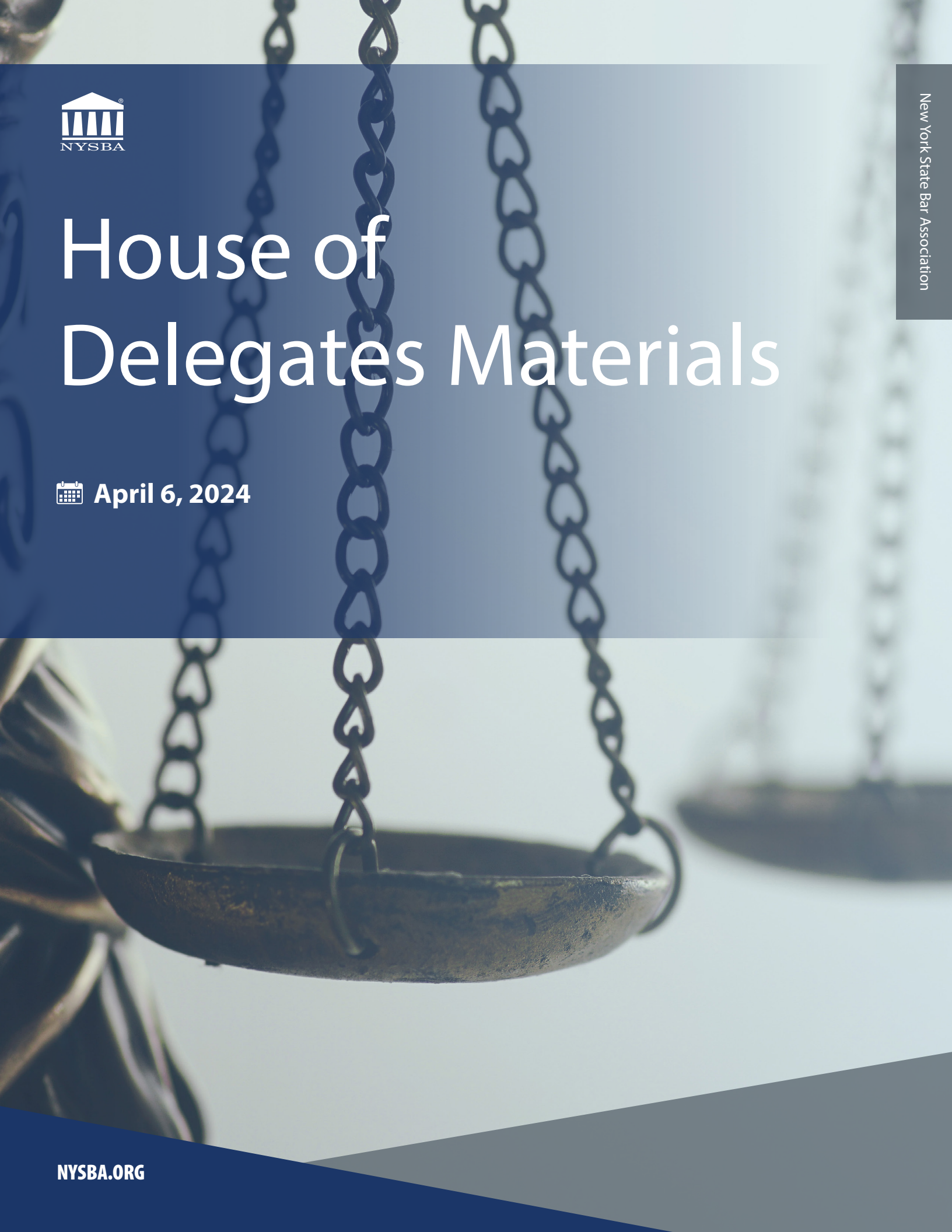

NYSBA

New York State Bar Association

House of Delegates Materials

April 6, 2024

NYSBA.ORG

NEW YORK STATE BAR ASSOCIATION
MEETING OF THE HOUSE OF DELEGATES
BAR CENTER, ALBANY, NEW YORK
AND REMOTE MEETING
SATURDAY, APRIL 6, 2024 – 9:00 A.M.

AGENDA

1.	Call to order, Pledge of Allegiance, and Welcome	9:00 a.m.
2.	Approval of minutes of January 19, 2024, meeting	9:03 a.m.
3.	Report of Treasurer – Susan Harper, Esq.	9:05 a.m.
4.	Report of President – Richard C. Lewis, Esq.	9:15 a.m.
5.	Presentation of 2024 Ruth Bader Ginsburg Memorial Scholarship Award to Kristen Popham of Columbia Law School – Richard C. Lewis, Esq.	9:30 a.m.
6.	Election of Nominating Committee and State Bar Delegates to ABA House of Delegates – Scott Karson, Esq.	9:50 a.m.
7.	Report and recommendations of the New York State Bar Association Trusts and Estates Law Section - Proposed Legislation – Becoming a Voluntary Administrator Act – Stacey Woods, Esq.	10:05 a.m.
8.	Report of the New York City Bar Association - Constitutional Cap Proposal - Hon. Andrea Masley and Laurel Kretzing, Esq.	10:20 a.m.
9.	Report and Recommendations of the Strategic Planning Committee Taa R. Grays, Esq.	10:35 a.m.
10.	Report and recommendations of Committee on Attorney Professionalism – Andrew Oringer, Esq. and Jean-Claude Mazzola, Esq.	11:05 a.m.
11.	Report and Recommendations of Task Force on Artificial Intelligence – Vivian Wesson, Esq.	11:20 a.m.
12.	Report of Committee on Membership – Clotelle L. Drakeford, Esq., Michelle H. Wildgrube, Esq., and Patricia Stockli, Esq.	11:35 a.m.

13.	Report of The New York Bar Foundation – Carla Palumbo, Esq. and Thomas Kissane, CCS Fundraising	11:50 a.m.
14.	Administrative Items – Domenick Napoletano, Esq.	12:05 p.m.
15.	New Business	12:15 p.m.
16.	Date and place of next meeting: Saturday, June 8, 2024 Bar Center, 1 Elk Street, New York, and Remote Meeting	

Future Meeting dates:
Saturday, June 8, 2024 - Bar Center (Virtual Option Available)
Saturday, October 26, 2024 – Bar Center (Virtual Option Available)
Friday, January 17, 2025 - New York Hilton Midtown (Virtual Option Available)
Saturday, April 5, 2025 – Bar Center (Virtual Option Available)
Saturday, June 7, 2025 - Bar Center (Virtual Option Available)

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #1

REQUESTED ACTION: None, as the report is informational.

President-Elect Domenick Napoletano, Esq. will call the meeting to order and lead attendees in the pledge of allegiance.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #2

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

President-Elect Domenick Napoletano, Esq. will present the January 19, 2024, meeting minutes and ask if attendees have any corrections or amendments. If there are no corrections, amendments, or objections, the meeting minutes will be accepted as distributed.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #3

REQUESTED ACTION: None, as the report is informational.

Attached are the Operating Budget, Statement of Financial Position, Statements of Activities, Statements of Activities (continued), and Capital Items Approved and Purchased for the period ending February 29, 2024.

The report will be presented by NYSBA Treasurer, Susan L. Harper, Esq.

New York State Bar Association
2024 Operating Budget
For the period ending February 29, 2024

REVENUE

	2024 BUDGET	UNAUDITED 2024 February YTD	% RECEIVED	2023 BUDGET	UNAUDITED 2023 February YTD	% RECEIVED
Membership dues	8,827,780	7,145,521	81%	9,000,000	7,574,630	84%
SECTIONS:						
Section Dues	1,130,965	914,160	81%	1,181,350	937,798	79%
Section Programs	2,782,065	628,778	23%	2,587,528	518,328	20%
Investment Income	640,000	(11,111)	-2%	494,215	(34,765)	-7%
Advertising	314,500	25,934	8%	319,500	27,286	9%
Continuing legal education program income	2,802,000	335,023	12%	2,390,000	354,450	15%
USI Affinity	2,000,000	333,333	17%	2,000,000	333,333	17%
Annual Meeting	1,168,800	946,547	81%	895,000	862,957	96%
House of Delegates & Committee	188,000	17,712	9%	36,700	7,995	22%
Royalties	439,500	36,214	8%	308,000	49,646	16%
Reference Books, Formbooks Products	717,800	51,664	7%	1,309,350	37,160	3%
TOTAL REVENUE	**21,011,410**	**10,423,775**	**50%**	**20,521,643**	**10,668,819**	**52%**

EXPENSE

	2024 BUDGET	UNAUDITED 2024 February YTD	% EXPENDED	2023 BUDGET	UNAUDITED 2023 February YTD	% EXPENDED
Salaries and Fringe	8,800,217	1,407,607	16%	8,759,290	1,452,882	17%
BAR CENTER:						
Building Services	342,500	49,239	14%	325,500	51,490	16%
Insurance	222,800	35,164	16%	206,000	31,760	15%
Taxes	93,800	17,504	19%	93,750	11,019	12%
Plant and Equipment	746,000	170,419	23%	791,000	129,067	16%
Administration	571,300	151,113	26%	546,900	115,948	21%
Sections	3,880,930	451,595	12%	3,739,828	385,124	10%
PUBLICATIONS:						
Reference Materials	137,125	20,620	15%	131,500	22,789	17%
Journal	271,000	15,589	6%	250,300	48,737	19%
Law Digest	52,200	14,620	28%	52,350	11,050	21%
State Bar News	130,900	51,302	39%	122,300	43,827	36%
MEETINGS:						
Annual meeting expense	620,000	1,748,473	282%	383,100	1,461,453	381%
House of delegates	344,925	46,715	14%	442,625	26,263	6%
Executive committee	42,350	289	1%	44,550	924	2%
COMMITTEES AND DEPARTMENTS:						
CLE	421,400	21,390	5%	372,150	(52,534)	-14%
Information Technology	1,912,700	295,092	15%	1,741,700	351,462	20%
Marketing Department	394,500	149,263	38%	483,000	48,473	10%
Membership Department	566,250	111,090	20%	606,000	134,580	22%
Media Department	285,660	62,339	22%	285,750	55,567	19%
All Other Committees and Departments	1,120,375	147,450	13%	1,094,970	131,335	12%
TOTAL EXPENSE	**20,956,932**	**4,966,874**	**24%**	**20,472,563**	**4,461,216**	**22%**
BUDGETED SURPLUS	**54,478**	**5,456,901**		**49,080**	**6,207,603**	

New York State Bar Association
Statement of Financial Position
For the period ending February 29, 2024

ASSETS	UNAUDITED February YTD 2024	UNAUDITED February YTD 2023	UNAUDITED December YTD 2023
Current Assets:			
General Cash and Cash Equivalents	17,719,092	20,645,681	20,726,161
Accounts Receivable	38,009	40,660	28,089
Prepaid Expenses	1,013,043	1,128,975	1,379,900
Royalties and Admin Fees Receivable	333,333	333,333	604,000
Total Current Assets	19,103,477	22,148,649	22,738,150
Board Designated Accounts:			
Cromwell - Cash and Investments at Market Value	3,176,633	2,822,930	3,112,643
	3,176,633	2,822,930	3,112,643
Replacement Reserve - Equipment	1,129,134	1,118,067	1,129,134
Replacement Reserve - Repairs	802,448	794,722	802,448
Replacement Reserve - Furniture	222,137	220,048	222,137
	2,153,718	2,132,837	2,153,718
Long Term Reserve - Cash and Investments at Market Value	34,400,414	29,714,922	33,322,965
Long Term Reserve - Accrued Interest Receivable	0	0	210,156
	34,400,414	29,714,922	33,533,121
Sections Reserve - Cash and Investments at Market Value	4,041,483	3,858,535	4,051,707
Section - Cash	1,091,342	1,071,002	-99,946
	5,132,825	4,929,537	3,951,760
Fixed Assets:			
Building - 1 Elk	3,566,750	3,566,750	3,566,750
Land	283,250	283,250	283,250
Furniture and Fixtures	1,496,199	1,483,275	1,496,199
Building Improvements	1,068,201	905,925	1,054,381
Leasehold Improvements	0	-1	0
Equipment	4,645,220	3,016,800	3,716,037
	11,059,620	9,255,999	10,116,616
Less: Accumulated Depreciation	4,673,850	4,090,267	4,521,250
	6,385,770	5,165,732	5,595,366
Operating Lease Right-of-Use Asset	212,230	121,205	237,574
Finance Lease Right-of-Use Asset	5,397	18,170	6,975
	217,627	139,375	244,549
Total Assets	70,570,463	67,053,982	71,329,308
LIABILITIES AND FUND BALANCES			
Current liabilities:			
Accounts Payable and Other Accrued Expenses	506,451	1,187,208	949,652
Post Retirement Health Insurance Liability	15,564	18,241	15,564
Deferred Dues	0	0	5,955,952
Deferred Grant Revenue	17,150	17,150	17,150
Other Deferred Revenue	767,877	773,727	1,202,582
Payable to TNYBF - Building	3,317,438	3,542,245	3,375,902
Payable to TNYBF	2,700	11,445	12,025
Operating Lease Obligation	47,354	101,679	69,165
Finance Lease Obligation	4,652	11,966	5,382
Total current liabilities & Deferred Revenue	4,679,186	5,663,661	11,603,373
Long Term Liabilities:			
LT Operating Lease Obligation	164,876	19,527	168,409
LT Finance Lease Obligation	863	6,322	1,720
Accrued Other Postretirement Benefit Costs	5,310,347	6,274,759	5,310,347
Accrued Defined Contribution Plan Costs	63,495	61,759	335,970
Total Liabilities & Deferred Revenue	10,218,767	12,026,028	17,419,819
Board designated for:			
Cromwell Account	3,176,633	2,822,930	3,112,643
Replacement Reserve Account	2,153,718	2,132,837	2,153,718
Long-Term Reserve Account	29,026,572	23,378,404	27,676,648
Section Accounts	5,132,825	4,929,537	3,951,760
Invested in Fixed Assets (Less capital lease)	6,385,770	5,165,732	5,595,366
Undesignated	14,476,179	16,598,514	11,419,353
Total Net Assets	60,351,696	55,027,954	53,909,488
Total Liabilities and Net Assets	70,570,463	67,053,982	71,329,308

New York State Bar Association
Statement of Activities
For the period ending February 29, 2024

	February YTD 2024	*February YTD 2023*	*December 2023*
REVENUES AND OTHER SUPPORT			
Membership dues	7,145,521	7,574,630	8,721,625
Sections			
Section Dues	914,160	937,798	1,069,105
Section Programs	628,778	518,328	2,176,070
Continuing legal education program income	335,023	354,450	2,546,850
Administrative fee and royalty revenue	358,729	378,586	2,371,810
Annual Meeting	946,547	862,957	863,277
Investment Income	44,248	2,364	1,982,840
Reference Books, Formbooks Products	51,664	37,160	327,362
Other Revenue	75,432	72,484	198,835
Total revenue and other support	10,500,102	10,738,756	20,257,775
PROGRAM EXPENSES			
Continuing Legal Education Program Expense	281,132	201,374	1,896,051
Print Shop and Facility Support	86,914	130,808	655,934
Government relations program	32,436	34,236	253,491
Lawyer assistance program	52,587	48,710	68,567
Publications and public relations	126,350	110,928	634,359
Business operations	412,105	445,262	2,728,256
Marketing and membership services	404,296	346,684	1,971,518
Probono program	18,674	18,868	113,332
House of delegates	46,715	26,263	451,759
Executive committee	289	924	49,097
Other committee	69,270	19,343	253,340
Sections	451,595	385,124	3,345,121
Newsletters	43,153	36,549	261,953
Reference books and formbooks expense	99,915	101,156	633,482
Publications	81,511	103,614	396,620
Annual meeting expense	1,748,473	1,461,453	540,362
Total program expenses	3,955,415	3,471,297	14,253,242
MANAGEMENT AND GENERAL EXPENSES			
Salaries and fringe benefits	490,683	476,611	2,308,065
Pension plan and other employee benefit	54,184	114,117	(585,646)
Equipment costs	123,815	125,617	824,448
Consultant and other fees	128,066	142,459	648,373
Depreciation and amortization	152,600	114,000	674,219
Operating Lease	27,799	11,543	134,143
Other expenses	34,312	5,571	165,275
Total management and general expenses	1,011,460	989,919	4,168,877
CHANGES IN NET ASSETS BEFORE INVESTMENT TRANSACTIONS AND OTHER ITEMS	**5,533,228**	**6,277,541**	**1,835,656**
Realized and unrealized gain (loss) on investments	908,980	809,068	4,226,400
Realized gain (loss) on sale of equipment	-	-	(93,913)
CHANGES IN NET ASSETS	**6,442,208**	**7,086,608**	**5,968,143**
Net assets, beginning of year	53,909,488	47,941,346	47,941,346
Net assets, end of year	60,351,696	55,027,954	53,909,488

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #4

REQUESTED ACTION: None, as the report is informational.

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

A copy of the report is attached here.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #5

REQUESTED ACTION: None, as the report is informational.

Kristen Popham, a JD candidate at Columbia Law School has been selected as the recipient of the 2024 Ruth Bader Ginsburg Memorial Scholarship Award.

In November 2020, the Association's Executive Committee approved the creation of the Scholarship Award, to be awarded annually to a law student who, through written submission, research project, or an exemplary internship, externship, or pro bono service, demonstrates character consistent with and honoring the legacy of the late Supreme Court associate justice and native New Yorker Ruth Bader Ginsburg.

Association President Richard C. Lewis, Esq. will present the Scholarship Award to Kristen Popham.

LATEST NEWS

Global Human Rights Advocate to Receive Ruth Bader Ginsburg Memorial Scholarship

By Rebecca Melnitsky
March 27, 2024

TAGS

RUTH BADER GINSBURG MEMORIAL SCHOLARSHIP

The New York State Bar Association will present Kristen Popham, a champion of women and disability rights, with the Ruth Bader Ginsburg Memorial Scholarship during its House of Delegates meeting April 6 in Albany.

Popham is a second-year student at Columbia Law School. She ranks in the top 2% of her class, serves as podcast editor of the *Columbia Law Review*, and is the founder and president of the Columbia Disabled Law Students Association. In her work with the Columbia Law School Human Rights Clinic, she assisted women and LGBTQ+ activists from

the Central African Republic and helped present their testimony to the United Nations.

Popham has also worked with the U.S. Department of Justice Civil Rights Division, the Fulbright Franco-American Commission, and the Pulitzer Center on Crisis Reporting.

Popham graduated *summa cum laude* from the College of William & Mary in 2020 with a bachelor's degree in Government and Francophone Studies. In her application essay, she described how managing her rheumatoid arthritis has helped her connect with people from other countries and fueled her desire to fight injustice and marginalization.

"Kristen's work ethic and dedication to helping others is impressive," said Richard Lewis, president of the New York State Bar Association. "We are honored to present her with this award in recognition of her efforts to further gender equality around the world. She is truly living up to the late Justice Ginsburg's legacy."

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

In her nomination letter, Columbia Law School Professor Sarah Knuckey described how Popham "goes above and beyond constantly and impresses everyone around her with her unwavering commitment and drive."

Popham aspires to be a civil rights impact litigator and wants to dedicate her career to advancing women's equality and disability justice. She will intern with the American Civil Liberties Union in the summer.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #6

REQUESTED ACTION: Election of members of the 2024-2025 Nominating Committee and State Bar Delegates to the ABA House of Delegates.

Attached is a listing of nominations for district representatives for the 2024-2025 Association year, plus alternate members, and a listing of nominations for delegates to the American Bar Association House of Delegates.

The report will be presented by Scott Karson, Esq., Chair of the Nominating Committee.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #7

REQUESTED ACTION: Approval of the report and recommendations of the Trusts and Estates Law Section.

The *Becoming a Voluntary Administrator* Act would permit the guardian of the property of a decedent's otherwise eligible distributee, and the fiduciary of the estate of a post-deceased otherwise eligible distributee of a decedent, to become voluntary administrators of small estates under the informal rules of Article 13 of the Surrogate's Court Practice Act (SCPA). The Act would also clarify the voluntary administration provisions for a decedent who leaves a will nominating executors and/or successor executors and permit multiple nominees to become simultaneous voluntary administrators. The legislation would amend subdivisions (a), (b), and (c) of Section 1303 of the Surrogate's Court Procedure Act.

The *Becoming a Voluntary Administrator* Act would fill gaps in the current voluntary administration procedure.

While the current law permits the guardian of the property of an infant distributee of a decedent (SCPA Article 17) to become a voluntary administrator under SCPA Article 13, it does not do so for the guardian of the property of an otherwise eligible distributee who is intellectually disabled or developmentally disabled (SCPA Article 17-A) or the guardian of the property of an otherwise eligible adult distributee under MHL Article 81. The latter omission is particularly anomalous in light of the eligibility of conservators and committees to become voluntary administrators.

The current law is also ambiguous regarding the voluntary administrator priorities if the decedent has nominated both executors and successor executors, i.e., do nominated executors have priority, and whether if the decedent nominates multiple executors or multiple successor executors may there be multiple simultaneous voluntary administrators, as would be the case if the will were probated.

The Act would address these gaps by:

- Allowing any form of the guardian of the property of an otherwise eligible distributee to become a voluntary administrator of the decedent.
- Allowing a fiduciary of the estate of an otherwise eligible distributee to become a voluntary administrator of the decedent.
- Providing that nominated executors have priority over nominated successor executors, and if the decedent nominated multiple executors and/or multiple successor executors, multiple

members of either group may, but need not, become simultaneous voluntary administrators.

The report will be presented by Albert Feuer, Esq., Anna Masilela, Esq., and Cheryl Lynn Katz, Esq.

- The Committee on Legal Aid supports the Trusts & Estates Law Section's proposed legislation, *Becoming a Voluntary Administrator Act*.

- The President's Committee on Access to Justice supports the Trusts & Estates Law Section's proposed legislation, *Becoming a Voluntary Administrator Act*.

- The Committee on Diversity, Equity, and Inclusion supports the Trusts & Estates Law Section's proposed legislation, *Becoming a Voluntary Administrator Act*. The Committee recommends that in the future, additional revisions should be made to the Act to replace the current gendered language with gender neutral language.

Table of Contents

TO: Executive Committee, New York State Bar Association House of Delegates

FROM: Executive Committee, Trusts and Estates Law Section

DATED: December 8, 2023

RE: Reports for Executive Committee of NYSBA House of Delegates

RESOLVED, that the NYSBA Trusts and Estates Law Section supports the accompanying Proposed Legislation – Becoming a Voluntary Administrator Act entitled *Amend SCPA 1303-12-08-23*.

RESOLVED, that the NYSBA Trusts and Estates Law Section is in favor of the above legislation for the reasons set forth in the accompanying Memorandum in Support, which is entitled *T & E Memo in Support of Amendment of SCPA 1303-12-08-23*.

Resolution Prepared By:	Albert Feuer
Approved By:	Vote of the Executive Committee of the NYSBA Trusts and Estates Law Section
Section Chair:	Michael Schwartz

MEMORANDUM

From: Trusts & Estates Law Section of the New York State Bar Association
To: House of Delegates of the New York State Bar Association
Re: Proposed Legislation – Becoming a Voluntary Administrator Act
Date of Approval: December 8, 2023

AN ACT to amend the surrogate's court procedure act in relation to enacting the "Becoming a Voluntary Administrator Act," to clarify the role under Article 13 of guardians of the property of a distributee, fiduciaries of a deceased distributee, and of nominated executors and successor executors for small estates, including allowing multiple executors or successor executors to become simultaneous voluntary administrators under such article if a decedent nominates multiple executors and/or successor executors.

LAW & SECTION REFERRED TO: The legislation would amend subdivisions (a), (b), and (c) of Section 1303 of the Surrogate's Court Procedure Act.

STATUTORY PURPOSE:

This amendment would clarify that

(1) Section 1303 determines who may become a voluntary administrator in conformity with the section's title, whereas Section 1304 determines how to qualify as a voluntary administrator;

(2) a guardian of the property of a distributee may become a voluntary administrator if the decedent dies intestate;

(3) a fiduciary of a deceased distributee may become a voluntary administrator if the decedent dies intestate;

(4) nominated executors have priority to become voluntary administrators over nominated successor executors;

(5) successor executors have priority to become voluntary administrators over an individual eligible to become an administrator c.t.a;

(6) the above priorities to become voluntary administrators apply if a nominated executor who qualifies as a voluntary administrator resigns, dies, or is unable to complete the administration of the deceased's estate; and

(7) multiple nominated executors or multiple successor executors respectively may serve simultaneously as voluntary administrators.

Thus, the amendment would further the Article 13 remedial goal of providing a summary procedure to implement a decedent's intentions or presumed intentions if the decedent leaves a small estate. This memorandum is derived from the memorandum in support of legislation that is part of the attached proposed Becoming a Voluntary Administrator Act.

STATE OF NEW YORK

_____

_____

BILL NUMBER ____

IN _____

_____ __, 2024

Introduced by: _____

AN ACT to amend the surrogate's court procedure act in relation to enacting the "Becoming a Voluntary Administrator Act," to clarify the role under Article 13 of guardians of the property of a distributee, fiduciaries of a deceased distributee, and of nominated executors and successor executors for small estates, including allowing multiple executors or successor executors to become simultaneous voluntary administrators under such article if a decedent nominates multiple executors and/or successor executors.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 1303 of the surrogate's court procedure act, as amended by L. 1995, ch. 281, § 1, is amended to read as follows:

§ 1303. Persons who may become a voluntary administrator.

(a) If the deceased dies intestate, the right to become the ~~act as a~~ voluntary administrator is hereby given first to the surviving adult spouse, if any, of the decedent and if there be none or if the spouse renounce, then in order to a competent adult who is a child or grandchild, parent, brother or sister, niece or nephew or aunt or uncle of the decedent, or if there be no such person who will act, then to the guardian of the property of ~~an infant a~~ distributee, the committee of the property of any incompetent person or the conservator of the property of a conservatee who is a distributee, the fiduciary of a deceased distributee and if none of the foregoing named persons will act or if there are no known distributees within the categories listed above, then to the chief fiscal officer of the county except in those counties in which a public administrator has been appointed under articles eleven and twelve of this act. After the surviving spouse, the first distributee

EXPLANATION—Matter (underscored) is new; matter in brackets [-] is old law to be omitted

within the class of persons entitled or if no distributee will act or if no guardian of the property of such distributee will act or if no fiduciary of a deceased distributee will act or if there are no known distributees within the class of persons entitled, then the chief fiscal officer of the county as above who makes and files the required affidavit, is authorized to act as voluntary administrator, or as successor voluntary administrator in the event of the death or resignation of the voluntary administrator before the completion of the settlement of the estate.

(b) If the deceased dies testate, and the last will and testament has been filed with the surrogate's court, the right to become the voluntary administrator of the decedent's estate is hereby given first to the named executor, and if the named executor renounces, resigns, or is unable to serve as the voluntary administrator, the right is given to the named successor executors, in the order in which succession is set forth. If all those persons renounce, resign, or are unable to serve, ~~the named executor or alternate executor shall have the first right to act as voluntary administrator, upon filing the last will and testament with the surrogate's court. If the named executor or alternate executor, renounces~~ or fail to file the required affidavit within thirty days after the last will and testament has been filed in the surrogate's court, then any adult person who would be entitled to petition for letters of administration with will annexed under section 1418 of ~~this chapter may~~ the Surrogate's Court Procedure Act may ~~file the required affidavit and have the right to act as~~ become the voluntary administrator.

If multiple persons are named as executors, or, if none of the persons named as executors is willing to serve as the voluntary administrator of the decedent's estate, and multiple persons are named as successor executors, then more than one of those named persons, may simultaneously become the voluntary administrators.

(c) No person other than one hereinbefore mentioned may become a voluntary administrator, except in cases where multiple persons may become voluntary administrators as described in subsection (b).

Section 2. The provisions of this act shall be severable, and if any clause, sentence, paragraph, subdivision, section, or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Section 3. This act shall take effect immediately.

NEW YORK STATE _____

MEMORANDUM IN SUPPORT OF LEGISLATION

EXPLANATION—Matter (underscored) is new; matter in brackets [-] is old law to be omitted

Submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: _____

SPONSOR: _____

AN ACT to amend the surrogate's court procedure act in relation to enacting the "Becoming a Voluntary Administrator Act," to clarify the role under Article 13 of guardians of the property of a distributee, fiduciaries of a deceased distributee, and of nominated executors and successor executors for small estates, including allowing multiple executors or successor executors to become simultaneous voluntary administrators under such article if a decedent nominates multiple executors and/or successor executors.

The SCPA, enacted in 1966, contains Article 13 consisting of Section 1301-1312, that sets forth a summary procedure for the settlement of small estates by voluntary administrators. Article 13 is based on Article 8-B of the Surrogate's Court Act. The remedial purpose of the predecessor article was set forth in Section 137 of the Surrogate's Court Act as follows:

> The purpose of this article is to create a summary procedure for the settlement of small estates without formal administration which will eliminate the delay and unnecessary expense now frequently found in the settlement of such estates; and thereby to relieve the courts, lawyers, debtors, transfer agents and other persons from the burden of handling the details of such estates.

SCPA Sec. 1301 defines a "small estate" as the estate of a domiciliary or a non-domiciliary who dies leaving personal property having a gross value of $50,000 or less exclusive of the property required to be set off for the benefit of the decedent's family under EPTL Sec. 5-3.1(a). The affidavit that must be filed under SCPA Sec. 1304 to become a voluntary administrator provides that joint bank accounts, trust accounts, U.S. savings bonds, POD (payable on death) accounts or securities, and jointly owned personal property are also excluded in determining the $50,000 threshold. SCPA Sec. 1302 provides that the summary procedures of Article 13 are not applicable to any interest in real property in this state owned by a decedent, but such interest does not prevent the use of the summary procedures. SCPA Sec. 1306 provides that the voluntary administrator has no power to enforce a claim for wrongful death or for personal injuries to the decedent.

This amendment would clarify that

(1) Section 1303 determines who may become a voluntary administrator in conformity with the section's title, whereas Section 1304 determines how to qualify as a voluntary administrator;

(2) a guardian of the property of a distributee may become a voluntary administrator if the decedent dies intestate;

(3) a fiduciary of a deceased distributee may become a voluntary administrator if the decedent dies intestate;

(4) nominated executors have priority to become voluntary administrators over nominated successor executors;

(5) nominated successor executors have priority to become voluntary administrators over an individual eligible to become an administrator c.t.a;

(6) the above priorities to become voluntary administrators apply if a nominated executor who qualifies as a voluntary administrator resigns, dies, or is unable to complete the administration of the deceased's estate; and

(7) multiple nominated executors or nominated successor executors respectively may serve simultaneously as voluntary administrators.

Since its enactment by L. 1963 ch. 495 §1, the amendments to Article 13 have expanded the availability of voluntary administration, most notably, by increasing the gross value of the personal property eligible for voluntary administration from $3,000 as originally enacted, to $50,000 (SCPA Sec. 1301) by L. 2019 ch. 557, §1. Its application was expanded to testate as well as intestate estates (SCPA Sec. 1303(b)) by L. 1970, ch. 998, §§ 2-3.

In addition, the amendments to Article 13 have expanded the set of persons who may become voluntary administrators, most recently to include the decedent's siblings (SCPA Sec. 1303(a) by L. 1995 ch. 281 §1. The standards for who may become a voluntary administrator under SCPA 1303 are generally less stringent than the SCPA Sec. 707 standards applicable to executors and other estate fiduciaries.

A guardian of the property of an infant distributee may serve as voluntary administrator. It is advisable to permit a guardian of the property of an adult distributee to also serve as voluntary administrator to facilitate voluntary administration for a small estate when such a guardian is willing and able to serve whether the distributee is an infant or an adult. Similarly it is advisable to permit a fiduciary of a deceased distributees to serve as voluntary administrators.

There is uncertainty about the number of persons who may serve simultaneously as voluntary administrators. SCPA 1403.1(b) permits multiple persons to serve simultaneously as executors. EPTL Sec. 10-10.7 provides that absent an express provision in the will, such powers may be exercised by a majority of such fiduciaries. On the other hand, SCPA Sec. 1303(c) provides that "[n]o person other than one heretofore mentioned can become a voluntary administrator." Some, but not all, clerks interpret the latter provision to prohibit multiple persons from serving simultaneously as a decedent's voluntary administrator.

It is advisable to permit multiple voluntary administrators to serve simultaneously for testate small estates to satisfy the decedent's preference for multiple executors or multiple successor executors, in the order in which succession is set forth.

The amendment would ensure that a testator's wishes regarding who should administer the testator's personal property would be respected, in the order in which succession is set forth

in the testator's will, without the need for executors to be named in a formal probate proceeding, when the value of the testator's personal property is small enough to qualify for voluntary administration, and some of the decedent's nominees are willing and able to serve.

Thus, the amendment would further the Article 13 remedial goal of providing a summary procedure to implement a decedent's intentions if the decedent leaves a small estate.

LEGISLATIVE HISTORY:

None. New proposal.

FISCAL NOTE:

There would be no revenue impact from implementing the bill.

EFFECTIVE DATE AND SEVERABILITY:

The bill shall take effect immediately. In 1995, the most recent amendment to SCPA Section 1303 was enacted in 1995 with an immediate effective date. The amendment permitted an intestate decedent's aunts and uncles to become voluntary administrators.

The bill also includes a severability section.

FOR CONSIDERATION BY THE NEW YORK STATE BAR ASSOCIATION EXECUTIVE COMMITTEE AND BY THE HOUSE OF DELEGATES, APRIL 2024

Report of the New York State Bar Association Trusts and Estates Law Section
Section Chair Michael S. Schwartz
Approved: December 13, 2023

Drafting Committees: Life Insurance and Employee Benefits Committee
Chair Albert Feuer Vice Chair Anna Masilela
Estates and Trusts Administration Committee
Chairs Paul S. Forster and Jinsoo J. Ro

Proposed Legislation – Becoming a Voluntary Administrator Act

I. Introduction.

The Becoming a Voluntary Administrator Act would permit the guardian of the property of a decedent's otherwise eligible distributee, and the fiduciary of the estate of a post-deceased otherwise eligible distributee of a decedent, to become voluntary administrators of small estates under the informal rules of Article 13 of the Surrogate's Court Practice Act (SCPA). The Act would also clarify the voluntary administration provisions for a decedent who leaves a will nominating executors and/or successor executors, and permit multiple nominees to become simultaneous voluntary administrators

II. Executive Summary and Rationale for the Proposal

The Voluntary Administration provisions were introduced in 1963

> to create a summary procedure for the settlement of small estates without formal administration which will eliminate the delay and unnecessary expense now frequently found in the settlement of such estates; and thereby to relieve the courts, lawyers, debtors, transfer agents and other persons from the burden of handling the details of such estates. [1]

The individuals who administer such estates are called voluntary administrators and voluntary administration is available for both testate and intestate estates. Voluntary administration is limited to the decedent's personal property in the decedent's estate, and is only available if its date of death value was less than or equal to $50,000.

[1] Surrogates Court Act § 137 as enacted by L. 1963 chap. 945 § 1.

For intestate estates, at present the individuals who may become voluntary administrators are primarily the decedent's close relatives, the guardian of the property of an infant, committees, and conservators. For testate estates, the individuals who may become voluntary administrators are primarily the decedent's nominated executors or successor executors.

The voluntary administrator procedures are used extensively. In 2023 there were 30,122 voluntary administrations, 41,250 probates, and 20,386 administration filings in New York courts, and only 9 objections were filed pertaining to such administrations. This is consistent with the facts that many decedents have small estates for which there is little dispute about its disposition, or who should take care of such disposition. Thus, it is often the case that small estates may be disposed of quickly with little expense and little discord using the voluntary administration procedures as originally intended.

There are, however, still gaps in the current voluntary administration procedure.

While the current law permits the guardian of the property of an infant distributee of a decedent (SCPA Article 17) to become a voluntary administrator under SCPA Article 13, it does not do so for the guardian of the property of an otherwise eligible distributee who is intellectually disabled or developmentally disabled (SCPA Article 17-A) or the guardian of the property of an otherwise eligible adult distributee under MHL Article 81. The latter omission is particularly anomalous in light of the eligibility of conservators and committees to become voluntary administrators.

The current law is also ambiguous regarding the voluntary administrator priorities if the decedent has nominated both executors and successor executors, i.e., do nominated executors have priority, and whether if the decedent nominates multiple executors or multiple successor executors may there be multiple simultaneous voluntary administrators, as would be the case if the will were probated.

The Act would address these gaps by

- Allowing any form of the guardian of the property of an otherwise eligible distributee to become a voluntary administrator of the decedent.
- Allowing a fiduciary of the estate of an otherwise eligible distributee to become a voluntary administrator of the decedent.
- Providing that nominated executors have priority over nominated successor executors, and if the decedent nominated multiple executors and/or multiple successor executors, multiple members of either group may, but need not, become simultaneous voluntary administrators.

III. No Additional Parties Support or Oppose the Becoming a Voluntary Administrator Act

None of the other Sections or Committees of the NYSBA has expressed a position on the proposal.

IV. Conclusion

By harmonizing and clarifying the voluntary administration provisions, the Act would enhance the effectiveness of those provision in achieving their purpose of facilitating the informal administration of the many New York small estates. Moreover, those changes would also increase

the likelihood that the individuals who may become the decedent's voluntary administrators align with decedent's presumed or expressed intentions.

NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 ◎ PH 518.463.3200 ◎ www.nysba.org

COMMITTEE ON LEGAL AID

February 21, 2024

TO: Trusts & Estates Law Section

FROM: Committee on Legal Aid

RE: Support of the Trusts & Estates Law Section Proposed Volunteer Administrator Act

The Committee on Legal Aid has voted to support the Trusts & Estates Law Section's proposed legislation, *Becoming a Voluntary Administrator Act*. This proposal would help beneficiaries of those with small estates by permitting them to access an expedited and low-cost way of administering such estates while reflecting the intentions of decedents. For these reasons, we lend our support to the *Becoming a Voluntary Administrator Act.*

NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 PH 518.463.3200 www.nysba.org

PRESIDENT'S COMMITTEE ON ACCESS TO JUSTICE

March 14, 2024

TO: Trusts & Estates Law Section

FROM: President's Committee on Access to Justice

RE: Support of the Trusts & Estates Law Section Proposed Volunteer Administrator Act

The President's Committee on Access to Justice has voted to support the Trusts & Estates Law Section's proposed legislation, *Becoming a Voluntary Administrator Act*. This proposal would help beneficiaries of those with small estates by permitting them to access an expedited and low-cost way of administering such estates while reflecting the intentions of decedents.
For these reasons, we lend our support to the *Becoming a Voluntary Administrator Act*.

New York State Bar Association
One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

New York State Bar Association
Committee on Diversity, Equity, and Inclusion

March 15, 2024

Albert Feuer
Chair, Life Insurance and Employee Benefits Committee
New York State Bar Association Trusts & Estates Law Section
Law Offices of Albert Feuer
110-45 71st Road #7M
Forest Hills, New York 11375
afeuer@aya.yale.edu

Dear Mr. Feuer:

The Association's Committee on Diversity, Equity, and Inclusion (the "Committee on DEI") has reviewed the Becoming a Voluntary Administrator Act (the "Act") legislative proposal (the "Proposal") of the Association's Trusts & Estates Law Section (the "T&E Section").

We commend the T&E Section on its legislative proposal, as well as the Section's commitment to ensuring that the intentions of decedents who leave small estates are respected. We support the Proposal, including its stated goal of furthering the remedial goal of providing a summary procedure to implement a decedent's intentions or presumed intentions if the decedent leaves a small estate.

A review of the Proposal shows that there are various portions of the Act that uses gendered language, including, but not limited to, brother or sister, niece or nephew, and aunt or uncle. Although we are aware of the fact that this may not be possible at the current legislative stage or as part of the Proposal, in the future, we would recommend additional revisions to the Act to use gender neutral language in place of gendered language, in order to ensure that the Act reflects the gender identities and pronouns of all New Yorkers affected.

The Committee on DEI thanks the T&E Section for its work on the Proposal, and remains willing to collaborate with the T&E Section on this matter and others.

Signed,

Nihla Sikkander and Dena DeFazio on behalf of the New York State Bar Association's Committee on Diversity, Equity and Inclusion

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #8

REQUESTED ACTION: Approval of the New York City Bar Association's Report *Repeal the Cap and Do the Math: Why We Need a Modern, Flexible, Evidence-Based Method of Assessing New York's Judicial Needs*.

The New York City Bar Association ("City Bar") proposes amending the New York State Constitution to eliminate the population-based formula that allots up to one elected Supreme Court Judge to a certain number of people, a provision of Article VI of the Constitution since 1846. The City Bar Report is consistent with prior New York State Bar Association policy (*Report and Recommendations Concerning Whether New Yorkers Should Approve the 2017 Ballot Question Calling for a Constitutional Convention* approved by the House of Delegates on June 17, 2017. The Report can be found at https://nysba.org/app/uploads/2020/02/June-2017-NYS-Constitution-Final-Report-1.pdf).

In sum, the Report examines and addresses the need for the New York State Legislature (the "Legislature") to provide the People of the State of New York with a sufficient number of judges to do justice.

Recommendations:

1. A Constitutional Amendment to Eliminate the Cap: The Report recommends the constitutional cap on the number of elected Supreme Court Justices be eliminated. The Report proposes that the constitution be modified to remove the cap in its entirety and add language that requires the Legislature to consider whether to change the number of Supreme Court justices in any judicial district at least once every ten years.

2. Enabling Legislation: The Legislature must codify a mandatory regular systematic assessment of the courts' specific needs as many other states and the federal courts have done. There is a constitutional obligation for the Legislature to evaluate judicial districts—and implicitly the number of judges, at least every ten years when there is a new census. The Report recommends such an evaluation should be informed by the cost of conducting the evaluation, which the federal courts and many states perform in-house, and other states perform using outside experts such as the National Center for State Courts.

3. Annual Reporting: The Chief Administrative Judge is currently required to keep data that would enable the Legislature to perform its regular and systematic assessment, and he thus has a significant role in this process. The statutory responsibility to annually evaluate the adequacy of current court resources and issue an annual report should include a directive to analyze the number of judges in each court and request changes when appropriate. This

annual report would inform the Legislature in carrying out its constitutional duty to set the number of judicial seats in each court, giving the court responsibility to initially identify the need to change the number of judicial seats.

4. Establish Assessment Methodology: The Legislature must adopt a system for assessing the judicial needs of all courts, taking into account not only population (which is the only factor currently listed in our constitution) but also translating the various caseloads, civil, and criminal, complexity of cases, out-of-court time for preparation and writing decisions, and extra time for unrepresented litigants, into a number representing the total number of judges that will be necessary at a given time to fulfill all judicial obligations.

5. Transparency: Information on such newly adopted systems should be published.

6. Immediate Interim Measures: In the interim, less time-consuming statutory changes are immediately available. For example, since the number of judges in courts other than the Supreme Court is not subject to a constitutional cap, the Legislature could immediately assess the judicial needs in those courts with support from appropriate professionals and change the number accordingly.

This report will be presented by Hon. Andrea Masley.

The report has been endorsed by:

- New York State Bar Association Commercial and Federal Litigation Section (Anne B. Sekel, Chair).
- New York County Lawyers Association (Adrienne Koch, President).
- Acting Supreme Court Judges Association (Gerry Lebovits, President)

COVER NOTE

On September 8, 2023, the New York City Bar Association published a report entitled *REPEAL THE CAP AND DO THE MATH: WHY WE NEED A MODERN, FLEXIBLE, EVIDENCE-BASED METHOD OF ASSESSING NEW YORK'S JUDICIAL NEEDS* (the "Report").[1]

On December 6, 2023, the New York State Bar Association Commercial and Federal Litigation Section (Anne B. Sekel, Chair) endorsed the Report.

On January 8, 2024, the New York County Lawyers Association (Adrienne Koch, President) endorsed the Report.

On January 9, 2024, Governor Hochul expressed her support for repealing the constitutional cap on Supreme Court Justices.

On January 10, 2024, the Acting Supreme Court Judges Association (Gerry Lebovits, President) endorsed the Report.

Additionally, the Fund for Modern Courts supports repealing the constitutional cap on Supreme Court Justices and utilizing a "more modern and progressive approach to providing appropriate judicial resources" whereby the Unified Court System would "study and develop a system of analyzing the actual work-load of the courts with the goal of apportioning state judicial resources in a less arbitrary way than the antiquated system established in New York State Constitution."[2]

The New York State Bar Association's Committee on the State Constitution (Christopher Bopst, Chair) has agreed to consider endorsing the Report at its next meeting.

The New York City Bar Association respectfully requests that the New York State Bar Association's House of Delegates endorse the Report and treat this issue as a legislative priority for the 2024 legislative session.

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[1] https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/constitutional-cap-on-judges. The Report is also attached and fully incorporated herein.

[2] https://moderncourts.org/programs-advocacy/judicial-article-of-nys-constitution/resources-constitutional-limit-number-justices-supreme-court/

TITLE PAGE

REPEAL THE CAP AND DO THE MATH: WHY WE NEED A MODERN, FLEXIBLE, EVIDENCE-BASED METHOD OF ASSESSING NEW YORK'S JUDICIAL NEEDS

NEW YORK CITY BAR ASSOCIATION
Council on Judicial Administration (Fran Hoffinger, Chair)
Subcommittee on the Constitutional Cap (Hon. Andrea Masley, Chair and Presenter)

LISTING OF MEMBER PAGE(S)

On September 8, 2023, the New York City Bar Association published a report entitled *REPEAL THE CAP AND DO THE MATH: WHY WE NEED A MODERN, FLEXIBLE, EVIDENCE-BASED METHOD OF ASSESSING NEW YORK'S JUDICIAL NEEDS* (the "Report").

Lead Committee:
Council on Judicial Administration, Fran Hoffinger, Chair

Constitutional Cap Sub-Committee Members: Robert Calinoff; Maria Park; Hon. Steven L. Barrett; David H. Sculnick; James P. Chou; Steven B. Shapiro; Michael Graff; Hon. Philip Straniere; Hon. Andrea Masley (Subcommittee Chair); Raymond Vanderberg; Robert C. Newman; Daniel Wiig

The report was supported by the following City Bar committees: Alternative Dispute Resolution Committee (Philip Goldstein, Chair); Civil Court Committee (Sidney Cherubin, Chair); Criminal Courts Committee (Carola Beeney and Anna G. Cominsky, Co-Chairs); State Courts of Superior Jurisdiction Committee (Amy Carlin, Chair)

The Report is also endorsed by:

New York State Bar Association Commercial and Federal Litigation Section (Anne B. Sekel, Chair).

New York County Lawyers Association (Adrienne Koch, President).

Acting Supreme Court Judges Association (Gerry Lebovits, President).

ACKNOWLEDGMENTS PAGE(S)

The City Bar's Constitutional Cap Sub-Committee began under the leadership of Council on Judicial Administration (CJA) Chair Steve Kayman. Hon. Carolyn E. Demarest and Michael Regan also chaired the CJA during the work of the Sub-Committee. The City Bar wishes to thank the City Bar's Librarian Richard Tuske and Administrative Assistant Dionie Kuprel. The Committee is most grateful to the following for sharing their expertise, advice, and/or data: Hon. Shahabuddeen Ally, Alex D. Corey, Esq., Prof. Peter J. Galie, Jonathan Goeringer, Esq., Gloria Smyth-Gottinger, Betty Hooks, Hon. Roslynn R. Mauskopf, Karen Milton, Esq., Prof. Dan Rabinowitz, Joan Vermeulen, Esq., and Hon. John Zhou Wang. The Report would not have been completed without the assistance of student interns Liam Clayton, Emily Friedman, Max Gerozissis, Fiona Lam, Samil Levin, Andrew Lymm, Max Sano, Sarah Shamoon, and Kristen Sheehan. The City Bar thanks editors Juanita Bright, Esq., Jamie N. Caponera, Esq., Hannah E. Reisinger, Esq, and Maria Reyes Vargas, Esq. Claudia Blanchard of Calinoff & Katz LLP provided Word expertise without which we would not have finished the Report.

