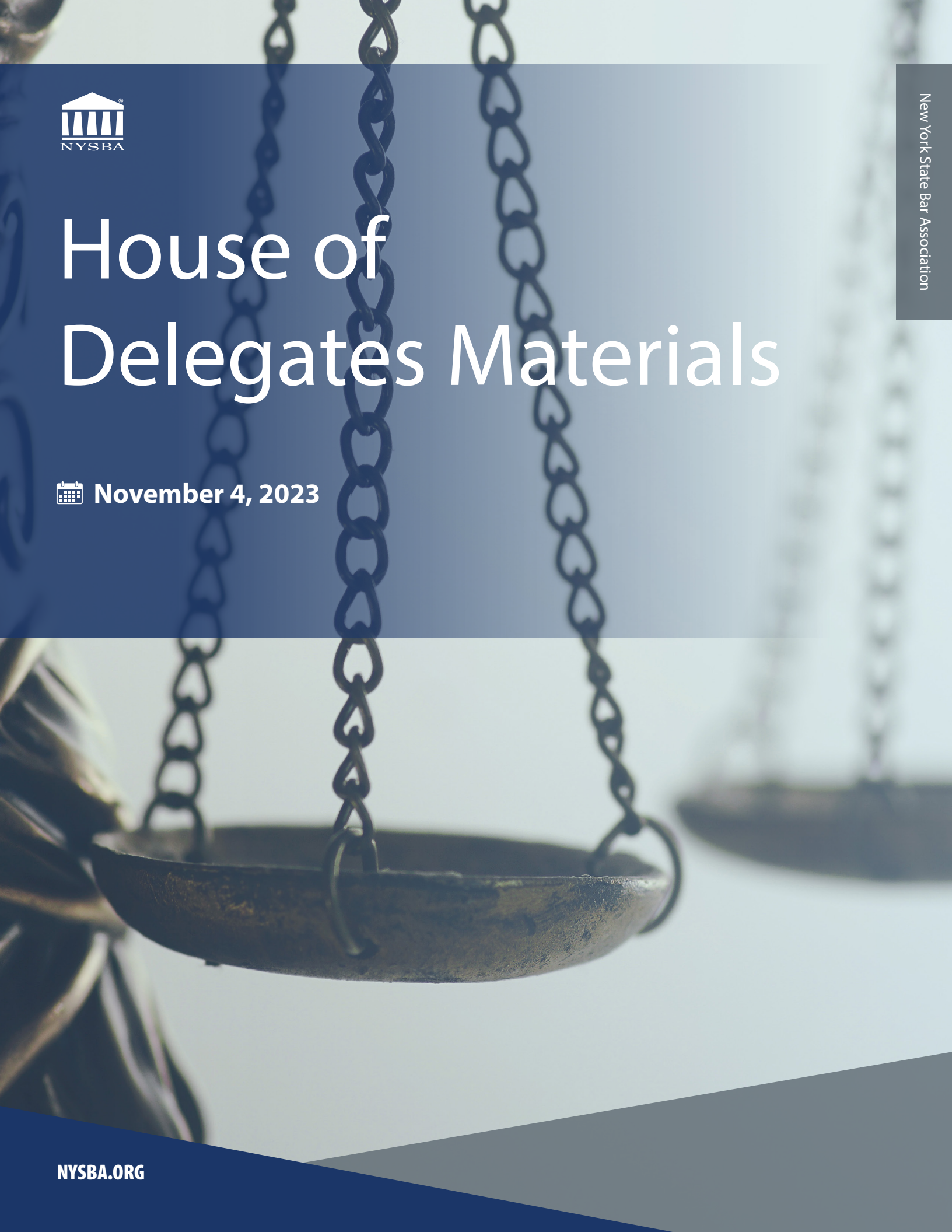


NYSBA

New York State Bar Association

House of Delegates Materials

November 4, 2023

NYSBA.ORG

NEW YORK STATE BAR ASSOCIATION
MEETING OF THE HOUSE OF DELEGATES
BAR CENTER, ALBANY, NEW YORK
AND REMOTE MEETING
SATURDAY, NOV 4, 2023 – 9:00 A.M.

AGENDA

1.	Call to order, Pledge of Allegiance, and Welcome	9:00 a.m.
2.	Approval of minutes of April 1, 2023, meeting	9:03 a.m.
3.	Report of the Nominating Committee – Scott Karson, Esq.	9:05 a.m.
4.	Report of the Treasurer – Susan Harper, Esq.	9:15 a.m.
5.	Report of the Finance Committee – Michael McNamara, Esq.	9:25 a.m.
6.	Report of President – Richard C. Lewis, Esq.	9:40 a.m.
7.	Chief Administrative Judge Joseph A. Zayas	9:50 a.m.
8.	Memorial for Past President James Moore, Esq.– A. Vincent Buzard, Esq.	10:00 a.m. .
9.	Report of the Committee on Membership – Michelle Wildgrube, Esq and Clotelle Drakeford, Esq.	10:10 a.m.
10.	Report and Recommendations of the Bylaws Committee - Robert Schofield, Esq.	10:25 a.m.
11.	Report and Recommendations of the Task Force on Advancing Diversity - Secretary Jeh Johnson and Brad Karp, Esq.	10:45 a.m.
12.	Presentation of 2023 Root/Stimson Award to Stephen E. Diamond, Esq. - Richard C. Lewis, Esq.	11:10 a.m.
13.	Report and recommendations of Working Group on Facial Recognition Technology and Access to Legal Representation – Thomas Maroney, Esq.	11:25 a.m.
14.	Report and Recommendations of the Task Force on the Future of the Profession - John Gross, Esq. and Mark Berman, Esq.	11:40 a.m.

15.	Report of the Committee on Gala – John H. Gross, Esq.	12:00 p.m.
16.	Report of The New York Bar Foundation – Carla Palumbo, Esq.	12:05 p.m.
17.	Administrative Items – Richard C. Lewis, Esq.	12:10 p.m.
18.	New Business	12:15 p.m.
19.	Date and place of next meeting: Friday, Jan 19, 2024 9:00 a.m.	

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #1

REQUESTED ACTION: None, as the report is informational.

President-Elect and Chair of the House of Delegates, Domenick Napoletano will welcome attendees of the meeting and review instructions and mechanics for in-person and virtual discussion and voting.

Remote Participation:

For reports for which discussion and votes are required, please use the "raise hand" feature after the presentation of the report to be recognized should you wish to request to speak. Second, after discussion is completed, you will be asked to complete a poll that will appear on your Zoom screen; you will select "Aye," "Nay," or "Abstain" and then click "Submit." You will have ten seconds to vote. The vote results will be displayed on your screen. Third, if you abstain from a vote, please send an email address to Melissa O'Clair at moclair@nysba.org so that your abstention can be recorded in the minutes.

In-Person Participation:

If you are attending the meeting in person, please use the standing microphones should you wish to speak to a report. For any items which require a vote, the voice vote in the room will occur simultaneously with the launch and closing of the online poll. Please note that there will be a short delay to allow the in-person and online votes to be tallied.

For all delegates – both those participating remotely and those here in person – if selected to speak, as has been our practice, we ask that you follow these guidelines to promote an orderly discussion and debate:

- Delegates should identify themselves and their affiliations.
- Delegates should speak only once and limit remarks to three (3) minutes.
- Questions should be directed to me as the Chair of the House.
- Delegates should refrain from procedural motions until substantive discussion is completed. In this regard, a delegate may rise to speak to the motion on the floor and advise me that they intend to make a procedural motion at the appropriate time. I will recognize you to make that motion.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #2

REQUESTED ACTION: Request for corrections, amendments, or objections.

President-Elect and Chair of the House of Delegates, Domenick Napoletano will present the June 10, 2023, meeting minutes and ask if attendees have any corrections or amendments. If there are no corrections or amendments, the meeting minutes will be accepted as distributed.

NEW YORK STATE BAR ASSOCIATION
MINUTES OF HOUSE OF DELEGATES MEETING
THE OTESAGA, COOPERSTOWN, NEW YORK, AND REMOTE MEETING
JUNE 10, 2023

PRESENT: Abneri, Adigwe, Ahn, Antongiovanni, Arenson, Averna, Babbie, Barreiro, Baum, Beecher, Bello Burke, Beltran, Berlin, Besunder, Bladykas, Block, Bondar, Bouse, Braunstein, Breen, Broderick, Brown, Bucki, Buckley, Buholtz, Campbell, Carlisle, Carter, Chandrasekhar, Christian, D. Cohen, B. Cohen, Cohn, Davidoff, Degnan, Dennis-Taylor, Dubowski, Duvall, Effman, Feal, Fellows, H. Fernandez, L. Fernandez, Filabi, Finerty, Finkel, Frenkel, Gauntlett, Gerstman, Getnick, Gilbert, Gilmartin, Glover, Goffer, Gold, Graber, Grande, Grays, Griesemer, Gutekunst, Gutierrez, Haig, Harper, Harwick, Heath, Henderson, Hoffman, Holder, Houth, Islam, Jackson, Jacobson, Jaglom, James, Jamieson, Jayne, Jimenez, Jones, Kamins, Kaufman, Kelley, Kobak, Koch, Lamb, Lapp, LaRose, Lathrop, Lau-Kee, Leber, Lenci, Levin, Levin Wallach, Levy, Lewis, Lissauer, Livshits, Loyola, Mack, MacLean, Madigan, Marinaccio, Markowitz, Maroney, Marotta, Martin, Mason, Masri, Matos, Mazur, McCann, McElwreath, McGinn, McKeegan, McNamara, McPherson, C. Miller, M. Miller, Minkoff, Montagnino, Moretti, Morris, Muller, Murphy, Napoletano, Nasser, Nielson, Nimetz, Noble, Nowotarski, D. O'Connor, J. O'Connor, O'Donnell, A. Palermo, C. Palermo, Pappalardo, E. Parker, J. Parker, Petterchak, Pierson, Quaye, Randall, Reale, Reckess, Richter, Riedel, Russell, Ryan, Safer, Samuels, Sargente, Schwartz-Wallace, Sen, Sharkey, Silkenat, Simels, Skidelsky, Spring, Stoeckmann, Strenger, J. Sunshine, N. Sunshine, Sweet, Tambasco, Taylor, Treff, Treibwasser, Vaughn, Waterman-Marshall, Welden, Whittingham, Williams, Yeung-Ha, Young

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

1. Call to order, Pledge of Allegiance, and introduction of new members. The meeting was called to order and the Pledge of Allegiance was recited. Mr. Napoletano welcomed the new members of the House.

2. Approval of Minutes of April 1, 2023, meeting. The minutes were deemed accepted as distributed.

3. Report of Treasurer. Susan L. Harper, treasurer, reported that through April 30, 2023, the Association's total revenue was approximately $13,200,000, an increase of approximately $1,218,000 from the previous year, and total expenses were approximately $7,568,000, an increase of approximately $1,525,000 over 2022. The report was received with thanks.

4. Installation of President. Mr. Lewis was formally installed as the one-hundred and twenty-sixth President of the New York State Bar Association. The oath of office was administered by Hon. Elizabeth A. Garry, Presiding Justice of the New York State Supreme Court Appellate Division, Third Department.

5. Report of President. Mr. Lewis addressed the House with respect to his planned initiatives for his term as President. A copy of the written report is appended to these minutes.

6. Report and recommendations of Task Force on Modernization of Criminal Practice. Task Force co-chairs Catherine A. Christian and Andy Kossover outlined the recommendations contained in the report pertaining to justice courts, sentencing reform, technology, discovery, and e-filing, and the Vehicle and Traffic Law. After discussion, a motion was adopted to approve the report and recommendations. Judge Murphy and three other members abstained from the vote.

7. Report of Task Force on the Post-Pandemic Future of the Profession. Task Force co-chairs Mark A. Berman and John H. Gross reviewed the recommendations contained in the Task Force's report in advance of final consideration at the November 2023 meeting of the House of Delegates. The report was received with thanks.

8. Report and recommendations of Task Force on Mental Health and Trauma Informed Representation. Task Force co-chairs Joseph A. Glazer and Sheila E. Shea presented the Task Force's report and recommendations contained therein. After discussion, a motion was adopted to approve the report and recommendations. Two members abstained from the vote.

9. Report of Special Committee to Examine Selection of Judges for the Court of Appeals. Special Committee co-chairs Damaris Hernandez and Vincent E. Doyle, III, presented on the role, composition, and work of the special committee since its establishment in January 2023. The report was received with thanks.

10. Reconsideration of Report of Task Force on Modernization of Criminal Practice. A motion to reconsider approval of the report of the Task Force on Modernization of Criminal Practice failed to carry. Judge Murphy abstained from the vote.

11. Reconsideration of Report of Task Force on Mental Health and Trauma Informed Representation. A motion to reconsider approval of the report of the Task Force on Mental Health and Trauma Informed Representation failed to carry.

12. Report and recommendations of Committee on Membership. Clotelle D. Drakeford and Michelle H. Wildgrube, co-chairs of the Committee on Membership, reviewed the committee's proposal to implement a revised fee structure and subscription model of membership. After discussion, a motion was made to adopt the resolution, after which a motion to amend the sixth clause of the resolution to read "THEREFORE, IT IS RESOLVED, that the House of Delegates endorses the concept of implementation of a subscription payment model for membership dues" was duly carried. The main motion was then approved, and the following resolution was adopted by the House:

> WHEREAS, the New York State Bar Association, as a membership organization, delivers certain benefits for the purpose of the professional development of its members;
>
> WHEREAS, the benefits of membership with the New York State Bar Association include access to Continuing Legal Education programming,

publications and articles, legal templates and forms, and other member-specific content;

WHEREAS, the implementation of a subscription payment model for membership dues would allow members to process Section membership and access to virtual and on-demand Continuing Legal Educational programming as part of their respective annual membership renewal;

WHEREAS, the implementation of a subscription payment model for membership dues would assist the administration of the Association through consolidated marketing efforts, allocation of staffing and resources, and stronger long-term revenue forecasting.

WHEREAS, the implementation of a subscription payment model for membership dues would streamline online transactions for both members and non-members and would facilitate the expansion of membership amongst New York licensed attorneys who are not currently members of the New York State Bar Association;

THEREFORE, IT IS RESOLVED, that the House of Delegates endorses the concept of implementation of a subscription payment model for membership dues;

RESOLVED, that any subscription payment model would be available to those persons eligible for membership within the classes of Active Members, Associate Members, and Law Student Members of the Association;

RESOLVED, that the powers and privileges incumbent on each of the above-referenced classes of membership would not be abrogated or altered by implementation of a subscription payment model;

FURTHER RESOLVED, that this resolution and report be commended to the Committee on Bylaws for such review so that the appropriate Bylaws amendments can be drafted as necessary for consideration and subscription at the November 5, 2023, meeting of the House of Delegates;

FURTHER RESOLVED, that such appropriate Bylaws amendments, if subscribed to by the House, will be presented for discussion and adoption at the 2024 Annual Meeting of the Association.

One member abstained from the vote.

13. Report and recommendations of Committee on the New York State Constitution. Desmond C.B. Lyons, chair of the Committee on the New York State Constitution's subcommittee on simplification of the state constitution, reviewed the committee's proposals for simplification of articles VI (Judiciary), VII (State Finances), and VIII (Local Finances) of

the New York State Constitution. After discussion, a motion was adopted to approve the report and recommendations. Two members abstained from the vote.

14. Report of Working Group on Facial Recognition Technology and Access to Legal Representation. Thomas J. Maroney, a member of the Working Group, reported on the mission, composition, and goals of the Working Group, including a review of activity since the group was established in February 2023. The report was received with thanks.

15. Report of Committee on Annual Awards. John H. Gross, committee chair, reported that the Gold Medal Award would be presented to Jeh C. Johnson, former Secretary of Homeland Security, at the 2024 Gala Dinner. The report was received with thanks.

16. Report of The New York Bar Foundation. Carla M. Palumbo, president of the New York Bar Foundation, updated the House members on the ongoing work and mission of The Foundation, including fundraising and grand-making capabilities. The report was received with thanks.

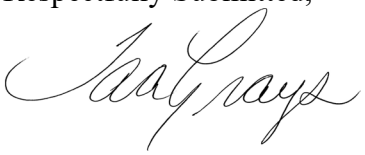
17. Administrative Item. Mr. Lewis reported that at its June 8, 2023, meeting, the Executive Committee had confirmed the reappointment of Jackie J. Drohan, Andre R. Jaglom, and Tara Anne Pleat as members of the Finance Committee, each to serve a two-year term. Pursuant to the Bylaws, the House is required to ratify the selection of these members. A motion was adopted to ratify the members' selection.

18. New Business. Mr. Napoletano encouraged eligible members to participate in the New York State Unified Court System Office for Justice Initiatives' Attorney Emeritus Program.

19. Date and place of next meeting. Mr. Napoletano announced that the next meeting of the House of Delegates would take place on Saturday, November 4, 2023, with options for participation in person at the Bar Center in Albany or remotely via Zoom.

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

Respectfully Submitted,



Taa R. Grays
Secretary

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #3

REQUESTED ACTION: None, as the report is informational.

The Nominating Committee submits nominations of candidates for all offices required by Article XI of the Bylaws to be filled by election at each Annual Meeting or at the meeting of the House of Delegates immediately following each Annual Meeting.

The individuals nominated for the following offices for the 2024-2025 Association year will be announced at this meeting: President-Elect, Secretary, Treasurer, Vice Presidents, Members-at-Large of the Executive Committee, Section Member-at-Large, and Young Lawyer Member-at-Large.

The individuals nominated as delegates to the American Bar Association House of Delegates for the 2023-2025 term will also be announced.

The report will be presented by Scott M. Karson, Esq.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #4

REQUESTED ACTION: None, as the report is informational.

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

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

New York State Bar Association
2023 Operating Budget
For the period ending September 30, 2023

REVENUE

	2023 BUDGET	UNAUDITED 2023 September YTD	% RECEIVED	2022 BUDGET	UNAUDITED 2022 September YTD	% RECEIVED
Membership dues	9,000,000	8,634,954	96%	9,372,690	8,957,575	96%
SECTIONS:						
Section Dues	1,181,350	1,067,650	90%	1,219,400	1,104,973	91%
Section Programs	2,587,528	1,676,361	65%	2,841,555	960,475	34%
Investment Income	494,215	395,520	80%	486,225	312,083	64%
Advertising	319,500	146,635	46%	218,000	196,809	90%
Continuing legal education program income	2,390,000	2,011,175	84%	2,950,000	1,574,330	53%
USI Affinity	2,000,000	1,500,000	75%	1,912,000	1,500,000	78%
Annual Meeting	895,000	865,857	97%	400,000	444,011	111%
House of Delegates & Committee	36,700	56,127	153%	47,500	44,519	94%
Royalties	308,000	277,427	90%	213,500	252,363	118%
Reference Books, Formbooks Products	1,309,350	217,716	17%	1,247,000	704,301	56%
TOTAL REVENUE	**20,521,643**	**16,849,421**	**82%**	**20,907,870**	**16,051,439**	**77%**

EXPENSE

	2023 BUDGET	UNAUDITED 2023 September YTD	% EXPENDED	2022 BUDGET	UNAUDITED 2022 September YTD	% EXPENDED
Salaries and Fringe	8,759,290	6,399,908	73%	8,588,946	6,265,873	73%
BAR CENTER:						
Building Services	325,500	341,933	105%	342,000	259,208	76%
Insurance	206,000	169,923	82%	190,000	161,772	85%
Taxes	93,750	66,887	71%	167,250	133,204	80%
Plant and Equipment	791,000	586,317	74%	862,000	635,238	74%
Administration	546,900	493,943	90%	610,750	633,458	104%
Sections	3,739,828	2,679,021	72%	4,039,155	1,722,882	43%
PUBLICATIONS:						
Reference Materials	131,500	62,954	48%	121,500	75,180	62%
Journal	250,300	209,408	84%	265,000	194,235	73%
Law Digest	52,350	39,332	75%	47,000	39,199	83%
State Bar News	122,300	107,093	88%	100,300	99,044	99%
MEETINGS:						
Annual meeting expense	383,100	540,562	141%	360,100	37,535	10%
House of delegates	442,625	388,823	88%	505,750	438,386	87%
Executive committee	44,550	38,546	87%	55,800	61,649	110%
COMMITTEES AND DEPARTMENTS:						
CLE	372,150	262,470	71%	370,700	112,614	30%
Information Technology	1,741,700	1,670,574	96%	1,564,850	1,489,600	95%
Marketing Department	483,000	201,423	42%	424,500	241,819	57%
Membership Department	606,000	283,987	47%	481,250	256,695	53%
Media Department	285,750	179,023	63%	290,000	200,848	69%
All Other Committees and Departments	1,094,970	700,197	64%	1,399,575	693,058	50%
TOTAL EXPENSE	**20,472,563**	**15,422,325**	**75%**	**20,786,426**	**13,751,496**	**66%**
BUDGETED SURPLUS	**49,080**	**1,427,096**		**121,444**	**2,299,943**	

New York State Bar Association
Statement of Financial Position
For the period ending September 30, 2023

ASSETS	UNAUDITED September YTD 20	UNAUDITED September YTD 2022	UNAUDITED December YTD 2022
Current Assets:			
General Cash and Cash Equivalents	16,051,553	15,958,639	20,224,069
Accounts Receivable	19,397	-2,016	81,146
Prepaid Expenses	1,244,467	984,856	1,754,912
Royalties and Admin Fees Receivable	500,000	500,000	768,684
Total Current Assets	17,815,417	17,441,479	22,828,810
Board Designated Accounts:			
Cromwell - Cash and Investments at Market Value	2,865,852	2,635,060	2,778,996
	2,865,852	2,635,060	2,778,996
Replacement Reserve - Equipment	1,118,133	1,118,021	1,118,049
Replacement Reserve - Repairs	794,768	794,689	794,709
Replacement Reserve - Furniture	220,061	220,039	220,044
	2,132,962	2,132,749	2,132,802
Long Term Reserve - Cash and Investments at Market Value	30,504,226	27,204,934	28,907,317
Long Term Reserve - Accrued Interest Receivable	0	0	163,465
	30,504,226	27,204,934	29,070,782
Sections Reserve - Cash and Investments at Market Value	3,909,120	3,806,899	3,846,571
Section - Cash	64,990	342,566	203,122
	3,974,110	4,149,465	4,049,692
Fixed Assets:			
Building - 1 Elk	3,566,750	3,850,000	3,566,750
Land	283,250	0	283,250
Furniture and Fixtures	1,483,275	1,473,566	1,480,650
Building Improvements	1,003,540	0	898,571
Leasehold Improvements	0	871,624	-1
Equipment	3,173,311	3,220,527	3,006,400
	9,510,126	9,415,717	9,235,620
Less: Accumulated Depreciation	4,431,549	3,939,368	3,976,267
	5,078,577	5,476,349	5,259,354
Operating Lease Right-of-Use Asset	47,368	0	129,472
Finance Lease Right-of-Use Asset	7,698	0	21,208
	55,066	0	150,680
Total Assets	62,426,210	59,040,035	66,271,115
LIABILITIES AND FUND BALANCES			
Current liabilities:			
Accounts Payable and Other Accrued Expenses	690,596	905,028	771,399
Post Retirement Health Insurance Liability	18,241	0	18,241
Deferred Dues	2,530	0	6,167,778
Deferred Grant Revenue	16,998	18,103	17,150
Other Deferred Revenue	448,733	390,330	1,077,024
Payable to TNYBF - Building	3,428,025	3,639,456	3,597,110
Payable to TNYBF	300	0	12,250
Operating Lease Obligation	47,368	0	101,506
Finance Lease Obligation	4,712	0	14,221
Total current liabilities & Deferred Revenue	4,657,503	4,952,917	11,776,680
Long Term Liabilities:			
LT Operating Lease Obligation	0	0	27,966
LT Finance Lease Obligation	3,095	0	7,102
Accrued Other Postretirement Benefit Costs	6,484,759	8,426,910	6,214,759
Accrued Defined Contribution Plan Costs	250,759	248,484	303,263
Total Liabilities & Deferred Revenue	11,396,115	13,628,311	18,329,770
Board designated for:			
Cromwell Account	2,865,852	2,635,060	2,778,996
Replacement Reserve Account	2,132,962	2,132,749	2,132,802
Long-Term Reserve Account	23,768,708	18,529,540	22,389,295
Section Accounts	3,974,110	4,149,465	4,049,692
Invested in Fixed Assets (Less capital lease)	5,078,577	5,476,349	5,259,354
Undesignated	13,209,886	12,488,562	11,331,207
Total Net Assets	51,030,095	45,411,724	47,941,346
Total Liabilities and Net Assets	62,426,210	59,040,035	66,271,115

New York State Bar Association
Statement of Activities
For the period ending September 30, 2023

	September YTD 2023	*September YTD 2022*	*December 2022*
REVENUES AND OTHER SUPPORT			
Membership dues	8,634,954	8,957,575	9,060,075
Sections			
Section Dues	1,067,650	1,104,973	1,112,055
Section Programs	1,676,361	960,475	1,264,530
Continuing legal education program income	2,011,175	1,574,330	2,266,156
Administrative fee and royalty revenue	1,773,628	1,747,134	2,349,960
Annual Meeting	865,857	444,011	446,281
Investment Income	831,972	747,369	1,393,587
Reference Books, Formbooks Products	217,716	704,301	1,182,198
Other Revenue	215,093	369,034	535,827
Total revenue and other support	17,294,405	16,609,202	19,610,670
PROGRAM EXPENSES			
Continuing Legal Education Program Expense	1,402,227	750,618	1,210,191
Print Shop and Facility Support	536,432	840,929	1,001,577
Government relations program	191,950	212,932	294,697
Lawyer assistance program	124,185	50,105	85,632
Publications and public relations	465,628	480,279	624,280
Business operations	2,106,302	1,848,173	2,499,203
Marketing and membership services	1,306,393	1,194,732	1,834,420
Probono program	84,073	56,591	95,313
House of delegates	388,823	438,386	536,024
Executive committee	38,546	61,649	70,688
Other committee	223,235	169,347	252,271
Sections	2,679,021	1,722,882	2,173,463
Newsletters	190,923	193,030	254,776
Reference books and formbooks expense	458,901	442,264	609,087
Publications	355,832	332,478	384,028
Annual meeting expense	540,562	37,535	37,545
Total program expenses	11,093,034	8,831,928	11,963,195
MANAGEMENT AND GENERAL EXPENSES			
Salaries and fringe benefits	1,888,592	2,486,345	3,026,728
Pension plan and other employee benefit	513,587	511,552	(1,629,086)
Equipment costs	616,163	647,010	837,398
Consultant and other fees	532,650	591,006	751,505
Depreciation and amortization	513,000	558,900	595,798
Operating Lease	97,136	-	102,913
Other expenses	84,706	124,755	115,846
Total management and general expenses	4,245,834	4,919,568	3,801,101
CHANGES IN NET ASSETS BEFORE INVESTMENT TRANSACTIONS AND OTHER ITEMS	**1,955,537**	**2,857,706**	**3,846,373**
Realized and unrealized gain (loss) on investments	1,162,799	(10,406,303)	(8,652,105)
Realized gain (loss) on sale of equipment	(29,587)	(136,142)	(349,385)
CHANGES IN NET ASSETS	**3,088,749**	**(7,684,738)**	**(5,155,116)**
Net assets, beginning of year	47,941,347	53,096,463	53,096,463
Net assets, end of year	51,030,096	45,411,725	47,941,347

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #5

REQUESTED ACTION: Approval of the 2024 Association income and expense budget.

Attached is the 2024 proposed Association operation budget. The budget has a projected revenue of $21,011,410, and projected expense of $20,956,930, leaving a projected surplus of $54,480.

The budget will be presented by Michael J. McNamara, chair of the Finance Committee.

2024 PROPOSED BUDGET

THE ASSOCIATION HAS PROJECTED REVENUE OF $21,011,410,
AND PROJECTED EXPENSE OF $20,956,930 LEAVING A PROJECTED SURPLUS OF $54,480.

Prepared by staff

2024 PROPOSED INCOME BUDGET

ITEM	2023 BUDGET	RECEIVED TO 6/30/23	PROJECTED YEAR END	2024 PROPOSED BUDGET	2022 ACTUAL	2021 ACTUAL	2020 ACTUAL
Membership Dues	*9,000,000*	*8,406,913*	*8,800,000*	*8,827,780*	*9,060,075*	*9,335,487*	*9,339,925*
Continuing Legal Education	*2,390,000*	*1,595,027*	*2,802,000*	*2,802,000*	*2,266,156*	*2,715,526*	*3,043,386*
Investment Income	*494,215*	*208,916*	*605,500*	*640,000*	*608,640*	*503,868*	*489,631*
Advertising	*319,500*	*104,254*	*309,500*	*314,500*	*310,042*	*306,637*	*259,859*
Reference Materials	*1,309,350*	*152,890*	*586,100*	*717,800*	*1,182,198*	*1,262,049*	*1,032,335*
Publications and Miscellaneous	*308,000*	*170,632*	*439,500*	*439,500*	*332,794*	*233,545*	*168,907*
Insurance Program	*2,000,000*	*1,000,000*	*2,000,000*	*2,000,000*	*2,000,000*	*2,143,644*	*2,389,144*
Annual Meeting	*895,000*	*865,707*	*865,711*	*1,168,800*	*446,281*	*489,977*	*1,582,326*
House of Delegates	*16,200*	*21,470*	*25,850*	*15,500*	*21,400*	*7,360*	*(250)*
Committees	*20,500*	*34,657*	*62,500*	*172,500*	*139,697*	*19,931*	*24,344*
Sections	*3,768,878*	*2,195,650*	*2,997,700*	*3,913,030*	*2,374,600*	*1,875,805*	*1,986,214*
TOTAL	**20,521,643**	**14,756,115**	**19,494,361**	**21,011,410**	**18,741,883**	**18,893,829**	**20,315,820**

Prepared by staff

EXPENSE BUDGET

ITEM	2023 BUDGET	EXPENDED TO 6/30/23	PROJECTED YEAR END	2024 PROPOSED BUDGET	2022 ACTUAL	2021 ACTUAL	2020 ACTUAL
Salaries and Fringe Benefits	*8,759,290*	*4,385,039*	*8,247,866*	*8,800,215*	*6,057,675*	*6,917,249*	*8,166,428*
Less: Allocations	*(8,759,290)*	*(4,385,039)*	*(8,247,866)*	*(8,800,215)*	*(6,057,675)*	*(6,917,249)*	*(8,166,428)*
Bar Center Operations & Administration	*2,038,150*	*1,082,222*	*2,125,991*	*1,976,400*	*2,333,290*	*2,513,038*	*2,475,893*
Publications and Meetings	*1,295,225*	*1,053,416*	*1,388,447*	*1,461,375*	*1,028,285*	*636,858*	*1,633,681*
Committees and Departments	*13,424,361*	*6,732,233*	*12,818,856*	*13,638,225*	*10,229,257*	*10,675,148*	*12,966,685*
Sections	*3,739,828*	*1,973,113*	*3,236,260*	*3,880,930*	*2,173,463*	*703,398*	*1,756,235*
TOTAL	**20,497,564**	**10,840,985**	**19,569,554**	**20,956,930**	**15,764,295**	**14,528,442**	**18,832,493**

2024 MEMBERSHIP DUES

CLASS	DUES	MEMBERS PAID	AMOUNT
Affiliate	*185*	*95*	*17,575*
Attorney - Admitted 1-2 Years	*95*	*3,271*	*310,745*
Attorney - Admitted 3-6 Years	*175*	*3,206*	*561,050*
Attorney - Admitted 7+ Years	*275*	*28,533*	*7,846,575*
Newly Admitted	-	*8,567*	-
Newly Admitted Upgrade	*95*	*107*	*10,165*
Law Student Premium	*45*	*66*	*2,970*
Law Students	-	*6,783*	-
Retired	*100*	*787*	*78,700*
		51,415	***8,827,780***

CLE INCOME BUDGET

	ITEM	2023 BUDGET	RECEIVED TO 6/30/23	PROJECTED YEAR END	2024 PROPOSED BUDGET	2022 ACTUAL	2021 ACTUAL	2020 ACTUAL
560-4700	**Programs**	*75,000*	*481,353*	*500,000*	*500,000*	*58,120*	*9,699*	*190,991*
572-4700	**Webcast Program Income**	*1,000,000*	*357,707*	*1,000,000*	*1,000,000*	*923,248*	*1,440,678*	*1,409,251*
572-4025	**CLE Webcast - Sponsorship**	-	-	-	-		-	-
568-4780	**On-Line**	*900,000*	*561,472*	*900,000*	*900,000*	*872,984*	*803,855*	*1,093,991*
569-4790	**Audio Compact Disk (CD)**	-	-	-	-	-	-	*48,747*
561-4710	**Course Book**	-	-	-	-	-	-	*3,194*
574-4780	**All Access Pass**	*400,000*	*193,060*	*400,000*	*400,000*	*399,009*	*429,349*	*206,737*
571-4715	**DVD/CD**	*15,000*	*1,435*	*2,000*	*2,000*	*12,795*	*31,945*	*90,475*
	TOTAL	**2,390,000**	**1,595,027**	**2,802,000**	**2,802,000**	**2,266,156**	**2,715,526**	**3,043,386**

SECTION DUES INCOME

ITEM	2023 BUDGET	RECEIVED TO 6/30/23	PROJECTED YEAR END	2024 PROPOSED BUDGET	2022 ACTUAL	2021 ACTUAL	2020 ACTUAL
Antitrust	*10,000*	*9,150*	*9,500*	*12,000*	*9,660*	*10,065*	*11,100*
Business Law	*58,000*	*49,575*	*50,000*	*55,000*	*55,384*	*60,495*	*65,186*
Cannabis Law	*10,500*	*10,115*	*10,000*	*10,115*	*7,070*	-	-
Commercial & Federal Litigation	*63,000*	*55,400*	*57,000*	*57,000*	*56,700*	*62,855*	*65,872*
Corporate Counsel	*24,000*	*23,790*	*25,000*	*26,500*	*25,925*	*25,275*	*31,598*
Criminal Justice	*31,000*	*26,040*	*27,500*	*25,000*	*28,945*	*32,130*	*33,088*
Dispute Resolution	*58,000*	*40,810*	*45,000*	*45,000*	*47,065*	*56,272*	*42,026*
Elder Law and Special Needs	*65,000*	*63,300*	*64,050*	*64,000*	*66,320*	*71,265*	*69,668*
Entertainment Law	*27,000*	*24,745*	*25,000*	*23,000*	*26,536*	*28,968*	*29,921*
Environmental Law	*28,000*	*24,470*	*25,000*	*27,000*	*26,555*	*26,758*	*26,705*
Family Law	*65,000*	*58,030*	*60,000*	*65,000*	*62,488*	*66,723*	*67,329*
Food, Drug	*5,000*	*3,230*	*4,000*	*5,000*	*4,493*	*4,898*	*5,488*
General Practice	*23,800*	*22,105*	*23,000*	*23,800*	*24,834*	*27,615*	*30,065*
Health Law	*31,000*	*28,185*	*30,000*	*30,000*	*30,456*	*32,340*	*35,451*
Intellectual Property Law	*23,000*	*19,300*	*20,000*	*23,000*	*22,155*	*26,125*	*30,276*
International Law	*33,000*	*30,555*	*32,000*	*32,000*	*33,425*	*37,735*	*41,737*
Judicial	*8,500*	*7,125*	*8,000*	*7,200*	*7,675*	*8,625*	*9,229*
Labor & Employment	*52,000*	*45,895*	*48,000*	*48,000*	*50,918*	*54,870*	*58,891*
LGBTQ	*9,000*	*7,170*	*7,500*	*7,800*	*7,740*	*270*	-
Local State Government	*24,000*	*22,200*	*23,000*	*22,050*	*23,970*	*25,365*	*27,010*
Real Property	*127,800*	*115,760*	*119,000*	*115,000*	*123,217*	*128,675*	*135,363*
Senior Lawyers	*42,000*	*34,900*	*35,500*	*42,000*	*39,940*	*45,679*	*37,727*
Tax	*87,000*	*51,795*	*59,000*	*87,000*	*48,318*	*40,725*	*46,803*
Torts, Insurance and Compensation	*70,750*	*48,680*	*49,000*	*52,400*	*54,100*	*59,820*	*65,569*
Trial Lawyers	*50,000*	*43,080*	*45,000*	*43,000*	*48,020*	*52,670*	*56,347*
Trusts and Estates	*150,000*	*144,025*	*147,000*	*145,000*	*149,987*	*154,785*	*154,616*
Women in Law	*20,000*	*20,100*	*20,500*	*20,600*	*19,340*	*17,760*	*16,678*
Young Lawyers	*20,000*	*16,995*	*17,500*	*17,500*	*17,235*	*17,140*	*22,865*
TOTAL	**1,216,350**	**1,046,525**	**1,086,050**	**1,130,965**	**1,118,470**	**1,175,901**	**1,216,608**

SECTION OTHER INCOME

ITEM	2023 BUDGET	RECEIVED TO 6/30/23	PROJECTED YEAR END	2024 PROPOSED BUDGET	2022 ACTUAL	2021 ACTUAL	2020 ACTUAL
Antitrust	*195,950*	*179,603*	*210,000*	*248,950*	*43,005*	*116,550*	*172,770*
Business Law	*28,000*	*586*	*3,200*	*41,500*	*1,778*	*1,949*	*6,662*
Cannabis Law	*14,000*	*-*	*13,000*	*14,000*	*-*	*-*	*-*
Commercial & Federal Litigation	*182,878*	*151,858*	*175,450*	*237,500*	*62,470*	*15,241*	*63,955*
Corporate Counsel	*29,800*	*-*	*5,800*	*27,500*	*2,819*	*7,850*	*(225)*
Criminal Justice	*21,200*	*6,500*	*12,500*	*25,200*	*1,920*	*(1,570)*	*10,390*
Dispute Resolution	*96,500*	*42,953*	*55,000*	*123,500*	*38,323*	*44,627*	*2,378*
Elder Law and Special Needs	*110,000*	*24,990*	*107,250*	*154,000*	*137,275*	*148,638*	*31,710*
Entertainment Law	*53,200*	*6,891*	*15,500*	*48,950*	*5,469*	*23,821*	*9,596*
Environmental Law	*69,450*	*28,300*	*45,800*	*84,000*	*48,150*	*29,242*	*39,395*
Family Law	*391,950*	*194,845*	*402,000*	*380,000*	*337,710*	*70,523*	*79,650*
Food, Drug	*1,650*	*-*	*-*	*1,100*	*-*	*-*	*180*
General Practice	*2,600*	*1,715*	*2,300*	*4,215*	*-*	*330*	*270*
Health Law	*23,200*	*6,270*	*12,200*	*38,400*	*2,683*	*2,973*	*11,165*
Intellectual Property Law	*25,500*	*365*	*10,200*	*55,800*	*750*	*4,798*	*14,035*
International Law	*220,000*	*50,819*	*210,000*	*270,000*	*297,880*	*28,916*	*9,705*
Judicial	*15,550*	*15,440*	*15,500*	*15,750*	*-*	*-*	*16,215*
Labor & Employment	*124,100*	*9,745*	*30,250*	*123,600*	*30,780*	*41,880*	*26,925*
LGBTQ	*7,500*	*315*	*1,000*	*3,000*	*-*	*10,000*	*-*
Local State Government	*35,100*	*100*	*12,500*	*36,000*	*11,395*	*13,592*	*160*
Real Property	*129,200*	*44,285*	*51,500*	*103,000*	*36,809*	*6,285*	*18,335*
50+	*-*	*-*	*-*	*-*	*125*	*125*	*350*
Tax	*129,000*	*110,500*	*105,000*	*149,300*	*35,555*	*-*	*106,145*
Torts, Insurance and Compensation	*114,600*	*50*	*30,000*	*59,000*	*2,368*	*(1,480)*	*4,535*
Trial Lawyers	*38,500*	*135*	*8,200*	*36,000*	*-*	*16,138*	*135*
Trusts and Estates	*395,100*	*235,515*	*325,500*	*407,850*	*143,668*	*84,326*	*60,120*
Women in Law	*57,500*	*14,020*	*27,000*	*57,500*	*8,591*	*27,503*	*40,050*
Young Lawyers	*40,500*	*23,325*	*25,000*	*36,450*	*6,610*	*7,650*	*45,000*
TOTAL	**2,552,528**	**1,149,125**	**1,911,650**	**2,782,065**	**1,256,130**	**699,904**	**769,606**

SECTIONS EXPENSE

ITEM	2023 BUDGET	RECEIVED TO 6/30/23	PROJECTED YEAR END	2024 PROPOSED BUDGET	2022 ACTUAL	2021 ACTUAL	2020 ACTUAL	
Antitrust	*205,950*	*200,135*	*240,400*	*260,950*	*95,294*	*57,665*	*157,921*	620
Business Law	*86,000*	*28,234*	*66,700*	*96,500*	*37,050*	*52,849*	*77,299*	621
Cannabis	*24,500*	*1,582*	*3,000*	*24,115*	-	-	-	648
Commercial & Federal Litigation	*245,878*	*196,309*	*268,100*	*294,500*	*78,277*	*16,848*	*123,821*	631
Corporate Counsel	*53,800*	*12,636*	*33,460*	*54,000*	*28,718*	*25,987*	*29,749*	622
Criminal Justice	*52,200*	*26,930*	*38,000*	*50,200*	*16,104*	*8,281*	*30,064*	623
Dispute Resolution	*154,500*	*103,847*	*127,700*	*168,500*	*94,434*	*36,078*	*58,183*	644
Elder Law and Special Needs	*175,000*	*97,239*	*180,110*	*218,000*	*230,177*	*141,796*	*134,483*	632
Entertainment Law	*80,200*	*57,339*	*85,350*	*71,950*	*39,879*	*28,717*	*58,486*	630
Environmental & Energy Law	*97,450*	*56,027*	*75,540*	*106,750*	*45,938*	*29,092*	*70,577*	624
Family Law	*456,950*	*138,585*	*384,500*	*445,000*	*408,431*	*52,797*	*159,267*	625
Food, Drug	*6,650*	*131*	*180*	*6,100*	*106*	-	*5,773*	626
General Practice	*26,400*	*18,813*	*26,700*	*28,015*	*12,422*	*12,455*	*23,201*	627
Health Law	*54,200*	*46,260*	*56,750*	*68,400*	*29,280*	*13,858*	*49,434*	633
Intellectual Property Law	*48,500*	*4,037*	*8,450*	*78,800*	*8,216*	*6,466*	*40,228*	634
International Law	*253,000*	*27,647*	*255,500*	*302,000*	*455,737*	*25,713*	*50,087*	629
Judicial	*24,050*	*27,687*	*31,200*	*22,950*	*2,005*	*1,265*	*25,033*	635
Labor & Employment	*176,100*	*41,740*	*80,200*	*171,600*	*55,064*	*50,799*	*64,557*	636
LGBTQ	*16,100*	*2,693*	*4,600*	*10,800*	*2,902*	*2,156*	-	647
Local State Government	*59,100*	*9,238*	*39,750*	*58,050*	*58,210*	*28,694*	*11,649*	637
Real Property	*257,000*	*113,752*	*177,650*	*218,000*	*158,870*	*24,571*	*111,269*	638
50+	*22,000*	*11,693*	*18,900*	*22,000*	*1,425*	*(53)*	*19,051*	645
Tax	*207,450*	*202,044*	*246,420*	*236,300*	*48,986*	*67*	*166,208*	639
Torts, Insurance and Compensation	*185,350*	*55,248*	*122,300*	*111,400*	*19,957*	*11,314*	*22,216*	628
Trial Lawyers	*88,500*	*34,675*	*49,150*	*79,000*	*10,665*	*10,726*	*25,796*	640
Trusts and Estates	*545,000*	*393,053*	*540,000*	*545,000*	*211,328*	*54,029*	*168,276*	641
Women in Law	*77,500*	*42,664*	*48,350*	*78,100*	*7,170*	*3,049*	*40,922*	646
Young Lawyers	*60,500*	*22,875*	*27,300*	*53,950*	*16,816*	*8,178*	*32,685*	642
TOTAL	**3,739,828**	**1,973,113**	**3,236,260**	**3,880,930**	**2,173,463**	**703,398**	**1,756,235**	

BAR CENTER OPERATIONS AND ADMINISTRATIVE EXPENSE

ITEM	2023 BUDGET	EXPENDED TO 6/30/23	PROJECTED YEAR END	2024 PROPOSED BUDGET	2022 ACTUAL	2021 ACTUAL	2020 ACTUAL
Rent	-	-	-	-	-	*283,623*	*283,624*
Building Services	*325,500*	*168,480*	*344,000*	*342,500*	*367,355*	*417,725*	*474,322*
Insurance	*206,000*	*107,378*	*228,000*	*222,800*	*224,492*	*197,354*	*177,692*
Taxes	*93,750*	*43,975*	*91,491*	*93,800*	*152,226*	*186,645*	*221,880*
Plant and Equipment	*841,000*	*462,796*	*874,500*	*849,200*	*778,637*	*780,373*	*763,702*
Office Administration	*41,200*	*49,368*	*67,900*	*42,000*	*324,845*	*201,141*	*84,264*
Other	*530,700*	*250,226*	*520,100*	*426,100*	*485,736*	*446,177*	*470,409*
TOTAL	**2,038,150**	**1,082,222**	**2,125,991**	**1,976,400**	**2,333,290**	**2,513,038**	**2,475,893**

PUBLICATIONS AND MEETINGS

PUBLICATIONS

ITEM	2023 BUDGET	EXPENDED TO 6/30/23	PROJECTED YEAR END	2024 PROPOSED BUDGET	2022 ACTUAL	2021 ACTUAL	2020 ACTUAL
New York State Bar Journal	*250,300*	*146,694*	*238,510*	*271,000*	*238,686*	*228,021*	*298,433*
New York State Law Digest	*52,350*	*28,731*	*52,200*	*52,200*	*46,298*	*46,416*	*83,846*
State Bar News	*122,300*	*61,970*	*114,300*	*130,900*	*99,044*	*67,947*	*80,471*
TOTAL PUBLICATIONS	***424,950***	***237,395***	***405,010***	***454,100***	***384,028***	***342,384***	***462,750***

MEETINGS

Annual Meeting	*383,100*	*540,562*	*540,562*	*620,000*	*37,545*	*13,811*	*958,195*
Executive Committee	*44,550*	*31,446*	*41,050*	*42,350*	*70,688*	*13,666*	*14,020*
House of Delegates and Officer's Expense	*442,625*	*244,012*	*401,825*	*344,925*	*536,024*	*266,997*	*198,716*
TOTAL MEETINGS	***870,275***	***816,021***	***983,437***	***1,007,275***	***644,257***	***294,474***	***1,170,931***
TOTAL	**1,295,225**	**1,053,416**	**1,388,447**	**1,461,375**	**1,028,285**	**636,858**	**1,633,681**

2024 NYSBA PROPOSED BUDGET

COMMITTEES AND DEPARTMENTS

ITEM	2023 BUDGET	EXPENDED TO 6/30/23	PROJECTED YEAR END	2024 PROPOSED BUDGET	2022 ACTUAL	2021 ACTUAL	2020 ACTUAL
Committees $25,000 and/or more	*192,700*	*96,935*	*168,650*	*312,500*	*110,714*	*49,704*	*124,483*
Committees $3,001 - $24,999	*130,545*	*42,318*	*91,850*	*173,450*	*76,086*	*19,504*	*143,898*
Non-Line Items Committees and Other	*148,025*	*29,168*	*52,200*	*89,125*	*65,472*	*7,245*	*70,003*
Departments	*12,953,091*	*6,563,812*	*12,506,156*	*13,063,150*	*9,976,985*	*10,598,695*	*12,628,300*
TOTAL	**13,424,361**	**6,732,233**	**12,818,856**	**13,638,225**	**10,229,257**	**10,675,148**	**12,966,685**

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #6

REQUESTED ACTION: None, as the report is informational.

Association president Richard C. Lewis will advise the House of Delegates with respect to his presidential initiatives, the governance of the Association, and other developments of interest to the House.

A copy of the report is attached here.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #7

REQUESTED ACTION: Not applicable.

Chief Administrative Judge Joseph A. Zayas will address the attendees of the House of Delegates meeting.

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November 3, 2023

Dear Colleagues:

You have heard me say that I have chosen 'Standing Up for the Practice of Law' as the theme of my presidency and to that end, I have spent the past 150 days working on issues that confront our profession, our judiciary, and our educational system. I traveled around the state and beyond, attending so many events that I have lost count. I met with affinity groups and local bar associations. I have met with the Chief Judge and Chief Administrative Judge and have joined them with other distinguished members of the judiciary on a panel that listened to testimony from a dozen civil legal services organizations. I met with young lawyers. I want to add that Domenick, Susan, and Taa have also been very busy attending events, as has our Executive Director, Pam.

At the Third Department's Bar Admissions Ceremony this past spring, I heard young lawyers' growing concerns about student-loan debt, work-life balance, and gender equity. We need to address their concerns because they are our leaders of tomorrow and the ones who will promote our values going forward.

I have also met with leaders from Hong Kong, Pakistan, Argentina, Israel and Great Britain and multiple other states.

We must tackle the issues that confront us as today's leaders.

We are faced with deeply rooted, 21st century challenges that threaten the rule of law, which is why our Task Force members are working diligently on such matters as hate crimes, anti-Asian hate, antisemitism, homelessness, equal access to education, dignity in end stages of life, and an ever-evolving technological environment. In addition, we are trying to confront the issue of civility and debate which is essential to Democracy.

Our Task Force on Advancing Diversity's substantive report was turned out in a little more than a month following the Supreme Court's decision on affirmative action. We actually began working on it prior to the Decision. We are seeking your approval of this report today. It recommends that higher education institutions as well as businesses, law firms, and the courts, take a holistic approach in their admission processes with a focus on how an applicant enhances their goals and values and defines the post Harvard/N.C. landscape for the courts, businesses, law firms, and institutions of higher learning to move forward in pursuing DEI programs.

We were fortunate to get input from experts throughout the country and will continue to monitor the landscape to determine what our response should be as the inevitable lawsuits to follow are filed challenging diversity programs. I am so thankful to Jeh Johnson, Brad Karp, and Loretta Lynch for chairing this Task Force.

I have met with New York's Chief Judge Rowan Wilson to talk about his priorities, which include making sure that tenants and landlords in Housing Court are represented. He wants to provide incentives for lawyers who take on housing cases so that tenants – especially those who live below the poverty line – may stay in their homes. We intend to work with him to achieve the fairness to both tenants and landlords.

I also met with Chief Administrative Judge Joseph Zayas who will address us this morning. This has laid the foundation for further collaboration regarding court rules, e-filing in all courts, including District Courts in Nassau and Suffolk counties, and other issues which impact lawyers.

As you probably know, the 2023 legislative session was one of our most successful in memory. We accomplished a great deal by advocating for the practical concerns of lawyers. We lobbied legislators and the governor to raise the pay of court-appointed 18-B attorneys for the first time in nearly 20 years and our hard work paid off. We continue to advocate for future financing of this program. We also urged the Legislature to repeal antiquated Judiciary Law Section 470, which requires admitted New York practitioners who reside out-of-state to maintain a physical office within state boundaries. The bill passed the state Senate and Assembly, and we are continuing to encourage 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.

We succeeded in getting Bill S5162/A5772 passed and signed by the governor. The bill removes barriers to New Yorkers in civil, housing, and family court matters slowing litigants in these cases to swear to a statement without having to have the statement notarized. This is a win for access to justice because it helps urban New Yorkers who might not be able to take off from work to get a document notarized, suburban New Yorkers who might have to spend significant time riding on public transportation to locate a notary, and rural New Yorkers who might have to travel long distances in areas where notaries are difficult to find.

My travels took me to Denver this past August to attend the ABA Annual Meeting where we, along with the California Lawyers Association, introduced a resolution to urge local and state governments and the federal government to forgive some or all of the student loans of young lawyers who practice in rural areas. I am happy to report that our resolution was overwhelmingly approved and adopted as ABA policy. It is our hope that our lobbying efforts on behalf of young lawyers will be successful, and that loan forgiveness will incentivize young lawyers to work in rural areas where it is now extremely difficult to find a lawyer.
Just this past week, I had the honor of testifying on behalf of our Association before the New York State Commission on Legislative, Judicial, and Executive Compensation Public Hearing – and at a hearing before the Senate Standing Committees on the Judiciary and on Children and Families.

I shared our support for increased judicial compensation because a properly funded judiciary is the cornerstone of a democratic society, and the operation of the justice system depends upon the

confidence of all involved parties. Salary stagnation is an impediment to retaining qualified and experienced judges and attracting the best to the bench. In short, the justice system's ability to function properly depends upon the judges who serve it.

My testimony to the Senate Committees on Judiciary, and Children and Families reiterated what our published reports have said – that there is a myriad of challenges that need to be addressed for an under-resources and overburdened court system. We need more judges, we need to update the court's infrastructure, and we must ensure that our judges and staff are well-trained in e-filing systems, digital technology, and virtual proceedings. And, we need to keep our courts safe.

Our Annual Meeting is approaching.

I am looking forward to seeing you at the New York Hilton Midtown for a full slate of robust in-person discussion, professional development, and the opportunity to set aside being adversaries in the courtroom and at the negotiating table, and engage each other as partners and friends.
The Presidential Summit will Focus on the impact that A.I. is having and will continue to have on our profession. We will hear from two world renown experts: Bridget Mary McCormack who is President and CEO of the American Arbitration Association, International Centre for Dispute Resolution, and past Chief Judge of the Ohio Supreme Court, and Katherine Forrest who is a Partner and Co-Chair of the Digital Technology Group at Paul, Weiss and former District Court Judge in the Southern District of New York. In addition, members of our own Task Force on A.I., chaired by Vivian Wesson will discuss the ever-changing issues surrounding A.I.

Our Task Force on Medical Aid in Dying is addressing a controversial topic, and we are looking for legislative solutions. We are looking at this subject in a balanced way, taking all stakeholders' concerns into consideration.
Legislators are seeking our recommendations on this issues and on regulatory oversight of A.I., which our Task Force on Artificial Intelligence is discussing.
In May, we will be hosting a Civics Convocation at the Bar Center that is shaping up to be an exceptional event that will include judges, attorneys, teachers, and students who will participate in a vigorous discussion about the future of our democracy. We need to zealously guard our democratic principles to ensure that we are teaching them to the next generation. We cannot accomplish that unless we engage in civil debate.

I have been consulting with our Task Forces on Combating Antisemitism and Anti-Asian Hate, A.I., Medical Aid in Dying, and Homelessness and the Law. Homelessness continues to grow as a national disgrace, and I am looking forward to seeing the report of our Task Force.

The other tragedy with which we are dealing is the issue of antisemitism which has become overt and dangerous, in our country and throughout the world, following the barbarism that occurred on October 7th in Israel. As your President, I immediately condemned that barbarism, and disregard for human life. As leaders in the legal community, we have an obligation to strongly and directly condemn this hatred and evil and continue to urge respect for the rule of law and the sanctity of human life throughout the world.

I have been working closely with our Task Force on Combating Antisemitism and Anti-Asian Hate and thank them for their guidance in the strong public statements we have made.

In light of the atrocities we have seen in Israel this past month, I have called upon our Task Force to redouble its efforts and produce an interim report and recommendation by the next meeting of this House, so that the principles that we all firmly believe can become policy of our Association. Even in the darkest days, and these recent days have been very dark for all humanity, our Association should be a clarion voice for our profession and the public. And I call upon our Task Force to rise to that occasion and provide us a clear, strong, thoughtful report and policy that we can proudly bring forth to the world. I am confident they will do so with all necessary deliberation and that this great House will support it.

In closing – there is plenty of work to do. However, nobody said it was going to be easy. As the great Muhammad Ali once said: "The fight is won or lost far away from witnesses – behind the lines," and I could not be more grateful for the support of those working behind the lines; our Executive Director Pam McDevitt, and all the NYSBA staff who have been so dedicated to me and the good causes of our great Association.

Thank you.

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NEWS

While Experiencing War, NY Lawyer Coordinates Meeting to Help Meet Israel's Legal Needs

Hank Greenberg, shareholder in Greenberg Traurig's Albany office, visiting during the armed conflict between the State of Israel and Hamas.

October 30, 2023 at 03:41 PM

International Law

Brian Lee
Litigation Reporter

Leaders of New York's legal community met with the head of the Israeli bar on Oct. 26 to discuss ways in which the former can assist with the country's legal needs in time of war.

"We discussed maybe being able to provide pro bono assistance for the evacuees," said meeting facilitator, Hank Greenberg, shareholder of Greenberg Traurig's Albany office.

Greenberg visited Israel, arriving the evening of Oct. 23 and returning safely, albeit "jetlagged," to New York early on Oct. 27.

He went to Israel in the midst of the ongoing armed conflict between Hamas-led Palestinian militant groups and Israel military forces as part of a solidarity mission sponsored by the Jewish Federations of North America.

Greenberg told the Law Journal he heard and saw a rocket destroyed by Israel's Iron Dome missile defense system. Greenberg also experienced three air raids during his short visit to Israel, including one at the airport just before his departure flight.

Greenberg met in person with Israel Bar Association President Amit Becher, while other leaders of New York's legal community participated in the meeting via Zoom.

As a consequence of the meeting, New York State Bar Association president Richard Lewis said he's exploring the idea of entering into a memorandum of understanding, for the state bar to show its support for the rule of law and continuation of democracy in Israel.

It would be in recognition that Becher, as president of a mandatory bar association, sits in opposition to reforms that are being suggested by his country's present coalition, said Lewis, who also indicated he would like to arrange his own visit to Israel in the near future.

Another meeting participant, NYCLA and NYSBA past-president Michael Miller mentioned the New York legal community's vast experience assisting people during times of crisis.

For instance, New York's legal community established pro bono crisis management models in the wake of the Sept. 11, 2001 terrorist attacks, and the Covid-19 pandemic.

"We discussed the family assistance center established shortly after 9/11 that brought together legal, social services and government professionals and agencies who assisted surviving family members in obtaining services and benefits to which they were entitled, a model that could be helpful in addressing certain of the immediate needs of surviving family members," Miller said.

The lawyers are contemplating whether that type of help should be replicated in Israel.

"Obviously, it's a different system," added NYCLA president Adrienne Koch, who also participated in the meeting. "But we have the impression that something like that might be of use to them."

Koch said NYCLA was "delighted" to participate in the Zoom meeting.

"We came to the meeting, really primarily planning to listen to see what, if anything, we could do to assist," she said.

"One of the things that I said at the meeting, which I really believe is true, is that in times of crisis, many different kinds of crisis, oftentimes one of the things that people need is lawyers, but it's not the first thing that everybody realizes that they need."

Koch said it's up to the lawyers to discern the ways that lawyers can help.

Said Lewis: "The invasion with the intent to kill civilians is one of the most heinous crimes there could be. There are a lot of different issues that will need to be confronted in the future, and we're certainly interested in helping... in whatever way we can. Not to mention the humanitarian issues," given the disruption within the legal community there.

"Attorneys are being called to military service, and moving into military serice, just as everyone else is," Lewis said. "With all the destruction that's taken place – delays and interruptions in cases – and of course they, like everyone else, are suffering huge

losses. The killings are astronomical when you put it together statistically."

The New York attorneys said they also talked about the possibility of organizing a joint forum on judicial independence, since that topic has been a concern of both Becher and here at home in New York, given suggestions of reforms by some lawmakers here.

Unlike New York's voluntary bar system, Israel's mandatory bar is a quasi-governmental system that involves attorney licensure.

Becher was elected after running on a platform of supporting judicial independence in opposition to Netanyahu's proposals to reduce the independence of the judiciary in Israel. The divisive issue resulted in mass protests.

"I think everyone on the call was very pleased to hear that we're all very firmly on the same side in that regard," Koch said of judicial independence. "There might be things in the future that we can do together, including, potentially, a joint forum, where they might actually come here to participate in something like that, which would be very exciting."

Koch said it would be impossible for one Zoom meeting to produce resolutions about every concern about the war from the legal community.

"I think we opened a dialogue," she said. "We indicated that to the extent that there are things that we as lawyers who are not there, but who are interested in being helpful, can do that, the hand of friendship is extended—and it's not about politics. It's about the legal community, providing services where it's needed, and that was really the tone of it."

Greenberg echoed the sentiment: "It wasn't about the politics of the war, or any of that."

He continued: "Israel is an ally of the U.S. More Jews were killed by Hamas' terrorists on Oct. 7 than at any one time since the Holocaust. The entire country is now a hot war zone. I'm speaking from firsthand knowledge."

Greenberg said he laid facedown on the ground for one of the air raids he experienced.

"They're living with that everyday," said Greenberg, who lodged in a Jerusalem hotel that had just 14 guests, or an 8% occupancy, when he arrived.

"It's a ghost town," he said.

Greenberg said he also met with family members of hostages at the Foreign Ministry in Israel, the country's state department.

"That was gut-wrenching," he said. "Everybody that's lived in the south has been evacuated. And so, 200,000 people have been displaced from their homes."

Greenberg also visited a kibbutz that's being used for about 500 evacuees to learn about their experiences.

Greenberg spoke to first responders and heard a speech by Noam Tibon, a retired major general who was the senior commander of the Israeli paratroopers, and was recently featured on CBS's 60 Minutes.

"We did pretty much all of that in 36 hours," Greenberg said of his three full days in Israel. "The last day I wasn't expecting to do anything, other than just work in my firm's office in Tel Aviv. And then the meeting came together with the bar associations."

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Statement-Letter

The New York County Lawyers Association Condemns Hamas Terrorist Attacks on Israel

Statements & Letters

Written by:
NYCLA OFFICERS

Published On:
OCT 09, 2023

We stand with the Israeli people and condemn the unprecedented terrorist attacks perpetrated by Hamas militants. The terrorists shot civilians in their homes, kidnapped women and children, and massacred people celebrating at a music festival. There can be no justification for such horrific acts.

We hope that, in the end, peace and security will prevail. In these trying times, we stand with all who are committed to peace, security and the rule of law.

About the New York County Lawyers Association

The New York County Lawyers Association (**www.nycla.org**) was founded in 1908 as one of the first major bar associations in the country that admitted members without regard to race, ethnicity, religion or gender, and has a long history of supporting the rights of LGBTQ+ people. Since its inception, NYCLA has pioneered some of the most far-reaching and tangible reforms in American jurisprudence. For more information on NYCLA please visit nycla.org.

# # # #

LATEST NEWS

New York State Bar Association Decries Hate Speech Supporting Repugnant Attacks

By Susan DeSantis
October 11, 2023

News Center *New York State Bar Association…*

The NYSBA Task Force on Combating Antisemitism and Anti-Asian Hate is saddened and dismayed by what can only be termed hate speech in our own backyard in New York City and in certain colleges and universities on the part of pro-Hamas demonstrators. These individuals have held up swastikas and praised the massacre of innocent civilians in Israel. New York Gov. Kathy Hochul called these demonstrations "abhorrent" and "morally repugnant." Mayor Eric Adams told the protesters: "Do not use our streets to spread your hate."

NYSBA has correctly denounced the brutal murders of Israelis in their homes and communities as violative of international law. But they are more than that. They are atrocities reminiscent of the worst crimes committed by ISIS: slaughtering babies and the elderly in their homes. As President Biden said yesterday, these unprovoked terrorist attacks were "pure, unadulterated evil." In the wake of the horrific attacks on Israel perpetrated against innocent civilian men, women, and children, we urge New Yorkers to stand against the hate speech supporting these repugnant attacks.

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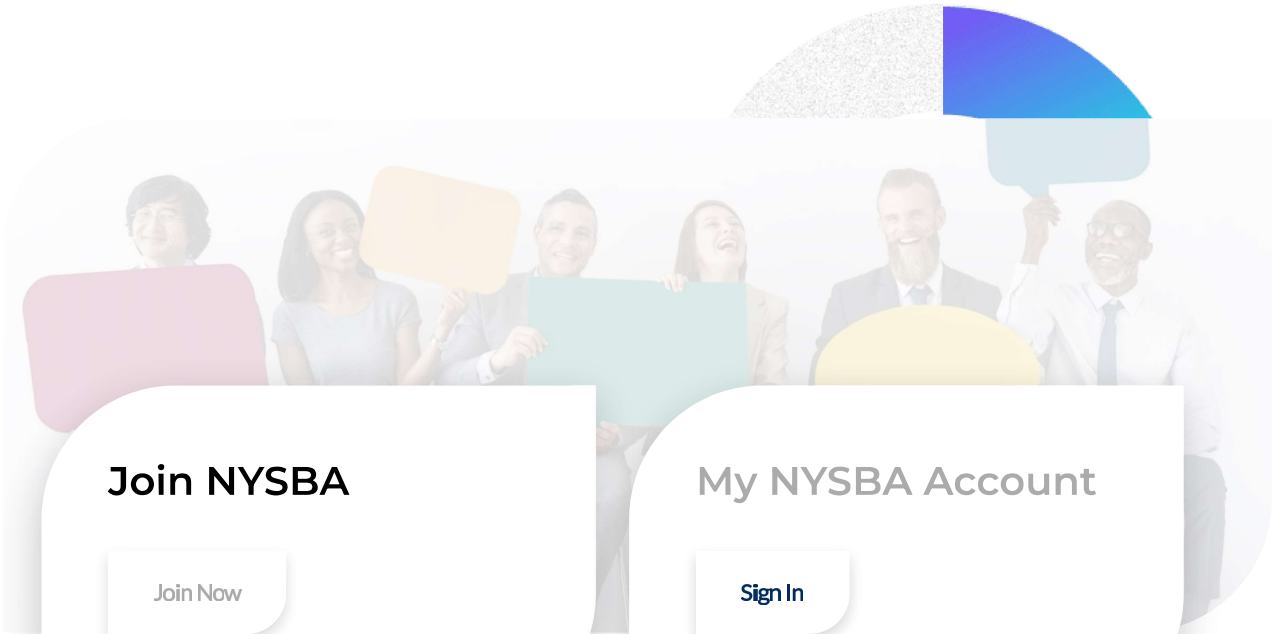

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New York State Bar Association Strongly Condemns Abhorrent Attacks Against Israeli and Arab Citizens and the Sovereign State

10.9.2023

By Susan DeSantis

Richard Lewis, president of the New York State Bar Association, issued the following statement about Hamas' invasion of Israel:

"The New York State Bar Association strongly condemns Hamas' premeditated invasion of Israel and its brutal murders of hundreds of Israeli and Arab citizens in their homes and communities. The attacks are abhorrent and unforgivable and flagrantly violate the United Nations Charter, Helsinki Accords, and established norms and principles of international law.

"Moving from house to house, the terrorist organization slaughtered, grievously injured and kidnapped women, children, and the elderly. The attacks came on Simchat Torah, a major Jewish holiday, and were reminiscent of the invasion of Israel 50 years ago on Yom Kippur, the holiest day of the Jewish year.

"The New York State Bar Association joins with President Biden and other world leaders in demanding that Hamas cease all hostilities. We call on the international community to stand against these atrocities."

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #8

REQUESTED ACTION: Not applicable.

James Moore, past president of NYSBA from 1998 to 1999 and former partner at the firm Harter Secrest & Emery, passed away on June 24, 2023, at the age of 83.

The memorial will be presented by A. Vincent Buzard.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #9

REQUESTED ACTION: None, as the report is informational.

Committee on Membership Co-Chairs Clotelle Drakeford, Esq. and Michelle Wildgrube, Esq., and NYSBA Senior Director of Attorney Engagement and Retention, Ms. Victoria Shaw, will give an update on the Association's membership engagement and retention efforts, including membership renewal for the 2024 dues year.

REVISED MEMBERSHIP FEE STRUCTURE

NOVEMBER 2023 REPORT

Introduction

On June 10, 2023, the New York State Bar Association's House of Delegates was presented with a report on the revised membership fee structure centering on an annual membership model, payable as a one-time fee or via monthly payments, that includes a multitude of add-ons and resources that were previously available as individual purchases. This report was delivered by the co-chairs of the Committee on Membership, Clotelle Drakeford and Michelle Wildgrube. At that time, the House of Delegates approved the concept of the model.

Based on the feedback received during that meeting, along with the Executive Committee meeting on June 9, 2023, and additional stakeholder input since then, below reflects updates made since the initial presentation.

- Dues for additional sections
- Section royalties
- Membership Discounts
- Business Requirements Document
- Marketing Plan

Dues for Additional Sections

The revised membership plan includes two complimentary section memberships. The existing median cost for section membership is $35.00. We are proposing that additional section memberships selected by an individual should come at a cost of $30.00 per section, updated from the original proposal of $25.00 per additional section.

Section Royalties

As previously presented, we are presenting a royalty model with sections, using a rate determined by total paid section membership, then multiplied by total NYSBA paying members.

This model would see Sections generating revenue based on the total NYSBA paid membership number, regardless of whether the paid NYSBA member is also a member of that Section. When NYSBA membership increases, then Section revenue increases along with it.

- For example, a section with 1,000 paid members would qualify for the $0.95 revenue share rate. Multiply that by 38,000 NYSBA paying members and it comes to $36,100.

- A section with 2500 paid members would qualify for the $2.10 revenue share rate. Multiply that by 38,000 NYSBA paying members and it comes to $79,800.

Section Members	Royalty Rate	2022 Paid NYSBA Members	*Section Revenue
0-200	$0.15	38,000	$5,700
201-400	$0.30	38,000	$11,400
401-500	$0.35	38,000	$13,300
501-600	$0.45	38,000	$17,100
601-700	$0.55	38,000	$20.900
701-800	$0.70	38,000	$26,600
801-900	$0.80	38,000	$30,400
901-1000	$0.90	38,000	$34,200
1001-1100	$0.95	38,000	$36,100
1101-1200	$1.30	38,000	$49,400
1201-1300	$1.35	38,000	$51,300
1301-1400	$1.45	38,000	$55,100
1401-1500	$1.50	38,000	$57,000

Section Members	Royalty Rate	2022 Paid NYSBA Members	*Section Revenue
1501-1600	$1.55	38,000	$58,900
1601-1700	$1.60	38,000	$60,800
1701-1800	$1.65	38,000	$62,700
1801-1900	$1.70	38,000	$64,600
1901-2000	$1.75	38,000	$66,500
2001-2250	$1.80	38,000	$68,400
2251-2500	$1.95	38,000	$74,100
2501-2750	$2.10	38,000	$79,800
2751-3000	$2.25	38,000	$85,500
3001-3250	$3.25	38,000	$123,500
3251-3500	$3.45	38,000	$131,100
3501-3750	$3.65	38,000	$138,700
3751-4000	$3.95	38,000	$150,100

If this model was in place today, based on 38,000 paid members in 2022, with each of our twenty-eight sections receiving their appropriate revenue share percentage, then 26 Sections would generate equal or greater income.

