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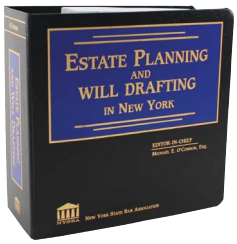

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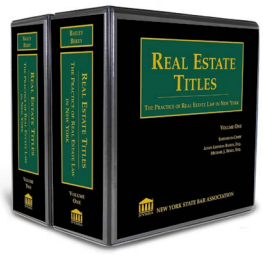

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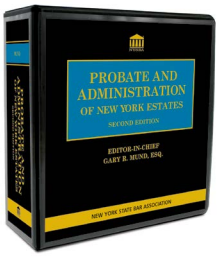

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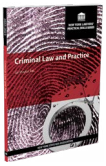

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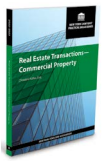

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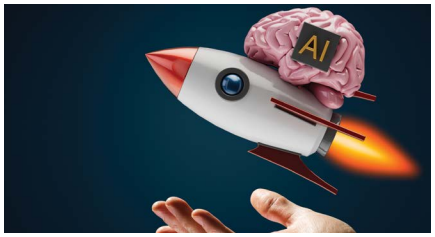

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SHERRY LEVIN WALLACH

The Importance of Embracing and Understanding Advances in Technology

The precipitous change in technology and its impact on the legal profession brings about opportunities and concerns. While its rapidly evolving pace can be impossible to comprehend, as a legal community we need to be on the forefront of these changes. It is imperative that we educate, provide effective representation and have a voice in how the development of new technology impacts the legal profession.

We need to appreciate the evolving digital landscape as an opportunity for growth.

As former President John F. Kennedy said: "Change is the law of life. And those who look only to the past or present are certain to miss the future."

The COVID-19 pandemic brought on advances in the use of virtual proceedings and meetings at a pace the legal community was not initially prepared to accept. It also clarified the need for us to have open minds that are willing to learn and adapt while keeping the sanctity of the profession front and center.

The emergence of digital technology, artificial intelligence, ChatGPT and other platforms has the potential to change how we conduct our business and provide client representation. These realities can be intimidating. However, many of these concepts that may seem only theoretical in nature are in fact already part of our everyday lives.

We can address them most efficiently by educating ourselves on the issues, by reaching out to experts inside and outside of the legal profession and by finding ways to incorporate them safely into our daily workflow.

Other technologies such as Web3 and the metaverse also have the potential to bring about a future that we could barely imagine only a decade ago. They can reshape how we practice law because they decentralize ownership of data and digital assets to individuals.

These resources are already impacting the legal profession at an increasingly rapid rate. After all, our clients are using these technologies, creating, accepting and owning cryptocurrency, and operating in the Web3 space. Around the world, businesses and legal communities must be prepared to understand and use Web3 and the technologies it offers.

In addition, these technological advances bring with them a heightened awareness and the need for prudent cybersecurity.

The recent use of facial recognition technology to exclude attorneys who represented clients with lawsuits against Madison Square Garden or who worked for firms that represented these clients took the legal community by surprise. Questions were raised, including the ethics of using this technology in such a manner, its potential chilling effect on the willingness of attorneys to accept cases and the significant impact on access to justice for our communities.

While technology redefines long-standing legal issues and creates many new ones, it is our responsibility to educate, evaluate and suggest how and when the use of technology is appropriate and where we as a legal community and bar associations can benefit from the use of this technology. We must also aim to protect the sanctity of the legal profession.

For instance, advances in AI have left the legal community questioning how it impacts the practice of law.

AI has the propensity to offer illogical recommendations because it generally operates with limited human context and understanding, and it poses risks to confidentiality. AI is also prone to prejudice because its decision-making stems from its programming and data sources. Machine-learning software could thus be developed from a dataset that may underrepresent a particular gender or ethnic group.

Conversely, AI has the potential to narrow the justice gap by providing individuals from low-economic communities greater access to legal resources. It also can streamline law firms' business operations by automating day-to-day tasks, conducting research in a more efficient manner and affording clients quicker access to documents.

Large language models such as ChatGPT have grown since the tool was made publicly available in November, and GPT-4, which was released in March, improved chatbots' accuracy although there are still concerns regarding bias and a cloudy regulatory landscape.

As we try to understand the impact of these new technologies on our system of justice and the practice of law, we must come to appreciate the extent of their benefits and their limitations. To do this effectively, it is important to learn to use and navigate these evolving technologies.

At the New York State Bar Association, we formed the Task Force on Emerging Digital Finance and Currency and a Committee on Technology in the Law, which both have been actively presenting CLE programing on issues including Web3 and the metaverse, digital assets, cryptocurrency, cybersecurity, virtual practice of law and digital notarization. We formed the Task Force on the Post Pandemic Future of the Profession and, most recently, the Working Group on Facial Recognition Technology and Access to Legal Representation.

Recognizing that these technologies are here to stay, we must continue to learn about them and test their abilities and limitations. To that end, I decided to ask the ChatGPT Artificial Intelligence Program, which is designed to respond to text-based queries and generate natural language responses, what it believed its limitations were in legal representation. The response was not only appropriate but shows that even AI believes that humans are necessary, at least so far, to the legal profession.

ChatGPT identified four areas of legal representation where it could not replace humans:

One, AI cannot provide the human touch that is essential for legal representation.

Two, AI cannot provide creative solutions to legal problems.

Three, AI is not yet able to process large amounts of data and parse out its relevant portions, which may impact the data's quality.

Finally, AI cannot provide ethical judgment.

"Whether it is AI, Big Data, Legal Tech or online courts, we must be part of the conversation."

It concluded by acknowledging that AI has limits to what it can provide in legal representation. ChatGPT's own acknowledgment of its limitations seems to suggest that lawyers will remain essential to the practice of law and in client representation . . . at least for the time being.

Whether it is AI, Big Data, Legal Tech or online courts, we must be part of the conversation and innovation process. As we learn to better understand and embrace these new technologies, the legal community can work together to integrate technology into our practice of law in a productive and beneficial way. In doing so, we continue to "Invest in the Future of Our Profession."

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MSG and Facial Recognition: What's at Stake?

By Marissa J. Moran

Due to technological advancements and use of biometric data, balancing the interests of citizens in terms of privacy and security is one of the many challenges facing our society today. As both government and non-governmental agencies begin and continue using innovative or emerging technologies, such as facial recognition software, those entrusted to create laws and safeguard rights need to listen to the experiences and concerns of all citizens to make impartial and just decisions. To do so will require the engagement of various members of our communities including, but not limited to, the legal community; law enforcement; industry and business leaders, including accountants and auditors; technology, cybersecurity and forensic experts; data scientists; researchers; and academics. All of these groups must be willing to work together to inform the public about how these emerging technologies function and what privacy protections exist when using biometrics.

Background

As early as 2018, The New York Times reported that Madison Square Garden Entertainment, the owner of Madison Square Garden and Radio City Music Hall in New York City, among other private entities, was using biometric data via facial recognition software for safety and security purposes at its venues.[1] MSG explained that the location of several of their establishments, "on major transit hubs and in the heart of New York City," necessitated such security and safety use.[2] Further, that use of this technology was made clear to their guests and to the

public.[3] Vendor and team officials also cited customer engagement and marketing capabilities as other valuable uses of this technology.[4] Yet, it was not until fall of 2022 that the use of facial recognition technology at MSG seemed to garner public interest, spark debate and call for an examination of existing law, after attorney Kelly Conlon was denied entry to Radio City Music Hall. MSG enacted a ban on lawyers (and law firms) involved in lawsuits against them, and all impacted attorneys were notified of MSG's policy.[5]

Sherry Levin Wallach, president of the New York State Bar Association, raised concerns that the "use of facial recognition software to exclude members of law firms from [for instance] a Knicks basketball game or a Taylor Swift concert discriminates against lawyers for doing their jobs. . . . A law firm should be able to represent clients in a personal injury lawsuit, a dispute about concert tickets or any other legal matter without fear of retribution."[6]

The State of the Law

As news of the ban spread, Attorney General Letitia James sought details about its application, noting possible discriminatory or retaliatory practices.[7] Citing a lack of regulation on such use of facial recognition technology, Senator Brad Hoylman-Sigal, among other elected officials, announced he would introduce legislation aimed at both government and non-government entities "that would ban police from using biometric information technology and another bill that would prevent landlords from using it on residential property."[8] Advocacy groups like Surveillance Technology Oversight Project (STOP), Amnesty International and the Immigrant Defense Project announced similar efforts in support of legislation "to curb the use of this software in public places in New York."[9] In contrast, New York City Mayor Eric Adams stated, "It blows my mind how much we have not embraced technology, and part of that is because many of our electeds are afraid."[10]

While the states of Illinois, Texas, Washington (and others to varying degrees), and major cities like New York City, San Francisco, Boston and Portland are attempting, or have attempted, to regulate and/or "ban" the use of this technology, there is no federal law that specifically addresses the use of facial recognition technology.[11]

What Is Biometric Data?

Biometrics data is defined as "measurable biological (anatomical and physiological) and behavioral characteristics that can be used for automated recognition."[12] Both physical or behavioral characteristics of an individual are coded into data.[13] This data may include "the input of fingerprints, facial or voice patterns, retina scans, and even typing patterns."[14] The National Institute of Science and Technology includes as examples of physiological characteristics "fingerprint, iris patterns, or facial features used to identify an individual."[15]

Historical Uses of Biometrics

The use of biometrics as a reliable method with which to identify persons due to unique characteristics dates to 1892, when Sir Francis Galton developed the first fingerprint classification system. Within a decade, New York State prisons began using fingerprints for identification purposes.[16] In 1960, based on research conducted by Woodrow W. Bledsoe, face recognition became semi-automated. Less than a decade later, in 1969, the FBI began to automate fingerprint recognition.[17] The National Institute of Science and Technology (NIST) has also conducted "research in the area of biometrics for over 60 years" and assisted law enforcement like the FBI through its work on fingerprint technologies since the 1960s.[18]

In the early 1990s, the Immigration and Naturalization Service developed an Automated Biometric Identification System (ABIS) IDENT as a law enforcement tool.[19] The need for sharing of data between government entities became evident when border patrol agents and the FBI were unaware of data that the other possessed that could have assisted in apprehending a violent criminal before additional murders occurred.[20] In 2011, the U.S. Department of Defense and the U.S. Department of Homeland Security entered a memorandum of understanding "for interoperability between the DoD's ABIS and [DHS's] IDENT."[21]

Use of Biometrics by Government Agencies Today

Some of the ways in which the Department of Homeland Security makes use of biometrics are "to detect and prevent illegal entry into the U.S., grant and administer proper immigration benefits, and for vetting and credentialing, facilitating legitimate travel and trade, enforcing federal laws and enabling verification for visa applications to the U.S."[22] Operating through its Office of Biometric Identity Management, the DHS carries out its mission of protecting our nation by providing biometric identification services. To that end, this office "supplies the technology for matching, storing, and sharing biometric data" and maintains IDENT, "the largest biometric repository in the U.S. government."[23] Currently, IDENT "holds more than 260 million unique identities and processes more than 350,000 biometric transactions per day."[24] Additionally, "through biometric interoperability, the DoD, DHS, and the Department of Justice share critical biometric information using advanced data filtering and privacy controls in furtherance of homeland security, defense and justice missions."[25]

Biometrics Viewed as the Gold Standard for Security

A major challenge with data security in our world today is due to password-only authentication. According to the Verizon's 2022 Data Breach Investigations Report, 80% of all data breaches are linked to stolen credentials.[26] Relevant to authentication threats is the increased sophistication of hacks. What makes biometrics so attractive in terms of data security is that unlike other authentication tools, it has shown to be resistant to hacks or brute force attacks by bad actors who guess or steal usernames/passwords.[27] As an innovative and emerging technology, biometrics may be the impetus for a password-less future.[28]

Societal Dilemma: Privacy Versus Security – Must We Forsake One for the Other?

Critics and opponents of the use of biometrics by private entities and organizations and government or law enforcement agencies cite privacy concerns, and the potential for discriminatory and/or bias in the use of facial recognition technology. While proponents focus on the safety and security that the use of biometrics provides society, critics like law professor Hannah Bloch-Wehba at Texas A&M wish to explore the idea of what safety concerns mean, raising such questions as "who are you trying to keep [patrons] safe from? How are you deciding who poses the threat? Is that a decision that the management of the venue is making, or is it a decision that the technological product is making? And who is checking that decision?"[29] Proponents turn to the NIST website, which cites some of the security and safety issues concerning use of biometrics, such as "to secure facilities, protect access to computer networks, counter fraud, screen people at our borders and fight crime."[30] NIST mentions additional uses of biometrics "to manage identities for first responders at the scene of a natural disaster, border patrol, soldiers in theater and police officers on the street."[31] Biometrics has also been used in health care, commercial applications and civil identification.[32] Further, NIST "recently found that facial biometrics are nearly 99% accurate."[33]

Development of Biometric Standards and Guidance

Central to "building effective biometric systems" is the creation of standards and guidelines.[34] Such standards espoused by NIST allow for the

> open exchange of biometric data between different agencies and their biometric systems, built by different companies; guidance on how biometric systems are to be tested, and how results should be calculated and reported so that the performance of one system can be compared to the performance of another system; defining methods for assessing the quality of the biometrics that are collected; and ensuring interoperability, meaning that all biometric systems used in the government work well together.[35]

Ján Lunter of Innovatrics explains "the importance of maintaining ethics and the legal responsibility when working with biometric data," noting "ethical concepts need to be considered by those working with biometric data." For example, "why the biometric data has to be obtained, how it will be used, and [also] the proper ways to discard it after it's no longer needed."[36] The standards and guidance by NIST, together with ethical considerations, suggest a framework from which to begin discussion and the development of biometric standards.

If Technology Created This Issue, Technology Can Resolve It

Each iteration of technology aims to resolve the issues and problems identified with its use or reported by the end users. Coincidentally, in November of 2022, when facial recognition technology was implemented at Radio City Music Hall/MSG and the ban occurred, ChatGPT was being introduced to the public. As the limitations and benefits of artificial intelligence become more known, and people and businesses begin using technology such as ChatGPT in their work and daily lives, confidence and trust in its use most likely will occur. This then may also be true of AI with biometrics, especially since "AI can notice things that most humans" cannot easily distinguish, as in the case of identical twins where AI can detect "minute differences immediately."[37]

The same issues and concerns that arose surrounding the ban at MSG – namely, societal concerns about discriminatory use of such technology and losing consumer confidence and trust – will likely be assessed against or balanced with the convenience and safety this technology provides consumers/end users, such as "hands-free security checkpoints at airports, or physical workplace environment, or accessing a cell phone/computer."[38] Uses of facial recognition software range "from tech companies securing personal devices to retailers scanning for potential shoplifters to e-commerce giants tracking delivery drivers."[39]

Section Four, "User-Centric Biometric Approach," of a September 2011 report issued by the National Science and Technology Council, Subcommittee on Biometrics, "The National Biometrics Challenge," recognizes that "the increasing availability of mobile, universal computing and communication platforms, coupled with users' expectation of convenience and security applications will drive the development and acceptance of biometric systems in the commercial sector over the next 10 years." Further, Section Five, "Science and Technology,"

addresses concerns raised by "individuals' and organizations' view of biometrics as invasive technology that systematically violates the individual's privacy," noting that "a concerted dialogue is needed to engage and properly educate society about the technology and the privacy protection capabilities of systems that use biometrics."[40] In 2023, these same pronouncements are echoed by Terry Schulenburg, the vice president of business development at CyberLink, noting that "[p]eople enjoy using biometrics when it makes their life easier and they have opted [consented] into it." Biometrics with AI may allow "businesses to increase convenience, improve security, and deliver the best customer experience possible" and assist businesses in keeping more precise records, while reducing incidents of fraud attributable to false or stolen IDs or keys.[41]

Conclusion

As the concerns for and against the use of facial recognition software by government and non-governmental agencies are debated in the public forum, and standards/guidance for its use are being considered, the convenience this technology affords citizens in their everyday lives and the concerns about safety and security it addresses may provide the tipping point for adoption and general acceptance of its use in society.

With regard to the continued use of biometrics by government and non-government entities, the issue may soon resolve itself. As Schulenburg predicts, for the future we must look to the past. He reminds us that "Rome wasn't built in a day, but when the tides do turn on facial recognition, especially when supported by AI, we'll see an incredible trajectory of adoption."[42] The time, energy and efforts of the legal community may best be spent considering the concerns expressed by both proponents and critics of this technology, and then discussing and developing guardrails for its use by creating and implementing biometrics standards and guidance mindful of ethical considerations in the best interest of all citizens in our society.

Marissa J. Moran is a professor in the law and paralegal studies department at New York City College of Technology, CUNY.

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Artificial Intelligence Presents Opportunities and Challenges for the Legal Ecosystem

By Marc Beckman

Artificial intelligence has already proven that it will alter many industries, including the legal profession. In fact, a wide range of legal tasks are already being automated, and naturally, a mountain of ethical issues will require thoughtful debate and examination.

In March of 2023, Bill Gates declared AI the "most important advance in technology since the graphical user interface."[1] While there is no denying that artificial intelligence is a revolutionary development, not everyone is as enthusiastic about its application as Mr. Gates. There are social concerns that must be addressed, not to mention the wide ramifications of AI in the law community, including patent and copyright law, privacy and others not yet contemplated. The advantages and disadvantages of this quickly developing technology will be discussed in this article, plus an evaluation of the legal 'profession's position on its integration into the practice of law.

OpenAI's ChatGPT-4 is now intelligent enough to successfully pass the bar exam, with a top 10% score – better than most law school graduates. Although interesting at face value, what lies below is both startling and compelling. GPT-4 is considered five times more powerful than its predecessors and just a few months ago was unable to pass the bar exam.[2]

OpenAI is the creator of several artificial intelligence systems that are transforming our civilization, including GPT-4, ChatGPT, DALL-E and Codex. ChatGPT boasts the most successful product launch in history, reaching 100 million users in just two months.[3] The speed of AI's user adoption is eye-popping. For perspective, what took ChatGPT two months to achieve took Facebook and Instagram four-and-a-half years and two years, respectively.

It is predicted that by 2030, AI will generate $13 trillion for the global economy while boosting the global GDP by 14 percent.[4] Interestingly, Gartner predicts that although AI will eliminate certain types of jobs (i.e., legal assistants), new jobs will be created because of AI, thus resulting in a net increase in employment.[5]

Benefits to the Profession of Law

The legal field will benefit from AI in many ways, such as automating work that is done repeatedly, predicting how a case will turn out and providing lawyers with data about legal trends and patterns. AI-powered software will create efficiencies when reviewing documents, locating pertinent cases, statutes and regulations, conducting legal research and even contract analysis. Naturally, AI has the potential to positively impact a law firm's bottom line. Moreover, clients will benefit from more precise and effective legal services, quicker access to legal information and lower legal service fees.

OpenAI recently invested in Harvey AI, a system that facilitates legal work and is based on a GPT variant created by OpenAI. Harvey AI was most recently trained with general legal information, including case law and reference documents, after initially learning from general internet data. To start, Harvey AI will assist lawyers with contract analysis, due diligence, litigation and regulatory compliance. Harvey AI can also aid in producing insights, suggestions and forecasts based on data.

Allen & Overy and Harvey AI revealed their collaboration in February 2023. Since then, Harvey AI has been questioned more than 40,000 times by the 3,500-lawyer company with 43 offices. Interestingly, 25% of the attorneys in the firm have embraced the new technology and participate in an "alignment" system by checking and validating everything that comes out of the Harvey AI system. Achieving behavioral alignment between an AI system's human operators or authors is known as "alignment" in the context of artificial intelligence. In general, the objective is to stop AI from acting in ways that are detrimental to human interests.

A Positive Impact on the Justice Gap

Artificial intelligence will provide individuals from low-economic communities with more access to legal counsel. The gulf between legal requirements and access to legal services is known as the justice gap.

Most at-risk groups in New York are principally affected by this disparity, with minorities and those from low-income areas being disproportionately affected. In fact, most people still believe hiring a lawyer is expensive. Eighty percent of those with low incomes are unable to pay for legal counsel, and even the middle class faces difficulties. For example, 40–60% of the middle class's legal requirements go unfulfilled.[6]

Consider AI's value in the health care sector. New York State's Permanent Commission on Access to Justice's mission is to expand access to civil legal services. The commission's November 2022 report found that 99% of patients remain without legal representation and highlighted a staggering 98% success rate for civil medical debt cases won on default. The report determined that hospitals are suing patients, mainly minority patients from low-income zip codes.[7]

DoNotPay is widely considered "the World's First Robot Lawyer" and according to its CEO, Joshua Browder, the company has successfully resolved more than 2 million cases by utilizing AI technology. Moreover, DoNotPay currently maintains hundreds of thousands of active subscribers and predicts legal conflict resolution of medical bills will play a central role in the businesses' core focus. Indeed, a harbinger for the legal industry.

