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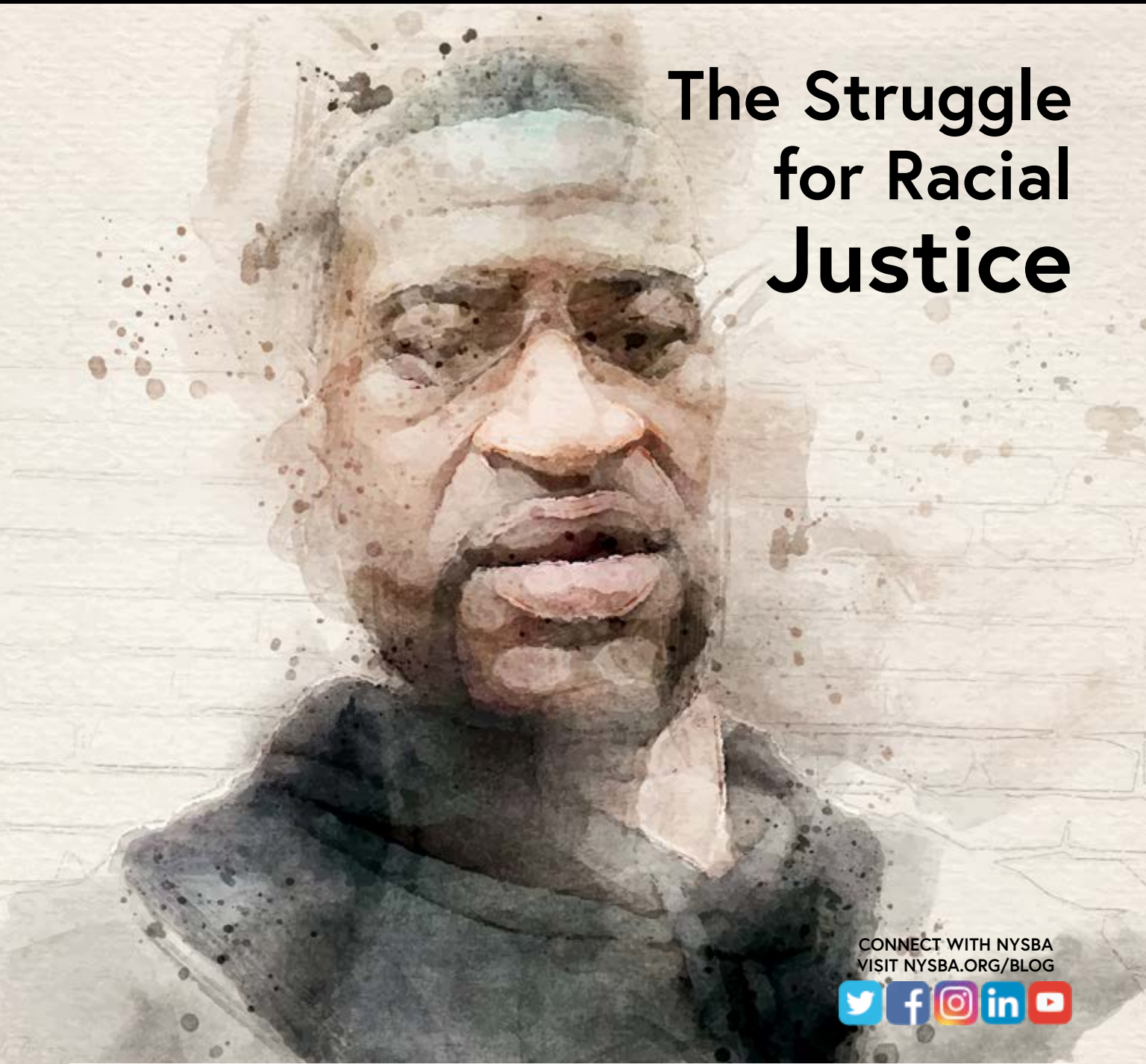

The Struggle for Racial Justice

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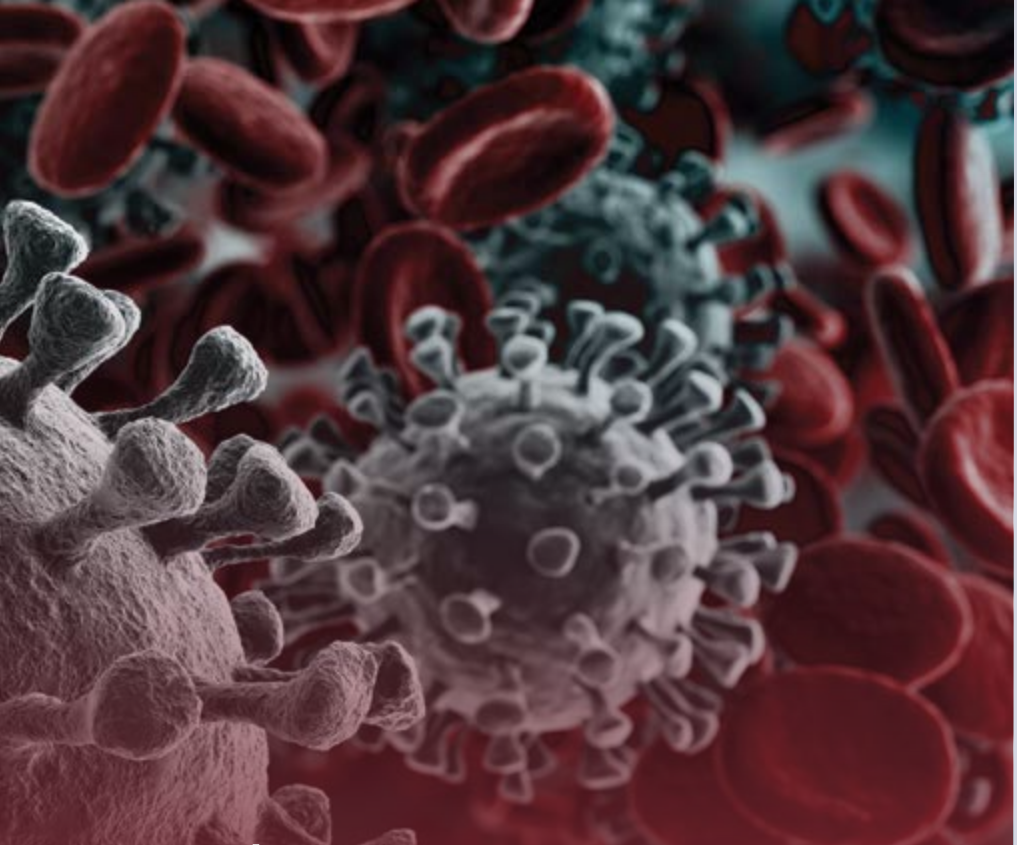

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PUBLISHER
Pamela McDevitt
Executive Director

NYSBA CHIEF COMMUNICATIONS STRATEGIST
Susan DeSantis

PRODUCTION EDITORS
Pamela Chrysler
Alyssa Colton

SENIOR WRITER
Christian Nolan

CONTRIBUTORS
Brendan Kennedy
Brandon Vogel

DESIGN
Lori Herzing
Erin Corcoran
Christine Ekstrom

COPY EDITORS
Alex Dickson
Reyna Eisenstark
Howard Healy

EDITORIAL OFFICES
One Elk Street, Albany, NY 12207
518.463.3200 • FAX 518.463.8844
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NYSBA ADVERTISING
MCI USA
Holly Klarman, Account Executive
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by T. Andrew Brown

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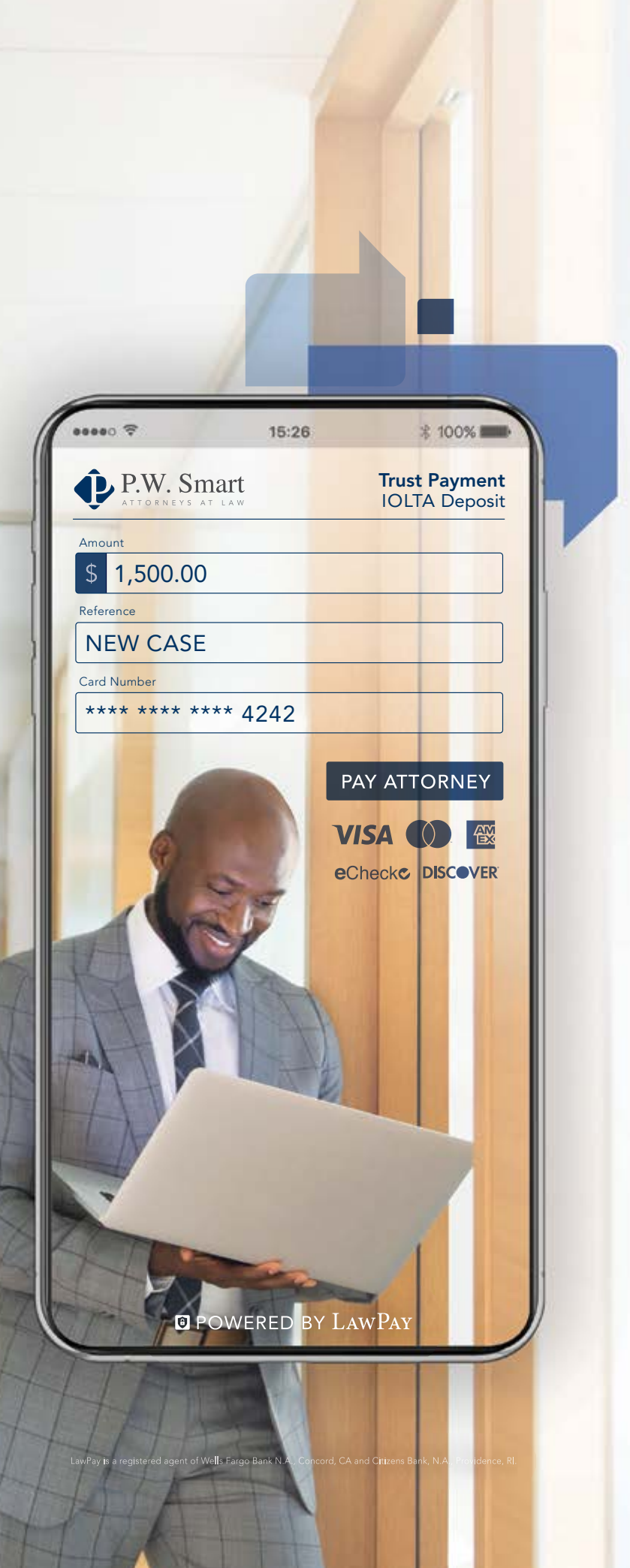
The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the New York State Bar Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. For submissions guidelines: www.nysba.org/JournalSubmission. Material accepted may be published or made available through print, film, electronically and/or other media. The *Journal* ((ISSN 1529-3769 (print), ISSN 1934-2020 (online)), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January/February, March, April, May, June/July, August, September/October, November, December. Single copies $30. Library subscription rate is $210 annually. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.



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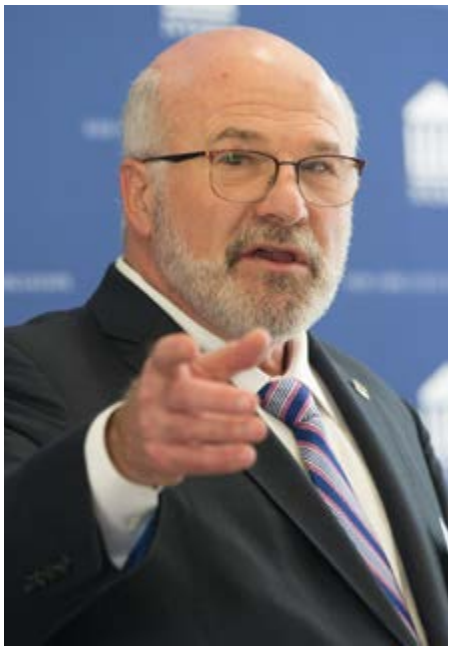
Fighting the Scourge of Racial Injustice



I grew up in Great Neck, a suburban community on the North Shore of Long Island. At that time, Great Neck was a hotbed of progressive thinking and concern for social justice.

As a boy, my parents brought me to numerous demonstrations in opposition to the Vietnam War and in support of the civil rights movement, including Dr. Martin Luther King's famous "I Have a Dream" speech at the Lincoln Memorial as part of the 1963 March on Washington. My parents instilled in me from a very young age the importance of racial equality.

The civil rights movement of the 1960s has informed my thinking to this day. It is why all these years later it infuriates me to see the scourge of racial bigotry and the egregious inequities in how people of color are treated in our criminal justice system and society at large.

Make no mistake, George Floyd's death at the hands of law enforcement and its aftermath were not aberrations; they were the culmination of a long history of racism and inequality that continues to plague our nation.

It is now up to us, as a society, to seize this important moment and make sense of what must come next. The protest movement in the wake of the death of George Floyd is a call for bold action, including institutional and cultural reform – in law enforcement, as well as within the broader criminal justice system.

While I earnestly believe the vast majority of police officers are dedicated and honorable public servants, the repeated incidents of police brutality demonstrate that there is a far-reaching problem that must be addressed. We cannot dismiss these incidents as being isolated and simply look the other way. The status quo is plainly unsustainable.

Police violence against people of color is just a symptom of the broader and more complex deep-seated racial disparities within our criminal justice system that undermine the rule of law. Meaningful change will thus require much more than addressing the issue of police brutality but instead rethinking all aspects of our justice system – from investigation to arrest to trial to sentencing and incarceration.

I applaud both the governor and the legislature for quickly enacting reforms that will help bring about meaningful systemic changes, especially the repeal of section 50-a of the Civil Rights Law, an action which was supported by our association. For too many years, section 50-a has been utilized by police departments as a shield to prevent the release of critically important information regarding police misconduct and disciplinary actions taken against police officers.

TASK FORCE ON RACIAL INJUSTICE AND POLICE REFORM

While they are a step in the right direction, these statutory reforms alone are not enough to combat years of systemic racism. There is much more that can be done, and NYSBA is uniquely positioned to play a role in that effort.

With respect to police misconduct, there must be greater transparency and better accountability within the police force itself, through the use of body cameras and other

data-gathering techniques, along with better and more rigorous training.

The oversight of police conduct should also be more inclusive. In particular, there should be greater civilian participation in the review of police conduct.

And when laws are broken, independent and impartial prosecutors who are not influenced by their relationship with law enforcement must investigate and respond to police misconduct swiftly, transparently and fairly – as with any other crime.

In order to achieve these and other needed reforms, I have asked two distinguished members of the New York State Bar Association – President-Elect T. Andrew Brown and Taa Grays, a former Association Vice President from the First Judicial District – to co-chair a new Task Force on Racial Injustice and Police Reform.

The task force is already hard at work developing strategies to combat the repeated incidents of police brutality and inequality in our criminal justice system that we have all witnessed.

The task force is engaging a diverse team of stakeholders and is also working with advisory groups from around the state, including diverse bar associations.

The task force will review why racial bias persists in policing and will provide recommendations to policymakers, law enforcement and the judiciary to end policing practices that disproportionately impact persons of color.

NYSBA welcomes this opportunity to be an active and positive force for reform, and we look forward to working with New York state and local officials to effect the kind of robust and meaningful change that is needed to restore justice – and faith – in our criminal justice system.

By asking and struggling with difficult questions and listening to those who bear witness to and suffer from the consequences of racism, we will learn, and we will act.

Many people of color face daily the possibility of being targeted, threatened, maligned or worse while engaging in the normal daily activities that the rest of us engage in with impunity, for no reason other than their race.

The threat of having one's peace or life destroyed has nothing to do with class, education or income and everything to do with race. This has long been morally and legally unacceptable, yet the needle barely moves.

It is time for lawyers to step up and to take a different tack. Why? Because lawyers are the guardians of justice and protectors of the rule of law. We must never lose sight of that.

By reason of our licenses to practice law, we are singularly positioned to fight for justice. On paper, the law and the legal system are colorblind, but in practice they are not.

It is time for lawyers to collectively stand on the front lines of the fight for full and fair implementation of the promise of the law. It is our job.

SCOTT KARSON can be reached at skarson@nysba.org

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Imagining W

"Racial injustice has seemingly become everyone's problem, increasing the interest in and likelihood of finding solutions. ***Finally.***"

g a Bright Future Where Everyone Is Treated Equally

By T. Andrew Brown

T. Andrew Brown is President-Elect of NYSBA and is managing partner at Brown Hutchinson in Rochester and New York City. He is a past president of the Rochester Black Bar Association and Monroe County Bar Association, former corporation counsel and chief legal officer for the City of Rochester and currently serves as vice-chancellor of the New York Board of Regents.

Conversation around racial injustice in America has reached new heights. It's no longer a conversation driven solely by people of color, for people of color. Black Lives Matter (BLM) has become a movement embraced by the full spectrum of diversity. It's no longer someone else's problem for someone else to fix.

BLM is now being championed by people of all races and ethnicities, as well as public and private industry and government sectors throughout the country. Racial injustice has seemingly become everyone's problem, increasing the interest in and likelihood of finding solutions. Finally.

Racial injustice itself is nothing new. Racial injustice of blacks reaches back to the days when blacks were first brought to American shores in the 1600s. Unlike others who willingly came to America, blacks were brought to this country involuntarily. Others came with a sense of hope, seeking opportunity and a better life. Blacks were brought in shackles, only to see life worsen, having been branded the lesser race due to the color of their skin.

Racism and white supremacy underlie systemic injustice that continues to plague our society. Racism by definition leads to inequality, discrimination and differential treatment. Racism continues to tarnish our ideal of justice for all. The word and concept of race is nothing more than a social construct created to differentiate between people. Throughout time, the concept has been used to justify the favorable treatment of one group over another, usually based solely on the color of skin. The favored race is provided with privileges, rights and opportunities to the disadvantage of the lesser race.

The concept of race supported a mental justification and rationale for early colonization of African countries, just as it supported the institution of slavery in America for over 250 years, and Jim Crow laws for another 100 years. The concept of race, and racism, provided cover to degrade and dehumanize blacks. Our laws and system of justice were of no avail, but, rather, part of the problem. The harmful effects continue to this day.

History reveals that blacks have been subjected to injustices in every facet of American life throughout the entirety of black history in America. Ample studies reveal these injustices continue to limit access to education, housing, property ownership, capital, health care, employment and economic opportunity.

The most visible injustice today is in the area of criminal justice and policing. Blacks are disproportionately represented at every step of the criminal justice system, from police encounters and arrests to incarceration. Evidence of police mistreatment and brutality is greater than ever, due in large part to cameras worn by police officers and the existence of cell phones with cameras in the pockets of bystanders.

Mistreatment of blacks at the hands of police is sadly nothing new. This problem has long been known and is commonly discussed in black communities. The recent killing of George Floyd and the growing access to video has expanded the conversation and prioritized the need for action. Video capturing police mistreatment of blacks, and the extent that it is portrayed in social media, makes it hard to dismiss.

The current role of cell phone video is strikingly similar to the role of television in the 1960s, broadcasting for the first time into people's living rooms the severity of police brutality and racial injustice. Seeing the backlash against the Civil Rights Movement made it hard to ignore and brought about two of the most significant pieces of equal rights legislation, the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Without the impact of video these laws would not have been enacted when they were, if at all.

Sadly, though, other incidents of police brutality have sparked outrage over the years, but did not lead to meaningful reforms. Most Americans can remember the video footage of Los Angeles police savagely beating Rodney King in 1992. Most New Yorkers can recall the news coverage of Amadou Diallo, who was unarmed and shot 19 times by New York City police in 1999 as he attempted to enter his apartment. Both incidents and subsequent officer acquittals were followed by protests against brutality and racial injustice.

Despite the reaction to King, Diallo and countless other incidents of police brutality, the incidents continue. Will we now, finally, see a difference? I have reason to believe we will. Things feel different. BLM has become one of the largest movements in U.S. history. The momentum following the killing of George Floyd continues to grow. There's never been a better chance for meaningful change

The horrific image of the knee on the neck of George Floyd for almost nine minutes, causing his death, remains imprinted in my mind. As a black man it hits too close to home. When I see that video I see me and so many others that look like me that have been on the receiving end of racial injustice. These types of incidents almost always involve a black or brown person as the subject of brutal mistreatment. It's hard to even imagine the George Floyd video if George Floyd was white.

The fact that George Floyd was subjected to such harsh treatment while handcuffed on the ground and posing no threat to anyone, in broad daylight, and in view of so many onlookers depicts the complete absence of fear of retribution for the conduct. It is the epitome of that privilege that has fueled the level of outrage playing out in protests throughout America. The incident struck an emotional chord across the country. This has led to an earnest discussion of the extent of racial injustice and the immediate need for change.

Statutes across the country are swiftly being enacted to combat racial injustice and police misconduct. In New York, new laws have already been passed to address racial injustice and needed police reform in the aftermath of the George Floyd killing.

Governor Cuomo recently signed into law sweeping legislation. One of the most notable reforms is the banning of chokeholds and other restraints (the "Eric Garner Anti-Chokehold Act") that have too often been used on people of color, resulting in serious injury and even death. Reform laws call for greater reporting of demographic information of arrests, use of weapons and arrest-related deaths. New laws also require that medical and mental health attention must now be provided to individuals in custody, prohibit race-based 911 reports and expand mandated use of police body-worn cameras.

Evidence of police mistreatment and brutality is greater than ever, due in large part to cameras worn by police officers and the existence of cell phones with cameras in the pockets of bystanders.

These are long-sought-after measures to address systemic injustices suffered by blacks at the hands of police.

In addition, section 50-a of the New York Civil Rights Law was repealed. This repeal now allows access to police misconduct records. Prior to this the public had no way of knowing the prior misconduct history of police officers entrusted to safeguard their communities.

By Executive Order, all municipalities within the state, as a condition of state funding, will now be required to establish a plan for reinventing and modernizing police strategies to be more community-responsive and to address racial bias and disproportionate policing in communities of color. This will require all municipalities to assess policing practices for equity and fairness in application to those who have suffered most from police misconduct.

For those officers that are law-abiding, good officers, the police reform acts should not hamper their ability to perform their duties. Rather, the reforms should lead to increased trust and confidence in the minds of citizens they serve.

At the federal level, Congress is currently debating new policing legislation. This was clearly spurred on by the George Floyd killing and the public outrage that followed. While disagreeing on how far the legislation should go, both Republicans and Democrats in the House and the Senate are talking about the need for change.

Throughout our country's history, its laws have far too often been unequally applied to blacks and other people of color. Changes in existing legislation and the enactment of new laws alone will not now suddenly solve the problem. Lasting and truly meaningful change will only come from changing the minds of people. Unlike the speed with which we can enact new laws, changing the way people think will take time and will not come easy.

