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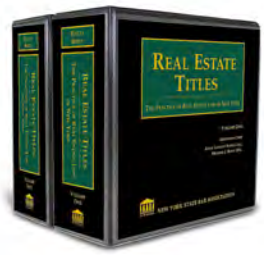

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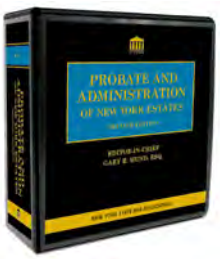

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RICHARD LEWIS

Alleviating Barriers To Expand Access to Legal Representation

The opportunity to serve as the 126th president of the New York State Bar Association is the highest honor of my professional career. It is the culmination of all my work for this association, from my service as Executive Committee liaison to the Task Force on Rural Justice to chairing the Uniform Court Rules Committee and leading the Task Force on Notarization as well as my work at my local bar association and my presidency of the Broome County Bar Association.

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

I don't have all the answers to removing these hurdles, which is why I need you to use your voice.

I assure you that my door – at least virtually – will always be open, and I urge you to contact me. 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, especially when it comes to the impediments that stand in the way of your ability to help your clients.

The aftermath of the COVID-19 pandemic has further embedded technology into our everyday professional and personal lives. This technology has had a profound impact on how we conduct our business, but unfortunately it has not alleviated all the daily barriers we face serving our clients and trying to expand access to legal representation.

That is why "Standing Up for the Practice of Law" is the theme of my presidency.

Its overarching goal is to enable the New York State Bar Association to provide our members with the resources and support they require to perform their jobs in the most productive manner possible. Those resources include the tools and training that are necessary for our members to operate in an expanding digital environment so we may have a stronger impact on our clients and communities, while continuing to grow and expand our influence.

However, again, I need your feedback to help facilitate that.

I encourage you to alert us to the inefficiencies and redundancies that prohibit you from serving your clients and being as effective as you can in their representation.

I understand that it isn't always easy to speak out.

However, 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 the rule of law is under attack. We need to listen to each other and respect differences of opinion so that we may 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 ahead in addressing these challenges is largely dependent on our ability to listen to each other, even if we disagree, or 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 in response to a significant increase in hate crimes targeting Jews and Asians throughout the nation and the world.

Regarding homelessness, we see it every day of our lives, on the news or walking through our hometowns. Most of us, at one time or another, have averted our eyes, but we need to do the opposite and see the problem more clearly. By working to ease homelessness, we also address outcomes related to it such as domestic violence, mental illness, alcoholism, drug addiction and the challenges our veterans face.

We have a lot to be proud of at the New York State Bar Association.

One of the biggest assets we have 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 government attorneys to Big Law. We need to embrace that diversity and appreciate the issues that confront our colleagues who may be dealing with an overwhelming caseload if they take assigned counsel cases or may simply need better internet access.

We also have access to the most influential individuals and institutions throughout the state and the nation.

We possess the means to bring issues to the table whether it be to the executive, legislative or judicial branch. We can speak to our legislators and governor as the most powerful attorney lobbying group in the state, and we can speak to the chief judge or to the Office of Court Administration because of the respect we have cultivated throughout our proud history.

Looking back, 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 one of my hobbies: 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 can be said for practicing law; we need to stop skating in proverbial circles.

We can start by streamlining redundancies. Only about 33% of our time is spent on billable hours, according to the 2022 Clio Legal Trends Report, which is an improvement from the previous year, although far from 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 cannot do that without better broadband access, easier to use e-filing systems, training for court employees and, most of all, honest and frequent communication.

To that end, I have established the Committee on Law Practice and Court 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, to make recommendations to our Executive Committee.

Still, there cannot be access to justice if individuals lack representation.

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 earning 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, both state and federal, to incentivize young lawyers to practice in less populated areas and underserved areas.

Civics education is also an issue that 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 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 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 which will include judges from all levels, attorneys, teachers and students.

Leading up to that, I will spend my presidential tenure aiming to remove the impediments that interfere with your ability to perform your job in the best manner possible. I assure you that the work I have done with the New York State Bar Association is what has inspired me and continues to motivate me to do even more.

I will close with this thought. I would not be here today if not for the dedication and leadership of the 125 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.

RICHARD LEWIS can be reached at rlewis@nysba.org.

What's Your Succession Plan?

By Sarah Gold

Whether you've been a solo or small firm practitioner for a year or for decades, there is a thought in everyone's mind about what happens when you don't want to do this anymore, or worse yet, when you can't do it anymore. That's when preparation pays off. And to be fair, this sort of preparation can serve you well in your day-to-day practice in the short term.

The best first step is always documenting things. This is true in your personal life as well as a practice like the law. You need lists. Lists of clients, lists of cases, lists of files (both open and closed) and where to find them. I know for many people this may already be in place; just be more intentional about it. What would someone do if they had to handle your firm in your absence? Could they figure out the status of your files? I know it can be easy to let certain things slide over time, but it can be a good project to just touch the open files and find out where they are in process. They may actually be closed but need that last little push to take them out of rotation. Beyond your files, what about your passwords? You shouldn't have them written down where anyone can find them, but a good rule is to have them in a password-protected database. But who knows that password? Could someone access it if they had to? And remember, this also bleeds over to your personal life. There's an entire digital landscape that needs to be taken care of after you're gone. Many people don't give thought to what their digital estate looks like.

Beyond the passwords and clients, think more broadly. Who are your vendors and service providers? What contracts do you have in place, and what are their renewal terms? Can you find the paperwork for any of them? The terms may not be what you think they are, or were. Renewal might be 60 days out. It might be month-to-month, but only if you say so. As an attorney, you probably did read the terms once, but if it's been a while, take a look to see if they've changed. It's become much easier for vendors to change terms electronically, so you might not know where you stand. As someone who is going through a renewal cycle personally for several vendor contracts, I've been surprised more than once.

Next, consider documenting standard operating procedures for your firm. This could be a big value-add. It can also be handy to have an SOP as a reference for yourself, as you may forget certain steps on projects and duties that are not done every day. I know that a simple reminder of that one step you cannot remember comes in handy at the most opportune times. Creating standard operating procedures are worth it because they can help alleviate frustration. Another word for this is workflow, and there are several ways it can be done. It can be as simple as a legal pad and pen, but you can go digitally, too. There are software packages that will record your work patterns to provide you with videos and documentation. If dictation is your way to think out loud, record yourself talking through the work. My rule is that if another person could

pick up the documentation and be able to do the work without asking you questions, you've done it right. Yes, it can be daunting to take on a project like that, but it could be helpful if someone needs to take over for you in the short or long term. Beyond the usefulness for your own firm, it can help ease the transition if you were to sell or merge with another firm in the future.

"The consequences of not planning for the future can be dire. Without advance planning on what happens to your firm upon disability or death, you may leave someone with a true mess that will take much time and effort to fix."

The consequences of not planning for the future can be dire. Without advance planning on what happens to your firm upon disability or death, you may leave someone with a true mess that will take much time and effort to fix. If you are the attorney who is assuming cases because of a lack of succession, you need to be aware of issues that might come up. What's the situation regarding data? Have the files been secured regularly on the cloud? Are the files only in hard copy? How is email being handled? What about your website? And even more basic, what about the escrow account? Think about it: If you don't make arrangements to allow another attorney to access the trust account, the money must remain in trust until a court authorizes access. Only today I saw an attorney asking on a forum how to handle this problem because a client is waiting on funds of a sale that got hung up in escrow due to an attorney incapacity. Lack of foresight if something goes wrong goes beyond you and your firm and affects the clients directly. It always makes me wonder when I see the ubiquitous ad in the county bar association newsletter seeking the files of a prior attorney. Certainly, not every situation can be prevented, but some advance planning goes a long way in easing the tensions for the successive attorneys handling your work as well as those clients who also must face those consequences.

These are the sort of tips we outline in the soon-to-be published updated version of the NYSBA's "Planning Ahead Guide." We put it together with the thought of what to do in emergencies as well as preparing for succession in a firm. Closing down a firm comes with a multitude of issues, and some of them can be handled with proper forethought and planning. Knowing where things like files and passwords are is half the battle, and strong direction can assist immeasurably in your absence.

Planning for Succession

If you're in the position of planning your next move and are looking to give up the practice and retire, think about successors. Depending on your firm type, you may already have built-in successors available to you, but if you are a true solo, you'll have to go further afield. Where you practice is going to play a large role in this. Some more rural locations may have difficulty in identifying younger attorneys who are willing to take on a more general practice in an established firm. Be sure to identify a successor who is qualified to take over your practice. For many it may be someone you train up and introduce to your client base. If you can't identify a successor, you may instead choose to sell your practice outright. If you're in this position, your thoughts may be about what collections look like for longer-term clients. If you leave abruptly, there may be cases that have not yet paid; who collects those fees? What should your malpractice insurance coverage look like as you transition away from the firm?

Either way, this will take time, so try not to rush the process if you can help it. Your thoughts on the process may not be in line with those working with you, so you need to keep an open mind to how the succession is handled. We all think our work is valuable, but a valuation of the firm may state otherwise. There are firms that can assist in such financials. Keep in mind your own personal planning in this, making sure your estate planning documents reflect the state of your business. And be flexible. As we all know far too well, things can change, and quickly. It is important to be flexible with your succession plan. Be prepared to make changes as needed.

These can be scary things to think about. For many, the retirement plan may be to work until you can't anymore, and that's fine. However, your clients may not necessarily agree to this approach. By planning ahead, even a small amount, you can help to ensure that your solo law practice is prepared for the future.

Sarah Gold, founder of Gold Law Firm in Albany, works with businesses and nonprofits. She is a professor at Rensselaer Polytechnic Institute, where she teaches business law and ethics. Gold is a member of NYSBA's Executive Committee, chair of the Law Practice Management Committee, and previously chaired the General Practice, Business Law and Young Lawyers sections. She has been named a fellow of the New York and American Bar foundations.

SPONSORED COLUMN

How Solo Lawyers Can Amplify Their Impact

By Jack Newton

Solo lawyers make up a strong and vital contingent within the wider market for legal services. While running a solo practice certainly presents its challenges, solos have had great success in delivering tailored client experiences rooted in deeper, hands-on relationships, while themselves also pursuing a greater degree of flexibility in how they work compared to traditional roles.

Running a solo practice is becoming an increasingly popular route for lawyers to take: As outlined in this year's "Legal Trends for Solo Law Firms" report, 31% of lawyers who quit their firms in 2022 started their own solo practices, indicating that the market for solo lawyers is thriving.

Why are so many lawyers taking this direction with their careers? Going solo affords lawyers more control over their personal and professional lives – and being able to work a flexible schedule is key. Not surprisingly, solo lawyers are 38% more likely to prefer working at home over a commercial office. Furthermore:

- 50% want to meet clients virtually;
- 98% want to choose what hours they work; and
- 88% want to work outside of traditional 9–5 working hours.

Since solos have only themselves to rely on, they've also been innovators when it comes to adding new forms of legal technology to help manage their practices and find new efficiencies. For example, the use of cloud-based legal practice management software has become practically universal among solo practitioners.

However, while solos have enjoyed a tremendous advantage in technology adoption, larger firms have also rapidly taken on cloud-based technologies since the start of the COVID-19 pandemic. In doing so, larger firms have since created more efficient and distributed work environments, similar to what solos have been pioneering for more than a decade.

Technological innovation continues to move fast. At the same time, clients expect fast, efficient and seamless experiences with their legal professionals, in line with the experiences they've come to expect elsewhere. To stay competitive, solo practitioners must find new ways to stand out from larger firms by providing an excellent legal product and an effortless client experience, while at the same time balancing their personal needs and desire for flexibility.

While any legal career inevitably comes with some level of stress, an abundance of stress will inevitably negatively impact your physical and mental health. And, although the vast majority of solos working regular business hours reported having positive mental and emotional wellness, nearly half of those working irregular schedules couldn't say the same. Solo lawyers may need to assess how well they can balance work and life and how the dissonances between them can risk adverse outcomes for both.

First, solo lawyers can use technology to set boundaries on their time while staying responsive to clients – a crucial consideration, with responsiveness being key to both client experiences *and* client decisions on who to hire. Client apps, electronic payments and e-signatures included in practice management solutions like Clio Manage give clients what they need to feel in-the-know about their legal matters – even outside of business hours – without needing a direct interaction with their lawyer.

Solos can also use technology to manage more of the behind-the-scenes work that goes into managing client relationships. Solutions like Clio Grow offer features like online calendar bookings, email follow-ups and appointment reminders, online intake forms, e-signatures and lead management. These features help improve experiences and efficiency when building new relationships with clients.

Finally, solo lawyers can always learn more about the latest technologies and build community with like-minded, innovative professionals by attending industry events. The 2023 Clio Cloud Conference, taking place in Nashville, Tennessee on Oct. 9–10, offers a fantastic opportunity for solo practitioners to connect, grow and learn how to amplify their impact.

A solo may be a law firm of one, but with the right tools and approaches, the impact of that one lawyer on the legal industry can be multiplied many times over. Technology provides an important means to help solo lawyers achieve more for their business and for their clients. As solos remain at the forefront of innovations in the legal technology space, they will continue to shape the practice of law in ways that benefit themselves, their profession and their clients.

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

The Future's Not What It Used To Be — You Need an Estate Plan Now

By Lauren E. Sharkey

It took me five years of practicing trust and estates law to develop my own estate plan. The cobbler's children have no shoes, right? I spent my days counseling clients on the importance of having a will and advance directives, at the very least, and could not find the time over a period of *years* to plan for myself.

What finally triggered me to plan for myself was having my first child, Margot. I wanted to have a plan in place before she was born, to pick guardians for her if something were to happen to my spouse, Patrick, and me. I also wanted her to have a trusted person to manage our assets for her benefit if we were gone, and I didn't want her to receive those assets outright until after college, at the very earliest.

For many people, lawyers included, estate planning is often the item on the proverbial to-do list that keeps getting pushed aside. Not because we think it is unimportant, but because we have a lot of other tasks that have higher priority. As lawyers, we spend our careers helping others navigate the legal system, and our clients rely upon our expertise and guidance. So, of course, it is hard to find time for ourselves. It really should be considered a form of self-care to take time out of our busy schedules and develop a thoughtful estate plan for ourselves with qualified professionals. I know I felt a lot better and less stressed after finalizing my own plan.

For lawyers in transition, in particular, it is important to carve out time to think about your own future. Lawyers transition their practice for a variety of reasons: retirement, career changes, family changes or emergencies, sudden illnesses, disability, death or other miscellaneous situations that can arise. Any attorney can experience a variety of transitions over their career. A lot of times it can take events like these to initiate taking the steps to develop an estate plan. Unfortunately, sometimes that can be too late.

As a trusts and estates lawyer, I see the effects of not having a plan or an old plan that may not be what a person would have intended if there is a change in circumstances. A lack of planning can result in children having guardians appointed to manage their assets by persons whom a parent would not have chosen; in assets being inherited by distant relatives; in adverse tax consequences that could have been avoided; in businesses having to close or engage in lengthy litigation; and in costly and invasive guardianship proceedings, to name a few.

I once was involved in a guardianship proceeding for a man in his 80s who had no will, power of attorney or health care proxy. His sister asked me to assist her in getting a guardian appointed for him after the second time he was found by the police wandering outside far away from his home with no idea where he was. For most of his life he had lived alone in a small house he inherited from his parents, and he worked part-time as a janitor at General Electric. He was never formally diagnosed during his lifetime, but needed help with bill paying, grocery shopping, meal preparation, laundry and other life skills. His sister and her husband would buy him groceries each week and do his laundry and whatever else he needed help with. This went on for many years. Unfortunately, he passed away during the guardianship proceeding, and we started an administration proceeding in Surrogate's Court. As we started developing a family tree, the family learned that a predeceased brother had a child who was alive and lived in Pennsylvania. We contacted her and confirmed her relationship to the decedent, though both parties were not interested in reconnecting as family. Once the sister was appointed as administrator, we discovered that the decedent had over $1 million in his checking account. He had accumulated his income and lived a very frugal lifestyle supplemented by his sister and brother-in-law. His sister had no idea he had such resources of his own. For example, we ended up appraising his home and selling it for approximately $8,000, due to the condition of the property and location. The long-lost and estranged niece received 50% of the net probate estate – a complete windfall for her and likely not what the decedent or his sister would have wanted.

In the changing nature of estates, it is even more important to have a plan in place (I sound like a broken record, don't I? But you get the idea – plan, plan, plan!). We are now seeing estates with more unique assets beyond checking, savings, real property and retirement accounts. Some estates have interests in cryptocurrency, NFTs, closely held businesses and cryo-preserved embryos and oocytes. With cryptocurrency and NFTs, it is vital to provide details about the blockchain platform where the asset is located and obtain information about where the password is stored. Wills can specifically bequeath these assets, but unless the executor is able to access the assets, they may not be transferrable and could quite literally be lost forever. With closely held businesses and cryo-preserved embryos and oocytes, many times they are governed by agreements made with the shareholders or cryostorage facility, so it is important to align your estate plan with those agreements.

In addition to avoiding estranged family members from receiving a benefit from your estate, a good estate plan can protect your assets for future generations; it can reserve funds for your own retirement and long-term care needs; it can avoid ethical issues that may arise when transitioning your law practice; it can allow you to choose your preferred fiduciaries to act in your place; and it can provide you and your loved ones with a guided path that meets your goals and values, which can set you up for an enjoyable retirement or reduce the stress of transitioning your practice for other reasons.

So, where do you start?

1. Choose Your Team

Estate planning should be a team approach between an estate planning attorney, a financial advisor and an accountant. You might also include a geriatric care manager, a business attorney or a physician in some cases. Each professional, working in tandem, can help develop a tailored plan for your specific situation, which is based on your family situation, your assets, and your values and goals.

For me, it can be overwhelming to choose from a variety of options (from what accountant to do my taxes to the best camp to send my children to this summer). I have found that asking trusted friends and professionals what they would recommend generally results in a lot of great referrals. I would encourage anyone reading this to do the same. You will want to pick someone that you know has worked well for others. It may not be the right fit for you, but it is a good place to start.

2. Create a Will

In New York, we have a default provision for those domiciled in New York who pass without a will (EPTL 4-1.1). At times, a will may not be necessary to have if the default provision meets your intent. The problem is that life changes, and what might be your intent one day may be affected by situations outside of your control another day. A will can hedge that risk and lay out a contingency plan within the document.

Generally, a will applies to assets that are owned individually, without a beneficiary designation. However, you could establish a testamentary trust within your will for the benefit of a minor, for example, and name that trust as a beneficiary on a retirement account or life insurance policy. This will ensure that the retirement funds and/or life insurance proceeds are properly managed for the minor until they reach the age at which the funds can be distributed to them outright (if it is not a dynasty or lifetime trust).

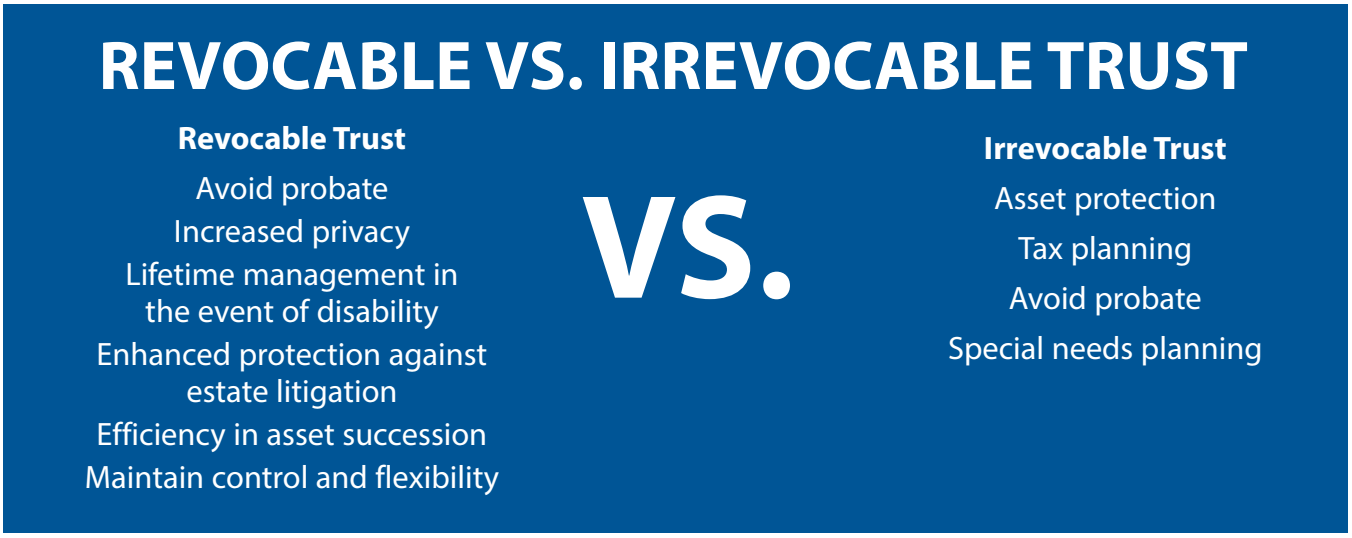
Since the SECURE Act 1.0 and 2.0, it is important to have qualified plan language in your will if you're intending your estate or a testamentary trust to be funded with that type of asset, as it could affect how the trust may have to distribute the account and the resulting tax consequences.

It is also important to choose an appropriate executor in your will, one who will be responsible for managing the estate and distributing assets after the attorney's death. This should be someone (or a corporate fiduciary) that you trust and that is familiar with your family dynamics and the assets of your estate. You can also add provisions in your will to enable your executor to hire professionals, such as accountants, financial advisors, realtors and attorneys.

Most obviously, the will should outline exactly how your assets should be distributed and have back-up plans laid out clearly. Other terms of a typical will should include payment of taxes and debts; granting authority or powers to your executor and trustee, where applicable; a family statement; a provision regarding payments to minors or persons under a disability; and guidance for fiduciaries.

3. Consider Trusts

Trusts can be an excellent tool for estate planning, particularly if you have significant assets, complex family situations or wish to protect assets from the costs of long-term care. Trusts allow you to transfer assets to beneficiaries while avoiding probate, which can be costly and time-consuming. There are several types of trusts,



including revocable and irrevocable trusts, and each has its own advantages and disadvantages.

There are several reasons why you may consider creating a trust as part of your estate planning strategy.

Overall, a trust can be an effective way to manage and distribute assets, avoid probate, save or plan for the payment of estate taxes or long-term care and provide for beneficiaries in a flexible and private way.

4. Plan for Incapacity

In addition to planning for your death, it is essential to consider what will happen if you become incapacitated and unable to make decisions for yourself. At a minimum, you should have a health care proxy and living will that nominate an agent (with backups) to make health care decisions for you if you are unable to make them yourself, and general written instructions for life-sustaining treatment (or not) to your agent in the event you are in a terminal condition. You should also, at a minimum, have a power of attorney, which designates someone to make financial and legal decisions on your behalf.

For transitioning a law practice, having a business power of attorney may be a useful tool. You can limit the agent's authority to specific powers that would enable him or her to act on your behalf regarding your firm's business. If something happens to you suddenly, you may need someone to step in and manage your financial affairs, ensure clients will be protected and well cared for and safeguard original documents.

