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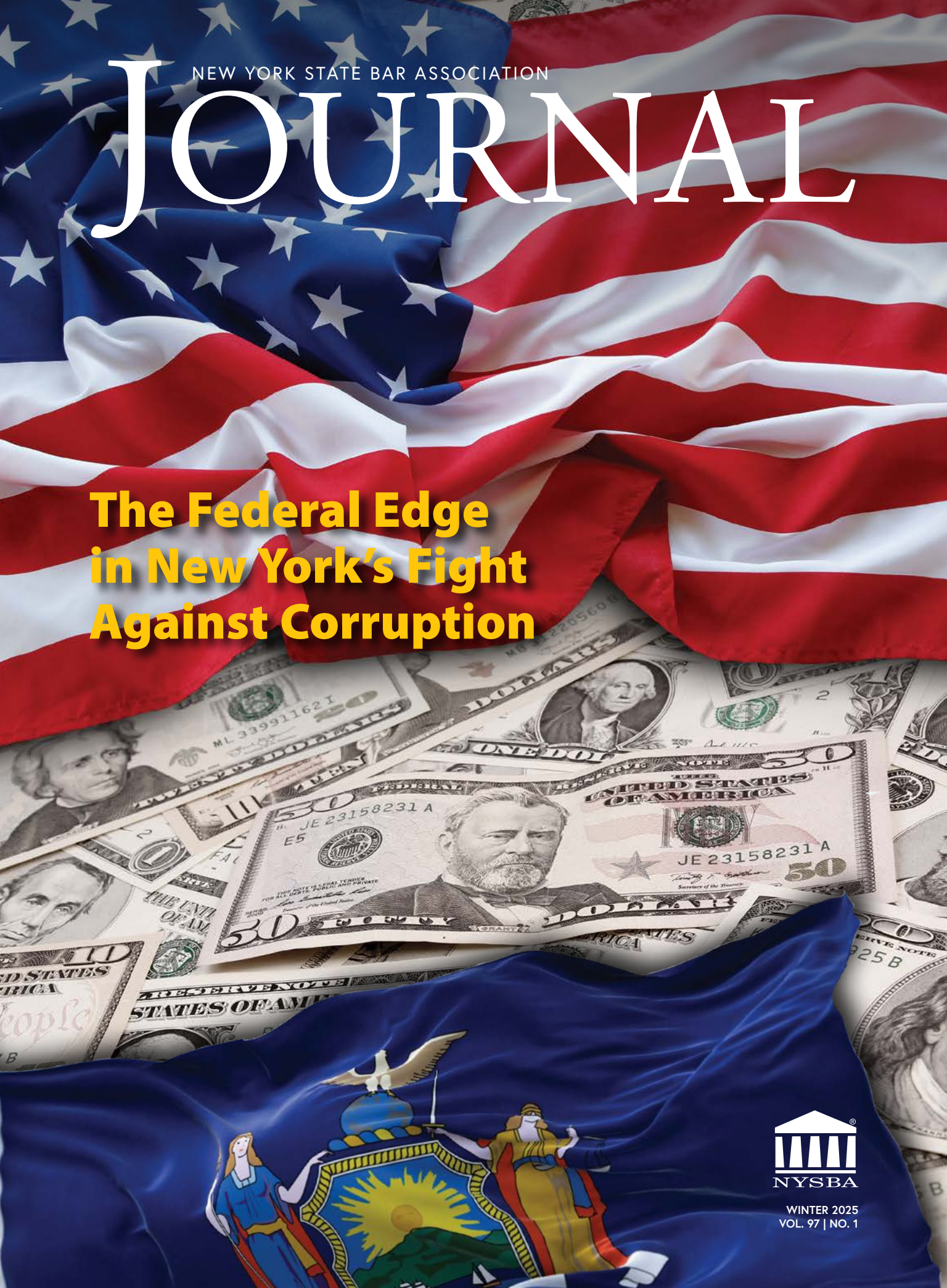
The Federal Edge in New York's Fight Against Corruption



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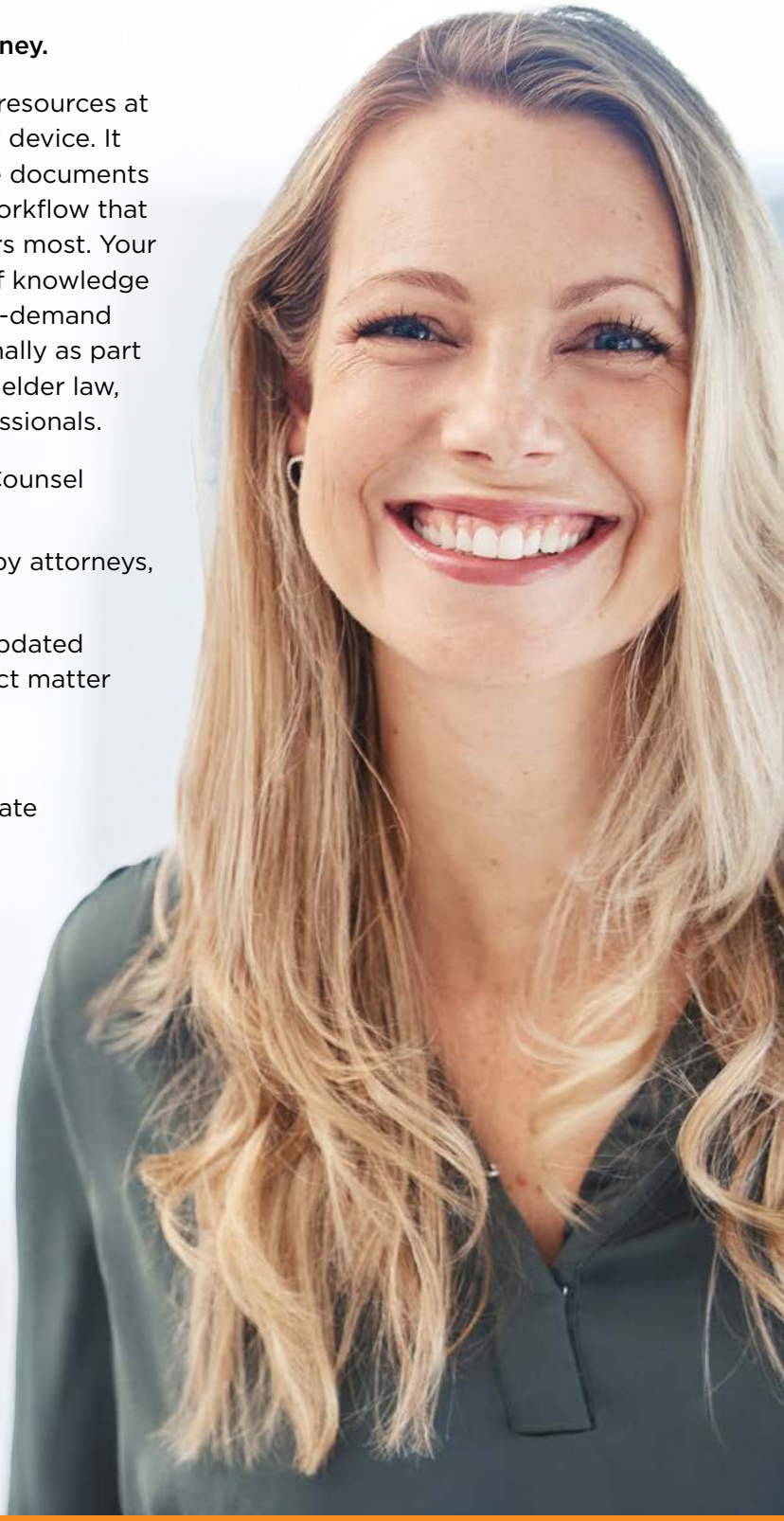

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DOMENICK NAPOLETANO

The Terror of Human Trafficking in War

When I think about human trafficking in war, I envision the demoralized victims who are kidnapped, isolated and tortured. They have no escape. Those few who do slip away and claw their way back to their families are often condemned by their loved ones and thus wind up as outcasts.

I can't imagine how terrible their suffering must be. Sedatives and painkillers cannot mask the agony or shame that plagues these innocent bystanders of war.

Sexual assault as a weapon of war is part of the world's shameful history, and it is not abating even as we have become more civilized. It is a weapon that is cheaper than bullets, and impunity is the norm.

The New York State Bar Association seeks to shine a light on these merciless acts during our Presidential Summit, one of the marquee events of our Annual Meeting that will take place at the New York Hilton Midtown, where we will host over 120 programs and panels January 14-17.

The summit will focus on the physical and emotional costs inflicted on victims of human trafficking during war. Our panelists will share how we can support the survivors.

Cochav Elkayam-Levy is an international human rights expert. Abid Shamdeen is a co-founder of Nadia's Initiative and a former translator for the U.S. Army in Iraq, and Susana SáCouto is the director of the War Crimes Research Office of the American University Washington College of Law.

Elkayam-Levy has developed a contemporary way of thinking about human trafficking as "kinocide," a term she devised that defines the deliberate destruction and weaponization of families as a means for destroying societies. Shamdeen has supported victims of the Yazidi genocide through Nadia's Initiative, a nonprofit organization committed to rebuilding communities and advocating for justice for survivors of sexual violence, while SáCouto has provided legal assistance on international criminal law issues to courts throughout the world.

Victims are looking to us. We can let them know that they are not alone because we are watching out for them, and we are doing everything within our power to hold everyone who is complicit accountable, from the highest-ranking government officials to soldiers on the ground.

Two of our esteemed Presidential Summit panelists from last year will also join us.

Former U.S. District Court Judge Katherine Forrest and former Chief Justice of the Michigan Supreme Court Bridget McCormack will provide an update on AI from the past 12 months.

There is much more that I am looking forward to at Annual Meeting, including the Judicial Luncheon and the Constance Baker Motley Symposium, along with the many other programs that are taking place throughout the week.

Our Judicial Section will mark its centennial. Distinguished judicial leaders will be honored during Friday's luncheon to help commemorate this special occasion. Chief Judge Rowan Wilson, Chief Administrative Judge

Joseph Zayas and Justices Dianne Renwick and James Hyer will be recognized for their dedication to diversity.

I am eagerly awaiting the opportunity to celebrate our strong partnership with them.

Wednesday's Motley Symposium will feature an interactive program aimed at helping our members discuss issues such as implicit bias and harassment in a non-threatening manner.

There are many more outstanding educational opportunities for you to take advantage of during the week.

The Antitrust Law Section will discuss the potential fallout of a monumental year that saw the Department of Justice file lawsuits against prominent companies, including Live Nation, Apple and Visa. The Criminal Justice Section will talk about the evolving nature of discovery, which has become more complex than ever, and changes to bail laws that are often misrepresented to the public through a few emotionally charged cases.

The Health Law Section is tackling the important work of advancing and safeguarding the public's health through legal services and workforce education and training. Section Chair Mary Beth Quaranta Morrissey, who is leading our blue-ribbon Task Force on Opioid Addiction, has reached across the aisle to other section members and prominent legal professionals throughout the state to study this issue with the goal of improving access to treatment programs.

Retired U.S. Supreme Court Justice Stephen Breyer will receive the Gold Medal, the New York State Bar Association's highest honor. See page 59.

In addition, the LGBTQ+ Law Section will detail its efforts advocating for trans youth, including access to gender-affirming health care and equal participation in sports, while the Environmental and Energy Law Section will provide updates from federal and state regulators and will discuss changes in the state's wetlands regulations.

The Food, Drug and Cosmetic Law Section will be digging into the ongoing issues around continuing drug shortages and human food safety, and the Trusts and Estates Law Section will examine the rise of malpractice actions and best practices for attorneys to protect themselves.

Hopefully, I will see you at the New York Hilton Midtown so we may collaborate and exchange ideas, discuss pertinent issues within our profession, provide mentorship and honor the most talented and dedicated members of our profession.

Finally, I would like to express my gratitude to you and all our members who never waver in their commitment to developing a fairer world at a time when we are faced with countless daunting and extraordinary challenges.

DOMENICK NAPOLETANO can be reached at dnapoletano@nysba.org.

Tilted Scales: The Federal Edge in New York's Fight Against Corruption

By Daniel R. Alonso

The recent indictment of New York City Mayor Eric Adams on bribery and campaign finance charges is only the latest example of the prosecution of state and local New York officials in federal rather than state courts in New York for corruption crimes.

Aside from Adams, in the last 20 years federal authorities have prosecuted the lieutenant governor, the speaker of the state Assembly, four state Senate majority leaders and more than a dozen other members of the state Legislature. Although there have been state prosecutions as well – most notably that of Alan Hevesi, the former state comptroller – those have been rare exceptions. New York's prosecutors have a long history of combating corruption, going back to Boss Tweed, but it is rare today for political or other high-level corruption to be prosecuted at the state level. A mix of practical and legal issues unique to New York have created this circumstance.

Adams is charged with conspiracy and wire fraud involving alleged bribes in the form of luxury travel in exchange for preferential treatment to the Turkish government. He is also accused of essentially stealing money from New York taxpayers in the form of 8:1 campaign contribution matching payments, by falsely certifying that the contributions subject to matching satisfied all applicable rules, including the prohibition against foreign contributions. By knowingly submitting and causing to be submitted false certifications, the indictment alleges, Adams defrauded city taxpayers of more than $10 million.[1] The indictment also includes the separate federal crime of soliciting donations from foreign nationals.

The Challenge of Public Corruption Prosecutions

Public corruption prosecutions, particularly high-level prosecutions of political actors, are very hard in any jurisdiction. By its nature, bribery is a secretive exercise, and in many cases only two people – the briber payer and the recipient – really know what, if any, agreement existed. It is therefore difficult to discover what happened absent some combination of informants, recordings and solid paper trails. And as prosecutors in this area are aware, the high stakes involved often invariably lead to attempts to hinder the investigation. In the Adams case, for example, although the mayor himself has not been charged with obstruction crimes, the indictment recounts in detail the efforts of a staffer to delete – during a break from an FBI interview – the encrypted messaging application used to communicate with Turkish nationals and the mayor.[2] Adams himself is said to have supposedly forgotten the password to his own phone, thereby precluding access by investigators.[3]

Another complicating factor is that, in the case of elected officials, democracy itself is arguably implicated. A conviction, and often merely a prosecution, of such an official could lead to the removal from office of someone put there by the people through lawful democratic processes. Given these higher stakes, the prosecutor must be beyond reproach, and independence is key.

An important practical hurdle is that, although the relevant state authorities – namely district attorneys and the

attorney general – are honorable people, investigating a county official or state legislator from the same jurisdiction can raise potential conflicts of interest among public servants who might otherwise be either political allies or political foes. Independent authorities such as state special prosecutors or, to be sure, federal authorities, can alleviate these issues. Another practical hurdle, particularly in smaller counties with modest budgets, is that corruption cases are time-consuming and expensive, often taking years to build and drawing on a wide range of evidence to pursue claims against a single official. This may simply be beyond the practical abilities of a small district attorney's office to handle, whereas the FBI or other federal agencies can bring resources to bear that only the largest offices in New York State can hope to match.

"Although New York's corruption laws were modernized under the 1965 Penal Law and some later legislative enactments, Congress has simply provided federal prosecutors with more powerful tools to combat public corruption than the state Legislature has provided state counterparts."

But the more significant hurdles are legal. Although New York's corruption laws were modernized under the 1965 Penal Law and some later legislative enactments, Congress has simply provided federal prosecutors with more powerful tools to combat public corruption than the state Legislature has provided state counterparts. The advantages that federal prosecutors enjoy in the battle against public corruption can be roughly divided into substantive and procedural categories.

Substantive Laws

Substantively, federal laws provide more options for prosecuting bribery of federal and state or local officials, and they are generally worded quite broadly. And, notwithstanding the tendency in recent years, discussed below, for the Supreme Court to interpret these federal statutes narrowly, the U.S. Department of Justice's arsenal remains strong. Following is a discussion, not meant to be exhaustive, of some key provisions.

Bribery

Although the federal bribery statute only applies to federal officials, it is useful to contrast its relative flexibility with the narrower New York equivalent. Under Section 201(b), guilt is established when, with respect to a federal official or someone selected for such position, any person "corruptly gives, offers or promises anything of value . . . or promises . . . to give anything of value to any other person or entity, with intent . . . to influence any official act," aid in a fraud or induce the official "to do or omit to do any act in violation of [their] lawful duty." A corresponding section similarly criminalizes the receipt of such thing of value. "Corruptly" has been regularly interpreted to mean "with a bad or evil purpose," and the Supreme Court has limited the "official act" requirement to "acts that a public official customarily performs" rather than things that are more properly *political* favors.[4] Additionally, and in contrast to New York law, the federal bribery law also makes a felony the receipt of gratuities, i.e., payments that are not agreed to in advance but are nevertheless conferred "for or because of any official act performed or to be performed."[5]

Under the New York bribery statute, the more flexible "intent to influence" language of Section 201 is nowhere to be found. Instead, the law requires that the actor "offers or agrees to confer" a benefit, "upon an agreement or understanding that such public servant's" actions or discretion "will thereby be influenced."[6] And this has, in turn, been narrowly interpreted by state courts. In *People v. Bac Tran*, the New York Court of Appeals reversed the conviction of a hotel fire safety director who slipped cash into the pocket of a fire inspector, holding, notwithstanding the "offers" language of the statute, that New York bribery requires a mutual agreement between the bribe-giver and public official or at least a unilateral belief by the bribe-giver that the bribe will in fact influence the public official – both absent in *Tran*. Notably, New York's other bribery laws (sports bribery, commercial bribery, labor bribery) merely require, like the federal law, that the bribe-giver "intend[s] to influence" the bribe-receiver.[7] The practical result has been that in New York, "those who bribe public officials are *less* likely to be prosecuted than those who bribe athletes, businesspeople or labor officials."[8]

Federal prosecutors have other tools to combat bribery. The Hobbs Act prohibits extortion under color of official right, which essentially means demanding a quid pro quo bribe while holding a public position.[9] The Travel Act prohibits traveling in interstate commerce or using the mails in connection with state bribery schemes. For broader schemes, recourse through the Racketeer Influence and Corrupt Organizations Act is available, and under that statute, state and local bribery, as well as mail and wire fraud (see below), are available predicate

acts. New York's "little RICO" – the Organized Crime Control Act of 1986 – is much narrower in breadth and carries much lower penalties.[10]

Finally, federal program bribery prohibits the agents and employees of organizations or governments that take in more than $10,000 per year, like the City of New York, from taking bribes in connection with transactions worth $5,000 or more. Specifically, the statute applies to one who "corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of" such an organization, as well as one who "corruptly solicits or demands, for the benefit of any person, or accepts or agrees to accept, anything of value . . . intending to be influenced or rewarded" in connection with such transactions.[11] This language, which the Supreme Court has called "expansive [and] unqualified," goes well beyond New York bribery as interpreted by the Court of Appeals in *Tran.*[12]

Mail and Wire Fraud

The broadly worded mail and wire fraud statutes historically enabled prosecutors to combat not only traditional frauds committed for the purpose of wrongfully obtaining money and property, but also, and less obviously, activities deemed corrupt – including bribery and self-dealing in local government – through the deprivation of what became known as the "intangible right of honest services." After a period of uncertainty that included Congress's enactment of 18 U.S.C. Section 1346 to make clear that "honest services" were protected, the Supreme Court ultimately held, in a case arising out of the Enron scandal, that courts could only apply these statutes to corruption when bribery and kickbacks were involved. The court rejected the government's argument that other forms of unethical conduct, such as undisclosed self-dealing, were covered.[13]

The use of the honest services theory is central to the federal government's stated priority of combating state and local corruption and is employed more frequently in this area than other applicable laws.[14] One enormous advantage it has over state bribery law is that a bribery scheme involving a course of dealing over many years, including discussions, payments, actions taken by the public official and any aborted efforts, may be pled and prosecuted in a single count of wire fraud or wire fraud conspiracy. Moreover, honest services and other federal bribery theories discussed above, including extortion under color of official right and federal program bribery, include the powerful "as opportunities arise" theory of bribery, which posits that a bribe does not have to relate to one specific official action – or indeed, even one specific payment – but rather may include an agreement to assist the bribe payer over time, when the opportunity arises.[15] A corollary is that the payments themselves may constitute a "stream of benefits" over time to the public official. This appears to be the theory in the Adams case, as the benefits to Mayor Adams are alleged to have begun when he was Brooklyn borough president and continued for several years, although he was not called upon to take official action until he was mayor and the opportunity arose to assist the Turkish government.[16]

In contrast, New York's mail fraud analogue, Scheme to Defraud,[17] does not include an honest services component,[18] and it appears that New York courts interpreting other state corruption laws have yet to grapple with the "as opportunity arises" or "stream of benefits" theories of bribery. Although not foreclosed by New York bribery law, the Court of Appeals' strict interpretation of different New York bribery statutes in *Tran* and other cases would seem to make the prospect of applying such theories an uphill battle.[19] At the very least, the uncertainty provides a disincentive to file such a case in state court.

Conspiracy

Federal prosecutors have increasingly charged conspiracy to commit wire fraud under 18 U.S.C. Section 1349, sometimes without charging any substantive counts. Section 1349, added by the Sarbanes-Oxley Act of 2002, does not require the government to plead or prove an overt act, unlike the general federal conspiracy statute, 18 U.S.C. Section 371, and it carries a maximum 20-year prison term rather than five years.

