NEW YORK STATE BAR ASSOCIATION

# JOURNAL

## The Supreme Court's *Bruen* Decision and Its Impact: What Comes Next?

NYSBA
SEPTEMBER/OCTOBER 2022
VOL. 94 | NO. 5

# LawPay®

AN AFFINIPAY SOLUTION

+

NYSBA

Member Benefit Provider

> **"I love LawPay!** I'm not sure why I waited so long to get it set up.
>
> *– Law Firm in Ohio*

Trusted by more than 150,000 professionals, LawPay is a simple, secure solution that allows you to easily accept credit and eCheck payments online, in person, or through your favorite practice management tools.

- **22% increase in cash flow with online payments**
- **Vetted and approved by all 50 state bars, 70+ local and specialty bars, the ABA, and the ALA**
- **62% of bills sent online are paid in 24 hours**


YOUR FIRM LOGO HERE

Trust Payment
IOLTA Deposit

New Case Reference

**** **** **** 9995 ***

TOTAL: $1,500.00

VISA AMEX POWERED BY LawPay

eCheck DISCOVER

PAY ATTORNEY

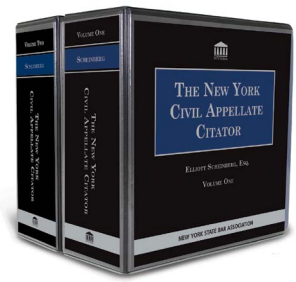
Get started at
lawpay.com/nysba
855-759-5284

Data based on an average of firm accounts receivables increases using online billing solutions.

LawPay is a registered agent of Wells Fargo Bank N.A., Concord, CA and Synovus Bank, Columbus, GA.

# PUBLICATIONS

## Featured titles available

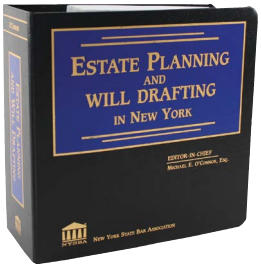



### The New York Civil Appellate Citator, 2022 Revision

This extensive compendium is a finessed compilation of appellate authority, foundational and uniquely esoteric, on all aspects related to civil appeals to the New York State Appellate Division. Use it to locate key precedential language for use as authority in briefs and arguments.

Book (401822)
eBook (401822E)

NYSBA Members $185
Non-Members $245

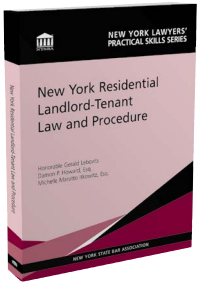



### Estate Planning and Will Drafting in New York, 2022 Revision

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

Book (409522)
eBook (409522E)

NYSBA Members $185
Non-Members $220




### New York Residential Landlord-Tenant Law and Procedure, 2021-22

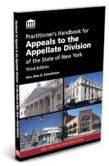
This practical guide introduces the fundamentals of residential landlord-tenant law and offers a guide to the procedural mechanics practitioners face in landlord-tenant disputes.

Book (416922)
eBook (416922E)

NYSBA Members $125
Non-Members $165

## Other titles also available

**Practitioner's Handbook for Appeals to the Appellate Division, 3rd ed.**



An invaluable guide covering all aspects of taking a civil or criminal appeal to the New York State Appellate Division, including panel assignments and calendaring, correcting defects, cross and joint appeals, more…

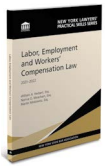
Book: 401421 | eBook: 401421E | 186 pages
Member $65 | List $88

**Elder Law & Special Needs Planning/Will Drafting**

This planning guide provides an extensive overview to the practice of elder law, special needs planning and will drafting for attorneys entering this field.

Book: 4082122 | eBook: 4082122E | 354 pages
Member $125 | List $165

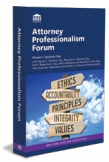
**Labor, Employment and Workers' Compensation Law**



Part One of this practice guide provides the general practitioner with an overview of the complex and inter-related issues in labor and employment law. Part Two focuses on the essential questions related to workers' compensation law in New York State.

Book: 41022 | eBook: 41022E | 466 pages
Member $125 | List $165

**Attorney Professionalism Forum**



The *Forum* answers thought-provoking questions by blending analysis of applicable law and the Rules of Professional Conduct with practical guidance on how to best act as a professional.

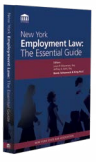
Book: 407821 | eBook: 407821E | 558 pages
Member $65 | List $85

**Estate Planning: A Guide to the Basics**

This easy-to-read reference is a great resource for the non-attorney looking to increase their knowledge of estate planning options, including setting up a trust, powers of attorney, the importance of a will, and more.

Book: 409321 | eBook: 409321E | 38 pages
Member $15 | List $25

**New York Employment Law: The Essential Guide**



Covering a wide range of state substantive and regulatory employment issues, this publication is formatted in an easily accessible Question-and-Answer format and offers clear and succinct responses to more than 450 employment law questions.

Book: 410121 | eBook: 410121E | 560 pages
Member $95 | List $130

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


# USI Affinity

## Where Lawyers Go For Protection.

### A Full Suite of Insurance Solutions. For You, Your Family, and Your Practice.

As the endorsed insurance program of the NYSBA, we offer a complete range of insurance solutions covering all of your business and personal needs, while providing exclusive insurance and benefit solutions not available to the general public.

**Business Insurance:**

- Lawyers Professional Liability
- Cyber Liability
- EPLI

**1.855.USI.0100**

**Personal Insurance:**

- Life & Disability
- Student Loan Refinancing
- Long Term Care
- Auto, Travel, Pet
- Dental & Vision

**1.855.874.0141**

**Call today for more information on the insurance products available to New York State Bar Association members, including a NYSBA professional membership credit.**

**www.NYSBAInsurance.com**

USI AFFINITY

FLY_0545_0122_NYSBA

# CONTENTS



## CONNECT WITH NYSBA | VISIT NYSBA.ORG

@nysba @nysba www.nysba.org/LinkedIn @nystatebar nysba

NEW YORK STATE BAR ASSOCIATION
# JOURNAL

SEPTEMBER/OCTOBER 2022
VOL. 94 | NO. 5



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

**NYSBA ADVERTISING**
Advertising Representative MCI-USA
Holly Klarman, Sales Director
holly.klarman@wearemci.com
410.584.1960

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

SHERRY LEVIN WALLACH

# NYSBA Serves as a Guiding Light and Provides Common Ground During Critical Policy Debates


Many of us felt the ground shift beneath our feet this summer as the U.S. Supreme Court reversed precedent on abortion, undid decades-long gun regulations in New York and stripped the Environmental Protection Agency of some of its power. Regardless of political ideology, it left some of us feeling unnerved and uncertain and others energized and ready to get to work. At the New York State Bar Association, you can be more involved in efforts to impact the law of the land; there is no more vibrant place to do it than with our sections, committees and task forces.

I have spent time since my June 1 inauguration meeting with our sections right here in New York, in neighboring states and around the globe. The camaraderie and intelligent dialogue that I have seen is exactly what drew me to NYSBA in the first place – there is a warm collegiality that empowers and educates members and allows for the cross-pollination of ideas across political spectrums.

As this country becomes more politically divided, NYSBA has renewed its commitment to fostering the free exchange of ideas across the political aisle.

I have also encountered a growing concern at these meetings: that as young lawyers become more detached from their colleagues due to work from home arrangements, they are losing opportunities to grow, network and develop perspective.

Our association provides the perfect antidote to the isolation faced by new lawyers, solo practitioners, and those at the end of their careers who are stepping back from practice but want to stay connected and contribute their valuable experience to the legal discourse. We provide opportunities for members to work with one another on important legal issues that may go beyond their day-to-day area of practice but that may be near and dear to their heart. As we come out of the pandemic lockdown and ramp up our in-person meetings and networking events, we provide a medium for professional development, collegiality, development of mentoring relationships and relationship building.

Chairing the Young Lawyers and Criminal Justice sections blessed me with connections I would not have gotten anywhere else – connections that have been instrumental in my career.

My perspective as president has also revealed to me just how critical task forces are to the dynamism of our organization. The task forces that I have created on the U.S. territories, emerging digital finance and currency, mental health and trauma, the modernization of criminal practice and the ethics of local public sector lawyering have motivated attorneys experienced with these issues, law professors, young lawyers and law students to secure NYSBA membership so that they are represented when the reports are written, and the association's policies are determined.

NYSBA's Task Force on the U.S. Territories is bringing together experts from well-regarded institutions to undo

the racist and unconstitutional Insular Cases. The U.S. Supreme Court has relied on this case law to deny equal rights and privileges enjoyed by citizens of the 50 states to the citizens of the territories. Our group hopes that the issue will be heard before the U.S. Supreme Court next year because Justice Sotomayor and conservative Justice Neil Gorsuch have both made it clear they see the current situation as an affront to the Constitution.

To be sure that NYSBA remains on the cutting edge of new laws and technology, the Task Force on Emerging Digital Finance and Currency has begun its work. This task force will explore the issues arising with regulation and legislation in this area and work to continue to educate and guide our legal community on the issues arising in this new digital space including representation, taxation, digital currency and NFT ownership, purchase, sale and legal analysis about the creation of decentralized autonomous organizations, non-fungible tokens and other digital relationships.

Our Women in Law Section has been working tirelessly in the wake of the *Dobbs* decision to educate our communities on the new laws enacted in New York to protect the rights of childbearing people and their medical providers to decide what's right for them. This section has also been focused on how the legal impact that this decision has on women and child-bearing people throughout our state and those who choose to come to our state for protection under its laws.

In another bipartisan effort, our Task Force on Mass Shootings and Assault Weapons will continue to advocate for laws that prevent needless deaths but protect individual rights. In the face of the Supreme Court's ruling in *New York State Rifle & Pistol Association, Inc., et al. v. Bruen,* we will push for laws that are well-thought-out. Laws that are passed too quickly often have fatal flaws and contradictions to existing laws, which then require amendments.

Recently, I published an op-ed in the Gannett newspapers warning that New York's red flag law is broken and must be amended. One of the issues that I have advocated for in this regard is for the need to extend the right to counsel to respondents in these matters, even though they have been "housed" in the civil procedure law, and for people's mental health to be evaluated by health professionals, not law enforcement and judges. The most efficient way to accomplish this is to include experts from both sides of the aisle, with multiple perspectives, in the debate.

NYSBA is critical to crafting sound policy on the most significant issues of our day. What we do is invite everyone to the discussion. We amplify the essential elements of our arguments, educate those who are looking for guidance, provide camaraderie and guidance to those seeking it and give a home to those whose storied careers are coming to an end but who have so much more to give.

Between living through and with a pandemic and the drastically changing tides of our profession, we must recognize the additional stresses that have been forced upon those of us already working in a high-pressure profession. We must remember to support one another and look out for our well-being and that of our colleagues. The New York State Bar Association is already deeply committed to lawyer assistance and attorney well-being, and this year one of my task forces will expand that commitment to a focus on the well-being of our clients by addressing how we can better represent people living with mental illness and trauma.

These are challenging times, but we are strong and dedicated. NYSBA is a home for everyone and a guiding light in these uncertain times.

---

**Sherry Levin Wallach** can be reached at slwallach@nysba.org.

# The Supreme Court's *Bruen* Decision and Its Impact: What Comes Next?

By Margaret J. Finerty

The impact of the *Bruen* decision on New York and throughout the country cannot be overstated. It will result in major changes to present gun regulations, as we have already seen in New York State, and increased legal challenges to existing gun laws, as is already happening. The executive branch, legislators and the courts, as well as lawyers, will have to navigate this new terrain, and the path for doing so is not clear-cut.

The goal is to protect the public while honoring the rights guaranteed by the Second Amendment. To accomplish this, it is essential that those who do not qualify to be a gun owner are not allowed access to guns. Ensuring that thorough background checks can be completed in all transfers of firearms is crucial, in addition to providing law enforcement with access to the most complete set of records regarding a person's background with respect to disqualifying factors. Licensing and training are also key components to ensure responsible gun ownership. As we move forward after *Bruen*, we must adapt to this new legal landscape in a way that protects the Constitution and human life.

## *Bruen* and Its Aftereffects

On June 23, 2022, the United States Supreme Court, in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*,[1] rendered one of the most significant decisions to be issued on the Second Amendment in over a decade. It struck down as unconstitutional New York State's concealed carry law that required an individual to prove "proper cause" existed before a license would be issued allowing that person to carry a concealed pistol or revolver in public.[2] The court held that this "proper cause" requirement violated the 14th Amendment because it prevented law-abiding citizens who have ordinary self-defense needs – as opposed to specific articulable reasons that show they may be vulnerable to harm – from exercising their Second Amendment right to keep and bear arms.

As a result of this decision, New York sprang into action, passing a range of laws on July 1, 2022 during a special legislative session that, among other things, set forth many sensitive locations where a person is not allowed to carry a firearm. Prior to the *Bruen* decision there were legislative efforts in New York and on the federal level to strengthen gun laws. On June 6, 2022, Gov. Hochul signed into law significant legislation in reaction to the horrific shootings that occurred on May 14, 2022 in Buffalo, New York at the Tops Friendly Market in which 10 people were killed and three injured,[3] and on May 24, 2022 at a school in Uvalde, Texas where 19 students and two

teachers were killed and more than a dozen other people were wounded.[4] On June 25, 2022, President Biden signed the Bipartisan Safer Communities Act, the result of a bipartisan compromise to pass gun legislation in the wake of these two dreadful tragedies.

The New York State Bar Association has been a leader in promoting commonsense gun laws that protect people's safety while also protecting their rights under the Second Amendment. On Nov. 6, 2020, NYSBA's House of Delegates adopted the report and recommendations of the Task Force on Mass Shootings and Assault Weapons, which I co-chaired with NYSBA Past President David Schraver. In its report, "Reducing the Epidemic of Mass Shootings in the United States – If Not Now, When?,"[5] the task force set forth several concrete recommendations for legislative change that would go a very long way towards reducing not only mass shootings, but gun violence in general, and suicides. NYSBA has included recommendations set forth in the task force report in its legislative priorities. NYSBA was a co-sponsor, along with the American Bar Association's Standing Committee on Gun Violence, of a resolution to close the "Charleston loophole." This resolution was adopted as ABA policy by its House of Delegates on Aug. 8, 2022 at the ABA's annual meeting.

NYSBA is currently following up on the work of the task force by focusing on extreme risk protection laws, also known as "red flag" laws, which are being utilized more and more as a tool to address the epidemic of gun violence in our country. Red flag laws are an effective means to prevent gun violence, but it is essential that they are administered in a manner that protects the due process and constitutional rights of all parties involved. Extreme Risk Protection Order hearings in New York are governed by the state civil law provisions in Civil Practice Law and Rules Article 63-A. These proceedings can give rise to criminal law and mental hygiene law issues that may impact an individual beyond the protection order and bring into play constitutional protections such as the right to counsel and the right against self-incrimination. NYSBA is studying Extreme Risk Protection Orders in light of these constitutional and due process concerns and will be reporting its findings and recommendations in the future.

## The *Bruen* Decision

The *Bruen* decision[6] overturned a New York law with origins dating back well over a century. New York's law requiring a license to carry a handgun in public harkens back to the 1911 Sullivan Law, which was amended in 1913 to add "good moral character" and "proper cause" as conditions.[7] The "proper cause" licensing requirement has been interpreted to mean that a person must demonstrate a special need for self-protection that is distinguished from that of the general community.[8]

Justice Thomas references two of the court's last major gun rights cases in his *Bruen* opinion: *District of Columbia v. Heller*[9] and *McDonald v. Chicago*.[10] He begins by pointing out that these seminal cases recognize that the Second and 14th Amendments protect a law-abiding citizen's right to possess a handgun in their home for self-defense.[11] *Bruen* holds that the Second and 14th Amendments also protect an individual's right to carry a handgun for self-defense outside of the home as well.

The court applied a textual and historical analysis of the Second Amendment in reaching its decision.[12] The court found that based on the plain text of the Second Amendment the petitioners have a right to bear arms in public for self-defense. Its historical review concludes that there is no American tradition of firearm regulation that justifies New York's proper cause requirement.

It is important to note that *Bruen* does not undo the licensing requirements, e.g., fingerprinting, background checks and training, that exist in many states in order to possess a firearm, nor does it repeal the prohibitions that exist under federal and state law regarding who is qualified to possess a firearm.[13] Justices Kavanaugh and Alito, in their concurrences, highlight that the *Bruen* decision does not undo the types of legitimate gun restrictions that were addressed in *Heller* and *McDonald*. These earlier seminal Supreme Court decisions acknowledged that the Second Amendment does not entitle a person "to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." They recognized the legitimacy of longstanding prohibitions on who can possess firearms and forbidding their possession in sensitive places, such as schools and government buildings, and specifically noted that these regulatory measures were only examples and not exhaustive.[14]

## New York's Response to *Bruen*

On July 1, 2022, Gov. Kathy Hochul issued a proclamation convening an extraordinary session of the Senate and Assembly, pursuant to the New York State Constitution, to consider gun legislation in light of the *Bruen* decision. On that date, the governor signed the Concealed Carry Improvement Act into law.[15] This sweeping legislation is designed to address the impact *Bruen* will have on the increase in the number of people in New York carrying concealed firearms in public. New York is the first state to take such action in response to *Bruen*. This extensive package of new laws, which go into effect on Sept. 1, 2022, has a number of significant provisions.

One of the most notable is the listing of numerous sensitive locations where a person cannot carry a firearm in public.[16] A violation of this provision, new Penal Law § 265.01-e, is an E felony. These locations include: places of worship; educational institutions; courthouses; federal, state and local government buildings; polling

sites; public transportation such as subways and buses; health and medical facilities; entertainment venues; shelters, including homeless and domestic violence; daycare facilities; playgrounds and places where children gather; airports; bars and restaurants where alcohol is served; entertainment venues; libraries; public demonstrations and rallies; and Times Square.

Notably, with respect to privately owned property and premises, such as office buildings, the law puts into place a default provision saying that a person may not carry a firearm into those premises unless the owner or lessee of that property has posted a conspicuous sign indicating that the carrying of firearms, rifles or shotguns is allowed.

There are several other significant changes in the law that arose from this special legislative session. They include the following:

- Expands the requirements for a concealed carry permit by requiring: four character references, firearm safety training courses, live fire testing, an in-person interview, information on the applicant's former and current social media accounts from the past three years, in addition to background checks.
- Expands the disqualifications for receiving a concealed carry permit by excluding individuals with documented instances of violent behavior, misdemeanor convictions for assault, weapons possession and menacing, alcohol-related misdemeanor convictions, such as driving under the influence,[17] recent treatment for drug-related reasons and recent involuntary commitment to a department of mental health facility.
- Requires that licenses are to be recertified or renewed every three years, and the license be revoked if behavior that would result in a denial of a license occurs. If an applicant has knowingly made a material false statement on the application, the license must be revoked; New York's Division of Criminal Justice Services will conduct monthly criminal record and other checks for disqualifying information for licensees.
- Requires that guns be stored safely at home if a person under 18 lives there and prohibits owners from leaving a gun in their car unless it is stored in a lockbox.
- Redefines body vests to include a broader array of bullet resistant protective equipment, including hard body armor.[18]
- Directs the state to take the lead in performing its own background checks that will include access to state and local records and databases,[19] as well as

the FBI's National Instant Criminal Background Check System.

- Requires background checks for the sale of ammunition.

## New York's Response to the Mass Shootings in Buffalo, New York and Uvalde, Texas

Not long before the Supreme Court's decision in *Bruen*, New York took steps to strengthen its gun laws. This followed in the wake of two horrific shootings that shocked the nation. The first occurred on May 14, 2022, in Buffalo, New York, at the Tops Friendly Market in which 10 people were killed and three injured. In that case the shooter was motivated by racism and targeted people of color.[20] The second occurred on May 24, 2022, at an elementary school in Uvalde, Texas, where 19 students and two teachers were killed and more than a dozen other people were wounded. It was the deadliest school shooting since 20 children and six adults were murdered in 2012 at the Sandy Hook Elementary School in Newtown, Connecticut.[21]

On May 18, 2022, in response to the tragic shooting in Buffalo, Gov. Hochul issued two executive orders and proposed legislation targeted to address the rise of domestic terrorism and gun violence in the country. In particular, she issued an executive order[22] that requires the New York State police to train its members on how to file for an Extreme Risk Protection Order pursuant to Article 63-A of the Civil Practice Laws and Rules and how to apply for a temporary Extreme Risk Protection Order in the Supreme Court where the respondent resides, when there is probable cause to believe that the respondent is likely to engage in conduct that would cause serious harm to the respondent or others, as defined in Mental Hygiene Law § 9.39(a)(1) or (2). Notably, the shooter in the Buffalo case had undergone a psychiatric evaluation in a hospital in June of 2021 after he said he wanted to commit a murder-suicide when asked in school about his plans post-graduation. He was released a couple of days afterwards. The police never sought an Extreme Risk Protection Order and said he had not named a specific target in his threat.[23]

Following this, the governor signed into law a 10-bill legislative package on June 6, 2022 that, among other things:

- prohibits the sale of semiautomatic rifles to people under 21 by requiring a license;[24]
- bans the sale of body armor other than to people in specific professions;[25]
- expands the list of people who can file for an Extreme Risk Protection Order, and requires that police and district attorneys apply for such an order when they have credible information that a person is likely to seriously harm themselves or others;[26]
- expands the definition of a firearm;[27] and
- requires social media platforms to provide a way for its users to report hateful conduct and to establish policy on how they would respond to such incidents.[28]

In both the Buffalo and Uvalde shootings, the gunman was 18 years of age and used an AR-15 assault-style rifle.[29] In the Buffalo shooting, the gunman posted a racist manifesto online as well as a video from the camera affixed to the helmet he wore during the shooting.[30] The shooter in the Uvalde case posted photos of automatic rifles online and troubling videos involving his mother.[31] Each of the shooters appeared to have suffered from mental health issues.[32] It is clear that New York's recent gun legislation is an effort to address some of the specific issues that are found in these two, and other, shocking mass shootings, in particular, the fact that 18-year-olds were able to purchase such deadly assault-style rifles and that there were warning signs before the shootings, including on social media, that these two individuals might harm themselves or others.

## Challenges to Gun Regulations Post-*Bruen*

As a consequence of the *Bruen* decision, challenges to existing gun regulations, both old and new, are being mounted. In *Bruen*, Justice Thomas noted that in *Heller* the court found, based on a historical analysis, that the Second Amendment protects the possession and use of weapons that are "in common use at the time."[33] Justice Thomas points out, "Nor does any party dispute that handguns are weapons 'in common use' today for self-defense."[34] The court's analysis in *Bruen* was based on a textual review of the Second Amendment in light of its historical setting and tradition at the time it was enacted. The court rejected the means-end two-step framework that many appeals courts have utilized in reviewing gun regulations, i.e., if the regulated conduct falls within the scope of the Second Amendment, then the court would evaluate whether the regulation promoted an important governmental interest and the burden it placed on the protected right, i.e., whether the regulation was tailored to achieve that interest. Courts have utilized both a strict scrutiny and intermediate scrutiny analysis in performing their review and reaching a decision.[35]

Federal lawsuits have been filed in New York, New Jersey and California, citing to the *Bruen* decision, challenging those states' ban on various semi-automatic firearms. The Supreme Court has sent several gun cases back to lower courts for reconsideration in light of *Bruen*.[36] In New

York, multiple lawsuits have been filed in federal court to challenge the state's designation of sensitive locations where firearms cannot be carried and the requirement that a weapon cannot be carried onto private property unless the owner or lessee specifically allows it in obvious signage. The requirement to provide social media account information and undergo extensive training has also been criticized.[37]

Defense attorneys in New York are mounting challenges in criminal gun possession cases based on *Bruen*, arguing that New York's gun licensing provisions are unconstitutional and that their clients had a constitutional right to possess the firearm in public and no obligation to seek a license. To date, these challenges have not been successful.[38]

We can expect additional future lawsuits throughout the country challenging both gun laws that existed before *Bruen* and new gun laws that are passed to deal with the impact that *Bruen* will undoubtedly have on the increase in the number of people who will now be carrying guns in public settings.

## Bipartisan Safer Communities Act

The Bipartisan Safer Communities Act[39] was signed into law by President Biden on June 25, 2022. It was the first time in years that the Senate and the House had agreed to pass gun reform legislation. Although the legislation did not go as far as some had hoped, it was universally heralded as a step in the right direction. This legislation, agreed upon in principle prior to the *Bruen* decision and signed into law two days after, came on the heels of the tragic mass shootings in Buffalo and Uvalde and many other incidents of gun violence that did not get the same attention.

The law does close a major loophole that previously existed in federal law: individuals with misdemeanor domestic violence convictions cannot possess a firearm.[40] Previously, the law only included convictions where the victims were married to the individuals, lived with them or had children with them. The law now includes convictions where the victim was in a dating relationship with the convicted individual. A dating relationship is defined as "a relationship between individuals who have or have recently had a continuing serious relationship of a romantic or intimate nature."[41] This inclusion only applies, however, if the person seeking to purchase or possess a gun is convicted of a domestic violence crime. This does not apply if there is a domestic violence order of protection and only a dating relationship exists between the parties.

Another significant provision strengthens background checks for gun buyers under the age of 21.[42] When a background check is performed for a purchaser under 21 years of age, the FBI's National Instant Criminal

Background Check System must now investigate if there are juvenile justice records in the buyer's home state to determine if there is a disqualifying event. Such records will include felony and misdemeanor domestic violence convictions and involuntary commitment to mental health facilities after the potential purchaser turned 16 years old. The relevant state custodian of mental health records and the buyer's local law enforcement agency must be contacted to search for any disqualifying records which would preclude the firearm purchase. Significantly, the law does allow more time to perform a background check, if needed in cases where the potential purchaser is under 21 years of age. The National Instant Criminal Background Check System can have up to 10 business days to do so, but it must inform the seller that it needs additional time. If the check is not complete at that point the sale must go through.[43]

The requirement of who must obtain a federal firearms license was broadened from those "with the principal objective of livelihood and profit," to anyone selling guns "to predominantly earn a profit."[44] This is an effort to close what has become known as the "gun show loophole," where individuals not registered as having a federal firearms license regularly sell guns at gun shows or online and do not perform background checks, as this type of license is required to do.

