree; Rule 4(b) thus may also be unneeded.
- Rule 6: The Advisory Committee “believe[d] that there is no problem within the court system with regard to papers and their form There are already rules that seem to work well.” Apart from the issue of bookmarking PDFs discussed above, we agree. We note, moreover, that an OCA rule that purports to supersede a statute, such as CPLR 2101’s provision setting the minimum type size for documents other than the summons at ten point, is of uncertain legal effect. We also believe that Rule 130 is sufficient authority on its own to govern the conduct of parties and their counsel, and that a separate court rule that says Rule 130 applies is superfluous.
- Rule 7: The Advisory Committee believed conferences can be wasteful of parties’ resources, and opposed making this rule applicable outside the Commercial Division. We believe that Rule 7 does not sufficiently differ from Uniform Rule 202.12(b) to warrant a separate rule.
- Rule 10: The Advisory Committee believed that Rule 10’s requirement that counsel file certification that he or she has discussed ADR with the client invades the attorney-client relationship. We believe that the certification is make-work and have observed that the Justices in New York County’s Commercial Division appear to be

uninterested in the certification or whether or not it has been made. As for the other information Rule 10 requires, we are not aware of any Commercial Division Justice asking for any of it other than what motions are anticipated. We do not believe that a separate rule is necessary for that purpose; Uniform Rule 202.12(c) can be amended to include anticipated motions and Com. Div. Rule 10 can be eliminated.

- Rules 11, 11-c, 11-f: The Advisory Committee believed each of these rules is superfluous in the face of the CPLR and other provisions of the Uniform Rules. We agree.
- Rule 15: The Advisory Committee believed judicial discretion as to adjourning conferences should remain unfettered. We do not believe Rule 15 articulates a standard that is not already inherent in the assigned Justice's power to manage his or her docket.
- Rule 16: The Advisory Committee did not recommend adoption of this rule governing motion procedures, deeming it superfluous in the face of CPLR 2214 and 3212 and Uniform Rule 202.8. We agree that, if Uniform Rule 202.70(g) did not make Uniform Rule 202.8 inapplicable to Commercial Division matters, Rule 16 would be unnecessary.
- Rule 18: The Advisory Committee did not recommend adoption of this rule governing sur-replies and post-submission papers on the ground that such matters should be left to the judge's discretion. We note in addition that we have not experienced problems with these matters outside of the Commercial Division, which are governed by Uniform Rule 202.8; and that if Uniform Rule 202.70(g) did not make Uniform Rule 202.8 inapplicable to Commercial Division matters, Rule 18 would be unnecessary.
- Rule 21: The Advisory Committee recommended against adoption of this rule on courtesy copies because it viewed the rule as contrary to the goals of paperless e-filing. We find the topic ill-suited to a statewide rule because the requirement of courtesy copies tends to be addressed in local rules in accordance with local preferences and in Part Rules in accordance with the assigned Justice's preferences. Accordingly, Rule 21 seems superfluous.
- Rule 23: The Advisory Committee recommended against adoption of this rule on counsel reminding the Court when it fails to decide a motion within 60 days on grounds that Justices are presumed to know the standards and goals they work against. We agree and add that Rule 23 has been dead letter ever since Uniform Rule 202.8(h) was amended to eliminate its parallel requirement in favor of periodic reports to Justices by the Chief Administrator, effective October 1, 2006. We are not aware that Rule 23 is ever complied with or enforced.

John W. McConnell, Esq.

January 28, 2019

- Rule 25: The Advisory Committee rejected this rule on the scheduling of trial as having the potential to “result in substantial injustice.”
- Rule 32-a: The Advisory Committee highlighted the weakness of direct testimony by affidavit: it is “more likely to result in counsel’s version of the witness’s testimony than that of the witness.” For that reason, we believe presentation of direct testimony by affidavit should be at the discretion of the parties, not the Court.
- Rule 33: The Advisory Committee did not recommend adoption of this rule authorizing the Court to preclude evidence for failure to comply with four other Commercial Division rules because it “is vague and, depending on how it is construed, could lead to substantial injustice.” We note as well that CPLR 3126, upon which Rule 33 purports to be grounded, provides penalties for “fail[ure] to disclose information . . . pursuant to [Article 31 of the CPLR].” The Commercial Division rules to which Rule 33 applies that penalty are not among the matters addressed by Article 31 of the CPLR, however; they are instead rules governing trial exhibits (Rule 28), the presentation to the Court of deposition testimony to be used at trial (Rule 29), pre-trial memoranda, exhibit books and jury questionnaires (Rule 31); and trial witness lists (Rule 32). That legal defect in Rule 33 and the drastic penalties it purports to provide for procedural missteps lead us to question whether the rule should remain in place.

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Again, we are grateful for the opportunity to comment on the proposal to adopt some of the Commercial Division Rules for use in other types of civil cases. If the OCA would like elaboration on any of the foregoing, please let us know.

Respectfully submitted,

s/Timothy K. Beeken
 MACA Rules Committee Chair
 Counsel & Managing Attorney
 Debevoise & Plimpton LLP

s/John D. Bové
 MACA President
 Managing Clerk
 Mound Cotton Wollan
 & Greengrass LLP

**Appendix 5 - Report of the New York State Bar Association
Task Force on Rural Justice, April 2020**



NEW YORK STATE
BAR ASSOCIATION

Report of the New York State Bar Association Task Force on Rural Justice

April 2020





REPORT & RECOMMENDATIONS OF THE TASK FORCE ON RURAL JUSTICE



**INTERVENTIONS TO AMELIORATE THE
ACCESS-TO-JUSTICE CRISIS
IN RURAL NEW YORK**

APRIL 2020

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APPENDIX

INTRODUCTION

Despite New York State having more licensed attorneys than any other jurisdiction in the United States, many New Yorkers do not have access to attorneys to assist with their legal problems. This lack of access is acutely felt within New York's rural communities, where the delivery of legal services presents both distinctive challenges and rewards that are largely uninvestigated by our metro-centric bar.

This metro-centrism is a symptom of the following reality: the great majority of New York's licensed attorneys practice in or around urban centers. According to the data, roughly 96% of attorneys practice in metropolitan areas, with the remaining 4% presumably serving New York's mostly rural geography. Compounding this inequitable distribution of attorneys, recent research has brought to light that nearly 75% of current rural practitioners will be retiring from practice in the next 10–30 years, with little to no new attorneys taking their stead. This alarming legal trend is exacerbating the access-to-justice gaps already faced by rural communities.

The Task Force on Rural Justice was formed to investigate these legal trends and to propose creative interventions to combat this imminent crisis.¹ We have taken insight from the other jurisdictions that have already been addressing their rural access-to-justice challenges, and now, as a united Task Force, endeavor to advance solutions crafted for New York's own unique jurisdictional needs. The report and recommendations that follow are the culmination of our collective effort to spotlight alarming legal trends, ameliorate the plight of New York's rural attorneys, encourage new attorneys to consider rural practice, and ensure greater access-to-justice for all New Yorkers.

We hope this Report inspires all invested stakeholders to take the necessary action required to avert the rural access-to-justice crisis upon us.

Co-Chairs



Honorable Stan L. Pritzker
Supreme Court, Appellate Division
Third Judicial Department



Taier Perlman, Esq.
Staff Attorney
Legal Services of the Hudson Valley

¹ A detailed description and background on the Task Force can be found in Appendix A and B.

ACKNOWLEDGEMENTS

The Task Force on Rural Justice acknowledges Hank Greenberg, President of the New York State Bar Association (NYSBA), for his vision in spearheading the creation of this Task Force and assembling its diverse and knowledgeable members. Staying true to NYSBA's commitment to ensure access-to-justice for all New Yorkers, he created this task force to respond to the shrinking pool of attorneys serving rural communities across the state. Further, our work would not have been possible without our NYSBA liaisons—Katherine Suchocki and Tom Richards—who from start to finish supported us with great dedication to the cause. We would also like to thank the Honorable Elizabeth Garry, the Presiding Justice of the New York State Supreme Court, Appellate Division, Third Department, for her support of this initiative, and for championing the rural-justice cause long before this Task Force formed.

This report builds on an empirical study of lawyers in rural New York spearheaded by Taier Perlman for the Government Law Center at Albany Law School. The Task Force thanks the Government Law Center for sharing the underlying data on which its published study, [*Rural Law Practice in New York State*](#), was based.

The Rural Justice Task Force also acknowledges the many invested stakeholders across the state who graciously and generously shared their time and insights. Special thanks goes to David Kay and Robin Blakely-Armitage from the [Cornell Community & Regional Development Institute](#) (CaRDI) who offered expertise in data science, rural demographic trends, and preliminary map-making. The Task Force also thanks [ZevRoss Spatial Analysis](#) for creation of the maps, infographics, and tables.

Finally, we acknowledge the many hard-working and dedicated rural practitioners from across the state that reached out to share their stories, comments, and proposals to support the Task Force. Without their tireless self-sacrifice, rural access to justice would just be a concept. These rural practitioners creatively maneuver through myriad challenges to deliver urgently needed legal services. They are justice warriors at the frontlines of the accelerating access-to-justice crisis affecting rural New York.

CONCEPTUAL FRAMEWORK—A PACKAGE OF PROPOSALS

It must be clarified at the onset, that the rural access-to-justice challenges this Task Force was formed to address are largely due to forces beyond the scope of our work. The social, economic, and political circumstances that have brought about the decline of rural communities in New York and other states will not be addressed herein. Further, given that the diverse and complex challenges rural communities face implicate multiple stakeholders, including local and state governments, the Task Force had to take a creative approach when developing our recommendations.

Our recommended interventions fall under five categories—Rural Law Practice, Funding, Broadband and Technology, Law Schools and New Attorneys, and Law and Policy—which in totality make up a package of targeted proposals. These category specific interventions address the diverse and complex challenges rural communities face. Only through such a diversified approach can we meaningfully avert the justice gap crisis that will occur when nearly 75% of present-day rural practitioners retire.

This package of proposals is an invitation to any and all stakeholders invested in rural well-being and access to justice. Our diverse interventions call on the State Bar, the State Legislature, the New York Unified Court System, law schools, and others to take action where action is due. The interventions we discuss in this Report are not mutually exclusive. They each make up a piece of the bigger rural justice puzzle, and advancement of any one of them will make a difference for the rural access-to-justice problems our Task Force set out to address. In laying out these diverse recommendations, we invite the full panoply of stakeholders to help bring them to fruition. It will take the proverbial village to activate all of our recommendations, and the more recommendations we can advance, the better for all.²

BACKGROUND & RESEARCH

Readers familiar with the access-to-justice challenges experienced in rural New York may wish to skip this section and begin reading the Task Force recommendations which start at page 15.

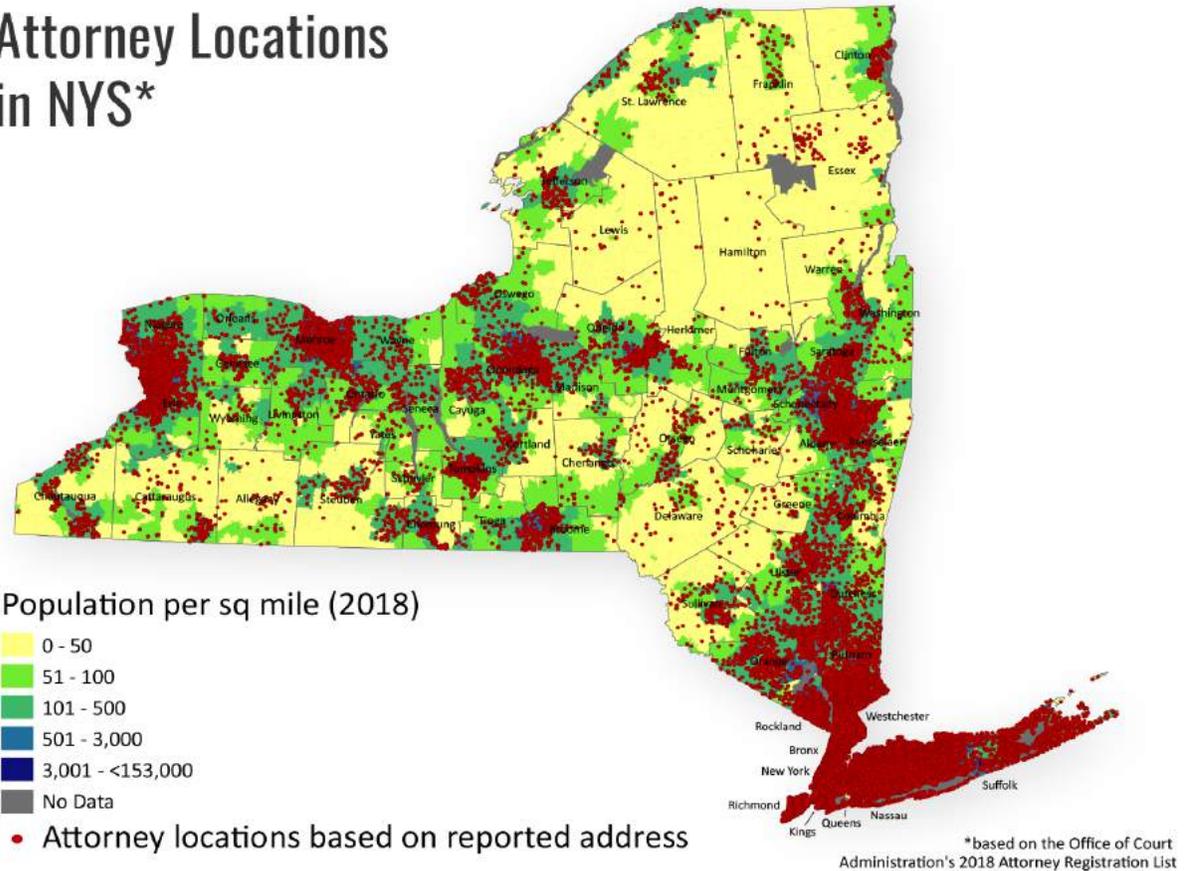
I. New York State Attorneys: Where Are They?

According to the *ABA National Lawyer Population Survey: Lawyer Population by State*, New York is home to the largest concentration of registered attorneys of any jurisdiction in the United States. As of 2018, New York had 179,600 registered attorneys, 155,369 of whom had in-state addresses. The majority of these registered attorneys are based in non-rural counties, so naturally, the organized bar focuses on meeting the needs of this great majority of practitioners. Accordingly, the needs of rural attorneys and access-to-justice challenges are not prioritized. This is documented across all jurisdictions.

² A summary of all the recommendations is located in Appendix F.

The urban clustering of New York attorneys is readily apparent when projected on a map:

Attorney Locations in NYS*



Each dot represents a single attorney based on addresses reported to the Office of Court Administration.³ The vast majority of New York State attorneys are located in urban centers of the state—Buffalo, Rochester, Syracuse, Utica, Albany (Capital Region), and the New York City metropolitan areas. Geographically, however, New York is primarily rural. Of the state’s 62 counties, 44 are considered rural under [New York State Executive Law § 481](#).