In anticipation of proceeding with this membership model for the 2025 membership year, the membership numbers, and subsequent royalty used, will reflect closing section numbers from the 2024 calendar year. Payment(s) will then be distributed to sections in 2025. Payment(s) to sections in 2026 will be based on final 2025 numbers, and so on and so forth.

It is important to note that there is not a suitable way to determine the anticipated increase for certain sections once we institute this new model. While we currently recognize approximately 50% NYSBA members are a member of at least one section, once we have our entire membership population eligible for two free sections, there is a possibility of certain sections increasing their membership by 300%-500%. The

association intends to review the royalty scale at the end of 2025 and 2026, upon having a better idea of where significant growth in section membership may take place, and adjusting the scale accordingly, still ensuring a lack of negative impact on any of our twenty-eight sections.

Membership Discounts

Feedback on potential discounts for varying membership types has been shared since the rollout of this proposed new model. Upon lengthy discussions and feedback, we have addressed a few items specifically.

1) The New York State Bar Association has not instituted a membership dues price adjustment for a decade.
2) The new membership model includes such significant value with free programming, publications, forms, and section membership that there is something for everyone, and instituting blanket discounts could significantly devalue what is being offered and impact the association financially.
3) Extending a blanket discount solely based on job category (i.e., Government, Non-Profit) may find us in a place of inequity, as some members represented in those categories produce a salary that does not represent a financial hardship.
4) We are moving forward with an income-based discount, believing it will offer the solution we are looking for across all job types, mitigating the expense for those members that need it most. Members generating a gross income of $75,000 or less will automatically qualify for a 25% discount on dues through the Dues Waiver Program for as long as they meet the criteria. Additional discounts through the program may be handled on a case-by-case basis.
5) Members participating in the Dues Waiver program remain completely anonymous and receive the exact same benefits as that of a full-paying member.
6) For retired members, we are updating to a discounted rate of $11.95 per month, or $129.06 if paid annually, which reflects a 60%+ discount on the standard dues rate.

Business Requirements Document

During March 2020, in an effort to evolve our organization into a virtual bar center, we conducted a large digital overhaul, launching a completely updated website along with

a new Association Management Software (AMS). This was in conjunction with transitioning our CLE programs to virtual offerings, utilizing Zoom as our primary delivery model. We are committed to making necessary adjustments to both improve the overarching user experience, as well as transition to this new membership model, and are confident that the necessary tools and business partners exist to make this a reality.

While the project scope will focus primarily on the deliverables necessary to accommodate the soon to be updated model, functional requirements were outlined, by category, to develop the most feasible and first-rate gameplan involving all partners and vendors involved.

We currently have a complicated membership dues structure that requires our systems to process and keep track of varying transactions, both during the join and/or renew stage, as well as during individual purchases such as an activity, event, publication, or online form throughout the year.

Based on user feedback, the existing transactional process for joining, renewing, registering, and purchasing resources can prove to be difficult, clunky, and slow.

From a user experience standpoint, it has been increasingly difficult for members to find what they are looking for in a timely and efficient fashion when utilizing the global search feature.

Since we are a membership organization, it is important to collect and manage a great deal of data and records on our members, which can be quite burdensome at times, as it both involves manual resources from a staff and complicated technological updates with our current AMS.

A Business Requirements Document (BRD) has been built, assessing all of current systems, and collecting substantial feedback from internal and external stakeholders, in order to implement much needed updates in conjunction with the membership changes outlined in this new model.

Marketing Launch

In September 2023, NYSBA's marketing team distributed a Request for Proposal (RFP) to marketing firms across the state. Approximately seven proposals were received from firms as of the October 25th deadline outlined in the RFP. The

review/interview/section process will conclude within the next 4-6 weeks in order to begin working on the 2024-2025 membership campaign.

While the change is significant for the association, the goal is to make this transition easily understood by our members, and potential members, as well as appear as a seamless conversion.

Objectives/Goals:

1) Create, develop, and execute campaign to announce the membership model change to existing members and perspective members

2) Explain and answer any questions from the membership

3) Reinforce the reasons for the change in membership

4) Convert members to the new model

5) Convert current non-members to NYSBA membership

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #10

REQUESTED ACTION: Members to complete subscription forms.

The proposed changes to the Bylaws are necessary in order to implement the "Subscription Model" approved by the House of Delegates in June 2023.

This report will be presented by Robert Schofield, IV.

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October 12, 2023

To: Members of the House of Delegates

Re: Report on Proposed Bylaws Amendments

INTRODUCTION

The stated purpose of the Committee on Bylaws is to examine and report on proposed amendments to the Bylaws of the Association and to observe the activities of the Association under the present Bylaws and, from time to time, report to the Executive Committee and the House of Delegates on such amendments as, in its opinion, will promote the efficiency of the Association.

This report proposes amendments to the Bylaws to implement the resolution of the House of Delegates on June 10, 2023, endorsing a subscription dues model and adopting the report of the Committee on Membership on that topic.

Also, during the course of this year, the Committee has studied proposed amendments to clarify (1) the order of succession with respect to who presides over meetings of the House of Delegates and Executive Committee in the absence of the President and President-elect, and (2) the manner in which service on the Executive Committee is counted towards the maximum allowed service. Finally, the Committee is in the midst of a comprehensive review the Bylaws to ensure that they conform to the requirements of the New York Not for Profit Corporations Law. The work on these projects is on-going and will likely be presented to the House as an interim report in Spring, 2024.

SUBSCRIPTION MEMBERSHIP MODEL AMENDMENTS
Proposed amendments to Article III, Sections 1 (A) and (B), 2 (A)(2), 3, and 6 (A) and Article X, Section 5.

The Association Bylaws presently refer to dues generically, leaving the issue of the nature and amount of dues to the province of the Membership Committee and House of Delegates.

At its June 10, 2023, meeting, the House of Delegates adopted a resolution and report from the Committee on Membership recommending the endorsement of a "subscription" dues model and referring the adopted Report to this Committee "so that appropriate Bylaws amendments can be drafted as necessary for consideration and subscription at the November 5, 2023 meeting of the

House. By adopting the report, the House has chosen to pursue a subscription dues model which is described as plan by which "members will pay a recurring fee at regular intervals, typically monthly[, for an annual] plan that offers certain benefits, such as access to exclusive content, CLE programming, digital publications and forms, and additional partner benefits." The Committee on Membership's report and resolution, as adopted by the House of Delegates, is attached as Exhibit "A" to the report.

The Committee on Bylaws accepted its charge to develop Bylaws amendments to implement this House action. After considering the issues, we have recommended several minor changes to the Bylaws to facilitate the new subscription model. It is noteworthy that the relative silence of the Bylaws on the topic of the nature and amount of dues, resulted in few proposed amendments. Those which are proposed focus on clarifying terms and reconciling them to the new model being put forth. For example, whereas the Bylaws currently speak to "applicable" dues, we are suggesting replacing that term with the term "annual" dues. Further, in the section on "Dues" (Article III, Section 3), our edits are focused on describing a dues payment schedule that more flexibly accounts for the fact that a subscription-based dues system allows members to have membership years that run from when they join, rather than a set date on the calendar. Finally, to account for that portion of the new model that alters how Sections are paid for their members participation, we proposed amending Article X, Section 5 to reflect the Sections' receipt of "Royalties" from the Association, rather than "Dues."

Our proposed amendments are as follows:

III. MEMBERS AND AFFILIATES

Section 1. Membership. There shall be five classes of membership in the Association: Active, Associate, Honorary, Sustaining and Law Student, and the members shall be divided among such classes according to their eligibility.

A. Active Members. Any member of the legal profession in good standing admitted to practice in the State of New York may become an Active member by submitting any required application form and supporting documentation to the Executive Director. Upon payment of the ~~applicable~~annual dues following such submission, the applicant shall immediately be entitled to all of the rights and subject to all responsibilities of membership.

B. Associate Members. Any member of the legal profession in good standing admitted to practice in any state, territory or possession of the United States or another country but not in New York may become an Associate member by submitting any required application form and supporting documentation to the Executive Director. Upon payment of the ~~applicable~~annual dues following such submission, the applicant shall immediately be entitled to all of the rights and subject to all of the responsibilities of membership, with the exception of being an officer of the Association, being a member of the House of Delegates or Executive Committee, or serving as a Section Chair; provided, however, that upon the request of a Section Executive Committee and with the consent of the Association Executive Committee, an Associate member may serve as a Section Chair.

* * *

E. Sustaining Membership. The House of Delegates shall have the power to establish Sustaining memberships in the Association and to fix from time to time the amount of dues therefor. Sustaining membership shall be available to such members of any class as are willing, for the support of the general work of the Association, to pay such amount as annual dues in any year, in lieu of the dues prescribed pursuant to Section ~~2~~3 of this Article. A member who elects to be a Sustaining member in any year shall not be obligated thereby to continue as such in any subsequent year. Sustaining members shall have the same rights and privileges as pertain to the class of which they are a member. Subject to the provisions of this Article, the House of Delegates shall have power to make appropriate regulations as to such Sustaining membership and the collection of sustaining dues therefrom.

* * *

Section 2. Non-attorney Affiliates.

A. Any person:

1. holding a law degree but not admitted to practice in any state, territory or possession of the United States or another country who is employed by a law school approved under the rules of the Court of Appeals or who is employed by a bar association, or

2. who is not admitted to practice in any state, territory or possession of the United States or another country and is a legal assistant or paralegal, qualified by education, training or work experience, who is employed by an attorney, law office, corporation, governmental agency or other entity, and who performs specifically delegated substantive legal work for which an attorney is responsible,

may become a Non-attorney Affiliate of the Association by submitting any required application form and supporting documentation to the Executive Director. Upon payment of the ~~applicable~~annual dues following such submission, the applicant shall immediately be entitled to all of the rights and subject to all of the responsibilities as if such person were a member, except those of voting, being an officer of the Association, being a member of the House of Delegates or Executive Committee, or being Chair of a Section or Committee. Non-attorney Affiliates are not entitled to hold themselves out as members and their status as Non-attorney Affiliate does not authorize them to practice law unless they otherwise have standing to do so.

Section 3. Dues. The annual dues of all members shall be in such amounts as may be fixed and determined from time to time by the House of Delegates. All such dues shall be payable at the beginning of ~~the fiscal~~ their membership and on each subsequent anniversary of their membership in ~~year of with~~ the Association. The ~~House of Delegates upon recommendation of the Executive Committee and the~~ Finance Committee shall have the power to ~~prorate the annual dues for the current year of those who become members during the year; to~~ suspend the accrual and

payment of the dues of any member during the term of such member's service with the Armed Forces of the United States; and to waive, in whole or in part, the dues of any member or former member of the Association that may be in arrears or may thereafter become payable, or both.

* * *

Section 6. Termination of Membership.

A. If any member fails to pay ~~yearly~~ annual dues within the period designated by the Association for payment of dues, it shall be the duty of the Treasurer to send a notice to the member stating that unless said dues are paid the member shall cease to be a member of the Association. If the dues are not paid by the member within 30 days of the date of the Treasurer's notice, the member's membership shall thereupon terminate.

* * *

X. SECTIONS AND DIVISIONS OF SECTIONS

* * *

Section 5. ~~Dues~~Royalties. ~~The executive committee of a section or if there be none, the members at an annual meeting of the section may, subject to the approval of the Finance Committee, fix the amount of annual dues, the payment of which shall be a condition to membership in the section.~~ Sections shall receive royalties from the Association in lieu of dues charged to the section's members.

CONCLUSION

Our committee proposes the foregoing amendments to the Association to implement the changes previously requested by the House of Delegates and the Membership Committee. We commend them to you for your consideration and subscription at the November 4, 2023, meeting of the House of Delegates. If subscribed, the above amendments will be presented for discussion and adoption at the 2024 Annual Meeting of the Association.

* * *

Respectfully submitted,

COMMITTEE ON BYLAWS
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Anita L. Pelletier, Vice Chair
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Staff liaison: David P. Miranda

NYSBA

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #11

REQUESTED ACTION: Approval of the report of the Task Force on Advancing Diversity.

The Task Force on Advancing Diversity was created by President Richard C. Lewis in June 2023 to address the then-imminent Supreme Court decision in the affirmative action cases pending before it. The Supreme Court decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina* (the "*SFFA* decision"), held that Harvard University and the University of North Carolina Chapel Hill had violated the Equal Protection Clause of the Fourteenth Amendment of the Constitution and Title VI of the Civil Rights Act of 1964 in its race-conscious admissions process. This Task Force report conducts an initial assessment in the immediate aftermath of the *SFFA* decision.

The Task Force created four (4) Working Groups: academia (law schools and other higher education institutions); corporations; law firms; and the New York State judiciary. The recommendations of the report are outlined below.

1. *Academia (Law Schools and Other Higher Education Institutions)*

- Any effort to advance diversity in law schools should focus on the mission of the university and how values and goals associated with that mission are articulated and pursued. Having and articulating important institutional goals, including diversity in legal education, remains permissible.

- Define the attributes to be given weight in the admissions process in advance and ensure that they are connected to the mission identified by the institution.

- Comprehensively consider viable race-neutral strategies to advance broader institutional diversity and equity goals, including SES, place-based and other potential admissions policies and ensure that race-neutral strategies reflect alignment with authentic institutional aims.

- Design application materials to collect demographic data (in conformance to the Court's guidance in the *SFFA* decision on the permissible role of race in the admissions process). Collection of disaggregated data may be important for research and evaluation purposes.

- Re-examine existing admissions policies and practices to address barriers to equitable educational access and consider reevaluating the criteria for assessing merit,

including: (1) using standardized tests; (2) legacy, athlete and donor preferences; (3) providing resources to alleviate the financial burden on law school applicants; and (4) developing methods for recruitment that can help diminish the pervasive disparities in law student enrollment and graduation among students of varying generational, racial or ethnic, and socio-economic backgrounds.

- Consider implementing recruitment and outreach strategies that extend beyond schools from which educational institutions have traditionally recruited to also encompass less-well-represented institutions and achieve a broadly diverse applicant pool.

- Directly engage with legislatures to advocate for new or expanded financial aid funding.

- Increase outreach to, investment in and collaboration with prospective students and affiliative partners.

- Implement broad-based support programs (*e.g.*, the Equal Opportunity Programs in New York), which can help address students' ancillary and complementary admissions needs, such as test preparation, financial assistance, academic and mentorship support, and related resources. In designing and implementing these programs, institutions should ensure that additional requirements do not inadvertently disadvantage participating students compared to the rest of the student body.

- Consider explicitly referencing eligible student groups that may otherwise be underrepresented in all marketing materials, programming and related eligibility descriptions to signal to prospective diverse candidates that their applications for admission are truly welcome.

- Foster inclusive learning environments, both inside and outside the classroom and create a sense of belonging and support for historically underrepresented students. Diversity plan–related initiatives should include alumni, foundation representatives, donors, law firms, legal clients and government. Active engagement of key stakeholders facilitates consistent messaging about core values, including the elimination of bias, as well as guidance on implementing new policies and practices, which will lead to increased buy-in and trust throughout the community.

- Use testimonials from diverse scholarship and specialized program participants to convey to potential applicants, and the broader community, the demographic scope of awardees while also inherently conveying eligibility standards.

- Consider specialized campus-wide training as part of diversity initiatives to address critical changes in policy and practice focusing on cultural competence as well as identifying, eliminating, and disrupting bias to ensure that students of all backgrounds experience a respectful climate in which they can thrive.

- Train key personnel and stakeholders in admissions, financial aid, enrollment, diversity equity and inclusion, institutional advancement and student success groups to ensure a holistic effort and response campus-wide.

- Design assessment and audit procedures to ensure that the resources and support necessary for compliance are accessible, especially where race-neutral considerations are at issue.

- Commit to purposeful and lawful strategies to improve representation of faculty from diverse backgrounds and culturally competent leadership.

- Implement trainings and coursework grounded in racial justice to promote anti-racist educational settings.

- Recognize the emotional impact that public dialogue around diversity, the *SFFA* decision and race generally may have on campus stakeholders. Provide support to ensure the mental health and well-being of students, campus faculty and staff across the learning community as they navigate a shifting and contested landscape regarding racial diversity in legal education.

- Purposefully design wellness, and social, cultural and academic programming to show all students, especially underrepresented and first-generation students, that they are valued, that they belong and that they have a place in the legal profession.

2. *Private Employers: Corporations and Law Firms*

- Communicate a continued commitment to the organization's DEI principles.

- Assess existing DEI programs and consider engaging external counsel to conduct a legally privileged audit of DEI programs.

- Assess perceptions of DEI efforts, including through an analysis of the perception of DEI programs by employees and external stakeholders.

- Identify the specific benefits of diversity in the workplace and develop programs and initiatives specifically tailored to further those benefits.

- Increase internal controls over communications and disclosures about DEI initiatives, paying careful attention to appropriately and accurately describing those initiatives and the implications of making such disclosures.

- Implement education and training for all key partners, managers and employees to ensure that recruiters and those tasked with making employment decisions understand the purpose of DEI programs, as well as the key legal principles that govern those programs, and perform their functions in a way that mitigates legal and reputational risks.

- Appropriately collect, track, manage and utilize DEI data to increase organizational awareness of the performance of DEI programs. In addition, measure the outcomes of hiring, retention and promotion practices, as well as specific diversity initiatives, and periodically assess such data to identify and better understand patterns, gaps and opportunities for improvement.

- Foster good practices and ensure that senior leadership teams understand, and are invested in achieving, the objectives of the organization's DEI programs, which should be well-documented.

- Monitor changes in state and local laws and initiatives aimed at protecting and limiting DEI programs and any changes thereto.

- Rely on lawful strategies to achieve goals relating to: (1) outreach and recruitment efforts; (2) retention; and (3) the advancement of underrepresented groups. Organizations seeking to amplify opportunities to attract and recruit diverse talent should consider: (i) leveraging inclusive job postings; (ii) expanding recruiting efforts beyond schools they have traditionally focused on; (iii) targeting outreach to diverse student organizations and diverse career fairs and leveraging relationships with bar associations; (iv) recruiting candidates who have taken alternate paths in school or their careers; (v) implementing structural behavioral interviews; and (vi) engaging with pipeline programs for high school and college students.

- Consider implementing development and retention programs that incorporate a range of tools, including: (1) affinity groups and ERGs; (2) advice and mentorship programs coupled with feedback and evaluation; (3) formal training programs; (4) equitable work allocation systems; and (5) networking opportunities.

- Consider implementing effective advice and mentorship programs that seek to achieve a range of objectives, including:

    - Understanding issues that the employee is experiencing and helping to resolve them;

    - Clarifying commitment and performance expectations and behavioral norms;

    - Getting to know the employee as an individual;

    - Helping the employee assess their medium- and long-term career goals and identifying ways to position them to achieve those, whether for internal promotion opportunities or to pursue external opportunities in the future;

    - Identifying important skills that need developing and helping the employee identify the work opportunities that will most directly improve those skills; and

    - For high-potential employees that manifest the talent to become vice presidents, directors and partners, ensuring that firm or company leadership has them on their radar to track and develop.

- Consider, as regards client-service focused companies (and law firms), forming partnerships with clients around diversity, which may take several forms, including:

    - Bringing together affinity groups and ERGs from the employer and selected clients for events, potentially with guest speakers;

    - Running training sessions focused on building skills that employees at both organizations need;

    - Collaborating to identify secondment opportunities;

    - Jointly sponsoring selected events that provide diverse employees at different organizations the opportunity to get to know each other; and

    - Working with clients on public service initiatives that address legal issues faced by disadvantaged or marginalized communities, which can demonstrate a shared commitment to promoting social justice and equality.

- Consider factors that impact employee career trajectories at their company, and how those factors may create a greater hurdle for underrepresented minorities. Examples include:

    - How salaries and other financial incentives are structured;

    - For client service firms, how underrepresented minorities and women may be impacted by a client or firm's desire to have a diverse team participate in a pitch or other nonbillable assignment;

    - The types of social and business development activities that are available and encouraged;

    - How parental leave is handled;

    - How fertility and family-planning challenges are handled and/or acknowledged; and

    - The extent to which flexible and reduced hours work schedules are permitted and supported.

- Consider the development of supplier diversity programs as a way to both diversify business risks and help small and diverse business owners.

3. *The Judiciary*

- In order to ensure that judicial commitment to diversity is messaged from the top levels of court leadership, courts should consider:

    1. promoting judgeships as viable career opportunities for attorneys of all backgrounds, through transparent selection procedures and educational seminars;

    2. eliminating barriers to people from diverse backgrounds seeking election or appointment to judgeships and clearly communicating procedures for opportunities for judicial promotions;

    3. developing a comprehensive strategic plan that incorporates both mandatory educational programming, and human resource policies and practices that promote DEI, including those which aim to: (i) promote transparency and accessibility in application procedures; (ii) promote a diverse applicant pool; (iii) develop inclusive civil service exams and other written evaluation tools; and (iv) implement structured interviews conducted by diverse interview panels consisting of individuals from various backgrounds, experiences, and perspectives;

    4. developing or updating mission statements to include support for diversity, and to specifically acknowledge the effects of bias and discrimination, and the court's responsibility to minimize such effects in the judicial process;

    5. encouraging judicial leadership to demonstrate awareness of personal and organizational bias, including by enlisting subject matter experts to guide and assist in the development of mandatory bias education programs for judges, court staff, uniformed personnel and jurors that focus on understanding and identifying explicit and implicit bias;

    6. recognizing accountability as an ethical duty and ensuring that there are clear policies and protocols for investigating claims of bias, harassment and discrimination; and

    7. broadly supporting measures that create equal opportunities for attorneys to take on lead roles in their courtrooms, putting in place policies that demonstrate the court's commitment to diversity and equal opportunity in discretionary appointments;

    8. ensuring that employment applications and hiring processes are clear and transparent to the public at-large; and

    9. engaging in focused outreach to communities with higher percentages of underrepresented groups.

- Civil service exams should be developed by professional exam developers trained in exam development and the *Uniform Guidelines on Employee Selection Procedures* and include exam validation, job analysis, item analysis and adverse impact analysis. Exam content and qualifications should be based on comprehensive job analysis studies and input from diverse subject-matter-experts. Exam developers should aim to minimize and reduce the adverse impact of written exams by implementing fair and inclusive practices that minimize bias and create a level playing field for all test-takers.

- Consider collaboration and communication with community and local organizations, including:

    1. creating robust community outreach efforts, including through the use of public hearings and community meetings, listening sessions and surveys;

    2. establishing centralized and innovative civic engagement programs; and

    3. taking steps to ensure that courthouses are inclusive.

- Consider the utility of data collection and analysis and maintain rigorous data on the make-up of members of the judiciary, court personnel and applicants for positions in the court system, which should be made available to the public to support transparency.

- Consider incorporating a well-developed and implemented structured interview format, which reduces bias, in the interview selection process.

The Report will be presented by Secretary Jeh Johnson and Brad Karp, Esq.

The Bronx County Bar Association unanimously voted to endorse the report and recommendations of the Task Force on Advancing Diversity.

NEW YORK STATE BAR ASSOCIATION

Report and Recommendations of the New York State Bar Association **Task Force on Advancing Diversity**

September 2023

Adopted by the Executive Committee on September 20, 2023.

August 31, 2023

REPORT OF THE NEW YORK STATE BAR ASSOCIATION TASK FORCE ON ADVANCING DIVERSITY

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NYSBA President

Richard C. Lewis

ACKNOWLEDGEMENTS

This past June Richard Lewis, president of the New York State Bar Association, approached the three of us to co-chair a "Task Force on Advancing Diversity," to address the then-imminent decision of the Supreme Court in the affirmative action cases pending before it. Dick recognized then that the Court would likely rule against Harvard and UNC in those cases and wanted to promptly provide guidance on a post-decision path forward for law firms, clients, academia and the state judiciary. We commend Dick for his leadership and foresight.

The three of us accepted Dick's request and immediately put out a call to the New York State bar to recruit members of the Task Force. The response was gratifyingly swift and vast. Many in our legal community recognize the compelling benefits of diversity in the legal profession and in higher education, which is the training ground for the legal profession.

While every member of the Task Force contributed to the this report, a special thanks goes to the following co-chairs of working groups of the Task Force, for their expertise and work in bringing this report to completion: Dean Gillian Lester, Dean Alicia Ouellette, Michael Delikat, Julie Swidler, Jonathan Katz, Jill Rosenberg, the Honorable Cheryl Chambers and the Honorable Edwina Richardson-Mendelson. We also thank the Appellate Division, Second Department of the state Supreme Court, the Office for Justice Initiatives, the Franklin H. Williams Judicial Commission, and the New York State Unified Court System's Department of Human Resources. We thank the law firms of Ropes & Gray LLP, and Wollmuth Maher & Deutsch, LLP. We offer special thanks to Professor Rachel Godsil of Rutgers Law School, who is also the Director of Research and Co-Founder of the Perception Institute.

Additionally, the staff of the NYSBA have been invaluable in their support of the Task Force and the production of this report. We recognize in particular Pamela McDevitt and Melissa O'Clair, our NYSBA liaisons.

Last but far from least, we thank our own Paul Weiss colleagues Lissette Duran and Liza Velazquez for spearheading the work of the Task Force and assembling this report.[1]

Jeh Charles Johnson
Brad Karp
Loretta E. Lynch

[1] This report is a continuation of NYSBA's work of addressing issues of diversity, equity, and inclusion. *See e.g.*, Report and Recommendations of the Task Force on Racial Injustice and Police Reform; Report and Recommendations of the New York State Bar Association Task Force on Racism, Social Equity, and the Law.

I. EXECUTIVE SUMMARY

On June 29, 2023, the Supreme Court issued its decisions in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina* (collectively, the "*SFFA* decision").[2] The Court held that Harvard University and the University of North Carolina at Chapel Hill violated the Equal Protection Clause of the Fourteenth Amendment of the Constitution and Title VI of the Civil Rights Act of 1964 by impermissibly using race-conscious admissions processes.

Specifically, in the majority opinion authored by Chief Justice Roberts, the Court ruled that the race-conscious admissions systems used by Harvard and UNC lacked sufficiently focused and measurable objectives, and thus failed strict scrutiny, which applies when considering whether the use of a racial classification is permissible under the Equal Protection Clause. Chief Justice Roberts noted that the application of strict scrutiny requires an examination of whether the racial classification is used to "further compelling governmental interests," and is narrowly tailored to achieve that interest.[3] But, the Court found that the educational benefits (*i.e.*, compelling interests) proffered by Harvard and UNC could not "be subjected to meaningful judicial review" or measured sufficiently to satisfy strict scrutiny.[4]

The majority also found that Harvard and UNC's race-conscious admissions programs were not narrowly tailored, as they impermissibly used race as a negative and an illegitimate stereotype and had no logical endpoint.[5] The majority stated that college admissions are "zero-sum" and thus a benefit provided to some applicants "necessarily advantages the former group at the expense of the latter."[6]

Justice Thomas filed a concurring opinion providing what he called an "originalist defense of the colorblind Constitution."[7] Justice Gorsuch filed a concurring opinion, joined by Justice Thomas, concluding that Harvard's and UNC's systems violated Title VI. Justice Gorsuch further noted that the statutory language of Title VI is similar to that of Title VII in that "[b]oth Title VI and Title VII codify a categorical rule of individual equality, without regard to race."[8] In a separate concurring opinion, Justice Kavanaugh addressed the Court's precedents and the importance of an end point for race-based programs.[9]

Justices Sotomayor and Jackson each filed dissenting opinions. Justice Sotomayor—whose dissent was joined by Justices Kagan and Jackson—concluded that the schools' admissions policies satisfied strict scrutiny because the "compelling interest in student body diversity is grounded not only in the Court's equal protection jurisprudence

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[2] 143 S. Ct. 2141 (2023).
[3] *Id.* at 2166.
[4] *Id.*, n.4.
[5] *Id.* at 2170, 2172.
[6] *Id.* at 2169.
[7] *Id.* at 2177 (Thomas, J., concurring).
[8] *Id.* at 2209 (Gorsuch, J., concurring).
[9] *Id.* at 2221–25.

but also in principles of 'academic freedom,' which 'long [have] been viewed as a special concern of the First Amendment.'" [10] Similarly, Justice Jackson emphasized that "although formal race-linked legal barriers are gone, race still matters to the lived experiences of all Americans in innumerable ways . . . and it will take longer for racism to leave us. And ultimately ignoring race, just makes it matter more." [11]

Let no one doubt that the *SFFA* decision is a setback to efforts to achieve diversity throughout all echelons of American life. Regrettably, in the year 2023, we are still in many respects a segregated society—where we live, where we worship, and with whom we socialize. For recent generations of American teenagers, encountering a diverse student body on a college or university campus was and is the first opportunity to broaden their horizons by living, socializing and learning with those different from themselves.

Furthermore, diversity in higher education has fed diverse professions. Today, the legal profession is more reflective of America. Today, our state court judiciary is more reflective of the diversity in New York State.[12] A generation of Black graduates from the nation's top law schools have gone on to become Cabinet secretaries, deputy secretaries, members of the U.S. House and Senate, a House minority leader, a U.S. Attorney General, a U.S. Supreme Court Justice, a Governor of Massachusetts, a Vice President, and a President.[13]

Studies also reveal that the increased diversity in the nation's medical schools has strengthened the medical profession and alleviated racial disparities in the quality of healthcare.[14]

Nevertheless, the *SFFA* decision is today the law of the land, and must be followed. The question now is where do those in higher education, business, the legal profession, and the judiciary go from here? For those of us in these fields with a continued commitment to diversity, what lawful course can we chart given the *SFFA* decision? Courts and legal analysts will no doubt spend years wrestling with these questions. At the request of the NYSBA, this Task Force report undertakes an initial assessment in the immediate aftermath of the *SFFA* decision.

A few preliminary observations:

First, it is important to note that the *SFFA* decision was rendered in the unique context of higher education admissions—and the admissions practices at Harvard and UNC

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[10] *Id.* at 2233–34 (Sotomayor, J., dissenting), (quoting *Regents of Univ. of Col. v. Bakke*, 438 U.S. 265, 312 (1978)).

[11] *Id.* at 2277 (Jackson, J., dissenting).

[12] *Report from Jeh C. Johnson, Special Adviser on Equal Justice in the New York State Courts*, Oct. 1, 2020, 32–33.

[13] This growth is in part due to the Supreme Court's decision in *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978) approving affirmative action in higher education.

[14] Douglas Grbic & Franc Slapar, *Changes in Medical Student's Intentions to Serve the Underserved: Matriculation to Graduation,* 9 Analysis in Brief No. 8 at 2 (AAMC July 2010); s*ee also* Brief for Amici Curie Association of American Medical Colleges et al. in Support of Respondents, filed in the *Harvard* and *UNC* cases on July 28, 2022, at 11–12.

in particular. Though the concurring opinions would appear to prefer to outlaw affirmative action categorically, the majority opinion authored by Chief Justice Roberts focuses at great length on the perceived shortcomings in the Harvard and UNC admissions programs specifically. The majority opinion does not claim to overrule *Bakke, Fisher* or *Grutter*— in contrast to the Court's 2022 decision on abortion in *Dobbs* which expressly overruled *Roe v. Wade.*[15] Notably, the majority opinion also stated explicitly that it was not purporting to rule on admission practices at the nation's military academies.[16] Nor does the majority opinion purport to rule on the employment practices of private employers, governed principally by Title VII of the Civil Rights Act and 42 U.S.C. § 1981. Nevertheless, we must recognize that the *SFFA* decision reflects an evolving legal landscape and a very different attitude at the Supreme Court toward affirmative action.

Second, we note also the following key passage in Chief Justice Roberts' majority opinion:

> Nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration or otherwise.[17]

Thus, the majority leaves open the possibility that a college or university may consider, as a matter of personal characteristics, the way in which an applicant has faced the challenge of race discrimination in his or her life. In America today, personal challenges still encompass discrimination on the basis of race.

To conduct the assessment documented in the pages that follow, the Task Force was divided into four working groups: (1) academia, (2) corporations, (3) law firms, and (4) the New York State judiciary. The report that follows is structured accordingly. In what we hope are useful, concrete terms, we set forth guidance and recommendations here for educational institutions, corporations, law firms and the state court system. The report proceeds in four sections. The first section outlines the benefits and importance of diversity (pp. 7–23).[18] The second section, authored by law school deans and others in academia, discusses the implication of the *SFFA* decision on law schools and other educational institutions and provides guidance on how to lawfully enhance admissions practices to

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[15] *Roe v. Wade*, 410 U.S. 113 (1973).

[16] *Id.* at 2166, n. 4 ("The United States as amicus curiae contends that race-based admissions programs further compelling interests at our Nation's military academies. No military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present.").

[17] *Id.* at 2176.

[18] The focus of this report is racial and ethnic diversity, including, among others, the representation and inclusion of Black, Latinx/Hispanic, Asian and Pacific Islander (API) and Native Americans. Additionally, this report uses the terms "historically underrepresented" or "underrepresented" groups. For the purposes of this report, we mean to include Black, Latinx/Hispanic, Asian and Native Americans, recognizing that Asians as a racial group may be over-represented in certain industries, the API community in the United States is broad and diverse, with individuals representing over fifty ethnic groups. Moreover, many of these ethnic groups have experienced a long history of discrimination in education, employment, and other areas.

advance diversity goals (pp. 24–39). The third section, authored by lawyers in firms and in-house corporate counsel, discusses the decision's indirect impacts on private employers, including corporations and law firms, and provides practical steps on how to assess and update DEI initiatives to mitigate potential legal and reputational risks (pp 40–74). The fourth and last section, authored by judicial personnel, summarizes the *SFFA* decision's potential impact on courts, the continued importance of diversity on the bench and among non-judicial personnel, and the judiciary's responsibility to foster an inclusive environment for all those who enter its courthouses (pp. 75–84).

This report is not intended to provide legal advice, and no legal or business decision should be based on its content.

II. THE IMPORTANCE OF DIVERSITY

It is well established by social science research that diversity is correlated with wide-ranging and far-reaching benefits to organizations. Diverse student bodies and educators are essential to the success of our education system and a diverse workforce—at all levels—is essential to the success of America's businesses and civic institutions like our court system. While the Court did not explicitly acknowledge the benefits of diversity in its majority opinion, it did find Harvard and UNC's goals of, among other things, "training future leaders in the public and private sectors," "preparing graduates to 'adapt to an increasingly pluralistic society,'" "better educating its students through diversity," "producing new knowledge stemming from diverse outlooks," and "enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down of stereotypes" to be "commendable,"[19] "plainly worthy"[20] goals, though not sufficiently measurable for purposes of conducting a judicial strict scrutiny analysis. In this section, we provide documented evidence of the importance and benefits of diversity in academia, corporations, law firms and the judiciary.

A. Diversity in Law Schools and Other Higher Education Institutions

For decades, researchers have recognized the positive impact of student body diversity on the academic experience.[21] That research has found that "prejudice on college campuses and the underrepresentation of racial minority groups in student bodies impose significant educational obstacles for both minority and nonminority students"[22] and that "campus diversity is an effective response, mitigating these educational deficiencies and improving the academic experience for all students."[23] Indeed, campus diversity relieves many of the negative educational impacts of discrimination and prejudice.[24] Measures that reduce discrimination and prejudice mitigate the psychological phenomena that inhibits academic and later workplace success for minority students.[25] The American College

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[19] *SFFA*, 143 S. Ct. at 2166.

[20] *Id.* at 2167.

[21] Brief for the American Psychological Association ("APA") et al. as Amicus Curiae in Support of Respondents, *SFFA*, 143 S. Ct. 2141 (2023); cites a number of these studies; *see also* Brief for the American Educational Research Association ("AERA") et al. as Amicus Curiae in Support of Respondents at 8, *SFFA*, 143 S. Ct. 2141 (2023) ("The leading meta-analysis published in 2006 by Pettigrew and Tropp remains highly relevant. The study analyzed over 500 studies from a range of educational, workplace, and informal settings, including college campuses, and reached the clear conclusion that positive intergroup contact reduces prejudice and that greater intergroup contact is associated with lower levels of prejudice.").

[22] Brief for the APA et al. as Amicus Curiae in Support of Respondents at 3, *SFFA*, 143 S. Ct. 2141 (2023).

[23] *Id*.

[24] *See* Mitchell R. Campbell & Markus Brauer, *Is Discrimination Widespread? Testing Assumptions About Bias on a University Campus*, 150 J. Experimental Psychol: General 759 (2021); *see also* Brief for the APA et al. as Amicus Curiae in Support of Respondents at 19, *SFFA*, 143 S. Ct. 2141 (2023) (citing same and Julie J. Park, *Asian Americans and the Benefits of Campus Diversity: What the Research Says* 2, Nat'l Comm'n on Asian American and Pacific Islander Research in Education, http://care.gseis.ucla.edu/wpcontent/uploads/2015/08/CARE-asian_am_diversity_D4.pdf (a 2012 study finding that Black and Latinx students who interacted with students of different races "had more favorable attitudes toward Asian Americans as college seniors").

[25] Brief for the APA et al. as Amicus Curiae in Support of Respondents at 16, *SFFA*, 143 S. Ct. 2141 (2023) (citing Nicholas A. Bowman et al., *Institutional Racial Representation and Equity Gaps in College*

Health Association's recent report confirms that "the perception of one's environment is an important factor in determining emotional wellbeing" and "institutional support for diversity is a strong predictor of emotional well-being among students, faculty and staff within the campus community."[26]

Certain of the benefits of diversity are particularly relevant to the skill sets and values that law schools seek to promote in developing the next generation of lawyers. One study that analyzed data from over 4,400 students at nine public universities concluded that student interaction with diverse peers contributed to improvements in cognitive abilities (*e.g.*, analytical problem-solving skills and complex thinking skills), socio-cognitive skills (*e.g.*, cultural awareness and leadership) and democracy-related skills (*e.g.*, dealing with pluralistic settings and valuing civic contributions).[27] Likewise, national longitudinal studies indicate that negative interactions, including racial isolation, tokenism and stereotype threat, are often associated with unfavorable outcomes, including reductions in civic engagement, self-confidence and moral reasoning skills.[28]

Despite these findings, those opposed to race-conscious admission practices often claim that (1) race-conscious practices make underrepresented students admitted as a result of such practices feel stigmatized and (2) the use of race-neutral alternatives will result in equal, if not more, racial and ethnic diversity in schools. As discussed further below, recent studies and applications of race-neutral alternatives indicate the contrary.

Professor Richard Sander and other opponents of race-conscious admissions have long claimed that it imposes costs on underrepresented students by stigmatizing their qualifications and calling into question whether they are a "mismatch" for the school. Many of those same critics have further argued that beneficiaries of affirmative action who are admitted to more competitive institutions may do worse academically than if they had

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Graduation, 93 J. Higher Educ. 399 (2022); Ivuoma N. Onyeador et al., T*he Value of Interracial Contact for Reducing Anti-Black Bias Among Non-Black Physicians: A Cognitive Habits and Growth Evaluation (CHANGE) Study Report*, 31 Psychol. Sci. 18 (2020); Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. Pers. & Soc. Psychol. 751, 766–67 (2006)).

[26] American College Health Association, *ACHA's Statement of the Recent Affirmative Action Decision by the U.S Supreme Court*, July 19, 2023, https://www.acha.org/ACHA/About/ACHA_News/Statement_on_SCOTUS_Decison_Ending_Affirmative_Action.aspx; *see also* American College Health Association, *The Influence of Environmental Factors, Including Diversity, Equity, and Inclusion, on the Emotional Well-Being of Students, Staff, and Faculty*, https://www.acha.org/documents/ACHF/Influence_of_Environmental_Factors_on_the_Emotional_Well-Being_on_Students_Staff_and_Faculty.pdf.

[27] Sylvia Hurtado, *The Next Generation of Diversity and Intergroup Relations Research*, 61 J. Soc. Issues 595, 600–06 (2005).

[28] *See* Matthew Mayhew & Mark E. Engberg, *Diversity and Moral Reasoning: How Negative Diverse Peer Interactions Affect the Development of Moral Reasoning in Undergraduate Students*, 81 J. of Higher Edu. 459–88 (2010); Nida Denson & Mitchell Chang, *Do Curricular and Cocurricular Diversity Activities Influence Racial Bias? A Meta-Analysis*, 79 Rev. Educ. Res. 805 (2009); Mark Engberg, *Educating the Workforce for the 21st Century: A Cross-Disciplinary Analysis of the Impact of the Undergraduate Experience on Students' Development of a Pluralistic Orientation*, 48 Research in Higher Education 283 (2007).

instead attended a less competitive school.[29] With respect to law schools, one of the most prolific advocates of this theory is Richard Sander, who in a 2004 law review article purported to pursue a comprehensive assessment of the relative costs and benefits of affirmative action in legal education and focused on the "largest class of intended beneficiaries: Black applicants to law schools."[30] Based on his analysis, Sander claimed that law school presented a large mismatch effect for Black law students as measured by their bar passage rate and posited that eliminating race-conscious admissions would "not have severe effects on the production of [B]lack lawyers."[31] This article generated considerable criticism, including of Sander's empirical analysis.[32] Yet Sander has continued to advocate for the consideration of socioeconomic status ("SES") over race in admissions.[33]

Empirical research has since largely debunked Sander's and similar arguments. For instance, a 2010 study comparing students enrolled in universities with race-conscious admissions policies with students enrolled in universities in states that had barred race-conscious admissions posed several questions focusing on both "internal stigma" (minority students' own feelings of doubt or inferiority) and "external stigma" (non-minority students' questioning of minority students' abilities and qualifications).[34] The study found that internal stigma was lower among students in schools with race-conscious admissions.[35] The study also found that only about one-quarter of the students at schools with race-conscious admissions reported that non-minority students had questioned their qualifications, compared to nearly one half of the students who were enrolled in states with bans on race-conscious admissions.[36] And a separate 2008 study examining stigma among students at seven public law schools, four of which (University of Cincinnati, the University of Iowa, the University of Michigan and the University of Virginia) employed race-conscious admissions and three of which (University of California ("UC") Berkeley, UC Davis and the University of Washington) did not, found minimal differences in multiple forms of stigma at those schools.[37]

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[29] *Brief for Richard Sander as Amicus Curiae in Support of Petitioner*, *SFFA*, 143 S. Ct. 2141 (2023) spends significant time on mismatch.

[30] Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367 (2004).

[31] *Id*. at 374.

[32] *See, e.g.*, David L. Chambers et al., *The Real Impact of Ending Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 Stan. L. Rev. 1855 (2005); Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Numbers of Black Lawyers?*, 57 Stan. L. Rev. 1807 (2005); Daniel E. Ho, Scholarship Comment, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 Yale L.J. (2005).

[33] Richard H. Sander, *Class in American Legal Education*, 88 Denver U. L. Rev. 631 (2011).

[34] *See* Brief for the AERA et al. as Amicus Curiae in Support of Respondents at 22, *SFFA*, 143 S. Ct. 2141 (2023) (citing Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action,* 85 Ind. LJ. 1197 (2010)).

[35] Bowen at 1223–24.

[36] *Id.* at 1224–25.

[37] *See* Angela Onwuachi-Willig, Emily Houh & Mary Campbell, *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 Calif. L. Rev. 1299 (2008) (examining stigma among students at seven public law schools, four of which (University of Cincinnati, the University of Iowa, the University of Michigan, and the University of Virginia) employed race-conscious admissions and three of which (UC

Likewise, the so-called "mismatch" hypothesis remains unproven and contested by many scholars. For example, "a national study focusing on minority students who entered selective public institutions in 1999 found that '[B]lack male students who went to more selective institutions graduated at higher, not lower rates than [B]lack students in the same GPA interval who went to less selective institutions.'"[38] And a similar study examining educational outcomes for a cohort of college freshmen attending 28 selective institutions nationwide found no evidence supporting the mismatch hypothesis with respect to first-year grades or dropout rates.[39] Instead, the effect of diversity admissions on first-semester grades "was positive, precisely opposite the direction predicted by the mismatch hypothesis" and, with respect to dropouts, "the degree of an individual's likely benefit from affirmative action is negatively related to the likelihood of leaving school."[40]

Although studies relating specifically to the impact of eliminating the consideration of race in law and graduate schools are limited, the available research suggests that "race neutral" admissions will in fact reduce racial diversity at the graduate school level.[41]

Past experience with respect to undergraduate admissions suggests that without taking other actions to increase diversity within the applicant pool, elimination of the ability to consider race as one factor in the admissions process will likely decrease racial diversity. To illustrate: Arizona, California, Florida, Michigan, Nebraska, New Hampshire, Oklahoma[42] and Washington have enacted legal bans against any consideration of race in university admissions processes. Extensive research on the impact of these laws on student body diversity finds that racial diversity has significantly decreased in the wake of the enactments and that attempts to enhance diversity by other means have not made up the difference.[43] The authors of a nationwide analysis of minority enrollment trends at selective colleges found that "banning affirmative action at a public university in the top 50 of the U.S. News rankings is associated with a decrease in Black enrollment of roughly 1.74 percent, a decrease in Hispanic enrollment of roughly 2.03 percent, and a decrease in

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Berkeley, UC Davis, and the University of Washington) did not, and finding minimal differences in multiple forms of stigma at the law schools).

[38] *Id*. (quoting William G. Bowen, Matthew W. Chingos & Michael S. McPherson, *Crossing the Finish Line: Completing College at America's Public Universities* 209 (2009) (emphasis in original)).

[39] *See* Brief for the AERA as Amicus Curiae in Support of Respondents at 24, *SFFA*, 143 S. Ct. 2141 (citing Mary J. Fischer & Douglas S. Massey, *The Effects of Affirmative Action in Higher Education*, 36 Soc. Sci. Res. 531 (2007)).

[40] Fischer at 539, 541, respectively (emphasis in original).

[41] Liliana M. Garces, *Understanding the Impact of Affirmative Action Bans in Different Graduate Fields of Study*, 50 Am. Educ. Res. J. 251 (2013)

[42] In an amicus brief submitted in *SFFA*, Oklahoma claims no "long-term severe decline in minority admissions." But as other amici noted, Black and Native American enrollment has dropped sharply at the Norman campus—Oklahoma's flagship and most selective campus. By 2019, enrollment of Black freshmen at the Norman campus dropped from 5.1% to 3.7% and enrollment of Native American freshmen dropped from 3.8% to 3.0%. *See* University of Oklahoma Institutional Research & Reporting, *First-Time Freshman Analysis Fall 2013*, at 2, Table 1: University of Oklahoma – Norman Campus (Oct. 2013). University of Oklahoma Institutional Research & Reporting, *First-Time Freshman Analysis Fall 2019*, at 2, Table 1 University of Oklahoma – Norman Campus (Sept. 2019).

[43] *See, e.g.*, Prabhdeep Singh Kehal et al., *When Affirmative Action Disappears: Unexpected Patterns in Student Enrollments at Selective U.S. Institutions*, 1990–2016, 7 Socio. of Race & Ethnicity 543 (2021).

Native American enrollment of roughly .47 percent ."[44] Another study found similar impacts across a sample of 19 public universities.[45] Likewise, a study examining national data found comparable declines in minority enrollments in highly selective colleges in states banning race-conscious admissions and found that the decline in the use of race-conscious admissions in states with bans also negatively affected students who live in adjacent states that lack highly selective colleges, such as Nevada, Arizona and Idaho.[46]

California is perhaps the best known example of the impact of the end of race-conscious admissions on diversity, as the passage of Proposition 209 in 1996 ended race-conscious affirmative action in California's public universities.[47] In the years immediately following, UC's more selective campuses experienced a more than 50 to 60 percent drop in the number of Black applicants accepted and a 40 to 50 percent reduction in the number of Latinx high school seniors accepted for admission.[48] At UC, Los Angeles, the reductions in acceptances were similar: 43 percent for Black applicants and 33 percent for Latinx applicants.[49] Of note, the API community continues to be overrepresented within the UC system even after the removal of Proposition 209.[50] However, disaggregation analyses show that the underrepresentation of many ethnically distinct subgroups within the API community persists within the UC system. Such less represented communities include Sri Lankan, Hmong, Laotian, Bangladeshi, Malaysian, Tongan and Fijian students.[51]

A recent study on the California ban found even broader, more adverse effects in which underrepresented minorities (URM)[52] "cascaded" into less competitive institutions,

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[44] Peter Hinrichs, *The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demographic Composition of Universities*, 94 Rev. Econ. & Stat. 712, 717 (2012).

[45] Mark Long & Nicole Bateman, *Long-Run Changes in Underrepresentation After Affirmative Action Bans in Public Universities*, 42 Educ. Evaluation & Pol'y Analysis 188 (2020).

[46] Grant H. Blume & Mark C. Long, *Changes in Levels of Affirmative Action in College Admissions in Response to Statewide Bans and Judicial Rulings*, 36 Educ. Eval. & Pol'y Analysis 228 (2014).

[47] Proposition 209 was preceded by the enactment of SP-1 in 1995 by the University of California Board of Regents, which barred the use of "race, religion, sex, color, ethnicity, or national origin as criteria for admission to the University or to any program of study." The November 1996 vote to authorize Proposition 209 as an amendment to the state constitution provided backing for SP-1. Applicants for admissions to spring quarter 1998 were the first to feel the effects of the new admissions policy.

[48] *See Underrepresented Groups (URG) as a Percentage of California Public High School Graduates and UC Applicants, Admits, and New Freshmen, Systemwide, Fall 1989 to Fall 2016*, https://www.ucop.edu/academic-affairs/_files/prop209-gap-analysis-chart.pdf.

[49] Steven A. Holmes, *Re-Rethinking Affirmative Action*, N.Y. Times, Apr. 5, 1998, https://www.nytimes.com/1998/04/05/weekinreview/the-nation-re-rethinking-affirmative-action.html; *Prop. 209 Lands on UC*, L.A. Times, Apr. 1, 1998, https://www.latimes.com/archives/la-xpm-1998-apr-01-me-34867-story.html (reporting that the number of Black and Latinx students admitted to UC Berkeley, as a part of the first freshman class since Proposition 209 went into effect, dropped by 66% and 53%, respectively, compared to the previous year).

[50] Teresa Watanbe and Jennifer Lu, *Affirmative Action Divides Asian Americans, UC's Largest Overrepresented Student Group,* L.A. Times, Nov. 1, 2020, https://www.latimes.com/california/story/2020-11-01/affirmative-action-divides-asian-americans-ucs-largest-overrepresented-student-group.

[51] University of California, *Disaggregated Data*, Jul. 12, 2023, https://www.universityofcalifornia.edu/about-us/information-center/disaggregated-data.

[52] Zachary Bleemer, *Affirmative Action, Mismatch and Economic Mobility After California's Proposition 209*, Ctr. for Studies in Higher Education (2020), https://cshe.berkeley.edu/sites/default/files/publications/rops.cshe.10.2020.bleemer.prop209.8.20.2020

attainment of undergraduate and graduate degrees declined, and the average annual income of underrepresented minority graduates' wages dropped by five percent.[53] In response to the dramatic decline in enrollments by racially diverse students following the passage of Proposition 209, California adopted a percentage plan through which top-performing students graduating from most high schools in the state were guaranteed admission to most of the eight UC undergraduate campuses. In addition, UC, in its amicus brief submitted in the *SFFA* decision, stated:

> UC has implemented numerous and wide-ranging race-neutral measures designed to increase diversity of all sorts, including racial diversity. Those measures run the gamut from outreach programs directed at low-income students and students from families with little college experience, to programs designed to increase UC's geographic reach, to holistic admissions policies. Those programs have enabled UC to make significant gains in its system-wide diversity. Yet despite its extensive efforts, UC struggles to enroll a student body that is sufficiently racially diverse to attain the educational benefits of diversity.[54]

And even though the UC system as a whole admitted its most diverse class ever in 2021, that achievement is "tempered by two important concerns. First, UC's diversity gains have not been shared equally among all campuses." And "[s]econd, UC's student population at many of its campuses is now starkly different, demographically speaking, from the population of California high school graduates."[55]

Texas and Michigan corroborate that, without other actions to mitigate the effect, racial diversity is likely to decline without the consideration of race in admissions. In 1996, the Fifth Circuit of the United States Court of Appeals, in *Hopwood* v. *University of Texas Law School,*[56] prohibited the use of race in admissions in Texas, Louisiana and Mississippi. Texas later introduced a percentage plan the following academic year, but the first post-*Hopwood* class at the University of Texas had a much smaller minority enrollment.[57]

_2.pdf (In this study, URM includes African-American (Black), Chicano and Latino (Hispanic), and Native American students.).

[53] Bleemer found that: (1) Ending affirmative action caused UC Berkeley's 10,000 annual URM freshman applicants to cascade into lower-quality public and private universities; (2) URM applicants' undergraduate and graduate degree attainment declined overall and in STEM fields, especially among lower-testing applicants; and (3) as a result, the average URM UC applicant's wages declined by five percent annually between ages 24 and 34, almost wholly driven by declines among Hispanic applicants.

[54] *See* Brief for the President and Chancellors of the University of California as Amicus Curiae Supporting Respondents at 4, *SFFA*, 143 S. Ct. 2141 (2023).

[55] *Id*. at 9.

[56] *Hopwood* v. *University of Texas Law School* (78 F.3d 932 (5th Cir. 1996).

[57] Sue Anne Pressley, *Texas Campus Attracts Fewer Minorities*, Washington Post, Aug. 28, 1997, https://www.washingtonpost.com/archive/politics/1997/08/28/texas-campus-attracts-fewer-minorities/03b40410-276f-461c-b7a2-8d54a6c80e34/; Gary M. Lavergne & Bruce Walker, *Implementation and results of the Texas automatic admissions law (HB 588) at UT-Austin: Demographic analysis*, *Fall 2002*, Admissions Research, The University of Texas at Austin (2003); *see also* Marta Tienda, Kevin Leicht, Teresa Sullivan, Michael Maltese & Kim Lloyd, *Closing the gap?: Admissions and enrollments at the Texas public flagships before and after affirmative action*, Texas Top 10% Project (2003) (studying enrollment trends at Texas A&M and finding 74.4 percent whites in the admitted

Similarly, Black and Native American student enrollment at the University of Michigan also dropped significantly after race-conscious admissions ended.[58]

Two major categories of race-neutral alternatives for achieving diversity in undergraduate admissions have been advocated: (1) preferences for applicants from disadvantaged backgrounds (e.g., SES plans) and (2) place-based admissions plans. But empirical studies suggest that neither alternative is likely to replicate current levels of diversity on campus, especially at highly selective institutions.[59]

Since students from racial and ethnic minority groups are more likely to be from low-income and under-served or under-resourced geographic regions due to longstanding societal inequities, targeted financial aid and scholarships based on such eligibility criteria have the potential to increase racial diversity and economic diversity at selective institutions. Targeting first-generation students, who are more likely to come from racial or ethnically diverse or low income backgrounds, also has the potential to increase racial diversity on campus. Indeed, even before the *SFFA* decision, some institutions were already incorporating family income and status into their admissions criteria.[60] Empirical studies of those admissions programs, however, suggest that these preferences fail to foster racial diversity as effectively as race-conscious admissions.[61]

For example, studies have demonstrated that employing race-neutral economic or SES models does not necessarily yield racially diverse student bodies comparable to those

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classes between 1992 and 1996). By 1998, this percentage had grown to 80.5 percent. *See* Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences (2003)*, Charles T. Clotfelter, The Civil Rights Project at Harvard University (2011).

[58] William C. Kidder, UCLA C.R. Project, *Restructuring Higher Education Opportunity?:African American Degree Attainment After Michigan's Ban on Affirmative Action* 3 (2013); Nick Assendelft, *Investing in Diversity*, Alumni Ass'n of the Univ. of Mich. (Spring 2017), https://alumni.umich.edu/michigan-alum/investing-in-diversity/ ("Since the passage of Proposal 2, the number of underrepresented minority undergraduate students attending U-M has dropped nearly 11 percent."). From 2006 to 2015, the underrepresented minority population at the University of Michigan decreased by 12% at the undergraduate school, despite attempts to use race-conscious alternatives, *see* Br. for the University of Michigan as Amicus Curiae, *Fisher* v. *Univ. of Texas at Austin*.

[59] Research has documented that low-income and first-generation students are underrepresented at selective institutions. Richard D. Kahlenberg*, Achieving Better Diversity: Reforming Affirmative Action in Higher Education*, The Century Foundation (Dec. 3, 2015), https://tcf.org/content/report/achieving-better-diversity.

[60] Halley Potter, *Transitioning to Race-Neutral Admissions: An Overview of Experiences in States Where Affirmative Action has been Banned*, https://production-tcf.imgix.net/assets/downloads/6_Transitioning-to-Race-Neutral-Admissions.pdf. While Potter describes several universities that have started to include more socioeconomic-based factors in admissions after eliminating the consideration of race, she notes that the institutions also made other major changes to their admissions practices, such as introducing a percentage plan (*e.g.*, Texas, California, Florida) or greatly expanding financial aid and recruitment and eliminating legacy preferences (*e.g.*, Georgia).

[61] Using data from 2004, one study estimates that the preference given to low-income students is equivalent to the additional preference given to an applicant with a slightly better academic record (a 0.15 standard deviation difference). Sean F. Reardon, Rachel Baker, Matt Kasman, Daniel Klaskic & Joseph B. Townsend, *What Levels of Racial Diversity Can Be Achieved with Socioeconomic-Based Affirmative Action? Evidence from a Simulation Model*, 37 J. Pol'y Analysis & Mgmt. 630 (2018)).

produced by explicitly race-conscious models.[62] As one study noted, "the presence of minorities among all low-income students in the United States, and especially among those graduating from high school with sufficient grades and test scores to be admitted to college, would be too small to generate a level of minority representation anywhere close to its current level."[63] This analysis included multiple simulations looking at variables such as family income, wealth and assets and parental education level, and compared these simulations to results produced by race-conscious admissions policies. The study found that, in replacing race-based policies with SES policies, the share of minority students fell dramatically, declining "nearly one-third, from 16 percent to around 10 percent."[64] The study concluded that "no race-neutral model of preferential treatment can match the level of racial and ethnic diversity achieved by race-based affirmative action."[65]

A more recent study using agent-based modeling drew on data that could incorporate family income, parental education and parental occupation into simulated admissions processes to compare SES-based admissions with race-conscious admissions.[66] The study found, among other things, that reasonable SES-based admissions policies do not replicate the effects of race-based policies on diversity and produce lower levels of racial diversity. Although it noted that SES policies could be used together with race-conscious admissions policies, the study concluded that such efforts would likely be prohibitively expensive as a strong preference and increased financial aid would need to be directed towards low-income students, if the goal is to attempt to come close to the racial diversity levels attained through race-conscious admissions alone.[67]

B. Diversity in Corporations and Law Firms

The benefits that result from fostering diverse academic environments continue—and are amplified—in the workplace. These benefits include (1) enhancing cognitive and financial performance; (2) being better positioned to handle an increasingly diversified consumer and client base; and (3) attracting the next generation of employees.

Decades of social science has found that diversity significantly and positively impacts corporate spaces. In particular, a 2018 Boston Consulting Group study suggested that increasing the diversity of leadership teams leads to more and better innovation and, as a result, improved financial performance.[68] Companies that reported above-average diversity on their management teams also reported innovation-related revenue that was 19 percent higher than that of companies with below-average leadership diversity—45 percent

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[62] Sigal Alon, *Race, Class and Affirmative Action* 160–87 (2015); *see also* Brief for the AERA et al. as Amicus Curiae in Support of Respondents at 33–34, *SFFA*, 143 S. Ct. 2141 (2023) discussing same.

[63] Harry J. Holzer and David Neumark, *Affirmative Action: What Do We Know?*, 25 J. Pol'y Analysis & Mgmt. 463, 476 (2006).

[64] Alon, *supra* note 62, at 174.

[65] *Id.* at 249. *See also*, Alan Krueger et al., *Race, Income and College in 25 Years: Evaluating Justice O'Connor's Conjecture*, 8 Am. L & Econ. Rev. 282, 309 (2006).

[66] *See* Reardon et al., *supra* note 61.

[67] *Id.*

[68] Rocío Lorenzo et al., *How Diverse Leadership Teams Boost Innovation*, BCG (Jan. 13, 2018) https://bcg.com/publications/2018/how-diverse-leadership-teams-boost-innovation.

of total revenue versus just 26 percent.[69] Nearly half the revenue of companies with more diverse leadership comes from products and services launched in the past three years. These organizations also reported better overall financial performance with Earnings Before Interest and Taxes (EBIT) margins that were nine percent higher than those of companies with below-average diversity on their management teams.[70]

Diverse companies are also more likely to outperform their non-diverse peers financially.[71] A 2020 McKinsey & Company study examined proprietary data sets for over 1,000 public companies across a range of industries in 15 countries.[72] Companies in the top quartile for racial and ethnic diversity were 36 percent more likely to have financial returns above their respective national industry medians.[73] In contrast, companies with low levels of diversity were 40 percent more likely to underperform relative to their national industry standards in profitability.[74] Similarly, a survey of the S&P 500 conducted by *The Wall Street Journal* in 2019 found that the 20 most diverse companies "not only have better operating results on average than the lowest-scoring firms, but their shares generally outperform those of the least-diverse firms."[75]

A 2017 study showed that companies with a diverse workforce enjoy greater sales revenue, market share and relative profits than their more homogenous competitors.[76] Nearly two-thirds of American companies with high levels of racial and ethnic diversity saw above-average profitability.[77] Notably, high-diversity companies outpaced those with low levels of diversity by over $750 million in average sales revenue.[78] In fact, diversity "is among the most important predictors" of a company's sales revenue—even when controlling for alternative explanations of revenue variance like company size, type, industrial sector, region and age.[79] A study of venture capital firms found similar results.[80] Further, ethnically homogenous investment partnerships had 26 to 32 percent lower rates of success on their investments, and "diverse collaborators were better equipped to deliver" the kind of creative thinking required to thrive in highly competitive environments.[81]

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[69] *Id.*
[70] *Id.*
[71] McKinsey & Company, *Diversity Wins: How Inclusion Matters* (May 2020), https://www.mckinsey.com/~/media/mckinsey/featured%20insights/diversity%20and%20inclusion/diversity%20wins%20how%20inclusion%20matters/diversity-wins-how-inclusion-matters-vf.pdf.
[72] Id. at 1.
[73] *Id.* at 4.
[74] *Id.* at 5.
[75] Dieter Holger, *The Business Case for More Diversity*, Wall Street J., Oct. 26, 2019, https://www.wsj.com/articles/the-business-case-for-more-diversity-11572091200.
[76] Cedric Herring, *Is Diversity Still a Good Thing?,* 82 Am. Socio. Rev. 868, 876 (2017).
[77] *Id.* at 870.
[78] *Id.*
[79] *Id.* at 873–76.
[80] Paul Gompers & Silpa Kovvali, *The Other Diversity Dividend*, Harvard Bus. Rev., July–Aug. 2018, https://hbr.org/2018/07/the-other-diversity-dividend%20 ("Diversity significantly improves financial performance on measures such as profitable investments . . . and overall fund returns. . . . Along all dimensions measured, the more similar the investment partners, the lower their investments' performance.").
[81] *Id.*

In the law firm context, research indicates that diversity within law firms improves the services that firms provide to their clients, leading clients to seek out those services more often. Both the client and the firm benefit from this symbiotic relationship.[82] According to the ABA, "a diverse group of people working together to identify, analyze, and resolve issues ensures that those collective perspectives, perceptions and beliefs are voiced, considered, and represented as part of any proposed solution . . . building confidence within the legal community that diverse opinions, thoughts, and proposals are respected, appreciated, and desired."[83]

A study of law firms from 2015 to 2017 found that, all else being equal, firms with higher diversity were more profitable than firms with lower diversity.[84]

Within the legal profession, research also shows that having cultural and cognitive diversity leads to more "just, productive and intelligent" lawyers because it results in "better questions, analyses, solutions, and processes."[85] Law firm diversity is especially significant given the pipeline from law firms to senior societal leadership, both in government and in the corporate world. Law firm lawyers "often acquire a unique currency—a blend of high-level training, access to elite networks, and knowledge of the inner workings of influential institutions accumulated through their work advising on transactions and lawsuits. These credentials translate into the top tiers of influence across many sectors of our markets, government, and culture."[86]

Indeed, data confirms that law firm lawyers disproportionately go on to substantial leadership roles in government, academia and business. And lawyers who stay within their law firms often play pivotal roles in consequential Wall Street deals, public investigations and local, state and national lawsuits that define the daily rights of individuals and organizations. Even though lawyers make up only 0.8 percent of the workforce, they disproportionately influence other sectors of society, such as big business (16 percent of Fortune 100 chief executive officers ("CEOs")), media, sports (three of four major commissioners are lawyers) and academia (over 10 percent of university presidents).[87] Most lawyers start their careers in firms, and whether they stay or move on, society benefits when law firm populations reflect the diverse makeup of those they serve.

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[82] Dev Stahlkopf, *Why Diversity Matters in the Selection and Engagement of Outside Counsel: An In-House Counsel's Perspective*, Am. Bar Ass'n, May 6, 2020, https://www.americanbar.org/groups/litigation/publications/litigation_journal/2019-20/spring/why-diversity-matters-the-selection-and-engagement-outside-counsel-inhouse-counsels-perspective.

[83] *Id.*

[84] Evan Parker, *Missing in Action: Data-Driven Approaches to Improve Diversity (074)*, Legal Evolution, Nov. 25, 2018, https://www.legalevolution.org/2018/11/missing-action-data-driven-approaches-improve-diversity-074/; Bryan Anderson, *The Business Case for Diversity – What Does the Evidence Show?*, Palm Beach County Bar Ass'n, Jan. 3, 2023, https://www.palmbeachbar.org/the-business-case-for-diversity-what-does-the-evidence-show.

[85] American Bar Association Presidential Diversity Initiative, *Diversity in the Legal Profession: The Next Steps* (April 2010), https://law.lclark.edu/live/files/8835-aba-next-steps.

[86] Lisa Kirby, *Why Diversifying the Legal Industry is the Key to a More Equitable World*, The American Lawyer, March 29, 2022.

[87] *Id.*

Importantly, as the United States becomes more diverse,[88] and as businesses increasingly cater to a global and culturally diverse market, diverse workforces are better equipped to handle the realities of modern business. Increased diversity bolsters revenue by improving a company's orientation toward the market and alignment with customers.[89] A company that considers and reflects its customer base is better equipped to understand market dimensions and develop products and services that most of the population, and not merely a small sector, wants to buy.[90] That correlation helps to explain why workforce diversity is one of the best predictors of a company's number of customers.[91]

Using data from sources like the U.S Census Bureau and the U.S Bureau of Economic Analysis, the University of Georgia's Selig Center for Economic Growth reported that the buying power of Asian American, Black American and Native American consumers "has exploded over the past 30 years."[92] Since 1990, the buying power of these groups has risen from $458 million to over $3 trillion annually, accounting for 17.2 percent of the nation's total buying power.[93] Today, success in American business requires understanding and communicating effectively with a racially diverse consumer population.[94] Diversity of both inherent traits, such as ethnicity, and acquired experiences, such as a facility and comfort interacting with people of different backgrounds, across a company's workforce improves business outcomes.[95] For example, a team with a member who shares a client's ethnicity is 152 percent more likely than another team to understand that client.[96] As a result, diversity helps teams better serve consumers and clients.

At the same time, diversity has become essential for recruitment and retention at all levels and in all industries. For example, in a survey of over 20,000 high school seniors graduating in 2023, diversity was the top item that students wanted in their campus community. "A diverse student body was appealing to 42% of respondents and an

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[88] Nicholas Jones et al., *2020 Census Illuminates Racial and Ethnic Composition of the Country*, U.S. Census Bureau, Aug. 12, 2021, https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html (explaining that between 2010 and 2020, the proportion of people who identified as white alone decreased from 72.4 to 61.6 percent of all people living in the U.S., and the U.S. population became more multiracial and diverse).

[89] Maryam Imam, *Economics of Diversity*, Haley Guiliano LLP, March 1, 2019, https://www.hglaw.com/news-insights/economics-diversity .

[90] *Id*.

[91] Herring, *supra* note 76, at 876 (explaining that "the relationship between racial diversity and number of customers . . . is stronger than the impact of company size, establishment size, and organization age," suggesting diversity is "one of the most important predictors of number of customers.").

[92] Julianne Akers, *UGA's Selig Center for Economic Growth: Consumer buying power grows*, WUGA, June 21, 2023, https://www.wuga.org/local-news/2023-06-21/ugas-selig-center-for-economic-growth-consumer-buying-power-grows.

[93] J. Merritt Melancon, *Consumer Buying Power Is More Diverse Than Ever*, UGA Today, Aug. 11, 2021, https://news.uga.edu/selig-multicultural-economy-report-2021.

[94] Brief for Major American Business Enterprises et al. as Amici Curiae Supporting Respondents at 15, *SFFA*, 143 S. Ct. 2141 (2023).

[95] *Id.*; *see also* Randall Kiser, Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients 81–83 (2010).

[96] Sylvia Ann Hewlett et al., *How Diversity Can Drive Innovation*, Harvard Bus. Rev., Dec. 2013, https://hbr.org/2013/12/how-diversity-can-drive-innovation?registration=success.

additional 37% said that it was a must-have in their college experience."[97] Similarly, many jobseekers—particularly Millennials and Gen Zers—now prioritize a "diverse and inclusive organization" and a significant portion "have turned down or decided not to pursue job opportunities because of a perceived lack of inclusion."[98] A 2018 Deloitte Millennial Survey showed that Millennials and Gen Zers correlate diversity with "a forward-thinking mindset" and "a tool for boosting both business and professional performance."[99] According to a 2020 survey from Glassdoor, 76 percent of employees and job seekers said a diverse workforce was important to them in evaluating companies and job offers.[100] Nearly half of Black and Hispanic employees and job seekers said they had quit a job after witnessing or experiencing discrimination at work and 37 percent of employees and job seekers said they would not apply to a company that had negative satisfaction ratings among people of color.[101] The September 2022 survey from Glassdoor and Indeed showed similar results; 72 percent of workers between the ages of 18 and 34 said "they would consider turning down a job offer or leaving a company if they did not think their manager (or potential manager) supported DEI initiatives."[102] Notably, Gen Z, which comprises one of the largest segments of the workforce, is also one of its most diverse, with about 48 percent of Gen Z individuals identifying as racial or ethnic minorities.[103]

Over the last decade, much of the driving force for diverse legal teams has come from law firm clients. Clients have recognized that strong talent generates value. Clients often depend on the advice of outside counsel at law firms to make strategic decisions, and good strategic decisions lead to success. "The only way you can flesh out an idea is with diversity of opinion and that needs to be reflected in the diversity of people giving us the opinion," noted Kristin Sverchek, Current President and former General Counsel at Lyft.[104]

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[97] Will Patch, *Class of 2023 Fall Senior Survey*, Niche, Nov. 1, 2022, https://www.niche.com/about/enrollment-insights/class-of-2023-fall-senior-survey.

