NEW YORK STATE BAR ASSOCIATION
MEETING OF THE HOUSE OF DELEGATES
THE OTESAGA, COOPERSTOWN, NEW YORK
AND REMOTE MEETING
SATURDAY, JUNE 10, 2023 – 8:30 A.M.

AGENDA

1. Call to order, Pledge of Allegiance, and introduction of new members – Domenick Napoletano, Esq. — 8:30 a.m.

2. Approval of minutes of April 1, 2023, meeting — 8:35 a.m.

3. Report of Treasurer – Susan L. Harper, Esq. — 8:40 a.m.

4. Installation and inauguration of Richard C. Lewis, Esq. as President – Oath to be administered by Hon. Elizabeth A. Garry, Presiding Justice, Supreme Court, Appellate Division, Third Judicial Department — 8:50 a.m.

5. Report of President – Richard C. Lewis, Esq. — 9:05 a.m.

6. Report and recommendations of Task Force on Modernization of Criminal Practice – Catherine A. Christian, Esq., and Andy Kossover, Esq. — 9:15 a.m.

7. Report and recommendations of Task Force on the Post-Pandemic Future of the Profession – Mark A. Berman, Esq., and John H. Gross, Esq. — 9:45 a.m.

8. Report and recommendations of Task Force on Mental Health and Trauma Informed Representation – Joseph A. Glazer, Esq., and Sheila E. Shea, Esq. — 10:15 a.m.

9. Report of Special Committee to Examine Selection of Judges for the Court of Appeals – Damaris Hernandez, Esq., and Vincent E. Doyle III, Esq. — 10:45 a.m.

10. Report and recommendations of Committee on Membership – Clotelle D. Drakeford, Esq., and Michelle H. Wildgrube, Esq. — 10:55 a.m.

11. Report and recommendations of the Committee on the New York State Constitution – Desmond C.B. Lyons, Esq. — 11:20 a.m.

12. Report of Working Group on Facial Recognition Technology and Access to Legal Representation – Thomas J. Maroney, Esq. — 11:40 a.m.

13. Report of Committee on Annual Awards – John H. Gross, Esq. — 11:50 a.m.

14. Report of The New York Bar Foundation – Carla M. Palumbo, Esq. — 11:55 a.m.

15. Administrative items – Domenick Napoletano, Esq. 12:00 p.m.

16. New business 12:05 p.m.

17. Date and place of next meeting:
Saturday, November 4, 2023
Remote and Bar Center, Albany, New York

NEW YORK STATE BAR ASSOCIATION
RULES OF THE HOUSE OF DELEGATES
ADOPTED JANUARY 24, 1973; AMENDED APRIL 13, 1991; AMENDED NOVEMBER 5, 2022

1. Chair of the House of Delegates

(a) The President-Elect shall be the Chair of the House of Delegates. In the absence of the President-Elect, the President shall preside, and in the absence of the President and President-Elect, the Vice-President with seniority of membership shall preside. In the absence of the President, the President-Elect, and all Vice-Presidents, the senior member of the House shall preside.

(b) The Chair of the House of Delegates shall:
(1) Ensure that meetings are conducted in an orderly manner.
(2) Decide questions of order and procedure.

(c) The Chair of the House of Delegates may:
(1) Change the order of business at any meeting.
(2) Limit the time of debate or discussion on any matter of business.
(3) Call for a vote on any matter before the House.

2. Meetings of the House of Delegates

(a) Unless otherwise ordered by the House, regular meetings shall be held at the time and place designated by the Chair of the House of Delegates, but in no event less than four times in each year including one meeting to be held in conjunction with the Annual Meeting of the Association.

(b) Any meeting of the House of Delegates may be called at any time, subject to the notice requirements of the Bylaws and subsection c below, by:
(1) The President-Elect
(2) The President
(3) The Executive Committee
(4) The Secretary upon the written request of at least 25% of the delegates; provided, however, that the Secretary shall not be required to call such meeting to consider any matter which was considered and acted upon at a meeting of the House held within the previous twelve meetings.

(c) Notice of any meeting of the House of Delegates shall be sent by the Secretary not less than 15 days prior to the time fixed for such meeting. Notice of any meeting shall be deemed sufficient when written notice of the time and place thereof is given by mail, email, or other electronic transmission by the Secretary to each member of the House of Delegates on or before the 15th day prior to such meeting.

3. Order of Business

(a) The Chair of the House of Delegates shall determine the order and priority of business at a meeting. A written agenda shall be sent by mail, email, or other electronic transmission by the Secretary to each delegate not less than 15 days prior to the time fixed for the meeting, but additions or deletions may be made to the agenda by the President-Elect, the President, or the Executive Committee.

(b) Unless permitted by the Chair of the House of Delegates, no resolution may be proposed by a delegate for action at a meeting unless such resolution has been submitted in writing to the Chair of the House of Delegates and the delegates at least 15 days prior to such meeting.

(c) Delegates shall notify the Chair of the House of Delegates, in writing, by the end of the business day Wednesday prior to the meeting should they intend to introduce a matter of new business or make a motion to table a report or resolution, unless the Chair of the House of Delegates determines that the motion will be heard without such notice.

(d) If no member has risen in opposition or requested to speak in opposition to a report or resolution, then the Chair of the House of Delegates may invoke the rules of limited debate, limiting comments to no more than three speakers.

(e) With the exceptions noted below, no delegate shall speak more than three minutes at one time or more than once at the same session upon the same question unless such member obtains the consent of the Chair of the House of Delegates, or a majority of the delegates present at the meeting. The main motion and amendments shall be deemed separate questions. The person presenting the matter under discussion shall have the right to close the debate on that matter. The Chair of the House of Delegates may adjust the length of time for making oral presentations if in his or her judgment the conduct of the business of the House so requires, but such limitations may be removed by majority vote of the delegates present at the meeting.

(f) Without limitation on the other powers of the House, the House may by majority vote refer any matter coming before it to the Executive Committee or other committee, section, or task force of the Association for further consideration.

(g) Voting shall be by voice vote, unless the Chair of the House of Delegates directs a division of the House, or, if the delegate is participating remotely, by polling through the videoconference software.

(h) Robert's Rules of Order, Newly Revised shall govern meetings of the House, except as otherwise provided in these Rules or the Bylaws.

4. Persons in attendance at meetings of the House of Delegates

Meetings of the House shall be open to attendance by members of the Association unless the Executive Committee or the delegates vote to exclude non-delegates from a specified meeting. The Chair of the House of Delegates in his or her discretion may permit attendance at meetings of the House of Delegates by members of the press or members of the public. No non-delegate shall be heard by the House unless requested to speak by the Chair of the House of Delegates or upon the vote of two-thirds of the delegates present at the meeting, provided that such non-delegate shall first disclose the representative nature of his or her appearance, including the name of any client or principal whose interests the non-delegate may represent.

5. Amendments

The Rules of the House of Delegates may be amended at any meeting of the House by a vote of two-thirds of those present, provided that 15 days previous notice in writing of the proposed amendment shall have been given to the delegates.

NEW YORK STATE BAR ASSOCIATION
MINUTES OF HOUSE OF DELEGATES MEETING
BAR CENTER, ALBANY, NEW YORK, AND REMOTE MEETING
APRIL 1, 2023

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PRESENT: Abneri; Ahn; Alcott: Alomar; Arenson; Barreiro; Bascoe; Battistoni; Baum; Bello Burke; Beltran; Berlin; Berman; Bladykas; Block; Bond; Bonina; Braunstein; Brown; Bucki; Buholtz; Bunshaft; Campbell; Carter; Chambers; Chandrasekhar; Chang; Christian; B. Cohen; D. Cohen; O. Cohen; Cohn; Coreno; D'Angelo; Davidoff; Degnan; Doyle; D'Souza; Dubowski; DuVall; Effman; Feal; Fernandez; Filemyr; Finerty; Fiore; Fox; Gauntlett; Gerstman; Gilmartin; Gold; Good; Grays; Greenberg; Griffin; Gutekunst; Haig; Harper; Harwick; Heath; Hill; Himes; Hoffman; Islam; Jackson; Jacobson; Jaglom, James; Jimenez; Jones; Kamins; Karson; Kawecki; Kelley; Kelly; Kenney; Kiernan; Ko; Kobak; Koch; Kretser; LaMancuso; Larose; Lathrop; Lau-Kee; Lessard; Levin; Levin Wallach; Lewis; Livshits; Loyola; Madigan; Makofsky; Markowitz; Marotta; Marinaccio; Martin; Mathews; May; Mazur; McCann; McElwreath; McGinn; McGeegan; McNamara; C. Miller; M. Miller; Minkoff; Minkowitz; Montagnino; Moretti; Morrissey; Muller; Murphy; Napoletano; Nielson; Noble; Nowotarski; Palermo; Parker; Petterchak; Pope; Quaye; Randall; Richter; Riedel; Rothberg; Russ; Russell; Safer; Samuels; Sargente; Schram; Schraver; Schwartz-Wallace; Sciocchetti; Seiden; Sen; Sharkey; Silkenat; Skidelsky; Sonberg; Spring; Stephenson; Strong; Sunshine; Swanson; Sweet; Tambasco; Terranova; Treff; Vaughn; Vigdor; Waterman-Marshall; Wesson; Westlake; Whittingham; Yeung-Ha

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

The meeting was called to order and the Pledge of Allegiance was recited.

1. Approval of Minutes of January 20, 2023, meeting. The minutes were deemed accepted as distributed.

2. Report of Treasurer. Domenick Napoletano, Association treasurer, reported that through February 28, 2023, the Association's total revenue was $10,668,818, an increase of approximately $803,831 from the previous year, and total expenses were $4,461,259, an increase of approximately $1,588,945 over 2022, for a budgeted surplus of $6,207,559. The report was received with thanks.

3. Address by Hon. Elizabeth A. Garry – Presiding Justice, Appellate Division, Third Department. Presiding Justice Garry updated the House on matters of interest within the Third Department, including technology upgrades, the scheduling of in person, hybrid, and remote proceedings, and staffing at the various courts within the Department. The Chair received the report with thanks.

4. Report of President. Ms. Levin Wallach highlighted items contained in her written report, a copy of which is appended to these minutes.

5. Presentation of the 2023 Ruth Bader Ginsburg Memorial Scholarship Award to Shelley Wu. Ms. Levin Wallach presented the annual Ruth Bader Ginsburg Memorial Scholarship Award to Shelley Wu, a third-year law student at Benjamin N. Cardozo School of Law, in recognition of her academic achievements and work on behalf of women and children's rights.

6. Election of Nominating Committee and State Bar Delegates to ABA House of Delegates. Henry M. Greenberg, chair of the Nominating Committee, presented the report of the Nominating Committee.

   a. Election of members of the Nominating Committee. The following were nominated for service on the 2023-2024 Nominating Committee:

      District members and alternates of the Nominating Committee: First –Jai Chandrasekhar, Vincent Ted Chang, Lisa M. Stenson Desamours, Margaret J. Finerty, Stephen Charles Lessard, Seth Rosner, Jay G. Safer, Diana S. Sen, Richard P. Swanson, First Alternate Mira C. Weiss, Second Alternate Mark Griffin, Third Alternate David Cohn; Second – Hon. Cheryl Chambers, Aimee Richter, and Alternate Hon. Joanne D. Quiñones; Third – Elena DeFio Kean, Matthew J. Kelly, Alternate Matthew Griesemer; Fourth – Peter V. Coffey, Martin Gilmartin, Alternate M. Elizabeth Coreno; Fifth – Donald C. Doerr, Jean Marie Westlake, Alternate John McCann; Sixth –Kathryn Grant Madigan, Bruce McKeegan, Alternate Alyssa Barreiro; Seventh – Eileen E. Buholtz, Amy Schwartz Wallace, Alternate Kevin F. Ryan; Eighth – Norman P. Effman, Sharon Stern Gerstman, Alternate Vincent E. Doyle, III; Ninth – Clare J. Degnan, John A. Pappalardo, Hon. Jonah I. Triebwasser, Alternate Hon. Adam Seiden; Tenth – Justin M. Block, Dorian Ronald Glover, Lynn D. Poster-Zimmerman, Sanford Strenger, First Alternate Ilene S. Cooper, Second Alternate Steven Leventhal; Eleventh – Richard M. Gutierrez, Zenith Taylor, Alternate Arthur Terranova; Twelfth – Hugh Campbell, Suzanne McElwreath, Alternate Steven E. Millon; Thirteenth – Jonathan B. Behrins, Sheila T. McGinn, Alternate Claire Cody Miller.

      A motion to elect the foregoing was adopted.

   b. Election of Delegates to ABA House. A motion was adopted to elect the following members for a two-year term in the ABA House of Delegates, commencing in August 2023: Claire P. Gutekunst, Scott M. Karson, Sharon Levin Wallach, Michael Miller, and Domenick Napoletano.

7. Report of Task Force on Mental Health and Trauma Informed Representation. Joseph A. Glazer, co-chair of the Task Force on Mental Health and Trauma Informed Representation, reported on the ongoing work of the Task Force in anticipation of submission of a final report for consideration at the June 2023 meeting of the House of Delegates. The report was received with thanks.

8. Report of Task Force on Modernization of Criminal Practice. Catherine Christian and Andy Kossover, co-chairs of the Task Force on Modernization of Criminal Practice, reported on

the ongoing work of the Task Force and an update on the status of the Task Force's forthcoming report and recommendations. The report was received with thanks.

9. Reports and recommendations of Task Force on Notarization. Ellen G. Makofsky, co-chair of the Task Force on Notarization, together with Task Force members Jaime D. Lewis and Michael A. Markowitz, presented on the Task Force's reports on Notary Record Keeping Regulations and Remote Online Notarization ("RON") Credentialing. After discussion, a motion was adopted to approve the following resolution:

> WHEREAS, Executive Law 130 and 135-c, and regulations from Secretary of State 19 NYCRR 182 have been recently promulgated regarding electronic and non-electronic notarizations;
>
> WHEREAS, these new laws and regulations have a significant impact on notaries and attorneys;
>
> WHEREAS, there is no statutory basis for the record keeping and retention requirement for non-electronic notarizations;
>
> WHEREAS, the new laws and regulations are unduly broad and burdensome on notaries and attorneys;
>
> WHEREAS, the new law requires that a licensed electronic notary select a Credential service provider who meets certain technical requirements;
>
> WHEREAS, in many circumstances, the licensed electronic notary lacks sufficient knowledge to determine whether the technical requirements have actually been met; and
>
> WHEREAS, there is no showing that the new laws and regulations will diminish concerns of fraud that the legislation was intended to address;
>
> WHEREAS, the efficiency of attorney notaries will be impacted by the above resulting in increased costs to consumers,
>
> NOW, THEREFORE, IT IS RESOLVED that the Executive Committee approves the Reports and Recommendations of the Task Force on Notarization.
>
> AND IT IS FURTHER RESOLVED that the officers of the New York State Bar Association are hereby authorized to take such other and further action as may be necessary to implement this resolution.

10. Report of Task Force on the Ethics of Local Public Sector Lawyering. Steven Leventhal, co-chair of the Task Force on the Ethics of Local Public Sector Lawyering, presented to the House on the mission, composition, and goals of the Task Force. The report was received with thanks.

11. Report and recommendations of Task Force on Emerging Digital Finance and Currency. Task Force co-chair Jacqueline J. Drohan and Matthew Feinberg, a member of the Task Force, presented the Task Force's report on digital assets in two parts.

First, after discussion, a motion was adopted to approve the "Legislative Regulatory Resolution," which reads as follows:

> **Whereas** The New York State Bar Association formed a Task Force on Emerging Digital Finance and Currency in June 2022 to study the impact of digital assets, digital currency, non-fungible tokens, Web3, and the Metaverse on the legal profession, to educate lawyers on how to represent clients effectively, ethically, and knowledgeably in these areas, and to evaluate and study the regulatory, legislative, and licensing structures governing emerging digital assets, finance and currency.
>
> **Whereas** The Task Force has held education programs on the topics of digital assets, digital currency, non-fungible tokens, Web3 and the Metaverse and its impact in and on the law and legal profession and presented to bar leaders on the effects of these emerging technologies across many practice areas.
>
> **Whereas** NYSBA, in conjunction with the Task Force, has taken notice of the rapid growth and expanded application of digital finance and underlying distributed ledger and other decentralized web technologies, and has undertaken a careful consideration of the manifest need for consumer and environmental protection against certain risks posed by virtual currency markets.
>
> **Whereas** Given the interest, knowledge base and broader informational needs of its membership in the complex legal, regulatory and practice aspects of the industry, and the leading role New York State has played in licensing and enforcement, the Association shall take a position of public advocacy for clear, efficient, and effective state regulation.
>
> **Resolved** The New York State Bar Association supports prioritizing consumer and environmental protection while balancing the growth of well-regulated digital finance and related business within New York State.
>
> **Resolved** The New York State Bar Association recommends regulation, legislation and licensing that is consistent across the country to prevent inequities in the use of currency and assets across the country.
>
> **Resolved** The New York State Bar Association suggests exploration of regulation, legislation and licensing of digital finance and currency, digital assets, and Web 3 across the country and globally.

Second, after discussion, a motion was adopted to approve the "Web3 Resolution," which reads as follows:

> **Whereas** The New York State Bar Association formed a Task Force on Emerging Digital Finance and Currency in June 2022 to study the impact of digital assets, digital currency, non-fungible tokens, Web3, and the Metaverse on the legal profession, to educate lawyers on how to represent clients effectively, ethically, and knowledgeably in these areas, and to evaluate and study the regulatory, legislative, and licensing structures governing emerging digital assets, finance and currency.
>
> **Whereas** The Task Force has held education programs on the topics of digital assets, digital currency, non-fungible tokens, Web3 and the Metaverse and its impact in and on the law and legal profession and presented to bar leaders on the effects of these emerging technologies across many practice areas.
>
> **Resolved**, that the Task Force recommends that the New York State Bar Association explore and engage in the Web3 space by providing information-sharing opportunities, educating its members, and promoting the mission of the Association through use of the Web3 and other emerging digital technologies, including the potential use of blockchain, the Metaverse, NFTs, and digital currency to store and deliver content and provide value and access to the membership.

One member abstained from the vote.

12. Report of The New York Bar Foundation. Carla M. Palumbo, President of The Foundation, updated the House members on Foundation activities, including the awarding of grants, fellowships, and scholarships. The report was received with thanks.

13. Report of Committee on Membership. Clotelle L. Drakeford and Michelle H. Wildgrube, co-chairs of the Committee on Membership, presented on the Association's membership engagement and retention efforts, including membership renewal for the 2023 dues year. The report was received with thanks.

14. Administrative items. Mr. Lewis reported on the following:

    a. Motions to approve the designation of delegates filed by the county and local bar associations for the 2023-2024 Association year and to approve the filed roster of the members of the House for the 2023-2024 Association year were requested and approved.

    b. The Chair advised that Allyn Crawford, Elected Delegate, Thirteenth Judicial District, had resigned from the House of Delegates in March, and that the vice president and remaining elected delegates from the Thirteenth District had nominated Ellen Soren to

fill the vacancy. A motion to elect Ellen Soren to fill the vacancy for the 2023-2024 term was requested and approved by the elected delegates in attendance at the meeting.

c. The Chair noted that this meeting represents his last as Chair of the House and thanked the House for the opportunity to serve. He thanked the departing members of the Executive Committee and the House for their service and thanked the staff for their support. He introduced Domenick Napoletano as the next Chair of the House and presented him with the House's gavel.

15. Date and place of next meeting. Mr. Lewis announced that the next meeting of the House of Delegates would take place on Saturday, June 10, 2023, at The Otesaga in Cooperstown, New York, with an option for remote participation.

16. Adjournment. There being no further business to come before the House of Delegates, the meeting was adjourned.

Respectfully Submitted,

Taa R. Grays
Secretary

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Report of President Sherry Levin Wallach to the House of Delegates of the New York State Bar Association April 1, 2023

Dear Colleagues:

As one of the world's most prominent legal organizations, the New York State Bar Association must wield its significant influence to defend the rule of law, protect those who are vulnerable to oppression, and create a more equitable society. As bar association leaders, we must do everything we can to ensure access to justice, equity, inclusion, and equality within and without the profession.

This has been a year filled with wonderful accomplishments, challenges, new opportunities, and crises which have altered our profession on a grand scale. We have incorporated lessons and technologies learned over the pandemic years into our daily lives, and have faced uncertainty, including economic upheaval, the deepening of political and socio-economic divides, the war in Ukraine, and the rapid development of the metaverse and the digital economy.

In times like these, the rule of law often comes under attack both at home and abroad, and this time is no exception. But the uncertainty we are all feeling also brings opportunity to us as lawyers and bar members – the opportunity to speak out and be a part of the change in the global legal community and at home in our communities. We are uniquely positioned to address these issues because we are New York, a legal community that impacts the nation and the world. As the New York State Bar Association, we have the means, voice, and experience to lead and to engage.

We have influence within our state and we have an impact on a local, national, and international scale. We are a global organization. We have formal partnerships with bar associations throughout the world and have nearly 1,500 international members in eighty-four countries and the U.S. Territories. We are New York, and people at home and globally want to know what we are doing and how and why we are doing it. Our voice matters.

During my presidency, we have signed memoranda of understanding with ten bar groups worldwide, including the Bar Association of Puerto Rico, the Bar Council of England and Wales, the Bar Association of Serbia, the Law Society of Scotland, the Law Society of England and Wales, the Global Accountability Network, Polish Bar Council, the Warsaw Bar Association, the National Bar of Legal Advisers in Warsaw, and the U.S. Virgin Islands Bar Association.

Our Association has not hesitated to tackle issues head on. Shortly after my installation and the issuance of the *Dobbs* decision by the U.S. Supreme Court, I worked closely with our Women in

the Law Section on their landmark report in support of the protection of women's reproductive rights and access to health care as well as support for the Equal Rights Amendment. The Section continues to be a leader in programming and supporting women's rights and women in the law.

Ownership of our wonderful bar center was successfully transferred to NYSBA, and we and have been busy developing plans to begin the much need repairs and upgrades to our building. These repairs and upgrades were more extensive than anticipated due to the age of our building and its systems Work is divided into two phrases – the first phase consisting of the necessary repairs and upgrades and the second phase consisting of the necessary construction to provide a new ADA compliant entrance to our building. We are contemplating forming a historical building 501(3)(c) to allow us to raise money for construction and additional upgrades.

We have changed the trajectory of our membership numbers. We have exhaustively studied how to best develop membership within our Association and will be exploring a new subscription membership model in the coming months. We have also launched our law firm enterprise model providing law firms with the opportunity to enroll all of the members of their firm. Law firm membership includes the All Access Pass for our virtual CLE library. I am happy to say that Whiteman Osterman & Hanna was the leading firm to adopt this model.

Our International Section added a Ukraine chapter, and then launched a task force to assist refugees and displaced lawyers. We called on the United Nations to set up a tribunal to investigate violations of international law there. In fact, we were the first international legal agency to urge the U.N. General Assembly to establish a special tribunal to investigate the crime of aggression against Ukraine, and then, when the American Bar Association adopted our policy as its own in this area, we brought that effort nationally.

That is a mere example of how far our reach extends. I have traveled to Europe and met with bar leaders from around the world several times. I have joined international conversations on the status of the rule of law, access to justice, mental health and attorney well-being, the status of courts across the world and the virtual practice of law. Each time it opens new doors and opportunities for our association and our members, in addition to raising awareness of the opportunities of membership in a collaboration with the New York State Bar Association. I have been honored to address the Barcelona Bar Association's International Commission, the UIA International Association of Lawyers, the NYSBA International Section's meeting in London, the Virgin Islands Bar Association as well as many New York based bar associations.

We have continued our commitment toward Diversity, Equity, and Inclusion with our work on the issues facing the U.S. Territories but also with our work in New York.

We have also partnered with the Virgin Islands, Puerto Rico, and Guam bar associations to fight for equality for the people of the U.S. Territories and to eliminate the racism embedded in our society and laws because of the *Insular Cases*. Our Task Force on the U.S. Territories continues to fight to have these cases overruled. The U.S. Supreme Court and lower courts have relied on the *Insular Cases* to limit the rights to the people of the U.S. territories since the early 1900s, establishing a second-class citizenship status and promoting racism.

In November, our House of Delegates approved a resolution declaring that residents in the U.S. territories should be afforded the same rights as those in the 50 states. We presented this resolution to the American Bar Association where it was adopted as policy as well. We have helped to educate members on the fact that this is a national issue. We continue to do so and show the strength in collaboration by partnering with the New York City Bar Association's Task Force on Puerto Rico to present a program in May 2023 on the issues facing the U.S. Territories and the *Insular Cases*, as well as participating in the planning of an American Bar Association symposium on the same topics later this year.

Earlier this week, I attended ABA lobby days in Washington DC with our President-Elect Richard Lewis, past presidents Mark Alcott and Stephen Younger and Hilary Jochmans and Cheyenne Burke from our Government Relations Department. We held meetings with our representatives in the legislature to promote both the ABA and NYSBA legislative polices. I am happy to report that there is movement again with HR 279 the resolution acknowledging that the United States Supreme Court's decisions in the *Insular Cases* and the territorial incorporation doctrine are contrary to the text and history of the United States Constitution, rest on racial views and stereotypes from the era of Plessy v. Ferguson that have long been rejected as contrary to our Nation's most basic constitutional and democratic principles, and should be rejected as having no place in the United States constitutional law.

We are also addressing the growing mental health crisis within our own profession.

We have launched a Task Force on Mental Health and Trauma Informed Representation that is focusing on the intersection between the growing mental health crisis in the state and its impact on the public as well as criminal and civil justice systems. Individuals living with mental illness and/or trauma are often incarcerated or housed in hospital emergency rooms instead of in settings that have the resources to provide them with the care they need. Making this issue the topic of the Presidential Summit at our 2023 Annual Meeting displayed the importance of these issues and raised awareness about this very serious problem.

We now have a 24/7 hotline for attorneys in need of support, and our Committee on Attorney Well- Being has developed programming to support our members on the importance of self-care. Our leadership on attorney well-being has been recognized nationally and internationally.

We have entered our first ever enterprise membership model with one of our partners at the Virgin Island Bar Association who expressed the desire to access NYSBA Attorney well-being programming as well as our trial advocacy training. The pilot membership opportunity has allowed the Virgin Island Bar Association to pay for its members to join NYSBA, bringing us an additional 1200 members and assisting the Virgin Island with relevant and useful programming.

We have filed a lawsuit against the state seeking a statewide pay rate of $164 an hour for assigned counsel. If successful it will ensure that 18-B attorneys in the 57 counties outside of New York City will be compensated the same as those court-appointed attorneys within the city. This will increase the number of attorneys who are able to take on this work and prevent children and indigent adults from being deprived of their constitutional rights to meaningful and effective representation in the criminal and family courts.

We have fought against additional bail reform in the wake of the proposed bail reform rollbacks that Gov. Hochul has included in her 2023–24 proposed state budget. These changes would likely force more New Yorkers, particularly people of color, to be incarcerated and for longer periods simply because they lack the financial means to afford bail.

We have continued our efforts to have Question 26 removed from the Bar Application process which in its current state requires applicants to divulge all interactions with law enforcement including family court and traffic court matters. While we have been successful in urging the Administrative Board to agree to modify the question to some degree, we still have more work to do because even in its modified state, applicants are still required to report youthful offender adjudications which will continue to foster disparity in the applicants to the Bar and deter many people of color and/or those from marginalized communities.

Our House of Delegates adopted a report from the LGBTQ+ People and the Law Section's report asking for the adoption of a resolution to adopt the Office of Court Administration's LGBTQ+ Bench Card and promoted its use statewide with a resolution. I was then honored to successfully bring our report and bench card to the ABA with a resolution that promoted and supported the use of similar LGBTQ+ bench cards nationwide.

The Association continues to protect the legal profession in many ways and keep its members informed of legal, economic, and policy developments which affect the practice of law.

Our Executive Committee has launched a Working Group on Facial Recognition Technology and Access to Legal Representation that will explore the impact of this technology on access to justice and our members' ability to represent clients without fear of retribution.

In the wake of our state's struggle to confirm our next chief judge, I have formed a Special Committee to Evaluate the Selection Process for the Court of Appeals. It is imperative that our judiciary remains independent, respected, and strong.

After the governor signed into law new requirements for notary publics that have a significant effect on the legal community, we immediately developed CLE programming to educate our members on these changes and formed a special committee to study and comment on the impact of the regulations on the legal profession.

This is vital work.

NYSBA continues to lead within the American Bar Association, where we successfully brought resolutions to the floor of the House at both the 2022 Annual and 2023 Midyear meetings, and lent our support to resolutions brought by other bar associations.

Four NYSBA-sponsored resolutions were adopted at the ABA Annual Meeting in August 2022. These resolutions are Resolution 402, which reaffirms the ABA's commitment to the law that prohibits lawyers from sharing legal fees with non-lawyers and from directly or indirectly transferring ownership or control over entities practicing law to non-lawyers; Resolution 404, which declares that the "territorial incorporation doctrine" established by the U.S. Supreme Court

in the *Insular Cases* in 1901 is contrary to the principles of the U.S. Constitution and civil rights jurisprudence; Resolution 405, which calls upon the United Nations General Assembly to authorize the secretary general to establish international war crime tribunals to determine whether the Russian Federation and its officials violated international law in Ukraine; and Resolution 601, which urges federal, state, local and tribal governments to enact laws to give police reasonable time to complete a background check of a gun buyer.

NYSBA supported two resolutions at the 2023 Midyear Meeting in February – Resolution 501, adopting ten principles to advance the goal of gender equity among employers, institutions, and people who are part of the criminal legal profession, and Resolution 603, which urges federal, state, local, territorial, and tribal governments to enact statutes, rules and regulations that would make it unlawful for any person, other than law enforcement, to possess firearms on property owned, operated, or controlled by any public or private institute of higher education; and in states that do not make it unlawful for any person, other than law enforcement, to possess firearms on property owned, operated, or controlled by any public institute of higher education, authorize such institutions of higher education to restrict or regulate the concealed or open carry of firearms on their campuses.

In addition, our Association is uniquely positioned to have an impact internationally. Our voice is part of the discussion on how virtual practice will impact the profession worldwide.

The Task Force on Emerging Digital Finance and Currency is hard at work educating our legal community in New York, across the nation and the world. It has put the New York State Bar Association at the forefront of discussions regarding regulations and ethical considerations within this quickly evolving frontier, and Web3's impact on the practice of law. NYSBA is exploring opportunities to engage in and use Web3 technology to teach and provide opportunities to our association and its members. Our Sections have also engaged with these emerging technologies and continue to produce excellent programming to educate lawyers on how to handle matters involving digital assets, digital currency, and non-fungible tokens.

Earlier this year, I presented to the University of Florence, Italy, on the work that the NYSBA is undertaking within the digital finance, blockchain, and Web3 space. I serve on the Advisory Board to New York University's Metaverse Collaborative Advisory Board and have formed a close working relationship with NYU's School of Professional Studies ("SPS") I am proud of this bond between NYSBA and NYU, and look forward to late April when the "Deep Dive Into Web3 and The Metaverse" international conference will be presented at NYU in collaboration with the SPS and the NYU School of Law.
While technology redefines long standing legal issues and creates many new ones, as members of the legal community and bar associations we educate, evaluate, and suggest how and when use of technology is appropriate. We also struggle to protect the sanctity of the legal profession and the need for humanism.

As we strive to understand the impact of these new technologies on our system of justice and the practice of law, we must also come to understand 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 a Committee on Technology and the Legal

Profession which has been actively presenting CLE programing on issues including cyber security and the virtual practice of law.

We formed the Task Force on Emerging Digital Finance and Currency and the Task Force on the Post Pandemic Future of the Profession and, as mentioned, most recently the Working Group on Facial Recognition Software. Our sections and committees have developed programing in collaboration with each other and these groups to educate our membership and develop important policies to enable the New York State Bar Association to have a voice in this rapidly evolving world.

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 what it believed its limitations were in legal representation. The response was not only appropriate but proves that humans are necessary, at least so far, to the legal profession.

The Chat GPT identified three areas of legal representation where it could not replace humans. One, AI cannot provide the human touch and empathy that is essential for legal representation. Two, AI cannot provide creative solutions to legal problems. Three, AI is not able to process a large amount of data and parse out relevant portions. This issue may also impact the data's quality. Finally, AI cannot provide ethical judgment. It concluded by acknowledging that AI has limits to what it can provide in legal representation. While it was reported just yesterday that Goldman Sachs estimated generative AI could automate 44% of legal tasks in the U.S, the Chat GPTs own acknowledgment of its limitations seems to suggest that lawyers will remain essential to the practices of law and in client representation, at least for the time being.

New York and NYSBA are recognized global leaders. The benefits of New York law and courts have made it a go-to place for worldwide commercial contracts. Businesses throughout the world look to our state because it offers among the most sophisticated set of rules that cover a wide range of business transactions from collaborations and partnerships to joint ventures.

Through our memoranda of understanding with the Law Society of England and Wales and the Bar Council of England and Wales, I have developed a close working relationship with both organizations. Both organizations will support the "Deep Dive Into Web3 and The Metaverse" program later this month. Further, through collaboration while our International Section was in London, and throughout the year, I have developed an excellent working relationship with the United Kingdom's Ministry of Justice and the British Consulate. I look forward to working together to support cross-border practice of law for our members.

We are thus positioned to forge change, globally, nationally, and here in New York.

We must continue to move forward to help those facing the atrocities of war and oppression, to address quickly evolving technology, and to reinforce our position as a voice and ally to the international legal and business communities.

Our stake in safeguarding access to justice for everyone can never diminish. We live in a moment that is rife with issues that can appear to be overwhelming. Conversely, these issues present us with the opportunity to have an indelible impact on our profession and the rule of law itself.

NYSBA has remained strong despite the challenges that this year has presented. We anxiously await the completion of the selection of our new Chief Judge and the restoration of our Court of Appeals to a full bench. While these have been challenging times, we must remember that adversity makes us stronger. We must continue to unite as a profession and remember the oath we took when we became lawyers and judges. Remember that the mission of our Association ends with the goal to Do the Public Good.

Our Association is at its best when it uses its collective voice to lead, influence, and inspire. We learn from each other by exposing ourselves to new approaches toward resolutions. We possess a robust voice that is heard because of our influence, prestige, geographic position, and worldwide memberships and partnerships.

Throughout my presidency, NYSBA has confronted numerous issues that have demanded the attention of the bench and bar of the Empire State. As leaders and as members of the greatest bar association in the nation, we should be proud of our work and what we have accomplished. However, there is always more that can be done. We must and we will continue to forge a path forward and express our voice to impact change on issues affecting the profession, the association, and the rule of law.

Sherry Levin Wallach
President

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item # 3

REQUESTED ACTION: None, as the report is informational.

Attached are the Operating Budget, Statement of Financial Position, Statements of Activities, Statements of Activities (continued) and Capital Items Approved and Purchased for the period ending April 30, 2023.

The report will be presented by Association treasurer Susan L. Harper.

NEW YORK STATE BAR ASSOCIATION
2023 OPERATING BUDGET
FOUR MONTHS OF CALENDAR YEAR 2023

REVENUE

	2023 BUDGET	UNAUDITED RECEIVED 4/30/2023	% RECEIVED 4/30/2023	2022 BUDGET	UNAUDITED RECEIVED 4/30/2022	% RECEIVED 4/30/2022
MEMBERSHIP DUES	9,000,000	8,217,807	91.31%	9,372,690	8,533,354	91.04%
SECTIONS:						
Dues	1,181,350	1,022,355	86.54%	1,219,400	1,051,425	86.22%
Programs	2,587,528	914,214	35.33%	2,841,555	200,254	7.05%
INVESTMENT INCOME	494,215	74,952	15.17%	486,225	55,689	11.45%
ADVERTISING	319,500	72,329	22.64%	218,000	108,467	49.76%
CONTINUING LEGAL EDUCATION	2,390,000	1,164,349	48.72%	2,950,000	664,636	22.53%
USI AFFINITY PAYMENT	2,000,000	666,667	33.33%	1,912,000	666,667	34.87%
ANNUAL MEETING	895,000	865,602	96.72%	400,000	444,011	111.00%
HOUSE OF DELEGATES & COMMITTI	36,700	17,656	48.11%	47,500	14,980	31.54%
PUBLICATIONS, ROYALTIES AND OT	308,000	87,790	28.50%	213,500	90,767	42.51%
REFERENCE MATERIALS	1,309,350	96,181	7.35%	1,247,000	150,749	12.09%
TOTAL REVENUE	**20,521,643**	**13,199,902**	**64.32%**	**20,907,870**	**11,980,999**	**57.30%**

EXPENSE

	2023 BUDGET	UNAUDITED EXPENDED 4/30/2023	% EXPENDED 4/30/2023	2022 BUDGET	UNAUDITED EXPENDED 4/30/2022	% EXPENDED 4/30/2022
SALARIES & FRINGE	8,759,290	2,844,337	32.47%	8,588,946	2,828,775	32.94%
BAR CENTER:						
Rent						
Building Services	325,500	99,575	30.59%	342,000	112,496	32.89%
Insurance	206,000	69,739	33.85%	190,000	72,759	38.29%
Taxes	93,750	27,143	28.95%	167,250	100,967	60.37%
Plant and Equipment	791,000	268,260	33.91%	862,000	279,106	32.38%
Administration	546,900	249,330	45.59%	610,750	304,204	49.81%
SECTIONS	3,739,828	1,542,738	41.25%	4,039,155	377,690	9.35%
PUBLICATIONS:						
Reference Materials	131,500	47,268	35.95%	121,500	29,810	24.53%
Journal	250,300	95,248	38.05%	265,000	83,693	31.58%
Law Digest	52,350	18,118	34.61%	47,000	21,589	45.93%
State Bar News	122,300	61,970	50.67%	100,300	53,437	53.28%
MEETINGS:						
Annual Meeting	383,100	530,485	138.47%	360,100	37,425	10.39%
House of Delegates, Officers and Executive Committee	487,175	200,931	41.24%	561,550	327,803	58.37%
COMMITTEES:						
Continuing Legal Education	378,150	201,256	53.22%	370,400	6,599	1.78%
LPM / Electronic Communication Com	8,100	718	8.86%	35,150	-	0.00%
Marketing / Membership	1,092,700	259,668	23.76%	909,450	269,460	29.63%
Media Services	285,750	90,296	31.60%	290,000	102,361	35.30%
All Other Committees and Department	2,818,870	960,649	34.08%	2,925,875	1,034,928	35.37%
TOTAL EXPENSE	**20,472,563**	**7,567,729**	**36.97%**	**20,786,426**	**6,043,102**	**29.07%**
BUDGETED SURPLUS	**49,080**	**5,632,173**		**121,444**	**5,937,897**	

NEW YORK STATE BAR ASSOCIATION
STATEMENTS OF FINANCIAL POSITION
AS OF APRIL 30, 2023

ASSETS	UNAUDITED 4/30/2023	UNAUDITED 4/30/2022	UNAUDITED 12/31/2022
Current Assets:			
General Cash and Cash Equivalents	20,720,012	18,949,612	20,224,069
Accounts Receivable	25,028	60,982	81,146
Prepaid expenses	957,982	1,108,807	1,754,912
Royalties and Admin. Fees receivable	166,667	666,667	768,684
Total Current Assets	21,869,689	20,786,068	22,828,811
Board Designated Accounts:			
Cromwell Fund:			
Cash and Investments at Market Value	2,892,267	2,965,288	2,778,996
Accrued interest receivable	0	0	0
	2,892,267	2,965,288	2,778,996
Replacement Reserve Account:			
Equipment replacement reserve	1,118,086	1,117,974	1,118,049
Repairs replacement reserve	794,735	794,655	794,709
Furniture replacement reserve	220,052	220,030	220,044
	2,132,873	2,132,659	2,132,802
Long-Term Reserve Account:			
Cash and Investments at Market Value	30,383,101	30,312,662	28,907,317
Accrued interest receivable	0	0	163,465
	30,383,101	30,312,662	29,070,782
Sections Accounts:			
Section Cash and Investments at Market Value	3,932,694	3,869,201	3,846,571
Cash	393,831	873,989	203,122
	4,326,525	4,743,190	4,049,693
Fixed Assets:			
Building - 1 Elk	3,566,750	0	3,566,750
Land	283,250	0	283,250
Furniture and fixtures	1,483,275	1,465,027	1,480,650
Building Improvements	905,924	0	898,570
Leasehold Improvements	0	1,470,688	0
Equipment	3,102,281	3,182,187	3,006,400
	9,341,480	6,117,902	9,235,620
Less accumulated depreciation	4,204,267	4,166,199	3,976,267
Net fixed assets	5,137,213	1,951,703	5,259,353
Operating Lease Right-Of-Use Asset	103,146	0	129,472
Finance Lease Right-Of-Use Asset	15,131	0	21,208
	118,277	0	150,680
Total Assets	66,859,945	62,891,570	66,271,117
LIABILITIES AND FUND BALANCES			
Current liabilities:			
Accounts Payable & other accrued expenses	737,500	708,861	771,399
Post Retirement Health Insurance Liability	18,241	0	18,241
Deferred dues	0	0	6,167,778
Deferred grant revenue	16,769	29,836	17,149
Other deferred revenue	339,962	309,006	1,077,025
Payable To TNYBF - Service Agreement	3,500,100	0	3,597,110
Payable To The New York Bar Foundation	400	0	12,250
Operating Lease Obligation	95,820	0	101,506
Finance Lease Obligation	9,708	0	14,221
Total current liabilities & Deferred Revenue	4,718,500	1,047,703	11,776,679
Long Term Liabilities:			
LT Operating Lease Obligation	7,326	0	27,966
LT Finance Lease Obligation	5,539	0	7,102
Accrued Other Postretirement Benefit Costs	6,334,759	8,276,910	6,214,759
Accrued Defined Contribution Plan Costs	115,759	247,484	303,263
Total Liabilities & Deferred Revenue	11,181,883	9,572,097	18,329,769
Board designated for:			
Cromwell Account	2,892,267	2,965,288	2,778,996
Replacement Reserve Account	2,132,873	2,132,659	2,132,802
Long-Term Reserve Account	23,932,583	21,788,268	22,389,295
Section Accounts	4,326,525	4,743,190	4,049,693
Invested in Fixed Assets (Less capital lease)	5,137,213	1,951,703	5,259,353
Undesignated	17,256,601	19,738,365	11,331,209
Total Net Assets	55,678,062	53,319,473	47,941,348
Total Liabilities and Net Assets	66,859,945	62,891,570	66,271,117

New York State Bar Association
Statement of Activities
For the Four Months Ending April 30, 2023

	April 2023	***April 2022***	***December 2022***
REVENUES AND OTHER SUPPORT			
Membership dues	8,217,807	8,533,354	9,060,075
Section revenues			
Dues	1,022,355	1,051,425	1,112,055
Programs	914,214	200,254	1,264,530
Continuing legal education program	1,164,349	664,636	2,266,156
Administrative fee and royalty revenue	751,407	770,183	2,310,597
Annual meeting	865,602	444,011	446,281
Investment income	247,078	179,364	1,393,587
Reference Books, Formbooks and Disk Products	96,181	150,749	1,182,198
Other revenue	243,539	279,182	575,190
Total revenue and other support	13,522,532	12,273,158	19,610,669
PROGRAM EXPENSES			
Continuing legal education program	701,657	248,489	1,210,191
Graphics	243,499	446,972	1,001,577
Government relations program	90,586	105,965	294,697
Lawyer assistance program	103,484	41,931	85,632
Media / public relations services	207,237	214,290	624,280
Business Operations	838,646	778,639	2,499,203
Marketing and Membership services	603,531	530,956	1,834,420
Pro bono program	37,296	27,584	95,313
House of delegates	169,651	278,932	536,024
Executive committee	31,280	48,871	70,688
Other committees	98,794	74,307	252,271
Sections	1,542,738	377,690	2,173,463
Section newsletters	77,524	82,674	254,776
Reference Books, Formbooks and Disk Products	208,543	181,093	609,087
Publications	175,336	158,719	384,028
Annual meeting expenses	530,485	37,425	37,545
Total program expenses	5,660,287	3,634,537	11,963,195
MANAGEMENT AND GENERAL EXPENSES			
Salaries and fringe benefits	860,058	1,141,731	3,019,225
Pension plans and other employee benefit plan costs	228,294	360,276	(1,629,086)
Rent and equipment costs	258,519	325,807	837,398
Consultant and other fees	287,371	310,599	749,755
Depreciation and amortization	228,000	248,400	595,798
Operating Lease	33,022	-	102,913
Other expenses	12,178	28,116	125,098
Total management and general expenses	1,907,442	2,414,929	3,801,101
CHANGES IN NET ASSETS BEFORE INVESTMENT TRANSACTIONS AND OTHER ITEMS	**5,954,803**	**6,223,692**	**3,846,373**
Realized and unrealized gain (loss) on investments	1,781,914	(5,947,434)	(8,652,105)
Realized gain (loss) on sale of equipment	-	(53,319)	(349,385)
CHANGES IN NET ASSETS	**7,736,717**	**222,939**	**(5,155,117)**
Net assets, beginning of year	47,941,346	53,096,463	53,096,463
Net assets, end of year	55,678,063	53,319,402	47,941,346

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #4

REQUESTED ACTION: None, as the report is informational.

Richard C. Lewis will be formally inaugurated as the 126th President of the New York State Bar Association. The oath of office will be administered by Hon. Elizabeth A. Garry, Presiding Justice, State of New York Supreme Court, Appellate Division, Third Judicial Department.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #5

REQUESTED ACTION: None, as the report is informational.

Association president Richard C. Lewis will report to the House of Delegates concerning his presidential initiatives, the goals for his presidency, and other developments pertaining to the governance of the Association.

A copy of the report is attached here.

RICHARD C. LEWIS
President
New York State Bar Association
One Elk Street
Albany, New York 12207
rlewis@hhk.com
607.231.6891

Report of President Richard C. Lewis to the
House of Delegates of the New York State Bar Association
June 10, 2023

Dear Colleagues:

It is so wonderful to be in this beautiful village on Lake Otsego in Cooperstown, about eighty miles north of Binghamton where I was born and raised and have spent most of my life. This rural setting resonates with me.

Standing here before you as your one-hundred and twenty-sixth president is the highest honor of my professional career. It is the culmination of all my work for the New York State Bar Association and for my local bar association. My presidency of the Broome County Bar Association. My time chairing the Uniform Rules Committee of the New York State Bar Association. My stint leading the NYSBA Task Force on Notarization. All these positions have prepared me for today.

Presiding Justice Garry, it was a distinct honor to have you swear me in and I look forward to working closely with you over the next year.

I ask all of you to take a moment to acknowledge my predecessor, Sherry Levin Wallach, for her outstanding leadership, guidance, and many accomplishments during the past 12 months. I also want to acknowledge all of the past presidents who have advised and encouraged me.

Looking ahead to the next year and beyond, I want to introduce the Association's incoming leadership team. President-Elect Domenick Napoletano, Secretary Taa Grays, Treasurer Susan Harper and, of course, Sherry Levin Wallach, who has now become our Immediate Past President.

I view the next 12 months as an opportunity for the Association to tackle issues that are important to us individually as attorneys, and for the profession as a whole. Most of them do not have easy solutions, which is why we need to tackle them head on.

I don't have all the answers, which is why I need all of you. I promise that my door – at least virtually – will always be open. I want to hear from you -- whether you are practicing in Manhattan or Malone. The strength and success of our Association rests on your participation. Your time, expertise, and input are invaluable.

The overarching theme of my presidency will be Standing up for the Practice of Law.

The primary objective is to provide our members with the resources and support they require to perform their jobs in the most productive manner possible. Here again, I need your input. We want to hear about impediments and redundancies and inefficiencies and anything else that stands in the way of your ability to serve your clients and maximize their effective representation.

The future of our profession and our ability to confront issues are dependent upon the willingness and ability of attorneys to step forward when we believe our vocation – or the rule of law – is under attack. We also need to listen to each other and respect differences of opinion. We may not always agree, but we can increase our influence through a constructive and civil dialogue.

We face enormous issues as a profession and as a society – from hate crimes to homelessness and everything in between. Our ability to move forward in addressing these challenges is largely dependent on our ability to listen to one another, even if we disagree – perhaps especially if we disagree.

To begin that discourse, I am launching three task forces: Homelessness and the Law, Medical Aid in Dying, and Anti-Semitic and Anti-Asian Hate. The task force on Anti-Semitic and Anti-Asian Hate is responding to a significant increase in hate crimes targeting Asians and Jews in New York and the nation.

As far as homelessness goes, we all see it every day, whether on the news or walking through our hometowns. I know most of us in this room have at one time or another averted our eyes, but we need to do the opposite – we need to see the problem more clearly. By working to ease homelessness, we will be addressing other problems that are related to it such as domestic violence, alcoholism, mental illness, drug addiction, and the difficulties our veterans face.

One of the biggest assets we have at the New York State Bar Association is our diversity. Our diverse thoughts, our diverse backgrounds, our diverse political views. That's what makes us effective. And that's why we have the ability to represent everyone – from the solo practitioner to Big Law.

We have access, too, to bring issues before decision makers at the state and federal level – whether it be the executive, legislative or judicial branches. We are the most powerful attorney lobbying group in the state and as you know, the largest voluntary state bar association in the country.

To be clear, while it's important to acknowledge that we can always do better, we also do a lot of things right.

For example, we make it easier for attorneys to practice law by offering almost 500 new CLE's per year and providing our members 24/7 access to over 1,500 courses on-demand. We have fought the new notarization requirements, helped indigent people gain access to justice and succeeded in having the court system modify illogical rules.

One of the things I quickly learned during my law school days in Chicago and in my early days as a general practitioner is that being a lawyer is hard work, and there is no reason to make it any harder. It's like playing hockey. Skating around in circles might look like progress, but it makes no sense when the goal is right in front of you.

The same goes for practicing law, we need to stop skating in proverbial circles. We can start by improving our professional efficiency. Only about thirty-three percent of our time is spent on billable hours, according to the 2022 Clio Legal Trends Report, which, believe it or not, is actually an improvement from the previous year, but clearly still not optimal.

We need a more efficient court system that operates in a way that is best for the bar, the bench, and all litigants. We can't do that without better broadband access, easier to use e-filing systems and training for court employees on the secure use of mobile devices, protected case management and data management platforms, and, most of all, frank and frequent communication.

To that end, I have established a Committee on Law Practice and Law Rules to address inefficiencies and procedural impediments that impact lawyers. The committee's mission will be to identify and evaluate barriers, to monitor proposed amendments to court rules, and ultimately make recommendations to our Executive Committee.

Even in the most efficient system, there cannot be access to justice if individuals lack representation. In the rural areas of this state, there are simply not enough attorneys to meet a growing need for their services.

This is a mounting crisis that must be addressed at both the state and federal levels. As a proud upstater who returned home to the Southern Tier to practice after receiving my law degree in a big city outside the state, this is personal for me. As members of the New York State Bar Association, we have an obligation to help rectify this shortage by encouraging our political leaders to incentivize young lawyers to practice in less populated areas and underserved areas.

Civic education is critical to the long-term success of our organization, our state, and our nation. We need to educate our children and the public about the power and importance of "small-d" democracy. We as a bar association and in collaboration with other bar associations should highlight the importance of informing the next generation of voters that the best way to maintain the rule of law is to better understand it. Our democracy depends on it.

We can and we will make a more sustainable profession for the next generation. Educating our children about the legal system can incentivize social change and remove the cynicism that has caused many of them to lose faith in the very institutions designed to protect them. However, we cannot expect them to actively participate and make their voices heard if they do not understand how the systems work.

We have a duty to mentor the next generation and help them reach their incredible potential. That is why we are planning on holding a Civics Symposium next May.

The work I have done with the Association is what has inspired me and continues to motivate me to do even more.

Rest assured; I understand the breadth of my agenda. My aim this year is to bring forth our concerns to the governor, the Legislature, and the Office of Court Administration so we can remove

barriers interfering with the practice of law, protect vulnerable New Yorkers, and improve access to justice across the state.

I would like to leave you with this thought. I would not be here today if not for the dedication and leadership of the one-hundred and twenty-five presidents of this organization who have come before me. They are all role models who have set high standards. I am humbled to be included in this group of venerable leaders and am honored that you have entrusted me to be in their company. I assure you I will strive every day to live up to the lofty standards they have set for this organization and for the rule of law.

Thank you.

Richard C. Lewis
President

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #6

REQUESTED ACTION: Approval of the report and recommendations of the Task Force on Modernization of Criminal Practice.

The Task Force on Modernization of Criminal Practice was established by President Sherry Levin Wallach in June 2022 and charged to "seek to modernize criminal law practice in the State of New York in order to improve safety, fairness, access to justice, and efficiency in the administration of criminal justice."[1]

Three subcommittees were formed – Justice Courts, Sentencing Reform, and Technology – each charged to review existing NYSBA policy on criminal justice matters and to develop recommendations within their respective mandates that would improve safety, fairness, access to justice, and efficiency in the administration of criminal justice.

The Justice Courts Subcommittee recommendations focus on court consolidation, district courts, and the requirement that town and village justices be attorneys at law.

The Sentencing Reform Subcommittee recommendations focus on presentence interviews, "second look" resentencing, mandatory minimum sentencing requirements, and the creation of a commission on sentencing.

The Technology Subcommittee recommendations focus on discovery, electronic filing, and access to virtual appearances.

In addition to recommendations regarding sentencing, justice courts, and technology, the Task Force recommends three modifications to the Vehicle and Traffic Law (VTL).

The report was submitted to the Reports Group in May 2023. An informational session was held on Wednesday, May 10th, for members of the Reports Group to preview the report and its recommendations. Comments were submitted by members Peter Barlet and Hon. James Bacon and Hon Jonah Triebwasser in their individual capacities.

Task Force co-chairs Catherine A. Christian and Andy Kossover will present the report to the Executive Committee and the House of Delegates.

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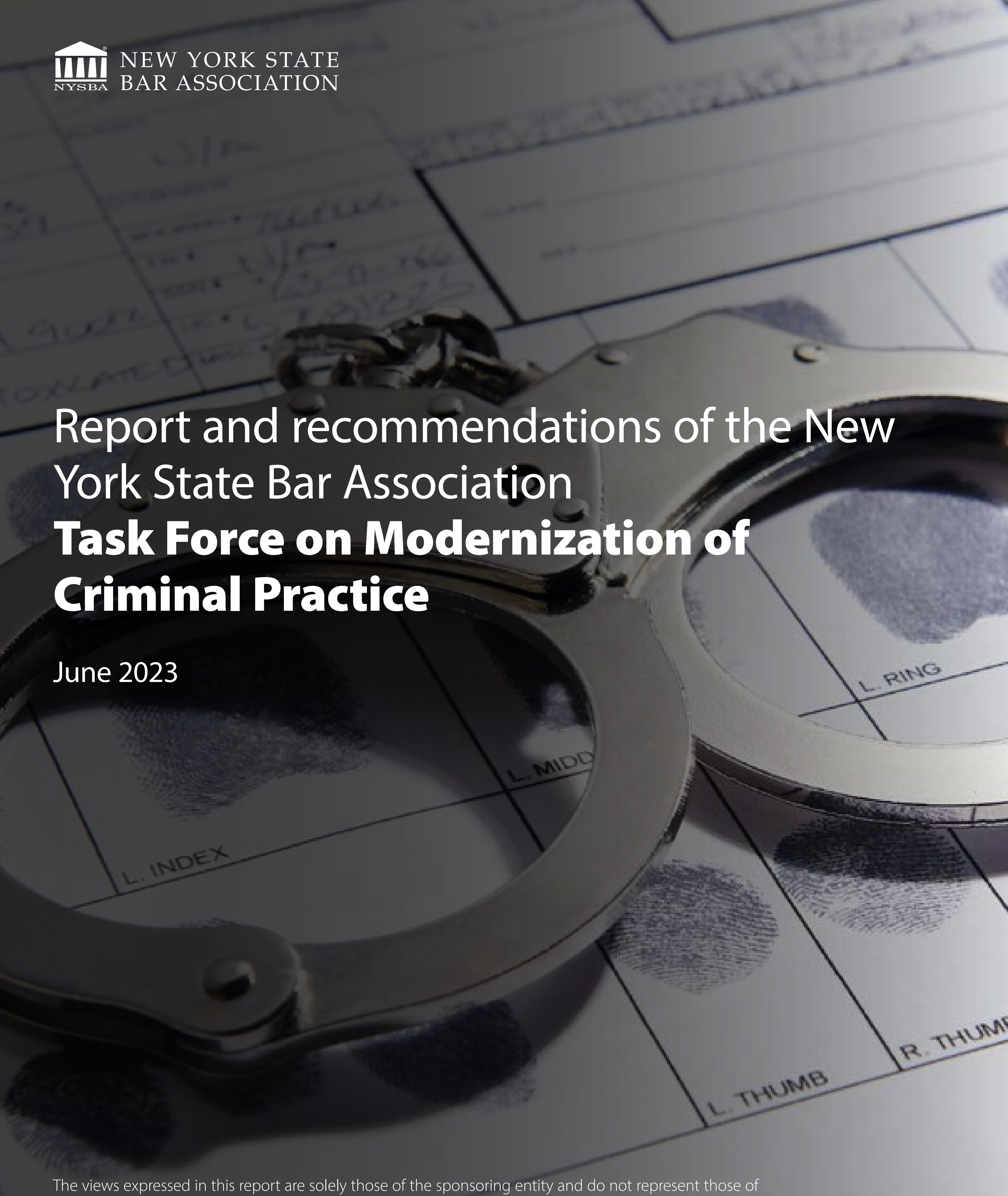
[1] *See* https://nysba.org/committees/task-force-on-the-modernization-of-criminal-practice/.



NYSBA NEW YORK STATE BAR ASSOCIATION

Report and recommendations of the New York State Bar Association **Task Force on Modernization of Criminal Practice**

June 2023

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

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While every member of the task force contributed to the final report a special thanks goes to the Task Force subcommittee co-chairs Kathleen Cassidy, Sandra Doorley, Ronald Hedges, Hon. Barry Kamins, Yung-Mi Lee and Greg Lubow for their expertise and outstanding work in bringing the report to completion. We thank Steven Epstein for his contributions to the recommendations related to the Vehicle and Traffic Law. We also thank the Westchester District Attorney's Office for their assistance in drafting a portion of the Justice Courts section of the final report.

The New York State Bar Association staff have been invaluable in their support of the work of the Task Force and the production of this report. We would like to recognize Thomas Richards, Deputy General Counsel, our liaison, who has supported us in all our efforts as we brought our report to completion.

Catherine A. Christian and Andrew Kossover, Co-Chairs
Task Force on the Modernization of Criminal Practice

INTRODUCTION

The New York State Bar Association's Task Force on the Modernization of Criminal Practice ("Task Force") was appointed in the Summer of 2022 by then-President Sherry Levin Wallach to suggest new laws and policies to improve safety, fairness, access to justice and efficiency in the administration of criminal justice. "The criminal justice system has benefited from several reforms in recent years, including more humane bail and parole laws and the Raise the Age Law, but there are opportunities for a more holistic review of criminal practice and the criminal justice system through the post-COVID lens," said President Levin Wallach.[3] A broad range of representatives from the criminal justice system were appointed as members of the Task Force to provide a balance of perspectives on these issues. They include attorneys who practice in rural and other upstate areas of New York State as well as New York City and the greater metropolitan area. Members include criminal defense counsel who are solo practitioners, who practice in large, medium and small firms, current and former prosecutors, current and former public defenders and current and former members of the judiciary. Several members of the task force are active in the NYSBA Criminal Justice Section, Committee on Mandated Representation, and Committee on Technology & the Legal Profession.

In order to achieve its goals, the Task Force created three subcommittees:

- The Subcommittee on Justice Courts
  co-chaired by Greg D. Lubow, Esq. and Monroe County District Attorney Sandra J. Doorley
- The Subcommittee on Sentencing Reform
  co-chaired by Hon. Barry Kamins and Kathleen E. Cassidy, Esq.
- The Subcommittee on Technology
  co-chaired by Yung-Mi Lee, Esq. and Ronald Hedges, Esq.

The Task Force's Mission Statement is as follows:

> The Task Force on the Modernization of Criminal Practice shall seek to modernize criminal law practice in the State of New York to improve safety, fairness, access to justice and efficiency in the administration of criminal justice.

We hope that this Report educates the public and provides a resource to legislators and policymakers as they seek to improve safety, fairness, access to justice and efficiency in the administration of criminal justice.

3 Susan DeSantis, *New York State Bar Association Announces Task Force on Modernization of Criminal Practice*, New York State Bar Association, Aug. 25, 2022, https://nysba.org/new-york-state-bar-association-announces-task-force-on-modernization-of-criminal-practice.

EXECUTIVE SUMMARY

JUSTICE COURTS

The Task Force recommends that the current Justice Court system be replaced by a countywide District Court or significantly consolidated in order to meet the demands of due process in an efficient and effective judicial system. Due process demands that all justices be attorneys.

In order to achieve economy of scale appropriate to caseload and demographics, while taking geographic proximity rather than municipal boundaries into account, many courts must be eliminated either through extensive consolidation or replacement by district or regional courts. Such consolidated/district courts would be in session for more than just two to three hours per week, as caseloads demand. They could have both daytime and nighttime hours to accommodate the needs of the local population. A consolidated court justice or a district court judge could even ride a circuit and conduct many court proceedings in various locations throughout the consolidated court or district court jurisdiction, as local needs require.

With increased caseloads for consolidated courts, full-time clerks with more training will be required, especially as more courts adopt "plea by mail" models for handling traffic tickets, which make up approximately 85% of court caseloads.

Recognizing that converting from the current justice court system to a new consolidated court/district court system will require counties to undertake studies to devise the revised system best suited to the needs of its towns and villages, legislation mandating that such studies be undertaken, and completed and new systems proposed by a certain date. Voluntary programs that already exist have not produced the desired consolidation.

Finally, implementation of consolidated/district courts will have to be phased in over time to allow for current non-lawyer justices to complete their duly elected terms of office.

With these ideals in mind the Task Force recommends the following:

1. All justices must be attorneys duly admitted to practice law in the State of New York for a period of no less than five years. The Legislature shall amend the requirements for town or village justices to require the same.

2. During the time that town and village courts are being studied by the comptroller, and court consolidation or district court plans are being developed, no town or village justice who is not an attorney at law may be elected to the office of town or village justice. To address the possibility that there is no attorney qualified or willing to be elected a town or village justice residing in each town or village, Public Officers Law § 3 as well as appropriate sections of the Justice Court Act and Town and Village laws shall be amended to permit, in said event, every town or village to elect a justice who is an attorney at law who does not reside in the town or village provided the attorney resides within the towns in the proposed consolidated courts or district.

3. Traffic tickets account for approximately 85% of court dockets; the Vehicle and Traffic Law should be amended to provide for plea bargaining not just initial appearances by mail, which is the method by which an increasing number of courts are now proceeding.

4. The office of the State Comptroller shall undertake a study of the justice courts detailing caseloads, revenues and projected cost savings from court consolidation / district courts replacing justice courts in reasonable distances of each other.

5. Utilizing such data each county shall, with input from the District Attorney, the primary public defense provider, the Legal Aid Society that provides civil representation in said county, at least one criminal defense attorney who resides in and regularly practices criminal law in the county, the Sheriff, a representative of the justice court justices in said county and of the justice court clerks in said county within six months of the completion of the Comptroller's report, prepare a plan for the consolidation of the town and village courts to achieve economies of scale, or in the alternative, propose a District Court plan.

   Such plan shall be submitted to the Office of the State Comptroller, the office of Indigent Legal Services, the Chief Administrative Judge for the courts outside the City of New York the Administrative Judge for the Judicial District in which the county is located, and to each town or village board affected by such plan, for their review and comment. Such "stakeholders" shall provide each county with their input within two months of receiving the proposed plan. Thereupon each county shall have up to two months to revise such a plan if it chooses to do so and to conduct public hearings on such plan to be completed within said two months. Within two months after public hearings are completed, each county shall adopt a plan for the consolidation of courts or the creation of district courts.

6. If the county adopts a plan of consolidation, the same shall become effective immediately upon adoption provided that there is a phase-in period of up to six months to allow the services of the court to be consolidated.

7. Once there is a consolidation of courts, where the town or village justice presiding in any town or village is not an attorney at law, said justice shall only preside over cases that arise in the town or village where the justice was elected until the end of their term. If the current justice is an attorney at law, the justice shall have the right to preside over all cases within the consolidated court's jurisdiction, if the justice chooses to do so until the justice's term expires.

   If a district court plan is chosen, the same shall be placed on the next general election ballot and shall become effective no later than three months after such approval. Any justice whose municipality is located within the district shall continue to preside over cases arising in said town or village jointly with the district judge until the expiration of their term. If the electors shall not approve said district court plan, then the county legislature shall adopt a consolidation plan as provided herein.

SENTENCING REFORM

The Task Force proposes that the New York State Legislature enact three pieces of legislation to change current New York law. In addition to this legislation, the Task Force also recommends the creation of a commission to address necessary preconditions to an additional area of reform for the future.

The Task Force's sentencing reform proposals are as follows:

1. Allow defense counsel to be present at presentence Probation Department interviews upon counsel's request by enacting legislation similar to Federal Rule of Criminal Procedure 32(c)(2).

   The Task Force anticipates that this reform will enhance the quality of representation for criminal defendants in New York and will make the rules for representation at presentence interviews consistent throughout the state.

2. Permit judicial decision-makers to review and consider modification of the sentence of a defendant who has served at least 10 continuous years of a sentence of imprisonment, subject to principles of eligibility.

   The Task Force finds that this type of "second look" resentencing is appropriately limited and will save money, incentivize good behavior and participation in rehabilitative programs, and ultimately reduce the unwarranted and negative consequences of mass incarceration.

3. Allow for the elimination of mandatory minimum sentencing requirements upon consent of the prosecution and court.

   The Task Force expects that this type of "safety valve" legislation will provide judges with greater flexibility in sentencing and afford prosecutors greater flexibility in plea negotiations, eliminating wasteful procedures to circumvent the current statutory scheme when all parties agree that a mandatory minimum sentence is not appropriate.

4. Create a commission, appointed by the governor, to engage in an in-depth analysis of New York State's current indeterminate sentences to determine whether they should be transformed into determinate sentences.

   The Task Force is of the belief that it would be irresponsible and contrary to the stated purpose of the Penal Law to recommend expanding determinate sentencing without considering a multitude of collateral issues. The Task Force recommends that a commission consider certain preliminary issues to pave the way for appropriate and successful legislation in this area in the future.

TECHNOLOGY

The Task Force studied the current state of discovery, electronic filing and virtual appearances.

The Task Force's technology reform proposals are as follows:

<u>DISCOVERY</u>

On April 1, 2019, New York State passed a new discovery statute (CPL article 245) which provides for timely production of evidence in criminal cases. Indeed, the law, which was part of sweeping criminal justice reform legislation, sets forth specific timeframes for earlier disclosure of evidence to facilitate the defense's ability to prepare a defense and make informed decisions for plea bargaining. Since its enactment, article 245 has made great strides toward better transparency and fairness in the criminal justice system in New York.

However, the law has created challenges for those responsible for its implementation. The benefits and ideals of discovery reform are often lost due to the inadequacy of technology and guidance

for sharing evidentiary materials with defendants who are incarcerated or acting pro se. To ensure these benefits are realized, there should be a uniform methodology for providing access to electronic discovery ("e-discovery"), including to an incarcerated defendant or unrepresented defendant. Finally, discovery reforms require monitoring and oversight for further study and recommendations. There is currently no governing body to set standards and effectuate best practices at the state level.

1. The Task Force recommends that the state allocate necessary funding for prosecution, law enforcement, and defense functions to properly implement and uphold discovery obligations pursuant to this legislation**.** The recommendation of adequate funding for prosecutors, law enforcement and defense attorneys takes into account the many challenges posed by e-discovery, including the following considerations:

   (a) Need to contract with a company that provides and supports discovery platforms or develops such platforms independently;

   (b) Need to provide devices (e.g., laptops, tablets, etc.) to allow attorneys and defendants the means by which to interact with the discoverable material, including adequate programming to support various file types;

   (c) Need to install or update existing internet access to allow attorneys/defendants to access substantial amounts of electronic information stored via the internet or cloud, with focus placed on rural areas that may have inadequate connectivity (suggestion: break down by county or geographical area and evaluate each region for its needs);

   (d) Need for prosecutors and defenders' offices/panels to hire additional staff, attorneys, paralegals, technicians, etc. to account for the increased workload that was the direct result of discovery reforms and to address widespread attrition and recruitment issues;

   (e) Need to train attorneys and their supportive staff in the use of the discovery platforms and to identify and address technical issues efficiently;

   (f) Need to obtain virus and data protection services to comply with cybersecurity mandates; and

   (g) Need to manage voluminous e-discovery files, including hours of body-worn and car camera videos and electronic surveillance, and provide adequate cloud storage systems to meet document and file retention obligations.

2. The Task Force recommends a uniform platform for discovery delivery that would streamline and simplify the prosecutor's obligations while allowing defense attorneys the ability to access and meaningfully interact with discovery materials and subsequently present and discuss discovery materials with clients. Pro se defendants should have access rights to this platform, with consideration given to having any hard-copy materials mailed to the pro se defendant with the option of viewing electronic discovery by appointment, or – for an incarcerated pro se defendant – the ability to view the materials at the jail.

   Security

   A universal platform of discovery delivery must include safeguards that protect sensitive information such as witness-identifying information, grand jury material, etc. For example,

information subject to a protective order should be flagged or logged and segregated appropriately.

Supportability

A platform should be able to host and maintain a wide variety of file types, including a myriad of audio/visual files, text files, etc. Use of obsolete or unsupported file types should be discouraged.

Storage

A tremendous challenge posed by the digital age and discovery reform obligations is the sheer volume of e-discovery to be disclosed, especially given that technology and digital devices are now ubiquitous in daily life.

A study of maintenance of e-discovery is recommended as soon as practicable. Innovative, cost-effective and collaborative means for addressing this challenge are encouraged.

Structurability/Searchability

A platform that not only meets increasing storage capacity concerns but also allows attorneys and pro se defendants to structure the data by search terms, bookmarks, flags, etc. is needed.

Uniformity

Study into the use of a uniform platform across New York State is recommended to streamline access to discovery and avoid incongruities arising from the use of different platforms and programs in different jurisdictions. Uniformity will make it easier to resolve technical issues, as opposed to having different technicians for different platforms, by having a centralized support team.

3. The Task Force recommends that the state implement uniform measures to provide incarcerated defendants access to e-discovery.

   All defendants have a right to confront the evidence against them and participate in the preparation of their defense. This right should not be contravened if a defendant is in custody. It is necessary for extraordinary measures to be taken to assure these rights and allow access to e-discovery for incarcerated defendants.

   The Task Force recommends the promulgation of rules or enactment of legislation to secure this right and simplify and unify the means by which e-discovery is shared/provided to those in custody. Further study is recommended to review potential modalities which would be acceptable and consistent with jail policies and available internet access.

   Specific consideration should be given as to how incarcerated pro se defendants may access the discovery platform consistent with jail policies on internet access.

   The platform should be compatible with the software used to facilitate confidential attorney-client videoconferences at correctional facilities.

4. The Task Force recommends that the state appoint a permanent commission on discovery.

Currently there is no governing body that exists solely to review and make recommendations and promulgate standards to meet the ideals and intent of discovery reform and practice throughout the state. The federal court system has an oversight agency for this purpose. The permanent commission on discovery should be appointed by the governor and overseen by the chief judge of the State of New York. The composition of this body should be made up of prosecutors, defense attorneys, retired judges, practitioners from civil and criminal bars and technology experts.

E-FILING

1. The state should adopt a universal e-file system.

   While the size and scope of New York's vast court system present challenges, the Task Force believes that New York should aim to move, in the near future, to a single, universal system of electronic filing. Universal electronic filing would fundamentally change for the better how courts, lawyers, judges and staff operate and perform their duties. Electronic filing is more efficient than traditional paper filing: it imposes fewer costs on litigants (who often have scarce resources), and it is environmentally sound.

2. The state should use the federal system as a model.

   A universal e-filing system is an attainable goal. New York needs to look no further than to the federal system for guidance as to how such a system can, and should, operate. PACER, or "Public Access to Court Electronic Records," was implemented in the late 1990s within the federal court system and has proven to not only simplify the filing procedure for attorneys, but also to ease the burden of court staff while providing a layer of public benefit by offering direct access to public records.

3. Statutory changes are needed to implement universal e-filing.

   The legislature should amend the judiciary law and court rules to specifically authorize the creation of a universal e-filing system, with exceptions for those who are unable to participate in e-filing, such as pro se litigants and persons who lack access to the necessary technology. Also, security protocols (and perhaps alternative filing protocols) will be required for confidential or sensitive materials, sealed documents and materials submitted to the court for in-camera review.

4. The state should fund the transition to a universal system.

   The Task Force recognizes that changing from a patchwork system of various e-filing systems to one centralized system would create an initial and ongoing financial burden for the court system and stakeholders. The legislature should allocate funding for the creation and implementation of a universal system in the budget process to help defray costs and reduce financial burdens on litigants and courts. Costs will not only include system creation and implementation, ongoing security and IT support to maintain the system, but also training of court staff, attorneys and other system actors and requisite technology upgrades throughout the system to ensure that universal e-filing works as intended.

VIRTUAL PROCEEDINGS

In March 2020, because of the COVID-19 pandemic, New York State courts rapidly shut down their physical locations and in-person visits, and appearances ceased. Virtual meetings and appearances first through Skype and then through Microsoft Teams began to become the norm.

As a result of this rapid shift to virtual court appearances, and as the pandemic gained a long foothold, several studies on the efficacy and the effects of virtual appearances emerged:

1. Arraignments should remain in person. The arraignment is, oftentimes, the first meeting between an attorney and the accused. An attorney should be able to better see the person as a whole, including signs of medical or emotional distress. These signs are often lost during a video proceeding. Additionally, due to the resource inequities, attorneys oftentimes need to utilize physical papers, notices or signed HIPAA forms.

2. Grand jury appearances should remain in person. Any proceeding that requires credibility determinations should occur in person, except in narrow, already-established cases, e.g., the vulnerability of young children and/or hospitalized witnesses.

3. Preliminary hearings should be conducted in person unless another emergency arises.

4. Remote guilty pleas should remain limited to misdemeanors or violations/infractions that do not entail jail sentences.

5. Limit the number of remote appearances even if they are for status conferences only.

VEHICLE AND TRAFFIC LAW

In addition to recommendations regarding sentencing, justice courts and technology, the Task Force recommends modifications to the Vehicle and Traffic Law (VTL) to correct legal and social inequities:

1. Changes to the requirements to enter the Impaired Driver Program.

2. Changes to ignition interlock mandates when a person has no access to vehicle.

3. Changes to VTL § 1192(1) with respect to cannabis.

JUSTICE COURTS

I. Introduction

When the New York State Bar Association formed the 2022 Task Force on Modernization of Criminal Practice, it stated that its purpose was to: "suggest new laws and policies to improve safety, fairness, access to justice and efficiency in the administration of criminal justice."[4] In order to achieve those goals, one of the three subcommittees created was specifically charged with looking at New York's antiquated system of justice courts, made up of more than 1,200 town and village courts spread throughout New York State. These courts are inefficient, outdated, operate without significant direct state oversight, and are presided over by more than 1,800 justices of which more than 1,200 are non-lawyer lay justices. Many of these courts lack technology beyond the basic digital recording computer and security measures essential to the proper operations of a criminal court.

The importance of an effective local court system cannot be overstated. Justice courts, often referred to as "the courts closest to the people," are often the first contact a person accused of an offense has with the criminal justice system in the State of New York. Justice court is where first-time and low-level offenders often have their cases promptly disposed of. Justice court is where, in appropriate cases, the court can address the issues that bring individuals in contact with the criminal justice system in the first place.

Since the 1950s, several task forces, commissions and committees have looked at the issues regarding the justice courts in an effort to improve the quality of justice in the town and village courts. However, the archaic structure of the justice courts has nonetheless persisted over the years. It is clear that New York's justice courts need to consolidate in order to begin to make substantial in order to improve the "safety, fairness, access to justice and efficiency"[5] that a modern criminal justice system requires.

II. Executive Summary

For more than 70 years, *every* entity that has studied the justice court system has come to the same inescapable conclusion: significant and substantial changes are not just warranted but are necessary to provide justice in accordance with the constitutional demands of due process. In order to achieve this goal in a rational, reasonable, efficient and effective way, major structural changes are necessary. Such changes are long overdue. Proposals ranged from consolidation of regional courts to completely abolishing and replacing the current system with district courts.

There are essentially just two problems with the current justice court system. First, in order to provide constitutional due process, every judge must be an attorney. Although a law degree and years of practice are no guarantee of fairness, competence or even common sense, employing lay justices with nominal training is simply not a constitutionally acceptable substitute. Criminal law is complex and becoming more so daily. Arraignments under the new bail laws, suspension of driver's licenses, orders of protection, pretrial hearings, accepting pleas, sentences, discovery under the new discovery laws, speedy trials, evidence in hearings and trials all require extensive, almost inherent understanding

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4 *Id.*
5 *Id.*

of the applicable law. While there certaintly are some lay justices who have extensive knowledge and understanding of the law, most do not. The minimal amount of training provided by OCA is no substitute for years of law school and practice.

Since at least 2001, the State Bar has adopted the policy that all town and village justices must be attorneys at law, admitted to practice in the State of New York.[6] That Task Force also recommended the consolidation of justice courts. The State Bar considered and adopted additional reports with the same conclusions in 2009[7], 2018[8] and 2020.[9]

The second problem is multifaceted. There are just too many justice courts handling too few cases within close proximity to each other. The justice courts are dictated by municipal boundaries without regard to caseloads, often on a part-time basis, with part-time justices and clerks. The result is great inefficiencies, repetitive services and no regard to economy of scale.

In 2008, a report was issued by the Special Commission on the Future of the New York State Courts, entitled *Justice Most Local: The Future of Town and Village Courts in New York State* (commonly known as the Dunne Commission Report).[10] The Dunne Commission Report identified these deficiencies and recommended that the best way to correct them was to replace the current system with county-based district courts, presided over by lawyer-justices. The Dunne Commission, convinced that any substantial changes were not feasible, offered only watered-down band-aids, many of which were ignored.

On February 1, 2008, the House of Delegates adopted a Resolution accepting the Report and Recommendations of the NYSBA Task Force on Town and Village Justice Courts.[11] That Task Force considered OCA's 2006 Action Plan and was aware of the Dunne Commission's work. The report reaffirmed the Bar Association's commitment to having all town and village justices be lawyers.

Mandatory court consolidation, regardless of what the court is called, based on caseload and geography not constrained by municipal boundaries is necessary in order to achieve economy of scale and efficiency. These courts must be presided over by lawyer-justices in order to provide all litigants with the constitutional due process to which they are entitled. These changes are necessary to bring the New York State justice court system into the 21st century. Legislative amendments to a relatively few statutes are required to mandate these changes. Such changes would have to be phased in over

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6 Report and recommendations of the Special Committee to Promote Public Trust and Confidence in the Legal System.
7 Report and recommendations of the Committee on Court Structure and Judicial Selection, Adopted by the House of Delegates in January 2009, https://nysba.org/app/uploads/2022/03/January-2009-Court-Structure-Report.pdf.
8 Report from the Criminal Justice Section on Town and Village Justice Courts, Approved by the House of Delegates on April 14, 2018, https://nysba.org/app/uploads/2020/02/FINAL-Updated-Report-Recommendations-2018-Edited-post-HOD-6.pdf.
9 Task Force on Rural Justice, Approved by the House of Delegates on April 4, 2020, https://nysba.org/app/uploads/2020/04/Report-Task-Force-on-Rural-Justice-April-2020-.pdf.
10 *Justice Most Local: The Future of Town and Village Courts in New York State*, The Special Commission on the Future of the New York State Courts (2008), http://www.nycourtreform.org/Justice_Most_Local_Part1.pdf.
11 Resolution and report of the Task Force on Town and Village Justice Courts, Approved by the House of Delegates on Feb. 1, 2008, https://nysba.org/app/uploads/2022/03/Feb.-2008-resolution-and-report-of-the-Task-Force-on-Town-and-Village-Justice-Courts.pdf.

time to allow for the end of current justices' terms of office and to allow for counties to determine the form and boundaries of the consolidated courts that best suits towns and villages.

Putting into practice the long-held policies of the State Bar is the challenge presented to today's Task Force. How do we "modernize" criminal practice? The conclusions and recommendations in this report represent the unanimous opinion of every prosecutor and defense attorney on the Task Force. The town justice members of the Task Force are essentially satisfied with the status quo, seeing no need to change a 300-year-old system that, in their experience, continues to work well.

III. Brief History of the New York Justice Courts

Justice courts throughout New York State are a significant part of the justice system and play an exceptionally significant role in adjudicating New York State criminal and civil matters. New York's Unified Court System (UCS) and the Office of Court Administration (OCA) oversee and fund city courts, district courts, and county courts. These courts are "courts of record," with standardized data collection. In addition to the courts overseen by the state, there are approximately 1250 justice courts throughout New York State that are situated within towns and villages.[12] Today, almost all towns and approximately half of the villages have justice courts.[13]

The development of justice courts came long before today's Unified Court System. The judicial structure in New York State was set up in the 1600s and was revised in the mid-1800s as the population grew and the needs of the court system changed with the changing landscape of New York.[14] Small localized courts, with criminal and civil jurisdiction, have existed in New York since colonial times.[15] The 1846 New York State Constitution officially established justices of the peace and local judicial officers for the towns and villages of New York.[16] These individual town and village justices provided for local justice, at a time when travel options were limited to travel by horse or on foot. As New York has continued to evolve, with its population growing exponentially from the early days of establishing the judiciary, those same town and village justice courts have continued largely unchanged in over 300 years.[17]

IV. Past Reviews and Recommendations to Reform the New York Justice Courts

There is a long history in New York State of missed opportunities at substantial reform of its justice courts, which has left New York with a justice court system established centuries ago and not designed to effectively meet the needs of today's justice system. With the establishment of the 2022

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12 Thomas DiNapoli, *Report on the Justice Court Fund*, Office of the State Comptroller, (2010), https://www.osc.state.ny.us/files/local-government/publications/pdf/justicecourtreport2010.pdf.
13 Alissa Pollitz Worden & Kaitlin Moloney, *Before Bail Reform: Pretrial Bail Decisions and Outcomes in New York's Justice Courts Report*, Upstate Reform Project in collaboration with the Data Collaborative for Justice, The John F. Finn Institute for Public Safety, Inc., Nov. 13, 2022, https://finninstitute.com/wp-content/uploads/2022/11/Before-Bail-Reform-New-Yorks-Justice-Courts-Finn-11-14-22-final.pdf.
14 *The Evolution of the Court*, New York State Unified Court System, https://ww2.nycourts.gov/courts/1jd/supctmanh/A_Brief_history_of_the_Court.shtml.
15 Judith S. Kaye & Jonathan Lippman, *Action Plan for the Justice Courts* (Nov. 2006), https://ww2.nycourts.gov/sites/default/files/document/files/2018-06/ActionPlan-JusticeCourts.pdf.
16 N.Y. Const. of 1846, art. VI.
17 Kaye & Lippman, *supra* note 15.

New York State Bar Association Task Force on the Modernization of Criminal Practice, there is a renewed opportunity to transform this antiquated court system into a system that works for today's New York. We are now at an inflection point where the structure and purpose of the justice courts must be reconsidered.

Over the years, the justice courts have been criticized for a range of issues, including the use of lay justices with minimal training, the costly inefficient and duplicative use of resources by having so many courts in close proximity to one another each sitting for only a few hours once a week or as needed with small caseloads, the lack of oversight by the state and numerous other concerns that result from such inefficiencies. As a result, since the 1950s, there have been several attempts to review and reform the New York justice court system.

The Temporary Commission on the Courts (Tweed Commission) was established in the 1950s and considered, but eventually rejected, requiring that all justices be lawyers and the establishment of district courts and magistrate courts in lieu of the justice courts.[18] Instead of these more sweeping early ideas, it recommended adding training requirements for the justice court justices.[19] The 1960s saw continued attempts and rejections to legislatively change the structure of the justice courts. Additional calls for change continued into the 1970s, with the 1973 Dominick Commission recommending an end to village courts and limiting the jurisdiction of town courts.[20] Neither proposal was adopted by the State. The New York State Bar Association took up the issue in 1979 and recommended looking into consolidating some of the justice courts, but that suggestion also fell flat.[21]

In the 1980s and 1990s, efforts at reforms continued with the Senate Select Task Force on Court Reorganization, which recommended both constitutional and legislative proposals to allow court mergers. During her tenure on the bench of the New York Court of Appeals, Chief Judge Judith Kaye submitted court restructuring proposals to the legislature in 1997[22] and again in 2001,[23] but neither was adopted.

Over the past 20 years, there has been a flurry of activity around reforming the justice courts. In 2001, the Special Committee to Promote Public Trust and Confidence in the Legal System of the State Bar issued a report that recommended that all town and village court justices be attorneys. Among its reasons were the following: the court's ability to incarcerate people at arraignment or upon conviction, to set bail and to preside over motion practice and trials. The report noted that these matters, if they had occurred in a city, would come before a city court judge who, by statute, had to not only be an attorney but had to have significant years of practice. The report noted that the 35-hour basic training for town and village justices was significantly less than the training necessary to obtain a license to become a hair removal wax technician. This report also noted that in counties where administrative traffic violation bureaus, instead of courts, were used to handle traffic tickets, all

18 Temporary State Commission on the Courts (Tweed Commission), Subcommittee on Modernization and Simplification of the Court Structure, A Proposed Simplified State-Wide Court System (1955).
19 Temporary State Commission on the Courts (Tweed Commission), Final Report to the Legislature (1958).
20 Temporary State Commission on the State Court System (Dominick Commission), "... And Justice for All" (1973).
21 *Report of Action, Unit Report No. 4: Court Reorganization*, New York State Bar Association (1979).
22 Press Release, New York State Unified Court System, Proposal to Reform New York State Court System Submitted to Legislature (Mar. 19, 1997).
23 Judith Kaye, The State of the Judiciary (2001), https://www.nycourts.gov/ctappS/news/soj2001.pdf.

administrative judges were attorneys. In 2003, the Office of the State Comptroller called for merging justice courts to increase efficiency and cost savings. One study showed that if just 10% of the village courts were to merge into the town courts surrounding them, the savings, in 2003 dollars, would be $1.6 million annually.[24] In 2006, Chief Judge Judith Kaye and Chief Administrative Judge Jonathan Lippman laid out an extensive plan to support New York's justice courts with a $10 million appropriation request to support court operations and administration, auditing and financial control, education and training, and facility security and public protection. These funds were intended to address internal court operations but did not address either court consolidation or the need for lawyer justices.[25] In 2006 the New York City Bar Association formed the Task Force on Town and Village Courts and issued several reports, the final report listing 10 recommendations for the structuring of the justice courts. Among those applicable to criminal cases, the Task Force recommended that all cases involving misdemeanors, and all hearings and trials, be transferred to justice courts presided over by lawyer-justices.[26]

Also in 2006, the New York Times published a series of investigative articles critical of the New York's justice court system.[27]

In 2008, the Special Commission on the Future of the New York State Courts put out a report entitled *Justice Most Local: The Future of Town and Village Courts in New York State*. This report opined that if one were to create a justice court system from scratch it would not look anything like what we have today. The ideal system would be a number of district courts based on caseload and demographics, with only lawyer-justices. However, the Commission determined that creating district courts was not feasible and that it was unrealistic to require all justices to be attorneys.[28] Yet it did set forth recommendations for new requirements, such as raising the age and educational qualifications for justices, expanding the pool of justice candidates, improving training and oversight and modernizing court facilities.[29] It also recommended giving defendants an "opt-out" right from having certain cases heard by a non-attorney justice. Furthermore, the report called for county-based panels to reform and merge courts.[30]

In December 2008, the State Bar's Special Committee on Court Structure and Judicial Selection and its subcommittee on Town and Village Courts issued a report analyzing the Dunne Commission report and recommendations. The report restated the State Bar's position that all justices must be attorneys, although, like the Dunne Commission, it recognized that this requirement may not

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24 *Opportunities for Town, and Village Justice Court Consolidation*, Office of the N.Y. State Comptroller, Division of Local Government Services and Economic Development (2003).
25 Kaye & Lippman, *supra* note 15.
26 *Recommendations Relating to Structure and Organization*, New York City Bar Task Force on Town, and Village Courts (Oct. 2007), https://www.nycbar.org/pdf/report/Town%20_Village_TF.pdf.
27 William Glaberson, *In Tiny Courts of N.Y, Abuses of Law and Power*, N.Y. Times, Sept. 25, 2006, https://www.nytimes.com/2006/09/25/nyregion/25courts.html.
28 *Justice Most Local: The Future of Town and Village Courts in New York State*, The Special Commission on the Future of the New York State Courts (Sept. 2008), http://www.nycourtreform.org/Justice_Most_Local_Part1.pdf.
29 *Id.*
30 *Id.*

be politically feasible "for now." It recommended that county committees be formed to study and recommend court consolidation.

Another report came out in 2008 by the New York State Commission on Local Government Efficiency & Competitiveness, called *21st Century Local Government*, which recommended legislation to incentivize towns and villages to merge or abolish some of their smaller and less active courts.[31] Another 2008 report from the Fund for Modern Courts, entitled *Enhancing the Fair Administration of Justice in New York's Towns and Villages Through Court Consolidation*, found that court consolidation would solve many of the issues facing justice courts.[32]

In 2016, 22 N.Y.C.R.R. §17.2 was promulgated requiring annual training for town and village Justice Court justices and court clerks for the first time.[33] In 2018, the New York State Bar Association issued a report entitled *Town & Village Justice Courts Report: Update Regarding Counsel at First Appearance, Training & Education, and Centralization*.[34] The report laid out a number of recommendations regarding counsel at first appearance and other improvements in training and auditing. In addition, it called for the stripping of town and village courts of criminal jurisdiction and the establishment of misdemeanor courts in each county.[35]

In 2020, the New York State Bar Association Task Force on Rural Justice published a report that included some important statistics, including that roughly 96% of attorneys practice in metropolitan areas, with the remaining 4% presumably serving New York's mostly rural areas.[36] It also reported that nearly 75% of current rural practitioners will be retiring from practice in the next 10 to 30 years, with little to no new attorneys taking their place.[37] The report discussed the extremely far distances that rural practitioners must travel to appear in these scattered courts. It also noted the lack of access to high-speed broadband.[38] Out of this recommendation, the NYSBA House of Delegates adopted a Resolution on Broadband Access urging the state to prioritize funding high speed broadband to all parts of the state.[39]

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31 *21st Century Local Government*, New York State Commission on Local Government Efficiency & Competitiveness (April 2008), https://www.cgr.org/consensuscny/docs/NYS_LGEC_Report.pdf.
32 *Enhancing the Fair Administration of Justice In New York's Towns and Villages Through Court Consolidation*, Town, and Village Justice Courts Task Force Report, Feb. 2008, http://moderncourts.org/wp-content/uploads/2013/10/justice_courts_08.pdf.
33 22 N.Y.C.R.R. § 17.2.
34 *Town & Village Justice Courts Report, Update Regarding Counsel at First Appearance, Training & Education, and Centralization*, New York Bar Association (2018), https://archive.nysba.org/tvcourtsreport.
35 *Id.*
36 *Report and Recommendation of the Task Force on Rural Justice*, New York State Bar Association (April 2020), https://nysba.org/app/uploads/2020/03/Report-and-Recommendations-of-the-Task-Force-on-Rural-Justice-as-of-3.18.2020.pdf.
37 *Id.*
38 *Id*.
39 New York State Bar Association House of Delegates, Resolution on Broadband Access, June 27, 2020, https://nysba.org/app/uploads/2022/06/adopted-resolution-on-broadband-access-June-2020.pdf.

In 2019, and again in 2022, Chief Judge Janet DiFiore recommended changes for the constitutional modernization of courts, but changes to the justice courts were not included in either proposal.[40]

Though there have been incremental changes and minor improvements recently, the most significant recommendations in all of these reports – court consolidation and lawyer-only justices – have not, over the last 70 or so years, been seriously attempted. With such a long history of missed chances to make necessary changes, New York is increasingly seeing the repercussions of an antiquated system and must take this opportunity to consolidate and modernize to meet the needs of today's New York criminal justice system.

V. The Need for Only Attorney Justices

One of the paramount issues concerning justice courts is that more than 1,000 of the nearly 1,800 town and village justices are not attorneys admitted to practice in New York State. While a defendant has the right to be represented by an attorney, in New York a defendant does not have the right to have his or her matter heard by a justice who is an attorney with a law school education. The Task Force is of the opinion that meaningful due process demands that every justice be an attorney. New York is one of just eight remaining states in the country that still permits non-lawyer justices.[41] The gatekeepers of all the constitutional rights of the accused are the justices who are empowered to apply the rule of law and who are given the enormous responsibility of determining someone's liberty. In handling misdemeanor cases, justice court justices are able to sentence guilty defendants to up to one year in jail, or possibly two years in consecutive one-year sentences. These justices are also making bail decisions at arraignments on cases, including felony cases, where the stakes can be extremely high. Having justices on the bench who are trained in and have a deep understanding of the law is paramount in ensuring that the rights of defendants and citizenry are protected.

Since at least 2001, the New York State Bar has adopted the position that all justice court justices should be attorneys.[42] Nonetheless, justice court justices are the only New York State justices who do not have the requirement of being an attorney. According to the Office of Justice Court Support

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40 *Chief Judge Proposes Constitutional Reforms to Simplify Outdated Court Structure, Aiming to Enhance Access, Optimize Resources*, Press Release, New York State Unified Court System, Sept. 25, 2019, https://ww2.nycourts.gov/sites/default/files/document/files/2019-09/PR19_22.pdf; *Chief Judge DiFiore, Senate and Assembly Judiciary Chairs Hoylman and Lavine Announce Introduction of Constitutional Amendment for Court Reform and Simplification*, Press Release, New York State Unified Court System, Mar. 3, 2022, https://www.nycourts.gov/LegacyPDFS/press/pdfs/PR22_03.pdf.

41 Matt Ford, *When Your Judge Isn't a Lawyer*, The Atlantic, Feb. 5, 2017, https://www.theatlantic.com/politics/archive/2017/02/when-your-judge-isnt-a-lawyer/515568/.