It should be briefly noted that defining “rural” is no simple task.⁴ The definition shifts depending on the specific data sets being used, and what demographic factors or data units are being analyzed. State and federal agencies define rural differently from each other, and which definition of rural to use in a particular study depends on the context and purpose of the research. In a presentation to the Task Force, Robin Blakely-Armitage, Senior Extension Associate and

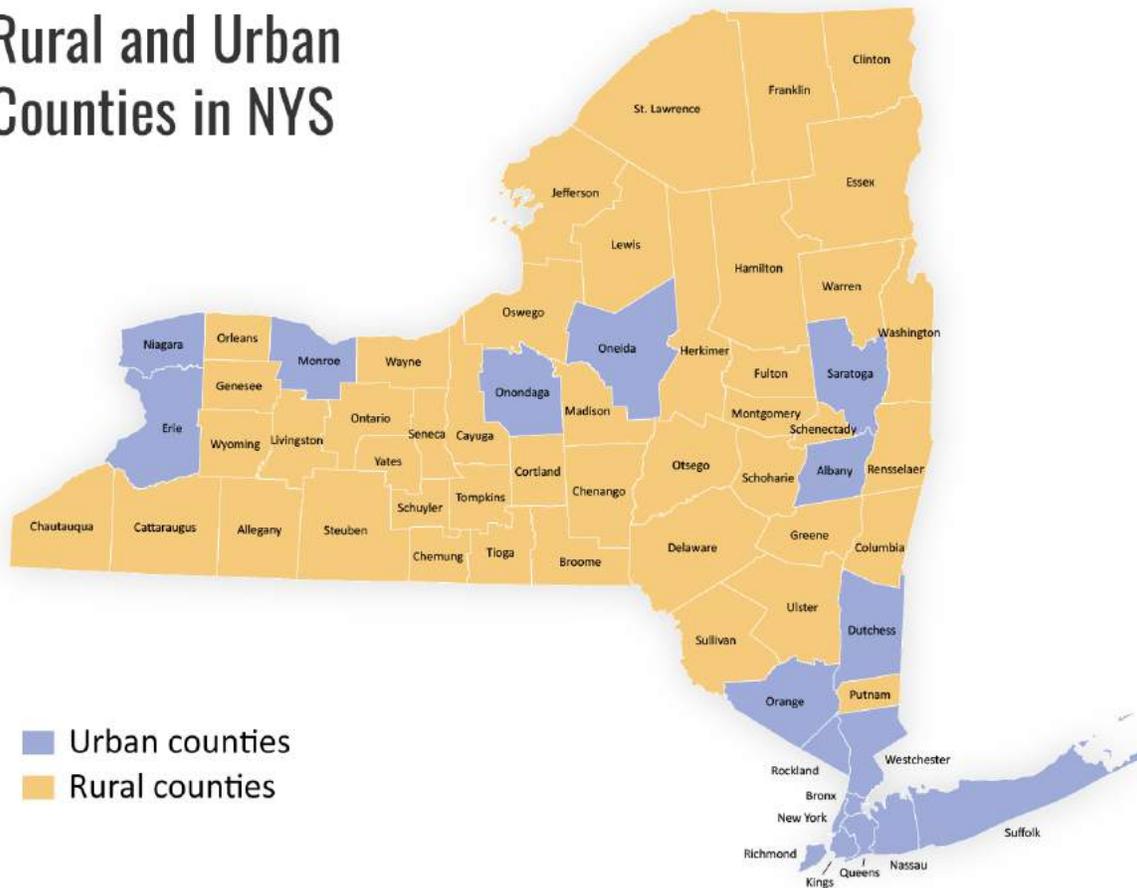
³ The attorney registration list maintained by the Office of Court Administration’s Attorney Registration Unit only publicly releases attorney work addresses, not their home addresses. Accordingly, attorneys that only report a home address, without including a work address, are not projected on this map. Additionally, attorneys in suspended status are not shown on this map.

⁴ See Ruth Igielnik Wieder, Pew Research Center, “Evaluating what makes a U.S. community urban, suburban or rural” (Nov. 22, 2019), <https://medium.com/pew-research-center-decoded/evaluating-what-makes-a-u-s-community-urban-suburban-or-rural-159f9d082842>.

Program Manager at Cornell’s Community and Regional Development Institute, explained that defining rural is largely contextual, and shifts depending on what you are studying. She said that the best general definition of rural is lower population density and limited proximity to a population center.

The Task Force deliberately decided not to get bogged down by the nuance involved in crafting a specific definition of “rural.” For our purposes, we relied on the definition of “rural” in [Executive Law § 481](#), which identifies a county as rural if its population is below 200,000 people. Relying on this definition, the following map visualizes just how rural New York State is:

Rural and Urban Counties in NYS



Rural New York makes up approximately 80% of New York’s land mass, and is home to approximately 17% of New Yorkers, or 3,260,008 people.⁵ According to attorney-registration data, there are only 6,176 attorneys serving these vast rural territories. In reality, the number of rural attorneys that actually offer legal services to individual members of the public is much smaller than that statistic indicates, since it is unrealistic to presume that all 6,176 attorneys work

⁵ This statistic was computed from the population data contained in the Table found in Appendix E. This Table, created by [ZevRoss Spatial Analysis](#), used 2018 US Census population estimates.

in private law practices or legal services organizations. A sizable proportion of these attorneys are district attorneys, government lawyers, members of the judiciary, or employees of private businesses, government or public institutions, none of which offer legal services to the general public. This is corroborated by data from rural county bars. For example, the Delaware County Bar Association has a total of 71 members. However only 26 of them maintain a primary solo practice office in the county. Seventeen members are employed by the government, and the other 28 members are not offering legal services to the general public.⁶ It is safe to conclude that less than 4% of New York licensed attorneys actually serve the access-to-justice gaps that exist in rural communities.⁷

Without a doubt, there are far fewer attorneys serving rural counties than urban ones. But are there too few? The uneven distribution of attorneys across New York State does not necessarily demonstrate an attorney shortage, particularly when we would expect there to be less attorneys in areas where there are less people. The question is whether there are enough attorneys per resident to meet the need, and in rural New York, there usually are not, as the following section shows.

II. Evidence of Rural Attorney Shortages

Not Just a New York Problem

Research across jurisdictions documents the growing shortage of attorneys throughout rural America. For instance, a recent publication titled *Legal Deserts: A Multi-State Perspective on Rural Access to Justice* summarized research on rural attorney shortages across five states—California, Georgia, Maine, Minnesota, South Dakota, and Wisconsin.⁸ Data studies of rural attorney shortages have also been done in other jurisdictions including Arkansas, Montana, and Utah.⁹

⁶ The Delaware County Bar Association statistics were shared with us by Task Force Member Gary A. Rosa on August 2, 2019. Similar figures come from other rural county bar associations. For example, the Madison County Bar Association has 86 members. 27 are court staff, agency attorneys, or lawyers who are members but do not practice law in the county. Of the 59 remaining, 5 are employed half time as government attorneys. Also, only 3 attorneys are under the age of 40. These figures were reported to us by Gemma Rossi Corbin on July 22, 2019. Corbin served as Madison County Bar Association President from 2016 to 2017.

⁷ The facial inadequacy of the numbers in illuminating just how many rural practitioners actually serve rural legal needs was demonstrated in a rural practitioner survey that was conducted from August to October 2018 by Albany Law School's Government Law Center. Hundreds of survey responses had to be dropped from the analyzed data set because they were completed by rural practitioners who did not offer legal services to the general public. See Taier Perlman, *Rural Law Practice in New York State*, endnote 5 (Gov't Law Center, Apr. 16, 2019), available at <https://www.albanylaw.edu/centers/government-law-center/the-rural-law-initiative/Documents/rural-law-practice-in-new-york-state.pdf>.

⁸ Lisa R. Pruitt, et al., *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 Harv. L. & Pol'y Rev. 15 (2018). <https://harvardlpr.com/wp-content/uploads/sites/20/2019/04/4.-Legal-Deserts.pdf>.

⁹ Arkansas study: Lisa R. Pruitt, et al., *Justice in the Hinterlands: Arkansas as a Case Study of the Rural Lawyer Shortage and Evidence Based Solutions to Alleviate It*, 37 U. Ark. Little Rock L. Rev. 573 (2015); Montana study: Hilary A. Wandler, *Spreading Justice to Rural Montana: Expanding Local Legal Services in Underserved Rural Communities*, 77 Mont. L. Rev. 235 (Summer 2016); Utah study: David McNeill, *Measuring the Legal Services Market in Utah*, Vol. 30 No. 5 Utah Bar J. 22 (Sept/Oct 2017).

The California studies are especially relevant, because California is similar to New York. It has the largest population of any state; it has the second highest count of registered attorneys; and its attorneys practice mostly in large metro-areas, even though the state is predominately rural. The California Commission on Access to Justice published a report in July 2019 spotlighting attorney shortages in California’s rural territories.¹⁰ That study documented the same attorney distribution trends as New York, including the problematic attorney deserts that exist in rural communities.

The New York Problem

While many studies have been done examining workforce shortages across rural New York, no one entity has specifically studied legal workforce shortages until the Government Law Center at Albany Law School published its seminal *Rural Law Practice in New York State Report* in April 2019.¹¹ This detailed report, based on a three-month survey of rural practitioners, revealed a number of telling legal trends affecting rural communities. The report provided qualitative and quantitative data about what rural practice is like as well as the rewards and challenges of rural practice. Most significantly, it documented the growing shortage of rural attorneys based on several indicators—difficulties rural attorneys have making referrals in their geographic region, feeling overwhelmed by the volume of cases they are handling, and the greying of the rural bar due to a shortage of new attorneys. The below section focuses on the later indicator, which is what has prompted many jurisdictions to action.

A. The Greying Rural Bar

The Government Law Center’s survey reported an alarming figure: 74.3% of respondents were 45 years or older, with 54% at or near retirement age. This means that within 10 to 30 years, the majority of current rural attorneys will be fully retired. The gravity of these figures was colored by comments from the respondents:

“I am the only lawyer handling complex business transactions. I am 69 years old and cannot retire because too many people rely on me.”

“While there are currently enough attorneys to go around, most are in their 60s, which means many will probably retire in 10-20 years. There may be a crisis in the future, just look at the age of the attorneys.”

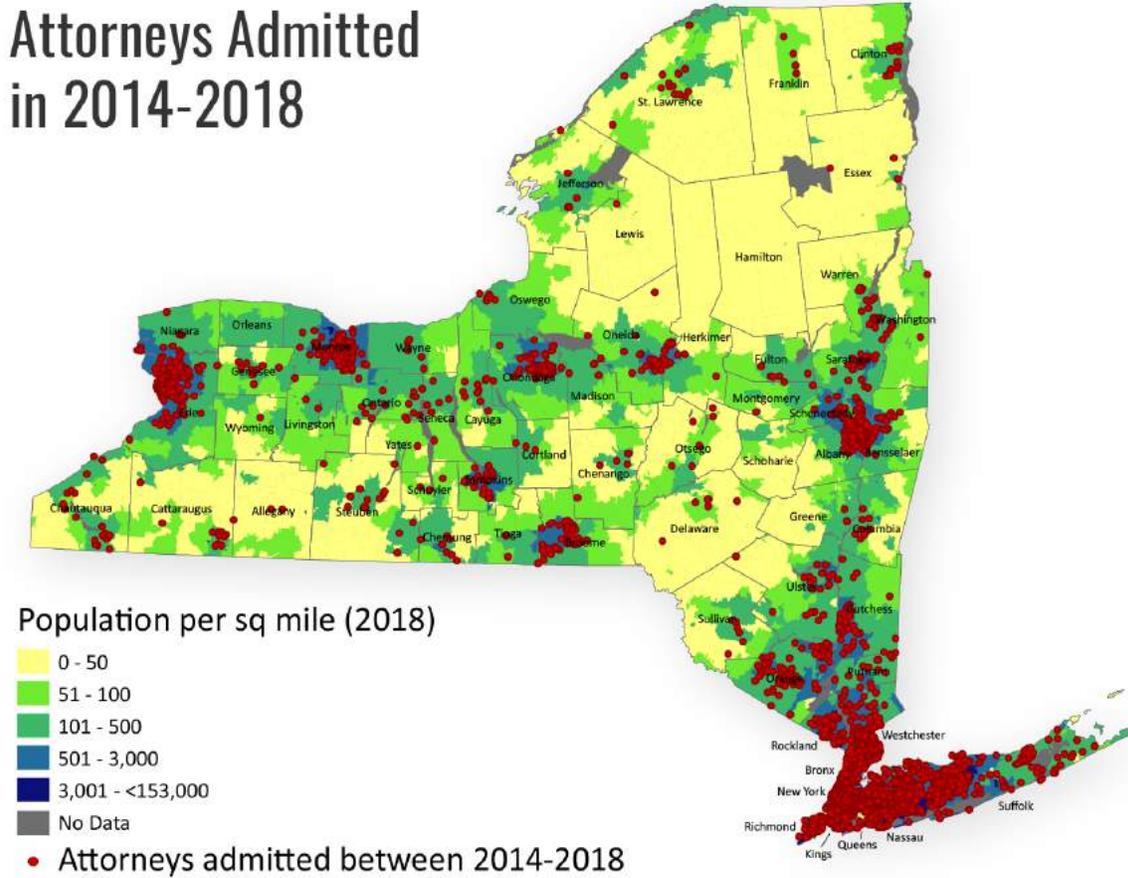
“We are running out of lawyers! Something needs to be done to attract young attorneys to the rural areas . . . Our county is literally running out of lawyers.”

¹⁰ CA Commission on Access to Justice, CALIFORNIA’S ATTORNEY DESERTS: ACCESS TO JUSTICE IMPLICATIONS OF THE RURAL LAWYER SHORTAGE (July 2019).
<http://www.calbar.ca.gov/Portals/0/documents/accessJustice/Attorney-Desert-Policy-Brief.pdf>

¹¹ See Perlman, *Rural Law Practice*, at <https://www.albanylaw.edu/centers/government-law-center/the-rural-law-initiative/Documents/rural-law-practice-in-new-york-state.pdf>.

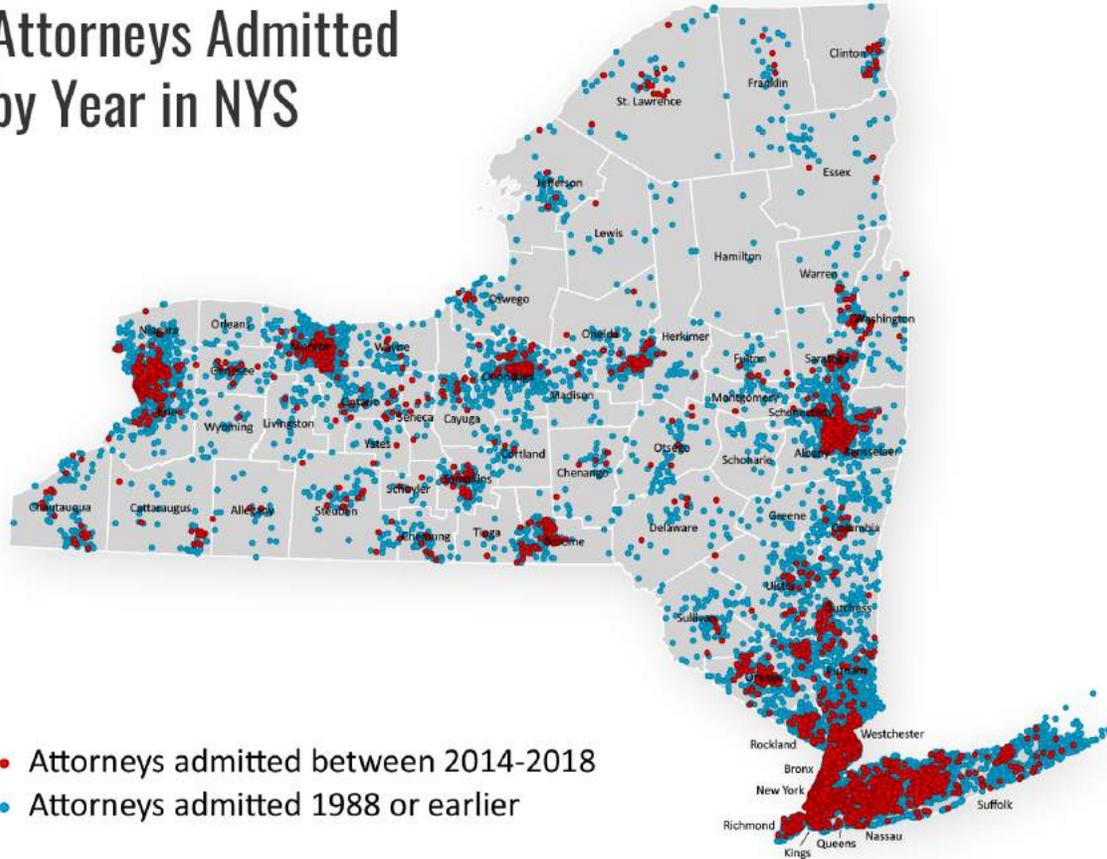
Based on these findings, the Task Force took a deeper look at the composition of rural practitioners. Using attorney registration data, we worked with data scientists to compare how many rural attorneys are newly admitted compared to those that have been in practice for quite some time.