AI Safety

Are we releasing new large language models of AI into the public responsibly? Many argue that we are not. In fact, a new report affirms that 50% of AI researchers believe there is a 10% or greater chance that humans will go extinct from our inability to control AI. Consider this: would you give a prescribed medication to your child without the endorsement from the entire medical community?[8]

The legal community has time to contemplate the most effective ways to use the new technology for business purposes and to establish meaningful ethical standards since we are currently in the early stages of AI's development. However, large language models like GPT-4 can teach themselves by utilizing massive data inputs through the lens of text and even synthesize the relationships between the data inputs. To align AI's outputs with factual information and, further, to prioritize outputs, OpenAI has devised a system rooted in a massive amount of human feedback – essentially a rating system dubbed "RLHF," Reinforcement Learning with Human Feedback. But naturally this process can be very subjective, entirely based on the opinion of the human providing the output's rating.

Typically, our laws evolve with invention, and AI requires thoughtful policy development, legal application and regulation. Consider Justice Brandeis' role in evolving the right to privacy as new technologies like wiretapping and photography were invented.[9]

One of the biggest shifts on the horizon applies to authentication verification. Today, deep fakes (audio and video content impersonating an individual) require only three seconds of voice audio to fully create new content in that individual's likeness. Institutions that currently use audio and/or video content-based verification, like the banking sector, are at risk.

Many people are concerned about how quickly AI will permeate our everyday lives and the difficulties it will present, such as its propensity for bias. Naturally, biased data inputs lead to biased data outputs and, in turn, can result in the denial of legal help to certain racial, ethnic, religious and socioeconomic groups. Additionally, there are concerns surrounding data protection and privacy rights. Finally, attorneys, legal assistants and other staffers within the legal profession's ecosystem are concerned about being rendered nullified.

Since AI is still in its infancy, we have time to think about how people will use these tools before the legal community has a chance to decide precisely what to do.

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The Future Is Here: New York Approves Remote Online Notarization

By Michael A. Markowitz

You have a client in Europe who needs to sign a document before a notary public. Generally, you would instruct your client to appear before the United States Embassy for notarial services similar to the functions of a New York notary public.

What would happen if your client was in a country where there is no U.S. consulate? Or a country with a closed consulate – like Ukraine? Until recently, to have a document notarized your client would have to travel either to New York or a neighboring country with a U.S. consulate. Now, with the passage of New York Executive Law Section 135-c, a licensed New York electronic notary public may remotely notarize a signature wherever your client may be – New York, California, the world or the International Space Station.

There are many benefits to this new law. Since remote online notarization (RON) eliminates travel requirements, RON offers a workable "stay at home" solution, reduces errors and papers costs in loan closing documents and allows delivery of the executed documents by email – avoiding loss, destruction and wasted time. Since a New York notary public electronically notarizes the document, an attorney also avoids the inconvenience of having to provide a certificate of conformity to record an out-of-state document.[1]

Electronic Licensing Requirements

Executive Law Section 130 sets forth the "traditional" requirements to notarize a document in New York. Generally, a client physically appears, produces identification and signs his or her name before the notary. The notary then "stamps" a registration number and expiration date and ink-signs the document.[2]

Not long ago, and as a result of the COVID-19 pandemic, then-Governor Andrew M. Cuomo issued an executive order allowing a New York notary public to officiate remote notarization of a document.[3] During a video conference, the individual signing the document (the principal)[4] presented a photo identification, signed and immediately delivered the document to the notary public who "stamped" and ink-signed the copy. Although convenient, this notarization procedure was temporary and is no longer legal.

With the passage of Executive Law Section 135-c, New York has a true electronic notarization statute. The new law does not allow a traditional notary public to provide electronic notarization services. Instead, an attorney must apply for a separate license.[5] To obtain the license, the attorney must create or log into an existing New York Business Express account.[6] After answering a series of online questions, uploading a signed oath of office and paying the $60 fee, the secretary of state will issue a commission for an attorney to act as an electronic notary public. Similar to a traditional notary, an electronic notary's registration number must be renewed every four years. It is noteworthy that an electronic notary may provide both electronic and traditional notary services.

Identity Verification and Credentialing Analysis Provided by a Third-Party Vendor

Thanks to the pandemic, New York attorneys began to use and rely on third-party platforms such as Zoom or Microsoft Teams for video conferencing. Unfortunately, the new law and regulations require additional security protocol for remote online notarizations, making traditional videoconferencing platforms unworkable.

Under the regulations, an electronic notary must use a third-party vendor to provide video conferencing that allows for "identity verification" and "credentialing analysis."[7] Identity verification "means the use of an authentication process by which a notary public validates the identity of any principal and/or individual present for a notarial act."[8] Credentialing analysis "means a process or service . . . through which a third-party affirms the validity of government-issued identification through review of public and proprietary data sources."[9]

The regulations also require the electronic notary to "use only those vendors or providers who comply with the standards outlined in this Part and any communication or reporting relating to those standards as required by the secretary of state."[10] Presently, the standards as required by the secretary of state are specific and technical. For example, a third-party video provider "must meet at a minimum, the Identity Assurance Level 2 standard as outlined in the Digital Identity Guidelines of the National Institute of Standards and Technology . . . document SP 800-63-3, Revision 3, dated June 2017 and includes updates as of 03-02-2020. . . . "[11]

The regulations require the third-party provider to present "evidence to the online notary public of the provider's ability to satisfy requirements set forth in this rule."[12] Consequently, the secretary of state places responsibility on the electronic notary to choose a suitable third-party provider that will provide proper identity verification and credentialing analysis.[13]

Unlike New York, most states having remote online notarization require the secretary of state (not the notary) to approve the third-party provider. The secretary of state's authorization procedure is either through "self-certification" or "application and certification." Self-certification is when the secretary of state approves a third-party provider that files a certification of compliance.[14] The application and certification model is when the secretary

of state actively reviews and then approves a third-party provider's application.[15] It is unfortunate that New York utilizes neither standard – instead placing the obligation on the electronic notary.

Electronically Notarizing and Filing a Document

Although regulations are complicated, the procedure to electronically notarize a document is fairly simple. Using a third-party provider, the electronic notary sends a link to the principal. The principal then signs into the third-party provider's platform where the electronic notary confirms audio and video capabilities. The electronic notary then requests identity verification through a link that would allow the principal to upload a copy of his or her driver's license or such other proof of identity. The third-party vendor then electronically verifies the identification, and the electronic notary compares the identification picture to the principal's likeness on the computer screen.

To sign the document, an electronic copy (generally in .pdf format) is provided to the principal who then consents to an electronic signature. The notary then witnesses the principal's signature and then electronically signs and stamps the document. All signatures and stamps are generated by the third-party provider.

Although the principal may be located anywhere, the electronic notary must be physically located in New York when electronically notarizing a document.[16] When a principal is located outside the United States, he or she must verify "that the record or subject of the notarial act: (i) is to be filed with or relates to a matter before a public official or court, governmental entity, or other entity subject to the jurisdiction of the United States; or, (ii) involves property located in the territorial jurisdiction of the United States or involves a transaction substantially connected with the United States."[17]

Once a document is electronically executed or notarized, it may be printed and mailed, or emailed, faxed or electronically transmitted to any person or place. However, to record an electronically signed document, an electronic notary must "paper out." Papering out is when the individual who performed the remote online notary service executes a certificate of authenticity that substantially sets forth the following:

> On this ..... day of ..... in the year ....., I certify that the signature page of the attached record (entitled .....) (dated .....) is a true and correct copy of the signatures affixed to an electronic record printed by me or under my supervision. I further certify that, at the time of printing, no security features present on the electronic record indicated any changes or errors in an electronic signature in the electronic record after its creation or execution.

The certificate of authenticity must be ink-signed by the notary, include his or her title, official stamp or registration number, and the expiration date of the notary public's commission.[18] A county clerk, city registrar or other recording officer must accept for recording a tangible copy of an electronic record so long as it is filed with an original certificate of authenticity.[19]

An electronic notary may only charge a fee of $25 "for each electronic notarial act performed, which shall be inclusive of all costs incurred by the notary public."[20] Since the fee is inclusive of all costs, an electronic notary may not pass to the principal the cost incurred to retain a qualified third-party vendor. However, since the $25 is for each notarial act, an electronic notary may charge for each promissory note, mortgage and affidavit notarized during one session with the principal. Furthermore, an electronic notary may charge an additional $2 for each certificate of authenticity.

Recording and Recordkeeping

Before the new law, New York did not have a statute, regulation or executive order requiring a notary public to maintain a journal.[21] New regulations now require all notary publics (including attorneys) "to maintain records sufficient to document compliance with the

requirements of sections 130 and 135-c of the Executive Law. . ."[22]

For a traditional and electronic notary public, a log, journal or ledger must be maintained that includes the date, time, verification process (e.g. driver's license) and the type of notarial act performed.[23] An electronic notary's log must also include the identity of the third-party provider.[24]

The log, journal or ledger may be kept in paper or electronic format such as a Microsoft Excel spreadsheet. If the recordkeeping is stored using a third-party, the electronic notary must use a password or other secure means for authentication or access.[25]

The notary public must maintain all records for a minimum of 10 years.[26] For an electronic notary, the third-party provider must be able to record and archive the audio-video communication. This electronic file must be maintained by the notary public for a period of at least 10 years from the date of the transaction.[27] Many attorneys have complained that the 10-year recordkeeping requirements are overly burdensome and, as officers of the court, attorneys should be exempt from the regulation.

Conclusion

The public's anxiety concerning electronic notarization is unfounded and will wane over time. Compared to a traditional notary, since an electronic notary must use a qualified third-party vendor, remote online notarization has better safeguards to detect fake identification documents. Furthermore, the odds of a fraudulent transaction or an individual signing under duress is greatly reduced since there is a video-audio recording that is saved for 10 years.

Accordingly, it would benefit a New York lawyer to become thoroughly knowledgeable about remote online notarization. In the last several years, use of Mortgage Electronic Registration Systems electronic promissory notes increased well over 100%.[28] Pursuant to a recent American Land Title Association survey, 62% of companies offering remote online notarization believe that there will be an increase over the next year.[29]

Forty-three states have some form of a remote online notarization law. On Feb. 27, 2023, the House passed H.R. 1059, the Securing and Enabling Commerce Using Remote and Electronic (SECURE) Notarization Act of 2023. The U.S. Senate has a similar bill.[30] If proposed legislation becomes a federal law, the SECURE Notarization Act would provide meaningful relief to America's homeowners and prospective buyers by allowing immediate, nationwide use of remote online notarization technology.[31]

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Preparing for the New Wave of NFT Litigation

By Jonathan E. Barbee

Non-fungible tokens (NFTs) have unleashed a whole new side of blockchain technology. Unlike cryptocurrencies, NFTs may have far-reaching implications for intellectual property rights. As a result, NFTs will certainly spur novel intellectual property litigation, especially for copyright litigation and litigation under the Lanham Act (the statute that governs trademark law).

Courts are only beginning to figure out how existing intellectual property laws, such as the Copyright Act and the Lanham Act, apply to NFTs. Leading the wave, Nike,[1] Hermès,[2] and rapper Lil Yachty[3] have filed lawsuits alleging that NFTs infringe their intellectual property rights. And, in June, a case was filed to protect the Bored Ape Yacht Club NFTs that caused a flurry of attention in 2021.[4]

This article explores the contours of how NFTs can impact intellectual property rights and concludes with some suggestions for how in-house counsel can prepare for the new wave of NFT litigation.

Can NFTs Convey Intellectual Property Rights?

NFTs do not inherently convey intellectual property rights. Looking at the blockchain technology that enables NFTs, NFTs are technically just a line in a digital ledger. And we should treat them as such, at least until they become more than that. It is easy to assume that NFTs embody some sort of intellectual property or artistic asset, especially since we colloquially call NFTs "digital assets." For example, if someone has an NFT for a unique picture, many people would assume that the NFT gives that person rights to the picture as an asset. But, without more, an NFT is simply a symbol that a particular transaction occurred that delivered the picture to the recipient. Another way to think about it is that an NFT, like a piece of software, is a type of technology – not an intellectual property right.

While NFTs do not automatically convey intellectual property rights, they can help confirm and verify that ownership rights or intellectual property rights were acquired through the proper means. Just as a ledger line confirms that a transaction occurred, NFTs can verify the identity of the true owner of intellectual property and make it harder for fraudsters to claim false rights over intellectual property.

How Do NFTs Differ From Copyrights?

NFTs are not a new form of copyright and do not automatically convey rights to copyrights. For instance, with a photograph that might be subject to copyright law, there is a bundle of rights attached: the right to access the photograph, the right to sell the photograph and the actual copyright to the photograph. An NFT could potentially convey all of those rights or none of them, depending on the structure and terms of the NFT. Because NFTs are often used to provide access to photographs, designs and other artwork that can be copyrighted, it is easy to confuse the receipt or purchase of an NFT with the rights to actually use, distribute or sell the artwork associated with the NFT.

"For now, individuals and corporations using NFTs should be careful not to overestimate the power of NFTs to grant rights to intellectual property, such as copyrights and trademarks."

If we remember that an NFT is more like a ticket than an intellectual property right, then an NFT for a piece of artwork conveys no more rights to the artwork than a movie ticket conveys the copyrights to a movie script.

How Can NFTs Impact Trademarks?

Likewise, NFTs are not a new form of trademark and will not necessarily convey the right to use the trademarks associated with an NFT. With many visual NFTs, such as images and replicas of real-world designer products, this may cause infringement issues because the rights to the trademark underlying a visual NFT may be needed to use, distribute and sell the NFT. This is especially true if the NFT is going to be used commercially or sold, which may put the NFT beyond the fair use protections of the Lanham Act.

NFTs are rife with potential trademark and trade dress infringement issues. (Trade dress is an area of trademark law that provides protection for the design and appearance of things. For example, the distinctive red sole on Louboutin heels could be protectible as trade dress.) This explains why the four lawsuits listed above – on behalf of Nike, Hermès, Lil Yachty, and the Bored Ape Yacht Club – all included claims under the Lanham Act (and did not include claims under the Copyright Act).

Will NFTs Implicate Patents?

NFTs are unlikely to impact patent rights as much as they will interfere with trademarks and copyrights. While NFTs have potentially endless applications, they are not often used to convey patented materials or objects. As a

result, it is less likely that using an NFT will lead directly to patent infringement.

The more pressing issue is whether the blockchain technology underlying NFTs – and any software operating NFTs – infringes patents. As NFTs become more popular, inventors are bound to file more and more patent applications covering the blockchain technology behind NFTs. To list a few examples, inventors will likely invent new ways for storing NFTs on the blockchain, transferring NFTs to purchasers, making NFT transactions more secure and even bundling intellectual property rights into NFTs. Corporations should be wary of this when integrating NFTs into their transactions, systems and processes. Depending on the type of NFTs used by corporations, there may be a risk of patent infringement.

Preparing Your Corporation for NFTs

For now, individuals and corporations using NFTs should be careful not to overestimate the power of NFTs to grant rights to intellectual property, such as copyrights and trademarks. To the extent that NFTs are seen as a ticket or a line on a ledger, they will only convey as much as the terms of that ticket or ledger line. Until the courts sort out how NFTs fit within the boundaries of the Lanham Act and the Copyright Act, corporations should be extra cautious when incorporating NFTs into their operations.

Below are some suggestions for in-house counsel to keep in mind as we venture into the world of NFTs and the digitization of other legal tools, such as contracts and licenses.

1. **Do not assume that NFTs are intellectual property rights.** NFTs – without additional technology or contractual terms – are not substitutes for intellectual property rights, including copyrights and trademarks. While NFTs could be used to convey intellectual property rights, they do not automatically transfer intellectual property rights and should not be used as a proxy for intellectual property rights.
2. **Independently verify whether an NFT may infringe copyrights, trademarks or patents.** Corporations should treat their use of NFT technology like the use of other technologies. Accordingly, corporations should ensure that they have the proper licenses for any relevant copyrights and trademarks when using NFTs and that their use of NFT technology will not infringe any patents.
3. **Reevaluate intellectual property policies in light of NFTs.** Many intellectual property policies have not been updated to account for the very recent challenges posed by NFTs. In updating intellectual property policies, it is also important for corporations to educate employees about these new types of digital tools and how they affect intellectual property rights.
4. **Brush up on the Lanham Act and the Copyright Act.** As recent NFT cases show, NFT litigation will bring a new relevance to the Lanham Act and the Copyright Act. It is also likely that NFT litigation will push the boundaries of the Lanham Act and the Copyright Act in new directions. In-house counsel should make sure they are up to speed on these statutes, including how the Lanham Act addresses trade dress and false advertising.
5. **Apply learnings from NFTs to other new technologies in the metaverse.** If nothing else, NFTs show that society, the economy and the law are entering what many are calling the "metaverse" – a world where real-world rights, assets, events, transactions and things are translated into a virtual world. Observing how NFTs play out in litigation over the coming years will educate us about how the digitization of other aspects of the real world may face similar issues.

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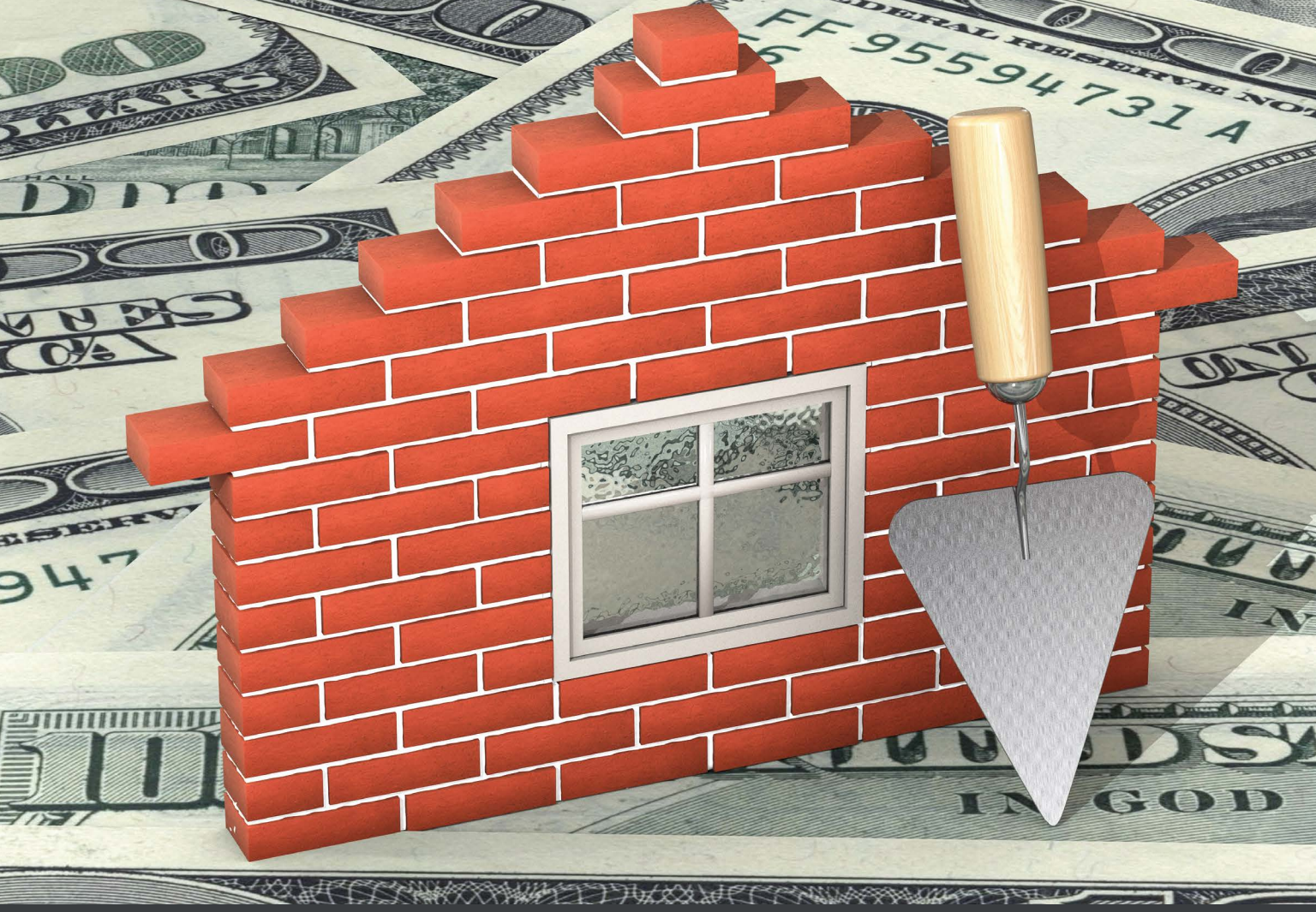

Update on Structured Attorney Fees

By Robert W. Wood

I recently wrote about structured legal fees for lawyers (see "Contingent Fee Tax Planning, Anyone?" NYSBA Journal, vol. 94, no. 5, Sept./Oct. 2022, p. 37). For nearly 30 years, plaintiff lawyers have been structuring contingent legal fees based on the seminal tax cases of *Childs v. Commissioner*.[1] Payments over time can flatten the peaks and valleys of your income and reduce borrowing needs to finance cases. An annuity company or third party doles out the payments, so a legal fee structure is a little like a tax-deferred installment plan. It doesn't rely on the creditworthiness of the defendant or the client, and it can grow pretax rather than post-tax.

