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Making Strides:

How Women Are Gaining Under the Law and in Service to It

Special Issue on Topics Relating to Women in the Law

Edited by Susan L. Harper, Ferve Ozturk, and the Committee on Women in the Law

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EUGENE C. GERHART
(1912–2007)
Editor-in-Chief, 1961–1998

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DEPARTMENTS

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media.

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CLAIRE P. GUTEKUNST

Letter to a Recent Law Graduate

Dear Member of the Class of 2017:

Congratulations! You made it through law school. The bar exam looms, and it is a difficult test, but you lived through your one L year – and graduated. You have what it takes to pass the bar and to have a successful career. Have faith in yourself – we have faith in you.

I commend you for choosing the law. It is a noble profession, and one where you truly can make a positive difference in people's lives. It is a wonderful opportunity and an awesome responsibility.

Lawyers are counselors. To be an effective counselor, your client has to trust you, and you have to be worthy of that trust. This is why lawyers are held to high ethical standards. It is our duty – and our honor – to meet and champion those standards.

Here's a little advice as you begin your life in the law (and a refresher for newer attorneys).

1. "Help, I need somebody. Help!" – Lennon/McCartney

When you need help, *ask*. As a member of our great Association, never feel compelled to go it alone. Pick the brains of our members – especially those in the Young Lawyers Section. All lawyers have war stories, give useful advice and offer encouragement, but their experience is fresher.

Take advantage of every resource. And when seasoned attorneys lend their help and support, think about what they are doing to help you solve your immediate problem. A mentor is invaluable – learn how to be one. By next year, you will be in a position to give back to the next class of new lawyers. So be sure to lift others while you climb.

2. "The people who don't ask questions remain clueless throughout their lives." – Neil deGrasse Tyson

Ask questions. Never try to bluff your way through a brief, a motion or a transaction because you don't have the information you need, aren't sure who to ask or are afraid of looking dumb. You are a newbie – you should demand the training and information you need to do your job. But before you ask, prepare. Do your research and frame your questions as clearly as possible. And keep in mind that, while there may be no such thing as a stupid question, there may be a bad time to ask. Be perceptive.

3. "The life so short, the craft so long to learn." – Hippocrates

A life in the law is a lifetime of learning. The more you learn, the better a lawyer you will be. And some of your best learning will be learning from your mistakes.

The law is nuanced, layered and constantly changing. Keeping up will keep your mind sharp. See fulfilling your continuing legal education requirements as an opportunity to learn, to grow as a lawyer and to understand the law more deeply. Be curious. Practice areas overlap, and you will need to understand how all the moving parts work. And, at least sometimes, go to a live CLE program. See it as a networking opportunity. Especially if you practice solo, it helps to get out of the office and talk to other lawyers in person.

4. "We . . . have a professional and moral duty to represent the underrepresented in our society, to ensure that justice exists for all." – U.S. Supreme Court Associate Justice Sonia Sotomayor

Give back. Whatever your area of practice, you have valuable skills that can make a difference for those who cannot afford a lawyer. Our Association is connected with not-for-profit legal services providers across the state, and we can help match you with providers that need your skills. We offer free trainings for attorneys who want to volunteer through our domestic violence and immigration initiatives. To make it easier to volunteer, we recently launched NY.FreeLegalAnswers.org, where low-income individuals ask legal questions online and attorneys answer at their convenience.

5. "There's no place like home." – Dorothy

Home is where you can kick back and get the support you need. No matter how or where you practice – big firm, small firm, solo, in-house or public service sector – you need a bar home. That's where you'll find the kind of camaraderie that nurtures sharing –

CLAIRE P. GUTEKUNST can be reached at cgutekunst@nysba.org.

PRESIDENT'S MESSAGE

whether it's exchanging ideas and best practices, brainstorming solutions to problems, discussing issues that affect legal practice or just telling war stories. As we grow increasingly reliant on technology to communicate, what we gain in efficiency comes at the expense of personal relationships. That's why a bar home is so important – for you, and for all of us.

As a statewide association, we offer our members a lot: free legal research, good deals on insurance and practice tools, practice Sections and online legal communities with lawyers in your practice area, discounted and free CLEs and an array of relevant material from e-newsletters to books.

NYSBA has power and reach. We seek your ideas and opinions on issues you care about, and then make our collective voice heard by the state and federal governments. We nurture our relationships with New York's 200-plus local and affinity bar associations and work with them to make sure our Association represents all New York lawyers.

Most important, we've been bringing attorneys together and building relationships since 1876. It's what we do.

So, welcome! You are the future of the profession I love, and that future is bright.

Best regards,
Claire

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DWI on Trial – Big Apple XVII
May 11 — New York City

Updates and Hot Trending Topics Affecting Insurance Coverage
May 12 — Buffalo, New York City
May 19 — Albany, Long Island

U.S. Immigration Law – Where Are We Now?
May 15-16 — New York City

Qualified Retirement Plans
May 17 — Rochester
June 8 — Westchester
June 13 — Albany
June 16 — New York City
June 23 — Long Island

Starting a Solo Practice in New York
May 19 — New York City

Representing Licensed Health Care Professionals in the Disciplinary Process
(9:00 a.m. – 12:45 p.m.; live & webcast)
June 1 — New York City

Family Court Trial Institute II: Support Hearings, Enforcement and Downward Modification
June 1 — Long Island

Toxic Tort Litigation
June 1 — Long Island, Syracuse
June 9 — New York City

Purchases and Sales of Home 2017
June 5 — Albany
June 6 — Buffalo, Westchester
June 7 — New York City, Syracuse
June 9 — Long Island, Rochester

LLCs and Corporations: Tax and Legal Planning Considerations
(9:00 a.m. – 12:30 p.m.; live & webcast)
June 12 — Albany

Bridging the Gap – Summer 2017
July 19-20 — Albany, Buffalo (video conf.) New York City (live)

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Women in the Law: Reflection, Celebration and Work To Be Done

By Claire P. Gutekunst

It is my distinct honor to serve as President of this great association and to introduce this special issue of the New York State Bar Association *Journal*, which addresses issues of great importance to women and society and celebrates the 30th anniversary of our Committee on Women in the Law (CWIL).

This Committee occupies a very special place in my heart. I joined CWIL nearly 30 years ago and served for eight years, three as chair. It was where I found my bar home, and I will always be grateful for the opportunity it provided me to address issues of importance to society and to the legal profession, to make lifelong connections with the extraordinary women – and men – with whom I served, and to learn how to lead.

I joined CWIL at the invitation of Ruth Schapiro, the Committee's first chair and the first woman partner at Proskauer, where I was then an associate. Ruth had an exceptional legal mind and was a passionate advocate for women. The Committee's first report, on the status of women – litigants, attorneys, judges, jurors, and non-judicial personnel – in the courts, published under Ruth's guidance, has served as a model for subsequent Association reports and programs on issues affecting women in the profession and in the public at large, including domestic violence, child support standards, gender bias, pay equity, family leave, and sexual harassment.

This report set a very high bar for CWIL's work, a standard it has met and surpassed year after year, most recently with a report, adopted by the House of Delegates, that has provided the underpinning for the Association's lobbying efforts to advance paid family and medical leave legislation.

Every year, CWIL presents its signature Women on the Move conference and other CLE programs to help women attorneys sharpen their skills and advance their practice, and offers networking opportunities for women to meet and help each other. CWIL also works to raise the profiles of women attorneys and judges and to honor their achievements, including through presentation of the Ruth G. Schapiro Memorial Award and the Kay C. Murray Award.

Add the May *Journal* to CWIL's list of accomplishments. This issue covers important topics such as domestic violence (including so-called "revenge porn"), human trafficking, sex discrimination and harassment, paid family leave and equal pay, diversity in the workplace and in the courtroom, women's suffrage, and the Equal Rights Amendment.

Thank you to the authors who took the time to write these thoughtful and enlightening articles. And kudos to CWIL co-chairs and *Journal* co-editors Susan L. Harper and Ferve Ozturk for conceiving this issue and putting it all together.

In closing, I want to pay tribute to a remarkable woman jurist whose recent passing has saddened – and left a huge hole in – the entire New York legal community: Sheila Abdus-Salaam, Associate Judge of the New York Court of Appeals.

Judge Abdus-Salaam was the first African-American woman to serve on the Court. This made her a trailblazer, but her wisdom, compassion, and commitment to justice throughout her career as a public defender, at the state Civil Rights Bureau and on the bench, made her extraordinary.

In less than four years on the state's highest Court, she has left a justly celebrated judicial legacy. A key part of that legacy will surely be her tightly reasoned opinion in *Matter of Brooke S.B. v. Elizabeth A.C.C.*[1] That decision expanded the definition of parenthood in the context of ensuring that New York's custody and visitation law affords equal protection for all parents and all children.

On a personal note, I was privileged to experience first-hand her keen intellect and calm judicial demeanor in her courtroom some 15 years ago and, as our paths frequently crossed at NYSBA, women's bar association, and Court events, to appreciate and cherish her personal warmth and unfailing graciousness. She gave generously of her time and experience to our Association, to the legal profession, and to the many lawyers and judges for whom she was a mentor and role model.

Thank you, Judge Abdus-Salaam. ■

1. 28 N.Y.3d 1 (2016).

Claire P. Gutekunst, an independent mediator and arbitrator in Yonkers, NY, is the 119th President of the New York State Bar Association.

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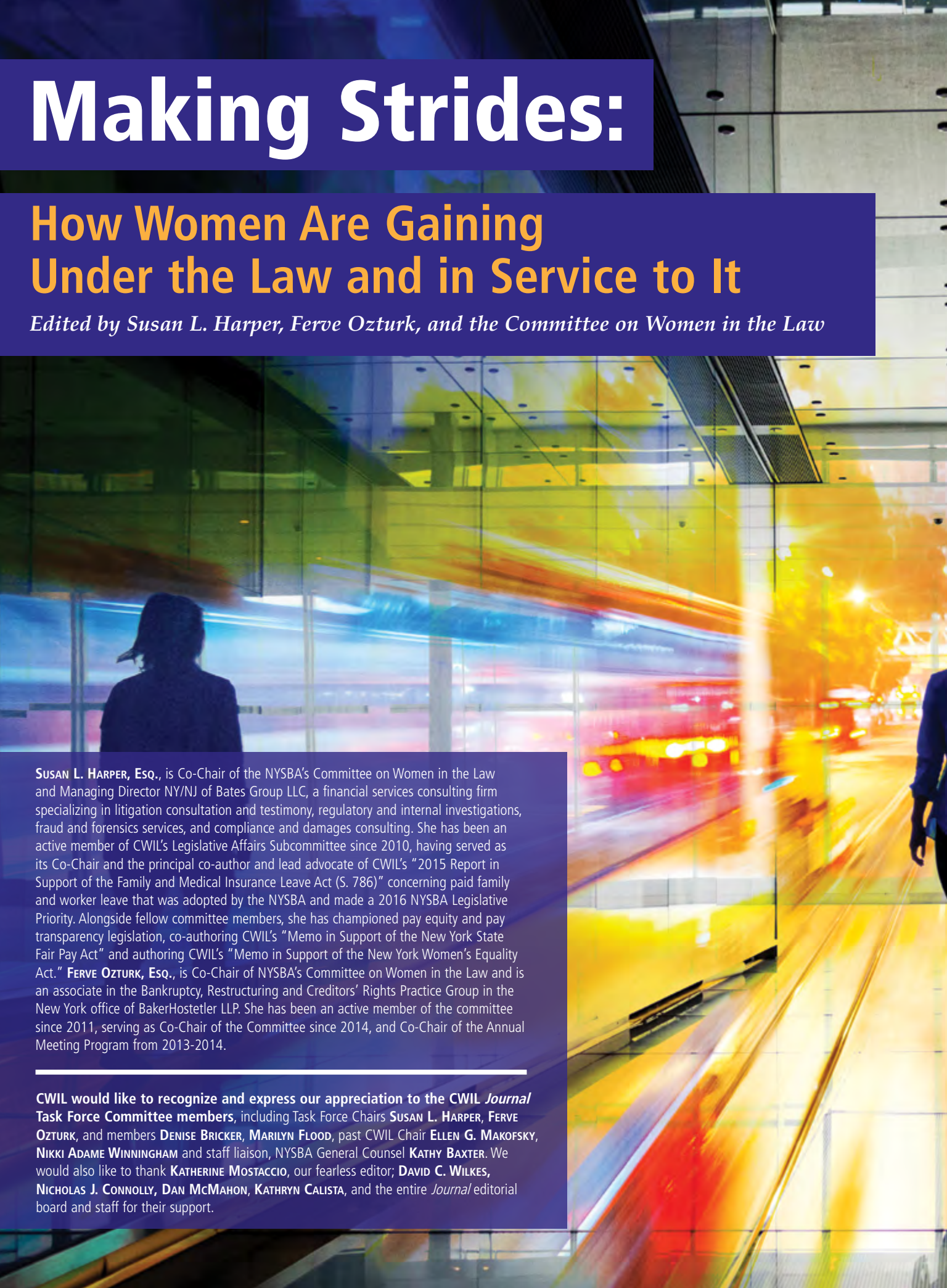
How Women Are Gaining Under the Law and in Service to It

Edited by Susan L. Harper, Ferve Ozturk, and the Committee on Women in the Law



Susan L. Harper, Esq., is Co-Chair of the NYSBA's Committee on Women in the Law and Managing Director NY/NJ of Bates Group LLC, a financial services consulting firm specializing in litigation consultation and testimony, regulatory and internal investigations, fraud and forensics services, and compliance and damages consulting. She has been an active member of CWIL's Legislative Affairs Subcommittee since 2010, having served as its Co-Chair and the principal co-author and lead advocate of CWIL's "2015 Report in Support of the Family and Medical Insurance Leave Act (S. 786)" concerning paid family and worker leave that was adopted by the NYSBA and made a 2016 NYSBA Legislative Priority. Alongside fellow committee members, she has championed pay equity and pay transparency legislation, co-authoring CWIL's "Memo in Support of the New York State Fair Pay Act" and authoring CWIL's "Memo in Support of the New York Women's Equality Act." **Ferve Ozturk, Esq.**, is Co-Chair of NYSBA's Committee on Women in the Law and is an associate in the Bankruptcy, Restructuring and Creditors' Rights Practice Group in the New York office of BakerHostetler LLP. She has been an active member of the committee since 2011, serving as Co-Chair of the Committee since 2014, and Co-Chair of the Annual Meeting Program from 2013-2014.

CWIL would like to recognize and express our appreciation to the CWIL *Journal* Task Force Committee members, including Task Force Chairs **Susan L. Harper**, **Ferve Ozturk**, and members **Denise Bricker**, **Marilyn Flood**, past CWIL Chair **Ellen G. Makofsky**, **Nikki Adame Winningham** and staff liaison, NYSBA General Counsel **Kathy Baxter**. We would also like to thank **Katherine Mostaccio**, our fearless editor; **David C. Wilkes**, **Nicholas J. Connolly**, **Dan McMahon**, **Kathryn Calista**, and the entire *Journal* editorial board and staff for their support.

We are delighted to welcome you to the first NYSBA *Journal* devoted to issues impacting women. The Committee on Women in the Law (CWIL) conceived, launched and coordinated this special *Journal* edition with the outstanding support of the NYSBA's editors and leaders in honor of our 30th anniversary, our steadfast work advancing women's rights and their status in the profession, as well as furthering critical legislation and policy in New York State and the country.

We Have Come a Long Way

The birth of the modern day women's rights movement started on July 19-20, 1848, at the First Women's Rights Convention in Seneca Falls, New York. More than 300 women and men attended the historic gathering, organized by Elizabeth Cady Stanton and Lucretia Mott, to address women's social, economic and political rights. The delegates' grievances and demands were detailed in a Declaration of Sentiments, signed by more than 100 women and enlightened men, including Frederick Douglass.[1] It opened with the following powerful words: "*We hold these truths to be self-evident: that all men and women are created equal.*"[2]

Many of the issues they called out in the Declaration involved women's political disenfranchisement, which in turn impacted women and their families socially and economically. These included not having the right to vote or participate in the legislature, and not having a say in laws that impacted them, such as divorce and child custody. Moreover, the delegates called out issues of economic injustice impacting women, not being able to participate in professional opportunities in medicine and law, to name a few, and in particular complained of poor pay for the sort of jobs that were open to them.[3]

It would take women 69 years to secure the right to vote in New York State in 1917, and three years later, or in 1920, when the 19th Amendment was ratified so that women could vote in national elections. While Stanton, Mott and even Susan B. Anthony did not live to see or celebrate the fruits of their labor, trailblazing and strategic leaders of the major women's associations of their time, along with legions of members and organizers, deep-pocketed women and men who supported them, and courageous politicians, helped bring home the New York victory.[4] This year New Yorkers celebrate the 100th Anniversary of women gaining this sacred right and we honor this important anniversary in this *Journal* with remarks from

the 77th Lieutenant Governor of New York State, Kathy C. Hochul, President of the NewYork State Senate, Chair of the Regional Economic Development Councils and New York State Women's Suffrage 100th Anniversary Commemoration Commission. Since the pivotal Seneca Falls Convention, women, along with many male champions, continued to work to break down political, social, economic and gender barriers throughout our nation, including in New York, when Kate Stoneman was the first woman to pass the New York State Bar in 1885 and was admitted to practice a year later, after the Legislature passed a bill allowing all qualified applicants, regardless of gender, to be admitted.[5]

Awe or Pause?

Imagine the foremothers' awe (and pause) if they could witness the progress and stalemates of today's women. Women make up half of all law school graduates; they hold 104, or 19.4 percent, of the seats in the United States Congress and 21 percent of the seats in the U.S. Senate.[6] Women are law firm partners, practice leaders, chairpersons of firms, and members of all levels of the judiciary. Married and single women can own their property and possess rights in connection with divorce and child custody, points of great contention the delegates raised at the First Women's Rights Convention.

> The vision of a world where women and men achieve equality in all spheres of life has been a driving motivation for the Committee over the years.

However, as far as women have progressed, women's advancement is moving at what many have described as a glacier's pace. As we report on in this *Journal*, through timely and thought-provoking articles authored by leading lawyers and advocates in their practice areas, women on a whole still face hurdles due to pay disparity, a lack of a nationwide paid leave policy, sexual discrimination, domestic violence, and tragically, sexual exploitation, through modern day human trafficking, and virtual exploitation through the internet. Can an Equal Rights Amendment give U.S. women the needed protections and teeth to be truly equal? Special contributor and lifelong champion of women's rights, United States Congresswoman Carolyn Maloney, lays out the case here for us to revisit and consider.

Turning to women in law firms, recent research conducted by CWIL's Best Practices Committee found that while women in law are making some encouraging and exciting strides, significant challenges remain. The New York City Bar Association's 2015 Diversity Benchmarking Report, for example, found that "women partners at signatory firms reached 19.7%, the highest level since the City Bar began tracking diversity data in 2004," and have "showed notable gains in representation on firm management committees and among practice group heads . . . ."[7] However, on close inspection, many of these gains have not translated to all women: "white women make up 85% of all women partners and minority women make up less than 3% of all partners at signatory firms."[8] On an encouraging note, it was found that minority lawyer representation increased at signatory firms in the areas of Special Counsel and on leadership bodies, such as management committees and practice group heads.[9]

The report further revealed that gender and race impact partnership tracks: "white men represented 77% of all equity partners at signatory firms," while "minority and women partners continue to be concentrated at the income partner level," rather than as equity partners.[10] Search firm Major, Lindsey & Africa surveyed 2,100 law firm partners across the United States and found that there is a 44 percent pay differential between female and male partners in compensation.[11] In fact, the *New York Law Journal* and other legal publications have reported an increasing number of lawsuits filed by women attorneys alleging gender bias, often over pay inequity. Origination credit, Major, Lindsey found, is cited as a key contributing factor for the pay disparity.[12] How do we move women's roles forward in the profession? One group of diversity and inclusion consultants provides their insights here on how law firms can improve these efforts. Also, former Chairs and special task force members of NYSBA's Commercial and Federal Litigation Section discuss current initiatives to advance women's role in the courtroom.

CWIL: A Champion for Women for Over 30 Years

In light of these statistics, the NYSBA Committee on Women in the Law has championed to advance women's rights, advocating for and effecting change in the home, workplace, and court system domestically and abroad. Since our establishment 30 years ago in 1986, CWIL has been charged with the responsibility of identifying, studying and making recommendations to address gender bias and law-related issues affecting women. The Committee proposes legislation; the adoption and implementation of policy by the Executive Committee and House of Delegates of the New York State Bar Association, and other actions to ensure the fair treatment of women under law and the full participation of women in the administration of justice and as equal members of the legal community. The Committee is a standing com-

mittee of the Association as designated by the House of Delegates in 1989.

The CWIL conducts studies and develops recommendations; comments on and proposes legislation; drafts model policies on women's issues; presents educational programs and publications; raises awareness of women's issues; and coordinates its work with other Committees and Sections of the Association as well as other organizations addressing gender-related legal issues. The Committee also presents two keystone MCLE programs each year that feature topics of particular relevance to women attorneys and presents the prestigious Ruth G. Schapiro Award and Kay Crawford Murray Award to honor members of the Association who have made extraordinary efforts to advance diversity and address the concerns of women. In addition, in 2014, the Committee presented a Report and Recommendation to the Executive Committee of the NYSBA recommending steps NYSBA could take to increase participation by women attorneys.

In connection with this report, the Committee created a New York State Woman Attorney's Trailblazer Exhibit and presented Trailblazer Awards to the three living Trailblazers honored in the exhibit. This exhibit features women who fought discrimination and gained a foothold in a range of careers: among them the first woman admitted to the New York State Bar, the first African-American woman judge, the first woman elected district attorney, the inaugural head of New York's Civil Rights Bureau, and the first woman judge of New York's highest court, as well as the New York State Bar Association's first woman president. Awards were presented to the exhibit's living trailblazers at the June 2015 New York State Bar Association House of Delegates meeting in Cooperstown, New York. The exhibit was featured around New York State, including at the Capitol in Albany and at many law schools, and was featured in NYSBA's Fall 2015 *Women's Community Journal*. Given the success of the exhibit, in 2017, the Committee, will be preparing an exhibit to commemorate the 100th Anniversary celebration of the women's right to vote.

Our Story, Our Achievements for Women

The Committee was appointed in 1986 as the Special Committee on Women in the Courts to study and help implement the findings of the New York State Task Force on Women in the Courts. Under the leadership of its chair, Ruth G. Schapiro, the Special Committee prepared an extensive report recommending legislative proposals concerning domestic violence; alimony and support; matrimonial law; surveying the treatment of women lawyers and women court employees; and suggesting initiatives by NYSBA to combat gender discrimination.

After gaining standing committee status, the Committee set to work to implement the recommendations set forth in the 1986 report. We have been active in advocating for change for family, health and safety issues; gender equity; international issues, and Association leadership.

Family, Health and Safety Issues

In 1990, the CWIL developed a model childbirth and parenting leave policy. In 1992, we prepared a resolution supporting initiatives to combat breast cancer. Three years later, in 1995, the Committee set out a model policy on alternative work arrangements. In 2009, the Committee prepared a report opposing the "Stupak" amendment of the Affordable Care Act, which would have limited access to health care for family planning. In 2010–2014, the CWIL prepared various memoranda in support of legislation concerning pay equity and pay transparency. In 2014–15, the Committee also prepared and presented an extensive report and recommendation in support of a proposed federal paid leave bill, the Family and Medical Insurance Leave Act (S. 786). After several presentations, the report was adopted by the Association in a unanimous vote of NYSBA's Executive Committee and supported by the House of Delegates. Paid leave was also made a 2016 NYSBA Legislative Priority and the Association has been lobbying Congress to pass the Act. And now New York is only one of five states in the country to have its own Paid Leave Law, which our fellow committee member, Sheryl Galler, introduces to readers in this issue.

The Committee has also strongly supported efforts to increase the safety and privacy of women in the workplace and beyond. In 1992, the Committee developed a model sexual harassment policy for law firms. In 2006, we reviewed and endorsed state legislation to extend the statute of limitations in rape cases. And in 2016, to address the exploitation of women and girls personally and professionally on the internet, CWIL prepared a memo supporting legislation to combat so-called "revenge porn." We are pleased to include an article focusing on this subject by one of the leading lawyers blazing the trail in this evolving area, our fellow committee member, Carrie Goldberg.

Gender Equity

The vision of a world where women and men achieve equality in all spheres of life has been a driving motivation for the Committee over the years. In 2002–2003, the CWIL performed an extensive Gender Equity Study. In 2005, the Committee endorsed state legislation to adopt a state Equal Rights Amendment. The Committee has also advocated for pay equity, preparing a report supporting the New York State Fair Pay Act in 2011. The Committee's efforts have been integral to the Governor's signing legislation important to women such as the Equal Pay Act in 2015, an important piece of the Women's Equality Act.

International Issues

The Committee has also looked beyond the borders of New York State and the country to advise on issues

of importance to women across national lines. In 1994, NYSBA prepared a resolution calling for ratification of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women. The Committee had also formed a subcommittee to study the issue of sex trafficking, and it prepared a resolution in 2006 endorsing legislation to address abuse of women in trafficking.

NYSBA Leadership

The Committee has historically been mindful of the powerful role NYSBA can play to advance issues of importance to women, and has advised the Association on these matters. In 1993, the Committee prepared a report on participation levels of women in NYSBA, and prepared a supplemental report five years later discussing ways to enhance participation by women in NYSBA. As women attorneys' participation increased in the state bar, in 2014, the Committee prepared a report outlining initiatives for the Association to recruit, retain, and tap leadership potential from women members.

Help Be Part of Change

In more than 30 years as an extension of the New York State Bar Association, the Committee on Women in the Law has helped effect true and lasting change for women in New York State. We are looking forward to continuing the fight to make critical progress for women in the years to come and greatly appreciate the support of our fellow members of the bar and leaders who have helped make these advancements happen. As we move forward, we encourage you to join our steadfast efforts to help us continue to address the gender barriers impacting women today and tomorrow. ■

If you are interested in joining the Committee, please email the Committee's NYSBA liaison Kathy Baxter, kbaxter@nysba.org, for an application for the 2018-19 NYSBA year.

1. First Women's Rights Convention, National Park Service, www.nps.gov/wori/learn/historyculture/the-first-womens-rights-convention.htm.
2. *Id.*
3. *Id.*
4. Susan Ingalls Lewis, *Women Win the Right to Vote in New York State*, https://sites.newpaltz.edu/nyrediscovered/2013/11/06/women-win-the-right-to-vote-in-new-york-state.
5. For more on Kate Stoneman, visit Albany Law School's Kate Stoneman tribute page at http://www.albanylaw.edu/katestoneman/Pages/news.aspx.
6. Center for American Women and Politics, Eagleton Institute of Politics, Rutgers University, www.cawp.rutgers.edu/women-us-congress-2017/.
7. Diversity Benchmarking Report 2015, New York City Bar Association, at 2–3, http://documents.nycbar.org/files/NYC_Bar_2015_Diversity_Benchmarking_Report.pdf.
8. *Id.*
9. *Id.*
10. *Id.*
11. Elizabeth Olsen, *A 44% Pay Divide for Female and Male Law Partners, Survey Says*, New York Times, Oct. 12, 2016, www.nytimes.com/2016/10/13/business/dealbook/female-law-partners-earn-44-less-than-the-men-survey-shows.html?_r=0.
12. *Id.*

Domestic Violence and the Law: A New York State-Centric Overview and Update

By Dorchen Leidholdt and Lynn Beller

Over the past three decades, domestic violence has emerged as an urgent priority of public health professionals, government leaders, and human rights proponents alike. Once misunderstood as the product of individual pathology and minimized as "trifling,"[1] domestic violence is now recognized as a widespread, devastating societal problem, with consequences that reach far beyond the family. During this time, our understanding of domestic violence has evolved from a focus on individual incidents of physical violence to an awareness that domestic violence is, first and foremost, a gender-based pattern of control and an acute form of gender-based discrimination, manifested not only in acts of physical and sexual violence but also in abuse that takes psychological, emotional, sexual, economic, legal, and other forms. At the same time, there has been a growing recognition of the severity of its harm to victims and their children, to extended families, and to communities, and its cost to our economy and key institutions, especially those addressing public health and criminal justice.

Despite groundbreaking advances in understanding and policy that have led to a dramatically improved response to victims in many countries, including our own, domestic violence remains a significant problem world-

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wide and throughout the U.S. A World Health Organization study[2] found that domestic violence is pervasive in all cultures, with about 1 in 4 women having experienced physical and/or sexual intimate partner violence in their lifetime.[3] In the U.S., on average, 20 people per minute are victims of physical violence by an intimate partner (more than 10 million individuals annually).[4] In New York State in 2013, there were 84,577 *reported* incidents of domestic violence (likely understated due to the high number of incidents that go unreported).[5] A recent report noted that although the overall homicide total in New York City has declined significantly over the past 25 years, the number of homicides resulting from domestic violence has climbed.[6]

In the U.S., on average, 20 people per minute are victims of physical violence by an intimate partner (more than 10 million individuals annually).

New York has been in the forefront of the efforts to fight domestic violence, with the formation of the New York State Governor's Task Force on Domestic Violence in 1983, which led to the creation of the New York State Office for the Prevention of Domestic Violence (OPDV) in 1992. The New York City Mayor's Office to Combat Domestic Violence was founded in 2001. In many respects, New York State's judiciary has been ahead of the curve, with the establishment of the first specialized felony domestic violence court in Brooklyn in 1996 and now 75 domestic violence courts in jurisdictions across the state, handling more than 32,000 cases each year. Attorneys throughout the state increasingly recognize that domestic violence directly impacts their practices and that in order to effectively and zealously represent their clients they must understand domestic violence, the role it plays in their cases, and the evolution of the law and the legal system's response. Many of these attorneys are taking cases pro bono on behalf of victims who cannot afford legal representation, greatly enhancing victim protection and safety. This article reviews this journey, reveals how a strengthening response to domestic violence has affected key practice areas under New York law, and highlights emerging issues in the field.

Criminal Law

Law Enforcement

For much of history, under law and social custom, domestic violence was considered to be the privilege of the husband, who had the right to physically "chastise," i.e., batter, his wife.[7] Until the 1990s, abuse of victims by their intimate partners was largely treated by the justice system as a private, family matter; police officers were encouraged to "engage in the resolution of conflict . . . without reliance upon criminal assault" statutes.[8] In New York State, the family courts had original jurisdiction over domestic violence cases. It was not until 1977 and the landmark case of *Bruno v. Codd*, a mandamus action brought by legal services lawyers against New York City for its systemic failure to protect "battered wives" – in this case economically disadvantaged women, most of color – that this state of affairs faced challenge.[9] Here, suit was brought on behalf of women who had received no assistance from the police after being brutally attacked by their intimate partners (one victim was actually being strangled at the time of the police visit). In several of the cases, the police officers actually condoned the abuse. "Thus, one woman, whose arm had just been sprained by her husband's attack, requested his arrest, and says she was informed by a police officer that 'there is nothing wrong with a husband hitting his wife if he does not use a weapon.'" Another woman, who was slapped and struck with a knife by her husband, reported that the officer, who refused to arrest her husband, said to him, "'Maybe if I beat my wife, she'd act right too.'"[10] Although the case was settled when the police department agreed to a consent decree in which it pledged to treat domestic violence investigations like those of other crimes, police officers were still allowed to use their discretion in arresting abusers and continued their unofficial policy of failing to protect domestic violence victims.[11]

This approach came under increasing pressure as police departments faced civil lawsuits from victims of domestic violence alleging failure to protect.[12] Although New York's Office for the Prevention of Domestic Violence promulgated a pro-arrest policy, law enforcement resisted.[13] Statewide reform remained elusive until the passage of New York State's Family Protection and Domestic Violence Intervention Act of 1994 (DVIA),[14] followed by the federal Violence Against Women Act (VAWA),[15] passed in the same year. DVIA amended N.Y. Criminal Procedure Law to reduce police discretion in domestic violence incidents by mandating arrest of perpetrators in felony and criminal contempt cases, a reform carried out in many other states at the time as well. While encouraging arrest, this nuanced statute continued police discretion in the investigation of misdemeanor crimes, the vast majority of domestic violence cases.[16]

Such pro-arrest law began to change police behavior, resulting in increased rates of arrest of domestic violence perpetrators, increased prosecution, and a lower rate of recidivism.[17] The laws decreased pressure on victims by placing the burden of an arrest fully on the government and confirming the status of the abused as a victim of a crime rather than as an equal participant in an abusive relationship. Advocates reported the beginning of a sea change in criminal justice response to victims, which continues to this day.