The following map shows each attorney that was admitted to the bar between 2014 and 2018:



Like attorneys generally, newly admitted attorneys are heavily concentrated in New York’s urban counties. An overlay of attorneys that have been admitted since 1988 or before—representing attorneys that have been in practice for 30 plus years—shows a remarkable effect:

Attorneys Admitted by Year in NYS



The older generation of attorneys are much more numerous and spread out across New York’s rural territories. They also clearly outnumber the newly admitted attorneys that are settling in rural areas. This attorney age imbalance was also documented in the Government Law Center’s survey, albeit qualitatively:

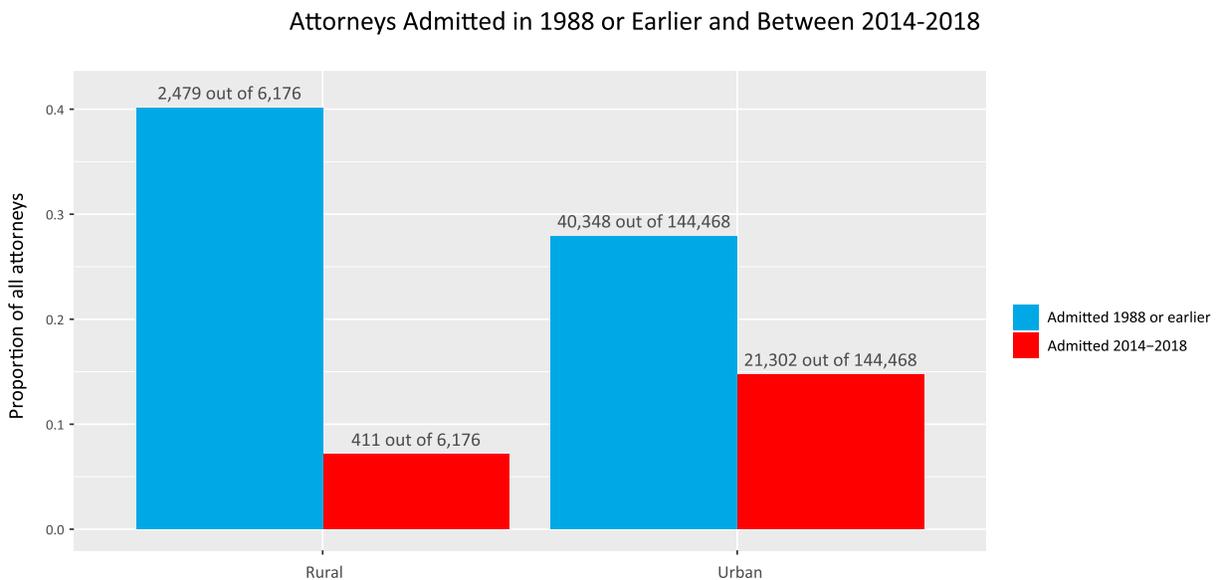
“This county has no public defender office; all indigent legal defense is 18-b. We are running out of defense attorneys who are willing/able to take cases because more attorneys are retiring or leaving the area than those coming in to replace them.”

“I get the impression sometimes that young attorneys are coming out of law school with so much debt that they do not feel they can come to our small villages.”

“Attracting and retaining young lawyers to work in rural areas is one of the biggest challenges I face as a rural practitioner.”

Many more commenters likewise expressed concern about the shortage of newer attorneys and the dim prospects once currently practicing attorneys retire.

The following graph compares the proportions of older and newer attorneys in urban and rural counties and corroborates the anecdotal knowledge:

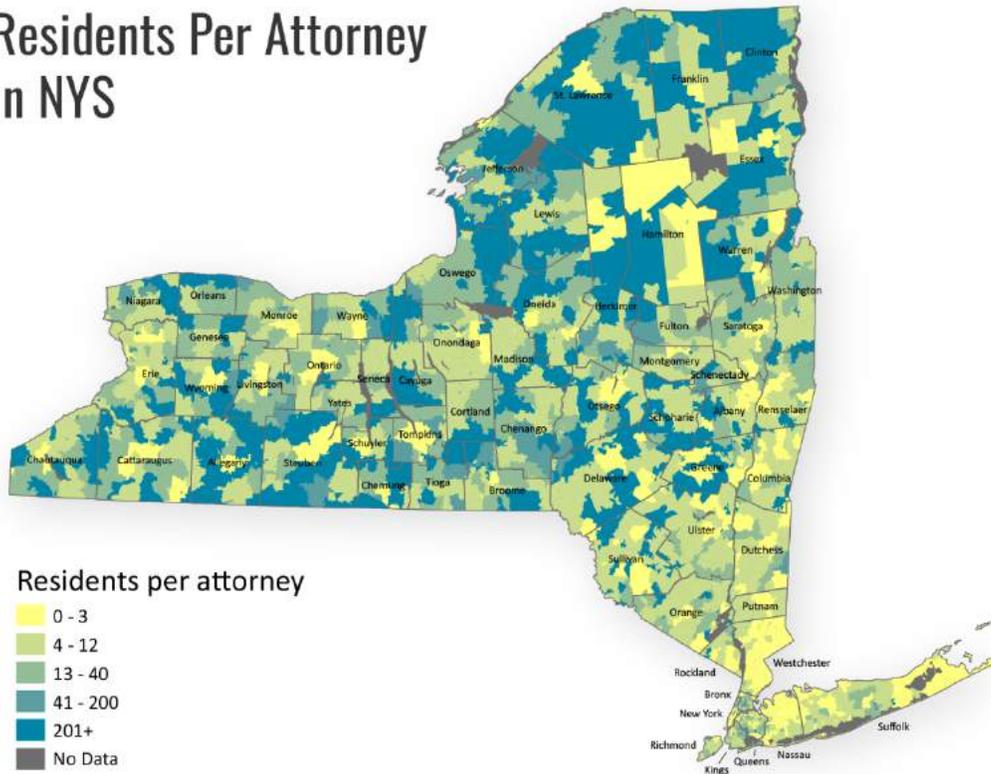


As the chart makes clear, newer attorneys in rural areas are much more heavily outnumbered by late-career attorneys than newer attorneys in urban areas.

B. Attorney-to-Resident Ratios

When we compare resident-to-attorney ratios across the state, we see a significant imbalance of attorneys in rural areas compared to urban or suburban areas as measured on a per capita basis. The below map uses population data and attorney-registration data to compute the resident-to-attorney ratio, giving an average of how many people there are for each attorney in that area. The darker areas are where there are more residents per attorney.

Residents Per Attorney in NYS



As the map shows, rural areas across the state have higher resident-per-attorney ratios. This is in stark contrast to more urban areas of the state which have much better ratios—for each attorney there are 1 to 40 residents. In many rural areas, however, for each attorney there are 201+ residents. This explains the challenges rural practitioners reported about overwhelming volume of cases and difficulties making referrals to legal experts in their geographic region.¹²

C. Challenges in Rural Practice

As noted above, rural law practice presents unique challenges (and rewards).¹³ The rural-practitioner survey conducted by the Government Law Center at Albany Law School illuminated the following eight themes which make rural law practice difficult¹⁴:

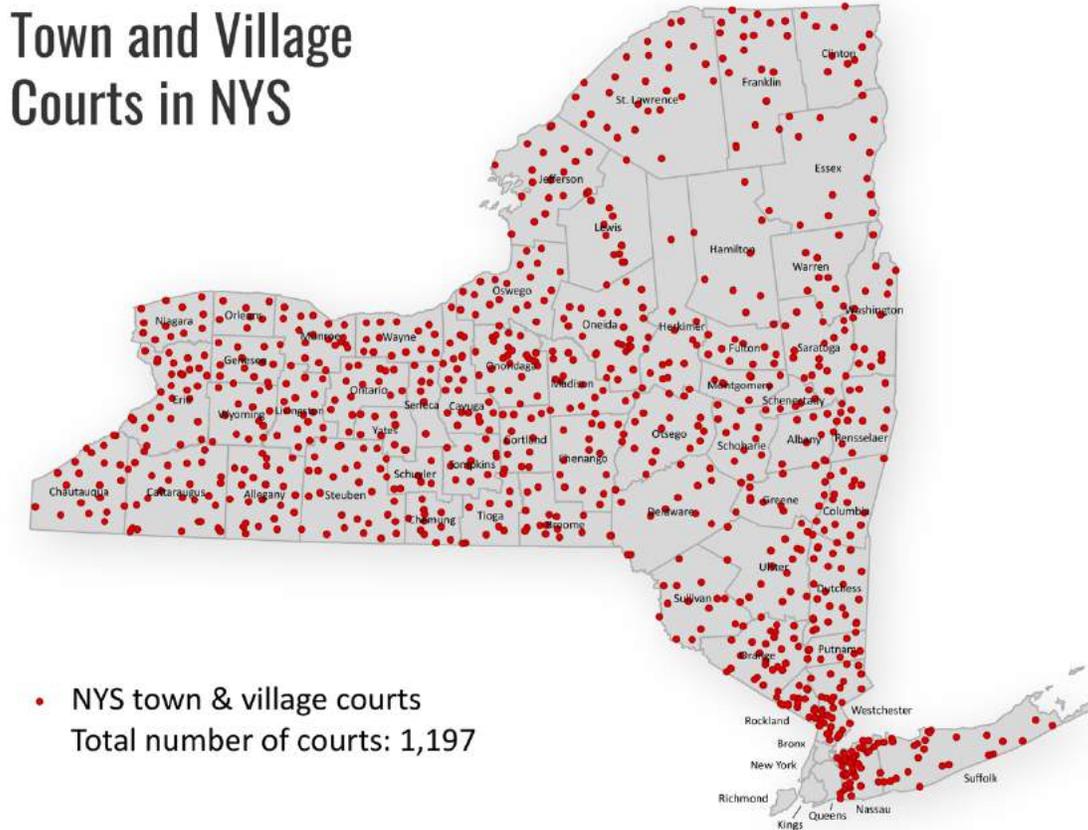
¹² The disparity in the rural and urban attorney-to-resident ratios is perhaps more clearly visualized by the infographic in Appendix C, which plots the attorney-to-resident ratios by county.

¹³ The Government Law Center's survey also revealed a number of rewards to rural practice, which are important to appreciate for full understanding of rural law practice. The rewards survey respondents discussed include: love for an impact on their community; reward of helping their clients in meaningful ways; reward of helping underserved poor clients; quality of life in rural communities; and appreciation for type of practice, the local bar community, and relationships with the courts.

¹⁴ *Id.* at 6. Readers are encouraged to refer to Government Law Center's report, which is available at <https://www.albanylaw.edu/centers/government-law-center/the-rural-law-initiative>, for more details.

1. Prevalence of indigent clients
2. Financial stress on lawyers
3. Professional isolation
4. Overwhelming caseload/not enough attorneys to assist
5. Systemic inefficiencies
6. Distance burdens
7. Technology issues
8. Conflicts of interest/knowing too many people in small communities

The Task Force considered these difficulties in devising its interventions, and several of our recommendations address these difficulties from multiple angles. For instance, one of the bigger challenges faced by rural practitioners relates to the non-uniform and scattered nature of the town and village court system in New York State, also known as justice courts. There are presently 1,197 active justice courts in New York State:¹⁵



¹⁵ Data provided by the New York State Office of Justice Court Support. The Office of Justice Court Support was formed in 2007 as part of an initiative to improve the efficiency and quality of local town and village courts. The Office supports the work of the justice courts by delivering legal assistance, training, equipment, and services to the justices and court clerks.

Active rural practitioners have to travel tremendous distances to appear in these scattered courts, which typically only hold court during night hours one-to-several times a month. Steuben County in western New York, for example, has 34 justice courts, and Franklin County in northern New York has 20. *See* maps in Appendix D. The tally of justice courts in Steuben County does not account for the county’s five state-run courts, which sit in three different cities, or the federal district court that has jurisdiction over Steuben County, which has its courthouse two counties away, in Rochester.¹⁶ This overwhelming tapestry of courts, no doubt adds to the challenges that rural practitioners experience.

The Rural Justice Task Force did not go further in studying justice courts, especially since several NYSBA task forces have already done so.¹⁷ However, the impact of this court system on rural practice could not be ignored, and accordingly, several of the proposed interventions address the challenges of practicing in these courts.

We now move on to the recommended interventions of the Task Force which begins on the following page.

¹⁶ For a list of courts in Steuben County run by the state, see New York State Unified Court System, “Steuben County,” <http://ww2.nycourts.gov/courts/7jd/steuben/index.shtml>. For information on the jurisdiction of the United States District Court for the Western District of New York, see <https://www.nywd.uscourts.gov/accessing-court>.

¹⁷ Town & Village Courts Report, Report & Recommendations of the NYSBA Criminal Justice Section (2018), <https://www.nysba.org/tvcourtsreport/>.

RECOMMENDATIONS OF THE NYSBA TASK FORCE ON RURAL JUSTICE

(A summary of all the recommendations is located in Appendix F)

I. FUNDING-RELATED INTERVENTIONS

A. Funding Is Crucial to Attract Rural Practitioners

As this report shows, the serious shortage of lawyers in rural New York is amply demonstrated not only through metrics, but also anecdotally. Therefore, one focus of this Task Force has been on ways to incentivize new attorneys to practice their skills in these underserved areas.

One concrete approach involves providing financial assistance in exchange for a certain time commitment to practice in a targeted rural area. There are a number of possible models, discussed below, to achieve this. The student-debt crisis is not only real, but growing. “Economists project an accumulated student loan debt of \$2 trillion by 2021, and, at a growth rate of 7% a year, as much as \$3 trillion or more by the end of the next decade.”¹⁸ Of course, this crisis has caused a wide range of pernicious impacts. “Studies show that many of those struggling to repay these mountainous student loans are also experiencing serious mental health problems, caused in large part by the crushing weight of these loans.”¹⁹ Indeed, this crisis has profoundly impacted the choice of where one chooses to practice law, as the benefits of rural practice are often far outweighed by financial concerns as urban practice is often far more lucrative. It is within this vexing context that we have considered and now recommend the following ameliorative economic strategies.

The Task Force considered several different programs before endorsing the following approaches, ranked in order from most to least preferred.

B. Establish a Direct Pay Model

Our first proposal is that New York State adopt a program similar to the South Dakota Legal Education for Public Service and Rural Practice Loan Repayment Assistance Program.²⁰ The general idea of this model is to provide money to certain attorneys, making rural practice feasible and more appealing by removing, or at least diminishing, the specter of student-loan debt when establishing a practice or entering into governmental service in a rural area.

Direct-pay models are a preferred method to incentivize rural practice because, compared to other interventions such as tax relief and law school scholarships, the direct pay model affords the following benefits:

- By allowing flexibility, it is scalable and provides a tangible benefit.

¹⁸ See Daniel Johnson, *What Will It Take to Solve the Student Loan Crisis?*, Harvard Business Review (Sept. 23, 2019).

¹⁹ *Id.*

²⁰ See *Rural Attorney Recruitment Program*, <https://ujls.sd.gov/uploads/RuralAttorneyRecruitmentProgram.pdf>

- The ability to operate as a pilot program for a limited number of years.
- The ability to direct the benefit to the rural areas that are the focus of this report.
- Avoiding the criticism that tax policy is not the best place to implement social policy.

The South Dakota program provides direct payment to attorneys in certain defined rural communities. The attorneys are paid \$12,500 per year for 5 years. The funding is provided as follows: 50% from the court system, 35% from the county (or the county and city combined) and 15% from the South Dakota Bar Association (a mandatory bar association).

The following proposals are based upon the South Dakota model but are somewhat different as the demographic landscape in New York differs significantly from South Dakota. Thus, the Task Force has modified the South Dakota model in significant ways to fit our needs in New York. Some of the details of our plan, which are highly flexible, are as follows:

1. New York State Direct Pay Model

Eligible Areas: Counties with population densities less than 100 per square mile and outside of the corporate boundaries of a city.²¹

This would include the following counties, listed in order of decreasing population density: Cortland, Tioga, Columbia, Oswego, Cayuga, Seneca, Chautauqua, Sullivan, Washington, Greene, Clinton, Steuben, Warren, Wyoming, Yates, Wayne, Jefferson, Otsego, Cattaraugus, Chenango, Schuyler, Orleans, Schoharie, Allegany, Herkimer, St. Lawrence, Delaware, Franklin, Lewis, Essex, and Hamilton.