[98] *See, e.g.*, *Understanding Organizational Barriers to a More Inclusive Workplace*, McKinsey & Company (June 2020), https://www.mckinsey.com/~/media/mckinsey/business%20functions/people%20and%20organizational%20performance/our%20insights/understanding%20organizational%20barriers%20to%20a%20more%20inclusive%20workplace/understanding-organizational-barriers-to-a-more-inclusive-workplace.pdf?shouldIndex=false; Ed O'Boyle, *4 Things Gen Z and Millennials Expect from Their Workplace*, Gallup, March 30, 2021, https://www.gallup.com/workplace/336275/things-gen-millennials-expect-workplace.aspx.

[99] *2018 Deloitte Millennial Survey*, Deloitte, https://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/gx-2018-millennial-survey-report.pdf.

[100] Glassdoor Team, *Diversity & Inclusion Workplace Survey*, Glassdoor, Sept. 30, 2020, https://www.glassdoor.com/employers/blog/diversity-inclusion-workplace-survey.

[101] *Id.*

[102] *Indeed & Glassdoor's Hiring and Workplace Trends Report 2023*, https://www.glassdoor.com/research/app/uploads/sites/2/2022/11/Indeed-Glassdoors-2023-Hiring-Workplace-Trends-Report-Glassdoor-Blog.pdf.

[103] Kim Parker & Ruth Igielnik, *On the Cusp of Adulthood and Facing an Uncertain Future: What We Know About Gen Z So Far,* Pew Research, May 14, 2020, https://www.pewresearch.org/social-trends/2020/05/14/on-the-cusp-of-adulthood-and-facing-an-uncertain-future-what-we-know-about-gen-z-so-far-2.

[104] Kristin Sverchek, former Current President and former General Counsel at Lyft, quoted in Christine Simmons, *170 GCs Pen Open Letter to Law Firms: Improve on Diversity or Lose Our Business*, The

When clients can draw upon advice from an outside counsel talent base that includes all aspects of diversity, clients receive superior legal services.[105] Therefore, both the law firm and its clients benefit financially and culturally from hiring teams that reflect the diversity of the marketplace.[106]

Today, in-house legal departments frequently invest in programs and initiatives to encourage partner law firms to foster and increase diversity.[107] Clients are leveraging their substantial purchasing power to promote diversity by considering key diversity efforts and metrics, among other factors, in selecting outside counsel.[108] In addition, clients gather extensive information from their existing partner firms, tracking not only the numbers of diverse attorneys at the firm, but also whether those attorneys are doing meaningful work and receiving credit for it.[109] Certain in-house legal teams have also used incentive-based or diversity criteria-based fee structures to reward firms that make advancements in diversity and penalize those that do not.[110]

Clients are also increasingly taking an interest in the career development and progression of diverse attorneys to attract a strong talent base. In-house legal departments

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American Lawyer, Jan. 27, 2019, https://www.law.com/americanlawyer/2019/01/27/170-gcs-pen-open-letter-to-law-firms-improve-on-diversity-or-lose-our-business/?slreturn=20230701195016.

[105] *Diversity in Law: Who Cares?*, Am. Bar Ass'n, Apr. 30, 2016, https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2016/spring2016-0416-diversity-in-law-who-cares.

[106] Dev Stahlkopf, *Why Diversity Matters in the Selection and Engagement of Outside Counsel: An In-House Counsel's Perspective*, Am. Bar Ass'n, May 6, 2020, https://www.americanbar.org/groups/litigation/publications/litigation_journal/2019-20/spring/why-diversity-matters-the-selection-and-engagement-outside-counsel-inhouse-counsels-perspective; *Diversity in Law: Who Cares?*, Am. Bar Ass'n, Apr. 30, 2016, https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2016/spring2016-0416-diversity-in-law-who-cares.

[107] Christine Simmons, *170 GCs Pen Open Letter to Law Firms: Improve on Diversity or Lose Our Business*, The American Lawyer, Jan. 27, 2019, https://www.law.com/americanlawyer/2019/01/27/170-gcs-pen-open-letter-to-law-firms-improve-on-diversity-or-lose-our-business/?slreturn=20230701195016; Dev Stahlkopf, *Why Diversity Matters in the Selection and Engagement of Outside Counsel: An In-House Counsel's Perspective*, Am. Bar Ass'n, May 6, 2020, https://www.americanbar.org/groups/litigation/publications/litigation_journal/2019-20/spring/why-diversity-matters-the-selection-and-engagement-outside-counsel-inhouse-counsels-perspective.

[108] Brian P. Seaman, *How client surveys are moving the DEI needle at law firms*, Reuters, Feb. 23, 2022, https://www.reuters.com/legal/legalindustry/how-client-surveys-are-moving-dei-needle-law-firms-2022-02-23. For a comprehensive list of client efforts to drive outside counsel diversity, please visit *Legal Department (AKA Clients) Efforts Designed to Drive Outside Counsel Diversity*, Diversity Lab, July 8, 2017, https://www.diversitylab.com/knowledge-sharing/clients-push-for-diversity; Dev Stahlkopf, *Why Diversity Matters in the Selection and Engagement of Outside Counsel: An In-House Counsel's Perspective*, Am. Bar Ass'n, May 6, 2020, https://www.americanbar.org/groups/litigation/publications/litigation_journal/2019-20/spring/why-diversity-matters-the-selection-and-engagement-outside-counsel-inhouse-counsels-perspective.

[109] Roy S. Ginsburg et al., *Diversity Makes Cents: The Business Case for Diversity*, ABA Section of Litigation Annual Conference (Apr. 2014), https://www.americanbar.org/content/dam/aba/publications/landslide/diversity-makes-cents.pdf.

[110] Dev Stahlkopf, *Why Diversity Matters in the Selection and Engagement of Outside Counsel: An In-House Counsel's Perspective*, Am. Bar Ass'n, May 6, 2020, https://www.americanbar.org/groups/litigation/publications/litigation_journal/2019-20/spring/why-diversity-matters-the-selection-and-engagement-outside-counsel-inhouse-counsels-perspective.

are growing faster than law firms, and many lawyers who start their careers at firms will work in-house either through a secondment or as in-house counsel later in their careers.[111] Clients understand the value of increasing opportunities for diverse attorneys to do meaningful work and form ongoing client relationships. For these reasons, in-house legal teams have been intentional in seeking to include diverse outside counsel in recruiting and training opportunities, understanding the career trajectory of key talent, including diverse attorneys, discussing origination credit opportunities and exploring opportunities for diverse attorneys to have lead or key roles in transactional and litigation matters (e.g., arguing a motion and first-chairing depositions).[112] By supporting diversity and inclusion among outside counsel and in-house teams, clients can increase the pipeline of diverse people going on to pursue legal careers and attracting others in their network to the profession. This broadens the talent pool. And when clients facilitate opportunities for development, advancement and recognition of diverse attorneys, it ensures that both companies and law firms attract and retain the best legal professionals.[113]

However, the full achievement of diverse representation within corporations and law firms remains elusive. While at the entry levels, many corporations have been able to diversify their workforce, "the top ranks are still predominantly white and male."[114] "Today there are only eight Black CEOs of Fortune 500 companies, and there have only been 25 throughout our history and just 3.3% of all executive or leadership positions in the largest companies are held by Black people."[115] According to a study published by the United States Government Accountability Office, Hispanic women are "underrepresented by eightfold [in management jobs] when compared to their share of the workforce."[116] Similarly, representation of certain racial and ethnic groups within the legal profession continues to lag demographics in law schools and in the larger workforce population.

C. Diversity in the Judiciary

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[111] Bill Henderson, *In-house is bigger than BigLaw (262)*, Legal Evolution, Sept. 30, 2021, https://www.legalevolution.org/2021/09/in-house-is-bigger-than-biglaw-262; *The Evolution of In-house Legal Departments and the Catalysts Behind Corporate Law as a Discipline*, JDSupra, Sept. 14, 2022, https://www.jdsupra.com/legalnews/the-evolution-of-in-house-legal-1800425.

[112] Brian P. Seaman, *How client surveys are moving the DEI needle at law firms*, Reuters, Feb. 23, 2022, https://www.reuters.com/legal/legalindustry/how-client-surveys-are-moving-dei-needle-law-firms-2022-02-23.

[113] *Diversity Begets Diversity: General Counsel Perspectives on DEI Initiatives in Law Firms* (Baker Donelson Panel Discussion), JDSupra, Oct. 10, 2022, https://www.jdsupra.com/legalnews/diversity-begets-diversity-general-2802018.

[114] Jessica Guynn and Jayme Fraser, *Corporate Diversity Database: A USA Today Investigative Series Inside the Nation's Most Powerful Companies*, USA Today, Feb. 16, 2023, https://www.usatoday.com/in-depth/news/investigations/2023/02/16/corporate-company-diversity-in-america-exclusive-searchable-database/7484640001.

[115] Michael Posner, *Why Companies Need To Defend Their Diversity Policies*, Forbes, Jul. 19, 2023, https://www.forbes.com/sites/michaelposner/2023/07/19/why-companies-need-to-defend-their-diversity-policies/?sh=298f9ae61379.

[116] *Id.*; U.S. Government Accountability Office, *Women in Management: Women Remain Underrepresented in Management Positions and Continue to Earn Less than Male Managers* (Mar. 2022), https://www.gao.gov/products/gao-22-105796.

The judiciary serves a unique and critical role in society and the value of diversity in the court system has been widely documented. "Diversity and inclusion are not just abstract concepts that warrant lip service in the legal profession; they are at the heart of promoting justice and respect for democratic institutions and the rule of law."[117] Further, diversity brings richness of thought and of experience to the judiciary. These enhanced viewpoints and expansion of ideas help courts to: (1) increase public trust; (2) improve decision-making; (3) provide symbolic and practical role models; and (4) root out overt discrimination.

When our nation was founded, Alexander Hamilton recognized that "[t]he judiciary . . . has no influence over either the sword or the purse; . . . neither force nor will, but merely judgment."[118] It follows, then, that "[t]he judiciary's authority depends in large measure on the public's willingness to respect and follow its decisions."[119]

A core value of the federal judiciary, as expressed by the Judicial Conference of the United States, is to create and maintain "a workforce of judges and employees that reflects the diversity of the public it serves."[120] This goal is predicated in part upon the dual recognition that "[t]he ability of courts to fulfill their mission and perform their functions is based on the public's trust and confidence in the judiciary,"[121] and that the "judiciary can retain public trust and confidence . . . only if it is comprised of a diverse complement of highly competent judges, employees, and . . . attorneys."[122] Therefore, "[p]ublic trust and confidence are enhanced when the judiciary's workforce – judges, employees, and . . . attorneys – broadly reflects the diversity of the public it serves."[123]

This recognition at the federal level of the importance of judicial diversity in maintaining public trust is no less true at the state level, where most of this nation's legal disputes are heard.[124] Evidence shows that more diverse courts have the potential to "engender greater goodwill from the population they serve."[125] A diverse judiciary signals to those before the court that the judiciary is less likely to be inherently biased against any particular group.[126]

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[117] Hon. Rolando T. Acosta (Ret.), *The State of Diversity in New York's Judiciary*, New York State Bar Ass'n Journal (May 2020) at 24.

[118] Federalist Papers No. 78 (Alexander Hamilton) (capitalization altered).

[119] *Williams-Yuke* v. *Florida Bar*, 433 US 445, 446 (2015).

[120] Judicial Conference of the United States, *Strategic Plan for the Federal Judiciary*, at 2 (Sept. 2020), https://www.uscourts.gov/sites/default/files/federaljudiciary_strategicplan2020.pdf.

[121] *Id*. at 9.

[122] *Id*. at 15.

[123] *Id*.

[124] Ciara Torres-Spelliscy et al., Brennan Center for Justice, *Improving Judicial Diversity* (2010), https://www.brennancenter.org/sites/default/files/legacy/Improving_Judicial_Diversity_2010.pdf.

[125] Stacy Hawkins, The Importance of a Diverse Federal Judiciary Hearing Testimony 5–6 (March 25, 2021), https://docs.house.gov/meetings/JU/JU03/20210325/111405/HHRG-117-JU03-Wstate-HawkinsS-20210325-U1.pdf; Maya Sen, Written Testimony on the Importance of Judicial Diversity 6 (March 25, 2001), https://scholar.harvard.edu/files/msen/files/sen-written-testimony.pdf.

[126] Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 Northwestern U. L. Rev. 587, 594 (2011).

Judges from various courts and common law systems have expressed the view that judicial diversity enhances the ability to "see more angles" to a case,[127] and that "the more people you get from various backgrounds and experiences the more fair your judging is going to be."[128] Justice Ruth Bader Ginsburg noted that, while judges may ultimately reach the same decision, "it is also true that women, like persons of different racial groups and ethnic origins, contribute to the United States judiciary what . . . [is] fittingly called 'a distinctive medley of views influenced by differences in biology, cultural impact, and life experience.'"[129] Justice Thurgood Marshall observed that his arrival on the Supreme Court in 1968 as the first Black justice led his colleagues to obtain new information and a new perspective.[130] As Former Chief Judge Harry Edwards of the D.C. Circuit Court of Appeals has stated, "[i]ncreased demographic diversity often fosters the informational diversity that promotes improved appellate decision making."[131]

Heterogenous decision-making groups are more likely to engage in greater informational exchange and prepare more thoroughly for discussions.[132] Indeed, studies show that deliberative procedures themselves become more robust when a decision-making body is heterogenous.[133] For example, in a mock jury experiment, White jury members made fewer inaccurate statements and contributed more information when deliberating in a diverse setting, suggesting that participants "processed the trial information more systematically when they expected to deliberate with a more heterogenous group."[134] As articulated by retired Judge Richard Posner of the United States Seventh Circuit Court of Appeals, "[t]he nation contains such a diversity of moral and political thinking that the judiciary, if it is to retain its effectiveness, its legitimacy, has to be heterogeneous."[135] A critical mass of members from underrepresented groups also "helps to alleviate the misconception that members of sparsely represented groups are all alike, usually in a pejorative sense."[136] The result of a more diverse decision-making body is very often a "more lively, rich, and thorough" deliberative process.[137]

Diversity within the judiciary likewise ensures that the full range of perspectives of the community is reflected in the development of case law. Professor Sherrilyn A. Ifill has used the term "structural impartiality" to refer to an ideal in which the judiciary as a whole is "comprised of judges from diverse backgrounds and viewpoints," thereby "diminishing

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[127] Jonathan K. Stubbs, *A Demographic History of Federal Judicial Appointments by Gender and Race: 1789-2016*, 26 Berkeley La Raza L.J. 92, 124 (2016).

[128] Rosemary Hunter, *More Than Just a Different Face? Judicial Diversity and Decision-making,* 68 Current Legal Problems 119, 137 (2015).

[129] Angela Onwuachi-Willig, *Representative Government, Representative Court? The Supreme Court as a Representative Body*, 90 Minn. L. Rev. 1261, 1261–62 (2006) (quoting Justice Ginsburg).

[130] Adam Liptak, *The Waves Minority Judges Always Make*, N.Y. Times, May 31, 2009, https://www.nytimes.com/2009/05/31/weekinreview/31liptak.html.

[131] Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U Pa. L. Rev. 1639, 1670 (2003).

[132] K. Phillips, *How Diversity Makes Us Smarter*, 311 Sci. Am. 42 (2014).

[133] *See* Sen, *supra* note 125, at 6.

[134] S. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations,* 90 J. of Personality and Soc. Psychol. 597, 606–07 (2006).

[135] Stubbs, *supra* note 127, at 119, quoting Richard Posner, *Law, Pragmatism and Democracy* 94 (2003).

[136] *Id.* at 123.

[137] Edwards, *supra* note 131, at 1668.

the possibility that one perspective dominates adjudication."[138] As President James Madison noted, "[i]t is essential to [a republican form of] government that it be derived from the great body of the society, not from . . . a favored class of it."[139] In short, a more diverse bench helps to ensure that traditionally excluded perspectives are not systemically omitted from the values reflected in court judgments.[140]

Discussions about the value of judicial diversity also routinely acknowledge the role that members of the judiciary play in serving as role models to the community, both symbolically and practically.[141] Inclusion of historically marginalized groups in the judiciary indicates to members of those groups that opportunities are available to them in the judicial space.[142] It further indicates that potential participants will not be excluded due to race, sex or gender.[143] These symbolic benefits translate to concrete advantages to the community through mentorship of younger generations.[144]

The history of members of the judiciary making overtly discriminatory and racist statements and presuppositions toward court users has been well documented. Contemporary anecdotes reflect that such instances still occur far too often in the courts.[145] But the presence of a diverse judiciary and court staff can reduce the likelihood that overtly sexist, racist or other discriminatory conduct will be tolerated.[146]

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The data shows that the benefits of building diverse environments are profound, and access to the most qualified and diverse talent is essential for educational institutions, companies, law firms and the judiciary to fully appreciate, respond to and solve the challenges ahead.

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[138] Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. Rev. 95, 99 (1997).

[139] Federalist Papers No. 39 (James Madison) (capitalization altered).

[140] Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 Wash & Lee L. Rev. 405, 410–11 (2000).

[141] *Id.* at 409; *see*, *e.g.*, Hunter, *supra* note 128, at 123.

[142] Hunter, *supra* note 128, at 123.

[143] Theresa M. Beiner, *White Male Heterosexist Norms in the Confirmation Process*, 32 Women's Rts. L. Rep. 105, 117–18 (2011).

[144] Hunter, *supra* note 128, at 123.

[145] *Report from the Special Advisor on Equal Justice in the New York State Courts* 59–64 (Oct. 1, 2020), https://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf (hereinafter Equal Justice Report); *see* Fla. Standing Comm. on Fairness & Diversity, Fla. Supreme Court, *Final Report: Perceptions of Fairness and Diversity in the Florida Courts* 9, 23–24 (2008), https://www.flcourts.gov/content/download/218224/file/FairnessDiversityReport.pdf.

[146] Hunter, *supra* note 128, at 123-24.

III. IMPLICATIONS OF THE *SFFA* DECISION FOR LAW SCHOOLS AND OTHER HIGHER EDUCATION INSTITUTIONS[147]

Without question, the most direct effects of the *SFFA* decision will be felt by academic institutions. The institutions that have historically used race-conscious admissions policies may now have to reframe their practices while at the same time ensuring alignment with their DEI goals.

In response to these changes, the Academic Working Group of the Task Force has provided below an explanation of the practical implications of the *SFFA* decision on academic institutions and guidance on how these institutions can continue to advance DEI efforts through their admissions process. Note that although the focus of this section is on legal education and the legal profession, it draws on research from settings beyond law schools, and also offers considerations and recommendations, the applicability of which can be extended to a broader range of higher educational settings and stakeholders.

This section proceeds in four parts. *First*, it discusses why academic institutions should establish clear goals and values with respect to diversity in light of the analysis in the *SFFA* decision. *Second*, it outlines the permissible admissions practices following the decision. *Third*, it provides potential steps for eliminating policy barriers to achieving a diverse applicant pool. *Lastly,* this section discusses how implementing a broad educational institution strategy can help academic institutions foster inclusive learning environments for their students.

A. Institutional Goals and Values

The *SFFA* decision highlights the importance of developing well-articulated goals and values before making decisions—especially admissions decisions—that shape academic institutions. In striking down the race-conscious admissions programs at Harvard and UNC, the Court criticized the universities for relying on justifications deemed insufficiently "coherent"[148] and for "fail[ing] to articulate a meaningful connection between the means they employ and the goals they pursue."[149] In this regard, the Court explained that "[b]oth [Harvard's and UNC's] programs lack sufficiently focused and measurable objectives warranting the use of race."[150] The Court's reasoning therefore explicitly links the question of whether a particular consideration of race is legitimate to the question of whether there are defined institutional goals and values closely connected to that consideration.

The Court, while criticizing the schools' admissions practices, made clear that the task of identifying those goals and values properly remains in the hands of universities.

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[147] This section draws on EducationCounsel, *Preliminary Guidance Regarding the U.S. Supreme Court's Decision in* SFFA v. Harvard *and* SFFA v. UNC, July 6, 2023, https://educationcounsel.com/our_work/publications/higher-ed/educationcounsel-s-preliminary-guidance-regarding-the-u-s-supreme-court-s-decision-in-sffa-v-harvard-and-sffa-v-unc_3.

[148] *SFFA*, 143 S. Ct. 2141, 2166.

[149] *Id.* at 2167.

[150] *Id.* at 2175.

Although unwilling to grant great deference to universities when evaluating the lawfulness of the use of race, the Court made plain the high degree of freedom available to institutions of higher learning when defining their mission: "Universities may define their missions *as they see fit*."[151] As discussed below, the Court's emphasis on the mission of the university—and its critical assessment of how values and goals associated with that mission are articulated and pursued—should be kept at the forefront of any effort to advance diversity in law schools. Accordingly, having and articulating important institutional goals, including diversity in legal education, remain permissible. The means of achieving those goals will be subject to strict scrutiny when race is used as a factor, but the Court's decision does not forbid the pursuit of those goals.

Meanwhile, the *SFFA* decision also notes that military academies present distinct interests from colleges and universities, suggesting that there are potentially distinct considerations in the admissions process for graduate and professional programs. The Court expressly declined to address arguments by the United States, as *amicus curiae*, about the importance of race-based admissions programs at the military academies. The opinion noted, "No military academy is a party to these cases, . . . and none of the courts below addressed the propriety of race-based admissions systems in that context."[152] The Court therefore would not "address the issue, in light of the potentially distinct interests that military academies may present." This cautious approach indicates the need for sensitivity to the facts and circumstances associated with different institutional settings.[153]

Therefore, although different in important ways, law schools may be viewed as similar to military academies (and distinct from undergraduate institutions) because they train students to enter a profession where education in a diverse environment, as well as the diversity of the profession itself, supports a unique compelling interest. The extent to which there are "distinct interests" presented by law schools would require careful attention to facts and circumstances that were not considered in the undergraduate cases before the *SFFA* decision.

B. Permissible Processes Following the *SFFA* Decision

Because the majority opinion hewed closely to the record in each case and focused on the specifics of the Harvard and UNC admissions programs, the Court has spoken much more clearly about what is improper than what remains permissible. Nevertheless, the decision addresses important aspects of the admissions process including the consideration of: (1) the life experiences and the impact of race on an individual applicant; (2) values, perspectives and mission alignment; (3) SES, geography, employment and first-generation status; and (4) collection of demographic information during and after the admissions process.

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[151] *Id.* at 2168 (emphasis added).

[152] *Id.* at 2166, n.4.

[153] Opponents of affirmative action appear to be preparing to litigate against military academies. See Anemona Hartocollis, *The Next Affirmative Action Battle May Be at West Point*, N.Y. Times, Aug. 3, 2023, https://www.nytimes.com/2023/08/03/us/affirmative-action-military-academies.html.

It is important to note that the Court did not forbid colleges and universities from being aware of an applicant's race or from considering how race affected their lived experience. Specifically, the majority opinion, in summarizing its analysis, permitted consideration of how race has impacted a specific applicant's life in making admissions decisions so long as that impact was considered in close connection to a non-racial goal or value being pursued by the university. When discussing the evaluation of race in admissions essays, the Court observed:

> At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. But, despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today. . . . "[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows," and the prohibition against racial discrimination is "levelled at the thing, not the name."[154]

In fact, on August 14, 2023, the Department of Justice and the Department of Education issued Questions and Answers that reiterated this point, stating that "universities may continue to embrace appropriate considerations though holistic application-review processes and (for example) provide opportunities to assess how applicants' individual backgrounds and attributes—including those related to their race . . . position them to contribute to campus in unique ways."[155]

This presents a delicate task for law schools during the admissions process. As the majority opinion states, the use of an admissions essay to glean a candidate's race for the purpose of granting or denying admission solely because of race would be an impermissible end run around the limits imposed by the Court—an attempt to do indirectly what cannot be done directly. At the same time, an institution that has articulated certain goals and values, and that seeks to identify how specific candidates for admission fit with those goals and values, does not need to blind itself to an applicant's race or the importance of an applicant's experiences with race in assessing how an applicant might contribute to the school.

Schools that have articulated the desire to pursue certain values, perspectives, skills or other attributes will therefore be able to continue to be aware of an applicant's race and consider an applicant's experiences with race in the admissions process when the applicant discusses how race informs the assessment of those attributes. Considering applicants' discussion of how race affected their lives or influenced their development of desired skills

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[154] *SFFA*, 143 S. Ct. at 2176 (quoting *Cummings* v. *Missouri*, 71 U.S. 277, 325 (1867)).

[155] Department of Justice and Department of Education, *Questions and Answers Regarding the Supreme Court's Decision in* Students for Fair Admissions, Inc. v. Harvard College and University of North Carolina, Nov. 14, 2023, https://s3.documentcloud.org/documents/23908763/post-sffa-resource-faq_final_508.pdf.

or other qualities, remains permissible, so long as *race itself* is not the factor driving an admissions decision. The Court provided several examples to demonstrate the distinction:

> A benefit to a student who overcame racial discrimination, for example, must be tied to that student's courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to that student's unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.[156]

In each of the Court's examples, the "why" and "how" of the consideration of race are key. In each example, the institution has articulated beforehand the values, perspectives, skills or other nonracial attributes sought in the admissions process (courage and determination in one example, and leadership ability in the other). The university can then permissibly consider race when an applicant, in turn, shows how race informs his or her own experiences that demonstrate a fit with the goals of the institution in the admissions process. To state the point directly, the Court does not require an institution to be race blind, so long as race is relevant to nonracial considerations in the institution's decision-making as to that specific applicant.

A corollary to the role of an institution's values and goals is that they are in fact concretely articulated. Law schools will be on firmer ground if the attributes given weight in the admissions process have been defined in advance and connected to the mission identified by the institution.

Although the Court did not expressly address issues relating to race-neutral strategies, the Court's ruling elevates the importance of comprehensively considering viable race-neutral strategies to advance broader institutional diversity and equity goals, including SES, place-based and other potential admissions policies. Unlike race-conscious policies, which are subject to strict scrutiny, race-neutral policies have been subject to less exacting scrutiny,[157] leaving institutions more latitude to consider SES, first generation status, geographic diversity and percentage plans.

Importantly, however, the ruling suggests that institutions would be wise to ensure that even race-neutral strategies reflect alignment with authentic institutional aims.[158] "In assessing authenticity, institutions should document their commitment and actions in pursuit of the interest reflected in the relevant factors (*e.g.*, socio-economic diversity) to help demonstrate that they would pursue the interest with comparable effort based on broad

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[156] *Id.*

[157] *SFFA*, 143 S. Ct. at 2225 (Kavanaugh, J., concurring) ("[G]overnments and universities still 'can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race.'"), quoting Justice Scalia's concurrence in *Richmond* v. *J. A. Croson Co.*, 488 U.S. 469, 526 (1989) (Scalia, J., concurring in judgment).

[158] EducationCounsel, *Preliminary Guidance*, *supra* note 147.

interests in diversity and equity, as well as to help evaluate and develop potential—not based on interests in racial diversity alone."[159]

The design of application materials to collect demographic data will need to conform to the Court's guidance on the permissible role of race in the admissions process. Nothing in the Court's decision bars the collection of data about race and ethnicity. Collection of disaggregated data may be important for research and evaluation purposes. Indeed, a law school's ability to assess data about race and ethnicity may be of increased importance in light of the Court's emphasis on the need for careful attention to the facts and circumstances of different institutional settings when evaluating the use of race.

Much turns, however, on when demographic information is collected and how it is used. A law school could ask matriculating students—after the admissions process is closed—to disclose their race and ethnicity in order to capture a complete picture of the entering class. Gathering that information would not cross into prohibited territory under the Court's reasoning. If demographic information is collected during the admissions process, the lines drawn by the Court's decision will shape the manner of collecting and using the data. Seeking demographic information on an application through a checkbox would not violate the Court's decision, so long as the admissions process does not extract that information in pursuit of race-based decision-making. But if such information is solicited during the application process, schools as a prudential matter should consider ways of designing application materials so that decision-makers in the admissions process do not see the checkbox information while assessing a particular candidate's file. By contrast, if an application invites candidates to speak in an essay about factors that have affected their lives or that demonstrate other important qualities (such as courage, determination, leadership or the ability to overcome hardship), the disclosure of race—and the consideration of race as relevant to those qualities—would not be impermissible.

C. Policy Barriers in Admissions Processes

A 2015 study by the Bureau of Labor Statistics found that the legal profession was one of the least racially diverse professions in the country; nearly a decade later, this remains true.[160] While leaders in the legal profession continue to consider racial and ethnic diversity "necessary to demonstrate that our laws are being made and administered for the benefit of all persons" since "the public's perception of the legal profession often informs impressions of the legal system . . . and create[s] greater trust in the rule of law," those efforts will become more challenging in the wake of the *SFFA* decision.[161]

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[159] *Id.*

[160] *Labor Force Statistics from the Current Population Survey*, U.S. Bureau of Labor Stats. (2022), https://www.bls.gov/cps/cpsaat11.htm (In 2022, legal occupations, which included lawyers, judicial law clerks, judges/magistrates/other judicial workers, paralegals and legal assistants, title examiners/abstracters/searchers, and legal support workers/other, 84.1 percent of the population being Caucasian, 8.5 percent Black or African American, 4.9 percent Asian, and 10.9 percent Hispanic/Latinx).

[161] *Diversity in Law: Who Cares?: Why Justice John Robert's Implications Were Wrong*, Am. Bar Ass'n Apr. 30, 2016, https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2016/spring2016-0416-diversity-in-law-who-cares.

With the Court's restriction on race-conscious admissions, colleges and universities committed to values of access and inclusion must re-examine their existing admissions policies and practices to address barriers to equitable educational access.[162] As we discuss below, schools should consider reevaluating the criteria for assessing merit, including (1) using standardized tests; (2) legacy, athlete and donor preferences; (3) providing resources to alleviate the financial burden on law school applicants; and (4) developing methods for recruitment that can help diminish the pervasive disparities in law student enrollment and graduation among students of varying generational, racial or ethnic, and socio-economic backgrounds.[163] Additionally, the *SFFA* decision's restrictions on considerations of race-conscious admissions may well reduce the racial diversity of students graduating from selective undergraduate institutions, so law schools may wish to ensure that their recruitment and outreach strategies extend beyond schools from which they have traditionally recruited to also encompass less-well-represented institutions and achieve a broadly diverse applicant pool.

1. Standardized Testing Requirements

Standardized admission tests have been criticized as inherently racially biased.[164] Performance on a standardized test is treated as a main indicator of success in higher education. However, there are many—and more accurate—indicators and qualities contributing to academic success, not to mention the capabilities required for the successful practice of law. In light of this, some undergraduate and graduate institutions have embraced test-optional policies, which have resulted in an increase in applications—in particular from racially diverse students—as well as increased admission of racially diverse students.[165] A recent study showed that, while underrepresented minority students were more likely than others to opt out, "non-submitters" still graduated at equivalent or slightly

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[162] EducationCounsel, *Preliminary Guidance*, *supra* note 147; *see also* Simon Marginson, *Unequal Opportunity The Dream Is Over: The Crisis of Clark Kerr's California Idea of Higher Education*, 152–67 (Univ. of California Press 2016), http://www.jstor.org/stable/10.1525/j.ctt1kc6k1p.24 (accessed Aug. 1, 2023); *see also* Shane LaGesse, *Legacy Admissions: What It Is and Why Colleges Are Reconsidering It*, U.S. News & World Report, July 21, 2023, https://www.usnews.com/higher-education/articles/legacy-admissions-what-it-is-and-why-colleges-are-reconsidering-it; Liam Knox, *Affirmative Action for the Rich*, Inside Higher Ed., July 26, 2023, https://www.insidehighered.com/news/admissions/traditional-age/2023/07/26/would-ending-legacy-admissions-improve-elite-college; *see* Jennifer Medina, Kate Benner, & Kate Taylor, *Actresses, Business Leaders and Other Wealthy Parents Charged in U.S. College Entry Fraud*, N.Y. Times, March 12, 2019, https://www.nytimes.com/2019/03/12/us/college-admissions-cheating-scandal.html.

[163] Karen Bussey et al., *"The Most Important Door That Will Ever Open": Realizing the Mission of Higher Education through Equitable Admissions Policies*, Inst. for Higher Educ. Pol'y (June 2021), https://www.ihep.org/wp-content/uploads/2021/06/IHEP_JOYCE_full_rd3b-2.pdf; Marisa Manzi & Nina Totenberg, *'Already Behind': Diversifying The Legal Profession Starts Before The LSAT*, Na'tl Pub. Radio, Dec. 22, 2020, https://www.npr.org/2020/12/22/944434661/already-behind-diversifying-the-legal-profession-starts-before-the-lsat; Georgetown Pub. Pol'y Inst., *Separate and Unequal: How Higher Education Reinforces the Intergenerational Reproduction of White Racial Privilege*, Georgetown Univ. Ctr. on Educ. & the Workforce (July 2013), https://cew.georgetown.edu/wp-content/uploads/SeparateUnequal.FR_.pdf.

[164] *See* John Rosales & Tim Walker, *The Racist Beginnings of Standardized Testing*, Nat'l Educ. Ass'n, March 20, 2021, https://www.nea.org/advocating-for-change/new-from-nea/racist-beginnings-standardized-testing.

[165] *Id.*

higher rates than those of prospective candidates who submitted test scores.[166] Though accredited professional programs generally require standardized entry exams (*e.g.*, MCAT, LSAT, GRE, GMAT), some programs provide candidates the option to choose from specified standardized exams or offer standardized exam waivers for students participating in Early Admission Programs and/or Guaranteed Admission Programs.[167] In addition to standardized testing options, some higher education institutions, such as the UC Davis School of Medicine, have incorporated adversity scoring[168] within their evaluative processes.[169]

At the time of the writing of this report, the debate over standardized test requirements in law schools is playing out dramatically. In November 2022, the accreditation council of the American Bar Association voted to amend its accreditation requirements so as to eliminate Standard 503's mandate of a "valid and reliable admission test," instead making such a test optional. The ABA House of Delegates rejected the proposal, and the matter remains "paused."[170]

Proponents of the amendment argue that the requirement of a standardized test operates as a barrier to entry into law school for students from some ethnic and racial groups, particularly Black, Hispanic and Native American students, who perform systematically worse on the LSAT and other standardized tests than others.[171] Although the LSAT may be considered a strong predictor of success in the first year of law school, these detractors point out that this is not the same as predicting long-term success in the profession.[172] Opponents, including a large consortium of law school deans, argue that without standardized tests, racial, socioeconomic and other forms of diversity in law schools will backslide, not because standardized tests are free from bias but because in their absence, other, *more* biased, factors such as GPAs, letters of recommendation and

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[166] *Id.*

[167] *See* Jack Westin, *Medical Schools That Don't Require MCAT: All You Need to Know*, June 21, 2023, https://jackwestin.com/resources/blog/medical-schools-that-dont-require-mcat-all-you-need-to-know.

[168] Matthew N. Gaertner & Melissa Hart, *Considering Class: College Access and Diversity*, 7 Harvard Law and Pol'y Rev. 367, 379–83 (2013) (assessing the design and utility of a "disadvantage index") https://harvardlpr.com/wp-content/uploads/sites/20/2013/09/Gaertner-and-Hart.pdf; https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1103&context=faculty-articles.

[169] *See* Anemona Hartocollis, *SAT 'Adversity Score' Is Abandoned in Wake of Criticism*, N.Y. Times, Aug. 27, 2019, https://www.nytimes.com/2019/08/27/us/sat-adversity-score-college-board.html. *But see* Stephanie Sohl, *With End of Affirmative Action, a Push for a New Tool: Adversity Scores*, N.Y. Times, July 3, 2023, https://www.nytimes.com/2023/07/02/us/affirmative-action-university-of-california-davis.html.

[170] *Midyear 2023: ABA House of Delegates Rejects Changing Law School Admissions Standards*, Am. Bar Ass'n, Feb. 6, 2023, https://www.americanbar.org/news/abanews/aba-news-archives/2023/02/hod-resolution-300-debate. *But see* Michael T. Nietzel, *Most University of California at Berkeley Graduate Programs Will Not Require The GRE This Year*, Forbes, Sept. 30, 2021, https://www.forbes.com/sites/michaeltnietzel/2021/09/30/most-graduate-programs-at-the-university-of-california-berkeley-will-not-require-the-gre-this-year/?sh=5d7e7ddd122c; Michael T. Nietzel, *University of Michigan to Drop GRE for Ph.D. Admissions*, Forbes, Feb. 25, 2022, https://www.forbes.com/sites/michaeltnietzel/2022/02/25/university-of-michigan-to-drop-gre-for-phd-admissions/?sh=6dd5359443f5.

[171] Aaron N. Taylor, *The Marginalization of Black Aspiring Lawyers*, 13 FIU L. REV. 489, 496–97 (2019).

[172] *Id.* at 490.

reputations of undergraduate institution will come to dominate admissions decisions.[173] At a minimum, advocates for retaining the admission testing requirement believe abandoning it is premature until more rigorous research has been conducted on the possibility of a superior alternative to the existing testing instruments for evaluating potential for success in law school.

2. Legacy, Athlete and Donor Preferences

Following the *SFFA* decision, the question of whether educational institutions should continue to give preferential admissions treatment to athletes, children and relatives of donors and legacy (children of alumni) candidates has been the subject of increased scrutiny. Although the "Operation Varsity Blues" scandal focused nationwide media attention on wealthy parents "funding" enrollment opportunities for their children,[174] athletes and legacy admits also come disproportionately from high-income families.[175]

A recently published study focuses on the impact of family wealth on admissions outcomes in undergraduate admissions.[176] Using college attendance and parental income data from 1999 to 2015 and standardized test scores from 2001 to 2015, the authors found that applicants from the top one percent of American families are more than twice as likely

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[173] *Letter to Leo Martinez*, Council Chair, Am. Bar Ass'n, Sept. 1, 2002, https://taxprof.typepad.com/files/deans-letter-to-aba.pdf.

[174] On "Operation Varsity Blues," *see* Jennifer Medina, Kate Benner & Kate Taylor *Actresses, Business Leaders and Other Wealthy Parents Charged in U.S. College Entry Fraud*, N.Y. Times, Mar. 12, 2019, https://www.nytimes.com/2019/03/12/us/college-admissions-cheating-scandal.html. Children of important or potential donors receive a substantial advantage in the admissions process, greater than legacy candidates, that may be equivalent to 400 or 500 points out of 1600 on the SAT. The advantage therefore would help a student with a score of 1100 out of 1600 get into a top university. According to media reports, the threshold for preferential treatment for admission to Stanford University is $500,000. *See* Justine Moore, *Connections to University Can Affect Admissions Decision*, The Stanford Daily, March 12, 2013, https://stanforddaily.com/2013/03/12/connections-to-university-can-affect-admissions-decision; Gabrielle Wilson, *The Legal College Admissions Scandal: How the Wealthy Purchase College Admission to the Nation's Elite, Private Universities Through Donations*, BYU Educ. & L.J., (2021), https://scholarsarchive.byu.edu/byu_elj/vol2021/iss1/5.

[175] Admissions data is seldom open to the public. The Students for Fair Admissions lawsuit against Harvard College revealed how preferences operate in Harvard's admissions decisions for different applicant groups, including recruited athletes, legacies, those on the dean's interest list, and children of faculty and staff (ALDCs). The acronym ALDC serves as a helpful marker of admission-specific barriers. *See generally SFFA, Inc.* v. *President & Fellows of Harvard Coll.*, 600 U.S. __ (2023). *See also* Peter Arcidiacono, Josh Kinsler & Tyler Ransom, *Legacy and Athlete Preferences at Harvard*, 40 J. of Labor Econ. 133, 133–56 (2022), https://gwern.net/doc/sociology/2021-arcidiacono.pdf("On average, LDC applicants (i.e., excluding athletes) are stronger than typical applicants. However, the average LDC admit is weaker than the average typical admit. . . . The admissions advantage for recruited athletes appears to be even stronger. Admitted athletes have significantly worse credentials than typical admits and, in some cases, typical applicants. . . . We find that a white typical applicant with a 10% chance of admission would see a fivefold increase in admissions likelihood if they were a legacy and more than a sevenfold increase if they were on the dean's interest list; we also find that they would be admitted with near certainty if they were a recruited athlete."); Saahil Desai, *College Sports Are Affirmative Action for Rich White Students*, The Atlantic, Oct. 23, 2018, https://www.theatlantic.com/education/archive/2018/10/college-sports-benefits-white-students/573688.

[176] Raj Chetty, David J. Deming & John N. Friedman, *Diversifying Society's Leaders? The Determinants and Causal Effects of Admission to Highly Selective Private Colleges* (2023).

to attend the nation's most elite private colleges as applicants from middle-class families with similar standardized test scores. The study concluded that among students with the same test scores, the colleges gave preference to alumni and recruited athletes and provided applicants from private schools higher non-academic ratings. If legacy, athlete and private applicant preferences were removed, the study suggests that applicants from the top one percent would have made up 10 percent of an admitted class rather than 16 percent.

Contending that such preferences have a discriminatory impact, advocacy groups recently filed a civil rights complaint against Harvard challenging its legacy admissions practices.[177] Furthermore, since the *SFFA* decision, several academic institutions nationwide such as Occidental College[178] and Wesleyan University[179] have moved to eliminate legacy admissions, concerned that they not only favor students from higher income households but inherently disqualify first-generation applicants from such preference.[180] Early decision (ED) options, though more indirectly associated with preferential admission eligibility, also tend to favor applicants from higher socioeconomic backgrounds because ED applicants typically have no information about what, if any, financial aid packages are available to them at the time they are required to make enrollment decisions.[181]

3. Tuition and Educational Resource Costs

Educational costs are also significant barriers to educational access.[182] These begin at the pre-application stage (*e.g.*, through standardized test preparation costs and pre-

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[177] Complaint, *Chica Project v. President & Fellows of Harvard Coll.*, https://assets.bwbx.io/documents/users/iqjWHBFdfxIU/rKHUM_KThEyQ/v0.

[178] *Formally Ending Legacy Admission & Next Steps*, Occidental College, https://www.oxy.edu/about-oxy/college-leadership/presidents-office/community-messages/formally-ending-legacy-admission.

[179] Vimal Patel, *Wesleyan University Ends Legacy Admissions*, N.Y. Times, Jul. 19, 2023, https://www.nytimes.com/2023/07/19/us/wesleyan-university-ends-legacy-admissions.html.

[180] Since the *SFFA* decision, Wesleyan University, Carnegie Mellon University, Virginia Tech, and the University of Virginia eliminated legacy admissions, joining other institutions that had eliminated them previously, including Johns Hopkins, Amherst, the University of California system, MIT, CalTech, and University of Washington. John Hopkins ended its legacy admissions in 2020, although since 2013, it has decreased the percentage of incoming students with a family connection to university from 8.5% to 1.7% and increased the percentage of first-generation or limited income students from 16.7% to 30.8%. The percentage of Pell Grant–eligible students rose from 12.8% in 2013 to 20.1% in 2021. Ronald J. Daniels, *Abolish Legacy Admissions Now*, The Chronicle of Higher Educ., Oct. 7, 2021, https://www.chronicle.com/article/abolish-legacy-admissions-now; Nick Anderson, *University of Virginia to Limit 'Legacy' Factor in Admissions*, Wash. Post, Aug. 1, 2023, https://www.washingtonpost.com/education/2023/08/01/uva-legacy-admissions-college-application; Mark Owczarski, *Virginia Tech Implements Changes to Undergraduate Admissions Process for 2023-24 Admissions Cycle*, Virginia Tech News, July 28, 2023, https://news.vt.edu/articles/2023/07/cm-admissions-cycle.html (also announcing the end of its Early Decision option).

[181] *Eliminating Early Decision Policies*, IHEP 29-35, Aug. 1, 2023, https://www.ihep.org/wp-content/uploads/2021/06/IHEP_JOYCE_Ch3-1.pdf (because financial aid packages may play an important role in students' enrollment decisions, especially for those from low-income backgrounds, applying early decision is sometimes not a realistic option. Research also shows that students applying from affluent families tend to apply for early decision about twice as often as those from lower-income families, even if they have identical academic credentials.).

[182] This was first addressed by universities following the Civil Rights Act of 1964 and Voting Rights Act of 1965 when institutions of higher education realized that without restructuring financial aid policies to be

admission application fees and deposits)[183] and then continue through a student's enrollment to post-graduation, including but not limited to tuition, administrative fees, books, supplies (including technological requirements), room and board and health insurance coverage. Although the cost burden of education is often attributed to tuition and other costs of attendance post-enrollment, the opportunity cost of lost wages while attending professional programs, such as law school, due to workload and policy restrictions also affects low-income, first-generation and other students from non-traditional backgrounds.[184] Student advisors often discourage students from working during law school, unless such employment opportunities are paid, practical, legal experiences—which often do not provide sufficient financial resources to meet personal and/or family financial needs.[185] The debilitating nature of these costs was brought into keen focus by the student debt statistics outlined in the recent Supreme Court case addressing comprehensive student loan forgiveness.[186]

Merit and need-based scholarships are the two primary forms of financial aid utilized in higher education, though institutions recognize that traditional merit-based considerations typically favor students from high-income and/or well-resourced backgrounds and communities.[187] Nonetheless, diversity- and race-conscious awards have

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more conscious of the financial needs of minority students, these students would likely be unable to matriculate even if admitted. *See* Alexander S. Elson, Note, *Disappearing Without a Case – The Constitutionality of Race-Conscious Scholarships in Higher Education*, 86 Wash. U. L. Rev. 975, 978 (2009).

[183] *Cf.* Marisa Manzi & Nina Totenberg, *'Already Behind': Diversifying The Legal Profession Starts Before The LSAT*, Nat'l Pub. Radio, Dec. 22, 2020, https://www.npr.org/2020/12/22/944434661/already-behind-diversifying-the-legal-profession-starts-before-the-lsat ("Collectively, with the average applicant applying to six schools, fees can add up to $1,000 or more. And this number does not even include paying for an LSAT prep course, which most applicants routinely rely on to up their scores. The average LSAT prep course costs between $600 and $1,800. Although expensive, they can significantly improve LSAT scores. For example, the Princeton Review's "LSAT 165+" essentially guarantees an improvement of at least seven points. It costs $1,700. Bottom line: Though courses like these are a critical piece of success, they are financially out of reach for many minority students. While some organizations offer free LSAT prep courses online, there is often a hitch. Khan Academy, for example, does not have live programming and does not guarantee an increase in the LSAT score.").

[184] *Frequently Asked Questions*, Am. Bar Ass'n, https://www.americanbar.org/groups/legal_education/resources/frequently_asked_questions (last accessed Aug. 2, 2023) (Student Employment: Standard 304(f), which restricted student employment to 20 hours per week, was eliminated in 2014. ABA-approved law schools may continue to retain a student employment rule even though it is no longer required by the Standards.); *see also BRIEF: Do Scholarships Improve Retention Among Top UB Undergraduates?* 3, SUNY Buffalo Office of Institutional Analysis, Oct. 17, 2006, https://www.buffalo.edu/content/dam/www/provost/files/oia/Survey%20Briefs/Freshmen/scholarshipsandretention.pdf ("An increment of $1,000 in scholarship dollars typically produces a 26% greater retention rate, while the same increase in other grant dollars yields only an 11% gain in retention. Changes in loan amounts did not influence second-year retention.").

[185] *Pros and Cons of Working During Law School*, JD Advising, https://jdadvising.com/pros-and-cons-of-working-during-law-school/ (last accessed Aug. 2, 2023).

[186] *See generally Biden* v. *Nebraska*, 600 U.S. __ (2023); *Dep't of Educ.* v. *Brown*, 600 U.S. __ (2023).

[187] Law schools are attempting to use need-based scholarships to address the differences between the country's demographics and those of the legal profession. A 2021 report from the American Bar Association noted that lawyers of color make up 14.6% of the legal profession. For example, at Yale Law School, the Hurst Horizon Scholarship covers tuition, fees, and health insurance for students whose

been invaluable assets for supporting underrepresented minority students and building racially and ethnically diverse student bodies. Financial aid and scholarships of this nature have been legally funded for decades through government programs, nonprofits organizations and private donors. The parameters for provision of such aid have narrowed over time to ensure that institutions can offer it without running afoul of federal antidiscrimination law.[188]

Law schools should consider directly engaging with legislatures to advocate for new or expanded financial aid funding. States might consider broadening financial eligibility standards for tuition and related educational cost assistance. This, coupled with restrictions on government funding for schools that consider legacy and/or donor status as admission factors, would benefit a broad base of economically disadvantaged law school applicants and students.[189]

Though industry and legal experts agree that future challenges to race-conscious financial aid are inevitable, there is also consensus that these challenges will take years to wind their way through the courts to conclusion and that the claims asserted to require departure from existing legal precedent. Nonetheless, institutions should proactively consider race-neutral alternatives and strategies, while remaining cautious not to over-correct prematurely in a manner that may be detrimental to the campus community, in terms of diversity and inclusion of students from differing backgrounds.[190]

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family assets are less than $150,000 and whose family income is below the federal poverty guidelines. Beatrice Peterson, *Why Yale Law's Dean Says Eliminating Tuition for Students in Need Benefits the Legal Profession*, ABC News, July 29, 2022, https://abcnews.go.com/US/yale-laws-dean-eliminating-tuition-students-benefits-legal/story?id=86892182.

[188] Office of Civil Rights, *Nondiscrimination in Federally Assisted Programs*, U.S Dep't of Educ., https://www2.ed.gov/about/offices/list/ocr/docs/racefa.html (last accessed Aug. 2, 2023).

[189] *See, e.g.*, Lexi Lonas, *Attention Turns to Legacy Admissions After Affirmative Action Ruling*, The Hill, July 8, 2023, https://thehill.com/homenews/education/4084026-attention-turns-to-legacy-admissions-after-affirmative-action-ruling (Colorado is the only state in the U.S. to ban state universities from considering legacy status in the application process); Capital Tonight Staff – New York State, *Lawmakers Propose Bill to End 'Legacy' Admissions in N.Y.*, Spectrum News, July 7, 2023, https://spectrumlocalnews.com/nys/central-ny/capital-tonight/2023/07/07/lawmakers-propose-bill-to-end--legacy--admissions-in-n-y- ("legislation has been proposed by Sen. Andrew Gounardes and Assembly Member Latrice Walker that would end the practice of 'legacy admissions' in New York").

[190] EducationCounsel, *Preliminary Guidance*, *supra* note 147; Simon Marginson, *Unequal Opportunity* in *The Dream Is Over: The Crisis of Clark Kerr's California Idea of Higher Education* 152–67 (Univ. of California Press, 2016), http://www.jstor.org/stable/10.1525/j.ctt1kc6k1p.24 (accessed Aug. 1 2023). Even prior to *SFFA*, diversity scholarships have faced pressure to cease altogether or be re-structured. For example, the State University of New York ("SUNY") once operated the Underrepresented Graduate Fellowship Program, which distributed $6.2 million in financial aid to 500 students, and the Empire State Minority Honors Scholarship Program, which distributed $649,000 a year to 898 students. Prior to 2006, both programs—designed to recruit, enroll and retain students who were historically underrepresented at SUNY—were open only to Black, Hispanic and American Indian students. In January 2006, however, the SUNY Board of Trustees "voted unanimously to expand the eligibility criteria" by opening the programs to all races. Also, in states that banned affirmative action in admissions prior to SFFA, institutions of higher education saw a decline in scholarships that were deemed "race-conscious." Elson, *supra* note 182, at 981–89.

4. Outreach, Enrollment and Student Success Barriers

Notwithstanding empirical literature noting how challenging it will be for race-neutral alternatives to foster diversity as effectively as race-conscious programs, particularly at highly selective institutions, recruiting practices that are both strategically targeted and inclusive have been, and continue to be, invaluable mechanisms for achieving and enhancing diverse campus communities nationwide.[191]

Law schools can mitigate the impact of academic, personal and financial challenges students face by increasing their outreach to, investment in and collaboration with prospective students and affiliative partners. For example, some states and institutions have implemented programs in which students may qualify for guaranteed admission and/or dual enrollment options based on academic criteria or participation in specialized programs.[192] Furthermore, broad-based support programs (e.g., the Equal Opportunity Programs in New York) can help address students' ancillary and complementary admissions needs, such as test preparation, financial assistance, academic and mentorship support, and related resources.[193] In designing and implementing these programs, institutions should ensure that additional requirements do not inadvertently disadvantage participating students compared to the rest of the student body.[194]

Institutions should also consider explicitly referencing eligible student groups that may otherwise be underrepresented in all marketing materials, programming and related eligibility descriptions to signal to prospective diverse candidates that their applications for admission are truly welcome. Such language may be framed to convey, for example, that, "students from underserved communities are eligible, including but not limited to low-income and first-generation students." Furthermore, institutions may use testimonials from diverse scholarship recipients, in addition to specialized program participants, to convey to potential applicants, and the broader community, the demographic scope of awardees, while also inherently conveying eligibility standards.

Though law schools must individually assess and tailor their recruitment and outreach strategies—e.g., marketing materials and tools, designated human and financial

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[191] Aaron N. Taylor, *The Marginalization of Black Aspiring Lawyers*, 13 FIU L. REV. 489. For law school applicants, "AccessLex does provide an extensive directory of diversity pipeline programs, and the programs on its list do tremendous work." Manzi & Totenberg, *supra* note 183. However, for these programs to work and for prospective students to apply to them, individuals need to be made aware that they exist in the first place. *Id.*

[192] Potter, *supra* note 60.

[193] "The State University of New York's Arthur O. Eve Educational Opportunity Program provides access, academic support and financial aid to students who show promise for succeeding in college but who may not have otherwise been admitted. Available primarily to full-time, matriculated students, the program supports students throughout their college careers within the University." *See Arthur O. Eve Educational Opportunity Program (EOP)*, State Univ. of NY, https://www.suny.edu/attend/academics/eop/.

[194] These programs may impose a "tax" on students that require them to satisfy separate requirements than typically imposed on the rest of the student body. Most importantly, these programs, as effective as they may be, have not resulted in a significant increase in diversity in the legal profession. Deseriee A. Kennedy, *Access Law Schools & Diversifying the Profession*, 92 Temple L. Rev. 799, 808 (2020).

resources and targeted locations and events—to ensure inclusivity and equity, the race-neutral considerations and strategies discussed can mitigate risk.

D. Broad Educational Institution Strategy

Public and private higher education institutions and their respective communities are uniquely designed to attract, train and enrich the vibrant diversity that exists in society and to foster individual and communal growth for the betterment of society.[195] Recognizing the value of diversity in the legal profession, the ABA has advised law schools to implement diversity plans that require the collaboration of diverse persons and voices, including institutional leader engagement.[196]

Fostering inclusive learning environments, both inside and outside the classroom, will be especially important to attracting and retaining a broad range of students in light of the *SFFA* decision. As the number of racially and ethnically diverse students enrolled in institutions that previously used race-conscious admissions tools likely decreases, supporting matriculated students from underrepresented backgrounds will be crucial to meeting institutional diversity and equity goals. Creating a sense of belonging and support for historically underrepresented students is essential for their academic success, particularly in law schools.[197] In addition, these efforts are essential to cultivating a next generation in the profession that is attuned to the norms and values of institutional inclusiveness.

Even so, institutions have struggled to reflect the breadth of societal diversity in their campus communities adequately and consistently.[198] Though such challenges often result from the barriers previously referenced, institutions have also leaned too heavily on diversity officers, and their respective offices, to implement, sustain and enhance campus diversity with very little support.[199] This phenomenon extends beyond higher education into private, non-profit and government sectors and across industries, resulting in short-

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[195] Michael R. Bloomberg, *Supreme Court Ruling Requires New Diversity Efforts*, Wash. Post, Jun. 29, 2023, 'https://www.washingtonpost.com/business/2023/06/29/supreme-court-affirmative-action-ruling-isn-t-end-of-diversity/a882b83a-168b-11ee-9de3-ba1fa29e9bec_story.html.

[196] *Diversity in Law: Who Cares?: Why Justice Roberts's Implications Were Wrong*, Am. Bar Ass'n, Apr. 30, 2016, https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2016/spring2016-0416-diversity-in-law-who-cares/.

[197] LSSSE, *2020 Diversity and Exclusion*, LSSSE (2020), https://lssse.indiana.edu/wp-content/uploads/2020/09/Diversity-and-Exclusion-Final-9.29.20.pdf; Laura Bagby, *Law Schools Can Create More Inclusive Environments, New Study Finds*, 2Civility, Oct. 8, 2020, https://www.2civility.org/law-schools-can-create-more-inclusive-environments-new-study-finds.

[198] *How Diverse Are Student Populations on College Campuses in the U.S.?*, The Chronicle of Higher Education, May 10, 2023, https://www.chronicle.com/article/student-diversity; *see also Race, Ethnicity, and Gender of Full-Time Faculty Members at More Than 3,300 Institutions*, The Chronicle of Higher Education, May 31, 2023, https://www.chronicle.com/article/race-ethnicity-and-gender-of-full-time-faculty.

[199] Drew Goldstein, Manveer Grewal, Ruth Imose, and Monne Williams, *Unlocking the potential of chief diversity officers*, McKinsey & Company, Nov. 18, 2022, https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/unlocking-the-potential-of-chief-diversity-officers.

term—if any—success and very high turnover in Chief Diversity Officer related roles.[200] For institutions to effectuate inclusive learning environments, campus-wide and community-wide outreach, collaboration and specialized training must be at the foundation of any established diversity plan.[201] Therefore, diversity plan–related initiatives should include alumni, foundation representatives, donors, law firms, legal clients and government. Active engagement of key stakeholders facilitates consistent messaging about core values, including the elimination of bias, as well as guidance on implementing new policies and practices. This will lead to increased buy-in and trust throughout the community.

Institutions should consider specialized campus-wide training as part of their diversity initiatives to address critical changes in policy and practice from both operational and philosophical standpoints. These trainings should address cultural competence as well as identifying, eliminating and disrupting bias to ensure that students of all backgrounds experience a respectful climate in which they can thrive. Institutions should develop and promote—and possibly require—faculty trainings on inclusive teaching.[202] This might include training on democratizing discussion, anonymizing participation, guided reading questions and other tools.[203] In addition, key personnel and stakeholders in admissions, financial aid, enrollment, diversity equity and inclusion, institutional advancement and student success should be trained to ensure a holistic effort and response campus-wide. While developing and operationalizing training, campuses should also design assessment and audit procedures to ensure that the resources and support necessary for compliance are accessible, especially where race-neutral considerations are at issue.

Students from diverse backgrounds often lack diverse advisors and mentors, despite studies showing the positive effects of diverse faculty on students' graduation rates.[204] Therefore, institutions of higher learning should commit to purposeful, lawful strategies to improve representation of faculty from diverse backgrounds and culturally competent leadership.[205] In addition, educational opportunities and coursework grounded in racial

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[200] *Id.*

[201] Dan Roe, *"The End of Affirmative Action Warrants More Collaboration Between Law Firms, Clients, and Schools, DEI Leaders Say,* The Am. Lawyer, June 30, 2023, https://www.law.com/americanlawyer/2023/06/30/the-end-of-affirmative-action-warrants-more-collaboration-between-law-firms-clients-and-schools-dei-leaders-say/.

[202] UC Davis School of Law, *Exploring Diversity in Legal Education*, Mar. 29, 2023, https://law.ucdavis.edu/deans-blog/exploring-diversity-legal-education; CJ Libassi, *The Neglected College Race Gap: Racial Disparities Among College Completers*, Ctr. For Am. Progress, May 23, 2018, https://www.americanprogress.org/article/neglected-college-race-gap-racial-disparities-among-college-completers ("[I]nclusive teaching, which seeks to level the playing field, equalizing the opportunity for students from all backgrounds to participate and succeed. Inclusive teaching has two main components: putting more structure into a course, giving clear instructions so that all students know what to do before, during, and after class; and thoughtfully facilitating class discussion, so that everyone can participate.").

[203] *See, e.g.*, Beckie Supiano, *Traditional Teaching May Deepen Inequality. Can a Different Approach Fix It?*, The Chronicle of Higher Educ., May 6, 2018, https://www.chronicle.com/article/traditional-teaching-may-deepen-inequality-can-a-different-approach-fix-it.

[204] *Characteristics of Postsecondary Faculty: The Condition of Education* 3, Nat'l Ctr. for Educ. Stats., https://nces.ed.gov/programs/coe/pdf/2022/csc_508.pdf (last updated May 2022).

[205] S*ee generally* Rebecca Stout et al., *The Relationship Between Faculty Diversity and Graduation Rates in Higher Education*, 29 Intercultural Educ. 399 (2018) (Studies of the relationship between faculty

justice have been at the forefront of social dialogue in recent years.[206] In 2020, 150 deans of schools petitioned the ABA's Section of Legal Education and Admissions to the Bar to consider requiring all accredited law schools to offer anti-racism training and education.[207] The Student Affairs Administrators in Higher Education (NASPA), in collaboration with the National Association of Diversity Officers in Higher Education (NADOHE), published a report on the various campuses that have undertaken, beyond public statements, to enact institutional changes, including but not limited to listening sessions, workgroups, trainings, professional development opportunities, and funding new initiatives based on community feedback.[208] Moreover, strategic efforts to facilitate ongoing professional development must also be interwoven methodically throughout campus community efforts and not left to chance.[209]

It also is important to recognize the emotional impact that public dialogue around diversity, the *SFFA* decision and race generally may have on campus stakeholders. Institutions must provide support to ensure the mental health and well-being of not only students, but also campus faculty and staff across the learning community, as they navigate

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racial/ethnic diversity and graduation rates of undergraduate students from underrepresented racial and ethnic minority populations have found that U.S. faculty diversity is lower than in the U.S. national population, and that overall graduation rates for underrepresented minority students of all races/ethnicities are positively affected by increased diversity of their faculty.). For the benefits of diverse faculty more generally, *see* Jeffrey F. Milem, "The Educational Benefits of Diversity: Evidence From Multiple Sectors," in Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities, ed. Chang, Mitchell J. et al. (The Rev. of Higher Educ., 2004).

[206] Keeshea Turner Roberts, *Law Schools Push to Require Anti-Racism Training and Courses,* Am. Bar Ass'n, Dec. 13, 2020, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/rbgs-impact-on-civil-rights/law-schools-push/.

[207] Alicia Ouellette et al., *Letter to the Members of the American Bar Association, Section of Legal Education and Admissions to the Bar*, Aug. 20, 2020, https://taxprof.typepad.com/files/aba-bias-cultural-awareness-and-anti-racist-practices-education-and-training-letter-7.30.20-final.pdf; https://nadohe.memberclicks.net/assets/2021/Framework/National%20Association%20of%20Diversity%20Officers%20in%20Higher%20Education%20-%20Framework%20for%20Advancing%20Ant-Racism%20on%20Campus%20-%20first%20edition.pdf.

[208] NASPA, *NASPA and NADOHE Releases Research Report on Racial Justice Statements from 2020*, https://www.naspa.org/press/naspa-and-nadohe-releases-research-report-on-racial-justice-statements-from-2020; *see also* Alexa Wesley Chamberlain, Jill Dunlap, Paulette Granberry Russell, *Moving from Words to Action: The Influence of Racial Justice Statements on Campus Equity Efforts*, NASPA, July 26, 2021, http://apps.naspa.org/pubs/Moving_From_Words_to_Action_FINAL.pdf. The Law Deans Antiracist Clearinghouse Project tracks progress and provides resources for law schools committed to racial equality and the eradication of racism in the United States. https://www.aals.org/antiracist-clearinghouse.

[209] CJ Libassi, *The Neglected College Race Gap: Racial Disparities Among College Completers*, Ctr. For Am. Progress, May 23, 2018, https://www.americanprogress.org/article/neglected-college-race-gap-racial-disparities-among-college-completers/. "The law school can attract the brightest stars from racialized communities by offering a diverse and welcoming environment, a sampling of prospective courses with attractive titles, and a system of professional counseling and supported access to the competitive job market. However, while the law school is the forum in which students are typically first introduced to law firms, it is the firms and members of the profession, not the school, that determine the students' access to professional training, entry to professional culture, and opportunities for employment. The schools deliver graduates to the profession but have no authority over student job placement or firm hiring decisions." Faisal Bhabha, *Towards a Pedagogy of Diversity in Legal Education*, 52 Osgoode Hall L. J. 59, 90 (2014).

a shifting and contested landscape regarding racial diversity in legal education.[210] For decades, research has shown that campus faculty and staff are instrumental contributors to the academic, professional and personal outcomes of students, including student mental health and wellbeing.[211] Wellness, and social, cultural and academic programming should be purposefully designed to show all students, especially underrepresented and first-generation students, that they are valued, that they belong and that they have a place in the legal profession.[212]

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[210] Julian Roberts-Grmela, *Students Say Mental-Health Breaks From Class Help Them Succeed. Here's How Colleges Are Responding*, The Chronicle of Higher Educ., Feb. 2, 2023, https://www.chronicle.com/article/students-say-mental-health-breaks-from-class-help-them-succeed-heres-how-colleges-are-responding ("Seventy-two percent of student-affairs officials reported that mental-health concerns on campus worsened over the last year, according to a recent survey by Naspa: Student Affairs Administrators in Higher Education. A new Center for Collegiate Mental Health report found that levels of trauma and social anxiety have increased among students over the last decade, and that academic distress has increased compared to pre-pandemic.").

[211] Mary Christie Foundation, *The Role of Faculty in Student Mental Health*, https://marychristieinstitute.org/wp-content/uploads/2021/04/The-Role-of-Faculty-in-Student-Mental-Health.pdf.

[212] Adrienne Lu, *This Simple 30-Minute Belonging Exercise Could Boost Student Retention*, The Chronicle of Higher Education, May 4, 2023, https://www.chronicle.com/article/this-simple-30-minute-belonging-exercise-could-boost-student-retention, citing Gregory M. Walton et al., *Where and with whom does a brief social-belonging intervention promote progress in college?* 380 Science 499–505, May 4, 2023. https://www.science.org/doi/10.1126/science.ade4420 (randomized controlled experiment with 26,911 students at 22 diverse institutions showing that a "social-belonging" intervention, administered online before college (in under 30 minutes), increased the rate at which students completed the first year as full-time students, especially among students in groups that had historically progressed at lower rates. The college context also mattered: The intervention was effective only when students' groups were afforded opportunities to belong).

IV. IMPLICATIONS OF THE *SFFA* DECISION FOR PRIVATE EMPLOYERS: CORPORATIONS AND LAW FIRMS

While the *SFFA* decision does not directly apply to private employers like corporations and law firms, the Court's ruling may still create heightened risks for organizations seeking to advance their DEI goals. These concerns have already begun to play out with several firms having been sued in relation to fellowship programs that they offered. In anticipation of these challenges, the Business and Law Firm Working Groups of the Task Force set forth below guidelines and recommendations to help organizations identify and mitigate potential legal and reputational risks and bolster their current DEI initiatives.

This section proceeds in two parts. *First*, it discusses the legal framework and current landscape of federal anti-discrimination laws applicable to private employers, including Titles VI and Title VII of the Civil Rights Act, and Section 1981.[213] It also discusses the need to balance the real and anticipated backlash against DEI efforts against the risks associated with private employers reducing or abandoning publicly disclosed DEI initiatives. *Second*, this section provides practical steps that organizations can consider taking to effectively communicate and document their DEI efforts, and to mitigate certain potential legal risks. It also provides examples of current strategies that may help organizations as they pursue workforce DEI goals focused on the recruitment, retention and advancement of underrepresented groups.

A. Legal Framework and Current Landscape

Corporate DEI initiatives continue to be lawful following the *SFFA* decision so long as they do not run afoul of federal anti-discrimination statutes such as Title VI and Title VII of the Civil Rights Act and 42 U.S.C. § 1981. However, even prior to the *SFFA* decision, DEI programs have received scrutiny in the form of (1) shareholder challenges; (2) reverse discrimination litigation; and (3) government enforcement actions. These challenges—and new ones such as antitrust considerations—will likely continue to surface following the *SFFA* decision. However, these risks should be balanced against the significant risks associated with retreating from publicly committed DEI efforts. Companies that abandon their public commitments may be subject to (1) Securities and Exchange Commission (SEC) investigations and shareholder derivative suits; (2) disparate treatment and disparate impact actions; and (3) additional negative impacts like loss of top talent or reduced financial performance.

Title VI of the Civil Rights Act prohibits "intentional discrimination based on race in any program that receives federal funding,"[214] including a "pattern or practice" of treating one race less favorably than others.[215] A private organization is not subject to Title VI liability unless one of the following thresholds is satisfied: (1) the organization "as a whole" receives federal funds, in which case all operations of the organization are subject to Title VI; (2) the organization is "principally engaged in the business of providing

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[213] 42 U.S.C. § 1981.
[214] *Bridges* v. *Scranton Sch. Dist.,* 644 F. App'x 172 (3d Cir. 2016).
[215] *Blunt* v. *Lower Merion Sch. Dist.*, 767 F.3d 247, 299–300 (3d Cir. 2014).

education, health care, housing, social services, or parks and recreation," in which case all operations of the organization are subject to Title VI; or (3) the organization receives federal funds designated for a specific activity, in which case the organization may be sued under Title VI for engaging in discrimination with respect to that specific program.[216] In order to bring a successful challenge under Title VI, a plaintiff (either a natural person or a corporation) must show that the organization's program receives federal funds and that the plaintiff has been either (1) excluded from participation in such program; (2) denied the benefits of such program; or (3) subjected to discrimination under such program.[217]

Although the Supreme Court in the *SFFA* decision did not explicitly analyze the race-conscious admissions systems at Harvard and UNC under Title VI, the majority stated, in a footnote, that "discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI."[218] Justice Thomas's and Justice Gorsuch's concurrences also reference the applicability of the majority opinion to Title VI, with Justice Thomas writing that the language of Title VI "makes no allowance for racial considerations" and "reinforces the colorblind view of the Fourteenth Amendment."[219] Thus, opponents of diversity programs may rely on the reasoning of the *SFFA* decision to bring future legal challenges under Title VI seeking to argue that those programs involving federal funding confer or deny benefits on the basis of race.

