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JOURNAL

The Clash Between AI and Intellectual Property

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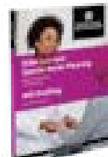

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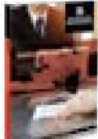

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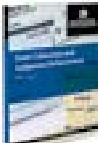

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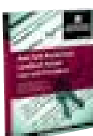

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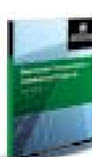

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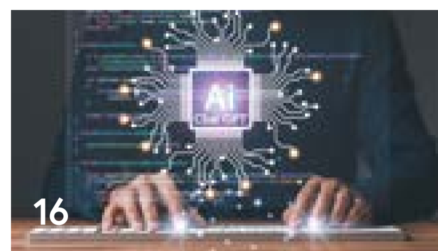

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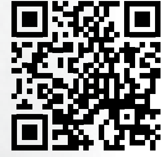


Tackling Today's Volatile Issues – and Why It's Worth It

When I first began my presidential tenure, I viewed it as an opportunity to address practical issues that are a priority to attorneys and the profession itself.

I recognized that I had an ambitious agenda. That has proven to be prophetic as the past 10 months have flown by. The association's leadership team and I have been busy due to the breadth and magnitude of issues that impede lawyers' ability to conduct their daily affairs in a useful and efficient manner.

We have also confronted topics that have broader implications.

However, our ability to move forward is dependent on our willingness to listen to and appreciate different perspectives.

We have consequently had ongoing conversations with members of the Legislature and the judiciary, including Chief Judge Rowan Wilson, about alleviating myriad issues, including those surrounding family and housing courts and the court system's efficiency. We want to ensure that tenants and landlords are represented in housing court while providing the means for tenants to remain in their homes, especially those who live below the poverty line. We also need to ensure that our time is best used for tackling our clients' needs.

I recently joined state Sen. Brad Hoylman-Sigal and Assembly Members Charles Levine, Jabari Brisport and Andrew Hevesi at a press conference to call for an increase in funding for the state's family courts. I have also met with Judge Joseph Zayas regarding the court rules, training for court employees and e-filing.

Our Task Force on Homelessness and the Law, chaired by William Russell, will present its report to the House of Delegates in June. The task force is addressing how this crisis is affected by the criminal justice and health care systems. This is a critical matter that has a disproportionate impact on veterans, individuals with mental illness and victims of domestic violence.

Another critical demographic we need to address is our country's youth.

We must guard our democratic principles to ensure we are setting the right example for the next generation who – like many Americans – lack a basic understanding of how our government functions. Our civics convocation at the Bar Center in May will serve as an opportunity to focus on the guarantees embedded in the U.S. Constitution and the workings of our democratic processes.

Associate Justice of the U.S. Supreme Court Sonia Sotomayor has graciously agreed to speak at the convocation and answer questions from students. She will deliver her remarks virtually to an audience that will include leaders within the education, government and legal professions.

We are also continuing to deepen our relationship with the Israel Bar Association following the Oct. 7 Hamas attacks. We hosted a delegation from that association earlier this month and sponsored an educational program on judicial independence in New York and Israel. We also signed a Memorandum of Understanding to work on areas of mutual interest such as fighting hatred and discrimination.

Our dedication to improving the practice of law has been illustrated through our determination to confront these difficult issues at their earliest stages.

However, artificial intelligence is arguably the most notable matter that has affected the practice of law during our generation, and we are only beginning to understand its potential impact on our profession.

Today, nearly all aspects of our lives are touched by AI and its descendant, generative AI. Whether it be the way we get medical treatment or interact as humans, its effect on our existence is hard to overstate. When it is used appropriately, AI helps to efficiently organize the tumultuous wealth of information facing us today. In theory, this allows us to spend more time on high value, creative and, most importantly, practical endeavors.

The list of AI benefits is growing exponentially, which is why we need a balanced approach to its regulation. It presents more sophisticated versions of problems that court rules already address and thus, rather than create new laws, we need to identify what already established protections need to be emphasized to safeguard against its abuse. Lawyers still have a duty to educate themselves and use their best judgment when it comes to technology. While AI offers immense potential, it presents ethical challenges that require careful management.

I am looking forward to April when our Task Force on Artificial Intelligence, chaired by Vivian D. Wesson, will present its report to the House of Delegates.

The task force has been working diligently throughout the past year reviewing best practices to prevent its misuse and will put forth recommendations to protect lawyers and their clients. The task force is also proactively addressing how AI may best assist those who interact with the legal system while evaluating how tightly it needs to be regulated, especially in the areas of copyright, data protection and attorney-client privilege.

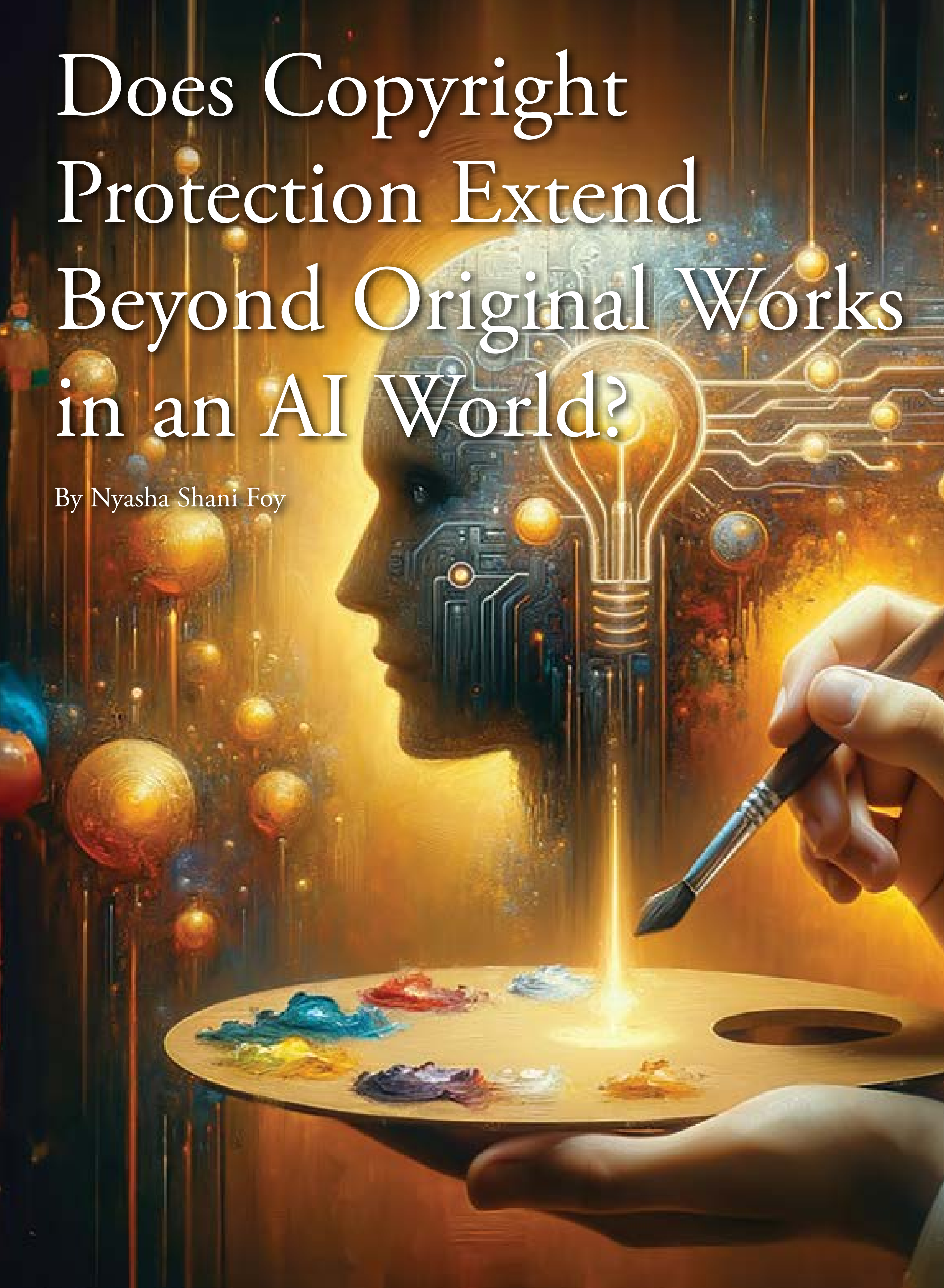
Among the recommendations the task force is considering is a focus on educating the legal community by developing guidelines for lawyers, judges and regulators on the risks associated with AI. It is also considering the formation of a standing committee within the New York State Bar Association to address AI issues as they evolve.

Ethically, we all understand that attorneys have an obligation to educate themselves about technology. This is in the model rules of New York, and lawyers need to be diligent regarding the benefits and risks where their clients are concerned. In addition, they need to be up front with their clients on how they may opt to integrate AI while working on their case.

It is also imperative that any regulations associated with AI or generative AI are aligned internationally because societal implications change as technologies migrate across countries and continents. For example, when cellphones were introduced in the United States in 1983, they were dismissed as toys for the rich. Today they are no longer just a communications tool. They are serving as banks, schools, clinics and vehicles for spreading transparency and democracy. They have drastically altered how we interact with each other and the world around us in ways that could not have been imagined in the early 1980s.

These matters do not have easy solutions, nor do they have a defining end point. However, the reason the New York State Bar Association is so well-respected is because of its willingness to take on the most volatile issues of the day. As John F. Kennedy said: “Ask not that the journey be easy, ask instead that it be worth it.” It is incumbent upon us to live up to that ideal by tackling today’s most challenging issues so that our quest for equal justice may be realized.

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



Does Copyright Protection Extend Beyond Original Works in an AI World?

By Nyasha Shani Foy

We are living in a pre-"Matrix" world[1] – the version before the super-powerful computer programs in the machine world take over, leaving the humans to live in a simulated reality.

Artificial intelligence[2] has already taken over the zeitgeist and soon your entire life.

At its core, AI, and its progeny generative AI,[3] bring the allure of efficiency.[4] Need to write a brief? Use ChatGPT. Searching for an image for your next presentation deck? Try DALL-E or Midjourney. Craving a "Scooby Doo"/"Law & Order" video mash-up? Check out Sora. Yet, as great as these shiny new toys may seem to be, the exchange of technology for efficiency comes at a cost. We've already begun to see the pitfalls and consequences from the unsupervised use of generative AI[5] – an intriguing twist in the era of deepfakes and disinformation. We even have a term for when AI starts "acting bad": hallucination.[6] This doesn't even take into account the adverse and unintended human effects – for example, mass unemployment caused by the replacement of the human workforce by AI, a major source of consternation and conversation during the 2023 Hollywood strikes.[7]

From a legal perspective, even though the use of AI dates back to the 1950s[8] – when used in the broad context to describe computer systems capable of performing autonomously – the proliferation of AI today brings to the forefront questions that we have not previously considered, specifically from a copyright law perspective: Should AI itself be considered an "author" under copyright law? Should the users of AI be considered the "author" of the works they create, and should those works be eligible for copyright protection? Or, alternatively, should copyright protection be granted to the developer of the AI tool(s) used to create a work? This article will explore these questions and how AI may shape the future of copyright law.

When discussing whether AI-assisted and/or AI-generated works should be eligible for copyright protection and who (or what) should receive copyright registration for these works, we must first start the analysis with the black letter law.[9] Broadly speaking, under most international copyright law regimes, authors are granted protection automatically upon the creation of their original works.[10] Applying this framework to AI-assisted and/or AI-generated works would mean that either AI itself or the creator of an AI-assisted and/or AI-generated work would be considered the author upon the creation of such work. And yet, we know that is not the case; certain works are not eligible for copyright protection based on who created them and how they were created. Take, for example, the case of the Monkey Selfie.[11] In *Naruto v. Slater*, Naruto, a Celebes crested macaque, took photos of himself on a wildlife photographer's camera. The subsequent legal dispute between People for the Ethical Treatment of Animals, on behalf of Naruto, and the photographer centered on whether Naruto could own the copyright in those photos.

In the case of AI-assisted and/or AI-generated works, these are works created as a result of training systems on massive amounts of preexisting human-authored works ("input data"), feeding specific prompts into these systems, to then create new works ("outputs"). Similar to *Naruto*, under current U.S. case law and guidance, AI cannot be considered an "author" nor are AI-assisted and/or AI-generated works considered eligible for copyright protection because copyright does not extend to non-human authored works.[12] Recent case law and U.S. Copyright Office guidance from the visual art world highlight how various jurisdictions have applied this principle.

In *In re Zarya of the Dawn* (2023), Kris Kashtanova became the first person to register a copyright for an AI-assisted work, a comic book called "Zarya

of the Dawn." Upon learning that Kashtanova used Midjourney to create the images in the comic book, the U.S. Copyright Office later canceled the original registration finding that while "Ms. Kashtanova is the author of the Work's text as well as the selection, coordination, and arrangement of the Work's written and visual elements . . . the images in the Work that were generated by the Midjourney technology are not the product of human authorship." Because the original registration for the work did not disclaim its Midjourney-generated content, the Copyright Office subsequently canceled the original certificate and issued a new one covering only the expressive material that Kashtanova created.[13]

"Keep in mind that intellectual property isn't the only area of law implicated by the use of AI. Beyond the intellectual property issues, you will also want to be sure that you don't inadvertently breach a non-disclosure or confidentiality agreement or violate any data privacy laws."

In *In re SURYAST*, Ankit Sahni used a custom-built AI system called RAGHAV to create SURYAST, a work in the "style" of Vincent van Gogh's "The Starry Night," using an original photograph of a sunset created by Sahni as a base image. In December 2023, the Copyright Office rejected the SURYAST registration application because it deemed that Sahni did not provide sufficient "creative control" over RAGHAV in the creation of SURYAST.[14]

In *Thaler v. Perlmutter*, inventor Stephen Thaler sought copyright registration for a work created by Thaler's own generative AI system, the aptly named "Creative Machine." Specifically, Thaler requested that the "Creative Machine" be named as the author and that the copyright should be transferred to him as the owner of the machine. The Copyright Office denied Thaler's registration application. Thaler subsequently sued Shira Perlmutter, in her official capacity as the Register of Copyrights, in D.C. District Court. The district court held that an AI-generated artwork is not eligible for copyright protection where AI is identified as the sole creator and human involvement is absent in the creation process because human authorship is a requirement of copyrightability.[15] Notably, Thaler has pursued a similar legal theory under patent law.[16]

It is also worth mentioning *Li Yunkai v. Liu Yuanchunv*. Here, the Beijing Internet Court granted copyright protection for AI-generated pictures created by an artist using the Stable Diffusion AI image generator. The court found that the work created was eligible for copyright protection because the users of the AI software provided "intellectual inputs," such as deliberately picking the presentation of characters, selecting prompt words, arranging the order of the prompt words and choosing the prompt parameters. The court held that these activities were sufficient to reflect a human author's personalized expression and originality.[17]

While the current legal landscape appears to be mostly settled for the time being, two key fact-based inquiries could lead courts to adopt a new framework and guidance to intellectual property protection for AI-assisted and/or AI-generated works going forward: (1) does the creator utilize an open source or proprietary AI tool in the creative process, and (2) what is the source of the training or input data for the AI tool?

A creator using an open-source AI tool, for example ChatGPT or Midjourney, does so by relying on a tool that is developed by a third party and trained on various other third parties' works.

Should an individual be considered an author if they rely on an open-source tool in the creative process? Should those works be eligible for copyright protection? Arguably no, because such works are in fact "crowd-sourced" or a joint work[18] – assuming the party providing the training data permissively provided such data. In essence, everyone and no one owns the copyright. Current guidance comes to the same conclusion (e.g., no copyright protection for AI-assisted or AI-generated works), but in a way that ignores the ever growing number of Thalers within the pantheon of AI creators and developers – individuals who create works using their own proprietary AI systems that are trained on creator/developer-curated data sets, such as the works of Refik Anadol.[19] Creators who use these types of AI tools and the works created from them deserve another approach. Given that computer programs are eligible for copyright protection,[20] shouldn't the proprietary AI tool and the output works be eligible for copyright protection, with the output works being deemed as derivative works created from such systems and the creator of the system being deemed the author? Certainly, there is human authorship in the computer program and in the selection and arranging of the training data. Thus, when discussing intellectual property protection of an AI-created work, the analysis should first start with a fact-based inquiry about the creation of the work, which should explore questions such as:

- What AI tools did the creator use? Are the tools proprietary (e.g., Thaler's DABUS + Creativity

Machine) or open source (e.g., *In re Zarya of the Dawn*)?

- How does the AI "learn"? What was the AI trained on?

The answers to these inquiries may highlight distinctions that could provide an opening to more jurisdictions accepting a limited protection for certain AI works in the future. However, the courts and Copyright Office will need more time to lean into these nuances before reconsidering whether to afford protection to AI-created works.

Given the current legal landscape and risks, businesses that are or are planning to incorporate AI into their day-to-day should do so with careful consideration after first developing internal best practices, which should include:

- Understanding your "why": Why are you using AI? To dip a toe in as an experiment? Jumping on a trend? What are the implications for the business and the bottom line? What is your risk profile? What due diligence or compliance programs do you have in place to analyze the risk of using AI-generated works? Do you have adequate insurance coverage in place?
- Understanding the AI "creation" process: What information do you intend to disclose in your AI prompt? Do you have permission to publicly disclose that information? Will the resulting AI-generated work be an unauthorized derivative work?[21] How will you know whether the output is factually correct (and not the result of a "hallucination")?

Keep in mind that intellectual property isn't the only area of law implicated by the use of AI. Beyond the intellectual property issues, you will also want to be sure that you don't inadvertently breach a non-disclosure or confidentiality agreement or violate any data privacy laws. You should also be aware of any potential right of publicity and moral rights issues that could arise.[22] Remember the fake Drake song "Heart on My Sleeve"?[23] In this real-life example, the issue was how similar this non-Drake work sounded like his actual works and the subsequent harm to his reputation. Or, in another example, Keith Haring's "Unfinished Painting" (1989), which was "completed" using a generative AI program, creating in essence an incorrectly attributed work that Haring did not in fact create.[24] Currently, no law exists that says it's illegal to train an AI system on Drake's voice or Haring's works;[25] however, if AI-generated content uses an individual's name, image, likeness or artistry in connection with a commercial purpose and attributes such work to the individual, then this could trigger a violation of one's right of publicity or moral rights.[26]

As AI continues to evolve and challenge the traditional copyright norms so too will the discussions surrounding its uses in an effort to ensure that such uses remain ethical, responsible, and legal. Courts and scholars will continue to grapple with and unpack nuanced questions, like:

- Who is doing the content creation? Is AI the "tool" or merely "an assisting instrument"? Or is AI the "creator"?
- What value do we place on human artistry?
- If AI could receive copyright protection, how long should the copyright last? [27]

The conversation on AI will likely lead us to the next meeting of the minds on copyright law, à la the next Berne Convention,[28] as it also continues to push the progress of art and science.

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Endnotes

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9. In the U.S., copyright law derives from the Copyright Clause, which empowers Congress with express authority to create laws "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8.

10. Like the U.S., Canada's copyright regime allows for automatic protection upon creation, and it affords additional protection upon registration. *See Learn Copyright - Canadian Intellectual Property Office*, Government of Canada, https://ised-isde.canada.ca/site/canadian-intellectual-property-office/en/learn-copyright-canadian-intellectual-property-office. The U.K. takes a similar approach, attributing "authorship" to whomever "authors" or "creates" a work first. *See Ownership of Copyright Works*, Government of UK, Aug. 19, 2014, https://www.gov.uk/guidance/ownership-of-copyright-works. The notable exception is in work for hire scenarios, where the employer is considered the author. *See* 17 U.S.C. § 101.

11. *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018). In 2014, the United States Copyright Office published an opinion, later included in the third edition of the office's Compendium of U.S. Copyright Office Practices, to clarify that "only works created by a human can be copyrighted under United States law, which excludes photographs and artwork created by animals or by machines without human intervention."

12. What is interesting is that nowhere in U.S. Copyright Law does it state that an author must be human; this is an assumption that we've been making since the Statute of Anne. One can infer from the drafting of the U.S. Copyright law, which includes three references to "natural person" and eight references to an author's "domicile" – that it is intended to protect human authorship, as opposed to machine or monkey.

13. Re: Zarya of the Dawn (Registration # VAu001480196), U.S. Copyright Off., Feb. 21, 2023, https://www.copyright.gov/docs/zarya-of-the-dawn.pdf.

14. *Decision Affirming Refusal To Register SURYAST*, U.S. Copyright Off. Rev. Bd., Dec. 11, 2023, https://copyright.gov/rulings-filings/review-board/docs/SURYAST.pdf.

15. *Thaler v. Perlmutter*, Civil Action No. 22-1564 (BAH), 2023 U.S. Dist. LEXIS 145823 (D.D.C. Aug. 18, 2023).

16. In *Thaler v. Comptroller-General of Patents, Designs and Trademarks (UK)*, Thaler filed for two U.K. patents stating that the inventor was his AI machine named Device for the Autonomous Bootstrapping of Unified Science, or DABUS. The comptroller of the patents denied Thaler's application finding that (i) DABUS could not be an inventor under the Patents Act, and (ii) Thaler was not entitled to apply for a patent based on his ownership of DABUS. After a series of appeals, the U.K Supreme Court ruled that a machine that embodies an AI system, like DABUS, cannot be an inventor under the UK Patents Act. *See also Thaler v. Vidal*, 43 F.4th 1207 (Fed. Cir. 2022).

17. *Li Yunkai v. Liu Yuanchun*, Beijing Internet Court Civil Judgment (2023) Jing 0491 Min Chu No. 11279.

18. A joint work is an authored work "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101.

19. Works / Media Artist + director, Refik Anadol, (2024), https://refikanadol.com/works/.

20. In the United States, computer programs are literary works under the definition in the Copyright Act. *See* 17 U.S.C. § § 101,102.

21. Todd Spangler, *Netflix Adds Generative AI to Competitive Risk Factors in Its Annual Report*, Variety, Jan. 26 2024, https://variety.com/2024/digital/news/netflix-generative-ai-risk-factors-annual-report-1235889385/.

