NEW YORK STATE BAR ASSOCIATION

JOURNAL

6 to 3: The Impact of the Supreme Court's Conservative Super-Majority

NYSBA

NOVEMBER/DECEMBER 2023
VOL. 95 | NO. 6

LawPay®

AN AFFINIPAY SOLUTION

+

NYSBA®

Member Benefit Provider

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

Trusted by 50,000 law fims, LawPay is a simple, secure solution that allows you to easily accept credit and eCheck payments online, in person, or through your favorite practice management tools.

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

YOUR FIRM LOGO HERE

Trust Payment
IOLTA Deposit

New Case Reference

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

TOTAL: $1,500.00

VISA AMEX POWERED BY LawPay

eCheck DISCOVER PAY ATTORNEY

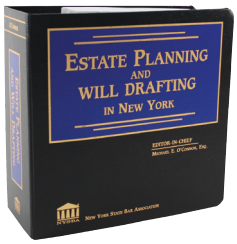
Get started at
lawpay.com/nysba
866-730-4140

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

LawPay is a registered agent of Synovus Bank, Columbus, GA., and Fifth Third Bank, N.A., Cincinnati, OH.

PUBLICATIONS

Featured titles available

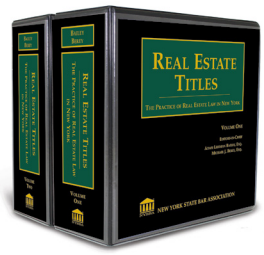


Estate Planning and Will Drafting in New York (2023)

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

Book (409523)
eBook (409523E)

NYSBA Members $185
Non-Members $220

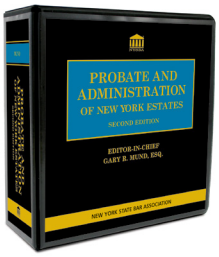


Real Estate Titles, 4th ed.

Written and edited by many of the leading real estate practitioners, this book covers the nature of title and estates in New York, deeds, contracts of sale and real estate financing. This is an invaluable resource for all real estate professionals

Book (421020)
eBook (421020E)

NYSBA Members $185
Non-Members $235



Probate and Administration of New York Estates, 2d ed. (2022)

This comprehensive, single-volume reference covers all aspects of probate and administration, from securing the will through the final accounting, and provides quick answers for both the novice and seasoned practitioner on straightforward and perplexing estate administration issues.

Book (4005422)
eBook (4005422E)

NYSBA Members $185
Non-Members $220

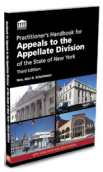
Other titles also available

The Legal Writer: The Last Word

Hon. Gerald Lebovits' most recent work is a collection of in-depth columns which include practical legal writing advice, writing and punctuation exercises, lessons on citation, and a 17-part series dissecting the very best legal writers of our time.

Book: 407123 | eBook 407123E | 470 pages
NYSBA Members $95 | List $129

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



Written by Hon. Alan D. Scheinkman, this invaluable guide covers all aspects of taking a civil or criminal appeal to the NYS Appellate Division, including panel assignments and calendaring, correcting defects, cross appeals and joint appeals, and more.

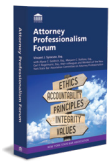
Book: 401421 | eBook: 401421E | 186 pages
Member $65 | List $88

NYSBA New York Rules of Professional Conduct

Protect your practice with your copy of the Rules of Professional Conduct. A much-needed resource for every New York attorney's library, this handbook also includes a Preamble, Scope and Comments (not adopted by the Appellate Division). This version of the Rules is published solely by NYSBA. The additional resources are included as guidance for attorneys in complying with the Rules.

Book: 403022 | eBook: 403022E | 283 pages | Member $18 | List $28

Attorney Professionalism Forum



The *Forum* identifies the ethical issues faced by members of the legal profession as they interact with judges, lawyers, clients and the public. It answers thought-provoking questions by blending analysis of applicable law and the Rules of Professional Conduct with practical guidance.

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

Practitioner's Handbook for Appeals to the Court of Appeals, 4th ed.

This handbook covers taking and perfecting civil and criminal appeals, the procedure used for expedited disposition, rules covering the briefs and arguments, publication of the decision and remittitur, and motion practice in the Court of Appeals.

Book: 401721 | eBook: 401721E | 262 pages
Member $65 | List $88

The Courts of New York: A Guide to Court Procedures, 2d ed.

This handbook offers a concise description of the New York state and federal court structures. This edition includes updated charts and an expanded chapter on news coverage of the courts that reflects increased reliance on digital technology in reporting and gathering the news.

Book: 425521 | eBook: 425521E | 104 pages | Member $15
List $25

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

CONTENTS

CONNECT WITH NYSBA | VISIT NYSBA.ORG

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

NEW YORK STATE BAR ASSOCIATION
JOURNAL

NOVEMBER/DECEMBER 2023
VOL. 95 | NO. 6

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

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

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

GROW YOUR PRACTICE *your way.*

Are you looking for new ways to bring efficiency and revenue to your practice? WealthCounsel's robust, cloud-based solutions for estate planning, elder law, business law, and special needs planning can help you serve more clients in new ways. Instead of referring your clients to other attorneys for wills, trusts, or business planning, expand your services and strengthen your relationships. Developed and maintained by attorneys, for attorneys—our intelligent solutions are designed to support your success.

SOFTWARE

Draft with confidence, and access your files wherever and whenever you need them with secure, cloud-based drafting solutions.

COMMUNITY

Connect and collaborate with a nationwide attorney community—a truly invaluable resource for sharing knowledge and referring business.

EDUCATION

Benefit from live and on-demand training to help you utilize WealthCounsel software and learn how to practice confidently and competently.

SUPPORT

Dedicated member support and software support teams are here to help you so you can help your clients.

WealthCounsel®

wealthcounsel.com/nysba

INTERESTED? Scan the QR code below to learn how WealthCounsel solutions can help you grow your practice.

RICHARD LEWIS

What Matters Most to Lawyers: Takeaways From My Statewide Listening Tour

By Richard Lewis

During the first 150 days of my presidency, I have crisscrossed the state, meeting with as many leaders of affinity, local, county, national and international bar associations as possible. Our listening tour has given President-elect Domenick Napoletano and me the opportunity to engage with more than 50 bar association leaders from Buffalo to Rochester to Binghamton to New York City.

I discovered that while we have our differences, we have so much more in common, especially when it comes to the fundamental matter of helping lawyers better represent their clients. When an issue arises that impacts our profession, we always study all sides despite our own personal beliefs. Once the association's governing body adopts a position, we lobby for it vigorously with the state Legislature, governor's office and court officials.

We had tremendous success addressing the practical concerns of lawyers in the last legislative session. We successfully lobbied legislators and the governor to raise the pay of court-appointed 18-B attorneys for the first time in nearly two decades – an especially urgent issue in rural areas where the lack of legal representation has become critical.

We also urged the Legislature to repeal Judiciary Law Section 470, which requires New York practicing attorneys who live out of state to have an office in the state – an unnecessary expense in today's world. That bill passed and we are continuing to lobby the governor to sign it. We also pushed for passage of the Clean Slate Act and the state Equal Rights Amendment, both of which were approved by the Legislature.

More recently, I have had discussions with Chief Administrative Judge Joseph Zayas regarding conflicts within the Uniform Court Rules. Judge Zayas has expressed his willingness to work with our association and perhaps make further changes to the rules. At our urging, Judge Zayas' predecessor, Chief Administrative Judge Lawrence Marks, and the state's chief judge and presiding justices have already made some revisions to the rules.

Naturally, judges and attorneys want the courts to operate in the most effective way possible. Relying more on virtual appearances, staggering the starting time of cases so lawyers are not waiting all day in court and limiting travel time would help lawyers to be more efficient. This would also lessen the reliance on per-diem attorneys and other lawyers who are not as familiar with our cases, which also leads to unnecessary delays.

But every issue doesn't have to be that complicated. Solving minor issues would still make a major difference. We continue to fight for better broadband service for upstate New York because lawyers and their clients can't take advantage of virtual technology if they can't access it. We are also working downstate to give clients more options for virtual court appearances. It's inefficient for lawyers downstate to drive 90 minutes in terrible traffic for a five-minute court appearance. We are also working to encourage universal e-filing.

In the rural parts of the state, there are too many clients who can't find representation and lawyers who want to retire and can't find another lawyer willing to take on their cases. We are working with the American Bar Association and the California Lawyers Association to urge local, state and the federal government to help attract more attorneys to rural areas with incentives such as student loan forgiveness.

I have also connected with leaders from The Bar Council of England and Wales, a former president of the Rosario Bar Association in Argentina and the president of The Law Society of Hong Kong. At the Hong Kong meeting, I registered our concern about the Hong Kong government issuing an arrest warrant for a pro-democracy barrister who now lives in the United States and raised other concerns relating to a free press.

As some of you already know, the members of the five task forces I established in June are working to propose association policy on critical 21st century matters. Their discussions range from antisemitism and anti-Asian hate to artificial intelligence, homelessness and end-of-life issues for the terminally ill.

Our Task Force on Advancing Diversity publicly issued its report last month, garnering national attention at a press conference in New York City. It is an inspiring study that was turned out in a little more than a month. It provides a blueprint for colleges, law schools, corporations and the judiciary to achieve diversity in the wake of the U.S. Supreme Court decision on affirmative action.

The Task Force on Combating Antisemitism and Anti-Asian Hate is focusing on a crime that has dangerously escalated in the past few years, in part because the burden of proof to charge a perpetrator with a hate crime is too high.

Delving into a cutting-edge issue that is disrupting many industries, the Task Force on Artificial Intelligence is planning to deliver a preliminary report at our Annual Meeting before completing its final report in the spring.

The Task Force on Medical Aid in Dying is meeting with members of the state Legislature and other experts as it reviews the legal, ethical, health and broader policy considerations.

Finally, the Task Force on Homelessness and the Law is addressing an issue that pervades our everyday lives, often involves victims of domestic violence and has a negative impact on property owners and our educational and health systems, as well as the homeless.

We undoubtedly are facing difficult issues, some of which I have touched upon here. While we still live in the world's strongest democracy, we need to commit to educating our children on how our government functions if we are to remain so. That's why in May we will host a civics convocation that will include judges, attorneys, teachers and students for a robust discussion on how to save our democracy.

In closing, I want to say that President-elect Domenick Napoletano has agreed to continue to meet with bar leaders during his presidential term so that everyone has a chance to be heard. I also want to express my gratitude to all our members who are helping to develop a society that embraces equal opportunity, ever-changing technology, safe shelter and grace in the final stages of life.

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

New York's Unregulated Litigation Lending Industry

By Heather R. Abraham and Maura Graham

Third-party litigation lending is booming, but at whose expense? Litigation loans are advance payments to individuals or companies to finance lawsuits in exchange for a portion of the potential legal recovery. Demand for this lending has substantially increased "with no signs of slowing down," according to Westfleet Advisors, which tracks the industry.[1] Moreover, the industry operates under minimal state or federal regulation.[2]

While the industry primarily finances large-scale commercial litigation, it also targets individual consumers. Would-be plaintiffs are turning to third-party loans to finance everything from personal injury to police misconduct to wrongful conviction lawsuits.[3] As the industry gains traction, so are its most vocal critics, including the U.S. Chamber of Commerce and a miscellany of lawmakers.[4]

This article is a primer on the common concerns raised by litigation lending, the history of litigation lending in New York, how it may affect your practice, how some states regulate it and options for New York.

What Are Litigation Loans?

Litigation loans – also called third-party litigation financing or consumer litigation lending – offer claimants financial support while they await a settlement or other payout. The typical funder is a third party who lends for the potential return on investment. While there is no universal definition, third-party funding agreements typically share five common traits: (1) a cash advance (2) made by a non-party (3) in exchange for a share of the litigation or arbitration proceeds (4) from settlement, judgment or other recovery (5) payable at the time of recovery – if and only if – such recovery occurs.[5] Defendants may also seek litigation loans.

There are two broad categories of litigation lending: consumer and commercial. Each category raises its own ethical concerns. This article highlights some concerns raised by all litigation loans but primarily focuses on the unique hazards of consumer loans.

'Legal Loan-Sharking'

The primary justification for consumer lending is expanding access to justice. Lending increases the chances that would-be plaintiffs initiate and sustain litigation, especially against well-resourced defendants, and helps them secure legal counsel. Even so, litigation loans raise a host of ethical concerns.

Critics voice three central concerns: unconscionable interest rates, interference with attorney-client privilege and the influence of third-party funders over litigation decision-making.

Unconscionable Interest Rates

Consumer litigation loans are commonly criticized for violating usury laws. Usury is "charging financial interest in excess of the principal amount of a loan" or, more broadly, "interest above the legal or socially acceptable rate."[6] Usurious transactions are characterized by three common elements: a loan or forbearance, an absolute obligation to repay the principal (not contingent on any event) and greater compensation for the loan.[7] Some sources cite interest rates ranging from 36%[8] to 124%,[9] whereas the going rates for unsecured personal loans are 6 to 35.99% and credit cards are 28%.

Interference With Attorney-Client Privilege

Litigation lenders may request confidential and privileged information to determine whether to grant a cash advance.[10] In New York City, for example, an attorney can represent a client who has obtained a lawsuit loan, but the attorney must inform the client of the potential ethical complications, including potential waiver of attorney-client privilege and the potential impact on the exercise of independent judgment.[11] Lenders generally do not fall within the scope of attorney-client privilege, meaning the privilege does not protect litigation loan companies' communications with clients and attorneys.[12] Legal scholars have considered how to extend privilege to lenders, but the differences in interests between them and plaintiffs makes this a difficult needle to thread.[13]

Influence of Third-Party Funders

Litigation lenders are not bound to the same ethical rules as attorneys, so there is little stopping funders from interfering like pressuring clients to settle – or not.[14] As such, lenders may impinge on a client's agency in litigation. To illustrate the point, Burford Capital Limited, the "biggest litigation funder in the world," recently made headlines after a commercial litigation loan recipient – Sysco Corp – decried Burford's interference when Burford brought an arbitration proceeding to enjoin Sysco from finalizing settlement in antitrust litigation.[15] As summarized by one news outlet, Sysco argued that "it is a litigation hostage, forced by a greedy funder to keep litigating cases that it wants to resolve."[16] It remains to be seen how courts will resolve such disputes.

Litigation Lending in New York

In 1994, the New York State Bar Association's Committee on Professional Ethics issued an early opinion on litigation lending. While it did not prohibit lawyers from accepting litigation loans, it strongly cautioned attorneys on the potential risks to confidentiality and warned attorneys that clients must provide informed consent for any loan-related disclosure of confidential information.[17] Since then, the bar association has gone on to provide opinions surrounding conflicts of interest and a lawyer's personal interest in a litigation funding agency.[18]

The New York City Bar Association (NYCBA) has also opined on litigation financing. In 2011, it flagged concerns about the potential interference with confidentiality, attorney-client privilege and client independent judgment.[19] In 2018, it addressed the issue of fee-sharing as it relates to litigation funding.[20] That opinion generated substantial interest, which led to the creation of the NYCBA Working Group on Litigation Funding. The working group created four subcommittees: (1) ethical rules, (2) best practices, (3) disclosure and (4) consumer litigation.[21] The working group issued a detailed report with recommendations, including amendments to the New York Rules of Professional Conduct, proposed guidelines and best practices for attorneys, and suggestions to improve the Consumer Litigation Funding Bill.[22] It also advised against mandatory disclosure of a client's use of litigation loans.[23]

Regulatory Approaches

Usury Laws

Jurisdictions vary in how they regulate litigation loans. In most states, usury laws and regulations only apply to traditional loans, not nonrecourse debts[24] – i.e., loans in which the lender can only pursue the collateral. Since litigation loans are typically treated as nonrecourse debt, usury laws are unlikely to limit interest rates. However, a few jurisdictions do have usury laws that regulate nonrecourse loans.[25] Additionally, some jurisdictions treat litigation loans as traditional loans. For instance, the Colorado Supreme Court has held that litigation financing is a "loan" subject to the Colorado Uniform Consumer Credit Code because "the transactions create debt, or an obligation to repay, that grows with the passage of time."[26]

Champerty and Maintenance Laws

Some jurisdictions use champerty and maintenance laws to regulate these loans. Historically, these common law doctrines prohibited the involvement of third parties in lawsuits.[27] Specifically, maintenance prevented a third party from financing another person's litigation, and champerty prevented financing it in exchange for a portion of the damages recovered.[28]

Champerty's ability to regulate litigation loans depends on the state's adherence to the doctrine.[29] Even if these doctrines are invoked, litigation lenders may avoid champerty-enforcing jurisdictions through arbitration clauses that remove the case to a jurisdiction that does not enforce maintenance and champerty.[30] Empirically, some courts have voided litigation lending agreements for violating champerty doctrine,[31] but other courts have rejected these claims.[32]

Currently in New York, champerty is interpreted to regulate third-party involvement when the purpose of taking the claim is "with the intent to sue."[33] Thus, "as long as the primary purpose and intent of the assignment [is] for some other reason than bringing suit," financial investment in litigation is permissible in New York.[34]

Disclosure Requirements

In California, the Predatory Lawsuit Lending Prevention Act, SB 581, as originally introduced, would have required all parties in state court lawsuits to disclose whether outsider investors were funding the case.[35] After substantial opposition, the proposal was amended to require disclosure only when ordered by a judge.[36] The Legislature has not adopted the resolution. In some instances, courts require third-party financing disclosures, such the U.S. District Court for the District of New Jersey, and one federal judge in Delaware requires disclosures in patent cases.[37]

Other jurisdictions have adopted lesser protections, like requirements that the lending agreements be written in clear language.[38] Vermont requires lenders to disclose alternative options to litigation funding, such as personal loans and life insurance policies.[39]

The New York Attorney General's Office has also attempted to regulate the industry. In 2005, it authorized an "Assurance of Discontinuance Pursuant to Executive Law Section 63(15)" agreement with litigation funders, which addresses a variety of concerns raised by the AG's office. While only binding on nine signatories, it nonetheless offers guidelines for the industry as a whole.[40] For instance, the assurance requires litigation funding contracts to comply with the Plain Language Law, and contain certain financial disclosures on the front page.[41] Additionally, consumers must be advised to consult with their lawyer before signing the funding agreement, they must be given five business days to cancel the agreement and the attorney's fees must be reasonable.[42]

Proposed Reforms in New York

Nationwide, a hodgepodge of critics is calling for reform.[43] Some state legislatures have passed consumer-focused statutes[44] but not without significant pushback.[45]

In New York, the Legislature has considered, but not passed, the Consumer Litigation Funding Act, which was first introduced in the 2017–2018 session and has been reintroduced each subsequent session.[46] If passed, it would limit interest rates, restrict fee-sharing, require disclosures, set penalties, define how litigation loans would impact attorney-client privilege and require registration and reporting.

Among its key provisions, the bill would allow consumers to rescind a litigation loan contract within 10 days of signing and would require that the contract be written in clear and coherent language.[47] It would also require that all fees be stated clearly on the disclosure form, that a contract disclose the maximum amount the plaintiff may be required to pay the funding company and a clear payment sched-

ule, and would prohibit companies from charging fees outside the disclosure form. This differs from some states that address the issue of compounding interest and provide a time limit on when the interest may be compounded.[48]

In terms of attorney-client privilege, the bill would expand the privilege to include communication between the lending company and the consumer's attorney. An alternative approach used by some jurisdictions is simply to clarify by statute that communication between attorneys and funding companies does not limit, waive or abrogate the scope of the privilege.[49]

Regarding registration and licensing, most states that have adopted legislation require litigation lenders to register or obtain a license.[50] Some states require lending companies to prove they operate fairly and honestly[51] and may be subject to background checks.[52] The New York bill would require lenders to register with the New York secretary of state and submit to an evaluation of character and fitness that warrants the belief that the business will be operated honestly and fairly.[53] Like other states, it would also require annual reports or data submission regarding the administration of legal funding.[54] It would not, however, require licensing for lending companies.

Finally, for enforcement, some states include a fine or penalty for operating a consumer litigation financing company without a license.[55] If a funder is found to be in willful violation of the statute, many states consider the contract void,[56] and some states reserve the right to revoke the funder's license.[57] Similarly, the New York bill provides that a willful violation could revoke the company's ability to recover from the contract and could result in additional fines.

In its 2018 report, the NYCBA Working Group on Litigation Funding recommended amending the bill to (1) insert a definition of "consumer," (2) include reporting requirements, (3) remove fee caps, (4) revise the penalty provision to include only forfeiture of fees and charges, and (5) restrict the ownership of litigation financing companies by attorneys and judges.[58]

Conclusion

To date, third-party litigation lenders have operated in relative obscurity. As the litigation loan industry grows, New York attorneys should be well aware of the potential ethical concerns for attorneys and their clients and take steps to inform their clients of these risks or avoid them altogether.

Endnotes

1. Westfleet Advisors, 2022 Litigation Finance Market Report 2, www.westfleetadvisors.com/wp-content/uploads/2023/02/WestfleetInsider-2022-Litigation-Finance-Market-Report.pdf.

2. U.S. Gov't Accountability Off., Gao-23-105210, *Third-Party Litigation Financing: Market Characteristics, Data, And Trends 23-26* (2022); New York City Bar Assoc. Comm. on Prof'l Ethics, Formal Op. 2011-2: Third Party Litigation Financing, www.nycbar. org/index.php/ethics/ethics-opinions-local/2011-opinions/1159-formal-opinion2011-02 (litigation loans have garnered "increased attention, both within and outside the legal profession, in part because the arrangements are largely unregulated").

3. *See, e.g.*, Corey Kilgannon, *They Were Unjustly Imprisoned. Now They're Profit Centers*, N.Y. Times, Nov. 27, 2022.

4. *See, e.g.,* U.S. Chamber of Commerce, Statement for the Record for the House Oversight Hearing, *Unsuitable Litigation: Oversight of Third-Party Litigation Funding,* (Sept. 12, 2023).

5. Bernardo M. Cremades Jr., *Usury and Other Def. in U.S. Litig. Fin.*, 23 Kan. J. L. & Pub. Pol'y 151, 152 (2013).

6. *Id.* at 158.

7. *Id.* at 170.

8. Daniel Brook, *Litig. by Loan Shark*, Legal Affairs 42–43 (2004).

9. *See* Consumers for Fair Legal Funding, https://fairlegalfunding.org/ (Last Visited June 1, 2023).

10. *See, e.g.*, Steven Garber, *Alt. Litig. Fin. in the U.S.: Issues, Knowns, and Unknowns*, Rand Law, Finance, and Capital Market, 2010, at 19; Grace M. Giesel, *Alt. Litig. Fin. & the Att'y-Client Privilege*, 92 Denv. Univ. L. Rev. 95 (2014).

11. Thurbert Baker, *Paying to Play: Inside the Ethics and Implications of Third-Party Litig. Funding*, 23 Widener L. J. 229, 235–36 (2013) (discussing New York City Bar Association Formal Opinion 2011-2).

12. Giesel, *supra* note 9, at 105; *see generally In Re Outlaw Lab'y, Lp Litig.*, 2021 WL 5768123 (S.D. Cal. 2021); *Finjan, Inc. v. Sonicwall Inc.*, 2020 WL 4192285 (N.D. Cal. 2020).

13. Giesel, *supra* note 9, at 140; Nevada has expanded the scope of attorney-client privilege to encompass lenders. *See* Nev. Rev. Stat. Ann. § 604c.240 (West 2023) (communication between the funding company and consumer's attorney is "subject to the attorney-client privilege, including . . . the work product doctrine").

14. Lesley Stahl, *Litig. Funding: A Multibillion-Dollar Industry for Inv. in Law With Little Oversight*, CBS News, Dec. 18, 2022, www.Cbsnews.Com/News/Litigation-Funding-60-Minutes-2022-12-18; *see* Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litig. Funding,* 95 Minn. L. Rev. 1269, 1272 (2011).

15. Alison Frankel, *Sysco Sues Litigation Funder Burford, Blasts Boies Schiller Over $140 Million Soured Deal*, Reuters, Mar. 9, 2023, www.Reuters.Com/Legal/Legalindustry/Sysco-Sues-Litigation-Funder-Burford-Blasts-Boies-Schiller-Over-140-Million-2023-03-09.

16. *Id.*

17. N.Y. Bar Ass'n Comm. on Prof'l Ethics, Op. 666 (1994).

18. N.Y. Bar Ass'n Comm. on Prof'l Ethics, Op. 1145 (2018) (neither the lawyer nor their firm may represent a client in a litigation funded by a company in which the lawyer is an investor); N.Y. Bar Ass'n Comm. on Prof'l Ethics, Op. 1206 (2020) (Firm May Not Refer Its Clients To A Litigation Funder Where The Sole Owner Of The Financing Company Is Married To A Firm Attorney); N.Y. Bar Ass'n Comm. On Prof'l Ethics, Op. 1196 (2020) (lawyer is permitted to refer to a litigation financing agency owned by the attorney's sibling when the parent or legal guardian consents); N.Y. Bar Ass'n Comm. on Prof'l Ethics, Op. 1108 (2016) (lawyers in criminal matters may refer potential clients to litigation financers for the lawyer's legal fees even when the lawyer pays certain fees to the lender in connection with a financing program so long as the lawyer obtains informed consent and the lawyer's payment to lender does not constitute as financial assistance to the client).

19. N.Y. City Bar Assoc. Comm. on Prof'l Ethics, *supra* note 2.

20. N.Y. City Bar Assoc. Comm. on Prof'l Ethics, Formal Op. 2018-5, *Litigation Funders' Contingent Interest In Legal Fees*, https://S3.amazonaws.com/documents.nycbar.

Professor Heather R. Abraham directs the Civil Rights & Transparency Clinic at the State University of New York at Buffalo School of Law, a litigation clinic that offers pro bono client representation in the areas of civil rights and government accountability. Her academic research examines enforcement of federal, state, and local fair housing laws, and explores how fair housing laws can be used to reduce residential segregation.

Maura Graham is a third-year law student and pro bono scholar at the State University of New York at Buffalo School of Law and recently graduated with her Master of Social Work from UB's School of Social Work. Throughout her law school career, she has served as a research assistant and adviser in Title IX proceedings. She has interned at the Center for Elder Law and Justice, and competed internationally in mediation competitions.

org/files/2018416-litigation_funding.pdf (lawyer-lender agreement violates rule 5.4 prohibition on fee sharing when lawyer's payments are contingent on the lawyer's receipt of legal fees).

21. N.Y. City Bar Assoc. Working Group on Litigation Financing, Report to the President (2020), http://documents.nycbar.org/files/report_to_the_president_by_litiga-tion_funding_working_group.pdf.

22. *Id.*

23. *Id.*

24. Cremades, *supra* note 4, at 162.

25. *Id.* at 187; *see also Odell v. Legal Bucks, Llc*, 192 N.C. App. 298, 313–16 (N.C. Ct. App. 2008).

26. *Oasis Legal Fin. Group, LLC v. Coffman*, 361 P.3d 400, 410 (Colo. 2015).

27. Baker, *supra* note 10, at 231.

28. *Id.*

29. Cremades, *supra* note 4, at 189, 190–92 (Georgia, Minnesota, Mississippi, and Maryland are among the states that enforce the doctrines of champerty and maintenance, whereas Oregon and Texas apply the doctrine on a case-by-case basis, and New Jersey and Massachusetts do not enforce the doctrine).

30. *Id.* at 190.

31. *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217 (Ohio 2003) (violated champerty and maintenance); *Johnson v. Wright*, 682 N.W.2d 671 (Minn. Ct. App. 2004) (violated champerty and public policy because "respondents effectively intermeddled and speculated in appellant's litigation and its outcome"). *But see Maslowksi v. Prospect Funding Partners LLC*, 944 N.W. 2d 235, 238-41 (Minn. 2020) (abolishing the common-law prohibition against champerty but observing that courts "may still scrutinize litigation finance agreements to determine whether equity allows their enforcement," referencing the common-law defense of unconscionability).

32. *See Odell,* 192 N.C. App. at 309 (not champerty and maintenance because the inter-ference was not clearly officious); *see also Fast Trak Inv. Co., Llc v. Sax*, 2018 WL 2183237 (N.D. Cal. 2018) (not champerty because plaintiff did not exert control over the under-lying case).

33. *Echeverria v. Estate of Lindner*, 7 Misc. 3d 1019 (Sup. Ct., Nassau Co. 2005).

34. *Id.* at 4.

35. Emily R. Siegel, *Cal. Law Funding Bill Slashed After Industry Pushback*, Bloomberg Law, Apr. 27, 2022, https://news.bloomberglaw.com/business-and-practice/california-law-suit-funding-bill-slashed-after-industry-pushback.

36. *Id.*; Press Release, *Senator Anna M. Caballero Proposes Stronger Consumer Protections Against Predatory Lawsuit Lending*, Mar. 1, 2023. *Compare* S.B. 581, California State Senate, Reg. Session 2023-2024 (version dated Feb. 15, 2023) with S.B. 581, California State Senate, Reg. Session 2023-2024 (version dated April 17, 2023).

37. Siegel, *supra* note 34; *see* D.N.J L.Civ.R. 7.1.1 (New Jersey Rule requiring disclosure of third-party litigation funding); Kelcee Griffis, *Fed. Cir. Permits Funding Probes in Delaware Patent Cases*, Bloomberg Law, Dec. 8, 2022, https://news.bloomberglaw.com/ip-law/appeals-court-wont-block-financial-disclosures-in-patent-cases.