Immediately after the implementation of New York State's domestic violence arrest statute, advocates bore witness to an unintended consequence. Faced with counter allegations of abuse when arriving at the scene of a domestic violence call, police began to implement an unofficial policy of "dual arrest," arresting both parties alleging domestic violence and leaving the courts "to sort it out." As a result, many victims were wrongfully arrested, which deepened their harm and chilled the likelihood of their calling the police again. In order to combat this problem, the New York State legislature enacted the Primary Aggressor Law in 1998,[18] which mandated that when there are such dueling allegations law enforcement must consider certain criteria to determine who should be arrested. These criteria include any history of domestic violence, existence of protective orders, the relative severity of the injuries to each party, and whether one party was acting in self-defense.[19] This law ameliorated but did not eliminate the problem of dual arrest, or retaliatory arrest, particularly when a victim is non-English speaking.[20]

Concern that mandatory arrest would result in a disproportionate arrest rate for men of color was alleviated when a study commissioned by OPDV demonstrated that the implementation of mandatory arrest laws in New York State actually resulted in a greater percentage of white men being arrested for crimes of domestic violence, and a study conducted by the National Institute of Justice in 19 states found that arrest occurred more frequently in cases where the offender was white.[21]

Prosecutors

Mandatory arrest also had an impact on the prosecution of abusers since victims often try to withdraw criminal charges against their abusers due to such factors as pressure from the abuser and his family, fear of retaliation, concern for their children, and financial dependency on the abuser. Initially, prosecutors adopted "no drop" policies, and too often forced uncooperative victims to testify against their abusers, sometimes threatening or even jailing them to secure cooperation.[22] Recognizing the harsh, traumatizing impact of such tactics on victims, prosecutors in the early 1990s, led by then-San Diego County Attorney Casey Gwinn, began to turn to a new approach: evidence-based prosecution.[23] This new methodology recognized that such evidence as photographs of a victim's injuries, physical and other evidence from the police crime scene investigation, medical records, social media communications, and 911 calls can enable prosecutors to build strong cases against domestic violence perpetrators without having to rely on victim participation.

Prior to 2004, New York courts readily permitted 911 tapes and other "excited utterances" – powerful evidence of domestic violence – as exceptions to the hearsay rule. In 2004, the Supreme Court decided *Crawford v. Washington*,[24] holding that the use in a criminal trial of a recorded statement made during a police interrogation by the complainant, who did not testify at trial, violated the defendant's Sixth Amendment right to be confronted with the witness against him. The decision had an immediate effect on the ability of prosecutors to prove their cases through the use of evidence that had previously been deemed admissible through exceptions to the hearsay rule. In particular, the decision negatively affected domestic violence prosecutions, and prosecutors found that courts were dismissing more domestic violence cases due to evidentiary issues.[25] A subsequent decision, *Davis v. Washington*,[26] clarified that statements such as 911 calls and other statements during an ongoing emergency are considered non-testimonial and thereby are admissible. Nevertheless, the courts are continuing to define testimonial statements, and prosecutors in domestic violence cases must carefully evaluate whether potential testimony will be allowed.

Defense Attorneys

A parallel revolution took place in the understanding of domestic violence in the context of cases in which abused women severely injured or killed their abusive partners. In 1979, Dr. Lenore Walker published a groundbreaking book, *The Battered Woman*,[27] which articulated a theory about domestic violence and the psychology of its victims called the "battered woman syndrome." Dr. Walker's theory was embraced by many attorneys defending domestic violence victims in cases in which the victim used deadly physical force under circumstances in which the deadly physical force used by their abusers was arguably not imminent. Many advocates and experts in the psychology of domestic violence victims ultimately rejected "battered woman syndrome" as an overly narrow category that tended to exclude economically and racially marginalized victims and contributed to pathologizing domestic violence survivors generally. Today "battered woman syndrome" has been largely replaced by theories about post-traumatic stress disorder. Nonetheless, defense attorneys continue to use expert witnesses to explain to courts and juries why some domestic violence victims feel so trapped in an abusive relationship that, in their belief, their only avenue to safety requires the use of deadly physical force.

Advocates for incarcerated domestic violence victims began to push for clemency for victims who had been convicted of killing their abusers, pointing to research demonstrating that the average prison sentence for men who kill their female partners is two to six years while the average sentence for women who killed their male partners is 15 years, despite the fact that "most women who kill their partners do so to protect themselves from violence initiated by their partners."[28]

These efforts have met with mixed success, as evidenced by *In re Niki Rossakis*.[29] Ms. Rossakis has spent more than 20 years in prison for killing her abusive husband, during which time she obtained two associate's degrees, successfully completed most rehabilitative programs offered to her, and was a model prisoner. She sought and was denied parole three times, most recently because the parole board

contended that her statements about suffering domestic violence at the hands of her husband were inconsistent with her protestations of remorse. In 2015, the Appellate Division, First Department, strongly rejected this claim and affirmed the lower court's finding that the Parole Board "acted with irrationality bordering on impropriety and therefore arbitrarily and capriciously denied petitioner parole. . . . It fails to recognize that the petitioner may legitimately view herself as a battered woman, even though the jury did not find that she met New York's exacting requirements for the defense of justification."[30]

A proposed New York State law, the Domestic Violence Survivors Justice Act,[31] which has widespread support among domestic violence victim advocates and others intent on bringing about reform in the criminal justice system, would allow judges to sentence domestic violence survivors to fewer years behind bars or to alternative-to-incarceration programs when their abuse was "a significant contributing factor" in their crime.[32]

Emerging Issues: Cyberstalking and Revenge Porn

In 1999, after a decade-long effort by advocates, the New York State Legislature passed the Anti-Stalking Act,[33] finally providing domestic violence victims in New York with a criminal remedy to an insidious, terrifying, and often subtle form of abuse. Recent refinements to the statute have recognized the increasing prevalence of cyberstalking, amending the definition of "following" to include "tracking . . . through the use of a global positioning system."[34] A variant of cyberstalking, "e-sexual abuse," or "revenge porn," is a new weapon both for abusers intent on humiliating their victims and destroying their reputations and websites that profit from this abuse. Thirty-four states currently have laws against this crime, and a bill has been brought before the House of Representatives.[35] Although New York does not yet have an e-sexual abuse statute, a campaign is mobilizing for such a remedy for victims. In the meantime, prosecutors have pursued criminal cases against perpetrators for aggravated harassment, dissemination of an unlawful surveillance image, and public display of offensive sexual material. Victims have also sought protection from increasingly aware and responsive family court judges in cases for civil protective orders alleging such family offenses as harassment, disorderly conduct, coercion, and reckless endangerment. [36]

A Changing Infrastructure for Justice

Prior to the DVIA, victims had three days in which to choose whether to seek an order of protection in family court or in criminal court – they could not do both. The DVIA amended the Family Court Act to establish concurrent jurisdiction over family offenses in both family courts and courts presiding over criminal cases.[37] While this change in the law increased the relief available to victims, it meant that a victim could find herself litigating a civil protective order case before a judge in family court while serving as a complainant in a criminal case on an identical set of facts before a separate judge. A matrimonial action might bring her before a third judge. In 1995, Chief Judge Judith Kaye, recognizing the burden on domestic violence victims of having to pursue protection in different courts from multiple judges as well as the negative impact of this state of affairs on judicial economy, opened the first Integrated Domestic Violence Court (IDV),[38] dedicated to a "one family – one judge" model and aspiring to a greater level of responsiveness to the safety needs of victims and their children and a higher degree of monitoring of offenders. There are now more than 40 Integrated Domestic Violence Courts throughout New York State.

An important parallel development has been the inception and growth throughout the country of Family Justice Centers, "one stop shops" for survivors of domestic violence, initiated by Casey Gwinn in 1989, that bring together under one roof domestic violence prosecutors with civil legal service providers, social service providers, and representatives of community-based organizations. This collaborative, multi-disciplinary model works to promote not only the safety of victims and their families but their healing and economic empowerment. Under the leadership of the Mayor's Office to Combat Domestic Violence, the first Family Justice Center opened in Brooklyn, New York in 2005.[39] Today, there are Family Justice Centers in all five counties of New York City as well as in Erie and Westchester counties.

The Family Court has recently implemented a pilot program to allow electronic filing of petitions for temporary orders of protection and for the issuance of such orders by audio-visual means from remote locations. This provides relief for victims who cannot travel to court, or for whom appearing in the courthouse creates risk of harm.[40]

Family Law

Orders of Protection

While pundits have denigrated orders of protection as "meaningless pieces of paper," research has demonstrated that civil orders of protection, like their criminal counterparts, can be powerful vehicles for deterring repeat incidents of domestic violence.[41] Under Article 8 of the Family Court Act, victims can pursue a wide array of forms of relief – from temporary orders of child support to orders that require abusers to stay away from victims and their places of education and employment, and exclude abusers from their victims' homes – so that safety from domestic violence does not lead to the victim's homelessness. With a finding of aggravating circumstances, family court judges can issue orders of protection up to five years in duration, and recent changes to the Family Court Act permit judges to extend civil protective orders before they expire upon a showing of "good cause."[42] The legislature's recognition of a growing number of domestic violence-related crimes as "family offenses" – from sexual misconduct and criminal mischief to coercion and identity theft – has meant that victims can

pursue protection in family court for the growing array of tactics that deviously creative abusers employ.[43]

One of the most important legislative changes in Article 8 of the Family Court Act took place in 2008, when the New York State Legislature changed the requirements for who has standing to pursue a civil order of protection. While any crime victim could be the beneficiary of a criminal protective order, until 2008 civil protective orders could be obtained only by those who were married to their abusers, who were close blood relations to their abusers, or who had children in common with them. This meant that the doors of family court were closed to many urgently in need of protective orders, most notably unmarried heterosexual couples without children together and couples in same-sex relationships, who at that time were unable to marry in New York State. The 2008 passage of the law known as Fair Access to Family Court considerably expanded the protections available to domestic violence victims in nontraditional relationships.

As victims' attorneys quickly came to learn, the choice of forum is important to consider in fashioning the most protective legal strategy for one's client. While filing a protective order petition in family court puts the victim, as a party to the litigation, squarely in control of the case – a welcome state of affairs for many – it also means that she or he must appear in court, literally face the abuser on multiple court appearances, and take days off from work for each.[44] Abusers quickly learned to manipulate this situation by cross-filing for their own orders of protection or for custody of or extensive visitation with the children. To avoid such a situation, a victim may wish to pursue a criminal protective order instead by reporting the violence to law enforcement and thus initiating a criminal case.[45]

Custody, Visitation and the Hague Convention

Although there is a growing awareness on the part of courts of the importance of responding swiftly and appropriately to domestic violence in the context of criminal and family offense cases, judges have been reluctant historically to recognize its significance in matters of child custody and visitation.[46] In reversing a lower court award of custody, for example, the Appellate Division noted, "the Family Court gave inexplicably little weight to its own findings regarding the father's domestic violence against the mother."[47] Many courts have been reluctant to acknowledge the extent to which abusers can use visitation and custody proceedings to continue their abuse, often through the children, or use court appearances to stalk and maintain contact with victims.[48]

To address this situation, in 1996 the New York State Legislature mandated that trial courts take into consideration proof of domestic violence in child custody and visitation disputes. Pointing in its legislative findings to the growing body of research demonstrating the negative impact on children of exposure to domestic violence ("Studies indicate that children raised in a violent home experience shock, fear, and guilt and suffer anxiety, depression, low self-esteem, and development and socialization difficulties"), the legislature stated that domestic violence "should be a weighty consideration" when courts analyze the best interest factors in making custody and visitation determinations.[49] In 2009, New York statutes were further amended to require courts to include and state on the record how findings, facts and circumstances of domestic violence were factored into custody decisions.[50]

Court decisions that have been reported since 1996 indicate that some judges deciding custody cases are giving considerable weight to allegations of domestic violence.[51] In *E.R. v G.S.R.*, for example, the court declined to accept either the expert's recommendation, because he "skims over the many episodes of domestic violence," or the law guardian's, because she "discounted the history of domestic violence."[52] The Second Department has reversed and remanded cases when lower courts failed to consider sufficiently the mother's allegations of domestic violence perpetrated against her by the father.[53] Appellate courts have consistently held that domestic violence witnessed by a child is a significant factor in determining custody and visitation.[54]

A longstanding area of concern is accusations against victims by domestic violence perpetrators of "parental alienation," a problematic spin on the best interest factor, "unfriendly parent." Typically this allegation is a strategy employed by an abuser to pathologize the victim and make her or his protective actions appear to be wrongful interference in parental rights. Although New York's appellate courts continue to reject this theory as a valid psychological phenomenon, there have been cases in which domestic violence victims have been threatened with loss of custody of their children because such allegations have not been confronted vigorously.[55]

Relocation and the UCCJEA

The Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA)[56] became effective in 2011 and has been adopted by every state,[57] including New York.[58] The UCCJEA vests exclusive and continuing jurisdiction for child custody litigation in the courts of the child's "home state," which is defined as the state where the child has lived with a parent for six consecutive months prior to the commencement of the proceeding, or since birth. This act becomes significant in domestic violence cases in situations in which victims must flee for their or their children's safety. While the act enables victims to petition for "emergency jurisdiction," such a grant is usually temporary, and the court in the jurisdiction from which the victim fled is vested with the ultimate determination of whether she or he must return.

The act also addresses situations in which abusers wrongfully take the children to another jurisdiction and keep them there, providing victims with affirmative defenses to the abusers' claims that the location in which they wrongfully took the children is now their home state. In such situations, victims can assert that the entire period of the wrongful taking of the children was "a period of

temporary absence," that the children are not in the care of someone acting as a legal custodian (if, for example, the abuser has deposited them with relatives), or that there is a lack of respect for human rights in the new jurisdiction, if the abuser has taken them to a country that does not protect due process and women's rights.

The Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention")[59] is a multilateral treaty, signed by 94 countries, intended to protect children from wrongful removal or retention across frontiers by mandating return to the child's "place of habitual residence," and preserving custody arrangements in place prior to wrongful removal.[60] While drafters of the Hague Convention envisioned the abducting parent as a disgruntled non-primary caretaking father, the more representative scenario has involved a primary caretaking mother fleeing with her child to a jurisdiction where she believes that she will have a greater degree of safety and protection.[61] Domestic violence victims in this situation can assert affirmative defenses to the application of the Convention, alleging "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation" (Article 13(b)). In *Elyashiv v. Elyashiv*,[62] the court found that the three children of a mother who had fled from Israel to New York to escape her husband were habitual residents of Israel. Crediting the testimony of a child psychiatrist who had conducted a forensic evaluation documenting that the husband had battered the mother and abused the older two children, the court determined that returning the children to Israel would subject them to a "grave risk of harm" and denied the father's petition for the return of the children.

Neglect and Abuse

Domestic violence victims with children have been charged with neglect for failing to protect the children from exposure to domestic violence under Article 10 of the Family Court Act.[63] Child Protective Services, in New York City, Administration for Children's Services (ACS), investigates the parties and their home environments. Prior to 2002, Child Protective Services, and in particular ACS, routinely removed children who had allegedly been exposed to domestic violence from their homes, charging the mothers, although themselves victims, with failure to protect their children from exposure to domestic violence.[64] In 2002, the court in *Nicholson v. Williams*[65] held that this practice was unconstitutional, and the Court of Appeals subsequently mandated that removal could only take place if the mother was defined as neglectful and if "a preponderance of the evidence establishes that the children were actually or imminently harmed by reason of her failure to exercise even minimal care."[66] Judge Kaye, for the Court of Appeals, opined, "While we cannot say, for all future time, that the possibility can never exist, in the case of emotional injury – or, even more remotely, the risk of emotional injury – caused by witnessing domestic violence, it must be a rare circumstance in which the time would be so fleeting and the danger so great that emergency removal would be warranted."[67] Although a review of the case law since *Nicholson* indicates that courts are applying a higher standard in removal decisions in cases of domestic violence,[68] there is still evidence that unlawful removals occur.[69]

Immigration Law

Immigrant victims of domestic violence often face additional barriers to safety and independence, including lack of family or community support, language barriers, lack of information about the legal system, cultural stigma of divorce, and economic hardship. For those who are undocumented or partially documented these barriers can be magnified. Domestic violence victims dependent on an abusive spouse for immigration status may believe that they must stay in the abusive relationship in order to obtain immigration protection and relief. For others – in abusive relationships with undocumented individuals or on their own – basic survival may be in jeopardy. Fortunately, significant progress has been made in providing remedies for immigrant victims, and it is more incumbent than ever for attorneys to identify these remedies and assist their clients in accessing them.

Family-based immigration is the most common way for foreign-born individuals to gain permanent legal status in the United States. Annual caps on visas based upon familial relationships create long waits, depending on the country of origin. Individuals married to a U.S. citizen are not subject to annual caps so can avoid the wait. Perpetrators of domestic violence who are U.S. citizens or permanent residents often use the power that their immigration status confers on them as a tool of power and control over the spouse they are sponsoring – holding the threat of deportation above the victim's head. Federal law provides remedies for spouses of abusive U.S. citizens or permanent residents.[70]

For victims married to U.S. citizens or lawful permanent resident spouses, two forms of relief exist: the Violence Against Women Act (VAWA) Self-Petition and the Battered Spouse Waiver. A Self-Petition allows current or former spouses of U.S. citizens or lawful permanent residents to seek permanent residence, regardless of whether the abusive spouse has ever initiated an immigration petition. The Battered Spouse Waiver allows victims who already hold or have held conditional residence based on having been petitioned for by their spouse to apply. Another relief option is the VAWA Cancellation of Removal, which allows an immigration judge to grant a stay to a victim facing removal or deportation proceedings who is either married to or has a child in common with an abusive citizen.[71]

These remedies offer protection to relatives of U.S. citizens, but cannot be used by victims who lack a qualifying family relationship or those whose batterers lack legal status in the U.S. Fortunately, remedies may exist for these victims, in particular the U Nonimmigrant Status, or "U visa," which affords lawful status to victims of domestic

violence and other qualifying crimes who cooperate with the investigation or prosecution of criminal activity when such cooperation has been certified by a law enforcement official, such as a police officer, an assistant district attorney, a Child Protective Services supervisor, or a judge.[72] Upon approval of U visa status, the victim will receive four years of lawful status in the U.S. and an employment authorization document. After three years, she may apply for lawful permanent residency.[73]

Like the U visa, the T Nonimmigrant Status, or "T visa," is also a remedy for immigrant victims, providing relief to victims of human trafficking. Applicants need to demonstrate that they are victims of a severe form of human trafficking: sex trafficking in which a commercial sex act is induced by force, fraud or coercion or in which the victim is a minor, or the recruitment, harboring or transporting of a person for labor or services through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude. Because domestic violence and human trafficking often overlap, the T visa can be a valuable remedy for an immigrant victim of domestic violence.[74]

An additional remedy is asylum. Domestic violence victims, as victims of gender-based persecution, may be able to demonstrate that they are members of a "particular social group" and therefore are being persecuted based on membership in this group. U.S. immigration law offers protection to women fleeing severe family violence, such as female genital mutilation, forced marriage, honor killing, and prostitution. There is a growing body of case law supporting asylum as a remedy for domestic violence victims. In *Matter of R-A-*,[75] a Guatemalan woman sought asylum after suffering severe, ongoing violence at the hands of her husband, a former soldier. After the Guatemalan authorities rejected her plea for help, she fled to the United States and was placed in deportation proceedings. An initial decision by the nation's highest immigration tribunal, the Board of Immigration Appeals (BIA), in 1999 concluded that RA did not have membership in a "particular social group" for asylum purposes.[76] However, in 2003, the Attorney General certified *Matter of R-A-* to himself to decide, pending the issuance of final regulations on gender-based asylum claims, and ordered briefing on RA's eligibility for relief. The Department of Homeland Security prepared a brief which essentially adopted many of the points long articulated by domestic violence advocates, including the formulation of RA's membership in a particular social group.[77] The Immigration Court ultimately granted the applicant asylum based on a stipulation between the parties, without addressing the issue of the particular social group, and has no precedential value. Nevertheless, the government's brief on RA's eligibility had a profound impact on the adjudication of domestic violence-based asylum claims, and enabled immigrant women fleeing domestic violence to seek and prevail in their asylum claims.

In a groundbreaking precedential decision, issued on August 26, 2014, *Matter of A-R-C-G-*,[78] the Board of Immigration Appeals formally recognized domestic violence as a basis for asylum. Specifically, the court held that "married women in Guatemala who are unable to leave their relationship" is a cognizable social group. The court further indicated that particular social groups defined by gender, nationality, and status in a domestic relationship may meet asylum law's immutability, particularity, and social distinction requirements.[79]

For immigrant survivors of domestic violence who are minors and cannot be reunited with one or both parents, the remedy of Special Immigrant Juvenile Status may be a possibility. It requires a Special Findings Order issued by a family court judge, after which the victim can apply for permanent resident status.

Conclusion

Throughout the past three decades, advocates for victims of domestic violence, working in partnership with judicial leaders, prosecutors and public defenders, members of the private bar, and leaders in state and local government, have brought into force a body of statutory and decisional law that has greatly advanced the rights of victims of domestic violence in New York State and nationally, while providing much needed protections to their children. At the same time, these leaders have made extraordinary progress in creating infrastructure and improving systems that provide victims with vastly improved avenues to protection and justice. While important hurdles remain, especially for victims rendered vulnerable by lack of immigration status, youth and age, nonconforming sexual identity or orientation, racial or ethnic marginalization, disability, and economic disadvantage, the progress has been undeniable. All New Yorkers, especially those in the legal profession, can lift our heads with pride in our achievement of furthering the safety and independence of those among us at greatest risk of harm. ■

1. *State v. Rhodes*, 61 N.C. 453 (1868).

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A Right NOT to Be Trafficked

By Taina Bien-Aimé

Under the leadership of the great Eleanor Roosevelt, governments gathered after World War II to write and adopt the Universal Declaration of Human Rights, which lays out the basic principles of our inalienable and indivisible rights, among which that all human beings are born free and equal in dignity and rights[1] and that "[e]veryone has the right to life, liberty and security of person."[2] Emphasizing equality, Article 2 of the Declaration elaborates that "[e]veryone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind . . . such as sex . . ." and Article 7 declares that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law."

Human trafficking is a severe human rights violation, violating equality principles. Recognized as one of the fastest growing global crimes, toe-to-toe with arms and drugs trafficking, human trafficking is fundamentally the buying and selling of human beings into labor or sexual servitude for profit. Many describe human trafficking as "modern-day slavery," which encapsulates the phenomenon for the general public, but can cloud the ability to recognize human trafficking in all of its manifestations. Human trafficking has myriad faces, from fisher boys in Ghana to domestic servants held captive by diplomats, from forced labor on farms to child marriage, from organ selling to brothels and sex establishments in every country of the globe. Human trafficking is not only a pervasive crime but also an extraordinarily lucrative one, perpetrated with a very low risk of punishment for the trafficker coupled with high profits. The International Labor

Taina Bien-Aimé is the Executive Director of the Coalition Against Trafficking in Women (CATW), which works to end human trafficking and the commercial sexual exploitation of women and girls worldwide. Founded in 1988, CATW and its partners engage in advocacy, education, victim services, and prevention programs for victims of trafficking in Asia, Africa, Latin America, Europe, and North America, including the United States. CATW has been a leader in promoting legislative, policy, and educational measures to raise awareness about the underlying causes of human trafficking.

Organization estimates that illegal profits from human trafficking amount to $150 billion a year, $90 billion of which comes from sex trafficking.[3] Given the nature of these crimes, this a conservative estimate.

The question often asked is how many people are trafficked around the world? The quick answer is that no one really knows. International statistics vary widely, ranging from 4 million to 27 million people trafficked worldwide for both labor and sexual servitude. The U.S. Department of State calculates that 14,500 to 17,500 individuals are trafficked into the country, mostly from Latin America, Asia and Eastern Europe. Domestically, the National Center for Missing and Exploited Children found that 1 in 16 of the 18,500 runaways reported to the Center in 2016 was likely a sex trafficking victim. In its report about patterns of human trafficking globally, the United Nations Office for Drugs and Crime (UNODC) qualifies its findings on the number of trafficking victims as "detected."[4] These broad-range estimates reflect in part both the reality that human trafficking is an under-targeted crime and also that it is one "hidden in plain sight." Traffickers range from organized crime rings, to family and community members, to farmers and neighborhood pimps.

However, one statistic on which international agencies and governments all agree is that 79 to 80 percent of trafficked persons are women and children,[5] and that the majority of that population is trafficked for commercial sexual exploitation.

Given these facts, what can governments, national and international civil societies do to tackle the overwhelming phenomenon of trafficking in persons? This article is merely a brief overview of the major international, national and state laws that guide governments to address trafficking in persons. The second part of the article will underline a few key points related to trafficking for purposes of sexual servitude, which primarily affects trafficked women and girls.

International Law

Ratified by the United States in 2005, the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,[6] also known as the Palermo Protocol or the UN Trafficking Protocol, provides the first internationally agreed-upon definition of human trafficking, whereby:

> Trafficking in persons is the recruitment, transportation, transfer, harbouring or receipt of persons, **by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception** (emphasis added). . . . of the **abuse of power or of a position of vulnerability** or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation . . . (emphasis added).

The major takeaways from this definition and other provisions of the Palermo Protocol include that:

1. **Trafficking Does Not Require Movement**
   The "recruiting," "harbouring," and "receipt" of persons can happen without a trafficking victim ever leaving her neighborhood.[7] For example, a pimp who "harbours" his victim could be a trafficker whether or not he moved across state borders.
2. **Trafficking Does Not Require Force**
   The Palermo Protocol defines an array of means with which a trafficker entices, induces or coerces persons for purposes of trafficking. Critical to the definition is the recognition of the acute vulnerability of victims of trafficking, coupled with abuse of power, which can manifest itself through psychological coercion and other means that do not necessarily involve force.
3. **Consent Is Not a Defense to Trafficking**
   The consent of a victim of trafficking to the intended exploitation . . . shall be irrelevant where any of the means described have been used, given that "a victim's exercise of free will is often limited by means of force, deception or the abuse of power"[8] (emphasis added).
4. **A Child in Labor or Sexual Servitude Is by Definition a Trafficked Person**
   The means described above need not be in place for a child, defined as a person less than 18 years of age, to be found trafficked.
5. **Governments Must Address Demand**
   Article 9.5 of the Protocol requires state parties to take measures to discourage demand. There is growing consensus that addressing "demand" is key to the prevention of human trafficking. While the "push factors" of trafficking include vulnerabilities linked to gender, racial, and ethnic discrimination and violence; civil unrest and armed conflict; or natural disasters, the "pull factors" are the global demand for cheap labor and products in labor trafficking and the global demand for prostitution as it pertains to sex trafficking.
6. **Provides Assistance and Protection to Victims**
   Governments party to the Palermo Protocol must invest in efforts to assist and protect victims of trafficking, including implementing appropriate measures to provide for the physical, psychological and social recovery of victims of trafficking; appropriate housing; and employment, educational and training opportunities.

U.S. Federal Law

Federal and state legal frameworks provide us with a few tools to combat human trafficking. The Trafficking Victims Protection Act of 2000, as amended (TVPA), is the federal legislative response to trafficking, promoting the prevention of trafficking, the protection of victims and the prosecution of the perpetrators. The TVPA creates a new federal crime of trafficking. A prosecutor must prove

that the trafficker used "force, fraud, and coercion" as means to traffic his victim, a high threshold.

In 2015, President Barack Obama signed into law the Justice for Victims of Trafficking Act (JVTA), amending the TVPA, as well as multiple other federal statutes. The JVTA redefines federal law to clarify that sex buyers of children and human trafficking victims can be prosecuted as traffickers and it creates a new funding stream to finance services for U.S. trafficking victims. The JVTA also requires the Department of Justice to incorporate demand-reduction strategies into all human trafficking training programs. Recognizing that survivors are key in finding solutions to the extensive harm perpetrated against them in trafficking, the JVTA also created the survivor-led U.S. Advisory Council on Human Trafficking to make recommendations to the government on anti-trafficking strategies.

State Law

New York became the first state to pass what is known as the Safe Harbor Act, which seeks to offer and engage child victims in rehabilitative services in lieu of charging them with prostitution. The goal of the law is to eliminate the double standard that while children under the age of 17 cannot consent to sex under the law, young prostituted girls are routinely charged and incarcerated for prostitution. The state Safe Harbor laws ensure that trafficked children are instead provided refuge and services for trauma. Today, two-thirds of the states have passed some version of "Safe Harbor" legislation, although the laws are not equal in scope and effectiveness.

Since women and girls are overwhelmingly impacted by trafficking, the remainder of this article will focus on trafficking for the sex trade, although it is important to note that women trafficked for labor servitude are also at high risk of sexual violence and sexual exploitation during their captivity. There is not one country in the world where trafficking doesn't exist. Nigerian women are trafficked into Iceland; Bulgarian women into Dubai; Venezuelan women into Queens. Domestically, Aboriginal, Indigenous, First Nations, Black, Maori, so-called Scheduled Castes, and other highly marginalized groups of women are overrepresented in the sex trade.

In examining trafficking for purposes of the commercial sexual exploitation of women and girls, gender-based violence and discrimination is an important framework to adopt. Culture, religion, tradition, gender stereotypes and inequality secure the low status of women and girls in every country, respectively. One must also make the connections between fundamental human rights, equality and trafficking, and between sex trafficking and the demand for prostitution. To cite another international law, the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others declares that "*prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the* ***dignity and worth*** *of the human person and endanger the welfare of the individual, the family and the community . . . .*" The 1949 Convention also advocates for punishing the "demand" and the prosecution of pimps and sex buyers, rather than punishing the exploited victims.

Indeed these few past years, a number of member states, including Ireland, Northern Ireland, Canada and Israel, have followed the examples of Sweden, Norway, Iceland, and most recently, France, by enacting or proposing laws that address the exploitation in the sex trade as gender violence and discrimination, punishing only those who buy and sell human beings for sex. Independent reports from the governments of Sweden and Norway show that targeting the demand for prostitution has reduced the levels of sex trafficking, compared to their neighboring countries that have not adopted such laws.

Conclusion

Civil society plays a critical role in partnering with governments in identifying victims, providing services and developing policies and strong laws to prevent and tackle human trafficking, but no single entity can do it alone. Combating human trafficking requires an intensive collaborative network of law enforcement, governments and non-profit organizations, but also the medical community, labor unions, men and boys, and youth groups. It is extremely important to strengthen our capacity to gather critical data that remain inadequate about these human rights abuses. Nationally, we must establish medical protocols in emergency rooms and mental health facilities to identify and support victims of trafficking. Finally, and most importantly, it is time to invest in the growing movement of survivors, who are informing us about the dark realities of exploitation and trafficking. They are guiding us toward implementing laws and policies and, more importantly, changing our cultural beliefs about human trafficking and the sex trade.

"Where do human rights begin?" Eleanor Roosevelt asked. "In small places, close to home, so close and so small that they cannot be seen on any map of the world." And so this is where our efforts to end human trafficking begin. ■

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Why Your Diversity Initiative Is Irrelevant . . . and How to Fix It

By Joanne Cleaver, Melissa McClenaghan Martin and Dr. Anne Perschel

"Let me close my office door," said the firm managing partner. That's when we knew the truth was going to come out.

"Women keep leaving our firm," he said into the phone. "We can't figure out why. Everyone gets the same opportunities. We have a women's initiative so the women can get together and hear from women partners. We give them extra business development and leadership training. None of it seems to make a difference. Women quit anyway. This can't continue. What are we doing wrong?"

As consultants with complementary practices, we often collaborate to help professional firms diagnose and address vexing problems with retaining and developing women and diverse talent. We've seen too many misguided initiatives doomed from the start. They're doomed because the initiatives are seen as add-ons: programs ancillary, not necessary, for the firm's future.

Women are half of the legal profession's new talent. For too long, firms have assumed the pipeline problem will solve itself – that more women funneling to firms from law schools will automatically result in more women partners. The same misguided logic has been applied to other diverse talent.