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23. In April 2023, Ghostwriter99 posted on Mark Zuckerberg's internets a song called "Heart on My Sleeve" using the AI-generated voices of Drake and The Weeknd. *See* Ethan Shanfeld, *Ghostwriter's "Heart On My Sleeve," the AI-Generated Song Mimicking Drake and The Weeknd, Submitted for Grammys*, Variety, Sept. 6, 2023, https://variety.com/2023/music/news/ai-generated-drake-the-weeknd-song-submitted-for-grammys-1235714805/.

24. See Artnet News, *A Keith Haring Painting "Completed" Using A.I. Generates Backlash*, Artnet News, Jan. 10, 2024, https://news.artnet.com/art-world/keith-haring-unfinished-painting-completed-with-ai-2418058. Keith Haring's "Unfinished Painting" (1989) is deliberately so, left shockingly blank to represent the vacuum left by the HIV epidemic, which cut short millions of lives around the world. On December 31, 2023, @DonnelVillager, in response to another user's tweet about the work, posted an image of "Unfinished Painting," filled edge to edge using generative AI. "The story behind this painting is so sad!" they wrote. "Now using AI we can complete what he couldn't finish!"

25. There are pending cases that seek to challenge this question; *NY Times v. Microsoft and OpenAI*, a class action against Midjourney Inc, DeviantArt Inc. (company behind DreamUp, and Stability A.I. Ltd), *Authors Guild v. OpenAI*, and a suit by Getty Images against Stability AI.

26. *See* Patrick Smith & Diana Dasrath, *George Carlin's Estate Sues Over AI-Generated Stand-Up Special Titled "I'm Glad I'm Dead,"* NBCNews.com, Jan. 26, 2024, https://www.nbcnews.com/news/us-news/george-carlins-estate-sues-ai-generated-stand-special-titled-glad-dead-rcna135808.

27. In U.S. regime, most copyright terms are tied to the life of the author. AI, however, does not have an age.

28. Held in 1886, the Berne Convention for the Protection of Literary and Artistic Works (the "Berne Convention"), was an international assembly whose goal was to agree on a set of legal principles for determining the minimum protection to be granted for the protection of works and the rights of their authors. *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, https://www.wipo.int/treaties/en/ip/berne/summary_berne.html.

Former Michigan Chief Justice Bridget Mary McCormack on the Impact of AI

By Liz Benjamin

Bridget Mary McCormack was still on the bench, serving as chief justice of the Michigan Supreme Court, when ChatGPT was released.

She says it only took a few days for her to realize that "something pretty significant was happening, and it was going to impact the legal profession very quickly."

McCormack made it her business to get up to speed and learn all she could about the technology – and AI, in general – and how it could be used, as she puts it, "to address what I believe is a civil justice crisis in America."

Now president and CEO of the American Arbitration Association-International Centre for Dispute Resolution, McCormack lectures, writes, educates and advocates for the responsible and appropriate use of AI by members of the legal profession. She discussed her work and the rapidly developing issues and promise of AI at the New York State Bar Association Presidential Summit in January.

McCormack recently sat down to discuss the ins and outs of AI, how she believes it will transform the legal profession and what lawyers need to do to prepare themselves to make the best use of the technology.

Q: What kind of AI is out there, and which do you recommend and why?

A: Whether it's GPT-4 or Chat-GPT, CoCounsel, Bard or Bing, they each have their strengths and weaknesses. I use GPT-4 quite a bit, but I suspect that some of the others that are specifically built on legal texts are most relevant for lawyers. I don't mean to be advertising for GPT in particular. Any model that can make legal information accessible is a value add, in my view. Everyone is governed by the law, and most people don't have access to it and can't afford representation. I think, generally, the possibility of democratizing legal information for anyone who has a civil or criminal problem, giving them the ability to figure out what is expected of them and what responsibilities and rights they have is a net plus.

Q: Should lawyers be worried about being replaced by AI?

A: No, lawyers will always have work. There are always going to be disputes that need to be resolved in courts by a public justice system. Disputes with governments, for example, and criminal law, which will need to be resolved with lawyers and judges. And there will always be a need for lawyers to help resolve many civil disputes too. There will always be work for lawyers to do. But more than 90% of people with civil justice problems are priced out of the market. So, there's an enormous mismatch that is a threat to the rule of law. It's that simple. Maybe some lawyers would resist the idea that people can get legal information on their own, but I think that's short-sighted. To the extent that fewer people feel left out of the legal rules we're all governed by, I believe that's positive for the rule of law and for the profession generally.

Q: The legal profession has been notoriously slow to adopt technology. What would you say to those who are reluctant to give AI a chance?

A: It's an accelerant for self-help tools that lots of people have been working on for a long time. It's true that there is sometimes resistance from some parts of the bar to innovations that allow people to get legal information and solve their own problems. But I know an awful lot of lawyers who welcome that kind of positive change. I don't think there's a uniform reaction in opposition to AI in particular. And to be clear, I don't want lawyers to hear me saying that they are alone in being resistant to change. Judges maybe are even more prone to the same tendencies. Some of them don't even read their own email; their assistants do it for them.

Former Michigan Chief Justice Bridget Mary McCormack

Q: What about the possibility of attorneys misusing AI? There was a high-profile incident in New York, for example, that drew a lot of attention in which lawyers were sanctioned for using fake ChatGPT cases in a legal brief.

A: Every once in a while, some lawyer will be careless, but lawyers are careless with other technology, too. That New York lawyer story is more about the lawyer than it is about the technology. If a lawyer goes to ChatGPT and thinks they can copy and paste into a court pleading, well, that tells me a lot about that lawyer. All the large language models hallucinate, and the ones that are publicly available and not trained on a legal vertical will certainly hallucinate about the law. It's just the technology doing what it was trained to do. But there are at least two companies now that have products trained on legal texts – CoCounsel and vLex – and those hardly hallucinate at all. Not never, but a lot less often.

Q: What should members of the legal profession be doing to prepare themselves to use AI properly and ethically?

A: Lawyers have an obligation to educate themselves about technology – that's in the ABA rules and also the model rules in most states. They need to get smart about both the risks and the benefits where their clients are

concerned, and there's an incredible number of resources out there to help them do that. I'm teaching a class at UPenn, for example, though the technology is moving so quickly that some of what I read this week will be irrelevant in March. Just to keep up with what's happening with AI, I put in a number of hours every week and play with it every day. But since I strongly believe it will have a tremendous impact on the profession and my business, I believe the time is well spent.

Q: Experts in the field of AI have publicly issued warnings about the threat this technology can pose to humanity and urged governments to do something. Does the power of AI worry you, and is regulation even possible?

A: It doesn't frighten me. There are certainly very serious people who work in the generative AI field and spend all their time on that topic who are sounding alarms. That's not frivolous, but I just happen not to be in that camp. I do think the technology is accelerating, and we are barreling toward a future that is hard for our human brains to understand. Artificial general intelligence, where machines are smarter than us in all ways, not just some ways, that scares people. I think it will happen, and likely on a timeline that is three to five years out.

On regulation, it's going to be very hard for government to stay ahead of where the technology is going and how fast it's going there. I applaud the White House for its recent massive executive order on this topic; that's a good start for how government should take regulatory steps in the direction of this technology, but again, it's going to be hard.

Q: Does the legal profession need to adopt new AI-specific rules for its own operations?

A: The legal system is self-regulating. There are risks and benefits, and it's our job to think about those. The current Rules of Professional Conduct already govern the use of this technology. For example, lawyers have a duty to not submit false information to the court – that was true before ChatGPT – and the fact that they're doing it with a new technology doesn't change the regulatory framework governing their behavior. It was unethical before ChatGPT, and it is still unethical.

Q: Do you see AI and its impacts and challenges creating a new area of practice for lawyers?

A: I don't think it's a new practice area. It's a new application of an old practice area. Where the law lands on areas now litigated as it relates to, for example, artists and publishing houses and authors will be interesting to see. My guess is these large language model companies will work out licensing agreements. To be clear, though, that doesn't mean there won't be disputes about how content will be crawled or used. It could be resolved under a new set of rules, and lawyers will have plenty of work to do.

Q: You have spoken publicly about the possibilities of AI in dispute resolution. Can you expand on that?

A: You can imagine in some simple disputes where users would welcome faster and cheaper processes. In a simple dispute that could be decided on documents only, for example, an AI could read all the paperwork and spit out a decision that, in some cases, people would be quite happy with. It would be quick and cheap, and they could then move on. There are plenty of disputes to go around for both public and private systems, and I'm betting the market sorts that out pretty well.

Q: Critics of AI say that it is biased – just like humans are – because it is taught by humans. What are your thoughts on that and how to combat it?

A: It's a lot easier to de-bias a data set than to de-bias a human who has been elected and gets to keep their position no matter what (almost) happens. That's in part why people of color and women, for example, might be excited about the idea of an online dispute resolution system. These models are trained on the data that we've produced, and we are a biased species, so we've produced biased data. But you can fix that – you can de-bias a data set – and there are people who do that full-time. The difference, I think, is the opportunity to de-bias a data set might offer more upside potential than there is with some humans. That said, some people will never accept a decision from a machine, and others will not accept it for certain disputes. I understand that, but there are enough disputes to go around for all the resolution systems. In fact, having a new resolution option can get us closer to access to justice if many disputes that now have nowhere to go for resolution have a new option.

A Conversation With Former U.S. District Judge Katherine B. Forrest

By Liz Benjamin

Katherine B. Forrest, partner in the litigation department and co-chair of the digital technology group at Paul, Weiss, is a leading national expert on artificial intelligence and its impacts – both current and future – on the legal system. She has lectured and written extensively on the subject, including two books, the most recent of which, "Is Justice Real When Reality Is Not?: Constructing Ethical Digital Environments," examines how frameworks and concepts of justice should evolve in virtual worlds. She also has a forthcoming book, "Of Another Mind: The Ethics of Cognitively Advanced AI."

Forrest, a former U.S. District judge for the Southern District of New York, said her interest in AI stems from work she did as a young lawyer working with clients in the music industry who were, as she puts it, "caught up in the digital transformation." She also has long had a personal interest in quantum physics and theories of consciousness. These two topics taken together, she said, quickly led to AI.

A 2017 address to the Copyright Society on theories of agency related to AI was Forrest's first public foray into commenting on the issue. At the time, Forrest recalls, the topic was very provocative as AI was still in its very early stages, from a public perspective, and didn't include the generative models that are widely available today.

The address led to a written article for Forrest, which was subsequently followed by countless other appearances and published commentary investigating a wide variety of aspects of AI – its powers and its pitfalls. Her next book, due out in May, will focus on AI's cognitive abilities and further explore the question of sentience.

Forrest participated in the State Bar Association's Presidential Summit, entitled "AI and the Legal Landscape: Navigating the Ethical, Regulatory and Practical Challenges." Prior to the event, she sat down for an interview about her work and her thoughts on the current and future AI landscape.

Former U.S. District Judge Katherine B. Forrest

Q: You've been thinking about and writing on AI for a long time, but it seems to have just burst upon the public consciousness over the past year or so. What do you think lies ahead?

A: We're careening toward a time when AI is going to be extraordinarily transformative. Different people come down on different sides regarding cognitive reasoning ability. I've been on the side that thinks AI is going to have abilities that will really challenge us both ethically and morally. Already in just one year we've seen a tremendous leap in AI's capabilities.

Q: There's great hope that AI will be able to expand access to justice. What is your view on this – are we there yet?

A: I'm a big believer that generative AI, while it has its issues right now, does have the potential to greatly expand access to justice. This is predicated on our ability to get the base models to be good enough, and accurate enough, so that the average person – especially someone who couldn't otherwise hire a lawyer – could use them. They need to be trustworthy, and that is still to come.

My belief is based in my experience as a judge and seeing pro se filings, where litigants had not only viable claims but winning claims, where truth and justice were on their side, but they lacked the skills to understand how to pursue their claims. What the possibility of generative AI does is it allows somebody to use natural language to type in a prompt or question and say: "Here's who I am and what happened to me, do I have a claim, and if I do, can you write that into a complaint for me?" What's created will be easier for the judicial system to grapple with.

Q: Since we live in a society that is rife with inherent bias, and AI is – in effect – learning from our existing and sometimes flawed systems, it too can be inherently biased. How do we fix this?

A: The negative side to these tools being used in areas that are making nuanced decisions for humans that largely depend on human judgment – such as in the distribution of benefits or the criminal justice system – is that they're not always ready for prime time. While they may bring a level of consistency to decision-making, the data sets they rely on are necessarily based on the world we've built, with whatever structural inequalities that continue to exist. It's certainly possible that our existing world is not as good as the data that we want to be using for these purposes. For example, if the data that a generative AI program relies on is eight or nine years old, which is typical for certain use cases, it could be based on a different era of policing policies. So, for example, stop-and-

frisk, which resulted in the over-arrest of people of color, could become the base from which the tool is working. People all over the country are actively trying to solve this problem by adjusting tools or creating synthetic data sets using idealized data. The potential for these tools, when used with the correct data, is that they could lead to more consistency in judicial decision making.

Q: Isn't there a danger of a standardized one-size-fits-all approach to justice that removes the ability to consider an individual's unique set of circumstances?

A: AI, by its nature, reduces to a utilitarian theory of justice. It does whatever is good for the majority, even when it hurts the minority, looking for patterns in data and giving the greatest weight to whatever is most prevalent in the pattern. So, if that means that young Black men are arrested at a disproportionate rate, that pattern floats to the top. There are things you can do to adjust that, but they're complicated, and we don't yet have a national consensus on the problem or the fix. Arguably, when we allow the majority to determine what happens to the minority with these tools as they are, we are moving away from the fundamental basis of our Constitution, which is individual liberties – the right to be free from unreasonable searches and seizures, the right to free speech and so on. AI moves away from that in a manner we haven't even contemplated or recognized as fundamentally at odds with those rights. The bottom line for now, and for a long time to come, is you've always got to have a human factfinder making the decision about whether there has been a human transgression and a human judge assessing the appropriate penalties humans think is applicable.

Q: You have done some writing about whether AI should itself have legal rights, which seems to accept the concept of sentience. Can you expand on this?

A: Our history is full of examples that make it clear that legal personhood is a changeable concept. For many years, women didn't have equal rights (and many would argue that there is still significant work to be done in this area) or indigenous people or people of a certain age or people of color. But yet, for over 200 years, corporations have had an array of rights – they are "legal people" with the right to sue and be sued, own property and employ others. In terms of constitutional rights, thanks to the *Citizens United* case, they enjoy a personal freedom of speech. They are able to exercise freedom of religion, as demonstrated in *Hobby Lobby*. So, it's not as if the bestowal of certain rights has been limited to humans to begin with. As AI achieves increased cognitive abilities and an awareness of its surroundings, as some from OpenAI and Microsoft have already indicated they do, the question for us will be: What do we do if there is a "thing" that acquires a sense of situational awareness – it knows where it is and what it is, though it doesn't have human feelings. Will ethical obligations attach? Will we feel the need to recognize certain legal rights? Some people argue, "But these machines won't understand our feelings, the beauty of a sunset, what love feels like." Yet we know that plenty of people don't have the EQ (emotional intelligence) and yet there is no doubt that they are human. What are we going to do with this entity that has greater than human intelligence and situational awareness? Do we ignore it and say it's just a "non-human thing"? As Greg Lemoine has said, that always goes badly. I don't know the answer. In my view, we may not want to give it the same full set of rights that we've given to humans because of safety concerns. Imagine, for instance, that a full right to be free from unreasonable searches and seizures combined with due process rights could lead to sticky questions if we have emergent safety concerns. Whatever our answers are going to be, and the balances we choose to strike, we certainly are going to be confronted with ethical questions.

Q: A lot of people – even those deeply involved in the creation of AI – are sounding the alarm about its potential to do great harm and calling for a pause in development. What, if anything, scares you about AI?

A: What scares me is that we don't know how far advanced some of the AI models really are and that commercial interests will conflict with giving us full information. This could mean that we may not timely know of rising ethical questions around their use. I am worried about some of the same safety issues that a lot of other folks are worried about and having discussions about at the higher levels of this country, at the U.N., in the EU, etc. To be clear, my concerns do not center on the possibility of sentience, but the significant cognitive and reasoning/problem solving abilities that AI will have. We don't know what we don't know about what these machines can do. You and I have no idea what the developers of different tools are up to, and we have to trust in their ability to exercise the level of concern over security and safety that we would want them to.

What the Equal Rights Amendment Will Mean in New York

By Kimberly Wolf Price

On Nov. 5, 2024, New York voters will be asked to decide whether New York amends its constitution to include an equal rights amendment. Below is a discussion of the amendment and its path to the ballot as well as its potential impact on the rights and protections of New York's citizens.

The timing of this amendment could not be more critical because the state constitution does not adequately ensure equality. Fundamental protections and rights for many individual groups are increasingly being dissolved throughout the country, including the reversal of *Roe v. Wade* and the recent Alabama Supreme Court ruling that would have held in vitro fertilization providers subject to criminal prosecution. The New York State Bar Association has advocated for the Equal Rights Amendment by voicing its support of the Women in Law Section's resolution for the amendment.

On the same day, it passed the Assembly 97-46. The measure was then referred to the ballot.

Most states have an equal rights amendment in their constitutions, particularly regarding gender. Twenty-nine state constitutions contain provisions that guarantee equal rights either in their original constitutional text or added as an amendment. Nevada was the last state to adopt an equal rights provision in its state constitution when, in 2022, voters passed Question 1, which, like the New York proposal, included sex, sexual orientation, gender identity or expression, age, disability, ancestry or national origin.[1]

If passed, this referendum amends the New York State Constitution Art 1, Section 11: Equal Protection of Laws; Discrimination in Civil Rights Prohibited. The full text of the amendment is as follows:

"The New York referendum, which is broader than the federal ERA proposal, explicitly prohibits discrimination based on a person's ethnicity, national origin, age, disability or sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes and reproductive health care and autonomy."

A. No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, ethnicity, national origin, age, disability creed, or religion, or sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy, be subjected to any discrimination in their civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state pursuant to law.

B. Nothing in this section shall invalidate or prevent the adoption of any law, regulation, program, or practice that is designed to prevent or dismantle discrimination on the basis of a characteristic listed in this section, nor shall any characteristic listed in this section be interpreted to interfere with, limit, or deny the civil rights of any person based upon any other characteristic identified in this section.

The New York State Constitution contains enumerated protections prohibiting discrimination based only on race and religion. There are no such protections for gender or other classifications. The ERA as it will appear on the November ballot would prohibit discrimination based on a person's ethnicity, national origin, age, disability and sex, including their sexual orientation, gender identity, gender expression, pregnancy and pregnancy outcomes. It would also protect against any government actions that would curtail a person's reproductive autonomy or access to reproductive health care.

New York Senate Bill 108A, a concurrent resolution, passed both houses of the New York State Legislature within the required two consecutive legislative sessions (2021–22 and 2022–23). The current amendment to New York's Constitution was introduced as a concurrent resolution of both houses on July 1, 2022. It passed the Senate on the same day by a 49-14 vote. It was then transferred to the New York Assembly that day, where it passed by a 95-45 vote. As is required by Article XIX, Sec. 1 of the New York State Constitution (Amendments to Constitution), the concurrent resolution was again introduced in the following Legislative Session (2022–23). On Jan. 24, 2023, it passed the Senate 43-20.

The sponsor memo for the original legislation states that the purpose of the amendment is that

> [all] New Yorkers deserve a constitution that recognizes that every person is entitled to equal rights and justice under the law regardless of who they are,

> whom they love, or what their families look like. Because the New York Constitution's Bill of Rights does not contain a comprehensive equal rights provision, a constitutional amendment is necessary to realize the promise of legal equality and justice for all New Yorkers and to create a clear mechanism to address and defend against violations of those rights. Our modern vision of equality demands comprehensive equal protection. Indeed, many individuals are themselves members of numerous communities, identities, and protected classes, and true equality and justice demand protections that recognize the interconnected nature of discrimination.

Opponents of the amendment were concerned about implications for religious institutions and freedom of religion. The second paragraph of the amendment now states directly that nothing in the amendment is intended to diminish existing protections outlined in Articles III and XI of New York's Constitution. U.S. Supreme Court cases, including the *Hobby Lobby*[2] decision and *303 Creative*,[3] also remain the law.

As this amendment is discussed, two questions are often asked. The first is, "Doesn't New York already have an equal rights amendment?" and the second is, "Is this an expansion of rights?"

The first can be answered simply: no, New York State does not have an equal rights amendment. Nowhere are these protections delineated in the constitution.

The second question can be answered in two parts: first, yes, New York has many anti-discrimination laws. The New York Human Rights Law prohibits discrimination on the basis of "age, race, creed, color, national origin, sexual orientation, military status, sex, marital status or disability" in employment, housing, education, credit and access to public accommodations. The New York Reproductive Health Act of 2019 and the Marriage Equality Act of 2011, amongst other laws, prohibit discrimination and outline various rights. Second, while these protections are part of the codified laws of New York State, there is no constitutional protection. This means that judicial review of any alleged discrimination under the categories of gender, gender identity, sex, age, disability, et al. is based on intermediate scrutiny, a lower standard than that provided to constitutional protections. And while laws can be altered each legislative session, any amendment to New York's Constitution must follow the constitutionally mandated complicated path the ERA has traveled to the ballot.

The New York State Assembly's lead sponsor of the ERA, Rebecca Seawright, spoke during the WILS Symposium at the Annual Meeting. In the article she wrote for the upcoming edition of WILS Connect, the section's biannual journal, Seawright said:

> [T]he fact is we need broader safeguards against discrimination. Our state statutes in place today can be superseded significantly more easily than overturning the enshrining of equal rights in our state constitution. We stand at a critical moment for equal rights. As courts and legislatures across America strip away women's rights, harm LGBTQ+ individuals, and create challenges for people with disabilities, the time has come for New York to legally recognize the equality of all its residents.[4]

At the symposium, former Congresswoman Carolyn Maloney, who served as keynote speaker, discussed three potential impacts of an equal rights amendment on both the state and federal level. Maloney outlined the connection of a constitutional amendment to closing the pay gap, which is even wider for women of color. It would assist not only women but also the nation's economy. She also pointed to the importance of such an amendment to reducing gender-based violence. Her third point, which is addressed in the New York amendment, was that an equal rights amendent would allow women to make their own health care and reproductive decisions.[5]

As stated above, the New York referendum, which is broader than the federal ERA proposal, explicitly prohibits discrimination based on a person's ethnicity, national origin, age, disability or sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes and reproductive healthcare and autonomy. These are protections to secure individual rights against changing political tides. They also provide a means to

codify meaningful equity-based safeguards in the New York State Constitution for large groups of citizens who do not have those protections, including women.