Under this conspiracy-focused approach, a public official alleged to be corrupt could be charged with agreeing with others to devise a scheme or artifice to defraud the populace of the public official's own honest services through the receipt of bribes or kickbacks. There would be no requirement that the scheme was devised, that anyone took a step in that direction or that a bribe was offered or paid.

In New York, it is of course a crime to conspire to bribe another or to receive bribes, but a conspiracy to commit simple bribery requires an overt act and constitutes a mere misdemeanor unless the object bribe was valued in excess of $10,000. And even then, conspiracies involving even outsized bribes would constitute the lowest-level New York felony, punishable by up to 1 1/3 to four years in prison.[20]

Recent Supreme Court Interpretations

Notably, in recent years the Supreme Court has interpreted these federal laws in a way that limited some of the Department of Justice's more expansive readings. This includes limiting honest services fraud to bribery and kickbacks;[21] limiting bribery cases to official acts;[22] holding that only sitting public servants (i.e., not mere political operatives) owe the public a duty of honest services sufficient to trigger the doctrine;[23] and, most

recently, rejecting the notion that the federal program bribery statute includes a gratuities component.[24] But these are ultimately just demarcations of contours, and at bottom they mean that the Supreme Court will not easily expand plain language and takes seriously basic precepts such as the quid pro quo and official act requirements.

Procedural Rules

Because proving corruption schemes, including knowledge and intent, is so difficult, prosecutors and investigators require sophisticated methods to uncover them. The availability of investigative techniques can make the difference between a successful case and the proverbial dry hole. This is particularly the case when, as noted, corrupt schemes are accompanied by bad faith attempts to defeat the investigation. In this area, too, New York falls short.

Grand Jury Practice

In many ways, no anti-corruption tool is more powerful than compelling investigative testimony before grand juries. But in New York, alone among the 50 states, all grand jury witnesses automatically receive transactional immunity for any matters relating to the subject of their testimony.[25] For that reason, and because of long experience with inadvertently immunizing bad actors, "state prosecutors regularly refrain from calling witnesses before the grand jury for fear of unwittingly immunizing someone who is either a serious criminal or is the subject of an investigation in another county."[26] While understandable, this hampers the ability to investigate corruption cases.

Similarly restrictive is the New York rule that bars most hearsay before the grand jury.[27] In federal cases, other than compelled investigative testimony, the grand jury typically only hears from a federal agent who summarizes the investigation and leaves the grand jurors to vote based on the prosecutor's instructions. In the routine cases for which the New York rule was intended, calling, say, the victim of a robbery serves an important purpose. But for complex corruption cases, the rule not only compels the time-consuming presentation of multiple witnesses, sometimes from far-flung locations, but it also makes superseding indictments – commonplace in federal court – rare and cumbersome events. While federal prosecutors simply read the transcripts from the previous grand jury to the new grand jury and present whatever other evidence is required, state prosecutors need to call all the witnesses a second time.

Obstruction of Justice

As noted above, false statements to investigators, destruction of evidence, tampering with witnesses and other obstructive conduct are commonplace in corruption investigations. Federal prosecutors regularly prosecute under one of a number of powerful statutes available to them, including the crime of making false statements to government agents or obstruction of an official proceeding (including grand jury investigations).[28] Although detectives in television police dramas regularly threaten

arrest for "obstruction of justice" if witnesses don't cooperate, the reality is that "obstruction" as such is not a crime in New York,[29] nor is lying to police officers. But because lying to federal agents is itself a felony, prosecutors have one more lever to use to seek cooperation. As Martha Stewart found out when her insider trading charges were dismissed but she went to prison for lying to the Securities & Exchange Commission, false statements prosecutions should not be taken lightly.[30] Such prosecutions in state court are limited to sworn testimony.

A Bright Spot?

Notably, although not equipped with as robust powers to prosecute, and ultimately obtain convictions for, crimes of public corruption, state prosecutors do have one very effective tool: the nearly unlimited powers of New York grand juries to investigate public corruption and other malfeasance, non-feasance or neglect in public office – even if it does not rise to the level of criminality – and issue a grand jury report exposing the misconduct.[31] Unfortunately, this power is rarely used for the reason stated above regarding New York's unique transactional immunity rule. This authority lays dormant waiting for an enterprising state prosecutor to use it under appropriate circumstances.

Conclusion

To be clear, although it is generally "easier" to prosecute public corruption in federal court rather than state court, it is certainly not easy. Federal prosecutors who ignore the Supreme Court's careful adherence to the quid pro quo standard and the official acts standard do so at their peril, and the Adams case has predictably been challenged on these grounds. Based only on the indictment and what prosecutors have said and written, it appears that the allegation is that Adams received a stream of benefits over several years starting while he was Brooklyn borough president, but he was not asked to do anything in return until he became mayor. The defense argues that makes it a mere gratuity, while the prosecution argues that it was always part of an agreement made years earlier. Time will tell whether this will pass muster in federal court. It would likely have trouble in a New York courtroom.

Daniel R. Alonso is a partner at Orrick, Herrington & Sutcliffe, where he concentrates on white collar representation of corporations and individuals, internal investigations, and civil litigation, with a special focus on cross-border investigations in Latin America. He is a former corruption prosecutor in the Manhattan District Attorney's Office, where he was the chief assistant D.A., and the U.S. Attorney's Office for the Eastern District of New York, where he was chief of the Criminal Division. He is also an adjunct professor of law at Cornell Law School, where he teaches the seminar "Transnational Corruption and the Law."

Endnotes

1. *United States v. Adams*, 1:24-cr-00556-DEH, Ind., ECF No. 2 ¶ 32 (Sept. 24, 2024).
2. Ind. ¶ 48c.
3. Ind. ¶ 48d.
4. *McDonnell v. United States*, 579 U.S. 550 (2016).
5. New York recognizes the felony receiving reward for official misconduct, but it adds an element not present in the federal gratuities provision: rather than merely *exercising* his or her discretion, the public servant must *violate* it. N.Y. Penal Law §§ 200.25, 200.27. New York does have basic gratuity statutes, but they are merely misdemeanors, N.Y. Penal Law §§ 200.30, 200.35, whereas the federal law is a two-year felony. 18 U.S.C. § 201(c).
6. N.Y. Penal Law §§ 200.00, 200.03, 200.04.
7. N.Y. Penal Law §§ 180.00–180.45.
8. Report of the New York State White Collar Crime Task Force (2013), District Attorneys Association of the State of New York, at 73, www.daasny.com/wp-content/uploads/2014/08/WCTF-Report.pdf.
9. *United States v. Benjamin*, 95 F.4th 60 (2024).
10. N.Y. Penal Law §§ 460.00 *et seq.*
11. 18 U.S.C. § 666(a).
12. *Salinas v. United States,* 522 U.S. 52, 56 (1997).
13. *Skilling v. United States,* 561 U.S. 358 (2010).
14. *See, e.g., United States v. Skelos,* 988 F.3d 645 (2d Cir. 2021); U.S. Dep't of Justice, Strategic Plan, Goal 4.2, www.justice.gov/doj/doj-strategic-plan/doj-strategic-plan-glance (last accessed Nov. 8, 2024).
15. *United States v. Silver,* 948 F.3d 538, 568 (2d Cir. 2020); *see United States v. Ring,* 628 F. Supp. 2d 195 (D.C. 2009).
16. Ind. ¶¶ 38-39, 43.
17. N.Y. Penal Law §§ 190.60, 190.65.
18. *People v. Wolf*, 98 N.Y. 2d 105 (2002).
19. *See id.* (narrowly construing New York's commercial bribery statutes).
20. N.Y. Penal Law §§ 105.10, 105.13, 200.00, 200.03.
21. *Skilling v. United States,* 561 U.S. 358 (2010).
22. *McDonnell v. United States,* 579 U.S. 550 (2016).
23. *Percoco v. United States*, 598 U.S. 319 (2023).
24. *Snyder v. United States,* 603 U.S. 1 (2024).
25. N.Y.C.P.L. § 190.40(2).
26. White Collar Crime Task Force, *supra,* at 28.
27. N.Y.C.P.L. § 190.30.
28. *E.g.,* 18 U.S.C. § 1512, 1503.
29. The New York crime of obstructing governmental administration is aimed at different conduct, typically involving physical intimidation, and its penalties are low. N.Y. Penal Law §§ 195.05, 195.07.
30. *United States v. Stewart*, 433 F.3d 273 (2d Cir. 2006).
31. N.Y. Const., Art. I § 6; N.Y. C.P.L. §§ 190.05, 190.85(1).

Human Trafficking: A Pathway to Hope

By Abid Shamdeen

Human trafficking is a complex and pervasive crime, the far-reaching effects of which are difficult to convey through numbers. While it is estimated that there are more than 25 million victims[1] around the world at any given time, with an estimated 6.3 million in a situation of forced sexual exploitation, due to the hidden nature of the crime and significant barriers to sharing information between stakeholders, among other reporting challenges, it is likely that existing data and statistics do not reflect the full scope of the problem.

The most recent United Nations Office on Drugs and Crime Global Report on Trafficking in Persons[2] highlights several alarming trends, including a significant global slowdown in the number of convictions for trafficking in persons and the fact that most victims rescue themselves before being proactively identified.

The analysis also underlined the increased risk faced by women, who are three times more likely to suffer violence during trafficking as compared to boys and men, and children, who represent nearly one-quarter of all victims and are two times more likely to be subjected to violence than adults.

Global anti-trafficking efforts are typically considered through a "3P" framework of prevention, protection and prosecution. A fourth "P," partnership, is also used to emphasize the importance of collaboration between all stakeholders to effectively combat this heinous crime. With 2023 marking the half-time of the U.N.'s 2030 Agenda, the world is far behind in reaching its sustainable development goals, and progress is stalling on all four fronts.

Clearly more work is needed to identify and protect victims and to bring perpetrators to justice.

As co-founder and strategic advisor at Nadia's Initiative, a nonprofit organization that advocates for the resources and policy changes needed to protect and support survivors of sexual violence, I have experienced the toll of human trafficking not as a series of statistics, but through listening to the devastating stories of real women.

The first case I was involved in was bringing a Yazidi[3] woman and her daughter home from captivity in Syria. The woman, who I will call H., was taken from her small village in southern Sinjar, Iraq, when ISIS invaded the region in 2014. H. was then sold between ISIS fighters, transported to Mosul and later trafficked to Syria. H. was a few months pregnant when she was taken and would later give birth to her daughter in captivity.

H. eventually got in touch with her family members who survived the genocide once she was able to access a phone in Syria, and we coordinated closely with them in our efforts to bring her home. We reached out to some of the tribesmen and Kurdish families in Syria who helped get her to safety inside Syria. The president of the Kurdistan region was also able to help. Still, getting her out meant she had to risk her life traveling in Syria within territory held by militia groups. We successfully navigated the threats to find safe places for her at every stop and to bring her and her daughter home. While in captivity, H. still hadn't chosen a name for her daughter. But once she survived and I met her, we hugged and both began to cry. She told me she wanted to name her daughter after my wife, Nadia.

Since then, I have been involved in collecting information and data on missing Yazidi women and children. The process of securing their return has been slow and painful for both the victims and their families. H.'s case is a common example of the complexities and the difficulties that organizations and governments face when trying to rescue victims of human trafficking and to help them seek justice.

Through the work my colleagues and I are doing at Nadia's Initiative, we have been able to secure the rescue of dozens of people. However, this number is far too small compared to the many still in captivity. One of the most frustrating aspects is that when the Yazidi women

and children were taken in 2014, it was often done publicly, with ISIS holding slave auctions on platforms like Telegram and in group messages on Facebook and Whats App. Such crimes are often committed brazenly and with impunity. The safety of these thousands of women and children was not made a priority by the international community, leaving the families of the missing to figure out how to bring back their loved ones – often through paying enormous ransoms and relying on smugglers. Ten years later, there are still more than 2,500 women and children being trafficked throughout the region held by ISIS and their families and supporters.

The international response to the Yazidi atrocities is a prime example of a failure to deliver on prevention, protection and prosecution. While there were signs that genocide was imminent as ISIS moved in, nothing was done to prevent invasion or to protect vulnerable communities. There was no protection for the innocent victims who lost their lives that day or for the many women and children still in captivity.

When it comes to prosecution, a lack of political will to hold perpetrators accountable in international court, as we have seen with ISIS, has led to only a small number of convictions and no streamlined process for prosecution, meaning there is not a strong enough deterrent to prevent these atrocities from happening again.

We were encouraged in 2017 when, as a result of Nadia's and Amal Clooney's advocacy, the U.N. Security Council passed resolution 2379 to establish UNITAD, an investigative team, to gather evidence of war crimes committed in Sinjar. Thousands of survivors have risked their lives to tell their stories. While we envisioned UNITAD would then form a prosecutorial arm to hold perpetrators accountable, it has since been dismantled without a clear path to justice.

There is a long history between war and an increased risk of human trafficking, and unfortunately, the Yazidi women and children in captivity are just one example of what is happening to refugees and victims of armed conflict all over the world. During one of my visits to Greece in 2022, I met refugees who had seen the horror of human trafficking firsthand while trying to make it to Europe from displacement camps via dangerous routes. With historic levels of displacement and conflicts raging in Ukraine, the Democratic Republic of Congo, Colombia, Mali, South Sudan and elsewhere, women and children are more vulnerable than ever.

The approach we have taken at Nadia's Initiative is an example of how governments and NGOs can work together to bring survivors home and to bring perpetrators to justice, as has been done successfully in Germany. Since 2018, using the principle of universal jurisdiction, German courts have convicted multiple individuals for membership in ISIS, crimes against humanity and genocide, often linked to actions against Yazidi victims. Further, by focusing on long-term sustainable solutions and advocating for governments to help displaced families and survivors find more permanent solutions and seek an end to prolonged displacement in the camps, Nadia's Initiative has shown that it is possible to return vulnerable populations to their homeland, to help them rebuild and to restore their dignity and their faith. We have also demonstrated how education and a survivor-centric approach can destigmatize rape and contribute to healing.

U.N. member states must come together to continue calls for justice, hold perpetrators accountable and provide survivor-centric support to victims of human trafficking. We must build a global coalition: one that spans governments, NGOs, survivor-led organizations, the private sector, academia and civil societies to achieve a comprehensive approach. In addition to the sustainable development goals outlined in the U.N.'s 2030 Agenda, we must strengthen the focus on trafficking in persons in the U.N.'s Women, Peace and Security Agenda as well as action plans and programs at the regional and national levels, as Special Rapporteur Siobhán Mullally recently argued in her July 2024 report on trafficking in persons. Governments must continue to focus on prevention and to involve women in the peacemaking process as much as possible. These crimes do not happen in a vacuum. Poverty, inequality and political oppression are all red flags that must be addressed swiftly and decisively.

While international efforts to curb trafficking have faltered thus far, my experience with H. is proof that there is reason to hope. H. is now back in Sinjar with little Nadia. Together, they are trying to rebuild their lives. And together, we must do everything in our power to help and to prevent such stories from playing out all over the world.

Abid Shamdeen is a co-founder of Nadia's Initiative. He holds a master's degree in political science from the School of International Service at American University and utilizes his extensive knowledge of global development to support the organization's advocacy efforts. He has a unique understanding of the challenges faced by the Yazidi community, gained through his experience as a member of the Sinjar Crisis Management Team and as a cultural advisor and translator for the United States Army in Iraq. Since the 2014 genocide in Sinjar, he has been actively advocating for the Yazidi community and has played a significant role in bringing aid and projects to the region.

Endnotes

1. *About Human Trafficking*, U.S. Department of State. https://www.state.gov/human-trafficking-about-human-trafficking/#how_many.

2. United Nations Office on Drugs and Crime, Global Report on Trafficking in Persons 2022, United Nations, https://www.unodc.org/documents/data-and-analysis/glotip/2022/GLOTiP_2022_web.pdf.

3. Yazidis belong to a religious minority primarily concentrated in northern Iraq. Many were forced to flee to Mount Sinjar when their homeland was attacked by ISIS in August of 2014.

Expert Panelists Will Share Their Insights on Human Trafficking, Artificial Intelligence at the Presidential Summit

The scourge of human trafficking and sexual violence that has a grip on the world today will be discussed during one of Annual Meeting's prominent events, the Presidential Summit, on Wednesday, Jan. 15.

The summit will feature the author of the accompanying article, Abid Shamdeen, and international human rights law expert Cochav Elkayam-Levy, who will examine the physical and emotional costs inflicted on women and girls, particularly during war. In addition, former U.S. District Court Judge Katherine Forrest and former Chief Justice of the Michigan Supreme Court Bridget McCormack will provide an update on AI since they last spoke at the summit a year ago.

Shamdeen and Elkayam-Levy will share their first-person observations on the physical and emotional costs inflicted on human trafficking victims during war, along with the need to better support and protect them. In addition, they will discuss the need for greater international political will to hold perpetrators accountable.

Human trafficking and war have been linked throughout history. However, the depth of conflict throughout the world, with wars raging in Ukraine, Israel, Iraq, the Democratic Republic of Congo, South Sudan and other areas, has rendered women and girls more vulnerable than ever.

Shamdeen, a former translator for the U.S. Army in Iraq, is the co-founder and strategic adviser of Nadia's Initiative, a nonprofit that advocates for the resources and policy changes needed to protect and support survivors of sexual violence. He has devoted himself to the complex task of returning home the more than 2,500 women and girls still being trafficked throughout Iraq's Sinjar Region, 10 years after ISIS first overran it. He has also visited refugee camps in Greece and Lithuania and met with trafficking survivors in Germany who have all shared horrifying stories with him.

An Israel Prize winner, Elkayam-Levy is the founder and chair of the Civil Commission on October 7th Crimes by Hamas Against Women and Children. She has developed a contemporary way of thinking about human trafficking crimes through kinocide, a term she devised that defines the deliberate destruction and weaponization of families within the larger framework of destroying societies. She spoke on this topic in June for a New York State Bar Association online program sponsored by the Women in Law and International sections, along with the Committee on Continuing Legal Education.

Abid Shamdeen (center) in a refugee camp in Serres, Greece, where he met with refugees from Iraq seeking asylum in Europe. Photo courtesy Abid Shamdeen.

New NYSBA Task Force on Opioid Addiction Is Making Headway

By Mary Beth Quaranta Morrissey, Nigel Farinha and Robert Kent

Opioid addiction is a public health crisis that affects all walks of life. This crisis is most devastating in marginalized communities that lack the resources to provide users with appropriate care. What is needed is a comprehensive program to ensure that all persons addicted to opioids, whether in cities or suburbs, in affluent neighborhoods or marginalized communities, will receive the treatment they need in a timely way.

To help advance these goals, NYSBA President Domenick Napoletano has appointed the Task Force on Opioid Addiction, including co-authors Mary Beth Quaranta Morrissey, Nigel Farinha and Robert Kent, to review and analyze the various initiatives that have been put forth so far and make recommendations on what steps are needed to produce a comprehensive strategy.

One of the many challenges in addressing the opioid crisis is grappling with the full breadth and complexity of the problem. There is always the temptation to settle on quick fixes that may run the risk of reducing the problem to a single-dimensional analysis.

Similarly, in evaluating existing policies or designing new policy proposals, all-or-nothing scenarios may seem attractive at first blush. However, given the experience

we have in confronting the opioid addiction crisis in New York, as well as the knowledge we have about what's happening across the nation, we are called to pause and slow down the churning to allow a closer look at what's happening on the ground. We need to understand what is driving both burgeoning rates of addiction and the glaring failures to make treatment available to those who are in desperate need, such as those incarcerated in prisons and jails.

A very helpful and essential frame in this context is, of course, public health. We know from the pandemic that understanding the coronavirus threat as a public health crisis proved critical to effective policy interventions. Here, too, it is all too clear that when it comes to opioid addiction, we are dealing with a crisis that is affecting not only individual lives, but marginalized communities and populations across the state. We call attention in particular to the limited access to treatment in correctional facilities.

The task force is examining various initiatives and will develop recommendations to be submitted to the NYSBA House of Delegates in January as an initial informational report. At this time, the following reports, issues, and pending bills are under study.

Office of Court Administration Report

The NYSBA Task Force on Opioid Addiction recognizes that our lawmakers in Albany can play a vital role in expanding treatment options for justice involved individuals through thoughtful and appropriate legislation. For example, our task force welcomes the opportunity to review proposals such as the 2023 N.Y. Senate-Assembly Bill S1976B/A1263B, often referred to succinctly as the "treatment not jail" bill, to ensure it addresses the needs of those most impacted by the opioid crisis and our justice system. The Unified Court System has already offered an extremely comprehensive comment on this proposed legislation that warrants careful consideration. Their critique is over nine pages in length and is quite detailed in its analysis. The entire report is worth a diligent review, but in the interest of time, we highlight a few of their most salient points as they track many of the same issues and concerns that have captured the attention of this task force.

For example, the "treatment not jail" bill requires that eligible defendants must be offered court-administered diversion options. However, it does not establish funding for this mandate. As the report points out, most diversion programs are actually administered to participants through third-party service providers working collaboratively with our court system to offer essential counseling and treatment for those who need them. A law that simply requires a court to offer diversion without providing that court with the means to do so is an illusory one.