Part of the solution must include examination of how we see race, and what meaning we give it. Profiling based on race has contributed to injustice and to the disproportionate number of encounters and arrests of black and brown people here in New York and across the country. Seeing a person of color as lesser and more likely to be criminal makes it easier to rationalize the degradation and dehumanization of that person. Did the police officer who killed George Floyd see Mr. Floyd as equally human while his knee was on his neck?

To change the way blacks are seen in America, a good start is to change what we teach about black history in our schools. This should include much more than a brief discussion of what slavery was and discussions of notable black figures during the month of February. It should include a full discussion of the achievements and contributions of black Americans in building this country, including its wealth, and adding to its culture, richness and vibrancy that we so enjoy today.

Very few people, including most reading this article, know much of anything about black American history. Sadly, most people's beliefs are formed by the mostly negative portrayals of blacks on television and other media. So, should we be surprised by the prevailing unfavorable stereotype?

As lawyers we have an even greater obligation to address racial injustice. We have an obligation to uphold the law as well as protect the integrity of our system of justice. We understand the importance of the rule of law in a democracy and the role laws play in day-to-day life. We also know how laws are made, and how those that are unjust can, and should, be challenged.

Until we have justice for all we have no true system of justice. Justice for some and not others is not justice.

Those lawyers who practice criminal law see the evidence and impact of racial injustice and a need for police reform

on a regular basis. Those in civil practice see it in claims filed for misconduct. The evidence is clear and should not be ignored. It should be called out in the name of justice.

Judges should also take steps within their powers to address the racial injustice that so often plays out in our courtrooms. More than 100 judges of color across New York recently signed a letter acknowledging the extent of systemic injustice and bias in the courts and the need for judges to be mindful of the impact and responsive to ensuring equal justice for all. Chief Judge Janet DiFiore recently announced an independent review of New York's courts for institutional racism. NYSBA recently named a task force to report on and make recommendations to address police misconduct and systemic racial injustice which I am proud to co-chair with Taa Grays.

To remain silent is to be part of the problem. The role and importance of lawyers in safeguarding equality and justice for all has never been more evident.

While we know changes are necessary, what is the ideal we strive for? What promise is there for our children, and our children's children? How can we ensure future generations a more promising and just life for all? Will society's conscience and conviction finally rise to the occasion?

It has always been part of the American dream for parents to envision a better life for their kids than they enjoyed. Does a better life include more than what we traditionally think of as success and wealth? Should it include such ideals as equal opportunity and justice for all? Will we remain tarnished as a nation until we have that?

Can there truly be a more promising life in America, built on continuing injustices that have plagued this country for centuries? Should we in positions of influence and power, including lawyers and judges, find our voices and take action? I believe it is our obligation.

I envision a future as spoken about by Dr. Martin Luther King, Jr. ". . . that one day this nation will rise up, live out the true meaning of its creed: 'We hold these truths to be self-evident, that all men are created equal.'" It's been 57 years since his famous I Have a Dream speech and we are nowhere near close to achieving the dream.

The younger generation, however, appears to have a greater sincerity and commitment to reaching the ideal, where the content of one's character will prove of greater importance than the color of one's skin.

A brighter future will ensure equal access to life's opportunities that have so often been denied to people of color. This will include a sound education, housing and employment opportunities, access to health care and other basics of life that so many take for granted, but so many others only dream about.

A brighter future must include equal treatment under law and at the hands of law enforcement. And there must be a just criminal justice system for all Americans. A system that will not show disproportionate numbers of police encounters, arrests, brutality, prosecutions, incarcerations and wrongful convictions based on skin color.

The future ideal will make the current reality of white privilege a thing of the past. One's shortcomings in life ought not be due to the color of one's skin. Equally, one's achievements and successes in life ought not be due to the color of one's skin.

All lives, of course, matter. BLM does not contend otherwise. But for far too long, throughout this country's history, black lives have mattered less. BLM is a calling to that fact. It's also a call to action. And for the first time we may be witnessing a powerful and diverse movement at the level of commitment necessary to bring about significant movement toward racial equality.

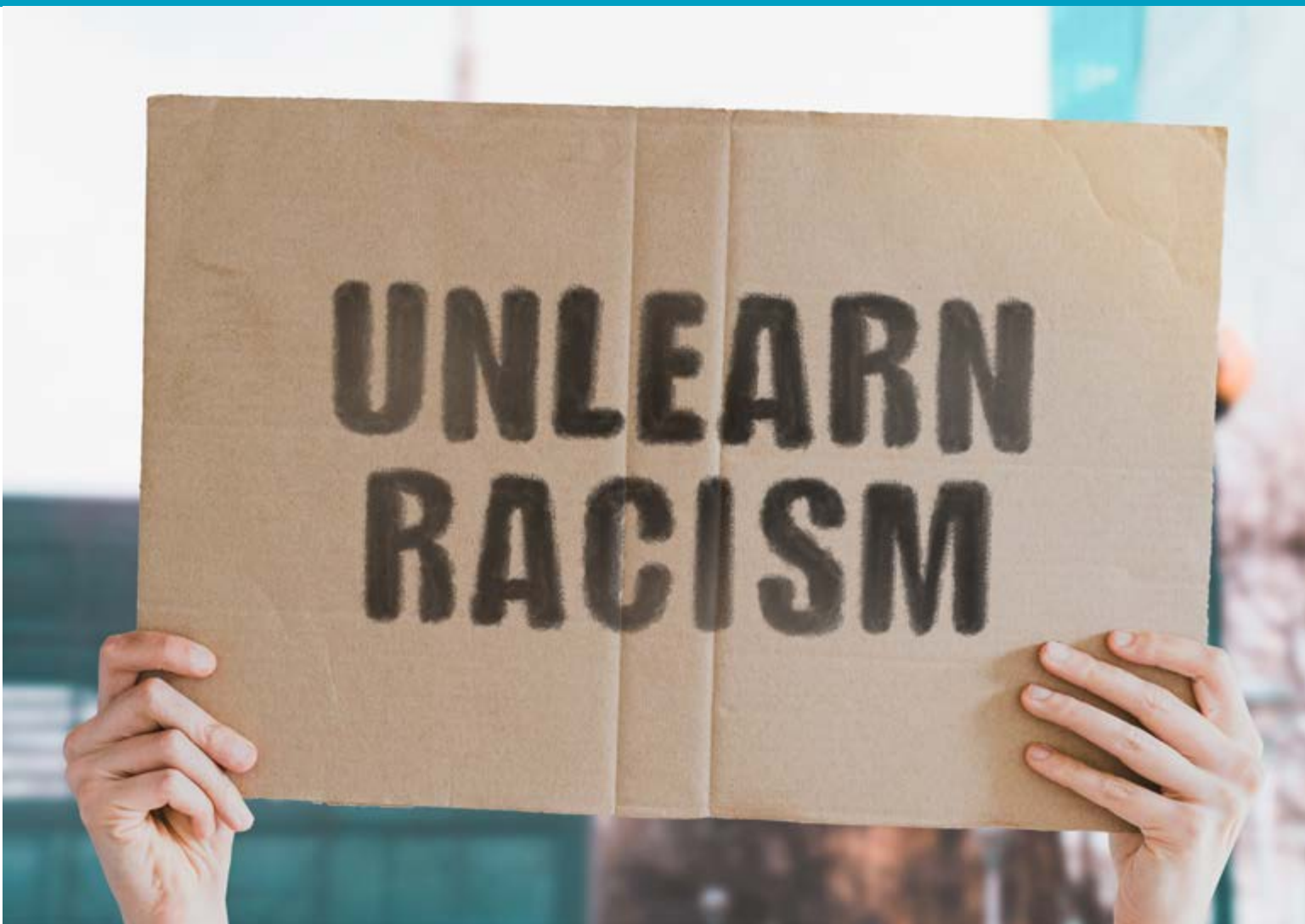
The question is how long will we have to wait to get there? The Emancipation Proclamation, Constitutional civil rights amendments, countless anti-discrimination and equal protection laws, however well-intentioned, have failed to alleviate the widespread systemic racial injustice that persists in every facet of American life. Will others be writing similar articles to this one decades from now and asking the same questions?

A certainty is that things will never change without a strong and concerted effort, a struggle. As Frederick Douglass said, "If there is no struggle, there is no progress." He also said, "Power concedes nothing without a demand." Change throughout American history validates his words. The demand made by BLM is for a just society that treats all races equally.

The demand has been made. **How will you answer the call?**

So Much More Than a Teachable Moment

By Betty A. Rosa



You will probably recall that in July 2009, noted Harvard professor Henry Louis Gates was arrested at his own home after a neighbor called the police to report a suspected break-in. Gates is black; the arresting officer, white.

The incident drew national attention and President Obama responded at the time by saying, "I don't know . . . what role race played in that. But . . . what I think we know separate and apart from this incident is that there's a long history in this country of African Americans and Latinos being stopped by law enforcement disproportionately."

The President invited Dr. Gates and the officer to the White House for a beer and a conversation and said that he hoped the incident could become a "teachable moment" for the nation.

A teachable moment is defined as "an event or experience which presents a good opportunity for learning something about a particular aspect of life."

It is clear that, with respect to race relations and police practices, that teachable moment left the national consciousness as quickly as it arrived. Nothing changed in the decade following the Gates arrest; we did not learn, we did not grow, we did not evolve.

But all of that has suddenly changed. We are now at an inflection point in American history. We appear ready for a paradigm shift that will address our nation's original sins of slavery and subjugation. We are well beyond a teachable moment. Now is the time for action.

The two precipitating events that have brought us to this tipping point are, of course, the utter devastation wrought by the COVID-19 pandemic and the videotaped killing of George Floyd while in police custody.

These two national tragedies have combined to form a perfect storm strong enough to jolt us from the hidebound systemic racism that has come to define America's institutions – from policing to schooling, from housing to lending practices, and in almost every other conceivable realm. That is why we call it "systemic." It is woven throughout the very fabric of our national identity. It is appalling. It limits our potential as a nation. And it must change.

The pandemic has laid bare America's longstanding, deeply embedded societal inequities. Simply put, COVID-19 disproportionately harms people of color and the poor – in terms of health, in terms of employment, and in terms of the ability to receive a meaningful education.

The New York Times reports that "Latino and African-American residents of the United States have been three times as likely to become infected as their white neighbors" and "have been nearly twice as likely to die from the virus as white people."

We are now at an inflection point in American history. We appear ready for a paradigm shift that will address our nation's original sins of slavery and subjugation.

COVID-19 has also revealed the inequities that run throughout our education system. The "digital divide" is real, and it is devastating. Students simply cannot participate in remote learning if they don't have access to a computer or other smart device and to the internet.

And then, in the midst of COVID's devastation, came the video that shook the world. Before our very eyes, we watched in abject horror as a black man pleaded for his life while a white police officer slowly and methodically killed him. The gathered crowd begged for the torture to stop. The officer knew he was being filmed, but assumed there would be no repercussions – because, until now, there rarely have been consequences for such acts.

His name was George Floyd. Say his name. Then say the names of all who have been persecuted and prosecuted and killed by those sworn to uphold the law.

By coincidence, in the same year that Dr. Gates was arrested, Nigerian author Chimamanda Ngozi Adichie gave a now-famous TED talk called "The Danger of a Single Story." As described by one columnist, Adichie's talk is about "what happens when complex human beings and situations are reduced to a single narrative" and that "each individual life contains a heterogeneous compilation of stories. If you reduce people to one, you're taking away their humanity."

It is a stunningly beautiful and insightful talk and I urge you to seek it out if you've never heard it before.

As brilliant as the talk is, though, it is not a new concept.

Betty A. Rosa is chancellor of the New York State Board of Regents, where she has served as regent for Bronx County since 2008. She was born in New York City, lived for 10 years in Puerto Rico, and attended public schools in the Bronx. Dr. Rosa has master's degrees in administration and bilingual education and an Ed.D. from Harvard University. Under her leadership as senior superintendent of Bronx public schools, the Maritime Academy for Science and Technology, a school she helped found, was one of the top performing schools in New York City. Dr. Rosa is also president of an educational consulting company, B.D.J. & J. Associates.

Every year, on the Fourth of July, I read two documents. I begin by reading the stirring words of Thomas Jefferson declaring that henceforth the American colonies were free and independent of the British monarchy.

No one wants to eliminate the teaching of that history. It should be taught, and it should be celebrated; but it must be placed in its proper historical context. Students must understand that the Declaration of Independence was written and signed exclusively by wealthy white males, many of whom were slaveholders.

But the story of the Founding Fathers is only one of the stories. And as Adicihie warned, there is real danger in telling just that story.

The other document that I read on Independence Day is Frederick Douglass's 1852 speech, "What to the Slave Is the Fourth of July?" Written a decade before Lincoln signed the Emancipation Proclamation, Douglass made the point – so obvious now, but so radical at the time – that, from an American slave's perspective, there was nothing to celebrate in our nation's freedom or independence. He warned us, in the most profound terms, of the danger of the single story, the single perspective.

Last month I asked Adelaide L. Sanford, Vice Chancellor Emerita of the Board of Regents, to address the Board on the issue of race relations. An icon of the civil rights movement, the Vice Chancellor has lost none of her fiery edge, even as she nears her 95th birthday. And she did not disappoint. In the wake of the George Floyd killing and the nationwide protests demanding a systemic response to systemic racism, she challenged us to teach our students that there is more than one story. She dared us to teach African American history in our schools. Not just slavery, but the entirety of the black experience in America.

She is, of course, right. The Board of Regents and the New York State Education Department must be a part of the solution. Education can and must play a role in combatting the systemic racism that is so deeply enmeshed throughout our society. It is why the Regents and I have for so long worked to make the teaching of civics and civic engagement an integral part of what is taught in New York's schools. It is particularly important for our schools to take on this role now – because we have an administration in Washington now that is fomenting a hateful culture war designed to pull us down and drive us apart, rather than lift us up and draw us together.

The teachable moment has passed. The actionable moment is upon us. As Douglass instructed in no uncertain terms: "At a time like this, scorching irony, not convincing argument, is needed . . . It is not light that is needed, but fire. It is not the gentle shower, but thunder. We need the storm, the whirlwind, and the earthquake."

What Good Policing Looks Like

By Cedric L. Alexander

Cedric L. Alexander Psy. D. is a law enforcement expert with over 40 years of experience in public safety. He has served as Deputy Commissioner of the New York State Division of Criminal Justice Services, and as an assistant professor at the University of Rochester Department of Psychiatry. He has lectured on police stress and burnout and currently trains on topics of management and leadership related to 21st century policing. He is the author of *The New Guardians: Policing in America's Communities for the 21st Century* and *In Defense of Public Service: How 22 Million Government Workers Will Save Our Republic.*

"In God we trust," the great statistician W. Edwards Deming famously quipped. "All others must bring data."

We have a quarter-century of data that shows a sharp decline in the U.S. crime rate between 1993 and 2018: down 51% by the FBI numbers and 71% according to the Bureau of Justice Statistics. By these numbers, we could claim that whatever policing looks like today is good policing.

But there are also other numbers.

Each year since 2015, American police have shot and killed about 1,000 people. Black Americans are 2.5 times more likely than white Americans to be killed by police, and, last year, 24% of all police killings were of black Americans – who make up about 13% of the U.S. population. A PBS NewsHour-NPR-Marist Poll conducted during June 2–3 of this year revealed that two-thirds of black Americans do not trust the police to treat them equally with whites. A 2019 study showed that 96 of 100,000 black American boys and men are killed by police, compared with a rate of 39 out of 100,000 for white boys and men.

Whatever *this* looks like, it is not good policing.

I can give you a consensus best-practices view of good policing in just four headings:

Professional: Good policing serves the public effectively and continually seeks out and adopts proven best practices.

Accountable: It holds its officers accountable in upholding state-of-art policies on, among other things, use of force. An independent citizen oversight agency is increasingly emerging as key to accountability, and good policing today also employs some form of an Early Intervention System (EIS). This personnel management tool identifies, at the earliest possible stage, potential individual or group concerns based on behavior and actions. After all, even the best policy is useless if it is evaded, ignored, or abused.

Transparent: Transparent police agencies open their books to the public, providing information on their policies and operations, publishing their policy manual online, explaining the department's different units and what they do, and providing easy public access to officers in each unit.

Self-monitoring: Good policing looks out into the community, but it is also highly introspective. Regular self-monitoring, self-reviewing, lessons-learned procedures are in place and put into practice – especially after use of force incidents and shootings.

To these headings, I would also add that good police departments judiciously integrate aspects of problem-oriented policing (POP) into their strategy. This requires being proactive and data-driven in identifying relevant crime and disorder problems and developing policies and strategies, including allocation of personnel, to address them.

All these principles, including POP, work best in close partnership with the community. Forty years in law enforcement convinces me of the enduring value of community policing. Every police leader and every rank-and-file police officer needs to understand that while police authority comes from the law, that authority is little more than theory unless the people of the community grant *legitimacy* to each and every officer in their midst. Such

legitimacy is granted only as it is merited by the behavior, demonstrated attitude, and actions of the police.

If you ask me what good policing *should* look like today and *must* look like in the future, I would ask you to cast your imagination back to 1829 and the founding of the world's first "modern" police force, London's Metropolitan Police, by British Home Secretary Sir Robert Peel. In a single sentence, he defined the essence of effective policing in a free country: "The police are the public and the public are the police."

This statement still applies, 191 years later, on the streets of America's communities. Good policing *is* community policing. One for all and all for one. Peel gave his officers a distinctive uniform – one that made the policeman look nothing like a soldier. The last thing Peel wanted in London was a police force that might be mistaken for a military force of occupation.

What does good policing look like – literally, *look* like? Anything but an invasion.

The police are the public and the public are the police. This is a social equation, and like any other equation, it must balance. America's current crisis, therefore, cannot be understood as a crisis of policing. It is a crisis of the American people, which, naturally, includes the police.

GOOD POLICING TACTICS, STRATEGIES, AND POLICIES ARE NECESSARY TO GOOD POLICING. BUT THEY ARE NOT SUFFICIENT.

First, we must look beyond these necessities. The visible and vocal manifestations of the widespread public denial of police legitimacy were triggered by the actions of a few officers, by which I emphatically do *not* mean a few "bad apples." What we need to understand is that the acts of any individual officer come not alone from his or her head, heart, or instinct. Each act is also the sum of that officer's training and the informed embrace of values received through the culture of the agency in which that officer serves.

We must, then, look beyond tactics, strategies, and policies to departmental values and culture. But precisely because the police are the public and the public are the police, we must also look to the context in which each law enforcement agency develops its values and culture. They are products of wider American society, laws, and history.

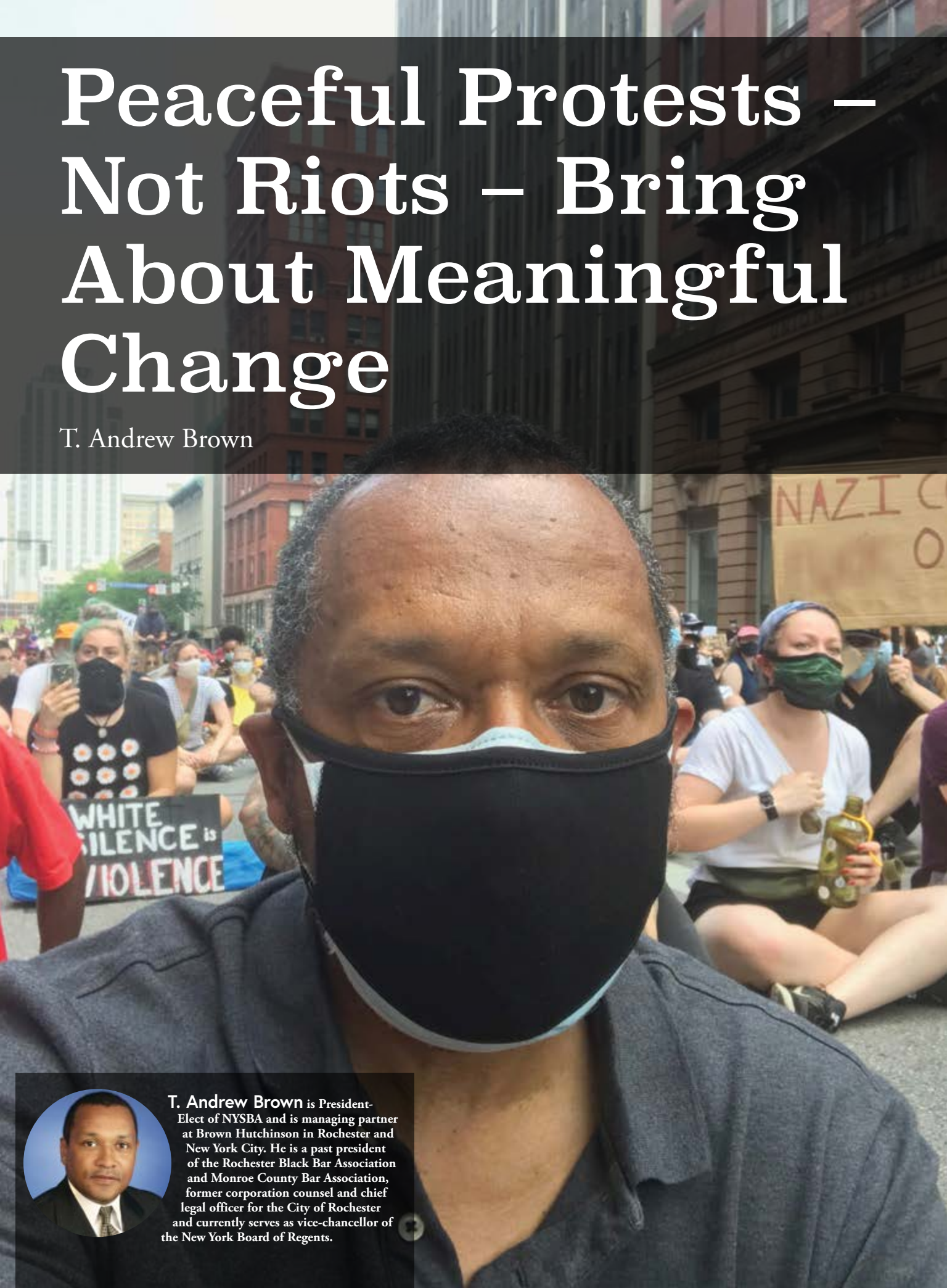
Good policing looks like the acts of each police officer. Each act is, in some essential way, the result of our society, laws, and history. Many politicians vehemently object to the notion of "systemic racism" in policing or American society.

Well, objection overruled. Racism is *manifestly* endemic in the American system.

But systemic as well is our intense and enduring American aspiration toward what a slaveholding Thomas Jefferson described in the Declaration of Independence: a society in which all people are regarded as they were created – equal – all possessing the same unalienable rights to life, liberty, and the pursuit of happiness. The more that American policing succeeds in closing the gap between aspiration toward and realization of *these* systemic constituents of America, the more the nation's policing will look like good policing.

