NEW YORK STATE BAR ASSOCIATION
Journal
NYSBA
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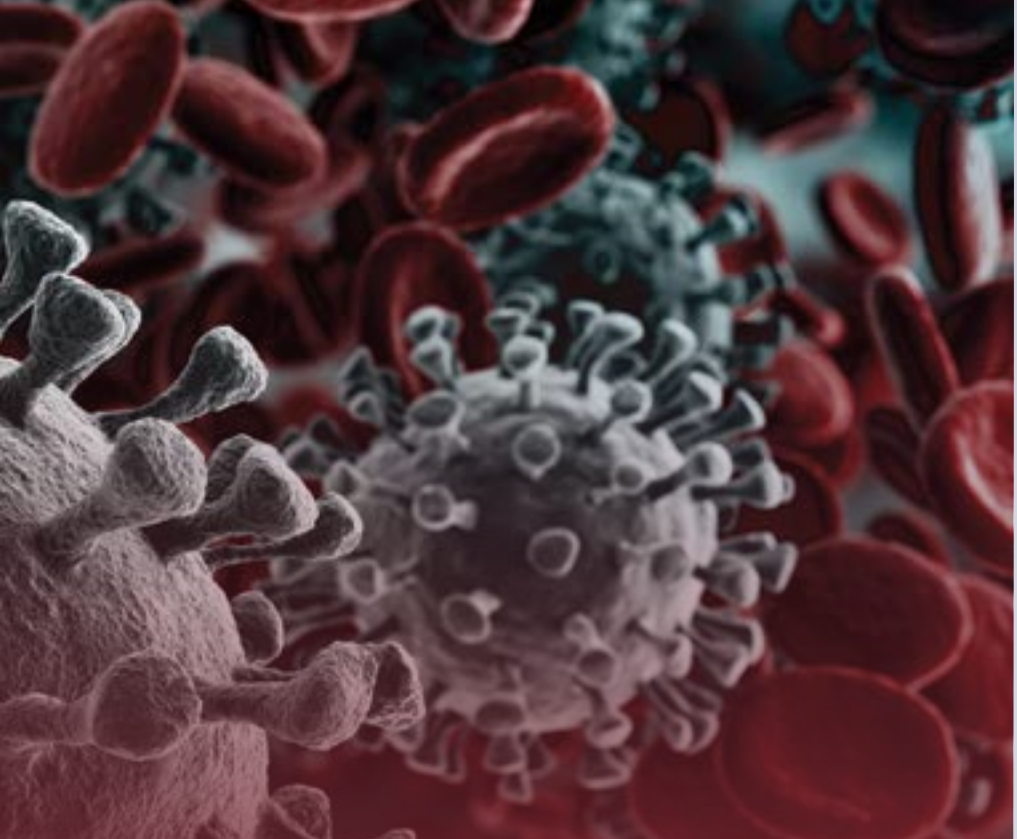

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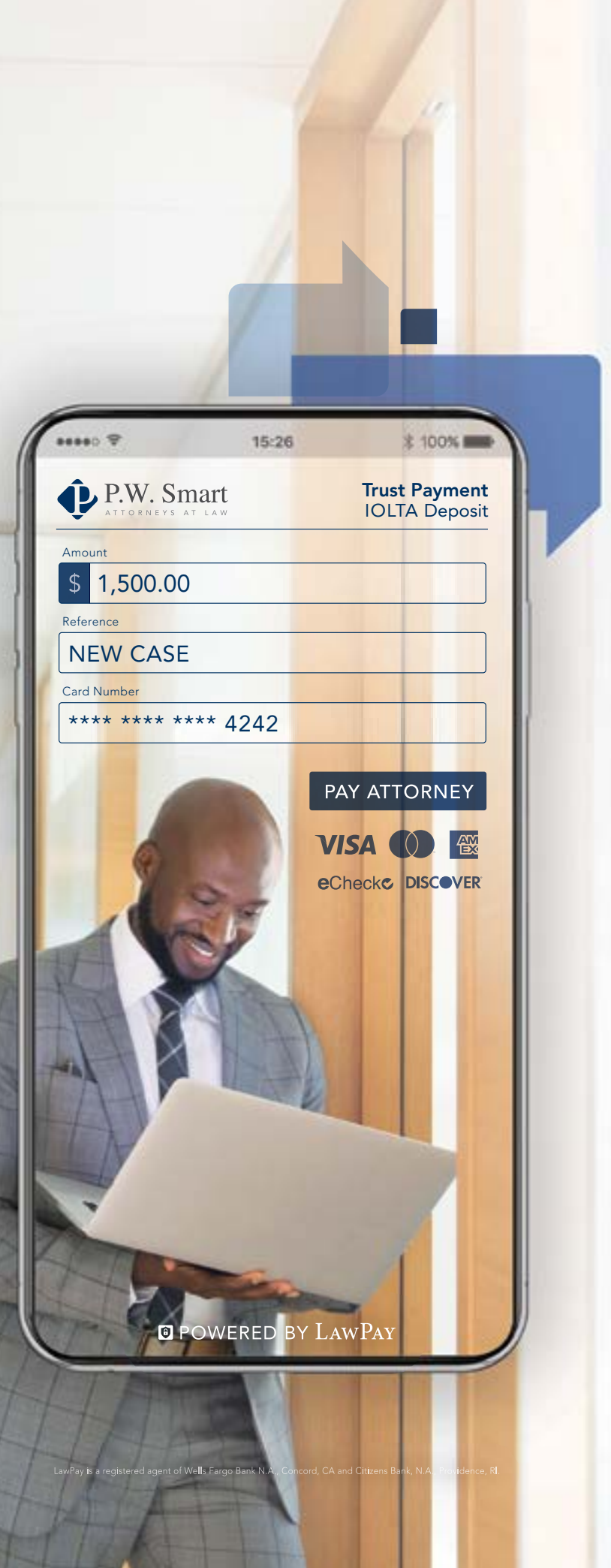

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How the Profession I Love Took a Toll on My Health

Being a lawyer is stressful in the best of times. Rates of mental illness, fatigue, substance use and other health issues are higher for those in the law than in any other profession.

I recognize this firsthand, as the profession has exacted a physical toll on me. I am a Type 2 diabetic who takes insulin. Prior to practicing law, I was a young, energetic athlete playing ice hockey right through college and law school, and continuing during my early years as an attorney. But in the second half of life came the pressures of working long hours and balancing time for my family and other responsibilities. Over time, my health began to suffer as a result.

With the grind of billable hours, it was no surprise that at 8 p.m. most of my colleagues and I were still at the office. There were rewards that came with this sacrifice, and I'm proud of what I have achieved on behalf of clients and through bar association work. But it is still important to be mindful of striking the right work-life balance to keep our minds and bodies healthy.

Studies dating back decades have shown that lawyers are more prone to depression than are members of other professions and are at greater risk of committing suicide. Lawyers are more susceptible to stress-related illnesses like heart disease and high blood pressure. Alcohol and other substance use are also higher among lawyers than in other professions.

Perhaps the most alarming study comes from the Hazelden Betty Ford Foundation and the American Bar Association Commission on Lawyer Assistance Programs, which revealed that of the more than 15,000 lawyers surveyed across 19 states, 21% of licensed, employed attorneys qualify as problem drinkers, 28% struggle with some level of depression and 19% demonstrate symptoms of anxiety.

The study found that younger attorneys in the first 10 years of practice exhibit the highest incidence of these problems. The study also concluded that the stigma surrounding mental and emotional support has long been a factor in preventing attorneys from seeking the help they need.

When statistically significant portions of our profession are not personally and collectively well, the public trust is at risk. This is deeply troubling, and we must make every effort to reverse this trend.

Add to the mix the stress and unpredictability of the ongoing coronavirus pandemic that is impacting all of us, and it is clear that the legal profession is facing a wellness crisis of significant proportions.

The New York State Bar Association has long offered support and services for members struggling with attorney wellness issues after they have begun to take their toll.

Now, however, is the time to be proactive. Maintaining mental and physical health takes focus and effort, but it is far easier than regaining health after years of neglect. What is needed now is a holistic approach that takes into consideration the entirety of an attorney's health from law school through retirement.

That is why it was a priority for me as president to launch a Task Force on Attorney Well-Being, which is being ably co-chaired by the Honorable Karen Peters of Woodstock, a former presiding justice of the Appellate Division,

Third Department, and Libby Coreno, a practicing lawyer from Saratoga Springs.

Coreno and Peters bring a wealth of experience, understanding and knowledge, having worked for years on issues related to attorney wellness. Under their leadership, the task force will be taking a holistic approach, studying mental and physical well-being strategies and formulating recommendations for their implementation throughout New York's legal community.

Throughout the pandemic, Coreno has been co-moderating a unique effort to provide support through confidential Zoom sessions for lawyers, judges and law students. These sessions have provided immense comfort to those who were isolated and struggling due to the impact of the unprecedented public health crisis, which closed courtrooms and law offices.

This all-encompassing task force features nine working groups, each focused on a specific area related to wellness and the entire continuum of the legal profession – from law school to retirement. The nine working group concentrations are: Emotional Well-Being, Physical Well-Being, Substance Use and Addiction, Law Culture and Employment, Law Education, Bar Associations, Judiciary and the Courts, Public Trust and Ethics and Continuing Legal Education.

The work of this new task force is well underway. The working groups are meeting and gathering resources. The task force aims to have a final report to present to NYSBA's Executive Committee and House of Delegates next spring.

While we recognize the enormity of this effort, we are convinced of its timeliness and importance at this unprecedented moment when the legal profession – and society at large – finds itself at a crossroads and in need of big changes going forward.

My hope is that this effort will result in recommendations that will be beneficial not only to the legal community, but to other professions as we all seek to navigate the new normal wrought by the pandemic.

Overall, we must eliminate the stigma associated with mental health treatment and make it easier for all lawyers to seek out the help that they need. We all must recognize that the mental and physical well-being of attorneys is critical to the effective practice of law, protection of the public trust and the vibrancy of our profession.

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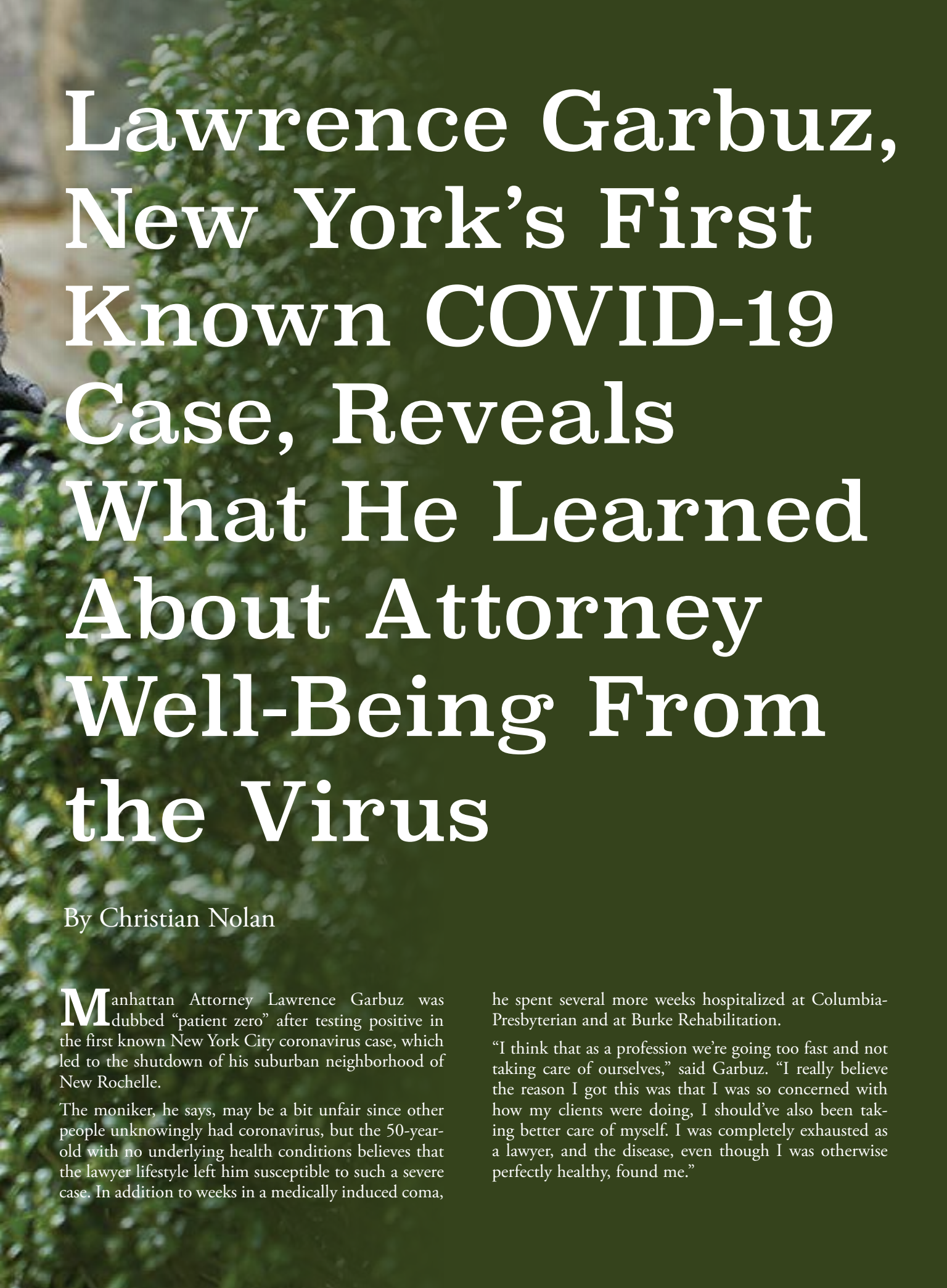
Lawrence Garbuz, the first New Yorker known to have coronavirus, and his wife Adina Lewis Garbuz



Lawrence Garbuz, New York's First Known COVID-19 Case, Reveals What He Learned About Attorney Well-Being From the Virus

By Christian Nolan

Manhattan Attorney Lawrence Garbuz was dubbed "patient zero" after testing positive in the first known New York City coronavirus case, which led to the shutdown of his suburban neighborhood of New Rochelle.

The moniker, he says, may be a bit unfair since other people unknowingly had coronavirus, but the 50-year-old with no underlying health conditions believes that the lawyer lifestyle left him susceptible to such a severe case. In addition to weeks in a medically induced coma, he spent several more weeks hospitalized at Columbia-Presbyterian and at Burke Rehabilitation.

"I think that as a profession we're going too fast and not taking care of ourselves," said Garbuz. "I really believe the reason I got this was that I was so concerned with how my clients were doing, I should've also been taking better care of myself. I was completely exhausted as a lawyer, and the disease, even though I was otherwise perfectly healthy, found me."

Garbuz likened it to the counter-intuitive announcements on an airplane where passengers are told to put their own oxygen masks on first before helping others. He says that in order to be effective lawyers, we must take the time to be good to ourselves too.

Garbuz, a practicing lawyer for 25 years, works in the field of trusts and estates and estate litigation. As such, he said he is painfully aware of the many conflicts within family dynamics and the need to find lasting resolution. These work experiences and current medical experience have only led Garbuz "to appreciate more that we need to savor all that each of us has," he said.

Still, several weeks since his discharge home, he has neuropathy in his left leg and is unable to move his leg from his knee down. He relies on a cane and help from his wife while taking his now daily walks.

Now that he isn't constantly on the run, he says he takes time to appreciate all of the wonderful things that surround him. As a religious person, he is convinced that part of his recovery is his learning to appreciate the beauty around us, such as nature.

"We can still be effective professionals even if we all hear the message just sent to us: Let's slow down a little bit and that we are always rushing, rushing, rushing," said Garbuz.

Now, despite several setbacks, he's very much thankful to be alive and with his wife and children.

'AM I GOING TO DIE?'

Garbuz's story begins in late February after just concluding several large and bitterly contested estate litigation matters. He is a partner and co-founder of Lewis and Garbuz, a firm that limits its practice to the field of trusts and estates and elder law. He commuted each day via Metro-North to his offices located across Grand Central.

He had developed a slight cough, but it was not initially significant or bothersome. Then during the night of Feb. 26, he developed a mild fever. He decided to take the

Front row (left to right): Jonah Garbuz, Eva Garbuz, Adina Lewis Garbuz and Lawrence Garbuz.
Back row: Liav Garbuz and Ella Garbuz.

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next morning off to visit his general internist. The result of that visit was not what he expected.

"My doctor concluded that I needed to go to the emergency room right away," Garbuz recalled.

A friend then drove him to local Westchester hospital (his friend later tested positive for the virus, as did members of his friend's family). Because there were no documented cases of community spread coronavirus in New York, the hospital was unable to determine the cause of the cough and his fever.

Garbuz said that his local hospital treated him like a pneumonia patient and most of the hospital staff were not wearing any masks. His condition, however, quickly deteriorated.

Within 48 hours following his appointment with his internist, he was moved to the intensive care unit and his oxygen levels were decreasing rapidly. By the weekend, Garbuz was too weak to even speak and could no longer communicate with his family or doctors.

He slipped a note to his emergency room doctor asking, "Am I going to die?" The doctor responded 'no' but later admitted to his wife, Adina, and his son that he was gravely concerned at his worsening condition.

"The hospital was fearful I was going to die," Garbuz acknowledged.

Next, the decision was made to place Garbuz on a ventilator and transport him to Columbia-Presbyterian. There, he was treated as a potential coronavirus patient and on March 2 tested positive for the virus.

He was put in a negative pressure room and hospital staff were all wearing personal protection equipment. His wife and family weren't allowed to visit him, and his family was all placed in quarantine. Soon thereafter New Rochelle was placed on lockdown and the National Guard were deployed there.

TABLECLOTHS ON THE WINDOWS

So as Garbuz spent the next two weeks on a ventilator, his family remained in quarantine and the members of his firm were also quarantined. His son's college, Yeshiva University in Manhattan, shut down for a week and then resumed classes online. His daughter's school, SAR High School in the Riverdale section of the Bronx, was also shut down for a number of days before resuming classes online. A short while later, as the pandemic worsened throughout New York, schools and businesses all began to shut down.

Garbuz has two other children who were out of the country when he was diagnosed – one in Israel and the other in Poland. They flew back immediately but did not stay at the family home as the family did not want to risk anyone else contracting the virus.

Meanwhile, the family was bombarded by national and international media with relentless requests for interviews. Media trucks were camped outside their home and his wife needed to put tablecloths on their windows to prevent members of the media from peering into their home.

As he approached two weeks on the ventilator, doctors began weaning him off it to see if he could breathe on his own. Soon thereafter he was taken off the ventilator.

Despite breathing without the ventilator, he still needed oxygen to breathe, was very weak and could not walk. It took several more weeks until he tested negative for the coronavirus.

THE NEED TO RECHARGE

Notwithstanding his medical ordeal, he freely discusses his experience and opines as to lessons learned. He has progressed from needing a walker to using a cane. He also has a brace for his leg that without it would make it nearly impossible to walk.

The overall prognosis for his leg is not good but he remains hopeful he will one day regain his feeling in the leg and be able to walk unassisted. While currently unable to return fully to work, he is able to continue to guide and advise his staff and clients to maintain the same quality of counsel his firm has always provided.

Because he feels he is uniquely positioned to be part of the cure, Garbuz regularly participates in several research studies in the hope to find a vaccine and/or a cure for COVID-19. He says he wants to help even though, "I'm a person who is very much on the mend and I'm trying to think positive and have trust in my doctors."

Overall, his clients have been very supportive and understanding. He stated that he received an outpouring of support from other attorneys for which he remains most appreciative. In turn, his advice for busy lawyers is to take better care of yourselves.

"To better help your clients, you need to recharge," he said.

He is eager to return to work full-time and yet to continue to employ his new lifestyle changes. He loves being an attorney and helping families find legal solutions. He says that by also focusing on taking care of himself, his clients will be better off for it and so will he.

How a Lunch Between Dear Friends Led to a Movement to Change the Legal Culture

By Kerry Murray O'Hara

Dr. Kerry Murray O'Hara, clinical psychologist, is the Director/Founder of DBT Wellness & Psychological Services in Saratoga Springs, N.Y. She has over 25 years of experience in a variety of clinical settings including inpatient, residential, forensic, outpatient, and academic. Over the course of the last six years, Dr. O'Hara has focused on the mental health crisis and wellness for the field of law. Dr. O'Hara has been named as a clinical consultant to the Task Force on Attorney Well-Being and currently co-facilitates the weekly Lawyer Round Table discussions.

One day over lunch, I was speaking to a lawyer friend about the spoken and unspoken pressures and unrealistic expectations inherent in the culture of law. As a clinical psychologist, I was struck by all the ways in which lawyers' brains are trained, the unrealistic expectations they often have of themselves and the personal sacrifices they feel they "should" make to be a good lawyer.

It was apparent to me that these patterns of thinking, the system of reinforcement and the common methods lawyers employ to manage their lives are the very pathways that lead to clinical depression, anxiety and addiction. It was no surprise to me after reading the research that lawyers have significantly higher rates of all of these life-impairing diagnoses We didn't fully know at the time how this lunch conversation with Libby Coreno would frame the next chapter of both of our professional lives. In retrospect, that day solidified our journey together to enhance well-being and mental health for lawyers and for that I am so grateful.

We need to acknowledge that a balanced life creates higher functioning, more productive and effective lawyers.

I still vividly recall our first joint presentation at NYSBA's Annual Meeting in 2018. We wondered how we would be received and how I as a psychologist would be perceived discussing what it means to be a lawyer. We were aware that by pointing out the mental health crisis and the need for change, we were entering unchartered and uncomfortable territory. We treaded lightly while outlining how perfectionistic thinking, anticipatory anxiety and the adherence to unrealistic work expectations at the expense of all other areas of life are not optimal for healthy living.

At first, it was difficult to read the crowd and no hands were raised for the question and answer portion. Feeling a bit deflated, I became aware of numerous stragglers. It was when the presentation was over that lawyers felt safe to come forward and the questions and stories flowed. One on one, people thanked us for presenting on such an important topic; they shared with us their struggles, self-doubt and fears. Most importantly, they asked for help. Since this time, Libby and I have had the honor of discussing these issues with hundreds of lawyers across New York State.

These lawyers are ready to discuss the topic of mental health because they are suffering. We have all read the ABA statistics on depression and anxiety and they are striking; however, it is easy to fall back into the business as usual mode where lawyers believe they have no other options. Employees, friends and colleagues feel that they need to choose between self-care and work expectations, that a healthy work/life balance would be met with criticism and that anything less than perfect is failure. They fear that if they set limits or need help that it's a sign of weakness or not worthy of the role of being a lawyer. These stories of suffering don't need to continue if we choose together to shift these dynamics.

The second lesson we have learned is that our law schools do an amazing job of teaching the cognitive skills necessary to become an excellent lawyer. I have talked with hundreds of lawyers regarding how they have been trained to think and perceive the world like a lawyer. They describe to me the following: the skill of problem solving with dispassionate logic, effective arguing techniques, anticipating all possible negative outcomes to protect clients, competitiveness, perfectionistic standards and high priority on control.

I have no doubt that these are qualities that clients want in their attorney. What is missing, however, is that the attorney is also a parent, spouse, sibling, friend and needs to be allowed to have human needs. Imagine if law schools also taught young lawyers that "to be a good lawyer one needs to be a healthy lawyer." How would things change if schools addressed work/life balance and self-care as essential skill sets to producing high functioning lawyers who will be buffered from emotional burnout?

Young lawyers also need to be taught how to transition from the role of attorney to the other essential roles in their life. I have heard the heartbreaking stories of young lawyers who are trying to accept the personal sacrifices they feel they must make for the profession. We need to acknowledge that a balanced life creates higher functioning, more productive and effective lawyers. This is important for every stakeholder. How would the culture of law change if we addressed these topics?

After hearing hundreds of stories of what lawyers experience in the profession, what both Libby and I know to be true is that individual lawyers can't do this in a vacuum. The overarching culture of law must change as well. Lawyers share with us fears that if they follow the recommendations we provide for their mental/physical well-being they will be met with criticism and negative professional consequences. These fears are valid, and this is an impossible choice that no one should have to make.

Reflecting back over the last six years on my journey into the world of what it is like to be a lawyer there have been moments when I have felt the enormity and power of the culture. There were times I questioned can this really shift? Are we asking individual lawyers to do the impossible while the unhealthy cultural context remains rigidly in place?

In those moments, I look back to that first presentation when no one could publicly speak their truth to now. In our more recent presentations, Libby and I are moved by the transparency in self disclosures, bravery and honesty regarding deep issues like vicarious trauma, depression/suicide and burnout. Most recently at the weekly NYSBA Roundtable we saw lawyers ban together to discuss self-care in the face of social isolation and anxiety due to COVID-19. How far we have all come; the changes are already underway.