"The tax case uniformly cited as establishing the bona fides of attorney fee structures is Childs, and over the last several decades, the IRS has often cited it favorably."

The contingent fee lawyer must document it before settlement, can structure some or all of it and can call for payment over any number of years or for life. Some companies even allow borrowing. Whether the structure involves annuities or securities, the format and documents are important, but done properly, it has not been controversial.

The tax case uniformly cited as establishing the bona fides of attorney fee structures is *Childs,* and over the last several decades, the IRS has often cited it favorably. But in December 2022, the IRS released Generic Legal Advice Memorandum, AM 2022-007, a "GLAM." It does not address the precise fact pattern in *Childs* or call for it to be overturned, but it may be a roadmap for what the IRS may argue in tax audits of fee structures. The GLAM is not binding on any taxpayer and is not published authority, unlike an IRS revenue ruling, a treasury regulation or a tax case like *Childs*.

The GLAM is lengthy, 25 pages single-spaced, and makes four arguments why the hypothetical structured fee the IRS describes should not work. The IRS says it would violate the assignment of income doctrine, the economic benefit doctrine, Section 83 of the tax code (an IRS argument the Tax Court and 11th Circuit rejected in *Childs*) and is a deferred compensation plan violating Section 409A of the tax code. That section says some compensation deferred under regular tax rules should nevertheless be currently taxed if it fails to comply with certain rules.

Fortunately, the Treasury Regulations under Section 409A say that the *entire provision* does not apply to independent contractors who have two or more customers or clients, among other requirements that are usually satisfied for structured fees. Since the time this regulation was released in 2007, it has been widely understood to *exempt* structured legal fees, since most lawyers have two or more clients. In any case, it is not yet clear if the IRS will have any success with its new positions on certain structured legal fees.

Much of the IRS's discussion seems to rely on distinguishing its hypothetical from the facts in *Childs*' structured fee, so the IRS may face bigger challenges if it tries to attack structured fees more universally. At a minimum, the GLAM suggests that the IRS is less comfortable with at least some structured fee arrangements than was previously thought. Of course, most people are never audited, and that is true with lawyers and structured fees too. But the release of the GLAM by the IRS suggests that if you are, there may be more pushback than was previously thought, particularly if your fee structure looks like low-hanging fruit to the IRS.

It is even possible that we will end up with *another* tax case reprising the issues discussed in *Childs*, though if that occurs, it will take years. And like any tax case, it will be based on the facts and documents in that *particular* case. In the meantime, there is no reason that plaintiff lawyers or the structured settlement industry need to stop structuring legal fees. But more care and awareness with the issues, dotting your i's and crossing your t's, would be a good idea.

Robert W. Wood is a tax lawyer and managing partner at Wood. This discussion is not intended as legal advice.

Endnote

1. 103 T.C. 634 (1994), *aff'd without opinion*, 89 F.3d 856 (11th Cir. 1996).

The 2023 National Defense Authorization Act and Its Potential Impacts on the Practice of Law

By Chad H. Lennon

The National Defense Authorization Act for fiscal year 2023 was signed by the president on Dec. 23, 2022. The act brought about changes that can affect the practice of military law as well as other areas such as family law, criminal law and trusts and estates. Two of the most impactful changes will affect the Survivor Benefit Plan and the COVID-19 vaccine mandate. The act also brought about changes to the Uniform Code of Military Justice, titling actions, inspector general complaints and a few other changes.

The Survivor Benefit Plan ensures a continuous annuity to spouses and dependents of military retirees based on the pension earned by the service member if the service member dies first. It is an insurance plan that will pay a surviving spouse and/or others monthly to compensate them for the pension the service member earned. The premium is paid from the gross retired pay, so it does not count toward income. This plan is a small but important area of law that has long-term effects, especially in family law. The National Defense Authorization Act requires an open enrollment period for the plan for the first time in over a decade. The open enrollment period is open now until Jan. 1, 2024. A retiree will be able to make changes as well as enroll a beneficiary in the plan. Any changes will be effective as of the first day of the month following the election. However, a change may require back pay for the premiums from the first day a beneficiary would have been eligible. As of right now, the Defense Finance Accounting Service is still working through the policies, procedures and forms before accepting any enrollments or changes. This is just one of many significant changes outlined in the recently signed act.

The act also directed the rescinding of the COVID-19 vaccine mandate for service members. Recently, the secretary of defense put forth a memorandum stating all negative paperwork associated with a service member that solely refers to the COVID-19 vaccine will be removed from the service member's record. The new rule does not require removal of bad paper from the personnel files of veterans and former service members. Those individuals are required to petition their respective board for correction of military records. The secretary of defense recently directed that if a service member received a discharge of other than honorable, the discharge will also be upgraded to at least general. Additionally, any Department of Defense contractors will have the COVID-19 vaccine mandate temporarily suspended.

The military justice system will also undergo some minor changes. The previous National Defense Authorization Act required some changes to the military justice system regarding sexual harassment/assault claims. This year's act will provide additional covered offenses to those over which the Office of Special Trial Counsel will exercise authority, requiring the president to amend the "Manual for Courts-Martial" to ensure that residual prosecutorial and judicial duties with respect to covered offenses are transferred to an appropriate entity, and requiring comprehensive reporting from the Department of Defense regarding implementation of the 2022 changes. Article 66 of the Uniform Code of Military Justice will be amended to authorize judicial review of any conviction by court martial, regardless of the sentence imposed. Additionally, Article 69 will be amended to clarify the scope of review in general and special court-martial cases reviewed by a judge advocate general. Finally, Article 25 will be amended to require the random selection of personnel to serve as panel members on courts martial under regulations prescribed by the president. Titling for criminal investigations will undergo some changes as well.

A service member is "titled" when the military's criminal investigation elements (the Naval Criminal Investigative Service, Office of Special Investigations, and the Army Criminal Investigation Division) enter the service member's name in the title block of a criminal investigation report. This is not a judicial decision but an administrative procedure. Currently, titling requires credible information that the service member committed the offense, a much lower standard than the previous probable cause standard. This is vastly different from a criminal conviction, which requires proof beyond a reasonable doubt. Once titled, the titling action will appear on an FBI background check of a service member/veteran and make it appear as if he or she was arrested or convicted of an offense when no such conviction ever took place. Once titled, removal is difficult, and many service members never know a titling action was taken against them. The National Defense Authorization Act now requires the investigatory bodies to notify any service member who was the subject of investigation, the crime investigated for, and how a service member may seek removal from being titled. The act also provided guidance to agencies about removing titling. To remove the titling, a service member or veteran will have to request the investigating agency remove their name or factual inaccuracies from the record of titling. If the request is denied, the service member or veteran will have to request relief from the Board for the Correction of Military Records.

Some other more minor changes that may affect the legal field are: (1) allowing a service member whose sole dependent dies to continue to receive a basic allowance for housing at the "with dependents" rate for a period up to 365 days after the death of the dependent; (2) a 4.6% pay raise; (3) establishing a Cold Case Unit in the Army Criminal Investigation Division (the Departments of the Navy and Air Force already have one within their criminal investigation service and office respectively); and (4) the Department of Defense will provide a report about potential changes to marijuana-based offenses,

which could bring about a major change for those discharged based on a marijuana charge in the past.

Congress passed the 2023 National Defense Authorization Act, but there could be other changes based on the interpretation provided by the secretary of defense and further guidance from Congress. One subject that many expect further clarification on involves veterans who were separated or punished based on not receiving the COVID-19 vaccine and what they can do to correct their records.

Attorneys need to be aware of these changes due to the effect they can have on a client. The Survivor Benefit Plan is an annuity that can affect a client for practitioners who work in family law and trusts and estates. Specific to family law, beneficiaries may be appointed through a divorce; however, the change in the program must be made through a deemed election with the Defense Finance Accounting Service. Many attorneys have falsely believed a divorce decree would be sufficient to make a change in a beneficiary. There are also cases where an attorney relied on the opposing party to make a deemed election with the accounting service. However, these actions may never have taken place. This can cost a client tens of thousands of dollars. Now that the Defense Finance Accounting Service has an open season, any mistakes from the past can be corrected during the calendar year.

Criminal defense attorneys should be aware that a titling action can affect a client who claims not to have a criminal record; if the veteran client was never convicted by court martial while in service, this is correct. However, the client may have been unknowingly titled by the criminal investigation division, since there was previously no duty to notify anyone of a titling action. An FBI background check may demonstrate a record that appears to show a conviction despite no judicial action ever taking place.

The uniqueness of military law is that it can apply across multiple practice areas. Attorneys across the numerous practice areas should be aware of the changes associated with the fiscal year 2023 National Defense Authorization Act as these changes could impact a client who is a veteran, service member or a family member of a veteran or service member.

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Can Private Employees Be Fired for Out-of-Office Political Speech?

By Joseph Pace

Consider a few hypotheticals:

A shop clerk attends a Proud Boys rally and gets "doxxed" by activists who discover his place of work and demand he be terminated. Soon, a Twitter campaign emerges calling for a boycott until the demand is acceded to. The owner gives in and fires the clerk.

A food server attends a Black Lives Matter rally and gives a stirring speech that gets picked up by local media. The restaurant's clientele skews conservative and includes many police officers. Worried that the server's presence will alienate clients, the owner fires her.

Shortly after an individual receives a job offer at a bank, his prospective co-workers discover a string of posts on his social media accounts endorsing President Trump's Muslim ban and his policy of separating children at the border. Concerned that his presence will create tension in the workforce and undermine productivity, the boss withdraws the offer.

Did any of these employers violate the law? Surprisingly, the answer is far from clear. While the First Amendment does not apply to private employers, New York has an "off-duty conduct" law, New York Labor Law Section 201-d, that bars private employers from firing (or refusing to hire) someone for certain "political" and "recreational" activities that take place outside the office. But the statute's language is remarkably vague and the courts have done little to clarify its key provisions.

Section 201-d was enacted in simpler times, when the barrier between an individual's office and personal life was less porous and political disagreements less toxic. But social media has demolished that barrier. Studies indicate that increased political polarization has undermined the ability of people on opposite ends of the political spectrum to form productive working relationships,[1] consumers are increasingly punishing businesses for their political commitments (or lack thereof)[2] and public calls for employers to oust politically "problematic" employees have become the norm.

Given the trend lines, we should expect to see an increase in New York employers retaliating against employees for political speech: if an employee's out-of-office activities engender hostility with his or her coworkers, employers may face pressure to terminate the employee in the interests of "protecting productivity." And if an employer finds himself or herself in the blast radius of public outcry about his or her employee's political offenses, he or she may feel pressure to terminate the employee to avoid alienating customers or stave off a boycott. This has led to a recent rise in litigation brought under other states'

"off-duty" conduct laws; a similar increase in claims brought under Section 201-d is also likely.

The scope of that law's protections, however, are remarkably uncertain.

Section 201-d provides that an employer may not fire, discriminate or refuse to hire someone based on that individual's "political activities outside of working hours," or their "legal recreational activities."[3]

The statute defines "political activities" as: "(i) running for public office, (ii) campaigning for a candidate for public office or (iii) participating in fundraising activities for the benefit of a candidate, political party or political advocacy group."[4] It defines "recreational activities" as including "any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including, but not limited to, sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material."[5]

"The statute also contains an important safe-harbor provision: it allows an employer to take adverse action if the employee's speech 'creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest.'"

The statute also contains an important safe-harbor provision: it allows an employer to take adverse action if the employee's speech "creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest."[6]

Thus, the threshold question for anyone bringing a Section 201-d claim is whether the out-of-office conduct that led to the adverse employment action was a protected "political" or "recreational" activity. If the activity was protected, one must then determine whether the employer was empowered under the safe-harbor provision to take adverse action.

Were the Actions of Our Hypothetical Employees Even Protected?

At the outset, it is unclear whether any of the employees in the three hypotheticals engaged in protected activities. Participating in a Black Lives Matter or Proud Boys rally or tweeting in support of a politician's platform would seem to be quintessentially political activity. But the statute defines "political activity" as encompassing only three things: running for office, campaigning for a candidate and participating in a fundraising activity for a political candidate, party or cause. Under the "expressio unius" canon of statutory interpretation, by listing those activities, the Legislature is presumed to have excluded all others from the statute's ambit.[7] There is also a rule that courts should strictly construe any law that interferes with an employer's right to terminate an employee at will, which might counsel against a judicial expansion of those categories.[8] One might argue that tweeting in support of a president's policies is akin to "campaigning for a candidate" (at least if the president was running for reelection), but it is hard to situate the rally attendance in any of the categories. There is a strong plain-text argument against extending the statute's protections to our hypothetical employees.

However, no court has actually held that the only protected "political activities" are the three delineated in the statute. The Appellate Division has permitted – albeit without any analysis – Section 201-d claims to be brought by individuals who were terminated because of a "political argument" at a restaurant[9] and for attending a vigil to memorialize the victim of a hate crime.[10] As for "expressio unius," that canon is "only an aid to statutory construction," not to be used to reach outcomes contrary to legislative intent.[11] In fact, the legislative history offers some support for the idea that the law's intent was to broadly "ensure that employers do not tell [employees] how to think and play on [their] own time."[12] And pitted against the presumption against interfering with the employer's right to terminate an at-will employee is the opposite principle that antidiscrimination statutes, being remedial in nature, must be liberally construed.[13]

Thus, whether the hypothetical employee is engaged in protected political activity is an open question.

If the employee did not engage in protected political activity, might his or her conduct nonetheless constitute a protected "recreational activity"? Maybe. Tweeting and rally attendance is uncompensated activity, enjoyed in one's leisure time; for many, these are as recreational as playing a video game or attending a concert. But maybe not. In 1995, the Third Department set an austere tone by rejecting the idea that "dating" qualified as "recreational."[14] Relying on that decision, courts have found that organizing and participating in "after-work celebrations with fellow employees"[15] and "picketing" were not recreational because they did not bear any resemblance to "sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material."[16]

While those cases do not augur well for the rally-goers or tweeters, their durability is questionable. The foundational Third Department opinion about dating – on

which all subsequent opinions were based – has been continually attacked, not just by the dissenting judge in that case but by Second Circuit judges who predict that the Court of Appeals will embrace a broader view of "recreational activity" if and when the chance comes.[17]

In short, there is no clear answer whether the employees' activities would be deemed protected. But that is only the first level of uncertainty.

Does the Safe-Harbor Provision Apply?

For simplicity's sake, let's stipulate that the rally-goers and the tweeters engaged in protected activity. Might they nonetheless be fired (or have an offer rescinded) on account of that activity? That depends on whether their conduct created a "material conflict of interest related to the employer's . . . business interest."[18]

But what that means is anyone's guess. On one end of the extreme, the law might give the employer latitude to terminate an employee if he or she subjectively believes that doing so is necessary to mitigate a risk of harm to the business. Under such a rule, the restaurant manager could fire the Black Lives Matter protester based on the fear the clientele *might* find out about the server's activities and *might* respond by taking their business elsewhere. The employer in our third hypothetical could withdraw the offer due to concerns about potential inner-office strife that might harm productivity. One quickly seeks how such a safe harbor would swallow the rule: just about any employer can construct a plausible yarn as to how employing a politically "problematic" individual might damage office morale, undermine productivity or turn away customers.

At the other extreme, the law might only excuse a firing upon proof that the employee's out-of-office conduct had actually blown back on the business and cost sales or severely undermined office cohesion in a way that resulted in a measurable reduction in productivity. Under this reading, an actual boycott would free the employer's hand, but a handful of tweets calling for a boycott would not. Actual evidence that worker productivity was declining because of interoffice strife might suffice, but the grumblings or resentments of the employee's coworkers would not.

Here, again, there is little in the text, legislative history or case law to light the way. The "material conflict" language was added to the law after the governor vetoed the first incarnation of the bill. In his veto memorandum, he warned that the bill, as written, would leave employers without recourse if the employee were to "moonlight with a supplier, customer, or even a competitor" or "endorse a competitor's product."[19] The possibility that an employer might need to protect the business from a public backlash or fire an employee to maintain interoffice cohesion does not appear to have been front of mind.

As for case law, there is only one opinion addressing the "material conflict" provision: a two-paragraph Appellate Division order affirming a judgment that allowed the German National Tourist Office to fire an employee after it emerged that he had translated Holocaust revisionist articles.[20] But the order is easily cabined to its facts: an obvious conflict of interest arises when an organization responsible for promoting German culture is forced to employ an apologist for the most shameful episode in German history (denial of which is a crime in Germany). In the same way, a material conflict would arise if a Christian pastor suddenly announced to his church employers that he was now a practicing Muslim. No equivalent conflict presents itself when a banker tweets in support of Trump or a food server attends a Black Lives Matter rally.

These layers of uncertainty persist because Section 201-d has largely been confined to employment law's backwaters. Rising political temperatures, social media and a rise in consumer activism – and the corresponding pressures that employers will feel to oust politically troublesome employees – virtually guarantees that Section 201-d will not endure.