38. *See* Okla. St. Ann. Tit. 14a, § 3-806 (West 2013); Ohio Rev. Code Ann. § 1349.55 (West 2008); Neb. Rev. Stat. § 25-3303 (West 2010).

39. *See* Vt. Stat. Ann., Tit. 8, § 2253 (West 2023).

40. N.Y. City Bar Assoc. Working Group on Litigation Financing, *supra* note 20; Julia H. Mclaughlin, *Litig. Funding: Charting a Legal & Ethical Course*, 31 Vermont L. Rev. 615, 654 (2007).

41. N.Y. City Bar Assoc. Working Group on Litigation Financing, *supra* note 20.

42. *Id.*

43. *See, e.g., Fausone v. U.S. Claims, Inc.*, 915 So. 2d 626 (Fla. Dist. Ct. App. 2005) (noting that the Legislature "might examine this industry to determine whether Florida's citizens are in need of any statutory protection"); Michael A. Wittman, *Finding Transparency & Equity in Consumer Litig. Funding*, Prize Winning Papers 21 (2022), https://scholarship.law.upenn.edu/prize_papers/21 (calling for statutory reform).

44. *See* Me. Rev. Stat. Ann. Tit. 9-A § 12-101 (West 2023); Neb. Rev. Stat. § 25-3302 (West 2022); Vt. Stat. Ann, Tit. 8, § 2251 (West 2023); Nev. Rev. Stat. Ann. § 604c.010 (West 2023); W. Va. Code Ann. § 46a-6n-1 (West 2023); Tenn. Code Ann. § 47-16-101 (West 2023); Okla. St. Ann. Tit. 14a, § 3-801 (West 2023).

45. Siegel, *supra* note 34.

46. S9105, 2017-2018 Leg. Sess. (NY 2018); S4555, 2019-2020 Leg. Sess. (NY 2020); S705, 2021-2022 Leg. Sess. (NY 2022); S4146, 2023-2024 Leg. Sess. (NY 2023).

47. *See, e.g.*, S4146, 2023-2024 Leg. Sess. (NY 2023).

48. *See* Me. Rev. Stat. Ann. Tit. 9-A § 12-105 (West 2023); Neb. Rev. Stat. § 25-3305 (West 2022).

49. *See, e.g.*, Vt. Stat. Ann, Tit. 8, § 2255 (West 2023); Neb. Rev. Stat. § 25-3306 (West 2022).

50. *See* Me. Rev. Stat. Ann. Tit. 9-A § 12-107 (West 2023); Neb. Rev. Stat. § 25-3307 (West 2022); Nev. Rev. Stat. Ann. § 604c.500 (West 2023); W. Va. Code Ann. § 46a-6n-2 (West 2023); Tenn. Code Ann. § 47-16-103 (West 2023); Vt. Stat. Ann., Tit. 8, § 2252 (West 2023).

51. *See, e.g.*, Neb. Rev. Stat. § 25-3309 (West 2022).

52. *See, e.g.*, Me. Rev. Stat. Ann. Tit. 9-A § 12-106 (West 2023).

53. S4146, 2023-2024 Leg. Sess. (NY 2023).

54. *Id. See, e.g.*, Me. Rev. Stat. Ann. Tit. 9-A § 12-107 (West 2023); Nev. Rev. Stat. Ann. § 604c.640 (West 2023).

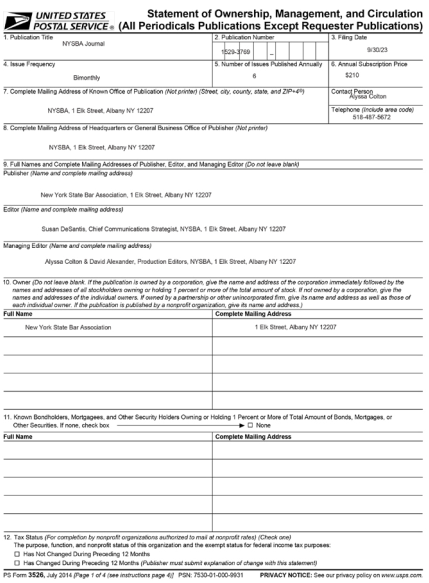
55. *See* Nev. Rev. Stat. Ann. § 604c.840 (West 2023); Okla. St. Ann. Tit. 14a, § 3-815 (West 2023).

56. *See* Nev. Rev. Stat. Ann. § 604c.800 (West 2023); W. Va. Code Ann. § 46a-6n-7 (West 2023); Tenn. Code Ann. § 47-16-107 (West 2023).

57. *See* Nev. Rev. Stat. Ann. § 604c.810 (West 2023); Neb. Rev. Stat. § 25-3309 (West 2022) (Reserving The Right To Revoke, Suspend, Or Refuse To Renew A License After Proper Notice And An Opportunity For A Hearing).

58. N.Y. City Bar Assoc. Working Group on Litigation Financing, *supra* note 20.

Official U.S. Postal Service Annual Filing Statement



UNITED STATES POSTAL SERVICE® **Statement of Ownership, Management, and Circulation (All Periodicals Publications Except Requester Publications)**

1. Publication Title	2. Publication Number	3. Filing Date
NYSBA Journal	1529-3769	9/30/23
4. Issue Frequency	5. Number of Issues Published Annually	6. Annual Subscription Price
Bimonthly	6	$210

7. Complete Mailing Address of Known Office of Publication *(Not printer) (Street, city, county, state, and ZIP+4®)*: NYSBA, 1 Elk Street, Albany NY 12207 — Contact Person: Alyssa Colton; Telephone *(Include area code)*: 518-487-5672

8. Complete Mailing Address of Headquarters or General Business Office of Publisher *(Not printer)*: NYSBA, 1 Elk Street, Albany NY 12207

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor *(Do not leave blank)*

Publisher *(Name and complete mailing address)*: New York State Bar Association, 1 Elk Street, Albany NY 12207

Editor *(Name and complete mailing address)*: Susan DeSantis, Chief Communications Strategist, NYSBA, 1 Elk Street, Albany NY 12207

Managing Editor *(Name and complete mailing address)*: Alyssa Colton & David Alexander, Production Editors, NYSBA, 1 Elk Street, Albany NY 12207

10. Owner *(Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.)*

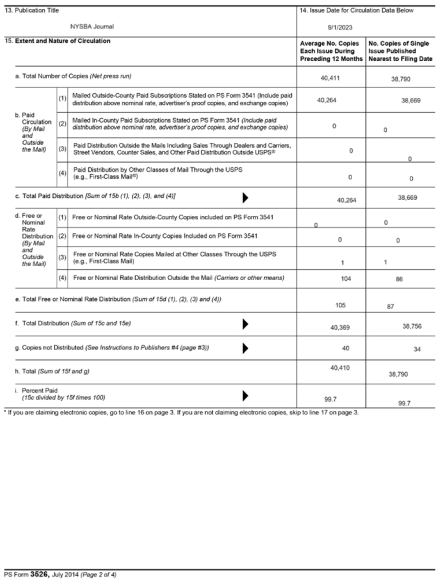
Full Name	Complete Mailing Address
New York State Bar Association	1 Elk Street, Albany NY 12207

11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box → ☐ None

Full Name	Complete Mailing Address

12. Tax Status *(For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one)*
The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes:
☐ Has Not Changed During Preceding 12 Months
☐ Has Changed During Preceding 12 Months *(Publisher must submit explanation of change with this statement)*

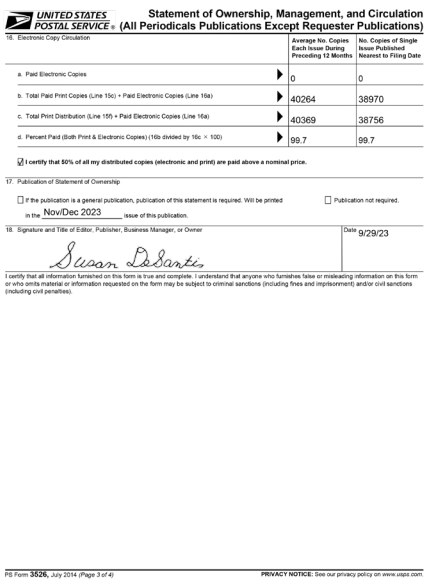
PS Form **3526**, July 2014 *(Page 1 of 4 (see instructions page 4))* PSN: 7530-01-000-9931 **PRIVACY NOTICE:** See our privacy policy on www.usps.com.



13. Publication Title: NYSBA Journal	14. Issue Date for Circulation Data Below: 9/1/2023	
15. Extent and Nature of Circulation	**Average No. Copies Each Issue During Preceding 12 Months**	**No. Copies of Single Issue Published Nearest to Filing Date**
a. Total Number of Copies *(Net press run)*	40,411	38,790
b. Paid Circulation *(By Mail and Outside the Mail)* (1) Mailed Outside-County Paid Subscriptions Stated on PS Form 3541 (Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	40,264	38,669
(2) Mailed In-County Paid Subscriptions Stated on PS Form 3541 *(Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)*	0	0
(3) Paid Distribution Outside the Mails Including Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Paid Distribution Outside USPS®	0	0
(4) Paid Distribution by Other Classes of Mail Through the USPS (e.g., First-Class Mail®)	0	0
c. Total Paid Distribution *(Sum of 15b (1), (2), (3), and (4))*	40,264	38,669
d. Free or Nominal Rate Distribution *(By Mail and Outside the Mail)* (1) Free or Nominal Rate Outside-County Copies included on PS Form 3541	0	0
(2) Free or Nominal Rate In-County Copies Included on PS Form 3541	0	0
(3) Free or Nominal Rate Copies Mailed at Other Classes Through the USPS (e.g., First-Class Mail)	1	1
(4) Free or Nominal Rate Distribution Outside the Mail *(Carriers or other means)*	104	86
e. Total Free or Nominal Rate Distribution *(Sum of 15d (1), (2), (3) and (4))*	105	87
f. Total Distribution *(Sum of 15c and 15e)*	40,369	38,756
g. Copies not Distributed *(See Instructions to Publishers #4 (page #3))*	40	34
h. Total *(Sum of 15f and g)*	40,410	38,790
i. Percent Paid *(15c divided by 15f times 100)*	99.7	99.7

* If you are claiming electronic copies, go to line 16 on page 3. If you are not claiming electronic copies, skip to line 17 on page 3.

PS Form **3526**, July 2014 *(Page 2 of 4)*



UNITED STATES POSTAL SERVICE® **Statement of Ownership, Management, and Circulation (All Periodicals Publications Except Requester Publications)**

16. Electronic Copy Circulation	Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Paid Electronic Copies	0	0
b. Total Paid Print Copies (Line 15c) + Paid Electronic Copies (Line 16a)	40264	38970
c. Total Print Distribution (Line 15f) + Paid Electronic Copies (Line 16a)	40369	38756
d. Percent Paid (Both Print & Electronic Copies) (16b divided by 16c × 100)	99.7	99.7

☑ **I certify that 50% of all my distributed copies (electronic and print) are paid above a nominal price.**

17. Publication of Statement of Ownership
☐ If the publication is a general publication, publication of this statement is required. Will be printed in the Nov/Dec 2023 issue of this publication. ☐ Publication not required.

18. Signature and Title of Editor, Publisher, Business Manager, or Owner: Susan DeSantis — Date: 9/29/23

I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).

PS Form **3526**, July 2014 *(Page 3 of 4)* **PRIVACY NOTICE:** See our privacy policy on www.usps.com.

Joseph Zayas, New York's First Latino Chief Administrative Judge: 'We Want To Be More Proactive'

By Liz Benjamin

The job of New York's chief administrative judge is equal parts problem-solver, relationship-builder and collaborative consensus-builder.

Responsibilities of the position include, but are not limited to, ensuring that things run smoothly at some 300 courthouses statewide, managing a $3.3 billion annual budget, boosting the morale of a 15,000-member non-judicial workforce still regrouping after the COVID-19 crisis and rebuilding the strained relationship between 3,600 judges and the state Legislature.

That to-do list would perhaps make even the most accomplished jurist think twice about accepting the job. It was certainly not high on the list of potential opportunities for the man who currently holds the title – the Honorable Joseph A. Zayas – at least not at first.

"I didn't want this job," Judge Zayas said bluntly in an Aug. 2, 2023 interview on Amici, a podcast hosted by John Caher, senior adviser for strategic communications at the New York State Unified Court System. "I had the best job in the world . . . in the Second Department. It was a peaceful existence. It was intellectually challenging, and I had no intention of leaving."

Judge Zayas said he had rebuffed suggestions that he throw his hat into the ring for the chief judge's job in the wake of the "unfair" treatment by state lawmakers of the governor's first nominee, the man who served as his presiding justice, Hector LaSalle. And the idea of returning to the stress and time-consuming strain of an administrative role did not appeal to him.

But something clearly changed his mind. Because this past May, Judge Zayas made history when he was appointed by Chief Judge Rowan D. Wilson to be New York's first-ever Latino chief administrative judge, the highest-ranking administrative judge in the court system.

So, what was the deciding factor? Judge Zayas says it was the combined efforts of three very important people: his wife, Catherine; his mentor, former Presiding Justice Rolando T. Acosta; and his new boss, the chief judge, who – in keeping with his reputation as an expert and persuasive litigator – successfully pleaded his case over a private dinner.

Chief Judge Rowan Wilson and Chief Administrative Judge Joseph Zayas. Photo credit: David Handschuh

"I've always been attracted to brilliant, smart people and great tacticians," Judge Zayas explained during a recent interview with the State Bar Association. "[Chief Judge Wilson] had all the right instincts about what direction the court should go in and how we should get there. I believed he was somebody I could work with, and we could get things done."

Judge Zayas was also mindful that the departure from the bench of Judge Acosta this past spring would leave a significant leadership void in the Latino legal community, which was still reeling from the "gut punch" of LaSalle's missed history-making opportunity to serve as New York's first Latino chief judge.

"[W]hat happened to him, plus Rolando's leaving, was leaving a real vacuum in leadership in [the Office of Court Administration]," Judge Zayas told Caher. "My wife as well was concerned that the Latino community, especially the judges, needed to be inspired in some way. This would make history. And somehow, before I knew it, we agreed that maybe this is something we need to do."

Expanding diversity on the bench is critical, Judge Zayas said, because it will lead to fairer results in both criminal and civil cases. But he also firmly believes that improving diversity across the board – diversity of thought, as well as ethnic representation – is the ultimate key to dispensing a higher quality of justice for all New Yorkers.

Though advocates of a judicial reform and simplification plan advanced by the previous chief judge argue the proposal would improve diversity by establishing a consolidated court structure, Judge Zayas maintained the improvement would be "negligible" at best. Instead, he said, his short-term priority is to "change the culture of delay" and provide additional resources for the beleaguered and backlogged family court system.

Another top priority, Judge Zayas said, is to create a task force that will examine how to expand mental health courts and address the mounting crisis of mental health challenges faced by defendants statewide. His passion for this effort is born in part of the many years he spent working for Legal Aid, his creation of the first Mental Health Court for misdemeanor defendants in Queens and his personal experience growing up as the son of a father who struggled with schizophrenia.

"I saw too many people getting rejected from drug treatment by the court because they had a dual diagnosis; they had mental health *and* addiction problems," Judge Zayas recalled. "I knew we couldn't send these people back

Judge Zayas and his wife Catherine. Photo credit: Jaclyn Zayas

to high-volume courts, so we created something new to solve that problem. . . . It's not as if I said to myself, 'What happened to my dad is going to motivate me to start a Mental Health Court in Queens,' but did it have an impact? I imagine that it did."

Five months after his swearing in, Judge Zayas has settled into the chief administrative judge's job and is focused on strengthening and rebuilding what he characterizes as "broken" relationships both inside and outside OCA.

The challenge of restoring relationships is something Judge Zayas has wholeheartedly embraced. He insists he is making progress with a particularly recalcitrant group – members of the state Senate Democratic majority, who clashed with the judiciary during the LaSalle nomination fight – as well as with the governor's office, the media and the public.

"It's pretty amazing how quickly that listening to people – talking to them, spending time with them – will mend relationships," Judge Zayas said. "All of this is part of the chief judge's plan to restore the integrity and reputation of the judiciary and OCA. This is someone who believes in a collaborative approach to making decisions and sees relationships as the primary way to get things done – even if it takes more time."

"There were so many things done that, quite frankly, alienated the legislators, and I've been telling [senators] to give us a chance because we want to be transparent," he continued. "We're aligned with them on a lot of things – we want more mental health courts; we want more treatment courts; we want more options for young people charged with crimes. So, they need to give us a chance to work with them, and my sense is that they're amenable to that."

Along with working to make OCA's legislative affairs approach more responsive in real time, Judge Zayas said, he and the chief judge are building a civic engagement plan to be "out in the community more." They also recently announced a restructuring of the Unified Court System's communications operations, which will be headed by Al Baker, a veteran former reporter and former executive director of media relations at the NYPD.

"There's a lot of good things the courts are doing – from treatment courts to adoptions and everything in between – but that's not getting out there," Judge Zayas said. "We've been so reactive; we want to be more proactive. We have a PR problem, and we have to deal with that."

Judge Zayas is bringing an outside-the-box approach to every aspect of his new job, including making a pledge that he will participate in the Physical Aptitude Test all court officers must pass, which includes timed sprints, as well as 30 sit-ups and 30 push-ups, both performed in a minute.

The goal, Judge Zayas explained, is to "encourage" the biggest class of court officer candidates in OCA history following a significant shortage during the pandemic and "let them know we're rooting for them." But there's a healthy dose of competition between him and his boss.

"My goal is passing, of course," Judge Zayas confided. "But the real question is whether I will be able to beat the chief judge's score."

6 to 3: The Impact of the Supreme Court's Conservative Super-Majority

By Vincent Martin Bonventre

As a new term of the Supreme Court begins, it is good to look back at what has gone before and at what that might tell us about the court and what we might expect to come.

There is a six-justice majority of Republican appointees on the current court. They are decidedly more politically conservative than the three remaining justices – the Democratic appointees, who are just as decidedly more politically liberal.[1] On the crucial, controversial, ideologically charged "hot-button" issues, the six Republican appointees – Chief Justice John Roberts and Justices Neil Gorsuch, Clarence Thomas, Samuel Alito, Brett Kavanaugh and Amy Coney Barrett [hereafter, The Six] – and the three Democratic appointees – Justices Sonia Sotomayor, Elena Kagan and Ketanji Brown Jackson (who replaced Justice Stephen Breyer in June 2022) [hereafter, The Three] – usually vote on opposite sides. These issues include the rights of the accused, the death penalty, abortion, racial equality, LGBTQ rights, church and state, gun rights, environmental protection and immigration.

It has now been three terms since Justice Barrett was appointed to fill the vacancy created by the passing of Justice Ruth Bader Ginsburg: the October 2020, 2021 and 2022 terms. The six-to-three majority has emphatically borne politically conservative fruit in many areas of the law. A survey of some of the most consequential will leave no doubt.

The Death Penalty

The court – more specifically, The Six – has shown little patience for the claims of death inmates. Indeed, they seem exasperated with the appeals, collateral challenges and emergency petitions that regularly delay the implementation of death sentences.

Dunn v. Reeves[2] is illustrative. The defendant, convicted of murder and sentenced to death, sought post-conviction relief on the ground of ineffective counsel. The Alabama Court of Criminal Appeals denied relief. However, the U.S. Court of Appeals for the 11th Circuit found that the state court's application of the federal constitutional

standard was "unreasonable" and granted habeas corpus. The Supreme Court, in a per curiam decision joined by The Six, granted certiorari and summarily reversed.

Applying the restrictions on federal courts imposed in the Anti-Terrorism and Effective Death Penalty Act of 1996 [hereafter, AEDPA], The Six held that the 11th Circuit had been insufficiently deferential to the findings of the state court. Repeating the court's prior interpretation of AEDPA, that "federal courts can correct only 'extreme malfunctions in the state criminal justice syste[m],"[3] the six-justice majority insisted that the circuit court should not have disturbed the Alabama court's denial of post-conviction relief.

The Three dissented. In her opinion, Justice Sotomayor decried the "troubling trend in which this court strains to reverse summarily any grants of relief to those facing execution." Citing numerous recent examples, Sotomayor argued that the current conservative majority had turned "deference [to state courts] into a rule that federal habeas relief is never available to those facing execution."[4]

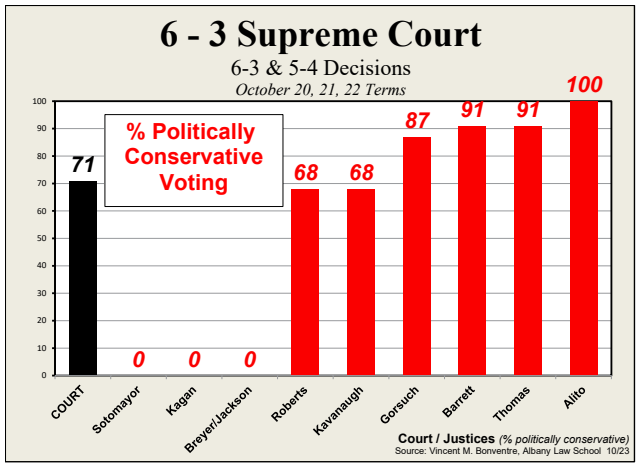
Among other death penalty cases, The Six again applied the "extreme malfunction" test to reverse a circuit court's grant of habeas corpus in *Shin v. Ramirez*.[5] In that case, the death inmate's post-conviction attorney failed to raise an ineffective assistance claim in the Arizona courts. But both the federal district and circuit courts excused the procedural default, ruled on the merits and granted habeas relief.

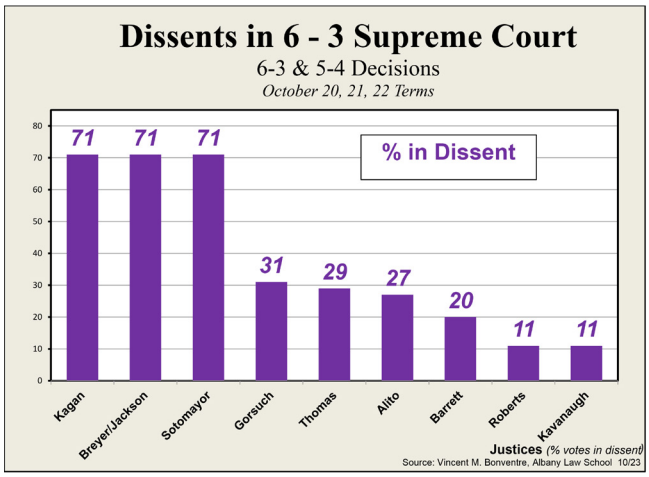
Speaking through Justice Thomas's opinion, The Six reversed the grant of habeas corpus on the ground that, under the court's previous applications of AEDPA, the "state postconviction counsel's ineffective assistance in developing the state-court record is attributed to the prisoner."[6] The Three, in a dissenting opinion authored by Justice Sotomayor, protested that "implausible" holding. "Make no mistake," the dissenters complained. "Neither AEDPA nor this court's precedents require this result."[7]

Constitutional Causes of Action

The six-to-three majority has narrowed the rights of victims of constitutional violations to bring claims against their government offenders. The constitutionally based *Miranda* protections were among those diluted as a result.

In *Vega v. Tekoh*,[8] the acquitted defendant brought a lawsuit for the undisputed violations of his *Miranda* rights by a local California law enforcement official. The case raised the question of whether 42 U.S.C. Section 1983, which provides a cause of action against state officials who deprive a person of their "rights, privileges, or immunities secured by the Constitution and laws," covers *Miranda* violations.





The Ninth Circuit held that it does. That court agreed with the defendant that the use of his un-*Mirandized* statement against him in a criminal prosecution was a violation of the Fifth Amendment right against compulsory self-incrimination. The Six, however, disagreed.

In an opinion by Justice Alito, they held that the mere failure to give *Miranda* warnings to a suspect being interrogated – absent any actual compulsion – is not a violation of the Fifth Amendment right. *Miranda* is a court-created protection of that right, not the right itself.[9]

In dissent, The Three, speaking through Justice Kagan, insisted that *Miranda*'s protections are indeed a right "secured by the Constitution" and, therefore, that violations should be actionable under Section 1983. The dissenters relied on the court's 2000 landmark in *Dickerson v. United States*,[10] where the court – speaking through previous *Miranda* critic Chief Justice William Rehnquist – held that *Miranda* could not be overruled by a congressional statute. Why? Because, as Rehnquist had explained "in no uncertain terms," *Miranda* is a "Constitutional rule" – a proposition with which The Six did not disagree.[11]

But the sides did disagree on whether the protections afforded by that "constitutional rule" – which extend beyond the "compulsion" core of the Fifth Amendment right – were to be viewed as constitutional rights themselves. The Six ruled that they were something less than that – they were merely "prophylactic" and, accordingly, not enforceable through Section 1983.[12]

In an analogous case, *Egbert v. Boule*,[13] The Six restricted so-called *Bivens* causes of action. In *Bivens v. Six Unknown Fed. Narcotics Agents*,[14] the Supreme Court had recognized a cause of action against *federal* officials for Fourth Amendment violations. The Court subsequently extended *Bivens* to Fifth Amendment due process and Eighth Amendment cruel and unusual violations.[15]

In *Egbert*, The Six declined to "extend" *Bivens* to a Fourth Amendment excessive force claim against border agents. In their view, *Bivens* causes of action were a "disfavored judicial activity."[16] As such, they held, in an opinion by Justice Thomas, that it was up to Congress, not the court, to determine whether a cause of action was necessary to redress any such violation.[17]

The Three, in a dissent authored by Justice Sotomayor,[18] were unsurprisingly dismayed. Although the majority did not overrule *Bivens* outright, it had nevertheless stripped it pretty bare. According to the dissenters, the majority disregarded the Court's repeated recognition of the importance of *Bivens*, "particularly in the Fourth Amendment search-and-seizure context and closes the door to *Bivens* suits by many who will suffer serious constitutional violations at the hands of federal agents."[19]

Women/Minority/LGBTQ+ Rights

It is unlikely that anyone reading this article is unfamiliar with the *Dobbs* decision.[20] For the purpose here, it is enough to note that The Six upheld Mississippi's law prohibiting abortion after 15 weeks' gestation.[21] With the exception of Chief Justice Roberts, who would have gone no further,[22] they did so by overruling *Roe v. Wade* and rejecting any constitutional right of a woman to choose to terminate a pregnancy.[23] Justices Breyer, Sotomayor and Kagan joined in an impassioned, bitter dissenting opinion.[24]

In yet another blockbuster of this six-to-three era to date, The Six ruled that affirmative action in college and university admissions violates constitutional equal protection.[25] In his majority opinion in *Students for Fair Admissions*, Chief Justice Roberts asserted what he has before, that "[e]liminating racial discrimination means eliminating all of it."[26] As applied to affirmative action, he explained that the use of racial preferences cannot be reconciled with the guarantee of equal protection because, among other things, it "unavoidably employ[s] race in a negative manner [and] involve[s] racial stereotyping."[27]

In angry dissents, Justices Sotomayor and Jackson,[28] each writing for The Three, denounced what they viewed as the majority's disregard of entrenched racial inequality in society and college admissions. As Sotomayor put it, the majority had "cement[ed] a superficial rule of color-blindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter."[29]

The Six also decided that civil rights laws, at least to the extent that they prohibit sexual orientation discrimination, must sometimes give way to religious objections. In *303 Creative LLC v. Elenis*,[30] in an opinion by Justice Gorsuch, the six-to-three majority ruled that the owner of a wedding website business could not be required to create a website celebrating the marriage of a same-sex couple. Because such a website would be contrary to her religious beliefs, the effect of enforcing Colorado's anti-discrimination public accommodations law against her would be coercing the expression of ideas with which she disagreed. According to The Six, the court's precedents make clear that such coercion would "represent an impermissible abridgment of the First Amendment's right to speak freely."[31]

The Three, speaking through Justice Sotomayor's dissenting opinion, argued that the state's civil rights law regulates conduct, not speech, and that an "*act* of discrimination has never constituted protected expression under the First Amendment."[32] Indeed, as Sotomayor noted about what The Six had done, "for the first time [the Court's] history, it grant[ed] a business open to the public a constitutional right to refuse to serve members of a protected class."[33]

Church and State

In a series of religious liberty decisions, a majority of the current court has rejected efforts to keep church and state separate and, instead, has invalidated such efforts for their disparate treatment of religion.[34] In *Carson v. Makin*,[35] for example, Chief Justice Roberts' majority opinion, speaking for The Six, viewed Maine's restriction on its tuition assistance program to "nonsectarian" schools as an impermissible discrimination against religion. The state's interest in keeping church and state separate, according to the six-to-three majority, "does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise."[36]

As Justice Breyer stressed in his dissenting opinion for The Three, the court had never previously held that "a State *must* (not *may*) use state funds to pay for religious education as part of a tuition program."[37] As he stated otherwise, "[n]othing in our Free Exercise Clause cases compels Maine to give tuition aid to private schools that will use the funds to provide a religious education."[38] Even more pointedly, Justice Sotomayor, in a dissenting opinion of her own,

accused the majority of "continu[ing] to dismantle the wall of separation between church and state."[39]

The very next week, in *Kennedy v. Bremerton School District*,[40] The Six sided with a high school football coach who had continued to engage in prayer with students, both during and after games, disregarding the school district's insistence that he stop. Justice Gorsuch, writing for the majority, characterized the case as government "punishing an individual for engaging in a brief, quiet, personal religious observance [that is] doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment."[41] He also characterized the school district's position as "a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech."[42]

Justice Sotomayor, writing in dissent for The Three, again chastised the majority for giving "short shrift" to the nonestablishment principle of the First Amendment in the name of free exercise.[43] She noted that the court "consistently has recognized that school officials leading prayer is constitutionally impermissible," but that the current majority was "chart[ing] a new course."[44]

Guns, the Environment, Immigration, Financial Relief

The conservative super-majority flexed its muscle to render consequential rulings in so many other areas of the law – far too many to review here. But a few cannot go unmentioned even in a brief assessment of the court's six-to-three impact.