But then, diverse talent quits for a variety of reasons. Poorly designed, underfunded, badly executed and run largely by practitioners, initiatives make the problem worse by elevating expectations, only to fuel cynicism

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and disillusionment when the initiatives don't deliver as promised. Moreover, millennial talent often avoids such initiatives, seeing them as out of touch with a workplace that should be a true meritocracy. Clearly, things aren't working as they should.

Through our consulting work across professional services, we know how successful initiatives can transform a firm's diversity efforts, improving retention and promotion rates, significantly increasing firm revenue and ROI, and engaging and inspiring diverse talent. Some of the most successful models are outside of the legal profession. For example, at many accounting firms, gender diversity initiatives have been more entrenched, better funded and more effective than many law firm efforts. Here, we profile key aspects from some of the best diversity initiatives across sectors, including both law and accounting firm examples.

For each aspect, we detail common initiative misfires and the corresponding "silver bullet" solutions that best practices firms use to fix them.

Begin With Metrics and Accountability

By Joanne Cleaver

The problem: Many diversity initiatives don't seem to deliver results. Why should firms keep spending when there's scant proof of return on their investment?

The solution: Build metrics and accountability into initiatives from the start and create action plans for achieving them. Hold the firm accountable both internally and externally, sharing its successes, as well as areas for improvement.

Moss Adams LLP, one of the 15 largest accounting firms in the United States, makes no secret of its ambitions for "Forum W," its women's initiative: 30 percent women partners by 2020.

And because the firm publishes an annual report about Forum W, everyone, from staff to clients, can see how close it is to making its goals. Moss Adams has momentum, making steady progress and reaching 26 percent women partners in early 2017.

"The act of publishing our goals becomes a motivation – we can see where we've been and what we need to strive toward," says Tricia Bencich, the Moss Adams human resources manager who oversees Forum W and related talent development efforts for the firm's 1,700 employees. In 2016, the firm added a parallel initiative for diverse staff and is considering publishing an annual report about that initiative's mission, strategy and results.

Accountability starts at the top at Moss Adams. Each office managing partner has a demographic snapshot – referred to as the "women's initiative scorecard" – that illustrates how that partner's practice is contributing to the firm's goals for advancing women – or not. The numbers are both dispassionate and compelling, says Bencich, and the personal accountability report motivates partners to find innovative ways to use Forum W to achieve office objectives by advancing women.

But the diversity conversation at Moss Adams doesn't stop at the scorecard, as it does at many firms. It's prescriptive as well, utilizing a women's initiative liaison to help managing partners create detailed action plans to improve salient metrics.

In addition to its Forum W annual report, Moss Adams also holds itself accountable externally through its participation in the Accounting MOVE Project, an industry-wide initiative that provides detailed best practices for key metrics, programs and aspects of culture that clearly drive retention of women. (MOVE was designed and launched in 2010 by my firm.) Although there's no corollary to MOVE in the legal profession, many best practices identified by MOVE are relevant to law firms, given the similar partnership structures and cultures at law and accounting firms.

"Clients are just as concerned about advancing women in their organizations as we are for our own workplace," says Bencich. "By sponsoring the Accounting MOVE Project and being on the project's advisory board, we show clients that we share their values. That's critical for building long-lasting relationships and for differentiating Moss Adams in a fragmented and fast-moving market."

By connecting the dots from initiatives, programs and cultures to proven results, MOVE equips member firms with well-tested strategies. For instance, firms receive detailed MOVE scorecards that benchmark their performance against peers in key metrics and provide best practice case studies.

"We are pretty sure we are an innovator in developing initiatives and programs for women, but we confirm that through the benchmarking tools we get through the MOVE Project," says Bencich. "Our best practices help others, and we always learn new tactics that help us keep Forum W relevant in today's market."

As Moss Adams has found, the truism "you get what you measure" is particularly relevant for designing initiatives that work.

However, at many firms, measurement of diversity initiatives often is worse than an afterthought: many firms measure the wrong thing – focusing on activity, and not whether programs improve retention and promotion statistics. When diversity initiatives are busy filling their calendars with brown bag lunches, partner panels, one-off trainings or client events, activities become the dominant metrics. Retention and promotion predictably stall, the initiatives don't appear to make a difference, funding is cut and the firm endures another round of disappointment and confusion about what went wrong.

But, by finding (should it be funding?) and tracking the right metrics, firms will move beyond activity-based diversity initiatives and start to truly move the needle because leaders will understand what they are working toward and act accordingly. Many firms on the

MOVE Best CPA Firms for Women list have done exactly that. Among MOVE firms, the aggregate percentage of women partners and principals has increased from 17 to 25 percent in six years. Firms on the MOVE list also advance women faster than the norm for the profession. As accounting firms are starting to find, the best practices tracked and examined by MOVE can also begin to move the needle for diverse professionals.

With the right metrics and accountability, firms can see trend lines and make necessary course corrections. Leaders can also focus on the right actions, transforming activity-based programs into robust initiatives that can truly advance diverse talent.

Transform Diversity and Women's Initiatives Into Business Drivers

By Melissa McClenaghan Martin

The problem: At many law firms, women's business development programs are woefully underfunded, typically comprised of episodic trainings and perhaps a few women's client events. Leadership wonders "what's the point?" – women are still leaving, little new revenue comes from these events, and too few women are making significant rain. Programs for diverse attorneys are given less attention and, not surprisingly, have even worse results.

The solution: Transform your diversity initiative into a business driver for the firm. And, if you do it right, in the process you'll engage and inspire diverse talent to become true rainmakers, deepen their connection to the firm, foster a business development culture and improve your retention and promotion statistics, while bringing in significant new revenue and showing ROI.

Rothstein Kass & Company, P.C., a national accounting firm with more than 1,000 employees as of 2014 (when its assets were acquired by KPMG LLP) and a client of mine, was able to achieve all of those things through its women's initiative, referred to as "LIFE." I helped create LIFE's business development platform, delivered business development training to pre-partner women and designed and helped execute numerous prospecting initiatives for the firm.

In three years, LIFE's business development program achieved extraordinary successes, bringing in more than $6.5 million in new revenue for the firm. Early on, we converted LIFE detractors into some of our biggest and most vocal advocates. Retention and promotion rates for participating women rose significantly in both cases. And, throughout it all, we saw women become engaged and inspired by their careers, take greater leadership roles inside and outside the firm, and become thought leaders and rainmakers.

LIFE had several important components such as mentoring and work-life initiatives, says Rosalie Mandel, a former Rothstein Kass partner and founder of LIFE, "but our business development program was the most transformative in terms of engaging larger numbers of women and convincing firm leadership of the business case for the women's initiative."

And why were we so successful? We went beyond the norm and beyond the "activities" which characterize many women's initiative business development efforts.

Business development training is not new to women's or diversity initiatives. But, if you want to achieve substantial gains, you need to change behavior, instill new habits and create a marketing mindset. You can't do that with one or two trainings, like most firms provide; participants need continued attention and practice.

That's why our first LIFE business development training series (provided to about 20 pre-partner women) was launched alongside a parallel track of conversion-oriented business development opportunities. These opportunities weren't just one-off women's client events with training "for" the event, the approach common at most firms.

Rather, we introduced participating women to key potential sources of referral and industry groups and helped nurture those relationships through a series of facilitated events and meetings. With referral sources, we went beyond typical "meet and greets" to create meaningful and sustained relationships that converted into significant revenue. With industry organizations, our relationships went far deeper than the usual sponsorship models. And we used our trainings to help participants fully leverage these opportunities.

> The truism "you get what you measure" is particularly relevant for designing initiatives that work.

We also positioned our women as industry leaders through thought leadership. To that end, we launched the Women in Alternative Investments Survey ("WAI Survey"), which provided seminal research regarding the opportunities and challenges facing women fund managers, and showcased the insights of Rothstein Kass women partners. (The WAI Survey continues at KPMG, where I co-author it.)

Training and opportunities continued, with new women joining LIFE's business development program each year.

One thing that was essential to our success: a significant budget. In its last year, Rothstein Kass' LIFE budget was about $540,000. "Thirty percent of that was for business development because we knew we'd continue to see exponential revenue gains," says Mandel.

And, as anyone in professional services should know, "You can't leave it up to practitioners to move your initiative forward in a meaningful way," she adds. "You

need dedicated resources internally and outside experts in each area of your women's initiative platform. That's why we were able to achieve the gains we did."

More of the same – diversity initiatives focused on activities, given little funding, managed by practitioners or overstretched diversity staff, well-intentioned but badly executed – will not achieve significant results. If firms truly seek transformation, more is needed: significant resources need to be given and bold new initiatives need to be undertaken. Only then will firms be able to move the needle.

Firms Lose Ground by Standing Still on Sponsorships

By Dr. Anne Perschel

The problem: Executive sponsors are among the most important career promoters but are more readily available for men than women or diverse protégés.

The solution: Well-designed, structured sponsorship initiatives attract, advance, engage and retain women and diverse leaders, while creating a more inclusive culture.

If you ask senior leaders how they rose to leadership, most will attribute their rise, at least in significant part, to one or more executive sponsors who served as advocates. It's not unusual for sponsors to coach and mentor their protégés as well. Sponsors also use their influence and credibility to introduce protégés to internal power players, ensure protégés obtain the right development opportunities and facilitate protégés' advancement internally.

Most sponsorships develop organically, when a mentor or supervisor becomes a protégé's informal sponsor. Because men comprise the majority of senior leaders, they account for the majority of sponsors. The homophily factor – the tendency to associate and bond with people "like me" – further exacerbates the lack of equal sponsorship opportunities for women. Advantages accrue to male protégés, for whom sponsorship develops organically, while women and diverse talent suffer undeserved disadvantages. When we achieve real diversity, the organic process will work for everyone. Until then, intentional, focused and well-designed sponsorship initiatives are a best-known practice to achieve that vision. That is why the best-known companies for promoting diverse talent, such as American Express, Genentech, and Intel, have sponsorship initiatives.

And yet, intentional sponsorship initiatives for women and minorities don't exist at most law firms. Certainly, a greater number of law firms have mentoring programs now than in the past, but few have taken affirmative steps to ensure sponsorships are equally available for all attorneys.

Crowell & Moring is an exception and a pioneer in this area among law firms. Ellen Dwyer, general counsel and management board member at Crowell & Moring, introduced and launched her firm's sponsorship initiative with a team of Crowell partners and professional staff. Dwyer says the journey began with active internal dialogue about how to develop and retain the firm's women and diverse lawyers.

With support from external consultants and significant investment in learning about sponsorship, they began translating and adapting practices from large corporations to Crowell. Next, they established an incubator to experiment with a range of strategies to accomplish two measurable goals: (1) impact career advancement of people on the cusp of promotion and (2) embed sponsorship into the culture. The initiative is open to all eligible Crowell & Moring attorneys, but it is designed to ensure that women and minorities are not left out of sponsorship relationships.

Several years later, Dwyer reports, "We definitely made measurable progress toward achieving our first goal, and we are assessing progress, recalibrating, and figuring out how to embed sponsorship more fully into the firm's culture."

Holland & Knight LLP has a unique approach to sponsorships. Like Crowell & Moring, the firm ensures sponsorships are open to diverse talent, but with one important difference – at Holland & Knight, sponsor-protégé relationships develop organically. The organic approach works for Holland & Knight, in large part, because its diversity and women's initiatives have already helped embed sponsorships for diverse talent into firm culture.

For example, Holland & Knight's "Rising Stars" program, launched in 2003, is a robust and comprehensive leadership program that provides pre-partner women direct access to firm power players. Frequent interactions between potential sponsors and protégés ensure matches occur more organically. In addition, Tammy Knight, a partner at the firm and women's initiative chair, identifies and advocates for women as the right opportunities arise.

While there is no one-size-fits-all model for a successful sponsorship initiative, certain aspects are essential: (1) sponsors must be influential firm leaders, (2) there should be a structured sponsor-protégé matching process that simulates the organic process (arranged matches are not the best) and (3) sponsors and protégés need to be educated about roles, responsibilities and expectations.

Law firms are losing women and diverse talent at greater rates than their non-diverse male peers. By standing still on structured sponsorship initiatives, firms will continue to lose ground on diversity and gender balance goals.

Conclusion

Advancing diverse talent isn't a "woman problem" or a "minority problem." It's everyone's problem. Every practice area, every client and every succession plan pivots on retaining and developing tomorrow's partners. Firms that align their growth, revenue and profit goals with the aspirations of rising women and diverse talent are the ones that will gain a commanding lead that benefits all. ■

BY CARRIE H. COHEN AND THE COMMERCIAL AND FEDERAL LITIGATION SECTION TASK FORCE ON WOMEN IN THE PROFESSION

Where Are the Women Litigators?

Former Chairs of ComFed Section Work to Advance Women's Role in the Courtroom

There has been much written and discussed during the last decade about whether women are appearing in court with the expected frequency given their numbers in the profession. The Commercial and Federal Litigation Section counts among its former chairs a substantial number of prominent women litigators as well as a former United States District Judge and a former President of the New York State Bar Association. These alumnae banded together and with the full support and commitment of the Section's leadership formed an *ad hoc* task force devoted to the issue of women litigators in the courtroom. The task force began its work in 2016 and has undertaken a project seeking to diagnose whether there is a disparity – and, if there is, to make concrete suggestions to eradicate it.

This article was prepared by the task force and primarily authored by **Carrie H. Cohen**, a partner at Morrison & Foerster LLP who focuses in white collar criminal defense, trial work, and internal investigations and previously served as an Assistant United States Attorney in the Southern District of New York, Criminal Division where she tried numerous jury cases. Ms. Cohen is a founding member of the Section's task force on women in the profession and serves on that task force with the following former Section Chairs: **Honorable Shira A. Scheindlin** (ret.), Stroock & Stroock & Lavan LLP; **Bernice K. Leber**, Arent Fox LLP and former President of NYSBA; **Tracee E. Davis**, Zeichner Ellman & Krause LLP, **Sharon Porcellio**, Bond, Schoeneck & King; Lesley Rosenthal, Lincoln Center for the Performing Arts; and **Lauren J. Wachtler**, Mitchell Silberberg & Knupp LLP, as well as **Carla Miller**, Universal Music Group. The ad hoc task force was created under Section Chair **Mark A. Berman** with the full support of former Section Chair **James M. Wicks**, Section Chair-Elect **Mitchell J. Katz**, and Section Vice Chair **Robert N. Holtzman**.

Background

Prior Studies of the Numbers of Women Litigators in the Courtroom

Approximately one year ago, a research report, entitled *First Chairs at Trial: More Women Need Seats at the Table*, was prepared by two women attorneys with support from the American Bar Association's Commission on Women in the Profession and the American Bar Foundation. This report was based on a "docket study" of all cases filed in 2013 in the Northern District of Illinois. The data reported was drawn from a review of Civil Cover Sheets filed in those cases and totaled 558 civil cases and 50 criminal cases. As a baseline, the study noted that, as of the date of the study, women made up 17 percent of all equity partners in big firms and 22 percent of general counsel in Fortune 500 companies. The results of the Northern District of Illinois study showed that women were underrepresented in the courtroom. Here are just a few of the findings:

- Of all appearances in *civil cases*, 68 percent of the lawyers who appeared were men.
- Of those appearing as *lead counsel*, 76 percent were men, meaning that men were approximately three times more likely to appear as lead counsel in a civil case than women.
- Of those appearing as *trial counsel*, 73 percent were men, meaning that, like lead counsel, men were approximately three times more likely to appear as trial counsel in a civil case than women.
- The gender gap was greatest in certain areas of law including contracts, torts, labor, and intellectual property. The gender gap was less apparent in civil rights, social security, and real property cases.
- When the government was a party (federal, state, or local), women were more likely to appear, ranging from 31 percent when the federal government was a party to 40 percent when the state or a municipality was a party.
- By contrast, when individual litigants or businesses were a party, almost 80 percent of lead counsel were men.
- Of those women who were lead counsel, 60 percent represented defendants, but only 40 percent represented plaintiffs.
- For class actions, men comprised 87 percent of lead counsel.

In a news article written in August 2015, the Chief Judge of the Northern District of Illinois confirmed these findings anecdotally. He spoke at the ABA annual meeting and was quoted as stating that, in his 21 years on the bench, he has seen only 14 or 15 cases where women served as lead counsel.

The Section's task force anecdotally believed that New York courts would have numbers similar to those found in the Northern District of Illinois. Indeed, the District Judge of the Southern District of New York who served on the task force, the (ret.) Hon. Shira A. Scheindlin, reported to the task force that she had a remarkably similar experience to that of the Chief Judge from the Northern District of Illinois. The task force also spoke with judges of the New York State courts who reported a similar gender disparity in appearances in their courtrooms.

The Data Collection

In order to determine whether women litigants actually are underrepresented in our New York federal and state courtrooms, the task force conducted a survey that tracked appearances by gender in federal and state courts for a set time period. The task force created a simple, one-page user-friendly questionnaire that asked judges in all four federal District Courts in New York, the New York State Court of Appeals, the four New York State Appellate Departments, and the ten Commercial Divisions to track all court appearances by gender and type of case for a three-month time period (September through December 2016).[1] Specifically, the questionnaire asked the judges to indicate whether the litigant who spoke in court was a woman and, if so, in what type of case she appeared, identified by subject matter and whether the case involved a government party or a private party. The form also asked what type of proceeding was held – for example, a trial, a motion, an appeal, or an evidentiary hearing. The form tracked appearances primarily in civil cases, although it also tracked federal criminal cases.[2]

As the Commercial and Federal Litigation Section has a longstanding relationship with the judiciary, the participation in the survey from the bench was fulsome. Judges of three of the four federal District Courts, the New York State Court of Appeals, the four Appellate Departments, and almost all of the Commercial Divisions generated survey responses. In fact, the task force received more than 4,000 survey responses and analyzed more than 200 arguments before the Second Circuit.

The Survey Results and Next Steps

The task force has spent the first quarter of 2017 aggregating the survey data and currently is working on drafting a report detailing such data. If the findings show a distinct gender disparity in the numbers of court appearances, then the task force will begin to work on proposing remedies to eliminate such disparity.

Indeed, the task force has not waited for the survey results to be tallied before beginning to work on possible suggested remediation (assuming based on prior reports and studies that the disparity does indeed exist). Again, drawing on the Section's longstanding and productive relationship with the judiciary, the task force has held several roundtable discussions attended by many members of the state judiciary as well as other prominent litigators in federal and state courts. These roundtables have produced a litany of suggested next steps and concrete proposals aimed at ensuring that women are appearing in court in equal numbers as men. Thus, the remedial sections of the report are well under way.

The Related ADR Project

As many of the task force members are commercial litigators, the task force expanded its initial mission to now include a study of the percentages of women who appear in Alternative Dispute Resolution forums, in particular in arbitration and mediations as attorneys and as neutrals. Like the women in the courtroom project, previous studies had been conducted with respect to ADR providers. According to the author of a 2014 article on gender diversity in international arbitration, only 10 to 15 percent of appointments in international arbitration have been women. When the matter involved more than $1 billion, the percentage shrank to 4 percent. Recent data shows statistics for each international ADR center. For example, in 2015, in arbitrations under the auspices of the International Centre for the Settlement of Investment Disputes, women were appointed in only 12 percent of the cases. For fiscal year 2015, arbitrations conducted by The International Institute for Conflict Prevention & Resolution (CPR) reflected that women were appointed in only 10 percent of cases although they made up 18 percent of the panel. Other ADR organizations reported similar statistics.

The task force decided that like its courtroom study, the ADR study would be based on direct observations of ADR proceedings. Accordingly, the task force prepared a questionnaire similar to the one used in federal and state courts and secured the cooperation of a number of well-known ADR organizations. The ADR organizations agreed to distribute the questionnaire to their neutrals so that the task force could obtain sufficient raw data about the number of mediations and arbitrations that were being handled primarily by women and in what field of law and how the neutral had been selected for those proceedings. The task force expects to receive initial data responses by the second half of 2017 and then to begin preparing a report with suggested proposals to improve the gender breakdown in the ADR context, if applicable.

Conclusion

While in some respects, the Commercial and Federal Litigation Section task force's work has just begun, securing the participation of so many federal and state court judges as well as ADR providers truly could not have been possible without the strong connection between the Section and the bench and bar. The task force looks forward to continuing the ongoing dialogue and contributing to it in a meaningful and lasting way. ■

1. For the Second Circuit Court of Appeals, the requested data was available (and obtained) through the court's electronic filing database.

2. The questionnaire did not account for transgendered persons.

LAW DAY, MAY 1, 2017

STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

ANDREW M. CUOMO
GOVERNOR

May 1, 2017

Dear Friends:

It is a pleasure to send greetings to everyone gathered for the annual Law Day celebration of the New York State Bar Association (NYSBA).

Our nation's Constitution provides the framework of our legal system, which ensures every person's inherent right to liberty, equality, and justice. Law Day is a celebration of this system of rules and principles that advance the ideals of our democracy. Members of the New York State Bar Association serve the legal profession and our society responsibly, by protecting the rights of countless New Yorkers in courthouses, government halls, and other institutions across our state.

This year's Law Day celebration honors the theme, "The Fourteenth Amendment: Transforming American Democracy" in recognition of the importance of one of the most often cited constitutional enactments defining the principles of citizenship rights and equal protection afforded all persons born or naturalized in the United States. The amendment was the inspiration for landmark civil rights legislation and court decisions protecting and advancing the rights of Americans, its provisions forming the basis for historic progress, changes, and contributions to American law and society.

On this Law Day, New Yorkers extend gratitude to all members of the NYSBA, who continue to serve the public interest as an effective force for justice in our society. We also recognize the admirable level of responsibility for our youth shown through the Association's Law, Youth, and Citizenship Program which, for over forty years, has been a valuable resource for educating youth in matters of civic consciousness and good citizenship, helping to guide many generations toward meaningful participation in our democratic process.

As you take this opportunity to reflect upon the fundamental purpose of the law as the foundation of our civil society, we recommit ourselves to maintaining integrity and respect for its intended purposes.

Warmest regards and best wishes for an inspiring ceremony.

Sincerely,

ANDREW M. CUOMO

100 Years of Women's Suffrage

By Lieutenant Governor Kathy Hochul

Here in New York State, we have a long-standing reputation to uphold. It's an enduring legacy of empowerment and equal rights that began nearly 170 years ago. And the voices of its champions echo today in the corridors of power around the globe. Voices of bold women who stood against the tides of their time.

This year marks the 100th anniversary of Women's Suffrage in New York State, which was the culmination of the fight to get women the right to vote, setting the stage for future battles against workplace discrimination, to achieve pay equity and to preserve a woman's right to make decisions about her health care.

The first-ever Women's Rights Convention, held in Seneca Falls, was organized by Lucretia Mott and Elizabeth Cady Stanton. It took 69 more years for women in New York State to win the right to vote. Three years after that, the 19th Amendment was ratified, granting all women the right to vote as protected by the United States Constitution.

As Chair of the New York State Women's Suffrage 100th Anniversary Commemoration Commission, I am proud to lead an effort to promote this anniversary through a series of statewide programs and events large and small and through an exhibit featured at the New York State Museum. We are celebrating the accomplishments of women and their contributions to our history and taking the message of women's equality all across the State.

At the same time, as the State's highest ranking elected woman, I hope we can inspire the next generation of young women who want to rise up and achieve great things themselves.

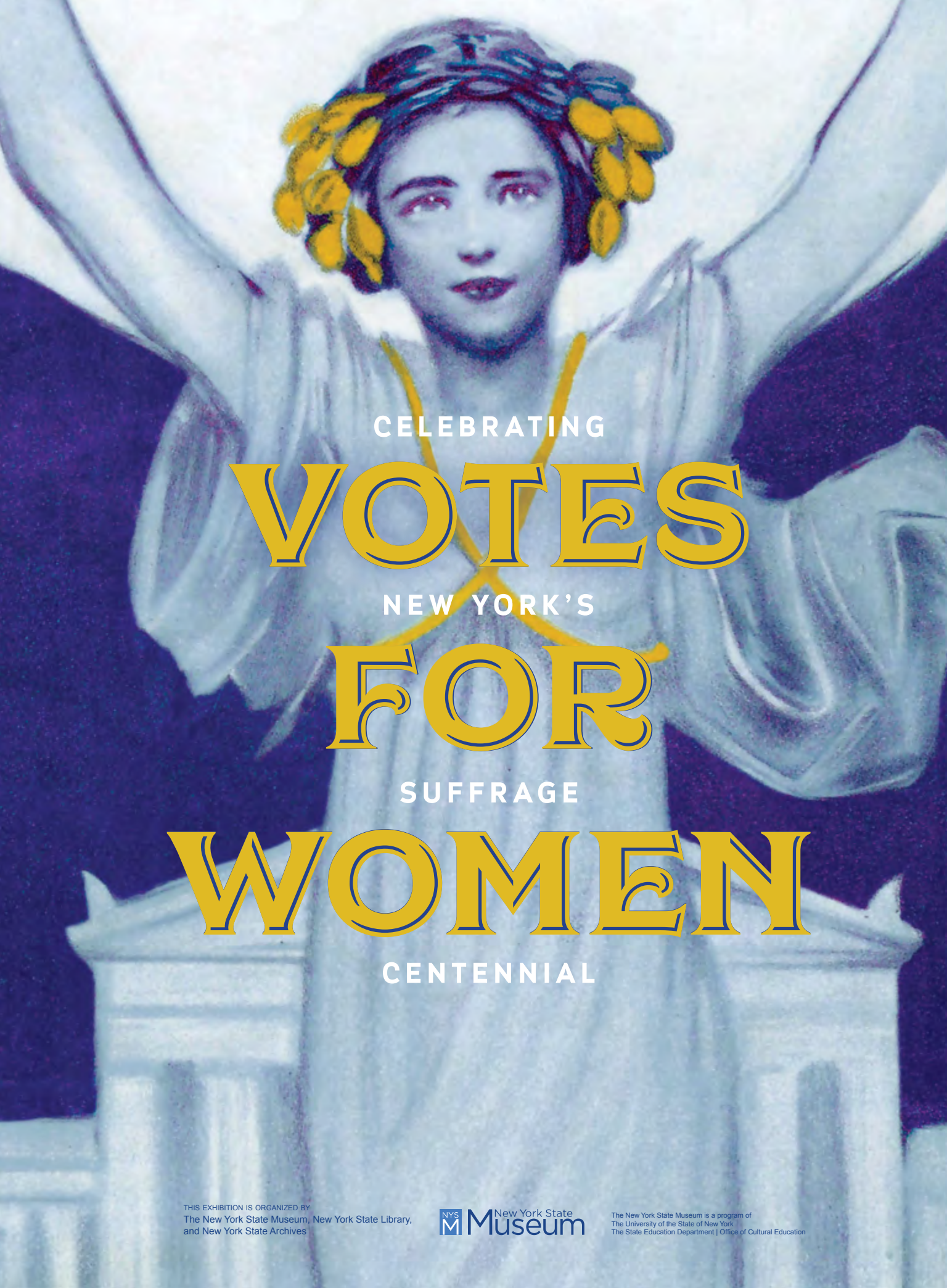
In Congress, only 19 percent of our representatives are women. In the New York State Legislature, women are very proud to have moved up to 26 percent. But across the nation in local government, where many elected leaders get their start, only 13 percent of women are chief administrative officers like mayors, supervisors or county executives. And that number hasn't moved since 1970.

We still have a long way to go, yes, but let's seize the opportunity we have in the coming years and join together to lift up and inspire the next generation of women leaders. One-hundred years from now, when women in the future look back to 2017–2020, what are they going to say about us? What will they be celebrating about the men and women in New York State from our era and what are we doing to further the legacy of the courageous women on whose shoulders we now stand?

I hope you will join me and the other Commission members at events in every corner of the State in the years ahead. Bring your friends and, most importantly, share these occasions with younger generations. Together, we can continue our progress forward and make our foremothers proud.

Lieutenant Governor Kathy Hochul has served under Governor Andrew M. Cuomo in her post since January 1, 2015. Previously, she served in the U.S. House of Representatives, representing New York's 26th District. As Lieutenant Governor, Hochul chairs the New York State Women's Suffrage 100th Anniversary Commemoration Commission.

The New York State Museum will present a large scale exhibition titled, *Votes for Women: Celebrating New York's Suffrage Centennial*, between Nov. 4, 2017 and May 13, 2018. The panels on the following pages are a sample of the history and artifacts included in the exhibition. Special thanks to **Jennifer Lemak** and **Ashley Hopkins-Benton**, exhibition curators, and **Karen Glaz**, graphics designer. Reprinted with permission from the New York State Museum, the New York State Library and the New York State Archives.



CELEBRATING

VOTES FOR WOMEN

NEW YORK'S

SUFFRAGE

CENTENNIAL

THIS EXHIBITION IS ORGANIZED BY
The New York State Museum, New York State Library,
and New York State Archives

NYSM New York State Museum

The New York State Museum is a program of
The University of the State of New York
The State Education Department | Office of Cultural Education

AGITATE! AGITATE!

EARLY REFORM AND THE SENECA FALLS CONVENTION

New York State women became inspired by the cause of women's rights for many reasons.

Women heard the calls of "no taxation without representation" during the American Revolution, but they were still not granted this right. During the 19th-century abolition and temperance movements, women worked for social reform while bearing injustices in their own lives. In 1836, Ernestine Rose initiated the first petition to the NYS legislature calling for married women's property rights (married women could not own property they inherited), and the state led the nation when the law was finally passed in 1848.

Elizabeth Cady Stanton with Baby, daguerreotype, c. 1842

Seneca Falls Historical Society

Agitations for women's rights came to a head in July 1848, when Elizabeth Cady Stanton, Lucretia Mott, Martha Coffin Wright, Mary Ann M'Clintock, and Jane Hunt published a call for a women's rights convention. Stanton drafted a *Declaration of Sentiments*, stating the grievances women faced in various spheres, including their exclusion from voting.

The Seneca Falls Convention was held July 19th–20th and packed the Wesleyan Chapel in Seneca Falls, NY. All of the proposed resolutions were passed, including the right of women to elective franchise. Sixty-eight women and 32 men signed the Declaration of Sentiments. A second convention followed two weeks later in Rochester, marking the beginning of regular local, state, and national meetings to discuss women's rights.

"Ernestine L. Rose," c. 1881, from *History of Woman Suffrage, Vol. I*

In addition to her petition work for married women's property rights, Rose was active on the reform lecture circuit, and well known as a talented orator.

New York State Library, Manuscripts and Special Collections

***Report on the Woman's Rights Convention, Held at Seneca Falls, N.Y., July 19th and 20th, 1848*, Printed by John Dick, North Star Office, Rochester, 1848**

The official report of the Seneca Falls Convention was printed in Frederick Douglass' office. Douglass had attended the second day of the convention, and was a vocal supporter of the call for women's suffrage.

New York State Library, Manuscripts and Special Collections

RIGHT **Declaration of Sentiments Table**

On July 16th, 1848, Stanton traveled to the M'Clintock home in Waterloo to work on the declaration she was developing for the convention. Sitting at this table, the women decided to use the *Declaration of Independence* for their model, beginning "We hold these truths to be self-evident; that all men *and women* are created equal..."

Division of Political History, National Museum of American History, Smithsonian Institution

CONTINUING THE FIGHT AFTER THE CIVIL WAR

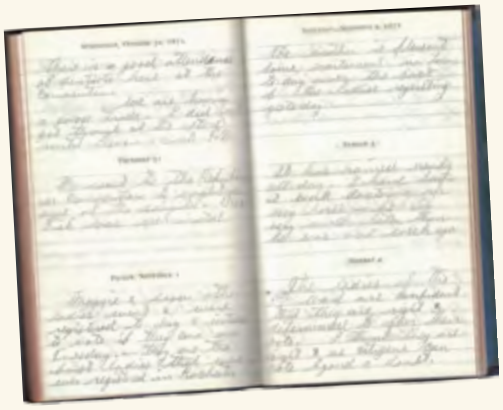
***Sojourner Truth*, Framed Carte-de-Visite**

Sojourner Truth was an active supporter of AERA and its work for Universal Suffrage. Arguments over the pursuit of African American male suffrage versus women's suffrage first left out African American women like Truth.