Key provisions in the Bipartisan Safer Communities Act focus on addressing mental health issues. It provides billions of dollars in funding for mental health services and

crisis intervention programs in schools and communities. It provides funding to states to support extreme risk protection order laws.[45] The act emphasizes that extreme risk protection order court proceedings must be administered in a manner consistent with all constitutional rights and according to due process.[46]

In order to reach a compromise, there were major concessions that had to be made. The law does not require universal background checks for all gun sales, which would include private sales. It does not ban assault weapons or high-capacity magazines. But it does enact some significant changes that will hopefully prevent guns from getting into the hands of those who should not have them under the law.

## NYSBA's Ongoing Efforts To Address Gun Violence

NYSBA is continuing its work to address the epidemic of gun violence in our country. NYSBA has included the recommendations set forth in the task force report in its federal legislative priorities. It was a co-sponsor, along with the ABA's Standing Committee on Gun Violence, of a resolution to close the "Charleston loophole" was adopted as ABA policy at its House of Delegates meeting on Aug. 8, 2022. This is a significant resolution and closing this loophole regarding background checks was a specific recommendation in the task force report. The resolution seeks to repeal the federal law, which requires the sale of a firearm to be consummated after a three-business-day period has expired even if the background check has not been completed.[47] This three-day limit has resulted in numerous tragedies that could have been prevented if additional time had been allowed to complete a thorough background check of a potential purchaser. A fatal and tragic example of such consequences is the horrific shooting that occurred at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina, on June 17, 2015. The shooter in that case, Dylann Roof, entered the church and sat through a Bible study group before killing the pastor and eight parishioners. Roof should not have been allowed to purchase the .45-caliber Glock pistol he used to carry out the killings, due to a prior arrest record that revealed possession of a controlled substance and drug use. That would have disqualified him from purchasing the gun.[48] Because the background check was not completed within three business days, the sale went through, and Roof was able to gain possession of the firearm.[49]

Most background checks can be completed within the three-business-day period, and this resolution would not delay the transfer of a firearm in these instances. Some background checks, however, require more than three business days to be completed, often because there are issues regarding a potential purchaser's qualifications. Frequently in these cases, state and local records need to be examined for disqualifying events such as misdemeanor domestic violence convictions, which can often slow down the process. This is what happened in the tragic case at the church in Charleston, which gave rise to the term "Charleston loophole." To avoid this and other tragic shootings, the time to complete a background check before a gun is transferred to a purchaser should be extended to a reasonable period of time that allows law enforcement sufficient opportunity to complete a thorough background check, and sufficient funding should be provided to ensure timely processing of the background checks. Twenty-one states have addressed this loophole with the passage of laws that expand the time for background checks in various ways.[50]

The need for additional time to perform background checks has been recognized in the Bipartisan Safer Communities Act. As noted above, it allows up to 10 business days for a background check to be performed when the purchaser is under 21 years of age. It recognizes that checking juvenile records and mental health records at the state and local level can often take longer than the three business days currently required by 18 U.S.C. § 922(t)(1)(B)(ii).

There is also a bill, the Enhanced Background Checks Act of 2021, H.R. 1446 (117th Congress), that was introduced by Rep. Jim Clyburn of South Carolina to close the "Charleston loophole" by expanding the three-business-day limit on federal background checks before a sale can go through.[51] It passed in the House on March 11, 2021. The bill increases the time from three business days to 10 business days for the initial background check. If a background check has not been completed after the 10-day period, the potential purchaser may submit a petition for a final firearms eligibility determination. They must certify that they are not prohibited from purchasing or possessing a firearm when making this request. The FBI will then have an additional 10 business days to complete the background check. If after this 10-day period the background check is still not complete, the federal firearms license holder may transfer the firearm. If the potential purchaser does not petition for an expedited review, they will have to wait until their background check is completed before the sale occurs. As soon as the background check is finalized the firearm may be transferred. This legislation is pending in the Senate.[52] The bill seeks to balance public safety with a purchaser's lawful right to purchase and possess a firearm.

NYSBA is following up on the work of the task force by focusing on extreme risk protection orders and red flag laws that are being utilized more and more as a tool to address the epidemic of gun violence in our country. Red flag laws are proven to be an effective means to prevent gun violence,[53] but, as we stated in the task force report, it is essential that they are administered in a manner that protects the due process and constitutional rights of all parties involved. The task

force report specifically noted that these constitutional and due process concerns were beyond the scope of the report and recommended that NYSBA further study Extreme Risk Protection Orders.

NYSBA is now focusing on the implementation of the extreme risk laws and examining an array of issues that can arise in these proceedings, including:

- the use of findings in Extreme Risk Protection Order proceedings in other proceedings, including criminal and mental health matters;
- the right to counsel;
- the protection against self-incrimination;
- training for law enforcement and others with the authority to seek Extreme Risk Protection Orders, and for judges who preside over the hearings;
- input of professional mental health expertise during a hearing when needed to assist the judge in reaching a determination; and
- expanding the jurisdiction for the courts hearing Extreme Risk Protection Order proceedings to city and county courts.

NYSBA will be reporting on these issues in the future.

**Margaret J. Finerty** is a partner at Getnick & Getnick in New York City. Her practice areas include federal and state False Claims Act qui tam litigation, IRS and SEC whistleblower matters, corporate monitorships, internal investigations, and business integrity counseling. Finerty served on NYSBA's Executive Committee for eight years and has been a member of its House of Delegates for over 20 years. She recently co-chaired NYSBA's Task Force on Mass Shootings and Assault Weapons and was just appointed to a three-year term as a member of the ABA's Standing Committee on Gun Violence.

**Endnotes**

1. 597 U.S. ___, 142 S. Ct. 2111 (2022).
2. New York Penal Law § 400.00(2)(f).
3. Jesse McKinley, Alex Traub and Troy Closson, *Gunman Kills 10 at Buffalo Supermarket in Racist Attack*, N.Y. Times, May 14, 2022, https://www.nytimes.com/live/2022/05/14/nyregion/buffalo-shooting.
4. *What to Know About the School Shooting in Uvalde, Texas*, N.Y. Times, July 17, 2022, https://www.nytimes.com/article/uvalde-texas-school-shooting.html.
5. An online version of the task force report is available at https://nysba.org/app/uploads/2020/11/12.-Final-Report-11.5.2020-Task-Force-on-Mass-Shootings-and-Assault-Weapons-With-cover-FINAL.pdf.
6. The case was a 6–3 decision with Justice Thomas writing the majority opinion, and Justices Roberts, Alito, Gorsuch, Kavanaugh and Barrett joining. Justice Breyer wrote a dissent, with Justices Sotomayor and Kagan joining. Justices Alito, Barrett and Kavanaugh wrote concurring opinions, with Justice Roberts joining in Justice Kavanaugh's concurrence.
7. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. ___, 142 S. Ct. 2111, (2022).
8. *E.g., In re Klenosky*, 75 A.D.2d 793 (1st Dep't 1980).
9. 554 U.S. 570 (2008).

10. 561 U.S. 742 (2010).

11. Justice Thomas noted that *Heller's* textual and historical analysis of the Second Amendment conferred the right to keep and bear arms on the individual regardless of service in the militia. 554 U.S. at 592, 595.

12. The court specifically rejected a means-end scrutiny analysis that is often applied by courts in assessing the constitutionality of laws that impact on constitutionally protected behavior. Means-end scrutiny has been described as:

> [A]n analytical process involving examination of the purposes (ends) which conduct is designed to serve and the methods (means) chosen to further those purposes. When government action is subject to a constitutional limit, courts frequently evaluate the justification for that action. If a sufficient justification exists, the action may be permitted despite the applicability of the limit. If the courts find the justification insufficient, they hold that the action violates the limit and is unconstitutional. Means-end scrutiny is a systematic method for evaluating the sufficiency of the government's justification for its conduct.

Russell W. Galloway, *Means-End Scrutiny in American Constitutional Law,* Loyola of Los Angeles L. Rev., Vol. 21, No. 2, Art. 1 (1988).

13. *See* 18 U.S.C. § 922(g). For example, it is illegal for persons in the following categories to possess a firearm: convicted of a crime punishable by imprisonment for more than one year (18 U.S.C. § 922(g)(1)); fugitive from justice (18 U.S.C. § 922(g)(2)); unlawful user of, or addicted to, a controlled substance (18 U.S.C. § 922(g)(3)); adjudicated as a mental defective or committed to a mental institution (18 U.S.C. § 922(g)(4)); illegally or unlawfully in the United States (18 U.S.C. § 922(g)(5)); dishonorably discharged from the Armed Forces (18 U.S.C. § 922(g)(6)); U.S. citizens who have renounced their citizenship (18 U.S.C. § 922(g)(7)); subject to a domestic violence restraining order issued after a hearing on notice (18 U.S.C. § 922(g)(8)); convicted of a misdemeanor domestic violence crime (18 U.S.C. § 922(g)(9)). There are state laws that have added to these categories.

14. *District of Columbia v. Heller*, 554 U.S. 570, 626–27, 661 n. 26 (2008); *McDonald v. Chicago*, 561 U.S. 742, 786 (2010).

15. S.51001/A.41001.

16. 18 U.S.C. § 930 prohibits the carrying of a firearm or other dangerous weapon in a federal facility, such as federal office buildings, as well as a federal courthouse, by anyone who is not authorized to do so. A violation of this provision is a misdemeanor for federal facilities and a felony for federal courthouses.

17. The convictions considered will have occurred within the last five years.

18. The shooter in the Buffalo case was wearing a steel-plated vest, which would be included in this broader definition.

19. Prior to this legislation, New York was one of the states that relied on the FBI to conduct background checks through NICS.

20. McKinley, et al., *Gunman Kills 10 at Buffalo Supermarket in Racist Attack*, N.Y. Times, May 14, 2022, https://www.nytimes.com/live/2022/05/14/nyregion/buffalo-shooting.

21. *What to Know About the School Shooting in Uvalde, Texas*, N.Y. Times, July 17, 2022, https://www.nytimes.com/article/uvalde-texas-school-shooting.html.

22. Executive Order No. 19, *Directing the State Police to File Extreme Risk Protection Orders*.

23. Ashley Southall, Chelsia Rose Marcius and Andy Newman, *Before the Massacre, Erratic Behavior and a Chilling Threat*, N.Y. Times, May 15, 2022, https://www.nytimes.com/2022/05/15/nyregion/gunman-buffalo-shooting-suspect.html.

24. S.9458/A.10503. In order to obtain a license a person must be 21 years of age or older. Since a person must now have a license to possess a semiautomatic rifle, those under 21 years of age will not be able to buy such weapons. This law would have banned the Buffalo shooter from purchasing the weapon he used.

25. S.9407-B/A.10497.

26. S.9113-A/A.10502. In addition to law enforcement, family members, and school officials having the ability to apply for an Extreme Risk Protection Order, now health care practitioners who have examined an individual within the last six months can do so as well.

27. S.9456/A.10504.

28. S.4511-A/A.7865-A

29. Michael R. Sisak, *22 mass shootings. 374 dead. Here's where the guns came from*, AP News, May 27, 2022, https://apnews.com/article/uvalde-school-shooting-buffalo-supermarket-texas-d1415e5a50eb85a50d5464970a225b2d; Jonathan Franklin, *Where AR-15-style rifles fit in America's tragic history of mass shootings*, NPR, May 26, 2022, https://www.npr.org/2022/05/26/1101274322/uvalde-ar-15-style-rifle-history-shooter-mass-shooting.

30. McKinley, et al., *Gunman Kills 10 at Buffalo Supermarket in Racist Attack*, N.Y. Times, May 14, 2022, https://www.nytimes.com/live/2022/05/14/nyregion/buffalo-shooting.

31. Robert Klemko, Silvia Foster-Frau and Shawn Boburg, *Gunman bought two rifles, hundreds of rounds in days before massacre*, Wash. Post, May 25, 2022, https://www.washingtonpost.com/nation/2022/05/25/uvalde-texas-school-shooting-gunman.

32. *Id.*; Southall, et al., *Before the Massacre, Erratic Behavior and a Chilling Threat*, N.Y. Times, May 15, 2022, https://www.nytimes.com/2022/05/15/nyregion/gunman-buffalo-shooting-suspect.html.

33. 597 U.S. ___, 142 S. Ct. 2111, 2128 (2022) (quoting *Heller*, 554 U.S. at 627).

34. 597 U.S. ___, 142 S. Ct. 2111, 2134.

35. If strict scrutiny is applied the government must prove the law is narrowly tailored to achieve a compelling governmental interest. If intermediate scrutiny is applied, the government must show that the regulation is substantially related to achieving an important governmental interest. Many appellate courts have determined that intermediate scrutiny is appropriate in reviewing Second Amendment cases.

36. This includes a case challenging New Jersey's restrictions on large-capacity magazines. Jacob Gershman, *Challenges to Gun Laws Take Off, After High Court Ruling*, Wall St. J., July 24, 2022, https://www.wsj.com/articles/challenges-to-gun-laws-take-off-after-high-court-ruling-11658664004.

37. Brian Lee, *Challenges to New York's Conceal Carry Permitting Restrictions Begin in Federal Courts*, N.Y.L.J., July 13, 2022, https://www.law.com/newyorklawjournal/2022/07/13/challenges-to-new-yorks-conceal-carry-permitting-restrictions-begin-in-federal-courts.

38. Andrew Denney, *Armed With SCOTUS' Ruling in 'Bruen,' New York Defense Attorneys Fighting Uphill Battle Against Gun Charges*, N.Y.L.J., July 29, 2022, https://www.law.com/newyorklawjournal/2022/07/29/armed-with-scotus-ruling-in-bruen-new-york-defense-attorneys-fighting-uphill-battle-against-gun-charges. One Judge that rejected such a challenge in *People v. Rodriguez*, 2022 N.Y. Slip Op. 22217, at *1-3 (Sup. Ct., N.Y. Co. 2022), stated: "Defendant, however, misreads both *Bruen* and the Second Amendment as conferring an unqualified entitlement to possess deadly weapons in public places without restriction"; "*Bruen* . . . did not hold that the State is powerless to criminalize the unlicensed possession of firearms on city streets."

39. Pub. L. 117-159.

40. 18 U.S.C. § 922(g)(9).

41. *Supra* note 39, TITLE II, § 12005(a)(2).

42. As noted in this article, the shooters in the Buffalo and Uvalde mass shootings were 18 years of age. There are numerous instances of mass shootings where the gunmen were under 21 years of age, including the 2018 Marjory Stoneman Douglas High School shooting in Parkland, Florida, and the 2012 Sandy Hook Elementary School shooting in Newtown, Connecticut, among many others.

43. *Supra* note 39, TITLE II, Section 12001.

44. *Supra* note 39, TITLE II, Section 12002.

45. *Supra* note 39, TITLE II, Section 12003. Specifically, the funding is to come in the form of grants from the BYRNE JAG Program.

46. *See* Alexander Bolton, *What's in the Senate's 80-page Bipartisan Gun Safety Bill*, The Hill, June 21, 2022, https://thehill.com/homenews/senate/3532042-whats-in-the-senates-80-page-bipartisan-gun-safety-bill.

47. 18 U.S.C. § 922(t)(1)(B)(ii).

48. 18 U.S.C. § 922(g)(3).

49. *See* Michael S. Schmidt, *Background Check Flaw Let Dylann Roof Buy Gun, FBI Says,* N.Y. Times, July 10, 2015, https://www.nytimes.com/2015/07/11/us/background-check-flaw-let-dylann-roof-buy-gun-fbi-says.html; Larry Buchanan, Josh Keller, Richard A. Oppel, Jr. and Daniel Victor, *How They Got Their Guns*, N.Y. Times, Feb. 16, 2018, https://www.nytimes.com/interactive/2015/10/03/us/how-mass-shooters-got-their-guns.html; Carrie Johnson, *FBI Says Background Check Error Let Charleston Shooting Suspect Buy Gun*, NPR, July 10, 2015, https://www.npr.org/sections/thetwo-way/2015/07/10/421789047/fbi-says-background-check-error-let-charleston-shooting-suspect-buy-gun; *Statement by FBI Director James Comey Regarding Dylann Roof Gun Purchase*, FBI Press Release, July 10, 2015, https://www.fbi.gov/news/press-releases/press-releases/statement-by-fbi-director-james-comey-regarding-dylann-roof-gun-purchase.

50. *Which States Have Closed or Limited the Charleston Loophole?* Everytown Research and Policy, https://everytownresearch.org/rankings/law/charleston-loophole-closed-or-limited. Many states have extended the time allowed for a background check to be completed by: (1) prohibiting the transfer of a firearm until a background check is completed or after the expiration of time greater than three days (e.g., Utah has an indefinite amount of time for a background check to be completed (Utah Code Ann. § 76-10-526(5)(b)); New York requires a license to purchase a handgun, and the FFL holder has up to 30 days before the firearm must be transferred, (N.Y. Penal Law §§ 265.00 et seq., 400.00, 400.01); (2) requiring the purchaser to obtain a license or permit prior to the transfer of a gun (e.g., New Jersey requires a permit to purchase a handgun or a Firearms Purchaser Identification Card to purchase a rifle or shotgun (N.J. Admin. Code § 13:54-1.9)); or (3) requiring mandatory waiting periods before transferring the gun to the purchaser (e.g., California has a 10-day waiting period that can be expanded up to 30 days if the background check is not completed, (Cal. Penal Code § 28220(f)(1)(A)). *See also*, Giffords L. Ctr., *Browse State Gun Laws* (Jan. 2020), https://giffords.org/lawcenter/gun-laws/browse-state-gun-laws.

51. *See* Bipartisan Background Checks Act of 2021, H.R. 8, 117th Cong. (as passed by House, Mar. 11, 2021); Enhanced Background Checks Act of 2021, H.R. 1446, 117th Cong. (as passed by House, Mar. 11, 2021). *See also*, Congress.gov, *H.R.1446 – Enhanced Background Checks Act of of 2021*, https://www.congress.gov/bill/117th-congress/house-bill/1446; Michael A. Goster, *Federal Firearms Law: Selected Developments in the Executive, Legislative, and Judicial Branches*, Congressional Research Service, Nov. 3, 2021, https://crsreports.congress.gov/product/pdf/R/R46958.

52. *Id.*

53. Andy Newman, Benjamin Weiser and Ashley Southall, *How a New York County Used the State's 'Red Flag' Law to Seize 160 Guns*, N.Y. Times, June 5, 2022, https://www.nytimes.com/2022/06/05/nyregion/red-flag-law-shootings-new-york.html.

# Supreme Court Turns a Blind Eye to Wrongful Convictions, Guts 6th Amendment Rights to Effective Counsel

By Cary Sandman

The Supreme Court's just-completed term has left many with concerns. In about half the states, women no longer retain their constitutional rights to bodily autonomy and reproductive health.[1] The lines separating what Justice Neil Gorsuch now refers to as the "*so-called* separation between church and state"[2] have been weakened.[3] New York's century-old gun safety regulations have been declared unconstitutional.[4] And the court stripped the Environmental Protection Agency of the power to respond to the climate crisis.[5] In the midst of these media-grabbing decisions, it would be unsurprising if you had not noticed another key ruling – court's sapping of the cherished Sixth Amendment right to effective criminal defense counsel.

In *Shinn v. Ramirez*, the court gutted its own precedents to render federal courts powerless to vindicate prisoners' fundamental Sixth Amendment rights to effective assistance of trial counsel.[6] The *Shinn* decision will make it more difficult to overcome wrongful convictions, and worse, in those states that still carry out capital punishment, *Shinn* will make it easier to carry out executions of prisoners who were indisputably denied their Sixth Amendment rights – even those who are actually innocent. *Shinn* is an important decision (and not in a good way) that deserves more attention.

Any serious Sixth Amendment discussion usually begins with *Gideon v. Wainwright*, and we do so here. *Gideon* enshrines a bedrock Sixth Amendment principle, essential to constitutional justice – a criminal defendant's right to counsel at trial.[7] The court described this right as indispensable to the protection of the right to a fair trial and "fundamental human rights . . . [because] if the institutional safeguards it provides be lost, justice will not still be done."[8] The court reaffirmed this principle in *Strickland v. Washington*, when it held that fulfillment of *Gideon*'s promise demanded professionally competent, reasonably effective assistance of counsel at trial.[9]

Finally, just a decade ago, the court announced a landmark decision in *Martinez v. Ryan* in which *Strickland*'s Sixth Amendment protection of the right to effective trial counsel was extended.[10] There, the court abrogated prior decisions barring federal habeas review of trial counsel ineffectiveness claims whenever the prisoner had failed to first assert the claim in initial state-court post-conviction proceedings, because his post-conviction counsel neglected to raise the claim. Instead, *Martinez* held that a prisoner's failure to present the claim in state court post-conviction proceedings would be excused when the prisoner's post-conviction counsel was also constitutionally ineffective within the meaning of *Strickland*.[11] After *Martinez,* if a prisoner failed to raise his trial counsel ineffectiveness claim in an initial state post-conviction proceeding, the court would excuse that failure if it was the result of negligent state post-conviction counsel.

*Martinez* was a critically important holding because, in most states, when the first state post-conviction attorney neglects to raise a constitutional claim in the first post-conviction proceeding, the prisoner is forever barred from bringing the claim in a later state court proceeding. This means, in the words of *Martinez*, that in the absence of federal review, "it is likely that no [] court at any level will hear the prisoner's claim."[12] *Martinez* eliminated that injustice.

But it seems that precedents don't carry as much weight as they used to in the Supreme Court. In its recent decision in *Shinn v. Ramirez*, the court took a wrecking ball to *Martinez,* and by turns, *Gideon* and *Strickland.* What the court had granted in *Martinez* it gutted in *Shinn*.[13] As explained in the three-justice dissent, *Shinn* "all but overrules [*Martinez*]," and "reduces to rubble many habeas petitioner's Sixth Amendment rights to effective assistance of counsel."[14] *Shinn*, now "hamstrings the federal courts' authority to safeguard" the right to effective assistance of trial counsel.[15] The results will be tragic and "will leave many people who were convicted in violation of the Sixth Amendment to face incarceration or even execution without any meaningful chance to vindicate their right to counsel."[16]

The respondents in *Shinn* were Arizona death-sentenced prisoners, Barry Jones and David Ramirez.[17] Jones and Ramirez relied on *Martinez* to raise their ineffective assistance of trial counsel claims in federal court, where they both proved that their appointed state post-conviction lawyers were ineffective for failing to raise substantial trial counsel ineffectiveness claims. Ramirez and Jones won relief in the lower courts in federal habeas proceedings based on evidence that their respective trial counsel were constitutionally ineffective.[18] The Supreme Court reversed their grants of relief.[19]

In *Shinn,* the court explained that the *Martinez* decision was well and good; that is, *Martinez* could excuse the failure to first present a claim asserting ineffective assistance of trial counsel in state court, when the state post-conviction counsel negligently failed to do so. But then the court hobbled *Martinez* by asserting that a provision in the Antiterrorism and Effective Death Penalty Act of 1996 at 28 U.S.C. § 2254(e)(2) barred federal courts from actually considering evidence supporting a trial counsel ineffectiveness claim when the same negligent post-conviction counsel who failed to raise the claim also failed to present supporting evidence to the state court.[20] In other words, a prisoner's failure to bring a claim in state court can be excused under *Martinez* due to state post-conviction counsel's negligence, but the prisoner's failure to develop and present evidence to the state court supporting that same, unraised, claim cannot be excused based on state post-conviction counsel's negligence because the statutory text in § 2254(e)(2) requires the negligence of post-conviction counsel to be imputed to the prisoner.

But make no mistake. The actual text of the statute says no such thing, explicitly or by reasonable implication. It is no wonder that in the decade between the decision in *Martinez* and the decision in *Shinn,* not a single lower federal court (district court or court of appeals) adopted *Shinn*'s twisted construction of the habeas statute.[21] The *Shinn* dissenters called the court's reasoning "perverse" and "illogical," an assertion easily supported.[22]

> *Martinez* and *Trevino*[23] establish that such a petitioner is not at fault for any failure to bring a trial-ineffectiveness claim in state court. Despite these precedents, the court today holds that such a petitioner is nonetheless at fault for the ineffective assistance of post-conviction counsel in developing the evidence of trial ineffectiveness in state court. The court instead holds that a petitioner in these circumstances, having received ineffective assistance of trial and post-conviction counsel, is barred from developing such evidence in federal court.[24]
>
> It makes no sense to excuse a habeas petitioner's counsel's failure to raise a claim altogether because of ineffective assistance in postconviction proceedings, as *Martinez* and *Trevino* did, but to fault the same petitioner for that post-conviction counsel's failure to develop evidence in support of the trial-ineffectiveness claim. In so doing, the court guts *Martinez*'s and *Trevino*'s core reasoning. The court also arrogates power from Congress: the court's analysis improperly reconfigures the balance Congress struck in the Antiterrorism and Effective Death Penalty Act between state interests and individual constitutional rights.[25]

The driving force of the court's decision was its so-called respect for state's rights. Justice Thomas made this clear, explaining that "[u]ltimately . . . [i]n our dual-sovereign system, federal courts must afford unwavering respect to the centrality of the trial of a criminal case in state court."[26] Otherwise there would be "an affront to the State and its citizens who returned a verdict of guilt after considering the evidence before them."[27] And with that, the court eradicated any principled basis for

protecting the Sixth Amendment guaranty of a fair trial led by constitutionally adequate counsel; "categorically prioritize[ing] maximal deference to state-court convictions over vindication of the constitutional protections at the core of our adversarial system."[28] *Shinn* will make it virtually impossible for many wrongfully convicted and wrongfully sentenced prisoners to vindicate their Sixth Amendment rights to effective assistance of trial counsel. Barry Jones' case provides a prime example.

> Jones was charged with the murder of his girlfriend's 4-year-old daughter, Rachel Gray. The State argued that Rachel died as a result of an injury she sustained while in Jones' care. Jones' trial counsel failed to undertake even a cursory investigation and, as a result, did not uncover readily available medical evidence that could have shown that Rachel sustained her injuries when she was not in Jones' care. Having heard none of this evidence, the jury convicted Jones and the trial judge sentenced him to death.[29]

In federal habeas proceedings, Jones's conviction was overturned (subject to Arizona's right to retry him) on grounds that he was denied his Sixth Amendment right to effective assistance of trial counsel.[30]

Of course, the Supreme Court reversed the grant of habeas relief to Jones, but not because he had failed to prove his constitutional rights had been denied to him nearly 30 years ago. Instead, the court turned a blind eye to the constitutional violations in Jones's case, including his obvious wrongful conviction, and corresponding decades on death row, to achieve its goal of paving the path to deny any federal review of his claim. This also earned deserved criticism from the dissent.