In *New York State Rifle & Pistol Association Inc. v. Bruen*,[45] The Six did away with the state's more than century-old law which required a "proper cause" to carry a handgun outside the home. They struck the state's requirement as a violation of an individual's Second Amendment right of firearm self-defense. One week later, in *West Virginia v. EPA*,[46] that six-justice majority rejected the Environmental Protection Agency's authority to address climate change. They ruled that the agency could not promulgate a "generation shifting" regulation of greenhouse gas emissions without more specific congressional delegation of authority to do so.

In *Johnson v. Guzman Chavez*,[47] the same six-to-three court held that noncitizens, already subject to "administratively final" removal orders, are not entitled to a hearing to consider their reasonable fears of persecution or torture if they are returned. Several days thereafter, in *Chrysafis v. Marks*,[48] The Six sided with landlords claiming due process violations of their property rights. Over the protests of The Three, the majority summarily enjoined the enforcement of New York's moratorium on residential evictions, which was intended to protect tenants facing financial hardship during the COVID pandemic. And at the very end of last term, in *Biden v. Nebraska*,[49] the six-to-three majority rejected the Biden administration's program to cancel $430 billion in student loan debt. They held that the authority delegated under the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act), to "waive or modify" provisions of student financial assistance, did not extend to creating such a "novel and fundamentally different" program.

Politically Liberal Decisions of the 6-3 Court

Salinas v. United States Railroad Retirement Board, 141 S. Ct. 691 (2021): A worker aggrieved by the board's refusal to reopen its prior denial of disability benefits may seek judicial review.

(5-4, The Three were joined by Chief Justice Roberts and Justice Kavanaugh.)

Biden v. Missouri, 142 S. Ct. 647 (2022): The Biden administration's Department of Health and Human Services has authority to mandate COVID-19 vaccination for workers at Medicare – and Medicaid-funded facilities.

(5-4, The Three were joined by Chief Justice Roberts and Justice Kavanaugh.)

Allen v. Milligan, 143 S. Ct. 1487 (2023): Alabama's redistricting plan for its congressional representatives likely violates the anti-racial gerrymandering provisions of Section 2 of the Voting Rights Act.

(5-4, The Three were joined by Chief Justice Roberts and Justice Kavanaugh.)

Moore v. Harper, 143 S. Ct. 2065 (2023): The Constitution's Election Clause (Art. I, Section 4, cl. 1) does not support the so-called "Independent Legislature Doctrine"; state courts may impose state constitutional restrictions on a state's congressional redistricting.

(6-3, The Three were joined by Chief Justice Roberts and Justices Kavanaugh and Barrett.)

Conclusion

When President Donald Trump appointed three conservatives to the Supreme Court – Justices Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett – they joined the three sitting Republican appointees – Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito. Together, those six have wielded a far-reaching influence on "the law of the land," moving the court and its decisions in an unmistakably politically conservative direction.

Whether this reality is good or bad, wise or foolish, to be applauded or decried, it cannot be dismissed or denied upon insistence that the justices are simply applying the law. Nor that the justices are voting – and the court deciding – in a detached, dispassionate, and entirely neutral manner.

To borrow from Benjamin Cardozo, the wisdom and candor of whose "The Nature of the Judicial Process" has never been surpassed:

> Judges cannot escape . . . any more than other mortals . . . forces which they do not recognize and cannot name [that] have been tugging at them – inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs. . . . [They] may try to see things as objectively as [they] please. None the less, [they] can never see them with any eyes except [their] own.[50]

So without characterizing the "instincts," "beliefs" and "convictions" of the six-justice conservative majority as evil or laudable – or simply mistaken or wise – let us be clear about what in fact they have decided.

Make no mistake – and I'm not aware of anyone who really does – this nation's law is profoundly different than it otherwise would be because there is a six-to-three conservative super-majority on the court. The decisions reviewed are just a sample to illustrate that impact.

To be sure, there have been decisions during this six-to-three era – i.e., since Justice Amy Coney Barrett replaced Ruth Bader Ginsburg in October of 2020 – in which the six-to-three division did not hold. Yes, sometimes, The Three were joined by two or more of The Six to form a majority for a politically liberal ruling (see the sidebar for a few major examples). But that in no way undermines the reality that the ideological direction of the court, compliments of the six-justice politically conservative super-majority, has been indisputably and markedly politically conservative (see graph 1). Nor is the reality that, in most of the significant, ideologically charged cases, the three more politically liberal justices have been relegated to the role of frustrated protesters (see graph 2).

As the October 2023 term of the Supreme Court begins, it is reasonable to expect that the six-to-three politically conservative majority will continue to transform the nation's fundamental law in a more politically conservative direction.

Vincent Martin Bonventre is the Justice Robert H. Jackson Distinguished Professor of Law at Albany Law School and director for the Center for Judicial Process. He is the author of New York Court Watcher.

Endnotes

1. Regarding the terms "liberal" and "conservative" as representing ideologically opposing positions, see the discus-sion, 'Liberal' Justices, 'Conservative' Justices, in one of my previous articles in this journal, *Supreme Shift: What the 6-3 Conservative Majority Means Going Forward*, 93 NYSBA Journal 9 (Jan./Feb. 2021).
2. 141 S. Ct. 2405 (2021).
3. *Id.* at 2411, *citing Harrington v. Richter*, 562 U.S. 86, 102 (2011).
4. *Id.* at 2420–21 (Sotomayor, J., dissenting) (*citing United States v. Higgs*, 592 U.S. ___ (2021) (emergency vacatur of stay and reversal); *Shinn v. Kayer*, 592 U.S. ___ (2020) (per curiam) (summary vacatur); *Dunn v. Ray*, 586 U.S. ___ (2019) (emergency vacatur of stay); *Johnson v. Precythe*, 593 U.S. ___ (2021) (denying certiorari); *Whatley v. Warden*, 593 U.S. ___ (2021) (same); *Bernard v. United States*, 592 U.S. ___ (2020) (same)).
5. 142 S. Ct. 1718 (2022).
6. *Id.* at 1734.
7. *Id.* at 1740.
8. 142 S. Ct. 2095 (2022).
9. *Id.* at 2101–02. Noting that "the Court has repeatedly described [the *Miranda* warnings] as 'prophylactic'" and not the Fifth Amendment right itself, Alito cited a long list of decisions in which the court repeated that proposition. *Id.* at 2102.
10. 530 U.S. 428 (2000).
11. 142 S. Ct. at 2108–09 (Kagan, J., dissenting).
12. 142 S. Ct. at 2101.
13. 142 S. Ct. 1793 (2022).
14. 403 U.S. 388 (1971).
15. *See Davis v. Passman*, 442 U.S. 228 (1979) (Fifth Amendment due process); *Carlson v. Green*, 446 U.S. 14 (1980) (Eighth Amendment, cruel and unusual punishment).
16. 142 S. Ct. at 1803 [citations omitted].
17. *Id.* at 1806–07 (also noting that an administrative Border Patrol grievance process already existed). Justice Gorsuch, in a separate concurring opinion, called for the court to overrule *Bivens* entirely. *Id.* at 1809 (Gorsuch, J., concurring).
18. *Id.* at 1810 (Sotomayor, J., concurring in part, dissenting in part).
19. *Id.* at 1823–24.
20. *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).
21. *Id.* at 2284 ("legitimate interests justify Mississippi's Gestational Age Act").
22. *Id.* at 2310 (Roberts, C.J., concurring).
23. *Id.* at 2284.
24. *Id.* at 2317 (Beyer, Sotomayor, Kagan, JJ., dissenting).
25. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141 (2023).
26. *Id.* at 2161.
27. *Id.* at 2175.
28. *Id.* at 2225 (Sotomayor, J., dissenting) and 2263 (Jackson, J., dissenting).
29. *Id.* at 2226 (Sotomayor, J., dissenting).
30. 143 S. Ct. 2298 (2023).
31. *Id.* at 2313 (citing, among other prior decisions, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), where the court invalidated a compulsory flag salute law that required schoolchildren to recite the Pledge of Allegiance even if that that contravened their religious convictions).
32. *Id.* at 2322 (Sotomayor, J., dissenting) [emphasis in the original].
33. *Id.* (Sotomayor, J., dissenting). Sotomayor reminded the majority of what the court had recently emphasized when it confronted a similar issue in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018), that religious objections to same-sex marriage "do not allow business owners . . . to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Id.*
34. *See e.g., Carson v. Makin*, 142 S. Ct. 1987 (2022) (Maine's tuition assistance program may not be restricted to non-religious schools); *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022) (school district may not prohibit football coach from praying midfield and inviting players to join him); *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020) (Montana may not apply its state constitutional prohibition of any aid to religion to exclude religious schools from the state's scholarship program); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017) (Missouri may not apply its state constitutional prohibition of any aid to religion to exclude a church from the state's program to financially assist the resurfacing of children's playgrounds).
35. 142 S. Ct. 1987 (2022).
36. *Id.* at 1998.
37. *Id.* at 2006 (Breyer, J., dissenting).
38. *Id.* at 2009–10.
39. *Id.* at 2009 (Sotomayor, J., dissenting).
40. 142 S. Ct. 2407 (2022).
41. *Id.* at 2433.
42. *Id.* Justice Gorsuch also asserted that the court had abandoned the three prong non-establishment test formulated by then-Chief Justice Warren Burger in his landmark majority opinion in *Lemon v. Kutzman*, 403 U.S. 602, 612–13 (1971) (government actions that have a religious purpose, a primary religious effect or foster an excessive entanglement with religion violate constitutional non-establishment). *Id.* at 2427.
43. *Id.* at 2434 (Sotomayor, J., dissenting).
44. *Id.*
45. 142 S. Ct. 2111 (2022).
46. 142 S. Ct. 2587 (2022).
47. 141 S. Ct. 2271 (2021).
48. 141 S. Ct. 2482 (2021).
49. 143 S. Ct. 2355 (2023).
50. Benjamin N. Cardozo, The Nature of the Judicial Process 12–13 (1921).

Communications Overload: Protecting Attorney-Client Privilege With Today's Communications Tools

By Alexander Paykin

Attorneys have an obligation to maintain records of all client communication (as well as many other communications with third parties).[1] We are further often tasked with obtaining communications as part of the discovery process. However, while technology has made communication faster and simpler, it has also created a morass of record keeping.[2] Clients also have needs, which vary by client and practice area, not to mention geography. Many of us have been forced to embrace apps like WhatsApp, not because we want to, but because our clients insist on them. Sometimes, it's a matter of economics and convenience, like with clients who are in other countries and who rely on those apps to avoid costly long distance telephone calls, or those who simply demand to communicate with us through those apps because they regard them as easier, faster and more secure than emails. At other times, it is a matter of security, since those apps can offer a level of protection that email does not. But what do we do to make sure that the methods used both protect the attorney-client privilege and allow us to retain accurate records of all communications? The situation gets even worse when it becomes a question of obtaining client, opposing party and third-party communications during the discovery process. Which apps did they use? Do they have a copy of the entire communication? Will they still have that copy by the time the need arises in discovery or can they or someone else delete important bits after the fact?

This article is by no means an ethics opinion or a dissection of ethics opinions. This article is an overview of the various means of digital communications from a tech perspective. Ideally, if you understand the features, pitfalls and limitations of the technology you rely on, you will be able to avoid circumstances where ethics rules and opinions may be used against you.

As those of us who practiced before the internet took over our lives and we entered the world of today, record keeping used to be a simple concept. One would take notes of the in-person and telephonic conversations one had with a client or third party and store those in the client file. Written communications were all in paper form, even when faxed, and it was easy enough to make a copy for the client file. This is no longer the case. Today's communications can take on countless forms, exist in digital-only formats and be timed to self-destruct. Various platforms allow for encryption, single-view messages, deletions by the sender after the fact and even the ability to wipe the entire record for both sides of the conversation with a couple of taps. Many of these communications become irretrievable. Even if one takes a screenshot or a photo of a vanishing message, establishing its authenticity becomes near impossible.[3] Depending on the app or platform one uses, the retention of information varies wildly. Some methods are more permanent than others, and few make it easy for an attorney to maintain a clear and complete record of all client communications.

So, what do we do? Should lawyers avoid all messaging apps? What do we do to discover client and third-party communications in litigation? How do we make sure we don't run afoul of our professional responsibilities and maintain an adequate record? Over the next few paragraphs, we will look at the various app features and technological hurdles that lawyers should be aware of, to make sure we are using the best tools for our needs and avoid those that can cause harm to befall our clients and careers. First, we should discuss the broad stroke concepts. Below is an overview of the features and functions one must be aware of, so that technology can best be used for efficient communications, without causing us to fail to retain those necessary records of communications.

End-to-End Encryption

In the past, end-to-end encryption was achieved by placing a letter into an envelope, sealing it and entrusting the postal service to deliver it without fail. After all, tampering with the U.S. mail is a federal crime, and one could reasonably rely on a mailed letter not to be intercepted or read while in transit. Say what you might about the quality of the U.S. Postal Service; that remains true to this day. However, most clients and fellow counsel would frown at the idea of all communications going through the post. The deficiency in speed is obvious. In fact, most lawyers have turned to email to fill their daily communication needs. However, email is not sealed in an envelope and is not delivered by a federal agency with legal protections against third-party interference. In fact, email is not encrypted at all.[4] I still regularly see transactional counsel emailing out Social Security numbers and birth dates, as well as other extremely confidential and private information, no matter how often I point out that this should not be done. Email is not secure. Period. Email is great in terms of near instant delivery and the ability to run one's practice on the go, but email should be regarded as the equivalent of speaking to your client in a crowded elevator. It is not, by any means, private. Emails regularly get hacked, and unencrypted attachments offer your client no protection whatsoever. If you must send something by email, at least put the sensitive content into a secure PDF, which you encrypt and protect with a complex password. This is by no means the "best" form of security, but it at least provides a fig leaf for your client's information. While email is amazing for communications and record keeping, it should never be used for truly sensitive information. So, what does one use instead? Well, many products offer end-to-end encryption and are a better choice for sensitive communications. But each one comes with its own set of drawbacks, whether in terms of security or record keeping.

In a perfect world, we would all use secure client portals, which most practice management systems already have built in, to communicate with our clients. However, I have yet to encounter a law firm, big or small, that has

successfully implemented such a system The reasons are simple. It is cumbersome to use and requires the client to log into your firm's portal to read and respond to each message. As someone who personally hates every secure message a financial institution sends me, with its two-factor authentication and a five-minute process just to read every silly notification, I have a hard time believing that we will ever be able to get our client or staff to embrace the idea that those portals should be the sole means for confidential communications.

If the only issue were the need for end-to-end encryption in communications, many excellent apps would be there to fill the gap left by email, without the need for me to write anything more than their names. But let's start with a few concepts and names, and we'll discuss the drawbacks of each one as we go.

Text and Multimedia Messaging (SMS and MMS)

Among the first messaging tools on the scene was SMS. While it has become more feature-rich over time, now allowing the sending of low-resolution images and video, SMS, at its core, was designed for fast delivery of short messages. It is fairly secure, since the delivery is handled by telecoms, and is fairly simple to retrieve during the discovery process. While one can generally delete a message one has sent from one's own device, this deletion does nothing to remove the record from the recipient, so at least one party to the communication will generally have access to the message in question. However, the drawbacks to SMS/MMS are also quite severe. Since in most cases, SMS/MMS messages are delivered to one's phone, it becomes difficult to maintain the record in one's client file, making SMS messages difficult to log, and making it so that if a client sends a message to one member of a firm, it is likely that no other staff member in the firm will be aware of it. Surely, lawyers can log all their SMS messages in their client file, but few actually do anything of the sort. They rely on the fact that those messages exist in their smartphone and assume they can always reference them from there. This can result in disaster when one's staff and co-counsel are not updated on developments that occurred via such private messaging. SMS is, of course, also very limiting, in that there is a character limit and no ability to attach documents (other than photos and short, low-quality videos). Many solutions have been introduced over the years, with some more useful than others, but none that truly solve all our problems.

Google Voice

A practical solution for a solo practitioner is Google Voice. It is basically a 21st century answer to SMS/MMS, telephone calls and voicemails. It allows for large messages, maintains a log of all communications that can be accessed on the Google Voice web portal, transcribes and maintains recordings and transcriptions in an email inbox style view, allows for easy searching through all of one's communications, just like email, and because it is available on a computer browser, allows for easy copying and/or pasting of communications into other destinations. This product also allows one to place and receive telephone calls, all through Google Voice's own telephone number; allows for the recording of calls with an automated message that notifies all parties that the call is being recorded; allows for advances like call blocking and spam filtering; and provides good encryption of the data stored. It even offers extremely cheap long-distance calling. Most alluring, of course, is that it is free to sign up and use. For clients who insist on speaking with us through SMS, Google Voice is probably the best solution for a solo. Why only a solo? Well, because unless your entire firm shares one Google Voice account (which can be very dangerous and chaotic for its own reasons), you are left with the same problem as regular SMS, in that if you message me, how will my staff know about that communication? In theory, I could copy and paste all the communications I get on Google Voice into my practice management system, but let's face it, will I? Unlikely.

"Today's communications can take on countless forms, exist in digital-only formats and be timed to self-destruct. Various platforms allow for encryption, single-view messages, deletions by the sender after the fact and even the ability to wipe the entire record for both sides of the conversation with a couple of taps."

SMS Built Into the Practice Management Systems

Seeing this problem in every law firm, many practice management systems have embedded a communication tool that emulates SMS directly into themselves. At first, this sounds like an excellent idea. However, it too has its drawbacks. The advantage is obvious. All SMS communications land in the client and matter records automatically and all staff members working on a matter have direct access to those communications. The drawbacks? Depending on the practice management system,

those SMS communications may be limited to clients with U.S. telephone numbers, they have no spam filters that I know of and they are often difficult to use on the go, as the mobile apps of most practice management systems have added SMS as an afterthought and have not added many of the features a product like Google Voice or WhatsApp have natively. It can also result in message overload, as now all staff members are receiving notifications of all SMS messages to the firm. It is also important to note that this feature is often ridiculously and unjustifiably expensive. For example, some vendors charge extra for the plan that includes SMS service, versus the most expensive plan without it. Since most practice management systems charge for their plans on a per user basis, this can often scale up to hefty sums on a monthly basis. For me, that is inappropriate, considering the technology is simple and cheap to the point that Google is giving the equivalent away for free. Surely our practice management systems could do better and realize that this is a vital feature that they should include in every level of subscription, but alas, they are for-profit companies. But even if it were free, let's face it: SMS is the technology of yesteryear. The clients of tomorrow expect something more feature-rich.

WhatsApp, Telegram and Other Apps

This brings us to the apps of today. Many if not most of those reading this article have heard of WhatsApp. Fewer have heard of Telegram, WeChat and other apps that have appeared over the years. These apps have eliminated the concept of long-distance phone charges, SMS fees while roaming, character limits, attachment size and type limits and, depending on the app, virtually all bottlenecks in communications. However, they come at a heavy price, at least for us lawyers. Depending on the specific features of a given app, as attorneys, we must be aware of their risks and limitations.[5] Implemented correctly, these apps allow us to communicate with clients on their terms, making for happier clients who know they can contact their attorneys at any time, using apps that they are comfortable with.

Let's discuss the features and limitations of each app and what we as lawyers must do to make them compatible with our professional responsibilities. WhatsApp allows for almost all forms of file transfer and, unlike email, offers true end-to-end encryption. If you need to share confidential or privileged information, this is probably among the most secure tools to do it.[6] However, be warned that for record keeping and discovery purposes, WhatsApp can pose a serious problem in that it allows you to not only delete a message after it has been sent (and received and read), but it allows you to delete the message not just on your device but also on those of all recipients. This can make keeping communications records a problem. The "best" solution, since WhatsApp has a web browser and desktop client app, is to copy and/or paste each communication into your practice management system as it occurs. Of course, this is a hassle, and I have yet to meet a lawyer that religiously does this. In general, this should not be an issue in your communications with your clients, unless you expect your client to suddenly delete his or her communications with you.

However, when reviewing WhatsApp messages for discovery purposes, I would suggest asking your client to download and save all communications they may have had with the opposing parties and/or third parties. In fact, you may want to have this export done by a third-party service, to avoid the possibility of not being able to authenticate the messages. After all, at any given point after you commence litigation, it is possible that someone might delete that smoking gun you were hoping to later rely on.

Another thing to note about WhatsApp is that it is quite simple to create a WhatsApp group chat. This can be excellent for many different purposes, but please be sure to note that if you ever leave the group and then later rejoin the group, you will not see any of the group messages that occurred while you were away, much like walking out of a conference room in real life.

For a practical example, I have regularly represented condominium and cooperative boards, many of which handle their day-to-day communications as a group chat. When a board member resigns or does not get reelected, they regularly leave the board's group chat. Then, later, when litigation occurs over some issue that the board member was involved in, he or she suddenly discovers that they only have partial records of board communications. This could theoretically be remedied by subpoenaing one of the other members to the chat, but that is an unnecessary hassle that can be avoided. This becomes a bigger problem when, as it did in a case I consulted on, the entire board fails to win reelection. All five board members, having been defeated at an annual meeting, disbanded and left their board chat group, deleting their own local copies. What none of them realized was that all of them ended up losing their transcripts of years of chats. When did they realize it? Well, when they got sued for a breach of fiduciary duty by the new board and suddenly discovered that not one of them was able to produce records of their deliberations and positions. It became a lot more difficult to establish facts in discovery when all board communications were missing. As you might imagine, given that they effectively deleted the evidence, however unintentionally that might have been, the plaintiffs sought a negative inference when the former board members were forced to admit that they deleted those records.[7] Before you think that you could possibly subpoena WhatsApp for those records, think again. The whole point of end-to-end encryption is that WhatsApp does not maintain a record of any of those communications, making them lost forever.

2024 Presidential Gala

Thursday, January 18, 2024 | 7:30 pm – 11:30 pm
The Museum of Modern Art | New York, NY

The NYSBA Annual Dinner has been the flagship event for the association since 1878. The upcoming 2024 Gala will take place at The Museum of Modern Art in NYC, with live entertainment and an auction facilitated by the New York Bar Foundation. The spotlight of this black-tie optional event will be the presentation of the Gold Medal Award, the highest honor bestowed by the association, to Jeh Johnson, former U.S. Secretary of Homeland Security and current partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP.

Jeh Johnson
Gold Medal Award Recipient

Live entertainment
by The Revisionists

Silent and Live Auction hosted by
The New York Bar Foundation

Individual tickets are now available!

Regular Ticket: $425
Friend of NYSBA Ticket (includes listing in dinner program): $600

Table sponsorships are also available.

To purchase a ticket, or for more information on a table sponsorship, please visit

NYSBA.ORG/2024PRESIDENTIALGALA

For any additional questions, please contact NYSBAGALA@NYSBA.ORG

800.582.2452

Moving on to Telegram, you will face similar but even more dangerous problems. Telegram prides itself on being among the most secure methods of communication[8] but, again, faces similar problems to WhatsApp. In fact, Telegram's problems in this respect are even more pronounced since any party to a chat can delete the entire chat for all parties to the conversation. This makes for very secure messaging but is terrible for record keeping. In addition, in Telegram one can delete the entire chat or any given message sent at any time. One can even delete a message that was sent more than a year ago. (WhatsApp has a limit of 60 hours for deleting messages.) As such, whenever you're worried that a communication might disappear or be edited after the fact, make sure to save it upon receipt. Since Telegram supports all forms of files and audio/video messages, it is important to download those upon receipt as well.

Not long ago, WhatsApp adopted one of the features of Telegram – the ability to edit messages (in this case, the message will be marked as edited, but you will never be able to see or recover the original text). Thus, this opens the possibility of a wide range of ex post facto manipulations. For example, a fraudster can ask "How are you?" and after you answer "okay," change his question to "Can I take $50k from your safe?" When asked why the message was edited, the fraudster can simply say that he misspelled one of the words in the question and had "corrected" the spelling. A fraudster can even make a spelling error in the original message on purpose and correct it before you even answer, so that the recipient will see the message as edited before responding and think nothing of it. Then, when the fraudster later changes the message again, there will be an indicator showing that the message was edited a second time, as it will simply show "edited." The message can effectively be edited countless times, making it impossible to be sure who said what and when. By comparison, WhatsApp has a limit of only 15 minutes for editing messages, while Telegram gives you as much as 48 hours, which makes it much easier to commit fraud and manipulate the conversation records after the fact.

Both WhatsApp and Telegram also allow single view messages, which will disappear after they have been viewed once. It makes record-keeping nearly impossible unless you photograph your phone screen with another device when opening the message.

Another very popular app is WeChat. WeChat is a product that very few in the United States have used or even heard of. One of the main reasons for that is that it is a Chinese app, which, by that fact alone, scares most Americans. In fact, WeChat is an app that allows for much more than messaging and is a universal app that provides means for online payments, ordering food and other products to be delivered, allows for lots of person-to-person interaction and is generally a very impressive product. However, as attorneys, we probably want to stay away from it, as it is entirely possible that the Chinese government has some back-end access to all communications. WeChat will of course deny this, but be it paranoia or an abundance of caution, I have yet to meet an American lawyer that feels comfortable using WeChat.

It would be wrong not to mention the various messaging apps built into the various social media platforms, like Facebook Messenger or LinkedIn Messenger. However, while it might be wrong to leave them out of this article, you should most certainly leave them out of any communications toolbox that involves confidential or privileged information. The long and short of is that these are not truly private messages, nor are they end-to-end encrypted. In fact, the terms of service of these products are rather explicit about the communications being available to their publisher, for advertising and business development purposes. In other words, anything you say using Facebook or LinkedIn will be parsed by them and used to market to you.[9] This is akin to using a consumer grade Gmail address to run your practice. If you don't own your data, how can you protect it from falling into the wrong hands?

In the end, there are basic questions you must ask about each communication method you use, and you must establish firm protocols for data retention and security for all such communications.

Key Takeaways

1. Read the terms of service of each platform you intend to use and confirm that you own your communications and that they are encrypted end-to-end, and, if that is not the case, do not use the platform for any communication that you would not want accessed by third parties. For example, Facebook Messenger is usually fine for planning a night out with friends. It is not fine for confidential and privileged communications.
2. Whenever you get a notification from any such platform that they updated their terms of service, don't just click OK. Read the changes and make sure that the provider hasn't changed its policy on data ownership, access, use or encryption.
3. If using a platform that does not guarantee you the ability to retain and archive your communications, make sure you export those communications and archive them yourself, at least those communications that you are required to maintain records of or ones that you may need to rely on later (e.g., Google Voice will keep every SMS, MMS, voicemail

and file transfer in your Google Voice inbox, so you can always access them there, whereas products like WhatsApp or Telegram may result in messages disappearing later if one of the parties deletes them).

4. When you take on a matter, before sending out a demand letter, commencing litigation or even contacting the opposing party, sit down with your client and identify what platforms were used to communicate between the parties to the dispute and/or third parties related to it. Have an IT company export and store all those communications, so that you can establish a chain of evidence later and so that no one deletes the important data to avoid discovery.
5. Consider issuing pre-litigation subpoenas or at least sending out litigation hold letters to all parties you expect to need communications records from. That way, if messages are deleted after the fact, you can make a motion for a negative inference.
6. Update your engagement letters to make clients opt in and affirmatively acknowledge that (a) you have a client portal built into your practice management system and that the most secure way to communicate with your office electronically is via that portal; (b) if they wish to communicate by email, they understand that it is not encrypted and understand and accept the inherent risks and direct you to use it for confidential communications anyway; (c) if they wish to use a communications app of any sort, that they have read and understood the terms of service, accept those terms and understand that they must not delete any messages after sending them to you; and (d) that they understand that if they have used any such apps to communicate with the opposing parties or third parties, that they shall immediately coordinate to have all such communications retrieved and stored by an IT company.
7. Log all communications you receive by SMS or through any app into your practice management system as soon as they occur, so that your client is complete and those communications are contemporaneously and diligently logged and maintained by your firm, providing a business records exception to the hearsay rule.[10]

If you follow these basic rules, you should not have too many problems with any of these tools, and your clients will greatly appreciate your ability and willingness to communicate with them on their own terms and with the tools they feel comfortable using.

Alexander Paykin is the owner of The Law Office of Alexander Paykin, a boutique commercial and real estate litigation and complex transaction firm. He is also a consultant to other law firms on the use of technology in the practice of law, on topics ranging from hardware and practice management systems to billing, payment, bookkeeping and accounting technologies. He is the chair of NYSBA's Committee on Technology and the Legal Profession and is a member of NYSBA's Committee on Law Practice and Court Rules, Committee on Civil Practice Law and Rules, the Law Practice Management Committee, and the Committee on Law, Youth and Citizenship.