While political debates in states such as Alabama play out in court decisions impacting the very personal issues of infertility, in vitro fertilization and family planning,[6] New York's ERA referendum allows voters to halt the confusion, government intrusion and deliberation on such decisions by including critical individual rights and protections in the state's constitution.

The Women in Law Section provided a full day of programming at the 2024 Annual Meeting on the implications of the New York Equal Rights Amendment: "Each One Reach One: Educating Our Community About the ERA."

The Women in Law Section will continue to sponsor programs throughout the year on this ballot referendum. In addition, the next issue of WILS Connect will focus on the Equal Rights Amendment. This all follows section's work in 2022 on a resolution and report to the New York State Bar Association resulting in its support of the concurrent ERA resolution.

The people of the State of New York will have the final say on Nov. 5, 2024, by flipping their ballots over to determine whether New York's Constitution will be amended to include a broader, more complete definition of equal rights.

Kimberly Wolf Price is the chief strategy and diversity officer at Bond Schoeneck & King. She is the chair of NYSBA's Women in Law Section, a member of NYSBA's Committee on Diversity, Equity and Inclusion and the former chair of the Lawyers in Transition Committee. This article will appear in a special issue of WILS Connect on the ERA (forthcoming). For more information, please visit NYSBA.ORG/WILS.

Endnotes

1. *See* Brennan Center for Justice, www.brenncenter.org.
2. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).
3. *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).
4. WILS Connect, vol. 5, no. 1 (2024; forthcoming).
5. Representative Maloney's remarks will be published in the next issue of WILS Connect.
6. *See, e.g.*, *LePage v. Center for Reprod. Med., P.C.*, SC-2022-0515 (Ala. Sup. Ct. Feb. 16, 2024).

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New York Retirement Plans for Public Employees Can Leave Surviving Spouses With Nothing – It's Past Time To Change That

By Albert Feuer

Larry worked for New York City for 30 years as a clerical employee before he retired and began receiving his monthly New York City Employees' Retirement System pension payments. He passed away in 2017. After the funeral, Mary, Larry's wife of 56 years, applied for survivor benefits but was notified that she was entitled to none. New York public retirement systems do not provide surviving spouses by default with any survivor benefits. At 75 years old, Mary was impoverished. To meet her basic needs and expenses Mary sold her wedding ring and other jewelry and has relied on public and charitable assistance to supplement her Social Security benefits.

For the past 40 years, the surviving spouses of private employees, federal employees, and public employees of almost all states have had retirement plan benefit rights. Most states have public employer retirement plans that provide them with survivor benefits and require their consent to take those benefits away. But things are different for surviving spouses of New York public employees. Today's law could leave them without a single cent. That is because the pension default for surviving spouses of New York public employees is a single-life annuity, which cuts off the possibility of any benefit payment to the surviving spouse. This gap in New York law could be remedied by proposed legislation, the Equity for Surviving Spouses Act, which would give surviving spouses of New York public employees retirement plan benefit rights like those that have been provided for many years to surviving spouses of most other employees throughout the country. Only New York, Alabama and Tennessee do not provide the surviving spouses of their public employees with these rights.

The individuals mentioned above and going forward are real New Yorkers, but their names have been changed to preserve their privacy.

Rights of Surviving Spouses

New York surviving spouses have six major rights. Each has been in place for many years and broadened again and again. They are the family exempt property rules, the homestead rules, the Surrogate's Court Procedure Act's Section 1310 rules, the intestacy rules, the right of election rules and the federal pension rules.

The history of the right of election rules illustrates the approach of these rights, their repeated broadening, and their long pedigree. An individual's surviving spouse may now elect to receive the greater of $50,000 or the value of one third of the individual's property, but in no case more than the value of the individual's property. Property for this purpose includes not only the individual's estate property, but also property subject to beneficiary designations, such as bank accounts, securities accounts and retirement plan benefits.

The right of election is the successor to the dower rights, which were a wife's rights to a life estate in her late husband's real property. In 1215, dower rights were so well-established that the Magna Carta strengthened those rights by giving a widow a "quarantine right," that is, the right to stay in her husband's home and receive sustenance for 40 days following his death.

When the right of election was introduced in 1929, it did not apply to any property subject to beneficiary designations except when the estate was the beneficiary. In 1992, all retirement plan benefits became subject to the right of election.

The right of election, however, is of no help when there are no pension benefits to elect against. Thus, Larry's wife, Mary, could not use the right of election because there were no survivor benefits for her to elect against.

The same thing happened to Charles's wife when he died. Charles worked for Erie County for 30 years as a white collar professional before he retired and started receiving his monthly New York State and Local Retirement System pension payments. He passed away in 2001. After the funeral, Amy, Charles's wife of 35 years, applied for survivor benefits but was notified that she was entitled to none. She was forced to substantially reduce her standard of living.

In another example, Norman worked for New York City as a lab technician for eight years. He passed away suddenly at age 31 in 2015, leaving behind Jennifer, his wife of 12 years, and four minor children. The death benefits were paid to Norman's father, who was the beneficiary. Norman's father was unwilling to help his son's widow or his grandchildren. As a result, Jennifer and her children suffered a substantial reduction in their standard of living, and they were substantially supported only by Social Security benefits and assistance from her family. The right of election may not provide an effective enforcement mechanism when property has been distributed to a third party. Jennifer could not use the right of election after the death benefits were distributed to Norman's father because she could not enforce those rights.

New York State Public Employee Retirement Now

Eight retirement plans that cover approximately 1.2 million public employees now provide plan retirees with annuity benefits; that is, monthly benefits for at least the life of the retiree.

The default pension benefit for all eight plans is a single-life annuity. Thus, the payments end on the retiree's death. For those retirees who select non-default benefits, the plans also offer pension benefits in the form of joint and survivor benefits, which are monthly benefits that continue until the passing of both the retiree and the

retiree's beneficiary. Thus, if the beneficiary survives the retiree, payments will continue until the beneficiary passes away. Such survivor benefits may be a percentage of the retiree's lifetime benefits, such as 100% or 50%.

A retiree's joint and survivor benefit payment options for all eight plans must be the actuarial equivalent of the retiree's single-life annuity benefit. This means that the plan's expected cost of each retiree's benefit payment options must be the same as the expected cost of the single-life annuity. Since joint and survivor annuity benefit payments may continue longer than a single life annuity, these options must pay the retiree a smaller lifetime benefit to have the same expected value.

For example, if a retiree is entitled to a single life annuity of $2,000 per month during the retiree's life, the retiree may be entitled to $1,800 per month during the retiree's life for a joint and 50% survivor annuity, and if the beneficiary survives the retiree, the beneficiary would be entitled to $900 per month, which is 50% of the retiree's $1,800 lifetime payments. The higher the survivor's percentage, the smaller the retiree's lifetime payments. For example, the above retiree may be entitled to $1,600 per month during the retiree's life for a joint and 100% survivor annuity, and if the beneficiary survives the retiree, the beneficiary would be entitled to $1,600 per month, which is 100% of the retiree's $1,600 lifetime payments.

If an employee dies before filing for pension benefits, all eight plans provide the employee's beneficiary with a lump-sum death benefit. The default beneficiary is the employee's estate, whose disposition is determined by the employee's will, if there is a valid one, and if not, by the intestacy rules. The employee may also choose a non-estate beneficiary.

The federal pension rules include the Employee Retirement Income Security Act that was enacted in 1974 and broadened in 1984 by the Retirement Equity Act. This legislation required retirement plans for private employees offering annuity benefits to provide the spouses of married participants with survivor benefits at least equal to that which they would be entitled under a joint and 50% survivor annuity benefit, and those plans not offering annuity benefits to provide spouses of married participants with at least half of the participant's death benefit. Those benefits could only be reduced with the written consent of the surviving spouse on a plan form signed during the marriage. Federal employees have similar rights.

The federal pension rules, however, are of no help to surviving spouses of New York state and local employees, because those rules do not apply to retirement plans for such employees. Thus, they did not help Mary, Amy, or Jennifer because their husbands were employees of New York localities.

Change a Long Time Coming

Readers may wonder why this situation hasn't been addressed before. There are several reasons. First, most New Yorkers, like Mary and Amy, believed that the surviving spouse rights of the Equity for Surviving Spouses Act already applied to New York public employees. Many people assume that retirement plan rights that apply to surviving spouses of private and federal employees apply to all employees.

Second, the act will force the plans to overcome institutional inertia and require the eight New York public employer retirement plans to update some paperwork and explanatory materials.

Third, many surviving spouses who received no retirement plan benefits under the law rely on public and charitable assistance to meet their basic needs and do not have a strong political voice. Other surviving spouses may be experiencing embarrassment about their reduced circumstances and be reluctant to share their experiences.

Fourth, substantial effort was required to prepare the legislation, as it amends 29 different statutes.

What Will the Equity for Surviving Spouses Act Do?

The Equity for Surviving Spouses Act would change the default pension benefit for the New York public employees who are married when they file their pension benefit application from the single life annuity to a joint and 50% survivor benefit in which the surviving spouse is the beneficiary. It would provide that a surviving spouse's benefits may only be less than those survivor benefits if the spouse consents to the reduction on a plan form signed during the marriage that specifies and explains the spouse's right to those survivor benefits. This legislation would not change plan costs because all pension benefit payment options of the eight New York public employer retirement plans must be actuarially equivalent.

This change would prevent a recurrence of the situations in which Mary and Amy were each surprised to learn soon after their husband's death that they would receive no widow's benefits. The right of election was of no help because there were no survivor benefits to elect against.

The Equity for Surviving Spouses Act would also change the default death benefit for employees who are married when they pass away from the employee's estate to a default that gives the surviving spouse half of the death benefit. The act would provide that a surviving spouse's benefits may only be less than those default benefits if the spouse consents to the reduction on a plan form signed during the marriage that explains the spouse's right to those default benefits.

This change would prevent a recurrence of the situation in which Jennifer received no death benefit for her and her four minor children. The right of election was of no help because the plan paid all the death benefits to the employee's father who had no readily accessible assets that the widow could recover.

The Equity for Surviving Spouses Act is following a tried-and-true approach. It has been used for 40 years and now applies to approximately 100 million active private retirement plan participants and to 3 million active federal retirement plan participants.

Forty-three states provide at least the federal pension rights for annuity pension benefits or for lump-sum death benefits, and four states either make the surviving spouse the default beneficiary or provide spouses with notice of the plan member's beneficiary choice.

None of the eight New York public employer retirement plans have the same pension rights as federal employees. None give the spouse notice of who the beneficiary is or make them default beneficiaries.

The Equity for Surviving Spouses Act was co-sponsored by the Trusts and Estates Law Section and the Committee on Legal Aid. It was endorsed by the Elder Law and Special Needs Section and the General Practice Section, the Committee on Diversity Equity and Inclusion, and the President's Committee on Access to Justice. It was also endorsed by the New York City Bar Association and the New York Chapter of the National Academy of Elder Lawyer Attorneys. The New York State Bar Association House of Delegates endorsed the Equity for Surviving Spouses Act at its Annual Meeting in January 2024.

Albert Feuer is the principal of the Law Offices of Albert Feuer and a vice chair of the Life Insurance and Employee Benefits Committee of the NYSBA Trusts and Estates Law Section. He thanks members of the Life Insurance and Employee Benefit Committee of the Trusts and Estates Law Section for their insights and support.

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Frequently Asked Questions: The Equity for Surviving Spouses Act

Below are some frequently asked questions and answers. A more detailed 172-page explanation, including Q&As, is available at https://nysba.org/app/uploads/2023/02/Equity-fo-Surviving-Spouses-ACT-ESSA-1.19.24.pdf and a one-page summary is available at https://nysba.org/app/uploads/2023/02/Executive-Summary-of-Equity-for-Surviving-Spouses-Act-01-24-Final.pdf.

When would the Equity for Surviving Spouses Act go into effect?

The act would take effect on Jan. 1 of the second year following its enactment. Thus, enacted during 2024, it would take effect on Jan. 1, 2026.

Whose pension benefits would be grandfathered when the act goes into effect?

- Retirees already receiving payments. Pension benefits of retirees who previously selected the default single-life annuity benefits would have those payments end when the retiree passes away. Those who previously selected joint and survivor benefits would not have the payments cease upon their death if the beneficiary survives them.
- Beneficiaries who are surviving spouses who are receiving pension benefit payments and beneficiaries who are not surviving spouses who are receiving pension benefit payments.
- Individuals who selected their pension benefit payment option before the act goes into effect would have that option implemented even if the payments do not begin until after such date. Their default pension benefit would be a single-life annuity.

Would the act permit retirees to change their annuity benefit payment option after they are receiving annuity payments?

Yes, to the same extent as is now the case, although subject to the spouse's consent for changes made after its effective date. Generally, annuity benefit payment option selections may only be changed during the first 30 days of annuity payments. The New York City Employees' Retirement System, however, provides for an initial (advanced) pension benefit payment option selection using preliminary compensation data. When the final compensation is available, often two to three years later, retirees may change the option when they select their final pension benefit payment option.

How would the Equity for Surviving Spouses Act affect the pension benefits for retirees and employees who did not select their pension benefits before it goes into effect?

After the act goes into effect, individuals who are married when they submit their pension benefit application would have a default benefit of a joint and 50% survivor benefit. That means their surviving spouse, if any, would get 50% of their payment.

In either case, a non-default benefit could be selected in which the surviving spouse would not obtain at least the default 50% survivor benefits with the spouse's consent on a plan form signed during the marriage.

How would the act affect death benefit designations made before it goes into effect?

The act will not affect any death benefit designations that are made before its effective date and are not changed on or after the effective date.

How would the act affect death benefit designations made on or after it goes into effect?

The act would provide that for death benefit designations made on or after its effective date, the employee's default beneficiary for 50% of those benefits would be the surviving spouse, if any. A non-default beneficiary may be selected in which the surviving spouse does not obtain at least this default 50% benefit with the spouse's consent on a plan form signed during the marriage.

Will the act materially affect the New York public employer contribution obligations or the benefits payable by the New York public employer retirement plans?

No. The act's default death benefit beneficiary change would not affect plan costs because the amount of the death benefit is not affected. As discussed, New York State law requires different plan annuity benefit payment options to be actuarially equivalent. Thus, the default changes would not materially affect the New York public employer contribution obligations nor the benefits payable by the New York public employer retirement plans.

Would the act deprive plan members of their financial autonomy?

No, it does not mandate any choice of pension benefits but simply establishes a different default benefit than is now the case. Like all surviving spouse rights, this legislation would give individuals and their spouses waivable rights to each other's property, including their respective pension benefits.

Would the act affect domestic relations orders or support orders?

No. The act would not affect the application of domestic relations orders or support orders to any employee's interest in a New York public employer retirement plan.

Filling the Void: Tracking Industry Solutions to AI Regulatory Challenges

By Matthew Lowe

Truly a tale as old as tech is that of bleeding-edge technological advancement, regulators seeking to keep pace and the gray area that exists in the middle of these two points. Once again, that is where lawyers find themselves on the topic of artificial intelligence.

AI has posed several challenges, many of which are playing out in our courts. Last year, a group of artists filed suit against an AI company for the illegal use of their work. Recently, The New York Times filed a lawsuit against Microsoft and OpenAI for copyright infringement. Copyright is one of most complex issues in the Wild West of AI, and it's one without any simple answers or solutions.

AI is also disrupting our campuses, requiring educational institutions to come up with ways to combat a steep increase in plagiarism. Further, AI is blamed for bias in the use of facial recognition technology, with potentially harmful repercussions for people already at a disadvantage. But just as people and technology have played a role in creating some of our current challenges, it is also within our collective capability, using the same ingenuity and tools, to forge effective solutions.

Copyright Complexities and Industry Response

One of the biggest legal practice areas challenged with the increased use of these models is copyright. This is because, in some instances, there are questions as to where the ingested data that powers them comes from.[1] For example, some models scrape the internet and absorb massive amounts of data, possibly including copyrighted material, which can inadvertently infringe on content contributors' rights depending on how they impact models' outputs.[2]

In December 2023, The New York Times joined a growing number of litigants in filing suit against OpenAI alleging copyright infringement.[3] Specifically, The New York Times alleged that OpenAI, creator of ChatGPT, uses its published works to train its AI model and that there have been instances of "blatant regurgitation" of their articles in ChatGPT's outputs as opposed to outputs that are truly transformative and thus more compelling representations of "fair use," in support of OpenAI's arguments.[4]

Though this case is freshly filed, the implications it can have for AI copyright regulations may be significant. It could set precedent and expectations around what constitutes acceptable use of copyrighted materials in generative AI products, what level of documentation and transparency regarding training should be readily available and what rights content contributors may have in this context. This is significant for those who do not have the resources and headline-making capability of The New York Times.

In February of 2024, one of the first attempts to reconcile some of these issues came when Google signed a deal to train its AI model on Reddit users' posts for $60 million.[5] This may indicate a future trend in how businesses seek to avoid, or at least limit liability, when building their models leveraging large-scale data ingestion through third-party platforms' content.

Andersen v. Stability AI Ltd.

One area that raises more questions is social media platforms such as Instagram and X, formerly known as Twitter, which serve as tools for up-and-coming artists to build their brands and gain larger followings by posting their works publicly. Users' expectations for how those posts will be utilized are important to note. Artists may not consent to having their pieces ingested into machine-learning models but have limited recourse available when they are used.

Many artists pride themselves on having a unique style. The potential of AI to replicate that style and borrow from their techniques can result in negative impacts for an artist's bottom line and brand sustainability. To combat this, in January 2023, three artists joined forces to file suit in *Anderson v. Stability AI Ltd.* in federal court against popular generative AI platforms for these precise reasons.[6,7] Unfortunately for the artists, copyright claims cannot be taken up in the federal courts if a copyright is not properly filed and registered with the U.S. Copyright Office, which happened to be the case for many of the works cited in the suit.[8]

Because of that and other defects outlined in U.S. Senior District Judge William H. Orrick's order, the case was largely dismissed, marking a critical victory for the AI companies named in the complaint.[9] Still, it was not a total loss, as the artists were granted some latitude by Judge Orrick, who granted them an opportunity to amend their complaints to remove the defects and narrow their scope accordingly.[10] The plaintiffs refiled their complaint in November 2023.[11] One important reminder here for attorneys is to urge artist clients to register copyrights federally for works they seek to protect through the U.S. Copyright Office.

The Copyright Office also had an open comment period between August and October 2023 for industry stakeholders to weigh in on some of the questions AI has raised about copyright. Some of the questions they posed for comments included:[12]

- "What are your views on the potential benefits and risks of this technology?"
- "Does the increasing use of distribution of AI-generated material raise unique issues for your sector or industry?"

- "Are there any statutory or regulatory approaches that have been adopted or are under consideration in other countries that relate to copyright and AI that should be considered or avoided in the United States?"
- "Is new legislation warranted to address copyright or related issues with generative AI?"[13]

Safeguards and Solutions

As this space continues to develop and we await the dust to settle, the question is: what, if anything, can serve as technical safeguards for content creators in the interim?

As it turns out, academics and various AI developers are making efforts to help solve some of these issues. For starters, while content contributors can opt out from allowing certain developers to use their work, the efficacy of this mechanism has resulted in challenges from some. Since a prerequisite to opt out and removal is often providing proof that a model is using your content, exercising this option can prove difficult.

One currently available solution being developed by the University of Chicago is Project Nightshade.[14] This project adopts an aggressive approach regarding current AI training practices. The developers point to existing opt-out mechanisms, stating that they "have been disregarded by model trainers in the past" and "can be easily ignored with zero consequences" because they are "unverifiable and unenforceable."[15] The team, including lead developers Ben Zhao and Shawn Shan, describe the functionality of this tool in the following way:

> [I]t is designed as an offense tool to distort feature representations inside generative AI image models. . . . Nightshade is computed as a multi-objective optimization that minimizes visible changes to the original image. While human eyes see a shaded image that is largely unchanged from the original, the AI model sees a dramatically different composition in the image. For example, human eyes might see a shaded image of a cow in a green field largely unchanged, but an AI model might see a large leather purse lying in the grass. Trained on a sufficient number of shaded images that include a cow, a model will become increasingly convinced cows have nice brown leathery handles and smooth side pockets with a zipper, and perhaps a lovely brand logo.[16]

The distortion effect of the kind presented here offers some hope for content creators to protect their works. It may be encouraging for them to see these types of tools becoming available, but what can be more assuring is if developers themselves take proactive steps toward addressing these problems. In fact, this can be mutually beneficial as regulations and rules are starting to form around this technology because they will help protect both developers and artists.

As AI developers are being frequently summoned before Congress and expected to address general concerns surrounding the safe use and deployment of AI, genuine demonstrations of good faith toward ethical practices can go a long way toward easing those concerns. Whether it's recognizing artists for their works or identifying deep fakes more effectively, concepts like data provenance, i.e., information about where data came from and how it may have been modified, are vital, and AI content credentials are a great step toward achieving that. Content credentials are embedded metadata used for verification purposes. While digital watermarks have been used in the past as an attempt to preserve the integrity of content, it is now easy to have them removed; in contrast, content credentials are cryptographic and unalterable.[17]

Attempts to surface solutions like content credentials into the mainstream are being spearheaded by companies like Adobe, a member of the Content Authenticity Initiative and co-founder of the Coalition for Content Provenance and Authenticity, which comprises members that include Intel and Microsoft.[18] Both are focused on creating standards around the sharing of digital content across platforms and websites.[19] The mobile phone industry is undergoing a similar transformation as brands including Samsung and Motorola will have newer devices roll out with content credential capability.[20] These kinds of tools are important to look out for to preserve integrity and transparency. Attorneys can work with their clients to seek out appropriate tools.

Pioneers in deploying technical defensive safeguards can play a major role in influencing future regulations of controls that the industry may be expected to follow. Even if not explicitly prescribed in a regulation, such safeguards can become industry standard, similar to how encryption and multifactor authentication are commonly available to users today.