Most hopeful to me and the most promising sign that New York is ready for true culture change to support our lawyers is the formation of the NYSBA Task Force on Attorney Well-Being. Libby Coreno, one of the task force chairs, knows deeply both the undeniable need for change in law culture as well as the enormity and complexity of this undertaking.

This task force has been divided into nine separate working groups. Each working group is charged with developing recommendations to truly move New York on a pathway to a more positive future for lawyers. With the innovative minds and dedication behind this ground-breaking undertaking, I have no doubt that the NYSBA Task Force on Attorney Well-Being will become the model that others will emulate. I am so proud to be on this journey with you all and I know I will look back in the years to come and again be struck by how much we have grown.

Beyond the Silence: Removing the Stigma Around Addiction

By Terry L. Harrell

Terry L. Harrell, Executive Director of the Indiana Judges and Lawyers Assistance Program, graduated from Maurer School of Law and is a Licensed Clinical Social Worker (LCSW), a Licensed Clinical Addictions Counselor (LCAC) and has a Master Addictions Counselor certification (MAC). Terry is active with the Indiana State Bar Association and is a Fellow of the Indiana Bar Foundation. She serves on the American Bar Association's Commission on Lawyer Assistance Program's Policy and Well-Being Committees and serves on the National Task Force on Lawyer Well-Being and as an advisor on the New York State Bar Association Task Force on Attorney Well-Being.

CULTURE CHANGE

As the National Task Force on Lawyer Well-Being reviewed the research published in the *Journal of Addiction Medicine* in 2016 and thought about what we could do to improve our professional well-being in general and our struggles with substance use in particular, we recognized that we needed to change our very culture. No one develops a substance use disorder solely because they work in the legal profession, but we have a professional culture that is very hospitable to the development of addictions and particularly alcohol use disorders. Factors that make it easier to develop an alcohol use disorder include long hours, the adversarial process, the isolation, the level of responsibility, a culture that accepts and even applauds drinking and a culture that values individual freedom and is reluctant to interfere in the affairs of a colleague. If you have ever lost a colleague to an addiction or a suicide you will recognize that this "reluctance to interfere" can be taken to a deadly extreme. On a broad level changing our professional culture means changing the ways we think and behave.

CHANGING THINKING

Changing our thinking about addiction will help to dissolve the stigma that currently surrounds both addiction and help-seeking behavior. Lawyers do not seem to have difficulty seeking treatment for dental problems. They will even encourage each other to get a knee or a hip problem checked out or share the name of their physical therapist. But when it comes to problems with alcohol . . . silence. We need to remove the stigma around seeking help for an alcohol problem. Research shows that the most effective way to reduce stigma around addictions is one-on-one contact with a person in long-term recovery. We can do more to create opportunities for lawyers in long-term recovery to speak, author articles and meet with people one-on-one. And, we can learn to talk to each other more openly about problems with the use of alcohol and, thus, break the silence around this difficult subject.

Another significant way to change the way we think is to be mindful of the language we use. We need to talk about addiction with the same respect we give other medical conditions. As lawyers we know the importance of the words we choose to use. Our American society needs to change the language around addiction and we, the legal profession, need to lead the way. We need to talk about a person who has a substance use disorder or an addiction or a problem with substances or a person in long-term recovery and stop using derogatory terms such as addict, alcoholic or drunkard. We need to accurately describe urine screens as "positive or negative" and move away from terms such as "dirty or clean." When a diabetic's blood work is disappointing to the doctor and dangerous for the patient, the bloodwork is not described as "dirty." To reduce the stigma around these illnesses, the medical profession has changed the diagnosis for a problem with substances from "substance abuse or dependence" to "substance use disorder."

CHANGING BEHAVIOR

While these changes in thinking and language are important, we in the legal profession also need to look at how our behavior contributes to our culture of drinking. I have attended lawyer functions where many people had a drink or two and everyone had a pleasant time. I have also attended functions where I was asked to evaluate whether to call 911 for a lawyer who had consumed a hazardous amount of alcohol during the function. At least in this situation the lawyer was connected to me and the lawyer assistance program so that immediate and longer-term interventions could be implemented. Too often the response to such a situation is to ignore behavior that is, in fact, a warning sign. We need to be clear about what is appropriate social drinking and be willing to confront our peers about hazardous drinking.

When there is a heavy emphasis on drinking – at the cocktail hour, at dinner and at the beer tasting after dinner – it becomes uncomfortable for lawyers and judges who do not want to drink. People choose not to drink because they are in recovery, because they have another medical condition or take a medication that is not compatible with alcohol use, because of religious reasons, because of family history, because they are training or trying to lose weight or because they simply don't like it. Many of those people will avoid events with a heavy emphasis on alcohol, where they feel they will not fit in or be welcome. We inadvertently exclude some interesting, talented people in this way. And, if you talk to people who have worked in other professions, they will tell you that the focus on alcohol at lawyer functions is much more pronounced than at other professional functions. This emphasis on alcohol is not inevitable in the legal profession. We can create events where it is acceptable to drink alcohol or not drink alcohol. We can create events where the focus is on socializing, meeting new people, having fun or learning new things, and alcohol plays a minor role or no role at all.

We can offer substance use support groups at our larger functions or within larger organizations. Hosting such groups shows respect and support for those seeking help and managing a challenging health condition. I know of large companies that host cancer support groups. Why not host substance use support groups?

SYSTEMIC SUPPORT FOR CHANGE

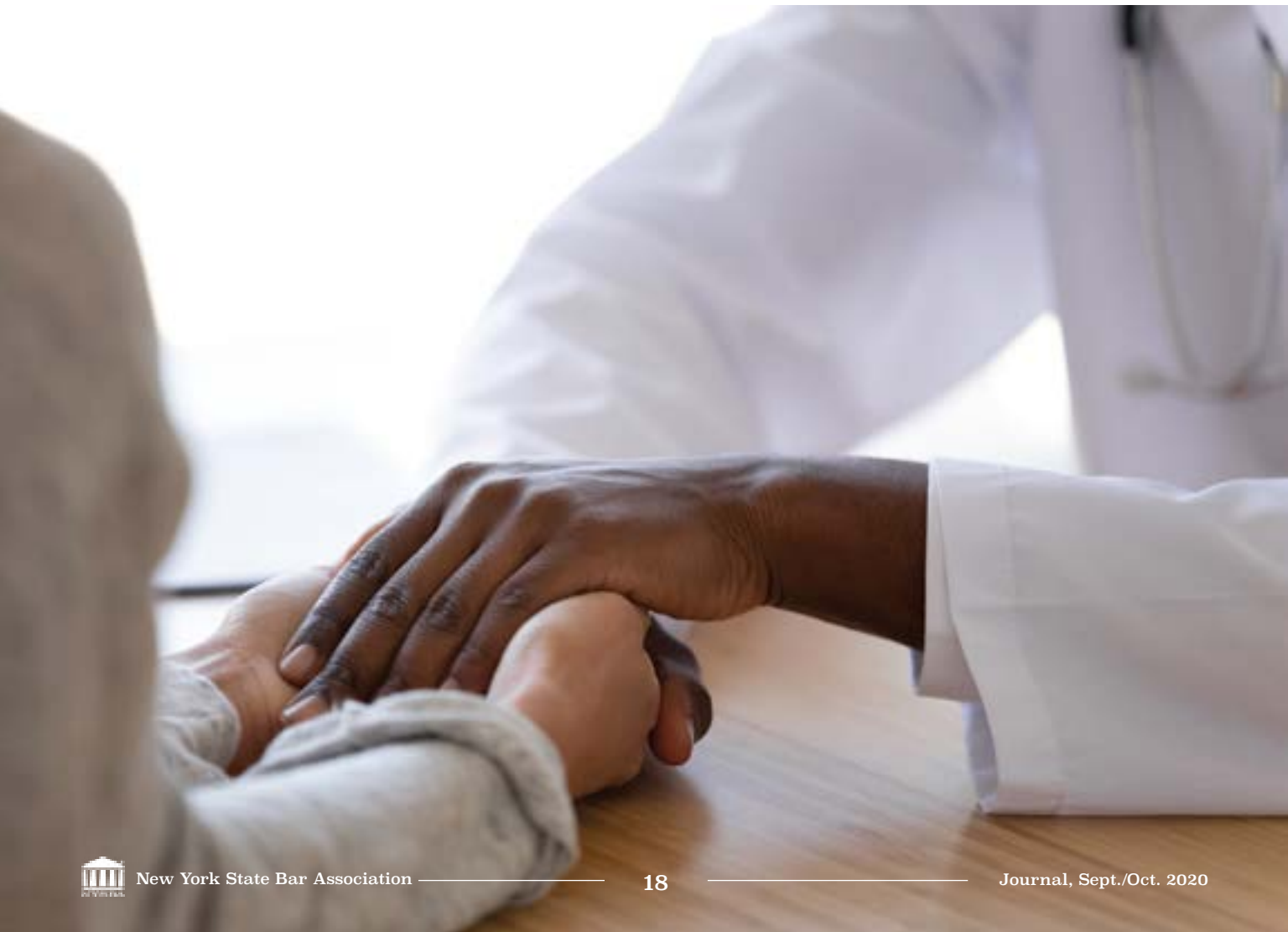
There are also systematic ways to accelerate this change in our thinking and our behavior. We can alter CLE requirements to include well-being topics including addiction and the importance of seeking help for all mental health challenges, as well as strategies for maintaining optimal health and performance. We can make sure that resources for help are readily available and accessible for everyone in the profession.

I want to congratulate New York on removing questions about mental health diagnoses or treatment from the bar exam application. This removes a barrier for law students wanting to seek help and serves as a great example of systemic change that makes a big difference. We can evaluate whether there are other applications within our profession that still ask about diagnosis or treatment in a stigmatizing manner that discourages help-seeking.

Disciplinary responses to professional misconduct can be tailored to fit whether the judge or lawyer is "sick, dumb, or bad." A mentor of mine told me this 20 years ago and it still holds true. A "sick" professional needs medical care and a recovery plan. A professional who is "dumb" may need education, coaching or mentoring. Diversion may be particularly appropriate for some in one of these first two categories. With diversion a lawyer with a substance use or other mental health problem or lacking knowledge or skill may be provided the resources and assistance needed to return to a high level of practice. Someone who is intentionally misbehaving or "bad" needs consequences. Of course, some lawyers engaged in professional misconduct may fit more than one of these categories and require a comprehensive response. Our response to professional misconduct should be tailored appropriately if we want the behavior to change and the public to be protected.

THE CHALLENGE

I encourage everyone to review the Report of the National Task Force on Lawyer Well-Being or at least the first three pages that lay out the recommendations for the profession. I challenge everyone to find two or three of the recommendations that you can pursue to create the positive change in our culture that the research and our experience so clearly support. If we all pursue the changes in thinking and behavior that are within our power, together we can create a culture that is significantly less hospitable to addictions.



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NEW YORK STATE BAR ASSOCIATION
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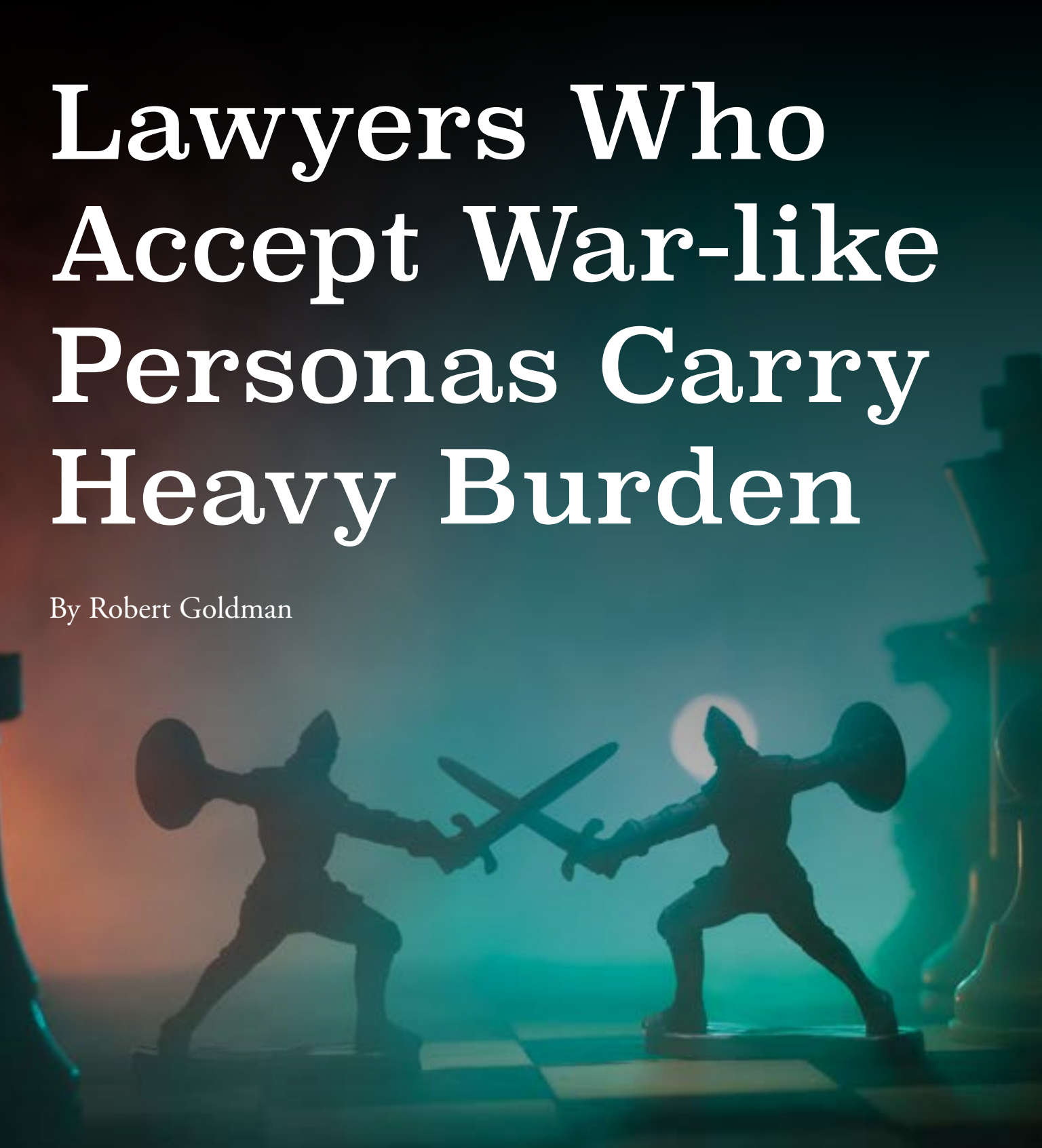
Lawyers Who Accept War-like Personas Carry Heavy Burden

By Robert Goldman



Dr. Robert Goldman is a licensed psychologist and attorney with over 18 years of experience in combining law and psychology. He served as the supervising psychologist for the Suffolk County Probation Department and Suffolk County Mental Hygiene Services and has lectured nationally on topics ranging from restorative justice, educational law, forensic evaluations and the treatment of anxiety and depression among teens and adults. He is also the co-chair of the Neuroscience and Law Committee and an adjunct professor at Hofstra University and St. Joseph's College. Dr. Goldman recently started a company, TLC-Virtual Resiliency, which provides virtual support to help employees develop resiliency.

As a practicing attorney and licensed psychologist, I have observed many of my attorney colleagues who have suffered with anxiety and depression. However, acknowledgement of their suffering has been somewhat taboo. It is for this reason, when I was asked to be a member of the New York State Bar Association's Task Force on Attorney Well-Being, I saw it as a call to action to help my fellow colleagues.

The acknowledgement by an attorney of his suffering is rare, for it might be perceived as a chink in his armor. For many, lawyers are perceived as gladiators who are hired to fight their clients' battles. Lawyers who accept this war-like persona often carry a heavy burden.

The unwillingness of the attorney to accept his or her own humanity often prevents them from seeking a supportive environment where their feelings and emotions can be acknowledged. As a consequence, their suffering continues, and they may turn to what they perceive as more "acceptable" treatment in the form of self-medication and substance use.

As the gladiator persona persists, lawyers have unrealistic expectations about their own performance. Their biggest fear is that their helmet may fall off and their identity of imperfection will be revealed. My psychology colleague refers to this phenomenon as the "impostor syndrome." Those who have this mindset doubt their competence and have unrealistic expectations about their own performance.

This can cause great emotional angst for an attorney. What compounds the anxiety is the inability to share with colleagues their own self-doubt. Perhaps if they could find a supportive environment with other attorneys, each could reveal their own mask and find solace in knowing that many of their colleagues suffer in a similar fashion.

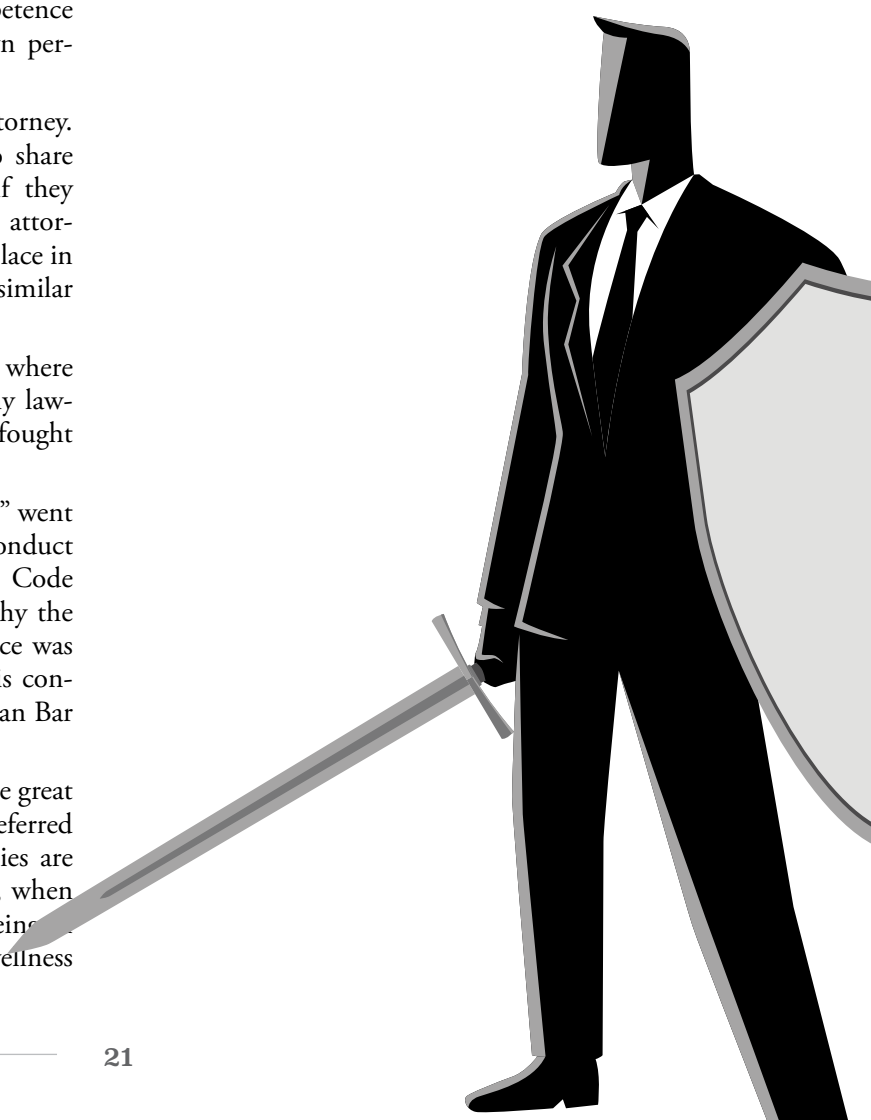
But alas, the gladiators find themselves in a forum where the adversarial system guides their behavior. Many lawyers still mistakenly believe that the battle must be fought with zealousness. I am guilty of the same.

I learned recently that in New York, the word "zeal" went missing in 2009 when the rules of Professional Conduct superseded the former Disciplinary Rules of the Code of Professional Responsibility. Many wondered why the term had been removed. I believe its disappearance was due to a recognition of the deleterious effects this concept has had on the well-being of lawyers (American Bar Association, 2018).

The constant burden of fighting with zeal can cause great stress to one's life. My psychology colleagues referred to this type of stress as hypervigilance. Our bodies are programmed to respond to acute stress. However, when one feels under constant attack and in need of being [illegible] defense mode, it has toxic effects on the overall wellness of the body.

Being prepared for all possibilities is what makes a good lawyer. However, it can compound the chronic stress experienced by the hypervigilant, zealous gladiator. A lawyer is trained, from the very earliest days of law school, to anticipate the negative, constantly thinking of the world as a series of "what ifs." This mindset can cause what my psychology colleagues refer to as "anticipatory anxiety." This type of thinking becomes quite problematic when it invades the daily living of the attorney.

As an attorney and psychologist, I believe that the legal community is awakening to the damage that the chronic stress of our profession does to practitioners. It is my hope that through education that starts in law school and continues throughout years of practice, lawyers will be mindful of the psychological pitfalls that they may encounter. Most importantly, lawyers must find support in the legal community to remove their gladiator helmets and reveal their humanity without fear, recognizing that to do so makes them stronger and does not detract from their ability to perform of practice. I am honored and humbled to be asked to participate in the New York State Bar Association's Task Force on Attorney Well-Being and hope that I can help create the space for this to happen.



Legal Culture Must Change for Attorneys to Thrive

By Kathleen Fyfe

Kathleen Fyfe, President of Fyfe Consulting, is a Culture Sleuth, Change Strategist, and Community Builder. She brings decades of experience working with individuals and organizations, both large and small. Believing that the people and their choices are the most important resources a company has, she customizes trainings based on the needs of the company and how they want to grow. Her expertise includes culture, strategic planning and development, organizational assessments, emotional intelligence, leadership and management training, team building and coaching.

The definition of "culture," according to Merriam-Webster, is the "set of values, conventions, or social practices associated with a particular field, activity, or societal characteristic."

Put more simply, culture is the way we operate. It is defined by our behaviors, not our mission or business statements.

In looking at the culture of the legal profession, there are some long-held generalizations that can be made. The billable hour is the bottom line. Those who work the longest hours are the most successful. Young attorneys need to learn from the school of hard knocks and earn their way up the ladder – just like their predecessors did.

Perhaps these statements strike you as outdated, cliched and more than a little off-putting. But we know they are true, as they are what has been supported, rewarded and tolerated in our industry for decades.

For the sake of the health and well-being of both the legal profession and the attorneys who practice in it, this must change. And the coronavirus pandemic offers the perfect opportunity to finally address the entrenched cultural issues that have been collectively holding us back.

COVID-19 has handed the world a poorly packaged gift. What we decide to do with this gift is up to us, individually and communally. Having been forced to find new ways to exist in the world, communicate, manage our time, work and redefine our purpose – will we adapt for the better? Or will we shed these new lessons and ways of acting as soon as it's physically possible to return to our old ways of life?

The global pause required by the pandemic provides an opportunity to ask ourselves some hard and long-overdue questions.

For example, is it really true that those who work the longest hours are the most successful? Is our true purpose to bill the most hours or to service the client in the best and most efficient way possible? Do we honestly believe that all members of a firm are on the same team or have we placed them at odds or in competition with each other?

Are there new, better and more effective ways for us to operate, other than the way we always have, and are we even capable of trying something new? We already know the answer to that final question is "yes," because this unprecedented public health crisis has made it so.

While individuals are responsible for their own personal well-being, real systemic change will not be realized until the industry as a whole decides to address the current culture of law. Healthy attorneys who feel clarity of mind, emotional connectedness, trust, love and purpose will be able to accomplish more, and in less time, than those who are stressed, emotionally disconnected and without a sense of purpose.

The needle of change will not be moved very far if the culture of the law industry itself doesn't consider well-being and make it a priority.

But what is the blueprint for this overarching culture shift? How might law offices and firms find ways to cultivate health? How can the focus change?

Might a senior partner bring a new attorney hire into meetings so he or she can learn from experience and with mentorship instead of the bruises of the hard knocks school? Could that same senior partner recognize that fewer hours worked by a healthy individual are actually better and more productive hours?

A culture that is supportive of health tends to also see stronger and better productivity.

There are some who may decide that change on this scale, within this well-worn culture of law, is too much, too hard or unnecessary. Change is uncomfortable. The metric for success for some may continue to be the billable hour or number of hours spent in an office.

But those who can embrace the humanity of the people in their firms, and support their mental and physical well-being, will see a more passionate and engaged staff, increased productivity, fewer sick days, and more success with clients. We have been forced to consider new ways of being in the world, finding ways to incorporate them into the future is our gift – should we choose to accept it.