5. Plan for Your Law Practice

If you own a law practice, it is important to consider what will happen to your practice when you retire, transition to a different career or need to take a leave of absence:

- Develop a succession plan that outlines how ownership and management of the practice will be transferred to another attorney or to a partner and develop a clear exit plan.
- For solo practitioners, align yourself with another attorney or law firm as you approach retirement or transition to ensure that your clients will be cared for in your absence.
- Consider purchasing life insurance to finance the cost of a buyout upon transition or death of a partner.
- Develop corresponding estate planning documents to transfer your interest in the business and appoint an appropriate agent or executor to manage your estate.
- Discuss client communication and notify clients of your transition so that they can choose whom they would like to work with and be informed as to who has control of their file.
- Hire multiple generations of attorneys and support staff, which can be a long-term plan of succession to ensure that the firm will be able to sustain the retirement of one or more attorneys.
- Create checklists to assist you in working through transitions.
- Develop timelines for retaining files and find a custodian for original documents that cannot be destroyed after a period of time (e.g., wills, powers of attorney, health care proxies).

Taking time to work through these steps, and more, will help develop a customized plan for your own situation and hopefully alleviate some stress as you transition your practice.

6. Review and Update Your Plan Regularly

Even though it may be hard to get started, once you do, remember that this is not a "set it and forget it" type thing. I typically recommend a review of your estate plan every three to five years (and sometimes annually, depending on the client's situation). Either way, you should review and update your estate plan regularly to ensure that it reflects your current wishes and circumstances, especially if there has been some type of event or transition in your life recently.

Estate planning is a critical step for a transitioning lawyer. By working with an experienced estate planning attorney and considering all the above factors, you can develop a comprehensive plan that meets your needs and gives you peace of mind for the future. It's relatively painless, I swear!

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A New York Perspective on Term Limits

By Hermes Fernandez

> To prevent every danger which might arise to American freedom by continuing too long . . . It is earnestly recommended . . . that in their future elections of delegates to the Continental Congress one half at least of the persons chosen be such as were not of the delegation next preceeding, and the residue be of such as shall not have served in that office longer than two years.
>
> – Thomas Jefferson, Proposed Resolution for Rotation of Membership in the Continental Congress, July 2, 1776[1]

> [A] few of the members of Congress will possess superior talents; will by frequent re-elections, become members of long standing; will be thoroughly masters of the public business, and perhaps not unwilling to avail themselves of those advantages. The greater the proportion of new members of Congress, and the less the information of the bulk of the members, the more apt they be to fall into the snares that may be laid before them.
>
> – James Madison, Federalist Paper No. 53

The debate framed by Jefferson and Madison continues today. Term limits do not exist in the abstract. They have a direct impact upon the structure and accessibility of democratic government and the balance of power within government. Proponents contend that term limits will make government more responsive, more representative and less corrupt. Opponents contend that term limits make government less effective and interfere with the will of the voters. This article will examine term limits from both the executive and legislative perspective. It will also discuss term lengths, an issue closely linked to term limits. The examination will provide some historic context regarding term limits, survey their use in other states, the arguments for and against, and examine how those arguments may be applicable to New York.

Historic Context

We tend to trace term limits to George Washington's decision to decline a third presidential term, but the picture is more complex. Eleven of the original 13 states adopted constitutions before the federal constitution. These constitutions reflected strong concerns over concentrated power[2] and diffused power in various ways. New York, for example, had a council for the appointment of officers.[3] Pennsylvania had no governor, but an Executive Council of the State.[4]

Most of the revolutionary state constitutions set terms of office at one year. Most also established short term limits for some offices, usually three years, though individuals could be elected again after a duration out of office, again usually three years.[5] The Pennsylvania Constitution explicitly stated the rationale for both. "By this mode of election and continual rotation; more men will be trained to public business, . . . and moreover the danger of establishing an inconvenient aristocracy will be prevented."[6]

New York's first constitution, adopted in 1777, prohibited senators from serving on the Council for the Appointment of Officers for two successive years.[7] There were no term limits for any other offices.

The Articles of Confederation limited members of the Continental Congress to serving three years in any six-year period. There was no other branch of government.[8]

Despite the practice of most states and the Articles of Confederation, the delegates to the Constitutional Convention of 1787 rejected term limits.[9] In committee, the delegates considered a three-year or seven-year term of office, limited to one term, for the president, but ultimately approved unlimited four-year terms.[10]

Term limit concerns extend even to the federal bureaucracy. Andrew Jackson's Spoils System, which Jackson himself referred to as "rotation in office," was a reaction to what Jackson saw as a developing aristocracy, with few appointments changing hands and some passing from father to son. Even today, we see pushback against a permanent civil service. In the last months of the Trump administration, the then-president issued an Executive Order that would have increased the number of federal political appointees atop the civil service.[11]

Survey of Current Term Limits

Today, term limits are much more common for statewide elected offices than for legislators. Thirty-six states term limit executive offices. Sixteen states currently term limit state legislators.[12] Term limits are typically two terms for executive offices and from eight to 12 years for legislators. Most term limits apply a period of ineligibility, though a not insignificant number are lifetime limits.

States With Term Limited Statewide Elected Officials[13]

The number represents the terms the official is allowed to serve. C stands for consecutive and L for lifetime.

STATE	GOVERNOR	LT. GOV	ATTY. GEN'L	COMPTROLLER/ AUDITOR/ TREASURER
Alabama	2 C	2 C	2 C	2 C
Alaska	2	2		
Arizona	2 C		2	2 C
Arkansas	2 L	2 L	2 L	2 L
California	2 L	2 L	2 L	2 L
Colorado	2 C	2 C	2 C	2 C
Delaware	2 L	2 L		
Florida	2 C	2 C	2 C	2 C
Georgia	2 C			
Hawaii	2 C	2 C		
Indiana	8 of 12	2 C	8 of 12	8 of 12
Kansas	2 C	2 C		
Kentucky	2 C	2 C	2 C	2 C
Louisiana	2 C			
Maine	2 C			
Maryland	2 C			
Michigan	2 L	2 L	2 L	
Mississippi	2 L	2 C		
Missouri	2 L			2 L
Montana	8 of 16	8 of 16	8 of 16	8 of 16
Nebraska	2 C			2 C
Nevada	2 L	2 L	2 L	2 L
New Jersey	2 C	2 C		
New Mexico	2 C	2 C	2 C	2 C
N. Carolina	2 C	2 C		
Ohio	2 C	2 C	2 C	2 C
Oklahoma	2 C	2 C	2 C	2 C
Oregon	8 of 12			8 of 12
Pa.	2 C	2 C	2 C	2 C
R. I.	2 C	2 C	2 C	2 C
S. Carolina	2 C	2 C		
S. Dakota	2 C	2 C	2 C	2 C
Tenn.	2 C			8 year term (no limit)
Virginia	1 C			
W. Virginia	2 C			
Wyoming	8 of 16			

All current legislative term limits were enacted between 1990 and 2000, with the exception of North Dakota, approved by the voters in November 2022. All legislative term limits are expressed in years rather than terms. In a small number of states, term limits apply to total legislative service.

States With Term-Limited Legislatures[1]

STATE	HOUSE LIMIT	SENATE LIMIT	YEAR ENACTED
Maine	8	8	1993
California[2]	12	12	1990
Colorado	8	8	1990
Arkansas[3]	12	12	1990 (2020)
Michigan	6	8	1992
Florida	8	8	1992
Ohio	8	8	1992
South Dakota	8	8	1992
Montana	8	8	1992
Missouri	8	8	1992
Oklahoma[4]	12	12	1990
Nebraska[5]	8		2000[6]
Louisiana	12	12	1995
Nevada	12	12	1996
Arizona	8	8	1992
North Dakota	8	8	2022

Chart Two Endnotes

1. Legislative term limits were overturned by the courts in Massachusetts, Oregon, Washington and Wyoming. The legislatures of Idaho and Utah repealed previously enacted legislative term limits.
2. California has a 12-year limit for total legislative service – House and Senate together.
3. Arkansas enacted a six-year limit for the House and eight-year limit for the Senate. In 2014, that was changed to a 16-year lifetime limit for all legislative service. Since 2020, the limit has been 12 consecutive years of service, with more service permitted after a four-year break.
4. Like California, the limit is lifetime service in the Legislature, not per house.
5. Nebraska has a unicameral legislature.
6. The term limit was enacted by constitutional amendment in 2000 and became effective in 2006.

In Arizona, Colorado, Florida, Maine, Montana, Ohio, South Dakota, Arkansas, Nebraska and Louisiana, term limits are followed by periods of ineligibility. In Michigan, Missouri, California, Oklahoma, North Dakota and Nevada the limits are lifetime.

As these tables show, New York is in the minority regarding statewide office term limits and in the majority regarding legislative term limits.

Lengths of Terms of Office

Federal terms have stayed the same since the adoption of the Constitution. At the state level, there has been a lengthening of terms from the days of the Revolution. Today, nine states, including the unicameral Nebraska

legislature, set state senate terms at four years. In all other states, terms are two years. Five states set house seats at four years, the remainder at two.[14] All states but New Hampshire and Vermont set gubernatorial terms at four years. New Hampshire and Vermont set the term at two years.

The New York Experience

New York gubernatorial term lengths have varied. The 1777 State Constitution set gubernatorial terms at three years. Terms were reduced to two years beginning with the election of 1820 and returned to three with the election of 1876. The 1894 State Constitution restored the two-year gubernatorial term. Four-year terms for statewide offices were not established until a 1937 constitutional amendment, beginning with the elections of 1938. Four years remains the standard today.[15]

New York's legislative terms have also varied. The 1777 Constitution set Senate terms at four years and Assembly terms at one.[16] The 1846 Constitution reduced Senate terms to two years.[17] An 1874 constitutional amendment increased Senate terms to three years. The 1894 State Constitution returned Senate terms to two years, effective with the election of 1898.[18] Assembly terms were not extended to two years until a 1937 constitutional amendment.

Governors Since the 1937 Constitution

Since the advent of four-year terms, New York voters have elected two governors four times – Nelson Rockefeller beginning in 1958 and Herbert Lehman beginning in 1932, though Lehman's first three elections were to two-year terms.

Voters have elected four governors to four-year terms three times: Thomas Dewey in 1942, 1946 and 1950; Mario Cuomo in 1982, 1986 and 1990; George Pataki in 1994, 1998 and 2002; and Andrew Cuomo in 2010, 2014 and 2018. Since 1938, except for those listed, no other New York governor has been elected more than twice.

No governor has been elected to a fourth term since Nelson Rockefeller in 1970, more than 50 years ago. By their votes, New Yorkers would seem to be comfortable with three-term governors.

Attorneys General Since the 1937 Convention

Like the governorship, attorney general terms have been four years since the election of 1938. New Yorkers have been comfortable with long-serving attorneys general. Voters elected John J. Bennett, Jr. attorney general five times – four two-year terms beginning in 1930 and a sole four-year term in 1938. Louis Lefkowitz was New York's longest tenured attorney general, elected five times by the voters and once by the Legislature to fill the incomplete term of Jacob Javits. Lefkowitz served 22 years, from 1957 through 1978. Robert Abrams succeeded Lefkowitz and was elected four times beginning in 1978. Nathaniel Goldstein was elected three times, in 1942, 1946 and 1950. Eliot Spitzer and Eric Schneiderman were both elected twice, in 1998 and 2002, and 2010 and 2014, respectively, as has the current attorney general, Letitia James.

Although no attorney general has been elected to more than two terms since Robert Abrams in 1990, that seems to be more a function of attorney general ambition than voter preference. Both Eliot Spitzer and Andrew Cuomo were elected governor rather than pursuing reelection.

Comptrollers Since the 1937 Constitution

Since the advent of four-year terms, New York comptrollers have been repeatedly reelected. Arthur Levitt held office for 24 years, winning election six times starting in 1954. He was succeeded by Edward Regan, himself elected four times starting in 1978. Between them, they held the comptroller's office for almost 40 consecutive years. The current comptroller, Thomas DiNapoli, was first elected by the state Legislature in 2007 and popularly elected four times beginning in 2010. Since the advent of four-year terms, only J. Raymond McGovern has been elected just once, in 1950. Morris S. Tremaine also was elected to only one four-year term, but he had been elected to five two-year terms beginning in 1926. The voters elected Carl McCall and Alan Hevesi twice.

As with attorneys general, New Yorkers would seem to be comfortable with long-serving comptrollers.

The Legislature

Due to sheer number, the tenure of the members of the state Legislature cannot be so easily categorized. Since 1938, Senate and Assembly terms have been two years.

Since most current discussions of legislative term limits begin with durations of eight years, this article uses that duration as a demarcation line of the state Legislature, using the 2021–22 Legislature.

There are 63 seats in the state Senate. Of those 63, 21 were held by senators serving eight or more years. Four seats were held by senators seeking a fourth term on Election Day 2022.[19] The longest-serving senator was elected in 1996. Only two other senators were serving 20 or more years. Twenty-nine senators had served four years or less, being first elected in 2018 or later.[20]

There are 150 seats in the state Assembly. Of those 150, 26, or approximately one in six, had served 20 years or more. The longest tenured member, having been first elected in 1970, and members first elected in 1980 and 1984, did not seek reelection in 2022. A member first elected in 1980 won reelection.[21] No other member was elected prior to 1990. Forty-three members had served between eight and 20 years. Sixty members, a full 40% of

the Assembly, had served four years or less. Twenty-one members had served between four and eight years. The remaining seats were vacant.[22]

The Arguments for and Against

Proponents of term limits argue that they make officeholders more reflective of the constituencies they represent by increasing turnover and decreasing the electoral advantages of incumbency, including fundraising. The proponents assert that term limits create opportunities for more people – and a greater variety of people – to serve, thereby reducing the incentives of those in office to cater to entrenched interest groups and electorally valuable, particularistic interests at the expense of the interests of their constituents and lessen corruption. Opponents claim that term limits result in inexperienced and therefore somewhat incompetent policy makers and that they cripple legislatures, the branch of government that is most closely linked with the citizenry. Opponents argue that term limits enhance the relative power of governors, careerist bureaucrats and lobbyists.[23] Opponents also argue that term limits amplify office-shopping and, at the same time, discourage good candidates from running.

Which is correct? Both and neither. Certainly, term limits can go too far. The experience of the early republic makes that point. In little more than a decade, the nation's founders moved from the short terms and limits of the early state constitutions to the longer and unlimited terms of the federal constitution. Heightened concerns for the concentration of power had been replaced by a desire for stability. No serious person today would argue that the complexity of modern society and government could be well-served by three single-year terms. At the same time, few serious people would argue that concentrations of power do not remain a strong concern, but in what offices does that concern arise? New Yorkers apparently have no concern with the repeat election of comptrollers and attorneys general. At the national level, presidents are limited to two terms. Whether governors present a similar level of concern in our federal system is a fair question. Certainly, the system of dual sovereignty leaves substantial powers with the states, powers that states have exerted in notable ways in the last few years. In New York, the great bulk of that power is held by the governor, not least through the means of executive budgeting.[24]

Incumbent governors also have substantial political fundraising abilities, abilities that seemingly give them a strong advantage in seeking reelection. Nevertheless, in New York, at least, gubernatorial incumbency is not a guarantee of reelection. More than half a century has passed since Nelson Rockefeller's election to a fourth term. No governor since has been elected more than three times. Despite the powers of incumbency, the falls from office for Eliot Spitzer and Andrew Cuomo were sudden and swift.

Most of the 36 states that have gubernatorial term limits set the limit at two. There is no magic to that number. It appears to reflect nothing more than the example of George Washington, as eventually embodied in the Twenty-second Amendment. A three-term limit is arguably as legitimate as two, and New Yorkers have imposed a de facto limit of three for the last half-century. The reasons to override voter choice must be strong to overcome almost 250 years of state constitutional practice. It must be more than simply increasing the chance of a change in party control. At the same time, the concern for power accreting over time is legitimate.[25] If a limit is considered, it should be more than the voters have imposed themselves.

Although intended to check power, term limits, when applied to legislatures, can have the opposite effect. Legislative power is diffuse. Imposing the same term limits on legislators and executives can weaken legislatures, tipping the balance of power to the executive. Westchester County Executive George Latimer recognized this when he successfully reduced the applicable term limit of the county executive from three to two four-year terms but left the county legislative terms to six two-year terms. Assemblywoman Marcia Wallace (D-Lancaster) has also recognized that same point, proposing a constitutional amendment to limit legislators to 16 years in office and set legislative terms at four years.[26] Longer terms, Wallace argues, would free legislators from perpetual campaigns and fundraising. Sixteen-year limits would permit legislators to develop deep expertise, but prevent stale government, and open opportunities for greater participation both within legislative leadership and from the opening of legislative seats.

Given the amount of turnover in the state Legislature, the question must be asked whether a constitutional change is necessary. In the current legislature, only 20 of 150 Assembly members and six of 63 senators have served more than 16 years. One can argue that numbers like that do not justify a constitutional amendment. A further consideration is that the change would have a disproportionate effect upon legislative leadership, arguably hobbling the Legislature in its dealings with the executive.

Many more legislators would be impacted if the shorter term limits, eight and 12 years, used in several states were implemented. But shorter limits would exacerbate imbalance between the Legislature and executive. Professor Eric Lane has made that point regarding the current New York City term limits: two four-year terms for both citywide elected officials (mayor, comptroller and public advocate) and City Council members.[27] Lane is especially critical of the legislative limits. Besides arguing that inadequate term limits upend the balance of power, Lane

argues that the New York City term limits have unnecessarily caused a loss of legislative expertise, with legislators becoming dependent upon lobbyists and interest groups for their information, not outcomes proponents would want.[28]

Lane also argues that term limits do not increase public participation. Legislators remain professional politicians. Term limits cause the perpetual pursuit of the next position.

In 2020, the National Conference of State Legislatures published a study on the impact of term limits. The NCSL study found that term limits resulted in 14% more turnover than in legislatures without term limits. More significantly, because term limits remove long-serving legislators, legislative leadership is impacted, weakening legislatures in relation to the executive. In Michigan, where House members are limited to six years, there were nine speakers of the House in 22 years. Term-limited governors are not similarly weakened, as they have all the resources of the executive agencies behind them.

In states where term limits are applied by the house, a second imbalance of power arose where individuals would serve in the lower house and, being term-limited, would then run for the upper house. The upper house would tend to become more experienced, with resultant greater expertise. Where the term limits were cumulative between both houses, members would tend to make their career in one house, and the imbalance between the houses did not arise. NCSL also found that term-limited legislators give less attention to constituent services and are collectively less knowledgeable on policy issues.[29]

One of the most cited reasons for term limits has been that term limits open up participation to younger members and under-represented groups, including women. NCSL cited studies that found women and minorities did not achieve office at higher rates in term-limited legislatures.[30]

Samantha Pettey, an assistant professor of political science at Massachusetts College of Liberal Arts who studies the effects of term limits in statehouses, cites Nevada and Colorado as term-limited states that have seen increases in women in their legislatures. Professor Pettey has also published a study in which she found that the increase in women candidates for open seats to be relatively small, but she suggests that the cumulative effect over time will lead to greater numbers of women running and holding office.[31]

> George Washington University Professor Casey Burgat has taken aim at assertions like these: States with term limits haven't led to a more diverse, representative cadre of lawmakers; they haven't incentivized legislators to spend more time seeking bipartisan policies or more efficient responses to constituent's requests; they haven't borne politicians less dependent on lobbyists or special interests; nor have they produced members who are more in-tune with their constituents' policy wishes or more willing to give up politics once their time in office is up.
>
> Instead, term limits have been found to empower actors outside the chambers, including lobbyists, agency bureaucrats, and long-serving staffers. They have done little to minimize the time spent on fundraising or other electoral activities or slow the revolving door between the private and public sectors. And they have been found to cause what scholars call a "Burkean shift," where members care less about the interests of their constituents and more about their own personally held beliefs; when they know their electoral fates aren't dependent on the voters any longer, they defer more to their personal stances.[32]

None of the frequently cited arguments for term limits, as alluded to by Professor Burgat, are a check against corruption. The notion holds some intuitive appeal and finds support in the convictions of three prominent longtime New York state legislators, former Assembly Speaker Sheldon Silver and former Senate Majority Leaders Joseph Bruno and Dean Skelos. Nevertheless, the argument may not bear scrutiny. The record regarding New York's statewide elected officials since the initiation of four-year terms, and the records of members of the state Legislature since 2000, do not show a notable correlation between length of service and corruption.

Since 1938, two New York governors, Eliot Spitzer and Andrew Cuomo, one attorney general, Eric Schneiderman, and one comptroller, Alan Hevesi, have left office under clouds. Spitzer resigned in his first term following allegations of money structuring and solicitation of prostitution. Cuomo resigned in his third term following allegations of sexual harassment and use of his office staff for personal gain. Schneiderman resigned in his second term, following allegations of physical abuse by four women. Hevesi left office during his first term, but after winning reelection, due to allegations that he had placed his wife on his office payroll. Later, Hevesi was convicted of having accepted gifts and payments in exchange for steering state investment interests.

In sum, of the statewide office holders since 1938, corruption allegations causing the office holder to leave office arose in a third term only once.

For legislators, establishing a causal link between corruption and length of office is similarly difficult. There are certainly some for whom duration in office was a factor, but for many that is not the case. Since 2000, there have been 48 members found to have engaged in improper activities. Their terms ranged from one to 38 years. Eleven members served 20 or more years. Five members had served only a year. Twenty-three members had served

eight years or less. The misdeeds of the longer serving members may not have occurred but for their longevity, yet the misdeeds of the three longest serving members, Sheldon Silver, Joseph Bruno and Dean Skelos, all related to their roles as leaders. The misdeeds of several members were unrelated to their legislative office. Clarence Norman, Jr.'s crimes, for example, were related to his tenure as Brooklyn County Democratic chair. Term limits may prevent some legislative corruption, but in an imprecise way. Very junior members as well as senior members have gone awry.[33]

Concluding Thoughts – Neither Panacea nor Poison

Madison and Jefferson framed the question well. Term limits are a check on power and all that entails. They do so at the cost of government effectiveness and the balance of power between the branches.

Greater participation is a democratic value. Term limits open seats. The evidence is not yet strong that term limits open more seats to women and minorities. Although there are long-serving members of the state Legislature, a significant turnover in seats already occurs even without term limits, calling into question whether a need exists, and, if so, the offices to be included.

Term limits overcome the power of incumbency (and indeed, probably weaken it in the lame-duck term) by eliminating the incumbent. Although the seat opens, whether term limits actually open the office to new people is not yet clear. The political class will continue to run and be appointed to new offices.

Like so much in our governmental structure, if term limits are to be adopted, they must have balance. Limits cannot be too short. Most importantly, the limits must be different for the executive and the Legislature. All elected officials must have the possibility of sufficient time in office so that they can be effective in their positions. Because of the diffusion of power within a legislative body, legislative term limits must not be so short as to hamper the Legislature in its dealings with the executive. Consideration also must be given to whether limits are for a lifetime or durational and, in the case of the Legislature, by house. One could go further, and even consider whether committee chairs and leadership positions should be term-limited. Without careful consideration, term limits could lead to greater concentrations of power, imbalances of power, less meaningful participation and less worthy candidates.

If term limits are to be considered, so, too, should term length. There is no overriding principle that requires legislative terms to remain at two years or that Senate and Assembly terms be equal.

Hermes Fernandez is a member of Bond, Schoeneck & King, and his practice includes health, government and administrative law. He is a member of NYSBA's House of Delegates, a member of the association's Executive Committee, and past chair of the Health Law Section. He is also a member of the NYSBA Committee on the State Constitution and chair of the ad hoc Subcommittee on Term Limits. This article is based upon a report of that subcommittee. The views expressed are the author's own.

Endnotes

1. https://founders.archives.gov/documents/Jefferson/01-01-02-0174.