Acknowledgement and thanks are extended to those who took the time to review, discuss and ultimately endorse the Report: the New York State Bar Association Commercial and Federal Litigation Section (Anne B. Sekel, Chair); the Board of the New York County Lawyers Association (Adrienne Koch, President); and the Acting Supreme Court Judges Association (Gerry Lebovits, President).

INTRODUCTION

The effective and efficient administration of justice in the State of New York's Unified Court System requires adequate judicial resources to serve the needs of litigants that appear before those courts. Such resources include: a robust judiciary consisting of qualified jurists committed to the rule of law, adequate staffing of judicial and administrative clerks, personnel necessary to carry out the courts' functions, and basic supplies to operate the courts' facilities. While a wide array of factors play into the sufficiency of the courts' resources and ability to serve the people, including budgetary constraints, political will, and the need for legislative action, at a fundamental level, the number of judges and the means by which New York State determines that figure is a major consideration—*i.e.*, is the current calculation method yielding a sufficient number of judges necessary to provide litigants the quality of justice they deserve and to handle the court's ever-expanding caseload in a state that has increasingly become the world's forum of choice for complex commercial litigation? As discussed below, this question is particularly important with respect to the New York State Supreme Court, (collectively, the "Court" or the "Supreme Court"), not only by reason of its status as New York's trial court of general jurisdiction, but because the existing means by which the Supreme Court bench is populated impacts the number of judges and the administration of justice in other courts within the Unified Court System, including what are often called the "People's Courts"—the Family Court, Civil Court and local criminal courts.

In New York, the state constitution (the "Constitution") prescribes the number of judges for the Supreme Court. New York State is divided into thirteen judicial districts; each county within New York City is a single district, and the remaining districts contain multiple counties. Since 1846, Article VI of the Constitution has provided for a population-based formula allotting up to one elected Supreme Court judge—known as a "justice"—to a certain number of people. Since 1963, the formula has been one justice for every 50,000 people in the state, calculated by district. Based on data from the 2020 United States Census reflecting a population of 20.2 million, the New York State Legislature may authorize the Court to have up to 401 elected justices throughout the state. Currently, the Legislature has authorized only 364 elected justices to sit on the New York State Supreme Court bench—a number that more closely corresponds to the state's population in 1999: 18.2 million people.

This reduced number of judges, however, is confounding, since every indication is that the constitutional formula has proven woefully inadequate and outdated. Indeed, while the Supreme Court bench has 364 *elected* justices,[3] in reality, it is populated by an *additional* 317 judges– a number that has gone as high as 396 in 2012. These are judges that OCA has transferred from lower and other courts pursuant to constitutional provisions authorizing these appointments on a "temporary and emergency" basis. Thus, the number of acting justices is almost the same as the number of elected Supreme Court Justices and has often *exceeded* the number of elected Justices since 2008. Moreover, the designation of these "acting" justices has been anything but temporary,

[3] This number will increase by 3 in 2024 following the enactment of Senate Bill 7534, Chp. 749, which was signed into law by Governor Hochul on December 22, 2023.

and once so designated, it is rare, if ever, that an acting justice is returned to his or her original judicial office.

This practice of increasing the aggregate number of justices through the *ad hoc* appointment of judges from other courts puts squarely into question the efficacy of the constitutional formula and demonstrates that, at a minimum, the state needs a significant number of additional authorized Supreme Court justice seats. It also raises at least two concerns: (1) the depletion of resources from the other courts from which acting Supreme Court justices are drawn has a ripple effect, and ultimately impairs the administration of justice for litigants in those other courts; and (2) the current practice of *ad hoc* appointments—originally intended to serve as a provisional stopgap—has become a *de facto* permanent solution for what is effectively a perpetual emergency and runs afoul of both the original intent of the constitutional provision vesting OCA with this authority, as well as the constitutional provision granting citizens the right to choose, by election, those jurists who sit in the Supreme Court.

Unanimously, the participants in the courts—judges, litigants, and practitioners—have long voiced concerns with the ever-increasing and crushing dockets in the Supreme Court and the lower and other courts, and the resulting impact on the pace at which cases move through the judicial system. The situation has become even more critical in light of the impact of the COVID pandemic's economic fallout on the courts—specifically, a $300 million cut to the judiciary budget, which resulted in OCA's decision to (1) effectively terminate 46 certificated judges across the state in one fell swoop[4] and (2) reduce other resources and personnel, including the elimination of judicial hearing officers ("JHO") and certain law clerks. These cuts in judicial resources promise to tax an already over-burdened judiciary beset with backlogs[5] preceding COVID, such as long waits for decisions on motions or trial dates when both parties are ready.

The City Bar proposes eliminating the population-based cap in light of, among other things, (1) the over 300 acting Supreme Court judges assigned to supplement the 364 elected Supreme Court justices since 2008, (2) increasing caseloads, (3) frustration with the slow disposition of cases, (4) more than 60 Supreme Court justices routinely certificated as needed and qualified to serve up to three additional two year terms after turning 70 years of age, and (5) the decreasing number of jury trials in all courts because of the paucity of available judges. The City Bar also offers a practical alternative to determine the appropriate number of Supreme Court justices and judges based on meaningful metrics: the weighted caseload analysis. The Report reaches these recommendations based on (1) an analysis of the existing constitutional and statutory structure of

[4] Since the termination of these certificated judges in October 2020, twenty have been reinstated to the bench.

[5] "Backlog is a term reserved for a court's older cases. A standard definition of backlog involves cases that are pending beyond a certain time frame. For courts that have adopted time standards, backlogs are identified as the share of cases exceeding time standards (e.g., cases more than 365 days old)." National Center for State Courts, Trends in State Courts 2022, at 95, https://www.ncsc.org/__data/assets/pdf_file/0024/80358/Trends-2022.pdf. For the purposes of this report, a "backlog" occurs when more cases are filed in a certain period than are disposed during that period, which can be quantified as a "clearance rate." *Id*. at 94. Another helpful measure is the time to disposition measured from filing to resolution. *Id*. Likewise, the age of a pending case is a helpful measure of the days since filing, but that too is not what we mean in this report when we use the term "backlog." *Id.*

the courts and administration of the courts and (2) consideration of the Legislature's duty to authorize all judicial seats and its obligation to apportion those seats to achieve justice for all. It also draws on the methods of determining the number of judges utilized by the federal courts and 49 other states. The Report is organized in six parts:

First, the Report provides an overview of the relevant courts in the state's byzantine and often bewildering Unified Court System. A basic understanding of these various courts and how the number of jurists for such courts is determined is a requisite underpinning of the Report's analysis. Indeed, such analysis includes an assessment of the impact on these other courts' resources resulting from the transfers from lower courts to supplement the number of constitutionally elected justices. The analysis also addresses how the appointment of justices to the Supreme Court's four Appellate Divisions affects the Court's trial court bench and creation of new "temporary" seats when the Presiding Justice declares to the governor that the Department is "unable to dispose of its business within a reasonable time."

Second, the Report then discusses the historical origins of the constitutional formula for determining the number of Supreme Court justices—the primary subject of this Report's evaluation—and lays the groundwork for the City Bar's rejection of the formula's relevance and effectiveness today. The Report also examines the existing but unused constitutional provisions that contemplate mechanisms for the Legislature to revisit the existing methodology in recognition of the notion that the calculus should evolve and adapt to society's changing needs.

Third, the Report proceeds to assess the current burden on the Supreme Court, the significant increases in the number of cases filed in the court over the years, and the factors that have led to this drastic expansion. This part of the Report also discusses how the increasing burden on the Supreme Court bench is compounded by constitutional provisions and practices that affect the number of justices, such as the appointment of judges to the Appellate Divisions of the Supreme Court from the pool of elected Supreme Court justices in the trial courts, the mandatory retirement age, and the certification of judges. As part of this discussion, the Report also touches upon various reasons why the caseload of all courts within the Unified Court System has dramatically increased.

Fourth, the Report then examines the measures that OCA has implemented to address the need for additional justices by reassigning judges from other courts, including a discussion of the statutory basis for such action. The Report also examines the historical use of these makeshift measures, which were apparently necessitated by Legislative inaction in not authorizing the maximum number of Supreme Court seats to the cap and raises questions as to whether the current utilization of these temporary measures is in the best interests of justice and New York's citizens.

Fifth, the Report then proceeds to analyze the adverse impact of these emergency measures on the other courts from which OCA has drawn acting justices. Based on anecdotal

evidence and some publicly available data, the Report concludes that the lower and other courts, such as the New York City Civil Court, are unfairly deprived of much-needed judges to preside over cases, which ultimately inures to the detriment of the litigants in those courts.

Sixth, and finally, the Report explores possible solutions by first comparing practices in 49 state courts and the federal courts, examining the methods that these jurisdictions and systems use to set the number of judges within their respective judicial systems, and then offering non-constitutional and constitutional-based proposals.

I. EXECUTIVE SUMMARY

In sum, the Report examines and addresses the need for the New York State Legislature (the "Legislature") to provide the People of the State of New York with a sufficient number of judges to do justice.[6] Throughout its history, New York State has struggled with an insufficient number of judicial seats necessitating stopgap measures that have only resulted in a complicated, overworked, and confusing court system that fails to provide justice to all. The dire need for additional judges overall is a function of the chronic failure to provide adequate judicial resources to New York's Unified Court System. And while the reasons underlying such failure are manifold and multilayered, on a fundamental level, the lack of judicial resources stems largely from the constitutionally prescribed method by which the New York State Legislature determines the number of justices that can be elected to the state's trial court of general jurisdiction—the New York State Supreme Court. Since enacted in 1846, and as amended in 1961, Article 6 of the New York State Constitution, has set the number of Supreme Court seats—which are elected positions—for geographically-defined areas known as judicial districts by using a solely population-based ratio—i.e., one justice per 50,000 people. The effect of such a formula is to cap the number of legislatively authorized Supreme Court seats within each judicial district, leaving the Legislature powerless to authorize additional seats to meet the growing and particular needs of the courts in such districts. Thus, the purely population-based "constitutional cap" has proven over-simplistic, outdated, and unworkable. Even worse, it has created a ripple effect that has impacted the entire New York Court system. Specifically, to address the lack of resources at the Supreme Court level, the Office of Court Administration has long resorted to adopting makeshift measures that involve designating judges from other courts to sit on the Supreme Court on an "acting" basis. Not only has this "robbing Peter to pay Paul" approach depleted these other courts of judicial resources, it has created a *de facto* permanent and large class of "Acting Supreme Court Justices," sitting in a court other than the one to which they were either elected by the people or appointed by the relevant appointing authority.

[6] The Report does not address court merger about which much has been written. *See* New York City Bar, *2020 New York State Legislative Agenda*, (January 7, 2022), https://www.nycbar.org/issue-policy/issue/new-york-state-2022-legislative-agenda (listing "Simplify New York State's Courts through restructuring" as a topic). Nor does the Report address whether judges should be elected or appointed or both.

In this era of metrics, the people of New York State are entitled to a modern, flexible, evidence-based method of assessing the state's judicial needs, as is the case in many other states and the federal judiciary. To that end, **the Report makes the following recommendations** which should be enacted and implemented for the proper and adequate administration of justice in New York State's courts.

- First, A Constitutional Amendment to Eliminate the Cap: It is undisputed that the constitutional cap on the number of elected Supreme Court Justices must be eliminated. The Report thus proposes that the constitution be modified to remove the cap in its entirety, and add language that requires the Legislature to consider whether to change the number of Supreme Court justices in any judicial district at least once every ten years. The Report's comparison to 49 other states and the federal courts shows that such analysis is performed even more regularly including once a year or biannually.

- Second, Enabling Legislation: The Legislature must codify a mandatory regular systematic assessment of the courts' specific needs as many other states and the federal courts have done. The constitutional obligation for the Legislature to evaluate judicial districts—and implicitly the number of judges—at least every ten years when there is a new census, has been consistently breached, with the Legislature increasing the number of judges only on an ad hoc basis. The City Bar does not recommend how often such an evaluation must be performed in New York State, as such a decision should be informed by the cost of conducting the evaluation, which the federal courts and many states perform in-house, and other states perform using outside experts such as the National Center for State Courts.

- Third, Annual Reporting: The Chief Administrative Judge is currently required to keep data that would enable the Legislature to perform its regular and systematic assessment, and he thus has a significant role in this process. His statutory responsibility to annually evaluate the adequacy of current court resources and issue an annual report should include a directive to analyze the number of judges in each court and request changes when appropriate. Requesting changes in the number of judges is not currently required and has not been the practice. This annual report would inform the Legislature in carrying out its constitutional duty to set the number of judicial seats in each court, giving the court responsibility to initially identify the need to change the number of judicial seats.

- Fourth, Establish Assessment Methodology: The Legislature must adopt a system for assessing the judicial needs of all courts, taking into account not only population (which is the only factor currently listed in our constitution) but also translating the various caseloads, civil, and criminal, complexity of cases, out-of-court time for preparation and writing decisions, and extra time for unrepresented litigants, into a number representing the total number of judges that will be necessary at a given time to fulfill all judicial obligations. The City Bar's review of the procedures for

determining the right number of judges in 49 states and the federal judiciary is attached.

- Fifth, Transparency: Information on such newly-adopted systems should be published. Most states use a "weighted caseload analysis," which includes counting the number of cases filed and disposed, as well as the time from filing to disposition, or "clearance rate," and assigning weights to each type of case based on complexity and other resources available to courts e.g., nonjudicial staff. The people of New York State have the right to know the time it takes to resolve criminal cases, small claims cases, Family Court cases and others, as well as their legislators' positions on what are acceptable clearance rates in those courts.

Sixth, Immediate Interim Measures: In the interim, less time-consuming statutory changes are immediately available. For example, since the number of judges in courts other than the Supreme Court is not subject to a constitutional cap, the Legislature could immediately assess the judicial needs in those courts with support from appropriate professionals, and change the number accordingly.

II. BACKGROUND

See above.

III. ANALYSIS AND PRESENTATION OF RECOMMENDATIONS

The recommendations are listed above and appear in full at pp. 56 – 60 of the Report. The first one – repealing the constitutional cap – requires a constitutional amendment. If the Legislature passes legislation that repeals the cap in the 2024 session, then the same bill must pass the Legislature in the 2025/26 session before being placed on the ballot for voters' approval.

The remaining recommendations are also directed at the Legislature and do not require a constitutional amendment. These recommendations urge the Legislature to codify a mandatory regular systematic assessment of the courts' specific judicial needs; to require annual reporting from the Chief Administrative Judge that includes an analysis of the number of judges in each court and a request for changes when appropriate; to adopt a system for assessing the judicial needs of all courts, taking into account not only population (which is the only factor currently listed in our constitution) but also translating the various caseloads, civil, and criminal, complexity of cases, out-of-court time for preparation and writing decisions, and extra time for unrepresented litigants, into a number representing the total number of judges that will be necessary at a given time to fulfill all judicial obligations; to transparently publish such newly-adopted systems and analyses; and to, in the interim, concerning courts not subject to a constitutional cap, continually assess the judicial needs in those courts and change the number accordingly.

Legislative advocacy is anticipated this session, beginning with support for A.5366 (Bores)/S.5414 (Hoylman-Sigal), a CONCURRENT RESOLUTION OF THE SENATE AND ASSEMBLY proposing amendments to article 6 of the constitution, in relation to the number of supreme court

justices in any judicial district. This bill would repeal the cap. In addition to endorsing the Report, the City Bar recommends that the New York State Bar Association support A.5366/S.5414.

IV. CONCLUSION

In the almost 60 years since 1962, when the constitutional formula changed to one judge per 50,000 people and the creation of the civil and criminal lower courts, there has been no change in the calculus of Supreme Court justices. Despite the constitutional obligation to reconsider the need for more justices every ten years based upon newly collected census data, the failure to increase the number of Supreme Court positions in light of the significant interim population growth has forced OCA to implement ad hoc mechanisms in order to provide the jurists needed to actually carry out the critical obligations of the third branch of government. Based on the assignment of at least 300 such acting justices for over ten years, the time has come to lift the cap and begin calculating the number of judges in all of New York's courts using actual data and modern methods of evaluation.

We urge the New York State Bar Association to endorse the Report and all recommendations contained therein and to support A.5366/S.5414 so that, in the first instance, the constitutional cap on judges can be repealed. The Report's remaining legislative recommendations are likewise critical so that a reliable and effective process for assessing judicial needs in Supreme Court is in place once the cap is lifted.

GLOSSARY / INDEX

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REPEAL THE CAP AND DO THE MATH: WHY WE NEED A MODERN, FLEXIBLE, EVIDENCE-BASED METHOD OF ASSESSING NEW YORK'S JUDICIAL NEEDS

September 2023

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REPEAL THE CAP AND DO THE MATH:
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EXECUTIVE SUMMARY

This report (the "Report") examines and addresses the need for the New York State Legislature (the "Legislature") to provide the People of the State of New York with a sufficient number of judges to do justice.[1] Throughout its history, New York State has struggled with an insufficient number of judicial seats necessitating stopgap measures that have only resulted in a complicated, overworked, and confusing court system that fails to provide justice to all. The dire need for additional judges overall is a function of the chronic failure to provide adequate judicial resources to New York's Unified Court System. And while the reasons underlying such failure are manifold and multilayered, on a fundamental level, the lack of judicial resources stems largely from the constitutionally prescribed method by which the New York State Legislature determines the number of justices that can be elected to the state's trial court of general jurisdiction—the New York State Supreme Court. Since enacted in 1846, and as amended in 1961, Article 6 of the New York State Constitution, has set the number of Supreme Court seats—which are elected positions—for geographically-defined areas known as judicial districts by using a solely population-based ratio—i.e., one justice per 50,000 people. The effect of such a formula is to cap the number of legislatively authorized Supreme Court seats within each judicial district, leaving the Legislature powerless to authorize additional seats to meet the growing and particular needs of the courts in such districts. Thus, the purely population-based "constitutional cap" has proven over-simplistic, outdated, and unworkable. Even worse, it has created a ripple effect that has impacted the entire New York Court system. Specifically, to address the lack of resources at the Supreme Court level, the Office of Court Administration has long resorted to adopting makeshift measures that involve designating judges from other courts to sit on the Supreme Court on an "acting" basis. Not only has this "robbing Peter to pay Paul" approach depleted these other courts of judicial resources, it has created a *de facto* permanent and large class of "Acting Supreme Court Justices," sitting in a court other than the one to which they were either elected by the people or appointed by the relevant appointing authority.

In this era of metrics, the people of New York State are entitled to a modern, flexible, evidence-based method of assessing the state's judicial needs, as is the case in many other states and the federal judiciary. To that end, the Report makes the following recommendations which

[1] This Report will not address court merger about which much has been written. *See* New York City Bar, *2020 New York State Legislative Agenda*, (January 7, 2022), https://www.nycbar.org/issue-policy/issue/new-york-state-2022-legislative-agenda (All websites last accessed on August 3, 2023). (listing "Simplify New York State's Courts through restructuring" as a topic). Nor does the report address whether judges should be elected or appointed or both.

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necessary at a given time to fulfill all judicial obligations. The Council's review of the procedures for determining the right number of judges in 49 states and the federal judiciary is attached.

- Fifth, Transparency: Information on such newly-adopted systems should be published. Most states use a "weighted caseload analysis," which includes counting the number of cases filed and disposed, as well as the time from filing to disposition, or "clearance rate," and assigning weights to each type of case based on complexity and other resources available to courts e.g., nonjudicial staff. The people of New York State have the right to know the time it takes to resolve criminal cases, small claims cases, Family Court cases and others, as well as their legislators' positions on what are acceptable clearance rates in those courts.

- Sixth, Immediate Interim Measures: In the interim, less time-consuming statutory changes are immediately available. For example, since the number of judges in courts other than the Supreme Court is not subject to a constitutional cap, the Legislature could immediately assess the judicial needs in those courts with support from appropriate professionals, and change the number accordingly.

INTRODUCTION

The effective and efficient administration of justice in the State of New York's Unified Court System requires adequate judicial resources to serve the needs of litigants that appear before those courts. Such resources include: a robust judiciary consisting of qualified jurists committed to the rule of law, adequate staffing of judicial and administrative clerks, personnel necessary to carry out the courts' functions, and basic supplies to operate the courts' facilities. While a wide array of factors play into the sufficiency of the courts' resources and ability to serve the people, including budgetary constraints, political will, and the need for legislative action, at a fundamental level, the number of judges and the means by which New York State determines that figure is a major consideration—*i.e.*, is the current calculation method yielding a sufficient number of judges necessary to provide litigants the quality of justice they deserve and to handle the court's ever-expanding caseload in a state that has increasingly become the world's forum of choice for complex commercial litigation? As discussed below, this question is particularly important with respect to the New York State Supreme Court, (collectively, the "Court" or the "Supreme Court"), not only by reason of its status as New York's trial court of general jurisdiction, but because the existing means by which the Supreme Court bench is populated impacts the number of judges and the administration of justice in other courts within the Unified Court System, including what are often called the "People's Courts"—the Family Court, Civil Court and local criminal courts.

In New York, the state constitution (the "Constitution") prescribes the number of judges for the Supreme Court. New York State is divided into thirteen judicial districts; each county within New York City is a single district, and the remaining districts contain multiple counties. Since 1846, Article VI of the Constitution has provided for a population-based formula allotting up to one elected Supreme Court judge—known as a "justice"—to a certain number of people. Since 1963, the formula has been one justice for every 50,000 people in the state, calculated by district. Based on data from the 2020 United States Census reflecting a population of 20.2 million, the New York State Legislature may authorize the Court to have up to 401 elected justices throughout the state. Currently, the Legislature has authorized only 364 elected justices to sit on the New York State Supreme Court bench—a number that more closely corresponds to the state's population in 1999: 18.2 million people.

This reduced number of judges, however, is confounding, since every indication is that the constitutional formula has proven woefully inadequate and outdated. Indeed, while the Supreme Court bench has 364 *elected* justices,[2] in reality, it is populated by an *additional* 317 judges– a number that has gone as high as 396 in 2012. These are judges that OCA has transferred from lower and other courts pursuant to constitutional provisions authorizing these appointments on a "temporary and emergency" basis. Thus, the number of acting justices is almost the same as the number of elected Supreme Court Justices and has often *exceeded* the number of elected Justices since 2008. Moreover, the designation of these "acting" justices has been anything but temporary, and once so designated, it is rare, if ever, that an acting justice is returned to his or her original judicial office.

This practice of increasing the aggregate number of justices through the *ad hoc* appointment of judges from other courts puts squarely into question the efficacy of the constitutional formula and demonstrates that, at a minimum, the state needs a significant number of additional authorized Supreme Court justice seats. It also raises at least two concerns: (1) the depletion of resources from the other courts from which acting Supreme Court justices are drawn has a ripple effect, and ultimately impairs the administration of justice for litigants in those other courts; and (2) the current practice of *ad hoc* appointments—originally intended to serve as a provisional stopgap—has become a *de facto* permanent solution for what is effectively a perpetual emergency and runs afoul of both the original intent of the constitutional provision vesting OCA with this authority, as well as the constitutional provision granting citizens the right to choose, by election, those jurists who sit in the Supreme Court.

Unanimously, the participants in the courts—judges, litigants, and practitioners—have long voiced concerns with the ever-increasing and crushing dockets in the Supreme Court and the lower and other courts, and the resulting impact on the pace at which cases move through the judicial system. The situation has become even more critical in light of the impact of the COVID pandemic's economic fallout on the courts—specifically, a $300 million cut to the

[2] This number will increase by 3 as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

judiciary budget, which resulted in OCA's decision to (1) effectively terminate 46 certificated judges across the state in one fell swoop[3] and (2) reduce other resources and personnel, including the elimination of judicial hearing officers ("JHO") and certain law clerks. These cuts in judicial resources promise to tax an already over-burdened judiciary beset with backlogs[4] preceding COVID, such as long waits for decisions on motions or trial dates when both parties are ready.

The Council proposes eliminating the population-based cap in light of, among other things, (1) the over 300 acting Supreme Court judges assigned to supplement the 364 elected Supreme Court justices since 2008, (2) increasing caseloads, (3) frustration with the slow disposition of cases, (4) more than 60 Supreme Court justices routinely certificated as needed and qualified to serve up to three additional two year terms after turning 70 years of age, and (5) the decreasing number of jury trials in all courts because of the paucity of available judges. The Council also offers a practical alternative to determine the appropriate number of Supreme Court justices and judges based on meaningful metrics: the weighted caseload analysis. The Report reaches these recommendations based on (1) an analysis of the existing constitutional and statutory structure of the courts and administration of the courts and (2) consideration of the Legislature's duty to authorize all judicial seats and its obligation to apportion those seats to achieve justice for all. It also draws on the methods of determining the number of judges utilized by the federal courts and 49 other states. The Report is organized in six parts:

> First, the Report provides an overview of the relevant courts in the state's byzantine and often bewildering Unified Court System. A basic understanding of these various courts and how the number of jurists for such courts is determined is a requisite underpinning of the Report's analysis. Indeed, such analysis includes an assessment of the impact on these other courts' resources resulting from the transfers from lower courts to supplement the number of constitutionally elected justices. The analysis also addresses how the appointment of justices to the Supreme Court's four Appellate Divisions affects the Court's trial court bench and creation of new "temporary" seats when the Presiding Justice declares to the governor that the Department is "unable to dispose of its business within a reasonable time."

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[3] Since the termination of these certificated judges in October 2020, twenty have been reinstated to the bench.

[4] "Backlog is a term reserved for a court's older cases. A standard definition of backlog involves cases that are pending beyond a certain time frame. For courts that have adopted time standards, backlogs are identified as the share of cases exceeding time standards (e.g., cases more than 365 days old)." National Center for State Courts, Trends in State Courts 2022, at 95, https://www.ncsc.org/__data/assets/pdf_file/0024/80358/Trends-2022.pdf. For the purposes of this report, a "backlog" occurs when more cases are filed in a certain period than are disposed during that period, which can be quantified as a "clearance rate." *Id*. at 94. Another helpful measure is the time to disposition measured from filing to resolution. *Id.* Likewise, the age of a pending case is a helpful measure of the days since filing, but that too is not what we mean in this report when we use the term "backlog." *Id.*

Second, the Report then discusses the historical origins of the constitutional formula for determining the number of Supreme Court justices—the primary subject of this Report's evaluation—and lays the groundwork for the Council's rejection of the formula's relevance and effectiveness today. The Report also examines the existing but unused constitutional provisions that contemplate mechanisms for the Legislature to revisit the existing methodology in recognition of the notion that the calculus should evolve and adapt to society's changing needs.

Third, the Report proceeds to assess the current burden on the Supreme Court, the significant increases in the number of cases filed in the court over the years, and the factors that have led to this drastic expansion. This part of the Report also discusses how the increasing burden on the Supreme Court bench is compounded by constitutional provisions and practices that affect the number of justices, such as the appointment of judges to the Appellate Divisions of the Supreme Court from the pool of elected Supreme Court justices in the trial courts, the mandatory retirement age, and the certification of judges. As part of this discussion, the Report also touches upon various reasons why the caseload of all courts within the Unified Court System has dramatically increased.

Fourth, the Report then examines the measures that OCA has implemented to address the need for additional justices by reassigning judges from other courts, including a discussion of the statutory basis for such action. The Report also examines the historical use of these makeshift measures, which were apparently necessitated by Legislative inaction in not authorizing the maximum number of Supreme Court seats to the cap and raises questions as to whether the current utilization of these temporary measures is in the best interests of justice and New York's citizens.

Fifth, the Report then proceeds to analyze the adverse impact of these emergency measures on the other courts from which OCA has drawn acting justices. Based on anecdotal evidence and some publicly available data, the Report concludes that the lower and other courts, such as the New York City Civil Court, are unfairly deprived of much-needed judges to preside over cases, which ultimately inures to the detriment of the litigants in those courts.

Sixth, and finally, the Report explores possible solutions by first comparing practices in 49 state courts and the federal courts, examining the methods that these jurisdictions and systems use to set the number of judges within their respective judicial systems, and then offering non-constitutional and constitutional-based proposals.

PART I: THE CURRENT LANDSCAPE OF NEW YORK'S UNIFIED COURT SYSTEM

The New York State Constitution provides that "there shall be a unified court system" that consists of the Courts of Appeals, the Supreme Court including the Appellate Divisions of

the Supreme Court, the Court of Claims, the County Court, the Surrogate's Court, the Family Court, the courts of civil and criminal jurisdiction of the City for New York, and such other courts that the Legislature decides.[5] New York State's Constitution thus prescribes a multilayered judicial structure, which over time has evolved into a byzantine system that is incomprehensible to most practitioners. The following passage illustrates the point markedly:

> "On the trial court side, we have eleven separate courts including a court of general civil and criminal jurisdiction, courts of limited civil and general criminal jurisdiction, courts of special jurisdiction, a court of limited civil jurisdiction only, a court of limited criminal jurisdiction only, and courts of both limited civil and limited criminal jurisdiction. Some of these courts sit across that state, some sit only in New York City, some sit only outside New York City; some sit only on Long Island; some exercise all the jurisdiction they are granted; some exercise only a portion of their jurisdiction. Most of these courts exercise only trial jurisdiction; some, however, exercise both trial and appellate jurisdiction. Some of the judges of these courts are elected; some are appointed. And of those that are appointed, some are appointed by the governor, some by the mayor of the municipality in which they serve, and some by a city's common council. Some judges serve fourteen-year terms; some ten-year terms; some nine-year terms; some six-year terms; and some four-year terms. Some judges never sit on the court for which they are chosen; some are chosen to sit in two or three courts at once. In some courts, court parts are not even presided over by judges but, instead, by quasi-judicial hearing officers."[6]

Accordingly, to evaluate the adequacy and allocation of judicial resources, a basic understanding of New York's complex judicial system and how judges are assigned to the various courts in keeping with the constitution is essential.[7]

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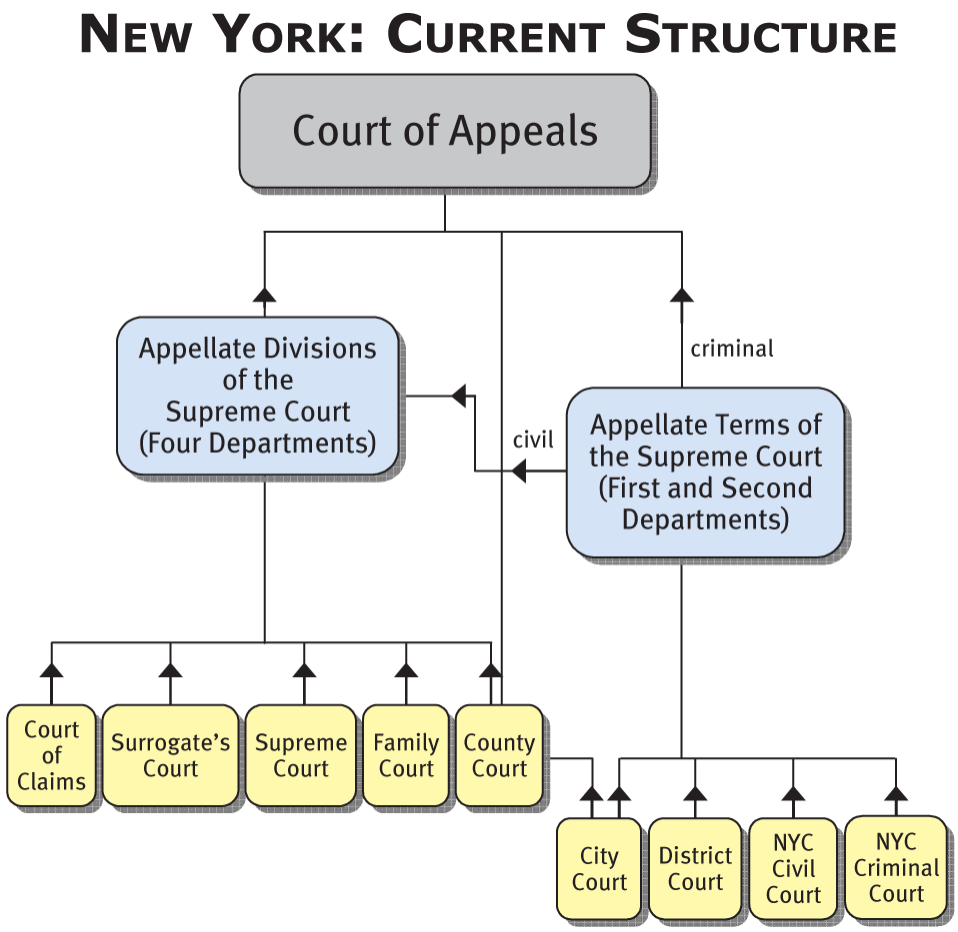
[5] N.Y. Const. Art. VI, §1.

[6] L. Daniel Feldman and Marc C. Bloustein, New York State's Unified Court System 81, New York's Broken Constitution: The Governance Crisis and The Path to Renewed Greatness (Peter J. Galie, Christopher Bopst & Gerald Benjamin eds., 2016).

[7] See Exhibit 2 for the statutory source of each judicial seat.

The following diagram illustrates the structure of the courts described above:[8]



A. Courts with Jurisdiction Across All of New York[9]

1. The Court of Appeals of the State of New York. The Court of Appeals sits at the apex of the Unified Court System, serving as New York State's highest and last court of resort. The Court of Appeals' jurisdiction is generally limited to the review of questions of law.[10] Composed of the Chief Judge and six Associate Judges, each appointed to a 14-year

[8] The Fund for Modern Courts, *Structure of the Courts* (2022), https://moderncourts.org/programs-advocacy/judicial-article-of-nys-constitution/structure-of-the-courts/. (Also appears as Exhibit 1).

[9] N.Y. Const. Art. VI, § 1; N.Y. Jud. Law §2, "Courts of Record".

[10] N.Y. Const. Art. VI, § 3(a).

term,[11] the highest court may seek to increase its composition on a temporary basis by way of a request to the governor certifying the need and gubernatorial designation.[12]

2. The Supreme Court. Bearing a name that confusingly suggests that it is the state's court of last resort, the Supreme Court is New York's trial court of general jurisdiction in law and equity.[13] Under the constitution, the judges sitting on this court are known as "Justices" and are elected to 14-year terms[14] from one of 13 judicial districts.[15] A Supreme Court Justice may serve until December 31 of the year in which he or she reaches age 70, and may thereafter perform duties as a Supreme Court Justice if OCA certifies that the Justice's services are necessary to expedite the business of the Court, and that he or she is physically and mentally competent to fully perform the duties of such office.[16] Certification is valid for a two-year term and may be extended for up to two additional two-year terms,[17] but in no event beyond December 31 in the year in which he or she reaches age 76.[18] In addition to OCA's certification process, judges seeking to continue performing judicial functions in New York City after reaching 70 years of age appear before the New York City Bar Association's Judiciary

[11] N.Y. Const. Art. VI, § 2(a).

[12] N.Y. Const. Art. VI, § 2(b) ("Whenever and as often as the court of appeals shall certify to the governor that the court is unable, by reason of the accumulation of causes pending therein, to hear and dispose of the same with reasonable speed, the governor shall designate such number of justices of the Supreme Court as may be so certified to be necessary, but not more than four, to serve as associate judges to the court of appeals.").

[13] N.Y. Const. Art. VI, § 7(a).

[14] The fourteen-year term was the result of a compromise in 1867 where the debate was between lifetime tenure, allowing judges to devote themselves to their work, and a fixed term. Looking Back on a Glorious Past 1691-1991, NYS Bar Association Journal citing Judge Francis Bergan, The History of the New York Court of Appeals, 1847-1932 (Columbia University Press, 1985). The fourteen-year term was selected based on "the statistical average of the actual number of years that had been served by federal judges and others who had life tenure." *Id*.

[15] N.Y. Const. Art. VI, § 6(c).

[16] N.Y. Const. Art. VI, § 25(b).

[17] In light of COVID and alleged budget cuts, however, 46 certifications were denied. *See* Heather Yakin, *To meet budget cut goals, New York courts won't extend terms for senior judges*, Record Online (Oct. 7, 2020), https://www.recordonline.com/story/news/2020/10/02/state-courts-wont-extend-terms-this-year-for-judges-over-age-70/5870683002/; Ryan Tarinelli, *'Teetering on the Edge of Total Dysfunction': Older Judges Being Forced From Bench Sue NY Court Officials, Warn of Chaos*, Law.com (Nov. 5, 2020), https://www.law.com/newyorklawjournal/2020/11/05/older-judges-being-forced-from-bench-sue-ny-court-officials/?slreturn=20201103170944.

[18] N.Y. Const. Art. VI, § 25(b).

Committee.[19] Currently, there are 364 judicial seats authorized by the Legislature for election,[20] while the constitutional cap allows for 401 judicial seats. Certificated judges are not counted toward the cap.

3. The Supreme Court, Appellate Division. Technically a part of the Supreme Court, the Appellate Divisions hear appeals from judgments or orders from the Supreme Court,[21] Surrogate's Court,[22] Appellate Term of the Supreme Court,[23] Family Court,[24] Court of Claims,[25] and County Courts.[26] While it is an intermediate court between the Supreme Court and the Court of Appeals, as a practical matter, the Appellate Divisions are the last court of resort for the vast majority of cases, as leave is required for appeals to proceed to the Court of Appeals, with limited exceptions.[27] The four Appellate Divisions hear cases from specified geographic districts in the state.[28] The constitution sets the number of Appellate Division judges—also known as justices—who are appointed by the governor and selected from among the elected Supreme Court justices.[29] Thus, to fill a constitutional seat on the Appellate Division, the judge first must be an elected Supreme Court justice.[30] Acting justices, who are designated and note elected to the Supreme Court do not qualify. The constitution also permits temporary assignments and appointments of justices to the Appellate Division among the departments by agreement of the presiding justices of the four departments, initiated by the presiding justice of the department in need.[31] These "temporary" judges must also first be elected as Supreme Court justices. In 2020, prior to COVID, there were four presiding justices, 20 justices authorized by the constitution, 30

[19] See e.g., letter from Chief Administrative Judge Marks, July 12, 2021, inviting views on 18 Judges from The First and Second Departments who applied for certification to begin in 2022. The American Lawyer, New Crop of Older New York Judges seeking approval to stay on bench (July 19, 2021). For a description of the process, see Facing the Future at 70, Judge Wonders if Certification is an Option, NYLJ, April 14, 2003.

[20] N.Y. Jud. Law §140-a. See Exhibit 12 for changes to N.Y. Jud. Law §140-a. This number will increase to 367 as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

[21] N.Y. CPLR 5701 (1999).

[22] N.Y. SCPA § 2701(1) (1967).

[23] N.Y. CPLR 5703 (1963).

[24] N.Y. Family Ct. Act § 1111 (1969).

[25] N.Y. Ct. Cl. Act § 24 (1979).

[26] N.Y. CPLR 5701 (1999).

[27] Thomas R. Newman et. al., *Clerk's Annual Report for the Court of Appeals*, New York Law Journal, Law.com (May 3, 2022), https://www.law.com/newyorklawjournal/2022/05/03/clerks-annual-report-for-the-court-of-appeals/.

[28] For a map of the four Appellate Divisions, see Exhibit 3.

[29] N.Y. Const. Art. VI, § 5; N.Y. Family Ct. Act § 1111; N.Y. CPLR Art. 57; N.Y. Ct. Cl. Act § 24.

[30] N.Y. Const. Art. VI, §§ 4(b), (c).

[31] N.Y. Const. Art. VI, § 4(g).

"temporary" justices[32] and seven certified justices,[33] for a total of 61.[34] As Supreme Court justices, 54 of the 61 Appellate Division justices are part of the 364 judicial seats authorized by the Legislature; the seven certificated justices do not count towards the constitutional cap.

4. The Supreme Court, Appellate Terms. The Appellate Terms are part of the Supreme Court and hear appeals from lower courts. Sitting only in the First[35] and Second Departments,[36] the Appellate Terms in New York City hear appeals from New York City Civil Court and convictions in New York City Criminal Court.[37] The First Department's Appellate Term covers New York and Bronx Counties.[38] Each of the two Appellate Terms in the Second Department is composed of not less than three but not more than five elected Supreme Court justices and each of the two Appellate Terms has a presiding justice.[39] Currently, each Appellate Term consists of four Supreme Court justices and a presiding justice.[40] "The Appellate Terms in the Second Department are comprised of two separate courts . . . One court serves the 2nd, 11th and 13th Judicial Districts (Kings, Queens and Richmond Counties), and the other the 9th and 10th Judicial Districts (Nassau, Suffolk, Westchester, Rockland, Orange, Putnam and Dutchess Counties)."[41] "In the Second Department, the Appellate Terms also have jurisdiction over appeals from civil and criminal cases originating in District, City, Town and Village Courts, as well as non-felony appeals from the County Court."[42] All of the Appellate Term judges are designated by the Chief Administrator of the Courts with the approval of the presiding justice of the appropriate Appellate Division.[43] In addition to their appellate duties, each Appellate Term

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[32] N.Y. Const. Art. VI, § 4(e) provides that: "In case any appellate division shall certify to the governor that one or more additional justices are needed for the speedy disposition of the business before it, the governor may designate an additional justice or additional justices; but when the need for such additional justice or justices shall no longer exist, the appellate division shall so certify to the governor, and thereupon service under such designation or designations shall cease."

[33] N.Y. Const. Art. VI, § 25(b) allows elected judges who reach 70 years of age to apply to the Administrative Board to be certificated for two more years of additional service up to a total of 6 years. "[T]he services of such judge or justice [must be] necessary to expedite the business of the court and [] he or she is mentally and physically able and competent to perform the full duties of such office." *Id.*

[34] *See* Exhibit 5, NYS Unified Court System 2022 Judicial Positions of Total Number of Judges.

[35] 22 NYCRR § 640.1.

[36] 22 NYCRR § 730.1.

[37] N.Y. Const. Art. VI, §§ 8(a), (d).

[38] N.Y. Const. Art. VI, § 4(a).

[39] N.Y. Const. Art. VI, § 8(a).

[40] New York State Unified Court System, *Lower Appellate Courts: First Judicial Department Appellate Term, Supreme Court* (Aug. 17, 2020), https://www.nycourts.gov/courts/appterm_1st.shtml.

[41] Supreme Court of the State of New York Appellate Term, Second Judicial Department, *About the Court: An Overview of the Appellate Terms*, https://www.nycourts.gov/courts/ad2/appellateterm_aboutthecourt.shtml.

[42] New York State Unified Court System, *Lower Appellate Courts* (June 9, 2014), https://www.nycourts.gov/courts/lowerappeals.shtml.

[43] *Id.*

judge continues to preside over a Supreme Court part. As Supreme Court justices, the Appellate Term justices' seats are part of the 364 judicial seats authorized by the Legislature, except for the presiding justice in the ninth and tenth judicial district who is certificated.

5. The Family Court of the State of New York. The Family Court is a specialized court that handles issues such as child abuse and neglect, adoption, child custody and visitation, domestic violence, juvenile delinquency, paternity, and child support.[44] It is a statewide court from which appeals go to the Appellate Division.[45] Within New York City, the Family Court has concurrent jurisdiction with the New York Criminal Court for family offenses.[46] Each county in the state must have at least one Family Court judge.[47] As of January 2023, the Family Court Act authorizes 150 Family Court judges statewide,[48] of which 60 judges are in New York City.[49] Family Court judges outside of New York City are elected to ten-year terms.[50] Family Court judges in New York City are appointed by the mayor of New York City for ten-year terms.[51] In 2022, 57 appointed Family Court judges sat in New York City Family Court[52] with the remaining three Family Court judges assigned to other courts.[53] In New York City, elected Civil Court judges have occasionally been temporarily assigned to Family Court as acting Family Court judges.[54] Some judges from other courts have also volunteered to assist during COVID.[55] In 2021, certificated judges were assigned to Family Court as well.[56] Family Court judges are assisted by JHOs and nonjudicial officials such as child support magistrates who have at times outnumbered the judges.

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[44] N.Y. Const. Art. VI, §§ 7(a), 13(b), 13(c).

[45] N.Y. Family Ct. Act § 1111; N.Y. Const. Art. VI, § 4.

[46] N.Y. Const. Art. VI, § 15(c).

[47] N.Y. Const. Art. VI, § 13(a).

[48] This number will increase by 13 as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

[49] N.Y. Family Ct. Act §§121, 131. This number will increase to 63 as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

[50] N.Y. Const. Art. VI, § 13(a).

[51] *Id.*

[52] NYS Unified Court System 2022 Judicial Positions. *See* Exhibit 5.

[53] *Id.*

[54] The Family Court Judicial Appointment and Assignment Process, (Dec. 2020) https://s3.amazonaws.com/documents.nycbar.org/files/2020790-FamilyCourtJudicialAppointmentProcess.pdf.

[55] Thirty-five judges from other courts volunteered for Family Court. New York County Lawyer's Association, *Message from Chief Judge Janet DiFiore* (Dec. 28, 2020), https://www.nycourts.gov/whatsnew/pdf/December28-CJ-Message.pdf.

[56] Ryan Tarinelli, n*early 20 older judges return after having been ousted from the bench*, New York Law Journal (June 18, 2021), https://www.law.com/newyorklawjournal/2021/06/18/nearly-20-older-judges-return-after-having-been-ousted-from-the-bench/.

> "Reading Section 121 [of the Family Court Act], an attorney, a party, or a member of the general public, i.e., any individual who is not experienced in Family Court practice, would assume that the court is served exclusively by the specified number of judges. However, as an integral part of the Unified Court system with flexible assignment and transfer policies, the judge presiding in a Family Court part may well be an individual other than one of the 56 Section 121 judges. Further, "Raise the Age" legislation has established "Adolescent Offender" parts which are endowed with Family Court authority, but may or may not be assigned a Section 121 judge. Last, for many years there has been a proliferation of support magistrates and referees, non-judicial adjudicatory officials who exercise Family Court jurisdiction (see the Original Commentary at pp. 57-58). Reality has superseded Section 121."[57]

There is no constitutional cap on the number of Family Court judges; the New York State Legislature determines the number of seats.[58] But there is no regular assessment of the number of judges necessary to meet the demands of the Family Court and its litigants. Like the Supreme Court, the Legislature arbitrarily changes the number of Family Court judges. Until 2022's increase of seven Family Court judges, the last increase occurred in 2014,[59] following the advocacy of the New York State Coalition for More Family Court Judges, a group of over 100 organizations.[60] Twenty-five new judicial seats were created in 2014.[61] Before that, the Family Court saw no increases in the number of its judges for 24 years.[62]

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[57] Merril Sobie, Supp. Practice Commentaries, McKinney's Cons Law of NY Family Court Act § 121 (2019). "As of 2003, for example, the New York City Family Court employed a complement of 72 non-judge adjudicating officials, compared to 47 judges. …The case migration to non-judge officials has also eroded Article One and Article Two's [of the Family court Act] significance; the carefully constructed statutory provisions governing judges, including qualifications, election or appointment procedures, and the authority to issue process do not apply to referees or support magistrates." Merril Sobie, Practice Commentaries, McKinney's Cons Law of NY Family Court Act § 121.

[58] N.Y. Const. Art. VI, § 13(a).

[59] Merril Sobie, Supp. Practice Commentaries, McKinney's Cons Law of NY Family Court Act § 121 (2014).

[60] For list of 100 members of the New York State Coalition for More Family Court Judges, *see* https://moderncourts.org/programs-advocacy/access-to-justice/family-court-reform/.

[61] *State to Strengthen Family Court Bench*, NIAGARA GAZETTE (June 20, 2014), https://www.niagara-gazette.com/news/local_news/courts-state-to-strengthen-family-court-bench/article_cae6bd35-06d1-52be-addc-0c5613653ec9.html.

[62] Merril Sobie, Supp. Practice Commentaries, McKinney's Cons Law of NY Family Court Act § 121 (2014).