Alternate Eligible Areas: Counties with lawyer densities less than two lawyers per 1,000 population and outside the corporate boundaries of a city.²²

This would include all of the counties described above, with the exception of Hamilton, Warren, Columbia, and Sullivan counties, and adding Oneida, Ontario, Genesee, Chemung, Montgomery, Livingston, Madison, and Fulton counties.

Amount of annual benefit: An amount equal to the average published annual in-state tuition rate and mandatory fees for the accredited SUNY law schools, CUNY School of Law, and School of Law at the University at Buffalo. Currently, that average is \$22,148.

Benefit Period: We recommend a five-year benefit period and justify that period, as it is longer than a traditional three-year law school program, because this time period allows the attorney to:

- Become firmly established in the community.
- Helps to repay tuition of more expensive schools.

²¹ *New York Population Density County Rank*, <http://www.usa.com/rank/new-york-state--population-density--county-rank.htm>.

²² *New York Lawyer Report: How many lawyers per resident in each county in New York State?*, Press Connects (May 14, 2018), <https://www.pressconnects.com/story/news/local/2018/05/14/new-york-lawyer-report-how-many-lawyers-per-resident-each-county-new-york-state/545197002/>.

- Helps to repay room and board.
- Helps to repay interest.

Eligible Applicant: We propose an Eligible Applicant would be any person not currently employed in an Eligible Area, who has not previously participated in the Direct Pay Model Program and who:

- Is admitted to practice law in the State of New York.
- Has never been disbarred, suspended, or publicly censured from the practice of law in any jurisdiction.
- Is willing to sign a contract to practice in the selected Eligible Area for the length of the Benefit Period.
- Will carry malpractice insurance during their involvement in the program and provide proof thereof.
- Has in excess of \$100,000 in combined debt, including debt incurred in undergraduate and graduate programs.

Method of Selection: The application process will be designed, coordinated, and overseen by the New York State Bar Association (NYSBA). Applicants are to apply based upon their intended Eligible Area and selections per Eligible Area are to be made by way of a lottery. Final selections will be limited to the number of authorized awards each year. These awards will be made in rolling order from lowest population density/lawyer density (depending on definition of Eligible Area) to highest.

Number of Annual Awards: Seven awards annually over five years would potentially put 35 attorneys into the underserved rural counties, which we believe is enough to begin to make a significant difference.

Funding: State funding. To be made annually in a lump sum after the completion of each contract year.

2. Direct Pay Loan Repayment Assistance for the Rural Lawyer

We recommend this program as an alternative to the above, which is similar in scope and eligibility to the Direct Pay Model, but differs in that assistance would be directed to the attorneys' student loan payments, which would either be abated in whole or in part during the award period.

C. Student Loan Repayment Programs

We recommend that NYSBA promote existing loan-repayment-assistance programs. First, the College Cost Reduction Act of 2007 created a federal program, administered by the U.S. Department of Education through subcontractors, which was designated to benefit both attorneys and non-attorneys in urban and rural areas. It provides for income-based repayment plans. And, for those with high debts and low incomes, federal loans qualifying for income-based repayments are structured so that payments are capped at a certain percentage of the borrower's income, with the remainder forgiven after 25 years.

The same Act created a program known as Public Service Loan Forgiveness, a more accelerated loan-forgiveness program for those who work in public service for a cumulative ten-year period. At the end of ten years, or after having made 120 qualifying payments while working in public service, the remainder of a federal direct-consolidation loan is forgiven.

There are significant problems with the administration of this program, and upwards of 90% of those applying for loan forgiveness following the ten-year period have had their applications for loan forgiveness denied. On April 3, 2019, six U.S. senators wrote to the Consumer Financial Protection Bureau and outlined problematic areas regarding the administration of the program. On October 28, 2019, 22 U.S. senators wrote to the Consumer Financial Protection Bureau requesting that it immediately open an enforcement investigation into the Pennsylvania Higher Education Assistance Agency's management of this program. The Pennsylvania agency is a U.S. Department of Education subcontractor.

In addition, in July 2019, the American Federation of Teachers (AFT) and individual plaintiffs filed a lawsuit in the United States District Court for the District of Columbia, *Weingarten v DeVos*, which challenges practices by the United States Department of Education that are contributing to the low rates of forgiveness currently being granted. These include claims of due process violations including the lack of notice regarding denials and processes for appealing denials.

Given this scenario, we further recommend that NYSBA engage in advocacy efforts to ensure proper administration of this program. NYSBA should do so through its Committee on Legal Aid and President's Committee on Access to Justice, both of which have subcommittees working on loan repayment issues and both of which have in the past recommended that this program be a federal legislative priority for NYSBA.

Second, the New York State District Attorney and Indigent Legal Services Attorney Loan Forgiveness Program is administered by the New York State Higher Education Services Corporation and is designed to retain experienced attorneys employed as district attorneys, assistant district attorneys, or indigent legal services attorneys throughout New York State. Again, attorneys may apply for this program from both urban and rural areas of the state. This is a retention program designed to keep people in these positions longer term. To be eligible, attorneys must have worked in these positions for at least four years, but no more than nine years. Awards are in the amount of \$3,400 each year with a cap of \$20,400 for each attorney. We recommend that the amount of the award be raised to \$5,500 per year and that the wait time to access this program be decreased from four years to two years, and that NYSBA advocate for pending bills on topic.²³ We further recommend that the program be more widely publicized by NYSBA.

Third, we also recommend that NYSBA publicize the Legal Services Corporation's Herbert S. Garten Loan Repayment Assistance Program which provides loan repayment assistance to select

²³ See pending Senate Bill S6668, which expands the eligibility period for indigent legal service attorneys to receive certain loan forgiveness and increases loan reimbursement for certain attorneys who work in legal services with indigent clients. <https://www.nysenate.gov/legislation/bills/2019/s6668>

attorneys who work full time for Legal Services Corporation (hereinafter LSC) grantees throughout the United States, regardless of whether a program serves urban or rural areas. Six LSC grantees serve the counties outside of the five New York City boroughs and are headquartered in Albany, Buffalo, Geneva, Hempstead, Utica, and White Plains. Selected attorneys receive up to \$5,600 annually for a maximum period of three years.

D. Tuition Assistance Programs

The Task Force also recommends that the Excelsior Program administered by the Higher Education Services Corporation be expanded to cover eligible students who wish to practice law in rural areas.

The Excelsior program, in combination with other student-financial-aid programs, allows students to attend a SUNY or CUNY college tuition-free, if they agree to work in New York State upon graduation. We recommend that consideration be given to establishing a similar program to develop a pipeline from high school to college to law school for rural high-school students who commit to return to their rural locations to work upon graduation from law school.

A model similar to this one has been established in Nebraska. In that program, students from certain Nebraska areas study at one of three Nebraska state colleges or universities, obtain their legal education at Nebraska College of Law, and then practice in rural areas throughout the state. Program benefits include full-tuition scholarships for undergraduate education, automatic acceptance into the law school, and eligibility for loan forgiveness after completion of law school. The high-school students must come from a rural section of Nebraska and must agree to return to that same rural area to practice law. Additionally, academic requirements must be met and maintained throughout college and law school. We envision that the establishment of a model such as this in New York would require partnership with University at Buffalo Law School and/or CUNY School of Law.

II. LAW SCHOOLS AND NEW ATTORNEYS INTERVENTIONS

Law schools play an important role in ensuring access to legal services in rural communities. This section of the report identifies several strategies for law schools seeking to do more.

Law schools help rural communities obtain access to justice in two ways: directly, when law-school students, faculty, and staff provide legal services to people in rural communities; and indirectly, when law schools train the attorneys who will serve those communities. This section of the report recommends that law schools assess their programs in both areas in terms of their impact on rural justice.

A. Assessment of Existing and Potential Programs

The first strategy available to law schools is to undertake an assessment of existing and potential programs in terms of their prospects for helping to promote rural access to justice. We

recommend that law schools assess how their current programs serve the interests of people in rural communities and students who might choose to practice in rural communities.

Such assessment could be done on a schoolwide basis, but could also be done program-by-program. For example, a specific clinic could assess how many of their clients live in rural communities and whether a future expansion could make more services available to those communities. A law-school office that hosts panel discussions about careers could assess how many of its guest speakers practice in rural communities.

Assessments of this kind could be built into other strategic-planning processes. For example, if a school is undertaking an institution-wide strategic-planning process, one committee or planning group could be tasked with focusing on rural justice. The same task could be assigned within a department that is undertaking a strategic-planning process. Law schools or departments within law schools can identify specific goals for programs that serve rural communities and/or students who are interested in rural practice.

There are also less formal opportunities to incorporate rural justice into strategic planning. For example, job vacancies can be an opportunity for thinking about priorities; hiring a new admissions director is an opportunity to ask candidates about how they would reach out to prospective students from rural communities.

It should be emphasized that assessments of this kind should not be aimed at ensuring “balance” between rural communities and urban or suburban communities. Some law schools, depending on factors like whether they are located near rural communities, have good reason to emphasize rural practice to a greater extent than other schools. Moreover, all communities have access-to-justice needs, and every law school has students who have the potential to do great things in rural, urban, and suburban communities. The goal of assessment and strategic planning, then, should be to identify opportunities for growing schools’ capacity to serve rural communities and the students who might wish to serve them, not to take focus away from the needs of other communities.

Assessments of the kind recommended above depend on information, but at this point little information is available about the impact of law-school programs on rural communities and students who might wish to serve them. Thus, gathering data is an important part of the assessment process.

Again, departments within law schools can gather data separately or together: admissions offices can collect data about their own recruitment efforts in rural areas, and the outcome of those efforts; careers offices can collect data about employers and students to learn more about where jobs are located and how attitudes toward rural practice affect students’ career choices; alumni offices can survey alums in rural communities about the skills needed to prepare for practice in those areas and schools’ outreach to people in their communities; and so on. Gathering information about the impact of programs on rural communities and students who are interested in serving them is an important precursor to meaningful strategic planning.

B. Law Schools' Role in Providing Services

The simplest way for law schools to address the shortage of legal services—although not necessarily the most effective in the long term—is for the law schools to provide legal services themselves. Every law school supports numerous programs in which students, sometimes with the help of significant faculty and school resources, directly provide services to people in their communities. These services fall into a number of overlapping categories.

One major category is services that students receive academic credit for providing. The rise in experiential education over the last few decades has created numerous ways for law students to provide services to their communities, including clinics, externships, internships, and other curricular options. One example of a rural-focused program of this kind is the Drake Agricultural Law Center.²⁴

In addition, students participate in pro bono programs. Albany Law School students, for example, provided a total of 42,000 hours of pro bono work in 2018, with some students providing more than 750 hours, or nearly 19 weeks of full-time service.²⁵ (No data is available on how much of that service was provided to rural communities.)

Pro bono work is not optional in New York; the state court system requires that all students complete 50 hours of pro bono service before they are admitted to the bar.²⁶ The regulation defines “pro bono service” as “assist[ing] in the provision of legal services without charge,” which allows students to count work for which they receive academic credit (such as clinical work) as pro bono service. Work that counts as pro bono service can thus be provided either as part of a curricular program, like a clinic, or as an extracurricular activity or part of an outside job.

Direct-services programs take many forms. Many law schools provide institutional support for students' pro bono work. Not all student pro bono work involves direct services; a different kind of service is provided by the Legislative Research Service of the Rural Law Center at the University of Wyoming College of Law, which involves student volunteers providing free legislative research and drafting services.

Another creative program is the Justice Bus program in Buffalo. This program is an initiative of Neighborhood Legal Services, joined by community partners including Volunteer Lawyers Project, the Western New York Law Center, and the University at Buffalo School of Law. The

²⁴ See Drake University, *Agricultural Law Center*, <https://www.drake.edu/law/clinics-centers/aglaw/>.

²⁵ Albany Law School, *Students Commit to Pro Bono Work, Exceed 42,000 Hours* (Apr. 26, 2018), <https://www.albanylaw.edu/about/news/2018/Pages/Graduating-Class-Drives-Public-Interest-Work-Far-Beyond-the-States-50-Hour-Requirement.aspx>.

²⁶ Rule 520.16 of the Rules of the Court of Appeals, available at <http://www.nycourts.gov/ctapps/520rules10.htm#B16>. FAQs make clear that qualifying work includes clinical work, work under the supervision of a faculty member, and externships and internships. See http://ww2.nycourts.gov/sites/default/files/document/files/2018-07/FAQsBarAdmission_0.pdf, page 9.

project is a 12-passenger van that transports lawyers and law students to rural areas of Western New York to provide services to poor and disabled people.²⁷

While some programs are supervised by law school staff and faculty—which is costly for the law schools—others involve outside placement of students. These programs are variously known as internships, externships, or field placements, and all of them involve primary supervision of the students providing services by attorneys in practice, rather than law school faculty or staff. There appear to be more programs of this kind supporting rural areas than faculty or staff-run programs.

Are law schools' direct-services programs an important way to address the shortage of legal services in rural communities? It is clear that service providers within law schools can become important resources within their communities. For example, the Farmworkers Clinic at Cornell and the Immigration Law Clinic at Albany Law School serve not only as significant providers of legal services but as hubs through which people in need of legal services are put in contact with attorneys who can provide those services. But their scope is limited in several ways: students spend longer on cases than experienced attorneys, and require supervision; clinics generally pick one kind of case (like immigration) and serve only clients with needs relating to that subject; and clinics are geographically limited because there are only four law schools in upstate New York (above Westchester County): Albany, Buffalo, Cornell, and Syracuse. Also, clinics are by far the most expensive educational program run by law schools, which makes it challenging to expand them.

One potential benefit of law students' direct-service work is that, in addition to helping the recipients of the services, it also exposes students to practice in rural communities. But there is good reason to be skeptical of experiential education's potential for motivating students to work in rural communities. Students' experiences in clinics involve working with very specific clienteles in narrow legal areas. This is very different from most rural law practice, in which a majority of lawyers are general practitioners working in solo practice or small firms. A farmworkers' clinic may give students excellent exposure to the life of farmworkers, but it will give them little insight into the life of rural lawyers. In this sense, direct-services programs' primary benefit is the services themselves.

One important consideration for programs that provide direct services is their relationship to other service providers. Ideally, the programs will complement and cooperate with existing service providers, rather than displacing them or competing for funding.

In sum, it is important for law schools to assess their direct-services programs with an open mind. While they have the potential to contribute significantly to the needs of their communities, law schools' role in producing future lawyers affects rural communities on a much greater scale.

²⁷ See UBNOW, *Justice Bus to offer on-site legal help to poor, disabled*, (Aug. 21, 2019), <http://www.buffalo.edu/ubnow/stories/2019/08/justice-bus.html>; see also Neighborhood Legal Services, *Beep Beep! The Justice Bus Is Coming to Western New York*, <https://nls.org/justicebus/>.

C. Law Schools' Role in Providing Attorneys

Although law schools can usefully serve their communities by providing direct services, their greater impact is training the lawyers who will go on to serve rural communities.

Without wading into complex questions of curriculum design, the Task Force recommends that schools assess their curricula with an eye towards the needs of lawyers who will practice in rural communities. In the substantive legal training that law schools provide—that is, the courses they teach—the schools can (and many do) make an effort to give students the skills and training they need to succeed in rural practice. This includes both substantive courses and skills-based courses like practice management. And although there is much debate within law schools about the idea that graduates should be “practice-ready”—given the diversity of legal practices—there is a growing movement to teach classes on practice management and other classes that will be particularly useful for rural lawyers.²⁸

It is also worth noting that law schools nationally are expanding online education.²⁹ This presents a potential opportunity for students who might consider rural practice, because prospective students in rural communities, especially those with limited resources, might find distance learning more manageable. Law schools considering such programs should assess their capacity for making law school more accessible to people in rural areas.

Outside of the curriculum training law schools provide, there are several important strategies for supporting students who might wish to practice in rural communities. Three of them include: increasing students' access to information about rural practice; working to challenge the prestige hierarchy which devalues rural practice; and growing the pipeline to rural practice by recruiting more students from rural communities.

1. Increasing students' access to information about rural practice

One important way law schools can support students who might wish to practice in rural communities is by helping them learn more about rural practice through mentoring, informational, and connection-building programs. Lack of information should not be a barrier to serving communities that need legal services.