2. Gubernatorial power was greatly limited in the revolutionary state constitutions. Pennsylvania went as far as to abolish the position of governor all together. The New York Constitution of 1777 placed the veto power in a council that included the governor (N.Y. State Const. of 1777, Art. III), and placed the appointment of state officers in a separate council dominated by the Legislature with the governor having only a casting vote. N.Y. State Const. of 1777, Art. XXIII.

3. N.Y. State Const. of 1777, Art. XXIII.

4. Plan or Frame of Government for the Commonwealth or State of Pennsylvania, Art. XIX (1776).

5. See Delaware Const. of 1776, Art. 7, 8, 15; North Carolina Const. of 1776, Art. XV, Art. XXXVI; Georgia Const. of 1778, Art. XXIII; New Jersey Const. of 1776, Art. XIII; New Hampshire Const. of 1784, Pt. II; South Carolina Const. of 1778, Art. IX, XXVIII, Art. XXIX; Massachusetts Const. of 1780, Ch. II, Art. II, Pt. the Second, Ch. I, § 2, Art. 1, § 3, Art. 1.

6. Plan or Frame of Government for the Commonwealth or State of Pennsylvania, Art. XIX (1776). See also Virginia Declaration of Rights, § 5, June 12, 1776; Maryland Declaration of Rights, Art. XXXI (1776).

7. N.Y. State Const. of 1777, Art. XXIII.

8. Colonial governors appointed by the Crown were not usually subject to term limits, although the Fundamental Orders of Connecticut of 1639 limited the governor to serving one year of every two. www.libertyfund.org.

9. Articles of Confederation, Art. V.

10. See Thomas Neale, Congressional Research Service. Twenty years later, Jefferson seized on Washington's example to invoke the need for presidential term limits. "If some termination to the services of the Chief Magistrate be not fixed by the Constitution, or supplied by practice, his office, nominally four years, will in fact become for life, and history shows how easily that degenerates into an inheritance." Letter of Thomas Jefferson to the Vermont Legislature, Dec. 10, 1807, https://founders archives.gov/documents/Jefferson/01-23-02-0491.

11. Creating Schedule F in the Excepted Service, Exec. Order 13957, 85 Fed. Reg. 67631, Oct. 26, 2020, revoked, Exec. Order 14003, 86 Fed. Reg. 7231, Jan. 27, 2021.

12. National Council of State Legislators, https://www.ncsl.org.

13. State Legislatures With Term Limits, Ballotpedia, https://ballotpedia.org/State_legislatures_with_term_limits. N.B.: some states have other state-wide elected offices to which term limits apply. This table is limited to offices having a New York State equivalent.

14. National Conference of State Legislatures, https://www.ncsl.org/research/about-state-legislatures/number-of-legislators-and-length-of-terms.aspx.

15. New York voters had defeated a constitutional amendment establishing four-year terms in 1927. Carter, NYS Constitution, Sources of Legislative Intent, at 35, n. 2.

16. N.Y. State Const. of 1777, § 11, § IV, respectively.

17. N.Y. State Const. of 1846, Art. III, § 2.

18. N.Y. State Const. of 1894, Art. III, § 2.

19. Three of those four, Senators Bailey, Helming and Tedisco, were reelected. John Brooks was not.

20. Twelve new Senators were elected in 2022: Jacob Ashby, Patricia Canzoneri-Fitzpatrick, Iwen Chu, Kristen Gonzalez, Monica Martinez, Jack Martins, Steven Rhoads, Robert Rolison, Jessica Scarpella-Spanton, Mark Walczyk, Lea Webb and Bill Weber.

21. Assemblywoman Helene Weinstein.

22. Twenty-six new Assembly members were elected in the 2022 general election: George Alvarez, Juan Ardila, Anil Beephan, Jr., Scott Bendett, Jake Ryan Blumencranz, Alex Bores, , Monique Chandler-Waterman, Lester Chang, Chris Eachus, Edward Flood, Scott Gray, Grace Lee, Dana Levenberg, Nikki Lucas, Brian Maher, Michael Novakhov, Sam Pirozzolo, Steven Raga, MaryJane Shimsky, Sarahana Shrestha, Tony Simone, Matthew Slater, John Zaccaro, Jr. and Stefani Zinerman. Three others were elected in 2022 special elections: Ari Brown, Brian Cunningham and Manny De Los Santos.

23. Richard G. Niemi, Kristen K. Rulison, *The Effects of Term Limits on State Legislatures and Their Applicability to the Executive Branch*, 4 Albany Law R. 641 (2011).

24. N.Y. State Constitution, Art VII, §§ 2, 3, 4, *see Pataki v. N.Y.S. Assembly*, 4 N.Y.3d 75 (2004); *Silver v. Pataki,* 96 N.Y.2d 532 (2001).

25. "The individuals in these positions can make autonomous decisions with far-reaching effects without the requirement of a majority. . . . As a consequence, the power of certain offices can be as impactful as it can be intoxicating. . . . The research on the effects of term limiting elected officials other than state legislators is sparse, but as with studies of legislator term limits, there are some findings that suggest tenure limits of executive officers produces some negative outcomes unanticipated by well-meaning proponents. One early study found states that term-limited their governors had higher government spending and tax rates than those without . . . [A] 2011 study found states with reelection-eligible incumbents produced more economic growth and lower taxes, spending, and borrowing costs." Casey Burgat, *New York Term Limits Could Have Unintended Consequences*, Brookings, Feb. 3, 2022, https://www.brookings.edu/blog/fixgov/2022/02/03/new-york-term-limits-could-have-unintended-consequences.

26. A.B. 1407.

27. Eric Lane, *The Impact of Term Limits on Lawmaking in the City of New York*, 3 Election Law J., No. 4, Nov. 4, 2004, https://www.liebertpub.com/doi/10.1089/elj.2004.3.670.

28. Professor Lane's criticism of the New York City term limits were echoed in a 2010 report of the New York City Bar Association. "A two-term limit . . . has created pressure on individual Council members to "make their mark" as early and as often as possible." "Finally, . . . a two-term-limited City Council cannot effectively check, or even somewhat counter, the power of New York City's extremely strong Mayoral authority." *Recommendations on Governmental Structure and Election Issues for the 2010 Charter Revision Commission*, New York City Bar Assoc., June 2010, at 3.

29. Others have made the same findings. "[W]hen term limits are applied to both the executive and legislative branches, they weaken the legislative branch in a significant fashion. Term limits' systematic removal of experienced members from the legislature handicaps . . . with regard to expertise and thus influence." Patrick J. Egan, *Term Limits for Municipal Elected Officials: Executive and Legislative Branches*, New York University, June 2010, at 1.

30. *See also* Burgat, *supra* note 31. "Term limits have not led to the election of more women or racial minorities as legislators, nor have they been associated with election to office of legislators who are younger, less wealthy, less ideological, or less likely to already be politicians." *Id.* at 8–9.

31. *Female Candidate Emergence and Term Limits: A State Level Analysis*, Political Research Quarterly, vol. 71(2), 318 (2018).

32. Burgat, *supra* note 31.

33. The list, in descending order of seniority:

As. Sheldon Silver, 38 years, 21 as Speaker, undisclosed referral fees;

Sen. Joseph Bruno, 31 years, 14 as Majority Leader, convicted on corruption charges, convictions overturned, acquitted on remaining charges;

Sen. Dean Skelos, 30 years, six as Majority Leader, bribery;

As. Anthony Seminerio, 30 years, honest services fraud;

As. Vito Lopez, 27 years, censure and resignation (sexual harassment and retaliation);

Sen. Vincent Leibell, 26 years, bribery and tax evasion;

Sen. Thomas Libous, 24 years, lying to FBI re: son's job, conviction vacated due to death while appeal pending;

As. Roger Green, 23 years, false travel reimbursement;

As. Gloria Davis, 22 years, bribery;

As. Clarence Norman, Jr., 21 years, illegal campaign fundraising;

As. William Scarborough, 20 years, use of campaign funds for personal benefit;

As. Chris Ortloff, 20 years, solicitation of sex with minors;

Sen. George Maziarz, 19 years, diversion of campaign funds;

Sen. Nicholas Spano, 19 years, tax evasion for failure to report income from a state contractor;

Sen. John Sampson, 18 years, embezzlement from sale of foreclosed homes;

Sen. Efrain Gonzalez, 18 years, diverting state and federal money to his personal use;

Sen. Guy Velella, 18 years, bribery;

Sen. Carl Kruger, 17 years, bribery;

Sen. Ada Smith, 17 years, threw coffee at staff member;

As. Samuel Hoyt, 16 years, censured for sexual relationship with intern;

Sen. Malcolm Smith, 14 years, (Majority Leader for one), corruption charges related to matching NYC campaign matching funds;

As. Brian McLaughlin, 14 years, theft of union funds, theft of state funds;

As. Joe Errigo, 12 years (non-consecutive), bribery;

As. William Boyland, Jr., 11 years, bribery;

As. Jerry Johnson, 8 years, breaking into female aide's home;

As. Adam Clayton Powell IV, 8 years, Driving While Ability Impaired;

As. Diane Gordon, 7 years, bribery;

Sen. Kevin Parker, 7 years, criminal mischief (altercation with photographer);

As. Dennis Gabryszak, 7 years, sexual harassment (resigned);

Sen. Shirley Huntley, six years, embezzlement of a state grant;

As. Micah Kellner, six years, sexual harassment, retaliation;

As. Steven McLaughlin, six years, censured for sexual harassment;

Sen. John Sabini, five years, Driving While Ability Impaired;

As. Nelson Castro, four years, perjury;

As. Eric Stevenson, Jr., three years, bribery;

As. Ryan Karben, three years, sexual advances towards staffers;

As. William. Nojay, three years, theft from a client;

Sen. Pedro Espada, two years, embezzlement and theft from operation of a health care center;

As. Pamela Harris, two plus years, false claims to FEMA of home damage;

As. Robert Rodriguez, two years, DWI;

Sen. Marc Panepinto, two years, unwanted sexual advance to a staff member;

As. Karim Camara, two years, DWI;

As. Steve Katz, two years, marijuana possession;

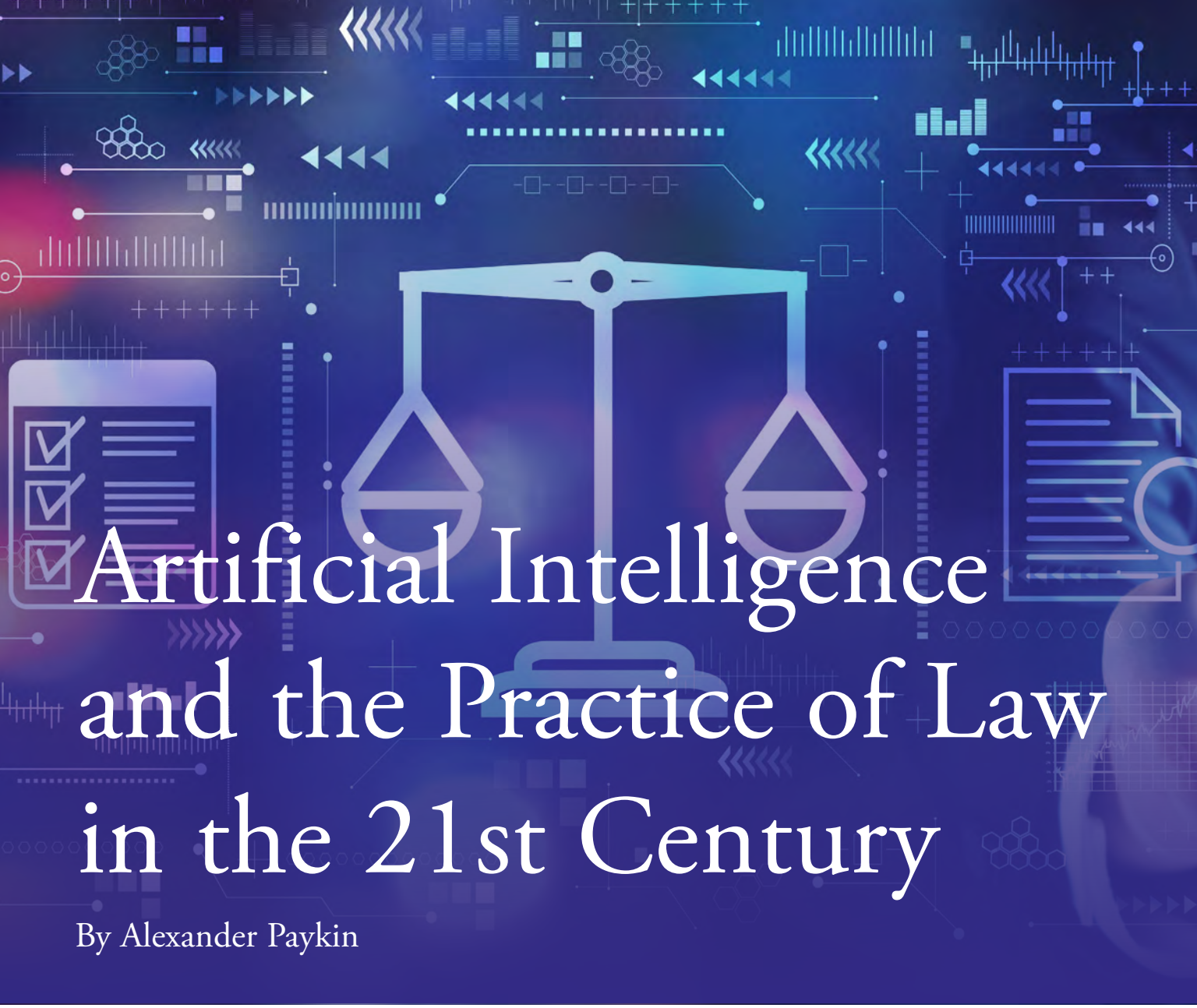
As. Michael Cole, one year, censured, spent night in intern's apartment;

As. Diana Richardson, one year, child abuse;

As. Gabriela Rosa, one plus years, lied to immigration authorities re: marriage;

Sen. Hiram Monserrate, one year, misdemeanor assault;

As. Angela Wozniak, one plus years, sexual relationship with staffer;



Artificial Intelligence and the Practice of Law in the 21st Century

By Alexander Paykin

The legal system has never been quick to embrace change. Whether it is electronic research, electronic filing, video depositions or artificial intelligence, most of the legal system will be dragged into the future kicking, screaming and holding on to whatever antiquated methods it can sink its claws into. This is, of course, true not just of the courts or the county clerk's office but also at law firms. It is not even a question of money, as many big law firms could easily spend what's necessary to truly improve their efficiency and profitability with the newest tech. Surprisingly, it is often the smallest firms, with the smallest budgets, that embrace technology, realizing that they need to innovate to survive. Additionally, it is often the small firms that can experiment with various tech solutions to optimize efficiency, while the bureaucratic process of implementing technology at the big firms often defaults to the tried-and-true solution before any implementations talks can even start.

To make life more interesting, the universe threw us a curveball in 2020. Offices were shuttered, and the world went remote. We were all forced to turn to technology to find solutions to problems we previously did not even consider. Some of those solutions are here to stay (like expanded electronic filing), while others may or may not catch a foothold now that we are all able to go places again (like the dreaded cattle call and in-person depositions). At the very least, just about every lawyer was forced to learn to video conference, do basic work with PDFs, including e-filing, and become much more comfortable with e-signing. So where does our technological toolbox go from here?

It would be difficult to find anyone now who opposes electronic filing. That is now a technology that we have accepted as functional and convenient. The jury is still out on virtual depositions and trials, with many lawyers arguing that it's more difficult to examine a witness or get a sense for the judge or jury when everything is remote. That may very well be true. The counterargument is that it substantially reduces the costs of litigation, which may be just as true.

However, lawyers are now facing a deluge of technological solutions, many of which are overlapping and overwhelming and whose purposes are often questionable. What's worse is that much of this technology only works well if both sides are using it, such as AI-based contract negotiation and drafting tools or virtual deposition software, and some would have to be formally adopted by the court before it can be used; for example, New York State courts have adopted Microsoft Teams.

While these challenges are surmountable, we are also being offered tools that include predictive and generative AI. These tools are shiny and exciting and, for those of us who are into tech, are simply droolworthy. But do they actually work and produce a net benefit in the practice of law? To varying extents.

Predictive AI has been around for quite a while, and most of us began using it without really acknowledging its existence. What is it? One example is when you type a text message on your smartphone and you find that the messaging app offers to complete the word you started typing, having "predicted" what word you were intending to use. The technology then got better, and eventually you saw proposed words under where you were typing, where your device would actually try to predict the most likely candidates for each next word. Was it always correct? Of course not. But often, you could put together a simple responsive text message just by using the predictive offers for each next word. It wouldn't necessarily end up being what you wanted to say, but it would be contextually appropriate and grammatically correct. In other words, predictive AI used what was said to you and what you started responding with as clues as to what the most likely next words could be.

Another great example of predictive AI is when your smartphone reviews all your photos and prepares proposed collections or collages for you, based on what it expects you would want to see, using your photographing and photo viewing history.

Have we accepted predictive AI into our lives without knowing it? Most likely. What's interesting to note, though, is that we have all accepted it to varying degrees and often not by our own choice, but by the terms of service we agreed to with any number of tech companies.

In practice, predictive AI, like anything that tries to give you an intelligent output, benefits from as much input as possible. So, for the best predictive AI experience, you would want the system to be "trained" on as much input as possible. Obviously, if Google reads everything I ever write, it will have an easier time predicting the next word in what I am writing, based on my writing style, than if it only had two emails to work with. So, in effect, everything we do to maintain control and security over our documents and communications also reduces the predictive AI's ability to help us, and the tradeoff becomes a choice between efficiency and security. As lawyers, we must walk that fine line very carefully and need to make sure that our sensitive data does not become part of a public AI.

If that wasn't confusing enough, out comes generative AI. In many ways, generative AI is still a form of predictive AI, but on a much grander scale. While my SMS app will take a stab at offering me proposed short answers, a generative AI can do so much more. You can ask it to write a poem about the dangers of technology in the style of Edgar Allan Poe, and it will produce one. It's difficult to believe that AI has any level of "creativity" though, so we need to look at the math behind this. In essence, it's the same idea as the predictive AI that suggests one word at a time. However, generative AI is "trained" by a wide range of outside sources. So now, as it writes the poem you requested, each next word that it selects must make it through quite a few predictive conditions, such as being topical and responsive to the query, being in the "style" of Edgar Allan Poe, rhyming and so on. In other words, this is the natural evolution of predictive AI. How good is it? Well, mileage may vary. . . .

More than anything, it is important to understand that generative AI is not ready for prime time. In other words, it is a tool and cannot be relied on to create a finished product. In the end, we all know that we, as attorneys, are the ones responsible for the documents we generate, and neither a court nor a client will be willing to give you a break because your AI messed up. If you are the adventurous type and want to embrace the cutting edge, just be aware that it's quite sharp.

This, of course, begs the question of what it is you can use generative AI for right now in your practice area, and the potential pitfalls of doing so. Using AI to generate templates for transactional documents or general documents is quite easy at this point. You can ask it to prepare a draft, which will by no means be final, and save yourself from typing or pasting in all the basic clauses. However, you should still review and edit. In my personal experience, I have found that AI can generate documents at about the same level as a law student in his or her 2L year. Good enough to call a first draft, sure, but certainly

nothing I would send to a client or the opposing counsel without first reviewing every word. AI is impressively useful if you want a few proposed versions of a contract clause. Often, if I find that a client or opposing counsel is unhappy with the wording of a clause, I will drop it into a generative AI and ask it to provide me with five alternative wordings. I review all five to make sure there are no substantive differences, edit as needed and then send them off to the recipient to pick one. Often, the same clause restated a different way is more acceptable to the reader, and the AI can generate the five versions in under a minute, whereas I would waste 15 minutes of my time (and my client's money) doing that same task by hand. Essentially, generative AI is excellent at providing templates.

However, you must remember that the AI is simply predicting what you want to hear, based on its library of available data. As such, its persuasive argument skills are quite good, but limited to arguments previously made. In other words, it is not all that useful for writing legal arguments, since it can't treat citations as entire blocks of thought, but rather takes elements from various ones and mashes them together. It also does this with the citation itself, often producing references to cases that don't exist.

Finally, remember that the various generative AI tools are still in beta and often have terms of service that give the company that owns that AI bot unlimited use of your query data, so be sure not to form your queries in such a way that you breach attorney-client privilege or other confidentiality requirements. For example, if you're having it draft a medical record demand under HIPAA, enter fictitious names, social security numbers, birthdates and the like. In fact, if you don't provide that information to the AI, it will generally prepare a template letter, with fields (like [INSERT BIRTHDATE HERE]) right in the letter, so that you can populate the sensitive data manually.

Where does AI go from here? In the last few years, we have seen staggering advances in this technology; whereas a year ago, it was barely able to do the basics, it can now produce an entire essay, article or even book, which will, at least on its face, appear well-written. Some law firms have been using chatbots that simulate human conversational capabilities to provide information regarding services offered by their lawyers, the status of their clients' proceedings or simply a firm's contact details, opening hours or the steps to schedule an appointment with an attorney. A newer and more powerful chatbot known as GPT-4, developed by OpenAI, seems to be able to perform more complex tasks, including, potentially, legal research, by scanning through large amounts of text data and providing relevant information on a given topic and legal analysis by providing suggestions and insights based on its understanding of the relevant legal principles and precedent.[1] In February, a big law firm announced the introduction of an AI chatbot called Harvey to help its lawyers draft contracts and prepare documents for mergers and acquisitions.[2]

The takeaway is not that you should grab onto generative AI with both hands, as it is still quite dangerous to let loose. The takeaway is not to fear the technology. For the best results, start playing around with generative AI on simple tasks first, such as having it prepare a collections letter for you or a demand letter for unpaid rent – something simple and easy to check over. Start using AI to generate individual clauses for you when working on a contract or rider. Check its work, always. As you get the hang of what the AI is good at versus where its weaknesses are, you will become more comfortable with using it.

Remember, in the end, AI is a tool, and, like any tool, it will make your job easier. However, we are nowhere near the level of technology where the tool will replace you and the human element of relationships with clients (an empathetic attorney decreases attrition, builds relationships and drives client satisfaction and gratification). Your biggest risks are (a) adopting the technology without oversight and cross-checking its work – the equivalent of hiring law school student interns and declaring their first draft to be the final product, without an attorney review; and (b) not adopting the technology at all, which over time will make you less efficient and therefore less price-competitive than your colleagues, as you will still be doing the repetitive tasks by hand.

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Endnotes

1. *See* Andrew Perlman, *The Implications of ChatGPT for Legal Services and Society*, The Practice, Harvard Law School, March/April 2023, https://clp.law.harvard.edu/knowledge-hub/magazine/issues/generative-ai-in-the-legal-profession/the-implications-of-chatgpt-for-legal-services-and-society.

2. *See* Arthur Piper, *ChatGPT and the Legal Profession*, International Bar Association, April/May 2023, https://www.ibanet.org/ChatGPT-and-the-legal-profession.

Navigating the Ethical and Technical Challenges of ChatGPT

By Mostafa Soliman

Since its release in November 2022, many people have been impressed by ChatGPT's ability to understand context, generate fast responses and have a human-like conversational tone. The potential applications for ChatGPT in the legal industry are varied. As technology continues to develop, it is inevitable that this kind of technology will be incorporated into the practice of law. Whether it can help increase access to legal services or improve efficiency in the legal industry, such incorporation will come at a cost.

ChatGPT is a natural language processing tool that can aid lawyers and legal professionals with legal research, contract review and client communication. It is capable of understanding human language and responding conversationally. The latest addition to ChatGPT, AutoChatGPT, will enable it to draft legal documents such as contracts, generate legal forms and complete routine legal tasks automatically. Although ChatGPT and AutoChatGPT can enhance efficiency and productivity by automating mundane tasks, they also pose potential risks to the legal profession.