Endnotes

1. Pursuant to Guideline No. 3.C of NYSBA Social Media Ethics Guidelines, 2019, "If an attorney utilizes social media to communicate with a client relating to legal representation, the attorney should retain records of those communications, just as he would if the communications were memorialized on paper."

2. The Pennsylvania Bar Association has opined that, under the Pennsylvania Rules of Professional Conduct, which are different from the NYRPC, an attorney "should retain records of those communications containing legal advice." *See* Pa. Bar Association, Ethics Comm., Formal Op. 2014-300.

3. In detail, the authenticity of a screenshot, namely that it is an accurate copy of text messages sent, can be established by a witness testifying that (1) he or she observed the incriminating messages on the cell phone, (2) the screenshot, although he or she did not personally take it, was an accurate representation of the messages seen on the cell phone, (3) the cell phone belonged to the owner based on his or her familiarity with the make, model and color of the cell phone, (4) he or she had seen the owner use the cell phone many times, (5) the witness personally handled the phone, and (6) the cellphone was password-protected, making it unlikely that someone, other than the owner, was able to send the messages sought to be introduced. *See Matter of RD (CL)*, 58 Misc. 3d 780, 787–88 (2017).

4. I get a lot of questions and confusion on this point, as people often refer to encrypted emails as if they were an actual thing. They are not. You can have an encrypted message sent to you, but not via email. When you get what is commonly referred to as an encrypted email, you are actually just getting a link with a token that then lets you log into an encrypted webpage, where you then get to see the contents of your message. If you are clicking on a link to leave your email client and to land on a different server, you are viewing an encrypted message, but it was not an "encrypted email."

5. In addition to presenting some risks and limitations, social network apps have great potentialities. In *Baidoo v. Blood-Dzraku*, 48 Misc. 3d 309 (2015), the court granted permission to serve defendant with the divorce summons using a private message through Facebook.

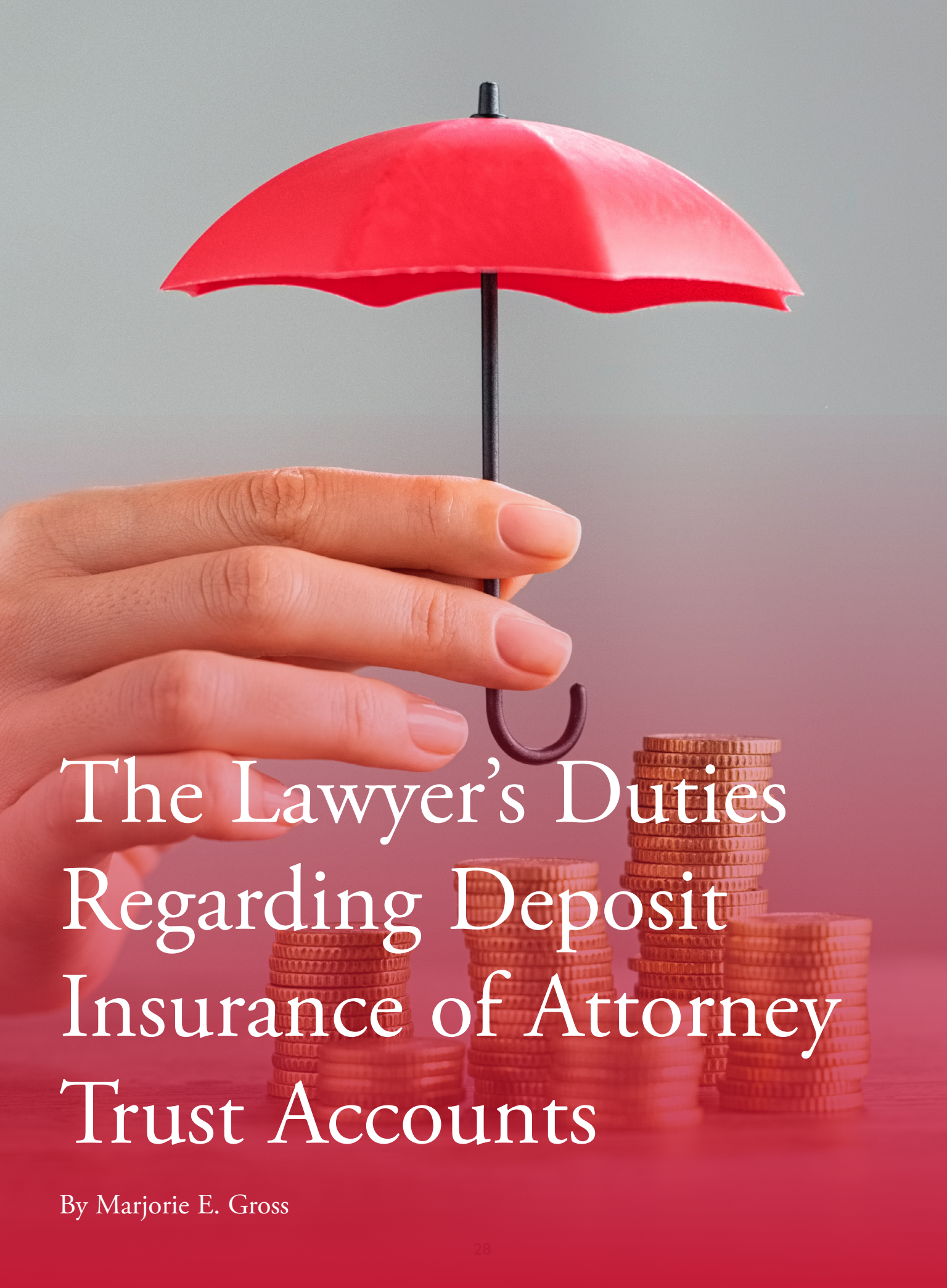
6. Regarding WeChat messages and the attorney-client privilege, *see Hansen Realty Dev. Corp. v. Sapphire Realty Group LLC*, 2020 N.Y. Slip Op 33166(U) (Sup. Ct., N.Y. Co. Sept. 25, 2020).

7. Regarding the spoliation of WhatsApp chats and the grant of an adverse inference, *see RCSUS Inc. v. SGM Socher, Inc.*, 2022 N.Y. Slip Op 30926(U) (Sup. Ct., N.Y. Co. Mar. 20, 2022). Regarding the unintentional spoliation of WeChat chats in the event of phone lost or damaged, *see Siras Partners LLC v. Activity Kuafu Hudson Yards LLC*, 171 A.D.3d 680 (1st Dep't 2019).

8. Though I have heard many argue that Telegram's privacy is highly questionable, since all communication records are stored in their cloud, yet it is a free app with no ads, leading many to suspect that some financial backer – possibly the Russian government – is financing the costs of operation and has access to all contents. This is, of course, rumor and inuendo, but given that the app appears to have no revenue generation and has large operating costs, one must wonder how the company stays afloat.

9. As recently set forth by commentators regarding privacy and social networking sites, given the millions of users, "[i]n this environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking." *Romano v. Steelcase Inc.*, 30 Misc. 3d 426, 434 (Sup. Ct., Suffolk Co. 2010), *citing* Dana L. Fleming and Joseph M. Herlihy, *What Happens When the College Rumor Mill Goes Online? Privacy, Defamation and Online Social Networking Sites,* 53 Boston B.J. 1:16 (Jan./Feb. 2009).

10. Pursuant to Guideline No. 3.C of NYSBA Social Media Ethics Guidelines, 2019, "A lawyer shall not deactivate a social media account, which contains communications with clients, unless those communications have been appropriately preserved."



The Lawyer's Duties Regarding Deposit Insurance of Attorney Trust Accounts

By Marjorie E. Gross

In March 2023, bank regulators closed Silicon Valley Bank and Signature Bank and appointed the FDIC as liquidator. Signature Bank in particular provided banking services to many New York law firms and, therefore, held many attorney trust or escrow accounts. While most bank and credit union deposits benefit from federal insurance issued by the Federal Deposit Insurance Corporation or the National Credit Union Share Insurance Fund, the current limit on federal deposit insurance is $250,000 per "insurable interest," and many lawyers hold more than that amount on behalf of clients and third parties. For example, a lawyer may hold escrow accounts that are well in excess of the FDIC insurance limit in connection with real estate and other transactions, estate administration or payment of a judgment.

In the case of Silicon Valley Bank and Signature Bank, no depositors lost money because the bank regulators invoked the systemic risk exception to the FDIC's least cost resolution requirement. That involved recommendations by the boards of the FDIC and the Federal Reserve and the approval of the secretary of the Treasury after consultation with the president.[1] But the FDIC takeovers caused many lawyers to focus on their ethical and fiduciary obligations with respect to attorney escrow account balances, especially those that might exceed insurance limits.

What exactly are a lawyer's obligations with respect to client or third-person funds held in an attorney trust account? Must the lawyer worry about the extent to which the funds are federally insured?

Rule 1.15 and Attorney Trust Accounts

The New York rules governing attorneys who hold monies on behalf of clients and third persons appear in three different places. The first is Rule 1.15 of the New York Rules of Professional Conduct. The second is the so-called bounced check rule, which appears in 22 N.Y.C.R.R. Part 1300 and is administered by the New York Lawyers' Fund for Client Protection. The third is the rules governing Interest on Lawyer Account (IOLA) funds, found in Section 97-v(4)(a) of the State Finance Law, Section 497 of the Judiciary Law and 21 N.Y.C.R.R. Section 7000, which is administered by the IOLA Trust Fund. Since an IOLA account is a type of attorney trust account, and the bounced check rule and the IOLA rule both follow Rule 1.15 with respect to the operation of the account, this article will focus on Rule 1.15.

Rule 1.15 has several different parts. The first, in paragraph (a), prohibits a lawyer from commingling the lawyer's own funds with funds belonging to another person, such as a client or third person. That historically has been the principal focus of the regulations governing escrow accounts – making sure that the lawyer cannot improperly use client funds by commingling them with the attorney's own funds.[2] Indeed, the title of that paragraph is "Prohibition Against Commingling and Misappropriation of Client Funds or Property." That paragraph is the reason that lawyers need one or more operating accounts, separate from the attorney's trust account, for activities such as receiving fee payments and paying normal operating expenses for the firm.[3]

Paragraph (b)(1) of Rule 1.15, denominated "Separate Accounts," contains several requirements governing funds belonging to a client or third person that are incident to the lawyer's law practice:

- The funds must be maintained "in a banking institution" within New York State that agrees to provide dishonored check and overdraft reports under 22 N.Y.C.R.R. Part 1300. The term "banking institution" is defined in this section. It includes "a state or national bank, trust company, savings bank, savings and loan association, or credit union." Based on the banking institutions on the approved list of the Lawyers' Fund for Client Protection, to be "within New York State," the financial institution need not be headquartered here, as long as it has one or more branches in New York.[4] Part 1300 provides that an agreement by a bank to provide dishonored check and overdraft reports must be filed with the Lawyers' Fund for Client Protection, which maintains a central registry of all banking institutions that have been approved under Part 1300. The list of approved institutions is available on the website of the Lawyers' Fund.[5]
- Funds may be maintained in a banking institution located outside New York if the banking institution agrees to make bounced check reports under Part 1300 and the lawyer receives prior written approval of every person whose funds may be in the account, after the lawyer informs them of the name and address of the office of the bank where the funds are to be maintained.[6]
- The funds must be maintained "in the lawyer's own name" or in the name of the law firm that employs the lawyer. Paragraph (b)(2) of Rule 1.15 also requires that the attorney trust account be identified as an "attorney special account," "attorney trust account" or "attorney escrow account," and the checks and deposit slips must bear that title.
- The funds must be separate from any business or personal accounts of the lawyer or law firm and separate from any accounts the lawyer

may maintain as executor, guardian, trustee or receiver.

- Assuming a lawyer or law firm is not improperly commingling funds and maintains an attorney trust account in an approved institution in an appropriately titled manner, does that end their obligations?

Standard of Care Applicable to Attorney Trust Accounts

The standard of care for attorney trust accounts appears in Rule 1.15(a), which states:

> A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, *is a fiduciary*, and must not misappropriate such funds or property or commingle such funds or property with his or her own (emphasis supplied).

Comment [1] to Rule 1.15 goes further; it says that a lawyer should use the care required of a professional fiduciary. Two ethics opinions of the New York State Bar Ethics Committee state that the lawyer/escrow agent must meet the same professional and fiduciary standards that are mandated for lawyers and trustees with respect to the preservation, safekeeping and use of client funds and trust property.[7]

When it comes to matters of professional discipline, the Appellate Departments have adopted only the black letter rules. As the introduction to the New York Rules of Professional Conduct volume published by NYSBA states, the comments are published by the Association solely "to provide guidance for attorneys in complying with the Rules." Consequently, it is unlikely that Comment [1] to Rule 1.15 adds any substantive obligations.

In any event, Comment [1] to Rule 1.15 does not further explain either the "fiduciary" or the "professional fiduciary" standard. The state bar committee that recommended the rules noted that Comment [1] was taken from the ABA Model Rules.[8] The ABA rule, however, does not explain the fiduciary standard. In fact, comment 18D to New York's Rule 1.6 notes that "Questions of fiduciary duty are legal issues beyond the scope of the Rules." Does either standard require the lawyer or law firm to ensure that client funds maintained in a bank are entirely federally insured?

Section 44 of the American Law Institute's Restatement of the Law Governing Lawyers describes the lawyer's obligation with respect to attorney escrow funds this way:

> A lawyer holding funds or other property of a client in connection with a representation . . . must take *reasonable steps* to safeguard the funds or property. . . . In particular, the lawyer must hold such property separate from the lawyer's property, keep records of it, deposit funds in an account separate from the lawyer's own funds . . . and comply with related requirements imposed by regulatory authorities (emphasis supplied).

As in the case of Rule 1.15, the focus is on "no commingling" and on good recordkeeping.[9] That is also the thrust of General Business Law Section 778-a,[10] which provides that an escrow agent who undertakes to hold a buyer's down payment in the purchase and sale of a home has the fiduciary obligation to segregate and safeguard the buyer's down payment in a special bank account and may not commingle that down payment with the escrow agent's personal or business funds but may commingle it with other client funds in an IOLA account.

Section 11-2.3(b)(2) of the New York Estates Powers and Trusts Law (the Prudent Investor Act) provides: "A trustee shall exercise reasonable care, skill and caution to make and implement investment and management decisions as a prudent investor would for the entire portfolio, taking into account the purposes and terms and provisions of the governing instrument." Section 11-2.3(b)(3)(B) further describes this obligation:

> (3) The prudent investor standard requires a trustee:
>
> (B) to consider, to the extent relevant to the decision or action, the size of the portfolio, the nature and estimated duration of the fiduciary relationship, the liquidity and distribution requirements of the governing instrument, general economic conditions . . . .

Thus, the question under New York law seems to be what reasonable steps a prudent investor would take, given the size of the deposit, the length of time the escrow agent expects to hold it and other economic factors.[11]

Most attorney trust accounts are held for short amounts of time and do not involve investment decisions. The closest thing to an investment decision is whether the funds should be placed in an interest-bearing bank account. In a 1986 ethics opinion,[12] the New York State Bar Association Ethics Committee opined that when a lawyer is holding a contract deposit as escrow agent, and the amount is sufficient to warrant the administrative expense of being placed in a separate account, the lawyer should recommend that the contracting parties give instructions on whether the funds should be placed in an interest-bearing account. The Ethics Committee's advice to seek client instructions is consistent with the Prudent Investor Rule, which provides an exception to the prudent investor standard where the terms of the governing instrument provide.[13]

Before the adoption of the current Prudent Investor Rule, both the American Law Institute and many states had more prescriptive lists of permitted investments. Yet even then it was recognized that bank deposits (which are analogous to unsecured loans to the bank) were permitted. The FDIC's Trust Manual quotes the follow-

ing excerpt from ALI's Restatement (Second) Trust Law Section 227:

> Unsecured Loan. An unsecured loan of trust funds may be improper because imprudent. Such a loan, however, is not necessarily imprudent. Thus, a trustee can properly make a general deposit of trust money in a bank, as a method of safekeeping.
>
> A deposit in a bank at interest, as, for example, a deposit in a savings account, may be proper as a method of investing trust funds. Such a deposit was generally held to be prudent as an investment even before such deposits were at least partially insured by the Federal Deposit Insurance Corporation. In some States, statutes have permitted such deposits to the extent to which they are insured.

Is the Lawyer Responsible for the Solvency of the Depository Institution?

The banking institutions described in Rule 1.15(b) are regulated entities. They are required to maintain specified amounts of capital and to file periodic financial statements, and they are inspected periodically by federal or state regulators. Is it reasonable to rely on the regulators to determine whether to keep more than the insured amount in a particular bank?

In theory, uninsured depositors exercise some degree of due diligence over their depositaries, in order to reduce the risk of a default.[14] In practice, lawyer/escrow agents are not in a good position to predict whether their depository bank will be seized by the regulators. Banks, savings institutions and credit unions are required to file a Consolidated Report of Condition and Income (also known as a call report) on a quarterly basis. For banks with at least $1 billion in assets, this includes the estimated amount of uninsured deposits.[15] But even a bank that appears to be well-capitalized can quickly become unable to repay depositors in the midst of a bank run. Signature Bank had a common equity tier 1 risk-based capital ratio of 10.212% as of year-end 2022.[16] It was taken over on March 12, 2023, before it published its first quarter call report.[17] Both Silicon Valley Bank and Signature Bank had an unusually high level of uninsured deposits (94% at year-end 2022 in the case of SVB and 90% in the case of Signature). This made it more likely that, once rumors of the losses in the banks' long-term investments began, the uninsured depositors would start rushing for the doors – a classic bank run. But other banks with high levels of uninsured deposits did not fail.

One New York court case that considers whether an attorney is liable when the bank that holds the attorney escrow account is closed is *Bazinet v. Kluge*.[18] In *Bazinet*, an attorney acted as escrow agent in several real estate transactions involving escrow deposits over $1 million. Before the transactions could be consummated, the escrow bank was closed, and the FDIC was named as receiver. The plaintiff sued the lawyer for malpractice for not making sure that the deposit was covered by FDIC insurance and requested return of the down payment. The court dismissed the claim:

> To prevail in a legal malpractice action, the plaintiff must show, inter alia, that the attorney failed to exercise that degree of care, skill and diligence commonly possessed and exercised by a member of the legal profession . . . . There is no allegation that Reiser violated any statute or regulation, much less that he breached the escrow provisions of the contracts. There is no requirement imposed by law that an attorney-escrow agent place escrow funds in an account fully insured by the FDIC . . . , and there are no allegations that Reiser knew that CBC was in danger of closing. The proximate cause of Kluge's injury, if any, was CBC's unforeseen demise.

The case provides substantial comfort to lawyers. The degree of care, skill and diligence commonly possessed and exercised by a member of the legal profession does not include analysis of the solvency of banking institutions. But the case implies that, even if it normally would be reasonable for an attorney to rely on regulators to evaluate the solvency of a banking institution, the attorney's duty may change when the public media are filled with newspaper articles questioning the long-term solvency of the institution, with pictures of depositors lined up outside to make withdrawals.

Insurance Coverage of Attorney Trust and IOLA Accounts

It seems likely that a prudent investor would know whether his or her deposits were insured. Consequently, lawyers should understand how deposit insurance works, so that they can ensure that their attorney trust accounts qualify for the greatest possible amount of deposit insurance. Deposits at national and state banks, trust companies, savings banks and savings and loans are insured by the Federal Deposit Insurance Corporation.[19] Deposits at federal credit unions and the vast majority of state-chartered credit unions are insured by the National Credit Union Share Insurance Fund.[20] This article will focus on the FDIC rule.

The standard amount of FDIC insurance is $250,000 per depositor, per insured bank, for each category of legal ownership. Examples of ownership categories include single owner accounts (including an account established by a guardian under the Uniform Gifts to Minors Act), joint accounts (where each co-owner is insured up to $250,000), certain retirement accounts (such as an IRA), employee benefit plan accounts (such as a self-directed 401(k) or Keogh plan), trust accounts and business accounts.

To find out the amount of coverage on your various accounts, you can consult the FDIC's Electronic Deposit Insurance Estimator.[21]

All deposits that an accountholder has in the same ownership category at the same bank are added together and insured up to the standard insurance amount. Depositors may qualify for coverage over $250,000 if they have funds in different ownership categories and all FDIC requirements are met. An attorney trust account is a different ownership interest from the attorney's firm accounts and the attorney's personal accounts.

Several parts of the FDIC insurance rule give pass-through insurance treatment to separate or commingled deposit accounts, such as an attorney trust account for a single client or an IOLA account for a group of clients whose individual trust deposits are too small for a separate trust account. For example, Section 330.5(b) is called fiduciary relationships and includes relationships involving a trustee, agent, nominee, guardian, executor or custodian. Under this section, the FDIC will recognize a claim for insurance based on a fiduciary relationship as long as the relationship is expressly disclosed in the deposit account records of the insured depository institution where the deposit is held, or the title of the deposit account and the underlying deposit records sufficiently indicate the fiduciary relationship.

Section 330.5(b)(2) explains how to detail a fiduciary relationship. It says the details of the relationship and the interests of other parties (e.g., the beneficial owners) in the account must be ascertainable either from the deposit account records of the insured depository institution or from records maintained in good faith and in the regular course of business by the depositor or someone who maintains records for the depositor. Thus, if the account meets the titling and recordkeeping requirements of the FDIC rules, each beneficial owner with an interest in the attorney trust account will benefit from a separate $250,000 insurance limit. In fulfilling the attorney's fiduciary responsibilities with respect to attorney trust accounts, the attorney should make sure that the books and records maintained by or on behalf of the attorney or law firm meet the requirements for maximum insurance. Assuming that records detailing the interests of clients are maintained in the ordinary course of business in accordance with Rule 1.15, by the law firm or its agent, the beneficiaries of the trust account should qualify for pass-through insurance treatment.

Here is an example of how ownership categories work. Assume that, at her bank, attorney Jane Smith has the following accounts:

	Amount	Insured
In the name of Jane Smith (a single owner account)		
Jane Smith Checking account	$55,800	
Jane Smith Savings account	$117,000	
Law Firm of Jane Smith Operating Account	$100,000	
	$272,800	$250,000
Joint Accounts		
	$427,200	
Jane Smith Joint Owner		$213,600
Jeffrey Smith Joint Owner		$213,600
Retirement Accounts		
Jane Smith IRA	$585,000	$250,000
Trust Accounts		
Jane Smith UGM Peter Smith	$34,000	$34,000
Sarah Fisher Esq Attorney Trust Account (Owner Sarah Fisher as Escrow Agent for Jane Smith)	$400,000	$250,000
Jane Smith Esq. Attorney Trust (IOLA) Account	$300,000	$300,000
Total	$2,019,000	$1,511,200

Jane has, in her own name as a single owner, $272,800 in deposits. (The FDIC considers her law firm, which is a sole proprietorship under her own Social Security number and is not separately incorporated, to be a personal account rather than a business account, which would be a different ownership category.) She has a joint account with her husband, which is a separate ownership category in which each co-owner is deemed to own a pro rata share. Jane's IRA is a retirement account, which is also a separate ownership category, but the balance over $250,000 is uninsured. Finally, Jane has three trust accounts – an account in which she is custodian under the Uniform Gift to Minors Act for her son, an IOLA account for clients and third parties, none of which has enough to warrant a separate interest-bearing account, and an escrow account being held by her attorney in the same bank in connection with Jane's purchase of a new house. Since the son is the sole beneficiary of the UGM account, it is completely insured. If the proper records are maintained for the IOLA account and no beneficiary has over $250,000, the entire account will be insured. If the escrow deposit has Jane as the sole beneficiary, then it is insured only in the amount of $250,000. But if Jane and her husband are joint beneficiaries, then each is insured to $200,000.

What if the Trust Amounts for a Beneficiary Exceed the Insured Amount?

State and municipal depositors in New York have two ways to protect their deposits that don't work for private depositors. First, state and municipal depositors often require that a bank provide collateral for their deposits that exceed the amount of deposit insurance.[22] But banks are prohibited from collateralizing private deposits.[23] Deposit insurance is therefore the only practical way for a private depositor to mitigate the risk of bank insolvency.

State and municipal depositors in New York are also authorized by statute to use "reciprocal deposit" programs under which a designated depository bank (the depositor's "relationship institution") may "redeposit" the government entity's funds in one or more additional banking institutions (the "destination institutions"), in order to increase the amount of available deposit insurance.[24] For example, the largest reciprocal deposit program is run by a company called IntraFi Network LLC. Another program, called MaxSafe, is run by Wintrust Financial Corp.

A lawyer may use an insured cash sweep program for the lawyer's operating account. Nothing in the Rules of Professional Conduct prohibits or interferes with it. But there are several impediments to using such a program for an attorney trust account. The first is Rule 1.15's requirement that trust funds be deposited in a banking institution in New York unless "the lawyer has obtained the prior written approval of the person to whom such funds belong specifying the name and address of the office or branch of the banking institution where such funds are to be maintained." A second impediment is the requirement that the account be in the name of the lawyer and be called an attorney trust, escrow or special account. A third is that the depository banking institution must agree to provide the bounced check and overdraft notices required by 22 N.Y.C.R.R. Part 1300.

The major sweep programs do not have an easy way to limit deposits to New York banks. The MaxSafe program uses banks affiliated with Wintrust in Illinois and Indiana. The IntraFi Network rules allow a depositor to exclude particular insured depository institutions from eligibility to receive the depositor's funds, on an institution-by-institution basis, but don't enable the depositor to specify only banks headquartered or with a branch in a particular state. Excluding banks not approved by the Lawyers' Fund in New York would be difficult to do and would only work until IntraFi added another non-New York bank to the list of network banks.

What about obtaining client consent to keep trust funds outside New York? The ABA's Model Rule 1.15 does not require any particular disclosures in connection with obtaining consent. But New York's Rule 1.15 requires the lawyer to specify the name and address of the office or branch of the banking institution where the funds are to be maintained. That may make sense where the lawyer plans to keep the entire attorney trust account at a non-New York bank. It makes very little sense where the lawyer is spreading trust account funds among a variety of banking institutions and the interest of both lawyer and client is not in the location of the individual banking institutions but the fact that its deposits are FDIC-insured. Moreover, it would be extremely burdensome where a sweep program has numerous participating banks (IntraFi has about 3,000), and it is impossible to predict ahead of time which will actually receive redeposits. Could the lawyer describe the sweep program and request client consent to use it? Perhaps. But given that Rule 1.15 is the most strictly enforced Rule in the Rules of Professional Conduct,[25] it would be prudent to seek an amendment to the Rule.

The second impediment to using a cash sweep program is the requirement of Rule 1.15(a) that the funds be maintained "in the lawyer's own name." According to IntraFi, the deposit at the destination institution is denominated by a number. The identity of the depositor appears only in the books and records of the relationship institution and Bank of New York as sub-custodian.[26]

The third impediment to using cash sweep programs for attorney trust accounts is Rule 1.15's requirement that the non-New York bank agree to make bounced check and overdraft reports under 22 N.Y.C.R.R. Part 1300.

Again, this makes sense if the attorney trust account will be held by a single non-New York bank. It makes less sense if (i) the attorney's relationship bank will be placing the sweep deposits and will have sole authority to make and terminate placements and (ii) all deposits and withdrawals by the attorney will be made in the main account with the relationship bank, which has already agreed to make bounced check and overdraft reports under 22 N.Y.C.R.R. Part 1300.

If the requirements of Rule 1.15 make it impossible to use cash sweep programs to increase the amount of applicable FDIC insurance, and the amount involved is too large for the attorney to make arrangements himself or herself to spread it among New York banks, then the lawyer should not be responsible for the failure to ensure that all funds in the trust account are FDIC-insured. As things stand now, Rule 1.15 would have to be amended in order to permit the use of sweep programs. In my opinion, it would be desirable for the bar association to seek an amendment to Rule 1.15 so that lawyers with attorney trust accounts with amounts above the FDIC insurance limit can benefit from programs to sweep excess funds into insured deposits where the length of time the deposit is likely to be maintained warrants greater safety precautions.

Marjorie E. Gross, a retired bank regulatory lawyer, was the deputy superintendent and general counsel of the New York State Banking Department (now the Department of Financial Services) from 2007 to 2011. She was a managing director of JP Morgan Chase Bank and its predecessors from 1989 to 2004. She is also a member and former chair of the Committee on Professional Ethics of the New York State Bar Association.

Endnotes

1. *See* Joint Statement by Treasury, Federal Reserve and FDIC, Mar. 12, 2023, https://www.federalreserve.gov/newsevents/pressreleases/monetary20230312b.htm.

2. *See* N.Y. State 575 (1986) (The professional standards for lawyers with respect to clients' funds emphasize using one or more identifiable bank accounts without commingling funds belonging to the lawyer, maintaining complete records and rendering appropriate accounts to the client, and promptly paying such funds as requested by the client). Opinions of the Association's Ethics Committee are referred to herein as "N.Y. State [number]" and are available on the Association's website.

3. New York is one of a handful of states where advance payments of fees are assumed to be the property of the lawyer, subject to return to the extent they have not been earned when the representation ends, unless the retainer agreement provides otherwise. Advanced fee payments thus should not be placed in an attorney trust account. *See* N.Y. State 816 (2007), N.Y. State 570 (1985) (advance payment of legal fees need not be considered client funds).

4. When these rules first became effective, most banks were located in a single state. Nationwide interstate branching did not exist until the Riegle-Neal Interstate Banking and Branching Act became effective September 29, 1995.