Ideally, law students would never miss out on a possible career choice because they are unable to obtain information about it. But information about rural careers can be scarce. Every law school has an office responsible for helping students learn about careers, and those offices are

²⁸ See Robert J. Condlin, “*Practice Ready Graduates*”: *A Millennialist Fantasy*, 31 *Touro L. Rev.* 75 (2014); Martha Kanter and Grace Dodie, *Discarding the Fiction of The Practice-Ready Law Graduate to Reclaim Law As A Profession*, 17 *W. Mich. Cooley J. Prac. & Clinical L.* 265 (2015); Jason G. Dykstra, *Beyond The “Practice Ready” Buzz: Sifting Through The Disruption Of The Legal Industry To Divine The Skills Needed By New Attorneys*, 11 *Drexel L. Rev.* 149 (2018).

²⁹ See Mark Lieberman, *States Limit Spread of Online Legal Education*, *Inside Higher Ed* (Jan. 23, 2019), <https://www.insidehighered.com/digital-learning/article/2019/01/23/new-york-maintains-restrictions-around-online-programs-amid>

increasingly conceiving of their function in a broader way—hence the phrase “professional development” increasingly being incorporated into the names of those offices. As these offices help students build their professional identity and their career goals, they have an opportunity to introduce them to the significant opportunities that may exist in rural communities—or to reinforce the unfortunate message that such opportunities are not worth pursuing.

Professional Development offices can bring in guest speakers or organize informational sessions to help students learn about rural practice. They can engage in outreach to rural employers, who (lacking large human-resources offices) may be less knowledgeable about how to make their job openings known to law schools. One innovative program is the [Iroquois “Take a Look” program](#)—a healthcare-related program which takes downstate doctors on tours of upstate areas to entice them to move and work upstate.³⁰ To the extent that lack of information about upstate living is an obstacle to choosing rural practice, simple exposure can be very powerful.

Professional Development offices can also encourage students, during mentoring sessions, to consider rural options. Of course, many offices do just this; the Task Force’s recommendation is simply that such offices assess their work to see whether their students are missing opportunities.

Professional Development offices are not the only offices within a law school that can help students learn more about rural practice. Alumni offices, for example, may sponsor mentoring programs that connect law students to attorneys in practice, and those offices can make sure to reach out to attorneys in rural communities for mentoring programs. Likewise, student-services offices can encourage students to form affinity groups on campus. Every office that works directly with students can assess their programs to determine whether they are serving students who might wish to practice in rural communities.

For each program in this category, questions for assessment should include:

- Whether the program helps eliminate informational barriers to rural practice (in other words, make sure that students do not eschew rural practice because of a lack of accurate information);
- Whether it makes it easier for students interested in rural practice to overcome the cultural devaluing of rural practice within law schools;
- Whether it helps students make connections with attorneys in rural practice who can help them establish a practice there.

2. Perceived Prestige of Rural Jobs

One important way law schools can make a long-term difference is by working to change the way rural practice is perceived by students. There is a perceived prestige hierarchy of jobs in law schools, and rural practice, because it involves small towns and small firms, can be seen as low in that hierarchy. Law schools could do more to change the cultural perception of rural work, to

³⁰ It is not clear there will be continued funding for this program.

spread the understanding that—as Professor Hannah Haksgaard has written—“Private practice legal work in rural areas is public interest work.”³¹

Law professors and law-school staff frequently send implicit messages about the legal profession when they talk about successful lawyers (and identify certain lawyers as successful); when they talk about jobs (and identify certain jobs as desirable); and when they talk about the rewards they themselves find in their own work.

As many scholars have noted, prestige in the legal profession tends to be associated with urban practice, large firms, male lawyers, and representation of institutions rather than individuals.³² It is important for professors and staff at law schools to challenge this prestige hierarchy and speak about the value of small-town and small-firm practice. The Government Law Center’s data clearly shows that many lawyers thrive in rural practice because of benefits that are simply unavailable in large firms and large metropolitan practices, such as deep connections with close-knit communities. Professors and staff should endeavor to make clear to students that practice of this kind has more value than traditional prestige hierarchies acknowledge.

3. Growing the Pipeline to Rural Communities

Finally, one of the most important ways law schools can help rural communities is by recruiting applicants from those communities. As the Task Force spoke to rural lawyers, we heard a strong consensus that the new lawyers most likely to stay in rural communities were those who had connections to those communities, particularly those who had grown up in them. That being the case, it is extremely important to make sure that college students in rural communities—and even high-school students—are fully aware of the availability of legal careers.

One exemplary program in this regard is Washburn School of Law’s Rural Legal Practice Initiative, a partnership with undergraduate schools that helps pre-law students learn about legal career opportunities in rural communities.³³ Albany Law School, too, is reaching out to undergraduate students in rural communities through its partnership with SUNY Cobleskill. Many students who attend rural schools do not have family members who practice law and may never consider law school unless they encounter outreach or role models.

While there is no doubt that law schools in today’s climate are aggressively recruiting students from all geographic regions, admissions offices can nonetheless usefully assess their own outreach efforts in rural communities. Faculty, too, can contribute to awareness of the possibility of legal careers by guest-teaching classes at rural schools, including high schools. Students in rural communities should not miss out on the possibility of a legal career simply because they are not exposed to that possibility.

³¹ Hannah Haksgaard, *Rural Practice as Public Interest Work*, 71 Me. L. Rev. 209, 210 (2019).

³² See, e.g., John Heinz & Edward Laumann, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (rev. ed. 1994).

³³ Washburn School of Law, *Rural Legal Practice Initiative*, <http://washburnlaw.edu/news/2016/10/RuralInitiative.html>.

III. RURAL LAW PRACTICE INTERVENTIONS

A. Introduction

The great majority of rural lawyers in New York are solo practitioners or members of small firms, are over age 45, serve clients of modest means, and there are not nearly enough lawyers in rural areas to meet residents' needs.³⁴ To achieve rural justice, the bar must find creative ways to lure lawyers and judges to come to, or remain in, rural communities. To this end, the Task Force makes six recommendations: (1) to relax residency requirements that compromise the ability of rural employers to find talent and of rural lawyers to thrive; (2) to increase rates for assigned counsel to fairly compensate attorneys; (3) to raise the low jurisdictional limits in small claims court, which can undermine the ability of rural New Yorkers to achieve justice; (4) to consider law school loan forgiveness programs that could enable more attorneys to settle in rural communities; (5) to eliminate will filing fees; and (6) for NYSBA to offer discounted CLE rates to rural attorneys and free consultations and/or expanded programming to support lawyers in transition.

B. Legislative Action

1. Raise 18-B rates

Extensive advocacy has occurred around stagnant hourly rates paid to assigned counsel in criminal and Family Court cases. The Task Force does not recommend further study, but instead discusses the particular impact of the assigned counsel rates on rural attorneys, rural New Yorkers entitled to mandated representation, and rural justice. In 2018, the State Bar embraced a report of the Criminal Justice Section and Committee on Mandated Representation, calling for a rate increase. Most recently, this goal has been declared a 2020 legislative priority of the Association.³⁵

An Interim Report to Chief Judge Janet DiFiore, issued by the Commission on Parental Legal Representation in February 2019, recommended that the rates for parental representation increase to \$150 an hour.³⁶ In her State of the Judiciary Message in 2019, the Chief Judge advocated for an increase in assigned counsel rates for criminal defendants, parents, and children, and stated that she had transmitted a letter to Governor Cuomo and leaders of the Legislature urging action. She further explained:

³⁴ Taier Perlman, *Rural Law Practice in New York State*, Albany Law School Gov't Law Center (April 2019), at 2, 4, 6, 8.

³⁵ The last increase in assigned counsel rates was in 2004, when rates went to \$75 per hour regarding felonies and \$60 per hour for representation of a person charged with a misdemeanor or lesser offense. After 16 years, these rates should be increased to prevent the further exodus of practitioners from the assigned counsel program across the state.

³⁶ See http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PLR_Commission-Report.pdf.

New York State has made great progress to strengthen its criminal indigent defense system thanks to the creation of the Office of Indigent Legal Services...and to increased state funding...However, our state continues to rely on the hundreds of private attorneys or assigned counsel who provide legal representation to indigent criminal defendants and family court litigants in many areas of the state. Without fair and adequate compensation for these attorneys, a vital component of the system is at risk.³⁷

The success of the criminal defense reforms contemplated by the Legislature depends on the availability of enough qualified attorneys. A survey of assigned counsel plan administrators conducted by the Committee on Mandated Representation revealed that a significant number of programs do not have enough attorneys because the fees are too low. The impact of inadequate rates—and a resulting shortage of qualified private attorneys willing to accept assigned cases—is felt acutely in rural counties. In such areas, fewer institutional offices exist to handle mandated representation cases. Thus, assigned counsel attorneys play a particularly significant role in protecting the rights of New Yorkers accused of crimes, as well as Family Court litigants and children. Increased rates are vital to sustaining such representation. The key role played by assigned counsel in rural criminal defense was underscored by a report of the NYSBA Criminal Justice Section on Town and Village Justice Courts.³⁸

A survey of rural attorneys revealed the importance of raising rates, as exemplified by these comments:

“My clients cannot afford my services, and I cannot sustain a practice on only 18-B representation, as those fees are too low.”

“Clients cannot afford lawyers for the criminal and family cases...and therefore lawyers often take on assigned cases to supplement income, but assigned cases do not pay well, and it is easy to become overloaded with assignments. We need to encourage more young people to move into rural counties, and mentors in diverse areas of law to dedicate time to teaching [these young lawyers]...We also need to increase pay for assigned counsel and allow practitioners to decline assignments once they’ve maxed out their caseload.”

“Clients are very poor, as this is an economically depressed area. It is rare to have private-pay clients, and unless attorneys are being appropriately compensated, we will not be able to attract qualified attorneys to serve our needs. I made my money doing other types of cases and can only afford to represent indigent clients because I am toward the end of my career and don’t have the financial obligations most young lawyers do...[T]he hourly rate for assigned counsel needs to be increased in order to have attorneys available to handle these matters.”

³⁷ http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/19_SOJ-Speech.pdf.

³⁸ See <https://www.nysba.org/tvcourtsreport/>.

2. Relax residency requirements for public positions

Attorneys

The idea that public employees who live where they work are more invested in the community appears to underlie residency requirements set forth in State law. *See Matter of Dehond v Nyquist*, 65 Misc 2d 526 (Sup Ct, Albany Co 1971) (residency requirement aims to hire public officials who are knowledgeable and concerned about affairs of unit of government they seek to serve). Since 1829, New York has required public officers to be residents of the State, and local governments have required public officials to be residents of the locality by which they are employed. *See Winkler v Spinnato*, 72 NY2d 402, 405 (1988), *cert denied* 490 US 1005 (1989). Many things have changed in the last two centuries. Workers commute significant distances, and many work remotely. The notion that public officials will be less dedicated to their jobs absent residency mandates seems outdated and questionable.

Instead, rural communities are hurt by residency provisions. Rural justice is eroded by residency requirements, as communities cannot attract qualified talent due to such restrictions. The pool of attorneys to draw from locally is far too small in rural areas of the State. As noted previously in the Report, the vast majority (96%) of New York attorneys live and/or work in urban areas. For all these reasons, to advance rural justice, the concept of “community” should be broadened to encompass rural regions, and residency requirements found in State law and other relevant laws should be relaxed.

The primary residency statute for “public officers,” is found in Public Officers Law § 3 (1), which provides that “[n]o person shall be capable of holding a civil office who shall not***[be] a resident of the political subdivision***of the state for which he shall be chosen.” Section 30 (1) (d) further provides that “[e]very office shall be vacant upon***[the incumbent’s] ceasing to be an inhabitant***of the political subdivision***of which he is required to be a resident when chosen.” The terms “resident” and “inhabitant” are understood to be synonymous with “domicile.” *See Matter of Hosley v Curry*, 85 NY2d 447, 451 (1995).

Section 3 contains a patchwork of numerous special laws that provide for more flexible residency requirements as to certain attorney or judge positions in individual villages, towns, cities, or counties. *See e.g.* subdivisions (37), (38), (40), (44), (46), (64), (69). Typical exceptions declare that a specified town or city official need only reside in the county in which the city is located, or the specified county official may reside in an adjoining county. Specific positions covered include Town and Village Court Justices, City Court Judges, Assistant District Attorneys, Assistant Public Defenders, Deputy County Attorneys, and City Attorneys. Some exceptions are broad, such as subdivision (28), providing that all public officers employed in Westchester County may reside anywhere in the State of New York. Other State laws that impose residency mandates on officials, and thus are implicated by this analysis and recommendation, include Town Law § 23 (1) and Village Law § 3-300.

Insight into why some localities sought special residency laws can be gleaned from one Memorandum of Support of an Assembly bill that resulted in such a special law—Public

Officers Law § 3 (64) (Wyoming County Assistant District Attorneys, except the Chief or First ADA, may reside in adjoining county). The justification in the memo explained:

The Assistant District Attorney position requires a set of unique skills and specialized experiences...This bill has been introduced at the request of the Wyoming County District Attorney. It is essential that predominantly rural counties...have the same ability as...[other] counties with a higher population to recruit practitioners with the necessary skills and experience...Exceptions for the residency requirement...have typically been granted to counties with smaller populations...Adoption of this legislation will provide the Wyoming District Attorney with a more flexible recruiting process by allowing the District Attorney to hire from adjoining rural counties...[that] share many of the same characteristics as Wyoming County, ensuring that the interests of Wyoming County are adequately represented.

As the memo indicates, strict residency requirements work against localities' ability to find skilled attorneys to fill public positions; and since adjoining rural counties share many of the same characteristics, nothing is lost by imposing a less parochial approach to hiring talent.

In addition to the state law, some local laws impose residency mandates. As to some positions, localities have the authority to enact local laws providing for stricter or more liberal residency requirements than Public Officers Law § 3, and many have exercised that authority. *See generally Matter of Ricket v Mahan*, 97 AD3d 1062 (3rd Dept 2012) (discussing Public Officers Law residency provisions and localities' home-rule powers). The result of the current State requirements and exemptions and the local laws is an inconsistent mélange of residency provisions that do not serve New York well and that undermine the consistent administration of rural justice. To overcome the challenges faced by under-resourced municipalities and to attract qualified employees, the State law on residency requirements should be reformed. Further, rural localities should be discouraged from enacting local provisions providing for stricter requirements.

Relaxing state law residency requirements for the public positions set forth above, as well as for attorney officials at County Departments of Social Services, would make it more practicable for a larger pool of attorneys to work in rural areas. Opportunities regarding where attorneys may hold public office, while also engaging in private practice, would be broadened. The desired flexibility could be achieved as to county positions by removing any residency requirement, except for requiring New York state residence, or by providing that the officials could reside in a county adjacent to the county in which the positions are held.

In the area of public defense, flexibility as to residency could have a particularly profound impact. The case of *Hurrell-Harring v State of NY* brought attention to the State's failure to provide for effective representation to criminal defendants. A settlement in that case resulted in significant State funding to the five named counties to improve the quality of criminal defense by

public defenders and assigned private attorneys.³⁹ The reforms embodied in the settlement are now being implemented throughout the State, pursuant to Executive Law § 832 (4) and State Legislature budget plans for incremental implementation of the State funding of public defense.

Hundreds of public defense positions have been added in rural counties across New York. Moreover, assigned counsel programs are expanding, becoming more structured,⁴⁰ and receiving significant resources. To recruit qualified applicants to serve in rural public defender offices and as administrators and supervising attorneys at assigned counsel programs, greater flexibility in State laws as to the county of residence will be needed. Further, by allowing private attorneys from adjoining counties to participate on assigned counsel panels, counties will be able to attract more talent. These attorneys can help deliver quality representation to criminal defendants and Family Court litigants, while achieving professional growth via the mentoring, second-chair, training, and other resources that are being provided, or will soon be provided, to such programs via State funding. The importance of also increasing assigned counsel rates to achieve the public defense reforms contemplated by the Legislature was already discussed above.