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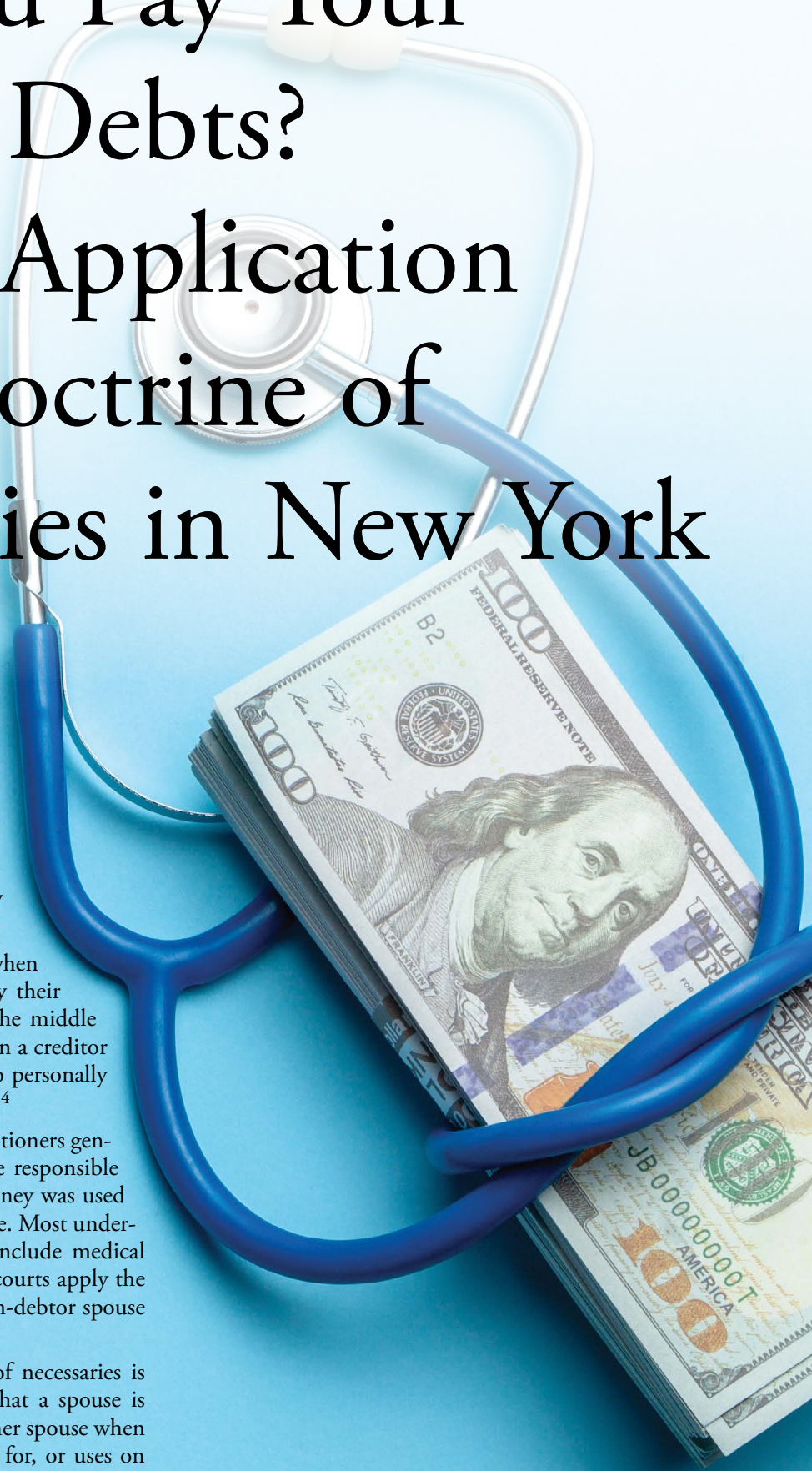
Endnotes

1. Martin Reeves, Leesa Quinlan, Mathieu Lefevre and Georg Kell, *How Business Leaders Can Reduce Polarization,* Harvard Business Review, Oct. 8, 2021, https://hbr.org/2021/10/how-business-leaders-can-reduce-polarization.
2. Tamara Holmes, *38% of Americans Are Currently Boycotting a Company*, Lending Tree, July 20, 2020, https://www.lendingtree.com/credit-cards/study/boycotting-companies-political-pandemic-reasons.
3. Labor Law § 201-d(2)(a) & (c).
4. Labor Law § 201-d(1)(a).
5. Labor Law § 201-d(1)(b).
6. Labor Law § 201-d(3)(a).
7. *Colon v. Martin*, 35 N.Y.3d 75, 78 (2020).
8. *McCavitt v. Swiss Reinsurance Am. Corp.*, 89 F. Supp. 2d 495, 497 (S.D.N.Y. 2000).
9. *Cavanaugh v. Doherty*, 243 A.D.2d 92, 100 (3d Dep't 1998).
10. *El-Amine v. Avon Prods., Inc.,* 293 A.D.2d 283 (1st Dep't 2002).
11. *Westnau Land Corp. v. United States Small Bus. Admin.*, 1 F.3d 112, 116 (2d Cir. 1993).
12. *See Pasch v. Katz Media Corp.,* 1995 U.S. Dist. LEXIS 11153, at *13 (S.D.N.Y. Aug. 4, 1995).
13. *See, e.g.*, *Wetherill v. Eli Lilly & Co.*, 89 N.Y.2d 506, 514 (1997).
14. *State v. Wal-Mart Stores, Inc.*, 207 A.D.2d 150 (3d Dep't 1995).
15. *Delran v. Prada USA Corp.*, 2004 WL 5488006 (N.Y. Sup. Ct. Aug. 2, 2004).
16. *Kolb v. Camilleri*, 2008 WL 3049855, at *13 (W.D.N.Y. Aug. 1, 2008).
17. *McCavitt v. Swiss Reinsurance Am. Corp.,* 237 F.3d 166, 168–69 (2d Cir. 2001) (McLaughlin, J., concurring).
18. Labor Law § 201-d(3)(a).
19. *Pasch v. Katz Media Corp.*, 1995 U.S. Dist. LEXIS 11153, at *11 (S.D.N.Y. Aug. 4, 1995).
20. *Berg v. German Nat'l Tourist Office*, 248 A.D.2d 297 (1st Dep't 1998).

Must You Pay Your Spouse's Debts? Current Application of the Doctrine of Necessaries in New York

By Damien Bosco



People aged 65 and older represented 16% of the population in 2019 but are expected to grow to be 21.6% of the population by 2040.[1] As a result, there is an increase in medical debt.[2] And with an increase in debt per household,[3] many clients ask and are worried if they will be responsible to pay the debts of their spouse.

This can happen during a marriage when one spouse fails to or is not able to pay their own debts or when the spouses are in the middle of a divorce. And this can also occur when a creditor attempts to contact a surviving spouse to personally pay the debts of the pre-deceased spouse.[4]

When it comes to creditors' claims, practitioners generally understand that a spouse could be responsible to pay the other spouse's debts if the money was used for a necessary service during the marriage. Most understand that necessaries would generally include medical debt. However, there are nuances when courts apply the law to make a determination when a non-debtor spouse must pay the debtor spouse's debts.

As applied in New York, the doctrine of necessaries is a common law doctrine propounding that a spouse is responsible to pay certain debts of the other spouse when the other spouse borrows money to pay for, or uses on credit, essential goods and services that a third party provides.[5]

The question is, what debts of one spouse is the other spouse responsible to pay? It can depend on whether the purpose of the debt is to pay for essential goods and services (necessaries), the ability to pay of both spouses and whether the creditor considered the non-debtor spouse's credit.

Essential goods and services or necessaries are not specifically defined. Case law does show or indicate that medical debt could be deemed necessaries.[6] And case law and some statutory provisions address when a spouse would have to support the other spouse or pay the other spouse's legal fees.[7]

An important factor is whether the debtor spouse had assets sufficient to take out the loan originally, still has the ability to pay and whether the creditor based the original loan on the non-debtor spouse's credit. Consequently, applying the doctrine of necessaries does not mean that in all circumstances the non-debtor spouse must pay the other spouse's debt.

A reasonable interpretation of case law shows that a creditor needs to show that (1) the debt was for an essential product or service; (2) the debtor spouse does not now have funds to pay the debt; (3) the creditor provided the loan only after taking into consideration the credit of the non-debtor spouse; and the non-debtor spouse has the ability to pay.

Although case law does not specifically say so, basing a loan on the credit of the non-debtor spouse could be evidenced by a lender using the credit rating or financials of the non-debtor spouse as part of a credit check before making the loan to the debtor spouse. A written guarantee would have to be honored. However, this does not mean the non-debtor spouse has to sign a guarantee to be responsible to pay the debt.

A creditor most likely would attempt a summary judgment motion in its favor based on the undisputed fact (as alleged) that the creditor took into consideration the credit of the non-debtor spouse, while the non-debtor spouse would argue that it is a matter of fact that the creditor must prove at trial. If the debtor spouse no longer has the ability to pay and the creditor attempts to collect or file suit against the non-debtor spouse, the non-debtor spouse most likely would argue that a creditor must prove or show that it offered the original debt based on the credit of the non-debtor spouse.

What Have New York Courts Said About It? Selected Cases in New York in the Court of Appeals

In *Garlock v. Garlock,* a case decided in 1939, the issue was whether a husband must support his wife.[8] The Court of Appeals held that marriage imposes a duty upon the husband to support and maintain his wife in conformity with their current standing of living as a married couple. The court espoused that the "duty rests upon the husband to support his wife and his family, not merely to keep them from the poorhouse, but to support them in accordance with his station and position in life." [9]

Although not directly referring to the doctrine of necessaries and the requirement that a husband pay the debts of the wife, the *Garlock* court appeared to support the then widely held belief that a husband financially supports his wife while the wife provides support in other ways during the marriage.

Almost 50 years later, in 1988, the Court of Appeals in *Lichtman v. Grossbard* was asked on appeal to consider the issue regarding the doctrine of necessaries as applicable to a wife supporting a husband based on the equal protection clause of the constitution.[10] However, the court did not rule on the matter. The court did refer to what it called the common law rule that a husband must pay for the necessaries of his wife, but was not able to rule on its converse, stating that issue "was not preserved for our review."[11]

It appears that the Court of Appeals has not addressed the issue directly in recent years. However, the First, Second and Third Departments have had some cases addressing the doctrine of necessaries, although not completely covering all aspects of it. The Second Department's line of cases provides more detailed analysis. And there appear to be no direct applicable cases in the Fourth Department.

Highlight of a First Department Case

In a case from 2020, the First Department laid out elements that a plaintiff/creditor would have to establish under the doctrine of necessaries. In *Jopal Bronx, LLC v. Montilla*, the court denied a nursing facility summary judgment against the community spouse (non-debtor spouse) for not paying the debtor spouse's bill.[12] The court held that the plaintiff nursing facility did not establish any of the elements to sustain a cause of action. The court held that the plaintiff failed to show (1) that it provided care to the defendant's husband based on the defendant's credit; (2) that the community spouse could afford to pay for her husband's care: or (3) that her husband was unable to pay for the debt from his own resources.[13]

Generally, the first step is to determine if the debtor spouse actually has the money to pay the debt before filing a claim against the non-debtor spouse based on the credit or ability to pay of the non-debtor spouse.

Highlight of Second Department Cases

The most recent case addressing the doctrine of necessaries in the Second Department is from 2016. In *Jones,*

LLP v. Sitomer, the Second Department set forth what a creditor must do to collect from the non-debtor spouse under the common law doctrine of necessaries.[14] The court held that a spouse who receives necessary goods or services is primarily liable for payment. The court stated that a creditor seeking to recover a debt against the non-debtor spouse must (1) demonstrate that the primary debtor was unable to satisfy the debt out of his or her own resources; (2) that necessaries were furnished on the non-debtor spouse's credit; and (3) that the non-debtor spouse has the ability to satisfy the debt.[15]

One Second Department case from 1992 is significant for its discussion of the details of the application of the doctrine of necessaries. In *Medical Business Associates, Inc. v. Steiner*, the court found, *inter alia*, that the spouse who received the necessary goods or services should be primarily liable for payment.[16] Also, the court held that a creditor seeking to recover a debt against the non-debtor spouse has the burden of demonstrating that necessaries were furnished on the non-debtor spouse's credit and that the non-debtor spouse has the ability to satisfy the debt. The court stated that proof that the services were furnished in reliance on the credit of the other spouse, as well as proof as to each spouse's financial status and ability to pay, was necessary.

The court espoused that

> [t]he doctrine [of necessaries] has historically served several beneficial functions. Among these are the encouragement of health-care providers and facilities to provide needed medical attention to married persons and the recognition that the marriage involves shared wealth, expenses, rights and duties. We conclude that the benefits to the institution of marriage will be enhanced by expanding rather than abolishing the doctrine of necessaries. Our decision is a recognition of a personal duty of each spouse to support the other, a duty arising from the marital relationship itself and carrying with it the corollary right to support from the other spouse.[17]

A Third Department Case

In a notable 1992 Third Department case, the court held that there was a rebuttable presumption that a creditor has looked at the credit of the non-debtor spouse. In *Our Lady of Lourdes Memorial Hosp., Inc. v. Frey*, the court denied the creditor's summary judgment motion.[18] The court said that the plaintiff did not meet the burden to prove that it looked at the credit of the non-debtor spouse prior to providing necessaries to the debtor spouse.

Interestingly, the court laid out in effect what steps a creditor would need to take. The court stated that with respect to seeking payment for bills, it [a creditor] looks first to the patient's insurance, then to the guarantor listed on the admission forms, then to the patient and, only as a last resort, to the patient's family.[19]

Conclusion

With our aging population and an increase in medical debt, as well as an increase in debt per household, the doctrine of necessaries will continue to come into play to determine if one spouse is obligated to pay for the other spouse's medical services. Also, application of the doctrine of necessaries can extend beyond medical bills to legal fees and possible other types of debts that courts have yet to rule upon.

The basis of analysis is not only to determine if the debt is for an essential good or service but also whether the debtor spouse has the ability to pay, whether the creditor took into consideration the non-debtor spouse's credit when deciding to provide the loan for the good or service, and whether the non-debtor spouse has the ability to actually pay the debt. Further application of the doctrine of necessaries could require practitioners to conduct additional analysis to support their clients' cases.

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Endnotes

1. *See 2020 Profile of Older Americans*, Administration on Aging, May 2021, https://acl.gov/sites/default/files/aging%20and%20Disability%20In%20America/2020Profileolderamericans.final_.pdf. The Administration on Aging is part of the Administration for Community Living, an operating division of the U.S. Department of Health and Human Services,
2. See *1 in 10 Adults Owe Medical Debt, With Millions Owing More Than $10,000*, Kaiser Family Foundation, March 10, 2022, https://www.kff.org/health-costs/press-release/1-in-10-adults-owe-medical-debt-with-millions-owing-more-than-10000.
3. *See Household Debt Rises to $16.90 Trillion; Credit Cards Pass Pre-Pandemic High,* Federal Reserve Bank of New York, Center for Microeconomic Data, Household Debt and Credit Report (Q4 2022), https://www.newyorkfed.org/microeconomics/hhdc.html.
4. Some creditors attempt to collect from a spouse or family member not because of a premature distribution from the estate but because the estate is insolvent.
5. The doctrine itself has its basis in English common law going back to the Middle Ages.
6. *See Medical Business Assoc., Inc. v. Steiner*, 183 A.D.2d 86 (2d Dep't 1992) (holding in part that the common-law doctrine of necessaries, which imposed liability on the husband to third parties who provided essential goods and services, included medical care and treatment, to his wife and children).
7. *See Powers v. Pignarre,* 34 A.D.3d 243 (1st Dep't 2006) (holding that appellant's legal fees in the underlying litigation are properly viewed as necessaries of her then-husband). *See generally* Domestic Relations Law § 237, Counsel fees and expenses; *see also* Family Court Act § 412, Married person's duty to support spouse.
8. 279 N.Y. 337 (1939).
9. *Id.* at 2.
10. 73 N.Y.2d 792 (1988).
11. *Id.* at 794.
12. 206 A.D.3d 426 (1st Dep't 2022).
13. *Id.* at 1.
14. 139 A.D.3d 805 (2d Dep't 2016).
15. *Id.* at 2.
16. 183 A.D.2d 86 (2d Dep't 1992).
17. *Id.* at 94.
18. 183 A.D.2d 994 (3d Dep't 1992).
19. *Id.* at 995.

Mobile Homes on Rented Land: Why *Steckel II* Needs Updating

By John Kaufmann

Like light, which is both a wave and a particle at once, a mobile home affixed to the ground can be either real or personal property, depending on legal context. For lien perfection purposes, a mobile home is personal property.[1] For statute of frauds purposes, the better view is that a mobile home is real property.[2] For federal income tax depreciation purposes, mobile homes fixed to the ground are real property.[3]

For New York State municipal finance purposes, mobile homes are real property.[4] The current law dates to the late 1950s. Before then, mobile homes were personal property for municipal finance purposes. As the population of manufactured housing communities swelled in the years following World War II, local governments tried to tax mobile homes as real property in order to raise revenue to fund the municipal services they consumed. Park owners protested these actions in a series of cases that I will discuss below. At first, the park owners won. In response to these cases, the Legislature changed the law to provide that manufactured homes are real property. After that happened, park owners protested the constitutionality of the law. They won in some lower courts and lost in the Court of Appeals in a case called *New York Mobile Homes Ass'n v. Steckel* (hereinafter referred to as *Steckel II*).[5] *Steckel II* is still good law.[6]

There are two problems with *Steckel II*. First, for reasons which I will discuss below, it is outdated. Second, its reasoning is flawed. The *Steckel II* court held on the constitutionality of two features of the current statute, i.e., that (1) mobile homes are real property for applicable purposes and (2) that the value of a mobile home sited on land is included in the assessment of the land on which it is located. The first of these two rules is uncontroversial and, if anything, more true today than it was in 1961, as manufactured homes have become less mobile than they were when *Steckel II* was decided.[7] The problem is that, by including the value of mobile homes in the assessment of the land on which they sit, landowners are subject to tax on the assessed value of an asset that they do not own. They have none of the benefits of ownership with respect to the home. They can't sell it. They can't rehypothecate it, paint it or let their in-laws live there – but if they fail to pay property tax on it, they can lose the land that it sits on in an in-rem proceeding.[8]

That's both unfair and crazy. It probably deprives the landowners of due process of law, because it imposes taxes on the value of something that they do not own. How did it get to be like this?

Background: Postwar New York

"Travel trailers" were first built soon after the invention of the automobile. Early trailers were used by vacationers and parked on vacant land. A few entrepreneurs began to open "travel courts" where vacationers could park their trailers overnight. Some of these establishments offered travelers access to certain utilities and amenities, like bathrooms, showers and shuffleboard decks. Travel trailers were used to house workers for certain Works Project Administration projects during the 1930s, for defense worker housing during World War II, and as housing for students and returning GIs during the late 1940s. During this time, the design of trailers used as permanent or semi-permanent housing began to diverge from that of pure travel trailers. By the early 1960s, the two had had fully bifurcated. The break was formalized in 1963, with the establishment of two independent industry groups for RVs and for what we now call manufactured homes, i.e., the Recreational Vehicle Association and the Mobile Home Manufacturers Association, respectively. Standardized rules for the manufacture of mobile homes designed to be used as permanent residences were passed when the Federal Manufactured Housing Construction and Safety Standards Act of 1974 was passed.[9]

Mobile home parks are the descendants of the travel courts that cropped up during the 1920s. Since the 1950s, they have been a source of affordable housing for a large segment of the population.[10] In most parks, tenants own their homes but do not own the land. Instead, an owner of a home will enter into a "lot lease" with the owner of the park, pursuant to which the homeowner pays the park owner for use of the land and for the right to hook the home up to utilities owned by the park. Homes manufactured after 1995 have titles that are issued by the Department of Motor Vehicles. When the DMV issues a title for a home, the homeowner's name is on the title, but the name of the landowner on which the home sits does not.

The population of upstate mobile home parks boomed after World War II. Since mobile homes were treated as personal property for municipal finance purposes, and since municipal revenue was raised through taxes on real property, this placed a strain on local governments. Here's what the *Steckel II* court said on the subject:

> This litigation stems from a statute, underlying which is an attempt to secure reimbursement from trailer dwellers for some share of the expense of providing them with police and fire protection, educational facilities and the various other services rendered by a municipality to persons residing within its confines. By making his [sic] more or less permanent home in a trailer, an individual could derive the benefit of all the services provided by the local government, while leaving the burden of paying for them upon his neighbors who lived in more conventional dwellings. Although the inequities of this situation were readily apparent, as all the cases on the subject agree, there was seemingly no solution of the problem since the New York State tax against personal property had been repealed, and trailers, of course, were traditionally considered to be personalty.[11]

In the early 1950s, certain towns attempted to solve this problem by declaring mobile homes to be real property. Under contemporary law, "real property" consisted of land and "all buildings and other articles and structures, substructures and superstructures, erected upon, under or above or affixed to the same."[12] Park owners sued, saying that mobile homes did not fall within this definition. Courts held for the plaintiffs.[13] From the courts' descriptions, it appears that, at the time the cases were decided, mobile homes were more similar to current-day RVs than to 21st century manufactured homes. As the court in *Farrington* said, "It appears that the trailers upon which the taxes in dispute were levied were for the most part on wheels, movable, and without any permanent foundation. Trailer tenants moved such trailers in and out of the trailer camp at frequent intervals and the number of such trailers parked in the trailer camp varied from time to time."[14] The *Stewart* court held likewise, although it admitted that a mobile home placed on a permanent foundation might fall within the contemporary definition of real property:

> The validity of the assessment complained of by the petitioner stands or falls on the determination whether or not the "trailers" are real or personal property.
>
> "House coaches" and "trailers" are primarily designed, manufactured, bought and sold as mobile units. Trailer parks or areas have sprung up all over the country to provide accommodation to this form of transportation. No one can seriously contend that as soon as these vehicles are halted for a given period of time they change character and become real property. It is true that a trailer can be divested of its wheels and motor power, and mounted upon a foundation of a permanent construction and thereby cease to be a mobile unit. In such case it can very properly fall within the definition of real property.[15]

This is quite different from the situation today, where mobile homes installed in parks are tied down to custom-designed foundations and hooked up to electricity, water and septic, and the transaction costs involved in moving a manufactured home make it economically unfeasible in most cases for the owner thereof to move the property off the land where it sits.