Peaceful Protests – Not Riots – Bring About Meaningful Change

T. Andrew Brown



T. Andrew Brown is President-Elect of NYSBA and is managing partner at Brown Hutchinson in Rochester and New York City. He is a past president of the Rochester Black Bar Association and Monroe County Bar Association, former corporation counsel and chief legal officer for the City of Rochester and currently serves as vice-chancellor of the New York Board of Regents.

Shortly after the coronavirus struck, we all thought this was going to be the year of the virus. And so far it has. But the killing of George Floyd on May 25, 2020 has made it equally the year of the protest.

Ever since that day, protests have been taking place around the country on a daily basis. Cities big and small have had their protests. Cities around the globe quickly joined in the protests. The Black Lives Matter movement quickly became global.

Those protesting at gatherings and marches cannot be easily categorized. They are diverse in race, gender, age, educational background, wealth status and every other way we can think to categorize people. It's everyone. That's what makes the current movement so different, so powerful and so promising.

Most protests have a similar look. The faces of protesters reveal a similar look of passion and commitment to the cause. Even the signs they carry look similar, conveying the message of Black Lives Matter, calling for an end to racism, police brutality and unequal treatment. Systemic injustice is the target.

Protests often take place over short periods of time and then the protesters go about their ways, returning to the comforts of life. The current protests and protesters are proving much more resilient. There are no signs of the protests lightening up. The continued media attention and early successes of the movement continue to fuel what looks like a non-ending readiness of protesters.

Immediately following the George Floyd killing, people began to take to the streets. Some look at this with worry and concern. Protests were watched closely, having been wrongly associated with violence, destruction and looting that took place alongside some of the early protests. The well-meaning and devoted protesters were quick to distinguish themselves from those engaged in such riotous and criminal activity.

The violence and destruction taking place during and after some of the protests appeared to some to be part of the protests. This immediately caused some police departments and government officials to label the protests as riots, harmful to the order of society. This was a failing on their parts to distinguish the protests, and protesters, from criminals causing disorder.

Protesters are engaged in the lawful practice of publicly challenging societal conditions. This right to speech and assembly is found squarely in the First Amendment of the United States Constitution, signaling the importance from the earliest days of our country.

Protests have been a part of the American fabric throughout history, and protests played a significant role in our country's independence. One of the most famous protests that we all learned about in school was the Boston Tea Party. Colonists organized in opposition to the British government's imposition of taxes. And one of the aspects of the protests we remember most is the destruction of property – the dumping of tea into the Boston Harbor. A riot?

Some form of protest has played a role in the shaping of every major change throughout American history, resulting in a more equitable and just society. Equality has never been provided out of a pure sense of benevolence and good will. It always followed an organized and collective movement for change.

Lawful and civil protests should be valued as a peaceful and productive questioning of our values and ways. They should be encouraged, not thought of as counter to the soundness of society.

Protests are a calling out. A chance to be both seen and heard. A ground-level movement for change. And the only qualification to be a protester is commitment of time and to the cause at hand.

We should not confuse a protest with a riot. They are two different things. Unlike a protest, a riot is civil disorder. A modern-day image of riots may include visions of cars and buildings being destroyed and burned, physical violence and looting of stores. While a riot may garner immediate attention, and that may be the idea, riots alone will never bring about lasting and meaningful change.

Riots have historically grown out of oppressive conditions, similar to many protests, including poverty, unequal access to employment, education, housing, health care and injustice to name a few. But unlike the civil disorder of rioting and looting, civil protests can lead to lasting change. They can bring about changes in laws, policies and governance, as we've already seen in New York and other states across the country in the aftermath of George Floyd's killing. And perhaps even more important, civil protests can bring about changes in the minds and hearts of citizens in ways that criminal conduct, destruction and looting never will.

So, we should not fear or feel threatened by the protests we are witnessing. We should embrace them. Protesters are doing the work of civic engagement to question and challenge the unsound laws and ways of our society.

The issues being championed by the BLM movement are not radical. Putting an end to racial injustice, police brutality and unequal treatment are causes we should all be prepared to advocate for. Thinking otherwise makes you part of the problem. Anyone who would challenge these ideals is likely misguided by self-interest.

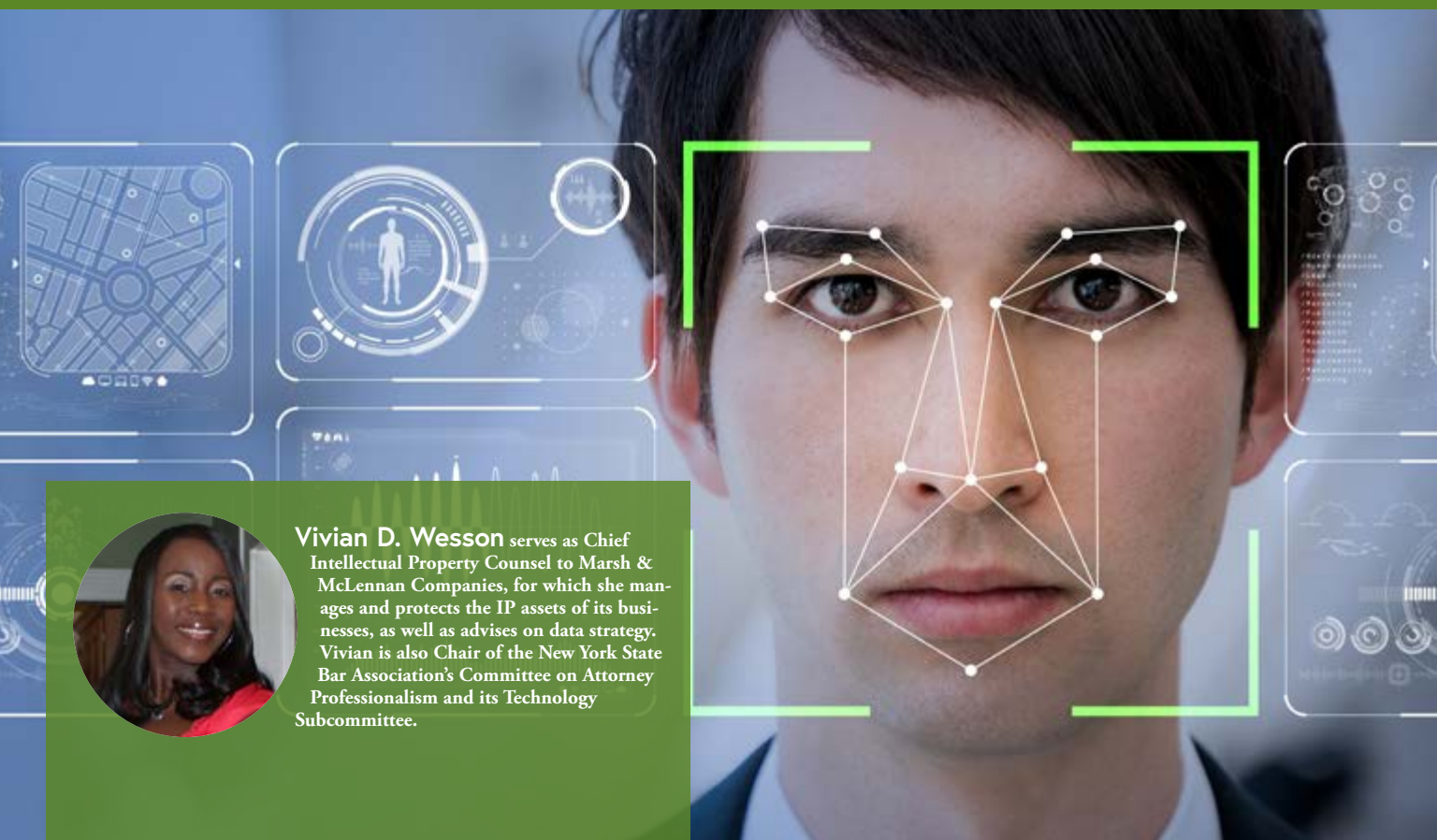
The success of the BLM movement will be the success of us all.

Why Facial Recognition Technology Is Flawed

By Vivian D. Wesson

What do Steve Talley and Robert Julian-Borchak Williams have in common? Both men share the dubious distinction of false arrest by law enforcement using facial recognition technology. In December 2015, the Denver police using facial comparison technology falsely arrested Mr. Talley when he was identified as a suspect in an armed bank robbery.[1] Prior to making the arrest, the police had not investigated whether Mr. Talley had an alibi, relying instead on the software match. Similarly, Mr. Williams, accused of shoplifting watches, had an alibi for the time of his alleged offense, which the Detroit police did not verify before his arrest.[2] In both cases, law enforcement erroneously relied on technology as dispositive, but facial recognition software is not magic – "It's meant to serve as an investigative tool, not evidence."[3]

While there are arguably benefits to facial recognition technology, its present unregulated application by law enforcement raises grim concerns about its role in exacerbating systemic racism and infringing civil liberties. Following the tragic killing of George Floyd, an unarmed black man



Vivian D. Wesson serves as Chief Intellectual Property Counsel to Marsh & McLennan Companies, for which she manages and protects the IP assets of its businesses, as well as advises on data strategy. Vivian is also Chair of the New York State Bar Association's Committee on Attorney Professionalism and its Technology Subcommittee.

suffocated by a white police officer,[4] opponents of this technology have viewed it with even greater scrutiny, stressing the need to both regulate the technology and reform its use.[5] In a country that champions the right to free speech, peaceful assembly, and social equality, we must question whether (and how) the police should deploy facial recognition systems in our democratic society.

WHY FACIAL RECOGNITION TECHNOLOGY IS FLAWED

Facial recognition technology owes its genesis to the development of computer vision in the 1960s.[6] The software underlying a facial recognition system relies on machine learning and complicated algorithms. Algorithms are ubiquitous in this digital age. In the case of facial recognition, however, algorithmic biases have developed within the code because the system was not adequately trained with diverse data.[7] Algorithmic biases (i.e., believing without verifying a computer's accuracy assessment) have led to unfairness and inequities when seeking employment, securing a loan, and, most egregiously, being misidentified for a crime.[8]

HOW LAW ENFORCEMENT APPLIES FACIAL RECOGNITION

Facial recognition technology has assisted law enforcement in locating and identifying missing people and in identifying deceased persons. In an opinion supporting the technology's use for public safety, New York police commissioner, James O'Neill, wrote "Used properly, the software effectively identifies crime suspects without violating rights."[9] He further noted that facial recognition technology has cleared suspects, stating "No one can be arrested on the basis of the computer match alone."[10] As witnessed in Mr. Talley's and Mr. Williams' cases, though, the technology can be improperly applied with tragic results. In those cases, law enforcement failed to recognize that "the technology is no magic bullet."[11]

HOW FACIAL RECOGNITION SHOULD BE REFORMED

Recognizing the inherent biases in facial recognition systems and how they can be (and have been) misused, the question is how these systems can be reformed and regulated to ensure their constructive use by law enforcement.[12] An answer to this question will take several forms: (1) limitations on facial recognition software use, (2) state and federal legislation, (3) judicial intervention, and (4) diversification in the technology workforce.

Although a few large technology companies have announced temporary bans on facial recognition technology sales to police departments (e.g., IBM,[13] Amazon,[14] and Microsoft[15]), the true players in this market, NEC, Idemia, and Clearview AI, have failed to take any action with respect to their sales practices. NEC's founder and CEO, Hoan Ton-That, has remarked that his company would not offer the technology to certain countries,[16] but believes that the system can be used to "combat racism."[17] Notwithstanding Clearview AI's anti-racism assertion, it has been sued in multiple states for its claim to "end your ability to walk down the street anonymously,"[18] a chilling specter of a panopticon society.[19] The courts' ultimate rulings in the pending Clearview AI litigation will serve as a litmus test of our ability to curb this technology's malevolent applications through judicial intervention.

Federal and state legislators must also play a critical role in this reformation. The laws they adopt should protect the right to privacy and other civil liberties impugned by facial recognition technology. Currently, all states have introduced or adopted a bill to address these concerns in some form[20] but Congress has yet to act. Washington State leads the way in legislative reform, noting, "[L]egislation is required to establish safeguards that will allow state and local government agencies to use facial recognition services in a manner that benefits society while prohibiting uses that threaten our democratic freedoms and put our civil liberties at risk."[21] Acknowledging the chilling effect that mass surveillance has on peaceful protests, Washington's and California's laws forbid the use of facial recognition technology on any individual participating in "a particular noncriminal organization or lawful event."[22] Further, the Washington law expressly forbids profiling or the use of predictive law enforcement tools.[23] New York's law is more circumscribed, banning the use of facial recognition or biometric surveillance in police officer cameras only.[24] Boston, MA has joined San Francisco, CA in voting unanimously to "ban surveillance technologies that automatically identify and track people based on their face."[25]

Federal legislation entitled "Facial Recognition and Biometric Technology Moratorium Act of 2020" will soon be introduced to "prohibit biometric surveillance by the Federal Government without explicit statutory authorization and to withhold certain Federal public safety grants from State and local governments that engage in biometric surveillance."[26] Citing the December 2019 report from the National Institute of Standards and Technology[27] in support of their proposed bill, legislators noted that "a growing body of research points to systematic inaccuracy and bias issues in biometric technologies."[28] Senator Merkley stated, "At a time when Americans are demanding that we address systemic racism in law enforcement, the use of facial recognition technology is a step in the wrong direction. Studies show that this technology brings racial discrimination and bias."[29] Co-author of the bill, Congresswoman Pressley, emphasized "Facial recognition technology is fundamentally flawed, systemically biased, and has no place in our society."[30]

Transformation of facial recognition systems should also include reform at the developmental stage. We can

achieve this by educating and training programmers from diverse backgrounds. As author and optics research scientist Janelle Shane writes, "Programmers who are themselves marginalized are more likely to anticipate where bias might be lurking in the training data and to take these problems seriously."[31] In her TED talk, Joy Buolamwini, a computer scientist at the MIT Media Lab, encourages inclusivity in her coding movement, noting that it matters who codes, how we code, and why we code and that technology should "work for all of us, not some of us."[32]

CONCLUSION

Absent issuing everyone a pair of anti-facial recognition glasses[33] or employing creative face make-up techniques,[34] we need immediate practical solutions to the negative repercussions from the use of facial recognition technology by law enforcement. Limiting use, imposing strict regulations, and diversifying the technology workforce are logical places to start with a technology that does not magically work in every instance.

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2. Hill, *supra* note 1. *See also* Shira Ovide, *When the police think software is magic*, N.Y. Times, June 25, 2020, https://www.nytimes.com/2020/06/25/technology/facial-recognition-software-dangers.html.

3. Manning, *supra* note 2. *See also* Ovide, *supra* note 3 ("The police are supposed to use facial recognition identification only as an investigative lead."

4. Brittany Shammus et al., *Murder charges filed against all four officers in George Floyd's death as protests against biased policing continue*, Wash. Post (June 3, 2020), https://www.washingtonpost.com/nation/2020/06/03/george-floyd-police-officers-charges.

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8. Gary Marcus & Ernest Davis, Rebooting AI: Building Artificial Intelligence We Can Trust 57 (2019) (a company selling a deep learning based facial recognition system to a police department may not be able to tell the law enforcement agency much in advance about whether or how the system will work).

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16. *See* John Oliver, *Last Week Tonight* (HBO broadcast Jun. 15, 2020), https://youtu.be/jZjmlJPJgug.

17. *Id.*

18. *Calderon v. Clearview AI, Inc.*, No. 20 civ. 1296 (CM), 2020 BL 201620 at *2 (S.D.N.Y. May 29, 2020).

19. *See* Crockford, *supra* note 6. A "panopticon" is a type of institutional building and a system of control designed by the English philosopher and social theorist Jeremy Bentham in the 18th century. A guard can see every cell and view all inmates, but the inmates cannot see into the tower. These inmates will never know whether or not they are being watched.

20. *See* Susan Crawford, *Facial Recognition Laws Are (Literally) All Over the Map*, Wired (Dec. 16, 2019), https://www.wired.com/story/facial-recognition-laws-are-literally-all-over-the-map ("From Portland to Plano, local governments are placing different limits on the use of biometric data.").

21. H. S.B. 6280, 66th Leg., 2020 Sess. §1(1) (Wash. 2020) (hereinafter the "Washington FR Bill"). Beneficial uses of facial recognition technology are allowed under the Washington FR Bill, including locating or identify missing persons (including missing or murdered indigenous women, subjects of Amber and silver alerts, and other possible crime victims), and identifying deceased persons, all for the purposes of keeping the public safe. In Washington State, using facial recognition technology for ongoing surveillance is strictly prohibited and allowed only if the government agency has obtained a warrant, exigent circumstances exist, or the agency has a court order for locating or identifying a missing person or identifying a deceased person.

22. Washington FR Bill at §11(2); A.B. 2261 §1798.360(b)(1)(B) (Ca. 2020).

23. Washington FR Bill at §11(2).

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28. Sen. Ed Markey, *Senators Markey and Merkley, and Reps. Jayapal, Pressley to Introduce Legislation to Ban Government Use of Facial Recognition, Other Biometric Technology* (June 25, 2020), https://www.markey.senate.gov/news/press-releases/senators-markey-and-merkley-and-reps-jayapal-pressley-to-introduce-legislation-to-ban-government-use-of-facial-recognition-other-biometric-technology.

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30. *Id.*

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32. Buolamwini, *supra* note 9 (As part of her Algorithmic Justice League, Ms. Buolamwini inspires people to take action against algorithmic bias by reporting it, requesting software audits, and becoming a tester of the technology). *See also* Cathy O'Neil, Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy (2016) (The author discusses the proliferation of "WMDs" – widespread mysterious and destructive algorithms used to make decisions that affect every aspect of our lives.).

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Indivisible

Civic and Constitutional Education as a Vehicle for Social Justice

By Christopher R. Riano

Participants at the YES Civic Education Workshop at the U.S. Department of State on February 27, 2018[1]

Children learn more from what you are than what you teach.

–W.E.B. DuBois

On July 1, 2020, civic education was added to the New York State Education Law as a mandatory subject for all of the state's school children. A civic and constitutional education gives students of all ages the tools to understand the historical and philosophical foundations of our constitutional democracy, promotes an informed and responsible participation in civic life and fosters the traits of character that are necessary to enrich our American democracy. As lawyers, we should redouble our commitment to ensuring that this new statute is executed as robustly in schools as is possible. This includes dedicating ourselves to fostering greater partnerships between the bench and the bar to organize civic and constitutional engagement with schools across the entire state. Over the last few years, a number of programs in New York have started to spearhead this important work, but it is our solemn responsibility to do far more in order to promote social justice within our state.[2]

Christopher R. Riano is Executive Director of the Center for Civic Education and a lecturer in constitutional law and government at Columbia University. He also is Chair of the LGBTQ People and the Law Committee for the New York State Bar Association. Twitter: @ChrisRiano

Some of our most celebrated rights and liberties, including the freedom of speech and expression, the freedom to assemble and associate, and the critical protections of both procedural and substantive due process are all found within the first ten constitutional amendments. They are frequently celebrated as being core to American civic principles. As lawyers, we have each taken an oath to ourselves and to our profession to "swear (or affirm) that I will support the Constitution of the United States," and we have no greater responsibility in our execution of that oath then by ensuring that our fellow Americans receive a proper civic and constitutional education to further their own understanding and participation within our system of a republican government.

We are currently faced with an unprecedented moment of change, where people from around the country are spotlighting the role structural racism plays in our society, the place of law enforcement in our communities, and by extension, how each of us can play an active, rather than passive role, in delivering on the ideals of a more perfect union. Much of our collective history has been influenced by the idea, popularized by Horace Mann in 1848, that "[e]ducation then, beyond all other devices of human origin, is a great equalizer of the conditions of men – the balance wheel of the social machinery." However, as lawyers are well aware, it was not until more than a century later, in 1954, that the U.S. Supreme Court would rule in *Brown v. Board of Education* that racial segregation of public school children is profoundly unconstitutional.

Lawyers frequently view the world through the lens of our clients and our professional responsibility to those clients. In order to ensure the rule of law, however, one of our greatest obligations must always be to the system of law itself. There is no other way to ensure its strength, and there is no more powerful way to protect its virtues, than to do our part to ensure the development of an educated, effective and conscientious society. Critically, we have the added constitutional responsibility to our oath that we each work towards ensuring the judicious dismantling of structural barriers that prevent equal access to justice. To do so, we must be virtuous ourselves. This includes taking our time, *pro bono* or not, and using it towards the strengthening of social organizations, community projects and (currently) virtual programming. These works should celebrate the creation of community and teach the importance of a constitutional education.

We have a vigorous history of doing a commendable job forming and leading numerous task forces and study groups dedicated to the elimination of social justice barriers. But time and again more substantial progress could be made on ensuring just and equal representation of our voices if all members of society had the tools of constitutional rights, liberties and change in both their hearts and in their minds. In "Politics," Aristotle stated that "[i]f liberty and equality, as is thought by some, are chiefly to be found in democracy, they will be attained when all persons alike share in the government to the utmost."

Lawyers frequently view the world through the lens of our clients and our professional responsibility to those clients. In order to ensure the rule of law, however, one of our greatest obligations must always be to the system of law itself.

Sustaining a constitutional democracy requires that habits of mind, and one's civic disposition, come from both the power of scholarship and the power of paradigm. The power of scholarship requires that we ensure equal access to information, which should be fostered by the new legal mandate, but we must remain vigilant that the mandate is enacted equally amongst our schools. The power of paradigm requires that students have the knowledge of how change is possible, and how it is possible to take a policy issue and foster change in the community by properly accessing the various parts of your local, state and federal government.

To ensure that we continue to reproduce a civically virtuous society, and that we remain indivisible, we must ensure that all members of our society have the tools and knowledge to participate fully in order to sustain our constitutional democracy.

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1. https://commons.wikimedia.org/wiki/File:YES_Civic_Education_Workshop_(25708573327).jpg.
2. *See* N.Y. Education Law §§ 801 and 803.

New York State Court System Commissions Independent Review of Racial Issues

By Matthew Krumholtz

The New York State Unified Court System on June 9th announced an independent review of its policies and practices that address issues of racial bias. Chief Judge Janet DiFiore cited the tragic death of George Floyd as the impetus for this evaluation, and she named Jeh Johnson, currently a partner at Paul, Weiss, Rifkind, Wharton & Garrison, to lead the review process as Special Adviser for Equal Justice in the Courts. Johnson is a former U.S. Secretary of Homeland Security and General Counsel for the Department of Defense.

"The death of George Floyd, and the issues it has brought into harsh focus, are a painful reminder of the repeated injustices and institutional racism that have long undermined the values and unity of our nation. The court system's commitment to these values is especially vital," said DiFiore.