Elizabeth Cady Stanton Trust

Following a pause during the Civil War, women's rights activists joined with abolitionists to establish the American Equal Rights Association (AERA) to work for both women's and African American rights, with the goal of universal suffrage. With passage of the Fourteenth Amendment, the first to add "male" to the constitutional definition of citizenship, this partnership suffered. As arguments raged over the Fifteenth Amendment, which protected voting rights regardless of "race, color, or previous condition of servitude," some suffragists saw their goal being deferred.

Not only did these arguments over strategy cause strife in AERA, but they also created a schism in the suffrage movement. Elizabeth Cady Stanton, Susan B. Anthony, and Matilda Joselyn Gage withdrew from AERA to form the National Woman's Suffrage Association (NWSA), which focused on pushing for a Federal amendment granting women suffrage. Leaders from New England, including Lucy Stone, formed the American Woman Suffrage Association (AWSA), which promoted a state-focused strategy.

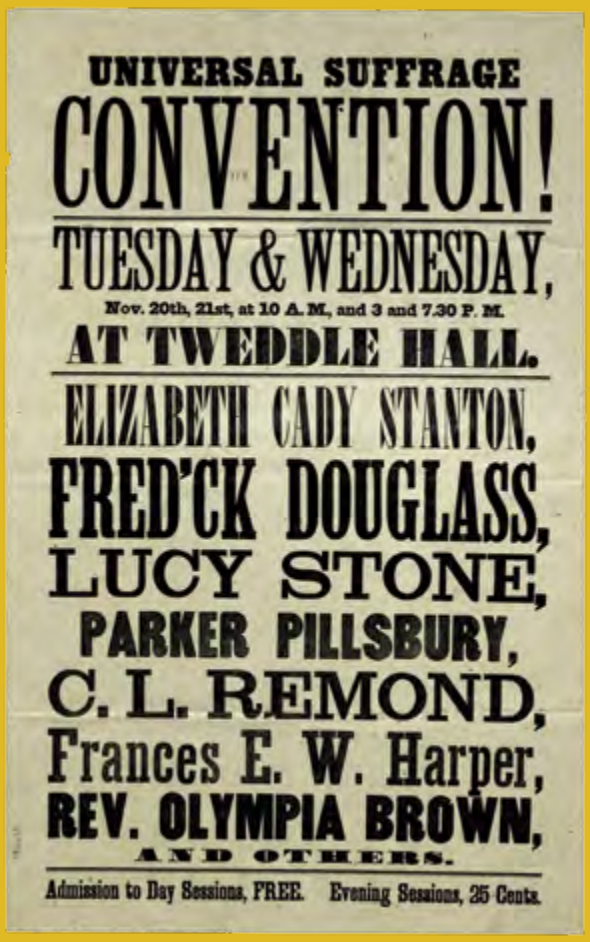


Maurice Leyden's Journal, 1872

Maurice and Maggie Leyden worked for suffrage in Rochester, NY. Maggie registered and voted in 1872 alongside Susan B. Anthony, and Maurice recorded: "The ladies of the 8th ward are confident that they are right & determined to offer their votes. I think they are right & as citizens can vote beyond a doubt."

The Maurice Leyden Collection, Special Collections, Binghamton University Libraries, Binghamton University, State University of New York

NWSA turned the disappointment over the Fourteenth and Fifteenth Amendments into a strategy called "The New Departure." Supporters argued that the U.S. Constitution already granted women suffrage, and attempts were made by women to vote. In November 1872, 16 Rochester, NY women took to the polls, including Susan B. Anthony, Rhoda Degarmo, and Maggie Leyden. Anthony along with the poll-workers who allowed her to register were arrested.



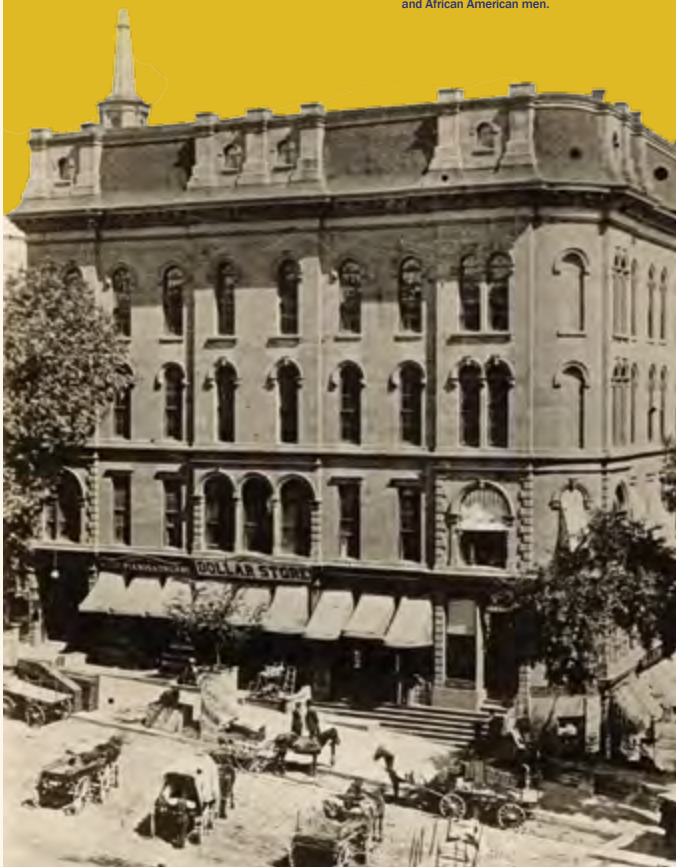
ABOVE **"Universal Suffrage Convention!" Broadside, 1866**

New York State Library, Manuscripts and Special Collections

BELOW **Tweddle Hall, Albany, New York, Photograph, 1876**

Albany Institute of History and Art

Following the Civil War, optimistic reformers supported the goal of universal suffrage, seeking the vote for both women and African American men.



THE SUFFRAGE MOVEMENT UNITES

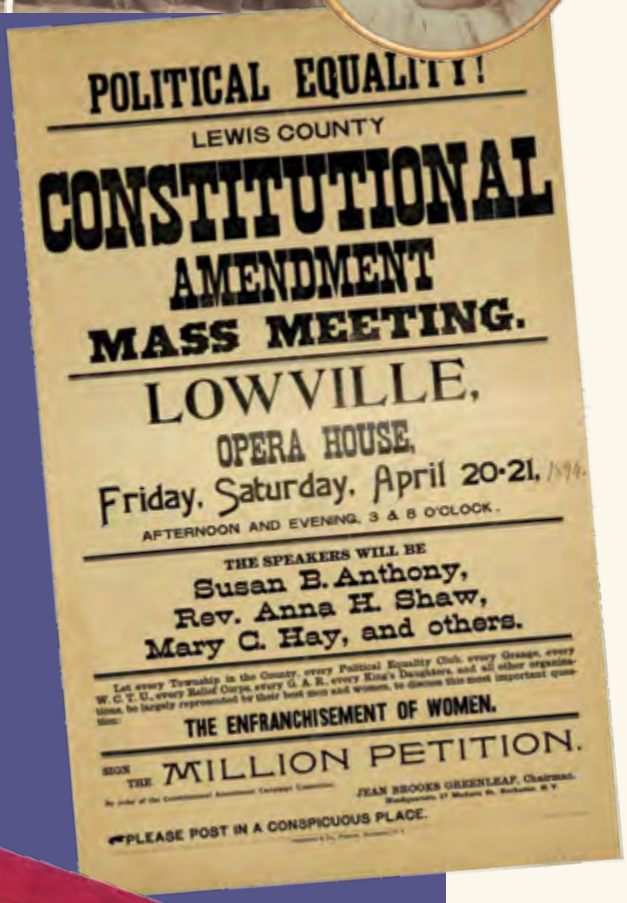
ABOVE **State Presidents and Officers of the National American Woman Suffrage Association, 1892**

Bryn Mawr College

ABOVE RIGHT **NYSWA Ribbon featuring Anna Howard Shaw**

Collection of Ronnie Lapinksi Sax

Anna Howard Shaw (front row, second from right) was instrumental in the merging of NWSA and AWSA, and she served as president of NAWSA between 1904 and 1915, always pushing for a national constitutional amendment for women's suffrage. NAWSA grew under her tenure from an organization of 17,000 to 200,000 suffrage workers. Despite Shaw never living in New York, she had a constant presence in the state. In 1903 alone, Shaw spoke in 30 of New York State's counties.


POLITICAL EQUALITY!

LEWIS COUNTY

CONSTITUTIONAL AMENDMENT MASS MEETING.

LOWVILLE,

OPERA HOUSE,

Friday, Saturday, April 20-21, 1894.

AFTERNOON AND EVENING, 3 & 8 O'CLOCK.

THE SPEAKERS WILL BE

Susan B. Anthony,
Rev. Anna H. Shaw,
Mary C. Hay, and others.

Let every Township in the County, every Political Equality Club, every Grange, every W. C. T. U., every Relief Corps, every G. A. R., every King's Daughters, and all other organizations, be largely represented by their best men and women, to discuss this most important question:

THE ENFRANCHISEMENT OF WOMEN.

SIGN THE MILLION PETITION.

JEAN BROOKS GREENLEAF, Chairman.

PLEASE POST IN A CONSPICUOUS PLACE.

RIGHT **Broadside, Constitutional Amendment Mass Meeting, Lowville Opera House, 1894**

Jean Brooks Greenleaf, president of NYSWSA, and Mary S. Anthony, the corresponding secretary, worked toward revision of the State Constitution for six months with few breaks. Susan B. Anthony, who was 74 years old at the time, spoke in each of New York's 60 counties. Harriet May Mills and Mary G. Hay organized mass meetings across the state, while Lillie Deveraux Blake organized all of New York City and Mariana Chapman led Brooklyn.

New York State Library, Manuscripts and Special Collections

Anti-Suffrage pennant, c.1912

As long as there were women working for suffrage, there were also women working against it. Anti-suffragists believed that the men in their life would look out for their best interests when they went to the polls. New York State had the most active and organized anti-suffrage activity of any state in the Union, creating the New York State Association Opposed to Woman Suffrage in 1895 and the National Association Opposed to Woman Suffrage (NAOWS) in New York City in 1911.

New York State Parks, Recreation, and Historic Preservation

In 1890, the National Woman's Suffrage Association (NWSA) and the American Woman Suffrage Association (AWSA) merged to form the National American Woman Suffrage Association (NAWSA). Its main goal was to push for suffrage at the state level. In New York, this work was accomplished through an extensive network of local and county-level clubs which fed into the larger New York State Woman Suffrage Association (NYSWSA). Women across the state distributed leaflets, discussed equal rights, hosted suffrage lectures, sent literature and reports to the press, and recruited new dues-paying members.

In 1894, New York's suffrage organizations mounted its first unified campaign to revise the state's Constitution to include a clause for equal suffrage. Suffragists sought support from other organizations such as the Women's Christian Temperance Union, labor unions, and local Granges. In total, almost 600,000 people signed a petition in favor of the Constitution's change, but the amendment was voted down—98 opposed to 58 in favor.

After the defeat, suffragists across the state went right back to work.

RIGHT **Phyllis Wheatley Club, Buffalo, New York**

Since African American women were not allowed to join most white women's clubs, they formed their own working toward equality for their race and gender. In 1899, Mary Burnett Talbert and Susan Evans established a local Buffalo affiliate of the National Association of Colored Women's Clubs (NACW) called The Phyllis Wheatley Club.

Library of Congress

A MODERN MOVEMENT LEADS TO VICTORY

Harriot Stanton Blatch (second from left) in Albany, March 12, 1912

At the beginning of the 20th century, more women worked outside the home. Women were slowly gaining access to a college education and a few were even entering into professional fields of work. This photo shows a group of WPU members marching on the NYS Capitol steps in an effort to bring the suffrage measure to the Assembly.

Coline Jenkins, Elizabeth Cady Stanton Family

The 20th century ushered in a new determination for women's suffrage. New leaders like Harriot Stanton Blatch and Carrie Chapman Catt helped to revolutionize New York State's suffrage movement, from a 19th-century endeavor of upper class white women to a modern 20th-century reform movement involving women from all social classes and ethnic backgrounds.

In 1915, hard work led to suffrage referendums in four highly-populated eastern states—New York, Massachusetts, Pennsylvania, and New Jersey. Success in one of those states would drastically influence the national situation. Previously, Carrie Chapman Catt and Harriet May Mills had organized leaders from suffrage organizations across the state into the Empire State Campaign Committee (ESCC). Harriot Stanton Blatch and the Women's Political Union (WPU) worked to successfully lobby New York State's legislature to include a referendum supporting a state amendment granting women the vote in the 1915 election. Both the WPU and the ESCC mobilized suffrage workers across New York State in an effort to educate the male voters about women's suffrage and earn their vote. On November 2, 1915, the vote took place. The suffrage referendum lost by 194,984 votes.

New York women mobilized again and passed another suffrage referendum for 1917. Things were different this time. First, many suffragists were veterans to the cause. Secondly, they supported World War I efforts at home. In turn, President Wilson endorsed suffrage as a war measure. On November 6, 1917, New York men went to the polls and voted in favor of granting women the right to vote in the state.

Banner, fabric, 1917

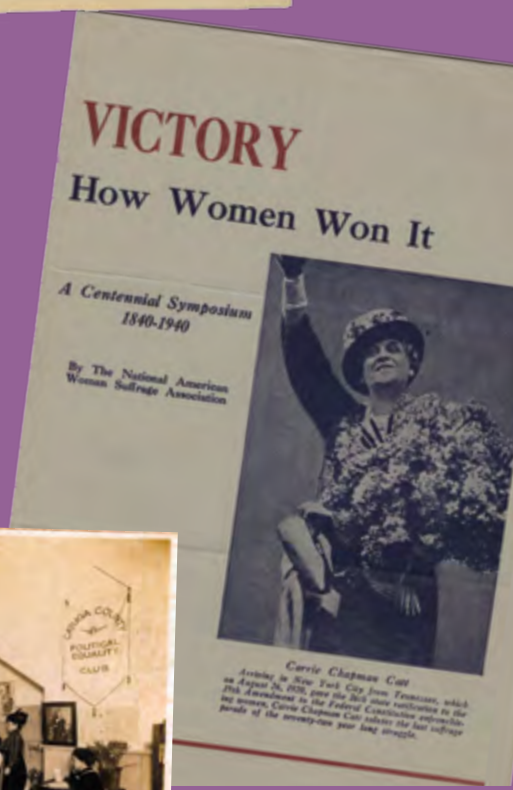
Ten days before the November 1917 elections, a small band of Orange County women carried this banner up Fifth Avenue in New York City as part of a massive suffrage parade. This banner urged male voters to extend the right of suffrage to women in New York by amending the state constitution.

New York State Museum

Empire State Campaign Committee, crepe-paper banner, 1915

The Empire State Campaign Committee included representatives from New York State Woman Suffrage Association, the Woman Suffrage Party of New York City, the Equal Franchise Society, the College Equal Suffrage League, the Men's Equality League, and other organizations.

Elizabeth Cady Stanton Trust



Carrie Chapman Catt at the victory parade in New York City, August 27, 1920

In 1916, Carrie Chapman Catt left the New York State campaign to become president of NAWSA and work toward a suffrage Amendment. She worked for suffrage at the state and federal levels, simultaneously. Catt's plan, along with President Wilson's endorsement of suffrage after the U.S. entry into WWI, led to the passage of the 19th Amendment in 1920.

University of Rochester

Women Suffrage Headquarters Auburn, New York During the 1915 Campaign

Suffragists moved away from meeting in home parlors and other private spaces and into public spaces with parades, open air meetings, hikes, tents at fairs, theaters, and whatever else would capture the attention of the public and, more importantly, the press. Isabel Howland (1859–1942, standing with fur stole) was the Cayuga County suffrage leader and served as president of the NYSWSA.

Howland Stone Store Museum

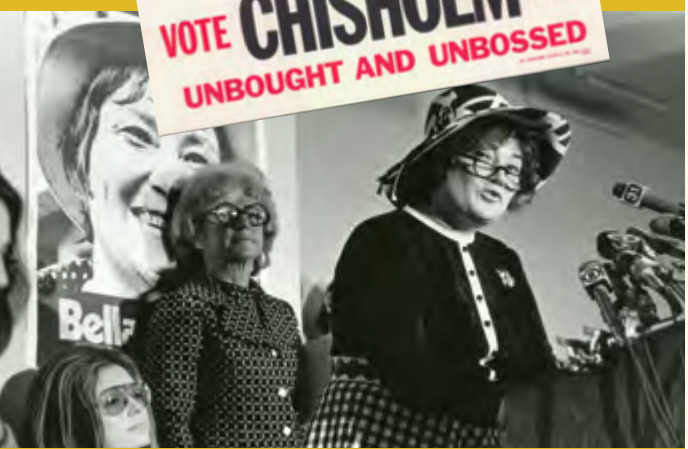
THE FIGHT AFTER SUFFRAGE

ABOVE **Alice Paul at her desk, 1913**
Library of Congress

Alice Paul, leader of the National Women's Party (NWP), realized that suffrage would not guarantee equality between the sexes. To remedy this, on July 21, 1923, Paul presented the Equal Rights Amendment (ERA) to the group of NWP members gathered in Seneca Falls to celebrate the 75th anniversary of the Seneca Falls Convention. Since 1982, the ERA has been reintroduced to Congress in every session and has yet to be ratified into the Constitution.

ABOVE RIGHT **Stop ERA button**
Ronnie Lapinski Sax

Conservative and religious groups were against passage of the ERA, believing that if the amendment were to pass, women would be drafted, mothers would not receive custody of their children, alimony would not be awarded to women, and single-sex bathrooms would be eliminated.



ABOVE **Shirley Chisholm campaign poster, 1972**
New York State Museum

ABOVE RIGHT **"Krupsak She's not just one of the boys," Broadside, c. 1974**
New York State Museum

Born in Schenectady, New York, Mary Anne Krupsak worked for women's rights in several capacities within New York State government. She served in the New York State Assembly from 1968 to 1972, and then in the State Senate from 1972 to 1974.

Bella running for Congress, 1976
Museum of the City of New York, photograph by Diana Mara Henry.

After New York women won the vote, its leaders continued reform efforts throughout the 20th century. African American women made progress for civil rights through club activities, working with the National Association for the Advancement of Colored People (NAACP) and the National Urban League. First Lady Eleanor Roosevelt and Secretary of the Department of Labor Frances Perkins made history on the state and national levels. Betty Friedan wrote *The Feminine Mystique* in 1963, and, three years later, helped to found the National Organization for Women (NOW), whose leaders still fight for equal opportunities and equal pay for women. Gloria Steinem and others founded *Ms.* magazine in the early 1970s, which served as a voice for the new feminist movement. In 1972, pathbreaker Shirley Chisholm of Brooklyn became the first African American woman to run for the office of president. More recently, New York women from Bella Abzug to Geraldine Ferraro to Kirsten Gillibrand are winning elections and continuing the work that began in Seneca Falls in 1848.

The centennial of women's suffrage in New York State provides an opportunity to re-examine the efforts of the women and men who worked for the vote and the efforts towards equality since the vote. In June 2016, on the evening when former New York State Senator, Hillary Rodham Clinton, was the first female to be declared the presumptive presidential nominee from a major political party, she evoked the power of the past: "Tonight's victory is not about one person, it belongs to generations of women and men who struggled and sacrificed and made this moment possible. In our country, it started right here in New York, a place called Seneca Falls."

Susan B. Anthony's Gravesite, Rochester, New York, Election Day 2016

On November 8, 2016, over 10,000 people visited Susan B. Anthony's gravesite at Mount Hope Cemetery to pay homage to one of the leaders of the suffrage movement. With the Democratic Party's nomination, Hillary Rodham Clinton ran as the first female presidential candidate backed by a major political party. Clinton won the popular vote, but lost the electoral vote.

Communications Bureau, City of Rochester

New Developments in Sex Discrimination and Harassment Law

By Bettina B. Plevan and Laura M. Fant

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More than 50 years following the passage of Title VII of the Civil Rights Act of 1964 ("Title VII"),[1] workplace sex discrimination remains a key focus for legislators and courts alike. Recently, this focus has moved beyond "traditional" disparate treatment and sexual harassment claims to broadening protections against discrimination "because of" sex, including protections based on sexual orientation and gender identity.

On the federal level, there has been minimal congressional action regarding workplace issues, including discrimination and harassment. However, the Equal Employment Opportunity Commission (EEOC or the "Commission"), the federal agency tasked with enforcing Title VII, has continued to take an expansive approach to the enforcement of the statute's sex discrimination provisions.

On the local level, courts, along with state and city legislatures, have been called upon to address perceived gaps in sex discrimination protections, including with regard to sexual orientation and gender identity. In recent months, New York has been at the forefront of both legislative and judicial developments regarding this "new wave" of discrimination protections, while continuing to expand already existing legal safeguards against sex discrimination.

Bolstered Protections Under the New York State Human Rights Law

New York has recently taken steps to expand safeguards for sex discrimination complainants under the New York State Human Rights Law (NYSHRL).[2] In October 2015, Governor Andrew Cuomo signed multiple pieces of legislation, collectively termed the "Women's Equality Agenda."[3] The bills, which took effect January 19, 2016, address a variety of topics impacting women in the workplace, including increased protections against sex discrimination and harassment.

Specifically, the "Protect Victims of Sexual Harassment" bill eliminates the previous four-employee minimum threshold for coverage of sexual harassment claims under § 296 of the NYSHRL.[4] As a result, employees of small businesses may now bring sexual harassment claims under the NYSHRL regardless of employer size.

The "Remove Barriers to Remedying Discrimination" bill amends NYSHRL § 297.10 to permit prevailing parties in sex discrimination cases to recover attorney fees.[5] Although Title VII already provides for attorney fees with respect to all covered claims, including sex discrimination, prevailing parties in NYSHRL sex discrimination cases were not previously eligible for an award of attorney fees. Complainant-employees are now entitled to such awards where the respondent-employer has been found liable for having committed an unlawful discriminatory practice.[6]

Expanding the Scope of Protections Against Discrimination "Because of" Sex

An area that has seen extensive developments in recent months is the broadening of sex discrimination protections beyond "traditional" sexual harassment claims to include protections against discrimination based on sexual orientation and gender identity. This expansion may be attributed, at least in part, to shifting societal perceptions of the gay, lesbian, bisexual and transgender (LGBT) communities. However, it is also likely a response to an increase in discrimination claims based on sexual orien-

tation and gender identity. In 2016, the EEOC received 1,768 charges that included allegations of discrimination related to sexual orientation and/or gender identity, a significant increase from the previous year.[7]

EEOC Efforts to Expand Title VII Protections

Title VII does not now expressly include sexual orientation or gender identity as protected categories under the law, and case law has not historically interpreted Title VII as covering such claims.[8] Efforts to create an independent statutory source for sexual orientation protections (for example, the oft-proposed, but never passed, Employment Non-Discrimination Act) have thus far stalled in Congress.

Despite the lack of an existing federal statutory framework, the EEOC has taken the position that Title VII protects employees against sexual orientation discrimination as discrimination "because of" sex.[9] In its July 2015 ruling in *Baldwin v. Foxx*,[10] the agency affirmatively stated its position that sexual orientation discrimination is cognizable under Title VII's prohibition of discrimination based on sex.[11] In the decision, the Commission stated that "[d]iscrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms," and "'[s]exual orientation' as a concept cannot be defined or understood without reference to sex."[12]

The *Foxx* decision criticizes federal courts for "simply cit[ing to] earlier and dated decisions without any additional analysis" when interpreting Title VII's prohibition of sex-based discrimination in the context of sexual orientation discrimination.[13] The EEOC took particular aim at the Second Circuit's 2000 ruling in *Simonton v. Runyon*[14] – in which the appellate court held that "Title VII does not proscribe discrimination because of sexual orientation"

> [M]any courts have gone to great lengths to distinguish adverse employment actions based on "sex" from adverse employment actions based on "sexual orientation." The stated justification for such intricate parsing of language has been the bare conclusion that "Title VII does not prohibit . . . discrimination because of sexual orientation."[15]

Since *Foxx*, the EEOC has continued to actively pursue sexual orientation discrimination claims.[16]

The EEOC has also been particularly active in pursuing gender identity discrimination claims based on Title VII's protections against sex discrimination.[17] In July 2016, the Commission filed suit against Rent-A-Center, alleging the company violated Title VII by discharging a transgender employee after she informed her supervisors that she planned to transition from male to female.[18] The Commission filed a similar suit in June 2015 against a financial services corporation, alleging that the company refused to allow a transgender employee presenting as female to use the women's bathroom.[19] And in its recent Proposed Enforcement Guidance on Unlawful Harassment, the EEOC expressly incorporates sexual orientation and gender identity into Title VII's prohibitions on sex discrimination.[20]

Second Circuit Set to Revisit Sexual Orientation Protections Under Title VII

Fifteen years after its holding in *Simonton v. Runyon* that Title VII does not proscribe discrimination because of sexual orientation,[21] the Second Circuit is again tasked with interpreting the scope of Title VII's protections against discrimination "because of" sex in *Christiansen v. Omnicom Group*.[22]

In *Christiansen*, a homosexual employee alleged that he experienced taunting, name-calling and other harassment by his supervisor based on his sexual orientation. In March 2016, the District Court granted a motion to dismiss, holding that, under *Simonton*, it was "constrained to find" that the employee had not stated a cognizable claim.[23] The court noted, however, that the "broader legal landscape has undergone significant changes" since the *Simonton* decision.[24]

On appeal, the employee argues that the Second Circuit's interpretation of Title VII should be expanded to recognize sexual orientation claims, and asserts that the holding of *Simonton* is incompatible with the EEOC's position on the scope of Title VII sex discrimination protections (discussed *supra*).[25] The employer relies on the holdings set forth in *Simonton*, as well as decisions from other circuits rejecting similar claims.[26]

The case has attracted the attention of numerous *amici curiae* arguing for reversal of the *Simonton* precedent. In their amicus briefs, the American Civil Liberties Union (ACLU) and the EEOC present similar arguments, namely that: (1) sexual orientation discrimination is sex discrimination under a plain language reading of the term; (2) sexual orientation discrimination necessarily involves impermissible sex stereotyping, which is covered under Title VII's protections;[27] and (3) discrimination against individuals engaged in same-sex relationships is associational discrimination, which is a recognized basis for race-based discrimination claims and should be actionable in the same manner for sex discrimination claims.[28]

Oral argument in *Christiansen* took place on January 20, 2017, and as of the date of submission of this article, a decision remains pending. Discussion of procedural issues dominated the argument, with the panel's questions suggesting the potential for the case to be remanded for consideration of whether the claims at issue are time-barred because the alleged conduct occurred more than 300 days prior to the employee's filing of a charge with the EEOC, which the district court did not address in its decision. The panel, however, did question counsel on both sides about changes in the legal landscape regarding the scope of protections based on sexual orientation and whether the EEOC's stated position and agency decision on the subject may serve as a basis to overturn *Simonton*.[29]

Should the *Christiansen* court diverge from its prior decision in *Simonton*, it could mark a significant judicial shift on the question of whether Title VII prohibits discrimination based on sexual orientation, as well as create a circuit split, opening the door to Supreme Court review.[30] Conversely, a decision reaffirming precedent would further widen the gap between federal and New York state law protections in this area.

New York Legislative Expansions of Gender Identity Protections

The extent to which the EEOC under the Trump administration will continue to seek to expand sexual orientation and gender identity protections remains to be seen. Nevertheless, recent developments under New York state and city law highlight the trend toward providing broader gender-based protections to employees on the local level – a trend that is expected to continue under the new administration in response to a likely dearth of new federal lawmaking addressing such protections.

In October 2015, the New York State Division of Human Rights promulgated new regulations expanding the NYSHRL's discrimination protections to include expressly discrimination on the basis of gender identity or transgender status.[31] The regulations, which took effect in January 2016, further provide that discrimination on the basis of gender dysphoria – a medical condition related to an individual having a gender identity different from the sex assigned at birth – may also give rise to a claim for disability discrimination under state law.[32]

At the city level, the New York City Commission on Human Rights issued legal enforcement guidance in December 2015[33] addressing gender identity discrimination under the New York City Human Rights Law (NYCHRL), which expressly prohibits discrimination based on both gender identity and sexual orientation.[34] The guidance addresses how the protections of the NYCHRL apply to transgender and gender non-conforming employees with regard to such topics as restroom access, dress code and appearance standards, and pronoun usage. The guidance states, for example, that the following conduct may violate the NYCHRL:

- prohibiting a transgender or gender non-conforming person from using the single-sex restroom or other facility consistent with the person's gender identity or expression;
- maintaining grooming and appearance standards that impose different requirements based on gender-based distinctions (e.g., requiring employees of one gender to wear a uniform specific to that gender though the guidance states that it would be permissible to offer different uniform options that are "culturally typical" male or female, so long as employees may choose which style to wear based on their gender expression); and
- intentional or repeated refusal to use an individual's preferred name, pronoun or title or conditioning such use on documentation of a legal name change or undergoing specific medical procedures.

Conclusion

The future scope of federal sex discrimination protections may not be easily predicted. Nevertheless, attorneys representing both New York employers and employees must remain cognizant of the broader protections already provided under state and city law with regard to sex discrimination and harassment in the workplace. They should also be aware that, under the new administration, expansion of discrimination protections at both the state and local levels – and the patchwork of protections this creates – is likely to continue. ■

1. 42 U.S.C. §§ 2000e–2000e-17 (2012).
2. N.Y. Exec. Law §§ 290–301.
3. *Governor Cuomo Signs Legislation to Protect and Further Women's Equality in New York State* (Oct. 21, 2015), www.governor.ny.gov/news/governor-cuomo-signs-legislation-protect-and-further-women-s-equality-new-york-state.
4. S.B.2, 2015-16 Leg. 238th Sess. (N.Y. 2015). It is noted that the amendment does not extend to other types of sex discrimination claims, or claims based on other protected characteristics under the NYSHRL.
5. S.B.3, 2015-16 Leg. 238th Sess. (N.Y. 2015).
6. *Id.*
7. U.S. Equal Employment Opportunity Commission, *LGBT-Based Sex Discrimination Charges FY 2013–FY 2016*, https://www.eeoc.gov/eeoc/statistics/enforcement/lgbt_sex_based.cfm.
8. *See, e.g., Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764–65 (6th Cir. 2006) (holding that harassment based on sexual orientation does "not fit within the prohibitions of the law" under Title VII); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001) (same); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (same, discussed further *infra*).
9. The EEOC's expansive view of Title VII's sex discrimination coverage is centered, in part, on two significant United States Supreme Court decisions addressing harassment "because of" sex. In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989), the Court held that discrimination based on the perception that an employee does not conform to gender stereotypes violates Title VII's prohibition on discrimination "because of" sex. In *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998), the Court further expanded upon Title VII's "because of" sex protections to cover hostile work environment claims based on harassment between members of the same sex.
10. *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641 (July 16, 2015).
11. *Id.* at *5.
12. *Id.*
13. *Id.* at *8, n.11.
14. 232 F.3d 33, 35 (2d Cir. 2000).
15. *Foxx*, 2015 WL 4397641, at *8.
16. *See, e.g., EEOC v. Capital Rest. Concepts, Ltd.*, No. 1:16-cv-2477 (D.D.C. filed Dec. 20, 2016) (suit on behalf of a restaurant employee allegedly subject to harassment by co-workers on the basis of his sexual orientation).
17. In *Macy v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012), the EEOC first found a transgender employee's claim of employment discrimination based on gender identity and/or transgender status viable under Title VII.
18. *EEOC v. Rent-A-Center E., Inc.*, No. 16-cv-2222 (C.D. Ill. filed July 18, 2016).
19. *EEOC v. Deluxe Fin. Servs., Inc.*, No. 15-cv-02646 (D. Minn. filed June 4, 2015). The case was settled by consent decree in January 2016. *See* U.S. Equal Employment Opportunity Commission, *Deluxe Financial to Settle Sex Discrimi-*

nation Suit on Behalf of Transgender Employee (Jan. 21, 2016), https://www.eeoc.gov/eeoc/newsroom/release/1-21-16.cfm.

20. U.S. Equal Employment Opportunity Commission, *Proposed Enforcement Guidance on Unlawful Harassment*, https://www.regulations.gov/docket?D=EEOC-2016-0009 (Jan. 10, 2017).

21. *See Simonton*, 232 F.3d at 35.