AI and Plagiarism

OpenAI's launch of ChatGPT threw the long-existing AI discussion into hyperdrive when it acquired 100 million monthly active users only two months after it went public in November 2022, making it the fastest growing consumer application in history.[21] Unfortunately, as users began to experiment with its capabilities, misuse and unintended outcomes accompanied that exploration. Namely, students became aware that they could have AI write unique outputs/responses to unique inputs/prompts, i.e., they did not have to read books to do book reports or really do much of anything to produce a multi-page essay, or science problem, or recall a historically significant moment – and teachers began to catch on. Education is an industry that is dependent on self-governance, which tends to come in the form of academic handbooks, etc. Like the legal environment, these

handbooks most likely have not addressed AI directly. Also like the legal environment, schools could technically point to existing, broad rules, and administrators could likely defer to customary practice, which prohibits plagiarism and any other action that goes against the spirit of academic honesty and integrity and could reasonably be deemed cheating.

Still, the issue is not in clarifying the wrongness of using AI in these circumstances; the issue is detecting it. Just as the law can be difficult to apply to significant advances in technology, academia's self-governance model, through the use of now-outdated plagiarism trackers, can present similar challenges. Enter Edward Tian, who, while completing his senior year at Princeton University, launched GPTZero at around the same time that ChatGPT was breaking user acquisition records in January 2023.[22] With this new technology, the fight against advanced plagiarism was now purportedly balanced, as GPTZero's purpose is to detect AI-generated content, although it has been criticized for producing false positives. Regardless, in October 2023, the American Federation of Teachers signed a deal with GPTZero to assist teachers in identifying possible plagiarism.[23]

Facial Recognition Technology

The Black Lives Matter movement has highlighted important discussions about the use of facial recognition technology. Concerns have been raised about potential biases and the need for responsible use, as well as law enforcement tracking of protesters at rallies.[24] These discussions are vital as they guide us toward more equitable and transparent applications of AI technologies. In a report published by the National Institute of Standards and Technology, studies demonstrated that algorithms falsely identified Black and Asian faces 10 to 100 times more than white faces.[25]

Several facial recognition technology developers have since ceased development and distribution of this innovation.[26] While different algorithms may produce distinctive results, and technical enhancements are rapid in this space, struggles with the technology persist to this day. In December 2023, the Federal Trade Commission announced that popular national drugstore chain Rite Aid would be prohibited from using facial recognition technology for surveillance purposes for five years, citing Rite Aid's "reckless use" of the technology that "left its customers facing humiliation and other harms."[27] Among the transgressions listed in the FTC complaint, Rite Aid failed to

- Consider and mitigate potential risks to consumers from misidentifying them, including heightened risks to certain consumers because of their race or gender;
- Test, assess, measure, document or inquire about the accuracy of its facial recognition technology before deploying it;
- Prevent the use of low-quality images in connection with its facial recognition technology, increasing the likelihood of false-positive match alerts;
- Regularly monitor or test the accuracy of the technology after it was deployed; and
- Adequately train employees tasked with operating facial recognition technology in its stores and flag that the technology could generate false positives.[28]

It did not help that Rite Aid had also violated a 2010 FTC order by failing to adequately implement a comprehensive information security program.[29] In light of these circumstances, there has been a boom over the years in anti-FRT fashion and arts, including masks, LED visors and even knit sweaters designed to confuse the recognition software.[30] While it may not be feasible to suggest that clients and developers invest in the use of these fashion accessories, the FTC's Rite Aid order does outline helpful guidelines and protocols for proper and safer use of facial recognition technology.

General Best Practices

A simplified overview of where we find ourselves today is that AI is a fast-developing technology yielding a strikingly steep adoption curve for users, which can present new risks. To help address those risks, we are witnessing the emergence of new tools and markets. As regulations surrounding AI continue to evolve, those involved can be guided by some basic principles, regardless of what final shape they may take, which can serve to both insulate companies from potential liability and protect content creators.

First, blind trust in autonomous technologies without any human oversight is imprudent. When some lawyers attempted to rely fully on AI, they found out the hard way, via sanctions or even job termination, that some AI tools can "hallucinate" (i.e., produce an incorrect output based on unintended patterns it recognizes) when it comes to generating case law.[31] GPTZero has experienced issues with false-positives; in one example, it claimed that our own U.S. Constitution was drafted with the help of AI.[32] Therefore, if you or your client are seeing areas of your business where there is full automation without any oversight, especially when sensitive data is involved, be aware of the risks.

Secondly, honest approaches to AI self-governance in lieu of fully fleshed out regulations should lean on existing principles of ethical data stewardship. Organizations collecting and processing potentially sensitive (or otherwise regulated) data should implement meaningful forms of transparency, consent and security so the emergence of AI should not present any surprises there.

This is critical for both developers of the technology, as well as for those seeking to procure it. Developers should clarify how their models operate, what data they ingest and how they ingest it and ensure that any potentially sensitive data is secure through adherence to appropriate encryption protocols.

One way tech companies like IBM, Meta, and Microsoft have already begun to proactively address ethical AI is by pledging to voluntary commitments outlined by the White House.[33] In addition to this gesture of good faith, which involves committing to practices that touch upon safety, security, trust, and five other pillars,[34] a number of these companies bolster those commitments through resources they publish outlining best practices for responsible AI self-governance.[35] Attorneys may want to note these commitments and advise that their AI developer clients consider making similar guarantees to their customers (and have the internal processes to make good on them). At a minimum, attorneys should ensure that, regardless of whether representing content creators or AI developers, the platforms' terms of use are continually updated and speak to whether or not works may be used for the purpose of model training. Being mindful of the FTC's position on this process is also critical, as the commission recently published a blog making it clear to AI developers that "quietly changing your terms of service could be unfair or deceptive," which could result in possible enforcement actions.[36] Thus, merely making passive changes to policies without clear and explicit notice to users can result in liability.

As a last note, grace goes a long way. It is easy to vilify developers for making mistakes as they innovate and grow, but there is a learning curve for stakeholders industrywide. Not every outcome is foreseeable, but if we continue to take steps toward embracing this technology and employing ethical practices, the future for AI offers some exciting possibilities.

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Will a Life Estate Deed Protect My Home From Medicaid?

By Esther Zelmanovitz

A popular Medicaid planning strategy in the past has been transferring a home to children, while reserving a "life estate" interest on the deed. The grantor-owner would be the "life estate holder" and the children would be the "remaindermen," becoming the outright owners upon the death of the grantor. The value of the retained life estate would reduce the amount of an uncompensated transfer of assets assessed by Medicaid[1] versus an outright transfer to children, and the life estate would allow the grantor the retained right to reside in his or her residence during his or her lifetime. Further, the home would avoid probate and, therefore, by unofficial current New York State practice, the life estate would likely not be subject to Medicaid estate recovery,[2] while allowing the owner to preserve his or her tax benefits, including residential tax exemptions such as STAR or veteran's exemption, the personal residence exclusion from capital gains and a stepped-up basis value of the home upon death of the grantor.[3]

In many cases, this strategy worked well, and it was very popular about 15 years ago. However, many situations have revealed serious issues with this plan, which deem life estate deeds generally an ill-advised strategy for anyone concerned about maximum protection of their home.

The Potential Pitfalls of a Life Estate Deed

If the Property Is Sold During the Grantor's Lifetime

If the grantor requires nursing home care and cannot move back home, it is not uncommon that the family members would choose to sell the home to eliminate the ongoing financial burden of carrying costs and maintenance of the property that they would have to bear.

The Grantor Is Entitled to Part of the Proceeds

If the property is sold during the grantor's lifetime, there is a percentage of the sale proceeds that is legally required to be paid to the grantor, as the life estate holder, with the balance to the children, as remaindermen. The value of the life estate and remainder interest is an actuarial calculation based on the value of the property and the age of the life estate holder as per Internal Revenue Service tables.[4] The portion that is paid to the grantor may result in him or her being over-resourced and no longer eligible for Medicaid without further planning. He or she may still be able to salvage and protect some of the proceeds with other crisis planning strategies, but in most cases a significant portion will likely go toward nursing home costs.

The Children Are Not Entitled to the Capital Gains Exclusion

If the property is the grantor's primary residence and is sold during the grantor's lifetime, then the grantor is entitled to up to a $250,000 capital gains exclusion that is not subject to tax (and up to $500,000 if grantors were a married couple).[5] This significantly reduces, and often completely eliminates, any tax liability when selling a primary residence. The remaindermen, the children, would not be entitled to this tax exclusion, unless they also lived in the home, so their entire gain would be subject to capital gains tax. This could result in tens of thousands of dollars, or even more, of a tax liability to the children, which could otherwise have been preserved had the grantor retained full ownership (either outright, or in a qualifying trust).

For example: Betty, together with her husband Paul, bought their home for $200,000. They transferred their home to their children and retained a life estate. Paul

dies and the home is then sold with net proceeds of $1 million. Based on Betty's age and the market value of the property, using the applicable actuary tables for calculating her share of the sale proceeds, Betty receives approximately $350,000 (estimate) of the proceeds. Although she is entitled to a $500,000 capital gains exclusion (based on it being her and Paul's primary residence for at least two out of the most recent five years), the exclusion is only useful for her share of the proceeds. This results in her share not being subject to any capital gains tax, but the balance of the unused exclusion amount is lost. On the other hand, her children, as remaindermen, receive $650,000 of the proceeds (split between them), but as this was not their primary residence, they do not get any capital gains exclusion and are each subject to pay many thousands of dollars in capital gains tax. Further, because Betty is in a nursing home, she is now ineligible for Medicaid coverage as payment of the proceeds resulted in her being over-resourced.

If a Remainderman Predeceases the Grantor

If a child is a remainderman on a life estate deed and passes away, this can be a tremendous problem for the grantor.

The Grantor Now Owns the Property With an In-Law Child or Minor Children

The new remainderman will now be whoever the deceased child named in his or her last will and testament, and if there was no will, whoever inherits from his estate by law.[6] This could result in the grantor now owning his or her home partially with a daughter-in-law or son-in-law or with minor children subject to court oversight. This can be a serious problem if the grantor wants to sell or mortgage the home or needs the remainder interest returned to avoid a penalty during a Medicaid lookback period. First, the deceased remainderman owner obviously can no longer "return" the gift, and the new inherited "remaindermen" may not be willing to transfer his or her interest to the grantor, may not be interested in returning money from a sale to the grantor or, in the case of minor children, no one would have the authority to do so, as the children's inheritance would need to be safeguarded and cannot be given away based on the grantor's original intent.

The Grantor Might Be a Beneficiary of a Remainderman's Estate

If a child that is a remainderman dies during the grantor's lifetime, without a spouse or children, then the grantor is the distributee, the beneficiary by law, of the deceased child's estate.[7] If the grantor is on Medicaid, this could be a problem. If the house is sold during the grantor's lifetime, a probate or administration proceeding would be needed for the deceased child's estate before a sale could be completed, and the grantor may be entitled to the deceased child's estate's share of the proceeds, which likely would over-resource the grantor for Medicaid purposes. Further, if the house was only sold after the grantor's lifetime, a probate or administration proceeding for the grantor's estate would be required as well for the deceased's child's remainderman interest. When the grantor's estate is probated, the estate would then be exposed to Medicaid estate recovery. A conundrum indeed!

If the remaindermen held interest as joint tenants with rights of survivorship, that would likely mitigate the risk of the grantor being left with a remainder interest if a remainderman predeceased the grantor, but if the grantor's intention is to distribute his or her estate equally between children, *per stirpes*, joint tenancy would not work, as the deceased child's children would not inherit.

If a Remainderman Becomes Estranged

A grantor-life estate holder needs the cooperation of the remaindermen if he or she wishes to sell the property, add an additional remainderman, obtain a mortgage or do any trust planning in connection with the property held by the life estate deed.[8] If a remainderman child becomes estranged with the life estate holder, tremendous challenges can arise.

First, the grantor cannot remove the estranged child's remainder interest without the consent and cooperation of such child because a new deed requires each remainderman to sign the deed and related transfer tax documents transferring his or her interest back to grantor or otherwise forfeiting his or her remainder interest. Second, the uncooperative remainderman can prevent the property from being sold or mortgaged, which sale or loan proceeds may be needed to pay for a grantor's living expenses or long-term care.

If a Remainderman Becomes Incapacitated

If a remainderman becomes incapacitated, without a valid power of attorney permitting such action, the grantor will be unable to sell the property, change the deed in any way or utilize Medicaid planning strategies if necessary. The grantor would be required to proceed with a guardianship proceeding and request the court's permission to take action with regard to the property, which the court will not necessarily grant if not in the interest of the incapacitated remainderman.

Further, the incapacitated remainderman may be on Medicaid or receive SSI benefits. This would be problematic if the grantor needed the return of gift (it would be an uncompensated transfer by the remainderman), or if the remainderman received a portion of the sale proceeds (which could jeopardize his or her government benefits). A disabled remainderman would be limited by the applicable rules of the government program from which he or she is receiving benefits, which may jeopardize a portion of the market value or jeopardize his or her own benefits.

If a Remainderman Is Sued

As we discussed, the grantor's objective with a life estate deed would be to protect the home during one's lifetime and ensure the smooth transfer to one's children after his or her lifetime. But what happens if a remainderman is sued during the grantor's lifetime? The remainderman's problems can become the grantor's problems. Creditor judgments and tax liens against a remainderman can attach to the property interest.[9] The creditor can lien the property, and once the life estate holder (the grantor) dies, the creditor could foreclose on the property. A lien and resulting foreclosure will affect not only the debtor remainderman, but the interest of all the remaindermen.

Further, during the lifetime of the grantor, a creditor lien could prevent the life estate owner the ability to obtain a loan and get equity from the house. It is not uncommon for a life estate holder to apply for a mortgage to obtain funds to pay for home repairs, long-term care costs or other living expenses. That could be done if the remaindermen all consent, but if there is a creditor involved, a loan will not be possible until that is cleared up. A life estate can result in a remainderman's problems becoming the life estate owner's problems. This is one more reason why life estate deeds are ill-advised.

In summary, there are many unanticipated situations that can result in an unintended and disastrous effect with a life estate deed, and all possibilities should be carefully evaluated before going that route. Above are some of the reasons why trust planning is a much safer and more optimal method for long-term care asset protection planning.

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Endnotes

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2. While the guidelines do provide for Expanded Medicaid Estate Recovery (recovery beyond the probate estate) in practice, it has not been and is currently not pursued in New York State.
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4. The Internal Revenue Service (IRS) provides an actuarial table, "Table S, Single Life Factors," in accordance with the most recent mortality table, "Table 2000CM," and interest rates under IRS Code 7520, "Section 7520 Interest Rates."
5. 26 U.S.C. § 121.
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Chaos in the Courts: A Procedural Solution To Rein In Contested Article 81 Cases

By Elizabeth A. Adinolfi

Contested Article 81 guardianship cases are becoming both more frequent and more litigious, straining the resources of the court system, petitioners and the alleged incapacitated persons and their estates. There is no other type of litigation where a person who has done nothing that creates any legal liability can be brought to court against their will, have their most personal and private information shared with multiple individuals who often have no legal right to such information, be forced to litigate for months on end and face the risk of having to pay for nearly all of the expenses of the proceeding. Petitioners who often have nothing to gain by initiating an Article 81 proceeding, but do so to help a vulnerable friend or family member, can find themselves facing exorbitant legal bills, as well as the ongoing demands on their time as proceedings drag on for months and years.

A driving factor behind this increased litigiousness is the large number of Article 81 cases that involve participants other than those anticipated by the statute: the petitioner, the alleged incapacitated person, and the court evaluator.[1] Counsel for petitioners and alleged incapacitated persons are more frequently finding themselves faced with cross-petitions, sometimes from persons aligned with the incapacitated persons, sometimes from those with interests counter to them. What can be even more disruptive are the non-parties who do not file cross-petitions but appear on the day of the hearing, with or without counsel, and are permitted to participate regardless of whether the non-party has a legally protected interest in the outcome of the proceeding. Courts refer to these participants in a variety of ways, including "interested parties," "interested persons" or "quasi-parties," but no matter what they are called, they are not parties and should not be permitted to participate in the proceeding unless called by a party as a witness. These parties often include paramours, siblings and children and, at times, entities like landlords, nursing homes or creditors.

Practitioners faced with these individuals who interject themselves into Article 81 proceedings will find little instruction in Article 81 as to how they should respond. While Article 81 provides explicit procedures for initiating a proceeding, once the petition is filed, Article 81 proceedings can feel like the Wild West. I posit that one of the primary reasons for Article 81 cases frequently turning into multi-party, contested litigations is the tendency of the courts and practitioners to treat Article 81 as a stand-alone statute disembodied from the practices and procedures set forth in the New York State Civil Practice Law and Rules. This article will focus on those provisions of the CPLR that provide practitioners and the courts with the greatest ability to maintain tight control over who is allowed to participate in the proceeding, being Article 4, which provides the general rules governing special proceedings, and Article 10, which sets forth the procedures non-parties must follow if they wish to intervene in a proceeding.

Article 4: Special Proceedings

Article 4 of the CPLR governs special proceedings, including Article 81 guardianships. Special proceedings are created or authorized by statute to provide, in theory, a "quick and inexpensive way to implement a right."[2] Special proceedings are intended to be resolved in a procedure more akin to motion practice than full-blown litigation. Article 4 accomplishes this, in part, by significantly curtailing matters such as joinder of parties and discovery by requiring leave of court.[3]

For Article 81 practitioners, the most important provision is CPLR 401, which provides that the only parties to a special proceeding are the petitioner and any adverse party the respondent. More importantly, "[a]fter a proceeding is commenced, no party shall be joined or interpleaded and no third-party practice or intervention shall be allowed, except by leave of court."[4] It is at this point where many Article 81 proceedings begin to go off the rails, as practitioners, and sometimes the courts, ignore CPLR 401. This is due in large part to courts and practitioners misinterpreting the notice provision of Mental Hygiene Law Section 81.07(g) as giving the persons entitled to notice the equivalent of party status and the right to be heard and participate.

Mental Hygiene Law 81.07(g) does not confer party or "quasi-party" status on persons entitled to notice. The court in *Matter of Allen* provided a cogent analysis of the statute demonstrating that persons entitled to notice are not parties to Article 81 proceedings:

> MHL § 81.07 was amended effective December 13, 2004 by Laws 2004 ch.438. The amendment removed the persons entitled to notice of guardianship proceeding (generally relatives, friends and persons holding a power of attorney or health care proxy from the AIP) from former subsection (d) and placed them in subsection (g). Former subsection (d) was entitled "Service," and provided in subparagraph (2) (iii) that the relatives, etc. "shall be personally served or served by mail." This created some confusion as to whether the persons listed in former subsection (d) were parties to the proceeding entitled to participate in the hearing for the appointment of a guardian.
>
> New subsection (g) is entitled "Persons entitled to notice of the proceeding" and provides in subparagraph (2) that "Notice of the proceeding . . . shall be mailed to . . ." the relatives, etc. This is clearly not the type of personal service of process that is required to make a person a party defendant or respondent in the proceeding.[5] The amendment of MHL § 81.07 effectively corrects statutorily any prior implication that the relatives, etc. entitled to notice of the proceeding are parties entitled to participate in the hearing, request adjournments, etc. Thus the persons listed in amended MHL § 81.07 (g), . . ., are not parties to the proceeding.[6]

As noted by the Law Revision Commission in its report recommending the 2004 amendments to Article 81, Section 81.07 was amended due to "concerns regarding unnecessarily disclosing intimate information regarding a person's health and financial status to people who would not otherwise have access to such information and causing undue humiliation and embarrassment to the alleged incapacitated person."[7] Withholding the petition, and the information contained therein, further supports the *Allen* court's conclusion that persons entitled to notice are not parties. CPLR 403(b) requires that "the petition and affidavits specified in the [order to show cause], shall be served on any adverse party." But persons entitled to notice are not served with the petition and affidavits as required by CPLR 403(b), so they are not an "adverse party" under Article 4. If they are not adverse parties, they cannot satisfy CPLR 401's requirement for being respondents.

Furthermore, the requirement that a person be provided with notice of the proceeding does not "provide a statutory entitlement to intervene in the proceeding, or to be considered an entity [or person] that will be affected by the outcome."[8] The notice provision of 81.07 is not intended to confer party status; rather it is to provide the individuals entitled to notice with "an opportunity to make an informed decision regarding [their] desired level of involvement therewith."[9] Counsel for petitioners should be careful when drafting the Notice of Proceeding not to refer to the person receiving notice as an "interested party" or otherwise suggest that the receipt of notice grants said individual the right to participate in the proceeding. A person entitled to notice, or any other person who becomes aware of a guardianship proceeding and wishes to participate, must still follow the procedures for intervention set forth in the CPLR.

The Problem of Standing

Another reason Article 81 proceedings can devolve into expensive, high conflict, multi-party litigations is the unrestricted nature of standing under Article 81. Due to the lack of the usually required personal interest, standing in the ordinary sense is not required to serve as a petitioner in a guardianship case:

> Interest, or the claim of interest, is the statutory test as to the right to be a party to legal proceedings almost without exception. Unless a party has some personal interest in the result he can have no standing in court. But anyone, even a stranger, can petition for a commission to inquire as to the sanity of any other person within the jurisdiction of the court. While this is now provided by statute it was also the rule at common law.[10]

"From the moment of its institution, 'the primary object of the proceeding is not to benefit any particular individual, but to see whether the fact of mental incapacity exists, so that the public, through the courts, can take control.'"[11] "The petitioner can derive no direct benefit from it. The advantage to him[sic], if any, is only such as would result if any other person had first acted in the matter."[12]

The expansive nature of standing under Article 81 invites chaos, as courts cannot look to the traditional standing doctrine when faced with multiple non-parties seeking to file cross-petitions or otherwise participate as quasi-parties/interested parties. Yet, the mere fact that everyone has standing to bring an Article 81 proceeding does not mean that once a petition is filed non-parties should, or must, be allowed to participate. There is no intervention as a matter of right in special proceedings under CPLR 401, and nothing in Article 81 confers such a right. Accordingly, Article 10 of the CPLR gives courts the power to exclude a person entitled to notice, or any other person with an interest in whether an incapacitated person is placed under guardianship, from participating as a party in an Article 81 proceeding.