She added that this independent evaluation "will serve as a valuable tool in furthering diversity and inclusion within the New York State court system and ensuring equal justice under the law."

The internal review will look at court system policies, operations, and practices that address issues of institutional racism and will make recommendations for changes that advance racial justice. This review comes at a time of mounting nationwide protests and calls for systemic change, in response to Floyd's death in Minneapolis on May 25. The court system says the recommendations will focus on operational issues that they have the power to change, not on police practices.

"Above all else, we depend upon the courts as the place where equal justice before the law is guaranteed. This is an important assignment and I will answer the call with energy and dedication," said Johnson, who will be assisted in the evaluation process by Hon. Troy K. Webber, Associate Justice on the Appellate Division, First Department, and Hon. Shirley Troutman, Associate Justice on the Appellate Division, Fourth Department.

"The New York State Bar Association commends the state court system for proactively reviewing ways to root out racial inequalities within our legal system that undermine the rule of law," said NYSBA President Scott M. Karson. "In order to effect the kinds of institutional and cultural changes needed in our society to eradicate racism, we must continue to rethink all aspects of our justice system."

The findings and recommendations of the review will be released on October 1.

Matthew Krumholtz is a freelance writer.

New York State Passes Sweeping Police Reform Agenda

By Matthew Krumholtz

In early June, the New York State Legislature passed, and Gov. Cuomo later signed into law, a package of 10 bills known as the "Say Their Name" Reform Agenda, which calls for sweeping changes in police tactics. On June 16, Gov. Cuomo signed two laws requiring police officers to use body cameras and creating the new Law Enforcement Misconduct Investigative Office.

Among the reform bills that passed the New York Senate and Assembly is the repeal of section 50-a of the Civil Rights Law, which had been used for decades to shield law enforcement disciplinary records from public access. This package of reform legislation comes in response to the death of George Floyd and the ensuing weeks of nationwide protests calling for an end to police brutality against people of color.

"The murder of George Floyd was just the tipping point of the systemic injustice and discrimination that has been going on in our nation for decades, if not centuries," Cuomo said. "These are issues that the country has been talking about for a long time, and these nation-leading reforms will make long overdue changes to our policing and criminal justice systems while helping to restore community confidence in law enforcement."

Cuomo also committed to issuing an Executive Order that will require police agencies to develop a plan for reinventing programs and strategies on the basis of community input to be eligible for future state funding.

Nationwide calls for systemic change in policing have covered a wide spectrum from reforming law enforcement through oversight and regulation to defunding and disbanding departments to abolishing them altogether.

The New York State's response, both from the governor and the Legislature, has come down on the side of reform, aiming to increase transparency and accountability for law enforcement and place limits on the use of police force.

A focal point of this police reform package is the repeal of section 50-a, which passed both the State Senate and Assembly on June 9 – the same day the funeral for George Floyd was held in Houston. This section formerly protected all police personnel records "used to evaluate performance" from being publicly disclosed unless the subject of the records agrees to their release.

The protests against police violence led to renewed scrutiny of section 50-a, which was enacted in 1976, since it has long been viewed as a shield against public disclosure of police misconduct. For 44 years, this state law has been cited by police departments in refusing to make public formal complaints about excessive force or even whether officers have been punished. The statute was widely criticized following the death of Eric Garner in 2014 at the hands of Daniel Pantaleo, then a New York City Police Department officer, whose disciplinary records were blocked from being released.

The New York State Bar Association (NYSBA) issued a memo in support of the repeal, noting "the sponsor of the legislation that enacted section 50-a, the late Senator Frank Padavan, indicated that 50-a was 'never intended to block disclosure of police misconduct form the public.'"

"Disclosing all records pertaining to police misconduct and discipline will help stem the tide of repeated and

senseless incidents of police brutality that are all too frequently aimed at people of color and remain a scourge on our nation," said NYSBA President Scott M. Karson.

This new legislation will require law enforcement agencies to disclose the records of officers when they are requested under the state's Freedom of Information Law (FOIL). It would still protect personal information, including home addresses and medical records of law enforcement by allowing those details to be redacted.

Alongside the repeal of section 50-a, the "Say Their Name" Reform Agenda included an additional nine laws focused on police reform.

Bill S6670/A6144: This bill creates criminal penalties for the use of chokeholds by law enforcement, and the law is named after Eric Garner, who died in 2014 after an NYPD Officer wrestled him to the ground in a chokehold. The bill defines a chokehold as a criminal obstruction of breathing and blood circulation that causes injury or death and classifies it as a violent felony.

Bill S8492/A1531: This legislation prohibits the biased misuse of emergency services when there is no reason to believe a crime is taking place. The new law makes it a civil rights violation for people to call the police on a person of color when there is no reason to suspect a crime or an imminent threat. This bill comes in the wake of a viral video of a white dog walker in Central Park falsely reporting an attack by an African-American bird watcher on May 25.

Bill S3253/A1360: Named the "New Yorker's right to monitor act," this bill affirms the right to record law enforcement activities. The bill also adds a right of action for people who are prevented from recording and provides an affirmative defense for those charged with a violation of this right.

Bill S1830/A10609: The bill expands reporting requirements of misdemeanors and violations charged by the Chief Administrator of the Courts and law enforcement agencies. The bill mandates the collection of data about the race, ethnicity, age and sex of individuals charged as well as the status of their cases, all of which must now be made publicly available online. It also requires the reporting and publication of deaths in police custody and those caused by any use of police force.

Bill S2575/A10608: This bill imposes a duty for police or peace officers to immediately report the discharge of their weapon under circumstances where a person could be struck by a bullet. The requirement applies to all law enforcement officers, whether on or off duty, and provides a timeframe of six hours to verbally report the incident to a supervisor and 48 hours to file a written report.

Bill S8493/A8674: This bill, which Gov. Cuomo signed into law on June 16, requires state police to provide all officers with body cameras and to establish policies on when and how they should be used. It is designed to record all interactions with people suspected of criminal activity, all arrests and uses of force, as well as investigative actions with members of the public. The purpose of this measure is to increase accountability and transparency of law enforcement activities.

Bill S6601/A8226: This act adds an amendment to the Civil Rights Law, which establishes a cause of action for failure by law enforcement to provide proper medical treatment for people in their custody. This bill creates a duty for police officers to respond in good faith in addressing the medical and mental health needs of people under arrest.

Bill S3595/A10002: Signed into law on June 16, this bill creates the Law Enforcement Misconduct Investigative Office within the Attorney General's Office. It directs the State Inspector General, MTA Inspector General and the Port Authority Inspector General to investigate allegations of corruption, fraud, use of excessive force, criminal activity, conflicts of interest or abuse by officer agencies. Unlike the Special Prosecutor, which is only triggered following a law enforcement related death, this law will allow for an independent review of alleged misconduct for any local law enforcement agency.

Bill S2574/ A1601: This legislation establishes an Office of Special Investigation within the Attorney General's Office. It provides the office with investigative authority and criminal jurisdiction over the death of a person caused by police, whether or not they were in custody, and it requires the office to issue a report when an investigation does not lead to an indictment.

In addition, there is a bill that prohibits racial profiling and requires law enforcement policies and complaint procedures to combat racial profiling. This bill is currently in the Codes Committee in the Assembly.

"Black New Yorkers, like all residents of this state, deserve to know that their rights, and lives, are valued and protected by our justice system," said Senate Majority Leader Andrea Stewart-Cousins in a statement. "The legislation that will be signed today will help stop bad actors and send a clear message that brutality, racism and unjustified killings will not be tolerated."

"The relationship between law enforcement and the communities they serve isn't working," Gov. Cuomo said. "We are leading the way by enacting real reforms to increase transparency in policing, promote accountability among our law enforcement agencies and ultimately mend that frayed relationship between the police and the community."

Matthew Krumholtz is a freelance writer.

Qualified Immunity: Does Law Enforcement Much Protection from

By Esther M. Schonfeld and Alexandra Weaderhorn

Esther M. Schonfeld is a founding partner of the law firm Schonfeld & Goldring with offices in Cedarhurst, New York. She specializes in matrimonial law and family law but has a passion for Constitutional law.

Alexandra Weaderhorn, also a matrimonial attorney associated with Schonfeld & Goldring, shares the same passion. They can be reached at aw@schonfeldandgoldring.com.

t Receive Too Personal Liability?

"To Protect and To Serve" is the well-known motto of the police. It is the aim and purpose of their profession . . . or so we are told. Even the Law Enforcement Code of Ethics provides that the duty of a police officer is, among others things, "To safeguard lives and property . . . . To never act officiously or permit personal feelings, prejudices, political beliefs, aspirations, animosities to influence my decision."

The scene was horrifying. The viral video shows a white police officer pinning down a black man to the ground with his knee on his neck. All while other police officers stood by and did nothing to save the man. In fact, further onlooker footage evidenced two other police officers aiding in holding this man down and another watching silently. The man was George Floyd. He was unarmed. He was gasping for air. He was crying out for help; crying out for his dead mother. Onlookers pleaded on his behalf. Yet, the police officer and his cohorts ignored these pleas, continuing to hold down George Floyd and continuing to apply pressure to his neck. The police officers all ignored his cries for help, "please, please, please I can't breathe." They ignored the pedestrians pleading with them to simply escort George into the police car. George lost consciousness and they remained on top of him. His nose bled and he lost control of his bodily functions. He was pronounced dead shortly thereafter.

Thus far, there are four officers face charges for the killing of George Floyd. Derek Chauvin, the officer at the face of this tragedy filmed with his knee of Mr. Floyd's neck, was initially charged with third-degree murder and second-degree manslaughter. His murder charge was then upgraded to second-degree murder. The other three officers on the scene have been charged with aiding and abetting second-degree murder and aiding and abetting second-degree manslaughter.

George Floyd's alleged crime was trying to buy groceries using a counterfeit bill. This is certainly not the first time a police officer killed a black person who posed no threat to his or her safety.

While much attention is being paid to these police officers and the criminal charges they are facing for the death of George Floyd, we are also likely to see the civil litigation ensue (if it hasn't already begun) resulting from the officers' violations of George Floyd's constitutional rights.

In this country, people are granted civil rights by the constitution. When a state actor uses the legal system to deprive a person of his or her constitutional rights, the victim may be entitled to seek legal action based on the violation of his/her civil rights. Section 1983 of Title 42 of the U.S. Code provides that cause of action. [1]

After the Civil War, Congress sought to address the problem of racial injustice in the post-Civil War era. Section 1983 of the US Code, 42 U.S. Code § 1983, known as the Civil Rights Act of 1981, was enacted to provide a civil remedy against the abuses that were committed in the South. Section 1983 provides a citizen the power to sue the government for civil rights violations. The act was intended to provide a remedy for violation of federal law and allows us to enforce our federal constitutional rights against state and local government. As the U.S. Supreme Court explained in *Owens v. City of Independence*,[2] by creating this remedy, Congress sought to enforce provisions of the Fourteenth Amendment "against those who carry a badge of authority of a State . . . . whether they act in accordance with their authority or misuse it."

As such, Section 1983 provides that police officers shall be liable to the person injured for deprivation of any constitutional rights. A Section 1983 lawsuit relating to excessive force requires civil damages be paid for abuses of constitutional rights and can be brought right to the federal level and need not be sought subsequent to seeking a state remedy. [3]

However, in the 1970s, this strict liability against the use of force by police officers was limited when the U.S. Supreme Court added a judge-made doctrine to the existing law and granted "qualified immunity" to government officials (i.e. police officers), unless the actions violated constitutional rights that were "clearly established."

As the Supreme Court held in *Mitchell v. Forsyth*,[4] qualified immunity is "an entitlement not to stand trial or face the burdens of litigation," under certain circumstances. So, the immunity granted is "immunity from suit rather than a mere defense to liability."

Qualified immunity was designed to diminish the social costs of exposing government officials to personal liability.

As such, government officials being sued under Section 1983 of the Civil Rights Act are permitted to raise the defense of qualified immunity, which protects them from discovery and trial, in cases against them which were seeking monetary damages against violations of the proponent's constitutional rights.

Qualified immunity shields government officials provided his or her conduct does not violate clearly established statutory or constitutional rights of which a reasonable officer would have believed that his/her conduct was unlawful based on a clearly established law.[5] This standard is difficult to overcome. For a claim of qualified immunity to fail and a constitutional right to be considered "established," it essentially requires that the actions by the government official had been previously adjudicated by the Court as unconstitutional. Furthermore, it then requires proof that such established law would have reasonably been known to a government official. The particular official's subjective intent is not considered.[6]

As explained by Constitutional law scholar, Martin A. Schwartz, Professor Emeritus of Law, Touro Law Center, "Thus, an officer's evil intention will not turn an objectively reasonable use of force into a Fourth Amendment violation."[7] So, if it would be reasonable to believe that the government official may not have been aware that the actions constituted violation of established law, then the case for qualified immunity is still maintained. Thus, if a victim is unable to meet the burden of proving a violation of a constitutional right, that this right is "clearly established," and a reasonable official would know that it was established, the state official receives qualified immunity and the lawsuit dies. This high standard alone is a deterrence to asserting rights under Section 1983 of the Civil Rights Act and has a chilling effect on the law. While it has been established that officer liability can exist even where the specific action has not previously been held unlawful,[8] the standard to pierce the qualified immunity, in practice, has still be very high and hard to meet.

Notwithstanding, the Supreme Court did allow a caveat to the immunity defense for actions taken with "deliberate indifference" to an established constitutional right.[9] In the 1994 case of *Farmer v. Brennan*, the U.S. Supreme Court held that actions taken with "deliberate indifference" may impose liability. That case specifically addressed the cruel and inhuman treatment clause of the Eighth Amendment to the U.S. Constitution. The "clearly established law" upon which the Plaintiff's contentions rested was specifically the proscription against "deliberate indifference to serious medical needs of prisoners" which was established in *Estelle v. Gamble*.[10]

As touched on above, while not the topic of this article, one explanation for the institution of this Qualified Immunity was to protect public officials from being personally sued for every discretionary action taken while on duty or even every reasonable error in judgment.[11] The doctrine was said to "balance two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when

they perform their duties reasonably."[12] According to Professor Erwin Chemerinsky, the effect of the court's approach on qualified immunity was to protect bad cops.[13] According to Billy Binion, assistance editor at Reason, in actuality, qualified immunity allows public officials "to get away with offenses that would land a normal person behind bars."[14] The fact is that the qualified immunity defense has shielded many police officers from being held accountable for the use of excessive force. Professor William Baude, law professor at Chicago law School and a leading scholar on this topic, documented 30 cases and found that in more than three decades, the Supreme Court only found two cases where official conduct violated "clearly established law."[15]

Qualified immunity was designed to diminish the social costs of exposing government officials to personal liability.

The U.S. Supreme Court in *Graham v. Conner*,[16] held that police officers should be given deference concerning the use of force.

Over the years, there has been much criticism that the qualified immunity doctrine, as applied, is unjust. It allows police brutality to go unpunished and denies victims' their constitutional rights. Professor Joanna C. Schwartz, discusses that the doctrine of qualified immunity, is "historically unmoored, ineffective at achieving its policy ends, and detrimental to the development of Constitutional Law."[17] According to Professor Joanna C. Schwartz, if the Court were to look at qualified immunity, they would find compelling reasons to "greatly restrict or abolish" it noting that there are "alternate protections" and "many barriers" currently in place to shield government officials local governments.[18] Judge Reinhart, U.S. Court of Appeals for the Ninth District, has commented that, "the court through qualified immunity has created such powerful shields for law enforcement that people whose rights are violated, even in egregious ways, often lack any means of enforcing those rights."[19]

The fight against qualified immunity has resulted in many appeals, some of which have been rejected and turned away; however, there are currently still several appeals before the U.S. Supreme Court where qualified immunity was granted to police officers.[20]

In a 2018 case addressing excessive force and Section 1983 of the Civil Rights Act, *Kisela v. Hughes*,[21] the Court overruled a lower court's denial of qualified immunity and, instead, held that the officer there who shot and killed the Plaintiff maintained qualified immunity and, therefore, the question of whether the Plaintiff's Fourth Amendment Rights were violated were not addressed by the Court. In that case, the Plaintiff was wielding a knife.

While it's premature to assess the case of George Floyd, one case that will likely come up in the analysis is *Deorle v. Rutherford*,[22] an excessive force case brought under Section 1983 of the Civil Rights Act. The facts of that case as enumerated in the Court's opinion were as follows: "Police Officer Greg Rutherford fired a "less lethal" lead-filled "beanbag round" into the face of Richard Leo Deorle, an emotionally disturbed resident of Butte County, California, who was walking at a "steady gait" in his direction. He did so although Deorle was unarmed, had not attacked or even touched anyone, had generally obeyed the instructions given him by various police officers, and had not committed any serious offense. Rutherford did not warn Deorle that he would be shot if he physically crossed an undisclosed line or order him to halt. Rutherford simply fired at Deorle when he arrived at a spot Rutherford had predetermined." In assessing the issue of excessive force used, the Court invoked *Graham v. Connor*.[23] The *Graham* Court called for, "careful[ly] balancing . . . 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake" and, citing *Liston v. County of Riverside*,[24] held that "[t]he force which [i]s applied must be balanced against the need for that force." The Defendant, Rutherford, raised the affirmative defense of qualified immunity. So, the questions before the Court became, in using the excessive force, did the officer make a reasonable mistake as to the legality of his actions? Could he have reasonably believed his actions were lawful? The Court ultimately held that, qualified immunity applied in this situation would not further the purpose of the defense, being to protect officers from "the sometimes hazy borders between excessive and acceptable force." This case, they held, was not a "borderline case." Rather, firing at the Plaintiff was "objectively unreasonable." The official there shot Deorle in the face with a lead-filled beanbag round, thought to be "less lethal" but still widely known to cause physical harm. The Court noted that the Plaintiff there was unarmed and had committed no serious offense. The Court also addressed the absence of direct precedent addressing the exact circumstance in *Deorle* (the exact method of excessive force) but found that same was insufficient to entitle Rutherford to qualified immunity.

Notwithstanding, as explained by Professor Martin A. Schwartz, "Even though the Court says it does not require precedent "directly on point" to clearly establish the law, it does demand a high degree of specificity with respect to both facts and circumstances relevant to the officer's use of force, and the legal precedents the plaintiff relies upon to support his argument that the officer's use of force violated clearly established federal law."[25] This specificity requirement, Professor Schwartz explains, makes it "especially difficult for section 1983 excessive force claimants to overcome qualified immunity" and "unlikely that a court will hold that the officer's use of force violated clearly established federal law."

As such, this qualified immunity doctrine can have a chilling effect of sending a message to police officers and other government officials that they will not face consequences for unjustifiably and wrongfully violating civil and constitutional rights. Courts, lawyers, scholars and organizations are calling on the Supreme Court to limit or do away with qualified immunity.[26]

In fact, lawmakers have put forth bills for consideration which would limit the doctrine of qualified immunity. In early June, 2020, Representatives Justin Amash, of Michigan, and Ayanna Pressley, of Massachusetts, introduced bipartisan legislation to end qualified immunity in the House of Representatives. The bill proposed correcting the Supreme Court's interpretation of section 1983, which provides for qualified immunity in favor of the language of the statute, "which does not limit liability on the basis of the defendant's good faith beliefs or on the basis that the right was not 'clearly established' at the time of the violation."[27] Another proposal expected to be put forth is by Indiana Senator Mike Braun. The bill is expected to seek to scale back and reform the doctrine in a less severe than the Amash/Pressley bill, which seeks to end the doctrine completely. Braun's bill would remove the requirement of the doctrine that the conduct violates a "clearly established law" and, instead, officials would only be eligible for qualified immunity if the conduct "had previously been authorized or required by federal or state statute or regulation" or if a court had found the conduct to be "consistent with the Constitution and federal laws."[28]