22. Notice of Appeal, *Christiansen v. Omnicom Grp., Inc.*, No. 16-748 (2d Cir. filed Mar. 9, 2016).

23. *Christiansen v. Omnicom Grp*, 167 F. Supp. 3d 598, 618 (S.D.N.Y.2016).

24. *Id.* at 619 (citing *United States v. Windsor*, 133 S. Ct. 2675 (2013) (striking down the Defense of Marriage Act), *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (recognizing the right to same-sex marriage under the Fourteenth Amendment), and *Foxx*, 2015 WL 4397641).

25. Brief for Plaintiff-Appellant, at 18–21, *Christiansen*, No. 16-748 (2d. Cir. filed June 21, 2016).

26. Brief for Defendants-Appellees, at 2–3, *Christiansen*, No. 16-748 (2d Cir. filed Sept. 16, 2016) (citing *Hively v. Ivy Tech Comm. Coll.*, 830 F.3d 698 (7th Cir. 2016), *vacated on other grounds*, No. 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016)) (*see* note 31 *infra*).

27. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

28. *See* Brief of ACLU as Amici Curiae in Support of Plaintiff-Appellant, at 15, 18, 21, *Christiansen*, No. 16-748 (2d Cir. filed June 28, 2016); *see also* Brief of EEOC as Amicus Curiae in Support of Plaintiff-Appellate, at 10, 18, 21, *Christiansen*, No. 16-748 (2d Cir. filed June 28, 2016).

29. Of note, panel member Chief Judge Robert A. Katzmann also served on the panel that decided *Simonton*.

30. A similar case is also pending before the Seventh Circuit in *Hively*. The court on October 11, 2016 granted *en banc* review of its prior panel ruling that Title VII did not protect an employee from discrimination based on her sexual orientation. *See Hively*, *supra* note 27.

31. 9 N.Y.C.R.R. § 466.13 (2016).

32. *Id.* at 9 § 466.13(d).

33. *See* NYC Commission on Human Rights, *Gender Identity/Gender Expression: Legal Enforcement Guidance*, www1.nyc.gov/site/cchr/law/legal-guidances-gender-identity-expression.page.

34. N.Y.C. Admin. Code §§ 8-102(23); 8-107.

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Know New York State's New Paid Family Leave Benefits Law

By Sheryl B. Galler

Next year, New York will provide employees in the state with paid family leave. New York's Paid Family Leave Benefits Law ("PFL Act") goes into effect as of January 1, 2018, and will be phased in over the course of four years.[1] At the end of the phase-in period, New York State will provide 12 weeks of paid family leave, one of the longest paid leave periods in the United States.

A Brief History of Paid Leave Laws in the United States

In the United States, on the federal level, private employers are required to provide only unpaid family leave. The federal Family and Medical Leave Act of 1993 ("FMLA of 1993") provides 12 weeks of unpaid job-protected leave for the employee's own serious health-related event, for the birth or adoption of a child, or to care for a spouse, a parent or a child who has fallen ill.[2] The federal law, by its terms, covers between 50 percent and 60 percent of the private workforce.[3] However, as a practical matter, many eligible workers cannot afford to take this leave because it is unpaid.[4]

According to Human Rights Watch, "[t]he U.S. is alone among developed countries in failing to guarantee at least some form of paid family leave."[5] Most countries worldwide provide some form of maternity leave and many also guarantee paid paternity leave.[6]

On the state level, New York is the fifth state, after California, New Jersey, Rhode Island and Washington, to pass a law granting eligible employees – women and men – paid family leave.[7] California, New Jersey and Rhode Island offer paid family leave for employees to care for a family member with a serious health condition or to bond with a child within 12 months of its birth or adoption. California and New Jersey offer six weeks of paid leave and Rhode Island offers four weeks of paid leave.[8] In each of those three states, paid family leave is part of short-term disability insurance and the premium is funded by employee payroll deductions. Washington State's legislature indefinitely delayed implementation of its law, which was scheduled to take effect in October 2009.[9]

In March 2015, Senator Kirsten Gillibrand of New York and Representative Rosa DeLauro of Connecticut introduced the Family and Medical Insurance Leave Act ("Family Act").[10] The Act seeks to provide coverage for employees and the self-employed nationwide, regardless of the size of the employer, with up to 12 weeks of paid family leave with partial wage replacement. The Family Act would cover employees taking leave due to their own serious health condition or the serious health condition of a close relative, or due to the birth or adoption of a child, or due to family needs upon a call to active military service. The Act would create a social insurance program under the auspices of the Social Security Administration, which would be funded by both employers and employees through small payroll deductions.[11]

As a result of CWIL's efforts, the NYSBA leadership made paid leave a 2016 NYSBA legislative priority and put the full NYSBA government affairs muscle behind efforts to further paid leave legislation.

NYSBA Supports Paid Family Leave

In consultation with the NYSBA, the State Bar's Committee on Women in the Law (CWIL) prepared a comprehensive 26-page report analyzing the need for paid family and worker leave in the United States, the details of the proposed 2015 Family Act and the potential impact of that Act.[12] The final report may be found on CWIL's committee webpage.[13] CWIL presented its report to the State Bar's Executive Committee and House of Delegates and recommended that the NYSBA support enactment of the Family Act. In November 2015, the Executive Committee and the House of Delegates adopted a resolution supporting the legislation to provide paid leave benefits, and approving the report and recommendation of the Committee of Women in the Law. As a result of CWIL's efforts, the NYSBA leadership made paid leave a 2016 NYSBA legislative priority and put the full NYSBA government affairs muscle behind efforts to further paid leave legislation.

Senator Gillibrand and Representative DeLauro reintroduced the Family Act in February 2017.[14] The new White House administration, as of February 2017, expressed support for some form of paid leave for new parents.[15]

Summary of the NYS Paid Family Leave Benefits Law

New York's Paid Family Leave Act provides employees with both leave time and partial wage replacement. Employees may use this paid leave to care for a newborn or adopted child, to care for a family member with a serious illness and to care for family members when another member is called to active military duty.[16] The PFL Act provides benefits that go beyond the regulatory programs currently in place. New York's short-term disability insurance provides partial wage replacement – but not a guaranteed leave of absence – to employees with non-work related temporary disabilities. The FMLA of 1993 provides a leave of absence – but not wage replacement – to employees to care for a newborn or adopted child, to care for a family member with a serious illness or to care for family members when another member is called to active military duty.[17]

The PFL Act, which is a series of amendments to the New York State Workers' Compensation Law, creates an insurance program that will supplement New York's short-term disability insurance and cover the benefits available under the Act.[18]

Key details and decisions needed to implement the Act have not yet been finalized but, by law, must be in place by June of this year.[19] As such, in late February 2017, the New York State Workers' Compensation Board and New York State Department of Financial Services issued proposed rules for public comment (due April 10, 2017).[20]

As the effective date of the PFL Act is approaching, employers and employees should become familiar with the basic provisions of the Act and how they can prepare for its implementation.[21]

The PFL Act Covers Most Private Employers and Employees in New York

Private employers in New York with at least one employee will be required to provide benefits under the PFL Act. In contrast, the FMLA of 1993 applies only to employers with 50 or more employees.

Full-time private employees who have worked for at least 26 weeks and part-time private employees who have worked at least 175 hours during the calendar year will be eligible for benefits under the PFL Act.[22] In contrast, the FMLA of 1993 applies only to employees who have worked for the employer for at least 12 months and/or at least 1,250 hours during the 12-month period prior to the leave.[23] Under the PFL Act, eligible employees will be entitled to benefits from the first day they are needed, without any waiting period.

Employees who are not working at the time of a triggering event, such as employees who are on leave while collecting workers' compensation, will not be eligible for benefits under New York's Act.[24] Independent contractors are not automatically eligible for paid leave under

the Act either, but may purchase their own insurance.[25] Employees' citizenship status and immigration status will not affect eligibility under the Act.

New York's Paid Leave Act Specifies Eligible Uses for Paid Family Leave

The PFL Act provides eligible employees with paid leave for only the following purposes:

1. For a father or mother to bond with a new child, whether born to the family, adopted by family or taken as a foster child, during the 12 months after the child joins the family.
2. To care for a close relative with a serious health condition. The Act defines a close relative as a child, parent, parent-in-law, grandchild, grandparent, spouse or domestic partner. The relative does not have to be in New York. The Act defines a serious health condition as "an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential health care facility [or] continuing treatment or continuing supervision by a health care provider."[26] This does not include illnesses such as the common cold, flu, upset stomach, headaches (except migraines) and similar conditions.
3. To care for a close relative when another close relative has been called to active military service.[27]

Employees may not seek paid family leave under the New York Paid Family Leave Act for their own health condition or for an employee's own military service.

New York's Act Mandates Additional Insurance Coverage

As of January 1, 2018, every employer in New York State must carry Paid Family Leave coverage in addition to disability coverage, and every disability benefits policy in New York State must include Paid Family Leave coverage. Employers who are self-insured for disability claims can self-insure for claims under the PFL Act.[28]

Insurance Premiums Will Be Paid by Employees

Premiums for the new Paid Family Leave coverage will be paid by the employees, through payroll deductions. The insurance policy will pay out the benefits (that is, partial wage replacement) to employees on paid leave.

Employee payroll deductions may begin on July 1, 2017. The regulations issued for public comment in February 2017 will determine, among other things, the maximum rate of the employees' contribution.

New York's Paid Leave Will Be Phased in Starting in 2018

As of January 2018, employers will be required to provide eight weeks of paid leave. In 2019 and 2020, employers will be required to provide 10 weeks of leave. Starting in 2021, employers will be required to provide 12 weeks of leave.[29]

The statutory leave amounts – eight, 10 and 12 weeks of paid leave – are the maximum benefits allowed within any 52-week period. As such, an employee who takes eight weeks of paid leave to care for a newborn in 2018 will not be entitled to additional paid leave in the event a family member becomes seriously ill during the same year. The 52-week period starts on the first day the employee takes paid family leave.

Unless otherwise expressly permitted by the employer, an employee using benefits available under FMLA must use them concurrently with paid family leave benefits.[30]

Employees are not required to take leave time during which they receive their full salary (such as sick leave or vacation time, if any) before taking paid family leave. Employers can permit, but *cannot* require, employees to take sick leave or vacation time before taking paid family leave.[31]

Employees may take paid family leave on a full-day basis only. However, employees may take paid family leave intermittently. So, for example, an employee entitled to eight weeks (40 days) of paid leave may take a leave of absence for two days per week over the course of 20 weeks.

Unless otherwise expressly permitted by the employer, an employee using benefits available under FMLA must use them concurrently with paid family leave benefits.

Employers may offer more generous paid leave time, in which case employees will not be eligible for statutory paid leave in addition to the time offered by the employer.

Wage Replacement Will Be Phased in Starting in 2018

In addition to leave, employees will be entitled to a partial wage replacement during their leave time. The wage replacement will be determined by a percentage of the employee's average weekly wage. The amount is not unlimited, however, but will be capped at a percentage of the statewide Average Weekly Wage (AWW), which is determined each year by the New York State Department of Labor.[32]

During each year of the phase-in period of the Act, both the percentage of the employee's average weekly wage and the cap will increase from 50 percent to 67 percent. In 2018, employees on paid leave will be entitled to 50 percent of the employee's average weekly wage, capped at 50 percent of the AWW. In 2019, employees on paid leave will be entitled to 55 percent of the employee's average weekly wage, capped at 55 percent of the AWW. In 2020, employees on paid leave will be entitled to 60 percent of the employee's average weekly wage, capped

at 60 percent of the AWW. In 2021 and subsequent years, employees on paid leave will be entitled to 67 percent of the employee's average weekly wage, capped at 67 percent of the AWW.[33] The State Superintendent of Financial Services may delay these increases if it is determined that the increases would negatively impact the state's economy.

Employees may combine disability leave under New York's short-term disability program and paid family leave for a total of 26 weeks in any 52-week period. For example, an eligible employee may take disability leave for a pregnancy-related disability followed by paid leave to care for a newborn. However, employees cannot collect disability payments and paid leave benefits at the same time.[34]

New York's Paid Leave Act Provides Job Protection

An employee who takes paid family leave under the Act is entitled to return to the same job or a comparable job (that is, one with comparable benefits, comparable pay, and comparable other employment terms and conditions). If an employer does not return the employee to the same or comparable job, the employee must formally request reinstatement.[35]

If the employee on leave was part of the employer's group health insurance plan, the employer must continue to provide health insurance to the employee on leave. If the employee contributed to the cost of the health insurance coverage before taking leave, then the employee must continue to pay his or her share of the health insurance premiums while on paid family leave.[36]

Discrimination and Retaliation Are Prohibited

Employers may not discriminate against, or retaliate against, an employee who takes paid family leave.[37]

Notice and Documentation Are Required

Employees are responsible for notifying their employers if they plan to claim paid family leave. If the event triggering the leave request is foreseeable, employees must give their employers 30 days advanced notice. If the triggering event was not foreseeable, the employee must notify his or her employer of the leave request as quickly as possible.[38]

Employees seeking paid family leave will need to file a written request and provide documentation – such as birth or adoption records, medical certification or military orders – in support of the request.[39] Employers likely will also be required to complete and submit documentation to the insurer regarding the dates of employees' paid family leave.

Practical Advice to NYS Employers and Employees

In preparation for the January 2018 effective date of the New York Paid Family Leave Benefits Act, employers should confirm that their disability insurance provider is adding insurance to cover claims for paid family leave, or take the necessary steps to self-insure against such claims. If New York, as required by the Act, issues regulations by June 2017 regarding premiums and deductions, employers may be able to begin funding insurance premiums by deducting amounts from their employees' payroll in July 2017.

An employee who takes paid family leave under the Act is entitled to return to the same job or a comparable job (that is, one with comparable benefits, comparable pay, and comparable other employment terms and conditions).

Employers should also work with counsel to prepare written policies, or revise employee handbooks, to notify employees of the new payroll deduction, the new insurance coverage and their rights and obligations under the PFL Act. Employees, in turn, should confirm that their employers are providing the required coverage, that the deductions for the insurance premiums comply with the applicable regulations and that their employers have policies and procedures in place to enable employees to request paid family leave should they ever need it.

Until January 2018, the effective date of the PFL Act, employees who need leave to care for a new child, care for a close relative with serious health conditions or care for a close relative when another is called to active military duty, may be entitled to unpaid leave under FMLA and may be entitled to other benefits offered by their employers. ■

1. N.Y. Workers' Compensation Law §§ 200–242 (WCL).
2. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654,.
3. Senator Kirsten Gillibrand, *The American Opportunity Agenda*, at 2, www.gillibrand.senate.gov/imo/media/doc/Gillibrand_Womens booklet.pdf; *Senator Gillibrand Announces Legislation to Provide Every American Worker with Paid Leave* (March 18, 2015), www.gillibrand.senate.gov/newsroom/press/release/senator-gillibrand-announces-legislation-to-provide-every-american-worker-with-paid-leave; Council of Economic Advisers, *The Economics of Paid and Unpaid Leave* (June 2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/leave_report_final.pdf.
4. *See* Council of Economic Advisers, *Economics of Paid & Unpaid Leave.*

5. Janet Walsh, *U.S. May Join the Rest of the World in Offering Paid Family Leave*, Human Rights Watch (March 19, 2015), www.hrw.org/news/2015/03/19/dispatches-us-may-join-rest-world-offering-paid-family-leave.

6. Katy Hall and Chris Spurlock, *Paid Parental Leave: U.S. vs. The World (INFOGRAPHIC)*, Huffington Post (Feb. 2, 2013), www.huffingtonpost.com/2013/02/04/maternity-leave-paid-parental-leave-_n_2617284.html; Human Rights Watch, *Failing Its Families: Lack of Paid Leave and Work-Family Supports in the US*, Summary of Report, https://www.hrw.org/report/2011/02/23/failing-its-families/lack-paid-leave-and-work-family-supports-us.

7. AB-908 Disability compensation: disability insurance (April 11, 2016), California Legislative Information, http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB908; New Jersey Temporary Disability Benefits Law, §§ 43:21-39.1, *et seq*. (2008); Rhode Island Temporary Disability Insurance–Benefits, § 28-41-35 (2013); http://lni.wa.gov/WorkplaceRights/LeaveBenefits/FamilyCare/LawsPolicies/FamilyLeave/default.asp.

8. San Francisco was the first city to require fully paid family leave. Its law requires that employers make up the balance of the employee's pay beyond the amount covered by state law, and makes it illegal to fire an employee for taking parental leave. The San Francisco law took effect Jan. 1, 2017 for companies with 50 or more employees. http://money.cnn.com/2016/04/06/news/economy/san-francisco-paid-parental-leave/index.html?iid=hp-stack-dom.

9. www.lni.wa.gov/WorkplaceRights/LeaveBenefits/FamilyCare/Maternity/.

10. S. 786, 114th Cong. (March 18, 2015), Law Library of Congress, https://www.congress.gov/bill/114th-congress/senate-bill/786/related-bills; H.R. 1439, 114th Cong. (March 18, 2015), Law Library of Congress, https://www.congress.gov/bill/114th-congress/house-bill/1439.

11. *Id*.

12. New York St. B. Ass'n, *Memorandum in Support – NYSBA's Committee on Women in the Law Supports the Passage of the Family and Medical Insurance Leave Act: S786 of 2015 by Senator Gillibrand*, https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=59878.

13. *Id*.

14. S. 337, 115th Cong. (Feb. 7, 2017), Law Library of Congress, https://www.congress.gov/bill/115th-congress/senate-bill/337/text; H.R. 947, 115th Cong. (Feb. 7, 2017), Law Library of Congress, https://www.congress.gov/bill/115th-congress/house-bill/947/related-bills.

15. https://www.whitehouse.gov/the-press-office/2017/02/28/excerpts-president-donald-j-trumps-address-joint-session-congress.

16. WCL §§ 200–242.

17. 29 U.S.C. §§ 2601–2654.

18. WCL §§ 200–242.

19. WCL § 209(3)(b).

20. www.wcb.ny.gov/PFL/pfl-regs.jsp; www.dfs.ny.gov/insurance/rpro-indx.htm.

21. The information provided in this article is based on the PFL Act and the proposed rules, and is subject to change. Further, the information in this article is not legal advice. Persons seeking legal advice should consult with counsel concerning the applicability of any law to a particular situation.

22. WCL § 203; https://www.ny.gov/programs/new-york-state-paid-family-leave (a "private employee is someone who does not work for the State, any political subdivision of the state, a public authority or any governmental agency or instrumentality").

23. WCL § 203; 29 U.S.C. § 2611(2)(A).

24. WCL § 206(3)(a).

25. WCL § 206(3)(d).

26. WCL § 201(18).

27. WCL § 201(15).

28. New York State, *Paid Family Leave: Family Matters*, https://www.ny.gov/new-york-state-paid-family-leave/helping-new-yorkers-need.

29. WCL § 204(1), (2).

30. WCL § 206(4).

31. WCL § 205(2)(c).

32. WCL § 204(2); https://www.labor.ny.gov/stats/avg_wkly_wage.shtm.

33. WCL § 204(2).

34. WCL § 205(4).

35. WCL § 203-b.

36. WCL § 203-c.

37. WCL § 203-a.

38. WCL § 205(5).

39. WCL §§ 205(2)(b), 217.

State-Sanctioned Humiliation: Why New York Needs a Nonconsensual Pornography Law

By Carrie Goldberg and Adam Massey

***Spoiler alert**: The first two paragraphs of this article contain spoilers for HBO's* Game of Thrones *season five finale. Start at the third paragraph if this is an issue for you.*

Naked and filthy, a barefoot woman walks into a crowd. She advances into a jeering mob, pelted with rotting vegetables, her nudity a spectacle. The street scum oozes between her toes with each step. Days prior she'd been a pillar of the community, the beloved Queen of the very population now punishing her; some punishing her with their jeers and insults, others literally pelting feces at her, the rest of the crowd taking it all in and bearing cruel witness to her shame. Nobody there can ever un-see it, nor will she ever recover the exalted reputation she'd so recently known. Cersei's "Walk of Atonement" concluding season five of *Game of Thrones* depicts a historical punishment – torture through public humiliation.

Variants of Cersei's punishment were once a legally sanctioned part of American life. Public shaming was an acceptable form of sentence until the 19th century.[1] The mode of punishment in colonial America ranged from the infamous stocks and pillories to "branding the criminal on a visible part of the body, such as cheek or forehand, so as to unmistakably alert the public to the offender's criminal tendencies."[2] The role of the crowd in facilitating these punishments was indispensable, necessary to achieve the full impact of disgrace; to transform the reputation to one as soiled as Queen Cersei's excrement-covered body. Eventually the practice of formally sentencing a person to public humiliation was stopped and is now considered barbaric by justice systems. It is now understood to obvi-

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ously violate the Eighth Amendment to the United States Constitution – the amendment that prohibits the government from imposing "cruel and unusual punishments."[3] But if we really think about it, punishment through public humiliation is anything but archaic.

What about when it's not a state actor, but instead citizens – often anonymously – doling out the punishments? Is it the responsibility of a modern state to protect its citizens from the mob?

While we might shirk at joining in the crowd watching a pillory, many of us have, just by following a link or clicking on that celebrity picture everybody is talking about. The internet has created a way for us common citizens to assemble in virtual town squares at a moment's notice, each of us empowered to throw anybody naked into the mob or to pelt modern day rotten fruit at their head. Thriving websites exist to expose people – whether truthfully or not – who have allegedly cheated, have sexually transmitted infections, are HIV positive, etc.

I. The Internet as Town Square for Public Humiliation

At our law firm, which fights for victims of online harassment, sexual assault, and blackmail, we have a front row seat to the myriad ways the internet can be weaponized to inflict maximum shame. We see high net worth men at the peak of extraordinarily successful careers being blackmailed by somebody claiming to have incriminating text messages from a long ago sexual dalliance. The would-be blackmailers know that they merely need to tag the victim on social media to activate the online mob. We've represented a 13-year-old girl who depends on public assistance; her rape video went viral around her Brooklyn public middle school as the offender decided to double down on injuring her. We have teenage clients threatened with the targeted distribution of nude pictures via Facebook unless they agree to make sex tapes. In over a dozen cases jilted exes have falsely advertised our clients as prostitutes on sites like craigslist.com and backpage.com. The terrifying result is that strangers appear at their homes or offices expecting sex. Our clients are posted onto bogus online registries claiming they are homewreckers, wife beaters, carrying sexually transmitted infections, and even pedophiles. The purpose is to harness the internet's collective i.d. – to brand our clients deviants in need of punishment. All too often the faceless mob is ready to answer this call. This is not rare – according to a recent study, 47 percent of all internet users have now experienced online harassment or abuse.[4]

Most typifying the type of vigilante public humiliation that proliferates online is what is popularly called "revenge porn." Revenge porn, more accurately called nonconsensual pornography, is a highly misleading term for a form of sexual exploitation that involves the distribution of nude/sexually explicit photos and/or videos of an individual without that person's permission.[5] Bad actors have made a dark art out of distributing intimate images and videos without the consent of the depicted party, often alongside personally identifying information. Regrettably, revenge porn remains totally legal in the state of New York providing implicit state sanction to a destructive and cruel practice now recognized as criminal in the majority of the United States. In this article we will discuss "revenge porn" as the modern-day "Walk of Atonement," the status of revenge porn legislation, components of a good law, and a brief overview of why critics of revenge porn legislation are wrong.

II. Nonconsensual Pornography

While nonconsensually sharing intimate images is not new behavior, it's no surprise why it's increasingly prevalent. Because of modern technology – particularly the ubiquity of smartphones with camera and recording capabilities – an unprecedented number of people now visually document their entire lives. With at least 72 percent of adults in the United States now owning smartphones, most American adults are rarely without a camera.[6] In the 18- to 34-year-old age cohort, smartphone ownership is at 92 percent.[7] The increased archiving of our daily lives has, not surprisingly, spread into our romantic lives, too. This has contributed to an increase in people consensually taking nude photographs of themselves and their romantic partners.[8] The exchange of intimate images is becoming commonplace within the context of many romantic relationships. [9] One 2014 survey found that 78 percent of people have sent sexual images of themselves and 47 percent do it multiple times a day.[10]

The most common nonconsensual pornography fact pattern our firm encounters is what we call the "jilted ex." In this scenario, nude images are originally created and shared voluntarily within the confines of a private romantic relationship that soured, causing one party to seek retribution by distributing the private images without consent. Bad actors have realized that distribution of a person's private nude images is a highly effective way to ruin a victim's life, costing the individual his or her safety and reputation, with very little risk to the wrongdoer.[11] At our firm we have removed more than 900 intimate images and videos from the internet on behalf of clients – many of them originally shared by jilted exes. Perhaps more than the other forms of public humiliation we see, there is a vast audience waiting for the newest naked people to be presented on platters online on specialized sites – these people are the 2017 version of the crowd gawking at a Walk of Atonement.

III. The Ecosystem of Nonconsensual Pornography

Not all nonconsensual sharing of sexual graphic images happens between formerly intimate partners. Sometimes the perpetrator disseminates images for money,[12] for the challenge of hacking,[13] a political statement,[14] to amuse their friends,[15] to brag about a sexual conquest, to abuse their power,[16] for the "lulz" or for no reason[17] at all. The

most recent in-depth study of the topic found the staggering breadth of the problem: 4 percent of American internet users have either had intimate images posted online without their consent or have been threatened with this heinous act.[18] Among women under the age of 30, the report finds that one-in-ten have been either posted or threatened.[19]

Besides uploading to dedicated websites, offenders use many methods to disseminate nonconsensual pornography.

Visitors to these sites are generally not content to merely view the material, but often viciously harass the subjects depicted. The mob crudely bloviates in the comment sections about victims' bodies, speculating about the victim's imagined promiscuity and affliction with sexually transmitted diseases. Because personally identifying information is usually posted alongside the intimate images, the online mob often tries to track down the victims. Our research (through Alexa.com) showed that Facebook was the second most frequented destination after users exited that revenge porn website – suggesting that viewers were often making efforts to get in contact with the individuals they'd viewed. Indeed many victims report receiving unwanted harassing contact from strangers who saw their pictures. Their purpose is to ensure that the victims are aware that they have been humiliated. These online mobs take pains to ensure that the victim is permanently branded. They compete with one another to discover identifying information about victims – where they work, where they go to school, who their siblings are – and make a sport out of compounding victims' misery by notifying the maximum number of people that the victim's image is online. The mob, virus-like, tries to infect others with the knowledge that a new victim is ready to be seen and scorned.

Besides uploading to dedicated websites, offenders use many methods to disseminate nonconsensual pornography. Some upload content onto the victim's social media accounts (e.g., Facebook, Instagram, Twitter, Tumblr, Reddit) and tag the victim, while more enterprising offenders will actually create imposter social media accounts, posing as the victim and connecting with all of her friends before posting the images publicly or publishing the links. Millennials tend to distribute images more laterally and discretely – through text and instant messaging apps. Regardless of the means of distribution, the material often ends up on "porn tube" sites with URLs containing the victim's name. With monthly pageviews that exceed a billion, images and videos go viral and within a matter of days a victim's nude photos may appear on dozens of other porn sites. The name of the victim is converted into an actual *search term* on the "porntubes," making their shame easily discoverable on search engines to an unfathomably wide audience.

IV. Fighting Revenge Porn

Nonconsensual pornography is a serious social problem that has a devastating impact on those victimized by it. The 4 percent of American internet users affected by it amounts to millions of individuals. Increased recognition of this fact has led to criminal laws banning the distribution of nonconsensual pornography in 33 states and the District of Columbia.[20] All but two of these laws passed since 2012. The mass adoption of these statutes by states on opposite sides of the political spectrum reflects the urgency of the problem.

While these statutes differ substantially from state to state, all of them ban the intentional distribution of nude images and video when that distribution is without the consent of the party depicted. Taken as whole, these states and the proposed federal law are important steps in legislating a right to sexual privacy. And it makes sense: our health records (HIPAA) and our educational records (FERPA) are private under federal law; why shouldn't material that's more personal warrant protections?[21] The legislation that has passed is a signal; it is affirmation that individuals have the right to dictate who can see their naked bodies.[22]

V. New York's Response to the Crisis

New York is one of only 17 states without a law criminalizing nonconsensual porn. In New York it is perfectly legal to distribute naked pictures of somebody without their consent and publish them alongside personal information about where they work, go to school, live, the names of their relatives, and more. In 2014, this was vividly illustrated in *People v. Barber*.[23] Ian Barber, a 29-year-old, posted nude images of his then girlfriend onto Twitter – without her consent – and also sent the same images to the victim's employer and sister. Prosecutors charged Barber with aggravated harassment in the second degree, dissemination of an unlawful surveillance image in the second degree, and public display of offensive materials.[24] Because Barber had not engaged in a course of conduct, because the image was *captured* with the subject's consent and because nudity is not itself "offensive material," the judge *correctly* ruled that Ian Barber had not committed a crime under New York law.

At any given time, there are an average of 50 pages (10 persons per page, three-to-10 images per person) of New Yorkers on one single particularly popular dedicated revenge porn site, a site with searchable fields enabling viewers to search for victims by city, state, and name.[25] The average victim on that site receives 30,000 to 80,000 views, with the most viewed victim seen more than 800,000 times. And this is just one of the many online sites where revenge porn is published. There are an estimated 3,000 dedicated revenge porn websites.

In 2013, Assemblyman Edward C. Braunstein (D–Bayside), announced and introduced a statute to criminalize nonconsensual pornography in New York.[26] Three years later, New York's failure to adopt a law is an embarrassment.

Indeed, Albany's failure to act on this urgent crisis has prompted New York City Councilmen Rory Lancman and Dan Garodnick to introduce a local law. While this is a step in the right direction, the proposed statute would leave the millions of New Yorkers who do not live in New York City without any kind of protection.[27]

VI. No Excuses – Moving Toward a Nonconsensual Pornography Law in New York

Despite the demonstrated harm caused by nonconsensual porn and the existence of strong, broadly supported statutes in sister states, there are still those who object to New York adopting nonconsensual pornography legislation. Opponents of revenge porn criminalization use a variety of arguments in their efforts to discredit the need for new laws. First, they resort to the fallacy that laws cannot keep up with the times. Implicit is the idea that we should not even try because the rapid advance of technology necessarily means lawmakers will always be lagging too far behind. This is simply untrue. New York has 10 different computer crimes, and Governor Cuomo recently proposed further refinement to them.[28] There are currently 11 distinct crimes in New York relating to the unauthorized sound or video recording of a concert, film or play, making it vastly more illegal to share an unauthorized clip of *Hamilton* than a nonconsensual captured nude image.[29]

A second line of criticism comes primarily from civil libertarians and the criminal defense bar – they argue that we simply do not need more criminal laws. This argument has two crucial flaws. First, society continues to evolve and so must criminal law. The capacity to instantly distribute intimate images around the world with malicious intent did not exist 25 years ago – today it does, and laws must progress along with society. Civil libertarians also sometimes claim that the adoption of nonconsensual pornography statutes will contribute to the problem of over-incarceration. The experience in states with nonconsensual pornography statutes does not support this theory. Revenge porn prosecutions are rare enough that when Oregon sentenced its first criminal under the law, to six months in jail in December 2016, it became national news.[30] The purpose of revenge porn statutes has always been primarily one of deterrence, to make would-be-offenders think before they act.

A corollary to the "no-new-crimes" argument is the inaccurate claim that nonconsensual pornography is already illegal under existing criminal law. This is simply wrong. Critics will generally claim that existing harassment and stalking laws are sufficient to cover the majority of the conduct. The reality is that revenge porn posters often only make one distribution – thereby falling below the "course of conduct" threshold necessary for harassment and stalking.[31] As the *Barber* case discussed above illustrates, the damage can be done in a couple discrete acts – and not involve a "course of conduct." The harassment mechanism we have herein called the Walk of Atonement handles the rest. Chillingly, the offenders targeting our clients are increasingly aware that New York's law does not cover the dissemination of intimate images. These offenders often threaten our clients with the fact that what they are doing *is not a crime*.