42 *The Judiciary Article of the New York State Constitution – Opportunities to Restructure and Modernize the New York Courts*, New York State Bar Association Committee on the New York State Constitution, Dec. 12, 2016, https://nysba.org/NYSBA/Practice%20Resources/Substantive%20Reports/PDF/Report%20on%20Judiciary%20Article.pdf.

at the New York State Office of Court Administration, as of February 28, 2023, there were 1,036 non-attorney town and village justices and 701 attorney town and village justices.[43]

All the "band-aids" discussed in various reports to address this issue are attempts to put a square peg into a round hole by transferring certain cases to courts already with attorney-justices. In the 40 years since Judge Kaye's notable dissent in *People v. Charles F.* (which in a 4-3 decision held that a defendant has no absolute due process right to a trial before a law-trained judge), [44] the practice of criminal law has only become more technical and complicated. The demands placed on town and village justices and their staff has grown exponentially. Requiring every town and village justice to be an attorney, admitted to practice in New York State, with a minimum number of years of experience, perhaps five years as required of city court judges, will resolve denial of due process issues that generally occur more frequently when lay justices preside. The right to counsel can become meaningless when the justice is not sufficiently knowledgeable in the law to comprehend the arguments or possesses the requisite knowledge of jurisprudence to deliver competent written decisions explaining the rationale in support of their determinations. Basic law school training affords the lawyer who is also a justice the ability to understand, almost inherently, the laws and rules applicable to criminal cases.

This concept dates back to the Magna Carta. At Runnymede in 1215, King John pledged to his barons that he would "not make Justiciaries, Constables, Sheriffs or Bailiffs, excepting of such as know the laws of the land…"[45]

In *North v. Russell*, Justice Stewart, in dissent, wrote:

> …the essential presupposition of this basic constitutional right [to counsel] is that the judge conducting the trial will be able to understand what the defendant's lawyer is talking about. For if the judge himself is ignorant of the law, then he, too, will be incapable of determining whether the charge is "good or bad." He, too, will be "unfamiliar with the rules of evidence." And a lawyer for the defendant will be able to do little or nothing to prevent an unjust conviction. In the trial before such a judge, the constitutional right to the assistance of counsel thus becomes a hollow mockery – "a teasing illusion like a munificent bequest in a pauper's will."[46]

In her oft-cited dissent in *People v Charles F.*,[47] Judge Kaye (joined by Chief Judge Cooke and soon to be Chief Judge Wachtler) wrote: "Appellant, facing the possible deprivation of his liberty, had the right to trial before a law-trained judge (see *North v Russell*, 427 U.S. 328, *supra*)." The right to effective assistance of counsel and the right to trial by jury, both so jealously guarded, lose force without a law-trained judge to ensure that motions are disposed of in accordance with the law, that

43 *See also* New York State Commission on Judicial Conduct, Annual Report 2022, https://cjc.ny.gov/Publications/AnnualReports/nyscjc.2022Annualreport.pdf. This report states that, in 2021, there were 1,776 Justice Court justices and roughly 700 of them were lawyers.
44 60 N.Y.2d 474 (1983).
45 Magna Carta, Article 45.
46 427 U.S. 328, 342–43.
47 60 N.Y.2d 474, 480 (1983).

evidentiary objections are properly ruled on, and that the jury is correctly instructed. Lay Judges are an important segment of the judicial system of this State. But "a lay person, regardless of his educational qualifications or experience, is not a constitutionally acceptable substitute for a member of the Bar."[48] Because of the technical knowledge required to ensure that defendants facing imprisonment are afforded a full measure of the rights provided to them, the use of non-law-trained judges is a procedure that "involves such a probability that prejudice will result that it is deemed inherently lacking in due process."[49] No particular trial error need be shown.

Before they take the bench, newly elected non-lawyer justices are required to take a week-long, 35-hour class covering the basic duties of a town or village justice.[50] In addition to procedural and substantive law and evidence, the training includes courses in recordkeeping and accounting practices as well as judicial ethics. In the several months after assuming their judicial duties, newly elected non-lawyer justices must participate in two full day sessions (12 hours). After they have completed their first year on the bench, justices – both attorneys and non-attorneys – must complete 12 hours of continuing legal education (CLE) a year provided by OCA. These classes are required to be offered at least three times a year.[51] The continuing legal education classes qualify as CLE credits for attorneys who are also justices. Compare that training to the three years of law school, 24 hours biannual CLE requirements and the five years of experience that is required to be a city court judge, which should be the same standards applied to town and village court justices since town and village justices have essentially the same jurisdiction.

One of the improvements adopted by OCA is the requirement that all proceedings in justice courts are now supposed to be digitally recorded. The primary motivating reason for this was to provide a more reliable transcribed record for review on appeal instead of having to rely on the recollection of the justice and the parties. There is a second potential use for such recordings: to be able to hear if the training being provided to the justices is being successfully utilized in everyday court proceedings. Recordings of arraignments – the most ubiquitous of all justice court functions – can show if the basic rights of the accused are being protected and if the necessary information is being provided by the court. The recordings of pleas of guilty could be reviewed to make certain that the defendant understands the rights being waived by a guilty plea. Unfortunately, there is no program to review on a regular or even an *ad hoc* basis any justice court proceedings.

Many non-attorney justices are competent and have sufficient knowledge of the law. However, despite the added training requirements, there have been far too many miscarriages of justice at the hands of non-attorney justices in New York. A review of the decisions of the New York State Commission on Judicial Conduct reveals decisions for removal, resignation, censure and admonishment, which demonstrate a basic lack of understanding of the law, along with a failure to understand the role and responsibilities of a being a justice.[52] Of course, these decisions are not solely attributed to non-lawyer justices, but this group stands out as one worth taking a closer look at based

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[48] *People v. Felder*, 47 N.Y.2d 287, 293 (1979) (right to law-trained counsel).
[49] *Estes v. Texas*, 381 U.S. 532, 542-543.
50 22 N.Y.C.R.R. § 17.2.
51 *Id*.
52 New York State Commission on Judicial Conduct, 2022 Press Releases, https://cjc.ny.gov/Press.Releases/2022.Releases/2022.Releases.html.

on the disciplinary decisions of the Commission on Judicial Conduct.[53] In 2022, there were 19 published decisions regarding the removal, resignation, censure or admonition of town or village justices.[54] Of those 19 decisions, 15 of them were non-attorneys and only four were attorneys.[55]

The Commission for Judicial Conduct devoted a section of their Annual Report in 2019 to the need for greater assistance for town and village courts. In that section, the Commission reviewed the trends of disciplinary issues that they have encountered with town and village justices. The report notes that "over the last decade, while only 20% of the complaints received by the Commission were against town and village justices, 59% of the Commission's investigations and 72% of its public decisions (120 out of 167) involved town and village justices, indicating that ethics complaints against them are more likely to have merit. Of those 120 public decisions rendered against town and village justices, 90 (i.e., 75%) were against lay justices."[56]

The State Legislature has the authority, pursuant to New York State Constitution Article VI § 20(c) to set the qualifications and restrictions for a person to be a town or village justice. If the Legislature were to impose a requirement that all local court justices had to be attorneys admitted to practice in New York, and have at least five years of experience, the change would, of necessity, have to be phased in over time to allow the four-year terms of the current non-lawyer justices to expire.

One concern that has been raised about the requirement that all town and village justices must be attorneys admitted to practice is that there may be a shortage of qualified and experienced attorneys interested in serving as a town or village justice in each individual town or village. The shortage of attorneys in rural New York State is a real concern.[57] There is a readily available legislative solution to this obstacle. Public Officers Law § 3 requires a justice (as well as all other municipal officials) to reside in the town in which they are the justice. Village Law § 3-300 has a similar restriction for villages. Both Public Officers Law § 3 and Village Law § 3-300 are replete with dozens and dozens of exceptions to the local residency requirement to meet the practical needs of the town or village. Section 23(1)(g) of the Town Law already provides that justice in a "shared town justice" agreement, as provided for in UJCA § 106(b), can be "an elector" in any town covered by the shared judge agreement. Amending these laws to permit an attorney to be elected as a town or village justice in any town or village within the consolidated courts in which they reside (or within the county if none are available within the towns that make up the consolidated courts) would make more attorneys available to become justices. That decision will be up to the consolidation agreements or plans adopted by each county in accordance with its demographics. If necessary, allowing attorneys to be elected town justices in adjoining towns located in adjoining counties could also be permitted.

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53 *See, e.g.,* Brian Lee, *State Courts Watchdog Says Town Judge in NY's Southern Tier Mishandled 7 Cases,* N.Y. Law J., Oct. 12, 2022, https://www.law.com/newyorklawjournal/2022/10/12/state-courts-watchdog-says-town-judge-in-nys-southern-tier-mishandled-7-cases.
54 New York State Commission on Judicial Conduct, *supra* note 50.
55 *Id*.
56 New York State Commission on Judicial Conduct, Annual Report 2019, https://cjc.ny.gov/Publications/AnnualReports/nyscjc.2019Annualreport.pdf.
57 Elizabeth Gerry, *The Rural Representation Crisis*, N.Y. Law J., Jan. 17, 2023, https://www.law.com/newyorklawjournal/2023/01/17/the-rural-representation-crisis.

Another argument against requiring all town and village justices to be attorneys is that the salaries paid by towns and villages, especially those where there are very low caseloads, may be insufficient to attract attorneys to be justices. Court consolidation would make more resources available to pay attorney-justices from the various municipalities. This would be in addition to the savings each municipality would realize due to consolidation.

VI. Changes to How Justice Courts Conduct Arraignments: CAFA, CAPS and Bail Reform

Despite the repeated calls for consolidation of the justice courts, it is extremely rare that towns or villages take the steps to voluntarily consolidate. As a result, the due process issues persist. Over the past 10 years, a number of changes in how arraignments are managed in justice courts have been undertaken. As arraignments represent the most universal functions of the justice courts, these changes have made an impact on how the local justice courts operate.

A. Counsel at First Appearance (CAFA)

In defense of the current justice court system, supporters often rally around the willingness of the local justices to wake up at all hours of the night to conduct an arraignment. These so-called "off-hours" arraignments – that is, an arraignment not during the normal business day (not that there are daily "normal" business hours for many, if not most, justice courts) – are supposed to demonstrate the dedication of the local justices. Previously present at these arraignments was the justice, the arresting officer and the defendant. Rarely was a defense attorney present to advocate on behalf of the accused. If the charge involved a felony, the justice was required to obtain a recommendation from the district attorney, often by phone call, on the subject of bail. Not surprisingly, many people found themselves being held in lieu of bail.

Arraignments have long been recognized as a critical stage of a criminal proceeding, requiring counsel to be present on behalf of the accused. In 2013, the Office of Indigent Legal Services (ILS) began funding some 25 counties in order for the counties to provide Counsel at First Appearance (CAFA). This was a system whereby public defense attorneys were paid to be available – on call – to attend the off-hours arraignments in person. When counsel began appearing with a defendant, the likelihood of incarceration following arraignment decreased significantly.

CAFA is an expensive program, since defense attorneys are paid to be on call. It is also an inconvenient program, since justices and defense attorneys still have to appear at court between the hours of 5 PM and 9 AM, Monday through Friday, outside the normal workday and at all times on weekends and holidays. Under CAFA, defense attorneys find themselves traveling long distances to courts that are far from their homes, while the justice, perhaps the ADA, the arresting officer and the defendant wait for them.

B. Centralized Arraignment Parts (CAPs)

In February 2017, Section 212 (w) was added to the Judiciary Law, along with changes to the Criminal Procedure Law and Uniform Justice Court Act. This law authorized ILS, working with various stakeholders in the counties, to establish what are referred to as Centralized Arraignment Parts (CAPs). The purpose of a CAP is to provide a central location in each county where arraignments could occur during daytime business hours that would have otherwise taken place during off hours at

the local criminal court. Off hours are often thought of as nighttime hours but also include daytime and weekend hours when the court is not otherwise in session. As envisioned, a person accused of a crime that required an arraignment would be held until the morning or evening session of the CAP court. The accused would be brought to the central location, often the county jail, and arraigned by the designated local town or village justice who was assigned to preside that day. The duly elected town and village justices were supposed to rotate their assignments to the CAP, thereby relieving each other of the burden of having to be available for off-hour arraignments every day and night.

CAP courts are in session at designated hours, several times a day, including weekends. This allows prosecutors, defense attorneys and some law enforcement to schedule appearances at reasonable times and with reasonable notice. Family members of the accused can attend, and arrangements can be made in advance.

While twenty-eight counties have embraced CAP courts, this voluntary program is currently not in all of the upstate counties. Some of the resistance to CAP courts comes from town and village justices who now have to travel to the central location to conduct arraignments of defendants who may not have been arrested in their town. Some resistance comes from local police departments who likewise have to travel to the central location transporting the person they arrested. This could take the police 'out of service' in their town or village.

In practice, a CAP represents a consolidated arraignment court. By ignoring municipal boundaries, this initial critical stage of a criminal proceeding is presided over by any justice designated as the CAP justice for that day. This allows both the prosecution and defense to attend court at reasonable, preset times and allows them time to prepare their respective cases. Prosecutors can confer with witnesses and police; defense attorneys can meet with the accused in advance, begin their investigation and consult with family, friends, and employers to arrange for bail if needed. Unfortunately, most counties have not created CAP courts that would cover either the entire county or certain designated towns within the county.

C. Bail Reform 2020

Perhaps the greatest change concerning the services provided by the local justice court is the 2019 adoption of bail reform, effective January 1, 2020. Under the new bail reform laws, a person arrested for most misdemeanors and a large number of non-violent felonies is no longer subject to having cash bail or another form of nonmonetary release on conditions set by a justice immediately following an arrest. Instead, provided the accused and the charges meet certain criteria, the arresting officer must issue an Appearance Ticket (AT) to the person accused, requiring them to appear in the local court at a later date within 20 days of the arrest. On the return date of the AT, the court arraigns the accused and can release them in their own recognizance (ROR) or, in a proper case, impose certain designated non-monetary release conditions.[58] Except for certain qualifying misdemeanors and felonies, the court was required to impose the least restrictive conditions designed to assure that the accused returns to court for future proceedings. The Criminal Procedure Law §530.20(1)(a) sets forth 9 criteria the justice is required to consider if the justice is not going to release the accused in their own recognizance without conditions. In addition, the justice is required to set forth, on the record or

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58 CPL 530.20 (a).

in writing the reason for their decision. The 2023-24 State Budget modified parts of the 2019 Bail Reform Act by removing the 'least restrictive conditions' requirement when a justice is considering release of a person accused of a serious offense.

The impact of bail reform on the justice courts cannot be overstated. Thousands of persons arrested for what are considered minor, non-violent crimes are not brought in front of a local court justice for immediate arraignment. Regarding serious crimes, which are designated misdemeanors and non-violent felonies and all but two violent felonies, under CPL § 530.20(b), the procedure is virtually the same as it was before bail reform. These crimes are identified as "qualifying [for bail or remand consideration] crimes." The arresting officer can issue an AT (as before) or bring the accused before a justice for immediate arraignment; the justice must obtain input from the DA before making a release decision and must explain the release decision.

As a result of bail reform, the vast majority of arraignments now take place on the return date of the appearance ticket at a regularly scheduled court date. This allows an accused person time to obtain counsel in advance of their appearance, thereby reducing the need for CAFA attorney appearances at off-hours arraignments. This allows the district attorney and defense counsel time to review their file in advance of the first court appearance, allowing for more informed and timely decision-making.

As the court system becomes more engaged in addressing the reasons a person becomes involved in the criminal justice system rather than simply imposing punishment – fines or incarceration – specialty courts, such as veteran courts, mental health courts, drug treatment courts, and others, have developed. These courts effectively remove the defendant from the justice court jurisdiction.

VII. How to Reduce the Number of Justice Courts: The Legal Options and Impediments to Court Consolidation

The first problem is that there are just too many justice courts. What other business is open for just two or three hours once per week? Across New York State that would be the majority of justice courts. In many of these courts the prosecutor is present in person once a month or only as needed, which is not often in such a court. The hours that a court "sits" reflects the caseload in that court, and the majority of courts complete their business in a matter of a couple of hours.

The Office of the State Comptroller (OSC) administers the Justice Court Fund, where all money from justice courts is deposited and distributed. OSC collects monthly reports from every justice court relating to its activities. In 2010, a Report on the Justice Court Fund analyzed the data obtained from the justice courts. The report graphically depicted caseload and revenue from each justice court. It broke down the dispositions of speeding tickets which represented 41% of all cases – criminal and traffic. The report revealed that there are large swaths of upstate New York where neighboring town courts each had annual caseloads of 200 cases or fewer. Much of the rest of the state only had caseload numbers of 200 to 600 cases per year. An updated report from the OSC analyzing current data is necessary to provide irrefutable evidence regarding the caseloads of various town courts.

In many parts of the state, there are dozens of justice courts within close proximity of each other. In some jurisdictions, a town and village court may even "sit" in the same building but on different days or at different hours or across the street from each other. In some areas, there are a dozen or more town and village courts within 30 minutes of each other. Extend that time to one hour and there will be dozens of justice courts. The level of redundancy with these courts sitting on different days and times, or worse, sitting on the same days at the same time is astounding. Dozens of part-time justices and part-time clerks, minutes apart, separated only by town or village boundary lines doing the exact same work for a few hours a week is an incredibly inefficient and irrational way to do business. The current system creates scheduling difficulties for prosecutors, defense attorneys, law enforcement and jail managers. Required appearances on multiple days in nearby communities or, worse, conflicting appearances on the same date and time, strain the resources of such agencies or private attorneys.

Consolidation of justice courts is an obvious strategy that should be employed to increase efficiency and justice. There are genuine cost savings, and the ability to make improvements would lead to a better-quality administration of justice in New York State. The legal framework exists for consolidation and there are clear benefits to all criminal justice stakeholders in moving in that direction. There currently are resources available through the Office of the State Comptroller to assist justice courts in consolidation efforts.[59] Nonetheless, there continues to be significant resistance to a larger consolidation effort across the state as evidenced by the lack of consolidated courts in most counties. Additional information on cost savings and benefits to municipalities could help incentivize more jurisdictions to explore the options. There are also additional smaller-scale efforts that can be undertaken in moving towards a better criminal justice system in New York's justice courts. An updated report from the OSC's Justice Court Fund analyzing the caseload, revenue generation and efficiency of the current justice courts in each of the 57 counties will be necessary to present to county legislatures (and town and village governments) in support of the justification for adopting a district court or court consolidation plan.

One supposed benefit of having a court in every town is that local people would have easy physical access to the court. While that was undoubtedly true at the inception of local courts in the 1700s through perhaps the mid-1950s, modern transportation now allows a person to travel 50 miles in less than one hour. As we conclude the first quarter of the 21st century, electronic technology has advanced to the point where personal physical presence for most court appearances is no longer necessary. As will be discussed below, traffic tickets make up much of a town or village court's docket. Again, modern transportation has created a situation where many traffic tickets are issued to persons who are traveling through rather than living in the local towns. As more courts adopt practices to dispose of traffic tickets without the need for personal appearances, having a court in every town is less necessary.

Another supposed benefit of the current system of having a court in every town or village is that the local court would be available at different hours and be able to accommodate people who work

59 *Cost-Saving Ideas: A Guide to Justice Court Consolidation in Villages and Towns*, Office of the New York State Comptroller, https://www.osc.state.ny.us/local-government/publications/cost-saving-ideas-guide-justice-court-consolidation-villages-and-towns.

during the day. Consolidated court sessions and hours would be determined by the justices, just as they are now. Court days and hours can be flexible as the needs of the community demands, just as they do now. In the past, many if not most justice courts sat at night. Today, many if not most hold court during the day. Regardless, if the needs of the community dictate that people having business before the court are better served by having evening sessions, there is nothing inherent in the formation of district or consolidated courts that would prevent that.

A. District Courts

As found by the Dunne Commission, creating county-based district courts would, in a perfect world, be the ideal solution. All justices would be lawyers admitted to practice in the state of New York, with at least five years of experience. The number and location of the districts would be decided by each county and reflect the needs of its communities. The district court would be properly staffed, its hours reflecting the community needs. The court could ride a circuit around the county to afford people who need court services ready access to the court without having to travel to a central location. District courts with criminal jurisdiction have existed in Nassau County and western Suffolk County since the 1960s.

There are, however, certain constitutional hurdles to the formation of district courts. Pursuant to Article VI §16 of the State Constitution, a district court can only be formed at the request of a county legislature to the state legislature to create a district court for the entire county or such towns and cities within a county as are contiguous to each other. Such a law must then be approved by a majority of the voters in the county if the district court is countywide or else in each of the towns cities, and villages that would come under the jurisdiction of the district court.

The establishment of a district court will necessitate a more extensive involvement by the Office of Court Administration in the functioning of the court being a part of the Unified Court System than is their current level of involvement in many of the Justice Courts across the state. Being full-time courts would eliminate the delays in many cases and proceedings currently seen in the justice courts. Another benefit of creating district courts is that the CAPs could easily be eliminated. The CAPs have been initiated in many jurisdictions throughout the state in recent years at great ongoing expense and inconvenience to the system. The creation of District Courts would mean that there would be no need to do off-hour arraignments in CAPs, as those arraignments could be appropriately handled by the district court on a daily basis in a centralized fashion with proper facilities and staffing.

B. Village Courts

The New York Constitution lays out the legal authority for the town and village justice courts, regulated by the state legislature.[60] The Legislature has the power to discontinue any village court.[61] It can also discontinue any town court with the approval of a majority of votes in a general election in each affected town.[62] Village courts are controlled by Village Law § 3-301 (2)(a), which allows for the dissolution of village courts if the Board of Trustees of the village, by resolution or local law, subject to permissive referendum, move to abolish the village court at the end of the current term of a

60 N.Y. Constitution Art. VI §17 (Town, Village, and City Courts).
61 *Id*.
62 *Id*.

village justice.[63] Villages are not required to have a justice court. Like town courts, there is little incentive to dissolve the court unless there is a budgetary need to cut back on court costs.

C. Town Courts: Uniform Justice Court Act 106(a) & (b)

Under the current Justice Court Act, there are two ways to effect consolidation in towns. Section 106(a) permits two contiguous towns to reduce the number of justices from two to one in each township, with one town justice elected from each of the participating towns. Each of those elected justices would not only have jurisdiction in their own town but also in the other participating townships. The effect of this means of consolidation is to continue to give towns an elected justice from their town (one instead of two) yet has the backup of justice(s) from the other participating town(s).

In 2008, New York, recognizing the shortcomings of the justice court system due to the redundancy of courts in close proximity to each other, enacted § 106(b) of the Uniform Justice Court Act. Section 106(b) presents an alternative option and permits two or more contiguous townships to share just one town justice. This law authorized, on a voluntary basis, after study and subject to a public hearing, two or more adjoining towns to effectively merge their justice courts into a single court serving both towns. Only a very few communities have taken advantage of this law and consolidated their courts. This voluntary program has not been embraced by the vast majority of towns. The extent of consolidation under this section is potentially far greater than the consolidation under § 106(a). Taken to the extreme, § 106(b) could be employed to reduce the number of justices in an entire county to just one. Obviously, proper investigation and planning at the county level is necessary to ensure that the right balance is achieved. Nothing under the law prevents a combination of consolidation efforts under §§ 106(a) and (b) simultaneously.

Mandating every county to undertake a study regarding the efficient use of local resources for the provision of local criminal justice is the first step. Counties would be free to design their own consolidated local court system – district courts, subject to mandatory referendum, or consolidated courts under the UJCA – to fit their individual needs based on caseload, demographics and location of courts.

Decades of studies, the findings of which have never been empirically challenged but rather simply ignored, have failed to produce the necessary improvement of the justice court system. As a result, the state must mandate that counties undertake the study, develop and implement a court consolidation plan. A reasonable timeline must be established for the adoption of such a plan. It is understood that fully implementing a court consolidation plan would of necessity have to phased in over a period of years as duly elected lay justices come to the end of their terms.

VIII. Structural Issues Facing Today's Justice Court System

A. Traffic Tickets, Fines and Surcharges

It is impossible to look at justice courts without considering the evolving way traffic tickets are disposed of and how fines and surcharges are allocated. According to data collected by OCA's

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63 Village Law § 3-301 (2)(a).

Office of the Chief Administrative Judge for Courts, outside the City of New York, traffic tickets accounted for approximately 85% of all cases handled by local courts in 2021 and 2022 (through October 14, 2022). The breakdown is:

- 2021: Total cases 1,069,349; Criminal: 115,333; Civil: 14,147; Traffic: 935,023; and special proceedings: 5,846. Traffic represented 87.24% of all cases.
- 2022 (through 10/14/22): Total cases: 834,771; Criminal: 97,138; Civil: 24,235; Traffic: 697,874; and special proceedings: 15,524. Traffic represented 83.6% of all cases.

While local court justices are not supposed to consider the revenue that fines and surcharges in their courts generate for the town, village, county and state, those amounts cannot be ignored. Some courts generate between $1 million to more than a $4 million dollars a year (Village of Freeport in 2022) through mostly traffic enforcement. Other courts in smaller communities still generate hundreds of thousands of dollars annually. Those funds can represent significant savings for local real property taxpayers.

In the past, traffic ticket dispositions required the personal appearance of both police officers and defendants. Police officers prosecuted their own traffic tickets. As with the entire criminal justice system, the vast majority of cases are resolved through plea bargaining. Officers met with defendants or their attorneys on the date set by the court for a trial. Most often a plea bargain would be agreed upon and presented to the justice for consideration. Motorists charged with moving violations were (and still are) looking to avoid the accumulation of points, which would cause insurance premiums to increase. State Police troopers were assured of two hours of overtime for trial appearances. If the court accepted the plea bargain, as often happened, the court would impose a fine and a mandatory surcharge, if allowed by law. Tickets that were reduced to parking tickets carried fines between $0 and $150 without any surcharge. More important, the fine money imposed on a parking ticket eventually was paid to the municipality instead of the state or county.

Several years ago, following a new state police contract that increased the overtime allowance for trials to three hours, the state determined that the trooper who issued the traffic ticket was not authorized to prosecute their own tickets. This set in motion a number of changes in how traffic tickets are handled. Initially, state police sergeants were assigned to prosecute and dispose of the traffic tickets issued by troopers. The Legislature later amended the Vehicle and Traffic Law to require a pretrial conference to see if the case could be disposed of without the need for attendance by police officers. In some counties, the district attorney took over the prosecution of traffic tickets from the arresting officers. Some towns and villages engaged municipal attorneys, with authorization from the district attorney, to dispose of traffic tickets.

Recognizing that reduction to parking tickets deprived the state of surcharge revenue, the law was changed to impose a $25 surcharge on all parking tickets. It should be noted that there is some legislative interest in eliminating all surcharges as a regressive tax.

Traffic ticket disposition continues to evolve. Some local courts, in coordination with district attorneys, recognizing that many traffic tickets are issued to persons who reside far from their jurisdiction, developed a "plea by mail" alternative to personal appearances. If a traffic offender met certain criteria, a reduction would be offered. Some district attorney programs require the alleged

offender to complete a driver improvement class. Some district attorney offices impose a fee paid to the district attorney's office for consideration of this reduction. The Covid-19 pandemic accelerated the conversion of a number of courts from in-person to plea by mail.

As more courts adopt one of the plea by mail models for the disposition of traffic tickets the need for in-person court appearances will become greatly reduced. It is important to note that the Task Force is not recommending that traffic tickets be disposed of through the creation of administrative traffic violation bureaus.

Plea by mail models create more responsibility for courts and clerks in the handling of the plea and the fines and surcharges. In its 2019 Annual Report, the Commission on Judicial Conduct commented on a trend it was seeing of financial mismanagement and recordkeeping issues among town and village courts, which are responsible for collecting and handling their own fines and fees.[64] Though the Commission noted that much of the mishandling is due to innocuous reasons, such as lack of attention or clerical assistance, the Commission went on to say that they have publicly disciplined approximately 80 town and village justices and cautioned an additional 140 judges for violations of the rules around managing court funds.[65]

B. Untenable Staffing

As the current system stands, practitioners from both the defense bar and the prosecutors' offices are stretched extremely thin trying to appear in numerous courts throughout the day and night to meet the demands of so many different justice courts with uncoordinated schedules. Defense attorneys and prosecutors are understaffed and the demands of a system with 1200 justice courts, on top of all of the city, county and district courts (in Nassau and Suffolk Counties), make it impossible to be in every court handling all criminal matters.

The *Hurrell-Harring* case, where NYCLU brought a class action, arguing that New York failed to provide adequate public defense services,[66] led New York State to prioritize providing for defense counsel at first appearance. Since that case, there has been a large push throughout the state to establish the presence of defense counsel at arraignments so that defendants are represented during the critical first appearance. With so many different justice courts to cover, the defense bar across the state is simply unable to provide representation at every arraignment. Consolidation of justice courts would better protect defendants' rights by promoting counsel at arraignment. With fewer courts to staff, district attorneys and defense attorneys would have the resources to staff arraignments, the crucial first appearance, where discussions of bail and sometimes dispositions occur.

Another benefit of consolidation is that it would support the flexibility to have prosecutors present at arraignment and even perhaps assist local law enforcement with charging decisions. It would allow for prosecutors to offer pre-arraignment diversion programs to eligible offenders and assist those with substance abuse issues with immediate treatment options.

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64 New York State Commission on Judicial Conduct, Annual Report 2019, https://cjc.ny.gov/Publications/AnnualReports/nyscjc.2019Annualreport.pdf.
65 *Id*.
66 *Hurrell-Harring v. State of New York*, 75 A.D.3d 667, 905 N.Y.S.2d 334 (3d Dep't 2010).

In addition to the staffing issues for defense attorneys, prosecutors are stretched to their staffing limits to try to appear in every justice court across the state. Prosecutors' offices have limited staff who are overwhelmed with their own caseloads, investigations, discovery obligations, motion practice and trial preparation. To also have enough staff to appear in court proceedings across the county at various times is a tremendously difficult lift. Shifting resources away from the round-the-clock staffing needs in the justice courts will allow prosecutors to focus those resources on more serious cases.

Some opponents of consolidation suggest that all that is needed is higher salaries to attract more defense attorneys and prosecutors to staff all the courts. While a raise in salaries might help to some extent, the reality is that many counties do not have an excess of attorneys to attract. Many offices have trouble attracting new talent and compete for attorneys. Staffing shortages in prosecutors' offices are the worst they have been in decades, with many of the DA's offices unable to fill all their budgeted attorney slots. Staffing decisions often come down to choosing between staffing felony bureaus or local court bureaus. The felony bureaus are always prioritized, leaving coverage of local courts short.

In addition to easing many of the staffing burdens facing defense attorneys and prosecutors, consolidation would free up law enforcement resources. Currently, in order to have an in-custody defendant appear in court, it takes law enforcement officers out of traditional law enforcement duties in order to transport the defendant and stay with him or her through the court appearance. If justice courts were consolidated into fewer courts, law enforcement could coordinate better to have fewer officers assigned to transport, allowing for a more efficient use of their time.

It is simply a waste of resources to have numerous justice courts in close proximity. District attorneys, defense counsel and law enforcement all must fund personnel and resources to staff these courts, costing the county taxpayers unnecessarily.

C. Limited State Oversight

Unlike the rest of the judicial system in New York State, there is no direct oversight over the 1,200 justice courts by OCA. Instead, the Administrative Justice in each judicial district through its court attorneys monitors compliance with training hours. Justice courts are required to file monthly case data reports with OCA. On a monthly basis, every justice court is required to file financial reports to the Office of the State Comptroller accounting for the money that has been received and disbursed. In addition, books and records of the justice courts are offered annually to the municipalities for audit. These reviews, however, only involve proper recording keeping and money management.

The New York State Commission on Judicial Conduct can investigate allegations of misconduct and recommend sanctions or even removal from the bench but only upon receipt of a complaint.

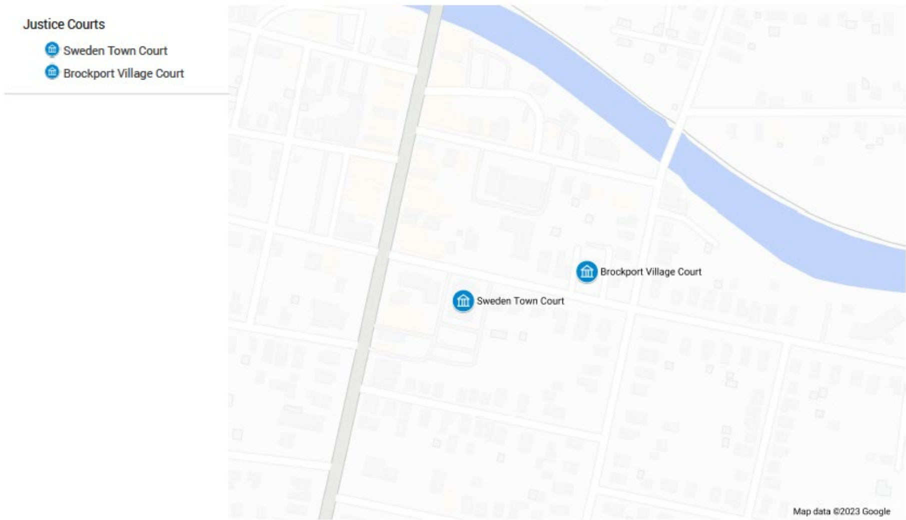
There is no oversight by OCA to see if the training provided, especially to lay justices, is being put into practice. There is no program for the regular or even the occasional review of justice court recordings. Regular reviews of the recordings of arraignments, pleas and sentencings would allow OCA to see if its training programs are being put into practice. Just the possibility of such reviews, even random unscheduled reviews, could go a long way to improving compliance.

D. Inefficient Overuse of Part-Time Courts

Most town and village court justices are part-time, their clerks are part-time and their courts are in session and open to the public on a part-time basis. The court will be in session once per week, or every two weeks, or even less often in some exceptionally low volume towns and villages. While in session, the court will often only be open for two or three hours, if that. It is not unusual for court staff to have limited office hours, making it difficult for defendants and defense attorneys to contact the court with basic inquiries. It should be pointed out that while the court may be in session on a limited basis, the work of the justice can extend beyond those hours. This would include researching and preparing decisions, reviewing, and preparing case files, completing, and filing monthly reports, conducting preliminary and probable cause hearings, eviction proceedings and small claims trials along with myriad other tasks that are necessary to the proper functiniong of the court.

Consolidated courts, with staff that work full-time and justices that are on the bench more than a couple of hours a week, will make the court far more available. One example is Monroe County, where the larger justice courts have been trending towards day courts, as opposed to night, which would make it a smoother transition to consolidate there. Monroe County has redundant courts that could be considered for dissolution or combining. One such example is in the town of Sweden, which has a population of approximately 13,000 people. Over half of the population within Sweden is in the village of Brockport. Both the town of Sweden and the village of Brockport have their own justice courts, with a total of four justices. These courts are located on the same block in Brockport, 400 feet from each other. This is not cost effective nor efficient in effectuating justice.

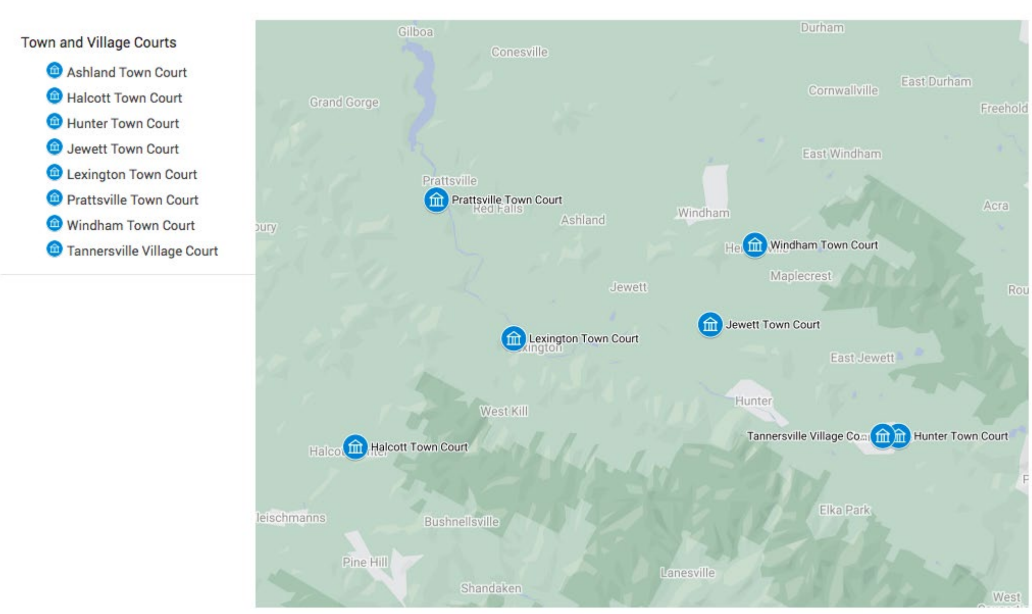
Justice Courts in Town of Sweden, NY



Another similar example in Monroe County is in the town of Mendon, which has a population of approximately 9,220 people. Within the town of Mendon is the village of Honeoye Falls. Both town and village each have their own justice courts, for a total of three justices. These courts are both located within the village of Honeoye Falls and are less than 500 feet from each other.

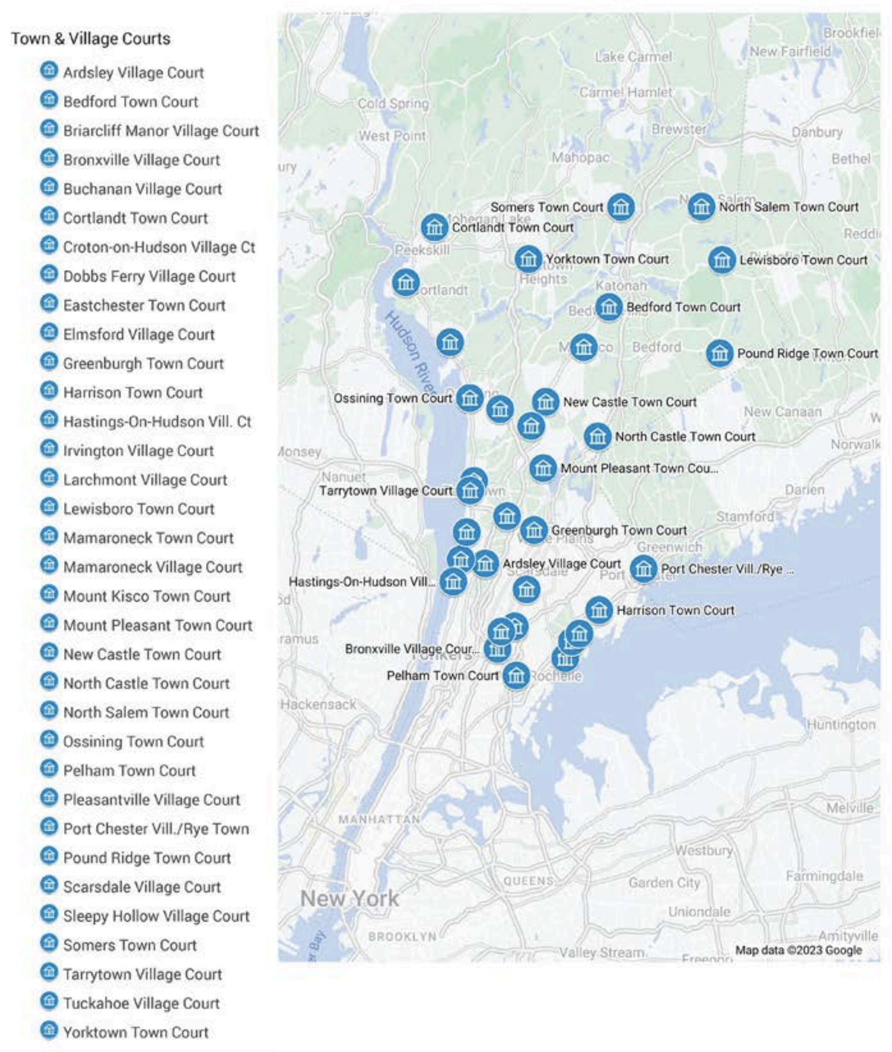
Another example of this inefficient structure can be seen in the seven mountaintop towns and one village court in Greene County. With the exception of the town of Halcott, the other seven courts are all within 25 minutes of each other. These eight courts each meet once a week or as needed, with the district attorney appearing generally once a month or as needed, sit for only an hour or two, use 13 justices (two attorney justices and 11 non-attorney justices), use five clerks and brought in a combined revenue of approximately $225,000 in 2022, with Halcott bringing in no revenue in 2021 or 2022. Two part-time justices and several full-time clerks could likely handle all the cases in these eight courts. The consolidated courts could meet once a week for four-plus hours. There could be one day a month that the DA appears for criminal cases instead of having an assistant DA present at least five days a month. This would be a huge efficiency improvement for all parties involved.

Greene County Town and Village Courts



Westchester County currently has 34 town and village courts (two of them – Port Chester Village and Rye Town Court – were recently consolidated) as well as six city courts. Within the southern part of Westchester, there are 24 courts, all within 20 minutes of White Plains. Within the river towns of Westchester (the villages of Sleepy Hollow, Tarrytown, Irvington, Dobbs Ferry and Hastings-on-Hudson), most of the village courts are just minutes from one another. Further south, Eastchester Town Court, Tuckahoe Village Court and Bronxville Village Court are all five minutes from one another. The volumes in these courts are low, and the courts operate infrequently. Many of these courts could conceivably consolidate and still provide locations that are easy to access for defendants. There was recently a case set for trial in one of Westchester's justice courts where the justice, clerk and all parties had to appear on a day that the court normally does not sit in order to handle the trial. This was yet another example of the inefficiencies created by part-time courts.

Westchester County Town & Village Courts



These are just a few examples of the inefficient use of redundant justice courts throughout the state. Every county could map out their courts and take a close look at volume and begin to think through consolidation plans that would bring a new level of efficiency of resources to the justice court system.

E. The Pitfalls of Hyper-Local Justice

One consistent argument in favor of keeping the status quo with justice courts has been that in keeping these courts extremely localized, they can better serve the local population. Justice in small municipalities then is not determined by larger, more urban locations that may have different priorities. Despite this argument, the majority of cases that town and village courts adjudicate are Vehicle and Traffic Law offenses, often committed by out-of-town defendants, who experience a vehicle stop on a highway that runs through the municipality.

Justice court justices live in and are a part of the communities they serve. While that gives these justices perspective on the needs of the local community, it also sometimes runs the risk of creating situations where outsiders are treated differently than locals. Having justices embedded in small communities can also create the situation where a local community member with a certain reputation in the community, whether theirs or their family and/or friends, could influence the justice's decision – sometimes in favor of the defendant or sometimes not in the defendant's favor. Furthermore, coming from a very small community runs the risk of creating the appearance that the local elected justices were put into their positions with the help of other local powerful people. Whether there is any truth to it or not, it can create a perception that the justices owe loyalties to individuals within the community.

IX. Opportunities and Benefits Provided by Consolidation

A. Cost Savings from Consolidation of Resources

Consolidation of justice courts could save municipalities significant costs. The current structure creates excessive inefficiencies in requiring the funding for personnel, resources and facilities to run so many justice courts in such close proximity to one another. Many of the courts are redundant and cost the county taxpayers unnecessarily.

Many of the smaller town and village courts have limited funds to invest in their courts and do not have a high enough volume to bring in sufficient revenue to support court costs.[67] In addition, rising costs and state mandated tax caps have left municipalities with limited options for properly supporting court services.[68] Thus, consolidation as a cost-saving option has become more appealing to some towns and villages.

Memorandum of understanding or sharing agreements between jurisdictions who are sharing a consolidated court can help share the cost burden. Many counties already have larger renovated courtrooms that are central to the surrounding towns and villages and could serve as a consolidated courthouse.

Town and village courts impose and collect fines, surcharges and fees on the cases over which they have jurisdiction, including civil, criminal and traffic cases.[69] In the event of consolidation, any incoming revenues would still go back to the town in which the offense took place. Thus, consolidation would not lead to a loss of revenue for towns, only a reduction in costs. The only exception is that villages that dissolve their justice courts and move operations to the town in which the village sits will no longer be entitled to fines from criminal or VTL matters, only local village law violations.[70] Nonetheless, the significant cost savings in no longer having to run their own justice court would outweigh any minimal lost revenue coming in, in most cases involving the smaller village courts.[71] In

67 *Justice Court Consolidation Solutions*, New York State Tug Hill Commission, July 2021, https://tughill.org/wp-content/uploads/2021/06/Justice-Court-Consolidation-Solutions-2021.pdf.
68 *Id*.
69 *Cost-Saving Ideas, supra* note 57.
70 *Id*.
71 *See Justice Court Fund: Town and Village Court Revenue Report*, Office of the State Comptroller, https://www.osc.state.ny.us/local-government/required-reporting/justice-court-fund.

2003, the Office of the State Comptroller audited 11 town and village courts and found that consolidation would lead to savings of almost 25% of the spending in these justice courts.[72]

B. Improved Courtroom Facilities and Better Security

In taking the steps to consolidate, municipalities would need to review existing courtroom facilities and choose courtrooms that are best equipped to handle the larger volume. With consolidated resources and the associated cost savings, resources could be allocated towards courtroom improvements and updates. In addition, with a larger volume, there would be a need for better security.

Currently, many smaller courts lack the necessary funding to have updated facilities, including accessibility and security measures.[73] Courtroom equipment, ranging from technological needs and even basic administrative supplies, are hard to fund with limited budgets.[74]

In recent years, there has unfortunately been an increased need for court security, the cost of which has become a burden to many localities, especially smaller jurisdictions. In its Task Force Report, the Fund for Modern Courts described many of the lapses in security in justice courts.[75] It noted that some justice courts are housed in places like fire garages, using folding card tables, and simply do not have the infrastructure nor the funding for security measures like magnetometers, security personnel or holding cells.[76] The report went on to quote a study where the sheriff's department in an upstate county, which was responsible for transporting in-custody defendants, believed that the courts were holding in-custody cases until the end of the calendar, so that the sheriff's department officers could provide security in courtrooms that lacked proper security personnel, while they waited for the in-custody case to be called.[77] Courtrooms must have the basic necessities in order to operate and protect the people they serve.

OCA has put together a list of best practices for justice court security, which includes a number of recommendations that are simply not feasible under the current justice court system but should be incorporated into planning for better security, given the cost efficiencies and combining of resources under a consolidation plan.[78] These best practices include: dedicating space exclusively for justice court use; eliminating potential courtroom weapons; creating strategic barriers; eliminating strategic lines of sight; securing courtroom furniture; providing uniformed and armed security presence; providing ingress screening; securing and illuminating parking; arranging armed escort for bank deposits; securing storage of cash and negotiable instruments; and providing duress alarms in strategic places.[79]

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72 *21st Century Local Government, supra* note 31.
73 *Justice Court Consolidation Solutions*, *supra* note 65.
74 *Id*.
75 *Enhancing the Fair Administration of Justice In New York's Towns and Villages Through Court Consolidation*, *supra* note 32.
76 *Id*.
77 *Id.*, citing *Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services*, June 2006 ("Spangenberg Report"), p.105.
78 Kaye & Lippman, *supra* note 15.
79 *Id*.

The savings associated with court consolidation could bring in funds to improve courtroom facilities, including updates to accessibility and technology. Basic administrative supplies and equipment could be obtained with the benefit of cost-sharing. Consolidation could lead to more resources for the appropriate and necessary level of security that all courtrooms should provide.

C. More Streamlined Docket Management

Another benefit of consolidation is better docket management. Defendants often have multiple cases in neighboring towns and villages. People tend not to just stay put in one town or village. People committing vehicular crimes may be doing so across multiple jurisdictions. Thus, some defendants end up with multiple cases from different neighboring towns, which are handled by different assistant district attorneys and different justices. This makes adjudication of the cases complicated and often slows down the process as the different parties try to connect and work on a disposition to cover the various cases.

Because consolidation would likely lead to many of these neighboring courts with overlapping defendants combining, a lot of this complicated docket management would be simplified.

Furthermore, consolidation could lead to better electronic recordkeeping and reporting of case statuses and outcomes. With fewer courts, it would be easier to administer a docket management system that all could use. Better reporting would help establish a better understanding of what is happening in the justice courts and how they can continue to improve.

D. Staggered Court Appearances and Extended Hours

As currently structured, town and village courts often meet once or twice monthly, some meeting more frequently. In some towns and villages, court is only held at night. As most justice court justices have regular jobs in addition to their positions as justices, having night court often makes it easier for them to work at their other jobs during normal business hours. This does not leave defendants within these towns and villages with any flexibility if the day or time of their local court is difficult to manage due to work, childcare or other reasons.

One benefit of consolidation is that it could provide for regular and more frequent court hours, with the flexibility to have occasional evening hours to accommodate different schedules. Fewer courts would allow for more streamlined and flexible scheduling. Consolidated courts will remove conflicting scheduling.

Court consolidation with longer court sessions will create larger court calendars. This would allow for staggered court appearances with set appearance times, rather than the current practice in many courts of having all interested parties present at the beginning of the court session. It could allow justices to schedule court appearances taking into account the availability of defense counsel as well as the defendant. This would reduce waiting time for all parties. Courts could schedule appearances

based on the tenets of procedural justice and respect for the individuals involved in the criminal justice system. This in turn would promote fairness and improve the public perception of justice.[80]

E. Modernization of Technological Needs

With decades and decades of efforts at reform of the justice courts, the COVID-19 pandemic shed light on the need for modernization in a way that we had never seen before. On March 16, 2020, as the COVID-19 pandemic began, all court nonessential functions came to a halt.[81] Arraignments began again on April 6, but were virtual with all parties in separate locations and defendants often being arraigned from booking facilities or jails.[82] Other essential court functions were provided virtually beginning on April 13.[83] With the move to virtual court operations, there was a new need for basic technology in the justice courts. Equipment as simple as computers for virtual proceedings was not readily available across all justice courts. For those counties with sufficient resources and technology, this shift was doable. However, many counties lacked the necessary equipment or internet access to move to a virtual system.[84] The COVID-19 pandemic demonstrated the value of and efficiency afforded by virtual proceedings.

If technology needs can be met, there is a lot of opportunity for improving the business of the justice courts. One area that has been explored is using technology for virtual arraignments with appropriate due process safeguards that allow defense counsel to properly represent the accused. Virtual arraignments have been effectively utilized in counties with adequate technology. During the COVID-19 pandemic, Orleans County was one of the municipalities that was able to successfully pivot its Centralized Arraignment Part (CAP) to all virtual arraignments under the governor's Executive Order. With the termination of the Executive Order, Orleans County returned to personal appearances at the court but, due to its success with virtual arraignments, the county is seeking authorization under Criminal Procedure Law § 182 to return to conducting some arraignments virtually.

In addition to virtual appearances for arraignment, traffic offenses and regular criminal appearances not involving hearings or trials could be handled virtually if courts had the equipment and technology to reliably allow for confidential communication between defense counsel and the accused. Virtual appearances have the potential to save tremendous resources and time and create better access to justice for the defendants who otherwise need to take off from work to attend court and wait for substantial amounts of time for their cases to be called and, in many instances, simply adjourned for "further investigation," discovery and/or consideration of a plea offer. In-person appearances could be limited to times when physical presence is necessitated, such as for hearings and trials and other occasional court appearances.

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80 Greg Berman & Emily Gold, *Procedural Justice from the Bench: How Judges Can Improve the Effectiveness of Criminal Courts*, Judges' Journal, Vol. 51, No. 2 (Spring 2012), https://www.innovatingjustice.org/sites/default/files/documents/JJ_SP12_BermanGold.pdf.
81 Pollitz Worden & Moloney, *supra* note 13.
82 *Id*.
83 *Id*.
84 *Id*.

During the COVID-19 pandemic, some counties began resolving all Vehicle and Traffic citations through the mail to eliminate foot traffic in the courts. Orleans County developed an automated system that, if initiated, would have a tremendous impact on the ease and efficiency with which motorists that have been ticketed will be able to address their citation without ever having to appear in court. This system will significantly reduce court dockets and the workload of prosecutors, court clerks and justices while enhancing traffic safety. The automated system requires giving prosecutor's offices throughout the state access to the data stream of the TraCs system, managed by the NYSP, which is the electronic source for all town and village citations issued throughout the state. Currently, the DA's office does not receive information regarding these citations until they receive them in court from the clerks, often weeks or months after they were issued. Access to this data would permit the automation of resolving traffic matters through the mail or online, significantly reducing the congestion in justice courts and providing motorists with an efficient way of resolving their traffic offenses.

If court resources are consolidated and provide for virtual and automated options, there could be computer kiosks set up in locations where former town and village courts once operated. This would ensure that all defendants had a close-to-home option for a computer and internet access to attend virtual court appearances.

Basic technological equipment, such as computers and courtrooms with internet access, should be the bare minimum requirements in the justice courts. However, in consolidating and subsequently modernizing New York's justice courts, there are myriad options to use technology to increase efficiency and improve justice in the town and village courts.

F. Better Planned Transportation of In-Custody Defendants

In-custody defendants must be transported by law enforcement officers to court. This process removes the officers from regular law enforcement duties and often takes several hours. Coordinating the transportation for in-custody defendants across 1,200 justice courts creates huge inefficiencies for law enforcement, who are pulled from their regular responsibilities to assist in the transport.

If justice courts consolidated, there would be fewer locations to transport in-custody defendants, and law enforcement officers could transport more defendants together to fewer locations. This would save substantial time and allow law enforcement to spend more time focused on their traditional law enforcement roles.

G. Reasonable Travel Distances for all Parties

In developing a consolidated court system, focus must be placed on making sure that defendants are not traveling unnecessarily far distances to appear in court. Highly populated locations with a higher volume of cases should be favored as centralized courts cover more remote locations. Notice should be paid to public transportation options, where available, to aid defendants who do not have access to a vehicle.

It is also important to consider that a high percentage of the cases in justice courts are Vehicle and Traffic law offenses, many of which may involve non-local defendants. For those cases, the concern over defendants having to travel outside of their hometown or village is less persuasive.

However, for the other types of cases, a closer look at individual counties is needed to sort out the opportunities for consolidation within a close distance to one another.

X. Examples of Successful Consolidation

A. Village of Port Chester (Westchester County)

Recently, in 2021, the village of Port Chester, in Westchester County, dissolved its court and shifted all court operations to the Town of Rye, in an effort to save money in Port Chester.[85] The shift happened after the three village justices' terms all ended.[86] Port Chester was simultaneously pursuing status as a city, which, if approved, would have given over court operation costs to the state.[87] Port Chester was having serious financial issues and was seeking ways to increase revenue and reduce costs.[88] It was found that by dissolving its court, Port Chester would save approximately $600,000.[89] This one example of consolidation could serve as a model for other villages and towns looking to consolidate.

B. Orleans County

In 1992, Orleans County had 20 sitting town justices in its 10 towns and four sitting justices in its two principal villages, Albion and Medina. These courts either meet once a week, once every two weeks or once every month. Justices sometimes had dockets of three or four cases. Courtroom facilities were mostly inadequate and often at their private residences. Over the last 30 years in Orleans County, the number of lawyer justices that have sat on justice court benches can be counted on one hand. Being elected a town justice had nothing to do with qualifications and more to do with popularity. The training for justices, once elected to office, remains minimal. Justices often depend on members of the district attorney's office to properly conduct proceedings in their court. In a county of less than 45,000 people, it was abundantly clear that they would be better served with fewer, more qualified individuals serving as town justices.

In 1992, Joseph Cardone was elected Orleans County district attorney. DA Cardone initiated efforts to make sweeping changes to the Orleans County local court system. He met with the various stakeholders in the criminal justice system including the local bar association, the public defender's office, the sheriff's department and local police chiefs, and he appeared at town and village board meetings. There was an obvious consensus that more efficiency in the court system was needed.

To begin with, Orleans County targeted the towns of Ridgeway and Shelby to study the possibility of consolidating their courts pursuant to the provisions of § 106(a) of the Justice Court Act, which at that time permitted the consolidation of two contiguous townships. They targeted these towns because they both had justices that were contemplating retirement. Also, as two of the larger

85 David Propper, *Port Chester to Dissolve Village Court System to Shed Costs*, Lohud, Oct. 19, 2020, https://www.lohud.com/story/news/local/westchester/port-chester/2020/10/19/port-chester-dissolves-court-system-seeks-city-status/3662590001.
86 *Id.*
87 *Id.*
88 *Id.*
89 *Id.*

townships, the thinking was that if they could accomplish consolidation there, then there would be no reason other townships in the county could not be consolidated.

Section 106(a) requires a fair amount of coordination and town board action and a specific timeline. The Orleans County district attorney first met with each of the town boards and suggested that consolidation should be something they should look at as a means of making their local court more efficient. Those meetings were then followed by public hearings where the district attorney appeared at town meetings with the public defender, sheriff and probation directors to publicly discuss consolidation. The process also requires that after those hearings, the town boards would pass a resolution to have the proposal for court consolidation placed on the ballot for a referendum. Prior to the election, the only real opposition they received was from a select few magistrates. The proposals passed overwhelmingly in each of the townships with approximately 85% of the vote.

As a result, circa 2006, the towns of Shelby and Ridgeway became one court with a single town justice elected from each jurisdiction that had jurisdiction over both towns. After a slight period of adjustment, it became abundantly clear that two elected justices could easily handle the caseload and that they preferred the arrangement. It was a clear success.

The following year, the State of New York amended § 106(a) to permit "two or more contiguous" townships to consolidate. As a result, the town of Yates, another neighboring township, met with Shelby and Ridgeway and went through the process of consolidating their town court with the two. What were once three separate courts with six separate town justices became technically one town court with just three town justices.

As a further measure, the district attorney had already begun talks with the Village of Medina to dissolve their village court. The Village of Medina, the largest village in the county, is geographically located in the towns of Shelby and Ridgeway. It was determined by the Village in or about 2009, that it would dissolve the Village of Medina justice court and terminate the two positions of village justice and assistant village justice. At that point, the whole west end of Orleans County, which comprised four separate courts with eight separate justices, became one court with just three elected justices.

It was not long until other jurisdictions within Orleans County realized the economy of these consolidations and followed suit. The second largest village, Albion, also dissolved its village court. Since that time, the towns of Gaines, Carlton, Kendall, Murray, Clarendon and Barre have all gone from two town justices down to one. Now, Orleans County, which had 24 town and village justices, is down to nine. Only the town of Albion has continued with two elected positions.

Over the last three years, with the support of the county Legislature, Orleans County has formed a committee to study establishing a centralized district court to exclusively handle all justice court level criminal proceedings. their work on this issue has been extensive. In addition to the district attorney, the committee includes the public defender, a justice from the magistrate's association, the sheriff, the probation director and a member of the county Legislature. They meet on a regular basis and have developed a District Court Plan. The committee is hoping to have the District Court Plan voted on in the fall of 2023.

Given the evolving complexity of the criminal justice system in this state, the concern for the rights of victims and defendants and the involvement of recent technologies, the time for sweeping reforms in the local court system is well overdue. Orleans County stands as a successful example of consolidation, and other counties should begin to follow suit.

C. Village and Town of Catskill (Greene County)

Recently the two busiest courts in Greene County, the town and village courts of Catskill, merged with the dissolution of the village court. This was prompted by the election of the same two lay justices in both jurisdictions. Each justice was holding court twice a week – once in the town and once in the village. They realized that they could handle the caseload of both courts by extending the hours of the town court, and now each justice holds court once each week. This was yet another example of successful consolidation.

XI. Recommendations

The current justice court system must be replaced, or significantly revised, in order to meet the demands of due process in an efficient and effective judicial system. Instead of some 1,200+ courts with 1,800+ justices of whom 1,000+ are not attorneys, many of whom are part-time justices, due process demands that all justices be attorneys.

In order to achieve economy of scale appropriate to caseload and demographics, while taking geographic proximity rather than municipal boundaries into account, many courts must be eliminated either through extensive consolidation or replacement by district or regional courts. Such consolidated/district courts would be in session for more than just two to three hours per week, as caseloads demand. They could have both daytime and nighttime hours to accommodate the needs of the local population. A consolidated court justice or a district court judge could even ride a circuit and conduct many court proceedings in various locations throughout the consolidated court or district court jurisdiction, as local needs require.

With increased caseloads for consolidated courts, full-time clerks with more training will be required, especially as more courts adopt plea by mail models for handling traffic tickets, which make up approximately 85% of court caseloads.

Recognizing that converting from the current justice court system to a new consolidated court/district court system will require counties to undertake studies to devise the revised system best suited to the needs of its towns and villages, legislation mandating that such studies be undertaken, completed and new systems proposed by a date certain is necessary. Voluntary programs that already exist have not produced the desired consolidation.

Finally, implementation of consolidated/district courts will have to be phased in over time to allow for current non-lawyer justices to complete their duly elected terms of office.

With these ideals in mind, the Task Force recommends the following:

1. All justices must be attorneys duly admitted to practice law in the State of New York for a period of not less than five years. The Legislature shall amend the requirements for town or village justices to require the same.

2. During the time that town and village courts are being studied by the comptroller, and court consolidation or district court plans are being developed, no town or village justice who is not an attorney at law may be elected to the office of town or village justice. To address the possibility that there is no attorney qualified or willing to be elected a town or village justice residing in each town or village, Public Officers Law § 3 as well as appropriate sections of the Justice Court Act, town and village laws shall be amended to permit, in said event, every town or village to elect a justice who is an attorney at law who does not reside in the town or village provided the attorney resides within the towns in the proposed consolidated courts or district.

3. Traffic tickets account for approximately 85% of court dockets; the Vehicle and Traffic Law should be amended to provide for plea bargaining not just initial appearances by mail, which is the method by which an increasing number of courts are now proceeding.

4. The office of the State Comptroller shall undertake a study of the justice courts detailing caseloads, revenues and projected cost savings from court consolidation / district courts replacing justice courts in reasonable distances of each other.

5. Utilizing such data each county shall, with input from the District Attorney, the primary public defense provider, the Legal Aid Society that provides civil representation in said county, at least one criminal defense attorney who resides in and regularly practices criminal law in the county, the Sheriff, a representative of the justice court justices in said county and of the justice court clerks in said county within six months of the completion of the Comptroller's report, prepare a plan for the consolidation of the town and village courts to achieve economies of scale, or in the alternative, propose a District Court plan.

   Such plan shall be submitted to the Office of the State Comptroller, the Office of Indigent Legal Services, the Chief Administrative Judge for the courts outside the City of New York, the Administrative Judge for the Judicial District in which the county is located and to each town or village board affected by such plan, for their review and comment. Such "stakeholders" shall provide each county with their input within two months of receiving the proposed plan. Thereupon each county shall have up to two months to revise such a plan if it chooses to do so and to conduct public hearings on such plan to be completed within said two months. Within two months after public hearings are completed each county shall adopt a plan for the consolidation of courts or the creation of district courts.

6. If the county adopts a plan of consolidation, the same shall become effective immediately upon adoption provided that there is a phase-in period of up to six months to allow the services of the court to be consolidated.

7. Once there is a consolidation of courts, where the town or village justice presiding in any town or village is not an attorney at law, said justice shall only preside over cases that arise in the town or village where the justice was elected until the end of their term. If the current justice is an attorney at law, the justice shall have the right to preside over all cases within the consolidated court's jurisdiction, if the justice chooses to do so,

until the justice's term expires. If a district court plan is chosen, the same shall be placed on the next general election ballot and shall become effective no later than three months after such approval. Any justice whose municipality is located within the district shall continue to preside over cases arising in said town or village jointly with the district judge until the expiration of their term. If the electors shall not approve said district court plan, then the county legislature shall adopt a consolidation plan as provided herein.

XII. Concluding Remarks

The fair and efficient administration of justice in New York State is dependent on an effective and well-operated local court system. The inescapable conclusion is that the current justice court system must be replaced. Minor changes have not met the requirements of due process in the protection of the rights of the accused as well as the rights of the People. Offering counties, towns and villages the opportunity to voluntarily evaluate and adopt cost-saving changes, economies of scale and efficiencies by consolidating court functions has not produced the desired effect. Mandating such changes is necessary. Since not every county has the same concerns and issues based on caseloads, demographics and geography, allowing counties the flexibility to adopt their own court consolidation plan designed to serve its needs is appropriate.

Consolidated courts presided over by justices who are attorneys duly admitted to practice law in New York will provide many benefits, starting with due process protections of the rights of the accused as well as the rights of the prosecution. The myriad cost-savings and efficiencies consolidation offers will pay for the necessary professional staff – whether full- or part-time – including attorney justices and clerks.

Whether due to nostalgia and a desire not to change things, benign neglect, simple inertia or political concerns, the justice court system has been allowed to continue in its current form for decades beyond its constitutional useful life. The time is long past to bring 21st century jurisprudence to upstate New York.

The New York State Bar Association must take the lead and urge the Legislature and the governor to make the changes necessary to achieve this goal.

SENTENCING REFORM

The task force presents three legislative proposals intended to modernize sentencing in the State of New York.

The task force proposes that the New York State Legislature enact legislation providing for the following changes to current New York law:

1. Allowing defense counsel to be present at presentence interviews upon counsel's request;
2. Permitting judicial decision-makers to review and consider modifying the sentence of a defendant who has served at least 10 continuous years of a sentence of imprisonment; and
3. Allowing for the elimination of mandatory minimum sentencing requirements upon consent of the prosecution and court.

In reaching these recommendations, the Task Force relied on the extensive experience of its members, existing initiatives, substantial research and meeting with experts in the field. The Task Force believes that the three proposals presented within this report parallel other successful and impactful legislative initiatives to improve the state's criminal justice system.

In addition to these proposals, the Task Force also considered supporting legislation to reform New York State's indeterminate sentencing structure. For reasons discussed herein, the Task Force declines to make a recommendation involving indeterminate sentences at this time and instead recommends that a commission be created to address certain issues that are necessary preconditions to drafting successful legislation in this area.

I. Counsel's Presence at Presentence Interviews

A. Background

In New York State, prior to sentencing in a criminal matter, the probation department is required to prepare a presentence investigation report (PSR or PSI) with sentencing recommendations, on which judges often rely in deciding an appropriate sentence for a defendant. To prepare the PSR, the probation officer conducts an interview of the convicted person. The New York Courts website states that "[t]he pre-sentence interview is a chance for the defendant to try to make a good impression and explain why he or she deserves a lighter punishment."[90] Currently, the right to counsel's presence at this PSR interview depends on the rules established by the county probation office. As a result, counsel is permitted to be present for the interview in some jurisdictions, while in others, counsel is prohibited. The right to representation at this critical step in the criminal proceedings should not be dependent on where a person is convicted.

New York Criminal Procedure Law § 390.30(1) provides:

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90 *Pre-Sentence Report*, New York State Unified Court System, https://nycourts.gov/courthelp/criminal/preSentenceReport.shtml.

> The pre-sentence investigation consists of the gathering of information with respect to the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, economic status, education, and personal habits. Such an investigation may also include any other matter which the agency conducting the investigation deems relevant to the question of sentence and must include any matter the court directs to be included.

The resulting PSR continues to impact a person's life even after sentencing. The PSR will accompany the sentenced individual to the correctional facility, where it will be used for a variety of purposes. For example, case managers may use the report to help determine the severity of the offense; counselors may use the report to determine who may visit the person at the prison; educational and program administrators will rely on the probation report to determine whether the individual will be required to participate in programs; and psychologists may use the report to determine what, if any, treatment the persons should receive while incarcerated.

The probation officer's interview of the defendant serves as an extremely important source of information for the report. The defendant's conduct and answers provided during this interview can have a significant impact on the sentence recommendations in the PSR. During the interview, the probation officer may elicit information that can increase or decrease the individual's sentence. Given the importance of the presentence interview to the sentence that will be imposed upon the defendant, excluding defense counsel is not justified.

A defense attorney can play a key role in ensuring fair and accurate fact-gathering by the probation officer at the interview by challenging the prosecution's version of the facts, on which the probation officer may rely heavily in questioning the convicted individual. In addition, the defense attorney can prevent a client from prejudicing him- or herself with the probation officer by preventing the client from providing inaccurate information, revealing prior criminal conduct for which the client was not convicted or charged or providing information inconsistent with the client's guilty plea taken in court. In certain situations, particularly where there was a conviction at trial, an appeal may be taken and the case could be retried, the attorney may not want the client to answer any questions about the instant offense to protect the person at a future trial. The federal courts have recognized the importance of counsel's presence, and New York should do the same.

B. Proposed Legislation

We recommend that the legislature pass a uniform law similar to the language in Federal Rule of Criminal Procedure 32(c)(2), which provides:

> The probation officer who interviews a defendant as part of a presentence investigation report must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.

People convicted of crimes in New York should have the same right to have an attorney present at the PSR interview – in all counties – to ensure accurate fact-gathering and to prevent their clients from prejudicing themselves with their statements. Adopting a rule such as Rule 32(c)(2) will enhance

the quality of representation for criminal defendants in New York and make the rules for representation at PSR interviews consistent throughout the state.

II. "Second Look" Resentencing

A. Background

Today, in the United States, two million individuals are incarcerated or in jail, with over 200,000 individuals serving life sentences.[91] In New York State, the average minimum sentence length is approximately 13 years with almost half of all incarcerated individuals serving minimum sentences of 10 years or more.[92] These figures reflect the supersized modern sentences imposed beginning in the 1970s at a time when there was strong public demand for increased punishment in response to high crime rates.[93] Research has shown, however, that decades-long detention often does not fulfill the goals of sentencing, and 10 years is more than sufficient to deter individuals as they age out of criminal behavior.[94] In light of this understanding, reexamining lengthy sentences, or taking a "second look," is warranted, especially as developments in effective treatment and technological advancements in surveillance reduce concerns of recidivism upon release.[95]

The benefits of second look legislation in modifying a sentence in excess of 10 years for a deserving incarcerated individual are not limited to the individual. The country's mass incarceration rates pose significant social, economic and political issues for society as a whole. At least $80 billion taxpayer dollars each year are allocated to funding the prison system. In New York State, the average annual cost per incarcerated individual is nearly $115,000.[96] In Black communities, the effects of incarceration, especially long sentences, are disproportionately felt. Today, one out of every three Black boys can expect to go to prison during his lifetime, compared to one of every six Latino boys and one of every 17 white boys.[97] In New York, 74% of incarcerated individuals are Black or Latino, meaning that these communities bear the most negative effects of mass incarceration.[98]

Numerous academics, organizations and states have recognized the importance of and consequently proposed second look legislation and reform. In fact, four states and the District of Columbia have passed such bills.[99] In 2017, the American Law Institute approved revisions to the

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91 Ashley Nellis, *No End in Sight: America's Enduring Reliance on Life Imprisonment,* The Sentencing Project, Feb. 2021, https://www.sentencingproject.org/app/uploads/2022/08/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf.

92 *Under Custody Report: Profile of Under Custody Population as of January 1, 2021*, New York State Dep't of Corrections and Community Supervision, https://doccs.ny.gov/system/files/documents/2022/04/under-custody-report-for-2021.pdf (hereinafter "DOCCS").

93 Kevin R. Reitz & Cecelia M. Klingele, Model Penal Code: Sentencing—*Workable Limits on Mass Punishment*, U. of Chicago Press J., Feb. 13, 2019, https://www.journals.uchicago.edu/doi/full/10.1086/701796; *see also Sentences Imposed*, Federal Bureau of Prisons, https://www.bop.gov/about/statistics/statistics_inmate_sentences.jsp.

94 Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. Rev. 113, 123 (2018).

95 *See* Reitz, *supra* note 91.

96 *See Mass Incarceration*, American Civil Liberties Union, https://www.aclu.org/issues/smart-justice/mass-incarceration (hereinafter "ACLU"); Jullian Harris-Calvin et al., *The Cost of Incarceration in New York State*, Vera Institute of Justice, Oct. 31, 2022, https://www.vera.org/the-cost-of-incarceration-in-new-york-state.

97 *See* ACLU, *supra* note 94.

98 *See* DOCCS, *supra* note 90.

99 Barry Kamins, *Sentencing Reform: The Next Criminal Justice Battleground*, N.Y. Law J., April 4, 2022, https://www.law.com/newyorklawjournal/2022/04/04/sentencing-reform-the-next-criminal-justice-battleground.

Model Penal Code recommending second look resentencing. Model Penal Code Sentencing § 11.02(1) provides that "[t]he legislature shall authorize a judicial panel or other judicial decisionmaker to hear and rule upon applications for modification of sentence from prisoners who have served 15 years of imprisonment." Upon additional research and developments in behavioral psychology, the American Bar Association similarly recommended second look legislation after a person has served a continuous 10 years of a sentence.[100]

Despite the national momentum, New York does not currently have a mechanism to permit courts to reconsider a sentence after all appeals have been exhausted. In 2021, New York amended the Criminal Procedure Law to permit an individual initially denied youthful offender treatment and who has not been convicted of a crime in the five years following his sentence to apply to the sentencing court for a new determination.[101] Yet, no legislation exists to provide individuals who have been rehabilitated and do not fall into this select category the opportunity to convince a court that their sentence is no longer appropriate. Enacting such legislation will save money, incentivize good behavior and participation in rehabilitative programs and ultimately reduce the unwarranted and negative consequences of mass incarceration.

B. Proposed Legislation

After careful consideration, the Task Force agrees that second look resentencing is warranted and recommends that the Legislature enact legislation in accord with the following principles:

1. Eligibility

An applicant who is incarcerated and serving an indeterminate maximum term of imprisonment of 10 years or more, or a determinate term of imprisonment of 10 years or more and has served at least 10 continuous years of the sentence of imprisonment, is eligible for resentencing under this proposed legislation, provided that the applicant is not serving a sentence of imprisonment for a conviction of a class A, B, or C felony defined in Penal Law art. 130 (Sex Offenses); and the applicant is not serving a sentence of life imprisonment without parole or the alternative authorized maximum sentence of imprisonment for the following crimes:

- murder in the first degree (Penal Law § 125.27);
- aggravated murder (Penal Law § 125.26);
- kidnapping in the first degree (Penal Law § 135.25(3)); or
- a Class A, B, C felony defined in Penal Law art. 490 (Terrorism).

Notwithstanding the foregoing requirements, a prosecutor may apply for the resentence of a defendant serving an indeterminate or determinate sentence of imprisonment when a resentencing of the defendant is in the interest of justice and is consistent with public safety and the rehabilitation of the defendant.

100 American Bar Association, Resolution 502 and Report, Aug. 8-9, 2022, https://www.americanbar.org/content/dam/aba/directories/policy/annual-2022/502-annual-2022.pdf.
101 L. 2021, Ch. 552, eff. 11/2/2021.

For those eligible for resentence, 10 years is a significant period of imprisonment and a sufficient period in which to judge whether a person deserves to have the sentence modified.

An eligible defendant may not waive his or her right to resentencing at any stage of the criminal proceedings.

2. Application Materials

The application may contain documents or information beyond what was available at the time of the sentence, including, but not limited to, those bearing on the defendant's age, health or culpability or responsibility for the commission of the felony, and those demonstrating that the incarcerated person has made strides in self-development and improvement, has made responsible use of available rehabilitative programs and has addressed identified treatment needs.

3. Procedure

The application shall be served on the district attorney and heard by the judge who sentenced the applicant, or, if that judge is unavailable, a judge assigned by the supervising or administrative judge of the court.

The court shall proceed to consider resentencing the applicant in accord with the pertinent procedures authorized for the imposition of the original sentence (CPL articles 380 and 400), including an updated sentence report; the right of the victim to make a statement; the applicant's right to counsel; and a hearing, if necessary.

If qualified for a court-assigned counsel, the applicant may accordingly apply for assigned counsel prior to filing the formal application for resentence to assist in the filing of the application.

The Department of Corrections and Community Supervision shall be required to timely notify an eligible applicant of the right to apply for resentence and the applicable procedures. Upon request of the parties or the court, the Department shall provide whatever documents and information that may be pertinent to a determination to resentence the defendant.

4. Criteria for Resentencing

Resentencing may be granted if the court determines that it is in the interest of justice and resentence is consistent with public safety and the rehabilitation of the applicant. In determining whether to resentence a defendant, a court may consider:

(a) the history and character of the defendant, the nature and circumstances of the crime for which the defendant is incarcerated and the defendant's role in the commission of that crime, including but not limited to the applicant's age at the time of the commission of the felony and degree of culpability or responsibility for commission of the felony;
(b) any statement of a victim of the crime;
(c) current physical or mental health, including, but not limited to, applicant's current age, whether the application is suffering from a terminal illness or has a severe and chronic disability that significantly incapacitates the offender or would be substantially mitigated by release from prison; and

(d) defendant's conduct while incarcerated and strides towards rehabilitation, including programs the defendant may have participated in while incarcerated, provided that the applicant's inability to participate in programs while incarcerated, although willing to do so, shall not be considered a negative factor.

5. Sentence

Upon determining that resentence is warranted, the court may modify the sentence by resentencing the applicant to any sentence that is authorized upon a conviction for the felony for which the applicant is incarcerated. The court may not, however, increase the sentence of imprisonment originally imposed.

A prosecutor shall not be entitled to have the defendant's plea of guilty set aside if the resentence is not in accord with the original plea agreement.

6. Appeal

The prosecutor may appeal an order resentencing the applicant on the grounds authorized for an appeal of the original sentence.

The applicant may appeal an order denying resentencing on the grounds authorized for an appeal of the original sentence.

7. Re-application

The applicant may reapply for resentencing after two years from the date of the order denying resentence, provided, however, that the court may in the order denying resentence authorize the defendant to reapply sooner.

III. Safety Valve for Mandatory Minimums

A. Background

New York's current sentencing scheme provides for mandatory minimum sentencing laws, which require a judge to impose no less than a stipulated amount of prison time, regardless of the circumstances of the offense or other mitigating factors. Although New York has weakened mandatory minimums through exceptions and nuances implemented since these types of laws first gained traction in the late 1970s and early 1980s, mandatory minimums in New York persist. In fact, over half of all prison sentences currently being served in New York resulted from mandatory minimum sentencing laws.[102]

Mandatory minimum sentences fuel mass incarceration, and the repercussions of these sentences are significant. Longer periods of incarceration cost taxpayers more money and do not necessarily enhance public safety or serve any other useful purpose. Research has shown that when a large number of individuals from a community are imprisoned, crime actually increases as families

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102 Fred Butcher, Amanda B. Cissner, and Michael Rempel, *Felony Sentencing in New York City: Mandatory Minimums, Mass Incarceration, and Race*, Center for Court Innovation, Dec. 2022, https://www.innovatingjustice.org/sites/default/files/media/document/2022/Felony_Sentencing_Minimums_Race.pdf.

lose providers, partners and parents, and accused individuals do not have the resources or tools to reintegrate into their communities.[103] More people, and disproportionately people of color, are incarcerated for longer periods of time than necessary, and those sentences are ineffective in reducing recidivism rates.[104] Mandatory minimums also fail to serve as a deterrent, since most people do not know the penalties they face for certain crimes.[105]

In general, minimums apply for most people convicted of a felony (violent or non-violent) if the individual has a prior felony conviction within the past 10 years.[106] These laws lead to unjust sentences because no matter how compelling the mitigating factors of a case may be, prosecutors and judges have no flexibility to go below the statutory floor in plea negotiations or sentencings. Judges are stripped of their usual discretion because they are required to impose minimum prison terms based on the charges brought by prosecutors. Under New York's Criminal Procedure Law, mandatory minimums also constrain prosecutors post-indictment in making a plea offer.[107] As a result, mandatory minimum laws create coercive plea negotiations and can result in innocent people pleading guilty.[108] When all parties agree that a mandatory minimum sentence is not appropriate under the circumstances, both the prosecution and judges are forced to undergo mental gymnastics to devise a result that circumvents the current statutory scheme, including wasteful procedures such as dismissing one indictment and re-charging the case under a different statute.

In recent years, many states have made efforts to eliminate or weaken the effects of mandatory minimum sentencing and have passed laws that permit courts and prosecutors to recommend and impose sentences below the statutory prescribed minimum in certain appropriate circumstances.[109] This type of legislation is often referred to as a "safety valve." In the federal system, a safety valve exists for first-time, non-violent, low-level drug offenders if they meet specific conditions.[110] Safety valve legislation gives judges greater flexibility in sentencing and prosecutors greater flexibility in plea negotiations. This flexibility and discretion support the goals of sentencing by allowing a sentence to be sufficient but not greater than necessary to address public safety and deterrence.

In addition to safety valve legislation, many legislative efforts exist, including in New York, to completely eliminate mandatory minimums. The Task Force considered adopting such an approach,

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103 *New York Should Abolish Mandatory Minimums*, The Vera Institute of Justice, Feb. 2022, https://www.vera.org/downloads/publications/new-york-should-abolish-mandatory-minimums_2022-03-08-160009_smuc.pdf.
104 Senate Bill S5712, 2019–2020 Legislative Session, https://www.nysenate.gov/legislation/bills/2019/s5712.
105 *See New York Should Abolish Mandatory Minimums, supra* note 104.
106 *See* Butcher, *supra* note 103.
107 Criminal Procedure Law § 220.10(5).
108 Rebecca Brown, *Why Do Innocent People End Up Pleading Guilty?*, N.Y. Daily News, Feb. 10, 2023, https://www.nydailynews.com/opinion/ny-oped-why-do-innocent-people-end-up-pleading-guilty-20230210-ql5tjpf2ubdl7iufyww4ezcwra-story.html.
109 Florida (Florida HB 89, Chapter No. 2014-195), Maine (Maine Revised Statutes 17-A:51 §1252:5-A(B) (2003), Maryland (Maryland Chp. 515(2016)), Minnesota (Minnesota § 609.11 (2017)), North Dakota (North Dakota, HB 1030 (2015)), Oklahoma (Oklahoma, HB 2479, (2016)), and Hawaii (Hawaii, SB 68 (2013)) have all passed safety valve legislation.
110 18 U.S.C. § 3553(f).

but ultimately arrived at the below recommendation, which requires the consent of both parties and the Judge, as an initial step to achieve greater flexibility in sentencing.

B. Proposed Legislation

1. Senate Bill 1003-01-3

The Task Force supports the adoption of legislation that would provide a safety valve from application of the current provisions of law which would require application of a mandatory minimum sentence, provided that defendant has the permission of the court and the consent of the people. That effect would be achieved by the Office of Court Administration's proposal in Senate Bill 1003-01-3 to amend subdivision 5 of Section 220.10 of the Criminal Procedure Law and subdivision 3 of Section 220.30 of the Criminal Procedure Law. Bill 1003-01-3 reads as follows:

Section 1. Subdivision 5 of section 220.10 of the criminal procedure law is amended by adding a new paragraph (i) to read as follows:

(i) A defendant, with both the permission of the court and the consent of the people, may enter a plea of guilty as authorized by this section, notwithstanding the provisions of paragraphs (a), (b), (c), (d), (f), and (h) of this subdivision, when upon review of the nature and circumstances of the criminal conduct, the available evidence and the history and character of the defendant, the prosecutor and the court are of the opinion that the plea is in the interest of justice. The factors warranting the plea shall be placed on the record; however, the failure to do so shall not entitle the defendant to have the plea of guilty set aside.

Section 2. Paragraph (b) of subdivision 3 of section 220.30 of the criminal law is amended by adding a new subparagraph (x) to read as follows:

x) A defendant, with both the permission of the court and the consent of the people, may enter a plea of guilty as authorized by this section, notwithstanding the provisions of subparagraphs (i), (ii), (iii), (iv), (v), (vi), (vii) and (ix) of this paragraph, when upon review of the nature and circumstances of the criminal conduct, the available evidence and the history and character of the defendant, the prosecutor and the court are of the opinion that the plea is in the interest of justice. The factors warranting the plea shall be placed on the record; however, the failure to do so shall not entitle the defendant to have the plea of guilty set aside.

Section 3. This act shall take effect immediately.

2. Modification of Senate Bill S5712

The Sentencing Committee also supports an alternative method to provide a safety valve by amending the current Penal Law through Bill S5712, known as the "Justice Safety Valve Act," provided that the language of the legislation is revised to require the prosecutor and court's consent to depart from the mandatory minimum. Bill S5712 amends section 60.01 of the Penal Law, by adding a new subdivision 5, which the Task Force revises to provide:

> Notwithstanding any other provision of law to the contrary, when sentencing a person convicted of a felony for which there is a mandatory minimum sentence, the court may depart from any applicable mandatory minimum sentence [*upon consent of the prosecuting attorney*] if, giving due regard to the nature of the crime, history and character of the defendant and his or her chances of successful rehabilitation, the court finds that:
>
> (a) imposition of the mandatory minimum would result in substantial injustice; and
> (b) the mandatory minimum sentence is not necessary for the protection of the public.
>
> The court shall report any departure from a mandatory minimum sentence on a form developed by the Office of Court Administration which shall be forwarded to the Division of Criminal Justice services.

The Task Force's proposed revised language to the Bill requiring consent of the prosecutor is included in brackets and italics above.

3. Considerations

The Task Force did not come to a unanimous decision on this issue, with some members recommending that only the court's consent should be required. A majority of the Task Force, however, ultimately arrived at the decision to recommend that both the prosecuting attorney's and the court's consent is necessary to depart from mandatory minimum sentences. Several members of the Task Force reached this conclusion based on practical reasons, namely based on the opinion that a bill requiring prosecutor's consent is more likely to be passed by the Legislature.

IV. Determinate Sentences

The Task Force evaluated whether to recommend a specific determinate sentencing proposal for class D and E felonies, but ultimately decided against approaching reform in this area through "small bites," or gradual, piecemeal efforts. Rather, the Sentencing Committee recommends the creation of a new Sentencing Commission whose mission will be to engage in an in-depth analysis of New York State's remaining indeterminate sentences and how other provisions of the Penal Law and Correction Law impact those sentences to determine what changes, if any, to propose to those laws.

A. Background

The sentencing framework in New York includes both determinate and indeterminate sentencing. Indeterminate sentencing was created in accordance with the belief that all information that needed to be known about the defendant could not possibly be known at the time of sentencing, and indeterminate sentencing would promote rehabilitation and better behavior in prison. Additionally, indeterminate sentencing reflected faith in the expertise of judges and their ability to do the right thing when the time came for sentencing.[111]

111 *The Future of Sentencing in New York State: Recommendations for Reform*, New York State Commission on Sentencing Reform, Jan. 30, 2009, pp. 4–5.

Scholars challenged these beliefs, and determinate sentencing proposals began to take root based on two fundamental principles: (1) to better protect the public and to put an end to gross disparities in sentences, punishment should be proportionate to the seriousness of the instant offense and equitable as compared to other offenders with similar prior conviction records; and (2) the sentence served should match the sentence imposed in court, with a limited exception for "good time."[112]

As a result of a 2014 report by the New York State Permanent Commission on Sentencing, a bill was introduced containing determinate sentencing proposals for class D and E felonies that the Sentencing Commission considered supporting.

Class D felonies tend to be crimes of a serious nature, but without the same sense of malice that the law assigns to higher grade felony cases (i.e., class A, B and C felonies). Class D felonies include larceny, types of fraud, theft, robbery, burglary, or manslaughter. Sentences for first-time, non-violent, non-drug, non-sex class D felonies are typically one to seven years of imprisonment and are frequently pled down to a class E felony, a misdemeanor (with jail time, a probationary sanction or split time) or dismissed outright. For predicate non-violent, non-drug, non-sex class D felony offenses, the prison term can be two to seven years.

Class E felonies are the lowest felony charge available in New York and are usually associated with serious crimes that do not warrant a higher felony charge, such as a DWI that results in harm being done to a person or property. Class E felonies include certain types of theft, assault, forcible touching and aggravated harassment. A class E felony conviction can result in one to four years of imprisonment, a reduction to a misdemeanor (with jail time, a probationary sanction or split time) or an outright dismissal. For predicate non-violent, non-drug, non-sex class E felony offenses, the prison term can be one-and-a-half to four years.

The 2014 legislation makes multiple recommendations, including amending Penal Law § 60.02(2) to clarify the applicable class E felony sentencing options for a youthful offender, amending Penal Law §70.09, which specifies the authorized sentence of imprisonment for first felony offenders, to set forth the range for determinate sentences of imprisonment for class B, C, D and E first felony offenders, and amending Penal Law § 70.06 to eliminate mandatory minimum sentences for class D and E second non-violent felony offenders.

V. Recommendation

After significant research and discussion, including a review of the history of sentencing reform in New York and the present and past appetite of the State Legislature (and various interest groups), as well as the Task Force's conversations with the Department of Corrections and Community Supervision (DOCCS) Acting Commissioner Anthony Annucci, the Task Force concluded that expanding determinate sentencing, even just limited to class D and E non-violent felonies (including select second felony and other provisions), has been insufficiently studied and may lead to unintended consequences given the myriad interlocking corrections and sentencing schemes at play. The Task Force believes that it would be irresponsible and contrary to the stated purpose of the Penal Law to

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112 *Id.* at p. 12.

recommend expansion without considering a multitude of collateral issues that impact sentencing. The data collected indicates that even a recommendation limited to the least serious felonies is too significant of a shift in New York State's current sentencing schemata to propose without consideration of its possible effects, as many of these offenses comprise the gristmill of what the state's criminal justice system deals with on a daily basis.

Prior to any recommendations expanding determinate sentencing, the Task Force recommends that a commission be appointed by the governor must consider and address the following:

- the assertion by many that the original premise underlying the proposed determinate sentencing ranges for all offenses are flawed, and the effect of determinate sentencing on the following:
  - (1) "merit time" and possibly "good time"; (2) limited credit allowance time; (3) the authority of DOCCS' time allowance committee; (4) post release supervision; (5) shock incarceration and drug treatment programs that offer early release; (6) DOCCS' designation of residential treatment facilities; and (7) jail time credit as it relates to extinguishing prior post-release supervision terms.

The Task Force is of the opinion that creating a separate commission to address these preliminary issues will pave the way for appropriate and successful legislation in this area. The Task Force believes that with this gradual and thoughtful approach, actual reform can take hold.

VI. Conclusion

The New York State Bar Association's Task Force on the Modernization of Criminal Practice urges our state leaders to support legislation permitting: (1) defense counsel's presence at presentence interviews; (2) second look resentencing; (3) a safety valve to mandatory minimums upon consent of the prosecutor and the court; and (4) establishment of a permanent sentencing commission to study and make recommendations regarding expanding determinate sentencing in accordance with the recommendations set forth herein. The Task Force is of the opinion that with these reforms, New York will take important steps towards reducing its prison population, decreasing the negative impacts of incarceration and modernizing the state's sentencing practice. We are hopeful that these legislative initiatives will improve safety, fairness, access to justice and efficiency in the administration of criminal justice.

TECHNOLOGY

I. Discovery

A. Background

On April 1, 2019, New York State passed a new discovery statute (CPL article 245), which provides for timely production of evidence in criminal cases. Indeed, the law, which was part of sweeping criminal justice reform legislation, sets forth specific timeframes for earlier disclosure of evidence to facilitate the defenses' ability to prepare a defense and make informed decisions for plea bargaining. Since its enactment, article 245 has made great strides toward better transparency and fairness in the criminal justice system in New York.

However, the law has created challenges for those responsible for its implementation. During the months preceding the effective date of January 1, 2020, prosecutors and defense counsel agreed to shift to electronic platforms to both send and receive discovery. Prosecutors and defense counsel have withstood the worst of increased workloads due to the new timeframes for evidence production and navigation of sometimes voluminous and digitally challenging discovery material.

Because the reforms were initially enacted without the benefit of appropriate funding, localities across the state developed systems specific to their jurisdictions, available resources and capabilities. Defense counsel likewise modified existing systems to receive discovery from prosecutor platforms. The result is a hodgepodge of discovery delivery modalities statewide, with different technology requirements from county to county and jurisdiction to jurisdiction. Furthermore, the lack of technology uniformity exacerbates practical issues such as confidentiality of sensitive information, management of protective orders, security of work product, assurance of ample storage capabilities and maintenance of metadata.

The benefits and ideals of discovery reform are often lost due to the inadequacy of technology and guidance for sharing evidentiary materials with defendants who are incarcerated or acting *pro se*. To ensure these benefits are realized, there should be a uniform methodology for providing access to electronic discovery ("e-discovery"), including to an incarcerated defendant or unrepresented defendant.

Finally, discovery reforms require monitoring and oversight for further study and recommendations. There is currently no governing body to set standards and effectuate best practices at the state level.

The following recommendations will address these issues and suggest further study and potential State action.

B. Recommendations

1. The State Should Allocate Appropriate Funding for Prosecutors, Police Agencies and Defense Counsel to Adequately Meet Discovery Obligations

The Task Force recommends that the state allocate necessary funding for both prosecution, including police agencies, and defense functions to properly implement and uphold discovery obligations pursuant to this legislation.

The recommendation of adequate funding for all parties takes into account the many challenges posed by e-discovery including the following considerations:

(a) Need to contract with a company that provides and supports discovery platforms or develops such platforms independently;

(b) Need to provide devices (e.g., laptops, tablets, etc.) to allow attorneys and defendants the means by which to interact with the discoverable material, including adequate programming to support various file types;

(c) Need to install or update existing internet access to allow attorneys/defendants to access substantial amounts of electronic information stored via the internet or cloud, with focus placed on rural areas that may have inadequate connectivity (**suggestion**: break down by county or geographical area and evaluate each region for its needs);

(d) Need for prosecutors, police and defenders' offices/panels to hire additional staff, attorneys, paralegals, technicians, etc. to account for the increased workload that was the direct result of discovery reforms and to address widespread attrition and recruitment issues;

(e) Need to train attorneys and their supportive staff in the use of the discovery platforms and to identify and address technical issues efficiently;

(f) Need to obtain virus and data protection services to comply with cybersecurity mandates; and

(g) Need to manage voluminous e-discovery files, including hours of body-worn and car camera videos and electronic surveillance, and provide adequate cloud storage systems to meet document and file retention obligations.

The State had allocated additional funding for prosecutors to meet discovery demands but had yet to address similar funding for defense providers. The Fiscal Year 2023 Budget allocated $90 million to prosecutors for discovery reform and pretrial services.[113]

In past budget years, the State allocated appropriate funding for prosecutors to meet these discovery challenges but failed to allocate any funding specific to discovery needs of defenders.

[113] *See Governor Hochul Announces FY 2023 Budget Investments to Create a Safer and More Just New York State*, New York State Governor, April 9, 2022, https://www.governor.ny.gov/news/governor-hochul-announces-fy-2023-budget-investments-create-safer-and-more-just-new-york-state.

Governor Kathy Hochul proposed similar inequitable discovery funding in her FY 2023-24 Executive Budget, with $40 million specifically for prosecutors to support discovery reform, but with no funding for discovery needs of criminal defense.[114]

Specifically, the Governor proposed $40 million to "support discovery reform implementation."[115] Moreover, the Governor proposed $40 million "in additional funding to hire hundreds of new prosecutors, across the State, to support District Attorneys develop crime strategy plans and reduce case backlogs."[116]

Defenders made clear the inequity and sought comparable funding for discovery challenges and the concomitant need for additional services.[117] Lisa Schreibersdorf, executive director of Brooklyn Defender Services, testified that "the lack of technology and support staff to manage the influx of electronic and digital evidence in criminal cases" has been a major contributing factor to attrition of attorneys in the criminal court system.[118]

On May 2, 2023, the State Legislature passed the FY 20203-24 budget and the final budget bills were signed into law by Governor Hochul. In keeping with the Task Force recommendation herein, the final enacted budget includes funding for prosecutors, law enforcement and defense providers to help meet discovery obligations. The final budget bill for Aid to Localities [S.4003-D/A.3003-D] includes $80 million for discovery funding for prosecutors and law enforcement (p. 109-110), $47 million for prosecutorial services (p. 110), $40 million for criminal defense discovery (p. 110-111) and $40 million for criminal defense services (p. 111).