Meanwhile, Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex (including pregnancy) and national origin.[220] Under Title VII, for example, it is unlawful for an employer to make hiring, compensation, promotion and termination decisions on the basis of race or ethnicity. However, historically, employers may make race-conscious employment decisions in specific circumstances pursuant to appropriately tailored voluntary affirmative action plans. Employers may also institute DEI initiatives to increase opportunity outside of a valid affirmative action plan.

Title VII guidelines explicitly state that employers "should take voluntary action to correct the effects of past discrimination and to prevent present and future discrimination."[221] Affirmative action allows employers to make race-conscious employment decisions in order to remedy the effects of such discrimination. By contrast, DEI programs generally do not involve deciding who to hire, promote, or fire based on race and can be used by employers to increase opportunity outside of an affirmative action plan context.

Prior to the *SFFA* decision, the Supreme Court set out the framework for "evaluating the compliance of an affirmative action plan with the Title VII prohibition on

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[216] 42 U.S.C. § 2000d-4a(3)(A).
[217] 42 U.S.C. § 2000d.
[218] *SFFA*, 143 S. Ct. at 2157, n.2 (citing *Gratz* v. *Bollinger*, 539 U. S. 244, 276, n. 23 (2003)).
[219] *Id.* at 2188, n.4 (Thomas, J. dissenting).
[220] 7 C.F.R. § 1901.203.
[221] 29 C.F.R. § 1608.1(c) (1979).

discrimination" in two cases: *United Steelworkers of Am.* v. *Weber*[222] and *Johnson* v. *Transp. Agency, Santa Clara Cnty.*[223] These decisions have not been overruled, and presumably remain good law for now. *Weber* noted that "Congress chose not to forbid all voluntary race-conscious affirmative action" under Title VII due to its overarching objective of "break[ing] down old patterns of racial segregation and hierarchy."[224]

Although not the subject of focus in recent years, an employer can implement a voluntary affirmative action plan in compliance with Title VII in at least three circumstances. *First*, the employer can do so to remedy prior discrimination or "correct the effects" of such practices.[225] As the Supreme Court observed, "it would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice" could not remedy prior discrimination under that law.[226] *Second*, it is permissible to use affirmative action to eliminate manifest imbalance in traditionally segregated job categories.[227] *Third*, affirmative action may be used to eliminate manifest imbalances in the workforce.[228] To achieve these goals, these plans can incorporate both race-conscious employment decisions and DEI measures, such as recruitment programs.

If an employer's voluntary affirmative action plan has been effectuated to realize one of these three goals, courts then look to a variety of factors to determine its validity. First, an affirmative action plan "must contain specific goals and objectives, numerical or otherwise."[229] In addition, "[n]umerous factors [must] be taken into account in making hiring decisions, including the actual qualifications of [minority] applicants for particular jobs."[230] Affirmative action plans also should not "unnecessarily trammel the interests" of non-minorities, which in *Weber* meant that the employer could not discharge workers for the purpose of replacing them with those recruited through affirmative action.[231] Indeed, employers must design affirmative action plans that require diverse applicants to compete "with all other qualified applicants."[232] In addition, an affirmative action plan should avoid creating an absolute bar to the advancement of those falling outside of its goals.[233] Finally,

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[222] *United Steelworkers of Am.* v. *Weber*, 443 U.S. 193, 194 (1979).
[223] *Johnson* v. *Transp. Agency, Santa Clara Cnty.*, 480 U.S. 616, 640 (1987).
[224] *Weber*, 443 U.S. at 206, 208.
[225] 29 C.F.R. § 1608.3(b) (1979); *see also Weber*, 443 U.S. at 204.
[226] *Weber*, 443 U.S. at 204.
[227] *Id*. at 201 ("[T]o eliminate traditional patterns of racial segregation"); *Johnson*, 480 U.S. at 620–21 ("[I]n making promotions to positions within a traditionally segregated job classification . . . the [employer] is authorized to consider as one factor the sex of the applicant").
[228] *Weber*, 443 U.S. at 208; *Johnson*, 480 U.S. at 631–32; *see also Shea* v. *Kerry*, 796 F.3d 42, 57 (D.C. Cir. 2015) (a manifest imbalance can be shown through "statistical disparities between the racial makeup of the employer's workforce and that of a comparator population").
[229] EEOC, *CM-607 Affirmative Action*, https://www.eeoc.gov/laws/guidance/cm-607-affirmative-action.
[230] *Johnson*, 480 U.S. at 637.
[231] *Weber*, 443 U.S. at 208.
[232] *Johnson*, 480 U.S. at 638.
[233] *Weber*, 443 U.S. at 208; *see also Johnson*, 480 U.S. at 637–38 (noting that the plan does not set aside a number of positions for women only); *Shea*, 796 F.3d at 62 (describing how non-minority applicants can still gain promotion from entry-level positions even if not included in the affirmative action program).

the plan should be a temporary measure and race-conscious decision-making should last only until the employer is close to reaching its goal.[234]

An affirmative action plan is invalid if: (1) it relies on quotas to achieve its goals or (2) it is used to maintain, rather than attain, a balanced workforce. An affirmative action plan must contain specific goals and objectives, numerical or otherwise."[235] For example, a "plan might include increasing the number of women in the employers workforce from . . . 10% . . . to 20% next year, 30% the following year, and so on" in order to address past discrimination.[236] However, if a plan is only in place to maintain balance after goals have been achieved, it is no longer valid.[237] The plan cannot require employers to hire employees based on rigid numerical quotas, regardless of whether the prospective employees are qualified, because "numerous factors [must] be taken into account in making hiring decisions, including the actual qualifications of applicants for particular jobs."[238]

The Supreme Court held in *Ricci* v. *DeStefano* that employers cannot change the practices that they use to make employment decisions—in this case, changing their promotion practices—based on race unless they can show that they had a strong basis in evidence to believe that their existing practices violated Title VII because of the practices' disparate impact.[239] In *Ricci*, the employer used an exam to determine promotions.[240] An analysis of exam results revealed that white applicants performed better than minority applicants. Fearing a disparate impact suit under Title VII, the employer decided to abandon the use of the exam results in promotions altogether.[241] In this case, such decision violated Title VII as the Supreme Court ruled that the employer, with limited exceptions, may not implement a race-based solution to address a disparate impact issue unless it could "demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable" for discrimination under a disparate impact theory.[242] An employer could show this by demonstrating that the challenged practice was not "job related" and "consistent with business necessity" or that it had failed to adopt an "equally valid, less-discriminatory alternative."[243] The employer must objectively believe that "the beneficiaries of the [affirmative] action were victims of disparate impact and the action puts them roughly where they would have been in the absence of discrimination."[244]

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[234] *Weber*, 443 U.S. at 208–09 (describing how the affirmative action plan was only in place until the number of Black employees was close to the percentage of those in the local labor force); *Shea*, 796 F.3d at 61 (stating that the plan "sought to attain more proportional representation" and ended after the goal was reached); *see also United States* v. *City of Cincinnati*, No. 1:80-cv-369, 2021 WL 4193211, at *1, *6 (S.D. Ohio Sept. 15, 2021) (invalidating an affirmative action plan that successfully remedied past discrimination and thus no longer had a valid purpose).

[235] EEOC, *CM-607 Affirmative Action*, https://www.eeoc.gov/laws/guidance/cm-607-affirmative-action.

[236] *Id.*

[237] *Cincinnati*, 2021 WL 4193211, at *6; *see also Johnson*, 480 U.S. at 640 (stating that an employer cannot seek to "use its plan to maintain a permanent racial and sexual balance").

[238] *Johnson*, 480 U.S. at 637.

[239] *See Ricci* v. *DeStefano*, 557 U.S. 557, 563 (2009).

[240] *Id.* at 561–62.

[241] *Id.* at 562–63; *see also* 42 U.S.C. § 2000e-2(k)(1)(A).

[242] *Id*. at 563.

[243] *Id.* at 587 (citing 42 U.S.C. § 2000e-2(k)(1)(A)).

[244] *United States* v. *Brennan*, 650 F.3d 65, 114 (2d Cir. 2011).

Today, many companies and organizations have developed DEI programs outside of the voluntary affirmative action framework to aid in achieving their diversity goals. These efforts include, among others, pipeline programs, affinity or employee resource groups (ERGs), trainings, fellowships and scholarships, and mentorship and sponsorship programs. DEI efforts, which are targeted at increasing the number of diverse applicants and retaining diverse employees, but do not involve the consideration of race in hiring, promotion, and other employment decisions, have also traditionally been considered lawful under Title VII. For example, the EEOC has highlighted increased recruiting efforts at HCBUs as an example of a permissible method of increasing workplace diversity.[245] Similarly, corporations and other organizations have developed practices, such as the National Football League's Rooney Rule,[246] requiring teams to interview candidates from racial or ethnic minorities for coaching and front-office positions. These efforts have been upheld under Title VII because they do not involve making hiring or promotion decisions *on the basis of* race or another legally protected characteristic.[247] Rooney Rule–like initiatives aim to counteract the effect of systemic challenges and barriers that make it more difficult for underrepresented populations to reach the first round of interviews.[248] These efforts ensure that *before* a hiring decision is made, an employer is considering a diverse and inclusive pool of candidates for the position.

Enacted shortly after the Civil War, Section 1981 of the Civil Rights Act of 1866 prohibits racial discrimination in the making and enforcement of contracts,[249] and requires plaintiffs to prove that their race was the "but for" cause of the denial of their rights.[250] It differs from Title VII in two important ways. *First*, Section 1981 applies only to intentional discrimination on the basis of race and citizenship, whereas Title VII applies to both intentional discrimination and disparate impact discrimination on the basis of race, color, national origin, sex or religion. *Second*, Section 1981 allows for uncapped damages and applies to employers of any size.[251]

To establish a prima facie Section 1981 claim, a plaintiff must demonstrate: (1) their membership in a protected class; (2) the defendant's intent to discriminate on the basis

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[245] U.S. Equal Employment Opportunity Commission, *2022 Annual Performance Report ("APR")* (March 2023), https://www.eeoc.gov/2022-annual-performance-report-apr.

[246] Jason Reid, *NFL's Rooney Rule Should Be Strengthened*, Wash. Post, Feb. 19, 2011, https://www.washingtonpost.com/wp-dyn/content/article/2011/02/19/AR2011021903268.html.

[247] *See, e.g., Mlynczak* v. *Bodman*, 442 F.3d 1050 (7th Cir. 2006) (finding a plan designed to promote workplace diversity through efforts to expand the pool of candidates for hiring or promotion, and expressly prohibiting decisionmakers from basing hiring or promotion decisions on race, ethnicity or gender, was lawful under Title VII).

[248] *See, e.g.,* John Simons, *For Black Applicants, the Hiring Market Hasn't Changed Much in 25 Years*, Wall Street J., Oct. 3, 2017, https://www.wsj.com/articles/for-blacks-the-hiring-market-hasnt-changed-much-in-25-years-1507039200 (finding that "white applicants receive more invitations of first-round interviews than similarly qualified African-Americans").

[249] Cornell Law School, *Section 1981*, Legal Information Institute, https://www.law.cornell.edu/wex/section_1981#:~:text=Section%201981%20is%20a%20shorthand,by%20nongovernment%20and%20state%20discrimination.

[250] *Comcast Corp.* v. *Nat'l Ass'n of African-American Owned Media*, 589 U.S. ___ at *13 (2020).

[251] Cornell Law School, *Section 1981*, Legal Information Institute, https://www.law.cornell.edu/wex/section_1981#:~:text=Section%201981%20is%20a%20shorthand,by%20nongovernment%20and%20state%20discrimination.

of race or citizenship; and (3) discrimination interfering with a protected activity (*i.e.*, the making and enforcement of contracts).[252] Specifically, to show discriminatory intent, a plaintiff must demonstrate that the "decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects on an identifiable group."[253] Importantly, the burden is on the plaintiff to show that race or citizenship was a "but-for" cause of his or her injury.[254] Unlike Title VII, it is not enough for a plaintiff to show that race or citizenship was a "motivating factor" in the challenged decision.[255]

In *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), the Supreme Court held that persons of any race may bring discrimination claims under Section 1981. Since then, numerous plaintiffs have used Section 1981 to bring reverse discrimination claims challenging corporate DEI initiatives aimed at, for example, increasing supplier diversity.

In the *SFFA* decision, the Supreme Court did not address diversity-focused contracting or funding under Section 1981. However, given that courts look to the Equal Protection Clause case law for guidance in analyzing claims under Section 1981, future challengers may ask courts to apply the Supreme Court's reasoning in the context of corporate commitments to contract with diverse suppliers or outside contractors or in other contexts involving race-conscious initiatives that are governed by contracts.

Legal challenges to DEI initiatives are not new. Even before the *SFFA* decision, a wave of reverse discrimination litigation and legislation seeking to limit or prohibit DEI programs had already begun. In response to the overwhelming support for racial justice initiatives following the murder of George Floyd and the Stop Asian Hate movement, we have seen an increase in voluntary DEI-related disclosures and the implementation of DEI initiatives. Progressive activist shareholder groups and public campaigns have advocated for an increased focus on environmental, social and governance (ESG) and human capital management disclosures by public companies, which has, in turn, resulted in increased attention by government enforcement agencies, including the SEC, Federal Trade Commission, Equal Employment Opportunity Commission (EEOC) and Office of Federal Contract Compliance Programs (OFCCP). As pressure to move the needle forward on DEI goals and public disclosures concerning DEI efforts has increased, so too have efforts challenging such initiatives.

Companies today are facing backlash on numerous fronts, including, as discussed further below: (1) shareholder proposals and demands to retract DEI policies and programs; (2) threats of reverse discrimination lawsuits; (3) government investigations and enforcement actions; and (4) potential antitrust risks.

Activist shareholders have challenged companies' DEI initiatives through a combination of proposals, including requests for audits of corporate DEI practices and

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[252] *Daniels* v. *Dillard's, Inc.*, 373 F.3d 885 (8th Cir. 2004).
[253] *Equal Emp't Opportunity Comm'n* v. *Joe's Stone Crab, Inc.*, 220 F.3d 1263 (11th Cir. 2000).
[254] *Comcast Corp.* v. *National Association of African-American Owned Media*, 589 U.S. ___ (2020).
[255] *Id.*

retraction demands requesting companies eliminate certain DEI policies or programs. The initial wave of racial equity audit requests were made by shareholders looking to increase the transparency of companies' DEI efforts. These requests called for companies to evaluate the impact of their DEI initiatives and programs in order to ensure that they had their intended impact and that employees and communities of color were indeed benefiting from such efforts.[256]

In 2022, there was a major increase in (anti) DEI-focused proposals,[257] and these efforts have continued into 2023. As of June 1, 2023, one activist shareholder who opposes DEI had filed at least 42 proposals,[258] and another group had filed at least 18 proposals.[259] Various other activists and entities have similarly filed proposals advocating against DEI and ESG efforts, including by arguing that companies have a fiduciary duty to focus only on financial returns, not what they claim to be the amorphous benefits of DEI.[260]

To date, such proposals have rarely been successful at requiring companies to undertake audits. For example, a proposal to Apple this year lost with 98.5 percent of shareholders voting against it.[261] Other proposals similarly garnered minimal support.[262] Nevertheless, the proposals put pressure on company boards to re-examine their DEI initiatives and have the potential to chill further efforts to advance diversity.

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[256] *See* Ron S. Berenblat and Elizabeth R. Gonzalez-Sussman, Olshan Frome Wolosky LLP, *Racial Equity Audits: A New ESG Initiative*, Harvard Law School Forum of Corporate Governance, Oct. 30, 2021, https://corpgov.law.harvard.edu/2021/10/30/racial-equity-audits-a-new-esg-initiative/.

[257] The companies putting the NCPPR's proposals to shareholder vote include: Walmart, Lowe's, Meta, Twitter, AT&T, Johnson & Johnson, Bank of America, and Levi Strauss & Co. *See* Michael Delikat, J.T. Ho, and Hong Tran, *DEI Initiatives under Attack by Activist*, Harvard Law School Forum on Corporate Governance, Oct. 7, 2022, https://corpgov.law.harvard.edu/2022/10/07/dei-initiatives-under-attack-by-activists/. In line with its other proposals, the NCPPR recently filed proposals with Apple and Caterpillar Inc. seeking to impose audits analyzing the impacts of DEI policies on civil rights and non-discrimination on the companies' business. *See* Caterpillar Inc., 2023 Proxy Statement 84 (2023); Apple Inc., Notice of 2023 Annual Meeting of Shareholders and Proxy Statement 79 (2023). More generally, ESG shareholder proposals have been increasing for the last several years. *See* Robert Stilson, *To Understand ESG Activism, Look to Shareholder Resolutions*, RealClear Markets, July 26, 2023, https://www.realclearmarkets.com/articles/2023/07/26/to_understand_esg_activism_look_to_shareholder_resolutions_968451.html ("[T]he number of ESG shareholder proposals filed at Russell 3000 companies has been increasing for four straight years, up from 754 in the 2020 proxy season to at least 951 in the 2023 season.").

[258] *See* Heidi Welsh, *Anti-ESG Shareholder Proposals in 2023*, Harvard Law School Forum on Corporate Governance, June 1, 2023, https://corpgov.law.harvard.edu/2023/06/01/anti-esg-shareholder-proposals-in-2023/.

[259] *See id.*

[260] *See id.*

[261] *See* Stephen Nellis, *Apple Shareholders Reject Proposals from Conservative Groups*, Reuters, March 10, 2023, https://www.reuters.com/technology/apple-shareholders-reject-proposals-conservative-groups-2023-03-10/.

[262] Other companies that received the NCPPR's proposals included The Walt Disney Company, CVS, Citigroup, and Comcast. *See* Michael Delikat, J.T. Ho, and Hong Tran, *supra* note 257. In each case, the shareholder votes were less than 5% in favor of the NCPPR's proposal. *See id.*

Activist shareholders have also sent retraction demand letters to companies on behalf of shareholders demanding that they eliminate various DEI-related policies, arguing that the companies' disclosed DEI policies violate Title VII, Section 1981, state or local antidiscrimination laws. Such demands often threaten litigation if companies fail to comply. One organization has sent at least 10 such letters since 2021.[263] That organization followed through with its threat of litigation against Starbucks after Starbucks rejected the demand stating that it "determined that it is not in the best interest of Starbucks to accept the Demand and retract the Policies." However, the court dismissed the organization's complaint as frivolous, noting that the complaint did not represent the interests of Starbucks' shareholders and that it raised policy questions for lawmakers and corporations, not courts, to decide.[264]

While "reverse discrimination" claims under Title VII, Section 1981, and state and other antidiscrimination laws are not new, the *SFFA* decision may embolden such claims and threats of litigation by activist shareholders and employees. The mere existence of DEI initiatives—however structured—does not in and of itself give rise to liability,[265] but some recent litigants have been successful at demonstrating a direct nexus between DEI policies or initiatives and the employment decision made against them. For example, in *Duvall* v. *Novant Health Inc*., which was decided before the *SFFA* decision, a jury found in favor of a white male plaintiff who alleged that he was fired without cause from his management position because of his race and sex.[266] To support his claim, the plaintiff pointed to evidence that the employer maintained a "goal of remaking the workforce to look like the community it served," and "to promote diversity during the D&I Program implementation," including at the management level. The plaintiff argued that his firing fit a pattern of similar actions by Novant, which eliminated all seven other white male managers who reported to the plaintiff's supervisor within one year.[267] The plaintiff won following a jury trial. More litigation is pending. American Express Co. faces a class action suit brought last year on behalf of a group of employees who claim that the company's implementation of certain DEI initiatives violates Title VII;[268] McDonald's Corporation is defending itself against an EEOC charge of discrimination challenging the company's

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[263] These companies include American Airlines, Levi Strauss & Co., Pfizer, Inc., Dropbox, JP Morgan Chase & Co., Starbucks Co., McDonald's Co., Novartis, Lowe's (twice), and Coca Cola. *See* Michael Delikat, J.T. Ho, and Hong Tran, *supra* note 257.

[264] Jody Godoy, *Conservative Starbucks Investor Loses Diversity Challenge*, Reuters, Aug. 11, 2023, https://www.investing.com/news/stock-market-news/starbucks-board-wins-dismissal-of-shareholder-lawsuit-over-diversity-policies-3152804.

[265] *See, e.g.*, *Jones* v. *Bernanke*, 493 F. Supp. 2d 18, 29 (D.D.C. 2007) ("[T]he mere existence of a diversity policy, without more, is insufficient to make out a [] case of reverse discrimination").

[266] *Duvall* v. *Novant Health Inc.*, No. 3:19-CV-00624-DSC, 2022 WL 3331263, at *5 (W.D.N.C. Aug. 11, 2022), *amended on reconsideration in part*, No. 3:19-CV-00624-DSC, 2022 WL 11271199 (W.D.N.C. Oct. 19, 2022).

[267] *Former Novant Health Executive Wins $10 Million in Discrimination Case,* Assoc. Press, Oct. 27, 2021, https://www.wsoctv.com/news/local/former-novant-health-executive-wins-10m-discrimination-case/JPCOKEDK4BBYHHNBU6GNUPWZ2E.

[268] *Netzel* v. *American Express Company et al.*, No. 2:22-cv-01423 (D. Az.). A motion to compel arbitration is currently pending before the court.

"Global Diversity, Equity and Inclusion Strategy;"[269] and Amazon is defending a class action lawsuit challenging several of its DEI initiatives.[270] Most recently, two law firms, Perkins Coie and Morrison & Foerster, face lawsuits filed in federal courts in Texas and Florida, respectively, challenging the consideration of race when selecting law students for fellowship programs.[271] The lawsuits allege that the fellowship programs discriminate against white law students because the programs only permit applicants who are of color, who identify as LGBTQ+ or who have disabilities.[272] Although only two firms are included in the lawsuits, diversity fellowship programs are commonplace among large law firms.[273] Notably, these lawsuits were filed by an organization financed by Edward Blum—the conservative advocate who initiated the *SFFA* case.[274] Another Blum-financed organization also recently launched a lawsuit in Georgia targeting a venture capitalist firm, Fearless Fund, alleging that the fund operates program which discriminates against non-Black individuals.[275]

Moreover, the types of employment decisions and workplace policies covered by Title VII appear to be expanding. Although Title VII has long been interpreted to apply only to "ultimate employment decisions" such as hiring, firing, promotion and pay, the law appears to be moving in the other direction. The *en banc* Fifth Circuit ruled in August of 2023 that other changes to the "terms, conditions, or privileges of employment," such as "[t]he days and hours that one works," may constitute prohibited discrimination that is actionable under Title VII.[276] And the Supreme Court in June 2023 granted certiorari on this very issue in another case, to be decided next term.[277] The expansion of the meaning of actionable employment actions or practices is a two-edge sword in terms of how it impacts DEI. On the one hand employees may be able to bring claims for lower-level adverse actions that previously would not have been actionable under the "ultimate employment decisions" standard. On the other hand, DEI programs may be at greater risk of legal challenge even though the individual challenging the program may not be able to show actual damages.

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[269] *America First Legal Files Federal Civil Rights Complaint Against McDonald's for Unlawful and Racist Hiring Practices*, Am. First Legal, Apr. 5, 2023, https://aflegal.org/america-first-legal-files-federal-civil-rights-complaint-against-mcdonalds-for-unlawful-and-racist-hiring-practices.

[270] *See Crystal Bolduc* v. *Amazon.com Inc.,* No. 4:22-cv-615-ALM (E.D. Tex. July 20, 2022); *see also Nat'l Ctr. for Pub. Policy Rsch.* v. *Howard Schultz*, No. 2:22-CV-00267-SAB (E.D. Wash., May 19, 2023).

[271] *See* Douglas Belkin, *Activist Behind Supreme Court Affirmative-Action Cases Is Now Suing Law Firms*, Wall Street J., Aug. 22, 2023, https://www.wsj.com/us-news/edward-blum-lawsuits-affirmativeaction-law-firms-b8871ab1.

[272] *See id.*

[273] *See id.*

[274] *See id.* Blum made clear that it is his desire for his organization, the American Alliance for Equal Rights, to continue such advocacy efforts in the courts moving forward. *See id.* ("Blum said he hopes his organization will generate at least two more Supreme Court cases over the next five years that will shore up the legal limits of how race and ethnicity is used in employment, contracting and internships.").

[275] *See* Kiara Alfonseca, *Group Behind Affirmative Action Case Sues Black Venture Fund For Alleged Racial Bias*, ABC News, Aug. 10, 2023, https://abcnews.go.com/Business/group-affirmative-action-case-sues-black-venture-fund/story?id=102165527.

[276] *Hamilton* v. *Dallas County*, No. 21-10133 (5th Cir. Aug. 18, 2023) (*en banc*).

[277] *See Muldrow v. City of St. Louis*, No. 22-193 (cert. granted June 30, 2022), https://www.supremecourt.gov/qp/22-00193qp.pdf.

Recent shareholder demands threaten further litigation along these lines. One organization recently sent letters to CEOs threatening litigation if the relevant corporations do not audit and disclose their DEI initiatives and cease and desist from certain DEI practices.[278] While the *SFFA* decision may inspire further reverse discrimination claims based on DEI initiatives, these efforts have been largely unsuccessful. In contrast, private litigation focusing on whether companies have been meeting their obligations under federal and state anti-discrimination laws is on the rise.

Government enforcement of anti-discrimination laws will continue. However, we can also expect increased government action, including investigations and enforcement actions, motivated by the *SFFA* decision. Some of this attention may be initiated by government officials acting on their own, but actions may also be requested or demanded via activists, employees or members of the public. For example, one activist shareholder has sent letters requesting that the EEOC investigate "woke corporations," including Lyft, DICK'S Sporting Goods, Kontoor Brands and Yum! Brands for their human resources practices and DEI initiatives.[279]

The EEOC Commissioners themselves are split across party lines on this issue. EEOC Chair Charlotte Burrows, a Democratic appointee, tried to reassure employers after the *SFFA* decision:

> The [SFFA] decision . . . does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. It remains lawful for employers to implement DEI and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace.[280]

But Commissioner Andrea Lucas, a Republican appointee noted that Title VII has always prohibited using race as a factor in employment decisions, and that the *SFFA* decision should prompt employers to "take a hard look" at their corporate diversity programs, especially those that "explicitly or implicitly tak[e] race into decision-making for employment decisions," such as through "race-restricted internships, race-restricted mentoring, [and] race-focused promotion decisions," which may already be "violating the law."[281]

Additionally, several Republican attorneys general have threatened to take enforcement actions challenging DEI initiatives. Following the *SFFA* decision, Republican attorneys general for 13 states wrote to Fortune 100 CEOs condemning DEI initiatives, and stating that companies would be held accountable for "illegal[] . . . preferences in

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[278] *See* Michael Delikat, J.T. Ho, and Hong Tran, *supra* note 257.

[279] *See Woke Corporations*, Am. First Legal, https://aflegal.org/woke-corporations/.

[280] *Statement from EEOC Chair Charlotte A. Burrows on Supreme Court Ruling on College Affirmative Action Programs*, U.S. Equal Emp't Opportunity Comm'n, June 29, 2023, https://www.eeoc.gov/newsroom/statement-eeoc-chair-charlotte-burrows-supreme-court-ruling-college-affirmative-action.

[281] *EEOC Commissioner Responds to Supreme Court Ruling Against Race-Based College Admissions*, Fox News, June 29, 2023, https://www.foxnews.com/video/6330307060112.

employment and contracting practices and threatened investigations and litigation."[282] That was followed days later by a letter from 21 Democratic attorneys general, stating "[w]e write to reassure you that corporate efforts to recruit diverse workforces and create inclusive work environments are legal and reduce corporate risk for claims of discrimination."[283] Then, on July 17, 2023, Senator Tom Cotton (R- Arkansas), sent a letter to over 50 large law firm chairs threatening congressional oversight "to scrutinize the proliferation of race-based employment practices," both to the extent such firms "advise clients regarding DEI programs or operate one of [their] own" and warning those firms and their clients to "take care to preserve relevant documents in anticipation of investigations and litigation."[284]

Further, at the state level, there has been a flood of legislation by Republican-led governments that seeks to curtail efforts to further DEI goals. For example, Florida Senate Bill 266, signed into law in May 2023, prohibits spending on activities that promote DEI in higher education throughout the state.[285] Such legislation seeks to replace particular areas of study, such as gender studies and critical race theory, with more "classical education."[286] Much of S.B. 266 overlaps with Florida's Stop-WOKE Act which, although it did not pertain to DEI specifically, prohibited what conservatives label as "divisive concepts," or legislation in opposition to considering race as a nexus of American life and racism as being perpetuated by the nation's institutions.[287] [288] Still, Florida Governor Ron DeSantis continues to sign bills barring state officials from investing public funds to promote ESG-related goals,[289] and banning public universities in Florida from using funds on DEI initiatives.[290] Dozens of similar bills have been introduced in over 20 other states, several of which have passed as of July 2023, including bills in North Carolina, Tennessee

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[282] *Letter to Fortune 100 CEOs from 13 Attorneys General*, July 13, 2023, https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2023/pr23-27-letter.pdf.

[283] *Letter to Fortune 100 CEOs from 20 Attorneys General*, July 19, 2023, https://illinoisattorneygeneral.gov/News-Room/Current-News/Fortune%20100%20Letter%20-%20FINAL.pdf.

[284] *See, e.g.*, Caroline Tabler and James Arnold, *Cotton Warns Top Law Firms About Race-Based Hiring Practices*, Tom Cotton, Senator for Arkansas, July 17, 2023, https://www.cotton.senate.gov/news/press-releases/cotton-warns-top-law-firms-about-race-based-hiring-practices.

[285] *H.B. 999/S.B. 266 – Higher Education Censorship and Government Control Bill*, https://www.aclufl.org/en/legislation/hb-999sb-266-higher-education-censorship-and-government-control-bill.

[286] Editorial Board, *In Defense of "Niche Subjects": Ron DeSantis Got It Wrong*, The Daily Californian, May 24, 2023, https://dailycal.org/2023/05/24/in-defense-of-niche-majors-ron-desantis-got-it-wrong.

[287] *Honeyfund.com, Inc.* v. *DeSantis*, 622 F. Supp. 3d 1159, 1175 (N.D. Fla. 2022); *Pernell* v. *Fla. Bd. of Governors of State Univ. Sys.*, No. 4:22CV304-MW/MAF, 2022 WL 16985720, at *2 (N.D. Fla. Nov. 17, 2022).

[288] *Honeyfund.com, Inc.* v. *DeSantis*, 622 F. Supp. 3d 1159, 1175 (N.D. Fla. 2022); *Pernell* v. *Fla. Bd. of Governors of State Univ. Sys.*, No. 4:22CV304-MW/MAF, 2022 WL 16985720, at *2 (N.D. Fla. Nov. 17, 2022).

[289] *See* Isla Binnie and Ross Kerber, *DeSantis Signs Sweeping Anti-ESG Legislation in Florida*, Reuters, May 3, 2023, https://www.reuters.com/business/sustainable-business/desantis-signs-sweeping-anti-esg-legislation-florida-2023-05-02/.

[290] *See* Nicholas Nehamas, *DeSantis Signs Bill Defunding Diversity Spending in State Schools*, N.Y. Times, May 15, 2023, https://www.nytimes.com/2023/05/15/us/politics/ron-desantis-dei-bill.html.

and Texas, aimed at DEI initiatives in higher education.[291] These efforts began during the Trump Administration and are likely to continue in earnest following the *SFFA* decision.

Finally, prior to the *SFFA* decision, in October 2022, 19 Republican state attorneys general served subpoenas on six United States banks seeking information regarding their involvement in the United Nation's Net-Zero Banking Alliance.[292] A month later, in November 2022, several Republican United States senators led by Tom Cotton (R-Arkansas) sent letters to 51 law firms warning them to advise their clients of potential risks related to their participation in ESG initiatives and that Congress would "increasingly use its oversight powers to scrutinize the institutionalized antitrust violations being committed in the name of ESG."[293] In March 2023, 21 Republican state attorneys general sent a letter to 53 asset managers raising concerns about how asset managers were voting proxies on certain key ESG issues. The letter stated "we will continue to evaluate activity in this area in line with our ongoing investigations into potential unlawful coordination and other violations that may stem from the commitments you and others have made . . . ."

While this correspondence has largely been focused on "E" (Environmental) efforts (*e.g.*, reduced investments in fossil fuels and net-zero pledges), similar challenges to "S" (Social) efforts (*e.g.*, DEI initiatives) have already followed on employment discrimination challenges, and may also become a part of antitrust or consumer protection laws challenges. It is thus important to understand how antitrust laws may impose constraints on how employers within an industry can communicate and coordinate with one another on DEI efforts.

The relevant antitrust laws forbid entities (including law firms, lawyers, and companies) from: (1) coordinating competitive conduct with competitors[294] and (2) providing or receiving "competitively sensitive" information about go-to-market

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[291] *See* DEI Legislation Tracker, The Chronicle of Higher Education, https://www.chronicle.com/article/here-are-the-states-where-lawmakers-are-seeking-to-ban-colleges-dei-efforts (last updated July 14, 2023); *see also* Laurent Belsie, *Corporate Diversity Push: How it's Shaken as Affirmative Action Ends*, Christian Science Monitor, July 26, 2023, , https://www.csmonitor.com/Business/2023/0726/Corporate-diversity-push-How-it-s-shaken-as-affirmative-action-ends ("Following the [*SFFA*] decision, the House of Representatives passed a defense policy bill with several social policy amendments tacked on, including the elimination of the Pentagon's programs for diversity, equity, and inclusion (DEI)."); Mark Segal, *Republicans Propose New Series of Anti-ESG Reporting and Investing Laws*, ESG Today, July 26, 2023, https://www.esgtoday.com/republicans-introduce-series-of-anti-esg-reporting-and-investing-laws ("Republicans on the House Financial Services Committee in the U.S. Congress announced on Tuesday the introduction of a series of bills aimed at pushing back on the influence of ESG initiatives in capital and financial markets including proposals to derail efforts to implement ESG and climate-related disclosure requirements on companies, and to reduce the ability of investors to engage with companies on sustainability issues.").

[292] Alex Swayer, *19 states subpoena six major banks for ESG records, say 'woke, climate agenda' hurts U.S. firms*, Wash. Times, Oct. 20, 2022, https://www.washingtontimes.com/news/2022/oct/20/19-states-subpoena-six-major-banks-for-esgrecords.

[293] *ESG Letters to Law Firms*, U.S. Senators Tom Cotton, Michael S. Lee, Charles E. Grassley, Marsha Blackburn, Marco Rubio, Nov. 3, 2022, https://www.grassley.senate.gov/imo/media/doc/cotton_grassley_et_altolawfirmsesgcollusion.pdf.

[294] 15 U.S.C. § 1.

strategies.[295] Such "competitively sensitive" information includes non-public data on pricing, margins and employee compensation, but it also encompasses non-public data that, in the hands of a rival, could give the rival a competitive advantage in the marketplace.[296] The agencies interpret "competitive conduct" broadly to include any metrics used to compete for business or talent—including DEI commitments.

B. Legal Risks of Dialing Back DEI Initiatives

While the recent anti-ESG backlash may have prompted some companies to pull back from or reduce resources committed to their DEI commitments,[297] experience demonstrates that abandoning DEI initiatives can pose significant risk. Public companies that dial back or eliminate DEI efforts could face SEC investigations and shareholder derivative suits. Employers could face pay equity and disparate impact enforcement and class actions, discrimination litigation and other negative repercussions, including to personnel, morale and their bottom line.

For public companies that have made DEI commitments to investors or other stakeholders, withdrawing from DEI initiatives or otherwise failing to meet these commitments may result in allegations that they misled investors about their commitment to DEI, not unlike allegations of "greenwashing," where companies are accused of overstating their environmental efforts.[298] Such allegations may form the basis for actions such as SEC investigations or shareholder derivative suits. In recent years, the SEC has shown an increased interest in regulating the disclosure of human capital management matters and requiring companies to disclose on their Form 10-K a description of their human capital resources that are material to their business, potentially opening the door to claims, investigations and lawsuits alleging failure to disclose or false or misleading statements related to such disclosures.[299]

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[295] *See, e.g.*, Dept. of Justice & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals* 4–6 (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

[296] *See* ABA Section of Antitrust Law, *Frequently Asked Antitrust Questions*, 2d ed., at 87–91; ABA Section of Antitrust Law, *Premerger Coordination: The Emerging Law of Gun-Jumping and Information Exchange* (William R. Vigdor ed. 2006); *Insilco Corp.,* No. C-3783 (F.T.C. Jan. 30, 1998), https://www.ftc.gov/sites/default/files/documents/cases/1998/01/insilcocmp.pdf; *cf. OmniCare, Inc.* v. *UnitedHealth Grp.*, 629 F.3d 697 (7th Cir. 2011).

[297] *See* Te-Ping Chen and Lauren Weber, *The Rise and Fall of the Chief Diversity Officer*, Wall Street J., July 21, 2023, https://www.wsj.com/articles/chief-diversity-officer-cdo-business-corporations-e110a82f ("[C]hief diversity officers have been more vulnerable to layoffs than their human resources counterparts, experiencing 40% higher turnover.").

[298] Dieter Holger, *Vodafone and Nestle Created Panels to Avoid 'Greenwashing' Allegations*, Wall Street J., May 23, 2023, https://www.wsj.com/articles/vodafone-and-nestle-created-panels-to-avoid-greenwashing-allegations-63fff965.

[299] 17 C.F.R. §§ 229, 239, and 240; Press Release, Sec. & Exch. Comm'n, *SEC Adopts Rule Amendments to Modernize Disclosures of Business, Legal Proceedings, and Risk Factors Under Regulation S-K*, Aug. 26, 2020, https://www.sec.gov/news/press-release/2020-192; Erin M. Connell, Jessica R.L. James, Necia Hobbes, *Achieving Workplace Equity in the New World of Pay Transparency and DEI Disclosures*, Practicing Law Institute, April 24, 2023, https://plus.pli.edu/Details/Details?fq=id:(373726-ATL5)#FID0EZG.

According to research by Bloomberg, over 40 lawsuits have been filed against companies in the last three years alleging that they have made false or misleading statements about DEI commitments.[300] For example, a 2020 shareholder derivative suit against Facebook's directors and officers alleged, among others, breach of fiduciary duty and SEC violations based on allegations that despite promoting diversity among higher ranks, Facebook actually lacked diversity at such ranks, thereby damaging its reputation.[301] Similarly, a derivative action was filed against Wells Fargo earlier this year alleging that it failed to properly implement a "Diverse Search Requirement" for highly paid employees as promised,[302] and a fiduciary duty claim was filed against Danaher Corp. by a large institutional investor in 2020 alleging that the company breached its diversity goals because it did not have a single Black board member at the time.[303] Other companies have faced similar suits.[304]

Although courts have thus far found broad corporate DEI commitments to be "non-actionable puffery or aspirational" and thus "immaterial," that may not always be the case, particularly given the SEC's and investors' increased focus on ESG.[305] In particular, the SEC is expected to soon require more detailed and robust disclosures regarding human capital measures, such as DEI.[306]

Next, although employers can and do face reverse discrimination claims, it is important to remember that Title VII was enacted to combat the insidious effects of racial discrimination against Black people and other under-represented groups,[307] the persistence of which means that the greatest risk of litigation continues to lie in traditional causes of action as opposed to reverse claims. This is supported by EEOC and state fair employment practice agencies' data, which indicates that employers are generally less likely to face reverse discrimination charges than more traditional discrimination charges from individuals and groups who have historically faced societal and structural discrimination and underrepresentation.[308] Employers continue to have an obligation under Title VII to

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[300] David Hood, *Lawsuits Challenge Corporate Diversity Pledges After Floyd*, Bloomberg Law, April 7, 2023, https://news.bloomberglaw.com/esg/host-of-companies-sued-alleging-unmet-diversity-equity-pledges.

[301] *See Facebook* v. *Zuckerberg*, 526 F. Supp. 3d 637 (N.D. Cal. Mar. 19, 2021).

[302] *Asbestos Workers Philadelphia Pension Fund* v. *Scharf*, No. 3:23-cv-01168 (N.D. Cal. Mar. 15, 2023).

[303] *In re: Danaher Corp. Shareholder Derivative Litigation*, No. 20-cv-02445 (D.D.C. Sept. 1, 2020).

[304] Erin M. Connell, Jessica R.L. James, and Necia Hobbes, *Achieving Workplace Equity in the New World of Pay Transparency and DEI Disclosures*, Practicing Law Institute, April 24, 2023, https://plus.pli.edu/Details/Details?fq=id:(373726-ATL5)#FID0EZG (discussing suits against Oracle, Qualcomm, and NortonLifeLock).

[305] *Id*.

[306] Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 FR 36654 (proposed June 17, 2022).

[307] *See, e.g.*, Paul M. Downing, *The Civil Rights Act of 1964: Legislative History; Pro and Con Arguments; Text*, Congressional Research Service (Aug. 1965), https://www.senate.gov/artandhistory/history/resources/pdf/CivilRights_CRSReport1965.pdf.

[308] *See, e.g.*, Donald Tomaskovic-Devey and Carly McCann, *Employment Discrimination Charge Rates: Variation and Sources*, Socius, 7 (2021), https://doi.org/10.1177/23780231211064389 (analyzing charge rates data from the EEOC and state fair employment practice agencies); *Wage Discrimination: Behind the Numbers*, Ctr. for Am. Progress, July 5, 2017, https://www.americanprogress.org/article/wage-discrimination-behind-numbers/ (same).

identify and remove barriers to equal employment opportunities, including policies that have a disparate impact on protected groups.

Additionally, given the recent surge in pay transparency legislation and requirements by state and local governments,[309] as well as efforts by the EEOC and OFCCP to collect employee pay data,[310] pay data and related information regarding job leveling and promotions will soon be under greater scrutiny than ever before. Importantly, the Equal Pay Act (EPA), which covers gender only, and a growing number of state and municipal laws arguably require employers not to rely on an individual's prior pay (which might have been based on societal or structural discrimination) in setting current pay, affirmatively bridging the gap to close any historical pay inequity.[311] Further, disparate impact cases under Title VII similarly hold employers liable for facially neutral practices that have a disparate impact on protected groups.[312]

Thus, the reality is that if employers abandon important DEI initiatives, they may perpetuate historic pay discrimination or other policies or practices that have a lopsided and unfair impact on certain protected classes, placing them at legal risk. The EEOC, OFCCP, parallel state agencies and private class action plaintiffs have instituted numerous investigations and lawsuits alleging as much.[313]

Support for such actions will likely remain, despite the *SFFA* decision. The Supreme Court Justices, though divided on the constitutionality of Harvard and UNC's

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[309] *See* Erin M. Connell, Jessica R.L. James, and Necia Hobbes, *supra* note 304 (summarizing recent legislation).

[310] *See, e.g.*, Press Release, Equal Emp't Opportunity Comm'n, *EEOC Announces Independent Study Confirming Pay Data Collection is a Key Tool to Fight Discrimination*, Jul. 28, 2022, https://www.eeoc.gov/newsroom/eeoc-announces-independent-study-confirming-pay-data-collection-key-tool-fight; *Compliance Review Scheduling Letter 1250-0003 30-day FINAL*, U.S. Dep't of Labor: Off. of Federal Contractor Compliance Programs, https://www.reginfo.gov/public/do/PRAViewIC?ref_nbr=202304-1250-001&icID=259464 (proposed scheduling letter would require information on contractors' "compensation analys[es]").

[311] *See, e.g.*, *Rizo* v. *Yovino*, 950 F.3d 1217, 1228 (9th Cir. 2020) ("setting wages based on prior pay [violates the EPA because it] risks perpetuating the history of sex-based wage discrimination"). The federal EPA applies only to gender-based disparities, but many states have extended parallel EPA protections to disparities based on other protected characteristics, including race. *See, e.g.*, Cal. Lab. Code § 1197.5; N.Y. Lab. Law § 194; 820 Ill. Comp. Stat. 112/10(a).

[312] *See, e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971) ("practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices").

[313] *See, e.g.*, *Morgan* v. *United States Soccer Fedn.*, 25 F.4th 1102 (9th Cir. 2022); *Bank of New York Mellon Corp. Will Pay $1.9M in Back Wages, Interest to Resolve Compensation Discrimination Allegations at Jersey City Location*, U.S. Dep't of Labor, Nov. 21, 2022, https://www.dol.gov/newsroom/releases/ofccp/ofccp20221121; *Google LLC, U.S. Department of Labor Settlement Resolves Alleged Pay, Hiring Discrimination at California, Washington State Locations*, U.S. Dep't of Labor, Feb. 1, 2021, https://www.dol.gov/newsroom/releases/ofccp/ofccp20210201; *Riot Games, Inc. Agrees to $100 Million Settlement and Systemic Reforms to Resolve Allegations of Workplace Sex Discrimination and Harassment*, Cal. Dep't of Fair Emp. & Hous. (Dec. 27, 2021); Complaint, *Ross v. Hewett Packard Enterprise, Co.*, No. 18CV337830 (Santa Clara County Super. Ct. Nov. 8, 2018); First Amended Complaint, *Cahill et al.* v. *Nike, Inc.*, No. 3:18-cv-01477-JR (D. Or) (Nov. 19, 2018) (ECF 42).

admissions policies, were united in acknowledging the long history of discrimination against certain racial groups.[314]

Finally, employers that abandon DEI initiatives may risk various forms of business and public relations backlash.[315] Indeed, 82 corporations and business groups signed amicus briefs that were filed in the litigation for the *SFFA* decision, in which they urged the Court to retain affirmative action in higher education on the basis that the erosion of diversity at the university level could have detrimental effects upon corporate DEI efforts, which in turn would be detrimental to their businesses and industries.[316] The potential negative impact to businesses who abandon diversity efforts is significant and may include missing out on top talent, reduced creativity and innovation, reduced financial performance, poorer customer service and market alignment, and poorer accountability contributing to the proliferation of corporate scandals.[317] Additionally, curtailing DEI efforts can lead to reduced investment as many investors are increasingly encouraging employers to implement DEI initiatives, and investors pay a premium for employers that do so.[318]

The potential negative consequences of retreating on DEI initiatives are, perhaps, the tip of the iceberg, given that the full benefits of many DEI initiatives have only recently been studied and measured, and their impacts fully understood and realized. Employers that consider abandoning such initiatives might well face additional downstream consequences ranging from decreased employee morale and satisfaction to increased

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[314] Justice Thomas acknowledged that he is "painfully aware of the social and economic ravages which have befallen my race and all who suffer discrimination[.]" *SFFA*, 143 S. Ct. at 2207–08 (Thomas, J., concurring). Justice Kavanaugh recognized that "racial discrimination still occurs, and the effects of past racial discrimination still persist." *Id*. at 2225 (Kavanaugh, J., concurring). Justice Jackson reported that historical and current racial disparities, emphasizing that "[g]ulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens. They were created in the distant past but have indisputably been passed down to the present day through the generations." *Id*. at 2263 (Jackson, J., dissenting).

[315] For additional information on the benefits of diversity, see section II of this Report.

[316] *See* Brief for Applied Materials, et al. as Amicus Curiae in Support of Respondents at 4, *SFFA*, 143 S. Ct. 2141 (2023); Brief for Major American Business Enterprises as Amicus Curiae Supporting Respondents at 9–12, *SFFA*, 143 S. Ct. 2141 (2023); Brief for Massachusetts Institute of Technology, Stanford University, International Business Machines Corp., and Aeris Communications, Inc as Amicus Curiae in Support of Respondents, *SFFA*, 143 S. Ct. 2141 (2023).

[317] *See, e.g.*, Simon Mundy and Patrick Temple-West, *How Corporate Scandals Get Swept Under The Rug*, Financial Times, Aug. 23, 2023, https://www.ft.com/content/75f53530-349d-43fc-81c9-dbe203f3134e.

[318] *See, e.g.*, McKinsey & Company, *The ESG Premium: New Perspectives on Value and Performance* (Feb. 2020), https://www.mckinsey.com/~/media/mckinsey/business%20functions/sustainability/our%20insights/the%20esg%20premium%20new%20perspectives%20on%20value%20and%20performance/the-esg-premium-new-perspectives-on-value-and-performance.pdf.

attrition rates[319] and, depending on the public relations consequences, even reduced consumer demand.[320]

C. Guidance for Private Employers

Since the majority opinion in the *SFFA* decision does not on its face alter the well-established law governing private employer decisions or workplace DEI programs, private employers continue to have a variety of tools available to lawfully foster diversity within their organizations.[321] Given the benefits of diversity for organizations and the business community discussed in section II, companies, including law firms, need not—and should not—abandon their commitment to advance DEI within their organizations, but should use the *SFFA* decision as an opportunity to review and enhance their workforce DEI initiatives to ensure that they are aligned with their recruitment, retention and development, and supplier diversity goals. Furthermore, given the current climate and changing legal landscape, it is prudent for companies to evaluate their DEI programs and initiatives to assess and mitigate any legal and reputational risks.

To proactively address and mitigate potential risk from future legal challenges, we recommend that companies: (1) communicate their continued commitment to their organization's DEI principles; (2) conduct a privileged assessment of their DEI programs (3) understand the internal and external perception of their DEI efforts; (4) identify compelling interests and develop measurable objectives for DEI programs; (5) increase controls over DEI disclosures; (6) properly educate and train managers and employees on DEI guardrails and practices; (7) collect, monitor and track DEI data; (8) ensure that DEI programs are enshrined within a framework of good governance and (9) monitor state and local laws, grassroot efforts and peer initiatives. Beyond risk mitigation, a recent report

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[319] *See, e.g.*, Steve Heisler, *How DEI Efforts Lead to Better Employee Retention*, Am. Marketing Ass'n, Oct. 10, 2020, https://www.ama.org/marketing-news/how-dei-efforts-lead-to-better-employee-retention/; Laura Wronski, *CNBC/SurveyMonkey Workforce Happiness Index: April 2021*, SurveyMonkey, Apr. 2021, https://www.surveymonkey.com/curiosity/cnbc-workforce-survey-april-2021; *DEI in the workplace: Why it's important for company culture*, Univ. of Pennsylvania College of Liberal and Professional Studies, March 22, 2023, https://lpsonline.sas.upenn.edu/features/dei-workplace-why-its-important-company-culture.

[320] In 2017, Fenty Beauty, a company founded by R&B singer Rihanna, made a tidal wave entry in the makeup industry by introducing a foundation that came in 40 diverse shades with the ambitious aim to match the skin tone of all women. Making over $100 million in sales in its first 40 days on the market, the brand changed the beauty industry and made many companies reexamine how to reach new customers and access untapped markets through diversity. Fenty's success may not be a fluke. According to a 2015 study, companies with a culturally diverse leadership team are more likely to develop new products. *Fenty Beauty: Broadening Makeup's Palette,* Time Magazine, Oct. 4, 2018, https://time.com/collection/genius-companies-2018/5412503/fenty-beauty/; Funmi Fetto, *How Fenty Beauty Changes the State of Play in the Beauty Industry*, British Vogue, April 6, 2020 https://www.vogue.co.uk/beauty/article/rihanna-fenty-beauty-diversity; Modupe Akinnawonu, *Why Having A Diverse Team Will Make Your Products Better*, N.Y. Times, May 23, 2017, https://open.nytimes.com/why-having-a-diverse-team-will-make-your-products-better-c73e7518f677.

[321] *See* Kenji Yoshino and David Glasgow*, What SCOTUS's Affirmative Action Decision Means for Corporate DEI*, Harvard Bus. Rev., Jul. 12, 2023, https://hbr.org/2023/07/what-scotuss-affirmative-action-decision-means-for-corporate-dei.

published by McKinsey & Company in partnership with the World Economic Forum[322] indicated that the success factors that yielded the "most significant, scalable, quantifiable and sustained impact" for minority groups across DEI initiatives were: "a nuanced understanding of the root causes, a meaningful definition of success, accountable and invested business leaders, a solution designed for its specific context, and rigorous tracking and course correction."[323] Accordingly, in addition to targeting risk mitigation, the guidance in this section can be adopted in order to strengthen the robustness and effectiveness of corporate DEI initiatives.

Communicate continued commitment to DEI. As an initial matter, private employers that remain committed to DEI may wish to assure employees that the *SFFA* decision does not impact their commitment to DEI principles and values. Leadership teams should be prepared to speak competently on the difference between race-conscious admissions considerations at educational institutions and legally permissible corporate DEI practices and policies. Additionally, employers should make sure that they communicate the tangible benefits of DEI generally, and of their DEI initiatives at their companies specifically. Companies can also reemphasize their DEI commitments to external stakeholders on dedicated DEI websites and through ESG reports.

Assess existing DEI programs. Companies should consider engaging external counsel to conduct legally privileged audits of their DEI programs in order to identify potential legal risks and seek advice on risk mitigation strategies. The scope of such review might include DEI-related policies and initiatives related to hiring, promotion and retention, compensation, goal setting, fellowships or internships, scholarships, mentorship and sponsorships, leadership development programs, diverse slate policies, compensation practices, supplier diversity programs and corporate giving programs.

The aim of such review is to confirm that: (1) these programs do not make or encourage decisions to be made on the basis of race or another protected characteristic; (2) diversity is appropriately and accurately defined across the enterprise; (3) internal and external written materials regarding DEI objectives and programs are accurate, consistent and, where appropriate, include the business-related criteria being used for evaluation; (4) ERGs are clearly described as voluntary, employee-led and open to all employees; and (5) appropriate oversight is in place for all DEI-related public statements (*e.g.*, vetting by DEI leads, legal teams and other relevant stakeholders). The assessment should extend beyond how relevant DEI programs are described, but also consider how they are understood and applied by decisionmakers. This is why robust training on DEI, especially at the manager level, is critical. For businesses with global operations, consideration should be given to

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[322] *See* McKinsey & Company, *Diversity, Equity and Inclusion Lighthouses 2023*, (Jan. 13, 2023), https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-equity-and-inclusion-lighthouses-2023 (The Global Parity Alliance, a cross-industry group committed to advancing DEI globally, launched the DEI Lighthouse Programme in May 2022 to "identify initiatives that have resulted in significant, quantifiable, scalable and sustainable impact, and uncover what those initiatives have in common. The ambition is to equip leaders with these insights, contributing to faster DEI impact across the global business community.").

the legality and appropriateness of such reviews in jurisdictions outside of the United States.

While not traditionally considered to be within the parameters of a "DEI program," understanding how employees—and particularly underrepresented employees—are compensated is incredibly important. Thus, companies should also consider engaging in regular and robust privileged pay equity analyses.[324] Pay equity analyses can help businesses to identify potential legal risks and consider any need for adjustments to compensation systems or employee pay, as well as whether there should be modifications to job structure or descriptions, whether particular managers or departments are presenting challenges, and whether (and for whom) implicit bias or other DEI training may be necessary.[325]

Assess perceptions of DEI efforts. The assessment of DEI programs described above should also include an analysis of the *perception* of those programs by both employees and external stakeholders. Employers should consider including DEI questions in their annual and pulse surveys to better understand how employees perceive their DEI efforts. This qualitative data has utility alongside quantitative demographic data in understanding potential gaps and areas of opportunity.[326]

Science-backed "engagement interviews" are another method to assess whether the company's talent, including its underrepresented employees, believe they have the same opportunities to stay and advance as others.[327] An engagement interview is an informal one-on-one meeting between a group leader or supervisor and a junior employee.[328] The purpose is to ensure that each member of the team, with an intentional focus on historically marginalized groups, receives a direct touch point from a senior employee who can gauge their engagement, productivity, satisfaction and happiness at the company and follow up on any barriers to advancement after the interview.[329] These simple but effective interviews—and the strategic actions that follow—help engage employees and often mitigate the risk of losing talent.[330] These interviews also set a foundation of continuous

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[324] *See, e.g.*, Erin M. Connell, Jessica R.L. James & Necia Hobbes, *Achieving Workplace Equity in the New World of Pay Transparency and DEI Disclosures*, Practicing Law Institute, April 24, 2023, https://plus.pli.edu/Details/Details?fq=id:(373726-ATL5); Lisa Burden, *Protecting privilege when conducting a pay audit*, Legal Dive, Jan. 13, 2023, https://www.legaldive.com/news/attorney-client-privilege-pay-audit-pay-disparities/640394/.

[325] *See, e.g.*, Erin M. Connell, *supra* note 304.

[326] *See* Lily Zheng, *To Make Lasting Progress on DEI, Measure Outcomes*, Harvard Bus. Rev., Jan. 27, 2023, https://hbr.org/2023/01/to-make-lasting-progress-on-dei-measure-outcomes.

[327] *See How to Use Stay Interviews to Improve Retention*, Monster, https://hiring.monster.com/resources/recruiting-strategies/interviewing-candidates/stay-interviews/ (last accessed Aug. 2, 2023); Richard Finnegan, *How to Conduct Stay Interviews: 5 Key Questions*, SHRM, https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/how-to-conduct-stay-interviews-part-2.aspx (last accessed Aug. 2, 2023); *Stay Interviews – An Important Tool for Boosting Law Firm Retention*, Thomson Reuters, April 14, 2022, https://legal.thomsonreuters.com/blog/conducting-stay-interviews.

[328] *See generally id.*

[329] *See generally id.*

[330] *See generally id.*

communication and collaboration for the future to sustain employees' productivity, upward career trajectory and retention.[331]

To understand external stakeholder views, employers can use surveys, perform social media and news sweeps and review external ratings. For example, Forbes partnered with Statista to create a list of America's Best Employers for Diversity based on surveys of over 45,000 U.S. employees.[332]

Identify interests and develop measurable objectives. The *SFFA* decision found that the benefits of diversity proffered by Harvard and UNC—namely, "training future leaders in the public and private sectors," "preparing graduates to 'adapt to an increasingly pluralistic society,'" "producing new knowledge stemming from diverse outlooks," "promoting the robust exchange of ideas"—while "commendable," "plainly worthy" goals, were not sufficiently measurable to pass strict scrutiny.[333] While DEI efforts by most private employers are not subject to strict scrutiny, it may be helpful for employers to identify the specific benefits of diversity in their workplaces and to develop programs and initiatives specifically tailored to further those benefits. Identifying such benefits can help employers demonstrate the legitimate business purpose and show how these programs contribute to the profitability of the business if their DEI efforts are challenged. It may also be helpful for employers to identify how DEI programs help address barriers to employment opportunities that would otherwise exist.

For more information on the benefits of diversity in workplaces, see section II.

Increase internal controls. Many challenges to DEI initiatives may arise from either internal communications or public disclosures about a company's DEI initiatives. Careful attention must be paid to appropriately and accurately describing those initiatives and the implications of making such disclosures. Statements can reiterate the company's commitment to DEI and open up opportunities, and describe aspirational diversity goals and how the company will achieve these goals through lawful means. Corporations should avoid statements which could be viewed as setting rigid numerical quotas or which place pressure on managers or recruiting and hiring professionals to achieve particular results.

Strong governance and leadership is essential in order to ensure that DEI messaging is accurate and consistent throughout the organization. For example, corporations should ensure that there are multiple, focused layers of review for all material communications including those from Communications or Marketing departments, Investor Relations and HR. All public—and internal—messaging should be reviewed by in-house legal teams to ensure alignment with commitments and previous messaging, as well as compliance with state and local laws, including discriminatory advertising.

Implement education and training for all key partners. Companies should confirm that recruiters, managers and employees, and those tasked with making

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[331] *See generally id.*

[332] Rachel Rabkin Peachman, *America's Best Employers for Diversity*, Forbes, April 25, 2023, https://www.forbes.com/lists/best-employers-diversity/?sh=199e4d226468.

[333] 600 U.S. 72 (2023).

employment decisions understand the purpose of DEI programs as well as the key legal principles that govern those programs and perform their functions in a way that mitigates legal and reputational risks. Diversity, anti-discrimination, anti-harassment and implicit bias trainings, particularly for hiring managers, recruiters, members of compensation teams and similar, should be regularly updated. In the absence of a valid affirmative action plan, hiring managers and human resource professionals should be instructed that all employment decisions should be made based on candidate qualifications, not protected characteristics, and the basis for all employment decisions should be well documented. Managers and recruiters should neither be punished nor rewarded for hiring or promoting from underrepresented groups.

Research shows that unconscious bias and other stand-alone DEI training is mostly ineffective at cultivating and sustaining fair and equitable workplaces.[334] This type of training does not generally spur actions that lead to true behavioral change.[335] Instead, actively learning a new perspective—namely through empathy and proximity—has been shown to be one of the most effective methods of ultimately changing behavior and building an inclusive culture.[336] By creating opportunities for individuals to share their unique backgrounds and experiences, organizations can increase awareness of diversity challenges, create an openness to new perspectives and foster a sense of belonging.

For example, several law firms and in-house legal departments are currently piloting a research-based experiential learning initiative called the "DEI A/V Club." It introduces participants to a variety of DEI perspectives with the goal of fostering conversation, understanding and connection across their practice areas and legal teams. The DEI A/V Club is modeled on a book club format, offering a curated roster of relevant TED talks, podcasts and more. Participants meet monthly for facilitated conversations on topics including unconscious bias, racism, microaggressions and pay equity. All participating legal organizations have reported that these forums have been significantly more effective than prior "one-off" training sessions in building a deeper understanding of the importance of diversity and fair talent systems as well as strengthening connections across their teams.

Appropriately collect, track, manage and utilize DEI data. The ability to measure the efficacy of DEI programs through data increases organizational awareness of the performance of such programs and provides guidance on remedial actions that can be taken to address gaps. In addition to representation data, it is also important for organizations to measure the outcomes of their hiring, retention and promotion practices as well as their specific diversity initiatives and to periodically assess such data to identify and better understand patterns, gaps and opportunities for improvement regarding the same.

For example, a pipeline program targeted at underrepresented talent may not directly lead to increased diversity in the company. Assessing the demographic data of the participants, as well as, who applies to a full-time position; who is offered the position; and

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[334] Francesca Gino & Katherine Coffman, *Unconscious Bias Training That Works*, Harvard Bus. Rev., Sept.-Oct. 2021, https://hbr.org/2021/09/unconscious-bias-training-that-works?registration=success.
[335] *See id.*
[336] *See id.*

who accepts it, can help the organization better understand the impact of the program and any processes that can be enhanced.

Organizations should carefully consider who has access to demographic data, both internally and externally, and for what purpose it is shared. Once an organization gathers data and conducts an appropriate review and analysis, they should be prepared to address concerning issues.

Foster good practices. Senior leadership teams should fully understand and be invested in achieving the objectives of their organization's DEI programs, which should be well-documented. Management should also be regularly updated through appropriate reporting channels on diversity-focused programs and challenges as they arise. Information reported to the leadership team should include, among others, demographic data relating to the workforce, promotions and attrition, number of complaints relating to discrimination or harassment, if any, and whether such claims were substantiated and the discipline imposed, and results from DEI assessments or other employee surveys.

Monitor changes in state and local laws and initiatives. In this dynamic environment, employers should be aware of state and local legislation and actions by state attorneys general aimed at both protecting and limiting DEI programs and any changes thereto. Companies should also monitor grassroots efforts—for example, by activist groups and shareholders. While some groups may seek to enforce laws that provide equal opportunity, others may seek to challenge corporate DEI initiatives and commitments. These efforts may be brought forth through campaigns, proxy battles or backlash efforts described above and will continue to evolve in the aftermath of the *SFFA* decision.

It may also be helpful for organizations to benchmark their peers' DEI programs, assessments and audits and how they communicate them. Participation in forums and memberships that provide opportunities to share ideas and brainstorm can also aid in developing and implementing robust DEI programming. However, as discussed above, companies should be mindful of the risks associated with collaboration in the context of sharing sensitive organizational information. Organizations should consult with internal or outside counsel regarding potential antitrust sensitivities.

Rely on lawful strategies to achieve goals. In addition to assessing risks, organizations should also continue to rely on lawful strategies to achieve workforce DEI goals relating to: (1) outreach and recruitment efforts; (2) retention; and (3) the advancement of underrepresented groups.

First, fostering a diverse workforce may become increasingly challenging in the wake of the *SFFA* decision to the extent that a decline in the number of diverse students attending colleges and universities, in turn, reduces the pipeline of diverse candidates for employment. Organizations must therefore reconsider and renew efforts to improve outreach and recruiting of diverse talent. Importantly, the *SFFA* decision did not foreclose efforts to develop a diverse pipeline and applicant pool, *i.e.*, non–zero sum efforts. Thus, outreach to and recruiting of diverse talent remains not only lawful, but crucial. Organizations seeking to amplify opportunities to attract and recruit diverse talent should

consider: (1) leveraging inclusive job postings; (2) expanding recruiting efforts beyond schools they have traditionally focused on; (3) targeting outreach to diverse student organizations and diverse career fairs; (4) recruiting candidates who have taken alternate paths in school or their careers; (5) implementing structural behavioral interviews; and (6) engaging with pipeline programs for high school and college students.

Second, preparing job postings to ensure that they utilize inclusive language is one of the first steps organizations can take in order to lawfully recruit diverse talent. Although Title VII prohibits employers from stating a preference for race or gender in job postings, it is lawful to encourage diverse and experienced candidates to apply for open positions by using inclusive language.

Employers can use job postings to highlight their commitment to fostering a welcoming environment for diverse candidates, including by explicitly stating their commitment to diversity and inclusion, listing or linking ERGs, or reiterating organizational efforts to attract and retain diverse talent (such as the organization's DEI initiatives).[337] Employers should also consider eliminating unnecessary technical jargon—provided it is not necessary for communicating the role's responsibilities—and gender-focused language from job postings.[338] Along with creating ambiguity in job responsibilities and skill requirements, using unnecessary technical jargon may have the effect of deterring otherwise qualified individuals, including diverse prospective applicants, from pursuing certain roles, resulting in reduced applications from underrepresented groups.[339] Similarly, using gender-based language may make it more difficult to attract and retain qualified employees from all groups.

Companies may also consider that diversity includes considerations beyond race and gender, such as SES, first-generation professionals, physical ability and geographic diversity. Utilizing a more expansive definition of diversity may make DEI programs more inclusive, provide additional opportunities for engagement with underrepresented groups and promote allyship.

Third, private employers can enhance the quality of their applicant pools and increase diversity by focusing on skills and qualifications that are relevant to effectively practicing law and expanding the range of schools from which they recruit via on-campus interviews.

By way of example, large national law firms[340] direct a significant amount of energy and resources towards recruiting from the top-ranked schools, using sources such

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[337] *See* Becca Carnahan, *6 Best Practices for Creating an Inclusive and Equitable Interview Process*, Harvard Bus. Sch., May 25, 2023, https://www.hbs.edu/recruiting/insights-and-advice/blog/post/6-best-practices-to-creating-inclusive-and-equitable-interview-processes.

[338] *See id.*

[339] *See id.*

[340] Llana Kowarski, *Why Big Law Firms Care About Which Law School You Attend*, U.S. News & World Report, Aug. 1, 2018, https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2018-08-01/why-big-law-firms-care-about-which-law-school-you-attend.

as the U.S. News & World Report law school rankings.[341] Underrepresented students, including Black, Hispanic and Native American students face increased challenges in accessing quality education, mentorship, tutoring, test-prep books, and LSAT prep courses,[342] contributing to underrepresentation at the top law schools.[343] While many Black, Hispanic and other underrepresented groups do attend top-ranked law schools, according to a recent study, the 23 most racially and ethnically diverse law schools all fall outside of the top 50 schools in the U.S. News & World Report rankings.[344]

Building strategic partnerships with college and university career services offices beyond the top-ranked schools will enable organizations to more fully consider talented individuals who are matriculating at a broader set of schools and enhance the diversity of applicant pools for employers.[345] For instance, in addition to pursuing underrepresented groups and other students at top-ranked elite schools, employers should consider directing recruiting efforts at a broader set of schools including, but not limited to, HBCUs, regional schools and other schools with diverse student bodies. Howard University School of Law, an HBCU, is typically outside of the top 50 schools in the U.S. News & World Report rankings, but has strong job placement statistics sending over 50 percent of its graduating class to national law firms, primarily in the New York, Washington, D.C. and California markets.[346] Similarly, the City University of New York School of Law is recognized as one of the most diverse law schools and has placed most of its graduates in full-time employment in New York.[347]

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[341] *See* Robert Morse, Kenneth Hines, Eric Brooks & Sam Wellington, *Methodology: 2023–2024 Best Law Schools Rankings,* U.S. News & World Report, May 10, 2023, https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology.

[342] *See, e.g.*, Marisa Manzi & Nina Totenberg, *'Already Behind': Diversifying The Legal Profession Starts Before The LSAT*, Nat'l Pub. Radio, Dec. 22, 2020, https://www.npr.org/2020/12/22/944434661/already-behind-diversifying-the-legal-profession-starts-before-the-lsat; *see also* Jay Rosner, *Op-Ed: The legal profession lacks diversity, and the LSAT makes matters worse*, L.A. Times, Dec. 13, 2022, https://www.latimes.com/opinion/story/2022-12-13/lsat-law-school-diversity-aba.

[343] *See, e.g.*, Phoebe Haddon A. & Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 St. John's L. Rev. 41 (2006).

[344] *See* Sarah Wood, *23 Racially and Ethnically Diverse Law Schools*, U.S. News & World Report, July 13, 2023, https://www.usnews.com/education/best-graduate-schools/the-short-list-grad-school/articles/racially-and-ethnically-diverse-law-schools.

[345] *See* Karen Sloan, *Is Big Law's Addiction to Elite Schools Hobbling Diversity Efforts*, Reuters, Oct. 18, 2021 https://www.reuters.com/legal/legalindustry/is-big-laws-addiction-t-14-hobbling-diversity-efforts-2021-10-18 ("Prestige and ability don't go hand-in-hand . . . If they really want to expand their ranks of Black associates, law firms should recruit from more schools, consider candidates outside the very top of their class and not wait for on-campus interviews to build relationships with diverse law students.").