1. 42 U.S.C. § 1983.
2. 445 U.S. 622 (1980).
3. *See Monroe v. Papp*, 365 U.S. 167 (1961).
4. 472 U.S. 511 (1985).
5. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Saucier v. Katz*, 533 U.S. 194 (2001).
6. *See Graham v. Connor*, 490 U.S. 386 (1989).
7. *See* Schwartz, Martin A., *The Supreme Court's "Double Deference" to Police Use of Force*, The Journal of PLI Press, Vol. 2, No. 2, Spring 2018 (© 2018 Practicing Law Institute), www.pli.edu/PLICurrent.
8. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).
9. *Farmer v. Brennan*, 511 U.S. 825 (1994).
10. 429 U.S. 97, 104 (1976).
11. *See Wood v. Strickland*, 420 U.S. 308 (1975); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).
12. *Pearson v. Callahan*, 555 U.S. 223 (2009).
13. Judge Lynn Adelman, *The Supreme Court's Quiet Assault of Civil Rights*, Dissent, Fall 2017, www.dissentmagazine.org/article/supreme-court-assault-civil-rights-section-1983.
14. Binion, Billy, *Two Cops Were Given Qualified Immunity After Allegedly Stealing $225,000. SCOTUS Won't Hear the Case*, Reason, May 19, 2020, www.reason.com/2020/05/19/qualified-immunity-supreme-court-jessop-theft-kelsay-police-brutality/.
15. Richard Wolf, *Legal Immunity for Police Misconduct, Under Attack from Left and Right, May Get Supreme Court Review*, USAToday, May 29, 2020, www.usatoday.com/story/news/politics/2020/05/29/police-misconduct-supreme-court-reconsider-qualified-immunity/5275816002/.
16. 490 U.S. 386 (1989).
17. Schwartz, Joanna C., *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797 (2018).
18. Schwartz, Joanna C., *After Qualified Immunity*, 120 Columbia Law Review ___ (2020).
19. Reinhardt, Stephen R., *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Courts Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequence*, 113 Mich. L. Rev. 1219 (2015).
20. Schweikert, Jay, *Supreme Court Will Soon Decide Whether To Reconsider Qualified Immunity*, Cato Institute, April 28, 2020, www.cato.org/blog/may-15th-supreme-court-will-finally-decide-whether-hear-cases-calling-abolition-qualified; Rubin, Jordan, *Justice Turn Down Trio of Qualified Immunity Doctrine Cases*, Bloomberg Law, May 18, 2020, www.news.bloomberglaw.com/us-law-week/justices-wont-hear-trio-of-cases-on-qualified-immunity-doctrine.
21. 138 S. Ct. 1148, 584 U.S. ____ (2018).
22. 272 F.3d 1272 (9th Cir. 2001).
23. 490 U.S. 386 (1989).
24. 120 F.3d 965, 976 (1997).
25. *See* Schwartz, Martin A., *The Supreme Court's "Double Deference" to Police Use of Force*, The Journal of PLI Press, Vol. 2, No. 2, Spring 2018 (© 2018 Practicing Law Institute), www.pli.edu/PLICurrent.
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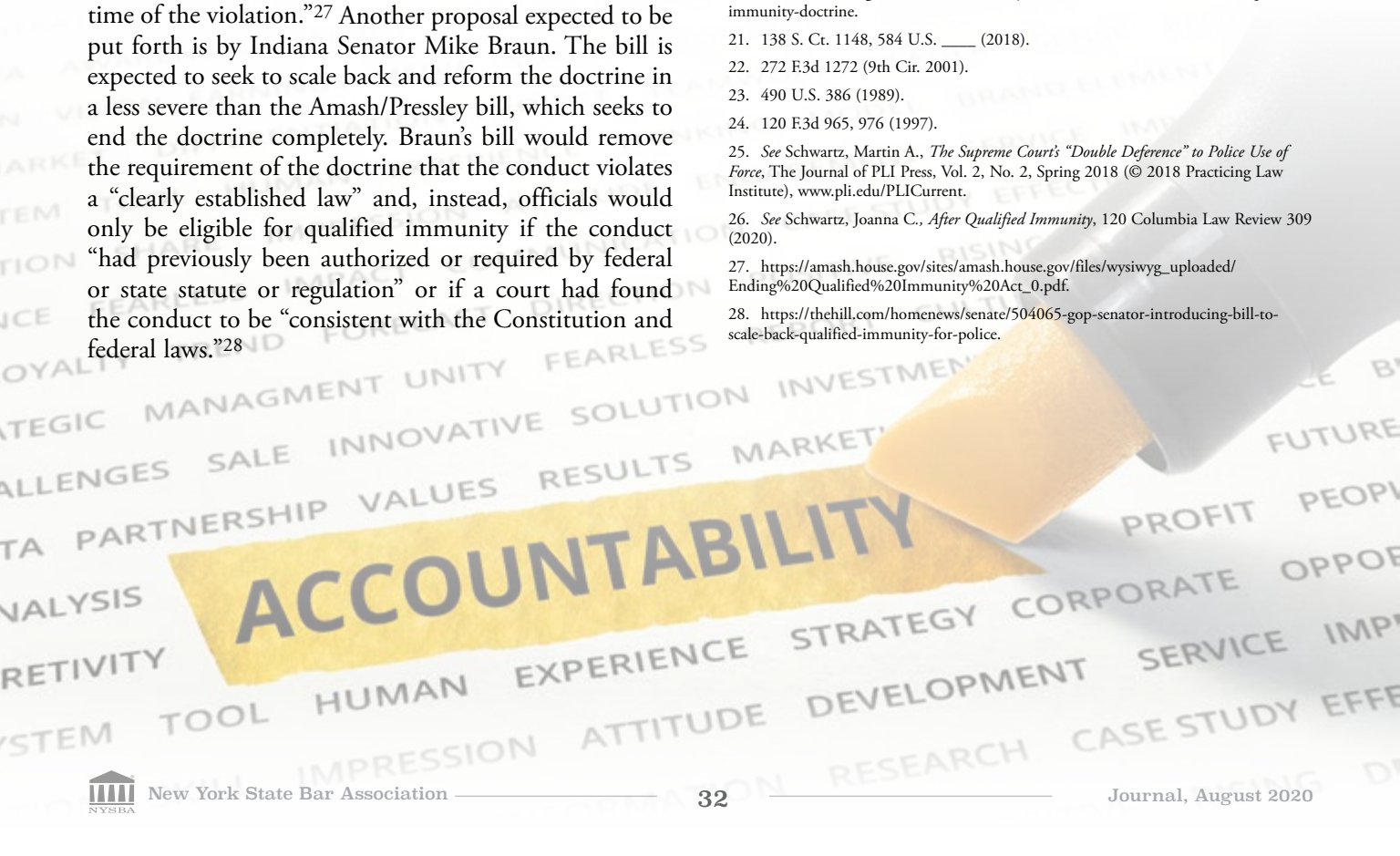

What's Happening in Washington With Police Reform

In the wake of the horrific killing of George Floyd at the hands of the police, in addition to numerous other instances throughout the country, elected officials in Washington are considering policing reform measures.

Motivated by protests throughout the country demanding changes on the use of force, racial and religious bias and national police standards, Congress and the White House responded to the same crisis with different political solutions.

On June 8, House and Senate Democrats introduced a broad reform package and later that week held a legislative hearing on the measure in the House Judiciary Committee, chaired by New York Congressman Jerry Nadler. The star witness was Philonise Floyd, George Floyd's brother. His moving, deeply personal and touching testimony resonated with the members of the committee on both sides of the aisle, with many expressing condolences and support for his family.

In contrast, the mark-up of the legislation the following week in the same committee was a contentious, personal and bitterly partisan spectacle.

In his first outreach to Congress as the new president of the New York State Bar Association, Scott M. Karson wrote to commend Chairman Nadler for introducing the legislation. He encouraged Congress to "embrace its constitutional and moral authority to pass police reforms that address the use of deadly force, create strong standards for training on bias and profiling, and ensure that officers who violate the public trust and their oaths to protect are removed from service and not merely transferred to other jurisdictions."

On June 25th, the House passed the George Floyd Justice in Policing Act, with all Democrats and three Republicans supporting the sweeping reform measure. Senate Majority Leader Mitch McConnell has said the entire House bill is a non-starter, as it would federalize too many issues that should be left to state and local governments. He also characterized the Democratic House bill as overreaching and typical of Democrats.

In the Senate, Tim Scott (R-SC), the only African-American Republican in the Senate, introduced the Republican bill. The measure addresses many of the same issues

Hilary Jochmans, policy director for the New York State Bar Association, writes about legislation of interest to members. Her column appears online and in the Bar Journal. Previously, Hilary was the director of the New York State Governor's Office in Washington for both Andrew Cuomo and David Paterson and has spent a dozen years on Capitol Hill working in the House and Senate.

as the House-passed measure, but there are significant differences between the two bills, specifically dealing with chokeholds, no-knock warrants, a misconduct database and qualified immunity.

Under the Democratic bill, chokeholds, which are defined as any maneuver that restrains an individual and restricts blood or oxygen flow to the brain or impedes breathing, are completely banned. In contrast, the Senate Republican bill has no outright ban, but instead prevents state and local law enforcement departments that do not have a ban from receiving certain federal grants. The definition of a chokehold is also narrower.

The Democratic bill also effectively ends the practice of no-knock warrants in federal drug cases and conditions certain federal funding on state and local law enforcement agencies banning this practice. The Republican measure requires states and localities to annually report their use, and the Attorney General would then publish it.

There has been a systemic practice throughout the country that when a police officer is involved in misconduct, that officer is often just transferred to a different area or is rehired in another jurisdiction that is unaware of the incidents. The Democratic bill seeks to address this issue by creating a nationwide federal database that would document misconduct by the police so that other jurisdictions would be aware of the misconduct.

Under the Republican bill, state and local jurisdictions would have to report officer-involved shootings and other use-of-force incidents each year to the FBI, which would make those records available to the public no later than one year after the legislation is enacted. To encourage participation, cities and states that failed to report the incidents would face cuts in federal funding.

This is indicative of the different viewpoints of the two political parties. Democrats traditionally favor a federal, nationwide law and the Republicans are inclined to empower states and localities to make laws that pertain to their citizens.

The issue of qualified immunity is one of the most contentious. According to FindLaw, this legal construct is designed to provide protection for police officers from civil lawsuits. Without such protection, proponents argue that officers would be subject to constant litigation in the normal course of their jobs. But opponents assert the shield has facilitated violating citizens' rights without being held accountable.

The Democratic bill would make it easier for victims of police brutality to take legal action against police officers and to seek civil damages. For Congressional Republicans and the White House, this provision is a non-starter. They fundamentally believe that bad actors should be dealt with by other means and that this legal doctrine, created by the courts, should go untouched.

The Republicans, who hold the majority in the Senate, did not work with the Democrats on the proposal, and the Democrats, who hold the majority in the House, did not consult with their Republican counterparts either. The Senate held a procedural vote on whether to proceed with debate on the Republican-backed bill. Democrats blocked consideration of the measure, arguing the legislation is insufficient. The lack of cooperation across the aisle and across the Capitol has resulted in an impasse.

At the other end of Pennsylvania Avenue, the White House pursued a different tack and, rather than backing a legislative measure, instead issued an Executive Order on policing reforms. President Trump's plan incentivizes and encourages changes but does not expressly mandate reforms at the local level. Certain federal funding would be conditioned on adopting changes concerning tracking abuses by officers and working with mental health and addiction specialists. Chokeholds are not completely banned, as there is an exception for when a police officer's life is at risk.

Presumptive Democratic presidential nominee Joe Biden has spoken out in support of policing reforms, including legislation banning chokeholds. In his campaign, he has called for creating a national police oversight commission, which he would do during his first 100 days in office.

He also supports a $300 million investment in the Community Oriented Policing Services (COPS) program, while distancing himself from calls to "defund the police." The phrase "defund the police" has become a rallying cry during the protests this summer. But many are asking what the phrase really means. Does it mean zero funding for any police department? Does it mean redirecting money from police departments to social services agencies? "Defund" entails different things to different people and has become politicized and weaponized in Washington.

But, despite the partisan jabs and posturing, there does appear to be a genuine interest in getting a bill passed and some room for compromise. The timeline for action is tight. Congress is set to adjourn for the summer recess by the beginning of August and is not set to return until after Labor Day. There is great momentum for Congress to act, but as we have seen with other national tragedies, such as mass shootings, political divisions can derail the legislative process resulting in no action.

Social Distance Lawyering: How Close Is Your Ethical Compliance?

By Devika Kewalramani, John Baranello and Eliza Barrocas

New Yorkers are grappling with the post-COVID-19 return to life from lockdown, whenever that may be. For months now, serious public health and safety concerns have, rightfully so, dominated the conversation: social distancing, face coverings, and contact tracing, to name but a few. In the wake of the pandemic, the personal and professional lives of New York lawyers have been dramatically dislocated with office closures, work-from-home orders, new court procedures, and executive orders. However, lawyers' ethical obligations to comply with the New York Rules of Professional Conduct (the "N.Y. Rules") have not been paused, relaxed or changed. The same ethical duties – essential duties – continue to govern the conduct of lawyers and firms, pre- and post-COVID-19.

As New York lawyers began to swiftly navigate their practices in the perilous COVID-19 terrain, shifting offices to homes, replacing in-person contact with technology tools, and perhaps temporarily relocating out-of-state, what ethical risks should they watch out for in this increasingly distanced relationship with colleagues, clients, courts and adverse counsel? With remote lawyering extending deeper into 2020, how should New York lawyers ensure that they and their firms are in compliance with their ethical duties? Since the COVID-19 outbreak, the New York State Bar Association and other state bar associations across the country have responded quickly to analyze the ethical impact of the pandemic on the professional conduct of lawyers, and to issue guidance on how to practice ethically during the crisis. Much of the guidance has focused on the rules regarding confidentiality, competence, communication, supervision, multijurisdictional practice, safekeeping property, advertising, solicitation, and lawyer capacity, as discussed below.

Devika Kewalramani is a partner and chair of Moses & Singer's legal ethics & law firm practice, where she represents law firms and attorneys in legal ethics, professional discipline, licensing and admissions matters.

John Baranello is of counsel and managing attorney in the firm's litigation department.

Eliza Barrocas is an associate in the firm's litigation department.

IS CLIENT DATA SAFE AT HOME?

As COVID-19 ravaged New York, the New York State Bar Association released an important alert ("Alert") on how New York lawyers should be working securely while working remotely, making sure that their firms have an accessible digital workspace and that lawyers and staff are prepared to work from home. The Alert warned lawyers to be ready for cybersecurity risks that may come with working remotely. It cautioned against storing or transferring client confidential data outside a firm's secure environment and on unapproved personal cloud service accounts or personal devices that are not secure, and encouraged ensuring personal devices are segregated with separate passwords to restrict access by family members (and if possible, encryption when not in use). In addition, the Alert suggested that firms' IT departments should keep a watchful eye on remote access to monitor any irregularities, keep better logs of network activity to identify any threats and perform random "stress tests" on existing security protocols to detect any vulnerabilities.[1]

American Bar Association (ABA) Formal Opinion 482 (2018) ("ABA Opinion") previously issued guidance concerning the impact of natural disasters (i.e., hurricanes, floods, fires, etc.) on the ethics rules.[2] It is equally relevant to the COVID-19 pandemic and echoes many of the security concerns raised in the Alert. The ABA Opinion concluded that lawyers should be mindful of their duty of competence to be aware of technology that is relevant to legal practice (ABA Model Rule 1.1) and their duty of confidentiality to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client (ABA Model Rule 1.6(c)), which are similar to N.Y. Rules 1.1 and 1.6. A recent article on the ABA Opinion ("ABA Article") noted that lawyers should retain consultants to ensure that client matters are handled appropriately and securely, and should not only be aware of "Zoom bombing," but also careful not to engage in confidential conversations while devices like Alexa and Google Homes are plugged in or within range as they are susceptible to hacking.[3]

Guidance issued by the State Bar of Wisconsin ("WI Guidance") provided practical suggestions to avoid cybersecurity risks involving the remote use of video conferencing platforms during COVID-19. It noted that lawyers should understand the need for computer security, have basic knowledge of video conferencing and its implications, recognize the importance of using a video conference provider that implements appropriate security measures, and carefully review and comprehend the

terms of use and service agreement. The WI Guidance suggested that when video conferencing with clients and colleagues, lawyers should manually check that Zoom is up-to-date, even if set to automatically update, use the waiting room feature to control participants, manage screen sharing options for video and audio, and use randomly generated meeting IDs and passwords transmitted by different means of communication, e.g., sending the meeting ID via email and the password via instant messaging.[4] Similarly, Pennsylvania Bar Association Formal Opinion 2020-300 (2020) ("PA Opinion") cautioned lawyers to ensure that video conferences are secure, meetings are private, and passwords and links are not shared publicly.[5]

To enhance online security during the pandemic, the PA Opinion warned lawyers to avoid public Internet and free Wi-Fi to access or transmit confidential data due to the ability of hackers to use unsecured Wi-Fi to distribute malware and access unencrypted data, i.e., emails and credit card information. It suggested that lawyers use Virtual Private Networks, two or multifactor authentication, long and complex passwords, back up remotely stored data, when possible, access websites with enhanced security, i.e., HTTPS rather than HTTP, firewalls, use and update anti-virus and anti-malware software, avoid opening or clicking on suspicious attachments or unusual links, avoid using websites with illicit content, use USBs, flash drives, or other external devices that the lawyer owns or was provided by a trusted source, and when appropriate, take reasonable precautions to ensure the data is not infected or corrupted, including contacting the supplying or sending party directly.

Guidance by the State Bar of Michigan ("MI Guidance") reminded lawyers that as a practical matter, with lightning advances in technology, what is considered reasonable cybersecurity today, may evolve over time. Therefore, lawyers should periodically assess whether their policies and procedures regarding electronically-stored information are consistent with current technology.[6]

PROTECTING CONFIDENTIALITY WHILE PRACTICING REMOTELY

A key concern regarding the remote work-setting is how to maintain client confidentiality in compliance with N.Y. Rule 1.6. The ABA Article noted that lawyers should be aware of their surroundings and avoid having confidential conversations around others. The MI Guidance cautioned lawyers on the use of technology and its impact on client confidentiality, noting that although video conferencing, shared files and emails allow lawyers to work remotely, they must exercise reasonable care to ensure that associates, employees, and others do not disclose or use confidential information. Similarly, guidance published by the Florida Bar ("FL Guidance") suggested that, to ensure that others, including family members, do not have access to client information, lawyers should safeguard their computers, tablets and phones with password protection, and if they use cloud computing technology, they must understand that technology and how it may impact confidential client information. It emphasized that this obligation applies whether legal work is done in the office or from home.[7]

In these extraordinary times, bar associations across the nation have provided lawyers with practical and useful guidance that will go a long way to inform lawyers of their continuing ethical obligations to clients that are unchanged and uninterrupted by the unprecedented disruption inflicted by COVID-19.

Similarly, the PA Opinion stated that whether the client communication occurs via email, text message, phone call, chat, or online conferencing, they must remain confidential, and lawyers should take reasonable precautions to prevent unauthorized persons from intercepting and reading such communications. It noted that lawyers should dedicate a private area where they can communicate with clients out of earshot from Amazon's Alexa, Google devices or other smart devices, which may record private conversations. In addition, the WI Guidance concluded that lawyers' reasonable efforts to prevent disclosure or access to client data must be proportionate to the risks presented by the technology involved, the type of practice and the individual needs of a particular client.

SUPERVISION BY REMOTE CONTROL

N.Y. Rules 5.1 and 5.3 require law firms and supervisory lawyers to ensure that all lawyers under their supervision conform to the N.Y. Rules, and that the work of non-lawyers is adequately supervised, based upon their experience, amount of work and likelihood of ethical issues arising during the course of work. But how can lawyers effectively supervise other lawyers and non-lawyers remotely? The MI Guidance, FL Guidance and PA Opinion suggested that supervisory lawyers should keep track of important dates and deadlines, provide inexperienced lawyers with supervision, have resources available to resolve ethical problems, account for client funds and property, and make sure that there are procedures in place to detect conflicts of interests.

To supervise remotely, the MI Guidance recommended that supervisory lawyers ensure that non-lawyers are

provided with the necessary assistance, instructions and supervision concerning the ethical aspects of their work, especially to protect client confidences and to avoid accidental straying into the unauthorized practice of law. It suggested that whether via video conferencing, email, or phone calls, lawyers should stay connected to their staff and to other lawyers using the same tools they would use to stay connected with clients. In addition, the PA Opinion stated that lawyers should ensure that their firms have appropriate policies requiring staff, consultants or other third parties to restrict use and disclosure of confidential client information to which they may have access.

CROSSING STATE BORDERS, PHYSICALLY, TO PRACTICE VIRTUALLY

Working remotely can mean different things to different New York lawyers. Some are remote lawyering during the pandemic without having left their New York residences while others have moved (temporarily) to another home

New York lawyers who have relocated to another state due to the COVID-19 outbreak should be careful not to engage in the unauthorized practice of law in violation of N.Y. Rule 5.5.

in-state or out-of-state where they are not licensed or admitted to practice. New York lawyers who have relocated to another state due to the COVID-19 outbreak should be careful not to engage in the unauthorized practice of law in violation of N.Y. Rule 5.5. The ABA Article observed that lawyers who have relocated should determine whether they can serve clients in their home jurisdiction. In some states, it may be against the rules to practice remotely on behalf of home state clients. Further, lawyers should not assume that ABA Model Rule 5.5(c), which allows temporary multijurisdictional practice, will apply in a particular jurisdiction and should consider consulting qualified counsel in their temporary jurisdiction to ascertain whether major-disaster provisions are in effect and whether any local rules or requirements may impact their ability to practice. Moreover, the ABA Article noted that out-of-state lawyers providing disaster victims with representation should also consider the rules regulating temporary practice and seek counsel from qualified lawyers.

Interestingly, D.C. Court of Appeals Opinion 24-20 (2020) ("D.C. Opinion") analyzed the potential dangers of teleworking from home and its implications on the unauthorized practice of law during the COVID-19 pandemic. The D.C. Opinion concluded that the "incidental and temporary practice" exception under D.C. Court of Appeals Rule 49(c)(13) permitted an attorney who is not licensed in D.C. to practice law from their residence located in D.C., as long as the attorney "(1) is practicing from home due to the COVID-19 pandemic; (2) maintains a law office in a jurisdiction where the attorney is admitted to practice; (3) avoids using a D.C. address in any business document or otherwise holding out as authorized to practice law in D.C., and (4) does not regularly conduct in-person meetings with clients or third parties in D.C."[8]

ADVERTISING SERVICES IN A PANDEMIC

Cultivating client relationships is an integral facet of lawyering. In times of uncertainty, lawyers may feel increasing pressure to expand their client base and may even consider embarking on less conventional marketing and business development practices. New York lawyers should be alert to N.Y. Rules 7.1, 7.3, 7.4 and 7.5 that place various restrictions on the content and context of advertising and solicitations regarding legal services. The ABA Article notes that lawyers should advertise cautiously during the COVID-19 crisis, being mindful that they must still comply with advertising and solicitation rules, specifically ABA Model Rules 7.1–7.3, in addition to any other requirements imposed by particular jurisdictions. Further, if lawyers comply with applicable rules, they may communicate with prospective clients in targeted written or electronic recorded material. The ABA Article also observed that during the pandemic, it may be possible for lawyers to solicit pro bono clients in real time because their motives do not involve pecuniary gain, which would otherwise violate the solicitation rules.

COMMUNICATING WHILE SOCIAL DISTANCING

Communication is key to any relationship, and N.Y. Rule 1.4 lays out the duty to communicate with clients. Although most New York lawyers are not working in a traditional office-setting during the pandemic, they must still ensure that they are in regular contact with clients. The ABA Article states that lawyers should ensure their clients know that they remain available to handle their matters and to discuss with them how the COVID-19 pandemic may impact case strategy. In addition, lawyers should consider how these circumstances may impact their ability to serve clients, and should promptly notify their clients of their unavailability if, due to exigent circumstances such as a mental health crisis or a family member's positive COVID-19 diagnosis, they are unable to devote necessary attention to client matters. The ABA Article suggested that lawyers should provide an alternative that provides seamless client service.

The MI Guidance provided practical suggestions on how to maintain client communication during the coronavirus crisis, noting that pursuant to ABA Model Rule 1.4, lawyers must keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information. Lawyers should provide their clients with the best method of contact, whether it be by phone, email, text, or video call. Lawyers should also keep clients updated on the status of their case and stay up-to-date on any business being conducted at the courts. The MI Guidance and the Utah Bar Coronavirus Response ("UT Response") stated that if lawyers have a succession plan in place should they become ill or are unexpectedly unable to represent their clients, they should inform their clients of this plan and discuss what the clients can expect moving forward, including who will contact the client.[9] Furthermore, the MI Guidance recommended that lawyers should find out from their clients who their power of attorney or legal representative is, should the client become ill or otherwise unable to communicate with their lawyers, and added that it would be prudent to obtain this information in writing and alternatively, to be prepared to provide resources if clients do not have a plan. The FL Guidance added that if withdrawal from representation becomes necessary, the tribunal's permission may be required, and the lawyer must take reasonable steps to protect the client's interests.

PREPARE TO BE UNPREPARED (OR UNWELL)

There are a number of technological competency requirements under N.Y. Rule 1.1 that lawyers should be mindful of during the COVID-19 pandemic. For example, the PA Opinion noted that lawyers are obligated to understand the risks and benefits of technology, pointing out that while some lawyers may be technologically competent and know how to implement safeguards, others should seek proper guidance from appropriate staff or outside consultants in order to do so. To illustrate, the WI Guidance recommended that when using video conferencing for court appearances, lawyers should understand how video conferencing works, since preparing for court appearances is part of the duty of competence. The FL Guidance urged lawyers to be on high alert for email scams, avoid downloading links from unfamiliar senders, and be aware of wire transfers that may be fraudulent, to prevent risking technological incompetence.