Further study into the allocation and potential sources of funding is recommended as part of implementing the goals described herein.[119] Funding is needed to correct the disparity and asymmetry in resources between prosecutor's offices and public defenders and to ensure that the needs of prosecutorial and defender offices are adequately resourced. In this context, the term "defender" includes not only institutional providers but also attorneys assigned to conflict-panels (e.g., 18b panel attorneys) who are to represent an indigent defendant.

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[114] *See* "Governor Hochul Announces FY 2023 Budget Investments to Create a Safer and More Just New York State," New York State Governor (online), pub. 9 April 2022. Available at: https://www.governor.ny.gov/news/governor-hochul-announces-fy-2023-budget-investments-create-safer-and-more-just-new-york-state.

[115] *See* "Governor Hochul Announces Highlights of FY 2024 Executive Budget," New York State Governor (online), pub. 01 Feb. 2023. Available at: https://www.governor.ny.gov/news/governor-hochul-announces-highlights-fy-2024-executive-budget.

[116] *See* NYS FY 2024 Executive Budget Briefing Book (online), "Public Safety," at 121 (emphasis added). Available at: https://www.budget.ny.gov/pubs/archive/fy24/ex/book/publicsafety.pdf or https://www.budget.ny.gov/pubs/archive/fy24/ex/book/briefingbook.pdf.

[117] *See* Testimony of Lisa Schreibersdorf, Executive Director of Brooklyn Defender Services, Feb. 07, 2023, before NY Senate Finance Committee and Assembly Ways and Means Committee, at 6. Available at: https://www.nysenate.gov/sites/default/files/brooklyn_defender_services_bds_testimony_joint_leg_budget_hearing_public_protection_2.7.23.pdf.

[118] Id. at 2.

[119] *See Criminal E-Discovery: A Pocket Guide for Judges,* Federal Judicial Center (2015) at 5, https://www.fd.org/sites/default/files/litigation_support/pocket-guide_criminal-e-discovery.pdf (noting that lack of funding, personnel, and training "often overshadows" other problems with electronic criminal discovery).

2. The State Should Adopt a Centralized Repository for e-Discovery

The Task Force recommends a uniform platform for discovery delivery that would streamline and simplify the prosecutor's obligations while allowing defense attorneys the ability to access and meaningfully interact with discovery materials and subsequently present and discuss discovery materials with clients. Pro se defendants should have access rights to this platform, with consideration given to having any hard-copy materials mailed to the pro se defendant with the option of viewing electronic discovery by appointment or, for an incarcerated pro se defendant, the ability to view the materials at the jail.

The platform should act like a repository for e-discovery, complete with protections to limit accessibility to authorized users and the ability to allow analysis, cataloguing and queries. It should also include an audit log and audit trail to accommodate multiple users and supplemental information.

Currently, most district attorney offices in New York State utilize the Digital Evidence Management System (DEMS) to assist in complying with discovery mandates. DEMS connects prosecutors and law enforcement agencies to manage documents, review body worn camera footage, surveillance videos and other digital evidence. Law enforcement agencies can upload files and digital evidence to DEMS to be accessed by district attorneys and then, eventually, to be shared with defense counsel. However, in practice, there are inconsistencies in how e-discovery is provided to the defense bar. Indeed, even in the City of New York, district attorneys in different boroughs deliver discovery differently.

Defense attorneys have also experienced inconsistencies in access expiration dates that are often arbitrary. And while the spirit of discovery reform is openness, there is a potential for breach of confidentiality the longer a link remains open. A means of averting this is for defense attorneys to exercise immediacy in downloading discovery, which is compounded, however, by issues of storage capabilities to be discussed *infra*.

Inconsistencies in discovery delivery, and consequently in receipt of digital evidence, frustrate the intent of discovery reform. The ideal discovery platform is a centralized repository with safeguards that should account for security, supportability, storage, searchability and uniformity.

Security

The Task force recommends the creation of a common platform for uploading and reviewing discovery by defense counsel and pro se defendants. Of course, development and implementation of that common platform must provide for secure access and use, including satisfactory means by which access rights can be verified and those rights be limited to specific data for defendants.[120]

Special consideration should be given to the provision of access rights and electronic discovery material to defendants who are proceeding without legal counsel. Any platform should be accessible

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120 *Recommendations for Electronically Stored Informed (ESI) Discovery Production in Federal Criminal Cases*, Dept. of Justice, Admin. Office of the U.S. Courts (Feb. 2012), at Recommendation # 10, p. 5, https://www.justice.gov/archives/dag/page/file/913236/download (recommending that "parties . . . limit dissemination of ESI discovery to members of their litigation team who need and are approved for access. They should also take reasonable and appropriate measures to secure ESI discovery against unauthorized access or disclosure.").

and user-friendly to pro se litigants. Concerning indigent defendants in particular who may not possess electronic devices independently, consideration might be given to developing portals where out-of-custody individuals can access the technology needed to review their discovery materials.

A universal platform of discovery delivery must include safeguards that protect sensitive information like witness identifying information, grand jury material, etc. For example, information subject to a protective order should be flagged or logged and segregated appropriately.

Supportability

A platform should be able to host and maintain a wide variety of file types, including myriad audio/visual files, text files, etc. Use of obsolete or unsupported file types should be discouraged.[121]

Certain files cannot be opened using conventional software, and study should be made into how public defenders may be given access to software needed to interact with more complicated or unconventional file types:

> When [electronically stored information] is in a proprietary format (for example, a Google Mail file), it cannot be reviewed with industry-standard tools; instead, review requires specialized hardware, software, an expertise to convert the data into a form that can be reviewed with standard tools. Even if the discovery is produced in an optimal way, defense counsel may still need expert assistance, such as litigation support personnel, paralegals, or database vendors, to convert e-discovery into a format they can use and to decide what processing, software, and expertise is needed to assess the ESI. In voluminous e-discovery cases, parties must be able to rely on document-review software, which can be costly. Nonetheless, it saves money because it speeds up the review process and improves counsel's ability to find information. Such software affords counsel a variety of search strategies, including word searches, document searches, date searches, sender/recipient searches, concept searches, and predictive coding searches.122

One suggestion contained in the aforementioned source indicates that prosecutors may provide "e-discovery on disks that contain software for viewing, searching, and tagging documents."[123] New Jersey requires the party providing discovery to include a "self-extracting computer program that will enable the recipient to access and view the files that have been provided" for any files "not provided in a PDF or open, publicly available format."[124]

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[121] *See generally Recommendations for Electronically Stored Informed ("ESI") Discovery Production in Federal Criminal Cases*, Dept. of Justice, Admin. Office of the U.S. Courts (Feb. 2012), at Recommendation # 6, p. 3, https://www.justice.gov/archives/dag/page/file/913236/download (general recommendation that electronically stored information "should be produced in the format[s] it was received or in a reasonably usable format[s]" and encouraging discussions between the parties concerning "what formats of production are possible and appropriate, and what formats can be generated. Any format selected for producing discovery should, if possible, conform to industry standard for the format.").

[122] *Criminal E-Discovery, supra* note 119, at 12–13.
[123] *Id.* at 15.
[124] NJ Ct. R. 3:13-3(b)(3).

When considering this factor, it must be kept in mind that attorneys may have need to obtain the files in their native, or original, format in order to view underlying metadata.[125]

> Metadata, frequently referred to as 'data about data' is electronically stored information ("ESI") that describes the "history, tracking, or management of an electronic document" and includes the "hidden text, formatting, codes, formulae, and other information associated" with an electronic documents including "all of the contextual, processing, and use information needed to identify and certify the scope, authenticity, and integrity of active or archival electronic information or records."[126]

Storage

A tremendous challenge posed by the digital age and discovery reform obligations is the sheer volume of e-discovery to be disclosed, especially given that technology and digital devices are now ubiquitous in daily life. With exponentially increasing amounts of data and discovery materials being generated, so too has the storage needs grown, with the gathering, processing and reviewing of gigabytes and even terabytes of information now commonplace. This is especially cumbersome on the defense bar, with solo practitioners struggling with the demand, and under-resourced public defender offices scrambling to meet the need.

A study of maintenance of e-discovery is recommended as soon as practicable. Innovative, cost-effective, and collaborative means for addressing this challenge are encouraged. Indeed, the Office of the Federal Public Defender in Dallas, Texas invested into a "server of its own and storing [*sic*] ESI in both its own cases and those of appointed defense attorneys. Defense attorneys who have relied on this server estimate that it has saved the federal government millions of dollars."[127]

Structurability/Searchability

Unstructured data is data that is "not in a formal, searchable database and not organized in a predefined manner."[128] The committee may want to consider a platform that not only meets increasing storage capacity concerns, but also allows attorneys and pro se defendants to structure the data by

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[125] *See* Jenia I. Turner, *Managing Digital Discovery in Criminal Cases,* 109 J. Crim. L. & Criminology 237, 253 (Spring 2019), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7651&context=jclc.
[126] *Mazarakis v. Caremount Med. P.C.,* 2020 N.Y. Slip Op. 34934(U) (Sup. Ct., Westchester Co. Mar. 16, 2020) at **4 (quoting *Aguilar v. Immigration and Customs Enforcement Div. of U.S. Dept. of Homeland Sec.,* 255 F.R.D. 350, 354 (S.D.N.Y. Nov. 20, 2008) (internal citations omitted)).

[127] Jenia I. Turner, *supra* note 125.

[128] Andrew Ferguson, *Big Data Prosecution and Brady,* 67 UCLA L. Rev. 180, 209 (Apr. 2020).

search terms, bookmarks, flags, etc.[129] Such measures might also assist attorneys and defendants in more efficiently scouring voluminous materials.[130]

Uniformity

Study into the use of a uniform platform across New York State is recommended to streamline access to discovery and avoid incongruities arising from the use of different platforms and programs in different jurisdictions. Currently, certain defense practitioners have reported having to maneuver different discovery platforms in different counties in which they practice. In addition to learning curve issues that may arise when practitioners must familiarize themselves with multiple different platforms, accessibility issues must also be considered (e.g., could various types of programs or platforms function differently depending on the type of device or operating system used by the user?).

Uniformity will make it easier to resolve technical issues by having a centralized support team as opposed to having different technicians for different platforms. By having all discoverable materials centralized on a single platform, materials will be more accessible, easier to find and may be easier to protect against potential viruses and other digital threats.[131]

3. The State Should Implement Uniform Measures to Provide Incarcerated Defendants Access to e-Discovery

All defendants have a right to confront the evidence against them and participate in the preparation of their defense. This right should not be contravened if a defendant is in custody. It is necessary for extraordinary measures to be taken to assure these rights and allow access to e-discovery for incarcerated defendants.

The Task Force recommends the promulgation of rules or enactment of legislation to secure this right and simplify and unify the means by which e-discovery is shared/provided to those in custody. Further study is recommended to review potential modalities which would be acceptable and consistent with jail policies and available internet access.

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[129] *See, e.g., id.*, 217 and 250–55 (discussing how the use of technology, including the type of programming found in social media networks, may assist prosecutors in flagging discovery material for *Brady* material). *See also* Douglass Mitchell and Sean Broderick, *Recommended E-Discovery Practices for FDO/CJA Attorneys*, Defender Services Office Training Division, at 8-9, https://www.fd.org/sites/default/files/Litigation%20Support/recommended-e-discovery-practices.pdf (recommending the use of concept-based analytical search programs to assist attorneys in sorting through voluminous discovery; such tools generally permit the attorney to "review the evidence by a concept, issue or key document as opposed to simply using keywords.").

[130] *See generally United States v. Skilling,* 554 F.3d 529, 577 (5th Cir. 2009), *aff'd in part and vacated in part sub nom. Skilling v. United States,* 561 U.S. 358 (2010) (noting *in dicta* that "the government may not hide *Brady* material of which it is actually aware in a huge open file in the hope that the defendant will never find it").

[131] *See* Samuel Greengard, *What to Know About Body-Worn Camera Video Data Storage and Management*," StateTech, July 31, 2018, https://statetechmagazine.com/article/2018/07/what-know-about-body-worn-camera-video-data-storage-and-management-perfcon (discussing that "a single, searchable repository that integrates and simplifies video storage" is better than using multiple products on a "scattershot" basis; using multiple programs and tools to manage data that are not integrated can make it "difficult or impossible to retrieve digital evidence when and where it's needed" and can "lead to security risks") (internal quotation marks omitted)).

Specific consideration should be given as to how incarcerated pro se defendants may access the discovery platform consistent with jail policies on internet access.[132] The platform should ultimately be compatible with the software used to facilitate confidential attorney-client videoconferences at correctional facilities.

4. The State Should Appoint a Permanent Commission on Discovery

The Task Force respectfully submits the foregoing recommendations but recognizes the ongoing and evolving challenges posed by discovery reform in New York State. Currently there is no governing body that solely exists to review and make recommendations and promulgate standards to meet the ideals and intent of discovery reform and practice throughout the state.

The federal court system has an oversight agency for this purpose. The U.S. Courts Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG) was created by the Department of Justice in 1998. JETWG oversees best practices in the delivery of e-discovery between the government and defendants and works to promote efficiency and cost-effective management of ESI Discovery.

Therefore, it is the final recommendation of this Task Force that a permanent Commission on Discovery be appointed by the governor and overseen by the chief judge of the State of New York. The composition of this body should be made up of prosecutors, defense attorneys, retired judges, practitioners from civil and criminal bars and technology experts. The Commission should exist to affect the studies recommended herein and to authorize and oversee the implementation of best practices.

II. E-Filing

A. Background

Over the past several years, New York courts have made many needed technological advances. During the pandemic, courts conducted virtual operations on an unprecedented scale, including the adoption of electronic filing. Electronic filing in New York courts, however, remains a work in progress.

Currently, different jurisdictions across the state utilize various methods of e-filing and service. For instance, the New York State Courts Electronic Filing system (NYSCEF) permits a degree of e-filing in many courts, including the Appellate Division, First Department. The Electronic Document Delivery System (EDDS) allows papers to be delivered electronically to a number of courts. And Court-PASS allows electronic delivery of documents to the Court of Appeals.

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[132] *See Criminal E-Discovery, supra* note 119, at 18 (while providing in-custody defendants with access to e-discovery "reduces attorney time and costs" and allows defendants to assist in the preparation their defense, "[j]ails have a legitimate security and staffing interests in preventing inmates from having unfettered access to computers. . . . [C]onsultation between the government, the defense, and the particular facility is most likely to result in an acceptable solution.").

Other courts around the state have adopted their own electronic filing systems and protocols. In some places, motions and briefs may be emailed to chambers with a carbon copy sent to opposing counsel's email. In other locations, a hard copy must be mailed to the clerk and to all other attorneys. And in locations that require e-filing, different platforms are used in various parts of the state. The Court of Appeals, too, has its own, unique system, which is not a true e-filing system, as paper documents must still be filed. By contrast, the United States Court of Appeals for the Second Circuit utilizes universal e-filing through Public Access to Court Electronic Records (PACER).

These electronic filing and document delivery systems vary in scope and sophistication. In some courts, certain types of documents can be filed entirely electronically. But in other circumstances, paper filing is still required. Some systems (such as NYSCEF) give opposing parties notice that a document has been filed and allow electronic access to the documents. Other systems do not give such notice or provide access. And under many of New York's various electronic filing protocols, e-filing does not affect the service of a document; traditional service is still required.

B. Recommendations

1. The State Should Adopt a Universal E-File System

While the size and scope of New York's vast court system present challenges, the Task Force believes that New York should aim to move, in the near future, to a single, universal system of electronic filing. Universal electronic filing would fundamentally change for the better how courts, lawyers, judges and staff operate and perform their duties. Electronic filing is more efficient than traditional paper filing; it imposes fewer costs on litigants (who often have scarce resources), and it is environmentally sound. Also, if electronic filing of a document qualifies as service of the document on the opposing party – as we believe it should, except perhaps with respect to pro se litigants – another substantial cost will be eliminated from the system. E-filing also resolves any concerns about document retention, as an online record of all court filings will be permanently retained. There will never be a lost court file, a lost document or a warehouse fire that destroys critical court records. Electronic filing will thus bring many efficiencies and will help bring the court system into the modern era.

A critical benefit from a single, universal e-filing system would be a statewide standardization of the rules governing e-filing and the service of papers. Many New York lawyers practice in more than one location within the state. Currently, those lawyers must learn to navigate many different e-filing systems, none of which are interrelated. Even lawyers who practice in a single jurisdiction (for instance, Manhattan) must still learn to navigate numerous e-filing systems if they have cases in different courts, for instance: Supreme Court, Criminal Court, Family Court, the Appellate Division, the Appellate Term, and the Court of Appeals. Each individual court has its unique e-filing rules. Even within New York City, the First and Second Departments (and the lower courts within those Departments) have varying rules. This presents lawyers with a confusing maze of differing rules, which are extremely challenging to master.

2. The Federal System as a Model

A universal e-filing system is an attainable goal. New York need look no further than to the federal system for guidance as to how such a system can, and should, operate. PACER was implemented in the late 1990s within the federal court system and has proven to not only simplify the

filing procedure for attorneys, but also to ease the burden of court staff while providing a layer of public benefit by offering direct access to public records. PACER offers anyone with an account quick access to the entire case docket, including all filings, court appearances and court decisions. Simply put, it functions as a concise repository of all relevant materials for a criminal or civil case. Filing a document on PACER also constitutes service of the document on an opposing party, so long as the party has a PACER account (as all attorneys who practice in federal court must). Additionally, the uniformity and centrality of the PACER platform allows for better management of large caseloads, organization and time management overall for all parties involved. There is no question that implementing a similar system would have an instantaneous and significant benefit to all New York practitioners.

3. Statutory Changes Needed to Implement Universal E-Filing

However, before New York State courts can even entertain the idea of implementing a centralized/electronic filing system, putting aside any financial concerns, the current laws concerning filing and service of documents must be amended. The legislature should amend the Judiciary Law and court rules to specifically authorize the creation of a universal e-filing system, with exceptions for those who are unable to participate in e-filing, such as pro se litigants and persons who lack access to the necessary technology. Also, security protocols (and perhaps alternative filing protocols) will be required for confidential or sensitive materials, sealed documents and materials submitted to the court for in-camera review.

4. The State Should Fund the Transition to a Universal System

The Task Force recognizes that changing from a patchwork system of various e-filing systems to one centralized system would create an initial and ongoing financial burden for the court system and stakeholders. The Legislature should allocate funding for the creation and implementation of a universal system in the budget process to help defray costs and reduce financial burdens on litigants and courts. Costs will not only include system creation and implementation, ongoing security and IT support to maintain the system, but also training of court staff, attorneys and other system actors and requisite technology upgrades throughout the system to ensure that universal e-filing works as intended.

While funding would facilitate a smooth and swift transition to a universal system, limits on initial investments should not be seen as a barrier to implementation. Utah moved to a completely paperless civil court system in 2013 without any funding in the state budget. Their experience, and the experiences of other jurisdictions, show that transitioning to a universal e-filing system both modernizes and promotes the efficiency of a court system, saving costs in the long term. A 2009 study in Manatee County, Florida, for example, found that transitioning to an e-file system saved nearly $1 million per year. Other jurisdictions have found that transitioning to a fully electronic system has created other cost savings. Courts in Utah have been able to convert file storage rooms to new courtrooms, expanding the court's ability to handle high caseloads. Transitioning to a universal e-file system ensures that all cases, which are public records, are fully accessible to the public without forcing interested parties to travel to a clerk's office and request a specific hard copy file, perhaps at great expense.

Simply put, instituting a centralized electronic filing system would have immeasurable benefits to litigants, court personnel tasked with maintaining dockets and managing cases, and the public at large. The time has come for reform. The Legislature should work with the court system and all stakeholders, including lawyers and bar associations, to create a universal e-filing system and to appropriate the resources necessary for its facilitation.

III. Virtual Proceedings

In March 2020, due to the COVID-19 pandemic, New York State courts rapidly shut down their physical locations and in-person visits and appearances ceased. Virtual meetings and appearances first through Skype and then through Microsoft Teams began to become the norm.

As a result of this rapid shift to virtual court appearances, and as the pandemic gained a long foothold, several studies on the efficacy and the effects of virtual appearances emerged. Most recently, the New York Pandemic Practices Working Group, chaired by the Hon. Craig Doran, issued its findings in January 2023: *New York Courts' Response to the Pandemic: Observations, Perspectives, and Recommendations*.[133] This working group conducted public hearings in three different parts of the state – New York City, Buffalo and Albany – and invited both written and oral testimony from a diverse group of stakeholders. The 123-page comprehensive report covers all types of courts in the state, including courts handling criminal cases.

In March 2020, federal courts across the United States found themselves challenged with the restrictions imposed by the global pandemic. While the federal court system traditionally has centered around parties appearing in open court as is prescribed under the Sixth Amendment of the U.S. Constitution,[134] the federal court system adapted to the circumstances quickly by shutting the courthouses to the public and, in many cases, shifting to remote video or audio participation. On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was signed into law to aid the nation in adjusting to the pandemic.

Notably, the CARES Act allocated approximately $7.5 million to the federal judiciary to expand remote work capabilities and maintain federal court operations. It also authorized the Judicial Conference of the United States, which is the administrative policy-making body for the federal courts, to provide chief district judges with authority to permit certain criminal proceedings to be conducted by "the use of video conferencing or telephone conferencing if video teleconferencing is not reasonably available." The criminal proceedings listed in the Act include:

- Initial appearance,
- Preliminary hearing,
- Waiver of indictment,
- Arraignment,
- Detention hearing,
- Probation,
- Supervised release revocation,
- Pretrial release revocation,

133 https://www.nycourts.gov/LegacyPDFS/press/pdfs/NYCourtsPandemicPracticesReport.pdf

134 *Court Orders Updates During the Covid-19 Pandemic*, United States Courts, (Mar. 7, 2023), https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic.

- Appearance under Rule 40 of the Federal Rules of Criminal Procedure,
- Misdemeanor plea and sentencing,
- Certain proceedings under the Federal Juvenile Delinquency Act, and
- Felony plea and felony sentencing hearings if a federal court finds that such proceeding "cannot be conducted in person without seriously jeopardizing public health and safety" and that any further delay "would seriously harm the interests of justice."

It is worth noting that video conferencing or telephone conferencing authorized under the Act may only take place with the consent of the defendant, or the juvenile, after consultation with counsel.

As such, on March 29, 2022, the Judicial Conference found that "emergency conditions due to the national emergency . . . with respect to COVID-19 will materially affect the functioning of the federal courts generally," and effectively granted chief district judges with the necessary authority to implement virtual criminal proceedings. This authority will end when whichever of the following two events occurs first: (1) 30 days after the national emergency ends; or (2) when the Judicial Conference finds the federal courts are no longer materially affected. The national emergency expired on May 11, 2023.

The Task Force focused on the impact of virtual proceedings in criminal cases in state courts, as well as the federal courts, namely, the Southern and Eastern Districts of New York. It will highlight the benefits and drawbacks of virtual proceedings and provide recommendations.

A. State Background

A series of administrative orders from the chief administrative judge, as well as a series of executive orders, were necessary to effectuate remote proceedings.

On March 15, 2020, the Office of Court Administration (OCA) authorized virtual arraignments.[135] In New York City, virtual arraignments began on March 25, 2020. All the parties appeared from separate locations. In-person arraignments did not resume until more than a year later: in Manhattan, June 28, 2021; in Brooklyn on July 6, 2021; and Bronx, Queens and Staten Island on July 10, 2021.

Soon after the suspension of in person arraignments, grand jury proceedings were suspended through a series of administrative orders. AO/126/2020, dated June 13, 2020, continued the suspension of grand juries but allowed prosecutors to apply to extend existing GJ terms.

Without grand juries, prosecutors were unable to meet strict deadlines to protect incarcerated individuals who were held in jail without a finding of probable cause by grand juries. Accordingly, EO 202.28, dated May 7, 2020, allowed for virtual preliminary hearings.

But preliminary hearings also contained time limitations for those incarcerated. Prosecutors still needed to obtain indictments by grand juries. Outside New York City, all in person grand juries

[135] *See Generally* OCA's "Updated Protocols" memo, https://www.nycourts.gov/covid-new.shtml.

resumed on July 13, 2020.[136] New York City, grand juries resumed on August 10, 2020. To accommodate safety concerns, EO 202.48, dated July 6, 2020, allowed for virtual testimony by incarcerated individuals before grand juries.

Virtual guilty pleas were authorized through Executive Order (EO) 202.28 on May 7, 2020, which suspended CPL 182.20 so that remote guilty pleas even on felonies could occur. This suspension continued with EO 202.76 (November 19, 2020) and lasted more than a year, eventually expiring on May 27, 2021, while courts reopened and returned to in-person appearances. The data does not show how many remote guilty pleas occurred. DCJS data shows that in 2020, there were 10,410 felony convictions (or 14.9%), compared to 23,397 felony convictions (18.8%) in 2019. Of those, in 2020, 4,846 (6.9%) received prison sentences vs. 2019 where 12,073 (9.7%) received prison sentences.

On Sept. 28, 2021, through EO 5, due to the ongoing crisis at Rikers Island, the governor suspended article 182 to allow for virtual guilty pleas. This suspension continued to occur until March 2023.

B. Federal Background

Both the Southern District of New York (SDNY) and the Eastern District of NY (EDNY) provided a series of executive orders to facilitate virtual proceedings.

1. EDNY Timeline[137]

§ **March 16, 2020, Administrative Order No. 2020-06:** All criminal and civil jury trials in the EDNY scheduled to begin before April 27, 2020, are continued pending further order of EDNY. Initial appearances and arraignments shall continue to take place in the ordinary course, or where practicable or necessary, be conducted remotely pursuant to procedures established by EDNY. Individual judges are strongly encouraged to conduct court proceedings by telephone or video conferencing in civil matters.

§ **March 30, 2020, Administrative Order 2020-13:** Chief Judge Roslynn R. Mauskopf of EDNY, pursuant to the CARES Act and authority granted by the Judicial Conference, orders that the criminal proceedings enumerated in the Act will be held via video or telephone conferencing with the consent of the defendant or juvenile. The authorization is effective for 90 days unless the Chief Judge determines that an extension is necessary. (EDNY extends this order multiple times through December 31, 2022.)

§ **September 29, 2020, Administrative Order No. 2020-24:** Members of the public are permitted to access public civil and criminal hearings conducted by teleconference or videoconference.

§ **November 24, 2020, Administrative Order No. 2020-26 and 2020-26-1:** All civil and criminal and civil jury selections and all in-person bench trials are postponed and

136 Another spike in infections led to more orders: AO/276/2020, dated November 23, 2020, continued the postponement of GJ's but allowed ADAs to apply to impanel a new GJ, and AO/304/202, dated December 11, 2020.
137 *Administrative Orders*, U.S. District Court, Eastern District of N.Y., https://www.nyed.uscourts.gov/administrative-orders.

continued. All new grand juries and replacement grand jurors are suspended. The criminal proceedings enumerated in the CARES Act will continue to be held virtually unless the defendant declines to consent.

§ **February 27, 2021, Administrative Order No. 2021-4:** Selection of grand juries and replacement grand jurors may be held in person. Criminal proceedings enumerated by the CARES Act should be held remotely to the extent possible. Proceedings of non-incarcerated defendants may be held in person.

§ **March 20, 2021, Administrative Order No. 2021-4-1:** Criminal and civil jury selections and trials are no longer postponed. Criminal proceedings enumerated by the CARES Act should be held remotely to the extent possible. (Note: The Court continued to make approximately 21 amendments extending this order, encouraging virtual proceedings while allowing for jury selection to be held in person. The last order on the matter of virtual conferences was made on August 31, 2022 (Administrative Order No. 2022-19), stating that, to the maximum extent possible, criminal hearings, conferences, sentencings and change of plea hearings should be conducted in person through September 30, 2022. However, such proceedings could be held remotely pursuant to the CARES Act.)

§ **December 12, 2022, Administrative Order No. 2022-26**: Order extending the authorization to conduct proceedings remotely through December 31, 2022, in accordance with the provisions of the CARES Act. The court did not renew this order in 2023.

2. SDNY Timeline[138]

§ **March 27, 2020, Standing Order 20MC173:** SDNY converts to a remote arraignment system, whereby the participants, including the presiding magistrate judge, will be present via teleconference.

§ **March 30, 2020, Order No. Ml0-46:**[139] Chief Judge Colleen McMahon enters an order concluding that it was necessary for the judges in SDNY to conduct proceedings remotely in accordance with the CARES Act. The Court extended this order several times until at least through September 20, 2021.

SDNY suspended in-person jury trials in March 2020. They were subsequently resumed in the fall of 2020 but suspended again in December 2020 due to rising COVID-19 rates. SDNY resumed jury trials again in March 2021.

IV. Weighing in On the Pros and Cons of Virtual Proceedings

The widespread adoption of virtual proceedings became a necessity during the COVID-19 pandemic to protect the health and safety of all those involved, but as the world opens back up, their place in the federal court system is not yet set in stone. As noted above, the CARES Act allowed

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138 *The Southern District of New York Response to COVID-19 (Coronavirus)*, U.S. District Court, Southern District of N.Y., https://nysd.uscourts.gov/covid-19-coronavirus.

139 *SDNY – Video Teleconferencing and Telephone Conferencing for Criminal Proceedings on March 30, 2020*, Federal Defenders of N.Y., https://www.federaldefendersny.org/news/sdny-video-teleconferencing-and-telephone-conferencing-for-criminal-proceedings-on-march-30-2020.

videoconferencing for court proceedings, and on March 31, 2020, the Judicial Conference gave temporary authorization for the use of video and teleconferencing for certain criminal proceedings and access via teleconferencing for civil proceedings during the COVID-19 national emergency. These provisions are drafted to expire 30 days after the date on which the national emergency ends, or the date when the Judicial Conference makes a finding that the federal courts are not materially impacted. The national emergency expired May 11, 2023, leaving the fate of videoconferencing in the balance. While it is hard to imagine that videoconferencing will not play any role in our justice system moving forward, the Judicial Conference should consider the pros and cons that have become known while using the technology over the past several years in deciding its role moving forward.

A. Pros of Videoconferencing

Promotion of Health and Safety. The impetus for the widespread adoption of videoconferencing was to protect the health and safety of all involved in the criminal process. As the world adapts to its new normal, we would be remiss if we did not acknowledge that remote hearings allow participants to confer without risking exposure to COVID-19 or other illnesses.

Accessibility (To Those with Internet Near and Far). While federal courtrooms are open to the public with few exceptions, the cost and time associated with traveling to the physical courthouse may serve as a barrier to those hoping to sit in on a portion of a case. However, through the use of video conferencing, anyone that has access to the internet has been afforded access to certain proceedings in federal courthouses. Indeed, Senior U.S. District Judge Nora Barry Fischer (W.D. Pa.) stated at the 2021 Relativity Fest Judicial Panel that in her experience criminal defendants have liked utilizing video, in large part because family and friends may participate by way of video.

Efficiency. Throughout the pendency of a criminal case, there are many brief appearances before the court (i.e., status conferences, updates) that take a significant amount of time and resources for the attorneys and criminal defendant to attend in person. These brief interactions with the court – that are not evidentiary proceedings – were often found to be much more efficient in the context of videoconferencing. Indeed, New York even went as far as to enact legislation, adopted by a number of counties, which allows the court to dispense with the personal appearance of the defendant, except an appearance at a hearing or trial, and conduct an electronic appearance in connection with a criminal action. Lawyers and their clients would also be present in the "online waiting rooms," obviating the time required to bring a defendant in and out of the court room. U.S. District Judge Indira Talwani, of the District of Massachusetts, who conducted two non-jury trials with witnesses from multiple counties stated that, "[t]he convenience of not having to travel here was enormous. Absolutely it was an effective way to deliver justice."[140]

B. Cons of Videoconferencing

Sixth Amendment Concerns – The Confrontation Clause. The Sixth Amendment gives a person accused of a crime the right to confront a witness against him or her in a criminal

140 *As Pandemic Lingers, Courts Lean into Virtual Technology*, U.S. Courts, Feb. 18, 2021, https://www.uscourts.gov/news/2021/02/18/pandemic-lingers-courts-lean-virtual-technology.

action, which notably includes the right to be present at the trial, guaranteed by the Federal Rules of Criminal Procedure Rule 43, and the right to cross-examine the prosecution's witnesses. The New York Constitution echoes this right in Article 1, Section 6. While the Supreme Court has allowed for a limited exception to this rule in *Maryland v. Craig*, finding that the right "may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured,"[141] the right to confront one's accusers is clearly hindered in the context of videoconferencing. New York has also allowed for a limited exception to the right to confront one's accuser in the context of vulnerable child witnesses, who may testify via live closed-circuit television if the court finds it prudent after conducting a hearing on the issue.[142] These limited exceptions stress the importance of this constitutional right. And ensuring that criminal defendants are not deprived of their rights under the Constitution is imperative, making these Sixth Amendment concerns particularly important.

Barriers to Communication with Counsel: The Sixth Amendment gives defendants the right to counsel in federal prosecutions, which refers to the right of a criminal defendant to have an attorney assist the defendant in their defense, even if they cannot afford one. The attorney-client relationship has arguably suffered because of the move to videoconferencing. Any attorney that has tried to communicate with a defendant through virtual conferencing knows that it comes with a series of challenges, as scheduling is an onerous process and conversations are oftentimes cancelled or backlogged. However, perhaps the bigger issue presented is the barrier to communication at the proceedings themselves. While in person, defendants and attorneys often confer in real time to address questions or make clarifications as the proceeding unfolds, but the ability to confer in this way is not available during video conferencing. While you may use "breakout rooms" to confer privately, this does not solve the problem of allowing an attorney to clarify issues to their client in real time.

Technological & Security Issues. The use of technology inevitably comes with its own vulnerabilities. Virtual proceedings are not immune to human error and technological failure. For example, U.S. District Judge Marsha J. Pechman had at least one trial where the proceedings had to be suspended due to a windstorm cutting out jurors' internet connections, and there was one other instance where a telephone outage interrupted audience audio in an election law case before U.S. District Judge Matthew W. Brann.[143] Vulnerabilities associated with virtual proceedings have also been exploited, with reports of "videobombing," where unwanted or nefarious persons have accessed and disrupted virtual court proceedings.[144] In at least one instance, hackers even went so far as to interrupt a hearing with pornographic and obscene language.[145] While the government attempted to address some of these concerns through the advent of platforms that had more security

141 *Maryland v. Craig*, 497 U.S. 836, 850 (1990).
142 CPL § 65.20.
143 *As Pandemic Lingers, Courts Lean into Virtual Technology, supra* note 140.
144 Paul McNally, *How to Safely and Securely Use Zoom for Government Meetings*, Arc 3 Communications, July 14, 2020, https://arc3communications.com/how-to-safely-and-securely-use-zoom-for-government-meetings.
145 Carlie Porterfield, *Twitter Hacking Court Hearing Gets "Zoombombed" with Porn*, Forbes, Aug. 5, 2020, https://www.forbes.com/sites/carlieporterfield/2020/08/05/twitter-hacking-court-hearing-gets-zoombombed-with-porn.

features, such as zoomgov.com and Cisco Webex, cyber incidents in the modern age have proven unavoidable.

Lack of Humanity. Technology provided us with a much-needed lifeline to communicate throughout the COVID-19 pandemic, but as the world finds its new normal, most would agree that there are often times no substitute for in-person communication. The need for humanity throughout the pendency of a criminal case is apparent given the deeply sensitive and very personal nature of what is at stake in criminal proceedings.

However, the use of technology puts up barriers to human connection and may disadvantage a criminal defendants' ability to connect with a judge or jury. In fact, one Cook County study by Northwestern University Law School professors found "a sharp increase in the average amount of bail set in cases subject to the [closed circuit television], but no change in cases that continued to have live hearings."[146] This is particularly concerning in the context of a University of Chicago Law School's Federal Criminal Justice Clinic report on pretrial detentions, which found that "in 1983, less than 24% of arrestees were jailed pretrial," and "by 2019, nearly 75% of them were," which resulted from "a poorly-written, war-on-drugs-era statute known as the Bail Reform Act of 1984, an over reliance on prosecutorial discretion, and risk-averse magistrate judges and federal defenders."[147] We can hypothesize from these results that the impersonal nature of video hearings may further exacerbate a judge's risk-averse nature given that video proceedings negatively impact a judge's ability to connect with and assess the defendant before him or her. The inability to connect is further aggravated by tech glitches and issues, which frustrate the cadence of a hearing and may sometimes bar it from occurring all together.

Equity Concerns. While we discussed accessibility afforded using virtual proceedings as a feature of the change, not a bug, the use of virtual proceedings has also proven to serve as a bar to accessibility for those that do not have access to the internet or the necessary technology to access the virtual format, raising serious equity concerns. There also may be limited access to non-English speakers, which is of particular concern in New York where more than two million New Yorkers are not fluent in English. While the courts are mandated to provide adequate interpretation for litigants, securing good translators and conducting real time translation in a virtual setting poses many challenges.

C. Recommendations

1. Arraignments should remain in person.

Rationale: The only known long-term study, which spanned a total of 16 years, shows that remote bail decisions had a significant and negative impact on bail decisions. A 2010 Cook County Study by Northwestern University Law School professors found that remote arraignments involving

146 Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 Journal of Criminal Law and Criminology 3, Summer 2010, https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7365&context=jclc.

147 Tami Abdollah, *Study: Federal magistrates, prosecutors misunderstand bail law, jailing people who should go free*, USA Today, Dec. 7, 2022, https://www.usatoday.com/story/news/politics/2022/12/07/federal-judges-misapply-bail-law-illegally-jail-arrestees-study-says/10798949002.

bail hearings or decisions resulted in "a sharp increase in the average amount of bail set in cases subject to the [closed circuit television], but no change in cases that continued to have live hearings." This report consisted of a total of sixteen years of data: comparing data from eight years prior to the use of closed-circuit television and eight years after.[148]

Additionally, more recently, in December 2022, the Data Collaborative for Justice issued a report, *Two Years In: 2020 Bail Reforms in Action in New York State*, and found that "bail-setting significantly increased in the second half of 2020—during a period of time when virtual arraignments were in place." The authors, however, note that there may not be a causal connection due to the pandemic.[149]

Finally, as discussed above, the arraignment is oftentimes the first meeting between an attorney and the accused. An attorney should be able to better see the person as a whole, including signs of medical or emotional distress. These signs are often lost during a video proceeding. Additionally, due to the resource inequities, attorneys oftentimes need to utilize physical papers, notices or signed HIPAA forms.

2. Grand jury appearances should remain in person.

Rationale: Any proceeding that requires credibility determinations should occur in person, except in narrow, already established cases, e.g., the vulnerability of young children and/or hospitalized witnesses. Many fact finders rely on eye contact, body language and non-verbal cues when making credibility determinations. With video testimony, these are all missing or, at best, difficult to assess. When an accused testifies, again, concerns about the dehumanizing aspects of virtual testimony arise.

3. Preliminary hearings should be conducted in person unless another emergency situation arises. Preliminary hearings, at a minimum, provide the additional safeguard of requiring a judge to determine that probable cause exists when the length of incarceration extends beyond the 180.80 time.

Rationale: Again, the same concerns regarding the ability to assess credibility arise.

4. Remote guilty pleas should remain limited to misdemeanors or violations/infractions that do not entail jail sentences. New York's CPL § 182.20 should be amended to include every county in New York State.

Rationale: When the governor suspended the limitations of CPL §§ 182.20 and 182.30, every county in the state developed the technology to conduct virtual appearances. However, the impact of virtual guilty pleas to felonies is unknown. There is not enough data to show how many people pled guilty to felonies by virtual appearance. It is also too early to ascertain whether any ineffective assistance of counsel claims may arise as a result of the wholesale suspension of the CPL's article 182. While the existing statute requires consent of both parties, courts should be aware that obtaining consent can be extracted through coercive methods, e.g., court officers refusing to call a case that is in

148 Sheila Seidman Diamond, et al., *supra* note 146.
149 https://datacollaborativeforjustice.org/wp-content/uploads/2022/12/Two_Years_In_Bail_Reforms_New_York.pdf.

person just because the litigant refused to consent. Courts must also be aware that many litigants represented by assigned counsel or public defender offices do not have the resources to purchase equipment or software to appear remotely. Many litigants may not have the physical space to appear remotely where privacy is ensured. Spontaneous private conversations – even simply whispering with one's attorney – are more difficult.

5. Limit the number of remote appearances even if they are for status conferences only.

Rationale: Overreliance on virtual appearances dehumanizes the accused such that plea bargaining may be affected. Such appearances may limit the attorney's ability to make ad hoc legal arguments that often occur when in person appearances. Finally, virtual appearances have the potential to erode the attorney/client relationship implicating the right to counsel. Attorneys and clients often lose the ability to adequately discuss or even have spontaneous private discussions; the ability to whisper to each other is eliminated. Such shortcomings increase the risk of ineffective assistance of counsel claims.

V. Conclusion

The adoption of videoconferencing allowed for our criminal justice system to continue on during a tumultuous period, and we would be hard pressed to say that it is not here to stay in any capacity as we move in to our new normal. In the context of routine and quick hearings that do not constitute evidentiary hearings, the benefits of video proceedings likely outweigh the risks for defendants as they are efficient and cost effective. Thus, the judiciary should continue to utilize this tool when all parties agree to its use and the interaction with the court at issue will have a relatively low bearing on the defendant's situation or the outcome of the case. To continue to enhance the success of these virtual proceedings, New York should continue to promulgate clear and consistent guidance on how these proceedings should be conducted. That said, the risks that videoconferencing may pose to a criminal defendant's due process rights, especially in the context of grand jury proceedings, arraignments and jury trials, suggest that certain criminal proceedings are best carried out in the courthouse, especially given our limited research to date on the impact of virtual proceedings over the past several years.

VEHICLE AND TRAFFIC LAW

In addition to our recommendations on justice courts, sentencing and technology, the following recommendations are made for modifications to the Vehicle and Traffic Law (VTL) to correct legal and social inequities. The proposed amendments are in APPENDIX A.

I. Changes to the requirements to enter the Impaired Driver Program.

As currently written, the VTL only permits a person ***who is found guilty*** of an alcohol or drug related driving offense to participate in New York's impaired driver program (IDP). IDP was created for the purpose of providing alcohol and/or drug rehabilitation. It is axiomatic that the state should supply alcohol and/or drug rehabilitation services to any individual charged with an alcohol- or drug-related driving offense and should not treat the innocent worse than the guilty.

A conditional license is a limited-use license that permits an individual whose license or privilege to operate a motor vehicle has been suspended or revoked to drive in limited situations. It is critical in that it allows travel to and from work, school, necessary medical treatment and other vital activities.

To be eligible for a conditional license, as the law is currently written, a person must have been found guilty of an alcohol- or drug-related driving offense. If an individual has been charged with an alcohol-related offense but not found guilty, that person is not eligible for IID and accordingly cannot obtain a conditional license. It is quite common for a person's license or privilege to operate a vehicle to be suspended or revoked for a refusal to submit to a chemical test but not convicted of any offense. In that situation the individual is not currently permitted to take the IDP program and, in turn, is not able to secure a conditional license in the ways currently allowed for those found guilty of an offense. This creates an injustice and has no rational basis in that the innocent are treated worse than the guilty.

The solution is a simple one: the VTL should be amended to allow individuals whose license or privilege to operate a vehicle was suspended or revoked for a refusal to submit to a chemical test to be eligible for IDP. The suggested changes are found in APPENDIX A.

II. Changes to ignition interlock mandates when a person has no access to vehicle.

The law currently requires those found guilty of certain alcohol-related driving offenses to install an ignition interlock device into any car they own or operate. This strict requirement does not allow for the court to relieve an individual from such requirements when that person has no access to or ability to drive a vehicle owned by them. For example, a person whose car is totaled in an accident but not yet surrendered to an insurance company or whose car is being held by law enforcement for evidence and/or forfeiture must still install an IID. The court should have the discretion not to require an IID when the court determines it would be in the interests of justice to do so.

III. Changes to VTL § 1192(1) with respect to cannabis.

The law allows alcohol-related driving offenses to be resolved with a non-criminal infraction rather than a conviction for a misdemeanor – "impaired" rather than "intoxicated." So, between the

extremes of denying all guilt and the other side insisting upon a criminal record, VTL § 1192(1) is a middle ground that allows parties to agree and for many cases to get resolved efficiently with a plea. However, VTL § 1192(1) suffers a shortcoming that renders it anachronistic. As presently written, VTL § 1192(1) only pertains to people who drive while impaired "by the consumption of alcohol." For those charged with being impaired by marijuana, a legal substance removed from Public Health Law § 3306, the courts throughout the state permit the parties to engage in the legal fiction of allowing defendants who are placed under oath to admit to driving while their ability to drive is impaired by alcohol, even when such conduct did not occur and is not charged. This is illogical and unseemly.

The solution to this problem is simple. The Legislature should amend the Vehicle and Traffic Law to add two words to the end of Section 1192(1): "or cannabis and concentrated cannabis." This will streamline the justice system by eliminating cases that all parties agree do not warrant criminal records. Punishing marijuana intoxication worse than alcohol intoxication lacks any bearing in the science. Research and studies done by the National Highway Traffic Safety Administration has revealed that, unlike alcohol, the presence of THC in an individual's bloodstream does not equate to impairment. This amendment is also compelled by social justice. Despite an equal rate of marijuana use, Black and Hispanic people get prosecuted in marijuana-related cases at much higher rates than White people. They are also more likely to be pulled over in a traffic stop in the first place. So, a regime that unduly elevates the minimum penalties for driving while impaired by marijuana builds an injustice into our state's criminal justice system shouldered disproportionately by racial minorities.

CONCLUSION

The New York State Bar Association Task Force on the Modernization of Criminal Practice has recommended a number of measures in this Report regarding discovery, sentencing, the current justice courts system and the Vehicle and Traffic Law. Most of the recommendations require our state leaders to support legislation, provide adequate funding and to work with the court system and all stakeholders, including lawyers and bar associations. The Task Force believes that these recommendations, if implemented, will contribute to making public policy and law that will improve safety, fairness, access to justice and efficiency in the administration of criminal justice in New York.

APPENDIX A

VTL § 1194 – Arrest and Testing

2. Chemical tests.

(b) Report of refusal.

(1) If: (A) such person having been placed under arrest; or (B) after a breath test indicates the presence of alcohol in the person's system; or (C) with regard to a person under the age of twenty-one, there are reasonable grounds to believe that such person has been operating a motor vehicle after having consumed alcohol in violation of section eleven hundred ninety-two-a of this article; and having thereafter been requested to submit to such chemical test and having been informed that the person's license or permit to drive and any non-resident operating privilege shall be immediately suspended and subsequently revoked, or, for operators under the age of twenty-one for whom there are reasonable grounds to believe that such operator has been operating a motor vehicle after having consumed alcohol in violation of section eleven hundred ninety-two-a of this article, shall be revoked for refusal to submit to such chemical test or any portion thereof, whether or not the person is found guilty of the charge for which such person is arrested or detained, refuses to submit to such chemical test or any portion thereof, unless a court order has been granted pursuant to subdivision three of this section, the test shall not be given and a written report of such refusal shall be immediately made by the police officer before whom such refusal was made. Such report may be verified by having the report sworn to, or by affixing to such report a form notice that false statements made therein are punishable as a class A misdemeanor pursuant to section 210.45 of the penal law and such form notice together with the subscription of the deponent shall constitute a verification of the report.

(2) The report of the police officer shall set forth reasonable grounds to believe such arrested person or such detained person under the age of twenty-one had been driving in violation of any subdivision of section eleven hundred ninety-two or eleven hundred ninety-two-a of this article, that said person had refused to submit to such chemical test, and that no chemical test was administered pursuant to the requirements of subdivision three of this section. The report shall be presented to the court upon arraignment of an arrested person, provided, however, in the case of a person under the age of twenty-one, for whom a test was authorized pursuant to the provisions of subparagraph two or three of paragraph (a) of this subdivision, and who has not been placed under arrest for a violation of any of the provisions of section eleven hundred ninety-two of this article, such report shall be forwarded to the commissioner within forty-eight hours in a manner to be prescribed by the commissioner, and all subsequent proceedings with regard to refusal to submit to such chemical test by such person shall be as set forth in subdivision three of section eleven hundred ninety-four-a of this article.

(3) For persons placed under arrest for a violation of any subdivision of section eleven hundred ninety-two of this article, the license or permit to drive and any non-resident operating privilege shall, upon the basis of such written report, be temporarily suspended by the court

without notice pending the determination of a hearing as provided in paragraph (c) of this subdivision. Copies of such report must be transmitted by the court to the commissioner and such transmittal may not be waived even with the consent of all the parties. Such report shall be forwarded to the commissioner within forty-eight hours of such arraignment.

(4) The court or the police officer, in the case of a person under the age of twenty-one alleged to be driving after having consumed alcohol, shall provide such person with a scheduled hearing date, a waiver form, and such other information as may be required by the commissioner. If a hearing, as provided for in paragraph (c) of this subdivision, or subdivision three of section eleven hundred ninety-four-a of this article, is waived by such person, the commissioner shall immediately revoke the license, permit, or non-resident operating privilege, as of the date of receipt of such waiver in accordance with the provisions of paragraph (d) of this subdivision.

(c) Hearings. Any person whose license or permit to drive or any non-resident driving privilege has been suspended pursuant to paragraph (b) of this subdivision is entitled to a hearing in accordance with a hearing schedule to be promulgated by the commissioner. If the department fails to provide for such hearing fifteen days after the date of the arraignment of the arrested person, the license, permit to drive or non-resident operating privilege of such person shall be reinstated pending a hearing pursuant to this section. The hearing shall be limited to the following issues: (1) did the police officer have reasonable grounds to believe that such person had been driving in violation of any subdivision of section eleven hundred ninety-two of this article; (2) did the police officer make a lawful arrest of such person; (3) was such person given sufficient warning, in clear or unequivocal language, prior to such refusal that such refusal to submit to such chemical test or any portion thereof, would result in the immediate suspension and subsequent revocation of such person's license or operating privilege whether or not such person is found guilty of the charge for which the arrest was made; and (4) did such person refuse to submit to such chemical test or any portion thereof. If, after such a hearing, the hearing officer, acting on behalf of the commissioner, finds any one of the said issues in the negative, the hearing officer shall immediately terminate any suspension arising from such refusal. If, after such hearing, the hearing officer, acting on behalf of the commissioner finds all of the issues in the affirmative, such officer shall immediately revoke the license or permit to drive or any non-resident operating privilege in accordance with the provisions of paragraph (d) of this subdivision. A person who has had a license or permit to drive or non-resident operating privilege suspended or revoked pursuant to this subdivision may appeal the findings of the hearing officer in accordance with the provisions of article three-A of this chapter. Any person may waive the right to a hearing under this section. Failure by such person to appear for the scheduled hearing shall constitute a waiver of such hearing, provided, however, that such person may petition the commissioner for a new hearing which shall be held as soon as practicable.

(d) Sanctions.

(1) Revocations.

a. Any license which has been revoked pursuant to paragraph (c) of this subdivision shall not be restored for at least one year after such revocation, nor thereafter, except in the discretion of the commissioner. However, no such license shall be restored for at least eighteen months after such revocation, nor thereafter except in the discretion of the commissioner, in any case where the person has had a prior revocation resulting from refusal to submit to a chemical test, or has been convicted of or found to be in violation of any subdivision of section eleven hundred ninety-two or section eleven hundred ninety-two-a of this article not arising out of the same incident, within the five years immediately preceding the date of such revocation; provided, however, a prior finding that a person under the age of twenty-one has refused to submit to a chemical test pursuant to subdivision three of section eleven hundred ninety-four-a of this article shall have the same effect as a prior finding of a refusal pursuant to this subdivision solely for the purpose of determining the length of any license suspension or revocation required to be imposed under any provision of this article, provided that the subsequent offense or refusal is committed or occurred prior to the expiration of the retention period for such prior refusal as set forth in paragraph (k) of subdivision one of section two hundred one of this chapter.

b. Any license which has been revoked pursuant to paragraph (c) of this subdivision or pursuant to subdivision three of section eleven hundred ninety-four-a of this article, where the holder was under the age of twenty-one years at the time of such refusal, shall not be restored for at least one year, nor thereafter, except in the discretion of the commissioner. Where such person under the age of twenty-one years has a prior finding, conviction or youthful offender adjudication resulting from a violation of section eleven hundred ninety-two or section eleven hundred ninety-two-a of this article, not arising from the same incident, such license shall not be restored for at least one year or until such person reaches the age of twenty-one years, whichever is the greater period of time, nor thereafter, except in the discretion of the commissioner.

c. Any commercial driver's license which has been revoked pursuant to paragraph (c) of this subdivision based upon a finding of refusal to submit to a chemical test, where such finding occurs within or outside of this state, shall not be restored for at least eighteen months after such revocation, nor thereafter, except in the discretion of the commissioner, but shall not be restored for at least three years after such revocation, nor thereafter, except in the discretion of the commissioner, if the holder of such license was operating a commercial motor vehicle transporting hazardous materials at the time of such refusal. However, such person shall be permanently disqualified from operating a commercial motor vehicle in any case where the holder has a prior finding of refusal to submit to a chemical test pursuant to this section or has a prior conviction of any of the following offenses: any violation of section eleven hundred ninety-two of this article; any violation of subdivision one or two of section six hundred of this chapter; or has a prior conviction of any felony involving the use of a motor vehicle pursuant to paragraph (a) of subdivision one of section five hundred

ten-a of this chapter. Provided that the commissioner may waive such permanent revocation after a period of ten years has expired from such revocation provided:

(i) that during such ten year period such person has not been found to have refused a chemical test pursuant to this section and has not been convicted of any one of the following offenses: any violation of section eleven hundred ninety-two of this article; refusal to submit to a chemical test pursuant to this section; any violation of subdivision one or two of section six hundred of this chapter; or has a prior conviction of any felony involving the use of a motor vehicle pursuant to paragraph (a) of subdivision one of section five hundred ten-a of this chapter;

(ii) that such person provides acceptable documentation to the commissioner that such person is not in need of alcohol or drug treatment or has satisfactorily completed a prescribed course of such treatment; and

(iii) after such documentation is accepted, that such person is granted a certificate of relief from disabilities or a certificate of good conduct pursuant to article twenty-three of the correction law by the court in which such person was last penalized.

d. Upon a third finding of refusal and/or conviction of any of the offenses which require a permanent commercial driver's license revocation, such permanent revocation may not be waived by the commissioner under any circumstances.

(2) Civil penalties. Except as otherwise provided, any person whose license, permit to drive, or any non-resident operating privilege is revoked pursuant to the provisions of this section shall also be liable for a civil penalty in the amount of five hundred dollars except that if such revocation is a second or subsequent revocation pursuant to this section issued within a five year period, or such person has been convicted of a violation of any subdivision of section eleven hundred ninety-two of this article within the past five years not arising out of the same incident, the civil penalty shall be in the amount of seven hundred fifty dollars. Any person whose license is revoked pursuant to the provisions of this section based upon a finding of refusal to submit to a chemical test while operating a commercial motor vehicle shall also be liable for a civil penalty of five hundred fifty dollars except that if such person has previously been found to have refused a chemical test pursuant to this section while operating a commercial motor vehicle or has a prior conviction of any of the following offenses while operating a commercial motor vehicle: any violation of section eleven hundred ninety-two of this article; any violation of subdivision two of section six hundred of this chapter; or has a prior conviction of any felony involving the use of a commercial motor vehicle pursuant to paragraph (a) of subdivision one of section five hundred ten-a of this chapter, then the civil penalty shall be seven hundred fifty dollars. No new driver's license or permit shall be issued, or non-resident operating privilege restored to such person unless such penalty has been paid. All penalties collected by the department

pursuant to the provisions of this section shall be the property of the state and shall be paid into the general fund of the state treasury.

(3) Effect of rehabilitation program. No period of revocation arising out of this section may be set aside by the commissioner for the reason that such person was a participant in the alcohol and drug rehabilitation program set forth in section eleven hundred ninety-six of this article.

(e) Regulations. The commissioner shall promulgate such rules and regulations as may be necessary to effectuate the provisions of subdivisions one and two of this section.

(f) Evidence. Evidence of a refusal to submit to such chemical test or any portion thereof shall be admissible in any trial, proceeding or hearing based upon a violation of the provisions of section eleven hundred ninety-two of this article but only upon a showing that the person was given sufficient warning, in clear and unequivocal language, of the effect of such refusal and that the person persisted in the refusal.

VTL § 1196 – Alcohol and Drug Rehabilitation Programming

4. Eligibility. Participation in the program shall be limited to those persons convicted of alcohol or drug-related traffic offenses, or persons charged with alcohol or drug-related traffic offenses whose cases resolved, by dismissal, trial, or plea bargain, without an alcohol or drug-related traffic conviction, or persons who have been adjudicated youthful offenders for alcohol or drug-related traffic offenses, or persons found to have been operating a motor vehicle after having consumed alcohol in violation of section eleven hundred ninety-two-a of this article, who choose to participate and who satisfy the criteria and meet the requirements for participation as established by this section and the regulations promulgated thereunder; provided, however, in the exercise of discretion, the judge imposing sentence may prohibit the defendant from enrolling in such program. The commissioner or deputy may exercise discretion to reject any person from participation referred to such program and nothing herein contained shall be construed as creating a right to be included in any course or program established under this section. In addition, no person shall be permitted to take part in such program if, during the five years immediately preceding commission of an alcohol or drug-related traffic offense or a finding of a violation of section eleven hundred ninety-two-a of this article, such person has participated in a program established pursuant to this article or been convicted of a violation of any subdivision of section eleven hundred ninety-two of this article other than a violation committed prior to November first, nineteen hundred eighty-eight, for which such person did not participate in such program. In the exercise of discretion, the commissioner or a deputy shall have the right to expel any participant from the program who fails to satisfy the requirements for participation in such program or who fails to satisfactorily participate in or attend any aspect of such program. Notwithstanding any contrary provisions of this chapter, satisfactory participation in and completion of a course in such program shall result in the termination of any sentence of imprisonment that may have been imposed by reason of a conviction therefor; provided, however, that nothing contained in this section shall delay the commencement of such sentence.

5. Effect of completion. Except as provided in subparagraph nine of paragraph (b) of subdivision two of section eleven hundred ninety-three or in subparagraph three of paragraph (d) of subdivision two

of section eleven hundred ninety-four of this article, upon successful completion of a course in such program as certified by its administrator, a participant may apply to the commissioner on a form provided for that purpose, for the termination of the suspension or revocation order issued as a result of the participant's conviction which caused the participation in such course. In the exercise of discretion, upon receipt of such application, and upon payment of any civil penalties for which the applicant may be liable, the commissioner is authorized to terminate such order or orders and return the participant's license or reinstate the privilege of operating a motor vehicle in this state. However, the commissioner shall not issue any new license nor restore any license if said issuance of restoral is prohibited by subdivision two of section eleven hundred ninety-three of this article.

15 NYCRR 134.1 – Introduction

(a) Intent. Article 21 of the Vehicle and Traffic Law as added by chapter 291 of the Laws of 1975, and recodified in article 31 by chapter 47 of the Laws of 1988, provides for the establishment of an alcohol and drug rehabilitation program for the purpose of providing rehabilitation to drivers convicted of alcohol or drug-related driving offenses, or persons charged with alcohol or drug-related traffic offenses whose cases resolved, by dismissal, trial, or plea bargain, without an alcohol or drug-related traffic conviction, or persons who have been adjudicated youthful offenders for alcohol or drug-related traffic offenses or persons found to have been operating a motor vehicle after having consumed alcohol in violation of section 1192-a of the Vehicle and Traffic Law to alleviate the threat to the lives and well-being of the citizens of this State posed by alcohol and drug-related driving. Although this article provides for the issuance of conditional licenses to persons enrolled in such a program, this provision is incidental to the primary purpose of the legislation, highway safety. This Part is intended to implement the legislative intent by establishing criteria for eligibility of persons for entrance into such programs, issuance and use of conditional licenses, procedures to be followed by the courts, the Department of Motor Vehicles and motorists in conjunction with such programs, as well as the curricula to be used in such programs and the qualifications of persons who will be conducting such programs.

(b) Definitions.

(1) Program. As hereinafter used in this Part, the terms program, alcohol and drug rehabilitation program, rehabilitation program, or course shall mean a specific curriculum which must include training in a classroom setting, and may include instruction, discussion, testing, interviewing, counseling, referral for extended alcohol or drug rehabilitative activities and such rehabilitative activities, all of which have been approved by the commissioner and are administered by program administrators designated as such by the commissioner. Any extended alcohol or drug rehabilitative activities which occur after eight months following enrollment in the program must be recommended licensed providers of such services.

(2) Full period of suspension or revocation effectively served. A person will be deemed to have effectively served the full period of a suspension if he has received a suspension order, has surrendered his driver's license in response to such suspension order, has not been issued an unconditional license and has not operated a motor vehicle for the period of time for which his license has been suspended. A person will be deemed to have effectively served the full period of a revocation if he has received a

revocation order, has surrendered his driver's license in response to such revocation order, has not been issued an unconditional license and has not operated a motor vehicle for a period of at least six months.

15 NYCRR 134.2 – Persons Eligible for Program

Any person who is convicted of a violation of any subdivision of section 1192 of the Vehicle and Traffic Law, <u>or is charged with an alcohol or drug-related traffic offense whose case resolved, by dismissal, trial, or plea bargain, without an alcohol or drug-related traffic conviction,</u> or is found to have been operating a motor vehicle after having consumed alcohol in violation of section 1192-a of this article, or of an alcohol or drug-related traffic offense in another state, shall be eligible for enrollment in an alcohol and drug rehabilitation program unless: such person has participated in a program established pursuant to article 31 of the Vehicle and Traffic Law within the five years immediately preceding the date of commission of the alcohol or drug-related offense or such person has been convicted of a violation of any subdivision of section 1192 of such law during the five years immediately preceding commission of an alcohol or drug-related offense; with respect to persons convicted of a violation of section 1192 of the Vehicle and Traffic Law, is prohibited from enrolling in a program by the judge who imposes sentence upon the conviction; or the commissioner is prohibited from issuing such new license to a person because of two convictions of a violation of section 1192 of the Vehicle and Traffic Law where physical injury, as defined in section 10 of the Penal Law, has resulted in both instances. Notwithstanding the provisions of this section, a person shall be eligible for enrollment in the alcohol and drug rehabilitation program if such person is sentenced pursuant to the plea-bargaining provisions set forth in Vehicle and Traffic Law, section 1192(10)(a)(ii) and (10)(d).

15 NYCRR 134.4 – Section 134.4. Initial procedures by the Department of Motor Vehicles upon receipt of a certificate of conviction for a violation of section 1192 of the Vehicle and Traffic Law

(a) Certificate of conviction indicates prohibition from enrollment by the judge. Upon receipt of a certificate of conviction for a violation of section 1192 of the Vehicle and Traffic Law when such certificate or an accompanying letter indicates that the convicting judge has prohibited the defendant from entering a rehabilitation program, the department will issue a confirming revocation or suspension order when a revocation or suspension has been imposed by the court, or, will issue an appropriate suspension or revocation order when such action has not been taken by the court. No further action with respect to rehabilitation programs will be taken by the department.

(b) Certificate of conviction does not indicate prohibition from enrollment by the judge. Upon receipt of a certificate of conviction for a violation of section 1192 of the Vehicle and Traffic Law when such certificate or an accompanying letter does not indicate a prohibition from enrollment by the judge, the department will make a review of the defendant's driving record.

> (1) Unless such review indicates that the defendant is ineligible to enroll in a rehabilitation program based upon criteria set forth in section 134.2 of this Part, the department will issue the appropriate suspension or revocation order against the defendant's driver's license, if the court has not already done so and will notify the defendant that he is eligible for enrollment in a rehabilitation program. Such notification will include instructions for enrollment in a rehabilitation program. The suspension or revocation order will indicate the effective date of the order. Unless such review indicates that the defendant is ineligible to enroll in a

rehabilitation program in accordance with the provisions set forth in section 134.2 of this Part, the department will also apply the criteria established in section 134.7 of this Part to determine whether the defendant is eligible for the issuance of a conditional license. Unless such review indicates that the defendant is ineligible for the issuance of a conditional license, the department will also notify the defendant that he may be eligible for such license. Such notification will include instructions for making application for the conditional license.

(2) If a review of the defendant's driving record indicates that the defendant is ineligible for enrollment in a rehabilitation program as set forth in section 134.2 of this Part, only the appropriate revocation or suspension order will be issued to the defendant. No further action with respect to rehabilitation programs will be taken by the department.

(c) Certificate of disposition. Upon receipt of a certificate of disposition for a charge of section 1192 of the Vehicle and Traffic Law, where the disposition indicates that the charge resolved, by dismissal, trial, or plea bargain, without an alcohol or drug-related traffic conviction, the department will make a review of the defendant's driving record in a manner consistent with subdivision (b)(1) of this paragraph.

15 NYCRR 134.7 – Criteria for Issuance of a Conditional License

(a) The issuance of a conditional license shall be denied to any person who enrolls in a program if a review of such person's driving record, or additional information secured by the department, indicates that any of the following conditions apply.

(1) The person has been convicted of homicide, assault, criminal negligence, or criminally negligent homicide arising out of operation of a motor vehicle.

(2) The conviction, adjudication or finding upon which eligibility for a rehabilitation program is based involved a fatal accident.

(3) The person does not have a currently valid New York State driver's license. This paragraph shall not apply to a person whose New York State driver's license has expired, but is still renewable, nor to a person who would have a currently valid New York State driver's license except for the revocation or suspension which resulted from the charges, conviction, adjudication or finding upon which his eligibility for the rehabilitation program is based, nor to a person who would have a currently valid New York State driver's license except for a suspension or revocation which resulted from a chemical test refusal arising out of the same incident as such conviction, adjudication or finding of a violation of section 1192-a of the Vehicle and Traffic Law section.

(4) The person has been convicted of an offense arising from the same event which resulted in the current alcohol-related conviction, adjudication or finding which conviction would, aside from the alcohol-related conviction, adjudication or finding result in mandatory revocation or suspension of the person's driver's license.

(5) The person has had two or more revocations and/or suspensions of his driver's license, other than the revocation or suspension upon which his eligibility for the rehabilitation program is based within the last three years. This subdivision shall not apply to suspensions which have been terminated by

performance of an act by the person, nor to a suspension or revocation resulting from a chemical test refusal, if the person had been convicted of a violation of section 1192 of the Vehicle and Traffic Law or found to be in violation of section 1192-a of such law arising out of the same incident.

(6) The person has been convicted more than once of reckless driving within the last three years.

(7) The person has had a series of convictions, incidents and/or accidents or has a medical or mental condition, which in the judgment of the commissioner or his designated agent tends to establish that the person would be an unusual and immediate risk upon the highway.

(8) The person has been penalized under section 1193(1)(d) of the Vehicle and Traffic Law for any violation of subdivision 2, 2-a, 3, 4, or 4-a of section 1192 of such law.

(9) The person is reentering the rehabilitation program, as provided in section 134.10(c) of this Part, for a second or subsequent time.

(10) [Repealed]

(11)

(i) The person has had three or more alcohol- or drug-related driving convictions or incidents within the last 25 years. For the purposes of this paragraph, a conviction for a violation of section 1192 of the Vehicle and Traffic Law, and/or a finding of a violation of section 1192-a of such law and/or a finding of refusal to submit to a chemical test under section 1194 of such law arising out of the same incident shall only be counted as one conviction or incident. The date of the violation or incident resulting in a conviction, or a finding as described herein shall be used to determine whether three or more convictions or incidents occurred within a 25-year period.

(ii) For the purposes of this paragraph, when determining eligibility for a conditional license issued pending prosecution pursuant to section 134.18 of this Part, the term “incident” shall include the arrest that resulted in the issuance of the suspension pending prosecution.

(12) The person was the holder of a limited DJ or limited MJ license at the time of the violation which resulted in the suspension or revocation.

(13) The person, during the five years preceding the commission of the alcohol or drug-related offense or a finding of a violation of section 1192-a of the Vehicle and Traffic Law, participated in the alcohol and drug rehabilitation program or has been convicted of a violation of any subdivision of section 1192 of such law.

(b) If after a person is enrolled in a rehabilitation program and has been issued a conditional license, but, prior to the reissuance of an unconditional license, information is received by the department which indicates that such person was not eligible for a conditional license his conditional license will be revoked.

15 NYCRR 134.9 – Conditional License

A conditional license will be issued only by the department which will establish the conditions applicable to each individual license based upon information submitted by the applicant.

(a) Form of conditional license. The conditional license will be a two-part form. One part shall be computer generated and will bear a notation indicating that it is a conditional license. The other part will be manually generated and will contain the specific conditions applicable to that particular conditional license. The holder of a conditional license, when required to display such license, must display both parts of such license.

(b) Establishment of conditions. Each conditional license shall contain the condition that such license shall be subject to revocation for operation outside of the limitations appearing on such license. Each conditional license will contain the limitations or use of such license as prescribed by the department, and as accepted by the holder. Such conditions shall be limited to operation: to and from the holder's place of employment; during the course of employment, when required; to and from a class or an activity which is an authorized part of the rehabilitation program and at which the holder's attendance is required; enroute to and from a class or course at an accredited school or approved institute of vocational or technical training; enroute to and from a medical examination or treatment as part of a necessary medical treatment for such participant or member of his household, as evidenced by a written statement to that effect from a licensed medical practitioner; during a three-hour consecutive daytime period as specified by the department on a day during which the holder is not engaged in his usual employment or vocation; to and from court-ordered probation activities; to and from a motor vehicle office for the transaction of business relating to such license or program; or enroute to and from a place, including a school, at which a child or children of the holder are cared for on a regular basis and which is necessary for the holder to maintain such holder's employment or enrollment at an accredited school, college or university or at a State-approved institution of vocational or technical training;

(c) A conditional license issued to a person charged with alcohol or drug-related traffic offenses whose case resolved, by dismissal, trial, or plea bargain, without an alcohol or drug-related traffic conviction, or to a person convicted of, or adjudicated a youthful offender for, a violation of any subdivision of section 1192 of the Vehicle and Traffic Law or found to have violated section 1192-a of such law shall not be valid for the operation of commercial motor vehicles as defined in section 501-a of such law or taxicabs as defined in section 148-a of such law.

(d) Revocation of conditional license.

(1) A conditional license which has been issued shall be revoked upon: the holder's conviction of any traffic violation, other than parking, stopping, standing, equipment, inspection or other nonmoving violations where such violation occurred during the period of validity of the conditional license; or for the holder's failure to attend any portion or portions of the rehabilitation program in accordance with attendance rules established for the program. A revocation for any of the above reasons shall be issued without a hearing based upon receipt of a certificate of conviction, or in the case of failure to attend any portion or portions of the rehabilitation program upon certification of the person administering such program. In addition, the commissioner may revoke a conditional license after a hearing, based upon a finding that the holder has not satisfactorily participated in the rehabilitation program, or that the holder is not attempting in good faith to accept rehabilitation, or upon a complaint that the holder is operating or has operated a motor vehicle in violation of the conditions imposed on his conditional license. The commissioner may also revoke a conditional license without a hearing upon receipt of a

certificate of conviction which indicates that the applicant has driven in violation of the conditions of such license.

(2) Persons under 21 years of age. The provisions of this subdivision shall apply to any person under the age of 21 who enters a rehabilitation program and is issued a conditional license as a result of an alcohol or drug-related traffic charge which resolved, by dismissal, trial, or plea bargain, without an alcohol or drug-related traffic conviction, or a conviction for a violation of any subdivision of section 1192 of the Vehicle and Traffic Law, committed when such person was under the age of 21. Notwithstanding any other provisions of this Part, if any such person's conditional license is revoked and such person has completed a rehabilitation program as provided for in section 134.10 of this Part, time served shall be credited toward the remaining portion of the revocation period, calculated from the effective date of the order of revocation which resulted in the issuance of the conditional license, to the date of the violation which resulted in the revocation of the conditional license.

(e) Extra-territorial effect of conditional license. Whether a conditional license will be honored by other states will be dependent upon the laws of each such other state. This state will honor a similar type of license issued by another state to a resident of the issuing state to the extent of the conditions imposed. The holder of a conditional license issued pursuant to article 31 should check with the appropriate motor vehicle authorities of any other state in such other state.

(f) Period of validity of conditional license. Unless otherwise revoked by the commissioner, a conditional license will be valid from the date of its issuance until the expiration date contained thereon or until the holder's unconditional license is returned to him, whichever occurs first.

15 NYCRR 134.10 – Completion of a Rehabilitation Program

(a) Requirements for satisfactory completion of a rehabilitation program. In order for a person to satisfactorily complete a rehabilitation program, he must have paid all necessary fees and have attended and actively participated in all segments of such rehabilitation program as required by the department, including completion of extended participation upon the recommendation of the appropriate officials.

(b) Results of satisfactory completion of a rehabilitation program. Upon satisfactory completion of a program, any unexpired suspension or revocation which was issued as a result of the conviction for which the person was eligible for enrollment in the program may be terminated by the commissioner unless the termination is prohibited under section 1193 of the Vehicle and Traffic Law or this Subchapter, or if the termination is based upon enrollment in the program pursuant to the plea bargaining provisions of Vehicle and Traffic Law, section 1192(10)(a)(ii) and 1192(10)(d), or if such person would not otherwise be eligible for enrollment in the program pursuant to section 1196(4) of such law, or if the person has two or more alcohol- or drug-related driving convictions or incidents within the 25 year look back period from the date of the violation which resulted in enrollment in the program. For the purposes of this subdivision, the 25 years look back period means the period commencing upon the date that is 25 years before the date of the violation that resulted in enrollment in the program and ending on and including the date of such violation.

(c) Failure to satisfactorily complete a rehabilitation program. If a person fails to satisfactorily complete a rehabilitation program, in addition to revocation of any conditional license which may be held by such person, the suspension or revocation of such person's unconditional driver's license will be reinstated for the full period of such suspension or revocation, unless such full period has already been effectively served. Such a person may apply for reentry into the rehabilitation program. A conditional license may only be issued upon the first such reentry. Although second and subsequent reentries may be permitted, a conditional license will not be reissued in such cases.

(d) Appeals. Appeals from decisions of treatment or program personnel regarding an individual's participation or treatment shall be directed to the program director. If the said director is unable to resolve the matter, such appeals shall be directed to the Division of Driver Licensing. If the said division is unable to resolve the matter, such appeals shall be sent to the commissioner who shall make a determination. Prior to making a determination the commissioner may consult with experts in the field of alcoholism and rehabilitation and any other appropriate agencies.

PETER D. BARLET

ATTORNEY AT LAW

May 22, 2023

New York State Bar Association
One Elk Street
Albany, New York 12207

Attn: Catherine A. Christian, Esq. - Co-Chair
Andrew Kossover, Esq. - Co-Chair

Re: Report and Recommendation of the Task Force on Modernization of Criminal Practice

Dear Sir and Madam,

As a long-term practicing attorney, a member in good standing of this Association, a duly elected Town and Village Justice, and a previous member of the Council of Judicial Associations, I wanted to respond to the views expressed in the June 2023 report issued by your committee.

In my view, the New York State Bar Association does nothing to enhance its reputation for independence and objectivity by ignoring the long, successful, and indisputable respect that New Yorkers hold for their Town and Village Courts by advocating for their elimination.

In an era in which our Court's are losing the respect of the People in their role as neutral arbiters of the law, our Town and Village Courts continue to provide all New Yorkers with a front row seat to their own democracy; and for that fact alone, the Town and Village Court should not only continue, but be given credit for the truly valuable role they play in our system of Justice.

The fact that an association of Attorneys actively oppose and see no value in a time-tested and effective approach to justice (which does not include a lawyer as a leading player) should be seen as nothing more than a basic conflict of interest that even the most junior non-lawyer justice would readily understand.

Having a law degree is great, but it has little to do with preparing an individual for the wide-ranging and intellectual challenges required to properly adjudicate a difficult case. After all, are the challenges faced by a Superior Court Judge (with a B.A. degree in film studies) who is asked to handle a complicated medical mal-practice, or intellectual property case involving claims relating to nano technology, really any different from a non lawyer judge asked to handle the challenges of the type of case that come within the jurisdiction given to the Town and Village Courts.

Justice requires an inquiring mind, intellectual curiosity, patience, and a desire to come to a fair and just determination of the issues in accordance with the law. Having a law degree is no guarantee that those essential values will be met. The New York State Bar Association's belief that justice and a law degree are one and the same -- is sadly misguided, and should be soundly rejected.

Thank you.

Very truly yours,

PETER D. BARLET

PDB:kr

POST OFFICE BOX 1010 ▾ 6 HIGH STREET ▾ WARWICK ▾ NEW YORK 10990 ▾ (845) 986-1988 ▾ FAX 986-1940 (not for service)

The Hon. James Bacon (Town of New Paltz, Ulster County) and the Hon. Jonah Triebwasser (Town and Village of Red Hook, Dutchess County) submit this on behalf of the retention of the justice court system as it is currently constituted and in opposition to the recommendations of the Subcommittee on Justice Courts:

A Tradition of Service To The Community[1]

When our nation's founders developed the framework of our judicial system 247 years ago, they could scarcely have imagined the challenges facing modern society. Yet throughout our history, from state and national constitutions to landmark Supreme Court decisions, the judicial branch has remained a stabilizing force in American society.

Nowhere is this more evident than with New York State's town and village justices. There are almost 1,200 justice courts in New York State and approximately 2500 justices. Every day, local town and village justices make important decisions affecting the lives of thousands of our neighbors.

Clearing Up Misconceptions

All too often, it is assumed that town and village justices merely preside over traffic court or help resolve the most minor of disputes. In fact, the jurisdiction of the local courts is much more extensive.

Realm of Jurisdiction

Justice courts have a very broad jurisdiction in matters affecting the local community and are readily accessible geographically to the people. It is for this reason that justice courts are "the

[1] We are indebted to the New York State Magistrates Association for providing the historical background material and statistics cited in this report.

courts closest to the people."

Civil small claims jurisdiction of a local town or village court is currently limited to $3,000.00. In landlord/tenant proceedings, however, the monetary jurisdiction is unlimited.

Actions can be filed in the regular civil part. Individuals can also file actions in the procedurally more relaxed small claims part of the court. New York State town and village courts have criminal jurisdiction over all misdemeanors, violations, and infractions. They have arraignment and preliminary jurisdiction over felonies. Jury and single judge trials are conducted.

Family Offense Proceedings

The local town and village courts and the county family courts have concurrent jurisdiction over certain offenses committed among members of the same family or household - related by blood or marriage, former spouses, a common child, etc., such as disorderly conduct, harassment, menacing, reckless endangerment, and certain assaults. The complainant in these matters may proceed in both local criminal court and family court at the same time. A local criminal court has authority to issue temporary family court orders of protection, receive family court petitions and may modify family court orders of protection when the family court is not in session.

Qualifications

The position of town or village justice is not one that the State or the justices take lightly. In addition to local election laws, justices must comply with uniform statewide standards. Justices are local, as opposed to state, elected officials. They preside on a part-time basis. Usually, two justices are elected in each town to four-year terms. Villages may have no more

than two justices elected to a four-year term. However, if a village has one justice, the village board must appoint an associate justice to serve as directed by the elected village justice.

Justices are required to record all court proceedings, by recorded audio or stenographically, and keep accurate, legible records. At least annually, they must submit case dockets for examination and audit to the town or village board. Justices must account for all fines and fees collected to the New York State Comptroller by the 10th of every month.

Justices must complete not only basic training, but also at least 12 additional hours of annual training. Many justices significantly exceed the annual training requirements.

There are strict rules limiting the way justices may campaign for their positions, as well as their participation in local, state, and national politics. These rules, combined with those governing behavior while in office, help maintain the independence, dignity, and integrity of the court system.

Looking Toward the Future

Local courts handle millions of cases each year. It has long been the goal of local courts to serve the people by providing substantial, timely and equal justice and to fulfill the notions of a separate, independent judicial branch as set forth by our forefathers in the Constitution.

Deliberations of the Subcommittee

Sad to say, it was obvious to us that, in our opinion, from the first meeting of the subcommittee and its first discussions, the recommendations of the subcommittee were preordained. Except for the two justices, there was, in our opinion, a pronounced antipathy to the justice courts among the other subcommittee members.[2]

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2 So pronounced was this antipathy, that when one of the justices tried to be heard on this

The main thrusts of this unreasoning opposition to a system that has served the populace well since colonial days were a) a lack of sufficient prosecutorial and public defense staff to cover all the justice court sessions in their counties, b) an objection to the existence of lay justices on the bench and c) a lack of oversight of the justice courts by the court hierarchy.

As to the lack of staff, expressed by some as an inability to recruit or retain enough staff because of the number of courts that must be covered, have the agencies involved performed exit interviews with the staff that they are losing to see if that is the sole reason for the exodus? Are practitioners also fleeing these positions, or not interested in joining these agencies, because of the new discovery rules which have assistant district attorneys and assistant public defenders working Wall Street hours without Wall Street pay? Must the dedicated justices and clerks lose their livelihoods because these defense and prosecutorial agencies cannot retain staff?

As to the push for all judges to be lawyers, the subcommittee and the state bar should read the recent New York Law Journal article by the Hon. Elizabeth Garry, Presiding Justice of the Appellate Division, Third Department, entitled "The Rural Representation Crisis."[3] In it, Judge Garry noted that there are not enough lawyers now to cover the legal needs of rural New York. If we mandate that all justices must be lawyers, that will further shrink the pool of available practitioners, as the judicial ethics rules prevent lawyer justices from appearing before other lawyer justices in their home counties.[4]

We asked that a non-lawyer justice be invited to join the deliberations of the subcommittee to acquaint the subcommittee members with lay justices dedicated to their craft

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matter, he was talked over in the Zoom meetings and prevented from being heard.

3 https://www.law.com/newyorklawjournal/2023/01/17/the-rural-representation-crisis/

4 22 NYCRR 100.6[B][2]

and who are educated and experienced public servants. We were turned down flat on the excuse that such a non-lawyer judge could not be a member of the subcommittee as he or she was not a NYSBA member. Yet, the subcommittee was very eager to have, late in the deliberations, a district attorney who boasted of doing away with many justice courts in his county join the subcommittee.

Following his lead, the subcommittee is pushing for wholesale merger of the justice courts, or the establishment of district courts, so that the local justice courts, which are convenient to local citizens at evening hours, will be replaced by expensive full time courts in central locations that will, in all probability, meet during daytime business hours only,[5] forcing litigants to take time off from work or pay for expensive childcare to have their day in court. This is a dramatic step backward in the quest of justice for all. This is directly contrary to the mission of the Task Force on the Modernization of the Courts, which was, among other things, to improve access to justice. By drastically limiting the number of local courts, there will be a concomitant drastic reduction in access to justice.

<u>Our Analysis of the Subcommittees Recommendations</u>

We will now address certain misconceptions in the subcommittee's report:

1) The Justice Courts operate without State oversight: The justice courts are answerable to the judicial districts' Administrative Judges, Supervising Judges, the Office of Court Administration, the Office of the State Comptroller and the Commission on Judicial

[5] https://ww2.nycourts.gov/COURTS/10jd/suffolk/dist/civilindex.shtml

https://ww2.nycourts.gov/COURTS/10jd/suffolk/dist/crimindex.shtml

https://ww2.nycourts.gov/COURTS/10JD/nassau/district-civil.shtml

https://ww2.nycourts.gov/COURTS/10JD/nassau/district-crim.shtml

Conduct. Town and village justices have more State oversight than the superior court judges. In fact, the NYS Commission Judicial Conduct Commission will not hesitate to remove or censure any judge for any action it finds violates NYS's strict ethics standards. The Commission states:

> [I]n 2006-2007 the Legislature, the Office of Court Administration (OCA) and the State Magistrates Association (SMA) made a significant commitment to enhance the resources available to the town and village courts and to improve the education and training provided to the justices of those courts. (See https://cjc.ny.gov/Policy.Statements/town_&_village_courts.html).

Thus, both lay and attorney judges have ample resources and may call OCA at any time to seek advice from an OCA attorney with expertise in any particular field.

2) Justice Courts lack the most basic technology: The justice courts have been issued laptop recorders by the State to record all proceedings and to perform word-processing and email response. They also have free access to West Law and Lexis for the purpose of legal research.

3) Lay justices have only nominal training: All judges are offered an extensive "taking the bench" course when first elected or appointed. The lay judges are required to take it. Thereafter, all justices must take 12 credits per year of continuing judicial education (many take more.) These courses are of such a high caliber that they qualify for continuing legal education credits for lawyer judges. Are we saying that this training is the equivalent of a J.D. degree? No, but it is adequate to the tasks and has been deemed so by the Office of Court Administration.

5) The Justice courts are open two hours per week: Many justice courts hold court sessions for much more than two hours per week and their offices and clerks are available to the public much more than two hours per week. The report looks only at time on the bench on traffic or criminal nights. It does not give great weight to the time taken to decide tickets of defendants who plead guilty by mail, it does not consider the preliminary and probable cause hearings that often take place on non-regular court nights, the criminal jury and bench trials that often take days, the small claims trials, the time judges research and write decisions, and a myriad of other tasks that we do including reviewing search warrants and signing search warrant returns. Very often, the job of local justice is part-time in pay only.

6) The gravamen of the subcommittee's recommendations seems to be that wholesale consolidation of the justice courts, or the establishment of District Courts, will save substantial amounts of money - an unfortunate point of view. What about the inconvenience of litigants traveling long distances for justice in remote rural areas, often in bad weather? What about the fact that these consolidated, full-time courts will probably meet during the day only (as do the District Courts on Long Island), thereby forcing litigants to take time off from work, or have to pay for expensive day care, to seek justice? Are we to sacrifice access to justice on the altar of the almighty dollar?

7) There is no regular data coming out of the justice courts: We file monthly reports with dispositions of all cases dealt with that month and all fine and surcharge monies collected.

We file criminal disposition reports and traffic ticket disposition reports. In addition, our books and records are offered annually to our municipalities for audit.

For all of the reasons articulated above, especially for what was, in our opinion, a lack of fundamental fairness in the deliberations of the subcommittee, we respectfully request that the House vote against that portion of the task force report that concerns the Town and Village Justice Courts.

James Bacon

Hon. James Bacon

Hon. Jonah Triebwasser

May 20, 2023

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Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #7

REQUESTED ACTION: Approval of the report and recommendations of the Task Force on the Post-Pandemic Future of the Profession.

The Task Force on the Post-Pandemic Future of the Profession was established in June 2021 by past president T. Andrew Brown and charged with the following mission:

> The foundational purpose of the New York State Bar Association is to advocate on behalf of the legal profession and the practice of law. Therefore, in preparation for the emergence from the COVID-19 Pandemic, the Association on behalf of its member attorneys must reflect on how the crisis has dramatically and determinatively affected the legal profession and anticipate how these changes may further alter the practice of law.
>
> The Task Force on the Post-Pandemic Future of the Profession is thereby established to systematically review the effects of the pandemic, both short-term and long-term, on the legal profession and the practice of law in general. This review shall include study of the remote practice of law, the increased use of technology, the efficacy of virtual courts and tribunals, changes in client interaction, law practice management, access to justice, the delivery of legal services, and the education, training, expectations, and mentorship of law students and newer attorneys. The Task Force shall advise on the anticipated future impact of these changes on the practice of law and on attorneys. It shall make recommendations to ensure practitioner success and to safeguard and strengthen the future of the legal profession.

The Task Force distributed a member-wide survey in late 2021 and formed four working groups – Attorney-Client Relations, Access to Justice, New Lawyers and Law Students, and Law Practice Management and Technology. The working groups each hosted an online public forum focusing on emerging issues and trends in the legal profession and practice of law;[1] additional focus group sessions were held in the summer of 2022 with members drawn from the different geographic regions of the state. Informational reports were given at the January and April 2022 meetings of the House of Delegates.

[1] The video recordings of the public forums are available for review on the Task Force webpage. https://nysba.org/committees/task-force-on-post-pandemic-future-of-the-profession/

The recommendations contained in the report are listed below by Working Group.

Attorney-Client Relations (pages 33-36)

1. NYSBA must enhance its efforts to train all attorneys on the proper use of technology so they are able to work virtually to appropriately service the needs of clients. This includes best practices associated with the use of video conferences for depositions, court appearances, client interaction, and "alternate dispute resolution" methodologies. All attorneys should be able to pivot between virtual and in-person proceedings seamlessly.

2. NYSBA needs to be a leader in evaluating rule amendments and ethical precepts to account for the prevalence of virtual lawyering, including where parties certify in advance that they are ready and prepared to participate remotely.

3. NYSBA needs to assist lawyers in how to embrace new marketing strategies to remain competitive in the marketplace.

4. NYSBA and local bar associations need to increase their in-person social event schedule to encourage development of personal relationships among the New York bench and bar in the community. Junior attorneys require more opportunities to build formative relationships that will help them throughout their entire careers.

5. NYSBA needs to prioritize mental health and provide services to help attorneys. Stress is not just pandemic-related—the delineation between work and home life has been considerably blurred.

6. NYSBA needs to be a leader in supporting attorneys and promoting best practices to develop policies and frameworks to manage client expectations and increased client demands outside of traditional working hours. Firms need to craft and adopt such policies. Firm leaders need to demonstrate acceptable client-work boundaries.

7. We must also be mindful of how our increasingly virtual world poses significant threats for practitioners working with vulnerable clients, such as indigent criminal defendants or the elderly, and that in-person communications are critical when dealing with these clients.

8. Attorneys seek a flexible work environment but also crave a sense of belonging and community. Incorporate a "flexible first" work culture approach.

9. Create a sense of community and belonging for attorneys both in person weekly or monthly gatherings. Encourage use of employee resource groups and memberships in groups, including bar associations, to foster community.

10. With the increased geographic pool of remote candidates, expect competition for talent to be robust. Emphasize flexibility, mentorship, and training to young attorneys. Set the expectation that the short-term investment of in-person/office with hybrid training and development early in their careers will yield greater professional dividends down the road. Failure to properly train junior attorneys will impact client outcomes, firm reputation, and client services when senior attorneys retire or take a position at another firm.

11. Enhance efforts to provide technology support and training to minimize the threat against cyber attacks. Bar associations can support members by offering training, help lines, and membership resource benefit opportunities to ensure solo, small, and medium-sized firm cyber resiliency.

Access to Justice (pages 68-71)

Court proceedings

- Courts should review existing policies and procedures and develop criteria and procedures with the goal of improving accessibility and equity that is responsive to the case.

- In virtual proceedings, certain norms, expectations, and best practices for respectful behavior need to be reinforced so that litigants, counsel, judges, and court personnel treat each other with dignity and respect.

- Support authorization of virtual court proceedings throughout New York State, whether by an Order of the Chief Judge of the Court of Appeals or legislation. Establish criteria for judicial approval of the use of remote litigation forums.

- Support training and creation of protocol for judges and court personnel on racism and bias (explicit and implicit) generally and in conducting in-person and virtual proceedings to promote a culture of service, respect, and dignity. Support training for court clerks and personnel that is designed to treat members of the public, including *pro se* litigants, with respect and dignity as consumers of court services.

- Immigration proceedings should be presumptively in-person, but if the proceeding is virtual, safeguards should be in place to assure that the detainee is in a private area outside the presence of ICE or corrections officers, but with sufficient protection for the court, support personnel, litigants, and counsel.

- Provide a means for attorneys to communicate privately with clients during a virtual proceeding.

- Tenants in housing court at their initial appearance, and prior to the issuance of any judgments or warrants, as appropriate, should be advised that they have a

right to an attorney; cases should be adjourned to provide tenants with the reasonable opportunity to retain an attorney; and safeguards should be established to prevent default judgments when an unrepresented litigant with good cause does not appear in court or is unable to connect to a virtual proceeding.

- Support consolidation of housing cases outside of New York City that are adjudicated in city, town, and village courts based on the Special COVID Intervention Parts ("SCIP courts") project in Monroe County.

- Support placement of private internet portals or stand-alone kiosks in court and other public buildings throughout the State to allow respondents to appear who are otherwise unable to access remote proceedings.

- Expand the New York State Court Navigator Program in housing and consumer debt cases, and in other appropriate courts, which trains non-lawyers to assistant unrepresented litigants.

- Support expansion of presumptive mediation in all appropriate matters

Administrative hearings

- Administrative hearing notices should be accessible and in plain language. Hearing notices should have separate forms for in person, telephonic, or video hearings.

- Hearings involving individuals with limited English proficiency should be presumptively in person, with the option to opt-in to a telephone or video hearing.

- Individuals who request a hearing by telephone should be asked for their hearing venue preference (i.e., in person, telephone, video). There should be an option to an online form to allow individuals to select which hearing venue (i.e., in person, telephone, video) they prefer.

- Provide training to administrative law judges on remote hearings, with the input of advocates, including how to conduct a remote hearing with an interpreter, how to securely send documents and evidence in a timely manner prior to a hearing, and how to address issues relating to credibility determinations in this context.

Access to remote proceedings: use technology to benefit individuals and communities

- Support funding and initiatives to increase access to electronic devices, broadband internet, and digital literacy support and training.

- Support funding for new and existing initiatives to increase the availability of technology for appearance in virtual proceedings.

- Increase use of technology and universal design principles to create uniform plain language court forms.

- We base this recommendation on the seriously deficient delivery of legal services to those most desperately in need of assistance, that the pandemic has laid bare. Our system is unable to provide sufficient help to those with very elemental legal needs such as housing, family law matters and immigration concerns. Existing access to justice initiatives, which frequently focus on an attorney-centered solutions, require a fresh look.

  We recommend that NYSBA undertake study of the use of trusted intermediators in the community using appropriate technology who will (i) identify, prevent, and resolve legal issues, (ii) access legal information, (iii) complete DIY forms without court involvement, and (iv) help people prepare and file papers for proceedings. These trusted intermediators will provide services under the general supervision of an experienced attorney, most likely from a legal services organization. The study should include consideration of state funding of training, certification, and employment of such paralegal - trusted community intermediators.

Empower communities to identify, prevent, and resolve legal issues

- To reduce involvement with the court system, communities must receive the necessary support and resources to identify, prevent, and resolve legal problems "upstream" before they become court cases. For example, through easy-to-understand legal information in a variety of forms, DIY forms, and continued expansion of presumptive ADR.

Unauthorized practice of law rules

- NYSBA should undertake a further study to address unauthorized practice of law statutes and rules in order to facilitate resolution of legal issues affecting indigent populations.

- NYSBA should create a Task Force charged with this mission for further study.

Increase free and low bono representation and diversify the legal profession.

- Increase funding for free legal aid/services, *pro bono*, and *pro bono* incubator projects.