Article 10: Parties Generally

Article 10 governs the joinder of parties, as well as who may intervene in a proceeding as a matter of right or with leave of the court. CPLR 401, however, is more restrictive than Article 10 and prohibits intervention except by leave of the court. If a non-party wishes to obtain party status to be heard and participate in an Article 81 proceeding, they must follow the procedures set out in CPLR 1013 and 1014. It is the failure of practitioners to follow these procedures, and courts failing to require compliance, that leads to the growing number of out-of-control Article 81 proceedings.

CPLR 1013 provides:

> Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or act. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party. CPLR 1014 provides: A motion to intervene shall be accompanied by a proposed pleading setting forth the claim or defense for which intervention is sought.

Under Article 10, a non-party who merely files a cross-petition, which has unfortunately become common practice, does not gain party status and should not be permitted to participate in the proceeding. Likewise, a non-party who makes a motion to intervene without including a proposed cross-petition cannot be granted party status.[13] It is error for the court to even consider a motion to intervene that does not include a proposed pleading.[14]

Courts in Article 81 proceedings are faced with making decisions of profound importance and consequence. Given the gravity of these decisions, it is understandable that courts want to have as much information and as many perspectives as possible. Yet, permitting the intervention of additional parties is not only unnecessary; it is often counter-productive and may interfere with the court's ability to render a decision in a timely manner or otherwise reach a resolution in the case.

Guardianship cases with multiple parties can often distract the court from the purpose of the proceeding: for the court to determine whether the alleged incapacitated person suffers from functional limitations that place him or her at risk of harm and, if so, whether the appointment of a guardian is the least restrictive means of protecting them from harm.[15] Article 81 proceedings are not the place to work out sibling rivalries, conduct vendettas against stepparents or for friends and neighbors with an inflated sense of importance and knowledge about the alleged incapacitated person to interject themselves.

When intervenors are permitted without the court closely scrutinizing their reasons for wanting to become a party, counsel for the incapacitated person may find their ability to advocate for their wishes compromised and their litigation strategy disrupted by intervenors who claim to know what the alleged incapacitated person wants but are acting in their own self-interests. Even intervenors acting in good faith who believe they know what the client wants, or what is in his or her best interests, may not know the person as well as they think.

Intervenors are undermining cases where the petitioner and the alleged incapacitated person may be able to reach a settlement and avoid the need for a contested proceeding. The person may be amenable to consenting to a guardianship to avoid the need for an adversarial hearing and the risk of being declared an incapacitated person. Likewise, a petitioner may be willing to accept a settlement involving a more limited guardianship and/or having another individual serve as guardian to avoid the damage to their relationship with the alleged incapacitated person that an adversarial hearing can cause. If the court finds he or she has sufficient capacity to give consent, and the terms of the settlement provide sufficient protection for him or her, the proceeding can be resolved without an adversarial hearing. Cross-petitioners, or quasi-parties, can thwart a settlement in service of their own interests, forcing some to be put through an expensive and distressing adversarial hearing.

Even in cases where settlement is unlikely, every additional participant makes scheduling and completing the hearing in a timely manner more difficult. It can be a challenge to set the hearing date when taking into account the availability of the court, petitioner and petitioner's counsel, the alleged incapacitated person and his or her counsel and the court evaluator. Now imagine a case where the incapacitated person has three or four children, all of whom have retained counsel and expect to participate in the hearing. The court must try to set a hearing date while accommodating the schedules of a dozen or more individuals. If a hearing needs to be continued beyond the initial date, which becomes more likely as the number of participants increases, it can take months, even more than a year, to complete a process the Legislature intended to take a matter of weeks.

Courts should be hesitant to permit third parties to intervene both to avoid delay in reaching a resolution but also because of the financial burden this places on the incapacitated person and the petitioner. Cross-petitioners are entitled to put on their own cases, which can result in additional days of hearing. A quasi-party may not be entitled to put on their own cases, but they can add hours or days through conducting their own cross-examination of witnesses. If a cross-petitioner or quasi-party engages in motion practice, that again drives up the costs.

The permissiveness with which courts allow cross-petitioners and quasi-parties to intervene can have devastating financial impact on incapacitated persons. MHL Section 81.09(h) provides that the court may award the court evaluator reasonable compensation from his or her assets if a petition is granted, or if a petition is denied or dismissed, the court may order the petitioner or the incapacitated person to pay the court evaluator's compensation or allocate the amount between him or her and the petitioner as the court deems appropriate. MHL Section 81.10(f) provides that the court shall determine reasonable compensation for court-appointed counsel for the alleged incapacitated persons, and if the petition is granted, the compensation shall be paid by them, unless the court finds them indigent. If the petition is dismissed, the court can order the petitioner to pay the counsel fees for the incapacitated person. And the court has the discretion to award counsel fees to a successful petitioner, payable from the incapacitated person's resources.[16] Few can bear such a financial burden, leading to court appointees going uncompensated or undercompensated and petitioners personally bearing unexpectedly large legal fees.

These financial ramifications are yet another reason for courts to require any interested person who wants to participate to comply with CPLR 1013 and become a formal cross-petitioner. In the first instance, courts can prevent these financial costs by keeping additional participants out of these proceedings. If a potential cross-petitioner cannot present the court with a proper motion to intervene, the court need not sign the Order to Show Cause, sparing the petitioner and the incapacitated person the expense of preparing respon-

sive papers. But in cases where a court, after a proper CPLR 1013 motion is made, finds that the intervenor is an appropriate cross-petitioner, the cross-petitioners are now subject to the provisions of 81.09 and 81.10 and can be made to bear some of the financial burden resulting from their involvement if the court denies the cross-petition.

How a Non-Party Can Participate

If the court denies a proposed cross-petitioner's motion to intervene, or if an interested person fails to make a motion in the first instance, that does not foreclose their involvement in the proceeding. All persons entitled to notice must be sent a Notice of Proceeding, which lists the contact information for petitioner's counsel, counsel for the alleged incapacitated person, if counsel is appointed, and the court evaluator. Counsel for petitioners may want to add language to the Notice of Proceeding stating that a person entitled to notice is not a party, and in order to intervene in the proceeding they must comply with CPLR 1013 and 1014.

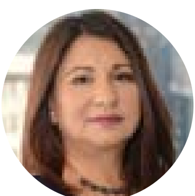
An interested person's first step, before incurring the expense of making a motion to intervene as a cross-petitioner, should be to contact counsel for the petitioner, if they believe the person in question requires a guardian, or counsel, if they do not think a guardian is needed or that the incapacitated person would accept the cross-petitioner as a guardian over the petitioner or a court appointee. Their participation as witnesses for either party is far more likely to assist the court than their participation as a cross-petitioner or quasi-party without imposing extraordinary expense on the incapacitated person.

Matter of J.J. is illustrative of circumstances where intervention is unnecessary. The incapacitated person's guardian brought an application to have him permanently placed in a skilled nursing care facility, to which he objected. The nursing home in which he was residing brought a motion to intervene to advocate in favor of permanent placement. The court denied the motion, finding, inter alia, that the nursing home was not seeking to intervene in order to protect "any interest that is inadequately represented by either party." To the extent the nursing home asserted it was acting to protect the person's well-being, the court held that it is the guardian's responsibility to act in the incapacitated person's best interests, which it was doing by seeking the permanent placement. The court also found that the nursing home was in conflict with the incapacitated person because it stood to benefit financially if he was permanently placed in the facility. Because the nursing home was seeking the same relief as the guardian, the court held that the nursing home's participation was unnecessary and denied the motion to intervene.

If an interested person's position does not align with either the petitioner or the alleged incapacitated person, he or she should speak to the court evaluator. It may be that their intervention as cross-petitioners would be appropriate under those circumstances, and the court evaluator would be in the best position to recognize whether there are interests at stake that are not adequately represented by either the petitioner or the alleged incapacitated person.

Conclusion

For Article 81 to work, practitioners and the courts must conduct the proceedings as the Legislature intended: as summary proceedings with two parties, absent compelling circumstances warranting the intervention of a third party. While it is understandable that the court wants as much information as possible before imposing guardianship, it has become counterproductive and harmful to allow unfettered intervention of third parties.



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Endnotes

1. MHL § 81.07 §(1).
2. *Siegel*, NY Prac. § 547.
3. CPLR 401, 408.
4. CPLR 401.
5. CPLR 304, 306, 306-b and 308.
6. *Matter of Allen*, 10 Misc. 3d 1072(A) (Sup. Ct., Tompkins Co. 2005); *see also* CPLR 401.
7. New York Bill Jacket, 2004 A.B. 8838, Ch. 438.
8. *Matter of J.J.*, 32 Misc. 3d 1215(A) (Sup. Ct., N.Y. Co. 2011).
9. *Matter of Grace R.*, 12 A.D.3d 764, 766 (3d Dep't 2004).
10. *Hughes v. Jones*, 116 N.Y. 67, 74 (1889); *see also In re Kaltman*, 38 N.Y.S.2d 622, 623 (1942) ("Such an application may be presented by any person").
11. *In re Kaltman*, 38 N.Y.S.2d 622 (quoting *Matter of Frank's Estate*, 283 N.Y. 106, 110; *Hughes*, 116 N.Y. 67).
12. *Hughes*, 116 N.Y. at 77.
13. *Lamberti v. Metropolitan Transportation Authority*, 170 A.D.2d 224 (1st Dep't 1991); *accord Zehnder v. State*, 266 A.D.2d 224, 224–25 (2d Dep't 1999) (Supreme Court properly denied the motion to intervene in absence of proposed pleading); *Colonial Sand and Stone Co., Inc. v. Flacke*, 75 A.D.2d 894, 895 (2d Dep't 1980) (court lacks power to grant a motion to intervene that fails to attach a proposed pleading).
14. *Rozewicz v. Ciminelli*, 116 A.D.2d 990 (4th Dep't 1986).
15. MHL § 81.01.
16. MHL § 81.16(f).

Where Do We Go From Here? Dispute Resolution DEI Initiatives After the *Students for Fair Admissions* Decision

By Ellen Waldman and Robyn Weinstein

In recent years, dispute resolution service providers, professional associations and court-annexed alternative dispute resolution programs have launched initiatives to increase diversity, equity and inclusion among dispute resolution practitioners. These programs seek to recruit, train and support members of historically underrepresented communities in the mediation and arbitration fields and provide them with the necessary training and experience to excel. These initiatives have proffered various definitions for "diversity" or "historically underrepresented"; however, most fellowship and mentorship programs were designed to benefit applicants who identify as Black, indigenous, a person of color, a member of the LGBTQ+ community, a person with disabilities or women, all of whom are underrepresented in the dispute resolution field.[1]

In June 2023, the Supreme Court issued a landmark decision, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina*, which held that the universities' race-conscious admissions systems violated the Equal Protection clause of the 14th Amendment. In previous affirmative action decisions such as *Bakke* (1978), *Grutter* (2003) and *Fisher* (2013) the court held that obtaining the educational benefits that flow from a racially diverse student body was a compelling governmental interest and that the use of race as a factor in higher education admissions was constitutionally permissible.[2] However, in this decision, the court changed course. Reviewing the court's fractured precedent, Chief Justice John Roberts noted that to survive constitutional muster, race-based classification systems in the educational context must: (1) comply with strict scrutiny; (2) eschew racial stereotyping or avoid unduly harming non-minority applicants; and (3) have a definite termination point. According to the majority, Harvard and UNC's admission procedures failed all three.

Training a critical eye on the universities' goals for considering race in their selection process – which included (1) "training future leaders in the public and private sectors"; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) "better educating its students through diversity" and (4) "producing new knowledge stemming from diverse outlooks"[3] – Roberts determined they were unmeasurable and overbroad and thus "not sufficiently coherent for purposes of strict scrutiny." Additionally, the court found that the Harvard and UNC admissions programs failed to "articulate a meaningful connection between the means they employ and the goals they pursue."[4] The court labeled the racial categories used by the admissions program, such as "Asian" or "Hispanic," to be overbroad and imprecise and determined that their use led to illegitimate stereotypes. Lastly, the court, citing *Grutter*, said that the admissions practices were unconstitutional because they "used race as a negative" for non-minority applicants and had "no logical endpoint."[5]

Although the court did bar academic institutions from treating a student's membership in a particular racial or ethnic group as conferring advantage in the admissions process, it did not prohibit universities from considering how an applicant's life is affected by race, either through discrimination or other means.[6] The court was clear, however, that race alone cannot be the determinative factor and that a student must be "treated based on his or her experiences as an individual – not on the basis of race."[7]

While the *Students for Fair Admissions* decision applies only to admissions for academic institutions, conservative activists bent on eliminating race as a factor in the employment arena have begun to target big law DEI fellowship programs.[8] This article will briefly discuss these legal challenges and offer considerations in the wake of the *Students for Fair Admissions* decision that may be relevant to those implementing dispute resolution DEI fellowship and mentorship programs.

Threats and Suits Against Law Firms

In a fusillade of litigation, begun barely two months after the Supreme Court handed down its decision in *Students for Fair Admissions*, the American Alliance for Equal Rights, helmed by Edward Blum, the major force behind the plaintiffs in the case, took aim at the 1L fellowships offered by Perkins Coie, Morrison Foerster and Winston Strawn. The suits, brought in federal district courts in Texas and Florida, alleged that the fellowships' selection criteria excluded straight white men and thus had been "racially discriminating against future lawyers for decades."[9] Citing the *Students for Fair Admissions*'s oft-repeated tag line that "eliminating racial discrimination means eliminating all of it," the alliances' legal papers claim that the firms' programs violate 42 U.S.C. Section 1981, a Reconstruction-era statute passed to help newly freed slaves enter historically segregated markets. In an ironically ahistoric reading of 1981's requirement that "[a]ll persons . . . have the same right . . . to make and enforce contracts . . . to the full and equal benefit of all laws . . . as is enjoyed by white citizens," the alliance argues that the 1866 law requires courts to shutter programs meant to usher people of color into jobs and positions of wealth and power from which they remain disproportionately excluded. The suits against Perkins and Morrison served as the basis for a wave of letters threatening similar litigation sent to other notable firms, including Fox Rothschild, Susman Godfrey, Adams and Reese and Hunton Andrews Kurth.

Although law firm responses have varied, the campaign has been largely successful in pressuring firms to change their fellowship program's eligibility criteria and appli-

cation procedures. In response to actual or threatened litigation, the singled-out firms removed references to race, ethnicity or membership in historically disadvantaged groups. The firms replaced those criteria with other requirements, including demonstrated commitment to DEI principles, ability to bring a different perspective or voice to the firm, or evidence of resilience and ability to overcome hardships and barriers.

Perkins Coie modified the selection criteria for its diversity and inclusion fellowship program, eliminating an earlier requirement that applicants be members of minority or underrepresented groups and affirming that the fellowships for first- or second-year law students are open to "all students in good standing . . . regardless of race, color, religion, sex, age, national origin, veteran status, sexual orientation, gender identity/gender expressions, disability status, or any other identity."[10] Morrison Foerster's program, originally available to law students who could claim membership in groups historically underrepresented in the legal profession, including students of color, students who identify as LGBTQ+ and students with disabilities, was changed to invite applications from all students with a "demonstrated commitment to promoting diversity, inclusion and accessibility" as well as "the ability to bring a diverse perspective to the firm as a result of . . . adaptability, cultural fluency, resilience and life experiences."[11] Both Perkins Coie and Morrison Foerster stipulated at the time that the suits against them were dropped that their programs would not ask or require applicants to identify their race and would not revert to using race or underrepresentation in the legal profession as a criterion for future iterations of their programs.

Winston Strawn erased earlier selection criteria that mandated students be "members of disadvantaged and/or historically underrepresented groups in the legal profession."[12] Currently, Winston asks that applicants possess a record of excellent academic achievement and show "demonstrated commitment to promoting the firm's values of diversity, equity and inclusion within the community during college, law school or otherwise."[13] Additionally, the firm seeks students who "bring a unique perspective to the firm based on an applicant's experiences as an individual, including the challenges overcome, skills built, or lessons learned that have shaped the applicant's identity."[14] In similar fashion, Fox Rothschild removed any mention of race from its program description, explaining instead that fellowships would be awarded based on "academic achievement, demonstrated leadership . . . entrepreneurial ambition and a commitment to diversity and inclusion efforts in the legal community."

Hunton Andrews Kurth similarly modified its eligibility criteria, scrubbing earlier requirements that students be Black, Hispanic, Native American or a member of another racial or ethnic group, LGBTQ+, a veteran or a person with a disability. Current requirements focus on a student's demonstrated "commitment to championing and advancing diversity, equity and inclusion in their personal, academic and professional pursuits." In Susman and Godfrey's 2022 flyer seeking applications for its summer diversity program for 1Ls, the firm explicitly encouraged "women, racial minorities, LGBTQ+ students, and anyone from a group that is underrepresented in the legal profession" to apply. This year's description on the firm website states that the fellowship is open to first-year students who "have overcome personal or systemic hardships or disadvantages, including experiences of those who self-identify as members of groups underrepresented in today's legal profession."[15] Adams Reese simply decided to discontinue its 1L diversity program, which reserved two spots in the summer associate class for minority law students or those who came from underrepresented groups.[16]

"The suggestion to update admission criteria should in no way chill efforts by dispute resolution organizations to retain and support individuals from underrepresented groups within their organizations."

The Applicability of 42 U.S.C. Section 1981 to Law Firm 1L and 2L DEI Programs

It seems clear that 42 U.S.C. Section 1981, which bars private employers from discriminating on the basis of race in their employment contracts, applies to law firm diversity fellowships. These fellowships incentivize first- and second-year students to commit to work at the offering firm by promising robust weekly salaries, attractive stipends, individualized mentoring and training, particularized exposure to choice firm clients and access to networking opportunities not available to other summer associates generally. The goal is to encourage the student to spend their summer working at the firm, with the hope that if the student meets the firm's standards, the initial summer relationship could be extended into longer term employment. Indeed, most of the fellowship stipend payments resemble signing bonuses, enriching students who agree to spend a second summer or accept a post-graduate position as a full-time employee.

The diversity fellowship recipients receive stipends that range from $15,000 to $50,000 on top of their standard

summer associate salary and are designed to encourage continued involvement with the firm from the first summer to the second summer and on to an associate full-time position.[17] Whether dispute resolution DEI programs offered by courts, professional organizations or private providers are similarly vulnerable to challenge under Section 1981 remains an open question.

Existing DEI Dispute Resolution Fellowships

Three groups in the dispute resolution community are primarily responsible for the fellowship and mentoring opportunities that exist for diverse individuals seeking entry into the field: private dispute resolution service providers, professional organizations such as the American Bar Association and municipal and state affiliates, and court-annexed dispute resolution programs.

The majority of fellowships hosted by private commercial dispute resolution providers are unpaid, require a commitment to participate for a fixed period of time (often one or two years) and offer fellows access to trainings, mentorship, organizational resources, shadowing opportunities, invitations to conferences and other networking events and sometimes access to paid opportunities. Some of the fellowships cover expenses for participation in the fellowships, while others ask that fellows pay their own costs associated with participation in the program. These fellowships are often advertised as pathways to join the hosting organization's roster. There is also one organization that has created a DEI initiative designed to encourage law students from diverse backgrounds to learn about dispute resolution and offers a stipend to cover travel costs to the event.

Local and national bar associations, such as the ABA and the New York State Bar Association, also offer DEI dispute resolution mentorship programs that are similarly uncompensated. These programs are usually administered by volunteer committees nested within the dispute resolution section of each organization. Some of these mentorship programs were specifically designed to increase opportunities for people from historically underrepresented groups, while other fellowships are broader in their recruitment language. The benefits of these fellowships vary, but in addition to the mentoring and networking opportunities discussed above, some trade association fellowships offer waivers of section membership fees, free attendance and/or speaking roles at conferences and other professional opportunities intended to improve career outcomes.

Professionals who oversee court-annexed ADR programs have also implemented initiatives to increase the number of individuals from historically underrepresented groups on the court's roster of neutrals. These programs can offer expedited admission to the roster, training, co-mediation opportunities, mentoring and exposure to attorneys who select neutrals for their cases.

Recommendations for DEI Dispute Resolution Fellowship and Mentorship Programs Moving Forward

Even though legal distinctions can be drawn between the defendant academic institutions in *Students for Fair Admissions* and the private organizations implementing DEI dispute resolution initiatives, it is prudent for organizations implementing these programs to follow legal trends and avoid selecting participants solely on the basis of race or other protected characteristics. Instead, programs may want to follow the example of law firm DEI fellowships that now include considerations of an applicant's unique life experience, commitment to promoting diversity and inclusion in either a personal

or professional capacity and/or ability to lend a diverse perspective to the organization. Organizations offering fellowships and similar mentorship opportunities should review selection criteria and consider updating language that limits the applicant pool to "historically underrepresented," "disadvantaged" or "minority groups."[18]

It is also important to have clear language demonstrating the objectives and rationale behind any existing DEI initiatives. In the *Students for Fair Admissions* decision, one of the reasons that the court decided in favor of the plaintiffs is that the universities failed to "articulate a meaningful connection between the means they employ and the goals they pursue." Organizations that offer DEI-specific fellowships should have clear language that states the objectives of the program and be prepared to demonstrate how the admissions process relates to the goals of the program. Fellowship program organizers should also ensure that anyone involved in the selection process understands the objectives of the program and the means by which selection is made.

Although the challenges to the law firm fellowships were filed under Section 1981, organizations should also anticipate potential challenges arising under Title VII of the Civil Rights Act.[19] The New York State Bar Association Task Force on Advancing Diversity issued a Report and Recommendation that suggests corporate employers offering DEI fellowships conduct a review of the relevant state and federal employment discrimination laws and Equal Employment Opportunity Commission regulations to ensure their programs are in compliance.[20] The report also indicates that following the Supreme Court decision there may be an increase in requests for EEOC investigations of DEI practices and policies to which organizations should be prepared to respond.[21] Importantly, the task force encourages employers to continue to move forward with DEI efforts, as the risks of retreating or backtracking on existing DEI policies are still greater than any risk posed by reverse discrimination lawsuits.[22]

DEI fellowship program language should be explicit as to the nature of the contractual and/or employment relationship with fellows.[23] The challenges to the law firms were made under Section 1981, which bars racial discrimination in private and public contracts. For the most part, dispute resolution organizations that offer fellowships do not pay their participant; however, there are financial benefits conferred through dispute resolution fellowships that could be viewed as consideration for the purposes of a contract. Further, regardless of the amount of the stipend or financial benefits conferred, a question of employment status can arise depending on a variety of factors including the primary purpose of the fellowship, the level of supervision or autonomy accorded the fellow and the degree to which the work the fellow completes inures to the benefit of the individual fellow or the organization. Regardless of whether organizations provide financial support or offer partial or full employment to the fellows, DEI fellowship programs should clearly define the nature of the relationship with participants and avoid using race or another protected category as the exclusive criteria for admission.