Finding a Healthy Way Our Lives as We Retire

Many older lawyers feel they have only two retirement options open to them: either continue in their primary career path working full time or retire from it. This is based on the traditional meaning of retirement that is a single event – "withdrawal" from the workforce into leisure, relaxation, a slide into the end of life. Terms such as retirement transition, planning for retirement, post-retirement employment, volunteer service and health and well-being have rarely been included in traditional retirement dialogue.

The combination of longer life expectancy and technological advances is opening new expectations and new possibilities for all retirement planning. Today, retirement can be better defined as a period of transition that starts for some people around the mid-50s and lasts well into the mid-70s. Caveat: It's important for law firms to protect against age discrimination claims by making any pre-retirement/retirement/post-retirement program strictly voluntary, along with safeguards to ensure that older attorneys who choose not to participate will not be penalized. This developmental stage can be a time of great personal growth and development, or it can degenerate into just the opposite.

Transition is the process of letting go of the way things used to be and then taking hold of the way they subsequently become. This planning process should start much earlier in every law firm experience in order to better serve those lawyers looking to transition away from full-time practice; mid-career professionals who are themselves looking to secure their own places in the firm; and young lawyers looking to find their own purpose in the profession – while they struggle to pay off their law school debt.

Providing greater flexibility for this period of transition will become an important part of this "renewal strategy" that will benefit attorney well-being in a number of ways. Unfortunately, many law firms have been following the mistaken idea that the best way to help people through life transitions is to deny the transition is taking place. By better managing life's transitions throughout an attorney's career, firms can help individuals make these difficult periods less painful and disruptive. Better managed transition will also benefit the law firm itself.

We have to stop viewing retirement as an end-point but rather to begin thinking of retirement as a series of developmental steps taken by individuals over an extended period of time. Everyone who holds a license to practice law needs to be involved in this important dialogue if the profession is going to solve the problems associated with the aging workforce.

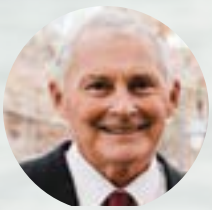
Unexpected multi-generational family assistance is becoming the new retirement wild card, so law firms need to build in support systems to help key people through these periods of transition. Increasingly, we are seeing pre-retirees who now must balance their retirement plans with the possibility of having to support aging relatives, adult children, grandchildren and siblings.

Volunteer work has always been a viable option for retiring lawyers, but more boomers will be looking for some form of money paid for work or service. There has never been much of a market for part-time lawyering, but with the number of lawyers living well past traditional retirement age, the legal profession needs to create greater opportunities for lawyers to "retire" with the open invitation to return to work on a part-time basis if individuals choose to do so.

ADVICE FOR IMPROVING ATTORNEY WELL-BEING IN RETIREMENT

1. With so many experienced lawyers positioned to leave the profession over the next three to five years, it is critical that law firms look more closely at the age profiles of all attorneys, but particularly those in the ownership ranks. This will help put a human face to the situation, and it should put the firm in a much better position to take appropriate actions.

   Appropriate actions may include: reducing billable hour goals while expanding time devoted to mentoring relationships; introducing partners or senior associates to client-base by a set date in time; and providing coaching for all senior lawyers looking to transition away from full-time practice.



Stephen P. Gallagher is a former director of law office economics and management with NYSBA. He is currently active with the 50+ Section and is an advisor to the Task Force on Attorney Well-Being. He is president of Leadershipcoach.us, a coaching practice for lawyers in transition. www.leadershipcoach.us.

to Transform

By Stephen P. Gallagher

2. Through transition planning initiatives, law firms could be in a very strong position to actually begin helping lawyers develop new life skills needed to manage individual career transition beyond the traditional retirement timeline.
3. Firms that prize the interdependence and mutual responsibility among all generations are much better prepared to help their pre-retirees through this period of transition. These firms are more inclined to encourage their senior lawyers to tackle fresh assignments designed to offer variety and challenge and to stimulate new skills development. Senior lawyers in these law firms seem to approach retirement as a way of gaining renewed purpose in their lives.
4. Law firms now need to adopt "design thinking" principles that will encourage lawyers to explore new life roles built around personal experiences. Firms will need to begin thinking of life design in terms of building "prototypes" or "models" over an extended period of time in which individuals progressively design and build their own lives, including their work careers that increasingly are extending well beyond traditional retirement age.
5. Law firms will need to adopt new strategies and tactics that emphasize greater human flexibility, adaptability, and confidence in the change process that has simply never existed in law firm culture. Rather than looking at career growth as a fixed sequence of stages, design thinking now approaches career development and pre-retirement planning as individual scripts compiled over an extended period of time.

The key to success in this new approach to retirement is how well a person prepares for it. Senior lawyers no longer have to prove to anyone what they're made of. Now they only have to answer to their own life goals, their own interests, their own calling, and their own passion.

The President, the States and Policing American Cities

By Michael Diederich, Jr.

Michael Diederich, Jr. is a solo practitioner who represents individuals in civil rights and employment law matters. He is a retired U.S. Army "JAG" lawyer and a member of NYSBA's Committee on Civil Rights. He served on active duty in Iraq and Afghanistan. His office is in Rockland County, N.Y.

The author wishes to acknowledge Hanna Madbak, Esq., Amir Badat, Esq. and Hubert G. Plummer, Esq. for their assistance. The opinions expressed herein are the author's alone.

President Donald Trump is reportedly planning to send federal agents to New York City to "help out" with the uptick in crime and protests.[1] He claims local officials have lost control of the streets. NYSBA President Scott M. Karson asked for the opinion of the Committee on Civil Rights (CCR) as to whether President Trump has the constitutional authority to involve federal personnel in the policing of American cities. This article explores the subject.

In declaring independence from the British Crown on July 4, 1776, our 13 original states were formed in a political revolution. This is our heritage. The roots of our democracy are grounded in the Declaration of Independence. The Founders pledged their "lives, [their] fortunes and [their] sacred honor" for the purpose of securing Americans' "unalienable rights," including "life, liberty and the pursuit of happiness."

The Founders did not specify any particular system of government, for example, capitalist, communist, liberal or conservative. What the signers of the Declaration agreed upon was that a people can revolt when the rule of an overlord (in this case, the British Crown) becomes insufferable. They enumerated their grievances against King George:

- He has erected a multitude of new offices, and sent hither swarms of officers to harass our people.
- He has kept among us, in times of peace, standing armies without the consent of our legislatures.
- He has affected to render the military independent of and superior to the civil power.
- For depriving us in many cases, of the benefits of trial by jury.
- He has excited domestic insurrections amongst us.
- In every stage of these oppressions we have petitioned for redress in the most humble terms: Our repeated petitions have been answered only by repeated injury. A prince whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

Today, many Americans in cities such as Portland, Oregon and New York City, worry that President Trump's views about federal "policing" are leading us down the road to authoritarianism – toward the central government oppression that the Founders rebelled against.

In 1776, the Founders had not yet devised the structure of government necessary to prevent insufferable grievances and to secure the people's unalienable rights. This was accomplished with the ratification of the Constitution of the United States in 1788, and the subsequent ratification of the Bill of Rights in 1791. Our Constitution, with its Bill of Rights, reflects the genius and ingenuity of the Founders, by separating powers within the branches of the federal government, and dividing power between the federal and state sovereigns.

Regarding states' rights and federalism, the Tenth Amendment to the Constitution is the most cited source of authority. However, as further discussed below, the source of constitutional law that is most applicable to the deployment of federal personnel to fight local crime and violence is the Guarantee Clause of the Constitution.

In response to NYSBA President Karson's inquiry regarding the legal constraints on the use of federal police forces in American cities, the CCR opined that the federal government's deployment of federal law enforcement into cities such as Portland for the purpose of quelling local violence unrelated to an obviously legitimate right to protect federal property and personnel is likely unconstitutional in four respects.

First, the federal government's actions undermine the United States' federal system of government. A bedrock principle of our federal system is that the national government possesses only the limited power granted to it by the Constitution. As stated in the Tenth Amendment, all other powers are reserved to the states, or the people. Traditional police powers have long been viewed as residing exclusively within the province of state government. The U.S. Supreme Court has made clear that general crime prevention is a state government function, and outside the federal domain.[2]

Of course, the Supremacy Clause ensures that federal law is not ignored by state governments. Thus, to enforce the federal guarantee of the equal protection of the law, President Eisenhower sent federal troops to Little Rock, Arkansas in 1957 and President Kennedy sent troops to the University of Mississippi in 1962 under the authority of 10 U.S.C. § § 332, 333 and 334. This exercise of federal power was to enforce federal law to secure African Americans' civil rights.[3] It was not to uphold the state's criminal law.

Under the principle of federalism, the federal government certainly has the right to protect a federal courthouse and federal personnel to enforce federal law, and to prosecute persons who violate federal law. However, federal officials do not have the power to use this authority as a pretext for undermining the rights the Tenth Amendment reserves to the states and to the people, particularly where the people's rights being intruded upon are the citizenry's rights to peacefully assemble, express views and petition government for redress – rights that federal officials are sworn to uphold, not trammel. Respecting federalism promotes democracy, because in our federal system it is state

officials who have political accountability for the enforcement of the general criminal law, not federal officials.

Second, as reported by the press, the warrantless seizures of peaceful protesters in Portland by unidentified federal law enforcement personnel using unmarked cars is what one would expect from totalitarian government, not American government. The Fourth Amendment prohibits unreasonable searches and seizures, including the warrantless detention of individuals. The Fifth and Fourteenth Amendments prohibit federal officers from depriving people of life, liberty, or property without due process of law, and guarantees citizens the equal protection of the law. In her lawsuit against the federal government, the Oregon Attorney General alleges that the federal government has been violating basic Constitutional rights, including detaining or arresting local residents far from the federal courthouse without any legal basis. Besides being an illegitimate exercise of police power, the federal efforts appear militarized, with unidentifiable personnel in tactical military garb grabbing ordinary citizens off the streets with an us-versus-them mentality. People have the right to expect that they can hold government responsible for its personnel. Transparency and accountability, not secrecy, is how government obtains the trust of the governed.

Third, the federal government appears to be targeting protesters in states and cities that President Trump has labeled "Democratic." If politics is being used by federal authorities to target one city's "liberal" protesters but not another city's "conservative" protesters, such would violate the First Amendment as selective enforcement based upon the content of the speech. Of course, the federal government has no business targeting peaceful protestors regardless of the content of the message. The federal government's actions have already had a chilling effect. Indeed, various organizations, including Black Lives Matter Chicago, have filed suit in the Northern District of Illinois seeking a declaration that the federal government's words and actions infringe upon their First Amendment rights.[4]

Finally, the Guarantee Clause of the Constitution (Art. IV, § 4) expressly provides for protection of the citizenry against "domestic violence," but only if there is a request for help by the affected state. Specifically, the Guarantee Clause provides that the federal government shall act upon "application of the [state] Legislature, or of the executive [governor] (when the Legislature cannot be convened)."

The Guarantee Clause has seldom been litigated. The Supreme Court has determined that its guarantee of a "republican form of government" is a political question, and thus not judiciable.[5] However, the Guarantee Clause's provision dealing with domestic violence has not been litigated at all, and importantly, does not involve any political question. Rather, the provision unequivocally (if implicitly) recognizes that it is state government that handles domestic violence, with federal power limited by the requirement of a state request. The Founders discussed the option of providing for mutual aid in the event of "rebellion, etc."[6] The "republican form of government" provision of the Guarantee Clause is thus different from the "insurrection" (domestic violence) provision, where the latter requires the state's request for help from the federal government.[7]

Thus, the Guarantee Clause clearly denies President Trump the authority to seek to quell "domestic violence" absent the state's request for such help. The principle behind both the Guarantee Clause and the Tenth Amendment is that the federal government shall not intrude into state governance in state matters. If Illinois, for example, requests federal help in combating gun violence in Chicago, this would be perfectly permissible under both constitutional provisions.

On the other hand, a state attorney general, governor or legislature would presumably have standing to assert the state's sovereignty against unwanted federal intervention. Not long ago, the Sixth Circuit suggested that the federal courts might revisit when a Guarantee Clause issue might be justiciable in an appropriate case.[8] In matters of law enforcement, cooperation and comity between the federal and state sovereignties have been the norm. Yet President Trump has threatened to unilaterally bring armed federal personnel to New York State (and other states) on the purported grounds of quelling domestic violence. There is no need for this, especially in New York. More importantly, under the express terms of the Guarantee Clause, the federal executive has no authority to do so, absent a state's request for federal help.

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1. *See*, Dave Goldiner, Trump warns federal agents coming to New York City to 'help out' with uptick in crime – City Hall says 'no indication' that's happening, N.Y. Daily News, July 25, 2020, https://www.nydailynews.com/news/politics/ny-trump-federal-agents-new-york-city-20200725-vqkyzmghjbcjvkgwb764x6re6i-story.html.

2. *See*, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549, 567 (1995) (holding that the states, and not the federal government, retain a "general police power").

3. *Id.* at 618 ("The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the states.").

4. *See Black Lives Matter Chicago, et al. v. Wolf, et al.,* Case No. 20-cv-4319, Dkt. No. 1 (N.D. Ill. July 23, 2020).

5. *See Luther v. Borden,* 48 U.S. (7 How.) 1 (1849).

6. *See e.g.,* Ryan C. Williams, The "Guarantee" Clause, 132 Harv. L. Rev. 602, 649–50, n. 289 (2018).

7. *Id.* at 676, n. 461 & accompanying text. It is the Congress, not the President, who can call forth the militia to suppress an insurrection. See, Art. I, § 8, cl. 15.

8. *See Kidwell v. City of Union,* 462 F.3d 620, 636 (6th Cir 2006).

Overhauling New York's Trial Courts

Chief Judge DiFiore and the Lesson of History

By Joseph W. Bellacosa

Joseph W. Bellacosa is a Retired Judge of the New York State Court of Appeals and a Retired Dean and Professor, St. John's University School of Law.

Chief Judge Charles Breitel explaining pending court reforms to New York City judges at a statewide judges conference with David Ross (seated) and William Kapelman, circa 1976. Judge Bellacosa is standing behind Chief Judge Breitel.

A common wisdom holds that those who fail to learn from history are doomed to repeat it. But are there times when the best outcome would be for history to repeat itself? New Yorkers will soon find out now that Chief Judge Janet DiFiore has undertaken the goal of modernizing, simplifying and consolidating the Rube Goldberg-like structure of New York's trial courts. Building on her inaugural Excellence Initiative, she brings refreshed energy, endurance, and her characteristic determination to get the job done.

It's a colossal Sisyphean-like undertaking, as history has shown. While Judge DiFiore's initiative has garnered strong initial support of the Governor, the State Bar Association, various media editorials, and good government groups, this is an uphill battle that one of her predecessors, Chief Judge Charles D. Breitel, several tenures removed, once wryly described as not a task for the "short-winded." It seems now that the time is right – the purity of public purpose underlying this long-languishing reform is manifestly in the public interest.

TODAY'S CHALLENGE

- Consolidate New York's 11 different trial courts into a three-level structure of Supreme Court, a Municipal Court and Justice Courts serving the state's towns and villages;
- Preserve the current rules for the selection of judges and the terms of office for all judges of the courts that would be abolished and merged into Supreme Court and Municipal Court;
- Eliminate the centuries-old cap of one judge per 50,000 residents in a Judicial District that limits the number of Supreme Court judgeships that can be established by the Legislature;
- Set a five-year phase in to allow for statutory, regulatory, administrative or other changes that might be deemed necessary.
- And perhaps the tallest mountain of them all – getting the proposed overhaul passed in the Legislature during the 2020 session, passed a second time in 2021, and finally approved by the state's voters as a State Constitutional amendment.

PAST AS PROLOGUE

Can this latest initiative succeed? This is where history comes in. This won't be the first time a chief judge has taken on a worthy challenge. In fact, none other than Chief Judge Breitel is proof that major reforms can be accomplished. And not just major, either, but transformative ones, which Judge Breitel achieved during his time as leader of the third branch of State government. His style and technique formed the blueprints and set in place the building blocks that led to the constituency and operation of the Court of Appeals as we know it today. In a relatively brief five-year tenure, from 1974 to 1978, he also championed fundamental and long-lasting changes in the structure and management of the New York State court system.

In 1973 judges on the Court of Appeals were still being elected, which gave political bosses the backroom power to choose who would be nominated and who would be excluded. Judge Breitel was a survivor of this system, and having prevailed in a bitterly contested statewide election for Chief Judge, he vowed that the elective process for selection of Court of Appeals judges should end and be replaced by an independent apolitical appointive system. True to his pledge, he initiated a successful coalition effort, co-led with Governor Hugh L. Carey, that brought about the required double legislative passage and then a successful constitutional referendum. Among other measures, the new system put in place the nomination and gubernatorial selection process for Court of Appeals Judges that has functioned well for over 40 years. That determined reform attitude and approach are what is required, at long last, to make the trial courts of New York understandable in the service of the people of the State who are entitled to a fair and efficient administration of justice.

As chief executive of the judicial branch, Judge Breitel also coordinated a centralized administration structure to replace the localized fiefdom-like system, and included a statewide funding source. He persuaded the Presiding Justices of the four Appellate Divisions to relinquish, de facto, some of their authority, which was transferred to a centralized management authority under a Chief Administrative Judge (the first person to hold the post being the late Honorable Richard J. Bartlett). Judge Breitel then persuaded the Legislature and the people to enact the overhauled system, de jure. As a third prong of the reform package, he even tucked in the creation of the Commission on Judicial Conduct to replace the dysfunctional Court on the Judiciary.

THE "HOT BENCH"

Not to be overlooked, Judge Breitel was attentive to his home base (the equally important [some say "more" important] Cardozean jurisprudential role in the dual title of Chief Judge of the Court of Appeals) by improving the internal adjudicative operations of the Court of Appeals. He convinced the six colleagues to alter the appeals-processing methodology to improve quality of their work, induce plenary participation, and gain efficiency. His conversion of the Court to a "hot bench" for oral arguments was substantive, and not just some superficial switchover from the so-called "cold bench." As part of that shift, he replaced the longstanding internal system of pre-assignment of appeals to individual judges by the Chief Judge and Chief Clerk. Instead of primary respon-

sibility for preparing written reports being designated to one internally known assigned judge, under the new system no one (neither judges nor staff) would know in advance who was to bear the new oral reporting duty at the very next morning's private Court conferences concerning the appeals of the previous day.

Under the new "hot bench" system, the reporting-duty assignment was to fall to the respective judges only after oral argument, as each judge randomly selected from a batch of index cards with names of the appeals typed on the backs. This technique also stretched the oral engagement with counsel, because judges who did not yet know to whom the case would fall for reporting duty the very next morning would be psychologically nudged to greater participation across the bench and to more attentive listening to all the lawyers' arguments and to the colleagues' inquiries in all the appeals.

Judge Breitel's motivation for this conversion was to encourage all judges to come to conference more invested in all the appeals, with more supple openness to the wider range of wisdom of one another, collegially and collectively. Whimsically, he mused that the collective body of work would benefit when an assigned orally reporting Judge is disincentivized from "falling in love" with their set-down pre-argument written words. Judge Brietel mischievously winked that this process would also keep final voting positions looser and softer rather than solidifying cement-like, as in a "hardening of the categories." Mixed metaphors aside, the innovative nimbleness of the changes in the operating appeal-management process is still the essential system at the Court of Appeals, installed five Chief Judges ago.[1]

OTHER MANAGEMENT REFORMS

Judge Breitel also installed by internal management direction the conversion of the Court of Appeals to a year-round 52-week operation, rather than the venerable long summer hiatus of built-up delays in the handling the civil motions for leave to appeal and criminal leave applications. Though personally dubious, he showed his combined leadership-collegial colors by acceding to the overtures of the Associate Judges for a pilot project of a small core of Central Legal Research law clerks, initially a pool of three young lawyers to assist the judges (along with the Chambers elbow-clerks) to generate draft reports on the civil motions for leave to appeal. That unit is now a permanent part of the Court's staff, with many more law clerks assigned primarily to that category of the Court's docket.

In the Breitel era of major court reforms, the Court of Appeals was hearing over 700 argued civil and criminal appeals per annum. So, on a given oral argument day of, not uncommonly, 10 appeals, several of the judges would be charged with picking not one but two appeals that would have to be reported at conference the following morning. That was also in the bygone era of full two-week 10-sitting-days Sessions of the Court every month over the ten-month sessions span of a Court year.

Many of the transformative management techniques were put in place on the Court's own initiative and authority. For example, a mutually reinforced work discipline – adopted not as a formal Rule but as a practice among the Judges themselves – included exchanging their respective draft opinions during the usually three-sometimes-four-week intervals of busy residential-Chambers sessions (often mischaracterized as "recesses") in between the formal Albany oral argument sessions. The lawyers and litigants for decades have received the decisions on appeals mostly within five to six weeks after argument and after conferencing by the seven Judges around their conference room table – not via a technological modality as a substitute for face-to-face discussion. These were other value-added dynamics that were deemed key inducements to the collegial quality of the institutional process and product serving the public interest. This unique turnaround time from argument to decision remains a proud speedy justice hallmark of the Court of Appeals' hard-work culture even today, greatly appreciated by the Bar, clients and public at large.

REFORMING THE CIVIL DOCKET

Notably, chapter 300 of the Laws of 1985 legislatively reformed the Court of Appeals civil docket to mostly permissive. That reform measure dropped the number of appeals to fewer than 200 annually, as now found from the Clerk's Annual Report (a transparency publication practice also started during Judge Breitel's tenure). In the modern era, as a result of many of these long-lasting transformations of process, the number of sitting days is down to no more than three per week in the two-week Sessions of the Court, with rarely more than three-to-four appeals argued per day. Chapter 300 was enacted in the first year of the tenure of Chief Judge Sol Wachtler. Shortly after its passage, that Chief also led the effort for another building block of court reform – a state constitutional amendment authorizing the certification of questions of New York State law from the Federal Circuit Courts that allowed for definitive resolution by the Court of Appeals.

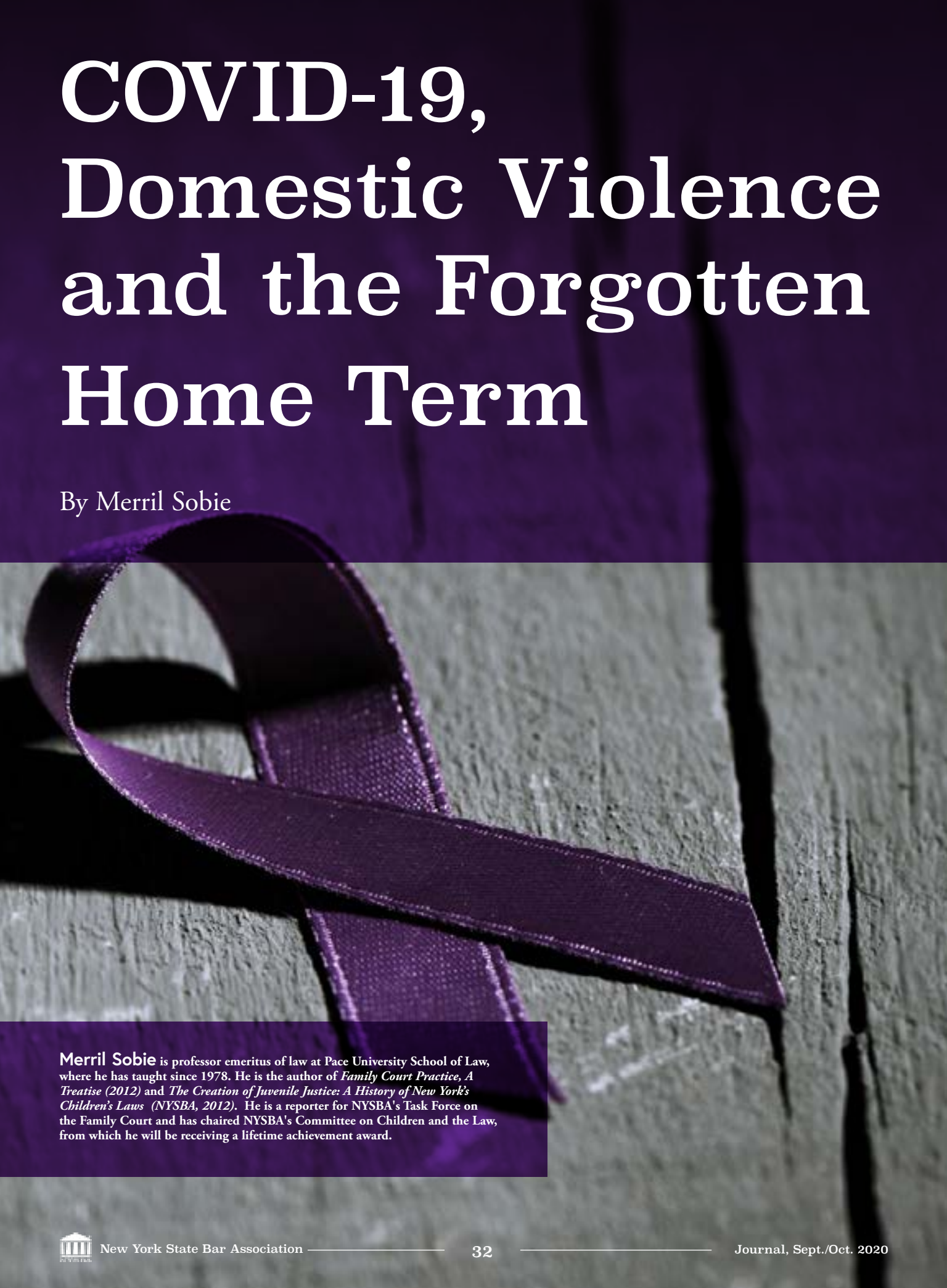
CONCLUSION

So, returning to where I started, Chief Judge DiFiore can be confident, as her predecessor Chief Judge Breitel was several tenures ago, that by assembling a coalition of diverse single-minded supporters, she might at long last also persuade the powers that be that the time for trial courts consolidation and transformation has come. And she has a template and lesson from history on her side.