The Oregon State Bar Coronavirus Response ("OR Response") highlighted another aspect of the duty of competence, observing that part of being a competent and diligent lawyer is to stay up-to-date on current events, including information and updates from the court.[10] The FL Guidance provided helpful tips to ensure that lawyers competently represent their clients, for example, having an emergency plan to access calendars and stay on top of client matters, hearings, closings, or appointments, to collect packages and regular mail, to retrieve voicemail, e-files, and e-portals, to manage attorney trust accounts, and to monitor court and administrative office closures and how they may impact client matters, filing deadlines and hearing dates.

Notably, the UT Response analyzed how the health of lawyers may impact their ability to competently and diligently represent their clients. Lawyers may have to consider withdrawal in the event that a client will be harmed by delay or if they will be unable to adequately prepare for the client's matter. In addition, the OR Response concluded that in the event that lawyers become impaired, incapacitated or die, they must arrange to safeguard clients' interests, including withdrawal if needed, or retain another lawyer to take over the matter with client consent.

Last but not least, lawyers have an obligation to act with civility. The Los Angeles County Bar Association released an important statement imploring lawyers to do their best to help mitigate stress and health risk to litigants, counsel and court personnel, and to avoid any practices that may increase such risk or seek to take advantage of the public health and safety crises.[11]

In these extraordinary times, bar associations across the nation have provided lawyers with practical and useful guidance that will go a long way to inform lawyers of their continuing ethical obligations to clients that are unchanged and uninterrupted by the unprecedented disruption inflicted by COVID-19. It remains to be seen if other aspects of our professional conduct rules are implicated by the pandemic, and whether bar associations will issue further guidance as COVID-19 lingers on. Lawyers cannot foresee the future, but they can plan for pandemics in order to continue to protect the interests of their clients and to comply with their ethical obligations – with masks on.

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1. *See Cybersecurity Alert: Tips for Working Securely while Working Remotely*, Technology and the Legal Profession Committee of the New York State Bar Association (March 12, 2020).

2. *See Ethical Obligations Related to Disasters*, American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 482 (September 19, 2018).

3. *See Five Pointers for Practicing in a Pandemic*, published on the ABA website, Margaret Monihan Toohey (April 8, 2020).

4. *See Videoconferencing and COVID-19: Zooming in on our Ethical Obligations*, published on the State of Wisconsin Bar website, Aviva Meridian Kaiser, Ethics Counsel with the State Bar of Wisconsin (April 7, 2020).

5. *See Ethical Obligations for Lawyers Working Remotely*, Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Formal Opinion 2020-300 (April 10, 2020).

6. *See Ethics in the COVID-19 Pandemic*, State Bar of Michigan (2020).

7. *See Ethics during COVID-19*, The Florida Bar Ethics and Advertising Staff (April 8, 2020).

8. *See Teleworking from Home and the COVID-19 Pandemic*, D.C. Court of Appeals Committee on Unauthorized Practice of Law Opinion 24-20 (March 23, 2020).

9. *See Utah Bar Coronavirus Response: Ethical Considerations during a Coronavirus (COVID-19) Outbreak, Utah State Bar* (2020).

10. *See Coronavirus Response: Legal Ethics FAQ*, Oregon Bar (2020).

11. See Statement by the Los Angeles County Bar Association Professional Responsibility and Ethics Committee, published on the Los Angeles County Bar Association website (2020).

COVID-19 and Restrictive Covenant Agreements

By Maryann C. Stallone, Richard W. Trotter and Marisa Sandler

With the global economy reeling from the COVID-19 pandemic, employers across the United States have terminated employees or reduced hours and compensation. Employees who have been terminated or have had their compensation reduced may look for opportunities with competitors, and competitors may attempt to capitalize by hiring away top talent. This gives rise to a crucial question that employers may want to consider as they make difficult workforce decisions during this period: *how might layoffs and reductions in employee compensation affect the enforceability of their employees' restrictive covenant agreements?*

This article discusses the risks employers may encounter in enforcing their employees' covenants not to compete, not to solicit or service clients, or not to solicit or hire employees ("restrictive covenants") if they lay off employees or reduce their compensation. Employers may be able to mitigate the risk of compromising the enforceability of their restrictive covenant agreements by familiarizing themselves with certain employment options before making important business decisions.

Key considerations that we will address include: (1) whether employers may want to enter into separation agreements with terminated employees; (2) whether employers who do not want to lose their key personnel to competitors may want to implement a reduction in compensation across their workforce in lieu of terminating employees to reduce costs; and (3) whether such reductions in compensation would constitute a "constructive discharge" and thereby potentially render employees' restrictive covenant obligations unenforceable.

WILL TERMINATING EMPLOYEES WITHOUT CAUSE RENDER RESTRICTIVE COVENANT AGREEMENTS UNENFORCEABLE?

Relying on the New York Court of Appeals' decision in *Post v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,*[1] employees terminated without cause frequently argue that their restrictive covenant agreements are unenforceable. In *Post*, the Court of Appeals held that "where an employee is involuntarily discharged by his employer without cause and thereafter enters into competition with his former employer, and where the employer, based on such competition, would forfeit the pension benefits earned by his former employee, such a forfeiture is unreasonable as a matter of law and cannot stand."[2] "Where the employer terminates the employment relationship without cause . . . his action necessarily destroys the mutuality of obligation on which the covenant rests as well as the employer's ability to impose a forfeiture."[3]

New York federal and state courts have since reached inconsistent conclusions on whether an employer's termination of an employee without cause renders restrictive covenants unenforceable.[4] While some courts have limited *Post* to cases involving an employer's denial of post-employment benefits that an employee is contractually entitled to receive, others have concluded that simply terminating an employee without cause renders restrictive covenants unenforceable.[5]

Consequently, there is a risk that courts may conclude that the post-employment restrictive covenant obligations of employees who were terminated without cause due to the pandemic are unenforceable. The economic hardship inflicted by the COVID-19 pandemic may further increase this risk. With millions of Americans currently unemployed, courts may be less inclined to enforce restrictive covenants that keep employees out of work.

What, then, are employers to do if they need to lay off employees or reduce compensation to cut payroll costs, but are concerned about rendering their restrictive covenant agreements unenforceable?

SEPARATION AGREEMENTS PRESENT OPPORTUNITIES FOR EMPLOYERS TO HAVE EMPLOYEES REAFFIRM THEIR RESTRICTIVE COVENANT OBLIGATIONS

Separation agreements are a useful tool for employers seeking to set forth the terms and conditions of employees' separation of employment and obtain a release of legal claims in exchange for a benefit (such as severance pay). Separation agreements also allow employees to reaffirm their restrictive covenant obligations. Such

Maryann C. Stallone is a partner and commercial litigator in Tannenbaum Helpern Syracuse & Hirschtritt's litigation and dispute resolution practice. She has over a decade of experience counseling business entities and executives in a broad range of industries on the best ways to prosecute, defend and resolve their complex business disputes in the state and federal courts, arbitration and alternate dispute resolution forums.

Richard W. Trotter is a cannabis and general commercial litigation counsel at Feuerstein Kulick in New York City. Mr. Trotter also has experience with federal bankruptcy and state receivership proceedings.

Marisa Sandler is an associate in Tannenbaum Helpern's employment law practice, where she handles a wide range of employment matters, including litigation matters in state and federal courts, arbitrations, administrative proceedings and workplace and government investigations.

agreements should be in writing and expressly confirm the survival of existing restrictive covenant obligations.

If entering into separation agreements is unrealistic (e.g., because terminations are occurring on a wide-scale basis or employers cannot afford to offer employees any separation benefit), employers may also consider an across-the-board reduction in compensation for all employees or similarly situated employees.

REDUCTIONS IN COMPENSATION MAY PRESERVE RESTRICTIVE COVENANT OBLIGATIONS PROVIDED THEY DO NOT RESULT IN "CONSTRUCTIVE DISCHARGE"

In lieu of terminating employees, employers may choose to retain their workforce by implementing across-the-board pay cuts to reduce payroll expenses during the pandemic. But will this help preserve the enforceability of the employees' restrictive covenants?

Generally, a reduction in compensation will not render restrictive covenant agreements unenforceable. However, employees who suffer a drastic cut in compensation may argue that they were "constructively discharged" and that their restrictive covenant obligations are unenforceable as a result. Under the constructive discharge doctrine, a court may conclude that, even where an employee resigned, the employee was constructively (i.e., effectively) terminated by the reduction in compensation or a hostile work environment created by the employer.

While courts consider a variety of factors in assessing whether an employee has met its burden of establishing a constructive discharge, a significant reduction in compensation is an important consideration in making such a determination. "Where the claim of constructive discharge is founded upon loss of pay, courts look to the compensation paid to comparable employees, the percentage of the reduction, and the reasonable expectations of the parties."[6] Similarly, in *Morris v. N.Y. City Department of Sanitation*, the District Court for the Southern District of New York found that the plaintiff had made a *prima facie* showing of constructive discharge by establishing that his salary would be reduced by $25,000 and his pension benefits would be curtailed.[7]

Even where there is a substantial reduction in employee compensation, to establish constructive discharge is no light burden; the employee must show that the employer intentionally created an "intolerable workplace condition" by creating an atmosphere that was "so intolerable as to compel a reasonable person to leave" the job.[8] In both *Kirsch* and *Morris*, the reductions in compensation were substantial and the motivation behind those salary reductions was to make the employees' working conditions so unbearable as to prompt the employees to quit. While *Kirsch*, *Morris* and *Granser* arose from claims of discrimination and wrongful termination, the arguments presented in *Integra Optics, Inc. v. Messina* – which was a restrictive covenant case – show that the constructive discharge doctrine is likely to be raised as a defense to enforcement of a former employees' restrictive covenant obligations.[9] Employers reducing compensation as a result of the COVID-19 pandemic can argue that the reductions were reasonable in light of the economic turmoil caused by the pandemic and that such reductions did not amount to a constructive discharge. The employers' argument will be even stronger if the reductions are fixed and imposed on all similarly situated employees.

By keeping employees on payroll, employees remain bound by their common law duty of loyalty to "exercise the utmost good faith and loyalty in the performance of his duties."[10] As a result, employees cannot act directly against their employers' interests, such as by "improperly competing with their current employer."[11] While we did not find a case involving compensation reductions implemented as a direct result of a global financial crisis or natural disaster of the sort businesses are currently facing in light of the COVID-19 pandemic, reductions in compensation compelled by a crisis, and implemented on a company-wide basis, likely will not (and we believe should not) be deemed a "constructive discharge" – particularly where the purpose of the reductions is to retain as many employees as possible, and the reductions are company-wide.

New York federal and state courts have reached inconsistent conclusions on whether an employer's termination of an employee without cause renders restrictive covenants unenforceable.

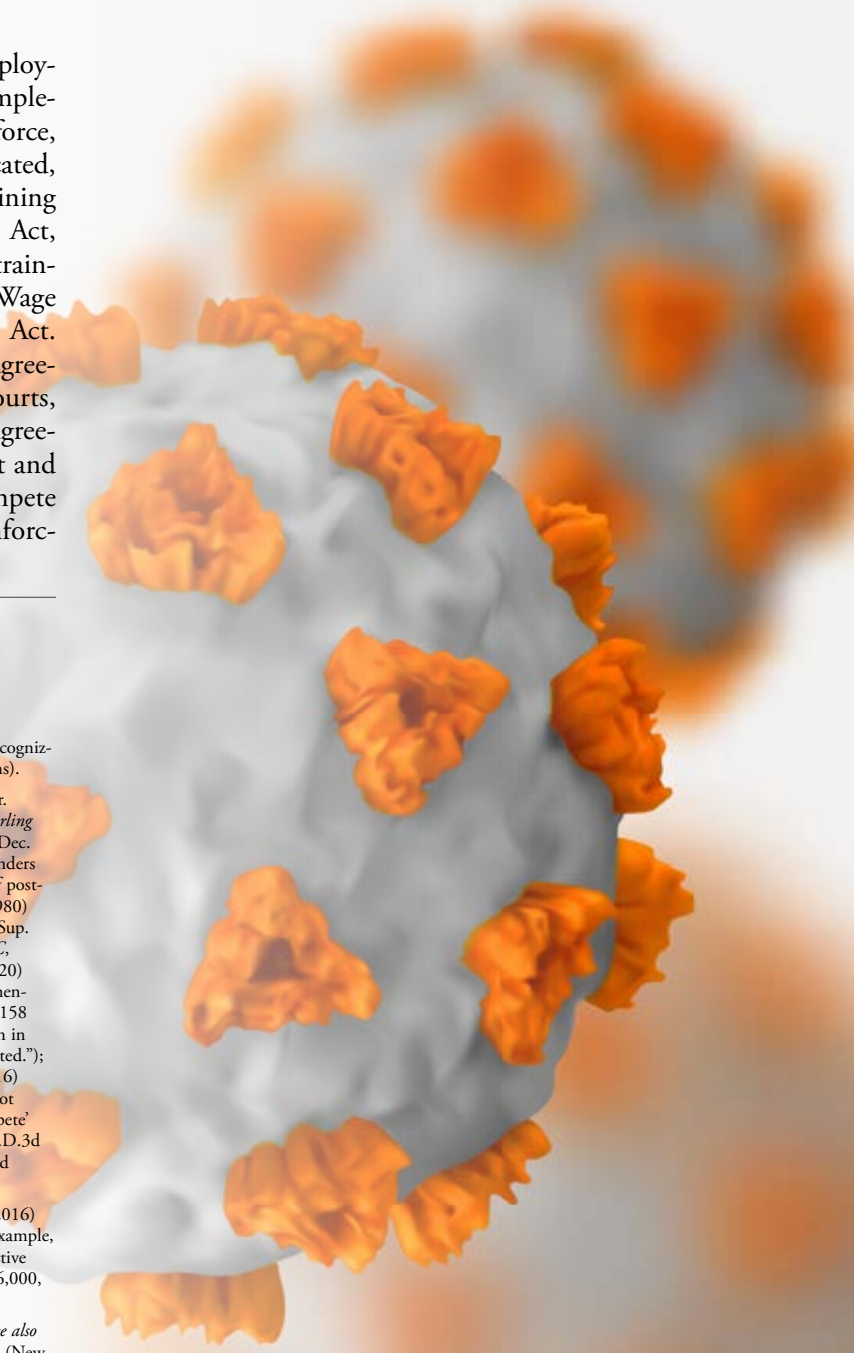
Across-the-board reductions in compensation for employees may therefore be preferable to terminating employees without cause and potentially compromising the enforceability of employees' restrictive covenant obligations.

THE PRESERVATION OF RESTRICTIVE COVENANTS MAY BE AN IMPORTANT CONSIDERATION IN EMPLOYERS' COST-CUTTING DECISIONS

The preservation of restrictive covenants may not be employers' top priority during these difficult times, but

it could be a significant factor in how employers manage their workforce. By considering their options, employers may be able to balance cutting costs, keeping key employees, and preserving employees' restrictive covenant agreements.

Employers are reminded to consult with their employment counsel prior to terminating employees or implementing any compensation reduction in their workforce, as certain other employment laws may be implicated, such as the federal Worker Adjustment and Retraining Notification Act, the federal Fair Labor Standards Act, the New York State Worker Adjustment and Retraining Notification Act, New York State's Minimum Wage Act and New York State's Wage Theft Prevention Act. Moreover, in light of the fact that non-compete agreements are generally given increased scrutiny by courts, employers may want to consider revising their agreements to include more narrowly tailored non-solicit and non-service agreements – rather than broad non-compete agreements – in order to increase their chances of enforcing such agreements.



1. 48 N.Y.2d 84 (1979).

2. *Id.* at 84–85.

3. *Id.* at 89.

4. *See Greystone Funding Corp. v. Kutner*, 137 A.D.3d 427 (1st Dep't 2016) (recognizing that the Second and Fourth Departments have rendered divergent conclusions).

5. *Compare Hyde v. KLS Prof'l Advisors Grp., LLC*, 500 F. App'x 24, 26 (2d Cir. 2012) (cautioning against extending *Post* beyond its holding); *Kelley-Hilton v. Sterling Infosystems Inc.*, No. 19-cv-9963 (DLC), 2019 WL 6617909, at *6–7 (S.D.N.Y. Dec. 5, 2019) (rejecting argument that employee's termination without cause alone renders restrictive covenants unenforceable; limiting *Post* to cases involving a forfeiture of post-employment benefits); *Wise v. Transco, Inc.*, 73 A.D.2d 1039, 1039 (4th Dep't 1980) (same); *Globaldata Mgmt. Corp. v. Pfizer Inc.*, 10 Misc. 3d 1062(A), at *8, n. 9 (Sup. Ct., N.Y. Co. 2005) (same); *Paul Andrew King v. Marsh & Mclennan Agency, LLC*, No. 653707/2019, 2020 WL 1498537, at *3–5 (Sup. Ct., N.Y. Co. Mar. 27, 2020) (a termination without cause does not necessarily render a restrictive covenant unenforceable); *with SIFCO Indus., Inc. v. Adv. Plating Techs., Inc.*, 867 F. Supp. 155, 158 (S.D.N.Y. 1994) ("New York courts will not enforce a non-competition provision in an employment agreement where the former employee was involuntarily terminated."); *Buchanan Capital Markets, LLC v. DeLucca*, 144 A.D.3d 508, 508 (1st Dep't 2016) (covenants not to compete "are not enforceable if the employer (plaintiff) does not demonstrate 'continued willingness to employ the party covenanting not to compete' . . . , *i.e.*, defendants"); *Grassi & Co., CPAs, P.C. v. Janover Rubinroit, LLC*, 82 A.D.3d 700, 702 (2d Dep't 2011); *Marsh USA, Inc. v. Alliant Ins. Servs., Inc.*, 49 Misc. 3d 1210(A), at *3 (Sup. Ct., N.Y. Co. 2015).

6. *Integra Optics, Inc. v. Messina*, 52 Misc. 3d 1210(A) (Sup. Ct., Albany Co. 2016) (citing *Scott v. Harris Interactive, Inc.*, 512 F. App'x 25, 28 (2d Cir. 2013)). For example, in *Kirsch v. Fleet Street Ltd.*, the Second Circuit upheld a jury finding of constructive discharge where the employer reduced the employee's salary from $60,000 to $26,000, 148 F.3d 149, 161–62 (2d Cir. 1998).

7. No. 99cv4376(WK), 2003 WL 1739009, at *5 (S.D.N.Y. April 2, 2003); *see also Granser v. Box Tree South Ltd.*, 164 Misc. 2d 191, 196 (Sup. Ct., N.Y. Co. 1994) (New York trial court held that plaintiff's allegations of a retaliatory demotion and a corresponding reduction in salary were [at the pleading stage] sufficient to state a claim of constructive discharge).

8. *Morris v. Schroder Capital Mgmt. Int'l*, 7 N.Y.3d 616, 622 (2006) (quoting Lumpkin v. H.E.L.P. USA, No. 02-cv-5475, 2005 WL 839669, at *5 (E.D.N.Y. Jan. 7, 2005)); *see also Petrosino v. Bell Atlantic*, 385 F.3d 210, 229 (2d Cir. 2004); Integra Optics, Inc., 52 Misc. 3d 1210(A), at *5.

9. *See Integra Optics, Inc.*, 52 Misc. 3d 1210(A), at *5.

10. *Duane Jones Co. v. Burke*, 306 N.Y. 172, 188 (1954).

11. *Veritas Capital Mgmt., L.L.C. v. Campbell*, 82 A.D.3d 529, 530 (1st Dep't 2011).

Workers' Comp and Working at Home

By Alex C. Dell and Edward Obertubbesing

The effect of the COVID-19 pandemic on the United States and the world has been enormous and historic. The economic impact on the world has been extraordinary. Following the World Health Organization's declaration on March 11, 2020 that COVID-19 was a global pandemic, by March 31, 2020, more than one-third of humanity was under some form of lockdown, and by April 7, 2020, roughly 95% of all Americans were under lockdown with 42 states declaring stay-at-home orders.[1]

While the unemployment rate has soared to levels paralleling those of the Great Depression[2] millions more Americans who have been able to retain their jobs have been asked or directed by their employers to work remotely from home. In New York, all businesses and not-for-profit entities throughout the state, other than those providing essential business and services, were ordered to reduce the in-person workforce at any work location by 100% on March 22, 2020.[3] That included

the Workers' Compensation Board (the Board), which closed all of its locations statewide and conducted all hearings remotely[4] using its Virtual Hearings Service with some Workers' Compensation Law Judges (WCLJs) conducting those virtual hearings from their own homes.

Even as American society slowly eyes a reopening, however, some of these changes may be here to stay, and working from home may become much more of the norm than it was prior to the worldwide spread of the COVID-19 virus.[5] With the workplace now encompassing the home offices and dining rooms of millions of Americans, the potential for accidents and illnesses in workers' homes must be considered on a scale that previously did not exist.

In New York, the Workers' Compensation Law (WCL) provides protections for both workers and employers when work-related injuries and illnesses occur. It is a fundamental principle of the WCL that coverage for workers and liability of employers is based upon injuries and illnesses that arise out of and in the course of employment.[6] Although injuries sustained in accidents outside the workplace are generally not compensable, injuries from at-home work may qualify when the employee engages in a specific work assignment for the employer's benefit or so regular a pattern of work at home that the home achieves the status of the place of employment.[7]

A "home office exception" has evolved to allow recovery under the WCL for work-related injuries that occur at home, although the scope of coverage for injuries to employees working from home has often been limited in recognition of the distinctive nature of the at-home work environment, and the "home office exception" has been applied cautiously by the Board and the courts.[8]

Previously, where work from home was the exception for many employees rather than the rule, the burden has been on the employee to demonstrate that an at-home injury was work-related. But has the dynamic changed in the current environment where employees are being directed by their employer or by government order to work from home? Should a WCLJ who is himself or herself working from home decide a claim for an at-home work injury brought by an injured worker? When an Executive Order of the Governor compels businesses to have their employees work from home, should the burden of proving a compensable injury that occurs at the employee's home be lessened? And what protects an employer from liability for injury to its workers in the home environment where personal and employment-related tasks and activities intersect and overlap? Case law decided in the pre-COVID-19 world provides a starting point for the analysis of some of these questions, but as more injuries occur to an at-home workforce, the possibility exists for a change in the way these cases are decided.