The incorporation of ChatGPT in the legal industry presents many challenges, ranging from ethical issues to technological limitations. Before using ChatGPT in practice, attorneys have a duty to provide competent representation to their clients.[1] To maintain such competence, attorneys should stay up to date with the benefits and risks associated with relevant technology.[2] Breaches in confidentiality, security and privacy are potential risks associated with ChatGPT.

Attorneys have an ethical duty to maintain client confidentiality and must take steps to protect client information from unauthorized disclosure.[3] Using ChatGPT to analyze clients' legal documents containing confidential information poses a risk that such information could be exposed or misused. Recently, there was a data leak in ChatGPT that allowed its users to view the chat history titles of other users, revealing the information of nearly 1.2% of ChatGPT Plus subscribers.[4] In addition to the data breach, chat history can be accessed and reviewed by ChatGPT employees.[5] It can also provide personal information to third-party vendors and affiliates, raising concerns about data security and privacy.[6]

If attorneys decide to use non-attorneys outside their firms, they have a duty to make reasonable efforts to ensure that the services are provided in a manner compatible with the lawyer's professional obligations.[7] This means attorneys are responsible for ensuring that ChatGPT is compatible with ethical obligations such as data retention. OpenAI, the parent company of ChatGPT, states in its privacy policy that it is "not responsible for circumvention of any privacy settings or security measures contained on the service, or third-party websites."[8] For example, it is unclear what the length and protection of the data retention policy of ChatGPT is.[9] If ChatGPT is used to analyze clients' documents that contain confidential information, it's important to ensure that proper retention and destruction policies are in place to protect client privacy.

There are other potential technological challenges that ChatGPT can create in law practice. ChatGPT's accuracy and reliability are not guaranteed. When dealing with large, complex legal documents, attorneys must verify the accuracy of their work. ChatGPT has limited access to the internet, and its knowledge is limited to events up to 2021.[10] This means ChatGPT is unable to stay current with the latest changes in law. It may sometimes even make up facts.[11] Not only that, but it can misstate caselaw without citing the correct portion of cases.

While ChatGPT can understand context and relate to prior chat history, its contextual understanding is still narrow. It is particularly limited in the context of legal cases and documents. As a result, it may produce inaccurate outcomes. It is also unclear whether ChatGPT has been trained on legal technicalities, including legal theories, which could lead to errors in its advice and legal documents.

The concept of automation in the legal industry is not a new idea, and there have been several initiatives that have gained popularity among legal professionals. One such initiative is DoNotPay, a website that offers legal services, including legal document generation and online dispute resolution, for a range of preset legal issues such as parking tickets, flight delays and landlord-tenant disputes.[12] ChatGPT, however, is not limited to a specific set of legal issues. It can provide legal information and generate basic legal documents that are customizable for specific law practices. While both DoNotPay and ChatGPT offer legal assistance, it remains unclear how ChatGPT's technology will advance when trained on a large database of legal documents.

The ChatGPT technology is currently in development, and AutoChatGPT is its latest iteration. While ChatGPT can only handle one task at a time, AutoChatGPT is capable of processing multiple tasks automatically, generating its own prompts and completing multi-step procedures without human input.[13] AutoChatGPT has the potential to automate routine legal tasks, including contract drafting and legal research. However, this automation raises ethical concerns surrounding the autonomy and accuracy of its work product.

The reliance on ChatGPT technology to automate repetitive legal work may exacerbate the existing generational gap in legal employment, putting younger attorneys, paralegals and legal assistants at a disadvantage. While the technology offers efficiency and accuracy, senior attorneys may be less likely to train younger attorneys and instead opt to use the technology. This could hinder

the development and progression of younger legal professionals and support staff.

The incorporation of ChatGPT and other Large Language Models into the legal industry is becoming increasingly inevitable. Leading legal research companies, including Westlaw and LexisNexis, may integrate this technology to gain an edge in the legal market. These companies possess large databases that can train LLMs to find accurate results in legal research. They can also review and analyze large volumes of documents, such as contracts or pleadings. One of the most significant features of this technology is predictive analysis, which can assist attorneys in making strategic decisions and provide insights into potential outcomes of legal cases.

It is important to recognize that ChatGPT and other LLMs should not be viewed as a replacement for the practice of law. While such technology can assist with daily tasks and improve efficiency, it cannot replace the legal skills and judgment of attorneys.[14] Comparably to the medical field, LLMs can be trained on specific data and images to enhance the accuracy of detecting medical conditions. Similarly, ChatGPT and other LLMs can be trained on specific legal information to support the practice of law.

Overall, the potential challenges and opportunities for using ChatGPT in the legal industry are significant. While there are ethical concerns and technical challenges that need to be addressed, the potential benefits of increased efficiency and improved access to justice make the use of AI tools, such as ChatGPT, an exciting prospect for the legal industry.

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Endnotes

1. ABA Model Rules of Professional Responsibility, Rule 1.1 (ABA Rules), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence.

2. Comment 8 of ABA Rules, Rule 1.1, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.

3. ABA Rules, Rule 1.6, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.

4. Andrew Tarantola, *OpenAI Says a Bug Leaked Sensitive ChatGPT User Data*, Engadget, March 24, 2023, https://www.engadget.com/openai-says-a-bug-leaked-sensitive-chatgpt-user-data-165439848.html.

5. *What Is ChatGPT?*, OpenAI, https://help.openai.com/en/articles/6783457-what-is-chatgpt (last visited April, 24, 2023).

6. *Privacy Policy*, OpenAI, April 27, 2023, https://openai.com/policies/privacy-policy.

7. ABA Rules, Rule 5.3, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_3_responsibilities_regarding_nonlawyer_assistant/comment_on_rule_5_3.

8. *Privacy Policy, supra* note 6.

9. *Id.*

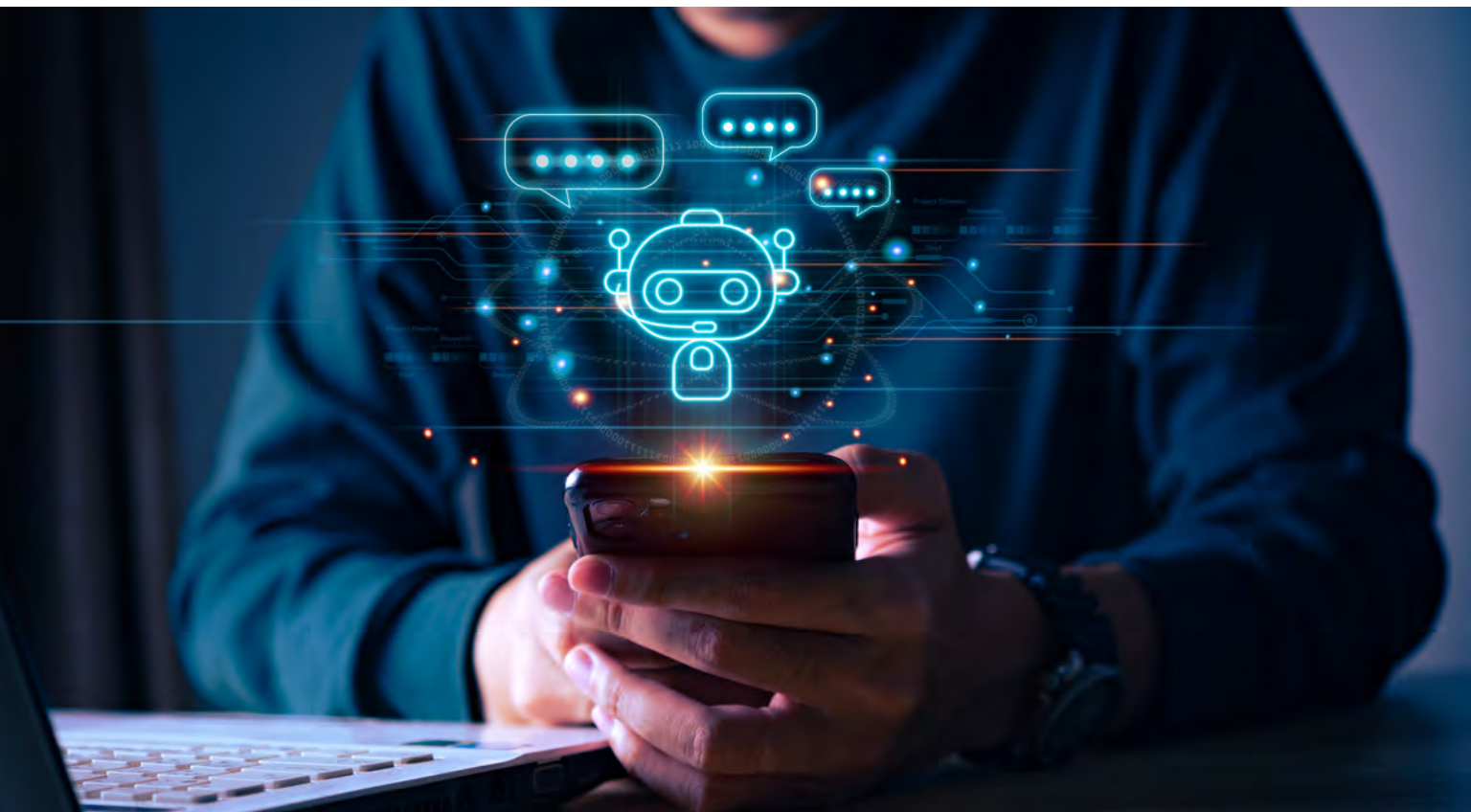
10. *What Is ChatGPT?*, *supra* note 5.

11. *Id.*

12. https://donotpay.com; ABA Rules, Rule 1.1,

13. https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence. Comment 8 of ABA Rules, Rule 1.1, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1/; ABA Rules, Rule 1.6, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information; Andrew Tarantola, *supra* note 4; Bernard Marr, *Auto-GPT May Be the Strong AI Tool That Surpasses ChatGPT*, Forbes, April 24, 2023, https://www.forbes.com/sites/bernardmarr/2023/04/24/what-is-auto-gpt-a-next-level-ai-tool-surpassing-chatgpt.

14. Ravin Jesuthasan, *Here's How Companies Should Navigate Generative AI in the World of Work*, World Economic Forum, April 14, 2023, https://www.weforum.org/agenda/2023/04/how-companies-should-navigate-generative-ai-in-future-of-work.



Bias and Fairness in Artificial Intelligence

By Luca CM Melchionna

An attorney has taken on a multifaceted case and can't decide whether to use artificial intelligence to meet discovery demands involving 100,000 sensitive documents (see Attorney Professionalism Forum on page 52). While AI can save money by selecting only the most pertinent documents, the lawyer does not want to risk the client's privacy by exposing sensitive documents to AI's DIALOG DTE computer program. What to do?

It's a good question, but it's only the beginning. There are many other questions about AI – its lack of transparency, for example, or its potential for intentional use of false information.

Perhaps even more important, what about AI's potential for bias and unfairness? It is well documented that AI can spread bias if the program's designer is biased. To combat this, lawyers need to recognize and guard against computer-generated bigotry to protect their clients and their professional reputations. This article will examine the issue of bias and fairness in AI from all angles, including how it works and how it can be misused.

AI – It's Everywhere

The presence, use and application of artificial intelligence is rapidly expanding not only in new and traditional industries but is also steadily becoming a new tool at disposal of our professional lives. AI developments involve education, trading, healthcare (e.g., with the recent discovery of the structure of the protein universe[1]), e-commerce, marketing and social media, just to name a few. This is because AI has various functional applications, which include, among others, speech processing, predictive analytics, distributed AI and natural language processing.[2]

Recently, the public at large had the opportunity to interact on a regular basis with a machine learning tool within the realm of natural language processing. ChatGPT-4 is a chatbot or a natural language tool developed by OpenAI that permits conversation (interrogation and responses) conducted in standard (or natural) language.[3] As of January 2023, ChatGPT had approximately 100 million users.[4] ChatGPT is not an isolated example: the natural language processing function/field is expanding rapidly. There are probably a couple dozen similar chatbot natural language processing tools on the market including Chatsonic, YouChat, Bing AI Chat and Google Bard AI, just to name a few.[5]

New Technology, Old Liabilities

As the popularity of machine learning soars, attorneys and courts must analyze not only the application in certain industries, but also its legal implications. For example, because ChatGPT collects information on the internet, a bug recently exposed the payment information of 1.2% of its users.[6] Another recent study found that ChatGPT-4 can spread more misinformation and false narratives than its prior version (facilitating the construction of disinformation campaigns by bad actors).[7] In such cases, the analysis (conducted by humans[8]) relates to additional legal consequences, including but not limited to the liabilities linked to the actors who created these false narratives. Even if ChatGPT-4 can pass the bar exam,[9] it cannot actually perform a legal self-assessment of the various dimensions of its own attention, values, rights and liabilities, much less those of someone else.[10]

This short contribution intends to focus on a very limited aspect of AI: bias and fairness.

AI and Machine Learning Definitions

Initial frenzy (or overenthusiasm) for new chatbots may start to vanish once most humans realize that these AIs fail the mirror test, which assesses an entity's capacity for self-awareness.[11] ChatGPT – a machine created by humans – is an autocompleting system mimicking human conversation. While individuals can learn from their failed test because they are sentient and have self-awareness, chatbots fail the mirror test.[12] Machines are not sentient, and if they eventually are able to acquire self-awareness, rather than simply mimicking this trait, they would be classified differently.[13] In other words, machines currently are lifeless, have no conscience and need humans to program them and to perform tasks.

"The rapid development of AI has consequences for human wealth, democracy, government stability, research and education, health, employment and social welfare."

How can we define artificial intelligence and machine learning? The first step in the direction of machine learning was provided by the 1950 Turing Test (aka the "imitation game") in which an interrogator had to discover whether he or she was interrogating a human or a machine and, therefore, whether a machine can show human-like intelligence.[14] In 2007, AI was defined as the "science and engineering of making intelligent machines, especially intelligent computer programs."[15] In 2018, Microsoft defined AI as "a set of technologies that enable computers to perceive, learn, reason and assist in decision-making to solve problems in ways that are similar to what people do."[16] More recently, AI has been defined as "a system that thinks and acts like humans."[17]

Similarly, machine learning is defined as a subset of AI and involves the use of data and algorithms to mimic the

way in which humans learn to incrementally reduce the margins of error.[18]

In both definitions, we need to further distinguish among the training algorithm (unbiased by definition), the dataset (potentially biased) and the model created (potentially biased). If a model is created to think and act like a human, it is because someone built the same using a dataset the algorithm is trained on. Therefore, if the dataset is factually incorrect or biased, the model will show the same bias (because the training algorithm is not aware of being biased).[19]

How AI Works: Learn To Reduce Errors

Briefly, AI and machine learning use a template function, namely training data and a training algorithm to try to learn the "optimal parameter values" of a model to accurately control the outcome for a new example or a new set of facts. Past experiences and facts are used as basis to instruct the machine to predict future outcomes. A template function can be linear or non-linear. Non-linear relationships are harder to train because of their intrinsic complexity. A neural network is one of the available models with non-linear relationships.[20]

A neural network is arranged in various layers, each one with a number of nodes, and an architecture geared towards the function the system is organized to face and train. The network is trained to solve a particular problem and tested against known outcome values to make adjustments and reduce marginal outcome errors close to zero.[21]

AI and Bias

The creation of a model and the use of a particular dataset are based on the free will/choice of the human creator or because the creator must perform a contractual obligation. This input affects the machines like the process of imprinting.

AI bias is the voluntary or involuntary imprinting of one or more human biases in one or more datasets. The model delivers biased results because of fallacious assumptions of the training data provided to the neural network.

Bias can be found in a model trained via a biased dataset that is comprised of biased human decisions, historical/social inequities and/or ignored variables such as gender, race or national origin, with the consequence of unreliable results.[22]

Once instilled into the algorithm or system, bias can be corrected if the biased source is detected or through anonymization and direct calibration.[23] However, once bias and/or misrepresentations are in the system, the damaged output is already in the world. Studies have demonstrated biases in pharmaceutical healthcare as well as in law enforcement facial recognition algorithms.[24]

Bias, misrepresentation and errors generated by AI are still numerous, so the AI as a product may fail to meet certain expectations.[25] In the facial recognition sector, the scholar Najibi suggests that to overcome the bias of AI it would be necessary to enlarge the dataset used as a training ground for the algorithm.[26] However, Gebru et al. warned that the larger the dataset used, the higher the risk of embedded biases and misrepresentations.[27] They proved to be correct with the current level of misinformation produced by ChatGPT-4.

In the space of recidivism, a 2016 ProPublica report showed that the use of the COMPAS algorithm (Correctional Offender Management Profiling for Alternative Sanctions[28]) was biased against Black individuals, and in its conclusions the report states that: "Black defendants were twice as likely as white defendants to be misclassified as a higher risk of violent recidivism, and white recidivists were misclassified as a low risk 63.2% more often than black defendants."[29]

In the field of pain medication, AI failed to detect patients in need.[30] In the area of loan application and mortgages, AI proved to systematically discriminate against Blacks at a higher rate compared to whites.[31]

If bias in AI is not recognized, isolated and corrected, the risks, repercussions and damages for our society (and for AI as a technology) overcome the money and time savings AI was intended to realize through its original goals of problem-solving and prediction. Bias in AI sows prejudice against groups and ideas and limits the advancement of the technology.

Countering Bias: AI Fairness

To resolve these failures, legislators, regulators and researchers have identified and proposed several measures and initiatives geared towards fairness and reducing prejudice.

In 2023, the U.S. National Institute for Information and Technology introduced the first Artificial Intelligence Risk Assessment Management Framework conceived "to better manage risks to individuals, organizations and society associated with artificial intelligence (AI)."[32] In its executive summary, the framework states that

> AI systems are inherently socio-technical in nature, meaning they are influenced by societal dynamics and human behavior. [. . .] AI risk management is a key component of responsible development and use of AI systems. Responsible AI practices can help align the decisions about AI system design, development and uses with intended aim and values. Core concepts in responsible AI emphasize human centricity, social responsibility and sustainability. [. . .] The Framework is designed to [. . .] AI actors [. . .]

to help foster the responsible design, development deployment.

Previously, in 2022, the White House Office of Science and Technology Policy released a whitepaper intended to be a reference point in the design, use and deployment of machine learning systems to "protect the American public in the age of artificial intelligence."[33] Privacy and protection against discrimination take a central stage.

Tasked by Congress, the Federal Trade Commission entered this space in August 2022 with the goal of creating new regulations to combat online scams, deepfakes, child sexual abuse, terrorism, hate crimes and election-related disinformation. Regarding commercial surveillance, the FTC requested comments from the public in order to stop the use of AI to collect, analyze and profit from information about consumers' private lives. According to the FTC, surveillance with AI leads to inaccuracies, bias and discrimination.[34]

From a legislative perspective, Congress introduced, and President Biden signed into law, two pieces of legislation: in October 2022, the Artificial Intelligence Training for the Acquisition Workforce Act[35] on federal agency procurement of AI and, in December 2022, the National Defense Authorization Act[36] that directs the defense and intelligence agencies to integrate AI systems and potential.

Among the legislative measures proposed to combat bias, it is important also to mention the Algorithmic Accountability Bill of 2022[37] that, if and when signed into law, will allow the FTC to verify a bias analysis by AI in various fields among which include employment, finance, healthcare and legal services. Additionally, California, New Jersey, Colorado and New York City introduced various measures to combat bias.[38]

Pagano et al. state that "more research is needed to identify the techniques and metrics that should be employed in each particular case in order to standardize and ensure fairness in machine learning models."[39] Additionally, Charles suggested that AI use more representative data sets inclusive of more diverse human groups coupled with human monitoring.[40]

AI, Fairness and Litigation

Fairness is not inherent in a training algorithm that is fair by design. Qualitatively, the model can be black-box or transparent. If fairness is the reference point to qualify a model as reliable, the same should be true during its deployment either by the private sector or the government. If transparency is an issue, then human supervision is the last resort to control, manage and correct an algorithm.[41]

Because algorithms are nothing more than a set of instructions for solving a problem or accomplishing a task, parameters and options can be selected, or even manipulated at a later point in time, to reach certain results.

In the last two years, litigation on algorithms has developed rapidly and largely centers on the biases of datasets and/or instructions. From the instructions provided, it is possible to determine the real intention of an algorithm's creator.[42] It is possible to instruct the algorithm to reach a specific result (and sow prejudice). On Feb. 21, 2023, the U.S. Supreme Court heard the oral arguments in *Gonzalez v. Google*.[43] The issue presented is whether Section 230(c)(1) of the Communication and Decency Act[44] shields interactive computer services from liability arising from content posted on their platforms and created by third-party providers using providers' algorithms. Here, the justices are also called to understand whether a model's goal is to affect the behavior of the targeted group of individuals. Manipulation can take many forms, including abusing bias or taking advantage of human insecurities.[45] This is the case of non-standard training algorithms created by developers on case-by-case basis with the goal to prepare certain data for training.

Case law is in this area is growing rapidly.[46]

Conclusions

The rapid development of AI has consequences for human wealth, democracy, government stability, research and education, health, employment and social welfare, just to name a few. Technology is an important component of human lives, and humans are becoming dependent on such tools. Are we in control, or do we want others to control us? That's substantially the question that, on March 29, 2023, a group of technology experts raised when they recommended a pause on AI research.[47]

Humans are still in the driver seat when it comes to verifying the fairness of a machine learning system at the time of creation, deployment and application, and attorneys are clearly called to verify the liability of the machine learning creators based on various theories among which include product defect, lack of transparency, abuse of privacy, fraud unjust enrichment and intentional use of false information, among others.

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Endnotes

1. Demis Hassabis, *AlphaFold Reveals the Structure of the Protein Universe,* DeepMind, July 28, 2022, https://www.deepmind.com/blog/alphafold-reveals-the-structure-of-the-protein-universe.

2. WIPO Technology Trend – Artificial Intelligence (2019), at 26.

3. *GPT-4 Is OpenAI's Most Advanced System, Producing Safer and More Useful Responses,* OpenAI, https://openai.com/product/gpt-4.

4. *Let's Chat About ChatGPT,* UBS Wealth Mgmt. Global, Feb. 23, 2023, https://www.ubs.com/global/en/wealth-management/our-approach/marketnews/article.1585717.html.

5. Aaron Drapkin, *Best ChatGPT AI Alternatives You Need to Try in 2023*, Tech.co, March 29, 2023, https://tech.co/news/best-chatgpt-alternatives.

6. Cecily Mouran, *The ChatGPT Bug Exposed More Private Data Than Previously Thought, OpenAI Confirms*, Mashable, March 24, 2023, https://mashable.com/article/openai-chatgpt-bug-exposed-user-data-privacy-breach.

7. Sara Fisher, *GPT-4 Readily Spouts Misinformation, Study Finds,* Axios Media Trends, March 21, 2023, https://www.axios.com/2023/03/21/gpt4-misinformation-newsguard-study.

8. As it stands today, humans should not state a disclaimer in the opening of an article, study or research to shield from liability.

9. Samantha Murphy Kelly, *ChatGPT Passes Exams From Law and Business Schools,* CNN Business, Jan. 26, 2023, https://www.cnn.com/2023/01/26/tech/chatgpt-passes-exams/index.html.