> [T]he Court understates, or ignores altogether, the gravity of the state systems' failures in these two cases. To put it bluntly: Two men whose trial attorneys did not provide even the bare minimum level of representation required by the Constitution may be executed because forces outside of their control prevented them from vindicating their constitutional right to counsel. It is hard to imagine a more extreme malfunction than the prejudicial deprivation of a right [to effective assistance of counsel that constitutes the foundation for our adversary system].[31]

*Shinn* is remarkable for its utter indifference to injustice, the precise outcome *Gideon* was intended to prevent.[32] Instead, the court disregarded its own precedents and established a new precedent that will insulate many wrongful convictions and constitutionally tainted death sentences from federal review. This happens only because an indigent prisoner loses the lawyer lottery whenever the state court appoints an unqualified incompetent lawyer to represent the prisoner in their initial state post-conviction review proceedings. It is disheartening that the court seems oblivious to the consequence of its decision – human suffering, especially in capital cases, where the decision will streamline executions of prisoners for crimes they did not commit, or for punishment they did not deserve. It brings to mind the words of George Bernard Shaw: "The worst sin towards our fellow creatures is not to hate them but to be indifferent to them. That is the essence of inhumanity."[33] And so it is.

We'd like to believe, as Dr. Martin Luther King Jr. said, that "the moral arc of the universe bends toward justice." But in our own time, the court has ensured that for the far too many people who have been deprived of the right to a fair trial and who are being wrongfully incarcerated, justice is not inevitable. It is now up to the Congress to reverse this unconscionable decision. In the meantime, the fight for justice goes on.

**Cary Sandman** joined the Arizona federal public defender's office in 2011 to work on postconviction, death penalty cases. Several of his clients have had death sentences overturned. He represents Barry Jones, whose wrongful conviction has been reinstated as a result of the *Shinn v. Ramirez* decision discussed in the accompanying NYSBA article. Before joining the Arizona federal public defender's office, Sandman was in private practice for 35 years, handling mostly commercial litigation.

**Endnotes**

1. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).
2. Statement of Justice Gorsuch during the Jan. 18, 2022, oral argument in *Shurtleff v. Boston*, No. 20-1800.
3. *Carson v. Makin*, 142 S. Ct. 1987 (2022) (mandating public funding of religious education); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) (public schools must permit school officials to kneel and say prayers at the center of a school event).
4. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).
5. *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587 (2022).
6. *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022).
7. *Gideon v. Wainwright*, 372 U.S. 335–36 (1963).
8. *Id.*, at 342–43 (internal quotations omitted).
9. *Strickland v. Washington*, 466 U.S. 668 (1984).
10. *Martinez v. Ryan*, 566 U.S. 1 (2012).
11. *Id.* at 17.
12. *Id.* at 10.
13. *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022).
14. *Id.* at 1740, 1750 (Sotomayor, J., dissenting).
15. *Id.* at 1740.
16. *Id.*
17. Jones and Ramirez were joined in the *Shinn* case due to commonality of the legal question presented; otherwise, their cases have no relation.
18. *Shinn*, 142 S. Ct. at 1741–43 (Sotomayor, J., dissenting).
19. *Id.* at 1740.
20. *Id.* at 1737–38.
21. *Jones v. Shinn*, 943 F.3d 1211, 1220–22 (9th Cir. 2019) (finding 28 U.S.C. § 2254(e)(2) does not prevent a district court from considering new evidence, developed to overcome a procedural default under *Martinez v. Ryan*, when adjudicating the underlying claim on de novo review), *rev'd sub nom. Shinn v. Ramirez*, 142 S. Ct. 1718 (2022); *Sasser v. Hobbs*, 735 F.3d 833, 853–54 (8th Cir. 2013) (same); *White v. Warden, Ross Corr. Inst.*, 940 F.3d 270, 279 (6th Cir. 2019) (same); *Stokes v. Stirling*, 10 F.4th 236, 244–56 (4th Cir. 2021), *cert. granted, judgment vacated in light of Shinn v. Ramirez*, 142 S. Ct. 2751 (2022).
22. *Shinn*, 142 S. Ct. at 1740 (Sotomayor, J., dissenting).
23. *Trevino v. Thaler*, 569 U.S. 413 (2013).
24. *Id.* at 1741.
25. *Id.*
26. *Shinn v. Ramirez*, 142 S. Ct. at 1739.
27. *Id.*
28. *Id.* at 1748 (Sotomayor, J., dissenting).
29. *Id.* at 1741 (Sotomayor, J., dissenting).
30. *Id.* at 1742 (Sotomayor, J., dissenting).
31. *Id.* at 1749–50 (Sotomayor, J., dissenting) (internal quotations omitted).
32. *Gideon,* 372 U.S. at 342–43.
33. George Bernard Shaw, The Devil's Disciple (1897).

# Trigger Tranquility, Not Outrage:

## What the *Depp v. Heard* Trial Can Teach Clients About Communicating During Disputes

By Scott L. Malouf and Debra Hamilton

I used to be respected.
People took me at my word
Then I became a lawyer representing Amber Heard.

– Objection Hearsay, @thetruegadfly

Clients fighting online battles is usually bad; it generates notoriety, increases costs and raises the stakes for all parties. Naturally, social media victories are of no moment to a judge ("But, your honor, we have 500,000 likes!").

Worse, internet influencers can mercilessly exploit your client's problem for popularity. The Amber Heard/Johnny Depp trial is an epic example of online creators commandeering a lawsuit. The lyrics above come from a songwriter's TikTok about the trial. That video has 2.4 million views. Content creators from lifestyle influencers to K-pop fans posted about the trial, mostly in favor of Depp.[1] Their support of Depp may have been driven completely by their own economic interests:

> Johnny content performed a lot better . . . . When people do post stuff trying to defend Amber Heard, they will lose followers. A lot of major content creators probably don't even care about it that much – they just care about the views that it gets. – Content creator[2]

The adversarial nature of such social media discussions linked Heard and Depp's reputations. Public favorability ratings of both Heard and Depp suffered in connection with the case.[3] Handed this challenge, it is up to Heard and Depp on whether to harm or help each other going forward. Both parties have appealed, and future proceedings may be forthcoming. Heard has hinted that she may write a "tell all" book.

The ongoing connection between Heard and Depp, the effect of social media influencers on both and the notoriety of the trial make this case an excellent pedagogical tool to teach clients about the dangers of using social media and online communications during disputes.[4] This article explains how lawyers can manage client social media practices that make disputes more difficult to resolve.

## Current Legal Advice: "Don't Say Anything!"

Most clients aren't international celebrities. However, this doesn't mean that what they say on social media is unimportant. A client may post damning statements or images or communicate with the other party in unproductive ways.

When lawyers discuss the use of social media with clients, the focus is generally on preventing harmful posts or communications. The most common advice is simple: "Don't say or post anything!"

This is sound advice. Lawyers focus on the creation of potential evidence that may affect a client's position.[5] Similarly, frequent posts add extra expense and complexity in discovery.

## "I Gotta Say Something!": The Risks of Speech During Ongoing Disputes

There are many situations where client silence is not an option. Clients must speak to the opposing or interested parties during a variety of disputes: employment or educational discrimination claims, family law matters, business disputes during a service agreement, contested ownership of a pet and many others. If a client must communicate, the standard lawyer advice will be to keep statements brief and factual (e.g., "Just say when you will pick up the kids, don't fight about school.") and to capture anything untoward the other side posts.

Despite attorney admonitions, some clients feel they must discuss the matter on social media or may hope the dispute will propel the client to becoming an influencer.

Even after a dispute is settled, a client can, knowingly or unknowingly, engage in harmful communications. The client may post something that violates a non-disclosure agreement or an employee may bad-mouth a vendor after a supply dispute is resolved.

Attorneys also need to be mindful of third-party posts that can provide relevant information or affect a client's perspective. For example, an auto accident or criminal incident might be covered in a local newspaper, news blog or on social media. A client's family may wish to "set the record straight" through comments or replies. Or a family member might disclose terms of a confidential settlement on social media, possibly threatening the settlement.[6] Students are heavy users of technology, so educational claims may involve third parties sharing relevant information or affecting client views. Even attorneys can be outsiders influencing a party.[7]

## Social Media Triggers Our Emotions and Reduces a Client's Ability To Resolve a Dispute

Beyond providing potential evidence, using social media can affect a client's perception of the opponent or the matter as well as influence substantive decisions. Social media's innate properties may also undermine the parties' ability to reach a collaborative, or even reasonable, resolution in several ways:

1. Social media and our devices constantly tempt us. Smartphones are omnipresent and our online accounts demand our attention (have you been notified of a text, post or email while reading this article?). Also, without prompting, many of us look at these devices in quiet moments, for fear of missing a message or funny post or just to soothe anxiety or relieve boredom.
2. Online tools are required for modern life. If we wished to end heated, unthoughtful communica-

tions between disputing parties, we could build in a cooling-off period. We could insist all communications take place via U.S. mail. However, in 2022, few of us would take a bet that clients would select that option or feel able to manage their affairs wholly offline.

3. Social media posts can be emotionally fulfilling for their creators and recipients. If an employee experiences unfavorable treatment at the hands of management, writing a post or creating a TikTok can give the employee a sense of power over a perceived injustice. Receiving likes, positive comments, and/or seeing the post go viral adds to that sense of fulfillment for many.
4. Many successful creators prefer emotional content; it is generally more engaging and more likely to go viral. Tools such as one-sided descriptions, simple and/or simplistic framing, ad hominem attacks, coarse language and other techniques may promote user engagement. They also are highly likely to anger, frustrate or humiliate the subject of the post and encourage similar responses.

These social media factors, especially when communicating with an opponent, reduce all parties' ability to see the dispute dispassionately and work collaboratively to resolve the matter.

## Tools To Get Ahead of the Problem

So how do attorneys keep clients out of this spiral?

Learn the pitfalls of social media and discuss the risks with clients.[8] Explain that social media posts about or relevant to the dispute, especially inflammatory posts, create challenges, such as increased e-discovery costs, delayed resolution through more complex discovery demands and motion practice, potential harm to the poster's substantive legal position, and undermining the parties' relationship and/or reputations. Inform clients that inflammatory posts reduce the likelihood of resolving the matter quickly.

Don't forget third parties! Remind the client that discussing attorney advice with others can lead to the loss of attorney-client privilege. Also, clients sharing the terms of a confidential settlement may be putting the settlement at risk. Tell clients that social media posts by family members or others discussing this information may be evidence the client is talking out of school.

Trigger tranquility. Repeatedly remind clients of the harms of thoughtless communication. In situations where the parties or others are likely to communicate in an unhelpful manner, the following ADR processes focused on addressing party social media practices can reduce risks and induce client caution.

1. **Employ a conflict coach**. A conflict coach is a certified professional who helps a client effectively "vent" to the coach. Then the coach and client reframe the client's position so that it can be better appreciated and understood by the recipient. The coach does not directly assist the client in the underlying dispute. The coach is closer to a filter; helping the client see matters in a more neutral manner. A coach also identifies a client's "triggers" (usually known by their opponent) and provides the client with tools to diminish or eliminate a triggered response, thereby preventing a potential opponent's thrill of setting off the client.

   A coach cannot affect posts made by an opponent or others so additional tools may be necessary.

2. **Engage a mediator**. Neutral mediators enable disagreeing parties to have a constructive discussion in a confidential setting. They work with all parties and their attorneys to identify the issues, review positions, evaluate those positions and find a path forward.

   During a dispute, when social media posts are harming one or both parties, the parties can agree to bifurcate party social media practices from the underlying dispute and mediate problems arising from those practices.

   There are two key benefits of using mediation. First, the parties build confidentiality into their process because mediation is inherently confidential. For example, at the time of contracting to mediate, the terms and processes to be used in the mediation will be agreed upon. The mediator will likely require the parties to agree they will not discuss or share information about the dispute or what is said in the mediation with others not present. As a result, parties can experience that *not* speaking (or posting) has benefits as well as see that the opponent is also making an effort to resolve the dispute.

   Second, the mediator can suggest actions that prevent relevant future posts. For example, the mediator might get assurances from the parties that they will not post about the dispute for a short period.[9] Or the parties may agree to actively discourage third parties from posting about the matter.[10] The mediator can also explore with both parties' immediate social media problems such as how posts may reduce business generation, create emotional distress, etc.

3. **Choose arbitration**. If the parties are intractable or social media use by the parties or others creates a major hindrance to resolving the underlying dispute, the parties may choose arbitration of social media issues. An arbitrator works to resolve disputes quickly, address a recalcitrant party and may order a party to remove prior posts.

Arbitration of social media disputes must be carefully designed. Generally, arbitrators are limited by the powers given in an agreement, cited rules, statutes, and the understood sense of fairness. Defining what powers an arbitrator might possess (such as directing the removal of a post or setting damages), how parties are to act across multiple social media platforms, as well as ensuring the First Amendment is respected and the arbitration process is operating at the speed of social media may be difficult.

## Conclusion

Remind clients of the real-world harms – as demonstrated by Amber Heard and Johnny Depp. Use the techniques above to educate difficult parties on how discretion and collaboration are better than "winning" social media. These shifts will help you and clients address their dispute by triggering tranquility, not outrage.

**Scott L. Malouf** is a social media attorney. He helps attorneys use social media evidence and assists with a variety of other digital issues. He also works with organizations to create effective and practical social media agreements, online policies, and responses to negative reviews. Malouf is a nationally recognized speaker on legal ethics and technology. He is based in Rochester.

**Debra Hamilton** is an attorney and mediator at Hamilton ADR-NC. Her focus is on conflicts between people over animals. She speaks on these matters nationally and internationally.

**Endnotes**

1. Taylor Lorenz, *Who Won the Depp-Heard Trial? Content Creators That Went All-In*, Wash. Post, June 2, 2022, https://www.washingtonpost.com/technology/2022/06/02/johnny-depp-trial-creators-influencers.

2. *Id.*

3. Inga Parkel, *Johnny Depp: Actor's Popularity Drops After Winning Amber Heard Trial, New Data Says,* The Independent, June 10, 2022, https://www.independent.co.uk/arts-entertainment/films/news/johnny-depp-amber-heard-popularity-trial-win-b2098395.html; Emma Nolan, *Amber Heard Ranks Higher Than Vladimir Putin on Most Hated People List*, Newsweek, July 22, 2022, https://www.newsweek.com/amber-heard-ranks-higher-vladimir-putin-most-hated-people-list-1727180.

4. For simplicity, we will use the term "social media" going forward, but the advice herein is equally applicable to communication activities like texting, messaging, emailing, using online tools that allow comments among users, as well as other communications between stakeholders or that discuss a client's matter.

5. For a detailed discussion of the mechanics of preserving social media information, *see* Andrew J. Weinstein and Barrie A. Dnistrian, *Preserving Social Media Is a Must – but How?*, NYSBA Journal, May 2019. The full May 2019 NYSBA Journal is found here: https://nysba.org/app/uploads/2020/04/NYSBA_Journal_MAY19_WEB.pdf.

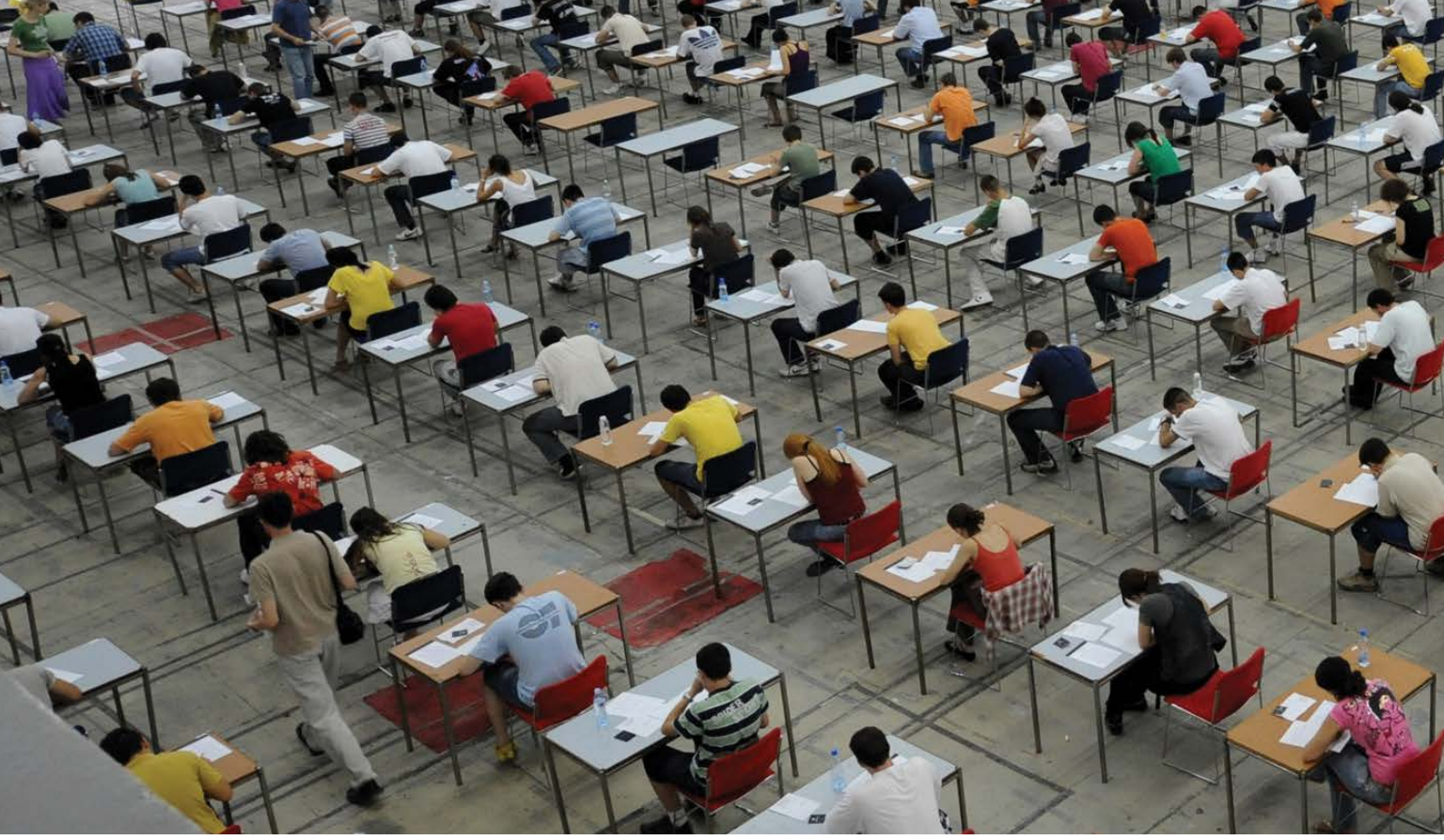
6. Matthew Stucker, *Girl Costs Father 80,000 with 'SUCK IT' Facebook Post*, CNN, Mar. 4, 2014, https://www.cnn.com/2014/03/02/us/facebook-post-costs-father/index.html.

7. *In re Sitton*, 618 S.W.3d 288 (Tenn. Sup. Ct. 2021) (attorney who advised woman, via Facebook, on how to make hypothetical murder of ex-husband appear to be self-defense receives four-year license suspension. Ex-husband saw attorney's post and reported attorney to authorities).

8. An attorney should consider several steps to reduce future, relevant client social media posts, including: addressing client social media practices in an engagement letter, having a staff member monitor client social media, utilizing social media monitoring software, reviewing posts before publication, and sending automated reminders to clients that social media is subject to preservation and discovery obligations. The volume, frequency, and variety of post formats (e.g. video, image, text, etc.) may make such tracking laborious. Clients should also be reminded that posts by family, friends, employees and others may be found by opposing parties or subject to discovery requests.

9. Such a test can help refine the terms of a final non-disparagement or nondisclosure agreement.

10. Note: third parties are unlikely to be litigants in a dispute or may be beyond the reach of a court with jurisdiction.

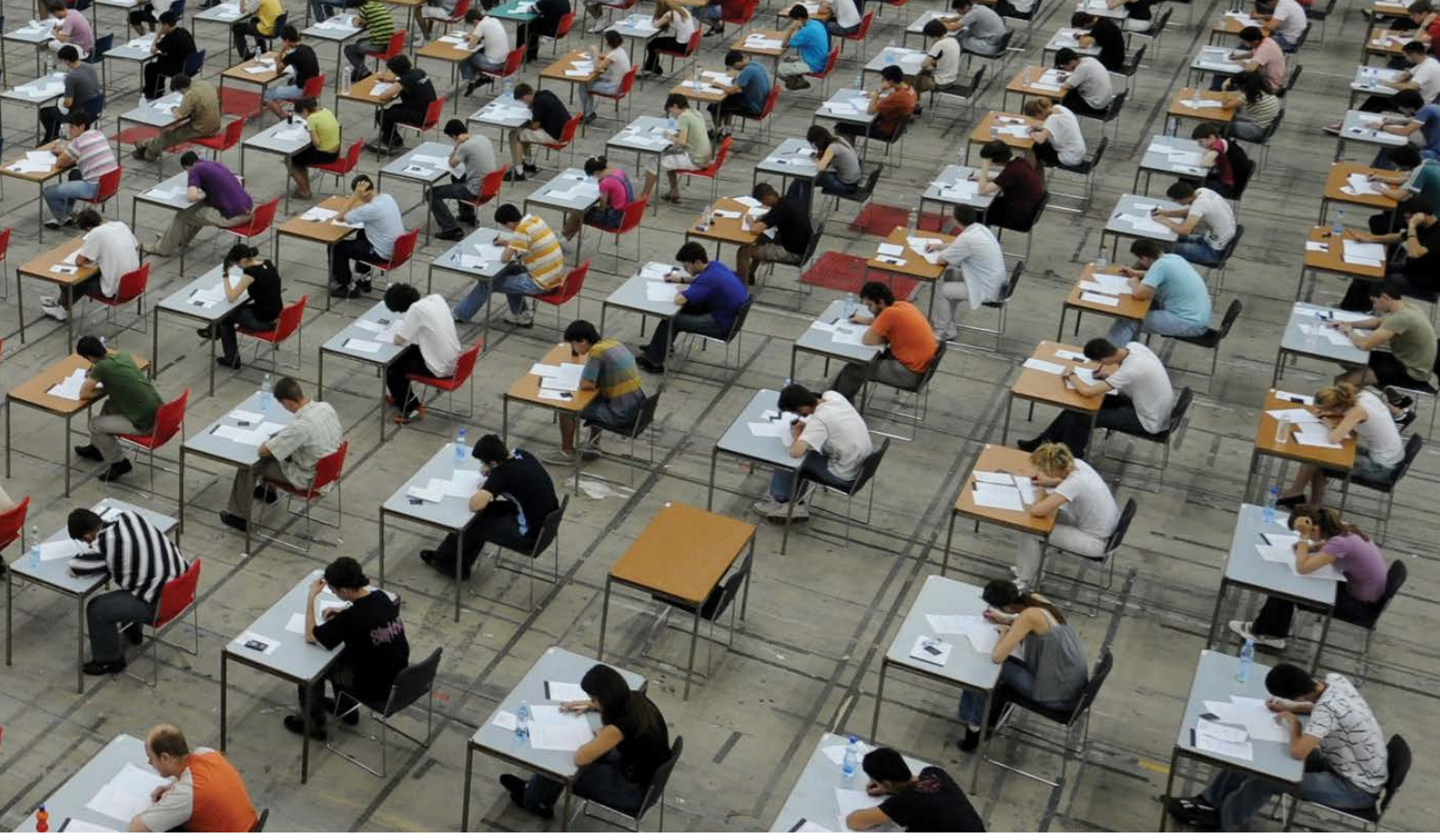


# LSAT-Optional Admissions: A Step in the Right Direction

By Eulas Boyd

The ABA's Strategic Review Committee has again recommended eliminating the requirement that law schools use a valid and reliable standardized test in admissions. It had done so in 2018 but withdrew the proposal before it could be formally adopted. This time feels different and more likely to pass. Adopting the proposal would bring the ABA in line with its professional school accreditor peers. This is a small, but potentially important, step in the direction of making a career in the law possible for far more students and enabling law schools to innovate and differentiate for everyone's benefit.

Consider the gatekeeping mechanisms most prospective U.S. lawyers must surmount: the SAT or ACT (despite recent test-optional admissions in some undergraduate schools), completing a bachelor's degree, the LSAT or GRE (often more than once to achieve a competitive score), completing a three- or four-year J.D. program, passing the bar exam, and the state bar admissions process. All of these processes are challenging and expensive



winnowing mechanisms, made easier only with substantial resources. In 2019 just 32% of Americans ages 25 or over had at least a bachelor's degree. For Black and Hispanic/Latino Americans those percentages are about 22% and 17% respectively. Accounting for student loan interest, private undergraduate education today can easily reach $400,000. Law school tuition and overall cost of attendance has similarly skyrocketed. For too many, a career in the law is just not within reach. Removing the testing requirement can and will make it easier for some, without flooding the profession with the unready.

To be clear, I am not suggesting that if Standard 503 is amended as proposed that we should or will see widespread adoption of test-optional admissions policies in law schools. What I am saying is that the availability of test-optional admissions policies will give law schools critically needed flexibility to experiment in admissions, which has the potential to facilitate beneficial change throughout legal education.

Right now, law schools are remarkably similar in curriculum, admissions, structure and career placement. Our first-year curricula are largely dictated by the ABA and a series of shared assumptions about important upper-class courses. Moreover, decades of commitment to the LSAT requirement have homogenized law school admissions. The result is a consistent legal education ecosystem across institutions that share a range of good qualities, like requirements to train lawyers in ethics and research and writing. But that, unfortunately, means that weaknesses are also shared and replicated across institutions. We have been trying to address problems like lack of diversity in the profession, poor attorney wellness, a gap between what employers and clients say they need and what law grads do well for a generation, but it's hard to see how we'll do it as things stand. We need significantly different kinds of law schools to build significantly different kinds of lawyers to address these challenges.

And there shouldn't be so great an adherence to our current admissions thinking such that we can't try something new. For all of our gatekeeping prowess, we are remarkably poor at measuring the relationship between our various gates and actual performance in the profession. We rely on bar passage as a proxy for qualification, but apart from a few studies showing some weak relationship between bar performance and late career ethics violations, we actually don't know how to predict who will be a great lawyer. What if all this time we have been screening for one range of qualities when we need others? Or, more to the point, what if some prospective students with relative strength in aptitudes we traditionally overlook in law school admissions, like collaboration, learning agility, quantitative reasoning, project management and emotional intelligence, are just as likely to be great lawyers if given different curricula or learning contexts?