1. *See* Joseph W. Bellacosa, Eight Chiefs, N.Y. St. B.J., (Nov.-Dec. 2015, Vol. 87, No. 9), p. 18.

COVID-19, Domestic Violence and the Forgotten Home Term

By Merril Sobie



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As the nation remains focused on the rising number of COVID-19 cases, one statistic has been largely overlooked – the rise in domestic violence cases brought on, to a large degree, by the stress of mandatory stay-at-home orders. While the surge is cause for concern, it is not unprecedented. At the end of World War II there was a similar surge, though for reasons far different from today. Back then the violence was attributed to abrupt reunification of long disrupted relationships. There is another difference as well. Today the victims of domestic violence can seek help from a court system that is much more streamlined and attuned to their needs than it was in 1945 – before, that is, one enlightened judge saw the need for reform and took action.

In 1945, the New York City Magistrate's Court, the current Criminal Court's predecessor tribunal, maintained jurisdiction over misdemeanor and offense cases, including third degree assault and disorderly conduct, and issued more than 10,000 summonses in cases alleging domestic violence or other family disputes.[1] In response, the court administratively established a new division, designated as the Home Term.[2] Originally limited to Manhattan, Home Term jurisdiction was expanded citywide in 1951. The articulated purpose, unique in that era, was "to focus on the offender and his family instead of on the offense itself."[3]

To implement and preside at the newly established term, the court appointed a remarkable woman, Anna Moscowitz Kross. Magistrate Kross had obtained a law degree in 1910, served as the first woman New York City Assistant Corporation Counsel, and in 1934 was appointed Magistrate by then Mayor John O' Brien.[4] Judge Kross presided until 1957, when she was appointed to the position of New York City Commissioner of Corrections.[5] During her tenure the adjudication and disposition of domestic violence cases was revolutionized.

The initial Anna Kross innovation was the physical removal of Home Term from the fortress-like Manhattan criminal courts building. Located first at 300 Mulberry Street and subsequently at 80 Lafayette Street, Home Term was designed as a family residence or friendly office suite. Waiting rooms resembled a family living room. The hardware and trappings of a typical criminal court were absent. Instead, the "courtroom" was a conference room, where the unelevated and unrobed judge presided at the head of a conference table. The parties, a probation officer, social workers and the judge discussed and attempted to informally resolve most cases (lawyers were rarely present).[6] Cases were "adjusted" or otherwise resolved by employing ameliorative diversional techniques. (Trials, however infrequent, were presumably held in a formal courtroom.) Conferences were private; the public was excluded.[7]

The parties had initially met with a specially trained probation officer; the large majority were "adjusted" without the need for a formal adjudication (relatively few cases, presumably the most egregious, were prosecuted initially, bypassing the informal phase). Parties were frequently referred to secular or religious social service agencies, perhaps after issuance of an order of protection. Magistrate's Court did not possess felony jurisdiction. Hence the charges were predominantly third degree assault, disorderly conduct or harassment. Felony cases, including first and second degree assault, continued to be prosecuted formally in the higher courts.

Home Term was staffed by 16 probation officers, who conducted "adjustment" sessions, investigated defendants, and supervised respondents who were placed on probation.[8] Another Kross innovation was the establishment of a Home Term nursery, an outdoor playground and a catered food service for children. Domestic violence victims could thereby bring their children to court, where they would be accommodated and nourished while the case was informally resolved or scheduled for a hearing. An in-house mental health clinic staffed in the early years by a full-time psychiatrist, a psychologist, and four social work graduate students formed an integral part of the system. Defendants could be evaluated and, when necessary, referred to outpatient services or committed to the Bellevue Hospital psychiatric prison unit.[9] Home Term also established an alcoholic clinic, where a significant number of domestic violence defendants who were alcoholic could be treated.[10] In sum, Home Term employed an interdisciplinary approach in resolving domestic violence cases. The breadth of diagnostic and treatment services, unique in the mid-20th century, was funded by New York City and a plethora of individual, governmental and private agency grants. (Judge Kross was apparently an adept grant writer.)

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There was no detail that escaped the judge. She even secured a loan of paintings from the Metropolitan Museum of Art and the Museum of Modern Art to decorate the family-style Home Term environment. (How many criminal court buildings are adorned with art museum paintings?)[11]

Magistrate's Court, including Home Term, maintained full criminal jurisdiction. Hence defendants could be incarcerated, a power evoked sparingly, though it was available. The authority of the court to imprison was apparently underscored throughout the proceedings, a policy that has been described as a "carrot and stick" approach.[12] The objective was to provide mediation, remediation and treatment alternatives, reserving incarceration for egregious assaults or violations of protective court orders.

However progressive, a deficiency of Home Term was its central location. Convenient to Manhattan and perhaps Brooklyn residents, the central term was very inconvenient to many city neighborhoods. A perhaps more significant problem was the absence of family law jurisdiction. Domestic violence victims frequently need spousal support, child support and custody orders for their children. Many seek paternity orders. The hapless victim petitioner might well face the challenge of litigating in several different geographically atomized courts, including the Magistrate's Court, the Domestic Relations Court, the Court of Special Sessions (which held paternity jurisdiction) and the Supreme Court. By 1960 the irrational New York court system had been heavily criticized. Family law advocates lobbied extensively for a unified Family Court, one that would enable a petitioner, including a domestic violence victim, to receive comprehensive remedies in one tribunal.[13]

By 1960 the irrational New York court system had been heavily criticized. Family law advocates lobbied extensively for a unified Family Court, one that would enable a petitioner, including a domestic violence victim, to receive comprehensive remedies in one tribunal.

Largely for that reason, the New York State Family Court was established in 1961. Home Term was an obvious candidate for inclusion and became the model for Family Court Act Article 8, with the former criminal provisions renamed as civil "Family Offense" proceedings.

By then, Magistrate Kross was the New York City Commissioner of Corrections, although Home Term continued as a unique interdisciplinary tribunal housed at an "off court" location. The original Family Court Act granted the court extensive domestic violence jurisdiction: "The Family Court has exclusive original jurisdiction over any proceeding concerning disorderly conduct or an assault between spouses or between parent and child or between members of the same family or household."[14] Jurisdiction was accordingly extended to felony cases, such as first degree assault, an extremely violent felony which should never have been decriminalized (the crime was removed from Article 8 by a subsequent amendment).

Stripped of criminal jurisdiction, the Family Court lost the Magistrate's "stick," although it was granted authority to transfer cases to the appropriate criminal court (original F.C.A. Section 814). Significantly, when adjudicating a family offense petition, the family court was authorized to direct the filing of a neglect, a spousal or child support, or a paternity petition (original Section 815, now Section 817). The provision thereby addressed the multiple legal needs of domestic violence victims.

Home Term never distinguished between married and unmarried parties. Magistrate's Court maintained jurisdiction over all misdemeanor cases, regardless of the parties' relationship. Hence the court could adjudicate domestic violence cases involving complaints by married persons, cohabitants or romantically involved couples. It was hence logical to statutorily encompass proceedings "between spouses or between parent and child or between members of the same family or household," i.e., presumably between unmarried cohabitants who reside in the same household. The probably intended interpretation was nevertheless rejected by the Court of Appeals in 1970, *People v. Allen*, 27 N.Y. 2d 108(1970):

> In sum, then, we held that the "family" and "household" categories' of Section 812 of the Family Court Act confer jurisdiction on the Family Court over disputes arising in relationships only where there is legal interdependence, either through a solemnized marriage or a recognized common law union.[15]
>
> Certainly making available conciliation proceedings . . . to such informal and illicit relationships as those before us, would clearly be contrary to public policy . . . [16]

Allen precluded relief for the growing number of people who cohabited, including same-gender relationships

(same-gender partners could not then marry). The restriction continued until 2008, when the legislature expanded Family Offense jurisdiction to include parties who "are or have been in an intimate relationship. . . ." It is doubtful that the legislature realized it had restored the historic Home Term jurisdiction.

Although legislatively abolished in 1962, Home Term, renamed the Family Court "Family Offense Term," continued as though it had never left the old Magistrate's Court.

When this writer initially became involved in 1968 (prior to the *Allen* decision), the Term was housed at informal leased quarters far removed from the Family Court. The comprehensive probation element remained intact, social services were robust, by then the expanded Home Term mental health clinic was well staffed, and the emphasis in favor of adjustment, remediation and mediation remained prevalent. Disturbingly, however, the mostly non-represented victims could not obtain spousal support, child support, child custody or filiation orders unless they prosecuted multiple simultaneous proceedings in other terms of the Family Court located throughout the City. As noted in a 1969 report, family offenses had not yet been integrated into the Family Court; ergo, one of the primary purposes of the court's establishment had not been achieved.[17]

Integration was finally achieved in the early 1970s, a decade following the Family Court's establishment. The Family Offense Term was merged into a reorganized court with "all purpose" parts, and a policy of "one family, one judge." (Home Term was not the only isolated branch of the court.) In one courtroom, a family offense petition could be determined simultaneously with applications for child custody, child support and spousal support. The former Home Term mental health clinic was integrated into a much larger Family Court clinic, augmented by federal and local grants. One goal was to partially replicate Home Term's successful mental health and remediation approach throughout the court.

The downside of integration was the loss of expertise within the Home Term context. Specialized probation, social work, family counseling and alcoholism services were no longer available. Domestic violence became one relatively minor aspect of a larger court (at least in New York City). Home Term no longer existed.

One generation later, the contemporary domestic violence paradigm evolved. In many ways, the present system is superior to Home Term. The statutory framework has been strengthened, victims are better protected and integrated domestic violence parts have developed an expertise that was largely unavailable in the earlier Family Court. Further, whereas Home Term was limited to New York City, domestic violence policies are now implemented statewide. Perhaps most significantly, law enforcement has been strengthened. Home Term could not address police arrest practices and policies, whereas we now focus on that essential aspect. Petitioners and respondents are legally represented. The protection of victims is paramount, and the system has made significant progress toward that objective.

Home Term nevertheless offers important insights. Anna Kross's emphasis on informality, social service remedies, mental health expertise and the presumption that cases, other than the most egregious, could and should be resolved without formal judicial involvement may be advantageous compared with the current emphasis on judicial authority and orders of protection. (The Magistrate Court's limitation to misdemeanor and offense cases militated a more benign approach). The Home Term emphasis on family needs, including those of the defendant, has been largely lost. As noted by one contemporary Home Term commentator, "today's domestic violence courts focus almost exclusively on victim safety and defendant accountability . . . they are not particularly interested in offering help to alleged offenders."[18] The holistic approach pioneered by Magistrate Kross surely merits study, and at least partial resurrection. We may attain a more balanced approach by analyzing the "Home Term" chapter of judicial history.

Perhaps the most notable fact is that Home Term existed and achieved considerable success. Thanks to Anna Kross, the lengthy historic era of domestic abuse neglect was not monolithic. One amazing innovator, assisted by several individuals and organizations, transformed the system in one city for several decades.

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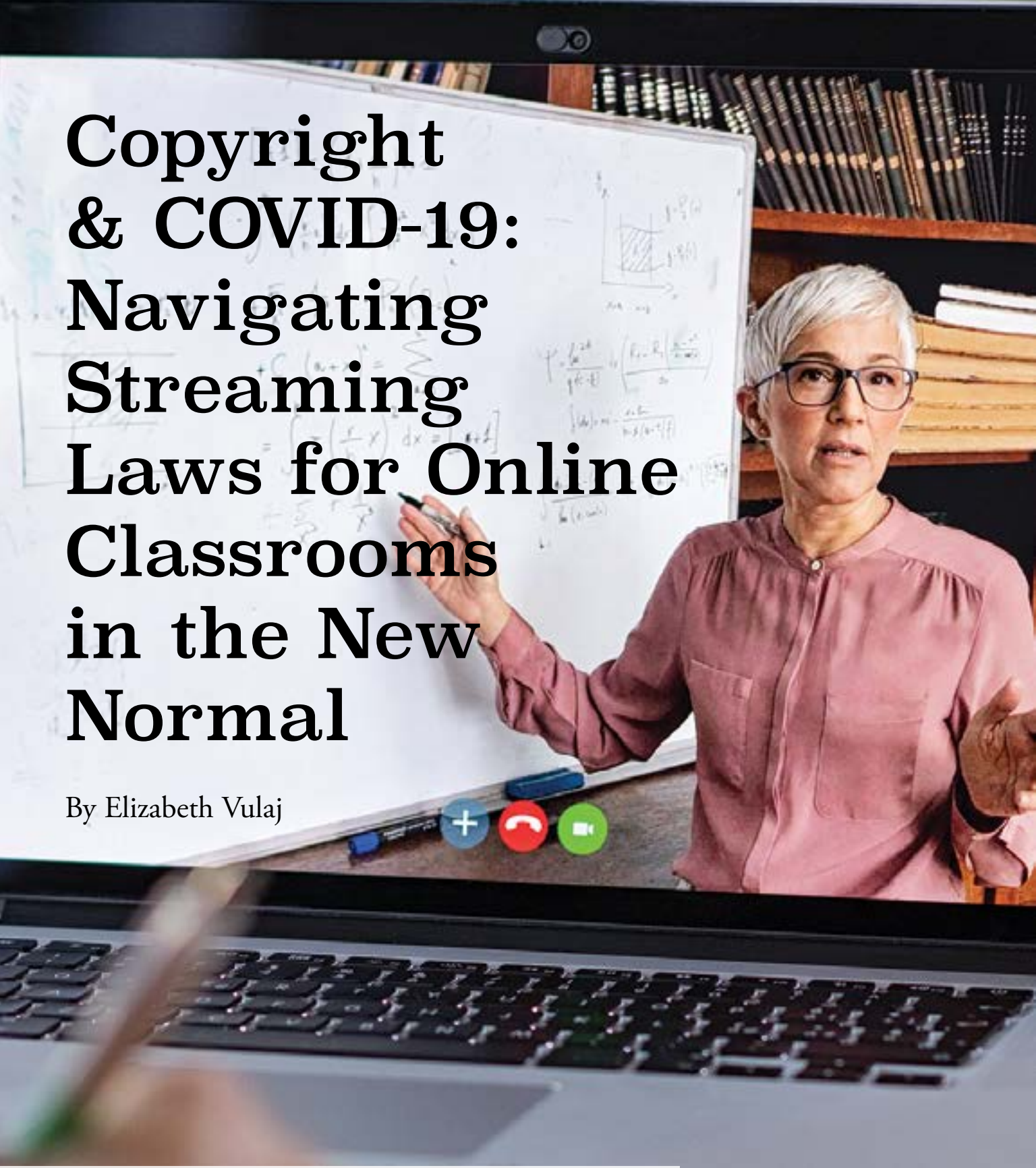
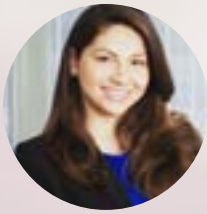
1. Walter Gellhom, *Children and Families in the Courts of New York City*, Dodd Mead & Co. 1954 at p. 217.
2. *Id.* at 217-218.
3. *Id.* at 219.
4. Mae C. Quinn, *Anna Moscowitz Kross and the Home Term Part: A Second Look at the Nation's First Criminal Domestic Violence Court*, 41 Akron L. Rev. 33 (2008).
5. Other magistrates were also assigned temporarily to Home Term parts.
6. Gellhom, *supra* note 1 at 221.
7. *Id.*
8. Gellhom, *supra* note l at 225.
9. Quinn, *supra* note 4 at 750.
10. Gellhom, *supra* note 1 at 224.
11. *Id.* at 220-221.
12. Quinn, *supra* note 4 at 741.
13. *See*, *for example*, Gellhom, *supra* note 1 at 282–89.
14. Original F.C.A. Section 812.
15. 27 N.Y.2d at 113.
16. *Id.* at 112.
17. A study of the Family Court of the State of New York within the city of New York . . . , the Officers of the Directors of Administration of the courts, First and Second Judicial Departments, p. 16 (1969).
18. Quinn, *supra* note 4, at 738.

Copyright & COVID-19: Navigating Streaming Laws for Online Classrooms in the New Normal

By Elizabeth Vulaj





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Once COVID-19 began spreading rapidly throughout the U.S. this past spring, schools across the state and nation quickly closed their doors, and our educational system had to adjust to a new kind of learning that began to take place primarily all online. Months later, many parts of New York City and the rest of the state are re-opening,[1] yet it is still likely that learning via webinars, lectures, and lessons will continue into the fall, as many high schools, colleges, and universities still plan on conducting classes partially remotely in the coming months.[2] As the educational world continues to navigate this new type of teaching, people need to be aware of the different aspects of the law that govern such usage of material, to better protect themselves moving forward in this changing world. Now, teachers are streaming materials, lessons, and content that are all easily accessible not only just by students, but by any individual with reasonable access to and skills in basic technology. Therefore, it is more important now than ever that we understand how copyright laws apply to this new form of learning.

First and foremost, copyright is a set of rights that are usually reserved for protecting original works of authorship, including novels, music, or even art. Copyright protection automatically extends once a piece of work is created, but it is usually recommended that the author or artist register the copyright, because that allows the owner to bring a lawsuit to enforce it – this makes it less likely that other people can copy the work and produce it by themselves.[3] The main exception to copyright law is fair use: when a person uses a copyrighted work for "purposes such as criticism, comment, news reporting, teaching, scholarship or research."[4] To determine if a use of copyright is fair, courts typically look at four factors:

1) purpose and character of the use (if it includes commercial nature or nonprofit educational purposes),
2) nature of the copyrighted work,
3) amount and sustainability of the portion used in relation to the copyrighted work as a whole, and
4) the effect of the use upon the potential market for or value of the copyrighted work.[5]

It is up to the person streaming the content to show how the fair use doctrine applies to their materials, and determining whether it applies mostly depends on the facts and information shown[6] and fair use usually "has a broader scope where the original work is factual or informational."[7]

However, just arguing that you are using a certain type of online content for educational purposes alone will not guarantee a complete defense to claims of copyright infringement – it is important to show that in the educational material, new insight, lessons, or information are being expressed, and the instructor should not just be streaming old materials with no input from his or her own instruction.[8] Under the second factor, instructors may have a better chance of using other material in their lessons if they can demonstrate that the work is factual/informational and if the work has already been published before (i.e., using material from a biography, memoir, or other non-fiction material is likely to be more successful than referencing portions of a fictional work like a play or novel).[9] The third factor looks at how much of the original content instructors are using – interweaving a few minutes of lessons into your own course is likely to pass muster, rather than streaming an entire presentation that has already been created by someone else.[10] Finally, the fourth factor looks at whether the person borrowing the content is depriving the owner of the original copyright of potential income or if it undermines a market for the copyrighted work. If streaming this borrowed content is likely to deprive the owner of the work of possible earning revenue, it is likely they will not be able to use the content.[11]

These factors apply to works in general, but there are also other guidelines that help instruct people on what they are able to stream in terms of educational content specifically. Firstly, The Copyright Act of 1976 allows a "performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction,"[12] unless (in the case of a movie or other types of audiovisual work), the copy was made unlawfully and the person who showed the material to their students knew such.[13] For further clarification, U.S. Congress issued a report in 1976 (House Report No. 94-1476) that provided more instruction as to what teachers can or cannot borrow when doing their jobs: essentially, they re-affirmed that using works by others is allowed during in-person teaching in a classroom or similar place, generally. The report also states that teachers are allowed to make a single copy of a chapter of a book, a newspaper article, a short story or essay, or charts for instruction.[14] Further, teachers can also provide multiple copies of such materials if certain rules regarding length, spontaneity, and cumulative effects are met and if each copy includes a notice of copyright.[15] However, these rules apply to in-person teaching and not online courses,[16] and the U.S. Copyright Act and accompanying guidelines regarding the act were all drafted in the 1970s, decades before the internet began playing a vital role in how students learn.

The Technology, Education, and Copyright Harmonization (TEACH) Act of 2002 provides further and more modern clarification regarding online teaching materials, which is sure to be of helpful use during this time, when teachers and students alike have become more reliant on technology to stay on top of their work. The TEACH Act of 2002 states that certain materials that are displayed in an online classroom are exempt from copyright infringe-

ment under the following requirements: (1) the presentation of materials is done through a teacher's instruction, (2) the content is a part of the instructional activities of the school, university, or institution, (3) the work is part of the teaching content of the transmission, and the (4) transmission is made only for students enrolled in the course.[17] Since the TEACH Act was enacted more recently and applies more directly to online learning, it is recommended that school officials and instructors take a close look at the provisions to ensure they are abiding by U.S. law.

It seems that with all of these potential defenses, teachers, instructors and school officials may have the best luck with arguing that their utilization of other people's materials constitutes fair use. Courts typically examine the four factors of the fair use doctrine holistically when making their assessment, and the very first factor is the "purpose and character of the use, including whether [it] is of a commercial nature or is for nonprofit educational purposes."[18] In that case, the court ruled that publishers of a college social psychology textbook that reprinted material from a copyright owner's psychological instrument known as the 'Love Scale' met their burden of showing that their use of the scale was fair use. In this case, the court stressed that the factors "are neither exclusive nor should any one factor be determinative. Rather, the factors should be considered "in light of the purpose of the fair use doctrine: to prevent strict enforcement of the copyright law when its enforcement 'would inhibit the very Progress of Science and useful Arts that copyright is intended to promote."[19] In terms of the first factor (purpose and character of the use), the court ruled that because the college textbook was "circulated within an educational setting for the purposes of teaching and higher learning" and that it was productive, the first factor was met. The court also found the second factor (nature of the work) was met because the reproduction of the Love Scale was previously published and the reproduction was scientific and scholarly in nature. Then, the third factor (the amount and substantiality borrowed) tipped in favor of the publishers because the Love Scale was only a small portion of the textbook, and with the fourth factor (effect of the use upon the potential market), the court found there was no threat to the market value of the original work. This is because the original work was published numerous times from the 1960s until the 1970s, and the court ruled that the textbook's one-page mention of the Love Scale in a 650+ page text did not create "any meaningful likelihood of future harm to the Love Scale markets."[20] As such, the court held that the publishers met their burden of fair use. In Cambridge University Press v. Albert, the publishing house sued for copyright infringement against various members of board of regents of a state university system, for allegedly allowing unlicensed portions of copyrighted books to be electronically available to students.[21] In that case, the Eleventh Circuit ruled that the district court's interpretation of whether the first and fourth factor of the fair use doctrine were satisfied was correct.[22] In Cambridge, the Eleventh Circuit stated that the fourth factor tipped in favor of the academic publisher, because the university used verbatim copying that served the same intrinsic purpose for which the works had been originally published, which contributed to the "threat of market substitution" (i.e., the original works would be rendered potentially useless because people can find the exact copy in the distributions the board made).[23] As such, the Eleventh Circuit ruled that the district court should hold that factor four disfavors fair use for 31 of the 48 excerpts of the copies, yet when discussing the first factor (the purpose of the work), the court stated: "On the first factor, we agreed that 'the nonprofit educational nature' of the University's use favored the fair-use defense."[24] This case shows that the purpose of utilizing material for educational reasons gives borrowers strong leeway, but courts will not just end their inquiry there – rather, they will look at the entire set of factors and make their assessment considering all of the facts as a whole. Similarly, in the case of Tresóna Multimedia, LLC v. Burbank High School Vocal Music Association, a copyright owner of four songs brought an infringement action against a high school, stating that the high school did not obtain a license for use of the owner's sheet music for their school choir performance.[25] The court began with their analysis of the first factor, stating: "Carroll's use of the musical work was in his capacity as a teacher in the music education program at Burbank High School. Such an educational use weighs in favor of fair use."[26] Yet the court still continued its analysis of all three other factors, stating that: the second factor went against a finding of fair use because the original arrangement of the song was creative, but that the third factor tipped in favor of the school because its rearrangement of the song "did not simply copy several lines from one chorus of the song and repeat it, but embedded that portion into a larger, transformative choir showpiece that incorporated many other works."[27] And finally, the fourth factor also weighed in favor of the school as well, because the court stated that using small portions of the original song in the choir production would not threaten the original song's market value: "It is difficult to see how even widespread and unrestricted use of the chorus, in the context of nonprofit show choir performances, could displace the market for sheet music for the entire song."[28] As such, the Ninth Circuit ruled that the school's use of the song constituted fair use. All of these cases seem to be sending the same message in their analysis: courts look at the four factors of the fair use doctrine holistically, and if it can be shown that a majority of the factors are weighed in favor

of the teachers borrowing certain materials, then those educators should be able to utilize works in more freely.