In 2022, 446,022 new petitions were filed in Family Court while there were 441,038 dispositions,[63] which compares to 578,346 filings and 570,826 dispositions in 2019.[64] While the number of filings and dispositions may be down, the continuing unaddressed need persists. In his 2020 report to the Chief Judge, Jeh Johnson, criticized the "demeaning cattle-call culture" of the Family Court, and other courts, and "dehumanizing effect it has on litigants, and the disparate impact of all this on people of color," caused by the "under-resourced, over-burdened court system."[65] As a result of backlogs after the pandemic, trials are scheduled eight months after the scheduling date compared to a four month delay before the pandemic.[66] "And for the court users themselves, the delay in case resolution could mean a parent is unable to see their children for an extended period of time or a child's future remains uncertain."[67] Sadly, "litigants in Family Court feel so disheartened by persistent delays that they eventually fail to appear at all."[68] Accordingly, "increasing the number of Family Court judges will address unconscionable delays in resolving cases, avoiding longer periods of stay in foster care for children, longer periods of uncertainty in custody cases, longer time for resolution of juvenile delinquency cases, longer periods of anxiety for domestic violence victims, and protracted periods of the stress, instability and trauma implicit in the cases heard in Family Court."[69]

6. Surrogate's Court of the State of New York. Each county within the state has a Surrogate's Court, which handles all probate and estate proceedings.[70] Each Surrogate's Court has one judge—referred to as a "surrogate"—except for New York and Kings Counties, which each has two surrogates.[71] In some counties, a judge may discharge the duties of surrogate, county court, and family court.[72] Surrogates are elected to ten-year terms, except those in the

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[63] 2022 Annual Report New York Unified Court System, https://www.nycourts.gov/legacyPDFS/22_UCS-Annual_Report.pdf, at 66.

[64] 2019 Annual Report New York Unified Court System, https://www.nycourts.gov/legacypdfs/19_UCS-Annual_Report.pdf, at 40.

[65] Johnson, Jeh, Oct. 1, 2020, Special Advisor Equal Justice Report at 54, https://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf.

[66] Kaye, Jacob, Queens has Fewest Family Court Judges per capita-a New Bill Could Change That, Queens Daily Eagle May 24, 2023. https://queenseagle.com/all/2023/5/24/queens-has-fewest-family-court-judges-per-capita-a-new-bill-could-change-that.

[67] *Id.*

[68] Johnson, Jeh, Oct. 1, 2020, Special Advisor Equal Justice Report at 56, https://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf.

[69] Franklin H. Williams Judicial Commission of the New York State Court Report on New York City Family Courts, December 19, 2022, at 8. https://www.nycourts.gov/LegacyPDFS/IP/ethnic-fairness/pdfs/FHW%20-%20Report%20on%20the%20NYC%20Family%20Courts%20-%20Final%20Report.pdf.

[70] N.Y. SCPA § 201(3) (1980).

[71] N.Y. Const. Art. VI, § 12(a); N.Y. Jud Law § 179.

[72] "The Legislature may at any time provide that outside the city of New York the same person may act and discharge the duties of county judge and surrogate or of judge of the family court and

five counties within New York City where the term is 14 years.[73] There is no cap on the number of Surrogate's Court judges. The New York State Legislature determines the number of seats.[74] There are 32 elected surrogate judges plus 50 additional judges with multi-court assignments which include sitting part-time in Surrogate's Court.[75] 15 Acting Supreme Court Justices come from Surrogate's Court.[76] Surrogate's Court decisions are appealed to the Supreme Court, Appellate Division.[77] In 2022, 146,396 cases were filed in Surrogate's Court with 114,394 dispositions as compared to 141,237 filings and 117,976 dispositions in 2019.[78]

7. The New York State Court of Claims. The Court of Claims' stated function is to adjudicate civil lawsuits in nonjury trials against the State of New York, as well as certain quasi-governmental authorities.[79] The governor appoints Court of Claims judges with the advice and consent of the Senate.[80] The constitution authorizes eight Court of Claims judges but the number may be increased without limitation by the Legislature and reduced to no less than six.[81] At present, 86 Court of Claims judgeships with nine-year terms have been authorized and the judges appointed pursuant to the Court of Claims Act.[82] But only 15 judges of the 86 actually hear cases against New York State in the Court of claims on a full time basis and 8 on a part-time basis.[83] The additional 59 judges appointed to the Court of Claims have been designated as acting Supreme Court justices to sit in Supreme Court, 32 of which sit in New York City.[84] In 2022, 1,251 claims were filed against the state and 1,403 claims were resolved.[85] Court of Claims decisions are appealed to the Supreme Court, Appellate Division.[86]

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surrogate, or of county judge and judge of the family court, or of all three positions in any county." (N.Y. Const. Art. VI, § 14.

[73] N.Y. Const. Art. VI, § 12(c).

[74] N.Y. Const. Art. VI, § 12(a).

[75] See NYS Unified Court System 2022 Judicial Positions, Exhibit 5.

[76] See Detailed Acting Supreme Court Judges and their Statutory Count, Exhibit 8.

[77] N.Y. SCPA § 2701. *See* map of courts, Exhibit 3.

[78] 2022 Annual Report New York Unified Court System at 66, https://www.nycourts.gov/legacyPDFS/22_UCS-Annual_Report.pdf; 2019 Annual Report New York at 40, https://www.nycourts.gov/legacypdfs/19_UCS-Annual_Report.pdf.

[79] N.Y. Const. Art. VI, § 9.

[80] *Id.*

[81] *Id.*

[82] N.Y. Ct. Cl. Act § 2.

[83] Irene Sazzone, Court of Claims Clerk, interview May 5, 2023. See Exhibit 5.

[84] *See* Exhibit 5, NYS Unified Court System 2022 Judicial Positions of total number of judges in 2022.

[85] 2022 Annual Report New York Unified Court System at 65.

[86] N.Y. Ct. Cl. Act § 24.

B. Courts Limited to New York City Jurisdiction

1. New York City Civil Court. Established in 1962 by amendment to the constitution,[87] the New York City Civil Court hears legal claims for damages up to $50,000.[88] Civil Court judges also hear small claims matters limited by a damages cap of $10,000,[89] Each borough (county) within New York City has a Civil Court, but it is considered a single citywide court.[90] Judges are elected for ten-year terms.[91] The Civil Court Act authorizes 131 judgeships for the Civil Court,[92] but only 120 seats[93] have actually been funded.[94] The other 11 slots are authorized by the 1982 Session laws, chapter 500, but were never filled.[95] Appeals go to the New York State Supreme Court, Appellate Term.[96] In 2022, of 120 elected Civil Court judges, 48 are sitting in Civil Court,[97] the remaining 30 are assigned to NYC Criminal Court or Family Court,[98] and 42 were designated as Acting Supreme Court Justices and reassigned to hear Supreme Court cases.[99] There is no constitutional cap on the number of Civil Court judges. The Legislature determines the number of seats.[100] Because the New York Constitution does not allow for Civil Court judges to be certificated, they must retire at age 70, even if they have been serving as Acting Supreme Court Justices. In 2022, 347,295 new cases[101] were filed in Civil Court, not including Housing Court, with 202,403 dispositions compared to 244,235 filings and 184,059 dispositions in 2019.[102]

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[87] *Cox v Katz*, 30 A.D.2d 432, 433-35 (1st Dep't 1968) (The court held that neither § 1 nor the equal protection rights of the voters were violated by 1968 N.Y. Laws ch. 987. The court also ruled that that there was no constitutional requirement that judges be allocated solely on the basis of population), *aff'd* 22 N.Y.2d 969 (1968), *cert denied* 394 U.S. 919 (1969).

[88] N.Y. Const. Art. VI, § 15(b); N.Y. NYC Civil Ct. Act § 202 (1984). The jurisdictional amount was $25,000 until 2021, when New Yorkers voted to increase it to $50,000.

[89] N.Y. NYC Civil Ct. Act § 1801 (2022). The housing part, where Housing Court judges decide residential landlord-tenant disputes, is a component of the NYC Civil Court. N.Y. NYC Civil Ct. Act § 110 (2022).

[90] N.Y. Const. Art. VI, § 15(a).

[91] *Id.*

[92] N.Y. NYC Civil Ct. Act § 102-a(1).

[93] This number will increase to 2 judges as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

[94] See NYS Unified Court System 2022 Judicial Positions Chart, Exhibit 5.

[95] New York State Unified Court System 29th Annual Report:2006 at 2 n. d.

[96] N.Y. Const. Art. VI, § 8(a), (d).

[97] New York State Unified Court System, *Judges of the Civil Court of the City of New York*, https://nycourts.gov/courts/nyc/civil/profiles.shtml.

[98] www.nycourts.gov/courts/nyc/civil/judges.shtml

[99] Acting Supreme Court Justices and their Statutory Court 2007 to 2022, Exhibit 8.

[100] N.Y. NYC Civil Ct. Act § 102 (1963).

[101] Cases include civil cases, small claims and commercial claims, not housing claims.

[102] 2022 Annual Report New York Unified Court System at 67, https://www.nycourts.gov/legacyPDFS/22_UCS-Annual_Report.pdf. 2019 Annual Report New York Unified Court System at 41 https://www.nycourts.gov/legacypdfs/19_UCS-Annual_Report.pdf.

2. New York City Housing Court. The Housing Court, a component of the Civil Court, was created in 1972 by amendment of the New York City Civil Court Act.[103] "The Housing Court handles almost all the residential landlord-tenant cases in New York City, including eviction cases filed by landlords, repair cases filed by tenants and by the City of New York, illegal lockout cases filed by tenants, and cases complaining of harassment."[104] Housing Court judges are appointed by the Deputy Chief Administrative Judge for five-year terms.[105] Fifty judges serve[106] in New York City Housing Court.[107] Appeals are heard by the Appellate Term of either the First or Second Department.[108] There is no cap on the number of Housing Court judges.[109] In 2022, the Housing Court received 126,498 new cases and disposed of 79,425 cases compared to 193,523 filings and 221,534 dispositions in 2019.[110]

3. The New York City Criminal Court. Created in 1962, the Criminal Court handles misdemeanors and lesser offenses, and conducts arraignments and preliminary hearings in felony cases.[111] The court includes an arraignment part, an all-purpose part, a felony waiver part, a trial part, a problem-solving court, and a summons part.[112] The New York City Criminal

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[103] N.Y. NYC Civil Ct. Act § 110. The Housing Court began with 16 hearing officers (later reclassified as judges) with three-year terms assigned to four boroughs, excluding Richmond. Dennis E. Milton, *Comment: The New York City Housing Part: New Remedy for an Old Dilemma*, 3 FORDHAM URB. L.J. 267 (1975). In 1997, there were 35 Housing Court Judges. Chief Justice Judith S. Kaye and Chief Administrative Judge Jonathan Lippman, *Housing Court Program: Breaking Ground*, 1 (Sept. 1997), https://nycourts.gov/COURTS/nyc/housing/pdfs/housing_initiative97.pdf.

[104] New York City Housing Court at nycourts.gov, Welcome. https://www.nycourts.gov/COURTS/nyc/housing/welcome.shtml.

[105] See N.Y.S. Unified Court System 2022 Judicial Positions Chart, Exhibit 5.

[106] N.Y. NYC Civil Ct. Act § 110(i) authorizes the court but does not state the number of seats.

[107] New York State Unified Court System, *Housing Court Judges* (May 13, 2022), https://www.nycourts.gov/courts/nyc/housing/judges.shtml. In its January 2018 report to Chief Judge DiFiore, the Special Commission on the Future of the New York City Housing Court, recommended increasing the number of judges by at least 10, in addition to providing each Housing Court judge with two law clerks. Special Commission on the Future of the New York City Housing Court, *Report to the Chief Judge*, 22 (Jan. 2018), http://ww2.nycourts.gov/sites/default/files/document/files/2018-06/housingreport2018_0.pdf. With the 50 Housing Court Judges handling a "surreal" 7,000 cases per judge per year, this increase is "not simply requested but mandated." *Id.*

[108] N.Y. NYC Civil Ct. Act § 1701 (1963).

[109] N.Y. NYC Civil Ct. Act § 110(f).

[110] 2022 Annual Report New York Unified Court System at 67, https://www.nycourts.gov/legacyPDFS/22_UCS-Annual_Report.pdf. 2019 Annual Report New York Unified Court System at 41, https://www.nycourts.gov/legacypdfs/19_UCS-Annual_Report.pdf.

[111] N.Y. Const. Art. VI, § 15(c); N.Y. NYC Crim. Ct. Act § 31 (1996).

[112] Chief Justice Judith S. Kaye and Chief Administrative Judge Jonathan Lippman, *The New York State Courts: An Introductory Guide*, 4 (2000), https://web.archive.org/web/20160304023432/http://nycourts.gov/reports/ctstrct99.pdf.

Court Act authorizes the Mayor of the City of New York to appoint 107 judges,[113] each serving a ten-year term.[114]

As of 2022, 38 judges sit in Criminal Court, while sixty-nine are assigned to the Supreme Court as Acting Supreme Court Justices.[115] Meanwhile, Civil Court judges are routinely assigned to Criminal Court. JHOs, who are retired judges appointed by the Chief Administrative Judge, preside over summons parts.[116] In 2022, 195,620 cases were filed,[117] and 210,026 cases were disposed compared to 278,928 filed in 2019 and 303,44 disposed.[118] Appeals go to the Supreme Court, Appellate Term.[119]

C. Courts of Limited Jurisdiction Outside New York City

1. District Courts. The county District Court is the Long Island analog to the New York City Civil Court. It is a trial court of limited jurisdiction serving Nassau County and the five western towns in Suffolk County.[120] This court has jurisdiction over civil matters seeking monetary damages up to $15,000, small claims matters seeking damages up to $5,000, and landlord-tenant cases.[121] The court's criminal jurisdiction includes misdemeanors and preliminary jurisdiction over felonies.[122] District Court judges are elected to six year terms.[123] Fifty judicial seats are presently authorized.[124] The Legislature creates the districts where there must be at least one judge per district.[125] The seats are apportioned according to population and judicial business.[126] District Court decisions are appealed to the Appellate Term.[127]

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[113] This number will increase by two judges as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

[114] N.Y. NYC Crim. Ct. Act § 20 (1982). The court began with 78 judges to which 29 judges were added.

[115] *See* Exhibit 5 *infra*, NYS Unified Court System 2022 Judicial Positions Chart and Exhibit 6 Sunburst chart of allocation of all Supreme Court Judges.

[116] N.Y. Jud. § 851 (1983). However, JHOs are not mentioned in the current 2023 budget.

[117] Cases include arrests and summons cases, not traffic and parking tickets.

[118] 2022 Annual Report New York Unified Court System at 67, https://www.nycourts.gov/legacyPDFS/22_UCS-Annual_Report.pdf. 2019 Annual Report New York Unified Court System at 41, https://www.nycourts.gov/legacypdfs/19_UCS-Annual_Report.pdf.

[119] N.Y. Const. Art. VI, § 8(a), (d).

[120] N.Y. Const. Art. VI, § 16(a).

[121] N.Y. Const. Art. VI, § 16(d); NY Uniform District Court Act §201.

[122] New York State Unified Court System, *10th JD – Nassau County: District Court*, https://ww2.nycourts.gov/COURTS/10JD/nassau/district.shtml.

[123] N.Y. Const. Art. VI, § 16(h); NY Uniform District Court Act §103(b).

[124] See Exhibit 5, NYS Unified Court System 2022 Judicial Positions Chart.

[125] N.Y. Const. Art. VI, § 16(e)(f).

[126] N.Y. Const. Art. VI, § 16(g).

[127] N.Y. Const. Art. VI, § 8(e).

2. The County Court. The County Court is a court of general jurisdiction outside of New York City,[128] vested with unlimited criminal jurisdiction and civil jurisdiction where the amount in controversy is no more than $25,000.[129] County Court judges are elected to ten-year terms.[130] Of the 128 authorized County Court judges[131] 55 also serve as Family Court and Surrogate's Court judges.[132] County Court decisions are appealed to the Appellate Division.[133] The County Courts in the Third and Fourth Departments (although primarily trial courts) hear appeals from cases originating in the city, town and village courts.[134] The Legislature determines the number of seats.[135]

3. Town and Village Courts. (Known collectively as the "Justice Courts") are local courts that handle traffic tickets, criminal matters, small claims matters, and local code violations.[136] Town justices are elected to four year terms.[137] Justices in these courts are not required to be lawyers, and indeed, the majority are not.[138] Within the 56 counties of New York State, excluding New York City, there are 1,270 town and village courts with 2,200 justices.[139] There is no cap on the number of judges for the Justice Courts; the number is set by the local community.[140] Two or more towns within a county, however, may combine resources to share a town and village judge after conducting a study and a public hearing.[141] Appeals are heard by the County Courts and the Appellate Terms.[142]

4. Quasi-Judicial Officers. The courts are assisted by quasi-judicial officers, including referees, JHOs, magistrates in Family Court only, and discovery masters. Quasi-judicial officers are part of the fabric of the courts. For example, courts have been referring

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[128] N.Y. Const. Art. VI, § 10.

[129] N.Y. Const. Art. VI, § 11(a).

[130] N.Y. Const. Art. VI, § 10(b).

[131] NYS Unified Court System 2022 Judicial Positions Chart, Exhibit 5.

[132] "The Legislature may at any time provide that outside the city of New York the same person may act and discharge the duties of county judge and surrogate or of judge of the family court and surrogate, or of county judge and judge of the family court, or of all three positions in any county." N.Y. Const. Art. VI, § 14.

[133] N.Y. CPLR 5701 (1999); NY Const. Art. VI, § 5.

[134] N.Y. Const. Art. VI, § 17.

[135] Judiciary Law § 182 was last increased by 1 judicial seat in 2019 and 2 added seats in 2005.

[136] New York State Unified Court System, *Town & Village Courts: Overview* (May 5, 2022), https://www.nycourts.gov/courts/townandvillage/.

[137] N.Y. Const. Art. VI, § 17(d).

[138] *People v. Skrynski*, 42 N.Y.2d 218, 221 (1977).

[139] N.Y. Const. Art. VI, § 17; New York State Unified Court System, *Town & Village Courts: Introduction* (May 6, 2022), https://www.nycourts.gov/courts/townandvillage/introduction.shtml.

[140] N.Y. CLS Vill. § 3-301(2)(a) (2016).

[141] N.Y. CLS UJCA § 106-b (2018).

[142] N.Y. Const. Art. VI, § 8(e).

long-form accountings to referees even before the adoption of the 1777 Constitution.[143] Now, courts refer certain designated matters on consent of the parties, and sometimes without it, to referees pursuant to CPLR 4317.[144] For example, some referees hold hearings on issues clearly delineated by a judge such as legal fees, mediation of cases, and supervision of discovery. Since 1983, Judiciary Law §850 *et seq*. has provided for the designation and compensation of judicial hearing officers who must be former judges[145] and who are paid a modest per diem.[146] The Chief Administrative Judge appoints JHOs, who have the physical and mental capacity to perform, when their services are necessary.[147] Procedurally, in regard to civil actions, various sections of the CPLR were amended to incorporate JHOs in all of the provisions relating to referees.[148] JHOs, however, are traditionally cut from the budget during a financial crises. In the 2011 budget crunch, JHOs were quickly cut from the budget.[149] More recently, during COVID when JHOs were eliminated and a hiring freeze decreased the number of law clerks who had regularly conducted discovery conferences and moved cases through discovery, retired attorneys volunteered to help the courts address discovery delays.[150]

Under CPLR 3104, the parties may agree to the appointment of a special referee who is an attorney and agree to share the fees that the special referee charges.[151]

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[143] N.Y. CPLR 4317 (2006). McKinney's Legislative Studies and Reports at 534.

[144] "(a) Upon consent of the parties. The parties may stipulate that any issue shall be determined by a referee. Upon the filing of the stipulation with the clerk, the clerk shall forthwith enter an order referring the issue for trial to the referee named therein. Where the stipulation does not name a referee, the court shall designate a referee. Leave of court and designation by it of the referee is required for references in matrimonial actions; actions against a corporation to obtain a dissolution, to appoint a receiver of its property, or to distribute its property, unless such action is brought by the attorney-general; or actions where a defendant is an infant.
(b) Without consent of the parties. On motion of any party or on its own initiative, the court may order a reference to determine a cause of action or an issue where the trial will require the examination of a long account, including actions to foreclose mechanic's liens; or to determine an issue of damages separately triable and not requiring a trial by jury; or where otherwise authorized by law." *Id*.

[145] N.Y. Jud. §§ 851, 852 (1983).

[146] *Id*.; See John Caher, *Volunteer JHOs Refuse to Abandon Court System*, NYLJ (Online) December 1, 2011. https://www.law.com/newyorklawjournal/almID/1202533977804/

[147] N.Y. Jud. §§ 851, 852 (1983).

[148] S*ee* N.Y. CPLR 105, 3104, 4301, 4312, 4313, 4315, 4321, 7804. (*See, Lipton v. Lipton*, 128 Misc. 2d 528, 530 (N.Y. Sup. Ct. 1985), *affd.* 119 A.D.2d 809, 501 N.Y.S.2d 437 (1986)). For a history of JHOs, see *Schanback v Schanback*, 130 A.D.2d 332 (2d Dep't 1987).

[149] Joel Stashenko, With Budget in Flux, Administrators Put the Brakes on Use of JHOs, March 16, 2011, https://www.law.com/newyorklawjournal/almID/1202486286989/; CA Joel Stashenko, Welcomes as Volunteers JHOs Cut in Budget Crunch, April 26, 2011, https://www.law.com/newyorklawjournal/almID/1202491460597/.

[150] Grant, Jason, Citing Budget Cuts, Justice Denies Request for Judicial Hearing Officer for Discovery, NYLJ, Oct. 9, 2020.

[151] S*ee* N.Y. CPLR 3104(b) (1983).

New York Court Rule § 202.14 allows judges to appoint attorneys, known as "special masters," to supervise discovery.[152]

D. Administration of the Courts

Divided into four broad geographic departments and 13 smaller judicial districts, the Unified Court System is administered by a combination of stakeholders.

First and foremost, "[t]he chief judge of the court of appeals shall be the chief judge of the state of New York and shall be the chief judicial officer of the unified court system."[153] The Chief Judge carries out this function with the assistance of the Chief Administrative Judge, who is appointed by the Administrative Board of the Courts and charged with oversight of the Office of Court Administration (OCA).[154] Consisting of the Chief Judge and the presiding justices of the four Appellate Divisions, [155] the Administrative Board serves an advice and consent role with respect to the Chief Administrative Judge's establishment of statewide administrative standards, policies, and rules regulating practice and procedure in the courts.[156]

OCA is responsible for all of the non-substantive functions of the court system. Created in 1955 by the Legislature, OCA represented a major step towards statewide management of court operations.[157] Its operational divisions include Division of Administrative Services, Division of Professional and Court Services, Division of Human Resources, Division of Technology, Division of Financial Management, Counsel's Office, Court Facilities Unit, Offices of Court Research, Office of Public Affairs, Office of Public Information, Office of Workforce Diversity, Office of Inspector General, Internal Audit Services and Department of Public

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[152] 22 NYCRR § 202.14 (1988).

[153] N.Y. Const. Art. VI, § 28.

[154] *Id.*; N.Y. Jud. § 213 (1978).

[155] N.Y. Const. Art. VI, § 28(a).

[156] N.Y. Jud. § 213. N.Y. Jud. §§ 214 and 214-a also provide for the Judicial Conference of the State of New York, which has responsibility for surveying current administrative practices in the courts, compiling statistics and proposing legislation and regulations. Judiciary Law § 214 mandates both the composition and selection of the Judicial Conference, which consists of representative judges of the various courts within the Unified Court System with two-year terms and *ex officio* members, which include Legislators from the Senate and Assembly Judiciary and Codes Committees. Although the Judicial Conference was continued in 1978, the year that § 213 was enacted, the Judicial Conference was effectively replaced by OCA with the Administrative Board of the Judicial Conference continuing. Compare to state courts and federal courts which are governed by such judicial conferences. See 49-State Survey, Appendix, e.g. Alaska, California, Georgia, Kansas, Louisiana, Minnesota, Montana, New Hampshire, Texas and Utah. Illinois recently reinstated its Judicial Conference. *Id*. The Council notes the Judicial Conference is an existing structure that could be redeployed to conduct the weighted caseload analysis recommended here. See Exhibits 10a and 10b for California's 2020 biannual assessment of its judicial needs.

[157] Joseph W. Bellacosa, *Judicial Administration – Spell it O-C-A NOT O-R-C-A*, 58 N.Y.S. Bar J. 6 (1986).

Safety.[158] The Chief Administrative Judge has a long list of tasks, including issuing an annual report with statistics.[159] Generally, he or she must "(j) Collect, compile and publish statistics and other data with respect to the unified court system and submit annually, on or before the [15th] day of March, to the [L]egislature and the governor a report of his or her activities and the state of the unified court system during the preceding year."[160] Specifically, he or she must:

> "(u-1) Compile and publish data on misdemeanor offenses in all courts, disaggregated by county, including the following information:
>
> (i) the aggregate number of misdemeanors charged, by indictment or the filing of a misdemeanor complaint or information;
>
> (ii) the offense charged;
>
> (iii) the race, ethnicity, age, and sex of the individual charged;
>
> (iv) whether the individual was issued a summons or appearance ticket, was subject to custodial arrest, and/or was held prior to arraignment as a result of the alleged misdemeanor;
>
> (v) the precinct or location where the alleged misdemeanor occurred;
>
> (vi) the disposition, including, as the case may be, dismissal, acquittal, adjournment in contemplation of dismissal, plea, conviction, or other disposition;
>
> (vii) in the case of dismissal, the reasons therefor; and
>
> (viii) the sentence imposed, if any, including fines, fees, and surcharges."[161]
>
> and
>
> "(v-1) Compile and publish data on violations, to the greatest extent practicable, in all courts, disaggregated by county, including the following information:
>
> (i) the aggregate number of violations charged by the filing of an information;
>
> (ii) the violation charged;

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[158] New York State Unified Court System, *Administrative Structure of the New York State Unified Court System* as of July 2022. The chart is available from the drafting committee.

[159] N.Y. Jud. § 212(1)(j) (2021).

[160] *Id.*

[161] N.Y. Jud. § 212(u-1).

(iii) the race, ethnicity, age, and sex of the individual charged;

(iv) whether the individual was issued a summons or appearance ticket, was subject to custodial arrest, and/or was held prior to arraignment as a result of the alleged violation;

(v) the precinct or location where the alleged violation occurred;

(vi) the disposition, including, as the case may be, dismissal, acquittal, conviction, or other disposition;

(vii) in the case of dismissal, the reasons therefor; and

(viii) the sentence imposed, if any, including fines, fees, and surcharges."[162]

And all of this information must be publicly available on the court's website.[163]

PART II: ORIGINS OF THE CONSTITUTIONAL CAP FOR SUPREME COURT JUSTICES: A BRIEF HISTORY

The struggle to determine and secure the appropriate number of Supreme Court Justices necessary to properly meet the needs of the state's expanding population dates back to at least the 1820s and 1830s at a time when New York City and State experienced tremendous population and commercial growth. By then, the need for greater elasticity to meet the demand for judicial resources among a growing population was widely recognized. Indeed, the judicial system in place in 1820 was "framed" on the basis of a population of 1,372,812, which had doubled by 1845 to 2,604,495, the last census.[164] Likewise, the wealth of the state had grown even more than the population, unavoidably causing more disputes and controversies among "an active, energetic and prosperous population."[165] The Supreme Court (known at that time as the Supreme Court of Judicature), however, "[was] insufficient in the number of its judges to dispose of the great mass of business to be done in it . . . its calendars [were] so [burdened] and

[162] N.Y. Jud. § 212(v-1).

[163] N.Y. Jud. § 212(w-1). "The OCA-STAT Act Dashboard aggregates the case-level data in the OCA-STAT Act Extract into dynamic tables and graphs. Both the extract and dashboard contain information on cases arraigned from the beginning of November 2020, refreshed monthly to add cases from the previous month and to update information from months prior. For example, the extract posted in December will include arraignments through November 30th of that year." New York State Unified Court System, *OCA-STAT Act Report* (2020), http://ww2.nycourts.gov/oca-stat-act-31371.

[164] Charles H. Ruggles, Chairman of the Judicial System Committee, Debates and Proceedings in the New York State Convention for the Revision of the Constitution 371 (1846) (Reporters: S. Croswell and R. Sutton).

[165] *Id.*

surcharged with business that suitors and counsel, after travelling great distances to arrive at the court, [were] frequently compelled to wait in vain for the opportunity to be heard."[166]

The widespread dissatisfaction with the court system was one of the principal reasons that New York's citizens called for a Constitutional Convention of 1846, which resulted in the significant overhaul and reform of the judiciary.[167] Of particular significance, the 1846 Constitution was the first time that the state was divided into judicial districts, and that constitution provided the first formula for the appointment of justices with a cap based on the population to provide for a sufficient number of justices while, at the same time, preclude the legislative urge to create too many judicial seats at low salaries—a practice that had become prevalent under the prior 1820 judicial structure.[168]

The specific constitutional cap adopted was "one judge to every 72,347 inhabitants," calculated per district.[169] But the proposed system contemplated future expansion: "The system proposed, is, however, capable of expansion without further constitutional provision. This may be done by adding to the number of districts after the state census of 1855; or by the establishment of superior courts if the Supreme Courts should be found overcharged with business."[170]

Indeed, the population-based mechanism for calculating the maximum number of allowable Supreme Court justices has evolved over time. In 1905, the ratio was 1:80,000, or a fraction over 40,000,[171] and in 1925, it dropped to 1:60,000, or a fraction over 35,000.[172] It was not until 1963, that the current formula of 1:50,000, or a fraction over 30,000 was established.[173]

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[166] *Id.*

[167] *Id.*

[168] N.Y. Const. Art. VI, § 4.

[169] Charles H. Ruggles, Chairman of the Judicial System Committee, Debates and Proceedings in the New York State Convention for the Revision of the Constitution 373 (1846) (Reporters: S. Croswell and R. Sutton).

[170] *Id.*, at 373-374.

[171] Charles Z. Lincoln, The Constitutional History of New York from the Beginning of the Colonial Period to the Year 1905: Showing the Origin, Development, and Judicial Construction of the Constitution 524 (Vol. 3 1905). This can be found at: https://nysl.ptfs.com/#!/s?a=c&detached=1&docid=88515.

[172] James C. Cahill, Basil Jones & Austin B. Griffin, Cahill's Consolidated Laws of New York: Being the Consolidated Laws of 1909, as Amended to July 1, 1930, Officially Certified by the Secretary of State and Entitled to be Read in Evidence (Vol. 2 1930). On November 3, 1925, the popular vote on the ballot imitative was 1,090,632 for the amendment of Article 6 (relating to organization of state judicial system) and 711,018 against. https://history.nycourts.gov/wp-content/uploads/2019/01/Publications_Votes-Cast-Conventions-Amendments-compressed.pdf.

[173] N.Y. Const. Art. VI, § 6. The Nov. 7, 1961 ballot proposal amended the Constitution by repealing article 6 as of Sept. 1, 1962 and replacing it with a new article 6 (providing for reorganization of the state court system). https://history.nycourts.gov/wp-content/uploads/2019/01/Publications_Votes-Cast-Conventions-Amendments-compressed.pdf.

The current version of Article VI, Section 6(d), of the New York State Constitution was adopted in 1963 and reads as follows:

> [The Legislature] may increase the number of justices of the supreme court in any judicial district, except that the number in any district shall not be increased to exceed one justice for fifty thousand, or fraction over thirty thousand, of the population thereof as shown by the last federal census or state enumeration. The Legislature may decrease the number of justices of the supreme court in any judicial district, except that the number in any district shall not be less than the number of justices of the supreme court authorized by law on the effective date of this article.

Section 6(b) of Article VI provides a mechanism for reapportioning Supreme Court justices, providing that: "[o]nce every ten years the Legislature may increase or decrease the number of judicial districts or alter the composition of judicial districts and thereupon re-apportion the justices to be thereafter elected in the judicial districts so altered. Each judicial district shall be bounded by county lines." The adoption of the cap in 1963, however, has done little to alleviate the growing demands on the Court. When the 50,000-person formula went into effect, the population in New York State was 18.2 million making the cap 364 justices.

The number of justices finally hit the 1963 census population cap in 2022.

Meanwhile, New York courts processed fewer than one million new cases annually in the 1950s.[174] That number exploded in the 1970s to several million per year. Currently, over 3 million new cases are filed in New York trial courts each year.[175] Yet, the number of elected justices authorized by the Legislature has not significantly changed since 1990, despite numerous efforts at reform.[176]

As early as 1967, only four years after the 50,000-formula was adopted, the Temporary State Commission on the Constitutional Convention argued for the necessity of more elected justices to the Supreme Court and decried the inaction of the Legislature to increase the number of justices by stating the following:

> From 1905 to 1967, the number [of Supreme Court justices] has been increased from 76 to 199 – 27 of whom sit only as Appellate Division justices, leaving 172 to serve in the Supreme Court itself. In those years, the New York State population increased from about 6,500,000 to

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[174] L. Danial Feldman and Marc C. Bloustein, New York State's Unified Court System, New York's Broken Constitution: The Governance Crisis and the Path to Renewed Greatness 85 (Peter J. Galie, Christopher Bopst & Gerald Benjamin eds., 2016).

[175] New York State Unified Court System, *2021 Annual Report* 59 (2021), https://www.nycourts.gov/legacyPDFS/21_UCS-Annual_Report.pdf for 5-year comparison and pie chart showing filings by case type.

[176] See Exhibit 12 for changes to N.Y. Jud. Law 140-a.

> 18,000,000 persons. During the same period, the number of cases noticed for trial in the Supreme Court and the number of dispositions substantially increased.
>
> Relying on this record, proponents of change assert that additional Supreme Court justices are clearly required and that reasons not having to do with the appropriate administration of justice in New York State have been responsible for the Legislature not authorizing the increase. Some accordingly propose that the [c]onstitution either specify a minimum number of Supreme Court justices, in addition to those now serving, or contain a formula for mandatory increases to reflect increases in population, increases in the interval from note of issue to trial or some other index reflecting the level of judicial business in a judicial department or in the court system itself. [177]

In 1967, because the New York State Constitution did not adequately address the needs of Supreme Court justices in the state, two lawsuits filed in federal court sought a declaration that the Legislature rectify delays caused by the shortages of judges on the trial level.[178] The federal courts dismissed both actions because they lacked jurisdiction to hear the matters and observed that the problem should be resolved by the Legislature or an upcoming Constitutional Convention pursuant to the New York Constitution.[179]

Currently, 12 of 13 judicial districts are below the maximum number of elected Supreme Court justices, which they are allowed under the constitution.[180] Indeed, the only judicial district that has the requisite number of justices based on the 1:50,000-ratio is the First Judicial District (New York County) which exceeds the Constitutional Cap by four judges. The number of elected justices in every other judicial district is under the 2020 cap.

Richmond County, which became its own judicial district in 2007, illustrates the underrepresentation poignantly. At the time the Thirteenth Judicial District was created for only Richmond County, an inadequate number of Supreme Court justices were assigned to it. As of 2007, it was estimated that the population of Richmond County was 470,728.[181] Thus, applying the constitutional formula to the county's population, Richmond County should have been assigned nine Supreme Court justices. Instead, only three elected justices were authorized for the new district.[182] Currently, there are seven judicial seats allocated to Richmond County which

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[177] Temporary State Commission on the Constitutional Convention, The Judiciary, March 31, 1967, at 155.

[178] *See New York State Asso. of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148 (S.D.N.Y. 1967) (sought to compel court reapportionment designed to eliminate court delay in the Supreme and lower courts under 14th Amendment); *Kail v. Rockefeller*, 275 F. Supp. 937 (E.D.N.Y. 1967).

[179] *Id.*

[180] See Exhibit 4 for comparison of number of justices allowed under 2020 census and actual number. See Exhibit 13 for bar chart showing number of acting judges as percent of total.

[181] Richmond County, New York (NY), City-Data.com, www.city-data.com/county/Richmond_County-NY.html.

[182] N.Y. Jud. Law § 140-a.

will increase to 9 in 2023.[183] Based on the 2020 Census, however, there should be ten elected Supreme Court justices.[184]

Currently, Judiciary Law §140-a authorizes 364 statewide elected judicial seats for the Supreme Court.[185] Using the 2020 census numbers, the New York Constitution's cap, however, allows for 401 seats. As set forth below, the 364 authorized seats are woefully inadequate to meet the demands placed on the Court, and legislative inaction has necessitated workarounds to meet such demands. While these workarounds are provided for by the constitution on a temporary basis, they are anything but temporary, demonstrating the dire need.

PART III: FACTORS AFFECTING THE CURRENT BURDEN ON THE SUPREME COURT

The challenge New York courts face in handling a caseload with over 3 million new matters annually on average[186] is further complicated by unequal distribution of judicial resources within the current framework. One poignant illustration of this problem occurred in the 9th judicial district.[187] "According to state court system figures for 2018, Orange County had 18.4% of the district population, 19.9% of the new Supreme Court case filings and 12.5% of the Justices. The numbers work out to 456 cases per justice in Westchester County (for 19 justices), to 752.4 per justice in Orange County, and more than 1,000 each in Rockland and Dutchess." [188] What is most telling about this situation is how it reflects upon the efficacy of the New York Constitution's intent to have one judge per 50,000 New York citizens. Currently, Westchester County has one justice per 55,803 people, Putnam has one justice per 32,556 people, while

[183] *Id*. See Exhibit 4 for comparison of number of justices allowed under 2020 census and actual number.

[184] See Exhibit 4 for comparison of number of justices allowed under 2020 census and actual number.

[185] This number will increase by three judges as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

[186] For five-year comparison of new filings in trial courts, see New York State Unified Court system, *Annual Report of the Chief Administrator of the Courts for 2021,* at 59, https://www.nycourts.gov/legacyPDFS/21_UCS-Annual_Report.pdf.

[187] The ninth judicial district, which presently has 33 elected Supreme Court judges, is comprised of Dutchess, Orange, Putnam, Rockland and Westchester counties. (See Exhibit 3 for a map of judicial districts.) https://iapps.courts.state.ny.us/judicialdirectory/Bio?judge_id=J/29DKCbsRMt464/bnx7tw%3D%3D. This number will increase to 34 judges as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

[188] Heather Yakin, *Local District Supreme Court Imbalance Concerns Lawyers*, Times Herald-Record (Middleton) (September 23, 2019).

Rockland County has only one justice per 112,000 people.[189] Population and caseloads, however, are not the only factors affecting the administration of justice.

A. Special Factors that Influence the Number of Available Trial Judges

A number of factors unique to New York's court system affect the allocation of judges to trial courts.

1. Assignment of Justices to the Appellate Courts

The appointment of Appellate Division judges contributes to the long-term and short-term shortage of trial court judges in the Supreme Court. As noted above, the Appellate Division is a part of the Supreme Court, and under Article VI, section 4 of the constitution, the judges who populate the Appellate Divisions must first be elected Supreme Court justices—*i.e.*, elected trial court judges sitting in Supreme Court. Acting Supreme Court justices designated to serve on the Supreme Court bench are not eligible to serve on the Appellate Divisions because they were not elected to the Supreme Court. Thus, when a Supreme Court trial judge is assigned to the Appellate Division to fill a vacancy, the number of elected Supreme Court justices presiding in the trial courts necessarily decreases on a 1:1 basis, temporarily. Though temporary, this movement of judges can be devastating to the trial court if several trial judges are appointed to a particular Appellate Division simultaneously—a scenario which occurred in New York County in 2017 when the governor appointed four Supreme Court trial judges to the Appellate Division, First Department.[190] The process that occurs to fill the void when a trial level judge is appointed to the Appellate Division is to assign the trial court cases handled by the newly appointed Appellate Division judge to the remaining trial judges who may be either elected Justices or acting justices. Alternatively, a new acting justice may be transferred from a lower court to take the caseload.

When an appellate justice retires, resigns, or turns 70 and remains as a certified judge, the change creates a new Supreme Court vacancy, which will be filled at the next election. The justice elected to that vacant seat will go to the trial court, not one of the Appellate Divisions.

An additional eight judges in the Appellate Divisions are certificated judges over 70 years of age as of 2022.[191]

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[189] US Census as of April 1, 2020, Census.gov, http://ww2.nycourts.gov/courts/9jd/landing-courts.shtml.

[190] In July 2017, the governor appointed four trial judges from Supreme Court, N.Y. County, Civil, to the Appellate Division. David B. Saxe, *End of Summer at the First Department*, N.Y.L.J., at 6 (Aug. 30, 2017).

[191] See 2022 Judicial Positions, Exhibit 5. This number will increase by 3 as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

A further problem arises from the constitutional provision under which each Appellate Division presiding justice may certify to the governor that more judges "are needed for speedy disposition of the business before it."[192] And upon request by the presiding justice of each Appellate Division, the governor "may also . . . make temporary designations" of Appellate Division justices "in case of the absence or inability to act of any justice in such appellate division, for service only during such absence or inability to act."[193] Indeed, even though the constitution authorizes only a total of 23 justices in the four Appellate Division departments,[194] 31 additional elected Supreme Court justices are serving in the Appellate Divisions as "temporary emergency" judges.[195]

Such temporary designations have effectively become permanent seats, with no provision for election of a new Supreme Court justice to fill the resulting void in the trial court. Our Proposal #2 (at p. 62, *infra*) would address this problem by providing that when a presiding justice of a particular Appellate Division expresses such a serious need, which is anything but temporary, it would create a Supreme Court vacancy to be filled at the next election. Such an increase in the number of Supreme Court seats would be permissible if the cap on the number of Supreme Court judges is removed.

Similarly, the appointment of Appellate Term justices who assume their appellate duties while maintaining a trial court docket necessarily reduces the amount of time they have to devote to their trial level work. In 2022, seventeen judges were assigned to the Appellate Terms plus two additional certificated judges.[196]

2. Mandatory Retirement Age

New York State's mandatory retirement age for judges and the practice of certificating judges who reach mandatory retirement also impact the availability of trial judges. The mandatory retirement age for judges in New York is 70.[197] Judges retire from the court to which

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[192] N.Y. Const. Art. VI, §4e. Likewise, "when the need for such additional justice or justices shall no longer exist, the appellate division shall so certify to the governor." *Id*.

[193] N.Y. Const. Art. VI, §4(d).

[194] N.Y. Const. Art. VI, §4(b).

[195] First Department – 17 justices. *See* New York State Unified Court System, *Justices of the Court, First Department*, http://www.nycourts.gov/courts/AD1/justicesofthecourt/index.shtml.

Second Department – 21 justices. *See* Supreme Court of the State of New York Appellate Division, *Justices of the Court, Second Judicial Department*, http://www.nycourts.gov/courts/ad2/justices.shtml.

Third Department – 11 justices. *See The Members of the Court*, http://www.nycourts.gov/ad3/Justices.html.

Fourth Department – 11 justices. *See* Supreme Court of the State of New York, *Justices of the Court, Fourth Judicial Department*, http://www.nycourts.gov/courts/ad4/Court/Judges.html.

[196] See 2022 Judicial Positions, Exhibit 5.

[197] N.Y. Const. Art. VI, §25(b).

they are elected or appointed—not from the Supreme Court to which they are assigned as acting justices. In theory, every retirement, which occurs on or before December 31st of the year in which the retiring justice reaches 70, creates a vacancy. So that there is no gap between the retiring elected justice's term and an incoming justice's term, the vacancy is typically filled in the election cycle of the year the retiring justice turns 70. In the case of a retiring appointed judge in a lower or other court, the appointing authority has the responsibility to fill the vacancy at some point after the retiring judge steps down, with the timing of such appointment entirely within the discretion of the appointing authority. Thus, in theory, there should be no net loss in the number of constitutionally-elected or appointed judges from any particular court or within any particular jurisdiction brought about by the retirement of a sitting judge, although in the case of a vacant appointed seat, the appointing authority could conceivably leave the seat vacant indefinitely.[198] If a judge who reaches 70 decides to apply for certification and is so certificated, the court enjoys the benefit of an additional judge since his or her seat is also filled by election.

3. Certification

The constitution includes an exception to the mandatory retirement age which allows for the certification of elected Supreme Court justices who have reached 70 years of age where it is "necessary to expedite the business of the court and [the retiring justices are] mentally and physically able and competent to perform the full duties of such office."[199] Under this exception, Court of Appeals judges may conceivably continue to serve in the Supreme Court as certificated justices.[200] The certification is valid for two years and may be extended for "additional terms of two years" "until the last day of December in the year in which [the Justice] reaches the age of seventy-six."[201] Notably, certification increases the number of sitting Supreme Court justices beyond that expressly authorized by the Legislature. In other words, certificated judges do no take up a constitutional Supreme Court seat, which as noted above, is filled through the usual political and elective process, and are not taking up a position limited by the Constitutional Cap or the number of seats that the Legislature has decided to authorize. Thus, the practice of certificating judges has been a valuable means of helping to alleviate the shortage of

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[198] Corinne Ramey, *Court Official Blast Mayor de Blasio for Delays on Judges*, Wall St. J. (Jan. 2, 2019); Corinne Ramey, *New York City Council Members Criticize Mayor for Delayed Court Appointments*, Wall St. J. (April 17, 2017); Rebecca Davis et. al., *Cuomo Appoints 10 Appeals-Court Justices Amid Criticism of Delays*, Wall St. J. (Feb. 18, 2016).

[199] N.Y. Const. Art. VI, § 25(b); David Saxe, Chief Judge's inquiry into dissents intrudes on Judicial Independence, N.Y.L.J. (Online) (January 23, 2019); Deposition of Lippman ordered in suit against OCA over Certification, N.Y.L.J. (Online) (January 24, 2007).

[200] N.Y. Const. Art. VI, § 25(b); Joel Stashenko, Pigott seeks return to trial-level work after retirement, N.Y.L.J. (October 26, 2016) at 1, col. 5; see also Timothy P. Murphy, Judge Pigott returns to trial bench after Illustrious Appellate Career, New York State Bar Association Leaveworthy, Vol. VI No. 1 (2017).

[201] *Id.*

constitutionally-elected and appointed judges.[202] In 2019, 71 certificated justices were in Supreme Court, Appellate Divisions, and administrative posts while the number of certificated judges in 2022 dropped to 46 with 37 certificated judges in Supreme Court, eight in the Appellate Divisions and one in administration.[203]

The significance of certification as a stopgap measure has become all the more evident with OCA's decision not to re-certificate some 46 judges in response to a possible $300 million cut to the 2021 judiciary budget because of the COVID pandemic's economic fallout.[204] This created significant consternation in the legal community about the chaos that would ensue if the certificated judges at issue were effectively terminated, as OCA would be required to re-assign some 21,000 cases to an already over-taxed judiciary.[205] On December 31, 2020, the New York State Supreme Court ruled that OCA's decision to decline the application of 46 Supreme Court justices to serve as certificated judges for the years 2021-2022 was "annulled as arbitrary and capricious."[206] But that decision was reversed.[207] In the meantime, by agreement 20 of those 46

[202] In 2017, 39 of 43 applicants were approved for certification. Joel Stashenko, *Productivity of Judges Weighed in Extending Judicial Terms,* N.Y.L.J. (Online) (December 2, 2016). In 2016, 42 judges applied for two-year terms. Joel Stashenko, *42 Judges Seek Terms Beyond Mandatory Retirement Age*, N.Y.L.J. (August 15, 2016). In 2015, 34 judges were approved to begin two-year term, totaling 70 judges serving. Joel Stashenko, *Judges Serve Past Retirement Age*, N.Y.L.J. (Online) (January 16, 2015); John Caher, *40 Judges Certificated by Administrative Board*, N.Y.L.J. 1, col. 2 (December 24, 2013); Leigh Jones, *Facing the Future At 70, Judge Wonders if Certification Is an Option,* N.Y.L.J. (Online) (April 14, 2003). In 1997, thirty-one judges were approved for certification. *Certification Issued to 31 Judges*, N.Y.L.J. 30 (September 2, 1997). Clearly, the courts depend on these experienced judges to supplement the deficiency and the continued availability of these judges is presumed.