[346] *Law School Transparency*, Howard Univ., https://www.lawschooltransparency.com/schools/howard.

[347] CUNY School of Law Newsroom, *CUNY Law Named Most Diverse Law School in the Nation,* March 13, 2023, https://www.law.cuny.edu/newsroom_post/cuny-law-named-most-diverse-law-school-in-the-nation/#:~:text=CUNY%20School%20of%20Law%20has,preLaw%20magazine's%20winter%202023%20issue; *Employment Summary for 2022 Graduates*, Am. Bar Ass'n, May 6, 2023, https://www.law.cuny.edu/wp-content/uploads/page-assets/career/employment-statistics/ABA-Summary-Employment-Report-_-2022-Class-CUNY-Law.pdf.

In addition to recruiting through on-campus interviews, employers may consider other ways to recruit diverse students such as developing and hosting mock interview programs as well as receptions and mentoring programs that include diverse students. Employers may also want to consider thoughtful and deliberate interactions with law school career services and faculty members to identify and encourage diverse applicants. While these recommendations focus on law firm recruitment, these strategies can be similarly applied to other private employers.

Fourth, private employers can also make connections with students and recruit through strategic sponsorships, thought leadership and events coordinated with the various student organizations at colleges and universities. Stanford Law School, for example, has over 60 student organizations, many of which are diversity based.[348] Most law schools—and undergraduate schools—have similar organizations on campus, and there are likewise national chapters which may also provide employers opportunities for partnership and recruitment.[349]

Employers can also direct recruiting beyond the schools themselves, by participating in non-traditional career fairs. For example, New York City has hosted an Annual Diversity Employment Day Career Fair and Roundtable for 23 years.[350] For law firms, such fairs include the highly attended Lavender Law[351] and the Minority Corporate Counsel Association's virtual diversity career fair.[352] Similar diversity-focused student job fairs exist at the regional and market-specific level.[353] These organizations and job fairs have long-standing commitments to breaking down barriers and increasing diversity and

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[348] *See, e.g.*, Asian and Pacific Islander Law Students Association (APILSA), Black Law Students Association, Disability and Mental Health Network at Stanford (DAMNS), Middle Eastern and South Asian Law Students Association (MESALSA), Muslim Law Students Association (MLSA), Native American Law Students Association (NALSA), and Older and Wiser Law Students (OWLS). *See* Stanford Law School, *Directory: Organizations*, https://law.stanford.edu/organizations/?tax_and_terms=308&page=1 (last accessed Aug. 7, 2023).

[349] *See, e.g.*, National Asian Pacific American Law Student Association, *About Us*, https://www.napalsa.com/ (last accessed Aug. 7, 2023); National Association of Law Students With Disabilities, *About Us*, http://www.nalswd.org/about-us.html (last accessed Aug. 7, 2023); National Black Law Student Association, *About Us*, https://www.nblsa.org/about (last accessed Aug. 7, 2023); National Latino/a Law Students Association, *About Us*, https://www.nllsa.org/mission (last accessed Aug. 7, 2023); National Muslim Law Student Association, *About Us*, https://www.nmlsa.com/ (last accessed Aug. 7, 2023); National Native American Law Students Association, *About Us*, https://nationalnalsa.org/bylaws (last accessed Aug. 7, 2023); North American South Asian Law Students Association, *About Us*, https://www.nasalsa.org/ (last accessed Aug. 7, 2023).

[350] *See* City Career Fair, *23rd Annual Diversity Employment Day Career Fair and Roundtables*, https://citycareerfair.com/newyork/ (last accessed Aug. 17, 2023).

[351] *See* The LGBTQ+ Bar, *The 2024 Lavender Law Conference & Career Fair*, https://lgbtqbar.org/annual/career-fair (last accessed Aug. 7, 2023).

[352] *See* MCCA, *MCCA Virtual Diversity Career Fair*, https://mcca.com/virtual-diversity-career-fair/ (last accessed Aug. 7, 2023).

[353] *See, e.g.*, Southeastern Minority Job Fair, *Home*, https://semjf.org/ (last accessed Aug. 7, 2023); UC Davis School of Law, *Job Fairs*, https://law.ucdavis.edu/career-services/oci/job-fairs (last accessed Aug. 7, 2023) (Rocky Mountain Area Diversity Summit & Legal Career Fair); Northwest Minority Job Fair, http://www.nwmjf.org/ (last accessed Aug. 7, 2023).

provide yet another way to broaden an applicant pool beyond the traditional on-campus interview model.[354]

Fifth, private employers may consider revisiting traditional assumptions about characteristics that are needed to perform jobs for which they are hiring or indicative of employee success on the job. For example, while a track-record of academic success can be a useful data point, it is not the only factor that can assist in determining success on the job.

For example, over-reliance on a student's GPA might not be appropriate or determinative of a student's career outcome, and is often at the expense of evaluating a prospect's qualities and abilities more holistically. Identifying and focusing the recruitment and hiring process on criteria and qualifications that are necessary to perform the job,[355] and eliminating those that operate as unnecessary barriers to entry can be an effective strategy to expand the pool of diverse candidates[356]—for example, by looking at whether students have developed practical lawyering skills through clinics, term-time internships or other extracurricular activities.[357]

Recruiting candidates who have taken non-traditional or non-linear career paths may also help to advance an employer's diversity goals. For example, employers have created "returnship" programs, helping people to re-enter the workforce after a long break. These programs help to incentivize the hiring of candidates who may be otherwise overlooked despite being fully qualified.[358] In the legal industry, the OnRamp Fellowship is a platform that law firms and legal departments have used to recruit, as fellows are lawyers who have taken breaks from the workforce and are now looking to make a return.[359] The OnRamp program is effective at re-immersing diverse talent with legal organizations, as participants most often receive full time offers.[360] Indeed, since the program's inception in 2014, over 115 returning lawyers, one-third of whom were attorneys of color, were matched with law firms and legal organizations for paid fellowships; 89 percent of these fellows received offers to join firms on a full-time basis.[361] OnRamp plans to continue its efforts, with the goal of returning women lawyers—who

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[354] Another resource for law firms is the Leadership Council on Legal Diversity, an organization of more than 400 corporate chief legal officers and law firm managing partners, which is devoted to creating a more equitable and diverse legal profession. *See* Leadership Council on Legal Diversity, *Our Mission*, https://www.lcld.com/about/ (last accessed Aug. 7, 2023).

[355] *See, e.g.*, *id.*

[356] *Id.*

[357] *Id.*

[358] Kathryn Vasal, *These Return-to-Work Programs Could Help Moms Reenter the Workforce*, CNN, Jun. 1, 2021, https://www.cnn.com/2021/06/01/success/returnship-programs/index.html.

[359] *See* Dylan Jackson, *39 Firms and Legal Departments Team Up to Bring Women Back to the Legal Workforce*, The Am. Lawyer, No. 1, 2021, https://www.law.com/americanlawyer/2021/11/01/36-firms-and-legal-departments-team-up-to-bring-women-back-to-the-legal-workforce/; Sara Randazzo, *For Female Lawyers, a Way Back In After Taking Time Off*, Wall Street J., May 26, 2016, https://www.wsj.com/articles/BL-LB-53875.

[360] *See* OnRamp Fellowship, *About the OnRamp Fellowship*, , https://onrampfellowship.com/about/ (last accessed July 31, 2023).

[361] *See id.*

often experience high levels of attrition due to a lack of flexible working arrangements—to the workplace.[362]

Sixth, employers may also consider requiring interviewers to interview candidates using structured behavioral interview questions. Behavioral interviews can be a lawful way to assess candidates based on their prior conduct in specific professional settings. As opposed to situational interviewing, behavioral interviewing permits interviewers to inquire about a candidate's past behavior to forecast future behavior rather than merely relying on hypotheticals.[363] It focuses on actual experiences to learn about an applicant's specific skills, abilities, behaviors and knowledge. For instance, the interviewer might ask for an example of a time they asked for feedback and why, or for an example of when the applicant had to work with someone who was difficult to get along with, and how they handled interactions with that person. By focusing on past achievements and behaviors, interviewers are less likely to be influenced by characteristics such as race and gender when assessing candidates.

Seventh, private employers may consider working more deliberately to foster greater exposure about career options and develop and enhance pipeline programs at the many stages of education that can improve diversity at their workplace. This can start as early as high school through internships or shadowing opportunities, offering college-bound high school students the opportunity to gain exposure to corporate work environments and professional experiences that will prepare the students for college and beyond. In order to increase relationships with diverse employment candidates, employers should consider building active relationships with associations, including affinity bars and organizations that have DEI "school-to-workforce" pipeline programs in place. Further, law firms can consider supporting urban debate leagues, which have been shown to have meaningful results in enhancing literacy and graduation rates for young students of color.[364]

Law firms can also establish pre-law fellowship programs that hire college students to work at the firm and provide them with exposure to career opportunities in areas they may not have had information or access to, as well as critical mentorship opportunities in

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[362] *See* Catherine Baksi, *Bridging Gender Inequality Through 'Returnships'*, Raconteur Oct. 31, 2016, https://www.raconteur.net/diversity-and-inclusion-2016/bridging-gender-inequality-through-returnships. As stated on the OnRamp website, "[i]n 2021, Diversity Lab introduced OnRamp 200—the newest iteration of the Fellowship. Through this collective legal industry movement, Diversity Lab will work with legal organizations to bring 200 women lawyers back into the legal profession by 2025." *Id.* More generally, companies interested in hiring candidates that have taken non-linear paths have surged in recent years. *See* Caroline Castrillon, *Why Non-Linear Career Paths Are The Future*, Forbes, Feb. 26, 2023), https://www.forbes.com/sites/carolinecastrillon/2023/02/26/why-non-linear-career-paths-are-the-future/?sh=60bc70113a90. Abandoning a more traditional hiring approach, many companies have embraced a "skills-based" hiring approach. *Id.* This new approach has had the effect of expanding the talent pool, tearing through the "paper ceiling" that often holds back qualified, non-traditional candidates from being considered for roles. *Id.*

[363] *See* Jessica Elliott, *What Is Behavioral Interviewing? And How to Use It to Hire for Your Business*, CO – U.S. Chamber of Commerce, July 27, 2022, https://www.uschamber.com/co/run/human-resources/behavioral-interviewing.

[364] Briana Mezuk, *Urban Debate and High School Educational Outcomes for African American Males: The Case of the Chicago Debate League*, 78 J. Negro Ed. 290 (2009).

their pre-law years. In addition to giving students exposure to the corporate work environment, these programs—and other similar fellowships—can provide opportunities to engage current employees in a meaningful way. Employees can be asked to serve as a resource to assist students with school applications and hold workshops to support students as they continue their academic careers and navigate the application process for college and law school. Employers can also partner with organizations that provide career exposure, professional development and educational programs for students interested in pursuing legal careers.[365] For example, the ABA's National Pipeline Diversity Initiatives Directory—a searchable database of projects, programs and initiatives that encourages and equips diverse students to pursue legal careers—can serve as a starting point to access these programs.[366]

Finally, although being intentional in casting a wide net for talent is an obvious and necessary step to diversify a workplace, it is hardly sufficient. Employers should also implement programs aimed at the development, retention and advancement of diverse talent within their organizations and promote an inclusive work environment.[367] An effective development and retention program will increase the likelihood that diverse employees choose to stay.

To that end, development and retention programs will typically include a range of tools, including: (1) affinity groups and ERGs; (2) advice and mentorship programs coupled with feedback and evaluation; (3) formal training programs; (4) equitable work allocation systems; and (5) networking opportunities. While the role of each of these tools is discussed briefly below, this section is not intended to be a comprehensive treatment of the full range of development and retention tools available to employers, about which much has been written.[368]

Many employers sponsor affinity groups for their employees, including for employees from certain racial and ethnic backgrounds, or based on religion, gender, or sexual orientation. Some employers also sponsor groups for first-generation professionals, recognizing that such employees (who may hail from widely different backgrounds

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[365] *See, e.g.*, *Thurgood Marshall Summer Law Internship Program*, https://www.nycbar.org/serving-the-community/diversity-and-inclusion/student-pipeline-programs/programs/thurgood-marshall-summer-law-internship.

[366] *See National Pipeline Diversity Initiatives Directory*, American Bar Association, americanbar.org/groups/diversity/diversity_pipeline/projects_initiatives/pipeline_diversity_directory/.

[367] *See* Minority Corporate Counsel Association, *U.S. Law Firm Diversity Survey Report 2022* at 20 ("Beyond outreach and recruiting, firms need to focus on their retention of attorneys, as high attrition of attorneys from underrepresented racial/ethnic groups will lead to lower diversity over time and decreasing levels of diversity at higher-level positions in the firm."), https://mcca.com/wp-content/uploads/2023/02/MCCA_US-Law-Firm-Diversity-Survey-2022.pdf.

[368] *See, e.g.*, William D. Henderson & Christopher Zorn, *Talent Analytics White Paper: Evidence-Based Strategies for Retaining High-Performing Midlevel Associates*, ALM Legal Intelligence, Sept. 2012, https://www.legalevolution.org/wp-content/uploads/sites/262/2021/07/ALM-Strategies-for-Retaining-Associate-Talent-Whitepaper.pdf; Terri Mottershead, *Innovating Talent Management in Law Firms*, Law Practice Today, Nov. 14, 2016, https://www.lawpracticetoday.org/article/innovating-talent-management-law-firms/.

themselves) often encounter similar issues integrating into a high-pressure workspace where behavioral expectations may be opaque.

Affinity groups can be very useful tools that support a diverse and inclusive work environment. First, they can assist underrepresented employees in avoiding feelings of isolation and imposter syndrome (*i.e.*, feeling like "there aren't a lot of people like me here") and provide a forum to discuss issues of common concern, offer informal mentorship from more senior diverse employees who can demystify the workplace for new entrants, and sponsor programming that can educate the broader work community on the issues, challenges and achievements of particular groups. Having affinity group leaders that can effectively communicate concerns to leadership is a powerful tool for employers to stay ahead of issues before they become more difficult to address.

Firms and companies can also leverage the impact of ERGs by looking for opportunities for ERGs to engage with each other and with non-diverse allies in the workplace. This can help in exploring issues and insights around intersectionality, as well as help bring greater visibility to workplace challenges that are shared across difference and those whose impact is felt more by some groups than by others. It can be valuable for ERGs to have one or more partner or executive non-diverse allies who affiliate with it in order to understand the goals and concerns of the group and provide perspectives, including on communications about the group within the firm. Other steps to strengthen the impact of ERGs in the DEI mission, and mitigate potential risks related to having exclusive programs, would include (1) opening participation in certain ERG gatherings to allies or not limiting inclusion or participation to members of specific demographic groups; (2) where appropriate, having group programming open to all members of the community to facilitate understanding and discussion and (3) having multiple affinity groups co-promote events to increase discovery of areas of common ground.

Effective advising and mentorship, coupled with constructive and timely feedback on performance, can be transformative in improving the quality of a new employee's experience and development, especially for employees from underrepresented groups. Mentors can provide guidance on how maximize learning and growth opportunities and navigate challenges, as well as give practical, industry-specific advice about the demands of the profession or company. As noted above, the degree to which an employee feels that someone at their company or firm is invested in their career is often a defining factor in whether they view their experience as positive.

To function well, management and partners acting as advisors and mentors should be trained in providing effective feedback and counseling (including across difference) and given a template of key questions to ask at different stages of an employee's career. In addition, there should be accountability to the organization's professional development team to ensure that these advisors and mentors are following through with their responsibilities and encourage switching up pairings when they are clearly not working.

Effective advice and mentorship programs should seek to achieve a range of objectives, including:

- Understanding issues the employee is experiencing and helping to resolve them;

- Clarifying commitment and performance expectations and behavioral norms;

- Getting to know the employee as an individual;

- Helping the employee assess their medium- and long-term career goals and identifying ways to position them to achieve those, whether for internal promotion opportunities or to pursue external opportunities in the future;

- Identifying important skills that need developing and helping the employee identify the work opportunities that will most directly improve those skills; and

- For high-potential employees that manifest the talent to become vice presidents, directors and partners, ensuring that firm or company leadership has them on their radar to track and develop (more on this below).

Although formal mentorship programs and practices should encompass and be available to all employees, diverse employees and first-generation professionals stand to benefit the most due to the obstacles that implicit bias (or lack of familiarity with the corporate world) may create in the formation of more informal relationships. Thus, mentorship can prevent promising first-generation professionals and/or employees from underrepresented backgrounds from leaving merely because they "fell through the cracks" of the talent tracking process. Within the legal profession, it can also help demystify the partnership process, assist attorneys in understanding their own partnership chances and identify additional skills or types of matters considered helpful to advance. For many of these employees, mentors ensure that they feel connected to someone at the company who is visibly invested in their career.

Advice and mentorship is most effective when it works together with a robust evaluation and feedback process. Effective feedback requires timeliness, candor and preparation and should convey specific and concrete suggestions for improvement. Ideally, any messaging from advisors and mentors would be informed by a holistic review of the employee's feedback messages so that the company can speak with one voice to provide guidance and a realistic assessment of future prospects. As noted above, it will be important for advisors and reviewers to be trained in how to give feedback and advice and to spot instances where misunderstandings are negatively impacting development.

Formal training can play a beneficial role in acculturating and developing new employees. In any industry, formal training can level the playing field for new entrants by providing clear guidance and instruction on skills and knowledge development, as well as soft skills such as working in teams, negotiation and client service. Employers with comprehensive training programs will have a better chance of developing and retaining their people, including diverse employees, because they will be better able to perform at

an earlier stage. The legal profession has traditionally relied primarily on an "apprenticeship model" of learning by doing. However, that approach in isolation can lead to inequitable outcomes depending on the distribution of work opportunities (more on that below) and the quality of feedback and senior lawyer interaction. For any workplace that relies on an apprenticeship model, some of the biases that could arise can be lessened by equal access to formal training.

Although all the tools described above can be powerful aids to the development and retention of new employees, access to challenging and "visible" work opportunities is crucial.[369] Substantive work experience tests and improves technical and soft skills, provides exposure to leadership and leadership opportunities and consequently offers an opportunity to forge relationships that will in turn lead to future work opportunities.[370] As a result, ensuring that work is fairly allocated is of paramount importance to maximizing development prospects. Not surprisingly, equitable work allocation is not just a tool for development but for retention. Companies should therefore ensure that people managers are allocating work and new opportunities equitably amongst their teams. A company's HR or other people organization should monitor evaluations and feedback processes to ensure that employees—in particular those from historically underrepresented backgrounds—are getting access to meaningful work and opportunities for advancement.

For law firms, studies show that satisfaction with the quality of one's work is a definitive factor in whether attorneys choose to stay at a firm.[371] But law firms' "free market" staffing system, where partners simply choose the associate with whom they want to work, often leads to partners consistently working with the same people—and excluding particular attorneys from valuable opportunities. Diverse attorneys may be particularly disadvantaged by unstructured staffing systems, as unconscious bias may play a role in allocating work to associates that have backgrounds more similar to senior lawyers.[372]

There are several approaches that can result in more equitable distribution of work opportunities in law firms. Centralized staffing overseen by dedicated professional development coordinators can identify instances where associates need work and ensure that assignments are allocated based on activity levels. Periodic review of associate activity levels with practice group leadership can serve as a cross-check against how the group is allocating assignments and identifying associates that are being under-allocated. Similarly, setting achievement benchmarks for attorneys at different levels (for example, litigation attorneys should have experience taking and defending depositions after a certain number of years of practice), and monitoring to ensure that attorneys are receiving the type of

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[369] *See* Erin Macke, Gabriela Gall Rosa, Shannon Gilmartin & Caroline Simard, *Assignments Are Critical Tools to Achieve Workplace Gender Equity*, MITSloan, Jan. 4, 2022; Joan C. Williams and Marina Multhaup, *For Women and Minorities to Get Ahead, Managers Must Assign Work Fairly*, Harvard Business Review, Mar. 5, 2018, hbr.org/2018/03/for-women-and-minorities-to-get-ahead-managers-must-assign-work-fairly.

[370] *See id.*

[371] William D. Henderson & Christopher Zorn, *Talent Analytics White Paper: Evidence-Based Strategies for Retaining High-Performing Midlevel Associates*, ALM Legal Intelligence, Sept. 2012, https://www.legalevolution.org/wp-content/uploads/sites/262/2021/07/ALM-Strategies-for-Retaining-Associate-Talent-Whitepaper.pdf.

[372] *See id.*

assignments needed to meet those benchmarks, will also promote more equitable distribution of work opportunities.

The ability to build networks is an often overlooked but significant contributor to advancement in the corporate world. However, "a wealth of research finds that employees from underrepresented racial and ethnic groups find it more challenging to create networks that support their professional growth."[373] Companies should thus consider helping employees to build robust networks by leveraging strategic partnerships with clients and other external stakeholders. These initiatives can help diverse employees expand their networks beyond their workplace and develop helpful relationship skills that will be critical as they rise through the ranks.

For client-service focused companies (and law firms), partnerships with clients around diversity can take several forms, including:

- Bringing together affinity groups and ERGs from the employer and selected clients for events, potentially with guest speakers;
- Running training sessions focused on building skills that employees at both organizations need;
- Collaborating to identify secondment opportunities;
- Jointly sponsoring selected events that provide diverse employees at different organizations the opportunity to get to know each other; and
- Working with clients on public service initiatives that address legal issues faced by disadvantaged or marginalized communities, which can demonstrate a shared commitment to promoting social justice and equality.

Employers that develop a robust and diverse leadership and advancement pipeline will be well-positioned to lead in a diverse world in the future. Key components to such a pipeline can include carefully structured succession plans and identifying and addressing other structural barriers to advancement.

Employers wishing to diversify future company leadership should structure succession plans in a way that seeks to eliminate implicit and structural biases and focuses on the roles being planned for.

Traditional succession planning often relies on measures that cause leaders to select individuals who are like them, based on factors ranging from whether the individual took a traditional career path, to relationships with partners and senior leaders, to whether an

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[373] Justin Dean, John Rice, Wallrick Williams, Brittany Pineros, Daniel Acosta, Ian Pancham, and Mike Snelgrove, *The Real Reason Diversity is Lacking at the Top*, Nov. 19, 2020, https://www.bcg.com/publications/2020/why-is-diversity-lacking-at-top-of-corporations (citing Herminia Ibarra, *Race, Opportunity, and Diversity of Social Circles in Managerial Networks*, Academy of Management Journal, June 1995).

individual is viewed as a "fit."[374] Assessments of "potential" may also rely on subjective factors that are particularly subject to implicit bias, such as intuition.[375] And factors such as past experience or current performance, although one part of the equation, might be more reflective of who has had access to more opportunities in the past—not necessarily who has the necessary skills for a role in the future.[376] These types of succession planning considerations create a structural barrier to diversity given that leadership in many organizations is still largely White and male.[377]

Employers seeking to develop a more objective and inclusive succession plan should start, just as they do in recruiting, by looking at the specific skill set and qualifications required for the role being planned for.[378] Potential, too, should be measured not in the abstract, but based on the traits and skills required for a specific role.[379] Focus on a specific role also allows for the use of other DEI recruiting strategies, such as a diverse slate of candidates,[380] and for targeted leadership development where there is a gap between an individual's traits and skills and those required for specific roles. Role-focused succession planning can allow for greater transparency, provide the basis for meaningful and actionable advice to employees on what they need to do to advance[381] and keep the focus on building a robust pipeline for each key role in order to ensure continuity—rather than relying too heavily on one or two "favorite sons" to take the reins.[382]

For law firms, achieving Mansfield Certification has helped to improve rates of diversity among leadership. Over 300 law firms now participate, and firms that have achieved certification annually for several years have increased diversity in their leadership ranks above and beyond their typical rate pre-Mansfield.[383] The Mansfield Rule "measures whether law firms and [corporate] legal departments are considering a broad pool of talent—including historically underrepresented groups such as women lawyers,

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[374] Laura Clydesdale, et al., *Your Diversity Problem Might Actually Be a Succession Planning Problem*, Talent Quarterly, Mar. 25, 2022, https://www.talent-quarterly.com/your-diversity-problem-might-actually-be-a-succession-planning-problem/.

[375] Lisa Blais, *To Get Diversity Right, Get Potential Right*, EgonZehnder, Jan. 1, 2017, https://www.egonzehnder.com/insight/to-get-diversity-right-get-potential-right.

[376] *Id*.; Ann Marie Olszewski, *Succession Planning: Is It Part of Your DEI Strategy*, LinkedIn, Sept. 22, 2022, linkedin.com/pulse/succession-planning-part-your-dei-strategy-ann-marie-olszewski/.

[377] *See e.g.*, Amanda Robert, *Law Firm Leaders Are Still Mostly White and Male, ABA Diversity Survey Says*, ABA Journal, May 16, 2022, https://www.abajournal.com/web/article/law-firm-leaders-are-still-mostly-white-and-male-aba-diversity-survey-says.

[378] Ann Marie Olszewski, *supra* note 376; Sheryl Estrada, *Why Succession Planning With a D&I Focus Supports Business Continuity*, HR Dive, Aug. 17, 2020, hrdive.com/news/succession-planning—diversity-inclusion-business-continuity/583617/.

[379] Lisa Blais, *supra* note 375.

[380] *Lawyers' Toolkit for Diversity & Inclusion*, D.C. Bar Association, https://www.dcbar.org/getmedia/c10cfbb4-3ccb-4d33-82c4-f481d7b83ea0/Lawyers-Toolkit-for-Diversity-Inclusion (accessed Aug. 3, 2023).

[381] Laura Clydesdale, *supra* note 374; Ann Marie Olszewski, *supra* note 376.

[382] *See, e.g.*, Jeremy Harper, *Developing a Succession Plan That Supports Diversity*, HR Certification Institute, Feb. 14, 2022, https://www.hrci.org/community/blogs-and-announcements/hr-leads-business-blog/hr-leads-business/2022/02/14/developing-a-succession-plan-that-supports-diversity.

[383] Julia DiPrete, *What is Mansfield Certification and Why is it so Important for Law Firms*, Vault, Dec. 9, 2022, https://vault.com/blogs/vaults-law-blog-legal-careers-and-industry-news/what-is-mansfield-certification-and-why-is-it-so-important-for-law-firms.

underrepresented racial and ethnic lawyers, LGBTQ+ lawyers, and lawyers with disabilities—for leadership roles and career advancement opportunities. In addition, legal departments are asked to consider a broad pool of talent for outside counsel roles." [384]

Employers can also identify and address other barriers to advancement by considering the factors that impact employee career trajectories at their company, and how those factors may create a greater hurdle for underrepresented minorities. Examples include:

- How salaries and other financial incentives are structured. Companies should review their compensation packages to ensure that they are not unduly disadvantaging diverse employees. At law firms, it is important for firms to review how origination credit is allocated and managed (and whether, for example, partners involved in client service and maintaining client relationships are being fairly acknowledged).[385]

- For client service firms, how underrepresented minorities and women may be impacted by a client or firm's desire to have a diverse team participate in a pitch or other nonbillable assignment. (If there are fewer underrepresented minorities and senior women, they may be asked to play this nonbillable role more often than their peers who are White and male.)[386]

- The types of social and business development activities that are available and encouraged. Consider whether some employees may feel left out of the firm's opportunities for relationship-building. Companies should consider offering a broad range of opportunities so that all employees feel they can participate and contribute in some way.

- How parental leave is handled. Companies can improve retention by providing and encouraging a generous parental leave for new parents of all genders, regardless of the path to parenthood.[387]

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[384] *Mansfield Overview*, Diversity Lab, https://www.diversitylab.com/pilot-projects/mansfield-overview/.

[385] *Accelerating Progress on Gender Equity in Law Firms*, Fairfax Assoc., May 17, 2022, https://fairfaxassociates.com/insights/accelerating-progress-on-gender-equity-in-law-firms/; Miguel Eaton, *Diversity & Inclusion in Business Development: 5 Lessons Learned*, American Bar Assoc., Sept. 10, 2021, https://www.americanbar.org/groups/labor_law/publications/ebc_news_archive/issue-summer-2021/diversity-and-inclusion/.

[386] *See id.*

[387] John Murph, *Survey Emphasizes Need for Updated Parental Leave Policies*, D.C. Bar Assoc., May 20, 2021, https://www.dcbar.org/news-events/news/survey-emphasizes-need-for-updated-parental-leave-; Kelsey Heino, *Oh, Baby! Accommodating Parental Leave in Your Small Firm*, Amer. Bar Assoc., Jan. 31, 2019, https://www.americanbar.org/groups/litigation/committees/solo-small-firm/practice/2019/accommodating-parental-leave-in-your-small-firm/; Arlene S. Hirsch, *The Importance of Promoting Parental Leave for New Fathers*, SHRM, July 12, 2023, https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/the-importance-of-promoting-parental-leave-for-new-fathers.aspx.

- How fertility and family-planning challenges are handled and/or acknowledged. Some employees face family-planning challenges during crucial years in their career path, and the support—or lack thereof—that they receive can impact their trajectory for years to come. Not surprisingly, companies have found that comprehensive fertility benefits, as well as bereavement leave for fertility losses (miscarriage, failed surrogacy, etc.), have helped them not only recruit but retain diverse employees.[388]

- The extent to which flexible and reduced hours work schedules are permitted and supported. These types of programs can be crucial for retention, particularly for parents of young children and other caretakers.[389]

Lastly, many organizations have developed supplier diversity programs as a way to both diversify business risks and help small and diverse business owners. These programs are also a great way to support and engage local communities and foster public trust. Again, while the *SFFA* decision does not directly impact these efforts, there may be some risk associated with how organizations describe and implement their supplier diversity programs. To mitigate risks, organizations should review their supplier diversity materials to ensure that contracts are not being awarded on the basis of race (or another protected status). Moreover, organizations should consider zero-sum alternatives to increasing the diversity in their supplier base by investing in resources that train small and diverse businesses on how to apply for certification, properly manage financial records and insurance requirements and compete for business. Organizations can also consider updating payment timeline provisions in supplier contracts from the standard 90-day or 60-day payment cycle to a 30-day commitment, thereby ensuring that diverse suppliers can participate and are not self-excluding due to longer pay cycles.

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[388] Karen Kaplowitz, *Best Law Firms for Women & Diversity: The DEI Best Practices Behind the Numbers*, Seramount, June 1, 2023, https://seramount.com/articles/best-law-firms-for-women-diversity-the-dei-best-practices-behind-the-numbers/.

[389] Joan C. Williams, *Still Struggling? Implementing "Part-Time" Programs That Work*, Minority Corp. Counsel Assoc. (last accessed Aug. 3, 2023), https://mcca.com/mcca-article/still-struggling/; *ABA Survey: Most Lawyers Want Options For Remote Work, Court and Conferences*, American Bar Assoc., Sept. 28, 2022, *https://www.americanbar.org/news/abanews/aba-news-archives/2022/09/aba-survey-lawyers-remote-work/*; Ruiqi Chen, *Flexible Work Could Boost Diversity for In-House Law Departments*, Bloomberg Law, July 30, 2021, https://news.bloomberglaw.com/business-and-practice/flexible-work-could-boost-diversity-for-in-house-law-departments.

V. IMPLICATIONS OF THE *SFFA* DECISION FOR THE JUDICIARY

The issues before the Supreme Court in the *SFFA* decision did not directly pertain to actions by the judiciary. Thus, the *SFFA* decision should not impinge on the judiciary's commitment to advancing DEI, either as employers or in the fulfillment of their official duties. At the outset, we note that decision-making influenced by racial bias has no place in the courts, in either hiring or the adjudication of disputes.[390] Moreover, promoting DEI in the judiciary is an urgent and paramount goal because it is vital to maintaining public trust and upholding the rule of law. Given the judiciary's unique role in our democracy, this section offers a different focus and approach than the sections addressing the private sector. This section, drafted by the Judiciary Working Group, outlines best practices for courts to aid in advancing their DEI goals while avoiding any appearance of impropriety.

This section includes a discussion of: (1) helpful strategies and leadership communication; (2) incorporation of diversity considerations into HR and other hiring practices; (3) bias training and educational outreach for judges, court staff, uniformed personnel and jurors; (4) collaboration and communication with community and local organizations; and (5) the utility of data collection and analysis. These suggestions are also consistent with those described in former Secretary Jeh Johnson's seminal 2020 report on *Equal Justice in New York State Courts*.

In addition to the recommendations provided below, courts should consider undertaking a review of their DEI efforts to identify risks and opportunities, when implementing the best practices outlined in section V of this report.

A. Strategy and Leadership Communication

It is important for the court's commitment to diversity to be messaged from the top levels of court leadership. To that end, courts should consider: (1) promoting judgeships as viable career opportunities for attorneys of all backgrounds, through transparent selection procedures and educational seminars; (2) developing a comprehensive strategic plan that includes DEI considerations throughout the entirety of its operations; (3) developing or updating their mission statements to include support for diversity; (4) encouraging judicial leadership to demonstrate awareness of personal and organizational bias; and (5) recognizing accountability as an ethical duty.

A diverse judiciary representative of the public it serves. Courts should eliminate barriers to people from diverse backgrounds seeking election or appointment to judgeships.

As noted in the Equal Justice Report, underrepresentation in the judiciary in New York State has persisted across all non-White groups. Though the representation of Black judges has steadily improved over the past 30 years, for the Latinx and Asian communities, the gap between their respective share of the population and judges widened in the late 1990s before more recently narrowing, but remains larger for both communities than they

[390] *See, e.g., Brown v Board of Educ*., 349 U.S. 294, 300–01 (1955); 42 U.S.C. § 2000e-2(m); N.Y Admin. Code § 8-101 *et seq*.

were in 1991.[391] Judicial selection procedures vary greatly among states, and appropriate procedures for ensuring the selection of qualified candidates from a diverse pool will inevitably vary according to jurisdiction.[392] While the specific procedures used for judicial selection is a complex subject that is beyond the scope of this report, we offer the following broad suggestions to help courts further their diversity and inclusion efforts:

Irrespective of whether judges are elected or appointed, procedures for seeking judicial nomination or appointment should be transparent, well publicized and designed to attract a diverse range of candidates. Courts should consider posting such information on court websites in an intuitive and conspicuous location, such as under a "Careers" tab. In addition to making opportunities more widely known, courts should also consider working with bar associations and affinity groups to routinely host continuing legal education programs with detailed information on the pathways to becoming a judge.[393]

Additionally, in jurisdictions where judicial officers or their designees either have appointment authority or take part in the screening process, it is important for these judicial officers or their designees to promote diversity and inclusion in the judicial appointment and screening processes. Attorneys from a wide variety of backgrounds should be invited to participate in the procedures for interviewing judicial candidates.[394]

Equally important to initiatives that attract diverse candidates to the bench are initiatives that are designed to retain diverse judges and support their progression within the judiciary. Once judges are appointed or elected, court administration should clearly communicate procedures for opportunities for judicial promotions. The factors and considerations involved in judicial promotions should be clear and transparent.[395]

A comprehensive strategic plan. To demonstrate their commitment to enhancing judicial and workforce diversity, judicial leaders should also develop a comprehensive strategic plan that incorporates both mandatory educational programming, and human resource policies and practices that promote DEI.

Courts' engagement in strategic planning is well documented throughout the United States. In 2016, the National Center for State Courts ("NCSC") estimated that "31 state administrative offices, one U.S. territory, the Federal Courts, and the District of Columbia courts" all had some form document "that [could] be referred to as a strategic plan." [396] Today, strategic planning in state courts has ballooned. Through grant funding provided by NCSC, federal agencies and several other organizations, state courts have been developing

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[391] *See* Equal Justice Report, *supra* note 145, at 33.
[392] *See* Equal Justice Report, *supra* note 145, at 67-70.
[393] Equal Justice Report, *supra* note 145, at 31; *see also How to Become a Judge*, New York City Bar Association, (2018), https://www.nycbar.org/pdf/report/become_a_judge.pdf.
[394] Equal Justice Report, *supra* note 145, at 68.
[395] *Id.* at 67.
[396] Peter C. Kiefer, *The Role of Strategic Planning and Strategic Management in the Courts* (May 2016), https://www.ncsc.org/__data/assets/pdf_file/0019/19234/role-of-strategic-planning-and-strategic-management-in-the-courts.pdf.

systemwide and initiative-based plans in growing numbers.[397] "Courts must rely on a deliberate process to determine organizational values, mission, vision, goals, and objectives."[398]

A mission statement that supports diversity. Many courts have existing mission statements that set forth goals to promote justice by upholding the law in an efficient and fair manner.[399] As a component of strategic planning, courts should update their mission statements to specifically acknowledge the effects of bias and discrimination, and the court's responsibility to minimize such effects in the judicial process.

For example, in 2021, the New York State Unified Court System revised its mission statement, which previously read:

> *The mission of the Unified Court System (UCS) is to deliver equal justice under the law and to achieve the just, fair and timely resolution of all matters that come before our courts.*

The new mission statement now includes additional language to reflect the court's expanded commitment:

> *In the service of our mission, the UCS is committed to operating with integrity and transparency, and to ensuring that all who enter or serve in our courts are treated with respect, dignity and professionalism. We affirm our responsibility to promote a court system free from any and all forms of bias and discrimination and to promote a judiciary and workforce that reflect the rich diversity of New York State.*

Publicly declaring these mindful goals establishes diversity as an ongoing pursuit and encourages courts to cultivate an atmosphere that leverages the collective strengths of their workforce. The declaration further drives the goal of building public trust and confidence in the judiciary by operating a legal system that more accurately reflects the communities it serves.

Awareness of personal and organizational biases. Bias negatively impacts the fair administration of justice. To ensure that personal biases do not impact judicial decision making and impartiality, it is important that judges and non-judicial staff become aware of their own biases and develop tools and skills for identifying and ameliorating them. Judicial

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[397] National Center for State Courts, *Justice for All State Planning Documents* (2018), https://www.ncsc.org/__data/assets/pdf_file/0016/26305/jfa-lessons-learned-final-2018.pdf.

[398] State Justice Institute, *Strategic Planning*, https://www.sji.gov/priority-investment-areas/strategic-planning/.

[399] *See, e.g.*, Superior Court of California, County of Riverside, *Court Mission Statement*, https://www.riverside.courts.ca.gov/GeneralInfo/Mission/mission.php; Texas Judicial Branch Fourth Court of Appeals, *Mission Statement*, https://www.txcourts.gov/4thcoa/mission-statement/; Delaware Courts Justice of the Peace Court, Mission, *Vision & Goals*, https://courts.delaware.gov/jpcourt/mission.aspx; Florida Supreme Court, *Mission & Vision*, https://supremecourt.flcourts.gov/About-the-Court/Mission-Vision.

leaders should consider enlisting subject matter experts to guide and assist in the development of mandatory bias education programs that focus on understanding and identifying explicit and implicit bias. Engaging social scientists and other relevant experts in the field will enable courts to develop informed and targeted strategies for moving forward and to create organizational capacity to further these values.

Accountability. It is essential that the people who serve our courts—especially those who lead them—inspire confidence. Every state has a code or rules that govern judicial conduct which includes upholding the integrity and independence of the judiciary, avoiding the appearance of impropriety and upholding the duties of judicial office fairly and impartially. In New York, the rules of judicial conduct go a bit further. They expressly require judges to perform their duties "without bias or prejudice against or *in favor* of any person," and prohibit judges "by words or [by] conduct" from manifesting bias or prejudice based upon a host of identities, including but not limited to, race, gender, age, disability, sexual orientation and SES. New York additionally mandates that judges "require staff, court officials and others subject to the judge's direction and control" to likewise refrain from any such words or conduct.[400] The state also requires judges to ensure that attorneys appearing before them do so.

Courts should also ensure that they have clear policies and protocols for investigating claims of bias, harassment and discrimination. Adopting an anonymous reporting system and clear "no retaliation" policies are fundamental to ensuring that claimants feel safe coming forward.[401]

Importantly, to engender public trust and the trust of the workforce, courts should be steadfast in their duty to hold accountable those who demonstrate bias or prejudice against litigants, colleagues or other stakeholders.[402] Decision matrices can help ensure that similar actions result in similar discipline without undue regard to title or seniority.

Capacity building. Mindful of the importance of diversity in the profession, members of the judiciary should broadly support measures that create equal opportunities for attorneys to take on lead roles in their courtrooms.[403] Likewise, when making

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[400] 22 NYCRR 100.3(4) ("A judge shall perform judicial duties without bias or prejudice against or in favor of any person. A judge in the performance of judicial duties shall not, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon age, race, creed, color, sex, sexual orientation, gender identity, gender expression, religion, national origin, disability, marital status or socioeconomic status, and shall require staff, court officials and others subject to the judge's direction and control to refrain from such words or conduct.").

[401] Equal Justice Report, *supra* note 145 at 87.

[402] Yousueng Han & Sounman Hong, *The Impact of Accountability on Organizational Performance in the U.S. Federal Government: The Moderating Role of Autonomy*, 39 Rev. of Pub. Personnel Admin. 3 (2019); Jeffrey J. Rachlinski et al., *Does Unconscious Bias Affect Trial Judges?,* 84 Notre Dame L. Rev. 1195 (2009).

[403] New York State Bar Association, *The Time is Now: Achieving Equality for Women Attorneys in the Courtroom and in ADR*, at 14-15 61-62, 67 (2020) (hereinafter NYSBA 2020 Report), /https://nysba.org/app/uploads/2020/06/5.-Report-and-recommendations-of-Commercial-and-Federal-Agenda-Item-11-2-1.pdf; New York State Bar Association, *If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and in ADR*, at 23 (Nov. 2017) (hereinafter NYSBA 2017 Report),

discretionary appointments, including internships, clerkships, court referees, mediator, special masters and guardian ad litem positions, the judiciary should put in place policies that demonstrate its commitment to diversity and equal opportunity.[404]

Human Resources plays a pivotal role in creating a diverse, inclusive and equitable workplace and is instrumental in formulating and implementing policies and strategies that actively promote diversity. Courts should consider setting clear and inclusive HR policies which aim to: (1) promote transparency and accessibility in application procedures; (2) promote a diverse applicant pool; (3) develop inclusive civil service exams and other written evaluation tools; and (4) implement structured interviews conducted by diverse interview panels consisting of individuals from various backgrounds, experiences, and perspectives.

Courts' employment applications and hiring processes should be clear and transparent to the public at-large. At the inception of the hiring process, relevant personnel compiling employment opportunities should review the same to ensure that they cater to a wide and diverse audience. For example, courts should consistently evaluate whether educational or experience requirements remain appropriate. Courts should further focus on "making the hiring process more user friendly for diverse candidates"[405] by, for example, providing free test preparation materials for any exams required to fill the position, distributing hard copy applications to those who may not necessarily have access to technology and ensuring that candidates are provided with constructive feedback where applicable.[406]

To increase awareness of judicial opportunities, courts should engage in focused outreach to communities with higher percentages of underrepresented groups. These efforts can be strengthened by using inclusionary language for job postings. Plain language and inclusive wording in job postings can positively influence the diversity and inclusivity of applicant pools and promote fairer recruitment practices.[407] Similarly, posting opportunities in LGBTQ+ centers, HBCUs, bar associations, fraternal organizations, faith communities, local colleges, career fairs and social media may also aid in attracting diverse applicants.[408]

Most local, state and federal government positions are filled through the civil service examination process. Civil service exams should be developed by professional exam developers trained in exam development and the *Uniform Guidelines on Employee*

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https://www.actl.com/docs/default-source/default-document-library/task-force-on-mentoring/aba_nysba_achieveing_equality_women_attorneys.pdf?sfvrsn=43726969_4.

[404] NYSBA 2020 Report, *supra* note 403, at 63-64, 68; NYSBA 2017 Report, *supra* note 403, at 23, 34.

[405] Equal Justice Report, *supra* note 145, at 96.

[406] *Id.* at 96-98.

[407] Lien Wille & Eva Derous, *Getting the Words Right: When Wording of Job Ads Affects Ethnic Minorities' Application Decisions*, 31 Mgmt. Commc'n Q. 533 (2017).

[408] Equal Justice Report, *supra* note 145, at 46; Patrick J. Carrington, *A Court System's Guide to Increasing Diversity and Fostering Inclusion* 16 (National Center for State Courts), https://www.ncsc.org/__data/assets/pdf_file/0018/66321/a_court_systems_guide_Carrington.pdf; Hon. Janet DiFiore, Equal Justice in the New York State Courts: 2020-2021 Year in Review, at 31-32 (2021), https://www.nycourts.gov/LegacyPDFS/publications/2021-Equal-Justice-Review.pdf.

Selection Procedures and include exam validation, job analysis, item analysis and adverse impact analysis.[409] Exam content and qualifications should be based on comprehensive job analysis studies and input from diverse subject-matter-experts. Exam developers should aim to minimize and reduce the adverse impact of written exams by implementing fair and inclusive practices that minimize bias and create a level playing field for all test-takers.

As discussed above, a well-developed and implemented structured interview format reduces bias in the interview selection process.[410] In order to reduce bias and ensure that candidates are evaluated fairly based on merit, interviewers must be trained to conduct structured interviews effectively. Structured interviews involve standardized questions and evaluation criteria to ensure fairness and consistency in the selection process. Interview questions should be designed to assess a candidate's knowledge, skills and abilities, while also probing for their commitment to diversity and inclusivity. The questions should be job-related behavioral or situational questions. In order to demonstrate the court's commitment to diversity and anti-discrimination policies, the court may consider incorporating questions related to diversity and anti-discrimination policies, as applicable.

B. Bias Training and Educational Outreach

Anti-bias training and educational programming for judges, court staff, uniformed personnel and jurors foster the courts' commitment to DEI.

Regular mandatory bias training for judges is a crucial step towards alleviating racial injustice within the court system.[411] Several experts have posited that such training should be administered by experts in the field to facilitate relevant and nuanced discussions and incorporate practical guidance. This training should include how to respond when witnessing unacceptable or questionable behavior by others in a court setting.[412] The training must acknowledge that issues of racial and cultural bias are intersectional,[413] and

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[409] Uniform Guidelines on Employee Selection Procedures (1978), https://www.govinfo.gov/content/pkg/CFR-2011-title29-vol4/xml/CFR-2011-title29-vol4-part1607.xml.

[410] Julia Levashina et al., *The Structured Employment Interview: Narrative and Quantitative Review of the Research Literature*, 67 Personnel Psychol. 241 (2014).

[411] Pamela M. Casey et al., *Addressing Implicit Bias in the Courts*, 49 Ct. Rev. 64, 65-69 (2013); Hon. Edwina Richardson-Mendelson, Equal Justice in the New York State Courts: 2022 Year in Review, at 8 (2022), https://www.nycourts.gov/LegacyPDFS/publications/22-Equal-Justice-Review.pdf; Equal Justice Report, *supra* note 145, at 81-83.

[412] Renee N. Allen & DeShun Harris, *#SocialJustice: Combatting Implicit Bias in an Age of Millennials, Colorblindness, & Microaggressions*, 18 U. Md. L.J. Race Relig. Gender & Class 1, 19-28 (2018); Francesca Gino & Katherine Coffman, *Unconscious Bias Training that Works*, Harvard Business Review, Sept.-Oct. 2021, https://hbr.org/2021/09/unconscious-bias-training-that-works.

[413] Equal Justice Report, *supra* note 145, at 82, n.214; *see* Merrill Perlman, *The Origin of the Term Intersectionality*, Colum. Journalism Rev. (2018), https://www.cjr.org/language_corner/intersectionality.php.

that discrimination based on race often overlaps with class, gender, sexual orientation, immigration status and beyond.[414]

There is an equal need for bias training for non-judicial personnel. Court staff and uniformed personnel interact with court visitors and other stakeholders in a variety of capacities. Court personnel, in every role, must be trained in the skill of treating court visitors from diverse and other backgrounds with dignity and fairness and to successfully navigate challenges that may arise.[415]

Requiring bias education for jurors will serve to enhance fairness in trials. While the law requires jurors to be impartial racial and cultural biases can prevent people from acting fairly.[416] Prospective jurors are shown an orientation video at the start of service in many courthouses across the country.[417] Any such video should include a segment on implicit bias.[418] The video should describe what implicit bias is, explain why the way our brains work can lead to bias and discuss strategies that jurors can employ to mitigate underlying biases or stereotypes in decision-making.[419] Courts should also formulate uniform rules to explicitly permit and endorse addressing juror bias during voir dire as well as develop model jury instructions that explain the concept of bias and remind the members of the jury to be aware of their implicit biases, as well as all other forms and sources of bias.[420]

C. Engage with the Community and Local Organizations

Community outreach serves an important role in building trust and nurturing confidence in the judiciary, and in advancing equal opportunity by inspiring individuals

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[414] Equal Justice Report, *supra* note 145, at 82; Melissa L. Breger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial*, 53 U. Rich. L. Rev. 1039, 1077 (2019); Peggy Li, *Hitting the Ceiling: An Examination of Barriers to Success for Asian American Women*, 29 Berkeley J. Gender L. & Just. 140, 148-149 (2014).

[415] Equal Justice Report, *supra* note 145, at 61-65.

[416] Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 Conn. L. Rev. 827, 835-837 (2012); Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice against Black Defendants in the American Courtroom*, 7 Psychol. Pub. Pol'y & L. 201, 220-221 (2001).

[417] Ruth V. McGregor, *State Courts and Judicial Outreach*, 21 Geo. J. Legal Ethics 1283, 1290 (2008).

[418] A. Roberts, *supra* note 416, at 860-866; Lee J. Curley, James Munro, & Itiel E. Dror, *Cognitive and Human Factors in Legal Layperson Decision Making: Sources of Bias in Juror Decision Making*, 62 Med., Sci., & the Law 206, 212 (2022); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1181-1182 (2012).

[419] 2022 Year in Review Report, *supra* note 411, at 9; N.Y. Unified Court Sys., *Jury Service and Fairness*, http://www.nyjuror.gov/ (last visited August 1, 2023).

[420] Anona Su, *A Proposal to Properly Address Implicit Bias in the Jury*, 31 Hastings Women's L.J. 79, 83-85 (2020); Caroline B. Crocker & Margaret Bull Kovera, *The Effects of Rehabilitative Voir Dire on Juror Bias and Decision Making*, 34 Law & Hum. Behav. 212, 224-226 (2010); Hon. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harvard L. Rev & Policy 149, 158-161 (2010); Rachael A. Ream, *Limited Voir Dire: Why it Fails to Detect Juror Bias*, 23 Crim. Just. 22, 25-27 (2009); A.B.A., *Keeping Close Watch on Implicit Bias in the Courts* (August 11, 2022), https://www.americanbar.org/news/abanews/aba-news-archives/2022/08/keeping-close-watch-on-implicit-bias-in-the-courts/.

from diverse backgrounds to pursue careers as lawyers and judges. To that end, courts should consider: (1) creating robust community outreach efforts, including through the use of public hearings and community meetings, listening sessions and surveys; (2) establishing centralized and innovative civic engagement programs; and (3) taking steps to ensure that courthouses are inclusive.

Courts should actively create opportunities for interactions with communities that are positive via public hearings, meetings and listening tours. These interactions engage the public in identifying challenges affecting their communities. Such opportunities are particularly important for underserved and low-income communities.[421] Public hearings allow the court to learn of the public's experiences and concerns, including their perceptions about racial and ethnic bias or discrimination,[422] while providing a platform for courts to educate communities about available court programs and services.[423] Courts should also use in-court and local surveys to ensure that there are systematic procedures for requesting and acting upon regular feedback.

To reach a wider audience, courts should use web-based technology, social media and broadcast media to engage and educate communities. Members of the public who cannot otherwise physically attend public meetings or other community outreach activities can often be reached through online communications.

Court leaders should also consider forming local committees in their jurisdictions. Local committees comprised of members of the court and community who understand local dynamics and nuances, regional politics and historic mores, can help with implementing reforms at the local court level aimed at changing the institutional culture.[424]

While many judges and court staff engage in civic-related activities on their own, as a best practice, a centralized organizational structure to monitor, promote and enhance civic engagement is strongly recommended. Schools, educators and many community-based programs regularly seek learning opportunities through the courts. Maintaining a registry for courthouse tours and for available speakers to address specific subject matter areas is a strong first step for developing a centralized civic engagement plan.

A model initiative that leverages technological resources is the Second Circuit's Justice For All: Courts and Community program. Through a computer-based court learning center and interactive museum-like exhibits, the public—from school children to senior

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[421] National Center for State Courts, *Public Engagement Pilot Projects*, https://www.ncsc.org/consulting-and-research/areas-of-expertise/racial-justice/resources/community-engagement-initiative/public-engagement-pilot-projects.

[422] The Neb. Minority and Justice Task Force, *Final Report* (April 2011), https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1099&context=publicpolicypublications.

[423] Superior Court of California, County of Orange, *Leadership Academy*, https://www.occourts.org/directory/education/leadership-academy.html.

[424] National Center for State Courts, *The Evolving Science on Implicit Bias: An Updated Resource for the State Court Community* at 21-25 (2021), https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/911; 2022 Year in Review Report, *supra* note 411, at 20.

citizens—can learn about the federal courts, historic cases and iconic lawyers.[425] These in-court experiences allow members of the public to learn about the court system and the experience of working within the judicial system.

The physical courthouse environment and how it looks can also help to foster a positive experience for court users. The photographs, portraits and artworks displayed in our governmental buildings signal to its users who belongs and is welcome.[426] Displaying portraits of jurists from various backgrounds or artwork honoring local community members can send the message to court visitors, from the moment they enter the courthouse, that they will be treated fairly and with respect.[427]

D. Data Collection and Analysis

Lastly, courts should maintain rigorous data on the make-up of members of the judiciary, court personnel and applicants for positions in the court system. Such data should be made available to the public to support transparency.

Current efforts made by some states to maintain robust diversity data on judges[428] should be expanded to include law clerks and other judiciary personnel, which is currently generally lacking.[429] The judiciary should consider developing metrics and reporting requirements for each court, and systematically collecting and publishing diversity-related data on at least an annual basis.[430] Participation in the data collection should be voluntary, and the data should be handled sensitively, and should be released only under limited circumstances—*e.g.*, in aggregate on a state-wide and court-level basis.[431] The collected data should be comprehensive and cover a range of diversity categories, including gender identity and sexual orientation. The data should also be collected using clear and accepted methods, and reliable practices that are sufficiently detailed to allow other researchers to

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[425] Justice For All: Courts and the Community Initiative, *Courthouse Visits*, https://justiceforall.ca2.uscourts.gov/courthouse_visits.html.

[426] Heather L. Stuckey & Jeremy Nobel, *The Connection Between Art, Healing, and Public Health: A Review of Current Literature*, 100 Am. J. Pub. Health 254, 254 (2010); 2022 Year in Review Report, *supra* note 411, at 27-28, 30-31, 48.

[427] 2022 Year in Review Report, *supra* note 411, at 27.

[428] *See* Amanda Powers & Alicia Bannon, State Supreme Court Diversity — May 2022 Update, Brennan Ctr. for Justice, May 25, 2022, https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-may-2022-update (discussing data compiled by states); *see also* Judicial Council of California, Judicial Officer (JO) Demographic Data, https://www.courts.ca.gov/13418.htm (last visited July 29, 2023).

[429] Jeremy D. Fogel, et al., *Law Clerk Selection and Diversity: Insights from Fifty Sitting Judges of the Federal Courts of Appeals*, 137 Harv. L. Rev. (forthcoming 2023) ("An annual report of law clerk demographics that is official, complete, and public would go a long way toward remedying the invisibility of the issues identified in our study . . .. For law clerks, we suggest annual collection of this information, along with the court or jurisdiction where they are clerking, the law school they attended, veteran status, and socioeconomic indicators such as parental education or whether they were the first in their family to attend college or law school.").

[430] Yuvraj Joshi, Diversity Counts: *Why States Should Measure the Diversity of Their Judges and How They Can Do It* at 24–26 (Lamba Legal 2017), https://legacy.lambdalegal.org/in-court/legal-docs/20170607_diversity-counts.

[431] *Id*. at 24, 26.

replicate their findings.[432] Courts should also collect measurable and quantifiable data on the effectiveness of existing programs for addressing grievances involving violations of HR practices and policies.

[432] *Id.* at 25.

CONCLUSION

The *SFFA* decision is a setback for preserving the benefits that flow from fostering diversity in our university classrooms. It is also a call to action for those committed to the principles of DEI. We offer the guidance and recommendations in this report to support higher education institutions, law firms, businesses and our judiciary in maintaining their commitment to diversity and achieving their DEI goals in a manner which is consistent with the Supreme Court's ruling and mitigates the potential risks of a changing legal landscape.

[APPENDIX A]

Report of the New York State Bar Association Task Force on Advancing Diversity Summary of Recommendations and Guidance

This Appendix provides a high-level summary of the Task Force on Advancing Diversity's recommendations and guidance for educational institutions, corporations, law firms and the state court system in the context of advancing their respective DEI efforts.

This summary is not intended to provide legal advice, and no legal or business decision should be based on its content.

I. Law Schools and Other Higher Education Institutions

- Any effort to advance diversity in law schools should focus on the mission of the university and how values and goals associated with that mission are articulated and pursued. Having and articulating important institutional goals, including diversity in legal education, remain permissible.

- Define the attributes to be given weight in the admissions process in advance and ensure that they are connected to the mission identified by the institution.

- Comprehensively consider viable race-neutral strategies to advance broader institutional diversity and equity goals, including SES, place-based and other potential admissions policies and ensure that race-neutral strategies reflect alignment with authentic institutional aims.

- Design application materials to collect demographic data (in conformance to the Court's guidance in the *SFFA* decision on the permissible role of race in the admissions process). Collection of disaggregated data may be important for research and evaluation purposes.

- Re-examine existing admissions policies and practices to address barriers to equitable educational access and consider reevaluating the criteria for assessing merit, including: (1) using standardized tests; (2) legacy, athlete and donor preferences; (3) providing resources to alleviate the financial burden on law school applicants; and (4) developing methods for recruitment that can help diminish the pervasive disparities in law student enrollment and graduation among students of varying generational, racial or ethnic, and socio-economic backgrounds.

- Consider implementing recruitment and outreach strategies that extend beyond schools from which educational institutions have traditionally recruited to also encompass less-well-represented institutions and achieve a broadly diverse applicant pool.

- Directly engage with legislatures to advocate for new or expanded financial aid funding.

- Increase outreach to, investment in and collaboration with prospective students and affiliative partners.

- Implement broad-based support programs (*e.g.*, the Equal Opportunity Programs in New York), which can help address students' ancillary and complementary admissions needs, such as test preparation, financial assistance, academic and mentorship support, and related resources. In designing and implementing these programs, institutions should ensure that additional requirements do not inadvertently disadvantage participating students compared to the rest of the student body.

- Consider explicitly referencing eligible student groups that may otherwise be underrepresented in all marketing materials, programming and related eligibility descriptions to signal to prospective diverse candidates that their applications for admission are truly welcome.

- Foster inclusive learning environments, both inside and outside the classroom and create a sense of belonging and support for historically underrepresented students. Diversity plan–related initiatives should include alumni, foundation representatives, donors, law firms, legal clients and government. Active engagement of key stakeholders facilitates consistent messaging about core values, including the elimination of bias, as well as guidance on implementing new policies and practices, which will lead to increased buy-in and trust throughout the community.

- Use testimonials from diverse scholarship and specialized program participants to convey to potential applicants, and the broader community, the demographic scope of awardees while also inherently conveying eligibility standards.

- Consider specialized campus-wide training as part of diversity initiatives to address critical changes in policy and practice focusing on cultural competence as well as identifying, eliminating, and disrupting bias to ensure that students of all backgrounds experience a respectful climate in which they can thrive.

- Train key personnel and stakeholders in admissions, financial aid, enrollment, diversity equity and inclusion, institutional advancement and student success groups to ensure a holistic effort and response campus-wide.

- Design assessment and audit procedures to ensure that the resources and support necessary for compliance are accessible, especially where race-neutral considerations are at issue.

- Commit to purposeful and lawful strategies to improve representation of faculty from diverse backgrounds and culturally competent leadership.

- Implement trainings and coursework grounded in racial justice to promote anti-racist educational settings.

- Recognize the emotional impact that public dialogue around diversity, the *SFFA* decision and race generally may have on campus stakeholders. Provide support to ensure the mental health and well-being of students, campus faculty and staff across the learning community as they navigate a shifting and contested landscape regarding racial diversity in legal education.

- Purposefully design wellness, and social, cultural and academic programming to show all students, especially underrepresented and first-generation students, that they are valued, that they belong and that they have a place in the legal profession.

II. Private Employers: Corporations and Law Firms

- Communicate a continued commitment to the organization's DEI principles.

- Assess existing DEI programs and consider engaging external counsel to conduct a legally privileged audit of DEI programs.

- Assess perceptions of DEI efforts, including through an analysis of the perception of DEI programs by employees and external stakeholders.

- Identify the specific benefits of diversity in the workplace and develop programs and initiatives specifically tailored to further those benefits.

- Increase internal controls over communications and disclosures about DEI initiatives, paying careful attention to appropriately and accurately describing those initiatives and the implications of making such disclosures.

- Implement education and training for all key partners, managers and employees to ensure that recruiters and those tasked with making employment decisions understand the purpose of DEI programs, as well as the key legal principles that govern those programs, and perform their functions in a way that mitigates legal and reputational risks.

- Appropriately collect, track, manage and utilize DEI data to increase organizational awareness of the performance of DEI programs. In addition, measure the outcomes of hiring, retention and promotion practices, as well as specific diversity initiatives, and periodically assess such data to identify and better understand patterns, gaps and opportunities for improvement.

- Foster good practices and ensure that senior leadership teams understand, and are invested in achieving, the objectives of the organization's DEI programs, which should be well-documented.

- Monitor changes in state and local laws and initiatives aimed at protecting and limiting DEI programs and any changes thereto.

- Rely on lawful strategies to achieve goals relating to: (1) outreach and recruitment efforts; (2) retention; and (3) the advancement of underrepresented groups. Organizations seeking to amplify opportunities to attract and recruit diverse talent should consider: (i) leveraging inclusive job postings; (ii) expanding recruiting efforts beyond schools they have traditionally focused on; (iii) targeting outreach to diverse student organizations and diverse career fairs and leveraging relationships with bar associations; (iv) recruiting candidates who have taken alternate paths in school or their careers; (v) implementing structural behavioral interviews; and (vi) engaging with pipeline programs for high school and college students.

- Consider implementing development and retention programs that incorporate a range of tools, including: (1) affinity groups and ERGs; (2) advice and mentorship programs coupled with feedback and evaluation; (3) formal training programs; (4) equitable work allocation systems; and (5) networking opportunities.

- Consider implementing effective advice and mentorship programs that seek to achieve a range of objectives, including:

    (1) Understanding issues the employee is experiencing and helping to resolve them;

    (2) Clarifying commitment and performance expectations and behavioral norms;

(3) Getting to know the employee as an individual;

(4) Helping the employee assess their medium- and long-term career goals and identifying ways to position them to achieve those, whether for internal promotion opportunities or to pursue external opportunities in the future;

(5) Identifying important skills that need developing and helping the employee identify the work opportunities that will most directly improve those skills; and

(6) For high-potential employees that manifest the talent to become vice presidents, directors and partners, ensuring that firm or company leadership has them on their radar to track and develop.

- Consider, as regards client-service focused companies (and law firms), forming partnerships with clients around diversity, which may take several forms, including:

  (1) Bringing together affinity groups and ERGs from the employer and selected clients for events, potentially with guest speakers;

  (2) Running training sessions focused on building skills that employees at both organizations need;

  (3) Collaborating to identify secondment opportunities;

  (4) Jointly sponsoring selected events that provide diverse employees at different organizations the opportunity to get to know each other; and

  (5) Working with clients on public service initiatives that address legal issues faced by disadvantaged or marginalized communities, which can demonstrate a shared commitment to promoting social justice and equality.

- Consider factors that impact employee career trajectories at their company, and how those factors may create a greater hurdle for underrepresented minorities. Examples include:

  (1) How salaries and other financial incentives are structured;

  (2) For client service firms, how underrepresented minorities and women may be impacted by a client or firm's desire to have a diverse team participate in a pitch or other nonbillable assignment;

(3) The types of social and business development activities that are available and encouraged;

(4) How parental leave is handled;

(5) How fertility and family-planning challenges are handled and/or acknowledged; and

(6) The extent to which flexible and reduced hours work schedules are permitted and supported.

- Consider the development of supplier diversity programs as a way to both diversify business risks and help small and diverse business owners.

III. The Judiciary

- In order to ensure that judicial commitment to diversity is messaged from the top levels of court leadership, courts should consider:

(1) promoting judgeships as viable career opportunities for attorneys of all backgrounds, through transparent selection procedures and educational seminars;

(2) eliminating barriers to people from diverse backgrounds seeking election or appointment to judgeships and clearly communicating procedures for opportunities for judicial promotions;

(3) developing a comprehensive strategic plan that incorporates both mandatory educational programming, and human resource policies and practices that promote DEI, including those which aim to: (i) promote transparency and accessibility in application procedures; (ii) promote a diverse applicant pool; (iii) develop inclusive civil service exams and other written evaluation tools; and (iv) implement structured interviews conducted by diverse interview panels consisting of individuals from various backgrounds, experiences, and perspectives;

(4) developing or updating mission statements to include support for diversity, and to specifically acknowledge the effects of bias and discrimination, and the court's responsibility to minimize such effects in the judicial process;

(5) encouraging judicial leadership to demonstrate awareness of personal and organizational bias, including by enlisting

subject matter experts to guide and assist in the development of mandatory bias education programs for judges, court staff, uniformed personnel and jurors that focus on understanding and identifying explicit and implicit bias;

(6) recognizing accountability as an ethical duty and ensuring that there are clear policies and protocols for investigating claims of bias, harassment and discrimination; and

(7) broadly supporting measures that create equal opportunities for attorneys to take on lead roles in their courtrooms, putting in place policies that demonstrate the court's commitment to diversity and equal opportunity in discretionary appointments;

(8) ensuring that employment applications and hiring processes are clear and transparent to the public at-large; and

(9) engaging in focused outreach to communities with higher percentages of underrepresented groups.

- Civil service exams should be developed by professional exam developers trained in exam development and the *Uniform Guidelines on Employee Selection Procedures* and include exam validation, job analysis, item analysis and adverse impact analysis. Exam content and qualifications should be based on comprehensive job analysis studies and input from diverse subject-matter-experts. Exam developers should aim to minimize and reduce the adverse impact of written exams by implementing fair and inclusive practices that minimize bias and create a level playing field for all test-takers.

- Consider collaboration and communication with community and local organizations, including:

  (1) creating robust community outreach efforts, including through the use of public hearings and community meetings, listening sessions and surveys;

  (2) establishing centralized and innovative civic engagement programs; and

  (3) taking steps to ensure that courthouses are inclusive.

- Consider the utility of data collection and analysis and maintain rigorous data on the make-up of members of the judiciary, court personnel and applicants for positions in the court system, which should be made available to the public to support transparency.

- Consider incorporating a well-developed and implemented structured interview format, which reduces bias, in the interview selection process.

BRONX COUNTY BAR ASSOCIATION

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Donna Cook, *Treasurer*
Financial Secretary

September 15, 2023

Via Email and 1st Class Mail

Richard C. Lewis, Esq.
President
New York State Bar Association
One Elk Street
Albany, New York 12207

Re: Draft Report of the Task Force
On Advancing Diversity

Dear President Lewis:

At their regularly scheduled meeting held on September 13, 2023, the Board of Directors of the Bronx County Bar Association reviewed and considered the Draft Report of the Task Force on Advancing Diversity and the accompanying Summary of Recommendations and Guidance. I am pleased to report that the Board unanimously voted to endorse the report and recommendations.

Very truly yours,

/S/

Laura Jordan, Esq.
President

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #12

REQUESTED ACTION: None, as this report is informational.

The Root/Stimson Award honors a lawyer who has demonstrated outstanding commitment to community and volunteer service and to the improvement of the justice system. Named for Elihu Root and Henry L. Stimson to honor their commitment to public service, this award is presented to a lawyer admitted to practice in New York state who is actively involved in volunteer community service work. The award recognizes members of the legal profession who have given unstintingly of their time through community service activities.

The 2023 Root/Stimson Award recipient is Stephen E. Diamond, Esq.

Association president Richard Lewis will present the Root/Stimson Award to Stephen E. Diamond, Esq.

NYSBA

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #13

REQUESTED ACTION: Approval of the report and recommendations of the Working Group on Facial Recognition and Access to Legal Representation.

Attached is the report and recommendations of the Working Group on Facial Recognition and Access to Legal Representation. The Working Group examined "the legal and ethical considerations surrounding the use of facial recognition and other technology to restrict individual freedoms, including but not limited to attendance at events or entrance into venues as well as the propriety of the use of this and other technology on a lawyer's ability to represent clients without fear of retribution."[1]

The Working Group explored policy and ethical considerations regarding facial recognition and other biometric technology, a proposed amendment to the Civil Rights Law, and support of the Biometric Privacy Act. Recommendations of the Working Group are outlined below.

1. *Proposed Amendment to the Civil Rights Law*
   The Working Group recommends Civil Rights Law § 40-b be extended to include "professional or collegiate sporting venues" in the definition of "places of public entertainment and amusement." It is also recommended that the civil penalties under Civil Rights Law § 41 be enhanced. Currently injunctive relief is not allowed, and the monetary payment is limited to between $100 and $500. It is recommended that this be changed so that injunctive relief be allowed *in addition to* civil penalties which should be increased to between $1000 and $5000.

2. *The Biometric Privacy Act*
   The Working Group examined proposed statutes that were submitted to the Legislature regarding facial recognition and biometric technology. The Working Group recommends that NYSBA support the Biometric Privacy Act (BPA) and make it a legislative priority for the 2023-2024 Legislative session. The Memorandum of Support of this legislation that the Working Group submitted is attached to the report.

   An interim report of the Working Group was submitted to the Reports Group in June 2023.

   The report will be presented by Domenick Napoletano, Esq.

[1] Mission Statement of the Working Group on Facial Recognition Technology and Access to Legal Representation.