5. *See* http://www.nylawfund.org/APPLST%20140.pdf.

6. The ABA Model Rule is to the same effect. Model Rules of Prof'l Conduct R. 1.15 ("Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person").

7. *See* N.Y. State 575 (1986), N.Y. State 532 (1981).

8. New York State Bar Association, *Report and Recommendations of the Committee on Standards of Attorney Conduct* (September 30, 2005) at p. 213.

9. *See also In re Wiseman*, 107 A.D.2d 161 (1st Dep't 1985) (attorney disbarred for converting to his own use funds held by him in escrow and for failing to provide records of his escrow account and his handling of client funds).

10. N.Y. Gen. Bus. Law § 778-a.

11. *See also* American Law Institute, Restatement Third, Trusts (Prudent Investor Rule) § § 227-229.

12. *See, e.g.,* N.Y. State 575 (1986), citing ABA Formal Opinion 348 (1982) (Client funds are generally commingled and left un-invested because of the administrative expense of establishing a separate account for each client and the impracticability of calculating and allocating interest on commingled funds. However, where the amount of funds held for a specific client and the expected holding period make it obvious that the interest which would be earned would exceed the lawyer's administrative costs and bank charges, the lawyer should consult the client and follow the client's instructions as to investing).

13. *See* EPTL 11-2.3(a); *see also* Restatement of the Law Governing Lawyers, Section 44, Comment *e* ("the terms of an agreement under which the lawyer receives property can modify the obligations imposed by this Section").

14. Conversely, if the insurance amount were substantially increased, it could encourage riskier behavior by banks and depositors, and potentially expose taxpayers to more losses in the event of a bank failure. *Options for Deposit Insurance*, FDIC, May 1, 2023, https://www.fdic.gov/analysis/options-deposit-insurance-reforms/index.html.

15. Call reports for banks and savings banks are available on the website of the Federal Financial Institutions Examination Council (FFIEC) Central Data Depository. Those for credit unions are available on the website of the Federal Credit Union Association.

16. Signature Bank Press Release, March 9, 2023. The bank had investment grade long- and short-term credit ratings and claimed a strong liquidity position. The New York Department of Financial Services took possession of the bank on March 12, 2023.

17. *See* New York Department of Financial Services, Press Release, March 12, 2023, https://www.dfs.ny.gov/reports_and_publications/press_releases/pr20230312.

18. *See Bazinet v. Kluge*, 14 A.D.3d 324 (1st Dep't 2005).

19. *See* 12 C.F.R. § Part 330 (FDIC rule on recognition of deposit ownership for insurance purposes).

20. *See* 12 C.F.R. § 745; National Credit Union Administration, *How Your Accounts are Federally Insured.*

21. See https://edie.fdic.gov. *See also Your Insured Deposits,* FDIC, https://www.fdic.gov/resources/deposit-insurance/brochures/insured-deposits/index.html. This pamphlet contains examples of ownership categories and how the FDIC rules would apply to various accounts in these categories.

22. *See, e.g.*, N.Y. State Fin. Law § 105 (requiring a surety bond or specified collateral), N.Y. State Fin. Law § 97-T (requiring that deposits of the Lawyers' Fund for Client Protection be secured by obligations of the

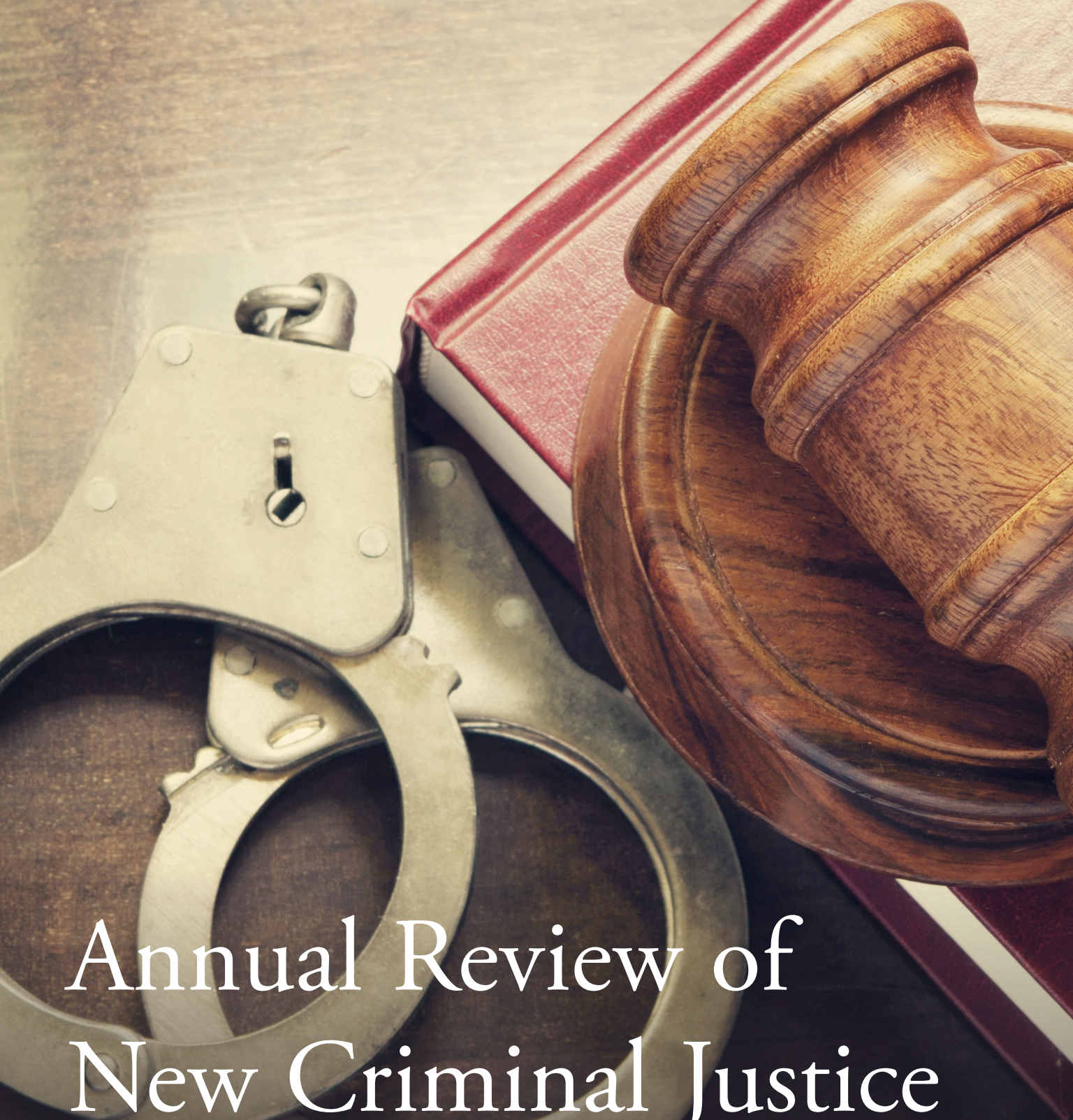
United States or of the State of New York having a market value equal to the amount of such deposits and authorizing banks and trust companies to give security for such deposits), N.Y. Gen. Mun. Law Section 10(3) (all public deposits in excess of the amount insured under the provisions of the Federal Deposit Insurance Act must be secured in accordance with this subdivision).

23. *See Texas & Pacific Railway Co. v. Pottorff*, 291 U.S. 245 (1934). (A national bank has no power to pledge its assets to secure a private deposit, as opposed to a governmental deposit. To permit the pledge would be inconsistent with many provisions of the National Bank Act, which are designed to ensure, in case of disaster, uniformity in the treatment of depositors and a ratable distribution of assets).

24. *See* N.Y. State Fin. Law § 106(D); N.Y. Gen. Mun. Law § 10(2)(a)(ii); N.Y. Pub. Auth. Law § 2927; Office of State Comptroller Memorandum on Deposit Placement Programs, Nov. 2012, https://www.osc.state.ny.us/files/local-government/publications/pdf/depositplacementprograms.pdf. The term "banking institution" in these statutes is as defined in Section 9-r of the New York Banking Law, which includes a bank, trust company, savings bank, savings and loan association or branch of a foreign banking corporation, as long as (1) it is chartered under the laws of New York or any other state or of the United States and (2) its deposits are insured by the FDIC.

25. *See* Simon and Hyland, Simon's New York Rules of Professional Conduct Annotated § 1.15.1 ("Even minor or unintentional infractions of the detailed provisions of Rule 1.15 are met with swift and often harsh discipline").

26. Email correspondence, dated Aug. 16, 2023, to Marjorie E. Gross from Shannon Prendergast, managing director, New York, New Jersey & Delaware, IntraFi.



Annual Review of New Criminal Justice Legislation

By Barry Kamins

This article contains the annual review of new legislation amending the Penal Law (PL), Criminal Procedure Law (CPL) and related statutes. The discussion that follows will highlight key provisions of the new laws and, as such, the reader should review the legislation for specific details. In some instances, where indicated, legislation enacted by both houses is awaiting the governor's signature and, of course, the reader should check to determine whether the governor has signed or vetoed the bill.

For the third time since 2019, New York's bail laws have been amended.[1] At the outset, on Jan. 1, 2020, New York implemented a new bail statute that was transformative, creating a new landscape for release decisions following an arrest. In response to criticism of the initial statute, however, the Legislature later enacted two series of amendments that attempted to address those concerns: an expansion of both the number of qualifying offenses and the opportunity to impose additional non-monetary conditions of release.

Bail Statutes

This year, the Legislature did not propose amendments to the bail statute, but Governor Hochul did, out of her stated concern for public safety. The amendments, however, do not mandate more restrictive bail determinations than were authorized under the prior law, nor do they add any additional qualifying offenses. And, a defendant can still raise, of course, the constitutional argument that bail cannot be set in an excessive amount to prevent flight.[2] The amendments also retain the essential purpose of bail – to ensure the return of a defendant to court. The amendments, however, do change the overarching standard that judges have been required to utilize in making bail determinations.

Prior to the latest amendment, unless a court determined that an individual posed a risk of flight to avoid prosecution, the court was required to "select the least restrictive alternative and condition or conditions that will reasonably assure the [defendant's] return to court" (CPL Section 510.10(1)). Even when a defendant was charged with a bail-eligible "qualifying offense," a court was required to seek the "least restrictive alternative" available. That standard has now been removed from all sections of the bail statutes, even though there was no evidence that the standard had confused or restricted judges or forced them to allow pretrial release where the setting of bail would instead be appropriate.

In its place, the Legislature has mandated that a court "shall make an individualized determination as to whether a [defendant] poses a risk of flight to avoid prosecution, consider the kind and degree of control or restriction necessary to reasonably assure the [defendant's] return to court, and select a securing order consistent with its determination under this subdivision" (CPL Section 510.10(1)). Notably, this language is now included in the general rule applying to securing orders, the rule governing local criminal court securing orders (CPL Section 530.20(1)(a)), and the rule governing securing orders in superior courts (CPL Section 530.40(3)).

Courts should be aware, however, that the "least restrictive" standard has been retained for parole warrant hearings where a court must determine whether a parolee should be detained in jail pending adjudication of a non-technical parole violation. Unless a court finds that a parolee must be detained pending a preliminary or final revocation hearing, a court must still release the parolee on the "least restrictive non-monetary conditions" (Exec. Law Section 250-i(3)).

While the new amendment to the bail law removes the list of usual factors courts must consider in setting securing orders (the defendant's history, prior convictions, etc.) from the sections dealing with local and superior court securing orders, the list is included by reference in the section providing the general rule for securing orders (CPL Section 510.10(1)).

The latest amendment to the bail statute was, in part, a reaction to the governor's concern that an increasing number of individuals were being arrested after having been released for committing an earlier crime. In the initial 2019 amendment to the bail laws, the Legislature addressed a court's authority to modify or revoke a defendant's release conditions if he or she is rearrested. The authority to fix bail when a defendant had been at liberty for a non-qualifying offense was only available if a defendant was found, after a hearing, to have met certain criteria under CPL Section 530.60. Upon revocation of a securing order, however, a court was still required to select the least restrictive alternative available to ensure the defendant's appearance in court. That language has now been deleted and, under the latest amendment, courts appear to have more discretion in fashioning a new securing order for the original arrest.

Specifically, the new legislation now provides that, in issuing a new securing order on the first arrest, a court "shall consider the kind and degree of control or restriction necessary to reasonably assure the [defendant's] return to court and compliance with court conditions" (CPL Section 530.60(2)(d)(iii)). In making this determination, courts must consider the "nature and extent of the [defendant's] noncompliance with previously ordered non-monetary conditions of the securing order subject to revocation" (*id.*). Finally, in issuing a new securing order, a court can now add non-monetary conditions in addition to fixing bail (CPL Section 530.60(2)(d)(ii)).

The new law also provides that when an individual is arrested for a non-qualifying crime, courts will continue to have the authority to set non-monetary conditions, although those conditions will no longer need to be con-

sistent with the "least restrictive alternative rule." Finally, when setting a non-monetary condition in combination with bail, a court will no longer need to explain on the record that no other condition will suffice to reasonably assure the defendant's return to court (CPL Section 500.10(3-a)(d)).

In addition, the Legislature has also expanded the types of treatment that can be required as a condition of release. Courts can now require a defendant to receive "mental health and chemical dependence treatment" or require a defendant to attend a "crisis stabilization center" (CPL Section 500.10(3-a)(f)). The latter is operated under the authority of the Office of Mental Health and the Office of Addiction Services and Support. The center can provide immediate treatment for individuals experiencing a behavioral health crisis and divert them from unnecessary emergency room visits. Last year, Governor Hochul announced funding awards of up to $75 million to create nine new centers across the state that will be open 24/7.

Clean Slate Bill

Two substantive pieces of legislation that would affect large numbers of New York citizens, if signed into law. The first bill, known as the Clean Slate Bill, would provide for the automatic sealing of most convictions within certain time periods, depending on the class of crime.[3] If enacted, New York would become the 11th state to adopt "clean slate" legislation.

The purpose of the bill is explained in its introductory paragraph, i.e., to eliminate discrimination of individuals who are seeking employment based on past convictions. The bill seeks to accomplish this by sealing, from public access, the conviction records of individuals for certain crimes only after the individual has satisfied his sentence and a required period of time has passed.

Under the proposal, a felony conviction would be automatically sealed after eight years subject to certain time restrictions mentioned below. Certain felonies, however, would be excluded: all Class A felonies (other than Class A felonies as defined in Article 220 of the Penal Law) and a conviction for a sex offense under the Penal Law, or a sexually violent offense as that is defined under Section 168-a of the Correction Law.

A felony conviction would be eligible for sealing if eight years have passed from the date an individual was released from incarceration for the sentence imposed or from the imposition of sentence if there was no sentence of incarceration. A conviction is not eligible for sealing, however, while an individual is on probation or parole for the conviction that is eligible for sealing. The reader should also review the amendment for other disqualifying factors, e.g., subsequent criminal charges pending in this state, a subsequent conviction for a crime before the conviction is sealed and certain subsequent felony charges or convictions pending in another jurisdiction.

A misdemeanor conviction can be automatically sealed if at least three years have passed from the defendant's release from incarceration or the imposition of sentence if there was no sentence of incarceration. A conviction for Impaired Driving (VTL 1192(1)) is also eligible for sealing after three years.

Criminal records that are sealed pursuant to this statute will still be accessible to several agencies. For example, records would be available to state and federal law enforcement agencies, agencies that provide background checks for individuals who work with children and individuals with disabilities, and agencies that provide background checks for firearm permits and for those who wish to work in the area of law enforcement, financial services and education, etc. The statute also creates a cause of action against any person who improperly discloses information about the conviction once it is sealed.

The second piece of substantive legislation that was enacted is a bill that dramatically expands the ability to vacate convictions under Article 440 of the Criminal Procedure Law.[4] As the bill sponsor's memorandum indicates, the goal of the legislation is a "fundamental overhaul of our state's post-judgment motion law, article 440 . . ." in order to increase protection against wrongful convictions. While the goal of the bill is laudable, the legislation repeals a number of procedural provisions that exist to regulate meritless applications.

One of the most notable amendments to the statute provides defendants who have pled guilty with the ability to vacate their convictions. For example, a defendant who pleads guilty, but who is actually innocent, will now have the ability to set aside his or her conviction, abrogating the Court of Appeals decision in *People v. Tiger*.[5] Under the statute, an actually (or factually) innocent individual must prove "by a preponderance of the evidence that no reasonable jury of the [defendant's] peers would have found the defendant guilty beyond a reasonable doubt" (CPL Section 440.10(h)).[6]

Defendants who plead guilty will have additional grounds under which they can seek relief. When a defendant pleads guilty and the defendant does so in reliance upon information provided by the prosecutor that was false, the defendant can move to set aside the conviction (CPL Section 440.10(1)(c)). In addition, a defendant who pleads guilty, but who did not move to suppress evidence that was unlawfully obtained, will still be able to move to vacate the conviction (CPL Section 440.10(1)(d)). Where exculpatory forensic evidence is uncovered after a conviction, a defendant who has pled guilty can now vacate the conviction where the court determines that there is a reasonable probability that the plea offer would

have been more favorable or the defendant would have rejected the plea offer (CPL Section 440.10(1)(g-1)).

Regarding newly discovered evidence, the legislation would eliminate the current requirement that a defendant must establish that such evidence could not have been obtained with due diligence prior to trial. And defendants who plead guilty will now be able to move to vacate a conviction when there is a reasonable probability that had such evidence been discovered prior to a plea agreement, the guilty plea would have been more favorable to the defendant (CPL Section 440.10(10(g)).

The bill repeals several procedural bars (both mandatory and discretionary) that had been in place to limit the number of otherwise meritless applications. For example, it would permit a trial court to reverse a conviction even though the same issue had been denied by an appellate court or when a defendant failed to raise an issue on direct appeal, even though he or she could have done so based on the record.

In addition, a court may now grant a hearing even though a claim is made solely by the defendant and is unsupported by any affidavit or evidence, as long as the claim is not contradicted by court records and there is a reasonable possibility that such allegation is true. Finally, the new statute provides that, upon request of the defendant or his or her counsel, a court must order the prosecution to "make available a copy of its file of the case, including any physical evidence in the People's possession and grand jury minutes" (CPL Section 440.30(2)(a)).

Finally, the legislation would have an impact on the workload of the appellate courts. Currently, after a denial of a motion pursuant to CPL Section 440, a defendant may seek leave to appeal to the Appellate Division. The bill provides that a defendant would have the automatic right to appeal a denial in each case (CPL Section 450.10(4)).

Expanding Definition of Rape and 'Revenge Porn'

Each year the Legislature enacts new crimes and expands the definition of others, and this year was no exception. The crime of rape has been broadened to include nonconsensual vaginal sexual conduct as well as nonconsensual oral and anal sexual contact; the latter conduct had previously been prosecuted under the "criminal sex act" statute that has now been repealed. By broadening this definition, the Legislature has provided increased protection to men and trans women who were previously unable to allege that they were victims of rape. In addition, the definition of "sexual intercourse" has been redefined as "vaginal sexual contact."[7]

Four years ago, the Legislature enacted legislation to address the problem of "revenge porn," where an individual disseminates or publicizes an intimate image of another person without that person's consent. The crime – unlawful dissemination or publication of an intimate image – has now been broadened to address the utilization of artificial intelligence-generated technology to make images of fake events, commonly known as "deep fakes."[8]

This technology allows an individual to create extremely realistic videos, often pornographic, placing the face of one individual on the body of another or using the technique of lip syncing. This fictitious, sexually explicit imagery disproportionately targets women and children, and it has been reported that the use of this technology has increased dramatically over the last three years.

Gun Rights

Last year the Legislature enacted several bills to comply with the Supreme Court's decision in *New York State Rifle and Pistol Assn. Inc. v. Bruen*.[9] In amending various weapon laws, the Legislature created a comprehensive list of "sensitive locations" in which the possession of a firearm, rifle and shotgun constitutes an E felony. This year the law was amended to exclude from prosecution certain activities in summer camps and to add additional classes of individuals who are permitted to carry firearms at these locations.[10]

Safer Roads and Workplaces

In reaction to an increase in fatalities caused by unlicensed drivers, the Legislature amended the definition of aggravated unlicensed operation of a motor vehicle, a Class E felony. It lowered the required threshold from 10 license suspensions on 10 separate dates to five suspensions on five separate dates. In addition, if the individual being arrested for this crime is "evading lawful arrest," the penalty can be a maximum of a two-year definite sentence.[11]

Finally, in an attempt to improve safer working environments, the Legislature has expanded the definition of "employee" in order to make corporations and employers more responsible for workplace deaths and serious injuries in the construction industry.[12] In addition, prosecutors can now seek stronger penalties against employers who steal wages from workers.[13]

Procedural Changes

A number of procedural changes were enacted in the last legislative session. One bill that will have a significant impact on a defendant's right to appellate review permits a defendant to appeal a denial of a motion to suppress evidence, despite the fact that he or she has executed a valid waiver of appeal.[14] This may encourage prosecutors to offer more favorable plea bargains prior to a suppression hearing.

In *People v. Slade*,[15] the New York Court of Appeals held that, in cases where a complainant or witness has limited English proficiency, a certificate of translation is not required to convert a complaint into an information. In response, the Legislature has required that law enforcement officials use qualified translators who can translate the deponent's allegations into English. Second, the translators must submit affidavits, affirming what they did along with their qualifications.[16]

Last year, Governor Hochul vetoed a bill that would have required courts to warn non-citizen defendants during a guilty plea allocution that "[i]f you are not a citizen of the United States you *may* become deportable, ineligible for naturalization or inadmissible to the United States based on a conviction by plea or verdict" (emphasis added). In the governor's veto memorandum, she rejected the bill because the "hyper-technical requirements of this legislation would result in the vacatur of otherwise lawful convictions where defendants were fully aware of the immigration consequences of their actions" (Veto #94, 2022).

This year, the same legislation has been passed without any apparent amendments to the bill. One potential defect, not mentioned in the governor's veto memorandum, is the one-sentence warning mentioned above. While a court would only be required to warn a non-citizen that he or she may be deported based upon a conviction, certain convictions mandate deportation under federal immigration law. Courts have held that such advice, if given by defense counsel, would constitute the ineffective assistance of counsel.[17]

Health Care and Substance Abuse

The Legislature has enacted several bills that will provide enhanced protection for certain classes of health care providers. One provision builds upon the abortion and reproductive health services law signed in 2022 by explicitly adding protections for telehealth services and prohibiting arrests in New York for those who provide these services.[18]

A second bill provides protection for individuals who come to New York State seeking "gender-affirming care, i.e., any type of care that affirms their gender identity or gender expression." This legislation will make New York a haven for transgender individuals and their families whose rights are under attack in their home state and elsewhere. It prevents any arrests in New York for those who provide such care and prohibits law enforcement from cooperating with other states' investigations regarding individuals who came to New York for that purpose.[19]

The Legislature has enacted a procedural change that would permit defendants in substance abuse treatment programs to opt out of any religious element of a program.[20] Another provision would permit the chief administrative judge to require judges to receive at least three hours of training on "bail recognizance and commitment procedures and standards."[21]

An amendment would correct a typographical error in the statute that permits a vacatur or reduction of former marijuana offenses. As a result of a scrivener's error, it was unclear whether individuals who were previously convicted of lower-level offenses could obtain relief without demonstrating "severe and ongoing consequences" as a result of their conviction. This amendment eliminates that requirement.[22]

Finally, the Legislature has prohibited the issuance of a desk appearance ticket when a police officer is required to arrest a person for a domestic violence crime pursuant to CPL Section140.10(4).[23]

Barry Kamins is a partner in the law firm of Aidala, Bertuna, & Kamins, where his practice focuses primarily on appellate matters and professional discipline. Prior to joining the firm, he was the administrative judge of the New York City Criminal Court and chief of policy and planning for the New York court system. Judge Kamins is an adjunct professor at Brooklyn Law School, where he teaches New York criminal practice. He is the author of "New York Search and Seizure" and writes the Criminal Law and Practice column for the New York Law Journal.

Endnotes

1. L. 2023 N.Y. Laws, Ch. 56 (amending CPL Articles 500, 510 and 530)), eff. June 2, 2023.
2. *U.S. v. Salerno*, 481 U.S. 739 (1987).
3. S 7551, awaiting the signature of the governor.
4. S 7548, awaiting the signature of the governor.
5. 32 N.Y.3d 91 (2018).
6. *People v. Chao*, 217 A.D.3d 277 (2d Dep't 2023).
7. A 3340, awaiting the signature of the governor.
8. S 1042, awaiting the signature of the governor.
9. 142 S. Ct. 211 (2022).
10. L. 2023 N.Y. Laws, Ch. 5 (amending PL § 265.01(e)), eff. May 3, 2023.
11. A 3983, awaiting the signature of the governor.
12. L 2023 N.Y. Laws, Ch. 61 (adding PL § 10.00(22)), eff. June 1, 2023.
13. L. 2023, N.Y. Laws, Ch. 353 (adding PL § 155.05(f)), eff. September 6, 2023.
14. A 152, awaiting the signature of the governor.
15. 31 N.Y.3d 127 (2021).
16. A 129, awaiting the signature of the governor.
17. *People v. Doumbia*, 153 A.D.3d 1139 (1st Dep't 2017); A 3057, awaiting the signature of the governor.
18. L. 2023 N.Y. Laws, Ch. 138 (amending CPL § 570.17 and § 740.10(3-a), eff. June 23, 2023; 2023 N.Y. Laws, Ch. 101 (amending CPL § 570.17 and PL § 140.10(3-a)), eff. June 13, 2022.
19. L. 2023 N.Y. Laws, Ch 143 (amending CPL § 570.19 and PL §140.10(3-b)), eff. June 23, 2023.
20. A 5074, awaiting the signature of the governor.
21. A 4899, awaiting the signature of the governor.
22. S 7505, awaiting the signature of the governor; *People v. Graubard*, 214 A.D.3d 143 (2d Dep't 2023).
23. L. 2023 N.Y. Laws, Ch. 56 (amending CPL § 140.20(2) and CPL § 150.20(1)), eff. May 3, 2023.

Excellence in Mandated Representation: Revised Indigent Legal Services Appellate Standards

By Cynthia Feathers and Tammy Feman

What does it mean to be a quality appellate attorney? What are essential elements of appellate representation? Should there be a difference in the caliber of representation for clients who retain counsel and those who are entitled to assigned counsel – so-called "mandated representation" or "public defense" for criminal and family cases? Those were among the questions the New York State Office of Indigent Legal Services and the ILS Board[1] confronted when revisiting the Appellate Standards and Best Practices that ILS originally established in January 2015. This review was undertaken by a working group of appellate leaders from the Appellate Defender Council, an invaluable advisory panel serving ILS.[2] In October 2023, ILS issued significantly revised Standards after their review and approval by the ILS Board.[3]

There were compelling reasons to reconsider and overhaul the standards. In the last eight years, the world has changed in many ways relevant to mandated appellate representation. Increased attention on racial justice has heightened awareness of systemic inequities in the criminal and child welfare systems[4] – and of legal arguments that should be advanced based on unfair treatment of public defense clients.[5] There is a greater awareness of the importance of using inclusive language that honors people's dignity and humanity. Further, many criminal and family laws have changed since 2015, as have Appellate Division rules governing appellate practice.

These new standards reflect core elements of effective advocacy that transcend mandated appellate representation. This is not surprising, given that the New York Rules of Professional Conduct provide a foundation for the standards and that the same expectations regarding ethics and excellence should apply to private and public appellate representation. All appellate counsel – whether providing private or public defense – must have proper qualifications, training and support, and they should not accept a case unless possessing the skill, time and resources needed to provide competent representation. Throughout the appeal process, the retained or assigned attorney should communicate with the client and seize every opportunity to persuade the court of the client's position, which may include filing a reply brief when representing an appellant and orally arguing a case.

Funding Increases and Unique Challenges

A core value reflected in the original and revised standards is that persons entitled to assigned counsel should receive high quality representation. That requires robust government funding. Until recent times, such funding had been lacking in our county-based system of public defense.[6] Thus, in 2015, some of the standards were more aspirational than achievable. Since the initial standards were published, however, New York State has appropriated substantial funding for public defense, which puts the declared goals within reach.[7] More important, however, the standards are not premised on what clients and counsel should settle for in New York, but rather on what government funding must be provided to make the vision of effective, constitutional representation in criminal and family appellate cases a reality.

The new standards do more than set forth broad precepts in black letter declarations. In commentaries and footnotes, they explore some of the unique challenges and responsibilities of appellate counsel in public defense cases; offer foundational support for the principles enunciated; and, where practicable, provide links to relevant resources and support. One fundamental aspect of mandated representation is the high stakes for clients. These matters often impact the liberty of convicted persons and the integrity of families facing government intervention. Another element of mandated cases is that clients are often from marginalized populations, including poor people, Black and brown people, LGBTIQA+ people, people with a history of mental health issues and others. Our clients have typically faced discrimination and bias throughout their lives, including in their experiences with the criminal legal system, the child welfare system or both.

The Revised Appellate Standards

The Appellate Standards are divided into three parts:

A. Qualifications, Training, and Oversight of Counsel (Standards 1-4).

B. Duties of Counsel (Standards 5-19).

C. Special Ethical Considerations (Standards 21-26).

Some standards did not appreciably change (Standards 2, 3, 7, 13, and 16 on selection process, ongoing evaluation, initial steps, reply brief and relief after state remedies). However, there were major revisions to most standards, particularly the commentaries following the black letter statements, as described below.