To fill the breach caused by these cases, the Legislature changed the statute to its current form. Under the new law, real property includes mobile homes sited on land for 60 days or more, and the assessed value of mobile homes is included in the value of the land.[16] Park owners sued again on constitutional grounds. Two lower courts held for the park owners,[17] but in *Steckel II*, the Court of Appeals held the statute to be constitutional.

Constitutional Arguments

Before a discussion of the cases, a few distinctions are in order. First, both the lower courts and the Court of Appeals mushed two issues together. The first issue is whether a mobile home is real or personal property; the second issue is whether landowners should be taxed on the value of a mobile home that sits on their land. The first of these two issues was straightforward in 1961 and is trivial now; because of the way manufactured homes are anchored to the ground and because of the cost required to move them, they are now, under any reasonable definition, real estate.

The second issue is also trivial, but not in the way envisioned by the courts. The *Steckel II* court and the statute assume that, because mobile homes are real estate affixed to park land, of course the park owner should be responsible for property taxes thereon. That is simply not true. Every spring, I receive a list of every home located in each of my parks, listing the lot number, year, manufacturer and owner of each home, from the assessors of the towns where my parks are located. In certain cases, such as homes belonging to senior citizens and certain disabled people, the assessor creates a so-called "slash account," i.e., a property tax account whose number consists of the deed and lot number for my land, followed by a slash and a unique numeric identifier. These slash accounts are treated as accounts separate from the land account for record-keeping and STAR program purposes; however, I, as landowner, am stuck with the bill. So, of course, the assessors could treat each home as a separate parcel and bill the owner for the tax due on that parcel. They have all the information they need to do that. They already do it, for the slash accounts. They bill me, instead of the owners of the homes, because it is administratively easier for them to send me one big bill than to send out multiple small bills. However, administrative ease should not sustain a due process claim, because the U.S. Supreme Court has held unequivocally that matters of administrative convenience may not be used by a tax administrator to deprive citizens of due process rights.[18]

Second, two separate constitutional arguments can be made against the current treatment of mobile homes. The first is an equal protection argument, and the second is a due process argument. The equal protection argument is : since a mobile home can be moved from park A to park B, and since the assessment date is a snapshot, it is unfair to tax park owner A's land where another homeowner's property on the assessment date if the homeowner moves the home to park B the day after the assessment date, because park owner B will enjoy the benefit of the home's for the majority of the tax year, while park owner A is stuck with the tax bill. The due process argument, by contrast, is : in order to ensure that citizens enjoy due process of law, the burden of a tax should be rationally linked to the basis for the tax. An income tax should be borne by the recipient of income; a sales tax should be borne by a participant in a sales transaction; and a property tax should be borne by a property owner.

Imposing a property tax on a party other than the party who enjoys the benefits of ownership of the tax basis burdens the taxed party unduly.

Although the due process argument is mentioned, the courts give the equal protection argument the most space. This is problematic, because the equal protection argument is the weaker of the two, and also because the equal protection argument as couched by the courts is weaker today than it was in 1961. As discussed above, mobile homes are less mobile today than they were 60 years ago. In my own parks, a resident might move a home into or out of the park once or twice a year. It happens, but it is a rare occurrence. So the equal protection argument, as made in the original cases, would not be a winner today. However, I believe that another equal protection argument could be made that was not mentioned in any of the litigation. In making the equal protection argument, the courts only examined the relationship between park owner A and park owner B in the example above. They did not examine the relationship between a park owner and the owner of a home sited on the park owner's land. It would appear to me that the park owner and the owner of the home are similarly situated parties for municipal finance purposes, because both are owners of real estate; however, they are treated differently by the state and municipality because park owners are taxed on the value of their real estate, but homeowners are not. Disparate treatment of similarly situated parties is at the heart of an equal protection argument.[19]

The constitutional issues were first examined in *Barnes v. Gorham*[20] and *New York State Trailer Coach Ass'n v. Steckel* ("*Steckel I*").[21] Both cases held for the plaintiffs, on the ground that the mobile homes of 1955 were too mobile to be treated as real property. Here's the *Barnes* court, discussing the equal protection issue:

> If the owner of a trailer which had been parked for 58 days in one trailer park moved the trailer to another trailer park in the same tax district on May 30, it would be subject to taxation as a part of the real estate of the second trailer park owner although it had only been there two days whereas the owner of the first trailer park upon whose land it had been kept for at least 58 days would pay no portion of the tax. As the court pointed out there would be innumerable additional situations as incongruous as this and depending upon the nature of the circumstances someone would be deprived of the equal protection of the law or would be deprived of property without due process of law whether he [sic] be the owner of the trailer, the owner of the trailer park or the owner of some other trailer park in the same tax district. If instead of being moved within the same tax district, it was moved into an adjoining one, it of course would not be there 60 days and would come within the statutory exception.[22]

As discussed above, this argument might have made sense in 1955, when mobile homes were mobile. It makes less sense today, when they are more or less permanently fixed to the ground.

The court in *Steckel I* mentioned the due process argument but skirted the important issue:

> In *Hoeper v. Tax Commission* . . . the court states: "We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income." . . . So here the fundamental difficulty would appear to be that calling a "60-day trailer" real property does not make it real property.[23]

In so doing, the *Steckel I* court approaches the goal, shoots . . . and misses. In *Hoeper v. Tax Commission*,[24] the U.S. Supreme Court addressed a Wisconsin state income tax statute that, effectively, required all married couples to file jointly. The taxpayer was a man who married a widow who owned significant income-producing assets. The taxpayer filed a return that did not include income from his wife's investments. The state ruled that he was responsible therefore, and the taxpayer sued. The Supreme Court held that, although a husband was deemed to own his wife's property at common law, times had changed. Because a husband did not own his wife's property and did not have the right to receive income therefrom under contemporary law, it would deprive him of due process to tax him on that income. Here's the money quote:

> We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income.[25]

The juice here is not, as the *Steckel I* court states, that it is wrong for a state to declare a type of property or income something that is inconsistent with economic substance. Instead, it is that it is wrong for a state to impute the basis for a tax to a party who does not, if one looks at the economic substance of the applicable transaction, have any rights with respect to the applicable item, be that income, property or something else. In fact, it is so wrong that it constitutes the deprivation of that party's access to due process of the law.

The Court of Appeals examined the issue in *Steckel II*.[26] The *Steckel II* court held that the value of homes should be included in park owners' land assessments for two

reasons, i.e., because that is how it had been done in the case of stick-built structures erected on land owned by a party other than the owner of the structure, and because park owners could pass on the burden of tax to mobile homeowners through lot rents:

> The statute, as we have seen above, seeks to include the value of the trailer in the assessment of the land and improvements thereon. In this respect the situation presented is no different from that involved in any case where a lessee erects a building or other improvement on the realty of his landlord. "Where the fee is privately owned, the real property tax attaches to the combined interests of all the parties interested in the land and the improvements thereon (*In re Fort Hamilton Manor v. Boyland*, 4 N.Y.2d 192, 198). Although the fee owner will, in such a situation, of course, be required to pay a higher tax than if the land were vacant, he will also protect himself by some stipulation in the lease against the increased taxation, and will in effect put the payment of it upon the lessee." (*People ex rel. Van Nest v. Commissioners of Taxes*, 80 N. Y. 573, 577). So too in the instant situation, the trailer park owner has the means at his disposal, by way of rent, to allocate the increased tax upon the owner of the trailer – the individual who rightfully should pay for it.[27]

This is deeply problematic for two reasons. First, "we do it that way because that's how we have always done it" is not an argument. Mobile homes are pieces of property separate from the land they sit on. Ownership of a mobile home is independent of ownership of the land on which it sits. The owner of the land that a home sits on has no rights of ownership with respect to the home. The owner can't sell the home, borrow against it, move it, live in it or repair it. If the home was manufactured prior to 1995, the owner has a bill of sale that grants the owner legal title thereto. If it was manufactured after 1994, the owner has a document of title issued by the Department of Motor Vehicles with the owner's name, rather than that of the landowner, written on it. It offends common sense to say that ownership of one should be imputed to the owner of the other. If the same can be said about stick-built homes sited on rented land, then stick-built homes should be treated as parcels separate from the land on which they sit and separately assessed. The dead hand of history is not legal support; it is just dead. The *Steckel II* court's failure to buttress its conclusion in this regard with analysis suggests to me that it did not have an analysis to offer.

Second, the *Steckel II* court's argument that park owners can pass the cost of real estate taxes imposed on homes on to homeowners through increased lot rents is no longer true. In 2019, the Housing Stability and Tenant Protection Act imposed rent control on mobile home park owners in New York State.[28] Under current law, mobile home park owners may increase lot rents annually by 3% as of right, and by 6% if justified by capital expenses or increased operating costs. Since the annual inflation rate has exceeded 7% for the past two years, and since money is fungible, this effectively means that increases in property tax burdens attributable to mobile home valuations can never be passed on to the owners of the applicable homes. (In 1990, the Appellate Division held that park owners cannot pass the cost of property tax on homes on to homeowners in the form of a charge separate from lot rent. So the cost of property tax on homes may be transferred to the homeowner *neither* in the form of lot rent, *nor* as something other than rent.[29])

Steckel II's discussion of *Hoeper* is desultory and, again, outdated:

> Plaintiffs' reliance upon *Hoeper v. Tax Comm.* (284 U. S. 206, 215) is misplaced. In the first place, it is readily distinguishable on its facts, involving as it does the validity of an income tax statute which sought to tax a husband upon the combined total of his and his wife's income, and thus place him in a higher tax bracket. In that connection, the court noted that it was improper to "measure the tax on one person's property or income by reference to the property or income of another" . . . . Furthermore, in such a case the husband – unlike the trailer park owner – would have no means of recouping the additional tax resulting from the value of another's property.[30]

I do not think that *Hoeper* can be distinguished. The fact that *Hoeper* involved an income tax and *Steckel II* involved a property tax should not be relevant to the analysis. Each involved a tax imposed on a party who did not have the benefits of ownership of the basis for the tax. That the basis was income in *Hoeper* and property ownership in *Steckel II* should be no more relevant that the fact that, say, the plaintiff in one was a man and the plaintiff in the other was a woman. And, as discussed above, park owners can no longer pass on the cost of property tax assessments on homes to their residents.

Steckel II's dismissal of the equal protection arguments set forth in *Barnes v. Gorham* and *Steckel I*, discussed *supra*, is, frankly, confusing. *Steckel II* states that the argument that the rule that park owner A should bear the tax on a home sited on that owner's land on the assessment date treats similarly situated parties differently. The home could be moved to park owner B's park the day after the assessment date should not be addressed because the problem posed is hypothetical. It would appear to me that every equal protection argument is hypothetical. A law that prohibits, say, red-haired people from eating at lunch counters is subject to an equal protection argument because it could cause red-haired people and similarly situated blue-haired people from being treated similarly. But that is not acknowledged by the *Steckel II* court.

Next Steps

Steckel II was decided wrongly. Changes in the facts and the law have made it even more wrong than it was in 1961. The way it was decided unduly burdens park owners in a way that deprives them of due process and equal protection of the law. More importantly, it burdens the manufactured housing industry in a way that makes it difficult for park owners to do their job, i.e., to provide clean, safe and affordable housing to people who need it. It is time for a change. An industry group (say, the successor to the New York State Trailer Coach Association or the New York State Mobile Homes Association) should challenge the current statute on due process and equal protection grounds. The law would favor success on the merits. The plaintiffs would have nothing to lose but their unjust assessments.

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Endnotes

1. Unlike a mortgage, which is recorded at the local deed registry, a lien on a mobile home is perfected through the filing of a CC or, for homes manufactured after 1994, by recording the lien on the title issued by the DMV.

2. *See, e.g., Burrus v. Reyes*, No. 08-14-00265-CV (Texas, 2017). I once got my head handed to me by a results-oriented judge when I asked him to help me enforce my rights under an oral handyman-special contract.

3. Section 168(e)(2) of the Internal Revenue Code of 1986, as amended to date. *See also Rupert v. Commissioner*, T.C. Memo. 2001-179; *Smith, Foy D. et Ux. V. Comm*, cited in Tax Notes, Jul. 27, 2010.

4. N.Y. Real Property Tax Law, Article 1, § 102(12)(g) (RPTL). "'Real property,' 'property' or 'land' mean and include . . . Forms of housing adaptable to motivation by a power connected thereto, commonly called 'trailers' or 'mobile homes,' which are or can be used for residential, business, commercial or office purposes, except those (1) located within the boundaries of an assessing unit for less than sixty days, (2) unoccupied and for sale or (3) 'recreational vehicles' that are four hundred square feet or less in size, self-propelled or towable by an automobile or light duty truck and used as temporary living quarters for recreational, camping, travel or seasonal use. The value of any trailer or mobile home shall be included in the assessment of the land on which it is located. . . ."

5. 9 N.Y.2d 533 (1961).

6. *See, e.g., Morley v. Town of Oswegatchie*, 152 A.D.2d 862 (3d Dep't 1989); *Frontier Park v. Assessor, Town of Babylon*, 184 Misc. 2d 354 (Sup. Ct., Nassau Co. 2000).

7. Although modern-day manufactured homes grew out of the "house trailers" that were first manufactured during the 1920s, a modern mobile home is not very mobile. It is manufactured in a factory and then hauled using special equipment to the site, where it is placed on a foundation that is specially designed for it. It is blocked, leveled, tied down using massive anchors, and hooked up to the land's water, sewer and electrical service. Although it can be moved to another site, that process is expensive and must be done by a licensed transporter using specialized equipment. The cost of moving a manufactured home is too high for most owners thereof to bear. Because of this, most mobile homes, once sited, stay put.

8. RPTL, Article 11, Title 3.

9. 42 U.S.C. §§ 5401–5426. Since the passage of the HUD Code, it is proper to refer to what were previously referred to as "trailers" as "mobile homes" or, more correctly, "manufactured homes." A "trailer" is an RV that can be towed behind a passenger vehicle or a light truck.

10. According to the Manufactured Housing Institute, in 2020, 22 million Americans lived in mobile homes. https://www.manufacturedhousing.org/wp-content/uploads/2020/07/2020-MHI-Quick-Facts-updated-05-2020.pdf.

11. *Id.* The *Steckel II* court and contemporaneous courts and legislators often refer to mobile homes as "trailers." The term is offensive today, but those were different times.

12. *Stewart v. Carrington*, 203 Misc. 543, 544 (Sup. Ct., Broome Co. 1953).

13. *Id. See also Erwin v. Farrington*, 285 A.D. 1212 (4th Dep't 1955).

14. *Id.*

15. *Id.*

16. RPTL, Article 1, § 102(12)(g).

17. *Barnes v. Gorham*, 12 Misc. 2d 285 (Sup. Ct., Onondaga Co. 1957); *New York State Trailer Coach Ass'n v. Steckel*, 208 Misc. 308 (Sup. Ct., Monroe Co. 1955), *rev'd on procedural grounds*, 3 A.D.2d 643 (4th Dep't 1956) ("*Steckel I*").

18. *Hoeper v. Tax Commission*, 284 U.S. 206, 217 (1931) ("'That is to say, "A" may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against "B". Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever.' The claimed necessity cannot justify the otherwise unconstitutional exaction.").

19. *See, e.g., Jersey Shore State Bank v. United States*, 479 U.S. 442 (1987).

20. 12 Misc. 2d 285.

21. 208 Misc. 308. It is unclear whether *Steckel I* was the precursor to the Court of Appeals case (*Steckel II*). The name of the plaintiff in *Steckel I* is different from that of the plaintiff in *Steckel II*. It is possible that the industry association representing owners of what were then called trailer courts changed its name between 1955 and 1961, as the nature of the industry changed.

22. *Barnes*, 12 Misc. 2d at 294–95.

23. *Steckel I*, 208 Misc. at 313.

24. 284 U.S. 206 (1931).

25. *Id.* at 215.

26. 9 N.Y.2d 533 (1961).

27. *Id.* at 539.

28. S.645, June 12, 2019. Relevant provisions are codified in RPL Article 7, § 233-B.

29. *People ex rel. Higgins v. Leier*, 164 A.D.2d 492 (3d Dep't 1990), interpreting RPL Article 7, § 233(g). *See also* Law of Excluded Middle.

30. 9 N.Y.2d at 540.

The 'One Family, One Judge' Court Model: Instituting Integrated Domestic Violence Courts in the United States

By Elka Blonder

For decades, New York courts have led innovation in the way domestic violence cases are addressed in the United States legal system.[1] Specifically, New York has been at the forefront of instituting specialized courts to handle domestic violence cases, giving courts one focus in handling the endemic of domestic violence.[2] In 1996, the first felony domestic violence court was established in Kings County, operating specifically to handle domestic violence felonies.[3] In the late 1990s, domestic violence courts expanded to include domestic violence misdemeanors as well.[4] Now it is time, past time really, that this approach be adopted nationwide.

There was some resistance to these courts at their origin. Critics were generally skeptical of "problem-solving" courts, which take a holistic approach to a problem instead of focusing only on a legal decision. They complained that judges were turning into social workers or policymakers.[5] Some critics were particularly concerned about judicial neutrality in domestic violence courts.[6] However, there is now "a broad consensus that the primary goals of [domestic violence] court are victim safety and offender accountability."[7]

In many states, the process of legal separation and protection from an abuser still involves a family court, a criminal court and sometimes more.[8] Even with domestic violence courts, there is a separation of family court cases and criminal court cases, with only the latter belonging in the specialized court.[9]

The Introduction of Integrated Domestic Violence Courts

The Integrated Domestic Violence, or IDV, court system, created in 2001, is an expansion of domestic violence courts, to include not only felony and misdemeanor domestic violence cases but also "related or concurrent Family Court and matrimonial cases."[10] IDV courts combine civil, criminal and matrimonial courts into one court, with the motto "one family, one judge."[11] This ensures that domestic violence is handled through both a civil and a criminal lens, all in one court.[12]

The Challenge of Navigating the Court System

Policymakers realized the need for IDV court when they recognized how many families had cases in multiple courthouses simultaneously, including "juvenile corrections, domestic violence, domestic relations, adoptions, and child protection actions." [13] The Idaho Code explains, "there is a need to coordinate these diverse cases and related family services to provide an effective response to the needs of these children and families."