Many defenders of the LSAT and other standardized tests believe they promote diversity by permitting students that either attended less well-known undergraduate schools or that had lower undergraduate GPAs to

distinguish themselves in law school admissions with one competitive test score. But the lesson of DEI initiatives across industries is that helping a few more through the door should never be the point. Given how poorly these tests predict academic performance without all the accompanying context of a holistic review process, this Hail Mary benefit is a meager tradeoff in comparison to building a fulsome and complimentary admissions and curricular environment designed purposely to enable diverse students to succeed.

**"I suspect we'll see standardized tests in admissions until we can satisfy ourselves that we can still make these relative judgments about prospective students."**

Without the testing requirement, maybe we'll see more 3+3 programs, accelerated programs and specialized extended programs for nontraditional students from underrepresented, but highly desirable, professional backgrounds. Maybe we'll see schools experiment with alternative curricula for students admitted under nontraditional criteria. Perhaps schools will implement more apprenticeship or lab models. Some schools may develop programs that better address the needs of disabled and neurodiverse students. With new flexibility in distance learning, creative class scheduling, and now a potentially crucial change in admissions criteria, we have a real chance to make this a moment of transformation for our industry.

These initiatives will be tepid at first, with most schools continuing to require the LSAT or GRE for the majority of their entering students even if they technically adopt test-optional policies. Law school admissions, like most professional and private undergraduate higher education, is not just about qualification, but rather intense competition. We do not assess applicants against a standard of "good enough" or not. Our charge is to enroll "the best" students we can, given the pool. We believe we do this in service of students to acknowledge and reward their academic success and tenacity; in service to our schools on the theory that the strongest students will produce the most dynamic and valuable intellectual experience for students and faculty; and in service to clients on the theory that we owe them the best possible lawyers. I don't know if this intense competition paradigm is correct, but I do know that I practice it, and every law school with which I have been associated practices it. So, I suspect we'll see standardized tests in admissions until we can satisfy ourselves that we can still make these relative judgments about prospective students.

Still, just as was the case with the arrival of the GRE, some schools will be more aggressive, and others may be followers but with better ideas or better execution. The important thing is that law schools get more degrees of freedom. We must change and grow before we are disrupted by technology, other professions or some combination.

If it does move forward with this change, the ABA seems likely to adopt it in a way that ensures only the most gradual uptake of test-optional policies. The first issue with adoption will be lack of clarity on reporting requirements under the new rule. If a student has a valid LSAT score but does not report it, preferring to be evaluated under a test-optional policy, but the ABA requires that score's inclusion in the school's annual data report, it will be functionally the same as if that student submitted their LSAT score. Schools cannot ignore LSAT scores that affect their reportable medians under the current rubric. If the ABA issues a different rule or says nothing, and U.S News is similarly obscure on how it will include these students in its methodology, many schools will wait until the rules are clear or limit these programs to a statistically insignificant number of students.

But truthfully it will take substantial time for anything at all to happen. This recommendation is out for comment until at least November and won't be taken up by the House of Delegates of the ABA until its February meeting. The Strategic Review Committee has the last word, but the House of Delegates can send it back for additional consideration and comment, twice should it choose, and it's unclear when the committee would act were that to happen. There certainly appears to be no circumstance in which the 2023 entering admissions cycle would be impacted. Still, this is undeniably a step in the right direction, even if it is a slow and small one.

**Eulas Boyd** is the dean of admissions and financial aid at Brooklyn Law School. He practiced commercial litigation in New York for nine years before transitioning to careers in workforce planning, talent acquisition and law school admissions. He joined Brooklyn Law School in 2015 and is a graduate of Harvard Law School and Cornell University.


# Enforcing Mediated Settlement Agreements, or, When Is a Deal Really a Deal: An Analysis of *Murphy v. Institute of International Education*

By Steven M. Bierman

After a long day of mediation, success – the parties have reached agreement to settle their dispute. Together, counsel prepare a mediation settlement agreement incorporating material terms, and the parties, counsel and mediator sign it, understanding that a more comprehensive agreement will be prepared. Several days later, having had second thoughts, the plaintiff declares she does not wish to settle after all.

Is the mediation agreement enforceable by the defendant? Does a party's change of heart require deference, where the more detailed settlement agreement had not yet been finalized and signed? Should it matter that plaintiff is pro se and contends that she signed the mediation agreement under duress caused by her court-appointed mediation counsel and the mediator? The U.S. Court of Appeals for the Second Circuit recently grappled with these issues in

*Murphy v. Institute of International Education*,[1] an opinion authored by Hon. Richard J. Sullivan that is instructive for counsel, parties and mediators alike.

## The Dispute: Mediation, Settlement and Second Thoughts

In Feb. 2019, Philana Murphy, acting pro se, sued her employer, Institute for International Education, alleging unlawful employment discrimination in violation of federal, state and local employment laws. U.S. District Judge Andrew L. Carter Jr. referred the case to the Southern District of New York's mediation program and appointed pro bono counsel to represent plaintiff in the mediation.[2]

At the conclusion of the mediation, the parties advised the mediator that they had settled the dispute. Using a form supplied by the S.D.N.Y. Mediation Program, they prepared a document setting forth the case caption and titled "Mediation Agreement," beginning with the preprinted sentence: "IT IS HEREBY AGREED by and between the parties and/or their respective counsel that, following mediation, agreement has been reached on all issues." Below that, the parties handwrote, "In exchange for a discontinuance with prejudice and a general release of all claims," defendant will furnish to plaintiff one year's salary, two months COBRA premium contributions and regular pay and benefits through a set date. They next wrote, "A full settlement agreement w/applicable releases will follow." The parties, counsel and mediator all signed the mediation agreement, and the district court thereafter entered an order dismissing the case.[3]

Following the mediation, counsel negotiated a draft of a more comprehensive settlement agreement that included the institute's disclaimer of any liability and acknowledged its obligation to provide a neutral reference, and also included Murphy's obligation to keep the terms confidential, to not disparage defendant, to not seek employment with defendant and to not assist anyone else in pressing claims against defendant. The draft "full agreement" also included general provisions such as contract integration and interpretation.[4]

Three days after she signed the mediation agreement, Murphy contacted the district court and expressed a desire to revoke it. She was told to send an email to the court, which she did three days later. Plaintiff's email stated that she was nervous and confused during the mediation and had told her attorney that she was not comfortable signing; that her attorney advised that mediation "was the nicer portion of [her] lawsuit;" and that the mediator said that if plaintiff continued, she "would be stuck in a room filled with white men that would question every aspect of [her] life for hours."[5] Murphy called her mother, who advised her not to sign, and she took 10 minutes outside the room to "clear her head." Murphy stated that she then asked to have until Monday to think over the mediation agreement but was told "no" and that the mediation agreement included the most compensation she would ever receive. Murphy averred that she ultimately signed the mediation agreement because she "was so sad and felt [she] had no choice but to sign."[6]

## The Institute Seeks To Enforce

After Murphy refused to sign the "full agreement," the institute filed a motion to enforce the mediation agreement itself. Murphy, with new counsel, opposed. The parties agreed that whether the mediation agreement was enforceable was governed by the four-factor test set forth in 1985 by the Second Circuit in *Winston v. Mediafare Entertainment Corp.*:

> (1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing.[7]

The district court referred the motion to a magistrate judge, who issued a Report & Recommendation that the mediation agreement be enforced. The district court agreed, overruling Murphy's objections and concluding that "[c]onsidering all of the *Winston* factors, . . . the parties sufficiently indicated their intent to be bound by the signed Mediation Agreement, and, accordingly, that the Mediation Agreement is enforceable."[8] The district court (as had the R&R) also rejected plaintiff's additional argument that the mediation agreement not be enforced because she was "demeaned, disrespected and pressured during the mediation" and signed the agreement under duress.[9] The district court entered judgment in the institute's favor, and Murphy appealed.

## The Second Circuit's Framework for Analysis

In *Murphy*, the Second Circuit began by reminding, "It is well established that settlement agreements are contracts and must therefore be construed according to general principles of contract law."[10] The court then looked to the framework first posited by then-District Judge Leval in 1987 in *Teachers Insurance and Annuity Assn. of America v. Tribune Co.*,[11] and which the Second Circuit has applied in the decades since, identifying two kinds of preliminary contracts that New York law recognizes. The first (Type I) occurs "when the parties have reached complete agreement (including the agreement to be bound) on all the issues perceived to require negotiation," and is "preliminary only in the sense that the parties desire a more elaborate formalization of the agreement;" and the second (Type II) is one that "expresses mutual commitment to

a contract on agreed major terms, while recognizing the existence of open terms that remain to be negotiated."[12]

The Second Circuit noted that it previously had referred to the four-factor *Winston* test (on which the district court in *Murphy* exclusively focused) when determining whether something constitutes a Type I agreement and a modified five-factor version of that test when considering whether something is a Type II agreement.[13] But the court acknowledged that such factors "do not provide us with a talismanic scorecard" and, while helpful to consider, "the ultimate issue, as always, is the intent of the parties: whether the parties intended to be bound, and if so, to what extent."[14]

*Murphy* presented the Second Circuit with an unusual opportunity because, unlike in *Winston*, where the key issue was whether the parties intended to be bound, in *Murphy* the court was "confronted with a written agreement that has been executed" and thus, "the question instead is what kind of agreement did the parties make."[15] As the panel observed, "While we have a body of law distinguishing non-binding agreements from Type I agreements and non-binding agreements from Type II agreements, we have had fewer occasions to explain how courts should distinguish between Type I and II agreements when confronted with an agreement that is clearly binding in some sense."[16]

## A 'Paradigmatic Type I Agreement'

With the table thus set, the court in *Murphy* focused on the text of the mediation agreement, "which is the most important consideration when determining how the parties intended to be bound."[17] The court observed that, here, "the mediation agreement clearly states that 'agreement has been reached on all issues,' which is strong language indicating this is a Type I agreement," no less so because the language was pre-printed; this, the court found, was in contrast to a case in which the language of the agreement merely committed the parties to "work together in accordance with the terms and conditions outlined in" the agreement, "which would be a Type II agreement to continue negotiating."[18]

In addition to finding that the language of the mediation agreement was "unequivocal," the court determined that the language "reflects that the terms included in the agreement were the material terms" and that, "[a]lthough the mediation agreement clearly contemplates a final contract that 'would include additional boilerplate,' that does not prevent us from finding a Type I agreement so long as the parties 'foresaw no disputes relating to the boilerplate.'"[19] Indeed, the court noted, a Type I agreement, "by definition, contemplates a future formalization that will likely include some additional terms," but "trivial open issues will not prevent the court from upholding a Type I agreement.[20] While the draft "full agreement" in *Murphy* contained some terms not in the mediation agreement, including a confidentiality provision identified as material, there was no evidence to suggest that the parties considered those terms "open issues in need of negotiation at the time the parties entered into the mediation agreement, which is the proper frame of reference."[21]

Notably, the court found that the "context of the district court's mediation program further confirms that this was a Type I agreement."[22] As the court recounted, "everyone in the mediation understood the executed mediation agreement to bind the parties to its terms and not merely to set a framework for future negotiation," and the parties, their attorneys and the mediator all signed it; moreover, Murphy, by her own admission, "agonized over the mediation agreement, taking time to clear her head and call her mother before signing it, indicating that she thought the mediation agreement would bind her and conclude the litigation."[23] Thus, "there can be no doubt" that the parties intended to be bound, and their anticipation of "lawyer's embellishments" in a final formal agreement "in no way makes the mediation agreement unenforceable."[24] Indeed, the court observed, "To hold otherwise would defeat the very purpose of the mediation program and render the execution of mediation agreements a hollow and pointless exercise."[25]

## Plaintiff Did Not Sign the Mediation Agreement Under Duress

As she had argued in the district court, Murphy also contended on appeal that, due to pressure exerted by the mediator and her attorney, the mediation agreement was voidable because she signed it under duress. The Second Circuit noted that "repudiation of an agreement on the ground that it was procured by duress requires a showing of both a wrongful threat and the effect of precluding the exercise of free will."[26] The court rejected plaintiff's argument, finding "no evidence to support the contention that Murphy's free will was overcome" and that, to the contrary, Murphy "was given the opportunity to step outside of the room and collect herself, and she was given the opportunity to call her mother to discuss her options."[27] For that matter, although her attorney and the mediator "urged her to sign the mediation agreement, no one prevented her from leaving the mediation or continuing with the litigation."[28]

Moreover, the panel agreed with other courts and the Restatement (Second) of Contracts that "a party seeking to void an agreement based on duress must show that the alleged coercive behavior originated with the defendant or was known to the defendant at the time the agreement was made."[29] The court observed that Murphy had not described any coercive behavior by the institute during the mediation or alleged the institute's awareness of any such behavior; rather, insofar as Murphy was put under any pressure to sign the mediation agreement, "that pressure came from her counsel and the mediator, not the Institute or its attorneys."[30]

## Lessons for Enforceability

In *Murphy,* the Second Circuit provided welcome guidance regarding enforceability of mediated settlement agreements and the distinction for that purpose between "Type I" and "Type II" agreements. In affirming the judgment enforcing what it determined was "a paradigmatic Type I agreement, binding with respect to its terms despite contemplating a later formalization," the Second Circuit provided a significant guidepost for counsel, parties and mediators: "In all but the most unusual circumstances, mediation agreements that include express language indicating that the parties have reached agreement on all material terms are presumptively Type I agreements – unless the parties explicitly reserve the right not to be bound by the mediation agreement's terms until a final agreement is drafted and signed."[31]

For all participants in the process, *Murphy* underscores the importance, at the end of a long day of mediation, of memorializing the parties' intent through clear and precise drafting of a mediation settlement agreement embodying all material settlement terms, without explicitly stating that they will not to be bound (Type I), unless it is the parties' intention not to be bound pending execution of a more formal or extensive agreement (Type II), and, if so, to so state. And, even though the district and appellate courts rejected plaintiff's alternative argument that she signed the mediation agreement under duress, the litigation serves to remind all participants of the core mediation principle of party self-determination, in practice and appearance.

**Steven M. Bierman** is an independent mediator, arbitrator, and dispute resolution advisor, and founder of Bierman ADR. He is a fellow of the Chartered Institute of Arbitrators and accredited as a mediator by the Centre for Effective Dispute Resolution. He also serves on multiple ADR rosters, including the Mediation Panels for the U.S. District Courts for the Southern and Eastern Districts of New York and for the New York State Supreme Court (Commercial Division). Previously, he was a partner at Sidley Austin, where he headed or co-headed the New York Litigation Group for 25 years and was co-leader of its global commercial litigation and disputes practice. This article appears in a forthcoming issue of Dispute Resolution Lawyer, a publication of the Dispute Resolution Section. For more information, please see NYSBA.ORG/DISPUTE.

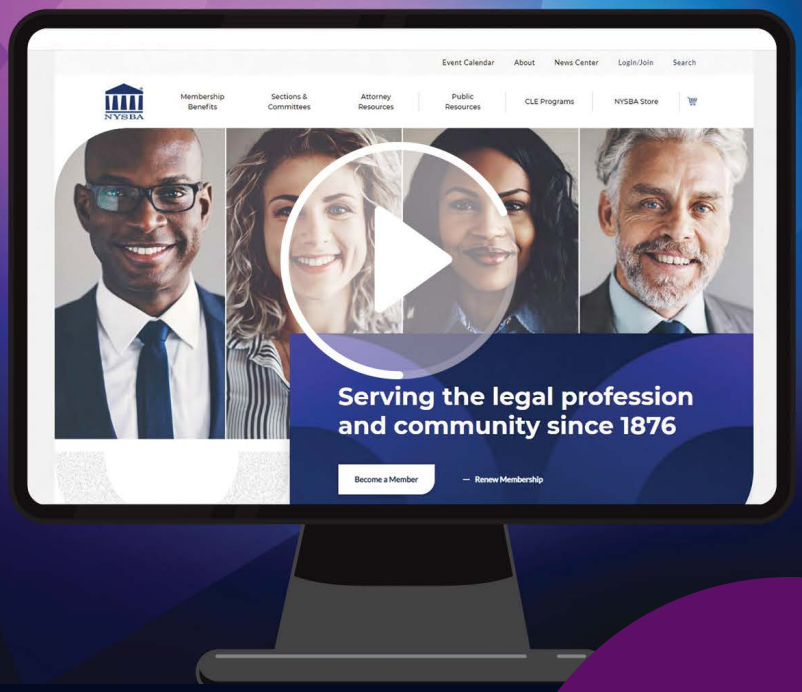
**Endnotes**

1. 32 F.4th 146 (2d Cir. 2022).
2. *Id.* at 149.
3. *Id.*
4. *Id.* at 149–50.
5. *Id.* at 150.
6. *Id.*
7. *Winston v. Mediafare Entertainment Corp.*, 777 F.2d, 78–80 (2d Cir. 1985).
8. *Murphy v. Institute of International Education*, No. 19-cv-1528, 2020 WL 5658628, at *4 (S.D.N.Y., Sept. 23, 2020).
9. *Id.*
10. *Murphy v. Institute of International Education*, 32 F.4th 146, 150 (2d Cir. 2022), quoting *Collins v. Harrison-Bode*, 303 F.3d 429, 433 (2d Cir. 2002).
11. 670 F. Supp. 491 (S.D.N.Y. 1987).
12. *Murphy*, 32 F.4th 146, 150–51 (2d Cir. 2022); *see Vacold LLC v. Cerami*, 545 F.3d 114, 124–29 (2d Cir. 2008); *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 71–73 (2d Cir. 1989).
13. *Murphy*, 32 F.4th at 151.
14. *Id.*, quoting *Vacold,* 545 F.3d at 125.
15. *Id.*
16. *Id.*
17. *Id.* at 152.
18. *Id.*
19. *Id.*, quoting *Vacold*, 545 F.3d at 129.
20. *Id.* at 152.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*, quoting from *United States v. Twenty Miljam-350 IED Jammers*, 669 F.3d 78, 88 (2d Cir. 2011) (internal quotation marks omitted).
27. *Id.* at 153.
28. *Id.*
29. *Id.*, citing *Evans v. Waldorf-Astoria Corp.*, 877 F. Supp. 911, 914 (E.D.N.Y. 1993), *aff'd*, 33 F.3d 49 (2d Cir. 1994), and Restatement (Second) of Contracts, § 175 (Am. Law Inst. 1981).
30. *Id.* at 154.
31. *Id.* at 153.

NYSBA CLE

# All Access Pass

## Maximize Your Time and Earn CLE Credits with On-Demand Learning




**Access hundreds of programs online and satisfy your MCLE requirement for one low price.**

> Gain access to all CLE Online video programs and course materials for one year

> New programs added each month

> Monthly billing option

**Includes Annual Meeting 2022 Programs!**

**$495 for NYSBA Members**

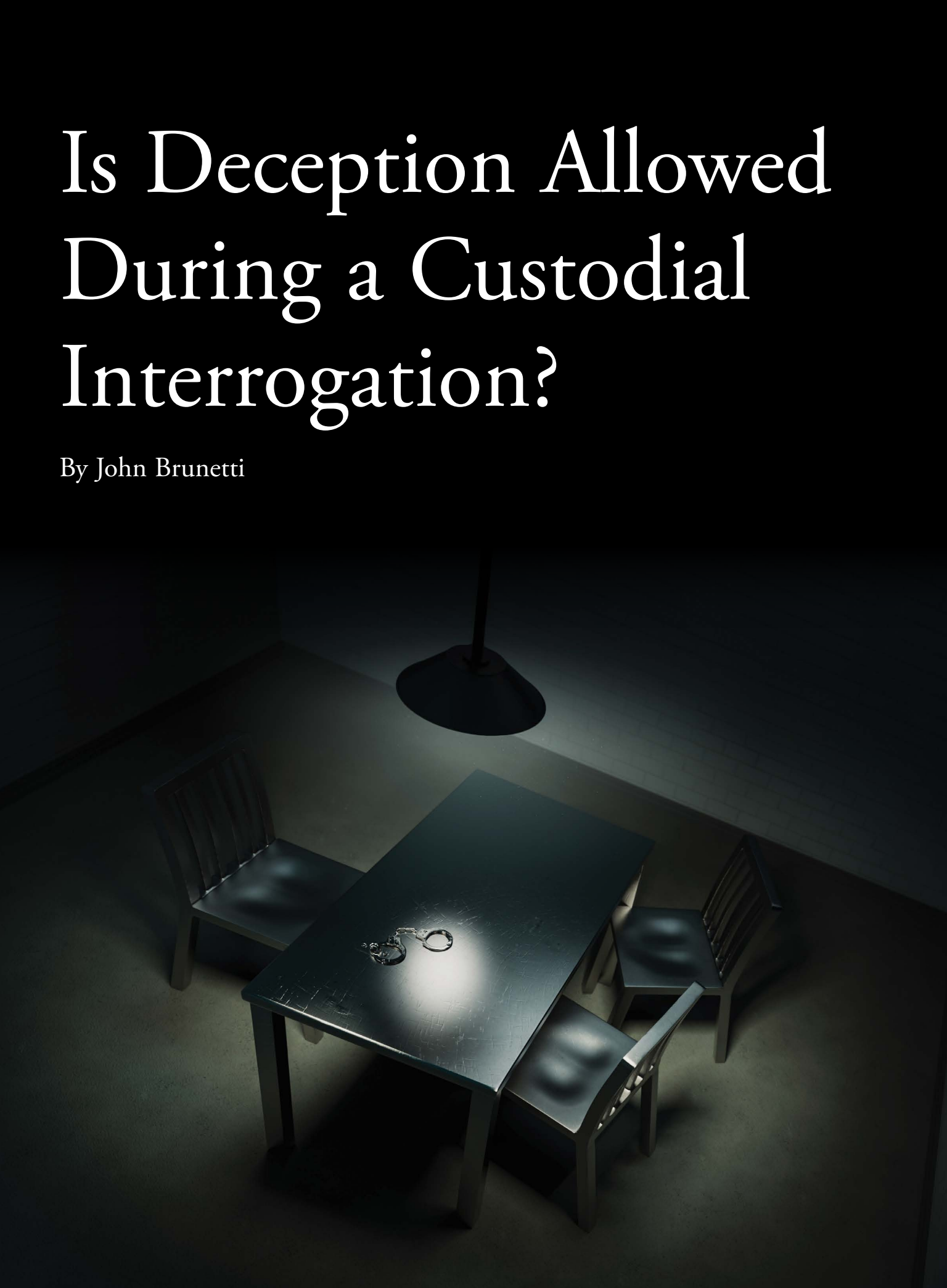
For more information visit **NYSBA.ORG/ALLACCESSPASS**

*Online only. Does not include live programs, CD or DVD products.*

*All Access Pass requires member login and cannot be transferred. Annual subscription required.*

# Is Deception Allowed During a Custodial Interrogation?

By John Brunetti



Neither the United States Supreme Court[1] nor the New York Court of Appeals has ever ruled that deception of a suspect undergoing a custodial interrogation to which *Miranda* applies is permitted.

The two cases often cited to support a claim to the contrary in relation to the Supreme Court[2] are *Frazier v. Cupp*,[3] to which *Miranda* did not apply,[4] and *Oregon v. Mathiason*,[5] where the suspect was not in custody when police told him his fingerprints were found at the scene.

As for our Court of Appeals, each defendant in the court's most famous deception cases, *People v. Tarsia*,[6] *People v. Tankleff*,[7] and *People v. Thomas*,[8] was not in custody when deceived, so *Miranda* did not apply. So, what case law was the Second Department referring to in 2012 when it asserted that a "review of the case law amply demonstrates that when interrogating a suspect, the police may, as part of their investigatory efforts, deceive a suspect, and any resulting statement will not be suppressed for that reason alone"?[9] Two older cases where *Miranda* did not apply[10] and three cases where the defendant was not in custody – *Tarsia* and two more recent cases.[11]

## The Importance of Custodial Status to the Meaning of Case Precedent

In announcing the *Miranda* rule, and explaining valid waivers, the U.S. Supreme Court said "[a]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege."[12] The court would later reassert this principle in *Moran v. Burbine*: ". . . the relinquishment of the right [to remain silent] must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception."[13]

The New York Court of Appeals' rule governing the admissibility of statements produced through deception was first expressed in *People v. Tarsia*[14] in the context of a non-custodial interview. Since the defendant in *Tarsia* was not in custody when he made his statement, *Miranda* was inapplicable. So, the only arguments he had to advance when seeking suppression of his statement based on deception were a traditional involuntariness/due process claim and a statutory CPL § 60.45(2)(b)(i) claim. It was in the context of rejecting the due process claim that the Court of Appeals stated the rule governing the use of deception to obtain a suspect's admission during a non-custodial interview that has been cited time and time again since: "But such stratagems need not result in involuntariness without some showing that the deception was so fundamentally unfair as to deny due process or that a promise or threat was made that could induce a false confession."[15]

Thirty-one years after *Tarsia* was decided, the Court of Appeals was presented with another non-custodial[16] deception case, *People v. Thomas*,[17] where the defendant[18] was assured eight times that he would be going home, told 67 times that his child's death was an accident, misinformed 21 times that the child was still alive and 14 times that he would not be arrested. His statement was ruled subject to suppression on both the grounds of involuntariness in the traditional sense and CPL § 60.45(2)(i) (police statement to suspect likely to induce a false confession).

While the *Tarsia* rule[19] was announced in a case where the statement was produced via deception in a non-custodial interview and has been properly applied to those settings by both the Court of Appeals[20] and Appellate Division,[21] it has also been cited by the Appellate Division in cases where the statement was the product of custodial interrogation.[22] Despite those decisions, there are Appellate Division cases that correctly recognize that *Tarsia's* applicability is dependent upon the interrogation having been non-custodial. Thus, in a Second Department case the court recognized the distinction in properly applying *Tarsia* and *Tankleff* in resolving the admissibility of a deception-induced statement made during a non-custodial interview, adding "since no promises or threats were made and *the defendant was not in custody*, this deception was not so fundamentally unfair as to render the defendant's subsequent statements involuntary."[23] The First Department would do the same one year later, holding that "since no promises or threats were made and *defendant was not in custody*, the deception employed by the police was not so fundamentally unfair as to render defendant's subsequent statements involuntary, or to deny him due process."[24]

## Deception in Extracting an Initial Waiver Versus Deception During a Custodial Interrogation

Is there a constitutional difference between the use of deception during a custodial interrogation to cajole a defendant into an initial agreement to speak with the police and the use of deception during the interrogation in order to cajole the defendant to answer a particular question? Supreme Court case law says there is no difference.