10. The mirror test (a.k.a. the mirror self-recognition test, MSR) is a technique developed by psychologist Gordon Gallup Jr., to determine whether an animal possesses the ability to self-recognition and to measure such physiological and cognitive self-awareness. Animals have negligible self-awareness. Humans employ many years to simply pass the first five stages of self-awareness during early life. Philippe Rochat, *Five Levels of Self-Awareness as They Unfold Early in Life*, 12 Consciousness and Cognition 717–31 (2003).

11. James Vincent, *Introducing the AI Mirror Test, Which Very Smart People Keep Failing,* The Verge, Feb. 17, 2023, https://www.theverge.com/23604075/ai-chatbots-bing-chatgpt-intelligent-sentient-mirror-test.

12. Like in a mirror chamber, I pretend to be a machine using the pronouns "their" and "they."

13. Frank John Ninivaggi, *Consciousness and Awareness* in Learned Mindfulness (2020), https://www.sciencedirect.com/topics/psychology/self-awareness ("*Self-awareness* includes multiple dimensions of how one experiences the self (Duvall and Wicklund, 1972; Northoff, 2011). Self-awareness involves paying attention to oneself and consciously knowing one's attitudes and dispositions. This mindful understanding comprises awareness of sensations, emotions, feelings, thoughts, the physical body, relationships with others, and how these interact.").

14. Alan M. Turing, *Computing Machinery and Intelligence,* 49 Mind 433–60 (1950).

15. John McCarthy, *What Is Artificial Intelligence?* Formal Reasoning Grp., Nov. 12, 2007, https://www-formal.stanford.edu/jmc/whatisai.pdf.

16. *The Future Computed: Artificial Intelligence and Its Role in Society*, Microsoft, 2018, https://blogs.microsoft.com/uploads/2018/02/The-Future-Computed_2.8.18.pdf

17. Stuart Russell and Peter Norvig, Artificial Intelligence: A Modern Approach, 4th ed. (2020). The authors also add the definition of "a system that thinks and acts rationally."

18. Arthur Samuel, *Some Studies in Machine Learning Using the Game of Checkers,* 3 IBM J., 535–54 (July 1959), http://people.csail.mit.edu/brooks/idocs/Samuel.pdf.

19. In 1843, Lady Lovelace stated that machines could be programmed to perform a sequence of operations, but also recognized their limitations and the fact that they could not generate new ideas or concepts on their own. As reported by Turing, this is also known as the Lovelace Objection: "The Analytical Engine has no pretensions to originate anything. It can do whatever we know how to order it to perform." Lady Lovelace "Notes" on Luigi Menabrea *Notions sur la machine analytique de M. Charles Babbage*, in Bibliotheque Universelle de Geneve, (1842).

20. Michael Mauriel, Andrew Noble and Rory Radding, *Patenting Artificial Intelligence Inventions: Introduction and Selected Issues,* NYSBA Bright Ideas, Summer 2020, vol. 29, no. 2, 4–10, 6.

21. *Id.* at 6, 9.

22. James Manyika, Jake Silberg, Brittany Presten, *What Do We Do About the Biases in AI?* Harvard Bus. Rev. Oct. 25, 2019, https://hbr.org/2019/10/what-do-we-do-about-the-biases-in-ai.

23. Paul Barba, *6 Ways To Combat Bias in Machine Learning,* Builtin, March 2, 2021, https://builtin.com/machine-learning/bias-machine-learning.

24. T. Gebru & J. Buolamwini, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, Proceedings of Machine Learning Research, MIT Media Lab, Feb. 4, 2018, 1–15, https://www.media.mit.edu/publications/gender-shades-intersectional-accuracy-disparities-in-commercial-gender-classification.

25. N. Mehrabi, F. Morstatter, N. Saxena, K. Lerman, A. Galstyan, *A Survey on Bias and Fairness in Machine Learning,* 54 ACM Computing Survey 6, 1–35 (July 13, 2021), https://dl.acm.org/doi/10.1145/3457607; W. Sun, O. Nasraoui, P. Shafto, *Evolution and Impact of Bias in Human and Machine Learning Algorithm Interaction*, PLOSOne(Aug. 13, 2020), https://doi.org/10.1371/journal.pone.0235502.

26. Alex Najibi, *Racial Discrimination in Face Recognition Technology*, Harvard University Blog, Oct. 24, 2020, https://sitn.hms.harvard.edu/flash/2020/racial-discrimination-in-face-recognition-technology.

27. Timnit Gebru, Emily M. Bender, Angelina McMillan-Major, Shmargaret Shmitchell, *On the Dangers of Stochastic Parrots: Can Language Models Be Too Big?,* FAccT '21: Proceedings of the 2021 ACM Conference on Fairness, Accountability, and Transparency, March 2021, 610–23, https://dl.acm.org/doi/10.1145/3442188.3445922.

28. https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/compas.pdf.

29. Jeff Larson, Surya Mattu, Lauren Kirchner and Julia Angwin, *How We Analyzed the COMPAS Recidivism Algorithm,* ProPublica, May 23, 2016, https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm.

30. Maia Szalavitz, *The Pain Was Unbearable. So Why Did Doctors Turn Her Away?*, Wired, Aug. 11, 2021, https://www.wired.com/story/opioid-drug-addiction-algorithm-chronic-pain.

31. E. Martinez and L. Kirchner, *The Secret Bias Hidden in Mortgage-Approved Algorithms,* The Markup, Aug. 25, 2021, https://themarkup.org/denied/2021/08/25/the-secret-bias-hidden-in-mortgage-approval-algorithms.

32. *Artificial Intelligence Risk Management Framework*, Nat'l Inst. of Stds. and Tech., Jan. 2023, https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf.

33. *Blueprint for an AI Bill of Rights*, The White House, https://www.whitehouse.gov/ostp/ai-bill-of-rights.

34. *FTC Explores Rules Cracking Down on Commercial Surveillance and Lax Data Security Practices*, Fed. Trade Comm.: Press Release, Aug, 11, 2022, https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-explores-rules-cracking-down-commercial-surveillance-lax-data-security-practices.

35. Pub. Law No: 117-207.

36. FY23 Nat'l Defense Auth. Act.

37. H.R. 6580.

38. For a comprehensive view on federal, state and European state of the art, see *Artificial Intelligence and Automated Systems 2022 Legal Review*, Gibson Dunn Blog, Jan. 25, 2023, https://www.gibsondunn.com/artificial-intelligence-and-automated-systems-2022-legal-review.

39. Tiago Palma Pagano et al., *Bias and Unfairness in Machine Learning Models: A Systematic Literature Review*, Cornell University, arXiv:2202.08176, Nov. 3, 2022, https://arxiv.org/abs/2202.08176.

40. Sergio Charles, *The Algorithmic Bias and Misrepresentation of Mixed Race Identities by Artificial Intelligence Systems in the West*, Research Based Argument in Vol. 1, No. 1 (2023): AI Frameworks Discission of Abeba Birhane's "Algorithmic Injustice" and Social Impact Articles (Feb. 16, 2023), https://ojs.stanford.edu/ojs/index.php/grace/article/view/2592.

41. Ben Green, *The Flows of Policies Requiring Human Oversight of Government Algorithms*, 45 Computer Law & Security Review, 1–22 (2022).

42. The AI Now Institute provides a useful introduction. https://ainowinstitute.org/.

43. *Reynaldo Gonzalez et al. v. Google LLC et al.*, No. 21-1333.

44. 47 U.S.C. § 230.

45. George Petropoulos, *The Dark Side of Artificial Intelligence: Manipulation of Human Behaviour*, Bruegel Blog, Feb. 2, 2022, https://www.bruegel.org/blog-post/dark-side-artificial-intelligence-manipulation-human-behaviour

46. A useful starting point is the AI Litigation Database of George Washington Law School, https://blogs.gwu.edu/law-eti.

47. L. Mohammad, P. Jerenwattananon, J. Summers, *An Open Letter Signed by Tech Leaders, Researchers Proposes Delaying AI Development*, NPR, March 29, 2023, https://www.npr.org/2023/03/29/1166891536/an-open-letter-signed-by-tech-leaders-researchers-proposes-delaying-ai-developme.

Remote Mediations and Unwanted Guests

By Darren Rumack

The federal government has officially ended the COVID-19 emergency, but remote mediation remains. The practical benefits of remote mediation for both attorneys and their clients are obvious. On the other hand, the relaxed formality of remote mediations has created unexpected problems, including the appearance of uninvited guests, who can wreak havoc and endanger a productive mediation process. By working ahead, mediators and attorneys can prepare to keep these surprise attendees from ruining a mediation.

Adverse Consequences of Remote Mediations

Wohnberger v. Lucani[1], a recent case from the New York Supreme Court, is indicative. During a court-ordered mediation, the plaintiff's non-party business partner and fiancé appeared, attempting to act as the plaintiff's representative. The purported representative's conduct was apparently so egregious that the mediator was prompted to report to the ADR coordinator.

After reviewing the mediator's email to the ADR office, the court dismissed the complaint "upon the plaintiff's failure to comply with ADR rules." The dismissal order described the representative's conduct as "disturbing, rude and disrespectful." Fortunately for plaintiff, the First Department reversed this order, holding that although the conduct was egregious, dismissal of the complaint was not warranted, in part because the plaintiff was not alerted that the circumstances of the failed mediation could lead to the dismissal of the complaint and was not

given the opportunity to respond to the allegations in the mediator's email.

Nonetheless, this case demonstrates how an uninvited participant can not only ruin a mediation but also lead to sanctions. Given that the presence of non-party participants is certainly more common in the age of remote mediations (especially if parties participate from their own home), mediators and attorneys should prepare ahead of time for this contingency.

Practical Tips To Handle the Unwanted Mediation Guest

During the pandemic, all parties accepted a degree of informality as the price to pay to keep cases moving forward. On Zoom, parties may treat mediation as a less formal process, with people coming and going as they please. Now that the COVID-19 emergency has ended, and remote mediations are here to stay, mediators and attorneys must anticipate the unwanted mediation guest.

1. Have Counsel Communicate Who Is Appearing Ahead of Time

Mediators should request that counsel identify who will be attending the mediation ahead of time (preferably in their mediation statements). By having counsel specify the attendees before the mediation, the mediator is ahead of the game should any surprise guests show up.

Should the unwanted guest(s) appear and become disruptive, the mediator will have already preemptively addressed the issue, and the parties cannot act surprised if the non-party is asked to leave. During in-person mediations, it can be as simple as requesting that the non-party participant wait in another room. During remote mediations, this may be a more difficult conversation, especially if one of the parties is appearing from home. Asking non-parties to leave the room, especially if it is in their own home, can generate negative feelings toward the mediator, and the party may question the mediator's partiality. If counsel is directed to identify appearances prior to the mediation, the mediator can try to flag any potential unwanted guests prior to any disruptions.

2. Communicate Expectations

In conjunction with having counsel identify attendees ahead of time, mediators should also communicate expectations ahead of the mediation regarding the conduct of the attendees. Specifically, the mediator should stress that individuals not identified before the mediation, or anyone who makes a surprise appearance, may be asked to leave the room.

By communicating expectations for participants, the parties cannot argue they have not been warned if someone is asked to leave for being disruptive or if the mediation is unproductive as a result.

3. Have Separate Conversations With Attorneys Only

If the above tactics fail, and an unwanted guest appears to put the mediation in peril, the mediator should consider pulling the attorneys into a separate breakout room. A lawyer's-only breakout room has two benefits. First, it will give the interloper a cooling off period and may signal the need for the person to calm down before the mediation breaks down entirely.

Second, a lawyers-only breakout room may allow the attorneys to discuss practical matters related to the case, share possible valuations and see if there is any potential compromise that can be reached without the unwanted guest's interference. Even if the mediation does not result in a resolution during the lawyers-only session, the parties can still make headway through a productive process.

"Now that the COVID-19 emergency has ended, and remote mediations are here to stay, mediators and attorneys must anticipate the unwanted mediation guest."

Conclusion

Generally speaking, no one wants a mediation to fail because of a participants'conduct, let alone a non-party participant. By having counsel identify expected appearances ahead of the mediation, communicating expectations of all attendees and segregating any disruptive parties from the process, mediators can preemptively address the issue of the unwanted guest and lessen or eliminate one obstacle to a successful mediation.

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Endnote

1. 214 A.D.3d 615 (Sup. Ct., N.Y. Co. 2023)

Risky Business: What Attorneys Need To Know About the Recent Bank Failures

By David L. Glass

The dominant business news story of the first half of 2023 has been the failures of three large regional banks: Silicon Valley Bank, based in Palo Alto; Signature Bank, based in New York; and First Republic Bank, based in San Francisco. First Republic was taken over by JPMorgan Chase, with assistance from the Federal Deposit Insurance Corporation; Silicon Valley and Signature have been closed by the FDIC, which acts as receiver of most failed banks in addition to insuring their deposits. The Silicon Valley and First Republic failures were the second and third largest in history; only the failure of Washington Mutual during the global financial crisis in 2008 was larger.

The common denominators in all three of this year's failures were the rapid increase in interest rates resulting from the Federal Reserve's inflation-fighting policy; each bank's overreliance on one industry or sector, particularly high tech; and rapid growth that was not properly managed. But the more fundamental reason is the age-old inherent flaw in the banking system as a whole: what bankers call "maturity mismatch." Most if not all commercial banks derive the bulk of their funding from demand deposits – checking accounts. Because bank deposits are insured by the FDIC up to the insurance limit, currently $250,000 per account, the ability to take such deposits is the primary reason for obtaining a bank charter in the first instance. In normal times, demand deposits are a low-cost and reliable source of funding.

The problem is that demand deposits, by definition, are withdrawable "on demand" – any time at the depositor's initiative. But the primary assets in which most banks invest – commercial loans and mortgages – are longer-term in nature. One thinks of the scene in the classic movie "It's a Wonderful Life" in which Jimmy Stewart, as the head of a local building and loan association, reminds his depositors that their money isn't at the building and loan's office sitting in a safe: "It's in Joe's house, right next to yours, and Mrs. Macklin's and the Kennedys, and a hundred others."

And for banks that rely on high net worth and business depositors, a large proportion of these deposits may exceed the $250,000 insurance limit. Silicon Valley Bank styled itself and waxed prosperous as the go-to bank for the large high-tech firms based in the eponymous San Francisco Peninsula region; an estimated 97% of its total deposits exceeded the insurance limit. In the case of First Republic, about two-thirds of its total deposits were uninsured at the end of 2022. Even a bank that appears to be soundly capitalized can quickly find itself in trouble if depositors decide to withdraw large amounts of those deposits. That's what happened: large customers started withdrawing deposits because they were having trouble obtaining financing as interest rates rose. With loan demand down, Silicon Valley Bank had invested those funds in longer-term government bonds to obtain better yields. As the Federal Reserve rapidly raised interest rates to fight inflation, these longer-term bonds declined in value, so, to meet deposit outflows, Silicon Valley was forced to sell these bonds at a loss. As word spread, more and more large depositors drew down their balances – a classic death spiral. And once Silicon Valley failed, depositors quickly moved to withdraw their uninsured funds from other struggling regionals, including First Republic. Its uninsured deposits, some two-thirds of the total, dropped from about $120 billion to about $20 billion, even as its insured deposits held steady or increased somewhat.

The Federal Reserve, as regulator of Silicon Valley and its parent holding company, has released a preliminary report pointing at the bank's inadequate risk management and criticizing its executive compensation schemes for being overly based on performance while neglecting risk management and governance concerns. The FDIC, as primary federal regulator of Signature Bank, has released an internal report citing "poor management" and, not surprisingly, the pursuit of rapid, unrestrained growth without developing risk management practices adequate to the bank's size and complexity. The New York and California regulators are also conducting reviews and will be weighing in on the deficiencies that led to these failures.

In the interim, and predictably, some politicians have pointed the finger at the "deregulation" resulting from legislation in 2018 that relieved smaller banks from some of the more extreme strictures of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted in the wake of the global financial crisis of 2008–2009.[1] It is true that Silicon Valley and other regionals successfully lobbied to raise the threshold for certain stress tests from $100 billion to $250 billion in total assets and thus avoided the need to conduct these tests, one of which was designed to identify potential exposure to interest rate increases, but it also appears that the Federal Reserve, in examining the bank, had all the tools it needed to identify the problem and take corrective action. The Federal Reserve Bank of San Francisco did indeed identify many of the bank's risk exposures and issued a series of corrective notices known as "matters requiring attention" and "matters requiring immediate attention." The reasons for the bank's apparent failure to address these are currently under regulatory and congressional scrutiny.

One reason for the enactment of Dodd-Frank was to address the so-called "too big to fail" scenario. Smaller banks had long protested, with some justification, that they were hampered in competing for deposits exceeding the insurance limit because of the perception that while a smaller bank could and would fail if it got in trouble, the regulators simply would not allow a larger

bank to fail due to the impact on the banking system as a whole. That is exactly what happened here; to prevent "systemic contagion" the FDIC in effect has guaranteed all the deposits, and the banking industry will collectively be assessed additional premiums to bring the FDIC's Deposit Insurance Fund back up to the mandated percentage of total deposits. Contrary to misinformed statements in the press, "the taxpayer" will not pay for these failures; they are covered by the FDIC's Deposit Insurance Fund, which is funded by premiums paid by all insured banks based on their total deposits. This fund is backed by the full faith and credit of the United States in the event of a shortfall, but this provision has never been invoked in a commercial bank failure (it was invoked, however, in the 1980s to bail out failed thrift institutions under a separate insurance fund, since merged into the Deposit Insurance Fund).

For attorneys who advise sizable businesses, this is yet another matter that should be on your radar. Corporations have other options for investing their liquid funds, and there are deposit broker services that place a company's excess deposits with other banks to obtain maximum FDIC insurance coverage, although this generally applies to large certificates of deposit, which are not withdrawable on demand. Under FDIC rules it is also possible to open multiple deposit accounts with the same bank and have each insured up to $250,000, based on their beneficiaries. But the problem is that a company's working capital accounts will need to hold sufficient funds to cover predicable outflows, such as for payroll and to pay suppliers. While the FDIC's commitment to pay all the deposits of the failing banks has raised the specter that the too-big-to-fail rule is back in effect, de facto if not de jure, companies and their attorneys should not assume that this will be the case going forward. While it is not the attorney's function to oversee the client's finance and treasury function, he or she should be satisfied that, at the least, management and the board of directors are aware of this risk and taking appropriate measures to mitigate it.

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Endnote

1. *See* David Glass, *Banking Regulation: The Pendulum Swings Back [Slowly]*, 22 N.Y. Bus. Law J. 1, 9 (2018).

In Favor of Trust-Based Estate Planning

By Allison Voge

To the bewilderment of many estate planners, the debate about trust-based versus will-based estate plans endures in certain states, including New York. A trust-based estate plan entails creating a revocable living trust (RLT) using a legal document similar to a will. However, unlike a will, a properly funded RLT can avoid both probate at death and court involvement in the event of a client's incapacity during life. Some practitioners may be reluctant to use RLTs for the reasons discussed below, but a trust-based estate planning practice can achieve more reliable outcomes in critical situations – and more satisfactory results overall – for most clients.

Misconceptions

Funding an RLT is tedious and time-consuming. An RLT can only govern the assets it owns;[1] its funding is therefore essential for probate avoidance. Once a trustmaker establishes an RLT, the trustmaker must update property titles and beneficiary designations to transfer ownership of the trustmaker's assets to the trust. In practice, funding may be shared by attorney and client. For example, savvy clients may retitle bank accounts and other investments[2] in the name of the trust themselves. However, to fund real estate to the trust, an attorney's assistance may be needed to prepare and record a deed and communicate with lenders, insurers and homeowners' associations to obtain consent to the transfer. In terms of time, cost and effort, the funding process is a clear winner over later court involvement at a client's death or incapacity. Practitioners who are reluctant to promote trust-based estate plans because of the potential liability and time involved in funding may consider implementing more effective internal asset-tracking processes, using engagement letters that detail the respective obligations of the client and the firm and offering funding as a separate service on an hourly basis.

RLTs cost more than standalone wills. Some practitioners find standalone wills easier to sell to clients who mistakenly believe that a trust-based estate plan is more expensive because it includes preparing the RLT and accompanying pour-over will as well as attendant funding requirements. However, the true cost of a will-based estate plan includes the court filing and attorney's fees associated with a probate proceeding upon the client's death and a potential guardianship if a client becomes incapacitated during life. A trust-based estate plan – and lifetime funding – is arguably more cost-effective than court-supervised asset management under guardianship and changes in ownership during the post-death probate process. In addition, though the New York probate process is said to be efficient, post-death trust administrations can proceed with more flexibility and less delay (successor trustees do not have to wait for a judge to appoint them). Finally, if a standalone will establishes continuing trusts for any beneficiary, there will be ongoing administration even after the conclusion of the probate.

A lost trust cannot be proven. A lost or destroyed will may be admitted to probate in New York if it meets certain statutory requirements.[3] Some proponents of will-based estate planning cite the lack of a comparable lost trust statute. Nevertheless, there is strong case law and guidance for proving the existence of a valid trust in the absence of an original executed trust document,[4] as befits a will substitute with no statutorily recognized revocation by destruction[5] and more formal revocation requirements.[6] A trust also has more extrinsic evidence of its existence, such as beneficiary designations naming – and accounts and deeds titled in the name of – the trust. In the absence of lost trust legislation, practitioners with successful document retention policies have little reason to shy away from trust-based estate planning.

A durable power of attorney provides adequate incapacity planning. A typical estate plan will include some combination of health care documents as well as a durable power of attorney (DPOA). Unfortunately, statutory mandates to honor DPOAs vary by state,[7] clients are more transient than ever and financial institutions regularly reject valid DPOAs based on their own ever-evolving internal policies. A bank may deny an agent authority unless that authority was granted using the bank's specific form or preferred language or if it was executed within a certain period before the client's incapacity. In these (usually urgent) circumstances, the

agent must petition a court to appoint the agent to act for the incapacitated client in a guardianship proceeding – with ongoing supervision of the guardian's actions and required filing of regular accountings with the court. Alternatively, an incapacitated client with a trust-based estate plan can rely on a successor trustee to assume control of the assets funded into the RLT without court supervision. This aspect of trust-based estate planning is particularly persuasive when dealing with clients who have family histories of conditions involving progressive cognitive decline as well as clients who wish to rely entirely on probate avoidance techniques, such as beneficiary designations and forms of joint ownership.

Advantages of Trust-Based Estate Plans

In addition, trust-based estate plans have some unique advantages over standalone wills.

An RLT can eliminate the need for multiple probates of out-of-state property. A client who dies owning real estate in more than one state will require a domiciliary probate proceeding in the state of the client's primary residence as well as an ancillary probate proceeding in each state in which the client owns other real estate. The estate will need to engage attorneys licensed in the relevant states for the probate and transfer of the deceased client's property and will face increased court costs, recording fees and delays, as the domiciliary proceeding must typically be commenced before opening any ancillary proceeding. Alternatively, funding real estate into an RLT during life may avoid the need for a separate probate proceeding in each state at death.

Trust administration is more private than probate. Probate proceedings, including probated wills, inventories of probate assets and estate beneficiaries, are a matter of public record. This sensitive information is best kept private for several general and personal reasons. Accordingly, practitioners who take a trust-based estate planning approach and promote the full funding of RLTs will better serve clients who wish to protect the confidentiality of their beneficiaries' identities and the nature, value, and disposition of their trust assets.

Compared to a standalone will-based estate plan, a properly drafted and fully funded RLT provides more private, streamlined, cost-effective, flexible and timely asset management upon a client's death and incapacity. For these reasons, most clients will benefit from and prefer a trust-based estate plan.