NYSBA WORKING GROUP ON FACIAL RECOGNITION TECHNOLOGY AND ACCESS TO LEGAL REPRESENTATION

FINAL REPORT TO NYSBA HOUSE OF DELEGATES

SATURDAY, NOVEMBER 4, 2023

The NYSBA Working Group on Facial Recognition Technology and Access to Legal Representation, chaired by NYSBA President-Elect Domenick Napoletano, respectfully presents this Final Report to the NYSBA House of Delegates. This Report, to be presented to the House of Delegates at the November 4, 2023 meeting in Albany, will in some respects echo the Interim Report of this Working Group presented in Cooperstown on June 10, 2023, by describing the events that led to the establishment of the Working Group, the public policy reasons that animate the Working Group's mission, the particular threats that facial recognition software and other biometric technologies create for lawyers and the legal system, and the steps the Working Group has taken to address those threats.

This Final Report contains two new, central recommendations. *First,* we recommend amending the New York Civil Rights Law to (i) expand the scope of Section 40-b, which prohibits customers with a "ticket of admission" to certain specified "places of public entertainment and amusement" from being barred from admission to, or being required to leave, those places, to include "professional or collegiate sports venues"; and (ii) expand the scope of Section 41, to increase the monetary penalties for violations of, *inter alia,* Section 40-b and to permit a court to impose injunctive relief. *Second,* we recommend that NYSBA formally support A.1362, the Biometric Privacy Act, which would provide statutory guardrails to private entities' use of private citizens' biometric information in a manner that balances the legitimate needs of certain businesses to use that information with private citizens' rights to privacy and other protected interests. The Working Group has already submitted a Memorandum in support of this proposed statute to the

Legislature, but we ask the HOD to formally support the statute so it becomes a legislative priority of the Association.

The Mission Statement of the Working Group, attached as Exhibit A, was as follows:

> The Working Group on Facial Recognition Technology and Access to Legal Representation shall examine the legal and ethical considerations surrounding the use of facial recognition and other technology to restrict individual freedoms, including but not limited to attendance at events or entrance into venues as well as the propriety of the use of this and other technology on a lawyer's ability to represent clients without fear of retribution. The Working Group will also consider how the use of technology can prohibit the ability of members of the legal profession to provide effective representation of clients and disrupt access to justice. The Working Group shall make any necessary policy recommendations to the NYSBA Executive Committee.

Why the Working Group was Established.

In late November 2022, on the weekend after Thanksgiving, Kelly A. Conlon, an associate at the law firm of Davis, Saperstein & Solomon, P.C. ("DSS"), accompanied her daughter's Girl Scout troop to see the Christmas Spectacular at Radio City Music Hall, a venue owned by Madison Square Garden Enterprises ("MSGE"). Although Ms. Conlon had a ticket, the security guards, identifying her by name and law firm affiliation, refused to let her enter. The security guards showed her that she was on an "attorney exclusion list" that MSGE and its President, James Dolan, had created.[1] Ms. Conlon had to wait outside in the rain while the rest of the troop and chaperones enjoyed the performance.[2]

[1] "Madison Square Garden Uses Facial Recognition Technology to Bar Its Owner's Enemies", N.Y. Times, 12/22/22, https://www.nytimes.com/2022/12/22/nyregion/madison-square-garden-facial-recognition.html.

[2] "Teaneck Law Firm to challenge MSG liquor license after associate barred from Rockettes show," NorthJersey.com, 12/22/22, https://www.northjersey.com/story/news/bergen/teaneck/2022/12/22/radio-city-facial-recognition-lawyer-banned-from-seeing-rockettes/69747073007/.

The incident soon went viral. MSGE defended itself by citing two notifications it had sent DSS on October 28 and November 14, 2022, informing the firm that "all its attorneys were banned from [MSGE's] venues while the firm was engaged in legal action against one of its restaurants."[3] This did little to quell the rising public disgust at MSGE's use of facial recognition technology to bar from MSGE facilities all employees at law firms with the temerity to represent clients suing MSGE – and that it was continuing to enforce that policy by barring other lawyers, from law firms other than DSS, from its facilities.

Disclosure of the policy itself also outraged the public. In an internal "policy memorandum" dated July 28, 2022, attached as Exhibit B, MSGE and its affiliates explicitly "reserve[d] the right to exclude from the MSGE Venues litigation counsel who represent parties adverse to the Companies, *and other attorneys at their law firms.*" (Emphasis added.) It went on to state that MSGE could prohibit these attorneys even from purchasing tickets to MSGE events – regardless of whether the attorneys were buying the tickets for someone else or had no personal involvement in the case. *Id.* MSGE justified the policy on the ground that adverse counsel might communicate "with employees of the Companies in violation of ethical rules, which prohibit any communication with opposing parties and their employees," and would allow lawyers to seek or attempt to seek "disclosure outside proper litigation discovery channels." *Id.*

This led to an array of public responses. New York State Attorney General Letitia James wrote a letter to MSGE executives and its legal department on January 24, 2023, attached as Exhibit C, noting that MSGE's exclusion policy affected "approximately 90 law firms," involving "thousands of lawyers" and warning that "the Policy may violate the New York Civil Rights Law and other city, state, and federal laws prohibiting discrimination and retaliation for engaging in

[3] *Id.*

protected activity." Other politicians weighed in, with one, State Senator Brad Hoylman, noting: "There's a pattern of James Dolan [the owner of MSGE] punishing those who he views as his corporate adversaries", and calling the implementation of MSGE's policy a "frightening prospect for every New Yorker and, frankly, any visitor to New York. . .. "[4] Still others started lawsuits, one of which, *Hutcher v. Madison Square Garden*,[5] brought on behalf of several partners of Davidoff Hutcher & Citrin LLP, has since had some claims brought on behalf of DHC partner Larry Hutcher rejected by the First Department, while claims on behalf of another firm partner, Myron Rabij, resulted in MSGE being fined under the N.Y. Civil Rights Law.[6] (We will explain below why the two closely-related claims achieved different results; the respective decisions are attached as Exhibits D and E, respectively.) And the New York State Liquor Authority has started proceedings to revoke MSGE's liquor licenses for violating applicable laws and regulations.

New York judges are not the only ones who have criticized MSGE's so-called "Adverse Attorney Policy." In oral argument in *In re Madison Square Garden Ent. Corp. Stockholders Litigation*, Vice Chancellor Kathaleen St. J. McCormick referred to the policy as "the stupidest thing [she's] ever read" and that she was "shocked" when she read it.[7] She also noted that the policy was potentially vindictive, stating that "whether Jim Dolan bullied his attorney into sending

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[4] "Pols, activists blast James Dolan, MSG owners for tech faceoff with unwanted fans," AMmetro New York, 1/17/'22.

[5] *Hutcher v. Madison Square Garden Entm't Corp.*, 214 A.D.3d 573 (1st Dep't 2023) (hereafter," Hutcher*"*),

https://casetext.com/case/hutcher-v-madison-square-garden-entmt-corp-5.

[6] *Hutcher v. Madison Square Garden Entm't Corp,* Index No. 653793/2022, Slip Op. at 1-2 (June 26, 2023) (hereafter, "*Rabij*").

[7] Oral Argument on Def. Madison Square Garden Ent. Corp.'s Mot. for a Protective Order, Plaintiff's Omnibus Mot. and Rulings of the Court, Held via Zoom, C.A. No. 2021-0468-KSJM (Del. Ch. Nov. 6, 2022)

a completely idiotic letter to 90 different adverse attorneys for presumptively vindictive reasons is a question for Jim Dolan."[8]

In the face of all this, on February 5, 2023, MSGE altered its policy slightly, saying it did not apply to attorneys involved in pending litigation "with Tao Group Hospitality, which includes about three dozen restaurants and clubs in the city," ostensibly because MSGE was looking to sell the chain.[9]

That same day, NYSBA President Sherry Levin Wallach appointed this Working Group, chaired by then-Treasurer, now President-Elect Napoletano, to "examine the legal and ethical considerations surrounding the use of facial recognition and other technology to restrict individual freedoms, including but not limited to attendance at events or entrance into venues as well as the propriety of the use of this and other technology on a lawyer's ability to represent clients without fear of retribution." Since then, the Working Group has met several times, formed subcommittees to address ethical issues and pending legislation, has monitored the ongoing litigation against MSGE as well as proposed legislation, and is recommending that NYSBA support certain legislative proposals that will address this problem. We now present those conclusions to the House.

Policy Considerations.

The Working Group discussed its Mission at length. We agreed on three fundamental considerations.

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[8] *Id.*

[9] "MSG Entertainment Lifts Ban for Some Lawyers Involved in Lawsuits Against the Company," nbcnewyork.com, 2/6/23, https://www.nbcnewyork.com/news/local/msg-entertainment-lifts-ban-for-some-lawyers-involved-in-lawsuits-against-company/4089798/.

First, the proper use of facial recognition and other biometric technology is an issue that far transcends Kelly Conlon, Larry Hutcher, James Dolan and MSGE – or even lawyers or the legal profession. It goes to the very core of our civil liberties, to our ability to freely move about, associate with whom we want, to organize and speak politically and culturally. The examples are legion. The Chinese government has created a massive database containing facial recognition and other biometric information on the Chinese citizenry, allowing the government to monitor all its citizens' activities, and requiring those who demonstrate against the government to mask themselves to avoid recognition and prosecution. Closer to home, many stores are using facial recognition technology to keep out customers previously accused, or even suspected, of shoplifting – even if there has been no adjudication of wrongdoing. Making this worse is that facial recognition technology has been found to be less likely to accurately identify persons of color, thus increasing the risks of misidentification and false arrests. Even if facial recognition and biometric technology improves – and it surely will – it represents a threat to our most fundamental values as a society, a threat that has the potential to alter the lives of every single person living in the United States. This threat – and how to counter it – must be our ultimate mission.

Second, as MSGE's actions have shown, facial recognition technology represents a special and unique threat to lawyers and the legal system. Our Mission Statement makes this clear, asking us to consider "how the use of [biometric] technology can prohibit the ability of members of the legal profession to provide effective representation of clients and disrupt access to justice." Ex. A. The ability of large corporations, and the government, to use this technology to zero in on lawyers whose firms represent clients suing them will inevitably chill the desire of lawyers to take on such cases and will limit ordinary citizens' access to the justice to which they are entitled. While it may seem frivolous to some, the inability of a long-time Knick season ticket holder to use

those tickets may discourage her from taking on a case against MSGE – especially if she has already paid thousands of dollars in advance for those tickets. The same is true of a regular concertgoer, who will be unable to see shows at Madison Square Garden, Radio City and any other MSGE venues. If MSGE is permitted to throw its corporate weight around in this way – and in a way that impacts not just the lawyer handling a case *but every single lawyer in their firm* -- it will become all the more difficult for potential plaintiffs to retain the lawyers they want or need to bring a lawsuit against it.

Again, this is not just about MSGE. Imagine a larger corporation – a national shopping chain, an airline, a hospital system, an online ride hailing service – that could employ this technology to prevent lawyers who sue them from using their services. In some localities, this would prevent the lawyer or their family from shopping at the only nearby food store, or flying to a particular destination, or using a particular doctor or hospital, or obtaining cab service. The larger and more powerful the corporation, the more powerful this tool can be. And the more the use of facial recognition technology can insulate that corporation from opposing lawyers and lawsuits, the more access to justice for individual citizens is imperiled.

Our mission, in short, is not just to protect our members – though that is part of it. It is to protect the very integrity of our legal system against a new tool that can insulate large, powerful institutions from being sued by targeting lawyers, their colleagues and even their families directly. Lawyers are accustomed to encountering hostility and even attacks from their adversaries, but only within the bounds of our legal system and with a judge or other neutral to control them. They do not expect to be denied public accommodation for doing their jobs – nor should they be. This Association must take steps to ensure they are not.

Third, MSGE's actions have galvanized lawyers and politicians to fight back. We have closely monitored those efforts, and viewed our first task to make appropriate recommendations about legislative proposals regarding biometric technology that are currently before the New York State Senate and Assembly. On May 25, 2023, a memorandum of support of Bill S. 4457 / A.1362, which would establish the New York State Biometric Privacy Act, was submitted to the legislature on behalf of the Working Group. A copy of this memorandum is attached as Exhibit F, and a copy of the proposed statute is Exhibit G.

Ethical Considerations

The participation of lawyers, whether in-house or outside counsel, to create policies allowing their clients to use biometric technology to target lawyers at the opposing law firm (whether or not those lawyers are involved in the case) and prohibit their access to public accommodations raises serious ethical concerns. As we explained above, this conduct allows a well-heeled corporate adversary to use its economic clout and technological prowess to interfere in the private lives of those lawyers whose firm chooses to represent a client bringing an action against them. This appears intended, and will certainly have the effect, of discouraging at least some law firms from taking on these cases, thereby limiting access to justice. Moreover, the more powerful the corporation, the more clout it will have and the more effective this weapon will be.

This is bad for lawyers, and bad for the public at large, as a matter of policy and judicial administration. It is also extremely troubling from an ethical standpoint, as it allows lawyers to attack their adversaries outside the arena where their clients' dispute is supposed to be resolved (in courts and other tribunals), to directly intervene in and interfere with their private affairs, and to do so without the knowledge or supervision of the tribunal. This bullying – calling it what it is, plain and simple – appears to violate N.Y. Rule of Prof'l Conduct ("Rule") 4.4(a) ("In representing

a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person"), Rule 8.4(d) (prohibiting "conduct prejudicial to the administration of justice", and Rule 8.4(h) (prohibiting conduct "that adversely reflects on a lawyer's fitness as a lawyer"). As Comment 3 to Rule 8.4 states: "The prohibition on conduct prejudicial to the administration of justice is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in substantial harm to the justice system comparable to those caused by obstruction of justice," including paying a witness to be unavailable, advising a client to testify falsely or repeatedly disrupting a proceeding. The conduct here falls into the same category. Just as intimidating a witness to give false testimony or leave the jurisdiction is improper [*see* Rule 3.4, Cmt. 1 ('Fair competition in the adversary system is secured by prohibitions against . . . improperly influencing witnesses . . ."), so too is conduct which is intended to extrajudicially intimidate and discourage opposing counsel and their client from taking on or continuing a litigation. *See, e.g., Matter of Lung,* 183 A.D.3d 256, 262 (2d Dep't 2020) (disciplining lawyer under Rules 4.4(a) and 8.4(h) for sending emails disparaging opposing counsel to opposing counsel's client, in part for the purpose of disrupting the attorney-client relationship); N.Y. City 2017-3 (2017) (Rule 8.4(d) violated if counsel threatens opposing party with proceeding unrelated to the dispute he or she is handling); N.Y. City 2015-5 (2015) (threat to file grievance proceeding against opposing counsel in order to gain advantage in civil proceeding may violate Rule 8.4(d)); R. Simon, *Simon's New York Rules of Prof'l Conduct Annotated (2020-21 ed.), §* 4.4;2 at 1346 ("The main use of Rule 4.4(a) would be against a lawyer who repeatedly uses litigation techniques whose sole purpose is to embarrass third parties. . . . "[W]itnesses [and] opposing lawyers . . . fit within the rubric 'third person'. . .").

Proposed Amendment to the Civil Rights Law

Studying the *Hutcher* decisions reveals fundamental flaws in the N.Y. Civil Rights Law that we believe can and should easily be fixed.

First, the definition of "places of public entertainment and amusement" should be expanded to include "professional or collegiate sports venues". Section 40-b of the N.Y. Civil Rights Law currently reads, in pertinent part:

> No person . . . corporation or association, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public entertainment and amusement as hereinafter defined shall refuse to admit any public performance held at such place any person over the age of twenty-one years who present a ticket of admission to the performance a reasonable time before the commencement thereof, or shall eject or demand the departure of such person from such such place during the course of the performance, whether or not accompanied by an offer to refund the purchase price or value of the ticket . . . , but nothing in this section shall be construed to prevent the refusal of admission to or the ejection of any such person whose conduct or speech thereat or therein is abusive or offensive or of any person engaged in any activity which may tend to a breach of the peace.
>
> ***The places of public entertainment and amusement within the meaning of this section shall be legitimate theaters, burlesque theaters, music halls, opera houses, concert halls and circuses.*** (Emphasis added.)

The bold, italicized language led to anomalous results in *Hutcher.* The First Department rejected plaintiff Hutcher's claim because MSGE excluded him from a sporting event at Madison Square Garden, and such an event was not considered a "place[] of public entertainment and amusement" under the statute.[10] The court recognized that "Madison Square Garden is a multi-purpose venue that sometimes functions as a concert hall or theater and other times as a sports arena," but ruled that "it only falls within the ambit of Civil Rights Law § 40-b when it is being used as an enumerated purpose."[11] Thus, the plaintiff was not entitled to any relief under the statute.

[10] 214 A.D.2d at 573-74.

[11] *Id.*

But because plaintiff Rabij was ejected from an event at the Hulu Theater, another MSGE-owned venue but one which happened to be a designated "place of public entertainment and amusement" under the statute, he received the full relief available – civil penalties and a refund of his ticket.[12]

It is hard to reconcile these results from the standpoint of public policy: MSGE should not be allowed to bar lawyers from its adversary law firms from its sporting venues, while being able to do so from its theaters. Indeed, the notion that the bar applies to Madison Square Garden when it is being used for some purposes and not others does not make any sense to us. Nor has our research disclosed any reason for this distinction.

We do note that Civil Rights Law § 40-b has long been strictly construed. In *Mandel v. Brooklyn Nat'l League Baseball Club*, 179 Misc. 27, 28 [Sup Ct, Bronx County 1942], the Court held that §40-B did not include a baseball stadium, stating that "[i]t is apparent from the reading of this section that the law as to the construction of a statute permitting a court to supply words 'ejusdem generis' does not apply, and that consequently a baseball ground cannot be held to be a place of amusement or entertainment contemplated by this section." This strict interpretation was reiterated in *Christie v. 46th St. Theatre Corp.*, 265 A.D. 255, 39 N.Y.S.2d 454 (App. Div. 1942), aff'd, 292 N.Y. 520, 54 N.E.2d 206 (1944), where the court held that the statute did not include a movie theatre.

Christie, however, may be instructive. The court stated that the inclusion of certain classes of theatres (legitimate theatre, for example), were not arbitrary because a moviegoer could see a performance at "hundreds of houses," whereas in legitimate theatre, they would be restricted to a few venues to see a play or performance. *Id.* at 458. Because live sporting events are limited in

[12] *Hutcher v. Madison Square Garden Enterprises,* Slip Op. dated 6/23/23 at 1-2.

attendance to one location, the logic applied to legitimate theaters and other limited venues should apply to them as well.

Accordingly, we recommend that the definition of "places of public entertainment and amusement" under Civil Rights Law § 40-b be extended to include "professional or collegiate sporting venues."

Second, the civil penalties under Civil Rights Law § 41 should be enhanced. Under the current statute, the penalty is limited to a monetary payment between $100 and $500, at the court's discretion. As the First Department made clear in *Hutcher,* injunctive relief is not allowed.[13] This should be changed, and the statute amended to allow the court the option of issuing injunctive relief *in addition to* the civil penalty. This will enable courts to prevent the type of concerted plan that MSGE attempted here – to systematically bar a group of people from its venue for reasons not permitted under the statute. Furthermore, the civil penalty under the statute should be increased ten-fold, to between $1000 and $5000 per instance, to keep up with inflation.

The Biometric Privacy Act

Our proposals regarding the Civil Rights Act are narrow and focus on the use of facial recognition technology in a limited context. The broader concerns mentioned earlier in this Report require a broader solution, one that addresses the myriad possible uses (and misuses) of biometric recognition by individuals and businesses throughout the state.

Our Working Group has examined a number of proposed statutes that were submitted to the Legislature earlier this year, in the wake of the revelations about MSGE. We strongly prefer the Biometric Privacy Act (the "BPA"), which proposes a new Article 32-A of the General Business Law and was introduced by sixteen members of the State Assembly. *See* Ex. F. As noted,

[13] 214 A.D.3d at 574,

we have already submitted a memorandum to the Legislature on behalf of the Working Group supporting the BPA. *See* Ex. E. We ask that NYSBA as a whole support this legislation and make it a legislative priority for the 2023-24 session.

As our memorandum states, the BPA would require private entities that have biometric data in their possession to develop written policies that are available to the public and that address retention and destruction of that data. The BPA would also require private entities to, among other things, advise a person that his or her data is being collected and stored, and obtain written consent for collection and storage. It also would bar sale or resale of data, and limit further disclosure. Finally, the BPA would allow a private cause of action for violating its terms.

Digging a bit deeper, the BPA revolves around two key defined terms. The first, the "biometric identifier", means "a retina or iris scan, fingerprint, voiceprint or scan of hand or face geometry." It thus includes facial recognition technology but goes way beyond it. Still, it is limited in scope: it specifically excludes writing samples, signatures, photographs, human biological samples used for standard medical testing, and donated body parts, among other things. The use of biometric *technology* is the focus.

The second key defined term is "biometric information", which is "any information, regardless of how it is captured, converted, stored or shared, based on an individual's biometric identifier used to identify an individual." It excludes information captured using items excluded from the definition of "biometric identifier."

The BPA would require that any "private entity" – also a defined term, covering individuals and entities – develop a written policy, available to the public, establishing a retention schedule and guidelines for destroying biometric identifiers and biometric information at the earlier of (a) the accomplishment of the initial purpose for collecting or gathering that information, or (b) three

years after the information is gathered. More significantly, it prohibits a private entity from obtaining, through trade or otherwise, biometric identifiers or biometric information unless it first: (i) informs the subject or their legally authorized representative (collectively, the "subject") in writing of: the fact that the biometric identifier or biometric information is being collected stored or used, and the purpose for which that is being done; and (ii) receives a written release from the subject permitting this. Private entities are also prohibited from "sell[ing], leas[ing], trad[ing] or otherwise profit[ing]" from a customer's biometric identifier or biometric information, or from disseminating it absent consent or legal obligation. The BPA also requires that this biometric information be stored using a "reasonable standard of care" that is at least consistent with how it protects other sensitive and confidential information, including attorney-client privileged information.

A subject whose biometric identifier or biometric information is used in violation of the BPA has a private right of action that allows recovery of the greater of $1000 or actual damages for a negligent breach, and the greater of $5,000 or actual damages for an intentional breach. In addition, the subject may recover their reasonable attorneys' fees if they prevail and, in the court's discretion, may obtain injunctive relief *in addition to* the damages.

The BPA would make a powerful tool indeed to limit the use of facial recognition and biometric technology. It would allow individuals and businesses to use such technology for legitimate purposes, such as security or customer identification, while creating guardrails that prevent misuse, improper dissemination and outright trafficking in biometric identifiers and information. By requiring customers to be informed that their biometric information is being used, and to consent to that use, it would prevent abuses such as those perpetrated by MSGE. We heartily support the BPA, and we ask this Association to do the same.

Working Group on Facial Recognition Technology and Access to Legal Representation

Domenick Napoletano, chair

Orin J. Cohen

Sarah E. Gold

Ronald J. Hedges

LaMarr J. Jackson

Thomas J. Maroney

Michael R. May

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Vivian D. Wesson

Hilary J. Jochmans, advisor

Thomas J. Richards, staff liaison

*Mr. Minkoff abstains from any vote on the report.

Working Group on Facial Recognition Technology and Access to Legal Representation

Mission Statement

The Working Group on Facial Recognition Technology and Access to Legal Representation shall examine the legal and ethical considerations surrounding the use of facial recognition and other technology to restrict individual freedoms, including but not limited to attendance at events or entrance into venues as well as the propriety of the use of this and other technology on a lawyer's ability to represent clients without fear of retribution. The Working Group will also consider how the use of technology can prohibit the ability of members of the legal profession to provide effective representation of clients and disrupt access to justice. The Working Group shall make any necessary policy recommendations to the NYSBA Executive Committee.

MADISON SQUARE GARDEN ENTERTAINMENT

MADISON SQUARE GARDEN SPORTS

Policy Memorandum

Subject: Business Relationships with Counsel to Litigation Plaintiffs

Date: July 28, 2022

This Policy Memorandum outlines the internal policy (the "**Policy**") of MSG Entertainment Group, LLC ("**MSGE**") and MSG Sports, LLC (collectively, the "**Companies**"), which seeks to address serious and legitimate concerns related to protecting the Companies' interests in connection with certain ongoing litigations.

The Companies have become increasingly concerned about counsel that represent plaintiffs in certain ongoing litigation against the Companies attending events at the MSGE Venues (defined below). In addition to the adversarial nature inherent in litigation proceedings, other risks involved in adverse counsel and other attorneys in their law firm attending events at the MSGE venues include, but are not limited to:

i. Adverse counsel communicating directly with employees of the Companies in violation of ethical rules, which prohibit any communication with opposing parties and their employees;
ii. Adverse counsel seeking (or attempting to seek) disclosure outside proper litigation discovery channels as a result of their presence at the MSGE Venues, including by communicating directly with employees of the Companies or engaging in other improper evidence-gathering activities on site; and
iii. Adverse counsel otherwise undermining or harming the Companies' interests in certain ongoing litigation.

In light of these concerns, the Companies reserve the right to exclude from the MSGE Venues litigation counsel who represent parties adverse to the Companies, and other attorneys at their law firms. Similarly, the Companies may determine to prohibit any such attorney from purchasing from the Companies tickets to events at the MSGE Venues and/or utilizing the special services of dedicated MSG employees, such as the Season Membership, Group Sales or Hospitality Sales groups, to assist with or consummate their purchases.

Under applicable law, tickets to attend events at the MSGE Venues are merely licenses revocable at will. Accordingly, MSGE has discretion to exclude individuals from its premises and may remove visitors to the MSGE Venues for any reason or no reason at all. For the same reasons, the Companies have the right to decline to sell tickets for events held at the MSGE Venues to any person or group of people, except on grounds prohibited by law.

In exercising the rights being reserved under this Policy, the Companies will comply with any laws proscribing retaliation against litigants raising certain types of claims. Before making the determination on behalf of the Companies to exercise the rights reserved under this Policy, the MSGE Legal Department will carefully analyze potential conflicts in making case-by-case determinations as to whether to exercise the rights to exclude, and/or decline to sell tickets to,

adverse counsel and/or other attorneys at their law firms. This includes carefully considering whether any applicable federal, state, or local laws proscribing retaliation against litigants raising certain types of claims would be violated as a consequence of the Companies' exercise of such rights.

In those ongoing litigations where, after such analysis, the Companies exercise their right to exclude adverse counsel and/or other attorneys at their law firms, the MSGE Legal Department will send a letter to adverse counsel in that litigation, and (where applicable) to the named or managing partners at their law firms, informing them that they and the other attorneys at their law firms will not be admitted to the MSGE Venues. This communication will explain the rationale underlying this Policy and include a list of the MSGE Venues.

Subject to providing proof that a ticket purchase was made prior to their or their firms' receipt of the communication referenced above, Any attorney excluded from an MSGE Venue may request a refund of the established price of the tickets for their entire party, or for the attorney only. In the latter case the remainder of the party will be permitted to enter the MSGE Venue but the attorney will not be permitted to enter the MSGE Venue. Refunds will be processed as promptly as feasible.

As of the date of this Policy, "**MSGE Venues**" means Madison Square Garden, Hulu Theater at Madison Square Garden, Beacon Theatre, Radio City Music Hall and The Chicago Theatre. The Companies reserve the right to include in this definition additional premises owned and/or operated by MSGE or its subsidiaries.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
CIVIL RIGHTS BUREAU

January 24, 2023

VIA USPS AND E-MAIL

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Legal Department
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Dear Counsels,

The New York State Office of the Attorney General (OAG) has reviewed reports alleging that Madison Square Garden Entertainment Corp. and its affiliates (collectively, the "Company"), have used facial recognition software to forbid all lawyers in all law firms representing clients engaged in any litigation against the Company from entering the Company's venues in New York, including the use of any season tickets (the "Policy"). Reports indicate that approximately 90 law firms are impacted by the Company's Policy, constituting thousands of lawyers.

We write to raise concerns that the Policy may violate the New York Civil Rights Law and other city, state, and federal laws prohibiting discrimination and retaliation for engaging in protected activity. Such practices certainly run counter to the spirit and purpose of such laws, and laws promoting equal access to the courts: forbidding entry to lawyers representing clients who have engaged in litigation against the Company may dissuade such lawyers from taking on

legitimate cases, including sexual harassment or employment discrimination claims. *See*, *e.g.*, N.Y. Civ. Rights Law § 40-b (prohibiting wrongful refusal of admission to and ejection from public entertainment and amusement, such as legitimate theaters, burlesque theatres, music halls, opera houses, concert halls, and circuses, etc.); N.Y. State Exec. Law ("NYSHRL") § 296(2) (prohibiting public accommodations from engaging in discrimination in New York State); New York City Human Rights Law ("NYCHRL") § 8-107(4) (prohibiting public accommodations from engaging in discrimination in New York City). And attempts to dissuade individuals from filing discrimination complaints or encouraging those in active litigation to drop their lawsuits so they may access popular entertainment events at the Company's venues may violate state and city laws prohibiting retaliation. *See* NYSHRL § 296(7) (prohibiting retaliation); NYCHRL § 8-107(7) (prohibiting "retaliatory or discriminatory act or acts [that are] reasonably likely to deter a person from engaging in protected activity"). Lastly, research suggests that the Company's use of facial recognition software may be plagued with biases and false positives against people of color and women.[1]

By February 13, 2023, please respond to this Letter to state the justifications for the Company's Policy and identify all efforts you are undertaking to ensure compliance with all applicable laws and that the Company's use of facial recognition technology will not lead to discrimination. Discrimination and retaliation against those who have petitioned the government for redress have no place in New York.

Thank you for your cooperation with this inquiry.

Sincerely,

/s/ Kyle S. Rapiñan, Esq.
Civil Rights Bureau
New York State Office of the Attorney General
Kyle.Rapinan@ag.ny.gov | (212) 416-8618

[1] *See* Davide Castelvecchi, Is facial recognition too biased to be let loose? Nature. Nov. 18, 2020, https://www.nature.com/articles/d41586-020-03186-4 (last accessed Jan. 18, 2023); *see also* Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification,* Proceedings of Machine Learning Research 81, 1–15, 10 (2018), http://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf (last accessed Jan. 18, 2023) (finding facial recognition was more accurate for white people and men overall but less accurate for people of color and women).

No. 2022-05318
Supreme Court of New York, First Department

Hutcher v. Madison Square Garden Entm't Corp.

214 A.D.3d 573 (N.Y. App. Div. 2023) · 186 N.Y.S.3d 26 · 2023 N.Y. Slip Op. 1646
Decided Mar 28, 2023

17588-, 17589-, M-912 Index No. 653793/22 Case Nos. 2022-05178, 2022-05318

03-28-2023

Larry HUTCHER et al., Plaintiffs–Respondents–Appellants, v. MADISON SQUARE GARDEN ENTERTAINMENT CORP. et al., Defendants–Appellants–Respondents.

King & Spalding LLP, New York (Randy M. Mastro of counsel), for appellants-respondents. Davidoff Hutcher & Citron LLP, New York (Larry Hutcher of counsel), for respondents-appellants.

27 *27

King & Spalding LLP, New York (Randy M. Mastro of counsel), for appellants-respondents.

Davidoff Hutcher & Citron LLP, New York (Larry Hutcher of counsel), for respondents-appellants.

Kern, J.P., Oing, Kennedy, Pitt–Burke, Higgitt, JJ.

573 *573 Order, Supreme Court, New York County (Lyle E. Frank, J.), entered on or about November 14, 2022, and order (denominated supplemental order), same court and Justice, entered on or about November 18, 2022, which, insofar as appealed from, granted plaintiffs' motion for a preliminary injunction to the extent of enjoining defendants from denying access to a person presenting a valid ticket to a theatrical performance or a musical concert on the day of an event at defendants' venues, unanimously reversed, on the law, without costs, and the preliminary injunction vacated.

The motion court properly concluded that Civil Rights Law § 40–b requires the admission of plaintiffs to venues controlled by defendants if they arrive at the venue after it opens on the date of a theatrical performance or musical concert with valid tickets thereto. We reject the invitation of amicus curiae the New York State Trial Lawyers Association to treat defendant Madison Square Garden Entertainment Corp. as a common carrier with a more limited right to exclude.

The motion court properly excluded sporting events from its holding because Civil Rights Law § 40–b is specifically limited in application to "legitimate theatres, burlesque theatres, music halls, opera houses, concert halls and circuses" (*see Madden v. Queens County Jockey Club, Inc.*, 296 N.Y. 249, 254, 256, 72 N.E.2d 697 [1947], *cert denied* 332 U.S. 761, 68 S.Ct. 63, 92 L.Ed. 346 [1947] ; *Impastato v. Hellman Enters., Inc.*, 147 A.D.2d 788, 790, 537 N.Y.S.2d 659 [3d Dept. 1989] ; *Mandel v. Brooklyn Natl. League Baseball Club Inc.*, 179 Misc. 27, 28–29, 37 N.Y.S.2d 152 [Sup. Ct., Bronx County 1942]). Although Madison Square Garden is a multi-purpose venue
574 that sometimes functions as a concert hall or *574
28 theatre and other times as a sporting arena, *28 we find that it only falls within the ambit of Civil Rights Law § 40–b when it is being used for an enumerated purpose.

However, it was improper for the motion court to issue a preliminary injunction. As Civil Rights Law § 41 prescribes a monetary remedy for violations of Civil Rights Law § 40–b, plaintiffs are limited to that remedy (*see Woolcott v.*

Shubert, 169 App.Div. 194, 197 [1st Dept. 1915] ["The general rule is that where a statute creates a right and prescribes a remedy for its violation that remedy is exclusive and neither an action for damages nor for an injunction can be maintained"]; *O'Connor v. 11 W. 30th St. Rest. Corp.,* 1995 U.S. Dist LEXIS 8085 *20, 1995 WL 354904, *6 [S.D.N.Y. June 1, 1995] ; *see also Drinkhouse v. Parka Corp.,* 3 N.Y.2d 82, 88, 164 N.Y.S.2d 1, 143 N.E.2d 767 [1957], *superseded by statute on other grounds as stated in Alan J. Waintraub, PLLC v. 97–17 Realty, LLC,* 2020 N.Y. Slip Op. 34502[U], *10–11, 2020 WL 9596265 [Civ. Ct., Queens County 2020] ; *Broughton v. Dona,* 101 A.D.2d 897, 898, 475 N.Y.S.2d 595 [3d Dept. 1984], *lv dismissed* 63 N.Y.2d 769, 481 N.Y.S.2d 1025, 471 N.E.2d 464 [1984]). Even if injunctive relief were available, the existence of a statutory damages remedy would undermine plaintiffs' claims of irreparable harm (*see* Civil Rights Law § 41 ; *Woolcott,* 169 A.D. at 199, 154 N.Y.S. 643).

Motion for leave to file an amicus curiae brief granted.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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INDEX NO. 653793/2022

MOTION DATE N/A

MOTION SEQ. NO. 004

LARRY HUTCHER, JEFFREY CITRON, SID DAVIDOFF, HOWARD WEISS, IAN BRANDT, LESLIE BARBARA, CHARLES CAPETANAKIS, ADAM CITRON, ROBERT COSTELLO, SEAN CROWLEY, ARTHUR GOLDSTEIN, PATRICIA GRANT, CHARLES KLEIN, JOSH KRAKOWSKY, GARY LERNER, ELLIOT LUTZKER, WILLIAM MACK, STEVE MALITO, HOWARD PRESANT, ERIC PRZYBYLKO, ROBERT RATTET, PETER RIPIN, MARTIN SAMSON, STEVE SPANOLIOS, WILLIAM WALZER, MICHAEL WEXELBAUM, DEREK WOLMAN, JUDITH ACKERMAN, NICK ANTENUCCI, MYRON RABIJ, ASHWINI JAYARATNAM, ALEXANDER MCBRIDE, RICHARD WOLTER, STEVEN APPELBAUM, MAX DUVAL, ELI GEWIRTZ, DANIEL GOLDENBERG, CAROLINE HALL, MICHAEL KATZ, DAVID LEVINE, BENJAMIN NOREN, FEDERICA PANTANA, JOSEPH POLITO, ASHWANI PRABHAKAR, NICOLE SANTO, MICHAEL APPELBAUM, JAMES GLUCKSMAN, JOSEPH ASIR, HENRY CITTONE, JOHN CORRIGAN, WILLIAM COX, JOHN KIERNAN, ROBERT LEVINE, MARK SPUND, NICHOLAS TERZULLI, ALEXANDER VICTOR, DAVIDOFF HUTCHER & CITRON, LLP

Plaintiff,

- v -

MADISON SQUARE GARDEN ENTERTAINMENT CORP., HAROLD WEIDENFELD,

Defendant.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 126, 127, 129, 131, 132, 133, 134, 135, 136, 137, 138

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion to dismiss is granted in part.

This Court has previously ruled that only section 40-b of the Civil Rights Law ("CRL") is applicable to this matter. As such, of the first nine causes of action, all are dismissed except the third and eighth causes of action, which allege violations of CRL § 40-b. Moreover, as the

Appellate Division, First Department, has ruled that injunctive relief is not appropriate in this case, the causes of action requesting injunctive relief are among the claims dismissed.

As to the new cause of action, the tenth, that cause of action must also be dismissed. The Court agrees with the defendant that plaintiffs have failed to state a claim pursuant to CRL §§ 50 and 51. It is undisputed that to state a claim pursuant to CRL §51, plaintiffs must allege "(i) usage of plaintiff's name, portrait, picture, or voice, (ii) within the State of New York, (iii) for purposes of advertising or trade, (iv) without plaintiff's written consent" (*Molina v Phoenix Sound, Inc*., 297 AD2d 595, 597 [1st Dept 2002]).

Here, plaintiffs' complaint contains no factual allegations that defendants are using or are intending to use plaintiffs' photographs for advertising or trade. Further, plaintiffs in opposition to defendants' motion, allege that defendants' economic benefit is derived from its policy of banning attorneys to gain favorable settlements, this argument however is unpersuasive. Plaintiffs also contend that defendants may use the photographs for advertising r trade in the future is inadequate to maintain this cause of action. Based on the foregoing, it is hereby

ORDERED that the complaint is dismissed, with the exception of the third and eighth causes of action, which remain.

20230626152051LFRANK30B39BA639C4FC39A275B4018A40A8E

6/26/2023
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	X	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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INDEX NO. 653793/2022

MOTION DATE 06/23/2023

MOTION SEQ. NO. 005

LARRY HUTCHER, JEFFREY CITRON, SID DAVIDOFF, HOWARD WEISS, IAN BRANDT, LESLIE BARBARA, CHARLES CAPETANAKIS, ADAM CITRON, ROBERT COSTELLO, SEAN CROWLEY, ARTHUR GOLDSTEIN, PATRICIA GRANT, CHARLES KLEIN, JOSH KRAKOWSKY, GARY LERNER, ELLIOT LUTZKER, WILLIAM MACK, STEVE MALITO, HOWARD PRESANT, ERIC PRZYBYLKO, ROBERT RATTET, PETER RIPIN, MARTIN SAMSON, STEVE SPANOLIOS, WILLIAM WALZER, MICHAEL WEXELBAUM, DEREK WOLMAN, JUDITH ACKERMAN, NICK ANTENUCCI, MYRON RABIJ, ASHWINI JAYARATNAM, ALEXANDER MCBRIDE, RICHARD WOLTER, STEVEN APPELBAUM, MAX DUVAL, ELI GEWIRTZ, DANIEL GOLDENBERG, CAROLINE HALL, MICHAEL KATZ, DAVID LEVINE, BENJAMIN NOREN, FEDERICA PANTANA, JOSEPH POLITO, ASHWANI PRABHAKAR, NICOLE SANTO, MICHAEL APPELBAUM, JAMES GLUCKSMAN, JOSEPH ASIR, HENRY CITTONE, JOHN CORRIGAN, WILLIAM COX, JOHN KIERNAN, ROBERT LEVINE, MARK SPUND, NICHOLAS TERZULLI, ALEXANDER VICTOR, DAVIDOFF HUTCHER & CITRON, LLP

Plaintiff,

- v -

MADISON SQUARE GARDEN ENTERTAINMENT CORP., HAROLD WEIDENFELD,

Defendant.

----------X

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion for partial summary judgment is granted.

Both this Court and the Appellate Division, First Department have held that the actions of the defendants, with regard to its refusal of entry to people with valid tickets violates Civil Rights Law Section 40-b. As such, plaintiff Myron Rabij, has established *prima facie* entitlement to

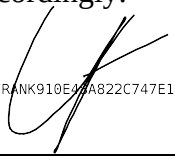
judgment as a matter of law, by showing that he was denied entry to an event where he presented a ticket that had not been revoked,

The arguments made by the defendants, are unavailing. The defendants argue that by revoking all tickets to the subject plaintiffs, that the plaintiffs could never possess a valid ticket and insists that by barring these plaintiffs it renders all tickets, whether having already been issued and not yet issued, as revoked. This Court has previously rejected such an argument, requiring that the revocation be specific as to time, date, and seat location. To do otherwise would turn Section 40-b into a nullity. The Court declined to do this before and declines to do so again.

As the defendants have continually knowingly violated the law even following this Court's determination that their actions were violative of the law, the Court believes that the maximum penalty allowed by law along with the cost of the ticket is mandated. It is therefore

ADJUDGED that the motion for partial summary judgment is granted, and plaintiff Myron Rabij is entitled to judgment as against the defendants in the amount of $662.35; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.



6/26/2023
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[X]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**

NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

Memorandum in Support

WORKING GROUP ON FACIAL RECOGNITION TECHNOLOGY

Facial Recognition #1 May 25, 2023

S.4457 By: Senator Liu
A.1362 By: M of A Gunther
Senate: Consumer Protection
Assembly: Consumer Affairs and Protection
Effective Date: 90th day after it shall have become a law

AN ACT to amend the General Business Law, in relation to biometric privacy.

LAW AND SECTIONS REFERRED TO: adds new article 32-A of the General Business Law

THE WORKING GROUP ON FACIAL RECOGNITION TECHNOLOGY SUPPORTS THIS LEGISLATION

This bill would add a new article 32-A of the General Business Law titled, "the Biometric Privacy Act."

Recent events at an entertainment venue in New York State have demonstrated that biometric data about a person can be used to, among other things, deny access to that venue. More broadly, the capture, storage, use, and resale of that data by private entities can invade legitimate privacy interests of persons that are not protected by existing federal or New York State law.

The Biometric Privacy Act would require private entities that have biometric data in their possession to develop written policies that are available to the public and that address retention and destruction of that data. The Act would also require private entities to advise a person that his or her data is being collected or stored, to obtain written consent for collection or storage, bar sale or resale of data, and limit further disclosure. The Act would also allow a private cause of action for violation of its terms.

The capture and use of biometric data by private entities, often without knowledge of that capture or use by an affected person, is ubiquitous. Certainly, biometric data can be used for legitimate purposes by private entities. This bill would not prohibit private entities from doing so. However, it would install "guardrails" to protect the privacy interests of persons and to provide clear guidance to private entities. This will benefit the people of New York State as well as the entities that do business here.

For the above reasons, the NYSBA Working Group on Facial Recognition Technology **SUPPORTS** this legislation.

Opinions expressed are those of the Section/Committee preparing this memorandum and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

STATE OF NEW YORK

4457

2023-2024 Regular Sessions

IN SENATE

February 9, 2023

Introduced by Sen. LIU -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection

AN ACT to amend the general business law, in relation to biometric privacy

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The general business law is amended by adding a new article 32-A to read as follows:

ARTICLE 32-A
BIOMETRIC PRIVACY ACT

§ 676. Short title. This article shall be known and may be cited as the "biometric privacy act".

§ 676-a. Definitions. As used in this article: 1. "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry. Biometric identifiers shall not include writing samples, written signatures, photographs, human biological samples used for valid scientific testing or screening, demographic data, tattoo descriptions, or physical descriptions such as height, weight, hair color, or eye color. Biometric identifiers shall not include donated body parts as defined in section forty-three hundred of the public health law or blood or serum stored on behalf of recipients or potential recipients of living or cadaveric transplants and obtained or stored by a federally designated organ procurement agency. Biometric identifiers do not include information captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Porta-

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD01142-01-3

bility and Accountability Act of 1996. Biometric identifiers do not include an X-ray, roentgen process, computed tomography, magnetic resonance imaging, positron-emission tomography scan, mammography, or other image or film of the human anatomy used to diagnose, prognose, or treat an illness or other medical condition or to further validate scientific testing or screening.

2. "Biometric information" means any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual. Biometric information shall not include information derived from items or procedures excluded under the definition of biometric identifiers.

3. "Confidential and sensitive information" means personal information that can be used to uniquely identify an individual or an individual's account or property which shall include, but shall not be limited to, a genetic marker, genetic testing information, a unique identifier number to locate an account or property, an account number, a personal identification number, a pass code, a driver's license number, or a social security number.

4. "Private entity" means any individual, partnership, corporation, limited liability company, association, or other group, however organized. A private entity shall not include a state or local government agency or any court in the state, a clerk of the court, or a judge or justice thereof.

5. "Written release" means informed written consent or, in the context of employment, a release executed by an employee as a condition of employment.

§ 676-b. Retention; collection; disclosure; destruction. 1. A private entity in possession of biometric identifiers or biometric information must develop a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within three years of the individual's last interaction with the private entity, whichever occurs first. Absent a valid warrant or subpoena issued by a court of competent jurisdiction, a private entity in possession of biometric identifiers or biometric information must comply with its established retention schedule and destruction guidelines.

2. No private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first:

(a) informs the subject or the subject's legally authorized representative in writing that a biometric identifier or biometric information is being collected or stored;

(b) informs the subject or the subject's legally authorized representative in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and

(c) receives a written release executed by the subject of the biometric identifier or biometric information or the subject's legally authorized representative.

3. No private entity in possession of a biometric identifier or biometric information may sell, lease, trade, or otherwise profit from a person's or a customer's biometric identifier or biometric information.

4. No private entity in possession of a biometric identifier or biometric information may disclose, redisclose, or otherwise disseminate a

person's or a customer's biometric identifier or biometric information unless:

(a) the subject of the biometric identifier or biometric information or the subject's legally authorized representative consents to the disclosure or redisclosure;

(b) the disclosure or redisclsoure completes a financial transaction requested or authorized by the subject of the biometric identifier or the biometric information or the subject's legally authorized representative;

(c) the disclosure or redisclosure is required by federal, state or local law or municipal ordinance; or

(d) the disclosure is required pursuant to a valid warrant or subpoena issued by a court of competent jurisdiction.

5. A private entity in possession of a biometric identifier or biometric information shall:

(a) store, transmit, and protect from disclosure all biometric identifiers and biometric information using the reasonable standard of care within the private entity's industry; and

(b) store, transmit, and protect from disclosure all biometric identifiers and biometric information in a manner that is the same as or more protective than the manner in which the private entity stores, transmits, and protects other confidential and sensitive information.

§ 676-c. Right of action. Any person aggrieved by a violation of this article shall have a right of action in supreme court against an offending party. A prevailing party may recover for each violation:

1. against a private entity that negligently violates a provision of this article, liquidated damages of one thousand dollars or actual damages, whichever is greater;

2. against a private entity that intentionally or recklessly violates a provision of this article, liquidated damages of five thousand dollars or actual damages, whichever is greater;

3. reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses; and

4. other relief, including an injunction, as the court may deem appropriate.

§ 676-d. Construction with other laws. 1. Nothing in this article shall be construed to impact the admission or discovery of biometric identifiers and biometric information in any action of any kind in any court, or before any tribunal, board, agency, or person.

2. Nothing in this article shall be construed to conflict with the federal Health Insurance Portability and Accountability Act of 1996.

3. Nothing in the article shall be deemed to apply in any manner to a financial institution or an affiliate of a financial institution that is subject to Title V of the federal Gramm-Leach-Bliley Act of 1999.

4. Nothing in this article shall be construed to apply to a contractor, subcontractor, or agent of a state agency of local government when working for that state agency of local government.

§ 2. This act shall take effect on the ninetieth day after it shall have become a law.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #14

REQUESTED ACTION: Approval of the Report and Recommendations of the Task Force on Post-Pandemic Future of the Profession.

Attached is the report from the Task Force on Post-Pandemic Future of the Profession, concerning the short- and long-term impacts of the pandemic on the legal profession and practice of law.

The report examines the short- and long-term impacts of the COVID-19 crisis from four main perspectives (corresponding with the working groups set forth by the task force): attorney-client relations; access to justice; new lawyers and law students; and law practice management and technology. The four working groups created a survey which was distributed to NYSBA members. The task force held virtual focus groups and each of the four working groups conducted their own virtual public forums. The public forums and focus groups were made up of a variety of practitioners and perspectives. The survey, public forums, and focus groups provided the basis for the report.

Each working group provided recommendations.

1. Attorney-Client Relations
   The Attorney-Client Relations Working Group examined the future of the attorney-client relationship in the post-pandemic legal profession, understanding that effective attorney-client relations are dependent on accepting and understanding the impact of the COVID-19 pandemic on attorneys.

   The recommendations from this working group centered around four main categories: recruitment and talent development; engaging new clients; attorney-client communication, with an emphasis on communication with vulnerable clients; and navigating client expectations. A summary of the Working Group's recommendations is outlined below.

   - NYSBA increases efforts to train all attorneys in the use of technology and provide best practice guidelines to help attorneys be able to switch between virtual and in-person meetings and proceedings seamlessly.
   - NYSBA evaluates changes in laws and ethical rules regarding virtual lawyering.
   - NYSBA to help attorneys implement marketing strategies to remain competitive.
   - NYSBA and local bar associations increase in-person social events to allow junior attorneys the opportunity to build formative relationships.
   - NYSBA prioritizes the mental health needs of attorneys and provides services.

- NYSBA develops policies to manage client expectations and firms must adopt such policies and demonstrate healthy and appropriate client-work boundaries.
- Law firms should incorporate a "flexible first" approach to organizational culture.
- Encourage use of employee resource groups (including bar associations) to cultivate community.
- Law firms must emphasize flexibility and mentorship to young attorneys and have a firm understanding that failure to train young attorneys well impacts clients.
- Improve efforts to provide technological support to help minimize threats against cyber security. NYSBA and local bar associations should offer training and assistance to help develop cyber resiliency.

2. Access to Justice:

The Access to Justice Working Group examined how the COVID-19 pandemic has exacerbated and shed light on access to justice issues in the legal profession. In particular, the Working Group examined the intersecting structural problems that underlie access to justice.

Recommendations of this Working Group are divided into six (6) sections. A summary of the recommendations is outlined below.

1. *Court Proceedings*

   Improve access and equity in court proceedings; creation and implementation of best practices for virtual court proceedings; support and implementation of training for court personnel regarding racism and bias; protection of private communication between attorney and client in virtual proceedings, including immigration proceedings; advisement of tenants in housing court to their right of counsel; support consolidation of housing cases outside of NYC; support installation of private internet portals and stand-along kiosks in court and other public buildings; expand the NYS Court Navigator Program; and support expansion of presumptive mediation.

2. *Administrative Hearings*

   Ensure language accessibility of administrative hearing notices; support presumptive in-person hearings for individuals with limited English proficiency; allow individuals to choose their hearing venue preference, including implementation of an online form for making said choice; and creation and implementation of training for administrative law judges regarding remote hearings.

3. *Access to remote proceedings: use of technology to benefit individuals and communities.*

   Support funding and programs to increase access to electronic devices, internet, and digital literacy, and create uniform plain language court forms. It is recommended that NYSBA should study the use of certified professionals, under the supervision of an attorney, to assist people in the community to access legal information; identify, prevent, and resolve legal issues; complete DIY forms; help prepare and file papers for proceedings.

4. *Empower communities to identify, prevent, and resolve legal issues.*
   Provide support and resources to communities to assist them in identifying, preventing, and resolving legal problems prior to these issues becoming court cases.

5. *Unauthorized practice of law rules.*
   Recommended that NYSBA create a task force to study the unauthorized practice of law regarding the use of trained and certified paraprofessionals to address legal issues impacting indigent persons.

6. *Increase free and pro bono representation and diversify the legal profession.*
   Support and increase funding for free legal aid services and *pro bono* projects; increase spending for access to justice programs; and support continued efforts of the New York State Bar Foundation to fund legal services.

3. New Lawyers and Law Students:
   The New Lawyers and Law Students Working Group examined how law students and new attorneys have been impacted by the COVID-19 pandemic and how such experiences will shape the future of the legal profession. The Working Group also explored the bar exam and the need for a New York law practice course.

   The Working Group focused on four (4) categories that were explored in the survey: New York Law Practice Course and the Bar Exam, Virtual Learning Environment, and Virtual Working Environment. A summary of the Working Group's recommendations is outlined below.

   1. *New York Law Practice Course and the Bar Exam*
      The Working Group recommends that New York Practice should be a required class in New York law schools, and that law schools need to examine their curriculum to make certain that law students who intend to practice in New York are receiving sufficient opportunity to take New York-focused courses.

   2. *Virtual Learning Environment*
      It is recommended that New York law schools educate their students in virtual lawyering, and that they continue to enhance the quality of distance learning and that distance learning is integrated into curricula.

   3. *Virtual Working Environment*
      The Working Group recommends that hybrid work needs to remain an option and law firms must offer hybrid work schedule options. Further, it is recommended that consideration must be given as to whether fully remote options are appropriate for practice. Law firms must take on the responsibility to properly train young lawyers in virtual/hybrid lawyering.

   4. Law Practice Management and Technology
      The Law Practice Management and Technology Working Group examined the impact of changes to law practice and technology caused by the COVID-19 pandemic,

explored the general attitude of the New York State Bar Association regarding such changes, and determined what further technological changes and resources are necessary to continue to facilitate law practice post-pandemic.

The survey questions for this Working Group were focused on four (4) primary topics: technology, hardware, and software; cybersecurity protocol and training; the impact of technology on the social aspect of law practice; and virtual meeting platforms. A summary of the Working Group's recommendations is outlined below.

1. *Technology, Hardware, and Software*
   Develop and implement policies and protocols that support remote law practice for attorney and non-attorney staff; assign financial resources to support the cost of maintaining and implementing technology at the home and office; provide training to employees on new and existing technology; and provide training regarding data privacy and cybersecurity. The Working Group further recommends that NYSBA act as a resource in exploring ways to decrease the costs of IT hardware and software via contractual relationships; provide CLEs on the remote use of IT hardware and software; and create and implement a Law Practice Management and Technology Resource Center (LPMT Resource Center).

2. *Cybersecurity Protocols and Training*
   Attorney and non-attorney staff must have regular education and training about the security risks associated with both in-office and at home online work and NYSBA and other bar associations should develop and offer cybersecurity CLEs.

3. *Impact of Technology on the Social Aspect of Law Practice*
   NYSBA and legal employers must offer CLEs/training to assist attorney and non-attorney staff about how to gain control over virtual meetings and to better understand the non-verbal communication of virtual participants; and cultivate and support social interactions (remote and in-person) by holding meetings and taking full advantage of virtual tools such as chat functions.

4. *Virtual Meeting Platforms*
   Attorney and non-attorney staff must familiarize themselves with any virtual meeting software they elect to use; platforms must have end-to-end encryption and conduct any virtual meetings in a private space, to ensure confidentiality; regular training on the use of virtual meeting software to ensure any updates are understood; provide training on hardware (headphones, printers, scanners, webcams, etc.) as well as software; and NYSBA should facilitate a day of free virtual technology training on an annual basis.

This Working Group also briefly explored new technologies, including the Metaverse, Generative AI, and Cryptocurrency. The Working Group recommended that legal practitioners: familiarize themselves with new technologies before using them; consult with and advise clients on the potential implications of use on the attorney-client relationship; and review current ethical opinions of the use of these new technologies.

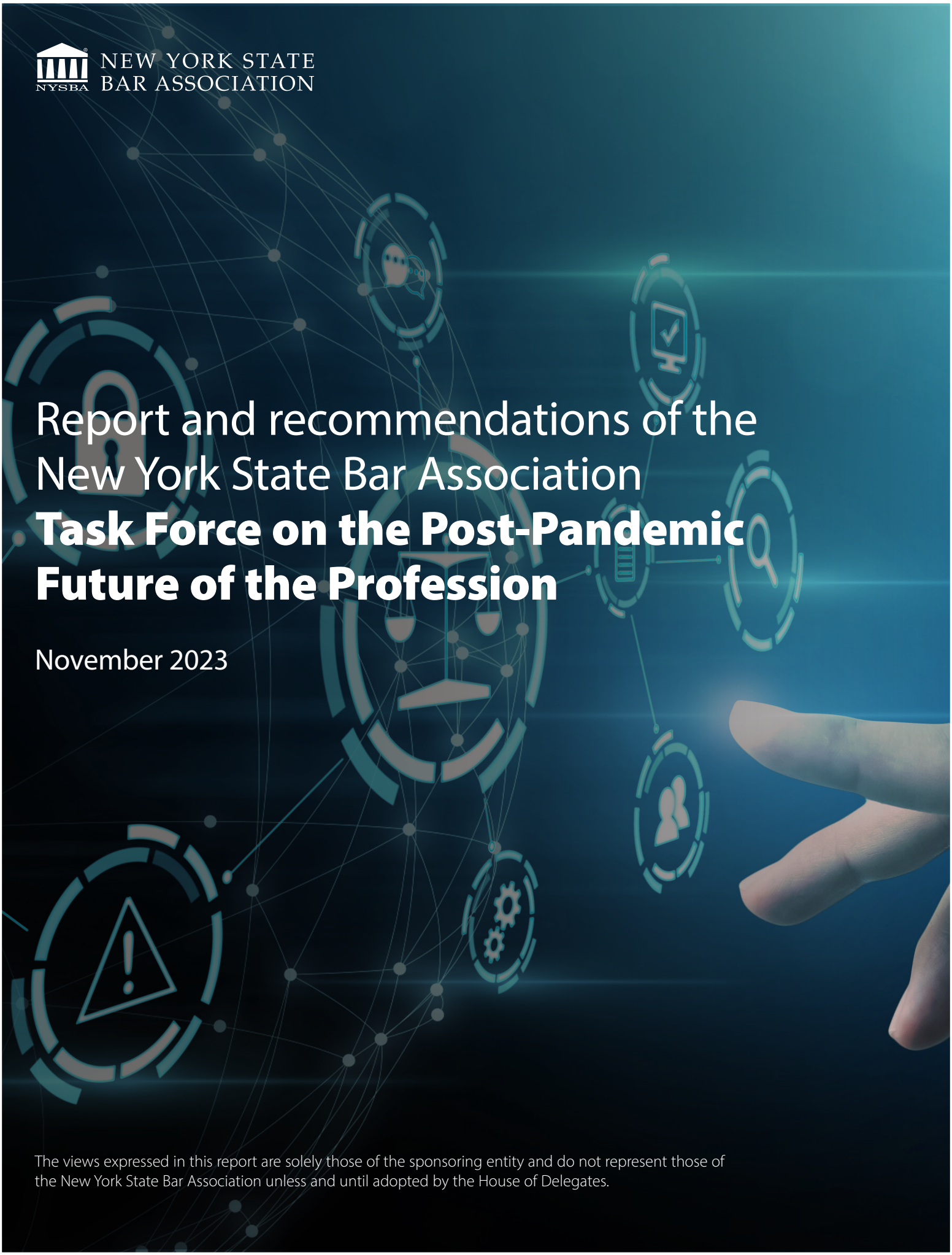
The report was submitted to the Reports Group in June 2023.

The report will be presented by John Gross, Esq. and Mark Berman, Esq., Co-Chairs of the Task Force on the Post-Pandemic Future of the Profession.

NEW YORK STATE BAR ASSOCIATION

Report and recommendations of the New York State Bar Association **Task Force on the Post-Pandemic Future of the Profession**

November 2023



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

New York State Bar Association

Task Force on the Post-Pandemic Future of the Profession

September 2023

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John H. Gross, Esq.

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Introduction & Executive Summary

The New York State Bar Association's (NYSBA) Task Force on the Post-Pandemic Future of the Profession ("Task Force") undertook study in Winter 2021 to review the effects of the pandemic—both short- and long-term—on the legal profession and the practice of law in general. In presenting our report, we must emphasize that this is an account of the New York State Bar Association on the future of our noble profession from the perspective of New York practitioners.[1]

The practice of law in New York is unique. New York has more lawyers than most other states; more lawyers work in high-rise office buildings; many

[1] The House of Delegates of the New York State Bar Association has previously adopted several reports containing recommendations on the future of the legal profession, including, inter alia, the 2011 report of the Task Force on the Future of the Legal Profession, the 2021 report of the Emergency Task Force on Solo and Small Firm Practitioners, the 2021 report of the Task Force on Attorney Wellbeing and the 2022 joint report of the Committee on Legal Aid and the President's Committee on Access to Justice on Access to Justice During the COVID-19 Pandemic. Links to these four reports are provided below. To the extent that any recommendations offered in this report may conflict with specific recommendations previously adopted by the House of Delegates, the specific recommendation offered in those reports would prevail as current established policy of the Association.

Joint Report of Committee on Legal Aid and President's Committee on Access to Justice on Access to Justice During the COVID-19 Pandemic: https://nysba.org/app/uploads/2022/11/Committee-on-Legal-Aid-and-Presidents-Committee-on-Access-to-Justice_AFTER_web-1.pdf

Report of Task Force on Attorney Wellbeing: https://nysba.org/app/uploads/2021/10/Report-on-Task-Force-on-WellBeing-APPROVED-HOD-no-comments-or-staff-memo.pdf

Report of Emergency Task Force on Solo and Small Firm Practitioners: https://nysba.org/app/uploads/2021/11/8.-Emergency-Task-Force-Solo-and-Small-Firm-Cover-report-comments-for-printing-new-cover.pdf

Report of Task Force on the Future of the Legal Profession: https://nysba.org/app/uploads/2020/02/Report_FINAL_APR_14_W_COVER-1.pdf.

lawyers and staff have long commutes to the office using public transportation; many courthouses are antiquated; Wi-Fi is spotty in upstate New York; and many litigants do not have internet access necessary for a virtual courtroom.[2]

The profession is at a multi-level crossroads as the pandemic wanes. "Business as usual" is now better stated as "business can no longer be as usual." We consider the legacies of COVID-19 in the context of the social issues altering the fabric of our Union. Simultaneously, we must ensure that we live up to our obligation to serve as best we can the residents and companies of New York, without regard to, among other factors, wealth, size, geography, age, ethnicity, race, color, religion, gender, sexual orientation, or disability.

The Rule of Law is essential to the distinctive American social contract. Lawyers, in their everyday legal practice, are essential to upholding the Rule of Law in America.[3] We must embrace the understanding that our profession is a public calling requiring fidelity to those we serve as trusted counselors and representatives, while at the same time reflecting our obligation to the Rule of Law. The Task Force charge articulates its purpose rather clearly:

> The foundational purpose of the New York State Bar Association is to advocate on behalf of the legal profession and the practice of law. Therefore, in

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[2] *See* ABA National Lawyer Population Survey, *Lawyer Population Survey by State Year 2022*, AM. BAR ASS'N, https://www.americanbar.org/about_the_aba/profession_statistics; Isha Marathe, *No Easy, Inexpensive Solution to Remote Trials Impeding Litigants Without Internet Access*, LAW.COM, March 29, 2022, https://www.law.com/legaltechnews/2022/03/29/no-easy-inexpensive-solution-to-remote-trials-impeding-litigants-without-internet-access; Joshua Solomon, *Thousands Still Can't Get Internet Access. Will Broadband Funding Help?*, TIMES UNION, Sept. 30, 2022, https://www.timesunion.com/state/article/new-york-internet-acces-solution-17454221.php.

[3] Orison S. Marden Lecture, *Keepers of the Rule of Law*, Louis A. Craco, Feb. 21, 2006.

> preparation for the emergence from the COVID-19 Pandemic, the Association on behalf of its member attorneys must reflect on how the crisis has dramatically and determinatively affected the legal profession and anticipate how these changes may further alter the practice of law.
>
> The Task Force on the Post-Pandemic Future of the Profession is thereby established to systematically review the effects of the pandemic, both short-term and long-term, on the legal profession and the practice of law in general. This review shall include study of the remote practice of law, the increased use of technology, the efficacy of virtual courts and tribunals, changes in client interaction, law practice management, access to justice, the delivery of legal services, and the education, training, expectations, and mentorship of law students and newer attorneys. The Task Force shall advise on the anticipated future impact of these changes on the practice of law and on attorneys. It shall make recommendations to ensure practitioner success and to safeguard and strengthen the future of the legal profession.[4]

To that end, the Task Force, chaired by Mark A. Berman, Esq., and John H. Gross, Esq., divided its work into four working groups, whose focused studies address the corpus of issues in our charge. They are:

- Attorney-Client Relations, chaired by Susan L. Harper, Esq.
- Access to Justice, co-chaired by Frederick K. Brewington, Esq., and Professor Joseph A. Rosenberg.
- New Lawyers and Law Students, co-chaired by James R. Barnes, Esq., and Professor Leslie Garfield Tenzer.
- Law Practice Management and Technology, co-chaired by Karen Greve Milton, Esq., and Anne B. Sekel, Esq.

[4] NYSBA, *Task Force on Post-Pandemic Future of the Profession Mission Statement*, https://nysba.org/committees/task-force-on-post-pandemic-future-of-the-profession (last visited Feb. 2, 2023).

The four groups designed a survey that was distributed to NYSBA members, the results of which help form the predicate for this Report. In addition, the Task Force held virtual focus groups in different locations throughout New York, and each Working Group conducted their own virtual public forum. These focus groups and public forums were composed of a broad variety of practitioners and provided insightful anecdotal evidence that likewise served as a basis for this Report.

From the results of the survey, focus groups, and public forums, there are four sections to this Report drafted by each Working Group, addressing their findings and making recommendations for the future of the legal profession. These four sections necessarily overlap because common to each is an analysis of the impact of "good, the bad, and the ugly" through each respective Working Group's unique perspective of what took place during the COVID-19 pandemic. The throughline is the need for technological "prowess" by the courts, lawyers, and citizens of New York so that the problems of New Yorkers can be effectively and fairly resolved.[5]

The Future Is Now

New York clients have remained as demanding as ever. No matter the type, clients demand instantaneous responses from their attorneys by way of a quickly convened call, Zoom, or a late-evening email. Our Pavlovian response to

[5] Appendix A of this Report contains the survey sent to NYSBA members. Recordings of the public forums are available at https://nysba.org/committees/task-force-on-post-pandemic-future-of-the-profession/.

these communications is antithetical to ensuring attorney well-being and the understanding that our profession requires informed contemplation to arrive at the best client outcomes.

Client acceptance of virtual lawyering differs. Some clients are comfortable with remote conferences and meetings as well as with a hybrid work schedule. Other clients demand in-person meetings and object to hybrid schedules. The latter generally share a belief that "true" training and mentoring of their lawyers only occurs at the office or in court, therefore meetings with counsel need be in-person. Of course, this must be harmonized with lawyers who advocate for a flexible hybrid approach. The struggle for "work-life balance" is endemic in our profession.

Law firms can no longer hide from these issues and need to ensure that junior lawyers receive proper training, and to recognize the critical importance of boundaries and wellness. Junior lawyers now demand a hybrid work environment, whether law firms like it or not. At the same time, firms must devote time and effort to ensure that young lawyers are appropriately mentored.

Access to justice issues were only exacerbated by the pandemic. It is imperative that lawyers understand the fundamental equity issues inherent in addressing legal needs for marginalized communities. This means first to acknowledge and to take action to make their access to legal services easier, and then to make addressing their rights in court available. Ensuring the citizens of

New York have equal access to court proceedings, whether in-person or virtually, through improved court procedures, policies, and training, allows their legal issues to be addressed on a more level playing field. Second, we must urge the government to ensure broadband availability throughout New York State; seek to provide increased access to technology and software to enable better pro se litigants; to have trained individuals who can assist with such technology; and to improve access to easy-to-use forms. Thirdly, we must address the rural New York problem of "no lawyers."

Law schools must adjust their curricula to teach law students how to practice law virtually and to encourage law students to select available courses in New York Practice. As to remote learning, law schools must ensure that robust student and faculty interaction is not lost. Synchronous instruction requires balance with asynchronous teaching.

Participation in NYSBA and affiliated associations waned dramatically during the age of COVID, borne of an already existing pre-COVID malaise among membership. The redoubling of ongoing efforts of NYSBA to recruit law students and young lawyers into the Association is essential to the future of the legal profession in our State. We must partner with deans of New York's 13 law schools to infuse the importance of Association membership into students early on in their legal education.

NYSBA's efforts to ensure compliance with new cybersecurity rules and CLE requirements must be continued. Legal employers need to develop office-wide policies and protocols that support remote law practice for all employees, including back-office staff, and to promote a safe, efficient, and effective virtual law practice.

What does this all mean? New York needs to learn from the pandemic to ensure that our noble profession fulfills its mission: to provide the best representation to its citizens of this State, whether an individual or a corporation, and to ensure access to justice needs are met by taking advantage of technology through proper education, mentoring, and sponsorship. We underscore that New York State attorneys, with the assistance of NYSBA, must be educated on the newest technologies to properly represent clients. Recent and rapid developments in generative artificial intelligence (AI), virtual technologies and the use of cryptocurrencies have raised many novel questions for the legal profession that we need to come to terms with, including ethical questions regarding the formation of attorney-client relationships. We discuss these concerns later in this report. We identify some of the issues posed by these technologies and offer some suggestions to smoothly navigate their use.

Technology training only goes so far. The practicing bar requires the technology to service clients while safeguarding sensitive material. As recommended by the Law Practice Management and Technology Working Group,

NYSBA should pursue relationships with technology vendors to offer discounts on hardware and software to reduce the obstacle of cost so attorneys can be technologically prepared to operate in the post-pandemic world. NYSBA should endeavor to create a comprehensive technology resource center to provide advice on best practices relating to virtual technology (from setting up an effective and secure home office to virtual practice), case and/or client management software, technology support, and training. Such a resource will promote success in the post-pandemic practice of law.

The Survey

Nearly 2,000 individuals responded to the Task Force's survey. Summarized below are some of the more salient demographic percentages reflecting those participants. While not reflective of NYSBA's actual membership profile, the conclusions and recommendations contained in this Report need to be analyzed in the context of the below percentage:

- Approximately 70% of the respondents were over age 50;
- Approximately 70% of the respondents had over 20 years of legal experience;
- Approximately 54% of the respondents were males;
- Approximately 40% of the respondents were from the five boroughs of New York City;
- Approximately 44% percent of the respondents were litigators;
- Approximately 26% of the respondents were transactional attorneys;

- More partners than associates responded to the survey;
- Approximately 28% of the respondents were solo practitioners;
- Approximately 14% of the respondents were from law firms of five or fewer attorneys;
- Approximately 11% of the respondents were from law firms of six to 20 attorneys;
- Approximately 7% of the respondents were from law firms of 21 to 50 attorneys;
- Approximately 15% of the respondents were from law firms of over 51 attorneys; and
- Few government attorneys responded to the survey.