In *Miranda*, the Supreme Court said that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege" and later asserted that one of "[t]he purposes of the safeguards prescribed by *Miranda* [is] to ensure that the police do not coerce or trick captive suspects into confessing."[25] The court did not say "trick the suspect into agreeing to answer questions." The court said, "trick the suspect into confessing." Absent a blurt-out, the confession always comes after the initial rights advisement and initial waiver. So, *Miranda*'s prohibition on deception was expressly held to apply during a custodial interrogation.

In *Moran v. Burbine*,[26] the court held that "[o]nly if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." The court reiterated this principle in *Fare v. Michael C.*:[27] "[T]he determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have counsel."

In *Moran* and *Fare*, the court did not limit the scope of review of the *Miranda* rights waiver to the circumstances surrounding the defendant's initial decision to speak, but rather extended it to the circumstances surrounding the entire interrogation. That is because a suspect's decision to answer each question during the interrogation is a waiver of *Miranda* rights. The Supreme Court's decision in *Berghuis v. Thompkins*[28] confirms this principle.

In *Berghuis*, the court held that where there is evidence that a suspect has been advised of his rights and understood them, an express *Miranda* waiver is not required, and the suspect's answering a question three hours into the interrogation, after remaining selectively silent, constituted an implied waiver of *Miranda* rights.[29] Thus, the court made clear that a suspect's act of answering a question is a waiver of the *Miranda* right to remain silent. But just in case there is doubt about each answer during a custodial interrogation constituting a *Miranda* rights waiver, there's more.

In *Berghuis*, the Supreme Court said:

> Interrogation provides the suspect with additional information that can put his or her decision to waive, or not to invoke, into perspective. As questioning commences and then continues, the suspect has the opportunity to consider the choices he or she faces and to make a more informed decision, either to insist on silence or to cooperate.[30]

So, what right is the court talking about when it says that as to each question asked during an interrogation, the suspect makes a "decision to waive, or not to invoke"? The answer is the *Miranda* right to remain silent. What else could it be?

This article would not be complete if it did not make mention of the 2010 4–3 decision of the Court of Appeals in *Matter of Jimmy D.*[31] There, the three-judge dissent by judges who are no longer on the court agreed that each answer a suspect gives to an interrogator's question is, in and of itself, a discrete *Miranda* rights waiver: "Contrary to the majority's view, the continuing validity of a *Miranda* waiver is not a non-issue after the waiver has first been made, even in the absence of the waiver's retraction. Logically, every response made during a custodial interrogation is a reaffirmation of the original waiver."[32]

The four-judge majority of judges no longer on the court commented on the dissent as follows:

> The dissent, while acknowledging the validity of Jimmy's initial waiver, relies on a novel theory: that the validity of the waiver was vitiated by police misconduct that occurred after the waiver. . . . The dissent does not suggest that Jimmy was tricked or coerced into his initial waiver, or that Jimmy later invoked his rights and failed to waive them a second time.[33]

In evaluating the precedential value of *Jimmy D.*, it is noteworthy that neither the majority nor the dissent cited *Berghuis,* which had been decided four months earlier.[34]

---

**John Brunetti** previously served as a Court of Claims judge assigned to Supreme Court and currently serves as a judge of the Oneida Indian Nation Court. He is the author of "New York Confessions" (LexisNexis). This article appears in a forthcoming issue of NY Criminal Law Newsletter, a publication of the Criminal Justice Section. For more information, please see NYSBA.ORG/CRIMINAL-JUSTICE-SECTION.

## Endnotes

1. WestLaw search of "trick! /4 cajole! and miranda" in the U.S. Supreme Court database yields only four cases in addition to *Miranda* and none approves of deception of the suspect through lies during a custodial interrogation: *Colorado v. Spring*, 479 U.S. 564 (1987); *Connecticut v. Barrett*, 479 U.S. 523 (1987); *Orozco v. Texas*, 394 U.S. 324 (1969); and *Moran v. Burbine*, 475 U.S. 412 (1986). In *Colorado v. Spring*, 479 U.S. at 576 n.8, the court made clear via footnote that it was "not confronted with an affirmative misrepresentation by law enforcement officials as to the scope of the interrogation and [would] not reach the question whether a waiver of *Miranda* rights would be valid in such a circumstance."

2. *See, e.g.,* Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & Hum. Behav. 3, 13 (2010); Gohara, *A Lie for A Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 Fordham Urb. L.J. 791, 798–99 (2006); Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. Crim. L. & Criminology 219, 316 (2006); Garcia, *Regression to the Mean: How* Miranda *Has Become a Tragicomical Farce*, 25 St. Thomas L. Rev. 293, 297 (2013); Wilson, *An Exclusionary Rule for Police Lies*, 47 Am. Crim. L. Rev. 1, 28–29 n. 176 (2010). *Moran v. Burbine*, 475 U.S. 412 (1986).

3. *Frazier v. Cupp*, 394 U.S. 731 (1969).

4. *Id.* at 738 ("But *Miranda* does not apply to this case.").

5. *Oregon v. Mathiason*, 429 U.S. 492 (1977).

6. *People v. Tarsia*, 50 N.Y.2d 1 (1980).

7. *People v. Tankleff*, 84 N.Y.2d 992 (1994).

8. *People v. Thomas*, 22 N.Y.3d 629 (2014). The Appellate Division's finding that the defendant was not in custody (93 A.D.3d at 1024) was left undisturbed by the Court of Appeals.

9. *See People v. Aveni*, 100 A.D.3d 228, 237 (2d Dep't 2012), *appeal dismissed*, 22 N.Y.3d 1114 (2014).

10. *See People v. Aveni*, 100 A.D.3d 228, 237 (2d Dep't 2012), *appeal dismissed*, 22 N.Y.3d 1114 (2014), *citing People v. Pereira*, 26 N.Y.2d 265 (1970) and *People v. McQueen*, 18 N.Y.2d 337 (1966), both non-*Miranda* cases.

11. *See People v. Aveni*, 100 A.D.3d 228, 237 (2d Dep't 2012) *appeal dismissed*, 22 N.Y.3d 1114 (2014), *citing Tarsia* (a non-custody case) and two additional non-custody cases, *People v. Thomas*, 93 A.D.3d 1019 (3d Dep't 2012), reversed but not on the non-custody issue at 22 N.Y.3d 629 (2014) and *People v. Jordan*, 193 A.D.2d 890 (3d Dep't 1993).

12. *Miranda v. Arizona*, 384 U.S. 436, 476–77 (1966).

13. *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

14. *People v. Tarsia*, 50 N.Y.2d 1, 11 (1980).

15. *Id.* The cases cited for the due process reference were *People v. Leyra*, 302 N.Y. 353 (1951), *People v. Isaacson*, 44 N.Y.2d 511 (1978), cf. *Brewer v. Williams*, 430 U.S. 387 (1977) and for the false confessions, *People v. Pereira*, 26 N.Y.2d 265 (1970), *People v. McQueen*, 18 N.Y.2d 337 (1966) and *United States ex rel. Everett v. Murphy*, 329 F.2d 68 (2d Cir. 1964). *Leyra* is a traditional involuntariness case. *Issacson* is a dismissal case. *Pereira* was decided after *Huntley*, on facts which arose before *Miranda* was decided, so it is a traditional involuntariness case where the police failed to inform the defendant that the victim had died. That was not enough to constitute involuntariness. McQueen's trial took place in 1964, but her appeal was decided by the Court of Appeals in 1966. The court took particular note of the fact that it was free to apply *Miranda* retroactively, based upon the Supreme Court decision in *Johnson v. New Jersey*, 384 U.S. 719 (1966). In *McQueen*, it is not clear whether the defendant was deemed in custody, but she was told that the victim would identify her even though the victim was dead. That was not enough for involuntariness.

16. The Appellate Division's conclusion that the interrogation was non-custodial in *People v. Thomas*, 93 A.D.3d 1019 (3d Dep't 2012), was left undisturbed by the Court of Appeals. *People v. Thomas*, 22 N.Y.3d 629 (2014).

17. *People v. Thomas*, 22 N.Y.3d 629.

18. The Appellate Division's conclusion that the interrogation in *Thomas* was non-custodial, 93 A.D.3d 1019 (3d Dep't 2012), was left undisturbed by the Court of Appeals. *People v. Thomas*, 22 N.Y.3d 629.

19. *People v. Tarsia*, 50 N.Y.2d 1, 11 (1980). The Second Department has expressed the *Tarsia* test as whether or not the conduct was so "fundamentally unfair to the defendant as to deprive him of due process of law." *People v. Brewley*, 192 A.D.2d 540 (2d Dep't 1993), *lv. denied*, 81 N.Y.2d 1070 (1993).

20. *People v. Tankleff*, 84 N.Y.2d 992 (1994).

21. *See, e.g., People v. Rivera*, 285 A.D.2d 385, 386 (1st Dep't 2001), where the court emphasized that "since no promises or threats were made and defendant was not in custody, the deception employed by the police was not so fundamentally unfair as to render defendant's subsequent statements involuntary, or to deny him due process"; *People v. Newcomb*, 45 A.D.3d 890 (3d Dep't 2007), where the court, in rejecting a deception argument, emphasized that the defendant was not in custody; *People v. Williams*, 272 A.D.2d 485 (2d Dep't 2000), *lv. denied*, 95 N.Y.2d 873 (2000), where the court properly cited *Tarsia* and *Tankleff* in a ruling upon the admissibility of a statement produced by a non-custodial interview and emphasizing that "since . . . the defendant was not in custody, this deception was not so fundamentally unfair as to render the defendant's subsequent statements involuntary."

22. *See People v. Walker*, 278 A.D.2d 852 (4th Dep't 2000), *lv. denied*, 96 N.Y.2d 869 (2001), where defendant in custody was falsely told that the victim gave a dying declaration implicating the defendant. The court used the regular *Tarsia* test instead of *Miranda*'s "cajole" test; *People v. Dickson*, 260 A.D.2d 931 (3d Dep't 1999), *lv. denied*, 93 N.Y.2d 1017 (1999), where defendant in custody was "fully informed of his *Miranda* rights" and confessed after an officer falsely told him "that his actions were memorialized on a video surveillance camera in the gas station. Suppression was denied because "this deception was not so fundamentally unfair as to deny defendant due process or accompanied by a promise or threat likely to produce a false confession," citing *Tarsia*; *People v. Sobchik*, 228 A.D.2d 800 (3d Dep't 1996), where defendant was in custody and was questioned regarding a series of burglaries. He was asked if he would be willing to take a polygraph test and agreed. Once hooked up to the machine (which was not working), he admitted his involvement in the burglaries and ultimately gave a confession. Since there was no indication of misrepresentation of the results of the test, suppression was denied, citing *Tarsia*; *People v. Hassell*, 180 A.D.2d 819 (2d Dep't 1992), *lv. denied*, 79 N.Y.2d 1050 (1992), where the court applied the *Tarsia* test to deception employed by officers who interrogated a defendant in custody.

23. *People v. Williams*, 272 A.D.2d 485 (2d Dep't 2000), *lv. denied*, 95 N.Y.2d 873 (2000).

24. *People v. Rivera*, 285 A.D.2d 385, 386 (1st Dep't 2001) ("Moreover, since no promises or threats were made and defendant was not in custody, the deception employed by the police was not so fundamentally unfair as to render defendant's subsequent statements involuntary, or to deny him due process.") (emphasis added).

25. *Berkemer v. McCarty*, 468 U.S. 420, 433 (1984).

26. *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

27. *Fare v. Michael C.*, 442 U.S. 707, 725 (1979).

28. *Berghuis v. Thompkins*, 560 U.S. 370 (2010).

29. *Id.* at 386, *citing North Carolina v. Butler*, 441 U.S. 369, 373.

30. *Id.* at 388.

31. *In re Jimmy D.*, 15 N.Y.3d 417 (2010).

32. *Id.* at 428.

33. *Id.* at 424.

34. *Id.*, decided Oct. 26, 2010; *Berghuis v. Thompkins*, 560 U.S. 370 (2010), decided June 1, 2010.

# Contingent-Fee Tax Planning, Anyone?

By Robert W. Wood

All lawyers know something about taxes. We all pay them, and we all know that legal fees are income. In fact, they are ordinary income and are even subject to self-employment taxes. Lawyers occasionally try to argue that legal fees are capital gain, but that is an awfully tough sell with the IRS. So, you have to figure that you will be paying full freight in taxes on your legal fees, no matter what.

But what about timing? Much in the tax law is about timing. In general, a classic tenet of tax planning is to try to defer income and to accelerate deductions. For generations, tax lawyers have explored all manner of tax deferral strategies, so there are many decades of tax lore to draw from. According to the IRS, you have income for tax purposes when you have an unqualified, vested right to receive it. Asking for payment later doesn't change that.

The idea is to prevent taxpayers from deliberately manipulating their income. The classic example is a bonus check available in December, where the employee asks to have the employer hold it until January 1. You might think that normal cash accounting suggests that the bonus is not income until paid. But the employer *tried* to pay in December and made the check available. To the IRS, that makes the bonus income in December, even though it is not collected until January.

Lawyers are subject to these rules just like everyone else, but there is a surprising exception for contingent-fee lawyers. Plaintiff lawyers often lament the unpredictability of their own income. They may also lament the need to resort to borrowing to finance their cases. In some cases, plaintiff lawyers complain that they cannot take the cases they really want to take, given the financial realities of contingent-fee practice.

However, plaintiff lawyers can actually use a benefit most other people – including other lawyers – can't: structured legal fees. Reduced to simplicity, the concept of a legal fee structure is a kind of tax-advantaged installment plan that doesn't rely on the creditworthiness of the defendant or the client. Like much else that is tax-advantaged, it has some rigidity. Yet it involves a tried-and-true tax structure that works, and it is grounded in economic reality.

In essence, the contingent-fee lawyer can decide before settlement that, instead of taking a contingent fee upon settlement of the case, he or she wants that fee paid over time. The lawyer must decide to do this before the case settles, but that can be right before it settles, even the night before. As a practical matter, the lawyer has "earned" his contingent fee over the course of the case. Yet the tax authorities say that the lawyer hasn't technically earned the fee for tax purposes until the settlement documents are actually signed.

Amazingly, the attorney can have complete discretion whether to structure all of his or her fee or any percentage of it. The tax case uniformly cited as establishing the bona fides of attorney fee structures is *Childs v. Commissioner*.[1] For a few years, there was concern that the IRS might disagree with contingent-fee structures despite the *Childs* case. But over the last several decades the IRS has often cited *Childs* favorably.

But care is still needed. The settlement agreement must call for it, and no lawyer wants to rely on the defendant to pay the fees over time. So the defendant pays the full amount to a third party. In the early days of structured fees, the third party was invariably a life insurance company that funded annuities for the benefit of the lawyer. Then the annuity payments would be taxed over time.

Annuities still work fine today. But most lawyers seem to want a better return than life insurance annuities, so most structured fees are done with a portfolio or stocks and securities. Whether the structure is done with annuities or securities, the format and documents are important. The lawyer can't own the annuities or the securities, but is the named payee of the structure.

Now, what if you don't want the defendant involved in knowing about your structure, or you just need time to sort out what kind of structured fee you want, and which company you want to trust with it? These days, most structured legal fees are not implemented by defendants directly, but rather by qualified settlement funds. The settlement agreement provides that instead of paying the settlement to the law firm trust account, it goes to a qualified settlement fund (QSF).

Then, the QSF pays the plaintiff – or implements structured settlements for any plaintiffs who want one. And it is the QSF that implements the lawyer's structured fees, too. Done properly, an attorney fee structure obviates the normal tax doctrines of constructive receipt and economic benefit. These fearsome tax doctrines can often result in amounts being taxed to someone even before they actually receive the income.

In the case of properly structured attorney fees, the attorney will be taxed only when and as he or she receives each payment, according to the schedule the lawyer has set. Why is this such a good deal? Paying tax later is nearly always better. It's simple economics. Would you rather pay $100,000 of tax today or in 10 years?

There is also investment return. Like a giant 401(k), structured legal fees put the full amount of your fee to work earning an investment return. If you take your fee in cash and pay tax, you can lose half or more in taxes and then can only invest the after-tax amount. With structured fees, you are investing the full amount, so your "principal" plus the investment return is taxed later when you receive the payments over time. Think of it as tax-free compounding, and the longer the attorney wants to stretch out the payments, the better the financial result.

In essence, the lawyer constructs a kind of unlimited individual retirement account. They are flexible, too. The payments might start right away and go for the next five or 10 years. Alternatively, the payments might be deferred entirely for 10 or 15 years, building up tax-free. Thereafter, they might begin paying out annually for the rest of the attorney's life or the joint life of the attorney and his or her spouse. There is almost infinite flexibility.

Finally, how about borrowing? With traditional life insurance annuities, there was no borrowing feature. But many of the structured legal fee companies today allow lawyers who structure fees to borrow money, too. Not paying current tax on your fees, but being able to borrow money, is another double benefit. After all, when you borrow money, the amount you borrow isn't income because you have to pay it back.

Of all the topics with structured fees, perhaps the one where the most care is needed concerns borrowing. You don't want the IRS to think the arrangement is a sham and to call your loans income, a payment of your own legal fees. But if you're careful, structured legal fees can allow tax-free compounding, defer taxes and help build a solid financial plan. There are estate planning advantages, too.

What's not to like?

**"Like a giant 401(k), structured legal fees put the full amount of your fee to work earning an investment return."**

**Robert W. Wood** is a tax lawyer with www.woodllp.com, and the author of numerous tax books, including "Taxation of Damage Awards and Settlement Payments" (www.taxinstitute.com). This discussion is not intended as legal advice.

**Endnote**

1. 103 T.C. 634 (1994), *aff'd without opinion*, 89 F.3d 56 (11th Cir. 1996).

# NYSBA's Ukraine Task Force Leads to a New National One

By Brandon Vogel

When Russia invaded Ukraine, the International Section did what it does best: It put together the best legal minds in international law and got straight to work.

Working through the New York State Bar Association's Ukraine chapter and the Ukrainian Bar Association, the International Section assisted the country as it struggled with Europe's largest refugee crisis since World War II and gathered evidence to prove that it was the victim of war crimes.

Their collaborative efforts and thought leadership have now led to a larger and robust Ukraine Immigration Task Force devoted to helping Ukrainians fleeing war find refuge in the United States. The volunteer legal coalition now numbers more than 100 attorneys and policy professionals as well as nonprofit and advocacy organizations.

The goals include expediting Employment Authorization Documents to help Ukrainian refugees find work quickly, providing educational resources in a multitude

of languages on how women and children can safely find shelter and creating permanent pathways for residence.

## How It Started

Under the leadership of Edward Lenci, immediate past chair of the NYSBA's International Section and co-chair of the Ukraine Task Force, the section had been working since December to offer its support.

Lenci and Serhiy Hoshovsky, a Ukrainian lawyer practicing in New York who is chair of the International Section's Committee on Eastern Europe, worked closely to make this a reality.

As tensions intensified between Russia and Ukraine, the section established a Ukraine chapter and partnered with the Ukrainian Bar Association, eventually signing a memorandum of understanding pledging to work together. On Feb. 15, the International Section launched the Ukraine Task Force to help collect evidence of war crimes, assist refugees, provide humanitarian relief and aid displaced lawyers.

Task force member Joy Ziegeweid, a senior visiting fellow at Immigrant ARC, coordinated legal services with other immigration attorneys around the country, which resulted in a national spinoff of the Ukraine Immigration Task Force operating under the leadership of Anne L. Smith, co-chair and policy director.

Watching the destruction of her hometown, the Kyiv-born Smith immediately sought to find and contact relatives and try to help them evacuate.

"Our relief from knowing they had found temporary refuge in Europe was soon replaced with the sobering realization that they may not be able to reunite with their loved ones in the United States anytime soon," said Smith. "Attorneys such as myself felt a lot of frustration at the painfully slow visa processing, bureaucratic inconsistencies that approved some applicants while rejecting others who met the qualifications, and the overall lack of efficient pathways for Ukrainians fleeing war."

Under Ziegeweid's leadership, NYSBA's Ukraine Task Force immigration and refugee team provided up-to-date information and resources to aid both Ukrainian nationals seeking protection and the attorneys that serve them inside the U.S. and abroad. Members recruited volunteers, dispelled misinformation and published up-to-date information about relief available in Europe and the U.S. For immigration lawyers, the team provided up-to-date information about best practices, consulates, NGO guidance and relief and special legal considerations for Ukrainians.

While Europe and Canada quickly responded and welcomed refugees, the U.S. domestic response was slower. Issuance of B2 visitor visas to Ukrainians at consulates in Europe was marked by inconsistency and confusion. The U.S. government designated Ukraine for Temporary Protected Status in early March but did not begin accepting applications until April 19.

Due to growing interest and a new focus, the attorneys realized that a stand-alone Ukraine Immigration Task Force was essential to meet the challenges of the moment, particularly engaging in the multipronged policy advocacy necessary to ensure that Ukrainians could safely and quickly find refuge and stability in the United States.

**"Our relief from knowing they had found temporary refuge in Europe was soon replaced with the sobering realization that they may not be able to reunite with their loved ones in the United States anytime soon."**

Ziegeweid, the co-chair, said, "While it has been frustrating to witness how the dysfunction of the U.S. immigration system has prevented Ukrainians from quickly seeking safety and stability in the United States, it has been heartening to work with this ever-growing group of committed attorneys and advocates for refugees."

"When I learned that the Ukraine Immigration Task Force had grown out of the NYSBA's Ukraine Task Force, I was delighted and proud that our task force was really making a difference, and I think it showed on my face," Lenci said. "I was wowed, blown away, when I learned for the first time at the task force meeting on July 14 that our immigration team, under Joy's leadership, had blossomed into a nationwide organization."

## What It Does

The Ukraine Immigration Task Force established contact early on with Ukrainian communities to centralize

efforts to provide guidance and educational resources in Ukraine and Russia.

"Immigration law is a highly complex field, and it can take years to obtain certain legal statuses but only one small misstep to endanger one's chances at remaining here lawfully," said Smith. "There was – and still is – a lot of misinformation ranging from well-meaning but misguided advice to scams attempting to profit off people's desperation."

She said that, "unsurprisingly," attorneys – as well as nonprofit and volunteer organizations – were flooded with pleas to help families at the U.S. border and in precarious living situations worldwide, as well as to assist individuals with scarce funds and English skills to file various forms.

"We felt it was paramount not only to reach out to Ukrainians about the risks of abuse, trafficking and exploitation, but also to promptly communicate the rapidly evolving regulatory changes to Ukrainians, their families and supporters so they didn't end up making costly mistakes as they tried to resettle here."

One of the task force's first projects was drafting a resource document informing Ukrainians fleeing war about various entry options into the United States, which it provided in English, Ukrainian and Russian. This document grew into 74 pages of guidance that covers a broad range of immigration topics, including refugee admission and asylum protection, humanitarian parole and the "Uniting for Ukraine" program, seeking entry at the U.S. border, temporary protected status, non-immigrant visas, immigrant visas and permanent residence in the U.S.

The task force also provides educational materials on such topics as filing for temporary protected status, applying as a sponsor for Uniting for Ukraine, safety tips for women and children entering the United States, ways to avoid detention and separation of families at the border, rights and protections for Ukrainians admitted through the Uniting for Ukraine program, and tips for Ukrainian parolees applying for select federal benefits.

Moreover, the task force helps shape immigration policy by communicating directly with the Department of Homeland Security and U.S. Citizenship and Immigration Services through correspondence with key officials. Some of the concerns the task force has expressed about obstacles to entry, technical malfunctions and lack of clarity on certain processes have resulted in revisions and new guidance for certain procedures.

Overwhelmingly, the issue that has come up over and over from virtually all sources with which the task force interacts is the lack of access to lawful employment by recent arrivals. This issue puts countless vulnerable individuals and families in communities across America at risk for homelessness, exploitation, victimization, domestic abuse and even human trafficking.

The task force's current top priority is expediting Employment Authorization Documents for the 25,000 Ukrainians who were previously admitted at the U.S. border and potentially hundreds of thousands who are arriving this year through the Uniting for Ukraine program.

They – along with tens of thousands of Afghans and over a million others – face a processing delay of eight to 13 months due to an unprecedented backlog of work permit applications. Bloomberg Law reported in May that U.S. Citizenship and Immigration Services had more than 1.5 million pending applications for Employment Authorization Documents, according to data released for the first quarter of fiscal year 2022. That is a fraction of the 5.2 million total applications in its processing queue as of June 2022, a figure released by the Office of the Citizenship and Immigration Services Ombudsman in its annual report to Congress.

The task force has proposed a temporary solution that would help not only Ukrainians, but also Afghans, Cubans, Haitians and individuals from other countries admitted on humanitarian parole. Rather than calling for Ukrainians to bypass the agency's (preferred) standard application process, the task force's proposal would function within the current regulatory framework by asking the agency to adjust its procedures within the existing application process to temporarily grant conditional employment authorization to Ukrainians, Afghans and others granted humanitarian parole.

In response to the task force's advocacy and efforts by some of its partners such as Welcome.US, U.S. Citizenship and Immigration Services announced on July 28 that Ukrainians, Afghans, Cubans, Haitians and other "public interest parolees" eligible to seek employment authorization under category (c)(11) parolees may now file Form I-765, Application for Employment Authorization Document, online. U.S. Citizenship and Immigration Services estimates that processing time for such applicants will be reduced to a few months and could be completed in as little as six weeks in some cases. Humanitarian parolees who need to file a paper application, including those who apply for a fee waiver by mail, are also expected to benefit from reduced processing times due to automated improvements that aim to streamline the application process.

The Ukraine Immigration Task Force's next major advocacy project will focus on creating pathways for permanent residence for Ukrainians who lost everything, including family members who are unable to return to the place they once called home.

To learn more about the Ukraine Immigration Task Force and to get involved, visit ukrainetaskforce.org.

---

**Brandon Vogel** is the former senior writer for NYSBA.

# Curing Gig Economy Worker Misclassification During COVID-19 and Beyond

By Trish Dessai

The arrival of gig-centric companies, such as Uber or Lyft, and the recent prominence of companies such as DoorDash, Instacart, TaskRabbit, Postmates and Amazon have caused a soaring demand for gig economy workers. As recently as 2018, approximately 36% of Americans relied on gig economy work as their primary or secondary source of income.[1] Thus, the question arises: who qualifies as a gig worker?

Gig workers are defined as workers with flexible work schedules who are actively responding to the consumer's ebb and flow of demand for a given service. Due to the flexibility of the arrangement, gig workers appear to be independent contractors. An independent contractor is defined as a person who contracts with a company but is not controlled by the company nor subject to the company's control with respect to physical conduct or performance.[2] Additionally, independent contractors are not entitled to employee benefits such as unemployment insurance, health care and minimum wage standards.