- Increase expenditures for access to justice initiatives.

- Support the continued efforts of the New York State Bar Foundation to fund legal services to those in need.

New Lawyers and Law Students (pages 88-89)

1. New York Practice should be a required class in New York law schools.

2. Law schools need to take a hard look at their curriculum to ensure that law students intending to practice in New York have sufficient New York centric course options and properly educate their student body on virtual lawyering.

3. Law schools should continue to improve the quality of distance learning and work to provide a variety of distance learning course modalities into the curriculum.

4. The Office of Court Administration needs to ensure that virtual proceedings are effective for all participants, particularly for those less than financially able as described in the Access to Justice portion of this report.

5. Hybrid work options need to remain, must be offered by law firms, and consideration needs to be given whether to offer a fully remote option under the appropriate practice circumstances. The beneficial effect of hybrid work is the expansion of work opportunities to lawyers with parenting obligations. However, law firms bear the responsibility to ensure the proper training for the practice of law for those young lawyers opting for expanded hybrid work environments.

Law Practice Management and Technology

Technology at Home Versus in the Office (pages 98-100)

1. The post-pandemic practice of law will continue to include aspects of law practice management that is virtual. Legal employers must develop office-wide policies and protocols that support remote law practice for all their employees, including back-office staff, that include providing the hardware and software necessary to promote safe, efficient, and effective virtual law practice.

2. Legal employers need to allocate adequate financial resources to support the cost of regularly upgrading, maintaining, and implementing new technology at the office and at home.

3. Legal employers need to provide regular training to employees in both existing and new technology to ensure that lawyers and staff working remotely are competent in the use of the firm's technologies and systems.

4. Legal employers are responsible for providing regular training on data privacy and cybersecurity.

5. NYSBA should act as a resource to its members in finding ways to reduce the costs of purchasing, upgrading, and replacing IT hardware and software through contractual relationships with technology providers, as it does with rental car agreements and other similar member benefits.

6. NYSBA should provide regular CLEs to its members on the remote use of IT hardware and software, including the setup and maintenance of remote home law offices and the use of virtual meeting platforms.

7. NYSBA should offer its members a Law Practice Management and Technology Resource Center ("LPMT Resource Center") that provides advice on best practices relating to practicing law remotely, virtual mediation practice, case management software, technology support, setting up an effective home law office, training in IT hardware and software, and other issues related to the virtual practice of law. The LPMT Resource Center could offer recommendations for law practice-related IT technologies and negotiated discounts for IT technology products related to a virtual home law office. Finally, the LPMT Resource Center could provide access to an IT technology consulting firm at a discounted rate for members, e.g., a NYSBA "Geek Squad" that could provide immediate technology support and assistance.

Cybersecurity Protocols and Training (page 102)

8. While practitioners seem confident that they are adequately protecting client information, the seemingly widespread lack of cybersecurity training is a great risk. All attorneys and staff must be educated on a regular basis regarding the security risks associated with any online work, whether at home or in the office. Further, attorneys should be trained to take adequate precautions to secure their online activities and electronic data.

9. NYSBA and other bar associations must offer cybersecurity CLEs as required by the new cybersecurity CLE requirement and other practical trainings designed to raise attorneys' awareness of the ever-changing cyber-risk landscape, how to mitigate that risk, as well as best practices, industry protocols, and referrals available for cybersecurity specialists and cyber insurance and other insurance to protect against social engineering scams.

The Impact of Technology on the Social Aspect of the Practice of Law (pages 105-106)

10. While it is clear that there are certain benefits associated with remote working, and that hybrid working arrangements will continue even after the pandemic has receded, such arrangements do have disadvantages. These can be mitigated through education, training, and thoughtful programming by bar associations and legal employers. For example:

a. Legal employers and NYSBA need to offer CLE and other trainings that highlight the functionality of online meeting platforms to assist practitioners in gaining a sense of control over virtual meetings and to better judge the non-verbal communication of meeting participants;

b. Legal employers and NYSBA can foster social interactions, even in a remote environment, by, among other things, holding regular online meetings and employing fuller use of the chat functions on virtual meeting platforms.

Virtual Meeting Platforms (pages 108-110)

11. Practitioners should take time to familiarize themselves with any virtual meeting software they elect or agree to use within a professional setting. Before agreeing to a virtual meeting, practitioners should confirm it will take place on a platform with which all parties are familiar and have the appropriate skills to navigate.

12. Regardless of the platform, it is a best practice to advise that the platform must have end-to-end encryption to ensure confidentiality is maintained. To further maintain confidentiality, the physical room where virtual meetings take place should be a private room.

13. Remote meeting platforms have been embraced by practitioners for court conferences, day-to-day meetings with colleagues, and informal discussions with opponents. In fact, the benefits of virtual conferences, which save time, money, and resources for law firms and clients alike, are undeniable. Therefore, remote activities will become a permanent feature to the practice of law.

14. Training on the use of virtual meeting software must take place regularly to keep pace with these rapidly changing technologies. For example, Zoom and Teams continually change and are updated and will continue to incorporate new features. In order to utilize the software and effectively communicate using the technology, it is not enough to simply learn how to use the platforms; one must also routinely keep abreast of changes to the platforms.

15. Training should not be exclusive to the virtual meeting software. It should include edification on hardware such as cameras, headsets, microphones, and speakers, which are necessary to effectively utilize and communicate on the platforms. Further, practitioners must understand how their hardware directly interacts with each platform, and then amend their settings if necessary.

16. One common thread that each of the Working Groups uncovered is the need for increased training in technology for litigants, attorneys, and court personnel. This Working Group recommends that, in addition to, but part of NYSBA's

continuing legal education programs, NYBSA annually devote a day to free virtual technology training throughout the State. The training should provide a firm elemental footing for all practitioners. Such a day would enable NYSBA to strengthen its commitment to promoting access to justice. The need for this training has been underscored in the Pandemic Practices Working Group of the Commission to Reimagine the Future of New York's Courts recently released report.

The report was submitted to the Reports Group in April 2023. An informational session was held on Tuesday, May 16th, for members of the Reports Group to preview the report and its recommendations. Comments were submitted by the President's Committee on Access to Justice and the Committee on Animals and the Law.

The report will be presented by Task Force co-chairs Mark A. Berman and John H. Gross.
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Report and recommendations of the New York State Bar Association **Task Force on the Post-Pandemic Future of the Profession**

June 2023

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

New York State Bar Association

Task Force on the Post-Pandemic Future of the Profession

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Introduction & Executive Summary

The New York State Bar Association's (NYSBA) Task Force on the Post-Pandemic Future of the Profession ("Task Force") undertook study in Winter 2021 to review the effects of the pandemic—both short- and long-term—on the legal profession and the practice of law in general. In presenting our report, we must emphasize that this is an account of the New York State Bar Association on the future of our noble profession from the perspective of New York practitioners.

The practice of law in New York is unique. New York has more lawyers than most other states; more lawyers work in high-rise office buildings; many lawyers and staff have long commutes to the office using public transportation; many courthouses are antiquated; Wi-Fi is spotty in upstate New York; and many litigants do not have internet access necessary for a virtual courtroom.[1]

The profession is at multilevel crossroads as the pandemic wanes. "Business as usual" is now better stated as "business can no longer be as usual." We take into account the legacies of COVID-19 in the context of the social issues altering the fabric of our Union. Simultaneously, we must ensure that we live up to our obligation to serve as best we can the residents and companies of New

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[1] *See* ABA National Lawyer Population Survey, *Lawyer Population Survey by State Year 2022*, AM. BAR ASS'N, https://www.americanbar.org/about_the_aba/profession_statistics; Isha Marathe, *No Easy, Inexpensive Solution to Remote Trials Impeding Litigants Without Internet Access*, LAW.COM, March 29, 2022, https://www.law.com/legaltechnews/2022/03/29/no-easy-inexpensive-solution-to-remote-trials-impeding-litigants-without-internet-access; Joshua Solomon, *Thousands Still Can't Get Internet Access. Will Broadband Funding Help?*, TIMES UNION, Sept. 30, 2022, https://www.timesunion.com/state/article/new-york-internet-acces-solution-17454221.php.

York, without regard to, among other factors, wealth, size, geography, age, ethnicity, race, color, religion, gender, sexual orientation or disability.

The Rule of Law is essential to the distinctive American social contract. Lawyers, in their everyday legal practice, are essential to upholding the Rule of Law in America.[2] We must embrace the understanding that our profession is a public calling requiring fidelity to those we serve as trusted counselors and representatives, while at the same time reflecting our obligation to the Rule of Law. The Task Force charge articulates its purpose rather clearly:

> The foundational purpose of the New York State Bar Association is to advocate on behalf of the legal profession and the practice of law. Therefore, in preparation for the emergence from the COVID-19 Pandemic, the Association on behalf of its member attorneys must reflect on how the crisis has dramatically and determinatively affected the legal profession and anticipate how these changes may further alter the practice of law.
>
> The Task Force on the Post-Pandemic Future of the Profession is thereby established to systematically review the effects of the pandemic, both short-term and long-term, on the legal profession and the practice of law in general. This review shall include study of the remote practice of law, the increased use of technology, the efficacy of virtual courts and tribunals, changes in client interaction, law practice management, access to justice, the delivery of legal services, and the education, training, expectations, and mentorship of law students and newer attorneys. The Task Force shall advise on the anticipated future impact of these changes on the practice of law and on attorneys. It shall make recommendations to ensure

[2] Orison S. Marden Lecture, *Keepers of the Rule of Law*, Louis A. Craco, Feb. 21, 2006.

> practitioner success and to safeguard and strengthen the future of the legal profession.[3]

To that end, the Task Force, chaired by Mark A. Berman, Esq., and John H. Gross, Esq., divided its work into four working groups, whose focused studies address the corpus of issues in our charge. They are:

- Attorney-Client Relations, chaired by Susan L. Harper, Esq.
- Access to Justice, co-chaired by Frederick K. Brewington, Esq., and Professor Joseph A. Rosenberg.
- New Lawyers and Law Students, co-chaired by James R. Barnes, Esq., and Professor Leslie Garfield Tenzer.
- Law Practice Management and Technology, co-chaired by Karen Greve Milton, Esq., and Anne B. Sekel, Esq.

The four groups designed a survey that was distributed to NYSBA members, the results of which help form the predicate for this Report. In addition, the Task Force held virtual focus groups in different locations throughout New York, and each Working Group conducted their own virtual public forum. These focus groups and public forums were composed of a broad variety of practitioners and provided insightful anecdotal evidence that likewise served as a basis for this Report.

From the results of the survey, focus groups, and public forums, there are four sections to this Report drafted by each Working Group, addressing their

[3] NYSBA, *Task Force on Post-Pandemic Future of the Profession Mission Statement*, https://nysba.org/committees/task-force-on-post-pandemic-future-of-the-profession (last visited Feb. 2, 2023).

findings and making recommendations for the future of the legal profession. These four sections necessarily overlap because common to each is an analysis of the impact of "good, the bad, and the ugly" through each respective Working Group's unique perspective of what took place during the COVID-19 pandemic. The throughline is the need for technological "prowess" by the courts, lawyers, and citizens of New York so that the problems of New Yorkers can be effectively and fairly resolved.[4]

The Future Is Now

New York clients have remained as demanding as ever. No matter the type, clients demand instantaneous responses from their attorneys by way of a quickly convened call, Zoom, or a late-evening email. Our Pavlovian response to these communications is antithetical to ensuring attorney well-being and the understanding that our profession requires informed contemplation to arrive at the best client outcomes.

Client acceptance of virtual lawyering differs. Some clients are comfortable with remote conferences and meetings as well as with a hybrid work schedule. Other clients demand in-person meetings and object to hybrid schedules. The latter generally share a belief that "true" training and mentoring of their lawyers only occurs at the office or in court, therefore meetings with counsel need be in-person. Of course, this must be harmonized with lawyers who advocate for a

[4] Appendix A of this Report contains the survey sent to NYSBA members. Recordings of the public forums are available at https://nysba.org/committees/task-force-on-post-pandemic-future-of-the-profession/.

flexible hybrid approach. The struggle for “work-life balance” is endemic in our profession.

Law firms can no longer hide from these issues and need to ensure that junior lawyers receive proper training, and to recognize the critical importance of boundaries and wellness. Junior lawyers now demand a hybrid work environment, whether law firms like it or not. At the same time, firms must devote time and effort to ensure that young lawyers are appropriately mentored.

Access to Justice issues were only exacerbated by the pandemic. It is imperative that lawyers understand the fundamental equity issues inherent in addressing legal needs for marginalized communities. This means first to acknowledge and to take action to make their access to legal services easier, and then to make addressing their rights in court available. Ensuring the citizens of New York have equal access to court proceedings, whether in-person or virtually, through improved court procedures, policies, and training, allows their legal issues to be addressed on a more level playing field. Second, we must urge the government to ensure broadband availability throughout New York State; seek to provide increased access to technology and software to enable better pro se litigants; to have trained individuals who can assist with such technology; and to improve access to easy-to-use forms. Thirdly, we must address the rural New York problem of “no lawyers.”

Law schools must adjust their curricula to teach law students how to practice law virtually and to encourage law students to select available courses in New York Practice. As to remote learning, law schools must ensure that robust student and faculty interaction is not lost. Synchronous instruction requires balance with asynchronous teaching.

Participation in NYSBA and affiliated associations waned dramatically during the age of COVID, borne of an already pre-COVID malaise among membership. The redoubling of ongoing efforts of NYSBA to recruit law students and young lawyers into the Association is essential to the future of the legal profession in our State. We must partner with deans of New York's 13 law schools to infuse the importance of Association membership into students early on in their legal education.

NYSBA's efforts to ensure compliance with new cybersecurity rules and CLE requirements must be continued. Legal employers need to develop office-wide policies and protocols that support remote law practice for all employees, including back-office staff, and to promote a safe, efficient, and effective virtual law practice.

What does this all mean? New York needs to learn from the pandemic to ensure that our noble profession fulfills its mission: to provide the best representation to its citizens of this State, whether an individual or a

corporation, and to ensure access to justice needs are met by taking advantage of technology through proper education, mentoring, and sponsorship.

Technology training only goes so far. The practicing bar requires the technology to service clients while safeguarding sensitive material. As recommended by the Law Practice Management and Technology Working Group, NYSBA should pursue relationships with technology vendors to offer discounts on hardware and software to reduce the obstacle of cost so attorneys can be technologically prepared to operate in the post-pandemic world. NYSBA should endeavor to create a comprehensive technology resource center to provide advice on best practices relating to virtual technology (from setting up an effective and secure home office to virtual practice), case and/or client management software, technology support, and training. Such a resource will promote success in the post-pandemic practice of law.

The Survey

Nearly 2,000 individuals responded to the Task Force's survey. Summarized below are some of the more salient demographic percentages reflecting those participants. While not reflective of NYSBA's actual membership profile, the conclusions and recommendations contained in this Report need to be analyzed in the context of the below percentage:

- Approximately 70% of the respondents were over age 50;
- Approximately 70% of the respondents had over 20 years of legal experience;

- Approximately 54% of the respondents were males;
- Approximately 40% of the respondents were from the five boroughs of New York City;
- Approximately 44% percent of the respondents were litigators;
- Approximately 26% of the respondents were transactional attorneys;
- More partners than associates responded to the survey;
- Approximately 28% of the respondents were solo practitioners;
- Approximately 14% of the respondents were from law firms of five or fewer attorneys;
- Approximately 11% of the respondents were from law firms of six to 20 attorneys;
- Approximately 7% of the respondents were from law firms of 21 to 50 attorneys;
- Approximately 15% of the respondents were from law firms of over 51 attorneys; and
- Few governmental attorneys responded to the survey.

The Pandemic's Impact on Attorney Client Relations

Introduction

The future of attorney-client relations in our post-pandemic legal profession requires New York attorneys to be adaptable and supportive of each other, while understanding that the practice of law often occasions an adversarial rather than collaborative model.

During a Task Force focus group, a sage New York attorney reflected on a chat with a colleague long before the onset of the pandemic:

> I was coming out of court and was approached by a friend who asked, "Do you still enjoy practicing law?" He was complaining about the difficulties of the business, dealing with difficult judges and clients, and was not sure of his future in the profession. I came away from that interaction asking myself, "Why are so many lawyers unhappy and discontented with their chosen profession?" One possibility is that the law is a wonderful profession but a terrible business. It is also a business that we were not trained for like we were in the law. It seems that conflict does not end at the courthouse exit door. As lawyers, we are constantly in adversarial postures not only with adversaries and judges, but also with our clients, who can turn on us when they are dissatisfied with the result. Moreover, in litigation at least, our competence and sometimes self-worth is determined by a third-party who decides whether we won or lost.

The mission of the Task Force is to help chart the path forward for practitioners in the post-pandemic world. We present this Report based on results of the survey, the attorney client Working Group's research and public forum, and the Task Force focus groups hosted throughout the state. We recognize that effective

attorney-client relations depend on embracing and understanding the impact of the pandemic on attorneys.

Our survey results found that eagerness to return to pre-pandemic practice was tempered by the lingering threat of COVID-19 and the risk of new variants and consequential shutdowns. Attorneys should expect to continue to face the task of balancing the benefits and drawbacks of a hybrid workplace while endeavoring to meet client needs and expectations. Remote work and video conferencing are acceptable in certain situations, but these modalities often are not in the best interest of vulnerable and/or criminal clients, and may provide challenges for low income clients and those in rural areas with spotty or no internet. Attorneys are concerned about associate development, building their practice communities, and fostering a sense of belonging. At the same time, attorneys are concerned about increasing cyber threats to their practice. One legacy of the pandemic is the blurring of the line between work and home. Another is the profession's acknowledgment that attorney well-being must be a priority—burnout is now recognized as a real concern. Finally, attorneys express the need to embrace modern marketing approaches to raise their profile in a very competitive client landscape.

The pandemic has challenged attorneys and the legal profession like never before, and the one thing that can be proclaimed as certain is a future of uncertainty. As a participant in the Western New York focus group commented,

> I think that there is a foregone conclusion that remote work is going to actually be the future of the profession. I don't think there has been enough consideration about whether or not this is working, whether or not it's working for anyone or whether or not it will work. If the bar association is going to do something . . . I think it should be looked at, when it works and when it doesn't work.[5]

As COVID-19 began its reign of terror, New York attorneys donned masks and socially distanced. We listened to daily reports of transmissions, deaths, and new variants. Face-to-face interactions with clients and the courts turned virtual seemingly overnight, while we hoped we would not appear on screen as a cat.[6] New York attorneys' patience, creativity, grit, and drive to safely serve the public and our clients and ourselves—while also managing the practice and business of law—will always be remembered as an extraordinary, powerful, and transformative period for the profession.

Challenging deeply entrenched attitudes in the legal profession, we have demonstrated that the "traditional manner" of working from an office is not the only way. Efficiencies can be built into our court system and our law firms, accommodating different working styles that achieve similar or better outcomes for our clients. However, we must recognize that the new virtual world may not work for all clients, creating unique challenges for collaboration. Our

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[5] Western N.Y. Focus Group Transcript at 453–55.

[6] During a virtual civil forfeiture hearing in Texas, a county attorney was unable to turn off the "cat filter" on Zoom, so an image of a cat appeared instead of the attorney. Daniel Victor, *'I'm Not a Cat,' Says Lawyer Having Zoom Difficulties*, N.Y. TIMES, May 6, 2021, https://www.nytimes.com/2021/02/09/style/cat-lawyer-zoom.html.

profession’s ethos requires that the path forward must be in the best interest of the client. However, the pandemic has underscored that the best interest of the attorney’s and staff’s physical and mental health must also be considered.

As we can all attest, developments in our legal practice arising from the pandemic present both pros and cons. Remote conferences and mediations, for example, are more efficient, save clients’ money, reduce unnecessary travel, and alleviate temporal stress. However, not being in court robs us of the day-to-day interaction with our clients, colleagues, judges, and court personnel, which negatively impacts collaboration to solve clients’ problems in a profession that is often truculent. There is no true virtual equivalent for the physical wooden bench outside a courtroom to host a casual yet consequential conversation with opposing counsel, or privately with a client.

At its ethical core, the legal profession is driven by its mission to serve the public and advance the rule of law and judicial integrity. It is also a self-analytical profession with local and state bar associations engaged in continuous study through task forces and committees addressing problems and formulating solutions. Bar associations across New York State continue to analyze how the profession can improve quality of our citizen’s lives while also serving the public and the legal system.

Flexibility Is the Future

The Task Force's statewide survey of the profession, the Working Group on Attorney Client Relations' virtual forum, and the virtual focus groups held across the state provide a framework for analysis of the state of post-pandemic attorney-client relations in New York.

In general, many, but not all, New York attorneys demonstrated a desire to move forward with the hybrid model, which grew out of necessity.[7] This model promotes flexibility and recognizes that the explosion of advanced technology and virtual communications can work to the benefit of lawyers and clients.

Survey participants were asked how the pandemic positively influenced their work. Forty-three percent of respondents noted they could work remotely, and 30.84% said they could more easily attend hearings or meetings because of virtual proceedings.[8]

Next, we asked, "What is the ideal mix of in-office and remote work?"[9] Thirty-two percent selected "In-office 2–3 days a week."[10] The second most popular answer, selected by 27.47%, was "In-office as needed based on a flexible week-to-week schedule."[11] Slightly fewer respondents (24.61%) selected "In-

[7] *See* Survey questions 24 and 25.
[8] Survey question 40, survey results question 40.
[9] Survey question 25.
[10] Survey results question 25.
[11] *Id.*

office 4–5 days a week," which was followed by "Rarely in the office" at 10.76%.[12] Only 4.81% of respondents selected "In-office one day a week" as the ideal mix.[13]

The top two responses to "What aspects of in-office work have you missed the most?" demonstrate the essential collegial role firms play in our success: 51.97% selected "Being able to walk down the hall to discuss legal issues with my colleagues," and 50.61% selected "As a result of working remotely, I have lost collegial interaction with attorneys who are members of my organization."[14]

As of summer 2022, law firms viewed two or three days in the office as the new likely standard, though some were permitting fully remote work.[15] Some large firms had a "remote-only August" with fewer in-person meetings with clients.[16] Another large law firm instituted a "Zoom-free" Wednesday policy "so that colleagues spend time together rather than in meetings on their screens."[17]

The hybrid workplace can pose obstacles for attorneys and staff. As one forum participant noted, an "important part of the problem is that people—staff

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[12] *Id.*
[13] *Id.*

[14] Survey question 26, survey results question 26.
[15] *Talent is a Top Concern on Law Firm Leaders' Minds, Says New Report*, THOMSON REUTERS, June 14, 2022, https://www.thomsonreuters.com/en-us/posts/legal/talent-esg-report-2022. ("Globally, return to office arrangements are greatly varied, with some regions, such as firms in Asia, returning to the office nearly full time, while law firms in the United States continue to view two or three days per week in the office as the likely new standard. As firms attempt to execute their return-to-office plans, many associates are voicing an increasing desire for continued flexibility in their working arrangements." *Id.*).
[16] Sara Merken, *Summer Means Brief Return to Remote Work Option for Several New York Law Firms*, REUTERS, June 30, 2022, https://www.reuters.com/legal/government/summer-means-brief-return-remote-work-option-several-new-york-law-firms-2022-06-29.
[17] Sara Merken, *Saul Ewing Declares Wednesdays 'Zoom-free' as Law Firms Plot Office Returns*, REUTERS, March 14, 2022, https://www.reuters.com/legal/legalindustry/saul-ewing-declares-wednesdays-zoom-free-law-firms-plot-office-returns-2022-03-14.

and associates, even some partners—have become used to working from home. And there's a belief that there is an entitlement now to work from home two or three days a week, and not be in the office."[18] Another participant pointed out the pandemic has strained the relationship between attorneys and support staff, as they were and are being treated differently based on different expectations.[19] The relationships may have been "irreparably harm[ed]"[20] and "it's going to take some time before the attorneys and the staff have the relationship they had before[.]"[21]

Creating World Class Attorneys: Recruitment and Talent Development is Vital to Build Firm and Organizational Pipelines

Spending less time in the office may threaten a new attorney's professional development as they have less opportunity to observe senior attorneys interacting with clients, which may have an enduring impact on attorney-client relations. We observe a generational divide, with one managing partner sharing that "senior partners think it's absolutely essential that [young associates] need to be in the office to observe"[22] and to "learn from [older attorneys] how to act as an attorney and learn all the things you can't be taught by books or things like that[.]"[23] He shared his impression that younger attorneys believe they can receive the same training and benefits of mentoring by coming in only two or

[18] ACR 12/8/21 Transcript at 372–73 (hereinafter "ACR transcript").
[19] ACR transcript at 368–71.
[20] *Id.* at 370; 370–71.
[21] *Id.*
[22] *Id.* at 380.
[23] *Id.* at 381.

three days a week: “they wanted to have the access to senior people to learn, but they didn’t think it had to be [] five days a week.”[24] The participant noted that with extra effort, younger attorneys can be mentored. He emphasized “that’s going to be the future so we’re going to need to figure out how to do it better than we have.”[25]

New York attorneys need to be aware that flexibility can be consequential. A legal employer’s ability to attract and retain talented attorneys, and keep clients, will depend on their ability to offer a hybrid schedule. Further, not all clients appreciate or agree with a flexible approach. For example, the chief legal officer at a major financial firm expressing concerns about the impact of associate development recently warned the firm’s outside counsel to return to the office five days a week.[26] He wrote a letter expressing these concerns and "‘the lack of urgency to return lawyers to the office.’"[27] The letter expressed that “firms that get lawyers back to the office ‘will have a significant performance advantage over those that do not,’ affecting their work[.]”[28] The letter further

[24] *Id.* at 382, 383.
[25] *Id.* at 385.
[26] Joe Patrice, *‘We Need All Lawyers in the Office’ Says Bank Definitely Not Freaking Out About Commercial Real Estate Portfolio*, ABOVE THE LAW, July 19, 2021, https://abovethelaw.com/2021/07/we-need-all-lawyers-in-the-office-says-bank-definitely-not-freaking-out-about-commercial-real-estate-portfolio.
[27] David Thomas, *Morgan Stanley’s CLO wants you back in the office – for good*, REUTERS, July 19, 2021, https://www.reuters.com/legal/government/morgan-stanleys-clo-wants-you-back-office-good-2021-07-19.
[28] *Id.*

provided that the company "'will not be accommodating Zoom participation in critical meetings.'"[29]

Notwithstanding this, we cannot ignore the fact that flexibility attracts young, talented candidates. When respondents were asked to rank threats to the practice of law going forward, 14.40% felt the biggest threat is the "ability to attract talent because candidates want flexible, hybrid or fully remote work environments."[30] According to a recent American Bar Association survey, 44% of young lawyers "would leave their jobs for a greater ability to work remotely."[31] Further, "[m]ost lawyers reported that working remotely or on a hybrid basis has not adversely impacted the quality of their work, productivity or billable hours."[32]

Attorneys participating in the summer 2022 focus group reiterated the threat flexibility poses for retaining talent:

> [E]veryone from our Legal Service agencies to our big firms are struggling to hire people . . . they're trying to find lawyers to hire . . . [managing partners] are saying to me they don't feel like they're in a position where they can tell somebody well you've got to be in the office five days a week. Because that person can say look, you know . . .

[29] *Id.*

[30] Survey results, question 46. "Ability to attract clients because candidates want flexible, hybrid or fully remote work environments" was the fourth-most-selected option for the greatest threat, following loss of information due to cyber-attacks, inability to keep up with technology changes, and effectiveness of virtual court proceedings for counsel, witnesses, or clients. *Id.*

[31] *ABA survey: Most lawyers want options for remote work, court, and conferences*, AM. BAR ASS'N, Sept. 28, 2022, https://www.americanbar.org/news/abanews/aba-news-archives/2022/09/aba-survey-lawyers-remote-work/#:~:text=Share%3A,and%20legal%20training%20sessions%20remotely.

[32] *Id.*

> there's 100 jobs out there, I can go find a job, where I don't have to be in the office at all.[33]

This has led to the poaching of talent from the upstate firms during the pandemic. Bigger firms do so "because they can pay more, they say 'Oh, you can stay in Rochester and live at the price that it costs to live in Rochester and we'll pay you a New York [City] salary as well you know that's hard to turn down."[34] Attorneys face a difficult task in balancing the need for traditional face-to-face mentoring when successful talent recruitment depends on offering greater absence from the office.

Consider the added difficulty with addressing flexible operations for a firm with offices in different states. A focus group attorney from New York City shared that his firm is having difficult conversations about how much time to spend in the office:

> We all have extremes[,] people who think we should be here five days a week, particularly in our LA office they're there all the time. And here we have a lot of people who refuse to come in. . . . [W]e are having trouble training people without having them in-person . . . I think personally that they're missing out on a lot by not being here to you know, meet with clients with either me on the phone or in person to debrief a court appearance or hearing. . . [T]hey're also, I think, losing a lot about developing relationship with each other, because those of us [who] have been doing this for a while, know that a lot of our core relationships began when we were young associates, and we met people and those became our friends and they became the source of business and . . . part of the network. On the other hand, I hate commuting an hour and twenty minutes from my house . . . So it's like it's crazy and then I come here, and you know there's three partners here if I'm in the litigation department if I'm lucky on

[33] Western N.Y. transcript 300–02.
[34] *Id.* at 304.

> a good day. And, and the secretaries are really pissed off about being here, because they see no reason why they need to be in the office[.] You know there's obviously a lot of strong feelings about you know what's been going on.[35]

Engaging new clients

While the pandemic brought a flood of business for some practitioners, others felt an abrupt interference with their very livelihood. The experience has forced attorneys to focus on the best ways to engage new clients.

The Task Force survey gathered useful data regarding client development. We note that participants were strictly socially distancing at this time, and recognize that many in-person events have since returned. When asked "I anticipate the following new challenges to developing new clients: (Rank one (1) to eight (8), with (1) being most significant)," 50.65% of respondents ranked "lack of in person networking events" as the most significant challenge to developing new clients.[36] Interestingly, two other popular responses were "clients do not want to meet in person" and "clients do want to meet in person[.]"[37] The foregoing may be a result of self-imposed client restrictions on social interaction to avoid the risk of transmission of the virus or the need for better service.

Respondents were asked to rank the following in level of significance "to attract clients going forward": "provide timely or more legal/practice updates electronically to my clients[,]" "speak on webinars or at conferences[,]" "improve

[35] NYC transcript, 204–19.
[36] Survey question 41, survey results question 41.
[37] *Id.*

online marketing[,]" "write and publish legal articles[,]" "hold client in person events[,]" "join industry groups[,]" "join bar association committees[,]" "demonstrate that my firm is technology enabled[,]" and "demonstrate that I am technology enabled[.]"[38] The top choice for "most significant" was "provide timely or more legal/practice updates electronically to my clients" with 36.31%.[39] The second was "improve online marketing" and the third was "speak on webinars or at conferences."[40]

Another question asked survey respondents to rank the most significant or notable development in marketing, business development, and client engagement.[41] The top choice for "most significant" or "notable development" was "adapting to the lack of in-person meetings with clients" (40.15%), followed by "clients seek a virtual presence" and "firm establishing a presence with blogs and posting content electronically."[42]

Our forum participants discussed new and existing client marketing and business development efforts. For some, the pandemic ushered in new and unique marketing techniques. One senior managing partner representing educational institutions shared that his firm has released over 60 unsolicited opinion letters to clients regarding government regulations with masking and

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[38] Survey question 42.
[39] Survey results question 42.
[40] *Id.*
[41] Survey question 45.
[42] Survey results question 45.

vaccinations.[43] He found that "our opinion letters are all over the place and we're getting calls from institutions we don't represent and as a result of that have actually obtained additional new clients[.]"[44] Since the survey was conducted, the world has reopened and there are many more opportunities for in-person networking and client development at conferences and events. Visits to clients in office, however, may still present challenges for attorneys going forward as many clients continue to work remotely or hybrid.

One of the forum presenters shared her experience working at a small office of around nine attorneys with no marketing department.[45] During the pandemic, her office transitioned to more virtual marketing techniques like "promoting accolades or speaking events on our Facebook page or LinkedIn" and staying consistent with a schedule of postings to stay in the algorithm.[46] They even began advertising on the radio and received a "tremendous response" from their target audience.[47] Others pointed to the increased use of informational online videos, webinars, and half-hour "meet and greets" instead of lengthy client lunches. For attorneys to remain competitive in the post pandemic legal world, they will need to harness a blended modern day marketing approach, which includes in-person events to develop new relationships, and digital and

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[43] ACR transcript at 90–93.
[44] *Id.* at 95.
[45] *Id.* at 107.
[46] *Id.* at 108–10.
[47] *Id.* at 111–12.

social media platforms to build their profile, and promote their capabilities to existing and prospective clients. Savvy bar associations have an enormous opportunity to serve their members by helping them develop these skill sets (often not taught in law school) to help attorneys stand out in the evolving digital communications space. Bar associations need to stand ready to fill the social gap to bring people back together again and build a sense of community.

The attorney-client relationship and attorney-client communications

Few—if any—historical events or developments have done more to impact the attorney-client relationship than the COVID-19 pandemic. We faced obstacles at every step in our relationship: from the commencement of representation, to maintaining confidence in one's continued service, to managing expectations and constructing necessary boundaries. COVID-19 restrictions prevented many of us from meeting with our clients in-person and inevitably resulted in challenges with communications. When an attorney and client meet virtually, communications can be stymied.[48]

The survey results echo these challenges for attorney-client communications. Respondents were asked "What do you consider to be the disadvantages of virtual communications?" and the most selected response was "It is difficult to 'read' the reactions of participants in remote proceedings"

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[48] "Research also suggests that the use of remote video proceedings can make attorney-communications more difficult." Alicia Bannon & Janna Adelstein, *The Impact of Video Proceedings on Fairness and Access to Justice in Court*, BRENNAN CTR. FOR JUSTICE 2 (2020), https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court.

(62.41%), followed by "Technology glitches undermine the efficiency and effectiveness of remote communications" (58.87%).[49] Third, "It is difficult to determine witness credibility" (43.97%).[50] Fourth, "Household or other similar interruptions interfere with or prevent effective and efficient remote communications" (32.06%).[51] Fifth, "I feel I have less control" (29.79%).[52] The remaining 14.26% selected "none of the above."[53]

Later in the survey, respondents were asked "How has the use of virtual communications impacted your attorney-client relationships?" and 40.80% selected "No impact on my relationships[,]" 28.29% selected "Somewhat enhanced my relationships[,]" 13.89% selected "Diminished my relationships[,]" 9.26% selected "Greatly enhanced my relationships," and the remainder selected not applicable.[54]

The Working Group's forum discussed communications extensively. The pandemic overwhelmingly increased reliance on video and email communication, saving attorneys and clients time and money.[55] Instead of spending time in traffic, an attorney can easily host a virtual preparation session in the minutes leading up to the more formal proceeding. One of the task force

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[49] Survey question 23 results.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] Survey results question 49.
[55] *Id.* at 151 ("[S]o overwhelmingly we have video and email [as] now the leading modes of communication.").

co-chairs emphasized the value of these brief meetings, especially before lengthy collective bargaining sessions, noting that clients feel much more comfortable this way.[56] One Long Island participant discussed that waiting five hours for conferences is annoying for attorneys and clients—this practitioner's clients love virtual proceedings because they get to see what they are paying for, which is wonderful for client relations.

Communications with vulnerable clients

The Online Courts Working Group of the Commission to Reimagine the Future of New York's Courts identified "the ability for clients to meaningfully interact with their counsel" as a "chief challenge[]" to virtual proceedings.[57] Confidential communications between attorney and client may be jeopardized by the virtual format, with many attorneys reporting "difficulties that arise from not being able to pass notes with their client during a proceedings, or of not being able to explain the judge's decisions contemporaneously."[58] "Even where provisions are made for separate attorney-client breakout rooms, technical limitations and requirements can lessen the ability of attorneys and their clients to freely communicate without court assistance."[59]

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[56] *See* ACR transcript at 174–82.

[57] ONLINE COURTS WORKING GROUP OF THE COMMISSION TO REIMAGINE THE FUTURE OF NEW YORK'S COURTS, *Initial Report on the Goals and Recommendations for New York State's Online Court System* 13 (2020), https://www.nycourts.gov/whatsnew/pdf/OCWG-Report.pdf.

[58] *Id.*

[59] *Id.*

Criminal law practitioners did not have as positive a view from the trenches. Meeting with a client posed difficulty, as the attorney needed to wait days while a quarantine was in place.[60] Next, confidentiality: "the jail tries, they give the clients headsets and the laptop, but it still is not an area that is quiet or confidential in any way, so . . . it is a problem for the initial conversations and interviews and we are very careful to be asking yes and no questions."[61] This disadvantages attorneys who are thus unable to get the "full story" from an incarcerated client until much later on during representation.[62] Forum attorneys reported that some criminal clients displayed less respect for the courts during virtual hearings, finding that the lack of structure during a virtual hearing may send the message that a proceeding is less serious than it is.[63]

Attorneys representing clients in nursing homes or adult care facilities likewise felt additional pressure regarding their communications. Clients struggled to effectively utilize virtual communication technology (Zoom), devices, or the internet.[64] Consider situations where an abuser lives in the home with a client. One forum attendee advised taking attendance at the beginning of a proceeding: "whoever's there has to identify themselves."[65]

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[60] One of the ACR forum attorneys described a 10-day waiting period in Westchester County jail. ACR transcript at 189.
[61] ACR transcript at 191–93.
[62] *Id.* at 193.
[63] ACR transcript at 540-544.
[64] *Id.* at 574.
[65] *Id.* at 587, 590.

In his article, *Communicating With Clients: Three Lessons From the Pandemic*, author Sateesh Nori asserts that in his experience "during the pandemic, lawyers got better at communicating with their clients."[66] Accordingly,

> First, we started texting with clients. Many of us realized that emails are too formal, too slow, and often go unread. Emails from lawyers tend to turn into legal briefs or office memos – TLDR (Too Long; Didn't Read). And phone calls meant endless games of phone tag. Through SMS (Short Message Service) and MMS (Multimedia Messaging Service), clients would send photos of documents, messages about the factual details of their legal issues, and often just check in with us.
>
> . . .
>
> Second, the frequency of our communications with clients and with each other increased. Because of texting and because of the ease of use of Zoom and other platforms, we were able to chat with clients more often. Clients were able to share information as it arose.
>
> . . .
>
> Third, eliminating in-person contact as a default restores a power balance to attorney-client relationships.[67]

Navigating client expectations

COVID-19 revealed that clients will continue to rely on counsel's guidance and availability even if such demands may appear unreasonable. As one of the presenters during the Attorney Client Relations forum noted, "this is now [a] [twenty-four] seven job that you can never get away from because you're always

[66] Sateesh Nori, *Communicating With Clients: Three lessons From the Pandemic*, REUTERS, Oct. 25, 2021, https://www.reuters.com/legal/legalindustry/communicating-with-clients-three-lessons-pandemic-2021-10-25.
[67] *Id.*

available to your clients."[68] He stressed that going forward, we should focus on whether this is "healthy for the profession" or "healthy for the clients."[69] Polls were conducted in real time during the forum group presentation, and 87% of participants answered that client expectations will not change post-pandemic.[70] The presenter commented, "The answer that 87% think it won't change post-pandemic is somewhat frightening."[71]

A judge involved in the Working Group noted that as the pandemic began, she saw "a lot of motions to be relieved as counsel coming from both clients and attorneys and largely because of lack of communication . . . or problems with communication, so how you all are navigating your communication between yourselves and your clients is obviously, very important."[72] The pandemic's impact on client communications necessarily impacts the attorney's ability to navigate client expectations.

The Task Force survey asked, "Increasingly, my clients expect the following from my law firm," and the top response was "to be available on demand" (39.89%), followed by "more advice and counsel" (25.20%).[73] Similarly, "During the pandemic, have your client expectations for attorney availability changed?"[74] 44.82% selected "yes: expected to be available after traditional business hours

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[68] *Id.* at 239.
[69] *Id.* at 241.
[70] *Id.* at 243.
[71] *Id.*
[72] *Id.* at 438–40.
[73] Survey results question 43.
[74] Survey question 47.

and on weekends."[75] Conversely, 38.89% selected that their client's expectation for their availability has not changed.[76] Finally, "Does your firm have a policy to manage client expectations as to the timing of access to members of the firm?"[77] 44.99% selected "no" while 18.88% selected "not applicable[.]"[78] 16.73% selected "no, but there should be one[.]"[79] Only 16.48% report having a policy.[80] A mere 2.92% selected "We are currently creating one[.]"[81] Such results say a lot as to what the profession needs to implement.

For some participating in the forum, the pandemic has not changed client expectations regarding availability, citing our already-Pavlovian reflexes with our cell phones.[82] This attorney emphasized, "We've got to just train our clients, that there are certain times that we may not be available to them."[83] However, as this attorney later noted, failure to communicate with a client is the biggest grievance complaint.[84]

Managing client expectations is a balancing act of seeking to serve clients, as well as having a life outside the profession. As client expectations change, it will be important for firms to create and institute policies that meet client

[75] Survey results question 47.
[76] *Id.*
[77] Survey question 48.
[78] Survey results question 48.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] ACR transcript at 248.
[83] *Id.* at 252.
[84] *Id.* at 284–85.

expectations as to timing and access to attorneys. With only 16.48% respondents[85] reporting they have such a policy, there is room to develop a reasonable framework (e.g., responding to clients within two hours, by the end of the day, or by the very next day, and relaying your firm's policy verbally and/or within retainer letters).

Conclusion and recommendations

The pandemic has directly impacted New York's legal profession. The pandemic forced attorneys and firms to reconsider how and where they work. Survey respondents realized they can work remotely successfully and can more easily attend hearings or meetings because of virtual proceedings. Attorneys seeking more workplace flexibility have used hybrid work for more "work-life balance." Changing the "work-life balance" requires attorneys to convert working hours to non-work time. This directly clashes with the other pronounced pandemic lesson that clients want nearly 24/7 access to their attorney.

Another consequence is what has been described as the "threat culture." A recent article in The American Lawyer, entitled *The Lawyers Are Not All Right*, included information from Dr. Larry Richard—a lawyer and psychologist viewed as an expert in the psychology of lawyer behavior.[86] Dr. Richard explained that the area in control of our brain's fight-or-flight response has grown larger

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[85] Survey results question 48.

[86] *The Lawyers Are Not All Right*, AM. LAWYER, Jan. 30, 2023, https://www.law.com/americanlawyer/2023/01/30/the-lawyers-are-not-all-right.

"because typically the fight-or-flight response is called into use for a brief period of time."[87] The article articulated this silent COVID impact:

> "The pandemic forced us to create a new way of experiencing work that we weren't prepared for [and happened very quickly] in the shadow of a threat that can kill you [and you can't see it]," he said. "The threat sensing circuit in our brain that was designed to protect . . . the mechanism it uses is change," he added, noting "the threat was invisible and open-ended." Instead of the stress being "of a moment," he said, "it's been constant … that wears out the circuit." As a result, Richard said, people have grown sensitive to little things, or "hyper-reactive to things." It's distorted people, he said. We're not using our intellectual horsepower" because it's being diverted to the threat circuit, he said. "We are diminished."[88]

The article also reflects upon the diminution of time spent collaborating with fellow attorneys due to the explosion of remote work.[89]

While the pandemic impacted attorney-client communications, nothing has changed our professional duty to respond to client inquiries regardless of how late at night they ask or how many emails they have already sent that day. We must also be mindful of how our increasingly virtual world poses significant threats for practitioners working with vulnerable clients such as the indigent, criminal defendants, or the elderly.

Dealing first with an attorney's "work-life balance," firms with younger attorneys and hybrid programs will need to develop new ways to train and mentor associates while fostering community and a sense of belonging. While

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[87] *Id.*
[88] *Id.* (alterations in original).
[89] *Id.*

courts are now open, veteran attorneys must train both themselves and new practitioners to prepare for the realities of in-person, fully virtual, and/or hybrid law practice. They must be prepared to pivot.

By extension, firms must invest in training to help counsel and staff better navigate the new world of virtual meetings and proceedings. Bar associations play a pivotal role in helping solo, small, and mid-size firm attorneys prepare for this new reality going forward by offering training opportunities and mentorship.

Failing to incorporate the lessons we learned from the pandemic will prevent us from training the next generation of world-class lawyers. This impacts our clients and our firms and the New York legal profession.

A junior associate working at a large firm in New York City discussed her experience in completing three virtual internships: "all of the work was the same."[90] She never made it inside the courtroom and missed opportunities to socialize with other interns, law clerks, and judges.[91] The virtual format "makes it hard to figure out what you do not know. If you only know what you see on the screen . . . you can't hear about other people's successes unless you specifically set up those conversations, so I think that that's been the biggest challenge[.]"[92]

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[90] NYC Focus Group transcript, 376–83.
[91] *Id.*
[92] *Id.*

It is critical going forward that all attorneys become technologically comfortable and competent with virtual lawyering. Such knowledge is not optional for a successful law practice and is as critical as any other valued skill. Lawyers and firms must also embrace modern-day marketing and communications to stay competitive. This means learning digital communications, promoting talent and achievements on social media, and moving out of their comfort zones to connect and align with clients and the next generation of attorneys in 21st-century mediums. At the same time, all attorneys must continue to balance the number one threat to the practice of law identified by survey respondents: cyber attacks and loss of information. Large firms spend a lot of money checking client data; however, they are not immune to breaches, phishing, or other business compromise. Small and mid-sized firms must set aside resources to protect their client and firm data as cyber attacks become more common each day.

Junior attorneys must also take advantage of training, apprenticeship, mentorship, and sponsorship opportunities. Collaboration with other attorneys is part of the essence of lawyering.

Firms must think outside of the box to invest in training and mentorship for recruitment and retention purposes. Attorneys want flexibility, a sense of belonging, and community. Junior attorneys must also keep in mind that their advice and work product can have significant personal, financial, and life-

altering consequences for their clients. Adverse consequences may ensue from inadequate training and preparation. Thus, new attorneys should consider hybrid and/or full time in-person work to ensure they develop into world-class attorneys. Experienced attorneys must commit to such in-person training, while also preparing to work and handle cases virtually.

This Report did not explore the positive opportunities working remotely may have for disabled individuals. Previously, working in-person or appearing in court may have presented a serious challenge due to a person's disability. Virtual meetings and proceedings therefore help in leveling the playing field for disabled attorneys and give them greater opportunities to participate in the profession. Clients should, therefore, not discount participation by Zoom to support disabled attorney participation, where possible.

Finally, it is worth noting that the survey did not address AI-based solutions like ChatGPT and other similar technology. Our recommendation is for the NYSBA to study and evaluate AI, as it may have significant legal, business, policy, and ethical implications for attorney-client relationships.

<u>Recommendations by the Attorney Client Working Group</u>

- NYSBA must enhance its efforts to train all attorneys on the proper use of technology so they are able to work virtually to appropriately service the needs of clients. This includes best practices associated with the use of video conferences for depositions, court appearances, client interaction,

and “alternate dispute resolution” methodologies. All attorneys should be able to pivot between virtual and in-person proceedings seamlessly.

- NYSBA needs to be a leader in evaluating rule amendments and ethical precepts to account for the prevalence of virtual lawyering, including where parties certify in advance that they are ready and prepared to participate remotely.
- NYSBA needs to assist lawyers in how to embrace new marketing strategies to remain competitive in the marketplace.
- NYSBA and local bar associations need to increase their in-person social event schedule to encourage development of personal relationships among the New York bench and bar in the community. Junior attorneys require more opportunities to build formative relationships that will help them throughout their entire careers.
- NYSBA needs to prioritize mental health and provide services to help attorneys. Stress is not just pandemic-related—the delineation between work and home life has been considerably blurred.
- NYSBA needs to be a leader in supporting attorneys and promoting best practices to develop policies and frameworks to manage client expectations and increased client demands outside of traditional working hours. Firms need to craft and adopt such policies. Firm leaders need to demonstrate acceptable client-work boundaries.

- We must also be mindful of how our increasingly virtual world poses significant threats for practitioners working with vulnerable clients, such as indigent criminal defendants or the elderly, and that in-person communications are critical when dealing with these clients.
- Attorneys seek a flexible work environment but also crave a sense of belonging and community. Incorporate a "flexible first" work culture approach.
- Create a sense of community and belonging for attorneys both in person weekly or monthly gatherings. Encourage use of employee resource groups and memberships in groups, including bar associations, to foster community.
- With the increased geographic pool of remote candidates, expect competition for talent to be robust. Emphasize flexibility, mentorship, and training to young attorneys. Set the expectation that the short-term investment of in-person/office with hybrid training and development early in their careers will yield greater professional dividends down the road. Failure to properly train junior attorneys will impact client outcomes, firm reputation, and client services when senior attorneys retire or take a position at another firm.
- Enhance efforts to provide technology support and training to minimize the threat against cyber attacks. Bar associations can support members

by offering training, help lines, and membership resource benefit opportunities to ensure solo, small, and medium-sized firm cyber resiliency.

Access to Justice

Introduction

A great deal of attention has been devoted to the study of "access to justice," with mixed results, before and after March 2020, when COVID-19 transformed society, the legal profession, and the practice of law in New York.[93] These studies identify with a fairly high degree of specificity the nature and scope of the access to justice problem: mostly poor and working class, vulnerable "everyday people," particularly in Black, Brown, and Indigenous communities, continue to confront weighty "justice problems" that result in multiplying "legal needs." These problems require free or *pro bono* assistance that is not accessible or available, and stubbornly defy formal attorney or court interventions or are resolved (or ignored) outside of the formal legal system.[94]

Structural and systemic forces give rise to fundamental socio economic justice problems: safe and affordable housing, hunger and food insecurity, access to quality health care, voting rights, educational opportunities, and a living wage. Usually, attorneys and the legal profession view access to justice

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[93] N.Y. STATE UNIFIED COURT SYSTEM OFFICE FOR JUSTICE INITIATIVES, *Law Day Report, 2022: Toward a More Perfect Union: the Constitution in Times of Change* (2022), https://www.nycourts.gov/LegacyPDFS/publications/pdfs/OJI%20Law%20Day%20Report%202022.pdf; *Center for Court Innovation*, https://www.courtinnovation.org (last visited Sept. 18, 2022); N.Y. STATE UNIFIED COURT SYSTEM, *Permanent Commission on Access to Justice*, https://ww2.nycourts.gov/accesstojusticecommission/index.shtml (last visited Sept. 18, 2022); LEGAL SERVS. CO., *2017 Justice Gap Report* (2017), https://www.lsc.gov/our-impact/publications/other-publications-and-reports/2017-justice-gap-report (last visited Sept. 18, 2022) (estimating 86% of legal problems of low-income people received insufficient or no legal assistance, including more than 50% of people who go to legal services corporation-funded offices due to inadequate staff resources).

[94] *See* Rebecca L. Sandefur, *Access to What?*, 148 DÆDALUS 1, 9, 49–55 (2019), https://doi.org/10.1162/daed_a_00534.

primarily from the top down: the court system, government agencies, state legislators, and other "stakeholders."

Instead, in the age of COVID-19, we recommend that NYSBA and the legal profession approach access to justice questions from the perspectives of those most impacted by the legal system, including, but not limited to: poor people, Black, Brown, Indigenous, women, the LGBTQ+ community, immigrants and non-citizens, those with physical, cognitive, and psychosocial disabilities, the elderly, domestic violence survivors, people living with HIV, the homeless, debt-burdened, low-wage workers, unemployed workers, and veterans, among other marginalized and oppressed individuals and groups. For example, undocumented immigrants and other non-citizens who need counsel are often ineligible for free legal services, cannot afford a private attorney, and may be afraid of the legal system.

The legal profession must ask itself the following questions in planning and implementing access to justice reforms and initiatives:

- Does the proposed reform or initiative empower those most impacted by the legal system?

- Does it consider that vulnerable and marginalized groups often have:

    - limited access to technology and training, and may need to rely on a telephone to access court proceedings;
    - limited means to comply with court procedures (computer devices, internet connectivity, printers, faxes, payment requiring credit cards);

    - limited time and ability to take time off from work or caregiving responsibilities; and
    - limited quiet, private spaces?

- Does it reflect an understanding of the needs of immigrants, particularly those who are undocumented, who may have:

    - limited English proficiency;
    - limited understanding of systems and rights;
    - limited resources; and
    - fear of the unknown and participation in the legal system?

COVID-19 has revealed and exacerbated the fundamental intersecting structural problems that underlie access to justice, which include, but are not limited to:

- racism, express and implicit bias, xenophobia, and disability discrimination;
- income and wealth disparities;
- poverty and limited safety net support systems, particularly for women, children, and families;
- disproportionate incarceration of Black and Brown people;
- a dysfunctional and inequitable immigration system; and
- an epidemic of gun violence.

The high cost of legal representation, ancillary costs resulting from taking time off work to attend court, and dependent care all impose additional obstacles. Further, the price of legal services may impact the quality of justice a person receives. Outcomes often depend on the quality of representation a

litigant can afford to obtain. Courts and "justice" institutions are often underfunded.[95]

Attorneys and judges try their best to fulfill the legal needs of their clients, particularly those committed to a career in legal service practice, as well as those who willingly provide *pro bono* services. Attorneys and judges endeavor to identify or empathize with such clients or litigants, perhaps because they do not share life experiences and/or have not received adequate training in implicit bias and microaggressions.[96] This makes it more difficult for attorneys to represent clients effectively and for judges to treat litigants fairly.

We must ensure that judges realize that the lawsuits before them often do not occur on a level playing field. Ongoing training of the judiciary and the practicing bar in explicit and implicit bias is critically required.[97]

From a disability justice perspective, access to justice is a framework used widely in deaf, signing, and disabled communities, but it raises important

[95] *See e.g.,* Greg B. Smith, *The Bronx Hall of Justice is Falling Apart and No One Knows How to Stop It*, THE CITY, Feb. 20, 2022, https://www.thecity.nyc/2022/2/20/22942537/bronx-hall-of-justice-falling-apart.

[96] *See e.g.*, Derald Wing Sue et al., *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 AM. PSYCH. 4, 271 (2007).

[97] N.Y. STATE UNIFIED COURT SYSTEM, *Report from the Special Adviser on Equal Justice in the New York State Courts* (2020) https://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf (hereinafter "Johnson Report") (despite progress made by NYS courts, continued racism, bias, and lack of diversity requires additional measures, including training with mandatory policies and protocols on racial bias for judges, court personnel, and jurors); N.Y. STATE UNIFIED COURT SYSTEM, *Equal Justice in the New York State Courts, 2020–2021 Year in Review* (2021) https://www.nycourts.gov/LegacyPDFS/publications/2021-Equal-Justice-Review.pdf (affirming that racism is an access to justice issue, noting implementation of some recommendations in the Johnson Report, and recommending reforms that include: a statewide policy of "zero tolerance" for racial bias and discrimination; mandated comprehensive racial bias training for all judges and nonjudicial staff; and a new mission statement for the Unified Court System that incorporates principles of equity, diversity, and inclusion).

questions about the quality of that access. Do disabled people have appropriate access to legal services addressing their needs? The needs of disabled people, including those with intellectual or developmental disabilities, psychosocial disabilities, and age-related cognitive disabilities must be considered in the operation and design of physical courtrooms and virtual proceedings, with the understanding that virtual proceedings can sometimes more effectively meet those needs.[98]

Access to justice also requires attention to language services, both in-person and virtually. Language justice—beyond mere access—makes it essential to provide accurate interpretation in a proceeding to protect a litigant's due process rights.[99] "Providing language services is essential to upholding the integrity of our justice system. Barriers to language access can interfere with the capacity of state courts to accurately evaluate the facts and fairly administer justice."[100] Language services in the courtroom are important, but they are also needed in court clerk's offices, self-help centers, on signs, websites, forms, and

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[98] David Allen Larson, *Access to Justice for Persons with Disabilities: An Emerging Strategy*, 4 LAWS 220, 238 (2014) ("We can improve access to justice by removing physical and architectural barriers. We also can carefully examine whether we have created unnecessary cognitive barriers through oversight or simply by habit."). *See also There is No Justice Without Disability*, FORD FOUNDATION, https://www.fordfoundation.org/news-and-stories/big-ideas/there-is-no-justice-without-disability (last visited Dec. 19, 2022).

[99] U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIVISION, *Language Access in State Courts* (2016) https://www.justice.gov/crt/file/892036/download.

[100] *Id.*

other court services, including when the court appoints psychologists, mediators, or counsel.[101]

Unmet legal needs may be due to a lack of meaningful access to lawyers, government agencies, and courts due to fear, language, and cultural barriers, and the limited availability of free or *pro bono* legal representation. Free or low-cost legal representation is only available to a very small percentage of people with legal needs, due to legal aid and legal services eligibility restrictions and limited funding and staffing, including organized bar *pro bono* initiatives. Other barriers to access to justice include the complexity of laws and court procedures, the cost of retaining an attorney, time and travel expenses, and a perception that the legal system is biased and unfair.

For example, even with the right to counsel in eviction cases in New York City for tenants below 200% of the federal poverty level,[102] eviction cases far exceed the available capacity of legal services organizations whose attorneys already have excessive caseloads.[103] With the lifting of the eviction moratorium in Spring 2022, a growing number of tenants in New York City and throughout the state are facing eviction proceedings without an attorney.[104]

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[101] *Id.*
[102] Sam Rabiyah, *Less Than 10% of Tenants Facing Eviction Actually Got a Lawyer Last Month, Undermining 'Right to Counsel' Law*, THE CITY, Oct. 27, 2022, https://www.thecity.nyc/2022/10/27/23425792/right-to-counsel-housing-court-tenant-lawyers.
[103] *Id.*
[104] *See* Mihir Zaveri, *After a Two-Year Dip, Evictions Accelerate in New York*, N.Y. TIMES, May 2, 2022, https://www.nytimes.com/2022/05/02/nyregion/new-york-evictions-cases.html; Chloe Sarnoff & Casey Berkovitz, *From Crisis to Opportunity: Strengthening Housing Stability and Increasing Opportunity for Law-Income Families in New York City*, THE CENTURY FOUNDATION, July 22, 2021,

Another reason why "access" and "justice" remain elusive may be the limitations of the existing architecture of the legal system. While the New York State court system has made strides in modernizing, particularly in response to the COVID-19 crisis, far too many court procedures remain difficult to navigate. Despite the best of intentions, the recommendations of numerous commissions, reports, studies, proposals, and promising initiatives, New York State courts are not yet truly consumer-friendly and service-oriented.

First, some courts have failed to evolve from their stated purpose, while others have evolved in ways that represent a departure from their original purpose. Housing court was originally intended to regulate housing maintenance, but overwhelmed by the number of nonpayment proceedings it has become focused primarily on processing evictions.[105]

Second, the court system reinforces the perception of two systems of justice. For example, in Family Court, poor and diverse families are left to the

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https://tcf.org/content/report/strengthening-housing-stability-opportunity-low-income-families-new-york-city; Oksana Mironova, *Right to Counsel Works: Why New York State's Tenants Need Universal Access to Lawyers During Evictions*, COMMUNITY SERVICE SOCIETY, March 7, 2022, https://www.cssny.org/news/entry/right-to-counsel-new-york-tenants-lawyers-evictions. In the Spring 2022 Session, the New York State Legislature failed to pass bills providing for Right to Counsel Access for tenants outside of New York City and "good cause" protections against eviction for tenants throughout New York State. Jeanmarie Evelly et al., *New York's Legislative Session Ends, With Mixed Results on Housing. Here's What Passed & What Didn't*, CITY LIMITS, June 4, 2022, https://citylimits.org/2022/06/04/new-yorks-legislative-session-ends-with-mixed-results-on-housing-heres-what-passed-what-didnt.

[105] Judith S. Kaye & Jonathan Lippman, *Housing Court Program: Breaking New Ground* (1997), https://nycourts.gov/courts/nyc/ssi/pdfs/housing_initiative97.pdf.

informality of a "poor person's court," while litigants who can afford lawyers pay for a higher-quality court experience.[106]

Third, court procedures and forms are unnecessarily complex and do not appropriately serve all the needs of the public.[107]

Some attempts to address structural problems in the New York State court system have been made including, *inter alia*, Justice Courts, Integrated Courts, and Problem Solving courts. A recent proposal for a constitutional amendment to modernize and simplify New York State courts is a long overdue step in the right direction.[108] In the Seventh Judicial District in Upstate New York, Special COVID Intervention Parts ("SCIP courts") consolidated all landlord-tenant cases in Rochester City Court and Monroe County's village and town courts into a much smaller number of SCIP courts, which enabled legal service providers across a broad geographical area to represent their clients more effectively.[109]

COVID-19 illuminated the pervasive impact of three connective threads, which are critical to understand to more effectively address the access to justice

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[106] Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, 22 GEORGETOWN J. POV. L. & POL'Y 473 (2015); Jonah E. Bromwich, *Family Court Lawyers Flee Low-Paying Jobs. Parents and Children Suffer,* N.Y. TIMES, April 29, 2022, https://www.nytimes.com/2022/04/29/nyregion/family-court-attorneys-fees.html.

[107] *See e.g.*, The Fund for Modern Courts, https://moderncourts.org/ (last visited Dec. 19, 2022) ("The Fund for Modern Courts is a non-partisan, statewide organization committed to ensuring that the New York State judiciary is independent and that our courts are just and equitable for all.").

[108] *See* Chief Judge Janet DiFiore, *State of Our Judiciary 2022*, Feb. 16, 2022, https://www.nycourts.gov/whatsnew/pdf/22_SOJ-Speech.pdf; Luis Ferré-Sadurní, *Can New York Overhaul its Complex, Antiquated Court System?*, N.Y. TIMES, Feb. 16, 2022, https://www.nytimes.com/2022/02/16/nyregion/new-york-court-system.html.

[109] Press Release, Monroe County, NY: *Local Leaders Announce Community Effort to Assist in Eviction Cases*, Sept. 17, 2020, https://www.monroecounty.gov/news-2020-09-17-evictions.

gap: (1) racism, implicit bias, and inequity; (2) poverty, wide income and wealth disparities, and the lack of an adequate social safety net for poor and working class people; and (3) the "digital divide" and the need for digital justice that will provide litigants access to computers, broadband internet, and the necessary training and support to achieve more widespread digital literacy.

New York attorneys, paralegals, judges, court personnel, and other members of the legal profession practice in extraordinarily diverse subject matter areas and work in rural, suburban, and urban regions. Suffice it to say, "one size does not fit all." The pandemic confirmed and heightened our understanding of the true extent of preexisting access to justice problems and the future challenges facing the legal profession; our ongoing experience with COVID-19 should continue to inform and serve as a catalyst for innovation.

To speak to the vast needs of those most impacted by our legal system, this report of the Access to Justice Working Group includes the following sections:

1. A framework for understanding access to justice.
2. COVID-19 revealed and exacerbated the preexisting access to justice crisis.
3. The "digital divide" prevents access and justice in virtual proceedings and communities.
4. Recommendations.

This report incorporates research and fact-gathering, including the results of the NYSBA Task Force Survey and the information gathered by the Access to Justice Working Group of the Task Force, including at our public forum.

A framework for understanding access to justice

Access to justice has different meanings and interpretations that can obscure the reality of injustice in society and within the New York legal system. As a result, it is necessary to define and "unpack" what "access" and "justice" mean to understand and frame the nature of the problems and propose meaningful solutions.

Historically, the access to justice community has focused on meeting the legal needs of individuals with low incomes who have trouble accessing a complicated legal system.[110] Access to justice advocates have observed that the legal profession has prioritized the need for lawyers rather than resolving the problems lawyers have been sent to address.

Despite the extensive efforts of the organized bar, including NYSBA and the New York State Bar Foundation, to address access to justice by supporting the matrix of legal service organizations in this state and by providing and supporting *pro bono* legal services, many litigants in civil proceedings remain

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[110] THE HAGUE INSTITUTE FOR INNOVATION OF LAW (HIIL) & THE INSTITUTE FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (IAALS), *Justice Needs and Satisfaction in the United States of America* (2021), https://www.hiil.org/wp-content/uploads/2019/09/Justice-Needs-and-Satisfaction-in-the-US-web.pdf.

unrepresented by counsel.[111] There remains a complicated intersection of needs. There is an overwhelming need for effective and competent representation and legal advice for those faced with desperate legal circumstances, without the financial means to obtain legal assistance.

"Access" generally encompasses what attorneys think of as "legal issues" that require intervention by attorneys and the legal system.[112] This view leads to solutions that inevitably require more, rather than less, involvement by attorneys and the system. This is at least in part why the access-to-justice gap remains stubbornly large despite many laudable initiatives that invest large amounts of financial resources and human capital.

In contrast to access problems, "justice problems" encompass a broader range of challenges faced by everyday people that are inextricably linked to structural and systemic forces, such as racism, bias, and economic inequities. This includes, for example, employment, wages, and work conditions; housing; debt and other financial obligations or issues; health care and medical treatment; family matters; disability and inclusion; education; discrimination; and lack of legal status.[113] If those working in the legal profession widen their perspective to center justice problems as the framework to view and address legal needs, the role of communities becomes pivotal, and a greater range of

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[111] *See generally* David Freeman Engstrom, *Post-COVID Courts*, 68 UCLA L. REV. DISC. 246 (2020) (exploring the toll of COVID-19 on our courts).
[112] Sandefur, *supra* note 94.
[113] *Id.*

solutions and remedies emerge beyond those available through the legal system.[114]

Increasing access without fundamentally reevaluating what justice is within and outside the legal system—for example, addressing racial disparities and inequities, providing the means to effectively avoid, prevent, and resolve legal issues, and reducing unnecessary involvement with the legal system—will perpetuate the ongoing access to justice "crisis" in which: (i) legal needs that are tied to greater socioeconomic inequities are unmet, (ii) court resources remain stretched to the breaking point, and (iii) underlying access to justice problems continue to escalate.

To better visualize the relationship between access and justice, we constructed the "Justice Pyramid" below, which is upside down to reflect the actual scope of each of the tiers from top to bottom: system obstacles, justice problems, legal needs, and the legal system.

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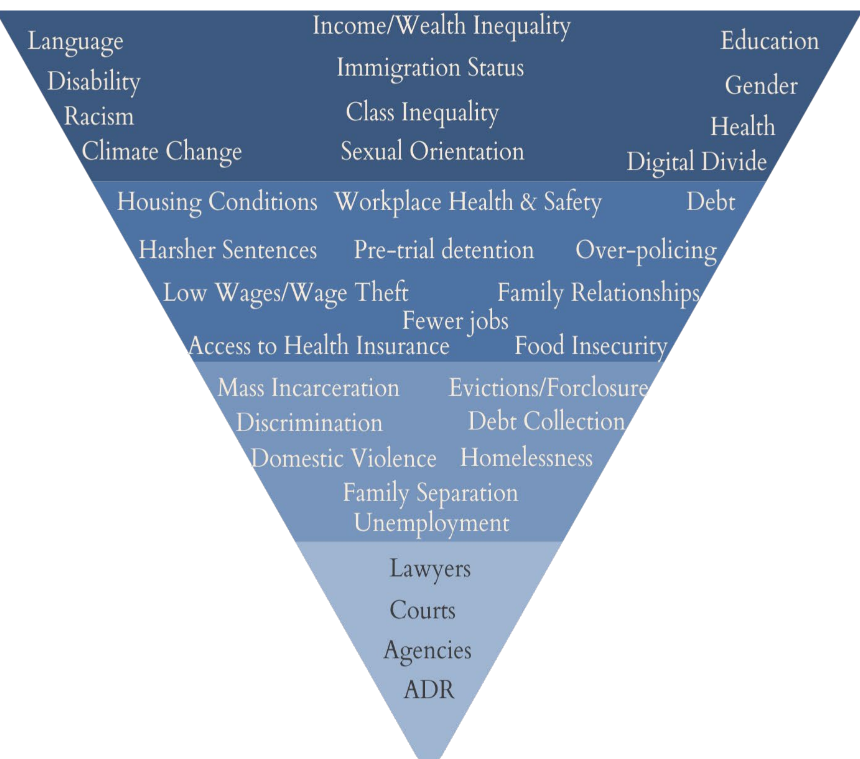
[114] The Justice Index provides "a snapshot of the degree to which each US state has adopted best practices for ensuring access to justice for all people. NCAJ has identified policies in four key areas—attorney access, support for self-represented litigants, language access and disability access—that we believe every state should have in place to ensure meaningful access to justice for everyone." NAT'L CTR. FOR ACCESS TO JUST., *Justice Index*, https://ncaj.org/state-rankings/justice-index (last visited Dec. 20, 2022).



<u>Summary of survey data related to access to justice</u>

The access-to-justice framework helps contextualize the relevant results of the Task Force survey. Responses reflect the legal profession's traditional view that the access-to-justice crisis can be addressed predominantly by legal aid and legal services, pro bono representation by the private bar, and law school clinics. This traditional notion of access to justice in the legal profession focuses on legal needs and representation. In contrast, a broader view of justice problems requires a greater role by non-lawyers in the community. Notably, although respondents did not view technology as critically important, they believed access to information—including through technology—would make the biggest difference for the clients and communities they serve.

The first survey question regarding access to justice was question 31, which asked respondents to rank seven different descriptions of access to justice.[115] 35.63% of respondents answered that the best description for access to justice was “Providing more legal representation through legal aid and civil legal services and law school clinics”; 17.52% selected “Supporting legislation and other actions that will simplify court procedures, forms, and rules”; 16.79% selected “Educating people about their legal rights and making other information about legal issues more readily available and accessible”; 14.48% selected “Restructuring the court system to better meet the needs of litigants”; 13.32% selected “Providing legal representation through increased involvement of attorney pro bono services, assigned counsel or pro bono programs”; 7.4% selected “Expanding the use of alternative dispute resolution to the unrepresented, including mediation and arbitration”; and 4.3% selected “Improving the use of technology to help the unrepresented and under-represented litigants.”[116]

Question 33 asked, “To increase ‘access to justice,’ how important are free legal services to those without means to pay legal fees?”[117] 60.93% of respondents selected “Very important”; 22.41% selected “Important”; 13.33% selected “Somewhat important” and 3.33% selected “Not important.”[118] The

[115] Survey question 31.
[116] Survey results question 31.
[117] Survey question 33.
[118] Survey results question 33.

following question asked respondents to identify the services from question 33 that should be free, and the written responses indicate a tension between the inability of most low-income people to afford an attorney and the economic pressure attorneys have to earn enough to pay bills, including student loans, and make enough to support themselves and their families.

Question 35 asked, "To increase 'access to justice,' how important is it to provide more affordable legal services to those who are not indigent, but who still need legal assistance?"[119] 44.61% of respondents selected "Very important"; 31.77% selected "Important"; 19.59% selected "Somewhat important" and 4.03% selected "Not important."[120]

Question 37 asked respondents to rank four changes to improve access and justice in the courts for the unrepresented or under-represented. 40.88% of respondents ranked as most significant "Changes in court rules, procedures, and forms to improve quality, efficiency, and public information to seek to make it easier for litigants to better understand and participate in court proceedings."[121] Next, 25.22% of respondents ranked as most significant "Training of judges and court personnel on the impact of the court system (for example, on housing, income, health care, employment, family matters, and incarceration)," followed closely with 22.69% of respondents selecting

[119] Survey question 35.
[120] Survey results question 35.
[121] Survey results question 37.

"Legislation that would seek to prevent legal problems that require court resolution."[122] 16.97% of respondents ranked as most significant "Better understanding, design, and use of technology by courts to enable virtual appearances (i.e., computers, mobile devices, printers, and connectivity) and facilitate access to information by litigants."[123]

Question 38 asked, "From an 'access to justice' perspective, what changes would make the biggest difference to the clients and communities you serve?"[124] In reviewing the written answers, respondents tend to believe that through technology and public education an increase of accessible information would make the biggest difference in access to justice to the clients and communities they serve.

COVID-19 revealed and exacerbated the pre-existing access to justice crisis

As the Honorable Edwina G. Mendelson wrote in her July 2020 report entitled *Ensuring Access to Justice for Unrepresented Court Users in the Virtual Court Era—and Beyond*,

> [T]he impact of COVID-19 will lead to a greater number of unrepresented litigants entering the court system—either to initiate a claim, to defend against one, or both. The unrepresented are often at a disadvantage in even the best of times, and this crisis has exacerbated many of the hardships, including the digital divide between those with access to technology and those lacking such access. Yet, this crisis comes with an opportunity—it has provided the [Unified Court System] with the impetus to design and implement

[122] *Id.*
[123] *Id.*
[124] Survey question 38.

> a virtual extension of our existing Access to Justice program. A system that works well during a pandemic will work exceedingly well as the crisis subsides. Our response must be immediate; we simply do not have the luxury of delay.[125]

The impact of COVID-19 on the legal profession has been profound. As the National Center for Access to Justice describes in its 2021 report "*Working With Your Hands Tied Behind Your Back": Non-lawyer Perspectives on Legal Empowerment*:

> Every year, millions of Americans who need help with their legal problems find out that there is no such help or offer. Some are left to go it alone in court, where they may stand little chance against a better-equipped adversary. Some lose their homes, their savings and their children in cases they might have won with the right kind of help. Others avoid the legal system altogether, in situations where it could help vindicate their rights or win reparation for abuse.[126]

The following statistics provide a snapshot of the access to justice gap for civil legal problems:

- In 2017, "86% of the civil legal problems reported by low-income Americans received inadequate or no legal help."[127] At the same time, "71% of low-income households experienced at least one civil legal problem in the last year, including problems with health care, housing conditions, disability access, veterans' benefits, and domestic violence."[128]

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[125] HON. EDWINA G. MENDELSON, *Ensuring Access to Justice for Unrepresented Court Users in the Virtual Court Era—and Beyond* 3 (2020), https://www.nycourts.gov/LegacyPDFS/ip/nya2j/Unrepresented-Court-Users-Report-July-1-2020.pdf.

[126] *Working With Your Hands Tied Behind Your Back,* NAT'L CTR. FOR ACCESS TO JUST., *Non-lawyer Perspectives on Legal Empowerment* 3 (June 2021), https://ncaj.org/sites/default/files/2021-06/NCAJ%20Working%20With%20Your%20Hands%20Tied%20Behind%20Your%20Back.pdf.

[127] LEG. SERVS. CORP., 2017 JUSTICE GAP REPORT, *supra* note 93.

[128] *Id.*

- Each year, 55 million Americans experience 260 million legal problems.[129] "A considerable proportion of these problems—120 million—are not resolved or are concluded in a manner which is perceived as unfair."[130]

- The national benchmark for civil legal aid attorney count per 10,000 people is 10, whereas the New York score count is 4.39 per 10,000.[131]

As COVID-19 forced courts to close their physical doors, technology opened virtual doors, enabling court services to remain available to the public.[132] The New York State court system pivoted to virtual proceedings using the Microsoft Teams platform.[133] Virtual proceedings will no doubt continue to be an essential part of what has become a hybrid court system.[134]

Many attorneys and legal services/legal aid organizations were creative and resourceful in this pivot and deployed digital tools and platforms to respond to the needs of their clients.[135] They maintained communication with their clients and, wherever necessary and possible, provided them access to technology they needed to communicate and/or appear in court. Some implemented community education such as "know your rights" workshops.

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[129] *Justice Needs and Satisfaction in the U.S.*, *supra* note 110, at 222.
[130] *Id.*
[131] *Attorney Access: State Scores and Rankings*, NAT'L CTR. FOR ACCESS TO JUST., https://ncaj.org/state-rankings/justice-index/attorney-access (last visited Dec. 20, 2022).
[132] *How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations*, THE PEW CHARITABLE TRS. (2021), https://www.pewtrusts.org/-/media/assets/2021/12/how-courts-embraced-technology.pdf.
[133] NYSUCS, Microsoft Teams – Virtual Court Appearances, https://portal.nycourts.gov/knowledgebase/article/KA-01071/en-us (last visited Dec. 12, 2022).
[134] *Creating an Archive: Responding to the 2020-2021 Pandemic*, HIST. SOC'Y OF THE NEW YORK CTS., https://history.nycourts.gov/pandemic-response (last visited Dec. 12, 2022).
[135] *See, e.g.*, Law Help NY, https://www.lawhelpny.org/ (last visited Dec. 12, 2022); *Lawyering in the Digital Age*, Projects, COLUMBIA LAW SCH., https://blogs.law.columbia.edu/ldaclinic/projects/ (last visited Dec. 12, 2022).

COVID-19 illuminated the importance of community-based projects and resources beyond individual representation. For example, Legal Hand is a project where trained non-lawyer community volunteers provide free legal information, assistance, and referrals to help resolve issues with employment, housing, family, immigration, domestic violence, and benefits, aiming to prevent these problems from turning into cases.[136] Legal Hand offices were conceived as one-stop legal information centers, accessible and connected to legal and other service providers, with a community volunteer training program and located in low-income communities.

Before and during the COVID-19 pandemic, Legal Hand was a physical space, and then became a virtual space where people with different kinds of justice problems were able to obtain information. There are many unmet legal needs, including problems that are outside the scope of what legal services typically provide. For example, according to Jennie Kim, immigration attorney with Queens Legal Services and former attorney for Legal Hand:

> We think about housing in terms of tenants and landlords, housing conditions, and affordability. But, as a result of the affordable housing shortage, a tenant may be renting out their rooms. People came into Legal Hand needing to resolve conflicts with the tenant over who is entitled to a particular room and how much they must pay as the 'room rental' arrangements are not in writing. The court system couldn't really handle that situation and even when we were trying to develop some kind of method of dealing with conflicts that arise in that situation and it's not just about . . . personal conflicts, but we're talking about actually fighting over one room, and the

[136] Legal Hand, https://www.legalhand.org (last visited Dec. 19, 2022).

> tenant of the apartment had actually decided to put someone else in that room. And so, the person who was there was kicked out into the living room, without any partitioning. There are a lot of people who are coming in with these issues.[137]

The New York State courts and many organizations came up with creative and new ways, including emergency procedures and protocols, to make courts and information available. There were "delays in justice," but perhaps these were actually justice initiatives from which we can learn, for example, the eviction moratorium.

At the beginning of the pandemic, online proceedings were essential for the safety of clients and legal staff, including judges and court personnel. What did not change is that "disparities in healthcare, employment, and housing place communities of color at great risk of being targeted by the legal and court systems, and places them at a great risk of illness and death."[138]

Virtual proceedings have had different impacts, both positive and negative, depending on the type and procedural posture of a particular case. Virtual proceedings have made court appearances much more accessible for many litigants, including working parents, older adults, people with disabilities, and others with caregiving responsibilities. Interpreters can more easily provide services merely by signing into the virtual proceeding. The option to appear in

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[137] On file with Access to Justice Working Group.

[138] Written testimony of Lisa Schreibersdorf, Executive Dir. of Brooklyn Defender Servs. (Dec. 14, 2021), https://bds.org (on file with Access to Justice Working Group).

court remotely, particularly for appearances without testimony, evidence, and final decisions, can provide easier and more efficient access to the courts and brings substantial benefits, including relieving litigants, often relying on public transportation, of the burden to travel. Outside of New York City, litigants may have to travel long distances to law offices and courts, adding a great deal of time and expense.

However, virtual proceedings can amplify preexisting inequities. For example, as Family Court turned virtual, Brooklyn Defender Services reported an increase in dehumanizing language used to speak to both families in the court system and their staff.[139]

A disproportionate percentage of litigants in New York City Family Court and Housing Court are people of color, who often do not have access to adequate computer devices, internet connectivity, or the digital literacy necessary to fully participate in virtual proceedings.[140] This compromises their due process rights and their attorneys' ability to zealously advocate. During virtual court appearances, it was difficult for attorneys and their clients to communicate privately, which prevents attorneys from incorporating a client's personal knowledge and opinions into litigation decisions. This also prevents counsel

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[139] Johnson Report, *supra* note 97, at 2–5.
[140] NEW YORK CITY FAMILY COURT COVID WORKING GROUP, THE IMPACT OF COVID-19 ON THE NEW YORK CITY FAMILY COURT: RECOMMENDATIONS ON IMPROVING ACCESS TO JUSTICE FOR ALL LITIGANTS 3–5 (2022) https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/nyc-family-court-covid-19-impact.

from being able to answer a client's real-time questions and ensure that they understand what is happening in court.

Former US Secretary of Homeland Security Jeh Johnson recently examined institutional racism in the New York State court system.[141] Johnson reported repeatedly hearing about "'dehumanizing' and 'demeaning cattle-call culture' in New York City's highest volume courts."[142] Accordingly, "[t]he picture painted for us was that of a second-class system of justice for people of color in New York State."[143]

The United States immigration court system was suffering from a significant backlog of cases prior to COVID-19, among other inefficiencies, and a lack of fairness. Because removal proceedings are deemed civil matters, immigrants facing removal do not have a right to an attorney like a criminal defendant. This leads to a high percentage of *pro se* respondents in immigration courts. There is also no right to language interpretation during a removal hearing, which deprives respondents of the right to understand the entire proceedings, despite the fact that these proceedings determine their entire fate. As immigration courts increase their reliance on virtual proceedings, due process is adversely impacted in depriving respondents access to their attorney(s) and prejudicing the rights of *pro se* respondents. Immigrants are

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[141] *Id.* at 3. *See also* Johnson Report, *supra* note 97, at 54.
[142] Johnson Report, *supra* note 97, at 54.
[143] *Id.*

deprived the opportunity to have meaningful participation in their hearings or present their defenses in removal cases.

While the primary focus of this report is on civil access to justice, we recognize that the criminal justice system in New York State has had, and continues to have, a devastating impact on Black and Brown communities with far-reaching collateral consequences.

In 2021, there were 76,021 individuals incarcerated in federal, state, and local jails and prisons in New York.[144] Approximately 96,000 adults are on probation, and 43,000 are on parole.[145] Despite the current perception of an increase in crime, racism, bias, and inequality continue to exist throughout New York State, including within the legal system.[146]

The "digital divide" prevents access to justice in virtual proceedings and communities

COVID-19 accelerated the pace of lawyering in the digital age, including expanded e-filing and virtual proceedings. Virtual proceedings were initially

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[144] PRISON POL'Y INITIATIVE, *States of Incarceration: The Global Context* 2021, Appendix 1: State Data (Sept. 2021), https://www.prisonpolicy.org/global/appendix_states_2021.html.

[145] PRISON POL'Y INITIATIVE, *New York Profile*, https://www.prisonpolicy.org/profiles/NY.html (last visited Dec. 18, 2022).

[146] *See e.g.*, NEW YORK ADVISORY COMM. TO THE U.S. COMM. ON CIV. RTS., *Racial Discrimination and Eviction Policies and Enforcement in New York* (2022), https://www.usccr.gov/files/2022-03/New-York-Advisory-Committee-Evictions-Report-March-2022.pdf (within the broad context of the nationwide eviction crisis, lack of affordable housing, and homelessness, together with historical housing segregation, redlining, and zoning policies; examining impact of racism in housing courts in Albany, Buffalo, and New York City); Johnson Report, *supra* note 97 (noting some progress, but proposing urgent additional measures to address persistent racism and bias in the court system that is "dehumanizing, over-burdened and under-resourced"). New York State has implemented some of the recommendations in the Johnson report. Press Release, NYSUCS: *New Report Documents Significant Progress Made, Efforts Underway to Advance Equal Justice in the NYS Courts*, Nov. 17, 2021, https://www.nycourts.gov/LegacyPDFS/press/pdfs/PR21_29.pdf.

used as a stopgap measure, but now are a permanent part of the New York State court system. The accelerated transition to online practice and proceedings necessitated by the pandemic highlighted the deep "digital divide," which creates obstacles for many litigants who are forced to rely on technology as never before. "For instance, users without high-speed internet services or computers faced significant hurdles when trying to access courts using the newly available tools."[147]

The move to virtual proceedings revealed another preexisting problem: the "digital divide" largely corresponds to the broader socioeconomic disparities that disproportionately impact marginalized groups. The digital divide separates those with access to broadband internet, computer devices (including tablets and smartphones), and the necessary training enabling meaningful participation. These problems are also pervasive in the New York State administrative hearing system that presides over a vast government benefit system that impacts a substantial number of the most vulnerable people.

For over 250,000 New Yorkers, broadband service is unavailable in their neighborhood, and more than 1 million households do not have access or a subscription to broadband as of 2019.[148] According to Professor Conrad Johnson, Founder and Director of Columbia Law School's Lawyering in the

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[147] PEW, *supra* note 132.
[148] OFFICE OF NYS COMPTROLLER, *Availability, Access and Affordability: Understanding Broadband Challenges in New York State* (2021), https://www.osc.state.ny.us/files/reports/pdf/broadband-availability.pdf

Digital Age Clinic, the digital divide consists of three main components: (1) lack of internet access, cost, and broadband infrastructure; (2) lack of computer devices and software; and (3) lack of understanding how to access services online, which requires training on digital literacy.[149]

An early pandemic housing case provides a glimpse at a providing approach to overcome the digital divide: the "Justice Tablet" project pioneered by Professor Johnson's Lawyering in the Digital Age Clinic at Columbia Law School, in partnership with the Legal Aid Society of New York City.[150] Using low-cost computer tablets that are preloaded with essential software programs (e.g., Microsoft Teams to access New York State virtual proceedings, WhatsApp to facilitate communication with counsel, CamScanner to copy documents, and a suite of Google programs, including Google search and Gmail), clinic students worked with Legal Aid in representing an 83-year-old client in an eviction proceeding alleging that her rent-controlled apartment was not her primary residence. Clinic students served as "digital navigators" and spent a substantial amount of time helping the client learn how to use the justice tablet prior to the proceeding. Clinic students and Professor Johnson "second seated" the Legal

[149] Testimony of Professor Conrad Johnson, Chief Judge's Hearings on Civil Legal Services in New York, Sept. 19, 2022, https://nycourts.gov/ctapps/civil.html.
[150] Lawyering in the Digital Age, *Projects*, https://blogs.law.columbia.edu/ldaclinic/projects/ (last visited Dec. 20, 2022).

Aid attorneys during the successful four-day trial, one of the first virtual proceedings in the State.

Justice Tablets can be loaned to litigants when they need them. Because they are relatively compact, they can be mailed with a self-addressed, stamped return label, and returned at the conclusion of the virtual proceeding. The Justice Tablet concept requires that a multi-pronged approach be used, including "Digital Navigators" who can assist litigants at home or in the community.

Justice Tablets also have great potential to use in public libraries and other community settings, in addition to any existing computers in these settings. For example, while libraries may have computers, users may be limited to one hour, which may not be enough time for a litigant in a virtual proceeding, a client who needs to access information in a court-mandated program (e.g., to be trained as an adult guardian), or a client who needs more time to communicate with their attorney or access other information. In addition, the library or other community settings may not have a private space for the person to use the computer and may lack staff to provide any necessary assistance to the person. Beyond physical confidentiality, litigants need confidentiality and trust in those providing support, along with problems litigants may have in traveling to community sites (due to physical or cognitive limitations or child or elder care responsibilities).

While landline telephones, cell phones and smart phones can be used for routine and limited communications with attorneys and courts—for example, for scheduling or information—they are not adequate for virtual proceedings. As a result, when we consider how to overcome the digital divide, it is essential that each component—an adequate computer device, sufficient internet connectivity, and digital literacy or support—be part of any initiative.

In the digital age, access to information for the general public, and actual or potential litigants, can and should be made readily available in plain language. For example, Lawhelp.org provides legal information and resources in collaboration with local legal service providers.[151] The New York State court system has numerous "do it yourself" ("DIY") forms and guided interview programs.[152] JustFix provides building an owner information, forms for tenants, and other resources.[153] Immi is a web-based program that provides important legal information and preparation packets for immigrants in English and Spanish.[154]

Despite its benefits, DIY technology has limits in that a substantial number of people do not have computer devices, lack access to reliable internet, and perhaps most important, do not have the necessary digital literacy to

[151] LAWHELP, https://www.lawhelp.org/ (last visited Dec. 20, 2022).
[152] NYSUCS Court Help, *DIY Forms*, https://www.nycourts.gov/courthelp/DIY/index.shtml (last visited Dec. 21, 2022).
[153] JUSTFIX, *Tools*, https://www.justfix.org/en/tools (last visited Dec. 21, 2022).
[154] IMMI, *About Immi*, https://www.immi.org/en/Info/About (last visited Dec. 21, 2022).

navigate computer platforms and programs without assistance. "Techno-optimism" refers to the idea that DIY programs and related digital tools will be available and usable by the majority of people who have a particular legal need but are not represented by an attorney.[155] However, while digital tools certainly can and should be designed to be DIY, a more promising "use case" involves using digital tools with training advocates and trusted intermediaries in the community.

The New York State court system has made a significant commitment to creating spaces where legal information is accessible (broadly defined) and easy to understand, providing services intended for court users who are indigent or low income, and offering opportunities to file papers without attorneys.[156]

A promising approach to these issues is the Office for Justice Initiatives ("OJI").[157] The OJI framework centers on court access, community outreach and prevention, and family and juvenile justice through various means including "[d]eveloping and coordinating region specific community outreach initiatives designed to broaden access to and improve public understanding of the legal system" and "[g]aining legislative and public support for the New York State Judiciary's proposals relating to access-to-justice matters."[158]

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[155] Tanina Rostain, *Techno-Optimism & Access to the Legal System*, 148 DÆDALUS 1, 93–97 (2019).
[156] *See generally* NYSUCS OFF. JUST. INITIATIVES, *Law Day Report: Advancing the Rule of Law Now* (2021) https://www.nycourts.gov/LegacyPDFS/ip/nya2j/OJI_LawDayReport_2021.pdf.
[157] NYSUCS OFF. JUST. INITIATIVES*: About Us*, https://ww2.nycourts.gov/ip/oji/about.shtml (last visited Dec. 21, 2022).
[158] *Id.*

Our legal system broadly includes the administration of justice through administrative adjudication. One case study of the impact of the pandemic at the administrative level is New York City's due process procedures to deny, discontinue, or curtail public assistance. New York City's Human Resources Administration ("HRA") decides the actions that deny, discontinue, or limit public assistance. New York State's Office of Temporary and Disability Assistance ("OTDA") administers hearings that challenge HRA's actions. HRA established the Advocates Inquiry System, which allows advocates (not *pro se* respondents) to resolve matters without the need for a fair hearing. This also helped reduce the number of baseless hearings. However, it has meant that those hearings that are held now typically involve more complex issues, often requiring the submission by the respondent of evidence or corroborating testimony.

With COVID-19 came telephonic administrative hearings. This pilot project was extended through 2021 and 2022 and may become permanent.[159] The goals were to reduce the number of people who had to physically travel to offices for hearings, create efficiencies, and not violate the due process protections of recipients. Procedures were enacted to provide evidence packets in advance to recipients, to receive evidence from recipients by mail, email, or fax, and for connection to the hearings by telephone. Litigants are expected to

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[159] *See Hearing by Phone*, NYC OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, https://www.nyc.gov/site/oath/hearings/hearing-by-phone.page (last visited Feb. 28, 2023).

submit digital evidence prior to the hearings (challenging at best) or during the hearing. ALJs often need to evaluate the credibility of witnesses. All of this makes a hearing by phone (even a smartphone) inappropriate.

Clearly, there are potential benefits to a virtual hearing system, even absent a pandemic. The elderly, disabled, certain working people (i.e., people whose wages still leave them unable to meet the cost of rent, food, and are therefore eligible for public assistance), and those with eldercare or childcare responsibilities could benefit from a virtual option. Even from within New York City, travel to 14 Boerum Place can be onerous; outside the city, travel challenges may often be even worse. Adding the pandemic to the mix further necessitated the need for a virtual hearing option, beyond telephonic, so long as participation in the hearing could be meaningful.

The bottom line is the same for administrative hearings as it is for court proceedings: if virtual proceedings can provide litigants with viable due process protections and assistance from advocates, then these hearings can be useful. Until that is a reality, virtual hearings of the type that currently occur via the fair hearing "pilot project" will continue to deprive under-resourced communities from meaningful access to justice. It is therefore imperative that consideration be given to require a judicial decision process with appropriate criteria as a prerequisite for virtual proceedings, along with litigant consent to virtual processes.

Before concluding with our recommendations, it is worth mentioning unauthorized practice of law statutes. Courts have long recognized that legal problems of indigents are too numerous to be handled by attorneys.[160] Unauthorized practice of law rules are intended to protect the public from harm by requiring objective credentials that define who is competent to practice law. In New York, the unauthorized practice of law generally involves a person who is not admitted to the bar providing specific legal advice or opinions to clients,[161] or holding oneself out as an attorney in court.[162] Providing general legal information to members of the public about the law, their rights, court procedures, and legal forms is not considered practicing law. This substantially limits the ability of non-lawyers and community-based organizations to provide the kind of services—whether in person or digitally—that identify, inform, and resolve legal issues for specific clients.[163]

Unauthorized practice of law statute questions raises complex issues: some fear relaxing those rules in New York would increase exploitation and fraud, including by unscrupulous "notarios."[164] However, task specialization and experience in a variety of more routine legal matters may produce better

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[160] *Hackin v. Arizona*, 389 U.S. 143, 146–47 (1967) (Douglas, J., dissenting).
[161] *Matter of Rowe*, 80 N.Y.2d 336 (1992).
[162] *El Gemayel v. Seaman*, 72 N.Y.2d 701 (1988).
[163] *See Upsolve Inc. and Reverend Udo-Okon v. James*, No. 22-cv-637 (S.D.N.Y. May 24, 2022) (issuing preliminary injunction based on First Amendment against enforcement of unauthorized practice of law statutes against community based organization seeking to assist respondents in debt collection cases).
[164] *About Notario Fraud*, AM. BAR ASS'N, Jan. 31, 2022, https://www.americanbar.org/groups/public_interest/immigration/projects_initiatives/fightnotariofraud/about_notario_fraud/.

results than a license. The extent of the access to justice crisis, exacerbated by the impact of the pandemic, mandates that the New York State judiciary and NYSBA undertake study of different approaches that could allow certified non-lawyer advocates to provide more legal assistance to clients, including with guided interviews, expert systems, and other digital tools.[165] NYSBA should create a Task Force for such study.

Proposals expanding the New York Court Navigator Program have been successful primarily in housing court and to allow social workers who are "trained, certified and properly regulated" to offer limited legal services.[166]

Recommendations

These recommendations build on efforts to address the ongoing impediments to ensure access to justice and are designed consistent with the mandate of the Task Force to safeguard and strengthen the future of the legal profession.

Court proceedings

- Courts should review existing policies and procedures and develop criteria and procedures with the goal of improving accessibility and equity that is responsive to the case.

- In virtual proceedings, certain norms, expectations, and best practices for respectful behavior need to be reinforced so that litigants, counsel, judges, and court personnel treat each other with dignity and respect.

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[165] *See generally Working With Your Hands Tied Behind Your Back*, *supra* note 126.

[166] COMM. TO REIMAGINE THE FUTURE OF NY CTS., *Report and Recommendations of the Working Group on Regulatory Innovation* 18 (2020), https://www.nycourts.gov/LegacyPDFS/publications/RWG-RegulatoryInnovation_Final_12.2.20.pdf.