Qualifications, Training and Oversight

Revised Standard 1 on competence greatly expands on the original standard by citing Court of Appeals authority describing meaningful appellate advocacy and by adding necessary elements of competence: proficiency in technology; consultation with an experienced attorney by new attorneys; cultural consciousness; and advocacy based on the impact of race and trauma on the client and the case.[8]

New Standard 4 regarding brief review squarely confronts how private attorneys serving on assigned counsel program (ACP) panels can obtain review of their briefs. The prior appellate standard advocated review by another panel attorney – at a time when no mechanism existed

for such service. The revised standard declares that consideration of a brief by a generous colleague on a pro bono basis is inadequate to meet this important standard and that government funders must cover the cost of such services. Now many counties have managed ACPs with structures in place for mentors, supervising attorneys and other qualified attorneys who may be called upon to serve as reviewers.

Duties of Counsel: Caseloads, Conflicts, Meetings, Risks, Briefs

Revised Standard 5 on accepting cases elaborates on the qualifications needed to accept a given case, which include staying abreast of evolving laws and understanding the potential impact of convictions on noncitizens and the relief that may be available via postconviction motions. Moreover, the new guideline calls upon parent defense counsel to have a firm grasp on provisions of Family Court Act Article 11 governing appeals and on relevant sections of the CPLR impacting family cases. This standard also underscores the importance of appellate attorneys controlling their caseload to ensure that clients do not unnecessarily endure inordinate delays, which could mean years of wrongful imprisonment or separation from a child.

In a similar vein, revised Standard 6 broadens the scope of potential conflicts of interest to encompass such factors as insufficient funding or excessive caseloads or both, as well as the financial incentive that may exist for some attorneys to give preference to retained appellate clients over assigned clients.

The often arduous task of obtaining a complete record on appeal is addressed in Standard 8. Regarding the content and form of the record, the revised commentary advises appellate counsel to consult the Statewide Practice Rules of the Appellate Division, which did not exist when the original standards were issued. Other new elements include a discussion of the availability and impact of presentence reports in criminal appeals and links to resources for appeals under the Sex Offender Registration Act.

Revised Standard 9 as to client meetings provides a deeper discussion on this central topic. An in-person visit is still advocated for every client to build a meaningful attorney-client relationship. The commentary explains that, since the client does not have any agency in choosing counsel and may harbor mistrust toward "the system," there is an even greater need for in-person meetings in assigned cases than in other cases to overcome understandable skepticism. This standard does, however, convey some flexibility by noting that counsel should use the mode of communication best suited to meet the client's needs. While the old standard acknowledged that resources to cover the costs of traveling to visit incarcerated clients were not provided to appellate counsel, the new standard asserts that such costs should be covered. This guideline also advises that, if the client is not proficient in English, counsel should arrange for an interpreter for in-person meetings and a translator for written materials, and details requirements for effective use of such services.

New Standard 10 on risks expands on prior guidance about a core "be careful what your wish for" danger of appellate practice as to judgments based on guilty pleas. Appellate counsel must clearly explain risks presented where the sought-after vacatur of a guilty plea could result in reinstatement of all charges and, ultimately, a lengthier sentence. Among other things, the revised guideline stresses that counsel must "meet the clients where they are" by explaining risks in plain language. Further, if the client is not proficient in English, the risk letter must be translated verbatim and should be explained in a follow-up visit. Signed risks letters are no longer characterized as the only way of ensuring that the client understands the risks, but instead as one reliable means of achieving that goal.

Distinct risks to noncitizens are signaled in the current standard. Further, potential dangers of family court appeals are explained. Many appealable orders, whether intermediate or final, become moot before the appellate process plays out. Counsel must be savvy about these dynamics and carefully consider how litigation may or may not bring a desired outcome. This could involve invocation of an exception to the mootness doctrine or the pursuit of a modification of the subject order, rather than a direct appeal, the commentary explains.

New Standard 11 on timely filing of appeals provides guidance on factors to be considered in prioritizing cases, including whether the client is incarcerated and whether children have been placed outside the family. As to family court appeals, the revised commentary addresses the availability of statutory preferences and motions for expedited review.

Revised Standard 12 regarding writing the brief offers far more detailed guidance than the original standard. Some new key insights offered are that issues must be identified before the fact section is written and that storytelling is part of persuasive advocacy. The impact on family appeals of new facts going to parental fitness are explained in the new commentary. As to argument sections of criminal briefs, the revised standard describes the importance of preserving federal issues for habeas corpus review. For all briefs, counsel's ethical power to test legal boundaries is now addressed, as is the importance of scrutinizing the record for possible issues of racial or gender bias. This new standard also advises that, after the facts and argument sections have been drafted, counsel should seek to employ a theme to tie together all elements of the brief. Finally, where English is not the client's best language

and the client is not proficient in English, the revised commentary notes the advisability of counsel having an in-person visit with the client where an interpreter is present to convey the essence of the brief.

Further Duties of Counsel: Arguments, Leave To Appeal, Noncitizens, Sentences, Postconviction

Current Standard 14 on oral argument provides a more penetrating discussion about why oral argument matters, including the conviction conveyed by counsel's presence and, even where the client does not prevail, the chance to mitigate the damage of an adverse decision. Once again, the applicable rules of the statewide practice rules are cited, as is counsel's duty to report to the client about the oral argument. In the revised commentary, counsel is provided with helpful guidance about how to prepare for, and conduct, oral arguments.

New Standard 15 on leave applications includes practical guidance not presented in the original commentary, by citing relevant statutes and appellate court rules as to the content and deadlines for criminal applications versus family appeal motions and as to counsel's ethical duty to seek permission to appeal to the Court of Appeals. Also, a critical distinction is made between criminal cases where a substantive leave letter is required and where such submission is not warranted. Finally, the new standard suggests that counsel should seek expert assistance in drafting leave applications and offers links to relevant resources about such applications.

Revised Standard 17 on representing non-U.S. citizens provides significant new guidance. Whereas the prior standard advised that counsel must pursue an ineffective assistance claim where defective immigration advice was rendered, the current standard notes that such a claim should be pursued only "where appropriate" – e.g., when the requisite showing of prejudice can be made. Given the complex nature of immigration law impacting criminal and family law cases, the new commentary emphasizes the importance of receiving expert advice from specialty counsel with expertise in the intersection of immigration, criminal and family law. The standard reveals the availability of ILS Regional Immigration Assistance Centers to obtain such expert assistance for free. In addition, the new commentary provides a critical update on relevant law in discussing when a state court order reducing a sentence may be given effect by an immigration court.

New Standard 18 regarding comprehensive client-centered representation provides links to several potential resources to aid counsel and the client in pursuing matters outside the scope of the appeal assignment, such as parole release and reentry.

Current Standard 19 on sentencing issues covers not only counsel's duty to explore possibly illegal sentences but also the imperative to argue, where appropriate, that the sentence was harsh and excessive. The revised commentary sets forth the broad plenary power of the intermediate appellate court to modify an unduly harsh or severe sentence and notes that counsel should address not only the period of incarceration but also of post-release supervision. Also covered are the risks presented by some sentencing arguments, as well as the need to attack New York's ubiquitous waivers of the right to appeal before the mid-level appeals court can exercise its discretionary authority to consider whether more leniency may be warranted.

A sea change in postconviction representation is captured in Standard 20 on CPL Article 440 motions. CPL 440.10 motions seek to set aside convictions based on facts outside the record, while CPL 440.20 motions are filed to set aside illegal sentences. The original commentary indicated that counties should provide funding for appellate counsel to pursue these underutilized motions. An insufficiently heralded change in the law on "440 motions" is explained in the current standard. Without prior court approval, appellate counsel now have the authority to investigate and file CPL 440.10 motions, which are the primary vehicle in New York for setting aside wrongful convictions. Such power – and duty – also applies to motions challenging illegal sentences.

Further, there is an expanded discussion of various bases for relief under CPL 440.10 and of the interplay between direct appeal and postconviction motions as vehicles to attack an illegal sentence. In the family appeals arena, the closest analogue to 440 motions is the underutilized CPLR 5015, which is available to seek vacatur of certain orders appealed from based on default or new evidence or fraud or pursuant to the trial court's inherent discretionary power in the interest of substantial justice, as the revised guideline indicates.

Special Ethical Considerations: Communication, Issues, Diminished Capacity, Case File, Coram Nobis

New Standard 21 on client communication is stronger than the prior version in proclaiming counsel's duty to be proactive in overcoming impediments to meaningful communication. Moreover, the revised commentary now observes that counsel should determine and honor how the client would like to be addressed.

Revised Standard 22 on issue selection continues to emphasize the importance of an attorney-client dialogue about the issues to raise and counsel's duty to help as to pro se supplemental briefs where there is ultimately an attorney-client disagreement about issues. However, the new standard emphatically declares that the strategic decision about arguments to make on appeal belongs to

ILS Appellate Standards and Best Practices: Summary of Key Revisions

1. Competence – Requires that attorneys possess technological and cultural competence.
2. Selection Process – No major revisions.
3. Ongoing Evaluation – No major revisions.
4. Brief Review – Discusses resources now available for brief review.
5. Accepting Cases – Explores evolving legal knowledge needed to accept appeals.
6. Conflicts of Interest – Addresses conflicts flowing from insufficient funding or excessive caseloads.
7. Initial Steps – No major revisions.
8. The Record – Cites the Statewide Practice Rules of the Appellate Division and notes the role of the presentence report in criminal cases.
9. Client Meetings – Explores why in-person meetings, including with incarcerated clients, are important; the requirement of reimbursing travel costs; and the need for interpreters or translators in some cases.
10. Risks – Discusses in greater detail how and why counsel must explain appeal risks to clients in both criminal and family cases.
11. Timely Filing – Provides guidance on factors to consider in prioritizing cases and addresses the availability of statutory preferences and motions for expedited review in family appeals.
12. The Brief – Offers expanded guidance on how to write and structure the brief to tell a story, persuade the court, preserve federal issues and push the limits of the law.
13. Reply Brief – No major revisions.
14. Oral Argument – Explains why oral argument matters, cites the Statewide Practice Rules and offers guidance on how to prepare for argument.
15. Leave Applications – Provides practical guidance on relevant laws and rules dictating the content and deadlines for criminal leave application and family motions for permission to appeal to the Court of Appeals.
16. Relief After State Remedies – No major revisions.
17. Representing Noncitizens – Provides more nuanced advice on when to argue that legal advice on immigration consequences was unconstitutionally ineffective; stresses the importance of obtaining expert guidance and updates the law on the impact of sentence reductions in immigration court.
18. Comprehensive Representation – Provides links to resources to help the client in matters such as parole release and reentry.
19. Sentencing – Addresses counsel's duty to not only determine if the sentence is illegal but also if there is a viable argument that the punishment was harsh and excessive, and notes the threshold need to challenge waivers of appeal in most guilty plea cases.
20. CPL Article 440 Motions – Discusses a critical change in the law allowing counsel assigned to the direct appeal to make motions in the trial court to set aside judgments of conviction based on facts outside the record, as well as motions to set aside illegal sentences.
21. Client Communications – Asserts that counsel must be proactive in overcoming impediments to communication throughout the appeal process and must be sensitive and respectful in addressing the client in the preferred manner.
22. Issue Selection – Declares that the strategic decision about what issues to raise on appeal belongs to the attorney, while noting the importance of robust consultation with the client.
23. *Anders* Briefs – Details the many arguable issues that may be presented in plea appeals to avoid submitting briefs contending that no nonfrivolous issues exist and that appellate counsel should be relieved of the assignment. Analyzes the errant use of *Anders* briefs in family cases.
24. Diminished Capacity – Provides far greater clarity and specificity regarding how to proceed when the appellate client has diminished capacity and discusses a recent, pertinent ABA standard.
25. Case File – Cites a recent, relevant regulation to support the principle that case files for criminal clients should be maintained for the life of the client.
26. Coram Nobis – Stresses the duty of loyalty to a client who has accused counsel of rendering ineffective assistance and notes the availability of a self-defense exception that counsel may invoke in very limited circumstances.

appellate counsel and invokes U.S. Supreme Court authority to support that principle.

In explaining why briefs asserting that no nonfrivolous issues exist are generally anathema, new Standard 23 on these so-called Anders briefs[9] provides an expanded treatment of this vital topic. The many arguable issues that may be presented in criminal appeals based on guilty pleas are detailed in the new standard. Also explored is relevant family appeal authority shedding light on why appellate counsel may file errant Anders briefs. The problem could sometimes lie in the different calculus for private versus assigned appeals. When a potential client approaches retained counsel about an appeal that has a very remote chance of success, responsible counsel will provide a realistic assessment to inform a sound decision about moving forward – or not. In mandated representation, in contrast, if any issue is even arguable, counsel should present substantive arguments to the higher court, unless the client opts to withdraw the appeal.

Underlying the emphasis on achieving merits review of legal issues in mandated appeals is the elemental concept that a system providing for broad appellate review of criminal judgments and family court orders is crucial to achieving justice. Of course, appellate decisions can bring about corrective action to benefit aggrieved parties, while also enlightening lower courts. In addition, expected and frequent oversight by a higher court may lead to more careful lower-court decisions going forward. (The same goes for Court of Appeals review of orders issued by intermediate appellate courts.)

Extensive revisions to Standard 24 on diminished capacity seek to provide greater clarity on this topic. The original standard vaguely indicated that, when the client has diminished capacity, counsel must take appropriate action. The revised standard explains that counsel should maintain a conventional relationship as much as possible and only take specified protective measures where such a relationship is not possible. As the prior commentary, the current one cites to a relevant ethical rule, but the revised standard then goes on to offer specific guidance by citing a recent American Bar Association standard that is on point. The revised ILS Standard still does not dictate one correct path to pursue for all appellate clients with diminished capacity but is more nuanced than before in discussing factors counsel should consider in determining what course of action to pursue on a case-by-case basis.

The revised Standard 25 on the case file continues to state that the file generally belongs to the client, which – unlike for clients in civil appeals – should be maintained throughout the client's life. The reason for such a requirement is compelling: the files may be sought in the distant future for matters such as state postconviction motions based on ineffective assistance of counsel, federal habeas corpus petitions or immigration proceedings. In addition, the new standard bolsters and updates this guideline by citing a New York regulation, published after the prior Standards were issued, that supports the duty to maintain client files for the client's life or until the client's 80th birthday.

The updated final standard deals with coram nobis applications asserting that appellate counsel was ineffective. The revised treatment of the topic is more emphatic than the original one in stressing the primacy of the duty of loyalty owed to the client – even when the effectiveness of the appellate representation is called into question by new counsel. The original commentary focuses on the limited circumstances in which confidential information may be disclosed. In contrast, the new commentary begins by observing the core concept that a client in a criminal case has the right to effective assistance of appellate counsel. The situations in which confidential information may be revealed are set forth in greater detail in the new Standard, and the availability of a self-defense exception to protect counsel is discussed. Striving to end the Appellate Standards on a positive and philosophical note, the current commentary opines that lessons learned from making errors can enable counsel to do a better job going forward.

Final Thoughts

A takeaway from the new Standards is that delivering mandated appellate representation in criminal and parent defense cases is an important endeavor that requires dedication, expertise and skill. Attorneys performing such work should be applauded for their role in protecting the rights of vulnerable New Yorkers and helping to shape sound precedent to guide litigants, courts and counsel. These attorneys should have access to the resources required to meet the revised ILS Appellate Standards and Best Practices and should receive compensation that dignifies their contribution to our legal system and society and reflects the weightiness and complexity of the appellate representation they render.

Cynthia Feathers is the director of quality enhancement for appellate and post-conviction representation at the New York State Office of Indigent Legal Services, where her duties include overseeing the Statewide Appellate Support Center. Her appellate career has included a clerkship at the Appellate Division, Third Department, and experience at the New York Attorney General's Appeals & Opinions Bureau, the Center for Appellate Litigation in New York City, and a solo practice in civil and criminal appeals in upstate New York.

Tammy Feman is the appeals bureau chief of The Legal Aid Society of Nassau County and has worked with the society since 1996. She focuses on criminal law, family law, SORA, and complex special litigation. She has argued before the New York State Court of Appeals and regularly practices in the Appellate Division, Second Department, and the Appellate Term, Ninth and Tenth Judicial Districts. She briefed and argued the seminal case on misdemeanor accusatory instruments, *People v. Casey*, 95 N.Y.2d 354 (2000).

Endnotes

1. In 2010, the ILS Office and the ILS Board were created to "monitor, study and make efforts to improve the quality of services provided pursuant to article eighteen-B of the county law." Executive Law § 832 (1), § 833 (1).

2. The authors of this article served on both the ILS working group that produced the original standards and the working group for the revised standards. The efforts of the latter group were also informed by non-ILS experts on several topics, including immigration consequences and representation of clients with diminished capacity.

3. www.ils.ny.gov/files/Appellate%20Standards%20Final%20100423.pdf.

4. Child welfare cases – child protective matters, such as abuse and neglect proceedings – are highlighted here on the issue of racial bias. But the Appellate Standards encompass mandated representation to parents in all types of family court matters, including child support violations, custody and visitation, and family offenses and resulting orders of protection.

5. Last year, the Third Department held, for the first time in New York, that the exclusionary rule can be applied to a racially motivated stop, even where a police officer had probable cause to believe a traffic infraction was committed. *See People v. Jones*, 210 A.D.3d 150 (3d Dep't 2022). This momentous decision declared that the New York Constitution provides broader protection than the Fourth Amendment of the U.S. Constitution with respect to pretextual traffic stops, which have been the catalyst for many tragic and even fatal encounters between police and Black motorists.

6. New York State Commission on the Future of Indigent Defense Services (Final Report to the Chief Judge of the State of New York (June 2006)).

7. In recent years, substantial state resources have been appropriated to help improve the quality of mandated criminal defense throughout the state. The fiscal year 2023-2024 budget includes $273.8 million to achieve reforms in mandated criminal defense representation. The state budget also provides $14.5 million to improve parent representation. While that is a $10 million increase over FY 2022-23's allocation for parent representation in family court matters, there is an urgent need for a far greater state investment in such representation – a right of constitutional dimension. Finally, the final enacted state budget for FY 2023-24 amended County Law § 722-b to increase the hourly rate of compensation for assigned counsel, which had been stagnant for nearly two decades, to $158 an hour. When the vouchers of assigned attorneys are cut, however, the hourly rate is effectively reduced. This can devalue mandated representation and deter assigned counsel from doing this important work.

Other relevant resources available now did not exist when the Standards were first issued. For example, in 2016, ILS created a unique statewide network of six Regional Immigration Assistance Centers to support defense counsel in representing noncitizen clients. Last year, ILS launched a Statewide Appellate Support Center to provide resources, training and consultation to attorneys providing mandated representation at the trial, appellate, and postconviction level. The appellate center offers attorneys possessing extensive experience in direct appeals in criminal and family cases and attorneys with years of experience in postconviction practice, as well as special assistants for investigations and mitigation. Attorneys and other legal professional can seek consultations by emailing SASC@ils.ny.gov.

8. Understanding race issues and possessing cultural competence are deemed to be requisites of effective representation in revised ABA Ten Principles of a Public Defense Delivery System (August 2023), Principle 7.

9. *See Anders v. California*, 386 U.S. 738 (1967).

Kids Off the Grid: ‘Sovereign Citizen Parenting’ and Its Legal Impact on Children

By Erin Welsh

In 2015, 19-year-old Alecia Faith Pennington gained viral internet fame as "The Girl Who Doesn't Exist."[1] Alecia was home-birthed and raised in Texas. Her parents never secured her a birth certificate or Social Security number, never enrolled her in school and never took her to a hospital.[2] Without these vital records, Alecia could not get a job, go to college, buy an airline ticket or obtain a driver's license.[3] Due to her parents' decision not to report their children's births, Alecia (and her siblings) had no legal identity.[4]

The United Nations considers birth registration a fundamental right.[5] Though most unregistered births occur in developing countries with limited civil infrastructure,[6] there is a small movement of parents in places like the United States who choose to have unassisted and unregistered home births.[7] This parenting style appears to overlap with anti-medical intervention and anti-vaccine ideologies,[8] homeschooling[9] and the "sovereign citizens movement."[10] The Southern Poverty Law Center has described the sovereign citizens movement as a group of anti-government conspiracy theorists who consider themselves exempt from United States law.[11]

Parents' Approaches To Evading Birth Registration

Though it is difficult to generate data about a group of people who deliberately avoid being counted, social media spaces populated by "sovereign" parents suggest these individuals are racially and economically diverse.[12] The topics and views posted by those who identify as sovereign parents weave together a common thread of extreme distrust of Western medicine,[13] the government[14] and state apparatuses like public education[15] and child protection agencies.[16] Because doctors and licensed nurse-midwives are obligated to register live births with the state,[17] many sovereign parents opt for unattended or unassisted home births, which they sometimes refer to as "free births."[18]

For groups historically persecuted or disenfranchised by the state, the desire to keep children outside the government's reach could be grounded in intergenerational trauma.[19] The United States government has a documented past of separating Black, Indigenous, Japanese, Latinx and immigrant and refugee families.[20] Furthermore, as legal norms increasingly affect pregnant women's autonomy, privacy and liberty,[21] pregnant women may fear that involvement with the medical system and the state could subject them to civil and criminal penalties.[22] According to the Marshall Project, dozens of women have been prosecuted for miscarriages or stillbirths related to drug use – a number expected to rise after the *Dobbs* decision.[23]

Still, the primary motivations behind purposefully avoiding birth registration appear to be rooted in ideas of "individual choice,"[24] and conspiracy theories that birth and Social Security documents lead to government ownership of individuals.[25]

Legal Implications for Children

Children whose parents willfully avoid birth registration often fall into a legal limbo similar to that which impacts stateless and undocumented individuals.[26] They may be unable to work, travel, vote, apply for loans and obtain welfare services like food stamps and health care.[27] Even if they are not at risk of deportation, people without birth records might struggle to prove their citizenship.[28] They could also face challenges associated with a lack of legal parentage, like receiving child support or inheriting property.[29]

Raising children "off the grid" can prevent them from exercising their rights to health care and education and from securing their personal safety.[30] Some sovereign parents avoid seeking medical treatment for their children because they believe holistic methods are more effective[31] or because they fear practitioners will be mandated to report their families to Child Protective Services.[32] Home-schooling is popular with sovereign parents,[33] but some home-schooled children do not receive even a basic minimum education.[34] Furthermore, severe cases of abuse affecting school-age children often involve home-schooling.[35] Children whose existence is unknown to the state are especially vulnerable to trafficking, violence and abuse.[36]

Legal Implications for Parents

While parents in the United States generally have wide latitude in how they choose to birth and raise their children,[37] some states have instituted penalties for neglecting to register a live birth.[38] In response to Alecia Faith Pennington's struggle to obtain her birth record, Texas amended its health and safety code to make a parent's interference with his or her child's pursuit of delayed birth registration a Class A misdemeanor.[39]

The serious neglect that can stem from sovereign parenting may result in more severe penalties. Parents have been convicted of homicide crimes for failing to seek treatment for their gravely ill children.[40] In New York, parents may be found to have committed neglect for failing to provide adequate food, clothing, shelter, education and medical care for their children despite financially being able to do.[41] However, neither the New York Family Court Act nor the Public Health Law provides for a finding of neglect based solely upon a parent's refusal to register their children's births. Moreover, because these

parents often deliberately avoid interacting with state authorities, they can be difficult for law enforcement and other agencies to pursue.[42]

Potential Legal Solutions

Jurisdictions wishing to limit sovereign parenting as a matter of public policy could pass legislation or amend their current child protection laws to include caretakers' refusal to secure birth registration and legal personhood documents as a basis for neglect. State agencies could also be more aggressive in filing petitions based on educational neglect in circumstances where sovereign parents refuse to enroll their children in school or submit the required documents to teach them at home.[43] In New York, parents have been found responsible for educational neglect for removing their children from school and failing to provide them adequate home instruction.[44]

For the children of sovereign parents currently trapped in legal limbo, states could relax laws that require certain vital records to obtain legal documents. For example, children between 12 and 18 years of age seeking to obtain delayed birth registration in New York must provide several documents to prove their identities, including at least two written records (which may not be an affidavit) made at least five years prior to the date of application that shows one's name, place of birth, date of birth and parents' names.[45] Children raised "off the grid" may not have any such records or parents willing to furnish them.[46]

Legislatures may fear, however, that loosening the evidentiary requirements for obtaining delayed birth registration could widen opportunities for identity fraud. As the country's management of undocumented migrants and their children is politically contentious,[47] lawmakers may be reluctant to create a pathway by which people whose citizenship status is unclear or contested could more easily obtain legal documents.

Conclusion: Children's Right to Legal Personhood

The International Covenant on Civil and Political Rights (which the United States ratified in 1992)[48] and the Convention on the Rights of the Child (which the United States has not ratified)[49] both recognize birth registration as a fundamental right.[50] Registration is so integral to meaningful participation in society that Target 16.9 of the United Nations 2030 Agenda for Sustainable Development concerns "legal identity for all."[51] Without a legal identity, children may be excluded from education, health and social services.[52]

While these parents might want to avoid any state surveillance or control, doing so necessarily entails denying children their right to education, health care and political and social engagement, as well as many of the privileges that come with being a documented United States citizen. Perhaps sovereign parents believe they are allowing their children the "choice" to interact with the government on their terms.[53] In reality, these parents have precluded their children from making many of the choices one might take for granted: the choice to participate fully in society as a legal person.

Erin Welsh is a third-year law student at the University at Buffalo School of Law, where she is a James Kent Scholar and a member of The Buffalo Law Review. This article appeared in Family Law Review, a publication of NYSBA's Family Law Section. For more information, please see NYSBA.ORG/FAMILY.

Endnotes

1. Alexandra Leigh Young, *The Girl Who Doesn't Exist*, Radiolab, Aug. 29, 2016, https://radiolab.org/episodes/invisible-girl; Abby Ohlheiser, *How a Teenager's Viral Campaign to Prove Her Citizenship Is Inspiring a New Texas Bill*, Wash. Post, Mar. 12, 2015, https://wapo.st/3Zs4p1c.

2. *See* Matthew Paul Turner, *Homeschool Teen Can't Prove She's an American*, The Daily Beast, Apr. 14, 2017, https://bit.ly/3mFZevW.

3. *See id.*; Ohlheiser, *supra*, n.1.

4. Michelle Wilco, *Big Brother Is Watching: When Should Georgia Get Involved in Issues of Family Privacy To Protect Children's Liberties?*, 34 Ga. St. U. L. Rev. 819, 821 (2018). *See also* Barbara Cotter, *Born in the USA Without a Shred of Proof*, The Gazette (Colo. Springs), Sep. 30, 2011, https://bit.ly/3ynd2OL (detailing the story of Jamie Lanosga, who – like Alecia Faith Pennington – was born at home and not issued a birth certificate or Social Security number and was thus unable to get a driver's license, job or student loans for college).

5. OHCHR, *Birth Registration*, United Nations, https://www.ohchr.org/en/children/birth-registration.

6. *See id.*

7. *See* Brandy Zadrozny, *I Brainwashed Myself With the Internet*, NBC News, Feb. 21, 2020, https://www.nbcnews.com/news/us-news/she-wanted-freebirth-no-doctors-online-groups-convinced-her-it-n1140096; u/aggravatedangela, *Setting Your Child Up for a Lot of Struggle in Life*, Reddit, Dec. 23, 2022, https://www.reddit.com/r/ShitMomGroupsSay/comments/ztpide/setting_your_child_up_for_a_lot_of_struggle_in/ (reposting from a Facebook group where a parent writes: "This is birth #6 – the first 2 have BC & SSN (both were born in place of assistance, and I didnt know any better), the 3rd started to be registered but we never went back and finished (1st home/unassisted birth), the 4th and 5th are both completely 'unregistered' (both unassisted home births). . . . baby #6 is going to be born at home as well but we are contemplating having a midwife there this time, only thing is, she is REQUIRED to register the birth. So I'm hesitant. . . . What exactly does ONLY getting a BC do vs a BC & SSN?"); u/meowderina, *Comment: Has Anyone Ever Heard of "Sovereign Pregnancy?"*, Reddit, Mar. 17, 2022, https://www.reddit.com/r/BabyBumps/comments/tgo2ua/comment/i13d7gz/ ("[F]or a 'sovereign birth,' the main purpose is to keep the child out of the mainstream system, so they're never registered, given a birth certificate or SSN, eventually not taxed as adults, etc.").

8. *See* @clairelyrics, TikTok, Jan. 28, 2022, https://www.tiktok.com/@clairelyrics/video/7058344367433485615 ("My baby is a free home birth, unvaccinated 3 month old.").

9. *See* u/RileyRush, *"My Son Will Not Be Property of the State" So No BC or SS# for Him! Setting Up the Kid for a Lifetime of Hardship*, Reddit, Jan. 27, 2023, https://www.reddit.com/r/ShitMomGroupsSay/comments/10mwnlv/my_son_will_not_be_property_of_the_state_so_no_bc/ (reposting a comment from a Facebook group where a parent writes: "My son will not be property of the state. A social is an account number where you become a business. I plan to homeschool anyway especially the way the system is set up.").