But how would these rulings apply to teachers utilizing materials in webcasts, webinars, and their general online classrooms? Firstly, most courts would find that the first factor would be met, since a teacher would be generally using borrowed material for their courses and that would be deemed as an "educational purpose," similar to the cases above. Yet, as *Tresóna* points out, just because a use is educational does not mean it is automatically protected from a finding of infringement – it will strengthen a teacher's argument if the copying of the work adds something new or if the new work supersedes the objects of the original creation. Teachers should be aware that even if they are using material for the purposes of educating their students, they should also ensure they are interweaving the use of the work with their own input or lessons as well.

In regard to the second factor, courts typically lean in favor of the borrower of material if the material used comes from factual works such as biographies rather than fictional works, since distribution of facts or information generally benefits the public.[29] So, it would benefit an educator to rely more heavily on work that is based in non-fiction, rather than plays, novels, or other similar creative works.

In regard to the third factor, courts typically look at the amount and substantiality of the portion used in relation to the entire copyrighted work: simply put, the less actual text or content you use from the copyrighted work, the better (i.e.: utilizing a small paragraph in your class webinar would be more likely to be seen as fair use rather than re-printing an entire book). Yet, as *Tresóna* points out, even "entire verbatim reproductions are justifiable where the purpose of the work differs [enough] from the original."[30] In that case, the school's re-arrangement from a song showed that it used the copyrighted portion and embedded it into "a larger, transformative choir showpiece that incorporated many other works."[31] If a teacher uses only portions of a copyrighted piece and includes it as a part of a greater body of work, then it is likely that fair use will be seen.

In regard to the last factor, courts look at whether market value of the work would be put at risk if someone borrows it for educational purposes – courts are more likely to find fair use if people interested in getting the copyright owner's product would not find this need met by purchasing the allegedly infringing product and if the copying work performs a different function from the copyright owner's. In *Tresóna*, the purposes of both works did not intersect and a nonprofit show choir performance could not displace the entire song in the marketplace – as such, a teacher should ensure that the purpose of their work is not similar to the copyright owner's and demonstrate that their borrowed work is not a replacement of the original.

In these times, it is critical for instructors, professors, and teachers to know their rights when it comes to what, when, and how they are able to display content in this new world of online classrooms. Since it looks probable that New York will continue to use online teaching for at least part of the time in public schools, colleges, and universities all across the state, knowing the ins and outs of copyright law as we adjust to this new type of learning will provide a better and safer environment for all.

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Curbing Animal Cruelty

By Sheldon Siporin

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New York's animal cruelty laws need updating. They have not kept pace with contemporary animal protection legislation. Our pets are beloved family members yet under New York statutes abused animals are still treated more like property. The evolving view is to treat pets as sentient creatures and provide stiff penalties to protect them from cruelty. New York can learn how to improve its laws by drawing on recent federal legislation and by observing trends in other jurisdictions.

NEW YORK LAGS BEHIND RECENT FEDERAL ANTI-CRUELTY LAWS

In the age of the internet, animal cruelty has not diminished but actually thrives. "Crush videos" have become commonplace. These are videos in which acts of animal torture, burning or suffocation are filmed for commercial distribution. According to the Animal Welfare Institute, these videos may also depict perverse acts such as "women in stilettos or bare feet stomping on or impaling small, helpless animals."

To discourage this, Congress enacted the PACT (Preventing Animal Cruelty and Torture) Act, which was signed into law on November 25, 2019, with bipartisan support. The Act amends Section 48 of title 18, United States Code that had criminalized distribution of these "crush videos." The new law is revolutionary in that it makes not just distribution but the acts of animal cruelty themselves a federal crime. It prohibits all kinds of animal abuse to many varieties of pets. It states in pertinent part:

"It shall be unlawful for any person to purposely engage in animal crushing in or affecting interstate or foreign commerce or within the special maritime and territorial jurisdiction of the United States."[1]

Since PACT applies to harmful acts within the "territorial jurisdiction" of the United States, this makes it a federal animal cruelty statute.

Under the legislation, the term "crushing" is broadly defined to include a host of brutal acts. It covers cruelty to non-mammals as well as to dogs and cats. The PACT Act describes "animal crushing" as follows:

> (f) Definitions. –In this section–
>
> `(1) the term `animal crushing' means actual conduct in
>
> which one or more living non-human mammals, birds, reptiles, or
>
> amphibians is purposely crushed, burned, drowned, suffocated,
>
> impaled, or otherwise subjected to serious bodily injury.[2]

It also provides serious penalties for violation of its provisions. A person who commits acts of animal cruelty in violation of the Act, "shall be fined under this title, imprisoned for not more than seven (7) years, or both."

While New York often prides itself on being a leader in enlightened legislation, these federal penalties are much stiffer than those of New York's current animal cruelty statutes.

FEDERAL PET AND WOMAN'S SAFETY ACT (PAWS ACT 2018)

Animal abuse is perfidious but it is also linked to domestic abuse. During New York's Animal Advocacy day in June 2018, State Senator Tedisco quoted FBI findings that "animal cruelty is a bridge crime." Those who harm pets often go on to harm people as well.

According to the American Humane Society, a survey of pet-owning families with substantiated child abuse and neglect found that animals were abused in 88% of homes where child physical abuse was present. The Animal Welfare Institute states that multiple studies find that 49% to 71% of battered women report their pets were threatened, harmed, and/or killed by their partners.

In addition to PACT, recent federal legislation has been enacted to take domestic violence into account. The Pet and Women Safety (PAWS) Act was signed into law as part of the 2018 Farm Bill. As a result of PAWS, 18 U.S.C. § 2262 provides penalties for up to five years for violation during interstate travel of state protection orders that cover pets. Thus, the law covers not only violent acts against people but against their pets. It states, in pertinent part:

A person who violates this section shall be fined under this title, imprisoned –

> for not more than 5 years . . . . [this includes] any case in which the offense
>
> is committed against a pet, service animal, emotional support animal,
>
> or horse.[3]

The statute's coverage is broad because 33 states including New York have enacted laws that allow pets to be included in orders of protection. Under New York's Family Court Act the judge may issue an order of protection directing defendant "to refrain from intentionally injuring or killing, without justification any companion animal the respondent knows to be owned, possessed, leased, kept or held by the petitioner or a minor child residing in the household."[4]

Anti-Stalking

The PAWS Act also expanded the federal crime of stalking to include threats to the pets of stalking victims. The statute's protections apply to "a person traveling in interstate commerce [who] engages in conduct that

(A) places a person in reasonable fear of the death of, or serious bodily injury to . . . (iv) the pet, service animal, emotional support animal, or horse of that person."[5]

In addition, PAWS also covers threats by mail or otherwise. The statute prohibits

> use of the mail, any interactive computer service. . . . to engage in a course of conduct that —
>
> (A) places that person in reasonable fear of the death of or serious bodily injury to a person, a pet, a service animal, an emotional support animal, or a horse.[6]
>
> Penalties for violation include a fine and up to five years in prison.

CRUELTY AGAINST HUMANS? INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

As suggested by domestic abuse cases, there is always a second victim in cases of cruelty to pets— the traumatized pet owner. In the violently popular John Wick films, an assailant kills John Wick's dog. Of course, the act was not directed at the pet, but done to inflict severe emotional pain on John Wick. Any moviegoer can identify with Wick's pain and desire for vengeance. Any pet owner would suffer similar emotional distress if their beloved pet was harmed by a sadistic attacker. Unfortunately, New York, like most U.S. jurisdictions, does not recognize a crime, whether civil or criminal, of intentional or reckless infliction of emotional distress when a pet dog or cat is cruelly abused. The Michigan State University Animal Legal and Historical Center[7] indicates that only a few states (i.e., Florida, Kentucky, Idaho, Louisiana and Texas) have allowed monetary compensation for mental anguish in animal abuse cases.

Washington Appellate Court Awards Emotional Distress Damages

Ubi jus ibi remedium: there is no wrong without a remedy. However, you may have to travel to the West Coast to find it.

Seven years after a similar abuse case in New York, a Washington State appellate court reviewed a civil claim in *Womack v. Von Rardon*.[8] Three boys took Max, a two-year-old tomcat, from Ms. Womack's front porch to a nearby school, doused him with gasoline and set him on fire. Max suffered second and third degree burns and had to be euthanized.

The *Womack* opinion reported that, as punishment for that revolting crime, the juvenile court ordered the boys to pay restitution to an animal rights organization. Dissatisfied, Ms. Womack sued the boys and their parents *pro se* on behalf of herself and as "special guardian" over the "sentient being," Max Womack, deceased feline. The trial court awarded Ms. Womack $5,000 in "unliquidated damages" for the value of "Max and Bernadette Womack's emotional distress."

Still dissatisfied, Ms. Womack appealed, contesting, inter alia, the sufficiency of the damage award. The appellate court, pointing to the deficiency of the record, upheld the damage award. However, in a landmark opinion, the court concluded, "we hold malicious injury to a pet can support a claim for, and be considered a factor in measuring a person's emotional distress damages."[9]

PETS AND CHAIRS: VIVE LA DIFFÉRENCE

In France, pets were once considered property. However, the laws were changed to recognize that cats and dogs are not inanimate objects like chairs, but are living, sentient beings. Oregon's highest court has also observed that a pet is more than mere property.[10] The issue arose in 2014 when defendant, charged with misdemeanor neglect under Oregon's cruelty statute, objected to a blood sample taken from her dog. She claimed it was a "warrantless search" of her property. The prosecutor argued that a dog is a sentient being.

Reviewing the facts, the Oregon Supreme Court held the blood draw was not a warrantless search. The opinion concluded that a dog "should not be analyzed as though he were an opaque, inanimate container."[11]

Sadly, New York has long held that dogs are property,[12] not people. Even the U.S. Supreme Court once famously stated that *"Property in dogs is of an imperfect or qualified nature."*[13] Since pets are property, unauthorized possession of another person's dog is presumptive larceny,[14] rather than dognapping.

HORRIFIC CASES OF CRUELTY CRY OUT FOR REVISION OF NEW YORK LAW

New York's cruelty statutes have not changed in 20 years. State laws lag sorely behind federal cruelty legislation and behind evolving ideas of animal sentience. The need for change is also driven by horrific instances of cruelty and the inadequacy of current penalties. Change is further compelled by the contrivances courts must craft to serve justice where statutes are archaic or confusing.

Our state's primary animal cruelty laws consist of both a misdemeanor and a felony statute. The felony law was prompted in 1999 after a highly publicized incident in Schenectady showed the paucity of the existing penalties.

Buster the Cat Burned Alive

In a shocking instance of brutality,16-year-old Chester doused his neighbor's 18-month-old tabby, Buster, with kerosene and set the cat on fire. Despite being rushed for emergency treatment, Buster eventually died from the severe burns that were inflicted. However, the penalty for this gruesome act was slight: three years of probation and psychiatric care under New York's misdemeanor cruelty statute.[15]

In response to public outcry, the New York legislature added a new crime of "aggravated cruelty." That statute was oddly drafted and remains unchanged. It states, in pertinent part: "A person is guilty of aggravated cruelty to animals when, with no justifiable purpose, he or she intentionally kills or intentionally causes serious physical injury to a companion animal with aggravated cruelty."[16]

The statutory prohibition applied only to a "companion animal," which was not defined. Happily, the term has since been extended by the courts beyond dogs and cats to include even fish and reptiles.[17] Under the statute, a person can be convicted of abuse of their own companion animal. However, the maximum sentence is trivial, only two years, as compared to the seven-year sentence possible under the PACT Act. The statute is also strained in its effort to distinguish between misdemeanor cruelty and felony cruelty.

Isn't "Aggravated Cruelty" Redundant?

"Ordinary" cruelty under Section 353 applies to animals who are "overdriven, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated or killed." The statute also applies to cases of neglect, such as hoarding (having many animals without providing care) and depriving an animal of necessary food and drink. Thus, Section 353 appears to encompass almost every kind of cruel act. What, then, is "aggravated cruelty" under felony Section 353(a)?

The statute defines "aggravated cruelty" as: "conduct which: (i) is intended to cause extreme physical pain; or (ii) is done or carried out in an especially depraved or sadistic manner."[18] Acts of animal cruelty are inherently sadistic and cause pain, which makes this distinction hard to apply. Absurdly, an act of cruelty could be only

a misdemeanor in New York yet subject to more severe federal penalties if it violated the PACT Act.

People v. Jones: Is Killing Two Birds Worse Than Killing One?

Under New York's dual statutory system, a court must struggle to decide when torturing, mutilating or killing an animal is a felony and when it is "only" a misdemeanor. This can result in rather convoluted reasoning. In *People v. Jones,*[19] defendant was convicted of misdemeanor cruelty for killing one of his girlfriend's pet parakeets. However, he was convicted of aggravated cruelty for killing her second parakeet as well. On appeal, defendant argued that the second parakeet's death, like the first, was also only "ordinary" cruelty. Defendant also claimed the killing was "instantaneous" and so (presumably) not extremely painful.

New York's current animal abuse statutes are poorly drafted and the punishment inadequate. The penalties should be increased to parallel those of the PACT Act.

The appellate court affirmed the conviction for aggravated cruelty. Using rather tortuous logic, the opinion said that the time it took for the parakeet to die was "not dispositive." It reasoned that, since the parakeet was "crushed flat" between the bars of its cage, the trial court could draw an inference that it suffered "extreme physical pain."[20] Therefore the lower court decision was correct. Upon defendant's application, the Court of Appeals denied leave to appeal.[21]

People v. R.M.: Death by Suffocation

Similarly, in *People v. R.M.,*[22], a Westchester court also dealt with the issue of aggravated cruelty. There, a young girl suffocated a 15-year-old cat by wrapping it in a towel and sitting on it. The opinion found this was not simple cruelty but aggravated cruelty. To reach this result, the court supposed that the cat must have suffered terrible pain as it struggled to breathe for minutes before dying. This increased the cruelty level of the crime. Perhaps the court also considered the evidence that, after killing the cat, the mentally disordered girl sliced it open and removed its organs.[23] While some animal abusers suffer from mental disorders, this doesn't necessarily apply to all cases.

People v. Brinkley: The Dog Bit My Thumb Defense

Section 353(a) of the New York law on its face excludes acts of animal cruelty which are "justifiable." According to New York City Bar Association Guidelines on Animal Cruelty, "justification is defined in Penal Law 34.05" (i.e., authorized by law or necessary as an emergency measure).[24] However, this defies common sense. Can an act of cruelty ever be justifiable?

Still, defendants try to take advantage of this statutory exclusion. In *People v. Brinkley,*[25] defendant was convicted of aggravated cruelty to his young dog. On appeal, defendant claimed the dog bit his nephew; then, when he tried to discipline the dog, it bit him on the thumb. Defendant argued that he was in a "state of shock" and justified in acting to protect himself and his nephew.

The Third Department quickly disposed of this justification. Evidence showed defendant took the dog out of a closed crate before repeatedly kicking it and slamming it with a hammer. A necropsy found the "hammering" was so ferocious the dog had two collapsed lungs, a macerated liver and all its teeth fractured or missing. Given the strength of a young dog's teeth, a veterinarian testified that the animal endured a terrible pounding. The court ruled that this vicious attack contradicted any claim of justification.

In fact, Agriculture and Markets Sec. 350 describes cruelty as "every act, omission, or, neglect whereby *unjustifiable* physical pain, suffering or death is caused or permitted" (emphasis added).

Thus, animal cruelty by definition is unjustifiable.

A 50-YEAR PROHIBITION ON DOG OWNERSHIP

Given the maximum two-year sentence for felony abuse, judges have struggled to make the punishment fit the crime. Thus, the Brinkley judge enhanced defendant's sentence by prohibiting him from ownership or custody of animals for 50 years. On appeal, this was upheld. The appellate court noted that the law allows an abuser to be prohibited from ownership or custody of animals, "for a period of time which the court deems reasonable."[26] In light of defendant's vicious hammering of his pet dog, a 50-year prohibition was reasonable.

People v. Ivanchenko: Abuse Justified Because "Accidental"?

The Second Department recently upheld a conviction of aggravated cruelty in another brutal incident. In P*eople v. Ivanchenko,*[27] defendant allegedly beat her daughter's three-month-old puppy so ferociously she fractured its

skull, causing traumatic brain injury. Defendant claimed the puppy's injuries were "accidental." However, the trial judge relied on expert testimony which stated that the pup's injuries could not have been caused by accident.

On appeal, the court rejected defendant's argument that the expert testimony was not properly admitted. Further, the opinion pointed to evidence that defendant put the dying puppy in a black plastic bag and tossed it out of her car onto the roadway.

People v. Napoli: A Disobedient Lover Is No Excuse for Animal Abuse

Freud said an angry person may "displace" their rage onto an innocent animal. It seems he was right. However, rage at your lover does not excuse animal abuse. In *People v. Napoli*,[28] defendant demanded that his live-in girlfriend remove her dog from the premises and take it to the pound. Refusing, she declared she was leaving him. Angered by her disobedience, defendant grabbed a shotgun and fired two rounds into the dog, who later died. The appellate court upheld defendant's conviction for aggravated cruelty.

In re Pastor: Lawyer Cruelly Disbarred

A two-year felony sentence for animal cruelty is slight. However, it can really hurt if you're an attorney. In *In re Pastor*,[29] a New York attorney who beat his girlfriend's dog to death was disbarred after a felony cruelty conviction. He appealed, arguing that an uncharged prior crime of animal abuse was improperly admitted. The same appellate court that disbarred him disagreed and affirmed, noting the callousness of his actions.[30] The Court of Appeals denied leave to appeal.

The moral for New York lawyers: Don't commit animal cruelty. Or if you do, make sure it's only the misdemeanor kind.

NEW YORK CARS RECEIVE MORE PROTECTION THAN PETS

The maximum penalty for aggravated animal cruelty under Section 353 (a) is only two years. This is clearly inadequate given the heinous nature of many abuse cases. Further, not all defendants, if convicted, receive a maximum sentence.

If a New Yorker intentionally sets fire to a car they are guilty of arson in the third degree.[31] This is punishable by up to 15 years in prison. On the other hand, if that same person burns a dog or cat alive, they get only two years. Apparently, we care more about our pet cars than our pet dogs or cats.

The federal PACT Act provides for imprisonment for up to seven years for animal abuse. New York laws must be amended to match the PACT penalties.

NEW YORK LAW MUST BE CHANGED

New York's current animal abuse statutes are poorly drafted and the punishment inadequate. The penalties should be increased to parallel those of the PACT Act. Further, the statutory scheme makes little sense. If a distinction is to be drawn between misdemeanor and felony cruelty, it may make sense to distinguish acts of neglect (e.g., hoarding) from purposeful violence (e.g., burning, mutilating, crushing), rather than force the courts to parse the line between "cruelty" and "aggravated cruelty." Perhaps New York might take a lead role in recognizing that animals are sentient creature. It might consider creating a secondary crime of infliction of emotional distress upon the abused pet's owner. Finally, a statute that excludes "justifiable" cruelty is absurd since cruelty to animals in any form can never be justified.

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Examining Judicial Civility in New York Courts for Transgender Persons in the Wake of *United States v. Varner*

By James L. Hyer, Sherry Levin Wallach and Kristen Prata Browde

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Kristen Prata Browde is the President of the LGBT Bar Association of Greater New York and serves as co-chair of the National Trans Bar Association. Governor Andrew Cuomo appointed Browde to the Steering Committee of the New York State Council on Women and Girls, and, after serving on his transition team, Westchester County Executive George Latimer appointed Browde to the County's Women's Advisory Board. She also serves on the Boards of Directors of Equality NY, the Trans United Fund Political Action Committee and Princess Janae Place.

In January 2020, the United States Court of Appeals, Fifth Circuit, issued a decision in *United States v. Varner*,[1] that a federal court cannot require litigants, judges, court personnel or anyone else to refer to litigants using pronouns matching their gender identity. In the *Varner* decision, the Fifth Circuit sets forth three bases to support the determination not to use the pronouns requested by a transgender litigant, being: (1) no federal statute mandated that the Court grant the request, and the Court declined to grant the requests as prior federal courts "have done so purely as a courtesy to the parties";[2] (2) the Court wanted to protect against concerns of judicial impartiality,[3] and (3) the Court was concerned that the task of referring to a litigant with requested pronouns would be overly burdensome.[4]

In light of this decision, we must now examine the manner in which transgender individuals are treated within the New York State court system, taking into consideration the historic treatment of Lesbian, Gay, Bisexual and Transgender (LGBT) people by the courts. We find that substantial progress has been made in New York's courts, notably by the New York State Rules of Judicial Conduct, which compels a New York State court to not to act in accordance with the *Varner* decision, because to do so would fail to respect the litigant's gender identity and expression by using pronouns that conflict with the litigant's gender.

A HISTORICAL PERSPECTIVE ON THE TREATMENT OF LGBT PEOPLE IN THE NEW YORK STATE COURT SYSTEM

Without question the New York State court system is now among one of the most progressive in the nation with respect to the manner in which LGBT people are treated. That was not always the case. In a 1982 decision, the Hon. Kristin Booth Glen[5] noted, "There is no question that gay people have historically been oppressed by the laws and the court system, and that anti-homosexual views, conscious or otherwise, have dominated the legal arena . . . [G]iven the pervasiveness of cultural bias against gays judges themselves are frequently not free from anti-homosexual preferences."[6]

Several years later, the Hon. Paula J. Hepner,[7] who served as the Supervising Judge of Kings and Richmond County family courts, writing about her in-court experiences with LGBT persons, also noted concern pertaining to her judicial colleagues:

> When I was appointed a family court judge in the 1990s, a copy of the Code of Judicial Conduct was distributed during orientation for new judges. . . . During the orientation, no reference was made to the obligation to perform the duties of judicial office without bias or prejudice, or to the additional obligation that judges have to require that lawyers in proceedings before them refrain from manifesting bias or prejudice by their words or conduct. Nor was it ever pointed out that judges have a duty to see that court staff, court officials or others subject to their direction and control do not manifest bias or prejudice in their behavior or conduct . . . There was no discussion at our new judge orientation of what it means to manifest bias and prejudice by words, behavior or conduct.[8]

As the Chair of a work group tasked with LGBT sensitivity training, Judge Hepner recalls experiencing pushback from judges:

> The second encounter the work group had with resistance happened at the October 2006 training program for the delinquency judges. To say that it received a lukewarm reception would be an understatement. The judges were critical of the interactive format. They accused the presenters of 'talking down' to them. They sighed, rolled their eyes and read the newspaper throughout.[9]

Judge Hepner has noted far more positive experiences in her later role as a member of the Committee for Lesbian, Gay, Bisexual and Transgender Matters of the New York City Courts: "Over the past 10 years, there has been a major shift in the audiences to whom we have presented our LGBT training programs and the receptions our programs have received." She continued,

> But the task of making our courthouse environments friendly, welcoming, and safe for the members of diverse LGBT communities we serve is far from finished . . . Pursuing these goals and objectives requires strong judicial leadership. . . . Judges are in a unique position to bring about systemic change within their state and local judicial systems through coalition building, by coordinating education and training programs for judges, clerks, court officers, prosecutors, defense attorneys, law guardians, guardians ad litem, attorneys for children, probation officers, caseworkers, and court-appointed forensic mental health evaluators.[10]

The New York State courts heard the call of Judge Hepner, and in December 2016, the New York State Unified Court System established a new commission regarding LGBTQ issues for both employees and litigants with a stated mission of, "promoting equal participation and access throughout the court system by all persons regardless of sexual orientation, gender identity, or gender expression."[11] This Commission has been highly successful, conducting seminars and trainings throughout the State of New York.