Another point that the report makes concerns the expansion of the eligibility requirement. Everyone, including the Unified Court System, agrees that increasing the number of people in treatment programs represents a welcome alternative to increasing the number of people in our prisons. That said, the UCS believes it is irresponsible to simply expand program eligibility to include any defendant, at any time. The UCS argues, with considerable persuasion, that this broad expansion (without concern for severity of the alleged offense, degree of the alleged crime or potential functional impairment of the relevant defendant) runs the risk of overclassifying those the court believes could most benefit from diversion. And by overburdening an already strained system, we run the risk of not providing essential services to those most in need of them and most likely to benefit from a diversion option.

Finally, and perhaps most significantly, the "treatment not jail" bill would also remove the up-front plea requirement for eligible defendants. Presumably, the relaxation of this prerequisite was designed to emphasize the point that we are ultimately trying to treat our addicted population, not incarcerate them. That said, the UCS points out that the information it is receiving from actual diversion court judges suggests that removing this provision may actually have the exact opposite effect. These judges point out that much of the incentive and motivation for early participants in these programs is a defendant's acceptance of responsibility for their actions and a willingness to accept treatment as the first step toward making amends. Further, this acceptance of responsibility actually helps to ensure program completion by successful participants. The UCS acknowledges that certain collateral consequences may result from a guilty plea that may impact housing, employment and immigration status. However, the way to navigate around those concerns is to augment judicial discretion to adjust pleas as needed. To simply remove the plea requirement entirely would undermine the effectiveness of the remedy we are trying to achieve in the first place.

Our task force has looked long and hard at the recommendations in this report and we see the wisdom in their analysis. Notwithstanding such, the task force will be making suggestions for legislation and policy in our final report that are consistent with our experience and due diligence.

Expanding Access to Overdose Reversal Agents

Reversing overdoses and expanding access to overdose reversal agents are the first steps to stopping overdose deaths. There is already pending legislation (2023

N.Y. Senate-Assembly Bill S8991/A8075), which would require New York State to make all FDA-approved forms of overdose reversal agents available. Current law requires schools and SUNY campuses to make overdose reversal agents available. The task force is examining what other settings should have overdose reversal agents available.

Workforce Gaps

The addiction care system faces significant challenges in recruiting and retaining workers, and such gaps are impacting access to treatment. The task force is convening stakeholder experts to make recommendations to the state on programs to address such workforce issues. Possible recommendations include using opioid litigation settlement funds and opioid stewardship funds to pay for new initiatives that may include loan forgiveness, scholarships and tuition reimbursement and exploring whether to allow addiction care providers to buy into the state retirement system and the New York State Employee Health Insurance Program. The group will also review the Office of Addiction Services and Supports' staffing regulations for recommendations for possible changes to address the crisis without compromising patient safety.

The task force has also received feedback to date from its members, as well as stakeholders and researchers, that a significant yet overlooked concern in these contexts is the experience of trauma and grieving lived through by members of the workforce who are regularly bearing witness to pain, suffering, and loss of life in their interface with the problem of addictions. In response to the voicing of these overarching and urgent concerns and the moving testimonies heard to date, the task force will review relevant research and sharpen its focus on the unmet mental health needs of workers across all systems. Crafting recommendations that address the development of workforce education and training as informed by the goals of palliating pain and suffering is one priority of the task force.

EMT Initiation of Addiction Medicine

There is also pending legislation (2023 N.Y. Senate-Assembly Bill S9926/A9882) that would allow advanced emergency medical technicians to administer the opioid use disorder medicine, buprenorphine, in the field under the supervision of a physician. The state of New Jersey also allows this.

Medicaid Reimbursement

The task force will be reaching out to stakeholder experts to review the current Medicaid reimbursement model for substance use services and develop possible recommendations for changes to the model.

Substance Use Disorder Services

Also under study is a proposal that the state apply for a federal 1115 Medicaid waiver to provide substance use disorder services for up to 90 days prior to release. This federal waiver would better enable state and local correctional facilities to meet their legal requirements pursuant to Section 19.18-c of the New York Mental Hygiene Law.

Expanding Access to Methadone

Turning to federal law, the Modernizing Opioid Treatment Access Act (S644/H.R.1359) would allow board-certified practitioners to prescribe methadone for opioid use disorder to their patients. Currently, they are only allowed to offer methadone through a licensed opioid treatment program. This proposed legislation would allow qualified practitioners to prescribe methadone either at an opioid treatment program or by a physician or psychiatrist with a specialty certification in addiction medicine.

Any person who wishes to share information with the task force may reach out to Dr. Mary Beth Quaranta Morrissey, chair, or David Miranda, NYSBA general counsel.

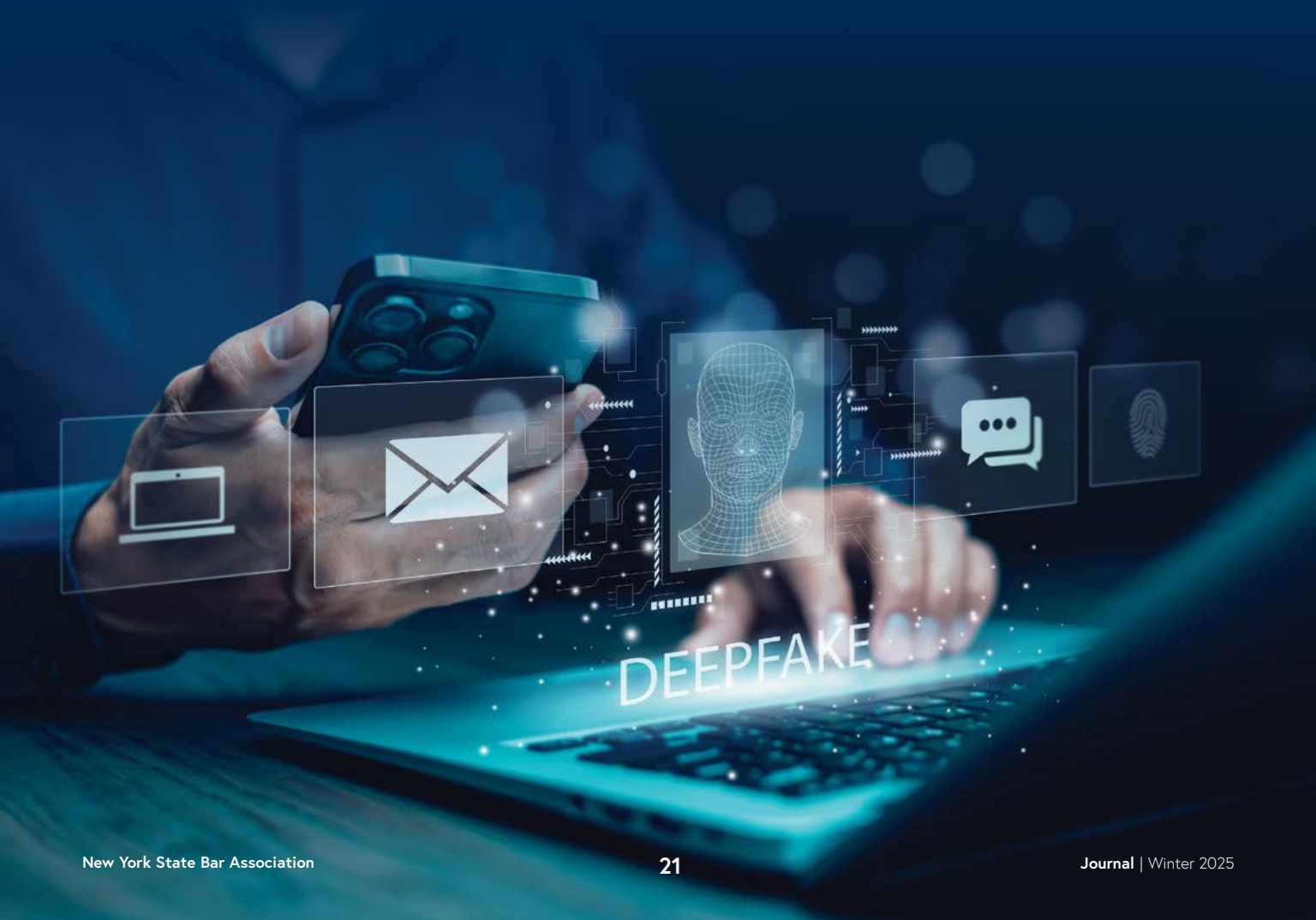
Mary Beth Quaranta Morrissey, Ph.D., is chair of the New York State Bar Association Health Law Section and a health care and public health law attorney. She is associate professor and director of the Ph.D. program in social welfare at Yeshiva University Wurzweiler School of Social Work and a researcher. She served as past chair of NYSBA's Medical Aid in Dying Task Force and the COVID Task Force on Mandatory Vaccination. She is also the founder and president of the Collaborative for Palliative Care that provides interdisciplinary palliative care and public health workforce education and training.

Nigel Farinha is an executive assistant district attorney in the Office of the Special Narcotics Prosecutor of the City of New York, where he serves as the chair of the Conviction Review Committee, the chief of gang prosecutions and the chief diversity, equity and inclusion officer. He is also chairman of the Diversity, Equity & Inclusion Committee of the District Attorneys Association of the State of New York (DAASNY). He served as part of Police Commissioner Bratton's 2015 NYPD Gang Enforcement Reengineering Committee and was the 2017 recipient of the Thomas E. Dewey Award for Excellence in Prosecution. He is the treasurer for the NYSBA Criminal Justice Section.

Robert Kent is the president of Kent Strategic Advisors, a consulting firm focused on drug policy and assisting stakeholders with making treating and recovery more accessible. He most recently served as general counsel with the White House Office of National Drug Control Policy. Prior to that, he served as the general counsel for the New York State Office of Addiction Services and Supports.

The Deeply Complicated Issues Surrounding Deepfakes

By Matthew Lowe



As generative AI technologies like OpenAI's GPT models gain traction, transforming everything from legal education to corporate strategies, a shadow looms in the form of deepfakes. A portmanteau, "deepfake" combines "deep" from "deep learning" – a subset of machine learning involving neural networks trained on large datasets – and "fake." These AI-generated illusions, once a curiosity in the realm of digital manipulation, now pose a serious threat, with the potential to disrupt elections and to exploit targeted populations through the creation of intimate deepfake images. The need for regulatory enhancements to effectively address deepfakes in these contexts is critical, as the technology's misuse has the potential for far-reaching implications.

In the electoral arena, deepfakes threaten the integrity of information, necessitating disclosure requirements to maintain transparency. Conversely, the use of deepfakes in pornography often involves non-consensual elements, requiring outright bans and stringent enforcement to protect individuals' rights and dignity. The distinction between these uses underscores the importance of crafting regulations that are both effective and context sensitive.

Illustrating the disruptive power of deepfakes, a fabricated image of an explosion at the Pentagon in 2023 impacted financial markets.[1] Similarly, a deepfake audio threat against a Brooklyn couple in the dead of night, mimicking a loved one's voice, highlights the deeply personal and psychological impact of this technology.[2] These examples, coupled with recent findings that "the mere possibility that AI content could be circulating is leading people to dismiss genuine images, video and audio as inauthentic,"[3] emphasize the urgency of developing nuanced legal responses.

The regulatory landscapes of states like California and New York offer insights into the varied approaches needed to tackle the multifaceted issues presented by deepfakes, reflecting the broader national efforts to balance innovation with ethical and legal considerations.

Election Implications

Concepts like integrity, veracity and accountability play crucial roles in the democratic process. However, deepfakes present a considerable threat by undermining that process and causing confusion among voters through the spread of disinformation. In July of this year, Elon Musk, CEO of the social media platform X, reposted an edited deepfake on his platform of one of Vice President Kamala Harris's campaign ads.[4] In the video, the vice president's voice is digitally altered to make it seem like she is saying President Joe Biden is senile, that she does not "know the first thing about running the country" and that, as a woman and a person of color, she is the "ultimate diversity hire."[5] This incident came only a few months after a political consultant in New Hampshire faced a $6 million fine from the FCC, as well as a host of criminal charges – including 13 counts of voter suppression, a felony and 13 counts of impersonating a candidate, a misdemeanor – across four New Hampshire counties for commissioning deepfake robocalls using President Biden's AI-generated voice to discourage voting.[6] The New Hampshire attorney general stated, "I hope that our respective enforcement actions send a strong deterrent signal to anyone who might consider interfering with elections, whether through the use of artificial intelligence or otherwise."[7]

In February of this year, the FCC ruled that AI-generated voices in robocalls are illegal, aiding in the issuance of the fine to the New Hampshire consultant and equipping state attorneys general nationwide to prosecute such tactics.[8] Furthermore, under the Telephone Consumer Protection Act, the FCC possesses not only civil enforcement authority to fine robocallers but also the ability to block calls from carriers facilitating illegal robocalls.[9] Additionally, the legislation allows individual consumers or organizations to sue robocallers in court.[10] State attorneys general also have their own enforcement tools, which may be tied to robocall definitions under the law.[11]

Some states have begun passing their own deepfake laws to secure the election process further. California, one of the most legislatively active in artificial intelligence, has enacted laws limiting how election-related deepfakes – including those targeting candidates and officials or questioning election outcomes – can circulate. The bill was designed to take immediate effect to address the 2024 election and effectively prohibit individuals and organizations from knowingly sharing certain deceptive election-related deepfakes without proper disclosures.[12] It is enforceable for 120 days before an election, similar to laws in other states, but uniquely remains enforceable for 60 days after,[13] which The New York Times recognized as "a sign that lawmakers are concerned about misinformation spreading as votes are being tabulated."[14]

California is just one of over a dozen states with election-related deepfake laws, including New York. New York's amended election law mandates that "[a] person, firm, association, corporation, campaign, committee, or organization that distributes or publishes any political communication that was produced by or includes materially deceptive media and has actual knowledge that it is materially deceptive shall be required to disclose this use."[15] The law defines the term "materially deceptive media" as

> any image, video, audio, text, or any technological representation of speech or conduct fully or partially created or modified that: (1) exhibits a high level of authenticity or convincing appearance that is visually or audibly indistinguishable from reality to a reasonable person; (2) depicts a scenario that did not actually occur or that has been altered in a significant

> way from how they actually occurred; and (3) is created by or with software, machine learning, artificial intelligence, or any other computer-generated or technological means, including adapting, modifying, manipulating, or altering a realistic depiction.[16]

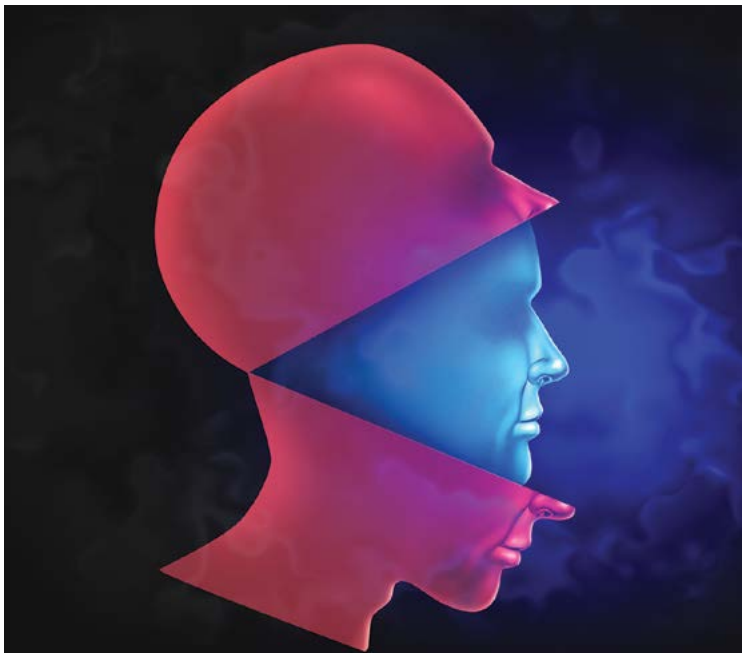
In short, the use of deepfakes to portray a false and/or significantly altered scenario requires a disclosure label in New York.

In the election context, regulators must navigate the delicate balance between protecting potentially vulnerable voters and upholding Americans' First Amendment right to free speech. California, like New York, permits the use of deepfakes as long as they are disclosed in compliance with the requirements of the law. Despite that concession, however, Senior U.S. District Judge John A. Mendez still blocked AB 2839 recently, finding that "[m]ost of [the law] acts as a hammer instead of a scalpel" and calling it "a blunt tool" that "hinders humorous expression and unconstitutionally stifles the free and unfettered exchange of ideas."[17] He carved out an exception for a "not unduly burdensome" portion of the law that requires verbal disclosure of digitally altered content in audio-only recordings.[18] This exception is necessary, considering audio-only recordings are much more difficult to discern. By contrast, where visual deepfakes are concerned, there have been volumes of guidance published from various sources that help individuals to recognize when they are likely being duped by paying attention to things like the subjects' lips, blinking patterns, skin texture, etc.[19]

The Pornography Problem

Freedom of speech is an important consideration as states look to act against election deception, but what happens when humor and/or parody is not the basis for an action – when the motivation is directly harmful to the average citizen?

There is a concerningly booming market in which individuals can enlist the help of AI to generate "explicit nonconsensual deepfake content, often referred to as nonconsensual intimate image abuse."[20] According to a Wired investigative report, "Across the internet, a slurry of 'nudify' and 'undress' websites sit alongside more sophisticated tools and Telegram bots, and are being used to target thousands of women and girls around the world – from Italy's prime minister to school girls in South Korea."[21] One of New York's own congressional representatives, Alexandria Ocasio-Cortez, has been a victim of these kinds of websites, which can be especially harmful for survivors of sexual abuse like herself.[22] In an interview with Rolling Stone magazine, Ocasio-Cortez reflected that "[t]here are certain images that don't leave a person, they can't leave a person. . . . It's not a question of mental strength or fortitude – this is about neuroscience and our



biology."[23] This is a sentiment widely accepted among mental health advocates, including Emma Pickering, the head of technology-facilitated abuse and economic empowerment at Refuge, the UK's largest domestic abuse organization, who says, "These types of fake images can harm a person's health and well-being by causing psychological trauma and feelings of humiliation, fear, embarrassment, and shame."[24]

As already alluded to, whereas regulatory construction is arguably best served by a disclosure requirement approach in the election context, such an approach is not feasible when it comes to deepfake pornography. Disclosure cannot undo or in any way materially mitigate the creation and distribution of images that have the potential to cause such significant harm. Instead, this category of illicit deepfake activity can only be curbed by the combination of laws that expressly prohibit them and/or grant private rights of action for victims, as well as state prosecutors who are aggressive about penal enforcement. Examples of these kinds of laws include California's SB 926, which expands existing law that classifies it as disorderly conduct to knowingly distribute intimate images or sexual content of another identifiable person without consent, when both parties understood the content was to remain private, and the distribution causes the depicted person serious emotional distress.[25] Under this new bill, the previously existing prohibition now covers the intentional creation and distribution of realistic, computer-generated or digital images of intimate body parts or sexual acts involving identifiable individuals, if the images could reasonably be believed to be authentic and result in emotional distress.[26]

The city of San Francisco advanced this issue by filing an unprecedented lawsuit in August against the owners of 16 popular websites that allow users to generate

nonconsensual nude images of women and girls. The lawsuit claims that the sites' owners and operators are in violation of state and federal laws prohibiting deepfake pornography, revenge pornography and child pornography.[27] While this case is new and the outcome is pending, California has far greater leverage to succeed in the courts than it does in its deepfake election legal battles. This is because free speech is harder to argue when its practice constitutes harm, illegal activity and/or obscenity. In *Miller v. California*, the court established a framework for determining unprotected obscenity, which stated that the material, considered as a whole, must (1) appeal to the prurient interest in sex, (2) depict or describe specifically defined sexual conduct in "a patently offensive way" and (3) "lack serious literary, artistic, political, or scientific value."[28] The website owners will also need to contend with the clear imbalance of any free speech claims against the violations of privacy and consent for subjects depicted in those obscene images. A slightly older California privacy law, AB 602 ("Depiction of individual using digital or electronic technology: sexually explicit material: cause of action"), creates a private cause of action for instances in which an individual is depicted in intimate images and/or has those images distributed by another person without having granted consent to do so.[29]

Fortunately, states are continuing to expand their existing laws, as California has, to stay current with technologies that can generate convincing and obscene deepfakes. New York's S1042A "amends subdivision 1 and 2 of section 245.15 of the penal law to state that a person is guilty of unlawful dissemination or publication of an intimate image when they intentionally disseminate or publish a still or video image depicting a person with one or more intimate parts exposed or engaging in sexual conduct with another person, including images created or altered by digitization where such person may be reasonably identified."[30] These laws are also unlike the first of a kind election laws being passed, in that their spirit, even if captured in new text and seeking to encompass new technologies, has existed for quite some time. Studies show:

- Deepfake pornography accounts for 98% of deepfake videos online, and 99% of all deepfake porn features women.
- The total number of deepfake porn videos produced in 2023 increased 464% from 2022.
- When asked about their reaction if someone close to them became a victim of deepfake porn, 73% of American males surveyed expressed a desire to report the incident to authorities and 68% indicated they would feel shocked and outraged by the violation of privacy.[31]

These stats demonstrate that this is a problem mostly impacting women. The Violence Against Women Act, originally passed in 1994 and amended numerous times over the years, was recently updated in 2022 to create, *inter alia*, "a federal civil cause of action for individuals whose intimate visual images are disclosed without their consent, allowing a victim to recover damages and legal fees; creating a new National Resource Center on Cybercrimes Against Individuals; and supporting state, tribal, and local government efforts to prevent and prosecute cybercrimes, including cyberstalking and the nonconsensual distribution of intimate images."[32]

Conclusion

In consideration of what the future of deepfake regulations will look like, New York and California offer strong demonstrations. The authors of New York's bill argue:

> In 2019, the legislature passed a law creating a crime for individuals who disseminate or publicize an intimate image of another person without such person's consent. This monumental legislation addressed the growing need for updated laws that reflect advancements in technology. Now, the creation of "deepfakes" demonstrates a need to update the law again.[33]

This captures the current state of regulatory developments nationwide as states seek to protect people from some of the more negative consequences of rapid AI growth and use. States will largely continue to expand on existing cybercrime, election and pornography laws to include coverage for deepfake capabilities, at least in the short term, rather than treat deepfakes altogether separately. Some states will seek outright bans when it comes to certain applications of the technology; others will continue to align with common AI regulations requiring disclosure and transparency and treat that as sufficient, depending on the context.