3. Raise small-claims-court caps

Small-claims courts are special parts in justice, city, and district courts where litigants can sue for money damages. Uniform Justice Court Act § 202 provides that, where justice courts handle small claims actions for money damages, the amount sought to be recovered, or the value of the property at issue, must not exceed \$3,000. The statute was last amended more than four decades ago (L 1977, ch 685, § 2). Uniform City Court Act § 1801 and Uniform District Court Act § 1801 have a cap of \$5,000—an amount set in 2003 (L 2003, ch 601, § 3).⁴¹

The decades-old jurisdictional limits are too low, and the Task Force recommends that they be raised to a uniform amount of at least \$10,000 for all Town, Village, City, and District Courts. This change could close a justice gap and allow for proper representation of rural clients, while bolstering the practices of rural attorneys and advancing judicial economy. Often litigants with disputes involving relatively small matters cannot afford the attorney fees and court expenses, multiple appearances, and delays associated with initiating a civil case in Supreme Court. In contrast, small claims in rural areas can be brought in front of an appropriate Town or Village Court.⁴² While litigants can represent themselves in these small claims courts, many are reluctant to do so and, in fact, cannot do so effectively. Increasing the monetary maximum will mean that more cases could be handled in small claims courts, where the filing fees are nominal. Rural practitioners could potentially expand their practice by obtaining fees in a large volume of such matters, while helping their neighbors favorably resolve their disputes.

³⁹ See New York State Office of Indigent Legal Services, *Hurrell-Harring Settlement and Implementation Information*, <https://www.ils.ny.gov/content/hurrell-harring-settlement-and-implementation-information>.

⁴⁰ See <https://www.ils.ny.gov/files/ACP/ACP%20Standards%20with%20Commentary%20070119.pdf>.

⁴¹ Under Chief Judge Janet DiFiore's proposal to consolidate New York's trial courts, District Courts and upstate City Courts would be abolished and would become part of a new statewide municipal court. See https://ww2.nycourts.gov/sites/default/files/document/files/2019-09/PR19_22.pdf.

⁴² <http://www.rurallawcenter.org/docs/Guide%20to%20Small%20Claims%20Court.pdf>.

4. Eliminate will-filing fees

SCPA 2402 (9) (v) regarding Surrogate’s Court filing fees states that a \$45 fee applies as to “a will for safekeeping pursuant to section 2507 of this act except that the court in any county may reduce or dispense with such fee.” The fees are discretionary, but should be eliminated entirely. This could benefit rural solo lawyers whose practices includes estate planning and administration and the filing of a large volume of wills. Such an amendment would also benefit the estates by encouraging the best practice of filing of wills with the court. Given the prevalence of indigent clients in rural communities and the tremendous amount of pro bono or low bono services offered by rural lawyers, this filing fee is unnecessarily cost-prohibitive.

C. NYSBA Action

Offer assistance and consultation for lawyers in transition

NYSBA’s 2020 legislative priorities declare that a core mission of the Association is to represent the interests of the legal profession, and that the Association thus works to ensure that attorneys are able to protect their clients’ interests and effectively engage in the practice of law.⁴³ The creation of the Rural Justice Task Force was an important step toward helping attorneys to engage in the practice of law in rural New York.

In this regard, the NYSBA Law Practice Management Committee has published an invaluable Planning Ahead Guide, including information regarding succession planning and the sale of a law practice. Further, the State Bar’s Committee on Lawyers in Transition provides excellent, free programs to members regarding transitioning or retiring.⁴⁴ The Task Force suggests that an additional service be offered by the State Bar: free, individualized consultations on succession planning and the sale of a law practice. Such a service is provided by the North Carolina Bar Association Transitioning Lawyers Commission.⁴⁵ As many rural New York attorneys are approaching retirement age, they could benefit greatly from particularized, expert guidance and assistance regarding transition plans.

Further, services could be expanded to include a mentoring program to connect transitioning attorneys with new attorneys interested in taking over an established practice. Also, rural attorneys could be encouraged to use www.lawyerexchange.com to post announcements regarding the sale of their practices. This could serve two purposes: first, it could facilitate the sale of the practices to the advantage of the selling attorneys; and second, it could help draw more attorneys to rural communities by making them aware of the attractive opportunities that exist.

⁴³ See n 2, *supra*.

⁴⁴ See <https://www.nysba.org/SellingYourPractice/>.

⁴⁵ See <https://www.ncbar.org/members/committees/transitioning-lawyers-commission/>.

IV. BROADBAND & TECHNOLOGY INTERVENTIONS

The practice of law has transformed over time, given the rise in technology. Many solo and small-firm practitioners adopt technology in order to streamline their practice, as well as to handle firm business outside of a standard office space. However, such technology adoption is reliant on the infrastructure available in their office, home, business, or courthouse. A number of rural attorneys who responded to the Government Law Center’s survey complained about technological shortcomings.⁴⁶ We have discovered in our research that such technological shortcomings arise from the lack of technology infrastructure in many instances. In fact, the American Bar Association has recognized that lack of access to highspeed broadband is a hurdle for access-to-justice efforts. Recognizing this, the American Bar Association passed a resolution in August 2019 urging “federal, state, local, territorial, and tribal legislatures to enact legislation and appropriate adequate funding to ensure equal access to justice for Americans living in rural communities by deploying, to at least 98% of the population, broadband infrastructure with a download speed of at least 100 megabits per second [Mbps], and an upload speed of at least 30 Mbps.”⁴⁷

To that end, New York State has a program in place presently called “Broadband for All”⁴⁸ which calls for investment in the state’s broadband capacity with the ultimate goal of 99.9% of New Yorkers having access to broadband. This plan was created in 2015, to be handled in three phases. The last phase, “Round III,” awarded 43 projects \$209.7 million dollars to handle “last mile” connectivity.⁴⁹ However, that last round was announced on January 31, 2018, with the effect of it being the end of this multi-year program. As is well understood, such connectivity is hindered by geography, distances between connection points, tower placements, as well as costs involved with laying miles of cabling, whether fiber optic or otherwise. To put it in perspective, one CEO of a broadband company that we spoke with quoted a basic cost of \$20,000-\$25,000 per mile for infrastructure. This does not include the cost to connect from the pole to the individual home(s), which is dependent upon pole location. Depending on the distance from the closest pole, that cost may double. So, by whom should the costs be borne, and will the end users be able to afford the service if finally made available?

Satellite internet is often the only other option you have available should you be too far away from a pole for broadband to be economically feasible. There are only two residential satellite internet providers available in the entire United States, Viasat and HughesNet.⁵⁰ HughesNet

⁴⁶ Taier Perlman, *Rural Law Practice in New York State*, Albany Law School Gov’t Law Center (April 2019), at 11.

⁴⁷ ABA House of Delegates Resolution 10B, Adopted August 12–13, 2019.

⁴⁸ <https://www.ny.gov/programs/broadband-all>.

⁴⁹ <https://www.governor.ny.gov/news/governor-cuomo-announces-round-iii-nation-leading-new-ny-broadband-program-bring-high-speed>.

⁵⁰ <https://www.satelliteinternet.com/>.

download speeds top out at 25Mbps⁵¹, or a quarter of what's considered standard broadband speeds, and Viasat offers speeds of "up to 25Mbps."⁵² In the case of HughesNet, they throttle the speed once users reach 50GB of usage in a month, meaning that it will be considerably slower for the remainder of the period. Both plans cost between \$60 and \$150 a month. By comparison, nationwide average download speed of a Verizon cellphone on their LTE network is 53.3 Mbps.⁵³

In effect you have two issues, not just one. If you have broadband service at your home or office, you may be able to do work and service clients. But if you leave your home or office, what then? The instant always-on connectivity that so many of us take for granted may end once you are out of the radius of your router. That is because your cellphone, probably the most important article in an attorney's bag, becomes a worthless brick without a cell phone signal to back it up. Travel through upstate New York with some of your colleagues to find out how important that fickle signal can be. The following anecdotes demonstrate the challenge:

"Providing colleagues or family members with name and address of court along with the route you will be traveling in the event something was to happen to you i.e. car breaking down or getting lost because you are traveling in areas where there is no cell phone reception and often times the GPS signal on direction apps gets lost."

"Serving process on someone in the middle of nowhere with no ability to access public safety without reception."

"Trying to broker a stipulation when you are trying and failing to get a signal in a courthouse to call an out-of-area client, and hoping you don't have to ask for the judge's landline in order to do so."

At the same time, technology has changed and will continue to change during the rollout of these plans. In the newest iteration of cellular technology, 5G, the fastest signals are created with many small cell sites, which need to be much closer together than today's standard technologies. Even so, each cell site must be connected to a network backbone, whether through a wired or wireless connection.⁵⁴ That implies that a network backbone is present, but in many rural areas it is not.

While this is certainly problematic for legal providers, it is also troublesome for legal clients. Trying to contact and do work with clients who also live rurally can be abnormally challenging. Distance and technology combine to be a strong issue when it comes to getting documents to and

⁵¹ <https://www.satelliteinternet.com/providers/hughesnet/internet/>.

⁵² <https://www.viasatspecials.com/lp/internet>.

⁵³ <https://www.tomsguide.com/us/best-mobile-network,review-2942.html>.

⁵⁴ <https://www.pcmag.com/news/what-is-5g>.

from clients, getting those documents filed with courts, and service of process are just some of the challenges faced by rural practitioners. Many upstate county courts, not including town and village courts, have been slow to implement e-filing, if they have at all. As of December 2019, 52 of 62 counties have some sort of e-filing, but current legislation does not authorize town and village courts to do so. If you have no internet, you cannot e-file or implement any technology at all into the court system. Given the distances involved in the larger counties, it makes sense to offer such opportunities to file even at the basic county level. Some of these counties have no cities, which makes the county courthouse the only point of service for purposes of any civil actions. To that end, the lack of scanned documents in real time can make for additional travel for practitioners. By either e-filing or at least providing real time access to non-electronic documents would allow attorneys to access the documents without bothering the court staff and not have to rely upon clients to transport copies of these documents to them. Many of these clients have transportation issues, lack of access to scanners or fax machines, forcing actual paper copies to become the only viable record available for review.

Currently, Monroe County has a Justice for All Initiative which includes the county's village and town justice courts, where they are collecting data on the number of filings, defaults, representations, and dispositions as well as surveying litigants about their experiences. Part of the initiative may be further expanded into working on transportation issues. Litigants have been found to have a lack of transportation in far-flung areas, making physical access to justice an ongoing issue, given the requirements for in-person appearances and lack of telephonic/video conference opportunities.

With all this as background to the many technological challenges for rural legal practice, we make the following recommendations:

1. NYSBA should adopt a resolution that urges New York State to enact further legislation and adequate funding to expand and continue the Broadband for All program with a Phase 4 round of funding. The goal of Phase 4 should be further deployment of reliable broadband infrastructure with a download speed of at least 100 Mbps and an upload speed of at least 30 Mbps for 100% of New Yorkers with a specific focus on the rural areas that were not served by Phase 3 of the program. We recommend the following steps:
 - a. New York State should require the creation of a granular database of all broadband serviceable locations at the completion of Phase 3 to "map the gap" which will allow policymakers to target where funds should be allocated. (Using the same methods as was used in the US Telecom broadband initiative pilot project in Virginia and Missouri or those suggested by the FCC granular mapping initiative).
 - b. Specifically target additional funding to those "gap" areas where the Broadband for All program did not extend access to broadband at speeds of 100/30 Mbps.

2. Monitor and track the Monroe County Justice for All pilot project. This project includes initiatives around real-time access to filings in civil matters, transportation to court in civil matters, uniform data collection and a court monitoring project in the town and village justice courts. Assuming that this program will be successful in breaking down these particular barriers to accessing justice, NYSBA should advocate for its expansion throughout the state.
3. The Office of Court Administration should promulgate guidelines to encourage and promote remote video conference appearances in town and village justice courts (and across all New York courts) by attorneys and litigants for civil matters using the available Skype technology already provided to town and village courts, or other similar technology.
4. The Office of Court Administration should continue to expand e-filing initiatives across the state as these important initiatives provide easier access to the courts for both practitioners and litigants alike. Legislation should be passed to authorize e-filing expansion into town and village justice courts.
5. NYSBA should again recommend the repeal of Judiciary Law §470 requiring a physical office in New York State. (This recommendation was previously adopted by the NYSBA Working Group on Judiciary Law §470, October 8, 2018.)

V. LAW AND POLICY INTERVENTION

The Committee on Law and Policy examined other laws and rules that affected rural practice. In particular, the Committee examined New York Court Rule §100.6(B)(2), which provides:

(B) **Part-Time Judge.** A part-time judge:

(2) shall not practice law in the court on which the judge serves, or in any other court in the county in which his or her court is located, before a judge who is permitted to practice law, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto;

The Committee examined this rule particularly in light of the longstanding NYSBA policy against non-lawyer judges. In 2009, the House of Delegates adopted the Report of the Committee on Court Structure and Judicial Selection, which was charged with reviewing the 2008 Report of the Chief Judge's Commission on the Future of the State Courts. The Commission Report had concluded that lawyer judges were desirable, but because of claims of feasibility, it had stopped short of seeking a constitutional amendment to require that all justices be lawyers. The NYSBA report in response reiterated the NYSBA position that all justices should be lawyers. The report also included the history of the NYSBA position, noting that such a position had been taken on numerous occasions going back to 1979.

The part-time judge rule in §100.6(B)(2) has been in effect for many decades, previously as Rule 100.5(f), and before that as Rule 33.5(f). There are three different extra-judicial activities prohibited: (1) The practice of law by the part-time judge in his/her own court, (2) the practice of law by the part-time judge in another court within the same county, if that judge is also permitted to practice law, and (3) the participation as a lawyer in any proceeding in which the judge has acted as a judge, or in any proceeding related to one in which the judge acted as judge. The Committee recommends maintaining the first and third of these prohibitions in their current form, and removing the second prohibition.

The rationale for the second prohibition has been stated in several opinions and disciplinary proceedings as to avoid the appearance of impropriety in the nature of a quid pro quo between part-time lawyer judges. Interestingly, where discipline is sought for violation of 100.6(B)(2), there are usually other provisions violated, particularly where the judge has participated in a case that truly creates a conflict or other improper activity. In the one reported case where the lawyer judge was subject to the disciplinary commission, the commission unanimously imposed an admonition only.⁵⁵

The rule has produced several opinions allowing the part-time lawyer judge to appear before an OCA employee who is a part-time judge,⁵⁶ a lawyer licensed to practice only in another state,⁵⁷ and a lawyer who is retired from the practice of law.⁵⁸ There have also been opinions regarding engineering the part-time judge's client cases before full-time, rather than part-time, judges in city, town and village courts. This is not permitted by transferring cases assigned to part-time judges to full-time judges⁵⁹, but it is permitted in a prospective way by an administrative judge,⁶⁰ and is permitted upon transfer down from Supreme Court by CPLR 325.⁶¹ In addition, because Rule 100.6(B)(3) provides that the prohibition of practice of a part-time judge before other part-time judges does not extend to the judge's associates and partners (although the prohibition of practice in the judge's own court does extend to any lawyer associated in any way with the judge), there have also been opinions allowing the associates to use a letterhead which includes the lawyer/judge's name as long as there is no indication on the letterhead that the lawyer is a judge.⁶²

The Committee concluded that the rule has a limited benefit. This is because the lawyer judge is governed by both the Rules of Judicial Conduct and the Rules of Professional Conduct which

⁵⁵ *In re Brian D. Mercy* (N.Y.S. Comm'n on Jud. Conduct, June 22, 2012), 2012 WL 2786179, available at <http://cjc.ny.gov/Determinations/M/Mercy.Brian.D.2012.06.22.DET.pdf>.

⁵⁶ NY Jud. Adv. Op. 10-73, 10-167.

⁵⁷ NY Jud. Adv. Op. 10-100.

⁵⁸ NY Jud. Adv. Op. 90-199.

⁵⁹ NY Jud. Adv. Op. 02-87 and opinions cited therein.

⁶⁰ NY Jud. Adv. Op. 08-132.

⁶¹ NY Jud. Adv. Op. 08-96.