Others fear that if we criminalize nonconsensual pornography, "good kids who made a mistake" will be flooding our court systems. The truth is that kids are capable of very bad things, sharing nude images of a peer without permission is one such thing. In our experience, the most severe response to victimization – suicide, self harm, severe depression – is from teen victims. If teen offenders are outside the scope of the law's teeth, the most vulnerable victims – also teens – will be unprotected. Further, if law enforcement intended to prosecute teens, it already would – through New York's child pornography laws. Rather than using underage offenders as a reason not to have a law, we should instead think about diversionary and leniency options for them, as with our Educational Reform Program (also known as our "sexting") law.[32]

Opponents of nonconsensual pornography legislation argue that it unconstitutionally restrains free speech or that there is no way to write a law that could pass constitutional muster. These arguments are irresponsible and distortionary. As discussed, well-drafted statutes have important exceptions that allow for lawful public speech. The statutes are narrowly written to cover only conduct society rightfully regards as criminal. As Professor Edwin Chemerinsky, one of our leading First Amendment experts, recently put it, "the First Amendment does not protect a right to invade a person's privacy by publicizing, without consent, nude photographs or videos of sexual activity."[33]

Finally, others claim that adequate remedies exist for victims of nonconsensual pornography via civil actions and copyright law. Certain provisions of the Digital Millennium Copyright Act (DMCA) provide powerful incentives for websites to remove copyrightable material.[34] However, these provisions only offer protection for those who own the copyright to the image being distributed. In practice, this means that there are no copyright protections for victims whose pictures or video were taken by someone else. Civil suits are simply not a viable option for many victims. The primary obstacle is cost – many victims are young people at the start of their careers who cannot fund civil suits and offenders are judgment-proof. Plus, the suits are public and often attract media attention drawing more – not less – interest onto the victim.[35] Moreover, New York recognizes only a single privacy tort – appropriation of name and likeness, which does not apply in most situations.[36]

VII. Conclusion

In July 2016, United States Representative Jackie Speier (D-California) introduced legislation called the Intimate Privacy Protection Act that would create a federal law criminalizing the distribution of nonconsensual pornography.[37] New York simply cannot wait for the federal government to take action on this issue. While the federal law is necessary for this borderless crime, it is no replacement for state laws, the latter of which can be enforced locally.

The hard work of crafting workable statutes has been accomplished in other states – and New York can learn from their experience by adopting a constitutional nonconsensual pornography statute that will protect its citizens. We can no longer tolerate being the nameless faces in the crowd that watch as our peers are dragged through the mud of public humiliation. The people of New York deserve better. ■

1. Paul Ziel, Eighteenth Century Public Humiliation Penalties in Twenty-First Century America: The "Shameful" Return of "Scarlet Letter" Punishments in *U.S. v. Gementera*, 19 BYU J. Pub. L. 499 (2005), *available at* http://digitalcommons.law.byu.edu/jpl/vol19/iss2/9.

2. *Id*.

3. In *Robinson v. California*, 370 U.S. 660 (1962), the Supreme Court ruled that this applies to states as well via the Fourteenth Amendment.

4. *See* Online Harassment, Digital Abuse, https://datasociety.net/blog/2017/01/18/online-harassment-digital-abuse/.

5. Definition provided by www.cybercivilrights.org; for a more in-depth discussion of nonconsensual porn, see Danielle Keats Citron and Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest Law Review, 345, 364 (2014).

6. Jacob Poushter, Smartphone ownership and Internet Usage Continues to Climb In Emerging Economies, Pew Research Center, Feb. 22, 2016, http://www.pewglobal.org/2016/02/22/smartphone-ownership-and-internet-usage-continues-to-climb-in-emerging-economies/.

7. *Id*.

8. A survey of 1,100 New Yorkers, reported that 45 percent had recorded themselves having sex. *New Yorkers reveal what their sex lives are really like*, New York Post, Sept. 3, 2014.

9. *New Yorkers reveal what their sex lives are really like*, New York Post, Sept. 3, 2014. The survey questioned 1,100 New Yorkers about sexting and other aspects of their sex lives. Half of the respondents were single and 69 percent were men, http://nypost.com/2014/09/03/new-yorkers-reveal-what-their-sex-lives-are-really-like/.

10. *Id*.

11. Statistics have shown that as many as 90 percent of victims of nonconsensual pornography are women. For ease, the author uses a feminine pronoun; however, the reader should not conclude that the crime is exclusive to women.

12. Website Operator Banned from the 'Revenge Porn' Business After FTC Charges He Unfairly Posted Nude Photos, Jan. 29, 2015, https://www.ftc.gov/news-events/press-releases/2015/01/website-operator-banned-revenge-porn-business-after-ftc-charges; Craig Brittain's website nonconsensually posted intimate images and then demanded money to remove said images.

13. Selena Larson, *Another hacker pleads guilty for his role in the 'Fappening,'* The Daily Dot (2016), www.dailydot.com/layer8/majerczyk-fappening-hacker-guilty-icloud/; *see also* Rob Prince, *Jennifer Lawrence: Celebgate photo leak is a 'sex crime,"* The Daily Dot (2014), http://www.dailydot.com/news/jennifer-lawrence-vanity-fair-celebgate/.

14. Claire Cohen, *#Gamergate: Victim of video games trolling launches anti-harassment network*, The Telegraph, Jan. 21, 2015, at www.telegraph.co.uk/women/womens-life/11360204/Gamergate-Zoe-Quinn-launches-anti-harrassment-support-network.html, last accessed January 24, 2017.

15. Caitlin Dewey, *The revenge pornographers next door*, Washington Post, March 19 2015, at https://www.washingtonpost.com/news/the-intersect/wp/2015/03/19/the-revenge-pornographers-next-door.

16. Cyrus Farivar, *Cop who stole nude pics off arrested women's phones gets no jail time*, ArsTechnica.com, January 27, 2015, at http://arstechnica.com/tech-policy/2015/01/cop-who-stole-nude-pics-off-arrested-womens-phones-gets-no-jail-time.

17. *Julian Edelman – Tinder Chick Apologizes 'I Made a Mistake,'* TMZ.com, Feb. 4, 2015, at www.tmz.com/2015/02/04/julian-edelman-tinder-chick-apologizes-i-made-a-mistake.

18. Amanda Lenhart, et al., *Nonconsensual Image Sharing: One in 25 Americans Has Been a Victim of "Revenge Porn,"* Data & Society Research Institute, December 13, 2016, *available at* https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf, page 4 .

19. *Id.*, page 5.

20. www.cagoldberglaw.com/states-with-revenge-porn-laws. The following states have criminalized nonconsensual pornography: AK, AZ, AR, CA, CO, CT, DE, FL, GA, HI, ID, IL, KS, LA, ME, MD, MI, MN, NV, NJ, NM, NH, NC, ND, OK, OR, PA, TN, TX, UT, VT, WA, and WI. The District of Columbia has also criminalized nonconsensual pornography. In addition to criminal laws, the following states have also created civil causes of action against distributors of nonconsensual pornography: CA, CO, FL, MN, NC, MD, PA, TX, VT, PA and WI.

21. See https://www.hhs.gov/hipaa/ and https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html.

22. Ari Ezra Waldman, *Privacy as Trust: Sharing Personal Information in a Networked World*, 69 U. Miami L. Rev. 559 (2015), arguing that individuals retain privacy rights within the context of disclosure to trusted individuals.

23. See *People v. Barber*, 2014 N.Y. Slip Op. 50193(U) (N.Y.C. Crim. Ct. Feb. 18, 2014), http://law.justia.com/cases/new-york/other-courts/2014/2014-ny-slip-op-50193-u.html.

24. *Id*.

25. To avoid further exploitation of the women on the referenced revenge porn website, the authors have decided not to include that website's name or URL.

26. *See* "Act…establishes the crime of non-consensual disclosure of sexually explicit images," at http://assembly.state.ny.us/leg/?default_fld=&bn=A08214&term=2013&Summary=Y&Actions=Y&Text=Y&Votes=Y.

27. *"Revenge Porn" Could Be Criminalized Under City Council Bill*, Dusica Malesevic, Oct. 26, 2016, accessible at https://www.dnainfo.com/new-york/20161026/civic-center/revenge-porn-city-council-bill.

28. Governor Cuomo Announces 4th Proposal of 2017 State of the State: Protecting New Yorkers from Cyber-Attacks, Jan. 6, 2017, https://www.governor.ny.gov/news/governor-cuomo-announces-4th-proposal-2017-state-state-protecting-new-yorkers-cyber-attacks.

29. *See* N.Y. Penal Law §§ 275.00–275.45.

30. *See First person sentenced under Ore.'s revenge porn law*," Dec. 2, 2016, at www.cbsnews.com/news/benjamin-barber-first-person-sentenced-under-oregon-revenge-porn-law/.

31. *See* PL § 240.25.

32. *See* N.Y. Social Services Law § 458-*l*.

33. Congresswoman Speier, Fellow Members of Congress Take on Nonconsensual Pornography, AKA Revenge Porn, July 14, 2016, *available at* https://speier.house.gov/media-center/press-releases/congresswoman-speier-fellow-members-congress-take-nonconsensual.

34. *See* 17 U.S.C § 512, *see also* www.withoutmyconsent.org/resources/take-down, for approaches to takedown.

35. Elisa D'Amico and Luke Steinberger, *Fighting for Online Privacy with Digital Weaponry: Combating Revenge Porn*, NYSBA Entertainment, Arts and Sports Law Journal, Summer 2015, Vol. 26, No. 2 at 32.

36. N.Y. Civil Rights Law §§ 50 and 51.

37. Intimate Privacy Protection Act,H.R. 5896, 114th Cong. (2016) *available at* https://www.congress.gov/bill/114th-congress/house-bill/5896/text.

BY CONGRESSWOMAN CAROLYN B. MALONEY

Carolyn B. Maloney is recognized as a national leader with extensive accomplishments on financial services, national security, the economy, and women's issues. She is a senior member of both the House Financial Services Committee (where she serves as Ranking Member of the Subcommittee on Capital Markets) and the House Oversight and Government Reform Committee, and the Ranking House member of the Joint Economic Committee. Maloney is the first woman to represent New York's 12th Congressional District; the first woman to represent New York City's 7th Councilmanic district (where she was the first woman to give birth while in office); and was the first woman to Chair the Joint Economic Committee, a House and Senate panel that examines and addresses the nation's most pressing economic issues. Only 18 women in history have chaired Congressional committees.

Why the United States Needs an Equal Rights Amendment

The United States is one of the few Western nations with a constitution that does not have a clause guaranteeing equal rights for women. In fact, some form of equal rights protection for gender is included in 184 out of the 200 written constitutions in the world.[1] As a result, U.S. women lack the tools they need to demand equal treatment in a variety of areas, including pensions, taxes and law enforcement. Women lag behind men in clout positions, including board and executive positions.[2] The wage gap has been virtually unchanged for more than 20 years.[3]

Nearly 100 years have passed since the original Equal Rights Amendment (ERA) was introduced by suffragist Alice Paul in Seneca Falls, New York, in 1923. It has been introduced in nearly every Congress since then. Our best opportunity to amend the Constitution to include an ERA occurred more than 40 years ago in 1972 when Rep. Martha Giffords and Sen. Birch Bayh persuaded Congress to pass the amendment and it was sent to the states for ratification. Historically, most amendments sent for ratification to the states have remained valid until they were ratified, but for the ERA opponents inserted a sunset clause after which the amendment would no longer be in effect. Originally, proponents had seven years to gain ratification. As the original deadline of seven years approached, Congress extended the deadline to 1982. Unfortunately, when the amended deadline passed, the ERA was still three states shy of ratification.

Women have made great strides since then, thanks in part to legislation designed to create equality in employment and education or protection against discrimination for pregnancy, but we continue to lag behind men in opportunity, income, pensions and other areas. I believe that amending the Constitution to include an ERA would level the playing field and enable women to close the gap that leaves us poorer, more vulnerable and less powerful.

Some have argued that the 14th Amendment gives women all the protection we need, but we know this is not true. Case law only grants gender discrimination intermediate rather than strict scrutiny, and the courts have allowed overt discrimination to stand.[4] Furthermore, the more conservative judges simply do not believe that the Constitution mandates gender equality. In an interview with *California Lawyer* in January 2011, the late Supreme Court Justice Antonin Scalia made clear his belief that the Constitution currently does not guarantee women equal rights: "Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't."[5] While Justice Scalia is no longer on the Supreme Court, his originalist thinking has other adherents, and there is no question that an ERA would solidify rights that currently could be

Amending the Constitution to include an ERA would level the playing field and enable women to close the gap that leaves us poorer, more vulnerable and less powerful.

overturned by a rightwing court or legislated away by a reactionary Congress. In my time in Congress, I have repeatedly had to fight efforts to roll back rights, such as Title IX, equality in education and sports, that have made an enormous difference for women.

The ERA is very popular among American adults. Surveys show that more than 90% of the population believes that the U.S. Constitution should guarantee women and men equal rights.[6] If the ERA were to reach the floor of Congress, I believe it would pass overwhelmingly. There is bipartisan support for the ERA in this Congress (currently, H. J. Res. 33[7]) as has been true in the past. While I have been prime sponsor of the ERA in the House of Representatives since 1997, the ERA has yet to receive a hearing, much less a vote.

In 2013, I changed the language of the ERA to introduce a new clause that would expand the impact of the amendment beyond the rationality review structure that has ruled anti-discrimination lawsuits for so long.[8] This language expressly puts women in the Constitution for the first time.

H. J. RES. 33 says:

> Section 1. Women shall have equal rights in the United States and every place subject to its jurisdiction. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Section 2. Congress and the several States shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Section 3. This amendment shall take effect two years after the date of ratification.

The new language takes us beyond the arguments over whether there is a significant difference between heightened scrutiny and intermediate scrutiny.[9] Furthermore, there is no longer a need to prove state action in order to seek redress for discrimination.

One of the most pernicious aspects of discrimination against women is the persistence of the wage gap. Women earn only about 79 cents for every dollar earned by a man.[10] The typical woman is paid $10,500 per year less than her male counterpart, or more than $500,000 over the course of her working life.[11] The wage gap hurts women and their families. According to *Legal Momentum*, women in America are still 35 percent more likely than men to be poor, with single mothers facing the highest risk.[12] Of those single mothers, 35 percent are raising their families in poverty.

The pension gap is even wider than the earnings gap. As a society, we have not provided support for families – child care, elder care, paid family leave – that often falls on women. If their pay suffers, the family suffers. Women's median IRA account balances are 71 percent as big as men's and their median defined contribution savings just 66 percent.[13] Furthermore, a married woman loses considerable income when her spouse dies. The Women's Institute for a Secure Retirement (WISER) has determined that household income declines by one-third if the couples' Social Security benefits are based on one person's work history, and up to 50 percent if based on both.[14] Women are four times more likely to survive their spouses.[15] The Social Security Administration tells us that, based on equivalence scales used for the official U.S. poverty thresholds, an elderly person living alone would need 79 percent of the income of an elderly couple to have the same standard of living.[16] Most widows receive less than that.

Insurance continues to have the ability to divide people by gender. When they do, they make determinations that advantage or disadvantage one gender,[17] and since women live longer and earn less than men, those differences often disadvantage women. While the Patient Protection and Affordable Care Act of 2010 (PPACA)[18] prohibits gender discrimination in health insurance rates, for the most part, there are no federal laws expressly forbidding insurers from engaging in any form of discrimination in the underwriting process. Each individual state has its own anti-discrimination rules, and in many cases there are no state restrictions on discriminating on the basis of gender. For example, 40 states do not ban discrimination on the basis of gender in auto insurance.[19] Only six states, including New York, prohibit discrimination on the basis of gender in life insurance.[20] Similarly, some states permit discrimination on the basis of gender in disability, property and casualty and health insurance. Only Montana prohibits discrimination on the basis of gender for all five types of insurance.[21]

One of the most pernicious aspects of discrimination against women is the persistence of the wage gap.

Some argue that we can follow the road map established in 1977 and simply amend the language of the 1972 bill to remove the ratification deadline so that three more states can ratify the original bill. I have been a cosponsor on a bill to remove the original deadline, but have doubts that it would pass constitutional muster to do that. I think the approach that has the best chance of success is to pass the amendment through Congress with the updated language affirmatively stating that men and women have equal rights included in my bill.

The only way to guarantee equality is to pass and ratify the Equal Rights Amendment. Without it, women's equality is not guaranteed under the law and will not be upheld in federal court. It is that simple. The ERA gives women a fighting chance to achieve

Without an Equal Rights Amendment, we cannot claim that we are a country that values "equality under the law."

pay parity with their male colleagues and ensure that they can seek damages against a violent partner who threatens her safety and the safety of her children. The fact that women are largely defenseless against discrimination in U.S. federal courts is unacceptable. Without an Equal Rights Amendment, we cannot claim that we are a country that values "equality under the law." Accordingly, we need to pass the ERA. ■

1. Catharine A. MacKinnon, Gender in Constitutions, in The Oxford Handbook of Comparative Constitutional Law 397, 404 (Michel Rosenfeld and András Sajó eds., 2012).

2. A 2015 study found that women currently hold 4.4 percent of chief executive positions at Standard & Poor's 500 companies according to 2015 research by Catalyst. From 1995 to 2015, Catalyst has monitored the participation of women at high echelons of the Fortune 500. Women's share of board seats has shown little growth during that period and today stands at around 20 percent (www.forbes.com/sites/karenhigginbottom/2017/01/30/board-diversity-still-unusual-in-a-fortune-500-firm/#5312269076bb). Similarly, a 2005 study done by Catalyst found that women occupied only 9.4 percent of clout titles at Fortune 500 companies (www.catalyst.org/media/rate-womens-advancement-top-corporate-officer-positions-slow-new-catalyst-tenth-anniversary).

3. According to the Institute for Women's Policy Research, the ratio of women's and men's median annual earnings was 79.6 percent for full-time/year-round workers in 2015 – a gender wage gap of 20.4 percent. The ratio of women's and men's median annual earnings has not had a statistically significant annual increase since 2007 (www.iwpr.org/publications/pubs/the-gender-wage-gap-2015-annual-earnings-differences-by-gender-race-and-ethnicity#sthash.q3iNHs4y.dpuf).

4. See for example, *United States* v. *Morrison*, 529 U.S. 598 (2000), in which Christy Brzonkala sued under the Violence Against Women Act after having been raped at Virginia Polytechnic Institute. The Court overturned portions of VAWA on the grounds that gender-based violence did not constitute economic activity and could not be regulated under the Commerce Clause and that the 14th Amendment only granted Congress the ability to regulate state action. The Court ruled that the law was "not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias." 529 U.S. at 626.

5. http://ww2.callawyer.com/story.cfm?eid=913358&evid=1.

6. A 2006 poll conducted for the ERA Coalition by db5, a market research firm, found that 94% of those polled thought there should be an amendment guaranteeing equal rights for men and women. Furthermore, 80% thought the Constitution already guaranteed equal rights for men and women (www.eracoalition.org/files/ERAPolling PressRelease.pdf). I got similar results when I commissioned a survey conducted by Opinion Research Corporation Caravan Services in 2001. That poll showed that seven in 10 people believed that the Constitution makes it clear that male and female citizens are entitled to equal rights. Nine out of 10 people believed the Constitution should make it clear that male and female citizens have equal rights (http://maloney.house.gov/sites/maloney.house.gov/files/documents/olddocs/era/AwarenessPoll.pdf).

7. https://www.congress.gov/115/bills/hjres33/BILLS-115hjres33ih.pdf.

8. https://maloney.house.gov/media-center/press-releases/rep-maloney-speaker-quinn-and-council-members-lappin-brewer-james-and-chin-join-women.

9. *Craig* v. *Boren*, 429 U.S. 190 (1976), was the first U.S. Supreme Court case to determine that sex classifications were subject to intermediate scrutiny under the 14th Amendment's Equal Protection Clause. The case involved an Oklahoma case that allowed women to purchase beer once they reached 18 years of age, but barred men from purchasing it until they were 21. The Court overturned the law holding that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." 429 U.S. at 197. In *United States* v. *Virginia*, 518 U.S. 515 (1996), the Supreme Court was asked to consider whether the state could deny entry to women to the Virginia Military Institution, a state school. The Court held that it could not and provided a clear summary of the review that a discriminatory law would have to pass in order to be upheld.

> Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." . . . The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'". . . The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications . . . Physical differences between men and women, however, are enduring: "[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered,". . . to "promot[e] equal employment opportunity," . . . to advance full development of the talent and capacities of our Nation's people . . .[S]uch classifications may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women.

518 U.S. at 532–34.

10. For a table of the wage gap from 1960 through 2015, see National Committee on Pay Equity, https://www.pay-equity.org/info-time.html. For 2015, the wage gap was 79.6 percent. In 2010, the wage gap was 77.4 percent, so we have gotten a raise, but we are far from parity.

11. Joint Economic Committee, The Pink Tax: How Gender-Based Pricing Hurts Women's Buying Power (December 31, 2016), https://www.jec.senate.gov/public/_cache/files/8a42df04-8b6d-4949-b20b-6f40a326db9e/the-pink-tax—how-gender-based-pricing-hurts-women-s-buying-power.pdf. Annual difference is based on median earnings of $51,212 for men and $40,742 for women (for full time, year-round in 2015). According to the Center for American Progress, the "career earnings gap" is now nearly $434,000. The Institute for Women's Policy Research has separately estimated that women born between 1955 and 1959 who worked full time, year-round each year lost more than $530,000 by the time they reached age 59.

12. www.legalmomentum.org/women-and-poverty-america.

13. www.cnbc.com/2015/10/19/-gender-gap.html.

14. www.wiserwomen.org/index.php?id=277&page=widows-and-widowhood.

15. *Id*.

16. https://www.ssa.gov/policy/docs/ssb/v70n3/v70n3p89.html.

17. Ronen, Avraham; Kyle D, Logue.; and Daniel Benjamin, Schwarcz, *Understanding Insurance Anti-Discrimination Laws*, Law & Economics Working Papers, Paper 52 (2013), http://repository.law.umich.edu/law_econ_current/52.

18. PPACA prohibits health insurers from taking gender into account.

19. http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1163&context=law_econ_current, p. 6.

20. *Id*. at p. 33

21. *Id*. at p. 35.

The State of Equal Pay in the 21st Century

By Wendi S. Lazar and Kerry C. Herman

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Gender Pay Equity, Then and Now

It's been nearly 54 years since the federal Equal Pay Act (EPA) passed Congress barring pay inequity based on sex,[1] and New York's state cognate, the New York State Equal Pay Act (NYS EPA), just celebrated its 50th anniversary.[2] Since the passage of these laws, the gap between a man's earnings and those of a woman has diminished considerably. For example, in 1964, shortly after the EPA went into effect, women earned 59 cents to every dollar earned by men.[3] In 2016, the gap had narrowed to 79 cents to every dollar.[4] As of 2015, the State of New York leads the nation with the smallest wage gap: women earned 89 percent of men's full-time earnings.[5] These disparities deepen when race and ethnicity are taken into account.[6]

However laudable these accomplishments may be, economists are quick to acknowledge a notable trend: the wage gap is diminishing at a much slower rate than the initial decades after equal pay legislation was first enacted.[7] In the five decades since equal pay became the law of the land, women entered every echelon of the American workforce. While men and women graduate in equal numbers from universities and graduate schools,[8] and entry level earnings are on par at the beginning of their careers,[9] studies show that the gender pay gap is greater for women with a college degree than for those without.[10] Based on the rate of change since 1960, the pay gap will not be diminished until 2059; however, given the current rate of change, which is much slower, the gender pay gap may not be eliminated until as late as 2152.[11]

There are a variety of explanations for the gender pay gap. Chief among them is the fact that women continue to bear primary responsibilities for child-rearing and homemaking in our society, which results in fewer working hours than men and reduced opportunities for promotion.[12] Another consideration is that women work in industries that are paid less than those dominated by men.[13] Although these factors bear some relation to systemic gender discrimination, they are not easily addressed by the framework of equal pay laws, which have a limited inquiry and no affirmative accommodation requirements. However, policymakers and employers have attempted to narrow the divide through efforts such as increasing the availability of paternity leave and creating more flexible work schedules. These efforts are commendable, but they may not be enough. Even adjusting the statistics to consider these non-discriminatory factors, economists project that the earnings ratio is still 92 percent, which means that women are still paid less than men for the same work for no other reason than their gender.[14] Gender discrimination in all its forms, including pregnancy discrimination, failure to promote and even sexual harassment and bullying, affects the pay gap and result in women earning less.

Challenges with the Existing Legal Framework

Legislators and activists alike have been hard-pressed to address the persisting disparity. After 50 years of use, the existing discriminatory pay laws appear unable to remedy the remaining discriminatory wage differential. In large part, this is the result of a legal framework that presents substantial hurdles to women pursuing claims of pay discrimination.

In order to prevail on an equal pay claim under the EPA, a plaintiff need not show that the inequitable compensation was driven by intentional discrimination.[15] However, she must demonstrate that she was paid a lower wage for the "equal work" performed within any "establishment" as her male peers.[16] This presents a significant hurdle for litigants: the requirement to show an appropriate male comparator.[17]

To begin with, the term "establishment" has been narrowly defined as a distinct, "physically separate" place

of business – not an enterprise, which may comprise multiple establishments.[18] As such, a woman providing services at her employer's location in one city may not use as her comparator a male peer doing the same work in another.[19]

Even more demanding is the standard of "equal work," which entails a demonstration that a comparator's job required "equal skill, effort and responsibility."[20] "Skill" concerns "such factors as experience, training education and ability;"[21] "effort" concerns "the physical or mental exertion needed for the performance of the job;"[22] and "responsibility" concerns "the degree of accountability required in the performance of the job, with emphasis on the importance of a job obligation."[23] Demonstrating such a high degree of similarity between work performed presents a challenge to plaintiffs, particularly for higher level executives and professionals, whose job responsibilities and duties are more particularized on a peer-to-peer level.[24]

Even when a plaintiff can demonstrate pay inequity with an appropriate male comparator, she will have failed to prove a prima facie case if there exists another male comparator whose pay was less than her total compensation.

Finally, even when a plaintiff can demonstrate pay inequity with an appropriate male comparator, she will have failed to prove a prima facie case if there exists another male comparator whose pay was less than her total compensation.[25] This leaves the equal-pay litigant with the daunting task of defining the universe of comparators without the prior knowledge of what those comparators truly make, all at the great cost and effort of bringing such litigation to begin with.

Once a plaintiff has established that she does not receive the same pay for the same work, an employer may nonetheless evade liability if it can demonstrate one of four affirmative defenses: that the disparity was the result of (a) a seniority system, (b) a merit system, (c) a system which measures earnings by quantity or quality of production, or (d) any factor other than sex.[26] In some circuits, to qualify for this last, catch-all defense, an employer need only show that the factor was gender-neutral and consistently applied.[27] In others, employers must also demonstrate that the factor served a legitimate business purpose that was related to the job at issue.[28] As a result, employers in some jurisdictions may lawfully pay greater wages based on an employee's prior salary, status as primary breadwinner, or due to market forces – all policies that have a disparate impact on female workers.[29]

Because the EPA was codified as an amendment to the Fair Labor Standards Act (FLSA), its remedies and procedures are limited to those available under the FLSA.[30] These vary greatly from those enacted by Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), the law which prohibits discrimination in employment, generally.[31] Under the EPA, remedies are limited to back pay, pay raises to the level of the opposite-sex counterpart, and, in the case of an intentional violation, 100 percent liquidated damages.[32] With such limited exposure, employers have little incentive to remedy pay inequities. In contrast, Title VII allows for recoupment of compensatory and punitive damages, in addition to lost wages.[33] Likewise, the FLSA, and by extension the EPA, limits plaintiffs in bringing collective actions to seek class-wide relief.[34] Unlike class actions which require an opt-out mechanism for potential plaintiffs, collective actions require all potential class members to affirmatively elect to join the class.[35] This significantly diminishes any leverage that might be gained by seeking class-wide relief of the already limited damages given potential plaintiffs – particularly those who are still employed by the defendant – are hesitant to affirmatively join such an action.

In some material respects, the New York EPA tracked the language of its federal predecessor: the prima facie case required a showing of a pay differential where the plaintiff was performing "equal work" in the same establishment as a male comparator. The state law also incorporated the federal EPA's affirmative defenses, such that a pay differential could legitimately be based on a seniority system, a merit system, a system which measures earnings by quality or quantity, or any other factor other than sex.[36] However, the New York EPA allows for class actions, not collective actions.[37] And while the New York EPA allows only for recovery of back pay and liquidated damages,[38] plaintiffs may recover over a substantially greater period – six years, in comparison to the EPA's two.[39]

Recent Developments in Gender Pay Equity Laws

In the past year, legislators and rule-makers on both the federal and the state level have put into place laws and regulations aimed at improving the existing equal pay laws. These amendments address at least two major hurdles women have had to overcome in bringing these claims under prior laws. The first sets less exacting legal standards for plaintiffs and more rigorous requirements for defendants, in the hopes that plaintiffs seeking to prove inequality under the law may prevail. The

second aims to increase pay transparency in the hopes that increased access to pay information will allow both employees and employers to determine the fair value of work performed.

Congress has tried and failed to address the legal complications of the EPA through the oft-debated though never passed Paycheck Fairness Act.[40] In the interim, states – including New York – have passed more robust equal pay laws that provide more tools for plaintiffs to challenge pay inequity.[41] Amendments to the state equal pay laws in New York and Maryland have broadened the definition of "establishment" to include an employer's location in a single county,[42] whereas changes to the California law have eliminated the "same establishment" requirement entirely.[43] In California, plaintiffs' burden has been limited to demonstrating "substantially similar work,"[44] whereas in Massachusetts the new standard is "comparable work,"[45] and in Maryland one must demonstrate "work of a comparable character or work in the same operation, in the same business or the same type."[46] Under the amended equal pay laws in New York, California and Maryland, employers can no longer rely upon the "any factor other than sex" catch-all but rather must demonstrate that the "bona fide" factor was both job-related and consistent with business and necessity,[47] and, in California and Maryland, that the factor accounts for the entire differential in pay.[48] In New York and California, a plaintiff can still prevail against the "bona fide factor other than sex" defense if she can identify an alternative practice that would not result in the gender-based pay disparity.[49] The Massachusetts legislature has eliminated the catch-all defense entirely and instead has added three additional defenses to the previously enumerated: geographic location; education, training or experiences that are reasonably related to the particular job; and travel, if it is a necessary condition of the position.[50] In an effort to make equal pay litigation more feasible, the New York amendment increased liquidated damages due to gender-based pay disparity threefold.[51] In order to address pay disparities related to race or ethnicity, California has opened up its Fair Pay Act protections to those protected classes.[52]

In addition to making equal pay claims more viable, recent legislative efforts have focused on another tool towards pay equity: transparency. Each of the new state laws provides more robust protections for employees who openly discuss or disclose pay-related information in the workplace.[53] Such open discourse will allow employees to be more aware of whether they are being paid unfairly, which may spur women's advocacy, through formal or informal means. Massachusetts's new statute goes one step further: it prohibits employers from asking applicants about their earnings at prior places of employment.[54] Such a prohibition may prevent the systemic discrimination that results in a pay decision that is based on a "prior salary." New York City is currently considering a similar bill.[55]

In a similar vein, the EEOC has revised its EEO-1 reporting form to include disclosure of pay data starting with the 2017 report.[56] The EEO-1 Form must be submitted by private employers with 100 or more employees and federal contractors and subcontractors with more than 50 employees. The revised form will require employers to place employees in "pay bands" that are based on each employee's W-2-reported income and identify each employee's race, ethnicity, gender and job category (e.g. senior executives, professionals, technicians, laborers).[57] Employers will also be required to report the aggregate hours worked by each employee.[58] This information will be a useful device in determining whether employers are inequitably making pay decisions based on gender and may also help employers identify inequitable treatment.

In addition to making equal pay claims more viable, recent legislative efforts have focused on another tool towards pay equity: transparency.

White Collar and Professional Pay Gap

In May 2016, the *Wall Street Journal* reported that women who work in highly skilled white-collar jobs actually fare worse than those in blue-collar jobs and the legislative remedies are unlikely to cure this gap.[59] They found that professions such as medicine, finance, and other professions, where long hours, risk-taking, and job-hopping are rewarded, have the widest gap.[60] Relying on Census Bureau data from the years 2010 through 2014, the *WSJ* reported that women with bachelor's degrees or higher earned 76 percent of the compensation earned by their male peers and women with less than a high school diploma working full time earned 79 percent of the compensation earned by their male peers.[61] For top-tier women, some economists say, men taking paternity leave, more flexible schedules, and creating positions that are interchangeable and not dependent on long hours could make a difference.[62]

Similarly, in the legal profession, women are paid less than their male colleagues at every level of practice and the disparity worsens at contract and equity partner levels.[63] Whether because of gender discrimination, family leave and part-time issues, or the failure of proper met-

rics, disbursements of credit, non-billable work, or mentor and sponsorship programs to assist women in their climb up the ranks of law firms, the result is that fewer women lawyers are in leadership positions and at the top ranks at firms and are paid less.