The federal government also has a potential role to play, aside from actually passing a comprehensive national AI law, in revising and expanding existing federal laws such as the Violence Against Women Act and passing new laws like Senator Ted Cruz's proposed Take It Down Act. Take It Down would, *inter alia*, require websites to have in place procedures to remove nonconsensual intimate image abuse pursuant to a valid request from a victim, within 48 hours. Websites must also make reasonable efforts to remove copies of the images.[34] California recently enacted a law with a similar aim, SB 981, which requires social media platforms "to provide a mechanism that is reasonably accessible to a reporting user who is a California resident who has an account with the social media platform to report sexually explicit digital identity theft to the social media platform."[35] "Identity theft" under this law refers to "an image or video created or altered through digitization that would appear to a reasonable person to be an image or video of any of the following: (i) An intimate body part of an identifiable person, (ii) An identifiable person engaged in an act of

sexual intercourse, sodomy, oral copulation, or sexual penetration, or (iii) An identifiable person engaged in masturbation."[36] A federal law, however, would be a step in the right direction towards ensuring all Americans are offered this kind of protection.

While deepfakes present a hot area for legislation and subsequent enforcement actions, social media platforms, and other website operators, can be proactive about addressing some of these issues ahead of impending legislation. However, this requires close alignment between written policies and accountability from stakeholders. In the case of Musk's repost, it was done in arguable conflict with existing X policy, which expressly prohibits sharing "synthetic, manipulated or out-of-context media that may deceive or confuse people and lead to harm."[37]

Finally, and perhaps most important, generative AI requires a certain level of humility on the part of all those seeking to use, regulate, develop and/or distribute it. While existing guidance on spotting deepfakes is somewhat helpful, New York Attorney General Letitia James sums it up best: "Deepfakes can leave clues showing they are fake, but the technology is getting better all the time and fakes are harder to spot. The absence of clues is not a guarantee that the content is real."[38] Possible solutions include updated regulations, leaders who can commit to continuous education about new technologies and cross-collaborative efforts that include website operators and AI developers who can create and/or implement effective tools and policies to counteract the potential downsides of generative AI technology.

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The Lanham Act and the Potential for Liability When Businesses Advertise Online

By Kamran Hashmi

In today's digital marketplace, many businesses have come to rely on online marketing campaigns, often handled by outside agencies. Any business, whether they do their marketing in-house or hire an outside service, should be aware of the potential for liability under the Lanham Act.

This article will examine some of the ways an unsuspecting client could be liable for false advertising on the internet without even knowing it. Courts are just beginning to grapple with some of these emerging trends. But as Judge Learned Hand wrote, "there is no part of the law which is more plastic than unfair competition, and what was not reckoned an actionable wrong 25 years ago may have become such today."[1]

False Advertising Under the Lanham Act

Under Section 43(a) of the Lanham Act, false advertising is the publication of any false or misleading description or representation of fact concerning goods or services that misrepresents their nature, characteristics, qualities or geographic origin.[2] To establish false advertising, a competitor must plead and prove that the challenged message is "(1) either literally or impliedly false, (2) material, (3) placed in interstate commerce, and (4) the cause of actual or likely injury to the plaintiff."[3]

What constitutes a "literally or impliedly false" message is by far the most litigated issue in this area. While a literally false message is "false on its face," an impliedly false message is "not literally false, [but] is nevertheless likely to mislead or confuse consumers."[4] Where the challenged message is literally false, consumer deception is presumed. Where the challenged message is impliedly false, consumer deception must be proved typically through expensive consumer surveys and studies.

Notably, the challenged message need not mention a competitor by name as the key inquiry is the plaintiff's "injury to a commercial interest in sales or business reputation proximately caused by the defendant's misrepresentations."[5] For example, even though it did not target a specific named competitor, an olive oil producer labeling its chemically processed olive oil as "100% Pure Olive Oil" was deemed literally false at the preliminary injunction stage in a lawsuit filed by an association of olive oil producers.[6]

The Sharp Teeth

As for damages, the courts have "some degree of discretion in shaping th[e] relief."[7] Thus, aside from injunctive relief, a business accused of false advertising could face significant monetary damages, including the competitor's lost profits, disgorgement of its *own* profits, reputational damages, treble damages, corrective advertising costs and attorney's fees. Upheld jury awards regularly reach tens of millions of dollars.

But the legal fees will bankrupt a company before a jury is even selected. And to make matters worse, when consumers get wind of it, a business might also endure a class action lawsuit arising out of the same allegations. This is precisely what happened to the previously mentioned olive oil producer. A year after settling that lawsuit, the company filed for Chapter 11 bankruptcy due to legal fees and an impending consumer class action lawsuit arising out of the "100% Pure Olive Oil" labels.[8]

Keyword Bidding Gone Wild

Google search is the number one driver of traffic to businesses. But how are these search results prioritized? Through the Google Ads platform, advertisers bid on keywords so that their website links and ads appear higher than their competitors in the search results. This is a great way to be seen and drive traffic, but there are a few ways that an unmonitored Google Ads campaign could subject a business to significant liability.

A common Google Ads strategy is to bid on a competitor's name so that the advertiser's business is elevated above the competitor in search results. For example, McDonald's could outbid Burger King for the keywords "Burger King," resulting in appearing higher in search results when the words "Burger King" are entered. Standing alone, there is likely nothing unlawful about this practice.[9] The Second Circuit has yet to directly address keyword bidding in the false advertising context. However, in the trademark context, courts generally allow keyword bidding unless it results in consumer confusion.[10] Thus, liability may attach if the search result or the website landing page includes the competitor's name or causes consumer deception.

Of particular concern in Google Ads is a tool called dynamic keyword insertion, which allows advertisers to dynamically update displayed ads to include the user's search query. For example, if you search for "toddler shirts," you might see a sponsored link that says, "Buy Toddler Shirts on Sale." When used properly, this tool creates targeted ads that will increase consumer engagement. However, when used improperly, the dynamically inserted keyword could misrepresent the product or service or suggest an association with a competitor's brand when there is none. To illustrate, if you search for "cotton toddler shirts" but the advertiser now manufactures polyester shirts only, liability may attach for a sponsored link that says, "Buy Cotton Toddler Shirts." Additionally, if a competitor's name or a phrase resembling it is included on the advertiser's dynamic keywords list, this could mislead consumers to incorrectly believe that they are visiting a website associated with the competitor.

Google Ads is one of the most powerful tools for both brick-and-mortar and online businesses alike. However, business owners should disengage the cruise control and pay close attention to their Google Ad campaigns before a lawsuit threatens their livelihood.

Affiliate Marketing Pitfalls

While researching a product or service on the internet, you have likely come across blogs and videos by influencers concerning said product or service. Compensating third parties for these reviews and endorsements is not inherently unlawful and is a common practice known as affiliate marketing.

Of course, a business can be liable to a competitor if the influencer materially misleads consumers. However, liability may also attach if the influencer fails to adequately disclose an association with the advertiser. Often, these paid reviews and testimonials look objective and impartial, but behind the scenes, the seemingly independent reviewer is being compensated by the advertiser – typically on a per-click or per-order basis through a uniquely coded hyperlink. There might be a tiny disclosure hidden on another section of the website or on the bottom of the page, but the Federal Trade Commission requires "clear and conspicuous" disclosure of these connections[11] and courts routinely consider FTC guidelines as persuasive authority in false advertising cases.[12]

Businesses freely enroll third parties into their affiliate marketing programs without reviewing or monitoring their content. In this age of shock content, a wildly popular influencer could conceivably ruin a business with a single disparaging remark about a competitor. While affiliate marketing is a great way for businesses to reach new customers, these programs must be monitored closely for Lanham Act compliance.

Ignorance Is Not Bliss

Hiring a local digital marketing firm to implement and administer the Google Ads and affiliate marketing programs should insulate a business from liability, right? Wrong. Under the Lanham Act, intent and bad faith are not elements in what is a "regime of strict liability."[13] Thus, although the marketing company may be a co-defendant in the lawsuit, the business is ultimately responsible for the harm inflicted on competitors.

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Oral Contracts in New York: How Valid Are 'Handshake' Agreements?

By Geoffrey A. Mort

Famous film producer Samuel Goldwyn is reputed to have remarked that "an oral contract is not worth the paper it's written on." Goldwyn's alleged comment echoes a widespread sentiment in the legal profession and elsewhere that oral contracts are of dubious validity and are "very difficult to enforce."[1] In reality, New York courts, to a surprising extent, recognize oral agreements in a wide variety of situations and, in an age where many communications are by electronic means, are more receptive to verbal agreements than they have been in the past.

An oral contract is nothing more than a contract whose terms have been agreed to by a verbal communication. Notwithstanding several rules requiring particular types of contracts to be in writing, oral contracts in New York are equally as valid as written ones, and "parties may enter a binding oral agreement even if" they "contemplate memorializing their contract in a formal document."[2] That said, counsel advocating the existence of an oral contract need to be aware of a handful of key requirements for such a contract to be deemed to exist.

Key Elements of Oral Contracts

In determining whether an oral contract exists, courts do not look at the "subjective intent" of either party to the alleged agreement.[3] Rather, "what matters are the parties' expressed intentions, the words and deeds which constitute objective signs in a given set of circumstances."[4] Although a wide range of "words and deeds" are found sufficient to establish an oral contract, as discussed below, counsel must be wary of several important pitfalls in arguing for the existence of an oral contract.

The court in *Allen v. Cox*[5] pointed out perhaps the most significant of these pitfalls when it stated that "[o]ral agreements are generally binding unless the parties have explicitly indicated their intention to be bound only by an executed written agreement." *Allen* involved a promise by an individual to her domestic partner that "if you take

care of me until I get completely through this recovery [from a serious illness], I will give you the settlement money [from a successful medical malpractice lawsuit]."[6] The defendant argued that the plaintiff promisor had failed to plead the necessary elements of a valid breach of contract claim. The court, however, looked at the facts and observed that the plaintiff had entered into an oral contract by agreeing to his partner's offer, did in fact care for her, was not paid and suffered damages because of the breach. Significantly, no agreement that the parties' contract must be in writing had been made, and the court denied the defendant's motion to dismiss.

"A second key consideration is whether an oral agreement encompasses all the material terms of the contract as opposed to some being left still to negotiate."

That there be no expression of a "right not to be bound absent a writing"[7] is the first and most important of several factors set forth in *Winston v. Mediafare Ent. Corp.*[8] that courts still look to in deciding whether an oral contract was made.[9] That this obstacle may not be difficult to overcome was demonstrated by the court in *Westside Winery,* holding that an email between the parties stating that they "will have to paper this and of course confirm the details with our clients"[10] did not reserve the right to be bound only by a writing. Similarly, in *223 Sam, LLC v. 223 25th Street, LLC,*[11] the court found that a series of emails between the parties relied on by the defendant did not overtly demonstrate that the parties did not intend to be bound without formal written execution, and thus there existed a triable issue of fact as to whether there was an oral contact.

A second key consideration is whether an oral agreement encompasses all the material terms of the contract as opposed to some being left still to negotiate. The requirement of mutual assent depends in part on whether either party, after the purported oral agreement was made, sought to renegotiate any of its material terms or made new demands. As such, a "mere agreement to agree, in which a material term is left for future negotiations, in unenforceable."[12]

This principle is not, however, as rigid as it might seem. Even in the mid-20th century, the courts stressed that an oral "contract is not necessarily lacking in all effect merely because it expresses the idea that something is left to future agreement."[13] Still, today, as long as there is a "meeting of the minds"[14] on the material terms of an agreement, an oral contract will be deemed to exist. Defendants' attempts to show relatively minor, non-material late changes to an agreement as defeating mutual assent fail more than they succeed. A good example of this is the court's conclusion in *Personal Water Craft Product SARL v. Robinson:*[15] "[t]he fact that plaintiff's counsel added boilerplate language to an otherwise substantively identical version of the oral agreement does not undermine the evidence . . . that the defendants intended to be bound by the oral agreement."

In the hurly-burly of exchanges about the details of an agreement, particularly when the parties are under tight time constraints, it is not uncommon for small details to be left unsettled for the short term or for the parties to concur that a written document setting forth the contract's terms should later be prepared. As a result, where "all of the *substantial* terms of a contract" are agreed upon, the "understanding that the contract should be formally drawn up and put in writing [does] not leave the transaction . . . without binding force."[16]

Yet another way to demonstrate that a binding oral contract exists is partial performance by one of the parties. As the Second Circuit held in *Kim v. Kyu Sung Cho,*[17] partial performance "by one party and the acceptance of such performance by another party can satisfy" the requirement that there be an agreement. *Westside Winery* concerned a dispute between two companies over the sale over a shipment of wine. That the defendant accepted and paid for some of the wine after it was delivered, which was one term of the parties' agreement, was deemed to represent partial performance. Accordingly, the court found that the plaintiff had "plausibly allege[d] an enforceable oral settlement agreement."[18] Partial performance was therefore considered sufficient to show that parties had made a binding oral agreement, "notwithstanding the absence of a written, executed contract."[19]

The Statute of Frauds Impediment

The most common argument against the existence of an oral contract arguably is that it violates the statute of frauds.[20] Simply put, the statute of frauds provides that "an agreement is void if it is not in writing and subscribed by the party to be charged therewith" if the agreement "by its terms is not to be performed within one year from the making thereof."[21] At times, whether the statute of frauds applies to an agreement is a relatively clear-cut

issue. One such case is *R.G. Group, Inc. v. Horn & Hardart Co.,*[22] where the terms of the agreement were such that there was no real doubt that the contract could not be performed in one year or less, and the plaintiff admitted that this was the case. The court then predictably held that no valid oral contract existed for that reason.

However, in many cases the terms of an oral agreement are such that it is unclear as to whether an agreement can in fact be performed within a year. When that is the case, statute of frauds arguments often fail. For example, disputes over oral partnership agreements, which frequently encompass an agreement to form a partnership for an indefinite period, often involve the statute of frauds and fall into this category. In *Prince v. O'Brien,*[23] the court found that because the term of the partnership was not firmly established, the oral agreement in question was not barred by the statute of frauds. Indeed, any "oral agreement that is terminable at will" could be "perform[ed] within one year and, therefore, does not come within the statute of frauds."[24]

As such, all that is necessary for an oral agreement to not run afoul of the statute of frauds is that it be *capable* of being performed within a year, even if a longer period seems likely. Thus, an oral employment agreement that allows for an employee's termination for cause (so long as the cause event is not a breach of the agreement itself) is not invalidated by the statute of frauds, in that a cause termination within a year is at least possible.[25]

Conclusion

In practice, the widespread notion that it is an uphill battle to enforce an oral contract is contradicted by the ways in which many courts have addressed the issue of when a verbal agreement is a valid contract. The court in *Nygren v. Greater New York Mutual Insurance Co.*[26] articulated the majority view that "[i]n general, oral agreements, so long as they comply with the requirements for a contract, are legally enforceable."

While a written contract is obviously preferable, counsel should not be reluctant to argue for the enforceability of an oral contract when the conditions discussed above have been satisfied. Cautioning a client not to seek revisions in an agreement once it is reached and ensuring that there is nothing in writing stating that the parties will only be bound by a written agreement are critical steps in building an argument that an enforceable oral contract exists.

Oral agreements are anything but unusual in today's business world, and situations where a party makes an oral agreement but then has second thoughts and attempts to withdraw from it are relatively common and often lead to litigation. Counsel representing plaintiffs in such cases would be well advised to keep in mind the core principle set forth by the New York Court of Appeals that most courts continue to embrace and adhere to: "parties . . . should be held to their promises."[27]

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18. *Westside Winery, Inc. v. SMT Acquisitions, LLC*, 511 F. Supp. 3d 256, 264 (E.D.N.Y. Jan. 4, 2021).
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23. 234 A.D.2d 12, 12 (1st Dep't 1996).
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The Fang Holdings Case: New York Supreme Court Extends Long-Arm Jurisdiction Over Foreign Real Estate Portal

By Piero Sauñe Casas

The New York Supreme Court decision in *Oasis Investments II Master Fund Ltd. v. Mo* (the Fang Holdings Case)[1] sets a precedent for New York courts to establish personal jurisdiction over foreign companies that exploit New York markets to defraud investors. This ruling opens new avenues for litigation, empowering the state to hold alleged wrongdoers accountable.

Previously, foreign defendants who appeared to have minimal contacts with the state could argue that the courts lacked jurisdiction due to their foreign status and absence

of a physical presence in New York. This defense will now be less effective, as the ruling suggests that even if a company is neither incorporated in New York nor has its principal place of business there, transactions involving schemes that manipulate the New York market – such as spinning off a company's valuable assets into a new subsidiary to benefit company officers at the investors' expense – can establish a substantial connection between New York and the claims of fiduciary duty breaches. This connection is sufficient to establish personal jurisdiction.

In this case, the court expanded the "minimum contacts" rule, allowing the New York State Supreme Court to deny the defendant's motion to dismiss. The defendants, officers of Fang Holdings Limited, a foreign company incorporated in the Cayman Islands with its principal place of business in China, were found to have subjected themselves to New York's jurisdiction. The ruling was based on allegations that the defendants' actions, manipulating New York markets, are connected to the claim that they breached their fiduciary duties, which led to the looting of Fang Holdings. These activities provided the necessary basis for establishing jurisdiction under CPLR 302(a)(1).[2]

When a New York court exercises personal jurisdiction over a non-domiciliary defendant, two conditions must be satisfied: (i) the court must have long-arm jurisdiction over the defendant pursuant to CPLR 302 and (ii) the exercise of such jurisdiction must comply with due process requirements.[3] Failure to establish either condition will prevent the action from proceeding. Additionally, long-arm jurisdiction permits adjudication only of issues that arise from or relate to the controversy that established jurisdiction.[4] Thus, the lawsuit must stem from the defendant's contacts with the forum.[5]

Under CPLR 302(a)(1), a New York court may exercise specific jurisdiction over a non-domiciliary who, either personally or through an agent, (i) "transacts any business within the state" or (ii) "contracts anywhere to supply goods or services in the state."[6] A single transaction can satisfy this requirement, provided the defendant's activities were purposeful and there is a substantial relationship between the transaction and the claim asserted.[7] Whether the activity conducted within the state is sufficient to constitute the "transaction of business" under this section depends on the facts of each case. This determination cannot be made by applying a mechanical formula but must instead consider what is fair and reasonable under the circumstances.

Fang Holdings Derivative Action Background

The plaintiffs initiated this lawsuit on May 29, 2023, alleging various breaches of fiduciary duties by Vincent Tianquan Mo and Richard Jiangogn Dai (collectively, the defendants). The defendants moved to dismiss the case on several grounds, arguing that the plaintiffs failed to establish personal jurisdiction, that the forum was non-convenient under CPLR 327 and that the action was time-barred under CPLR 202.[8] This article will focus solely on the issue of personal jurisdiction.

The plaintiffs contended that their breach of fiduciary duty claims arose from the defendants' use and manipulation of the New York financial market in a multi-step transaction designed to loot Fang Holdings and enrich themselves. The transactions allegedly undertaken by defendants included: (i) Fang's spin-off of its valuable wholly owned subsidiary, China Index Holdings Limited, as a separate publicly traded entity in New York; (ii) Fang's purchase of China Index Holdings' shares both on the New York market and from affiliates of defendants; (iii) Fang's delisting from the New York Stock Exchange, which further depressed the value of China Index Holdings shares on the New York market, enabling the defendants to buy back the shares at a reduced price; and (iv) Fang's participation in a take-private transaction, during which defendants forced Fang to pay approximately $130 million to acquire a 35.8% minority interest in China Index Holdings – a company that Fang had fully owned just a few years prior – all for the personal gain of the defendants.[9]

The defendants argued that their motion to dismiss was warranted because CPLR 302(a)(1) does not apply when there is no articulable nexus between the causes of action in the complaint and the defendants' activities in New York.[10] They contended that the transactions involving Fang Holdings did not serve as the nexus for the causes of action asserted in the plaintiffs' complaint.