- Support authorization of virtual court proceedings throughout New York State, whether by an Order of the Chief Judge of the Court of Appeals or legislation. Establish criteria for judicial approval of the use of remote litigation forums.

- Support training and creation of protocol for judges and court personnel on racism and bias (explicit and implicit) generally and in conducting in-person and virtual proceedings to promote a culture of service, respect, and dignity. Support training for court clerks and personnel that is designed to treat members of the public, including *pro se* litigants, with respect and dignity as consumers of court services.

- Immigration proceedings should be presumptively in-person, but if the proceeding is virtual, safeguards should be in place to assure that the detainee is in a private area outside the presence of ICE or corrections officers, but with sufficient protection for the court, support personnel, litigants, and counsel.

- Provide a means for attorneys to communicate privately with clients during a virtual proceeding.

- Tenants in housing court at their initial appearance, and prior to the issuance of any judgments or warrants, as appropriate, should be advised that they have a right to an attorney; cases should be adjourned to provide tenants with the reasonable opportunity to retain an attorney; and safeguards should be established to prevent default judgments when an unrepresented litigant with good cause does not appear in court or is unable to connect to a virtual proceeding.

- Support consolidation of housing cases outside of New York City that are adjudicated in city, town, and village courts based on the Special COVID Intervention Parts ("SCIP courts") project in Monroe County.

- Support placement of private internet portals or stand-alone kiosks in court and other public buildings throughout the State to allow respondents to appear who are otherwise unable to access remote proceedings.

- Expand the New York State Court Navigator Program in housing and consumer debt cases, and in other appropriate courts, which trains non-lawyers to assistant unrepresented litigants.

- Support expansion of presumptive mediation in all appropriate matters

Administrative hearings

- Administrative hearing notices should be accessible and in plain language. Hearing notices should have separate forms for in person, telephonic, or video hearings.

- Hearings involving individuals with limited English proficiency should be presumptively in person, with the option to opt-in to a telephone or video hearing.

- Individuals who request a hearing by telephone should be asked for their hearing venue preference (i.e., in person, telephone, video). There should be an option to an online form to allow individuals to select which hearing venue (i.e., in person, telephone, video) they prefer.

- Provide training to administrative law judges on remote hearings, with the input of advocates, including how to conduct a remote hearing with an interpreter, how to securely send documents and evidence in a timely manner prior to a hearing, and how to address issues relating to credibility determinations in this context.

Access to remote proceedings: use technology to benefit individuals and communities

- Support funding and initiatives to increase access to electronic devices, broadband internet, and digital literacy support and training.

- Support funding for new and existing initiatives to increase the availability of technology for appearance in virtual proceedings.

- Increase use of technology and universal design principles to create uniform plain language court forms.

- We base this recommendation on the seriously deficient delivery of legal services to those most desperately in need of assistance, that the pandemic has laid bare. Our system is unable to provide sufficient help to those with

very elemental legal needs such as housing, family law matters and immigration concerns. Existing access to justice initiatives, which frequently focus on an attorney-centered solutions, require a fresh look.

We recommend that NYSBA undertake study of the use of trusted intermediators in the community using appropriate technology who will (i) identify, prevent, and resolve legal issues, (ii) access legal information, (iii) complete DIY forms without court involvement, and (iv) help people prepare and file papers for proceedings. These trusted intermediators will provide services under the general supervision of an experienced attorney, most likely from a legal services organization. The study should include consideration of state funding of training, certification, and employment of such paralegal - trusted community intermediators.

Empower communities to identify, prevent, and resolve legal issues

- To reduce involvement with the court system, communities must receive the necessary support and resources to identify, prevent, and resolve legal problems "upstream" before they become court cases. For example, through easy-to-understand legal information in a variety of forms, DIY forms, and continued expansion of presumptive ADR.

Unauthorized practice of law rules

- NYSBA should undertake a further study to address unauthorized practice of law statutes and rules in order to facilitate resolution of legal issues affecting indigent populations.

- NYSBA should create a Task Force charged with this mission for further study.

Increase free and low bono representation and diversify the legal profession.

- Increase funding for free legal aid/services, *pro bono*, and *pro bono* incubator projects.

- Increase expenditures for access to justice initiatives.

- Support the continued efforts of the New York State Bar Foundation to fund legal services to those in need.

New Lawyers and Law Students

Introduction

The COVID-19 pandemic significantly impacted new lawyers. Working and learning environments were disrupted, forcing change in the way in which they are assimilated into the legal profession, learn, conduct their practice, and interact with colleagues and clients.[167]

For law students, an abrupt switch to online learning took place overnight, and opportunities for professional development and academic engagement withered.[168] Some students struggled to meet basic needs for housing, financial stability, and food insecurity.[169] All of these factors contributed to increased reports of anxiety, depression, emotional exhaustion, and loneliness experienced by law students during the pandemic.[170]

The COVID-19 pandemic caused many new lawyers to question the traditional practice of law.[171] New attorneys learning how to litigate for the first time had to try cases and present at hearings via online platforms.[172] Rather than walking down the hallway of a law office to seek mentorship and advice

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[167] For purposes of the survey data analyzed, a "new attorney" is defined herein as an attorney practicing for seven years or less.
[168] *The COVID Crisis in Legal Education*, INDIANA CTR. FOR POSTSECONDARY RESEARCH, Oct. 28, 2021, https://lssse.indiana.edu/wp-content/uploads/2015/12/COVID-Crisis-in-Legal-Education-Final-10.28.21.pdf.
[169] *Id.*
[170] *Id.*
[171] Elaine McArdle, *Practicing Law in the Wake of a Pandemic*, HARVARD LAW BULLETIN, July 15, 2022, https://hls.harvard.edu/today/practicing-law-in-the-wake-of-a-pandemic/.
[172] *Id.*

from a more senior lawyer, new attorneys had no choice but to seek guidance and support in creative ways such as virtual meetings.

Newly admitted attorneys entering the practice of law were forced to navigate an uncertain job market, some having their associate job offers revoked as a result of the pandemic.[173] Building a reputation, learning how to be a lawyer, finding a job as well as maintaining mental health amid a pandemic were challenges not faced by any recent generation of new attorneys. The careers and attitudes of thousands of new practitioners and law students were profoundly impacted, beginning in 2020 with the onset of the pandemic, during their early period of formative experience.[174]

Drawing upon statewide focus groups and the Survey measuring the attitudes and experiences of new attorneys and law students, the New Lawyers and Law Students Working Group has analyzed how law students and new attorneys were affected by the COVID-19 pandemic and how these experiences will shape the future of the legal profession.

Background and Methodology

The Survey included 12 questions specifically designed for attorneys in practice for seven years or fewer. A separate 20-question survey was designed for law students enrolled in New York State law schools. The questions allowed

[173] Michele Gorman, *COVID-19 Forcing Firms to Rescind Job Offers to Grads*, LAW 360, July 16, 2020, https://www.law360.com/articles/1292522/covid-19-forcing-firms-to-rescind-job-offers-to-grads.
[174] *Pandemic: Mental Health Impact on Young Lawyers*, AM. BAR ASS'N, Jan. 29, 2021, https://www.americanbar.org/groups/health_law/section-news/2021/01/pan-men/.

for narrative responses, asked respondents to rank their preferences, or solicited a yes or no answer.

Summary of Findings

Overall, law students and new attorneys reported that a virtual learning and/or working environment negatively impacted them in some way. Law students found it harder to forge relationships with classmates and learn from professors in a virtual environment. Gone were informally organized student study groups. New attorneys believe that the virtual working environment hindered their ability to conduct certain activities. Notwithstanding the negative impact felt by new lawyers and law students, the Survey results demonstrated that both groups are overwhelmingly in support of the continuation of some aspects of virtual education and the virtual practice of law.

For example, while a majority of law students believe that virtual law school hindered their ability to build relationships with others, thwarted their advocacy skills, and was less effective than in-person instruction, almost two-thirds of the law students surveyed indicated law students should have the option to choose virtual instruction for *all* classes.

This new penchant for continued reliance on virtual interaction born during the pandemic was reflected in the overwhelming majority response that new lawyers and law students will not consider job opportunities that do not include some form of a remote working option.

The Survey results highlighted the significant disagreement between law students and new attorneys concerning whether law schools should require a course dedicated to New York Practice. Many law students did not think that a New York Practice course in law school should be required, while new attorneys overwhelmingly believed it should be a required course.

The following is an analysis of the questions the New Lawyers and Law Students Working Group found most relevant to the Task Force's mission.

New York Law Practice Course & the Bar Exam

In response to the question of whether law schools should require a New York Practice course, only 45% of those law students surveyed thought that this course should be a required course.[175] Nearly as many students had an opposing view. The way this question was posed to law students was offered in the context of a yes/no answer, while also allowing for an expanded response. A comprehensive review of these narrative responses provides insight into why so many students felt the course should not be required. Reasons included, "I don't plan to practice in New York after school," "it should not be required, but highly recommended," and "it would be most useful only for litigators." These responses may very well be caused by a lack of exposure to the actual practice of law through summer associate jobs and internships during nearly three

[175] Survey question 16.

summers of the pandemic or a lack of appreciation for how such a course can positively impact the knowledge base of new attorneys.

Interestingly, new lawyers were posed the same question of whether they think law schools should require a New York Practice course. The strong majority (70%) responded that schools should require the course. The chasm between law students and new attorneys is most probably due to the experience that new attorneys have facing complex procedural issues involving New York law. Understandably, law students having not yet practiced law may not see the value of a New York Practice course in law school.

Recently, the New York State Bar Association Task Force on the New York Bar Exam recommended the state withdraw from the Uniform Bar Exam and develop its own bar admission test so that attorneys have a better understanding of New York State law before being admitted to practice.[176] Specifically, the Task Force on the New York Bar Exam proposed that the state use a "four-to-five year period to develop its own New York Bar Exam and allow law schools, law students, and bar preparation courses to prepare for the New York test."[177] The reason being that the "current bar exam fails to protect New Yorkers by not requiring attorneys seeking the right to practice within this state to demonstrate

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[176] Susan DeSantis, *New York State Bar Association Calls for State To Withdraw From the Uniform Bar Exam*, N.Y. STATE BAR ASS'N, June 12, 2021, https://nysba.org/new-york-state-bar-association-calls-for-state-to-withdraw-from-the-uniform-bar-exm/.

[177] N.Y. STATE BAR ASS'N, *Third Report and Recommendations of the Task Force on the New York Bar Examination* 12 (June 2021), https://nysba.org/app/uploads/2021/06/9.-Task-Force-on-the-New-York-Bar-Examination-with-staff-memo.pdf.

minimum competence in this state's law."[178] Though law students and attorneys seeking admission to practice law in New York are required to take the New York Law Course ("NYLC") and pass the New York Law Exam ("NYLE"), the Task Force on the New York Bar Exam believes the NYLC and NYLE are insufficiently rigorous to test that an applicant has meaningful knowledge of New York law.[179] We find it likely that the amount of law students and new attorneys who believe New York Law Practice should be a required course in law school would increase if New York follows the recommendations of the Task Force on the New York Bar Exam to divest from the Uniform Bar Exam in favor of a New York-specific bar exam.

Aligned with the Task Force on the New York Bar Exam's disfavor for the Uniform Bar Exam, there seems to be acknowledgement by the National Conference of Bar Examiners ("NCBE") that the current iteration of the Uniform Bar Exam could use reform to test minimum competency.[180] NCBE formally launched the development of a new bar exam titled the "NextGen Bar Exam," which will be offered for the first time in the third quarter of 2026.[181] The revamped exam will test examinees in seven skills areas, including client counseling and advising, client relationships and management, legal research,

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[178] *Id.* at 78.
[179] *See id.* at 78–79.
[180] *See* Karen Sloan, *Old bar exam or new one? States will have a choice in 2026*, REUTERS, Jan. 19, 2023, https://www.reuters.com/legal/government/old-bar-exam-or-new-one-states-will-have-choice-2026-2023-01-19/.
[181] NAT'L CONFERENCE OF BAR EXAM'RS, *NextGen Bar Exam of the Future*, https://nextgenbarexam.ncbex.org/ (last visited Feb. 28, 2022).

legal writing, and negotiations, and will get rid of several subject areas.[182] As of the date of this report, no states have formally expressed that they will administer NCBE's new bar exam come 2026. Regardless, it does not appear that NCBE's development of a NextGen Bar Exam will sufficiently address the Task Force on the New York Bar Exam's concerns about testing the minimum competency of New York State specific laws.

Notwithstanding the Task Force on the New York Bar Exam's recommendations or the NCBE's development of a new bar exam, the majority (59%) of law students surveyed do not believe the bar exam should remain a path to licensure at all.[183] This is not entirely consistent with the conclusion of the Task Force on the New York Bar Exam, which maintains that New York should once again have its own bar exam that would be the "primary pathway to practice" and would be used to "evaluate whether an individual possesses minimum competency for law licensure."[184]

We do not know the reasons why surveyed law students believe so strongly that the bar exam should not remain a path to licensure. However, during the COVID-19 pandemic, discussions erupted across the nation concerning the necessity of the bar exam. Some law students during the COVID-19 pandemic demanded they be admitted to practice based solely upon their having graduated

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[182] *See* Sloan, *supra* note 180.

[183] Survey question 13.

[184] Third Report and Recommendations of the Task Force on the New York Bar Examination, *supra* note 177, at 11 and 13.

from law school, known as "diploma privilege."[185] Others called the bar exam outdated, cumbersome, privileged, and racist.[186] Regardless of whether New York wholly divests from the Uniform Bar Exam in favor of a New York State-specific exam or it adopts the NCBE's NextGen Bar Exam, one point is certain: a majority of law students surveyed believe the current iteration of the bar exam must evolve or be eliminated altogether.

Virtual Learning Environment

In response to the question of whether the virtual learning environment enhanced, hindered, or did not affect students' law school experience, overall students felt that virtual learning was less effective than in-person instruction and that it also hindered their ability to master their advocacy skills.[187] More than half (52%) of the students surveyed believe that the virtual learning environment diminished their ability to connect and build relationships with others in the law school.[188] This is no surprise, as a significant part of the law school experience—interacting with other students about cases and exams—was lost for upwards of two to three years with the need to pivot to virtual instruction. During a focus group session of the Task Force, a third-year law student described that the lack of familiarity with her classmates resulted in a

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[185] *Id. at 4.*
[186] *See* Johanna Miller, *COVID Should Prompt Us To Get Rid Of New York's Bar Exam Forever,* ABOVE THE LAW, July 31, 2020, https://abovethelaw.com/2020/07/covid-should-prompt-us-to-get-rid-of-new-yorks-bar-exam-forever.
[187] Survey question 8.
[188] Survey question 7.

loss of opportunistic student interaction. This, in turn, made the first year of law school significantly harder compounded with the depressing nature of the pandemic.

Many law students surveyed had been attending law school in person for one to two years when COVID-19 forced the emergency closure of law schools in New York with little to no preparation to begin virtual instruction. Unsurprisingly, even if professors displayed "heroic levels of creativity," law students were dissatisfied with the emergency remote instruction in the face of a global pandemic.[189] After all, for the classes of 2020, 2021, and 2022, online law school was not what those students anticipated. Nonetheless, the insights of the students surveyed provides helpful clues for how law schools can effectively deliver distance learning in the future.[190]

Distance education, commonly known as distance learning, is an educational process in which more than one-third of the course instruction involves the use of technology to support regular and substantive interaction amongst students and faculty.[191] As we transition into a post-pandemic future when distance learning is optional rather than being thrust upon students due

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[189] Susan D'Agostino, *Gap Between Online and In-Person Learning Narrows*, INSIDE HIGHER ED, July 13, 2022, https://www.insidehighered.com/news/2022/07/13/law-school-gaps-between-online-and-person-learning-narrow.

[190] Gallup, *Law School in a Pandemic Student Perspectives on Distance Learning and Lessons for the Future*, ACCESS LEX INST., https://www.accesslex.org/sites/default/files/2021-06/Law%20School%20in%20a%20Pandemic_Student%20Perspectives%20on%20Distance%20Learning%20and%20Lessons%20for%20the%20Future.pdf.

[191] 22 NYCRR § 520.3(c)(6).

to a global health emergency, law students may experience a greater appreciation for and satisfaction with distance learning options.[192] In fact, law schools across the nation seem to be unphased by the general distaste of the classes of 2020, 2021, and 2022 toward their remote learning experiences. Many of the nation's law schools are expanding distance learning opportunities for law students.[193] As of the date of this Report, 14 ABA-approved law schools offer distance education J.D. programs, including New York's Syracuse University College of Law.[194]

Deans of several New York law schools commented that "schools can be highly successful using remote instruction to add flexibility to evening and part-time law programs" which provides "students from a range of backgrounds with enhanced educational access and other benefits, while maintaining high educational standards and quality."[195] Until recently, New York's rules concerning eligibility for bar admission were in lock step with the American Bar Association's accreditation requirements, including recommendations on distance learning.[196] In 2020, the American Bar Association revised its

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192 *Id.*

193 ABA News, *Law schools plan virtual learning expansion post-pandemic*, AM. BAR ASS'N, https://www.americanbar.org/news/abanews/aba-news-archives/2022/02/law-schools-plan-virtual-expansion.

194 *ABA-Approved Law Schools With Approved Distance Education J.D. Programs*, AM. BAR ASS'N, https://www.americanbar.org/content/aba-cms-dotorg/en/groups/legal_education/resources/distance_education/approved-distance-ed-jd-programs.

195 *New York Will Enhance Access to the Profession by Easing Limits on Remote Leaning*, N.Y. LAW JOURNAL, May 4, 2022, https://www.law.com/newyorklawjournal/2022/05/04/new-york-will-enhance-access-to-the-profession-by-easing-limits-on-remote-learning/.

196 *Id.*

accreditation standards to permit up to one-third of the credits required for a J.D. degree to be offered through distance learning.[197] Then again, in February 2023, the American Bar Association Council on Legal Education and Admissions to the Bar voted unanimously to advance changes to its accreditation standards which would allow J.D. programs to offer 50% of credits via distance learning.[198] New York, on the other hand, has distance learning credits capped at 15 out of 83 (18%) credit hours required for graduation.[199] Though the 15 distance learning credit hours can be applied toward the 64 classroom credit hours required by New York rules, they cannot be used until students complete their first year of law school.[200] Such limitations create a "substantial gap between ABA accreditation standards and the requirements of the New York bar".[201]

Although most law students reported that remote law school instruction during the COVID-19 pandemic was far less effective than in-person instruction, almost two-thirds (62%) of the law students indicated that they believe they should have the option to choose virtual instruction for *all* classes.[202] This

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[197] *Id.*

[198] Christine Charnosky, *ABA Council Sends Proposal to Increase Distance Learning to Notice & Comment*, Feb. 17, 2023, LAW.COM, https://www.law.com/2023/02/17/aba-council-sends-proposal-to-increase-distance-learning-to-notice-comment/.

[199] 22 NYCRR § 520.3(c)(6)(i).

[200] 22 NYCRR § 520.3(c)(6)(ii)–(iii).

[201] *New York Will Enhance Access to the Profession by Easing Limits on Remote Leaning*, *supra* note 195.

[202] Survey question 11. Our survey did not distinguish between synchronous instruction where students engage in learning in the remote presence of a professor in real time provided through digital video-based technology, from asynchronous instruction. The latter is when students engage in learning without the direct presence (remote or in-person) of a professor. The degree of contemporaneous synchronous interaction between a professor and the amount of asynchronous course work may be a factor in law student satisfaction with virtual instruction. Law schools should study the composition of virtual instruction to determine its effect on student satisfaction.

perhaps suggests recognition among law students that distance learning has cognizable benefits unrelated to the instructional process—it just needs improvement. The temporal efficiency of distance learning undoubtedly has allure for caregivers and parents pursuing a law degree and to those who need an income in the first instance to afford attending law school. By not having to be on campus to attend class, one gains time for expanded childcare or to work part-time jobs to make money. Distance learning provides access to legal education for individuals who are not in proximity to a law school, which further diversifies the legal profession.[203]

Furthermore, the Survey asked students entering their last year of law school how prepared they felt for practice in light of learning virtually for one or more years.[204] Of the responding impacted law students, the majority felt "somewhat" prepared to enter their first year of practice despite possibly having spent multiple semesters in a virtual or hybrid learning environment. Similarly, the Survey asked new attorneys whether law school adequately prepared them to practice law in New York.[205] Nearly 50% of new attorneys surveyed answered that they did not feel adequately prepared.

The sentiment that law school did not adequately prepare law students and new attorneys for the practice of law is not new. A survey conducted in 1978

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[203] Mike Stetz, *Distance learning gets ABA bump*, THE NAT'L JURIST, Sept. 8, 2022, https://nationaljurist.com/national-jurist/news/distance-learning-gets-aba-bump.
[204] Survey question 12.
[205] Survey question 54.

of "mid-career lawyers, two-third said that their legal education had been 'not helpful' or 'played no role' in their ability to develop critical practice skills like interviewing, counseling clients, and negotiating."[206] Similar sentiments were expressed by new attorneys again in 2009.[207] Seemingly law students and new attorneys feeling only "somewhat" prepared to enter the practice of law is attributed less to the COVID-19 pandemic and more to the significant changes law schools need to undergo to better prepare future attorneys.[208]

Virtual Working Environment

The Survey asked new lawyers to respond to questions regarding the virtual work environment.[209] Prior to the COVID-19 pandemic, trials, oral arguments, depositions, and other activities largely took place in person. The COVID-19 pandemic forced significant changes to litigation practices and moved entire appearance calendars to remote conferencing platforms.[210] The Survey

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[206] Martin Pritikin, *Are Law School Curriculums Preparing Students to Succeed?,* THE NAT'L JURIST, May 8, 2018, https://nationaljurist.com/national-jurist-magazine/are-law-school-curriculums-preparing-students-succeed; *see also* Leonard L. Baird, *A Survey of the Relevance of Legal Training to Law School Graduates,* 29 J. LEGAL EDUC. 264 (1978), https://perma.cc/73XH-WKHE.
[207] *Id.*
[208] *Id. See also* Matthew Diller and Joseph Landau, *New York Law Journal: Law Schools Must Implement Meaningful Adjustments*, FORDHAM LAW NEWS, June 29, 2021, https://news.law.fordham.edu/blog/2021/07/01/new-york-law-journal-law-schools-must-implement-meaningful-adjustments; Stephanie Hunter McMahon, *What Law Schools Must Change to Train Transactional Lawyers*, 43 PACE LAW REV. 106 (2022), https://digitalcommons.pace.edu/plr/vol43/iss1/; Marc Cohen, *Law Schools Must Restructure. It Won't Be Easy.*, FORBES, May 15, 2017 https://www.forbes.com/sites/markcohen1/2017/05/15/law-schools-must-restructure-it-wont-be-easy.
[209] In analyzing these questions, it is important to consider the practice area of the respondents. The top three categories of new attorneys who responded are litigators, followed by transactional attorneys, and then legal services providers. *See* Survey question 6.
[210] FUTURE TRIALS WORKING GROUP OF THE COMMISSION TO REIMAGINE THE FUTURE OF NEW YORK'S COURTS, *Report and Recommendations of the Future Trials Working Group* (April 2021), https://www.nycourts.gov/whatsnew/pdf/future-trials-working-grp-april2021.pdf.

asked respondents to rank the effectiveness of specific legal events and activities taking place virtually, based on a scale of 1 through 7, with 1 being the most effective and 7 being the least effective.[211] Not surprisingly, trial/arbitration was ranked as the least efficient activity to be conducted virtually (6.38 out of 7) and conferences with colleagues or adversaries were ranked the most efficient (1.91 out of 7).

Most experienced attorneys agreed with new attorneys that trial/arbitration is the least effective activity conducted virtually (ranked 6.10 out of 7).[212] They believed that the most effective virtual activity is non-motion conferences with the court (1.96 out of 7), an opinion that differed from new attorneys, who believed that conferences with colleagues or adversaries was the most effective virtual activity. While not asked, the obvious advantages of virtual witness preparation for trial or virtual preparation for transactional activities, like mediation, cannot be denied. When it came to scoring the disadvantages of virtual activities, practicing attorneys agreed with new attorneys that virtual communication hinders their ability to "read" participants' reactions and that technology glitches undermine the effectiveness of virtual proceedings.

It is recognized that virtual court appearances and the virtual practice of law will continue to be commonplace.[213] During a weekly COVID-19 update,

[211] Survey question 31.
[212] Survey question 18.
[213] *See* Nicole Black, *Are Virtual Court Proceedings Here To Stay? All Signs Point To Yes.*, ABOVE THE LAW, June 30, 2022, https://abovethelaw.com/2022/06/are-virtual-court-proceedings-here-to-stay-all-

former Chief Judge Janet DiFiore commented that "COVID-19 compelled us to transform court operations overnight, virtual proceedings are no longer an 'experiment' but have proven to be an effective method of moving cases closer to resolution while ensuring that litigants and lawyers can have their matters heard in a convenient, time and cost-effective manner."[214] The Commission to Reimagine the Future of New York's Courts extensively examined the ways in which evolving technologies effect trial practice in New York State and how the New York State Unified Court System can best prepare for and benefit from such technologies.[215] The Commission noted that remote conferencing technology enhances "access to the courts by those who lack the flexibility in their work or caregiving arrangement to easily secure time to travel, or who live far from their nearest courthouse."[216] However, the Commission shared the same concerns of new attorney Survey respondents, such as "increased potential for prejudicial disruptions to trial proceedings caused by technical malfunctions" and "diminished ability of counsel to observe contemporaneously the full body language and reactions of each juror."[217]

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signs-point-to-yes; Jon David Kelley, *Virtual Courts Are Not Going Away*, BLOOMBERG LAW, Oct. 13, 2022, https://news.bloomberglaw.com/us-law-week/virtual-courts-are-not-going-away; Christian Nolan, *Some Virtual Court Proceedings To Become Permanent*, N.Y. STATE BAR ASS'N, May 10, 2021, https://nysba.org/some-virtual-court-proceedings-to-become-permanent.

[214] *Id.*

[215] Future Trials Working Group, *supra* note 210.

[216] *Id.*

[217] *Id.*

Recognition by the New York State Unified Court System that the virtual practice of law is here to stay mirrors the sentiment expressed by new lawyers about remote and virtual work environments. The Survey shows that almost two-thirds of new attorneys find it very important that an employer offer a hybrid work environment.[218] Similarly, more than half of the responding attorneys with more than seven years of practice felt it was "very important" that a potential employer offer some form of a hybrid working environment.[219]

In fact, the American Bar Association found that new lawyers feel so strongly about remote work that 44% said they would leave their current jobs for a greater ability to work remotely elsewhere.[220] This seems to be buttressed by the fact that a majority of lawyers feel that remote work does not adversely impact the quality of their work, productivity, or ability to hit billable hour quotas.[221]

While most (54%) new attorneys did not believe the COVID-19 pandemic occurring early in their career would negatively impact their professional progression, more than half (52%) of the new attorneys surveyed felt that taking advantage of hybrid work may negatively impact their career growth.[222] This sentiment was not shared by non-new attorneys who overwhelmingly were "not

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[218] Survey question 56.
[219] Survey question 57.
[220] Amanda Robert, *Working remotely is now a top priority, says new ABA report highlighting lasting shifts in practice of law*, ABA JOURNAL, Sept. 28, 2022, https://www.abajournal.com/web/article/new-aba-report-highlights-lasting-shifts-in-practice-of-law-and-workplace-culture.
[221] *Id.*
[222] Survey question 58 and 59.

at all" concerned about a hybrid working environment negatively impacting their career progression (58%), nor did they indicate that they were concerned about the pandemic affecting their legal career (81%). This, however, is not surprising as experienced attorneys are more established in their practices.

Conclusion and Recommendations

While the worst of the COVID-19 pandemic is in the rearview mirror, law students and new lawyers faced a unique set of challenges and struggled with great instructional and practice adversity. Despite negative experiences surrounding virtual education and the remote practice of law, the Survey results and testimony of new lawyers and law students unequivocally show that new lawyers and law students want and require virtual education and the remote law practice to continue, albeit on a carefully selected basis. We recommend consideration of the following:

- New York Practice should be a required class in New York law schools.
- Law schools need to take a hard look at their curriculum to ensure that law students intending to practice in New York have sufficient New York centric course options and properly education their student body on virtual lawyering.
- Law schools should continue to improve the quality of distance learning and work to provide a variety of distance learning course modalities into the curriculum.

- The Office of Court Administration needs to ensure that virtual proceedings are effective for all participants, particularly for those less than financially able as described in the Access to Justice portion of this report.
- Hybrid work options need to remain, must be offered by law firms, and consideration needs to be given whether to offer a fully remote option under the appropriate practice circumstances. The beneficial effect of hybrid work is the expansion of work opportunities to lawyers with parenting obligations. However, law firms bear the responsibility to ensure the proper training for the practice of law for those young lawyers opting for expanded hybrid work environments.

Law Practice Management and Technology

Introduction

Overview

It is an understatement to simply say that the COVID-19 pandemic necessitated rapid changes to the technology used to practice law. Overnight, home offices were created, virtual meeting platforms proliferated, and the judiciary adopted measures to ensure that proceedings continued to be secure, fair, and effective. These changes, amongst others, have raised a multitude of questions about efficient allocation of technology, the means available to develop client and professional relationships, and effective delivery of legal services.

The Task Force's Law Practice Management and Technology Working Group (the "LPMT Working Group") sought to: (i) identify the scope and impact of pandemic-related changes to law practice management and technology, (ii) gauge the general sentiment of the New York Bar towards these changes, and (iii) determine what additional technological changes and other resources are needed to further facilitate the practice of law in a post-pandemic setting.

The LPMT Working Group's Survey Questions

The LPMT Working Group crafted targeted questions that were included in the Survey sent to members of the New York State Bar Association by NYSBA's Task Force on the Post-Pandemic Future of the Profession. The questions posed by the LPMT Working Group focused on four primary topic areas:

1. **Technology Hardware and Software** (e.g., respondents' proficiency, comfort level, and attitude toward the equipment and software used in most work-from-home scenarios);
2. **Cybersecurity Protocols and Training** (e.g., the level of security—perceived and actual—in place to protect confidential and privileged information while working remotely);
3. **Impact of Technology on the Social Aspect of Law Practice** (e.g., respondents' attitudes towards the in-person practice of law versus remote working environments and the impact that remote practice has on managing a law firm); and
4. **Virtual Meeting Platforms** (e.g., respondents' experiences using electronic meeting platforms).

Respondents' answers to the Survey questions were aggregated and then analyzed by the LPMT Working Group to inform the observations, conclusions, and recommendations set forth herein.

Survey Respondents' Demographic Information

Of the more than 2,000 respondents who responded to the LPMT Working Group's Survey questions, most were attorneys over the age of 50 with more than 10 years of experience. With respect to the nature of the responding attorneys' practices, nearly half reported working in litigation, with approximately one-quarter indicating that they were transactional lawyers.

Almost half of the respondents practiced in law firms of fewer than 20 attorneys, with 26% of these lawyers engaged in solo law practice.

The respondents' demographics are particularly relevant to the LPMT Working Group's analysis of the survey results. Generally, attorneys in their later years of practice are primarily responsible for managing law firms and other attorneys. Further, recently admitted attorneys may have familiarity and more comfort with technology than more senior attorneys. Finally, small firms often have a more limited IT infrastructure and fewer technological resources at their disposal. The LPMT Working Group recognizes the dearth of Survey responses from attorneys who graduated law school after 2000.

Executive Summary of Survey Results and Analysis

As discussed in detail below, the Survey results show that most New York practitioners have embraced technological changes spurred by the COVID-19 pandemic and feel competent and secure in the virtual environments in which they now practice. Nonetheless, to ensure ongoing competence with these technologies, and to fully protect client confidences and data from cybersecurity risk, enhanced trainings and continuing legal education are necessary.

Further, legal employers should allocate significant resources towards technologies that facilitate remote work and properly train users on those technologies. This in turn creates an opportunity for NYSBA and other bar

associations to provide valuable training and resources to practitioners geared toward the competent and secure use of technology in the practice of law.

Finally, there is a consensus amongst New York lawyers that certain aspects of the virtual practice of law result in significant time and cost savings. However, Survey respondents were clear that other aspects of their practice are better performed in person. Therefore, going forward, legal employers and attorneys should carefully and strategically choose the best forum in which to proceed based on the work to be performed. To the extent that events and activities must proceed remotely, lawyers should be highly skilled at using the remote platforms on which these events take place.

Analysis of the Survey Results & Recommendations

Technology, Hardware and Software

Proficiency with Technology

Respondents were asked to characterize their proficiency with technology.[223] Whether respondents' proficiency with technology originated prior to the COVID-19 pandemic or developed because of the COVID-19 pandemic, respondents rated themselves as generally proficient in using technology to practice law. 70% of respondents rated their proficiency with technology as "moderately to very proficient," and 25% rated their proficiency

[223] Survey question 13.

level as "adequately proficient." Fewer than 5% of responding attorneys indicated they were not proficient with technology.

Importance of Ability to Work Remotely

Respondents were asked to rank the following types of training in order of importance to the respondent's ability to work remotely: (1) how to use a computer, monitor, printer, and/or other hardware at home; (2) use of remote meeting software platforms (e.g., Zoom, Microsoft Teams, etc.); (3) effective communication using remote platforms; and (3) cyber security protocols and best practices.[224]

Forty-two percent of respondents ranked training on use of computers, printers, and other hardware components as their greatest need. An almost equal number of respondents reported a desire for training on the use of remote meeting platforms as their next most important priority. Thirty-five percent of respondents identified obtaining training in effective communication over remote meeting platforms as their third most-needed training. Slightly more than 31% of respondents indicated a need for training in cybersecurity protocols and best practices.

While a majority of respondents rated themselves as at least "adequately proficient" in their use of technology during the COVID-19 pandemic, it is revealing that many practicing attorneys responded that they require training in

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[224] Survey question 14.

use of computers, monitors, and other hardware to effectively work from home. This disparity may be due to the fact that some respondents did not have the necessary technical support from their law office information technology staff or colleagues to assist them in handling computer hardware issues in a remote environment.

Moreover, the Survey results indicate that 75% of attorneys desire further training on various remote meeting software such as Zoom and Microsoft Teams. It is imperative that lawyers are adept in using these programs for effective client and other communications (e.g., break-out meeting rooms, screen sharing functions, etc.).

Significant Obstacles to Implementing New Technology[225]

Reliance on technology for the virtual practice of law requires attorneys and law offices to be vigilant in upgrading, implementing, and learning new technologies. Lawyers and law offices need to dedicate sufficient resources to upgrading and modernizing technology. The costs of IT upgrades, including setting up home offices for employees, hardware (e.g., dedicated laptops, printers, scanners, copiers, web cameras, etc.), and firm-sanctioned software (e.g., Zoom, Microsoft Teams, Microsoft Office Suite, etc.), as well as training on the use of such firm-provided hardware and software, can be prohibitive. In fact, slightly more than 57% of respondents rated the cost of technology as their

[225] Survey question 15.

primary concern in implementing new technology. In fact, lawyers who rated themselves as “adequate” or “not proficient” with technology indicated costs constituted a barrier to implementing or upgrading technology.[226] The COVID-19 pandemic caused lawyers and law firms to shift priorities to fund home offices so that employees could work from home effectively and safely with regard to protecting law firm and client data. Accordingly, lawyers and law firms must build technology costs into their law practice expenditures to account for the continued remote practice of law.

An almost equal number of respondents reported that learning new technologies is a major barrier for implementation. From learning how to use a new app on an iPhone to navigating cloud computing, lawyers must embrace and learn new technologies to engage in the safe and effective remote practice of law. Although the majority of practitioners report being competent with technology, there is undoubtedly a learning curve when new technologies are implemented. As such, lawyers must engage in significant training to become proficient in these new IT technologies.

Notwithstanding the degree to which lawyers are or are not familiar with IT hardware and software, all lawyers require appropriate training in the use and implementation of both existing and new IT technologies. Not only is it a best practice for lawyers to be trained on any technology implemented, but it is

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[226] *See* Survey question 13.

an ethical obligation for lawyers to be competent in the use of existing and newly implemented IT technologies.[227]

Technology at Home Versus in the Office[228]

Respondents were asked to identify whether the level of technology available to them at home is equivalent to or better than those technologies available in their place of employment.[229] Nearly 46% of respondents indicated that they have the same or better access and availability to technology at their home offices as in their places of employment. Nineteen percent of respondents provided a neutral response to this question indicating that, although they did not have the same level of access to technology in their remote location, they were able to adapt adequately to working from home. Less than 10% of respondents indicated that they do not have adequate access to necessary technologies in their remote work environment.

Respondents also were asked to elaborate on missing or deficient IT technologies in their home or remote work environment.[230] The overwhelming majority of responses indicated that the deficiencies in their home or remote environment were with IT hardware, such as computer monitors and printers. Thus, in order for lawyers to work effectively in a remote environment, employers should ensure there are adequate technological resources, especially IT

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[227] *See* New York Rules of Professional Conduct Rule 1.1, Comment 8.
[228] Survey question 16.
[229] Specifically, telephone, printing, and other technologies including internet connection.
[230] Survey question 17.

hardware. However, the LPMT Group is mindful that the cost of implementing new technologies is a major obstacle for many lawyers. Nonetheless, if lawyers continue to work from home as the pandemic wanes, then remote IT setups need to be the equivalent of working in the office. Absent a financial commitment from law offices to recreate the office environment at home, lawyers working remotely will be at a disadvantage and less productive.

Conclusions and Recommendations

1. The post-pandemic practice of law will continue to include aspects of law practice management that is virtual. Legal employers must develop office-wide policies and protocols that support remote law practice for all their employees, including back-office staff, that include providing the hardware and software necessary to promote safe, efficient, and effective virtual law practice.
2. Legal employers need to allocate adequate financial resources to support the cost of regularly upgrading, maintaining, and implementing new technology at the office and at home.
3. Legal employers need to provide regular training to employees in both existing and new technology to ensure that lawyers and staff working remotely are competent in the use of the firm's technologies and systems.

4. Legal employers are responsible for providing regular training on data privacy and cybersecurity.[231]
5. NYSBA should act as a resource to its members in finding ways to reduce the costs of purchasing, upgrading, and replacing IT hardware and software through contractual relationships with technology providers, as it does with rental car agreements and other similar member benefits.
6. NYSBA should provide regular CLEs to its members on the remote use of IT hardware and software, including the setup and maintenance of remote home law offices and the use of virtual meeting platforms.
7. NYSBA should offer its members a Law Practice Management and Technology Resource Center ("LPMT Resource Center") that provides advice on best practices relating to practicing law remotely, virtual mediation practice, case management software, technology support, setting up an effective home law office, training in IT hardware and software, and other issues related to the virtual practice of law. The LPMT Resource Center could offer recommendations for law practice-related IT technologies and negotiated discounts for IT technology products related to a virtual home law office. Finally, the LPMT Resource Center could provide access to an IT technology consulting firm at a discounted rate for

[231] *See e.g.,* N.Y. STATE CONTINUING LEGAL EDUC. BD., *Guidance Relating to the New Cyber Security, Privacy and Data Protection Category CLE Credit,* https://www.nycourts.gov/LegacyPDFS/attorneys/CLE/Cybersecurity-Privacy-and-Data-Protection-Guidance-Document.pdf.

members, e.g., a NYSBA "Geek Squad" that could provide immediate technology support and assistance.

Cybersecurity Protocols and Training

As sophisticated cyber and ransomware attacks across all sectors of society become increasingly common, a lack of cybersecurity training creates an intolerable level of risk for courts, firms, and practitioners who are concerned about the confidentiality of their data and client data as well as the stability of their finances given the high cost of recovering data after a ransomware attack. Around 50% of lawyers indicated they had received some form of cybersecurity training for in-office and/or remote work. Alarmingly, about 49% of respondents received neither cybersecurity training nor refreshers for in-office work.

With the proliferation of hybrid work policies and remote workspaces, lawyers and other staff in the legal field must be appropriately trained on how to prevent and respond to malicious actors. The switch from in-office to remote work occasioned by the pandemic should have triggered additional training for all staff working in courts, firms, and legal services agencies. While there was little time for training on the special cybersecurity risks associated with remote working arrangements in March of 2020, now is the time to make a course correction. A workforce that is untrained or undertrained in current cybersecurity best practices places legal employers and practitioners, as well as their clients, directly at risk. A damaging attack is much more likely to take

place when lawyers and their staff are untrained in spotting or reporting cybersecurity issues. Remote legal work should be conducted only through secure private networks, i.e., VPNs, to protect these communications with clients, adversaries, colleagues, and the courts. All employees should be trained to use secure private networks or provided VPNs, and protocols for reporting the occurrence of anomalous events should be well-known to all employees and clearly identified in an employee handbook. Additionally, employees should be trained in cybersecurity protocols relevant to their position, as well as educated regarding the many potential repercussions of poor cybersecurity practices.

Cybersecurity and Confidentiality

Respondents were asked to describe their ability to preserve confidential information with the increased use of technology and virtual meetings. Specifically, with the advent of virtual conferences and client meetings, it is necessary to ensure that no unauthorized individuals are present (on- or off-screen) to maintain attorney-client privilege. In addition, given that only about 50% of respondents have received cybersecurity training for in-office and remote work, it is unclear whether respondents' apparent confidence in their ability to preserve confidential client information is based on a lack of accurate information about the nature and true risk to which confidential firm and client information is subject. If adequate cybersecurity training is not provided to

nearly half of all attorneys utilizing a virtual setup, then their ability to preserve confidential firm and client information would be inadequate.

As a best practice, it is recommended that legal employers review existing confidentiality policies and update them to incorporate current cybersecurity protocols. This practice could be done on a biannual basis to ensure the highest levels of security.

Conclusions and Recommendations

1. While practitioners seem confident that they are adequately protecting client information, the seemingly widespread lack of cybersecurity training is a great risk. All attorneys and staff must be educated on a regular basis regarding the security risks associated with any online work, whether at home or in the office. Further, attorneys should be trained to take adequate precautions to secure their online activities and electronic data.
2. NYSBA and other bar associations must offer cybersecurity CLEs as required by the new cybersecurity CLE requirement and other practical trainings designed to raise attorneys' awareness of the ever-changing cyber-risk landscape, how to mitigate that risk, as well as best practices, industry protocols, and referrals available for cybersecurity specialists and cyber insurance and other insurance to protect against social engineering scams.[232]

[232] *Id.*

The Impact of Technology on the Social Aspect of the Practice of Law

Several survey questions focused on the social effect of lawyers working from home or in hybrid arrangements and the way attorneys conduct life and legal practice in virtual settings.

The LPMT Working Group sought information about attorneys' current and ideal working arrangements.[233] The Survey responses reflect that approximately 75% of attorneys at the time were working remotely at least some of the time with more than 50% reporting that they were in a hybrid practice setting split between home and office. Most attorneys want at least hybrid arrangements to continue in the future.

The Survey results demonstrated that attorneys appreciate meaningful fiscal savings in remote work arrangements. Unsurprisingly, the greatest of these is time and funds saved on travel expenses, followed by savings in office supplies, office space, and utilities. To a lesser extent, lawyers report certain savings on CLE expenses, marketing and advertising, computer and related hardware, research, subscriptions, and bar dues.

Notwithstanding the reported advantages, respondents recognize there are disadvantages associated with virtual court proceedings, arbitrations, mediations, and other meetings.[234] Foremost on the list of respondents' criticisms was the inability to "read" witnesses or others, such as judges,

[233] Survey questions 24 and 25.
[234] Survey question 23.

arbitrators, and negotiating counterparties. Next was technology glitches, followed by interruptions by family members, pets, etc., and a general lack of control.

Looking into the future, these responses demonstrate a need for training programs that teach remote meeting participants skills to help provide a sense of control, as well as ways to identify body language and facial expressions that are visible during online meetings, like Zoom. One of these might be Paul Eckman's well-known studies on six universal human facial expressions, which has grown in popularity in the ADR field.[235] In fact, remote meeting platform features that enable a viewer to enlarge and focus on a single person's image may facilitate consideration of facial expressions. A "gallery" view enables a user to see the faces of all on the screen. This provides an image of the entire array of participants and, as such, provides a view that rivals even sitting at a conference table during a live gathering, where participants tend, at times, to lean in ways that block a full view of others in the room.

The challenges of addressing the social aspects of practice and use of technology provide opportunities for bar associations to be relevant to member needs. NYSBA can offer CLEs to train members in the use of online technology, including online video conferencing platforms. NYSBA can foster ways to enhance firm management and culture, with and without technology. NYSBA

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[235] *See* PAUL EKMAN GROUP, https://www.paulekman.com/resources/universal-facial-expressions (last visited Feb. 26, 2023).

can address the socialization deficit highlighted in Survey question 26 and provide ways to address it. For instance, NYSBA meetings—ranging from meetings of its Executive Committee and House of Delegates, to meetings of its Task Forces, Committees, and Sections—should have a full chat function permitting each participant in the meeting to chat with every other participant. While the meeting is underway, this enables participants to raise questions with friends and colleagues. The possible downside of a lack of attention to this issue during remote interaction is offset by the social benefit of providing an opportunity to connect, as well as the potential that a side chat can develop richer thinking. For this reason, the "Everyone" chat should include all participants. Side chat also can be a good source of creativity and provide for the refinement of ideas.

Conclusions and Recommendations

1. While it is clear that there are certain benefits associated with remote working, and that hybrid working arrangements will continue even after the pandemic has receded, such arrangements do have disadvantages. These can be mitigated through education, training, and thoughtful programming by bar associations and legal employers. For example:
    a. Legal employers and NYSBA need to offer CLE and other trainings that highlight the functionality of online meeting platforms to assist practitioners in gaining a sense of control over virtual meetings and

to better judge the non-verbal communication of meeting participants;

b. Legal employers and NYSBA can foster social interactions, even in a remote environment, by, among other things, holding regular online meetings and employing fuller use of the chat functions on virtual meeting platforms.

Virtual Meeting Platforms

Arguably, and as discussed in prior sections, the most prolific adoption and utilization of new technologies during the pandemic has been the implementation of virtual meeting platforms. Indeed, if video meeting software had not existed, the effective practice of law could not have occurred. However, as restrictions eased, courts reopened, and with expectations that staff return to an in-office or hybrid arrangement, questions have arisen pertaining to practitioners' preference or aversion to the use of virtual meeting platforms—in particular, to what extent they should be utilized at all.

Respondents were asked to rank, in order of importance, the issues they confronted in being able to work effectively from home. Over 75% of practitioners identified training on how to utilize and effectively communicate over virtual meeting platforms as their primary concern in connection with their use of such platforms. Specifically, the Survey results reflect that a significant portion of responding attorneys believe additional training for either themselves or other

practitioners is necessary, indicating that they likely have or will continue to have difficulty communicating with others over virtual meeting platforms.

Effective use of virtual meeting platform software from a home office also requires that lawyers invest in the necessary IT hardware such as webcams, microphones, speakers, headsets, etc. It is not enough to know how the software works; practitioners must also know how their hardware interacts with the software and its settings. Although not addressed specifically in the Survey, it follows that cybersecurity protocols require any virtual meeting platform software selected by lawyers to include end-to-end encryption protections. Further, other cybersecurity best practices should be observed when using a remote meeting platform, e.g., holding the virtual meeting in a secure location to prevent conversations being overheard by unauthorized participants.

Notwithstanding the need for training in the use of virtual meeting platforms, the Survey results revealed that practitioners recognize there is a time and a place for virtual meetings. Specifically, 82% of respondents selected conferences—with adversaries, clients, colleagues, or the court—as most effectively performed virtually.[236] Further, only 13.46% of respondents stated that they have difficulty navigating remote videoconferences needed for court appearances, depositions, or ADR.[237]

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[236] Survey question 18.
[237] Survey question 19.

This result contrasts starkly with the few respondents who preferred to conduct depositions, oral arguments, trials/arbitration, or alternative dispute resolutions virtually. In light of the perceived importance of assessing the credibility of parties, witnesses, and adversaries in person, it is understandable that respondents believed themselves to be hindered by current virtual meeting platforms, which we understand the Office of Court Administration is in the process of significantly updating. Indeed, the responses indicate that 62% of respondents ranked "reading reactions of participants in remote proceedings" and 44% of respondents who reported "difficulty determining credibility of a witness." Both observations were identified as the first and third biggest disadvantages of utilizing virtual meeting platforms, the second highest being "glitches," as 59% identified.[238]

Conclusions and Recommendations

1. Practitioners should take time to familiarize themselves with any virtual meeting software they elect or agree to use within a professional setting. Before agreeing to a virtual meeting, practitioners should confirm it will take place on a platform with which all parties are familiar and have the appropriate skills to navigate.
2. Regardless of the platform, it is a best practice to advise that the platform must have end-to-end encryption to ensure confidentiality is maintained.

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[238] Survey question 23.

To further maintain confidentiality, the physical room where virtual meetings take place should be a private room.

3. Remote meeting platforms have been embraced by practitioners for court conferences, day-to-day meetings with colleagues, and informal discussions with opponents. In fact, the benefits of virtual conferences, which save time, money, and resources for law firms and clients alike, are undeniable. Therefore, remote activities will become a permanent feature to the practice of law.
4. Training on the use of virtual meeting software must take place regularly to keep pace with these rapidly changing technologies. For example, Zoom and Teams continually change and are updated and will continue to incorporate new features. In order to utilize the software and effectively communicate using the technology, it is not enough to simply learn how to use the platforms; one must also routinely keep abreast of changes to the platforms.
5. Training should not be exclusive to the virtual meeting software. It should include edification on hardware such as cameras, headsets, microphones, and speakers, which are necessary to effectively utilize and communicate on the platforms. Further, practitioners must understand how their hardware directly interacts with each platform, and then amend their settings if necessary.

6. One common thread that each of the Working Groups uncovered is the need for increased training in technology for litigants, attorneys, and court personnel. This Working Group recommends that, in addition to, but part of NYSBA's continuing legal education programs, NYBSA annually devote a day to free virtual technology training throughout the State. The training should provide a firm elemental footing for all practitioners. Such a day would enable NYSBA to strengthen its commitment to promoting access to justice. The need for this training has been underscored in the Pandemic Practices Working Group of the Commission to Reimagine the Future of New York's Courts recently released report.[239]

[239] PANDEMIC PRACTICES WORKING GROUP OF THE COMMISSION TO REIMAGINE THE FUTURE OF NEW YORK'S COURTS, *New York Courts' Response to the Pandemic: Observations, Perspectives, and Recommendations*, 47–48 (2023), https://www.nycourts.gov/LegacyPDFS/press/pdfs/NYCourtsPandemicPracticesReport.pdf.

Task Force on the Post-Pandemic Future of the Legal Profession

1. If you are open to having the Task Force contact you with any follow up questions upon completing this survey, please feel free to share your contact info (First Name, Last Name, and E-Mail)

2. Age range

- 20-30
- 31-40
- 41-50
- 51-60
- 61-70
- 71 or older

3. Years of practice

- 1-3
- 4-5

◯ 6-10

◯ 11-20

◯ 21-35

◯ 36-50

◯ 51 or more

4. Gender

◯ Male

◯ Female

◯ Non-binary

◯ Transgender

◯ Cisgender

◯ Intersex

◯ Decline to answer

5. Judicial District? To view the list of NYS judicial districts and departments please visit: https://www.nycourts.gov/courts/ad4/Court/Dept-Districts.html

☐

6. Identify one of the below

- ◯ Litigation Attorney
- ◯ Transactional Attorney
- ◯ In-House Attorney
- ◯ Judicial
- ◯ Legal Services Provider (i.e. legal aid association, women's rights advocacy, etc.)
- ◯ Governmental Service

7. If you are a government-employed attorney, please identify your practice setting:

- ◯ Federal
- ◯ State
- ◯ Local
- ◯ I am not a government-employed attorney

8. ....and select one of the following:

- ◯ I am not a government-employed attorney
- ◯ Criminal Prosecution
- ◯ Criminal Defense
- ◯ Civil Litigation

9. If law school faculty, how long have you been teaching?

◯ 0-5 years

◯ 6-10 years

◯ 10 or more years

◯ I do not teach in a law school

Primary area of teaching

[ ]

10. If practicing in a law firm, identify role:

◯ Solo practice

◯ Firm (5 or less attorneys)

◯ Firm (6-20 attorneys)

◯ Firm (21-50 attorneys)

◯ Firm (51 or more attorneys)

11. If your firm has more than 5 attorneys, what is your role?

◯ Associate

◯ Partner/Counsel

◯ My firm has 5 or less attorneys

12. Are you employed?

- ◯ Part-time
- ◯ Full-time
- ◯ I am retired
- ◯ I am a per diem attorney
- ◯ I am unemployed

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Task Force on the Post-Pandemic Future of the Legal Profession

Technology and Law Practice Management

13. How would you describe your proficiency with legal technology?

- ◯ Very proficient
- ◯ Moderately proficient
- ◯ Adequately proficient
- ◯ Not proficient

14. Please rank the training below in order of importance to your ability to work remotely. Using one (1) to four (4), with one (1) being most significant?

- ☐ How to use your computer, monitor, printer, or other hardware from home
- ☐ How to use remote meeting (e.g. Teams, Zoom) or other remote platforms generally
- ☐ How to effectively communicate over remote platforms
- ☐

Cybersecurity – best practices and procedures

15. *For practicing attorneys*, what is your most significant objection or barrier to implementing new technologies? Using one (1) to five (5), with one (1) being most significant.

☐ Cost of technology

☐ Experience with technology

☐ Neither cost nor experience

☐ Firm leadership selects technology options

☐ Support at the firm

16. *For practicing attorneys*, the computer, telephone, printing, and other technologies (including internet connection) currently available to me at home are the same or better than the technologies available to me in my place of employment.

◯ Strongly Agree

◯ Agree

◯ Neutral

◯ Disagree

◯ Strongly Disagree

17. If you disagreed with the prior question, which technologies are missing or deficient at your home that are provided at your place of employment?

- ◯ Hardware (i.e., Monitors, printers, etc.)
- ◯ Mobile device
- ◯ Software (i.e. MS Office Suite, Citrix, Adobe Acrobat, etc.)
- ◯ Internet/Wi-Fi Connectivity
- ◯ Security-related technology
- ◯ I did not disagree with the prior question.

18. Please rank the following remote events/activities in order of preference with (1) being the activity that you find most effectively conducted by virtual means and four (4) being the activity that is the least efficient.

- ☐ Depositions
- ☐ Non-motion conferences with the court
- ☐ Oral arguments with the court
- ☐ Conferences with colleagues or adversaries/counterparties

19. I have difficulty navigating the technology used for remote video conferences, court appearances, depositions, or ADR.

- ◯ Strongly Agree
- ◯ Agree
- ◯ Neutral
- ◯ Disagree
- ◯ Strongly Disagree
- ◯ Not applicable (I am a member of the judiciary)

20. I have received cybersecurity training regarding in-office work.

- ◯ Strongly Agree
- ◯ Agree
- ◯ Neutral
- ◯ Disagree
- ◯ Strongly Disagree

21. I have received cybersecurity training regarding remote work.

- ◯ Strongly Agree
- ◯ Agree

- ◯ Neutral
- ◯ Disagree
- ◯ Strongly Disagree

22. How would you describe your ability to preserve confidential information with the increased use of technology and virtual meetings?

- ◯ Very confident in ability to preserve confidential information
- ◯ Moderately confident in ability to preserve confidential information
- ◯ Somewhat confident in ability to preserve confidential information
- ◯ Not confident in ability to preserve confidential information

23. What do you consider to be the disadvantages of virtual communications? (check all that apply)

- ☐ It is difficult to “read” the reactions of participants in remote proceedings
- ☐ It is difficult to determine witness credibility
- ☐ Technology glitches undermine the efficiency and effectiveness of remote communications
- ☐ Household or other similar interruptions interfere with or prevent effective and efficient remote

communications

- [ ] I feel I have less control
- [ ] None of the above

24. Which of the following statements best describes your organization's current working status:

- ◯ Fully remote with no plans to return to in-office work
- ◯ Fully remote with a scheduled date for a return to all in-office work
- ◯ Fully remote with a scheduled date for a return to some in- office work
- ◯ Hybrid: a mix of remote and in-office work
- ◯ Fully in-office work

25. What do you believe is the ideal mix of in-office and at-home work?

- ◯ Rarely in the office
- ◯ In-office one day a week
- ◯ In-office 2-3 days a week
- ◯ In-office 4-5 days a week
- ◯ In-office as needed based on a flexible week-to-week schedule

26. What aspects of in-office work have you missed the most? (check all that apply)

- [ ] As a result of working remotely, I have lost collegial interaction with attorneys who are members of my organization
- [ ] As a result of working remotely, I have lost assistance from support staff making my job more difficult
- [ ] Being able to work without household distractions (spouse, children, pets, etc.)
- [ ] Being able to walk down the hall to discuss legal issues with my colleagues
- [ ] Access to paper files
- [ ] Sufficient space to work
- [ ] Having a physical separation between work and home life
- [ ] The opportunity to mentor or be mentored
- [ ] Not applicable

27. *For attorneys in management*, identify the areas of law office management in which you or your firm have experienced significant fiscal savings due to working remotely (check all that apply)

- [ ] Office Space
- [ ] Utilities

- [ ] Computer and related hardware
- [ ] Office supplies
- [ ] Law research/library subscriptions
- [ ] Malpractice or other insurance coverage
- [ ] Bar association dues/CLE and other trainings
- [ ] CLE expenses
- [ ] Travel expenses
- [ ] Software and technological platforms (e.g. software, document review, research, accounting or law practice management licenses and platforms)
- [ ] Marketing/advertising
- [ ] Not Applicable
- [ ] Other (please specify)

28. If you are a *practicing attorney*, identify the areas of law office management in which you or your firm have experienced significant additional expenses due to working remotely.

29. Do you believe "New York Practice” should be a required course in law school?

◯ Yes

◯ No

30. Do you believe "technology in the legal profession" should be a required course in law school?

◯ Yes

◯ No

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Task Force on the Post-Pandemic Future of the Legal Profession

Access to Justice

31. Which of the following statements best describes "access to justice" (rank your answers from one (1) to seven (7), with one (1) being the best description):

- ☐ Providing more legal representation through legal aid and civil legal services and law school clinics
- ☐ Providing legal representation through increased involvement of attorney pro bono services, assigned counsel or pro bono programs
- ☐ Improving the use of technology to help the unrepresented and under-represented litigants
- ☐ Educating people about their legal rights and making other information about legal issues more readily available and accessible
- ☐ Restructuring the court system to better meet the needs of litigants
- ☐ Expanding the use of alternative dispute resolution to the unrepresented, including mediation and arbitration
- ☐ Supporting legislation and other actions that will simplify court procedures, forms, and rules

32. How do you contribute to any of the above?

33. To increase “access to justice,” how important are free legal services to those without means to pay legal fees?

- Very important
- Important
- Somewhat important
- Not important

34. Please identify those legal services you are referring to in question 33 that should be free.

35. To increase “access to justice,” how important is it to provide more affordable legal services to those who are not indigent, but who still need legal assistance?

- Very important
- Important
- Somewhat important

◯ Not important

36. Please identify those legal services you are referring to in the question above that need to be made more affordable?

37. What changes do you think would improve access and justice in the courts for the unrepresented or under-represented? (Rank one (1) to four (4) with one (1) being most significant)

- ☐ Legislation that would seek to prevent legal problems that require court resolution
- ☐ Changes in court rules, procedures, and forms to improve quality, efficiency, and public information to seek to make it easier for litigants to better understand and participate in court proceedings
- ☐ Better understanding, design, and use of technology by courts to enable virtual appearances (i.e., computers, mobile devices, printers, and connectivity) and facilitate access to information by litigants
- ☐ Training of judges and court personnel on the impact of the court system (for example, on housing, income, health care, employment, family matters, and incarceration)

38. From an "access to justice" perspective, what changes would make the biggest difference to the clients and communities you serve?

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Task Force on the Post-Pandemic Future of the Legal Profession

Attorney-Client Relations

39. Are you a judge?

- ◯ Yes
- ◯ No

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Task Force on the Post-Pandemic Future of the Legal Profession

40. How has the pandemic positively influenced your work? (Rank one (1) to eight (8), one (1) being most significant to you)

- [ ] I realized that I can work remotely
- [ ] I have been able to work more effectively/efficiently
- [ ] I can more easily attend hearings or meetings (where travel may have been a barrier) because of virtual proceedings
- [ ] I have more visibility with my firm or clients due to virtual meetings
- [ ] Petty fighting among counsel (in or out of court) is less frequent
- [ ] I have better work-life balance
- [ ] I have a developed a closer relationship with my client
- [ ] I have developed a closer relationship with my family

41. I anticipate the following new challenges to developing new clients: (Rank one (1) to eight (8), with one (1) being most significant)

- [ ] Lack of in person networking events
- [ ] Technology competency
- [ ] Clients do not want to meet in person
- [ ] Clients do want to meet in person
- [ ] Improving my marketing capabilities as I am not a strong digital marketer
- [ ] I do not want to travel
- [ ] Clients do not want to travel
- [ ] Inability to connect with clients due to client technology constraints

42. To attract clients going forward, I must do the following: (Rank one (1) to nine (9), with one (1) being most significant)

- [ ] Provide timely or more legal/practice updates electronically to my clients
- [ ] Speak on webinars or at conferences
- [ ] Improve online marketing
- [ ] Write and publish legal articles
- [ ] Hold client in person events
- [ ] Join industry groups
- [ ] Join bar associations committees
- [ ]

- [ ] Demonstrate that my firm is technology enabled
- [ ] Demonstrate that I am technology enabled

43. Increasingly, my clients expect the following from my law firm: (Rank one (1) to eight (8), with one (1) being the most significant)

- [ ] More advice and counsel
- [ ] Ability to complete technology audits requested by clients
- [ ] Technology enabled legal team
- [ ] Virtual capabilities
- [ ] More diverse team
- [ ] More niche legal capabilities rather than general practice
- [ ] Alternative fee arrangements
- [ ] To be available on demand

44. Going forward, I anticipate my clients will have: (Rank one (1) to four (4), with one (1) being the most significant)

- [ ] Greater budget constraints (corporate/in-house clients)
- [ ] Greater budget constraints (individual clients)

- [ ] Perform more in-house legal work due to budget constraints
- [ ] Scale back on hiring local counsel since the hiring counsel can appear remotely (with the consent of the court)

45. Please rank these trends and changes in Marketing/ Business Development /Client Engagement: (Rank with one (1) to five (5), with one (1) being the most significant or notable development)

- [ ] Clients seek a virtual presence
- [ ] Firm establishing a presence with blogs and posting content electronically
- [ ] Adapting to the lack of in-person meetings with clients
- [ ] Preforming pro bono as way to develop new business
- [ ] Greater use of Social Media

46. The greatest threats to the practice of law going forward are: Rank with one (1) to ten (10), with one (1) being the most significant)

- [ ] Loss of information due cyber attacks
- [ ] Reputational damage due to cyber attack
- [ ] Inability to keep up with technology changes
- [ ]

Inability to attract clients due to in-person constraints

- [ ] Inability to market in a digital world
- [ ] Ability to attract talent because candidates want flexible, hybrid or fully remote work environments
- [ ] Effectiveness of virtual court proceedings for counsel, witnesses, or clients
- [ ] Erosion of attorney-client confidentiality due to remote work where household members may hear the discussion
- [ ] Non-lawyer equity ownership of law firms and multidisciplinary practice restrictions
- [ ] Alternative legal service providers that specialize in providing such legal services as document review, contract management, litigation support, discovery and electronic discovery, contract lawyers and staffing

47. During the pandemic, have your client expectations for attorney availability changed?

- ◯ Yes: expected to be available after traditional business hours and on weekends
- ◯ Yes: expected to be available after traditional business hours during the weekday only
- ◯ No
- ◯ Not applicable

48. Does your firm have a policy to manage client

48. Does your firm have a policy to manage client expectations as to the timing of access to members of the firm?

- ◯ Yes
- ◯ No
- ◯ We are currently creating one
- ◯ No, but there should be one
- ◯ Not applicable

49. How has the use of virtual communications impacted your attorney-client relationships?

- ◯ Greatly enhanced my relationships
- ◯ Somewhat enhanced my relationships
- ◯ No impact on my relationships
- ◯ Diminished my relationships
- ◯ Not applicable

50. Post-pandemic, what kind of disability accommodations for lawyers and clients do you want to see law firms and courts implement?

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Task Force on the Post-Pandemic Future of the Legal Profession

New Lawyers

51. Were you admitted to practice within the last seven years? (2014-2021)

- ◯ **Yes**
- ◯ No

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Task Force on the Post-Pandemic Future of the Legal Profession

52. Did law school appropriately prepare you to practice law virtually?

- Strongly Agree
- Agree
- Neutral
- Disagree
- Strongly Disagree

53. If you disagreed with question 1, how could law school have better prepared you for practicing law virtually?

54. Did law school appropriately prepare you for "New York Practice"?

- Strongly Agree
- Agree

◯ Neutral

◯ Disagree

◯ Strongly Disagree

55. Was taking the bar exam virtually:

◯ Less stressful than taking an in-person exam

◯ More stressful than taking an in-person exam

◯ Same level of stress as taking an in-person exam

◯ Not applicable

56. When seeking new job opportunities post COVID, how important is it that an employer offer a fully remote work environment?

◯ Not at all

◯ Somewhat important

◯ Very Important

57. When seeking new job opportunities post COVID, how important is it that an employer offer a hybrid work environment?

◯ Not at all

◯ Somewhat important

- ◯ Very important

58. How worried are you that taking advantage of remote or hybrid work will negatively impact your career progression?

- ◯ Not at all
- ◯ Somewhat important
- ◯ Very important

59. How worried are you that the pandemic happening at the beginning of your legal career has negatively impacted your career progression?

- ◯ Not at all
- ◯ Somewhat worried
- ◯ Very worried

60. If you are in a hybrid office situation, which of the following best applies?

- ◯ I determine when I am in the office
- ◯ There is a schedule for when I am in the office determined by the firm management
- ◯ It is expected I am in the office a certain number of days a week

◯ It is preferred that I am in the office, but I can work from home when I need to or prefer

61. Among the following statements, rank your answers (1) to eleven (11), with one (1) being most significant to you: Post-pandemic, the practice of law will

- ☐ Return to how legal practice was pre-pandemic with little change
- ☐ Include all attorneys back in office
- ☐ Include more tangible work to disrupt unconscious bias
- ☐ Have a greater focus on well-being
- ☐ Allow for more flexibility in practice location (hybrid, remote, etc.)
- ☐ Focus more on how technology can enhance our practice
- ☐ Depend less on technology
- ☐ Allow for less formality in dress code
- ☐ Bring about the return to formality in dress code
- ☐ Allow for easier cross jurisdiction practice
- ☐ Incorporate web-based platforms for many activities such as depositions, hearings, negotiations, mediations, etc. as is appropriate

62. Among the following statements, rank your answers one (1) to twelve (12), with one (1) being most significant to you: Post-pandemic, I would want the following changes in the practice of law:

- [ ] To return to how legal practice was pre-pandemic with little change
- [ ] To have all attorneys back in office
- [ ] To develop more tangible work to disrupt unconscious bias
- [ ] To place greater focus on well-being
- [ ] To create a more diverse workplace
- [ ] To allow more flexibility in practice location (hybrid, remote, etc.)
- [ ] To ensure more focus on how technology can enhance one's legal practice
- [ ] To depend less on technology
- [ ] To allow for less formality in dress code
- [ ] To bring about the return to formality in dress code
- [ ] To allow for easier cross jurisdiction practice
- [ ] To incorporate web-based platforms for many activities such as depositions, hearings, negotiations, mediations, etc. as is appropriate.

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Task Force on the Post-Pandemic Future of the Legal Profession: Law Student Survey

1. Age range

- ◯ 20-30
- ◯ 31-40
- ◯ 41-50
- ◯ 51-60
- ◯ 61-70
- ◯ 71 and older

2. Gender

- ◯ Male
- ◯ Female
- ◯ Non-binary
- ◯ Transgender
- ◯ Cisgender
- ◯ Intersex

◯ Decline to answer

3. Expected graduation year

◯ 2021

◯ 2022

◯ 2023

◯ 2024

◯ 2025

4. Are you a full-time or part-time student?

◯ Full-time

◯ Part-time

5. Law School?

6. How would you describe your proficiency with legal technology?

◯ Very proficient

◯ Moderately proficient

◯ Adequately proficient

- ◯ Not proficient

7. If you attended law school virtually, either full-time or part-time, do you believe that virtual instruction in law school will/has:

- ◯ Enhanced your ability to connect with professors, mentors, and other students
- ◯ Hindered your ability to connect with professors, mentors, and other students
- ◯ Did not affect your ability to connect with professors, mentors, and other students

8. If you attended law school virtually, either full-time or part-time, do you believe that virtual instruction in law school will/has:

- ◯ Enhanced your ability to master your advocacy skills
- ◯ Hindered your ability to master your advocacy skills
- ◯ Did not affect your ability to master your advocacy skills

9. If you attended law school virtually, either full-time or part-time, do you believe that virtual instruction in law school will/has:

- ◯ More effective than in-person
- ◯ Less effective than in-person learning

- ◯ No different than in-person learning

10. If you attended law school virtually, either full-time or part-time, did studying virtually:

- ◯ Hinder your ability to build relationships with classmates
- ◯ Enhance your ability to build relationships with classmates
- ◯ Have no bearing on your ability to build relationships with classmates

11. Do you think students should have the right to choose in-person or virtual instruction?

- ◯ Yes, for all classes
- ◯ Yes, for upper-level classes only
- ◯ Law schools should return to the ABA Standard 306 limit of 15 credit remote learning limitation

12. For law students entering their last year of law school, how prepared do you feel you are for your first years of law practice?

- ◯ Very
- ◯ Somewhat
- ◯ Not at all

◯ Not applicable

13. Do you believe the Bar Exam should remain a path to licensure?

◯ Yes

◯ No

If you responded yes, would you modify it? What changes would you suggest? If you responded no, why not?

14. Would you prefer that a student's admission package to the Appellate Division be submitted electronically or through paper copy?

◯ Electronically

◯ Through paper copy

15. If submitted electronically, what problems do you foresee or have you incurred with that process?

16. Do you believe New York “Practice” should be a required course in law school?

17. Do you believe “technology in the legal profession” should be a required course in law school?

18. For law students entering their last year of law school, when seeking new job opportunities post COVID, how important is it that an employer offer a fully remote work environment?

- Not at all important
- Somewhat important
- Very important

19. For law students entering their last year of law school, when seeking new job opportunities post COVID, how important is it that an employer offer a hybrid work environment?

- Not at all important
- Somewhat important
- Very important

20. Which of the following statements best describes "access to justice" (rank your answers one (1) to seven (7), with one (1) being the best description)

- [ ] Providing more legal representation through legal aid and civil legal services and law school clinics
- [ ] Providing legal representation through increased involvement of attorney pro bono services, assigned counsel or pro bono programs
- [ ] Improving the use of technology to help the unrepresented and under-represented litigants
- [ ] Educating people about their legal rights and making other information about legal issues more readily available and accessible
- [ ] Restructuring the court system to better meet the needs of litigants
- [ ] Expanding the use of alternative dispute resolution to the unrepresented, including mediation and arbitration
- [ ] Supporting legislation and other actions that will simplify court procedures, forms, and rules

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PRESIDENT'S COMMITTEE ON ACCESS TO JUSTICE

May 15, 2023

TO: Executive Committee and Members of the House of Delegates

FROM: President's Committee on Access to Justice

RE: Support for the report and recommendations of Task Force on the Post-Pandemic Future of the Profession

The President's Committee on Access to Justice fully supports the report and recommendations of Task Force on the Post-Pandemic Future of the Profession. The committee voted in support of the conclusion and recommendations on May 09, 2023.

From:	Barbara J Ahern
To:	reportsgroup
Cc:	Richards, Thomas
Subject:	Comments on Reports for the June 2023 NYSBA HOD and EC Meetings
Date:	Monday, May 22, 2023 6:05:16 PM

To the Members of the Reports Group:

Thank you for providing the NYSBA Committee on Animals and the Law an opportunity to comment on reports scheduled for the November 2023 House of Delegates and Executive Committee Meetings. In the past, the Committee has decided that when there is an item that is integral to another area of law practice, and one that the members of this Committee lack familiarity, we will not comment. Consequently, we do not have any comment to make on the affirmative legislative proposals put forward by the Committee on Children and the Law and the Trusts and Estates Section.

Members of the Committee who reviewed the Report and Recommendations of the Committee on the New York State Constitution did not find there to be compelling reasons why the state constitution should be simplified, and we are not offering any comment on that report.

However, we would like to offer some brief comments on the Report and Recommendations of the Task Force on the Post-Pandemic Future of the Profession and the Report and Recommendations of the Task Force on Mental Health and Trauma Informed Representation.

Report and Recommendations of the Task Force on the Post-Pandemic Future of the Profession
There is no question that the COVID-19 pandemic caused major upheavals in both the professional and personal lives of attorneys. This Task Force and the four working groups of the Task Force have unquestionably put in tremendous time and effort to study the different aspects of changes that are apparent in the post-pandemic world. Our only comment is to question why neither the report nor the recommendations address the issues that accompany the development and use, in the legal profession, of ChatGPT AI technology.

This aspect of technology was not caused by the pandemic, but as noted in this report, the pandemic merely hastened the use of many of the technologies that were already in development at the start of the pandemic. NYSBA and the American Bar Association have provided commentary and advice on ChatGPT since the release of ChatGPT at the end of last year; it needs to be considered as part of this comprehensive report that addresses so many other aspects of technology in the legal profession, and the expectations of younger lawyers that they will have access to it in the course of practice. Some of the initial language in this report talks about NYSBA making it possible for attorneys to use technology to operate in the post pandemic world, but there are many concerns that have been raised about ChatGPT, and not everyone will agree, today, that its use in legal practice should be pursued or encouraged.

We recommend further study that specifically targets ChatGPT, and includes specific consideration of the ethical issues connected to its use in legal practice.

Report and Recommendations of the Task Force on Mental Health and Trauma Informed Representation

One of the current projects of the Committee on Animals and the Law involves the use of service animals and emotional support animals. Both can be extremely valuable to individuals who have special needs for physical or emotional assistance, but their use is not mentioned in this report. An appropriate reference to emotional support animals, for example, could state that when clinical conditions and treatment options are being evaluated, consideration should be given to specifically endorsing the use of emotional support animals, particularly in cases of acute trauma, and suggesting that this approach be adopted as a standard protocol in appropriate circumstances – an approach endorsed by many medical professionals.

Additionally, where inpatient services are recommended or required, such animals can prove invaluable and should be made available whenever possible; and reference to this use of them should be included in the report. Accommodation should be made to allow an individual who is suffering an acute mental crisis to have their animal accompany them (to court, to the hospital) even if it is not officially an emotional support animal, since separation from a beloved pet could inflict additional trauma, anxiety or distress, impairing the patient's treatment and recovery, and impeding or delaying their access to the justice system.

The report and recommendations might also address training that should be provided to the police or other sanctioned first responders to an emergency when they must handle a situation involving a mentally challenged individual. In such situations, if an animal is present (whether or not it is a service animal or emotional assistance animal), extreme care should be taken to defuse the situation without causing additional harm to the human individual or their animal. If any injury is inflicted on the animal, the mental state of the human patient will degrade. Protocols should be recommended that provide for police consultation with a veterinarian who can advise on the use of techniques or medications that will defuse any aggressive response unintentionally caused in the animal in order to prevent harm to the animal. Inflicting injury or harm to the animal will only increase the seriousness of the mental distress or trauma in the human individual, and make it less likely that they will receive the medical assistance or access to justice they need and deserve.

Members of the Committee on Animals and the Law will be happy to work with the task forces on the additional issues that we are suggesting for inclusion in their reports and recommendations. Thank you for this opportunity to share our concerns.

Barbara J. Ahern
Chair, NYSBA Committee on Animals and the Law

Barbara J. Ahern, Attorney at Law

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Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #8

REQUESTED ACTION: Approval of the report and recommendations of the Task Force on Mental Health and Trauma Informed Representation.

Task Force co-chairs Sheila E Shea and Joseph A. Glazer will present the report, a copy of which is attached to this memo.

The Task Force on Mental Health and Trauma Informed Representation was established in June 2022 by immediate past president Sherry Levin Wallach to focus on the impact of the mental health crisis on the public and the civil and criminal justice systems.

The mission statement of the Task Force is as follows:

> The Task Force on Mental Health and Trauma Informed Representation is created to explore, study, and evaluate the intersection between the mental health crisis and our civil and criminal justice systems. There is a well-documented crisis of mental health care in the United States that has failed to meet the needs of people with mental health challenges and/or histories of trauma. People living with mental health challenges or trauma histories are increasingly incarcerated, homeless, or boarded in hospital emergency rooms. They often bear additional burdens and stigma of racial discrimination, sex or gender identity discrimination, and poverty. The Task Force will focus on the need for the Bar to better serve individuals with mental health challenges and/or trauma histories, both adults and children, through trauma-informed practice, such as informing attorneys and the judiciary of available resources to assist in the representation of clients, by raising awareness of intersectional stigma and trauma, and by recommending education on best practices in the representation of these clients. Criminal diversion and civil processes will be examined to ensure that people living with mental health challenges and/or trauma histories are able to fully participate in legal proceedings that impact their liberty and well-being. State policy and budget priorities will be examined, and appropriate recommendations made.

The Task Force divided into four subcommittees – criminal justice, civil justice, seamless systems, and trauma informed practice – and heard from leading national and

international experts on the intersection of mental health and the law. The 2023 Presidential Summit focused on "Mental Health and the Justice System: Impacts, Challenges, Potential Solutions," and the January/February 2023 issue of the Bar Journal was dedicated to the topic.

The Task Force offers a series of recommendations, summarized on pages 17 to 24 of the report, categorized into recommendations for the court system, legislative recommendations, practice-based recommendations ("trauma informed practice"), recommendations focused on the seamless delivery of mental health services, recommendations to improve the delivery of both criminal and civil justice, and recommendations with respect to disability accommodations. Further, the Task Force recommends the establishment of a standing Committee on Mental Health.[1]

The report was submitted to the Reports Group in April 2023. An informational session was held on Thursday, May 11th, for members of the Reports Group to preview the report and its recommendations. Comments were submitted by the President's Committee on Access to Justice and the Committee on Animals and the Law.

The report was endorsed for favorable action by the House at the May 17, 2023, meeting of the Executive Committee.

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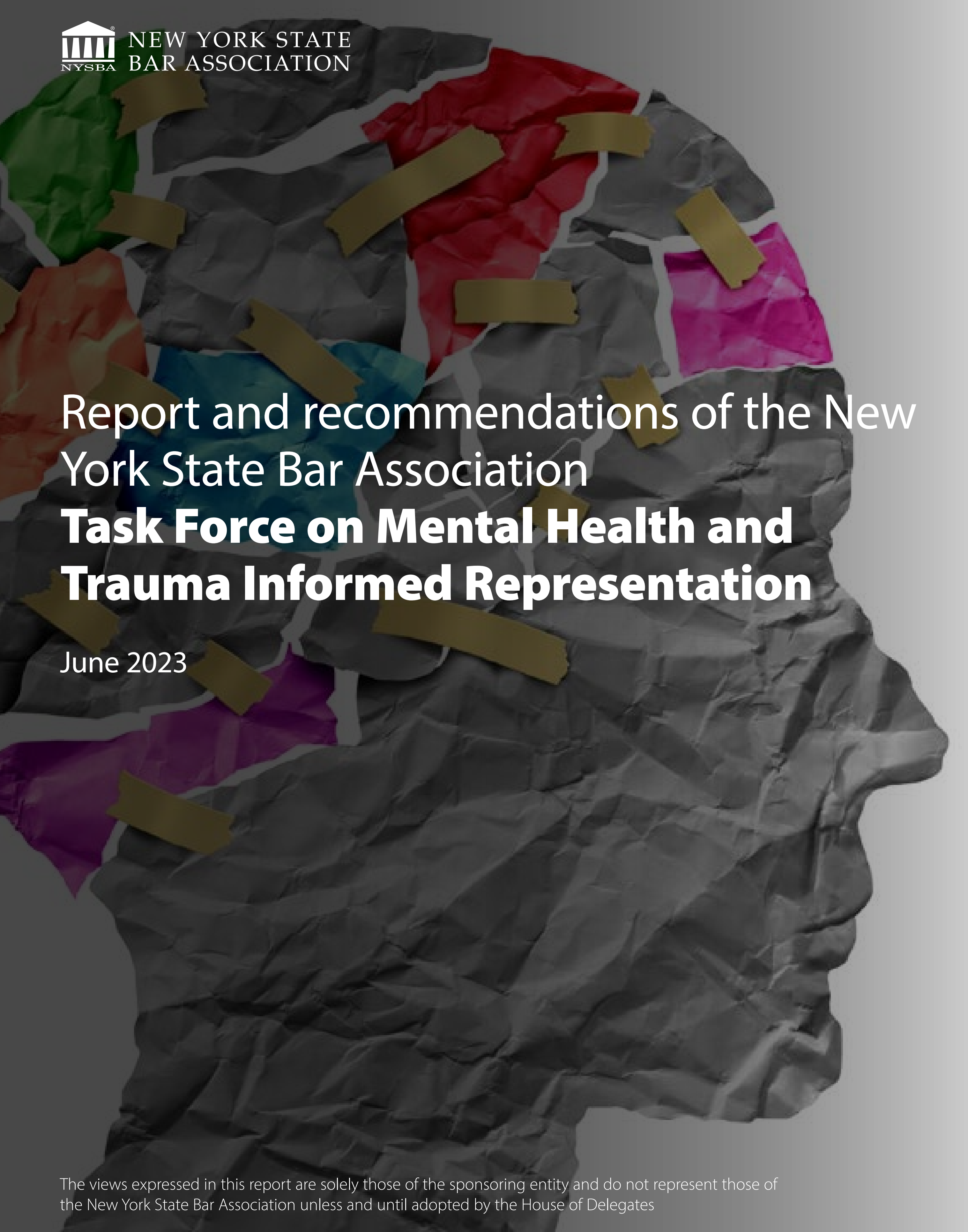
[1] In April 2019, the Executive Committee approved a report offered by the Committee on Mandated Representation that included a recommendation that the Association establish a standing committee on mental health. *See* Committee on Mandated Representation, Report to the Executive Committee of the New York State Bar Association on the Use and Efficacy of Penal Law § 40.15 and Criminal Procedure Law § 330.20and Recommendation to Establish a Mental Health Task Force or Committee, New York State Bar Association, Apr. 2019.



Report and recommendations of the New York State Bar Association

Task Force on Mental Health and Trauma Informed Representation

June 2023

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

Report and Recommendations of the **Task Force on Mental Health and Trauma Informed Representation**

April 2023

Members of the Task Force on Mental Health and Trauma Informed Representation

Joseph Glazer, Esq.
Co-Chair

Sheila Shea, Esq.
Co-Chair

Matthew W. Alpern, Esq

Brenda Baddam, Esq.

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Preface to the Report – A Note on Language

In rendering this report the members of the Task Force begin with a comment on language. As Nicholas Kristoff reminds us, language can be inclusive or alienating and it can also be divisive. [1] Many organizations have guides to writing style. For example, the American Medical Association ("AMA") released a 54- page guide on language to advance health equity.[2] The AMA states its goal is not to provide a list of "correct terms" but to provide guidance on equity-focused, person-first language and to among other things, avoid stigma.[3] Language promotes stigma when an illness is placed before the person, giving primacy of the illness (e.g., mental illness) over the human being.[4] Throughout this Report we have endeavored to use "person-first" language.[5]

As Dr. Thomas Insel, former director of the National Institute of Mental Health ("NIMH") reminds us, "the labels we use are simply conventions with limitations. Labels like 'illness' or 'disorder' describe a set of symptoms. They do not define a person." [6] Mr. Kristoff cautions that inclusive language must be a call to action and not a substitute for it. [7] Toward this end, and with a call for action,

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1 https://www.nytimes.com/2023/02/01/opinion/inclusive-language-vocabulary.html?smid=nytcore-ios-share&referringSource+articleShare

2 See, American Medical Association, *Advancing Health Equity: A Guide to Language, Narrative and Concepts (*2021).

3 *Id*. at p. 7, 45.

4 *Id*. at p. 45-46

5 This choice recognizes that some people with disabilities might prefer "identity first" language. While person first language is used in the title of the 1990 landmark civil rights law, the Americans with Disabilities Act, many in the disability community now prefer identity language which expresses disability pride with direct statements – such as I am deaf or I am autistic. A recommendation emerges from the University of Kansas Research and Training Center on Independent Living to ask the person you are writing or speaking about which approach they prefer. In a report such as this, person first language is recognized as respectful. *See*, https://rtcil.org

6 Thomas Insel, M.D., *Our Path from Mental Illness to Mental Health* (2022)

7 *Supra*, note 1.

Task Force member Chris Liberati-Conant persuasively argues in his January/February 2023 New York State Bar Association *Journal* article that "It's time to take 'hygiene' out of the Mental Hygiene Law"[8] Mr. Liberati-Conant observes, "there are many difficult issues related to mental health. This is not one of them." As his article explains, the term "mental hygiene" in our State Constitution and related statutes is associated with the eugenics movement. The Task Force agrees that it is time to remove "hygiene" from the Mental Hygiene Law. Adopting a modern nomenclature that does not stigmatize people with mental disabilities is certainly more reflective of the values of our community. This change is long overdue. A final note on language, because our Task Force investigation is not exclusive to people with mental illness, in this -report we use the statutory term "mental disability" in context because that term is defined more broadly to encompass "mental illness, intellectual disability, developmental disability, or an addictive disorder."[9]

Executive Summary

According to the NIMH nearly one in five adults in the United States live with a mental illness-over 50 million people in 2020-and over 13 million adults live with serious mental illness.[10] In his book, "*Healing: Our Path from Mental Illness to Mental Health*,"[11] Thomas Insel chronicles the failures in virtually every

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[8] Chris Liberati-Conant, *It's Time to Take 'Hygiene' Out of the Mental Hygiene Law*, 95 -Feb N. Y. St. B. J. 21 (2023).

[9] MHL § 1.03 (3).

[10] https://www.nimh.nih.gov/health/statistics/mental-illness

According to the NIMH website, the data is from the 2020 National Survey on Drug Use and Health ("NSDUH") by the Substance Abuse and Mental Health Services Administration ("SAMHSA"). For inclusion in NSDUH prevalence estimates, mental illnesses include those that are diagnosable currently or within the past year; of sufficient duration to meet diagnostic criteria specified within the 4th edition of the Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV"); and exclude developmental and substance use disorders. Any mental illness ("AMI") is defined as a mental, behavioral, or emotional disorder. AMI can vary in impact, ranging from no impairment to mild, moderate, and even severe impairment (e.g., individuals with serious mental illness as defined below). Serious mental illness ("SMI") is defined as a mental, behavioral, or emotional disorder resulting in serious functional impairment, which substantially interferes with or limits one or more major life activities. The burden of mental illnesses is particularly concentrated among those who experience disability due to SMI.

[11] Insel, *supra,* note 6.

aspect of our mental health system, including the ineffective delivery of care, the gutting of community health services and the reliance on police and jails for crisis services. Insel describes an "epiphany" during his last year at NIMH, after he had delivered a presentation to a group of advocates, touting researchers' progress on identifying genetic markers for various mental illnesses. A man in a flannel shirt appeared increasingly agitated during the presentation. When the question-and-answer period began, he rose to his feet to ask the Dr. Insel a question: "You really don't get it. My twenty-three-year-old son has schizophrenia. He has been hospitalized five times, made three suicide attempts, and now his is homeless. Our house is on fire," the man said, "and you are talking about the chemistry of the paint. What are you doing to put out this fire?" Dr. Insel writes that in that moment, "I knew he was right. Nothing my colleagues and I were doing addressed the ever-increasing urgency or magnitude of the suffering millions of Americans were living through — and dying from."[12]

In March 2020, the Conference of Chief Justices ("CCJ") and Conference of State Court Administrators ("COSCA") established the National Judicial Task Force to Examine State Courts' Response to Mental Illness to "assist state courts in their efforts to more effectively respond to the needs of court involved individuals with severe mental illness." Former New York Chief Administrative Judge Lawrence K. Marks was a Task Force Co-Chair.

The October 2022 report of the Task Force, *State Courts Leading Change*, observed:

> "Court leaders cannot solve the 'chaos and heartbreak of mental health in America.' Court leaders can, and must, however, address the impact of the broken mental health system on the nation's courts-especially in partnership with behavioral health systems. The broken system too often negatively impacts court cases involving those with mental illness, especially in competency proceedings, criminal and juvenile cases, civil commitment cases, guardianship proceedings for adults and juveniles, and family law cases. Each state court, as well

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[12] *Id.*, p. xvi-xvii. Thomas Insel, the 'Nation's Psychiatrist,' Takes Stock, With Frustration - The New York Times (nytimes.com)

as CCJ and COSCA, are urged to initiate a thorough examination of the mental health crisis and its impact on fair justice."[13]

Creation of Task Force on Mental Health and Trauma Informed Representation

Recognizing that the mental health crisis confronts our nation, state, localities and court system in profound ways, NYBA President Sherry Levin Wallach conceived and convened a NYSBA "Task Force on Mental Health and Trauma Informed Representation" as one of her first official acts. The mission statement of the Task Force was ambitious and provided:

> "The Task Force on Mental Health and Trauma Informed Representation is created to explore, study, and evaluate the intersection between the mental health crisis and our civil and criminal justice systems. There is a well-documented crisis of mental health care in the United States that has failed to meet the needs of people with mental health challenges and/or histories of trauma. People living with mental health challenges or trauma histories are increasingly incarcerated, homeless, or boarded in hospital emergency rooms. They often bear additional burdens and stigma of racial discrimination, sex or gender identity discrimination, and poverty. The task force will focus on the need for the bar to better serve individuals with mental health challenges and/or trauma histories, both adults and children, through trauma-informed practice, such as informing attorneys and the judiciary of available resources to assist in the representation of clients, by raising awareness of intersectional stigma and trauma and by recommending education on best practices in the representation of these clients. Criminal diversion and civil processes will be examined to ensure that people living with mental health challenges and/or trauma histories are able to fully participate in legal proceedings that impact their liberty and well-being. State policy and budget priorities will be examined and appropriate recommendations made."

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[13] *See, State Courts Leading Change*, Report and Recommendations (October 2022); From the 2016-2017 Policy Paper Adopted by CCJ/COSCA, "Decriminalization of Mental Illness: Fixing a Broken System." [Leading Change | NCSC]

The Task Force membership included lawyers engaged in the private practice, advocates for people with disabilities, criminal law attorneys, attorneys who advise local and state governmental entities delivering mental health services, attorneys with disabilities and attorneys with joint degrees who are practicing psychologists. The Task Force had a psychiatric advisor. With the Committee on Attorney Well-Being, the Task Force co-sponsored the January 18, 2023, NYSBA Presidential Summit where the theme was *Mental Health and the Justice System: Impacts, Challenges, Potential Solutions*. A remarkable conversation with Zack McDermott and his mother, Cindy McGilvrey, authors of the *Gorilla and the Bird: A Memoir of Madness and a Mother's Love,* was facilitated by Task Force Member Libby Coreno, at the Annual Meeting. That interview provided the audience with a remarkable account and lived experiences of a person who is a practicing lawyer with mental illness.[14]

When reporting to the House of Delegates on January 20, 2023, Task Force co-chair Joseph Glazer personalized the charge of the Task Force when he said: "I become informed by reading … I become responsive by taking action. We have a responsibility to meet our clients where they are." The theme of the January/February issue of the New York State Bar Association *Journal* was *Trauma, Mental Health and the Lawyer*. The lead article was written by Task Force member Libby Coreno. Task Force co-chairs Joseph Glazer and Sheila Shea and members Patricia Warth, and Chris Liberati-Conant were also contributors to the *Journal*.[15] The full Task Force report explores the historical antecedents to the current mental health crisis. It identifies the areas of inquiry that the Task Force undertook and seeks to meet the challenge of President Sherry Levin Wallach who stated in her President's Message leading the January/February *Journal*:

> "There is considerable work to be done to ensure equity and fairness in the justice systems for people with mental illness, trauma and disabilities. We need to have a system of care that is set up to the challenging task of serving clients with complex needs. Our organization must lead and join with others to ensure diversity and equity across all programs designed to improve outcomes for people with mental disabilities who are involved in the criminal justice

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[14] *See*, Paula L. Green and Jennifer Andrus, *The Criminalization of Mental Illness: Incarceration's Effect on Mental Health and Trauma*, State Bar News, Annual Meeting 2023, Vol. 65, No. 1, p. 4.

[15] Task Force member Jamie A. Rosen with Douglas Stern, was subsequently published in the March/April 2023 NYSBA Journal, writing on *The Unique Role of the Guardian in Inpatient Psychiatric Care*.95 -Apr N. Y. St. B. J. 43 (2023).

system. We must act now. Our task force, comprising more than two dozen leaders across New York State, will publish a report in the coming year. A choir of voices and perspectives is needed in every effort to improve court and community responses to individuals with mental disabilities. We need to be among the more prominent voices in that chorus urging reform." [16]

Investigation

The full membership of the Task Force convened regularly commencing in August of 2022, and later broke into separate sub-committees that studied issues pertaining to criminal justice, civil justice, seamless systems and trauma informed practice. It met periodically with experts and advocates to inform its judgments. The Task Force invited the Honorable Matthew D'Emic, Brooklyn Mental Health Court, to be its first guest presenter. Trista Borra, J.D., M.S.W., New York State Unified Court System, Office for Justice Initiatives, Statewide Director, Child Welfare Court Improvement Project ("CWCIP"), Aimee L. Neri, M.S.W., CWCIP 8th Judicial District Coordinator, Bridget O'Connell, J.D., M.S.W., Alternative Dispute Resolution ("ADR") Coordinator, 5th. 6th, 7th and 8th Judicial Districts and Court of Claims, and Sadie Ishee, J.D., Deputy Chief Attorney, Mental Hygiene Legal Service, First Judicial Department followed to address the Task Force on trauma and informed practices. Stephanie Marquesano, J.D., founder and president of "the harris project, " provided tremendous insights to the Task Force toward promoting co-occurring disorders awareness, prevention and advocacy. Harvey Rosenthal, Executive Director and Luke Sikinyi, Policy Director, New York Association of Psychiatric Rehabilitation Services ("NYAPRS") offered the Task Force with perspectives from the advocacy community. Cheryl Roberts, Esq., Executive Director, Greenburger Center for Social and Criminal Justice, spoke to the Task Force from multiple perspectives, including as a part-time City Judge implementing justice initiatives in her Columbia County community.[17] Dr. David Moore addressed the Task Force remotely from Australia where he successfully advocated to bring restorative justice principles into practice. The Commissioner of the Office of

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[16] Sherry Levin Wallach, *Lawyers Must Address Impact of Mental Health on Criminal Justice,*. 95 - Feb N. Y. St. B. J. 6,7 (2023).