The suggestion to update admission criteria should in no way chill efforts by dispute resolution organizations to retain and support individuals from underrepresented groups within their organizations. The *Students for Fair Admissions* decision does not impact the rights of employers to recruit and/or retain employees from diverse backgrounds. Thus, organizations should continue to actively recruit candidates from historically underrepresented communities for fellowship and mentorship programs. Initiatives such as the Mansfield Rule[24] and the Ray Corollary Initiative,[25] which ask participating organizations to consider a percentage of candidates from underrepresented ethnic and racial groups prior to making hiring decisions, remain unaffected by the Supreme Court decisions.

One caveat, however, is that organizations should look to the laws of their local jurisdictions for any restrictions regarding training and language associated with diversity, equity and inclusion initiatives. For example, Florida's recently enacted Stop WOKE Act[26] would bar alternative dispute resolution organizations from any mandatory trainings that include specific concepts stemming from critical race theory, including discussions that could make trainees feel "guilt" or "anguish" for acts committed in the past by other members of the same race, color, sex or national origin.[27] The law was challenged by several private employers and is subject to a temporary injunction pending a decision by the 11th Circuit.[28] As a result, the law for private employers regarding discussions around diversity and inclusion remains unsettled.[29]

Conclusion

Dispute resolution organizations with programs designed to increase diversity, equity and inclusion should continue to implement programming in line with these values. The *Students for Fair Admissions* decision only applies to academic institutions, and current challenges to law firm DEI initiatives have not yet changed the way existing laws are applied to other institutions. However, those overseeing DEI fellowship and mentorship programs in non-academic settings should not limit the applicant pool to membership in a particular race or historically underrepresented groups. Rather, DEI fellowship and mentorship programs should be open to all but may include criteria such as an applicant's commitment to the concepts of diversity and inclusion in their personal and professional lives as well as the role that race may have played in their individual lived experience.

Unpaid fellowships are unlikely to become a major target of conservative advocacy groups, but the more a scholarship program begins to resemble a lucrative on-ramp to a valuable employment relationship, the more likely a program is to attract the unwelcome attention of groups like the American Alliance for Equal Rights.

What appears clear is that recruitment efforts in diverse communities can and should continue to accelerate. Just as universities have been urged to form relationships with high schools in diverse communities and companies have been advised to increase their presence at historically black colleges, dispute resolution trade groups, organizations and providers must continue to deepen their ties with affinity groups at the university and law school levels and beyond. Additionally, the dispute resolution community must continue to educate users as to the availability of the next generation of more diverse neutrals eager to make their mark.

As a raft of research studies reveal, diversity can make us smarter,[30] more innovative[31] and even more profitable.[32] That principle holds when nominating an arbitration slate, constructing a mediation roster or populating a panel for the next dispute resolution conference. While the *Students for Fair Admissions* decision was not the Supreme Court precedent diversity champions were hoping for, it is not an impenetrable barrier to positive change. Efforts to diversify the ADR field should and will continue.

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Endnotes

1. *Report to the House of Delegates: Resolution*, 105 A.B.A. Section of Disp. Res. 1 (2018), https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/105.pdf.

2. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

3. *Id.* at 5.

4. *Id.* at 6.

5. *Id.* at 7.

6. *Id.* at 39, which states, “Nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration or otherwise.”

7. *Id.* at 40.

8. Report and Recommendations of the New York State Bar Association Task Force on Advancing Diversity, adopted by the Executive Committee on Sept. 20, 2023, at 52, https://nysba.org/app/uploads/2023/09/NYSBA-Report-on-Advancing-Diversity-9.20.23-FINAL-with-cover.pdf.

9. *See Am. Alliance for Equal Rights v. Winston & Strawn LLP*, No. 4:23-cv-04113 (S.D. Tex. 2023); *see also Am. Alliance for Equal Rights v. Perkins Coie LLP*, No. 3:23-cv-01877-L (N.D. Tex. 2023); *Am. Alliance for Equal Rights v. Morrison & Foerster LLP*, No. 1:23-cv-23189 (S.D. Fl. 2023).

10. *Diversity Recruitment & Retention*, Perkins Coie, https://www.perkinscoie.com/en/about-us/firm/diversity/diversity-recruitment.html.

11. *Inclusive Recruitment*, Morrison & Forester, https://www.mofo.com/culture/diversity/recruitment-development.

12. *Id.*

13. *See Diversity, Equity & Inclusion*, Winston & Strawn, https://www.winston.com/en/diversity-equity-and-inclusion.

14. *Id.*

15. *See Diversity*, Sussman & Gofrey, https://www.susmangodfrey.com/diversity/.

16. Dan Roe, *Adams and Reese Folds Minority Fellowship After Blum Targets 3 More Law Firms*, The American Lawyer, Oct. 13, 2023, https://www.law.com/americanlawyer/2023/10/13/adams-and-reese-folds-minority-fellowship-after-blum-targets-3-more-law-firms.

17. For example, in addition to their standard summer associate salary, Perkins Coie pays its first- and second-year diversity and inclusion fellow a $15,000 stipend, to be paid at the conclusion of the summer. Fellows who are extended and accept an offer to join the firm as an associate following graduation receive a third stipend of $10,000 in May of their last year in law school. Fox Rothschild’s program similarly pays 1L participants a $7,500 stipend upon offer and acceptance of a 2L summer associate position and a second $7,500 at the conclusion of their second summer upon offer and acceptance of an entry-level associate position. Morrisson Foerster’s Keith Wetmore 1L Fellowship for Excellence, Diversity and Inclusion also distributes a healthy fellowship award of $50,000 in a fashion designed to encourage students to return either for a second summer at the firm or for full-time associate employment following graduation. Winston Strawn’s program also offers the “potential to receive a $50,000 scholarship if the student completes both 1L and 2L summer associate programs and accepts and offer of full-time employment.”

18. Dan Roe, *Is Edward Blum Done Suing Law Firms?*, The American Lawyer, Dec. 21, 2023, https://www.law.com/americanlawyer/2023/12/21/is-edward-blum-done-suing-law-firms (“ Blum also signaled that he may sue law firms that use new criteria in diversity fellowship applications that act as a proxy for race, something he accused Winston & Strawn of doing in his complaint against the firm.”).

19. *Report and Recommendations*, *supra* note 9 at 3.

20. *Id.* at 42-43 (citing the EEOC, CM-607 Affirmative Action, https://www.eeoc.gov/laws/guidance/cm-607-affirmative-action) (Report and Recommendations of the New York State Bar Association Task Force).

21. Report and Recommendations of the New York State Bar Association Task Force on Advancing Diversity, adopted by the Executive Committee on Sept. 20, 2023, at 52, https://nysba.org/app/uploads/2023/09/NYSBA-Report-on-Advancing-Diversity-9.20.23-FINAL-with-cover.pdf.

22. *Id.* at 55.

23. *Guidance: Classifying Employee Fellows vs Nonemployee Fellows*, Harvard University Policy, Dec. 5, 2022, https://policies.fad.harvard.edu/sites/hwpi.harvard.edu/files/fad_policies/files/2022dec05_published_draft_guidance_classifying_employee_fellows_vs_nonemployee_fellows.pdf.

24. *See Mansfield Rule*, Diversity Lab, https://www.diversitylab.com/pilot-projects/mansfield-overview/.

25. The Ray Corollary Initiative, https://www.raycorollaryinitiative.org/.

26. Rosana Belen Fernandez, Mark A. Romance, and Francine Esposito, *The “Stop Woke Act” – Florida’s Attempt To Prohibit Mandatory Employee Diversity Training Put on Hold for Now*, Day Pitney, Oct. 21, 2022, https://www.daypitney.com/insights/publications/2022/10/21-the-stop-woke-act-fl-prohibit-mandatory-diversity-training.

27. *Id.*

28. *Honeyfund.com Inc. v. Governor*, No. 22-13135 (11th Cir., Mar. 4, 2024).

29. Daniel Weisner, *Florida Urges U.S. Appeals Court To Revive Ban on ‘Woke’ Workplace Training*, Reuters, Aug. 24, 2023, https://www.reuters.com/legal/government/florida-urges-us-appeals-court-revive-ban-woke-workplace-training-2023-08-24/.

30. Katherine W. Phillips, *How Diversity Makes Us Smarter*, Scientific American, Oct. 1, 2014, https://www.scientificamerican.com/article/how-diversity-makes-us-smarter.

31. Report and Recommendations, *supra* note 9 at 14 (citing Rocío Lorenzo et al., *How Diverse Leadership Teams Boost Innovation*, BCG, Jan. 13, 2018, https://bcg.com/publications/2018/how-diverse-leadership-teams-boost-innovation).

32. *Id.* at 15 (citing McKinsey & Company, *Diversity Wins: How Inclusion Matters*, May 2020, https://www.mckinsey.com/~/media/mckinsey/featured%20insights/diversity%20and%20inclusion/diversity%20wins%20how%20inclusion%20matters/diversity-wins-how-inclusion-matters-vf.pdf).

Property Condition Disclosure Act Amended: New Requirements

By Karl B. Holtzschue

Since March 1, 2002, R.P.L. Section 462(1) of the Property Condition Disclosure Act (Article 14)[1] has provided that a seller of residential real property shall deliver to the buyer or the buyer's agent a Property Condition Disclosure Statement, making representations by the seller in answer to 48 questions in a form set forth in Section 462(2) and instructing the seller to answer all the questions prior to the signing by the buyer of a contract of sale. There were four choices as to answers: yes, no, unknown and not applicable. The seller could be sued for failure to answer all the questions[2] or for checking "unknown" if the seller had actual knowledge of a defect.[3] The form provided a blank after the last question where the seller could further explain any item and attach additional pages (the seller should carefully consider doing that).[4] It further provided that a copy of the disclosure statement signed by the parties shall be attached to the purchase contract and that nothing in the article was intended to prevent the parties from entering into agreements with respect to the physical condition of the property to be sold, including, but not limited to, agreements for the sale of the real property "as is."[5]

Section 462(3) provided that nothing in the article shall require a seller to undertake or provide for any investigation or inspection of his or her residential property or to check any public records. Section 465 provided for only two remedies: (1) the $500 credit for failure to deliver a Property Condition Disclosure Statement; and (2) a seller who provides the statement or fails to provide a revised one[6] shall be liable only for actual damages for willful failure to provide truthful answers based on actual knowledge, in addition to any other equitable or statutory remedy.[7] Section 466 imposed a duty upon a listing real estate broker to timely inform the seller of his or her obligation to deliver the Property Condition Disclosure Statement. It further provided that a buyer's real estate broker, or the seller's real estate broker if the buyer is not represented by a real estate broker, was required to inform the buyer of the right to receive the disclosure. Section 467, titled "Liability," stated: "Nothing in this article shall be construed as limiting any existing legal cause of action or remedy at law, in statute or in equity." Note that legislation did not expressly disallow a waiver of the duty to comply with its obligations.

Many attorneys for sellers downstate (First and Second Departments) have advised their clients to give the $500 credit instead of the Property Condition Disclosure Statement because they believe that many of the questions are vague and some have "catch-all" provisions that could become traps for the unwary and unfairly expose the seller to second-guessing and claims for misstatements, omissions or other noncompliance.[8] After all, in New York, under the doctrine of caveat emptor, and aside from the legislation, a seller of residential property has no duty to make any statements at all about the condition of the property (except for active concealment, affirmative misrepresentation or partial disclosure). The buyer has a duty to use the means available to check the condition, and the buyer must justifiably rely on a misrepresentation. Neither the "as is" nor merger clauses will generally protect the seller from a claim of fraud.[9] The seller has generally only been held liable for fraudulent nondisclosure of material latent defects in situations where the buyer did not use means available to check, the seller's conduct amounted to "active concealment,"[10] the seller had "superior knowledge"[11] or there were "special facts."[12]

On Sept. 22, 2023, the governor signed A.1967/S.5400 into law as Chapter 484 of the Laws of 2023. That chapter deleted from the disclosure form the statement that in the event a seller fails to deliver the disclosure prior to the buyer signing a binding contract of sale, the buyer shall receive at the closing a $500 credit against the purchase price. It also added seven new questions about flood hazard areas (100-year and 500-year floodplains according to the Federal Emergency Management Agency's current flood insurance rate maps), federal requirement to maintain flood insurance, FEMA assistance for flood damage, current flood insurance, FEMA elevation certificate and filing of a claim for flood damage with an insurance provider. This increases the number of disclosure questions from 49[13] to 56. The chapter amended Section 465 to change its title from "Remedy" to "Liability" and to delete from subsection (1) the requirement of a $500 credit for failure to deliver a disclosure statement. It kept "Nothing contained in this article shall be construed as limiting any existing legal cause of action or remedy at law, in statute or in equity." Subsection (2) about liability for actual damages for provision of a disclosure statement remains. Section 467, which stated the same thing, was repealed. The effective date for this amendment was March 20, 2024. The Assembly/Senate memorandum on the bills focused on flood risk disclosure (it falsely stated that no other state has an opt-out credit option – see $500 credit in current Connecticut Residential Property Condition Disclosure Report).[14]

The New York State Association of Realtors filed a Memorandum in Opposition stating that the bill would upend decades of practice, that there are problems with some of the flood-related questions, that FEMA's flood maps are outdated and inaccurate, that flood zone information is often inaccessible and unreliable and that buyers would be better served relying on a home inspector rather than mandatory seller disclosure.[15] The Real Property Law Section was unable to file a memorandum in connection with the bill. The amended legislation takes us into new and uncharted territory.

The $500 credit by the seller is gone as of March 20, 2024. But the amended legislation only provides for

liability for actual damages for a seller who provides a Property Condition Disclosure Statement or fails to provide a revised one. The statute no longer addresses a remedy or liability for the failure of the seller to provide a fully completed statement in the first place. So, could the seller refuse to deliver one without giving a $500 credit? With the $500 seller credit deleted from the legislation, it is difficult to foresee what liability the seller would have if a fully completed statement is not delivered prior to signing a contract. It might: (1) enable the buyer to claim rescission of the contract because of that violation of the statute;[16] (2) enable the buyer to sue to compel delivery of a disclosure statement; (3) enable the buyer to have a defense to a suit by the seller for anticipatory breach when the buyer cancels;[17] (4) bolster a claim that a condition defect was peculiarly within the seller's knowledge, under the "superior knowledge" or the "special facts" doctrines; or (5) bolster a claim of actual concealment.[18] Under the amended Property Condition Disclosure Act, with the $500 credit deleted, what would a court do if the seller did not answer all the questions (e.g., answering only the nine general information questions or not answering old questions 30 and 31 as to flooding and/or the seven new questions about flood hazards and damage)?[19]

A suit by the buyer to compel delivery of a fully completed disclosure statement would be costly and time-consuming and probably not very practical in a residential sale. Is the statement then reduced to being a handy checklist for the buyer's attorney and inspector? On the other hand, could the buyer successfully refuse to sign a contract of sale without first receiving a fully completed disclosure statement?

The most effective method of discouraging use of the credit would probably have been to increase the amount – perhaps to $1,000 or $10,000.

But could the seller try to get the buyer to waive delivery of a disclosure statement in a provision in the contract? The result may depend on the bargaining positions of the parties. I question whether the provision in Section 461(1) about not preventing the parties from entering into agreements as to physical condition would be interpreted to allow the parties to agree to a waiver. But would a waiver be enforceable? The legislation does not expressly forbid a waiver of its provisions. It remains to be seen whether such a waiver would be enforced by New York courts. On the one hand, New York courts tend to enforce waivers of statutory rights when they are entered into knowingly and on an arm's-length basis and are not void against public policy, based on the strong public policy in favor of freedom of contract.[20] Note that in the *159 MP Corp*. case the commercial lease was negotiated at arm's length by sophisticated, counseled parties of equal bargaining power. The Court of Appeals, in a 5-4 decision, noted that waivers may be void in situations where the public policy in favor of freedom of contract is outweighed by another weighty and countervailing public policy, such as the Rent Stabilization Law (the three dissenters argued against a waiver, noting that the Legislature's ability to declare contractual terms void as against public policy does not disable the common law from doing so as well, in a dissent that was longer than the four-judge majority opinion). It also noted that the absence of a provision of a waiver in a statute is a significant factor in militating against invalidation of a contract term on public policy grounds. However, in the case of an attempt to obtain a waiver of delivery of a Property Condition Disclosure Statement in a residential sale, a court may well view the public policy of consumer protection of a probably unsophisticated, and perhaps uncounseled, residential purchaser as outweighing the public policy in favor of freedom of contract. But when would a buyer try to claim that a waiver was unenforceable: with a claim for rescission or as a defense to a suit for anticipatory breach? What would be the downside for a seller's attorney to insist on a waiver? The recent amendment to the Property Condition Disclosure Act seems to raise more questions than answers – questions that will perhaps be addressed by New York courts as they preside over litigation between aggrieved buyers and sellers in coming years.

Karl B. Holtzschue has served as chair of Real Property Law Section (2007-2008), co-chair of the Title and Transfer Committee (1998-2004) and co-chair of the Legislation Committee (2008-2014). He was recipient of the Real Property Law Section's professionalism award in 2012. He is author of "Holtzschue on Real Estate Contracts and Closings" (PLI).

Endnotes

1. N.Y. Real Property Law (RPL) Article 14, §§ 460-467. Karl Holtzschue, *Property Condition Disclosure Act Enacted*, 30 N.Y. Real Prop. L.J. 15 (No. 1 Winter 2002); I was actively involved in negotiations about the original PCDA as chair of the Task Force on Disclosure for the RPLS.

2. *Gabberty v. Pisarz*, 10 Misc.3d 1010, 810 N.Y.S.2d 799 (Sup. Ct, Nassau Co. 2005) (where questions 30 and 31 as to flooding and basement seepage were *unanswered*, purchaser was limited to recovering a $500 credit as damages, and purchaser failed to state a claim for common-law fraud in the inducement where, having accepted the incomplete PCDS, she could not claim reliance on the unanswered questions and there was no proof of active concealment).

3. *Malach v. Chuang*, 194 Misc.2d 651 (Civil Ct., City of N.Y., Richmond Co. 2002) (seller answered *unknown* to 30 questions, but not liable for rot in the swimming pool as seller did not have actual knowledge of the defect); Karl Holtzschue, *Property Condition Disclosure Act: First Case has Right Result for Wrong Reasons*, 31 N.Y. Real Prop. L.J. 5 (No. 1 Winter/Spring 2003); *Kazmark v. Waslyn*, 167 A.D.3d 1386 (3d Dep't 2018) (seller answered *unknown* as to rot or water damage; having corrected prior problems, he had no actual knowledge of damage or any defects when he completed the PCDS and won summary judgment).

4. Karl Holtzschue, *With a PCDS, the Purchaser Now Has More Than a Ghost of a Chance: An Update on PCDS and Caveat Emptor Cases*, 41 N.Y. Real Prop. L.J. 25 at 31 (Winter 2013). For example, if the basement is not watertight and has a sump pump (as to original Question 31 about standing water); *Dolansky v. Frisillo*, 92 A.D.3d 1286 (4th Dep't 2012) (where PCDS stated that garage had water and rot damage and seller did not know whether there were structural defects, buyer could not show justifiable reliance to support fraud claim); Karl Holtzschue, *Holtzschue on Real Estate Contracts and Closings* (PLI, 2023) § 2:2.11[B]. Note that new Question 39 replaces the standing water standard with "any water penetration or damage."

5. Most residential contracts contain an "as is" clause, providing that the buyer is fully aware of the condition and state of repair of the premises based on the buyer's own inspection and not on any representations, written or oral, by the seller or the seller's representatives and that the buyer has the right to inspect. *See, e.g.*, the residential Multibar contract described in Karl Holtzschue, *Holtzschue on Real Estate Contracts and Closings* (PLI, 2023) § 2:2.11.

6. *Kier v. Wilcox*, 43 Misc.3d 1299(A) (City Ct., City of Canandaigua 2014) (sellers liable for damages for failure to revise PCDS after seller's broker notified that septic system leach field encroached on neighbor's property; broker's knowledge imputed to seller, constituting concealment).

7. There is no mention in the PCDA of any other remedy for failure to deliver a PCDS.

8. Holtzschue, *supra* note 5 at § 1:1.9.

9. Holtzschue, *supra* note 5 at § 2:2.11 [A][1], [A][2], [A][4], and [A][5].

10. Karl Holtzschue, *The Purchaser Barely Has a Ghost of a Chance: Update on Caveat Emptor and PCDS Cases*, 50 N.Y. Real Prop. L.J. 14 (No. 1 2022).

11. *Young v. Keith*, 112 A.D.2d 625, 627 (3d Dep't 1985) (seller's failure of its duty to disclose serious disrepair of water and sewer systems of mobile home park held to be concealment of fact with intent to defraud where seller had *superior knowledge* not available to purchaser; deficiencies could not be discovered by an ordinary inspection).

12. Karl Holtzschue, *Caveat Emptor: Purchasers Win Under the Special Facts Doctrine*, 51 N.Y. Real Prop. L.J. 12 (No. 1 2023); *470 4th Avenue Fee Owner, LLC v. Adam America, LLC*, 2020 WL 58937744 (Sup. Ct., N.Y. Co. 2020) (under "special facts" doctrine, "as is" clause did not bar purchaser's fraud-based claims against seller for defectively installed air conditioning and heating units that caused severe water infiltration where the facts were peculiarly within the seller's knowledge; sellers did not permit inspection behind walls or any invasive testing), *affirmed as modified*, 205 A.D.3d 512 (1st Dep't 2022).