Renren Inc. and Its Impact on Fang Holdings

In determining whether there was an articulable nexus or substantial relationship between Fang Holdings' transactions and the alleged breaches of fiduciary duty, the court looked to the precedent set in *Renren Inc*. for guidance.[11] In *Renren Inc.,* the defendants similarly sought dismissal based on a lack of personal jurisdiction.[12] However, the court held that the defendants' alleged involvement in a multi-step transaction designed to strip Renren Inc. of its most valuable assets by manipulating the New York markets constituted transacting business in New York under CPLR 302(a)(1). The court further concluded that this exercise of jurisdiction was consistent with due process, thereby making jurisdiction in New York proper.[13]

Renren Inc. was also a foreign company, headquartered in China, and was often referred to as the Chinese equivalent of Facebook.[14] The company experienced significant growth, especially after Facebook was banned in China. Seizing this opportunity, the defendants took

Renren Inc. public on the New York markets, assuring investors that it would not become an investment company. However, as Renren's profits soared, the defendants reversed course, transforming the company into an investment company and devising a plan to capture its profits for their own benefit.[15]

At this point, the defendants in *Renren Inc.* initiated a multi-step transaction scheme. First, they announced a plan to spin off Renren Inc.'s investments by selling the assets to a wholly owned subsidiary, Oak Pacific Investment, for a nominal consideration of just 5% of its book value. Next, they executed a private placement of Oak Pacific Investment's shares, presenting investors with a Hobson's choice: either accept a cash dividend based on a grossly understated valuation or receive shares of the company, but only if they met the stringent criteria of having a net worth of at least $1 million and $5 million in investments.[16]

During the motion to dismiss, the court determined that the defendants' use of the Oak Pacific Investment spin-off in New York amounted to market manipulation that served the officers' interests rather than just a routine spin-off. The court found that these actions created a substantial connection between the defendants' transactions and the breach of fiduciary duty claims. Therefore, jurisdiction under CPLR 302(a)(1) was deemed proper.[17]

Connection Between Both Cases

The similarities between the Fang Holdings and *Renren Inc.* cases are remarkable. In both instances, the complaints allege that the defendants breached their fiduciary duties and sought to establish personal jurisdiction based on the defendants' transactions in New York – transactions that allegedly involved market manipulation through a spin-off scheme to defraud investors. The similarities set an easy path for the ruling of the courts, as the actions by both defendants involved a clear articulable nexus or substantial relationship between the transactions and the claims asserted, thereby justifying jurisdiction under CPLR 302(a)(1).

Primary Actors and the Assertion of Personal Jurisdiction Over Mo and Dai

The defendants further argued that while the plaintiff might have jurisdiction over Fang Holdings, it does not extend to them personally.[18] They argued that, as citizens of the People's Republic of China with insufficient contacts with New York, they are not subject to New York's personal jurisdiction.[19]

Under CPLR 302(a)(1), personal jurisdiction can be asserted over company officers if they are deemed "primary actors" in the relevant transactions.[20] To be a primary actor, a corporation needs to engage in purposeful activities in New York related to the transaction with the defendant's knowledge and consent. Personal jurisdiction over the defendant can then be established.[21] This applies if the defendant benefited from the transaction and exercised some degree of control over the corporation.[22]

The plaintiff's complaint provided enough information to establish the defendants as primary actors in Fang Holdings. They engaged in significant activities, including signing misleading securities filings on behalf of Fang Holdings and executing agreements related to the China Index Holdings' take-private transaction (Dai served as chairman of Fang Holdings during the China Index Holdings transaction). Given their involvement, control over the company and the benefits they derived, the court found grounds to reject their argument and assert personal jurisdiction over them individually, as well as over Fang Holdings as an entity.

Conclusion

Now that a precedent has been set, it remains to be seen how courts will apply it in future cases. What kind of impact will it have and how should attorneys prepare to plead or defend their cases? Only time will tell.

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Endnotes

1. 82 Misc. 3d 1242(A) (Sup. Ct., N.Y. Co. 2024).
2. *Id.*
3. N.Y. Civil Practice Law and Rules 302 (CPLR); *Williams v. Beemiller, Inc.*, 33 N.Y.3d 523, 528 (2019).
4. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).
5. *Bristol-Myers Squibb Co. v. Superior Ct. of California*, 582 U.S. 255, 262 (2017).
6. CPLR 302(a)(1).
7. *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467 (1988).
8. *Oasis Invs. II Master Fund Ltd. v. Mo*, 82 Misc. 3d 1242(A) (Sup. Ct., N.Y. Co. 2024).
9. *Id.*
10. *Id.*
11. *Id.*
12. *Renren, Inc. v. XXX*, 67 Misc. 3d 1219(A) (Sup. Ct., N.Y. Co. 2020).
13. *Id.*
14. *Id.*
15. *Id.*
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18. *Oasis Invs. II Master Fund Ltd. v. Mo*, 82 Misc. 3d 1242(A) (Sup. Ct., N.Y. Co. 2024).
19. *Id.*
20. *Coast to Coast Energy, Inc. v. Gasarch*, 149 A.D.3d 485, 487 (1st Dep't 2017).
21. *Id.*
22. *Retail Software Servs., Inc. v. Lashlee*, 854 F.2d 18 (2d Cir. 1988).

The Impact of the Affordable Care Act on Unrealized Future Benefits and Collateral Source Offsets

By Michael A. Posavetz

A recent decision by the Appellate Division of New York on the question of collateral sources of medical expenses highlights some issues that have arisen in the wake of the Affordable Care Act. One issue is the subsequent policy of not enforcing the original rule of requiring everyone to be enrolled in a health insurance plan and if such lack of enforcement affects its potential as a collateral source offset. In one recent case, a plaintiff who was paralyzed in an accident near the subway was challenged to reduce his future medical expense award after the defendant argued for a collateral source hearing. While the court was only tasked with deciding whether a collateral source hearing was appropriate, it laid out the rationale for how a future benefit, not yet realized, could be considered a collateral source reduction. The significance of this decision cannot be understated. Not only are future collateral sources permitted as an offset reduction to plaintiff's damages, but the collateral source does not have to be guaranteed; it merely needs to be reasonably certain that it will be available to the plaintiff.

In *Robert Liciaga v. New York City Transit Authority*,[1] the 23-year-old plaintiff was riding his bicycle through an unbarricaded drop zone where the defendant was conducting a track replacement on an elevated subway line. The plaintiff alleged he was struck by a railroad tie while riding his bicycle through the drop zone, which caused multiple fractured vertebrae in his thoracic spine and a severed spinal cord, leaving him permanently paralyzed below the T7 vertebra. The jury awarded the plaintiff $9 million and $60 million for past and future pain and suffering, $1,174,972.38 for past medical expenses and $40 million for future medical expenses. The plaintiff stipulated to reduced awards for past and future suffering to $4 million and $12 million, respectively. The defendant appealed, and the Appellate Division upheld the reduced award of over $57 million. However, they remanded the matter for a collateral source hearing regarding the plaintiff's future medical expenses.

The defendant's collateral source hearing request focused on the fact that the plaintiff was purportedly eligible for an insurance policy available through New York State's Health Plan Marketplace pursuant to the ACA.

The trial court denied the defendant's request, holding that their position would "improperly compel the plaintiff to procure insurance against his will."[2] Furthermore, the trial court held "insurance coverage that a plaintiff may be able to procure, but which a plaintiff does not currently have, cannot qualify as a 'collateral source within the meaning of CPLR 4545.'"[3]

While the Appellate Division noted the defendant bears the burden of establishing an entitlement to a collateral source reduction by "clear and convincing evidence that the result is highly probable," the burden for a collateral source hearing is "less than the ultimate hearing burden."[4] In order to be entitled to a collateral source hearing the defendant "must [merely] tender some competent evidence from available sources that the plaintiff's economic losses may in the past have been, or may in the future be, replaced, or the plaintiff indemnified from collateral sources."[5]

In support of their motion for a collateral source hearing, the defendant submitted affidavits from both a licensed insurance broker and a forensic economist. The broker identified a specific policy, and the economist opined that if the plaintiff obtained the policy, the future value of his future medical expenses would be approximately $3.75 million less than the jury awarded for future medical expenses. Furthermore, the broker noted the "plaintiff was legally obligated to obtain health insurance" pursuant to the ACA.[6]

As the text of CPLR 4545 does not squarely address this issue of whether a court is prohibited from "awarding a collateral source offset against future medical expenses which, at the time of trial, a plaintiff does not receive the benefits of," the Appellate Division considered the legislative history of the statute.[7] The primary objective of CPLR 4545 "was to eliminate windfalls and double recoveries for the same loss."[8] Furthermore, in 1985 the statute was amended to include future damages, the purpose of which was to "'extend' the 'practice' of awarding offsets for 'those sources of compensation that will, within reasonable certainty, be available to the plaintiff in the future.'"[9] Additionally, in 2009, language was added to CPLR 4545 to include "any collateral source" with certain exceptions.[10]

Without affording defendants the opportunity to present their evidence at a collateral source hearing, the plaintiff is in a position to recover twice for the same loss. In citing to the Fourth Department's dissent in *Young*,[11] the Appellate Division noted a plaintiff could "refrain from applying for" an insurance policy though the ACA "until after he [or she] has obtained a judgment" and recover a "larger award for future medical expenses than he or she would otherwise be entitled."[12]

The Appellate Division disagreed with the trial court's apparent interpretation and restriction of the phrase "continued receipt" of CPLR 4545. They found support in the Court of Appeals' *Bryant* decision.[13] The *Bryant* court followed the "interpretative maxim that a court should not 'hold that in one part of the same statute the legislature deliberately enacted one thing, and then in a subsequent part of the same statute revoked the previous enactment without any apparent reason for so doing.'"[14] Interpreting "continued receipt" in a "way that limits collateral sources to those of which the plaintiff is currently a beneficiary would conflict with the statute's broad language" to consider "'any collateral source' that 'will, with reasonable certainty,' replace or indemnify any awarded

future damages (CPLR 4545[a]).'"[15] Further, the *Bryant* court held a plaintiff's "protected interest in a government entitlement"[16] can be considered a collateral source offset. While recognizing the ACA does not establish a government entitlement, the Appellate Division noted it does entitle "individuals with preexisting medical conditions" to "not be denied coverage or pay unusually high premiums."[17] As such the ACA does support the defendant's position that the plaintiff "will, with reasonable certainty," be able to reduce his out-of-pocket medical expenses. Additionally, the court noted that even though Congress "effectively nullified the [financial] penalty" for those who failed to procure insurance coverage, the ACA "requires most American to comply with its mandate."[18] Regardless, plaintiffs are required to mitigate their damages. Without a plausible explanation, they cannot "simply decline" to obtain insurance coverage which would offset some of their future medical expenses.[19]

In remanding the matter back to the trial court, the Appellate Division held the purpose of CPLR 4545 requires, at a minimum, that the defendant be afforded an opportunity to present their evidence at a collateral source hearing.[20]

Of course, the court's dicta could lead to many unintended consequences for plaintiffs. Suppose at the time of the collateral source hearing there is "currently" a future benefit that will be available to offset plaintiff's future economic costs, but when those benefits are actually needed the collateral source is no longer available. By way of example, there is currently insurance available to cover the type of procedure a plaintiff may need in the future, but when that moment arises, the insurance is no longer available or the insurance carrier refuses to pay for the procedure. In this scenario, the plaintiff is now in a worse position due to any collateral source offset that may have been granted – the opposite of a windfall. However, the court is cognizant of not leaving the plaintiff in a worse position by granting a collateral offset. The court is looking to strike a balance between a plaintiff receiving a windfall and ensuring a collateral source offset does not unfairly harm the plaintiff. The court noted that if such an insurance policy deprived a plaintiff of the ability to choose his or her own providers or limited the plaintiff's treatment options, a defendant should not be entitled to a collateral source offset.[21]

The court focused on the standard for not only being entitled to a collateral source hearing but also explained that the standard to award a collateral source offset for future damages now includes future sources of compensation that will with "reasonable certainty" be available to the plaintiff. It is incumbent upon the plaintiff's counsel to argue against and focus on the "reasonable certainty" aspect of CPLR 4545 in order to avoid their client being put into a worse position should the future benefit not be available when needed. Counsel will need to point to instances, data and specific examples, supported with expert testimony, to show that a future benefit is not reasonably certain to be available to their client.

This decision bodes well for defense counsel practicing in New York, who now have an additional tool in their arsenal for post-trial motions. Additionally, it is wise to use this decision to counter plaintiffs' economic expert reports, as well as for settlement negotiations. A current lack of insurance should not lead to an automatic increase in monetary damages for plaintiffs. At the same time, counsel need to remember that the court strikes a balance to ensure a plaintiff is not put in a worse position due to an offset reduction. The court stressed that a plaintiff is entitled to receive any necessary medical care by their provider of choice.

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Endnotes

1. *Liciaga v. New York City Tr. Auth.*, 218 N.Y.S.3d 359 (2d Dep't 2024).
2. *Id.* at 15.
3. *Id.*
4. *Id.* at 12.
5. *Id.* at 13.
6. *Id.* at 16.
7. *Id.* at 23.
8. *Id.* at 23-24.
9. *Id.* at 24.
10. *Id.* at 25-26.
11. *Young v. Tops Mkts, Inc.*, 283 A.D.2d. 923 (4th Dep't 2001).
12. *Liciaga,* 218 N.Y.S.3d at 25.
13. *Bryant v. New York City Health v. Hosps. Corp.*, 93 N.Y.2d 592 (1999).
14. *Liciaga*, 218 N.Y.S.3d at 28.
15. *Id.* at 29.
16. Examples of a government entitlement include Medicare and Social Security.
17. *Id.*
18. *Id.* at 17.
19. *Id.*
20. *Id.* at 24.
21. *See Malmberg v. United States*, 816 F.3d 185 (2d Cir. 2016).

International Parental Child Abduction: The Perils of Fighting for Custody in Foreign Courts

By Stutee Nag

Recent New York immigration statistics suggest that over 37% of children residing in New York State have one or more foreign-born parents.[1] Data also suggests that most New York immigrants are from non-Hague signatory countries (i.e., countries that are not the signatories to the Hague Convention on the Civil Aspects of International Child Abduction).[2] This can create challenges for lawyers advising clients who are fighting for custody of children with foreign-born parents.

U.S. family lawyers commonly understand that when determining whether a U.S. family court has child custody jurisdiction in a matter, factors such as the children's (or their parents') nationality, gender, religion or immigration status are not relevant. In other words, if the child meets the residency requirement of a state, the concerned family court in that state has the child custody jurisdiction, irrespective of anything else.

Our international clients are often very relieved to learn that they have the option to file for child custody before a U.S. court, irrespective of the above-mentioned factors. But this information might give the client a false sense of security. The significant flip side of this situation is that while a client's or his or her child's immigration status, religion, gender or nationality may not be so relevant in the eyes of a U.S. court, it might just be relevant from the point of view of the other country concerned. In a place as diverse as New York, we can't really afford to overlook the very real possibility that foreign courts may not rule in favor of parents fighting to get their children back after an international parent child abduction.

Gender-Based Preferential Custody Rights Versus a New York State Custody Order

A recent case illustrates the difficulties of pursuing custody in the case of international parental abduction. A mother (an Indian citizen) who held permanent resident status in the U.S. and had been living in New York for several years initiated divorce and custody proceedings in New York against her American citizen husband (of Indian origin). She then abducted her 9-year-old autistic daughter to India while the custody proceedings were well underway in New York. Although she had made domestic violence allegations against the father in New York, such allegations were found to be untrue by the concerned authorities. Once in India, the mother filed for divorce almost instantly.[3]

The New York court noted as follows:

> It is hard to imagine a more egregious, terrifying and shocking action than the sudden abduction of a child [. . .] during the midst of an ongoing custody and divorce proceeding in New York. Plaintiff mother's purposeful and intentional acts in this regard may have permanently severed the relationship between Defendant father and his daughter causing lifelong psychological and emotional harm to both of them. [. . .] Plaintiff's extreme course of action may have permanently limited and seriously harmed the child's life and her future prospects in all regards.[4]

The New York court thus granted sole legal and physical custody of the child to the father. The father then petitioned the concerned Indian High Court for the immediate return of his child. However, despite the mother's conduct, the High Court denied the father's petition, noting that "the custody of a female minor with her biological mother cannot be said to be unlawful."[5] The Indian court further directed the father to appear before the concerned Indian family court.[6] He then appealed before the Indian Supreme Court, where his petition was dismissed once again.[7] No custody trial has taken place so far before the designated family court in India, and when it does, the father will likely only be granted supervised minimal visitation (in India) and will still face the Indian appellate system (which will likely take several years) before a final order is issued.

This is merely one example of how a parent's or a child's gender can play a significant role in another country, and where a U.S. custody order favoring the left-behind parent had no bearing at all.

Not Every Country Recognizes the Concept of 'Joint Custody'

Another significant challenge in international child custody cases is that joint legal custody is not the norm in all countries. Countries such as Algeria,[8] the Philippines,[9] Japan (until now) and Turkey[10] only allow sole custody (typically to the mother) upon a divorce, which, the left-behind parents say, encourages international parental abduction because it provides an abducting mother with an incentive to abduct the child to such a country where she can legally be free from the control and the interference of the other parent. Other than gendered domestic violence issues, the main reasons for awarding sole custody to mothers are due to the preferential custody rights of a mother in certain cultures or in order to give the mother the ability to move on with her life without any interference from the child's father. In the Philippines, custody automatically rests with the mother if the parents are not married.[11]

As recently as May 18, 2024, under significant international pressure, Japan revised its civil code to allow divorced parents the option of joint child custody for the first time in almost 80 years.[12] This revision will come into effect in 2026. Under the current Japanese law, child custody is granted to only one divorced parent, almost always the mother, to shelter the mother from any potential domestic violence. Even under the revised law, if there are concerns about domestic violence against the mother

and/or children, the parties will not have the option for joint custody. Greece is another example, which has, after significant pressure from divorced fathers, only recently allowed for the provision of joint custody upon divorce.[13] However, domestic violence concerns remain at the center of the debate around this law.

Gendered Domestic Violence

Parents who are victims of domestic violence and feel unprotected by the legal system may well wish to remove their child to a safer place and, consequently, some end up abducting their child.[14] The Child Crime Prevention and Safety Center estimates that "two-thirds of all instances of international child abduction involve mothers who were the victims of domestic violence."[15] Whether the country is a relatively new Hague signatory like Japan or a non-Hague country like India, suffice it to say that if an abduction takes place due to domestic violence, the foreign courts will generally not order the return of the child to the U.S.

In a Hague case, most domestic violence cases fall under Article 13(b) of the Convention, i.e., the defense of grave risk of harm. It is a somewhat narrow defense that requires the abducting, or taking, parent to meet a higher burden of proof to successfully assert it. Critics often argue that the vague language of this defense significantly limits its scope to cases where the abuse is directed toward the child. Scholars around the world encourage Hague judges to interpret this defense to treat acts of violence against one parent (or family member) as an act of abuse against the child.

In a non-Hague country, the chances of a child being returned to his or her home country are lower when there are allegations of domestic violence made by the mother. In India, for instance, the emergency return petition (the writ of habeas corpus) will be subject to the standard of best interest of the child, and the allegations of domestic violence will most definitely weigh against the left-behind parent. The courts will be extremely reluctant to order the return of the child if the taking mother or her child would be subjected to domestic violence upon their return. In the instances of alleged domestic abuse, if the left-behind father argues that the taking mother could have reported such abuse to the U.S. authorities, thus suggesting that there were options available to her that she could have pursued instead of simply abducting the child, this argument usually doesn't have any impact on the foreign court's custody determination. Mainly because the mother then alleges a lack of financial resources in the U.S., her "dependent" immigration status, an unsympathetic court system or issues like language barriers.

Domestic violence is not the only reason a parent would abduct a child. Other (often overlooked) reasons include separation or divorce, forum shopping, financial insecurities, disagreement with a court decision about custody, a desire to control or seek revenge against the other parent, disregard for authority, mental illness or paranoia about the other parent.[16] The reasons (other than domestic violence) for child abduction do not change the potential outcome of the case in non-Hague countries. In other words, the child will still most likely not be ordered to return, primarily because courts in such countries have the authority to conduct a *de novo* child custody determination based on the best interest of the child, which may take years. By then, the child is sufficiently at home in the foreign country, and the foreign courts are thus not inclined to order the return of the child. On the other hand, if the country is a Hague signatory and has a good record of returning abducted children (e.g.. Australia, England, New Zealand, Canada, etc.), the child will likely be ordered to return to the U.S. for a custody determination by the U.S. courts.

"In some cases, fathers may even be granted physical custody of the children simply because the mother belongs to a different religion or is judged to have an 'immoral character' based on completely outdated and patronizing gendered cultural norms, such as associating with men outside her own immediate family, dressing 'immodestly,' partying, etc."