In non-IDV jurisdictions, the process for victims of domestic violence involves the undue burden of learning how to navigate several courts' procedures; hours of filing papers; traveling to different courthouses; and waiting in long lines.[14] In some cases, victims can be so confused and overwhelmed by the different courts that they miss or ignore court notices, which threatens their cases.[15] An abuser can also purposefully delay the court proceedings to "prolong contact" with their victim.[16] Additionally, victims may need to record their stories many times before different judges, which forces victims to relive their trauma and can cause revictimization.[17]

Communication Failings Between Courts

Another problem is the lack of communication between courtrooms.[18] A Family Court judge may be wholly "unaware of relevant criminal data" in a domestic violence case, while the criminal court judge "may not have access to relevant information available in family court files."[19] The dangers of this lack of communication are numerous, especially pertaining to matters of victim safety and child custody, and can lead to inconsistent orders, such as a partial order of protection issued by one judge and a full order of protection issued simultaneously by another.[20] Retired judge Daniel Angiolillo writes, "Ordinarily there was little communication among the judges presiding over related family court, criminal, and matrimonial cases, and rarely would a criminal court judge exchange information with a family court judge about a related domestic violence case and vice versa."[21]

Benefits of IDV Court

"The goals of the IDV Court include providing integrated services to families, increased offender accountability, enhanced victim safety, improved court efficiency and consistent judicial making while protecting the rights of each litigant."[22] The Connecticut General Assembly, citing New York's Office of Court Administration, lists four main goals: (1) informed and consistent judicial decision-making, protecting the right of each litigation, by having one judge for one family; (2) "efficient use of court resources," such as fewer appearances; (3) stakeholder collaboration; and (4) victims' rights/safety.[23]

Court Consistency and Efficiency

To ensure judicial integrity, each IDV case must retain its separate elements: IDV judges often call criminal, family, and matrimonial cases as separate calendars, even if they are all one after the other on the same day, to distinguish the matter at hand, "preserving fundamental due process rights and evidentiary rules."[24] However, IDV courts can maintain consistency with records and cases with higher efficiency, since there is one judge and one courthouse, with cross-trained attorneys, preventing contradictory decisions by judges with different information.[25]

Impact studies of three IDV courts in different New York counties found a decrease in litigants' trips to court, which improved convenience for victims and offenders.[26] Fewer pending Family Court cases were outright

dismissed in IDV courts; thus, victims were less likely to "come away empty-handed."[27] The studies also showed an increase in victim safety and offender accountability, particularly through a higher number of criminal contempt charges holding defendants accountable for previous violations of protective orders.[28] Additionally, there was an increase in "mutually favorable" resolutions for families, leading to "fewer subsequent family court filings."[29] While domestic violence courts "face the issue of insufficiently educated judges and staff dealing with complex and challenging legal and psychological issues," IDV courts now stress the importance of all staff being educated in the area of domestic violence, with many special trainings for judges, attorneys and other staff members.[30]

Stakeholder Collaboration

Stakeholder collaboration, or community partner involvement, involves different resource groups contributing to the IDV court system beyond the ordinary courtroom staff.[31] The Kings County IDV Court brochure lists a slew of "free civil legal services" that the IDV court collaborates with, often in multiple languages.[32] IDV courts provide that "[v]ictims can . . . petition for an order of protection . . . speak with a counselor, and apply for housing and financial assistance—all while their children play safely in the supervised children's playroom."[33] Representatives from stakeholder organizations are consulted in cases and in the boroughs of New York, justice centers are available as victim resources.[34] There is a correlation between continued use of these services and fewer abused children being removed from their abused parents: in areas with an IDV approach, a study found out-of-home placement to be at lower rates than statewide statistics.[35] Additionally, the judge presiding over an IDV court has regularly scheduled stakeholder meetings with "all the participants in the process – police, prosecutors, defense attorneys, family court judges, victim advocates, treatment providers, representatives from the Departments of Health, Probation, Parole, Corrections, Social Services and others – to discuss how to improve systemic performance."[36]

Victim Safety and Offender Accountability

Research shows that centralizing information through "one family, one judge" increases safety for victims and their families.[37] The four IDV Mentor Courts have proven "records of improving victim safety" by restructuring court logistics, hiring advocates to work for and with the victims and educating courthouse staff on domestic violence.[38] Judges and court staff for an IDV courtroom receive training not only on the unique combination of law that these courthouses involve, but also on domestic violence issues overall, including the dynamics of domestic violence and the impact that it has on children in the home.[39] Additionally, IDV courts provide special waiting rooms for victims before a trial, with security cameras and/or officers, and have courtroom layouts to keep victims separate from offenders.[40]

Enforcing offender accountability goes hand-in-hand with victim safety, such as the inclusion of Compliance Parts.[41] In a study done on the implementation of IDV courts in Tulsa, Oklahoma, the authors note that IDV courts focus on holding offenders accountable with strict but "meaningful" sanctions, with orders that seem "fair" and reasonable, based on the danger presented by the offender, in order to be respected by all parties.[42] A resource coordinator refers defendants in IDV court to services such as batterers' programs and, if applicable, parenting classes, as well as treatment programs for problems such as substance abuse, which the judge will mandate.[43] These resource coordinators follow up with the programs to get reports on the defendant's compliance for the court.[44]

"The reality is that domestic violence victims suffer long beyond the span of abuse: 'Violence by an intimate partner is linked to both immediate and long-term health, social and economic consequences.'"

The Implementation of IDV Courts

IDV courts are instituted through an administrative order, such as the Order of the Chief Administrative Judge to create IDV parts in New York State Supreme Court in 2004.[45] The New York Codes, Rules and Regulations states: "Following consultation with and agreement of the presiding justice of the Judicial Department in which a county is located, the Chief Administrator, by administrative order, may establish an IDV part in Supreme Court or a DV part in Supreme Court or County Court in such county and assign one or more judges or justices to preside therein."[46]

Because "multiple actors within the judicial system" are involved in an IDV court, there needs to be advocacy and support for an IDV court to be established.[47] New York has the Center for Court Innovation, for example, which was a key factor in implementing IDV courts in the state.[48] IDV courts require a "buy-in" of the administrative judges and the district attorneys: the consent of these offices to the formation of an IDV court in their jurisdiction.[49] If a district attorney's office does not want

to participate in the IDV court system and refuses to send prosecutors to IDV courts, the criminal cases cannot be integrated.[50] There need to be judges who are passionate about both family law and criminal law and district attorneys who see the benefit of cooperating in sending their assistant DAs to IDV court and conference with the defense attorneys.[51] Judge Esther M. Morgenstern, a pioneer of IDV courts and presiding judge over a National Mentor Court for IDV in the Brooklyn Supreme Court, says that some district attorneys might argue that involvement with the family aspect of IDV is not their responsibility.[52] On the other hand, there are district attorneys like former Kings County District Attorney Charles Hynes, who advocate for an IDV court system because they have a strong interest in protecting domestic violence victims.[53] Other vital players for the implementation of IDV courts include a resource coordinator for victim services; victim advocates; and attorneys cross-trained in criminal and family law, since a primary concern of IDV courts is comprehensive resources for victims, in addition to the legal aspects.[54]

A critical reason that more states have not subscribed to the IDV court system is that it is expensive, says Judge Morgenstern.[55] "We have Safe Horizon in the courtroom, we have a resource coordinator, we have social workers… drug, alcohol programs. . . ."[56] Such resources are integral to IDV courts' mission of integrated services, bundling all the family's needs into one, but they come with a high price tag.[57] While New York's Center for Court Innovation has sent educators into other states, and even other countries, to speak about incorporating IDV courts, there is a reluctance to fund such an expensive project that not all jurisdictions deem necessary.[58] Therefore, it is vital for all organizations interested in protecting and empowering domestic violence victims to advocate for IDV courts in their respective states, and to show state officials that there is a need for these courts.[59] Supporters of the IDV court system can also appeal for grant money from various government departments: for example, in Idaho, the U.S. Department of Health and Human Services funded the Ada County IDV court with a three-year grant starting in 2003 and, in 2005, the U.S. Department of Justice Office on Violence Against Women awarded a grant to the Idaho Supreme Court to expand this model into more counties throughout the state.[60]

Once an IDV court is approved, the IDV Court Model recommends six months of intense planning and six months to implement the twelve necessary components listed under "IDV Court Model Court Components."[61] The criteria include: training judges and other staff; identifying, screening, and calendaring cases; establishing proper technology and safety features; and organizing domestic violence services and community resources.[62]

Conclusion

The reality is that domestic violence victims suffer long beyond the span of abuse: "Violence by an intimate partner is linked to both immediate and long-term health, social and economic consequences."[63] While IDV courts may not prevent the lifelong consequences, at the very least, they enable the justice system to provide victims of domestic violence a structure designed to help them.

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What Lawyers Can Do When Pet Abuse and Domestic Violence Intersect

By Amy Molloy Bogardus

Animal abuse is so tightly linked to domestic violence that it is unlikely to find abuse of a partner or child in a house with pets where abuse of the pet is not also present.[1,2] Often, this connection is simply called "the link."[3] When someone hurts an animal, the question is, who will be next?[4] Harming the family pet can be a way for the partner to instill fear, to foster coercion and to compel secrecy from victims, and when a partner gives away or kills the pet, victims are taught that they can just as easily be killed or seriously injured as well.[5,6] Animal abuse is often part of an intergenerational cycle of violence in which children living in a household with domestic violence and animal abuse absorb unhealthy attitudes and family norms that they pass down to future family members.[7]

Through the collaborative efforts of many individuals and various volunteer and professional organizations, New York State continues to enact legislation to end the link between domestic violence and animal abuse. What follows are ways attorneys can best serve the protective needs of clients and their pets.

The status of animals under New York law was explained in a June 14, 2022 ruling by the Court of Appeals:

> [a]lthough nonhuman animals are not "persons" to whom the writ of habeas corpus applies, the law already recognizes that they are not the equivalent of "things" or "objects." Unquestionably, nonhuman animals are sentient beings that, albeit without liberty rights, have been afforded many special protections by the New York Legislature – long considered a leader in animal welfare.[8]

The level of protective rights available to your clients and their animals is based upon the legal classification New York has assigned to that animal. The terms companion animal and pet are used interchangeably in this article as they are referred to in Agriculture and Markets Law Section 350(5). A pet or companion animal is defined as any dog or cat and any other domesticated animal[9] normally maintained in or near the household of the owner or person who cares for such other domesticated animal.[10] Be aware that farm animals[11] are usually not considered companion animals,[12] and special protections are afforded to service animals.[13]

Enhancing your knowledge is the first step in the process of creating a legal strategy customized to your client's needs and goals for their pet. In my view, your journey begins by developing an empathetic understanding of the bond between your clients and their pets and the ways partners exploit that bond as a power and control tool.[14] Being genuinely empathetic requires us to learn about others – their history, their reality, and their world.[15] A victim's inability to bring his or her pet to a residential domestic shelter may intensify the risks and negative consequences associated with domestic violence, all of which can affect your client's decision making.[16] If they fear their beloved pet being harmed or killed if they leave, their actual safety options are significantly narrowed. Victims are often isolated from family, friends, and then their pets, which places victims at higher risk for returning to their abusive and violent homes.[17]

Identifying the Presence of an Animal Within Your Client's Environment

A simple and easy-to-use tool is your client intake form. By adding a few more questions to your existing standard form, you can quickly identify the existence of animals and gain valuable insight and information into your client's situation and the actual challenges they are navigating.[18] Consider making "Do you care for or reside with an animal?" one of your intake questions. Using this open-ended language increases the likelihood that your client will self-identify the existence of a pet in their life, including one that may be owned by their partner. The client may be relieved that you both recognize and respect their concerns early on as you build a trusting lawyer-client relationship. Other factual areas[19] you may wish to explore are:

- current and past veterinary care of pets;
- negative and positive treatment of animals in the household;
- responses to animal maltreatment;
- the impact of the pet's situation upon a victim's decision to leave or stay with a partner;
- exposure of children to animal maltreatment; and
- changes in their partner's use of violence.

Also consider adding some of these suggested questions:[20]

- How many animals have you lived with in the past five years?
- Does your pet receive periodic veterinary care? If yes, who is your veterinarian?
- Has your partner helped care for these pets?
- Has the welfare of your pet impacted your decisions or actions?
- Have you noticed any change in your partner's willingness to harm your pet?
- Has anyone else ever seen or heard your pet being harmed?
- How did you feel after your pet was harmed?

The information that you collect during this intake process will impact your legal strategy. Your client's answers may expose the efforts of the abusive partner to diminish your client's ability to care for their pet. It may also

expose the abusive partner's attempts to manipulate or gaslight your client by reframing the abusive partner's animal mistreatment as corrective discipline.[21,22] As discussed later, veterinary records and the observations of a veterinarian may be a crucial supportive element regarding your client's legal burden of proof. Amplify the effectiveness of your representation by proactively developing relationships with local victim advocate providers and veterinarians and by identifying local resources that can support your client and their animal, including local pet-friendly domestic violence shelter options and respite or foster care support from animal assistance organizations.[23] If your region does not yet have a network of these supportive services,[24] start a community-wide conversation to create one; there are many entities that provide guidance and funding opportunities to help start those services locally.[25]

Some Legal Tools That May Assist Domestic Violence Victims and Their Pets

While there are still more gains to be achieved, New York State has enacted several useful pieces of legislation to assist victims in ending the environment of abuse created when domestic violence and animal abuse intersect. Below are a few legal tools to consider.

1. Orders of protection can afford specified protection to pets

Back in July 2006, New York amended the Family Court Act and Criminal Procedure Law to give judges the ability to add a condition to an order of protection that requires a respondent "to refrain from intentionally injuring or killing, without justification any companion animal the respondent knows to be owned, possessed, leased, kept or held by the petitioner or a minor child residing in the household." [27,28,29] In September 2008, the Legislature enacted a much needed follow-up amendment to the 2006 statute authorizing orders of protection to protect pets.[30,31] Except for family offenses, custody and parent-initiated PINS cases, the petitioner is a government entity, a prosecuting or presentment agency, not the alleged victim of family violence who requires protection, and there was no language addressing orders of protection in matrimonial cases.[32] By substituting the phrase "person protected by the order" for "petitioner" and adding similar provisions to protect pets to Sections 240 and 252 of the Domestic Relations Law, the 2008 amendments broadened the scope of protection intended for pets.[33,34] The goal of these amendments is to help break the cycle of violence and neutralize or eliminate tactics that partners used to control and force victims to stay in dangerous situations.[35] New York courts have not engaged in any significant legal discussion of the inclusion of pets in orders of protection.[36]

"In New York, a domestic violence victim has a conditional right to have their service animal accompany them to a residential domestic violence shelter so long as the accompaniment does not create an undue burden."

Lastly, if applicable, be prepared to discuss with your client how to develop a safety plan for their pet. A "safety plan" is a tool frequently employed by domestic violence victims or other crime victims that provides a checklist of things to do when there is danger. If your clients could benefit from a safety plan for their pet, they may also need a safety plan for themselves. Be sure to have your client work with a domestic violence program worker who is trained in safety plan development. In this context, the safety plan for pets[26] could include:

- creating a grab-and-go bag with pet food and supplies, any medications, and copies of pet registration documentation and veterinary records;
- identifying a reliable person who can be an emergency pet caretaker;
- having food, medication, exercise or other pet care-related instructions ready;
- alerting dog walkers or animal day care providers;
- changing veterinary providers; and
- confirming veterinary office and emergency pet care designee have copies of any legal documents discussing their pet.

As described below, evidence of animal abuse may corroborate your client's domestic violence victimization. For example, veterinary records can document a pet's fractured ribs that occurred when the pet tried to defend your client from their partner's attack.[37] Presenting evidence of pet abuse can increase the likelihood that the

court will grant your client's request to include their pet in any order of protection. Even if no physical or documentary evidence exists, the court may find testimony from your client of their observations or the observations from a non-party witness sufficiently compelling. If there are injuries (physical or emotional) to the animal caused by the abusive party, consider calling friends, family, animal care providers (dog walkers, cat sitters, doggie daycare), veterinarians or others who have witnessed changes in the pet's health or demeanor.

2. Codification of best interest analysis for possession determination of a pet within domestic relations matters

Effective Oct. 25, 2021, when awarding possession of the parties' companion animal in all domestic relations matters, New York courts shall consider the best interest of the companion animal and any other factors which the court shall expressly find to be just and proper.[38] This is not a novel concept; some courts determining exclusive pet possessions have used a "best interests of all concerned" standard, even in non-marital situations.[39] When the parties are not governed by domestic relations law, a custodial claim for the parties' pet may be brought as a replevin action since family court proceedings do not address the distribution of property, and a small claims court can only issue monetary relief, not the return of property.

There are several areas to explore as you build your case to establish that your client should be awarded exclusive possession of their pet. First, identify and quantify your client's past, present and future emotional and financial efforts for the care of their pet, as well as your client's ability to commit time, energy and finances for their pet's needs.[40] Through your direct case and cross-examination, document your client's superior intimate knowledge of their pet's physical and emotional needs, your client's ability to spend significant time caring for their pet, and the ingrained presence their pet has in your client's life, which can be demonstrated by the role your client's friends and family have taken in the care of their pet.[41] As part of your legal strategy, determine the existence of documentation[42] and witness testimony that can collaborate your client's claim for exclusive possession of the pet. Veterinary records and photos or videos of your client interacting with their pet may also be helpful in proving your client's positive role in the welfare of their pet and satisfying a best interest legal analysis. If necessary, consider offering testimony from an animal behaviorist or other expert who can explain how the animal's best interest will be better met by your client.

While mediation may be an excellent tool for many families struggling to resolve animal disputes,[43] this option is generally unavailable in divorce matters involving domestic violence due to safety concerns and dynamics of power and control.[44]

3. Cohabitation access for your client's animal at a residential domestic violence shelter

In New York, a domestic violence victim has a conditional right to have their service animal[45] accompany them to a residential domestic violence shelter so long as the accompaniment does not create an undue burden.[46] However, there is no formalized right for a pet. Instead, the regulations for general operational standards issued by the Department of Social Services state "[r]esidential programs for victims of domestic violence may have policies that permit residents to have emotional support/comfort animals and/or pets accompany residents."[47] Therefore, each shelter can determine its own policies regarding pet accompaniment. Many residential shelters often have established relationships with animal shelters and private residential networks that provide temporary housing arrangements for a victim's pet.[48] By having preexisting knowledge and established relationships with your local animal shelters and veterinarians, you are in a better position to assist and advocate for your client.

4. Protection of pets during the execution of an eviction warrant

Housing instability is a challenge that many domestic violence victims face, which has an increased negative impact upon pet owners.[49,50] In August 2018, New York State amended the eviction warrant process by adding subsection 2(b) to Section 749 of the Real Property Actions and Proceedings Law. This amendment directs officers serving an eviction warrant to check the property for the presence of a companion animal and to coordinate the safe removal of such animals with the evictee.[51] New York State ensures that the safety and wellbeing-of a pet is not compromised when a tenant is evicted.[52] Although safe housing can give survivors pathways to freedom, there are many barriers that prevent survivors from maintaining or obtaining safe and affordable housing.[53]

5. Impact of a conviction pursuant to Sections 353 or 353-a of Agriculture and Markets Law

A district attorney's office may pursue animal abuse charges against your client's partner, such as overdriving, torturing and injuring animals or failure to provide proper sustenance and aggravated cruelty to animals. These charges may be prosecuted whether domestic violence charges are pursued in criminal or civil court. Explain to your client the different ways an animal abuse conviction may impact your client and their abusive partner. Your client's petition in family court may be corroborated and strengthened by a successful prosecution of the misdemeanor offense of overdriving, torturing and injuring animals, and failure to provide proper sustenance (Agri. & Mkts. Law Section 353) or the felony offense of aggravated cruelty to animals (Argi. & Mkts.

Law Section 353-a).[54] In addition, the sentencing court may impose a term of imprisonment[55] and bar the convicted animal abuser, those who were criminally culpable in the abuse and those who could or should have acted to prevent the abuse, from owning or having custody of any other animals, other than farm animals, for a time period deemed reasonable by the court.[56,57] Be aware that fact patterns can exist when the barring of pet ownership directly affects your client, i.e., your client continues to reside with the convicted partner, or the prosecution argues that your client should have prevented the abuse. Therefore, you should be prepared to advocate for your client if either of those situations may arise.

A local district attorney's office can prove animal abuse charges through the admission of the pet's medical records; testimony from a veterinarian describing the pet's injuries or results from a necropsy (examination of a dead animal); testimony from animal control officers of their observations and any notification calls received by law enforcement; testimony from neighbors[58] documenting any observations or sounds relating to the abuse; and photographic evidence. Aggravated cruelty to animals can also be proven through cumulative evidence establishing that a defendant's unjustifiable, intentional conduct caused an animal to suffer immensely for an extended time prior to dying.[59]

6. The changing role of veterinarians

Effective Feb. 27, 2022, New York State empowered veterinarians by making them[60] mandated reporters of suspected animal cruelty if they reasonably and in good faith suspect that a companion animal's injury, illness or condition is the result of animal cruelty.[61] In addition, New York State permits veterinarians to disclose a pet's medical record to officials responding to and investigating complaints of animal abuse.[62] This new role makes veterinarians valuable allies in commencing a criminal investigation and ending the environment of abuse surrounding your client and their pet. In many cases the person bringing in an animal to the veterinarian may not volunteer information about abuse – for instance, where the person is afraid to report it because they fear for their safety or the animals' safety.[63]

Conclusion

Through the collaborative efforts of many individuals and various volunteer and professional organizations, New York State continues to enact legislation to end the link between domestic violence and animal abuse. When you incorporate these tools into your legal strategy, you increase the likelihood of achieving your client's goals, providing holistic representation and creating helpful caselaw.