10. *See id.* (reposting another comment from a Facebook group where someone writes: "It's a form of Sovereign Citizenship.. if a child is homeschooled they dont need social security. Pay cash. Work cash jobs or work a job as tax exempt. Lots of people do. A lot more than u probably realize"); Eric Evers, *My State Can't Take My Child From Me, I Am a Sovereign Citizen and/or My Child Doesn't Have an SS#*, Raise Your Rights, https://raiseyourrights.org/my-state-can-t-take-my-child-from-me-i-am-a-sovereign-citizen-and-or-my-child-doesn-t-have-an-ss/.

11. *Sovereign Citizens Movement*, SPLC, https://www.splcenter.org/fighting-hate/extremist-files/ideology/sovereign-citizens-movement.

12. For some popular TikTok accounts, *see, e.g.*, @theoffgridmom, TikTok, Feb. 15, 2023, https://www.tiktok.com/@theoffgridmom/video/7200555980357258538; @thebrownlotus, TikTok, July 27, 2022, https://www.tiktok.com/@thebrownlotus/video/7125216313856871723; @aamilahvilchez, TikTok, June 3, 2022, https://www.tiktok.com/@aamilahvilchez/video/7105117546373931 94.

13. *See, e.g.*, @mommaxenny, TikTok, Aug. 21, 2022, https://www.tiktok.com/@mommaxenny/video/7134309492061261099 (responding to another user who comments, "I would love to have an unassisted birth but I'm high risk for hemorrhage since I had it with my last," with "Don't let these doctors tell you you can't! I'm telling you all it takes is speaking life into yourself!").

14. *See, e.g.*, @nitraaaaaaa, TikTok (July 29, 2022), https://www.tiktok.com/@nitraaaaaaa/video/7125805045404192042 (where a woman who identifies herself as a trained doula and free birth mom of three children on her TikTok account writes, "Who have natural unassisted home lotus births with a doula and children don't have birth certificates or SSNs because you want them to be able to be independent free citizens and not legally owned by the state/ government and don't regret no decisions nor care about what the state says and deems 'right'").

15. *See id.* (commenting "I personally will be home schooling my children").

16. *See, e.g.*, u/round__up, "The fact that they feel they need to lie to hide what actually happened should tell them it isn't right," Reddit, Oct. 13, 2022, https://www.reddit.com/gallery/y3cb6b (reposting a parent's comment: "So, my 6 day old is having diarrhea and is sneezing a lot as well as projectile vomited . . . I went unassisted and had a wild pregnancy. I'm terrified of cps being called.").

17. *See, e.g.*, N.Y. Pub. Health Law § 4130 (requiring physicians and nurse-midwives in New York to register live births within five days).

18. *See* Kristi Pahr, *'Freebirth' Is on the Rise but There Are Huge Risks*, Parents, Dec. 16, 2022, https://www.parents.com/pregnancy/giving-birth/unassisted-home-births-are-on-the-rise-and-parents-need-to-know-the-risks.

19. *See* Amy E. Heberle, Elsia A. Obus & Sarah A. O. Gray, *An Intersectional Perspective on the Intergenerational Transmission of Trauma and State-Perpetrated Violence*, 76 J. of Soc. Issues 814 (2020).

20. *See* Laura Briggs, Taking Children: A History of American Terror, 3 (2020).

21. *See Dobbs v. Jackson Women's Health Organization*, 597 U.S. __ (2022) (holding that the Constitution of the United States does not confer a right to abortion); Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront*, 102 Calif. L. Rev. 781, 814 (2014).

22. *See, e.g.*, Jonathan A. Rapping, *The Critical Role of Public Defenders in a Post-*Dobbs v. Jackson *World*, 37 Crim. Just. 3, 6 (2023) (noting that women have been criminally charged with homicides for miscarriages and stillbirths).

23. *See* Cary Aspinwall, Brianna Bailey & Amy Yurkanin, *They Lost Their Pregnancies. Then Prosecutors Sent Them to Prison*, The Marshall Project, Sep. 1, 2022, https://www.themarshallproject.org/2022/09/01/they-lost-their-pregnancies-then-prosecutors-sent-them-to-prison.

24. *See* @tay_and_chrii, TikTok, Sep. 28, 2022, https://www.tiktok.com/@coveredinroses/video/7148111725399756075 (commenting, "[W]e honestly don't plan on ever registering Noah or any future babies . . . because we choose to let our children decide if they want to be tracked by the government. In reality, that should be each individuals choice.").

25. *See* @coveredinroses, TikTok, Sep. 29, 2022, https://www.tiktok.com/@coveredinroses/video/7148111725399756075 (commenting, "Learn how our SSN makes us literal stock for banks"); *A Quick Guide to Sovereign Citizens*, UNC Sch. of Gov't (2013), https://www.sog.unc.edu/sites/www.sog.unc.edu/files/Sov%20citizens%20quick%20guide%20Nov%2013.pdf.

26. *See, e.g.*, *Capernaum* (Mooz Films 2018) (following a fictional child in Lebanon who lives alongside refugees and undocumented workers because his parents never applied for a birth certificate).

27. *See* Ohlheiser, *supra* n. 1; Turner, *supra*, n. 2; "Father's rights concerning child's BC when hippy mother refuses to get them documented," Reddit (July 4, 2018), https://www.reddit.com/r/legaladvice/comments/8w4usk/fathers_rights_concerning_childs_bc_when_hippy.

28. *See* Turner, *supra*, n. 2; *In re Adoption of a Child by C.*, 85 N.J. 152, 167 (1981) ("The administration of naturalization laws depends on the accuracy of birth records because persons are classified according to their place of birth. *See, e.g.,* 8 U.S.C. § 1401 (1970). A birth certificate indicating that a person was born in the United States is prima facie evidence of United States citizenship."). *See generally*, Anthony Zurcher, *The Birth of the Obama "Birther" Conspiracy*, BBC News, Sep. 16, 2016, https://www.bbc.com/news/election-us-2016-37391652 (discussing how President Barack Obama was pressured to release his long-form birth certificate to prove he was born in the United States).

29. *See* Douglas NeJaime, *The Nature of Parenthood*, 126 Yale L. J. 2260, 2274 (2017).

30. For a discussion on the rights of children, *see Perspectives on Children's Rights*, in Douglas E. Abrams, Susan V. Mangold & Sarah H. Ramsey, Children and the Law (7th ed. 2020).

31. *See* u/ShibaInuLuvrr, "Not sure about God's Will because you had the option of avoiding it," Reddit, Feb. 20, 2023, https://www.reddit.com/r/ShitMomGroupsSay/comments/117e1dj/not_sure_about_gods_will_because_you_had_the/ (reposting a Facebook comment: "#freebirth is the only way to avoid doctors giving babies vaccines and meds that are proven to be unnecessary and do more harm than good.").

32. *See* u/RileyRush, "Freebirther fighting CPS because 5 year old tested positive for THC," Reddit, Jan. 23, 2023, https://www.reddit.com/r/ShitMomGroupsSay/comments/10j7ca3/freebirther_fighting_cps_because_5_year_old/ (sharing a Facebook post: "URGENT. Had an emergency and went to the hospital for my 5 year old son. While there WITHOUT OUR CONSENT tested his urine for THC. (Which tested positive for) we give him CBD. Then profiled us which we felt. As we got home the doctor hotlined us which resulted us getting a call from CPS!!!!!!!! What should I be doing or concerned for ?????? I also have a baby who is not registered and doesn't have a SS number / birth certificate. He was born with an unassisted birth in my home !!! HELP!").

33. *See* @theoffgridmom, *supra*, n. 12.

34. Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 Calif. L. Rev. 123, 135 (2008).

35. Rachel Coleman & Kathryn Brightbill, *The Turpin Child Abuse Story Fits a Widespread and Disturbing Homeschooling Pattern*, L.A. Times, Jan. 17, 2018, https://www.latimes.com/opinion/op-ed/la-oe-coleman-brightbill-turpin-homeschool-abuse-20180117-story.html.

36. *See A Child-Rights Approach on International Migration and Child Trafficking*, United Nations Children's Fund (2002), https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/unpd-cm1-2002-07-paper-13-unicef.pdf.

37. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205; *Troxel v. Granville*, 530 U.S. 57 (2000).

38. *See, e.g.*, N.Y. Pub. Health Law § 4102(2) (imposing a $5 - $50 fine for a person's first and second failures to record and file a certificate of birth, and for each subsequent offense, a misdemeanor punishable by a $10 - $100 fine and no more than 60 days imprisonment).

39. *See* 2015 Tex. HB 2794; Ohlheiser, *supra*, n. 1.

40. *See, e.g.*, *People v. Henson*, 33 N.Y.2d 63 (1973) (convicting parents of criminally negligent homicide and endangering the welfare after their four-year-old son died from pneumonia and the parents had not sought medical care despite being aware the child was very ill); *State v. Williams*, 484 P.2d 1167 (Wash. Ct. App. 1971) (convicting parents of manslaughter for failing to supply their 17-month-old child with necessary medical attention because they feared the welfare department would take the baby away from them).

41. N.Y. Fam. Ct. Act § 1012(f).

42. *See* Verena Fiebig & Daniel Koehler, *Uncharted Territory: Towards an Evidence-Based Criminology of Sovereign Citizens Through a Systematic Literature Review*, 16 Perspectives on Terrorism 34, 43 (2022).

43. *See, e.g.*, N.Y. Educ. Law § 3212(2) (requiring parents to fulfill certain obligations in home-schooling, including furnishing documents to the school district).

44. *See, e.g., In re Kyle T.*, 255 A.D.2d 945 (4th Dep't, 1998); *In re Ryan J.*, 255 A.D.2d 999 (4th Dep't,1998); *Matter of Viveca AA. v. Emily AA.*, 51 A.D.3d 1072 (3d Dep't, 2008); *Matter of Amanda M. v. Geraldine N.*, 28 A.D.3d 813 (3d Dep't, 2006).

45. N.Y. Comp. Codes R. & Regs. tit. 10 § 36.11(b).

46. *See* Cotter, *supra*, n. 4.

47. *See* Miriam Jordan, *U.S.-Born Children, Too, Were Separated from Parents at the Border*, N.Y. Times, Apr. 11, 2023, https://www.nytimes.com/2023/04/11/us/migrant-family-separations-citizens.html.

48. Ratification Status of CCPR – International Covenant on Civil and Political Rights, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx.

49. Ratification Status for CRC – Convention on the Rights of the Child, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx.

50. *See* OHCHR, *supra*, n. 5.

51. S. Mrkić, *United Nations Strategy for Legal Identity for All* (2019), https://unstats.un.org/legal-identity-agenda/documents/UN-Strategy-for-LIA.pdf.

52. *See* Ellen Mouravieff-Apostol, *The Significance of Birth Registration in Today's World*, Int'l Fed'n of Soc. Workers, https://www.ifsw.org/wp-content/uploads/ifsw-cdn/assets/ifsw_103846-7.pdf.

53. *See* @tay_and_chrii, *supra*, n. 25.

SPONSORED COLUMN

Reinventing the Mid-Sized Law Firm Experience

By Jack Newton

While mid-sized law firms have long defined the experience of working at a traditional legal practice, the same traits that define these firms may be working against them.

These firms typically display more overhead and structure, functioning like a complex organizational ecosystem with many players (including non-legal professionals, such as operations, IT and finance professionals) and moving parts (including software, processes and goals).

At the same time, higher head counts and entrenched processes can make it difficult for mid-sized law firms to respond to changing market conditions and client needs. With these challenges, we see a worrying trend of dissatisfaction and attrition among lawyers in mid-sized firms.

As outlined in the 2023 Legal Trends Report for Mid-Sized Firms,[1] lawyers working in mid-sized law firms were more than twice as likely to have reported leaving a job in the 12 months leading up to April and May 2022 than lawyers in smaller firms. They were also over five times more likely to be planning to leave a job in the next six months.

Why? Increased dissatisfaction is widespread among lawyers in mid-sized law firms. Lawyers who work in smaller firms have reported better states of well-being than their counterparts in mid-sized firms. The areas where they excel include:

- Building positive relationships with clients and colleagues.
- Managing their physical and emotional wellness.
- Earning higher revenue and personal income.
- Managing their time effectively.

Lawyers in mid-sized firms are also more resistant to the advent of distributed work than those in smaller firms. Specifically, they are less likely to prefer working from home and meeting colleagues or clients virtually. While some level of personal preference is understandable, these preferences may be at odds with client expectations.

The pace of technological advancement continues to accelerate rapidly. At the same time, clients want fast, efficient and seamless experiences with their legal professionals, in line with the experiences they've come to expect elsewhere. For example, the 2022 Legal Trends Report[2] observed that 25% more clients (35% compared to 28%) prefer virtual meetings over in-person meetings. The rest indicated no strong preference either way, meaning they're adaptable.

To retain top talent and stay competitive, mid-sized firms must find new ways to increase satisfaction and provide an effortless client experience. Our research provides a clear path forward: adopting cloud-based legal practice management (LPM) software.

A different pattern emerges when we compare lawyers in mid-sized law firms who use cloud-based LPM software to those who do not. Implementing LPM software increases profitability and enhances employee satisfaction, leading to higher levels of fulfillment and ultimately reducing employee turnover. As a result, these lawyers report significantly higher performance on all professional and personal metrics that match the satisfaction levels of lawyers in smaller firms. We also see that cloud-based lawyers are more likely to prefer distributed work, suggesting that firm technology may be a driving force behind lawyers' attitudes toward this method of work.

Despite these encouraging trends, only 27% of mid-sized firms use cloud-based LPM software (compared to 73% of smaller firms). They are also less likely to use online solutions for video conferencing, electronic payments, e-signatures and cloud-based data storage.

Moving to the cloud has obvious benefits for mid-sized law firms – but to successfully navigate change in a larger organization, mid-sized law firms must implement change strategically. Adopting the following practices can bring tremendous benefits for mid-sized law firms who are ready to make the switch:

- Assessing existing systems to distinguish essential upgrades from the "nice to haves" and prioritizing accordingly.
- Form a technology committee representing different roles and departments to help champion change.
- Tap into your network of friends, bar associations and consultants to learn how they've addressed similar changes.

Proactive strategies – and a positive mindset – can help mid-sized law firms navigate change management successfully and unlock new opportunities for growth and efficiency while providing experiences that align with modern employee and client expectations.

To learn more, download a copy of the 2023 Legal Trends for Mid-Sized Law Firms Report at https://www.clio.com/resources/legal-trends/2023-mid-sized-report/.

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. Jack 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.

Endnotes

1. https://www.clio.com/resources/legal-trends/2023-mid-sized-report.
2. https://www.clio.com/resources/legal-trends/2022-report/read-online.

Law Clerk Accepting Payments for Referrals Is Unacceptable

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 an attorney working for one of the federal courts in New York State. When I first began working with the court about a year ago, one of the clerks who handles criminal case intake took me under his wing and guided me through my first year. We became close friends over the last year, and he even attended my wedding. As a result, we developed a very trusting relationship, but he recently revealed something that I feel compelled to report.

A few days ago, I took the clerk out to lunch to thank him for staying late to help me sift through piles of discovery the past week. Over lunch, the clerk mentioned that the job is "so worth it," because he has a side hustle that more than doubles his salary. When I asked him what he meant, he disclosed that he refers criminal defendants who have court-appointed counsel to private defense lawyers by giving them their business card or calling the lawyers directly. These defense lawyers pay the clerk thousands of dollars per referral in cash under the table.

When I asked how long he had been doing this, the clerk replied, "Much longer than you've been here. I've got a book full of lawyers that I refer to. You wouldn't believe the killing I've made. I didn't buy that car on a court clerk's salary alone, I'll tell you that," and gestured toward his Mercedes in the parking lot. The look of shock on my face must have made him nervous as he then said, "You can't tell anyone though. I'll get in a lot of trouble. If you want, I can loop you in." I told him I would think about it – though I certainly was not thinking about it.

This side hustle doesn't sound legitimate – possibly criminal – and I know that there must be applicable ethical rules and even criminal statutes that prohibit this aside from a duty to report.

Sincerely,

N.T. Toby Trusted

Dear N.T. Toby Trusted:

Your instincts are absolutely correct, and the situation you find yourself in is fraught with ethical and legal implications. The referral scheme orchestrated by the court clerk and the participating defense attorneys is not just shady; it's potentially criminal and, most certainly, a breach of ethical rules. Let's dive into the intricacies of this issue.

It is crucial to address several important ethical considerations that apply to your situation. One key ethical rule in this context is Rule 3.5 of the New York Rules of Professional Conduct. This rule aims to preserve the "impartiality of tribunals and jurors"[1] and prohibits lawyers from seeking to or causing "another person to influence a judge, official or employee of a tribunal by means prohibited by law or give or lend anything of value to such judge, official, or employee of a tribunal when the recipient is prohibited from accepting the gift or loan . . . " Essentially, it forbids lawyers from trying to influence court personnel, such as judges, officials or employees, by means prohibited by law. The American Bar Association has a similar Rule 3.5 which more simply prohibits lawyers from "engag[ing] in conduct intended to disrupt a tribunal." Both rules prohibit lawyers from "seek[ing] to influence a judge, juror, prospective juror or other official by means prohibited by law."[2]

In this case, the defense attorneys' payments to the court clerk for client referrals clearly "disrupt[s] a tribunal." This could lead to favoritism towards certain attorneys, jeopardizing the fairness of proceedings. Federal court clerks are tasked and trusted with storing and maintaining confidential information, conducting legal research, preparing memos, proofreading and filing judge's orders and opinions, and communicating with counsel. What if one day one of the attorneys offers the clerk even more money to ensure an order is decided in a way favorable to that attorney's client? Or perhaps even worse, the clerk provides the defense attorney with confidential information about a witness. The ways in which this referral system interferes with the court's impartiality are limitless, and the defense attorneys here are in clear violation of Rule 3.5. As for the clerk, the rule specifically calls out court employees in stating that such "employee[s] of a tribunal" are not permitted to accept such monetary gifts from lawyers, so he too has violated this rule.

While illegal behavior is generally a matter of criminal law, it is also an obvious violation of RPC Rule 8.4, which prohibits a lawyer from "engag[ing] in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness, or fitness as a lawyer." As lawyers, we are held to a higher standard of honesty. It is safe to say that paying a court clerk for client referrals certainly constitutes illegal conduct that would adversely reflect on a lawyer's – or anybody's – honesty.[3]

As will be further explained below, bribing a public official violates federal law. Of course, in committing such a crime, the defense attorneys are obtaining clients in an illegal and dishonest way. This affects their fitness to practice law in that they were taking advantage not only of a court clerk, but of defendants who are seemingly unable to pay for private counsel as the lawyers and the clerks targeted defendants with court-appointed counsel. Lawyers are trusted to advocate for clients, not take advantage of them. Who knows what the clerk and the lawyers told these defendants to persuade them to hire them rather than continue with their free counsel? It's possible – if not likely – that the clerk bent the truth about the defense attorneys' capabilities or even disparaged other lawyers to encourage defendants to hire one of the attorneys paying him. The attorneys' payments

encouraged such dishonesty and illegal behavior as well. Lawyers are called to respect the courts and the justice system, and the defense attorneys' behavior here threatened the court's neutrality and ability to function the way it is meant to. How can someone who undermines the justice system in such a way be trusted to practice within it?

Moving on to the solicitation aspect, RPC Rule 7.3 comes into play. This rule addresses solicitation and recommendation of professional employment by lawyers. Solicitation, in essence, involves lawyers advertising their services to a specific target audience with the primary aim of financial gain. The rule defines solicitation as "any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients . . . the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain." Section (a)(2)

"While not necessarily bound by the ethics rules in the same way the attorneys are, clerks must comply with the United States Courts' Code of Conduct for Judicial Employees."

(iv) specifically prohibits solicitation by a lawyer "(2) by any form of communication if (iv) the lawyer knows or reasonably should know that the . . . physical, emotional or mental state of the recipient makes it unlikely that the recipient will be able to exercise reasonable judgment in retaining a lawyer." Rule 7.3 prohibits this if the lawyer knows that the recipient he or she is targeting is in a position that may make him or her unable to think clearly about hiring the lawyer.[4]

In this case, the defense attorneys are indeed motivated by financial gain, as evidenced by their willingness to pay substantial amounts for referrals. Moreover, they are targeting a vulnerable group: criminal defendants who likely cannot afford private counsel and have court-appointed attorneys. This situation puts these defendants in a compromised position, making it difficult for them to exercise reasonable judgment. Therefore, the defense attorneys may well be found in violation of RPC 7.3. Their "advertisement" for purposes of this rule is the clerk's referrals. Additionally, the lawyers are using this means of advertisement to target a specific group: criminal defendants with court-appointed counsel. The violation of RPC 7.3 arises here in that the lawyers know that the targeted group – the criminal defendants – may not be in in an "emotional or mental state" that would allow them to "exercise reasonable judgment in retaining a lawyer" for several reasons. The first is that these criminal defendants were likely assigned court-appointed counsel because they cannot afford private counsel. They are facing time in prison and might be vulnerable to persuasion to hire counsel if, say, they are promised a discounted rate for a private defense attorney that a court clerk is recommending. It is conceivable that criminal defendants facing significant jail time may, as an act of desperation, make a hasty decision to hire the first attorney suggested to them. Because the defense attorneys here know – or reasonably should know – that they are targeting highly vulnerable people as clients, their conduct could, in our view, run afoul of RPC 7.3.

While not necessarily bound by the ethics rules in the same way the attorneys are, clerks must comply with the United States Courts' Code of Conduct for Judicial Employees. This code of conduct states that a "judicial employee should never influence or attempt to influence the assignment of cases or perform any discretionary or ministerial function of the court in a manner that improperly favors any litigant or attorney, nor should a judicial employee imply that he or she is in a position to do so." The clerk is certainly in direct violation of this code as he favored the attorneys who paid him. Further, the clerk directly influenced the assignment of cases by taking them out of the hands of the court-appointed counsel and placing them in the hands of the private defense attorneys.[5]

Beyond ethical violations, the behavior of both the defense attorneys and the court clerk are certainly prohibited by law, and all involved risk facing federal criminal charges. The case of *U.S. v. Figueroa and Del Valle* serves as an alarming precedent. In that case, a clerk and an attorney who paid substantial sums for referrals were charged with various offenses, including conspiracy to bribe and unlawfully compensating a federal employee and federal employee bribery. Federal law explicitly makes it a crime to bribe public officials and witnesses, which could apply to this situation given the financial transactions involved.[6] The clerk and defense attorneys here may certainly be charged with these same crimes if an investigation so leads. 18 U.S.C. Section 201 makes it a crime to bribe public officials and witnesses.[7] 18 U.S.C. Section 203 makes it a crime to "knowingly" give, promise or offer "any compensation for any such representational services rendered or to be rendered at a time when the person to whom the compensation is given, promised, or offered is or was" a federal officer or employee.[8] While the clerk may mask the severity of his behavior by calling it a "referral" business, this conduct would likely be considered a bribe in violation of U.S. law in that the attorneys gave something of value – money – to the clerk – a public official – in exchange for potential clients. In other words, the attorneys compensated the clerk – a federal employee – for "representational services as an attorney" to these criminal defendants.

Regarding your role in this dilemma, RPC 8.3 requires that if you, as a lawyer, know that another lawyer has committed a violation that raises substantial questions about their honesty, trustworthiness or fitness as a lawyer, you must report this knowledge to a tribunal or other relevant authority. Given the gravity of the violations by the defense attorneys, reporting this misconduct is not only your ethical duty but also the right thing to do to uphold the integrity of the legal profession and the justice system. Specifically, the rule requires that a "lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."[9]

In conclusion, the situation you have described involves a web of ethical violations, potential criminal activity and a profound impact on the impartiality of the court. Reporting these violations is essential to maintain the trust and fairness of our legal system. You are not only obligated to do so but also would be contributing to the preservation of the principles our profession holds dear. The attorneys' conduct here raises substantial questions as to their "honesty, trustworthiness, [and] fitness as a lawyer." While you are required to report a violation of the Rules, you should feel under these circumstances that you are also doing the right thing.

Sincerely,

The Forum by

Vincent J. Syracuse (syracuse@thsh.com)

Jean-Claude Mazzola (jeanclaude@mazzolalindstrom.com)

Hanoch Sheps (hanoch@mazzolalindstrom.com)

Katie O'Leary (katie@mazzolalindstrom.com)

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am a young attorney named Iam Abel. I opened Abel Law in 2020. I hired my twin sibling, Sheis Cane, as my paralegal. Sheis Cane (Cane) also took the bar but failed.

One of the first cases that I signed up was Maybie Tomorrow's (Maybie) personal injury case in March 2020. Cane conducted the intake interview. Although I was out of the office that day, I spoke with Maybie by telephone during the interview to obtain information about her accident, injuries and employment status.

I instructed Cane to "work up" the file – get police reports, medical reports, etc. Once we obtained the necessary information (it took years due to COVID-19 pandemic delays), I reviewed the file and drafted the Summons and Complaint in November 2022.

On Dec. 1, 2022, I met virtually with Maybie via Zoom to review everything including documents I previously sent her to review. On Dec. 30, 2022, we had a second Zoom meeting, during which she signed a Verification to the Summons and Complaint, which I notarized after she showed me her driver's license. We also discussed what Maybie thought would be a good settlement offer. Maybie stated she would accept "nothing less than $500,000" as she was still in pain, undergoing medical treatment and out of work. My firm then served and filed the Summons and Complaint.

A few months later, on March 10, 2023, the defendants made an offer of $600,000, so I gladly accepted on behalf of Maybie, reasoning that she would be happy because it was $100,000 more than she wanted (and because I was behind on my bills). I asked Cane to call Maybie to tell her the good news and to obtain releases, etc. However, Cane could not reach Maybie.

Unbeknownst to me, on April 1, 2023, Cane cut and pasted Maybie's signature from another document, then used my notary stamp and signature stamp on the documents. My office sent the documents to the defense counsel, and we are awaiting the settlement proceeds.

I received a call from Maybie's daughter, stating that Maybie passed away on March 1, 2023, one month before she allegedly signed the settlement documents! Needless to say, I was unaware of Maybie's death, so I confronted Cane. She admitted what she did. I fired Cane on the spot.

HELP!! What am I professionally obligated to do? How do I handle this situation?

Sincerely,

Iam Abel

Endnotes

1. *See* New York State Bar Association New York Rules of Professional Conduct (2021), Rule 3.5.

2. *See* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_5_impartiality_decorum_of_the_tribunal/.

3. New York State Bar Association New York Rules of Professional Conduct (2021), Rule 8.4.

4. New York State Bar Association New York Rules of Professional Conduct (2021), Rule 7.3.

5. https://www.uscourts.gov/rules-policies/judiciary-policies/code-conduct/code-conduct-judicial-employees

6. https://www.justice.gov/usao-sdny/press-release/file/1577221/download; https://www.reuters.com/legal/legalindustry/ny-court-employee-lawyer-charged-with-trading-client-referrals-cash-2023-03-30/.

7. 18 U.S.C. § 201.

8. 18 U.S.C. § 203.

9. New York State Bar Association New York Rules of Professional Conduct (2021), Rule 8.3.

HIPAA Interviews Revisited, and Whose Body Is It?

By David Paul Horowitz and Katryna L. Kristoferson

In 2023 it is hard to understand why the medical profession, always based (at least, in modern times) on science and increasingly utilizing technology (sometimes in frightening ways), is one of the only professions that continue to rely on fax machines for sending and receiving patient information. The stated reason: privacy requirements under Health and Insurance Portability and Accountability Act (HIPAA). A recent Second Department case revisits the Court of Appeals' decision in *Arons v. Jutkowitz*[1] in the context of a defendant's right, in civil litigation, to interview physicians not about medical treatment but about the circumstances under which a personal injury plaintiff was injured, leading to the need for medical treatment.

At the same time, in an era where patients' rights to make medical choices and control their own bodies (at least in New York) are sacred, two recent cases touch on patients' privacy rights with respect to their own bodies. In the first, the issue was whether a patient's right to determine medical treatment by electing to proceed with surgery before a defendant conducts a physical examination under CPLR 3121 can constitute spoliation. In the second, the extent to which a defendant's right to conduct a physical examination includes what is patently an invasive physical examination of the plaintiff.

Scope of Physician Interviews Utilizing HIPAA Authorizations

In the *Arons* decision the Court of Appeals held:

> We see no reason why a nonparty treating physician should be less available for an off-the-record interview than the corporate employees in Niesig or the former corporate executive in Siebert. As an initial matter, a litigant is "deemed to have waived the [physician-patient] privilege when, in bringing or defending a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue" []. This waiver is called for as a matter of basic fairness: "[A] party should not be permitted to affirmatively assert a medical condition in seeking damages or in defending against liability while simultaneously relying on the confidential physician-patient relationship as a sword to thwart the opposition in its efforts to uncover facts critical to disputing the party's claim."
>
> ***
>
> Plaintiffs waived the physician-patient privilege as to this information when they brought suit, so there was no basis for their refusal to furnish the requested HIPAA-compliant authorizations.[] The waiver does not depend on the form or medium in which relevant medical information is kept or may be found: information does not fall outside the waiver merely because it is captured in the treating physician's memory rather than on paper (see generally 65 Fed Reg 82462, 82620 [explaining rationale for treating verbal communications the same as paper and electronically based information]). Of course, it bears repeating that the treating physicians remain entirely free to decide whether or not to cooperate with defense counsel. HIPAA-compliant authorizations and HIPAA court orders cannot force a health care professional to communicate with anyone; they merely signal compliance with HIPAA and the Privacy Rule as is required before any use or disclosure of protected health information may take place.