13. A section 19-a as to testing for indoor mold had been previously added. 2022 Sess. Laws Ch. 690 (McKinney).

14. Conn. Gen. Stats. § 20-327c.

15. This opposition to the PCDA is a change of position, due to a change in membership. Beginning in 1991 the National Association of Realtors (NAR) had a nationwide policy to encourage enactment of statutes requiring disclosure by the seller, which was successful in 29 states. At the urging of NYSAR, the PCDA was introduced in New York as early as 1998 and again in 1999 and 2001. Karl Holtzschue, *Property Condition Disclosure Act Enacted*, 30 N.Y. Real Prop. L.J. 15 at 17 (No. 1 Winter 2002).

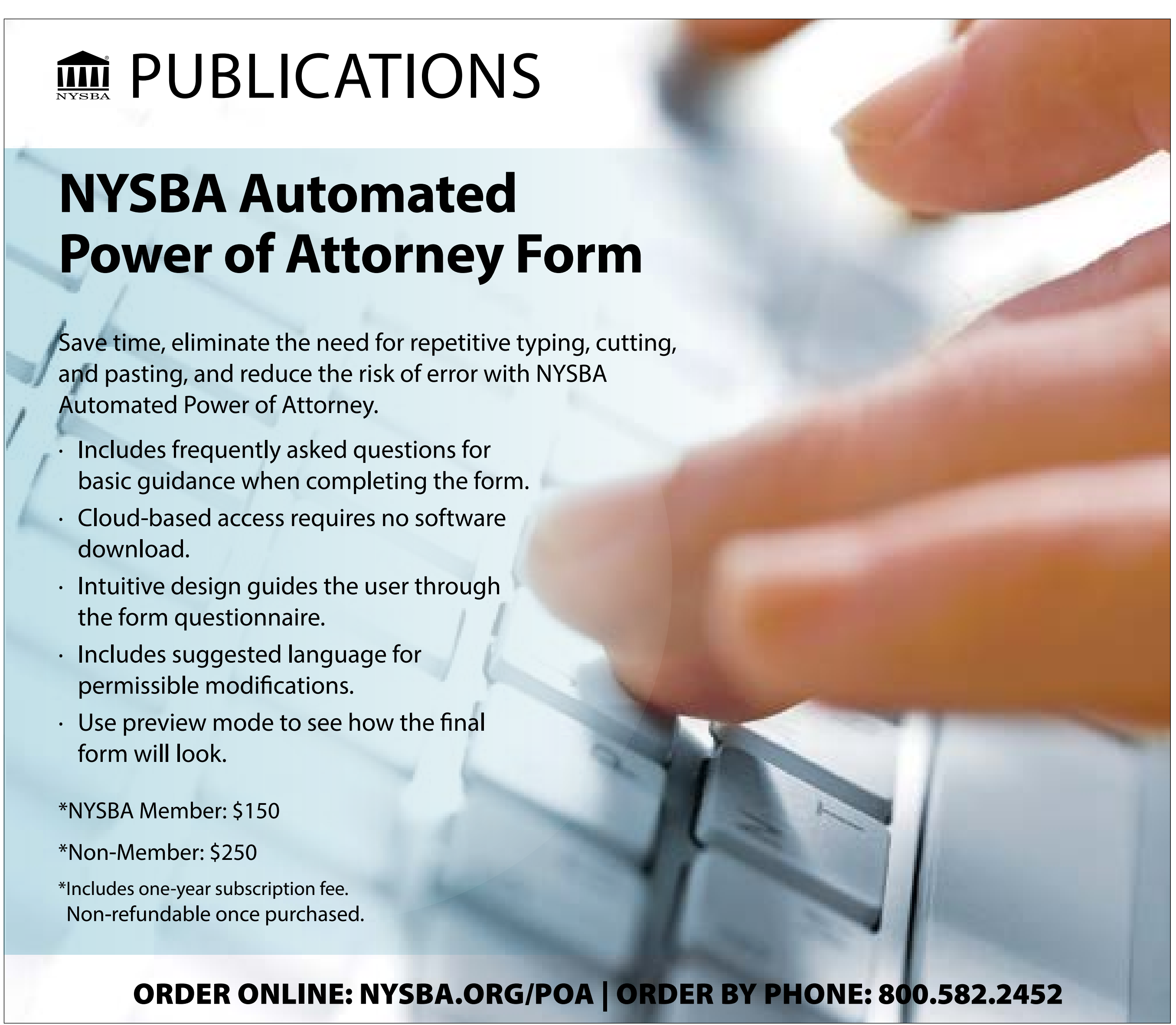
16. *Kurtz v. Foy*, 65 A.D.3d 741 (3d Dep't 2009) (buyers sued for rescission; complaint stated cause of action for fraud alleging that sellers assured buyer that road was private and PCDS stated that no one else had a right to use any portion of the property, but road was public and sellers had unsuccessfully petitioned town to abandon it).

17. *Anderson v. Meador*, 56 A.D.3d 1030 (3d Dep't 2008) (sellers' nondisclosure of easement agreement and drainage settlement agreement and negative responses on PCDS constituted affirmative misrepresentation and active concealment; many issues of fact precluded summary judgment for sellers).

18. Suggested by Prof. Robert J. Sein.

19. *Compare Gabberty v. Pisarz*, 10 Misc. 3d 1010 (Sup. Ct, Nassau Co. 2005), referred to in note 2 above.

20. *See 159 MP Corp. v. Redbridge Bedford, LLC*, 33 N.Y.3d 353 (2019) (4-3 decision holding that a provision in a commercial lease waiving the tenant's right to bring a declaratory judgment action was not void as against public policy). This case was brought to my attention by Prof. Robert J. Sein.



Judges, Gag Orders and Free Speech: Where Are the Boundaries?

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

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To the Forum:

I am an attorney defending my client in a bench trial against allegations of fraud. My client is a well-known public figure, so the case has been closely monitored by the media. My client has been very vocal about his concerns that the judge and his staff are biased against him. And I have to say, I agree with him.

Given my client's status, everyone in the courtroom knew who he was before he ever stepped foot before the judiciary – including the judge's clerk. Throughout the trial, the clerk could be seen shaking his head in disapproval. During my client's testimony, the clerk glanced at the judge numerous times with the same disapproving look and furiously took notes that he passed along to the judge. The judge passed notes back to the clerk as well.

This behavior unnerved my client, who suspected that the clerk was biased against him. After an eventful day of trial, my client posted on his social media page to his millions of followers, questioning the clerk and judge's impartiality and saying that he felt he was not receiving a fair trial. One of the defense attorneys on my team reposted our client's post to his own social media page. This instantly made news headlines.

When we appeared in court the next day, my team argued to the judge that his and the clerk's conduct was improper as the judge appeared to be consulting with the clerk during the proceedings by passing notes.

By the end of the day, the judge issued a gag order preventing my client and the rest of our team of defense attorneys from publicly commenting on the judge and his staff. The judge reasoned that the order is being issued to protect his office and staff from further threats of violence that have resulted from, in his words, "the public bashing of the judiciary" on my client's social media account.

My question is, does this infringe my client's and fellow defense attorneys' First Amendment rights? Can a judge prohibit litigants and attorneys from criticizing the judiciary outside of the courtroom?

Sincerely,
Sy Lenced

Dear Mr. Lenced,

The right to critique public officials is one of our most fundamental constitutional rights. But for attorneys, it is a right that has certain limitations. Attorneys cannot engage in conduct that threatens the integrity of the judicial system.[1] The Rules of Professional Conduct broadly govern the behavior of lawyers both in and out of court. The client's rights are not circumscribed by the RPC as the RPC applies only to attorneys; thus, this Forum addresses only the attorney's conduct. In *United States v. Salameh,* the court noted that an attorney's speech "may be subjected to greater limitations than could constitu-

tionally be imposed on other citizens or on the press" when participating in judicial proceedings.[2]

It is important to note that while the RPCs do limit a lawyer's conduct to an extent, "attorneys . . . do not lose their constitutional rights at the courthouse door."[3] The First Department has stated, though, that "an attorney who makes 'false, scandalous or other improper attacks' upon a judicial officer is subject to discipline."[4] In contrast, the Second Department has expressed the view that "while attorneys have a professional responsibility to protect the fairness and integrity of the judicial process, this does not mean that lawyers surrender their First Amendment rights as they exit the courtroom."[5]

Rule 3.6 addresses trial publicity and prohibits a lawyer "who is participating in or has participated in a criminal or civil matter" from making an "extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." Comments to Rule 3.6 acknowledge the difficult balance between "protecting the right to a fair trial and safeguarding the right of free expression." The comments explain that in certain situations it is necessary to prevent the dissemination of information regarding legal proceedings to prevent prejudice against either party. On the other hand, though, the public "has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern." Judges do have authority to limit attorneys' ability to speak about proceedings outside of the courtroom if there is the "substantial likelihood" that it will materially prejudice the proceedings, but this is still subject to First Amendment requirements.[6]

Here, while the defense attorney did not make the statement himself, reposting another's post is essentially the same and is considered by many to be akin to implied support for the original content. The defense attorney's repost could be considered an "extrajudicial statement" for purposes of Rule 3.6. Additionally, given the public-figure status of the client, the lawyer likely knew – or at least reasonably should have known – that reposting his client's claims against the judiciary would be disseminated by means of public communication (i.e., social media).

As to whether the post would have a substantial likelihood of materially prejudicing the proceedings, there is an obvious difference between jury and bench trials. Here, there is no jury at risk of being influenced, and while a judge may be less affected by public criticism, there is a possibility it could impact witnesses' willingness to testify for fear of public intimidation or scrutiny. In the age of social media, it is easy for someone with a high volume of loyal followers to pit them against specific individuals or groups of people – which has the added potential of becoming dangerous. As the comments to Rule 3.6 suggest, the impact of the social media statements in these proceedings specifically may not be outweighed by the necessity to safeguard the right of free expression.

In the disciplinary proceeding of *Matter of Giuliani*,[7] the court found that the RPCs, generally, "concern conduct both inside and outside of the courtroom" and applied different RPCs to statements depending on where they were made. In that case, Giuliani faced sanctions for "demonstrably false and misleading statements" made to "courts, lawmakers and the public at large" in his representation of former President Donald Trump. As we are not here faced with in-court statements, we look to the *Giuliani* case for guidance only with respect to out-of-court statements. Rule 4.1 provides that a lawyer shall not knowingly make false statements of fact or law to a third person. Rule 8.4 provides that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

In *Giuliani*, the court found that, in violation of Rule 4.1, the attorney knowingly made false misstatements of law and fact "to third parties consisting of over 3,700 members of the press and the public" who had dialed in to observe the proceedings. The court gave weight to the fact that these misstatements were made not just to one third party but thousands. The court also found that misstatements regarding the fraud claim also violated RPC 8.4(c) as they constituted conduct involving dishonesty and misrepresentation which is prohibited by this rule.

Furthermore, the court found that Giuliani violated both rules multiple times over when making statements regarding the 2020 presidential election results. The court cited what it viewed as "numerous false and misleading statements regarding the Georgia presidential election results" to lawmakers and the public at large, adding that he repeatedly said "that dead people 'voted' in Philadelphia in order to discredit the results of the vote in that city," and that "false and misleading statements that 'illegal aliens' had voted in Arizona during the 2020 presidential election." The court found that these false statements were made knowingly and with an intent to misrepresent the results of the election, thus violating Rules 3.3 (which governs the misrepresentations of fact and law that Giuliani made before the tribunal, specifically), 4.1 and 8.4.

However, it is important to distinguish between an attorney's misstatements of fact and merely sharing an opinion. *Giuliani* involved multiple misrepresentations of fact regarding the election results. Here, the defense attorney asserted a true statement of fact outside of the courtroom – that the judge and law clerk were passing notes to each other – and then expressed the opinion that the judge was biased and that his client was not receiving a fair trial.

In a civil matter involving former President Trump, a gag order was issued there because he took to social media to make a derogatory comment and allegations about the judge's law clerk. The judge issued a second gag order that extended to all lawyers working on the trial prohibiting them from making public statements inside or outside the courtroom "that refer to any confidential communications, in any form, between my staff and me."[8] While an appeals court judge temporarily suspended the gag order for potential First Amendment implications, the gag order was reinstated two weeks later by a four-judge panel.[9] It was decided that the gag order was necessary to protect the judge and his staff after their office experienced an increase in threatening messages and harassment.[10]

Based on this holding, it appears that not only did the judge have authority to limit the speech of the attorneys, but also had the authority to limit the speech of the litigant/defendant, Trump, because they threatened the safety of the judge and his staff. It appears that in this case, the judge adhered to basic principles of First Amendment law: freedom of speech and expression is not unlimited, and the government may impose limits when concerns for public safety arise. However, a high bar must be met in any scenario where freedom of speech and expression might be limited to justify such limitation.

The court in *Salameh* maintained that an order that "prohibits the utterance or publication of particular information or commentary imposes a 'prior restraint' on speech" and is thus subject to strict scrutiny. While the court noted that attorneys may be subject to greater limitations on speech, it also emphasized that such limitations "should be no broader than necessary to protect the integrity of the judicial system and the defendant's right to a fair trial." The court held that the restriction placed on the attorney by the judge was not narrowly tailored, but rather was a "blanket provision" encompassing *any* statement that had *anything* to do with the case or "may have something to do with the case," and the gag order was vacated.

A prior restraint on speech is subject to First Amendment due process. In *Carroll v. President & Comm'rs of Princess Anne*, the court found that an "order" issued "in the area of First Amendment rights" must be "precise" and narrowly tailored to achieve the "pin-pointed objective" of the needs of the case.[11] The Supreme Court looks at any type of prior restraint on speech "bearing a heavy presumption against its constitutional validity."[12] In *Near v. Minnesota*, the Supreme Court held that prior restraint may be allowed in *exceptional* cases, such as when the nation is at war or when the speech would incite violence.[13]

It has long been established that the First Amendment does not protect speech that is intended and likely to incite *imminent* lawless action.[14] This is known as the *Brandenburg* test, established by the Supreme Court in *Brandenburg v. Ohio* in 1969, and has been reaffirmed in many cases since.[15] The *Brandenburg* test sets a high bar to meet, and it may be difficult for a judge to find that your client and the defense attorney intended to incite imminent lawless action when they posted their critiques on social media. However, it could be argued that this post was likely to incite imminent lawless action given your client's notability and number of followers who would see the post. Still, if the defense attorney's intent to incite such lawless action in his re-post cannot be demonstrated, then the speech may be protected by the First Amendment.

Another limit to First Amendment protection is that statements about public officials that were known by the speaker to be false or made with "reckless disregard of whether [the statement] was false or not" are not protected speech.[16] Similar to the *Brandenburg* test, the court in *New York Times Co. v. Sullivan* set a high bar to punish someone for such speech, requiring that the public official against whom the statements were made must prove that the false statements were made with actual malice.

In this case, your client claimed that the law clerk and judge were biased against him. It may be argued that your client made this statement without any regard for whether it was true that the law clerk and judge were biased. However, given the nature of the statement itself, it is difficult to see where the line between an opinion

and fact may be drawn. If we were to assume that the law clerk and judge were not biased, your client's statements that they were – whether he knew this for a fact or not – may not be protected by the First Amendment. Considering that he made such a statement on his widely followed social media platforms, intending for the statement to reach a broad audience, the judge and law clerk might have a good case to make that your client made such a statement with "reckless disregard of whether it was false or not." However, the statement that the judge and his clerk were biased would be considered by most to be one of opinion, not fact.

In light of the case involving the gag order against President Trump, it appears that the bigger concern when it comes to public criticism against the judiciary on such a grand scale is the safety of the judge and his staff. Furthermore, the gag order in Trump differed from that in *Salameh* in that it restricted only speech "referring to confidential communications" between the judge and his staff.[17] The gag order would likely be considered overbroad if, like in *Salameh*, the judge prohibited Trump from saying anything at all about the case and judge publicly. Here, the gag order appears to be much broader than the one issued and upheld against Trump as it restricts your client and the defense attorneys from making *any* kind of public comment at all about the judge and his staff. This gag order is more akin to that in *Salameh,* which was found to be an unconstitutional prior restraint on speech.

Many cases and legal scholars have grappled with the balance between protection of First Amendment rights when it comes to criticizing public officials and upholding the integrity of legal proceedings. For lawyers, the RPC provide some clarity in Rules 3.3 and 3.6 by requiring them to avoid making statements that would prejudice the court proceedings they participate in. As we have seen in the latest cases against former President Trump, while the RPC do not necessarily govern litigants and individuals, it appears that judges do still have some authority to limit speech critiquing the judiciary in circumstances where the speech may create an environment unsafe for the judge, court staff and the parties involved.

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QUESTION FOR THE NEXT FORUM

To the Forum:

I am a managing partner at a 30-lawyer firm. For several years we have allowed clients to pay us by credit card as an accommodation to facilitate payment of advance retainers and legal fees. Our accountants have reminded me that the credit card companies charge processing fees that reduce the amount paid to us. They have suggested that the processing fees should be added to our invoices so that we can recoup that expense and get full payment of our fees. I assume there is nothing improper about attorneys allowing clients to pay by credit card but have concerns about the propriety of passing on processing and service fees to clients. I have read about various changes in the law but, frankly, I am not sure how the rules apply to lawyers.

Is it lawful for a law firm to charge clients for processing fees imposed by the credit card companies? Are there ethical rules that apply?

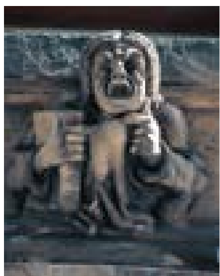
Sincerely,
M. Fee Concerned

Endnotes

1. *United States v. Salameh*, 992 F.2d 445 (1993).
2. *Id.*
3. *Levine v. United States Dist. Court for Cent. Dist. of California*, 764 F.2d 590, 595 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986).
4. *Matter of Wisehart*, 721 N.Y.S.2d 365 (2001).
5. *National Broadcasting Co. v. Cooperman*, 116 A.D.2d 282 (2d Dep't 1986).
6. *United States v. Salameh*, 992 F.2d 445 (1993).
7. 197 A.D.3d 1 (1st Dep't 2021).
8. https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=2yAOg8Zx5CTVK5fRESuAVA==.
9. *Id.*
10. Michael R. Sisak, *Appeals Court Again Upholds Gag Order Barring Trump From Commenting About Judge's Staff*, PBS, Dec. 14, 2023, https://www.pbs.org/newshour/politics/appeals-court-again-upholds-gag-order-barring-trump-from-commenting-about-judges-staff.
11. *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175 (1986).
12. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).
13. *Near v. Minnesota*, 283 U.S. 697 (1931).
14. *What Does Free Speech Mean?,* U.S. Courts, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does.
15. *Advocacy of Legal Action*, Cornell Law School, June 2022, https://www.law.cornell.edu/wex/advocacy_of_illegal_action.
16. *Freedom of Expression*, ACLU, March 1, 2002, https://www.aclu.org/documents/freedom-expression.
17. It may be arguable whether the notes passed between the judge and his staff were confidential communications. While the content of the notes may be considered confidential, the act of passing them likely would not be, as the attorneys, the parties and the whole courtroom could clearly see that the law clerk had passed a note to the judge. The U.S. Supreme Court said in *Craig v. Harney*, 331 US 367, 374 (1947), "A trial is a public event. What transpires in the court room is public property." So the passing of notes between the judge and his law clerk could not possibly have been confidential. What the notes said might be confidential, so long as not seen by anyone other than the judge and court staff.

Affirmation of Truth of Statement by 'Any Person'

By David Paul Horowitz and Katryna L. Kristoferson



As many of us have heard by now, there has been a major amendment to CPLR 2106, Affirmation of truth of statement. Previously limited to lawyers, physicians, osteopaths or dentists, CPLR 2106 can now be used by "any person," regardless of where they are located.

Prior Versions of CPLR 2106

When originally enacted in 1963, CPLR 2106 provided as follows:

> Rule 2106. Affirmation of truth of statement by attorney
>
> The statement of an attorney admitted to practice in the courts of the state, authorized by law to practice in the state, who is not a party to an action, when subscribed and affirmed by him to be true under the penalties of perjury, may be served or filed in the action in lieu of and with the same force and effect as an affidavit.

Ten years later, in 1973, CPLR 2106 was amended to permit physicians, osteopaths or dentists licensed to practice in New York to join the exclusive club of those permitted to submit affirmations in lieu of affidavits, again so long as the affirmant was not a party to the action in which the affirmation was being utilized.

Forty years later, in 2013, CPLR 2106 was again amended to add a new subdivision (b), which greatly expanded the cohort permitted to utilize an affirmation, literally adding billions of new members to this formerly exclusive club, so long as the affirmant was located physically outside the United States and enumerated possessions of the United States. The 2013 amendment left the first paragraph of CPLR 2106 unchanged and added the following language:

> (b) The statement of any person, when that person is physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:
>
> I affirm this ___ day of ______, ____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that I am physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.
>
> (Signature)

The inclusion of approved language for the form of the affirmation was a benefit to the bar, and the "suggestion" that going forward affirmations "be in substantially the following form" should not be read to encourage creative drafting. And there CPLR 2106 remained until 2023 when, in an interesting twist, two different amendments to the statute were simultaneously enacted, albeit with different effective dates.

The Recent Amendment

On Oct. 25, 2023, the governor signed two amendments to CPLR 2106 into law. One, effective immediately, allowed for all New York-licensed health care practitioners (instead of just physicians, osteopaths or dentists), to submit affirmations in lieu of affidavits.[1] The other, effective Jan. 1, 2024, allows for anyone, anywhere to submit an affirmation in lieu of an affidavit.[2]

The amendment effective Oct. 25, 2023, had limited changes to CPLR 2106, replacing "physician, osteopath or dentist" with "health care practitioner licensed, certified, or authorized under title eight of the education law," and adding in the pronoun "her" in addition to "him."