Gig companies argue gig workers are independent contractors because the gig company does not control the time worked or the schedule chosen by the workers. The major issue with this argument is the conflation of "worker flexibility" with the absence of control by the business. The gig companies control terms of service, fares charged, incentive-based pay, deactivation fees and rating structures of the workers. Thus, workers' advocates argue, gig workers are employees because the gig companies exercise sufficient control over the terms and conditions of work assigned to gig workers.

The merits of each argument can be seen in two recent cases. In *In re Vega*[3] the court held Postmates delivery drivers were employees because Postmates exhibited unilateral control over compensation, fixed delivery destinations and the hiring of replacement drivers. Conversely, in *Lawson v. Grubhub,*[4] the court held Grubhub delivery drivers are independent contractors because Grubhub did not control the number of deliveries, the work schedule timing or require any training or orientation. Both cases deal with identical services provided by gig economy delivery drivers using identical gig platforms, yet the courts reached different conclusions based on the definition of employer control.

The issue of misclassification has been further exacerbated due to the effects of the COVID-19 pandemic. State lockdown orders have classified gig workers as "essential." The majority of gig workers are working overtime in response to the demand for essential workers during the pandemic. Due to independent contractor classification, gig workers are denied basic benefits, such as minimum wages, paid sick leave and unemployment insurance. The absence of basic work benefits has proven to be detrimental to gig workers. For example, the inability to take paid sick leave forces workers to choose between their health, their paycheck and endangering the lives of customers due to the direct contact nature of the job.

To combat this injustice, Instacart workers staged a nationwide strike demanding hazard pay and sick leave for working during the pandemic.[5] In response to the outcries of gig economy workers, Congress extended the Coronavirus Aid, Relief, and Economic Security Act (CARES) to include the allocation of unemployment insurance to independent contractors. This was a historic move as it was the first time a "portable benefit" was extended by the government to independent contractors rather than only to employees. However, the imperative question remains: why not classify all gig workers as employees rather than independent contractors?

Recently, *People v. Uber*[6] held Uber and Lyft drivers who were classified as independent contractors were in violation of the California Labor Code § 2775 (ABC Test).[7] Although this decision was a momentous win for employee-based coverage, it only applies to ride-sharing-based companies such as Uber and Lyft. The issue of employer control varies dramatically in other businesses such as: delivery application-based companies (DoorDash, Grubhub, Instacart), hotel and lodging-based companies (Airbnb), online market-based companies (Amazon Flex Drivers, TaskRabbit) and domestic worker, service-based companies (SweepSouth).

The gig economy is continuously evolving, and the services provided by gig workers are expanding. It is likely that gig companies will continue to find different ways to support the classification of gig workers as independent contractors. Gig companies want to keep costs low and increase profits; gig workers, on the other hand, want to maintain flexibility but still retain basic worker protections. So, this begs the question: can we achieve a system in which gig companies and gig workers both win?

## A New Solution: Portable Benefits

Portable benefits are defined as benefits that are connected to a worker rather than a particular employer such that the benefits can be taken from job to job without interruption in coverage or loss of funding.[8] As a result, workers can accumulate benefits such as unemployment insurance or paid time off while working for different employers. This solution will allow workers, whether independent contractor or employee, to retain a basic level of worker protection across the board.

As stated above, the gig economy is growing rapidly. The MBO Partners State of Independence report [9] projects 52% of the workforce will be participating in the gig economy by 2023. Trends are showing that even unionized work such as construction and mining will move towards an app-based, service-oriented model. The protection of this new wave of workers must be the focus of the portable benefits system.

A functional portable benefits system will require an equitable infrastructure set forth by the government, unions and gig companies, and executed through the assistance of fintech.

### Current Role of the Government in the Creation of Portable Benefits

Congress does not extend unemployment insurance to independent contractors as they are not classified as employees. However, in light of the current pandemic, Congress extended unemployment insurance to independent contractors. This is the first time a benefit was extended by the government to independent contractors and employees. The benefit was universally attainable to workers irrespective of classification status – the first truly universal portable benefit. Further, it has proved to be effective in assisting gig workers during the pandemic.

**"Gig companies favor an independent contractor classification for gig workers because the flexibility in worker protection allows gig companies to maintain profit margins. "**

Similarly, some municipalities have taken action to pilot portable benefit systems that apply to workers within the state. Philadelphia recently passed the Philadelphia Domestic Workers Bill of Rights,[10] which ensures domestic workers the right to paid time off through a portable benefits model. All clients of domestic workers are required to pay a 2.5% fee towards the workers' portable benefits fund. The domestic workers will receive one hour of paid time off (PTO) for every 40 hours of paid work. The PTO accrues from client to client and the workers take the benefit (PTO) from job to job. The ratio is applied irrespective of where or when the hours are completed, effectively retaining the flexibility of the worker. Philadelphia is actively considering extending these provisions to gig economy workers as well.

The Seattle Universal Worker Protection Bill[11] proposes a similarly structured portable benefits system targeted towards gig economy workers. Companies pay a 5% fee, capped at $1 per hour, which is deposited in a portable benefits fund. The benefits in the fund include health insurance, retirement savings and paid vacation time. The worker can take these benefits from one employer to the next, once accumulated. In addition, several states, including New York and New Jersey, have considered legislation that supports creating similar portable benefit systems for independent contractors.

The active criticism with respect to extending portable benefits to independent contractors is: why would gig companies be willing to pay a 2.5% fee for the sake of worker protection?

### The Current Role of Gig Companies in the Creation of Portable Benefits

Gig companies favor an independent contractor classification for gig workers because the flexibility in worker protection allows gig companies to maintain profit margins. In a portable benefits system, gig companies would have to pay a 2.5% fee toward a workers' benefit fund. Thus, the question still stands: why would gig companies be willing to pay a 2.5% fee for the sake of worker protection?

Gig companies will be willing bear this cost in two scenarios: (a) the company is able to pass the cost on to the consumer, or (b) the company is able to pay a smaller portion of the net cost. The first scenario is best exemplified by New York's Black Car Fund model.[12] New York's Black Car Fund was established by the New York Legislature to exact a 2.5% surcharge on all companies which hire drivers. If the company owns less than 50% of the cars and 90% of the customer transactions are cashless, a 2.5% surcharge applies. The money obtained from the surcharge is deposited into a workers' benefit fund that includes telemedicine coverage, vision benefits and accidental death benefits. The benefits transfer with the driver from job to job, covered under the Black Car Fund. Uber and Lyft are subject to this 2.5% surcharge in New York and simply pass the cost to the consumer. Both companies have still maintained profitability while also promoting workers' benefits.

Alternatively, gig companies can use the customers' tips to contribute to the workers' portable benefits fund, allowing the companies to bear a smaller net cost. There is research showing that customers would be willing to pay extra in order to ensure workers receive benefits. For example, Alia[13] is an application which allows consumers to pay tips for their domestic workers into a portable benefit fund. Alia pools together voluntary funding from the customers of domestic workers to create a portable workers' benefit plan that gives workers access to protections such as accident insurance, paid time off and life insurance. Alia has been a success for domestic workers and customers. Customers report the driving factor behind the willingness to tip was the incentive of battling against the systemic inequality that domestic workers face, in addition to the negligible monetary amount required in order to make a difference.[14] The spotlight has been placed on gig economy workers as essential workers, raising social awareness about gig worker exploi-

tation and the lack of workers' benefits provided. This consumer awareness–based template can be applied to the gig economy workers incentivizing consumers to tip 2.5% per ride – approximately $.50 on a $20 ride.

Additionally, consumers have trended toward supporting workers against abuses as seen with the Collation of Immokalee Workers (CIW) campaign for farmworkers. The CIW raised awareness about the abusive practices of companies using suppliers who exploited farm workers. Consumers responded by boycotting such companies, causing companies such as Taco Bell to comply with fair practices in order to save their reputation. Consumers of the gig economy play a big role in influencing the practices of the gig companies and, when mobilized correctly, can effectuate an efficient portable benefits system as well.

Thus, the overarching question remains: how will the surcharge be decided in diverse industries, such as gig economy drivers versus domestic workers?

## The Current Role of Unions in the Creation of Portable Benefits

The concept of portable benefits transferring with workers from job to job may seem like a new idea, but unions have been implementing a very similar framework via the Taft-Hartley Act[15] for decades. The distinction, however, is that benefits move with the worker based on the industry. Employees and employers pay into a multi-employer fund subject to the terms of a collective bargaining agreement. The accrued funds are then reinvested and pay for the members' benefits. The most common examples of these agreements include ERISA benefits across the construction industry. Another relevant example is the Screen Actors Guild Pension and Health Plan. Although actors are contingent workers, the Guild submitted to collective bargaining agreements with each of the studios in order to pay for benefits for actors. The benefits are portable across any studio party to the collective bargaining agreement across the entertainment industry.

The inevitable criticism to this process is: why would gig companies agree to the collective bargaining process of unions when the goal of classifying workers as independent contractors is to circumvent the control imposed by collective bargaining agreements?

Oddly enough, gig companies have been open to the notion of a certain level of collective bargaining when creating portable benefits.[16] Under a recent joint letter between the Service Employees International Union (SEIU) and Uber, both parties made a commitment to create a collaborative universally portable benefits system for drivers espousing principles of universality, flexibility, proportionality and innovation. The letter acknowledges the longstanding legal barriers and legal history of conflict between companies and employers and pledges to break down such barriers by creating a portable benefits system from scratch with the input of both parties. Given this recent collaboration, it is highly likely that unions will turn to the Taft-Hartley Act model to structure the disbursement and negotiation of worker benefits.

Thus, the last question which must be addressed is: what is the most effective way to execute the disbursement and management of portable benefits?

## The Current Role of Financial Technology in the Creation of Portable Benefits

Financial technology (fintech) is defined as an innovative economic industry composed of companies whose purpose is to use technology to make financial services more efficient.[17] In response to COVID-19, Mastercard has partnered with Stride,[18] a portable benefits fintech platform, to provide cost-effective worker benefit options for gig economy workers. Workers can choose from a suite of benefits via the Stride application and the benefits directly transfer to the worker via the worker's Mastercard account. The benefits and disbursement platform would remain the same irrespective of whether the worker changes jobs or moves from job to job.

Similarly, the application Alia, as described above, uses a fintech platform to transfer the voluntary funds from the client to the domestic worker. The domestic worker can access the funds in the form of benefits directly from the Alia application. Furthermore, the United Kingdom launched Pirkx,[19] a fintech platform, which allows users of its platform to access workers' benefits irrespective of their classification as self-employed, part-time, independent or full-time workers. Fintech is actively innovating and working around the current lack of protection for workers during the pandemic by providing efficient disbursement platforms. However, the costs of benefit plans offered by fintech is extremely high and may come at a hefty cost to the employee, thus strengthening the call for a universally low-cost portable benefit system.

## The Pilot Portable Benefits Model for COVID-19 and Beyond

First, the government must pass overarching legislation approving a portable benefits plan that is applicable to all workers irrespective of independent contractor or employee status. The plan can mirror that of the Philadelphia Portable Benefits Plan and charge a fixed surcharge to the employer in order to contribute to the universal benefits fund. The government may offer tax subsidies to companies in order to incentivize participation in the pilot program for a minimum two-year period.

Second, the surcharge will be determined by the industry and negotiated by unions. Using a model akin to the Taft-Hartley Act, unions and companies will collaboratively set the surcharge across the industry.

Third, the gig companies can respond to the surcharge by either (a) passing it on to customers analogous to the Black Car Fund model or (b) pooling customer tips to offset the net cost of the surcharge. Additionally, employers can offer the option for consumers to pay directly towards the workers' fund rather than merely tipping in order to build social awareness about worker protection.

Fourth, the money collected by the surcharge will be invested into the industry-wide workers' fund, collaboratively negotiated by both the unions and the companies, and converted into a benefit that will be accessible to all workers in a given industry.

Fifth, a fintech platform will present the suite of benefits available to each worker, and workers can choose the benefits they deem necessary based on their independent contracting needs. The disbursement method will be analogous to the method used by the Alia application.

This collaboration between the government, employers, unions and fintech lays a rudimentary groundwork for a strong universal portable benefits system that is restricted by industry for the ease of distributing the benefits. This by no means is a fully exhaustive plan and modifications can be made accordingly in response to any conflicts or issues that may arise.

The major criticism that may be set forth in response to this plan is the presumption that the gig companies would be open to negotiating with unions. The recent collaborative efforts of the SEIU and Uber in negotiating a universal portable benefits plan strongly suggest this issue is not insurmountable. The recent collaborative efforts by both parties to create a portable benefits system from scratch in order to dismantle the underlying tension between companies and unions is a positive step forward in this direction.

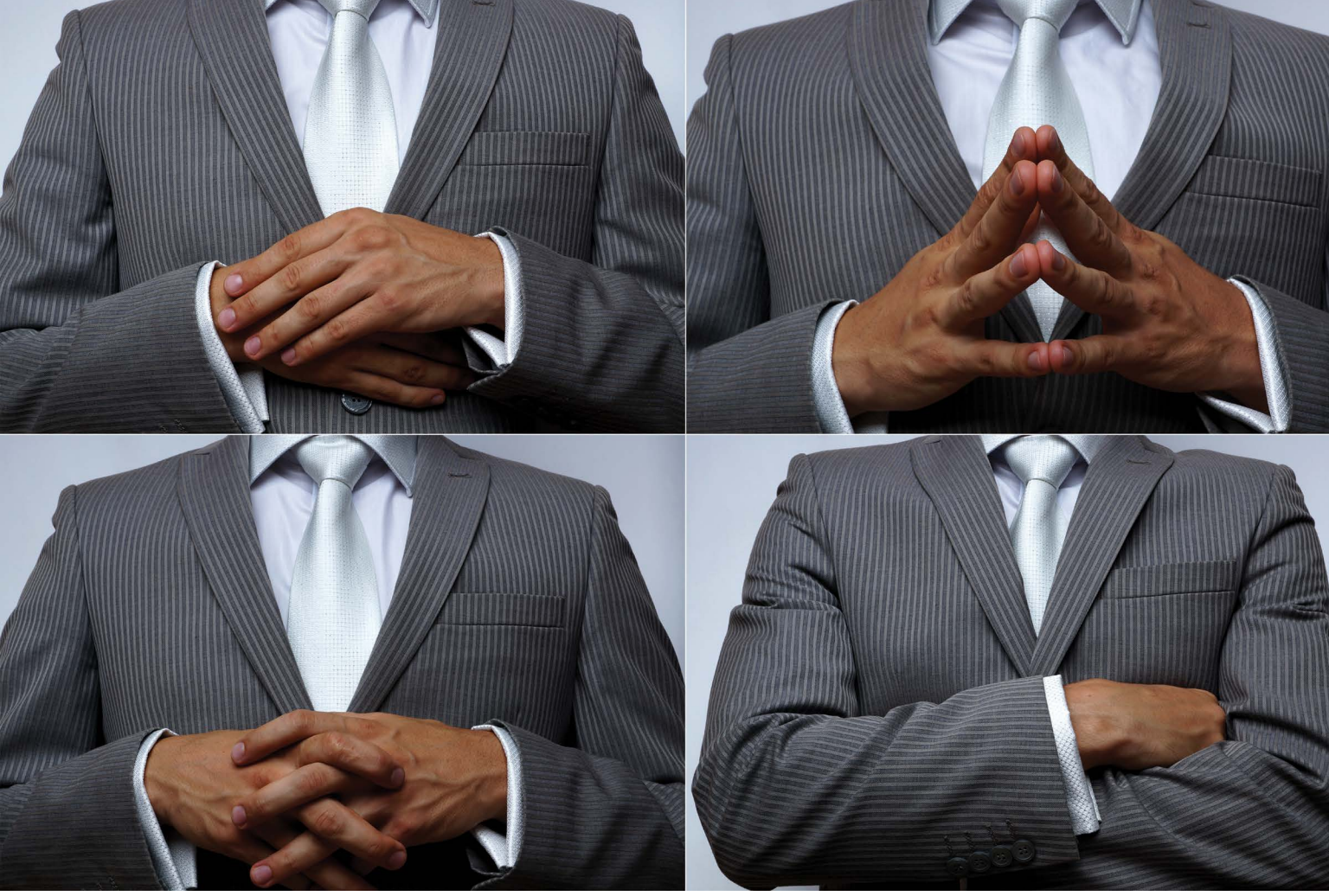
## Conclusion

The classification of gig economy workers as independent contractors has focused on the presence or absence of control by the company over the worker, across many different industries, including car services (Uber, Lyft), delivery application-based companies (DoorDash, Grubhub, Instacart), hotel and lodging-based companies (Airbnb), online market-based companies (Amazon Flex Drivers, TaskRabbit), and domestic workers (SweepSouth). Independent workers and self-employed workers are still workers even if they are not classified as employees. Therefore, these categories of workers should be afforded some form of basic worker protection as well. A workable solution is a universal portable benefits fund where the benefits attach to the worker, rather than to the classification of employee and employer. The fund will be created by a collaboration between the government, employers, unions and fintech. A rough framework for such a model is detailed as well. During the COVID-19 pandemic, workers, irrespective of classification status, have been left vulnerable without paid sick leave or minimum wages – all of which could be cured by a portable benefits system. Fintech is already finding ways to innovate portable benefits through privatized means. Rather than letting portable benefits act as another privately created fissure to workplace protections, parties should work together to make it an efficient pro-worker system that provides benefits to any classification of worker. As long as you are worker, you should be protected – a case for universal portable benefits system.

**Trishala Dessai** has a bachelor's in industrial labor relations, earned a J.D./LL.M from American University Washington College of Law in May 2022 and is pursuing an MBA at Cornell University. Inspired by seeing her immigrant parents' struggles with labor issues, she is founding a startup to offer portable benefits to workers.

### Endnotes

1. Gallup's Perspective on the Gig Economy and Alternative Work Arrangements (2018), https://www.gallup.com/workplace/240878/gig-economy-paper-2018.aspx.
2. Restatement (Second) of Agency § 2 (1958).
3. *In re Vega*, 35 N.Y.3d 131, 136 (2020).
4. *Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d 1071, 1072 (N.D. Cal. 2018).
5. Arielle Pardes, *This Pandemic Is a 'Fork in the Road' for Gig Worker Benefits*, Wired, April 9, 2020, https://www.wired.com/story/gig-worker-benefits-covid-19-pandemic.
6. *People v. Uber Techs., Inc.*, No. A160701, 2020 WL 6193994, at *3 (Cal. Ct. App. Oct. 22, 2020).
7. *See* Labor Code § 2775, subd. (b); *Dynamex Operations West. Inc. v. Superior Court of Los Angeles*, 4 Cal.5th 903 (2018).
8. Natalie Foster, *et al.*, Aspen Inst., Portable Benefits Resource Guide 7 (2016), https://assets.aspeninstitute.org/content/uploads/files/content/upload/Portable_Benefits_final.pdf.
9. The State of Independence in America (2018), https://www.mbopartners.com/wp-content/uploads/2019/02/State_of_Independence_2018.pdf/1.
10. Philadelphia Domestic Workers Bill of Rights (April 27, 2020), https://www.phila.gov/media/20200427102747/Domestic-Worker-Bill-of-Rights.pdf/.
11. The Seattle Universal Worker Protection Bill, H.R 1601, 116 Cong. § 5 (2019).
12. Testimony of Ira Goldstein, Executive Director of the Black Car Fund Before the New York State Senate Standing Committee on Internet and Technology Public Hearing: Examination of the Gig Economy (October 16, 2020), https://www.nysenate.gov/sites/default/files/ira_goldstein_black_car_fund_testimony_10.16.19.pdf.
13. NWDA Labs: Alia (2015), https://www.ndwalabs.org/alia.
14. Eillie Anzilotti, *This New Service Gives Domestic Workers a Way To Get Benefits and Paid Time Off*, Fast Company, Dec. 11, 2018, https://www.fastcompany.com/90278942/this-new-service-gives-domestic-workers-a-way-to-get-benefits-and-paid-time-off.
15. David Rolf, *et al.*, Aspen Inst., Portable Benefits in the 21st Century 3–4 (2016), https://assets.aspeninstitute.org/content/uploads/2016/07/portable-ben-21stcent.pdf?_ga=2.71541907.1605673233.1586528020-1677866451.1586528020.
16. David Rolf, *Building a Portable Benefits System for Today's World* (Jan. 23, 2017), https://ubernewsroomapi.10upcdn.com/wp-content/uploads/2018/01/Portable-Benefits-Principles-FINAL.pdf.
17. *What Is FinTech and Where Does It Live?* (July 26, 2016), https://www.finextra.com/blogposting/12890/what-is-fintech-and-where-does-it-live.
18. *Mastercard and Stride Team Up to Bring Portable Benefits to Gig and Independent Workers*, Mastercard, Oct. 15, 2020, https://investor.mastercard.com/investor-news/investor-news-details/2020/Mastercard-and-Stride-Team-Up-to-Bring-Portable-Benefits-to-Gig-and-Independent-Workers/default.aspx.
19. Jessica Ellerm, *Gig Workers Are on the Rise Post COVID. Fintech Pirkx Stands to Benefit*, Daily Fintech, Oct. 6, 2020, https://dailyfintech.com/2020/06/10/gig-workers-are-on-the-rise-post-covid-fintech-pirkx-stands-to-benefit.



# People Lie, Bodies Do Not

By Carol Schiro Greenwald

We know body language can have a big impact. We sense it every day. For example, when we attend a show and say an actor "inhabits a role," we mean their body language acts just like the fictional person would. When you are on a train or in a restaurant and you muse about the dynamics of the people across the way, you are reading body language.

Body language facilitates an understanding of others for two main reasons: first, we obtain most of our knowledge from visual stimuli, and second, the body does not lie. When we misread or misinterpret body language cues it places us at a disadvantage.

It always was and still is humans' basic language. We read people unconsciously. When what someone says conflicts with their body's message, they seem disingenuous. A common statistic says that 55% of what we communicate is visual, 38% is vocal and only 7% is what is actually said.

If 93% of communication is nonverbal, we should know as much as possible about how to understand and use it. This article discusses key body part players and their range of actions and then suggests how to read other peoples' unspoken agendas and how to project your best "you" in the workplace.

## Body Language Basics

Before language, humans moved in groups and needed a way to communicate. They used body language. People followed leaders by watching what they did and following along. This is still seen when people in conversation "mirror" each other's physical positions. Reading others occurs constantly, mostly as unconscious communication.

According to the Oxford Dictionary, body language is "the conscious and unconscious movements and postures by which attitudes and feelings are communicated" and "the process of communicating what you are feeling or thinking by the way you place and move your body rather than by words."

Body language includes:

- facial expressions, especially the eyes;
- how you hold your body, your posture;
- gestures, the most important of which in business situations is the handshake. Humans shake hands as a way to measure authenticity. The handshake "dance" begins when you take a small step forward, look the recipient in the eye, smile and offer your hand, palm up. In networking situations, keep your hands vertical in the shake itself, indicating equality, and match the other person's pressure. Give a greeting. Step back as you release the hand. This interaction sets the initial relationship;
- touch, which is an important body language component, whether it is welcome or not;
- connections with inanimate objects, like cigarettes, pencils, and coffee mugs; chewing on a pencil indicates the person is unsure. Doodling while someone is talking says that person does not value what the speaker is saying;
- proxemics, which includes spatial distance and positioning.

As can be deduced from this list, some body language is an involuntary, mostly unconscious, reaction to our environment and situation. Some actions, such as smoking, are learned. Some actions are inborn, like smiling back when someone else smiles; others are learned through personal experience. The meaning of body language actions is culture-bound, and influenced by many factors including age, gender, and the relationship's power dynamic.

## Reading Body Language

Reading body language is an inexact science at best. For example:

- Do crossed arms signal disagreement or a request to lower the air conditioning?
- If I scratch my nose, does it presage a lie or does it just itch?
- Does rubbing my eye signal tiredness, irritation or anger?

Movements need to be read in context and clusters. You need to see at least three coordinated body language indicators to feel that your reading is correct. For example, you might infer that someone does not like what you are saying if:

- They have their hand on their face with the index finger pointed up across their chin and the rest of the hand across their mouth suggesting disagreement.
- Legs and/or arms are tightly crossed, suggesting defensiveness.
- Their chin and head are inclined downward indicating negativity.

People look for this kind of congruence to nonverbally support spoken conversation.

One way to test the accuracy of your interpretations is to be aware of micro-signals. These are involuntary facial expressions that occur in 1/25th of a second. For example, when pupils contract, an eyebrow lifts, the corner of your mouth twitches. We do not see them, but they register with our unconscious. It is almost impossible to fake body language, because it is too difficult to align gestures, micro-signals and spoken words.

Being "perceptive" means that you are good at spotting incongruities between a person's body language and words. When your "gut tells you something" it is reacting to a discrepancy you sense. For example:

- Real smiles involve the mouth and the eyes. Fake smiles involve only the mouth. When you encounter fake smiles, take the time to review the other body's language "tells" in order to understand why the person is feeling hostile.
- Legs and feet indicate how we feel. When networking, if in a cluster talking together one or two people have a foot pointing away from the group, then that conversation is uncomfortable or about to end. In meetings, if you see someone jiggling their feet or pointing them away from the speaker, the feet owner likely wants to run away.

## Body Language and Communication

Body language is useful in conversation because it creates the base for human spoken interactions. Whatever we are saying is either reinforced or subverted by our body language. For example, eyes regulate conversation. As you speak, your eyes glance around at those listening to you. When you are ready to end a sentence, you tend to look up, signaling to others that they may speak. When you widen your eyes in conversation, it inspires trust and positive feelings.

To indicate interest in what the speaker is saying and show that you are paying attention, you can do any or all of the following body language moves:

- tilt your head to one side,

- make eye contact with the speaker,
- nod periodically to show you are following along,
- widen your eyes to show approval, and
- lean slightly forward toward the speaker.

## Business Messages

An understanding of basic body language cues is important in business situations for people who need to know what colleagues are really thinking.

- Observing body language determines our initial impression of people before they say a word. In those initial three to eight seconds, when we meet someone for the first time, we form an initial impression that becomes the lens through which we filter future impressions of the person.
- How you physically comport yourself influences your brand because body image is a powerful component of your brand image. When working or networking, it is important that your clothing, affect, energy, comportment and courtesy all support positive interactions with others in the room.
- When you want to create a sense of psychological comfort, mirror the behavior of others in the conversation, make eye contact, smile, stand tall and use people's names.
- Remember the importance of mind-body connection. Understanding your own body language increases your self-awareness and self-control, which are prerequisites for emotionally intelligent leadership.