THE "HOME OFFICE EXCEPTION" DEVELOPS

In *Hille v. Gerald Records*, 23 N.Y.2d 135 (1968), the New York Court of Appeals addressed the issue of whether a fatal automobile accident sustained while an employee was on his way home from work arose out of and in the course of his employment. The decedent, Gerald Hille, was a record company executive on his way home to his residence in New Jersey after working late into the evening at the studio's offices in Manhattan. Hille had recording tapes with him at the time of his accident, and in his home he had recording equipment belonging to his employer that he frequently used in connection with his job. The evidence demonstrated that it was a common practice for Hille to take tapes home to listen to them and to return to the studio thereafter for editing.

The Board determined in *Hille* that the accident was compensable, finding that Hille was in the course of his employment while traveling home at the time of the accident. The Appellate Division disagreed and dismissed the claim. But on review, the Court of Appeals reversed the Appellate Division, determining that under the circumstances, Hille's home had become an extension of the employment premises such that the accident occurring between his work location and home was compensable.

The Court of Appeals, in extending the "mixed" or "dual-purpose" trip doctrine first set forth by the Court in *Marks v. Gray*, 251 N.Y. 90 (1929), stated that where there is a specific work assignment for the employer's benefit at the end of the particular homeward-bound trip or so regular a pattern of work at home that the home achieves the status of a place of employment, the Board may permissibly find that a worker's home has become "a place of employment." Relevant considerations include the quantity and regularity of work performed at home; the continuing presence of work equipment at home; and special circumstances of the particular employment

Alex C. Dell is the founder of the Law Firm of Alex Dell (www.alexdell.com). He represents injured and disabled workers throughout New York and Florida with their workers' compensation, disability retirement, social security, disability/supplemental security income and veterans' affairs claims. He is a member of the executive committee of the workers' compensation division of NYSBA's Torts, Insurance and Compensation Law Section.

Edward Obertubbesing has over 30 years of experience in the area of workers' compensation law. He is an attorney in the workers' compensation department at the Law Firm of Alex Dell, where he focuses his practice on handling appeals before the New York State Workers' Compensation Board and the Courts of New York State.

that make it necessary and not merely personally convenient to work at home.[9]

Noting that the evidence in *Hille* demonstrated that he regularly took tapes home and worked on them, sometimes by himself and sometimes with another employee; he had work equipment at his home that was owned by the employer; and it was necessary and beneficial to his employer for him to perform duties at home, the Court found that the "mixed" or "dual" purpose doctrine was satisfied. Of significance, the Court of Appeals noted that the test must be applied with caution to professional employees who have frequent occasion to carry work home of varying degrees of importance and substantiality, and warned that the "rule is not to be subjected to 'a process of gradual erosion, through the device of finding some tidbit of work performed at home.'"

APPLICATION AND LIMITATION OF THE HILLE "HOME OFFICE EXCEPTION"

Following *Hille*, a series of decisions of the Appellate Division have applied *Hille* to find injuries compensable that occurred either at the employee's home or while traveling to home.

In *Levi v. Interstate Photo Supply Corp.*, 46 A.D.2d 951 (1974), the claimant's decedent often worked at home with the employer's knowledge and approval. On the day of his fatal work accident his supervisor had instructed him that, following a meeting out of the office, if the decedent decided not to return to the office to call his supervisor and to do additional work when he got home. Decedent's body was found partially in the elevator on the second floor of his apartment building with gunshot wounds to the head. His briefcase containing work-related papers had been rifled through. While the referee had disallowed the claim, the Board reversed and found that the death arose out of and in the course of his employment. The Appellate Division affirmed, finding that the decedent's home had achieved the status of a place of employment and, in journeying there at the conclusion of his business meeting to continue working until the end of the day, decedent was in the course of his employment.

In *Weimer v. Wei-Munch, Ltd.*, the claimant operated a restaurant business and maintained an office for the corporation in his home where all of the paper and telephone work of the business was regularly conducted. He was employed by the corporation as the restaurant's manager and chef. All business mail was received there, and there were business records, files and an adding machine. Payrolls, merchandise ordering, preparation of menus, employee scheduling and business meetings were conducted at that office. He sustained injuries in a motor vehicle accident while traveling from the restaurant to his home. In affirming the Board's finding that the injuries were compensable, and citing *Hille*, the court noted that if "work duties associated with the employee's home are such that it can genuinely be said that the home has become part of the employment premises," an accident occurring between work and home is compensable.

The Court of Appeals had an opportunity to visit the issue again in *Fine v. S.M.C. Microsystems Corp.,* 75 N.Y.2d 912 (1990), and affirmed its commitment to the principle it had announced in *Hille*. The claimant decedent in *Fine* had a heart attack while driving from his regular employment place to his home where he intended to complete his work. He had set up a separate work area in his home and sometimes worked at home on weekends to complete assignments in a timely fashion. His supervisor testified that the work done by decedent at home inured to the benefit of the employer and that he had permitted the employee to work at home in the past. The Appellate Division had reversed the Board's finding that the death was compensable, but the Court of Appeals reversed the Appellate Division, noting the well-settled rule of *Hille*, stating that an employee's home can achieve the status of place of employment when the employee performs either a specific work assignment for the employer's benefit or a regular pattern of work at home exists.[10]

The "home office exception" has not been applied without limitation. In *Bobinis v. State Ins. Fund*, 235 A.D.2d 955 (1997), the claimant was struck by a car in a parking lot when he stopped to purchase a pen that he needed for his next day's work. He reported to his office only one day a week and otherwise was responsible for attending hearings before the Board to represent the State Insurance Fund. He claimed that his accident while on the way home was compensable, but the Appellate Division affirmed the Board's disallowance of the claim.

The Appellate Division noted in *Bobinis* that the home office exception arises where it is shown that an employee's home has become part of the employer premises. However, the court observed, as it is commonplace for many professionals and managerial-level employees to take work home, the exception is applied cautiously and generally only after consideration of the following indicia: the quantity and regularity of the work performed at home, the continuing presence of work equipment at home, and the special circumstances of the particular employment that made it necessary and not merely personally convenient to work at home. In finding his accident not compensable, the court noted that although the claimant in *Bobinis* frequently took work at home, there was no proof that he maintained an office or that he had work equipment in his home. Further, his supervisor testified that he encouraged his employees to perform their work, other than hearings before the Board, in the office as much as possible. Based on this record, the court found no basis to disturb the Board's finding that the claimant's home was not a second employment site.

Similarly, the Appellate Division, in *Kirchgaessner v. Alliance Capital Mgt. Corp.*, 39 A.D.3d 1096 (2007) affirmed the Board's finding that the claimant's decedent's death did not arise out of and in the course of her employment. Notwithstanding the presence of work equipment in the home which enabled decedent to work from home during irregular business hours, testimony demonstrated that work at home only constituted about 5% to 10% of decedent's overall workload, and that decedent worked at home just three days per month. The employer's preference was for employees to come into the office. While the decedent had worked at home the day prior to her death, the evidence suggested that she did so for personal reasons. The Appellate Division found that the Board had properly disallowed the compensability of the death claim. The court again noted that the factors to be considered in determining whether an employee's home has achieved the status of an additional place of employment include factors such as the presence of work equipment in the home, the regularity and quantity of the work performed there, as well as the special circumstances of the particular employment that make it necessary, as opposed to personally convenient, for an employee to work at home.

Recent Board decisions reflect that, consistent with *Bobinis*, the home office exception has indeed been applied cautiously. In *IBM Corporation*, 2015 N.Y. Wrk Comp LEXIS 6682, the Board disallowed the claim when the claimant was injured at his home when he slipped and fell on ice. The claimant had a home office above his garage, and while walking from the office into his home to get a cup of tea, he slipped and fell and fractured his ankle. Just prior to his fall, he had been using a work computer that had been purchased by the employer and was commonly brought home by the claimant. His employer had also purchased a monitor and docking station for his home office. The employer, however, did not help him set up his home office nor did it pay for anything in his home. The testimony indicated that employees were expected to work at the employer's work location but that it was common practice for employees to work from home in the evenings. While the supervisor testified that the claimant's work from home was for both the employer's convenience as well as the employee's, it was mostly for the employee's convenience. In disallowing the claim, the Board found that the claimant did not perform his work at home on a regular basis and did so approximately once per month and at the claimant's convenience in order to perform a special errand. Outside of that once-a-month exception the claimant was working from the employer's office location on a daily basis. The employer did not provide substantial equipment for the establishment of the home office and the creation of a home office was never explicitly promoted or paid for by the employer.

The Board similarly denied the compensability of claims in *Aftercare Nursing Services, Inc.* 2019 N.Y. Wrk Comp LEXIS 9653 and *Matrix Absence Management*, 2019 N.Y. Wrk Comp LEXIS 4888.

Even as American society slowly eyes a reopening, some of these changes may be here to stay, and working from home may become much more of the norm than it was prior to the worldwide spread of the COVID-19 virus.

In *Aftercare Nursing*, the claimant's work schedule changed on a weekly basis, and she was typically required to report to the employer's premises and was allowed to work from home on a daily basis as well. On the date of her injury, while "working on a call" on a work-related matter, she was also interacting with her daughter preparing dinner. A can dropped on her foot and caused fractures of several toes. Noting that the can had nothing to do with her job duties, that there was no evidence that the phone call that the claimant was involved in had to be handled on an urgent basis, and that there is no evidence that the claimant used office space and equipment at home on a regular basis, the Board found her injury to not be compensable.

In *Matrix Absence*, the claimant was injured while installing furniture in his home office. He was hired by the employer as a telecommuter to work from home, but his employer had not provided the furniture or paid for it. The employer had provided the claimant with a computer tower, two monitors and a keyboard, but the claimant ordered the furniture and paid for it himself. He was injured during his work hours while assembling the furniture. In denying the compensability of his injury, the Board noted that when an employee works from home, the distinction between what is work-related and what is personal is not always as apparent as when an employee works at the employer's premises. Noting that more people are regularly working from home today than ever before, the legal standards developed to address whether an injury occurring in a traditional employer-controlled workspace is compensable cannot always be reasonably applied to injuries to employees working from home.

In denying the compensability of the claimant's injuries in *Matrix Absence*, the Board stated that the scope of compensable injuries to employees working from home should be limited in recognition of the distinctive nature of their work environment. Employees who

work from home, outside the direct physical control of their employers, are potentially able to alternate between work-related and personal activities when they choose. For this reason, injuries sustained by employees working from home should only be found to be compensable when they occur during the employee's regular work hours and while the employee is actually performing her employment duties. Injuries which occur while a claimant is not actively performing his or her work duties, such as taking a short break, getting something to eat, exercising or using the bathroom, for example, should be found to have arisen from "purely personal activities [that] are outside the scope of employment and not compensable (citing *Matter of McFarland v. Lindy's Taxi, Inc.*, 49 A.D.3d 1111 [2008])." Because the claimant's injuries did not occur while he was performing his duties as a claims adjuster and occurred while he was moving furniture during his lunch break, the Board found that the activities that claimant was engaged in were not sufficiently work-related to render his injuries compensable.

For those employees who do truly work full time from home, minor deviations from employment in the home office will not necessarily result in an injury being found not compensable. In *Wellpoint, Inc.*, 2014 N.Y. Wrk Comp LEXIS 11971, the claimant worked from home as a customer service representative. On the date of her accident she had put food in her oven, and when the timer went off she stood up from her desk to remove it and was injured when she fell over a bag on the floor. In finding her injury compensable, the Board found that to the extent that her actions amounted to a deviation from her employment in her home workplace, it was a momentary deviation that was reasonable and of a short duration. The Board found that her actions were not disqualifying under the circumstances, that her employment had not been interrupted at the time of her accident, and that her injuries arose out of and in the course of her employment.

WORK FROM HOME AFTER COVID-19

In the context of the COVID-19 pandemic, employers throughout New York State were required to act in haste to have their workforce moved from office locations to home environments. Some employees may perform that work solely with an employer-issued laptop, some may connect to their employer's servers using a personally owned computer, while others may have a fully equipped office in their home. Many are conducting their work from home while also keeping an eye on their school-age children in the next room doing remote learning.

While the cases discussed herein have shown that the presence of work equipment at the home has been a significant factor, how much of that equipment will be required going forward? Is a laptop enough? Is the compensability of an injury sustained at home limited to accidents occurring during normal work hours (i.e., between 9 a.m. and 5 p.m.)? Is a designated "home office" location within the home to be required? How should an injury during a coffee or meal break be handled? The home environment offers opportunity throughout the day for deviations from the employment-related tasks at hand. What types of deviations will be tolerated as *de minimis* and which will cause a legal separation from the course and scope of employment? Cases presenting these very questions will soon be working their way through the Board and the courts.

CONCLUSION

The "home office exception" first set forth in *Hille* is now over 50 years old. While it is established in the New York Workers' Compensation Law that injuries which occur at home may be deemed work-related and compensable, Appellate Division decisions and recent decisions of the Board demonstrate that the facts and circumstances of such claims will be carefully scrutinized. In recognition of the work-related and personal tasks that can take place in someone's home, the issue of whether an injury arises while the employee is actually performing work-related duties at the time that an injury occurs will turn frequently on the facts and circumstances involved.

With millions of Americans now working from home, and the prospect that remote work will become the norm rather than the exception, the compensability of injuries that occur at an employee's home promises to occupy the attention of legal representatives of both injured workers and their employers. As this discussion demonstrates, whether the worker will be entitled to workers' compensation benefits for those injuries will require a thorough understanding of the facts and circumstances surrounding the nature and extent of the work performed at home.

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6. *Malacarne v. City of Yonkers Parking Auth.*, 41 N.Y.2d 189, 193 (1976).

7. *Fine v. S.M.C. Microsystems Corp.*, 75 N.Y.2d 912 (1990).

8. See, e.g., *Bobinis v. State Ins. Fund*, 235 AD2d 955 (1997); *Kirchgaessner v. Alliance Capital Mgt. Corp.*, 39 A.D.3d 1096 (2007).

9. Citing 1 Larsen, Workmen's Compensation Law [1966], §18.32.

10. *See* also *Claim of McRae v. Eagan Real Estate*, 170 A.D.2d 900 (1991); *Shanbaum v. Alliance Consulting Group*, 26 A.D.3d 587 (2006).

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DEAR FORUM:

I am an attorney in private practice focusing on personal injury law here in New York. I also do a bit of matrimonial law. My clients come from underserved communities, and many face extreme financial hardships. I've always known that Rule 1.8(e) prohibits giving financial assistance to clients in connection with a pending litigation and, as much as I have wanted to, I never gave any help to anyone. Rather, over the years I developed a nice Rolodex with contacts at public service associations to refer these clients to so they could get their needs met. But with all this COVID-19 stuff going on it has gotten way worse, and so many have now found themselves without a paycheck and are simply unable to meet their day-to-day needs. The public service organizations have been inundated and my clients are unable to get desperately needed help. I was recently approached by a client, a young parent of two preschool-aged children, who is unable to buy groceries. And while I know that I probably shouldn't have, I figured that it would be okay to give him a few bucks for a couple bags of groceries. He's a good kid and I know the money is going to his children. I am concerned I may have done something wrong, but it really was so little to me and so much to him. What should I have done?

Sincerely,
Justa Bene Mensch

DEAR JUSTA:

Rule 1.8(e) provides that "[w]hile representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client . . . ." The rule serves several salutary purposes, among them that (a) it safeguards the independence of clients, so that they do not feel morally bound to continue the attorney-client relationship even after they may come to believe that a different attorney would be better suited for the task, and it maintains the client as the ultimate decision-maker, rather than the attorney to whom the clients might otherwise feel beholden if their living expenses were paid by the attorney; (b) it protects against wealthier attorneys incentivizing clients to retain them, to the detriment of less wealthy attorneys; and (c) it protects the justice system from vexatious claims and continuation of claims after they might otherwise be settled but for the fact that the clients' living expenses are being subsidized. One might also suggest that it provides attorneys with a ready response to clients who might ask for a small gift or loan to help them get to the end of the month: "I really wish I could, but it is against the ethics rules and I could lose my license if I do so."

Rule 1.8(e) can be traced to the Star Chamber Act of 1487 and the Statute of Liveries of 1504, which were intended to prevent wealthy landowners from bankrolling the legal claims of their serfs as a means to gain more land and power for themselves, codifying the historical prohibitions on champerty and maintenance. See James E. Moliterno, "Broad Prohibition, Thin Rationale: The Acquisition of an Interest and Financial Assistance in Litigation; Rules," 16 Georgetown J. Legal Ethics, 223, 228 (2003) (drawing on Max Radin, "Maintenance by Champerty," 24 Calif. L. Rev. 48 (1934)). Champerty was the crime of improperly stirring up litigation by investing in a lawsuit. The landowners would hire lawyers and advance financial support through these lawyers to the individual claimants. In essence, the rule was intended to prevent the rich from using the poor to engage in proxy fights for money and power.

Criticizing the policy grounds for Rule 1.8(e), Moliterno cited in his article the 1892 case of *Reece v. Kyle*, 31 N.E. 747 (Ohio 1892), wherein the court stated: "[i]t would not be wise to carry rules adopted originally for the purpose of preventing the powerful from oppressing the weak, by groundless suits in the courts, to the extent of hindering the weak in efforts to avail themselves of lawful remedies against the powerful, now that the conditions making the ancient rules necessary have substantially disappeared, and new conditions, arisen, by reason of which it has become the interest of the powerful to embarrass

and hinder the dependent and weak from obtaining speedy justice in the courts." (Moliterno at 232).

To be sure, "[i]t is not uncommon for attorneys to commence actions for poor people and make advances of money necessary to the prosecution of the suit upon the credit of the cause. Thus a man in indigent circumstances is enabled to obtain justice in a case where without such aid he would be unable to enforce a just claim . . . . The practice of advancing money to the injured client with which to pay living expenses or hospital bills during the pendency of the case and while he is unable to earn anything may in a sense tend to foment litigation by preventing an unjust settlement from necessity, but we are aware of no authority holding that is against public policy or of any sound reason why it should be so considered." (*Chicago Bar Ass'n v. McCallum*, 173 N.E. 827 (Ill. 1930) (as quoted in Moliterno).

Nonetheless, comment 10 to Rule 1.8 provides:

> Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, *because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation*. These dangers do not warrant a prohibition against a lawyer lending a client money for court costs and litigation expenses, including the expenses of medical examination and testing and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fee agreements and help ensure access to the courts. Similarly, an exception is warranted permitting lawyers representing indigent or pro bono clients to pay court costs and litigation expenses whether or not these funds will be repaid. (emphasis added)

Rejecting humanistic considerations and nuance, the Association of the Bar of the City of New York answered "Yes" to this question: "Would it be improper for me . . . to advance [my client] a little money to keep him from actual physical suffering pending his trial . . . . If he is permitted to starve, his physical suffering will be such that he will be compelled to accept a very small and inadequate [settlement] offer that [the defendant] has made. I consider that the amount they have offered him is about one-twentieth of what a jury would award my client." (New York City Bar Ass'n Comm. on Professional & Judicial Ethics, Op. 781 (1953), 779 (1953), 391 (1936), 319 (1934), 20 (1925) (as quoted in Moliterno)).

Rule 1.8(e) is paternalistic, no doubt, and discriminatory against the poor. Compare your impecunious client with, e.g., a business client who is under financial duress. He asks his law firm for an accommodation, a substantial write-down of his bill, because the COVID-19 pandemic has hit his business hard. As an accommodation, and with implicit understanding that the client will remem-

ber well the benevolence during these dire times, the law firm knocks $25,000 off a $100,000 invoice. So whereas giving $250 to a poor client who is suffering financial distress due to COVID-19 to buy groceries and pay the electric bill is *per se* violative of Rule 1.8, knocking $25,000 off the bill of a well-off client is treated as good business practices, even though the same public policy considerations are triggered – the only difference being between *giving* money to the client versus *forgiving* moneys due from the client, a distinction without economic difference.

Surely, you could have referred your client to a litigation funding company; however, as just observed by the Ninth Circuit in a case certified to the New York Court of Appeals based upon a New York choice-of-law clause, the interest rates charged by such companies can be rather exorbitant. See *Fast Trak Investment v. Sax*, 9th Cir. Docket No. 18-17270 (June 11, 2020) (57.2% return on investment if loan repaid immediately; 167.7% if repaid after 20 months).

In conclusion, notwithstanding the countervailing humanistic considerations, Rule 1.8(e) is unambiguous and unwaivable. (See NYSBA Bar Journal, Professionalism Forum, pp. 52–53). That being said, certain expenses, albeit not ordinary living expenses, could properly be advanced by the attorney. See Association of the Bar of the City of New York, Committee on Professional Ethics, Formal Opinion 2019-6 ("Litigation expenses may include the expense of travel to meet with the lawyer or to attend court. Likewise, they may include medical treatment 'if the client otherwise cannot afford to travel to treatment and if failure to obtain treatment may be used by the insurer to minimize the extent of the client's injuries.' However, routine medical care and living expenses do not qualify as expenses of litigation even if, in the absence of assistance, the client may be pressured to accept an unfavorable settlement.") Opinion 2019-6 notes that at least 10 other states and the District of Columbia have adopted a "humanitarian exception" to Rule 1.8(e) or have recognized other limitations "that allow lawyers to make loans or gifts to relieve necessitous circumstances."

Thus, notwithstanding your good intentions, you did violate Rule 1.8(e). Whether Rule 1.8(e) as it now stands is outdated or unfair is a different issue; there are, of course, many laws and rules that, in application, may seem unfair – or indeed *are* unfair – but attorneys, more than other members of society, are especially suited to seek a change in such laws.

We would suggest a very simple tweak of the rule: We submit that such gifts to clients should be permitted, so long as they are provided written notice – how hard could it be to send an email or text message? – stating, "Dear Client, I am hereby providing you written notice, as required by the New York's rules of ethics, that the $250 that I have given you is a gift, and it will not be added onto your bill or reimbursed from any monetary recovery. As you were previously informed in the retainer agreement, you remain free to discharge me and my law firm at any time and either proceed pro se or with different counsel."

Having violated the rule, are you now required to self-report? Rule 8.3 provides that a lawyer who knows of another lawyer's violation of the rules has an obligation to report it; there is no duty to self-report. Therefore, you should accept this as a lesson learned and a suggestion that you use your education and experience to advocate a change of the rules.

Sincerely,
The Forum by
Jean-Claude Mazzola
jeanclaude@mazzolalindstrom.com

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

TO THE FORUM:

I represent a client who is the executor and beneficiary of a decedent's estate, as well as the trustee of a supplemental needs trust created for the benefit of his disabled sister. The client requested that I close the estate, but in order to do so I need to obtain a release from his sister and fund the trust. I have serious concerns regarding the client's honesty that I believe may prohibit him from making the truthful representations required to obtain a legally effective release. For example, despite my many requests, the client has consistently refused to provide me with the back-up for distributions from the estate accounts. To make matters worse, I recently overheard the client on a personal call when visiting my office stating that he intended to dispose of certain estate assets as quickly as possible, even if that meant selling them for significantly less than face value.