The Pandemic's Impact on Attorney Client Relations

Introduction

The future of attorney-client relations in our post-pandemic legal profession requires New York attorneys to be adaptable and supportive of each other, while understanding that the practice of law often occasions an adversarial rather than collaborative model.

During a Task Force focus group, a sage New York attorney reflected on a chat with a colleague long before the onset of the pandemic:

> I was coming out of court and was approached by a friend who asked, "Do you still enjoy practicing law?" He was complaining about the difficulties of the business, dealing with difficult judges and clients, and was not sure of his future in the profession. I came away from that interaction asking myself, "Why are so many lawyers unhappy and discontented with their chosen profession?" One possibility is that the law is a wonderful profession but a terrible business. It is also a business that we were not trained for like we were in the law. It seems that conflict does not end at the courthouse exit door. As lawyers, we are constantly in adversarial postures not only with adversaries and judges, but also with our clients, who can turn on us when they are dissatisfied with the result. Moreover, in litigation at least, our competence and sometimes self-worth is determined by a third-party who decides whether we won or lost.

The mission of the Task Force is to help chart the path forward for practitioners in the post-pandemic world. We present this Report based on results of the survey, the attorney client Working Group's research and public forum, and the Task Force focus groups hosted throughout the state. We recognize that effective

attorney-client relations depend on embracing and understanding the impact of the pandemic on attorneys.

Our survey results found that eagerness to return to pre-pandemic practice was tempered by the lingering threat of COVID-19 and the risk of new variants and consequential shutdowns. Attorneys should expect to continue to face the task of balancing the benefits and drawbacks of a hybrid workplace while endeavoring to meet client needs and expectations. Remote work and video conferencing are acceptable in certain situations, but these modalities often are not in the best interest of vulnerable and/or criminal clients and can present challenges for low-income clients and those in rural areas with spotty or no internet. Attorneys are concerned about associate development, building their practice communities, and fostering a sense of belonging. At the same time, attorneys are concerned about increasing cyber threats to their practice. One legacy of the pandemic is the blurring of the line between work and home. Another is the profession's acknowledgment that attorney well-being must be a priority—burnout is now recognized as a real concern. Finally, attorneys express the need to embrace modern marketing approaches to raise their profile in a very competitive client landscape.

The pandemic has challenged attorneys and the legal profession like never before, and the one thing that can be proclaimed as certain is a future of uncertainty. As a participant in the Western New York focus group commented,

> I think that there is a foregone conclusion that remote work is going to actually be the future of the profession. I don't think there has been enough consideration about whether or not this is working, whether or not it's working for anyone or whether or not it will work. If the bar association is going to do something . . . I think it should be looked at, when it works and when it doesn't work.[6]

As COVID-19 began its reign of terror, New York attorneys donned masks and socially distanced. We listened to daily reports of transmissions, deaths, and new variants. Face-to-face interactions with clients and the courts turned virtual seemingly overnight, while we hoped we would not appear on screen as a cat.[7] New York attorneys' patience, creativity, grit, and drive to safely serve the public and our clients and ourselves—while also managing the practice and business of law—will always be remembered as an extraordinary, powerful, and transformative period for the profession.

Challenging deeply entrenched attitudes in the legal profession, we have demonstrated that the "traditional manner" of working from an office is not the only way. Efficiencies can be built into our court system and our law firms, accommodating different working styles that achieve similar or better outcomes for our clients. However, we must recognize that the new virtual world may not work for all clients, creating unique challenges for collaboration. Our

[6] Western N.Y. Focus Group Transcript at 453–55.

[7] During a virtual civil forfeiture hearing in Texas, a county attorney was unable to turn off the "cat filter" on Zoom, so an image of a cat appeared instead of the attorney. Daniel Victor, *'I'm Not a Cat,' Says Lawyer Having Zoom Difficulties*, N.Y. TIMES, May 6, 2021, https://www.nytimes.com/2021/02/09/style/cat-lawyer-zoom.html.

profession's ethos requires that the path forward must be in the best interest of the client. However, the pandemic has underscored that the best interest of the attorney's and staff's physical and mental health must also be considered.

As we can all attest, developments in our legal practice arising from the pandemic present both pros and cons. Remote conferences and mediations, for example, are more efficient, save clients' money, reduce unnecessary travel, and alleviate temporal stress. However, not being in court robs us of the day-to-day interaction with our clients, colleagues, judges, and court personnel, which negatively impacts collaboration to solve clients' problems in a profession that is often truculent. There is no true virtual equivalent for the physical wooden bench outside a courtroom to host a casual yet consequential conversation with opposing counsel, or privately with a client.

At its ethical core, the legal profession is driven by its mission to serve the public and advance the rule of law and judicial integrity. It is also a self-analytical profession with local and state bar associations engaged in continuous study through task forces and committees addressing problems and formulating solutions. Bar associations across New York State continue to analyze how the profession can improve quality of our citizen's lives while also serving the public and the legal system.

Flexibility Is the Future

The Task Force's statewide survey of the profession, the Working Group on Attorney Client Relations' virtual forum, and the virtual focus groups held across the state provide a framework for analysis of the state of post-pandemic attorney-client relations in New York.

In general, many, but not all, New York attorneys demonstrated a desire to move forward with the hybrid model, which grew out of necessity.[8] This model promotes flexibility and recognizes that the explosion of advanced technology and virtual communications can work to the benefit of lawyers and clients.

Survey participants were asked how the pandemic positively influenced their work. Forty-three percent of respondents noted they could work remotely, and 30.84% said they could more easily attend hearings or meetings because of virtual proceedings.[9]

Next, we asked, "What is the ideal mix of in-office and remote work?"[10] Thirty-two percent selected "In-office 2–3 days a week."[11] The second most popular answer, selected by 27.47%, was "In-office as needed based on a flexible week-to-week schedule."[12] Slightly fewer respondents (24.61%) selected "In-

[8] *See* Survey questions 24 and 25.
[9] Survey question 40, survey results question 40.
[10] Survey question 25.
[11] Survey results question 25.
[12] *Id.*

office 4–5 days a week," which was followed by "Rarely in the office" at 10.76%.[13] Only 4.81% of respondents selected "In-office one day a week" as the ideal mix.[14]

The top two responses to "What aspects of in-office work have you missed the most?" demonstrate the essential collegial role firms play in our success: 51.97% selected "Being able to walk down the hall to discuss legal issues with my colleagues," and 50.61% selected "As a result of working remotely, I have lost collegial interaction with attorneys who are members of my organization."[15]

As of Summer 2022, law firms viewed two or three days in the office as the new likely standard, though some were permitting fully remote work.[16] Some large firms had a "remote-only August" with fewer in-person meetings with clients.[17] Another large law firm instituted a "Zoom-free" Wednesday policy "so that colleagues spend time together rather than in meetings on their screens."[18]

The hybrid workplace can pose obstacles for attorneys and staff. As one forum participant noted, an "important part of the problem is that people—staff and associates, even some partners—have become used to working from home.

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[13] *Id.*
[14] *Id.*
[15] Survey question 26, survey results question 26.
[16] *Talent is a Top Concern on Law Firm Leaders' Minds, Says New Report*, THOMSON REUTERS, June 14, 2022, https://www.thomsonreuters.com/en-us/posts/legal/talent-esg-report-2022. ("Globally, return to office arrangements are greatly varied, with some regions, such as firms in Asia, returning to the office nearly full time, while law firms in the United States continue to view two or three days per week in the office as the likely new standard. As firms attempt to execute their return-to-office plans, many associates are voicing an increasing desire for continued flexibility in their working arrangements." *Id.*).
[17] Sara Merken, *Summer Means Brief Return to Remote Work Option for Several New York Law Firms*, REUTERS, June 30, 2022, https://www.reuters.com/legal/government/summer-means-brief-return-remote-work-option-several-new-york-law-firms-2022-06-29.
[18] Sara Merken, *Saul Ewing Declares Wednesdays 'Zoom-free' as Law Firms Plot Office Returns*, REUTERS, March 14, 2022, https://www.reuters.com/legal/legalindustry/saul-ewing-declares-wednesdays-zoom-free-law-firms-plot-office-returns-2022-03-14.

And there's a belief that there is an entitlement now to work from home two or three days a week, and not be in the office."[19] Another participant pointed out the pandemic has strained the relationship between attorneys and support staff, as they were and are being treated differently based on different expectations.[20] The relationships may have been "irreparably harm[ed]"[21] and "it's going to take some time before the attorneys and the staff have the relationship they had before[.]"[22]

Creating World Class Attorneys: Recruitment and Talent Development Is Vital To Build Firm and Organizational Pipelines

Spending less time in the office may threaten a new attorney's professional development as they have less opportunity to observe senior attorneys interacting with clients, which may have an enduring impact on attorney-client relations. We observe a generational divide, with one managing partner sharing that "senior partners think it's absolutely essential that [young associates] need to be in the office to observe"[23] and to "learn from [older attorneys] how to act as an attorney and learn all the things you can't be taught by books or things like that[.]"[24] He shared his impression that younger attorneys believe they can receive the same training and benefits of mentoring by coming in only two or three days a week: "they wanted to have the access to senior people to learn, but

[19] ACR 12/8/21 Transcript at 372–73 (hereinafter "ACR transcript").
[20] ACR transcript at 368–71.
[21] *Id.* at 370;370–71.
[22] *Id.*
[23] *Id.* at 380.
[24] *Id.* at 381.

they didn't think it had to be [] five days a week."[25] The participant noted that with extra effort, younger attorneys can be mentored. He emphasized "that's going to be the future so we're going to need to figure out how to do it better than we have."[26]

New York attorneys need to be aware that flexibility can be consequential. A legal employer's ability to attract and retain talented attorneys, and keep clients, will depend on their ability to offer a hybrid schedule. Further, not all clients appreciate or agree with a flexible approach. For example, the chief legal officer at a major financial firm expressing concerns about the impact of associate development recently warned the firm's outside counsel to return to the office five days a week.[27] He wrote a letter expressing these concerns and "'the lack of urgency to return lawyers to the office.'"[28] The letter expressed that "firms that get lawyers back to the office 'will have a significant performance advantage over those that do not,' affecting their work[.]"[29] The letter further provided that the company "'will not be accommodating Zoom participation in critical meetings.'"[30]

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[25] *Id.* at 382, 383.
[26] *Id.* at 385.
[27] Joe Patrice, *'We Need All Lawyers in the Office' Says Bank Definitely Not Freaking Out About Commercial Real Estate Portfolio*, ABOVE THE LAW, July 19, 2021, https://abovethelaw.com/2021/07/we-need-all-lawyers-in-the-office-says-bank-definitely-not-freaking-out-about-commercial-real-estate-portfolio.
[28] David Thomas, *Morgan Stanley's CLO wants you back in the office – for good*, REUTERS, July 19, 2021, https://www.reuters.com/legal/government/morgan-stanleys-clo-wants-you-back-office-good-2021-07-19.
[29] *Id.*
[30] *Id.*

Notwithstanding this, we cannot ignore the fact that flexibility attracts young, talented candidates. When respondents were asked to rank threats to the practice of law going forward, 14.40% felt the biggest threat is the "ability to attract talent because candidates want flexible, hybrid or fully remote work environments."[31] According to a recent American Bar Association survey, 44% of young lawyers "would leave their jobs for a greater ability to work remotely."[32] Further, "[m]ost lawyers reported that working remotely or on a hybrid basis has not adversely impacted the quality of their work, productivity or billable hours."[33]

Attorneys participating in the Summer 2022 focus group reiterated the threat flexibility poses for retaining talent:

> [E]veryone from our Legal Service agencies to our big firms are struggling to hire people . . . they're trying to find lawyers to hire . . . [managing partners] are saying to me they don't feel like they're in a position where they can tell somebody well you've got to be in the office five days a week. Because that person can say look, you know . . . there's 100 jobs out there, I can go find a job, where I don't have to be in the office at all.[34]

[31] Survey results, question 46. "Ability to attract clients because candidates want flexible, hybrid or fully remote work environments" was the fourth-most-selected option for the greatest threat, following loss of information due to cyber-attacks, inability to keep up with technology changes, and effectiveness of virtual court proceedings for counsel, witnesses, or clients. *Id.*

[32] *ABA survey: Most lawyers want options for remote work, court, and conferences*, AM. BAR ASS'N, Sept. 28, 2022, https://www.americanbar.org/news/abanews/aba-news-archives/2022/09/aba-survey-lawyers-remote-work/#:~:text=Share%3A,and%20legal%20training%20sessions%20remotely.

[33] *Id.*

[34] Western N.Y. transcript at 300–02.

This has led to the poaching of talent from the upstate firms during the pandemic. Bigger firms do so "because they can pay more, they say 'Oh, you can stay in Rochester and live at the price that it costs to live in Rochester and we'll pay you a New York [City] salary as well you know that's hard to turn down."[35] Attorneys face a difficult task in balancing the need for traditional face-to-face mentoring when successful talent recruitment depends on offering greater absence from the office.

Consider the added difficulty with addressing flexible operations for a firm with offices in different states. A focus group attorney from New York City shared that his firm is having difficult conversations about how much time to spend in the office:

> We all have extremes[,] people who think we should be here five days a week, particularly in our LA office they're there all the time. And here we have a lot of people who refuse to come in. . . . [W]e are having trouble training people without having them in-person . . . I think personally that they're missing out on a lot by not being here to you know, meet with clients with either me on the phone or in person to debrief a court appearance or hearing. . . [T]hey're also, I think, losing a lot about developing relationship with each other, because those of us [who] have been doing this for a while, know that a lot of our core relationships began when we were young associates, and we met people and those became our friends and they became the source of business and . . . part of the network. On the other hand, I hate commuting an hour and twenty minutes from my house . . . So it's like it's crazy and then I come here, and you know there's three partners here if I'm in the litigation department if I'm lucky on a good day. And, and the secretaries are really pissed off about being here, because they see no reason why they need to be in the office[.]

[35] *Id.* at 304.

> You know there's obviously a lot of strong feelings about you know what's been going on.[36]

Engaging new clients

While the pandemic brought a flood of business for some practitioners, others felt an abrupt interference with their very livelihood. The experience has forced attorneys to focus on the best ways to engage new clients.

The Task Force survey gathered useful data regarding client development. We note that participants were strictly socially distancing at this time and recognize that many in-person events have since returned. When asked "I anticipate the following new challenges to developing new clients: (Rank one (1) to eight (8), with (1) being most significant)," 50.65% of respondents ranked "lack of in person networking events" as the most significant challenge to developing new clients.[37] Interestingly, two other popular responses were "clients do not want to meet in person" and "clients do want to meet in person[.]"[38] The foregoing may be a result of self-imposed client restrictions on social interaction to avoid the risk of transmission of the virus or the need for better service.

Respondents were asked to rank the following in level of significance "to attract clients going forward": "provide timely or more legal/practice updates electronically to my clients[,]" "speak on webinars or at conferences[,]" "improve online marketing[,]" "write and publish legal articles[,]" "hold client in person

[36] NYC transcript at 204–19.
[37] Survey question 41, survey results question 41.
[38] *Id.*

events[,]" "join industry groups[,]" "join bar association committees[,]" "demonstrate that my firm is technology enabled[,]" and "demonstrate that I am technology enabled[.]"[39] The top choice for "most significant" was "provide timely or more legal/practice updates electronically to my clients" with 36.31%.[40] The second was "improve online marketing" and the third was "speak on webinars or at conferences."[41]

Another question asked survey respondents to rank the most significant or notable development in marketing, business development, and client engagement.[42] The top choice for "most significant" or "notable development" was "adapting to the lack of in-person meetings with clients" (40.15%), followed by "clients seek a virtual presence" and "firm establishing a presence with blogs and posting content electronically."[43]

Our forum participants discussed new and existing client marketing and business development efforts. For some, the pandemic ushered in new and unique marketing techniques. One senior managing partner representing educational institutions shared that his firm has released over 60 unsolicited opinion letters to clients regarding government regulations with masking and vaccinations.[44] He found that "our opinion letters are all over the place and we're

[39] Survey question 42.
[40] Survey results question 42.
[41] *Id.*
[42] Survey question 45.
[43] Survey results question 45.
[44] ACR transcript at 90–93.

getting calls from institutions we don't represent and as a result of that have actually obtained additional new clients[.]"[45] Since the survey was conducted, the world has reopened, and there are many more opportunities for in-person networking and client development at conferences and events. Visits to clients in the office, however, may still present challenges for attorneys going forward as many clients continue to work remotely or hybrid.

One of the forum presenters shared her experience working at a small office of around nine attorneys with no marketing department.[46] During the pandemic, her office transitioned to more virtual marketing techniques like "promoting accolades or speaking events on our Facebook page or LinkedIn" and staying consistent with a schedule of postings to stay in the algorithm.[47] They even began advertising on the radio and received a "tremendous response" from their target audience.[48] Others pointed to the increased use of informational online videos, webinars, and half-hour "meet and greets" instead of lengthy client lunches. For attorneys to remain competitive in the post-pandemic legal world, they will need to harness a blended modern-day marketing approach, which includes in-person events to develop new relationships, and digital and social media platforms to build their profile and promote their capabilities to existing and prospective clients. Savvy bar associations have an enormous

[45] *Id.* at 95.
[46] *Id.* at 107.
[47] *Id.* at 108–10.
[48] *Id.* at 111–12.

opportunity to serve their members by helping them develop these skill sets (often not taught in law school) to help attorneys stand out in the evolving digital communications space. Bar associations need to stand ready to fill the social gap to bring people back together again and build a sense of community.

The attorney-client relationship and attorney-client communications

Few—if any—historical events or developments have done more to impact the attorney-client relationship than the COVID-19 pandemic. We faced obstacles at every step in our relationship: from the commencement of representation, to maintaining confidence in one's continued service, to managing expectations and constructing necessary boundaries. COVID-19 restrictions prevented many of us from meeting with our clients in-person and inevitably resulted in challenges with communications. When an attorney and client meet virtually, communications can be stymied.[49]

The survey results echo these challenges for attorney-client communications. Respondents were asked "What do you consider to be the disadvantages of virtual communications?" and the most selected response was "It is difficult to 'read' the reactions of participants in remote proceedings" (62.41%), followed by "Technology glitches undermine the efficiency and

[49] "Research also suggests that the use of remote video proceedings can make attorney-communications more difficult." Alicia Bannon & Janna Adelstein, *The Impact of Video Proceedings on Fairness and Access to Justice in Court*, BRENNAN CTR. FOR JUSTICE 2 (2020), https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court.

effectiveness of remote communications" (58.87%).[50] Third, "It is difficult to determine witness credibility" (43.97%).[51] Fourth, "Household or other similar interruptions interfere with or prevent effective and efficient remote communications" (32.06%).[52] Fifth, "I feel I have less control" (29.79%).[53] The remaining 14.26% selected "none of the above."[54]

Later in the survey, respondents were asked "How has the use of virtual communications impacted your attorney-client relationships?" and 40.80% selected "No impact on my relationships[,]" 28.29% selected "Somewhat enhanced my relationships[,]" 13.89% selected "Diminished my relationships[,]" 9.26% selected "Greatly enhanced my relationships," and the remainder selected not applicable.[55]

The Working Group's forum discussed communications extensively. The pandemic overwhelmingly increased reliance on video and email communication, saving attorneys and clients time and money.[56] Instead of spending time in traffic, an attorney can easily host a virtual preparation session in the minutes leading up to the more formal proceeding. One of the task force co-chairs emphasized the value of these brief meetings, especially before lengthy

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[50] Survey question 23 results.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] Survey results question 49.
[56] *Id.* at 151 ("[S]o overwhelmingly we have video and email [as] now the leading modes of communication.").

collective bargaining sessions, noting that clients feel much more comfortable this way.[57] One Long Island participant noted that waiting five hours for conferences is annoying for attorneys and clients—this practitioner's clients love virtual proceedings because they get to see what they are paying for, which is wonderful for client relations.

Communications with vulnerable clients

The Online Courts Working Group of the Commission to Reimagine the Future of New York's Courts identified "the ability for clients to meaningfully interact with their counsel" as a "chief challenge[]" to virtual proceedings.[58] Confidential communications between attorney and client may be jeopardized by the virtual format, with many attorneys reporting "difficulties that arise from not being able to pass notes with their client during a proceedings, or of not being able to explain the judge's decisions contemporaneously."[59] "Even where provisions are made for separate attorney-client breakout rooms, technical limitations and requirements can lessen the ability of attorneys and their clients to freely communicate without court assistance."[60]

Criminal law practitioners did not have as positive a view from the trenches. Meeting with a client posed difficulty, as the attorney needed to wait

[57] *See* ACR transcript at 174–82.
[58] ONLINE COURTS WORKING GROUP OF THE COMMISSION TO REIMAGINE THE FUTURE OF NEW YORK'S COURTS, *Initial Report on the Goals and Recommendations for New York State's Online Court System* 13 (2020), https://www.nycourts.gov/whatsnew/pdf/OCWG-Report.pdf.
[59] *Id.*
[60] *Id.*

days while a quarantine was in place.[61] Next, confidentiality: "the jail tries, they give the clients headsets and the laptop, but it still is not an area that is quiet or confidential in any way, so . . . it is a problem for the initial conversations and interviews and we are very careful to be asking yes and no questions."[62] This disadvantages attorneys who are thus unable to get the "full story" from an incarcerated client until much later on during representation.[63] Forum attorneys reported that some criminal clients displayed less respect for the courts during virtual hearings, finding that the lack of structure during a virtual hearing may send the message that a proceeding is less serious than it is.[64]

Attorneys representing clients in nursing homes or adult care facilities likewise felt additional pressure regarding their communications. Clients struggled to effectively utilize virtual communication technology (Zoom), devices, or the internet.[65] Consider situations where an abuser lives in the home with a client. One forum attendee advised taking attendance at the beginning of a proceeding: "whoever's there has to identify themselves."[66]

In his article, *Communicating With Clients: Three Lessons From the Pandemic*, author Sateesh Nori asserts that in his experience "during the

[61] One of the ACR forum attorneys described a 10-day waiting period in Westchester County jail. ACR transcript at 189.
[62] ACR transcript at 191–93.
[63] *Id.* at 193.
[64] ACR transcript at 540–44.
[65] *Id.* at 574.
[66] *Id.* at 587, 590.

pandemic, lawyers got better at communicating with their clients."[67] Accordingly,

> First, we started texting with clients. Many of us realized that emails are too formal, too slow, and often go unread. Emails from lawyers tend to turn into legal briefs or office memos – TLDR (Too Long; Didn't Read). And phone calls meant endless games of phone tag. Through SMS (Short Message Service) and MMS (Multimedia Messaging Service), clients would send photos of documents, messages about the factual details of their legal issues, and often just check in with us.
>
> . . .
>
> Second, the frequency of our communications with clients and with each other increased. Because of texting and because of the ease of use of Zoom and other platforms, we were able to chat with clients more often. Clients were able to share information as it arose.
>
> . . .
>
> Third, eliminating in-person contact as a default restores a power balance to attorney-client relationships.[68]

Navigating client expectations

COVID-19 revealed that clients will continue to rely on counsel's guidance and availability even if such demands may appear unreasonable. As one of the presenters during the Attorney Client Relations forum noted, "this is now [a] [twenty-four] seven job that you can never get away from because you're always available to your clients."[69] He stressed that going forward, we should focus on whether this is "healthy for the profession" or "healthy for the clients."[70] Polls

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[67] Sateesh Nori, *Communicating With Clients: Three lessons From the Pandemic*, REUTERS, Oct. 25, 2021, https://www.reuters.com/legal/legalindustry/communicating-with-clients-three-lessons-pandemic-2021-10-25.
[68] *Id.*
[69] *Id.* at 239.
[70] *Id.* at 241.

were conducted in real time during the forum group presentation, and 87% of participants answered that client expectations will not change post-pandemic.[71] The presenter commented, "The answer that 87% think it won't change post-pandemic is somewhat frightening."[72]

A judge involved in the Working Group noted that as the pandemic began, she saw "a lot of motions to be relieved as counsel coming from both clients and attorneys and largely because of lack of communication . . . or problems with communication, so how you all are navigating your communication between yourselves and your clients is obviously, very important."[73] The pandemic's impact on client communications necessarily impacts the attorney's ability to navigate client expectations.

The Task Force survey asked, "Increasingly, my clients expect the following from my law firm," and the top response was "to be available on demand" (39.89%), followed by "more advice and counsel" (25.20%).[74] Similarly, "During the pandemic, have your client expectations for attorney availability changed?"[75] 44.82% selected "yes: expected to be available after traditional business hours and on weekends."[76] Conversely, 38.89% selected that their client's expectation for their availability has not changed.[77] Finally, "Does your firm have a policy to

[71] *Id.* at 243.
[72] *Id.*
[73] *Id.* at 438–40.
[74] Survey results question 43.
[75] Survey question 47.
[76] Survey results question 47.
[77] *Id.*

manage client expectations as to the timing of access to members of the firm?"[78] 44.99% selected "no" while 18.88% selected "not applicable[.]"[79] 16.73% selected "no, but there should be one[.]"[80] Only 16.48% report having a policy.[81] A mere 2.92% selected "We are currently creating one[.]"[82] Such results speak strongly as to what the profession needs to implement.

For some participating in the forum, the pandemic has not changed client expectations regarding availability, citing our already-Pavlovian reflexes with our cell phones.[83] This attorney emphasized, "We've got to just train our clients, that there are certain times that we may not be available to them."[84] However, as this attorney later noted, failure to communicate with a client is the biggest grievance complaint.[85]

Managing client expectations is a balancing act of seeking to serve clients, as well as having a life outside the profession. As client expectations change, it will be important for firms to create and institute policies that meet client expectations as to timing and access to attorneys. With only 16.48% respondents[86] reporting they have such a policy, there is room to develop a reasonable framework (e.g., responding to clients within two hours, by the end

[78] Survey question 48.
[79] Survey results question 48.
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] ACR transcript at 248.
[84] *Id.* at 252.
[85] *Id.* at 284–85.
[86] Survey results question 48.

of the day or by the very next day, and relaying your firm's policy verbally and/or within retainer letters).

Conclusion and recommendations

The pandemic has directly impacted New York's legal profession. The pandemic forced attorneys and firms to reconsider how and where they work. Survey respondents realized they can work remotely successfully and can more easily attend hearings or meetings because of virtual proceedings. Attorneys seeking more workplace flexibility have used hybrid work for more "work-life balance." Changing the "work-life balance" requires attorneys to convert working hours to non-work time. This directly clashes with the other pronounced pandemic lesson that clients want nearly 24/7 access to their attorney.

Another consequence is what has been described as the "threat culture." A recent article in The American Lawyer, entitled *The Lawyers Are Not All Right*, included information from Dr. Larry Richard—a lawyer and psychologist viewed as an expert in the psychology of lawyer behavior.[87] Dr. Richard explained that the area in control of our brain's fight-or-flight response has grown larger "because typically the fight-or-flight response is called into use for a brief period of time."[88] The article articulated this silent COVID impact:

> "The pandemic forced us to create a new way of experiencing work that we weren't prepared for [and happened very quickly] in the shadow of a threat that can kill you [and you can't see it]," he said.

[87] *The Lawyers Are Not All Right*, AM. LAWYER, Jan. 30, 2023, https://www.law.com/americanlawyer/2023/01/30/the-lawyers-are-not-all-right.
[88] *Id.*

> "The threat sensing circuit in our brain that was designed to protect . . . the mechanism it uses is change," he added, noting "the threat was invisible and open-ended." Instead of the stress being "of a moment," he said, "it's been constant … that wears out the circuit." As a result, Richard said, people have grown sensitive to little things, or "hyper-reactive to things." It's distorted people, he said. We're not using our intellectual horsepower" because it's being diverted to the threat circuit, he said. "We are diminished."[89]

The article also reflects upon the diminution of time spent collaborating with fellow attorneys due to the explosion of remote work.[90]

While the pandemic impacted attorney-client communications, nothing has changed our professional duty to respond to client inquiries regardless of how late at night they ask or how many emails they have already sent that day. We must also be mindful of how our increasingly virtual world poses significant threats for practitioners working with vulnerable clients such as the indigent, criminal defendants, or the elderly.

Dealing first with an attorney's "work-life balance," firms with younger attorneys and hybrid programs will need to develop new ways to train and mentor associates while fostering community and a sense of belonging. While courts are now open, veteran attorneys must train both themselves and new practitioners to prepare for the realities of in-person, fully virtual, and/or hybrid law practice. They must be prepared to pivot.

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[89] *Id.* (alterations in original).
[90] *Id.*

By extension, firms must invest in training to help counsel and staff better navigate the new world of virtual meetings and proceedings. Bar associations play a pivotal role in helping solo, small, and mid-size firm attorneys prepare for this new reality going forward by offering training opportunities and mentorship.

Failing to incorporate the lessons we learned from the pandemic will prevent us from training the next generation of world-class lawyers. This impacts our clients and our firms and the New York legal profession.

A junior associate working at a large firm in New York City discussed her experience in completing three virtual internships: "all of the work was the same."[91] She never made it inside the courtroom and missed opportunities to socialize with other interns, law clerks, and judges.[92] The virtual format "makes it hard to figure out what you do not know. If you only know what you see on the screen . . . you can't hear about other people's successes unless you specifically set up those conversations, so I think that that's been the biggest challenge[.]"[93]

It is critical going forward that all attorneys become technologically comfortable and competent with virtual lawyering. Such knowledge is not optional for a successful law practice and is as critical as any other valued skill. Lawyers and firms must also embrace modern-day marketing and

[91] NYC Focus Group transcript at 376–83.
[92] *Id.*
[93] *Id.*

communications to stay competitive. This means learning digital communications, promoting talent and achievements on social media, and moving out of their comfort zones to connect and align with clients and the next generation of attorneys in 21st-century mediums. At the same time, all attorneys must continue to balance the number-one threat to the practice of law identified by survey respondents: cyberattacks and loss of information. Large firms spend a lot of money securing client data; however, they are not immune to breaches, phishing, or other business compromises. Small and mid-sized firms must set aside resources to protect their client and firm data as cyberattacks become more common each day.

Junior attorneys must also take advantage of training, apprenticeship, mentorship, and sponsorship opportunities. Collaboration with other attorneys is part of the essence of lawyering.

Firms must think outside of the box to invest in training and mentorship for recruitment and retention purposes. Attorneys want flexibility, a sense of belonging, and community. Junior attorneys must also keep in mind that their advice and work product can have significant personal, financial, and life-altering consequences for their clients. Adverse consequences may ensue from inadequate training and preparation. Thus, new attorneys should consider hybrid and/or full time in-person work to ensure they develop into world-class

attorneys. Experienced attorneys must commit to such in-person training, while also preparing to work and handle cases virtually.

This Report did not explore the positive opportunities working remotely may have for disabled individuals. Previously, working in-person or appearing in court may have presented a serious challenge due to a person's disability. Virtual meetings and proceedings therefore help in leveling the playing field for disabled attorneys and give them greater opportunities to participate in the profession. Clients should, therefore, not discount participation by Zoom to support disabled attorney participation, where possible.

Finally, it is worth noting that the survey did not address AI-based solutions like ChatGPT and other similar technology. Our recommendation is for NYSBA to study and evaluate AI, as it may have significant legal, business, policy, and ethical implications for attorney-client relationships.

- NYSBA must enhance its efforts to train all attorneys on the proper use of technology so they are able to work virtually to appropriately service the needs of clients. This includes best practices associated with the use of video conferences for depositions, court appearances, client interaction, and "alternate dispute resolution" methodologies. All attorneys should be able to pivot between virtual and in-person proceedings seamlessly.
- NYSBA needs to be a leader in evaluating rule amendments and ethical precepts to account for the prevalence of virtual lawyering, including

where parties certify in advance that they are ready and prepared to participate remotely.

- NYSBA needs to assist lawyers in how to embrace new marketing strategies to remain competitive in the marketplace.
- NYSBA and local bar associations need to increase their in-person social event schedule to encourage development of personal relationships among the New York bench and bar in the community. Junior attorneys require more opportunities to build formative relationships that will help them throughout their entire careers.
- NYSBA needs to prioritize mental health and provide services to help attorneys. Stress is not just pandemic-related—the delineation between work and home life has been considerably blurred.
- NYSBA needs to be a leader in supporting attorneys and promoting best practices to develop policies and frameworks to manage client expectations and increased client demands outside of traditional working hours. Firms need to craft and adopt such policies. Firm leaders need to demonstrate acceptable client-work boundaries.
- We must also be mindful of how our increasingly virtual world poses significant threats for practitioners working with vulnerable clients, such as indigent criminal defendants or the elderly, and that in-person communications are critical when dealing with these clients.

- Attorneys seek a flexible work environment but also crave a sense of belonging and community. Incorporate a “flexible first” work culture approach.
- Create a sense of community and belonging for attorneys both in-person weekly or monthly gatherings. Encourage use of employee resource groups and memberships in groups, including bar associations, to foster community.
- With the increased geographic pool of remote candidates, expect competition for talent to be robust. Emphasize flexibility, mentorship, and training to young attorneys. Set the expectation that the short-term investment of in-person/office with hybrid training and development early in their careers will yield greater professional dividends down the road. Failure to properly train junior attorneys will impact client outcomes, a firm’s reputation, and client services when senior attorneys retire or take a position at another firm.
- Enhance efforts to provide technology support and training to minimize the threat against cyberattacks. Bar associations can support members by offering training, helplines, and membership resource benefit opportunities to ensure solo, small, and medium-sized firm cyber resiliency.

Access to Justice

Introduction

A great deal of attention has been devoted to the study of "access to justice," with mixed results, before and after March 2020, when COVID-19 transformed society, the legal profession, and the practice of law in New York.[94] These studies identify with a fairly high degree of specificity the nature and scope of the access to justice problem: mostly poor and working class, vulnerable "everyday people," particularly in Black, Brown, and Indigenous communities, continue to confront weighty "justice problems" that result in multiplying "legal needs." These problems require free or *pro bono* assistance that is not accessible or available, and stubbornly defy formal attorney or court interventions or are resolved (or ignored) outside of the formal legal system.[95]

Structural and systemic forces give rise to fundamental socio-economic justice problems: safe and affordable housing, hunger and food insecurity, access to quality health care, voting rights, educational opportunities, and a living wage. Usually, attorneys and the legal profession view access to justice

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[94] N.Y. STATE UNIFIED COURT SYSTEM OFFICE FOR JUSTICE INITIATIVES, *Law Day Report, 2022: Toward a More Perfect Union: the Constitution in Times of Change* (2022), https://www.nycourts.gov/LegacyPDFS/publications/pdfs/OJI%20Law%20Day%20Report%202022.pdf; *Center for Court Innovation*, https://www.courtinnovation.org (last visited Sept. 18, 2022); N.Y. STATE UNIFIED COURT SYSTEM, *Permanent Commission on Access to Justice*, https://ww2.nycourts.gov/accesstojusticecommission/index.shtml (last visited Sept. 18, 2022); LEGAL SERVS. CO., *2017 Justice Gap Report* (2017), https://www.lsc.gov/our-impact/publications/other-publications-and-reports/2017-justice-gap-report (last visited Sept. 18, 2022) (estimating 86% of legal problems of low-income people received insufficient or no legal assistance, including more than 50% of people who go to legal services corporation-funded offices due to inadequate staff resources).

[95] *See* Rebecca L. Sandefur, *Access to What?*, 148 DÆDALUS 1, 9, 49–55 (2019), https://doi.org/10.1162/daed_a_00534.

primarily from the top down: the court system, government agencies, state legislators, and other "stakeholders."

Instead, in the age of COVID-19, we recommend that NYSBA and the legal profession approach access to justice questions from the perspectives of those most impacted by the legal system, including, but not limited to: poor people, Black, Brown, Indigenous, women, the LGBTQ+ community, immigrants and non-citizens, those with physical, cognitive, and psychosocial disabilities, the elderly, domestic violence survivors, people living with HIV, the homeless, debt-burdened, low-wage workers, unemployed workers, and veterans, among other marginalized and oppressed individuals and groups. For example, undocumented immigrants and other non-citizens who need counsel are often ineligible for free legal services, cannot afford a private attorney, and may be afraid of the legal system.

The legal profession must ask itself the following questions in planning and implementing access to justice reforms and initiatives:

- Does the proposed reform or initiative empower those most impacted by the legal system?

- Does it consider that vulnerable and marginalized groups often have:

    - limited access to technology and training, and may need to rely on a telephone to access court proceedings;
    - limited means to comply with court procedures (computer devices, internet connectivity, printers, faxes, payment requiring credit cards);

    - limited time and ability to take time off from work or caregiving responsibilities; and
    - limited quiet, private spaces?

- Does it reflect an understanding of the needs of immigrants, particularly those who are undocumented, who may have:

    - limited English proficiency;
    - limited understanding of systems and rights;
    - limited resources; and
    - fear of the unknown and participation in the legal system?

COVID-19 has revealed and exacerbated the fundamental intersecting structural problems that underlie access to justice, which include, but are not limited to:

- racism, express and implicit bias, xenophobia, and disability discrimination;

- income and wealth disparities;

- poverty and limited safety net support systems, particularly for women, children, and families;

- disproportionate incarceration of Black and Brown people;

- a dysfunctional and inequitable immigration system; and

- an epidemic of gun violence.

The high cost of legal representation, ancillary costs resulting from taking time off work to attend court, and dependent care all impose additional obstacles. Further, the price of legal services may impact the quality of justice a person receives. Outcomes often depend on the quality of representation a

litigant can afford to obtain. Courts and "justice" institutions are often underfunded.[96]

Attorneys and judges try their best to fulfill the legal needs of their clients, particularly those committed to a career in legal service practice, as well as those who willingly provide *pro bono* services. Attorneys and judges endeavor to identify or empathize with such clients or litigants, perhaps because they do not share life experiences and/or have not received adequate training in implicit bias and microaggressions.[97] This makes it more difficult for attorneys to represent clients effectively and for judges to treat litigants fairly.

We must ensure that judges realize that the lawsuits before them often do not occur on a level playing field. Ongoing training of the judiciary and the practicing bar in explicit and implicit bias is critically required.[98]

From a disability justice perspective, access to justice is a framework used widely in deaf, signing, and disabled communities, but it raises important

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[96] *See e.g.,* Greg B. Smith, *The Bronx Hall of Justice is Falling Apart and No One Knows How to Stop It*, THE CITY, Feb. 20, 2022, https://www.thecity.nyc/2022/2/20/22942537/bronx-hall-of-justice-falling-apart.

[97] *See e.g.*, Derald Wing Sue et al., *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 AM. PSYCH. 4, 271 (2007).

[98] N.Y. STATE UNIFIED COURT SYSTEM, *Report from the Special Adviser on Equal Justice in the New York State Courts* (2020) https://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf (hereinafter "Johnson Report") (despite progress made by NYS courts, continued racism, bias, and lack of diversity requires additional measures, including training with mandatory policies and protocols on racial bias for judges, court personnel, and jurors); N.Y. STATE UNIFIED COURT SYSTEM, *Equal Justice in the New York State Courts, 2020–2021 Year in Review* (2021) https://www.nycourts.gov/LegacyPDFS/publications/2021-Equal-Justice-Review.pdf (affirming that racism is an access to justice issue, noting implementation of some recommendations in the Johnson Report, and recommending reforms that include: a statewide policy of "zero tolerance" for racial bias and discrimination; mandated comprehensive racial bias training for all judges and nonjudicial staff; and a new mission statement for the Unified Court System that incorporates principles of equity, diversity, and inclusion).

questions about the quality of that access. Do disabled people have appropriate access to legal services addressing their needs? The needs of disabled people, including those with intellectual or developmental disabilities, psychosocial disabilities, and age-related cognitive disabilities must be considered in the operation and design of physical courtrooms and virtual proceedings, with the understanding that virtual proceedings can sometimes more effectively meet those needs.[99]

Access to justice also requires attention to language services, both in-person and virtually. Language justice—beyond mere access—makes it essential to provide accurate interpretation in a proceeding to protect a litigant's due process rights.[100] "Providing language services is essential to upholding the integrity of our justice system. Barriers to language access can interfere with the capacity of state courts to accurately evaluate the facts and fairly administer justice."[101] Language services in the courtroom are important, but they are also needed in court clerk's offices, self-help centers, on signs, websites, forms, and

[99] David Allen Larson, *Access to Justice for Persons with Disabilities: An Emerging Strategy*, 4 LAWS 220, 238 (2014) ("We can improve access to justice by removing physical and architectural barriers. We also can carefully examine whether we have created unnecessary cognitive barriers through oversight or simply by habit."). *See also There is No Justice Without Disability*, FORD FOUNDATION, https://www.fordfoundation.org/news-and-stories/big-ideas/there-is-no-justice-without-disability (last visited Dec. 19, 2022).
[100] U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIVISION, *Language Access in State Courts* (2016) https://www.justice.gov/crt/file/892036/download.
[101] *Id.*

other court services, including when the court appoints psychologists, mediators, or counsel.[102]

Unmet legal needs may be due to a lack of meaningful access to lawyers, government agencies, and courts due to fear, language, and cultural barriers, and the limited availability of free or *pro bono* legal representation. Free or low-cost legal representation is only available to a very small percentage of people with legal needs, due to legal aid and legal services eligibility restrictions and limited funding and staffing, including organized bar *pro bono* initiatives. Other barriers to access to justice include the complexity of laws and court procedures, the cost of retaining an attorney, time and travel expenses, and a perception that the legal system is biased and unfair.

For example, even with the right to counsel in eviction cases in New York City for tenants below 200% of the federal poverty level,[103] eviction cases far exceed the available capacity of legal services organizations whose attorneys already have excessive caseloads.[104] With the lifting of the eviction moratorium in Spring 2022, a growing number of tenants in New York City and throughout the state are facing eviction proceedings without an attorney.[105]

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[102] *Id.*

[103] Sam Rabiyah, *Less Than 10% of Tenants Facing Eviction Actually Got a Lawyer Last Month, Undermining 'Right to Counsel' Law*, THE CITY, Oct. 27, 2022, https://www.thecity.nyc/2022/10/27/23425792/right-to-counsel-housing-court-tenant-lawyers.

[104] *Id.*

[105] *See* Mihir Zaveri, *After a Two-Year Dip, Evictions Accelerate in New York*, N.Y. TIMES, May 2, 2022, https://www.nytimes.com/2022/05/02/nyregion/new-york-evictions-cases.html; Chloe Sarnoff & Casey Berkovitz, *From Crisis to Opportunity: Strengthening Housing Stability and Increasing Opportunity for Law-Income Families in New York City*, THE CENTURY FOUNDATION, July 22, 2021,

Another reason why "access" and "justice" remain elusive may be the limitations of the existing architecture of the legal system. While the New York State court system has made strides in modernizing, particularly in response to the COVID-19 crisis, far too many court procedures remain difficult to navigate. Despite the best of intentions, the recommendations of numerous commissions, reports, studies, proposals, and promising initiatives, New York State courts are not yet truly consumer-friendly and service-oriented.

First, some courts have failed to evolve from their stated purpose, while others have evolved in ways that represent a departure from their original purpose. Housing court was originally intended to regulate housing maintenance, but overwhelmed by the number of nonpayment proceedings it has become focused primarily on processing evictions.[106]

Second, the court system reinforces the perception of two systems of justice. For example, in Family Court, poor and diverse families are left to the

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https://tcf.org/content/report/strengthening-housing-stability-opportunity-low-income-families-new-york-city; Oksana Mironova, *Right to Counsel Works: Why New York State's Tenants Need Universal Access to Lawyers During Evictions*, COMMUNITY SERVICE SOCIETY, March 7, 2022, https://www.cssny.org/news/entry/right-to-counsel-new-york-tenants-lawyers-evictions. In the Spring 2022 Session, the New York State Legislature failed to pass bills providing for Right to Counsel Access for tenants outside of New York City and "good cause" protections against eviction for tenants throughout New York State. Jeanmarie Evelly et al., *New York's Legislative Session Ends, With Mixed Results on Housing. Here's What Passed & What Didn't*, CITY LIMITS, June 4, 2022, https://citylimits.org/2022/06/04/new-yorks-legislative-session-ends-with-mixed-results-on-housing-heres-what-passed-what-didnt.

[106] Judith S. Kaye & Jonathan Lippman, *Housing Court Program: Breaking New Ground* (1997), https://nycourts.gov/courts/nyc/ssi/pdfs/housing_initiative97.pdf.

informality of a "poor person's court," while litigants who can afford lawyers pay for a higher-quality court experience.[107]

Third, court procedures and forms are unnecessarily complex and do not appropriately serve all the needs of the public.[108]

Some attempts to address structural problems in the New York State court system have been made including, *inter alia*, Justice Courts, Integrated Courts, and Problem Solving courts. A recent proposal for a constitutional amendment to modernize and simplify New York State courts is a long overdue step in the right direction.[109] In the Seventh Judicial District in Upstate New York, Special COVID Intervention Parts ("SCIP courts") consolidated all landlord-tenant cases in Rochester City Court and Monroe County's village and town courts into a much smaller number of SCIP courts, which enabled legal service providers across a broad geographical area to represent their clients more effectively.[110]

COVID-19 illuminated the pervasive impact of three connective threads, which are critical to understand to more effectively address the access to justice

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[107] Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, 22 GEORGETOWN J. POV. L. & POL'Y 473 (2015); Jonah E. Bromwich, *Family Court Lawyers Flee Low-Paying Jobs. Parents and Children Suffer,* N.Y. TIMES, April 29, 2022, https://www.nytimes.com/2022/04/29/nyregion/family-court-attorneys-fees.html.

[108] *See e.g.*, The Fund for Modern Courts, https://moderncourts.org (last visited Dec. 19, 2022) ("The Fund for Modern Courts is a non-partisan, statewide organization committed to ensuring that the New York State judiciary is independent and that our courts are just and equitable for all.").

[109] *See* Chief Judge Janet DiFiore, *State of Our Judiciary 2022*, Feb. 16, 2022, https://www.nycourts.gov/whatsnew/pdf/22_SOJ-Speech.pdf; Luis Ferré-Sadurní, *Can New York Overhaul its Complex, Antiquated Court System?*, N.Y. TIMES, Feb. 16, 2022, https://www.nytimes.com/2022/02/16/nyregion/new-york-court-system.html.

[110] Press Release, Monroe County, NY: *Local Leaders Announce Community Effort to Assist in Eviction Cases*, Sept. 17, 2020, https://www.monroecounty.gov/news-2020-09-17-evictions.

gap: (1) racism, implicit bias, and inequity; (2) poverty, wide income and wealth disparities, and the lack of an adequate social safety net for poor and working class people; and (3) the "digital divide" and the need for digital justice that will provide litigants access to computers, broadband internet, and the necessary training and support to achieve more widespread digital literacy.

New York attorneys, paralegals, judges, court personnel, and other members of the legal profession practice in extraordinarily diverse subject matter areas and work in rural, suburban, and urban regions. Suffice it to say, "one size does not fit all." The pandemic confirmed and heightened our understanding of the true extent of preexisting access to justice problems and the future challenges facing the legal profession; our ongoing experience with COVID-19 should continue to inform and serve as a catalyst for innovation.

To speak to the vast needs of those most impacted by our legal system, this report of the Access to Justice Working Group includes the following sections:

1. A framework for understanding access to justice.

2. COVID-19 revealed and exacerbated the preexisting access to justice crisis.

3. The "digital divide" prevents access and justice in virtual proceedings and communities.

4. Recommendations.

This report incorporates research and fact-gathering, including the results of the NYSBA Task Force Survey and the information gathered by the Access to Justice Working Group of the Task Force, including at our public forum.

A framework for understanding access to justice

Access to justice has different meanings and interpretations that can obscure the reality of injustice in society and within the New York legal system. As a result, it is necessary to define and "unpack" what "access" and "justice" mean to understand and frame the nature of the problems and propose meaningful solutions.

Historically, the access to justice community has focused on meeting the legal needs of individuals with low incomes who have trouble accessing a complicated legal system.[111] Access to justice advocates have observed that the legal profession has prioritized the need for lawyers rather than resolving the problems lawyers have been sent to address.

Despite the extensive efforts of the organized bar, including NYSBA and the New York State Bar Foundation, to address access to justice by supporting the matrix of legal service organizations in this state and by providing and supporting *pro bono* legal services, many litigants in civil proceedings remain

[111] THE HAGUE INSTITUTE FOR INNOVATION OF LAW (HIIL) & THE INSTITUTE FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (IAALS), *Justice Needs and Satisfaction in the United States of America* (2021), https://www.hiil.org/wp-content/uploads/2019/09/Justice-Needs-and-Satisfaction-in-the-US-web.pdf.

unrepresented by counsel.[112] There remains a complicated intersection of needs. There is an overwhelming need for effective and competent representation and legal advice for those faced with desperate legal circumstances, without the financial means to obtain legal assistance.

"Access" generally encompasses what attorneys think of as "legal issues" that require intervention by attorneys and the legal system.[113] This view leads to solutions that inevitably require more, rather than less, involvement by attorneys and the system. This is at least in part why the access-to-justice gap remains stubbornly large despite many laudable initiatives that invest large amounts of financial resources and human capital.

In contrast to access problems, "justice problems" encompass a broader range of challenges faced by everyday people that are inextricably linked to structural and systemic forces, such as racism, bias, and economic inequities. This includes, for example, employment, wages, and work conditions; housing; debt and other financial obligations or issues; health care and medical treatment; family matters; disability and inclusion; education; discrimination; and lack of legal status.[114] If those working in the legal profession widen their perspective to center justice problems as the framework to view and address legal needs, the role of communities becomes pivotal, and a greater range of

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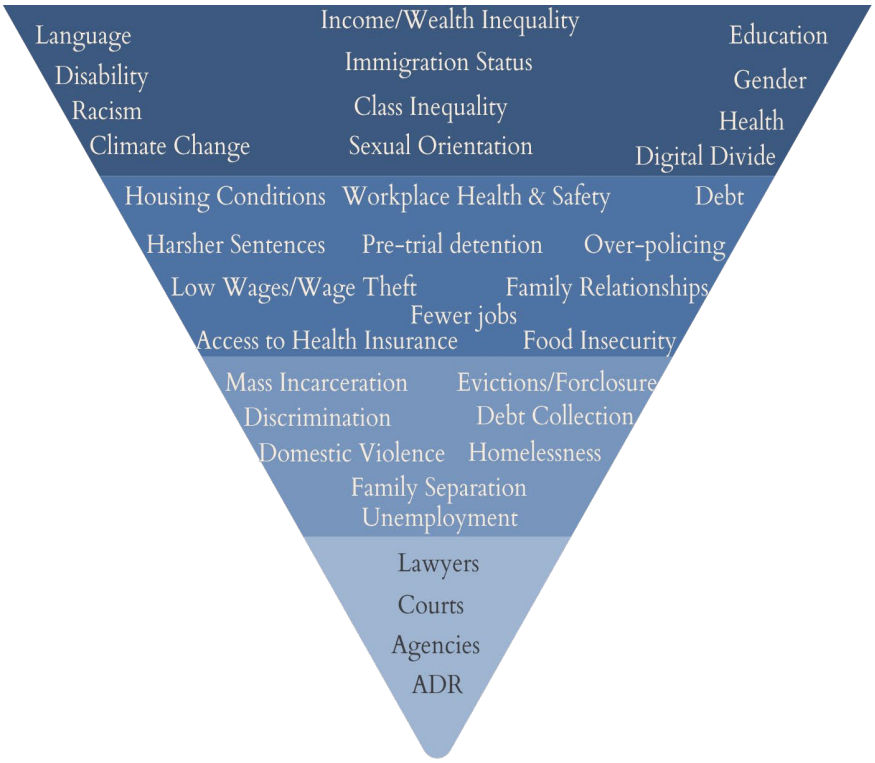
[112] *See generally* David Freeman Engstrom, *Post-COVID Courts,* 68 UCLA L. REV. DISC. 246 (2020) (exploring the toll of COVID-19 on our courts).
[113] Sandefur, *supra* note 95.
[114] *Id.*

solutions and remedies emerge beyond those available through the legal system.[115]

Increasing access without fundamentally reevaluating what justice is within and outside the legal system—for example, addressing racial disparities and inequities, providing the means to effectively avoid, prevent, and resolve legal issues, and reducing unnecessary involvement with the legal system—will perpetuate the ongoing access to justice "crisis" in which: (i) legal needs that are tied to greater socioeconomic inequities are unmet, (ii) court resources remain stretched to the breaking point, and (iii) underlying access to justice problems continue to escalate.

To better visualize the relationship between access and justice, we constructed the "Justice Pyramid" below, which is upside down to reflect the actual scope of each of the tiers from top to bottom: system obstacles, justice problems, legal needs, and the legal system.

[115] The Justice Index provides "a snapshot of the degree to which each US state has adopted best practices for ensuring access to justice for all people. NCAJ has identified policies in four key areas—attorney access, support for self-represented litigants, language access and disability access—that we believe every state should have in place to ensure meaningful access to justice for everyone." NAT'L CTR. FOR ACCESS TO JUST., *Justice Index*, https://ncaj.org/state-rankings/justice-index (last visited Dec. 20, 2022).



Summary of survey data related to access to justice

The access-to-justice framework helps contextualize the relevant results of the Task Force survey. Responses reflect the legal profession's traditional view that the access-to-justice crisis can be addressed predominantly by legal aid and legal services, pro bono representation by the private bar, and law school clinics. This traditional notion of access to justice in the legal profession focuses on legal needs and representation. In contrast, a broader view of justice problems requires a greater role by non-lawyers in the community. Notably, although respondents did not view technology as critically important, they believed access to information—including through technology—would make the biggest difference for the clients and communities they serve.

The first survey question regarding access to justice was question 31, which asked respondents to rank seven different descriptions of access to justice.[116] 35.63% of respondents answered that the best description for access to justice was "Providing more legal representation through legal aid and civil legal services and law school clinics"; 17.52% selected "Supporting legislation and other actions that will simplify court procedures, forms, and rules"; 16.79% selected "Educating people about their legal rights and making other information about legal issues more readily available and accessible"; 14.48% selected "Restructuring the court system to better meet the needs of litigants"; 13.32% selected "Providing legal representation through increased involvement of attorney pro bono services, assigned counsel or pro bono programs"; 7.4% selected "Expanding the use of alternative dispute resolution to the unrepresented, including mediation and arbitration"; and 4.3% selected "Improving the use of technology to help the unrepresented and under-represented litigants."[117]

Question 33 asked, "To increase 'access to justice,' how important are free legal services to those without means to pay legal fees?"[118] 60.93% of respondents selected "Very important"; 22.41% selected "Important"; 13.33% selected "Somewhat important" and 3.33% selected "Not important."[119] The

[116] Survey question 31.
[117] Survey results question 31.
[118] Survey question 33.
[119] Survey results question 33.

following question asked respondents to identify the services from question 33 that should be free, and the written responses indicate a tension between the inability of most low-income people to afford an attorney and the economic pressure attorneys have to earn enough to pay bills, including student loans, and make enough to support themselves and their families.

Question 35 asked, "To increase 'access to justice,' how important is it to provide more affordable legal services to those who are not indigent, but who still need legal assistance?"[120] 44.61% of respondents selected "Very important"; 31.77% selected "Important"; 19.59% selected "Somewhat important" and 4.03% selected "Not important."[121]

Question 37 asked respondents to rank four changes to improve access and justice in the courts for the unrepresented or under-represented. 40.88% of respondents ranked as most significant "Changes in court rules, procedures, and forms to improve quality, efficiency, and public information to seek to make it easier for litigants to better understand and participate in court proceedings."[122] Next, 25.22% of respondents ranked as most significant "Training of judges and court personnel on the impact of the court system (for example, on housing, income, health care, employment, family matters, and incarceration)," followed closely with 22.69% of respondents selecting

[120] Survey question 35.
[121] Survey results question 35.
[122] Survey results question 37.

"Legislation that would seek to prevent legal problems that require court resolution."[123] 16.97% of respondents ranked as most significant "Better understanding, design, and use of technology by courts to enable virtual appearances (i.e., computers, mobile devices, printers, and connectivity) and facilitate access to information by litigants."[124]

Question 38 asked, "From an 'access to justice' perspective, what changes would make the biggest difference to the clients and communities you serve?"[125] In reviewing the written answers, respondents tend to believe that through technology and public education an increase of accessible information would make the biggest difference in access to justice to the clients and communities they serve.

COVID-19 revealed and exacerbated the pre-existing access to justice crisis

As the Honorable Edwina G. Mendelson wrote in her July 2020 report entitled *Ensuring Access to Justice for Unrepresented Court Users in the Virtual Court Era—and Beyond*,

> [T]he impact of COVID-19 will lead to a greater number of unrepresented litigants entering the court system—either to initiate a claim, to defend against one, or both. The unrepresented are often at a disadvantage in even the best of times, and this crisis has exacerbated many of the hardships, including the digital divide between those with access to technology and those lacking such access. Yet, this crisis comes with an opportunity—it has provided the [Unified Court System] with the impetus to design and implement

[123] *Id.*
[124] *Id.*
[125] Survey question 38.

> a virtual extension of our existing Access to Justice program. A system that works well during a pandemic will work exceedingly well as the crisis subsides. Our response must be immediate; we simply do not have the luxury of delay.[126]

The impact of COVID-19 on the legal profession has been profound. As the National Center for Access to Justice describes in its 2021 report "*Working With Your Hands Tied Behind Your Back": Non-lawyer Perspectives on Legal Empowerment*:

> Every year, millions of Americans who need help with their legal problems find out that there is no such help or offer. Some are left to go it alone in court, where they may stand little chance against a better-equipped adversary. Some lose their homes, their savings and their children in cases they might have won with the right kind of help. Others avoid the legal system altogether, in situations where it could help vindicate their rights or win reparation for abuse.[127]

The following statistics provide a snapshot of the access to justice gap for civil legal problems:

- In 2017, "86% of the civil legal problems reported by low-income Americans received inadequate or no legal help."[128] At the same time, "71% of low-income households experienced at least one civil legal problem in the last year, including problems with health care, housing conditions, disability access, veterans' benefits, and domestic violence."[129]

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[126] HON. EDWINA G. MENDELSON, *Ensuring Access to Justice for Unrepresented Court Users in the Virtual Court Era—and Beyond* 3 (2020), https://www.nycourts.gov/LegacyPDFS/ip/nya2j/Unrepresented-Court-Users-Report-July-1-2020.pdf.

[127] *Working With Your Hands Tied Behind Your Back,* NAT'L CTR. FOR ACCESS TO JUST., *Non-lawyer Perspectives on Legal Empowerment* 3 (June 2021), https://ncaj.org/sites/default/files/2021-06/NCAJ%20Working%20With%20Your%20Hands%20Tied%20Behind%20Your%20Back.pdf.

[128] LEG. SERVS. CORP., 2017 JUSTICE GAP REPORT, *supra* note 94.

[129] *Id.*

- Each year, 55 million Americans experience 260 million legal problems.[130] "A considerable proportion of these problems—120 million—are not resolved or are concluded in a manner which is perceived as unfair."[131]

- The national benchmark for civil legal aid attorney count per 10,000 people is 10, whereas the New York score count is 4.39 per 10,000.[132]

As COVID-19 forced courts to close their physical doors, technology opened virtual doors, enabling court services to remain available to the public.[133] The New York State court system pivoted to virtual proceedings using the Microsoft Teams platform.[134] Virtual proceedings will no doubt continue to be an essential part of what has become a hybrid court system.[135]

Many attorneys and legal services/legal aid organizations were creative and resourceful in this pivot and deployed digital tools and platforms to respond to the needs of their clients.[136] They maintained communication with their clients and, wherever necessary and possible, provided them access to technology they needed to communicate and/or appear in court. Some implemented community education such as "know your rights" workshops.

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[130] *Justice Needs and Satisfaction in the U.S.*, *supra* note 111, at 222.
[131] *Id.*
[132] *Attorney Access: State Scores and Rankings*, NAT'L CTR. FOR ACCESS TO JUST., https://ncaj.org/state-rankings/justice-index/attorney-access (last visited Dec. 20, 2022).
[133] *How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations*, THE PEW CHARITABLE TRS. (2021), https://www.pewtrusts.org/-/media/assets/2021/12/how-courts-embraced-technology.pdf.
[134] NYSUCS, Microsoft Teams – Virtual Court Appearances, https://portal.nycourts.gov/knowledgebase/article/KA-01071/en-us (last visited Dec. 12, 2022).
[135] *Creating an Archive: Responding to the 2020-2021 Pandemic*, HIST. SOC'Y OF THE NEW YORK CTS., https://history.nycourts.gov/pandemic-response (last visited Dec. 12, 2022).
[136] *See, e.g.*, Law Help NY, https://www.lawhelpny.org/ (last visited Dec. 12, 2022); *Lawyering in the Digital Age*, Projects, COLUMBIA LAW SCH., https://blogs.law.columbia.edu/ldaclinic/projects (last visited Dec. 12, 2022).

COVID-19 illuminated the importance of community-based projects and resources beyond individual representation. For example, Legal Hand is a project where trained non-lawyer community volunteers provide free legal information, assistance, and referrals to help resolve issues with employment, housing, family, immigration, domestic violence, and benefits, aiming to prevent these problems from turning into cases.[137] Legal Hand offices were conceived as one-stop legal information centers, accessible and connected to legal and other service providers, with a community volunteer training program and located in low-income communities.

Before and during the COVID-19 pandemic, Legal Hand was a physical space, and then became a virtual space where people with different kinds of justice problems were able to obtain information. There are many unmet legal needs, including problems that are outside the scope of what legal services typically provide. For example, according to Jennie Kim, immigration attorney with Queens Legal Services and former attorney for Legal Hand:

> We think about housing in terms of tenants and landlords, housing conditions, and affordability. But, as a result of the affordable housing shortage, a tenant may be renting out their rooms. People came into Legal Hand needing to resolve conflicts with the tenant over who is entitled to a particular room and how much they must pay as the 'room rental' arrangements are not in writing. The court system couldn't really handle that situation and even when we were trying to develop some kind of method of dealing with conflicts that arise in that situation and it's not just about . . . personal conflicts, but we're talking about actually fighting over one room, and the

[137] Legal Hand, https://www.legalhand.org (last visited Dec. 19, 2022).

> tenant of the apartment had actually decided to put someone else in that room. And so, the person who was there was kicked out into the living room, without any partitioning. There are a lot of people who are coming in with these issues.[138]

The New York State courts and many organizations developed creative and new methods, including emergency procedures and protocols, to make courts and information available. There were "delays in justice," but perhaps they were actually justice initiatives from which we can learn, for example, the eviction moratorium.

At the beginning of the pandemic, online proceedings were essential for the safety of clients and legal staff, including judges and court personnel. What did not change is that "disparities in healthcare, employment, and housing place communities of color at great risk of being targeted by the legal and court systems, and places them at a great risk of illness and death."[139]

Virtual proceedings have had different impacts, both positive and negative, depending on the type and procedural posture of a particular case. Virtual proceedings have made court appearances much more accessible for many litigants, including working parents, older adults, people with disabilities, and others with caregiving responsibilities. Interpreters can more easily provide services merely by signing into the virtual proceeding. The option to appear in

[138] On file with Access to Justice Working Group.
[139] Written testimony of Lisa Schreibersdorf, Executive Dir. of Brooklyn Defender Servs. (Dec. 14, 2021), https://bds.org (on file with Access to Justice Working Group).

court remotely, particularly for appearances without testimony, evidence, and final decisions, can provide easier and more efficient access to the courts and brings substantial benefits, including relieving litigants, often relying on public transportation, of the burden to travel. Outside of New York City, litigants may have to travel long distances to law offices and courts, adding a great deal of time and expense.

However, virtual proceedings can amplify preexisting inequities. For example, as Family Court turned virtual, Brooklyn Defender Services reported an increase in dehumanizing language used to speak to both families in the court system and their staff.[140]

A disproportionate percentage of litigants in New York City Family Court and Housing Court are people of color, who often do not have access to adequate computer devices, internet connectivity, or the digital literacy necessary to fully participate in virtual proceedings.[141] This compromises their due process rights and their attorneys' ability to zealously advocate. During virtual court appearances, it was difficult for attorneys and their clients to communicate privately, which prevents attorneys from incorporating a client's personal knowledge and opinions into litigation decisions. This also prevents counsel

[140] Johnson Report, *supra* note 98, at 2–5.
[141] NEW YORK CITY FAMILY COURT COVID WORKING GROUP, *The Impact of Covid-19 on the New York City Family Court: Recommendations on Improving Access to Justice for All Litigants* 3–5 (2022) https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/nyc-family-court-covid-19-impact.

from being able to answer a client's real-time questions and ensure that they understand what is happening in court.

Former US Secretary of Homeland Security Jeh Johnson recently examined institutional racism in the New York State court system.[142] Johnson reported repeatedly hearing about "'dehumanizing' and 'demeaning cattle-call culture' in New York City's highest volume courts."[143] Accordingly, "[t]he picture painted for us was that of a second-class system of justice for people of color in New York State."[144]

The United States immigration court system was suffering from a significant backlog of cases prior to COVID-19, among other inefficiencies, and a lack of fairness. Because removal proceedings are deemed civil matters, immigrants facing removal do not have a right to an attorney like a criminal defendant. This leads to a high percentage of *pro se* respondents in immigration courts. There is also no right to language interpretation during a removal hearing, which deprives respondents of the right to understand the entire proceedings, even though these proceedings determine their fate. As immigration courts increase their reliance on virtual proceedings, due process is adversely impacted in depriving respondents access to their attorney(s) and prejudicing the rights of *pro se* respondents. Immigrants are deprived the

[142] *Id.* at 3. *See also* Johnson Report, *supra* note 98, at 54.
[143] Johnson Report, *supra* note 98, at 54.
[144] *Id.*

opportunity to have meaningful participation in their hearings or present their defenses in removal cases.

While the primary focus of this report is on civil access to justice, we recognize that the criminal justice system in New York State has had, and continues to have, a devastating impact on Black and Brown communities with far-reaching collateral consequences.

In 2021, there were 76,021 individuals incarcerated in federal, state, and local jails and prisons in New York.[145] Approximately 96,000 adults are on probation, and 43,000 are on parole.[146] Despite the current perception of an increase in crime, racism, bias, and inequality continue to exist throughout New York State, including within the legal system.[147]

The "digital divide" prevents access to justice in virtual proceedings and communities

COVID-19 accelerated the pace of lawyering in the digital age, including expanded e-filing and virtual proceedings. Virtual proceedings were initially

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[145] PRISON POL'Y INITIATIVE, *States of Incarceration: The Global Context* 2021, Appendix 1: State Data (Sept. 2021), https://www.prisonpolicy.org/global/appendix_states_2021.html.

[146] PRISON POL'Y INITIATIVE, *New York Profile*, https://www.prisonpolicy.org/profiles/NY.html (last visited Dec. 18, 2022).

[147] *See e.g.*, NEW YORK ADVISORY COMM. TO THE U.S. COMM. ON CIV. RTS., *Racial Discrimination and Eviction Policies and Enforcement in New York* (2022), https://www.usccr.gov/files/2022-03/New-York-Advisory-Committee-Evictions-Report-March-2022.pdf (within the broad context of the nationwide eviction crisis, lack of affordable housing, and homelessness, together with historical housing segregation, redlining, and zoning policies; examining impact of racism in housing courts in Albany, Buffalo, and New York City); Johnson Report, *supra* note 98 (noting some progress, but proposing urgent additional measures to address persistent racism and bias in the court system that is "dehumanizing, over-burdened and under-resourced"). New York State has implemented some of the recommendations in the Johnson report. Press Release, NYSUCS: *New Report Documents Significant Progress Made, Efforts Underway to Advance Equal Justice in the NYS Courts*, Nov. 17, 2021, https://www.nycourts.gov/LegacyPDFS/press/pdfs/PR21_29.pdf.

used as a stopgap measure, but now are a permanent part of the New York State court system. The accelerated transition to online practice and proceedings necessitated by the pandemic highlighted the deep "digital divide," which creates obstacles for many litigants who are forced to rely on technology as never before. "For instance, users without high-speed internet services or computers faced significant hurdles when trying to access courts using the newly available tools."[148]

The move to virtual proceedings revealed another preexisting problem: the "digital divide" largely corresponds to the broader socioeconomic disparities that disproportionately impact marginalized groups. The digital divide separates those with access to broadband internet, computer devices (including tablets and smartphones), and the necessary training enabling meaningful participation. These problems are also pervasive in the New York State administrative hearing system that presides over a vast government benefit system that impacts a substantial number of the most vulnerable people.

For over 250,000 New Yorkers, broadband service is unavailable in their neighborhood, and more than 1 million households do not have access or a subscription to broadband as of 2019.[149] According to Professor Conrad Johnson, Founder and Director of Columbia Law School's Lawyering in the

[148] PEW, *supra* note 133.
[149] OFFICE OF NYS COMPTROLLER, *Availability, Access and Affordability: Understanding Broadband Challenges in New York State* (2021), https://www.osc.state.ny.us/files/reports/pdf/broadband-availability.pdf

Digital Age Clinic, the digital divide consists of three main components: (1) lack of internet access, cost, and broadband infrastructure; (2) lack of computer devices and software; and (3) lack of understanding how to access services online, which requires training on digital literacy.[150]

An early pandemic housing case provides a glimpse at a providing approach to overcome the digital divide: the "Justice Tablet" project pioneered by Professor Johnson's Lawyering in the Digital Age Clinic at Columbia Law School, in partnership with the Legal Aid Society of New York City.[151] Using low-cost computer tablets that are preloaded with essential software programs (e.g., Microsoft Teams to access New York State virtual proceedings, WhatsApp to facilitate communication with counsel, CamScanner to copy documents, and a suite of Google programs, including Google search and Gmail), clinic students worked with Legal Aid in representing an 83-year-old client in an eviction proceeding alleging that her rent-controlled apartment was not her primary residence. Clinic students served as "digital navigators" and spent a substantial amount of time helping the client learn how to use the justice tablet prior to the proceeding. Clinic students and Professor Johnson "second seated" the Legal

[150] Testimony of Professor Conrad Johnson, Chief Judge's Hearings on Civil Legal Services in New York, Sept. 19, 2022, https://nycourts.gov/ctapps/civil.html.
[151] Lawyering in the Digital Age, *Projects*, https://blogs.law.columbia.edu/ldaclinic/projects (last visited Dec. 20, 2022).