[17] Judge Roberts described the Sequential Intercept Model ("SIM") and explained how Hudson, New York created a SIM map for its community. *See Report to Begin Decriminalizing Substance Use Disorders and Serious Mental Illness* [Decriminalizing Substance Use Disorders and Serious Mental Illness (cityofhudson.org)]

Mental Health ("OMH"), Dr. Ann Marie T. Sullivan addressed the Task Force as did the Commissioner of the Office for People With Developmental Disabilities ("OPWDD"), Kerri Neifeld, through her designee, Dr. Jill Pettinger. Task Force Member Sophie I. Feal, also attended and reported back to the Task Force on the progress of the Attorney General Letitia James' public hearings on the mental health crisis in New York State.[18]" Task Force Members Jeffrey Berman and Sabina Kahn testified at the Attorney General's New York City hearing.

While the Task Force investigation was ongoing, New York Governor Kathy Hochul released her 2023-2024 Executive Budget proposal on February 2, 2023. The Executive Budget identified many priorities of interest to the Task Force, including:

- $700 million to bolster mental health inpatient, outpatient and residential programs statewide, bringing total investment in mental hygiene sector to $10.5 billion for the upcoming fiscal year.

- $890 million in capital investment to build 3,150 new residential beds for people with mental illness who need varying levels of support.

- Adding 1,000 inpatient beds in the OMH system which is part of a multi-year plan to increase capacity at mental health facilities. Included in this total are 850 acute care beds in psychiatric wards of general hospitals that were "repurposed" during the COVID crisis as medical-surgical beds and 150 new beds in State operated psychiatric hospitals.

- Adding 39 beds at a cost of $11.7 million dollars in the OPWDD system at the former Finger Lakes Developmental Center campus as an intensive treatment option for people with developmental disabilities.

- 2.5 % cost-of-living increases to community based not-for-profit human services providers. [19]

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18 Mental Health Hearing | New York State Attorney General (ny.gov)

19 Briefing Book | FY 2023 Executive Budget (ny.gov) As reported in the Albany Times Union. https://www.timesunion.com/state/article/detailed-breakdown-gov-kathy-hochul-s-executive-17757303.php *See,* Joseph Glazer, Testimony to the Joint Legislative Budget Hearing

On February 16, 2023, the New York State Legislature convened a Joint Legislative Public Hearing on the 2023 Executive Budget Proposal. The Task Force considered the public hearing testimony when rendering its -report.[20]

The Task Force closed its investigation on March 31, 2023, and emerged with recommendations addressed to the Executive, Legislative and Judicial branches of government. An overview of the recommendations follows. The balance of the Task Force report provides context for its recommendations with an appendix of sources considered during its deliberations. The Task Force mission was broad, and the condensed time within which to conduct our inquiry led to a consensus that NYSBA should exercise continuing leadership in this space and consider creating a standing mental health committee that continues this valuable work. This recommendation is not new. On November 18, 2018, the NYSBA Committee on Mandated Representation issued a report and recommendation to establish a task force or standing committee on mental health. [21] Part of that goal was realized with the creation of the Task Force on Mental Health and Trauma Informed Representation. The Task Force has completed its work, but there is a need for education and advocacy to continue because the scope of the issues pertaining to mental health and trauma that confront our society are enormous. In our opinion, there is no more persuasive justification for the establishment of a standing mental health committee than the words of Professor Michael Perlin who observed:

> "Mental Disability is no longer-if it ever was-an obscure subspeciality of legal practice study. Each of its multiple strands forces us to make hard social policy choices about troubling social issues-psychiatry and social control, the use of institutions, informed consent, personal autonomy, the relationship between public perception and social reality, the many levels of 'competency,' the role of free will in the

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Proposed 2023-204 NYS Budget Hearing on Mental Hygiene (Feb. 16, 2023). Appendix Document 1, outlining budget priorities of the Executive.

[20] [Joint Legislative Public Hearing on 2023 Executive Budget Proposal: Topic Mental Hygiene | NY State Senate (nysenate.gov)]

[21] *See, Report to the Executive Committee of the New York State Bar Association on the Use and Efficacy of Penal Law 40.15 and Criminal Procedure Law 330.20 and Recommendation to Establish a Mental Health Task Force or Committee* (Robert Dean, Chair) (2018). Appendix Document 2

> criminal law system, the limits of confidentiality, the protection duty of mental health professionals, the role of power in forensic evaluations. These are all difficult and complex questions that are not susceptible to easy, formulistic answers." [22]

As the quote from Professor Perlin reminds us, the work of the Task Force only touches upon some of the many issues that are worthy of continued study by the Association.

Overview of Recommendations

Court System

- In his 2023 *State of Our Judiciary* address, Judge Anthony Cannataro, Acting Chief Judge of the State of New York, announced that the court system will create a committee to implement the recommendations from the National Judicial Task Force to Examine State Courts' Response to Mental Illness (*State Courts Leading Change*). The Task Force supports this initiative and recommends that the newly formed committee include representatives from within the court system, including, judges, court personnel, court officers, Americans with Disabilities ("ADA") compliance officers, and the directors of Attorneys For Children ("AFC") and Mental Hygiene Legal Service ("MHLS") programs and outside of the Office of Court Administration ("OCA"), such as prosecutors, public defense providers, legal service organizations and New York's federally funded protection and advocacy organization, Disability Rights New York ("DRNY")
- The court system should also study innovations emerging from other states, including Texas and its Judicial Commission on Mental Health ("TJCMH"). The TJCMH has developed literature and tool kits toward connecting people to treatment rather than jails while preserving community safety by diverting non-violent adults and youth with behavioral health issues to less restrictive, more healing environments to promote reform [23]

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[22] Michael L. Perlin, *Half-Wracked Prejudice Leaped Forth: Sanism, Pretexuality, and Why and How Mental Disability Law Developed as It Did*, 10 J. Contemp. Legal Issues 3, 31 (1999).

[23] Texas JCMH | Texas Judicial Commission on Mental Health

- The Task Force joins in the recommendations of the "Report from the Special Adviser on Equal Justice in the New York State Courts" (the "Johnson Report") that there be substantial implicit bias training of Judges, court personnel and juries as a high priority of the court system in New York.

- The court system should conduct training on implicit bias and disability.
- The Task Force agrees that a full-time mental health professional should be engaged by OCA to oversee the implementation of these training programs.

- Further, additional funding should be available, especially to smaller communities, for the creation of specialty courts in those areas and for the training of both judicial and non-judicial personnel in the proper operation of those courts.

- The court system should collect relevant data regarding the demographics of those involved in the criminal justice system and the outcomes of their cases so that further study can help to continue to improve the goal of equality of justice especially for those who are mentally disabled or a member of a traditionally targeted racial or gender population.

- The court system should also develop a methodology to encourage the submission of the ideas and suggestions of individual judges, lawyers, correction officials, and staff as well as those who are directly impacted by the current inequities in the system to improve the system.

- OCA should add information and forms to its website guiding users in the process to remove a guardian and to the newly enacted Supported Decision Making statute ("SDM") as a guardianship alternative. [24]

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[24] *See,* Mental Hygiene Law ("MHL") Article 82.
Surrogate's Court Article 17-A guardianship forms can be found at:
https://ww2.nycourts.gov/forms/surrogates/guardianship.shtml

- OCA should update its guidelines for attorneys accepting guardian ad litem appointments.[25]

Legislature

- Pass the *Treatment Not Jail A ct*, or consistent legislation to provide courts with guided discretion needed to authorize diversion, as opposed to incarceration, for people entangled in our criminal justice system who need services and support for mental disabilities.
- Restore legislative appropriations for the New York State Law Revision Commission ("LRC") to promote criminal and civil law reform.[26]
- Hold public hearings on particularly vexing problems within the service delivery system such as the boarding of people with multiple disabilities in emergency rooms and hospitals.
- Hold public hearings to study comprehensive and collaborative community responses to people in crisis in formed by studies and models of responses in various jurisdictions.
- Hold public hearings to study the repeal of Social Services Law § 384-b(4)(c) and consideration of a parent's status as a person with mental illness or intellectual disability in other family court proceedings.
- Hold public hearings on the need for guardianship reform in New York State.
- Introduce legislation to specifically recognize Psychiatric Advance Directives ("PADs") in New York State.

Trauma Informed Practice

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[25] Publications Home Page | NYCOURTS.GOV - Guidelines for Guardian Ad Litem, with Sample Reports and Forms.

[26] Legislative Law § 70 is the enabling statute of the New York State Law Revision Commission ("LRC"). The LRC is the oldest continuous agency in the common-law world devoted to law reform through legislation. *See,* New York State Law Revision Commission | Revitalizing the law through reform and legislation Unfortunately, the LRC has not received legislative appropriations for over a decade completely frustrating its laudatory purpose.

- The court system and state and local bar associations should be encouraged to develop and implement attorney-focused practicum on mental disabilities and trauma to ensure a consistent and level understanding among practitioners and jurists.
- In conjunction with the New York State Judicial Institute, OCA should sponsor additional and training programs on trauma and trauma informed practices for judges and court attorneys.[27]
- OCA should also continue to encourage and support trauma informed training for attorneys within the court system working with vulnerable populations including the AFC and MHLS programs.
- The resources of existing model programs within the court system such as the Child Welfare Court Improvement Project ("CWCIP"), with its focus on trauma informed representation, should be promoted and enhanced.
- OCA should also study and implement principles of "restorative justice" in New York State as restorative justice is trauma informed.
- Law Schools should encourage trauma informed approaches in clinical legal education.

Systems Reform

- State and local authorities administering programs for people with mental disabilities should promote "seamless systems" change which would have three components: 1) people with needs being able to connect to the system of care at any point; 2) each point in the various systems of care recognizing their needs and being able to connect them to the proper service providers and supports; and 3) emphasis on maintaining recovery, with person-centered treatment planning as well as attention to social supports and determinants of health.

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[27] Established by Judiciary Law 219-a, the New York State Judicial Institute is a statewide, year-round center for judicial education, training and research. Another goal of the Judicial Institute is to provide a framework for facilitating an improved dialogue between the Judiciary, the practicing bar and the public. Judicial Institute - N.Y. State Courts (nycourts.gov)

- Promote a seamless system that includes and addresses co-occurring disorders, recognizing that individuals in need frequently have multiple or overlapping needs and disabilities.
- Seek alternatives to coercive interventions and promote non-hospital community voluntary crisis stabilization programs.
- Support "peer bridging" as a link between the hospital and a successful discharge plan.
- Promote community investment in supported housing units.
- Recommend that the Office of Mental Health ("OMH"), the Office for People With Developmental Disabilities ("OPWDD"), and the Office of Addiction Services and Supports ("OASAS") and the Department of Health to collaborate and adopt integrated service regulations without further delay.
- Recommend that OMH and OPWDD operate or fund respite beds for children and adults with disabilities to avoid boarding in hospital emergency rooms.

<u>Criminal Justice</u>

- Support courts and communities in the use the Sequential Intercept Model to map resources, opportunities and gaps, and develop plans to improve court and community responses to individuals with mental illness, addiction, developmental disabilities, and co-occurring conditions.
- Advocate for funding and resources needed to implement a continuum of diversion programs, treatment and related services to improve public safety as a more humane and cost-effective approach when individuals with mental illness, addiction, developmental disabilities, and co-occurring conditions interface with the criminal legal system.
- Adequately fund beds in both the OMH and OPWDD systems for inpatient restoration for people in the criminal justice system determined to be incapacitated, while requiring OMH and OPWDD to expand and promote the clinical infrastructure required to permit outpatient restoration whenever possible.

- Recommend that those people admitted to the hospital or a developmental center for restoration must receive full and co-occurring competent care.
- Recommend an amendment to Article 730 of the Criminal Procedure Law ("CPL") to remove statutory requirement that the District Attorney consent to outpatient restoration, while providing prosecutor with notice and an opportunity to be heard before an outpatient restoration order is issued.
- Promote the development and utilization of community-based alternatives to CPL Article 730, including respite and crisis respite, crisis services and community-based restoration.
- OCA should promulgate official forms to implement CPL Article 730.
- Study and re-examine CPL 330.20 to ensure that it meets its dual objectives of promoting public safety while meeting the treatment needs of people subject to its provisions.
- OCA should update official forms that implement CPL 330 to reflect those commitments can be to either the custody of OMH or OPWDD.
- Foster and support efforts to ensure that diversion and problem-solving courts are linked to service systems that competently, effectively and efficiently serve participants, allowing for better outcomes and the fullest possible application of justice.
- Consistent with the recommendation made in the *State Courts Leading Change* report, explore, foster and support efforts to deflect and divert people with mental disabilities from the criminal legal system prior to or immediately after arrest.
- Commit to full implementation of Humane Alternatives to Long-Term ("HALT") Solitary Confinement Act and resist efforts to rollback these reforms that are critical to the human and effective treatment of people with mental disabilities who are incarcerated.

Civil Justice

- Promote autonomy of individuals with mental disabilities through supported decision-making principles.

- Introduce legislation to require recognition of PADs even without proxies in all settings, to fund peer and provider trainings to facilitate their use, and to establish means of transmission, such as registries and web-based access.
- Amend MHL Article 81 to explicitly include supporters for decision-making as “available resources” as defined under MHL § 81.03(e), when considering the need for and/or scope of guardianship.
- OMH should convene a working group to review supported decision-making processes in New York State, to promote peer supports and social environments that are conducive to supported decision-making and to explore the possibility of a pilot project relating SDM and psychiatric advance directives.
- OMH and OPWDD should collaborate to further the use of SDM for individuals with dual diagnoses, including any necessary reasonable accommodations, and to address the needs of people who are dually diagnosed when developing the upcoming OPWDD regulations implementing MHL Article 82.
- Promote reform of guardianship statutes in New York State and provide procedural pathways for individuals subject to guardianship to seek modification of existing orders and restoration of rights.
- Promote Single Transaction Orders as a less restrictive intervention than a plenary guardianship.
- Support amendment of the Extreme Risk Protection Order statute, CPLR Article 63-a, to add a right to counsel for respondents.
- Support amendment of the New York State Constitution and related statutes to remove references to “mental hygiene” and adopting a modern nomenclature that does not stigmatize people with mental health conditions and is more reflective of the values of the community.

<u>Accommodations</u>

The Task Force recommends that the court system adopt the following recommendations with respect to disability accommodations:

- Ensure centralized decision-making to reduce inconsistency throughout the court system.
- Establish an administrative review process for all judicial accommodation denials.

- Documentation for judicial accommodation requests should be the same as required for administrative accommodations.
- Place guidelines for reviewing accommodation requests into the Judge's Desk Book.

The Task Force also endorses a recommendation made by the New York Lawyers Assistance Group ("NYLAG") in a report it published in 2021 which is that "whenever litigants with disabilities struggle with either in-person or virtual proceedings, the court must consider whether a switch to the other format would serve as an appropriate accommodation."[28]

NYSBA

- Establish a standing Mental Health Committee to address pronounced systemic issues that may not fit within an existing single Section or Committee's purview. Elder Law and Special Needs Section, Health Law Section, Committees on Civil Rights, Mandated Representation and Disability Rights should have at least one member serve as a liaison to the standing Mental Health Committee.

I. Historical Antecedents to Current Crisis

Author Andrew Scull writes that if we are to confront the challenges that mental disabilities present to all of us, we shall have to take account of social and political realities.[29] "The decisions to confine the mentally ill to the madhouse and, more recently, to decant them to unwelcoming 'communities' have drastically affected what it means to be mentally ill."[30]

Almost sixty years ago, in 1963, the federal Community Mental Health Act ("CMA") was adopted with great hope and promise.[31] President John F. Kennedy

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[28] NYLAG Issue Brief, *Access to Justice in Virtual Court Proceedings: Lessons Learned from COVID 19 and Recommendations for New York State Courts.* https://nylag.org>wp-content>uploads>2021>NYLAG_CourtsDuringCovid_WP_FINAL.pdf at p. 18

[29] Andrew Schull, *Desperate Remedies: Psychiatry's Turbulent Quest to Cure Mental Illness* (2022), 384.

[30] *Id.*

[31] Public Law 88-164; https://www.govtrack.us/congress/bills/88/s1576
The legislation is also known as the Community Mental Health Centers Construction Act ("CMHCCA"). The Act established federal funds to help defray the costs of constructing (but not staffing) local clinics. Federal support for staffing, which was administered by the federal

remarked upon passage of the Act "that the mentally ill and the mentally retarded need no longer be alien to our affections or beyond the help of our communities." The CMA accelerated the process of deinstitutionalization,[32] but what was supposed to be a comprehensive, community-based health care system collapsed under the weight of the Vietnam War, the Watergate scandal and shifting federal priorities.[33] During the Reagan administration, remaining funds for the Act were converted to mental health block grants for the States.[34] From 1981 onward, "the federal government's reluctant disengagement from mental health policy quickly gave way to determined retreat." [35] As noted by Dr. Insel, federal policy failed people with serious mental illness contributing to homelessness, incarceration and early mortality for this population.[36] Task Force member Patricia Warth echoes this observation and further explains in her compelling article *Unjust Punishment:*

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department of Health Education and Welfare ("HEW"), was passed in 1965. CMHCCA was a radical break from previous national mental health policy in both the kind of facilities it supported and the degree of direct federal involvement that it represented but did not clearly define the target populations of the community centers or their relationship to other local health-care institutions. *See,* Bonita Weddle, *New York State Archives, Mental Health in New York State 1945-1998, An Historical Overview* (Publication Number 70), text citing to note 54 (publication is not paginated). Appendix Document 3

[32] In terms of closing state hospitals and reducing the number of people confined to mental health institutions, the deinstitutionalization movement was an overwhelming success. "Between 1950 and 2000 the number of people with serious mental illness living in psychiatric institutions dropped from almost half a million people to about fifty thousand," while the number of beds in state and county psychiatric hospitals declined by more than 90%. *See*, Patricia Warth, *Unjust Punishment: The Impact of Incarceration on Mental Health*, 95 Feb-N. Y. St. B. J. 11 -12 (2023), *citing* Alisa Roth, *Insane: America's Criminal Treatment of Mental Illness* 81,92 (2018).

[33] Insel, *supra,* note 6 at p. 28-34. *See,* Weddle, *supra* note 31, text citing to note 69 - The escalating conflict in Vietnam "increasingly occupied attention of President Johnson" and "drained money from social welfare programs." The pace of center development fell far short of projections. As of early 1967, 26 centers were receiving funding for construction and staffing, when 2,000 centers were projected to open nationwide.

[34] *See* Smith, Michelle R. (20 October 2013). *50 years later, Kennedy's vision for mental health not realized*. *The Seattle Times*.

[35] *See,* Weddle, *supra* note 31, text citing to notes 172, 173. The federal government's abdication of responsibility occurred at the same time the states and local governments were confronted with monumental social and economic problems, and as a result was "particularly disastrous for the mentally ill." *Id.*, *citing* Gerald N. Grob, *The Mad Among Us* (1994) pp. 286-287.

[36] Insel, *supra,* note 6 at p. 35. *See,* American Psychiatric Association, *The Psychiatric Bed Crisis in the U.S. Understanding the Problems and Moving Toward Solutions* (2022), *explaining* the historic and contemporary uses of psychiatric beds. https://www.psychiatry.org/news-room/news-releases/apa-report-psychiatric-bed-crisis

The Impact of Incarceration on Mental Health, [37] that in the last quarter of the 20th century, the dramatic reduction of inpatient mental health care was accompanied by an equally dramatic increase in criminalization and incarceration.[38] Often referred to as "transinsitutionalization," this increase in incarceration was historically unprecedented.[39]

In 1993, New York State adopted its own Community Mental Health Reinvestment Act[40] designed to ensure that funds from steadily closing state psychiatric hospital beds followed people living with mental illness back to the

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[37] Warth, *supra*, note 32.

[38] In 1973, the United States incarcerated adults at a rate of 161 per 100,000 adults; by 2007, this rate had quintupled to 767 per 100,000. In absolute terms, "the growth in the size of the penal population has been extraordinary; in 2012, the total of 2.23 million people held in U.S. prisons and jails was nearly seven times the number in 1972." *See,* Warth, *supra* note 34, National Research Council 2014, The Growth of Incarceration in the United States: Exploring Causes and Consequences, Washington, DC: The National Academies Press, https://doi.org/10.17226/18613, at 33, 35-36.

[39] Sol Wachler & Keri Bagala, *From the Asylum to Solitary: Transinstituionalization*, 77 Alb. L. Rev. 915 (2014). Patients were also moved from state hospitals to other institutional settings such as nursing homes. Fiscal policy choices incentivized discharges as the New York State Archives report explained. *See,* Weddle, *supra* note 31, text citing to note 67. Medicare and Medicaid were created in 1965 and among other things sharply limited Medicaid reimbursement for the cost of care furnished in state hospitals causing "unanticipated and dramatic consequences." The Hon. Cheryl Roberts, who addressed the Task Force, explains the origins of the federal Institutions of Mental Disease or "IMD Rule," and its consequences for people with severe mental illness. Judge Roberts argues that federal funding should be restored for certain facilities with bed limitations that would extend the continuum of care, while guarding against abuses of the past. https://greenburgercenter.org/congress-must-stop-blocking-mental-health-clinics-from-needed-money-cheryl-roberts-nydn-op-ed/

[40] L. 1993, c. 723 § 9 included community mental health reinvestment services in a five-year plan and annual implementation plans and budgets. *See* MHL § 41.55; Swidler RN, Tauriello JV, *New York State Community Mental Health Reinvestment Act*. Psychiatr Serv. 1995 May: 46(5); 496-500. Appendix Document 4 The goals of the 1993 Reinvestment Act were frustrated. Using "notwithstanding" language in many annual state budgets, funds intended to be allocated for local community-based programs were redirected to general government expenses. Contrary to the legislative intent, billions of dollars have not followed people from the inpatient psychiatric hospitals back to their communities and homes.

See https://www.nyaprs.org/e-news-bulletins/2013/nys-legislators-issue-proposal-to-restore-community-mh-reinvestment-program
https://assembly.state.ny.us/comm/Mental/20021031/report.html (*Broken Promises, Broken Dreams: A Report on the Status of the Mental Health Delivery System in New York State*) (2002)

community, but the goals of the legislation were not achieved. For example, large numbers of people with mental illness were placed into other types of institutions, including nursing homes and adult homes. This was the result of a "conscious State policy" to discharge patients from psychiatric hospitals into these facilities "due to the absence of other housing alternatives at a time when psychiatric centers were under pressure to downsize." [41] Even now, despite more investment in mental health services, OMH maintains that 3.1 million New Yorker's live in federal and/or state designated "mental health shortage areas."[42] Innumerable commentators and our own observations as lawyers lead us to conclude that the system of care is broken with unsustainable trends, and partially explained in large part by the lack of resources available to support people with significant mental health needs who are often living in poverty.[43]

II. Task Force Areas of Inquiry

A. *Overview - Policy and Practice*

Court System

Promoting systemic change in a broad context means contributions from all branches of government are required. Indeed, in the *State Courts Leading Change* report, it is recommended that a state-level inter-branch mental health task force be established in each state and that the Administrative Office of the court system in each state consider the appointment of a behavioral health director and team to improve court responses for court-involved individuals with serious mental illness.[44] The court system has tremendous incentive to contribute to solving the mental health crisis through specialty courts and other means. The *2023 State of Our Judiciary* address includes a section on "Mental Health in Our Courts." [45] The

[41] *See Disability Advocates, Inc. v Paterson*, 598 F. Supp. 2d 289, 297 (E.D.N.Y. 2009).

[42] https://omh.ny.gov/omhweb/planning/strategic-framework/index.html

[43] "Although most spending on social services, mental health, and public health flows through - and is reflected in - county budgets, the bulk of the money in those categories comes from state aid, not money the county itself raises or controls. From 2011 to 2019, New York State**:** cut aid to counties for behavioral health and social services by 8 percent — from $12.3 billion to $11.3 billion; and reduced state spending (that does not flow through county budgets) on human services by 21 percent from 2011 to 2017 and by 26 percent from 2017 to 2018." *see The Cost of Incarceration in New York State* (2021) https://www.vera.org/publications/the-cost-of-incarceration-in-new-york-state

[44] *See, State Courts Leading Change*, *supra* note 13 at 47.

[45] www.nycourts.gov/whatsnew/pdf/23_SOJ-Speech.pdf

court system announced it will form a committee to implement the recommendations from the National Judicial Task Force to Examine State Courts' Response to Mental Illness (*State Courts Leading Change*).[46] Guided by the National Task Force's report, OCA states it will focus on strengthening its community partnerships and reviewing its existing procedures and protocols to ensure that, in every way possible, the courts are taking an empathetic, humane, and effective approach to mental and behavioral health. The Honorable Matthew D'Emic, who is a pioneer in mental health courts, will chair the OCA committee. Further, the State of the Judiciary address indicates that the blue-ribbon committee will bring together experts, governmental partners, and community leaders to put the recommendations of the National Task Force into practice. [47]

The Task Force endorses the creation of the committee described in the *2023 State of Our Judiciary* address. We further recommend that the newly formed committee include representatives from within the court system, including, judges, court personnel, court officers, Americans with Disabilities ("ADA") compliance officers, and the directors of Attorneys For Children ("AFC") and Mental Hygiene Legal Service ("MHLS") programs and outside of OCA, such as prosecutors, public defense providers, legal service organizations and New York's federally funded protection and advocacy organization, Disability Rights New York ("DRNY") The Task Force further observes that the Texas Judicial Commission on Mental Health ("TJCMH") is a potential model for an OCA-sponsored Task Force within the New York judiciary. The TJCMH devotes itself toward connecting people to treatment rather than jail while preserving community safety by diverting non-violent adults and youth with behavioral health issues to less restrictive, more healing environments. [48]

The OCA plan to invest further resources to mental health courts is desperately needed. The Task Force is mindful, though, that contrary to general

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[46] *Id.* The *2023 State of Our Judiciary* speech observes: "Our problem-solving courts - overseen by Judge Toko Serita -include 42 Mental Health Courts across the state, and we have more mental health initiatives in development. The Ninth Judicial District, administered by Judge Anne E. Minihan, recently launched a misdemeanor wellness mental health court in Westchester County to complement its existing felony mental health court. And, in the Fourth Judicial District, supervised by Administrative Judge Felix J. Catena, Essex County recently opened a Superior Part for Mental Health Treatment."

[47] www.nycourts.gov/whatsnew/pdf/23_SOJ-Speech.pdf

[48] *See*, Stacey Soule, *Transforming the Judiciary*, 85 Tex. B. J. 842 (2022).

assumptions, mental illness is not considered a risk factor for criminal conduct.[49] Mental health courts work, but as Carol Fisler, a New York City-based consultant and formerly with the Office of Court Innovation argues, more research is needed to identify the current aspects of court design and operations that should be emphasized while at the same time introducing new program elements based upon research findings.[50]

Finally, any discussion of problems in the justice system would be remiss if it did not highlight rampant racial inequity and injustice. A recent study commissioned by former Chief Judge DiFiore and conducted by former Homeland Security Secretary Jeh Johnson entitled "Report from the Special Adviser on Equal Justice in the New York State Courts" (the "Johnson Report") remarked that:

> "The sad picture that emerges is in effect, a second-class system of justice for people of color in New York State. This is not new. In 1991, a Minorities Commission appointed by then Chief Judge Wachtler declared 'there are two justice systems at work in the courts of New York State, one for Whites and a very different one for minorities and the poor.'"

The Johnson Report also highlighted what it referred to as "the vile, racist Facebook posting by a Brooklyn-based court officer" which it said "appears to have peeled the lid off long-simmering racial tensions and intolerance within the court officer community" noting that that situation had also been mentioned in the 1991 Minorities Commission report.

For Black, Indigenous, People of Color (BIPOC), or those in the LGBTQIA+ community who live with a mental health condition, racism and prejudice can exacerbate their challenges. The stigma of mental illness is intersectional: a person's race, ethnicity gender, social class, age or housing status in addition to their mental health diagnosis, generates differing stigma experiences. For example, even if two people have the same diagnosis (e.g., bipolar disorder) a young and homeless BIPOC living in poverty is exposed to more extensive stigmatization than a young White non-Latinx middle-class person

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49 Carol Fisler, *When Research Challenges Policy and Practice*, Spring 2015 Judges Journal, Vol. 54, No. 2 (2015). *See*, Paula L. Green, *Mental Health Courts Operate with Compassion*, State Bar News, Annual Meeting, Volume 65 No.1 (2023), p. 27, quoting Carol Fisler at 2023 NYSBA Annual Meeting: "[P]overty usually drives the criminal behavior of a defendant ending up in mental health courts, rather than their mental illness."

50 *Id.* at p. 11.

who is stably housed. Moreover, due to the shameful legacy of racism and discrimination, Black and Brown communities are more impacted by poverty and less likely to receive adequate treatment for underlying mental health issues. Mental health diagnoses such as major depression go undiagnosed and untreated at disproportionally greater rates in majority Black and Latinx communities.[51] The same systemic failures that propagate generational poverty and mental illness also make it more likely for impacted people to be unable to access therapeutic services.[52]

The emerging literature on the family and community effects of mass incarceration points to negative health impacts on the female partners and children of incarcerated men and raises concerns that excessive incarceration could harm entire communities and thus might partly underlie health disparities both in the USA and between the USA and other developed countries. The Johnson Report also mentions that "countless interviewees told us that mandatory implicit bias and cultural sensitivity training is long overdue for judicial and non-judicial personnel in the New York State court system. At present, it appears that such training is both inconsistent and insufficient."

The Task Force joins in the recommendations of the "Report from the Special Adviser on Equal Justice in the New York State Courts" (the "Johnson Report") that there be substantial implicit bias training of Judges, court personnel and juries as a high priority of the court system in New York. Training is also needed to ensure that courts take an empathetic, humane, and effective approach to mental and behavioral health. The Task Force agrees that a full-time mental health professional should be engaged by OCA to oversee the implementation of these training programs. Additional funding should be available, especially to smaller communities, for the creation of specialty courts in those areas and for the training of both judicial and non-judicial personnel in the proper operation of those courts.

The court should collect relevant data regarding the demographics of those involved in the criminal justice system and the outcomes of their cases so that further study can help to continue to improve the goal of equality of justice especially for those who are mentally disabled or a member of a traditionally

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[51] Racial Disparities In Diagnosis and Treatment of Major Depression, Blue Cross Blue Shield, May 31, 2022, Racial Disparities in Diagnosis and Treatment of Major Depression (bcbs.com

[52]https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5192088/#:~:text=Barriers%20to%20Accessing%20and%20Using20Mental%20Health%20Services&text=It%20is%20estimated%20that%20among,and%20even%20fewer%20co mplete%20treatment

targeted racial or gender population. While this information should be made public, such transparency should be accomplished in a manner sensitive to the immigration status or other collateral consequences impacting disenfranchised people. The court system should also develop a methodology to encourage the submission of the ideas and suggestions of individual judges, lawyers, correction officials, and staff as well as those who are directly impacted by the current inequities in the system to improve the system.

Executive

In the narratives that follow, the Task Force will explain that the "O" agencies comprising the Department of Mental Hygiene in New York will likely spend near $10.5 billion dollars in fiscal year 2024 to meet the needs of more than 1,000,000 people with mental disabilities in New York State. [53] This sizeable investment includes a 17% budget increase for OMH which Commissioner Sullivan characterized as "historic" during her testimony before the Joint Legislative Committee on February 16, 2023. While the investment is desperately needed, it must also be smart to achieve its objectives.

Legislature

a. *Hold public hearings on emergent critical issues in the service delivery system.*

The Legislature should consider holding public hearings to address tragic gaps in the system of care that result, for example, in teens and young adults boarding in hospital emergency rooms when community supports could not be marshaled to prevent a crisis or establish a safe discharge plan. In one reported case, a teenager with intellectual disabilities spent over 36 days in the emergency room at the Champlain Valley Physicians Hospital in Plattsburgh, New York.[54] Regrettably, these and similar cases repeat themselves in substantial numbers and at great harm as well documented by both the American College of Emergency Room Physicians and thirty-four other signatories on a November 22, 2022 letter to the Biden Administration (on a national level) and the Healthcare Association of New York State ("HANYS").[55] HASNY observes that hospitals across the country and in New

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53 Briefing Book | FY 2023 Executive Budget (ny.gov)

54 *See*, *MHLS v Delaney*, 176 A.D. 3d 24 (3d Dept. 2019), *appl dismissed*, 38 N.Y.3d 1076 (2022)

55 https://www.hanys.org/communications/publications/scope_of_complex_case/

The psychiatric advisor to the Task Force, Dr. Laura Gardner, also shared a letter sent by the American College of Emergency Physicians and 34 other signatories to the Biden

York have reported an alarming rise in patients who become caught in limbo in emergency departments and inpatient units for weeks, months, and even years after they are medically ready for discharge. These delays most often occur due to a lack of care options, the inability to pay for post-discharge care and/or administrative gridlock. Complex case discharge delays, also known as bed blocking or boarding, are devastating for patient, exacerbate bed shortages and result in enormous unnecessary costs. Some of the longest delays are experienced by children with mental health needs and people with developmental disabilities.[56]

Another urgent area for study by the Legislature is the response to mental health crisis calls in the community. This is an issue of federal, state and local concern. On the federal level, on May 25, 2022, the Biden Administration issued Executive Order ("E.O.")14074 entitled *Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety*. Section 14 of E.O. 14074 provides:

> "*Promoting Comprehensive and Collaborative Responses to Persons in Behavioral or Mental Health Crisis.* (a) Within 180 days of the date of this order, the Attorney General and the Secretary of HHS, in coordination with the heads of other agencies and after consultation with stakeholders, including service providers, nonprofit organizations, and law enforcement organizations, as appropriate, shall assess and issue guidance to State, Tribal, local, and territorial officials on best practices for responding to calls and interacting with persons in behavioral or mental health crisis or persons who have disabilities.
>
> (b) The assessment made under subsection (a) of this section shall draw on existing evidence and include consideration of co-responder models that pair law enforcement with health or social work professionals; alternative responder models, such as mobile crisis response teams for appropriate situations; community-based crisis centers and the facilitation of post-crisis support services, including supported housing, assertive community treatment, and peer support

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Administration explaining the national scope and tremendous personal and economic costs associated with maintaining people in emergency rooms and hospitals without medical need. Appendix Document 5

[56] The Seamless Systems section of this report will further explain the crisis and describe a potential response in Massachusetts that New York may wish to study.

services; the risks associated with administering sedatives and pharmacological agents such as ketamine outside of a hospital setting to subdue individuals in behavioral or mental health crisis (including an assessment of whether the decision to administer such agents should be made only by individuals licensed to prescribe them); and the Federal resources, including Medicaid, that can be used to implement the identified best practices."[57]

On February 7, 2023, a coalition of advocates[58] wrote to the Department of Justice to emphasize their commitment to alternative unarmed responders for crisis calls involving vulnerable populations - including people with mental health conditions, deaf people, autistic people, and people with intellectual and developmental disabilities. The letter noted that these populations are at heightened risk for harm from police encounters, which can often turn deadly, especially when the person involved is Black.[59] The advocates further observed that the risk of harm to the vulnerable individual is so great, and the actual threat to public safety usually small, that law enforcement response to a mental health crisis be avoided whenever possible. The advocates letter to the President highlighted local communities, including Albany County, New York, that have piloted programs where unarmed teams answer 911 calls that would otherwise receive a police response by default.[60]

During our investigation, the Task Force considered various studies and bills that could lead to crisis response and systems reform in New York State. We endorse the following (12) fundamental guiding principles for developing or modifying response systems that currently place people with mental illness in danger. The principles emerge from the John Jay College of Criminal Justice, Disability Rights New York report *Systems in Crisis Identifying Critical Issues in Response to Mental Health Crisis Calls*:[61]

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[57] Federal Register :: Advancing Effective, Accountable Policing and Criminal Justice Practices To Enhance Public Trust and Public Safety

[58] The coalition was comprised of The Leadership Conference, Legal Defense Fund, Bazelon Center for Mental Health Law, National Urban League, Human Rights Watch, NAACP, the Arc of the United States, and the Vera Institute of Justice. Appendix Document 6

[59] *Citing*, Legal Defense Fund & Bazelon Center for Mental Health Law, *Advancing An Alternative to Police: Community-Based Services for Black People with Mental Illness* (2022) Appendix Document 7

[60] https://www.albanycounty.com › home › showpublisheddocument › 22105 (Albany County Crisis Officials Responding and Diverting [ACCORD])

[61] Report available at: https://www.drny.org/page/investigation--monitoring-reports-40.html

1. Replacement of Police Officers as First Responders

Review the legal, ethical and cultural factors that support replacement of police officers as first responders in the majority of circumstances where a call for assistance for a person in acute mental health crisis has been made.

2. Engage Community Stakeholders

Engage diverse stakeholders to discuss a non-police response model. Communities are urged to take the time required to accomplish such engagement and digest the information gained during the engagement process. Stakeholders must be kept apprised of all critical benchmarks in the development process. Communities should not succumb to demands for identification of a model and plan for implementation by federal or state entities which provide an inadequate timeline in which to make critical decisions. Stakeholders must avoid the "us vs. them" distinctions between the community at large and people with mental illness. It should be recognized by all stakeholders that people with mental illness are members of the community that members of the community may have current or past mental illness, and that police officers also develop mental illness. By breaking down these barriers and acknowledging that mental health crisis can occur to anyone, stakeholders can consider what kind of crisis response they would want for themselves or their loved ones.

3. Utilize Data

Utilize a data-driven approach to develop alternative response models. Consider patterns of response outcomes in individual neighborhoods and particularized impact on BIPOC individuals. Where relevant data is not immediately available, every effort should be made to access such data before critical determinations are made regarding the models being considered.

4. Create the Model That is Right for Your Community

Evaluate the unique cultural dynamics of the community to develop a model for respond to community members needing mental health assistance. This includes attaining stakeholder input about community goals and priorities, examining other successful models, and exploring new creative solutions and the means to attain them.

5. Work for Consensus on Community Safety

Seek consensus, based on feedback from diverse stakeholders, about what factors will be used to determine when dispatchers shift from initiating a presumptive non-police response to initiating a high-acuity response that includes police officers. Community discussion must consider the harms that result from addressing mental health crisis from a criminal perspective.

6. Carefully Consider Mechanism of Dispatch

Careful consideration should be given to how a caller places a request for assistance. Where the traditional 9-1-1 system is being considered, stakeholders must acknowledge that the police department, using traditional dispatch protocols within its purview, may maintain a high level of control over response determinations. Where an alternative number and/or platform for communication is being considered, a protocol for collaborative evaluation of some calls for assistance will be required. Where stakeholders are considering an alternative number/platform, they must consider the need for a robust public education campaign to inform the public when and how the new system is to be accessed. Stakeholders must consider developing the right professional profile for dispatch personnel, and the need for robust and continuing training which integrates dispatch personnel into training provided to response team members.

7. Identify the Right Professionals for First Response

First response should include a multidisciplinary team of professionals who are uniquely suited to the important task of safely assisting people in acute mental health crisis. Team members may include mental health professionals, emergency services professionals and peer specialists whose skills compliment and support those of other team members. Communities should not rule out creation of team positions for individuals who combine elements of these disciplines and others, providing for development of a specialized vocation ideally suited to the agreed-upon standards of community stakeholders, including people with mental illness.

8. Incorporate Robust and Sustained Training

Training must be comprehensive and reinforced to regularly incorporate information derived from stakeholder experiences. Training should be culturally competent and explicitly trauma informed, including the implications of vicarious trauma. Training should place the work in a historical context, encouraging understanding of how police culture and the

experiences of BIPOC community members' impact on behaviors exhibited during response. Wherever practicable, team members should be trained together to enhance the value of multidisciplinary exchange and support team cohesion. Training should adhere to the principles of "recovery-oriented" services that de-emphasizes coercion and emphasizes participant choice whenever possible, so that crisis workers are not used as de-facto police officers.

9. Revise Training for Police Officers Responding to High-Acuity Calls

Where police officers in new response models will respond only in designated high-acuity situations and in the context of a team response model, police officer training should be revised to reflect the role of the police officers in relation to other team members. Police officer training should also be immediately adapted to incorporate information (as set forth above) regarding the intersections of mental health and race, the unique impacts of such events on BIPOC communities, the impacts of such events on children with mental illness, and the need to view all people in crisis as representative of multiple identities. Police training must be regularly updated and, to every degree practicable, integrated into the training of other team members and dispatchers with whom they will partner.

10. Adopt A Presumption Against Non-Confinement

Communities should develop a model that embraces a presumption against non-confinement, including emergency admission into acute care facilities, where other available options are appropriate. Inherent in this presumption is a community commitment to develop and cultivate mental health services and supportive housing options. Response team training should consistently emphasize this presumption.

11. Incorporate Localized Mental Health Services

Stakeholders should examine existing neighborhood mental health services and cultivate and support expansion of creative new services by highly localized providers that support objectives of the chosen model. Where commitment of resources to a new response model is matched with commitment to highly localized non-acute mental health services, the

potential for acute mental health crises, and the potential for tragedy, will be reduced.

12. Commit to Transparency and Adaptation

Communities should commit to full transparency in reports back to the community on model successes and failures. This commitment must include addressing any deficiencies in modification of original policies and procedures, with priority given to those which directly impact on the safety of people in mental crisis and response team members.[62]

b. Restore funding for Law Revision Commission.

The Legislature should restore appropriations for the New York State Law Revision Commission ("LRC"). Defunded since 2016, the LRC is the oldest continuous agency in the common-law world devoted to law reform through legislation. [63] Among many other initiatives, the LRC was the drafter of the Insanity Defense Reform Act of 1980[64] and Article 81 of the MHL,[65] the general guardianship statute in our state. The Task Force makes several recommendations for further study and possible legislative reform and the LRC should be a partner in these endeavors.

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[62] The Albany Law School Government Law Center released an informative report in 2020 entitled *Alternatives to Police as First Responders: Crisis Response Programs*. Crisis Response programs in Eugene, Oregon, Austin, Texas, Olympia, Washington, and Edmonton, Alberta, Canada are examined and explained. https://www.albanylaw.edu/government-law-center/alternatives-police-first-responders-crisis-response-programs

[63] New York State Law Revision Commission | Revitalizing the law through reform and legislation

[64] Insanity Defense Reform Act of 1980. L.1980, c. 548. That Act, in turn, was recommended by the New York Law Revision Commission in a Report prepared in response to a specific request of Governor Carey. Session Laws of New York, 1981, pp. 2251–2293; *see also* Memorandum on Approving L.1980, c. 548, Session Laws of New York, 1980, p. 1879–1880 and Report of the Law Revision Commission of the State of New York, 1980 at Session Laws of New York, 1980, pp. 1599.

[65] L. 1992, c. 698. A three-year study by the LRC led to the enactment of MHL Article 81. The statute repealed and replaced New York's conservator and committee statutes (former Articles 77 and 78 of the MHL).

c. *Hold public hearings to study the repeal of Social Services Law § 384-b(4)(c) and consideration of a parent's status as a person with mental illness or intellectual disability in other family court proceedings.*

In the mid-1970s, New York enacted its contemporary law governing the termination of parental rights, Social Services Law § 384-b. Under § 384-b(4)(c), a court may terminate a parent's rights if they "are presently and for the foreseeable future unable, by reason of mental illness or intellectual disability, to provide proper and adequate care for a child who has been in the care of an authorized agency for the period of one year immediately prior to the date on which the petition is filed in the court …."[66] In the years 2006 - 2008, between 346 and 296 petitions to terminate parental rights were brought in New York on the ground of mental illness or intellectual disability.[67]

In 2009, a coalition of organizations advocated for the elimination of this ground for termination of parental rights. As noted in a statement in support of S.2835/A.6668,[68] when the law was drafted in 1975, "it would have been difficult to predict the changes that have taken place over the last thirty-five years for individuals with psychiatric disabilities. The thought process in 1975 was that these are static conditions that could not be changed. As we know now, nothing could be further from the truth."[69] The coalition stated that, "[t]o use mental illness as grounds for permanent termination is an archaic vestige of an outmoded and discredited view of mental disabilities still reflected by a law written almost forty years ago. It is a discriminatory practice that treats people with psychiatric disabilities and developmental disabilities as second-class citizens without the

[66] Social Services Law § 384-b(6)(a) defines the term "mental illness" and 384-b(6)(b) defines the term "intellectual disability."
[67] Mental Health Association of New York State, Termination of Parental Rights Bill Update (June 5, 2009).
https://web.archive.org/web/20090804193118/http://www.mhanys.org/publications/mhupdate/updatelatest.htm

[68] https://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A06668&term=2009&Summary=Y&Actions=Y&Memo=Y&Text=Y

[69] Mental Health Association of New York State, Termination of Parental Rights Bill Update (June 5, 2009).
https://web.archive.org/web/20090804193118/http://www.mhanys.org/publications/mhupdate/updatelatest.htm

same rights as individuals without these disabilities." A similar bill has been proposed as recently as 2018.

Several articles have addressed the discriminatory nature of New York's law.[70] In addition to the problems with focusing on the status of the parent as a person with a mental illness or intellectual disability,[71] "New York courts have consistently decided not to read the reasonable efforts requirement into the part of the statute governing cases of mental illness." (citing *Matter of Jammie "CC,"* 149 A.D.2d 822 (3d Dept 1989).

In 2017, the American Bar Association's House of Delegates adopted Resolution 114 urging all governments:

> "to enact legislation and implement public policy providing that custody, visitation, and access shall not be denied or restricted, nor shall a child be removed or parental rights be terminated, based on a parent's disability, absent a showing—supported by clear and convincing evidence—that the disability is causally related to a harm or an imminent risk of harm to the child that cannot be alleviated with appropriate services, supports, and other reasonable modifications."

The New York State Legislature should hold public hearings to study whether § 384-b(4)(c) should be repealed. This study should also address whether other statutes or caselaw permit the family court to consider a parent's status as a person

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[70] *See* Brandon R. White, *Termination of Parental Rights of Mentally Disabled Parents in New York: Suggestions for Fixing an Overbroad, Outdated Statute*, 34 Buff Pub Int LJ 1 (2015); Jeanne M. Kaiser, *Victimized Twice: The Reasonable Efforts Requirement in Child Protection Cases When Parents Have a Mental Illness*, 11 Whittier J Child & Fam Advoc 3 (2011); Dale Margolin, *No Chance to Prove Themselves: The Rights of Mentally Disabled Parents Under the Americans with Disabilities Act and State Law*, 15 VA J Soc Pol'y & L 112 (2007); Susan Kerr, *The Application of the Americans with Disabilities Act to the Termination of the Parental Rights of Individuals with Mental Disabilities*, 16 J Contemp Health L & Pol'y 387 (2000). *See also* Should a Mental Illness Mean You Lose Your Kid?, Pro Publica (May 30, 2014), https://www.propublica.org/article/should-a-mental-illness-mean-you-lose-your-kid.

[71] At least one author has concluded that "New York's law is also discriminatory in that it allows a court to terminate parental rights on the basis of status; without services, parents with mental disabilities cannot demonstrate their individual capabilities, and judges therefore cannot make decisions based on the mental illness instead of the parent's individual capabilities." Margolin, 15 VA J Soc Pol'y & L at 170. *See also* Leslie Francis, *Maintaining the Legal Status of People with Intellectual Disabilities as Parents: The ADA and the CRPD*, 57 Fam Court Rev 21 (2019) (noting that a New York court found that the ADA does not apply to termination of parental rights proceedings).

with mental illness or intellectual disability in a way that does not reflect current understanding of such disabilities and the resources available to support parents.[72]

Recommendations

- The Task Force endorses creation of a committee within the court system to implement the recommendations from the National Judicial Task Force to Examine State Courts' Response to Mental Illness. The Task Force recommends that the newly formed committee include representatives from within the court system, including, judges, court personnel, court officers, Americans with Disabilities ("ADA") compliance officers, and the directors of Attorneys For Children ("AFC") and Mental Hygiene Legal Service ("MHLS") programs and outside of OCA, such as prosecutors, public defense providers, legal service organizations and New York's federally funded protection and advocacy organization, Disability Rights New York ("DRNY")
- The court system should study innovations emerging from other states, including Texas and its Judicial Commission on Mental Health ("TJCMH"). The TJCMH has developed literature and tool kits toward connecting people to treatment rather than jails while preserving community safety by diverting non-violent adults and youth with behavioral health issues to less restrictive, more healing environments to promote reform.
- The Task Force joins in the recommendations of Secretary Johnson that substantial quality training of Judges, court personnel and juries on implicit bias should be a high priority of the court system in New York.
- The court system should conduct training on implicit bias and disability.
- The Task Force agrees that a full-time mental health professional should be engaged by OCA to oversee the implementation of these training programs.
- Further, additional funding should be available, especially to smaller communities, for the creation of specialty courts in those areas and for the

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[72] *See, e.g.,* Kaplan & Brusilovskiy, *Custody Challenges Experienced by Parents with Serious Mental Illnesses Outside of Child Protective Services Proceedings*, Psychiatric Rehab J 44(2), 197 (2021) (finding that "[m]ore than one third of parents with an SMI experienced custody challenges other than those brought by CPS.").

training of both judicial and non-judicial personnel in the proper operation of those courts.

- The court system should collect relevant data regarding the demographics of those involved in the criminal justice system and the outcomes of their cases so that further study can help to continue to improve the goal of equality of justice especially for those who are mentally disabled or a member of a traditionally targeted racial or gender population.

- The court system should also develop a methodology to encourage the submission of the ideas and suggestions of individual judges, lawyers, correction officials, and staff as well as those who are directly impacted by the current inequities in the system to improve the system.

- The Legislature should hold public hearings on particularly vexing problems within the service delivery system such as the boarding of people with multiple disabilities in emergency rooms and hospitals.

- The Legislature should public hearings to study comprehensive and collaborative community responses to people in crisis in formed by studies and models of responses in various jurisdictions.

- The Legislature should hold public hearings to study the repeal of Social Services Law § 384-b(4)(c) and consideration of a parent's status as a person with mental illness or intellectual disability in other family court proceedings.

- The Legislature should restore appropriations for the LRC to promote criminal and civil law reform.

B. *Trauma Informed Practices*

> *"On its most basic level, trauma occurs when an event happens to an individual, or group, over which they have no control, with little power to change their circumstances, and which overwhelms their ability to cope..."*[73]

[73] Libby Coreno, *Trauma, Mental Health the Lawyer*, 95-Feb. N. Y. St. B.J. 8 (2023).

The Task Force endeavored to define trauma as a foundational exercise upon which to build recommendations. The American Psychological Association defines trauma as "[A]n emotional response to a terrible event like an accident, rape, or natural disaster." [74] Task Force member Dr. Robert Goldman, J.D., Psy.D., defines trauma as "a deeply distressing or disturbing event that has long-lasting effects on an individual's mental, emotional, and physical well-being. A single event, such as a car accident or a natural disaster, or prolonged exposure to traumatic circumstances, such as abuse, crime, or combat can cause it. Trauma can manifest in various ways, including anxiety, depression, post-traumatic stress disorder (PTSD), and, most notably, crime." [75]

Comprehensive research has found that multiple childhood traumatic events have lifelong impact on those subjected to them. Often referred to as "ACEs" (adverse childhood experiences), a study conducted in the mid-1990s by the Centers for Disease Control and the Kaiser Foundation determined the long-term impact of childhood trauma. Specifically, the collaborative study of hundreds of thousands of Kaiser Permanente patients, led by pediatrician Dr. Nadine Burke Harris and conducted between 1995 and 1997, was the first to examine the relationship between early childhood adversity and negative lifelong health effects. The research found that the long-term impact of ACEs determined future health risks, chronic disease, and premature death. Individuals who had experienced multiple ACEs also faced higher risks of depression, addiction, obesity, attempted suicide, mental health disorders, and other health concerns. It also revealed that ACEs were surprisingly common – almost two-thirds of respondents, part of the white, well-off sample, reported at least one ACE. While the study demonstrated a high prevalence of trauma sustained by children, adults can frequently be traumatized as well. And the impact of trauma manifests for years to come, especially if undiagnosed and unresolved.[76]

As Task Force member Libby Coreno noted in her lead article in January/February 2023 NYSBA *Journal, Trauma, Mental Health and the Lawyer,* there is no question that anyone who traverses the legal system -particularly the

[74] http://apa.org/search?query=trauma

[75] https://www.psychologytoday.com/intl/blog/building-resilient-minds/202301/the-use-of-restorative-justice-as-a-trauma-informed-approach

[76] *See,* Sheila E. Shea Joseph A. Glazer, *50 Years After Willowbrook: Mental Disabilities and the Law in New York State,* 95 Feb-N. Y. St. B. J. 17 (2023) and the authorities cited therein.

criminal justice system or our family courts-is at risk for exposure to trauma. She quotes Natalie Netzel, who states that:

> "On its most basic level, trauma occurs when an event happens to an individual, or group, over which they have no control, with little power to change their circumstances, and which overwhelms their ability to cope..."[77]

New research suggests that experiencing psychological trauma at a young age nearly triples a person's risk to suffer from mental illness in the future, with researchers thus concluding that trauma can be considered a "transdiagnostic construct"[78] Dr. Goldman observes that research has shown that there is a strong link between trauma and criminal behavior.[79] Further, Dr. Goldman argues that the current criminal justice system can be retraumatizing to individuals who have experienced trauma in a number of ways. Some examples include:

1. Re-victimization: The process of reporting a crime, going through a trial, and facing the offender can be re-traumatizing for the victim, especially if they are not provided with appropriate support and resources.

2. Lack of sensitivity: Many criminal justice professionals may not be trained to recognize the signs and symptoms of trauma and may not understand the impact their words or actions can have on a trauma survivor.

3. Re-traumatization during incarceration: Prisons and jails can be high-stress environments that can trigger memories and feelings of past traumatic experiences for individuals who have been incarcerated.

4. Inadequate mental health care: Individuals with trauma-related mental health conditions may not receive appropriate care

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77 Libby Coreno, *Trauma, Mental Health the Lawyer*, 95-Feb. N. Y. St. B.J. 8 (2023).

78 *See, Massive review study suggests psychological trauma nearly triples a person's risk of mental disorder,* PsyPost, 1/10/23

79 https://www.psychologytoday.com/intl/blog/building-resilient-minds/202301/the-use-of-restorative-justice-as-a-trauma-informed-approach; *citing,* Ardino V. Post-traumatic stress in antisocial youth: A multifaceted reality. In: Ardino V, editor. Post-traumatic syndromes in children and adolescents. Chichester, UK: Wiley/Blackwell Publishers; 2011. pp. 211–229.

while in the criminal justice system, leading to an increased likelihood of reoffending and perpetuation of their trauma.

5. Stigma: Trauma survivors may be stigmatized by criminal justice professionals, which can further compound the feelings of shame, guilt, and isolation they may already be experiencing.

Dr. Goldman credits the many criminal justice professionals and organizations who are working to address these issues and implement trauma-informed practices to minimize the re-traumatization of individuals in the criminal justice system. The Task Force also heard from people engaged intimately in trauma informed practices at OCA. Our members were greatly influenced by the presentations of Trista Borra, J.D., Statewide Director, Child Welfare Court Improvement Project ("CWCIP"), Aimee L. Neri, M.S.W., the CWCIP 8th Judicial District Coordinator, Bridget O'Connell, J.D., M.S.W., an Alternative Dispute Resolution Coordinator, and Sadie Ishee, J.D., Deputy Chief Attorney, Mental Hygiene Legal Service, First Judicial Department, who have brought trauma informed principles from theory to practice.[80]

Court system employees can also experience vicarious trauma. The October 22, 2022, *Leading Change* report observes that sixty-three percent of judges have at least one symptom of secondary or vicarious trauma and fifty percent of court child protection staff experience high or very high levels of compassion fatigue.[81] Recognizing the enormous implications of trauma for litigants, attorneys, and court personnel, the Task Force recommends training judges, court personnel and attorneys in relation to trauma.

In this regard, trauma-informed care for judges refers to an approach to the administration of justice that recognizes the prevalence of trauma among those who intersect with the legal system.[82] It acknowledges the impact that trauma can

[80] Families involved in the family court system often experience trauma, particularly during the course of custody and visitation, abuse and neglect, permanency, and termination of parental rights proceedings. The ongoing work of the CWCIP to bring trauma informed principles to family courts is encouraging and should be expanded to local child protective services agencies and the New York State Office of Children and Family Services. There is substantial work that needs to be done within the child welfare and family court systems to avoid stigmatization of parents with mental illness or intellectual disabilities.

[81] *State Courts Leading Change*, *supra,* note 13, at p 41.

[82] *See*, Eva Mckinsey, Samantha Zottola, Alexis Mitchell, Mark Heinen, and Luke Ellamker, *Trauma-Informed Judicial Practice from the Judges' Perspective*, Bolch Judicial Institute,

have on their experiences and behaviors. In a trauma-informed judicial system, judges, and other court personnel are trained to understand the effects of trauma and how it can influence an individual's interactions with the legal system. This includes recognizing signs of trauma in litigants, witnesses, and other participants in the justice process and making steps to mitigate the re-traumatization that can occur because of judicial proceedings.

A trauma-informed judicial system also involves creating a safe and supportive environment in the courtroom. This can include providing clear and understandable information about the judicial process to litigants, avoiding practices that could be anticipated to retraumatize individuals, and making reasonable accommodations to support the participation of individuals who have experienced trauma. The goal of a trauma-informed approach to justice is to improve the experiences of litigants and others who participate in the judicial process to better ensure that justice is served and to promote healing and recovery for individuals who have experienced trauma.

The components of trauma-informed training for judges typically include the following:

1. *Understanding trauma*: Judges and court personnel are trained to understand the nature and effects of trauma, including the biological, psychological, and social impacts of traumatic experiences.
2. *Recognizing trauma:* Participants in the training learn how to recognize signs of trauma in individuals who interact with the court system, and to respond in a way that minimizes re-traumatization.
3. *Creating a safe environment.* Training focuses on creating a safe, supportive and respectful environment in the court, where individuals who have experienced trauma can participate effectively. [83]

Duke University (2022) https://judicature.duke.edu/articles/trauma-informed-judicial-practice-from-the-judges-perspective/#:~:text=All%20judges%20recognized%20prioritization%20of,that%20courtroom%20in%20the%20future.

[83] The research findings published by Duke University provide clear examples of trauma informed practice. One recommendation is to reimagine the courtroom. Judges described the

4. *Minimizing re-traumatization.* Judges and court personnel are trained to understand how court proceedings and practices can retraumatize individuals and to take steps to minimize this risk.
5. *Trauma-informed communication:* Training teaches participants to communicate in a trauma-informed manner, including avoiding language and practices that might retraumatize individuals, and using language that is clear, respectful and not stigmatizing.
6. *Understanding and addressing trauma in diverse populations:* Participants learn about the unique experiences and needs of individuals from diverse populations who have experienced trauma, and how to address their needs in a culturally responsive manner.
7. *Preparing judges:* Preparing judges to address traumatic triggers in various contexts.
8. *Self-care:* Training often includes components of self-care, to help judges and court personnel manage the emotion and psychological impact of working with individuals who have experienced trauma. [84]

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need to "soften" the courtroom environment, structurally and procedurally. Regarding structure, several judges expressed support for the use of round conference tables in the well of the courtroom to discuss disposition decisions. They described situations in which it would be beneficial to come off the bench, perhaps without a robe on, and join courtroom participants at their same level to discuss next steps and solutions together. As for procedural changes, several judges noted the need to re-think who is in the courtroom and when. As one judge questioned: "I don't know what effect it might have if we have a murder case and the next case behind it is a kid who got in a fight in school . . . and they're seeing the murder defendant walking out in chains. Does that affect them?" Taking intentional steps toward creating an environment that is calming, supportive, and not re-traumatizing is an essential component of a trauma-informed courtroom. https://judicature.duke.edu/articles/trauma-informed-judicial-practice-from-the-judges-perspective/#:~:text=All%20judges%20recognized%20prioritization%20of,that%20courtroom%20in%20the%20future

[84] *Id.*, in part drawn from the "4Rs" of the SAMSHA trauma informed care approach. R*ealizing* the prevalence of trauma and potential pathways for recovery; *recognizing* signs and symptoms of trauma in the people who come through the courtroom; *responding* by integrating knowledge of trauma into practice; and actively *resisting re-traumatization*. https://ncsacw.acf.hhs.gov/userfiles/files/SAMHSA_Trauma.pdf

The specific components of training for trauma-informed care for judges may vary, but the goal is always to improve the experiences of individuals who encounter the court system and to promote healing and recovery for those who have experienced trauma. Toward this end, video-hearings and trauma informed practices in remote environments must be considered and ongoing study is warranted. [85]

Lawyers must also engage in a professional shift from self-care to mutual care as so persuasively described by Libby Coreno. Tremendous work was done by NYSBA's Task Force on Attorney Well-Being which noted in its October 2021 report: "While the well-being of lawyers may seem like an individual's lawyer's problem, the data has been sounding an alarm for the better part of three decades that the training, culture, and economics of law contribute exponentially to the suffering in our profession." NYSBA has newly formed a Committee on Attorney Well-Being and has begun to cultivate new training programs for NYSBA members that focus on issue awareness and professional skill development - targeting the existential struggles, traumas and isolation that lead to suffering in our profession. This essential work must continue.

Finally, the Task Force encourages law schools and clinical legal education programs to implement trauma informed practices. The hallmarks of trauma-informed practice are when the practitioner puts the realities of the client's trauma experiences at the forefront in engaging with the client and adjusts the practice approach informed by the individual client's trauma experience. Trauma-informed practice also encompasses the practitioner employing modes of self-care to counterbalance the effect the client's trauma experience may have on the practitioner. Teaching trauma-informed practice in law school clinics furthers the

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[85] During the COVID crisis, physical distancing measures required courts to quickly adapt operations, the National Center for State Courts ('NCSC') saw an opportunity to examine the experience of families and child welfare court professionals in virtual hearings. With support from Annie E. Casey Foundation Inc. and Casey Family Programs, NCSC began a study that aimed to describe how families and court professionals experienced online court proceedings through the lenses of procedural fairness, access, and judicial engagement. The report of the study is found here: https://judicature.duke.edu/articles/best-practices-for-trauma-informed-virtual-hearings/..

goals of clinical teaching and is a critical aspect of preparing law students for legal careers.

Clinical professors Sarah Katz and Deeya Haldar[86] argue that teaching trauma-informed practice in law school clinics furthers the goals of clinical teaching and is a critical aspect of preparing law students for legal careers. According to the authors, trauma-informed practice is relevant to many legal practice areas and while clinical professors endeavor to teach students how to connect with their clients, equally challenging and important is helping students cultivate insight into identifying and addressing trauma and its effects. It is particularly crucial that law students be educated the effects of vicarious trauma and help them develop tools to manage its effects as they move through their clinical work and ultimately into legal practice. [87] At least four benefits can be anticipated:

1. *Better understanding of clients*: Trauma can have a significant impact on individuals, and a trauma-informed approach can help law students better understand the experiences of their clients and the challenges they may face in legal proceedings.
2. *Improved client outcomes*: By teaching trauma-informed practices, it can be anticipated that law students will learn to work more effectively with clients to address their needs and achieve better outcomes in legal cases. This can help reduce the adverse effects of trauma and increase the likelihood of positive outcomes for clients.
3. *Increased empathy:* A trauma-informed approach can help law students Develop greater empathy for their clients and a deeper understanding of the complex issues clients may face. This can foster a more supportive and legal environment for clients.
4. *Improved professional conduct*: A trauma-informed approach can help prepare law students for the demands of practice and provide insights into avoiding re-traumatization of clients and maintaining confidentiality. [88]

Restorative Justice

One response to trauma that can promote personal accountability and healing is restorative justice. As explained by our Task Force member, Dr. Robert

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[86] *See,* Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma Informed Lawyering*, 22 Clinical L. Rev. 359 (2016).

[87] *Id*. at p. 361.

[88] *Id.*

Goldman, "restorative justice" is a philosophy and a set of practices that aims to repair the harm caused by criminal behavior and address the needs of both the victim and the offender. Instead of focusing solely on punishment, restorative justice emphasizes the importance of repairing harm, restoring relationships, and rebuilding communities. This can involve bringing the offender and victim together in a facilitated meeting, called a restorative conference, where they can discuss the impact of the crime and work towards a resolution that addresses the needs of all parties involved. Unlike the traditional criminal justice system, restorative justice is victim focused. The traditional justice system often overlooks the needs of victims of crime. Research suggests that victims who participate in restorative justice processes are generally more satisfied with the outcome than those who go through the traditional criminal justice system. Victims who participate in restorative justice have reported feeling more heard and validated and have experienced a greater sense of closure and healing. They also reported feeling more satisfied with the outcome of the process, believing that justice was served and that the offender took responsibility for their actions.[89]

Restorative justice models can be found in around the world. The model is described in the following narrative:

> "Restorative justice can use a trauma-informed approach by recognizing the impact of trauma on both the victim and the offender and addressing those effects in the process of restoring harm and repairing relationships. By focusing on the traumatic impact, preventive strategies can be formulated. A trauma-informed restorative justice process would involve understanding the prevalence of trauma, recognizing signs and symptoms, responding with empathy and support, and taking steps to avoid re-traumatization. For the victim, a trauma-informed restorative justice process would involve creating a safe and supportive environment for them to share their experiences, feelings, and needs. It would also involve providing appropriate support and resources for them to heal from the trauma. For the offender, a trauma-informed restorative justice process would involve understanding the role of trauma in their criminal behavior and addressing those underlying issues as part

89 https://www.psychologytoday.com/intl/blog/building-resilient-minds/202301/the-use-of-restorative-justice-as-a-trauma-informed-approach

of their rehabilitation. Additionally, a trauma-informed restorative justice process would involve training and educating all involved parties, including facilitators, about trauma and its effects to create a more empathetic and effective process."[90]

On March 2, 2023, the Task Force heard from Dr. David Moore a restorative justice expert from Australia. Dr. Moore explained that restorative justice may seem like a new idea, but it has ancient origins. In fact, the concept has origins with indigenous peoples around the world, including Native American and Canadian First Nations civilizations. In New Zealand, where all juvenile crimes except murder go through a restorative process and adult crimes are automatically referred for similar consideration, the genesis lies in Maori traditions.[91] During his March 2, 2023 presentation, Dr. Moore informed the Task Force that restorative justice programs in the criminal context typically function in one of three ways: as a form of diversion from the criminal process, allowing offenders—especially young or first-time offenders—to avoid charges and a conviction; as a form of alternative sentencing; or, in more serious cases, as a way to reduce a criminal sentence. To date, 45 states in the United States have passed laws permitting the use of restorative justice in at least some criminal cases.[92]

Task Force Member Katherine LeGeros Bajuk observed that New York County District Attorney Alvin Bragg, Jr. implemented a restorative justice initiative.[93] Task Force Member Susan Bryant referred to the restorative justice

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90 *Id.*

91 *See also*, Lydialyle Gibson, *Restoring Justice: Exploring an alternative to crime and punishment* (2021). Restoring justice | Harvard Magazine

92 *Id.*

93 D.A. Bragg Creates "Pathways to Public Safety" Division to Elevate the use of Alternatives to Incarceration Across D.A.'s Office – Manhattan District Attorney's Office (manhattanda.org) - On March 2, 2022, the New York County D.A. created the Office's first Pathways to Public Safety Division ("Pathways") to elevate the use of diversion and evidence-based programming, ensuring individuals involved in the criminal justice system receive necessary services to reduce recidivism and enhance public safety. According to the press release announcing the program, this major restructuring will strengthen the Office's work related to alternatives to incarceration, specialized court parts, pre-arraignment diversion, restorative justice practices, and reentry practices. Additionally, Pathways will provide each of the six existing Trial Division bureaus with a dedicated prosecutor to serve as a resource from arraignment to sentencing, proactively identifying individuals who would benefit from diversion and programming without jeopardizing community safety.

program at the New York State Defender's Association ("NYSDA") where she is the Executive Director. NYSDA's program seeks to end cycles of violence and abuse at a community level, decrease incarceration and promote healing using restorative justice and trauma-informed practices. The program has focused on the Albany area, fostering healing in communities in Albany, Schenectady, and Ulster counties. As explained by NYSDA, restorative practices provide healthy and just alternatives to incarceration, detention, and suspension for a range of cases.[94]

The Task Force recommends the study, implementation and expansion of "restorative justice" programs in New York State. The NYSDA program can provide a model for other organizations to follow.

Recommendations

- The court system and state and local bar associations should be encouraged to develop and implement attorney-focused practicum on mental disabilities and trauma to ensure a consistent and level understanding among practitioners and jurists.
- In conjunction with the New York State Judicial Institute, OCA should sponsor additional and training programs on trauma and trauma informed practices for judges and court attorneys.
- OCA should also continue to encourage and support trauma informed training for attorneys within the court system working with vulnerable populations including the AFC and MHLS programs.
- The resources of existing model programs within the court system such as the Child Welfare Court Improvement Project ("CWCIP"), with its focus on trauma informed representation, should be promoted and enhanced.
- OCA should also study and implement principles of "restorative justice" in New York State as restorative justice is trauma informed.
- Law Schools should encourage trauma informed approaches in clinical legal education.

[94] https://www.nysda.org/page/RestorativeJustice

C. Seamless Systems

"Mental health systems optimally include a care continuum to meet people's needs in the most accessible, least restrictive environment. In broad perspectives, this continuum includes a range of services such as crisis services, accessible outpatient services, rehabilitation and recovery support services and inpatient psychiatric care."[95]

The seemingly basic formulation of an optimally operating system of care has proven to be incredibly difficult to achieve in New York and across the country. The Task Force attempted to examine the service delivery system in New York toward making recommendations that will promote the integration of services to meet people where they are and at their greatest time of need. To better serve clients with complex needs, it is crucial to have a system of care that is up to the task. That not only means a full array of services, but a coordinated system that meets the needs of people with multiple and co-occurring disorders.

The "system" of care in New York state is vast. This report provides a brief overview of the system to provide additional context for the reader. To begin, there are no fewer than twelve state and local agencies are responsible for delivering services to people with mental disabilities in our state, in addition to the various funding streams and services, primarily Medicaid, provided through the federal and state governments.[96] On the State level, the Department of Mental

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95 *See, supra*, note 36, American Psychiatric Association, *The Psychiatric Bed Crisis in the US: Understanding the Problem and Moving Toward Solutions (*2022), p. 3. https://www.psychiatry.org/psychiatrists/research/psychiatric-bed-crisis-report

96 Briefing Book | FY 2023 Executive Budget (ny.gov) This total includes the near 49-million-dollar budget of the Justice Center for the Protection of People with Special Needs which performs a myriad of oversight functions to prevent the abuse and mistreatment of people with mental disabilities. *See generally*, https://www.justicecenter.ny.gov/.

Hygiene is divided into three autonomous agencies – OMH, OPWDD and OASAS – and each agency will be briefly described in turn, below.[97]

Office of Mental Health (OMH)

The public mental health system in New York is vast and the prevalence of mental illness in the population is high.[98] It is estimated that 832,509 people were served in the public mental health system in 2019.[99] This statistic reflects a steady rise from 2013, for example, when 729,000 were served.[100] Comparatively, the New York State population has remained relatively stable. OMH attributes the increase in its population served to several factors, including expanded eligibility criteria, behavioral health parity initiatives, high demand, increased awareness of mental health issues and stigma-reduction efforts.[101] The United States Substance Abuse and Mental Health Services Administration ("SAMHSA") defines any mental illness ("AMI") "as having at least one mental disorder, other than a developmental or substance-use disorder, in the past 12 months, regardless of the level of impairment."[102] Applying this metric, the prevalence rate of AMI for the New York State general population within the past 12 months for adults aged 18 and over in 2019 was 19.5%. [103]

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97 The Executive Budget for proposes $10.5 billion dollars of combined spending in fiscal year 2024.[97] The Task Force heard from invited experts that the "O" agency silos have hindered the rendition of appropriate services and supports for people with dual or co-occurring diagnoses.

98 https://my.visme.co/view/6x6nk6p6-profile-of-the-new-york-state-public-mental-health-system-september-2022

99 This number may now approach 900,000 as stated in the Governor's Fiscal Year 2024 Budget Briefing Book, p.112.

100 *Id.* at p. 10.

101 https://my.visme.co/view/6x6nk6p6-profile-of-the-new-york-state-public-mental-health-system-september-2022 p.10.

102 Substance Abuse and Mental Health Services Administration. The NSDUH Report (11/19/2013) https://www.samhsa.gov/data/sites/default/files/NSDUH148/NSDUH148/sr148-mental-illness-estimates.htm

103 *Id.* at p. 5, *citing,* Behavioral Health Statistics and Quality. Results from the 2019 National Survey on Drug Use and Health: Detailed Tables. Rockville (MD): SAMHSA; 2019. https://www.samhsa.gov/data/report/2019-nsduh-detailed-tables

As a provider of service, OMH operates 24 inpatient facilities for civil, forensic and research purposes.[104] There are approximately 3,000 adult and children's beds in the OMH system and 700 forensic beds for people referred for admission from the criminal justice system.[105] In addition, OMH licenses over 100 acute care psychiatric units in general hospitals that have an aggregate capacity of 5,000 beds.[106] In 2019, there were approximately 128,000 admissions to hospitals licensed or operated by OMH.[107] Under the model of care developed by OMH, acute inpatient admissions are largely directed to the Public Health Law article 28 general hospitals with psychiatric units. Longer term care, if clinically indicated, is delivered by OMH state hospitals. Lengths of stay in OMH hospitals can be years in duration, particularly when a patient is referred from the criminal justice system.[108]

Due to the large number of people who are incarcerated and have significant mental health needs, OMH operates an inpatient hospital, the Central New York Psychiatric Center, for people serving sentences. There are also 29 satellite and "outpatient" mental health units with over 1,000 beds across mental health staffed prison programs.[109] People entering state prison are assessed to determine if they require mental health services. There is a range of need between levels 1-4, with level 1 indicating the most serious mental health diagnoses and level 4 the least serious.[110] As of February 1, 2023, there were 31,449 persons in the custody of the Department of Corrections and Community Services ("DOCCS"), a substantial decrease from 2016, for example, when the population was 52,340.[111]

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104 *See* MHL § 7.17.

105 https://my.visme.co/view/6x6nk6p6-profile-of-the-new-york-state-public-mental-health-system-september-2022 p. 24; Forensic Mental Health Services (ny.gov)

106 https://my.visme.co/view/6x6nk6p6-profile-of-the-new-york-state-public-mental-health-system-september-2022 p. 24

107 As reported to the Mental Hygiene Legal Service (MHL § 9.11). MHLS is an auxiliary agency of the Appellate Divisions of State Supreme Court and provides legal services and assistance to patients and residents of mental hygiene facilities pursuant to article 47 of the MHL.

108 Richard Miraglia & Donna Hall, *The Effect of Length of Hospitalization on Re-arrest among Insanity Plea Acquittees*, 39 J. AM. ACAD. PSYCHIATRY & L. 524, 524 (2011) https://jaapl.org/content/39/4/524.long

109 Forensic Mental Health Services (ny.gov) -

110 N.Y. STATE DEP'T OF CORRS. & CMTY. SUPERVISION, UNDER CUSTODY REPORT: PROFILE OF UNDER CUSTODY POPULATION 15 tbl.11 (2020).

111 https://doccs.ny.gov/system/files/documents/2023/02/doccs-fact-sheet-february-2023.pdf. *See also*, Sheila Shea and Robert Goldman, *Ending Disparities and Achieving Justice*

Even as the population of people confined in state correctional facilities has steadily declined, however, the percentage of people on the OMH caseload has increased. Statistics reflect that in 2016, 20% of the DOCCS population in custody at the time were on the OMH caseload. [112] As of January 1, 2020, 23% of individuals in DOCCS custody had an OMH service designation.[113] The percentage had risen again, according to Jack Beck, former director of the Prison Visiting Project at the Correctional Association of New York State, who spoke at the NYSBA annual meeting. As of September 2021, 8,174 people, representing 26% of DOCCS population were on the OMH caseload.[114]

In the community, OMH operates and regulates nearly 800 licensed outpatient programs. Assertive Community Treatment ("ACT") teams, Personalized Recovery-Oriented Services ("PROS") programs, Article 31 clinics, and Day Treatment programs provide treatment and rehabilitation to service recipients in need of community-based support to maintain their mental health.[115] The most common and most largely utilized outpatient services are clinic treatment services, which make up 64 % of all outpatient service programs. [116]

OMH states that community based residential services are provided to maximize access to housing opportunities, particularly for persons with histories of multiple or extended psychiatric hospitalizations, homelessness, involvement with the criminal justice system, and co-occurring substance use disorder.[117] In addition, these services assist individuals in developing functional skills needed

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for People with Mental Disabilities, 80 Alb. L. R. 1037, 1043-1045 (2016-2017) citing statistics on the prevalence of mental illness among people serving sentences in New York State prisons.

112 Shea & Goldman, *supra,* note 102 at p. 1043

113 N.Y. STATE DEP'T OF CORRS. & CMTY. SUPERVISION, UNDER CUSTODY REPORT: PROFILE OF UNDER CUSTODY POPULATION 15 tbl.11 (2020).

114 To address some of the tremendous need for advocacy, Prisoners' Legal Services has established a mental health advocacy program for people who are incarcerated - Mental Health Project – Youth and Veterans – Prisoners' Legal Services of New York (plsny.org) The Mental Health Project provides legal and advocacy services to ensure that incarcerated youth and veterans obtain the mental health care they need and are not subjected to conditions that exacerbate their mental illness. Youth or Veterans can be designated any service level by OMH. There is no minimum OMH service level to request services from the Mental Health Project.

115 https://my.visme.co/view/6x6nk6p6-profile-of-the-new-york-state-public-mental-health-system-september-2022 at p. 26.

116 *Id.*

117 *Id.* at 27.

to live independently and preserve tenure in the community.[118] Residential services are also offered to children to provide short-term residential assessment, treatment, and aftercare planning.[119] In 2019, OMH residential programs provided more than 46,000 beds statewide. Services include Supported Housing, Apartment Treatment, Supported/Single Room Occupancy, Community Residence, Community Residence/Single Room Occupancy and Other (Family Care and Residential Care Centers for Adults).[120] Supported housing is the most independent housing model. OMH contributes a stipend to the program providers which covers rent and supportive services, generally case management. There is generally not a time limit for individuals to reside in supportive housing whereas the treatment and congregate residential programs are limited from one year to 18 months.[121]

Office for People With Developmental Disabilities (OPWDD)

OPWDD is responsible for ensuring that New Yorkers with developmental disabilities "are provided with services including care and treatment, that such services are of high quality and effectiveness, and that the personal and civil rights of persons receiving such services are protected." [122] The services provided by OPWDD are designed to promote and attain independence, inclusion, individuality and productivity for persons with developmental disabilities. [123] Ninety-five percent of the people accessing OPWDD services and supports have Medicaid provided under the Home and Community Based Services ("HCBS") waiver. [124] In 2019, nearly 120,000 people received OPWDD Medicaid services and supports.[125] According to the 2024 fiscal year budget narrative, nearly 131, 000 people receive OPWDD services in New York State.[126] The OPWDD system is largely community-based with the closure of most developmental center

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118 *Id.*

119 *Id.*

120 *Id.*

121 That these programs are intended to be of limited duration is also reflected in OMH regulations governing residential programs for adults. The regulations provide that each "program shall ensure that a discharge planning process for each resident begins upon admission." 14 N.Y.C.R.R. 595.9 (a).

122 MHL § 13.07 (c).

123 *Id.*

124 https://opwdd.ny.gov/providers/home-and-commumnity-based-services-waiver

125 https://opwdd.ny.gov/data

126 Briefing Book | FY 2023 Executive Budget (ny.gov), p.112.

placements.[127] Over one-half of Medicaid enrollees from the OPWDD system live at home or with family care givers. Those people needing residential placement live in community residences licensed or operated by OPWDD.[128] These include "Individualized Residential Alternatives" which may have up to 14 residents and provide room, board and individualized service options.[129] Intermediate Care Facilities ("ICF") are a residential option for individuals with specific medical or behavioral needs whose disabilities severely limit their ability to live independently.[130] Sunmount Developmental Center and the Valley Ridge Center for Intensive Treatment) are classified as ICFs for purposes of the Medicaid program.

Office of Addiction Services and Support (OASAS)

OASAS provides a full array of services to a large and culturally diverse population.[131] OASAS funds, certifies and regulates the State's system of substance use disorder ("SUD") and problem gambling treatment and prevention services, including the direct operation of 12 Addiction Treatment Centers ("ATCs") statewide. The OASAS treatment system serves about 232,000 people each year, with an average daily enrollment of approximately 100,000 across more than 900 certified programs. During the 2018-19 school year, approximately 4,435,000 residents were reached by a one-time, population-based prevention service and 430,000 youth received a direct prevention service. The service continuum includes community-based treatment including inpatient, residential, outpatient, crisis and opioid treatment services, school and community-based prevention services as well as intervention, support, and crisis services. OASAS supports a comprehensive prevention system by supporting approximately 159 providers that implement evidence-based programs and practices in schools and local communities; community-based coalitions that implement environmental strategies; and statewide public awareness campaigns. OASAS also supports six Prevention Resource Centers ("PRCs") across the state that provide training and technical assistance further promoting coalition efforts and local prevention

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[127] OPWDD operates two developmental centers located in Franklin County (Sunmount) and Chenango County (Valley Ridge). Statutorily defined as "schools" (*see* MHL§ 1.03[11), OPWDD now refers to these centers as "Intensive Treatment Options" in its continuum of care. The 2024 Executive Budget proposed opening 39 developmental center beds in Rochester.

[128] https://opwdd.ny.gov/data Agencies licensed by OPWDD are often referred to as "voluntary providers" and they are non-profit organizations.

[129] *See* 14 NYCRR 686.16.

[130] *Id., see* 42 C.F.R. part 440-intermediate care facility (ICF/IDD services).

[131] *See,* MHL article 19, 14 N.Y.C.R.R. part 800

services. In addition, recovery-focused services include permanent supportive housing as well as peer engagement specialists, family support navigators, youth clubhouses, recovery centers, and regional addiction resource centers.[132]

People with Co-occurring Conditions

Mental Hygiene Law ("MHL") § 5.05 (b) provides that the commissioners of OMH, OPWDD and OASAS shall constitute an inter-office coordinating council ("IOCC"). Consistent with the autonomy of each office for matters within its jurisdiction, the council shall ensure that the state policy for the prevention, care, treatment and rehabilitation of individuals with mental illness and developmental disabilities, alcoholism, alcohol abuse, substance abuse, substance dependence, and chemical dependence is planned, developed and implemented comprehensively. Gaps in services to individuals with multiple disabilities are to be eliminated under state law and no person is to be denied treatment and services because he or she has more than one disability. During her March 16, 2023, presentation to the Task Force, OMH Commissioner Sullivan informed Members that the IOCC has not been active, but she is the incoming chair and intends to revive its mission.

State and Local Government Planning

MHL § 41.16 requires OASAS, OMH, and OPWDD to guide and facilitate the local planning process. As part of the local planning process, Local Governmental Units ("LGUs") develop and annually submit a combined Local Services Plan ("LSP") to all three state mental hygiene agencies through the Mental Hygiene County Planning System ("CPS"). There are 58 LGUs in New York. The LSP must establish long-range goals and objectives that are consistent with statewide goals and objectives.[133] The MHL also requires that each 'O" agency's statewide comprehensive plan shall be based upon an analysis of local services plans developed by each LGU.[134] Each LGU conducts a broad-based planning process to identify the mental hygiene service needs in the community

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[132] The narrative about OASAS is derived from the agency's 2020-2024 Statewide comprehensive plan which is available at: https://www.clmhd.org/img/uploads/OASAS_Statewide_Plan_20_24.pdf

[133] *See,* OASAS 2020-2024 Statewide Comprehensive Plan at p. 9.

[134] MHL § 5.07.

to inform their LSP. In addition to describing their own local priorities and strategies, these plans also inform each state agency's statewide comprehensive planning process. [135]

Investigation

Inspired by the presentation of Stephanie Marquesano, founder and president of "the harris project," and given the obvious complexity of the service delivery system in New York, the Task Force envisions and recommends realizing "seamless systems" change which would have three components:

> 1) people with needs being able to connect to the system of care at any point, and
>
> 2) each point in the various systems of care recognizing their needs and being able to connect them to the proper service providers and supports,
>
> 3) with an emphasis on maintaining recovery, with person-centered treatment planning as well as attention to social supports and determinants of health.

Particularly with respect to people with co-occurring disorders, the Task Force endorses the principle that there can be no "wrong door" when seeking services and supports. As stated by Dr. Ken Minkoff, a psychiatrist who has spent the past few decades helping governments around the world reform their mental health systems, too many systems treat people who suffer from both mental health and substance use disorders as the exception, when in fact they are the rule. They make up more than half of all people who seek treatment for one condition or the other. "You can't just create a few specialized programs for that many people," Dr. Minkoff said. "You need to structure your entire system with them in mind."[136]

To learn more about the gaps and challenges in systems, as well as strengths that can be built upon, the Task Force reviewed a sample of recent county mental hygiene self-assessments from 2021 and 2023 to learn about the counties' most recent determinations of their needs and to gain detailed information experienced

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[135] LGU plans for 2020, 2021, and 2023 can be found by county: https://www.clmhd.org/contact_local_mental_hygiene_departments/

[136] *See*, Jeneen Interlandi, Opinion | More Americans Are Dying of Drug Overdoses Than Ever Before - The New York Times (nytimes.com)

at the county levels.[137] In addition, the Task Force heard the testimony provided at the Attorney General Letitia James' hearings on mental health care, held in New York City in September 2022 and Buffalo in January 2023,[138] and reviewed OMH's summary of public comments gathered through its 2021 Statewide Town Halls.[139] Finally, the Task Force was informed by the legislative testimony of its Co-chair, Joseph Glazer which describes how Westchester County strives to create a seamless system of care, but fears the system could implode because service providers are in a staffing crisis and housing providers in a staffing and rent crisis. [140] The following areas of need are explained below.

Workforce Stabilization

Continued workforce shortages persist in mental health treatment systems, affecting inpatient, outpatient, and crisis services, peer supports, care coordination, and cross-systems coordination, as well shortages of culturally competent and bilingual personnel. OMH, OPWDD and OASAS all identify stabilization of their workforces as tremendous challenges. The entire system of care faces collapse when a sustainable workforce cannot be maintained. Thus, for example, the OASAS 2020-2024 Comprehensive Statewide Plan contains the following narrative: "More than half of all LGUs reported unmet Mental Hygiene Workforce Recruitment and Retention needs. While many LGUs reporting unmet workforce needs were in rural areas, LGUs with large urban and suburban populations also reported difficulties filling behavioral healthcare positions. Some LGUs are reporting positions remaining vacant for up to 18 months." [141]

Workforce challenges in mental health treatment systems were further exacerbated by COVID and remain profound. In both inpatient and outpatient

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[137] Albany, Broome, Columbia, Dutchess, Monroe, Nassau, Niagara, New York City, Oneida, Onondaga, Orange, Putnam, Rensselaer, Rockland, Saratoga, Schenectady, Sullivan, Westchester counties. https://www.clmhd.org/contact_local_mental_hygiene_departments/

[138] In addition to this review, Task Force Members Jeffrey Berman and Sabina Kahn testified at the New York City hearing.

[139] OMH, Local Services Plan and Statewide Town Hall Analysis, September 2022. https://my.vimeo.co/v/1j6edpo3-9zg8pjm

[140] *See,* Glazer testimony, Appendix Document 1

[141] *See,* OASAS 2020-2024 Statewide Comprehensive Plan at p. 11-12. OPWDD reports that stakeholder feedback consistently identifies sustaining the direct care workforce as the most critical issue to support people with developmental disabilities. The OPWDD 2023-2027 strategic plan reports a turnover rate of over 35% of the direct support personnel workforce and a vacancy rate of over 17% in these positions. https://opwdd.ny.gov/strategic-planning

settings, vacancies for psychiatrists and nurse practitioners are causing limits in hospital admissions and community clinic capacity. Counseling and social work positions are also vacant, and vacancies extend as well to peer specialists. Many counties noted the availability of higher pay positions in other fields, and recommended COLA increases. Some OMH-funded positions had been cut, adding to the shortage. These shortfalls are particularly acute as more people with complex needs, exacerbated by the COVID pandemic, are seeking access to services.

Counties further recognized the need for diversity in the workforce to reflect communities served, and many observed as a priority the delivery of culturally competent and linguistically accessible services. This is needed in low-income communities of color who have historically had inequitable access to health services, as well as recently arrived immigrants and refugees. In many immigrant communities, mental health issues are highly stigmatized; to be successful, these services must be culturally competent and sensitive to perceived stigmas.

Also commonly noted as a workforce challenge, was the lack of experienced health home coordinators who must coordinate services for an increasingly complex population. There is a great deal of turnover in these positions. Health home coordinators have higher caseloads than did case managers prior to transition to managed care. The care coordination offered has therefore become less person-centered. Counties also noted the lack of experience with coordinating services across systems of care, affecting populations with co-occurring disorders. The introduction of "Health Home Plus" coordinating services, whereby a coordinator serves people with more intensive needs, has not been sufficient to meet the demand for this critical service.

It was noted that while the promotion and development of telehealth services have helped to alleviate some of the workforce as well universally noted transportation challenges, telehealth is not beneficial for low-income communities that have limited access to technology and the internet. The Task Force further notes the powerful and repeated testimony presented to the New York State Attorney General Letitia James' hearings in September 2022 and January 2023 reviewing crisis in mental health treatment services, in both inpatient and outpatient settings.

To address workforce challenges, the Executive Budget proposed a 2.5% Cost of Living Adjustment ("COLA") Increase and Career Advancement Supports for Mental Health Para-Position. Unfortunately, the lack of COLA increases is so longstanding, that the Governor's proposed increase will not

suffice to boost staffing in these critical programs. Although a COLA statute was enacted in 2006 specifically for mental health treatment and human services providers, COLA increases were not in fact funded in most years since 2006. In the three years in which a COLA was provided, there was a 0.2%, 1.0% and a 5.4% COLA totaling 6.6%, while the consumer price index increased during that period *a total of 35.31%.* (In two other years, there were modest salary increases for mental health treatment programs but no across-the-board increases). Thus, the cumulative, compounded impact of deferred COLA increases is thus over 30% loss in reimbursement, when compared to the increase in inflation, over those 16 years. As a result, most mental health and substance use disorder providers have extreme difficulty hiring and retaining staff positions and many have double digit vacancy rates.

The Governor's historic proposed expansion of mental health services in her FY 2024 Executive Budget, would, in the opinion of the Task Force, have limited impact without increasing funding to existing providers to pay competitive salaries to recruit and retain competent staff. The Task Force, instead, supported the 8.5% COLA recommendation of the Legislature, NYAPRS and other advocates and issued a legislative memorandum for public release on March 16, 2023. The legislative memorandum of the Task Force is reproduced in the Appendix to this report.[142] The Task Force also recommends hiring bonuses for clinicians and peer specialists who have needed bilingual language skills.

The lack of affordable housing is a longstanding problem affecting both the availability of residential supportive housing and independent supportive housing.

Every county sampled reported lack of sufficient affordable housing, with many mentioning the lack of accessibility as an issue as well, preventing adults with psychiatric disability from aging in place, and limiting the housing available to individuals with both mobility impairments and psychiatric disability. Waitlists for independent housing (supported) can extend to years in all regions of New York State. Individuals generally must wait, though for not as long, for congregate staffed or apartment treatment housing. Counties commented that people favor the most independent level of housing. The Task Force notes that this is also a more permanent housing option, in contrast to the transitional congregate housing models.

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[142] Task Force Memorandum supporting S. 4007-B, Part DD, A. 3007, Part DD. Appendix Document 8

Problems affecting the supply include the rise in fair market rental prices in most regions of New York, while OMH's reimbursement rates for supported housing have remained static. Landlords leave the OMH housing system because they can charge higher rentals outside that system. Task Force Co-Chair Joseph Glazer's legislative testimony explains the problem concisely with the implications for Westchester County service recipients and providers:

> "Currently the Supported Housing allocation and guidelines for Westchester County provide $1699 for a one bedroom. The median rental rate in Westchester County, is $1796 a month for a one-bedroom apartment. That means that well over 50% of available apartments are not available to our population in need. The minimal increases in rental allowance included the last two years have proven to be insufficient to keep up with skyrocketing rental rates. Our mental health housing programs currently have a waitlist of 750 people on the Support Housing referral list. There are people on our waitlist for housing who have been on the list for up to five years. The average wait time for each program is:
>
> Community Residence – 2 years
>
> Treatment Apartment – 9 months
>
> Supported Housing – 5 years
>
> Beyond the overall insufficiency of the number of allocated beds, there are currently 60 vacant openings in Supported Housing because we cannot find rental apartments willing to accept the amount provides in the rental guidelines. Simply put, this means we have 'residential beds' that exist on paper in our housing system, but they do not actually exist because we cannot find landlords willing to accept the rental rate." [143]

There is also an unmet need for supportive, harm reduction housing for persons with co-occurring psychiatric and substance use disorders. However, "Not In My Back Yard" public resistance can obstruct the development of housing for individuals with psychiatric disability alone or co-occurring disorders. In addition to being directly related to treatment through the OMH system, stable, safe and affordable housing is a crucial social determinant of health. Several counties noted the stress on their communities of color, who suffer inequities in

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[143] *See,* Glazer testimony, Appendix Document 1

access to housing for both socioeconomic and historically racial reasons.[144] Many areas of New York remain segregated racially and economically. In high risk, historically marginalized communities, racial strife and extreme rates of poverty all lead to higher stress and increased need for mental health services. Homelessness is greatest among Blacks, and disproportionately so in relation to other populations.

The Empire State Supportive Housing Initiative ("ESSHI"), which awarded up to $25,000 in grants for services and operating costs and was available to all three "O" agencies, awarded its last contracts in 2021 and appears to have had limited impact on the state's overall needs.[145] There is some supportive housing development, with more coming on board, but the eligibility criteria linking to risk of homelessness is perceived by some counties as overly stringent. In addition, ESSHI does not fund capital costs, which has limited the development of sufficient housing to address regional needs. Awards were not based on a statewide assessment of need. Instead, local providers applied for housing that was recognized by the local CoC's determination of need.

Governor Hochul proposes high levels of both capital and operating expenses for supportive housing. Specifically, the Governor's plan includes $890 million in capital and $120 million in operating funding to establish and operate 3,500 new residential units for New Yorkers with mental illness. These units include 500 community residence-single room occupancy units, which provide housing and intensive services to individuals with serious mental illness who are at the highest risk of homelessness; 900 transitional step-down units; 600 licensed apartment units serving individuals who require an intermediate level of services.