[203] *See* NYS Unified Court System 2022 Judicial Positions Chart, Exhibit 5.

[204] *Pocket Change? Noncertification of Older Judges Barely Makes Dent in Resolving Budget Cut,* N.Y.L.J. (Online) (March 4, 2021); Hon. Carmen Valesquez et.al., *Coverage of Judge Recertification Issue Missed Key Points; Letters to the Editor*, N.Y.L.J. 6, col. 4 (January 5, 2022); Summons and Complaint, NYSCEF 1, *Gesmer et al v. The Administrative Board of the New York State Unified Court System et al*, (N.Y. Sup. Ct., Suffolk County, Index No. 616980/2020); Petition, NYSCEF 1; *Supreme Court Justices Association of the City of New York, Inc. et al v. The Administrative Board of the New York State Unified Court System et al* (N.Y. Sup. Ct., Suffolk County, Index No. 618314/2020).

[205] *Hon. Ellen Gesmer et al v. The Administrative Board of the New York State Unified Court System et al*, No. 616980/2020 (N.Y. Sup. Ct. Suffolk Cnty) NYSCEF 1, Petition and Complaint.

[206] *Id*., NYSCEF 127, Decision. Supreme Court Judges Association of the State of New York v. Administrative Board of New York State Unified Court System, Index No. 618314/2020, Suffolk County, NYSCEF Doc. No. 1 (Petition) ¶44].

[207] *Gesmer v Admin. Bd. of New York State Unified Ct. Sys.*, 194 A.D.3d 180 (N.Y. App. Div. 2021).

judges returned to the bench.[208] The ousted judges' litigation against the Chief Judge was ultimately dismissed in the New York State Court of Appeals as moot.[209]

4. Unexpected Vacancies

In addition to the judges who retire at 70, sometimes there are unexpected circumstances that create vacancies, such as deaths, retirements before age 70, or election of a Civil Court judge to a Supreme Court seat, leaving a vacant Civil Court seat that cannot be filled by way of election until the following election cycle. When such unexpected vacancies arise, there is no guarantee that they will be filled within reasonable time.[210] In the case of unexpected vacancies of elected judicial seats, the vacancies are filled in the next election cycle. In the interim, an appointing authority typically fills the seat with a temporary appointment—in the case of the Supreme Court, the governor; in the case of the Civil Court, the Mayor.[211] In the case of appointed seats, vacancies are filled by the regular appointing authority at a time of its choosing, or in the case of the Court of Appeals[212] by the statutory deadline[213] (e.g., the Court of Appeals, Court of Claims, Family Court, Criminal Court). Delays, however, by the governor or a Mayor in filling judicial vacancies has a profound impact on the courts.

5. Legislative Changes that Impact the Trial Courts

New legislation can result in a sudden and dramatic increase in new types of matters that are assigned judges without a corresponding increase in the number of judges to handle the expanded workload. Such legislation includes laws that (i) establish new procedures that increase the requirements for access to the courts and utilization of court resources, or (ii) define additional new substantive provisions that necessarily broaden judicial responsibilities. Examples include:

- The increase to the jurisdictional limit of the New York City Civil Court from $25,000 to $50,000 without increasing the number of judges;[214]

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[208] Ryan Tarinelli, *Nearly 20 Older Judges Return After Having Been Ousted from the Bench*, N.Y.L.J. (June 18, 2021).

[209] *Gesmer v. Admin. Bd. of New York State Unified Ct. Sys.*, 37 N.Y.3d 1103 (N.Y. App. Div. 2021).

[210] N.Y. Const. Art. VI, § 21; *see* Andrew Denney, *DeBlasio Counsel Sees Difficulty in Filling Vacant Civil Court Seats*, N.Y.L.J. (April 17, 2017).

[211] N.Y. Const. Art. VI, § 21.

[212] N.Y. Const. Art. VI, § 2.

[213] N.Y. Jud. Law §68.

[214] Jane Wester, Voters Approve Raised Cap for New York City Civil Court Claims, But Lawyers Warn More Judges Will Be Needed, N.Y.L.J. 1, col. 3 (November 4, 2021). https://www.law.com/newyorklawjournal/2021/11/03/voters-approve-raised-cap-for-nyc-civil-court-claims-but-lawyers-warn-more-judges-will-be-needed/.

- The passage of an important law guaranteeing the right to a jury trial for persons accused of B misdemeanors in NYC, a right long enjoyed by defendants outside NYC.[215] The immediate effect of this will be to discourage prosecutors from "reducing" A misdemeanor charges to B misdemeanor charges for the purpose of eliminating the jury trial right, as prosecutors have been doing for years. This could result in more jury trials, which would require more judicial resources;

- The 2019 enactment of the Child Victim Act changing the statute of limitations for such crimes from 23 to 55 for sex abuse they experienced prior to age 18.[216] During the two-year window, over 9,000 cases were filed.[217] There was no increase in the number of judges to manage these new cases;

- The Legislature's decision in 2015 to confer jurisdiction over spousal support matters on the Family Court. But in doing so, the Legislature did not allocate funds or other resources for training, additional personnel, and changes in the computer system and forms;[218]

- The creation in 2017 of youth courts in connection with the "Raise the Age" legislation, which radically altered the treatment of youths charged with adult crimes, taking Supreme Court and Family Court judges out of their regular assignments and making them dedicated youth part judges;[219]

- The number and variety of Penal Law offenses has grown exponentially in recent years. Such offenses include highly complex crimes, such as

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[215] 2021 N.Y. Laws, ch. 806 (amending N.Y. CRIM PROC. § 340.40) to provide the right to a jury trial to all defendants accused of misdemeanors. This right had previously applied everywhere except for persons charged with Class B misdemeanors in New York City Criminal Court. The majority of all persons charged with misdemeanors statewide are charged in NYC Criminal Court. Prior to passage of this law, prosecutors routinely reduced A misdemeanor charges to B misdemeanor "attempts" effectively preventing the defendant from demanding a jury trial.

[216] NY State Courts Prepared for Flood of Lawsuits Under New Child Victims Act, Officials Say, N.Y.L.J. (Online) (August 13, 2019). https://www.law.com/newyorklawjournal/2019/08/13/ny-state-courts-prepared-for-flood-of-lawsuits-under-new-child-victims-act-officials-say/.

[217] Bob Dylan Accused of Sexually Abusing 12-Year-Old in Lawsuit Filed as Child Victims Act Expires, N.Y.L.J. (Online) (August 16, 2021). https://www.law.com/newyorklawjournal/2021/08/16/bob-dylan-accused-of-sexually-abusing-12-year-old-in-lawsuit-filed-as-child-victims-act-expires/.

[218] *See* FAM. CT. ACT § 412 (amended by 2015 N.Y. Laws, ch. 2659, § 7).

[219] 2017 N.Y. Laws c. 59 (enacting Crim. Proc. Law § 722).

enterprise corruption, and new areas of concern, such as domestic violence offenses and crimes involving the exploitation of children;[220]

- The expected increase in nonpayment proceedings as public entitlements were reduced under the Federal Welfare Reform Bill. Meanwhile, the State Rent Regulation Act of 1997 added to Housing Court workloads by requiring Housing Court judges to hold immediate hearings when a tenant requested a second adjournment to establish certain defenses or pay a rent deposit;[221]

- The sentencing restructuring provisions during the 1990s, whereby state prison sentences for violent offenders were converted to determinate sentences while indeterminate sentencing was retained in other contexts, leading to complicated sentencing rules and a general increase in incarceratory sentences across the board;[222]

- The adoption of new provisions relating to sex offenders, creating additional, judicial obligations in dealing with such cases, e.g., SORA hearings;[223]

- The assignment of Supreme Court and Criminal Term judges to preside over Mental Health Law Article 10 jury trials, which take precedence over other trial schedules of such judges;[224]

- The establishment and growth of various specialty courts, *e.g.*, the Commercial Division of the Supreme Court, presided over by judges selected from Supreme Court trial parts. In part, the creation of this new division was necessitated when in 1984, the Legislature enacted General Obligations Law §5-1402, pursuant to which New York courts would hear contract cases arising from forum selection or choice of law provisions in matters over $1 million;[225] and

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[220] *See, e.g.*, 1986 N.Y. Laws, ch. 516 (enterprise corruption); 2012 N.Y. Laws, ch. 491 (aggravated domestic violence); 2018 N.Y. Laws, ch. 189 (sex trafficking of a child).

[221] Chief Judge Judith Kaye and Chief Administrative Judge Jonathan Lippman, Housing Court Program, Breaking New Ground, September 1997, at 2. Housing Court Program, September 1997.pdf (nycourts.gov).

[222] 1995 N.Y. Laws, ch. 3.

[223] 1995 N.Y. Laws, ch. 192, and subsequent amendments.

[224] 2007 N.Y. Laws 2007, ch, 7, § 2; N.Y. Mental Hyg. § 10.01.

[225] New York State Unified Court System, *Commercial Division – NY Supreme Court, History*, http://ww2.nycourts.gov/courts/comdiv/history.shtml.

- Recent changes in bail and discovery statutes, increasing the number of fact-finding proceedings that judges are required to conduct, and explanations they are required to give, in the course of processing criminal cases.[226]

In every instance noted, legislatively created demands on the judiciary to accommodate the additional responsibilities spawned by the new law, or to redirect judicial resources by designating judges to handle the new matters exclusively, were not accompanied by a corresponding addition of authorized judges for the affected courts.[227] This invariably left fewer judges available to conduct the regular business of the court, or led to a dramatic increase in each judge's caseload. That this incipient depletion of judicial resources has occurred with some regularity over the years and has established a new permanence illustrates that the issue is not trivial.

6. Societal Changes that Affect the Number of Cases Filed

The population-based formula overlooks other factors that impact the number of cases filed. For example, since the population formula was initiated in 1846, the number of business corporations, not-for-profit corporations, limited liability companies, general partnerships, limited partnerships, and sole proprietorships registered with the State of New York have exploded. These entities file cases in our courts but are overlooked by the formula. Likewise, the formula overlooks venue provisions. For example, due to a venue statute which allows divorce filings without a nexus to the county, Manhattan is the divorce capital of New York, but the number of divorce filings is completely untethered from the population resident in the county.[228]

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[226] 2019 N.Y. Laws, ch. 59.

[227] There has been one notable exception where a sudden increase in cases before the Supreme Court by reason of new legislation was accompanied by a corresponding increase in judicial resources in recognition of the need for additional judges to deal with the additional work—specifically, the creation of a new category of Court of Claims judges with a separate and unique jurisdiction to meet the anticipated flood of felony cases in the Supreme Court, due to the passage of the Rockefeller Drug Laws in 1973. *See, Taylor v Sise*, 33 NY2d 357 (1974). This corresponding creation of additional judges to meet a specific new challenge attributable to new legislation addressed immediately and effectively the need for increased judicial resources and continues to stand as a model for appropriate legislative action in coordination with a legislatively created infusion of new cases.

[228] *Castaneda v. Castaneda*, 36 Misc.3d 504 (N.Y. Sup. Ct. 2012) (Hon. Matthew Cooper's plea for the Legislature to intervene by requiring divorces to be filed in counties where at least one party resides). "Practitioners have experienced increasing delays. In Manhattan, the time from filing of final uncontested divorce papers to obtaining a judgment of divorce has apparently grown from a few months to a year or more. In Brooklyn, the time to obtain an uncontested divorce judgment has increased to about 10 months." New York City Bar Association, Council on Judicial Administration, Written

7. Legislative Inaction

As illustrated in Exhibit 12, Changes to Judiciary Law §140-a, the Legislature sporadically evaluates the number of Supreme Court justices and increases the number of seats. Legislative inaction despite Article VI, Section 6(b), which provides that the Legislature "may" change the judicial districts and thus reapportion the justices within them, is not new.[229] Likewise the Legislature "may" change the number of Supreme Court justices anytime, up to the population cap of 50,000/1.[230] In 1967, the Temporary State Commission on the Constitutional Convention proposed mandatory increases in the number of judges when population increased or a formula linked to "the level of judicial business" such as the interval between the filing of the note of issue and trial.[231] Such inaction affects other courts without caps too. Family Court went without an increase in the number of judges for 24 years all while the population and number of cases was exploding resulting in a crisis.[232] Likewise, no additional Criminal Court judgeships have been created in the last 34 years, in spite of significant workload increases.[233]

PART IV: MAKESHIFT MEASURES NECESSARY TO ADDRESS JUDICIAL SHORTAGES

A. Appointment of Acting Supreme Court Justices

To address the burden on the Supreme Court, OCA has used its authority to implement makeshift measures that, while well-intended, serve only as a stopgap and do not ultimately resolve the shortage of judges in the Unified State Court System. [234] One such measure is the

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Testimony in Support of the Judiciary's 2023-24 Budget Request (Feb. 2023). https://s3.amazonaws.com/documents.nycbar.org/files/20221136_Judiciary2023-24BudgetRequest.pdf. "Anecdotal evidence also suggests that the handling of divorce matters in Supreme Court is extremely backed up in New York City. We understand that, with respect to matters where final divorce papers are e-filed in New York County, the time to issue a judgment of divorce has grown from three or four months to a year or more. The divorce matter backlogs in Queens and Kings Counties are apparently equally severe." New York City Bar Association, Council on Judicial Administration, Report in Support of the Judiciary's 2023-24 Budget Request (Feb. 2023). https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/2022-2023-judiciary-budget. (Jan. 2022).

[229] New York Temporary Commission on the Constitutional Convention, The Judiciary, at 155 (March 31, 1967).

[230] N.Y. Const. Art. VI, § 6(d).

[231] *Id*. at 155-156.

[232] See Part I (A)(5) Family Court of the State of New York; Part V (C) Impact on Family Court.

[233] New York City Criminal Court Act §20. See Part I (B)(3) Criminal Court; Part V(B) Impact on Criminal Court.

[234] Special Commission on the Future of the New York State Courts, *A Court System for the Future: The Promise of Court Restructuring in New York State*, at 24 (February 2007). See this report for

certification of judges, which, as discussed above, has some benefits, but is ultimately unreliable and potentially counterproductive, as it appears to have created a disincentive for the Legislature to authorize much needed additional Supreme Court seats. Nowhere, however, is the adverse impact of OCA's makeshift measures more evident than in its practice of reassigning judges from lower and other courts to the Supreme Court.

Part 33 of the Chief Judge's rules confers on OCA the authority to make temporary assignment of judges and justices pursuant to Article VI, § 26 of the New York State Constitution.[235] The acting judges have the same jurisdiction as the judges of the court to which they are assigned.[236] OCA has utilized this authority to appoint Acting Supreme Court justices from a pool of judges ***not*** elected to serve on the Supreme Court bench.[237] As discussed below, this stopgap measure of designating lower court judges to the state's constitutional trial court of general jurisdiction has become an established and routine practice, such that it would simply be erroneous to characterize such designations as temporary. In fact, they are anything but temporary, and as a result, have led to an adverse impact on the courts to which these Acting Supreme Court justices were originally elected or appointed, as the case may be.

1. From the Lower Courts

Perhaps the largest pool from which OCA selects judges to serve as acting Supreme Court justices are the lower courts, such as the New York City Civil Court and Criminal Court. Since 2007, the number of acting Supreme Court judges from Civil Court has ranged from 34 to 67 while 60 to 86 Criminal Court judges have been assigned as Acting Supreme Court justices.[238] In 2022, 42 Acting Supreme Court justices came from New York City Civil Courts, while 69 came from New York City Criminal Courts.[239] "While temporarily assigned pursuant to the provisions of this section, any judge or justice shall have the powers, duties and

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a thorough review of past proposals, calls for reform and other administrative initiatives by OCA. [https://ww2.nycourts.gov/sites/default/files/document/files/2018-05/courtsys-4future_2007.pdf].

[235] Temporary assignment of lower court judges preceded the Constitutional change in 1977 creating OCA and allowing for the temporary assignment of judges. See *Morgenthau v Cooke*, 56 NY2d 24 note 3 (1982)(NY County District Attorney challenged OCA's plan to institute a rotation system of temporary assignments of lower court judges to Supreme Court as acting Supreme Court judges).

[236] *See People v. Harris*, 177 Misc.2d 154 (N.Y. Sup. Ct., Kings Cty 1998) (capital criminal defendant lacks standing to challenge the practice of assigning Judges of the Court of Claims and the New York City Civil and Criminal Courts to serve as Acting Supreme Court Justices based upon alleged violations of Voting Rights Act § 2, 42 USC § 1973); *People v. Scully*, 110 A.D.2d 733 (2d Dept 1985)(See cases collected therein); *People v. Campos*, 239 A.D.2d 185 (1st Dept 1997) ("defendant's conviction may not be invalidated on the basis of any alleged illegality in the assignment of a Judge of the Criminal Court to preside over defendant's trial as an acting justice of the Supreme Court").

[237] N.Y. Const. Art. VI, § 26, "Temporary assignments of judges and justices." (adopted Nov. 7, 1961.)

[238] For a detailed list of each acting judge and their source court, see Exhibit 8.

[239] Id.

jurisdiction of a judge or justice of the court to which assigned."[240] These temporary assignments are "made by the chief administrator of the courts."[241] The only limit on the number of acting justices that OCA may elevate to the Supreme Court is the size of the pool of lower court judges and legislative will as exemplified by the Court's budget. Further, while the constitutional provision that OCA relies on to designate acting justices expressly provides that the positions are temporary, the appointments are anything but provisional. Indeed, there are many lower court judges who have been serving as acting Supreme Court justices and carrying out the duties of a duly elected Supreme Court justice for more than a decade. The entrenched and longstanding practice has become the norm, and in some counties, a rite of passage for lower court judges before they can realistically be elected to an authorized Supreme Court seat.

The end result is that this practice perpetuates the shortage of judges rather than remedies it. Indeed, as further discussed below, the designation of an acting Supreme Court justice unavoidably and necessarily creates vacancies in lower or other courts of limited jurisdiction, while ostensibly obviating the need to create more authorized seats at the Supreme Court level. Even worse, to deal with the vacancies created by this practice, OCA often reassigns judges between the lower courts. For example, Civil Court judges have been assigned to sit in Criminal Court or Family Court, further depleting the Civil Court's resources.[242] Meanwhile, the Legislature increased the jurisdictional amount in NYC Civil Court to $50,000.

2. From the Court of Claims

In the absence of legislative action to create more authorized Supreme Court seats when needed, the governor has, at times, undertaken the task of ameliorating shortages through the appointment of Court of Claims judges, whom OCA immediately[243] appoints as acting Supreme Court justices—a position whose role is very different from that of a Court of Claims judge. [244]

The Court of Claims was established in 1950 in order to form a judicial body that presides over cases where New York State is a named party.[245] As noted above, however, in 1973, an increase in drug-related cases prompted the need for more judges at the Supreme Court

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[240] N.Y. Const. Art. VI, § 26(k).

[241] N.Y. Const. Art. VI, § 26(i).

[242] City Bar Association Family Court Judicial Appointment & Assignment Process Work Group, *The Family Court Judicial Appointment & Assignment Process*, December 2020. "A recurring problem is the assignment of judges to Family Court from other courts on short-term appointments." Jane Wester, *Gaps in Family Court Compromise Justice for New York Families and Children, City Bar Report Finds*, N.Y.L.J. (Online) (March 10, 2021), https://www.law.com/newyorklawjournal/2021/03/10/gaps-in-family-court-compromise-justice-for-new-york-families-and-children-city-bar-report-finds/.

[243] Irene Sazzone, Court of Claims Clerk, interview May 5, 2023

[244] N.Y. Const. Art. VI, § 9. Section 9 of the Court of Claims Act outlines what kinds of cases are to be heard by the judges who are appointed by the governor to the Court of Claims Court.

[245] N.Y. Const. Art. VI, § 23.

level to handle criminal cases. OCA designated Court of Claims judges as acting Supreme Court justices, and the Court of Claims judges were authorized to try felony cases.[246] In response, the Court of Claims Act was amended, and five judges were added to address this need.[247] Since then, the Court of Claims Act has been amended an additional eight times, most times in order to add judges who preside over both criminal and civil cases in which the state is *not* a named party.[248] The New York Bill Jacket associated with the most recent amendment in 2005 stated, "Currently, there are insufficient numbers of judges to handle the growing case load in certain parts of the State . . . This bill would help to alleviate this problem and make the Unified Court System more efficient."[249] In 2022, 1,251 claims were filed in the Court of Claims, while 1,403 claims were decided.[250] Of the 86 authorized Court of Claims judges, 15 hear claims against the state full-time and eight judges are 'hybrid," meaning they hear such claims and have other assignments.[251] The remaining 59 judges are assigned primarily to Supreme Court, Criminal Term, as well as the Commercial Division of the Supreme Court.[252]

As of the date of this Report, the number of acting Supreme Court justices stands at 317.[253] Of the 627 (310 elected plus 317 acting) judges presiding over and adjudicating Supreme Court cases statewide,[254] the percentage serving as acting Supreme Court justices is 50%. Without these acting justices, the Supreme Court would itself be incapable of handling its caseload in a timely manner. Even with this significant addition of acting justices, felony cases pending in Supreme Court, Criminal Term in New York City face significant delays.[255] Indeed, the average number of days between indictment and disposition (pleas, convictions, acquittals,

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[246] In *Taylor v. Sise*, 33 N.Y.2d 57 (N.Y. 1974), the Court of Appeals held that judges appointed to the Court of Claims by the governor could preside over criminal cases as Acting Supreme Court Justices as long as they were appointed by the governor and designated by the Appellate Division.

[247] Francis X. Clines, *Changes Expected in Plan on Judges*, N.Y. Times, May 14, 1973 http://www.nytimes.com/1973/05/14/archives/change-expected-in-plan-on-judges-rockefeller-reported-ready-to-ask.html?_r=0.

[248] N.Y. CT. CL. ACT § 2; 1982 N.Y. Laws, ch. 500, § 5, ch. 501, § 1; 1986 N.Y. Laws, ch. 906, § 1; 1990 N.Y. Laws, ch. 209, § 3; 1991 N.Y. Laws, ch. 195, § 1; 1992 N.Y. Laws, ch. 68, § 1; 1996 N.Y. Laws, ch. 731, §§ 1-3; 2005 N.Y. Laws, ch. 240, § 1.

[249] 2005 S.B. 5924, ch. 240.

[250] 2022 Annual Report of the Unified Court System at 65, https://www.nycourts.gov/legacyPDFS/22_UCS-Annual_Report.pdf.

[251] Irene Sazzone, Court of Claims Clerk interview May 5, 2023.

[252] *Id.*

[253] See Summary Acting Justices of the Supreme Court Analysis, Exhibit 7.

[254] See Table by Judicial District: Number of Actual Judicial Seats Compared to Cap, Exhibit 4. See Exhibit 13 for bar chart showing number of acting judges as percent of total.

[255] Brian Lee, *New York's Pending Court Caseload Has Increased 15% From Pre-Pandemic Numbers*, NYLJ, July 22, 2022, at 1; George Joseph, Crisis at Rikers: How Case Delays Are Locking Up More and More People for Years Without Trial, Gothamist (November 23, 2021).

and dismissals) for felonies in New York City rose from 293 to 316 days between 2014 and 2019.[256] And the pandemic only made matters worse.[257]

PART V: ADVERSE IMPACT OF MAKESHIFT MEASURES ON JUSTICE

Upstreaming lower court judges to the Supreme Court has left the lower courts from which these judges are selected hampered in their ability to efficiently and properly administer justice. In addition to inordinate delays in judicial proceedings, trials have become an endangered species nationally.[258] To be sure, there are few trials in the Civil Court of the City of New York, the Criminal Court, or Surrogate's Court.[259] This necessarily deprives litigants of their day in court.

The lower courts have traditionally been the incubator of trial lawyers. Without the emergence of a well-trained cadre of young trial lawyers, the profession, and ultimately litigants seeking justice through the courts, end up paying the price. Below, this Report examines in more detail the impact that shuffling judges between the various courts has had on the lower courts.

A. Impact on Civil Court

The re-designation of judges from the lower courts to the Supreme Court has deprived those lower courts of vital judicial resources, leading to serious, negative consequences to the administration of justice in those jurisdictions. The New York City Civil Court Act authorizes 131 judges in Civil Court, but only 120 judicial seats have been allocated among the five boroughs.[260] Again, as of 2022, there were 47 of 120 judges sitting in Civil Court; 31 judges

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[256] Joanna Weill, et. al., *Felony Case Delay in New York City, Lessons from a Pilot Project in Brooklyn*, Center for Court Innovation (March 2021), https://www.courtinnovation.org/sites/default/files/media/document/2021/Case_Delay_Policy_Brief_3.29.2021.pdf.

[257] Alan Feuer et. al., N.Y.'s *Legal Limbo: Pandemic Creates Backlog of 39,200 Criminal Cases*, The New York Times, June 22, 2020, https://www.nytimes.com/2020/06/22/nyregion/coronavirus-new-york-courts.html.

[258] Stephen Susman, *Jury Trials, Though in Decline, Are Well Worth Preserving*, LAW 360 (April 23, 2019); *see also* NYU School of Law, *Civil Jury Project*, https://civiljuryproject.law.nyu.edu/#:~:text=The%20Civil%20Jury%20Project%20at%20NYU%20School%20of%20Law%20examines,system%20and%20society%20more%20broadly.

[259] See Exhibit 14, Chart of Jury Trials Commenced 2019 to 2022.

[260] N.Y. Civil Ct. Act § 102-a (1), (2) (Consol. 2021).

sitting in New York City Criminal Court and Family Court; and 42 judges transferred to Supreme Court as Acting Judges.[261]

In addition to appointing Criminal Court judges and Family Court judges in New York City, the Mayor is required to fill any vacancy that occurs in Civil Court before the end of the term[262]. Mayors, however, have experienced difficulty in filling those seats.[263]

Council Member Rory Lancman, who led oversight hearings in early 2016 on the delays in the City's criminal courts, told *The New York Times* that about half of the judges appointed by the Mayor to Criminal Court have been transferred to hear felony cases in Supreme Court.[264] According to the Council Member Lancman, to then fill some of the shortages in Criminal Court, about two dozen Civil Court judges were transferred to Criminal Court.[265] Indeed, today 73 Civil Court judges are assigned to other courts. [266]

There are numerous examples of how the reassignment of Civil Court judges to the Supreme Court or to the Criminal Court has had severe and negative consequences to litigants who appear in Civil Court. In New York City Civil Court, New York County, there has been a drastic drop in the number of jury trials conducted. In 2013, 151 jury trials commenced, but in 2014, only one jury trial commenced, and in 2015 and 2022, two jury trials commenced.[267] By contrast, in that same period, 942 non-jury trials commenced in the Civil Court in 2013 and 5 non-jury trials in 2022. [268] But these decreases in jury trials began long before COVID. While there are a variety of factors contributing to these dramatic decreases in jury trials, the

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[261] New York State Unified Court System, *Judges of the Civil Court of the City of New York*, https://nycourts.gov/courts/nyc/civil/profiles.shtml. See Sunburst chart, Exhibit 6 and Detailed Source of Actings SCJs, Exhibit 8.

[262] N.Y. Civil Ct. Act, Law § 102-a (3) (Consol. 2021).

[263] *See* Corinne Ramey, *Court Officials Blast Mayor De Blasio For Delays On Judges*, Wall St. J. (January 2, 2019), https://www.wsj.com/articles/court-officials-blast-mayor-de-blasio-for-delays-on-judges-11546465712; Reuven Blau, *Blaz Judged Deficient On Appointees*, Daily News (New York) (January 2, 2019); Andrew Denney, *De Blasio Counsel Sees Difficulty In Filling Vacant Civil Court Seats*, N.Y.L.J. (April 14, 2017).

[264] Benjamin Weiser et. al., *Delays in Bronx Courts Violate Defendants' Rights. Lawsuit Says*, N.Y. Times, at A19, col. 2 (May 11, 2016). https://www.nytimes.com/2016/05/11/nyregion/chronic-bronx-court-delays-deny-defendants-due-process-suit-says.html.

[265] *Id*.

[266] https://www.nycourts.gov/COURTS/nyc/civil/profiles.shtml.

[267] NYS Unified Court System, Division of Technology and the Office of Court Research UCS 175 Local Civil Dump Report - Full Year 2013-2015 and 2022. (Report available from Drafting committee).

[268] *Id.* Exhibit 14, OCA Jury Trial chart. See also footnote 258, supra regarding Steven Susman's work on declining jury trials.

reassignment of Civil Court judges, decreasing the number of judges available to preside over jury trials, appears to be a strong possibility.

Non-jury trials are impacted too. Indeed, as of January 2016, there were no trials scheduled in the New York City Civil Court's Commercial Landlord Tenant Part, New York, that are presided over by Civil Court judges, [269] because of the lack of judges.[270] In 2022, there were 24 non-jury trials in that part in New York County, but in prior years, there had been over 150 non-jury trials per year.[271]

In its 2016 budget letter, the City Bar also stated that because of a shortage of judges in the no-fault part of Civil Court in New York County, there was a delay of one year for pre-trial conferences.[272] Eight years later, in 2023, a no-fault practitioner with over 35,000 pending no-fault cases in New York City at one time reported that "we have transitioned almost 98% to arbitration over the past 5 or more years . . . our presence in the City Civil Courts are limited at this point…Essentially – we don't look to the courts to timely adjudicate cases."[273] In 2023, there is reportedly no delay in no-fault parts, but the reason that the backlog receded appears to be that the cases moved to arbitration when judges were not available to hear the cases.[274]

Likewise, in a December 22, 2015 article, Leonard Levenson, Esq., used one of his cases to underscore the need for more judges and court parts in Civil Court in Kings County.[275] He reported that in a simple personal injury case, his opposing counsel had requested three adjournments to provide discovery.[276] Although Levenson was disturbed that the adjournments were granted with no inquiry as to their necessity, he was equally perturbed with the length of each adjournment, which was two or three months long, simply because there was a lack of available judges.[277]

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[269] These cases are not handled in Housing Court.

[270] New York City Bar, *Report in Support of the Judiciary's 2016-2017 Budget Request*, 4, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/report-in-support-of-the-judiciarys-2016-2017-budget-request.

[271] NYS Unified Court System, Division of Technology and the Office of Court Research UCS 175 Local Civil Dump Report - Full Year 2013-2015 and 2022. (Report is avaible from drafters of the report).

[272] *Id.*

[273] May 2023 interview of Civil Courts Committee members by Steve Shapiro of the Drafting Committee.

[274] *Id.*

[275] Leonard Levenson, *Justice Denied When Court Calendars are Unmanageable*, N.Y.L.J. (December 22, 2015).

[276] *Id.*

[277] *Id.*

Long before COVID-19, the Chair of the City Bar's Civil Courts Committee stated that Civil Court is a "frustrating place to practice" because growing calendars result in excessive delays.[278] Even when a judge had signed an Order to Show Cause, intended to expedite proceedings, many weeks would pass by before the Court heard the matter. She reported that in 2018, more than 100,000 consumer-related cases were filed in the Civil Court, a marked increase over the preceding year.[279] In 2022, the Consumer Credit Part is back to its pre-Covid delays.[280] Where consumers filed answers in 2020, preliminary conferences in their consumer credit cases are scheduled in 2023.[281] The New York City Housing Court, a branch of the Civil Court, is particularly under-resourced, as an expansion of tenants' right to counsel leads to more trials and the need for judges to conduct them.[282]

B. Impact on Criminal Court

The reassignment of the lower court judges has had a similar negative impact on the New York City Criminal Court, where misdemeanor cases are heard.[283] In a lawsuit filed in federal court in 2016, *Trowbridge v. Cuomo*, No. 16 CV 3455, the plaintiffs alleged that the delays in misdemeanor cases in the Bronx were "caused by a shortage of judges, court officers and court reporters that keep trial parts idle and locked."[284] One of the solutions the plaintiffs sought in the lawsuit was "allocating more judges and court staff."[285]

This situation has not been ameliorated. According to OCA's 2019 NYC Criminal Court Caseload Activity Report, there were 394 trials conducted citywide in Criminal Court (excluding summons parts) of which 207 were jury trials, out of 183,572 cases altogether that were disposed of in the All-Purpose Parts (cases that survived arraignment) in the Criminal Court. More recently, of cases that were resolved in 2022, there were only 115 trials, compared to 33,383

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[278] Interview with Shanna Tallarico, 2019 Chair, NYC Bar Association Civil Court Committee and Supervising Attorney Consumer Protection Unit at the New York Legal Assistance Group (May 31, 2019).

[279] *Id.*

[280] May 22, 2023 interview with ABCNY Civil Court Committee member.

[281] *Id.*

[282] Interview with Shanna Tallarico, footnote 278, supra; Will Drickey, *NYC Evictions Down Thanks to Legal Aid Program for Tenants*, Metro - New York (February 4, 2019). See also State of New York City Housing Court, Report of the New York City Bar Association Housing Court Committee, April 2019, https://s3.amazonaws.com/documents.nycbar.org/files/2019506-State_of_Housing_Court.pdf (calling for more judges, court attorneys, clerks, translators and guardians ad litem).

[283] Misdemeanors are criminal cases "for which a sentence to a term of imprisonment in excess of fifteen days may be imposed, but for which a sentence to a term of imprisonment in excess of one year cannot be imposed." N.Y. Penal Law § 10.00(4) (Consol. 2021).

[284] Benjamin Weiser and James C. McKinley, Jr., *Delays in Bronx Courts Violate Defendants' Rights. Lawsuit Says*, N.Y. Times, at A19, col.2 (May 11, 2016).

[285] *Id.*

guilty pleas and 86,372 dismissals.[286] Although it is difficult to know for certain whether non-trial dispositions of cases are attributable to the lack of judges or trial-ready courtrooms,[287] the percentage of tried cases revealed by these statistics is nonetheless an infinitesimal number relative to the total number of cases disposed. Indeed, the 2022 figure is one-tenth of one percent.[288]

Another disturbing statistic that reports reveal relates to the "mean age at disposition" of cases that were tried. It took far longer to get a trial in recent years than it did in 1994. In 2017, in the Bronx, the wait was 437 days for a bench trial and 777 days for a jury trial.[289] In the first four months of 2022, when courts had fully re-opened, the median time from arraignment to verdict for cases tried in the Bronx was 548 days.[290] The citywide median was not much better—469 days from arraignment to verdict (not distinguishing between bench and jury trials).[291] In

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[286] NYS Unified Court System, NYC Criminal Court Executive Summary, 2022 Term Trends, dated 1/11/23. 2020 and 2021 figures are not reported here because the relevant statistics for both years were heavily influenced by COVID-related closures and delays, that began in March 2020 and continued into 2021, especially with respect to trials. Jaclyn Cangro, Courts Facing Lengthy Case Backlogs Amid Ongoing Covid-19 Restrictions, https://spectrumlocalnews.com/nys/central-ny/news/2021/06/29/faced-with-restrictions--county-courts-deal-with-backlogs; Alan Feuer, et. al., N.*Y.'s Legal Limbo: Pandemic Creates Backlog of 39,200 Criminal Cases*, The New York Times (June 22, 2020).

[287] Of course, cases in Criminal Court are resolved for many reasons, such as that prosecutors are persuaded to offer a plea to a lesser charge, the evidence in the case does not support a criminal conviction for the crime that was initially charged, or the prosecutors are not ready for trial within the statutory period. However, when an overly lenient plea offer is made because the court lacks resources to try the case, or an innocent person is pressured into pleading guilty because it simply takes too long to get a trial, the public interest is disserved.

[288] It should be recognized, however, that nationwide, there has been a decrease of jury trials in the civil context. *See* NYU School of Law, *Civil Jury Project*, https://civiljuryproject.law.nyu.edu/#:~:text=The%20Civil%20Jury%20Project%20at%20NYU%20School%20of%20Law%20examines,system%20and%20society%20more%20broadly ("The Seventh Amendment to the US Constitution and provisions of most state constitutions guarantee citizens the right of trial by jury in common-law civil cases. But it is beyond dispute that the civil jury trial is a vanishing feature of the American legal landscape. In 1962, juries resolved 5.5 percent of federal civil cases; since 2005, the rate has been below one percent. In 1997, there were 3,369 civil jury trials in Texas state courts; in 2012, even as the number of lawsuits had risen substantially, there were fewer than 1,200. Similar trends are evident in states across the nation").

[289] In 2019, the average wait from arraignment to verdict in the Bronx, not specifying jury or bench, was 506 days. New York City Criminal Court Caseload Activity Report, "Annual Trends," January 18, 2022.

[290] NYS Unified Court System, Division of Technology and Court Research, NYC Criminal Court Caseload Activity Report, dated 5/5/23.

[291] Id. In 2019, the average citywide wait was 383 days, again not distinguishing jury from bench

1994, the citywide wait for a bench trial was 176 days and for a jury trial was 237 days, less than a year.[292] This change was gradual. In 1999, the average number of days for a bench trial citywide was 293 days and 352 days for a jury trial.[293] Five years later, in 2004, the average wait for a bench trial citywide was 309 days, but in the Bronx, it was 445 days.[294] For a jury trial, it took 320 days citywide and 501 days in the Bronx.[295]

There has been a reported increase in delays in Supreme Court, Criminal Term as well. In 2012, in Brooklyn, the average length of time it took for a criminal case to conclude—from arraignment on an indictment to the disposition was 243 days.[296] In 2021, as the courts were recovering from COVID shutdowns, the median time, across New York City, from arraignment on an indictment to final disposition was 620 days.[297] While parties' reactions to delays can vary, the tragic consequences of excessive and wasteful delays on victims have been well documented, [298] and delays likewise have a severe impact on individuals who are incarcerated pending trial, notwithstanding their presumption of innocence.

A further set of troubling statistics reflect the rapidly increasing average number of cases calendared per day in the All Purpose Parts in Criminal Court. In 2017, Staten Island had 134 cases calendared per day.[299] Although this number was an outlier compared to the other counties, which had a range between 70 and 93 cases calendared per day, even these daily caseloads, which have been consistent over the past decade,[300] are extremely high. It is nearly impossible for a judge to hear and consider difficult contested issues, which include change of bail applications and applications to modify orders of protection, in more than a small handful of daily cases, when confronted with such a workload. In addition, Criminal Court judges have

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trials. New York City Criminal Court Caseload Activity Report, "Annual Trends," dated January 18, 2022.

[292] New York State Unified Court System, *2014 Annual Report of the New York City Criminal Court*, at 27.

[293] *Id*.

[294] *Id*.

[295] *Id*.

[296] Stephanie Clifford, *For Victims, an Overloaded Court System Brings Pain and Delays*, N.Y. Times (Jan. 31, 2016), https://www.nytimes.com/2016/02/01/nyregion/for-victims-an-overloaded-court-system-brings-pain-and-delays.html.

[297] NYS Division of Criminal Justice Services, Criminal Case Processing Report, Criminal Justice Case Processing: New York State Report, dated June 2022, Table 8.

[298]William Glaberson, *Faltering Courts, Mired in Delays*, N.Y. TIMES (Apr. 13, 2013). https://www.nytimes.com/2013/04/14/nyregion/justice-denied-bronx-court-system-mired-in-delays.html.

[299] 2017 Criminal Court of the City of New York annual Report 40, https://www.nycourts.gov/LegacyPDFs/COURTS/nyc/criminal/2017-Annual-Report.pdf

[300] *Id*.

motions and other written applications that must be read and decided that require their time outside of the courtroom.

These challenges facing the Criminal Court were highlighted in the above-referenced City Council oversight hearing held on February 29, 2016. The Queens District Attorney's Office testified that in 2015, out of more than 8,000 pending cases in Queens Criminal Court, only nine misdemeanor jury trials and 30 bench trials were held.[301] According to the Queens District Attorney's Office, during an approximate eight-month period preceding the hearing, 332 trials were adjourned[302] because there was "no jury trial part at all."[303] Similar testimony was offered by the Staten Island District Attorney's office which lamented that while the DA was grateful for a new courthouse and additional judge, there was no new staff to support the changes.[304] The Bronx Defenders testified to 33 adjournments because there were no judges available for the trial.[305] After hearing this testimony, Council Member Lancman, who presided, determined that "a shortage of judges, court officers and courtrooms were the major reasons for the backlogs."[306]

As noted, a major factor underlying the Criminal Court's inability to timely try cases is that the court lacks enough sitting judges. The OCA's 2017 Criminal Court Report states that there were 76 judges sitting in Criminal Court (at least at some point during the year), and only 33 of them (excluding supervising judges) were appointed Criminal Court judges.[307] The remainder were Civil Court judges reassigned to Criminal Court or Acting Supreme Court justices (some of whom had originally been appointed to lower Criminal Court).[308]

This contrasts with a total of 107 Criminal Court judges authorized by statute, presumably based on the formula in section 20 of the New York City Criminal Court Act, which authorizes the number of judges sitting in the predecessor local courts in 1962, plus 29 more authorized as of 1982. No additional Criminal Court judgeships have been created in the last 34 years, despite significant workload increases. The full complement of authorized Criminal Court judges is not sitting in that court, however, because many Criminal Court judges have been assigned to other courts.

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[301] New York City Council Committee on Courts and Legal Services (Feb. 29, 2016) Deputy Executive Assistant District Attorney Laura M. Henigman, of Queens County District Attorney's Office), at Hearing Transcript at 35-36. http://legistar.council.nyc.gov/DepartmentDetail.aspx?ID=27452&GUID=319891B8-7F93-4063-AA20-FE0D9C62D2B0&Search=.

[302] *Id*. at 37:1-17.

[303] *Id*. at 35:20-21.

[304] *Id*. at 47:5-48:11.

[305] *Id*. at 69:15-23.

[306] *Id*.

[307] OCA's 2017 Criminal Court of the City of New York Annual Report at 6.

[308] *Id*.

C. Impact on Family Court

Family Court judges have also been assigned to sit in Supreme Court as "temporary" acting justices. Some have presided in the Supreme Court for years. Because of the huge caseloads in the chronically under resourced Family Court, the loss of even one judge to the Supreme Court has a significant impact on the overall ability of the Court to manage its caseload in optimal fashion.[309] OCA makes some effort to ameliorate the consequences of the loss of Family Court judges by assigning jurists from other courts (generally Civil or Criminal) to sit in Family Court on a temporary basis, but this practice has proven problematic.[310] As noted above, the practice necessarily depletes the other courts of valuable and much needed jurists. Moreover, concerns have been raised about delays in the replacement of judges from other courts whose temporary assignment to the Family Court have ended; use of judges who have no prior Family Court experience and have not been adequately trained in Family Court practice; and short-term appointments resulting in significant caseloads left uncovered, leading to exceptionally lengthy adjournments.[311] Indeed, cases in the Family Court can drag on for years, allowing, for example, child neglect cases which are commenced when the child is an infant to be concluded when the child is well into his or her school age years.[312] It can be hard to square this practice with the public policy mission of acting in the "best interests" of the child.

D. Resources for Acting Supreme Court Justices

Even though acting justices enjoy the powers and privileges of fully elected Supreme Court justices, they do not have access to all the same staffing resources. For example, under the

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[309] The Council acknowledges that some Family Court judges have been appointed as Acting Supreme Court Justices to sit in the Integrated Domestic Violence parts which are hybrid courts which hear related Family Court, matrimonial and criminal cases. See https://ww2.nycourts.gov/Courts/8jd/idv.shtml. Currently, two Family Court judges and one Criminal court judge sit in an IDV part in New York City. Appointments to an IDV Part do not take these judges from Family Court as much as give them the jurisdiction to hear the related matrimonial and felony cases.

[310] City Bar Association Family Court Judicial Appointment & Assignment Process Work Group, The Family Court Judicial Appointment & Assignment Process, December 2020; Jane Wester, Gaps in Family Court Compromise Justice for New York Families and Children, City Bar Report Finds, N.Y.L.J. (Online) (March 10, 2021). https://www.nycbar.org/media-listing/media/detail/gaps-in-family-court-compromise-justice-for-new-york-families-and-children-city-bar-report-finds-new-york-law-journal.

[311] *Id.*

[312] Robert Z. Dobrish *Solving the Hearing Problems in Custody Litigation*, N.Y.L.J. (December 28, 2021); Chris Bragg, *Falling Through Cracks in The System*, The Times-Union (May 25, 2020). https://www.timesunion.com/local/article/Falling-through-cracks-in-the-system-15292710.php. "A practitioner reports that in Kings County, a first appearance in May 2023 was scheduled for a modification of child support petition filed in September 2022. This level of delay in NYC child support cases is not atypical." New York City Bar Association, Council on Judicial Administration, Written Testimony in Support of the Judiciary's 2023-24 Budget Request (Feb. 2023). https://s3.amazonaws.com/documents.nycbar.org/files/20221136_Judiciary2023-24BudgetRequest.pdf.

constitution, every elected Supreme Court justice is not only assigned a law clerk, but is entitled to a confidential secretary, who performs administrative tasks.[313] An acting Supreme Court justice, however, is assigned a law clerk but not a confidential secretary.[314] Thus, while acting Supreme Court justices have the same caseload as elected justices, and sometimes more, they enjoy half the staff, which can adversely impact their productivity.

Additionally, many acting Supreme Court justices continue to be responsible for work in the lower courts on top of their Supreme Court duties. Each acting Supreme Court justice who was appointed from Civil Court or Criminal Court must handle weekend and holiday arraignment shifts in Criminal Court.[315] This assignment, which is not required of elected Supreme Court justices, imposes the obligation for acting Supreme Court justices to arraign criminal defendants between five to ten times a year.[316] Some cite to the assignment of acting justices with little to no criminal experience to criminal arraignments as yet another example of the negative consequences of the acting justice stopgaps.

At bottom, the current constitutional apportionment of Supreme Court justices is woefully inadequate to meet the Supreme Court's, and ultimately the public's need for more judicial resources. An observation made in 1904, in the Report of the Commission on Laws Delays, is particularly applicable today, over 100 years later: "The remedies adopted by the Constitutional Convention for the relief of large cities of the State have obviously proven totally inadequate to meet the exigencies of the situation and other and different remedies must be sought."[317] This Report will now address potential solutions to New York's justice shortfall crisis.

PART VI: SOLUTIONS TO NEW YORK STATE'S JUDICIAL SHORTFALL CRISIS

A. How New York's Formula Compares to Other Jurisdictions

In developing proposals to address the shortfall of judges, the methods that 49 other states use to determine the number of judicial seats for their respective trial courts of general jurisdiction were first surveyed. The method utilized to set the number of judges in the federal

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[313] N.Y. JUD. LAW §272.

[314] N.Y. JUD. LAW §36.

[315] Arraignments are the first-time criminal defendants appear before a judge and where they learn for the first time what the criminal charges are that have been filed against them. N.Y. CRIM. PROC. § 170.10(2). A number of criminal defendants plead guilty at the Criminal Court arraignment, and it is also the first time that bail is set if required. *Id.* at §§ 170.10(7); 530.20.

[316] See arraignment schedule on file with the City Bar CJA Subcommittee.

[317] Report of the Committee on Laws Delays, N.Y. S. Doc., Vol 9 at 22, (127th Sess. 1904).

courts as also examined. [This goes to who is signing and which names are listed. We can discuss. We want the report to be considered a City Bar report overall.]

1. State Courts

In all but four states, the responsibility of fixing the number of judicial seats is discretionary and falls entirely on the state Legislature, which uses either an ad hoc approach or a methodical evaluation of a variety of metrics, depending on the state.[318] Similar to New York, some states, such as Arizona (1 judge/ 30,000 people), Illinois (Cook County), Iowa (associate judges within districts), Nevada (family court if district population is over 100,000), Oklahoma (adds a Special Judge for every additional 50,000), West Virginia (in 2022, one magistrate court judges per 15,500) use population to set the number of some judges.[319] Our research found 27 states have used the weighted caseload analysis on a recently or on a regular basis[320] and Illinois is in the process of joining that list.[321] Some states use commissions consisting of a variety of participants appointed by a variety of principals.[322] In some states, the judiciary submits a request to change the number of judicial seats with its proposed budget. (*See e.g.*, Hawaii and Colorado). Some commissions are created by statute (Arkansas, Nebraska) while others are created by the judiciary (California, Florida, Georgia).[323] Sometimes these commissions collect and evaluate the data, or they are assisted by professionals such as the National Center for State Courts ("NCSC") to crunch the numbers provided by the court system. NCSC has been assisting courts to compile caseload statistics since 1975.[324] Indeed, the NCSC has worked with 35 states, territories, or subsets thereof, such as counties or particular courts, and five international

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[318] In North Dakota, the Supreme Court is empowered to create a Court of Appeals, while the courts in Ohio, Oklahoma, and South Dakota are involved in determining the number of judges. *See* Appendix, 49-State Survey. See also Exhibit 15, NCSC chart comparing the number of judges in 50 states.