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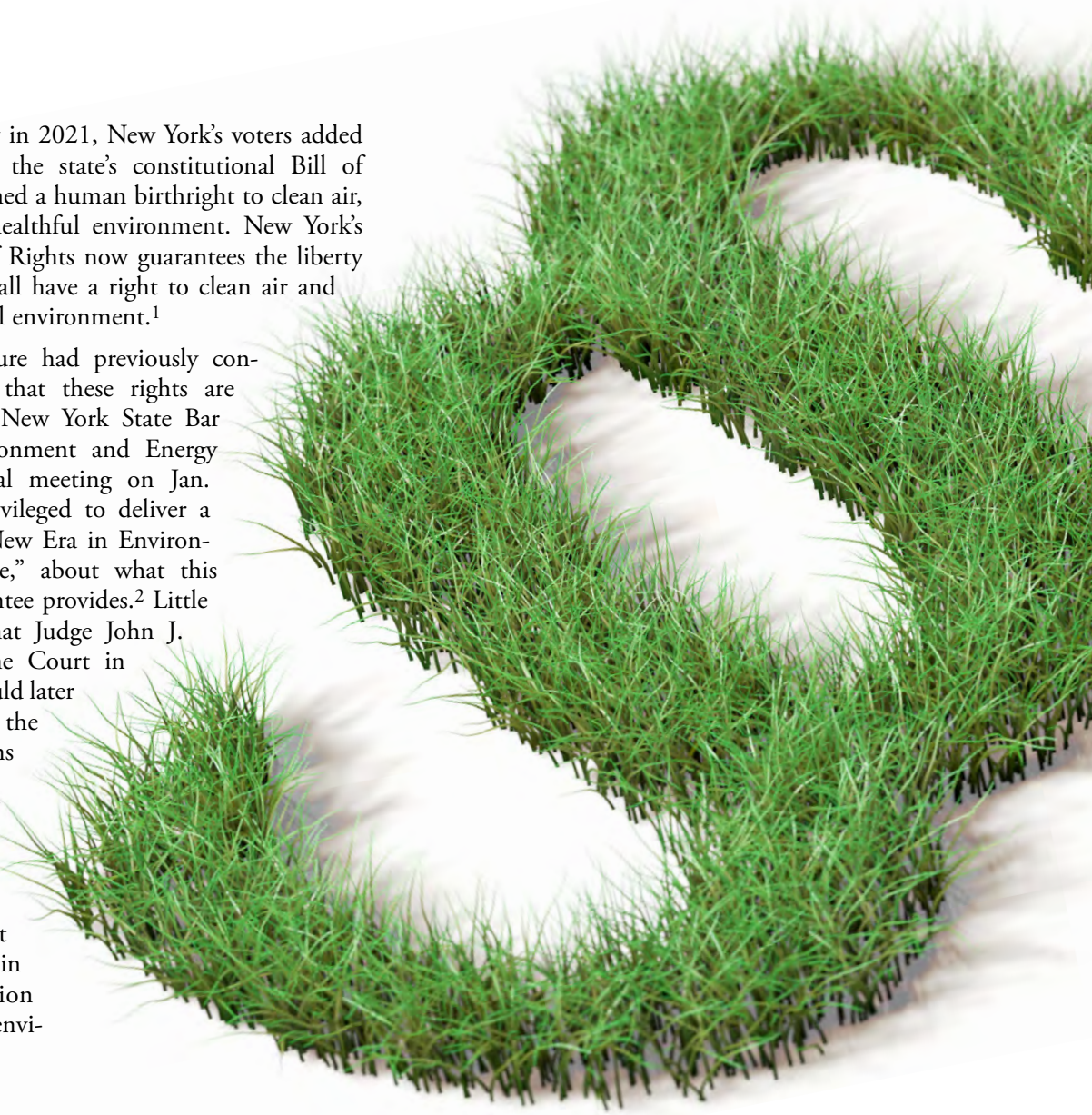
Endnotes

1. *See* N.Y. Estates Powers & Trusts Law 7-1.18 (ETPL).
2. Considerations regarding retirement accounts are outside the scope of this article.
3. N.Y. Surrogate's Court Procedure Act 1407.
4. *See* Amy F. Altman et al., *Lost Trusts in New York – The Case for Statutory Intervention*, Tr. & Ests. L. Section Newsl. (N.Y. State Bar Ass'n) Summer 2014, at 7; *see also, e.g., In re Doman*, 68 A.D.3d 862 (2d Dep't 2009).
5. *See* ETPL 3-4.1(a)(2).
6. *See* ETPL 7-1.17(b).
7. *See, e.g.*, N.Y. Gen. Oblig. Law § 5-1504(2); *cf.* Fla. Stat. § 709.2119 (2023).

The Dawn of Environmental Human Rights in New York

By Nicholas A. Robinson



On Election Day in 2021, New York's voters added Section 19 to the state's constitutional Bill of Rights. They reaffirmed a human birthright to clean air, clean water and a healthful environment. New York's constitutional Bill of Rights now guarantees the liberty that "each person shall have a right to clean air and water, and a healthful environment.[1]

New York's Legislature had previously concurred, recognizing that these rights are "elemental." At the New York State Bar Association's Environment and Energy Law Section's annual meeting on Jan. 25, 2022, I was privileged to deliver a lecture entitled "A New Era in Environmental Jurisprudence," about what this Bill of Rights' guarantee provides.[2] Little did I know then that Judge John J. Ark, of the Supreme Court in Monroe County, would later cite this lecture in the first judicial decisions applying New York's newly minted Bill of Rights' assurance of a personal freedom.[3] This article reflects on legal issues that are likely to emerge in ongoing adjudication about New York's environmental right.

There are now four lawsuits pending in New York courts. The Elisabeth Haub School of Law at Pace University maintains an online Environmental Right Repository with the principal pleadings, decisions on motions and eventually all judicial decisions as they arrive.[4] The repository also provides references to analogous rulings in other states that provide rights to the environment in their constitutions, as well as to decisions in other jurisdictions around the world. Although the right to the environment is new to New York jurisprudence, for many years other common-law countries have been enforcing this right, as have other courts around the world. As Environmental and Energy Law Section members study and apply the New York right to the environment, many issues arise. Not least is that the human right to the environment is now also in the domain of human rights commissions and legal counsel's offices for literally all state agencies. EELS may be a *primus inter pares*, given its environmental law expertise. However, just as due process of law is everyone's concern, so too the environmental rule of law, both embodied in the same New York constitutional Bill of Rights.

The Human Right

The United Nations General Assembly took note of the widespread acknowledgement of the right to the environment in July of 2022, when it recognized "the right to a clean, healthy, and sustainable environment as a human right."[5] An extensive analysis presented to the U.N. Human Rights Commission in Geneva, Switzerland, earlier demonstrated that the "vast majority" of nations have already recognized the right to a clean and healthy environment in their national constitutions and laws.[6] Legal scholars in the United States also have acknowledged or critiqued these rulings around the world.[7] Professors James May and Erin Daly have prepared a comparative law guide to judicial decisions applying environmental rights.[8]

It remains to be seen how New York courts will construe the constitutional guarantee to a clean and healthy environment. Because human health and ambient environmental situations are comparable around the world, and the duties established by environmental statutes are comparable worldwide, it is likely that rulings by New York courts will be akin to judicial decisions elsewhere applying environmental rights.[9] Like other provisions in the Bill of Rights (such as freedom of speech or freedom of religion), the constitution expressly prohibits government from trampling on the peoples' rights, now also for a clean and healthy environment. As the Pennsylvania Supreme Court ruled in 2013, these fundamental rights "are inherent in man's nature" and preserved rather than created by the Pennsylvania constitution.[10] The Pennsylvania court held that government's ignorance about its actions harming a person's environmental rights "does not excuse the constitutional obligation because the obligation exists a priori to any statute purporting to create a cause of action."[11]

This right to a clean and healthful environment is a fundamental human right, upon which all other human rights depend. The state has a duty to uphold these rights.[12] Moreover, New York's right to the environment underscores, and indeed elevates, all environmental justice claims in New York.[13] A government permit that allows environmental harm to persons in disadvantaged communities is legally suspect under New York's Bill of Rights. Beyond environmental agencies, the New York Human Rights Division and local human rights commissions have a new legal impetus to bring relief to communities experiencing environmental discrimination because of race, color, national origin or income. Suits on behalf of each person denied clean air or clean water or a healthful environment may be directed at governmental human rights officials who fail to act to ensure observance of these human rights.[14] The reach of New York's Bill of Rights in Article I, Section 19 will be surprising.[15]

Implications of the Initial Environmental Rights Rulings

New York's decisions of first impression interpreting Bill of Rights Article I, Section 19 deserve thoughtful analysis. Judge John J. Ark independently arrived at a determination of law comparable to those of the Pennsylvania decision. The case involves long-standing complaints by persons claiming that their right to a healthful environment has been infringed upon by the governmentally licensed High Acres landfill in the Town of Perinton. Denying the motions to dismiss by the New York State Department of Environmental Conservation, the judge ruled that the right to the environment in New York's Bill of Rights was self-executing and constituted a nondiscretionary duty on the part of all government agencies to fulfill their obligations under the Bill of Rights. Accordingly, plaintiffs could seek the remedy of mandamus. Moreover, plaintiffs had no obligation to exhaust any administrative remedies before seeking judicial relief and could do so within the six-year statute of limitations for constitutional claims (not the four-month limitation for CPLR Article 78 claims).[16] Judge Ark also ruled that the standards for judicial review of a constitutional claim are more rigorous than the "arbitrary and capricious" standards for administrative law claims. The burden of proof lies with the government to establish that it is not infringing a constitutionally guaranteed right. This shifts the burden of proof that environmental plaintiffs previously had to meet to the government defendant. As a corollary to this burden of proof, a number of courts abroad have adopted an evidentiary maxim known as in

dubio pro natura, which means that when the evidence or equities are equally balanced, the court, to respect the right to the environment, adopts the finding that is most protective of the environment.[17]

The freedoms enshrined in the Bill of Rights, like due process of law, have ancient roots in the Magna Carta of 1215.[18] The environmental rule of law has its origins in the Forest Charter of 1217, which Magna Carta produced.[19] The human right to the environment is today considered to be an element of due process of law.[20] Thus, claims to enforce the right to the environment in New York arise also as claims to secure due process of law (U.S. Constitution Bill of Rights, Articles V and XIV, and New York common law due process). When claims are asserted by persons in environmental justice settings, they also arise as claims under Article I, Section 11 (equal protection of the law). Similarly, if a local government acts to prevent a person asserting the right to the environment, a claim involving freedom of speech arises under Article I, Section 8, and so too if freedom of assembly, to demonstrate for claims environmental right, is curtailed, claims could arise also under Article I, Section 9.

Given that the Bill of Rights now includes the fundamental human right to clean air, water and healthful environment, it is frankly surprising that Gov. Kathy Hochul and state agencies such as the Department of Environmental Conservation, and also Attorney General Letitia James and the Department of Law, seem to resist making the changes in policy and procedure required by Article I, Section 19. Judge John Ark raised this concern in his *Fresh Air for the Eastside* decisions: "Whether the Green Amendment will be an important tool to allow communities to safeguard their environment and compel state and local governments to prevent environmental harms is uncertain. Indeed, the vigor of the state's opposition to this lawsuit does not bode well for its enforcement of the Green Amendment."[21]

Responding to the Paradigm Shift

Judge Ark observed that the "regulatory paradigm in existence on December 31, 2021, as of January 1, 2022, has become a matter of constitutional right."[22] One might expect that a local planning board, or bureau chief in the Department of Environmental Conservation, both understaffed and lacking sufficient resources to handle their respective workloads, might resist the paradigm shift. Certainly, the private sector in New York, including real estate developers, did not welcome the likelihood of a paradigm shift, as they lobbied hard against adoption of the Green Amendment in 2021. But that was then. As professor Rebecca Bratspies put it: "This changes everything."[23] Nonetheless, state and local agencies appear to be ignoring the implications of the state's human right to the environment.

All those in state government should take note of Judge Ark's thoughtful opinions delivered at the end of 2022. Judge Ark ruled, "Complying with the Constitution is not optional for a state agency and is thus nondiscretionary and ministerial." It is incumbent on state and local government agencies to exercise their due diligence to ensure that they respect each person's environmental human rights. To do otherwise is to reject democracy. As Judge Ark put it, "The voters of this State have empowered impacted citizens to bring a Green Amendment case when their right to breathe clean air and live in a healthful environment has been violated."[24]

New York's environmental rights effectively prohibits any government agency from violating each person's right to clean air and water and a healthful environment. When 70% of New York's voters adopted these words, they understood their plain meaning. Legislative sponsors made clear they wanted the Green Amendment to be concise, akin to expressions of due process or free speech rights.[25] Environmental rights guarantee the right to life, which our era of climate change, biodiversity loss and chemical pollution places in some peril.[26] The birthrights to breathe clean air, have clean water, and live in a healthful environment are widely regarded as natural rights.[27] As is amply clear from applications of process of law, courts ascribe more precise meanings to the basic liberties in the Bill of Rights in context of the government's act of trespass.

Objective criteria exist for the bench and bar, and government officials, to provide concrete meaning to clean air and water and a healthful environment. First, it's fundamental to human rights law that the law can countenance no backsliding from levels of protection currently in place. This is the non-regression principle.[28] It has concrete meaning in the context of environmental law, for example the non-degradation of water quality norm that underpins the Clean Water Act and New York's water quality standards.[29] It is evident in the duty to identify and adopt substantive mitigation of adverse effects under the State Environmental Quality Review Act.[30] This act also emphasizes the progressive nature of government's objective, to improve and sustain improved conditions: "The maintenance of a quality environment for the people of this state that at all times is healthful and pleasing to the senses and intellect of man now and in the future is a matter of statewide concern."[31]

Under Bill of Rights Section 19, governments cannot degrade the level of a person's clean air and water and healthful environment. Agencies can take note of existing conditions, since they are the baseline below which

degradation that impacts a person is proscribed. Without assessing the status of the local environment, agencies cannot know how their actions may cause degradation. This pre-action assessment is already required, but many agencies have ignored this duty. Such avoidance of this legal duty is at the root of many affronts to environmental justice.

When applying the right to the environment in context, Judge Ark provided a framework for judicial decision-making: "In adjudicating and applying the Green Amendment, it may be necessary to have a two-prong test. First, did the government action comply with the applicable statute? Second, did the government action violate a person's constitutional 'rights to clean air and water and a healthful environment?['"[32] If failure to adhere to a statutory duty is found, then a court may not need to reach the constitutional claim. In assessing the claim under the Bill of Rights, with the strict scrutiny appropriate when called upon to preserve the persons' rights, Judge Ark's test involves three considerations: (a) any agency's infringement on an environmental right must be justified by a compelling state interest (not business as usual, or mere economic advantage); (b) the proposed agency conduct must demonstrate that it is the least intrusive (like the alternatives analysis required under the State Environmental Quality Review Act, or showing overall the act is not regressive); and (c) the action claimed to be a compelling state interest must still be consistent with the non-degradation and hold harmless the person's environmental human rights (as in equal protection and environmental justice instances). Just as plaintiffs will need to assemble substantial evidence that the government is degrading the air and water to their detriment, defendants will face a daunting task to claim their act is compelling. There is not likely to be a large volume of environmental rights cases. If agencies reassessed how they respect each person's environmental rights, litigation could be avoided altogether.

The Duties of the Executive Branch

Article IV, Section 3 of the New York Constitution obliges the governor to ensure that the "laws are faithfully executed." The executive chamber should take stock of how manufacturing enterprises have learned to comply with environmental laws over the past decades. They created their own environmental management systems.[33] These systems allow any organization to adjust their operations to conform with legal norms for environmental stewardship.[34] Successful manufacturing enterprises also follow the environmental audit processes provided by the International Standards Organization.[35] The ISO 14,000 guidance series included provisions for independent audits of companies' environmental compliance procedures.[36] In the course of doing so, they were able to streamline operations, minimize waste streams and modernize their operations.[37] It is time for government agencies to follow the best practices being used routinely by the private sector.

There are consultancies and training programs for EMS and ISO 14,000. Gov. Hochul, or the executive of any agency, can enlist these services to establish an EMS that aims to ensure that the governmental entity complies with New York's environmental rights. Rather than opposing the right, as Judge Ark experienced, the Department of Law should counsel state agencies to review their operations to ensure compliance with human rights, including the right to the environment. Gov. Hochul should issue an Executive Order that each state agency adopt an appropriate EMS that ensures environmental rights are honored. There is a substantial practice for lawyers and environmental consultants in helping agencies learn to observe each person's environmental rights.

Arguably, New York voters are distressed that their state's ambient environmental quality continues to decline. They amended the Bill of Rights to secure their environmental liberty, a right to life. The incremental and cumulative impact of many pollutants or adverse land use changes add up. Governments are not preventing degradation. Many voters doubtless consider it a "crime" that their shared environment is being harmed by economic interests and temporizing, insufficient government regulation. The Bill of Rights, at least, now guarantees each person a right that she or he can bring to a court to vindicate.

Is it the dawn of a shift in how New York rebalances the equities toward affirming the right to life? Governmental agencies have tools to welcome the change or, as Judge Ark experienced, to fight to preserve their prerogatives and discretion to affirm business as usual. Ultimately, the Bill of Rights is in the hands of judges. Meanwhile, Gov. Hochul and Attorney General James have every opportunity to chart the paths to enable all governmental agencies to accept their human rights obligations.

The Bill of Rights' paradigm shift in New York requires no less.

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Endnotes

1. N.Y. Constitution Bill of Rights, Article I, § 19, In force since Jan. 1, 2022. Colloquially known as the "Green Amendment," voters accepted the right to the environment by a 2-to-1 margin, with 2,129,051 votes in favor of the amendment.

2. Prof. Nicholas A. Robinson, Elisabeth Haub School of Law at Pace University, Presentation at the N.Y.S. Bar Association Annual Meeting before the Environment and Energy Law Section (Jan. 25, 2022), https://digitalcommons.pace.edu/lawfaculty/1205/.

3. *Fresh Air for the Eastside v. State*, 2022 N.Y. Misc. LEXIS 8394, 2022 NY Slip. Op. 34429(U) (Sup. Ct., Monroe Co., Dec. 20, 2022). and the companion case of Fresh Air for the Eastside v. Town of Perinton, No. E2021008617 (Sup. Ct., Monroe Co., Dec. 8, 2022).

4. See https://nygreen.blogs.pace.edu.

5. U.N. General Assembly Resolution A/76/300 (July 28, 2022), with 161 nations voting in favor including the U.S., and 8 abstentions, and no votes in opposition. See https://news.un.org/en/story/2022/07/1123482.

6. This point was cited in the last preambular paragraph for the U.N. Resolution. See https://digitallibrary.un.org/record/3982508?ln=en.

7. *See* James May and Erin Daly, *Compendium of Global Environmental Constitutionalism: Selected Cases and Materials*, U.N. Environment Programme & Widener University, 2019 (2d Ed.).

8. James R. May and Erin Daly. Judicial Handbook on Environmental Constitutionalism (2017), http://works.bepress.com/james_may/100/.

9. See, for instance, rulings in Hawaii, Montana, Pennsylvania Constitution Article I, § 27.

10. *Robinson Township*, 83 A. 3d 901, 952 and n. 36 (Pa. 2013). The same finding was cited in the leading decision recognizing and enforcing the right to the environment abroad in 1993, by the Supreme Court of the Philippines, *Oposa v. Factoran*, by Justice Hilario Davide, Jr., https://lawphil. net/judjuris/juri1993/jul1993/gr_101083_1993. html. In Pennsylvania, the ruling struck down a state law (applied to legislative action); in the Philippines the ruling invalidated all the nation's forestry permits (applied to executive action).

11. *Id.*, 83 A. 3d 901, at 952.

12. The Bill of Rights Article I, § 19, then is to be applied as part of New York's Human Rights Law, Chapter 18 of the Executive Law. See Article 15, Human Rights Law, § 290, Article 1, providing that the Human Rights Division is charged to uphold that Human Rights of New Yorkers: "The legislature hereby finds and declares that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants." *See* https://www.nysenate.gov/legislation/laws/EXC/290.

13. Although the state Department of Environmental Conservation has policies and a modest program on Environmental Justice (see https://www. dec.ny.gov/lands/333. html), the Legislature has enacted the environmental justice Permitting Bill, S.8830, which Gov. Hochul signed last Dec. 31, 2022, and which is due to come into force in June 2023. *See* https://www.nysenate.gov/legislation/bills/2021/s8830. The law amends the State Environmental Quality Review Act (SEQRA, Article Environmental Conservation Law) to require all state and local governmental agencies making an environmental assessment under SEQRA to consider whether the proposed action may cause or increase a disproportionate and/or inequitable impact on a disadvantaged community (DAC). When an agency prepares an environmental impact statement, it must include a detailed statement defining the disproportionate and/or inequitable effects that the proposed action may have on a DAC. Read together with the Bill of Rights, Article I, § 19, the agencies have no discretion except to require a full avoidance of any act that infringes each person's right to a clean and water and a healthful environment. The New York Climate Justice Working Group has prepared criteria for identify each DAC. Before the June effective date for the environmental justice Permitting Bill, at Gov. Hochul's request, the Legislature is expected to make as yet unknown amendments to the environmental justice Permitting Bill. Should any of these amendments infringe on the environmental rights of persons in an environmental justice community, a court could conceivably face the question of the Bill of Rights potentially nullifying legislative actions that infringe the environmental rights.

14. See the discussion of Senate Bill S.8830, *supra* note 13.

15. For another example, consider how criminal law engages fundamental rights. *See* Rob White, *Ecocentrism and Criminal Proceedings for Offenses against Environmental Laws*, in E. Fisher and B. Preston, An Environmental Court in Action – Function, Doctrine and Process, Chapter 11, at 213 (2022, Hart Publishing).

16. *Fresh Air for the Eastside, supra* note 3.

17. Too often previously, an economic interest would prevail when the equities were equally balanced. See Oxford References: https://www. oxfordreference.com/display/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-912; Sarena Baldin and Sara de Vido, *The In Dubio Pro Natura Principle: An Attempt of a Comprehensive Reconstruction*, SSRN Electronic Journal 22/2022, 168-99, https://www.researchgate.net/publication/366634311_THE_IN_DUBIO_PRO_NATURA_PRINCIPLE_AN_ATTEMPT_OF_A_COMPREHENSIVE_LEGAL_RECONSTRUCTION.

18. Historical Society of the N.Y. Courts: "Eight hundred years ago (June 19, 1215), England's most powerful feudal barons gathered at Runnymede, on the banks of the river Thames to force King John to formally recognize their traditional legal rights by signing a charter known as Magna Carta. Divided into 63 chapters, Magna Carta established the crucial principle that the "law of the land" existed independently of the monarchy, and that the king was subject to it. The charter also recognized the rights of the barons to trial by jury, due process and habeas corpus." *See* https://history. nycourts.gov/about_period/magna-carta/.

19. *See* N.A. Robinson, *The Charter of the Forest: Evolving Human Rights in Nature*, in Daniel Barstow Magraw, et al (Eds), Magna Carta and the Rule of Law (ABA, 2014), https://digitalcommons.pace.edu/lawfaculty/990/. Under the NYS Bill of Rights Article I, § 14, the common law, as received from England and until repealed, continues as the law of New York, and this includes Magna Carta.

20. See the report prepared by the Environmental Law Institute (ELI) for the United Nations: https://www.unep.org/resources/assessment/ environmental-rule-law-first-global-report. See Chapter 4, § 4.2.

21. *Fresh Air for the Eastside, supra* note 3.