Posture is also a key tool for projecting the image you want people to see. When you walk into a room or sit in a chair, set your body so that your head is aligned with your spine, your whole body is upright and your expression is one of interest and self-confidence. Others will see you as a positive leader.

If you sign up for a networking function and it turns out that you are having a bad day and cannot bring yourself to project authority, energy or grace, do not go. No matter how much you try to act positive, your body will show how you really feel.

## Proximity

Proxemics form the basis of power formations. Humans have five spatial zones (COVID-19 notwithstanding):

1. Zero to six inches for intimate relationships like mother/child, lovers, etc.
2. Zero to 18 inches for the intimacy of close friends and crowded places.
3. Eighteen inches to four feet for people you interact with on a regular basis.
4. Four to 12 feet for social events, non-touch encounters.
5. Twelve feet or more for public areas with no interaction, with strangers.

When we have to engage in activities that violate these guidelines, we fudge it. Think of crowded elevator behavior: by facing front, looking straight ahead, saying nothing and not touching, our minds construct an invisible cocoon around us.

Spatial relations are also vital, but unconscious, indicators of relationships. In meetings, relationships in the room and the role of the leader can be established without saying a word.

- Sitting opposite another person creates a feeling of confrontation. Sitting side by side blocks conversation, since it is awkward and physically tiring to look someone very close to you in the eyes.
- Sitting behind a desk while the others sit on the other side emphasizes the authority and objectivity of the person behind the desk.
- When you want to create a feeling of congeniality and cooperation:
  - ♦ sit at a 45% angle from the other person,
  - ♦ hold meetings around a round table, or
  - ♦ lead the meeting from the center of a rectangular table.
- When standing while participating in group conversations, stand at a slight angle to the others to encourage openness and congeniality.

## Conclusion

Taking the time to learn more about body cues will increase your ability to communicate effectively. Understanding your own body language will allow you to project the most favorable image as a support for your position in the organization. The most intuitive leaders read bodies well. Use this knowledge to understand dissent and forge consensus in your firm, your family, with clients, judges and juries.

**Carol Schiro Greenwald, Ph.D.**, is a networking, marketing and management strategist, coach and trainer. She is the author of two books, "Strategic Networking for Introverts, Extroverts and Everyone In-between" (American Bar Association, Law Practice Division, 2019) and "Build Your Practice the Logical Way – Maximize Your Client Relationships" (with StevenSkyles-Mulligan, American Bar Association, First Chair Press, 2012). This article first appeared in the Entertainment, Arts and Sports Law Journal, a publication of the Entertainment, Art, and Sports Law Section (EASL). For more information, please visit NYSBA.ORG/EASL.

# Should a Law Clerk's Possible Leak to Press Be Reported?

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

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

## To the Forum:

I recently graduated from law school and took the bar exam and am working in the pool of clerks. The judges and their assigned clerks don't even recognize me, but I recognize them. After working late one night, I went to an Italian restaurant near the courthouse. There, I saw one of the clerks handing an envelope to another person, whom I did not know, but seemed familiar. Later, I saw his judge pick him up in his car outside the restaurant.

The next day, I saw an article on the front page of the newspaper about a controversial case currently *sub judice* in our court, reporting on "rumors" as to how the court was expected to rule. The author of the story appeared on the local news program and is a well-known local journalist. The author looked very similar to the person the clerk had met, but I am not certain it was the same individual. When asked by the interviewers how they had heard these rumors, the author did not give a direct answer, but implied that they have a confidential source. This is the first time any such rumors have been published and I am not sure who I should talk to about this issue.

The judge that I'd seen outside the restaurant was known throughout the courthouse to be a dissenter. I am now conflicted. Am I ethically required to report what I saw based upon mere suspicion, and do the rules apply to me if I have not yet even been admitted to practice?

*Sincerely,*

*A. Leaker*

## Dear A. Leaker:

Your question implicates rules governing nonjudicial court employees, rules governing judicial conduct under the New York Code, Rules and Regulations, and rules governing attorney ethics. These ethical rules were intended as a form of self-governance within the legal system; in the context of the judiciary, the rules enshrine the sanctity of the judicial process. These rules do not simply apply to attorneys representing parties in court, but to the entire courthouse – including administrators, clerks, attorneys, and judges. As a community of professionals, we must preserve the integrity of the system and the judicial process.

To be clear, you should report this matter because, if true, such conduct may be considered a violation of many ethical rules, but most importantly, it is prejudicial to the deliberative process that is the cornerstone of the entire judicial system.[1]

Regarding your own conduct, there are certain rules that can and do apply to you even though you have not yet been admitted to practice; however, which rules apply depend on your role and duties. Defining the role is often difficult because of the different nomenclature used to characterize different clerical roles. Commentators often utilize terms such as "law secretary," "court attorney," "elbow clerk" (a vivid term used more in other states), or "law clerk" to describe an attorney or recent law graduate who works directly with an individual judge.

### Reporting

Regardless of the nomenclature, under the New York Rules of Professional Conduct (RPC) 8.3(a), a lawyer – or in your case one pending admission – "who knows that another lawyer has committed a violation of the RPC that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." While RPC 8.3(a) refers to a lawyer "who knows" that a violation has occurred, all lawyers know that the definition of the term "knows" can be interpreted in many different ways and qualified in many different ways. Do not over analyze this requirement. Sometimes you know it when you see it; here, you've seen it. You not only have a duty as a clerk, but as an attorney, even though not yet admitted, to share your knowledge as to how this draft opinion may have been leaked.

Therefore, even though you cannot be completely certain, if you strongly believe that another lawyer has committed a violation of the RPC that raises a substantial question as to his honesty, trustworthiness, or fitness as a lawyer, then you should report it.

Comment 3 to RPC 8.3 notes that a lawyer is not necessarily obliged to report every violation of the rules. The rule limits the reporting obligation to "those offenses that a self-regulating profession must vigorously endeavor to prevent." Comment 3 also notes that "substantial refers to the seriousness of the possible offenses and not the quantum of evidence of which the lawyer is aware." In your situation, you do not have to be concerned with the quantum of evidence that you are aware of, but instead that the potential violation does indeed raise a substantial question to the lawyer's honesty, trustworthiness, and fitness as a lawyer, since the suspected violation, if true, shakes the foundation of the judicial process to its core by disrupting the deliberative process.

### Suspect Violation

Now, turning to the actions of the clerk, based upon your observations, it appears that the clerk has revealed confidential information in a case currently *sub judice* and has violated rules governing the conduct of nonjudicial court employees, judicial conduct, and the attorney rules of ethics. While there are many different potential reasons for the clerk's actions, we will analyze this from

the potential motivations of personal gain and political activism.

Pool clerks and judges' assigned clerks are subject to the same rules governing conduct of nonjudicial court employees under 22 N.Y.C.R.R. Part 50. Specifically, under 50.1(II)(D), court employees "shall not disclose any confidential information received in the course of their official duties, except as required in the performance of such duties, nor use such information for personal gain or advantage."

A draft of a judicial opinion (especially in a controversial case) would be considered confidential information "received in the course of the clerk's official duties" because of the role draft opinions play in the deliberative process. Judges understand that drafting without the threat of public scrutiny or intervention prior to publication is a critical part of that deliberative process. Sharing drafts undermines the process and compromises judicial integrity and objectivity. This is but one argument against premature public disclosure.

"Confidential information" is not a clearly defined phrase, but it is nonetheless evident that this draft opinion was confidential, as until an opinion is released, it is, *ipso facto*, not intended for public dissemination, ergo "confidential." If the clerk did disseminate this draft opinion to the media, such action would constitute a violation of 50.1(II)(D).

Next, if the clerk intentionally disseminated this draft opinion to the media, further ethical rules may be implicated. Personal gain or political activism could have been a motivating factor behind the disclosure due to the controversial nature of the case. If the clerk did so for personal gain – whether a monetary gain or other form – the clerk would be in violation of 50.1(II)(D).

### Political

Assuming that the clerk did disseminate the draft, if the clerk's intentions were political in nature, the clerk violated 50.1.(III)(B), which states that court employees shall not engage in political activity during scheduled work hours or at the workplace. This is another rule that you should not overanalyze. While lawyers could argue the nuances of "scheduled work hours" and "at the workplace," here, the intent of the rule is that court employees, in their capacity as such, should not engage in political activity. Here, the clerk was virtually on the courthouse steps, handing what we presume (for sake of this analysis) to be a draft judicial opinion to a journalist. While we cannot know for certain whether this action was political activity at the time, if it was, it was political activity on the courthouse steps and was directly related to the clerk's role as a clerk – a violation of 50.1(II)(B).

Generally, clerks are allowed to participate in any kind of political activity that is not specifically prohibited by 50.2(C), so long as they do not implicate their judges in their politics.[2] Therefore, while a law clerk cannot conduct political activity in the courthouse or chambers during work hours, he or she can circulate petitions for candidates for office, accept a volunteer position in a political campaign,[3] act as a political party member, and solicit signatures on nominating petitions for political candidates.[4] While law clerks are not permitted to hold any elective office in a political organization,[5] they can hold an appointive office in a political organization.

**"Assuming that the clerk did disseminate the draft, if the clerk's intentions were political in nature, the clerk violated 50.1.(III)(B), which states that court employees shall not engage in political activity during scheduled work hours or at the workplace."**

Law clerks are also subject to certain sections of the rules governing judicial conduct,[6] since they are considered personal appointees of judges. It is likely that the clerk violated both 50.5 and 100.3(B)(8). While you, as a clerk in the pool, are not considered a personal appointee of a judge, a clerk for a judge is considered a personal appointee and may not engage in political activities, as set forth in 100.3(B)(8) and 50.5.

Under 100.3(B)(8), judges "shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories." Further, a judge "shall require similar abstention on the part of court personnel subject to the judge's direction and control." Therefore, clerks are not permitted to comment on pending or impending proceedings in any court – and especially cases and decisions that are sub judice in their own court.

The Court of Appeals has accepted the Judicial Conduct Commission's recommendation in some cases that judges be removed from judicial office when their conduct represented "a callous disregard for the applicable ethical standards."[7] Such determinations are very fact intensive; however, for example, in *In re Maney*, the judge continued

his intense political involvement even after his election to judicial office. The Judicial Conduct Commission and Court of Appeals found that such conduct demonstrated his unwillingness to forgo political activity and reflected an insensitivity to his ethical obligations as a judge. Further, the Court of Appeals rejected the judge's attempts to justify his partisan involvement and views blatant political actions as flagrant disregards of the ethical restraints imposed by the rules governing judicial conduct.

While a law clerk may be free to participate in political activity, it is evident that the situation presented falls outside of the scope of the permissible activity under the rules governing judicial conduct and rules for nonjudicial court employees, since the clerk's perceived act of providing a draft of the decision to the media – whether authorized by the judge or not – implicates the judge in his politics.

### Prejudicial to the Administration of Justice

Under the RPC, the clerk has implicated RPC 8.4(d), which requires that a lawyer shall not "engage in conduct that is prejudicial to the administration of justice" and 8.4(f) by "knowingly assist[ing] a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law." While one cannot be certain whether the clerk was directed to leak the draft opinion or did so independently, its release is prejudicial to the administration of justice, as it compromises and disrupts the deliberative process, the most essential function of the court. The sanctity of the deliberative process is the cornerstone of the judicial system and such a violation can lead to a host of problems. Because the decision is not yet final, political activists could attempt to influence the judges deciding the case or judges could feel pressured to rule a certain way because of outside factors and not the law.

## Conclusion

In conclusion, lawyers must balance the letter and spirit of the law while trusting their instincts. The balance here mandates reporting because the clerk's actions, on their face, run afoul of both the letter and spirit of the various ethical rules that govern court employees, judges, and lawyer. We conclude that this potential violation must be reported.[8]

*Sincerely,*
*The Forum by*
*Jean-Claude Mazzola*
*(jeanclaude@mazzolalindstrom.com)*
*Hanoch Sheps*
*(hanoch@mazzolalindstrom.com)*
*Kevin Kelly*
*(kevin@mazzolalindstrom.com)*

## QUESTION FOR THE NEXT FORUM

I am a shareholder in Newtide Corporation and have recently encountered an issue with regard to the company's general counsel, whom I will refer to as Ms. Weaver. In addition to serving as the company's general counsel, Ms. Weaver has also represented me individually in matters unrelated to Newtide. A few months ago I discovered that the majority managers of Newtide were stealing funds from the corporation for their own personal use. I reached out to Ms. Weaver to seek advice as to an appropriate resolution for the shareholders. We were never able to resolve the issue and ended up at an arbitration hearing to litigate the issue. The other shareholders and I sued the majority managers derivatively and obtained separate litigation counsel to represent our interests. The majority managers also retained separate litigation counsel to represent them at the hearing.

During the arbitration hearing I learned that Ms. Weaver had been blind copying the majority members and managers of the company on communications between me and her where I sought counsel on how to resolve the issue. I also learned that she had produced private email communications between me and her to counsel representing the majority managers for use at the hearing. I never gave Ms. Weaver my consent to waive privilege or a conflict waiver and was very upset to learn that communications that I had thought were confidential attorney client communications were divulged to my adversary.

Are Ms. Weaver's actions ethical? Do I have any recourse to deal with her conduct assuming it is improper?

*Sincerely,*
*Carla Conflicted*

**Endnotes**

1. While we are solely focused on the ethical issues that arise in this situation, there are potential privacy and criminal implications for the clerk's disclosure. Attorney's ethics rules do not specifically direct attorneys to report crimes committed by other attorneys; it is our ethical duty as individuals and as members of the community at large – not lawyers – that compels us to report crimes committed whenever we see them.

2. When a clerk engages in political activity, a judge must instruct his or her law clerk not to create the impression that the judge is engaged in the political activities (*see* Opinion 12-71 citing Opinions 07-11; 90-102 (Vol. VII)) and should advise that political activities are not permitted in the courthouse or during the law clerk's working hours (*see* Opinions 07-11; 90-102 [Vol. VII]).

3. N.Y. Jud. Adv. Op. 93-36.

4. N.Y. Jud. Adv. Op. 90-85.

5. 22 N.Y.C.R.R. § 100.5(C)(1).

6. 22 N.Y.C.R.R. Part 100.

7. *In re Maney*, 70 N.Y.2d 27, 30–31 (1987) citing *Rosenthal v. Harwood*, 35 NY2d 469 (1974).

8. The Advisory Committee on Judicial Ethics implores law clerks with any questions to contact the Unified Court System's Office of Court Administration, the agency with the ultimate authority to interpret Part 50, for guidance on how Part 50 applies to his/her particular circumstances. (Contact: ETHICS HELPLINE: 1-888-28ETHIC.).

# In Congress, Rare Bipartisan Support for Mental Health Legislation

By Hilary Jochmans

In addition to the toll COVID-19 took on Americans physically, the stress, isolation, fear and sadness have also impacted our mental health. According to the Centers for Disease Control and Prevention, drug overdose deaths in the United States during the first year of the pandemic were at a record 100,000.[1] Depression and anxiety surged worldwide by a whopping 25%, says the World Health Organization, with women, youth and those with underlying health factors particularly impacted. Congress is actively looking to provide legislative solutions to these complex health issues.

One of the most robust legislative packages working its way through Congress is the Restoring Hope for Mental Health and Well-Being Act of 2022. This comprehensive measure would reauthorize certain programs relating to mental health and substance use disorders. Specifically, it would address maternal mental health and substance use disorders; prevention and treatment of mental and behavioral health issues for veterans, members of the Armed Forces and first responders; eating disorders; school-based mental health services; coverage of mental and behavioral health care through Medicaid and the Children's Health Insurance Program, including for juveniles in public institutions; and integration of behavioral health in primary care settings.

While this measure awaits action across the Capitol, several committees in the closely held Democratic Senate are working to produce a comprehensive measure to deal with mental health and addiction. Senate leaders had hoped to have a bill by the August recess but, as of this writing, that self-imposed deadline will not be met.

There are dozens of smaller, targeted mental health care bills pending in Congress. Some address veterans, access to counseling services or telehealth services, insurance issues, prescription drugs and even social media, which is believed to be a trigger for mental health problems in youth. One such measure that was recently implemented

is the new three-digit number (988) for a national suicide prevention and mental health crisis hotline. This legislative creation was first proposed pre-COVID-19, but was passed and signed into law in the height of the pandemic in the fall of 2020.

Veterans have suffered disproportionally from mental health ailments. In order to help address this crisis, the House passed the STRONG Veterans Act. This measure would require the Veterans Administration to update training for their workforce and Veterans Crisis Line staff, designate a Buddy Check Week to organize outreach events and educate veterans on conducting peer wellness checks, and update the Veterans Justice Outreach Program, including conducting program outreach to justice-involved veterans.

Additionally, provisions to increase funding for mental health programs were included in the recently enacted bipartisan Safer Communities Act. Monies would be provided to award grants to states to expand Medicaid or Children's Health Insurance Program assistance through school-based entities and the Pediatric Mental Health Care Access program, which promotes behavioral health integration into pediatric primary care by supporting mental health care telehealth access initiatives.

But, as House Energy and Commerce Oversight and Investigations Subcommittee Chairwoman Diana DeGette (D-CO) said, "There's no single problem with mental health in this country and so, therefore, there's no single solution." She went on to add at a hearing, "We need to look at a multifaceted way to support America's health and well-being."

When this article is published, we will be a little more than a month away from the key midterm elections. Democrats hold a narrow majority in Congress, a position likely to change after Nov. 8, with Republicans possibly taking control of the House and/or the Senate. In the final days of this Congress, members on both sides of the aisle should be working furiously to pass broad bipartisan legislation on which they can campaign in their districts. All 435 members of the House and 35 senators are up for reelection.

With an issue like mental health that impacts all Americans, this should be a prime target for legislative action. Elected officials on both sides of the aisle have shared their personal stories of mental health struggles, including addictions, suicide and overdoses. But unfortunately, time is a precious commodity in the Capitol. There are many national priorities that must be addressed before the curtain closes on the 117th Congress on Dec. 31, 2022.

President Biden has also weighed in on the mental health care debate. During his State of the Union, he outlined how the federal government could address the mental health care crisis. Included in his broad proposal is a provision of particular note to lawyers, as he seeks to increase mental health resources for people working in the justice system.

Biden cites a study that shows an estimated 40% of the incarcerated population have a mental illness, but only one-third of those individuals receive treatment. The president has directed the Department of Justice to expand funding to communities and corrections systems to provide behavioral health care, family services and transitional programming for adults returning home.

One issue that arose repeatedly in Congressional hearings on mental health was the need to develop a broader and more diverse workforce to assist those needing care. Missing from this discussion is the inclusion of lawyers in the mental health care ecosystem. NYSBA President Sherry Levin Wallach has seen the need to explore the connection between the mental health crisis and our civil and criminal justice systems. As part of her presidency, she has created the Task Force on Mental Health and Trauma Impacted Representation. This group of mental health and legal experts will consider how the bar association can better serve adults and children living with mental illness and/or trauma histories. The task force seeks to explore ways attorneys and other working in the judiciary can better serve the community through trauma-informed practice. These and other issues will be further explored and developed in the coming months.

If you, or someone you know, needs assistance, remember there is no shame in seeking and receiving help. Even in the absence of additional congressional action; help is out there.

Resources available to NYSBA members seeking assistance include the NYSBA LAP Hotline, available 24/7 and staffed by mental health professionals. Through this service, members can access referrals to counselors and receive up to four free sessions. Additionally, the LAP is available to assist lawyers, judges, law students and their families. Membership is not required.

---

*If you or someone you know needs mental health help, text "STRENGTH" to the Crisis Text Line at 741-741 to be connected to a certified crisis counselor.*

**Endnote**

1. https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2021/20211117.htm.

**Hilary Jochmans**, policy director for NYSBA, writes about legislation of interest to members. Previously Jochmans was the director of the New York State governor's office in Washington for both Andrew Cuomo and David Paterson and has spent a dozen years on Capitol Hill working in the House and Senate.

# Reducing Distractions and Boosting Productivity at Work

By Jennifer Andrus

Managing your time, your workload and increasing productivity are goals for most leaders in a workplace.

Paul Unger, attorney and founder of Affinity Consulting Group, says the first step is to acknowledge the type of interruptions in your workday. Most Americans deal with an interruption every five minutes at work. Attorneys tend to be interrupted every two to three minutes, according to Unger. Graphic 1 shows how to compute your own interruption rate using examples from his workload: "We live in a hair-on-fire world, and that is not going away anytime soon. We need to inject some process into our day so we can organize that information that comes in," he said.

Everyone has heard of ADHD, attention deficit hyperactivity disorder. Unger describes an environmental factor called "technology-induced attention deficit trait." ADT is not a medical problem but an environmental one. "ADT is why very smart people underperform. It's the brain fog, the inability to immerse ourselves in one topic and achieve focus."

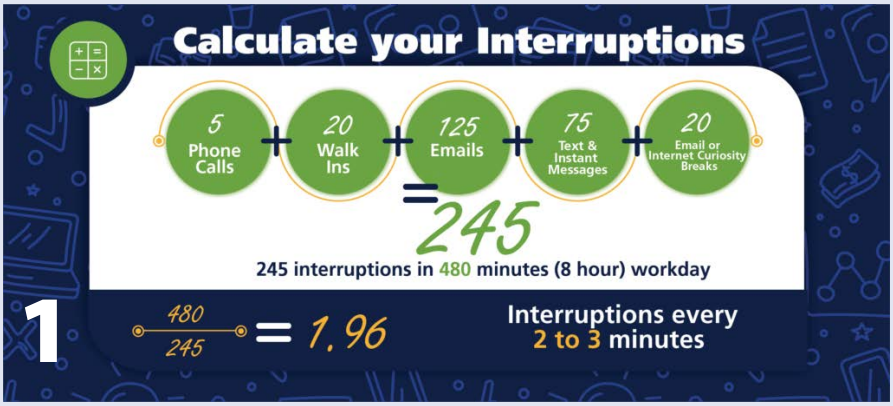
We can be our own worst enemy in derailing the day. How often do you check email or Facebook or look at your phone? The average adult checks their phone 80 times a day.

These internal interruptions not only stop your workflow, but it can take several minutes to get back on track. A 2007 study conducted by Microsoft found that it took workers 15 minutes to regain focus after an interruption. Unger says that number is now up to 23 minutes needed to regain focus (see graphic 2).

So, how do we limit distractions and interruptions? Set aside productivity time during the day and assign a single task in that time period. Think of it as an appointment with yourself in the same manner you make appointments with clients. Be specific about your work during that time. Unger says this will also help attorneys track time for clients (see graphic 3).

The cost of multitasking is a 40% loss in productivity. Switching tasks means it will take more time to complete work and creates more stress in the workplace.

"We need to stop trying to be multitasking superheroes. The reality is that the human brain does a very poor job at multitasking, and we just need to realize that."





# Member Profile: Margaret T. Ling

*Margaret T. Ling has been a real estate attorney since 1986. Prior to practicing as a real estate attorney, Margaret was a deputy court clerk for Chief Judge Constance Baker Motley of the United States District Court for the Southern District of New York. Following her clerkship, Margaret focused on the area of immigration law before transitioning into real estate law.*

*Currently, Margaret is in the role of business development and underwriting counsel for the New York State Agency Division of Amtrust Title Insurance Company.*

## Why did you decide to become a lawyer?

I was an Asian child and was raised to do what your parents want you to do, which was a career in medicine. When I couldn't get through biology, I dropped the idea of going to medical school. My father said, "Ok, you can go to law school and change the world in a different way." My desire was to go to journalism school but that was a "no-no" in the eyes of my parents.

## Why did you choose real estate law?

In the 1980s I had every intention to become an immigration attorney. I entered immigration law but quickly became frustrated by the corruption in the immigration system at the time.

My father was a physician practicing in Chinatown where his patients kept asking me if I did closings. So, I pivoted to real estate and worked for 10 years in solo practice helping lots of immigrants and first-time home buyers. Later, I was approached by title companies to work in-house; I have been doing that for the last 25 years.

## Can you share an experience dealing with racism and sexism in your professional life?

Early in my career, I would walk into court with my suit and my Coach briefcase, and someone would ask me, "Where is the lawyer?" Judges would call me up to the bench in front of a hundred people and start grilling me with questions. I couldn't get over it. Now I listen to women with similar experiences. That was 1980. We are in 2022 and it's still going on. I mentor young lawyers because there was no one there to help me. I tell them that you have to speak up for your work and fight to be recognized for it.

## How is the profession doing in the area of diversity, equity and inclusion, and what barriers remain?

There is still a lack of diversity in white shoe law firms, government and corporate law. In my experience in real estate law I have been the first and the only – the first Asian, the first woman.

Women and people of color are not making partner and leaving prestigious firms after 20 years of service to go to smaller firms, go solo or become in-house counsel. It's a waste. Those attorneys are not getting the opportunity to fulfill their potential. The DEI committee at NYSBA is reaching out and working with all the sections. Diversity isn't just our issue in our committee – it's an issue that every committee should care about.

## What advice would you give young lawyers or those new to the profession?

Be open and humble. Be willing to learn – you are always learning. Don't forget why you are really a lawyer: to uphold the rule of law. I encourage law students that I mentor to join NYSBA early and use its resources. It builds your resume and shows employers that you sincerely embrace the law.

## Finish this statement: "You should join the New York State Bar Association because . . ."

One of the benefits of membership is that you get access to tons of help and networking. I see it in the Real Property Law Section community all the time. Someone has a question and 50 people answer it to help them out. NYSBA helps you find a job, build confidence and hone your craft. It's a safe place to test drive all your skills without running the risk of failure. You can't pilot this career alone.

# Member Profile: Christopher Bopst

*Litigation attorney Christopher Bopst, partner of Wilder and Linneball in Buffalo, is the chair of the NYSBA Committee on the New York State Constitution. He is passionate about its work and the issues members are investigating this year, including term limits and simplification of the state's constitution.*

## What sparked your interest in the study of the New York State Constitution?

Peter Galie was a professor of mine at Canisius College in Buffalo. He's one of the preeminent scholars in the area of the New York State Constitution. During my undergrad, I was his research assistant while he was writing a constitutional history of the State of New York called "Ordered Liberty." Since then, we have written articles and co-authored two books.

## What are the points of pride and the flaws of our state constitution?

It's a heavily amended document that has not worn well over time. There are a lot of issues that could be updated and simplified. In Article VII, there are sections dedicated to bonds that were issued and retired decades ago. Our state constitution is roughly 55,000 words, which makes it about seven times the size of the U.S. Constitution. You have a constitution that is overgrown with many cases obsolete, unenforceable provisions under federal law.