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[144] *See, e.g.*, https://www.clmhd.org/contact_local_mental_hygiene_departments/erie_15_county.htm; https://www.clmhd.org/contact_local_mental_hygiene_departments/newyork_31_county.htm

[145] In a March 12, 2023, perspective piece published in the Albany Times Union, Kevin O'Connor, the Executive Director of Joseph's House Shelter in Troy, New York explains that the New York State Supported Housing Program ("NYSSHP"), the first state-funded program, has been left behind and it still receiving about the same level of financial support it received in 1987. The ESSHI program, in contrast, was created in 2016 and pays five times more in service funding than NYSSHP. However, as Mr. O'Connor explains, the state never brought the original NYSSHP in line with ESSHI, and thus "housing programs that began under the NYSSHP umbrella remain chronically underfunded and struggle to sustain themselves." https://www.timesunion.com/opinion/article/commentary-supportive-housing-keeps-people-17830689.php

Also funded through this allocation would be 1,500 supportive housing units, which would serve individuals who have less acute needs but still require support to live in the community. In addition, the plan includes $25 million in capital and $7.3 million in operating costs for 60 community step-down housing units in New York City to serve formerly unhoused individuals who are transitioning from inpatient care.

The Task Force applauds the Governor's commitment to invest in housing. However, given the consistently longer wait lists for supported housing than for congregate models, the balance of funds would be better allocated with the majority for more independent supportive housing. With flexible services that can vary intensity such as mobile teams and peer support, people whose needs may become acute can be well served in independent housing.

The Task Force notes the OMH Rehabilitative and Tenancy Support Services ("1115 Waiver") has been helpful to counties. This waiver increases the accessibility of Supported Housing to individuals with more complex needs by providing the support services necessary to promote stability in the community. For supported housing, this funding leaves more room in the original Supported Housing contracts for much needed rent to obtain more appropriate housing. OMH has included this waiver request in its 2023 package of Medicaid waiver services awaiting CMS approval. [146]

Practitioners on the Task Force have observed, as well, the gaps in access to housing that can exist for individuals who are incarcerated. One important gap is that supportive housing providers rarely interview people for housing during their incarceration. Solutions are needed to facilitate applications for incarcerated persons, such as videoconferencing. In addition, the State has requested CMS approval of a Medicaid waiver 30 days prior to an individual's release from jail or prison, which would include coverage of care coordination services. Individuals with developmental disabilities, psychiatric disability, and/or substance use disorders would qualify for such services. This added support for discharge planning should greatly enhance access to supportive housing for individuals with mental health or co-occurring needs.

Need for more crisis services/stabilization/ crisis respite beds to divert from hospitals and reduce interaction with law enforcement.

[146] This program was initiated in 2022. https://omh.ny.gov/omhweb/adults/supportedhousing/supportedhousingguidelines.html

Counties are benefitting from the new intensive crisis stabilization centers, such as those in the Hudson Valley, which serve to divert individuals experiencing crisis from emergency room admissions. However, long emergency department waits remain, particularly for individuals with co-occurring SUD, developmental disabilities, or medical needs with mental health needs. More training for people with developmental disabilities, as well as establishing a single point of contact for crisis services for individuals with mental health, SUD, and/or developmental disabilities is greatly desired. With more funding to permit longer stays, crisis centers could do more than divert from inpatient admission. These would be more in the model of crisis residences and crisis stabilization centers. The workforce challenge bears repeating here, as well, as counties see a need for more trauma-informed professionals to respond to mental emergencies. Counties noted good pilot programs where mobile crisis teams work together with law enforcement. Because of workforce challenges, this seems a necessary model to develop, particularly in rural areas. The need for peer specialists to augment crisis services was noted, as well.

Governor Hochul is proposing to establish 12 new comprehensive psychiatric emergency programs providing hospital-level crisis care; creating 42 additional Assertive Community Treatment teams to provide mobile, high intensity services to the most at-risk New Yorkers and eight additional Safe Options Support teams - five in New York City and three in the rest of state - to provide outreach and connection to services for homeless populations with mental illness and substance use disorders.

Coordinating Systems of Care

Mid-Hudson counties have come together to form a region-wide Co-Occurring System of Care ("COSOC") committee to address multiple, complex needs across a variety of behavioral health and other systems. This committee uses the Comprehensive Continuous Integrated Systems of Care ("CCISC") model, an evidenced-based SAMHSA "best practice" model[147] which brings together cross system partners to respond to complexity of needs regardless of where the individual initially touches down. Providers strive to become integrated and co-occurring, but are still constrained by lack of resources and type of licensure. Providers share a vision of a welcoming system of care that expects individuals to have complex needs and is prepared to provide competent

[147] Minkoff & Cline, 2004, 2005

integrated treatment and support in an empathic, hopeful, integrated, and strength-based way, a truly no wrong door approach.

Cross system coordination and improved access to care would be further enhanced through increased funding flexibility including the ability to braid and blend funds and dually license treatment and residential programs. Helpfully, the Governor's budget includes dually licensed behavioral health clinics, which will triple in number from 13 to 39. These clinics will offer integrated mental health and substance use disorder services for New Yorkers of all ages on a walk-in, immediate basis, regardless of insurance status.

The need for planning for people with co-occurring conditions is essential to the functioning of a seamless system of care. The Task Force placed a particular focus on co-occurring disorders ("COD") which refers to a diagnosis of one or more mental health disorders plus substance (drug and/or alcohol) misuse and/or addiction. Materials produced by "the harris project" explains that COD involves two diagnostic areas: mental health and substance misuse and/or addiction (as well as the impact of trauma). [148] Mental health disorders commonly associated with COD include:

- mood disorders like depression or bipolar disorder
- anxiety disorders like generalized anxiety disorder, social anxiety, panic disorder
- post-traumatic stress disorder, oppositional defiance disorder
- obsessive-compulsive disorder.[149]

Compared to those who have a mental health disorder or substance misuse and/or addiction alone, people with COD often experience more severe and chronic medical, social, and emotional problems. The challenge is to address both diagnostic areas without compromising the best treatment for either one.[150] Approximately 10.2 million Americans meet the diagnostic criteria each year and it is estimated that approximately 70% of those addicted to substances have

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148 https://theharrisproject.org

149 http://www.dpt.samhsa.gov/comor/co-occurring.aspx)

150 http://www.psychologytoday.com/conditions/co-occurring-disorders

COD.[151] As the mental health and substance misuse and/or addiction pieces impact one another greatly, they should be treated with an integrated, comprehensive plan.[152] As stated by "the harris project":

> "many of those diagnosed with COD who seek treatment are often bounced among different programs because each fails to provide a model delivering integrated, comprehensive treatment. Unfortunately, most rehabilitation programs, while claiming to address COD, focus almost exclusively on the substance piece, and most find abstinence to be nearly impossible to maintain because of the unaddressed mental health disorder(s). On the flip side, addressing the mental health piece while still misusing substances compromises the success of any mental health program …"[153]

In her remarks to the Task Force on March 16, 2023, OMH Commissioner Sullivan explained the initiatives undertaken by New York State try make its systems more seamless and break down silos of care. What remains unaddressed, but desperately needed in the view of the Task Force, is for the mental hygiene commissioners and the Department of Health to promulgate integrated service regulations. In pertinent part, the MHL provides:

MHL § 31.02 (f):

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[151] http://www.nami.org/factsheets/mentalillness_factsheet.pdf

[152] https://www.samhsa.gov/disorders

[153] http://www.helpguide.org/mental/dual_diagnosis.htm Statistics cited by "the harris project" are devasting. Every day in the United States, 197 people die because of drug overdose, and another 6,748 are treated in emergency departments ("ED") for the misuse or abuse of drugs. Drug overdose was the leading cause of injury death in 2016. Among people 25 to 64 years old, drug overdose caused more deaths than motor vehicle traffic crashes. In 2012, 33,175 (79.9%) of the 41,502 drug overdose deaths in the United States were unintentional. In 2011, drug misuse and abuse caused about 2.5 million ED visits. Of these, more than 1.4 million ED visits were related to pharmaceuticals. And those numbers continue to rise daily. Nearly 9 out of 10 poisoning deaths are caused by drugs. In 2012, of the 41,502 drug overdose deaths in the United States, 22,114 (53 percent) were related to pharmaceuticals. In 2017 over 72,000 Americans died by overdose. https://theharrisproject.org

> "No provision of this article or any other provision of law shall be construed to require a provider licensed pursuant to article twenty-eight of the public health law or certified pursuant to article sixteen or article thirty-two of this chapter to obtain an operating certificate from the office of mental health if such provider has been authorized to provide *integrated services* in accordance with regulations issued by the commissioner of the office of mental health in consultation with the commissioner of the department of health, the commissioner of the office of alcoholism and substance abuse services and the commissioner of the office for people with developmental disabilities …." (emphasis added). [154]

Regulations have not been proposed by the responsible state agencies forgoing a legislative remedy to redress a significant obstacle to creating a seamless system of care. The Task Force urges the state agencies to adopt integrated service regulations without further delay.

Limited inpatient resources

County self-assessments reveal that the lack of enough inpatient beds. This is a national trend as explained in the 2022 report of the American Psychiatric Association.[155] New York also experienced the repurposing of psychiatric beds in some Article 28 psychiatric units during COVID exacerbating a pre-existing crisis. [156] New York also altered Medicaid to incentivize earlier discharges from acute care settings – hospitals simply are not paid once the individual's needs are no longer acute. At the same time, OMH's intermediate long-term bed admissions now employ a higher criterion for admission. For example, OMH hospital staff may respond to a proposed admission requesting trials of a medication treatment before an admission, but that cannot be completed at the acute care setting. Counties and community providers find that often the acute care hospital discharge planners fail to coordinate with community-based providers to ensure

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[154] *See also*, MHL § 32.05 (b)(ii)

[155] *See, supra,* note 36, *The Psychiatric Bed Crisis in the U.S.: Understanding the Problem and Moving Toward Solutions,* p 3. As explained by the APA, access to inpatient psychiatric beds "undergrids local mental health systems, providing essential services to help treat adults or young people who are experiencing mental illness, just like inpatient medical hospitalization serves the most acutely ill."

[156] It should be noted that in many counties, during COVID access to outpatient services decreased even more severely than inpatient.

that services and housing are in place.[157] In addition, there simply may not be enough time, on the Medicaid dollars, to set a discharge plan.[158] Task Force practitioners have also found that hospital staff are not submitting SPOA referrals[159] and HRA 2010E supportive housing applications[160] likely for lack of time. It is essential that hospitals submit applications as early as possible during the patient's psychiatric hospitalization and that step-down programs are available for individuals to await the housing decision.

Governor Hochul proposes new requirements that hospitals responsibly admit and discharge patients, with new, comprehensive standards for evaluation and increased state-level oversight to ensure that new protocols are being used effectively. To ensure the success of these new requirements for discharge planning, a $28 million investment will create 50 new Critical Time Intervention care coordination teams to help provide wrap-around services for discharged patients - from housing to job supports.

Insurance Parity

Many counties noted the need to enforce insurance parity. Outpatient, care coordination, and mobile services are better covered by Medicaid than by private insurers. Governor Hochul's Article VII legislation would close gaps in insurance coverage for behavioral health services and prohibit carriers from denying access to medically necessary, high-need, acute and crisis mental health services for both adults and children, including medications for substance use disorder. This includes eliminating pre-authorization requirements for ACT and mobile crisis services.

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[157] https://www.clmhd.org/contact_local_mental_hygiene_departments/
Bronxworks and Center for Community Services, *Improving Care Coordination for Homeless Individuals with Severe Mental Illness in NYC*, p. 4 (February 2022).

[158] The APA similarly noted in its 2022 report that utilization review criteria that limit inpatient stay to the minimum "medically necessary" can lead to premature discharge and adverse consequences including relapse, hospital readmission, homelessness, criminal justice involvement and all-cause mortality including suicide. *Supra,* note 86 at p. 31.

[159] SPOA is an acronym for Single Point of Access, the system in place to access various OMH housing alternatives. https://www.nyconnects.ny.gov/services/single-point-of-access-spoa-omh-pr-705507562002

[160] An application, commonly called the HRA 2010e, must be submitted electronically by an approved provider to the Human Resources Administration's Placement, Assessment and Client Tracking (PACT) Unit in order to apply for supportive housing Approved providers include any NYC shelter, hospital staff, NYC corrections staff, residential treatment program staff or mental health professionals.

Expansion of Peer Specialists and Clubhouses

Clinical care alone is not a complete foundation for recovery for people who have psychiatric disabilities. As Dr. Insel observes, "recovery is not just relief from symptoms, it's finding connection, sanctuary, and meaning not defined or delimited by mental illness"- also framed in his book as "recovery: people, place and purpose." [161] Recovery is a growing process of self-determination that is supported through relationships and social networks. The person, not an illness, is at the center of this process. Peer specialists who have lived experience with psychiatric conditions, as well as training in supporting their peers, are essential to recovery and wellness. [162]

Counties repeated recognized the need for more peer specialists in all aspects of the care system and to support diversion from hospitals. This is also an important theme in the public input provided to OMH through its Town Hall process. According to OMH's summary of public comments from the 2021 Statewide Town Hall, many comments focused on the expansion of peer support services and emphasized the need to devote workforce funding to increase the roles of people with lived experience and paying an adequate living wage. The Task Force strongly advocates for expansion of peer programs, as most effective and motivating for individuals and the best way to engage people to make informed decisions and choices in treatment. Unless choice is supported, even if the person experiences momentary benefit from a medication, the individual's involvement is not likely to last. And for people who do not have support of family or friends, clubhouses are an established way of supporting recovery through supportive community.

The Governor proposes to invest $2.8 million to expand the Intensive and Sustained Engagement Treatment program to offer peer-based outreach and engagement for adults with serious mental illness. The Task Force supports this investment, and would call for greater increases for peer supports, including in

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[161] Insel, *supra,* note 6 at p 160-161.

[162] Harvey Rosenthal's description of the role that peers can play in facilitating successful discharges from hospitals resonated with the Task Force. Mr. Rosenthal referred to this concept as "peer bridging." The role of peer support is especially important when placed into the broader issues described in the APA report, specifically, that "today psychiatric care is complex and encompasses many factors that reflect a struggle to provide compassionate care with diminishing resources and within time frames that are often too short to evaluate treatment response or facilitate meaningful recovery." *See, supra,* note 36, *The Psychiatric Bed Crisis in the U.S.: Understanding the Problem and Moving Toward Solutions,* p 3.

crisis programs and residence to divert from hospitalization, as well as to bridge from hospital to community. The Task Force supports as well, training in crisis planning and psychiatric advance directives as part of the certification curriculum for peer specialists. In this way, individuals can exercise choice in treatments even when undergoing crisis, and thereby avoid traumatizing coercive interventions.

Racial Inequities in Access to Care and Exposure to Trauma

Commenters in OMH's Statewide Town Hall pointed out how vastly disproportionately, it is black and brown children who have lost parents and caregivers, lending a backdrop of trauma to their lives. County systems, as well, recognized the impact of racism and poverty on communities. Public commenters asked, how will OMH systems and crisis stabilization address racial trauma and reacted powerfully to the experience of mandatory treatment: "Get these AOT orders down, and these arrests down, and these fatalities down." Supportive engagement, and supporting safe and accessible housing, person-centered treatments of choice, need to be the pillars of the treatment system. Trauma is also the experience of many refugees who have settled in our state. Many suffer from undiagnosed trauma on account of political turbulence, war, and harrowing personal ordeals, which may affect the approach used to treat substance abuse disorder and/or mental illness and may hinder expected progress in treatment.

Serving the Mental Health Needs of Immigrants and Refugees

There are two obvious hurdles to serving the mental health needs of immigrants and refugees. One is cultural: mental health is a taboo issue in many new American communities, and mental illness is a source of shame in societies with a strong belief in honor versus shame. In addition, Western "talk therapy" is practically unknown outside the Global north. Instead, the family plays a critical role in a person's well-being in many countries and cultures, and as such, involving spouses or close family in the treatment of recent immigrants can help, a practice that is not widely embraced in the United States. Second, access to interpreters is unavailable in the group therapy context so learners of English are often simply excluded from this form of therapy even if it is part of the court-mandated behavioral health regimen. Recently, a Rockland County resident sued the county's drug court and the state court system, accusing court officials of barring him from a diversion program because of his limited English proficiency. As well, some treatment providers do not have easy access to reliable, professional interpretation services for optimum one-on-one mental health care.

Boarding in emergency rooms and an innovative response

In addition to studying local county mental health self-assessments, the Task Force focused its efforts on the vexing problem of patients boarding in emergency rooms and hospitals as a systems issue.

As explained earlier, the Healthcare Association of New York State ("HANYS") reports that hospitals across the country have reported an alarming rise in patients who become caught in limbo in emergency departments and inpatient units for weeks, months and even years after they are medically ready for discharge. These delays most often occur due to a lack of care options, the inability to pay for post-discharge care and/or administrative gridlock. Complex case discharge delays, also known as bed blocking or boarding, are devastating for patients, exacerbate bed shortages and result in enormous, unnecessary costs. HANYS described the impact upon patients as follows:

> "Unnecessary hospital stays can lead to an irreversible decline in functional status and negatively impact psychological well-being, especially for older adults and children. Patients living in limbo in the hospital environment lose their autonomy, become socially isolated and lack access to the intellectual and physical activity necessary to thrive. Discharge delays also exacerbate hospital bed shortages, risk staff safety and well-being and result in extraordinary costs to our healthcare delivery system." [163]

HANYS' 2021 white paper, *The Complex Case Discharge Delay Problem*,[164] provided an overview of the long-standing challenges facing real people and hospitals and highlighted real cases to emphasize the magnitude of the problem. This graphic is copied from the HASNY and lends a powerful image:

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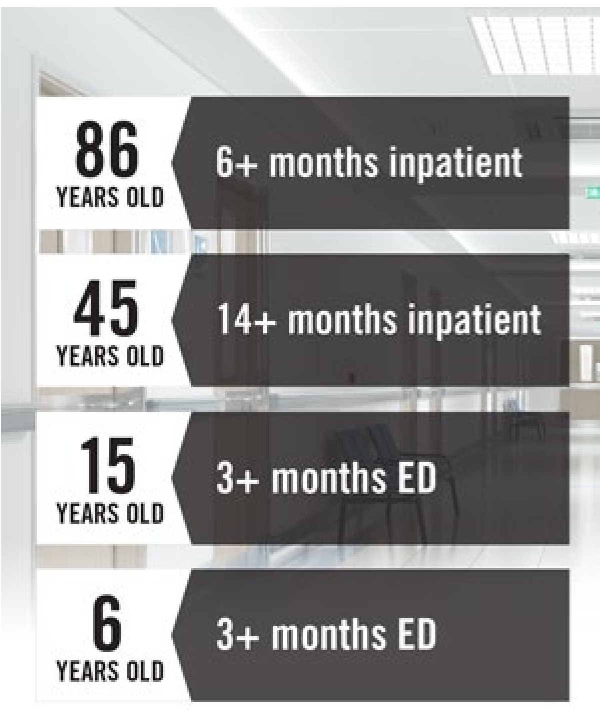
[163] https://www.hanys.org/communications/publications/scope_of_complex_case/
[164] https://www.hanys.org/communications/publications/complex_case_discharge_delays/



To learn more about the scope of complex case discharge delays in New York, HANYS conducted a three-month data collection pilot with hospitals statewide. In 2023, HANYS released a summary of the pilot findings and a framework to focus solutions. The data affirms that the fiscal cost of the problem is enormous. Fifty hospitals reported 992 patients experiencing discharge delays of more than two weeks between April 1 and June 30, 2022, at an estimated total cost of $167 million, or an average of $168,000 per case. Individuals who had an undocumented non-citizen status (most commonly uninsured or emergency Medicaid) experienced the longest average delayed days, followed by those with Medicaid fee-for-service. HANYS developed the following framework to focus efforts to ensure that patients no longer languish in hospitals for months to years after they are ready for discharge:

- prevent unnecessary hospitalization;
- intervene early when patients at high risk of delay arrive at the hospital;
- respond to patient needs during unavoidable extended delays; and
- increase visibility of delays in access to care.

The Task Force notes unique concerns about boarding and its impact upon children. This issue is not lost on New York State. In 2011, New York State convened a Respite Care Services Workgroup [165] at the behest of the Committee on Cross-systems Youth.[166] Group membership included the Council on Children and Families, OPWDD, DOH and OMH, among other state agencies. The workgroup noted that emergency respite availability is virtually non-existent for cross-system youth and consequently, children in crisis may be picked up by law enforcement or present at hospital emergency rooms. A report was rendered in April of 2011 and is included in the Appendix to this report.[167] Interim recommendations included strengthening respite care services as a preventative strategy within the system of care to meet the needs of high-risk youth. As far as the Task Force is aware, the working group did not issue any other reports and its interim findings and recommendations were never implemented.

Massachusetts ABC legislation

The Massachusetts Mental Health "ABC" Act – Addressing Barriers to Care[168] – was passed unanimously in 2022 could be a model for New York and other states to follow. The Commonwealth's legislation attempts to reform the service delivery system with the goal that everyone who needs mental health care will be able to receive it. [169] Here are six initiatives among any that are identified as priorities in Massachusetts:

- facilitate the development of interagency initiatives that: (i) are informed by the science of promotion and prevention; (ii) advance health equity and trauma-responsive care; and (iii) address the social determinants of health;
- develop and implement a comprehensive plan to strengthen community and state-level promotion programming and infrastructure through training,

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[165] Respite is a term of art and means intermittent, temporary substitute care of a person on behalf of a caregiver who requires relief from the responsibilities of daily caregiving. *See, e.g*., 14 NYCRR 635-10.4.

[166] The term "cross system youth" is understood by the Task Force to include children eligible to be served by more than one state or local agency and would commonly include children with multiple disabilities.

[167] *See* Appendix, Document 9

[168] Session Law - Acts of 2022 Chapter 177 (malegislature.gov)

[169] Mental Health ABC Act signed into law in Massachusetts | WWLP

technical assistance, resource development and dissemination and other initiatives;

- advance the identification and dissemination of evidence-based practices designed to further promote behavioral health and the provision of supportive behavioral health services and programming to address substance use conditions and to prevent violence through trauma-responsive intervention and rehabilitation;
- collect and analyze data measuring population-based indicators of behavioral health from existing data sources, track changes over time and make programming and policy recommendations to address the needs of populations at greatest risk;
- coordinate behavioral health promotion and wellness programs, campaigns and initiatives;
- hold public hearings and meetings to accept comment from the public and to seek advice from experts, including, but not limited to, those in the fields of neuroscience, public health, behavioral health, education and prevention science.[170]

The law takes specific aim at emergency room boarding and requires ER's to have a behavioral health clinician available. It will also create an online portal to speed up care for patients. [171] The portal "enables health care providers, health care facilities, payors and relevant state agencies to access real-time data on children and adolescents who are boarding, awaiting residential disposition or in the care or custody of a state agency and are awaiting discharge to an appropriate foster home or a congregate or group care program." Among other things, the online portal shall include information on the specific availability of pediatric acute psychiatric beds, crisis stabilization unit beds, community-based acute treatment beds, intensive community-based acute treatment beds, continuing care beds and post-hospitalization residential beds.

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[170] Session Law - Acts of 2022 Chapter 177 (malegislature.gov) sec. 1

[171] The Massachusetts statute offers a definition of boarding. Boarding means "waiting not less than 12 hours to be placed in an appropriate therapeutic setting after: (i) being assessed; (ii) being determined in need of acute psychiatric treatment, crisis stabilization unit placement, community-based acute treatment, intensive community-based acute treatment, continuing care unit placement or post-hospitalization residential placement; and (iii) receiving a determination from a licensed health care provider of medical stability without the need for urgent medical assessment or hospitalization for a physical condition."

The Massachusetts ABC law also requires the state to develop a similar portal for adults. The statute provides:

> "The secretary of health and human services shall facilitate psychiatric and substance use disorder inpatient admissions for adults seeking to be admitted from an emergency department or hospital medical floor by developing and maintaining a confidential and secure online portal that enables health care providers, health care facilities and payors to conduct a real-time bed search for patient placement. The online portal shall provide real-time information on the specific availability of all licensed psychiatric and substance use disorder inpatient beds that shall include, but not be limited to: (i) location; (ii) care specialty; and (iii) insurance requirements…"[172]

The Task Force urges New York to similarly hold public hearings elevate the issue of boarding in ERs and hospitals because there is a crisis that needs to be remedied. The human and fiscal cost is enormous. The very existence of the complex case discharge delay problem as framed by the APA and HANYS is evidence that our systems of care are broken.

Recommendations

- State and local authorities administering programs for people with mental disabilities should promote "seamless systems" change which would have three components: 1) people with needs being able to connect to the system of care at any point; 2) each point in the various systems of care recognizing their needs and being able to connect them to the proper service providers and supports; and 3) emphasis on maintaining recovery, with person-centered treatment planning as well as attention to social supports and determinants of health.
- Promote a seamless system that includes and addresses co-occurring disorders, recognizing that individuals in need frequently have multiple or overlapping needs and disabilities.
- Seek alternatives to coercive interventions and promote non-hospital community voluntary crisis stabilization programs.

[172] Session Law - Acts of 2022 Chapter 177 (malegislature.gov) sec. 2.

- Support "peer bridging" as a link between the hospital and a successful discharge plan.
- Promote community investment in supported housing units.
- Recommend that the Office of Mental Health ("OMH"), the Office for People With Developmental Disabilities ("OPWDD"), and the Office of Addiction Services and Supports ("OASAS") and the Department of Health to collaborate and adopt integrated service regulations without further delay.
- Recommend that OMH and OPWDD operate or fund respite beds for children and adults with disabilities to avoid boarding in hospital emergency rooms.

D. *Criminal Justice*

"America Has Made Mental Illness a Crime"

As observed by Task Force member Patricia Warth, quoting author Alicia Roth, "America as Made Mental Illness a Crime."[173] During the last quarter of the 20th century, the dramatic reduction of inpatient mental health care capacity was accompanied by an equally dramatic increase in criminalization and incarceration.[174] This increase in incarceration was historically unprecedented and occurred after decades of relative stability in incarceration numbers and rates.[175] Yet four decades of "tough on crime" rhetoric led to harsher sentencing policies and the criminalization of mental illness and substance dependence. This rhetoric is wholly inconsistent with crime victims' views that diversion - as

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[173] Warth, *supra* note 32, *Unjust Punishment: The Impact of Incarceration on Mental Health*, 95 Feb-N. Y. St. B. J. 11-12, *citing* Alisa Roth, *Insane: America's Criminal Treatment of Mental Illness* 81.

[174] In 1973, the United States incarcerated adults at a rate of 161 per 100,000 adults; by 2007, this rate had quintupled to 767 per 100,000. In absolute terms, "the growth in the size of the penal population has been extraordinary; in 2012, the total of 2.23 million people held in U.S. prisons and jails was nearly seven times the number in 1972." See Warth, *supra* note 11, National Research Council 2014, The Growth of Incarceration in the United States: Exploring Causes and Consequences, Washington,
DC: The National Academies Press, https://doi.org/10.17226/18613, at 33, 35-36.

[175] Sol Wachler & Keri Bagala, *From the Asylum to Solitary: Transinstituionalization*, 77 Alb. L. Rev. 915 (2014).

opposed to incarceration - is the preferred outcome for an accused person,[176] and also resulted in over-policing and over-criminalizing drug possession and "quality of life" issues, which in turn led to the U.S.'s overreliance on arrest, severe penalties, and increased incarceration.[177] Today, "[p]olicing, arrest, and criminal punishment have become the default response not only to violence and other harms, but also to poverty, mental health crisis, drug use and addiction, HIV and other health conditions, and school discipline." [178] Our nation's overreliance on arrest and incarceration, combined with the failure to provide meaningful treatment options for people with mental illness, has resulted in far too many people with mental health conditions being ensnared in our criminal legal system. The statistics are stark:

- The National Alliance on Mental Illness estimates that between 25% and 45% of all Americans with mental illness will be incarcerated at some point in their lives. In contrast, only 6.6% of the general population will experience incarceration.[179]
- People with mental illness in the U.S. are 10 times more likely to be incarcerated than they are to be hospitalized.
- More than 70% of people in U.S. jails and prisons have at least one diagnosed mental illness or substance use disorder or both, and up to a third of incarcerated people have a serious mental illness.
- The problem is most acute for women who are incarcerated; a 2017 study found that 20% of women in jail and 30% in prisons had experienced "serious psychological distress" in the month before the survey, compared to only 14% of jailed men and 26% of imprisoned men.

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176 Alliance-for-Safety-and-Justice-Crime-Survivors-Speak-September-2022.pdf (allianceforsafetyandjustice.org)

177 Warth, *supra* note 32, *Unjust Punishment: The Impact of Incarceration on Mental Health*, 95 Feb-N. Y. St. B. J. at 12.

178 *Id., quoting,* Andrea J. Ritchie and Beth E. Ritchie, The Crisis of Criminalization: A Call for a Comprehensive Philanthropic Response, Barnard Center for Research on Women at 3 (2017), https://bcrw.barnard.edu/wp-content/nfs/reports/NFS9-Challenging-Criminalization-Funding-Perspectives.pdf.

179 Megan J. Wolff, PhD MPH, Weill Cornell Medicine, Psychiatry, "Fact Sheet: Incarceration and Mental Health," May 30, 2017, available at: Fact Sheet: Incarceration and Mental Health | Weill Cornell Medicine Psychiatry

• The numbers of mentally ill in carceral settings continues to increase. In 2010, approximately 30% of people jailed at Rikers Island had a mental illness; by 2022 it had risen to 50%. .[180]

The "tough on crime" rhetoric that fueled mass incarceration also fostered a mistaken belief that rehabilitation is ineffective, often leaving punishment as the primary focus of our criminal legal system.[181] As our jail and prison population continued to increase, the will for a fiscal investment in rehabilitation and treatment programs waned, as did the will to fund mental health care both in and out of prison.[182] As observed by CCJ and COSCA, "For too many individuals with serious mental illness, substance abuse disorder, or both, the justice system is the de facto entry point for obtaining treatment and services. There are many causes, not the least of which is the criminalization of mental illness and the lack of alternative approaches and resources to support the diversion of individuals from the courts and into treatment."[183]

Toward More Humane Treatment of People with Mental Illness: Diversion and Deflection

Patricia Warth poignantly observes that America must develop a commitment to humanely care for, rather than criminalize people with mental illness and she says doing so asks us to address two questions: (1) who are we incarcerating and (2) how are we incarcerating them?[184]

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[180] People with mental illness are overrepresented in New York State's largest jail system, the New York City Department of Corrections. More than half (52%) of the people in the New York City Department of Correction's custody are recommended for mental health services, and in 2020, an average of 17% of incarcerated people were diagnosed with a "serious mental illness". New York City Comptroller. (March 2021). FY 2022 Agency Watch List: Department of Correction. Available at: https:// comptroller.nyc.gov/wp-content/uploads/documents/Watch_ List_DOC_FY2022.pdf

[181] Mental health care on Rikers: New York's largest psychiatric provider - City & State New York (cityandstateny.com)

[182] Warth, *supra* note 32, *Unjust Punishment: The Impact of Incarceration on Mental Health*, 95 Feb-N. Y. St. B. J. at 13.

[183] *State Courts Leading Change*, Report and Recommendations (October 2022) p 10.

[184] Warth, *supra* note 32, *Unjust Punishment: The Impact of Incarceration on Mental Health*, 95 Feb-N. Y. St. B. J. at 15

Regarding the first question, the Task Force urges implementation of reforms to dramatically reduce the number of people with mental illness who are arrested and processed through our criminal legal system and, for those people who are arrested, reduce the reliance on incarceration. Such reforms must include the codification of mental health courts in New York State; decriminalizing conduct that is a result of untreated mental illness, such as substance abuse, homelessness, and vagrancy; deflecting people from the criminal legal system before charges are filed, at the point of police contact; and importantly, expanding judicial diversion options for people who become entangled in the criminal legal system because of their health conditions, so that justice-involved individuals can be diverted to treatment, rather than incarceration.[185]

Investing in treatment courts and addressing the root causes that drive criminal behavior will save the state money. According to the Office of Court Administration, for every $1 invested in treatment courts, the state produces $2.21 in benefits, which comes to a net savings of $10,330 per participant over five years[186]. When accounting for the community impact beyond the savings of reduced incarceration and court system costs, like health and child welfare, the Center for Justice Innovation predicts that investment in diversion yields a far more staggering return, potentially saving the state $10 for every $1 invested. This savings is especially urgent in New York City, where taxpayers spend over $556,000 per year for the incarceration of a single individual. In the immediate term, investing in up-front costs to achieve savings in future years is exactly the kind of smart policy approach New York should be taking.

New York's pending Treatment Not Jail Act ("TNJ")[187] legislation is a much-needed evidence-based reform for judicially diverting individuals who become entangled in the criminal legal system due to their untreated functional impairment – be it a mental health condition, substance use disorder or other cognitive or intellectual disability. Significantly, NYSBA endorsed TNJ in a May 13, 2022, memorandum in support. [188] TNJ would amend New York's 2009 judicial diversion/drug court statute as codified in Criminal Procedure Law (CPL)

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[185] *Id.*

[186] New York State Unified Court System, The Future of Drug Courts in New York State: A Strategic Plan (2017), https://www.nycourts.gov/legacyPDFS/courts/problem_solving/drugcourts/The-Future-of-Drug-Courts-in-NY-State-A-Strategic-Plan.pdf.

[187] S. 1976-Ramos/A.1263-Forrest-

[188] *See,* Appendix document 10

article 216 and expand eligibility beyond substance use disorders and limited specified crimes. Under TNJ, mental health courts will also be codified into law, be available for any charged offense, and applicable not only to substance use disorders, but also to mental health conditions or other disabilities so long as the individual's "functional impairment" contributed to their pending charges. TNJ also expands and guides judicial discretion to divert a person from incarceration to treatment; incorporates treatment court best practices including harm reduction, adherence to clinical opinions, person-centered treatment, and voluntary participation; offers pre-plea participation in treatment; ensures equity, due process, and procedural justice in treatment courts; and establishes diversion parts in every county in New York State. Importantly, TNJ requires the presiding judge to engage in a public safety analysis based on clinical evaluation of potential participants and reflecting on the current case to determine whether a treatment mandate is in both the public and individual's best interests. The bill has the potential to address many of the concerns identified in the *Leading Change* report and acknowledges that evidence-based diversion courts work and significantly reduce recidivism.

The goal of deflecting people from the criminal legal system at the point of police contact is one shared by the Biden administration. In March 2022, the White House Office of National Drug Control Policy ("ONDCP") announced release of the Model Law Enforcement and First Responders Deflection Act to encourage all states to develop and use deflection programs-*i.e.*, programs that deflect people with a mental disability away from the criminal legal system and to evidence-based-treatment heard reduction, recovery and prevention services. [189] The Task Force urges examination of this Model Act as a potential source of legislation in New York that can improve policing in a manner that not only saves lives, but also diminishes the number of people with a mental disability caught up in our criminal legal system.

For the second question of how we incarcerate, the Task Force maintains that society must reject the notion that rehabilitation does not work and shift the focus of our prisons and jails from punishment to rehabilitation and treatment. We must also hold jails and prisons accountable for their treatment of incarcerated people by, among other things, requiring accurate reporting and rejecting practices

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[189] *White House Announces State Model Law to Expand Programs that Defect People with Addiction to Care, available at:* White House Announces State Model Law to Expand Programs that Deflect People with Addiction to Care | ONDCP | The White House

that are not evidence-based, such as solitary confinement.[190] A starting point is acknowledging the failure to fully implement the 2008 SHU exclusion legislation and the 2021 Humane Alternatives to Long-Term ("HALT") Solitary Confinement Act and requiring the Department of Corrections and Community Supervision ("DOCCS") to meaningfully implement these critically important reforms.[191] As so aptly stated by our Task Force member, Ms. Warth:

> ":.. we must recognize that the solution to caring for people with mental illness before they become ensnared in the criminal legal system--a network of community mental health centers with a single point of entry--has existed for decades but has never been adequately funded. It is time to commit the fiscal resources necessary to break the cycle of failure that has plagued our nation and to meaningfully care for our most vulnerable citizens." [192]

Reforming the Competency to Stand Trial System

The October 22, 2022, *Leading Change* report also identified as a priority reforming the competency to stand trial system. The report observed that nationally, "large numbers of defendants, including many who are charged with misdemeanors or non-violent felonies, spend excessive time in jail awaiting mental health evaluations and competency restoration, often staying longer in custody than they would have if they had been convicted of the crime, creating unnecessary cost that could be reinvested in community treatment. Those that then go through a restoration process often emerge legally competent, but remain untreated, and are returned to their communities with a poor prognosis for the future." [193] *Leading Change* recommends: 1) reserving the competency process, which in New York is codified at article 730 of the CPL, for defendants charged with the most serious crimes; 2) creating competency dockets that facilitate access to appropriate diversion and outpatient restoration services; 3) active management

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[190] Warth, *supra* note 32, *Unjust Punishment: The Impact of Incarceration on Mental Health*, 95 Feb-N. Y. St. B. J. at 15

[191] *See*, Correctional Association of New York Releases Report on Implementation of HALT Solitary Confinement Law — Correctional Association of New York A lawsuit has been filed challenging the failure to implement the HALT law and class certification is sought. Lawsuit seeks compliance from state prisons with HALT Act | News 4 Buffalo (wivb.com)

[192] *Id.*

[193] *State Courts Leading Change*, Report and Recommendations (October 2022) p 25.

of competency cases to avoid an individual languishing in jail and decompensating; and 4) requiring competency hearings to be scheduled and held without delay at every juncture.[194]

The Task Force recommends changes to the Criminal Procedure Law such as those advanced in a bill proposed by the New York State Association of Counties and the Conference of Local Mental Hygiene Directors to amend CPL 730. [195] The current provisions of this law have resulted in the diversion of scarce resources to the wasteful attempt to prepare mentally ill people to stand trial rather than helping them to receive the treatment they need. In New York State, for example, the cost of inpatient restoration services by OMH and OPWDD are charged to the counties currently at the rate of approximately $1,100 per day.[196] Consequently, local governmental units are forced to expend hundreds of thousands or even millions of dollars, in failed attempts at restoration, particularly for defendants who may have intellectual disabilities or dementia. Often judges will order such restoration on the mistaken belief that they are helping a defendant to receive treatment leading to recovery.

If enacted, the bill would update and modernize article 730 to eliminate provisions which have been deemed unconstitutional and would 1) require that the reports of professionals examining the defendant include the examiner's professional opinion of a reasonable possibility that the person can be restored; 2) create a definition of restoration services to make it clear that restoration is not aimed at recovery but simply at making the defendant legally able to stand trial; 3) delete the provision that the DA must agree to outpatient restoration so a court can make this decision independently and (4) allow the conversion of the defendant from a criminal status to a civil status so the defendant can receive mental health treatment leading to recovery. [197]

All that said, a functioning competency restoration system requires OMH and OPWDD to provide appropriate services on an inpatient and outpatient basis. On

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[194] *Id.*

[195] A. 8402A/S.7461A(2022).

[196] The New York State statute governing the commitment of defendants who lack capacity to assist in their own defense is codified at Criminal Procedure Law ("CPL") article 730. *See People v Schaffer*, 86 N.Y. 2d 460 (1995). The costs of article 730 commitments are a county charge. See MHL § 43.03 (c). Until 2020, the State only passed on half of the cost of these services to localities. In 2020, the State began charging the full charge of approximately $1,000 a day for in-patient restoration.

[197] A. 8402A/S.7461A(2022).

the inpatient side, a shortage of bed capacity within OMH and OPWDD has caused people adjudicated as incapacitated to languish in local jails awaiting restoration services in state facilities. As an example, in January of 2023, MHLS commenced three proceedings in State Supreme Court on behalf of individuals determined to lack capacity who were confined at the Chenango County Correctional Facility.[198] Two of the individuals had been previously ordered by criminal court to the custody of OMH for restoration and the other individual was ordered to the custody of OPWDD. One of the individuals determined to be incapacitated had been waiting 41 days and the other 52 days to be transferred to the custody of OMH. The individual ordered to the custody of OPWDD had been waiting 218 days for an OPWDD bed and from the time of his arraignment had spent over 494 days in the county jail. OMH and OPWDD both maintained that there was a bed shortage that prevented them from taking timely custody of the individuals. Ultimately, the proceedings were withdrawn when OMH and OPWDD agreed to take custody of the individuals pursuant to the court orders and article 730 of the CPL In addition to the Chenango County proceedings, similar cases were commenced in 2022 in Rensselaer County by MHLS and in Putnam County by DRNY on behalf of CPL 730 respondents committed to the custody of OPWDD.[199]

The cases and investigations proceeding them identified a systemic issue in New York State. Both OMH and OPWDD who receive defendants found to lack capacity and assist in their own defense for restoration services were at capacity in their forensic facilities. OMH, as a matter of policy, receives all CPL 730 respondents for restoration in one of four secure facilities. [200] OPWDD operates

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198 Index numbers 2023- 00005001, 00005002, 00005003

199 Putnam County Sup Ct, Index No: 500954/2022; Rensselaer County Index No: 2022 – 272453. Commissioner Sullivan informed the Task Force during her March 16, 2023, presentation that OMH would open additional forensic beds at the Rochester Psychiatric Center to alleviate the delays experienced in placing article 730 respondents. Commissioner Sullivan also stated that in 2022 there was a 20% increase in article 730 commitment orders issued by local criminal courts.

200 Forensic Mental Health Services (ny.gov) - the facilities are: the Northeast Regional Forensic Facility, Kirby Forensic Psychiatric Center, Mid-Hudson Forensic Psychiatric Center and the Rochester Psychiatric Center Forensic Unit. Confinement of 730 respondents in secure facilities raises constitutional concerns. A person who has been indicted, but not yet convicted, should not be confined in a setting which is more restrictive than necessary to achieve the purpose for which the individual is confined (*see, Jackson v Indiana*, 406 U.S. 715; *McGraw v Wack*, 220 A.D.2d 291; *People ex rel. Jesse F. v Bennett*, 242 A.D.2d 342 [2d Dept 1997]).

two inpatient developmental centers which may receive 730 respondents for restoration - the Sunmount Developmental Center and the Valley Ridge Center for Intensive Treatment). Litigation in other jurisdictions has resulted in settlements and court orders establishing that a State's failure to provide timely competency evaluations and restoration services to individuals with disabilities who languish in city and county jails, violates substantive due process rights guaranteed under the 14th Amendment to the United States Constitution[201] A new lawsuit has been commenced in Oklahoma. [202]

CPL section 730.60(1) provides, in part, that when a local criminal court issues a final or temporary order of observation or an order of commitment, it must forward such order and a copy of the examination reports and the accusatory instrument to the Commissioner, and, if available, a copy of the pre-sentence report. Upon receipt thereof, the Commissioner must designate an appropriate institution operated by the department of mental hygiene in which the defendant is to be placed. The sheriff must hold the defendant in custody pending such designation by the Commissioner, and when notified of the designation, the sheriff must deliver the defendant to the superintendent of such institution. There is no time limit by which the Commissioner must make a designation and the provision is particularly onerous and constitutionally infirm when, as described above, the Commissioners fail to make a timely designation leaving a defendant found to be incapacitated languishing in jail. The Task Force recommends that article 730 be amended to require that a designation by the Commissioners occur by a date certain. Until that time and where a court is ordering an individual to the custody of OMH or OPWDD for restoration services, the agencies should be transparent

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[201] ACLU-PA Settles Lawsuit Over Unconstitutional Delays in Treatment for Hundreds of Defendants With Severe Mental Illness | ACLU Pennsylvania (aclupa.org); *Trueblood v Washington State Dept. of Social and Health Services,* 73 F. Supp 3d 1311 [WD Wash 2014 - finding that wait times to admit those ordered to receive competency restoration services beyond 7 days are constitutionally suspect. *Trueblood* has extensive history beyond the scope of this report. Further history and a summary of the proceedings can be found at *Trueblood v. Washington State Dep't of Soc. & Health Servs*., 822 F.3d 1037 (9th Cir. 2016).

[202] https://www.oklahoman.com/story/news/2023/03/05/lawsuit-alleges-jail-inmates-in-oklahoma-receive-no-treatment-for-mental-illness/699

and report to the court system if facilities are at capacity or if substantial delays can be anticipated.[203]

The Task Force also urges that renewed consideration be given to outpatient restoration. With a 2012 chapter amendment to CPL 730,[204] New York joined the majority of other states that allow for outpatient restoration of capacity.[205] Commentators have suggested that outpatient restoration may offer the most promise for individuals with disabilities in the criminal justice system if all of the following apply: (a) the community has a program to restore competency that is suitable for the treatment needs of the defendant; (b) the program provides intensive, individualized competency training tailored to the demands of the case and the defendant's particular competency deficits; (c) the defendant has a stable living arrangement with individuals who can assist with compliance with appointments and with treatment; and (d) the defendant is compliant with treatment.[206] In New York, OMH has issued policy guidance on outpatient restoration, although outpatient restoration remains an underutilized remedy.[207] Commissioner Sullivan informed the Task Force that OMH would be interested in working with NYSBA to promote outpatient restoration particularly since there is enhanced funding for community services.[208] The Task Force observes that outpatient restoration may find more use, and avoid a potential constitutional

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[203] The same should be true for commitments under section 330.20 of the CPL and article 10 of the MHL - the discrete commitment statute for sex offenders nearing anticipated release.

[204] Assemb. B. 9056-D, 235th Reg. Sess. (N.Y. 2012) (enacted).

[205] *See* Reena Kapoor, *Jail-Based Competency Restoration*, 39 J. AM. ACAD. PSYCHIATRY & L. 311, 311 (2011).

[206] *Placement of Individuals found Incompetent to Stand Trial: A Review of Competency Programs and Recommendations* 25-26 (Disability Rights Cal., Paper. No. CM52.01, 2015).

[207] OFF. OF MENTAL HEALTH, OMH GUIDANCE FOR IMPLEMENTATION OF OUTPATIENT COMPETENCY RESTORATION (OCR) 1 (2013). *See* Ben Hattem, *How New York's Mentally Ill Get Lost in Courts, Jails and Hospitals*, ALJAZEERA AM. (July 27, 2015), http://america.aljazeera.com/articles/2015/7/27/ny-mentally-ill-get-lost-in-the-justice-system.html ("OMH has not made progress on implementing an outpatient restoration program.").

[208] The Commissioner's comments when read with Joseph Glazer's legislative testimony illustrates the potential for outpatient models of support. Mr. Glazer states that "we should be considering alternatives to the triggering of CPL 730, and allowing crisis, respite and enhanced and intensive community-based services to be utilized before a person is deemed CPL 730 incapacitated, which results in their hospitalization and long delays, in the justice system." Appendix Document 1

challenge, if the statutory requirement that the prosecutor consent to the order of outpatient restoration be amended to allow for notice to the people and an opportunity to be heard prior to the entry of the order.

Lastly, forensic hospitals treating individuals under a 730 order of commitment do not typically engage in *any* discharge planning. This glaring missed opportunity is extremely harmful to incarcerated whom after multiple months, are transferred back to local jails who must begin discharge planning efforts from scratch putting these individuals at the end of a waitlist for intensive mental health services and housing options. It is critical that forensic hospitals treating people under a CPL 730 order engage in meaningful and appropriate discharge planning well in advance of a return to fitness. Such planning may include the filing of a Single Point of Access ("SPOA") application seeking Assertive Community Treatment ("ACT") or Intensive Mobile Treatment ("IMT"), as well as a supportive housing application, noting that the failure to make such referrals in a timely manner is disadvantageous to the individual's future community stability and safety.

Practice considerations for article 730

In 1988, the Westchester County Supreme Court struck down the automatic 90-day commitment authorized by section 730.40 (final orders of observation) as unconstitutional in the case of *Ritter v. Surles*.[209] The state officer defendants (then OMH and OMRDD) elected not to appeal the order entered in *Ritter* and instead instituted a policy in OMH facilities hospitals requiring a defendant to be discharged within 72 hours following remand by the criminal court unless the defendant meets the criteria for either a voluntary or an involuntary admission to the hospital pursuant to article 9 of the MHL. In contrast, OMRDD did not immediately adopt any published regulations or policies concerning the retention, care, and treatment of defendants remanded to the Commissioner's custody pursuant to CPL section 730.40. Currently, the OPWDD Bureau of Institutional and Transitional Services ("BITS") makes a placement recommendation for the defendant. The defendant may be admitted to a developmental center pursuant to article 15 of the MHL, but more likely will be referred for community-based services. The statute has never been amended to reflect the *Ritter* decision. In practice. Town and village justices, county court judges, prosecutors, and defense attorneys in New York are often not aware of *Ritter v. Surles* and the fact that there is a declining infrastructure of in-patient beds to receive criminal defendants. *Ritter* should be codified, and the 90-day automatic commitment repealed.

[209] 144 Misc. 2d 495.

The current CPL article 730 was enacted in 1970. In 1972, the U.S. Supreme Court held in *Jackson v. Indiana*[210] that a person charged with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the state must either institute the customary civil confinement proceeding that would be required to commit indefinitely any other citizen or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal.[211] The constitutional limitation on the confinement of an incapacitated criminal defendant as enunciated by the Supreme Court in *Jackson* has never been codified in New York. Currently, the only temporal limitation of the permissible period in New York of an article 730 retention is that the retention "must not exceed two-thirds of the authorized maximum term of imprisonment for the highest-class felony charged in the indictment."[212] Upon reaching the two-thirds maximum, the indictment is dismissed, and the defendant may only continuously be retained as a civil patient. Currently, rights guaranteed by *Jackson* may be vindicated only through motion practice, which may be commenced by the defendant or the Commissioner. However, albeit rarely, District Attorneys will also commence *Jackson* motions in some cases to relieve counties of the burden of paying the cost of article 730 confinement. It is time for article 730 to be examined by the legislature. New York should have a maximum period of court-imposed retention for restoration that has a nexus to social science research and that also considers the needs of special populations, such as those with intellectual disabilities or dementia.[213]

Court rules implementing CPL article 730 need updating.[214] Currently, the regulations contemplate commitment only to the custody of OMH.[215] The regulations should be amended to recognize that a person can be committed to either OMH or OPWDD. Also, references in part 111 to the "Mental Health

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[210] 406 U.S. 715

[211] *Id*. at 738.

[212] CPL 730.50

[213] *See*, Shea & Goldman, *supra,* note 103, *Ending Disparities and Achieving Justice for Individuals with Mental Disabilities*, 80 Alb. L. Rev. 1037 (2016-2017).

[214] See, 22 N.Y.C.R.R. 111.1-111.8.

[215] 22 N.Y.C.R.R. 111.2.

Information Service" should be changed to "Mental Hygiene Legal Service." Section 111.8 of the rules address official forms. The regulations provide that "[f]orms promulgated by the Chief Administrator of the Courts and the Commissioner of Mental Health, or either of them, shall be the official forms for uniform use throughout the state in implementation of article 730 of the Criminal Procedure Law." [216] However, the section of the regulations where the forms are to be found is "reserved."[217] While there is an index of CPL article 730 forms at section 111.8 of the regulations, there are no official forms promulgated to the knowledge of the Task Force.

It is also time to consider anew the benefit of official forms following the decision in *Hirschfeld v. Stone*. [218] In that case, incapacitated defendants confined under article 730 challenged the release of personal information, including HIV status, in fitness reports conveyed to criminal courts. The District Court issued a preliminary injunction, holding that the state's interests in including personal information in reports submitted to courts and used to determine capacity were outweighed by the defendant's privacy interests The *Hirschfeld v. Stone* litigation concluded upon the entry of a consent order endorsed by the District Court, which resulted in the creation of a model competency report However, the model competency report is not uniform because OPWDD was not a party in the *Hirschfeld* litigation. Further, given that outpatient restoration is now legally authorized, examiners should be asked to opine whether the defendant would be a candidate for outpatient restoration. Toward the goal of promoting consistent practices, official forms should be promulgated.

Finally, in 1990, a law was enacted "directing the Law Revision Commission to study provisions of the Criminal Procedure Law and Correction Law to determine their impact [upon people] with mental retardation who are accused of" crimes and to recommend statutory revisions.[219] The study was to take into account the "cognitive ability and adaptive behavior" of persons with mental retardation and was to be conducted in consultation with executive branch agencies, the Mental Hygiene Legal Service, the Commission on Correction, and prosecutor and defense associations, among others. While a bill was never enacted as a result of the Law Revision Commission investigation into these compelling issues, there is no question that over thirty years later, people with

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[216] 22 N.Y.C.R.R. 111.8

[217] 22 N.Y.C.R.R. Subtitle D, Chapter I (CPL 730 forms reserved).

[218] 193 F.R.D. 175 (S.D.N.Y. 2000).

[219] Assemb. B. 11695-A, 213 Reg. Sess. (N.Y. 1990) (enacted)

developmental disabilities, including those with autism, continue to encounter significant difficulties and great risk in the criminal justice system.[220]

Reforming CPL 330.20

In New York, the current procedures for the retention, care, and treatment of persons found not responsible by reason of mental disease or defect, were enacted in 1980. The current statute was designed to comply with the constitutional mandates of *Matter of Torsney*[221] and followed a study conducted by the LRC. [222] The detailed statutory scheme, codified at CPL 330.20, was intended to mirror the MHL, but created "new procedures for aspects of post-verdict supervision" applicable only to people charged with a crime who are found not responsible by reason of mental disease or defect. The NYSBA

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[220] *See* Michelle Walton, *Barriers to Justice: Inaccessibility of New York's Criminal Justice System for Individuals with Intellectual Disabilities*. 14 Alb. Gov't L. Rev. 72, 91-92 (2020-2021). The author notes, for example, that in New York, individuals with prison sentences greater than one year are held in the custody of DOCCS. The only screening intellectual disabilities for inmates upon entry into the DOCCS system is a BETA IQ test. Those who score below seventy are referred for full-scale IQ testing and may be referred to the Special Needs Unit ("SNU"). However, individuals with mild or "borderline" intellectual disabilities defined as having an IQ score between seventy and eighty-five, still experience difficulties with adaptive functioning. In 1991, the former Commission on_Quality of Care (now the Justice Center for the Protection of People with Special Needs) reported that DOCCS's "battery of academic achievement tests and the Revised Beta IQ test administered to all incoming prison inmates at the reception centers appears to be unreliable in identifying inmates who may be developmentally disabled." A 2016 report by Disability Rights New York found that DOCCS is still not incorporating adaptive functioning assessments into its screening processes for people with developmental disabilities. DOCCS' overreliance on solely IQ testing is concerning because individuals with IQ scores over seventy who have adaptive functioning deficits are not being identified as having a disability, and thus receive no disability-related supports and accommodations.

[221] 47 N.Y.2d 667,674-675 (1979). In *Torsney,* Court of Appeals held that, because insanity acquittees lack criminal culpability, "[b]eyond automatic commitment ... for a reasonable period to determine [acquittees'] present sanity, justification for distinctions in treatment
between persons involuntarily committed under the Mental Hygiene Law and persons committed under CPL § 330.20 draws impermissibly thin."

[222] As explained in *Matter of Martin B.,* 138 Misc. 2d 685, CPL 330.20 was a major part of the Insanity Defense Reform Act of 1980. L.1980, c. 548. That Act, in turn, was recommended by the New York Law Revision Commission in a Report prepared in response to a specific request of Governor Carey. Session Laws of New York, 1981, pp. 2251–2293; see also Memorandum on Approving L.1980, c. 548, Session Laws of New York, 1980, p. 1879–1880 and Report of the Law Revision Commission of the State of New York, 1980 at Session Laws of New York, 1980, pp. 1599.

Committee on Mandated Representation issued a report on November 18, 2018, examining the use and efficacy of the Insanity Defense and CPL 330.[223] This Task Force does not repeat that work in its endeavors, but does see value in raising again for public consideration that the insanity defense is rarely invoked and even more rarely successful, while the numbers of people who are incarcerated and have serious mental illness is shockingly high.[224] People charged with a crime who successfully raise the insanity defense statistically will be confined in psychiatric hospitals for significantly longer periods of time than civil patients, despite the evidence showing that longer confinement is not correlated with reduced rates of recidivism.[225] In short, once person has been acquitted based upon on insanity and thereby adjudged to lack criminal culpability, she faces indefinite detention that can exceed the maximum time for which she could have been imprisoned. As the Committee on Mandated Representation commented in 2018, it is little wonder that the defense is so rarely invoked. New York's system for the retention, care, and treatment of those found not responsible by reason of mental disease or defect appears entrenched. However, the statute is over 40 years old and worthy of study and re-examination to ensure that it meets its dual objectives of promoting public safety while meeting the treatment needs of people subject to its provisions.

Recommendations

- Support courts and communities in the use the Sequential Intercept Model to map resources, opportunities and gaps, and develop plans to improve

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[223] Report to the Executive Committee of the New York State Bar Association on the Use and Efficacy of Penal Law 40.15 and Criminal Procedure Law 330.20 and Recommendation to Establish a Mental Health Task Force or Committee (2018) (Robert Dean, Chair). Excerpts of the report were later published in an article written by Task Force Members Sheila E. Shea and Christopher Liberati-Conant, '*You Have to Be Crazy to Plead Insanity, How an Acquittal Can Lead to a Lifetime of Confinement*, 91-May N.Y. St. B. J. 28 (2019).

[224] *See,* Shea & Liberati-Conant at p. 31. New York State does not track how often the defense is invoked, but data secured informally be the authors indicates that over the five-year period from 2013-2017, only 11 defendants, out of 19,041 felony and misdemeanor trials statewide, were found not responsible by reason of mental disease or defect after a trial. During the same five-year period, 241 defendants entered a plea of not responsible, compared to 1,375,096 convictions for felonies and misdemeanors. According to OMH, as of June 30, 2018, 260 CPL 330.20 respondents were in secure confinement and 452 were in the community subject to orders of conditions. Meanwhile, as of 2016, approximately 20 % of the people serving sentences in New York State prisons had mental health diagnoses that required OMH services.

[225] Miraglia & Hall, *supra* note 108 at p. 526.

court and community responses to individuals with mental illness, addiction, developmental disabilities, and co-occurring conditions.

- Advocate for funding and resources needed to implement a continuum of diversion programs, treatment and related services to improve public safety as a more humane and cost-effective approach when individuals with mental illness, addiction, developmental disabilities, and co-occurring conditions interface with the criminal legal system.
- Adequately fund beds in both the OMH and OPWDD systems for inpatient restoration for people in the criminal justice system determined to be incapacitated, while requiring OMH and OPWDD to expand and promote the clinical infrastructure required to permit outpatient restoration whenever possible.
- Those people admitted to the hospital or a developmental center for restoration must receive full and co-occurring competent care. [226]
- Recommend CPL article 730 amendment to remove statutory requirement that the prosecution consent to outpatient restoration, while providing prosecutor with notice and an opportunity to be heard before an outpatient restoration order is issued.
- Promote the development and utilization of community-based alternatives to CPL article 730, including Respite and Crisis Respite, Crisis Services and community-based restoration.
- Require OCA to promulgate forms to implement article 730 so that consistent practices are promoted throughout New York State.[227]
- Study and re-examine CPL 330.20 to ensure that it meets its dual objectives of promoting public safety while meeting the treatment needs of people subject to its provisions.
- Official forms to implement CPL article 330 should be updated to reflect that commitments can be to either the custody of OMH or OPWDD.[228]
- Foster and support efforts to ensure that diversion and problem-solving courts are linked to service systems that competently, effectively and

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[226] *See*, Glazer testimony, Appendix Document 1.

[227] Title 22 New York Code Rules and Regulations, Judiciary, Subtitle D (Ch 1)

[228] Title 22 New York Code Rules and Regulations, Judiciary, Subtitle D (Ch II)

efficiently serve participants, allowing for better outcomes and the fullest possible application of justice.

- Consistent with the recommendation made in the *State Courts Leading Change* report, explore, foster and support efforts to deflect and divert people with mental disabilities from the criminal legal system prior to or immediately after arrest.
- Commit to full implementation of Humane Alternatives to Long-Term ("HALT") Solitary Confinement Act and resist efforts to rollback these reforms that are critical to the human and effective treatment of people with mental disabilities who are incarcerated.

E. *Civil Justice*

Legal capacity is a human right which persons with disabilities have the right to enjoy "on an equal basis with others in all aspects of life," and persons with disabilities should be provided with "the support they may require in exercising their legal capacity."[229]

The Task Force membership includes attorneys who practice and have expertise in family law, protection and advocacy systems, guardianship, mental hygiene legal service, and in county and state government. The Task Force recommends reforms of civil justice systems that promote the autonomy and assist people with mental disabilities in exercising their legal capacity. The narrative that follows discusses the execution of advance directives and supported decision making. The report further makes the case for guardianship reform and examines article 9 of the MHL.[230] Reforms in family court and imposing a right to counsel in ERPO proceedings are also recommended. Finally, this section of the report

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[229] https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html

[230] The reader is referred to an article written by Task Force member Jamie Rosen, with Douglas Stern, published in the March/April 2023 edition of the NYSBA *Journal*, *The Unique Role of the Guardian in Inpatient Psychiatric Care,* that explains the intersection of our state's guardianship and civil commitment statutes and the important role a guardian can play as an advocate for appropriate care and discharge planning. 95-Apr N. Y. St. B. J. 43 (2023).

closes with a call to repeal and replace the "hygiene" from the Mental Hygiene Law to adopt a modern nomenclature that does not stigmatize people with mental disabilities.

Promote Individual Autonomy through Psychiatric Advance Directives

Under New York common law, every individual of adult years and sound mind has a right to determine what shall be done with his own body and to control the course of his medical treatment.[231] Patient autonomy and self-determination are basic tenets of New York law that have been faithfully adhered to by courts and codified in various statutes governing informed consent and health care decision making.[232] The priority of the patient's decision is a firmly ensconced principle in New York State law.[233]

As life-sustaining medical technology advanced through the 20th century, it became clear, however, that there was a need for consistent decision-making procedures for patients who lost decision making capacity.[234] Beginning with California in 1976, all states enacted advance directive statutes of some sort, including either living wills or durable powers of attorney (appointing a surrogate decision maker) or both.[235] In 1990, the federal Patient Self-Determination Act ("PSDA") was enacted to promote the use of written advance directives.[236] The PSDA requires health care facilities receiving federal funds to inform patients of their rights under state law to prepare an advance directive, to inquire and document whether patients have executed a directive, to ensure compliance with state laws by respecting advance directives, and to educate health care providers regarding these legal instruments.[237] The same year the federal PSDA was

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[231] *Schloendorff v. Society of N. Y. Hosp*. 211 N.Y. 125 (1914); *In Re Storar*, 52 N.Y. 2d 363 (1981).
[232] *Rivers v. Katz*, 67 N.Y.2d 485 (1986), 492-493; PHL 2405, 2805-d
[233] PHL § § 2983(5), 2994-c (6).
[234] See, Ronna Blau, Lisa Volpe, Christy Coe & Kathyrn Strodel, *Psychiatric Advance Directives: A New York Perspective,* NYSBA Health Law Journal, Vol. 22, No. 1 (Spring 2017).
[235] *Id., citing*, Jeffrey W. Swanson, PhD, S. Van McCrar Phd, Marvin Swartz MD., Eric B. Elbogen, Phd., and Richard A. Van Dorn, PhD., *Superseding Psychiatric Advance Directives: Ethical and Legal Considerations*, 34 J. Am. Acad. Psychiatry Law 385, 386 (2006).
[236] Codified at 42 U.S.C. § 1395cc(f). Passage followed the United States Supreme Court June 25, 1990 decision in *Cruzan v. Director, Missouri Department of Health,* 497 U.S. 269 (1990). Writing for a divided *Cruzan* Court in a 5-4 opinion, Chief Justice Rehnquist determined, among other things, that the United States Constitution did not forbid Missouri from requiring that there be clear and convincing evidence of an incompetent patient's wishes relative to the withdrawal of life-sustaining treatment.
[237] 42 U.S.C. § 1395cc(f).

enacted, New York amended its Public Health Law ("PHL") to permit a patient with capacity to appoint a health care agent.[238] Codified at article 29-C of the PHL, the health care proxy statute was in derogation of the common law which did not permit a third person to decide to forego life sustaining treatment on behalf of a patient lacking decision-making capacity in the absence of clear and convincing evidence of the patient's prior competent choice.[239] There is no legislation in New York expressly authorizing living wills, but they are recognized under the common law as evidence of the patient's intentions pertaining to the rendition or withholding of treatment.

While legal scrutiny in New York has been afforded primarily to life sustaining treatment cases, a legally authorized surrogate, such as a health care agent, is empowered to make any health care decisions on the principal's behalf that the principal could make. "Health care" is broadly defined under the proxy statute to mean "any treatment, service or procedure to diagnose or treat an individual's physical or mental condition."[240] Courts have long recognized that all patients, including patients with severe mental illness, have the right to participate meaningfully to determine the course of their own treatment, to be free from unnecessary or unwanted medication, and to have their rights of personal autonomy and bodily integrity respected by agents of the state.[241] A person is not deemed incapable of making medical decisions simply by virtue of a psychiatric diagnosis.[242] Nonetheless, a mental illness may render a person temporarily unable to make informed choices regarding his or her care and treatment, at a time when they may be in need of treatment.

Psychiatric advance directives ('PADs') are a means for people with psychiatric conditions to retain choice and control over their own mental health treatment during periods of decisional incapacity.[243] A PAD can consist solely of a person's preferences and instructions regarding treatments to be administered or refused when incapacitated, or it can take the form of a proxy directive by which the person appoints a representative to make health care decisions, or a combination of both.[244] Preparing a psychiatric advance directive can be

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[238] L. 1990, c. 752. The legislation was based upon the consensus recommendations of the Task Force on Life and the Law convened by Governor Mario Cuomo in 1985.
[239] *See, In Re Westchester County Med. Ctr. (O'Connor),* 72 N.Y. 2d 517.
[240] PHL § 2980 (4).
[241] *Rivers v. Katz*, 67 N.Y.2d 485 (1986).
[242] *Id.* at 494.
[243] National Resource Center on Psychiatric Advance Directives, https://nrc-pad.org/
[244] *Id*.

empowering for an individual who has been subject to involuntary commitment and treatment. By thinking through and planning for a possible future mental health crisis, the individual can regain control and temper the worst possibilities. Such plans can designate supporters, describe calming techniques and identify triggers, as well the individual's preferences for hospitals, alternatives to hospitalization, crisis programs, treatments and therapies; and clearly state treatments that the individual would not agree to and the reasons for these choices. People prepare the plans to ideally avoid coercive interventions that they have experienced as traumatic.

The use of psychiatric advance directives has indeed been shown to reduce coercive interventions such as civil commitments and involuntary medications, as well as contacts with law enforcement.[245] It also has been shown to improve shared understanding and alignment with treatment providers[246] as well as follow through with chosen treatments.[247] Facilitation and support for completing a PAD can greatly enhance a person's ability to complete the document.[248] This support can come from clinicians or trained peer specialists.[249]

The Center for Medicare and Medicaid Services ("CMS") endorses the use of the PAD in its hospital survey protocol and its inpatient psychiatric facilities quality reporting standards, recognizing that a PAD is akin to a traditional advance directive for health care and is a critical means for a patient to participate in the development and implementation of his or her plan of care.[250] CMS requires that, as a condition for participation in Medicare and Medicaid, a hospital accord a PAD the same respect and consideration given to a traditional advance directive for physical health care.[251] The Substance Abuse and Mental Health Services

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[245] Jeffrey W. Swanson et al., *Psychiatric Advance Directives and Reduction of Coercive Interventions,* J. Mental Health 255 (2008).

[246] Jeffrey W. Swanson et al., *Facilitated Psychiatric Advance Directives: A Randomized Trial of an Intervention to Foster Advance Treatment Planning Among Persons with Severe Mental Illness,* 163 Am J Psychiatry 1943 (November 2006);

[247] Christine M. Wilder et al., *Medication Preferences and Adherence among Individuals with Severe Mental Illness Who Completed Psychiatric Advance Directives,* 61 Psychiatr. Serv. 380-81 (April 2010).

[248] Michelle M. Easter et al., *Facilitation of Psychiatric Advance Directives by Peers and Clinicians on Assertive Community Treatment Teams,* 68 Psychiatric Services 717 (July 2017).

[249] *Id.*

[250] Center for Medicare & Medicaid Services (CMS), "Inpatient Psychiatric Facility Quality Reporting Manual," Version 7.0, pp.2-3; CMS, State Operations Manual Appendix A – Survey Protocol, Regulations and Interpretive Guidelines for Hospitals, Rev. 200, 02-21-20, pp.99-100.

[251] *Id.*

Administration offers information, resources,[252] and the Department of Health and Human Services requires certified community behavioral health clinic staff to educate consumers about PADs, and to develop crisis plans, including PAD's, with consumers.[253]

In New York, for Medicaid recipients who have behavioral health histories, a PAD can be uploaded through the Psychiatric Services and Clinical Knowledge Enhancement System ("PSYCKES") database. The New York State Office of Mental Health reiterates the CMS requirement in regulation for all OMH facilities participating in Medicare and/or Medicaid.[254] providers are to consider health care proxy instructions when developing treatment plans for assisted outpatient treatment.[255]

It is the experience of the Task Force that despite these steps and obligations under federal and state law, hospitals often do not honor psychiatric advance directives as they do other health care proxies and living wills. Individuals who issue instructions about their crisis care but who cannot name a trusted proxy are particularly vulnerable to not having their choices overridden because they have not conformed to the health care proxy law. A Supreme Court decision, citing to *Rivers v. Katz* and New York common law, held in 1991 that a hospital must respect an involuntarily committed patient's refusal of electroconvulsive therapy expressed while she had the capacity to refuse treatment.[256] However, this decision has had little apparent influence in the field. The perception of individuals with psychiatric histories– which is well-founded – is that advance treatment decisions will be ignored.[257] This is a significant barrier, particularly for engaging in a process that can involve revisiting painful experiences of unwanted treatment.

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[252] SAMSHA, A Practical Guide to Psychiatric Advance Directives, https://www.samhsa.gov/resource/ebp/practical-guide-psychiatric-advance-directives
[253] https://www.samhsa.gov/sites/default/files/programs_campaigns/ccbhc-criteria.pdf
[254] 14 N.Y.C.R.R. 527.7
[255] M.H.L. 9.6 (h)(5)(i)(2)
[256] *Matter of Rosa M.,* 155 Misc.2d 103 (S. Ct. New York Cty 1991).
[257] It is very likely that, pursuant to *Rivers v. Katz*, a provider can override a PAD in an emergency, such as when there is imminent danger to a patient or others in the immediate vicinity. *Rivers v. Katz*, 67 N.Y.2d 485, 495-496 (1986) (referencing the State's police powers and an OMH regulation, 14 N.Y.C.R.R. 27.8(b) which applies to OMH operated or licensed facilities). This may be the case if the individual has refused all treatments considered to be effective. However, a PAD may be equally valuable in emergencies by identifying treatments that have been effective and acceptable to the individual under emergency circumstances.

The Task Force supports efforts to expand the use of PAD's because individual choice is an important aspect of recovery as well as a foundation in New York law. Notably, New York City's newly released mental health plan includes a policy and advocacy priority to "[e]xpand provider education, training and accountability for psychiatric advanced directives, and make sure they are integrated into mental health quality improvement policies and programs," in order to "help improve health, decrease suffering, promote social connection and improve overall well-being for people living with SMI."[258]

When effectively developed, disseminated, and respected, PADs can help avoid repeated traumatizing coercive interventions, such as involuntary psychiatric admissions or restraint and seclusion. PADs should also be considered an available resource, along with other advance directives, as less restrictive alternative to guardianship. The Task Force recommends consideration of developing legislation that require recognition of PADs even without proxies in all settings, to fund peer and provider trainings to facilitate their use, and to establish means of transmission, such as registries and web-based access.

Promote Individual Autonomy through Supported Decision Making

In cases where a person is alleged to be unable to make his or her own decisions, the law has traditionally responded by empowering surrogates, including legal proxies or guardians, to act for or on behalf of the individual. Surrogate decision making regimes have increasingly been scrutinized and criticized, however, for curtailing the rights of people with disabilities to autonomy and self-determination.[259] In 2006, the United Nations Convention on the Rights of Persons with Disabilities ("CRPD") recognized legal capacity as a "human right" which persons with disabilities have the right to enjoy "on an equal basis with others in all aspects of life,"[260] and that persons with disabilities should be provided with "the support they may require in exercising their legal capacity."

[258] City of New York, *Care, Community, Action: A Mental Health Plan for New York City* (March 2023), care-community-action-mental-health-plan.pdf (nyc.gov)
[259] Emily Largent, Andrew Peterson, *Supported Decision-Making in the United States and Abroad*, 23 J. Health Care L. & Policy 271 (2021).

[260] https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html

[261]Article 12 of the CRPD is widely recognized as the cornerstone for supported decision making and is regarded by some as a mandate to abolish surrogate decision making regimes.[262]

Supported decision-making ("SDM") is a concept rooted in respect for the decision-maker's dignity, autonomy and right to self-determination. A person makes decisions with the assistance of a trusted person, or network of trusted people or supporters. Supporters assist by helping the person to understand and appreciate the options and the consequences of choices to be made, helping the person to gather information needed to decide, and to evaluate the information according to values or principles that the person feels are important. When necessary, the supporter communicates the decision to others. Essentially, SDM broadens how a person is understood to exercise decision-making, thereby advancing the person's autonomy. In 2016, with a grant from the Developmental Disabilities Planning Council ("DDPC"), Supported Decision Making New York ("SDMNY")[263] was formed as a five-year pilot project to explore the use of SDM in New York for people with developmental disabilities. In 2021, a bill to codify SDM and Supported Decision Making Agreements ("SDMA") was first proposed by OPWDD.[264] On July 26, 2022, MHL article 82 was enacted.[265] New York is now one of fourteen states, plus the District of Columbia, whose laws formalize the elements of supported decision-making agreements, including provisions that protect and enhance the autonomy of the decision-maker.[266] Article 82 will be effective upon promulgation of implementing regulations prescribing a process

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[261] *Id.* Supports will be unique to everyone and may involve "gathering relevant information, explaining that information in simplified language, weighing the pros and cons of a decision, considering the consequences of making--or not making--a particular decision, communicating the decision to third parties, and assisting the person with a disability to implement the decision." Kristin Booth Glen, *What Judges Need To Know About Supported Decision-Making, And Why*, 58 No. 1 Judges' J. 26, 27 (2019).

[262] Largent and Andrew Peterson, *Supported Decision-Making in the United States and Abroad*, *supra,* note 251 at p. 283-284.

[263] SDMNY was originally composed as a "consortium of Hunter College/CUNY; the New York Alliance for Inclusion and Innovation (formerly NYSACRA), a statewide association of provider agencies; and Arc Westchester, a large provider organization." https://sdmny.org/the-sdmny-project/history-and-goals/

[264] *See* A. 8586; S.7107 (2021).

[265] L. 2022, c. 41.

[266] In addition to New York, Alaska, California, Colorado, Delaware, District of Columbia, Illinois, Indiana, Louisiana, Nevada, North Dakota, Rhode Island, Texas, Washington, and Wisconsin each have laws establishing SDM.

for creating SDMA for people with developmental disabilities who receive or are eligible to receive OPWDD services. These agreements must follow a recognized SDM facilitation or education process.[267]

Only supported decision-making agreements of people with developmental disabilities completed in accordance with statute and regulations will be afforded full legal recognition under the statute. However, Article 82 contains two provisions signaling the potential for broader application of this decision-making model. The intent of the Legislature is to:

> "strongly urge relevant state agencies and civil society to research and develop appropriate and effective means of support for older persons with cognitive decline, persons with traumatic brain injuries, and persons with psychosocial disabilities, so that full legislative recognition can also be accorded to the decisions made with supported decision-making agreements by persons with such conditions, based on a consensus about what kinds of support are most effective and how they can best be delivered." [268]

Further, MHL § 81.15 states that "additional regulations related to this article may be promulgated by state agencies whose service populations may benefit from the implementation of supported decision-making."[269] In fact, people with psychiatric disabilities and histories in psychiatric systems very strongly advocated for Article 12, with the goal of curbing forced interventions based upon perceived or actual decision-making impairments.[270] Countries which ratified the U.N. Convention, and are therefore obligated to reduce reliance on guardianship,

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[267] Regarding the effective date of MHL article 82, the chapter amendment provides: "This act shall take effect ninety days from the date that the regulations issued in accordance with section one of this act appear in the New York State Register, or the date such regulations are adopted, whichever is later; and provided that the commissioner of mental hygiene shall notify the legislative bill drafting commission upon the occurrence of the appearance of the regulations in the New York State Register or the date such regulations are adopted, whichever is later, in order that the commission may maintain an accurate and timely effective data base of the official text of laws of the state of New York in furtherance of effectuating the provisions of section 44 of the legislative law and section 70–b of the public officers law."

[268] MHL § 82.01 (d).

[269] MHL § 81.15; *see,* Morgan K. Whitlatch and Rebekah Diller, *Supported Decision-Making: Potential and Challenges for Older Persons*, 72 Syracuse Law Rev. 165 (2022).

[270] Tina Minkowitz, *Reparation for Psychiatric Violence: A Call to Justice,* in Mental Health, Legal Capacity and Human Rights (2021).

have developed SDM more widely for people who have psychiatric disabilities, than has the United States.[271] However, in the United States, supported decision-making is naturally found among social networks for people with psychiatric disabilities. Clubhouses are intentional communities of peers who share common purpose and tasks and promote individual development and recovery in a supportive environment of trusting relationships. These are natural environments for supported decision-making to develop from trusting relationships.[272] Texas and California have each developed supported decision-making projects which promote supported decision-making through peer specialists and networks to further development of psychiatric advance directives. Crisis planning, such as Wellness Recovery Action Plans ("WRAP") plans,[273] also often involves identifying supporters and assistance with decision-making when needed. While these projects and networks generally do not rely on formal agreements, the process is just as valuable and important to recovery.

The Task Force recommends amending to Article 81 to explicitly include supporters for decision-making as "available resources" as defined under MHL 81.03(e), when considering the need for and/or scope of guardianship.[274] Informal SDM, as well as formal agreements that may differ from Article 82 should be recognized. The Task Force urges OMH to convene a working group to review supported decision-making processes in New York State, to promote peer

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[271] Countries include Canada, Australia, Sweden, United Kingdom, India, Bulgaria, *See* Mental Health, Legal Capacity and Human Rights (2021).

[272] Joel D. Corcoran, Cindy Hamersma, and Steven Manning, *The Clubhouse Model: A Framework for Naturally Occurring Supported Decision Making,* in Mental Health, Legal Capacity and Human Rights (2021).

[273] WRAP is a recovery-oriented plan to manage psychiatric conditions based on five concepts: hope, education, person responsibility, self-advocacy and support. In 1997, an eight-day peer support retreat led by Mary Ellen Copeland identified strategies to prevent emotional and mental breakdown and maintain positive mental health, including: tools that can be used every day to maintain wellness: words to describe wellness: unexpected things that can be "triggers": early warning sign that things are "off": how to know when things have gotten much worse and what to do; action plans for times that are overwhelming; and what to include in a crisis plan or advance directive. The Copeland Center for Wellness and Recovery is a peer-run nonprofit founded in 2002 to spread and meet the growing demand for WRAP Co-Facilitation workshops, empowering people from diverse communities to use WRAP for their own personal recovery journeys.
https://www.welnessrecoveryactionapplan.com/what-iswrap/the-wrap-story
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[274] Additional recommendations to reform Article 81 appear in the next section.

supports and social environments that are conducive to supported decision-making, and to explore the possibility of a pilot project relating SDM and psychiatric advance directives.[275] The Task Force further urges collaboration between OMH and OPWDD to further the use of SDM for dually-diagnosed individuals, including any necessary reasonable accommodations, and to address the needs of the dually-diagnosed when developing the upcoming OPWDD regulations implementing Article 82.

Guardianship Reform

Article 81 of the MHL

The general guardianship statute in New York is codified at Article 81 of the MHL. The purpose of Article 81 is to satisfy either personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person, which takes in account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life. Article 81 was the careful product of study and review by the New York State Law Revision Commission. Its procedural and substantive due process safeguards were a vast improvement from the old conservator/committee framework of and have withstood the test of time.

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[275] When expanding supported decision-making models reports and evaluations of current models should be considered. For example, an evaluation of the SDMNY pilot commissioned by the Developmental Disabilities Planning Council was completed by the Burton Blatt Institute ("BBI") of Syracuse University in 2022. The BBI report, entitled *Looking Back, Looking Forward: An Evaluation of the Surrogate Decision-Making Project with Recommendations to Increase Knowledge, Use, and Acceptance of Supported Decision Making in New York,* lauds the efforts of New York in enacting an SDM statute, but offers a critical examination of certain provisions of the new article 82 of the MHL. Among other things, the BBI report expresses concern that requiring a facilitation process pursuant to OPWDD regulations for an SDMA agreement to be legally recognized by third parties may actually limit rights in cases where people with developmental disabilities are capable of making their own decisions without facilitation. As SDM is implemented for people with developmental disabilities and considered for expansion to other populations, further study should be undertaken. Refinement of the laws and regulations promoting the laudable purpose of SDM is in the public interest.

That said, Task Force members are aware of frequent inquiries from people adjudicated to need guardians who are dissatisfied with their guardians. The complaints often arise in the metropolitan New York City area and involve community guardian programs, but upstate, inquiries of this nature are received, as well. Under MHL § 81.36, a person subject to guardianship or anyone concerned with his or her welfare can request a hearing on the continued need for guardianship powers[276], and the burden of proof is on the guardian to show by clear and convincing evidence that the incapacitated person is still incapable of making reasoned treatment decisions and the guardian's powers are still necessary.[277] While there is a statutory remedy under MHL to modify or terminate guardianships, it is not practical for a person to invoke the remedy, particularly if that person is indigent and unable to retain counsel. The Task Force concerns are shared by the NYSBA Disability Rights which identified as one of its 14 general principles of guardianship that "a person under guardianship has a right to seek review of the guardianship and restoration of rights. There must be a clear process to initiate restoration that permits the person under guardianship to initiate and obtain access to counsel at public expense."[278]

The Task Force offers two recommendations. First, article 81 court examiners should receive training to restore a matter to the guardianship calendar should the examiner receive an inquiry that a person subject to guardianship seeks to modify or terminate the order of appointment. Practices vary around New York State, but some examiners do not engage in oversight relative to personal needs, only property. Another possible avenue for consideration is the development of a form letter or simplified motion procedure so that a person adjudicated to need a guardian can request the appointment of counsel. Counsel could then investigate the matter, advise their client on whether pursuit of termination or modification of the order is likely to be effective, and represent the person under guardianship should she wish to proceed wish to proceed to a hearing. For those people who cannot afford counsel, an attorney should be assigned under County Law Article 18-B[279] or the Mental Hygiene Legal Service could be appointed where its jurisdiction is implicated. In short, in post-adjudication circumstances, particularly where a person may have consented to the appointment of a guardian and is now dissatisfied with the guardian, there ought to be a path to return to court

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276 *See*, MHL § 81.36 (b), (c); § 81.06(a)(6).

277 MHL § 81.36 (d).

278 *See*, Sheila E. Shea, *Guardianship's Article 17-A: Marooned in Time and in Need of Reform*, 95-Feb N. Y. St. B. J. 26, 30 (2023).

279 *See, Matter of Marie H*, 89 NY 2d 889

with representation by counsel. Thus, in an 81.36 proceeding, the individual seeking termination or modification should be afforded the same procedural protections and right to counsel as in the hearing for appointment of a guardian in the first instance.

Article 17-A of the SCPA

A discrete guardianship statute exists in New York that may be invoked for people alleged to require a guardian by reason of an intellectual or other developmental disability or traumatic brain injury ("TBI"). That statute, codified at Article 17-A of the Surrogate's Court Procedure Act ("SCPA"), is a plenary statute the purpose of which at its inception in 1969 was largely to permit parents to exercise continued control over the affairs of their adult children with disabilities. In essence, the statute rested upon a widely embraced assumption that "mentally retarded" people were perpetual children.

Under New York law, a person with developmental disabilities (or a TBI) can be subject to either guardianship statute, despite the considerable substantive and procedural variations between Article 81 and Article 17-A. An injustice arises, as a result, because a petitioner for guardianship can choose between two statutes and petitioner's choice will determine the due process protections to be afforded to a respondent with developmental disabilities.

Article 17-A is marooned in time and a counterweight to progressive principles that typically emerge in New York State, and which are reflected in the newly enacted MHL Article 82. Last year, the NYSBA Disability Rights Committee issued a report arguing that there is an urgent need to reform Article 17-A.[280] The committee maintained that there are 14 general principles that a guardianship statute for adults with intellectual and developmental disabilities should recognize:

> 1. Neither the alleged developmental disability nor the age of the individual alleged to have a developmental disability should be the sole basis for the appointment of a guardian. Rather, the individual's ability to function in society with available supports should be the focus of the court's inquiry into the need for a guardian.

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[280] Report of Disability Rights Committee, *Guardianship for People with Developmental Disabilities*: *Examination and Reform of Surrogate's Court Procedure Act Article 17-A is a Constitutional Imperative* (Joe Ranni, Alison Morris, Co-Chairs) (2021) Appendix Document 11

2. The appointment of a guardian must be designed to encourage the development of maximum self-reliance and independence in the individual. The standard for appointment should be that the person is unable to provide for personal needs and/or property management with available supports, and the person cannot adequately understand and appreciate the nature and consequences of such inability.

3. The appointment of a guardian must be necessary and the least restrictive form of intervention available to meet the personal and/or property needs of the individual as determined by a court.

4. A guardianship petition must allege the other available resources for decision-making, if any, that have been considered by the petitioner and the petitioner's opinion as to their sufficiency and appropriateness, or lack thereof. Other resources include, but are not limited to, powers of attorney, health care proxies, trusts, representative and protective payees and supported decision-making.

5. All persons alleged to be in need of the appointment of a guardian are entitled to due process protections including, but not limited to, notice of the proceeding in plain language and right to counsel of their own choosing or the appointment of counsel guaranteed at public expense.[281]

6. A guardian should not be appointed absent a hearing where the person alleged to be in need of a guardian is present. The person's appearance at the hearing may be dispensed with in exceptional circumstances at the court's discretion and in accordance with statutory standards. The person has the right to a jury trial.

7. The need for the guardianship must be established by clear and convincing evidence of the person's functional limitations that impair the person's ability to provide for personal needs; the person's lack of understanding and appreciation of the nature and consequences of his or her

[281] Some courts will appoint a guardian ad litem for the respondent in a 17-A proceeding. The Task Force notes anecdotally that many GALs are not familiar with the needs of people with developmental disabilities and would benefit from training, especially now with changes in the law that will be forthcoming following the enactment of the supported decision making statute. We take this opportunity to comment and recommend that OCA update its guidelines for attorneys accepting guardian ad litem appointments. The guidelines were last revised twenty years ago, in 2003.

functional limitations; the likelihood that the person will suffer harm because of the person's functional limitations and inability to adequately understand and appreciate the nature and consequences of such functional limitations; and necessity of the appointment of a guardian to prevent such harm.

8. The powers of the guardian should be identified in the order/decree issued by the court and tailored to meet the needs of the individual in the least restrictive manner possible. The person subject to guardianship retains any powers not expressly conveyed to the guardian.

9. The individual must be included in all decisions to the maximum extent possible and practicable, in order to encourage autonomy. The guardian should be encouraging the development of maximum self-reliance and independence in the individual.

10. The duties of the guardian should be specified in the order or decree. Among other things, the guardian's duty is to make decisions that give maximum consideration to the individual's preferences, wishes, desires, and functioning level. A guardian should protect the individual from unreasonable risks of harm, while supporting and encouraging the individual to achieve maximum autonomy.

11. The duration of a guardianship should be determined by the court and conform to the proof adduced at the hearing. For instance, time limited guardianships may be appropriate including where a guardianship is sought for a young adult between the ages of 18 and 25. Where a guardianship of limited duration has been ordered by the court, any application to extend the guardianship should require proof by clear and convincing evidence by the petitioner that it is necessary to continue the guardianship.

12. A person under guardianship has a right to seek review of the guardianship and restoration of rights. There must be a clear process to initiate restoration that permits the person under guardianship to initiate and obtain access to counsel at public expense.

13. The court should retain jurisdiction over the guardianship and entertain modification and termination proceedings where the burden of proof shall be on the person objecting to discharge or seeking increased powers for the guardian rather than on the respondent.

14. The person or entity appointed guardian must be subject to monitoring and oversight by the court. For instance, guardians should periodically file reports as to their activities.

The 14 principles enunciated above are contained within the article 81 guardianship statute. Article 17-A, in contrast, is devoid of most of these essential and fundamental due process safeguards.

While SCPA Article 17-A cries out for reform, it remains a surrogate decision-making remedy in New York State. As stated in the Practice Commentaries to the article, the statute is revered by parents who often commence guardianship applications without the assistance of counsel and at less expense than a typical Article 81 proceeding. [282]Also, many 17-A proceedings are not challenged, causing some to argue that the relative ease in proceeding be retained. Nonetheless, even where a guardianship proceeding is not contested, the relief granted by the court should be informed by the functional abilities of the respondent and constitute the least restrictive form of intervention. Recently reported cases where SCPA article 17-A guardianships were terminated reveal that the plenary nature of the 17-A adjudication is often not consistent with the lived experience of people with developmental disabilities.[283] With the enactment of MHL Article 82, New York now has both supported and surrogate decision-making models for a discrete population: people with developmental disabilities. SCPA Article 17-A and MHL Article 82 stand in stark contrast to one another. Article 17-A results in a plenary adjudication of the need for a guardian with a complete loss of civil rights. Article 82, by comparison, recognizes that "a person's right to make their own decisions is critical to their autonomy and self-determination" and that people with developmental disabilities "are often denied that right because of stigma and outdated beliefs about their capability." [284]

Given the passage of MHL Article 82, the Task Force concludes that it is time to amend and modernize SCPA Article 17-A. The Task Force recommends that the Article 17-A guardianship statute should provide that, where supported decision-making can meet the individual's needs, guardianship is to be avoided as

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282 *See* Margaret Valentine Turano, Practice Commentaries, McKinney's Cons. Laws of N.Y. SCPA 1750: "Admittedly, the Article 17-A guardianship is not for every disabled person ... On the other hand, the Article 17-A guardianship gives modest families access to affordable judicial process."

283 *See In re Richard S.H.,* 2022 N.Y. Slip. Op. 22328 (Surr. Ct., Westchester Co. Oct. 26, 2022). The respondent in this case attended college and graduate school and aspired to a career as a social worker to assist children with autism.

284 MHL § 82.01.

unnecessary. Further, because Article 17-A guardianship remains an available remedy in New York, guardians should be informed of supported decision-making and be guided by its principles. Finally, Article 17-A must be reformed to ensure that the constitutional rights of people subject to the statute are protected. This would include clarifying the rights of people who are currently subject to the statute to seek modification or termination of the guardianship with the burden of proof being on the guardian to demonstrate the need for the guardianship to continue. People who wish to pursue modification or termination of 17-A guardianships should be afforded access to their court files and the right to counsel. The Task Force also recommends that OCA provide forms and instructions on its website addressing the right of a person to seek restoration of their rights. Currently, the OCA website only has forms which assist a person seeking to petition for guardianship, while offering no alternative information for people already subject to the statute who desire to modify or terminate a guardianship.

Promote Single Transaction Remedies

An underutilized provision of New York's adult guardianship law, MHL § 81.16(b), permits a judge to "authorize a [necessary] transaction or transactions" that can solve a single problem or a series of interrelated problems that stem from a health concern. Informally known as a "*one-shot*" provision, section 81.16(b) can, for example, meet a health care provider's need for informed consent to a medical procedure. Using section 81.16(b) thus avoids the imposition of guardianship, permits a person to retain all their rights, personhood, and dignity, while offering a solution to the vulnerable person's immediate health concerns and, importantly, takes into consideration that individual's specific, related challenges. In addition to decisions that are directly related to a person's health and medical treatment, a single transaction solution can also encompass related issues that impact on a person's health, such as preserving that person's home from foreclosure, or securing an inheritance and that makes it possible to pay for necessities. For clients served in the OMH and OPWDD systems, single transaction dispositions have been used very effectively to establish special needs trusts, in those instances where the person may have received an inheritance or a retroactive SSA benefit. The Task Force recommends that OCA encourage through education of the Bench and Bar the single transaction disposition, where appropriate, to avoid unnecessary guardianships.

Article 9 of the Mental Hygiene Law

Removal from the Community and Admission to Psychiatric Hospitals

The principal statute governing inpatient psychiatric hospitalization in New York State is article 9 of the MHL. In 2019, there were over 120,830 legal status admissions to hospitals in New York State.[285] It is well recognized that involuntary civil commitment constitutes a "massive curtailment of liberty," which is constitutionally permissible only if stringent substantive and procedural due process standards are met.[286] Even the "willing patients" (voluntary and informal in New York) are not immune from such loss of liberty, as there is always the potential for these individuals to be converted to an involuntary legal status (e.g., by improperly classifying as voluntary those patients who are unable to understand or exercise their rights or by applying to the court for involuntary retention). They, too, are entitled to constitutional protections.[287]

In general, New York subscribes to a medical model for inpatient admission rather than a strictly legal or judicial model. Voluntary patients must be suitable and willing to be admitted to the hospital.[288] Involuntary admission for a period of up to 60 days is accomplished solely on the certifications of examining physicians, without mandatory judicial review.[289] During this initial admission period, judicial review is elective, and a challenge to involuntary hospitalization must be affirmatively exercised by the patient or others.[290] Mandatory and periodic judicial review applies to admissions that exceed 60 days.[291]

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[285] As reported to the Mental Hygiene Legal Service in accordance with MHL § 9.11. There are parallel provisions codified at Article 15 of the MHL governing admissions to developmental centers in New York State. There are only two developmental centers currently operating in our state which receive people with developmental disabilities on legal status.

[286] *Humphrey v. Cady*, 405 U.S. 504 (1972).

[287] *In re Buttonow*, 23 N.Y.2d 385 (1968).

[288] MHL § 9.13. MHL § 9.17 provides that In order for a person to be suitable for admission to a hospital as a voluntary or informal patient, or for conversion to such status he must be notified of and have the ability to understand the following: 1. that the hospital to which he is requesting admission is a hospital for the mentally ill. 2. that he is making an application for admission.3. the nature of the voluntary or informal status, as the case may be and the provisions governing release or conversion to involuntary status.

[289] MHL § 9.27, 9.37.

[290] MHL § 9.31.

[291] MHL § 9.33.