In January of 2018, the New York State Unified Court System, with the support of the New York State Bar Association,[12] took action to bring the groundbreaking training Judge Hepner engaged in decades ago to all attorneys within the State by establishing a new category of Continuing Legal Education (CLE): "Diversity, Inclusion and Elimination of Bias."[13] The new rule states any programs falling under this category

> must relate to the practice of law and may include, among other things, implicit and explicit bias, equal access to justice, serving a diverse population, diversity and inclusion initiatives in the legal profession, and sensitivity to cultural and other differences when interacting with members of the public, judges, jurors, litigants, attorneys and court personnel.

The rule further clarifies the definition of this new category, stating "[t]hese programs may include, among other things, diversity, inclusion and elimination of bias based on, for example, race, ethnicity, national origin, gender, sexual orientation, gender identity, religion, age or disability."[14]

NEW YORK STATE RULES OF JUDICIAL CONDUCT PROHIBITING BIAS OR PREJUDICE

Beyond the advances within the courts set forth above, New York's judiciary is prevented from engaging in or allowing others within the courts to engage in bias or prejudice.

The Rules of the Chief Administrator mandate that

> (4) A judge shall perform judicial duties without bias or prejudice against or in favor of any person. A judge in the performance of judicial duties shall not, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon age, race, creed, color, sex, sexual orientation, gender identity, gender expression, religion, national origin, disability, marital status or socioeconomic status, and shall require staff, court officials and others subject to the judge's direction and control to refrain from such words or conduct.[15]

Moreover these Rules note that

> (5) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon age, race, creed, color, sex, sexual orientation, gender identity, gender expression, religion, national origin, disability, marital status or socioeconomic status, against parties, witnesses, counsel or others. This paragraph does not preclude legitimate advocacy when age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, or other similar factors are issues in the proceeding.[16]

The First and Second Departments of the Appellate Division have also adopted Rules of Practice pertaining to court decorum requiring

> (a) In the administration of justice the judge shall safeguard the rights of the parties and the interests of the public. The judge at all times shall be dignified, courteous, and considerate of the parties, attorneys, jurors, and witnesses. In the performance of his duties, and in the maintenance of proper court decorum the judge is in all respects bound by the canons of judicial ethics.[17]

Numerous judges have been removed from the bench for violation of these rules for having engaged in actions of bias and prejudice, many of which include the use of racial slurs.[18] With respect to one decision removing a judge for having made racial slurs the Court of Appeals held,

> We are in complete agreement with the Commission's determination that a deliberate and calculated remark of this nature, even if isolated, 'casts doubt on [petitioner's] ability to fairly judge all cases before him,' and seriously violated the governing rules related to his duty to uphold the integrity and impartiality of the judiciary and to avoid even the appearance of impropriety . . . [19]

APPLICATION OF THE NEW YORK STATE RULES OF JUDICIAL CONDUCT TO THE USE OF PRONOUNS, GENDER IDENTITY AND GENDER EXPRESSION

As gender identity and gender expression are included within the categories in which a judge is to refrain from manifesting, by words or conduct, bias or prejudice, a question arises: does the failure to use the pronouns requested by a litigant, as in the Varner matter, rise to the level of a violation of the New York State Rules of Judicial Conduct?

In the four reported cases wherein a New York State court addresses the situation in which a transgender individual has asked the use of pronouns to conform to the litigant's gender identity and appearance, the courts have agreed to do so while making a notation in a footnote of the decision.[20] One decision goes beyond the court's use of pronouns for a litigant and addresses the pronouns used by the adversary: "The court recognizes the right of persons of trans-gender experience to indicate their gender preference grammatically. Therefore, although the City refers to Carlos Sanchez as 'he,' the court will refer to Carlos Sanchez with feminine pronouns, as presented in the Petitioner's moving papers."[21] It is noteworthy, in these reported cases, that the concerns raised in the *Verner* decision do not appear to have arisen, as no concerns of impartiality were raised by the litigants, and the communication between the parties and the court were not hindered.

Based upon the court rules and legal citations included above, members of the judiciary within the State of New York are duty-bound not only to refer to a litigant, attorney, witness or other party in the court system by the pronoun they request, but they must also direct opposing counsel, other parties and court staff to do so as well. A failure to do so would manifest bias and prejudice as to the subject individual's gender identity and gender

expression. This conclusion is inevitable when examining the similarity of misgendering an individual (referring to an individual by pronouns or honorifics that are not theirs) and exposing an individual to racial slurs, sexist comments or other words or conduct in the protected categories referenced in the Rules of Judicial Conduct.[22] There should be no distinction between the categories, and the Rules of Judicial Conduct must be equally applied to all categories.

Notably, misgendering an individual in the context of employment and housing is in violation of New York State law.[23] In one decision, where a plaintiff asserted a claim of discrimination based upon the continued use of male pronouns despite the plaintiff having expressed a gender identity of female, the court held, "As for the treatment to which plaintiff was subjected, accepting the allegations as true for the purposes of this motion to dismiss, the purposeful use of masculine pronouns in addressing plaintiff, who presented as female, and the insistence that she sign a document with her birth name despite the court-issued name change order, is not a light matter, but one which is laden with discriminatory intent," and continued, "[i]t cannot be said that plaintiff felt demeaned for any reason other than abject discriminatory reasons."[24]

New York State's adoption of gender identity and gender expression as protected classes that cannot be discriminated against follows a realization of the damaging impact that referring to a transgender individual by an improper pronoun can have upon that individual, causing shame, anxiety and helplessness.[25] In discussing this from the perspective of a transgender individual,

> Misgendering – referring to someone by the pronouns or honorifics of a gender that is not theirs – is a daily event for many trans people. Even those who are often read as our actual gender, rather than the one assigned at birth, colloquially referred to as having 'passing privilege,' live with at least the threat of misgendering, sometimes an intentional attempt by an adversary in a proceeding who perceives that there may be some advantage gained by bringing attention to our transgender status, or perhaps in a vain attempt to upset us and throw us off our task representing a client. Others, however, particularly those often perceived as being visibly transgender, can barely leave the house without being misgendered.[26]

When writing about gender identity and ethical rules to apply to decorum in the courts, transgender attorney Ellen "Ellie" Krug wrote,

> The takeaway from these and similar professional responsibility rules is that, as legal professionals, we owe ethical duties to each other. We simply cannot allow discomfort about transgender lawyers (particu-

larly as to those who do not pass) to turn into a basis for discrimination. We are, as a profession, held to a higher standard than the general public. Moreover, there is an ancillary duty to call out lawyers (be it opposing or co-counsel, a firm member, or merely someone we happen to encounter in a courtroom) who seek to marginalize or harass transgender attorneys on the basis of their gender identity or presentation. Unfortunately, as more transgender attorneys enter the profession, some degree of harassment likely will occur, with locale, age, and a host of other factors coming into play. The profession must be vigilant against such conduct and not allow it to flourish.[27]

Attorney Krug is correct that our profession must be vigilant in protecting all transgender individuals within the New York State courts and requiring that all judges adhere to the Rules of Judicial Conduct to meet the Court of Appeals mandate that, "members of the judiciary are held to higher standards of conduct than members of the public at large and that relatively slight improprieties [may] subject the judiciary as a whole to public criticism."[28] This is especially important considering that

> [w]hen the overt conduct of a judge strengthens a community's . . . implicit biases, the judge, either by design or accident, potentially creates community harm by not only shaping the unconscious attitudes of jury pools and witnesses, but also by undermining the principle of equal treatment for all litigants who may come to accept that judicial favoritism is an unfortunate permanent feature of the judicial system.[29]

Chief Justice Warren Burger noted that "[a] sense of confidence in the courts is essential to maintain the fabric of an ordered liberty for a free people," and, further, that when "people who have long been exploited . . . come to believe that courts cannot vindicate their legal rights from fraud" and "incalculable damage [occurs] to society."[30] While the Varner decision is not binding upon the New York State courts, Rule 8.4 of the New York Rules of Professional Conduct requires the opposite of the holding in *Varner.* The legal profession within New York must take note of it and reconfirm our commitment to diversity and inclusion, and the elimination of bias and prejudice within our courts, because doing so is the only way to ensure that the legal system remains above reproach and retains the public's confidence.

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1. *See United States v. Varner,* 948 F.3d 250 (2020).

2. *See id.* at 254–56 ("First, no authority supports the proposition that we may require litigants, judges, court personnel, or anyone else to refer to gender-dysphoric litigants with pronouns matching their subjective gender identity," and continued, "Congress knows precisely how to legislate with respect to gender identity discrimination, because it has done so in specific statutes," and finally, "But Congress has said nothing to prohibit courts from referring to litigants according to their biological sex, rather than according to their subjective gender identity").

3. *See id.* at 256 ("Second, if a court were to compel the use of particular pronouns at the invitation of litigants, it could raise delicate questions about judicial impartiality. Federal judges should always *see*k to promote confidence that they will dispense even-handed justice.")

4. *See id.* at 256–58 ("Third, ordering use of a litigant's preferred pronouns may well turn out to be more complex than at first it might appear," and "Deploying such neologisms could hinder communication among the parties and the court," concluding, "Courts would have to do the . . . same. We decline to enlist the federal judiciary in this quixotic undertaking.")

5. Hon. Kristin Booth Glen, Dean Emerita, received her B.A. in Political Science from Stanford University and her J.D. from Columbia University Law School, where she was a Harlan Fisk Stone Scholar. She clerked for the U.S. Court of Appeals for the Second Circuit and spent 12 years in private practice, and 15 years as a member of the judiciary, serving on the New York City Civil Court and the New York State Supreme Court. She served as Dean of the CUNY School of Law from 1995 to 2005.

6. *See M.V.R. v. T.M.R.*, 454 N.Y.S.2d 779 (Sup. Ct., N.Y. Co. 1982).

7. Hon. Paula J. Hepner was appointed a Family Court Judge in 1990 and served as Supervising Judge, New York City Family Court, Kings and Richmond Counties, from 2008 to 2015.

8. *See* Hon. Paula J. Hepner, (Ret.), *Blueprint for Respect: Creating an Affirming Environment in the Courts for the Lesbian, Gay, Bisexual, and Transgender Communities,* 41 Wm. Mitchell L. Rev. 4, 2015

9. *See id.*

10. *See id.*

11. *See* http://ww2.nycourts.gov/ip/lgbtq/aboutthecommission.shtml.

12. *See* New York State Bar Association, Committee on Continuing Legal Education, Re: Proposed Diversity and Inclusion and Elimination of Bias CLE Requirement for New York State Attorneys, January 2017, https://nysba.org/app/uploads/2020/01/CLE-Diversity-Report-final.pdf.

13. *See* 22 N.Y.C.R.R. § 1500.22.

14. Angelica Cesario, *New York to Implement New Diversity CLE Requirement in 2018*, Above the Law: Continuing Legal Education, Sept. 25, 2017, https://abovethelaw.com/lawline-cle/2017/09/25/new-york-to-implement-new-diversity-cle-requirement-in-2018.

15. *See* 22 N.Y.C.R.R. § 100.3.

16. *See* 22 N.Y.C.R.R. § 100.3.

17. *See* 22 N.Y.C.R.R. § 604.1; 22 N.Y.C.R.R. § 700.5.

18. *See Matter of Mulroy,* 94 N.Y.2d 652 (2000); Matter of Esworthy, 77 N.Y.2d 280 (1991); Matter of Agresta, 64 N.Y.S2d 327 (1985).

19. *Matter of Schiff,* 83 N.Y.2d 689, (1994).

20. *See Bumpas v. New York City Transit Auth.,* 859 N.Y.S.2d 893, (Sup. Ct., Kings Co. 2008); *Ava v. NYP Holdings, Inc.,* 885 N.Y.S.2d 247, (1st Dep't 2009); *Brian L. v. Administration for Children's Services,* 859 N.Y.S.2d 8, (1st Dep't 2008); *Hanna v. Turner,* 289 A.D.2d 182 (1st Dep't 2001)

21. *See* Hanna, 289 A.D.2d 182.

22. *See* Jessica A. Clark, *They, Them, and Theirs*, 132 Harv. L. Rev. 894, Jan. 2019 ("Harassment that expresses disrespect for a person's gender identity is objectively hostile, just like harassment that expresses disrespect for a person's racial or religious identity. For example, imagine a scenario in which xenophobes harass a coworker they know to be from India by referring to him as an "Arab." This deliberate ascription of an incorrect identity is a form of racism--among other things, it expresses the idea that all people with brown skin are "Arab" and that Indian identity is unworthy of respect. Similarly, intentional misgendering expresses stereotypes about what real "men" and "women" are and informs its target that their own gender identity is unworthy of respect. It is unreasonable to refuse to refer to a person by their first name, for example, calling a man "Jane" rather than "John," due to a disagreement about whether his male gender identity is val*id.* Likewise, it is unreasonable to insult him by referring to him as "she," as the Equal Employment Opportunity Commission has concluded. And if a person uses they/them pronouns, it is unreasonable to insist on referring to them as "he" or "she.").

23. *See* N.Y. Executive Law § 296.

24. *See Doe v. City of New York,* 976 N.Y.S.2d 360, (Sup. Ct., N.Y. Co. 2013).

25. *See* Joli St. Patrick, "What You're Really Saying When You Misgender," The Body Is Not an Apology, May 26, 2017, https://thebodyisnotanapology.com/magazine/what-youre-really-saying-when-you-misgender.

26. *Id.*

27. Ellen Krug, *We Hear You Knocking: An Essay on Welcoming 'Trans' Lawyers*, 41 Wm. Mitchell L. Rev. 181, 2015.

28. *See In re Going,* 97 N.Y.2d 121 (2001).

29. *See* Joshua E. Kastenberg, *Evaluating Judicial Standards of Conduct in the Current Political and Social Climate: The Need to Strengthen Impropriety Standards and Removal Remedies to Include Procedural Justice and Community Harm,* 82 Alb. L. Rev. 1495, Albany Law Review, 2019.

30. Chief Justice Warren Burger, The State of the Judiciary–1970, 56 A.B.A.J. 929, 934 (1970).

Spousal Maintenance Modifications Post-2017 Tax Cuts and Jobs Act

By Robert W. Jones

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In 2016 nearly 570,000 taxpayers claimed $12.9 billion in alimony deduction on their federal income tax returns.[1] That amounts to an average alimony deduction of over $22,600 per year for the payor spouses. Prior to the 2017 Tax Cuts and Jobs Act (TCJA), alimony was tax deductible by the payor spouse and taxable income to the payee spouse.[2] Because the payor spouse taking the alimony deduction was often in a higher federal income tax bracket than the payee spouse, the average alimony deduction could produce a federal income tax subsidy of up to $6,700 per year for divorced couples.[3] Higher alimony payments could result in even larger income tax subsidies. Since the TCJA eliminated the federal tax deductibility of alimony payments,[4] divorce attorneys and judges have been forced to confront the financial consequences of the lost deduction and subsidy when determining spousal maintenance (alimony) awards. This article examines the situations through the lens of New York's matrimonial law pertaining to spousal maintenance and considers: 1) whether any modifications to spousal maintenance awards should be made because of the lost alimony deduction, and 2) how the lost subsidy

resulting from the TCJA's changes in the income tax law can be allocated between the payor and payee spouse.

SHOULD MAINTENANCE AWARDS LAW BE ADJUSTED TO ACCOUNT FOR THE LOST DEDUCTIBILITY?

Domestic Relations Law (DRL) § 236B governs spousal maintenance,[5] which is determined by a set of formulas that make use of the payor and payee's respective incomes prior to any state or federal income taxes.[6] The maintenance formulas applied depend on whether the payor spouse is also paying child support or not[7] and the controlling formula is determined by the relative incomes of the payor and payee spouse.[8] Notably, none of the maintenance formulas, either for temporary or post-divorce maintenance, are based on after-tax income (except to the extent DRL § 240 allows for the deduction of FICA and New York City taxes).

DRL § 240, which establishes the definition of "income" used in the computations specified by § 236B, references "gross (total) income as should have been or should be reported in the most recent federal income tax return."[9] Presumably, the legislature could have based its definition of "income" on taxable income or after-tax income, but chose not to. It is also reasonable to presume that the legislature was aware that persons with similar gross incomes could have widely varying taxable incomes or after-tax incomes based on potential differences in the multitude of deductions allowable from gross income before arriving at taxable income, such as: education expenses, moving expenses, student loan interest, penalties on early withdrawal of savings, self-employed health insurance, and itemized deductions.[10] Other than the deduction for FICA and New York City taxes allowed in the determination of income under DRL § 240, there is no indication that the legislature had any concern for the after-tax implications of the maintenance award, as none of the maintenance formulas reflect any state or federal income tax concerns. Persons who were able to reduce their income tax liability with large deductions such as student loan interest or itemized deductions were subject to the same presumptively correct spousal maintenance obligation as those who had no such tax-reducing deductions, assuming they (and their respective spouses) had the same gross incomes.

Advocates for adjusting post-TCJA maintenance awards often point to the sections of DRL § 236 that allow the court to consider "the tax consequences to each party" as the basis for the adjustment.[11] Admittedly, the loss of the alimony deduction may change the after-tax cash flow available to the divorced or divorcing parties. But, the spousal maintenance formulas in DRL § 236B were already capable of generating divergent after-tax cash flows for payor and payee spouses who had similar gross incomes but differing levels of income deductions. There is no evidence to suggest that the variation in after-tax incomes caused by the eliminated deductibility of spousal maintenance is any greater than the variation in after-tax incomes that instead is the result of differing levels of itemized income deductions for payor spouses. What is the basis for granting relief to the payor spouse whose income taxes are now higher because he or she lost the alimony deduction compared to the payor spouse whose income taxes are higher because he or she did not have as many itemized deductions to claim? If we were able to live with the inequities in spousal maintenance awards caused by the latter, why does the former render the maintenance award unjust or inappropriate and entitle the payor to modification?

Let's assume that the lost deductibility of alimony is of special concern to the courts because, unlike student loan interest, self-employed health insurance costs, or other deductions from gross income, alimony (spousal maintenance) is an expense that is uniquely created by the Domestic Relations Law and the court.

TAX CHANGES OTHER THAN LOSS OF ALIMONY DEDUCTION

For purposes of furthering the discussion, let's assume that the lost deductibility of alimony is of special concern to the courts because, unlike student loan interest, self-employed health insurance costs, or other deductions from gross income, alimony (spousal maintenance) is an expense that is uniquely created by the Domestic Relations Law and the court. When considering the tax con-

Year	2017		2019
Filing Status	Head of Household		Head of Household
Pesonal Exemptions	3		3
Gross Income	$ 60,000		$ 60,000
Alimony Deduction	(12,000)		-
Adjusted Gross Income	$ 48,000		$ 60,000
Standard Deduction	$ (9,350)		$ (18,350)
Dependency Exemption	(12,150)		-
Taxable Income	$ 26,500		$ 41,650
Federal Tax	$ 3,311		$ 4,721
Child Tax Credit	(2,000)		(4,000)
Net Federal Tax	$ 1,311		$ 721

sequences to the parties of the lost deductibility of alimony, should the court not also recognize that while the TCJA eliminated the deductibility of alimony, it doubled the child tax credit,[12] nearly doubled the standard deduction[13] and reduced marginal tax rates?[14] For many lower or middle-income taxpayers with child dependents, the focus on the lost alimony deduction "tree" may cause us to lose sight of the overall tax reduction "forest." Consider the example below.

Example 1: Maintenance Payor spouse has income of $60,000 and a $1,000 per month spousal maintenance obligation. There are three children under age 17, two of which will reside with the Payor spouse. Under the tax laws as they existed prior to the TCJA (e.g., 2017), the Payor spouse would claim two dependents and file as head of household and deduct $12,000 of maintenance payments. The Payor would have a standard deduction of $9,350, three personal exemptions worth a total of $12,150, child tax credits worth a total of $2,000, and be in the 15% federal tax bracket. The Payor's total federal income tax liability would be $1,311. Post-TCJA, the Payor spouse gets no deduction for the $12,000 of maintenance paid, but takes the head of household standard deduction of $18,350, receives $4,000 of child tax credits, and is in the 12% federal tax bracket. The Payor spouse's total federal tax bill is $721, or $590 *less* than before the TCJA. In contrast, focusing only on the lost alimony deduction would suggest that the Payor spouse would be worse off by $1,800[15] using the 2017 marginal tax rate or $1,440[16] using the 2018 marginal tax rate.

The comparison made in the example above makes use of tax calculations from a base year of 2017. While it may be tempting to assess the impact of the lost alimony deduction by simply calculating the 2019 federal tax liability with and without the alimony deduction in 2019, such an approach lacks support. If the maintenance formula results are now unjust, the magnitude of the injustice would be measured against the last year for which the formula results were appropriate and just. Using the 2019 tax code except for the lost alimony deduction as the base result ignores any tax advantages conferred by the TCJA upon a payor spouse that might offset the lost alimony deduction (e.g., higher standard deductions and lower tax brackets).

THE MORE DIFFICULT CASES

In situations where the higher standard deductions, lower tax brackets, and increased child tax credits of the TCJA have left the maintenance payor spouse with greater after-tax income, the court could easily dismiss the need for any adjustment to the presumptively correct maintenance amount. But, there are more difficult cases. In some instances, as demonstrated in Example 2, the Payor spouse's tax bill increases by more than the Payee spouse's tax bill declines.

Year	2017		2019	
	Payor	Payee	Payor	Payee
Filing Status	Single	Single	Single	Single
Pesonal Exemptions	1	1	1	1
Gross Income	$150,000	$ 5,000	$150,000	$ 5,000
Alimony (Deduction)/Addition	(40,952)	40,952	-	-
Adjusted Gross Income	$109,048	$ 45,952	$150,000	$ 5,000
Standard Deduction	$ (6,350)	$ (6,350)	$ (12,200)	$(12,200)
Dependency Exemption	(4,050)	(4,050)	-	-
Taxable Income	$ 98,648	$ 35,552	$137,800	$ (7,200)
Federal Tax	$ 20,597	$ 4,870	$ 27,247	$ -

Example 2: Maintenance Payor has income of $150,000. Maintenance Payee has income of $5,000. There are no minor children. Prior to the TCJA, the Payor spouse would have deducted $40,952 of alimony payments and taken the single standard deduction of $6,350 along with a dependent exemption of $4,050. The Payor would have been in the 28% tax bracket, with a total federal income tax liability of $20,597. After the TCJA, the Payor spouse claims the standard deduction for single taxpayer of $12,200. The Payor spouse is in the 24% federal tax bracket, with a total federal income tax liability of $27,247. The changes implemented in the TCJA have increased the Payor's federal income tax liability by $6,660.

The TCJA also made alimony non-taxable to the Payee spouse, so what has happened to the Payee's federal income tax liability? Prior to the TCJA, the payee spouse had wages of $5,000 and alimony income of $40,952, for gross income of $45,952. The Payee spouse would have taken the single standard deduction of $6,350 and the dependent exemption of $4,050, resulting in taxable income of $35,552 and a federal income tax liability of $4,870. The Payee spouse would have been in the 15% federal tax bracket. After the TCJA, with alimony being non-taxable to the payee, the Payee spouse has no federal income tax liability, which is a reduction of $4,870.

In this example, the Payor spouse's federal taxes have increased by $1,790 more than the Payee spouse's federal income taxes have declined. Modifying the presumptively correct award to fully indemnify the Payor spouse against the changes in the TCJA would leave the Payee spouse $1,790 worse off than before the TCJA; modifying the award to leave the Payee spouse in a position equivalent to his or her pre-TCJA after-tax position would leave the Payor spouse $1,790 worse off than before the TCJA.

Before examining approaches to allocate the lost federal tax subsidy, it's worth noting that when the entirety of the TCJA tax changes is considered (i.e., higher standard deductions and lower tax brackets along with the lost alimony deduction) the allocation problem is often less daunting because the overall tax increase for the payor spouse is often less than the tax increase attributable solely to the lost alimony deduction. The other provisions of the TCJA partially or entirely offset the lost alimony deduction. For example, it would be expedient to estimate the Payee spouse's harm in Example 2 by applying the 24% marginal tax rate to his spousal maintenance payment of $40,952 and concluding that the TCJA's lost alimony deduction has cost him $9,828. But, other aspects of the TCJA have mitigated more than one-third of that harm, resulting in a net tax increase of only $6,660. Nonetheless, there is still a net federal tax increase of $1,790 across the two parties that has to be allocated.

While this discussion has avoided examples making use of large itemized deductions, many New Yorkers will point out that the TCJA's cap on the state and local tax deduction made the net tax effect for higher-income taxpayers overwhelmingly negative, even before consideration of the lost alimony deduction. In those instances, the difficulties of allocating the net federal tax increase will be of the same nature as in Example 2, but at a greater scale.

HOW TO ALLOCATE THE LOST FEDERAL INCOME TAX SUBSIDY

The simplest solution to implement is to use the formula results for the presumptively correct maintenance award with no modification. As explained earlier, this approach could be justified on the grounds that the formulas have never been concerned with after-tax income and changes in after-tax cash flow do not render the results inappropriate or unjust.