Aid attorneys during the successful four-day trial, one of the first virtual proceedings in the State.

Justice Tablets can be loaned to litigants when they need them. Because they are relatively compact, they can be mailed with a self-addressed, stamped return label, and returned at the conclusion of the virtual proceeding. The Justice Tablet concept requires that a multi-pronged approach be used, including "Digital Navigators" who can assist litigants at home or in the community.

Justice Tablets also have great potential for use in public libraries and other community facilities, in addition to any existing computers in these settings. For example, while libraries may have computers, users may be limited to one hour, which may not be enough time for a litigant in a virtual proceeding, a client who needs to access information in a court-mandated program (e.g., to be trained as an adult guardian), or a client who needs more time to communicate with their attorney or access other information. In addition, the library or other community settings may not have a private space for the person to use the computer and may lack staff to provide any necessary assistance to the person. Beyond physical confidentiality, litigants need confidentiality and trust in those providing support, along with problems litigants may have in traveling to community sites (due to physical or cognitive limitations or child or elder care responsibilities).

While landline telephones, cell phones and smart phones can be used for routine and limited communications with attorneys and courts—for example, for scheduling or information—they are not adequate for virtual proceedings. As a result, when we consider how to overcome the digital divide, it is essential that each component—an adequate computer device, sufficient internet connectivity, and digital literacy or support—be part of any initiative.

In the digital age, access to information for the general public, and actual or potential litigants, can and should be made readily available in plain language. For example, Lawhelp.org provides legal information and resources in collaboration with local legal service providers.[152] The New York State court system has numerous "do it yourself" ("DIY") forms and guided interview programs.[153] JustFix provides building an owner information, forms for tenants, and other resources.[154] Immi is a web-based program that provides important legal information and preparation packets for immigrants in English and Spanish.[155]

Despite its benefits, DIY technology has limits in that a substantial number of people do not have computer devices, lack access to reliable internet, and perhaps most important, do not have the necessary digital literacy to

[152] LAWHELP, https://www.lawhelp.org (last visited Dec. 20, 2022).
[153] NYSUCS Court Help, *DIY Forms*, https://www.nycourts.gov/courthelp/DIY/index.shtml (last visited Dec. 21, 2022).
[154] JUSTFIX, *Tools*, https://www.justfix.org/en/tools (last visited Dec. 21, 2022).
[155] IMMI, *About Immi*, https://www.immi.org/en/Info/About (last visited Dec. 21, 2022).

navigate computer platforms and programs without assistance. "Techno-optimism" refers to the idea that DIY programs and related digital tools will be available and usable by most people who have a particular legal need but are not represented by an attorney.[156] However, while digital tools certainly can and should be designed to be DIY, a more promising "use case" involves using digital tools with training advocates and trusted intermediaries in the community.

The New York State court system has made a significant commitment to creating spaces where legal information is accessible (broadly defined) and easy to understand, providing services intended for court users who are indigent or low income, and offering opportunities to file papers without attorneys.[157]

A promising approach to these issues is the Office for Justice Initiatives ("OJI").[158] The OJI framework centers on court access, community outreach and prevention, and family and juvenile justice through various means including "[d]eveloping and coordinating region specific community outreach initiatives designed to broaden access to and improve public understanding of the legal system" and "[g]aining legislative and public support for the New York State Judiciary's proposals relating to access-to-justice matters."[159]

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[156] Tanina Rostain, *Techno-Optimism & Access to the Legal System*, 148 DÆDALUS 1, 93–97 (2019).
[157] *See generally* NYSUCS OFF. JUST. INITIATIVES, *Law Day Report: Advancing the Rule of Law Now* (2021), https://www.nycourts.gov/LegacyPDFS/ip/nya2j/OJI_LawDayReport_2021.pdf.
[158] NYSUCS OFF. JUST. INITIATIVES*: About Us*, https://ww2.nycourts.gov/ip/oji/about.shtml (last visited Dec. 21, 2022).
[159] *Id.*

Our legal system broadly includes the administration of justice through administrative adjudication. One case study of the impact of the pandemic at the administrative level is New York City's due process procedures to deny, discontinue, or curtail public assistance. New York City's Human Resources Administration ("HRA") decides the actions that deny, discontinue, or limit public assistance. New York State's Office of Temporary and Disability Assistance ("OTDA") administers hearings that challenge HRA's actions. HRA established the Advocates Inquiry System, which allows advocates (not *pro se* respondents) to resolve matters without the need for a fair hearing. This also helped reduce the number of baseless hearings. However, it has meant that those hearings that are held now typically involve more complex issues, often requiring the submission by the respondent of evidence or corroborating testimony.

With COVID-19 came telephonic administrative hearings. This pilot project was extended through 2021 and 2022 and may become permanent.[160] The goals were to reduce the number of people who had to physically travel to offices for hearings, create efficiencies, and not violate the due process protections of recipients. Procedures were enacted to provide evidence packets in advance to recipients, to receive evidence from recipients by mail, email, or fax, and for connection to the hearings by telephone. Litigants are expected to

[160] *See Hearing by Phone*, NYC OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, https://www.nyc.gov/site/oath/hearings/hearing-by-phone.page (last visited Feb. 28, 2023).

submit digital evidence prior to the hearings (challenging at best) or during the hearing. ALJs often need to evaluate the credibility of witnesses. All of this makes a hearing by phone (even a smartphone) inappropriate.

Clearly, there are potential benefits to a virtual hearing system, even absent a pandemic. The elderly, disabled, certain working people (i.e., people whose wages still leave them unable to meet the cost of rent, food, and are therefore eligible for public assistance), and those with eldercare or childcare responsibilities could benefit from a virtual option. Even from within New York City, travel to 14 Boerum Place can be onerous; outside the city, travel challenges may be even worse. Adding the pandemic to the mix further necessitated the need for a virtual hearing option, beyond telephonic, so long as participation in the hearing could be meaningful.

The bottom line is the same for administrative hearings as it is for court proceedings: if virtual proceedings can provide litigants with viable due process protections and assistance from advocates, then these hearings can be useful. Until that is a reality, virtual hearings of the type that currently occur via the fair hearing "pilot project" will continue to deprive under-resourced communities from meaningful access to justice. It is therefore imperative that consideration be given to require a judicial decision process with appropriate criteria as a prerequisite for virtual proceedings, along with litigant consent to virtual processes.

Before concluding with our recommendations, it is worth mentioning unauthorized practice of law statutes. Courts have long recognized that legal problems of indigents are too numerous to be handled by attorneys.[161] Unauthorized practice of law rules are intended to protect the public from harm by requiring objective credentials that define who is competent to practice law. In New York, the unauthorized practice of law generally involves a person who is not admitted to the bar providing specific legal advice or opinions to clients,[162] or holding oneself out as an attorney in court.[163] Providing general legal information to members of the public about the law, their rights, court procedures, and legal forms is not considered practicing law. This substantially limits the ability of non-lawyers and community-based organizations to provide the kind of services—whether in person or digitally—that identify, inform, and resolve legal issues for specific clients.[164]

Unauthorized practice of law statutes raise complex issues: some fear relaxing those rules in New York would increase exploitation and fraud, including by unscrupulous "notarios."[165] A recent study by the University of Denver Institute for the Advancement of the American Legal System, published

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[161] *Hackin v. Arizona*, 389 U.S. 143, 146–47 (1967) (Douglas, J., dissenting).
[162] *Matter of Rowe*, 80 N.Y.2d 336 (1992).
[163] *El Gemayel v. Seaman*, 72 N.Y.2d 701 (1988).
[164] *See Upsolve Inc. v. James*, 604 F. Supp. 3d 97 (S.D.N.Y. 2022) (issuing preliminary injunction based on First Amendment against enforcement of unauthorized practice of law statutes against community-based organization seeking to assist respondents in debt collection cases).
[165] *About Notario Fraud*, AM. BAR ASS'N, Jan. 31, 2022, https://www.americanbar.org/groups/public_interest/immigration/projects_initiatives/fightnotariofraud/about_notario_fraud.

in November 2022, characterized "the crisis in access to justice" as "a crisis for our democracy."[166] It reports that over ninety (90%) percent of eviction and debt collection cases in certain jurisdictions involved an unrepresented defendant.[167] This crisis was substantially expanded during the COVID-19 pandemic.

Task specialization and experience in a variety of more routine legal matters may produce better results than a license. Many states have chosen expansion of non-lawyer certificated representatives to fill the void. The extent of the access to justice crisis, exacerbated by the impact of the pandemic, mandates that NYSBA undertake study of different approaches that could allow certified non-lawyer advocates to provide more legal assistance to clients, including with guided interviews, expert systems, and other digital tools.[168] NYSBA should create a Task Force for such study. New York has already ventured into expanding non-lawyer representation.

> "In June 2020, the Chief Judge of New York appointed the Commission to Reimagine the Future of New York's Courts. One of its working groups, the Working Group on Regulatory Innovation, was charged with "explor[ing] regulatory and structural innovations to more effectively adjudicate cases and improve the accessibility, affordability and quality of services for all New Yorkers." In December 2020, the working group submitted its report and recommendations to the commission, including a recommendation to allow social workers to

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[166] INSTITUTE FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *The Landscape of Allied Legal Professional Programs in the United States* 2 (Nov. 2022), https://iaals.du.edu/sites/default/files/documents/publications/landscape_allied_legal_professionals.pdf.

[167] *Id.* at 67.

[168] *See generally Working With Your Hands Tied Behind Your Back*, *supra* note 127.

> provide limited legal services and advocacy. The full commission accepted the recommendations and, per the request of the Chief Judge of the State of New York, work is underway to implement them."[169]

The Task Force is mindful of the many concerns that will arise with the creation of certificated paraprofessionals assisting indigent clients with legal advice and representation in certain legal proceedings. However, the desperate need publicly revealed with great intensity during the COVID-19 pandemic requires our Association's studied response.

Our recommendation is for the creation of a separate task force to address this specific approach to alleviate the inability of indigent litigants to have access to justice. We can recommend guardrails. The expansion of such representation can be limited to those who have received appropriate training, who work under the direct supervision of an attorney, and to limit the circumstances to when such assistance is critically needed. It is not inappropriate to limit such services to the patent areas of critical need including eviction; debt and other financial obligations; health care and medical treatment; and lack of legal status.

The Task Force also recognizes that without guardrails, privately owned for-profit organizations could take advantage of the purpose of this recommendation and seek to monetize such services under the titular leadership and supervision of attorneys, possibly leading to non-lawyer

[169] INSTITUTE FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 166 at 15.

ownership of organizations dispensing legal services. A task force charged with such study must consider this risk.

Recommendations

These recommendations build on efforts to address the ongoing impediments to ensure access to justice and are designed consistent with the mandate of the Task Force to safeguard and strengthen the future of the legal profession.

Court proceedings

- Courts should review existing policies and procedures and develop criteria and procedures with the goal of improving accessibility and equity that is responsive to the case.
- In virtual proceedings, certain norms, expectations, and best practices for respectful behavior need to be reinforced so that litigants, counsel, judges, and court personnel treat each other with dignity and respect.
- Support authorization of virtual court proceedings throughout New York State, whether by an Order of the Chief Judge of the Court of Appeals or legislation. Establish criteria for judicial approval of the use of remote litigation forums.
- Support training and creation of protocol for judges and court personnel on racism and bias (explicit and implicit) generally and in conducting in-person and virtual proceedings to promote a culture of service, respect,

and dignity. Support training for court clerks and personnel that is designed to treat members of the public, including *pro se* litigants, with respect and dignity as consumers of court services.

- Immigration proceedings should be presumptively in-person, but if the proceeding is virtual, safeguards should be in place to assure that the detainee is in a private area outside the presence of ICE or corrections officers, but with sufficient protection for the court, support personnel, litigants, and counsel.
- Provide a means for attorneys to communicate privately with clients during a virtual proceeding.
- Tenants in housing court at their initial appearance, and prior to the issuance of any judgments or warrants, as appropriate, should be advised that they have a right to an attorney; cases should be adjourned to provide tenants with the reasonable opportunity to retain an attorney; and safeguards should be established to prevent default judgments when an unrepresented litigant with good cause does not appear in court or is unable to connect to a virtual proceeding.
- Support consolidation of housing cases outside of New York City that are adjudicated in city, town, and village courts based on the Special COVID Intervention Parts ("SCIP courts") project in Monroe County.

- Support placement of private internet portals or stand-alone kiosks in court and other public buildings throughout the State to allow respondents to appear who are otherwise unable to access remote proceedings.
- Expand the New York State Court Navigator Program in housing and consumer debt cases, and in other appropriate courts, which trains non-lawyers to assist unrepresented litigants.
- Support expansion of presumptive mediation in all appropriate matters.

Administrative hearings

- Administrative hearing notices should be accessible and in plain language. Hearing notices should have separate forms for in person, telephonic, or video hearings.
- Hearings involving individuals with limited English proficiency should be presumptively in person, with the option to opt-in to a telephone or video hearing.
- Individuals who request a hearing by telephone should be asked for their hearing venue preference (i.e., in person, telephone, video). There should be an option to an online form to allow individuals to select which hearing venue (i.e., in person, telephone, video) they prefer.

- Provide training to administrative law judges on remote hearings, with the input of advocates, including how to conduct a remote hearing with an interpreter, how to securely send documents and evidence in a timely manner prior to a hearing, and how to address issues relating to credibility determinations in this context.

Access to remote proceedings: use technology to benefit individuals and communities

- Support funding and initiatives to increase access to electronic devices, broadband internet, and digital literacy support and training.
- Support funding for new and existing initiatives to increase the availability of technology for appearance in virtual proceedings.
- Increase use of technology and universal design principles to create uniform plain language court forms.
- We base this recommendation on the seriously deficient delivery of legal services to those most desperately in need of assistance that the pandemic has laid bare. Our system is unable to provide sufficient help to those with very elemental legal needs such as housing, family law matters and immigration concerns. Existing access to justice initiatives, which frequently focus on an attorney-centered solutions, require a fresh look.

We recommend that NYSBA undertake study of the use of trusted intermediators in the community using appropriate technology who will (i) identify, prevent, and resolve legal issues; (ii) access legal information; (iii) complete DIY forms without court involvement; and (iv) help people prepare and file papers for proceedings. These trusted intermediators will provide services under the general supervision of an experienced attorney, most likely from a legal services organization. The study should include consideration of state funding of training, certification, and employment of such paralegal-trusted community intermediators.

Empower communities to identify, prevent, and resolve legal issues

- To reduce involvement with the court system, communities must receive the necessary support and resources to identify, prevent, and resolve legal problems "upstream" before they become court cases. For example, through easy-to-understand legal information in a variety of forms, DIY forms, and continued expansion of presumptive ADR.

Unauthorized practice of law rules

- NYSBA should create a Task Force charged with the mission to study the unauthorized practice of law statutes and rules to address the legal issues affecting indigent populations through the use of trained certificated paraprofessionals in limited settings, under the direct supervision of an attorney.

Increase free and low bono representation and diversify the legal profession.

- Increase funding for free legal aid/services, *pro bono*, and *pro bono* incubator projects.
- Increase expenditures for access to justice initiatives.
- Support the continued efforts of the New York State Bar Foundation to fund legal services to those in need.

New Lawyers and Law Students

Introduction

The COVID-19 pandemic significantly impacted new lawyers. Working and learning environments were disrupted, forcing change in the way in which they are assimilated into the legal profession, learn, conduct their practice, and interact with colleagues and clients.[170]

For law students, an abrupt switch to online learning took place overnight, and opportunities for professional development and academic engagement withered.[171] Some students struggled to meet basic needs for housing, financial stability, and food insecurity.[172] All of these factors contributed to increased reports of anxiety, depression, emotional exhaustion, and loneliness experienced by law students during the pandemic.[173]

The COVID-19 pandemic caused many new lawyers to question the traditional practice of law.[174] New attorneys learning how to litigate for the first time had to try cases and present at hearings via online platforms.[175] Rather than walking down the hallway of a law office to seek mentorship and advice

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[170] For purposes of the survey data analyzed, a "new attorney" is defined herein as an attorney practicing for seven years or less.
[171] *The COVID Crisis in Legal Education*, INDIANA CTR. FOR POSTSECONDARY RESEARCH, Oct. 28, 2021, https://lssse.indiana.edu/wp-content/uploads/2015/12/COVID-Crisis-in-Legal-Education-Final-10.28.21.pdf.
[172] *Id.*
[173] *Id.*
[174] Elaine McArdle, *Practicing Law in the Wake of a Pandemic*, HARVARD LAW BULLETIN, July 15, 2022, https://hls.harvard.edu/today/practicing-law-in-the-wake-of-a-pandemic.
[175] *Id.*

from a more senior lawyer, new attorneys had no choice but to seek guidance and support in creative ways such as virtual meetings.

Newly admitted attorneys entering the practice of law were forced to navigate an uncertain job market, some having their associate job offers revoked as a result of the pandemic.[176] Building a reputation, learning how to be a lawyer, finding a job as well as maintaining mental health amid a pandemic were challenges not faced by any recent generation of new attorneys. The careers and attitudes of thousands of new practitioners and law students were profoundly impacted, beginning in 2020 with the onset of the pandemic, during their early period of formative experience.[177]

Drawing upon statewide focus groups and the Survey measuring the attitudes and experiences of new attorneys and law students, the New Lawyers and Law Students Working Group has analyzed how law students and new attorneys were affected by the COVID-19 pandemic and how these experiences will shape the future of the legal profession.

Background and Methodology

The Survey included 12 questions specifically designed for attorneys in practice for seven years or fewer. A separate 20-question survey was designed for law students enrolled in New York State law schools. The questions allowed

[176] Michele Gorman, *COVID-19 Forcing Firms to Rescind Job Offers to Grads*, LAW 360, July 16, 2020, https://www.law360.com/articles/1292522/covid-19-forcing-firms-to-rescind-job-offers-to-grads.
[177] *Pandemic: Mental Health Impact on Young Lawyers*, AM. BAR ASS'N, Jan. 29, 2021, https://www.americanbar.org/groups/health_law/section-news/2021/01/pan-men/.

for narrative responses, asked respondents to rank their preferences, or solicited a yes or no answer.

Summary of Findings

Overall, law students and new attorneys reported that a virtual learning and/or working environment negatively impacted them in some way. Law students found it harder to forge relationships with classmates and learn from professors in a virtual environment. Gone were informally organized student study groups. New attorneys believe that the virtual working environment hindered their ability to conduct certain activities. Notwithstanding the negative impact felt by new lawyers and law students, the Survey results demonstrated that both groups are overwhelmingly in support of the continuation of some aspects of virtual education and the virtual practice of law.

For example, while a majority of law students believe that virtual law school hindered their ability to build relationships with others, thwarted their advocacy skills, and was less effective than in-person instruction, almost two-thirds of the law students surveyed indicated law students should have the option to choose virtual instruction for *all* classes.

This new penchant for continued reliance on virtual interaction born during the pandemic was reflected in the overwhelming majority response that new lawyers and law students will not consider job opportunities that do not include some form of a remote working option.

The Survey results highlighted the significant disagreement between law students and new attorneys concerning whether law schools should require a course dedicated to New York Practice. Many law students did not think that a New York Practice course in law school should be required, while new attorneys overwhelmingly believed it should be a required course.

The following is an analysis of the questions the New Lawyers and Law Students Working Group found most relevant to the Task Force's mission.

New York Law Practice Course & the Bar Exam

In response to the question of whether law schools should require a New York Practice course, only 45% of those law students surveyed thought that this course should be a required course.[178] Nearly as many students had an opposing view. The way this question was posed to law students was offered in the context of a yes/no answer, while also allowing for an expanded response. A comprehensive review of these narrative responses provides insight into why so many students felt the course should not be required. Reasons included, "I don't plan to practice in New York after school," "it should not be required, but highly recommended," and "it would be most useful only for litigators." These responses may very well be caused by a lack of exposure to the actual practice of law through summer associate jobs and internships during nearly three

[178] Survey question 16.

summers of the pandemic or a lack of appreciation for how such a course can positively impact the knowledge base of new attorneys.

Interestingly, new lawyers were posed the same question of whether they think law schools should require a New York Practice course. The strong majority (70%) responded that schools should require the course. The chasm between law students and new attorneys is most probably due to the experience that new attorneys have facing complex procedural issues involving New York law. Understandably, law students having not yet practiced law may not see the value of a New York Practice course in law school.

Recently, the New York State Bar Association Task Force on the New York Bar Exam recommended the state withdraw from the Uniform Bar Exam and develop its own bar admission test so that attorneys have a better understanding of New York State law before being admitted to practice.[179] Specifically, the Task Force on the New York Bar Exam proposed that the state use a "four-to-five year period to develop its own New York Bar Exam and allow law schools, law students, and bar preparation courses to prepare for the New York test."[180] The reason being that the "current bar exam fails to protect New Yorkers by not requiring attorneys seeking the right to practice within this state to demonstrate

[179] Susan DeSantis, *New York State Bar Association Calls for State To Withdraw From the Uniform Bar Exam*, N.Y. STATE BAR ASS'N, June 12, 2021, https://nysba.org/new-york-state-bar-association-calls-for-state-to-withdraw-from-the-uniform-bar-exm.
[180] N.Y. STATE BAR ASS'N, *Third Report and Recommendations of the Task Force on the New York Bar Examination* 12 (June 2021), https://nysba.org/app/uploads/2021/06/9.-Task-Force-on-the-New-York-Bar-Examination-with-staff-memo.pdf.

minimum competence in this state's law."[181] Though law students and attorneys seeking admission to practice law in New York are required to take the New York Law Course ("NYLC") and pass the New York Law Exam ("NYLE"), the Task Force on the New York Bar Exam believes the NYLC and NYLE are insufficiently rigorous to test that an applicant has meaningful knowledge of New York law.[182] We find it likely that the amount of law students and new attorneys who believe New York Law Practice should be a required course in law school would increase if New York follows the recommendations of the Task Force on the New York Bar Exam to divest from the Uniform Bar Exam in favor of a New York-specific bar exam.

Aligned with the Task Force on the New York Bar Exam's disfavor for the Uniform Bar Exam, there seems to be acknowledgement by the National Conference of Bar Examiners ("NCBE") that the current iteration of the Uniform Bar Exam could use reform to test minimum competency.[183] NCBE formally launched the development of a new bar exam titled the "NextGen Bar Exam," which will be offered for the first time in the third quarter of 2026.[184] The revamped exam will test examinees in seven skills areas, including client counseling and advising, client relationships and management, legal research,

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[181] *Id.* at 78.
[182] *See id.* at 78–79.
[183] *See* Karen Sloan, *Old bar exam or new one? States will have a choice in 2026*, REUTERS, Jan. 19, 2023, https://www.reuters.com/legal/government/old-bar-exam-or-new-one-states-will-have-choice-2026-2023-01-19.
[184] NAT'L CONFERENCE OF BAR EXAM'RS, *NextGen Bar Exam of the Future*, https://nextgenbarexam.ncbex.org (last visited Feb. 28, 2022).

legal writing, and negotiations, and will get rid of several subject areas.[185] As of the date of this report, no states have formally expressed that they will administer NCBE's new bar exam come 2026. Regardless, it does not appear that NCBE's development of a NextGen Bar Exam will sufficiently address the Task Force on the New York Bar Exam's concerns about testing the minimum competency of New York State specific laws.

Notwithstanding the Task Force on the New York Bar Exam's recommendations or the NCBE's development of a new bar exam, the majority (59%) of law students surveyed do not believe the bar exam should remain a path to licensure at all.[186] This is not entirely consistent with the conclusion of the Task Force on the New York Bar Exam, which maintains that New York should once again have its own bar exam that would be the "primary pathway to practice" and would be used to "evaluate whether an individual possesses minimum competency for law licensure."[187]

We do not know the reasons why surveyed law students believe so strongly that the bar exam should not remain a path to licensure. However, during the COVID-19 pandemic, discussions erupted across the nation concerning the necessity of the bar exam. Some law students during the COVID-19 pandemic demanded they be admitted to practice based solely upon their having graduated

[185] *See* Sloan, *supra* note 183.
[186] Survey question 13.
[187] Third Report and Recommendations of the Task Force on the New York Bar Examination, *supra* note 180, at 11 and 13.

from law school, known as "diploma privilege."[188] Others called the bar exam outdated, cumbersome, privileged, and racist.[189] Regardless of whether New York wholly divests from the Uniform Bar Exam in favor of a New York State-specific exam or it adopts the NCBE's NextGen Bar Exam, one point is certain: a majority of law students surveyed believe the current iteration of the bar exam must evolve or be eliminated altogether.

Virtual Learning Environment

In response to the question of whether the virtual learning environment enhanced, hindered, or did not affect students' law school experience, overall students felt that virtual learning was less effective than in-person instruction and that it also hindered their ability to master their advocacy skills.[190] More than half (52%) of the students surveyed believe that the virtual learning environment diminished their ability to connect and build relationships with others in the law school.[191] This is no surprise, as a significant part of the law school experience—interacting with other students about cases and exams—was lost for upwards of two to three years with the need to pivot to virtual instruction. During a focus group session of the Task Force, a third-year law student described that the lack of familiarity with her classmates resulted in a

[188] *Id. at 4.*
[189] *See* Johanna Miller, *COVID Should Prompt Us To Get Rid Of New York's Bar Exam Forever,* ABOVE THE LAW, July 31, 2020, https://abovethelaw.com/2020/07/covid-should-prompt-us-to-get-rid-of-new-yorks-bar-exam-forever.
[190] Survey question 8.
[191] Survey question 7.

loss of opportunistic student interaction. This, in turn, made the first year of law school significantly harder compounded with the depressing nature of the pandemic.

Many law students surveyed had been attending law school in person for one to two years when COVID-19 forced the emergency closure of law schools in New York with little to no preparation to begin virtual instruction. Unsurprisingly, even if professors displayed "heroic levels of creativity," law students were dissatisfied with the emergency remote instruction in the face of a global pandemic.[192] After all, for the classes of 2020, 2021, and 2022, online law school was not what those students anticipated. Nonetheless, the insights of the students surveyed provides helpful clues for how law schools can effectively deliver distance learning in the future.[193]

Distance education, commonly known as distance learning, is an educational process in which more than one-third of the course instruction involves the use of technology to support regular and substantive interaction amongst students and faculty.[194] As we transition into a post-pandemic future when distance learning is optional rather than being thrust upon students due

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[192] Susan D'Agostino, *Gap Between Online and In-Person Learning Narrows*, INSIDE HIGHER ED, July 13, 2022, https://www.insidehighered.com/news/2022/07/13/law-school-gaps-between-online-and-person-learning-narrow.

[193] Gallup, *Law School in a Pandemic: Student Perspectives on Distance Learning and Lessons for the Future*, ACCESS LEX INST., https://www.accesslex.org/sites/default/files/2021-06/Law%20School%20in%20a%20Pandemic_Student%20Perspectives%20on%20Distance%20Learning%20and%20Lessons%20for%20the%20Future.pdf.

[194] 22 N.Y.C.R.R. § 520.3(c)(6).

to a global health emergency, law students may experience a greater appreciation for and satisfaction with distance learning options.[195] In fact, law schools across the nation seem to be unphased by the general distaste of the classes of 2020, 2021, and 2022 toward their remote learning experiences. Many of the nation's law schools are expanding distance learning opportunities for law students.[196] As of the date of this Report, 14 ABA-approved law schools offer distance education J.D. programs, including New York's Syracuse University College of Law.[197]

Deans of several New York law schools commented that "schools can be highly successful using remote instruction to add flexibility to evening and part-time law programs," which provides "students from a range of backgrounds with enhanced educational access and other benefits, while maintaining high educational standards and quality."[198] Until recently, New York's rules concerning eligibility for bar admission were in lock step with the American Bar Association's accreditation requirements, including recommendations on distance learning.[199] In 2020, the American Bar Association revised its

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[195] *Id.*

[196] ABA News, *Law schools plan virtual learning expansion post-pandemic*, AM. BAR ASS'N, https://www.americanbar.org/news/abanews/aba-news-archives/2022/02/law-schools-plan-virtual-expansion.

[197] *ABA-Approved Law Schools With Approved Distance Education J.D. Programs*, AM. BAR ASS'N, https://www.americanbar.org/content/aba-cms-dotorg/en/groups/legal_education/resources/distance_education/approved-distance-ed-jd-programs.

[198] *New York Will Enhance Access to the Profession by Easing Limits on Remote Leaning*, N.Y. LAW JOURNAL, May 4, 2022, https://www.law.com/newyorklawjournal/2022/05/04/new-york-will-enhance-access-to-the-profession-by-easing-limits-on-remote-learning/.

[199] *Id.*

accreditation standards to permit up to one-third of the credits required for a J.D. degree to be offered through distance learning.[200] Then, in February 2023, the American Bar Association Council on Legal Education and Admissions to the Bar voted unanimously to advance changes to its accreditation standards, which would allow J.D. programs to offer 50% of credits via distance learning.[201] New York, on the other hand, has distance learning credits capped at 15 out of 83 (18%) credit hours required for graduation.[202] Though the 15 distance learning credit hours can be applied toward the 64 classroom credit hours required by New York rules, they cannot be used until students complete their first year of law school.[203] Such limitations create a "substantial gap between ABA accreditation standards and the requirements of the New York bar."[204]

Although most law students reported that remote law school instruction during the COVID-19 pandemic was far less effective than in-person instruction, almost two-thirds (62%) of the law students indicated that they believe they should have the option to choose virtual instruction for *all* classes.[205] This

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[200] *Id.*
[201] Christine Charnosky, *ABA Council Sends Proposal to Increase Distance Learning to Notice & Comment*, Feb. 17, 2023, LAW.COM, https://www.law.com/2023/02/17/aba-council-sends-proposal-to-increase-distance-learning-to-notice-comment/.
[202] 22 N.Y.C.R.R. § 520.3(c)(6)(i).
[203] 22 N.Y.C.R.R. § 520.3(c)(6)(ii)–(iii).
[204] *New York Will Enhance Access to the Profession by Easing Limits on Remote Leaning*, *supra* note 198.
[205] Survey question 11. Our survey did not distinguish between synchronous instruction where students engage in learning in the remote presence of a professor in real time provided through digital video-based technology, from asynchronous instruction. The latter is when students engage in learning without the direct presence (remote or in-person) of a professor. The degree of contemporaneous synchronous interaction between a professor and the amount of asynchronous course work may be a factor in law student satisfaction with virtual instruction. Law schools should study the composition of virtual instruction to determine its effect on student satisfaction.

perhaps suggests recognition among law students that distance learning has cognizable benefits unrelated to the instructional process—it just needs improvement. The temporal efficiency of distance learning undoubtedly has allure for caregivers and parents pursuing a law degree and to those who need an income in the first instance to afford attending law school. By not having to be on campus to attend class, one gains time for expanded childcare or to work part-time jobs to make money. Distance learning provides access to legal education for individuals who are not in proximity to a law school, which further diversifies the legal profession.[206]

Furthermore, the Survey asked students entering their last year of law school how prepared they felt for practice in light of learning virtually for one or more years.[207] Of the responding impacted law students, the majority felt "somewhat" prepared to enter their first year of practice despite possibly having spent multiple semesters in a virtual or hybrid learning environment. Similarly, the Survey asked new attorneys whether law school adequately prepared them to practice law in New York.[208] Nearly 50% of new attorneys surveyed answered that they did not feel adequately prepared.

The sentiment that law school did not adequately prepare law students and new attorneys for the practice of law is not new. A survey conducted in 1978

[206] Mike Stetz, *Distance learning gets ABA bump*, THE NAT'L JURIST, Sept. 8, 2022, https://nationaljurist.com/national-jurist/news/distance-learning-gets-aba-bump.
[207] Survey question 12.
[208] Survey question 54.

of "mid-career lawyers, two-third said that their legal education had been 'not helpful' or 'played no role' in their ability to develop critical practice skills like interviewing, counseling clients, and negotiating."[209] Similar sentiments were expressed by new attorneys again in 2009.[210] Seemingly law students and new attorneys feeling only "somewhat" prepared to enter the practice of law is attributed less to the COVID-19 pandemic and more to the significant changes law schools need to undergo to better prepare future attorneys.[211]

Virtual Working Environment

The Survey asked new lawyers to respond to questions regarding the virtual work environment.[212] Prior to the COVID-19 pandemic, trials, oral arguments, depositions, and other activities largely took place in person. The COVID-19 pandemic forced significant changes to litigation practices and moved entire appearance calendars to remote conferencing platforms.[213] The Survey

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[209] Martin Pritikin, *Are Law School Curriculums Preparing Students to Succeed?,* THE NAT'L JURIST, May 8, 2018, https://nationaljurist.com/national-jurist-magazine/are-law-school-curriculums-preparing-students-succeed; *see also* Leonard L. Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL EDUC. 264 (1978), https://perma.cc/73XH-WKHE.

[210] *Id.*

[211] *Id. See also* Matthew Diller and Joseph Landau, *New York Law Journal: Law Schools Must Implement Meaningful Adjustments*, FORDHAM LAW NEWS, June 29, 2021, https://news.law.fordham.edu/blog/2021/07/01/new-york-law-journal-law-schools-must-implement-meaningful-adjustments; Stephanie Hunter McMahon, *What Law Schools Must Change to Train Transactional Lawyers*, 43 PACE LAW REV. 106 (2022), https://digitalcommons.pace.edu/plr/vol43/iss1/; Marc Cohen, *Law Schools Must Restructure. It Won't Be Easy.*, FORBES, May 15, 2017, https://www.forbes.com/sites/markcohen1/2017/05/15/law-schools-must-restructure-it-wont-be-easy.

[212] In analyzing these questions, it is important to consider the practice area of the respondents. The top three categories of new attorneys who responded are litigators, followed by transactional attorneys, and then legal services providers. *See* Survey question 6.

[213] FUTURE TRIALS WORKING GROUP OF THE COMMISSION TO REIMAGINE THE FUTURE OF NEW YORK'S COURTS, *Report and Recommendations of the Future Trials Working Group* (April 2021), https://www.nycourts.gov/whatsnew/pdf/future-trials-working-grp-april2021.pdf.

asked respondents to rank the effectiveness of specific legal events and activities taking place virtually, based on a scale of 1 through 7, with 1 being the most effective and 7 being the least effective.[214] Not surprisingly, trial/arbitration was ranked as the least efficient activity to be conducted virtually (6.38 out of 7) and conferences with colleagues or adversaries were ranked the most efficient (1.91 out of 7).

Most experienced attorneys agreed with new attorneys that trial/arbitration is the least effective activity conducted virtually (ranked 6.10 out of 7).[215] They believed that the most effective virtual activity is non-motion conferences with the court (1.96 out of 7), an opinion that differed from new attorneys, who believed that conferences with colleagues or adversaries was the most effective virtual activity. While not asked, the obvious advantages of virtual witness preparation for trial or virtual preparation for transactional activities, like mediation, cannot be denied. When it came to scoring the disadvantages of virtual activities, practicing attorneys agreed with new attorneys that virtual communication hinders their ability to "read" participants' reactions and that technology glitches undermine the effectiveness of virtual proceedings.

It is recognized that virtual court appearances and the virtual practice of law will continue to be commonplace.[216] During a weekly COVID-19 update,

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[214] Survey question 31.
[215] Survey question 18.
[216] *See* Nicole Black, *Are Virtual Court Proceedings Here To Stay? All Signs Point To Yes.*, ABOVE THE LAW, June 30, 2022, https://abovethelaw.com/2022/06/are-virtual-court-proceedings-here-to-stay-all-

former Chief Judge Janet DiFiore commented that "COVID-19 compelled us to transform court operations overnight, virtual proceedings are no longer an 'experiment' but have proven to be an effective method of moving cases closer to resolution while ensuring that litigants and lawyers can have their matters heard in a convenient, time and cost-effective manner."[217] The Commission to Reimagine the Future of New York's Courts extensively examined the ways in which evolving technologies effect trial practice in New York State and how the New York State Unified Court System can best prepare for and benefit from such technologies.[218] The Commission noted that remote conferencing technology enhances "access to the courts by those who lack the flexibility in their work or caregiving arrangement to easily secure time to travel, or who live far from their nearest courthouse."[219] However, the Commission shared the same concerns of new attorney Survey respondents, such as "increased potential for prejudicial disruptions to trial proceedings caused by technical malfunctions" and "diminished ability of counsel to observe contemporaneously the full body language and reactions of each juror."[220]

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signs-point-to-yes; Jon David Kelley, *Virtual Courts Are Not Going Away*, BLOOMBERG LAW, Oct. 13, 2022, https://news.bloomberglaw.com/us-law-week/virtual-courts-are-not-going-away; Christian Nolan, *Some Virtual Court Proceedings To Become Permanent*, N.Y. STATE BAR ASS'N, May 10, 2021, https://nysba.org/some-virtual-court-proceedings-to-become-permanent.

[217] *Id.*

[218] Future Trials Working Group, *supra* note 213.

[219] *Id.*

[220] *Id.*

Recognition by the New York State Unified Court System that the virtual practice of law is here to stay mirrors the sentiment expressed by new lawyers about remote and virtual work environments. The Survey shows that almost two-thirds of new attorneys find it very important that an employer offer a hybrid work environment.[221] Similarly, more than half of the responding attorneys with more than seven years of practice felt it was "very important" that a potential employer offer some form of a hybrid working environment.[222]

In fact, the American Bar Association found that new lawyers feel so strongly about remote work that 44% said they would leave their current jobs for a greater ability to work remotely elsewhere.[223] This seems to be buttressed by the fact that a majority of lawyers feel that remote work does not adversely impact the quality of their work, productivity, or ability to hit billable hour quotas.[224]

While most (54%) new attorneys did not believe the COVID-19 pandemic occurring early in their career would negatively impact their professional progression, more than half (52%) of the new attorneys surveyed felt that taking advantage of hybrid work may negatively impact their career growth.[225] This sentiment was not shared by non-new attorneys who overwhelmingly were "not

[221] Survey question 56.
[222] Survey question 57.
[223] Amanda Robert, *Working remotely is now a top priority, says new ABA report highlighting lasting shifts in practice of law*, ABA JOURNAL, Sept. 28, 2022, https://www.abajournal.com/web/article/new-aba-report-highlights-lasting-shifts-in-practice-of-law-and-workplace-culture.
[224] *Id.*
[225] Survey question 58 and 59.

at all" concerned about a hybrid working environment negatively impacting their career progression (58%), nor did they indicate that they were concerned about the pandemic affecting their legal career (81%). This, however, is not surprising as experienced attorneys are more established in their practices.

Conclusion and Recommendations

While the worst of the COVID-19 pandemic is in the rearview mirror, law students and new lawyers faced a unique set of challenges and struggled with great instructional and practice adversity. Despite negative experiences surrounding virtual education and the remote practice of law, the Survey results and testimony of new lawyers and law students unequivocally show that new lawyers and law students want and require virtual education and the remote law practice to continue, albeit on a carefully selected basis. We recommend consideration of the following:

- New York Practice should be a required class in New York law schools.
- Law schools need to take a hard look at their curriculum to ensure that law students intending to practice in New York have sufficient New York-centric course options and properly educate their student body on virtual lawyering.
- Law schools should continue to improve the quality of distance learning and work to provide a variety of distance learning course modalities into the curriculum.

- The Office of Court Administration needs to ensure that virtual proceedings are effective for all participants, particularly those less than financially able as described in the Access to Justice portion of this report.
- Hybrid work options need to remain, must be offered by law firms, and consideration needs to be given whether to offer a fully remote option under the appropriate practice circumstances. The beneficial effect of hybrid work is the expansion of work opportunities to lawyers with parenting obligations. However, law firms bear the responsibility to ensure the proper training for the practice of law for those young lawyers opting for expanded hybrid work environments.

Law Practice Management and Technology

Introduction

Overview

It is an understatement to simply say that the COVID-19 pandemic necessitated rapid changes to the technology used to practice law. Overnight, home offices were created, virtual meeting platforms proliferated, and the judiciary adopted measures to ensure that proceedings continued to be secure, fair, and effective. These changes, amongst others, have raised a multitude of questions about efficient allocation of technology, the means available to develop client and professional relationships, and effective delivery of legal services.

The Task Force's Law Practice Management and Technology Working Group (the "LPMT Working Group") sought to: (i) identify the scope and impact of pandemic-related changes to law practice management and technology, (ii) gauge the general sentiment of the New York Bar towards these changes, and (iii) determine what additional technological changes and other resources are needed to further facilitate the practice of law in a post-pandemic setting.

The LPMT Working Group's Survey Questions

The LPMT Working Group crafted targeted questions that were included in the Survey sent to members of the New York State Bar Association by NYSBA's Task Force on the Post-Pandemic Future of the Profession. The questions posed by the LPMT Working Group focused on four primary topic areas:

1. **Technology Hardware and Software** (e.g., respondents' proficiency, comfort level, and attitude toward the equipment and software used in most work-from-home scenarios);
2. **Cybersecurity Protocols and Training** (e.g., the level of security—perceived and actual—in place to protect confidential and privileged information while working remotely);
3. **Impact of Technology on the Social Aspect of Law Practice** (e.g., respondents' attitudes towards the in-person practice of law versus remote working environments and the impact that remote practice has on managing a law firm); and
4. **Virtual Meeting Platforms** (e.g., respondents' experiences using electronic meeting platforms).

Respondents' answers to the Survey questions were aggregated and then analyzed by the LPMT Working Group to inform the observations, conclusions, and recommendations set forth herein.

Survey Respondents' Demographic Information

Of the more than 2,000 respondents who responded to the LPMT Working Group's Survey questions, most were attorneys over the age of 50 with more than 10 years of experience. With respect to the nature of the responding attorneys' practices, nearly half reported working in litigation, with approximately one-quarter indicating that they were transactional lawyers.

Almost half of the respondents practiced in law firms of fewer than 20 attorneys, with 26% of these lawyers engaged in solo law practice.

The respondents' demographics are particularly relevant to the LPMT Working Group's analysis of the survey results. Generally, attorneys in their later years of practice are primarily responsible for managing law firms and other attorneys. Further, recently admitted attorneys may have familiarity and more comfort with technology than more senior attorneys. Finally, small firms often have a more limited IT infrastructure and fewer technological resources at their disposal. The LPMT Working Group recognizes the dearth of Survey responses from attorneys who graduated law school after 2000.

Executive Summary of Survey Results and Analysis

As discussed in detail below, the Survey results show that most New York practitioners have embraced technological changes spurred by the COVID-19 pandemic and feel competent and secure in the virtual environments in which they now practice. Nonetheless, to ensure ongoing competence with these technologies, and to fully protect client confidences and data from cybersecurity risk, enhanced trainings and continuing legal education are necessary.

Further, legal employers should allocate significant resources towards technologies that facilitate remote work and properly train users on those technologies. This in turn creates an opportunity for NYSBA and other bar

associations to provide valuable training and resources to practitioners geared toward the competent and secure use of technology in the practice of law.

Finally, there is a consensus amongst New York lawyers that certain aspects of the virtual practice of law result in significant time and cost savings. However, Survey respondents were clear that other aspects of their practice are better performed in person. Therefore, going forward, legal employers and attorneys should carefully and strategically choose the best forum in which to proceed based on the work to be performed. To the extent that events and activities must proceed remotely, lawyers should be highly skilled at using the remote platforms on which these events take place.

Analysis of the Survey Results & Recommendations

Technology, Hardware and Software

Proficiency with Technology

Respondents were asked to characterize their proficiency with technology.[226] Whether respondents' proficiency with technology originated prior to the COVID-19 pandemic or developed because of the COVID-19 pandemic, respondents rated themselves as generally proficient in using technology to practice law. 70% of respondents rated their proficiency with technology as “moderately to very proficient,” and 25% rated their proficiency

[226] Survey question 13.

level as "adequately proficient." Fewer than 5% of responding attorneys indicated they were not proficient with technology.

Importance of Ability to Work Remotely

Respondents were asked to rank the following types of training in order of importance to the respondent's ability to work remotely: (1) how to use a computer, monitor, printer, and/or other hardware at home; (2) use of remote meeting software platforms (e.g., Zoom, Microsoft Teams, etc.); (3) effective communication using remote platforms; and (3) cyber security protocols and best practices.[227]

Forty-two percent of respondents ranked training on use of computers, printers, and other hardware components as their greatest need. An almost equal number of respondents reported a desire for training on the use of remote meeting platforms as their next most important priority. Thirty-five percent of respondents identified obtaining training in effective communication over remote meeting platforms as their third most-needed training. Slightly more than 31% of respondents indicated a need for training in cybersecurity protocols and best practices.

While a majority of respondents rated themselves as at least "adequately proficient" in their use of technology during the COVID-19 pandemic, it is revealing that many practicing attorneys responded that they require training in

[227] Survey question 14.

use of computers, monitors, and other hardware to effectively work from home. This disparity may be due to the fact that some respondents did not have the necessary technical support from their law office information technology staff or colleagues to assist them in handling computer hardware issues in a remote environment.

Moreover, the Survey results indicate that 75% of attorneys desire further training on various remote meeting software such as Zoom and Microsoft Teams. It is imperative that lawyers are adept in using these programs for effective client and other communications (e.g., break-out meeting rooms, screen sharing functions, etc.).

Significant Obstacles to Implementing New Technology[228]

Reliance on technology for the virtual practice of law requires attorneys and law offices to be vigilant in upgrading, implementing, and learning new technologies. Lawyers and law offices need to dedicate sufficient resources to upgrading and modernizing technology. The costs of IT upgrades, including setting up home offices for employees, hardware (e.g., dedicated laptops, printers, scanners, copiers, web cameras, etc.), and firm-sanctioned software (e.g., Zoom, Microsoft Teams, Microsoft Office Suite, etc.), as well as training on the use of such firm-provided hardware and software, can be prohibitive. In fact, slightly more than 57% of respondents rated the cost of technology as their

[228] Survey question 15.

primary concern in implementing new technology. In fact, lawyers who rated themselves as "adequate" or "not proficient" with technology indicated costs constituted a barrier to implementing or upgrading technology.[229] The COVID-19 pandemic caused lawyers and law firms to shift priorities to fund home offices so that employees could work from home effectively and safely with regard to protecting law firm and client data. Accordingly, lawyers and law firms must build technology costs into their law practice expenditures to account for the continued remote practice of law.

An almost equal number of respondents reported that learning new technologies is a major barrier for implementation. From learning how to use a new app on an iPhone to navigating cloud computing, lawyers must embrace and learn new technologies to engage in the safe and effective remote practice of law. Although the majority of practitioners report being competent with technology, there is undoubtedly a learning curve when new technologies are implemented. As such, lawyers must engage in significant training to become proficient in these new IT technologies.

Notwithstanding the degree to which lawyers are or are not familiar with IT hardware and software, all lawyers require appropriate training in the use and implementation of both existing and new IT technologies. Not only is it a best practice for lawyers to be trained on any technology implemented, but it is

[229] *See* Survey question 13.

an ethical obligation for lawyers to be competent in the use of existing and newly implemented IT technologies.[230]

Technology at Home Versus in the Office[231]

Respondents were asked to identify whether the level of technology available to them at home is equivalent to or better than those technologies available in their place of employment.[232] Nearly 46% of respondents indicated that they have the same or better access and availability to technology at their home offices as in their places of employment. Nineteen percent of respondents provided a neutral response to this question indicating that, although they did not have the same level of access to technology in their remote location, they were able to adapt adequately to working from home. Less than 10% of respondents indicated that they do not have adequate access to necessary technologies in their remote work environment.

Respondents also were asked to elaborate on missing or deficient IT technologies in their home or remote work environment.[233] The overwhelming majority of responses indicated that the deficiencies in their home or remote environment were with IT hardware, such as computer monitors and printers. Thus, in order for lawyers to work effectively in a remote environment, employers should ensure there are adequate technological resources, especially IT

[230] *See* New York Rules of Professional Conduct Rule 1.1, Comment 8.
[231] Survey question 16.
[232] Specifically, telephone, printing, and other technologies including internet connection.
[233] Survey question 17.

hardware. However, the LPMT Group is mindful that the cost of implementing new technologies is a major obstacle for many lawyers. Nonetheless, if lawyers continue to work from home as the pandemic wanes, then remote IT setups need to be the equivalent of working in the office. Absent a financial commitment from law offices to recreate the office environment at home, lawyers working remotely will be at a disadvantage and less productive.

Conclusions and Recommendations

1. The post-pandemic practice of law will continue to include aspects of law practice management that is virtual. Legal employers must develop office-wide policies and protocols that support remote law practice for all their employees, including back-office staff, that include providing the hardware and software necessary to promote safe, efficient, and effective virtual law practice.
2. Legal employers need to allocate adequate financial resources to support the cost of regularly upgrading, maintaining, and implementing new technology at the office and at home.
3. Legal employers need to provide regular training to employees in both existing and new technology to ensure that lawyers and staff working remotely are competent in the use of the firm's technologies and systems.

4. Legal employers are responsible for providing regular training on data privacy and cybersecurity.[234]
5. NYSBA should act as a resource to its members in finding ways to reduce the costs of purchasing, upgrading, and replacing IT hardware and software through contractual relationships with technology providers, as it does with rental car agreements and other similar member benefits.
6. NYSBA should provide regular CLEs to its members on the remote use of IT hardware and software, including the setup and maintenance of remote home law offices and the use of virtual meeting platforms.
7. NYSBA should offer its members a Law Practice Management and Technology Resource Center ("LPMT Resource Center") that provides advice on best practices relating to practicing law remotely, virtual mediation practice, case management software, technology support, setting up an effective home law office, training in IT hardware and software, and other issues related to the virtual practice of law. The LPMT Resource Center could offer recommendations for law practice-related IT technologies and negotiated discounts for IT technology products related to a virtual home law office. Finally, the LPMT Resource Center could provide access to an IT technology consulting firm at a discounted rate for

[234] *See e.g.,* N.Y. STATE CONTINUING LEGAL EDUC. BD., *Guidance Relating to the New Cyber Security, Privacy and Data Protection Category CLE Credit,* https://www.nycourts.gov/LegacyPDFS/attorneys/CLE/Cybersecurity-Privacy-and-Data-Protection-Guidance-Document.pdf.

members, e.g., a NYSBA "Geek Squad" that could provide immediate technology support and assistance.

Cybersecurity Protocols and Training

As sophisticated cyber and ransomware attacks across all sectors of society become increasingly common, a lack of cybersecurity training creates an intolerable level of risk for courts, firms, and practitioners who are concerned about the confidentiality of their data and client data as well as the stability of their finances given the high cost of recovering data after a ransomware attack. Around 50% of lawyers indicated they had received some form of cybersecurity training for in-office and/or remote work. Alarmingly, about 49% of respondents received neither cybersecurity training nor refreshers for in-office work.

With the proliferation of hybrid work policies and remote workspaces, lawyers and other staff in the legal field must be appropriately trained on how to prevent and respond to malicious actors. The switch from in-office to remote work occasioned by the pandemic should have triggered additional training for all staff working in courts, firms, and legal services agencies. While there was little time for training on the special cybersecurity risks associated with remote working arrangements in March of 2020, now is the time to make a course correction. A workforce that is untrained or undertrained in current cybersecurity best practices places legal employers and practitioners, as well as their clients, directly at risk. A damaging attack is much more likely to take

place when lawyers and their staff are untrained in spotting or reporting cybersecurity issues. Remote legal work should be conducted only through secure private networks, i.e., VPNs, to protect these communications with clients, adversaries, colleagues, and the courts. All employees should be trained to use secure private networks or provided VPNs, and protocols for reporting the occurrence of anomalous events should be well-known to all employees and clearly identified in an employee handbook. Additionally, employees should be trained in cybersecurity protocols relevant to their position, as well as educated regarding the many potential repercussions of poor cybersecurity practices.

Cybersecurity and Confidentiality

Respondents were asked to describe their ability to preserve confidential information with the increased use of technology and virtual meetings. Specifically, with the advent of virtual conferences and client meetings, it is necessary to ensure that no unauthorized individuals are present (on- or off-screen) to maintain attorney-client privilege. In addition, given that only about 50% of respondents have received cybersecurity training for in-office and remote work, it is unclear whether respondents' apparent confidence in their ability to preserve confidential client information is based on a lack of accurate information about the nature and true risk to which confidential firm and client information is subject. If adequate cybersecurity training is not provided to

nearly half of all attorneys utilizing a virtual setup, then their ability to preserve confidential firm and client information would be inadequate.

As a best practice, it is recommended that legal employers review existing confidentiality policies and update them to incorporate current cybersecurity protocols. This practice could be done on a biannual basis to ensure the highest levels of security.

Conclusions and Recommendations

1. While practitioners seem confident that they are adequately protecting client information, the seemingly widespread lack of cybersecurity training is a great risk factor. All attorneys and staff must be educated on a regular basis regarding the security risks associated with any online work, whether at home or in the office. Further, attorneys should be trained to take adequate precautions to secure their online activities and electronic data.
2. NYSBA and other bar associations must offer cybersecurity CLEs as required by the new cybersecurity CLE requirement and other practical trainings designed to raise attorneys' awareness of the ever-changing cyber-risk landscape, how to mitigate that risk, as well as best practices, industry protocols, and referrals available for cybersecurity specialists and

cyber insurance and other insurance to protect against social engineering scams.[235]

The Impact of Technology on the Social Aspect of the Practice of Law

Several survey questions focused on the social effect of lawyers working from home or in hybrid arrangements and the way attorneys conduct life and legal practice in virtual settings.

The LPMT Working Group sought information about attorneys' current and ideal working arrangements.[236] The Survey responses reflect that approximately 75% of attorneys at the time were working remotely at least some of the time with more than 50% reporting that they were in a hybrid practice setting split between home and office. Most attorneys want at least hybrid arrangements to continue in the future.

The Survey results demonstrated that attorneys appreciate meaningful fiscal savings in remote work arrangements. Unsurprisingly, the greatest of these is time and funds saved on travel expenses, followed by savings in office supplies, office space, and utilities. To a lesser extent, lawyers report certain savings on CLE expenses, marketing and advertising, computer and related hardware, research, subscriptions, and bar dues.

Notwithstanding the reported advantages, respondents recognize there are disadvantages associated with virtual court proceedings, arbitrations,

[235] *Id.*
[236] Survey questions 24 and 25.

mediations, and other meetings.[237] Foremost on the list of respondents' criticisms was the inability to "read" witnesses or others, such as judges, arbitrators, and negotiating counterparties. Next was technology glitches, followed by interruptions by family members, pets, etc., and a general lack of control.

Looking into the future, these responses demonstrate a need for training programs that teach remote meeting participants skills to help provide a sense of control, as well as ways to identify body language and facial expressions that are visible during online meetings, like Zoom. One of these might be Paul Eckman's well-known studies on six universal human facial expressions, which has grown in popularity in the ADR field.[238] In fact, remote meeting platform features that enable a viewer to enlarge and focus on a single person's image may facilitate consideration of facial expressions. A "gallery" view enables a user to see the faces of all on the screen. This provides an image of the entire array of participants and, as such, provides a view that rivals even sitting at a conference table during a live gathering, where participants tend, at times, to lean in ways that block a full view of others in the room.

The challenges of addressing the social aspects of practice and use of technology provide opportunities for bar associations to be relevant to member

[237] Survey question 23.

[238] *See Are Facial Expressions Universal?,* PAUL EKMAN GROUP, https://www.paulekman.com/resources/universal-facial-expressions (last visited Feb. 26, 2023).

needs. NYSBA can offer CLEs to train members in the use of online technology, including online video conferencing platforms. NYSBA can foster ways to enhance firm management and culture, with and without technology. NYSBA can address the socialization deficit highlighted in Survey question 26 and provide ways to address it. For instance, NYSBA meetings—ranging from meetings of its Executive Committee and House of Delegates, to meetings of its Task Forces, Committees, and Sections—should have a full chat function permitting each participant in the meeting to chat with every other participant. While the meeting is underway, this enables participants to raise questions with friends and colleagues. The possible downside of a lack of attention to this issue during remote interaction is offset by the social benefit of providing an opportunity to connect, as well as the potential that a side chat can develop richer thinking. For this reason, the "Everyone" chat should include all participants. Side chat also can be a good source of creativity and provide for the refinement of ideas.

Conclusions and Recommendations

1. While it is clear that there are certain benefits associated with remote working, and that hybrid working arrangements will continue even after the pandemic has receded, such arrangements do have disadvantages. These can be mitigated through education, training, and thoughtful programming by bar associations and legal employers. For example:

a. Legal employers and NYSBA need to offer CLE and other trainings that highlight the functionality of online meeting platforms to assist practitioners in gaining a sense of control over virtual meetings and to better judge the non-verbal communication of meeting participants;

b. Legal employers and NYSBA can foster social interactions, even in a remote environment, by, among other things, holding regular online meetings and employing fuller use of the chat functions on virtual meeting platforms.

Virtual Meeting Platforms

Arguably, and as discussed in prior sections, the most prolific adoption and utilization of new technologies during the pandemic has been the implementation of virtual meeting platforms. Indeed, if video meeting software had not existed, the effective practice of law could not have occurred. However, as restrictions eased, courts reopened, and with expectations that staff return to an in-office or hybrid arrangement, questions have arisen pertaining to practitioners' preference or aversion to the use of virtual meeting platforms—in particular, to what extent they should be utilized at all.

Respondents were asked to rank, in order of importance, the issues they confronted in being able to work effectively from home. Over 75% of practitioners identified training on how to utilize and effectively communicate over virtual

meeting platforms as their primary concern in connection with their use of such platforms. Specifically, the Survey results reflect that a significant portion of responding attorneys believe additional training for either themselves or other practitioners is necessary, indicating that they likely have or will continue to have difficulty communicating with others over virtual meeting platforms.

Effective use of virtual meeting platform software from a home office also requires that lawyers invest in the necessary IT hardware such as webcams, microphones, speakers, headsets, etc. It is not enough to know how the software works; practitioners must also know how their hardware interacts with the software and its settings. Although not addressed specifically in the Survey, it follows that cybersecurity protocols require any virtual meeting platform software selected by lawyers to include end-to-end encryption protections. Further, other cybersecurity best practices should be observed when using a remote meeting platform, e.g., holding the virtual meeting in a secure location to prevent conversations being overheard by unauthorized participants.

Notwithstanding the need for training in the use of virtual meeting platforms, the Survey results revealed that practitioners recognize there is a time and a place for virtual meetings. Specifically, 82% of respondents selected conferences—with adversaries, clients, colleagues, or the court—as most effectively performed virtually.[239] Further, only 13.46% of respondents stated

[239] Survey question 18.

that they have difficulty navigating remote videoconferences needed for court appearances, depositions, or ADR.[240]

This result contrasts starkly with the few respondents who preferred to conduct depositions, oral arguments, trials/arbitration, or alternative dispute resolutions virtually. In light of the perceived importance of assessing the credibility of parties, witnesses, and adversaries in person, it is understandable that respondents believed themselves to be hindered by current virtual meeting platforms, which we understand the Office of Court Administration is in the process of significantly updating. Indeed, the responses indicate that 62% of respondents ranked "reading reactions of participants in remote proceedings" and 44% of respondents who reported "difficulty determining credibility of a witness." Both observations were identified as the first and third biggest disadvantages of utilizing virtual meeting platforms, the second highest being "glitches," as 59% identified.[241]

Conclusions and Recommendations

1. Practitioners should take time to familiarize themselves with any virtual meeting software they elect or agree to use within a professional setting. Before agreeing to a virtual meeting, practitioners should confirm it will take place on a platform with which all parties are familiar and have the appropriate skills to navigate.

[240] Survey question 19.
[241] Survey question 23.

2. Regardless of the platform, it is a best practice to advise that the platform must have end-to-end encryption to ensure confidentiality is maintained. To further maintain confidentiality, the physical room where virtual meetings take place should be a private room.
3. Remote meeting platforms have been embraced by practitioners for court conferences, day-to-day meetings with colleagues, and informal discussions with opponents. In fact, the benefits of virtual conferences, which save time, money, and resources for law firms and clients alike, are undeniable. Therefore, remote activities will become a permanent feature to the practice of law.
4. Training on the use of virtual meeting software must take place regularly to keep pace with these rapidly changing technologies. For example, Zoom and Teams continually change and are updated and will continue to incorporate new features. In order to utilize the software and effectively communicate using the technology, it is not enough to simply learn how to use the platforms; one must also routinely keep abreast of changes to the platforms.
5. Training should not be exclusive to the virtual meeting software. It should include edification on hardware such as cameras, headsets, microphones, and speakers, which are necessary to effectively utilize and communicate on the platforms. Further, practitioners must understand how their

hardware directly interacts with each platform, and then amend their settings if necessary.

6. One common thread that each of the Working Groups uncovered is the need for increased training in technology for litigants, attorneys, and court personnel. This Working Group recommends that, in addition to, but part of NYSBA's continuing legal education programs, NYBSA annually devote a day to free virtual technology training throughout the State. The training should provide a firm elemental footing for all practitioners. Such a day would enable NYSBA to strengthen its commitment to promoting access to justice. The need for this training has been underscored in the Pandemic Practices Working Group of the Commission to Reimagine the Future of New York's Courts recently released report.[242]

New Technologies

We must address the fact that recent and rapid developments in generative artificial intelligence (AI), virtual technologies and the use of cryptocurrencies have raised many novel questions for the legal profession. President Lewis has appointed a task force to study the impact of AI on our profession.

With the growth and development of a "metaverse," lawyers must grapple with ethical questions regarding the formation of attorney-client relationships.

[242] PANDEMIC PRACTICES WORKING GROUP OF THE COMMISSION TO REIMAGINE THE FUTURE OF NEW YORK'S COURTS, *New York Courts' Response to the Pandemic: Observations, Perspectives, and Recommendations*, 47–48 (2023), https://www.nycourts.gov/LegacyPDFS/press/pdfs/NYCourtsPandemicPracticesReport.pdf.

Generative AI has raised questions regarding the preservation of client confidentiality and ensuring that AI "hallucinations" do not generate false precedents and other fictional legal authority which, ultimately, could threaten the integrity of our legal system.

The Metaverse

The "metaverse" is a hypothetical version of the internet as a single, universal, and immersive virtual would be facilitated using virtual reality headsets.[243] While we are far from having one world called a "metaverse," attorneys and potential clients currently can meet on a variety of virtual platforms—creating a vast uncharted territory for the legal profession. There are no rules that explicitly govern attorney conduct in this space. However, as discussed in the Legal Intelligencer, existing rules of ethics and professional conduct should apply in a metaverse, just as they do in the physical world.[244] Accordingly, the formation of an attorney-client relationship in a metaverse should focus on whether a party "reasonably relies" on what they believe to be the attorney's legal advice. As with other online activities and social media, attorneys should speak only in generalized terms and provide disclaimers to avoid inadvertently forming an attorney-client relationship.

[243] *See* https://en.wikipedia.org/wiki/Metaverse.
[244] *See* Abraham C. Reich and Hala Zawil, *The Metaverse for the Risk-Averse: Legal Ethics in the Virtual World, Part I*, The Legal Intelligencer, Oct. 20, 2022.

Generative AI

Among the most pressing concerns regarding the use of generative AI by attorneys is how to safeguard client information and confidences. The generative AI tools that are available in the public domain, like ChatGPT, create written content based on information that is publicly available and to which users provide the tool access. Attorneys using generative AI must take caution to safeguard client information pursuant to Rule 1.6. As reported by Bloomberg Law, attorneys should review the terms and conditions of any tool used to understand what happens to data—including client information—put into the tool.[245] Recently, a judge on the U.S. Court of International Trade issued an order requiring attorneys to disclose their use of generative AI in preparing legal documents, citing concerns related to confidential information.[246] The order explained that AI "challenge[s] the Court's ability to protect confidential and business proprietary information from access by unauthorized parties."[247] For example, OpenAI advises that it is "not able to delete specific prompts from your history. Please do not share any sensitive information in your conversations."[248] Thus, before using AI technology, attorneys should get consent from their

[245] *See* Stephanie Pacheco, *ANALYSIS: Three Considerations for Attorneys Using Generative AI*, BLOOMBERG LAW, June 16, 2023, https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-three-considerations-for-attorneys-using-generative-ai.
[246] *See* Sara Merken, *Another US judge says lawyers must disclose AI use*, REUTERS, June 8, 2023, https://www.reuters.com/legal/transactional/another-us-judge-says-lawyers-must-disclose-ai-use-2023-06-08.
[247] *Id.*
[248] *See What is ChatGPT?*, OpenAI, https://help.openai.com/en/articles/6783457-what-is-chatgpt.

clients, review the relevant terms and conditions, and refrain from providing client information.

Generative AI also has created growing concerns for the legal profession regarding the tools' validity and reliability. However, once again, looking to the established ethical and other rules of conduct for attorneys is instructive and prudent. Of particular importance are rules of conduct regarding competence, such as New York's Rule of Professional Conduct 1.1. If attorneys choose to use generative AI, they must both have a minimum level of competence with the tool and verify the work product that the tool produces. The concern of hallucinations—incorrect or false results presented by the AI platform as real, correct and accurate—is acute and legitimate as illustrated recently in New York when two attorneys used ChatGPT to prepare legal briefs and provided the court with fabricated case law.[249] Consequently, attorneys should be intentional in how they use ChatGPT (or other similar platforms) and should make sure to independently review any work product the tools provide.

Furthermore, the research and development into specialized AI tools for lawyers by various legal services companies should further facilitate the safe and careful use of generative AI by attorneys. For instance, NetDocuments Software Inc. and Everlaw recently have released platforms with integrated

[249] *See generally Mata v. Avianca, Inc.*, No. 22-CV-1461 (PKC), 2023 U.S. Dist. LEXIS 95664 (S.D.N.Y. May 26, 2023).

generative AI, ndMAX and EverlawAI, respectively.[250] ndMAX is designed to assist with culling business intelligence from data and documents, and EverlawAI is designed to assist case teams in reviewing documents.[251] Additionally, Thompson Reuters recently acquired Casetext, which uses OpenAI's GPT-4 to assist with document review, legal research memos, contract analysis, etc.[252] These companies claim to protect client information and provide reliable results that can allow attorneys a measure of comfort. As with all AI tools, however, attorneys are best advised to conduct their own diligence to ensure that they are treating client information appropriately.

Cryptocurrency

Past President Levin appointed a Task Force on Cryptocurrency. We await its report.

Cryptocurrency is a "digital currency, which is an alternative form of payment created using encryption algorithms. The use of encryption technologies means that cryptocurrencies function both as a currency and as a virtual accounting system. To use cryptocurrencies, you need a cryptocurrency wallet."[253] In recent years, law firms have had to address the question of whether

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[250] *See* Steven Lerner, *NetDocuments, Everlaw Release Generative AI Tools*, LAW360, July 25, 2023, https://www.law360.com/pulse/articles/1701388/netdocuments-everlaw-release-generative-ai-tools.
[251] *Id.*
[252] *See Thomson Reuters to acquire legal AI firm Casetext for $650 million*, REUTERS, June 27, 2023, https://www.reuters.com/markets/deals/thomson-reuters-acquire-legal-tech-provider-casetext-650-mln-2023-06-27.
[253] *See The Basics About Cryptocurrency,* SUNY Oswego, https://www.oswego.edu/cts/basics-about-cryptocurrency.

to accept payment from clients in cryptocurrency. The New York City Bar Association (NYCBA) published a formal opinion on this issue in 2019, in which it advised that accepting or requiring payment by cryptocurrency is governed by Rules 1.8(a) and 1.5(a) of the New York Rules of Professional Conduct.[254]

Specifically, if law firms *require* payment in cryptocurrency by the terms of an agreement, rather than an optional method of payment, such a requirement is a "business transaction" under Rule 1.8(a) as the firm and client have varying, if not opposing, interests in negotiating the terms of the agreement.[255] Accordingly, the law firm must comport its conduct with Rule 1.8(a) such that:

> (1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client.
>
> (2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

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[254] *See* NYCBA, Comm'n on Prof'l Ethics, Formal Op. 2019-5.

[255] It should be noted that there has been some opposition to this position. *See* Nika Gigashvili, *The Ethics of Accepting Cryptocurrency as a Payment*, ABA, Nov. 21, 2019.

Additionally, any agreement for payment in cryptocurrency is also subject to Rule 1.5(a), which forbids lawyers from charging an illegal or excessive fee. However, where a client is merely given the *option* to pay in cryptocurrency and does so, such a transaction would not be considered a "business transaction" and thus would not be governed by Rule 1.8(a), only Rule 1.5(a).

Further, New York lawyers intending to hold cryptocurrency in trust for clients are subject to 23 N.Y.C.R.R. § 200, which requires individuals and entities "storing, holding, or maintaining custody or control of Virtual Currency on behalf of others" to obtain virtual currency, or "BitLicenses."

Consequently, lawyers must educate themselves and proceed with caution when dealing in cryptocurrency.

Conclusions and Recommendations

1. Practitioners need to fully familiarize themselves with these new technologies and platforms before using them.

2. Regardless of the technology or platform, consideration should be given to consulting with the client and advising the client on the implication of its use on the attorney-client relationship.

3. These new technologies and platforms implicate New York's Rules of Professional Conduct in ways that are often not self-evident, and practitioners must review the current state of ethical opinions on their use to ensure that they are complying with their ethical obligations. Likewise, we trust that the

Association will charge its Committee on Ethics to study the concerns raised in this Task Force report.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #15

REQUESTED ACTION: None, as this report is informational.

John Gross will update the House of Delegates regarding the work of the Committee on the Gala.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #16

REQUESTED ACTION: None, as this report is informational.

Carla Palumbo, president of The New York Bar Foundation, will update the House on the ongoing work and mission of the Foundation.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #17

REQUESTED ACTION: Not applicable.

President-Elect and Chair of the House of Delegates, Domenick Napoletano will speak to membership renewals for 2024, January's Annual Meeting, and other items that need to be shared with attendees.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #18

REQUESTED ACTION: Not applicable.

President-Elect and Chair of the House of Delegates Domenick Napoletano will ask for any new items that need to be discussed.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #19

REQUESTED ACTION: Not applicable.

The next meeting of the House of Delegates will take place on Friday, January 19, 2024, as an in-person meeting at the New York Hilton Midtown in NYC.