22. *Id.*

23. Rebecca Bratspies, *This Changes Everything: New York's Environmental Amendment, Viewpoint*, Environmental Law In New York, vol. 33, No. 6 (Arnold & Porter, Lexis/Nexis, June 2022) at 1.

24. *Id.*

25. Those who doubt the clarity of New York's Right to the Environment and carp that it is too vague to apply, have not studied the jurisprudence of construing other rights in New York. *See, e.g.*, *People v. P.J. Video*, 68 N.Y.2d 296, 303" (1985), recalling "New York's long tradition of interpreting our State Constitution to protect individual rights."

26. See the scientific synthesis report of the United Nations, *Making Peace With Nature* (2021), https://www.unep.org/resources/making-peace-nature/.

27. The court so held in the landmark environmental rights case of *Oposa v. Factoran, supra* note 10. New York court decisions have given concrete meaning to the natural right of due process of law "6,000 times in the first ten years of the twenty-first century, and over 6,000 times in the decade after that (2010–2020), giving judges a more solid, constitutionally grounded, and less amorphous platform than 'natural law.'" Albert M. Rosenblatt, *The Rise and Fall of Natural Law in New York*, Judicial Notice, issue 6, 18, 23 (2022, Historical Society of the State of New York). N.Y. courts cited natural law in less than 12 decisions.

28. *See* Markus Vordermayer-Reimer, Progressivity and Non-Regression in International Human Rights Law: Going up on the Escalator, in Non-Regression in International Environmental Law (Intersentia 2020), https://www.cambridge.org/core/books/abs/nonregression-in-international-environmental- law/progressivity-and-nonregression-in-international-human-rights-law-going-up-on-the-escalator/2FBC6B-7F7626E076E2EB16C171BB447C#.

29. Clean Water Act, § 101, 33 U.S.C. § 1251. The U.S. Environmental Protection Agency views anti-degradation expansively, beyond water quality issues. *See* https://www.epa.gov/wqs-tech/key-concepts-module-4-antidegradation.

30. Environmental Conservation Law (ECL) Article 8.

31. ECL § 8-0103.

32. *Fresh Air for the Eastside, supra* note 3.

33. See https://www.epa.gov/ems.

34. https://www.fedcenter.gov/programs/ems/.

35. https://www.iso.org/home.html.

36. https://www.iso.org/home.html.

37. The World Environment Center has long led major corporations to develop environmental compliance and stewardship tools and systems (see https://www.wec.org), as has the World Business Council for Sustainable Development (see https://www.wbcsd.org/).

Your NYSBA Leadership Team 2023–2024

Richard Lewis, President

Richard Lewis, special counsel at Hinman, Howard & Kattell, became president of the New York State Bar Association on June 1, 2023.

He concentrates his practice in litigation and business law. Lewis most recently served as vice president of the 6th Judicial District on the Executive Committee. He has served on the NYSBA House of Delegates since 2001. He was a member of the Committee on Professional Discipline and the Nominating Committee, as well as the Local and State Government Law Section.

Lewis is a past president of the Broome County Bar Association and past chair of its Endowment, Ethics and Grievance committees.

Active in his Binghamton community, he is a past chair of the editorial board of The Reporter Group. He previously sat on the endowment committee of the Jewish Federation of Greater Binghamton.

In addition, Lewis has served as a director and vice president of the Broome Sports Foundation. He is a former trustee of Hillel Academy of Broome County and served as its president from 2002–2012. He is past president of the Board of Trustees of Temple Israel, past chair of the Broome County Arena Board, past president of Broome Legal Assistance Corporation, past director of Children's Home of Wyoming Conference and past director of SOS Shelter.

Lewis is a graduate of Ithaca College and John Marshall Law School. He is married to Lori (Bowman) Lewis and they have two children.

Domenick Napoletano, President-Elect

Domenick Napoletano is a solo practitioner focusing on complex commercial litigation and appellate work while maintaining a general practice. A number of his cases have appeared in published decisions, most involving real property and tenancy and occupancy issues. He has spearheaded various state and federal class action lawsuits, in-cluding against the New York City Department of Finance for its imposition of "vault taxes."

Among his New York State Bar Association activities, Napoletano is a past chair of the General Practice Section and co-chair of the Committee on Civil Practice Law and Rules. He previously co-chaired the Emergency Task Force for Solo and Small Firm Practitioners. He has served on many association committees including Finance, Leadership Development, Bar Leaders of New York State, Animals in the Law, the President's Committee on Access to Justice, Task Force on the Evaluation of Candidates for Election to Judicial Office and the Task Force on Mass Shootings and Assault Weapons.

Napoletano also served on the association's Executive Committee as vice president from the 2nd Judicial District and the House of Delegates representing the Brooklyn Bar Association. He is a past president of the Brooklyn Bar Association, the Columbian Lawyers Association of Brooklyn, the Confederation of Columbian Lawyers of the State of New York and the Catholic Lawyers Guild of Kings County.

While in college and throughout law school, Napoletano worked for then-New York State Assemblyman Michael L. Pesce, who recently retired as presiding justice of the state Supreme Court Appellate Term for the 2nd, 11th and 13th Judicial Districts.

Napoletano earned his law degree from Hofstra University School of Law and his undergraduate degree from Brooklyn College.

Taa Grays, Secretary

Taa Grays is vice president and associate general counsel of information governance at MetLife Legal Affairs. As the lead of information governance, Grays is responsible for the strategic management of MetLife's global Information Lifecycle Management Program. She leads an eight-person team that develops, implements and manages the information governance strategic plan.

Grays was co-chair of the New York State Bar Association's Task Force on Racism, Social Equity and the Law. She is a member of the Business Law, Corporate Counsel and Women in Law sections. She served as vice president of the First Judicial District on the Executive Committee and chaired the New York State Conference of Bar Leaders and the Committee on Women in the Law (now the Women in Law Section). In addition, she co-chaired the Task Force on Racial Injustice and Police Reform.

Grays was honored with the State Bar Association's Diversity Trailblazer Award in 2008.

She started with MetLife in 2003 in the litigation section and served as the chief of staff to the general counsel since 2010. Prior to MetLife, Grays was an assistant district attorney with the Bronx District Attorney's Office in its rackets bureau for five-and-a-half years.

Grays was recognized as one of 100 Leading Women Lawyers in New York by Crain's New York Business in 2017, a Visionary Leader in Litigation by Inside Counsel in 2016, one of the Most Influential Black Lawyers in 2015 and named Ready to Rise to become a general counsel in 2013 and 2015.

Within the legal community, the New York City Bar Association recognized Grays as a Diversity Champion in 2015. The Metropolitan Black Bar Association acknowledged her dedication and leadership to the bar in 2010 by honoring her with its inaugural Bar Leaders of the Year Award.

Grays earned her law degree from Georgetown University Law Center and received her undergraduate degree from Harvard College.

Susan L. Harper, Treasurer

Susan L. Harper, managing director NY/NJ at Bates Group, began her term as treasurer of the New York State Bar Association on June 1, 2023.

Harper is the founding chair of the association's Women in Law Section and served as chair of the Committee on Women in the Law, where she successfully spearheaded initiatives and legislation to advance issues pertaining to women in the legal profession and advocate for the fair and equitable treatment of all women under the law.

Harper also served on the New York State Bar Association's Finance Committee and as a House of Delegates member. She has presented to the HOD on six occasions to advance issues regarding paid leave, the Equal Rights Amendment and the creation of the WIL Section.

Harper is the chair of the association's Attorney-Client Relations Working Group for the Task Force on the Post-Pandemic Future of the Profession.

Harper has been admitted to the New York and New Jersey Bars. She has represented major broker dealers, insurance companies and clearing firms and their employees on matters before the Financial Industry Regulatory Authority, the Securities and Exchange Commission and state and federal courts in connection with customer, industry and employment disputes.

Harper is co-chair of the New York County Lawyers Association Securities and Exchange Committee, past Women's Rights Committee chair and is an immediate past member of the NYCLA Board of Directors and its In-vestment Committee.

Harper served as president and chair of the board and executive committee of the Financial Women's Association of New York and the FWA of the New York Educational Fund. She also served as the FWA board restructuring chair and general counsel. She is the organization's liaison to the United States military.

She earned her law degree from New York Law School and her bachelor's degree in business management from Simmons College in Boston.

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Opposing Counsel Keep Stalling – What Can I Do?

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

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

To the Forum:

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

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

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

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

Sincerely,
Patience Isabel Waning

Dear Ms. Waning:

The frustrating situations that you describe certainly make it difficult to adequately represent your client. All litigators can appreciate that a caseload and to-do list is in constant flux, as are partners' and clients' priorities.

But lawyers have a higher duty of professional responsibility to give our clients and their legal matters our utmost attention, not opposing counsel. The potentially severe consequences and prejudicial effects for repeatedly and inexcusably missing deadlines are designed (in part) to discourage egregious and recurring behavior like the plaintiff's counsel's and to prevent wasting of judicial resources.

New York Rules of Professional Conduct

The New York Rules of Professional Conduct (RPC) Rule 1.3 states that lawyers must act with "reasonable diligence and promptness in representing a client." In the words of Rule 1.3(b), "a lawyer shall not neglect a legal matter entrusted to the lawyer." Comment [1] to Rule 1.3 states that "a lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer." If the lawyers are unable to carry out their obligations to the client, there are protocols for withdrawal from representation.

Your opposing counsel does not seem to be representing clients with the diligence required by the RPC. The Rule and its comments specifically guide lawyers concerning their workload, advising them to control the amount of work they take on "so that each matter can be handled diligently and promptly." Further, lawyers "are encouraged to adopt and follow effective office procedures and systems," and the rule warns that "neglect may occur when such arrangements are not in place or are ineffective." The situation you describe suggests that opposing counsel does not have effective office procedures and systems, which have led to the failure to handle the case diligently and promptly.

The American Bar Association's Model Rules of Professional Conduct

The American Bar Association's Model Rules of Professional Conduct[1] aligns with New York's by requiring effective case load management to avoid neglect. Though slightly less detailed than New York's version, the ABA rule mandates that "a lawyer shall act with reasonable diligence and promptness in representing a client . . . despite opposition, obstruction or personal inconvenience to the lawyer." Comment [3] details the importance of promptness throughout representation beyond ensuring that a case is filed within the statute of limitations, stating that "even when the client's interests are not affected in substance . . . unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness."

These rules suggest that opposing counsel is neglecting the case and that many of the reasons offered by opposing counsel for missing deadlines are meritless excuses. The supervising partners are supposed to bolster opposing counsel's lack of experience and run interference for the sudden departure of support staff. These are not problems the client, the court or your client should be forced to shoulder. Lawyers must still uphold their responsibility to their clients to tend to the legal matters to which they were assigned. A lawyer's job should be to ease the anxieties of their clients rather than add to them.

To File or Not To File a Motion To Dismiss

Moving to dismiss may be the best way to protect your client's rights. Undoubtedly, opposing counsel's lack of attention to the matter has wasted your client's time and the court's resources. It does seem unjust for your client to have to spend the money defending themselves against someone who doesn't seem to care about the fight he or she started. (If nothing else, you should move to recover attorney's fees and costs expended to attend those missed hearings.) While plaintiff might be harmed by their case being dismissed, your duty is to protect your clients' interests, and it is plaintiff's counsel's duty to protect their client's. A violation of rules of professional conduct is only one part of the equation.

Such a motion to dismiss falls under New York Civil Practice Law and Rules Section 3216, which states that "where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, with notice to the parties, may dismiss the party's pleading on terms."[2] These motions may be granted unless the party failing to prosecute "shows justifiable excuse for the delay and a good and meritorious cause of action."[3]

Sanctions Lawyers May Face for Neglectful Representation

Courts have handled sanctioning attorneys in these contexts in different ways. Generally, New York courts have the discretion to "award any party or attorney in any civil action or proceeding before the court . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part." This frivolous conduct includes that which is "undertaken primarily to delay or prolong the resolution of the litigation."[4] However, in order for a court to issue sanctions for frivolous conduct, there must have been a "pattern of frivolous behavior."[5]

In *In re Kraft*,[6] the court sanctioned a supervising attorney's neglect in managing a high-volume divorce practice because he failed to adequately supervise his subordinates in their handling of cases. This neglect was found to be a professional responsibility violation even though the court also found that the attorney was "well motivated, never intended to wrong his clients and was himself, to some extent, victimized by the unauthorized actions of one of his employees."[7] This lawyer was issued a sanction of public censure by the court.

U.S. District Judge Lewis Liman dismissed a lawsuit earlier this year in the Southern District where the

plaintiff's counsel consistently failed to meet deadlines, appear for court conferences and respond to defendants' counsel, just as your opposing counsel has been doing.[8] Defense counsel filed a motion to dismiss for failure to prosecute two weeks before the scheduled trial, noting that plaintiff's counsel repeatedly asked for extensions of deadlines to hopefully reach a settlement before trial but never communicated a settlement demand. Defense counsel also filed a motion for sanctions calling for the following relief: "(1) reasonable attorneys' fees for time prepping for trial this month; (2) reasonable attorneys' fees for today's conference and (3) all out-of-pocket expenses incurred by Defendant Wyrick, who is retired from the NYPD and drove back from the West Coast last weekend because this trial was scheduled to begin this coming Monday."

The judge ultimately granted this motion, citing a "a lack of interest in the case's prosecution" on the part of the plaintiff's counsel and as a result of their "consistently flouting deadlines imposed by courts in this district," and ordered that the plaintiff's attorneys each complete four CLE credit hours regarding federal practice and procedures. These CLE credits would not be counted toward the lawyers' standard CLE requirements to maintain their license with the New York bar. In addition, the court awarded attorney's fees and costs borne by the defendants in answering to plaintiff's claims. This ruling came in response to a motion to dismiss filed by the defendant's counsel.

Conclusion

Based on opposing counsel's conduct and the amount of time by which they have delayed litigation, you certainly seem to have a basis to dismiss the action and to request sanctions and reasonable attorney's fees. Though the last thing anyone wants to do is move for sanctions against fellow attorneys when we can all understand the feeling of being overwhelmed by our workload, opposing counsel should have at least tried to provide notice to you that a deadline would be missed and respond to your attempts to contact them.

Sincerely,
The Forum by

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QUESTION FOR THE NEXT FORUM

To the Forum:

Our firm was recently retained to handle a highly complex commercial action. The client is extremely cost-sensitive and asked that we do our best to keep costs lean wherever possible. We have been working on this case for several months, and the client has already asked for several discounts on the bill. I am concerned that we just received our client's document production consisting of over 100,000 documents for review. As cost is a concern for the client, I was discussing the strategy on how to approach the review with my associate, and she suggested we use an AI review tool such as DIALOG DTE to review the documents using an algorithm to pull only highly relevant documents and save time and money. Call me old school, but I have significant concerns about running 100,000 highly sensitive business documents through an unsecure computer program. Further, I am not familiar with DIALOG DTE's intricacies and other issues that may evolve in using this new AI tool as a discovery assistant. How do I know it is accurately pulling relevant documents? Are documents uploaded to DIALOG DTE protected and confidential?

My associate also told me it could even write briefs and create outlines of arguments for our firm. For obvious reasons, this program is extremely appealing to me as it could substantially increase the efficiency of my practice while keeping costs down for the clients.

I asked DIALOG DTE its thoughts and it recommended its use. However, I am interested to hear your thoughts. Is the use of this program permitted under the Rules of Professional Responsibility? What are the applicable rules of the road?

Sincerely,
Ould Skewl

Endnotes

1. https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_3_diligence/comment_on_rule_1_3/.
2. CPLR 3216(a).
3. CPLR 3216(e); *Builtland Partners v. Coordinated Metals, Inc.*, 166 A.D.2d 276 (1st Dep't 1990).
4. https://www.law.cornell.edu/regulations/new-york/22-NYCRR-130-1.1.
5. *Sarkar v. Pathak*, 67 A.D.3d 606 (1st Dep't 2009).
6. 148 A.D.2d 149 (1st Dep't 1989).
7. *In re Kraft*, 148 A.D.2d 149 (1st Dep't 1989).
8. *Federal Judge Orders CLE Classes for Lawyers After 'Persistent Failures' to Meet Deadlines*, N.Y.L.J., March 1, 2023, https://www.law.com/newyorklawjournal/2023/03/01/federal-judge-orders-cle-classes-for-lawyers-after-persistent-failures-to-meet-deadlines.

Evidence Is Hard

By David Paul Horowitz and Katryna L. Kristoferson

Readers may recall this column that ran in the Bar Journal from 2004 to 2018. After a five-year hiatus, corresponding to a period of significant changes in New York civil practice, occasioned in part by the pandemic but also by systemic changes, some pre-dating the pandemic, we pick up where the column left off.[1] Our goal, as before, is to focus on issues of interest and concern to civil litigators, focused on evidentiary and general civil litigation practice. And who are we? Katryna and David are partners both in practice and in writing this column and bring disparate experience to bear on writing on these issues. We hope you will find our sometimes-differing perspectives of interest and help to you in your day-to-day practice. We are in the trenches every day with you, and we all learn from each other.

Why Is Evidence Hard?

Once admitted to the New York bar, and just before or after hitting the trenches in New York State courts, new lawyers realize they aren't in Kansas anymore – Kansas being the place they learned about as a 1L, governed by the Federal Rules of Civil Procedure. And since most states' codes of procedure largely mirror the Federal Rules, prior experience in another jurisdiction is often of limited help. But the quirk in New York practice that likely most impacts a litigator's life is the absence of something the federal courts, and most state courts outside of New York (that we are aware of), have: a code of evidence.

Why no code of evidence, you ask? Don't. It is the result of myriad philosophical and political disputes among members of different branches of the bar, with a dose of aversion to change thrown in for good measure. So, on the civil side, with the exception of CPLR article 45 and other rules scattered about in diverse places, our rules of evidence are found in case law.

What Might a Code of Evidence Look Like?

There have been several draft Codes of Evidence proposed for adoption in New York, most recently in 1991. The structure is similar to that of the Federal Rules of Evidence, with the language of the proposed code followed by "Comment."

By way of example, Article 8 of the proposed 1991 Code, which addressed the topic that has bedeviled lawyers since the first common law trial – hearsay – starts with definitions:

> **§ 801. Definitions**
>
> For purposes of this article the following definitions are applicable:
>
> Statement. A "statement" is: (1) an oral or written assertion of a person; or (2) nonverbal conduct of a person if it is intended by such person as an assertion.
>
> Declarant. A "declarant" is a person who makes a statement.
>
> Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial, proceeding, or hearing, offered in evidence to prove the truth of the matter asserted.

Followed by Comment (excerpted):

> (a) Statement. The definition of "statement" is important because of subdivision (c)'s definition of "hearsay" as being a "statement, other than one made by the declarant while testifying at the trial, proceeding, or hearing, offered in evidence to prove the truth of the matter asserted." Subdivision (a) recognizes three types of statements that are included within the hearsay definition as enunciated in subdivision (c): (1) an oral assertion; (2) a written assertion; and (3) nonverbal conduct intended as an assertion.
>
> Oral and written assertions have long been subject to the hearsay rule. Prince, Richardson on Evidence § 200 (10th ed.). Similarly, nonverbal conduct intended as an assertion is considered to be hearsay. Thus, a statement made by sign language would be hearsay as would also be the act of a victim of a crime in pointing to identify the perpetrator of the crime in a police lineup. [. . .] Subdivision (a), by contrast, excludes from the operation of the hearsay rule nonverbal conduct not intended as an assertion, which some New York courts have characterized as hearsay [. . .]
>
> Nonverbal conduct not intended as an assertion is not regarded as hearsay for several reasons. First, a rule considering nonassertive conduct as hearsay is difficult to apply in the pressures of a trial, and is

> frequently overlooked. [. . .] Second, the principal reason for the hearsay rule-to exclude declarations where, inter alia, the veracity of the declarant cannot be tested by cross-examination-does not fully apply because such conduct, being nonassertive, does not involve the veracity of the declarant. Third, there is frequently a guarantee of the trustworthiness of the inferences to be drawn from such non assertive conduct because the actor has based an action on the correctness of a belief, i.e., actions speak louder than words [. . .].
>
> Accordingly, nonverbal conduct not intended as an assertion is not covered by the hearsay rule and its admissibility is governed by other rules of evidence. For example, evidence that ten people opened up their umbrellas when offered to prove that it was raining is not a statement and is not affected by the hearsay rule. It would be admissible if it were relevant under CE 401 and 402.
>
> The question of whether the conduct was intended as an assertion is one for the court to determine pursuant to CE 104(b). A Code of Evidence for the State of New York (citations omitted).

As you can see, the most recent proposed code furnishes the rule, the case law upon which it is based and helpful examples/explanations.

How Do the Rules of Evidence Develop in New York?

Given the sclerotic pace of change in our CPLR (friendly reminder: the 60th anniversary is this year!), perhaps the fact that our rules of evidence follow a natural evolutionary process is not such a bad thing. As the Court of Appeals noted in *People v. Price* in 2017:

> In our view, it is more prudent to proceed with caution in a new and unsettled area of law such as this. We prefer to allow the law to develop with input from the courts below and with a better understanding of the numerous factual variations that will undoubtedly be presented to the trial courts.[2]

People v. Price, a criminal case (obviously), addressed the authentication, and hence the admissibility, of a photograph of the defendant obtained from a social media profile page purportedly belonging to the defendant and concluded the People's proof "fell short of establishing the requisite authentication to render the photograph admissible in evidence."[3]

Notwithstanding the fact that the photograph in question was obtained from the defendant's social media page, the court held that traditional methods for admitting a photograph still applied:

> With respect to photographs, we have long held that the proper foundation should be established through testimony that the photograph "accurately represent[s] the subject matter depicted" (citations omitted). "Rarely is it required that the identity and accuracy of a photograph be proved by the photographer. Rather, since the ultimate object of the authentication requirement is to insure the accuracy of the photograph sought to be admitted into evidence, any person having the requisite knowledge of the facts may verify," or an expert may testify that the photograph has not been altered (citation omitted).[4]

A short time ago, citing *People v. Price*, the Court of Appeals, in *People v. Rodriguez*,[5] returned to the admissibility of electronic evidence, specifically screenshots taken from a cellphone:

> The trial court acted within its discretion determining that the People properly authenticated the screenshots. "[T]echnologically generated documentation [is] ordinarily admissible under standard evidentiary rubrics" and "this type of ruling may be disturbed by this Court only when no legal foundation has been proffered or when an abuse of discretion as a matter of law is demonstrated" (citation omitted). This Court recently held that for digital photographs, like traditional photographs, "the proper foundation [may] be established through testimony that the photograph accurately represents the subject matter depicted" (citation omitted). We reiterated that "[r]arely is it required that the identity and accuracy of a photograph be proved by the photographer" (citation omitted), which would be the boyfriend here. Rather, "any person having the requisite knowledge of the facts may verify" the photograph "or an expert may testify that the photograph has not been altered" (citation omitted).
>
> Here, the testimony of the victim—a participant in and witness to the conversations with defendant—sufficed to authenticate the screenshots. She testified that all of the screenshots offered by the People fairly and accurately represented text messages sent to and from defendant's phone. The boyfriend also identified the screenshots as the same ones he took from the victim's phone on November 7. Telephone records of the call detail information for defendant's subscriber number corroborated that defendant sent the victim numerous text messages during the relevant time period. Moreover, even if we were to credit defendant's argument that the best evidence rule applies in

this context, the court did not abuse its discretion in admitting the screenshots.[6]

So, everything old is new again.

Of course, as with many "rules" found in case law (and some enunciated plainly in statutes), the stated foundation or trigger for the application of an evidentiary rule often raises more questions. So, if "[r]arely is it required that the identity and accuracy of a photograph be proved by the photographer," just how rare is rarely, and how does one know when one is that rare situation? What circumstances require the photographer, instead of a person with "requisite knowledge"? Well . . . it depends.