⁶² NY Jud. Adv. Op. 08-210.

would otherwise prohibit any sort of quid pro quo between part-time lawyer judges. In addition, where an associate of a part-time judge appears before a part-time judge of another court in the same county, that associate may use a law firm name and stationery which uses the name of the part-time judge. Thus, the judge who the associate appears before may know full well that the associate has a relationship with the part-time judge. It should be noted that non-lawyer judges are not subject to Rules of Professional Conduct and have no specific rule regarding conflicts akin to Rule 100.6(B)(2). Accordingly, this rule effects only attorney part-time judges, and creates an unfair chilling effect on them, while part-time non-attorney judges continue to serve on the bench freely, even where appearances of impropriety exist. For instance, where a non-attorney part-time judge works in law enforcement within the county, but presides over criminal cases with county prosecutors appearing before them.

The presence of the rule is a considerable deterrent to lawyers in rural areas to seek positions as part-time judges. While there may be a substantial number of part-time judges who are lawyers in suburban settings, there are relatively few in rural areas. For example, in the 20 justice courts in Franklin County there is only one practicing lawyer and one retired lawyer; all of the rest are non-lawyers.

The Task Force believes that the modification of this rule will result in more lawyer judges, in furtherance of the longstanding NYSBA policy that justices should be lawyers, and recommends that the Chief Administrative Judge amend the rule to partially eliminate the second prohibition as it relates to non-contiguous town and village courts as follows:

(B) Part-Time Judge. A part-time judge:

(2) shall not practice law in the court on which the judge serves, or in any other contiguous town or village court in the county in which his or her court is located, before a judge who is permitted to practice law, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto;

A minority of the Task Force did not support the amendment, concluding that lawyer judges often have substantial practices and can appear before full-time judges and part-time non-lawyer judges. This is true only because presently there are so few part-time lawyer judges in rural settings. If NYSBA's policy to have all attorney justices were to come to fruition, this rule would have a significant effect on a lawyer judge's practice, and is, in fact, a deterrent to fulfilling this NYSBA policy.

CONCLUSION

As amply demonstrated in this Report, we face formidable challenges in ensuring that rural legal services are adequately delivered and administered with a fair and even hand. To be sure, a great society—a just society—is judged not on the success of the successful, but upon its response to those in need. The time has come to recognize that those in need include the many families and individuals who reside in rural New York. We hope that our diverse proposed interventions ameliorate some of these critical issues and that the full panoply of stakeholders who need to be involved to initiate these interventions step up, as we must do something about the imminent crisis before us. Thank you for your careful consideration.

APPENDIX

APPENDIX A

BACKGROUND TO TASK FORCE ON RURAL JUSTICE

I. Date of Formation & Composition

The Task Force on Rural Justice was formed on June 1, 2019. It is comprised of 32 members from across New York State with diverse expertise. Members are rural and urban practitioners, members of the judiciary, policymakers, academics, legal services organization leaders, and state officers. *See* member roster in Appendix 2.

II. Mission Statement

The Task Force organized its work in pursuit of the following mission statement:

The Task Force on Rural Justice shall examine the current state of rural law practice in New York. Topics of investigation will include the impact of rural attorney shortages on access-to-justice, challenges in delivering legal services in rural areas, and the unique practice needs of rural practitioners. The Task Force will make recommendations for potential changes in law and public policy, and will identify viable solutions to support rural law practice and greater access-to-justice in New York's rural communities.

III. Meetings & Expert Presenters

The Task Force met a total of ten (10) times between June 24, 2019 and March 5, 2020. A total of six (6) experts presented to the Task Force on the following dates and topics:

August 21, 2019	Hon. Elizabeth Garry, Presiding Justice of the Appellate Division, 3 rd Department	Remarks on the unique challenges and rewards of rural practice and the administration of justice
	Jim Sandman, President of Legal Services Corporation	Overview of federal legal services funding streams with a focus on rural legal services
September 25, 2019	Robin Blakely-Armitage, Senior Extension Associate and Project Manager at Cornell's Community and Regional Development Institute (CaRDI)	Rural demographics and data trends in NYS.
October 15, 2019	Nancy Sunukjian, Director of the Office of Town Justice Support	Town & Village Court system and administration—opportunities and challenges
October 30, 2019	Bill Leahy, Executive Director of the Office of Indigent Legal Services (ILS)	On ILS efforts to address shortage of public defenders across NYS

	Donna Kissane, Franklin County Manager	Difficulties recruiting new attorneys to fill legal positions in Franklin County government, a rural county in the North Country.
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The co-chairs carefully selected those experts that could educate members on specialized categories of knowledge most relevant to our work. The entire Task Force is tremendously grateful to all the illustrious experts that offered their time and resources to educate our members. It was an invaluable public service that informed the development of the recommendations contained herein.

IV. Task Force Sub-Committees

The “Rural Package” approach to our work compelled dividing our members across five sub-committees which focused on a discrete subject-matter that would then feed into our diversified interventions. Each member selected one-to-two sub-committees to serve on, and each sub-committee had 1-2 chairs to facilitate the work. The five sub-committees and the members that served on them were:

Rural Law Practice	Broadband & Technology	Funding	Law Schools & New Attorneys	Law & Policy
Scott Clippinger	Scott Clippinger	Taalib Horton	Sarah Gold	Gary A. Rosa
Chris Denton	Sarah Gold	Hon. Molly Reynolds Fitzgerald	Leah Nowotarski	Cynthia Feathers
Richard Lewis	Richard Lewis	Heidi Dennis	Hon. Molly Reynolds Fitzgerald	Leah Nowotarski
Daniel J. Fitzsimmons	Hon. Julie A. Campell	Richard Rifkin	Joanne Macri	Scott Fein
Marcy Flores	Taier Perlman	Brian Stewart	Tucker Stanclift	Hon. lloyd G. Grandy II
Tucker Stanclift	Robert M. Winn		Timothy Fennell	Heidi Dennis
John Ferrara		Ken Perri		Hon. Thomas Mercure
Hon. Mary M. Tarantelli	Willa Payne		Andy Ayers	
Hon. Stan L. Pritzker				Sharon Stern Gertsmann
				Richard Rifkin
Hon. Thomas Mercure				
Brian S. Stewart				
Sub-Committee Chairs				

These smaller working groups spent several weeks discussing their subject-matter in numerous remote conferences. They conferred with experts, researched, and worked collaboratively to devise recommendations for consideration by the entire Task Force. These recommendations were submitted to the co-chairs on November 1, 2019. The Task Force then convened three times to substantively discuss the recommendations put forth by each sub-committee. During these discussions, the Task Force collectively decided which recommendations to advance forward into the final report, subject to final approval by the co-chairs, and the entire Task Force in later editions of the Report.

The co-chairs are deeply thankful to all the sub-committees for their outstanding efforts in meeting our accelerated timeline. The quality and thoughtfulness of the recommendations that came from the sub-committees was truly impressive, and is a testament to the dedication and passion the sub-committee chairs and members brought to their work. The organic production of the sub-committee reports laid the foundation of our package of proposals.

APPENDIX B

COMPOSITION OF THE TASK FORCE ON RURAL JUSTICE

Co-Chairs

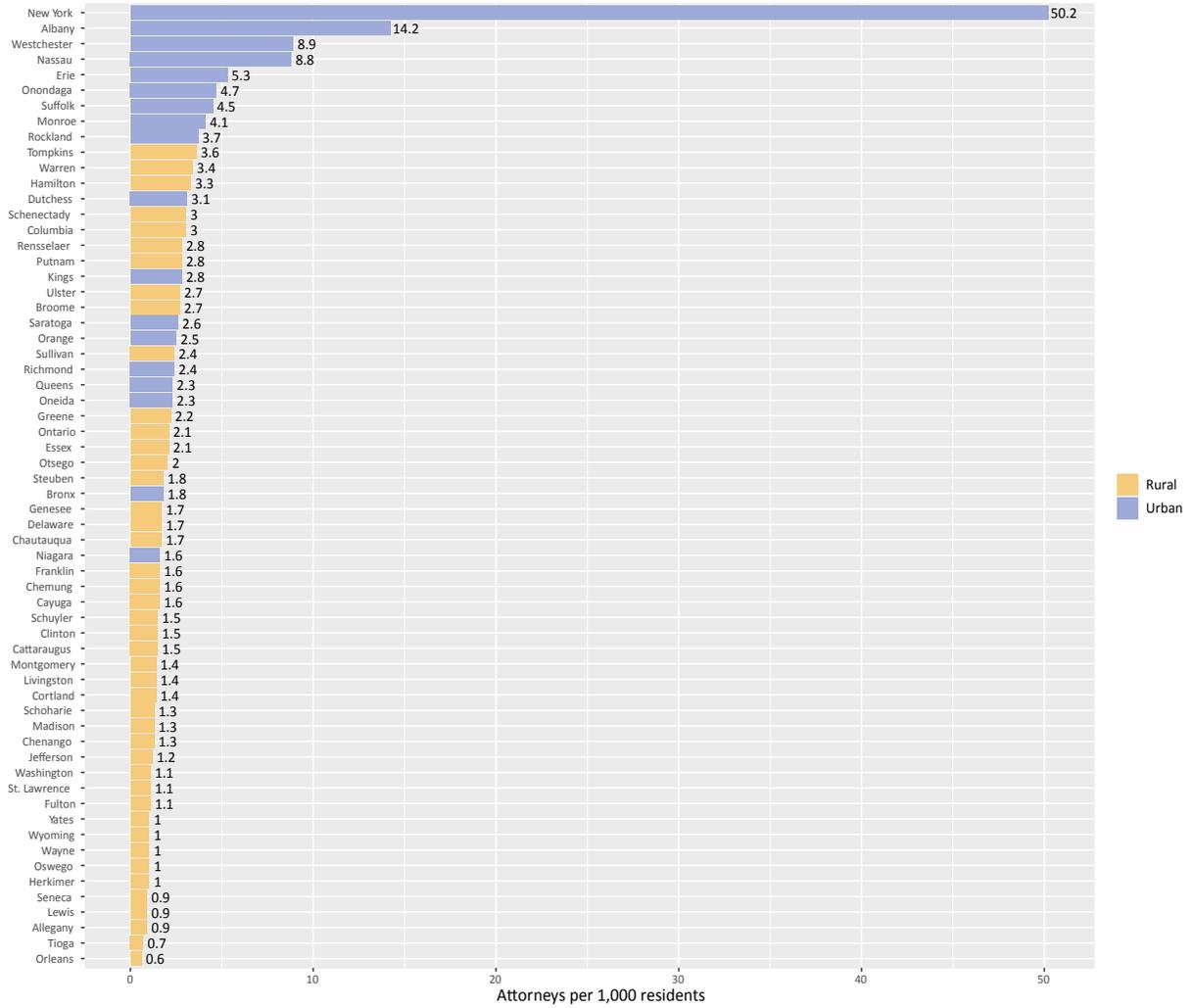
Taier Perlman, Esq.
Hon. Stan L. Pritzker

Members

Ava B. Ayers, Esq.
Hon. Julie A. Campbell
Scott Joseph Clippinger, Esq.
Heidi Dennis, Esq.
Christopher Denton, Esq.
Cynthia F. Feathers, Esq.
Scott N. Fein, Esq.
Timothy Fennell, Esq.
John Ferrara, Esq.
Hon. Molly Reynolds Fitzgerald
Daniel J. Fitzsimmons, Esq.
Marcy I. Flores, Esq.
Sharon Stern Gerstman, Esq.
Sarah E. Gold, Esq.
Lloyd G. Grandy, II, Esq.
Henry M. Greenberg, Esq.
Taalib T. Horton, Esq.
Hon. James F. Hughes
Richard C. Lewis, Esq.
Joanne Macri, Esq.
Hon. Thomas E. Mercure
Leah Rene Nowotarski, Esq.
Willa Skye Payne, Esq.
C. Kenneth Perri, Esq.
Richard Rifkin, Esq.
Hon. Gary A. Rosa
Robert M. Shafer, Esq.
Tucker C. Stanclift, Esq.
Brian S. Stewart, Esq.
Hon. Mary M. Tarantelli
Robert M. Winn, Esq.

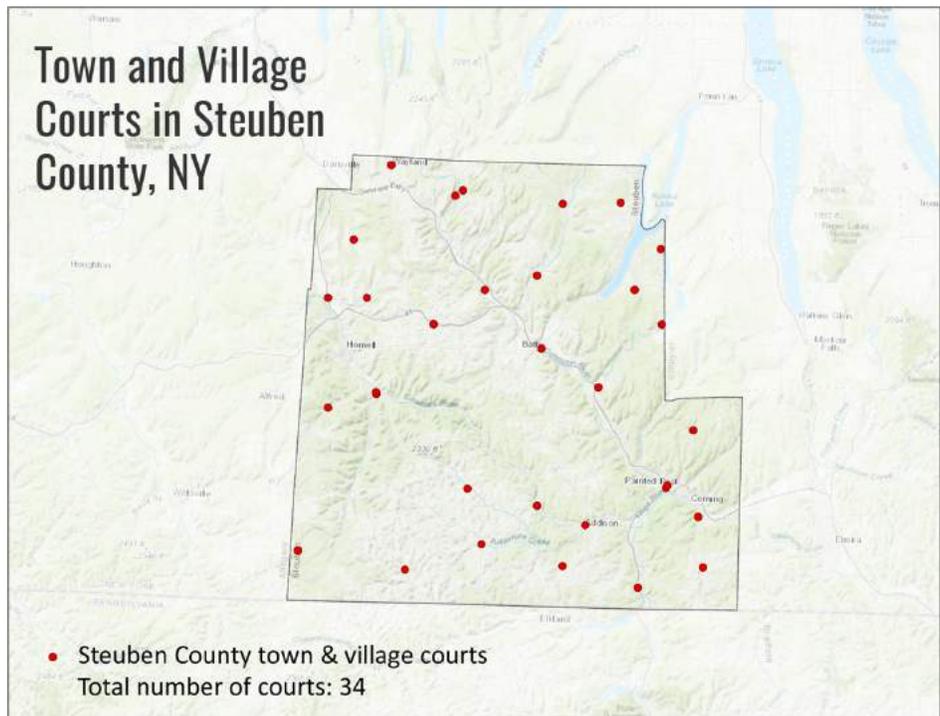
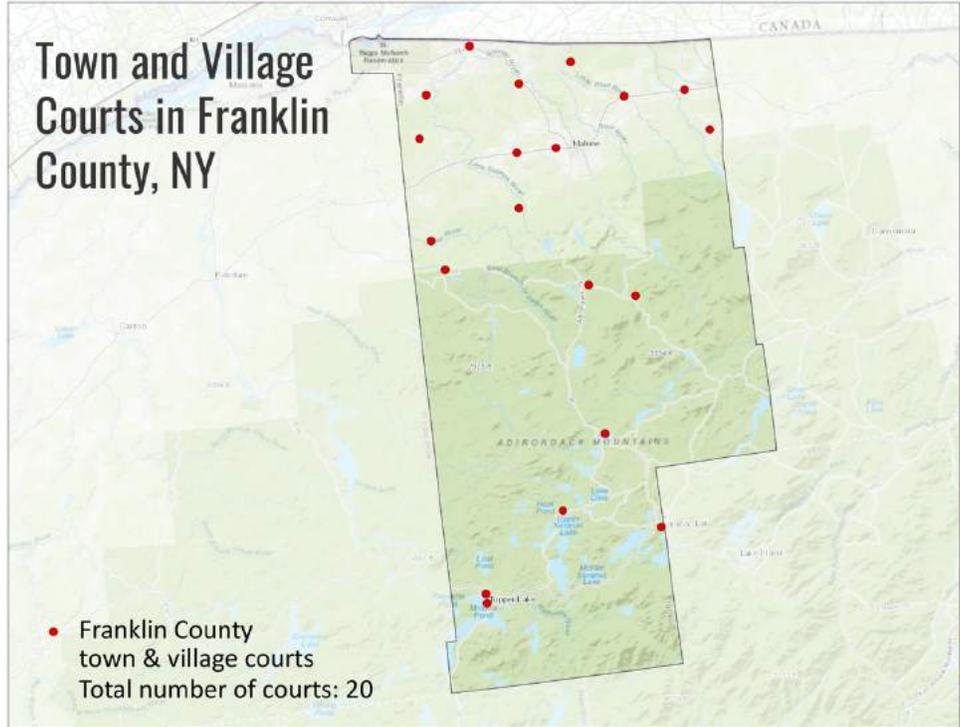
APPENDIX C