Gender Preference Under the Personal Laws of the Parties

In many non-Hague countries, family law is based on the personal law of the parties involved, and it often gives fathers preference as legal guardians, while mothers are usually limited to a caretaker role until the children reach a certain age. In some cases, fathers may even be granted physical custody of the children simply because the mother belongs to a different religion or is judged to have an "immoral character" based on completely outdated and patronizing gendered cultural norms, such as associating with men outside her own immediate family, dressing "immodestly," partying, etc. Although

U.S. courts find such decisions to be "repugnant to U.S. public policy," they are still rendered in some countries. In 2022, in a matter where the children were brought from the United Arab Emirates to Connecticut by their mother, a Connecticut court declined to enforce a court order from the country that awarded custody of two children to their father on the grounds that the children and the father are Muslim while the mother is Christian.[17]

Prevention Is Literally the Best Cure

How might a parent who has a child with a foreign-born immigrant prevent a child abduction? As reported by the U.S. State Department, the best way to handle a potential international parental child abduction situation is to act fast and prevent it from happening. The State Department encourages parents to enroll their children in the Children's Passport Issuance Alert Program. If a passport issuance application is submitted for a child who is enrolled in the program, the authorities can ensure that the parental consent requirement has been met and/or alert the enrolling parent if a passport application is submitted on behalf of their child by someone else. However, this tool is only effective when the child does not already have an American passport at the time of the abduction. Also, it is very likely that the child holds passports from more than one country. Sometimes, a passport is not required to leave the country. For instance, children under 16 are required to produce only a U.S. birth certificate to travel to Canada. Also, a passport may not be required if a parent travels by road into Canada or Mexico or through private means into another country.

The State Department's Prevent Abduction Program allows a parent to place a child's name on the list of children restricted from being removed from the United States if she or he presents an order from a U.S. court of competent jurisdiction prohibiting the child's removal. However, the U.S. does not have any exit controls, and the only way to monitor such a movement is through commercial air departure. Thus, these tools will be rendered ineffective if the child exits the country through other means.

Obtaining a mirror order from the courts in the concerned country or asking the taking parent to post a substantial bond might also be helpful steps in deterring a parent from wrongfully removing or retaining one's child in a foreign country, but such steps do not provide any guarantee of success.

Questions To Ask in an International Child Custody Dispute

In an international child custody dispute, some of the questions that a New York family lawyer must ask before advising an international client are:

- Which other countries are the parties connected to? Are either of the parties still domiciled in that country? Were the parties married in that country? Was their child born in that country? Is the child significantly connected to that country?
- Like the U.S., is that country a signatory to the Hague Convention?
- Does that country's legal system also consider international parental child abduction a serious crime? What is that country's overall record of returning abducted children?
- Do the courts in that country have a specified "residency requirement" for adjudicating child custody disputes? Or can child custody jurisdiction be established overnight in such a country?
- Unlike the U.S., will the courts in that country apply the best-interest-of-the-child standard even in an emergency return proceeding?
- Unlike the U.S., do the courts in that country still apply the "tender-years" doctrine, which favors the mothers?
- Do the courts and country look more favorably on a parent if the parent is male or female? Are the parties governed by the personal religious law of another country?
- Does that country also recognize the concept of "joint legal custody"?
- Does that country honor a foreign custody order? Is there a system in place to enforce or register a foreign custody order? Will a New York custody/return order be sufficient to secure the child's return from that country?
- Do the courts in that country issue mirror orders (orders that "mirror" the terms of a New York custody order)?
- Will the courts in that country recognize "the continuing and exclusive jurisdiction" of a New York court?
- Will the foreign courts give the left-behind parent any additional substantive rights other than initiating and fighting a plenary custody case in that country?
- Should your client allow the other parent to travel with the child to a country where the other parent will be favored because of their gender, religion or nationality?
- Is that country likely to issue a quick blanket travel ban once the child is present there?
- Is the foreign country's court system plagued by judicial delays?

Such timely questions will certainly help a New York attorney thwart the other side's "forum shopping" attempts in an international child custody dispute.

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Annual Review of New Criminal Justice Legislation

By Barry Kamins

This article reviews new legislation amending the Penal Law, Criminal Procedure Law and related statutes. The discussion that follows will highlight key provisions of the new laws, which the reader should review for specific details. Where indicated, legislation enacted by both houses is awaiting the governor's signature; the reader should check to determine whether the governor has signed or vetoed a bill.

In the past 2023-24 legislative session, there were three areas in which substantive legislation was enacted: added security for judges and juries; curtailment of organized retail theft; and the criminalization of deed theft to protect homeowners.

Increasing Security for Judges and Juries

The Legislature enacted two measures to increase security for judges and their families. First, it passed the New York State Judicial Security Act, which permits judges or former judges to request that personal information about themselves or family members be removed from the internet and other media. Such information includes home addresses, unlisted telephone numbers, cell phone numbers, email addresses, license plate numbers, identity of children under the age of 18, etc. The act would also restrict businesses and other entities in possession of such information from sharing it.[1]

This provision was in response to an increase in the number of judges around the country being threatened, stalked and even assaulted. In July 2020, in New Jersey, a federal judge watched as her son was murdered and her husband shot by an angry litigant in her home.

A second part of the legislation increases protection for judges by enacting new crimes to protect the judiciary and by amending the current statute. The current crime of assault on a judge (a class C felony) was amended by removing the requirement that the crime be committed with the intent "to cause serious physical injury." Thus, a prosecutor will now only need to prove that a person caused serious physical injury with the intent to "prevent a judge from performing official duties."

Two new crimes were enacted: aggravated assault on a judge (P.L. Section 120.09-a, a class B felony) and aggravated harassment of a judge (P.L. Section 240.33, a class E felony).

Aggravated assault on a judge will be committed when a person causes serious physical injury, with both the intent to cause that injury and an intent to prevent the judge from performing official judicial duties.

Aggravated harassment of a judge will be committed when a person engages in various acts, as specified in the statute, with the intent to harass either a judge or a member of the judge's "immediate family" and the person knows or should know that such act will cause the judge (or a family member) to reasonably fear harm to their physical safety or property. The acts can consist of various forms of threatening communications or physical contact (striking, shoving, kicking) that can cause physical injury. The statute adopts the definition of "immediate family" currently utilized in the crime of stalking (P.L. Section 120.40).

Members of juries were also provided more security by the Legislature. This was a reaction to certain high-profile cases where the names of jurors were not made public out of a concern that the welfare of the jury was at risk. Under an amendment to the Criminal Procedure Law, upon motion of the prosecutor, defense counsel, or "any affected person," or upon the court's own initiative, a court can issue a protective order preventing the names of any prospective juror from being made public.[2]

The protective order must be based upon "good cause." In determining good cause, a court can consider: (1) whether a juror or prospective juror has been tampered with, bribed, harassed or injured; (2) the seriousness of the charges against the defendant; or (3) the extent of pretrial publicity. If a court determines that a protective order should be issued, it must instruct the jury that the fact that the jury was selected on an anonymous basis is not a factor from which it may draw any unfavorable inference against the defendant.

Addressing Organized Retail Theft

A second initiative by the Legislature in the last session was an effort to reduce an increase in organized retail theft. Among the several laws that were enacted, the most notable bill permits felony charges to be filed against individuals who steal merchandise from more than one store. Currently, if a person steals merchandise worth $500 at one store, and then merchandise worth $501 at a second store, that person can only be charged twice with petit larceny.

Under the new law, if a person steals property from more than one location "pursuant to a common scheme of a plan," and the value of the property exceeds $1,000, the person can now be charged with grand larceny in the fourth degree, a class E felony.[3] If the aggregate amount is greater, a person can be charged with grand larceny in the third degree ($3,000); second degree ($50,000) or first degree ($1 million). It should be noted that a conviction for these crimes is excluded under the persistent felony offender statute for purposes of sentencing (P.L. Section 70.10 (1)(b)(iv)).

Another related bill enacted a new crime, assault on a retail worker (P.L. Section 120.19), a class E felony.[4] This crime will now be committed when a person causes physical injury to either an employee or owner of a retail establishment with the intent to "prevent a retail worker

from performing an act within the scope of such worker's employment."

Finaly, the Legislature created a new class A misdemeanor, fostering the sale of stolen goods.[5] This crime will now be committed when a person uses any digital platform or any venue to offer for sale stolen merchandise which the person knows or should have known was stolen or unlawfully obtained.

Criminalizing Deed Theft

A third substantive initiative by the Legislature criminalizes deed theft. This form of real property theft is committed by individuals who fraudulently obtain the deed to someone's home, either through falsifying signatures or persuading the homeowner to sign away the deed under false pretenses. Perpetrators of this type of crime target older victims and homeowners in minority communities.

The new law amends the definition of larceny by adding "deed theft" as a method of unlawfully obtaining another person's property, and it now constitutes grand larceny; the degree of grand larceny will depend upon the value of the property. Finally, the new law authorizes the attorney general to prosecute deed theft as well as "any crime that affects the title to, encumbrance of, or the possession of real property."[6]

Each year the Legislature enacts new crimes and expands the definition of others, and this year was no exception. In response to an increase in the number of hate crimes in New York and around the country, the Legislature added 22 "hate crimes" to the already existing list of 62 such crimes. State Comptroller Thomas Napoli issued a report which found that hate crimes increased 12.7%, statewide, in 2023 and that antisemitic bias incidents comprised 44% of the total amount. Designating a particular crime as a "hate crime" raises its severity by one level, thus increasing the severity of the potential sentence.[7]

In an effort to curtail identity theft (the fastest growing crime in this country), the Legislature added "medical information" and "health insurance information" to the type of information which, if obtained fraudulently, will now constitute the crime of identity theft.[8]

Two bills were enacted to protect specific classes of individuals. First, in response to an increase in anti-Muslim incidents in New York, the crime of aggravated harassment in the second degree (a class A misdemeanor) has been amended to include the removal of a "religious clothing article or headdress" from a person with the intent to harass, annoy, threaten or alarm. This will address the increase in incidents in which individuals have pulled or ripped off a hijab or a skullcap or yarmulke from individuals.[9]

A second bill amends the above harassment statute to provide more security for employees who work on trains, buses and ferries. A person can now be convicted of a class A misdemeanor by shoving, spitting, striking or otherwise subjecting these employees to physical contact.[10]

Updating Language on Firearms

The Legislature has enacted three new laws related to the possession of weapons. First, a bill was passed to amend the term "Kung Fu Star" as a per se weapon. As noted in the sponsor's memo, "Kung Fu Star" is an outdated term; the weapon does not originate in China as the term implies. The term "throwing stars" or "shuriken" has been substituted in its place.[11]

The term "pistol converter" has been added to the definitional section of Article 265 of the Penal Law. A pistol converter can transform an ordinary pistol into an automatic weapon by allowing it to fire as many as 15 rounds in under two seconds. The General Business Law was also amended to require firearm dealers in New York State to take reasonable steps to prevent the use or installation of pistol converters.[12] The licensing section of the Penal Law was amended to require firearms dealers to post warnings, specifically informing buyers, or potential buyers of weapons, about the inherent dangers of weapons possession. A failure to post such a warning will now constitute a violation under the Penal Law.[13] Finally, the crime of reckless driving has been expanded to include driving in a parking lot.[14]

Other Notable Legislation

In the last session, the Legislature sought to strengthen the laws that require a license to sell cannabis. One measure was an amendment to the crime of obstructing governmental administration, which now prohibits a person from damaging or removing a padlock that was installed pursuant to court order that closed or sealed an illegal cannabis store.[15]

Probationers have now been given the same protection as parolees, in that they are deemed incapable of consent should a probation officer engage in sexual activity with them. The disparity in power between a probation officer and his or her probationer creates the potential for any sexual relationship to be coercive in nature.[16]

Finally, the Legislature repealed the crime of adultery which was a class B misdemeanor. This was an antiquated but seldom enforced law that has been repealed in the vast majority of states. Only 13 people have been charged with adultery in New York over the past 52 years. The Legislature took this step because it was felt that the state should not be regulating the consensual sexual behavior between adults.[17]

A number of procedural changes were enacted in the last legislative session. One bill would expand e-filing to all "courts of New York having criminal jurisdiction"; this would allow e-filing to be used in the New York City Criminal Court and in the criminal term of Supreme Court.[18]

The Legislature has expanded the ability of judges to issue orders of protection in family offense matters. Judges can now provide an order of protection to an individual who is not a minor and who is neither a family member of the perpetrator nor someone having an intimate relationship with him or her.[19]

In *People v. Slade*,[20] the Court of Appeals held that an information is not subject to dismissal when, on the face of the instrument, there is no indication that the complainant's allegations have been translated from a non-English language. In response to that decision, the Legislature enacted a new law that requires a certificate of translation to accompany accusatory instruments and supporting depositions in cases where deponents are not fully proficient in the English language.[21]

Finally, the term "poor person relief" has been removed from the Criminal Procedure Law; it is a highly outdated and pejorative term.[22] And six additional counties have been given the authority to conduct electronic court appearance in criminal cases, aside from a hearing or trial (Saratoga, Monroe, Delaware, Oswego, Otsego and Schoharie).[23]

Finally, the Legislature has amended the Judiciary Law to allow a convicted felon to serve on a jury.[24] Approximately one third of black males in New York State have been excluded from the jury pool because of this exclusion and it has created racial disparity in some juries across the state; this in turn has had an impact on the quality and fairness of the jury system.

The Vehicle and Traffic Law has been amended to address the increase in "ghost" license plates that have been used by motorists to avoid payment of tolls. More than 100,000 license plates images passing through Department of Transportation cameras alone are unreadable every month. The police department has also been concerned about this phenomenon because it has a direct impact on crime detection. Fines under the new law range from $100 to $500. Repeat offenders who are convicted three times within five years may have their registration suspended for 90 days or longer.[25]

Finally, jaywalking has been legalized in New York City.[26] Legislation was passed by the New York City Council in September and became law on Oct. 26, 2024 after Mayor Eric Adams declined to act – either by signing or vetoing it after 30 days. The new law permits pedestrians to legally cross a roadway at any point, including outside of a crosswalk, and allows for crossing against traffic signals.

According to the bill's sponsor, the legislation was passed because an overwhelming number of summonses have been issued to persons of color. The police department issued 786 summonses for jaywalking in the first six months of the year and 77% of them were issued to Black and Hispanic individuals; the legislation was passed to address this imbalance.

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This article also appears in NY Criminal Justice Section Reporter, the publication of the Criminal Justice Section. For more information, please visit NYSBA.ORG/CRIMINALJUSTICE.

Endnotes

1. 2024 N.Y. Laws, Ch. 56, Part F (adding Judiciary Law article 22-c), eff. July 19, 2024.
2. A. 7495, awaiting the signature of the governor.
3. 2024 N.Y. Laws, Ch. 55, Part FF (amending P.L. §§ 155.36 155.40 and 155.42), eff. July 19, 2024.
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5. 2024 N.Y. Laws, Ch. 55, Part B, (adding P.L. § 165.66), eff. November 1, 2024.
6. 2024 N.Y. Laws, Ch. 56, Part O, (amending P.L. § 155.00), eff. July 19, 2024.
7. 2024 N.Y. Laws, Ch. 55, Part C (amending P.L. § 485.05) eff. June 19, 2024.
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11. A. 8425, awaiting the signature of the governor.
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13. 2024 N.Y. Laws, Ch. 426 (amending P.L. § 400.00), eff. October 9, 2024.
14. 2024 N.Y. Laws, Ch. 436 (amending VTL § 1212) eff. November 22, 2024.
15. 2024 N.Y. Laws, Ch. 55, (amending P.L. § 195.05), eff. April 20, 2024.
16. A. 1774, awaiting the signature of the governor.
17. A. 4714, awaiting the signature of the governor.
18. S. 7524, awaiting the signature of the governor.
19. S. 6288, awaiting the signature of the governor.
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Eminem's Fight Against 'Reasonably Shady' Housewives

By Alison Pringle

What do Eminem (also known as Marshall Mathers III) and two "Real Housewives of Potomac" have in common? They each claim trademark rights relating to the word "shady."

For those unfamiliar with the Bravo television network and its "Real Housewives" franchise, "The Real Housewives of Potomac" chronicles the lives of a group of women residing in Potomac, Maryland.[1] Gizelle Bryant and Robyn Dixon have served as main cast members since the show's first season in 2016.[2] Like many a reality television star, Bryant and Dixon decided to start a podcast, and in May 2021, the pair launched the "Reasonably Shady" podcast. Why "Reasonably Shady"? Dictionary.com defines "throwing shade" as "a subtle way of disrespecting or ridiculing someone verbally or nonverbally," and shade has become used on its own as a term for the act of an often-humorous snub or slight.[3] Their

chosen title was not likely any surprise for viewers. The slang terms "shade" and "shady" are commonly used in "The Real Housewives of Potomac," and the terms have inarguably evolved in their own right within pop culture over the last decade.

The "Reasonably Shady" podcast is at this writing over 147 episodes in and counting, and its range of topics include dating, rumors, beauty, pop culture, motherhood and, of course, commentary regarding "The Real Housewives of Potomac." And like many a podcast star, Bryant and Dixon sought to capitalize on their success by selling "Reasonably Shady" merchandise. Cut to February 2022, when Bryant and Dixon filed a trademark application for the mark REASONABLY SHADY.[4] The application sought trademark rights in a range of products, including candles, makeup, mugs and apparel, as well as in "entertainment services."[5] The application specifies such "entertainment services" as "providing podcasts in the field of dating, relationships, marriage, entrepreneurs, motherhood, style, glam and current events."[6]

Enter Eminem. In January and February 2023, Mathers filed notices of opposition with the United States Patent and Trademark Office's Trademark Trial and Appeal Board.[7] Mathers argued he would be damaged by the issuance of a registration for the mark REASONABLY SHADY, citing priority of use, likelihood of consumer confusion and dilution by blurring as grounds for the opposition.[8] Mathers specifically pointed to his own marks for SHADY and SLIM SHADY, which were registered from 2001 to 2002 and remain active.[9] Mathers' SHADY mark includes apparel (e.g., T-shirts, sweatshirts, hats)[10] Mathers' SLIM SHADY mark includes apparel as well as "musical sound recordings" and "entertainment services" (with the later specified as "the presentation of live musical performances by a recording artist").[11] Mathers argued that he has "been engaged in substantially exclusive use" of the name and marks SLIM SHADY and SHADY since 1996, including in connection with his stage identity, entertainment services, musical sound recordings and apparel.[12] Mathers also argued that the "dominant portion" of the REASONABLY SHADY mark is identical to his own marks and that confusion was unavoidable where the mark "simply looks and sounds like SHADY and suggests that it represents the services of Mathers."[13]

Opposition proceedings have been ongoing before the Trademark Trial and Appeal Board for the past year. To date, however, Mathers has refused to sit for a deposition. On Nov. 29, 2023, applicants Bryant and Dixon filed a motion to compel Mathers to appear. Bryant and Dixon argued that, as the signatory and owner of the marks, and where Mathers claimed dilution of his marks would harm his reputation, they would need to depose Mathers as part of the discovery process.[14] Bryant and Dixon further argued they too were celebrities (or, at the very least, "Bravolebrities," in the eyes of Bravo fans) in their own right and had each provided the courtesy of sitting for deposition for Mathers. Thus, they argued, it was "not overly burdensome for [Mathers] to extend the same courtesy for his obligation."[15] Mathers in turn moved for a protective order and again outright refused to appear for a deposition, claiming that it would indeed be highly burdensome for him and that another person had a better understanding of relevant documents, marketing and advertising (i.e., his business manager, Paul Rosenberg).[16]

Mathers is certainly not the first celebrity to oppose appearing for a deposition in a high-profile case. Nor is he the first to be ordered to appear in a trademark proceeding. Other examples include when LeBron James was ordered to appear for a deposition in a trademark dispute over an applicant's attempt to register the mark KING JAMES.[17] James argued that "King James" is a well-known nickname used to refer to him, and consumers would thus associate the KING JAMES mark with LeBron James. When the applicant sought to depose James, James argued the applicant "only intended to harass Mr. James."[18] The appeal board was not convinced, however, and cited the facts that James was a named party and had asserted trademark claims in the dispute in its decision.[19]

In another celebrity trademark case, the District Court for the Central District of California ordered Taylor Swift to sit for a deposition in a suit brought by the owner of the mark LUCKY13.[20] There, Swift was defending claims regarding her use of "Lucky 13" on merchandise, with 13 being Swift's purported lucky number. Swift moved for a protective order, citing harassment, a busy tour schedule and a claimed lack of relevant knowledge, but she was nonetheless ordered to appear.[21]

Back to Eminem. Like the above decisions involving Taylor Swift and LeBron James, on Feb. 29, 2024, the appeals board ruled that Mathers must appear for a deposition.[22] The decision rejected Mathers' attempt to rely on the burden-shifting analysis applied where a party is seeking to depose an officer at the highest level, or "apex," of a corporation. Instead, as the sole individual who brought the proceeding and owns the marks pleaded as the basis for opposition (marks by which Mathers alleged he is known by), Mathers was required to demonstrate good cause to prevent his deposition. The board found Mathers failed to demonstrate good cause and that Bryant and Dixon would be entitled to take his deposition.

Within hours of the ruling, Mathers filed a motion for summary judgment.[23] Mathers argued that his SLIM SHADY and SHADY marks are famous and that the parties' apparel and merchandise overlapped in the marketplace, particularly with respect to T-shirts and hats.