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New York's Tough (Maybe Too Tough) Disclosure Rules

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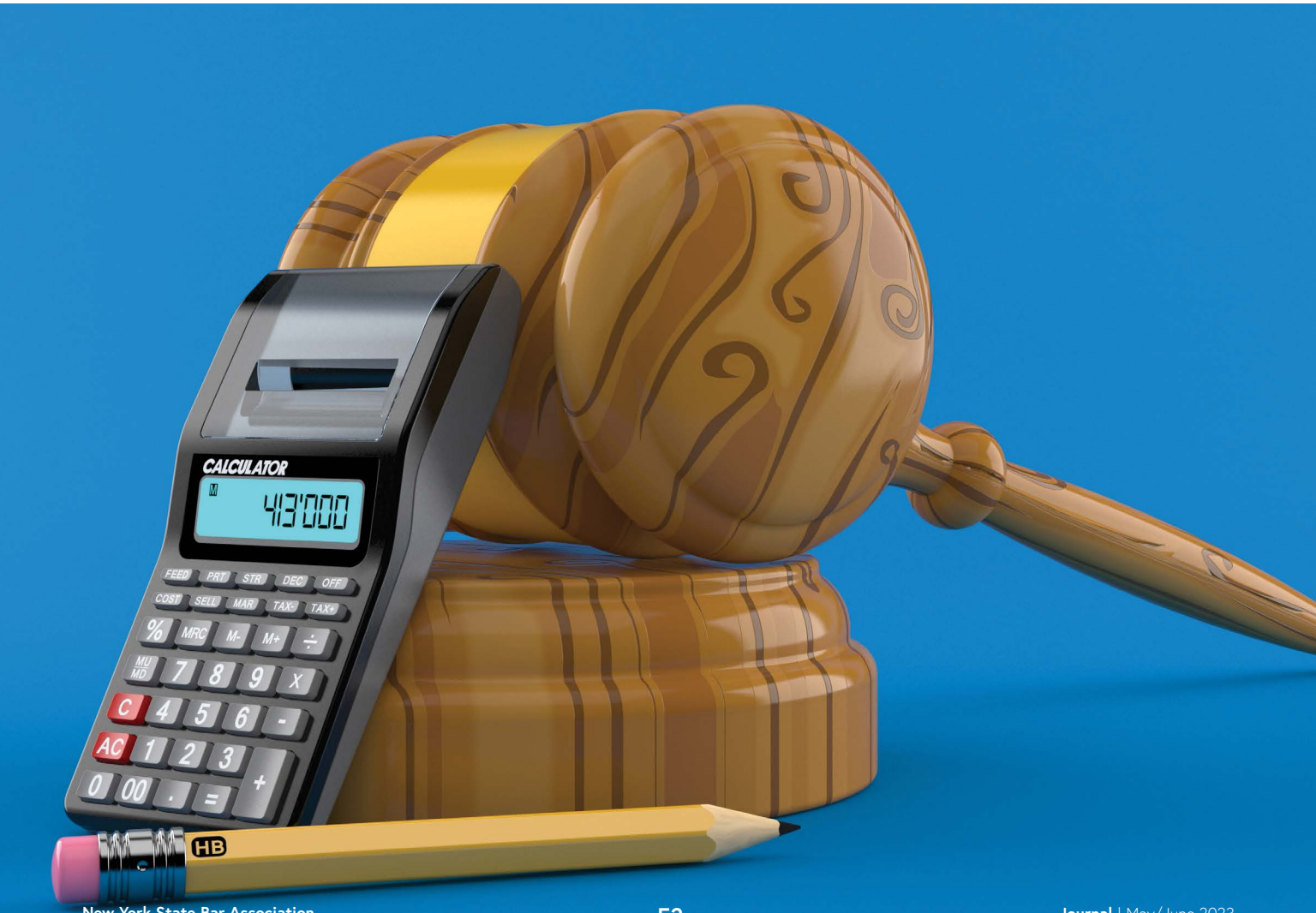


To the Forum:

The Jones Company needs advice on a real estate transaction that has complicated federal and local tax ramifications. The company is considering hiring one of the following:

(a) Archie Anderson is both a New York-admitted attorney and a CPA. Anderson has separate websites for his work as an attorney and as an accountant, advertises both his law firm and accounting firm separately to the general public, and keeps separate books and records for each. Anderson says he will handle the real estate transaction through his law firm and provide the necessary tax services through his accounting firm, at a lower hourly rate but one higher than the accounting firm, Smith & Taylor, across the street.

(b) Bill Baker is a New York-admitted attorney whose practice emphasizes real estate. He does not do tax work, but his brother-in-law, Carl Carlson, has an accounting firm in which Baker has a one-third ownership interest. Carlson offers his firm's accounting services to the general public (i.e., not just to Baker's clients). Baker says he will handle the legal work but will refer the accounting/tax work to Carlson, who also charges more than Smith & Taylor.

(c) Davis & Davis is a 30-lawyer real estate firm that has a CPA as a full-time employee. The CPA only does work for Davis & Davis clients. Davis & Davis bills the CPA at an hourly rate that is also higher than the highest rate charged by Smith & Taylor.

Under New York Rule of Professional Conduct 5.7, what disclosures must each of these providers make to The Jones Company, and what conflict waivers (if any) must they obtain?

Finally, would your answer change if each provider was doing purely legal work on the real estate deal for The Jones Company, and The Jones Company asked for help with a local tax filing on an unrelated matter that requires no tax law expertise?

Sincerely,

Big Boss Jones

Dear Big Boss Jones:

You correctly focus on New York Rule of Professional Conduct 5.7(a) ("Rule 5.7(a)" or the "Rule"), which is intended to guide lawyers asked to provide either a combination of legal and nonlegal services or only nonlegal services. Here, we assume from the question that the accounting work involved can legally be performed by a non-lawyer accountant, making it a "nonlegal service" under Rule 5.7.[1] The three law firms Jones Company is vetting – Anderson, Baker and Davis & Davis – are thus being asked to provide both the legal service of handling the real estate transaction and the nonlegal service of giving accounting advice, requiring them to follow Rule 5.7(a).

But choosing the correct rule is only the beginning. The black letter of Rule 5.7(a) and the Rule's comments impose different requirements, with one more onerous than the next.

The Obligation Imposed by Rule 5.7(a) Itself

New York's version of Rule 5.7(a) differs markedly from its counterpart in the Model Rules or in any other state. At bottom, the Rule is designed to eliminate client confusion as to when a law firm's *nonlegal* services are subject to the ethics rules. We summarize the Rule's lengthy provisions as follows:

> **Rule 5.7(a)(1):** Where the nonlegal services being provided "are not distinct" from the legal services, the lawyer or law firm is subject to the ethics rules as to both the legal and nonlegal services.
>
> **Rule 5.7(a)(2):** Even where the nonlegal services *are* "distinct" from the legal services, the lawyer or law firm performing the nonlegal services is still bound by the ethics rules if "the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship."
>
> **Rule 5.7(a)(3):** Similarly, a lawyer or law firm that "is an owner, controlling party or agent of, or that is otherwise affiliated with," an entity providing nonlegal services is bound to the ethics rules *as to the nonlegal services* if the person receiving those services could reasonably believe the nonlegal services are the subject of a client-lawyer relationship.
>
> **Rule 5.7(a)(4):** For purposes of (a)(2) and (a)(3), the lawyer or law firm must assume the person receiving the nonlegal services believes the services are the subject of a client-lawyer relationship unless "the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services" and that the protection of the client-lawyer relationship does not cover them (the "Rule 5.7(a)(4) Disclaimer").

Though ponderous, Rule 5.7(a) is really very simple. It is designed to avoid client confusion as to whether the bundle of protections that accompany legal services – client confidentiality, freedom from conflicts of interest and maintaining professional independence, to name a few – apply when a lawyer provides nonlegal services.[2] When the legal and nonlegal services are "so closely entwined that they cannot be distinguished from each other," the two sets of services are considered not "distinct," and the ethical rules are deemed to apply to both.

The services here are not that "closely entwined." Your question suggests that they can be separated, with a lawyer being able to perform the real estate transaction and a nonlawyer accountant being able to perform the tax services, as Anderson and Baker are offering. This means the ethical rules do not automatically apply to the nonlegal services, though there is a danger that Jones Company "could reasonably believe that the services are the subject of a client-attorney relationship" – especially where the same law firm performs both sets of services, as with Davis & Davis and (arguably) Anderson.[3] Anderson, who is having his separate accounting firm perform the accounting services, can protect himself by providing The Jones Company the Rule 5.7(a)(4) disclaimer in writing.

firm's own employees – is considered a business transaction with a client governed by Rule 1.8(a), New York's strictest conflicts rule.[5] Rule 1.8(a) requires that: (a) the "business transaction" be fair and reasonable to the client; (b) the terms of the transaction be "fully disclosed"; (c) the client be informed of the advisability of seeking, and is given a reasonable opportunity to seek, the advice of independent counsel; and (d) the client give informed consent, confirmed in writing, to the essential terms of the transaction. No other New York conflicts rule requires this level of disclosure.[6] The three law firms here all must comply with this heightened disclosure because each, by providing nonlegal services to the client, engages in a "business, property or financial transaction" with the client within the meaning of Rule 1.8(a).

"Whether a law firm partially or entirely owns an interest in an ancillary business that functions separate and apart from the law firm or has its own employees perform certain nonlegal functions, the New York Rules require the firm to obtain heightened disclosures from the client."

The proposed arrangement with Davis & Davis actually creates the greatest risk of confusion for the client, since a firm employee will perform the accounting services. But the law firm will almost certainly have the client sign a single retainer letter encompassing all the firm's services, indicating that all those services – legal and nonlegal – will be covered by the ethical rules. That makes even more sense given the law firm's ethical obligation to supervise its nonlawyer employees, and its responsibility for any resulting ethical lapses.[4]

The Obligation Imposed by the Comments to Rule 5.7

Unfortunately, the requirements of Rule 5.7(a)'s black letter are not the only hurdle Anderson, Baker and Davis & Davis face. The Comments indicate that they may have to make further – and more harrowing – disclosures.

Whether a law firm partially or entirely owns an interest in an ancillary business that functions separate and apart from the law firm (as Anderson and Baker do) or has its own employees perform certain nonlegal functions (as with Davis & Davis), the New York Rules require the firm to obtain heightened disclosures from the client. The Comments to Rule 5.7 make this clear. They state that an arrangement where a law firm provides nonlegal services to a client – whether through a separate business the law firm owns *or through the law*

It gets worse. Under Rule 1.7(a)(2), a lawyer is deemed to have a conflict of interest where "there is a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own financial, business, property or financial interests." As applied to Rule 5.7(a), the theory is that the law firm's decision to use its own nonlegal services provider – whether a separate firm or an employee – favors its own interests because the client might find a cheaper or better provider elsewhere. Comment 5A to Rule 5.7 explicitly requires this personal interest conflict to be waived in writing.[7] So, once again, all three lawyers or law firms involved here have to get The Jones Company to waive the conflict under Rule 1.7(a)(2), as well as under Rule 1.8(a).

We must note that these conflict waiver requirements will probably come as quite a surprise to most New York lawyers, including those you have approached. Both Comment 5A to the New York Rules and the ethics opinions we cite suggest *two separate types of conflicts* are created every time a New York lawyer so much as recommends a nonlegal services provider, whether from their own firm or a firm they separately own. This is at odds with the way law firms generally operate. After all, law firms regularly provide services that could be considered "nonlegal" services in order to support the firm's legal work. They may employ paralegals, in-house investi-

gators, e-discovery providers, fiduciary administrators or – you guessed it – accountants to assist clients with various nonlegal tasks in the course of the attorney-client relationship. It is neither common practice, efficient nor logical to require law firms in the above examples to have to suggest to their clients that similar nonlegal help may be obtained more cheaply elsewhere, much less to have clients execute heightened disclosures under the conflict of interest rules every time the firm assigns work to nonlegal professionals who work in-house at the firm.

Perhaps N.Y. Rule 5.7 and its Comments should be amended to more closely track with the Comments to Model Rule 5.7, which barely mention Rule 1.7 and limit the need to make a Rule 1.8(a) disclosure to a situation where the referral is to a *separate business* owned or controlled by the lawyer.[8] But until then, you should expect the lawyers offering to provide nonlegal services to The Jones Company through companies they own or their own employees to ask for Rule 1.7 and Rule 1.8(a) conflict waivers.

Your Alternative Question

This question serves to underscore how broadly the conflict waiver rules apply under the New York Comments to Rule 5.7. Here, the law firms are being asked to provide a purely nonlegal service for The Jones Company, so there is no possible "confusion" between legal and nonlegal services as there is in your original question. Thus, the black letter of Rule 5.7 is not implicated at all, though Anderson may still want to protect itself by having the client execute a Rule 5.7(a)(4) disclaimer. Yet the need to obtain Rule 1.7 and 1.8(a) conflict waivers still remains.[9] So even if the nonlegal service is "distinct" from any legal services the lawyer is providing, the lawyer is still bound by the conflict rules and still must make clear that the lawyer's personal interests are implicated in deciding to perform the nonlegal task as opposed to, for example, recommending another, possibly cheaper nonlawyer provider. This is yet another reason to question the breadth of these Comments.

Sincerely,
Ronald Minkoff
rminkoff@fkks.com
Vincent J. Syracuse
syracuse@thsh.com

QUESTION FOR THE NEXT FORUM

To the Forum:

I am the defendant's counsel in a federal lawsuit against a New York State Trooper being sued for malicious prosecution. This case has been very slow-moving as plaintiff's attorneys consistently miss deadlines, such as serving the summons and complaint, expert witness disclosure and responding to discovery demands. They also failed to appear for several court conferences, at which I have mentioned to the court counsel's frequent missed deadlines. It is beginning to feel like a waste of time and my clients' money to continue defending them in a case the plaintiff has paid no mind to.

Most of the time, plaintiff's counsel has brazenly missed these deadlines without so much as an email, but on several occasions, they requested same-day extensions of deadlines to try to reach settlement. While each of these extensions was granted by the court, counsel never reached out to me with any sort of settlement demand. I have tried to contact their office multiple times, but have either been told that they are unavailable or receive no response at all.

Several days after missing the final pretrial conference, counsel filed an apologetic letter requesting an adjournment and that no blame be placed on the plaintiff. The letter cited numerous excuses for the missed deadlines and appearances, such as this being the handling-associate's first federal case, the supervising partners being busy with other cases and a sudden resignation of several support staff. The court has yet to take any action against plaintiff's counsel beyond entering an order establishing discovery deadlines (which, predictably, counsel has missed).

I am contemplating filing a motion to dismiss the case and call for sanctions on the grounds that defendant is now prejudiced by the plaintiff's lack of attention to the case. Would filing a motion to dismiss be ethical and proper in this instance as it might harm the plaintiff? What kind of sanctions might the plaintiff's attorneys face?

Sincerely,
Patience Isabel Waning

Endnotes

1. *See* Rule 5.7(c) ("'nonlegal services' shall mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer").

2. *See* Rule 5.7(a), Comm. 1. "The risk of confusion is especially acute when the lawyer renders both legal and nonlegal services with respect to the same matter."

3. *See* Rule 5.7(a)(2) and (a)(3).

4. *See* Rules 5.3(a) ("a law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised . . . .") and 5.3(b) (setting forth when lawyer or law firm is responsible for nonlawyer's violation of ethics rules).

5. *See* N.Y. Rule 5.7, Cmt. 5A (requiring lawyer providing nonlegal services to comply, *inter alia,* with Rule 1.8(a)); *see also* N.Y. State Bar Ass'n Ethics Op. 896 (2011) (law firm providing both legal and lien search services through own employees required to comply with NY Rule 1.8(a)).

6. *Compare* N.Y. Rule 1.7(b)(4) (requiring only "informed consent, confirmed in writing" for most conflicts).

7. *See* N.Y. State Bar Ass'n Ethics Op. 1015 (2014) (Rule 1.7(a)(2) applies when lawyer is hiring or recommending separate provider to provide nonlegal services); N.Y. State Bar Ass'n Ethics Op. 958 (2013) (risks of conflicts under Rule 5.7 exist "whether or not the lawyer intends to perform the nonlegal services through the lawyer's firm . . . or through a separate entity that the lawyer owns or controls").

8. *See* Model Rule 5.7, Comm. 5.

9. *See* Rule 5.7, Comm. 5A ("[I]f the legal representation involves exercising judgment about whether to recommend nonlegal services and which provider to recommend, *or if it involves overseeing the provision of the nonlegal services,* then a conflict with the lawyer's own interests under Rule 1.7(a)(2) is likely to arise," going on to say lawyer "should" get waiver under Rule 1.8(a) as well) (emphasis added).

Legal Fee Financing: What It Is and How To Offer It

By Hannah Bruno

What if you could receive your total fee upfront at the beginning of an engagement while still allowing your clients to pay in installments? It sounds too good to be true, doesn't it?

With legal fee financing, not only is it possible, you can start taking advantage of this modern payment option today.

What Is Legal Fee Financing?

Fee financing (also known as fee funding) is an installment loan option that enables customers to purchase products or services while paying for them in smaller increments over time. By establishing a direct relationship with the merchant, the consumer can avoid using credit cards to cover the cost of the purchase and eliminate the associated fees and interest charges.

Legal fee financing is one of several alternative payment methods offered through law firms. By easing the burden of large, one-time bills, law firms can make legal services more accessible to those who need them most.

Who Should Consider Getting Help With Legal Fee Funding?

Law firms that cater to first-time legal clients report cost as the primary deterrent for customers who decide not to retain legal counsel. With 63% of Americans living paycheck to paycheck, and the average hourly rate for legal representation sitting at $275 across the country, law firms must utilize the best available tools to help potential clients afford services.

Why Should Law Firms Offer Options for Legal Fee Financing?

There are several reasons why lawyers should consider offering legal fee financing.

1. Appeal to more prospects

Although traditional billing remains the primary choice for millions of consumers, legal fee funding solutions became popular during the pandemic. It is now a standard and expected payment option.

For younger consumers, fee-funding solutions will be vital in choosing which attorney or firm they engage for services. Adding legal fee financing as one of your available payment methods can make a massive difference for your firm. It can elevate your practice to reach more prospects and, ultimately, increase your profitability.

2. Improve cash flow

Fee funding also improves the consistency and reliability of your cash flow. Lawyers often hesitate to let clients pay over time because traditional payment plans can have a higher incidence of late and non-payments.

Offering financing for legal fees helps mitigate the risk of both. Your firm receives the total requested amount up front, and clients can split an invoice into multiple payments. If a client falls behind on installment loan payments or refuses to pay, your law firm is typically not responsible.

3. Get paid faster and spend less time trying to collect

The other significant benefit of legal fee financing is that it increases how quickly you collect your total fees. When it comes to traditional payment plans, giving clients the ability to make multiple smaller payments over time means, by definition, you receive smaller deposits.

Allowing clients to use a legal fee financing option, on the other hand, means you can secure your total invoiced amount at the start of the engagement. By offering clients flexibility in payments, your firm's lawyers can spend less time trying to collect unpaid legal fees.

4. Build stronger client relationships

Hiring a lawyer may be one of the most expensive decisions your client will ever make. When offering legal fee funding to your clients, you must clearly communicate their financial responsibility from the start. Set clear expectations as to what clients can expect to see on invoices, when they'll receive them and how they'll be able to pay. This will spare them from unexpected bills and ensure that you receive timely payment for your work.

Most important, these conversations start your relationship on the right foot. Offering legal fee financing and walking clients through what that means may keep current clients coming back and increase referrals.

Manage Your Law Firm's Financing Options

Adopting an online payment solution enables you to offer flexible payment options such as credit, debit, eCheck and, in some cases, legal fee financing. The result is a stabilized cash flow, happier clients and more time to focus on work that matters to you.

Beyond the benefits listed above, the advantages of fee funding ultimately serve both you and your clients. Your clients get help with legal fees and know precisely how much they will owe with a set number of smaller payments scheduled over an established timeframe. This is an increasingly attractive option for consumers during growing economic uncertainty.

To learn more about LawPay, ClientCredit (a fee-lending solution built by LawPay specifically for the legal industry, powered by Affirm) and our commitment to supporting your firm's success, visit lawpay.com/nysba.

Hannah Bruno is a content writer for LawPay in Austin, Texas.

Designing Law Firms for Out-of-Office Work

By Jack Newton

We've seen a significant shift in the behaviors – and mindsets – of legal professionals in recent years.

Driven by the fact that countless lawyers and staff were forced to work in a distributed environment – often from home – at the start of the COVID-19 pandemic, we're now seeing the long-term implications for law firms and their office cultures.

Prior to 2020, law firms organized themselves in and around their commercial office spaces. The office determined how both staff and employees interacted with the firm. For lawyers, offices helped create clear delineations between personal and professional life. And while it was common for lawyers to catch up on a brief at home, visit clients or attend court, the office was still central to it all.

As home offices have become more integrated into firm operations, however, we've seen the lines between personal and professional domains increasingly blur. Lawyers have had to adopt new methods to maintain professional continuity and to keep up relationships with clients and other members of their firm. In effect, working outside of the office has made them more connected than ever – and more accessible to their firms and their clients.

If anything, it's become more difficult for lawyers to disconnect from their work, and many work throughout the day. According to research in the most recent Legal Trends Report, more legal professionals report working outside of regular business hours, and 74% of lawyers offer to communicate with clients after business hours.

Those working after hours and on weekends may not be seeing any professional benefit either. For comparison, lawyers working regular business hours are 28% more likely to have better relationships with clients, and they are 28% more likely to be happy with their professional life.