[319] *See* Appendix, 49-State Survey.

[320] Alabama, California, Florida, Georgia, Indiana, Iowa, Kentucky, Michigan, Montana, Nebraska, Minnesota, Michigan, Missouri, Nebraska, New Hampshire, New Mexico, North Dakota, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Wisconsin, Wyoming. *See* Appendix, 49-State Survey. See Exhibits 10a and 10b for California's 2020 biannual assessment of its judicial needs.

[321] *See* 49-State Survey, Appendix.

[322] States include Alabama, Arkansas, California, Florida, Georgia, Nebraska, Virginia, and Texas. *See* Appendix, 49-State Survey. In Tennessee, the Comptroller conducts the weighted caseload study, while in Utah, the Legislature Auditor General conducts the study. *Id.* See Exhibits 10a and 10b for California's 2020 biannual assessment of its judicial needs.

[323] *See* 49-State Survey, Appendix.

[324] Court Statistics Project, Guide to Statistical Reporting, https://www.courtstatistics.org/pub-and-def-second-row-cards/guide-to-statistical-reporting.

studies[325] to evaluate their data collection and calculate the right number of judges.[326] The NCSC's "The State Court Guide to Statistical Reporting: Standardized Reporting Framework for State Court Caseload Statistics Designed to Promote Comparisons among State Courts," assists courts by standardizing the collection of data allowing for comparisons across courts, specialties, and states. NCSC publishes statistics for 50 states.[327]

Many states use the "weighted caseload" model created by the NCSC in 1975.[328] The weighted caseload calculates judicial need based on total judicial workload. "The weighted case load formula consists of three critical elements: (1) case filing, or the number of cases of each type opened each year; (2) case weights which represent the average amount of judicial time required to handle cases of each type over the life of the case; and (3) the judge year value, or the amount of time each judge has available for case related work in one year."[329] For example, Indiana has been using the "weighted caseload" system since 1996, but it began in 1993 with a two-year study.[330]

> "The basic premise of a caseload assessment system is that all case types are not equal and each case type requires a different amount of time to complete from initial filing up through the final disposition of the case. To establish the "weight" each case type should be given, it first must be determined the average amount of time in minutes each case type takes to complete. During the most recent weighted caseload assessment study, thirty-nine case categories were examined."[331]

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[325] The World Bank studied the lessons learned from the 40-year history of weighted case analysis, and identified limitations and good practices in an effort to help policy makers decide whether and when to engage in a weighted case analysis. Case-Weighting Analyses as a Tool to Promote Judicial Efficiency: Lessons, Substitutes and Guidance (December 2017) https://documents1.worldbank.org/curated/en/529071513145311747/pdf/Case-weighting-analyses-as-a-tool-to-promote-judicial-efficiency-lessons-substitutes-and-guidance.pdf.

[326] November 16, 2021, interview of Suzanne Tallarico, Principal Court Management Consultant, Court Consulting Services, NCSC.

[327] NCSC Court Statistics Project, https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat.

[328] *Id.*

[329] Matthew Kleiman, et. al., *Workload Assessment: A Data-driven Management Tool for the Judicial Branch*, National Center for State Courts at 243 (2013), https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/2088/.

[330] *Weighted Caseload Measures and the Quarterly Case Status Report*, IN.GOV, https://www.in.gov/courts/iocs/files/pubs-trial-court-weighed-caseload.pdf.

[331] *Id.*

Another factor relevant to the evaluation is "clearance rates," which is the number of disposed cases as a percentage of the incoming cases.[332] Case counts are an important factor in this evaluation, but weighting the cases is imperative. "While case counts alone have a role in determining the demands placed on state judicial systems, they are silent about the resources needed to process the vast array of cases differently. That is, raw, unadjusted case filing numbers offer only minimal guidance regarding the amount of work generated by those case filings."[333] Indiana's July 1, 2021, report details the process it follows.[334]

As Indiana illustrates, there is an expense to initiating the process and implementing it. Accordingly, some states evaluate the need to change the number of judges biannually, (California, Hawaii, and Kansas)[335] while other states conduct such an evaluation every year (e.g., Alabama, Arkansas, Georgia, Idaho, Missouri, Nebraska, New Hampshire, Tennessee, Utah, West Virginia), every four years and at no other time (Iowa), every eight years (Kentucky), twice a year (Indiana) or every ten years (Mississippi). In 1998, the U. S. Department of Justice Office of Justice Program recommended that Florida adopt a weighted caseload system which was estimated to cost $52,000 per year every four years to update weights.[336]

Whether it is a commission, the judiciary, or the Legislature, relevant factors and metrics analyzed are wide ranging and, in some cases, specific to the unique needs of the jurisdiction. They include, among other things: population by district or circuits using latest U.S. census; judicial duties; specialized courts; number of civil, criminal, and domestic cases in each circuit; caseload by geographic area; court's data collected and averaged over three years; workload estimate from the average amount of time of bench and off-bench work required to resolve a case; ranking based on need; weighted case load studies; new case filings by case type; case weights which represent the average amount of judge or judicial officer time required to handle the case by type of case; and the amount of time each judge or judicial officer has available for case-related work per year.

Some unique provisions in the following states are worth highlighting:

> In Missouri**,** the relevant statute mandates the creation of an additional circuit judge position where, for three consecutive years, the annual judicial performance report indicates the need for two or more full-time judicial positions in any judicial circuit.[337] Because, however, the mandate

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[332] National Center for State Courts, *CourTools, Trial Court Performance Measures*, https://www.courtools.org/__data/assets/pdf_file/0012/7320/courtools-measure-2-clearance-rates.pdf.

[333] *Id.*

[334] See Exhibit 9.

[335] *Id.* See Exhibits 10a and 10b for California's 2020 biannual assessment of its judicial needs.

[336] Weighted Caseload Methods of Assessing Judicial Workload and Certifying the Need for Additional Judges, https://www.ojp.gov/ncjrs/virtual-library/abstracts/weighted-caseload-methods-assessing-judicial-workload-and.

[337] Mo. Rev. Stat. § 478.330 (2018).

is subject to appropriations made for that purpose, the Legislature ultimately retains the authority to create the position since it has the power to fund the new judgeship or not.[338]

North Dakota uses a two-year rolling average.[339]

In Florida, the constitution requires the state's Supreme Court to establish uniform criteria for determining the lower courts' need for additional judges. If the Supreme Court finds that a need exists, the Florida Constitution mandates that it certify to the Legislature its findings and recommendations to address such needs. At the Legislature's next regular session, it must consider the findings and recommendations, and may either reject the recommendations or by law implement the recommendations in whole or in part. The Legislature is permitted to create more judicial offices than the Supreme Court recommends and may also decrease the number of judicial offices by a greater number than recommended only if two-thirds of the membership of both houses of the Legislature finds that such a change is warranted.[340]

In Delaware, the governor has the authority to appoint judges *ad litem*.[341] For example, when Supreme Court judges disqualified themselves from the highest court, the governor appointed temporary judges to hear the appeal.[342]

In Indiana, the Legislature fixes the number of judges, but the constitution also commands the state's chief justice to regularly report to the Legislature. The Office of Judicial Administration ("OJA"), a department of the judiciary, assists the chief judge in meeting this requirement by collecting and compiling statistical data and other information on the Indiana court's work and publishing reports on the nature and volume of judicial work performed by the courts one to two times per year. The OJA uses a weighted caseload measurement system to establish an objective and uniform method for comparing trial court caseloads across the state. The OJA accomplishes this by dividing collected data into three categories: need, have, and utilization and ranking the categories county by county.[343]

In Texas, the Legislature must reapportion judicial districts at least every 10 years, but if the Legislature fails to do so, "the Judicial Districts Board shall convene not later than the first Monday of June of the third year following the year in which the federal decennial census is taken to make a statewide reapportionment of the districts. The Judicial Districts Board shall

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[338] *See* 49-State Survey, Appendix.
[339] *See* 49-State Survey, Appendix.
[340] Fla. Const. Art V, §9.
[341] *See* 49-State Survey, Appendix.
[342] *Nellius v. Stiftel*, 402 A.2d 359 (Del 1978). The Rule of Necessity would prevent any recusals that would leave litigants without a judge. Thomas McKevit, *The Rule of Necessity: Is Judicial NonDisqualification Really Necessary?* Hofstra Law Review 818, Vol 24 (1996).
[343] *See* 49-State Survey, Appendix.

complete its work on the reapportionment and file its order with the secretary of state not later than August 31 of the same year."[344] The Legislature must approve the order.[345]

The following states have implemented measures similar to those that New York has adopted to address shortages of judges:

Like New York, the New Hampshire Supreme Court, the highest court, may certify to the governor the need to convert a part-time judgeship into a full-time position.[346]

Like New York and federal courts, the Legislature in Georgia has authorized the court and the governor to call upon senior judges after their retirement to supplement the permanent judges.[347]

As noted above, the system of raising lower court judges to the state's constitutional trial court of general jurisdiction is not unique to New York, but the scale and longevity of such appointments is unique. While Illinois has a similar procedure, it is limited to authorizing Associate judges, who tend to hear misdemeanor criminal cases and any civil cases, to hear felony cases.[348] Also like New York's Chief Administrative Judge, the Illinois Judicial Conference reports to the Legislature annually on the state of the judiciary and proposes improvements, but they are not required to address a change in the number of judges.

In 2022, NCSC issued recommendations for using the weighted caseload analysis including lessons from the pandemic.[349] For example, courts should track hybrid, remote and in-person proceedings and regularly assess backlogs.[350]

2. The Federal Courts

The number of circuit and district judges in the federal system is set by statute—28 USC § 41 for circuit courts and 28 USC §§ 132, 133 for district courts—and Congress also sets out which states shall be divided into individual districts and in which states the district is comprised—*e.g.*, New York, Connecticut, and Vermont.[351] An Act of Congress created the federal courts specifying the number of judges appointed to that court and from time-to-time,

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[344] Tex. Const. Art. 5, § 7a(e).
[345] Tex. Const. Art. 5, § 7a(h).
[346] NH Rev. Stat Stat. 490-F:7.
[347] GA Code § 15-1-9.2 (2020).
[348] *Id. See also* Illinois, 49-State Survey, Appendix.
[349] Recommendations for Using Weighted Caseload Models in the Pandemic, March 31, 2022, https://www.ncsc.org/__data/assets/pdf_file/0034/75589/Recommendations-for-WCL-in-Pandemic.pdf.
[350] *Id.*
[351] 28 U.S.C. §41

additional Acts of Congress have added new judgeships to specific courts, the last judgeship bill passing Congress in 2002 preceded by a bill in 1990.[352]

Every two years, the Administrative Office of the United States Courts surveys each circuit and district court regarding the need for new judgeships.[353] The request for new judgeships is based on a national caseload threshold determined by the Judicial Conference of the United States ("JCUS") through the JCUS Committee on Judicial Resources (the "JRC").[354] A request for new judgeships must be approved by the court's board of judges (all the active judges and those senior judges involved in court governance), the circuit judicial council, the JRC Subcommittee on Statistics, the full JRC and then the full JCUS. The JCUS then transmits this request to Congress.[355]

Congress determines the numbers of judgeships based on statistical data from the Administrative Office of the U.S. Courts (the "Administrative Office").[356] The Administrative Office's professional staff uses algorithms to convert raw caseload data into weighted cases, which are the basis for determining whether a court is entitled to additional judgeships.[357] Each Circuit has a representative to the JRC.

In March 2017, based on the Administrative Office's latest survey, the JCUS recommended that Congress create five new judgeships in one court of appeals and 52 new judgeships in 23 district courts.[358] The JCUS also recommended that Congress convert eight existing temporary judgeships to permanent status. Since Congress enacted the last comprehensive bill for the U.S. courts of appeals and district courts, the number of cases filed in those courts grew by 40 percent and 38 percent, respectively.[359]

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[352] In 1990, Congress increased the number of Article III judges by 85 which was an 11% increase. Jud. Conf. of the U.S.: Hearing before Subcomm. On Bankr. and the Cts. Of the Comm. on the Jud., 113 Cong. (September 10, 2013) (Statement of Hon. Timothy M. Tymkovich, Chair, Comm. on Jud. Res.)

[353] United States Courts, *Federal Court Finder*, https://www.uscourts.gov/federal-court-finder/search.

[354] Statement of Hon. Timothy M. Tymkovich, *supra* 352.

[355] *Id.*

[356] *Id.*

[357] *Id.*

[358] *Id.*

[359] Chief Judge Lawrence Stengel, Judge Roslynn Mauskopf, and Judge Dana Sabraw testified at a Congressional hearing on "Examining the Need for New Federal Judges" on June 21, 2018. https://www.uscourts.gov/news/2018/06/21/courts-need-new-judgeships-judicial-conference-tells-congress.

Federal judges may take senior status when their years of service and age add up to 80.[360] Unless their workload is decreased, Senior Judges continue to be allocated chambers, administrative support and law clerks equal to the resources allocated to active judges.[361]

3. The Contrast to New York: Key Takeaways

The above nationwide state survey and brief examination of the federal court system led to the sobering conclusion that most other states and the federal system are far more advanced and methodical in their approaches to assessing the adequacy of judicial resources. While other states are largely data driven and staying atop current trends, New York State employs an ad hoc, speculative approach devoid of any meaningful reliance on facts—instead continuing to rely on an outdated constitutional cap based on population alone to determine the number of judges for the Supreme Court. Moreover, unlike New York, most of the approaches surveyed include a mandatory component—constitutionally by statute or otherwise—for the relevant authority or body to evaluate the need for additional judges and make recommendations, as necessary.

By contrast, while New York State's Chief Administrative Judge has the duty to keep and report data for the Unified Court System under the Judiciary Law, it merely has the option to request a change in the number of judges as needed.[362] The Chief Administrative Judge does **not** have the duty to request a change in the number of judges. Based on New York State's experience to date, without a mandate requiring the Chief Administrative Judge to evaluate and make a recommendation to change the number of judges, as needed, it is unlikely that any such request for additional judges will ever be made. Indeed, the Subcommittee has been unable to locate any such request, except for the Family Court crisis in 2007[363] and the Franklin H. William Commission in 2022.[364]

Regardless of the reason, the City Bar believes the time is right to add this important duty to Judiciary Law—specifically, section 212. Whether the courts are now performing at their

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[360] 28 U.S.C. § 371 (c); Hon. Frederic Block, *Senior Status: An Active Senior Judge Corrects Some Common Misunderstandings*, Cornel Law Rev. 533 (March 2007) https://core.ac.uk/download/pdf/73974972.pdf.

[361] *Id.* 539-540.

[362] N.Y. Jud. Law § 212.

[363] "According to court statistics, Family Court filings have grown to 700,000 annually, an increase of 90 percent over the past 30 years. But no new Family Court judges have been added statewide since one was created in Orange County in 2005." *OCA Proposes Allocation of New Family Court Judges*, N.Y.L.J. (May 16, 2014). In 2007, Chief Judge Kaye requested 39 new Family Court Judges. *Id.* It was not until 2014, however, that 25 new Family Court seats were created statewide. *Cuomo Signs Bill for New Family Court Judgeships*, N.Y.L.J. (June 27, 2014).

[364] Franklin H. Williams Judicial Commission of the New York State Court Report on New York City Family Courts at 6 and 28, https://www.nycourts.gov/LegacyPDFS/IP/ethnic-fairness/pdfs/FHW%20-%20Report%20on%20the%20NYC%20Family%20Courts%20-%20Final%20Report.pdf.

peak efficiency should be based on science, not speculation. Further, an independent professional analysis—in-house or by NCSC—that is reported to the Legislature and the public makes the process of changing the number of judges transparent.[365] Such a report would include statistics on the length of time that the courts are taking to resolve various types of cases. For example, the report would make it possible for the Legislature and the public to compare how long it takes to resolve a custody dispute in Family Court as opposed to the matrimonial part in Supreme Court, and it would be for the Legislature to decide whether delays, if any, are tolerable or not.

Accordingly, as part of the proposals discussed more fully below, the Council recommends that Judiciary Law § 212 be amended to require the Chief Administrative Judge to (1) annually assess the need to change the number of judges to ensure the efficient resolution of all cases filed in New York using a weighted caseload analysis; (2) report the needed changes to the number of judges in any court; and (3) make a request to the Legislature for such change, as needed.

B. The Path to A Better System

1. Guiding Principles

The Council concludes each court should have the right number of judges to perform its duties and provide justice to the people of New York. An excess of judges in any court or county obviously constitutes a waste of state resources, but there must be an adequate number of judges to provide civil litigants with access to the court and to assure that all parties in criminal cases are able to pursue justice in the courts. Achieving this goal will take time and professional analysis of the statistics. Once this task is performed, it is up to the Legislature under the constitution to create more judicial seats, or not. Whether there will be a budgetary impact depends on the recommendations adopted, how they are implemented, and when (e.g., staggered implementation).[366] In the judgment of the Council, the present allocation of judges, particularly of Supreme Court judges, in the various counties of the state is the result of an idiosyncratic and woefully inadequate patchwork of appointments that are not based on data or modern methods of evaluation.

Temporary measures should be temporary. As the 49-state survey illustrates, many states have temporary measures to address emergencies or societal changes that impact the courts. The Council appreciates the constitutional provision for acting Supreme Court justices to be moved

[365] Both the Legislature and the OCA may have such expertise. *See* New York Legislative Task Force on Demographic Research and Reapportionment., https://www.latfor.state.ny.us/; OCA's Division of Technology, https://ww2.nycourts.gov/Admin/supportunits.shtml#su4.

[366] *Cuomo Signs Bill for New Family Court Judgeships*, N.Y.L.J. (June 27, 2014); *see also*, *New York State Association of Trial Lawyers v. Rockefeller*; *Kail v. Rockefeller, et. al*, 275 F. Supp. 937 (E.D.N.Y. 1967).

from time to time to address a temporary need. But appointing over 300 acting justices each year for over 13 years proves that there is a dire need; it is not a passing or temporary need. Indeed, the use of acting justices has flooded the Court to the point that there have been more acting justices than there are constitutional justices throughout the state, to the detriment of lower courts. The use of the acting justice approach to address temporary needs has effectively created disparities in the availability of resources between acting justices and their colleagues who are constitutionally-elected justices—thus creating two disparate levels of judges in the same court.

The Council cannot determine the financial impact of these proposals. Therefore, this Report does not include a fiscal impact analysis. Rather, once the data is collected and organized either by OCA, the Legislature, or professionals, it will be up to the Legislature to determine how many judges are needed in each judicial district and each court. Such evaluations can be done at once or on a staggered basis by court or judicial district, with the attendant fiscal impact flowing from these processes. With these guiding principles in mind, our recommendations are five-fold.

First, the constitutional cap should be eliminated. Such a change to the constitution will take time to effectuate, as the Legislature will have to vote in favor of the change in two separate Legislatures before the measure goes to the New York electorate on a ballot.

Second, the Legislature must codify a regular systematic assessment of the courts' specific needs as many other states and the federal courts have done. The constitutional obligation for the Legislature to evaluate judicial districts—and implicitly the number of judges—at least every ten years when there is a new census, has been consistently breached, with the Legislature increasing the number of judges only on an ad hoc basis. Other state legislatures are required to regularly evaluate the number of judges and courts needs annually, biannually, or using a formula. The Council does not recommend how often such an evaluation must be performed in New York State, as such a decision should be informed by the cost of conducting the evaluation, which the federal courts and many states perform in-house, and other states perform using outside experts such as the National Center for State Courts. The Council, however, finds that performing such an evaluation every ten years, if at all, is insufficient. The Council's proposed statutory language appears in §V1(B)(2) (Proposal 1(C)).

Third, the Chief Administrative Judge plays a role in this process and should be tasked with the responsibility to evaluate the adequacy of current judicial resources and issue a report to the Legislature setting forth her findings and recommendations, so that the Legislature may carry out its function. The Chief Administrative Judge is currently required to keep data that would enable the Legislature to perform its regular and systematic assessment, and she thus has a significant role in this process.[367] His statutory responsibility to annually evaluate the adequacy of current court resources and issue an annual report should include a directive to analyze the

[367] The Chief Administrative Judge is Hon. Joseph Zayas

number of judges in each court and request changes when appropriate; this is not currently on the list of items to be reported. This annual report would inform the Legislature in carrying out its constitutional duty to set the number of judicial seats in each court, giving the court responsibility to initially identify the need to change the number of judicial seats. The Council's proposed statutory language appears in § V1(B)(2) (Proposal 1(D)).

Fourth, the evaluation must be performed regularly with OCA providing the data and initial recommendation and the Legislature performing its duty to regularly evaluate the number of judges and change the number accordingly. The Legislature should adopt a formula for assessing these needs, which takes into account not only population, but also translating the various caseloads, civil, and criminal, complexity of cases, out of court time for preparation and writing decisions, and extra time for unrepresented litigants into a number representing the total judges that will be necessary at a given time to fulfill all judicial obligations—until modified upon subsequent review based on new information. Such an analysis would also take into consideration the availability of nonjudicial resources such as ADR, JHOs, special referees, and magistrates. Any determination increasing or decreasing the number of judges in any particular court or in any particular department will necessitate a correlative change in support resources, such as court personnel, courtrooms, and the like.

Fifth, there must be transparency. The results of any assessment should be published so that the public has information as to the time it takes to resolve criminal cases, small claims cases, Family Court cases, and other matters. Most states use a "weighted caseload analysis," which includes counting the number of cases filed and disposed, as well as the time from filing to disposition, or "clearance rate," and assigning weights to each type of case based on complexity and other resources available to courts e.g., nonjudicial staff. The people of New York State have the right to know the time it takes to resolve criminal cases, small claims cases, Family Court cases and others, as well as their legislators' positions on what are acceptable clearance rates in those courts.

2. Proposed Solutions

PROPOSAL #1

The constitutional cap on the number of Supreme Court justices should be eliminated and the Legislature should be required to devise a new method to analyze and respond to the judiciary's needs.

Specifically:

A) (The following language in Article VI, Section 6(d) of the N.Y. Constitution should be deleted:

The Legislature may increase the number of justices of the Supreme Court in any judicial district, except that the number in any district shall not be increased to exceed one justice for fifty thousand, or fraction over thirty thousand, of the population thereof as shown by the last federal census or state enumeration. The Legislature may decrease the number of justices of the Supreme Court in any judicial district, except that the number in any district shall not be less than the number of justices of the Supreme Court authorized by law on the effective date of this article.

B) Article VI, section 6 (b) of the constitution should be rewritten as follows (new language
in red):

At least once every ten years, the Legislature shall consider whether to increase or decrease the number of judicial districts or alter the composition of judicial districts and thereupon re-apportion the justices to be thereafter elected in the judicial districts so altered, provided that each judicial district shall be bounded by county lines. The Legislature shall also, at least once every ten years, consider whether to increase or decrease the number of justices of the Supreme Court in any judicial district, except that the number in any district shall not be less than the number of justices of the Supreme Court authorized by law on the effective date of this subdivision as amended.

(These amendments would have to be approved by the current Legislature and the Legislature elected in 2023, and then submitted to the voters for ratification.)

C) A new section of the Judiciary Law should be enacted, to read in substance:

"In exercising its powers pursuant to Article VI, subd. (6)(b) of the constitution, the Legislature shall seek to ensure that each district and court therein shall have sufficient numbers of justices to perform its functions in a thorough and efficient manner, considering the number of cases filed in each court, the complexity of such cases, the extent of delays in the disposition of cases in each court, and any other factors used by recognized national or state authorities who study the proper allocation of judicial resources."

D) A new subdivision should be added to Section 212 of the Judiciary Law, "Functions of the chief administrator of the courts," directing the chief administrator to compile data to assist the Legislature in performing its functions under [the new section of the Judiciary Law, above] and to provide such data, and analyses thereof, with a specific request to change the number of judges in each court, in such manner as the Legislature may direct.

PROPOSAL #2

The constitution should be amended so that the case-handling capacity of the Supreme Court shall not be diminished by the appointment of Supreme Court justices to any appellate division.

Specifically:

Article VI, section 4(e) of the constitution shall be amended to read (new language in red):

In case any appellate division shall certify to the governor that one or more additional justices are needed for the speedy disposition of the business before it, the governor may designate an additional justice or additional justices; but when the need for such additional justice or justices shall no longer exist, the appellate division shall so certify to the governor, and thereupon service under such designation or designations shall cease. Designation of an additional justice pursuant to this subdivision shall be deemed to create a vacancy in the Supreme Court position previously held by said justice. Said vacancy shall be filled pursuant to Section 21(a) of this Article.

(Notes: this amendment would have to be enacted simultaneously with the other proposed amendment. Otherwise, implementation of this amendment may conflict with the cap on the number of Supreme Court justices.

This amendment would not preclude other changes regarding the composition of the appellate divisions that the Council, or the Legislature, may wish to adopt.

3. Immediate Interim Measures

In the interim, less time-consuming statutory changes are immediately available. Unlike the New York Supreme Court, the number of judges in the lower civil and criminal courts is not subject to a constitutional cap on the number of judges. For example, the shortage of Criminal and Civil Court judges created by the transfer of acting justices may be addressed by the legislative authorization of additional judges to the citywide courts. Since the number of judges in courts other than the Supreme Court is not subject to a constitutional cap, the Legislature could immediately assess the judicial needs in those courts and change the number accordingly. But any such change must be based on actual data and modern methods of evaluation. Indeed, the weighted caseload analysis could be performed and implemented in Housing Court immediately without any statutory change. The evaluation of whether the number of judges in the lower courts and calculation of weighted caseloads need not await a constitutional or legislative change. Rather, all that is needed is the raw data and the skills to evaluate it. The calculation of case weights, however, requires cooperation of court participants to determine the time it takes to perform certain tasks.

CONCLUSION

In the almost 60 years since 1962, when the constitutional formula changed to one judge per 50,000 people and the creation of the civil and criminal lower courts, there has been no change in the calculus of Supreme Court justices. Despite the constitutional obligation to reconsider the need for more justices every ten years based upon newly collected census data, the failure to increase the number of Supreme Court positions in light of the significant interim population growth has forced OCA to implement *ad hoc* mechanisms in order to provide the jurists needed to actually carry out the critical obligations of the third branch of government. Based on the assignment of at least 300 such acting justices for over ten years, the time has come to lift the cap and begin calculating the number of judges in all of New York's courts using actual data and modern methods of evaluation.

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Civil Court Committee, Sidney Cherubin, Chair
Criminal Courts Committee, Carola Beeney and Anna G. Cominsky, Co-Chairs
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[368] The sub-committee began under the leadership of CJA Chair Steve Kayman. Hon. Carolyn E. Demarest and Michael Regan also chaired the CJA during the work of the sub-committee.

[369] The Committee wishes to thank the City Bar's Librarian Richard Tuske and Administrative Assistant Dionie Kuprel. The Committee is most grateful to the following for sharing their expertise, advice, and/or data: Hon. Shahabuddeen Ally, Alex D. Corey, Esq., Prof. Peter J. Galie, Jonathan Goeringer, Esq., Gloria Smyth-Gottinger, Betty Hooks, Hon. Roslynn R. Mauskopf, Karen Milton, Esq., Prof. Dan Rabinowitz, Joan Vermeulen, Esq., and Hon. John Zhou Wang. This report would not have been completed without the assistance of our student interns: Liam Clayton, Emily Friedman, Max Gerozissis, Fiona Lam, Samil Levin, Andrew Lymm (creator of Exhibit 6), Max Sano, Sarah Shamoon, and Kristen Sheehan. We thank our editors: Juanita Bright, Esq., Jamie N. Caponera, Esq., Hannah E. Reisinger, Esq, and Maria Reyes Vargas, Esq.

[370] Claudia Blanchard of Calinoff & Katz LLP provided Word expertise without which we would not have finished the report.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #9

REQUESTED ACTION: Approval of the Report and Recommendations of the Strategic Planning Committee.

In 2022, then President Andrew Brown formed the Strategic Planning Committee, co-chaired by Taa Grays and Chritopher Riano, to see how the pandemic impacted who we were, what we did and how we do what we do. He tasked the Committee with identifying the near-term and long-term actions we needed to take to ensure the Association's continued success.

This report makes two recommendations:

1. Adopt a three-year Strategic Plan that (a) updates the Association's mission, vision and values; and (b) focuses on increasing membership, enhancing our decision-making processes and builds a strong business model to increase revenues as strategic objectives with several strategic goals to achieve the objectives.

2. The Association's Executive Committee will be responsible for implementing in three years the Strategic Plan with the support of staff.

The outline of the remainder of this report is: (1) Overview of Strategic Planning Process; (2) Prior Association Strategic Planning Work, (3) Assessment of Current and Future State; (4) Recommendations and (5) Conclusions.

Taa Grays, Esq., co-chair of the Strategic Planning Committee, will present the report.

NEW YORK STATE BAR ASSOCIATION

Report and Recommendations of the New York State Bar Association **Strategic Planning Committee**

April 2024

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

Strategic Planning Committee Members

TAA GRAYS, CO-CHAIR	**RICHARD LEWIS**
CHRISTOPHER RIANO, CO-CHAIR	**KATHRYN MADIGAN**
JAMES BARNES	**DAVID MARSHALL**
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Introduction

"The profession is at multilevel crossroads as the pandemic wanes. 'Business as usual' is now better stated as 'business can no longer be as usual'." Task Force on the Post-Pandemic Future of the Profession Report April 2023.

The pandemic jarringly impacted our members professionally and personally; indelibly impacted the legal profession locally, nationally and globally; and lastly, created novel and complicated legal issues.

Many though realized pre-pandemic that "business can no longer be as usual." An ABA October 2019 article observed, "Even though 2018 was the strongest year for law firms since the Great Recession . . . many lawyers sense the profession is undergoing important fundamental changes." The 2022 Future Ready Lawyer Survey by Wolters Kluwer identified the following top trends that have accelerated due to the pandemic:

- Increasing Importance of Legal Technology.
- Coping with Increased Volume and Complexity of Information.
- Meeting Changing Client/Leadership Expectations.
- Emphasis on Improved Efficiency/ Productivity; and
- Growth of Alternative Legal Service Providers

- Workforce expectations: tech-enabled organizations and working remotely or hybrid.

“On an organizational level,” a March 2020 TrendWatching article noted, “times of crises can be both threatening and liberating.” As a member-drive organization and a leader in the legal profession, the Association needs to take a step back and be reflective: is the way we have done things still the right way to deliver members services, create financial sustainability and advance the rule of law and justice? As we look to our 150 Anniversary in 2026, what steps do we need to continue to ensure our long-term success?

These questions are the ones the Strategic Planning Committee sought to answer and are the subject of this report.

This report recommends that the Association adopt a three year Strategic Plan that (1) aligns our activities to the current and emerging needs of our members, (2) sets us on the path to take advantage of additional revenue streams to ensure continued financial sustainability, and (3) enhances how we lead the legal profession to address the novel and complicated legal issues we now face.

Executive Summary

“As an organization, we must continue to ask ourselves how a specific effort may optimize engagement with current members,” President Andrew Brown explained to the Executive Committee when he formed the Strategic Planning Committee toward the end of his presidency in 2022, “as well as determine whether this same effort may help recruit new members or assist with retaining existing members?”

Coming out of the pandemic President Brown recognized that the Association needed to take that step back to see how the pandemic impacted who we were, what we did and how we do what we do. He tasked the Committee with identifying the near-term and long-term actions we needed to take to ensure the Association’s continued success.

“The pandemic has caused many organizations to re-evaluate their organizations,” stated the strategic consulting firm Danosky & Associates, “how they are serving their constituents and how to promote more equity and inclusion in the work they do.”

This report makes two recommendations:

1. Recommendation 1: Adopt a three-year Strategic Plan that (a) updates the Association’s mission, vision and values; and (b) focuses on increasing membership, enhancing our decision-making processes and builds a strong business model to increase revenues as strategic objectives with several strategic goals to achieve the objectives.
2. Recommendation 2: The Association’s Executive Committee will be responsible for the implementation. This effort involves working with volunteer leaders,

Association sections and committees as well as staff to develop the key activities and timing of the activities to execute the plan over three years.

The outline of the remainder of this report is: (1) Overview of Strategic Planning Process; (2) Prior Association Strategic Planning Work, (3) Assessment of Current and Future State; (4) Recommendations and (5) Conclusions.

Overview of the Strategic Planning Process

"Strategic Planning," Clark Crouch, noted author and strategic planning consultant, observed "is a process by which we can envision the future and develop the necessary procedures and operations to influence and achieve that future".

The New York State Bar Association is a 501(c)(6) not-for-profit corporation under New York State not-for-profit law. Strategic Planning is an important process for all corporations – for-profit and not-for profit to ensure future success. "A strategic planning process," explains the National Council for Nonprofits, "identifies strategies that will best enable a nonprofit to advance its mission."

The process for successful strategic planning[1] includes 5 steps below:

- **Assessment of Current State**: To understand what you need to do; you need to know what you have done. This assessment involves using several strategic planning analytical tools such as SWOT, PESTLE, Porter's Five Forces to be internally reflective and externally aware of factors impacting the organization.

- **Setting Goals and Objectives**: Based on the assessment work, the organization can set realistic and achievable goals and objectives for itself. These goals should be specific, measurable, and time bound.

- **Developing Strategies**: Once the goals and objectives have been set, the organization can then develop strategies to achieve them. These strategies may include marketing, financial, operational, and human resource strategies.

- **Implementation**: After developing the strategies, the organization needs to implement them. This involves assigning responsibilities and resources to different members in the organization to achieve the strategic goals and objectives.

- **Evaluation and Monitoring**: Finally, the organization needs to evaluate the effectiveness of the strategies and monitor progress towards achieving the strategic goals and objectives. This involves measuring performance against a set of metrics and adjusting as needed.

[1] For more details about strategic planning, please see Martins, Julia, "What is strategic planning? A 5-step guide," Asana, January 23, 2024, https://asana.com/resources/strategic-planning.

The rest of this report will focus on the first three steps of the strategic planning steps in the next three sections: (2) Prior Association Strategic Planning Work, (3) Assessment of Current and Future State, and (4) Recommendations.

Prior Association Strategic Planning Work

The Committee reviewed the Association's 2011 Strategic Plan and the 2019 Virtual Bar Center Assessment to understand the prior work done and what goals were achieved.

2011 Strategic Plan – Focus on Membership, Technology, Finance and Programming and Services.

In July 2010, President Stephen P. Younger appointed a Special Committee on Strategic Planning and engaged Harrison Coerver, a professional facilitator to assist with the development of the Strategic Plan. The committee focused on four areas: (1) Membership, (2) Technology, (3) Finance and (4) Programming and Services.

The Strategic Goals adopted were:

1. Increase the value of the Association to members and prospective members.
2. Strengthen the Association's CLE programming and delivery and maintain the Association's market leader position by providing quality, targeted and affordable CLE that is accessible through multiple delivery systems.
3. Strengthen the Association's Sections to add benefit to the members.
4. Use technology to communicate more effectively with existing members, attract and retain new members, and increase the overall value of membership in the Association.
5. Increase organizational support for use of technology.

The staff took the lead in implementing and executing the strategic plan. The goals were achieved, specifically:

1. Pricing accommodations have been implemented since the 2011 plan, discounting services and CLE programming, as well as providing dozens of free programs to members and non-members every given year.
2. CLE programming has grown exponentially over the last few years, including the implementation of a digital-first model.
3. NYSBA now has an on-demand CLE library with 1,700+ programs available 24/7.
4. Increased communications and dissemination of information has been evident over the years.
5. Third party resource portal allowing for job/position searches and resume sharing.
6. Implementation of online communities has led to greater networking.
7. Overhaul of various systems including website, learning management system, and association management software.

8. CTO on staff charged with developing a technology strategy aligned with the company's overall business goals and objectives. This involves assessing current technologies, anticipating future trends, and identifying opportunities for innovation.

2019 Building a Virtual Bar Center

“Our present challenges do not involve brick and mortar,” President Henry “Hank” Greenberg explained to the House of Delegates at its June 2019 Meeting, “the challenge is digital.” In thinking about the Association’s future, he with senior staff and Bar leaders spent months of thinking and analysis, and interviews about how to address this challenge. This work well-positioned the Association to shift to virtually support our members nine months later when the pandemic hit.

The work also produced several key findings pertinent to the current strategic planning work:

1. NYSBA has no Significant International Competition because we are the global leader. Building our international attorney membership is a membership growth opportunity.
2. We have outdated technology.
3. Implementing staff training will strengthen our staff’s ability to support the volunteer leaders and members.
4. We need structural and operations reform.
5. We need a strategic communications plan.
6. To continue fiscal soundness, we need a multi-year strategic fiscal plan.
7. Diversity is a hidden strength that we need to continue to nurture and build.

Understanding what had been accomplished and what gaps remain, the Committee proceeded to examine the Association’s current state and consider the future state by seeking three perspectives: (1) externally – what is happening around us; (2) internally from an operational perspective, and (3) internally from our members.

Assessment of Current and Future State

"If you don't know where you are going,” Yogi Berra, American baseball player observed, “you'll end up someplace else." To understand what areas the Association should focus in on, the Committee sought information from three sources:

1. External perspective – identifying issues and trends impacting not-for-profits and the legal profession.
2. Committee perspectives – identifying issues and seeking recommendations from those handling the operations of the Association; and
3. Member perspectives – reviewing feedback from current members, former members and possible members to understand how they view the Association’s work and value.

External Perspective – "Business can no longer be as usual."

The feedback from the five consultants[2] the committee spoke to was clear: Associations cannot do what they had been doing before. "Not-for-profit organizations have gone through a period of significant upheaval over the past decade," one consultant observed, further stating," In the past three years, trends which were evolving have now substantially accelerated." Advances in technology, new member expectations and needs, new sources of legal services and how these changes impact generating revenue are changing the way organizations have to operate to ensure continued success.

The Committee gained the following insights from the consultants:

<u>Organizations have to service their Membership differently.</u>

- Professional associations generally are experiencing declining membership: in 2019 pre-pandemic 68% struggled to explain and 32% saw 1 – 5% growth.
- Bar associations' declining membership can be largely attributed to its traditional value proposition not aligning with the needs of younger lawyers (Noting: The younger generation of lawyers tends to place greater value on time spent outside of work-related activities.)
- To attract new members, bar associations have begun offering tiered memberships, a la carte services and enhanced online communities. (Noting: Younger members want their associations to not only offer CLE and networking opportunities, but also to represent their personal interests.)
- Organizations are adapting their programs to respond to an increase in need for services,
- Associations are integrating Diversity, Equity and Inclusion into their teams and boards; looking for ways to include diverse voices in the conversation.
- Professional membership organizations have also begun to take a personal approach to their engagement and member learning opportunities. (Noting: Members who are highly engaged and feel personally connected will also be motivated to invite their peers and colleagues, increasing enrollment overall.)
- Millennials are the largest generation in the American workforce since 2016; they appear to prioritize work-life balance.
- Gen Z is estimated to make up over 27% of the workforce by 2025; they appear to prioritize DEI initiatives and hands on experiences.

<u>Technology provides support but is also disruptive.</u>

- Technology also enables other organizations to do the work done by the bar association. One consultant said there could be a free bar association completely online.
- Traditional Association offerings are being replaced by digital offerings.

[2] The key insights from KPMG, PWC, EY, Danosky & Associates and Parliamentary Associates.

- Online sites are competing with bar associations in terms of CLEs, networking and referral services.
- Technology enables increased “self/study/paced/time” options, hybrid participating options, and use of platforms that work on all devices.
- Budgets are being adjusted to invest in new systems and processes.

Operations need to be re-examined.

- Association are re-thinking operations and organizational structures.
- Associations are using technology to enhance automation capabilities.
- Associations are taking steps to demonstrate greater transparency and accountability.
- Associations are also assessing what they can and cannot do.
- Disruption examples include Amending the Governing Documents to Restructure the Governing Body and allow virtual training and activities.

Associations are re-assessing how they engage externally.

- Associations are becoming more purpose driven.
- Associations are exploring the ecosystem where the organization works.
- Associations are engaging community voices and fostering inclusion.

Focusing on How to Maintain Financial Sustainability

- Associations are focusing on building financial sustainability: to ensure the ongoing viability, the organization must develop a sustainable financial model that is responsible, fair and transparent.
- Associations are developing risk-based scenarios to demonstrate financial sustainability.

Committee Perspective – The Association can improve on how we operate.

The Strategic Planning Committee worked with four Association committees to gain insights and possible recommendations for strategic goals to advance our strategic objectives. The key insights we learned from the Finance Committee, Membership Committee, Communications Committee and the Committee on Committees are excerpted[3] below.

Finance Committee - we weathered the pandemic, but headwinds are ahead.

During the pandemic, and the year that followed, the Association performed exceptionally well from an operating standpoint, due in large part to pivoting our programming to virtual, hosting two virtual Annual Meetings, transitioning other

[3] The full reports are included in the Appendix.

organizational meetings and events to Zoom, and restructuring staff. We also benefited substantially from rising equity markets and the forgiveness of a sizable PPP loan.

It is quite evident, however, that we will not be able to thrive long-term as an organization simply by cutting expenses and virtually operating with a skeleton crew of employees. The Association faces significant headwinds in terms of revenue and expenses that it must confront head on, all the more so now that we own One Elk, and the significant expenses that came along with it.

Committee on Committees: Allocation of Staff Resources is not efficient or coordinated.

At the end of the day, this Association needs to find a way to balance the priorities of the Association, along with the priorities of the varying sections and committees. However, this can only be done if those priorities have been established in advance, and at a similar time. This strategy should not omit the ability to be flexible and pivot where necessary, handling last minute requests or changes, however those should be the "exception.' Association staff currently work a 35- hour work week based on the Human Resources department; however, there are times a Liaison role exceeds those hours. A Liaison's time is driven by the requests and decisions made by volunteers, who are not privy to the same requests and decisions section by section, or committee by committee, making time management very difficult.

Communications Committee: Enhancements will Support Strong Communications Foundation.

The Committee noted that we have strong content and disseminate that content to our members through various channels. The Committee recommended improving the website, creating separate sites for the NYSBA Bar Journal together with Section publications, developing podcasts, and further using collaboration tools/software to increase engagement with Association members.

Committee on Membership: Great benefits but Association is difficult to navigate.

When asked how is the Association different from other bar associations, the Committee identified a dozen activities that make the Association unique and show our value including, sections, CLEs, advocacy efforts, members being generous with their time to support each other, discounted publications and using our committees and task forces to examine issues that impact lawyers.

Our size does present some challenges, including:

- It can be hard to get involved because it is big and overwhelming.
- It can be difficult to reach leadership positions, the bylaws make it challenging to break out of a Section to get to the HOD and then to the EC.
- The information is not localized enough, in a state with 62 counties and potentially 62 different local practices.

Another challenge is our demographic representation – there are five generations of lawyers in the Association. The membership needs of each generation differ.

To improve promoting our value to members, the Committee recommended several activities, including in relevant part:

- District Vice Presidents can help promote NYSBA events.
- The Sections and their District Reps can plan and hold events in each District with a goal of having events on a monthly/quarterly basis.
- Improve online user experience to provide easier access to membership benefits.

Member Perspective – Strong Brand and Benefits but number of Members continues to decline.

The Committee reviewed our membership data and the result of membership surveys completed in 2011 (included in the 2011 Strategic Planning Briefing), 2021 and 2022 (the most recent set of data) and pertinent years of financial reports. Key data points include:

- In 2009 our total revenue was $23.5M; in 2023 it was $19.2M.
- In 2011 when we adopted the strategic plan, our total number of members was 77,736; in 2023, our total number is now 56,451.
- From 2012 to 2023, total Association revenue from dues declined from $13M in 2012 to $9.8M in 2023.
- In 2011, dues revenue was 50% of our total revenue; today it is 51%.
- Membership Satisfaction survey data in 2022 shows the majority (62%) rated their overall experience as an Association member as valuable. The survey participants skewed to more experienced lawyers: 71% of those surveyed were lawyers with 21+ of experience while those with less than 10 years experience were 9%.
- Membership Survey data in 2022 showed that the reasons members did not renew were: (1) I am no longer a practicing attorney (28.5% v. 14.4% in 2021), (2) financial constraints (19.7% v. 32.9% in 2021), (3) I did not see the value (18.2%. V. 12.9% in 2021) and I disagreed with some of NYSBA's views (14.4% v. 23.9% in 2021).
- An MCI survey conducted of international lawyers in 2018 showed opportunities to expand our international lawyer membership. These lawyers want to be members of the Association for "prestige, credibility and career development. MCI recommended "a deliberate and focused strategy toward proactive engagement of the international community and building relationships."

The Committee also conducted focus groups at the end of 2023. The groups consisted of a combination of veteran, new and former members of the Association. They were asked what value or benefit they saw in Association membership, to provide feedback

on the mission and vision, CLEs, and, finally, thoughts about the Association's leadership pipeline.[4]

In answer to the first question, some of the key responses provided were:

- Joined because I was friends with leaders at that time.
- When I graduated from law school, you automatically joined the State Bar.
- Before the internet, bar membership was the space to meet other attorneys and create a network to support the practice.
- It is important for individual lawyers to realize they are part of a bigger organization.
- The services available to them/State Bar offers services that are not available through affinity or county bars.
- Opportunity to network/see/work with/socialize with very accomplished/smart members of the profession (recurring response).

The response concerning the mission and vision is discussed under recommendations.

In response to feedback about CLEs, the majority of the focus group participants said they do not use that member benefit; The main reason was that they obtained CLEs from other organizations.

Finally, feedback concerning the leadership pipeline reflect the membership committee's comment about difficulty in becoming leaders in the Association:

- Without a mentor or someone to make the "introductions" it is challenging to get into the State Bar leadership pipeline.
- Solo practice attorneys struggle with having the time to engage in State Bar leadership even if they are able to have the "introduction."
- Why is committee service in the State Bar not more open and voluntary like other bars?
- My mentor has been instrumental in the leadership opportunities I have with NYSBA.

In his 2019 presentation, Past President Greenberg quoted, Wayne Gretzky, "I skate to where the puck is going to be, not where it has been." With the assessment completed, the Committee then focused on the future and the key areas that would drive the Association's long-term success.

[4] Feedback was also provided on the new membership model. The question was asked to provide feedback to the membership committee.

Recommendations

The Committee has two succinct recommendations.

Recommendation #1: Adopt a three-year Strategic Plan that (a) updates the Association's mission, vision and values; and (b) focuses on increasing membership, enhancing our decision-making processes and builds a strong business model to increase revenues as strategic objectives with several strategic goals to achieve the objectives.

The Committee's assessment identified several areas that the Association could focus on its strategic plan. The Committee chose the areas that would strengthen our brand, enhance our operations, address member concerns and ensure continued financial sustainability.

Strengthening our Brand: NYSBA the Leader of the Legal Profession

Although members can find different ways to engage with the Association, the Association should be clear about its brand. The brand defines who we are, what is important to us, and how we achieve what is important to us. The three items that broadcast and showcase our brand are a mission, vision and value statement.

Mission Statement: This statement states what the Association does, who it serves, and its objectives.

The New York State Bar Association will continue to be the leading voice for the legal profession by advancing the professional success of our members, equal access to justice, and the rule of law.[5]

Vision Statement: This statement describes who the Association wants to be in the future.

The New York State Bar Association engages and educates its members, shapes the development of law, responds to the demands of our diverse and ever-changing legal profession and the public we serve, and advocates for legislation, equal access to justice, and the rule of law.[6]

Values: These adjectives state how one would describe the Association and its members.