Mathers also claimed his use of the marks in connection with entertainment services, via live musical performances and musical recordings, was sufficiently related to Bryant and Dixon's podcast services. According to Mathers, the marks at issue are substantially similar and are likely to confuse consumers into believing the parties' products and services are from a single source.

Bryant and Dixon responded by filing a motion for discovery under Federal Rule of Civil Procedure 56(d).[24] This section provides that, if a nonmovant demonstrates it cannot present facts essential to justify its opposition, the court may defer or deny a dispositive motion, allow more time for discovery or issue other appropriate relief.[25] Bryant and Dixon argued that they could not rebut facts set forth in the motion, as they had not yet had an opportunity to conduct Mathers' deposition, expert testimony or follow-up discovery.

The appeals board recently issued an order ruling that Bryant and Dixon could take the deposition of Mathers' manager, Rosenberg, prior to responding to the motion for summary judgment, particularly where Mathers relied on Rosenberg's declaration to support the motion.[26] However, the board declined to order Mathers' deposition in advance of Bryant and Dixon's response, finding the pair failed to demonstrate it was needed to respond to the motion as drafted. The board rejected Bryant and Dixon's argument that they had not had the opportunity to ask Mathers about "his state of mind when selecting the trademarks at issue and why he believes they are famous."[27] The board noted that its assessment of a mark's fame or strength in connection with a likelihood of confusion claim "is not based on a party's belief that its mark is famous" and instead "is based on evidence such as the volume of sales and advertising expenditures for the goods and services sold under the mark."[28] Rosenberg, not Mathers, submitted such evidence. In essence, the board noted that Bryant and Dixon were not barred from taking Mathers' deposition as part of discovery generally, but the board did not agree that it was necessary to respond on summary judgment.

Bryant and Dixon have sought reconsideration, arguing they should be entitled to depose their mark's opposer rather than relegated to deposing a third party witness.[29] They also reiterated, "Mr. Mathers' deposition is critical in determining ownership, validity of rights, state of mind that pertains to fame, along with actual confusion issues, and current use."[30] This request remains pending, and the board has since suspended all proceedings. Thus, a critical question remains: Will the real Slim Shady sit for a deposition? This is one to keep an eye on for inquiring rap and Bravo fans alike.

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Endnotes

1. As it turns out, being a resident of Potomac, Maryland is not an actual requirement to be on the show. Rather, the cast includes women generally residing in the "DMV" (or District of Columbia, Maryland and Virginia) area.
2. In April 2024, Robyn Dixon was fired from the show after eight seasons. Dave Quinn and Dory Jackson, *Robyn Dixon Confirms Exit From Real Housewives of Potomac After 8 Seasons:'I Was Fired,'* People, Apr. 15, 2024, https://people.com/robyn-dixon-confirms-exit-from-real-housewives-of-potomac-8619843.
3. "Throwing shade," Dictionary.com, retrieved Apr. 18, 2024, https://www.dictionary.com/e/slang/throwing-shade/.
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5. *Id.*
6. *Id.*
7. United States Patent and Trademark Office's Trademark Trial and Appeal Board Opposition Proceeding Nos. 91283402, filed Feb. 14, 2023, and 97248176, filed Jan. 19, 2023.
8. Notice of Opposition, filed Feb. 14, 2023, Trademark Trial and Appeal Board Opposition Proceeding No. 91283402.
9. *Id.*
10. United States Trademark Registration No. 2468453, Serial No. 75831719, "SHADY," Goods/services Class 025: T-shirts, sweatshirts, shorts, halter tops and hats.
11. United States Trademark Registration No. 2626305, Serial No. 76181429, "SLIM SHADY," Goods/services Class 025- CLOTHING; NAMELY, SHIRTS, LONG-SLEEVE T-SHIRTS; SHORT-SLEEVE T-SHIRTS; CAPS, HATS, KNIT HATS AND BASEBALL CAPS; United States Trademark Registration No. 2641856, Serial No. 76181431, "SLIM SHADY," Goods/services Class 009: MUSICAL SOUND RECORDINGS; United States Trademark Registration No. 2667895, Serial No. 76152078, "SLIM SHADY," Goods/services Class 041: ENTERTAINMENT SERVICES, NAMELY, THE PRESENTATION OF LIVE MUSICAL PERFORMANCES BY A RECORDING ARTIST.
12. Notice of Opposition, ¶¶ 2-8, filed Feb. 14, 2023, Trademark Trial and Appeal Board Opposition Proceeding No. 91283402.
13. Notice of Opposition, ¶¶ 22-24, filed Feb. 14, 2023, Trademark Trial and Appeal Board Opposition Proceeding No. 91283402.
14. Motion to Compel Deposition of Marshall Mathers III, filed Nov. 29, 2023, Trademark Trial and Appeal Board Opposition Proceeding No. 91283402.
15. *Id.*
16. Response in Opposition to Applicants' Motion to Compel Deposition of Marshall Mathers III and Cross Motion for Protective Order, filed December 15, 2023, Trademark Trial and Appeal Board Opposition Proceeding No. 91283402.
17. Decision, filed Sept.1, 2021, Trademark Trial and Appeal Board Opposition Proceeding No. 91249886.
18. Decision, filed Apr. 1, 2021, Trademark Trial and Appeal Board Opposition Proceeding No. 91249886.
19. *Id.*
20. *See Fed.Blue Sphere, Inc. v. Swift*, No. SACV1400782CJCDFMX, Order Denying Defendants' Motion for a Protective Order (C.D. Cal. Aug. 4, 2015).
21. *Id.*
22. Decision, filed February 29, 2024, Trademark Trial and Appeal Board Opposition Proceeding No. 91283402.
23. Opposer's Motion for Summary Judgment, filed Feb. 29, 2024, Trademark Trial and Appeal Board Opposition Proceeding No. 91283402.
24. Motion for Discovery, filed Mar. 6, 2024, Trademark Trial and Appeal Board Opposition Proceeding No. 91283402.
25. Federal Rule of Civil Procedure 56(d).
26. Decision, filed July 1, 2024, Trademark Trial and Appeal Board Opposition Proceeding No. 91283402.
27. *Id.*
28. *Id.* at p. 10, n. 12.
29. Request for Reconsideration, filed July 12, 2024, Trademark Trial and Appeal Board Opposition Proceeding No. 91283402.
30. *Id.* at p. 2.

Can Lawyers Moonlight?

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

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

To the Forum:

I am a recent law school graduate who was admitted to practice just a few weeks ago. I began my first job as a lawyer soon after taking the bar exam at a small family law firm in New York City that participates in a lot of pro bono work. Being that the firm takes many pro bono cases, my salary is relatively low compared to my law school peers who are working at bigger firms. I very much enjoy my work and my firm but have found it very hard to make ends meet with my first-year associate salary and the current state of the economy. I do not want to quit for a higher paying job, but I have come very close to being unable to afford the rent for my modest New York apartment and necessities like groceries.

Throughout law school, I was a server and bartender at a restaurant, which I found to be very lucrative. That job helped me pay for housing during school and all of those expensive textbooks. I decided a few weeks ago to start looking for serving and bartending jobs again for my time outside of work at night and on the weekends to help me feel a bit more comfortable financially while allowing me to continue working at my firm. However, I recently came across an article about an attorney being sanctioned for moonlighting as a document reviewer for another company and now I am worried.

My question for the forum is what are the ethical rules surrounding attorneys working multiple jobs? Are attorneys bound to one job and firm at a time or are they allowed to work second jobs so long as they are not related to the practice of law?

Warmly,

Mona Leighton

Dear Ms. Leighton:

Your question highlights a concern many lawyers quietly share. The reality of financial strain, even in a profession often associated with high incomes, sometimes necessitates a second job. While the New York Rules of Professional Conduct (RPC) do not categorically forbid additional employment, several ethical and contractual considerations must be kept in mind.

Employment Contracts and Employer Policies

As an initial matter, we suggest that you start by reviewing your firm's policies regarding outside employment, or your employment contract with your firm if you have one. Many firms prohibit outside employment and include an exclusivity clause prohibiting outside employment – even unrelated to law – in written agreements with attorneys. Breaching such provisions could result in termination. Even without a specific clause, at-will employers may dismiss employees for reasons such as secondary employment, lawful though it may be.

There are public or governmental sector jobs that prohibit lawyers from private practice, e.g., the district attorney's office,[1] attorneys employed by the Workers' Compensation Board,[2] attorneys for the New York City Corporation Counsel,[3] or clerks of the New York State Court of Claims.[4] Generally, private employers are free to restrict their employees to working only for them.[5]

Conflicts of Interest

New York's Rule 1.7 bars lawyers from representing clients if their professional judgment could be impaired by personal interests. For example, taking a second job at a restaurant owned by a party involved in litigation with one of your firm's clients could create a conflict. Even unrelated jobs may lead to conflicts if circumstances arise that connect them to your legal practice. The section most applicable to your situation is 1.7(a)(2), which states that "a lawyer shall not represent a client if a reasonable lawyer would conclude that. . . . (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." This language is broad and can be applied to myriad situations.

Example Scenarios

Consider the case of Wilma Hill-Grier, an attorney who worked as a teacher while continuing to represent private clients. She was sanctioned for representing a client in litigation against the City of New York – her employer – violating both city rules and Rule 1.7. The dual roles created divided loyalties and impaired professional judgment.

Hill-Grier was fined by the board of education for her representation of this client because the city charter and board's rules prohibited its employees from appearing against the interests of the city in "any litigation to which the city is a party."

Of course, this situation also clearly created a conflict of interest that violated Rule 1.7 because Hill-Grier was employed by the city, and also actively participating in litigation against the city. Comment [1] to Rule 1.7 states that "the professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties." Put plainly, how could Hill-Grier represent her client who is suing the city in a manner that is "free of compromising influences and loyalties" when she herself worked for the city?[6]

Comment [2] to Rule 1.7 breaks down the questions lawyers should ask to analyze whether a conflict of interest exists and whether it can be resolved. The lawyer must:

1. Clearly identify the client or clients.

2. Determine whether a conflict of interest exists, i.e., whether the lawyer's judgment may be impaired or the lawyer's loyalty may be divided if the lawyer accepts or continues the representation.
3. Decide whether representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable under 1.7(b).

In Hill-Grier's case, her judgment would likely be impaired or her loyalty divided by her conflicting interests. She might be unable to effectively advocate for her client suing the city for fear of losing her job with the city.

While unlikely in your scenario, given the nature of the second job you would like to pursue, it is always possible that a conflict may arise. Suppose, for example, that the manager at the restaurant you work at is in the middle of a divorce and custody battle with her husband and you find out that your firm is representing her husband. It would be difficult for you and your firm to continue representing the husband as your personal interests (avoiding conflict with your manager, confidentiality breaches or possible termination) conflict with those of your client. In an instance like this, Rule 1.7 would require you to determine whether your judgment as an attorney for your manager's husband may be affected or your loyalty divided. Keep in mind that even though you personally might not be representing the husband, your conflict of interest may be imputed to your entire firm.

Other Ethical Considerations

We also cannot overlook the fact that there are special conflict rules that apply to former and current government officers and employees. Rule 1.11(a) states that "a lawyer who has formerly served as a public officer or employee of the government . . . (2) shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation." This limits jobs that government officers and employees may have concurrently or even after their employment with the government.

Other rules apply to former judges, arbitrators, mediators, or other third-party neutrals that limit their employment. Rule 1.12(a) prohibits a lawyer from "accepting private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity."

Beyond conflicts, rules like Rule 5.7 (lawyers providing nonlegal services) and Rule 8.4 (prohibiting dishonesty or conduct reflecting poorly on fitness to practice) may apply. If patrons at your restaurant seek legal advice, you must clarify that no attorney-client relationship exists. Avoid giving legal advice in such informal settings to steer clear of misunderstandings.

Rule 5.7 (a)(2) states that "a lawyer or law firm that provides nonlegal services to a person that are distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship."

Comment [2] to this rule poses the scenario of nonlegal services being "provided through an entity with which a lawyer is affiliated, for example, as owner, controlling party or agent." In this scenario, the lawyer must adhere to the RPC even if acting as a nonlawyer, because there is "a risk that the recipient of the nonlegal services might reasonably believe that the recipient is receiving the protection of a client-lawyer relationship." This must be abided by "unless the person understands that the nonlegal services are not the subject of a client-lawyer relationship."[7]

This is unlikely to be an issue in your situation. However, say you are bartending, and you have a customer who knows you are a lawyer and begins asking you legal questions or for legal advice for his particular circumstance. The lines may get blurry there. In such a scenario, it doesn't hurt to ensure that the customer understands that your conversation while you offer "nonlegal services" does not constitute a protected client-lawyer relationship. Generally, you should avoid providing any legal advice at all in a situation like this.

Moonlighting as a Lawyer

Greater scrutiny applies to lawyers who maintain side law practices. For example, a partner at a New York firm was suspended for improperly running a private practice, misrepresenting earnings, and breaching firm policies. These violations, rooted in dishonesty, clearly violated ethical rules. By contrast, honest and transparent supplemental employment unrelated to law, such as bartending, is less likely to raise ethical concerns.

Earlier this year, the First Department of the New York Appellate Division suspended an attorney from practicing in New York State for six months because he "improperly maintained his own personal practice" while working as a partner at the law firm Crowell and Moring and underreported his earnings from his side practice in violation of Rule 8.4.[8]

The court found that the lawyer violated the RPC because "he engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation" by "(1) failing to deliver to the law firm the earnings he received for his professional activities on behalf of his clients while employed as a

partner by the law firm; (2) utilizing a parallel invoice system and creating 12 personal invoices directing clients to make payments to his personal account in violation of the partnership agreement; and (3) using law firm letterhead for personal invoices." The court also found that the lawyer's conduct violated RPC 8.4 (h)[9] because it adversely reflected on his fitness as a lawyer.

Your case certainly is not as severe as this lawyer's was. It's hard to say that waiting tables or bartending at a restaurant would adversely reflect on your fitness as a lawyer. The lawyer there not only took on non-law firm clients privately, he also personally billed clients of the firm for work he solely did, avoiding use of the firm's billing practices. As a partner and employee of the firm advising firm clients, these funds belonged in part to the firm and the lawyer kept them for himself. The deceit and theft that this lawyer participated in while moonlighting was a clear ethical violation.

Best Practices

There are no specific rules that *prohibit* lawyers from moonlighting to supplement their incomes. However, there are certainly conflict-of-interest and other ethical rules to keep in mind before doing so. Additionally, even if there is no employment contract with your firm containing a provision prohibiting a second job or there is no conflict of interest, it is always best practice to check with your employer before beginning any sort of additional employment. Before pursuing a second job, consult your employer and disclose your plans to avoid misunderstandings. Transparency helps mitigate concerns about potential conflicts or policy violations. While moonlighting isn't inherently unethical, the specifics of your employment, your firm's policies, and potential conflicts must guide your decision.

The Forum by

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QUESTION FOR THE NEXT FORUM

To the Forum:

I have been an attorney with a prominent New York law firm for the past several years. During my tenure, I have gained a vast client base and a lot of experience, for which I am grateful. However, I feel that I am ready to move on and open my own private practice, and thought the partners that have mentored me would be happy for me. However, that was not the case when I told them the news and put in my two-weeks' notice. Instead, they were less than impressed and warned that my leaving is a breach of my employment agreement, which I signed before I was even admitted as an attorney, when I first received the job upon graduation. The partners threatened to hold me accountable for my breach of contract when I leave.

After my meeting with the partners, I took another look at the employment agreement. It contains several clauses that seem to me now – as an experienced attorney – to be completely unfair and make leaving the firm impossible without some sort of consequence. The employment agreement included restrictions and penalties that the firm would impose if lawyers leave the firm without "good reason." This phrase was undefined and completely up to the partners' discretion to decide what constitutes "good reason" for leaving. There were also restrictions placed on contacting clients to let them know of lawyers leaving firms, working with other lawyers and employees who have left the firm and participating in any sort of investigations against the firm.

Clearly, there is a contract issue and many of these terms can't possibly be enforced; however, my question for the forum is whether the firm's conduct violates any ethical rules?

Sincerely,

Owen Schingel

Endnotes

1. *See In re McDonald*, 174 A.D.2d 942 (3d Dep't 1991).
2. *See Lazarus v. Steingut*, 129 Misc. 2d 982 (Sup. Ct., N.Y. Co. 1985).
3. *See Civil Serv. Bar Assn. v. Schwartz*, 114 Misc. 2d 849 (Sup. Ct., N.Y. Co. 1982).
4. *See Klingaman v. Bartlett*, 92 Misc. 2d 271 (Sup. Ct., Albany Co. 1978).
5. *In Warren v. Meyers*, 187 Misc. 2d 668 (2001), the court found that it is "well recognized that restrictions on em-ployment by governmental or quasi-governmental agencies are enforceable."
6. *See* Rule 1.7, Comment [1].
7. *See* Rule 5.7, Comment [2].
8. David Thomas, *NY Suspends Moonlighting Ex-Partner at Law Firm Crowell & Moring*, Reuters, Jan. 5, 2024, https://www.reuters.com/legal/legalindustry/ny-suspends-moonlighting-ex-partner-law-firm-crowell-moring-2024-01-05/.
9. Rule 8.4(h) prohibits a lawyer from engaging in "any other conduct that adversely reflects on the lawyer's fitness as a lawyer."

The 'Shop Book' Rule

By David Paul Horowitz and Katryna L. Kristoferson

With the holiday season upon us, and shopping both online and in stores in full swing at the time of writing this issue's column, it seemed the right time to discuss an evidentiary rule originally referred to as the "Shop Book" Rule (and sometimes as the "Regular Entries" Rule). In our last column we opined that perhaps the most important rule in the CPLR is Rule 2104, "Stipulations." While reasonable minds might differ about which rule is most important, there is general agreement among CPLR geeks about rules that place in the top 10, and we turn to another one of those finishers, CPLR 4518, "Business Records" (f/k/a the "Shop Book" Rule).

The opening sentence of CPLR 4518 provides the foundation necessary to admit a business record into evidence:

> (a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.

Providing a proper foundation has been established, CPLR 4518 permits the introduction into evidence of myriad documents used every day in motions and trials which are, on their face, hearsay. Without the rule, the rapids counsel would have to navigate in order to admit those records into evidence would be difficult at best, impossible at worst, and would significantly increase the legal work necessary to establish that proof, along with the concomitant cost. It is a critical tool in the litigator's tool box.

Origins and Evolution of the Rule

The Court of Appeals in *Smith v. Rentz*[1] recites the origins of the rule:

> The "shop book" rule was first introduced in New York through the Dutch colonial courts. It permitted merchants to exhibit their books of account when it was shown that the books were regularly kept and that there had been several dealings between the parties involved in the suit. These books of account were admitted as evidence of the charges contained in them when it was proven that the books were regularly kept. When the English gained control of New York, there was an even greater need for the rule, for English common law at that time did not permit parties to testify on their own behalf.

Having satisfied the History Channel contingent, fast forward to the 21st century where, in 2010, the Court of Appeals in *People v. Ortega*,[2] explained the business records exception to the hearsay rule this way:

> Under the business records exception to the hearsay rule, "[a]ny writing or record . . . made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter" (citation omitted).

People v. Ortega restates the three necessary elements required to be satisfied by the rule:

> 1) Was the writing or record made in the regular course of any business?
>
> 2) Was it the regular course of such business to make such memorandum or record?
>
> 3) Was the memorandum or record made at the time of the transaction, occurrence or event or within a reasonable time thereafter?

However, there is one more component engrafted onto the rule in 1930 by the Court of Appeals in *Johnson v. Lutz*.[3] *Johnson v. Lutz*, involving an entry in a police report, added a fourth element for the admissibility of a statement by third party contained in a business record, to wit, that the person providing the information has a business duty to impart the information. The fourth element was required because:

> In view of the history of section 374-a [CPLR 4518's predecessor] and the purpose for which it was enacted, it is apparent that it was never intended to apply to a situation like that in the case at bar. The memorandum in question was not made in the regular course of any business, profession, occupation or

> calling. The policeman who made it was not present at the time of the accident. The memorandum was made from hearsay statements of third persons who happened to be present at the scene of the accident when he arrived. It does not appear whether they saw the accident and stated to him what they knew, or stated what some other persons had told them.

In addition to the three statutory elements, it is necessary to affirmatively answer the fourth question required by *Johnson v. Lutz*:

> 4) Was the person furnishing the information under a duty to report the information?

The Court of Appeals in *People v. Patterson*[4] explained the fourth element this way:

> More than 85 years ago, in *Johnson v. Lutz* (citation omitted), this Court imposed an additional requirement for admissibility that is not set forth in the statute – specifically, that "[u]nless some other hearsay exception is available . . . , admission may only be granted where it is demonstrated that the informant has personal knowledge of the act, event or condition and he [or she] is under a business duty to report it to the entrant" (citations omitted).

How the Rule Works and Doesn't Work

A recent Kings County decision by Justice Aaron J. Maslow highlights the interplay between the four elements and illustrates omissions that rendered the purported business record inadmissible. *CFG Merchant Solutions, LLC v. Complete Auto. Repair Serv., LLC*[5] is a breach of contract action where the plaintiff moved for summary judgment, which the defendant opposed on the basis that, *inter alia*, certain records submitted as evidence in support of the motion were inadmissible because the foundation to admit them as business records was not established.