Given that 69% of legal professionals *want* the flexibility to work throughout the day, law firm owners and managers are faced with the question of how to deal with this reality. On the one hand, lawyers want their freedom, but on the other, it can be to their detriment. This contradiction poses potential problems for attracting and retaining talent while keeping everything running smoothly at the firm.

Like many businesses in other industries, law firms need to consider how they will prioritize their resources and invest in their people in a way that continues to benefit their staff, their clients and their bottom lines. This is an especially important consideration for law firms today, given the heightened interest rates and costs of everyday goods and services we saw leading up to the start of this year.

What countless firms have realized is that cloud solutions provide both the necessary business structures that firms need while ensuring the highest degree of flexibility to those who use them. Cloud-based legal practice management software enables the type of flexible, distributed work that lets lawyers work virtually from anywhere. These solutions also provide the benefit of added efficiency and organization that comes with centralizing firm data within modern-day technologies.

Firms that use cloud-based technology are not only more likely to embrace more flexible work schedules – they are also more successful. As reported in our Legal Trends Report, lawyers working at firms that operate with cloud-based legal practice management software are 60% more likely to have positive relationships with clients and they are 29% more likely to be happy with their professional life. They're also 11% more likely to work at firms that have strong revenue streams.

These are the types of benefits that make for happy firm members *and* happy clients – both of which are critical to running a successful legal practice in 2023.

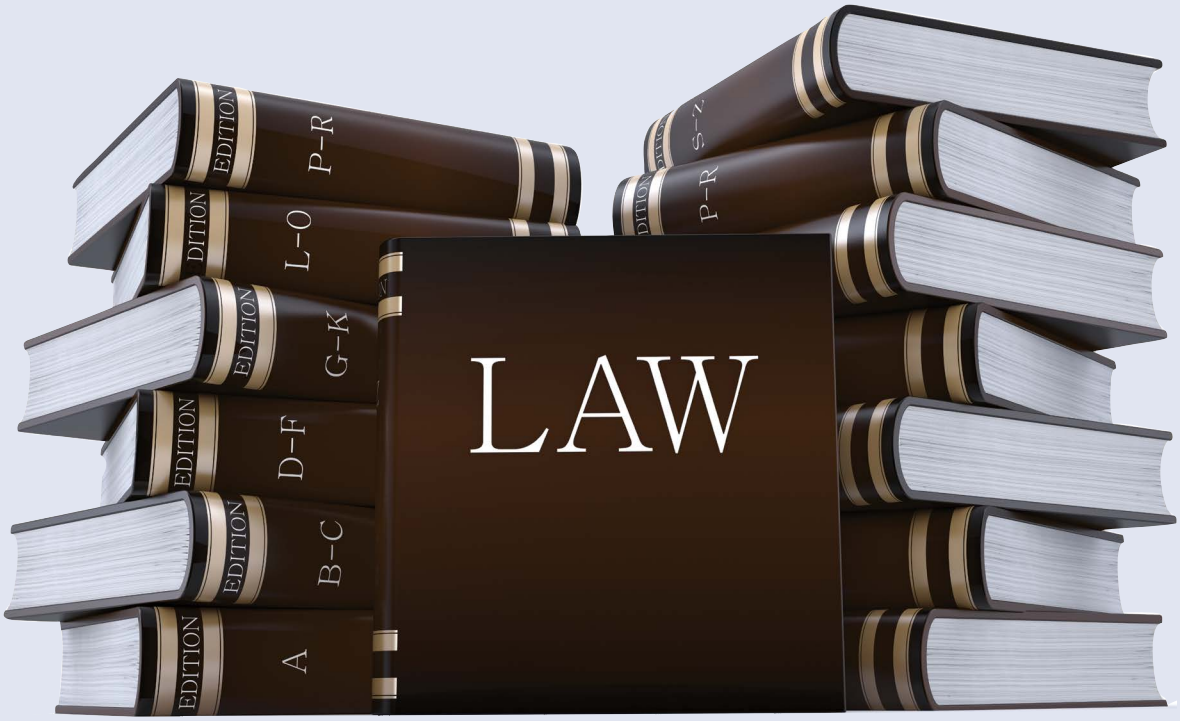
If the previous years have taught us anything, it's that the traditional foundations that businesses have been built on are not designed to meet the needs of today's legal professionals. When building a business that will withstand the tests of time – and ultimately thrive in times of uncertainty – it's all the more important that firms invest in the systems that have proven invaluable in both the good times and the bad.

To learn more about the trends affecting today's law firms, read the latest Legal Trends Report for free at www.clio.com/ltr.

Jack Newton is the CEO and founder of Clio and a pioneer of cloud-based legal technology. Newton has spearheaded efforts to educate the legal community on the security, ethics and privacy issues surrounding cloud computing and is a nationally recognized writer and speaker on the state of the legal industry. He is the author of "The Client-Centered Law Firm," the essential book for law firms looking to succeed in the experience-driven age, available at clientcenteredlawfirm.com.

New York State Bar Association Welcomes Revisions to the Bar Application, Urges Further Action To Encourage Diversity in the Legal Profession

By Susan DeSantis



Sherry Levin Wallach, president of the New York State Bar Association, issued the following statement on March 16 about the New York State courts' decision to amend Question 26 of the Character and Fitness examination of the New York State bar application:

"We appreciate New York State's courts' acknowledgement of the chilling effect the previous Question 26 had on law school applicants due to the disproportionate rates of policing and prosecution experienced in communities of color. We support the decision to no longer require applicants for the bar to disclose citations, tickets, arrests and other law enforcement encounters that did not result in criminal charges, indictment, trial, guilty plea or conviction. This is the right thing to do – especially when it comes to juvenile delinquency proceedings in Family Court.

"The courts' announcement is a significant step forward in encouraging diversity in the legal profession. Unfortunately, Question 26 in its revised form will still have a chilling effect on potential applicants for the New York bar, particularly when we consider the over-policing of communities of color.

"We have advocated for the complete removal of Question 26 because even with the revisions the court announced, the question still asks for all juvenile proceedings in criminal court. N.Y. Human Rights Law Section 296(15) and (16) unequivocally precludes licensing agencies from posing questions about arrests that are not pending and sealed criminal convictions. Our association will continue to work with the New York State courts and law schools to address the remaining issues regarding Question 26 and to encourage diversity in our legal profession."

Champion for Women's and Children's Rights Receives Ruth Bader Ginsburg Memorial Scholarship

By Jennifer Andrus

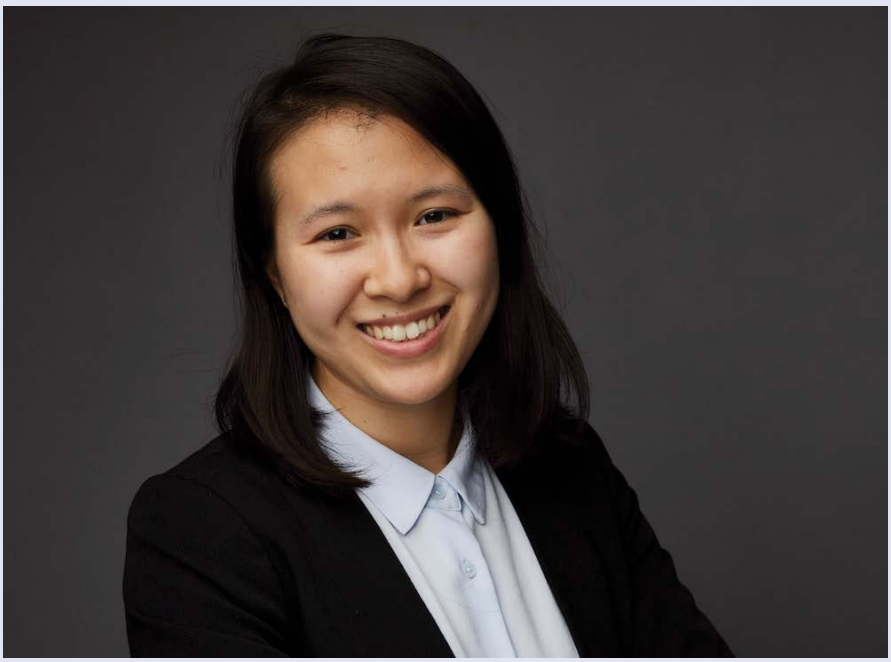
The New York State Bar Association presented Shelley Wu, a champion of women and children's rights, with the Ruth Bader Ginsburg Memorial Scholarship during its House of Delegates meeting April 1 in Albany.

Wu is a third-year law school student at the Cardozo School of Law at Yeshiva University. Wu ranks in the top 10% of her law school class, serves on the Law Review and commits her time to helping domestic violence survivors, seniors, people with disabilities and inmates preparing for parole hearings.

In her application letter, Wu says she learned how to advocate for others as a child, helping her Chinese immigrant parents navigate language and cultural barriers in America. Those early experiences instilled in her a strong sense of justice and a commitment to help those who face discrimination.

After graduating early from Fordham with an undergraduate degree, Wu worked as a paralegal in the Child Abuse and Domestic Violence Units of the New York County District Attorney's office. She says that work experience inspired her to become an attorney and fight for women's rights and gender equality.

New York State Bar Association President Sherry Levin Wallach says Wu is not afraid to get in the trenches and do the tough work advocating for survivors of domestic violence survivors and their children.



"Shelley's grit and determination is just what we need in the next generation of lawyers in civil legal service. The future of our profession is bright with young leaders like Shelley Wu," she said.

The $5,000 scholarship is presented by NYSBA's Women in Law Section, the Committee on Annual Awards, and the Committee on Civil Rights. Created in 2020 after the death of Justice Ginsburg, the scholarship is designed to honor Justice Ginsburg's principles including elevating the standard of integrity in the legal profession, fostering a spirit of collegiality and promoting the public good.

In her nomination letter, Cardozo Law School Dean Melanie Leslie praised Wu's work both on campus and off campus. "Shelley has cultivated a service-oriented mindset and a commitment to advancing women's rights," she wrote.

Wu intends to pursue a career in civil rights litigation with a focus on fighting gender-based discrimination and harassment.

New York State Bar Association Strengthens Ties With Three Polish Bar Organizations

By Jennifer Andrus

The New York State Bar Association entered into a memorandum of understanding with the Polish Bar Council and two bar associations in Warsaw during a ceremony in Poland on March 29.

The agreement provides a framework for the three legal associations to promote discourse between attorneys in both countries. Topics to be addressed include international legal issues pertaining to trade, international business transactions, commercial disputes, human rights and the transnational delivery of legal services.

"In the past year, our International Section and its Ukraine Task Force have worked closely with many members in this region to help those in both Ukraine and Poland during this war of Russian aggression," said Sherry Levin Wallach, president of the New York State Bar Association. "Today we stand alongside you as we continue to fight for justice and the rule of law."

Wojciech Bagiński, chairman of the Foreign Commission of the Polish Bar Council; Mikołaj Pietrzak, dean of the Warsaw Bar Association; Joanna Iwanicka, chair of the Warsaw Bar Association Izba Adwokacka w Warszawie; and Monika Całkiewicz, dean of the Warsaw Bar Association Okręgowa Izba Radców Prawnych W Warszawie, attended the ceremony.

Pietrzak said the agreement held great meaning for his organization.

"The war [in Ukraine] perhaps brought to light how very common our shared values are. Regardless of the different procedural regimes we may experience, we all ultimately serve the same values, human dignity, rights and freedoms. As work for lawyers becomes more and more international, we find more in common, then differences between our legal profession," he said.

They were joined by NYSBA International Section Chair Azish Filabi and many NYSBA members from New York who were attending a Spring Conference in Warsaw.

"I have reached out to bar associations large and small, across the state of New York, across the country and the territories and around the world to offer our friendship and to forge these important alliances. The goals are many, but the overarching theme of our affiliations is to protect and defend the rule of law, access to justice and to ensure that the law is applied equally and fairly to all while fostering diversity, equity and inclusion in our profession," added Levin Wallach.

The New York State Bar Association has signed more than a dozen memoranda with bar associations during Levin Wallach's presidential tenure.

How To Manage Time, Set Priorities and Reduce Anxiety

By Rebecca Melnitsky

Effectively managing time takes effort, but breathing, slowing down and prioritizing are a good way to start.

That was the message from Alyssa Malin, former in-house counsel to a New York City real estate investment firm who switched to life coaching. Nowadays, she runs The Stet Collective, which is focused on helping female lawyers with professional development and wellness.

On March 29, the New York State Bar Association hosted a seminar featuring Malin speaking about time management for lawyers. The seminar was sponsored by the association's Women In Law Section, the Committee On Law Practice Management and the Committee On Continuing Legal Education.

Setting Priorities

Malin said women are often prone to perfectionism and taught to take care of others before themselves, and that carries over into the workplace. "When we have a priority that is not in line with that gender norm, it results in some guilt," she said.

She said that the term "work-life balance" is a misnomer and that it's better to strive for being present and focused instead. "I obviously can't tell you how to prioritize," said Malin. "Everyone's life is different, and everyone's desires for how they want to live are different." She added that a list of priorities should also include what a person wants in their personal life as well as the workplace.

Malin said people should write down their top five priorities and then look at how they are spending their time. "It's a little bit uncomfortable because you're going to see that you may not be living according to your values," she said. "But it's a really effective exercise."

Reducing Anxiety

Anxiety is the number-one productivity killer and the most common issue Malin sees in her practice. She added that anxious people tend to procrastinate and avoid their work – often by doing other less-important tasks.

"The anxious brain is not a clear-thinking brain," Malin said. "Paranoid thoughts start to seem rational to us, and we have trouble differentiating between reasonable arguments and unreasonable arguments."

The first step to reducing anxiety is to address the physical components, like twitching, clammy hands, nausea, chest tightness and difficulty breathing. These sensations are caused by the release of cortisone and adrenaline. "The primitive brain is responsible for our stress response," Malin said. "And it hasn't evolved enough to differentiate between a lion that was going to eat us and an email from an upset client."

Using words to describe the physical symptoms distracts the brain from what's causing the anxiety and shows that those thoughts, while stressful, are not life-or-death. "You are not in physical danger; you are just feeling an uncomfortable physical sensation," Malin said. "And that's really all anxiety is."

The second step is to address the thought that is causing anxiety. As Malin described, thoughts create feelings, which create actions, which create results. "I recommend writing down these thoughts to see that they're just thoughts," she said. "They are not facts."

Malin recommended coming up with an alternative – yet believable – thought that feels better than what is causing the anxiety. "I call it thought work," she said. "It's a really awesome tool, and it's a tool that lawyers are particularly cut out for because . . . we're always training to be thinking of alternative explanations, other ways to look at a problem, other ways to interpret at the facts."

Effective Planning

When tasks are overwhelming, it helps to make a plan and then execute the plan later. "This way you're telling your brain that . . . you don't have to actually do the work," said Malin. "And that is much more calming to the brain. It's much less overwhelming. And once you've made that plan, all you have to do is follow it."

She also said it's important to limit distractions, like turning off notifications. Even if one cannot ignore all messages, it helps to only allow notifications from the most important people.

Overall, the key to effective time management is practice, consistency and finding what works for an individual. "The truth is there's no organizational system that's perfect," Malin said. "There's just the system that is perfect for you."

Laura Sulem, the chair of the Women in Law Section's Annual Meeting and Programming Committee, delivered the opening remarks.

It's a No-Brainer: Why Joe Gerstenzang Cherishes His NYSBA Membership

By Jennifer Andrus

Joseph Gerstenzang is a partner at Gerstenzang, Sills, Cohn & Gerstenzang. He is member of the Criminal Justice Section and a frequent panelist at NYSBA programs. Gerstenzang's firm primarily handles DWI, DWAI and drugs defenses. He comes from a family of attorneys including his parents, Peter and Karen Gerstenzang, and two siblings who are attorneys.

Coming from a family of attorneys with an established practice, did you want to be a lawyer and continue in the family profession?

I wasn't sure what I wanted to do. After college, I worked in other fields, but eventually the call came to follow in my family's footsteps. The passion for the law really came not from watching my father, but from law school at Albany Law. Professor Peter Preiser's constitutional law class really inspired me to follow in my family's footsteps. He solidified my interest in pursuing criminal defense.

How has DWI defense changed since you graduated from law school?

The practice has only changed in a couple of ways, and technology is one of them. The state police are now required by law to use body cams. It's no longer the cross-examination of a trooper about what they experienced [in a traffic stop] or what they saw. We can see every aspect of the investigation from beginning to end. It is more time-consuming to defend your client, but you're also able to find details that are very effective in defending your client, too.

How has discovery reform impacted your practice?

Discovery reform has made a huge impact on our practice in a positive way. Prior to reform, there was little we could do to compel the prosecution to turn over data in a timely manner. Now we are getting statements early on in the process. We also have access to data and documentation on breath-testing devices that we previously never saw before.

Has the legalization of marijuana affected your work?

We see a lot of arrests for DWAI, but it's a difficult area of law to enforce. There has not been an increase in impaired driving by cannabis, but we've been seeing more enforcement in anticipation of it. The problem is that of all the drugs that are investigated, you see the least amount of actual impairment caused by cannabis versus alcohol or narcotics like heroin. Probable cause for arrest is a pretty low standard, so police can investigate a driver for impairment if they cannot arrest a person for possession.

Why did you join NYSBA and what do you get out of the membership?

It's a no-brainer; you've gotta join the State Bar Association! When I was a new attorney, I saw the benefits very early on with the Bridging the Gap program. It introduced me to a wide array of different practices. Law school gives you tools, but you don't have any real practical knowledge.

I also attended the Trial Academy soon after joining. It's a tremendous resource. Now half of my firm has gone once a year to help guide younger attorneys at the academy. Providing new attorneys with some of the tools that I was given is gratifying and it's a lot of fun.

How has your membership helped your career?

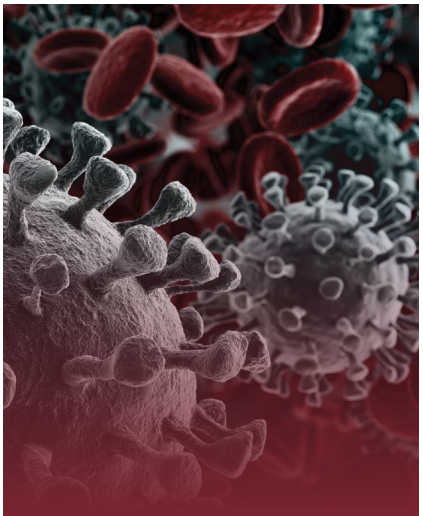
NYSBA is a place where you know you can go to exchange ideas with other attorneys and learn about what's going on in other parts of the state. That insight is critical for my practice, keeping up on trends and knowing what to expect if you have a case in other jurisdictions. At NYSBA, you can impact the profession and contribute to changes or lobby on an issue. It's a powerful organization where we can accomplish more together than anything we can do on our own.

Why did you take that next step to volunteer at NYSBA events and programs?

Lecturing and contributing to state bar events is hugely rewarding. I love engaging and interacting with other members and challenging myself to master a topic. If you're going in front of your peers, it can be nerve-wracking. They can be your most critical audience, but it forces me to be better at my job.

You should join the bar because ….

It's simple – the New York State Bar Association is the first membership you should have and the last one you should let lapse. My membership is part of my identity as a lawyer. Not being a member seems alien to me.



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

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NEW YORK STATE BAR ASSOCIATION

New York State Bar Association Section Upcoming Destination Meetings

Steve Houck Antitrust Trial Training Academy
Monday, May 22, 2023 – Wednesday, May 24, 2023 | Jacob K. Javits Federal Building - NYC

Environmental Issues in Commercial Real Estate: WNY Experience
Thursday, June 8, 2023, 8:30 a.m. – 1:00 p.m. | Hyatt Place Buffalo - Amherst

Real Property Law Section Summer Meeting 2023
Thursday, June 22, 2023 – Sunday, June 25, 2023 | The Saratoga Hilton - Saratoga Springs NY

Family Law 2023 Summer Meeting
Thursday, July 13, 2023 – Saturday, July 15, 2023, High Peaks Resort - Lake Placid

Tax Section 2023 Summer Meeting
Friday, July 14, 2023 – Saturday, July 15, 2023, Ritz Carlton – Philadelphia

Elder Law and Special Needs Summer Meeting 2023
Thursday, July 20, 2023, The Logan – Philadelphia

Trial Lawyers 2023 Summer Meeting
Sunday, July 30, 2023 – Tuesday, August 1, 2023, The Equinox - Vermont