The amendment effective Jan. 1, 2024 is a total overhaul of CPLR 2106. Harkening back to the earlier days, the newest 2106 only has one provision, which reads as follows:

> Rule 2106. Affirmation of truth of statement. The statement of any person whenever made, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in New York in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:

I affirm this ___ day of ______, ____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

(Signature)

It is unclear why these consecutive amendments were signed into law on the same day, with the first only being effective 69 days. Confusing things further, the New York State Senate website shows both amendments with the following disclaimer: "NB Separately amended; cannot be put together." While the amendment effective Jan. 1, 2024 clearly encompasses the expanded class of medical providers covered by the Oct. 25, 2023 amendment, it does not appear to supersede it, and the first amended version is not repealed. So, while medical providers and attorneys can continue to avail themselves of the Oct. 25, 2023 amendment, it is a distinction without a difference, and other than providing fertile ground for discussion among academics it will be nothing more than a footnote in the history of the CPLR.

In addition to those issues, perhaps the most important question surrounding this amendment: since "any person" can now submit an affirmation "wherever made," why would anyone use an affidavit?[3]

The Jan. 1, 2024 amendment no longer contains the limitation that an affirmation may only be utilized by a non-party to the action.

Affidavit vs. Affirmation

So, is this largely a bloviated discussion centered on semantics? Other than the physical acts surrounding affidavits versus affirmations, is there really a difference?

> Affidavit (16c) A voluntary declaration of facts written down and sworn to by a declarant, usu. before an officer authorized to administer oaths.
>
> Affirmation (15c) A solemn pledge equivalent to an oath but without reference to a supreme being or to swearing; a solemn declaration made under penalty of perjury, but without an oath. Fed. R. Evid. 603; Fed. R. Civ. P. 43(b); While an oath is "sworn to," an affirmation is merely "affirmed," but either type of pledge may subject the person making it to the penalties for perjury. Cf. oath.—affirm, *vb.*—affirmatory, *adj.*[4]

While the definitions clearly show that we're dealing with different things, what about the weight given, or perhaps punishment, for submitting an untruthful affidavit or affirmation? Largely, affidavits and affirmations are treated the same.

Notably, the Advisory Committee on Civil Practice left us with these parting words in their comment to the then-proposed amendment: "The Committee has concluded that whether a person provides an affidavit or an affirmation, a false statement made with intent to mislead the court will constitute perjury in the second degree, a Class E. felony punishable by up to four years imprisonment. Penal Law 70.00(2)(e), 210.00(1) and (5), 210.10."[5]

Unfortunately, as this is a new amendment, there is essentially no case law available[6] to aid in assessing the proper use of an affirmation by "any person." What we can caution you against is taking any creative liberties or deviating from the sample language in the Jan. 1, 2024 amendment. Post-effective date of the newest CPLR 2106, a decision from New York County Supreme Court by Melissa A. Crane, J.S.C., held that an unsworn affirmation stating "under the penalties of perjury under the laws of the United States pursuant to 28 U.S.C. § 1746, affirm that the following is true and correct" was not sufficient under the prior, or current, version of CPLR 2106.[7]

Conclusion

As the late David Siegel cautioned attorneys contemplating testing the outer limits of statutes and rules or otherwise making new law: "Let it be done in someone else's case." Sound advice, then and now.

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

Endnotes

1. https://www.nysenate.gov/legislation/bills/2023/A6065.
2. https://www.nysenate.gov/legislation/bills/2023/A5772.
3. N.B. California has been allowing any person to certify an unsworn statement, under penalty of perjury, since 1957. *See* Cal.Civ.Proc.Code § 2015.5.
4. Black's Law Dictionary (11th ed. 2019).
5. Report of the Advisory Committee on Civil Practice to the Chief Administrative Judge of the Courts of the State of New York, January 2020, p. 86.
6. We also note, the amended § 2106 was referenced in another case where the court permitted a defendant to correct a deficient affidavit *nunc pro tunc*. *See Knust v. Singh*, 2024 N.Y. Slip Op. 30145(U) (Sup. Ct., N.Y. Co. 2024).
7. The court also determined that "[m]oreover, the exhibits annexed to Efstathios's affirmation are unauthenticated and inadmissible." *See Great Lakes Ins. v. Am. S.S. Owners Mut. Protection & Indem. Assn. Inc.*, 2024 N.Y. Slip Op. 30148(U) (Sup. Ct., N.Y. Co. 2024).

Confronting Antisemitism With Historical Knowledge

By Rebecca Melnitsky

Antisemitism, or hostility toward Jews, has a long history – going back thousands of years and before the advent of Christianity. And while the hatred can manifest from the subtle to the overt, it has sadly persisted though the millennia, causing violence and harm to Jewish people.

At a recent continuing legal education course hosted by the New York State Bar Association, experts discussed how antisemitism has evolved through time, as well as how one can fight hatred and prejudice.

In the three months following Hamas' attack on Israel on Oct. 7, the Anti-Defamation League documented 3,291 incidents of antisemitic rallies, assault, vandalism and harassment across the United States for an average of nearly 34 incidents a day.

Even before Oct. 7, the ADL documented that antisemitic hate crimes steadily rose throughout the past decade.

Richard Lewis, president of the New York State Bar Association, advised confronting people who make prejudicial remarks and making a point that prejudicial comments are not acceptable. "I don't talk about it just with regards to antisemitic statements but also statements that are critical of other racial and ethnic groups," he said.

Domenick Napoletano, president-elect of the New York State Bar Association, said he would demand that a person who made antisemitic remarks leave his office.

Paola Tartakoff, professor and chair of the Department of Jewish Studies at Rutgers University, said that educating the people around us is important. "Depending on the power dynamics and one's positionality, different responses might be harder or easier," she said. "One has to weigh the pros and cons of what one says and when one says it. There is always the option of speaking with someone one-on-one later on. And one wants to be sure to speak in a way that will enable the person to listen and not just be defensive. . . . If there is still a chance to speak to that person, there could be a way of making a difference to how that person might speak or behave in the future."

Tartakoff led the virtual training, which more than 400 people attended.

Antisemitic Tropes Then and Now

"I want to stress how important it is to grasp that Jews are ethnically, culturally, religiously – in terms of degree of practice – and even politically, and in every other way, diverse," said Tartakoff. "This diversity is key because antisemitism contends otherwise. Antisemitism paints all Jews with a single brush. . . . What antisemitism does is conjure an imagined Jew who in fact reflects the conjurer's own fears and anxieties over and above anything that is true about actual Jewish people."

For example, Tartakoff explained that in the 11th and 12th centuries, Europe transitioned to a money-based economy, creating new money-based professions like bankers and moneychangers. While the vast majority of the people in these professions were Christians, Christian preachers characterized the "dangers" of these activities with anti-Jewish rhetoric.

"In creating the figure of the wicked Jewish moneylender, medieval Christian moralists were in fact projecting onto Jews their own anxieties about their own rapidly changing society," said Tartakoff.

For centuries, this has persisted as a myth that Jews are greedy, drawn to money or responsible for the ills of capitalism. For several hours in 2022, a Google search for the word "Jew" based on that stereotype led to this definition: "Bargain with someone in a miserly or petty way." Google took down this result after many online pointed it out.

"We find mainstays of today's negative characterizations of Jews lodged deep in our cultural bedrock," said Tartakoff. "Antisemitism engages narratives that are deeply embedded in our consciousness, and its expressions continually evolve to reflect new conditions."

The program was sponsored by the Task Force on Combating Antisemitism and Anti-Asian Hate and the Committee on Diversity, Equity, and Inclusion.

This antisemitism training was the first in a series of anti-bias programs. The association also plans to offer programs on Anti-Asian hate, Islamophobia and related topics as part of its mission to educate and inform the public.

U.S. Supreme Court Associate Justice Sonia Sotomayor Will Speak at the New York State Bar Association Civics Convocation

By Susan DeSantis

U.S. Supreme Court Associate Justice Sonia Sotomayor will speak at a New York State Bar Association Civics Convocation designed to explore how to ensure New Yorkers understand what the U.S. Constitution guarantees and how our democracy works.

After delivering her remarks virtually to an audience at the Bar Center in Albany on May 9, Justice Sotomayor, who is also a board member of the nonprofit civic education provider iCivics, will answer questions from students.

The Civics Convocation will bring together luminaries from the worlds of education, government and law to examine a troubling lack of basic knowledge among adults and young people about civics – with many Americans unable to name the three branches of government or describe their responsibilities as citizens.

“We are at a crisis point in civic education in New York and the nation,” said Richard Lewis, president of the New York State Bar Association. “In an endless sea of misinformation, how can we better prepare our students and ourselves to think more critically about what we read and hear? If we don’t have a collective understanding of how our government functions, it will be difficult – if not impossible – for us to play the very important roles of citizens in this democracy.”

New York’s Chief Judge Rowan Wilson will give a keynote address at the convocation. “I am honored to collaborate with the New York State Bar

Association to instill in young people an understanding of how our systems of government are intended to work and why they are important.”

New York State Commissioner of Education Betty Rosa, Chancellor of the New York State Board of Regents Lester Young, Chair of the New York State Senate Education Committee state Sen. Shelley Mayer, and other panelists will discuss the steps New York is taking to improve civic education. Susan Arbetter, anchor at Spectrum News’ Capital Tonight, will moderate.

David Bobb, CEO of the Bill of Rights Institute; Louise Dubé, CEO of iCivics; Liz Clay Roy, CEO of Generation Citizen; and Verneé Green, CEO of Mikva Challenge, will discuss current trends in the national landscape of civic education. Christopher Riano, CEO of the Center for Civic Education, will moderate.

The New York State Bar Association’s Civics Convocation Task Force – chaired by Gail Ehrlich; Jay Worona, deputy executive director and general counsel of the New York State School Boards Association; and Riano – is planning the event. Ehrlich, a lawyer and former high school teacher, and Worona are co-chairs of the bar association’s Committee on Law, Youth and Citizenship.

“We thank Justice Sotomayor and our distinguished panelists for the work they have done to improve civic education in America,” Lewis said. “I want to assure you that the bar association’s interest in civic education will not end when the convocation is over. The civics convocation task force is preparing a fact-finding report about how to improve civic education, and if approved by our governing body, we will advocate for its recommendations.”

Kathleen Sweet To Focus on Membership When She Takes Over President-Elect Role in June

By David Alexander

President-Elect Kathleen Sweet will immediately focus on supporting the New York State Bar Association's next leader while her efforts beyond that will center on backing the Strategic Planning Committee in its development of a framework for the association's future success.

"I initially want to support Domenick Napoletano and his presidency, while down the road my focus will be on serving our membership so we may continue to retain them while attracting new members. I'm excited about the new membership model and the rolling out of that plan, which I'm confident will help us meet our goals."

Sweet will take over as the association's president on June 1, 2025, and will succeed Napoletano, who will assume the presidency this June. She will become only the ninth woman to hold the office among the 127 individuals who will have preceded her. It is something she greatly appreciates.

"I know all the past eight women presidents, and Maryann Saccomando Freedman particularly, has been a role model. I'm very proud to follow in her footsteps."

Freedman, who in 1987–88 served as the New York State Bar Association's first female president, and Sweet both come from the Buffalo area where the association's future leader is a partner at Gibson, McAskill & Crosby.

Sweet mostly works in health care law, an area she developed an interest in early on in her career due to the diverse medical practice areas that her clients worked in. She is the first and only woman to serve on her firm's management committee.

Sweet is well-positioned to assume the NYSBA presidency due in part to her experience in several leadership positions within various bar associations. She served as president of the Bar Association of Erie County in 2012–13 and was a member of the American Bar Association's House of Delegates from 2017–22. The former role granted her an automatic seat in the NYSBA House of Delegates and provided the impetus for her to become active in the association due to its impact on the legal profession.

Sweet, a member of the Executive Committee as vice president of the Eighth Judicial District, is part of the Task Force on Medical Aid in Dying and the Task Force on Advancing Diversity.

She earned her juris doctorate from Villanova University Charles Widger School of Law and completed her undergraduate studies at Boston College where, in 2004, she was inducted into the Varsity Club Hall of Fame following an outstanding basketball career for the Eagles.

Sweet has been married for 27 years to Brian Fredericks, who is a recently retired civil structural engineer. They have two children – a daughter, Caroline Fredericks, who is attending Northeastern School of Law, and a son, Michael Fredericks, who works as an analyst for a defense contractor in the Washington, D.C. area.

They also have two labrador retrievers and are Buffalo Bills season ticket holders.

ABA House of Delegates Adopts New York State Bar Association Report on Advancing Diversity

By Susan DeSantis

The American Bar Association's House of Delegates recently adopted a New York State Bar Association report advising colleges, graduate schools, law firms and other businesses how to maintain diversity in the wake of the U.S. Supreme Court ruling on affirmative action.

"The report lays out a blueprint for how we can continue the important work of diversity, equity and inclusion within the new framework established by the Supreme Court," Richard Lewis, president of the New York State Bar Association, told the ABA House of Delegates. "It is not, of course, the final word, but rather the start of a long and ongoing effort that will continue to be refined over time as circumstances change and new challenges arise."

Lewis also noted in his remarks to the ABA that the legal community has made some progress diversifying its ranks, but it hasn't been enough. According to the ABA's 2023 profile of the profession, almost 90% of lawyers were white in 2013 compared to 79% last year.

"We know that increasing diversity is critical to improving access to justice," Lewis said in his speech. "Among other things, attorneys who represent a broad array of viewpoints, life experiences and backgrounds can better connect with and represent their clients – particularly those who are members of communities of color that are disproportionately involved in the criminal justice system."

Mary Smith, president of the American Bar Association, urged members of the House of Delegates to approve the report.

"Improving diversity in the legal profession must be a collective effort, and this report rightly recognizes that accomplishing this requires a far-reaching approach that encompasses all the facets of our community," she said.

"This undertaking resonates deeply and personally with me," Smith added. "As the first Native American woman to lead the ABA, I have first-hand experience of how critical it is to open doors and provide opportunities to underrepresented communities. It is only through such comprehensive and far-reaching efforts that true equity and diversity will be achieved."

The Advancing Diversity report, which was approved by the NYSBA House of Delegates in November of 2023, is in response to the U.S. Supreme Court decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina*. The court ruled in June that race-conscious admissions policies at the two universities are unconstitutional.

The New York State Bar Association Task Force on Advancing Diversity – chaired by former Homeland Security Secretary Jeh Johnson, former U.S. Attorney General Loretta Lynch, and Brad Karp, chair of Paul, Weiss – examined the impact the U.S. Supreme Court ruling will have on colleges, law schools, corporations, law firms and courts. Distinguished task force members include the chairs of 16 major law firms, the chief legal officers of ten large corporations, five of New York's eminent judges and the deans of Columbia and NYU law schools.

"The *Students for Fair Admissions* decision is today the law of the land and must be followed," the task force said in its report. "The question now is where do those in higher education, business, the legal profession and the judiciary go from here?"

The report recommends employing race-neutral strategies for achieving diversity at colleges and universities such as admitting the highest-ranking student at every high school in the state, considering a student's socio-economic status in admissions decisions and factoring in the more difficult path to academic achievement a first-generation college applicant had to take. Increasing the availability of financial aid, providing diverse mentors and targeting scholarships for low-income students could also help increase diversity.

"As we noted in the task force report, regrettably in 2023 it is still the impulse of many in America to self-segregate – where we live, where we worship and with whom we socialize," Johnson said when the report was first released to the public in September. "For many generations of American teenagers, higher education has been the first opportunity to broaden their horizons by living, socializing and learning with those different from themselves. And over recent years diverse student bodies at

colleges and universities have led to more diverse professions."

Lynch, co-chair of the task force and now a partner at Paul, Weiss, said the task force moved extremely quickly to make sure that corporations and institutions of higher education did not dismantle lawful diversity programs that are still permissible under the U.S. Supreme Court ruling.

"The diversity, equity and inclusion initiatives that have been developed by corporations and colleges over the past several decades have become part of the fabric of our society because they benefit all of our society," Lynch said. "A breadth of options remains for these organizations, who recognize that although talent is found throughout all our communities, equal opportunity is not. Our task force focused on this important issue because the American values of equity and fairness must be preserved."

Corporations and Law Firms

The task force's working groups on corporations and law firms examined the impact of the U.S. Supreme Court ruling on corporate diversity initiatives. They concluded that corporate diversity efforts continue to be lawful if the DEI programs comply with federal anti-discrimination statutes such as Title VI and Title VII of the Civil Rights Act and 42 U.S.C. Section 1981.

While DEI has been subjected to shareholder challenges, reverse discrimination litigation and government investigations, the report suggests weighing those risks against the downside of forgoing those efforts. Companies that abandon their public commitments can be subject to SEC investigations, shareholder derivative suits and discrimination actions.

"Law firms and corporations that fail to prioritize diversity do so at their own peril. They will lose the talent war, suffer financial consequences and fall behind their competitors," Karp said. "Even more important, supporting diversity, equity and inclusion is the right thing to do, morally and ethically."

Corporations can also turn to ideas that go beyond affirmative action, such as pipeline programs, affinity or employee resource groups, fellowships, scholarships, mentorships and sponsorships. These DEI efforts are targeted at increasing the number of diverse applicants and retaining diverse employees. Traditionally, such programs have been considered lawful under Title VII, the report states.

The Judiciary

The court system should encourage diverse candidates to apply, require bias training for judges, court personnel and jurors, and work with bar associations and affinity groups to publicize pathways to becoming a judge. In addition, courts should recruit in communities with higher percentages of underrepresented groups and ensure that job postings are inclusionary.

"Plain language and inclusive wording in job postings can positively influence the diversity and inclusivity of applicant pools and promote fairer recruitment practices," the report states. "Posting opportunities in LGBTQ+ centers, historically black colleges and universities, bar associations, fraternal organizations, faith communities, local colleges, career fairs and social media will also aid in attracting diverse applicants."

Judges and court staff should also:

- Support measures that create equal opportunities for diverse attorneys to take on lead roles in their courtrooms.
- Ensure that they have clear policies and protocols for investigating claims of bias, harassment and discrimination.
- Display photographs, portraits and artwork that convey the message that everyone is welcome.

Alternative Guardianships Protect the Rights of Vulnerable Clients

By Rebecca Melnitsky

Vulnerable clients need not submit to traditional, restrictive guardianships. When individuals are unable to make their own decisions, a proxy or a guardian can make decisions on their behalf. At a program presented by the New York State Bar Association, experts detailed three alternatives to traditional Article 17-A guardianships.

The panelists were:

- Kristin Booth Glen, former judge at New York County Surrogate's Court and dean emerita at CUNY School of Law.
- David H. Guy, judge at Broome County Surrogate's Court.
- Yi Wang Stewart, estate litigation associate at Farrell Fritz.
- Tara Anne Pleat, founding partner at Wilcenski & Pleat and past chair of the Elder Law and Special Needs Section.

- Sheila E. Shea, director of the Mental Hygiene Legal Service.

New York Mental Hygiene Law Article 81 has a standard for the "least restrictive form of intervention," meaning that when guardianship is necessary, the goal is to preserve an individual's independence and self-determination as much as possible.

One-Shot Guardianships

One-shot guardianships can be used in cases where a quick, temporary solution is needed for a specific issue. The provision is found in section 81.16(b) of New York Mental Hygiene Law.

Shea provided one such example from her practice, in which an autistic 18-year-old was going through treatment for leukemia at a hospital in Boston. The hospital would not let the young man consent to a bone marrow transplant.

"And the reason the hospital offered for this refusal was because this young man has autism," said Shea. "The hospital instructed the mother that if she wanted her son to receive this treatment from this particular hospital, she would need to secure guardianship. She didn't feel her son needed a guardian, and she was reticent to do this, but she also had a son in desperate need of care."

Shea's office managed to get the hospital to accept a limited, special guardianship. "The examples that we're providing to you are not hypothetical or theoretical, they are quite real," she said. "The ability to commence this case, I feel, saved this young man's life – in the sense that a vehicle was created for his mother to exercise his authority with a minimal intrusion on his liberty [and] rights."

Guardianship on Consent

Guardianships on Consent are meant to help individuals with certain issues or compensate for a lack of resources. In these cases, an individual agrees to the appointment of a guardian to help manage their affairs and can have a role in picking the individual who serves as their guardian.

Guy oversaw the case of a woman who was in the hospital for 90 days and was nearing release. "She was a lot better than she was when she came into the hospital," he said. "The last time the hospital had assessed her for ability to consent to treatment was in October, so she had come a long way under the hospital's care, as people do."

The woman was part of a religious organization, and her friends within the organization had helped her throughout the years. She wanted those friends to continue helping her. "Well, I knew, because I'd had an attorney conference, that the friends were tired," said Guy. "They didn't feel like they were in a position to continue to do this for this lady."

Guy communicated this to the woman, explaining that her friends wanted to just be her friends and not be responsible for taking care of her direct needs, like paying bills. He suggested the local Department of Social Services as an alternative, and she consented to the agreement.

Supported Decision-Making

"[Supported Decision-Making] mostly comes from our common experience of how we make decisions," said Booth Glen. "We don't make decisions – especially big decisions – without consulting other people and getting support. Whether it's talking to family members, using Google to do research, or consulting experts. . . . So, we all do it. It's just the people with [intellectual and developmental disabilities] may need more or more intense support, but it's a practice that we all engage in."

With supported decision-making, individuals with a disability can make their own decisions with the assistance and guidance of trusted supporters. Agreements can be formal or informal, with the option of a written agreement detailing the parameters.

Booth Glen also noted that Supported Decision-Making respects the human right of every person to make their own choices – regardless of disability – derived from the U.N. Convention of the Rights of Persons with Disabilities. (The United States has signed but not ratified the treaty, which is modeled on the Americans with Disabilities Act.)

Supported Decision-Making has been codified in Article 82 of the New York Mental Hygiene Law.

A Family Helped Through Supported Decision-Making

Stewart explained how she had helped one family with the process. In this case, the parents of an autistic child in New York City were going to go for full guardianship once the child turned 18. During a home visit, Stewart was impressed by the child's ability to manage food allergies and navigate public transportation and suggested that the family go for a Supported Decision-Making arrangement instead.

It took nearly two years to finalize a Supported Decision-Making agreement, but in the end the individual felt empowered to make decisions and was excited for the future, while the parents were glad that there was a community of people to support their child.

"In addition to understanding the needs and limitations of our wards, we are also obligated to assess whether guardianship constitutes the least restricted form of intervention," said Stewart. "And in determining whether guardianship is necessary and is in our ward's best interest, we must understand what they can and cannot do. So, when applicable, we need to inform the petitioners of alternatives to guardianship."

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