> In numerous studies, origination credit is often at the heart of the pay gap problem.

In addition, women who are not rewarded are leaving law firms for corporations as in-house lawyers or leaving the profession entirely.[64] But the women who remain in the profession, as published by the ABA Commission on Women in the Profession, are increasingly found in high profile roles in the judiciary, Fortune 500 corporations and law schools.[65] Accordingly, when private firms cannot compete with these other institutions, they will need to change their pay systems or lose the talent and maybe even their female clients who want to be represented by female and diverse lawyers.

In numerous studies, including the ABA's Closing the Gap reports, origination credit is often at the heart of the pay gap problem.[66] Often, women are not given credit for new clients they cultivate and fewer women receive split credit on matters. In addition, women are pressured to collaborate with other partners rather than initiate their own matters.[67] Finally, recent lawsuits over pay equity are becoming a trend and exposing these discriminatory practices at large law firms.[68] With liabilities increasing, firms, large and small, will be forced to develop new metrics and overall strategies and initiatives to level the playing field.

The Role of Unconscious Bias

The greatest difference between the gender pay gap of 1963 and that of today is the underlying rationale for the disparity. It's no longer commonplace for employers to intentionally pay a woman less, simply because of her gender. Rather, pay inequity stems from the metrics that we use to determine success and their inherent biases. Taking the law firm example, female attorneys are less often privy to client exposure – a critical component of advancement and, ultimately, compensation.[69] Similarly, women are often excluded from informal mentorship opportunities, which deprives them of inheriting valuable books of business.[70] Outside of the law firm context, studies have shown that women executives are perceived negatively when they demonstrate stereotypically male traits. For example, a female CEO who talks disproportionately longer at a meeting than her male counterparts is seen as less competent and less suitable for leadership than a male CEO.[71] Such perceptions affect compensation decisions when companies employ evaluation metrics, such as a 360 review process, that are wrought with opportunity for such biases to intercede. It's no surprise that 360 review processes and their ilk systematically undervalue the performance of women and subsequently affect their compensation.[72] Ideally, the amended laws and regulations regarding pay equity may provide a greater opportunity for plaintiffs to challenge such disparity. At minimum, one hopes they invite employers' introspection about how such ingrained gender stereotypes ultimately lead to disparate compensation schemes with their companies.

Conclusion

It will take meaningful change in the structure of companies, businesses, industry and professional organizations to end the gender pay gap across different levels of employees. However, the companies that lead with flexibility, diversity and thoughtful talent recruitment will benefit. The new statutory legal frameworks will likely help diminish the gaps where comparative work is an issue but will not change the condition of women professionals without altering other major policy, performance and compensation practices that affect women disparately and are at the heart of discrimination. Finally, flexibility and other workplace initiatives must succeed if women and men are to succeed in the workplace. ■

1. 29 U.S.C. § 206(d).
2. N.Y. Lab. L. § 194.
3. U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage: 2015*cb16-158 (Sep. 13, 2016).
4. *Id.*
5. Am. Assoc. of Univ. Women, *The Simple Truth about the Gender Pay Gap* (Spring 2017).
6. *Id.* at 11 (finding that Hispanic and African American women have an earnings ratio of 54% and 63%, respectively; whereas, Asian American women have a higher earnings ratio of 85%).
7. *Id.* at 4.
8. U.S. Dep't of Educ., *Digest of Education Statistics*, Table 318.30 (2015), *available at* https://nces.ed.gov/programs/digest/d15/tables/dt15_318.30.asp.
9. *See* Claudia Goldin, Lawrence Katz & Ilyana Kuziemko, *The Homecoming of American College Women: The Reversal of the College Gender Pay Gap*, 20 J. of Econ. Perspectives 133 (Fall 2006).
10. Janet Adamy and Paul Overberg, *Women in Elite Jobs Face Stubborn Pay Gap*, Wall St. J. May 17, 2016, http://www.wsj.com/articles/women-in-elite-jobs-face-stubborn-pay-gap-1463502938.
11. Am. Assoc. of Univ. Women, *The Simple Truth about the Gender Pay Gap*, (Spring 2017).
12. *See* Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends and Explanations*, IZA DP No. 9656 (Jan. 2016), *available at* http://ftp.iza.org/dp9656.pdf.
13. *Id.* Whether this remains a "non-discriminatory" factor remains to be seen, as some labor economists have found that wages in an industry are lowered as women enter the field whereas wages in an industry increase when men enter it. *See* Asav Levanon, Paula England & Paul Allison, *Occupational Feminization & Pay: Assessing Casual Dynamics Using 1950-2000 U.S. Census Data*, 88(2) Social Forces J. 865 (Dec. 2009).

14. *See* Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends and Explanations*, IZA DP No. 9656 (Jan. 2016), *available at* http://ftp.iza.org/dp9656.pdf.

15. *Ryduchowski v. Port Auth. of N.Y. & N.J.*, 203 F.3d 135, 142 (2d Cir. 2000) ("[U]nlike Title VII, the EPA does not require a plaintiff to establish an employer's discriminatory intent.") (citations omitted).

16. 29 U.S.C. § 206(d).

17. *Steele v. Pelmor Labs., Inc.*, 642 F. App'x 129 (3d Cir. 2016) (failure to identify an appropriate male comparator defeated EPA claim).

18. 29 C.F.R. § 1620.9.

19. *See Jaburek v. Foxx*, 813 F.3d 626 (7th Cir. 2016) (plaintiff failed to establish *prima facie* claim under the EPA where comparators worked in different offices).

20. 29 C.F.R. § 1620.13(a).

21. 29 C.F.R. § 1620.15(a).

22. 29 C.F.R. § 1620.16(a).

23. 29 C.F.R. § 1620.17(a).

24. *See, e.g.*, *EEOC v. Port Auth. of New York & New Jersey*, 768 F.3d 247 (2d Cir. 2014) (attorneys did not perform "equal work"); *Carey v. Foley & Lardner LLP*, 577 F. App'x 573 (6th Cir. 2014) (partners in law firm did not perform "equal work").

25. *Ghirado v. Univ. of S. Calif.*, 156 F. App'x 914, 915 (9th Cir. 2005); *Lavin-McEleney v. Marist Coll.*, 239 F.3d 476, 481 (2d Cir. 2001).

26. 29 U.S.C. § 206(d)(1).

27. *Id.*

28. *See, e.g.*, *Aldrich Randolph Cent. Sch. Dist.*, 963 F.2d 520 (2d Cir. 1992); *Brinkley v. Harbour Recreation Club*, 180 F.3d 598 (4th Cir. 1999); *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833 (6th Cir. 1997); *Ledbetter v. Alltel Corp. Servs., Inc.*, 437 F.3d 717 (8th Cir. 2006); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982); *Price v. Lockheed Space Operations Co.*, 856 F.2d 1503 (11th Cir. 1988).

29. *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 697 (7th Cir. 2006) (market forces were a legitimate factor in determining salary in EPA claim); *but see Siler-Khodr v. Univ. of Tex. Health Sci. Ctr. San Antonio*, 261 F.3d 542 (5th Cir. 2001).

30. 29 U.S.C. § 216.

31. 42 U.S.C. § 1981a.

32. 29 U.S.C. §§ 216, 260.

33. 42 U.S.C. § 1981a.

34. *See* 29 U.S.C. § 216(b).

35. *Compare* 29 U.S.C. § 216(b) *with* Fed. R. Civ. P. 23.

36. N.Y. Lab. L. § 194.

37. *Cf. Brzychnalski v. Unesco, Inc.*, 35 F. Supp. 2d 351, 353 (S.D.N.Y. 1999) (class action claims for New York state wage and hour claims initiated under New York Labor Law Article 6).

38. N.Y. Lab. L. § 198(1)(a).

39. *Compare* N.Y. Lab. L. § 198(3), *with* 29 U.S.C. § 255.

40. *See* Paycheck Fairness Act, H.R.1619, 114th Cong. (2015); Paycheck Fairness Act, S. 862, 114th Cong. (2015).

41. *See, e.g.*, New York Achieve Pay Equity Law, codified at N.Y. Lab. L. § 194; California Fair Pay Act, codified at Cal Lab. Code § 1197.5; Maryland Equal Pay for Equal Work Act, codified at Md. Code Lab. & Empl. § 3-301–3-308; Massachusetts Act to Establish Pay Equity, 2016 Mass. Acts ch. 177 (effective July 1, 2018).

42. N.Y. Lab. L. § 194(3); Md. Code Lab. & Empl. § 3-304(b)(2).

43. *See* Cal. Lab. Code § 1197.5(a).

44. *Id.*

45. 2016 Mass. Acts ch. 177 § 2(d).

46. Md. Code Lab. & Empl. § 3-304(b)(1)(i).

47. *See* N.Y. Lab. L. § 194(1)(d)(ii).

48. Cal Lab. Code § 1197.5(a)(3); Md. Code Lab. & Empl. § 3-304(c)(7)(iii).

49. N.Y. Lab. L. § 194(1)(d)(ii).

50. 2016 Mass. Acts ch. 177 § 2(d).

51. N.Y. Lab. L. § 198(1-b).

52. Cal Lab. Code § 1197.5(b).

53. N.Y. Lab. L. § 194(4); Md. Code Lab. & Empl. § 3-304.1(a); Cal Lab. Code § 1197.5(k); 2016 Mass. Acts ch. 177 § 2(c)(3).

54. 2016 Mass. Acts ch. 177 § 2(c)(1)-(2).

55. Int. 1253-2016 (Introduced Aug. 16, 2016). On Nov. 4, 2016, Mayor de Blasio signed an exective order prohibiting New York City agencies from asking job applicants about their salary history.

56. 81 Fed. Reg. 45479–45496

57. *Id.* at 45485-87.

58. *Id.* at 45487-89.

59. Janet Adamy and Paul Overberg, *Women in Elite Jobs Face Stubborn Pay Gap*, Wall St. J. May 17, 2016, http://www.wsj.com/articles/women-in-elite-jobs-face-stubborn-pay-gap-1463502938.

60. *Id.*

61. *Id.*

62. *Id.*

63. The NAWL Annual National Survey of Retention and Promotion of Women in Law Firms, sponsored by the Nat'l Assoc. of Women Lawyers, *available at* http://www.nawl.org/p/cm/fid=506 (hereinafter "NAWL Survey"); *see also* Jeffrey A. Lowe, *2016 Partner Compensation Survey*, Major, Lindsey & Africa.

64. Wendi S. Lazar, Stephanie A. Scharf & Michele Coleman Mayes, *Building Momentum for the Pay Equity Movement in BigLaw*, Law 360 (Dec. 21, 2016), *available at* https://www.law360.com/legalindustry/articles/874605/building-momentum-for-the-pay-equity-movement-in-biglaw.

65. ABA, Comm'n on Women in the Profession, *A Current Glance at Women in the Law* (Jan. 2017), *available at* http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_january2017.authcheckdam.pdf.

66. *See, e.g.*, Lauren Rikleen, *Closing the Pay Gap: A Road Map for Achieving Gender Pay Equity in Law Firm Partner Compensation* (2013), *available at* https://www.americanbar.org/content/dam/aba/administrative/women/closing_the_gap.authcheckdam.pdf (hereinafter "Closing the Gap"); NAWL Survey, *supra*, note 63.

67. Joan C. Williams and Veta T. Richardson, *New Millennium, Same Glass Ceiling? The Impact of Law Firm Compensation Systems on Women*, 42-43 (July 2010), *available at* http://worklifelaw.org/Publications/SameGlassCeiling.pdf.

68. *See, e.g.*, *Ribeiro v. Sedgwick LLP*, 2016 WL 6473238 (N.D. Cal. Aug. 10, 2016); *Campbell v. Chadbourne & Parke LLP*, No. 16 Civ. 6832, (S.D.N.Y., filed Aug. 31, 2016).

69. Lizzy McLellan, *Law Firms a 'Petri Dish' for Bias, Gender Inequity*, Law.com (Oct. 25, 2016), *available at* http://www.law.com/sites/almstaff/2016/10/25/law-firms-a-petri-dish-for-bias-gender-inequity.

70. *Id.*

71. *Closing the Pay Gap*, *supra*, note 66, at 19-20.

72. Adam. T. Klein and Nantiya Ruan, *Title VII Class Certification: Issue Certification and Targeting Specific Employment Practices Post* Dukes *and* Comcast (Apr. 2015), *available at* http://www.americanbar.org/content/dam/aba/events/labor_law/2015/april/eeo/klein_title7.authcheckdam.pdf.

BY DAVID PAUL HOROWITZ

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It Depends On What Your Definition of "or" Is (Part II)

Introduction

Last month's column began a discussion of the Court of Appeals decision in *Artibee v. Home Place Corp.*,[1] a four-two decision[2] with the majority decision by Judge Stein and dissent by Judge Abdus-Salaam.

At issue in *Artibee* was whether CPLR 1601 permits a jury in a Supreme Court action to apportion liability on the verdict sheet in a personal injury action against a non-party, the State of New York. The opening paragraph of Judge Stein's opinion explained that it was not:

> This appeal presents us with the question of whether the factfinder in Supreme Court may apportion fault to the State under CPLR 1601 (1) when a plaintiff claims that both the State and a private party are liable for noneconomic losses in a personal injury action. We conclude that such apportionment is not permitted and, therefore, reverse.[3]

CPLR 1601(1)

Article 16 was added to the CPLR in 1986 as part of a package of "tort reform."[4] Consisting of four sections,[5] CPLR 1601(1)[6] provides:

> 1601. Limited liability of persons jointly liable
>
> 1. Notwithstanding any other provision of law, when a verdict or decision in an action or claim for personal injury is determined in favor of a claimant in an action involving two or more tortfeasors jointly liable or in a claim against the state and the liability of a defendant is found to be fifty percent or less of the total liability assigned to all persons liable, the liability of such defendant to the claimant for non-economic loss shall not exceed that defendant's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic loss; provided, however that the culpable conduct of any person not a party to the action shall not be considered in determining any equitable share herein if the claimant proves that with due diligence he or she was unable to obtain jurisdiction over such person in said action (or in a claim against the state, in a court of this state); and further provided that the culpable conduct of any person shall not be considered in determining any equitable share herein to the extent that action against such person is barred because the claimant has not sustained a "grave injury" as defined in section eleven of the workers' compensation law.

In *Rangolan v. County of Nassau*,[7] the Court of Appeals explained:

> CPLR article 16 modifies the common-law rule of joint and several liability by limiting a joint tortfeasor's liability in certain circumstances (citation omitted). Prior to article 16's enactment, a joint tortfeasor could be held liable for the entire judgment, regardless of its share of culpability . . .
>
> * * *
>
> Article 16, as enacted, limits a joint tortfeasor's liability for noneconomic losses to its proportionate share, provided that it is 50% or less at fault (citation omitted). While article 16 was intended to remedy the inequities created by joint and several liability on low-fault, "deep pocket" defendants, it is nonetheless subject to various exceptions that preserve the common-law rule.

The Decision

The majority first addressed the portion of CPLR 1601(1) permitting apportionment against a private defendant, and the omission of concomitant language permitting apportionment in the Supreme Court,[8] which the plaintiff and State argued demonstrated the legislature's intent not to permit such apportionment:

> The statutory language permitting the State to seek apportionment in the Court of Claims against a private defendant if the claimant could have sued that defendant in any court of this State was specifically requested by the office of the Attorney General (citation omitted). Pursuant to that language, as long as a claimant in the Court of Claims could have commenced an action against a private tortfeasor in *any* court in the State of New York, then the tortfeasor's culpable conduct can be considered by the Court of Claims in determining the State's equitable share of the total liability (citation omitted). The statute does not, however, contain similar, express enabling language to allow apportionment against the state in a Supreme Court action (citation omitted).

The majority found further support in the fact that CPLR 1601(1) "provides that a nonparty tortfeasor's relative culpability must not be considered in apportioning fault 'if the claimant . . . with due diligence . . . was unable to obtain *jurisdiction over such person in said action*'. The meaning of that language is at the heart of the dispute herein (emphasis added)."[9]

Quoting the Court's seminal decision in *Lacks v. Lacks*[10] that "[j]urisdiction is a word of elastic, diverse, and disparate meanings," and noting that legislative history was largely silent on the meaning, the majority rejected, as a matter strict construction of the statute, that "jurisdiction" in CPLR 1601(1) was limited to personal jurisdiction. Furthermore:

> Moreover, interpreting the word "jurisdiction" as limited to "personal jurisdiction" effectively renders meaningless the phrase "in said action []or in a claim against the state" in CPLR 1601 (1). "[T]he inclusion of the [phrase] . . . is a strong indication that the term 'jurisdiction' encompasses both subject matter and personal jurisdiction" (citation omitted). On the other hand, if that phrase were eliminated, the statute would prohibit apportionment only "if the claimant prove[d] that with due diligence he or she was unable to obtain jurisdiction over such person . . . in a court of this state" (citation and comment omitted). Thus, if the statute had been so drafted, apportionment would be unauthorized only if the claimant proved that personal jurisdiction could not be obtained because the defendant "is not a domiciliary of New York and no basis for extraterritorial (i.e., longarm) jurisdiction is available against [the defendant]" (citation omitted). Inasmuch as a claimant can obtain jurisdiction over the State in a court of this State — the Court of Claims — apportionment against the State in Supreme Court would be permitted. However, judicially excising language to reach the result that defendant urges would contravene the "'accepted rule that all parts of a statute are intended to be given effect and that a statutory construction which renders one part meaningless should be avoided'" (citations omitted).[11]

Finally, the Court noted that "[w]hile the statute was intended to '"remedy the inequities created by joint and several liability on low-fault, deep pocket defendants"' (citation omitted), the driving purpose behind that intent was to alleviate a liability insurance crisis (citation omitted)."[12]

The Dissent

In dissent, Judge Abdus-Salaam concisely outlined her basis for dissenting and voting to uphold the Third Department decision:

> The majority's interpretation of CPLR 1601 is a strained reading of the statutory language and contravenes the legislative goal of limiting the liability of any and all tortfeasors who are responsible for 50% or less of the total liability. The majority's analysis gives the State a preferred status over other tortfeasors, despite no indication that the legislature intended such a result, and notwithstanding that the plain reading of the text indicates the legislature simply wanted to create parallel rights of apportionment for state tortfeasors

> and non-state tortfeasors. Furthermore, the majority's holding creates anomalous situations that I do not believe were intended by the legislature: 1) a defendant in Supreme Court cannot shift liability to the non-party State, but a State defendant in the Court of Claims can shift liability to a private party; and 2) a plaintiff in the Court of Claims will face apportionment with the State pointing to an empty chair, but a plaintiff in the Supreme Court will not face apportionment where the empty chair is the State. Accordingly, I respectfully dissent, and would affirm the Appellate Division's order.

Acknowledging the same rules of statutory construction as the majority, Judge Abdus-Salaam quoted the critical language from CPLR 1601(1), emphasizing the word "or:"[13]

> Notwithstanding any other provision of law, when a verdict or a decision in an action or claim for personal injury is determined in favor of a claimant in an action involving two or more tortfeasors jointly liable *or* in a claim against the State and the liability of a defendant is found to be fifty percent or less of the total liability assigned to all persons liable, the liability of such defendant to the claimant for non-economic loss shall not exceed the defendant's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic loss (emphasis added).

The word "or" meant that the "legislature intended to address alternative situations:"

> Thus, the general provision applies alternatively — equivalently, to state tortfeasors or non-state tortfeasors. In other words, whether in Supreme Court or the Court of Claims, in a personal injury action involving jointly liable tortfeasors, where the liability of a tortfeasor is found to be fifty percent or less of the total liability, that tortfeasor's monetary share of the damages may not be greater than the share of liability assigned to that tortfeasor.

Another reason for reaching this result was that:

> [I]f the legislature had actually wanted to preclude a private tortfeasor from seeking apportionment against the State in Supreme Court, in contravention of the overall purpose of CPLR 1601 which is to limit the liability of low-fault tortfeasors to only their actual share of responsibility (citation omitted), it could have simply specified that a joint tortfeasor cannot seek apportionment against the State. It is unlikely that the legislature would carve out such an important exclusion without express language indicating its intent. Yet, the majority concludes that the apportionment rule, vis-a-vis state tortfeasors, is the polar opposite in Supreme Court than it is in the Court of Claims.

Judge Abdus-Salaam outlined the basis for her disagreement with the interpretation of "jurisdiction" by the majority:

> [T]he majority veers off course when it applies the broadest possible interpretation of that term, without giving due weight to the context in which it is used. I do not quarrel with the majority's point that in CPLR 1601, the legislature did not expressly specify whether it was referring to personal or subject matter jurisdiction. However, I disagree with the conclusion that because the legislature did not so specify, it must have been referring to either personal or subject matter jurisdiction. The statute's requirement that the plaintiff exercise due diligence to obtain jurisdiction over a tortfeasor cannot possibly refer to *a court's subject matter jurisdiction*, where the plaintiff's due diligence has no bearing because a plaintiff can do nothing to affect a court's subject matter jurisdiction over the parties' claims. Instead, the phrase "due diligence" only makes sense in relation to personal jurisdiction, where a plaintiff may or may not exercise due diligence (citation omitted). Similarly, the phrase "over such person" makes sense when "jurisdiction" is read as "personal jurisdiction," as the phrase is meaningless in the context of subject matter jurisdiction, which refers to the authority of a court to hear particular claims. Hence, the reference to jurisdiction in the statute logically refers only to personal jurisdiction.

Summing up the dissent's analysis, Judge Abdus-Salaam concluded:

> [G]iven the purpose of CPLR 1601, which is to limit the liability of "low-fault, 'deep pocket' defendants" (*Rangolan* at 46 [2001]), there is no reason why the State should be permitted to demonstrate the culpability of non-parties in the Court of Claims but defendants in Supreme Court should not have the parallel right to demonstrate the State's culpability. Contrary to the majority's conclusion, the language of the statute does not require this disparate treatment of state tortfeasors and private tortfeasors, but instead, calls for comparable treatment. The majority's construction of the statute does not promote equity (citation omitted); it promotes inequity, by elevating the rights of plaintiffs in Supreme Court over those of plaintiffs in the Court of Claims, and the rights of state tortfeasors in the Court of Claims over those of private tortfeasors in Supreme Court.[14]

Conclusion

Whether you agree with the reasoning of the majority or the dissent, post-*Artibee* the mechanics of reconciling the results in parallel proceedings in the Court of Claims and Supreme Court are clear.

In the Court of Claims action, apportionment against the absent

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ATTORNEY PROFESSIONALISM FORUM

Dear Forum:

Although the majority of my practice is in litigation, I recently represented a longtime client in negotiating the purchase of real property with a number of environmental regulatory issues. After entering into the contract, however, a dispute arose when a third party claimed it was entitled to purchase the property. They commenced an action claiming irregularities with the contract and closing and I appeared for my client in the litigation. The plaintiff issued a subpoena to me regarding the transaction – demanding both documents and a deposition – and is moving to have me disqualified as counsel. I don't think the plaintiff's complaint has much merit and that the subpoena may be a litigation tactic to frustrate my client.

Shortly after receiving the subpoena and motion to disqualify, I also received a request to submit to a voluntary interview with an environmental agency investigating a claim alleged against my client with respect to the sale of the property. While the agency hasn't served an administrative complaint against my client yet, based upon my knowledge of the transaction and property, I think there is a strong possibility that an administrative complaint may be filed after their investigation is complete.

As an attorney in the litigation, can the other side subpoena me to testify about the transaction? Isn't my involvement in the transaction protected by an attorney-client privilege? If the court requires me to respond to the subpoena and appear at the deposition, will I also have to be disqualified as counsel? If I am disqualified, may someone from my firm step in to continue representing my client in the litigation? This client is very comfortable with our firm and we are the only attorneys they have had for many years.

If I appear for the voluntary administrative interview, will that create a basis for the agency to later seek to have me disqualified if an administrative complaint is filed?

Going forward, if I do transactional work in the future, are there any actions I should take to avoid disqualification motions and becoming a potential fact witness?

Sincerely,
Ina Jam

Dear Ina Jam:

The first issue you need to tackle is whether the documents and testimony at issue are protected by the attorney-client privilege. In a recent decision, *Vanderbilt Brookland LLC v. Vanderbilt Myrtle Inc.*, Index No. 500522/14, (Sup. Ct., Kings Co. Dec. 23, 2016) (Knipel, J.), the court grappled with a similar situation. In *Vanderbilt*, an attorney, acting as a corporate representative of her client, negotiated and entered into a contract to purchase certain real property. *Id.* at 7. After entering into the contract, the buyer then assigned the contract to another party which attempted to purchase the property. *Id.* at 2–3. The plaintiff, a third-party beneficiary to the contract (which agreed to be bound by the original contract), then questioned the validity of the assignment and whether the assignee was a good faith purchaser. *Id.* at 5. The plaintiff subpoenaed the original buyer's attorney seeking documents regarding the communications between the attorney and the title company. *Id.* at 4. When the attorney did not respond to the subpoena, plaintiff moved to compel discovery and disqualify counsel. *Id.* at 1–2.

The court ruled that the disclosure sought was not protected by the attorney-client privilege because "[i]n order to make a valid claim of privilege, it must be shown that the information sought to be protected from disclosure was a confidential communication made to the attorney for the purpose of obtaining legal advice or services." *Id.* at 13, citing *North State Autobahn v. Progressive Ins. Group*, 84 A.D.3d 1329, 924 N.Y.S.2d 295 (2d Dep't 2011), quoting *Priest v. Hennessy*, 51 N.Y.2d 62, 69, 431 N.Y.S.2d 511 (1980). Further, documents that are not primarily of a legal character, and address non-legal concerns, are not privileged. *See Vanderbilt* at 13, citing *Bertalo's Rest. v. Exch. Ins. Co.*, 240 A.D.2d 452, 454, 658 N.Y.S.2d 656 (2d Dep't 1997), *appeal dismissed*, 91 N.Y.2d 848, 667 N.Y.S.2d 683 (1997). Therefore, the court held that any of the attorney's *business transaction* communications, conducted in her capacity as a corporate representative of her client, were not protected by the attorney-client privilege. *Id.* at 14. In other words, plaintiff was entitled to disclosure of the buyer's attorney's communications with the title company and the seller.

The case teaches that when responding to a subpoena and deposition demand and determining whether the attorney-client privilege applies, you must first consider your role in the transaction. In other words, were you giving legal advice or were you simply acting as a negotiator on the client's behalf? If you were giving legal advice to your client with respect to the regulatory issues implicated by the terms of the sale, you have a strong basis for asserting the attorney-client privilege as to those communications. On the other hand, if you were involved in the actual negotiations and closing of the purchase and sale with the seller, your

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involvement on the business side of the transaction and communications with the seller would not be protected by the attorney-client privilege.

If you disclosed your regulatory analysis with the seller or seller's attorney, those communications and the analysis are unlikely to be protected by the attorney client-privilege even if the buyer and seller were working together toward a common goal of complying with statutory regulations. The Court of Appeals in *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 36 N.Y.S.3d 838 (2016), recently addressed this issue and limited the scope of the common-interest privilege, an exception to the general rule that disclosure to a third party constitutes a waiver of the attorney-client privilege, to situations where 1) the parties share a common interest, 2) the communications are made in furtherance of the common interest and 3) the communications relate to a pending or reasonably anticipated litigation. *Id.* at 620. Accordingly, if your client and the seller were merely aware of regulatory issues that needed to be addressed as part of completing the transaction, but did not reasonably anticipate litigation concerning those issues, the common-interest privilege is unlikely to apply to any of your communications with the seller or seller's attorney and any disclosure of your analysis would likely constitute a waiver of the attorney work product and attorney-client privilege.

From the details you have given, you do not appear to have a sufficient basis to rely solely on the attorney-client privilege to resist complying with the subpoena and deposition. Unless you are able to demonstrate that the documents and information sought in the subpoena are not material and necessary to the action, as is required under CPLR 3101(a), or that the plaintiff's claims should be dismissed in their entirety before completing discovery, you will need to respond to the subpoena and be deposed.

That gets us to the next question, should you be disqualified? Whether you may continue to appear for your client before the court, and whether the plaintiff has any basis for your disqualification as counsel, turns on the application of Rule 3.7 of the New York Rules of Professional Conduct (RPC), also known as the Advocate-Witness Rule:

> (a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:
>
> (1) the testimony relates solely to an uncontested issue;
>
> (2) the testimony relates solely to the nature and value of legal services rendered in the matter;
>
> (3) disqualification of the lawyer would work substantial hardship on the client;
>
> (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or
>
> (5) the testimony is authorized by the tribunal.
>
> (b) A lawyer may not act as advocate before a tribunal in a matter if:
>
> (1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or
>
> (2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

Telling a litigant that he or she must change counsel is not a trivial matter. An attorney's disqualification "rests within the sound discretion of the trial court." *Vanderbilt* at 16, quoting *Bajohr v. Berg*, 143 A.D.3d 849, 39 N.Y.S.3d 241 (2d Dep't 2016). The right to select counsel is a valued right, which means that someone seeking disqualification must satisfy a heavy burden to demonstrate that disqualification is warranted. *See Vanderbilt* at 16. The court in *Vanderbilt* also noted that "[d]isqualification is required only where the testimony by the attorney is considered necessary and prejudicial to plaintiffs' interests." *Id.* at 17, quoting *Ullman-Schneider v. Lacher & Lovell-Taylor PC*, 110 A.D.3d 469, 469–70, 973 N.Y.S.2d 57 (1st Dep't 2013).

Professor Roy Simon identifies three public policy purposes for the Advocate-Witness Rule:

1. avoid confusion on the part of the fact finder;
2. minimize prejudice to adversaries; and
3. avert conflicts between attorney and client.

Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1207 (2016 ed.).

Even before you consider opposing the disqualification motion, you should consider whether your testimony may be adverse to your client and therefore create a conflict of interest with your client. Comment 6 to RPC 3.7 addresses this issue:

> In determining whether it is permissible to act as advocate before a tribunal in which the lawyer will be a witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rule 1.7 or Rule 1.9. . . . Determining whether such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent.

RPC 3.7, Comment 6. Comment 4 to RPC 3.7 also provides guidance in determining whether disqualification is necessary:

> Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probably tenor of the lawyer's testimony and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client.

RPC 3.7, Comment 4. In *Vanderbilt*, the court disqualified the buyer's attorney because she "participated in negotiating the subject transactions and is likely to be a witness with respect to significant factual issues in [the] litigation" that were "hotly contested." *Vanderbilt* at 17–18.

You need to consider the position your adversary is taking in the litigation, whether there are contested factual issues about which you have personal knowledge, and whether your testimony would be adverse to your client's position. If your testimony would solely involve an uncontested factual issue that is consistent with your client's position, disqualification would not be necessary under RPC 3.7(a)(1). *See In re Florio*, 39 Misc. 3d 1225(A) (Sur. Ct., Nassau Co. 2013) (McCarty III, Surr.) ("An attorney should not be disqualified where his testimony relates solely to an uncontested issue."). If your testimony relates to a contested issue, however, a court may disqualify you unless one of the other exceptions found in RPC 3.7(2)–(5) are applicable.

The fact that you may be disqualified under 3.7(a), however, does not mean that you would be prevented from continuing to represent your client *outside* the courtroom on the matter – a point that is often overlooked when one seeks the disqualification of another lawyer. Professor Simon notes:

> Even where no exception [to the advocate-witness rule] applies, a lawyer may continue to work on the case in any capacity *outside the courtroom*. Thus, even if Rule 3.7(a) compels a lawyer to withdraw as counsel of record before a court or administrative agency, the lawyer may continue to advise the client's own courtroom advocate – including another lawyer in the disqualified lawyer's own firm – and may continue to counsel the client, to investigate the facts, research the law, to assist the advocate in preparing for trial, and otherwise work on the matter outside the courtroom.

Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1216. Therefore, even if you are disqualified as counsel of record based on your anticipated testimony, you may continue to advise your client in preparing motions, conducting legal research, and trial preparation absent any conflict of interest. *See id.* at 1216–17; RPC 3.7, Comment 5.