Arons balanced two competing interests: the patient's right to speak freely with his or her medical provider under the protection of the physician/patient privilege against a civil litigation defendant's desire to interview a plaintiff's treating physician.

The rationale of *Arons* was based upon an earlier decision by the Court in *Muriel Siebert & Co., Inc. v. Intuit Inc.*,[2] building on the seminal case *Niesig v. Team I*.[3]

In *Yan v. Kalikow Mgt., Inc.*,[4] the Second Department addressed and determined an issue of first impression, whether defendants

> were entitled to an authorization to conduct an informal, ex parte interview of a physician assistant who treated the plaintiff. This case apparently presents a matter of first impression, as the defendants seek to interview the physician assistant about a statement the plaintiff made regarding the cause of her accident, rather than about the diagnosis or treatment of the injury that allegedly resulted from the accident. We hold that the Supreme Court properly denied that branch of the defendants' motion which was for an *Arons* authorization, because compelling the plaintiff

to provide such an authorization would constitute an unwarranted extension of the Court of Appeals' holding in *Arons v. Jutkowitz*.

The medical records recorded:

> After the accident, the plaintiff was taken to the emergency department at New York-Presbyterian Hospital, where she was treated by physician assistant Alejandro F. Molina. The medical record prepared by Molina indicates that the plaintiff reported that "she was attempting to enter her automobile on the passenger's side when she tripped over a tree branch falling onto [her] outstretched right arm."

It is worth noting that statements made by a patient that are germane to medical treatment are considered exceptions to the hearsay rule and therefore admissible for their truth.[5]

Can a Plaintiff Be Penalized for Spoliation of a Body Part?

We can all agree that a competent patient, in consultation with his or her physician, has the right to make decisions concerning both the type of medical treatment and the timing of that treatment. CPLR 3121 codifies a defendant's right to conduct certain physical and mental examinations of a personal injury plaintiff to obtain independent analysis of the existence, origin and scope of that plaintiff's injuries:

> After commencement of an action in which the mental or physical condition or the blood relationship of a party, or of an agent, employee or person in the custody or under the legal control of a party, is in controversy, any party may serve notice on another party to submit to a physical, mental or blood examination by a designated physician, or to produce for such examination his agent, employee or the person in his custody or under his legal control. The notice may require duly executed and acknowledged written authorizations permitting all parties to obtain, and make copies of, the records of specified hospitals relating to such mental or physical condition or blood relationship; where a party obtains a copy of a hospital record as a result of the authorization of another party, he shall deliver a duplicate of the copy to such party. A copy of the notice shall be served on the person to be examined. It shall specify the time, which shall be not less than twenty days after service of the notice, and the conditions and scope of the examination. CPLR 3121(a).

The timing of the defendant's physical examination is often fluid. Most defense counsel routinely serve a CPLR 3121 demand with the answer, without a specified date, and preliminary and compliance conference orders routinely provide a provision for that examination, usually with reference to the examination following one or more precedent events such as a deposition.

The Second Department, in *Fadeau v. Corona Indus. Corp.*,[6] contended with the issue of whether a plaintiff undergoing surgery, after the commencement of an action but prior to defendants obtaining an IME of plaintiff, constitutes spoliation. Opting to agree with case law in the First Department,[7] the *Fadeau* court held:

> Plaintiffs must be free to determine when to undergo medical treatments based on personal factors such as doctor's advice and their specific pain and discomfort level. It would be absurd for courts to require a plaintiff to forgo surgery (or other medical treatment) for an injury so as not to potentially compromise a lawsuit against the party(s) alleged to have caused the injury.
>
> Thus, plaintiff's pre-ME spine surgery did not result in the spoliation of evidence. Defendant's categorization of the plaintiff's surgery as "non-emergency" does not alter this conclusion.
>
> In addition, defendant was not "prejudiced" by plaintiff's medical treatment, as there is other evidence upon which defendant may rely, including plaintiff's pre-surgical and post-surgical medical records.

Invasive Physical Examinations

It is hard to imagine a physical examination more delicate than a comprehensive gynecological examination inclusive of a pelvic examination. Yet that was precisely the type of physical examination demanded by the defendant in *Pettinato v. EQR-Rivertower, LLC.*[8]

The First Department framed the issue this way:

> A plaintiff in a personal injury action affirmatively places her physical and/or mental condition in controversy [ ]. Pursuant to CPLR 3121, following the commencement of an action, "[w]here a plaintiff puts her physical condition at issue, the defendants may require [a plaintiff to] submit to an IME by a physician retained by defendant for that purpose" [ ]. Thus, this is not a case about whether an IME, specifically a gynecological examination, should have been permitted.
>
> Instead, this is a case about the scope of such a physical examination. In determining what kind of examination to authorize, the court must balance the desire for the plaintiff to be examined safely and free from pain against the need for the defendant to determine facts in the interest of truth [ ]. Thus, a showing of the medical importance and safety of the particular procedure is required, as well as an explanation of the relevance and the need for the information that a procedure will yield [ ].
>
> Accordingly, "an examination should not be required if it presents the possibility of danger to [a plaintiff's] life or health."
>
> The defendant explained the rational for seeking the examination:

> In support of the motion, defendants submitted an affidavit (dated 2/18/2021), from [their expert] Dr. Lind indicating that "[i]n order to assess the severity of each of [plaintiff's] medical problems a full gynecological examination is required." Dr. Lind explained that "[a] proper inspection of the vulva . . . cannot be conducted merely by . . . [a] visual inspection" because such inspection "would only potentially allow [him] to see any scar and would not allow [him] to be able to evaluate the vagina or the pudendal nerve." Thus "[a] one finger examination is needed in order to fully inspect the entire vulva."
>
> ***
>
> Finally, Dr. Lind indicated, "[t]his examination would be less than five minutes in length and would require the use of a speculum, digital exam and bimanual exam of the pelvis."
>
> Plaintiff opposed the examination, arguing, through the affidavit of her treating physician:
>
> Dr. Kiley indicated her specific concerns about the proposed pelvic examination, which were as follows:
>
> "While Dr. Lind proposes classic pelvic exam techniques, those would not be revealing of her current complaints. Her current complaints mainly revolve around neuropathic pain which Gabapentin is controlling very well; surface pain after prolonged sitting; lack of flexibility on the right side; and PTSD. Neuropathy and neuropathic pain typically cannot be found on a pelvic or one finger exam. The surface pain after prolonged sitting and the lack of flexibility also would not be evaluated [by] the exam techniques proposed by Dr. Lind. Of course[,] PTSD is not evaluated by those techniques either, though in this instance those techniques could provoke it with this patient."

The court, in a decision by Justice Presiding Dianne T. Renwick, held:

> In the circumstances of this case, Supreme Court should not have limited the scope of the IME. Defendants' motion to compel was supported by a medical expert's affidavit showing that the comprehensive gynecological examination, which would include a pelvic examination, is necessary and material, that such examination was a routine procedure, and that it has no harmful effects. On this showing, the motion court should have allowed the comprehensive gynecological examination with the pelvic exam, particularly where plaintiff's medical expert does not materially controvert the opinion by defendants' expert. Absent any support for plaintiff's conclusory claim that a "further" pelvic examination would be harmful, the benefit of such examination to pretrial disclosure more than outweighs the discomfort to plaintiff.
>
> Contrary to the dissent's allegations, the record does not support the motion court's determination that the pelvic examination techniques were "potentially harmful" to plaintiff []. Indeed, plaintiff's treating physician herself classified the proposed examination as "classic pelvic exam techniques." Moreover, the only potential harm or threat to plaintiff's health indicated by plaintiff's treating physician was that the examination could potentially trigger PTSD. However, as the motion court properly found, the treating physician's assertion lacked any probative value as it was not accompanied by any supporting medical evidence from a treating psychiatrist or any other mental health professional. A conjectural assertion that a medical exam might trigger an unsubstantiated PTSD condition is not sufficient to warrant limiting the scope of an otherwise appropriate IME.

Conclusion

We recognize the delicate balancing highwire undertaken by all three courts in reaching their decisions, and the analysis and rationale underpinning each decision are legally supported. We also recognize that we live in a complex, often fraught world. Finally, we are rarely reluctant to express our personal opinions on court decisions, but here believe it best to leave it to the reader to do so without putting our grubby fingers on the scale (any more than we may have already).

Our next column will not hit until 2024 and, until then, we wish all of you a happy holiday season and a great start for the new year.

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. 9 N.Y.3d 393 (2007).
2. 8 N.Y.3d 506 (2007).
3. 76 N.Y.2d 363 (1990).
4. 217 A.D.3d 47 (2d Dep't 2023).
5. *See People v. Ortega,* 15 N.Y.3d 610 (2010); *Williams v. Alexander,* 309 N.Y. 283 (1955).
6. 217 A.D.3d 1 (2d Dep't 2023).
7. *See Gilliam v. Uni Holdings, LLC,* 201 A.D.3d 83 (1st Dep't 2021).
8. 213 A.D.3d 46 (1st Dep't 2023).

Former Homeland Security Secretary Jeh Johnson To Receive New York State Bar Association's Highest Honor at Gala

By Rebecca Melnitsky

Jeh Johnson, the former secretary of homeland security, will receive the New York State Bar Association's Gold Medal Award, its highest honor, at the association's Presidential Gala Jan. 18 at the Museum of Modern Art in New York City.

"Jeh has been a leader in diversity, equity and inclusion," said Richard Lewis, president of the New York State Bar Association. "After the U.S. Supreme Court ruled on affirmative action in June, colleges, law schools, law firms and the courts were left scrambling. But under Jeh's leadership, the Task Force on Advancing Diversity produced a detailed report in record time, providing much-needed guidance and making sure that legal diversity programs were not dismantled."

The Presidential Gala is one of the highlights of NYSBA's 147th Annual Meeting, which takes place Jan. 16 to 20 at the New York Hilton Midtown. The association's premier event, the Presidential Summit, will focus on "AI and the Legal Landscape: Navigating the Ethical, Regulatory and Practical Challenges."

Tickets and table reservations for the gala are already on sale. To buy tickets, reserve tables or sponsor the program, visit NYSBA.ORG/2024PRESIDENTIALGALA or email nysbagala@nysba.org.

During the Presidential Gala, which will be black–tie optional, Danny Jonokuchi & The Revisionists will perform. The band, dubbed "today's premier swing band" by BroadwayWorld, was the unanimous winner of the inaugural Count Basie Great American Swing Contest. A silent auction to raise funds for the New York Bar Foundation's legal services programs will begin on Jan. 8 and continue live at the gala.

About Jeh Johnson

Johnson serves as a co-chair of the association's Task Force on Advancing Diversity, which provided a path forward for diversity, equity and inclusion programs in universities, graduate schools, businesses and courts only a few short months after the U.S. Supreme Court ruled that race-conscious admissions policies at Harvard and the University of North Carolina were unconstitutional.

In 2020, then-Chief Judge Janet DiFiore appointed Johnson as an independent monitor to assess equal justice in New York State's court system. Within four months, he issued a 100-page report recommending significant changes to promote equal justice. In the three years since, many of these recommendations have been adopted.

A graduate of Morehouse College (cum laude) and Columbia University Law School, Johnson served as

secretary of Homeland Security from 2013 to 2017. Before that, he was general counsel of the Department of Defense (2009-2012), general counsel of the Department of the Air Force (1998-2001) and an assistant United States attorney for the Southern District of New York (1989-1991).

He has been affiliated with Paul, Weiss since 1984 and was elected as its first African American partner in 1993. He is the co-chair of the firm's cyberseccrity and data protection practice and advises high-tech companies, private equity firms and government contractors on the legal aspects of cybersecurity, national security, data privacy, government relations, crisis management, high-stakes litigation and regulatory matters.

Johnson also serves as a trustee of Columbia University and is a member of the board of directors for Lockheed Martin, U.S. Steel and MetLife.

New York State's First Black Chief Judge Rowan Wilson Speaks on the Significance of Humility While Formally Being Seated During Investiture

By David Alexander

The investiture of Chief Judge Rowan T. Wilson on Sept. 12 marked a historic moment as he was formally welcomed to his role before a standing room-only crowd inside the Court of Appeals Hall. Gov. Kathy Hochul presided over the investiture and delivered the oath of office.

Wilson, a graduate of Harvard Law School, became New York State's first Black chief judge in the court's 176-year history on April 18 after being confirmed by the state Senate. He had been an associate judge of the Court of Appeals since 2017.

Wilson spoke on the importance of being humble, of cooperation and his appreciation for his fellow Court of Appeals judges' willingness to collaborate, which elevates each of them and the court's work.

"Thanks to the commission on judicial nomination, Gov. Hochul and the New York state Senate, I now have an even more important job, really two different but interrelated important jobs. By more important, I mean that they come with greater responsibility. Although this job is more important, I'm still not an important person. If I start thinking of myself as an important person, I will not do my job well," said Wilson. "I've come to understand that there is a fundamental corollary in that the more important your job is, the less you are able to do it alone."

He went on to discuss how the court system faces challenges and that he welcomes criticism and open discussion as a manner to improve the court.

Rowan D. Wilson, chief judge of the Court of Appeals and the State of New York, and NYSBA President Richard Lewis

"The challenges ahead are great and present great opportunity. The quest to achieve the best possible judicial system must be our focus, but that quest will fail without the help of you, my friends and friends-to-be, who truly are friends of New York and its courts," said Wilson. "That help, by the way, includes disagreements, criticism and the identification of problems. We cannot fix what we do not know what needs to be corrected."

Hochul spoke of Wilson's qualifications before administrating the oath of office. She emphasized that while his appointment is a milestone, it is not the reason for his selection as chief judge.

"That is not why he was selected. He has demonstrated through his years already on this court the intellect, the understanding, the ability to write in such a powerful way and to really make decisions that matter," said Hochul.

Earlier, Senior Associate Judge Jenny Rivera spoke of the significance of Wilson's appointment and underscored his qualifications while delivering the event's opening remarks.

"It has taken centuries to arrive at this moment. It has taken too long. Firsts are important and not an end to themselves, but because they mark the end of exclusion," said Rivera. "A great chief judge leads by example. They are guided by their head and their heart, and he does that."

NYSBA Celebrates Constitution Day by Honoring New Americans

By Jennifer Andrus

New York State Bar Association President Richard Lewis addressed 29 new Americans with roots in 19 countries at a naturalization ceremony marking Constitution Day. For the new citizens, it was the culmination of years of waiting, and studying, to become U.S. citizens.

Dutchess County Family Court and Acting Supreme Court Judge Joseph Egitto presided over the ceremony, and Dutchess County Clerk Brad Kendall administered the oath of allegiance. New citizens pledged to support and defend the Constitution and give up their allegiance to foreign nations.

The ceremony took place at the Dutchess County Office Building in Poughkeepsie. Each new American received a pocket U.S. Constitution as a gift from the New York State Bar Association.

"It is a privilege to address these new Americans who have come from lands near and far to join the fabric of America," Lewis said. 'E pluribus unum – out of many, one' – is our motto, and being part of a naturalization ceremony marking Constitution Day is indeed special. As you listened to new citizens recite the oath, you could tell how much it means to them to become an American."

The United States celebrates Constitution Day each year on Sept. 17, the day it was signed in 1787. The entire week is known as Constitution Week, and people celebrate with naturalization ceremonies across the country in government buildings, courthouses, national parks and historic locations.

The 2023 Constitution Day theme was "Reflection, Choice, and Self-Government." The observance of Constitution and Citizenship Day began in 1940 as "I Am an American Day." President Truman renamed it Citizenship Day in 1952. Three years later, President Eisenhower expanded the observance and proclaimed it Constitution Week.

NYSBA President Joins Chief Judge in Hearing on Civil Legal Services

By Jennifer Andrus

A dozen representatives of civil legal service organizations, family court and advocacy groups testified before a panel at the Court of Appeals in Albany led by Chief Judge Rowan Wilson. Panelists included Chief Administrative Judge Joseph Zayas, Presiding Justice Gerald Whalen (Fourth Department), Presiding Justice Hector LaSalle (Second Department), Presiding Justice Dianne Renwick (First Department) and Justice Christine Clark (Third Department). New York State Bar Association President Richard Lewis was honored to be asked to participate on the distinguished panel.

The purpose of the Sept. 18 hearing was to evaluate the continuing unmet civil legal service needs of New Yorkers, including housing, consumer debt, family law and disability benefits. Over the course of four hours, civil legal service providers updated the court on the current state of services for the indigent and offered ideas on how the Office of Court Administration and the New York State Legislature could improve civil legal services across the state.

In opening remarks, Chief Judge Wilson lauded the creation of the New York's Commission on Access to Justice by his predecessor retired Chief Judge Jonathan Lippman. "No other state comes close to New York's commitment to civil legal services," he said, while admitting that more funding from the Legislature is needed.

Ronald Flagg, president of the Legal Service Corporation, traveled from Washington, D.C. to address the court. According to Flagg, the federal budget only allocates $560 million for civil legal services across the country. It is a figure he says has changed only slightly in the last 30 years and is not in keeping with inflation.

Supervising Family Court Judge Richard Rivera of Albany County told the panel that the Capital Region is "in desperate need of lawyers in family court." Rivera said the recent pay increase for 18-B attorneys is welcomed, and he has seen some attorneys return to the court. He said they still cannot sustain a full-time practice from assigned counsel cases and need cost of living increases written into law.

Chief Judge Wilson interjected, "Judge Zayas and I agree that family court is our priority."

Justice LaSalle asked Judge Rivera about the needs of families for whom English is not a first language. Rivera said the need for bilingual attorneys is great, remarking that several bilingual attorneys moved into the judiciary, creating a greater need for multilingual attorneys. His greatest need is funding for attorney training and funding for investigator positions to work for litigants in family court.

Kapil Longani: 'I Run Towards the Most Thorny, Intractable Issues Involving Equity and Fairness.'

By Jennifer Andrus

Kapil Longani is senior vice chancellor for legal affairs and general counsel for the State University of New York, which comprises 64 campuses across New York State. He is a member of the New York State Bar Association Task Force on Advancing Diversity. Longani recently published an essay on the decision by his alma mater, Yale University, to alter its admissions policies. He holds an undergraduate degree from Cornell University and legal degrees from the University of Florida College of Law, Yale Law School and Oxford University.

You are a new member of NYSBA and jumped right into a major issue of the day by joining the Task Force on Advancing Diversity. Why did you want to join?

NYSBA's focus on influential and historic matters is second to none. My initial introduction to NYSBA occurred during the pandemic when I was chief counsel to the mayor of New York City. The pandemic was a once-in-a-lifetime event, and the law was changing on a minute-by-minute basis. NYSBA provided a respected and well-known public forum to discuss the historic issues that our state faced, including balancing fundamental rights like the freedom to assemble while keeping people safe. For example, I was a panelist on two NYSBA panels focused on the use of emergency powers and cases of first impression faced by major cities across the country.

When I came to SUNY, I relished the opportunity to work on historic issues like race-conscious admissions and its effect on millions of people across this country and our great state. As a member of NYSBA's Task Force on Advancing Diversity, I had the privilege and honor of working with deans from Columbia, NYU and Albany Law schools and a Skadden partner to write the higher education section of the Advancing Diversity report, which was published on Sept. 20. The ability to get that report published in record time to provide much-needed advice is a great credit to the leadership of NYSBA President Lewis and the chairs of the committee. The report, like the panels during the pandemic, is a pointed example of how NYSBA is a critical source of dependable advice on the most complex legal issues confronting our state. I wanted to be a part of an organization that provides real value to its members and the public, and I look forward to contributing meaningfully to NYSBA in the coming years.

Looking at your career path and your work on a new democracy in South Africa, on a Congressional investigation of the Flint water crisis and New York City's COVID-19 response, you found yourself in very difficult legal situations. Do you see this as being in the right place at the right time, or have you sought out these thorny situations?

Both, I think! I run towards the thorniest, most intractable issues involving equity and fairness. Those are the only jobs that interest me. These issues are never easy but always interesting. That is what brings meaning to my professional life.

For example, in New York City, the pandemic-related issues of access to medical care, vaccines and masks were, at their core, issues of equity and fairness.

Here at SUNY, we focus on ensuring every New Yorker has an equal opportunity to be educated in a field of their choice. I can't imagine a more fulfilling mandate and mission, and I'm grateful to the chancellor and the chair of the board for the opportunity.

Your family emigrated to the United States from India. How has your background influenced your career focus on public service?

When you are born in a country like India, your caste determines your future. The opportunity to live your dreams and contribute to your community without the restraints of caste is why my parents immigrated to the United States. It's no coincidence that my parents are also public servants. My dad worked at NASA, and my mom is a school principal. Like my parents, I have spent my professional life in public service because it is where I feel I can make the biggest difference.

How can we encourage more young attorneys to seek out opportunities in public service and pro bono work?

As lawyers, we are obliged to better our society, and there are so many ways to do it. It is just a question of finding your niche.

You don't have to be a government employee to perform public service. After my federal clerkships, I spent four years at Skadden Arps, a private law firm in New York City. During that time, I worked on significant pro bono matters that were deeply fulfilling. I would strongly recommend that, regardless of the sector you are in – public or private – you look for opportunities to serve that are equally meaningful to you.

CLASSIFIEDS

Looking for a one stop for lawyers seeking to sublease a law office and executive suites and law firms to advertise available office space?

Check out www.lawspacematch.com Created by lawyers for lawyers sharing office space. Contact us at service@lawspacematch.com for a promo code - 30 days free listing.

Residential Real Estate Litigation Support and Expert Witness Services by a Certified Fraud Examiner

Experienced licensed Real Estate Broker. Cases related to Realtor Standards of Care, Premises Liability, Slip and Fall, Disclosure issues, Material Defects, and Fraud. Visit www.ExpertLitigationSupport.com - email: Richard@ExpertlitigationSupport.Com or call (888) 222.9960 CV upon request.

Mental Healthcare Attorney Position:

Seeking partner/successor for high income solo practice in NYC area specializing in mental healthcare law representing practitioners only. Dual background in mental healthcare practice preferred. Capital investment required. Email letter of interest and CV to psychlaw@yahoo.com.

Medical Expert In Thoracic And Vascular Surgery, Non-Invasive Vascular Testing And Wound Care

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

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

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

MEMBERS OF THE HOUSE OF DELEGATES

First District

Ahn, Bridgette Y.
* Alcott, Mark H.
Arenson, Gregory K.
Aufses, Arthur H.
Baum, Simeon H.
Bernstein, Karen J.
Braiterman, Andrew H.
Buckley, Erica F.
Carter, Ralph J
Chandrasekhar, Jai K.
Christian, Catherine A.
D'Angelo, Christopher A.
Enix-Ross, Deborah Delores
Finnerty, Margaret J.
* Forger, Alexander D.
Frenkel, Eugene
Galler, Sheryl B.
Grande, Ignatius A.
Grays, Taa R.
Griffin, Mark P.
Haig, Robert L.
Hoffman, Stephen D.
Holder, Adriene L.
Jaglom, Andre R.
* James, Seymour W.
Jayne, Marcella M.
Kaufman, Gary G.
Kennedy, Tanya R.
Klugman, Scott Brian
Kobak, James B.
Koch, Adrienne Beth
Kohlmann, Susan J.
* Lau-Kee, Glenn
* Leber, Bernice K.
Lenci, Edward
Lessard, Stephen Charles
Livshits, Aleksandr B.
Lustbader, Brian G.
MacLean, Ian William
Maroney, Thomas J.
Mason, Bernard Edward
McElwreath, Suzanne
McNamara, Michael J.
†* Miller, Michael
Minkoff, Ronald C.
Morris, Russell D.
Morrissey, Mary Beth Quaranta
O'Connor, James P.
Parker, Jessica D.
† Petterchak, Jacob Wade
* Pruzansky, Joshua M.
Quaye, Rossalyn
Radding, Rory J.
Rayskin, Alexander
Riano, Christopher R.
Rosato, Joseph S.
Rothberg, Peter W.
Russell, William T.
Safer, Jay G.
Sargente, Alfred J.
Sen, Diana S
Silkenat, James R.
Simels, Alexandra Leigh
Skidelsky, Barry
Stoeckmann, Laurie
Treff, Leslie C.
Warnke, Gordon
Watanabe, Tsugumichi
Waterman-Marshall, Kathleen C.
Weinstock, Ariel
Whittingham, Kaylin L.
* Younger, Stephen P.

Second District

Bonnina, Andrea E.
Cohn, Steven D.
D'Souza, Leroy Austin
Finkel, Fern J.
Kamins, Barry
Klass, Richard A.
Moreno, Angelicque M.
† Napoletano, Domenick
Richter, Aimee L.
Schram, Luke Christopher
Strong, Elizabeth S.
Sunshine, Jeffrey S.
Sunshine, Nancy T.
Vaughn, Anthony
Yeung-Ha, Pauline

Third District

Afzali, Mara Dew
Barry, Mathew P
Burke, Jane Bello
Davidoff, Michael
Fernandez, Hermes
Gold, Sarah E
†* Greenberg, Henry M.
Griesemer, Matthew J.
Johnson, Linda B.
Ko, Andrew Zhi-yong
Liebman, Bennett M.
Lubow, Greg
Mandell, Adam Trent
Matos, Maria
†*# Miranda, David P.
Monaco, Mackenzie Curtin
Monjeau, Caitlin J.
Pierson, Colleen Rachel
Richardson, Jennifer

Fourth District

Babbie, Luke John
Carter, J.R. Santana
Clark, M. Elizabeth
Gilmartin, Margaret E.
Harwick, John F.
Loyola, Guido A.
Montagnino, Nancy K.
Nielson, Kathleen A.
O'Connor, Dennis J.
Reale, Connor Julius
Rosner, Seth
Sciocchetti, Nancy
Sharkey, Lauren E.
Simon, Nicole M.

Fifth District

Bray, Christopher R.
Dennis-Taylor Tonastacia S.
Fellows, Jonathan B.
* Getnick, Michael E.
Gilbert, Gregory R.
Hobika, Joseph H.
LaRose, Stuart J.
McCann, John T.
Murphy, James P.
Randall, Candace Lyn
Reckless, Sarah C.
* Richardson, M. Catherine
Spring, Laura Lee
Westlake, Jean Marie

Sixth District

Adigwe, Andria
Barreiro, Alyssa M.
Buckland, Jake H.
Duvall, Jeri Ann
Jones, John E.
Kawecki, Robert J.
† Lewis, Richard C.
Mack, Jared
* Madigan, Kathryn Grant
May, Michael R.
McKeegan, Bruce J.
McNamara, Jacob Paul
Miller, Rachel Ellen
Walsh, Peter

Seventh District

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

Eighth District

Beecher, Holly Adams
Bond, Jill
Breen, Lauren E.
Bucki, Craig Robert
* Doyle, Vincent E.
Effman, Norman P.
Feal, Sophie I.
* Freedman, Maryann Saccomando
†* Gerstman, Sharon Stern
Graber, Timothy Joseph
LaMancuso, John Ignatius
Meyer, Harry G.
Nowotarski, Leah Rene
O'Donnell, Thomas M.
Raimondo, Elliot Samuel
Riedel, George E.
Russ, Hugh M.
Sweet, Kathleen Marie
Williams, Keisha A.
Young, Oliver C.

Ninth District

Battisoni, Jeffrey S.
Beltran, Karen T.
Bondar, Eugene
Braunstein, Lawrence Jay
Carbajal-Evangelista, Natacha
Carlisle, Jay C.
Cohen, Brian S.
Degnan, Clare J.
Fernandez, Lissette G.
Fiore, Keri Alison
Forster, Paul S.
Gauntlett, Bridget
Goldschmidt, Sylvia
* Gutekunst, Claire P.
Henderson, Amanda M.
Jamieson, Linda S.
†* Levin Wallach, Sherry
Lissauer, Lawrence D.
Milone, Lydia A.
Mukerji, Deepankar
Nimetz, Irma K.
Palermo, Christopher
Pappalardo, John A.
Parker, Eric David
Seiden, Adam
* Standard, Kenneth G.
Starkman, Mark T.
Triebwasser, Jonah
Weis, Robert A.

Tenth District

Antongiovanni, Michael J.
Averna, Raymond J.
Berlin, Sharon N.
Besunder, Harvey B.
Bladykas, Lois
Block, Justin M.
Bouse, Cornell V.
* Bracken, John P.
Broderick, Maxine Sonya
Glover, Dorian Ronald
Hafner, Bruce R.
Islam, Rezwanul
Jacobson, Christie Rose
†* Karson, Scott M.
Kartez, Ross J.
Kretzing, Laurel R.
Lapp, Charles E.
* Levin, A. Thomas
Levy, Peter H.
Markowitz, Michael A.
Masri, Michael H.
McCormick, Patrick
McPherson, Declan
Messina, Vincent J.
Strenger, Sanford

Eleventh District

Abneri, Michael D.
Alomar, Karina E.
Cohen, David Louis
Dubowski, Kristen J.
Gutierrez, Richard M.
Jimenez, Sergio
Nasser, Sharifa Milena
Samuels, Violet E.
Taylor, Zenith T.
Terranova, Arthur N.
Welden, Clifford M.

Twelfth District

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

Thirteenth District

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

Out of State

Choi, Hyun Suk
Filabi, Azish Eskandar
Harper, Susan L.
Heath, Helena
Houth, Julie T.
Malkin, Brian John
Wesson, Vivian D.

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

Periodicals

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