ATTORNEY-TO-RESIDENT RATIOS BY COUNTY



APPENDIX D

JUSTICE COURT MAPS—FRANKLIN & STEUBEN COUNTIES



APPENDIX E – COUNTY DATA

County Name	Attorney Count	Total Population 2018	Residents per Attorney	Poverty Rate (families 2018)	Area in Sq. Miles	Attorneys per sq mile	Attorneys per 1,000 Residents
Albany	4,361	307,426	70	7	533	8.18	14.19
Allegany	44	47,025	1,069	11.9	1,034	0.04	0.94
Bronx	2,589	1,437,872	555	26.1	48	53.66	1.8
Broome	524	194,402	371	10.7	715	0.73	2.7
Cattaraugus	120	77,686	647	10.9	1,323	0.09	1.54
Cayuga	124	77,868	628	8.2	735	0.17	1.59
Chautauqua	220	129,656	589	13.3	1,085	0.2	1.7
Chemung	141	85,740	608	10.8	411	0.34	1.64
Chenango	63	48,348	767	9.8	899	0.07	1.3
Clinton	122	80,794	662	10.2	1,117	0.11	1.51
Columbia	181	60,919	337	6.9	649	0.28	2.97
Cortland	69	48,123	697	8.3	502	0.14	1.43
Delaware	76	45,502	599	11.9	1,467	0.05	1.67
Dutchess	909	293,894	323	6.1	825	1.1	3.09
Erie	4,860	919,866	189	10.2	1,054	4.61	5.28
Essex	80	37,751	472	5.9	1,916	0.04	2.12
Franklin	80	50,692	634	13.1	1,698	0.05	1.58
Fulton	59	53,743	911	10.9	533	0.11	1.1
Genesee	98	58,112	593	7.7	495	0.2	1.69
Greene	107	47,617	445	9	658	0.16	2.25
Hamilton	15	4,575	305	4.3	1,808	0.01	3.28
Herkimer	60	62,505	1,042	9.5	1,458	0.04	0.96

County Name	Attorney Count	Total Population 2018	Residents per Attorney	Poverty Rate (families 2018)	Area in Sq. Miles	Attorneys per sq mile	Attorneys per 1,000 Residents
Jefferson	132	114,448	867	9.9	1,346	0.1	1.15
Kings	7,309	2,600,747	356	17.1	83	88.5	2.81
Lewis	24	26,719	1,113	10.3	1,290	0.02	0.9
Livingston	90	63,907	710	8.1	640	0.14	1.41
Madison	92	71,359	776	6.7	661	0.14	1.29
Monroe	3,087	744,248	241	10.4	667	4.63	4.15
Montgomery	71	49,426	696	15.3	410	0.17	1.44
Nassau	11,935	1,356,564	114	4	315	37.85	8.8
New York	81,994	1,632,480	20	12.7	32	2,559.94	50.23
Niagara	330	211,704	642	9.8	532	0.62	1.56
Oneida	520	230,782	444	12.1	1,258	0.41	2.25
Onondaga	2,202	464,242	211	9.9	806	2.73	4.74
Ontario	232	109,472	472	6.6	663	0.35	2.12
Orange	956	378,227	396	8.5	839	1.14	2.53
Orleans	24	41,175	1,716	11.4	393	0.06	0.58
Oswego	122	119,104	976	12.9	1,018	0.12	1.02
Otsego	119	60,244	506	8.8	1,016	0.12	1.98
Putnam	281	99,070	353	2.8	246	1.14	2.84
Queens	5,189	2,298,513	443	10.5	125	41.44	2.26
Rensselaer	449	159,431	355	8.1	665	0.67	2.82
Richmond	1,129	474,101	420	10.6	59	19.07	2.38
Rockland	1,211	323,686	267	9.9	199	6.07	3.74

County Name	Attorney Count	Total Population 2018	Residents per Attorney	Poverty Rate (families 2018)	Area in Sq. Miles	Attorneys per sq mile	Attorneys per 1,000 Residents
St. Lawrence	117	109,558	936	12.6	2,821	0.04	1.07
Saratoga	588	227,377	387	4	844	0.7	2.59
Schenectady	466	154,883	332	7.1	209	2.23	3.01
Schoharie	42	31,364	747	8.8	626	0.07	1.34
Schuyler	27	17,992	666	8.1	342	0.08	1.5
Seneca	30	34,612	1,154	7.4	390	0.08	0.87
Steuben	171	96,927	567	9.4	1,404	0.12	1.76
Suffolk	6,680	1,487,901	223	4.7	1,153	5.79	4.49
Sullivan	183	75,211	411	10.6	997	0.18	2.43
Tioga	34	49,045	1,442	7.1	523	0.07	0.69
Tompkins	369	102,962	279	8.3	492	0.75	3.58
Ulster	483	179,303	371	8	1,161	0.42	2.69
Warren	217	64,480	297	7	932	0.23	3.37
Washington	67	61,828	923	8.1	846	0.08	1.08
Wayne	87	90,856	1,044	8.2	612	0.14	0.96
Westchester	8,619	968,815	112	6.2	477	18.06	8.9
Wyoming	39	40,565	1,040	7.4	596	0.07	0.96
Yates	25	25,009	1,000	7.9	376	0.07	1
Totals and averages (median)	150,644	19,618,453	561	8.9	664	0.18	1.78

APPENDIX F

Summary of Recommendations of the NYSBA Task Force on Rural Justice

The Task Force devised a number of interventions across five distinct categories, which in totality, make up a package of targeted proposals to ameliorate the access-to-justice crisis in rural New York. Herein is a summary of the recommended interventions. Full discussion of them can be found in the Report, pages 15-37.

I. Funding Related Interventions

- New York Direct Pay Model-Furnish eligible applicants a 5-year direct payment of \$22,148 per year provided they agree to, among other things, practice in defined rural areas throughout the state during the benefit period.
- Student Loan Repayment Programs-(i) Promotion and advocacy by NYSBA of existing loan-repayment-assistance programs; and (ii) Raise the amount of annual award in NYS District Attorney and Indigent Legal Services Attorney Loan Forgiveness Program from \$3,400 per year to \$5,500 per year and reduce to wait time to access the program.
- Tuition Assistance Program-Expand the NYS Excelsior program to cover eligible students who wish to practice in rural areas.

II. Law School and New Attorney Interventions

- Assessment of Existing and potential programs-Gather data and assess how existing and potential law school programs promote rural access to justice.
- The Law Schools' Role in providing direct-services-Law schools should assess their ability to provide direct clinical services, in conjunction with other existing service providers, in the context of significant financial challenges these programs present.
- The Law Schools' role in training and providing attorneys who wish to practice in rural areas-(i) Assess the curricular with an eye towards the needs of rural attorneys, including substantive and skill-based training and increase access to on-line learning; (ii) increase students' access to information about rural practice; (iii) change the way rural practice is perceived by negating the perception that earning big bucks defines success; and (iii) foster an employment pipeline to jobs in rural communities.

III. Rural Law Practice Interventions

- Raise 18-B rates.
- Relax certain residency requirements for attorneys who wish to become public officers in rural areas to increase the talent pool.
- Raise the cap on small claims cases to at least \$10,000.
- Eliminate will filing fees.

- NYSBA should offer further assistance and consultation for lawyers in transition. Mentoring younger attorneys and connecting them with retiring attorneys should be pursued.

IV. Broadband and Technology Interventions

- NYSBA should adopt a resolution that urges New York State to enact further legislation and adequate funding to expand and continue the Broadband for All program with a Phase 4 round of funding. The goal of Phase 4 should be further deployment of reliable broadband infrastructure with a download speed of at least 100 megabits per second and an upload speed of at least 30 megabits per second for 100% of New Yorkers with a specific focus on the rural areas that were not served by Phase 3 of the program.
- Monitor and track the Monroe County Justice for All pilot project which includes initiatives around real-time access to filings in civil matters, transportation to court in civil matters, uniform data collection and a court monitoring project in the town and village justice courts. If successful, NYSBA should advocate for its expansion throughout the state.
- The Office of Court Administration should promulgate guidelines to encourage and promote remote video conference appearances in town and village justice courts (and across all New York courts) by attorneys and litigants for civil matters using the available SKYPE technology already provided to town and village courts, or other similar technology.
- The Office of Court Administration should continue to expand e-filing initiatives across the state. Legislation should be passed to authorize e-filing expansion into town and village justice courts.
- NYSBA should again recommend the repeal of Judiciary Law §470 requiring a physical office in New York State.

V. Law and Policy Intervention

- Amend Court Rule 100.6 (B) (2) to allow part-time attorney judges to practice in courts where other part-time attorney judges preside within the same county as follows:

(B) Part-Time Judge. A part-time judge:

(2) shall not practice law in the court on which the judge serves, or in any other contiguous town or village court in the county in which his or her court is located, before a judge who is permitted to practice law, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto;



NEW YORK STATE BAR ASSOCIATION
One Elk Street
Albany, NY 12207

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF EXECUTIVE COMMITTEE MEETING
VIRTUAL MEETING
April 9, 2021**

Present: Jonathan B. Behrins, Mark A. Berman, T. Andrew Brown, David Louis Cohen, Norman P. Effman, Donna England, Margaret J. Finerty, Jean F. Gerbini, Sarah E. Gold, Henry M. Greenberg, Richard M. Gutierrez, Andre R. Jaglom, Scott M. Karson, Sherry Levin Wallach, Richard C. Lewis, Michael A. Marinaccio, Ronald C. Minkoff, Mark J. Moretti, Domenick Napoletano, Aimee L. Richter, William T. Russell, Jr., Mirna M. Santiago, Robert T. Schofield, IV, Hon. Adam Seiden, Diana S. Sen, Carol A. Sigmond, Tucker C. Stanclift, Jean Marie Westlake.

Guests: Simeon H. Baum, Hon. Lucy Billings, Christopher Bopst, Orin J. Cohen, Evan M. Goldberg, Taa R. Grays, John H. Gross, Souren A. Israelyan, LaMarr Jackson, Steven A. Leventhal, A. Thomas Levin, Thomas J. Maroney, Edwina F. Martin, Michael J. McNamara, David P. Miranda, Joseph E. Neuhaus, Judith M. Nolfo, Hon. Karen K. Peters, Sandra Rivera, Alan Rothstein, Hon. Alan D. Scheinkman, David M. Schrauer, Nancy Sciochetti, Lauren E. Sharkey, Roy D. Simon, Kathleen M. Sweet, Thomas Weingard

Mr. Karson presided over the meeting as President of the Association.

1. Approval of minutes of meetings. The minutes of the January 28, and February 9, 2021 meetings were approved as distributed.
2. Consent calendar:
 - a. Approval of amendments to bylaws of International Section.
 - b. Approval of award of Committee on Veterans.
 - c. Approval of presidential appointments to House of Delegates.
 - d. Approval of amendments to sections Caucus operating rules.

The consent calendar, consisting of the above items, were approved by voice vote.

3. Report of President. Mr. Karson highlighted the items contained in his written report, a copy of which is appended to these minutes. He also thanked the departing members of the Executive Committee for their service.
4. Report of Treasurer. In his capacity as Treasurer, Mr. Napoletano reported on the association's operations for the first two months of 2021, including dues, CLE, and annual Meeting. The report was received with thanks.
5. Report of Finance Committee. John H. Gross, chair of the Finance Committee, presented an overview of financial projections for the next 10 years, including declining dues revenue and deficit budgets. The report was received with thanks.

6. Report of Committee on NYSBA Facilities. David P. Miranda, chair of the committee, updated the Executive Committee regarding lease negotiations with The New York Bar Foundation for the facility at One Elk Street. The report was received with thanks.
7. Report of President's Committee on Access to Justice. In his capacity as co-chair of the committee, Mr. Brown, together with co-chair Edwina F. Martin, provided an update on the committee's work, including the activities of the committee's subcommittees. The report was received with thanks.
8. Report and recommendations of Committee on Veterans. Committee member Judith F. Nolfo outlined a proposed pro bono program to assist service members with the preparation of powers of attorney and basic wills. After discussion, a motion was adopted approve the committee's proposal.
9. Report and recommendations of Committee on the New York State Constitution and Local and State Government Law Section. Hon. Karen K. Peters, Christopher Bopst, Alan Rothstein and A. Thomas Levin, representatives of the committee and section, reviewed a proposed amendment to the State Constitution with respect to municipal home rule. After discussion, a motion was adopted to approve the report and recommendations.
10. Report and recommendations of Local and State Government Law Section. Section members steven A. Leventhal and A. Thomas Levin presented an affirmative legislative proposal recommending amendment of General Municipal Law §808 with respect to training for local boards of ethics. After discussion, a motion was adopted to approve the report and recommendations.
11. Report of Task Force on Racial Injustice and Police Reform. Task Force co-chairs T. Andrew Brown and Taa R. Grays updated the Executive Committee on the Task Force's work and its planned recommendations. The report was received with thanks.
12. Report and recommendations of Committee on Standards of Attorney Conduct. Prof. Roy D. Simon, chair of the committee, together with committee member Joseph E. Neuhaus, reviewed the committee's proposed amendments to the comments to Rule 1.8(e) of the Rules of Professional Conduct. After discussion, a motion was adopted to endorse the proposals for favorable action by the House.
13. Report and recommendations of Committee on CPLR. Committee co-chairs Souren a. Israelyan and Domenick Napoletano, together with committee members Hon. Lucy Billings and Thomas Weingard, presented affirmative legislative proposals to amend CPLR 312-a (substituted service by social media, e-mail, or other technology); CPLR 2106 (elimination of notarization requirement for unrepresented parties); and CPLR 3113 and 3207 (remote deposition option). After discussion, motions were adopted to approve the proposals.

14. Report of Task Force on the NYS Bar Examination. Hon. Alan D. Scheinkman, chair of the Task Force, reported on the remote administration of the bar examination and the Task Force's work in studying the future of the examination. The report was received with thanks.
15. Report re legislative activity. Evan M. Goldberg, chair of the Committee on Legislative Policy, together with Director of Policy Hilary F. Jochmans, provided an update on the committee's work as well as legislative activity and the state budget. They introduced Cheyenne Burke as the Association's Governmental Relations associate. The report was received with thanks.
16. New Business.
 - a. Mr. Lewis raised a question as to why the association was not asked for its input with respect to the recently adopted Uniform Rules for the Supreme Court and the County Court. Mr. Karson advised that a group would be appointed to review the rules and make recommendations that would be communicated to the Office of Court Administration.
 - b. Mr. Berman recommended the establishment of a task force to consider issues surrounding voting rights.
17. Report of The New York Bar Foundation. David M. Schraver, chair of The Foundation's lease negotiation committee, reported on the committee's work with the Association's Committee on NYSBA Facilities. The report was received with thanks.
18. Date and place of next meeting.
Friday, June 11, 2021
Virtual Meeting
19. Adjournment. There being no further business, the meeting of the Executive Committee was adjourned.

Respectfully submitted,



Sherry Levin Wallach
Secretary

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF EXECUTIVE COMMITTEE MEETING
REMOTE MEETING
May 18, 2021**

Present: Jonathan Behrins, Mark A. Berman, T. Andrew Brown, David Louis Cohen, Norman P. Effman, Donna England, Margaret J. Finerty, Sarah E. Gold, Richard M. Gutierrez, Andre R. Jaglom, Scott M. Karson, Sherry Levin Wallach, Richard C. Aimee L. Richter, William T. Russell, Jr., Mirna M. Santiago, Diana S. Sen, Carol A. Sigmond, Jean Marie Westlake.

Guest: Hon. Lizbeth González.

Mr. Karson presided over the meeting as President of the Association.

1. Report and recommendations of Committee to Consider Whether to Support Legislation to Eliminate the Discretionary Denial of Recertification of New York Supreme Court Justices. Hon. Lizbeth González, a member of the committee, reviewed the committee's report recommending that the Association support legislation that would amend the Judiciary Law to require that the Office of Court Administration certificate justices who meet the constitutional criteria. After discussion, a motion to approve the recommendation failed by a 10-10 vote.
2. Adjournment. There being no further business, the meeting of the Executive Committee was adjourned.

Respectfully submitted,



Sherry Levin Wallach
Secretary