The plaintiff submitted several exhibits, including what purport to be the contract and proof of payment of the purchase price and a payment history. The plaintiff relied on the affidavit of James Elder, the director of risk management, to lay a foundation for the admissibility of the records submitted in support of the motion.

The first problem? "Mr. Elder repeatedly uses the phrase 'ordinary course of business,' but does not provide any further details as to how the records are maintained." Addressing the first three elements of the business record rule, Justice Maslow quoted *Rushmore Recoveries X, LLC v Skolnick*:[6]

> [R]epetitive statements that records were made in the regular course of business as if they were magic words, does not satisfy the business records exception to the hearsay rule. That phrase, standing alone, does not establish that the records upon which the Plaintiff relies were made in the regular course of the Plaintiff's business, that it was part of the regular course of the Plaintiff's business to make such records, or that the records were made at or about the time of the transactions recorded.

The second problem?

> To be admissible in evidence, fourth, the records must be made by a person who has personal knowledge of

the actor occurrence and is under a business duty to report it. This foundational element is important in the realm of financial transactions because often acts or occurrences are recorded by one person or company and then transmitted to or incorporated into another company's records. It is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted (citation omitted).

In this motion, the fourth foundational element to establish the business record exception was not met because the entries contained in the submitted payment history emanated from a different entity; they had to because these transactions were made by wiring money. However, nowhere in Plaintiff's papers is there reference to the records of this other entity and there is no affidavit by someone with personal knowledge at this other entity. The Court relies on its decision in *Fenix Capital Funding LLC v Sunny Direct, LLC (81 Misc 3d 1243[A], 203 N.Y.S.3d 921, 2024 NY Slip Op 50131[U] [Sup Ct, Kings County 2024]*). Each participant in the chain producing the record, from the initial declarant to the final entrant, must be acting within the course of regular business conduct or the declaration must meet the test of some other hearsay exception (citation omitted). Whoever at Plaintiff made the payment history record entries in its own records is unidentified in its papers (citation omitted). The submitted payment history contains coded data, "X08" [] which is not explained in the Elder affidavit []. Moreover, Mr. Elder stated that "R08" was used for April 8, 9, and 10, *2024* [], *yet the code for April 10, 2024 is X08* []; this constitutes an inconsistency in the record evidence.

The Elder affidavit also included the following sentence: "As to Plaintiff's business records that consist of documents created by third parties, if any, Plaintiff relies on the accuracy of such records in conducting its business." This one-sentence declaration with respect to records of third parties is totally insufficient to meet the business record exception to the hearsay rule. There are no details as to exactly which records submitted are from third parties, the originator of the third-party records, what the basis is for the accuracy of these records, and the circumstances under which they were made. "[T]he mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records" (citation omitted).

Justice Maslow held that the records submitted in support of the motion were inadmissible and denied the motion.

Conclusion

David always tells lawyers that if someone woke them out of a sound sleep at 2:00 a.m., when asked they should be able to recite the required elements of the business records foundation. Having woken Katryna out of a sound sleep at 2:00 a.m., she can. Seriously, it's that important.

So, thank you, CPLR 4518, for making our lives immeasurably easier. But smooth sailing in the business records world is not always easy, and our next column will address riptides and eddies that can capsize your efforts to admit business records into evidence.

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

Katryna L. Kristoferson is a partner at the Law Offices of David Paul Horowitz and has litigation experience across many practice areas. She has lectured at CPLR update, motion practice, and implicit bias CLEs, and teaches a course on bias and the law at the Elizabeth Haub School of Law at Pace University.

Endnotes

1. 131 N.Y. 169 (1892).
2. 15 N.Y.3d 610 (2010).
3. 253 N.Y. 124 (1930).
4. 28 N.Y.3d 544, 550–551 (2016).
5. 2024 N.Y. Slip Op 51512(U) (Sup. Ct., Kings Co. Nov. 8 2024).
6. 15 Misc. 3d 1139(A) (Dist Ct., Nassau Co. 2007).

New York State Bar Association Launches Task Force Aimed at Alleviating Opioid Public Health Crisis

By Susan DeSantis

The New York State Bar Association has appointed a blue-ribbon task force to recommend new laws and policies to address rampant opioid addiction in the state.

"The task force will be discussing how to prioritize treatment over punishment for those caught in the grip of the opioid crisis," said Domenick Napoletano, president of the New York State Bar Association. "The goal is to ease the path to treatment and recovery for these vulnerable New Yorkers."

Mary Beth Morrissey, chair of the association's Health Law Section, heads the task force, which includes the district attorneys from Manhattan, Brooklyn and Staten Island, eminent judges, prominent public defenders, leaders of addiction treatment programs and a special narcotics prosecutor for New York City.

"We will be studying legislative proposals and policy changes that will bring relief to suffering New Yorkers and their friends and families," Morrissey said. "Our goal is to strengthen the state's treatment programs by improving access to vital services."

More than 5,000 New Yorkers died from opioid overdoses in 2021, and emergency medical technicians throughout the state reported 24,679 suspected opioid overdose encounters, according to a report produced by the New York State Department of Health last year. Suspected opioid overdose encounters rose to 25,221 in 2022, a 2.2% increase, according to the report.

"The number of people addicted to opioids in our state is heartbreaking," Napoletano said. "We must stop these needless deaths and help those addicted lead healthy and productive lives."

New York Attorneys Will Have To Report Disciplinary Actions in Other States

By Susan DeSantis

New York-admitted attorneys completing their biennial registration are now required to provide to the state Office of Court Administration a list of all jurisdictions in which they are admitted to practice law and any disciplinary actions taken.

Chief Administrative Judge Joseph Zayas announced late last year that he had signed an order establishing the new reporting requirements. All attorneys are required to use the online system when their registration is due.

The amendment requires all attorneys to disclose whether they have ever been the subject of public discipline in any other jurisdiction and, if so, when they provided notice to the New York State courts as outlined in the Joint Rules of the Appellate Divisions (22 N.Y.C.R.R. § 1240.13).

Judge Zayas said he made the decision in consultation with Chief Judge Rowan Wilson and the Administrative Board of the State Courts.

Attorneys admitted in New York may verify their registration status and the date of their next biennial registration by logging into their Online Services account or by reviewing their listing in the public Directory of New York Attorneys.

SEC Commissioner Speaks Boldy on Cryptocurrency Regulation

By Jennifer Andrus

Securities and Exchange Commissioner Hester Peirce spoke forcefully in support of common-sense regulation and an improved registration process for cryptocurrency at the New York State Bar Association's Global Conference in Seoul, South Korea Oct. 16-18, 2024.

Appearing by video conference, Peirce outlined the flaws in the current regulatory regime, calling it too focused on enforcement without support for innovation. Peirce advocates for a collaborative approach to regulation, working to solve unique problems with digital currency and provide a better pathway for regulation.

The commissioner reminded attendees that she was speaking for herself and not on behalf of the SEC.

Regulation and Enforcement

Peirce said that many companies are trying to register their cryptocurrency with the SEC and cannot navigate the system. Many attending the Global Conference agreed, sharing their frustration at being unable to advise clients about cryptocurrencies because of such unclear regulations.

"It is wrong when people are trying to figure out how to apply (to the SEC) and need help, then we come in on the enforcement end. We can design a better regulatory framework than having enforcement show up at your door," Peirce said. "As I learned more about crypto, I understood it was really different. I believe we need to use the regulatory side of the house to make this doable. So few companies have come in and tried to register. It's too expensive, and it's like we are trying to jam a round peg into a square hole."

Peirce made news in April 2023 when she released a public statement critical of her agency's decision on regulation of digital currency.

"Rather than embracing the promise of new technology, as we have done in the past, here we propose to embrace stagnation, force centralization, urge expatriation, and welcome extinction of new technology. Accordingly, I dissent," she wrote.

Her ardent support of digital currency earned her the nickname "Crypto Mom." She told a Forbes reporter following the statement that she is not a fan of the title and stressed that government is not your mother.

Investor Responsibility and Financial Literacy

Howard Fischer, the moderator of the session at the Global Conference, asked Peirce how to find a balance between consumer protection and the personal responsibility of the investor. She reminded the attendees that it is not the SEC's role to determine winners and losers in the marketplace and that every investment decision comes with risk and personal responsibility.

"If someone is an adult, far be it from me to stand in the way. It's not our role to tell people what to put in their portfolio," she said.

Peirce did express concern over investors' lack of financial literacy, which makes them susceptible to scams.

"Financial education is so important. We need to have these basic lessons, so

if someone promises a great rate of a return, you can approach that with a lot of skepticism," she said. "We need to do a better job telling everyday people to be skeptical, whether you are buying crypto or something else."

Congressional Framework

The 90-minute panel ended with a look ahead to the next Congress, which may take up proposed regulation called FIT 21. While Peirce could not comment on pending legislation, she told the conference that lawmakers are taking a holistic approach to regulating digital currency. The plan, which was only brought up in the House, sets up a framework where some securities are regulated by the Securities and Exchange Commission and others are regulated by the Commodity Futures Trading Commission.

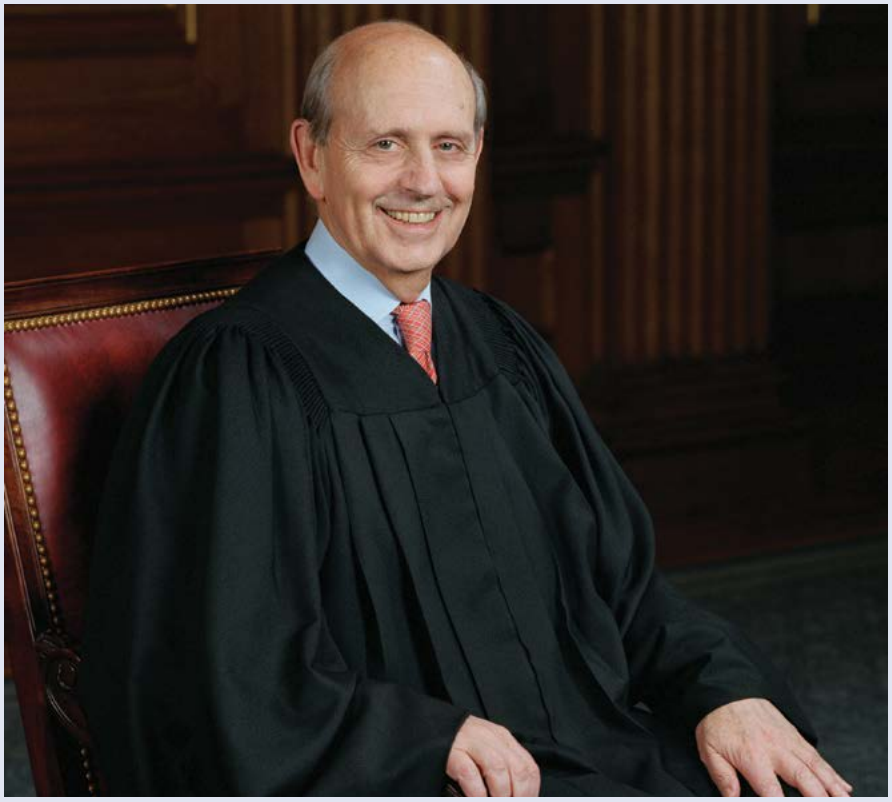
When asked about her thoughts on sharing regulatory authority with two agencies, Peirce responded, "It's not surprising; we don't know what crypto will become."

U.S. Supreme Court Justice Stephen Breyer Will Receive Gold Medal at Presidential Gala

By Susan DeSantis

The New York State Bar Association is awarding its highest honor, the Gold Medal, to retired Associate Justice Stephen Breyer of the Supreme Court of the United States at its presidential gala on Jan. 16 at The Plaza Hotel in New York City.

"Justice Breyer's loyalty is to the rule of law," said Domenick Napoletano, president of the New York State Bar Association. "There is no higher calling than that, and it is why he so richly deserves the Gold Medal. He stood up for that principle for nearly three decades at the Supreme Court of the United States, the most prestigious court in the world. In a nation dominated by partisan politics, he argued against being labeled as a liberal or a conservative. Instead, he cared most deeply about the consequences of the court's decisions and how they would impact ordinary people."



Justice Breyer, who was chief judge of the U.S. Court of Appeals for the First Circuit when President Bill Clinton appointed him to the Supreme Court in 1994, served on the appellate court for 14 years. Members of the court were delighted to hear earlier this year that Justice Breyer, who has senior status, plans to return to hear cases in early 2025. A graduate of Stanford, Oxford and Harvard Law School, Justice Breyer has taught law for many years at his alma mater. He was also an assistant Watergate special prosecutor and chief counsel to the Senate Judiciary Committee.

"I marvel at the ways Justice Breyer has served this country and the rule of law. At 86 years of age, he's still giving back by hearing cases and writing books," Napoletano said. "Through his writing and teaching, he has inspired so many young lawyers. In addition to his service as a judge, his experience as a government prosecutor and the chief counsel to the Senate Judiciary Committee has given him a unique perspective that I'm sure will enthrall the guests at the presidential gala."

Justice Breyer will take part in a fireside chat at the gala, speaking about his career, judicial philosophy and his recent book. He is the 11th Supreme Court justice to receive the Gold Medal. Justice Elena Kagan was honored in 2020, Justice Sandra Day O'Connor in 2008, Justice Ruth Bader Ginsburg in 1995, Justice William J. Brennan, Jr. in 1993, Justice Lewis F. Powell, Jr. in 1989, Justice Potter Stewart in 1984, Justice Thurgood Marshall in 1976, Justice John Marshall Harlan in 1966, Justice Felix Frankfurter in 1961 and Justice Robert H. Jackson in 1954.

Justice Breyer has written books and articles about a range of legal topics, including administrative law, economic regulation and the U.S. Constitution. His books include "Active Liberty" (2005), "Making Our Democracy Work: A Judge's View" (2010), "The Court and the World" (2015), "The Authority of the Court and the Peril of Politics" (2021) and "Reading the Constitution: Why I Chose Pragmatism, Not Textualism" (2024).

NYSBA Works To Bring Hundreds of Millions of Dollars in Legal Fees to N.Y.

The New York State Bar Association is working with the Commercial Division Advisory Council to provide economic benefits to NYSBA members and the State of New York. President Domenick Napoletano discusses these joint efforts.

Are there any precedents for NYSBA's efforts to persuade businesses to litigate their disputes in New York?

NYSBA has helped its members develop their law practices by bringing commercial litigation to New York for many years. I will mention two examples. On June 25, 2011, the NYSBA House of Delegates approved the Final Report of the NYSBA Task Force on New York Law in International Matters. Page 1 of that report stated, "As a part of its mission, the task force also seeks to educate lawyers, business leaders and investors about the benefits of selecting New York law and a New York forum. . . ." Page 3 of that report stated, "Without attempting to project the increased revenues which would be generated for hotels, restaurants, court reporters, economic experts and the like, if the business of dispute resolution in New York were to increase by 10%-20%, it could produce approximately $200 to $400 million in incremental revenues annually for law firms in New York."

Do you really think that it might be possible to increase dispute resolution revenues for New York law firms by $200 to $400 million annually?

That was the dollar amount in a report that NYSBA issued more than 13 years ago before the Commercial Division Advisory Council was created. The Advisory Council's current goals are much higher than that.

You mentioned two examples of NYSBA's interest in attracting legal disputes to New York. What was the second example?

My second example is more recent. On Aug. 6, 2021, NYSBA's Executive Committee approved a report of another NYSBA task force which recognized (on page 9) that "the Commercial Division was created and the rules adopted in order to create a procedural framework that rivaled the Federal Rules, and would provide the sort of framework that would be helpful in attracting legal disputes between multi-national or multi-state corporations to New York."

How can the Commercial Division provide economic benefits to NYSBA members?

The Commercial Division is renowned as one of the world's most efficient venues for the resolution of commercial disputes. The excellent reputation of the Commercial Division attracts commercial litigation to New York State that might otherwise be brought in other states or countries. NYSBA members may be able to work on these cases if NYSBA can help them communicate to businesses the reasons why they should litigate in New York.

Can the Commercial Division cause businesses to move to or expand operations in New York State?

Companies often seek to avoid doing business in jurisdictions that they perceive as unfriendly to business. Conversely, they often want to locate their operations in business-friendly jurisdictions. It is also important to many businesses (particularly financial services firms) to have ready access to cost-effective and predictable mechanisms for resolving business disputes.

When did the relationship between NYSBA and the Commercial Division begin?

NYSBA's Commercial and Federal Litigation Section proposed the creation of a commercial court in New York State in 1994. That section has worked closely with the Commercial Division for nearly 30 years. The Commercial Division Advisory Council has worked with the ComFed section and other NYSBA sections on member benefits.

How are NYSBA and the Advisory Council helping NYSBA members to get more business? One of the ways is by distributing the short educational film about the Commercial Division that the Commercial Division Advisory Council has produced. The film is available for viewing on YouTube or https://vimeo.com/195552034. The film features 16 judges and 11 generals counsel of major corporations speaking about the Commercial Division. One purpose of the film is to educate businesses about the advantages and benefits of litigating their disputes in New York. The film has been designed to be interesting and useful to lawyers and their clients, particularly in connection with their selection of a forum for business litigation (either in contractual choice of forum clauses or in commencing litigation). The film portrays improvements that have been made to the Commercial Division's rules, procedures and operations to be responsive to the needs and concerns of the business community. These changes have made the business litigation process in New York more cost-effective, predictable and expeditious, and have thereby provided a more attractive and hospitable environment for business litigation in New York State.

Can you give us another example?

NYSBA is helping to distribute a one-page flyer describing the Commercial Division that has been developed jointly by the Commercial Division Advisory Council and the Business Council of New York State. NYSBA and the Advisory Council have asked lawyers to distribute this flyer to current and potential clients and anyone else who might have an interest in litigating a dispute in New York. The Business Council is distributing this document to businesses that are considering moving to, or expanding or maintaining their presence in, New York State.

Anything else?

We are also distributing a document entitled "The Benefits of the Commercial Division to the State of New York," which was prepared by the Commercial Division Advisory Council. This document demonstrates how the Commercial Division helps New York State to attract and retain businesses and therefore to generate tax revenues and provide jobs. The value and importance of these benefits are confirmed in the proclamation relating to the Commercial Division that the New York City Council issued at its Stated Meeting on Dec. 20, 2018. In its proclamation, the city council concludes that "New York owes much of its world-class status as an economic engine to its world-class court: the Commercial Division of the New York Supreme Court." The city council's proclamation also states:

> WHEREAS: The Commercial Division is uniquely qualified to increase taxable revenue for the City of New York while stimulating job growth. It strengthens New York City's ability to attract and retain businesses, which add jobs, fuel demand for real property, and increase tax revenue. The tax revenues from local businesses also provide financial support for the New York State judicial system[.]

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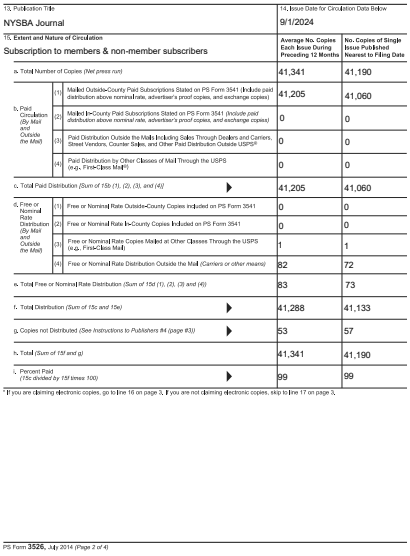

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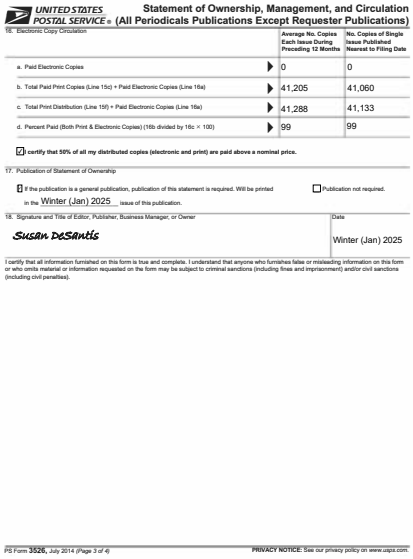

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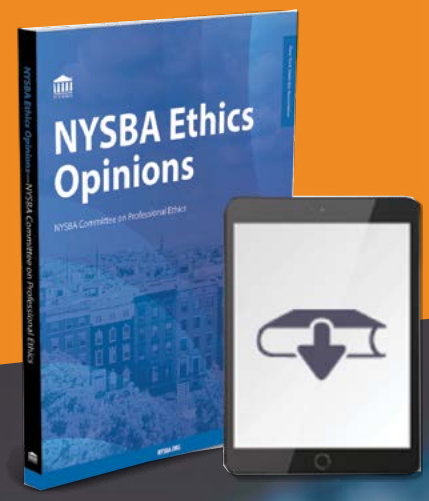
NYSBA Committee on Professional Ethics



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