Article 9 sets forth the legal requirements for civil admissions to a hospital. The statutory scheme, in effect since 1965, establishes a two-tiered or two-stage process for admission and retention of patients in hospitals. The first stage employs the medical model, allowing up to 60 days' confinement without mandatory judicial review. For patients in need of continued involuntary inpatient hospitalization beyond 60 days, the second stage provides for periodic court orders of retention. It has been argued that the medical model is constitutionally impermissible, or at least suspect; and indeed, most states do afford every involuntary patient a probable-cause hearing within five to 15 days of admission. However, both the New York Court of Appeals and the United States Court of Appeals for the Second Circuit have held that New York's statutory scheme is constitutional due to its substantial procedural due process protections, including the availability of the Mental Hygiene Legal Service (hereinafter "MHLS").[292]

There are several means of involuntary admission under New York's medical model. These sections of the MHL are procedurally and substantively intricate.[293] To the extent that such stringent, detailed requirements make involuntary admission less than easy, they reflect the gravity of the liberty interests at stake. Full compliance with statutory requirements is expected.[294] The Task Force does not endeavor to explain the entirety of the procedural and substantive requirements to sustain civil admissions in New York State and refers the reader to other resources for that purpose.[295] However, during the period of the Task Force's investigation, there was heightened attention to the processes that are used to remove people from the community and transport them to hospitals for psychiatric evaluation and potential admission. Thus, this Report addresses the standards for emergency admission (Section 9.39 of the MHL) and the statutory provisions that permit a

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[292] *See*, *Project Release v. Prevost*, 551 F. Supp. 1298 (E.D.N.Y. 1982), *aff'd*, 722 F.2d 960 (2d Cir. 1983); *Fhagen v. Miller*, 29 N.Y.2d 348 (1972). The MHLS (formerly the Mental Health Information Service), operates pursuant to Article 47 of the MHL and is an auxiliary agency of the Appellate Divisions. The Service has several functions which are defined by statute and uniform regulations of the Appellate Divisions. These duties include, among other things, to study and review the admission and retention of all patients, and to provide legal counsel for its clients in judicial proceedings concerning admission, retention, transfer, care and treatment.

[293] *See Project Release v. Prevost*, *supra* note 373.

[294] *See DeLia v. Munsey*, 26 N.Y.3d 124 (2015).

[295] *See Rights in Facilities,* included in New York State Bar Association publication Representing People with Disabilities, available online at _MHLS Articles (nycourts.gov)

person to be removed from the community for transport and evaluation for admission.

Emergency Admission for Immediate Observation, Care and Treatment

For a period of up to 15 days, a hospital approved by OMH may admit any person who, upon the examination of a staff physician, is alleged to have a mental illness for which immediate observation, care and treatment in a hospital is appropriate, and which likely would result in serious harm to that person or others.[296] "Likelihood to result in serious harm" is defined as:

> a substantial risk of physical harm to himself as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that he is dangerous to himself; or
>
> a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm.[297]

While the emergency admission is valid for 15 days, the patient may not be retained for more than 48 hours, unless a staff psychiatrist confirms the need for hospitalization.[298] At any time after admission, the patient, a relative or friend, or the MHLS may demand a hearing, which shall be held as soon as practicable, but no more than five days after the court receives the request. The court must determine the matter in accordance with the foregoing standard for admission. Involuntary hospitalization beyond 15 days may be continued by the execution of a two-physician certificate pursuant to Section 9.27 of the MHL.

An additional class of facility called a comprehensive psychiatric emergency program ("CPEP") was created to deal with the large number of patients, particularly in the downstate region, who were held in hospital emergency rooms for extended periods of time while awaiting the availability of regular hospital admission. The first such program began in 1990.[299] Section 9.40 of the MHL provides for the admission of patients who are dangerous to self or others, as defined above. The initial examination must be made within six hours, and it may result in admission for up to 24 hours, with an extension to 72 hours based

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296 MHL § 9.39.

297 MHL § 9.39.

298 *Id.*

299 L. 1989, c. 723

upon a confirming examination by a second physician. Notice and hearing provisions are set forth in Section 9.30 and continued hospitalization is permitted by means of Section 9.39 or 9.27.

Removal Provisions

People may be removed from the community and brought to a 9.39 hospital or CPEP for evaluation and if appropriate, for involuntary admission under section 9.39, by:

- By peace officers and police officers;[300]
- By order of courts of inferior or general jurisdiction; [301]
- By order of the local director of community services; [302]
- By direction of a qualified psychiatrist who is treating or supervising the treatment of the patient at an outpatient mental health clinic or program;[303]
- By the director of a general hospital, as defined in Article 28 of the PHL, that does not have a psychiatric unit;[304]
- By an approved mobile crisis outreach team.[305]

The common standard for all removals is that the person: "appears to be mentally ill and is conducting himself or herself in a manner which is likely to result in serious harm to the person or others." The person may be transported to a 9.39 hospital or a CPEP. In addition, a 2021 chapter amendment to Section 9.41 provides that

> "a person otherwise determined to meet the criteria for an emergency assessment pursuant to this section may voluntarily agree to be transported to a crisis stabilization center under section 36.01 … for care and treatment and, in accordance with this article, an assessment by the crisis stabilization center determines that they are able to meet the service needs of the person."[306]

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[300] MHL § 9.41.
[301] MHL § 9.43.
[302] MHL § 9.45.
[303] MHL § 9.57.
[304] MHL § 9.57.
[305] MHL § 9.58.
[306] L.2021, c. 57, pt. AA, § 4, eff. Oct. 1, 2021. A crisis stabilization center shall serve as a voluntary and urgent service provider for persons at risk of a mental health or substance abuse

On February 18, 2022, OMH Commissioner Ann Marie T. Sullivan and Chief Medical Officer Thomas Smith issued interpretive guidance which set forth the circumstances under which courts have determined that the MHL "permits persons who appear to be mentally ill and who display an inability to meet basic living needs" to be mandated into emergency psychiatric assessments and emergency and involuntary inpatient psychiatric admissions.[307] This document was issued by OMH in connection with New York State Governor Kathy Hochul's and New York City Mayor Eric Adams' release of a joint plan to remove people from the New York City subway system.[308] The OMH guidance document does not reference the standards that require probable cause and danger to self or others that underpin a mental hygiene "arrest" under Section 9.41.[309] However, the OMH guidance does specify that for purposes of a Section 9.41 removal, the refusal or inability of a person to meet his or her essential needs for food, shelter, clothing or health care must be immediate; that is, the refusal or inability is likely to result in serious harm if there is no immediate hospitalization.[310]

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crisis or who are experiencing a crisis related to a psychiatric and/or substance use disorder that are in need of crisis stabilization services. Each crisis stabilization center shall provide or contract to provide person centered and patient driven crisis stabilization services for mental health or substance use twenty-four hours per day, seven days per week, including but not limited to: (i) Engagement, triage and assessment; (ii) Continuous observation; (iii) Mild to moderate detoxification; (iv) Sobering services; (v) Therapeutic interventions; (vi) Discharge and after care planning;(vii) Telemedicine; (viii) Peer support services; and (ix) Medication assisted treatment.

[307] *See,* Interpretive Guidance for the Involuntary and Custodial Transportation of Individuals for Emergency Assessments and for Emergency and Involuntary Inpatient Psychiatric Admissions available online at: https://omh.ny.gov/omhweb/guidance/interpretive-guidance-involuntary-emergency-admissions.pdf

[308] *See,* Subway Safety Plan online at: https://www1.nyc.gov/assets/home/dowloads/pef/press-releases/2022.the-subway-safety-plan.pdf.

[309] *See, Anthony v. City of New York,* 339 F. 3d 129 (2d Cir. 2003).

[310] https://omh.ny.gov/omhweb/guidance/interpretive-guidance-involuntary-emergency-admissions.pdf

On November 29, 2022, Mayor Adams delivered an "Address on the Mental Health Crisis in New York City".[311] Referred to by some as the "NYC Removal Directive," New York City sought to provide guidance to police officers who may be called upon to decide whether a person should be transported to a hospital for evaluation. The announcement prompted objections by, among others, the Association of the Bar of the City of New York.[312] The City Bar maintained that the NYC Removal Directive was vague and raised significant legal issues to ensure the City's compliance with City, State, and Federal anti-discrimination laws, as well as State laws governing mental health treatment and the United States Constitution. The City Bar testimony quoted reports that the police effectuated more than 1,000 removals under Sections 9.41 and 9.58 of the MHL in 2022 before the Removal Directive was issued. The City Bar testimony also concludes that the OMH guidance aligns with case law interpreting Section 9.41 arrests with respect to both the probable cause standard and the requirement of an inability to meet basic needs such that a person represents a present risk of harm to self. The NYC Removal Directive provides examples of reasonable indicia that could result in a removal to include – serious untreated physical injury, unawareness or delusional misapprehension of surroundings, or unawareness or delusional misapprehension of physical condition or health. The standards are argued by the City Bar to be vague, broad, undefined and untethered from case law while missing the temporal urgency standard found in the OMH guidance.

The Task Force is persuaded by the City Bar's analysis of existing statutory and case authorities and likewise would recommend adherence to OMH guidance as the proper standard to apply when removal and transport for evaluation and possible involuntary admission to a hospital is under consideration. Our members are also influenced by the urging of advocates that crisis stabilization centers authorized by MHL § 36.01, which are voluntary alternatives to a psychiatric emergency room, remain largely untested in New York State and should be funded and promoted as a matter of policy.

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311 Transcript available online at: https://www.nyc.gov/office-of-the-mayor/news/871-22/transcript-mayor-eric-adams-delivers-address-mental-health-crisis-new-york-city-holds

312 *See,* Association of the Bar of the City of New York, Written Testimony on Mental Health Removals and Mayor Adams Recently Announced Plan. Appendix Document 12

Assisted Outpatient Treatment

On January 3, 1999, Kendra Webdale was pushed to her death before an oncoming subway train in New York City by Andrew Goldstein, a person with a severe mental illness who was untreated. Responding to this tragedy, the Legislature enacted Mental Hygiene Law § 9.60.[313] At that time of its enactment, nearly 40 other states had enacted a system of assisted outpatient treatment, or "AOT," pursuant to which people with mental illness unlikely to survive safely in the community without supervision may be subject to court-ordered mental health treatment. Before a court may issue an order for assisted outpatient treatment, the statute requires that a hearing be held at which several criteria must be established, each by clear and convincing evidence.[314] Significantly, the statute has certain prerequisites limiting its application to people who have a history of lack of compliance with treatment for mental illness that has either (a) at least twice within the last 36 months been a significant factor in necessitating hospitalization, or receipt of services in a forensic or other mental health unit of a correctional facility or a local correctional facility, not including any period during which the person was hospitalized or incarcerated immediately preceding the filing of the petition, or (b) resulted in one or more acts of serious violent behavior toward self or others or threats of, or attempts at, serious physical harm to self or others within the last 48 months, not including any period in which the person was hospitalized or incarcerated immediately preceding the filing of the petition. The court must also find by clear and convincing evidence that the assisted outpatient treatment sought is the least restrictive treatment appropriate and feasible for the respondent.[315] In 2022, one of the prerequisites was amended to permit an AOT application to be filed when an assisted outpatient treatment order has expired within the last six months, and:

> "…since the expiration of the order, the person has experienced a substantial increase in symptoms of mental illness and such symptoms substantially interferes with or limits one or more major life activities as determined by a director of community services who previously was required to coordinate and monitor the care of any individual who was subject to such expired assisted outpatient treatment order. The applicable director of community services or

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313 L. 1999, c. 408 "Kendra's Law."

314 *See,* MHL § 9.60 (c).

315 *See,* MHL § 9.60 (j)(2).

> their designee shall arrange for the individual to be evaluated by a physician. If the physician determines court ordered services are clinically necessary and the least restrictive option, the director of community services may initiate a court proceeding."[316]

If the individual subject to assisted outpatient treatment later fails or refuses to comply with treatment as ordered by the court, if efforts to solicit voluntary compliance are made without success, and if in the clinical judgment of a physician, the respondent may be in need of either involuntary admission to a hospital or immediate observation, care and treatment pursuant to standards set forth in the Mental Hygiene Law, then the physician can seek the respondent's temporary removal to a hospital for examination to determine whether hospitalization is required.[317]

Kendra's Law is not permanent and next expires in 2027.[318] The 2005 reauthorization of the AOT statute required an independent evaluation of the implementation and effectiveness of the AOT program in New Your State.[319] Upon issuing the report in 2009, researchers stated that as designed, AOT can be used to prevent relapse or deterioration before hospitalization is needed. However, in nearly three-quarters of all cases, it was used as a discharge planning tool for hospitalized patients. Thus, AOT was largely used as a transition plan to improve the effectiveness of treatment following a hospitalization and as a method to reduce hospital recidivism. Further, most of New York State's experience with AOT originates in the New York City region where approximately, at the time the report was generated, 70% of all AOT cases were found. AOT was systematically implemented citywide in New York City with well-delineated city-wide policies and procedures. In the remainder of the state, AOT was implemented and utilized at the discretion of each county. The researchers noted that in some counties, AOT had been rarely used; in several it had not been used at all. Based on key

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316 L.2022, c. 56, pt. UU, subpt. H, § 2, eff. April 9, 2022.

317 *See,* MHL § 9.60 (n).

318 Expires and deemed repealed June 30, 2027, pursuant to L.1999, c. 408, § 18.

319 Following a competitive request for proposal, the contract was awarded to the Services Effectiveness Research Program in the Department of Psychiatry and Behavioral Sciences at Duke University Medical Center with a subcontract to Policy Research Associates, Inc. of Delmar, New York. The evaluation team was led by Principal Investigators Marvin Swartz, M.D., and Jeffrey Swanson, Ph.D., of Duke and Henry Steadman, Ph.D., and Pamela Clark Robbins of PRA. The final report was issued on June 30, 2009.

stakeholder and recipient interviews and on AOT program data, the researchers found considerable variability in how AOT is implemented across the state, but strong uniformity in how it is implemented in New York City.

The Task Force members recognize that any conversation about reform of the mental health system in New York State must include the assisted outpatient treatment statute. The AOT remedy continues to be employed primarily in the New York City area. Data gathered by the Mental Hygiene Legal Service reflects that 4,138 AOT applications were filed in 2019, with the vast majority of cases arising in the First and Second Judicial Departments.[320] Racial disparities persist in the utilization of the statute with 44% of AOT recipients being Black and 32% Latino in New York City.[321] Duke University concluded in 2009, with similar data, that the racial disparities were a function of poverty, lack of insurance, access to private mental health treatment, and history of psychiatric hospitalizations and not racial discrimination.[322] The substantial racial disparities are nonetheless disturbing indicators of continued disparities in resources and disengagement with health care systems. While the legislative response to the mental health crisis has been to seek to expand eligibility criteria as reflected in the 2022 chapter amendment, our observation is that the law, as written, is not an impediment to accessing treatment, but rather, the lack of community resources remains a persistent problem. Indeed, counties in their self-assessments consistently noted that AOT petitions were the priority for scarce resources. [323]Finally, the Task Force heard from advocates who continue to insist that voluntary treatment options, including those with peer bridging, should be funded and enhanced to reduce reliance on more coercive interventions such as AOT. The perception of coercion, also clearly expressed in comments to OMH town halls [324]was also evident in the Duke University surveys. We agree with this observation and certainly find it consistent with the statutory requirement that

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[320] Based upon statistics maintained by the Mental Hygiene Legal Service which is served with every Kendra's Law application and appears as counsel for the respondent unless private counsel is retained.

[321] *See,* Association of the Bar of the City of New York, testimony, *supra,* note 310 , *citing*, What's Behind the Increased Use of Kendra's Law in New York City? https://www.gothgazette.com/city/11599-increase-kendra's-law-new-york-city

[322] Marvin S. Swartz*, et.al.*, *New York State Assisted Outpatient Treatment Evaluation*, Duke University School of Medicine (June 30, 2009).

[323] https://www.clmhd.org/contact_local_mental_hygiene_departments/

[324] OMH, Local Services Plan and Statewide Town Hall Analysis, September 2022. https://my.vimeo.co/v/1j6edpo3-9zg8pjm

least restrictive treatment options appropriate to the needs of the individual must be exhausted before AOT is imposed by court order.

Provide a Right to Counsel for Respondents in CPLR Article 63-a Proceedings

In 2019, New York State enacted its Extreme Risk Protection Order ("ERPO") statute, CPLR Article 63-a, also known as the Red Flag Law. The law allows the court to issue an ERPO where the petitioner establishes, "by clear and convincing evidence, that respondent is likely to engage in conduct that would result in serious harm to himself, herself or others, as defined in paragraph one or two of subdivision (a) of section 9.39 of the mental hygiene law." [325]If granted, an ERPO requires the respondent to surrender any firearm, rifle, or shotgun in their possession, directs the temporary suspension of the respondent's existing firearm license and ineligibility for such a license, and prohibits the respondent from purchasing or possessing such weapons.

The connection between mental illness and the enactment of New York's ERPO law is clear, including the Legislature's decision to incorporate the definition in MHL § 9.39 into Article 63-a. As noted by the NYSBA Task Force on Mass Shootings and Assault weapons:

> "There are various steps that can be taken to prevent individuals suffering from serious mental illness from having access to firearms thereby minimizing the incidence of mass shootings and the devastating injuries and loss of life that occur, as well as the self-inflicted harm that is often a more probable outcome. … [T]he Task Force examines and makes recommendations concerning three issues of fundamental importance to the proper balance of public safety and individual rights in this area. The first is the subject of so-called "red flag" laws or Extreme Risk Protective Order Laws. "[326]

NYSBA's Criminal Justice Section, the Committee on Disability Rights, and the Committee on Mandated Representation have raised several due process concerns regarding the ERPO law, including the failure to provide a right to counsel to respondents who are financially eligible for counsel.[327] On December

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[325] CPLR 6343

[326] Report of the New York State Bar Association Task Force on Mass Shootings and Assault Weapons (2020)

[327] Report of the New York State Bar Association Task Force on Mass Shootings and Assault Weapons (2020)

22, 2022, the Monroe County Supreme Court ruled in *G.W. v. C.S.*,[328] that CPLR Article 63-a is unconstitutional, in part due to the failure to provide a right to counsel, noting that similarly situated respondents in MHL § 9.39 and Article 10 proceedings are entitled to counsel.[329] The Task Force supports amendment of CPLR Article 63-a to provide a right to counsel. This would ensure that those who are alleged to meet the standard in MHL 9.39 have legal representation and are able to raise other due process issues.

Repeal and Replace Mental "Hygiene"

This report led with a note about language, and we reiterate here that language matters. Negative attitudes and beliefs toward people who have a mental health condition are pervasive. [330] The Task Force urges that non-stigmatizing and respectful language be incorporated into our public discourse, written work and in judicial proceedings. Throughout this report we have endeavored to adhere to these principles. All stakeholders in the delivery of essential services and justice would benefit from training on the tenants of procedural justice and the use of person-first language so we can emphasize the person rather than the condition or an illness. Having said that, we are burdened in New York with the Mental "Hygiene" Law. As Task Force Member Chris Liberati-Conant so cogently explained in his 2023 *Journal* article[331] the mental hygiene movement that gave its name to our law was closely associated with eugenics. The term "mental hygiene" is confusing and potentially offensive to anyone who does not know its history, and to who anyone who does, it is an unpleasant reminder of the early 20th century psychiatric establishment that sought to eradicate the individuals to whom it applies. To what might replace the term, if repealed, those who are subject to the law should be heard. To encompass the three autonomous offices and populations served by them, a name change could be as simple as the Department of Mental Hygiene becoming the Department of Mental Health, Developmental Disabilities and Addiction Services and Support. The "Mental Hygiene Law" could become the "Mental Disability Law" because of the

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[328] 78 Misc. 3d 289. Another court has followed suit, in Orange County, and declared the statute unconstitutional for lack of due process protections (*see, R.M. v. C.M.*, 2023 N.Y. Slip. Op. 23088).

[329] *Id.*

[330] Mental health: Overcoming the stigma of mental illness - Mayo Clinic

[331] Chris Liberati-Conant, *It's Time to Take 'Hygiene' Out of the Mental Hygiene Law*, 95 - Feb N. Y. St. B. J. 21 (2023).

definition of "mental disability" would encompass all populations served by the "O" agencies. [332]

Recommendations

- Promote autonomy of individuals with mental disabilities through supported decision-making principles.
- Develop legislation that require recognition of Psychiatric Advance Directives ("PAD"s) even without proxies in all settings, to fund peer and provider trainings to facilitate their use, and to establish means of transmission, such as registries and web-based access.
- Amending MHL Article 81 to explicitly include supporters for decision-making as "available resources" as defined under MHL § 81.03(e), when considering the need for and/or scope of guardianship
- Recommend that OMH convene a working group to review supported decision-making processes in New York State, to promote peer supports and social environments that are conducive to supported decision-making (SDM), and to explore the possibility of a pilot project relating SDM and psychiatric advance directives.
- Recommend collaboration between OMH and OPWDD to further the use of SDM for individuals with dual diagnoses, including any necessary reasonable accommodations, and to address the needs of people who are dually diagnosed when developing the upcoming OPWDD regulations implementing MHL Article 82.
- Promote reform of guardianship statutes in New York State and provide procedural pathways for individuals subject to guardianship under both Article 81 of the MHL and Article 17-A of the SCPA to seek modification of existing orders and restoration of rights.
- Promote Single Transaction Orders as a less restrictive intervention than a plenary guardianship.

[332] *See*, MHL § 1.03 (3).

- OCA should include information and forms on its website regarding the process to remove a guardian and the newly enacted SDM statute (MHL Article 82) as a guardianship alternative. [333]

- OCA should update its guidelines for attorneys accepting guardian ad litem appointments. The guidelines were last revised twenty years ago, in 2003.[334]

- Support amendment of the Extreme Risk Protection Order statute, CPLR Article 63-a, to add a right to counsel for respondents.

- Support amendment of the New York State Constitution and related statutes to remove references to "mental hygiene" and adopting a modern nomenclature that does not stigmatize people with mental health conditions and is more reflective of the values of the community.

F. *Accommodations*

On January 25, 2023, the Office of Court Administration Pandemic Practices Working Group issued its final report entitled *New York Courts' Response to the Pandemic: Observations, Perspectives, and Recommendations*.[335] The working group is an initiative of the Commission to Reimagine the future of New York State's Courts. The Task Force takes this opportunity to comment on court accommodations because the people who are the subject of our inquiry are court users and among the most vulnerable people appearing in civil and criminal proceedings. Lawyers with disabilities are also among our Associations' members and sit on the Task Force.

As noted in the introduction to the Pandemic Practices Working Group Report, "the COVID -19 pandemic was arguably the most disruptive event in the history of New York Courts, and it brought significant hardship to many individuals who depend on the court system." [336] The New York Lawyers'

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333 https://ww2.nycourts.gov/forms/surrogates/guardianship.shtml

334 Publications Home Page | NYCOURTS.GOV - Guidelines for Guardian Ad Litem, with Sample Reports and Forms.

335 *New York Courts' Response to the Pandemic: Observations, Perspectives, and Recommendations,* available at: Reports of the Commission to Reimagine the Future of New York's Courts | NYCOURTS.GOV

336 *Id.*

Assistance Group ("NYLAG") studied pandemic practices extensively and observed that COVID is receding, the changes it wrought on our justice system "are not disappearing overnight, or possibly ever. The present juncture offers a valuable opportunity to step back, regroup, and learn from the courts' pandemic-era experience thus far." [337] That particular framing of the issue causes the Task Force to consider virtual hearings and the impact upon people with mental disabilities.

The Task Force agrees with the Pandemic Practices Working Group which found: 1) that virtual proceedings can benefit people with disabilities and other people requiring accommodations and 2) that virtual proceedings may require accommodations in the same manner that in person proceedings can.[338] The Task Force endorses and agrees with the recommendations found at page 49 of the report of the Pandemic Practices Working Group. In particular, the accommodation of establishing a private means, such as a secure web form, for people to request accommodation, has long been advocated by the NYSBA Disability Rights Committee has benefitting not only litigants but attorneys with disabilities. [339]

OCA issued Guidelines for Handling Requests for Disability Accommodations in 2020.[340] These Guidelines made strides to simplify the Court's reasonable accommodation request process, including eliminating unnecessary jargon, designating a central point of contact for all requests, requiring higher-level review before requests can be denied, tracking denials through a written Denial Accommodation Form, and directing the Statewide ADA Coordinator to review all denials within 10 days. However, these changes only apply to accommodation requests that are classified as "administrative requests"

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[337] https://nylag.org>wp-content>uploads>2021>NYLAG_CourtsDuringCovid_WP_FINAL.pdf Access to Justice in Virtual Court Proceedings: Lessons From COVID-19 and Recommendations for New York Courts, New York Legal Assistance Group, August 2021.

[338] Reports of the Commission to Reimagine the Future of New York's Courts | NYCOURTS.GOV p 42.

[339] The court system is currently piloting the online accommodation form in the NYC courts. https://portal.nycourts.gov/ada-wizard/

[340] Appendix Document 13

and not requests classified as "judicial requests." [341] Court users, lawyers, and *pro-se* litigants with disabilities continue to face barriers obtaining reasonable accommodations when the request is classified as a judicial accommodation. Under the Guidelines, judicial accommodations are handled by the individual judge without the involvement of the Statewide ADA Coordinator, a written Denial Accommodation Form, or an ability to seek a timely review of the denial. As highlighted by the Pandemic Practices Working Group Report, many court users, lawyers and pro-se litigants needed the reasonable accommodation of appearing in court remotely. Yet, the accommodation process was not equally applied to each request because each judge was given the discretion to approve or deny the request. Others faced barriers to participation in remote proceedings and required accommodations in other to do so. There was no consistent response to these requests, even when made by the same party for the same accommodation before the same judge.

The Task Force recommends that the court system adopt the following recommendations with respect to disability accommodations:

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[341] Requests that do not have to be decided by a judge or judicial officer will be decided by the Chief Clerk or District Executive, sometimes in consultation with the Statewide ADA Coordinator. These include most requests for what the ADA calls "auxiliary aids and services," such as sign language interpreters, assistive listening devices, or CART (also known as "real-time") reporting for a person who is Deaf or hard of hearing, or copies of documents in large print, Braille, screen readable, or audio formats for a person who is blind or has low vision. The Chief Clerk or District Executive will also decide requests to modify an administrative practice or procedure, such as relocating a proceeding to a physically accessible courtroom or allowing papers to be filed in a physically accessible location for a person with a mobility impairment, or to provide assistance in filling out a form to a person with a manual impairment. A Chief Clerk or District Executive, however, cannot grant any request that involves a judicial balancing of the rights of the parties or the Judge's or judicial officer's inherent power to manage the courtroom and the proceeding. Examples of such requests may include, but are not limited to, requests for: extensions of time or adjournments; changes in the time of day a case will be heard; permission to participate by phone or video; the presence or absence of other persons in the courtroom; and, modifications in the way testimony is to be given. Those types of accommodation requests must be decided by the judge or judicial officer presiding over the case. If all or some part of the request that is made to a Chief Clerk or District Executive involves an accommodation that only a judge or judicial officer has the authority to provide, the Chief Clerk or District Executive will refer the request (or that part of it) to the judge or judicial officer presiding over the case.

- Ensure centralized decision-making to reduce inconsistency throughout the court system.
- Establish an administrative review process for all judicial accommodation denials. [342]
- Documentation for judicial accommodation requests should be the same as required for administrative accommodations.
- Place guidelines for reviewing accommodation requests into the Judge's Desk Book.

The Task Force also endorses a recommendation made by NYLAG in its report which is that "whenever litigants with disabilities struggle with either in-person or virtual proceedings, the court must consider whether a switch to the other format would serve as an appropriate accommodation." [343] The flexibility engendered by the NYLAG suggestion seems quite important as it may not be apparent that a person with a disability is unable to participate fully in a proceeding (whether in-person or hybrid) until the proceeding is commenced and one form or the other is attempted.

IV. CONCLUSION

> *"We need to recognize that we are deep in a crisis of care, made worse by pandemic loss and by the social inequities that have increased during the pandemic. We need to reframe this crisis as more than a medical challenge. It is a social justice issue."* [344]

There is considerable work to be done to ensure equity and fairness in the justice system and the service delivery system for people with mental disabilities. Task Force endeavored to provide meaningful recommendations for reform as explained in this report drawing from diverse perspectives. We focused on civil and criminal justice issues during our inquiry. Our observations and recommendations were placed in the context of a vast service delivery system that many characterize as "broken" while being mindful that solutions must be trauma informed and further justice. During our investigation, we were guided by the fact

[342] Under the current Guidelines, a person seeking judicial review of a denial must file an appeal with the Appellate Division.

[343] https://nylag.org>wp-content>uploads>2021>NYLAG_CourtsDuringCovid_WP_FINAL.pdf at p. 18

[344] Insel, *supra*, note 6 p. 241.

that too often the voices of family members and individuals with lived experience are left out of conversations about reform. Public responses can suffer as a result. Task Force members are also mindful that ample evidence exists regarding inequities in both the behavioral health system and the courts. There is, for example, over-representation of minority communities in the justice system and a lack of behavioral health providers of color. NYSBA must lead and join with others calling for evidence-based practices that ensure diversity and equity across all programs designed to improve outcomes for people with mental disabilities involved in the civil and criminal justice systems.

April 10, 2023

NEW YORK STATE BAR ASSOCIATION
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PRESIDENT'S COMMITTEE ON ACCESS TO JUSTICE

May 15, 2023

TO: NYSBA's Executive Committee and to the House of Delegates

FROM: President's Committee on Access to Justice

RE: Support for the Report and recommendations of the Task Force on Mental Health and Trauma Informed Representation

The President's Committee on Access to Justice fully supports the report and recommendations of the Task Force on Mental Health and Trauma Informed Representation. The committee voted in support of the conclusion and recommendations on May 09, 2023.

From: Barbara J Ahern
To: reportsgroup
Cc: Richards, Thomas
Subject: Comments on Reports for the June 2023 NYSBA HOD and EC Meetings
Date: Monday, May 22, 2023 6:05:16 PM

To the Members of the Reports Group:

Thank you for providing the NYSBA Committee on Animals and the Law an opportunity to comment on reports scheduled for the November 2023 House of Delegates and Executive Committee Meetings. In the past, the Committee has decided that when there is an item that is integral to another area of law practice, and one that the members of this Committee lack familiarity, we will not comment. Consequently, we do not have any comment to make on the affirmative legislative proposals put forward by the Committee on Children and the Law and the Trusts and Estates Section.

Members of the Committee who reviewed the Report and Recommendations of the Committee on the New York State Constitution did not find there to be compelling reasons why the state constitution should be simplified, and we are not offering any comment on that report.

However, we would like to offer some brief comments on the Report and Recommendations of the Task Force on the Post-Pandemic Future of the Profession and the Report and Recommendations of the Task Force on Mental Health and Trauma Informed Representation.

<u>Report and Recommendations of the Task Force on the Post-Pandemic Future of the Profession</u>
There is no question that the COVID-19 pandemic caused major upheavals in both the professional and personal lives of attorneys. This Task Force and the four working groups of the Task Force have unquestionably put in tremendous time and effort to study the different aspects of changes that are apparent in the post-pandemic world. Our only comment is to question why neither the report nor the recommendations address the issues that accompany the development and use, in the legal profession, of ChatGPT AI technology.

This aspect of technology was not caused by the pandemic, but as noted in this report, the pandemic merely hastened the use of many of the technologies that were already in development at the start of the pandemic. NYSBA and the American Bar Association have provided commentary and advice on ChatGPT since the release of ChatGPT at the end of last year; it needs to be considered as part of this comprehensive report that addresses so many other aspects of technology in the legal profession, and the expectations of younger lawyers that they will have access to it in the course of practice. Some of the initial language in this report talks about NYSBA making it possible for attorneys to use technology to operate in the post pandemic world, but there are many concerns that have been raised about ChatGPT, and not everyone will agree, today, that its use in legal practice should be pursued or encouraged.

We recommend further study that specifically targets ChatGPT, and includes specific consideration of the ethical issues connected to its use in legal practice.

Report and Recommendations of the Task Force on Mental Health and Trauma Informed Representation

One of the current projects of the Committee on Animals and the Law involves the use of service animals and emotional support animals. Both can be extremely valuable to individuals who have special needs for physical or emotional assistance, but their use is not mentioned in this report. An appropriate reference to emotional support animals, for example, could state that when clinical conditions and treatment options are being evaluated, consideration should be given to specifically endorsing the use of emotional support animals, particularly in cases of acute trauma, and suggesting that this approach be adopted as a standard protocol in appropriate circumstances – an approach endorsed by many medical professionals.

Additionally, where inpatient services are recommended or required, such animals can prove invaluable and should be made available whenever possible; and reference to this use of them should be included in the report. Accommodation should be made to allow an individual who is suffering an acute mental crisis to have their animal accompany them (to court, to the hospital) even if it is not officially an emotional support animal, since separation from a beloved pet could inflict additional trauma, anxiety or distress, impairing the patient's treatment and recovery, and impeding or delaying their access to the justice system.

The report and recommendations might also address training that should be provided to the police or other sanctioned first responders to an emergency when they must handle a situation involving a mentally challenged individual. In such situations, if an animal is present (whether or not it is a service animal or emotional assistance animal), extreme care should be taken to defuse the situation without causing additional harm to the human individual or their animal. If any injury is inflicted on the animal, the mental state of the human patient will degrade. Protocols should be recommended that provide for police consultation with a veterinarian who can advise on the use of techniques or medications that will defuse any aggressive response unintentionally caused in the animal in order to prevent harm to the animal. Inflicting injury or harm to the animal will only increase the seriousness of the mental distress or trauma in the human individual, and make it less likely that they will receive the medical assistance or access to justice they need and deserve.

Members of the Committee on Animals and the Law will be happy to work with the task forces on the additional issues that we are suggesting for inclusion in their reports and recommendations. Thank you for this opportunity to share our concerns.

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Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #9

REQUESTED ACTION: None, as the report is informational.

On January 19, 2023, the Executive Committee approved the establishment of a Special Committee to Examine Selection of Judges for the Court of Appeals. The enabling resolution reads as follows:

> The New York State Bar Association Executive Committee approves the appointment of a Special Committee on the Selection of Judges for the Court of Appeals in response to concerns raised in recent weeks over the appointment of a chief judge. The committee will examine the selection process, including its history, and make recommendations to the Association.
>
> The Executive Committee reaffirms that the rule of law and the independence of the judiciary are crucial to the administration of justice. It is of the utmost importance to public confidence that there is a fair process that allows the judiciary to operate independently and effectively.

Co-chairs Damaris Hernandez and Vincent E. Doyle III will report to the House on the work of the Special Committee. No formal action by the House is requested for this agenda item.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #11

<u>REQUESTED ACTION</u>: Approval of the report and recommendations of the Committee on the New York State Constitution.

Attached is a copy of the Committee's report on "Simplification of the New York State Constitution," with proposals for simplification of articles VI (Judiciary), VII (State Finances), and VIII (Local Finances) of the New York State Constitution. In the opinion of the sponsoring committee, the proposed amendments would simplify the State Constitution, remove provisions that are no longer applicable, and would not alter the intent, meaning, or operation of the document.

The proposed amendments are to the following provisions of the State Constitution:

Article VI – Judiciary

- Sections 6(a) and 6(b). *Judicial districts; how constituted; supreme court*
- Section 19. *Transfer of actions and proceedings.*
- Section 20. *Judges and justices; qualifications; eligibility for other office or service; restrictions.*
- Section 25. *Judges and justices; compensation; retirement.*
- Sections 35. *Certain courts abolished; transfer of judges, court personnel, and actions and proceedings to other courts.*
- Section 36. *Pending civil and criminal cases.*
- Section 36-a. *Effective date of certain amendments to articles VI and VII.*
- Section 36-c. *Effective date of certain amendments to article VI, section 22.*

Article VII – State Finances

- Section 14. *State debt for elimination of railroad crossings at grade; expenses; how borne; construction and reconstruction of state highways and parkways.*
- Section 18. *Bonus on account of service of certain veterans in World War II.*
- Section 19. *State debt for expansion of state university.*

Article VIII – Local Finances

- Section 2-a. *Local indebtedness for water supply, sewage and drainage facilities and purposes; allocations and exclusions of indebtedness.*

- Section 6. *Debt-incurring power of Buffalo, Rochester, and Syracuse; certain additional indebtedness to be excluded.*
- Section 7. *Debt-incurring power of New York City; certain additional indebtedness to be excluded.*
- Section 7-a. *Debt-incurring power of New York City; certain indebtedness for railroad and transit purposes to be excluded.*
- Section 8. *Indebtedness not be invalidated by operation of this article.*
- Section 9. *When debt-incurring power of certain counties shall cease.*

The Committee also recommends review of Article VIII, Sections 4 and 10, concerning local debt and tax limits, and the valuation of taxable real estate. These Sections were last amended in 1951 and 1953, respectively.

The text of the proposed constitutional amendments is included as an Appendix at pages 10 – 35 of the report.

Amendment of the State Constitution requires passage of concurrent resolutions at consecutive sessions of the Legislature followed by approval by the people at a general election. The Committee takes no position as to the number of separate constitutional amendments into which the proposals offered in the report should be divided.

The report was submitted to the Reports Group in March 2023. No comments were received as of May 23, 2023.

Committee chair Christopher Bopst and Constitutional Simplification Subcommittee chair Desmond C.B. Lyons will present the report to the Executive Committee. Mr. Lyons will present the report to the House of Delegates.

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Report and recommendations of the New York State Bar Association **Committee on the New York State Constitution on Simplification of the NYS Constitution**

June 2023

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

New York State Bar Association

Committee on the New York State Constitution

SIMPLIFICATION OF THE NEW YORK STATE CONSTITUTION, Part I

Proposals for Simplification of Articles VI, VII, and VIII of the New York State Constitution

Report Approved by the Committee on Friday, March 3, 2023

1. INTRODUCTION

The New York State Constitution is an imposing document. When one includes items such as the table of contents and the provenance of each provision provided by the secretary of state, the document swells to approximately 60,000 words—nearly eight times larger than the federal Constitution. Included in this lengthy tome are numerous sections that are outdated, inoperative, unnecessary, excessively statutory in nature, or in direct conflict with the U.S. Supreme Court's interpretation of the U.S. Constitution—in other words, provisions that would not command any consensus for their retention in the state's fundamental charter. Yet they remain, often times because the document does not command the requisite interest or public attention to have them removed. Moreover, many provisions are confusing as written and require clarification. Far from a mere academic interest, the continued existence of these obsolete provisions detract from the state constitution's readability and knowability, and show a profound lack of respect for the constitution and the tradition from which the document emanated.

The Constitutional Simplification Subcommittee of the New York State Bar Association Committee on the New York State Constitution (the "Subcommittee") analyzed three articles of the New York State Constitution (the "Constitution") which the Subcommittee deemed in need of revision: Article VI (Judiciary), Article VII (State Finances) and Article VIII (Local Finances). These are not the only articles in need of simplification. The Subcommittee intends to study other articles of the state constitution and propose further recommendations in later reports. The revisions proposed below do not, in any way, alter the intent, meaning or operation of the Constitution, but rather attempt to simplify the document and remove

provisions that are no longer applicable. The Subcommittee relied in large part on the work of Committee Chair, Christopher Bopst, and Professor Peter Galie, as laid out in their articles, *Constitutional "Stuff": House Cleaning the New York Constitution—Parts I and II*.[1] This Report and the proposed revisions contained in it were submitted to the entire Committee for approval, and the Committee approved it on March 3, 2023 for presentation to the Executive Committee and House of Delegates.

2. RECOMMENDATIONS

The Committee urges the Legislature to introduce and pass concurrent resolutions to amend the New York State Constitution consistent with the proposals recommended in this Memorandum. The Committee takes no position as to the number of separate constitutional amendments into which the below proposals shall be divided. Nothing contained in this Report shall be construed as an amendment to any prior position taken by the Association or any attempt to suggest that more substantive reforms are unnecessary.

3. ARTICLE VI - JUDICIARY

Like other articles of the New York State Constitution, the Judiciary Article is ripe for simplification. Article VI is lengthy, repetitive and filled with obsolete provisions which can be removed without altering the substance of the article or the powers of the judicial branch.

Below are some recommended revisions:

a. SECTIONS 6(a) and 6(b)

Sections 6(a) and 6(b) describe the judicial districts of the state and provides that the legislature can change them decennially.[2] Section 6(a) should be deleted in its entirety, as the legislature has created thirteen judicial districts while the provision lists only eleven. It is the subcommittee's view that these two sections should be consolidated and revised to read:

Judicial districts; how constituted; supreme court.

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[1] 77 *Albany Law Review* 1385 (2014) and 78 *Albany Law Review* 1513 (2015), respectively.
[2] See appendix.

“a. The judicial districts of the State as they currently exist shall continue, but the legislators may increase, decrease or alter the districts and reapportion the justices to be thereafter elected in the judicial districts so altered once every ten years. Each judicial district shall be bounded by county lines.”

b. SECTION 19

As it is currently written, Section 19, which provides for transfers of matters within the judicial branch, reads like a complex decision tree that is difficult to follow.[3] It should streamlined as follows:

Transfer of actions and proceedings.

“a. The supreme court may transfer any action or proceeding, except one over which it shall have exclusive jurisdiction which does not depend upon the monetary amount sought, to any other court within the judicial department having jurisdiction over the subject matter and the classes of persons named as parties. As may be provided by law, the supreme court may transfer to itself any action or proceeding originated or pending in another court within the department other than the court of claims upon a finding that such a transfer will promote the administration of justice.

b. The county court, surrogate’s court, family court, or a city-wide court for the city of New York shall transfer to any other of such courts or to the supreme court any action or proceeding which has not been transferred to it from any of the said courts and over which the transferring court has no jurisdiction.

c. The county court may transfer any action or proceeding, except a criminal action or proceeding involving a felony prosecuted by indictment or an action or proceeding required by this article to be dealt with in the surrogate's court or family court, to any court, other than the supreme court, within the county having jurisdiction over the subject matter and the classes of persons named as parties.

d. As may be provided by law, the supreme court or the county court may transfer to the county court any action or proceeding originated or pending in the district court or a town, village or city court outside the city of New

[3] See appendix.

York upon a finding that such a transfer will promote the administration of justice.

e. As may be provided by law, the supreme court shall transfer any action or proceeding to any other court in any other judicial district or county having jurisdiction over the subject matter and the classes of persons named as parties.

f. As may be provided by law, the county court, surrogate's court, family court or a city-wide court for the city of New York may transfer any action or proceeding which has not previously been transferred to it, to any other court, except the supreme court, having jurisdiction over the subject matter and the classes of persons named as parties, in any other judicial district or county.

g. As may be provided by law, the district court or a town, village or city court outside the city of New York may transfer any action or proceeding which has not previously been transferred to it, to any court, except a state-wide court, having jurisdiction over the subject matter and the classes of persons named as parties, in the same or an adjoining county.

h. Each court shall exercise jurisdiction over any action or proceeding transferred to it pursuant to this section.

i. The legislature may provide that the verdict or judgment in actions and proceedings so transferred shall not be subject to the limitation of monetary jurisdiction of the transferee court if that limitation be lower than that of the originating court."

c. SECTION 20

Section 20(b) lists the restrictions on all statewide and City of New York judges.[4] However, rather than simply describing the judges to which the restrictions apply, Section 20(b) lists all the various courts in which those judges sit. A simpler reading of Section 20(b) is warranted.

Judges and justices; qualifications; eligibility for other office or service; restrictions.

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[4] See appendix.

"b. A judge of a state-wide court, or a city-wide court for the city of New York may not:

(1) hold any other public office or trust except an office in relation to the administration of the courts, member of a constitutional convention or member of the armed forces of the United States or of the state of New York in which latter event the legislature may enact such legislation as it deems appropriate to provide for a temporary judge or justice to serve during the period of the absence of such judge or justice in the armed forces;

(2) be eligible to be a candidate for any public office other than judicial office or member of a constitutional convention, unless he or she resigns from judicial office; in the event a judge or justice does not so resign from judicial office within ten days after his or her acceptance of the nomination of such other office, his or her judicial office shall become vacant and the vacancy shall be filled in the manner provided in this article;

(3) hold any office or assume the duties or exercise the powers of any office of any political organization or be a member of any governing or executive agency thereof;

(4) engage in the practice of law, act as an arbitrator, referee or compensated mediator in any action or proceeding or matter or engage in the conduct of any other profession or business which interferes with the performance of his or her judicial duties.

Judges and justices of the courts specified in this subdivision shall also be subject to such rules of conduct as may be promulgated by the chief administrator of the courts with the approval of the court of appeals."

d. SECTION 25

Section 25(a), and to a lesser extent Section 25(b),[5] dealing with judicial compensation and retirement, should also be revised. As currently written, Section 25(a) and 25(b) are cumbersome and can be revised as follows:

Judges and justices; compensation; retirement.

[5] See appendix.

a. The compensation of a judge of the court of appeals, a justice of the supreme court, a judge of the court of claims, the county court, the surrogate's court, the family court, a city-wide court for the city of New York, the district court or of a retired judge or justice shall be established by law and shall not be diminished during the term of office for which he or she was elected or appointed.

b. Each judge of the court of appeals, justice of the supreme court, judge of the court of claims, the county court, the surrogate's court, the family court, a city-wide court for the city of New York and the district court shall retire on the last day of December in the year in which he or she reaches the age of seventy. Each such former judge of the court of appeals and justice of the supreme court may thereafter perform the duties of a justice of the supreme court, with power to hear and determine actions and proceedings, provided, however, that it shall be certificated in the manner provided by law that the services of such judge or justice are necessary to expedite the business of the court and that he or she is mentally and physically able and competent to perform the full duties of such office. Any such certification shall be valid for a term of two years and may be extended as provided by law for additional terms of two years. A retired judge or justice shall serve no longer than until the last day of December in the year in which he or she reaches the age of seventy-six. A retired judge or justice shall be subject to assignment by the appellate division of the judicial department of his or her residence. Any retired justice of the supreme court who had been designated to and served as a justice of any appellate division immediately preceding his or her reaching the age of seventy shall be eligible for designation by the governor as a temporary or additional justice of the appellate division. A retired judge or justice shall not be counted in determining the number of justices in a judicial district for purposes of subdivision d of section six of this article."

e. SECTIONS 35, 36, 36-a, and 36-c

Finally, Sections 35, 36, 36-a, and 36-c[6] should be removed as they are no longer necessary. Section 35 deals with an entire group of courts which were abolished by the adoption of Article VI. Since the courts are no longer

[6] See appendix.

in existence, Section 35 is no longer needed. Likewise, Sections 36 and 36-a through 36-c, simply list the dates on which particular provisions of the Article take effect and those dates have long since passed. These sections should be deleted in their entirety.

4. ARTICLES VII AND VIII – STATE AND LOCAL FINANCE

Articles VII (State Finances) and VIII (Local Finances) both contain a number of sections that have become outdated and obsolete. Many of these sections concern bonds for projects that have long been retired.

a. ARTICLE VII, SECTIONS 14, 18, AND 19

Sections 14, 18, and 19 address authorization for bonds that have long been retired, and can be repealed.[7] Section 14 authorizes bonds for eliminating railroad crossings at grade—bonds that have been retired for thirty-five years. Section 18 refers to bonds for payment of bonuses to members of the armed forces who served in World War II for up to $400 million. These bonds have been retired since before Nelson Rockefeller took office. Section 19 provides for incurring of state debt in the amount of up to $250 million dollars for the expansion of the State University of New York. These funds have been spent and the debt retired for close to two decades.

b. ARTICLE VIII, SECTIONS 2-a, 6, 7, 7-a, 8, and 9

Article VIII applies to local governments, which include counties, cities, towns, villages and school districts. It is filled with provisions that are no longer needed, many dating back to the Constitutional Convention of 1938.

Section 2-a allows municipalities to share services in certain specific areas: supply of water, disposal of sewage, and drainage.[8] Section 1 of the

[7] See appendix.
[8] See appendix.

article authorizes municipalities to share services generally. Section 2-a is therefore redundant and unnecessarily limiting.

Sections 6, 7, and 7-a provide certain exclusions from the municipal debt limits contained elsewhere in Article VIII. Section 6 excludes from the municipal debt limits indebtedness incurred by the cities of Buffalo and Rochester in the amount of $10 million, and Syracuse in the amount of $5 million.[9] Similarly, section 7 excludes certain debt incurred by New York City prior to certain dates for dock purposes, as well as for construction of rapid transit railroads, construction of hospitals and for school purposes.[10] Section 7-a also provides an exclusion of $315 million incurred by New York City for railroads and transit purposes. All of these debt exclusions have long since expired and should be repealed and removed from the constitution.

Section 8 relates to indebtedness of counties, cities, towns, villages or school districts. It provides that indebtedness that was valid at the time of its inception does not become invalid by adoption of Article VIII. This indebtedness was incurred prior to 1938 and has long since been retired, rendering this provision unnecessary.

Section 9 dates from 1938 and provides that for any city which includes within its boundaries more than one county, the power of any county wholly included within such city to contract indebtedness shall cease, but shall not be included as part of the city indebtedness. This section also includes a case where the boundaries of any city are the same as those of a county. This section applies only to New York City. This section is no longer needed. The counties within New York City have not incurred indebtedness for many years and do not currently have any indebtedness.

<u>Other sections</u>

Two sections of Article VIII, concerning local debt and tax limits, are not obsolete on their face but deserve examination. Section 4 contains limitations on the ability of municipalities to contract indebtedness based

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[9] See appendix.
[10] See appendix.

upon percentages of average full valuation of taxable real estate. The percentages are 7% for counties other than Nassau (Nassau County's limit is 10%), 9% for cities having populations over 125,000 (other than New York City, which has a 10% limit), 7% for towns and villages, and a more complicated formula for school districts. This provision was last amended in 1951. The question is whether the percentages are appropriate over 70 years later. Section 10 contains limitations on the percentages of average full valuation of taxable real estate that can be raised by real estate taxes. Last amended in 1953, these percentages should be examined to determine if they remain appropriate. The legislature should also examine whether average full valuation should be the benchmark for debt and tax limits.

5. CONCLUSION

Each of the articles discussed above is sorely in need of simplification, contains provisions that are no longer applicable and can be pared down considerably. We urge the legislature to take all required steps to begin the process of amending the Constitution to simplify the Articles referenced in this Report.

APPENDIX

Art. VI, sec. 6

a. The state shall be divided into eleven judicial districts. The first judicial district shall consist of the counties of Bronx and New York. The second judicial district shall consist of the counties of Kings and Richmond. The third judicial district shall consist of the counties of Albany, Columbia, Greene, Rensselaer, Schoharie, Sullivan, and Ulster. The fourth judicial district shall consist of the counties of Clinton, Essex, Franklin, Fulton, Hamilton, Montgomery, St. Lawrence, Saratoga, Schenectady, Warren and Washington. The fifth judicial district shall consist of the counties of Herkimer, Jefferson, Lewis, Oneida, Onondaga, and Oswego. The sixth judicial district shall consist of the counties of Broome, Chemung, Chenango, Cortland, Delaware, Madison, Otsego, Schuyler, Tioga and Tompkins. The seventh judicial district shall consist of the counties of Cayuga, Livingston, Monroe, Ontario, Seneca, Steuben, Wayne and Yates. The eighth judicial district shall consist of the counties of Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans and Wyoming. The ninth judicial district shall consist of the counties of Dutchess, Orange, Putnam, Rockland and Westchester. The tenth judicial district shall consist of the counties of Nassau and Suffolk. The eleventh judicial district shall consist of the county of Queens.

b. Once every ten years the legislature may increase or decrease the number of judicial districts or alter the composition of judicial districts and thereupon re-apportion the justices to be thereafter elected in the judicial districts so altered. Each judicial district shall be bounded by county lines.

* * *

Art. VI, sec. 19

a. The supreme court may transfer any action or proceeding, except one over which it shall have exclusive jurisdiction which does not depend upon the monetary amount sought, to any other court having jurisdiction of the subject matter within the judicial department provided that such other court has jurisdiction over the classes of persons named as parties. As may be provided by law, the supreme court may transfer to itself any action or proceeding originated or pending in another court within the judicial department other than the court of claims upon a finding that such a transfer will promote the administration of justice.

b. The county court shall transfer to the supreme court or surrogate's court or family court any action or proceeding which has not been transferred to it from the supreme court or surrogate's court or family court and over which the county court has no jurisdiction. The county court may transfer any action or proceeding, except a criminal action or proceeding involving a felony prosecuted by indictment or an action or proceeding required by this article to be dealt with in the surrogate's court or family court, to any court, other than the supreme court, having jurisdiction of the subject matter within the county provided that such other court has jurisdiction over the classes of persons named as parties.

c. As may be provided by law, the supreme court or the county court may transfer to the county court any action or proceeding originated or pending in the district court or a town, village or city court outside the city of New York upon a finding that such a transfer will promote the administration of justice.

d. The surrogate's court shall transfer to the supreme court or the county court or the family court or the courts for the city of New York established pursuant to section fifteen of this article any action or proceeding which has not been transferred to it from any of said courts and over which the surrogate's court has no jurisdiction.

e. The family court shall transfer to the supreme court or the surrogate's court or the county court or the courts for the city of New York established pursuant to section fifteen of this article any action or proceeding which has not been transferred to it from any of said courts and over which the family court has no jurisdiction.

f. The courts for the city of New York established pursuant to section fifteen of this article shall transfer to the supreme court or the surrogate’s court or the family court any action or proceeding which has not been transferred to them from any of said courts and over which the said courts for the city of New York have no jurisdiction.

g. As may be provided by law, the supreme court shall transfer any action or proceeding to any other court having jurisdiction of the subject matter in any other judicial district or county provided that such other court has jurisdiction over the classes of persons named as parties.

h. As may be provided by law, the county court, the surrogate’s court, the family court and the courts for the city of New York established pursuant to section fifteen of this article may transfer any action or proceeding, other than one which has previously been transferred to it, to any other court, except the supreme court, having jurisdiction of the subject matter in any other judicial district or county provided that such other court has jurisdiction over the classes of persons named as parties.

i. As may be provided by law, the district court or a town, village or city court outside the city of New York may transfer any action or proceeding, other than one which has previously been transferred to it, to any court, other than the county court or the surrogate’s court or the family court or the supreme court, having jurisdiction of the subject matter in the same or an adjoining county provided that such other court has jurisdiction over the classes of persons named as parties.

j. Each court shall exercise jurisdiction over any action or proceeding transferred to it pursuant to this section.

k. The legislature may provide that the verdict or judgment in actions and proceedings so transferred shall not be subject to the limitation of monetary jurisdiction of the court to which the actions and proceedings are transferred if that limitation be lower than that of the court in which the actions and proceedings were originated.

Art. VI, sec. 20

* * *

b. A judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of a county court, judge of the surrogate's court, judge of the family court or judge of a court for the city of New York established pursuant to section fifteen of this article who is elected or appointed after the effective date of this article may not:

(1) hold any other public office or trust except an office in relation to the administration of the courts, member of a constitutional convention or member of the armed forces of the United States or of the state of New York in which latter event the legislature may enact such legislation as it deems appropriate to provide for a temporary judge or justice to serve during the period of the absence of such judge or justice in the armed forces;

(2) be eligible to be a candidate for any public office other than judicial office or member of a constitutional convention, unless he or she resigns from judicial office; in the event a judge or justice does not so resign from judicial office within ten days after his or her acceptance of the nomination of such other office, his or her judicial office shall become vacant and the vacancy shall be filled in the manner provided in this article;

(3) hold any office or assume the duties or exercise the powers of any office of any political organization or be a member of any governing or executive agency thereof;

(4) engage in the practice of law, act as an arbitrator, referee or compensated mediator in any action or proceeding or matter or engage in the conduct of any other profession or business which interferes with the performance of his or her judicial duties.

Judges and justices of the courts specified in this subdivision shall also be subject to such rules of conduct as may be promulgated by the chief administrator of the courts with the approval of the court of appeals.

* * *

Art. VI, sec. 25

a. The compensation of a judge of the court of appeals, a justice of the supreme court, a judge of the court of claims, a judge of the county court, a judge of the surrogate's court, a judge of the family court, a judge of a court for the city of New York established pursuant to section fifteen of this article, a judge of the district court or of a retired judge or justice shall be established by law and shall not be diminished during the term of office for which he or she was elected or appointed. Any judge or justice of a court abolished by section thirty-five of this article, who pursuant to that section becomes a judge or justice of a court established or continued by this article, shall receive without interruption or diminution for the remainder of the term for which he or she was elected or appointed to the abolished court the compensation he or she had been receiving upon the effective date of this article together with any additional compensation that may be prescribed by law.

b. Each judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate's court, judge of the family court, judge of a court for the city of New York established pursuant to section fifteen of this article and judge of the district court shall retire on the last day of December in the year in which he or she reaches the age of seventy. Each such former thereafter perform the duties of a justice of the supreme court, with power to hear and determine actions and proceedings, provided, however, that it shall be certificated in the manner provided by law that the services of such judge or justice are necessary to expedite the business of the court and that he or she is mentally and physically able and competent to perform the full duties of such office. Any such certification shall be valid for a term of two years and may be extended as provided by law for additional terms of two years. A retired judge or justice shall serve no longer than until the last day of December in the year in which he or she reaches the age of seventy-six. A retired judge or justice shall be subject to assignment by the appellate division of the supreme court of the judicial department of his or her residence. Any retired justice of the supreme court who had been designated to and served as a justice of any appellate division immediately preceding his or her reaching the age of seventy shall be eligible for designation by the governor as a temporary or additional justice of the appellate division. A retired judge or justice shall not be counted

in determining the number of justices in a judicial district for purposes of subdivision d of section six of this article.

* * *

Art. VI, sec. 35

a. The children's courts, the court of general sessions of the county of New York, the county courts of the counties of Bronx, Kings, Queens and Richmond, the city court of the city of New York, the domestic relations court of the city of New York, the municipal court of the city of New York, the court of special sessions of the city of New York and the city magistrates' courts of the city of New York are abolished from and after the effective date of this article and thereupon the seals, records, papers and documents of or belonging to such courts shall, unless otherwise provided by law, be deposited in the offices of the clerks of the several counties in which these courts now exist.

b. The judges of the county court of the counties of Bronx, Kings, Queens and Richmond and the judges of the court of general sessions of the county of New York in office on the effective date of this article appointed, be justices of the supreme court in and for the judicial district which includes the county in which they resided on that date. The salaries of such justices shall be the same as the salaries of the other justices of the supreme court residing in the same judicial district and shall be paid in the same manner. All actions and proceedings pending in the county court of the counties of Bronx, Kings, Queens and Richmond and in the court of general sessions of the county of New York on the effective date of this article shall be transferred to the supreme court in the county in which the action or proceedings was pending, or otherwise as may be provided by law.

c. The legislature shall provide by law that the justices of the city court of the city of New York and the justices of the municipal court of the city of New York in office on the date such courts are abolished shall, for the remainder of the term for which each was elected or appointed, be judges of the city-wide court of civil jurisdiction of the city of New York established pursuant to section fifteen of this article and for such district as the legislature may determine.

d. The legislature shall provide by law that the justices of the court of special sessions and the magistrates of the city magistrates' courts of the city of New York in office on the date such courts are abolished shall, for the remainder

of the term for which each was appointed, be judges of the citywide court of criminal jurisdiction of the city of New York established pursuant to section fifteen provided, however, that each term shall expire on the last day of the year in which it would have expired except for the provisions of this article.

e. All actions and proceedings pending in the city court of the city of New York and the municipal court in the city of New York on the date such courts are abolished shall be transferred to the city-wide court of civil jurisdiction of the city of New York established pursuant to section fifteen of this article or as otherwise provided by law.

f. All actions and proceedings pending in the court of special sessions of the city of New York and the city magistrates' courts of the city of New York on the date such courts are abolished shall be transferred to the citywide court of criminal jurisdiction of the city of New York established pursuant to section fifteen of this article or as otherwise provided by law.

g. The special county judges of the counties of Broome, Chautauqua, Jefferson, Oneida and Rockland and the judges of the children's courts in all counties outside the city of New York in office on the effective date of this article shall, for the remainder of the terms for which they were elected or appointed, be judges of the family court in and for the county in which they hold office. Except as otherwise provided in this section, the office of special county judge and the office of special surrogate is abolished from and after the effective date of this article and the terms of the persons holding such offices shall terminate on that date.

h. All actions and proceedings pending in the children's courts in counties outside the city of New York on the effective date of this article shall be transferred to the family court in the respective counties.

i. The justices of the domestic relations court of the city of New York in office on the effective date of this article shall, for the remainder of the terms for which they were appointed, be judges of the family court within the city of New York.

j. All actions and proceedings pending in the domestic relations court of the city of New York on the effective date of this article shall be transferred to the family court in the city of New York.

k. The office of official referee is abolished, provided, however, that official referees in office on the effective date of this article shall, for the remainder of the terms for which they were appointed or certified, be official referees of the court in which appointed or certified or the successor court, as the case may be. At the expiration of the term of any official referee, his or her office shall be abolished and thereupon such former official referee shall be subject to the relevant provisions of section twenty-five of this article.

l. As may be provided by law, the non-judicial personnel of the courts affected by this article in office on the effective date of this article shall, to the extent practicable, be continued without diminution of salaries and with the same status and rights in the courts established or continued by this article; and especially skilled, experienced and trained personnel shall, to the extent practicable, be assigned to like functions in the courts which exercise the jurisdiction formerly exercised by the courts in which they were employed. In the event that the adoption of this article shall require or make possible a reduction in the number of non-judicial personnel, or in the number of certain categories of such personnel, such reduction shall be made, to the extent practicable, by provision that the death, resignation, removal or retirement of an employee shall not create a vacancy until the reduced number of personnel has been reached.

m. In the event that a judgment or order was entered before the effective date of this article and a right of appeal existed and notice of appeal therefrom is filed after the effective date of this article, such appeal shall be taken from the supreme court, the county courts, the surrogate's courts, the children's courts, the court of general sessions of the county of New York and the domestic relations court of the city of New York to the appellate division of the supreme court in the judicial department in which such court was located; from the court of claims to the appellate division of the supreme court in the third judicial department, except for those claims which arose in the fourth judicial department, in which case the appeal shall be to the appellate division of the supreme court in the fourth judicial department; from the city court of the city of New York, the municipal court of the city of New York, the court of special sessions of the city of New York and the city magistrates' courts of the city of New York to the appellate division of the supreme court in the judicial department in which such court was located, provided, however, that such appellate division of the supreme court may

transfer any such appeal to an appellate term, if such appellate term be established; and from the district court, town, village and city courts outside the city of New York to the county court in the county in which such court was located, provided, however, that the legislature may require the transfer of any such appeal to an appellate term, if such appellate term be established. Further appeal from a decision of a county court or an appellate term or the appellate division of the supreme court shall be governed by the provisions of this article. However, if in any action or proceeding decided prior to the effective date of this article, a party had a right of direct appeal from a court of original jurisdiction to the court of appeals, such appeal may be taken directly to the court of appeals.

n. In the event that an appeal was decided before the effective date of this article and a further appeal could be taken as of right and notice of appeal therefrom is filed after the effective date of this article, such appeal may be taken from the appellate division of the supreme court to the court of appeals and from any other court to the appellate division of the supreme court. Further appeal from a decision of the appellate division of the supreme court shall be governed by the provisions of this article. If a further appeal could not be taken as of right, such appeal shall be governed by the provisions of this article.

Art. VI, sec. 36

No civil or criminal appeal, action or proceeding pending before any court or any judge or justice on the effective date of this article shall abate but such appeal, action or proceeding so pending shall be continued in the courts as provided in this article and, for the purposes of the disposition of such actions or proceedings only, the jurisdiction of any court to which any such action or proceeding is transferred by this article shall be coextensive with the jurisdiction of the former court from which the action or proceeding was transferred. Except to the extent inconsistent with the provisions of this article, subsequent proceedings in such appeal, action or proceeding shall be conducted in accordance with the laws in force on the effective date of this article until superseded in the manner authorized by law.

Art. VI, sec. 36-a

The amendments to the provisions of sections two, four, seven, eight, eleven, twenty, twenty-two, twenty-six, twenty-eight, twenty-nine and thirty of article six and to the provisions of section one of article seven, as first proposed by a concurrent resolution passed by the legislature in the year nineteen hundred seventy-six and entitled "Concurrent Resolution of the Senate and Assembly proposing amendments to articles six and seven of the constitution, in relation to the manner of selecting judges of the court of appeals, creation of a commission on judicial conduct and administration of the unified court system, providing for the effectiveness of such amendments and the repeal of subdivision c of section two, subdivision b of section seven, subdivision b of section eleven, section twenty-two and section twenty-eight of article six thereof relating thereto", shall become a part of the constitution on the first day of January next after the approval and ratification of the amendments proposed by such concurrent resolution by the people but the provisions thereof shall not become operative and the repeal of subdivision c of section two, section twenty-two and section twenty-eight shall not become effective until the first day of April next thereafter which date shall be deemed the effective date of such amendments and the chief judge and the associate judges of the court of appeals in office on such effective date shall hold their offices until the expiration of their respective terms. Upon a vacancy in the office of any such judge, such vacancy shall be filled in the manner provided in section two of article six.

Art. VI, sec. 36-c

The amendments to the provisions of section twenty-two of article six as first proposed by a concurrent resolution passed by the legislature in the year nineteen hundred seventy-four and entitled “Concurrent Resolution of the Senate and Assembly proposing an amendment to section twenty-two of article six and adding section thirty-six-c to such article of the constitution, in relation to the powers of and reconstituting the court on the judiciary and creating a commission on judicial conduct”, shall become a part of the constitution on the first day of January next after the approval and ratification of the amendments proposed by such concurrent resolution by the people but the provisions thereof shall not become operative until the first day of September next thereafter which date shall be deemed the effective date of such amendments.

Art. VII, sec. 14

The legislature may authorize by law the creation of a debt or debts of the state, not exceeding in the aggregate three hundred million dollars, to provide moneys for the elimination, under state supervision, of railroad crossings at grade within the state, and for incidental improvements connected therewith as authorized by this section. The provisions of this article, not inconsistent with this section, relating to the issuance of bonds for a debt or debts of the state and the maturity and payment thereof, shall apply to a state debt or debts created pursuant to this section; except that the law authorizing the contracting of such debt or debts shall take effect without submission to the people pursuant to section 11 of this article. The aggregate amount of a state debt or debts which may be created pursuant to this section shall not exceed the difference between the amount of the debt or debts heretofore created or authorized by law, under the provisions of section 14 of article VII of the constitution in force on July first, nineteen hundred thirty-eight, and the sum of three hundred million dollars.

The expense of any grade crossing elimination the construction work for which was not commenced before January first, nineteen hundred thirty-nine, including incidental improvements connected therewith as authorized by this section, whether or not an order for such elimination shall theretofore have been made, shall be paid by the state in the first instance, but the state shall be entitled to recover from the railroad company or companies, by way of reimbursement (1) the entire amount of the railroad improvements not an essential part of elimination, and (2) the amount of the net benefit to the company or companies from the elimination exclusive of such railroad improvements, the amount of such net benefit to be adjudicated after the completion of the work in the manner to be prescribed by law, and in no event to exceed fifteen per centum of the expense of the elimination, exclusive of all incidental improvements. The reimbursement by the railroad companies shall be payable at such times, in such manner and with interest at such rate as the legislature may prescribe.

The expense of any grade crossing elimination the construction work for which was commenced before January first, nineteen hundred thirty-nine, shall be borne by the state, railroad companies, and the municipality or

municipalities in the proportions formerly prescribed by section 14 of article VII of the constitution in force on July first, nineteen hundred thirty-eight, and the law or laws enacted pursuant to its provisions, applicable to such elimination, and subject to the provisions of such former section and law or laws, including advances in aid of any railroad company or municipality, although such elimination shall not be completed until after January first, nineteen hundred thirty-nine.

A grade crossing elimination the construction work for which shall be commenced after January first, nineteen hundred thirty-nine, shall include incidental improvements rendered necessary or desirable because of such elimination, and reasonably included in the engineering plans therefor. Out of the balance of all moneys authorized to be expended under section 14 of article VII of the constitution in force on July first, nineteen hundred thirty-eight, and remaining unexpended and unobligated on such date, fifty million dollars shall be deemed segregated for grade crossing eliminations and incidental improvements in the city of New York and shall be available only for such purposes until such eliminations and improvements are completed and paid for.

Notwithstanding any of the foregoing provisions of this section the legislature is hereby authorized to appropriate, out of the proceeds of bonds now or hereafter sold to provide moneys for the elimination of railroad crossings at grade and incidental improvements pursuant to this section, sums not exceeding in the aggregate sixty million dollars for the construction and reconstruction of state highways and parkways.

Art. VII, sec. 18

The legislature may authorize by law the creation of a debt or debts of the state to provide for the payment of a bonus to each male and female member of the armed forces of the United States, still in the armed forces, or separated or discharged under honorable conditions, for service while on active duty with the armed forces at any time during the period from December seventh, nineteen hundred forty-one to and including September second, nineteen hundred forty-five, who was a resident of this state for a period of at least six months immediately prior to his or her enlistment, induction or call to active duty. The law authorizing the creation of the debt shall provide for payment of such bonus to the next of kin of each male and female member of the armed forces who, having been a resident of this state for a period of six months immediately prior to his or her enlistment, induction or call to active duty, died while on active duty at any time during the period from December seventh, nineteen hundred forty-one to and including September second, nineteen hundred forty-five; or who died while on active duty subsequent to September second, nineteen hundred forty-five, or after his or her separation or discharge under honorable conditions, prior to receiving payment of such bonus. An apportionment of the moneys on the basis of the periods and places of service of such members of the armed forces shall be provided by general laws. The aggregate of the debts authorized by this section shall not exceed four hundred million dollars. The provisions of this article, not inconsistent with this section, relating to the issuance of bonds for a debt or debts of the state and the maturity and payment thereof, shall apply to a debt or debts created pursuant to this section; except that the law authorizing the contracting of such debt or debts shall take effect without submission to the people pursuant to section eleven of this article.

Proceeds of bonds issued pursuant to law, as authorized by this section as in force prior to January first, nineteen hundred fifty shall be available and may be expended for the payment of such bonus to persons qualified therefor as now provided by this section.

Art. VII, sec. 19

The legislature may authorize by law the creation of a debt or debts of the state, not exceeding in the aggregate two hundred fifty million dollars, to provide moneys for the construction, reconstruction, rehabilitation, improvement and equipment of facilities for the expansion and development of the program of higher education provided and to be provided at institutions now or hereafter comprised within the state university, for acquisition of real property therefor, and for payment of the state's share of the capital costs of locally sponsored institutions of higher education approved and regulated by the state university trustees. The provisions of this article, not inconsistent with this section, relating to the issuance of bonds for a debt or debts of the state and the maturity and payment thereof, shall apply to a state debt or debts created pursuant to this section; except that the law authorizing the contracting of such debt or debts shall take effect without submission to the people pursuant to section eleven of this article.

Art. VIII, sec. 2-a

Notwithstanding the provisions of section one of this article, the legislature by general or special law and subject to such conditions as it shall impose:

A. May authorize any county, city, town or village or any county or town on behalf of an improvement district to contract indebtedness to provide a supply of water, in excess of its own needs, for sale to any other public corporation or improvement district;

B. May authorize two or more public corporations and improvement districts to provide for a common supply of water and may authorize any such corporation, or any county or town on behalf of an improvement district, to contract joint indebtedness for such purpose or to contract indebtedness for specific proportions of the cost;

C. May authorize any county, city, town or village or any county or town on behalf of an improvement district to contract indebtedness to provide facilities, in excess of its own needs, for the conveyance, treatment and disposal of sewage from any other public corporation or improvement district;

D. May authorize two or more public corporations and improvement districts to provide for the common conveyance, treatment and disposal of sewage and may authorize any such corporation, or any county or town on behalf of an improvement district, to contract joint indebtedness for such purpose or to contract indebtedness for specific proportions of the cost;

E. May authorize any county, city, town or village or any county or town on behalf of an improvement district to contract indebtedness to provide facilities, in excess of its own needs, for drainage purposes from any other public corporation or improvement district.

F. May authorize two or more public corporations and improvement districts to provide for a common drainage system and may authorize any such corporation, or any county or town on behalf of an improvement district, to contract joint indebtedness for such purpose or to contract indebtedness for specific proportions of the cost.

Indebtedness contracted by a county, city, town or village pursuant to this section shall be for a county, city, town or village purpose, respectively. In ascertaining the power of a county, city, town or village to contract indebtedness, any indebtedness contracted pursuant to paragraphs A and B of this section shall be excluded.

The legislature shall provide the method by which a fair proportion of joint indebtedness contracted pursuant to paragraphs D and F of this section shall be allocated to any county, city, town or village.

The legislature by general law in terms and in effect applying alike to all counties, to all cities, to all towns and/or to all villages also may provide that all or any part of indebtedness contracted or proposed to be contracted by any county, city, town or village pursuant to paragraphs D and F of this section for a revenue producing public improvement or service may be excluded periodically in ascertaining the power of such county, city, town or village to contract indebtedness. The amount of any such exclusion shall have a reasonable relation to the extent to which such public improvement or service shall have yielded or is expected to yield revenues sufficient to provide for the payment of the interest on and amortization of or payment of indebtedness contracted or proposed to be contracted for such public improvement or service, after deducting all costs of operation, maintenance and repairs thereof. The legislature shall provide the method by which a fair proportion of joint indebtedness proposed to be contracted pursuant to paragraphs D and F of this section shall be allocated to any county, city, town or village for the purpose of determining the amount of any such exclusion. The provisions of paragraph C of section five and section ten-a of this article shall not apply to indebtedness contracted pursuant to paragraphs D and F of this section.

The legislature may provide that any allocation of indebtedness, or determination of the amount of any exclusion of indebtedness, made pursuant to this section shall be conclusive if made or approved by the state comptroller.

Art. VIII, sec. 6

In ascertaining the power of the cities of Buffalo, Rochester and Syracuse to contract indebtedness, in addition to the indebtedness excluded by section 5 of this article, there shall be excluded:

Indebtedness not exceeding in the aggregate the sum of ten million dollars, heretofore or hereafter contracted by the city of Buffalo or the city of Rochester and indebtedness not exceeding in the aggregate the sum of five million dollars heretofore or hereafter contracted by the city of Syracuse for so much of the cost and expense of any public improvement as may be required by the ordinance or other local law therein assessing the same to be raised by assessment upon local property or territory.

Art. VIII, sec. 7

In ascertaining the power of the city of New York to contract indebtedness, in addition to the indebtedness excluded by section 5 of this article, there shall be excluded:

A. Indebtedness contracted prior to the first day of January, nineteen hundred ten, for dock purposes proportionately to the extent to which the current net revenues received by the city therefrom shall meet the interest on and the annual requirements for the amortization of such indebtedness. The legislature shall prescribe the method by which and the terms and conditions under which the amount of any such indebtedness to be so excluded shall be determined, and no such indebtedness shall be excluded except in accordance with such determination. The legislature may confer appropriate jurisdiction on the appellate division of the supreme court in the first judicial department for the purpose of determining the amount of any such indebtedness to be so excluded.

B. The aggregate of indebtedness initially contracted from time to time after January first, nineteen hundred twenty-eight, for the construction or equipment, or both, of new rapid transit railroads, not exceeding the sum of three hundred million dollars. Any indebtedness thereafter contracted in excess of such sum for such purposes shall not be so excluded, but this provision shall not be construed to prevent the refunding of any of the indebtedness excluded hereunder.

C. The aggregate of indebtedness initially contracted from time to time after January first, nineteen hundred fifty, for the construction, reconstruction and equipment of city hospitals, not exceeding the sum of one hundred fifty million dollars. Any indebtedness thereafter contracted in excess of such sum for such purposes, other than indebtedness contracted to refund indebtedness excluded pursuant to this paragraph, shall not be so excluded.

D. The aggregate of indebtedness initially contracted from time to time after January first, nineteen hundred fifty-two, for the construction and equipment of new rapid transit railroads, including extensions of and interconnections with and between existing rapid transit railroads or portions thereof, and reconstruction and equipment of existing rapid transit railroads, not

exceeding the sum of five hundred million dollars. Any indebtedness thereafter contracted in excess of such sum for such purposes, other than indebtedness contracted to refund indebtedness excluded pursuant to this paragraph, shall not be so excluded.

E. Indebtedness contracted for school purposes, evidenced by bonds, to the extent to which state aid for common schools, not exceeding two million five hundred thousand dollars, shall meet the interest and the annual requirements for the amortization and payment of part or all of one or more issues of such bonds. Such exclusion shall be effective only during a fiscal year of the city in which its expense budget provides for the payment of such debt service from such state aid. The legislature shall prescribe by law the manner by which the amount of any such exclusion shall be determined and such indebtedness shall not be excluded hereunder except in accordance with the determination so prescribed. Such law may provide that any such determination shall be conclusive if made or approved by the state comptroller.

Art. VIII, sec. 7-a

In ascertaining the power of the city of New York to contract indebtedness, in addition to the indebtedness excluded under any other section of this constitution, there shall be excluded:

A. The aggregate of indebtedness initially contracted from time to time by the city for the acquisition of railroads and facilities or properties used in connection therewith or rights therein or securities of corporations owning such railroads, facilities or rights, not exceeding the sum of three hundred fifteen million dollars. Provision for the amortization of such indebtedness shall be made either by the establishment and maintenance of a sinking fund therefor or by annual payment of part thereof, or by both such methods. Any indebtedness thereafter contracted in excess of such sum for such purposes shall not be so excluded, but this provision shall not be construed to prevent the refunding of any such indebtedness.

Notwithstanding any other provision of the constitution, the city is hereby authorized to contract indebtedness for such purposes and to deliver its obligations evidencing such indebtedness to the corporations owning the railroads, facilities, properties or rights acquired, to the holders of securities of such owning corporations, to the holders of securities of corporations holding the securities of such owning corporations, or to the holders of securities to which such acquired railroads, facilities, properties or rights are now subject.

B. Indebtedness contracted by the city for transit purposes, and not otherwise excluded, proportionately to the extent to which the current net revenue received by the city from all railroads and facilities and properties used in connection therewith and rights therein owned by the city and securities of corporations owning such railroads, facilities, properties or rights, owned by the city, shall meet the interest and the annual requirements for the amortization and payment of such non-excluded indebtedness.

In determining whether indebtedness for transit purposes may be excluded under this paragraph of this section, there shall first be deducted from the current net revenue received by the city from such railroads and facilities and properties used in connection therewith and rights therein and

securities owned by the city: (a) an amount equal to the interest and amortization requirements on indebtedness for rapid transit purposes heretofore excluded by order of the appellate division, which exclusion shall not be terminated by or under any provision of this section; (b) an amount equal to the interest on indebtedness contracted pursuant to this section and of the annual requirements for amortization on any sinking fund bonds and for redemption of any serial bonds evidencing such indebtedness; (c) an amount equal to the sum of all taxes and bridge tolls accruing to the city in the fiscal year of the city preceding the acquisition of the railroads or facilities or properties or rights therein or securities acquired by the city hereunder, from such railroads, facilities and properties; and (d) the amount of net operating revenue derived by the city from the independent subway system during such fiscal year. The legislature shall prescribe the method by which and the terms and conditions under which the amount of any indebtedness to be excluded hereunder shall be determined, and no indebtedness shall be excluded except in accordance with the determination so prescribed. The legislature may confer appropriate jurisdiction on the appellate division of the supreme court in the first judicial department for the purpose of determining the amount of any debt to be so excluded.

Art. VIII, sec. 8

No indebtedness of a county, city, town, village or school district valid at the time of its inception shall thereafter become invalid by reason of the operation of any of the provisions of this article.

Art. VIII, sec. 9

Whenever the boundaries of any city are the same as those of a county, or when any city includes within its boundaries more than one county, the power of any county wholly included within such city to contract indebtedness shall cease, but the indebtedness of such county shall not, for the purposes of this article, be included as a part of the city indebtedness.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #12

REQUESTED ACTION: None, as the report is informational.

On February 1, 2023, the Executive Committee approved the establishment of the Working Group on Facial Recognition Technology and Access to Legal Representation. The mission statement of the Working Group is as follows:

> The Working Group on Facial Recognition Technology and Access to Legal Representation shall examine the legal and ethical considerations surrounding the use of facial recognition and other technology to restrict individual freedoms, including but not limited to attendance at events or entrance into venues as well as the propriety of the use of this and other technology on a lawyer's ability to represent clients without fear of retribution. The Working Group will also consider how the use of technology can prohibit the ability of members of the legal profession to provide effective representation of clients and disrupt access to justice. The Working Group shall make any necessary policy recommendations to the NYSBA Executive Committee.

Chair Domenick Napoletano will report to the Executive Committee on the work, goals, and composition of the Working Group. Working Group member Thomas J. Maroney will report to the House of Delegates.

No formal action is requested for this agenda item.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #13

REQUESTED ACTION: None, as the report is informational.

John H. Gross, chair of the Committee on Annual Awards, will report to the House on preparations for the 2024 Gala Dinner.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #14

REQUESTED ACTION: None, as the report is informational.

Carla M. Palumbo, president of the New York Bar Foundation, will update the House on the ongoing work and mission of The Foundation, including the awarding of grants, fellowships, and scholarships.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #15

REQUESTED ACTION: One item of administrative business.

The Bylaws (IX.1.B) require the House to ratify appointments to the Finance Committee after confirmation by the Executive Committee. President Richard C. Lewis has reappointed Jackie J. Drohan, Andre R. Jaglom, and Tara Anne Pleat as members, each to serve a two-year term.

The report will be presented by President-Elect Domenick Napoletano, chair of the House of Delegates.

NEW YORK STATE BAR ASSOCIATION
MINUTES OF EXECUTIVE COMMITTEE MEETING
NEW YORK HILTON MIDTOWN, NEW YORK, NEW YORK
MARCH 31, 2023

Present: Gregory K. Arenson, Simeon H. Baum, T. Andrew Brown, David Louis Cohen, Orin J. Cohen, Elena DeFio Kean, Sarah E. Gold, Taa R. Grays, LaMarr J. Jackson, Sherry Levin Wallach, Richard C. Lewis, Michael A. Marinaccio, Michael A. Markowitz, Thomas J. Maroney, Michael R. May, Michael J. McNamara, Ronald C. Minkoff, Mark J. Moretti, Hon. James P. Murphy, Domenick Napoletano, Christopher R. Riano, Violet E. Samuels, Mirna M. Santiago, Nancy Sciocchetti, Hon. Adam Seiden, Diana S. Sen, Lauren E. Sharkey, Kathleen M. Sweet, Kaylin L. Whittingham, Pauline Yeung-Ha

Guests: Bridgette Ahn, Jane Bello Burke, Hon. Karen Beltran, Catherine A. Christian, Clotelle L. Drakeford, Jacqueline J. Drohan, Matthew H. Feinberg, Joseph A. Glazer, Evan M. Goldberg, Susan L. Harper, Shawndra G. Jones, Michael Kenneally, Andrew Kossover, Steven G. Leventhal, Thomas M. Pitegoff, Patricia J. Shevy, Barry D. Skidelsky, Michelle H. Wildgrube

Ms. Levin Wallach presided over the meeting as President of the Association.

The members were welcomed, and Ms. Ahn, Ms. Bello Burke, Judge Beltran, Ms. Harper, and Mr. Skidelsky were introduced as incoming members of the Executive Committee for the term commencing on June 1, 2023.

1. Approval of minutes of meetings. The minutes of the January 9, February 1, and March 2, 2023, meetings were approved as distributed.

2. Consent calendar:

   a. Approval of presidential appointments to the House of Delegates.
   b. Approval of mission statement of Task Force on Notarization.
   c. Approval of bank signatories.

   The consent calendar, consisting of the above items, was approved by voice vote.

3. Report of Treasurer. In his capacity as Treasurer, Mr. Napoletano reported that through February 28, 2023, the Association's total revenue was $10,668,818, an increase of approximately $803,831 from the previous year, and total expenses were $4,461,259, an increase of approximately $1,588,945 over 2022, for a budgeted surplus of $6,207,559. The report was received with thanks.

4. Report of Executive Director. Pamela McDevitt, executive director, updated the Executive Committee with respect to the administration and operations of the Association, including staffing changes, review of the 2024 Annual Meeting and planning for future annual meetings, and the expansion of the attorney wellbeing program. Ms. McDevitt also spoke

to activity within the Committee on Legal Education and Admission to the Bar. The report was received with thanks.

5. Report of President. Ms. Levin Wallach highlighted the items contained in her written report, a copy of which is appended to these minutes.

6. Report of Committee on Continuing Legal Education. Shawndra Jones, chair of the Committee on Continuing Legal Education, together with vice chair Patricia Shevy and associate executive director Kathy Suchocki, presented on the annual schedule of CLE programming and section meetings, the new MCLE credit in cybersecurity, privacy, and date protection, and the launch of a series of practical skills programs. The report was received with thanks.

7. Report of Committee on Legislative Policy. Evan M. Goldberg, chair of the Committee on Legislative Policy, together with Hilary F. Jochmans, policy director, and Cheyenne Burke, associate director of government relations, provided a review of the Association's 2023 legislative agenda and advocacy activity, includes updates on the state and federal legislative portfolios. The report was received with thanks.

8. Report on 18B Litigation. David P. Miranda, general counsel, updated the Executive Committee on the status of the ongoing litigation against the State of New York to implement an immediate statewide state-funded increase in assigned counsel rates. The report was received with thanks.

9. Report and recommendations of Business Law Section. Business Law Section chair Thomas M. Pitegoff presented the Section's affirmative legislative proposal to amend the New York Franchise Sales Act to change the definition of "franchise" and limit the geographic scope of the statute's pre-sale registration requirement to conform more closely with the franchise law of other states and federal regulations. After discussion, a motion was unanimously carried to approve the affirmative legislative proposal.

10. Reports of Vice-Presidents and Executive Committee Liaisons. Mr. Markowitz reported on developments within the Tenth Judicial District and the work of the Task Force on Notarization. Judge Seiden advised on matters of interest within the Ninth Judicial District. Mr. Marinaccio provided an update on developments within the Twelfth Judicial District. The reports were received with thanks.

11. Report and recommendations of Task Force on Emerging Digital Finance and Currency. Jacqueline J. Drohan, co-chair of the Task Force, and Matthew Feinberg, a member of the Task Force, presented the Task Force's report on digital assets in two parts.

    First, after discussion, a motion was unanimously adopted to endorse the following "Legislative Regulatory Resolution" for favorable action by the House:

    > **Whereas** The New York State Bar Association formed a Task Force on Emerging Digital Finance and Currency in June 2022 to study the impact of

digital assets, digital currency, non-fungible tokens, Web3, and the Metaverse on the legal profession, to educate lawyers on how to represent clients effectively, ethically, and knowledgeably in these areas, and to evaluate and study the regulatory, legislative, and licensing structures governing emerging digital assets, finance and currency.

Whereas The Task Force has held education programs on the topics of digital assets, digital currency, non-fungible tokens, Web3 and the Metaverse and its impact in and on the law and legal profession and presented to bar leaders on the effects of these emerging technologies across many practice areas.

Whereas NYSBA, in conjunction with the Task Force, has taken notice of the rapid growth and expanded application of digital finance and underlying distributed ledger and other decentralized web technologies, and has undertaken a careful consideration of the manifest need for consumer and environmental protection against certain risks posed by virtual currency markets.

Whereas Given the interest, knowledge base and broader informational needs of its membership in the complex legal, regulatory and practice aspects of the industry, and the leading role New York State has played in licensing and enforcement, the Association shall take a position of public advocacy for clear, efficient, and effective state regulation.

Resolved The New York State Bar Association supports prioritizing consumer and environmental protection while balancing and encouraging the growth of well-regulated digital finance and related business within New York State.

Resolved The New York State Bar Association recommends regulation, legislation and licensing that is consistent across the country to prevent inequities in the use of currency and assets across the country.

Resolved The New York State Bar Association suggests exploration of regulation, legislation and licensing of digital finance and currency, digital assets, and Web 3 across the country and globally.

Second, after discussion, a motion was unanimously adopted to endorse the following "Web3 Resolution" for favorable action by the House:

Whereas The New York State Bar Association formed a Task Force on Emerging Digital Finance and Currency in June 2022 to study the impact of digital assets, digital currency, non-fungible tokens, Web3, and the Metaverse on the legal profession, to educate lawyers on how to represent clients effectively, ethically, and knowledgeably in these areas, and to

evaluate and study the regulatory, legislative, and licensing structures governing emerging digital assets, finance and currency.

Whereas The Task Force has held education programs on the topics of digital assets, digital currency, non-fungible tokens, Web3 and the Metaverse and its impact in and on the law and legal profession and presented to bar leaders on the effects of these emerging technologies across many practice areas.

Resolved, that the Task Force recommends that the New York State Bar Association explore and engage in the Web3 space by providing information-sharing opportunities, educating its members, and promoting the mission of the Association through use of the Web3 and other emerging digital technologies, including the potential use of blockchain, the Metaverse, NFTs, and digital currency to store and deliver content and provide value and access to the membership.

12. Report of Local and State Government Law Section and Task Force on Ethics of Local Public Sector Lawyering. Steven G. Leventhal, co-chair of the Task Force on Ethics of Local Public Sector Lawyering, reported to the Executive Committee on the work, goals, and composition of the Task Force. Michael Kenneally, chair of the Local and State Government Law Section, then gave a legislative update on amendment of General Municipal Law §808 with respect to training for local boards of ethics, the support for which being a policy goal of the Association. The report was received with thanks.

13. Report of Task Force on Mental Health and Trauma Informed Representation. Joseph A. Glazer, co-chair of the Task Force on Mental Health and Trauma Informed Representation, reported to the Executive Committee on the ongoing work of the Task Force in anticipation of submission of a final report for consideration at the June 2023 meeting of the House of Delegates. The report was received with thanks.

14. Discussion on Future Meetings of the House of Delegates. Ms. Levin Wallach and Pamela McDevitt, executive director, facilitated a discussion on the scheduling and location of future meetings of the House of Delegates, and the possibility of holding the June meeting at the Bar Center in Albany. No formal action was taken on this item.

15. Report of Task Force on Modernization of Criminal Practice. Catherine Christian and Andy Kossover, co-chairs of the Task Force on Modernization of Criminal Practice, presented on the ongoing work of the Task Force and an update on the status of the Task Force's forthcoming report and recommendations. The report was received with thanks.

16. Report of Committee on Membership. Clotelle L. Drakeford and Michelle H. Wildgrube, co-chairs of the Committee on Membership, updated the Executive Committee on the Association's membership engagement and retention efforts, including membership renewal for the 2023 dues year, results of the recently conducted membership survey, and highlights of the member benefits program. The report was received with thanks.

17. New Business. Ms. Levin Wallach observed that Simeon H. Baum, T. Andrew Brown, Elena DeFio Kean, Hon. Adam Seiden, and Diana S. Sen are rotating off the Executive Committee and that this is their last meeting. She thanked them for their service and their participation. Ms. Levin Wallach then thanked the officers, members of the Executive Committee, and staff for their assistance during her term as President.

18. Date and place of next meeting. The next meeting of the Executive Committee will take place on Thursday, June 8, and Friday, June 9, 2023, in person at The Otesaga in Cooperstown, New York, with an option for remote participation via Zoom.

19. Adjournment. There being no further business, the meeting of the Executive Committee was adjourned.

Respectfully submitted,

Taa R. Grays
Secretary

NEW YORK STATE BAR ASSOCIATION
MINUTES OF EXECUTIVE COMMITTEE MEETING
REMOTE MEETING
MAY 17, 2023

Present: Gregory K. Arenson, Simeon H. Baum, T. Andrew Brown, David Louis Cohen, Orin J. Cohen, Elena DeFio Kean, Sarah E. Gold, Sherry Levin Wallach, Richard C. Lewis, Michael A. Marinaccio, Michael A. Markowitz, Thomas J. Maroney, Michael R. May, Ronald C. Minkoff, Mark J. Moretti, Violet E. Samuels, Hon. Adam Seiden, Diana S. Sen, Lauren E. Sharkey, Kathleen M. Sweet, Kaylin L. Whittingham, Pauline Yeung-Ha

Guests: Bridgette Ahn, Jane Bello Burke, Susan L. Harper, Sheila E. Shea

Ms. Levin Wallach presided over the meeting as President of the Association.

1. Ms. Levin Wallach called the meeting to order.

2. Report and recommendations of Task Force on Mental Health and Trauma Informed Representation. Task Force co-chair Sheila E. Shea presented the Task Force's report and recommendations contained therein. After discussion, and acceptance of a friendly amendment concerning addition of a footnote recommending further study on the efficacy of Rule 1.14, a motion was adopted to endorse the report for favorable action by the House of Delegates at the June 10, 2023, meeting. Mr. Arenson abstained from the vote.

3. Report and recommendations of the California Lawyers Association seeking co-sponsorship for ABA Resolution. Mr. Lewis, on behalf of the California Lawyers Association, reviewed a request that the New York State Bar Association co-sponsor a resolution submitted for consideration at the August 2023 Annual Meeting of the American Bar Association in Denver, Colorado. The proposed resolution reads as follows:

    RESOLVED, That the American Bar Association encourages federal, state, local, territorial, and tribal governments, and law schools to establish and fully fund a Rural Practice Loan Forgiveness (RPLF) program.

    FURTHER RESOLVED, That eligibility for participation in such a program resemble these recommended guidelines:

    (A) "Rural Area" should be defined according to the needs of the relevant jurisdiction in order to adequately address existing barriers blocking access to justice, taking into account factors such as the distribution of the population within the jurisdiction and the location and concentration of legal services within the jurisdiction.

    (B) The required service period for loan forgiveness be 7 years. Jurisdictions may recognize supervised services provided by law students while enrolled

in an ABA-Accredited school to count towards the seven-year service requirement.

(C) Any graduate of an ABA-Accredited law school may enter into a loan forgiveness program within seven (7) years of graduating from law school.

(D) Individuals participating in this program must represent members of their local rural area and not work in a rural office of a corporate entity or a law firm with more than 30 attorneys across all locations.

After discussion, a motion was adopted for the New York State Bar Association to co-sponsor the resolution, on the conditions that:

(a) Any participant in the RPLF program (a "Participant") must live and work in the "Rural Area" (as defined) for the duration of their participation; and

(b) No Participant may satisfy the RPLF program's duration/residency requirements by either remote practice or part-time practice in the Rural Area, though any Participant may engage in remote or part-time practice from time to time as necessary for travel, health, or other similar reasons.

4. Consent calendar:

a. Approval of J.R. Carter Santana as presidential appointment to House of Delegates from Fourth Department
b. Approval of mission statement of Task Force on Homelessness and the Law
c. Approval of mission statement of Task Force on Medical Aid in Dying

The consent calendar, consisting of the above items, was approved by voice vote.

5. New Business. Mr. Lewis reported that representatives of the Task Force on Notarization had met with staff of the NYS Attorney General concerning the recently enacted notary record keeping regulations. Ms. Levin Wallach thanked the members of the Executive Committee for their service over the course of the 2022-2023 term.

6. Date and place of next meeting. The next meeting of the Executive Committee will take place on Thursday, June 8, and Friday, June 9, 2023, in person at The Otesaga in Cooperstown, New York, with an option for remote participation via Zoom.

7. Adjournment. There being no further business, the meeting of the Executive Committee was adjourned.

Respectfully submitted,

Taa R. Grays
Secretary