- Competent
- Knowledgeable
- Informed

[5] The focus group feedback on the mission statement can be found via this link.
[6] The focus group feedback on the vision statement can be found via this link.

- Responsive
- Civil
- Advocates

Strategic Objectives: Membership, Improved Operations, Financial Sustainability

Strategic Objectives #1: Increase NYSBA Membership by 3% annually. Why? Membership is a key component of our mission as well as the main revenue driver for the Association.

Strategic Goals: The five goals to achieve this strategic objective focus on membership growth areas (international, law students, 50+, law firms/corporations), improving membership satisfaction (focusing on advancing the subscription model, enhancing communications, member benefits and CLE programming) and enhancing our technology capabilities.

1. Focus recruitment efforts on international, law students and 50+ membership categories
2. Create and promote Enterprise Model for law firm/corporations.
3. Use the subscription model to demonstrate our value proposition
4. Increase membership satisfaction by focusing on three areas: (a) communications; (b) refreshed benefits; and (c) optimized CLE programming
5. Review and integrate new technology capabilities in an effort to enhance what we currently have (e.g. website, podcasts, Web3, an app)

Strategic Objective #2: Better decision-making to best use volunteer leaders' and staff's time. Why? Changes in the New York Not-for-Profit Law[7] necessitate the Association evaluating its operations and structure. In addition, volunteer leaders and staff are seeking more collaborative and efficient ways of doing the work of the bar.

Strategic Goals: These goals were recommendations from the leaders of the By-Laws (1 + 2) and Committee on Committees (3 + 4).

1. Amend Association By-laws to enhance compliance with NYS not-for-profit law
2. Revise Association policies and procedures to support amended By-Laws
3. Create and align staff and volunteer leader to roles and responsibility descriptions
4. Volunteer leaders will develop section/committee goals and objectives each year to better align staff resources.

Strategic Objective #3: Build a business model that funds the better funds Association operations, including diverse revenue streams. Why? Membership dues constitute 51% of the Association's revenues. CLEs constitute 13% of revenue. The Finance Committee stated clearly the Association must increase revenue because we cannot reduce expenses further.

[7] New York Not-For-Profit Corporation Law Article 7 - DIRECTORS AND OFFICERS describes the governing body of a not-for-profit corporation.

Strategic Goals: These strategic goals seek to expand our business model to diversify our revenue streams to (1) include additional partners to provide member benefits, (2) develop more sponsors to generate more revenue from the Annual Meeting and (3) obtain more funding from foundations and other grant providing organizations.

1. Add eight New Member Benefit Partners
2. Increase sponsorship revenue to be 20% of Meeting sponsorship.
3. Increase revenue from grant submissions by 10%.

Recommendation #2: Executive Committee will be responsible for implementing in three years the Strategic Plan with the support of Staff.

"In real life, strategy is actually very straightforward. You pick a general direction and implement like hell." — Jack Welch, former CEO of General Electric

The fourth step in strategic planning is implementation. Once the strategic plan is adopted, the organization needs to implement it. The Strategic Planning Committee recommends that the Association's Executive Committee be responsible for the implementation. This effort involves working with volunteer leaders, Association sections and committees as well as staff to develop the key activities and timing of the activities to execute the plan over three years.

The Executive Committee should also ensure that the fifth and final step - Evaluation and Monitoring - is done. This step involves evaluating the effectiveness of the adopted strategic objectives, holding those accountable for their implementation tasks and monitoring progress towards achieving the strategic goals and objectives.

Conclusion

"Strategy is, at some level, the ability to predict what is going to happen, but it is also about understanding the context in which it is being formulated. And then you have to be open-minded to the fact that you are not going to get it right at the very beginning." Martin Dempsey

After two years of work, the Committee has developed and recommended a strategic plan with specific, measurable, achievable, relevant, and time-bound goals and objectives. The Committee believes these goals and objectives will provide direction, motivation, and a framework for planning, decision-making, and performance evaluation in the near and distant future. The Committee also recognizes that some of these goals may be expanded on or re-evaluated after the initial rollout depending on any organizational changes or unknown priorities that may have yet to be discovered at this time.

"Over its almost 150-year history," Past President Scott Karson observed in a May 4, 2021 article entitled, "A Vision for the Future of NYSBA", "NYSBA has frequently adapted to meet the needs of its members, the legal profession and the public. Time

and again, we have expanded operations and broadened our outlook, as dictated by the needs of the day." The needs of **today** now dictate that the Association must adopt a new strategic plan to (1) align our activities to the current and emerging needs of our members, (2) sets us on the path to take advantage of additional revenue streams to ensure continued financial sustainability, and (3) enhances how we lead the legal profession to address the novel and complicated legal issues we now face.

Thank you to all of the committees who provided feedback during the strategic planning process, as well as Ramona Hill and the rest of the team at Parliamentary Associates for their dedicated work with the Strategic Planning Committee.

Appendix

[Click on each link to view the corresponding resource]

1. SWOT Analysis
2. PESTLE Analysis
3. Porter's Five Forces
4. KPMG Strategic Planning Presentation
5. PWC Strategic Planning Presentation
6. EY Parthenon Strategic Planning Presentation
7. Danosky & Associates Strategic Planning Report
8. Parliamentary Associates Strategic Planning Presentation
9. Strategic Planning Committees
10. Focus Group Feedback prepared by Parliamentary Associates
11. EC/HOD January 2024 Meeting Survey Feedback
12. Strategic Plan Overview Presentation
13. 2011 Strategic Planning Report (Annotated)
14. Building a Virtual Bar Presentation (2019)
15. Video of Virtual Bar Presentation (2019)
16. Committee on Membership Strategic Planning Update
17. Finance Committee Strategic Planning Update
18. Committee on Committees Strategic Planning Update
19. Committee on Communications and Publications Strategic Planning Update

NYSBA

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #10

REQUESTED ACTION: Approval of the Report and Recommendations of Committee on Attorney Professionalism.

This Report addresses the concern that the public may not understand the proposition to which the legal profession adheres that a lawyer who has represented unpopular clients or causes should not, for that reason alone, be judged unfit for public service. One of the pillars on which our legal system is built is an unflagging emphasis on access to justice, which necessarily includes representation by counsel. This principle often results in a lawyer's representing unpopular clients and causes, sometimes even where the lawyers themselves are not supportive of the client or sympathetic to the causes. It is also true that lawyers, perhaps even disproportionately relative to people in other walks of life, seek to serve in government, whether in elective office, in appointed roles or on the bench.

The Report provides an analytical framework and some guideposts for the legal profession and the public in connection with the evaluation of a lawyer's prior legal and related activities when the lawyer is later seeking a governmental position or other position of public trust. The Report identifies relevant considerations, without attempting to resolve how one should or might balance those considerations. The Report is intended to be educational for both the legal profession and the public highlighting some of the more important considerations and it is intended that this Report will advance informed discussion and polite debate regarding these nuanced and important matters.

The report will be presented by committee chair Jean-Claude Mazzola, Esq., and committee members and primary authors Robert Kantowitz, Esq. and Andrew Oringer, Esq.

NEW YORK STATE BAR ASSOCIATION

New York State Bar Association **Committee on Attorney Professionalism**

Report on the **Impact of an Attorney's Activities on Consideration for Judicial and Political Positions**

April 2024

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

DATE – 28 February 2024

New York State Bar Association
Committee on Attorney Professionalism

Report on the Impact of an Attorney's Activities on Consideration for Judicial and Political Positions

I. *INTRODUCTION*[1]

One of the pillars on which our legal system is built is an unflagging emphasis on access to justice, which necessarily includes representation by counsel. This principle often results in a lawyer's representing unpopular clients and causes, sometimes even where the lawyers themselves are not supportive of the client or sympathetic to the causes.

It is also true that lawyers, perhaps even disproportionately relative to people in other walks of life, seek to serve in government, whether in elective office, in appointed roles or on the bench.

The confluence of these two contexts can raise several questions, including:

- Does a lawyer's representation of unpopular clients have, in practice, any bearing on the lawyer's qualifications and suitability for later work in government?

- Conversely, is it appropriate for a lawyer who has some desire to serve later in government in a visible way to tailor or limit his or her representations in order to avoid those representations that might have a negative impact on his or her reputation in the public consciousness?

We believe that that many in the general public do not understand a lawyer's responsibilities and the proper way in which lawyers fit into the legal system, and we hope that this Report advances the cause of increasing that understanding. In addition, we acknowledge the sentiment on the part of some that bar associations and similar groups should not give credence to the proposition that there is ever a basis on which a lawyer should allow such considerations to enter into the determination of what representations to undertake. Nevertheless, we believe that people who have chosen to be lawyers will in fact consider career-based and other

[1] The principal authors of this Report are Robert I. Kantowitz and Andrew L. Oringer; other members of the Committee on Attorney Professionalism made substantive and organizational contributions.

personal considerations when deciding on whether to enter any particular controversy or other conflict, and we offer this Report to discuss certain ways in which these considerations might manifest themselves.

II. *GENERAL BASES FOR THIS REPORT*

The issue of the impact that what a lawyer does has on future opportunities is not new, but the issue has arguably taken on increased urgency due to at least two developments.

One key development is the evolution of technology that is different not only in degree but also in kind. The proliferation of data-management and data-retrieval technology has provided an unparalleled and ever-increasing ability for anyone and everyone to find information from the distant past and from nearly forgotten sources and places, and has made it easy to disseminate information and to express opinions. There is virtually instantaneous access to extensive, detailed and often obscure information – not all of which is necessarily true or reliable, or presented in an unbiased and complete way – about events and people, and there is generally a striking preservation of posted information.[2]

A second development is the breakdown in traditionally shared viewpoints across many issues, leading to strong and irreconcilable differences among citizens and groups in the United States regarding an ever-increasing number of issues, together with a general and sometimes toxic erosion of civil discourse on political matters.

Together, these developments have resulted in a proliferation of calls that individuals in general, and attorneys in particular, who once did something in the past or who once were associated with purportedly bad actors be effectively disqualified taking on future public positions or other positions with educational institutions, interest groups or other high-minded organizations (or even being permitted to take a role in polite society).

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[2] In the European Union (the "EU") (and in certain countries outside the EU), there is a so-called "right of erasure," pursuant to which a person may require a search engine to remove certain links. The EU Court of Justice ruled, in Case C-507/17, *Google LLC v. Commission nationale de l'informatique et des libertés* (CNIL) (2019), that the right of erasure cannot be applied outside the EU. As a result of this limitation, it is likely that considerable information with serious implications about an individual can still be expected to come to light at any time. Some other countries have similar rules, but in the United States, there is no right to be forgotten, and there is no apparent prospect that there will be.

Over the past decade or two, there have been several well-publicized incidents involving claims that a particular lawyer who is a candidate for office is unfit by virtue of previous client work.[3] The public perception of, and reaction to, a lawyer's

[3] It is worth reviewing several examples to get a sense of what kinds of specific charges arise, how they are perceived and what the consequences have been.

In a 2010 race for the New York State Senate, one television advertisement included the following:

> If you are a killer, a drug dealer, a burglar or a scam artist, [my opponent] would like to represent you. [My opponent] makes a living defending the criminals who make our lives worse. . . . We need honest, ethical, respectable leaders in the State Senate. Not lawyers who side with hardened felons.

In reaction, one retired judge pointed out that "the U.S. Constitution demands that all defendants in the criminal justice system have proper representation and said [Opponent] was only fulfilling his responsibilities as a lawyer in representing them. *See* M. Scheer, *Thompson, Grisanti exchange accusations in Senate race*, *Niagara Gazette* (Oct. 28, 2010).

In 2014, a number of Democrats in the United States Senate voted not to confirm President Obama's nominee for the Justice Department's Civil Rights Division, who had been the litigation director of the NAACP Legal Defense and Education Fund when it represented the killer of a police officer. One Senator's explanation may be seen as reflecting the conflicting considerations: "I embrace the proposition that an attorney is not responsible for the actions of their [sic] client . . . . [just making sure that there was text between "client" and the final "."] The decades-long public campaign by others, however, [has] shown great disrespect for law enforcement officers and families throughout our region." *See* J. Weissman & M. Shear, *Democrats in Senate Reject Pick by Obama*, *New York Times* (Mar. 5, 2014).

In 2019, a nominee to the federal bench in Michigan asked that his nomination be withdrawn after backlash arising out of his having represented a city that had barred a farm from participating in its farmers' market after the farm owner had said that due to his religious beliefs he would not host same-sex marriage ceremonies. *See* M.N. Burke, *Michigan judicial nominee Bogren withdraws from consideration*, *The Detroit News* (June 11, 2019). (It is worth noting that ultimately the farmer won the case on First Amendment grounds. *Country Mill Farms, LLC v. East Lansing*, No. 1:17-cv-00487-PLM-RSK (W.D.Mich. Dec. 15, 2023) (consent judgment).)

previous work – both as to which clients that lawyer has represented and as to how that lawyer has represented those clients, including whether the results obtained do or do not square with what members of the public believe is appropriate contemporaneously and in the future – can, justly or unjustly, make it difficult or impossible for the lawyer to obtain a desired position in the future.

We agree with the general notion that the ability of any person, no matter how unpopular, to obtain competent legal representation (whether or not in a litigation setting) is a fundamental cornerstone of our society and the rule of law.[4] Indeed, many lawyers feel an affirmative responsibility to provide representation to the unpopular and otherwise unrepresented.[5]

However, there are limitations to this principle. For example, as a technical matter, sanctions imposed by the federal government may prohibit a person from doing certain kinds of business, and lawyers are not allowed to violate those sanctions or facilitate the violation of the sanctions by the individuals, which can make it

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This phenomenon is not new. President Clinton's 1993 nomination of Lani Guinier to be Assistant Attorney General for Civil Rights was derailed in large measure by objections to her approach to the law as expressed in her writings, and the Senate's rejection of President Reagan's 1987 nomination of Robert Bork to the United States Supreme Court was influenced in major part by Bork's legal writings and positions dating back almost a quarter-century. Indeed, the verb "bork" has entered the lexicon as slang meaning, according to the *Oxford English Dictionary*, to "defame or vilify (a person) systematically, esp. in the mass media, usually with the aim of preventing his or her appointment to public office; to obstruct or thwart (a person) in this way."

[4] *New York Rules of Professional Responsibility* 1.2(b), Comment [5] states:

> Legal representation should not be denied to any person who is unable to afford legal services, or whose cause is controversial or the subject of popular disapproval.

[5] A famous example in American history was John Adams's representation of the British soldiers who had fired on the crowd in the Boston massacre. Another example, was Abe Fortas's willingness to represent the indigent plaintiff when the request came to him from Chief Justice Warren, leading to the seminal Constitutional ruling guaranteeing counsel in state criminal cases, *Gideon V. Wainwright*, 372 U.S. 335 (1963). *See* Anthony Lewis, GIDEON'S TRUMPET 48 (Vintage ed. 1966).

impossible for such persons to compensate a lawyer.[6] As a further example, we can imagine circumstances in which an *individual* lawyer might choose not to represent a person whose actions or beliefs the lawyer finds too abhorrent, even though one can posit instances in which the same reluctance of many lawyers to take on a representation could make it difficult as a practical matter for a person to find willing counsel.

Rule 1.2(b) of our Rules of Professional Responsibility makes it clear that a client's views and positions are not ipso facto to be imputed to the client's lawyer.[7] It seems clear that it is rarely ever proper as a matter of legal and ethical rules for a lawyer to be considered unfit for public duty merely because the lawyer represented unpopular or even unquestionably vile client or clientele.

That general principle is not unfettered and should not be given greater scope than that to which it is entitled. Thus --

- Even though lawyers are given great latitude in representing their clients and it is often difficult to decide where zealous representation ends and misconduct begins, there are limits on what a lawyer may or may not do in representing a client. For example, attorney misconduct, such as filing frivolous lawsuits[8] or using the courts to harass opponents, is not condoned.[9]

- The mere fact that a lawyer represented an unpopular client or cause does not necessarily impute agreement by the lawyer with that unpopular client or cause. Lawyers understand that representing an unpopular client is not an endorsement of that client or that client's positions, but that understanding

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[6] *See Luis v. United States*, 578 U.S. 5 (2016). The Supreme Court acknowledged that "tainted" assets can be frozen even if that has the effect of making it impossible to pay a lawyer but held that assets unconnected with a crime cannot be frozen despite government's interest in maximizing recovery.

[7] *New York Rules of Professional Responsibility* 1.2(b) states:

> A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

See also Comment [5], note 4 *supra.*

[8] *See* Federal Rules of Civil Procedure 11(b).

[9] *See, e.g.*, RPC 1.16, 8.4.

> is not necessarily shared by the public at large. However, unlike the UK barrister, [cite] US lawyers have discretion as to what they undertake to do, and it can be willful blindness not to inquire, in such circumstances, as to what are the lawyer's actual positions and viewpoints. [cite]

More importantly than the distinctions and nuances that the bar sees concerning this issue, we also recognize that the bar has no control over the general public or how members of the public perceive matters or act on them. The bar does, however, have an interest in educating the public regarding and attempting to bring about an understanding of this basic principle of legal representation, even if, as Alexander Hamilton wrote in a different context, "this is a thing more ardently to be wished than seriously to be expected."[10] Therefore, we believe that it is appropriate to lay out some of the considerations that should go into examining and evaluating a lawyer's corpus of work whenever a question arises as to whether what the lawyer has done in the past may be relevant to fitness for an office of public trust. We also believe that it is appropriate to discuss certain pressures that may in fact be on lawyers as they decide which project to, or, not to pursue and accept.

III. *SCOPE OF THIS REPORT*

This Report addresses the relationship between legal work and later political activity. After engaging in private practice and other advocacy pursuits, a lawyer may choose to seek elective office, a role in the judiciary, or other public service.

This Report does not address broader employment or reputational issues that may plague lawyers who served in, or represented, an unpopular Administration or who represent clients in certain industries. Thus, we will not be addressing situations in which a law firm has pressed a lawyer to resign because that lawyer has represented or seeks to represent clients that other clients of the firm find objectionable, nor will we address the potential that law students who have disrupted speakers at law schools may find themselves identified as having done so and denied certain employment opportunities.

This Report is directed to the public in the context of its review and evaluation of client representations and other law-related activities in which a lawyer may have previously engaged prior to pursuing a public service role or position.[11] This Report

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[10] *Federalist 1* (1787).

[11] The activities with which we are concerned do not include activities outside the legal context unless there is a sufficient logical connection between such "general" activities and the lawyer's legal activities to assimilate them to the latter. This is not because general activities are irrelevant or insignificant but because the

suggests considerations and factors that may advance the public's review and evaluation of the lawyer, but the Report does not purport to dictate the manner in which the various considerations and factors should be weighed or resolved.

Furthermore, this Report may be useful to attorneys as they practice in the private sector and engage in other advocacy pursuits to consider the impact of representations that they undertake on future endeavors. While this Report may be illustrative for attorneys in this regard, we expressly make no recommendations regarding whether or how lawyers should make decisions regarding client representation or other advocacy work based on these considerations. Lawyers will make their own career decisions, taking into account their own personal deliberations in light of applicable professional obligations. And while we hope that this Report will be constructive in the context of the public's examination of past legal engagements, we do not make any predictions as to how a lawyer's choices may be viewed and do not intend to provide any professional development advice to lawyers.

IV. *OUTLINE OF CONSIDERATIONS*

A. The role of the lawyer in the legal system

B. How to think about this: a qualitative, if not precisely quantitative, approach

1. Type of representation: in what circumstances and in what capacity did the lawyer come to represent the client?
2. What, realistically, was the nature of the lawyer's role and activity?
3. When did the events take place?
4. Nature of the client and the representation
5. What were the alternatives?
6. What actions did the lawyer take in representing the client or clients?
7. Evolving roles over the course of a retention or other project
8. How an association with a particular law firm or lawyer or other association may be perceived

C. Applications to speeches, writings and publications, as distinct from client representations

1. Nature of the writing or other expression
2. What were the legitimate expectations of privacy?

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breadth and variety of such activities and the relevant considerations are far beyond the scope of this Report.

3. Writing may have purely theoretical aspects in a way that client representation does not
4. Lawyers produce professional and academic writing for a variety of different forums
5. Writing includes more than just original compositions

V. *DISCUSSION*

A. *The role of the lawyer in the legal system*

Lawyers represent clients, sometimes very unpopular clients, sometimes clients who may have committed heinous crimes. Indeed, the ability of the disdained to be represented vigorously by counsel is broadly considered to be a sine qua non of our legal system. Tracing the important contours of this aspect of our legal system –

- The Sixth Amendment to the Constitution, a core provision of the Bill of Rights ratified in 1791, provides:

  > In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

- This has always been construed to mean, at a minimum, that the government cannot insist that a person defend himself against criminal charges without representation.

- Over the course of the years, the Supreme Court held that the Sixth Amendment also requires that a defendant who cannot afford counsel shall be provided with counsel at the government's expense. In 1963, the Supreme Court extended this requirement to all state criminal cases.[12]

- Class action practice in civil matters has enabled the aggregation of large numbers of plaintiffs so as to make it feasible to pursue certain kinds of claims under circumstances where the small size of the injury to each individual plaintiff would otherwise make it not feasible to pursue cases individually.

- Although the United States is not alone in treating access to justice as a core value, what matters is not what a constitution and the laws say but how the executive operates and what actually can be enforced in the

[12] *See* note 5 *supra*.

courts and respected by the government.[13] The United States is a world leader in having both robust and independent court systems and a legal profession that aids in translating the concept into reality.

B. *Qualitative v. quantitative approaches*

In light of the foregoing, we are suggesting that, in the context of considering a lawyer for political or judicial positions, the lawyer's prior activities in connection with the representation of clients and prior legal writing and speaking activities be viewed through the lens of the lawyer's professional responsibilities and lawyers' collective role in the legal system. In that spirit, we offer the following factors and proposed guideposts. These are not intended to be exclusive, but rather to elucidate the kinds of issues and considerations that are involved and to stimulate discussion. We present these factors and guideposts from the standpoint of members of the public for their evaluation of what a lawyer did in the past, mindful that they will be considered by lawyers in making their own decisions and imagining how those will be viewed and interpreted in the future.

1. *Type of representation*

What were the circumstances and reasons for taking on and conducting the representation, how extensive and central was the representation and what is the particular lawyer's role in how the clients are to be represented and tried?

Examples of questions that one might ask in this context include:

a. Was the client a new client for the representation in question, or was the client a long-standing or other existing client?

b. Did the lawyer have a realistic choice regarding whether to participate? Was the attorney a senior lawyer who fought for and engineered the representation, or was the attorney assigned by a superior to the matter?

c. Did the representation truly originate with the client, or did the lawyer seek out a client to pursue a case, either to advance a legal position or merely to make money (the latter often alleged to be the case in certain

[13] The 1977 constitution of the Soviet Union, for example, included freedom of speech, freedom of the press, freedom of assembly, freedom of religion, freedom of artistic work, protection of the family, the person and the home, the right to privacy, and rights to work, leisure, healthcare, housing, education, and cultural benefits. It is beyond question that many Soviet citizens found these promises to be illusory in practice. *See* SCALIA SPEAKS 161-64 (C. Scalia & E. Whelan ed. 2017).

class actions where the lawyers get paid legal fees while clients get relatively little of value)?[14]

d. Was the client a pro bono client? Lawyers have a tradition of representing clients who cannot afford to pay for representation.[15] This is generally aspirational, though in some jurisdictions, courts may assert the authority to assign a lawyer to defend a client in a matter regardless of whether the lawyer consents.[16]

e. Taking a role as a public defender is a career choice, but it is an honorable and essential element of our system, and it would be unfair to criticize a lawyer for having undertaken this role. Furthermore, once a lawyer has assumed that role, the lawyer has far less than total discretion in deciding which cases to handle.

2. *The lawyer's specific role*

In thinking about the lawyer's role, it can matter what the lawyer actually did or did not do in any particular retention or other activity. For example:

a. Where on the spectrum were the positions taken by the lawyer on the client's behalf, from clearly meritorious to plausible to far-fetched, or might they even have been frivolous or otherwise brought for improper purposes (regardless of whether the lawyer was actually sanctioned)?[17]

b. Was the attorney advocating strictly for the client's agenda, or can it fairly be said that the attorney was also advocating for his or her own agenda?

c. How visible was the lawyer? Was it a broad role of responsibility on the matter or was the lawyer assigned by a superior to do discrete research?

3. *When did the events take place?*

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[14] *See, e.g., Chambers v. Whirlpool Corp*., 980 F.3d 645 (9th Cir. 2020) (vacating with instructions to reevaluate lawyers' fees).

[15] A discussion of the practices and jurisprudence regarding *pro bono* representation in the various states is beyond the scope of this Report.

[16] *See Madden v. Delran*, 126 N.J. 591 (1992). Whether this process may be subject to constitutional challenge is beyond the scope of this Report.

[17] *See* F.R.C.P 11.

This point comprehends several considerations, including the following:

a. The age, maturity level and cumulative experience of the lawyer at the time of the particular behavior or statement could be relevant.

b. One may inquire whether and the degree to which the social and political context in which the events and the lawyer's representation occurred had any bearing on what the lawyer did then and whether the lawyer might have made different choices in other settings or might act differently in today's circumstances.

c. How much time has elapsed since the activity and what else has happened since then that might have some bearing. Is a choice that the lawyer made recently identical in impact and relevance to something from decades before?

4. *Nature of the client and the representation*

As we noted at the outset, it is unrealistic to expect that a lawyer's activities and associations will never be used by the public as a proxy for how to predict that lawyer's decisions in a governmental role or in evaluating whether to entrust the lawyer with a public trust.[18] Yet, there are several considerations that reflect who the client is that are to be borne in mind:

a. Most obviously, what was the nature of the accusations against the client and what was the scope of the representation taken on by the lawyer?

i. As noted above, even the most despicable persons accused of the most horrendous crimes or engaging in the most offensive, but legal, behaviors, are entitled to seek competent and zealous representation, regardless of what the lawyer's personal preferences might be. One would hardly expect an organization that claims to stand for the civil rights of the oppressed to represent Nazis, and yet that is exactly what the ACLU famously did in defending their claim to a First Amendment right to march through a Jewish neighborhood with an unusually large number of Holocaust survivors in Skokie, Illinois in 1978.[19]

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[18] *See* Michel Paradis & Wells Dixon, "In Defense of Unpopular Clients – And Liberty," *The Wall Street Journal* A17 (Nov. 19, 2020).

[19] *See National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977). In the same vein, one could imagine that the disputes in *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), and *303 Creative LLC v.*

ii. In addition, it can sometimes be forgotten that even an obviously guilty person, aside from having the right to put the state to its burden of proof, may have a legitimate interest in being subject to a just penalty, one that is not disproportionate to the crime. The same can be said with regard to civil cases where one side is clearly in the wrong but the remedy or measure of damages needs to be fairly determined. Statutes and the common law set criteria, boundaries and ranges, but there is a lot of discretion for a judge or a jury, as the case may be, within those bounds.

The manner in which the judicial system functions, and the many different contexts that may apply to the representation, should be taken into account by those seeking to consider the lawyer's prior role.

b. Was the full extent of the client's putative and actual behavior and culpability known to the lawyer when the lawyer agreed to the representation and during the duration of the representation?

c. Conversely, in evaluating a charge that a government lawyer was too harsh or too lenient in a particular case, it should be kept in mind that the government has a legitimate interest in prosecuting crime and civil violations but also has both discretion in deciding when not to prosecute[20] and an overarching obligation to seek justice rather than merely to seek convictions and the largest possible fines and the longest sentences.

5. *What were the alternatives?*

Were there others who could and would have represented the client(s) in question in a sufficiently competent way?

How important, objectively, was it for this lawyer to have taken on the representation? Was it a matter of the client's personal liberty in a criminal trial, defense in a civil trial, acting for the client as a plaintiff in a civil litigation or acting for the client in some other legal or planning capacity?

6. *What actions did the lawyer take in representing the client or clients?*

Elenis, 600 U.S. 570 (2023), or other clashes between assertions of fundamental constitutional rights could give rise to similar considerations.

[20] *Wayte v. United States*, 470 U.S. 598 (1985).

What, if anything, did the lawyer do or say in representing the client that might be viewed as going beyond what the observer believes a "reasonable lawyer" would or should have done or said in the course of providing competent and zealous representation? There are both objective and subjective guideposts, but there are gray areas: what one lawyer might consider an essential or important fact in a court filing might be seen by others as defamation with a protective veil against suit, and what one lawyer might consider a vigorous pursuit of an aggrieved client might be seen by others as a strategic lawsuit against public participation ("SLAPP") against which legislation has been enacted in a majority of the states.

In addition, where applicable, did the lawyer advance or detract from the good of the profession – and of society – as a whole? Apart from whom the lawyer represented and what the lawyer did or did not achieve for the client(s), what, if anything, did the lawyer bring about in a broader sense? Does a "law and order" advocate hold it against the attorneys in the *Miranda* and *Gideon* cases[21] for having convinced the Supreme Court in those cases to rule as it did? Do elements of the public hold it against the O.J. Simpson legal team for having achieved an acquittal in that case? These are complicated and nuanced issues, but should be considered against the backdrop of the lawyer's commitment to the country's legal system as a whole and to the client in particular.

There is also the legitimate question of the lawyer's precise role regarding any given matter. There is a patent difference between diligently representing a client in an attorney-client relationship and being involved in an underlying criminal or otherwise inappropriate enterprise. [cite to rules involving criminal participation] Likewise, there are differences among representing an individual, representing an organization that purports to advocate for a particular class of individuals who are not actually the lawyer's clients and representing an organization or "movement" in which one is a member or adherent and believes in its goals and objectives.

7. *Evolving Roles over the Course of a Retention or Other Project*

Because lawyers' careers evolve, they can face multiple and inconsistent criticisms. A prosecutor may later become a white-collar defense attorney. A government regulatory lawyer may later become an attorney for the companies at the heart of governmental and class-action claims. These are common and accepted career developments, just as are movements from the private sector to the public sector.

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[21] *Miranda v. Arizona*, 384 U. S. 436 (1966) (prior to police interrogation, apprehended criminal suspects must be apprised of their constitutional rights); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right of indigent defendant to have counsel appointed), *supra*.

Should these progressions disqualify the lawyer from later activity or otherwise be viewed negatively?

8. *How an association with a particular law firm or lawyer or other association may be perceived*

A law firm may be involved with an unpopular client or sector, and a lawyer at the firm may be tasked with leading or otherwise participating in the advocacy effort. Over the years, there have been periodic suggestions that law students should to shun certain firms because they tended to be on the "wrong side" of certain societal issues. The unpopularity of a particular lawyer or of whom he represents can even affect others who merely are associated with that lawyer in the same firm.

A related issue is raised by suggestions made by some to law students and young lawyers that they should avoid certain activities and professional affiliations, for fear that they will not be received well by those reviewing the applicants later. We express no view as to the wisdom or practicality of these approaches, but we do note that they may raise real and legitimate practical considerations.

C. *Writings, speeches and other presentations*

The same set of considerations arises in connection with writings that a lawyer has published under circumstances that were not necessarily connected with a client representation.[22] But there are additional considerations as well. Although it is more frequent for a lawyer to face compulsion to take positions not in accord with his or her own philosophy and beliefs in the course of representing a client than it is in nonrepresentational settings, nonetheless, there is a long tradition of lawyers' writing articles or other pieces of a legal research nature exploring issues from the standpoint of others and even on a theoretical or intentionally provocative basis.

It is difficult to say that advocacy of positions outside of a client representation has the same core status as actual client representation, but even in these contexts, there can be a variety of relevant considerations regarding such matters.

1. *Nature of the writing or other presentation*

    a. Is a short letter to the editor of a newspaper or other publication – or in an online community – the same as a long and thoroughly developed op-ed or other opinion piece?

[22] For example, as noted above, the 1993 nomination of the late Lani Guinier to be Assistant Attorney General for Civil Rights was derailed in large measure by objections to her approach to the law as expressed in her writings.

b. Does adding one's signature to an "open letter" or position paper along with multitudes of others necessarily commit the individual to the specifics expressed therein to the same degree as having written a piece oneself?

2. *What were the legitimate expectations of privacy?*

Was the writing intended for public consumption, or did the lawyer intend it to remain anonymous or private or to be seen or heard by only a very small audience of confidants? One might have a greater expectation of privacy in respect of a text message on a telephone, a letter sent to one close friend or a written work shared within a small group than with a letter sent to a Member of Congress, for example, that might turn up later in the public domain.

3. *Writing may have purely theoretical aspects in a way that client representation does not*

If a lawyer produced a research memo for a superior in a firm or a government agency who asked the lawyer to examine one or both sides of an issue, should the lawyer be held responsible for expressing a positive view with respect to a position that he or she now wishes to disavow? Does it matter whether it was clear at the time or became clear subsequently to the production of the memo that the superior was leaning in one direction or another?

4. *Lawyers produce professional and academic writing for a variety of different forums*

Different kinds of professional writing and analysis, for different audiences, might need to be evaluated in different ways.

a. Can written work produced before law school ever be deemed relevant? This might well depend on how sophisticated or extensive the work was and whether it was of a nature similar to legal writing. A college senior sociology thesis that stakes out a particular distinct position might well be relevant, while a doctoral dissertation in mathematics may be expected not to be.

b. Is a paper or law review note that the lawyer wrote while in law school probative? It is not always possible to secure a publication slot for a piece on the subject of one's choice or one expressing a majority view on a particular subject, and many pieces are constrained to examine the pros and cons of all the positions. Conversely, does a student get a pass, so to speak, for using a controversial piece as an understandable and opportunistic way of standing out?

5. *Writing includes more than just original compositions*

To what degree should a lawyer have to answer for short or extensive quotations in material written or compiled by others, for having associated himself or herself with those particular others in allowing the quotations or for having favorably or unfavorably reviewed the work of others?

VI. *CONCLUSION*

In this Report, we recognize that the public may not understand or agree with the proposition to which the legal profession adheres that a lawyer who has represented unpopular clients or causes should not, for that reason alone, be judged unfit for public service. We have attempted to provide an analytical framework and some guideposts for members of the public in connection with the evaluation of a lawyer's prior legal and related activities when the lawyer is later seeking a governmental position or other position of public trust. We have endeavored here to identify relevant considerations, without attempting to resolve how one should or might balance those considerations. We have not attempted to be comprehensive in our identification of relevant factors, but hope that we have highlighted some of the more important considerations and that this Report will advance informed discussion and polite debate regarding these nuanced and important matters.

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Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #11

REQUESTED ACTION: Approval of the Report and Recommendations of Task Force on Artificial Intelligence.

Vivian Wesson, chair of the Task Force on Artificial Intelligence, will present the report.

The Task Force on Artificial Intelligence (AI) was created by NYSBA President Richard C. Lewis in June 2023.

The Report and Recommendations of the Task Force on AI proposes **four (4) principal recommendations** for adoption by NYSBA:

1. Adopt Guidelines: The Task Force recommends that NYSBA adopt the AI/GAI guidelines outlined in this report and commission a standing section or committee to oversee periodic updates to those guidelines (see pages 56-59).

2. Focus on Education: The Task Force recommends that NYSBA prioritize education over legislation, focusing on educating judges, lawyers, and regulators to understand the technology so that they can apply existing law to regulate it.

3. Identify Risks for New Regulation: Legislatures should identify risks associated with the technology that are not addressed by existing laws, which will likely involve extensive hearings and studies involving experts in AI.

4. Examine the Function of the Law in AI Governance: The rapid advancement of AI prompts us to examine the function of the law as a governance tool. Some of the key functions of the law in the AI context are: (i) expressing social values and signal fundamental principles; (ii) protecting against risks to such values and principles; and (iii) stabilizing society and increasing legal certainty.

   Other recommendations include:

   - AI as a general-purpose and dual-impact technology: Regulation should consider focusing on the effects of the technology on individuals and society, rather than the technical aspects of the technology itself (such as the algorithms or databases).

- Regulatory spectrum: The governance of AI should be tailored to the risks posed by AI applications. It can adopt varying degrees of regulatory intrusiveness, with the spectrum potentially extending from detailed legal regulation at one end of the spectrum to self-regulation on the other end of the spectrum, with a principles-based approach in the middle of the spectrum. The approach chosen to address a particular risk or problem should consider:

    - The sector involved (e.g., law enforcement or health care)
    - The importance of the social activity at hand (e.g., hiring applicants or making loans)
    - The rights affected (e.g., due process or privacy)
    - The risks associated with the use and impact of AI (e.g., job loss or misinformation)

- Comprehensive vs. specific regulation: Legislators should determine if regulations entail a comprehensive approach (i.e., an overarching framework governing diverse AI applications and their social implications) or a sector-by-sector or industry-by-industry approach (i.e., considering the particular and often unique issues posed by AI in each sector or industry). Regulators should determine which approach is best, or develop some mix or combination of these approaches, depending on the sectors and problems at hand.

- Global cooperation: The Report advises that local, state, and federal regulation is likely to prove inadequate without international and sometimes global cooperation, because AI is a cross-border phenomenon rather than a local one. The following four elements of AI may elude regulations if they are confined to a specific geographic area:

    - Data, which is the input for AI, can move across borders (although data location is likely to enhance a jurisdiction's power to regulate AI).
    - Algorithms programmable anywhere in the world.
    - Algorithms exportable for use anywhere else in the world.
    - Outputs from algorithms transmitted to and applied in different jurisdictions.

- The Trusts and Estates Law Section Executive Committee submitted comments regarding the report.

- The Trusts and Estates Law Section Technology Committee submitted comments regarding the report.

- The Dispute Resolution Section submitted comments regarding the report.

NYSBA TASK FORCE ON ARTIFICIAL INTELLIGENCE

REPORT AND RECOMMENDATIONS TO
NYSBA HOUSE OF DELEGATES

APRIL 6, 2024

Generated by DALL-E

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INTRODUCTION

The NYSBA Task Force on Artificial Intelligence, chaired by Vivian Wesson, respectfully presents this Report to the NYSBA House of Delegates. This Report, to be presented to the House of Delegates on April 6, 2024, examines the legal, social and ethical impact of artificial intelligence (AI) and generative AI on the legal profession. This Report also reviews AI-based software, generative AI technology and other machine learning tools that may enhance the profession but also poses risks for individual attorneys' understanding of new, unfamiliar technology, as well as courts concerned about the integrity of the judicial process. Further, this Report makes recommendations for NYSBA adoption, including proposed guidelines for responsible AI use. A copy of the Task Force's Mission Statement is attached as Exhibit A.

Why Now?

As NYSBA's President Richard Lewis has noted, AI's rapid growth and sophistication have, and will continue to have, a monumental impact on all professions – including lawyers, law firms and their clients. NYSBA seeks to proactively address how AI may best assist those who interact with the legal system while evaluating how tightly it needs to be regulated and what protections we should institute safeguard against misuse or abuse. From self-driving cars to ChatGPT to 3-D printed guns, AI has transformed our world. If this is our Promethean moment in AI evolution, now is the time to better understand, embrace, utilize and scrutinize this technology.

Who Is Involved?

For this Task Force, NYSBA has gathered legal professions across a range of subject matter expertise. We have deans of law schools seeking clarity on educating legal minds in this digital age. We have practitioners in the technology space advising clients on AI use. There are those who

enthusiastically deploy AI-based tools and those who are wary about the risks. The Task Force also has an international perspective, understanding that AI will have a global, not just a regional, effect.

What We Learned

We have organized this Report into five parts: (1) the evolution of AI and generative AI; (2) the benefits and risks of AI and generative AI use; (3) the impact of the technology to the legal profession; (4) legislative overview and recommendations; and (5) proposed guidelines.

EXECUTIVE SUMMARY

Artificial intelligence, particularly generative AI, has had a profound impact across multiple sectors of our society, revolutionizing how we approach creativity, problem-solving and automation. From art and entertainment to healthcare and education, AI is reshaping industries, creativity and society in multifaceted ways. While AI and generative AI offer immense potential for innovation and efficiency, the technology also presents challenges that require careful management, including ethical considerations, privacy concerns and labor impact. The ongoing evolution of generative AI promises to continue influencing the world in unprecedented ways.

Considering the continued revolutionary impact of the technology, this Task Force undertook the challenge to assess its evolution, benefits and risks, and impact on the legal profession. Here, we summarize our four principal recommendations for adoption by NYSBA.

Task Force Recommendations

1. *Adopt Guidelines*: The Task Force recommends that NYSBA adopt the AI/Generative AI guidelines outlined in this report and commission a standing section or committee to oversee periodic updates to those guidelines.
2. *Focus on Education*: The Task Force recommends that NYSBA prioritize education over legislation, focusing on educating judges, lawyers, law students and regulators to understand the technology so that they can apply existing law to regulate it.
3. *Identify Risks for New Regulation*: Legislatures should identify risks associated with the technology that are not addressed by existing laws, which will likely involve extensive hearings and studies involving experts in AI.
4. *Examine the Function of the Law in AI Governance*: The rapid advancement of AI prompts us to examine the function of the law as a governance tool. Some of the key functions of

the law in the AI context are: (i) expressing social values and reinforcing fundamental principles; (ii) protecting against risks to such values and principles; and (iii) stabilizing society and increasing legal certainty.

EVOLUTION OF AI AND GENERATIVE AI

"*For more than 250 years the fundamental drivers of economic growth have been technological innovations. The most important of these are what economists call general-purpose technologies – a category that includes the steam engine, electricity, and the internal combustion engine. . . . The most important general-purpose technology of our era is artificial intelligence, particularly machine learning."* ~ Erik Brynjolfsson and Andrew McAfee[1]

I. Introduction

To begin a discussion of artificial intelligence, it may be helpful to first define "intelligence." Intelligence is "the capacity to acquire knowledge and apply it to achieve an outcome; the action taken is related to the particulars of the situation rather than done by rote. The ability to have a machine perform in this manner is what is generally meant by artificial intelligence."[2] Artificial intelligence means "computers doing intelligent things – performing cognitive tasks, such as thinking, reasoning, and predicting – that were once thought to be the sole province of humans. It's not a single technology or function."[3]

According to the Merriam Webster dictionary, artificial intelligence is "the capability of a machine to imitate intelligent human behavior."[4] At a basic level, artificial intelligence programming focuses on three cognitive skills - learning, reasoning and self-correction:[5]

- The learning aspect of artificial intelligence programming focuses on acquiring data and creating rules for how to turn data into actionable information. The rules, called algorithms, provide computing systems with step-by-step instructions on how to complete a specific task.
- Reasoning focuses on the capability of artificial intelligence to choose the most appropriate algorithm, among a set of algorithms, to use in a particular context.
- Self-correction involves the capability of artificial intelligence to progressively tune and improve a result until it achieves the desired goal.

II. AI Defined and Explained

"*AI is a branch of computer science and often involves technical knowledge outside of most lawyers' expertise, understanding how AI programs operate may be difficult for lawyers.*"[6]

A. AI and Its Applications[7]

- **AI** is the term used to describe how computers can perform tasks normally viewed as requiring human intelligence, such as recognizing speech and objects, making decisions based on data and translating languages. AI mimics certain operations of the human mind.

- **Machine Learning** is an application of AI in which computers use algorithms (rules) embodied in software to learn from data and adapt with experience.

- A **Neural Network** is a computer that classifies information – putting things into "buckets" based on their characteristics.

B. What It Does

In general, AI involves algorithms (a set of rules to solve a problem or perform a task), machine learning and natural language processing.

Why do similar but varied definitions of AI exist?

"What qualifies as an intelligent machine is a moving target: A problem that is considered to require AI quickly becomes regarded as 'routine data processing' once it is solved."[8]

"One result of AI's failure to produce a satisfactory criterion of intelligence is that, whenever researchers achieve one of AI's goals – for example, a program that can summarize newspaper articles or beat the world chess champion – critics are able to say, 'That's not intelligence!'"[9]

"Marvin Minsky's response to the problem of defining intelligence is to maintain – like Alan Turing before him – that intelligence is simply our name for any problem-solving mental process that we do not yet understand. Minsky likens intelligence to the concept of "unexplored regions of Africa": it disappears as soon as we discover it."[10]

III. Types of AI

- **Narrow or Weak**: This kind of AI does some tasks at least as well as, if not better than, a human. For example, in law, there is TAR, or technology-assisted review – AI that can find legal evidence more quickly and accurately than a lawyer can; AI technology

that can read an MRI more accurately than a radiologist can. Other examples are programs that play chess or AlphaGo better than top players.