Alternatively, the court could deem the presumptively correct amount to be inappropriate or unjust and reduce the award. In the Dutchess County Supreme Court case *Wisseman v. Wisseman*,[17] the facts indicate that the payor spouse had a 22% "federal tax rate"[18] and the payee spouse had a 12% federal tax rate. The Hon. Maria G. Rosa elected to reduce the presumptively correct maintenance by 12%, which was the payee spouse's federal tax rate. By making the payee spouse surrender the amount she would have paid in federal income taxes prior to the TCJA, the *Wisseman* court was attempting to leave the payee spouse in the same financial position that she would have been in prior to the TCJA. With a focus on the parties' marginal tax rates, it would appear that the 12% reduction in the maintenance obligation would not fully compensate the payor spouse for the lost alimony deduction at his 22% marginal tax rate.[19]

While strong arguments can be made that the application of judicial discretion to modify presumptively correct spousal maintenance awards can produce more just results than rigid application of formulas, the former approach sacrifices the increased certainty and predictability that the formulas were intended to introduce.[20] Is there a systematic way to allocate the losses, if any, resulting from the federal income tax changes in the TCJA that would restore some certainty and predictability in maintenance awards?

EXISTING SPOUSAL MAINTENANCE FORMULAS CAN BE USED TO ALLOCATE CHANGES IN INCOME

The definition of income established in DRL § 240 and used in the spousal maintenance formulas of DRL § 236B already allows for the deduction of FICA and New York City taxes. If the courts wish to account for the post-TCJA tax consequences that arguably were unanticipated in the implementation of the spousal maintenance formulas, why not handle them as an income adjustment similar to FICA or New York City taxes? Rather than giving a dollar-for-dollar credit for the lost alimony subsidy against the payor spouse's presumptively correct maintenance obligation (or a dollar-for-dollar reduction in the payee spouse's post-TCJA tax benefit), treat their respective tax losses and gains as an adjustment to income in the spousal maintenance formulas. How would this be implemented and what would be the results?

Let's reconsider the facts from Example 2. Based on the ratio of the Payor and Payee's incomes and the absence of children, the controlling spousal maintenance formula is

Spousal Maintenance (SM) = 0.3 x Payor Income (R) – 0.2 Payee Income (E),[21] which we can then abbreviate as

$$SM = 0.3R - 0.2E.$$

The change in spousal maintenance (dSM[22]) will be equal to 0.3 times the change in Payor income (dR) less 0.2 times the change in Payee income (dE), or

$$dSM = 0.3\,dR - 0.2\,dE.$$[23]

In Example 2, the change in Payor income because of the lost alimony deduction and other TCJA tax changes was a reduction of $6,660 and the change in Payee income because of the non-taxable maintenance and other TCJA tax changes was an increase of $4,870. Prior to the TCJA, the presumptively correct maintenance award was $40,863 annually. If the changes to the Payor and Payee's incomes are treated as an income reduction and gain of $6,660 and $4,870, respectively, the modified maintenance award would be reduced by $2,972[24] to $37,980. This allows the Payor spouse to recover nearly half of the TCJA-induced tax increase, while allowing the lower income Payee spouse to retain some of the TCJA tax benefits.[25] This approach treats the TCJA-induced tax consequences as a change in income that can be addressed using the existing spousal maintenance formulas, restoring some certainty and predictability to the maintenance determination.

CONCLUDING OBSERVATIONS

Because the formulas used to determine the presumptively correct amount of spousal maintenance are premised on income prior to federal and state income taxes, it is not clear that any adjustment for changes in the federal tax deductibility of spousal maintenance are necessary. If the court determines that justice requires modification to the spousal maintenance award, the magnitude of the tax-induced losses for the payor spouse and gains for the payee spouse should reflect all of the TCJA tax changes and not just the isolated loss of the alimony deduction. This will require a comparison of pre-TCJA tax liabilities (based on 2017 tax law) with post-TCJA tax liabilities, not merely a determination and application of post-TCJA marginal tax rates. For most payor spouses, their tax increase will be less than the amounts suggested by applying marginal federal tax rates to the lost alimony deduction. Finally, incorporation of the TCJA-induced tax changes as income changes in the spousal maintenance formulas, akin to FICA or New York City taxes, provides an objective approach to allocating the financial consequences of these tax changes between the parties which, if adopted by the courts, would restore some predictability to maintenance awards.

APPENDIX

When no child support is being paid, Spousal Maintenance (SM) will be the lesser of:

(A) 20% of the Payor's income (R) less 25% of the Payee's income (E),

which can be written as

(A) 0.2R – 0.25E

or

(B) 40% of the Payor's and Payee's combined income (R + E) less the Payee's income (E),

which can be written as

0.4(R + E) – E,

which can be further simplified to

(B) 0.4R – 0.6E.

Using the notation specified above, Spousal Maintenance can be written as the lesser of

0.2R – 0.25E or (B) 0.4R – 0.6E.

Formula (B) will be the lesser of the two calculations whenever

0.2R – 0.25E > (B) 0.4R – 0.6E.

Using basic algebra manipulations, it can be shown that (B) will be the lesser of the two calculations when

-0.25E + 0.6E > 0.4R – 0.2R

0.35E > 0.2R

E > 0.2R/0.35.

So, when Payee income is more than 20/35ths of Payor income, spousal maintenance will be determined by equation (B) 0.4R – 0.6E. When Payee income is less than 20/35ths of Payor income, use equation

(A) 0.2R – 0.25E.

Similarly, when child support is being paid, maintenance will be the lesser of:

(A) 0.3R – 0.2E and (B) 0.4R – 0.6E.

Using the same algebraic manipulations, (B) will be the lesser of the two results whenever

(A) 0.3R – 0.2E > (B) 0.4R – 0.6E,

-0.2E + 0.6E > 0.4R – 0.3R

0.4E > 0.1R

E > 0.1R/0.4.

So, when Payee income is more than 1/4th of Payor income, spousal maintenance will be determined by equation (B) 0.4R – 0.6E. When Payee income is less than 1/4th of Payor income, use equation (A) 0.3R – 0.2E.

1. Treasury Inspector General for Tax Administration report dated August 7, 2019, Reference Number 2019-40-048.

2. 26 U.S. Code 215.

3. Assuming the payee spouse was in the 10% federal income tax bracket and the payor spouse was in the 39.6% bracket existing in 2016.

4. Pub.L. 115-97 § 11051.

5. Domestic Relations Law § 236B.

6. Maintenance formulas are specified in Domestic Relations Law § 236B (5-a) and (6). The use of pre-tax income is specified in Domestic Relations Law § 240. However, Domestic Relations Law § 240 does allow deductions for federal insurance contributions act ("FICA") taxes and New York City income taxes.

7. Domestic Relations Law § 236B (5-a) and (6).

8. Although DRL § 236B(5-a) and (6), as written, call for two sets of calculations with the minimum result of the two calculations being the presumptively correct amount of maintenance, the determination of which formula will govern is mathematically determined solely by the ratio of the payor and payee spouses' incomes. Where child support will be paid by the maintenance payor, if the (maintenance) payee spouse's income is more than 20/35ths of the payor's income, then maintenance will be 40% of the payor spouse's income less 60% of the payee spouse's income. Otherwise, the maintenance is 20% of the payor's income less 25% of the payee's income. When there is no child support being paid by the maintenance payor, if the payee's spouse is more than 1/4th of the payor spouse's income, maintenance will be 40% of the payor spouse's income less 60% of the payee spouse's income. Otherwise, the maintenance is 30% of the payor's income less 20% of the payee's income. For proof, see Appendix.

9. Domestic Relations Law § 240 (1-b)(b)(5)(i).

10. See 2017 IRS Form 1040, lines 23 to 43, for the differences between total income and taxable income.

11. For temporary maintenance, see DRL § 236B(5-1)(h)(1)(j). For post-divorce maintenance see DRL § 236B(6)(e)(1)(j).

12. IRS New Release IR-2018-17, November 7, 2018. Available at https://www.irs.gov/newsroom/get-ready-for-taxes-heres-how-the-new-tax-law-revised-family-tax-credits.

13. IRS Fact Sheet FS-2019-2, February 2019. Available at https://www.irs.gov/newsroom/be-tax-ready-understanding-tax-reform-changes-affecting-individuals-and-families.

14. Compare marginal tax rates in 26 U.S. Code § 1 with marginal rates in Pub.L. 115-97 § 11001.

15. Calculated as 15% multiplied by the $12,000 lost alimony deduction.

16. 12% of the $12,000 lost alimony deduction.

17. *Wisseman v. Wisseman,* 63 Misc.3d 819, 97 N.Y.S.3d 823, 2019 N.Y. Slip Op. 29092.

18. Given the payor spouse's reported income of $70,800, the quoted tax rate appears to be his post-TCJA marginal tax rate or tax bracket.

19. There is not enough detail in the reported decision to fully evaluate the total tax consequences to the parties; however, based on the parties' reported incomes of $70,800 and $30,000, the standard deductions, and available child tax credits, it is likely that both the payor and payee's overall federal income tax liabilities were lower post-TCJA than before its implementation. If that is correct, the payor spouse not only received all the benefits to which he was entitled under the TCJA, but also recouped part of the lost alimony subsidy from the payee spouse's TCJA tax benefits.

20. Correspondence dated July 6, 2015 from Helene W. Weinstein, Assembly Judiciary Committee Chair, to Gov. Andrew Cuomo. New York State Bill Jacket, 2015 Ch. 269, Assembly Bill 7645, Senate Bill 5678. Accessed at http://digitalcollections.archives.nysed.gov/index.php/Detail/objects/61722 on May 11, 2020.

21. With different income ratios or dependent children, the controlling formula for spousal maintenance could be different than the one presented here.

22. The letter "d" preceding the variable indicates the "change in" the variable.

23. This is the total differential of the spousal maintenance equation. For an explanation of the total differential, see, for example, University of Nebraska, Math 208 Differentials Handout at https://www.math.unl.edu/~tshores1/Public/Math208F07/Math208DifferentialsHandout.pdf.

24. Calculated as dSM = 0.3 x -$6,660 – 0.2 x $4,870.

25. It is interesting that the *Wisseman* approach could be problematic in situations such as Example 2, where the Payee's spouse's marginal tax rate is 0%.

Tax Malpractice Damages – Return to Fundamentals – Another Court Gets It Right

By Jacob L. Todres

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This article is an update to his earlier article, Return to Fundamentals? Tax Malpractice Damages – Recovery of Additional Taxes, N.Y. St. B.J. 32 (June 2017), p. 89.

If one were designing the measure of damages recoverable for negligent tax advice, the most obvious element of recoverable damages would be the avoidable extra taxes caused by the negligence. After all, minimizing taxes is at the heart of a tax representation. In most states, such avoidable taxes are recoverable. The situation in New York is more clouded. Under longstanding traditional tort principles, the additional taxes would be recoverable. However, a few outlier cases decided between 2007 and 2014 have held such additional taxes not recoverable.[1] There does not seem to be a principled rationale for these cases. Rather, they simply rely, directly or indirectly, on *Alpert v. Shea Gould Climenko & Casey*.[2] While *Alpert* did hold additional taxes were not recoverable, *Alpert* involved a fraud cause of action, and correctly applied longstanding principles of damages recoverable in fraud causes of action. But damages recoverable for fraud are different from, and more limited than, damages recoverable in tort causes of action. In *Serino v. Lipper,* [3] the First Department recognized this distinction and held that additional avoidable taxes are recoverable in negligence-based tax malpractice actions. Recently, a lower court, *Bloostein v. Morrison Cohen LLP*,[4] recognized the distinction and held that such additional, avoidable taxes are recoverable. While *Bloostein* reached the correct result, by failing to focus on the developments in this area of the law, *Bloostein* missed an opportunity to clarify the law and to clearly reset it on its proper path.

The factual background of *Bloostein* is most interesting and unusual. The case involved a pre-packaged tax product – a tax shelter, if you would – but there is no intimation in the case that it was abusive. The attorneys who drafted the tax opinion underlying the transaction obtained summary judgment dismissing all claims against them. In denying the defendant's motion for summary judgment dismissing the plaintiffs' claims, *Bloostein* addressed several fundamental issues of New York tax malpractice law. Centrally, unlike the few outlier post-*Alpert* cases, *Bloostein*, like *Serino*, correctly held that additional taxes proximately caused by a tax advisor's negligence are recoverable in a negligence-based cause of action. *Bloostein* recognized there are different recoveries in tort versus fraud-based actions and correctly distinguished *Alpert*. In fact, *Bloostein* read *Alpert* very narrowly – perhaps even too narrowly.

Before discussing *Bloostein*, it would be helpful to focus briefly on the tax provision at the heart of the litigation, Internal Revenue Code (IRC) section 1042.[5] Without becoming enmeshed in the detailed requirements, section 1042 is an elective nonrecognition provision. It provides for the nonrecognition of long term capital gain realized on the sale of "qualified securities" to an employee stock ownership plan (ESOP) of the corporation issuing the qualified securities.[6] The nonrecognition applies only to the extent the proceeds from the sale of the qualified securities are used to purchase qualified replacement property (QRP) within the designated replacement period.[7] If the taxpayer disposes of the QRP, such as by sale, the previously unrecognized gain must be recognized in income then.[8] In such situations, section 1042 acts as a deferral provision, allowing the taxpayer to defer reporting the gain recognized on the sale of the qualified property until when the QRP is disposed of.

Death of the taxpayer electing section 1042 treatment does not trigger recognition of the previously unrecognized gain.[9] Under the IRC's rules for the tax basis in inherited property,[10] the heir of the electing taxpayer will obtain a tax basis in the QRP equal to its fair market value at the electing taxpayer's date of death. This "basis step-up" means that the original unrecognized gain will never be recognized for tax purposes. Under these circumstances, section 1042 results in the permanent nonrecognition of the original unrecognized gain – i.e., tax avoidance, not just tax deferral. Section 1042, therefore, can function either as a gain deferral or a gain exclusion mechanism, depending on who – the electing taxpayer, or his heir – sells the QRP.

BLOOSTEIN – FACTS

The plaintiffs in *Bloostein* were owners of small to mid-sized businesses who engaged the defendant law firm, Morrison Cohen LLP and its attorney Brian Snarr, to represent them in connection with an IRC section 1042 reinvestment transaction. In a straightforward section 1042 transaction, the corporate shareholder sells some of his corporate shares to the corporation's employees through the corporation's ESOP and reinvests the proceeds in QRP of his choice. Thus, the shareholder has diversified his investment in his corporation's shares, which by definition are not publicly tradable,[11] without incurring any present income taxes on the gain realized. The owner, however, has gained no liquidity, unless he chooses to recognize a portion of his gain by not reinvesting all his proceeds in QRP. The transaction involved was designed by Stonebridge Capital to enable the corporate shareholder to also obtain liquidity by borrowing funds, indirectly secured by the QRP.

Under the Stonebridge plan, each plaintiff formed a special purpose vehicle, an LLC, the existence of which was to be ignored for income tax purposes, though fully recognized otherwise. Each of these vehicles was called a "1042 LLC." Stonebridge formed the Stonebridge Pass-Through Trust ("Stonebridge Trust"). The funds used to purchase the QRP were borrowed by the Stonebridge Trust from Nomura International PLC, and in turn lent to each plaintiff's 1042 LLC. Each plaintiff's 1042 LLC used the borrowed funds and certain cash contributed by the plaintiffs to purchase certain corporate bonds as QRP. The corporate bonds were insured by an insurance company and were pledged as collateral for the loan from

Stonebridge Trust to the 1042 LLC and were repledged as collateral to Nomura for the loan Nomura made to Stonebridge Trust.

Several days before the transaction closed, a change was made in the Event of Default section of the Nomura loan documents. The original documents provided that Nomura could declare a default if:

> [T]he rating with respect to any Underlying Bond fails to or falls below "B2 by Moody's or "B" by S&P.

The revised documents provided that Nomura could call a default if:

> [T]he rating with respect to any [sic] financial guaranty insurance policy related to any Underlying Bond fails to or falls below "B2 by Moody's or "B" by S&P.[12]

Under the original default provision, Nomura could call a default if there was a downgrade in rating of any of the bonds purchased as QRP. Under the revised provision, though the language is unclear, it was held[13] that a default could be called by Nomura if the rating of the insurer of the QRP bonds was downgraded, regardless of the rating of the bonds themselves. This change in the default provision was never called to the plaintiffs' attention by the defendant and the plaintiffs never agreed to the change.

Following the closing of the transaction on September 26, 2007, the rating of the insurer of the QRP bonds was downgraded and Nomura called a default. The bonds of five of the plaintiffs were sold to pay the loan, thereby causing immediate recognition of the gain intended to be deferred under section 1042. The sixth plaintiff, *Bloostein*, incurred additional costs, but managed to obtain another loan and avoid having his bonds sold. The five plaintiffs who incurred the additional taxes instituted this suit to recover the avoidable taxes incurred. *Bloostein* sought to recover the costs he incurred to obtain the replacement financing.[14]

The plaintiffs commenced this action against their attorney,[15] alleging he was negligent in failing to address the revised default provision to which the plaintiffs did not agree, and sought to recover the significant additional capital gains taxes they had expected to defer. Although the underlying controversy generated several third-party claims, a related litigation and an arbitration, all of these were previously resolved and are not relevant. In *Bloostein*, before addressing the defendant's motion for summary judgment dismissing the plaintiffs' claims, the court granted summary judgment to the attorneys who rendered the tax opinion that the underlying transaction was viable taxwise, dismissing the defendant's claim against them for contribution.[16]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The basic factual argument asserted by the defendant in support of its motion for summary judgment dismissing the complaint is that attorney Snarr acted reasonably and did not commit malpractice when he made a strategic and calculated decision to accept the revised event of default provision and to not even discuss the change with the plaintiffs. The basis for this was Snarr's good faith belief that the revised provision was unenforceable because insurance companies are rated, not insurance policies. This argument is not very compelling. At best, it seems like a hyper-technical argument. The judge in *Bloostein* characterized this as a gamble on Snarr's part that he was correct.[17] It was also a very extreme gamble for Snarr to be so sure of the invalidity as to not even mention the change to his clients. In fact, Snarr was wrong and the argument was unsuccessful when asserted in a separate litigation challenging the validity of the default called by Nomura.[18]

The legal argument presented by the defendant was that taxes are not recoverable as damages under New York law and, in any event, that the taxes sought here are too speculative to be recoverable under New York law. While *Bloostein*'s analysis of the speculativeness issue is significant and noteworthy, it will not be focused upon herein.[19] As support for its argument that taxes are not recoverable under New York law, the defendant relied primarily[20] on *Alpert v. Shea Gould Climenko & Casey*.[21] *Alpert* involved a fraud cause of action. While a few outlier cases did apply the *Alpert* result in negligence causes of action,[22] the court in *Bloostein* correctly recognized the distinction and held the taxes were recoverable. The court immediately cut to the chase and began its analysis of *Alpert* by stating: "[p]utting aside that *Alpert* involved fraud and not malpractice . . ."[23] *Bloostein* correctly understood the distinction between damages recoverable in tort versus damages recoverable in fraud.

Interestingly, *Bloostein* did not review the traditional fraud versus negligence jurisprudence. It simply assumed the distinction existed. While I believe this to be the correct result, it seems odd that the court did not focus even briefly on the developments in this area, especially in light of the few outlier cases that arose between 2007 and 2014 that incorrectly applied the fraud measure of damages in negligence causes of action. I believe a brief[24] overview of this jurisprudence is helpful to understand the context and significance of *Bloostein*.

TRADITIONAL NEGLIGENCE AND FRAUD MEASURES OF DAMAGES

Under New York law the damages recoverable in attorney malpractice situations based on negligence was established over one-hundred years ago as "the difference in the pecuniary position of the client from what it should have been had the attorney acted without negligence."[25] This was more recently restated in a concurrence by then Judge Judith S. Kaye of the Court of Appeals:

> In lawyer malpractice cases, as in all negligence cases, the focus in damages inquiries must be on the injured plaintiff . . . the objective being to put the injured plaintiff in as good a position as she would have been in had there been no breach of duty.[26]

This is an expectancy measure of damages, i.e., the difference between what should have been and what was with the negligence. Any additional, avoidable taxes incurred would seem to fit within the measure and be recoverable.[27]

The New York measure of damages for fraud is the "out-of-pocket" rule. While quite old,[28] the most recent reiteration of the rule by the Court of Appeals is that:

> The loss is computed by ascertaining the "difference between the value of the bargain which a plaintiff was induced by fraud to make and the amount or value of the consideration exacted as the price of the bargain" . . . Damages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained . . . there can be no recovery of profits which would have been realized in the absence of fraud.[29]

Nor does the out-of-pocket rule allow for recovery of the payment of taxes couched as consequential damages or otherwise.[30]

RECENT CASE-LAW DEVELOPMENTS

Despite the traditional different measures of damages recoverable in negligence-based versus fraud-based causes of action, several cases between 2007 and 2014 simply applied the fraud out-of-pocket rule to negligence-based causes of action and concluded that additional taxes caused by negligence are not recoverable. The first, and probably most egregious, of these "outlier" cases is *Menard M. Gertler, M.D. v. Sol Masch & Co.*[31] *Gertler* involved an action against an accountant for professional malpractice. Fraud was never mentioned in the opinion. In affirming the lower court's directed verdict dismissing the complaint on the issue of damages, the First Department, citing only *Alpert*, a fraud case, held simply "taxes . . . are not recoverable under New York law."[32] *Gertler*, without any reasoning or explanation, simply transported the fraud rule to the negligence area and misstated the negligence law.

In *Chen v. Huang*,[33] the plaintiff alleged the defendant attorney failed to properly effectuate a tax-free exchange of property under IRC section 1031[34] despite undertaking to do so. Under general tax provisions, if someone owns property A and exchanges it for property B, the exchange is treated as a sale of property A and any gain or

loss inherent in property A must be recognized then for tax purposes. Under a valid section 1031 exchange, the exchange is not treated as a taxable event and any gain or loss inherent in property A will not be recognized for tax purposes until the disposition of property B. In *Chen*, the plaintiff sought to recover the damages incurred by the inability to defer taxation of the gain. The plaintiff asserted causes of action for breach of contract, breach of fiduciary duty and malpractice. The defendant moved to dismiss the complaint on grounds that the plaintiff did not allege any compensable damages. Although the complaint did not allege any fraud cause of action, the court held "defendant correctly asserts that taxes paid are generally not recoverable under New York law."[35] As authority the court cited *Gertler*, *Alpert* and *Lama Holding*. *Alpert* and *Lama Holding* are fraud cases and not relevant. While *Gertler* did involve a malpractice cause of action, it conclusorily and incorrectly, simply misapplied the *Alpert* fraud rule.

Finally, in *Solin v. Domino*,[36] the plaintiff sued his insurance agent/financial advisor for professional malpractice and negligent misrepresentation. The plaintiff had an annuity worth over $3 million. He was contemplating whether to (1) roll over the annuity tax-free into another annuity thereby deferring tax on the gain inherent in the annuity; or (2) surrender the annuity in a taxable transaction, pay the tax and invest the remaining balance in a taxable account. Based on the defendant's advice that the tax incurred under option (2) would be approximately $200,000, the plaintiff chose option (2). It turned out the tax was approximately $600,000. The plaintiff commenced this action to recover the additional $400,000 of tax.

Sitting in diversity, the Southern District of New York applied New York law. In addressing the possible recoverability of taxes in New York, the court applied the fraud out-of-pocket rule. Relying on *Alpert* and *Lama Holding*, both fraud cases, the court held taxes are not recoverable.[37] On appeal, the Second Circuit affirmed. It, too, applied the fraud out-of-pocket rule, relying on *Lama Holding*.[38] The Second Circuit also cited *Gertler* for the proposition that taxes are not recoverable in New York.[39]

Contrary to the foregoing cases, in *Serino v. Lipper,*[40] the First Department clearly returned to the long established fundamental principles. The court explicitly held that fraud and negligence causes of action have different measures of damages and that taxes may be recoverable in a negligence, but not in a fraud cause of action.

Serino arose from alleged malfeasance by the auditor, PricewaterhouseCoopers (PWC), of an investment company and its hedge funds in failing to detect the substantial overvaluation of securities owned by the hedge funds. *Serino* involved cross claims by the owner of the investment company, *Lipper,* against PWC arising from the overvaluation. In addition to performing services for the investment company and hedge funds, PWC also prepared Lipper's tax returns and provided him with personal financial advice. In rendering personal advice to Lipper, PWC utilized the inflated value of the hedge funds' securities thereby overstating Lipper's net worth. Relying on the inflated values, in connection with his divorce, Lipper agreed to make certain gifts to his daughters and incurred over $6 million in gift taxes. One of the cross claims asserted by Lipper against PWC was to recover the gift taxes paid. Causes of action for recovery of the gift taxes paid were asserted in fraud, negligence/malpractice, breach of contract, breach of fiduciary duty and negligent misrepresentation.