There are times when another lawyer from your firm would be permitted to substitute as counsel in the litigation if you are disqualified. As noted in Comment 5 to RPC 3.7, "[t]he tribunal is not likely to be misled when a lawyer acts as advocate before a tribunal in a matter in which another lawyer in the lawyer's firm testifies as a witness." RPC 3.7, Comment 5. If, however, you have a conflict of interest or you will be called as a witness on a significant issue for another party which can be prejudicial to your client, then your firm may not be able to continue representing the client under RPC 3.7(b). In *Murray v. Metro. Life Ins. Co.*, 583 F.3d 173 (2d Cir. 2009), the Second Circuit defined "prejudice" to mean testimony that is "sufficiently adverse to the factual assertions or account of events offered on behalf of the client, such that the bar or the client might have an interest in the lawyer's independence in discrediting that testimony." *Id.* at 178, quoting *Lamborn v. Dittmer*, 873 F.2d 522, 531, (2d Cir. 1989). As Professor Simon notes, "[w]hether particular testimony meets that standard will depend on all of the facts and circumstances." Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1220.

If you consider all of the facts and circumstances of your case, and determine that your firm will have a conflict of interest with your client, or that you will give testimony adverse to your client when you are called as a witness by another party, another attorney from your firm will not be permitted to take over the representation. *See* RPC 3.7(b). If this is the case, you should promptly advise your client that her or she will need to obtain new counsel.

With respect to the voluntary environmental agency interview, the New York State Bar Association (NYSBA) Committee on Professional Ethics addressed a similar issue in NYSBA Comm. on Prof'l Ethics, Op. 1045 (2015). In that opinion, an in-house counsel was asked to submit to a voluntary interview by an administrative agency investigating a charge by a third party of wrongdoing by the client. The interview would address a meeting between the client and a third party in which the in-house counsel was present and would not require the attorney to disclose confidential information. *See* NYSBA Comm. on Prof'l Ethics, Op. 1045 (2015). The committee opined that although RPC 1.0(w) defines "tribunal" to include an administrative agency acting in an adjudicative capacity, RPC 3.7(a) was not yet implicated because the agency was only exercising its investigative function. *See id.* The committee further noted, however, that if the administrative agency did bring formal charges against the client, then the in-house counsel would need to consider whether he was likely to be a witness on a significant issue of fact under RPC 3.7 in determining whether he could advocate before the tribunal. *See id.*

As long as you are not divulging your client's confidential information in the interview, as is prohibited under RPC 1.6, your participation in the voluntary administrative agency meeting is permissible without consideration of RPC 3.7. We do not believe that your participation in the interview would create any additional basis for your disqualification if an administrative complaint is ultimately filed. If you choose not to participate in the interview, the agency could still call you as a witness which would still require the same RPC 3.7 analysis based on your expected testimony of the underlying facts. Under such circumstances, the scope of the agency's questioning may be even broader due to its lack of information from you and could possibly increase the likelihood of disqualification under a RPC 3.7 analysis.

In summary, when performing transactional work for your clients, it can be difficult to anticipate which transactions will result in litigation.

If you sense a higher likelihood of litigation on the horizon, and that your skills as a litigator may be more beneficial to your client down the road than your involvement in the transaction, you may want to consider having another attorney from your firm represent your client in the transaction. The more directly you are involved with the business side negotiations of the transaction, the more likely you will become a fact witness if litigation arises. Fortunately, the right to select your own counsel is highly valued and any restrictions by the court are carefully scrutinized. Even if you are ultimately disqualified because you are a likely witness in the dispute, as noted above, in many cases it does not mean that you are prohibited from advising your client and otherwise contributing in submissions to the court. You cannot simply appear.

Sincerely,

The Forum by
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I keep hearing stories of hackers breaking into the computer networks of law firms to steal confidential customer information. I am the managing partner of a 50-attorney firm and I must say this is keeping me up at night. I would appreciate some guidance on what a law firm's ethical obligations are with respect to guarding against the consequences of a cyberattack. Do we have any obligations with respect to the various vendors we hire?

Sincerely,

Sleepless in New York

BURDEN OF PROOF

CONTINUED FROM PAGE 63

private defendant is permitted. However, the current practice of Court of Claims judges to take account of the reduction in Supreme Court to account for the State's negligence because "as a practical matter, Court of Claims judges are 'attentive' to the reduction of a plaintiff's Supreme Court verdict to account for the State's supposed negligence and are less likely under those circumstances to accept the State's argument that it is not liable at all,"[15] will be extinguished since there will no longer be apportionment against the State in the Supreme Court actions.

In the Supreme Court action, apportionment against the State is not permitted, and the private defendant will have to bring a claim for contribution against the State in the Court of Claims.[16]

We reconvene in June, so have a wonderful Memorial Day weekend and start to the summer.

1. 2017 N.Y. Slip Op. 01145 (Feb. 14, 2017).
2. Judge Wilson took no part.
3. 2017 N.Y. Slip Op. 01145 at *1.
4. CPLR 1601(1) was amended in 1996 to add the final sentence addressing apportionment in actions where a third-party action could not be commenced because of the Grave Injury amendment to the Workers' Compensation Law.
5. The other three sections are CPLR 1600 "Definitions," CPLR 1602 "Application," and CPLR 1603 "Burdens of Proof."
6. CPLR 1601(2) provides: "Nothing in this section shall be construed to affect or impair any right of a tortfeasor under section 15-108 of the general obligations law."
7. 96 N.Y.2d 42, 725 N.Y.S.2d 611 (2001).
8. The State concedes that any finding of culpability against it in Supreme Court is not binding on the Court of Claims, but notes that, as a practical matter, Court of Claims judges are "attentive" to the reduction of a plaintiff's Supreme Court verdict to account for the State's supposed negligence and are less likely under those circumstances to accept the State's argument that it is not liable at all. 2017 N.Y. Slip Op. 01145 at n. 1.
9. 2017 N.Y. Slip Op. 01145 at *3.
10. 41 N.Y.2d 71, 74, 390 N.Y.S.2d 875 (1976).
11. 2017 N.Y. Slip Op. 01145 at *5–6.
12. *Id*.
13. The majority opinion noted it did not ignore the word "or:" "We do not ignore the meaning of the word "or" in the statute (citation omitted), but recognize that the disparate language in CPLR 1601 regarding "action[s]," on the one hand, and "claim[s] against the state," on the other, has disparate implications for private tortfeasors, as opposed to state tortfeasors."
14. 2017 N.Y. Slip Op. 01145 at *11.
15. *Id*.
16. *See, e.g., Bay Ridge Air Rights, Inc. v. State*, 44 N.Y.2d 49, 404 N.Y.S.2d 73 (1978). *Bay Ridge* involved the date of accrual of a claim against the State for contribution. The case history is notable for the fact that the Court of Claims dismissed the claim as untimely, whereas, on appeal, the Appellate Division modified the dismissal to be without prejudice since it concluded the action for contribution was premature. The Court of Appeals agreed that the action was premature because a claim for contribution accrued on the date payment is made.

"Too much going on in the world for us to hibernate."

BY LUKAS M. HOROWITZ

Lukas M. Horowitz, Albany Law School Class of 2019, graduated from Hobart William Smith in 2014 with a B.A. in history and a minor in political science and Russian area studies. Following graduation, he worked for two years as a legal assistant at Gibson, McAskill & Crosby, LLP, in Buffalo, New York, and with the New York Academy of Trial Lawyers hosting CLE programs. Lukas can be reached at Lukas.horowitz@gmail.com.

"Hot Bench" and Quick Wits

In recognition of this month's theme of Women in the Law, I want to take a brief moment to illustrate Albany Law School's dedication to providing equal opportunities in the pursuit of a legal education. The first woman to graduate from the law school was Kate Stoneman in 1898. Not only was she the first woman to graduate from Albany Law, but she was also the first woman to pass *and* be accepted to the bar, becoming New York's first woman lawyer. While numbers did not soar after Ms. Stoneman's graduation, female enrollment did increase over the years. Today, the school's current enrollment sits at an even 50/50 ratio. It is a privilege to attend a school that demonstrates a progressive attitude toward enabling equal opportunity, something that has long been denied to women of the law. Cheers!

Moot Court

A requirement for my lawyering class was to volunteer for one of the multiple moot court events taking place at the law school. Had this not been a requirement, I do not think I would have made the effort to participate. The most stimulating aspect of moot court was the "hot bench." The conduct of this bench was simultaneously terrifying and exhilarating. Every sentence produced by the competitors was dissected, holding each person accountable for every word. It is hard to say who spent more time speaking during those long, yet brief 12 minutes. What a learning experience! While I was not envious of the participants bearing the continuous onslaught of questions by the judges, I quickly learned the importance of not only the ability to articulate an argument, but also the need, while being questioned about every point being made, to "keep calm and carry on." It isn't enough to have a battle plan. It is imperative to know every fact of the case through and through. Think plan B and C is enough? Better learn your ABCs, because you never know what is going to be thrown at you during an oral argument.

> It is imperative to know every fact of the case through and through.

In the same stroke as moot court, this month, the N.Y. Court of Appeals visited the law school, holding oral arguments for an entire afternoon. It was a real treat to witness one of the most prestigious courts in the United States in action. The day after the Court visited, my lawyering class held a discussion about the events of the prior day, what students thought about the experience, etc. From that discussion, a very interesting point jumped out at me. During one of the oral arguments, one of the judges had asked the attorney speaking, roughly three quarters of the way through her argument, if she, "had anything more to say." To this, the attorney sat down, concluding her argument. It seemed strange at the time, but when this was brought up in class our professor explained that this question from the judge, depending on how you interpreted it, was a signal that the judge had heard enough from the attorney. Whether this was because she had made her point glaringly clear, or because the judge had come to a conclusion and needed no further persuasion, we have to wait and see. Given my nonexistent courtroom experience, I would never have thought that the question posed could have been a signal. I suppose there really are some things that a book just can't teach you.

You will all be heartbroken to know, I am sure, that I will not being bumming by the beach this summer. I have been afforded two exceptional opportunities. The first is a brief clerkship with a Federal Magistrate in White Plains. I will spend roughly a month there before embarking on my next internship. On June 14, I will begin living in the city of Haifa, located in northern Israel, until August. Here, I will be working with a law firm that, funny enough, keeps with the theme of this month's issue, in that they work to assist women in Haifa with the various and many legal issues that come about. I cannot express enough how excited I am for both of these summer internships and look forward to a break, even though brief, from the grind my fellow students and I call law school. ■

Continued from Page 80

And make their edits. Pick your writing battles with supervisors carefully: Fight over big things only, and have a good authority on your side to support your position.

Writing to adversaries requires firmness — and also civility and professionalism. The goal with adversaries is not to let your clients' acrimony affect your relationship. Thus, strive mightily, but afterward eat and drink as friends.[12]

Understanding Your Time Frame: When

Time management is essential to good legal writing. You must deliver your product on time. For some court documents, time is of the essence. If you don't file a document within the required time frame, you'll jeopardize your client's case and face malpractice. Remember your deadline, and make a schedule that allows you to meet the deadline. Assign reasonable time to each stage of your writing; allow more time for the complicated parts of the writing.

When you first get a writing assignment, it might seem unwieldy and intimidating. The trick is to break down your writing into stages and do smaller tasks in each stage to make the process less overwhelming.[13]

Allocate your time between researching, composing, and editing. If you're producing a first draft from scratch, devote no more than 30% of your time to researching and up to 40% to composing. Spend the remaining 30% editing.[14]

Understanding Format and Length: How

Different forms of legal writing have different formatting requirements. If you're working for a law firm, you may get a template you're required to follow. Otherwise, beware of boilerplate, especially one-size-fits-all boilerplate created years ago. If you're writing legal documents for a court, always check the court's rules.

You must know the maximum word or page limit. Is your maximum number of words or pages fixed or flexible? If it's fixed, roughly how many words would you assign to each part of your legal writing? If it isn't fixed, do you know how much you may write? Refer to previous, similar documents of similar nature to get an idea of how much you can write and what you must include, taking into account your document's goals and requirements.

2. Gathering Your Materials and Researching

Once you're clear on your document's purpose, gather the materials you need to write. You'll likely gather facts and do legal research.

Gathering Factual Information

Some types of legal writing require applying rules to fact, but not all do. If factual information is relevant to your document, gather information by interviewing witnesses, conducting a survey, or relying on the facts in other documents. If you decide to interview, consider the questions and learn how to interview efficiently.[15] If you plan to do a survey, you might need to design your survey questionnaires and know how to interpret and analyze the results. If you rely on factual information in other documents, verify facts from reliable sources.

Deciding the Scope of Research

Before you start researching, consider where to find the information you're looking for. Some sources you may want to look into are journals, books, treatises, and caselaw. Narrow the scope of cases and jurisdiction.

The scope of your research can constantly change depending on other cases, facts, or practical advice you find or are given. When you get deep into the research, you might find it necessary to research other related topics or other factors that might affect your case.

Taking Research Notes

You'll eventually need to gather your research and write. Taking notes while you're researching will make everything easier, faster, and more accurate. Write down key points of a journal article you read, and make a reference note of the sources. You must cite your sources for their words and ideas.[16] Taking notes will help you organize your research materials without going back to check your sources a second time. Doing so also avoids plagiarism.

3. Analyzing and Thinking

The process of legal writing involves analyzing and thinking about your subject. You might not have a conclusion ready before you write, but you can form your own opinion throughout the researching process. You might agree or disagree with the materials you read. You might or might not apply law to the facts of your case. Either way, evaluate critically the research you find, a difficult task with American law, in that primary and secondary authorities are often contradictory, vague, and sometimes unknown. Competent legal writing relies on proper training in legal research, the ability to identify governing law, one's skill at arguing correct authority, and applying law to fact.[17]

You'll know your research is done when your keep seeing the same authorities. But don't wait to find and understand every piece of research. The goal is to know everything when you're done writing, not before you start writing.

4. Organizing the Structure

Now that you understand your goal and have research materials on hand and your analysis in mind, brainstorm on how you'll organize your writing. Analyzing and writing require a good structure that logically connects the introduction to the legal argument and finally to the conclusion.

The organization of your legal writing doesn't necessarily mirror the process of your thinking while you're doing your research. Your research process could be disorganized, but when you approach the writing stage, present your thoughts in an organized way to allow readers to follow you easily. Appropriate organization makes your analysis more easily understandable to readers. It'll lead your readers through the steps of your reasoning.[18]

Some kinds of legal writing — the discussion section of an objective memorandum or the argument section of a brief, for instance — have particular struc-

tures. The structures include devices like IRAC (Issue, Rule, Application and Conclusion) or CRARC (Conclusion, Rule, Analysis, Rebuttal and Refutation, and Conclusion). If that's the case, use a special structure to organize your materials. Your structure depends on the purpose of your writing. If you want to persuade your readers, start with your strongest arguments supported by your strongest authorities. To inform others how you've concluded, start your analysis with a roadmap, or thesis — your conclusion. Starting with your conclusion gives your reader the essence of your argument in case your reader reads nothing else. It also gives context to enable your reader to understand you.

5. Outlining

An outline is an organized list of raw materials.[19] Before you progress too far in your research, jot down notes for a rough outline and rearrange them into an effective sequence later.[20]

Outlining is structuring your thoughts after thorough research and forming a logical construction about the entire project. At this stage, you don't need to worry about brevity. The outline should contain everything pertinent. Once the initial outline is complete, eliminate nonessential matters. Being selective with what you include ensures that your final draft is no longer than necessary.[21] There are many outlining techniques. Pick one that works for you, and be flexible. But outline if you have a complicated and lengthy product. An outline will control your writing. You'll know what to include and exclude, what to emphasize or deemphasize, and where things go. Outlining is a time saver, not a time waster.

II. Writing Stage

After you have an outline, fill in the details. And keep a legal-writing guide or two nearby so you can reference rules and tips as you write.

1. When to Start Writing

Just Start

No clear dividing line separates the pre-writing and writing stages. You might start writing down your ideas after brainstorming and taking research notes even before outlining. Writing notes and adhering with anything down is the starting point of your first draft. The first draft is the least important part of your writing.[22] So just start writing, and don't worry about what your first draft looks like. You'll have lots of opportunities to improve it.

Start Writing Early

Start writing as early as you can.[23] But outlining beforehand is an essential step. The earlier you start writing, the less likely you'll end up with a bad draft. If you start writing early, you'll have enough time to revise. If you leave little time for revision, a document that might have been rewritten into something wonderful will be subpar.[24] It's never good when your first draft becomes your final draft.

2. Where to Write

We all have places where we prefer to write. Some prefer quiet places; others, some background noise. Some prefer writing in a library or office; others, writing at home. Pick a place where you won't want to nap. Oliver Wendell Holmes and Ernest Hemingway wrote standing up. They were uncomfortable, but they got to the point quickly and wrote to the bone.

Legal writing isn't easy. It requires concentration. Know what distracts you, such as Facebook and Twitter. If social media distracts you, turn off your smartphone, or leave it at home while you write elsewhere.

3. What Part to Start Writing First

The thinking process isn't necessarily coordinated with the structural sequence of your writing. Some parts of your legal writing are more difficult than others. You don't have to write the first draft from beginning to end. You may start with any part of the writing you feel ready to write. You may begin at the middle and write the rest later.[25] You might be able to complete the introduction only after you've finished the rest of the writing. You might not be able to write a conclusion until you've finished your analysis.[26] It's not worth your time to write your introduction or conclusion at the beginning, when everything else is unclear and unsettled.

If you start writing from the part you're most familiar with, you'll enhance your confidence. For instance, if you know the facts of a case well, summarize the facts; if you're familiar with the cases, start citing them. If you're sure about the issues, just jot them down. Write whatever is easy for you first, and continue to write those more complicated parts, which require more analysis and thinking. This approach will help you feel more confident to handle the more difficult parts of your document.

4. Research Again, Rethink, and Reorganize

Your research doesn't end in the pre-writing stage. You might need to research more while you write. You might discover that your argument is weak in some areas, that you're missing something essential, or that you have new thoughts.

The process of legal writing is also the process of thinking. And thinking is rarely straightforward. The more you write, the more you reconsider the issues involved in your writing. You'll confirm or refute your notions when you organize your thoughts in writing.

The original organization of your outline might not hold when you do further research and reconsider the issues. You may amend your structure as needed depending on your further research.

Furthermore, what's clear to you might be ambiguous to a reader who doesn't know how you think, how you arrived at what you wrote, and what you intend.[27]

5. Overcoming Writer's Block

At some point, you might feel that your mind is empty and that you can't continue writing. You might be tired or bored, or have something more important to do. Especially when you focus on the details, you might lose track of your main points and find it hard to get back on track.[28] Writer's block is normal: there's no need to be afraid of that. Don't expect perfection in your first drafts.[29]

You may want to do something unrelated to keep your mind off of writing temporarily, such as getting a coffee, taking a walk, or listening to music. Some distance from the topic may help you to gain perspective.[30]

If a short break isn't enough for you to overcome writer's block, rest for a day or two — if you're still ahead of your deadline. Return to your writing when you feel fresh and comfortable. The point is, don't panic. And don't be afraid of creating some mental distraction for yourself.

6. Writing Approaches

Young lawyers may have to prepare a memo for their supervisors or clients, draft a contract for clients, or write a persuasive brief for a judge. Different legal documents require different writing approaches.

To write a memo, you're expected to write concisely, accurately, and in a way that's easy to understand. You should write the memo so that it could be transformed into a motion or a memorandum of law.[31] If the underlying supporting documents signal a particular legal issue, identify it. In doing so, include relevant caselaw, but avoid unnecessary procedural history or factual details about cases.

To write a contract on your client's behalf, you don't need to define each contractual term in accordance with Black's Law Dictionary.[32] The terms of the contract must be clear. When you write additional clauses, add to the definition section, where appropriate. Because additional clauses might be subject to further negotiations, your drafting should lean heavily toward your side, leaving room for both parties to agree.

To write a persuasive brief for a judge, write so that the judge will want to rule for you and so that it'll be easy for the judge to rule for you. Get to the point quickly. Show the court that it has the jurisdiction to hear your case. Enunciate immediately the relief you seek. Write in plain English. Use mostly simple, declarative sentences. Be accurate and precise. Follow the court's rules; focus on the elements of your cause of action, defense, burden of proof, and standard of review. Limit your issues to the ones that count. Don't waste space on givens. Avoid lengthy quotations. Don't string cite. Cite after you give your rules.

III. Post-Writing Stage

Revising

Some legal writing requires more revising than others. It depends on the complexity of the document and your skill at writing. Don't be in love with your writing. Let go of words, sentences, and citations that don't help you.

Always read your writing with a critical eye. View your writing as whole; have a big picture in mind when you're revising. Does your legal document fit into your purpose of writing? Is it complete or missing some essential points? Do you need more research to support your arguments? Is your writing concise, or does it contain repetition? Does your writing clearly address your points, or is it ambiguous in that it confuses or misleads? If so, revise, and revise again.

In addition, is the structure of your writing understandable from the reader's perspective? Your readers are the only ones who count; you don't count, and neither does your ego. Is it too difficult for the reader to digest, or is it so simple that it will make them bored? Is your writing structured in a way that is logically connected in a whole and easy for readers to follow?

Many young lawyers struggle with grammar, organization and sequencing, road mapping, verbosity (excessive detail, redundancies, extra words, multisyllabic SAT words), analysis (including use of authority, attention to facts, identification of counter-arguments, bold conclusions), and rhetorical issues (audience, purpose, and tone).[33] Tone is the attitude you express through writing.[34] Tone reflects the writer's character and personality. Writers create tone through their attention to detail and word choice.[35] To write persuasively, understate. Never overstate or overpromise. Limit adverbs and adjectives. Prefer verbs to nouns. Eliminate false emphatics like exclamation points, bolded words, or quotation marks for emphasis or sarcasm. Avoid the Jackie Chiles intensifier syndrome: Think "It's outrageous, egregious, preposterous." Put your strongest argument first. Write formally, not colloquially.

When you want to be objective, make your tone neutral. Predict an outcome, but articulate the other side's position. Don't case dump.[36] Find the rules from the cases and apply them to your facts. Don't list all the rules you find; mention only rules central to your position.

Use "shall" to set out an obligation. Use "may" to detail language of authorization.

Elegant variation, another bad practice, means using synonyms. Using the same word provides clarity, and repetition of words powers delivery.

Use a defined term once you've defined it. For example, in a motion for summary judgment, if the moving party is defined as "the plaintiff," all references in the document to the moving party should be to the plaintiff.[37] Another example is language of obligation, which is commonly found in contracts and legislation. Drafting conventions designate "shall" for language of obligation and "may" for language of authorization. Use "shall" to set out an obligation. Use "may" to detail language of authorization. And no metadiscourse, the running starts of writing. Instead, forget the wind-up: Just deliver the punch.

Use the active voice when attributing action or obligation.[38] In contracts and legislation, obligations should be expressed in the active voice and attributed to the obligated party. For example, "Purchaser shall pay Buyer the purchase price" is clearer than "Buyer shall receive the purchase price." Action, too, should be stated in the active voice and attributed to the appropriate party. For example, "Sam shot John" is clearer than "John was shot."

Avoid redundancy, which is boring and creates ambiguity.[39]

Write affirmatively so that your writing is easy to understand. In particular, avoid double negatives, which confuse readers. For example, "Purchaser cannot opt not to purchase unless the following

events occur" is more difficult to parse than "Purchaser must purchase unless the following events occur."[40]

It's a misconception that a lengthy piece of legal writing is better than a short one. Raising every argument you've dreamed up is a failed approach. Pick your best contentions. Unless you must preserve the record, forget the rest. Shorten your writing by excising complicated words, long sentences, and legalese.[41]

Editing

When you're satisfied that you've done a good revising on your large-scale organization, edit on a micro scale. Edit your sentences for clarity: "A clear sentence is no accident. Very few sentences come out right the first time, or the third."[42] A sentence is readable if a reader can understand it on a single reading and needn't reread it to figure out what the sentence means.[43]

Editing focuses on cleaning up spelling, grammar, punctuation, word choice, quoting, and citing. Editing is the last but a significant part in the writing process. Editing isn't simple; you might not be able to identify and fix all errors and mangled sentences in a single pass. You're committed to editing until you're happy with your work, or at least until you run out of time.[44]

Nowadays, people use Microsoft Word or other word-processing programs to check their writing. Use, but don't rely, on spell and grammar checkers. They don't catch every mistake.[45] Use a grammar checker program. Try Flesch Kincaid, which assesses by age and grade level how easy or difficult your writing is to read and suggests ways to make your writing simpler. Then edit on a hard copy. Some mistakes are hard to see when you edit on your computer screen. When you read on paper, your eyes are sharper. Readers often see problems on the printed page that are not apparent on a computer screen.[46]

Read your writing aloud. Good writing works for the ear; it's not directed to the eye, like good formatting is. You'll realize that some sentences don't make sense or don't fit properly into the context. Bad phrasing often sounds terrible when you say it.[47] If it doesn't sound right, it won't read right. Amend it until it sounds right.[48]

In addition, get someone to proofread your work, someone who'll edit it from a reader's perspective. That's the best perspective from which to edit. The main purpose of legal writing is to make your audience understand you and make a decision based on what you're explaining. Be nice to your editors. They care about your readers and aren't hung up by your ego. Before you submit your work, take one last look for wording that doesn't state clearly and unambiguously what you mean. You might have to wait at least a day after your second-to-last draft to do your final edits.

Conclusion

Legal writing is a process that takes ages to master. New lawyers will be happy to learn that their writing will get better, faster, and easier the more they write. ■

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Grossman, Peter G.
Kelly, Kevin Thomas
Lewis, Richard C.
†* Madigan, Kathryn Grant
McKeegan, Bruce J.
Saleeby, Lauren Ann

Seventh District
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Baker, Bruce J.
Brown, T. Andrew
* Buzard, A. Vincent
Castellano, June M.
Christensen, Amy L.
Cicero, Jill M.
Gaddis, Sheila A.
Hetherington, Bryan D.
Jackson, LaMarr J.
* Moore, James C.
Moretti, Mark J.
* Palermo, Anthony Robert
Rowe, Neil J.
* Schraver, David M.
Shaw, Mrs. Linda R.
Tennant, David H.
* Vigdor, Justin L.
* Witmer, G. Robert, Jr.

Eighth District
Bloom, Laurie Styka
Brown, Joseph Scott
* Doyle, Vincent E., III
Effman, Norman P.
Fisher, Cheryl Smith
* Freedman, Maryann Saccomando
† Gerstman, Sharon Stern
Halpern, Ralph L.
* Hassett, Paul Michael
Lazarin, Jessica Marie
Miller, Gregory Tyler
O'Donnell, Hon. John F.
O'Donnell, Thomas M.
Ogden, Hon. E. Jeannette
Pajak, David J.
Smith, Sheldon Keith
Spitler, Kevin W.
Sullivan, Kevin J.

Ninth District
Barrett, Maura A.
Birnbaum, James M.
Bowler, Richard J.
Braunstein, Lawrence Jay
Burke, Michael K.
Burns, Stephanie L.
Fay, Jody
Fox, Michael L.
Goldenberg, Ira S.
Goldschmidt, Sylvia
Gordon Oliver, Hon. Arlene
Hyer, James L.
Keiser, Laurence
Marcus, Robert B. B.
* Miller, Henry G.
Morrissey, Dr. Mary Beth Quaranta
* Ostertag, Robert L.
Preston, Kevin F.
Ranni, Joseph J.
Scheinberg, Elliott
Starkman, Mark T.
Thaler-Parker, Jessica D.
Townley, Rosemary A.
Wallach, Sherry Levin
Weathers, Wendy M.
Weis, Robert A.
Welch, Kelly M.

Tenth District
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Block, Justin M.
* Bracken, John P
Burns, Carole A.
Calcagni, John R.
Christopher, John P.
Clarke, Christopher Justin
Cooper, Ilene S.
England, Donna
Ferris, William Taber, III
Fishberg, Gerard
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Genoa, Marilyn
Glover, Dorian Ronald
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Karson, Scott M.
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Levy, Peter H.
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Mancuso, Peter J.
McCarthy, Robert F.
Meisenheimer, Patricia M.
* Pruzansky, Joshua M.
* Rice, Thomas O.
Strenger, Sanford
Tarver, Terrence Lee
Tully, Rosemarie
Wicks, James M.

Eleventh District
Alomar, Karina E.
Bruno, Frank, Jr.
Carola, Joseph, III
Cohen, David Louis
DeFelice, Joseph F.
Gingold, Hilary
Lee, Chanwoo
Samuels, Violet E.
Vitacco, Guy R., Jr.

Twelfth District
Braverman, Samuel M.
Cassidy, Daniel D.
Millon, Steven E.
* Pfeifer, Maxwell S.
Weinberger, Richard

Thirteenth District
Cohen, Orin J.
Marangos, Denise
Marangos, John Zachary
Martin, Edwina Frances
McGinn, Sheila T.
Miller, Claire C.

Out-of-State
Jochmans, Hilary F.
Sheehan, John B.

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

BY GERALD LEBOVITS

The Writing Process for New Lawyers: Getting It Written and Right

The legal-writing process is how we write, from receiving an assignment through submitting the final product. Good legal writing helps lawyers enhance their credibility with judges, lawyers, and clients; prevent malpractice and grievances; and win cases.[1] A good writing process — thinking at its hardest — enables lawyers, notably new lawyers, to capture ideas, write efficiently, and overcome difficulties. It's done through the "Madman, Architect, Carpenter, Judge" method, in which your madman generates ideas, your architect builds the outline, your carpenter fills in the details, and your judge edits your writing.[2]

This method articulates the three stages of legal writing: (1) the pre-writing stage — when the assignment is organized, researched, and analyzed; (2) the writing stage — in which research, analysis, and ideas are assembled into a written product; and (3) the post-writing stage — the stage at which the assignment is revised, edited, and assembled in final form.[3]

A good writing process leads to good legal writing, the toughest and most important legal art to master, especially for the new lawyer.

I. Pre-Writing Stage

1. Understanding Your Goal

If you're unclear about what you're writing, you'll research irrelevant topics and draft something your audience neither wants nor needs. Legal writing requires solving, diagnosing, defining, informing, and exploring issues.[4] Understanding what you want is critical.

Understanding the Purpose of Your Writing: Why

Writing before identifying your purpose is like plotting a road trip without knowing where you want to end up.[5] Good writers identify and articulate their purpose — what they want to achieve — before planning to write.[6] Legal documents serve different purposes: to inform, elicit information, persuade, memorialize, record, or describe.[7] Determine before writing whether you want your document to introduce your reader to the subject or to supplement your reader's knowledge.[8]

Understanding the Nature of Your Writing: What

The purpose of your writing determines your format, content, style, tone, structure, and word choice. Before writing, ask yourself several preliminary questions. Are you writing a legal document to create a contract or will, to analyze and predict objectively the strength of your client's position (memorandum), to persuade (litigation document to a court), or to educate and advocate a position (academic papers)?[9]

Some legal writing is made up of assignments from your supervisor. Your supervisor will tell you what you're writing about, although often too briefly. If you aren't clear about the nature of your task, get clarification without making a nuisance of yourself.

Sometimes you'll need to decide for yourself the nature of your writing assignment. Doing so in our client-centered legal system requires discussion with your clients and a thorough understanding of what they want you to achieve. In litigation, for example, you'll need to decide whether to write a motion to dismiss or a motion for summary judgment. The legal action will determine what and how you'll write.

> Writing before identifying your purpose is like plotting a road trip without knowing where you want to end up.

Understanding Your Audience: Who

Before writing, you'll need to know who your readers are.[10] If your readers — your audience — don't understand what you're trying to convey, then your document is ineffective. While brainstorming, keep your audience in mind. Your audience can be a judge, a client, a supervisor, or an adversary. If you're writing a brief to a court, you might lose your case if the judge doesn't understand your argument. Judges are busy and skeptical creatures; keep your points concise, and prove your case: don't be conclusory.

If you're writing to your client, explain legal concepts in a way a non-lawyer will comprehend. Avoid using legal terms your client won't understand, including certiorari, dictum, stare decisis, or res ipsa loquitur.[11] If you must use them, explain them to your client.

If you're writing to your supervisors, appreciate not only that they're busy, but also that their definition of a "draft" will be different from yours. When they say, "Just give me a draft," they mean "Give me a perfect, final product tomorrow."

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Periodicals

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