- **General or Strong AI**: This kind of AI would do most if not all things better than a human could. This kind of AI does not yet exist and there's debate about whether we'll ever have strong AI.
- **Super Intelligent AI** of the science fiction realm. This type of AI would far outperform anything humans could do across many areas. It's controversial, and some see it as an upcoming existential threat.[11]

IV. The Founding Fathers/Mothers of AI

Credited as the "father of artificial intelligence," Alan Turing was the wartime codebreaker at Bletchley Park and founder of computer science. Turing was one of the first people to take seriously the idea that computers could think.[12] Credited as the "father of deep learning," Frank Rosenblatt was a psychologist whose brainchild was the Perceptron.[13] The rise of the modern computer is often traced to 1836 when Charles Babbage and Augusta Ada Byron, Countess of Lovelace, invented the first design for a programmable machine.[14]

V. AI Through the Years: The AI Timeline

A. Mythology

Efforts to understand and describe the human thought process "as symbols – the foundation for AI concepts such as general knowledge representation – include the Greek philosopher Aristotle, the Persian mathematician Muḥammad ibn Mūsā al-Khwārizmī, 13th-century Spanish theologian Ramon Llull, 17th-century French philosopher and mathematician René Descartes, and the 18th-century clergyman and mathematician Thomas Bayes."[15]

B. Programmable Digital Computer (1940s)

In the 1940s, Princeton mathematician John von Neumann conceived the architecture for the stored program computer. This was the idea that a computer's program and the data it processes can be kept in the computer's memory.[16] The first mathematical model of a neural network, arguably the basis for today's biggest advances in AI, was published in 1943 by the computational neuroscientists Warren McCulloch and Walter Pitts in their landmark paper, "A Logical Calculus of Ideas Immanent in Nervous Activity."[17]

C. Theseus: Remote-Controlled Mouse (1950)

> "*It is customary to offer a grain of comfort, in the form of a statement that some peculiarly human characteristic could never be imitated by a machine. I cannot offer any such comfort, for I believe that no such bounds can be set.*" ~ Alan Turing, 1951

Developed by Alan Turing in 1950, the Turing Test focused on the computer's ability to fool interrogators into believing its responses to their questions were made by a human being.[18] The first step in the direction of machine learning was provided by the Turing Test (also known as the "imitation game") in which an interrogator had to discover whether they were interrogating a human or a machine and, therefore, whether a machine can show human-like intelligence.[19]

D. Dartmouth College Workshop (Summer of 1956)

The term "artificial intelligence" was first used in 1955 when John McCarthy, a computer scientist at Dartmouth College, in New Hampshire, used the phrase in a proposal for a summer school.[20] The 1956 summer conference at Dartmouth, sponsored by the Defense Advanced Research Projects Agency, or DARPA, included AI pioneers Marvin Minsky, Oliver Selfridge and John McCarthy. In addition, Allen Newell, a computer scientist, and Herbert A. Simon, an economist, political scientist, and cognitive psychologist, "presented their groundbreaking Logic Theorist – a computer program capable of proving certain mathematical theorems and referred to as the first AI program."[21]

With the promise of great advancement in AI, the Dartmouth conference garnished both government and industry support. Some significant advances in AI at that time include the General Problem Solver (GPS) algorithm published in the late 1950s, which laid the foundations for developing more sophisticated cognitive architectures; Lisp, a language for AI programming that is still used today; and ELIZA, an early natural language processing (NLP) program that laid the foundation for today's chatbots.[22]

E. Perceptron Mark I: Artificial Neural Network (1958)

The Perceptron was the first neural network, a rudimentary version of the more complex "deep" neural networks behind much of modern AI.[23]

F. AI Winter (1970s)

Eventually, when the promise of developing AI systems equivalent to the human brain proved elusive, government and corporations diminished their support of AI research. This led to what has been termed the "AI winter," which lasted from 1974 to 1980.[24]

G. AI Second Winter (1980s)

> "*In the literal sense, the programmed computer understands what the car or the adding machine understand: namely, exactly nothing.*" ~ John Searle, 1980

In the 1980s, there was renewed AI interest due in part to research on deep learning techniques and industry adoption of Edward Feigenbaum's expert systems. Yet, lack of funding and support led to the "second AI winter," which lasted until the mid-1990s.[25]

H. Machine Learning Development (1990s and 2000s)

During the 1990s and 2000s, many of the landmark goals of AI were achieved.[26] Groundbreaking work on neural networks and the advent of big data propelled the current renaissance of AI.[27] For example, in 1997, IBM's Deep Blue beat the chess grandmaster Garry Kasparov. The contest made global headlines, with Newsweek announcing, "The Brain's Last

Stand." Also, in 1997, speech recognition software, developed by Dragon Systems, was implemented on Microsoft® Windows®.[28] In 2007, AI was defined as the "science and engineering of making intelligent machines, especially intelligent computer programs."[29] In 2018, Microsoft defined AI as "a set of technologies that enable computers to perceive, learn, reason and assist in decision-making to solve problems in ways that are similar to what people do."[30]

I. AlexNet: Deep Learning System (2012)

Professor Mirella Lapata, an expert on natural language processing at the University of Edinburgh, stated that "AlexNet was the first lesson that scale really matters." "People used to think that if we could put the knowledge we know about a task into a computer, the computer would be able to do that task. But the thinking has shifted. Computation and scale are much more important than human knowledge."[31]

J. Introduction of Generative Adversarial Networks (2014)

OpenAI's GPT – an acronym meaning "generative pre-trained transformer" – and similar large language models (LLMs) can churn out lengthy and fluent, if not always wholly reliable, passages of text. Trained on enormous amounts of data, including most of the text on the internet, they learn features of language that eluded previous algorithms.[32] Once the transformer has learned the features of the data it is fed – music, video, images and speech – it can be prompted to create more. The transformer – not different neural networks – is relied upon to process different media.[33]

K. Language and Image Recognition Capabilities (2015)

An LLM is a machine-learning neuro network trained through data input/output sets; frequently, the text is unlabeled or uncategorized, and the model is using self-supervised or semi-supervised learning methodology. Information is ingested, or content entered, into the LLM, and the output is what that algorithm predicts the next word will be. The input can be proprietary corporate data or, as in the case of ChatGPT, whatever data it is fed or scraped directly from the

internet.[34] LLMs do not recreate the way human brains work. The basic structure of these models consists of nodes and connections.[35] Simply put, LLMs are "next word prediction engines."[36]

Examples of Open Model LLMs include:[37]

- OpenAI's GPT-3 and GPT-4 LLMs
- Google's LaMDA and PaLM LLMs
- HugginFace's BLOOM and XLM-RoBERTa
- Nvidia's NeMO LLM
- XLNet
- Co:here
- GLM-130B

According to Jonathan Siddharth, CEO of Turing, a Palo Alto company, "Hallucinations happen because LLMs, in their most vanilla form, don't have an internal state representation of the world. . . . There's no concept of fact. They're predicting the next word based on what they've seen so far – it's a statistical estimate."[38]

If the information an LLM has ingested is biased, incomplete or otherwise undesirable, then the response it gives could be equally unreliable, bizarre or even offensive. When a response goes off the rails, data analysts refer to it as "hallucinations" because they can be so far off track.[39] Further, since some LLMs also train themselves on internet-based data, they can move well beyond what their initial developers created them to do. For example, Microsoft's Bing uses GPT-3 as its basis, but it's also querying a search engine and analyzing the first 20 results or so. It uses both an LLM and the internet to offer responses.[40]

CEO Siddharth further explains, "We see things like a model being trained on one programming language and these models then automatically generate code in another programming language it has never seen. . . . Even natural language; it's not trained on French, but

it's able to generate sentences in French. It's almost like there's some emergent behavior. We don't know quite know how these neural network works. . . . It's both scary and exciting at the same time."[41]

L. Chatbots

> "*The foundation of the chatbot is the GPT LLM, a computer algorithm that processes natural language inputs and predicts the next word based on what it's already seen.*[42] *So, LLMs are the fundamental architecture behind chatbots like Open AI's ChatGPT or Google's Bard. A question typed in to ChatGPT [or Bard], for example, has to be processed by an LLM in order to produce an answer or response*."[43]

Another way to think about ChatGPT is that it is a computer program that can understand and respond to human language. It accomplishes this by learning from a large amount of text (such as books, articles and websites) and uses that knowledge to predict what word or phrase might come next in a conversation or text.

Because it is "generative," each response to a question will be generated on the spot and will be unique. Because it can remember earlier parts of a conversation, it can change its original output in response to further feedback. Because it is pre-trained, it is limited – for better or worse – to what is in its training materials. And because it works by being predictive, it generates text that seems plausible, but not necessarily accurate.[44]

According to Assistant Professor Yoon Kim at MIT, prompt engineering is about deciding what we feed this algorithm so that it says what we want it to. The LLM is a system that just babbles without any text context. In some sense of the term, an LLM is already a chatbot.[45] Thus, "prompt engineering is the process of crafting and optimizing text prompts for an LLM to achieve desired outcomes. Prompt Engineering by a user trains the model for specific industry or organizational."[46] "Prompt Engineering is said to be a vital skill for IT and business professionals,"[47] thus, a new job potential in this field.

BENEFITS AND RISKS OF AI AND GENERATIVE AI USE

Artificial intelligence continues to transform the globe in a manner not seen since the advent of the written word. Aspects of how each of the over 8 billion humans on planet earth live, work and play are increasingly impacted by AI. As with every transformative technology, there are an array of potential benefits and risks.

If the media and pop culture are to be believed, the world is facing an existential crisis that promises both utopia and global destruction. This section unpacks the reality of AI through a cost benefit analysis that goes beyond the media hype.

I. Benefits

AI has proliferated a wide array of human tasks and experiences over the last 70 years. Since the advent of the term in 1956 by John McCarthy, the concept of artificial intelligence has evolved from replicating and replacing human cognition to one of "augmented intelligence," which amplifies and optimizes human intellect. If used for such purposes (i.e., to amplify and optimize human intelligence), machine learning and AI help bring order to the chaotic wealth of information facing individuals today. In theory, this allows humans to spend more time on high-value and creative endeavors.

Today, nearly all aspects of human existence are touched in some manner by machine learning or AI. From the way we shop or interact as humans to medical treatment and supply chain logistics, the breadth of AI's impact on human existence, which may be hidden in plain sight, is hard to overstate.

A large portion of the proliferation is being driven forward by the wealth of benefits in terms of accuracy, speed and capability offered by AI powered technology. Some key examples of benefits derived from the application of AI include:

A. General Benefits

There are a substantial number of overall AI benefits, with the list growing daily. In general, AI: (i) efficiently performs repetitive tasks; (ii) reduces human error; (iii) increases efficiency; and (iv) augments human intelligence. Specific to the legal industry, AI has the potential to facilitate greater access to justice.

Legal representation in a civil matter is beyond the reach of 92% of the 50 million Americans below 125% of the poverty line.[48] Globally, there are an estimated 5 billion people with unmet justice needs.[49] The justice gap between access to legal services and unmet legal needs constitutes two-thirds of the global population, and these justice needs extend from minor legal matters to more grave injustices.[50]

AI-powered technology has lowered the bar for many underserved communities to access legal guidance. Further, AI has been heralded as a solution for the closing the "justice gap." Increased efficiency, accuracy and the ability for underserved populations to leverage self-service legal resources all contribute to this benefit. Technologies powered by AI may allow the underserved population with internet access or individuals with limited funds to access guides at little or no cost to navigate the complexities of the judicial system.[51] Generative AI-powered chat bots now hover on the line of unauthorized practice of law,[52] offering high volume, low-cost legal services absent human input in areas such as traffic court[53] and immigration,[54] among others. But the early uses of generic AI chatbots (as opposed to specific legal applications) in this area have had mixed results. According to a January 2024 study by researchers from Stanford University,[55] popular AI chatbots, such as Open AI's ChatGPT3.5, Google's PaLM 2 and Meta's Llama 2, are inaccurate in the majority of cases when answering legal questions, posing special risks for people relying on the technology because they can't afford a human lawyer. The study found that LLMs

get their results wrong at least 75% of the time when answering questions about a law court's core ruling.[56]

In December 2023, the courts in England and Wales produced Judicial Guidance on AI, which highlighted why these errors may appear.

> Public AI chatbots do not provide answers from authoritative databases. They generate new text using an algorithm based on the prompts they receive and the data they have been trained upon. This means the output which AI chatbots generate is what the model predicts to be the most likely combination of words (based on the documents and data that it holds as source information). It is not necessarily the most accurate answer.[57]

There are also limits with the training data provided to these tools. Currently available LLMs appear to have been trained on limited material published on the internet.[58] Their view of the law can be limited to the material included in the training data, which could include the opinions in chat rooms of individuals without any legal qualifications. Here, the Judicial Guidance in England and Wales looks at specific risks:

> AI tools may:
>
> - make up fictitious cases, citations or quotes, or refer to legislation, articles or legal texts that do not exist
> - provide incorrect or misleading information regarding the law or how it might apply, and
> - make factual errors.[59]

B. Healthcare Advancement and Human Longevity

The healthcare industry has similarly witnessed significant advances owing to AI-powered tools. AI has aided in new drug discoveries,[60] improved image analysis, robotic surgery and gene editing. Further, AI algorithms can predict diseases based on medical imaging, genetic information, and patient data.[61] AI-powered wearable technology allows physicians to continuously monitor patients remotely.[62] AI has been deployed for personalized medicine, providing patients with

tailored treatments and medication.[63] Finally, AI has supported mental health by providing early diagnostics and therapeutic assistance.[64]

C. Ethical AI Development

In the ethics field, AI has helped to identify and correct human biases in data and decision-making.[65] AI tools can also be designed with mechanisms to ensure ethical considerations are integrated into AI systems.[66] Additionally, AI can be employed to create frameworks that ensure equitable outcomes.[67]

D. Health & Public Safety

In the health and public safety sector, AI advances have revolutionized a broad swath of areas from infrastructure to cybersecurity. AI has been used to manage traffic signals, thereby reducing congestion and optimizing traffic flow.[68] The technology has utilized crime pattern analysis to predict and prevent future incidents.[69] AI algorithms optimize rescue and relief operations during natural disasters.[70] Engineers deploy AI-based sensors that predict when maintenance on bridges and buildings is required.[71] Finally, AI systems are used to detect and respond to cyber threats in real time.[72]

E. Quality of Life

Where AI has had the most visible societal impact involves quality-of-life products. AI has transformed our living spaces into "smart homes"[73] that can improve convenience and energy efficiency. AI has helped people with disabilities gain more independence. Technology companies capitalize on AI to enhance gaming and virtual reality experiences.[74] In marketing, chatbots that handle customer inquiries without human intervention have become a staple.[75]

People have become familiar with using AI to personalize recommendations on platforms, such as Netflix and Spotify. AI has been used to restore and preserve historical documents and artworks.[76] It can also facilitate the sharing and understanding of diverse cultural expressions.[77]

Artists use AI-based tools to explore new forms of creative expression. Lastly, AI has enhanced the personalized shopping experience.[78]

F. Scientific Advancement, Space & Exploration

AI's reach extends beyond the boundaries of Earth. Scientists use AI to process data from space missions and to operate rovers on Mars.[79] Aquatically, autonomous submarines are used to map the ocean floor and study marine life.[80] Because AI can analyze vast datasets faster than the human mind, it has sped up scientific discoveries. For example, DeepMind's AlphaFold program predicts the 3D structure of proteins,[81] which accelerates researchers' understanding of diseases and developing new treatments. AI has improved complex problem-solving in fields such as quantum physics and materials science. Lastly, AI enhances collaboration by connecting researchers across the globe and facilitating cross-disciplinary work.[82]

G. Global Environmental Impact

Environmentally, AI holds promises to combat climate change. Governments are deploying AI in the creation of "smart cities"[83] that optimize energy consumption in homes and businesses. AI-powered drones and image recognition technology have been used to monitor endangered species.[84] There are AI models that simulate and predict climate change impacts.[85] Some municipalities deploy sensors and AI systems to monitor and predict air and water quality.[86]

In the area of water conservation, AI has been used to predict water usage patterns and improve water conservation techniques.[87] In the quest for clean energy, AI can streamline the development and management of renewable energy sources.[88] Lastly, logistics managers find improved fuel efficiency through AI tools that optimize routes for freight and package delivery.[89]

H. Education Optimization

In the field of education, developers have created adaptive learning platforms that adjust in real time to the learning style and pace of students[90]. Educators can use AI systems to automate

grading and provide immediate student feedback.[91] Voice-to-text and text-to-voice AI services have assisted learners with disabilities.[92]

I. Economic Development

The economy has seen material changes in how the world conducts business. Precision farming techniques use AI to increase yield, reduce resource consumption and waste, and optimize food distribution.[93] AI has been utilized to analyze market trends, providing businesses with strategic insights. By automating routine tasks, employees turned their focus to more high-value work. Lastly, high paying new jobs relating to AI have been developed.[94]

II. Risks

A counterpoint to the transformative benefit of AI is an equally dramatic deluge from the press and media that AI poses substantial economic, ethical and existential risks. Some key examples of risks posed from the application of AI are described below.

A. Widening Justice Gap

While many proclaim that AI is the solution to democratization of justice, an equally powerful contingent claim AI may create a "two-tiered legal system."[95] Some anticipate that individuals in underserved communities or with limited financial means will be relegated to inferior AI-powered technology.[96]

Additionally, development of such technology should acknowledge that many populations currently underserved by legal representation may have compounded obstacles in accessing the benefits that AI may bring to others, including:

- Lack of access to computers/internet
- Limited facility/literacy in how to use AI

- A high level of distrust in government institutions, law as a tool that operates to protect them, law enforcement as a positive influence and/or legal professionals as people who are available to help.

The specific layer of concern here goes beyond the "haves" with better access to counsel than the "have nots." For example, in a landlord-tenant dispute, AI would likely be used by landlords to increase enforcement actions against tenants. However, the tenants would not likely have access to AI in preparing their response. In that sense, AI could be viewed as broadening the availability of legal services to the "haves," leaving the "have nots" worse off than they are now. Compounding this is the fact that most legal services organizations have little to no resources to prepare for these changes in access to AI now.[97]

B. Data Privacy & Surveillance

Protectors of civil liberties and data privacy have raised alarms about the potential of AI to corrupt both. As most AI systems are capable of aggregating vast amounts of personal data, this could lead to privacy invasions. Currently, governments and corporations use AI for comprehensive surveillance and social control.[98] Hackers have utilized AI tools to synthesize personal data for the purpose of impersonating individuals (think "deepfakes") and committing cyber theft.[99] Concerns also circle around the lack of transparency in training data,[100] biases built into models[101] and ownership of intellectual property.[102]

C. Security

In addition to the cyber threats mentioned above, general security concerns accompany AI use. For instance, AI systems in military applications that lack adequate human control can lead to unintended engagements.[103] Through social media, AI has been used to weaponize information, leading to an explosion in misinformation and potential erosion of democracy.[104] Cyber criminals have deployed AI to target critical infrastructure, such as power grids and water systems.[105]

D. Social and Ethical Issues

AI algorithms have been utilized to perpetuate and amplify societal biases. Given concerns about privacy and surveillance, the impact of all types of societal biases – including a significant number of instances of racial bias that have already been identified – is compounded. We have also witnessed a disquieting increase in adverse psychological issues related to AI (e.g., AI chatbot suicide[106]). We will also need to address the assignment-of-liability when decisions are made by AI systems.[107] As noted above, the disparity in AI access has exacerbated inequality issues.

E. Misinformation

As referenced earlier, bad actors have used "deepfakes" to disseminate misinformation. A deepfake is AI-generated content that is indistinguishable from real content. We are entering an age of information warfare in which AI systems can be used to create and spread misinformation at scale. We find this particularly troubling not only during political elections,[108] but also in the daily lives of our citizens, for example, through social engineering scams powered by AI that target vulnerable members of society, such as grandparents, who believe they are speaking with their grandchildren but instead become victims of fraud.[109]

F. Economic Impact and Disruption

The economic impact of AI is multilayered. There is the direct effect of job displacement where tasks are automated,[110] leading to unemployment in various sectors and the indirect effect of devaluing services traditionally offered by a human (e.g., legal services). Further, AI advancements tend to benefit those with access to technology, thus widening the wealth gap.

Our financial markets face manipulation. AI systems could perform high-frequency trading to influence financial market activity.[111] We face possible skill erosion; humans will no longer retain the knowledge to perform certain tasks.[112] Lastly, the resources required to power certain AI systems rely on materials that are derived from exploitation.[113]

G. Safety

Expanding on the general societal issues noted above, there are several safety concerns involving AI. How do we respond when AI systems that operate in critical roles fail and cause harm? We noted above AI's potential to manipulate emotions that could lead to psychological harm, but there is also the overdependence on AI that could lead to loss of human skills and abilities. Lastly, AI has been shown to behave unpredictably, which may result in harmful or unintended consequences.[114]

H. Legal and Regulatory Challenges

The area in which the law struggles now involves assignment of liability when AI causes damage or harm. The courts are also grappling with issues involving intellectual property, including copyright (e.g., training data protections),[115] ownership of output and invention patenting. Current laws and regulations have failed to keep pace with AI development. We will also encounter difficulty enforcing laws across borders as most technology companies offer global AI systems.

I. Loss of Human Centricity and Control

We mentioned earlier the concern that AI develops autonomously without a human in the loop. The existential threat where AI systems operate beyond human understanding and control has been the subject of science fiction but has surfaced more as a probable fact.[116] We encounter the risk that AI may make critical decisions without human oversight or ethical considerations. Further, AI decisions may not value human life nor human generated output.[117] We are imperiled by AI that makes moral decisions without human empathy or understanding.[118]

LEGAL PROFESSION IMPACT

I. Ethical Impact

In the previous portion of this report, we explored the varying benefits and risks of AI and AI-based tools. When using any technology in legal practice, attorneys must remain compliant with the Rules of Professional Conduct. With generative AI tools, the number of rules implicated may be surprising.[119]

A. Duty of Competency/Techno-solutionism

> "*A refusal to use technology that makes legal work more accurate and efficient may be considered a refusal to provide competent legal representation to clients*."[120]

Rule 1.1 of the Rules of Professional Conduct (RPC) requires that a lawyer provide competent representation to a client. Comment 8 to RPC Rule 1.1 asserts that keeping abreast of "the benefits and risks associated with technology the lawyer uses to provide services to clients" is an element of competency. However, a recent LexisNexis survey found that only 43% of U.S. attorneys use (or plan to use) these tools professionally.[121] The need for more education, training and proficiency with the technology is apparent.

In addition to competence, attorneys must resist viewing these tools through a techno-solutionism lens. "Techno-solutionism"[122] is the belief that every social, political and access problem has a solution based in development of new technology. In this case, some view generative AI as the solution to the access to justice problem. As infamously demonstrated in the *Avianca* case,[123] in which an attorney utilized ChatGPT (a generative AI tool) to write a brief that contained fictitious legal precedent, attorneys cannot rely on technology without verification. RPC Rule 5.3 imposes a supervisory obligation on attorneys with respect to nonlawyer work. In the *Avianca* case, the "nonlawyer" was the tool itself.

B. Duty of Confidentiality & Privacy

RPC Rule 1.6 states, in part, that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." This duty of confidentiality also extends to what client information a lawyer may share when using certain generative AI tools. Because AI models depend on data to deliver salient results, privacy protection must become an integral part of their design.[124] Lawyers should cautiously use these tools, being mindful of a client's privacy.

In fact, the California bar association[125] recommends that lawyers inform their clients if generative AI tools will be used as part of their representation. The Florida bar association[126] takes its recommendation a step further, suggesting that lawyers obtain informed consent before utilizing such tools. Whether an attorney informs the client or obtains formal consent, the ethical obligation to protect client data remains unchanged from the introduction of generative AI tools.

C. Duty of Supervision

As noted earlier, RPC Rule 5.3 imposes a duty to supervise non-lawyers involved in client representation. In 2012, the American Bar Association amended Model Rule 5.3 to clarify that the term "non-lawyers" includes non-human entities, such as artificial intelligence technologies.[127] Despite the cautionary tale set by the *Avianca* case, a prominent California law firm has submitted hallucinated cases in its legal briefs.[128] Dennis P. Block and Associates, which handles tenant evictions, was fined $999 for its ethical violation – a paltry sum considering the societal impact of wrongful evictions.

D. Unauthorized Practice of Law

To begin a discussion about what constitutes the unauthorized practice of law (UPL) and specifically how use of generative AI, including LLMs, such as ChatGPT, Claude, Bard, and Mid-journey, may be considered UPL, we first examine what is the practice of law.

While there is no nationally agreed definition of what constitutes the practice of law, the ABA Model Rules provides one (discussed below). Some states have also fashioned their own definitions of the practice of law. Yet, without a uniform definition and precise meaning of the practice of law, we fall upon the adage: "You know it when you see it."

The ABA defines the practice of law as the application of legal principles and judgment regarding the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law. However, New York State does not offer a precise definition of the term. ABA Model Rule 5.5 forbids lawyers from engaging in the unauthorized practice of law. Section (b) of the rule states:

> A lawyer who is not admitted to practice in this jurisdiction shall not: (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

Similarly, Rule 5.5 of the New York RPC defines the unauthorized practice of law in this manner:

> (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction. (b) A lawyer shall not aid a nonlawyer in the unauthorized practice of law.

Based on these rules, AI programs that do not involve a human-lawyer in the loop in providing legal advice arguably violate the rules and may be considered UPL. Thus, "AI programs cannot give legal advice unless a human lawyer is involved. In the age of AI, legal ethics preserves a human element in the practice of law."[129]

Case Law: Lawsuits Against AI Developers & UPL

Lola v. Skadden, Arps, Slate, Meagher & Flom LLP, 620 Fed. Appx. 37, 45 (2nd Cir. 2015). "According to the Lola decision, if a lawyer is performing a particular task [like document review] that can be done by a machine, then that work is not practicing law."[130] The court also interpreted

North Carolina's law to imply, however, that the practice of law requires "at least a modicum of independent legal judgment."[131]

Janson v. LegalZoom.com, Inc., 802 F. Supp. 2d 1053, 1064 (W.D. Mo. 2011). The court held that filling out blank forms like the ones provided on LegalZoom's website "does not constitute the unauthorized practice of law." -Further, in a settlement between LegalZoom and the North Carolina Bar Association, LegalZoom agreed to have a licensed attorney review blank templates offered to customers in North Carolina and to clearly indicate to customers that the templates do not replace the advice of an attorney to ensure LegalZoom would not engage in the unauthorized practice of law.[132]

Based on current case law, AI programs can direct clients to the forms they need to fill out. However, these programs may not give any advice as to the substance of the client's answers because that would be replacing the work of a human lawyer.[133]

E. Attorney-Client Privilege and Attorney-Work Product

> "*There's not a lot of thought given to whether the information that's provided [to the chatbot] is covered by attorney client privilege.*" ~ Jay Edelson, CEO and founder of Edelson PC

One of the oldest recognized privileges regarding confidential information, the attorney-client privilege, "shields from disclosure any confidential communications between an attorney and his or her client made for the purpose of obtaining or facilitating legal advice during a professional relationship" so long as the communication is "primarily or predominantly of a legal character."[134]

The overarching purpose of this privilege is to allow for full and frank communications or discussions between attorneys and their clients. The attorney-client privilege has been defined as:

> a legal privilege that works to keep confidential communications between an attorney and their client private. Communications made to and by a lawyer in the presence of a third party may not be entitled to this privilege on grounds that they are not confidential. The

> privilege can be affirmatively raised in the face of a legal demand for the communications, such as a discovery request or a demand that the lawyer testify under oath. A client, but not a lawyer, who wishes not to raise attorney-client privilege as a defense is free to do so, thereby waiving the privilege. This privilege exists only when there is an attorney-client relationship (Cornell University Law School, Legal Information Institute/LII, posting by the Wex Definitions Team).

The statutory attorney-client privilege in the State of New York is found in Civil Procedure Law and Rules 4503(A)(1), which states:

> Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local government or by the legislature or any committee or body thereof.

While discovery requests for privileged information may reveal attorney-client privileged information, so too may the use of generative AI tools such as ChatGPT or GPT-4.

Model Rules of Professional Conduct 1.6(a) and (c):

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

New York RPC Rule 1.6:

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected.

Comment to New York Rules of Professional Conduct 1.6(c):

- An attorney must "make reasonable efforts to safeguard confidential information against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are otherwise subject to the lawyer's supervision."
- "Unauthorized access to, or the inadvertent or unauthorized disclosure of, information protected . . . does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the unauthorized access or disclosure."

Focusing on the language in the Cornell University Law School LII definition of attorney-client privilege – "communications made to and by a lawyer in the presence of a third party may not be entitled to this privilege on grounds that they are not confidential" – how then may attorney-client privileged information or attorney-work product be revealed when directly and indirectly using generative AI tools such as ChatGPT or GPT-4.[135]

For example, through:

- Direct Use of ChatGPT as an app (the user directly enters a prompt that contains your private or confidential information, which then goes into ChatGPT)
- Indirect Use of GPT-4 that is embedded in search engines such as Microsoft Bing (the user enters a prompt that contains private or confidential information, which then goes into the generative AI app)

- Use of Application Programming Interface/API (using some other application that connects to ChatGPT via the API, private or confidential information is inputted into ChatGPT)
- ChatGPT plugins (accessing other applications from within ChatGPT via plugins, which conveys your private or confidential information further into ChatGPT and other places too. With plugins, other users/persons can see/view your private or confidential information).

Key Points for attorneys to be aware of and consider when utilizing ChatGPT and other similar generative AI tools include:

- Licensing Information
- Terms of Use
- Privacy Policies
- Frequently Asked Questions/FAQs list
- Data that is supplied to or inputted into ChatGPT may be used for training purposes or to refine/improve the AI model (For example, ChatGPT developers may view the input and conversation history of its users and users' personal information, including log/usage data, to analyze/improve/and develop ChatGPT services).
- Data that is supplied to or inputted into ChatGPT may be viewed by and disclosed to third parties/vendors in the training of the AI model.
- Data output by ChatGPT may be viewed by third parties, including opponents and adversaries.

Pursuant to the Model Rules of Professional Conduct and New York RPC, lawyers must take reasonable efforts to prevent inadvertent and unauthorized disclosure of or access to client

information. When utilizing generative AI tools such as ChatGPT, attorneys need to be knowledgeable about the technology they are using and/or ask for assistance from those lawyers or trusted technology experts who do understand its use and limitations, including IT personnel. If none of these options is possible, then the attorney should not utilize such technologies until they are competent to do so per the duty of competency.[136]

AI and Cybersecurity Risks

Open AI/ChatGPT may raise both ethical violations and cybersecurity issues. For example, "if there is a cyber intrusion [into OpenAI or ChatGPT], not only will that data potentially be lost to threat actors, but they could conceivably also obtain the firm's searches… [gaining] access into the mind of a lawyer and the arguments they might be raising."[137]

Preservation of Data

Data preservation and litigation hold obligations may present similar challenges for attorneys and the court. If the data that is inputted into the AI application is temporary/ephemeral, but also relevant and responsive to the litigation, parties have the duty to preserve this electronically stored information. Yet, how do you preserve what may no longer exist?

F. Candor to the Court

When using ChatGPT or other similar AI tools, attorneys must verify the accuracy of the information and legal authority produced by such tools. Attorneys' signatures and attestations appear on legal documents submitted to the court, documents which make representations about case law and other authorities relied upon in support of the attorney's case. Regardless of the use of and reliance upon new and emerging technologies like generative AI tools, as officers of the court and in the interest of justice, attorneys must identify, acknowledge and correct mistakes made or represented to the court.

The following ABA Model Rules of Professional Conduct and New York RPC guide attorneys in their use and reliance on information obtained from AI tools:

M.R.P.C. 3.3 (Candor to the Tribunal):

"(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false."

Comment [2] to *M.R.P.C.* 3.3:
"although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false."

Rule 3.3(a) (1) of the New York Rules of Professional Conduct prohibits lawyers from making false statements of fact or law to a court and requires correction of any false statements previously made during the case.

AI Hallucinations: What Are Hallucinations, and Why Do They Occur?

Hallucinations are incorrect/unreliable information produced by an LLM or generative AI chatbot, such as ChatGPT. In simplest terms, a hallucination is a euphemism for a lie. As an LLM, ChatGPT is trained on a vast amount of data to recognize patterns in language and then produce/generate a response it predicts is relevant and responsive to the user's input or prompt.[138]

> *AI hallucination is a phenomenon wherein a large language model, often a generative AI* chatbot *or* computer vision *tool, perceives patterns or objects that are nonexistent or imperceptible to human observers, creating outputs that are nonsensical or altogether inaccurate." "Generally, if a user makes a request of a generative AI tool, they desire an output that appropriately addresses the prompt (i.e., a correct answer to a question). However, sometimes AI algorithms produce outputs that are not based on training data, are incorrectly decoded by the transformer or do not follow any identifiable pattern. It "hallucinates" the response.*[139]

Case Law and Hallucinations

U.S. v. Prakazrel Michel, No. 1:19-cr-00148-1 (CKK)(D.D.C.) (motion filed Oct. 16, 2023). Defendant, convicted of money laundering and corrupt political influencing, alleges that his attorney's reliance on AI for his closing argument constituted ineffective assistance of counsel. Defendant argues that his attorney's "closing argument made frivolous arguments, misapprehended the required elements, conflated the schemes and ignored critical weaknesses in the government's case."

Ex Parte Allen Michael Lee, 673 S.W.3d 755 (Tex. App. Jul. 19, 2023). In denying the petitioner's motion for a new bail hearing, the court found that petitioner's moving brief, prepared by counsel, contained citations that did not exist and arguments that appeared to be generated by generative AI.

Mata v. Avianca, Inc., No. 22-cv-1461 (PKC), 2023 WL 4114965 (S.D.N.Y. June 22, 2023) (referenced in other portions of this report).

Donovan James Gates v. Christopher Omar, et al., No. 2022 cv 31345 (Col. Sup. Ct.). A lawyer used ChatGPT for research in connection with a motion to set aside summary judgment in a breach of contract matter, and the cases cited in the motion were nonexistent. The lawyer, who had been practicing in Colorado for 1.5 years and in civil litigation for 3 months, said he turned to ChatGPT because it was his first civil litigation and he wanted to save his client money by relying on the technology to conduct the research. As of June 2023, the Court was considering sanctions.

Attorneys cannot solely rely upon information provided by generative AI. Attorneys may instead use generative AI as a starting point and must independently review case citations, arguments and any other information/output produced by generative AI.

Deepfakes – Synthetic Media as Evidence in Court

With the understanding that the fundamental purpose of a trial is its truth seeking function, for "the very nature of a trial [i]s a search for truth,"[140] evidentiary issues surrounding Deepfakes – a form of AI called deep learning that makes images of fake events[141] – may also implicate the Duty of Candor to the Court. Deciding issues of relevance, reliability, admissibility and authenticity may still not prevent deepfake evidence from being presented in court and to a jury. "One of the fundamental tenets of the American legal system is that the trier of fact—either the judge or the jury—is best equipped to find the truth based on the evidence presented. But individuals cannot consistently determine truth from lies as they confront deepfakes."[142]

G. Judges' Ethical Obligations

The Model Code of Judicial Conduct mandates: "*A judge shall uphold and promote the independence, integrity and impartiality of the judiciary.*" ABA Model Code of Judicial Conduct, Canon 1.[143] How does Canon 1 of the Model Code of Judicial Conduct align with judicial use of generative AI, such as ChatGPT?

"The human aspect of intelligence that cannot be artificially constructed is that of 'judgment.'" While AI can and does assist judges in a variety of ways, judges will always have the responsibility of exercising their own judgment: the human trait of independent judgment.[144]

According to New York Rules of Professional Conduct Rule 5.4: Professional Independence of a Lawyer:

> (c) Unless authorized by law, a lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services or to cause the lawyer to compromise the lawyer's duty to maintain the confidential information of the client under Rule 1.6.
>
> Comment [2]
> This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also

> Rule 1.8(f), providing that a lawyer may accept compensation from a third party as long as there is no interference with the lawyer's professional judgment and the client gives informed consent.

How does this rule and comments to the rule align with attorneys' use of generative AI such as ChatGPT? Attributed to the 16th U.S. President and attorney Abraham Lincoln: "A lawyer's time and advice are his stock in trade." It follows then that an attorney's time, advice and professional judgment are what clients expect and rely upon when retaining a lawyer/law firm for representation in a matter. While AI can and does assist lawyers in a variety of ways, attorneys do not shed their professional responsibility of exercising their own "independent judgment" in client matters.

II. Access to Justice

A. Introduction

The rapid development of AI has the potential to have a significant impact on access to justice in the American legal system. While AI and especially generative AI is generally causing disruption in the market for legal services, this impact is likely to be even greater when discussing access to justice.

For some time, there has been an enormous gap in access to legal services. A recent survey found that 66% of the U.S. population experienced at least one legal issue in the past four years, with just 49% of those problems having been completely resolved. In the United States, it is well documented that there are many geographical regions that do not have enough human lawyers. A recent survey found that low-income Americans did not receive any or enough legal help for 92% of their civil legal problems.

Generative AI tools such as ChatGPT have the potential to enhance the accessibility, efficiency and affordability of pro bono legal services. Generative AI could truly transform the way in which legal services are provided, and the tremendous opportunities and challenges of this

technology are magnified when addressing pro bono services to clients. But there are clearly risks too as highlighted above. As we have already discussed, early generative AI tools have been unable to consistently provide accurate legal advice to their users. While more accurate tools may be developed, given the reach of the corporations promoting existing generative AI tools, new market entrants may not come to the attention of those most in need. Where generative AI may make it easier for those without a lawyer to find an answer to a legal issue, it may make it harder for them to find the correct answer.

We cannot underestimate the additional cost in terms of court resources to research, verify and challenge incorrect AI-generated legal opinions and arguments. Coming at a time when many courts are already stretched thin with unacceptably long waiting times in some jurisdictions for a hearing, adding to this strain could lead to more injustice.

B. Pro Bono Organizations Using Generative AI

Pro bono organizations often have faced challenges in meeting the needs of their clients and in hiring sufficient attorneys and staff to support the many matters that they take on. Staff and attorneys working for legal aid organizations are perpetually understaffed and overworked. AI has the potential to transform the way in which some pro bono organizations serve their clients.

Legal services organizations have limited resources and are unable to serve all the individuals who seek their assistance. Generative AI can help organizations put in place a triage process for pro bono clients that can help to analyze many potential matters and can enable these organizations to serve many more clients than they currently serve. Many organizations spend large amounts of time screening potential clients, but an AI chatbot could effortlessly screen potential clients and gather basic information about their legal issues. Several organizations have started building tools to access basic legal information and they have found that generative AI is a game-changer when it comes to client intake.

Pro bono attorneys have found that generative AI tools are excellent at summarizing and extracting relevant information from documents, translating legalese into plain English and helping to quickly analyze thousands of existing court forms. In addition, ChatGPT and other similar generative AI tools can identify potential clients' legal needs and build out and maintain legal navigators.

Pro bono organizations are seeing how generative AI can even assist them in putting together navigator-type tools that can help guide clients seeking legal services. For example, a site powered by generative AI technology could provide a step-by-step guide to getting divorced, explain how to file a claim against an unlawful landlord or provide legal and other support options for domestic violence survivors. This is not a hypothetical scenario, as such systems have already been put into place by some legal services organizations, and these tools will only become more powerful, intelligent and accurate as generative AI becomes more and more sophisticated.

In addition, language is often a barrier to justice. Members of some communities may struggle to understand English, and that struggle can be magnified when faced with the formal legal language that is often used in court documents and agreements. Generative AI tools can be utilized to simplify, summarize and translate documents.

Legal services organizations are often challenged by the research and writing that they must perform in order to properly support a matter. Generative AI can help with legal research and document preparation, which in turn can help to resolve cases more quickly. It could also help to draft legal documents, such as contracts or pleadings by providing template language and helping users to fill in necessary information. While drafting a complaint would have taken many hours in the past, with the help of generative AI, a complaint could be drafted in minutes.

If accurately and properly used, these tools may have the potential to bring legal services to those who cannot afford it and to make legal services organizations run more efficiently.

C. Will Generative AI Tools Prove to Be Too Expensive?

While generative AI has the potential to greatly benefit access to justice, there are some who believe that this technology could potentially hinder, and not help, access to justice.

It has been noted that while this technology is developing at a fast pace, the industry is not currently structured to serve the interests of underserved populations and pro bono organizations. While there is potential for pro bono organizations and low-income individuals to take advantage of this technology, there is a risk that this technology could further exacerbate existing inequities.

While it might appear that the application of this technology will help to even the playing field, it remains to be seen how expensive it will be to properly utilize this technology in the practice of law. The development of AI technology is unregulated, and the companies developing and applying this technology to the legal profession have an interest in making a product that is attractive to those who are willing to pay for it. Many law firms are investing millions of dollars to implement AI solutions. Pro bono organizations run the risk of falling even further behind the big law firms.

Additionally, when one addresses assisting non-lawyers with justice problems it is possible that new generative AI tools may not make a significant difference in improving access to justice for low-income and minority communities. Those who need legal services from this constituency are less likely to be able to use AI tools due to fees to use these tools, limited internet access and literacy and language barriers.

Since this technology really does have the potential to improve access to justice, it is crucial that pro bono organizations and low-income individuals be given access to these tools. While this

may be difficult, it is imperative that this technology be available to all who are in need of legal services.

D. Use of AI by Non-Attorneys

In its first year of widespread use by the public, Chat GPT and generative AI have been used by the general public for a wide range of uses. Non-lawyers will be able to readily interact with generative AI to ask a variety of legal questions. These uses of generative AI will present challenges for bar associations, courts and the legal community as a whole.

What one must realize when looking at this issue is that currently the majority of the parties in civil cases in state and local courts lack legal representation. Therefore, the question becomes: Are the people, who otherwise would not have legal counsel, better served by at least having a chatbot to assist them?

One of the challenges with non-attorneys using generative AI to assist with legal issues is the possibility of receiving misleading information. In its current iterations, generative AI is likely to provide an answer to a legal question, but it might do so without providing an indication that the confident answer is without a proper legal foundation. Some AI companies have included warnings in their user agreements about using their tools to provide legal advice. For example, OpenAI's online usage provisions state the following:

Prohibited use – "Engaging in the unauthorized practice of law, or offering tailored legal advice without a qualified person reviewing the information."

It is questionable whether individuals and new tools will abide by such prohibitions. Even if some tools include such warnings there is nothing to stop someone from asking a chatbot for legal advice or drafting papers for them. If a non-lawyer has a chatbot draft a brief or complaint, they are not in as good a position as an actual lawyer to know if the filing contains falsehoods, biases, incorrect cases or other AI hallucinations.

In addition, even though individuals who cannot afford an attorney will potentially benefit from generative AI tools, there will be some barriers to access, including more limited access to the internet and computers by the people experiencing homelessness or those living in poverty. Asking such tools the right questions also requires some skill. While a person may download advice on how to frame a question (i.e., developing a "prompt") correctly, some non-lawyers, particularly in those sections of society that have been traditionally underserved by the law, may struggle to design the correct prompt. In addition, much of the information that one would need to develop a system that provides accurate legal information would require access to databases that are generally behind a paywall (i.e., Westlaw, Lexis, Law360), which could potentially result in a cost to users.

Another potential issue stems from the fact that generative AI tools might not account for multiple, interrelated issues, which could include family, criminal, housing, employment, etc. It is possible that an answer from a chatbot could be correct for one issue but harmful in the context of the other issues. It is in this situation where a chatbot likely will never be able to fully replace a human. Generative AI will never have the same level of empathy as a human, and when individuals are seeking legal services, they often need someone to "hold their hand" and that simply is not possible with a chatbot (at least for the time being).

It should be noted that non-lawyers are already able to gather the same kind of advice or information that a chatbot provides by searching online for legal materials and legal information. While some information found online may be correct, other information may be outdated, suspect or simply incorrect. Generative AI is basically a new interface to this online information that has the advantage of being an interactive conversational tool. If this can make information more

accessible and let people know if they even have a legal issue, this will prove to be a positive development.

In addition, generative AI solutions are available 24/7. It could take days, weeks or months for a low-income plaintiff to find an attorney to meet with them or represent them for a matter. Generative AI is generally efficient and is scalable, allowing it to provide information to many people at once. While it's true that generative AI may be challenged when dealing with multiple overlapping issues, it will surely be a positive development for individuals who are unable to afford an attorney.

The reality of the situation is that generative AI is here, and it is not going away but will rather become more advanced and more available to the general public as time goes on. It should be noted that the challenges facing the legal profession are not unique. The medical profession also is addressing the challenges presented by patients who have consulted with generative AI and arrive at an appointment with opinions on what is the correct medical advice. Lawyers will similarly be challenged by clients who have compiled information and learned about their legal options using generative AI.

We believe it is important not to dismiss innovation, and to allow vendors and companies to develop programs that will help guide the general public. It is just as important for attorneys to educate themselves on AI so they can utilize it and understand how their clients may be using it as well.

E. Implications of AI Judges or Robo Courts

One other area where AI may have a great impact on access to justice relates to the utilization of AI by judges and courts. At the time of this Report, there are only a few examples of robo courts or AI judges being utilized to resolve disputes, and those trials have had mixed results. For example, in 2019, Estonia planned to use robo judges for small claims procedures. The

Estonian government said that those reports were misleading.[145] In Australia, a system designed to use technology to assess government payments has already failed.[146] But as generative AI becomes more sophisticated, it will become more feasible to have AI arbiters decide small claims courts matters or arbitration matters where both parties consent to an AI arbiter.

It is not clear at this time how widespread this practice will become and how it will impact access to justice. In some ways, it may make it more likely for those with little knowledge of the law and courts and those who have little financial means to have their day in court. An AI judge may also be less likely to be influenced by a prominent attorney or big-name firm. However, most people will generally not want their disputes to be decided by a computer or algorithm.

We are not quite yet to the point of AI judges replacing some portion of the judiciary, and that may never happen, but it is likely to be raised as a possibility in the future. We are already at a point where AI is being used to mediate matters, where both parties agree to the use of AI. While we have not quite arrived in a sci-fi world populated by robo judges, we do need to be wary of AI being used in lieu of judges, and we need to be well positioned to gauge the potential benefits and risks of using AI judges in certain situations.

III. Judicial Reaction/Responses to Generative AI

A. Introduction

Artificial intelligence has been in use by the legal profession and its clients for a long time. In November 2022, generative AI burst onto the scene through one program, launched by Open AI, known as ChatGPT. Since then, the use and varieties of generative AI platforms has expanded on a seemingly daily basis, and attorneys and clients are evaluating generative AI technology and how it could be used – and abused – in litigation. This section of the Task Force Report will introduce the reader to those uses and abuses.

B. Uses of AI and Generative AI

Other sections of this Report have discussed the technologies. For now, we consider some uses of AI and generative AI. Focusing on AI in general, it is in widespread use for:

- Identification (for example, airports and workplaces)
- Security (for example, to access cell phones and bank accounts)
- Law enforcement (for example, to identify suspects)
- Retail (for example, to identify shoppers)
- Human resources (for example, to interview and hire employees)

And, in addition to these uses, AI is used extensively for collection, review and production of ESI.

Generative AI takes AI to a new level. As we know, generative AI ingests data and, in response to "prompts," generates an answer. Generative AI is being used by the legal profession and other entities to, among other things:

- Draft and edit documents
- Conduct legal research
- Contract review
- Predictive analytics
- Chatbots for legal advice
- Brainstorming
- Summarize legal narratives
- Convert "legalese" into plain language

C. Causes of Action Arising out of AI and Generative AI

We are at the tip of the proverbial iceberg when thinking about causes of action (and we are only speaking of civil litigation here – there are uses of AI and generative AI that could give rise to criminal proceedings, including, for example, "deepfakes" that might be prosecuting under federal or state criminal laws). Here are examples of causes of action:

- Breach of privacy
- Discrimination
- Copyright infringement
- Malicious uses such as defamation
- Cyber breach
- Employment-related

These causes of action might derive from common law. However, statutes or regulations might also give rise to litigation as well as regulatory proceedings. Examples include:

- Section 5 of the Federal Trade Commission Act
- Discrimination actionable under the Equal Employment Opportunity Act and state equivalents
- The Illinois Artificial Intelligence Video Interview Act
- New York City Local Law Int. 1894-A

Attorneys and clients should expect to see legislation at the state and federal levels to address AI and generative AI.

It may also be useful to note that overseas laws attempting to govern AI may have extra-territorial effects. For example, the EU AI Act (summarized in Appendix A) was agreed in principle at an EU level in 2023. While there is still some way to go before this will become law, the EU AI

Act is designed to also regulate the use of AI by the U.S. and other entities outside the EU. Coupled with this, the EU has introduced an EU AI Pact, which could lead to some U.S. corporations agreeing to be bound by the EU AI Act's provisions as early as this year.

D. Discovery

Prior sections of this Report have described the technology behind AI and generative AI. Bearing in mind how technology might make mistakes and lead to injury, economic or personal, it is expected that regulatory requests for information and civil discovery demands that focus on, for example, alleged bias will be made. Discovery into bias might present questions about the nature of the data fed into the AI or generative AI and how algorithms used by the AI or generative AI "operated," as well as questions related to the prompt used to generate something. Such questions will raise other questions about the need for non-testifying or testifying experts. Moreover, as already outlined in this Report, the competence of attorneys to deal with this technology might present ethical questions.

E. *Avianca* and Judicial Reactions to Generative AI

Not only is generative AI now mainstream, but it has featured in judicial decisions and in "prophylactic" orders. The first of the decisions is *Avianca*, which is discussed below.

In *Mata v. Avianca, Inc.*,[147] the plaintiff's attorneys "submitted non-existent judicial opinions with fake quotes and citations created by *** ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question." The court held that:

- The attorneys acted with subjective bad faith and violated Federal Rule of Civil Procedure 11.
- The plaintiff's firm was jointly and severally liable for the attorneys' Rule 11 violation.

- Sanctions under U.S.C. 1927 could not be imposed because, "[r]eliance on fake cases has caused several harms but dilatory tactics and delay were not among them."
- "Alternatively," to Rule 11, sanctions were imposed under the inherent power of the court.
- $5,000.00 penalty imposed jointly and severally.

The court also required the attorneys "to inform their client and the judges whose names were wrongfully invoked of the sanctions imposed."

Since *Avianca* was decided, other courts have addressed generative AI in decisions (discussed earlier in this Report). However, and of particular interest to the Task Force, individual judges (and one United States bankruptcy court) have directed attorneys who appear before them and who use generative AI to take certain actions. Here is a "sampler:"

United States District Judge Brantly Starr of the Northern District of Texas has imposed a certification requirement:

> All attorneys and pro se litigants . . . must, file on the docket a certificate attesting either that no portion of any filing will be drafted by generative artificial intelligence (such as ChatGPT, Harvey.AI, or Google Bard) or that any language drafted by generative artificial intelligence will be checked for accuracy, using print reporters or traditional legal data bases, by a human being.

United States District Court Judge Michael Baylson of the Eastern District of Pennsylvania has issued a Standing Order for all actions assigned to him:

> If any attorney for a party, or a pro se party, has used artificial intelligence ('AI') in the preparation of any complaint, answer, motion, brief, or other paper, filed with the Court, and assigned to Judge Michael M. Baylson, MUST, in a clear and plain factual statement, disclose that AI has been used in any way in the preparation of the filing, and CERTIFY, that each and every citation to the law or the record in the paper, has been verified as accurate.