Do the rules of ethics require me to take any action with respect to the client's dishonesty? Given that there is no judicial settlement of the executor's account, do I have an ethical obligation to protect the trust beneficiary? Are there any other ethical rules I should be aware of?

Sincerely,
Sandy R. Suspicious

NEW YORK STATE BAR ASSOCIATION
State Bar News

Judges' Take: Litigating in the Federal Courts During COVID-19

By Brandon Vogel

The future of courtrooms is plexiglass. Lots of plexiglass.

With the COVID-19 pandemic, it will not be business as usual when the courts reopen in stages. Lawyers and the public can expect to see smaller courtrooms for civil cases that have been largely resolved during the pandemic, while bigger courtrooms will be for the criminal justice system that has struggled.

The chief judges in each of New York's districts recently discussed their challenges and triumphs during this unprecedented time on the recent Virtual Town Hall, "Litigating in the Federal Courts during COVID-19." The Commercial and Federal Litigation Section sponsored the free event attended by more than 200 members.

A NEW NORMAL

Moderator Mark A. Berman (Ganfer Shore Leeds & Zauderer) asked each judge when oral arguments would return to court.

I think it depends largely on the members of the bar, said Hon. Colleen McMahon, Chief Judge, SDNY, who does not see an end to remote civil proceedings "anytime soon." McMahon noted that the SDNY website contains updated protocols for Phase I, II and III. Phase I is a "very soft opening," with just staff to acclimate to their new quarters, as well as becoming accustomed to masks. Phase II, which began on July 6, is when the courthouse opened to the public, with enhanced screening protocols and kiosks in place before arrivals. Attendees will need to have a temperature under 100.4 and answer questions about any experienced symptoms.

Hon. Roslyn R. Mauskopf, Chief Judge, EDNY, said the district is on the same path as the Southern District. They do not foresee trials until after Labor Day. "Many of my colleagues believe even that is a bit ambitious," she said.

"When I look at the calendars every day, it doesn't seem that we have missed much of a beat at all in terms of civil cases," Mauskopf said.

The magistrate judges handle the large part of pre-trial matters in civil cases. Their calendars are "chock full. It is working remarkably well," she said.

Mauskpof acknowledged that the district is struggling with the criminal justice system. It is very difficult to communicate with incarcerated defendants; lawyers are having difficulties meeting with their clients in preparation for the very limited number of telephone and video proceedings.

McMahon noted that when the district is able to reopen, the largest courtrooms have been reserved for criminal trials with up to 16 jurors, but not all in the traditional jury box. Smaller courtrooms will be for civil trials of up to 8 jurors. Witnesses will not be masked due to constraints but instead be behind plexiglass. Floors and elevators will be clearly marked with stickers and labels.

"We have it so everyone feels safe," said McMahon, who consulted experts and involved parties on how to reopen. "I think we have done a pretty good job. It requires an awful lot of forethought, and, might I add, an awful lot of money."

Glenn T. Suddaby, Chief Judge, NDNY, said that his court's numbers are up 17% for closed cases from a year ago. Filings in civil cases are up, which is "just unbelievable to me."

He agreed with Judge Mauskopf that the district is struggling with the criminal system. "We are down almost 77%," said Suddaby. His court is in Phase II and has starting handling criminal court appearances bu "taking pleas." He said few defendants are being sentenced until the Bureau Prisons open up because "it makes very little sense."

Each courthouse is restricted to one courtroom with designated time slots for proceedings to ensure cleaning between hearings, Suddaby said. Everyone must wear a mask; elevators have passenger limits; people must socially distance when inside.

"We have had great compliance and there haven't been any issues," said Suddaby.

The district hopes to have a civil jury trial in early to mid-September.

Hon. Frank P. Geraci, Jr., Chief Judge, WDNY, has implemented similar measures to the NDNY. His court never closed, so it's now reopening to on-site operations. The district used Dropbox for file sharing and had a "skeleton crew" in the clerks' office. "We really didn't miss a beat."

All of the judges encouraged attendees to visit their courts' websites for the most up-to-date and written protocols.

NYSBA Welcomes New Committee Chairs and Leaders

Seven new members have joined NYSBA's executive committee and new leaders have taken over the association's committees and sections. Congratulations to the new chairs, co-chairs, vice-chairs and Executive Committee members. Thank you for your willingness to serve.

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Past President Henry Greenberg to Chair Commission to Reimagine the Future of New York's Courts

By Brendan Kennedy

In an effort to better equip the New York State court system to keep pace with society's rapidly evolving changes, Chief Judge Janet DiFiore announced in June that she was forming the Commission to Reimagine the Future of New York's Courts.

The commission will be chaired by New York State Bar Association immediate past president Henry M. Greenberg and will study the enhanced use of technology and online platforms and make recommendations to improve access to justice.

"I thank Chief Judge DiFiore for the honor of chairing the Commission and working with such an extraordinary group of judges and lawyers," Greenberg said. "The COVID-19 pandemic offers a unique opportunity to reimagine how courts deliver services and consider innovative proposals for the justice system of the future."

Greenberg, a partner at the Albany law firm Greenberg Traurig, just concluded his term as NYSBA president. He focused his tenure in part on making technological changes such as creating a virtual bar center, revamping the NYSBA website, partnering with legal technology companies Clio and Paladin to create a pro bono network in response to COVID-19 and conducting the first-ever virtual House of Delegates meeting in NYSBA's 140-year history.

The commission, which is comprised of judges, lawyers, academics and technology experts, will provide immediate recommendations for the courts as in-person operations resume this month and will develop a blueprint that the courts can use well into the future.

"The Commission, therefore, will explore the enhanced use of technology and online platforms, and regulatory and structural innovations, to more effectively and efficiently adjudicate cases and improve the accessibility, affordability and quality of legal services for all New Yorkers," Greenberg said.

President-elect T. Andrew Brown, past president Seymour James and executive committee member Mark A. Berman have also been asked to serve.

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NYSBA Report Finds Underrepresentation of Female Attorneys in the Courtroom and in ADR

The Commercial and Federal Litigation Section of the New York State Bar Association examined gender equity in the courtroom to see whether there had been improvement. Unfortunately, the survey found very few gains since the section's seminal report on the subject in 2017. For instance, women represented only 25.3% of lead counsel roles in the 2020 report. That was a tiny increase from the 24.7% three years ago. Read the full report at **nysba.org/equalityforwomen**.

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Thoughts on Legal Writing from the Greatest of Them All: William Strunk Jr. and E.B. White—Part I

William Strunk Jr. earned a Ph.D. from Cornell University in 1896 and taught English there for more than 40 years. He wrote and published "The Elements of Style," a grammar rulebook, for use in his Cornell English class.[1] The "little book," as Strunk and his students called it, discussed core principles of usage, composition and form. It also reviewed commonly misused words and expressions.

In 1919, a student named Elwyn Brooks White used the little book in Strunk's course. White recalls Strunk as an avid admirer of "the clear, the bold, and the brief," characteristics the little book embodied.[2] According to White, Strunk was most passionate about Rule 17, "Omit needless words." He "put his heart and soul" into teaching his students the importance of Rule 17.[3]

After passing Strunk's class, White had forgotten the little book but not his memorable English professor. White went on to an illustrious career as an acclaimed writer for The New Yorker and published notable works like "Stuart Little" and "Charlotte's Web."[4] White revisited Strunk's little book four decades after Strunk's class, when Macmillan Publishers asked White to revise it for college students and the general market.

White described the little book as a "forty-three-page summation of the case for cleanliness, accuracy, and brevity in the use of English."[5] The original book contains Strunk's principles on proper grammar; White sought to preserve his professor's dedication and vigor in his revision. White added a chapter, "An Approach to Style," exploring the mystery of style and distinguished writing.[6] Strunk had passed away by the time White revised the book. But Strunk's legacy continues through his students and his little book.

In this two-part column we highlight Strunk and White's principles of writing as expressed in their book, "The Elements of Style." In Part I, we'll address Strunk's recommendations on usage and composition. In Part II, we'll address White's suggestions on effective style, Strunk's principles on form and his critique of commonly misused words and expressions.

Gerald Lebovits (GLebovits@aol.com), an acting Supreme Court justice in Manhattan, is an adjunct at Columbia, Fordham, and NYU law schools. For his research he thanks Bayron Flores Tapia (Fordham University School of Law), his judicial fellow.

USAGE

Strunk dedicated Rules 3, 4, 5, and 6 to proper punctuation. He urged his readers to internalize these rules so that they become "second nature" to them.[7] We'll obey Strunk's command.

Rule 1: Form the Possessive Singular of Nouns by Adding 's

Strunk told writers to "[f]ollow this rule whatever the final consonant."[8] For example, the possessive singular of the noun *Charles* is "Charles's friend."[9] An exception, he explained, is for historical figures like Moses: *Moses'* book. Indefinite pronouns like "one's rights" likewise require an apostrophe to show possession.[10] Strunk cautioned writers to avoid the most common error in the English language: writing *it's* for *its*, or vice versa.[11] *It's* is a shorter version for "it is," and *its* is a possessive.[12]

Rule 3: Enclose Parenthetic Expressions Between Commas

Strunk observed that Rule 3 is difficult to follow: It might not be clear whether a word or phrase is parenthetic and therefore requires a comma. The rule is easier to follow when the writer uses a name or title in direct address.[13] For example, "Well, Susan, this is a fine mess you're in." Abbreviations such as *etc.*, *i.e.*, and *e.g.* are also parenthetic and warrant a comma.[14] Nonrestrictive relative clauses are parenthetic, too; they don't "identify or define the antecedent noun" but "merely add something."[15] *Example:* "The audience, which had at first been indifferent, became more and more interested."[16] The clause starting with *which* adds nothing; thus, you should include a comma. Restrictive clauses, on the other hand, don't require a comma and aren't parenthetic; they define the antecedent noun.[17]

Consider this: "People who live in glass houses shouldn't throw stones."[18] The clause starting with *who* tells the reader which people the writer is referring to. In situations of uncertainty, Strunk instructed writers never to "omit one comma and leave the other."[19]

Rule 4: Place a Comma Before a Conjunction Introducing an Independent Clause

"Two-part sentences of which the second member is introduced by *as* (in the sense of 'because'), *for*, *or*, *nor*, or *while* (in the sense of 'at the same time') likewise require a comma before the conjunction."[20] Similarly, if the subject of two clauses is the same and expressed only once, a comma is effective if it's separated by the conjunction *but*.[21] *Example:* "I have heard the arguments, but am still unconvinced."[22] A comma isn't required when two clauses are strongly related and the conjunction is *and*.[23]

For example, "He has had several years' experience and is thoroughly competent."[24]

Rule 5: Don't Join Independent Clauses with a Comma

Strunk declared that when a sentence consists of two or more grammatically correct clauses not joined by a conjunction, the proper punctuation is a semicolon.[25] For example, "Mary Shelley's works are entertaining; they are full of engaging ideas."[26] This is especially true if both clauses relate to the same idea or when the writer uses an adverb such as *accordingly, besides, then, therefore,* or *thus* before the second clause.[27] Being able to identify the relationship between clauses is integral to composition, Strunk explained.

Rule 6: Don't Break Sentences in Two

Strunk urged writers to avoid substituting periods for commas. If the writer seeks "to make an emphatic word or expression serve the purpose of a sentence," using a period for a comma is permissible so long as the "emphasis is warranted."[28]

Rule 9: The Number of the Subject Determines the Number of the Verb

"Words that intervene between subject and verb do not affect the number of the verb" because a "singular subject remains singular even if other nouns are connected to it by *with*, *as well as*, *in addition to*, *except*, *together with*, and *no less than*."[29] Strunk also cautioned writers

to avoid using a singular verb after the expression "one of" or similar expressions, when the subject warrants a plural verb.[30] For example, "One of those people who *is* never ready on time" should be written as "One of those people who *are* never ready on time."[31] Rule 9 is difficult to apply, but Strunk gave clear examples. In the case of pronouns like *each*, *either*, *everyone*, *everybody*, *neither*, *nobody*, *someone*, a writer should always use a singular verb.[32] If "a compound subject [is] formed of two or more nouns joined by *and*," the correct usage is a plural verb unless the compound subject is "considered a unit," in which case a writer should use a singular verb.[33] *Example:* "Give and take *is* essential to a happy household."[34] "Give and take" is a unit; a writer should use a singular verb.

There might be some times where a noun appears plural but is really singular, and therefore warrants a singular verb. In these situations, Strunk noted, a writer "must simply learn the idioms."[35]

COMPOSITION

Rule 12: Choose a Suitable Design and Hold to it

For effective writing, according to Strunk, one must be able to follow the writer's thoughts. The writer must determine "the shape of what is to come and pursue that shape."[36] If the writer chooses a suitable design and holds to it, the writing will be much more effective, and the reader will know where the writer is headed. Thus, "planning must be a deliberate prelude to writing."[37]

Rule 13: Make the Paragraph the Unit of Composition

Strunk noted that a "paragraph is a convenient unit" serving "all forms of literary work."[38] There's no clear-cut rule about how long a paragraph should be; "as long as it holds together, a paragraph may be of any length."[39] If a writer intends to write a brief synopsis of a movie, a single paragraph might be appropriate. If a writer is writing a legal brief or an argumentative paper, the writer should divide the subject "into topics each of which should be dealt with in a paragraph," beginning "each paragraph either with a sentence that suggests the topic or with a sentence that helps the transition."[40] This technique "aids the reader" by indicating "that a new step in the development of the subject has been reached" and making clear the "relation [of the paragraph] to what precedes or its function as part of the whole."[41]

Additionally, to "aid the reader," it might be appropriate to break long paragraphs into two even if the writer isn't required to do so, because it "is often a visual help."[42] Nevertheless, Strunk argued, "moderation and a sense of order should be the main considerations in paragraphing."[43]

Rule 14: Use the Active Voice

Strunk explained that using the active voice "makes for forcible writing."[44] Writing will be more concise, vigorous and direct than with the passive voice. Strunk also argued that the active voice tends to form shorter, stronger sentences because "brevity is a by-product of vigor."[45] Strunk cautioned, however, that a writer shouldn't entirely abandon the use of passive voice; they're sometimes convenient and necessary.[46] But in most cases, a writer should use the active voice to achieve clarity and concision.

Rule 15: Put Statements in the Positive

Strunk advisedwriters to "[m]ake definite assertions" and to "[a]void tame, colorless, hesitating, noncommittal language."[47] Specifically, writers must avoid auxiliaries like *would*, *should*, *could*, *may*, *might* and *can*, unless the subject involves genuine uncertainty.[48] If not, Strunk argued, "your writing will lack authority."[49] For example, "He was not very often on time" *becomes* "He usually came late."[50] "[I]t is better to express . . . a negative in positive form."[51]

Rule 16: Use Definite, Specific, Concrete Language

Strunk urged writers to "[p]refer the specific to the general, the definite to the vague, the concrete to the abstract."[52] This technique will "arouse and hold the reader's attention."[53] To comply with Rule 16, writers needn't include every detail, but only those "significant details . . . with such accuracy and vigor that readers, in imagination, can project themselves into the scene."[54]

Rule 17: Omit Needless Words

Here's some classic advice: "Vigorous writing is concise. A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts."[55] A writer mustn't be wordy. Strunk instructed writers to resist the temptation to use expressions like *owing to the fact that*, *in spite of the fact that*, and, most important, *the fact that*, "an especially debilitating expression."[56] Strunk argued that writers "fall into wordiness" because they improperly use more than one sentence to explain a single complex idea that could be expressed in one sentence. Writers must ensure that "every word tell[s]."[57]

This column continues in the next edition of the *Journal* with Part II, in which we'll address White's recommendations on effective style and Strunk's principles on form and commonly misused words and expressions.

1. Sam Roberts, *"The Elements of Style" Turns 50*, N.Y. Times (Apr. 21, 2009), https://www.nytimes.com/2009/04/22/books/22elem.html.
2. William Strunk Jr. & E.B. White, *The Elements of Style* xviii (4th ed. 2000).
3. *Id.* at xv.
4. *Id.* at x.
5. *Id.* at xiii.
6. *Id.* at xiv.
7. *Id.* at 7.
8. *Id.* at 1.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 3.
14. *Id.* at 2–3.
15. *Id.* at 3–4.
16. *Id.* at 4.
17. *Id.*
18. *Id.*
19. *Id.* at 2.
20. *Id.* at 5.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 5–6.
26. *Id.* at 6.
27. *Id.*
28. *Id.* at 7.
29. *Id.* at 9–10.
30. *Id.* at 9.
31. *Id.* at 10.
32. *Id.*
33. *Id.* at 9.
34. *Id.* at 10.
35. *Id.*
36. *Id.* at 15.
37. *Id.*
38. *Id.*
39. *Id.* at 16.
40. *Id.*
41. *Id.*
42. *Id.* at 17.
43. *Id.*
44. *Id.* at 18.
45. *Id.* at 19.
46. *Id.*
47. *Id.*
48. *Id.* at 20.
49. *Id.*
50. *Id.* at 19.
51. *Id.* at 20.
52. *Id.* at 21.
53. *Id.* at 21.
54. *Id.* at 22.
55. *Id.* at 23.
56. *Id.* at 24.
57. *Id.*

A Good Year To Be 2L

I started my second year of law school last fall with a sense of confidence mixed with relief.

As a 2L, I understood the demands of law school and had developed skills and strategies to cope with the stress and to succeed. The things that had worried me as a 1L – scholarships, class rank, on-campus interviews for summer positions – seemed much less daunting as I returned to campus in September

At the same time, the bar examination was still nearly two years away, too far in the future to worry about – let alone to begin studying for.

Suzanne Hassani is a rising 3L at the Maurice A. Deane School of Law at Hofstra University, editor-in-chief of the American College of Trust and Estate Counsel Law Journal Vol. 46, and a research assistant for Hofstra's Law, Logic, and Technology Lab.

And then came the COVID-19 pandemic and the resulting public health emergency. The already daunting task of succeeding in law school became even more daunting. Law students were presented with a whole new set of questions about how our law school experience would unfold and what – many of which had no easy answers.

I recognize that many law students may have been concerned about or unhappy with how their schools responded to the pandemic. However, I felt that my school, the Maurice A. Deane School of Law at Hofstra University, dealt effectively with the impacts of COVID-19.

At the outset, my biggest concern was personal: I live at home with my family and I was terrified that if I had to attend classes on campus, that I might bring the coronavirus home with me and expose my elderly parents. These worries faded quickly, though, as Hofstra moved quickly to close the campus and move to remote instruction. The decision to go remote came on a Sunday, professors and administrators were trained the next day, and classes resumed on Tuesday.

Since then, the faculty at the law school has sent out regular communications updates, our professors have been holding additional office hours and our librarians have been readily available as well. Hofstra students received prorated refunds for housing charges and for unused meal points in the dining halls. On a personal level, I found that I adapted well to remote learning.

Another important step taken by the law school was to convert all spring semester classes to pass-fail grading. From what I could tell, doing so eased concerns that students may have had about the quality of their work because they were operating outside of their comfort zone, under unusual and unprecedented circumstances.

I understand that the effects of the pandemic were much more problematic for 3Ls. I have no doubt that it was difficult and draining to suddenly find that they did not know when the bar examination would be held, even though a delay would mean more time to prepare. Without clarity on when the bar exam would be given, many 3Ls wondered what the impacts would be as they look to start careers for which they have been preparing for many years. Also, many of us have taken student loans to complete our education, and we are ready to get to work and to commence paying off those loans.

And then came the COVID-19 pandemic and the resulting public health emergency. The already daunting task of succeeding in law school became even more daunting.

To be sure, 2Ls are also feeling the impacts of the pandemic and its effects across the legal community, although the experiences have varied from student to student. Some of my classmates who had not yet secured summer positions found it more difficult to do so, while others lowered their expectations. Some with planned big law internships for this summer learned that those positions were eliminated, and it was far too late to pursue other positions as nearly all of these internships are filled far in advance.

One student had a firm cancel the summer program, but at the same time extend a full-time offer for after graduation in 2021. Personally, I am employed with a company that offered me increased hours after going remote, and I have been told that those hours will be maintained through the summer.

It is no secret that law school is intensely stressful for most students, and that stress sometimes leads to emotional and mental health issues and substance abuse. A 2014 Survey of Law Student Well-Being sponsored by the American Bar Association found that 42% percent of surveyed law students believed they needed help for emotional or mental health issues in the past year, but only half sought assistance. Sixty-three percent of the respondents feared that seeking help for a substance abuse issue could pose a threat to their bar admission, and 45% said the same thing regarding seeking mental health treatment.

Last fall, I had the privilege of participating in NYSBA's Working Group on Attorney Mental Health. I was pleased that the group found that the inclusion of mental health inquiries on the New York State bar application may lead law students to fail to seek assistance for these problems, and recommended removal of this part of the application. The Unified Court System agreed, and Chief Judge Janet DiFiore announced earlier this year that "the amended application will no longer ask intrusive questions about a candidate's mental health conditions or treatment history."

Knowing that law students are especially vulnerable to the impacts of stress, I inherently understood that the disruption of our lives due to the pandemic would lead to even great anxiety and strain for many of us. At the same time, I took some comfort in the fact that, with the change in the bar application, those students who felt they needed professional help to get through this tough time might be more likely to get it.

I already know that this fall, when I begin my 3L year, the future will be uncertain. But at least my fellow 3Ls and I will know that from the start. In the meantime, I will continue to appreciate the fact that the pandemic has led to a new level of camaraderie with my fellow law students.

For some of us, the impacts of COVID-19 have reaffirmed our urge to help society. We know there will be a widespread need for legal assistance relating to the impacts of the public health crisis, and we intend to find ways to provide that help. We may have been shaken to the core by the pandemic, but for me and many of my student colleagues, the shock has helped us see our own strengths, and solidified our commitment to be lawyers who will make a difference in the world.

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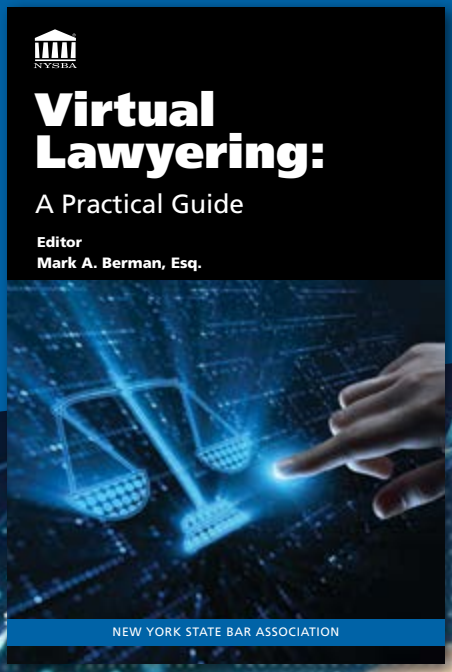

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