While we won't claim to always have the answers to questions like these (and we take refuge in the fact that the answer "it depends" is often the accurate answer), we will give it our best shot and endeavor to explain, when there is no definitive answer, the noteworthy shades of gray.

If Not a Code, What Do We Have?

First published online in 2017, Chief Judge Janet DiFiore explained the reason for the Guide to New York Evidence in her 2017 State of Judiciary speech:

> New York is one of the very few states that does not have a statutory code of evidence. Our law of evidence is scattered throughout thousands of judicial decisions, statutory provisions and court rules. For judges and lawyers, this is both frustrating and inefficient. This past July, I established an Advisory Committee on Evidence to create a single, definitive compilation of New York's law of evidence. Creating an accessible, easy-to-use guide for judges and lawyers will save research time, promote uniformity in applying the law, avoid erroneous rulings and improve the quality of legal proceedings.

The Evidence Guide is structured with the rule followed by a detailed explanatory note:

> **8.00 Definition of Hearsay**
>
> Hearsay is an out of court statement of a declarant offered in evidence to prove the truth of the matter asserted in the statement.
>
> The declarant of the statement is a person who is not a witness at the proceeding, or if the declarant is a witness, the witness uttered the statement when the witness was not testifying in the proceeding.
>
> A statement of the declarant may be written or oral, or non-verbal, provided the verbal or non-verbal conduct is intended as an assertion.
>
> Note
>
> This section sets forth the definition of hearsay which is generally applied by the courts. (*See People v Nieves*, 67 N.Y.2d 125, 131 [1986] [the statements in issue "constituted hearsay evidence, as they were made out of court and were sought to be introduced for the truth of what she asserted. Accordingly, they were admissible only if the People demonstrated that they fell within one of the exceptions to the hearsay rule" [. . .].
>
> Hearsay admitted without objection may properly be considered by the trier of fact and can be given such probative value as under the circumstances it may possess. [. . .] However, the Appellate Division may in the interest of justice reverse or modify a judgment for error in admitting hearsay even though no objection was made at trial. [. . .] The Court of Appeals review power is much more limited as it is precluded from reviewing a claim of error when no proper objection was made at trial except where the claim falls within "the narrow class of mode of proceedings errors for which preservation is not required." [. . .] The Court of Appeals has never held that a claim of error in the admission of hearsay to which no objection was made, much less a general claim of error in the admission of evidence generally, is a "mode of proceedings" error.[7]

Conclusion

It's nice to be back, and we welcome your comments and suggestions. Feel free to email us (David at david@dphpllc.law; Katryna at katryna@dphpllc.law) and we hope you will visit us at PracticalNewYorkPractice.com for weekly updates on cases of interest on New York evidence and civil practice.

David Paul Horowitz of the Law Offices of David Paul Horowitz has represented parties in personal injury, professional negligence, and commercial litigation for over 30 years. He also acts as a private arbitrator and mediator and a discovery referee overseeing pre-trial proceedings and has been a member of the Eastern District of New York's mediation panel since its inception. He drafts legal ethics opinions, represents judges in proceedings before the New York State Commission on Judicial Conduct and attorneys in disciplinary matters, and serves as a private law practice mentor. He teaches New York Practice, Professional Responsibility, and Electronic Evidence & Discovery at Columbia Law School.

Katryna L. Kristoferson is a partner at the Law Offices of David Paul Horowitz and has litigation experience across many practice areas. She has lectured at CPLR Update, Motion Practice, and Implicit Bias CLEs, and will be teaching "Bias and the Law" at Pace Law School next year.

Endnotes

1. *See How Did We Get Here*, N.Y.L.J., May 16, 2023.
2. 29 N.Y.3d 472, 478 n. 3 (2017).
3. *Id.* at 474.
4. *Id.* at 477.
5. 38 N.Y.3d 151 (2022).
6. *Id.* at 155.
7. Guide to New York Evidence (citations omitted).

Deputy Chief Administrative Judge Edwina Richardson-Mendelson Honored With Robert L. Haig Award

By David Alexander

Deputy Chief Administrative Judge for Justice Initiatives Edwina Richardson-Mendelson was presented with the Robert L. Haig Award by the New York State Bar Association's Commercial and Federal Litigation Section on Saturday, May 6.

She was honored during the Commercial and Federal Litigation Section and Dispute Resolution Section Joint Spring Meeting in Philadelphia. Justice Troy Webber, Appellate Division, First Department, presented Richardson-Mendelson with the award.

"Judge Richardson-Mendelson has dedicated her life to advocating for equal justice for all New Yorkers. She is a revered jurist and leader. She is active in a broad range of programs, many focusing on youth and families in underserved committees. She oversees New York State's hundreds of problem-solving and accountability courts that provide a wide range of legal and social services to assist participants achieve success," said Sherry Levin Wallach, immediate past president of the New York State Bar Association.

Judge Richardson-Mendelson was appointed to direct the New York State Unified Court System's Office for Justice Initiatives in 2017. The office is responsible for securing justice for all New Yorkers in civil, criminal and family courts regardless of their situation. The office administers pro bono attorney and other volunteer programs to fulfill its mission designed to serve underrepresented court users.

(L-R): Robert L. Haig, Sherry Levin Wallach, Justice Troy Webber, Judge Edwina Richardson-Mendelson, Ignatius Grande and Anne Sekel.

"Judge Richardson-Mendelson is a pioneer who has dedicated her legal career to helping those who are most in need, including victims of domestic abuse and indigent clients in family court. Her passion is evident by her relentless desire to ensure that everyone who walks through a courtroom door has the same access to justice as the next person and all those who may follow," said Ignatius Grande, immediate past chair of the Commercial and Federal Litigation Section.

Judge Richardson-Mendelson leads the Equal Justice in Courts Initiative to implement the recommendations of Jeh Johnson, special advisor on equal justice, that are described in his October 2020 report examining racial bias in the state court system, and to carry out the November 2020 court-based recommendations of the New York State Judicial Committee on Women in the Courts to enhance gender fairness in the New York State courts.

In January 2021, Judge Richardson-Mendelson began overseeing the Unified Court System's Office of Policy & Planning, which is responsible for administering the state's more than 300 problem-solving and accountability courts. Each model has the advantage of specially trained judges and staff, dedicated dockets, intensive judicial monitoring and coordination with outside services and agencies.

Judge Richardson-Mendelson first joined the court system as a court attorney-referee in Queens County Family Court, after representing clients in New York City Housing Court, Family Court and Supreme Court. She became a family court judge in 2003, the Queens County supervising family court judge in 2008 and was elevated to administrative judge of all New York City Family Courts a year later.

Milieudefensive v. Royal Dutch Shell Highlights New Strategies in Climate Change Litigation

By Rebecca Melnitsky

Around the world, lawsuits are seeking damages and mitigation for the effects of climate change. So far, most of these lawsuits have been against governments to prevent new construction or to seek compensation for damage already done.

But in a notable case in the Netherlands, *Milieudefensive v. Royal Dutch Shell*, the plaintiffs argued that the Shell oil company is actively contributing to climate change and thus must change its actions to avoid future damage to the environment. The Hague District Court ruled in the plaintiffs' favor, saying that Shell must work to reduce its carbon emissions by 45% by 2030.

The effects of this landmark ruling, and other climate change litigation, were the topic of discussion at a continuing legal education course hosted by the New York State Bar Association. It was sponsored by the International Section and the Environmental and Energy Law Section.

The panelists included:

- Professor Michael B. Gerrard of Columbia University in New York City
- Rodrigo Carè of Horizons & Co. in Dubai, United Arab Emirates
- Marieke Faber of NautaDutilh in New York City
- Dr. Maria Antonia Tigre of Columbia University in New York City

Milieudefensive, the Dutch branch of the nongovernmental organization Friends of the Earth, as well as other NGOs, filed the class-action lawsuit against Shell in April 2019. Hearings were held in December 2020, and the final ruling that Shell must reduce its carbon emissions came in May 2021.

"This has nothing to do with what Shell did in the past," said Faber. "Or what damage can be attributed to Shell. It is about the part that Shell plays in global emissions. But it is very much about the future and mitigating and reducing that impact going forward."

The court used human rights law, the duty of care enshrined in Dutch law and the 2015 Paris Agreement for the legal basis of its decision. The goal of the Paris Agreement is to limit the rise in global temperature to under 1.5 degrees Celsius. Warming has already reached 1.2 degrees.

Shell has appealed the ruling. A hearing is expected around the end of this year, with a judgment expected by the end of 2024. Shell has also moved its headquarters from the Netherlands to the United Kingdom.

Faber said that the court's use of the Paris Agreement helps clarify how it applies to corporations and countries. "It did not find that Shell was bound by the Paris Agreement," she said. "That is still far removed, but it does add to the international consensus as to what states can be held responsible for. And as we see more and more, that can also translate to what corporations can be held accountable for. The *Shell* judgment and the *Urgenda* judgment, in that respect, are two sides of the same coin."

Urgenda v. State of Netherlands was an earlier case in which the Dutch state was ordered to cut carbon emissions by at least 25% in 2020. The ruling was based on the court's interpretation of the European Convention on Human Rights, which guarantees a right to life and a right to family life. Faber said the *Milieudefensive* ruling built off this decision.

"In very brief, the court said: if the Dutch population is in real danger, there is a real and immediate risk from climate change," said Faber. "Then, as a state, you are obliged to take measures to prevent that risk from materializing. And climate change, even though it is a future risk, qualifies."

Therefore, the court ruled that the Dutch government must do everything in its power to reduce the danger from climate change. "And the court went further than that," said Faber. "It quantified that obligation."

More Climate Change Litigation Around the World

Gerrard explained that climate change litigation took off in 2007 and has since increased every year. More than 2,200 lawsuits have featured climate change, with most coming from the United States.

In Peru, farmer Saúl Luciano Lliuya has sued the German utility company RWE, seeking compensation for adaptation costs related to protecting his town from melting glaciers. The case was filed in 2015.

The German district court initially found the claim inadmissible, but a higher court reversed the decision. "The court acknowledged that a pri-

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Heschel School Wins First New York State Mock Trial Tournament in School History

By Jennifer Andrus

The Abraham Joshua Heschel School in Manhattan beat The Mount Academy in Esopus, Ulster County, to win the 2023 Mock Trial State Competition. The two squared off in the final round Tuesday, May 23, at the James T. Foley U.S. Courthouse in Albany, after beating out six other regional winning teams in the state semifinals the previous day.

The ceremonial courtroom on the fourth floor of the courthouse on Broadway was packed with students and coaches from those semifinal rounds to watch the final round of the tournament sponsored by the New York State Bar Association.

For months, these high school teams worked endless hours preparing the hypothetical case of *Remington Stone v. Marley Miser*. The civil case centered around who is responsible for an accident on a construction worksite. The plaintiff, Remington Stone, suffered burns from a fall off a ladder onto a wet surface near a live wire. Her legal team claims her employer on the construction site is to blame. The defendant, Marley Miser, claims the plaintiff caused the accident and should accept personal responsibility.

In the early rounds of the mock trial competition, teams prepare and execute the case from both the plaintiff and the defense sides. In the final round, a coin toss decides which side each team will represent. The Mount Academy team took on the plaintiff role, and the Heschel School took on the defense.

For more than three hours, the high school students presented their cases as lawyers, witnesses and researchers. They presented exhibits, examined and cross-examined witnesses and responded to each side's objections. Judge John P. Cronan, U.S. district judge for the Southern District of New York, announced Heschel as the winning team just before 12:30 p.m. after praising both teams for their skill and preparation. "These skills will serve you well in your future," he said.

Following the trial, both teams celebrated a hard-fought case and praised the challenge and dedication of the opposing team.

Eight regional teams competed in the May 22 semifinals. The regional champions were Frewsburg High School, Huntington High School, Augustine Classical Academy, Hunter College High School, W.T. Clarke High School and Maine-Endwell High School. In all, the mock trial program has 400 high schools with 4,000 participants each year.

The Mock Trial Tournament was created by the New York State Bar Association in 1978, and the first statewide tournament was held in 1982. The New York State High School Mock Trial Tournament is one of the largest in the country. It is administered by NYSBA's Committee on Law, Youth and Citizenship and supported by the New York Bar Foundation.

MILIEUDEFENSIVE V. ROYAL DUTCH SHELL HIGHLIGHTS NEW STRATEGIES IN CLIMATE CHANGE LITIGATION

Continued from page 59

vate company is, in principle, responsible for its share of climate damages resulting from its emissions," said Tigre. "Which in itself is an important development in global climate litigation as well."

The case has moved into the evidentiary phase, and judges, clerks and experts have traveled to Peru to see the impact firsthand. The case is still pending in German court. "The impact of that decision, if this case is successful, is huge," said Tigre. "Because there are several similar cases that could be replicated . . . it can be hugely significant if hundreds or thousands of similar cases are eventually filed along those lines."

Tigre noted that indigenous groups are becoming increasingly active in litigation, as they are especially affected by climate change. In Australia, indigenous people have filed a claim against South Korean financial institutions for supporting the development of the Barossa fossil gas reserve near the Tiwi Islands.

"That corporate accountability strategy is still a smaller percentage of the cases," said Tigre. "Now we have over 2,000 cases on a global scale, and that really is spreading in terms of the jurisdictions covered as well. . . . It really goes beyond what's happening in the U.S. and Europe."

Practical Uses of the Metaverse: What Is a POAP?

By Jennifer Andrus

A POAP (POE´-app) is an acronym for a proof of attendance protocol. It's a digital souvenir offered to commemorate special events, conferences or other meetings. The New York State Bar Association offered a POAP to those who attended the "Deep Dive Into the Metaverse and Web3" event at New York University on April 28 and 29.

The technology looks like a video game, but it offers much more than moving a character around a digital backdrop. The NYU Metaverse Collaborative Hub brings you to a park-like setting with trees and a water fountain. After choosing your avatar, you move your character to different areas to learn more about the speakers at the conference and how the NYU collective works. An additional attraction is the Garden Gallery in the park, which is full of vibrant digital artwork created by NYU graduate students.

New York State Bar Association Immediate Past President Sherry Levin Wallach explained the technology during the metaverse conference and why she wanted to use it. "It's an NFT (non-fungible token) that we created for this conference and its proof that you came here," she said. "It's to give you the experience of receiving a POAP and creating a wallet to save it there. You can add to it as you go to other conferences."

The process of creating a POAP, much like currency, is called "minting." The POAP has a unique serial number, giving one ownership of the item, which in the digital space means it is an NFT.

The technology is being embraced by the entertainment industry, where an artist's superfan might get one of a limited number of POAPs, thus increasing its value. Companies are also offering this as a thank you gift to their volunteers or vendors at events. Instead of a special T-shirt or hat, now volunteers can receive a digital keepsake, one that won't fade or wear out over time.

The use of the POAP is still in the early stages of development, but, in time, it could have a wide range of uses. One might include tracking and storing information on attendance at events that garner CLE credit.

"For conferences like this, these QR codes can be displayed instead of a CLE code," said Levin Wallach. "You would save it in your blockchain and eventually download all of your CLE credits. It may be a lot easier than collecting and filling all those forms to prove your attendance."

The NYSBA Task Force on Emerging Digital Finance and Currency continues to study the use of blockchain technology, how the law applies and how to promote the appropriate use of the technology within the legal profession.

The task force is working to develop recommendations on legislation while also studying how this technology might expand membership in NYSBA and the organization's Web3 footprint.

Incoming LGBTQ Law Section Chair Sam Buchbauer Says NYSBA Membership Makes National Impact

By Rebecca Melnitsky

Sam Buchbauer is a trusts and estates attorney at the Law Offices of David A. Caraway in New York City. His term as chair of the LGBTQ Law Section began in June. He graduated from the Syracuse University College of Law in 2019. He also served as co-chair of the Committee on Diversity, Equity, and Inclusion in 2022–2023 and is currently a member of the Strategic Planning Committee.

Why did you decide to become a lawyer?

I have always wanted to be in a career where I helped others. I initially started out in the nonprofit sector, and I loved the mission-driven approach to help make the world a better place. However, I felt I could make a more impactful difference as a lawyer, and I thought law school would be a good way to continue to help people.

And in my current practice, I feel I help others every day. Additionally, a majority of our clients identify as LGBTQ and I find it meaningful to help this community with their estate planning needs.

Tell me about working in trusts and estates.

I enjoy this practice because you're making a personal impact on someone's life. You get to know them intimately – what their family is like, all about their finances and all about their plans for the future. You get to work closely with clients on important decisions they have to make prior to and after their death.

What particular needs do you notice your clients have?

Each client has specific needs, but our firm has had some couples who are going through the surrogacy process. Some surrogacy agencies require that couples have estate planning documents in place should anything happen. They also require inserting specific language into the will or power of attorney regarding parental powers, enforcement of a surrogacy agreement and payment of surrogacy obligations.

Other times we draft estate plans for long-term same-sex partners who have chosen not to get married but would like to protect their partner through estate planning. This is especially important if a partner's biological family is not supportive of or hostile to their LGBTQ identity. In this way, one partner can ensure their assets are distributed per their wishes and benefits the other partner.

How did you first get involved with NYBSA?

I was familiar with NYSBA in law school, and I first got involved in the organization in 2020 right before the pandemic. I attended the Annual Meeting to network, and I happened to connect with Christopher Riano, who at the time was the chair of the LGBT People and the Law Committee. Christopher asked me to join as membership chair, and I've been involved ever since.

From 2020 to now, the committee has transitioned to a section. We've done excellent work under Christopher's leadership. And through my

involvement, I met Immediate Past President Sherry Levin Wallach, and she nominated me to be one of the co-chairs of the Committee on Diversity, Equity, and Inclusion. I was then appointed to join the Strategic Planning Committee.

You're the incoming chair of the LGBTQ Law Section. You're the second chair ever, and it's one of the newer sections.

It's an exciting opportunity, and something I hadn't foreseen at this stage in my career. I'm so looking forward to the opportunity to lead the section, and I'm confident in our Executive Committee. We've achieved a lot of great things, from amicus briefs to events and CLE programs.

We also have collaborated with other LGBTQ groups and individuals, and I hope to continue that during my tenure as chair. For example, one of the most satisfying collaborations for me has been working with Judge James Hyer on promoting the judicial bench card for using LGBTQ inclusive terms and pronouns in New

York courtrooms. This initiative was spearheaded by Sherry Levin Wallach. I wrote a report to introduce this initiative to the House of Delegates, which passed. Sherry invited me to join the delegation in New Orleans for the American Bar Association's mid-year meeting. She presented the report to the American Bar Association, and the initiative passed with a strong consensus. Being able to work on that and see that passed through to the American Bar Association just shows how important it is to ensure that courtrooms are spaces that are inclusive and respective of LGBTQ individuals. This collaboration has been a highlight in my involvement at NYSBA.

What are your hopes for the LGBTQ Law Section for the next two years?

The Executive Committee is still in the planning stages of what we want to accomplish for the next two years, and we want to continue the great work that we've been doing. I think the amicus briefs in particular have been very well-respected and well-received. I think we can continue to make a great impact in that arena.

We also look forward to our continued collaboration with other LGBTQ groups and organizations, such as working to advance the judicial bench card. We'd like to continue working on initiatives like that and collaborating with the LGBT Bar Association of New York. They've been great partners.

And as anti-LGBT laws and anti-trans laws are being passed across the country, it's important for us to respond with a strong voice and offer our support for the LGBTQ community, not just in New York State but across the U.S.

What benefits have you gotten from NYSBA membership?

It's led to leadership opportunities that I wouldn't have thought possible at this stage in my career. I've been a practicing attorney for three years, and now I have the opportunity to chair a section. It's also been a way to connect with the larger legal profession, not just in New York State but throughout the United States. Attending the American Bar Association mid-year meeting in New Orleans was a great way to meet attorneys from across the country.

I also found co-chairing the Committee on Diversity, Equity, and Inclusion provided another perspective on how a different body operates within NYSBA. Seeing how that committee runs its events and communications has inspired ideas for the LGBTQ Law Section.

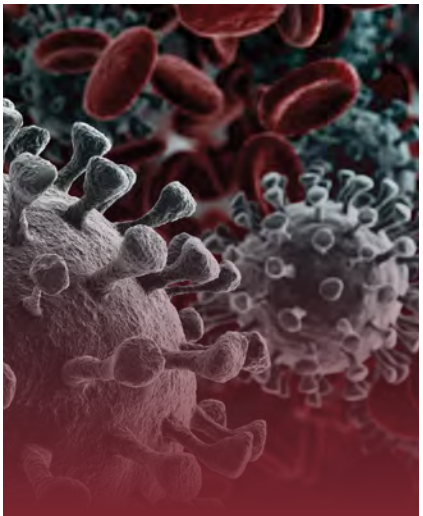
And it's been beneficial to be a part of the Strategic Planning Committee to see more big picture issues that are affecting the overall organization.

Whenever I can, I try to attend the CLEs, and I always find that a helpful resource.

Working with people on these various committees has also been a great benefit as a new lawyer, especially working with more seasoned and experienced attorneys and judges.

Finish this statement: You should join NYSBA because…

It offers a great way to meet people and network with attorneys across the state. The CLEs offered are also a great way to learn new skills. There are opportunities at the New York State Bar Association that I think most members don't realize. There are many ways to volunteer that can help you meet other practitioners and advance your career.



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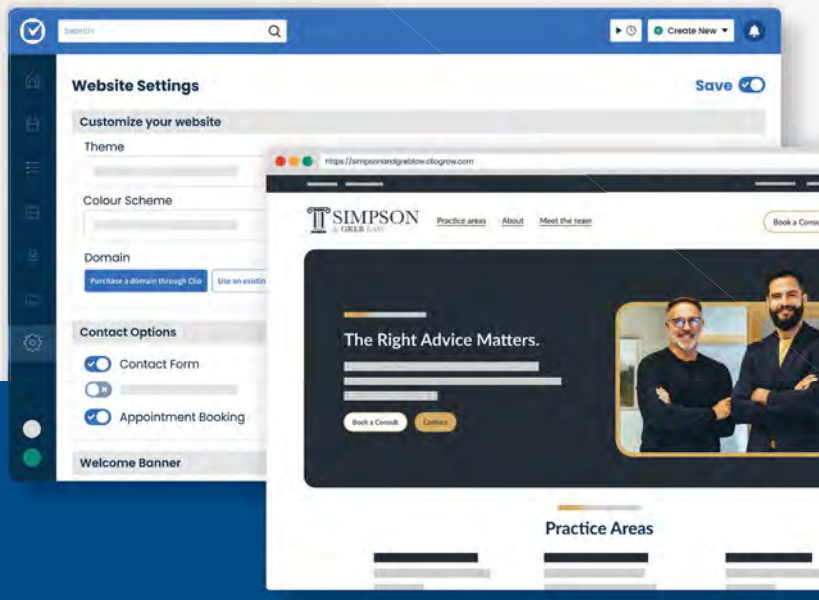

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New York State Bar Association Upcoming Destination Meetings

Family Law Section Meeting
July 12-15, 2023 | High Peaks, Lake Placid

Tax Section Meeting
July 13-15, 2023 | Ritz Carlton, Philadelphia

Elder Law and Special Needs Section Meeting
July 19-22, 2023 | The Logan, Philadelphia

Environmental & Energy Law Section Meeting
September 26-27, 2023 | Sagamore, Bolton Landing

Trusts & Estates Law Section Meeting
September 28-30, 2023 | High Peaks, Lake Placid