These and other orders are problematic for several reasons, including:

- Might attorney work product be implicated?
- Might the use of the term "artificial intelligence" (rather than generative AI) sweep into a disclosure obligation much more than generative AI? (For example, if an attorney uses computer-assisted review to cull and make a production of ESI, would the order encompass that use?).

Judges issue local rules for court management and in reaction to or to get ahead of issues that may arise or have the potential to arise in their courtrooms (in real time), regardless of existing rules which address the same concerns!

In time, with better understanding of the new and emerging technologies, and with more precision in language when referencing these emerging technologies, the language in the local rules will more precisely match and address the concerns of the court and so, achieve what these judges' orders were designed to do.

LEGISLATIVE OVERVIEW AND RECOMMENDATIONS

I. Legislative Overview

While the Task Force reviewed several pieces of proposed and passed legislation (summarized in Appendix A hereto), we do not endorse any specific pending legislation. However, as the recommendations below reflect, we do recommend certain changes to the RPC that will help clarify lawyers' ethical duties when using AI and generative AI tools.

II. Recommendations

The Task Force recommends the following for NYSBA adoption:

First, the Task Force recommends that NYSBA adopt the AI/Generative AI guidelines outlined in this report and commission a standing section or committee to oversee periodic updates to those guidelines. Daily, we learn more about the capability of the technology to transform society. As the impacts are continual, so should the updates to these guidelines be as well.

Second, we recommend a focus on educating judges, lawyers, law students and regulators to understand the technology so that they may apply existing law to regulate it. Many of the risks posed by AI are more sophisticated versions of problems that already exist and are already addressed by court rules, professional conduct rules and other law and regulations. Rather than invent new laws to address AI concerns, the Task Force suggests that we create a comprehensive education plan for judges, lawyers, law students and regulators so they can address the risks associated with AI using existing laws and regulations. This approach has already been adopted effectively in other jurisdictions. For example, the Italian Data Protection Authority, the Guarante per la Protezione dei Dati Personali, has already effectively used GDPR in a number of AI-related cases, including to modify or restrict the operations of the ChatGPT and Replika AI chatbots.[148]

This approach will allow the law to develop in a fact-based way along with the rapidly changing technology.

Comments to the rules of professional conduct, best practices, continuing education programs and state bar opinions can also aid in this process. For instance, in the Preamble to the RPC, we recommend including a general statement about the importance of competence with technology by adding "including . . . artificial intelligence" therein. Further, we would expand Comment [8] to Rule 1.1 to add that the duty of competence obligates lawyers to: (a) keep abreast of and be able to identify technology (including AI and generative AI) that is generally available to improve effective client representation and enhance the quality of legal services; (b) determine whether the use of AI will in fact augment the legal service to a specific client; and (c) attain a basic understanding of how AI-based tools operate to achieve the results and outputs sought.

Third, the Task Force recommends that legislatures seek to identify risks associated with the technology that are not addressed by existing law. This may involve extensive hearings, studies involving experts in AI and increased costs. Once such risks are identified, new laws may be crafted with a focus on new categories of problems.

Fourth, the rapid advancement of AI prompts us to examine the function of the law as a governance tool. Some of the key functions of the law in the AI context are: (i) expressing social values and reinforcing fundamental principles; (ii) protecting against risks to such values and principles; and (iii) stabilizing society and increasing legal certainty. Recommendations here involve:

a. AI as a General-Purpose and Dual-Impact Technology: The governance of AI should consider AI's nature as a classic dual-impact phenomenon. AI can improve many aspects of society but also has the potential to cause harm if left unchecked. Regulation should consider

focusing on the effects of the technology on individuals and society, rather than the technical aspects of the technology itself (such as the algorithms or databases).

b. Regulatory Spectrum: The governance of AI should be tailored to the risks posed by AI applications. It can adopt varying degrees of regulatory intrusiveness, with the spectrum potentially extending from detailed legal regulation at one end of the spectrum to self-regulation on the other end of the spectrum, with a principles-based approach in the middle of the spectrum. The approach chosen to address a particular risk or problem should consider:

- the sector involved (e.g., law enforcement or health care)
- the importance of the social activity at hand (e.g., hiring applicants or making loans)
- the rights affected (e.g., due process or privacy)
- the risks associated with the use and impact of AI (e.g., job loss or misinformation)

c. Comprehensive vs. Specific Regulation: Foundationally, legislators should determine if regulations entail a comprehensive approach (i.e., an overarching framework governing diverse AI applications and their social implications) or a sector-by-sector or industry-by-industry approach (i.e., considering the particular and often unique issues posed by AI in each sector or industry). Regulators should determine which approach is best, or develop some mix or combination of these approaches, depending on the sectors and problems at hand.

d. Global Cooperation: Another consideration in the regulatory approach involves jurisdictional reach. Can AI be effectively governed at the local, state or federal level, or does its governance necessarily require some degree of international or even global cooperation? We believe in local, state and federal regulation where appropriate, but also propose that local, state and federal regulation is likely to prove inadequate without international and sometimes global

cooperation, because AI is a cross-border phenomenon rather than a local one. The following four elements of AI may elude regulations if they are confined to a specific geographic area:

i. Data, which is the input for AI, can move across borders (although data location is likely to enhance a jurisdiction's power to regulate AI);
ii. Algorithms programmable anywhere in the world;
iii. Algorithms exportable for use anywhere else in the world; and
iv. Outputs from algorithms transmitted to and applied in different jurisdictions.

AI & GENERATIVE AI GUIDELINES

The chart below reflects the Task Force's recommended guidelines when utilizing AI or generative AI tools (collectively, the "Tools") in legal practice. We will update these guidelines periodically as the technology evolves.

TOPIC	GUIDANCE
ATTORNEY COMPETENCE (RULE 1.1)	*A lawyer should provide competent representation to a client.* You have a duty to understand the benefits, risks and ethical implications associated with the Tools, including their use for communication, advertising, research, legal writing and investigation. Refer to Appendix B for resources to better under the Tools.
SCOPE OF REPRESENTATION (RULE 1.2)	*A lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.* Consider including in your client engagement letter a statement that the Tools may be utilized in your representation of the client and seek the client's acknowledgement. Refer to Appendix C for a sample language to include.
DILIGENCE (RULE 1.3)	*A lawyer should act with reasonable diligence and promptness in representing a client.* Consider whether use of the Tools will aid your effectiveness in representing your client.
COMMUNICATION (RULE 1.4)	*A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.* While the Tools can aid in generating documents or responses, you must ensure that you maintain direct and effective communication with your client and not rely solely on content generated from the Tools.

TOPIC	GUIDANCE
FEES (RULE 1.5)	*A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense.* If the Tools would make your work on behalf of a client substantially more efficient, then your use of (or failure to use) such Tools may be considered as a factor in determining whether the fees you charged for a given task or matter were reasonable. If you will add a "surcharge" (i.e., an amount above actual cost) when using specific Tools, then you should clearly state such charges in your engagement letter, provided that the total charge remains reasonable.
CONFIDENTIALITY (RULE 1.6)	*A lawyer shall not knowingly reveal confidential information.* When using the Tools, you must take precautions to protect sensitive client data and ensure that no Tool compromises confidentiality. Even if your client gives informed consent for you to input confidential information into a Tool, you should obtain assurance that the Tool provider will protect your client's confidential information and will keep each of your client's confidential information segregated. Further, you should periodically monitor the Tool provider to learn about any changes that might compromise confidential information.
CONFLICTS OF INTEREST (RULE 1.7)	*A lawyer shall not represent a client if a reasonable lawyer would conclude that the representation will involve the lawyer in representing differing interests.* Your use of the Tools in a particular case may potentially compromise your duty of loyalty under Rule 1.7, by creating a conflict of interest with another client. Rule 1.7 imposes a duty on you to identify, address and, if necessary, seek informed client consent for conflicts of interest that may result from your use of the Tools.

TOPIC	GUIDANCE
SUPERVISORY RESPONSIBILITIES (RULE 5.1)	*A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to the ethical rules.* As a supervising lawyer, you have a duty to ensure that the lawyers for whom you have oversight observe the ethical rules when utilizing the Tools.
SUBORDINATE LAWYERS (RULE 5.2)	*A lawyer is bound by the ethical rules notwithstanding that the lawyer acted at the direction of another person.* If you as the subordinate lawyer utilize the Tools as directed by your supervising attorney, you are independently required to observe the ethical rules. All rules described in these guidelines apply equally to your conduct.
RESPONSIBILITY FOR NON-LAWYERS (RULE 5.3)	*A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate.* If the Tools are used by non-lawyers or paralegals (or the Tools themselves are considered "non-lawyers"), you must supervise their use to ensure compliance with the ethical rules. Further, you must ensure that the work produced by the Tools is accurate and complete and does not disclose or create a risk of disclosing client confidential information without your client's informed consent.
PROFESSIONAL INDEPENDENCE (RULE 5.4)	*A lawyer shall not permit a person to direct or regulate the lawyer's professional judgment in rendering legal services.* While the Tools are technically not a "person," you should refrain from relying exclusively on them when providing legal advice and maintain your independent judgment on a matter.
UNAUTHORIZED PRACTICE OF LAW (UPL) (RULE 5.5)	*A lawyer shall not aid a nonlawyer in the unauthorized practice of law.* Understand that human oversight is necessary to avoid UPL issues when using the Tools, which should augment but not replace your legal work.

TOPIC	GUIDANCE
VOLUNTARY PRO BONO SERVICE (RULE 6.1)	*Lawyers are strongly encouraged to provide pro bono legal services to benefit poor persons.* The Tools may enable you to substantially increase the amount and scope of the pro bono legal services that you can offer. Considering Rule 6.1, you are encouraged to use the Tools to enhance your pro bono work.
ADVERTISING (RULE 7.1)	*A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that: (1) contains statements or claims that are false, deceptive or misleading; or (2) violates an ethical rule.* You are responsible for all content that you post publicly, including content generated by the Tools. Further, you must be cautious when using the Tools for advertising or solicitation purposes to ensure that you comply with ethical guidelines regarding truthful and non-deceptive communication.
SOLICITATION AND RECOMMENDATION OF PROFESSIONAL EMPLOYMENT (RULE 7.3)	*A lawyer shall not engage in solicitation by in-person or telephone contact, or by real-time or interactive computer-accessed communication . . .* You may not use the Tools to automatically generate phone calls, chat board posts or other forms of solicitation, nor may you contract with another person to use the Tools for such purposes, as Rule 8.4 (Misconduct) prohibits you from using others to engage in conduct in which you personally could not engage.

CONCLUSION

This report offers no "conclusions." As AI continues to evolve, so will the work of NYSBA and the groups tasked with ongoing monitoring. As a profession, we must continue to refine the initial guidelines suggested in this report and audit the efficacy of proposed rules and regulations. We liken this journey to the mindset of ancient explorers: be cautious, be curious, be vigilant and be brave.

Exhibit A

Task Force Mission Statement

The Task Force on AI will examine the legal, social and ethical impact of artificial intelligence (AI) on the legal profession. The Task Force will review AI-based software, generative AI technology and other machine-learning tools that may enhance the profession and that pose risks for individual attorneys dealing with new, unfamiliar technology and courts concerned about the integrity of the judicial process. Also, the Task Force will explore the positive and negative implications of AI use by the legal community and the general public, including effects on access to justice, legal regulations and privacy preservation. As it engages in its work, the Task Force will consult and ensure alignment of approaches, where appropriate, with other entities within the Association, including but not limited to the Committee on Technology and the Legal Profession, the Task Force on Emerging Digital Finance and Currency, the Working Group on Facial Recognition Technology and Access to Legal Representation and relevant sections. Lastly, the Task Force will develop policies for bar association adoption and suggest legislation to govern effective and responsible AI use.

APPENDIX A: LEGISLATION REVIEWED

I. Assemblyman Clyde Vanel's proposed statutes on AI:

- *Evidence created or processed by artificial intelligence.* An Act to amend New York's Criminal Procedure Law (CPL) and Civil Practice Law and Rules (CPLR) to address "the admissibility of evidence created or processed by artificial intelligence"

The essence of the evidence bill, which would amend the CPL and CPLR, is as follows:

§ 60.80 Rules of evidence; admissibility of evidence created or processed by artificial intelligence.

1. Evidence *created, in whole or in part, by artificial intelligence* shall not be received into evidence in a criminal proceeding unless the evidence is substantially supported by independent and admissible evidence and the proponent of the evidence establishes the reliability and accuracy of the specific use of the artificial intelligence in creating the evidence.

2. Evidence *processed, in whole or in part, by artificial intelligence* shall not be received into evidence in a criminal proceeding unless the proponent of the evidence establishes the reliability and accuracy of the specific use of the artificial intelligence in processing the evidence (emphasis added).

- *Political communications using artificial intelligence.* An Act to amend New York Election Law by requiring disclosure of "the use of artificial intelligence in political communications."

This bill would amend New York Election Law by requiring disclosure of "the use of artificial intelligence in political communications." The bill has separate sections to cover visual and non-visual communications. The heart of the bill provides as follows:

5. (a) Any political communication, regardless of whether such communication is considered a substantial or nominal expenditure, that uses *an image or video footage that was generated in whole or in part with the use of artificial intelligence*, as defined by the state board of elections, *shall be required to disclose that artificial intelligence was used* in such communication in accordance with paragraphs (b), (c), and (d) of this subdivision (emphasis added).

Paragraphs (b), (c), and (d) require specific disclaimers for "printed or digital political communications," "non-printed and non-digital political communications," and political communications that are "not visual, such as radio or automated telephone calls."

- *Political communications created by synthetic media.* An Act to amend New York Election Law, by "prohibiting the creation of synthetic media with intent to influence the outcome of an election."

  This bill would amend New York Election Law, by "prohibiting the creation of synthetic media with intent to influence the outcome of an election." Specifically, the bill would add a new § 17-172 that would provide as follows:

  § 17-172. Creating synthetic media with intent to unduly influence the 4 outcome of an election.

  1. A person who, with intent to injure a candidate or unduly influence the outcome of an election, creates or causes to be created a *fabricated photographic, videographic, or audio record* and causes such fabricated photographic, videographic, or audio record to be disseminated or published within sixty days of an election shall be guilty of a class E felony (emphasis added).

- *Artificial intelligence bill of rights.* An Act to amend New York's Technology Law by "enacting the New York artificial intelligence bill of rights."

  This bill would amend New York's Technology Law by "enacting the New York artificial intelligence bill of rights." The section on legislative intent says, in part:

  [T]he legislature declares that any New York resident affected by any *system making decisions without human intervention* be entitled to certain rights and protections to ensure that the system impacting their lives do so lawfully, properly, and with meaningful oversight.

  Among these rights and protections are (i) the right to safe and effective systems; (ii) protections against algorithmic discrimination; (iii) protections against abusive data practices; (iv) the right to have agency over one's data; (v) the right to know when an automated system is being used; (vi) the right to understand how and why an automated system contributed to outcomes that impact one; (vii) the right to opt out of an automated system; and (viii) the right to work with a human in the place of an automated system.

  The next part of the bill defines various terms. For example:

  4. "Algorithmic discrimination" means circumstances where an automated system contributes to an unjustified different treatment or impact which disfavors people based on their age, color, creed, disability, domestic violence victim status, gender identity or expression, familial status, marital status, military status, national origin, predisposing genetic characteristics, pregnancy-related condition, prior arrest or conviction record, race, sex, sexual orientation, or veteran status or any other classification protected by law.

The next part of the bill imposes various requirements. For example:

§ 404. Safe and effective systems.

2. *Automated systems shall undergo pre-deployment testing, risk identification and mitigation*, and shall also be subjected to ongoing monitoring that demonstrates they are safe and effective based on their intended use, mitigation of unsafe outcomes including those beyond the intended use, and adherence to domain-specific standards.

3. If an automated system fails to meet the requirements of this section, it shall not be deployed or, if already in use, shall be removed. *No automated system shall be designed with the intent or a reasonably foreseeable possibility of endangering the safety of any New York resident or New York communities* (emphasis added).

- *New York Penal Law – Fabricated photos, video, or audio*. An Act to amend the penal law by addressing "unlawful dissemination or publication of a fabricated photographic, videographic, or audio record."

This bill would amend New York's Penal Law by addressing "unlawful dissemination or publication of a fabricated photographic, videographic, or audio record." The essence of the bill is as follows:

1. A person is guilty of unlawful dissemination or publication of a fabricated photographic, videographic, or audio record when, with intent to cause harm to the liberty or emotional, social, financial or physical welfare of an identifiable person or persons, he or she intentionally creates or causes to be created a fabricated record of such person or persons and disseminates or publishes such record of such person or persons without such person or persons' consent.

The bill contains many exceptions. For example, the bill says:

This section shall not apply to the following:
(a) Dissemination or publication of a fabricated record by *a person who did not create the fabricated record*, whether or not such person is aware of the authenticity of the record;
(b) Dissemination or publication of a fabricated record that was created during the lawful and *common practices of law enforcement, legal proceedings or medical treatment* where the record is not disseminated or published with the intent to misrepresent its authenticity;
(c) Dissemination or publication of a fabricated record that was created for the purpose of *political or social commentary, parody, satire, or artistic expression* that is not disseminated or published with the intent to misrepresent its authenticity . . . (emphasis added)

- *Advanced Artificial Intelligence Licensing Act.* An Act to amend the state Technology Law to require registration and licensing of "high-risk advanced artificial intelligence systems."

An Act to amend the state Technology Law to address "advanced artificial intelligence systems" and to require registration and licensing of "high-risk advanced artificial intelligence systems." The bill defines these as follows:

1. "Advanced artificial intelligence system" shall mean any digital application or software, whether or not integrated with physical hardware, that *autonomously performs functions traditionally requiring human intelligence*. This includes, but is not limited to the system:

(a) Having the ability to learn from and adapt to new data or situations autonomously; or

(b) Having the ability to perform functions that require cognitive processes such as understanding, learning or decision-making for each specific task.

2. "High-risk advanced artificial intelligence system" shall mean any advanced artificial intelligence system that possesses *capabilities that can cause significant harm to the liberty, emotional, psychological, financial, physical, or privacy interests of an individual or groups of individuals, or which have significant implications on governance, infrastructure, or the environment*. The director shall assess any such public or private system in determining whether such system requires registration (emphasis added).

After a long series of definitions, the bill provides that the New York Department of State shall have "discretion to issue or refuse to issue any license provided for in this article" and to "revoke, cancel or suspend" any such license.

- *General Business Law – Oaths of responsible use of advanced AI*. An Act to amend New York's General Business Law by "requiring the collection of oaths of responsible use from users of certain high-impact advanced artificial intelligence systems."

This bill would amend New York's General Business Law by "requiring the collection of oaths of responsible use from users of certain high-impact advanced artificial intelligence systems." Here is a sample of the operative language of the oath:

I, _____ residing at _____, do affirm under penalty of perjury that I have not used, am not using, do not intend to use, and will not use the services provided by this advanced artificial intelligence system in a manner that violated or violates any of the following affirmations:

1. I will not use the platform to create or disseminate content that can foreseeably cause injury to another in violation of applicable laws;

2. I will not use the platform to aid, encourage, or in any way promote any form of illegal activity in violation of applicable laws;

3. I will not use the platform to disseminate content that is defamatory, offensive, harassing, violent, discriminatory, or otherwise harmful in violation of applicable laws;

4. I will not use the platform to create and disseminate content related to an individual, group of individuals, organization, or current, past, or future events that are of the public interest which I know to be false and which I intend to use for the purpose of misleading the public or causing panic."

II. Federal and New York State proposals regarding use of AI-generated or compiled information in judicial proceedings

Judges face challenges in evaluating the admissibility of AI-generated or compiled evidence. Concerns include the reliability, transparency, interpretability and bias in such evidence. These challenges become even more pronounced with the use of generative AI systems. A discussion follows regarding two recent proposals to address these challenges.

Federal Law – A proposal to amend Fed. R. Evid. 901(b)(9)

As a general matter, Rule 901 of the Federal Rules of Evidence requires the proponent of a given item of evidence to authenticate that evidence. That is, the proponent "must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Subsection (b) of that rule provides a non-exhaustive list of examples of how the proponent may satisfy the authentication requirement. As currently written, Fed. R. Evid. 901(b)(9), which applies to "evidence about a process or system" states that such evidence is "accurate" if the proponent shows that the process or system "produces an accurate result."

The Advisory Committee for the Federal Rules of Evidence is considering a proposal by former U.S. District Judge Paul Grimm and Dr. Maura R. Grossman of the University of Waterloo to amend Fed. R. Evid. 901(b)(9). That proposal initially changes the "accurate" standard as currently exists for any evidence about a process or system and replaces it with a requirement that

the proponent provide evidence that shows that the process or system produces a "reliable" result. For evidence generated by AI, the proponent must also (a) describe the software or program that was used and (b) show that it has produced reliable results in the proposed evidence.

New York: Proposed amendments to the Criminal Procedure Law and CPLR

New York State Assemblyman Clyde Vanel has introduced a bill, A 8110, which amends both the Criminal Procedure Law and the Civil Practice Law and Rules regarding the admissibility of evidence created or processed by artificial intelligence. As stated in the bill, evidence is "created" by AI when AI produces new information from existing information. Evidence is "processed" by AI when AI produces a conclusion based on existing information.

Simplified greatly, the bill requires that evidence "created" by AI would not be received at trial unless independent admissible evidence establishes the reliability and accuracy of the AI used to create the evidence. Evidence "processed" by AI similarly requires the proponent of the evidence to establish the reliability and accuracy of the AI used. This bill does not yet have a co-sponsor in the Assembly and does not have a sponsor in the Senate.

The goals of both the proposal to amend Fed. R. Evid. 901 and the Vanel bill are laudable. The "black box" problem of AI is of great concern to lawyers and judges and has significant due process concerns in the criminal justice area. These proposals thus attempt to address AI-generated "deepfakes" that could be passed off as authentic evidence. Nevertheless, given the intricacies and time involved in the legislative and rule-amending processes, it may well be that the common law at the trial court level provides at least an interim roadmap for how judges should consider these issues. Indeed, this approach was largely employed to develop the law regarding discovery and admissibility of social media evidence when those issues first took hold.

III. New York City's local law regarding use of AI in hiring and promotion

As of this writing, there are no statewide laws or regulations in New York regarding commercial use of AI. Notably, Governor Hochul vetoed a bill in November 2023 (A.4969), initially proposed by Assemblyman Vanel, that would have created a statewide commission to study AI. But it appears that Assemblyman Vanel, and perhaps many of his colleagues, are undeterred in their attempts to keep the conversation moving. One such attempt is a bill actually drafted by an AI program, and introduced by Vanel, that permits tenants in New York state to have the right to be able to request a copy of their lease. That bill, A.6896, is awaiting sponsorship in the New York State Senate.

New York City has, however, entered the regulatory space regarding AI-based hiring decisions. As of July 5, 2023, New York City's Automated Employment Decision Tool (AEDT) law, Local Law 144 of 2021, or "NYC 144," requires New York City employers who use AI and other machine-learning technology as part of their hiring process to annually audit their recruitment technology. NYC 144 defines AEDT as (1) any computational process, derived from machine learning, statistical modeling, data analytics or artificial intelligence, (2) that issues a simplified output, including a score, classification or recommendation, which is used to substantially assist or replace discretionary decision making for employment decisions that impact natural persons. A third party must perform these audits, and the audit results must be available on the company's website. The audit itself must check for biases, whether intentional or unintentional, that are built into these systems. Failure to comply could result in fines starting at $500, with a maximum penalty of $1,500 per instance.

At the outset, NYC 144's focus on "employment decisions" appears to cover only hiring and promotion. Conversely, it appears that decisions regarding compensation, termination, benefits, workforce monitoring and perhaps even performance evaluations are beyond the reach

of the law. Moreover, NYC 144 applies only to those who actually apply for a job. Thus, the statute does not apply to any AI-based tools that might identify potential candidates who ultimately do not apply for a position.

Due to the recency of the NYC 144's implementation, there is no data as of this writing to determine its effectiveness, including whether and when any third-party audits have actually taken place. Even to the extent such audits have taken place, questions may remain as to the standards used for such audits and the company's data that was used for the audits.

IV. The White House's October 30, 2023 Executive Order regarding AI

On October 30, 2023, President Biden issued an Executive Order setting forth various standards for AI safety and security. It is one of the lengthier Executive Orders in recent history on any topic. The Order charges various executive agencies to develop guidelines, propose regulations or compile reports that will shape the AI landscape. The highlights of the Order include:

a. Establishment of the AI Safety and Security Board, under the auspices of the Department of Homeland Security, to address any threats posed by AI systems to infrastructure and cybersecurity.

b. Requiring the Department of Commerce to provide guidance for content authentication and watermarking to clearly label AI-generated content on government communications. In turn, federal agencies using AI-generated content are to highlight these authentication tools to assist recipients of government communications to know that these communications are authentic.

c. Federal agencies are to develop rules and guidelines to address algorithmic discrimination, both through training and technical assistance in areas including criminal justice, federal benefits and contracting programs, civil rights, and workplace equity, health and safety.

The question remains how these directives will be enforced. There is no requirement that any non-governmental entities involved in the creation or marketing of AI tools adhere to the directives that the various agencies will issue. Additionally, the Order does not provide, or even suggest, any recourse for individuals harmed by discriminatory AI systems. On these points (and perhaps many others), Congress may well have to provide guidance to federal agencies. Nevertheless, the Executive Order does provide a framework for both the government and the private sector to think about AI issues. It also invests the federal government, at least under the current administration, in AI security.

V. Summary of the EU AI Act

On December 9, 2023, the EU Parliament and Council negotiators reached a provisional agreement on the EU Artificial Intelligence Act (the "EU AI Act"). The agreed text will now proceed towards formal adoption by both the EU Parliament and Council to become EU law. While it is expected that the EU Parliament will adopt the EU AI Act, the law itself will not come into force for at least another two years after that vote.

As an overarching objective, the EU AI Act aims to ensure that fundamental rights, democracy, the rule of law and environmental sustainability are protected from high-risk AI, while boosting innovation and making the EU a leader in the field. The rules establish obligations for AI based on its potential risks and level of impact.

The following is a summary of the key aspects of the EU AI Act:

- General Regulatory Approach: The EU AI Act generally opts for a risk-based approach. Some applications are specifically prohibited (e.g., social scoring), some high-risk areas are strictly regulated (e.g., employment and worker management), and some areas of low risk are based on self-regulation. The EU AI Act strives to

mitigate harm in areas where using AI poses "unacceptable" risk to fundamental rights, such as health care, education, border surveillance and public services.

- Territorial Scope: The EU AI Act has extraterritorial scope. It applies to: (a) providers placing on the EU market AI systems, whether those providers are established within the EU or in a third country; (b) users of AI systems located within the EU; (c) providers and users of AI systems that are located in a third country, where the output produced by the system is used in the EU. In practice this is likely to mean significant regulatory impact for U.S.-based organizations. The majority of the GDPR fines levied to date have been on U.S.-owned organizations. This extraterritorial reach is likely to be a feature of the EU AI Act as well.
- Prohibited AI applications: Recognizing the potential threat to individuals' rights and democracy posed by certain applications of AI, the EU AI Act specifically prohibits the following applications:
    - biometric categorization systems that use sensitive characteristics (e.g., political, religious, philosophical beliefs, sexual orientation, race);
    - untargeted scraping of facial images from the internet or CCTV footage to create facial recognition databases;
    - emotion recognition in the workplace and educational institutions;
    - social scoring based on social behavior or personal characteristics;
    - AI systems that manipulate human behavior to circumvent their free will;
    - AI used to exploit the vulnerabilities of people due to their age, disability, social or economic situation.

- High-Risk AI Applications: The EU AI Act delineates the applications and activities designated as “high risk” and adopts certain requirements for their development, deployment and use. These uses are not prohibited but strictly regulated.
    - Categories of High-Risk AI Applications: Certain specific-use cases are designated as “high risk” irrespective of which industry or product the use case is deployed in, for instance, the use of AI in biometric identification systems, critical infrastructure, credit-worthiness evaluation, human resources contexts and law enforcement. In addition, this category includes the use of AI in relation to certain products, for example, machinery, radio equipment, medical devices and in vitro diagnostic medical devices, as well as AI used in certain products in civil aviation (security) and automotive industries. AI systems used to influence the outcome of elections and voter behavior are also classified as high risk.
    - Requirements for High-Risk AI Applications: Pursuant to the EU AI Act, high-risk AI must comply with various requirements such as conformity assessments, post-market surveillance, data governance and quality measures, mandatory registration, incident reporting and fundamental rights impact assessments. For example, in respect of AI systems classified as high risk (due to their significant potential harm to health, safety, fundamental rights, environment, democracy and the rule of law), the EU AI Act provides for a mandatory fundamental rights impact assessment applicable to, among other areas, the insurance and banking sectors. In addition, individuals will have a right to launch complaints about AI systems and receive explanations about decisions based on high-risk AI systems

that impact their rights. AI providers must build in human oversight, incorporating human-machine interface tools to ensure systems can be effectively overseen by natural persons.

- Law Enforcement: Predictive policing may only be employed under strict rules, such as clear human assessment and objective facts, not deferring the decision of investigating an individual to an algorithm. The EU AI Act stipulates a range of safeguards and narrow exceptions for the use of biometric identification systems (RBI) in publicly accessible spaces for law enforcement purposes, subject to prior judicial authorization and for strictly defined lists of crime. "Post-remote" RBI would be used strictly in the targeted search of a person convicted or suspected of having committed a serious crime. "Real-time" RBI would have to comply with strict conditions and its use would be limited in time and location, for the purposes of:
  - targeted searches of victims (abduction, trafficking, sexual exploitation),
  - prevention of a specific and present terrorist threat, or
  - the localization or identification of a person suspected of having committed one of the specific crimes mentioned in the EU AI Act (e.g., terrorism, trafficking, sexual exploitation, murder, kidnapping, rape, armed robbery, participation in a criminal organization, environmental crime).
- General-Purpose AI: In order to reflect the broad range of tasks that AI systems can accomplish and the rapid expansion of their capabilities, under the EU AI Act general-purpose AI (GPAI) systems, and the GPAI models they are based on, will need to adhere to certain transparency requirements. These include presenting

technical documentation, complying with EU copyright law and disseminating detailed summaries about the content used for training. GPAI is defined in the EU AI Act as "an AI system that can be used in and adapted to a wide range of applications for which it was not intentionally and specifically designed." In this regard, the legislative text does not seem to distinguish between foundation AI, generative AI or GPAI regulation based on use cases. However, with respect to high-impact GPAI models with systemic risk, the EU AI Act stipulates more stringent obligations. High-impact GPAI models (in essence, those that were trained using a total computing power above a certain threshold) will be subject to more onerous requirements due to the presumption that they carry systemic risk. If these models meet certain criteria, they will need to conduct model evaluations, assess and mitigate systemic risks, conduct adversarial testing, report to the European Commission on serious incidents, ensure cybersecurity and report on their energy efficiency.

APPENDIX B: RESOURCES

Blogs & Podcasts

- **OpenAI Blog**: Direct insights from one of the leading organizations in AI research. It covers breakthroughs, applications, and considerations around their technologies, including generative models like GPT and DALL-E.
- **Distill**: Though not exclusively focused on generative AI, Distill publishes detailed, interactive research articles on machine learning that often touch on generative models. Its visual and intuitive approach makes complex topics accessible.
- **The Gradient**: A place for deep technical and theoretical discussions on AI, including generative models. The Gradient offers perspectives on the latest research trends, ethical considerations, and practical applications.
- **AI Weirdness**: Authored by Janelle Shane, this blog explores the quirky and humorous side of AI, including many experiments with generative models. It's an entertaining way to see the creative potential and limitations of AI.
- **DeepMind Blog**: While DeepMind's research encompasses a wide range of AI technologies, their work on generative models and their applications is frequently featured, providing insights into cutting-edge developments.
- **The AI Alignment Podcast**: Hosted by the Future of Life Institute, this podcast covers broader topics in AI, including the development and implications of generative AI technologies. Discussions often revolve around safety, ethics, and future prospects.
- **TWIML AI Podcast** (This Week in Machine Learning & AI): Offers a wide range of interviews with AI researchers, practitioners, and industry leaders, including episodes focused on generative AI technologies and their applications.
- **The Gradient Podcast**: An extension of The Gradient blog, this podcast dives into discussions with AI researchers and industry professionals, shedding light on their work, the future of AI, and occasionally focusing on generative models.
- **AI in Business**: While more focused on the application of AI in industry, this podcast sometimes explores generative AI applications in business, offering insights into how companies are leveraging this technology.

Newsletters

- **The Batch by DeepLearning.ai**: Curated by Andrew Ng and his team, The Batch brings the most important AI news and perspectives, including topics on generative AI, to your inbox. It's great for professionals, researchers, and anyone interested in AI.
- **Import AI by Jack Clark**: Jack Clark, co-founder of Anthropic and former policy director at OpenAI, shares weekly insights on AI developments, policy implications, and research breakthroughs. While not exclusively focused on generative AI, the newsletter often covers significant advancements and considerations in the field.

- **Data Elixir**: While broader than just generative AI, Data Elixir covers data science and machine learning trends, tools, and resources, including topics on generative models and AI-generated content.

- **The Algorithm by MIT Technology Review**: Offers insightful commentary on the latest AI developments, including ethical considerations, policy, and groundbreaking research in generative AI.

- **The Sequence**: A deep-tech AI newsletter that offers cutting-edge perspectives on AI technologies, including generative AI. It's structured in a unique format that includes a brief overview, a deep dive, and a summary of the latest AI research.

Subscriptions

- **AI Weekly**: A roundup of the best content in AI, including research papers, articles, and news. It frequently features content related to generative AI technologies and their applications.

- **Last Week in AI**: This newsletter gives a concise overview of the latest AI news, research, and applications with occasional deep dives into generative AI technologies and their societal impacts.

- **Orbit**: Focused on machine learning and AI, Orbit provides updates on the latest research, applications, and trends, including insightful discussions on generative AI.

- **MIT Technology Review**: Their subscription gives access to in-depth reporting on emerging technologies, including detailed articles on developments in AI and machine learning. Their coverage on generative AI technologies, implications, and ethical considerations is among the best.

- **AI Business**: Provides insights, analysis, and news on the application of AI in the business world, including generative AI. The subscription is aimed at professionals looking to understand how AI can be leveraged in various industries.

- **Inside AI**: Offers premium content on the latest AI news, research, and trends, with some focus on generative AI. The paid subscription includes additional insights and analysis not available in the free version.

- **Benedict Evans' Newsletter**: While not exclusively about AI, Benedict Evans provides high-level analysis and insights on the tech industry, including AI's impact on different sectors. His annual presentation includes significant trends in AI and machine learning.

- **Stratechery by Ben Thompson**: Offers in-depth analysis on the strategy and business side of technology, including AI. While the focus is broader, Thompson occasionally dives into topics related to generative AI and its impact on industries.

- **Datanami**: Focused on data science and big data news, Datanami covers the technological advancements and applications in AI and machine learning. Their subscription service provides in-depth analysis and exclusive content.

APPENDIX C: SAMPLE ENGAGEMENT LETTER PROVISION

Use of Generative AI: While representing you, we may use generative AI tools and technology to assist in legal research, document drafting and other legal tasks. This technology enables us to provide more efficient and cost-effective legal services. However, it is important to note that while generative AI can enhance our work, it is not a substitute for the expertise and judgment of our attorneys. We will exercise professional judgment in using AI-generated content and ensure its accuracy and appropriateness in your specific case.

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[138] Tony Petruzzi and Helena Guye, *"The Perils of Dabbling": AI and the Practice of Law*, Reuters, Sept. 11, 2023, https://www.reuters.com/legal/legalindustry/perils-dabbling-ai-practice-law-2023-09-11.
[139] *What Are AI Hallucinations?*, IBM, https://www.ibm.com/topics/ai-hallucinations.
[140] *Nix v. Whiteside*, 475 U.S. 157, 166 (1986).
[141] Ian Sample, *What Are Deepfakes – and How Can You Spot Them?*, Guardian, Jan. 13, 2020, https://www.theguardian.com/technology/2020/jan/13/what-are-deepfakes-and-how-can-you-spot-them.
[142] Rebecca A. Delfino, *Deepfakes on Trial: A Call To Expand the Trial Judge's Gatekeeping Role To Protect Legal Proceedings from Technological Fakery*, 74 Hastings L.J. 293 (2023), https://repository.uchastings.edu/hastings_law_journal/vol74/iss2/3.
[143] *Id*.
[144] Marla Greenstein, *AI and a Judge's Ethical Obligations,* American Bar Assoc., Feb. 3, 2020, https://www.americanbar.org/groups/judicial/publications/judges_journal/2020/winter/ai-and-judges-ethical-obligations.

[145] *Estonia Does Not Develop AI Judge*, Republic of Estonia Ministry of Justice, Feb. 16, 2022, https://www.just.ee/en/news/estonia-does-not-develop-ai-judge.
[146] *Learning From the Failures of Robodebt – Building a Fairer, Client-Centred Social Security System*, Victoria Legal Aid, Nov. 13, 2023, https://www.legalaid.vic.gov.au/learning-from-the-failures-of-robodebt.
[147] No. 22-cv-1461 (PKC), 2023 WL 4114965 (S.D.N.Y. June 22, 2023).
[148] *Client Alert: Italian Data Protection Authority Bans Chatbot*, Cordery Legal Compliance, Feb. 7, 2023, https://www.corderycompliance.com/italy-dpa-chatbot-0223.

MEMORANDUM

TO: NYSBA House of Delegates

FROM: NYSBA Trusts and Estates Law Executive Committee

DATE: March 28, 2024

SUBJECT: NYSBA TASK FORCE ON ARTIFICIAL INTELLIGENCE REPORT

As prepared by the TELS Technology Committee and reviewed by the TELS Executive Committee, our comments to the report of the Task Force on Artificial Intelligence follow.

Comment on Recommendations:

1) Adopt Guidelines "*The Task Force recommends that NYSBA adopt the AI/GAI guidelines outlined in this report and commission a standing section or committee to oversee periodic updates to those guidelines. Daily, we learn more about the capability of the technology to transform society. As the impacts are continual, so should the updates to these guidelines be as well.*"

a. Given the pace and development of AI/GAI technology, the Trusts and Estates Law Section (TELS) is concerned that frequent updates to adopted guidelines will present challenges to practitioners conforming their practice to the guidelines. The TELS believes that a reasoned interpretation of the applicable rules of Professional Conduct and current guidance and commentary is sufficient to guide most practitioners. In other words, less might be more. However, the Task Force's proposed guidance is generally helpful and acceptable with the following comments/critiques which focus on the Task Force's contemplation of AI/GAI as having personhood. The TELS does not believe that AI/GAI should be considered or contemplated as a person.

i. Guidance on Rule 5.3: *A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate.*

"*If the Tools are used by non-lawyers or paralegals (or the Tools themselves are considered "non-lawyers"), you must supervise their use to ensure compliance with the ethical rules. Further, you must ensure that the work produced by the Tools is accurate and complete and does not disclose or create a risk of disclosing client confidential information without your client's informed consent.*"

The TELS opposes the parenthetical suggesting that the Tools may be considered "non-lawyers."

ii. Guidance on Rule 5.4: *A lawyer shall not permit a person to direct or regulate the lawyer's professional judgment in rendering legal services.*

"*While the Tools are technically not a "person," you should refrain from relying exclusively on them when providing legal advice and maintain your independent judgment on a matter.*"

The Tools are not a person in any sense, "technically" or practically. The TELS opposes implicating personhood with respect to a technological resource.

iii. Guidance on Rule 5.5: *A lawyer shall not aid a nonlawyer in the unauthorized practice of law.*

"*Understand that human oversight is necessary to avoid UPL issues when using the Tools, which should augment but not replace your legal work.*"

The guidance contemplates that AI/GAI could be engaged in the unlicensed practice of law. The TELS opposes assigning personhood to AI/GAI in this respect.

2) Focus on Education: "*The Task Force recommends that NYSBA prioritize education over legislation, focusing on educating judges, lawyers and regulators to understand the technology so that they can apply existing law to regulate it.*"

The TELS strongly endorses this recommendation.

3) Identify Risks for New Regulation: "*Legislatures should identify risks associated with the technology that are not addressed by existing laws, which will likely involve extensive hearings and studies involving experts in AI.*"

The TELS endorses this recommendation. The TELS however, believes that applicable legislatures and administrative agencies engaged in rulemaking ought to focus on proper attribution to AI/GAI and disclosure of the use of AI/GAI in submissions to tribunals. We believe that the issue of whether and to what extent disclosure must be had when an attorney uses AI/GAI should be addressed immediately. For example, if an attorney relies on AI/GAI in a brief or memorandum of law submitted to a court, the court, the litigants, and the public in general might be better served if reliance and use of AI/GAI is disclosed by way of attribution and/or disclosure. Consideration should be afforded to the nature and extent of the attorney's reliance on AI/GAI in this scenario, for example, is AI/GAI being utilized to help counsel of record spot flaws in a counterpart's argument? to summarize cases? to generate wholesale prose then incorporated into a litigant's brief/memorandum of law? to analyze technical data? to analyze and reach factual conclusions based on documentary evidence and testimony? The TELS believes that the guidance should be supplemented to require attorneys to disclose use of the Tools in instances where the attorney relies upon AI/GAI to generate an argument and employs that argument utilizing the prose generated by the Tools. However, where AI/GAI is used for less substantive tasks such as conducting research or summarizing case law, disclosure is less warranted.

The law is notoriously slow in addressing the much more rapid and frequent changes in technology. Deliberately considered legislation and rulemaking is a time-tested and valuable feature of the law. However, in this context, care must be exercised to avoid perpetually playing "catch-up" as a result of focusing on

specific technological features which may be subsumed or become obsolete in a very short period of time. A better approach would be to address technology globally, by focusing on the obligations of the attorney rather than the specific technology being employed at the moment. The legal profession, and the public as a whole, is far better served by making it clear that when a lawyer utilizes technology–any technology– as part of his or her practice, he or she is ultimately responsible for the content and quality of the work product thus generated.

Memo to: Patricia J. Shevy, Chair Trusts and Estates Law Section
From: Albert Feuer
Re: TELS Technology Committee March 26, 2024 memo regarding the NYSBA Task Force on Artificial Intelligence Report and Recommendations to NYSBA House of Delegate (April 6, 2024)
Date: March 28, 2024

The Task Force produced a very good and comprehensive discussion of the history and the significance of artificial intelligence (AI), its risks and benefits, the laws that govern AI and have been proposed to govern AI, and AI's implications for lawyers, the legal system, the access to justice, and for society.

Like the TELS Technology Committee I will focus only on the Task Force's four recommendations.

1) It is advisable to have a NYSBA standing committee or section to continue to examine the legal, social, and ethical impact of artificial intelligence. This entity could update the guidelines in a manner that balances the burdens and benefits of such updates.

As with all legal tools, including sample legal documents/templates, questions may arise whether (a) an attorney using such tools is exercising the attorney's legal judgment with respect to the proper use of such tools, or (b) the provider of such tools to lay persons is practicing law. I share the concern of the TELS committee about the anthropomorphizing of AI, although for a different reason. Such characterization may make it more difficult to correct AI errors because it may make it more difficult to hold the user and/or the provider/designer of AI responsible for those errors.

2) It is advisable for the NYSBA to "focus on educating judges, lawyers, law students and regulators to understand the technology so that they may apply existing law to regulate it." This may include explicitly mentioning AI in the Rules for Professional Conduct.

3) It is advisable for "legislatures seek to identify risks associated with the technology that are not addressed by existing law." I disagree with the TELS committee suggestion that this focus only on tribunal submissions. There also needs to be focus on the use of AI for the non-litigation responsibilities of attorneys: counseling, and the preparation of legal documents. Such usage also raises the issue of lay persons seeking to prepare documents using AI tools supplied by the same persons that now provide sample legal documents, such as wills.

4) It is advisable to consider how AI may be used in law as a governance tool, which recommendation the TELS committee did not discuss. For example, which principles should determine the appropriate regulation of AI tools, and who should regulate. Similarly, how may society/commercial benefits be weighed against risks to individuals or to different groups

PROPOSED COMMENTS BY THE DRS REGARDING THE REPORT AND RECOMMENDATION FROM THE NYSBA TASK FORCE ON ARTIFICIAL INTELLIGENCE

Paul R. Gupta

The DRS recommends to the Task Force that the following points should be added or discussed more fully. If it would be helpful to the Task Force, we can expand upon the points below, and draft fuller statements in a form that could be added to the Report.

1. Biometrics.
   a. The use of biometrics is one of the most significant current uses of AI. Many businesses use biometrics for hiring, supervision, and termination. State Legislatures have established rules with regards to the use, collection and storage of biometrics, such as face recognition, fingerprints, iris maps and voice prints. Illinois has led the way with broad biometrics legislation that includes a private right of action. The legislation covers the use of biometrics information (including selling that information), consent to obtain that information, and storage of that information.. (See IL Biometrics Information Privacy Act). New York and Maryland also have biometrics laws regarding employment, and Texas and Washington have broad biometrics laws. See also the following illustrative cases: Carpenter v. McDonald's Corp., 580 F. Supp. 3d 512 | Casetext Search + Citator, In re Facebook Biometric Info. Privacy Litig., Case No. 15-cv-03747-JD | Casetext Search + Citator, and Rivera v. Google, Inc., 366 F. Supp. 3d 998 | Casetext Search + Citator. Additionally, some municipalities, such as New York City, have biometrics laws that include a private right of action. (See The New York City Council - File #: Int 1170-2018 (nyc.gov)).

   b. Biometrics raise PII and other privacy concerns.

2. Bias:
   a. AI may create gender and racial bias, due to limited samples in databases used for comparisons (see: study exploring voice biometric disparities: Exploring racial and gender disparities in voice biometrics - PMC (nih.gov), The racism of technology - and why driverless cars could be the most dangerous example yet | Motoring | The Guardian, Study claims that self-driving cars more likely to drive into black people | Police Facial Recognition Technology Can't Tell Black People Apart | Scientific American)

   b. Ideological bias – AI can exacerbate ideological bias especially when used in conjunction with social media. AI can create its own echo chamber, generating spurious content to use as future training data, leading to ideologically based "hallucinations" and inaccuracies (see: Echo Chamber

of AI: Model Collapse Risks | Deepgram, Polarization of Autonomous Generative AI Agents Under Echo Chambers (arxiv.org))

3. Confidentiality:
    a. Confidentiality concerns arise when entering information into AI engines (such as chatbots) and when such entries are then added to the training set for the AI. Such uses may violate Protective Orders for prior and future cases involving different parties. These concerns are compounded when chatbot results are analyzed by evaluative AI. For example, if biometrics data (see point 1 above) is analyzed by a chatbot to assist a mediator in preparing a mediator's proposal, multiple levels of confidentiality concerns arise. Such issues are especially important when some or all of the data that the AI "learns" is used for training the AI for work on future cases. These concerns can be alleviated by closed systems.

    b. Some AI providers allow for anonymous queries, while others explicitly state that they save inputs and prompts (see ChatGPT privacy policy, section 1 regarding user content).

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #12

REQUESTED ACTION: None, as this report is informational.

Committee on Membership co-chairs Clotelle Drakeford, Esq. and Michelle Wildgrube, Esq. will give an update on the Association's membership engagement and retention efforts.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #13

REQUESTED ACTION: None, as the report is informational.

Carla M. Palumbo, president of the New York Bar Foundation, will update the House on the ongoing work and mission of The Foundation.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #14

REQUESTED ACTION: None, as the report is informational.

President-Elect and Chair of the House of Delegates, Domenick Napoletano, Esq. will speak to any administrative items that need to be shared with attendees.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #15

REQUESTED ACTION: None, as the report is informational.

President-Elect and Chair of the House of Delegates will ask for any new items that need to be discussed.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #16

REQUESTED ACTION: None, as the report is informational.

The next meeting of the House of Delegates will take place on Saturday, June 8, 2024 at the Bar Center in Albany, and remotely via Zoom.