We have things in our state constitution that are sources of real pride, like the forever wild provision in the Adirondacks, our commitment to help the needy and the right to a sound basic education. We have a lot in our state constitution that is not in the federal Constitution.

## The Committee on the New York State Constitution is dealing with current issues such as the lack of a provision to fill a vacancy in the office of lieutenant governor.

It's a unique quirk of New York State law that if there is a vacancy for lieutenant governor, the governor can appoint who she or he wants to fill that role without confirmation by anybody. Almost every other position at that level requires confirmation, usually by the state senate. The lieutenant governor is not subject to approval of elected representatives of the state. Someone can come in with no oversight.

## The Equal Rights Amendment to the New York State Constitution passed in the Legislature in extraordinary session following the *Dobbs* decision. What is your reaction?

The *Dobbs* decision made legislators realize that if you want to protect something you have to act. The Legislature should be looking out for people's rights. We can't rely on a Supreme Court decision. Why didn't Congress vote to codify *Roe* when they had a filibuster-proof majority? Now, all of a sudden you realize what the court gives, the court can take away. Now people are saying, "Well, we should have codified *Roe* when we had the chance. . . ."

## Why did you join NYSBA and what value do you get from your membership?

In 2014, Hank Greenberg really got me involved because he knew about my work on the state constitution. It's been truly rewarding. Being in Buffalo, oftentimes we're a little bit cut off from the rest of the state. NYSBA has given me an opportunity to interact with brilliant lawyers and people in New York City and Albany and throughout the state. I get so much joy and exuberance out of the committee and I'm excited about what we've been doing. I'm excited about our different subcommittees, and it's truly been a source of great joy for me.

## Any advice to young lawyers and those just starting out?

Find good mentors you can work with. It's one thing I have been fortu-

*continued on page 59*

# New York State Bar Association Recognized for Member Services During COVID-19

By Liz Benjamin

The New York State Bar Association received two prestigious awards from the Association for Continuing Legal Education for its outstanding commitment to the public interest and utilization of technology to improve member services.

The first award, for professional excellence, was given to NYSBA's Publications Department for its groundbreaking automation of the statutory Power of Attorney form.

The second, for outstanding achievement in the public interest, recognized NYSBA's COVID-19 Pro Bono Recovery Task Force, Information Center and pro bono network, established both to keep members informed and to connect New Yorkers in need to free legal services during the coronavirus pandemic.

Established in 1964, the Association for Continuing Legal Education is an international organization that supports the continuing legal education professional around the globe through leadership, community, education and development. Its members include administrators, trainers, managers, educators, publishers, programmers and meeting professionals.

"As the nation's largest voluntary state bar organization, serving our members by providing them with the tools and support necessary to succeed professionally is our top priority," said NYSBA President Sherry Levin Wallach. "These awards are a testament to our deep commitment to fulfilling that mission, which has grown even more important as technological advancements and the pandemic have required us to do more in the virtual space. I commend our staff for their hard work and congratulate them on this well-deserved recognition."

New York State significantly revised its power of attorney form in 2021, allowing for a number of technical amendments. Given that the form is a widely used and powerful legal document, NYSBA, which has always offered the form as a Word document along with practical guidance, decided to provide an automated version.

Working through a long-standing partnership with LexisNexis, the association produced a standalone automated form that eliminates the guesswork surrounding the new legislative changes and dramatically improves access for members.

The COVID-19 crisis presented unprecedented challenges for the legal profession, making it imperative that members had the most up-to-date information to make decisions about how to keep themselves and their employees safe while continuing to serve clients and safeguard access to justice. NYSBA created an online information center that provided real-time updates and served as a comprehensive clearing house of articles, memos, directives and more.

NYSBA also created a COVID-19 Pro Bono Recovery Task Force in partnership with the New York State Court System to pair attorneys with New Yorkers in need of effective, comprehensive and free services in urgent criminal and civil matters related to the pandemic. The association's pandemic-related efforts were rounded out by a series of CLEs on how to handle a variety of legal matters that arose as a result of COVID-19, which were offered for free to attorneys who volunteered their services for those who could not otherwise afford representation.

Experienced attorneys in New York must complete 24 accredited CLE credit hours during each biennial reporting cycle, while newly admitted attorneys are required to take a minimum of 32 credit hours of accredited transitional education within the first two years after admission to the bar.

The New York CLE Board has extended its order allowing newly admitted attorneys to complete the six-hour skills requirement of their 32 credit hours via videoconference, live webcast or teleconference through Dec. 31, 2022.

---

**MEMBER PROFILE: CHRISTOPHER BOPST**

*continued from page 58*

nate to have throughout my career. I have professionals along the way who helped me get through situations and helped me avoid mistakes that they've made and that's really important. My law partners say there's a reason they call it practice because you are constantly growing and learning and applying new skills and applying new things you've learned. To have an experienced lawyer you can talk with is invaluable.

## "I would join the New York State Bar Association because . . ."

The relationships you can build by being in the association, the people you can meet and the opportunities that you can develop and grow much more than pay for themselves with the cost of joining. The relationships that I have made through the association are critical to my development and my practice. These are folks I interact with regularly and learn from and who maybe learn a thing or two from me.

# New York State Bar Association Launches Task Force To Help Lawyers Better Serve Clients With Mental Health Challenges

By Jennifer Andrus

The New York State Bar Association is launching a task force that will focus on the impact that the burgeoning mental health crisis taking place across the state is having on the public and the civil and criminal justice systems.

"Despite a revitalized focus on the issues, the legal system is continuing to fail the majority of our clients living with mental illness and trauma," said Sherry Levin Wallach, who, as president of the New York State Bar Association, appointed the task force. "They must be treated with compassion and not automatically criminalized, when and if they interact with the justice system. Mental illness and trauma must be destigmatized."

New York State Attorney General Letitia James began public hearings in June on the difficulty of obtaining mental health treatment in New York. This problem has only been exacerbated during the coronavirus pandemic, when overwhelmed medical professionals and lockdowns combined to make it even harder for individuals to access the help they need. The COVID-19 crisis also deepened an already mounting mental health crisis across the state and nation, especially among young people.

But with COVID-19 hospitalizations easing, James says there is little evidence that hospitals are expanding their in-patient psychiatric services.

Since 2014, New York has seen a significant increase in mentally ill people housed in county jails, homeless shelters and state prisons, while the number of hospital beds for those living with mental illness has decreased. The state has only 3,000 in-patient beds for adults and just 274 beds for pediatric patients, and the number is only going down as labor shortages force facilities to curtail services or even shutter altogether.

In addition to its other responsibilities, the Task Force on Mental Health and Trauma Impacted Representation will review treatment courts, civil proceedings and our existing laws.

"There is a crisis in mental healthcare in New York and we hope our task force can effect change in state policy and identify budget priorities," said Sheila E. Shea, chair of the task force and director of the Mental Hygiene Legal Service, Third Judicial Department. "We also plan to develop an education program for attorneys to help better serve clients with mental illness or trauma histories."

The task force comprises two dozen leaders in the field from across New York State. They will compile a report by April 2023.

Members include:

**Matthew Wayne Alpern**, interim chief statewide implementation attorney, director of quality enhancement for criminal defense trials, New York State Office of Indigent Legal Services, Albany, NY

**Guy Arcidiacono**, deputy bureau chief, appeals & training bureau; attorney-in-charge psychiatric litigation unit, Suffolk County District Attorney's Office; Riverhead, NY

**Katherine LeGeros Bajuk**, senior trial attorney and mental health specialist, New York County Defender Services, New York, NY

**Jeffrey Berman**, mental health attorney, criminal defense practice, The Legal Aid Society, New York, NY

**Andrea E. Bonina**, partner, Bonina & Bonina, Brooklyn, NY

**Eric Broutman**, partner, Abrams Fensterman, New Hyde Park, NY

**Susan C. Bryant**, executive director, New York State Defenders Association, Albany, NY

**Jacqueline Cara**, solo practitioner, Cara Law; Garden City, NY

**M. Elizabeth (Libby) Coreno**, general counsel, Bonacio Construction, Saratoga Springs, NY

**Sophie Feal**, managing attorney, holistic representation program, Legal Aid Bureau of Buffalo, Buffalo, NY

**Joseph Glazer**, task force co-chair, deputy commissioner, Westchester County Department of Community Mental Health, Mamaroneck, NY

**Mary J. Goodwin-Oquendo**, attorney, Jo Anne Simon, New York, NY

**Beth Haroules**, senior staff attorney, New York Civil Liberties Union, New York, NY

**Christopher Andrew Liberati-Conant**, assistant attorney general, litigation bureau, Office of the New York State Attorney General, Albany, NY

*continued on page 62*

# American Bar Association Approves New York State Bar Association-Sponsored Resolutions on U.S. Territories, War Crimes, Guns and Legal Ethics

By Susan DeSantis

The New York State Bar Association succeeded in getting four resolutions passed by the American Bar Association's House of Delegates at its meeting Aug. 8 and 9 in Chicago.

The resolutions:

- Urge Congress to enact laws that provide residents of the U.S. territories the same rights, liberties, and protections as citizens of the 50 states;
- Advocate for the United Nations to determine if the Russian Federation committed war crimes in Ukraine;
- Call on federal, state and local governments to give law enforcement more time to conduct background checks for firearms purchasers; and
- Reaffirm that the sharing of legal fees with non-lawyers and the ownership or control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession.

Resolution 404, sponsored by the New York State Bar Association and the Virgin Islands Bar Association, declares that the "territorial incorporation doctrine" established by the U.S. Supreme Court in the Insular Cases in 1901 is contrary to the principles of the U.S. Constitution and civil rights jurisprudence. The New York State Bar Association launched a task force in June to examine the historically unequal treatment of the residents of the U.S. territories. The association's Executive Committee passed a resolution in July similar to the one adopted by the ABA at its two-day Annual Meeting Aug. 8 and 9 in Chicago. The ABA resolution urges Congress to enact legislation granting full citizenship rights to the residents of the territories.

"I am proud to take a leadership role in the efforts to establish equal rights for the people of the U.S. territories, eliminate the territorial doctrine and finally dismantle the racism and racist notions that still exist as 'good law' in the line of cases known as the Insular Cases," said Sherry Levin Wallach, president of the New York State Bar Association, who argued in support of the resolution at the ABA meeting.

Resolution 405 calls upon the United Nations General Assembly to authorize the secretary general to establish international war crime tribunals to determine whether the Russian Federation and its officials violated international law in Ukraine. The Executive Committee of the New York State Bar Association in July approved a similar resolution proposed by the association's International Section.

"It's hard to imagine a more serious threat to the rule of law than Russia's unprovoked invasion of a sovereign nation," Levin Wallach said. "The New York State Bar Association believes that support of the rule of law requires us to urge the United Nations General Assembly to establish an investigative body to determine and hear the evidence of war crimes that have taken place."

Resolution 601 urges federal, state, local and tribal governments to enact laws to give police reasonable time to complete a background check of a gun buyer. Federal law now requires that the gun be transferred to the buyer if the background check is not completed within three business days. In 2018, 276,000 background checks were not finished within the three-day period, giving the gun purchaser possession of the firearm regardless of criminal history.

"This can have devastating consequences if the gun gets into the wrong hands," Levin Wallach said. "The three-day deadline is known as the Charleston loophole because Dylann Roof, who killed the pastor and eight parishioners at the Emanuel African Methodist Episcopal Church in Charleston in 2015, obtained a gun when time ran out to do his background check. If his check had been completed, his application would have been denied due to an arrest for possession of a controlled substance."

The New York State Bar Association joins the Illinois and New Jersey state bar associations in co-sponsoring Resolution 402. The resolution reaffirms the ABA's commitment to the law that prohibits lawyers from sharing legal fees with non-lawyers and from directly or indirectly transferring ownership or control over entities practicing law to non-lawyers.

"Lawyers are held to the highest standards of professional ethics," Levin Wallach said. "The public must be protected from those who want to practice law free from the kind of responsibilities that ensure that a client's interest comes first."

## Roy M. Warner

Experienced NY Counsel, peer-reviewed author and CLE Lecturer offering consultations and extensive services for substantive motions, pleadings, discovery, appeals, trial preparation and more. I personally and confidentially review your underlying documents, research points of law and draft what is needed.

Visit www.coveringcounsel.com for details.
t. 561-504-2414
e. roy.warner@coveringcounsel.com

## MEDICAL EXPERT IN THORACIC AND VASCULAR SURGERY, NON-INVASIVE VASCULAR TESTING AND WOUND CARE

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

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

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

## Growing midsize US Law firm or boutique IP firm? Partner with a European IP Firm and put boots on the ground across the pond!

Expand your law firm's international practice and prestige by adding a vibrant international practice with over 20 years' experience in European IP filings. Make a firm, one that understands both US practice and European practice, your "of counsel" firm and receive EPO and other official actions packaged with your brand. Put highly experienced US and European trained boots on the ground here in Europe for your clients' benefit. Share prestigious worldwide brands like DA VINCI or GREAT WALL for your legal services! Contact john@moetteli.com for more information.

## www.lawspacematch.com

Find a clean LawSpace to sublease within a law office. Search for free by zip code and connect with Lawyers. Renting empty space instantly: www.lawspacematch.com

## FLORIDA ATTORNEY | TITLE COMPANY

STRALEY | OTTO & ACTION TITLE COMPANY over 35 years' experience in Real Estate, Title Insurance, Probate, Guardianship, Estate Planning, Business Transactions, and Community Association Law.

Dedicated to providing superior service and quick turnaround time for Legal and Title Work. For Co-Counsel or Referral contact:

954-962-7367
SStraley@straleyotto.com
www.Straleyotto.com
www.ActionTitleco.com

## NYSBA LAUNCHES TASK FORCE TO HELP LAWYERS BETTER SERVE CLIENTS WITH MENTAL HEALTH CHALLENGES

*continued from page 60*

**Nina Loewenstein**, senior staff attorney, Disability Rights New York; Albany, NY

**Daniel Theodore Lukasik**, judicial wellness coordinator, New York State Office Of Court Administration, Buffalo, NY

**Jennifer J. Monthie**, legal director, Disability Rights of New York, Albany, NY

**Ruth O'Sullivan**, project/clinical director, Brooklyn Mental Health Court, Brooklyn, NY

**Brendan P. Owens**, partner, Stafford, Owens, Murnane, Kelleher, Miller, Meyer & Zedick, Plattsburgh, NY

**Erin Lynne Peake**, associate, Bonina & Bonina, Brooklyn, NY

**Michelle A. Smith**, chief of staff, New York State Unified Court System Office for Justice Initiatives, New York, NY

**John V. Tauriello**, attorney, Brown & Weinraub, Albany, NY

**Patricia J. Warth**, director, New York State Office of Indigent Legal Services, Albany, NY

**Jed B. Wolkenbreit**, counsel, New York State Conference of Local Mental Hygiene Directors, New York, NY


NYSBA
Annual
MEETING
2023
Save the Date
JAN. 18 - JAN. 24, 2023
Registration starts in October
Additional Details & Agendas Coming Soon!

# MEMBERS OF THE HOUSE OF DELEGATES

### First District

Ahn, Bridgette Y.
†* Alcott, Mark H.
Arenson, Gregory K.
Baum, Simeon H.
Berman, Mark
Boston, Sheila S.
Braiterman, Andrew H.
Buckley, Erica F.
Carter, Ralph J
Chandrasekhar, Jai K.
Chang, Vincent Ted
Christian, Catherine A.
D'Angelo, Christopher A.
D'Souza, Leroy Austin
Filemyr, Edward J.
Finerty, Margaret J.
* Forger, Alexander D.
Fox, Glenn
Grays, Taa R.
Griffin, Mark P.
Haig, Robert L.
Hecker, Sean
Himes, Jay L.
Hoffman, Stephen D.
Holder, Adriene L.
Jaglom, Andre R.
†* James, Seymour W.
Kaufman, Gary G.
Kenney, John
Kiernan, Peter
Klugman, Scott
Kobak, James B.
Koch, Adrienne Beth
Kohlmann, Susan
* Lau-Kee, Glenn
* Leber, Bernice K.
Lenci, Edward
Lessard, Stephen Charles
Livshits, Aleksandr B.
Lustbader, Brian G.
Maroney, Thomas J.
Mazur, Terri A.
McElwreath, Suzanne
McNamara, Michael J.
†* Miller, Michael
Minkoff, Ronald C.
Minkowitz, Martin
Morrissey, Mary Beth Quaranta
O'Connor, James P.
Parker, Jessica D.
Paul, Deborah L.
† Petterchak, Jacob Wade
* Pruzansky, Joshua M.
Quaye, Rossalyn
Radding, Rory J.
Ravala, M. Salman
Riano, Christopher R.
Rothberg, Peter W.
Russell, William T.
Safer, Jay G.
Sargente, Alfred J.
Sen, Diana S
Shafiqullah, Hasan
Silkenat, James R.
Sonberg, Michael R.
Stephenson, Yamicha
Stoeckmann, Laurie
Swanson, Richard P.
Treff, Leslie C.
Watanabe, Tsugumichi
Waterman-Marshall, Kathleen C.
Wesson, Vivian D.
Whittingham, Kaylin L.
Wiig, Daniel K.
†* Younger, Stephen P.

### Second District

Aidala, Arthur L.
Bonina, Andrea E.
Finkel, Fern J.
Klass, Richard A.
Moreno, Angelicque M.
Napoletano, Domenick
Quiñones, Joanne D.
Richter, Aimee L.
Schram, Luke Christopher
Stong, Elizabeth S.
Sunshine, Nancy T.
Vaughn, Anthony
Wan, Lillian
Yeung-Ha, Pauline

### Third District

Bosworth, Lynelle
Burke, Jane Bello
Clouthier, Nicole L.
Davidoff, Michael
Fernandez, Hermes
Gold, Sarah E.
†* Greenberg, Henry M.
Johnson, Linda B.
Kean, Elena DeFio
Kelly, Matthew J.
Ko, Andrew Zhi-yong
Kretser, Rachel
Mandell, Adam Trent
†*◊ Miranda, David P.
Montagnino, Nancy K.
Richardson, Jennifer
Sikkander, Nihla
Silverman, Lorraine R.
Woodley, Mishka
* Yanas, John J.

### Fourth District

Betz, Edward
Carter, J.R. Santana
Coreno, M. Elizabeth
Gilmartin, Margaret E.
Harwick, John F.
Loyola, Guido A.
Meyer, Jeffrey R.
Nielson, Kathleen A.
Sciocchetti, Nancy
Sharkey, Lauren E.
Simon, Nicole M.
Sise, Joseph

### Fifth District

Bray, Christopher R.
Fogel, Danielle Mikalajunas
* Getnick, Michael E.
Gilbert, Gregory R.
Hobika, Joseph H.
LaRose, Stuart J.
Lynn, Martin Anthony
McCann, John
Murphy, James P.
Randall, Candace Lyn
* Richardson, M. Catherine
Spring, Laura Lee
Westlake, Jean Marie

### Sixth District

Adigwe, Andria
Barreiro, Alyssa M
Buckland, Jake
Duvall, Jeri Ann
French, Natalie S.
Jones, John E.
† Lewis, Richard C.
Mack, Jared
* Madigan, Kathryn Grant
May, Michael R.
McKeegan, Bruce

### Seventh District

Bascoe, Duwaine Terrence
* Brown, T. Andrew
Buholtz, Eileen E.
* Buzard, A. Vincent
Jackson, LaMarr J.
Kammholz, Bradley P.
Kellermeyer, William Ford
Kelley, Stephen M.
McFadden, Barry D.
McFadden, Langston D.
* Moore, James C.
Moretti, Mark J.
* Palermo, Anthony Robert
Ryan, Kevin F.
* Schraver, David M.
Schwartz-Wallace, Amy E.
* Vigdor, Justin L.

### Eighth District

Beecher, Holly
Bond, Jill
* Doyle, Vincent E.
Effman, Norman P.
Feal, Sophie I.
* Freedman, Maryann Saccomando
†* Gerstman, Sharon Stern
Graber, Timothy Joseph
Kimura, Jennifer M.
LaMancuso, John
McGrath, Patricia M
Nowotarski, Leah Rene
Redeye, Lee M.
Riedel, George E.
Russ, Hugh M.
Sweet, Kathleen Marie
Washington, Sarah M.

### Ninth District

Battistoni, Jeffrey S.
Beltran, Karen T.
Braunstein, Lawrence Jay
Caceres, Hernan
Carbajal-Evangelista, Natacha
Cohen, Brian S.
Degnan, Clare J.
Fiore, Keri Alison
Fox, Michael L.
Gauntlett, Bridget
†* Gutekunst, Claire P.
Jamieson, Linda S.
Lara-Garduno, Nelida
† Levin Wallach, Sherry
Milone, Lydia A.
Mukerji, Deepankar
Muller, Arthur J.
Seiden, Adam
* Standard, Kenneth G.
Starkman, Mark T.
Tarson, Derek
Triebwasser, Jonah
Ward, Denise P.

### Tenth District

Berlin, Sharon N.
Bladykas, Lois
Block, Justin M.
Bouse, Cornell V.
* Bracken, John P.
Bunshaft, Jess A.
Cooper, Ilene S.
Glover, Dorian Ronald
Good, Douglas J.
Gross, John H.
Islam, Rezwanul
Joseph, James P.
* Karson, Scott
Kartez, Ross J.
Leo, John J.
Leventhal, Steven G.
* Levin, A. Thomas
Lisi, Gregory Scot
Markowitz, Michael A.
Mathews, Alyson
Messina, Vincent J.
Mulry, Kevin P.
Penzer, Eric W.
* Rice, Thomas O.
Tambasco, Daniel John

### Eleventh District

Abneri, Michael D.
Alomar, Karina E.
Cohen, David Louis
Dubowski, Kristen J.
First, Marie-Eleana
Jimenez, Sergio
Katz, Joshua Reuven
Samuels, Violet E.
Terranova, Arthur N.

### Twelfth District

Braverman, Samuel M.
Campbell, Hugh W.
Cohn, David M.
Hill, Renee Corley
Marinaccio, Michael A.
Millon, Steven E.
* Pfeifer, Maxwell S.
Santiago, Mirna M.

### Thirteenth District

Cohen, Orin J.
Crawford, Allyn J.
Martin, Edwina Frances
McGinn, Sheila T.
Miller, Claire C.

### Out of State

Bahn, Josephine M.
Choi, Hyun Suk
Filabi, Azish
Heath, Helena
Houth, Julie T.
Malkin, Brian John
Wolff, Brandon

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

# Upcoming NYSBA Programs and Events

## October & November

Webinar | **After the Interview: The Do's and Don'ts**
October 6 | 1:30 p.m. - 2:00 p.m. | Informational

Webinar | **Cannabis & Insolvency: Debtor Creditor Rights and Remedies Under State and Federal Law**
October 6 | 12:00 p.m. - 2:00 p.m. | 2.0 Credits

Washington, D.C. | **Local & State Government Law Section Fall Meeting: 75th Anniversary**
October 14-16 | Credits TBD

Webinar | **Supreme Court Update 2022: Decisions of Interest**
October 18 | 12:00 p.m. - 3:00 p.m. | 3.0 Credits

Saratoga, NY | **Environmental & Energy Law Section Fall Meeting**
October 18-19 | Credits TBD

New York, NY | **The Steve Houck Antitrust Expert Training Academy**
October 19-21 | 8:30 a.m. - 5:00 p.m. | 21.0 Credits

Albany, NY | **2022 Partnership Conference**
October 19-20 | Credits TBD

Webinar | **Trial Lawyers Section 3rd Annual Justice Ruth Bader Ginsburg Vanguard Award and CLE**
October 19 | 4:30 p.m. - 5:30 p.m. | 1.0 Credit

Webinar | **Time Management Tips for Law Students**
October 20 | 12:00 p.m. - 1:00 p.m. | Informational

Webinar | **Professional Conduct Ethics Rules in a Nutshell and Grievance Practices and Procedures Fall 2022**
October 20 | 12:00 p.m. - 1:45 p.m. | 2.0 Credits

AAA | **Dispute Resolution Section Fall Meeting**
October 20 | Credits TBD

Webinar | **Women in Law Section Women on the Move**
October 20 | Credits TBD

Webinar | **Child Support for Adult Developmentally Disabled Children**
October 21 | 12:00 p.m. - 1:30 p.m. | 1.5 Credits

Albany, NY | **Criminal Justice Section Fall Meeting**
October 21-22 | Credits TBD

Webinar | **3-Day Commercial Mediation Training**
October 25-27 | 8:30 a.m. - 5:00 p.m. | 24.0 Credits

Webinar | **Bridging the Gap**
October 26-27 | 8:00 a.m. - 5:45 p.m. | 16.0 Credits

Webinar | **Entertainment, Arts and Sports Law Section Music Business Law Conference: Part 1**
October 27 | Credits TBD

Cooperstown, NY | **Elder Law and Special Needs Section Fall Meeting**
October 27-28 | Credits TBD

Webinar | **Entertainment, Arts and Sports Law Section Music Business Law Conference: Part 2**
November 3 | Credits TBD

New York, NY (Hybrid) | **Ethics for Corporate Counsel Fall 2022**
November 3 | 9:00 a.m. - 12:45 p.m. | 4.0 Credits

Webinar | **Commercial Litigation Academy 2022**
November 3-4 | 9:00 a.m. - 5:00 p.m. | 16.0 Credits

New York, NY | **2-Day Advanced Commercial Mediation Training**
November 8-9 | 8:30 a.m. - 5:00 p.m. | 16.0 Credits

Webinar | **Entertainment, Arts and Sports Law Section Music Business Law Conference: Part 3**
November 10 | Credits TBD

New York, NY | **Taking the Lead: Excellence in the Courtroom**
November 10 | 5:30 p.m. - 8:00 p.m. | 1.0 Credit

Palm Coast, FL | **Torts, Insurance & Compensation Law and Trial Lawyers Sections Fall Meeting**
November 10-12 | Credits TBD

Webinar | **Bridging the Gap**
November 16-17 | 8:00 a.m. - 5:45 p.m. | 16.0 Credits

Webinar | **Nuclear Weapons: The Greatest Threat to Humanity Second Annual Symposium**
November 17 | 9:00 a.m. - 5:00 p.m. | Informational

New York, NY | **Entertainment, Arts and Sports Law Section Music Business Law Conference: Part 4**
November 17 | Credits TBD

London, UK | **International Section London Global Conference**
November 30-December 2 | Credits TBD

*Details for programs and events may change so be sure to visit our website for the most up-to-date information.

To view all scheduled events, including those newly added, please visit:
**NYSBA.ORG/EVENTS**

Periodicals

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