In reversing the lower court's dismissal of all asserted causes of action for recovery of the gift taxes, the First Department held that recovery of the gift taxes paid under the fraud cause of action was barred by New York's out-of-pocket damages rule. However, the court went on to hold that the out-of-pocket rule did not bar the recovery of such taxes under the negligence/malpractice cause of action.[41] The court thus properly distinguished the negligence/malpractice damages from the more limited fraud out-of-pocket measure of damages.

BLOOSTEIN'S ANALYSIS

Rather than focus on the bigger picture described above and, perhaps, clarify this area that was unsettled by the *Gertler*, *Chen* and Solin cases, *Bloostein* focused very narrowly only on distinguishing *Alpert*. *Alpert* involved two plaintiffs who invested in a tax shelter whose attraction was the immediate deduction of advance minimum royalty payments for the right to mine coal in the future. The shelter turned out to be invalid and the plaintiffs paid substantial back taxes. The plaintiffs sought to recover the back taxes, interest and other losses. They sued the defendants, who were the attorneys who opined the tax shelter was valid, for fraudulent misrepresentation – i.e., fraud. The lower court in *Alpert* granted the defendants' motion for partial summary judgment dismissing the plaintiffs' claim for back taxes. In affirming this portion of the lower court's opinion, the First Department held:

> The recovery of consequential damages naturally flowing from a fraud is limited to that which is necessary to restore a party to the position occupied before commission of the fraud. . . . in the instant case, recovery of back taxes would place plaintiffs in a better position than had they never invested in the . . . [tax shelter][42]

Rather than simply distinguishing *Alpert* as involving a fraud claim and the fraud measure of damages, *Bloostein* went further. It focused closely on the facts in *Alpert* and decided that in *Alpert* there was no recovery because no fraud was perpetuated. In *Alpert* the plaintiffs purchased the tax shelter on December 30, 1977 and claimed a

large deduction on their 1977 tax returns for prepaid royalty payments for the right to mine coal in the future. On December 16, 1977 the relevant tax regulations were amended to prohibit any deduction for such prepaid royalty payments. On December 19, 1977 the IRS issued a Revenue Ruling specifically advising that such prepaid royalty payments were not deductible when paid but could be deducted only over the period for which they were paid.

As a result of these developments, the defendant law firm which issued the original tax opinion that the tax shelter was valid withdrew that opinion and warned that the IRS would likely attack on audit any deduction for prepaid royalties. The promoters of the tax shelter then obtained a tax opinion from another law firm which argued there was a reasonable basis for concluding the IRS' Revenue Ruling was invalid. But this opinion went on to caution that the argument that the Revenue Ruling is invalid may not prevail and the prepaid royalty payments would then not be deductible.[43]

Bloostein's analysis is that no fraud occurred in *Alpert*. The second law firm appropriately disclosed and opined about the change in the law. A fortiori, the first law firm which withdrew its original opinion and warned of the likely IRS challenge to any attempted deduction of prepaid royalties.

Under *Bloostein*'s reading of *Alpert*, there was no fraud committed by the defendant law firms so obviously there could be no recovery of any additional taxes (or other costs) incurred. Conceivably, under *Bloostein*, if fraud had actually occurred, perhaps taxes might have been recoverable. Nevertheless, in *Lama Holding* the Court of Appeals held that taxes are not recoverable in a fraud cause of action[44] under the out-of–pocket damages rule and it cited *Alpert* with approval on this point.[45]

In conclusion, *Bloostein* correctly held that *Alpert*, a fraud case, is not relevant to the issue of whether additional taxes caused by negligence in a tax malpractice situation may be recoverable as damages in New York. *Bloostein* correctly further held that such additional taxes may be recoverable as damages in a negligence-based cause of action. What *Bloostein* did not do is to explore and clarify the developments in this area of law. While I personally wish *Bloostein* had focused on the bigger picture in this area of New York law and properly reset it, nevertheless, *Bloostein* got the ultimate result right!

1. *See, e.g. Menard M. Gertler, M.D.P.C. v. Sol Masch & Co.,* 40 A.D.3d, 282, 283 (1st Dep't 2007); Chen v. Huang, 43 Misc. 3d 1207(A), (Sup. Ct., Kings Co. 2014); *see also Solin v. Domino,* 2009 WL 536052 at *3 (S.D.N.Y. Feb. 25. 2009), *aff'd*, 501 Fed. App'x 19 (2d Cir. 2012).

2. 160 A.D.2d 67 (1st Dep't 1990).

3. 123 A.D.3d 34 (1st Dep't 2014).

4. 61 Misc. 3d 1122(A) (#651242/2012) (unreported disposition); 2019 N.Y. Slip Op. 50199 (U) (Sup., Ct. N.Y. Co. Feb. 2019) (Westlaw).

5. 26 U.S.C. § 1042.

6. I.R.C. § 1042(a) & (b), 26 U.S.C. § 1042(a) & (b).

7. *Id.*

8. I.R.C. § 1042(e), 26 U.S.C. § 1042(e).

9. I.R.C. § 1042(e)(3)(B), 26 U.S.C. § 1042(e)(3)(B).

10. I.R.C. § 1014, 26 U.S.C. § 1014.

11. I.R.C. § 1042(c)(1)(A), 26 U.S.C. § 1042(c)(1)(A).

12. Bloostein, 2019 N.Y. Slip Op. 50199(U) at *2–*3.

13. *Stonebridge Capital, LLC v. Nomura Int'l. PLC,* 68 A.D.3d 546 (1st Dep't 2009).

14. Plaintiff Bloostein's damages for the costs incurred for replacement financing will not be mentioned further in the discussion since the focus is on the recoverability of additional taxes. The Court held these additional costs incurred were potentially recoverable as damages. Bloostein, 2019 N.Y. Slip Op. 50199(U) at *10.

15. For ease of reference, both defendants Brian Snarr and Morrison Cohen LLP will be referred to herein interchangeably and in the singular as defendant or attorney.

16. The defendant's counterclaim against the attorneys rendering the tax opinion was dismissed on several grounds including that the opinion was not shown to be incorrect and that the issues opined upon were not involved in the present controversy. Bloostein, 2019 N.Y. Slip Op. 50199(U) at *5–*6.

17. Bloostein, 2019 N.Y. Slip Op. 50199(U) at *6.

18. *Stonebridge Capital, LLC v. Nomura Int'l*, PLC, 68 A.D.3d 546 (1st Dep't 2009).

19. Bloostein held the asserted damages for additional taxes were not speculative despite the fact that IRC section 1042 can result in either tax deferral or tax avoidance. The court held that reference to life expectancy tables could eliminate the speculativeness. Bloostein, 2019 N.Y. Slip Op. 50199(U) at *9–*10.

20. The defendant also cited *Thies v. Bryan Cave LLP*, 13 Misc. 3d 1220[A] (Sup. Ct., N.Y. Co. 2006) but that case involved only the recovery of interest incurred due to claimed tax malpractice, not additional taxes.

21. 160 A.D.2d 67 (1st Dep't 1990).

22. These cases are cited in note 2, *supra.*

23. Bloostein, 2019 N.Y. Slip Op. 50199(U) at *7.

24. A longer discussion is contained in my article, New York's Law of Tax Malpractice Damages: Balanced or Biased?, 86 St. John's L. Rev. 143, 171 (2012).

25. *Flynn v. Judge,* 149 A.D. 278, 280 (2d Dep't 1912).

26. *Campagnola v. Mulholland,* Minion & Roe, 76 N.Y.2d 38, 45–46 (1990). See also Sanders v. Rosen, 159 Misc. 2d 563, 572 (Sup. Ct., N.Y. Co. 1993).

27. *See, e.g., Serino v. Lipper,* 123 A.D.3d 34 (1st Dep't 2014); *Fielding v. Kupferman,* 65 A.D.3d 437 (1st Dep't 2009); *Proskauer Rose Goetz & Mendelsohn v. Munao,* 270 A.D.2d 150 (1st Dep't 2000).

28. *Reno v. Bull,* 226 N.Y. 546 (1919).

29. *Lama Holding Co. v. Smith Barney Inc.,* 88 N.Y.2d 413, 421 (1996).

30. *Id.* at 422.

31. 40 A.D.3d, 282, 283 (1st Dep't 2007).

32. *Id.* at 283.

33. 43 Misc. 3d 1207(A), (Sup. Ct., Kings Co. 2014).

34. 26 U.S.C. § 1031.

35. Chen, 43 Misc. 3d 1207(A) at *2.

36. 2009 WL 536052 (S.D.N.Y. Feb. 25. 2009), *aff'd*, 501 Fed. App'x 19 (2d Cir. 2012).

37. 2009 WL 536052 at *3.

38. 501 Fed. App'x at 22.

39. *Id.* at 21.

40. 123 A.D.3d 34 (1st Dep't 2014).

41. *Id.* at 35–36.

42. Alpert, 160 A.D.2d at 71–72.

43. Bloostein, 2019 N.Y. Slip Op. 50199(U) at *7.

44. Lama Holding, 88 N.Y.2d at 421.

45. *Id.* at 422.

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

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

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

DEAR SANDY:

As a lawyer, navigating tensions between your duties to your client and your ethical obligations can present challenges. As discussed in prior Forums, there is often a fine line between an attorney's duty to be an advocate for a client and the responsibilities that we have as officers of the court to be truthful and candid. See Vincent J. Syracuse, Amanda M. Leone & Carl F. Regelmann, Attorney Professionalism Forum, N.Y. St. B.J., November/December 2017, Vol. 89, No. 9. In most instances, lawyers navigate this boundary without difficulty. However, there are some circumstances, such as the one you describe in your inquiry, that require a lawyer to give more thought to their ethical obligations under the Rules of Professional Conduct (RPC). So, what responsibilities do attorneys have when they suspect their client's behavior threatens their ethical obligations?

Professor Roy Simon reminds us that RPC 3.3 is one of the most important provisions in the RPC because it imposes a duty of candor on every lawyer who represents a client before a tribunal. See Roy Simon, Simon's New York Rules of Professional Conduct Annotated, at 960 (2019 ed.). RPC 3.3(b) provides that a lawyer representing a client before a tribunal who knows that the client intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding must take reasonable remedial measures, including, if necessary, disclosure to the tribunal. The disclosure obligations imposed on attorneys under RPC 3.3(b) are mandatory and even apply to client intentions that have not come to fruition or those that threaten the integrity of the proceeding if the attorney knows that a client intends to commit a fraudulent or criminal act. *Id.* Comment [12] to RPC 3.3 explains that mandatory disclosure obligations such as those imposed by RPC 3.3 are critical to the practice of law because "lawyers have a special obligation as officers of the court to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process." RPC 3.3, Comment [12].

However, before discussing your disclosure obligations under RPC 3.3(b), we recommend having a frank and straightforward conversation with your client to ascertain whether your suspicions and concerns about your client's dishonesty are well founded, and if so, inform the client of the consequences of the intended actions. As lawyers, we have an obligation to provide counsel to our clients and take all reasonable efforts to dissuade fraudulent or illegal conduct. If, after meeting with your client it is clear that your suspicions are on point and that your client nevertheless intends to proceed in the same course, your mandatory disclosure obligations under RPC 3.3(b) may be triggered.

Based on the facts you have given us, it appears that you suspect that your client has used funds from the estate accounts for an improper purpose, which calls into question the accuracy of the final accounting of the estate. Whether you have

an obligation to disclose your client's suspected misconduct under RPC 3.3(b) turns on two factors – (1) whether you "know" that the client has engaged or is engaging in criminal or fraudulent conduct relating to the proceeding, and (2) whether the probate matter you describe in your inquiry constitutes representation before a tribunal. See RPC 3.3(b). Pursuant to RPC 1.0(k), a lawyer "knows" something when they have "actual knowledge" of the fact in question; "a person's knowledge may be inferred from circumstances." RPC 1.0(k). According to the New York State Bar Association (NYSBA) Committee on Professional Ethics (the "Committee"), the key to this analysis is whether the attorney has actual knowledge that the information is false or misleading, and that a mere suspicion of misconduct is not enough to trigger disclosure under RPC 3.3(b). See NYSBA Comm. on Prof'l Ethics, Op. 1034 (2014) (citing NYSBA Comm. on Prof'l Ethics, Op. 837 (2010) ("[a]lthough a person's knowledge may be inferred from circumstances, it is clear that a mere suspicion would not be enough to constitute knowledge")). Professor Simon notes, however, that a lawyer may be charged with "knowledge" of a certain fact if a reasonable, objective attorney would say that the lawyer in question "should have known" a fact. See Simon, Simon's New York Rules of Professional Conduct Annotated, at 38.

In our view, the fact that you overheard your client discussing disposing of certain assets in the estate for a reduced sum, without more, likely does not rise to the level of having actual knowledge that your client is engaged in fraud or wrongdoing with respect to the estate. Other factors such as what facts the client disclosed about determining the value of the assets, the circumstances in which the sale price was determined, and the circumstances compelling the sale of the estate's assets also should be considered. Therefore, as stated above, we recommend that you have a frank discussion with your client about his intentions and the potential consequences of making false representations in estate accounting documents.

Next, the question of whether the matter you describe in your inquiry is considered "before a tribunal" as within the meaning of RPC 3.3(b) is slightly more complicated. The definition of "tribunal" in RPC 1.0(w) includes a court. The Committee has opined that even despite the fact that obtaining an informal accounting of the estate does not require the approval of the Surrogate's Court so long as the beneficiaries sign a form of "receipt and release" provided by the Surrogate's Court, because the affidavits filed by the fiduciary and the form of receipt and release all have captions indicating that the matter is before the Surrogate's Court, the matter is considered before a tribunal pursuant to RPC 3.3(b). See NYSBA Comm. on Prof'l Ethics, Op. 1034 (2014). Thus, if your remonstration with the client does not result in the client's submission of an accurate accounting, RPC 3.3(b) obligates you to take reasonable remedial measures, including, if necessary, disclosure of the fraudulent conduct to the tribunal.

It is important to note a significant change in the disclosure obligations since the RPC was adopted. Unlike the former Disciplinary Rules of the Code of Professional Responsibility (DR), the RPC does not provide an exception for confidences or secrets when the lawyer has knowledge that the client intends to commit a criminal or fraudulent act. See Vincent J. Syracuse, Amanda M. Leone & Carl F. Regelmann, Attorney Professionalism Forum, N.Y. St. B.J., November/December 2017, Vol. 89, No. 9. Before the adoption of RPC 3.3, DR 7-102(B)(1) stated that a lawyer with evidence "clearly establishing" that a client had perpetuated a fraud on a tribunal had to first insist that the client correct the fraud; if the client refused, the attorney was required to disclose the fraud to the tribunal, except when the information was "protected as a confidence or secret." However, under RPC 3.3(c), the mandatory disclosure duty applies "even if compliance requires disclosure of information otherwise protected by [RPC] 1.6." See NYSBA Comm. on Prof'l Ethics, Op. 837 (2010).

These rules do not create an easy course for you to follow. You appear to have reached an apparent impasse in your attorney-client relationship where your mistrust of the client makes it difficult for you to carry out your representation of the client. Consequently, even if you do not have direct "knowledge" of impropriety on the part of your client, your suspicions, coupled with the client's apparent lack of cooperation, may be sufficient to allow you to withdraw from the representation. See Vincent J. Syracuse, Maryann C. Stallone & Alyssa C. Goldrich, Attorney Professionalism Forum, N.Y. St. B.J., April 2020, Vol. 92, No. 3; see also RPC 1.16(c)(7). RPC 1.2(d) prohibits a lawyer from assisting a client in conduct that the lawyer knows to be illegal or fraudulent. RPC 1.16(b)(1) requires a lawyer to withdraw from a representation if he knows that the representation will result in a violation of the RPC or the law. Further, paragraphs (c)(2), (c)(4) and (c)(7) of RPC 1.16 permit a lawyer to withdraw from a representation under standards that are lower than "knowledge" of illegal or fraudulent conduct. For example, a lawyer may be permitted to withdraw where the client: (1) persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (2) insists upon taking action with which the lawyer has a fundamental disagreement; or (3) fails to cooperate in the representation or otherwise makes the representation unreasonably difficult for the lawyer to carry out effectively. See RPC 1.16 c)(2), (c)(4) and (c)(7).

RPC 1.16(c) also contains a catch-all provision in paragraph (12), which allows a lawyer to withdraw as counsel where the lawyer believes in good faith that "that the tribunal will find the existence of good cause for withdrawal." RPC 1.16(c)(12). In proceedings before a tribunal, a lawyer may

move to withdraw based on any truthful reason the lawyer thinks a court would accept. See Simon, Simon's New York Rules of Professional Conduct Annotated, at 851. Thus, if after speaking with your client, you are certain that your client intends to commit fraud related to the probate proceeding, then RPC3.3(b) requires you – after making valiant efforts to persuade the client to not engage in such conduct – to report the information concerning the fraud to the tribunal. See NYSBA Comm. on Prof'l Ethics, Op. 1194 (2020). This duty continues despite the lawyer's withdrawal from the representation. See NYSBA Comm. on Prof'l Ethics, Op. 1123 (2017).

In seeking permission to withdraw, the disclosures the lawyer may or must make about the client's conduct will again depend upon whether the lawyer knows that the client has engaged or is engaging in criminal or fraudulent conduct. If the lawyer does not have such knowledge, the lawyer should regard any information or suspicions about the client fiduciary's conduct as protected by RPC 1.6, which provides:

A lawyer shall not knowingly reveal confidential information, as defined by this Rule . . . . "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.

Comment [6A] to RPC 1.6 provides that in exercising the discretion to reveal information under RPC 1.6(b), the lawyer should consider factors such as: (1) the seriousness of the potential injury to others if the prospective harm or crime occurs; (2) the likelihood that it will occur and its imminence; (3) the apparent absence of any other feasible way to prevent the potential injury; (4) the extent to which the client may be using the lawyer's services in bringing about the harm or crime; (5) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action; and (6) any other aggravating or extenuating circumstances. See RPC 1.6, Comment [6A]. In any case, disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to prevent the threatened harm or crime. See Vincent J. Syracuse, Maryann C. Stallone & Alyssa C. Goldrich, Attorney Professionalism Forum, N.Y. St. B.J., April 2020, Vol. 92, No. 3; Vincent J. Syracuse, Carl F. Regelmann & Alexandra Kamenetsky Shea, Attorney Professionalism Forum, N.Y. St. B.J., January/ February 2019, Vol. 91, No. 1.

Now, turning to your question regarding whether you have an ethical obligation to protect the trust beneficiary, generally speaking, a lawyer who represents the executor of an estate has no ethical duty to the beneficiary of the estate, absent an agreement to the contrary. See CPLR 4503(a)(2); see also NYSBA Comm. on Prof'l Ethics, Op. 1194 (2020). CPLR 4503(a)(2) provides that for purposes of the attorney-client privilege, absent an agreement to the contrary between the attorney and the personal representative, no beneficiary of an estate may be treated as a client, and the existence of the fiduciary relationship does not by itself constitute a waiver of the privilege. However, it is important that you check the applicable rules in your jurisdiction regarding proceedings involving an infant, incompetent, or incapacitated person, as certain circumstances may require special procedures depending on the nature of the individual's disability.

Whether the law governing fiduciaries, or any other law, would require an attorney representing an estate fiduciary to treat the estate beneficiaries as clients is a legal question that is outside the scope of this Forum and perhaps something we can address in the future. It suffices to say here that recently the Committee concluded that absent other law or agreements to the contrary, the executor may be the lawyer's only client. See NYSBA Comm. on Prof'l Ethics, Op. 1194 (2020). This means that your executor client is ethically entitled to your undivided loyalty, including strict confidentiality pursuant to RPC 1.6(a). Accordingly, your client's sister would have no right to the disclosure of information protected by the attorney-client privilege solely by virtue of her status as a beneficiary of the estate.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com)
Maryann C. Stallone, Esq.
(stallone@thsh.com)
Alyssa C. Goldrich, Esq.
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QUESTION FOR NEXT ATTORNEY PROFESSIONALISM FORUM

TO THE FORUM:

After many years of practicing with Firm A, I have decided to strike out on my own. During my tenure at the firm, I have brought in clients with various needs that were serviced by other lawyers at Firm A. Given my lack of expertise in some of these areas, I do not feel comfortable representing these clients in my new practice. Some of these clients desire to come with me to my new firm despite my protestation. Others do not wish to remain at Firm A after I leave because of their longstanding relationship with me. What are my obligations to these clients?

Sincerely,
Larry Lateral

Hilary on the Hill is a new column in the NYSBA *Bar Journal* which will provide a D.C. insider's take on legislative and regulatory developments in the nation's capital that are important to NYSBA members, wherever they live.

Not only is my name Hilary, but I also worked on Capitol Hill for a dozen years and now live on Capitol Hill too. During my time working in Congress, I was the Legislative Director for longtime New York Congressman Gary Ackerman, and then the staffer for the Banking and Judiciary Committees for Delaware Senator Tom Carper. I have also worked in New York State government as the Deputy Director, and then Director, for the New York Governor's federal affairs office in Washington, D.C. for Governors Spitzer, Paterson and Cuomo. In that capacity, I served as the Governor's chief liaison with Congressional leadership and the Administration.

I am honored to be writing this column. In each issue, I will explore a different timely topic. I will discuss the underlying issue, as well as provide insights into the key players involved and the current political environment.

The first column, which appeared in July, looked at the federal response to the horrific killing of George Floyd at the hands of the police. Congress, the White House and the former Vice President Joe Biden, the presumptive Democratic presidential nominee, responded to the same crisis with very different political solutions. I discussed how the House and Senate bills dealt with chokeholds, no-knock warrants, tracking systemic police misconduct, and qualified immunity. I also looked at how the two men vying for the Presidency approached reforms. We are still waiting to see if the Senate will act on legislation before it adjourns for the summer recess. There is momentum now, but if action is not taken soon, will this critical issue fall victim to partisan, political, election season fights and doom the cause, as we have seen on gun violence?

As a native New Yorker and attorney, I am so glad to now serve as the Policy Director for the New York State Bar Association. I continue also as a government affairs consultant with my boutique lobbying business, which I founded after leaving government. In addition to this column, I will be developing the government relations and legislative advocacy program for the State Bar.

I have enjoyed being a member of this Association for over a decade, where I have had the opportunity to work with, and become friends with, so many wonderful members. I have had the privilege of serving in the House of Delegates as a Non-Resident Member and as Co-chair of the Legislative Policy Committee. I look forward to continuing with the Bar in this new capacity and hope that one day we will all be together in person. In the meantime, I will see you on Zoom. Be well, stay healthy, and wear a mask!

Hilary Jochmans is the policy director for the New York State Bar Association and a member of the House of Delegates. She is also the founder of Jochmans Consulting, a boutique government affairs business. Previously, Jochmans was the director of the New York State Governor's Office in Washington for both Andrew Cuomo and David Paterson. She has spent a dozen years on Capitol Hill working in the House and Senate.

NYSBA Supports Emergency Remote Bar Exam

By Christian Nolan

The New York Court of Appeals recently announced that it will administer a one-time emergency remote bar exam on Oct. 5–6.

Scott M. Karson, president of the New York State Bar Association, was pleased with the decision.

"Chief Judge Janet DiFiore and the New York State Court of Appeals have wisely provided recent law school graduates with a measure of certainty at a time when they face mounting student debt and a slow job market brought on by the coronavirus pandemic," said Karson. "We agree that a remote exam is not a perfect solution, but also concur that the benefits outweigh the potential shortcomings in affording the Class of 2020 with a much-needed path to a law license, which they previously did not have."

The late July announcement came a week after New York canceled the rescheduled September bar exam to protect the health of thousands of law school graduates who planned to take the test in the midst of the pandemic. The exam is typically administered each July and February.

Candidates who registered for the September exam will be automatically registered for the October remote exam, officials said.

According to the Board of Law Examiners, which operates under the auspices of the New York State Court of Appeals, careful consideration will also be given to waiver requests by J.D. candidates who graduated in 2019 or later, previously took the bar examination in New York and failed no more than two times and who wish to sit for the online examination.

Further, the Board of Law Examiners said they will make reasonable efforts to address technological or testing space issues for candidates who promptly seek assistance in advance of the examination.

DiFiore assembled a working group, chaired by retired Court of Appeals Judge Howard A. Levine, to study the future of the bar exam in New York. As its first undertaking, members of the group were tasked with studying whether immediate, emergency measures were necessary to address the disruption experienced by recent law school graduates due to the pandemic.

The working group ultimately recommended that New York administer the one-time emergency remote testing option to be offered by the National Conference of Bar Examiners on Oct. 5–6.

In a statement, the Court of Appeals acknowledged that there are shortcomings with holding a remote bar exam, including its experimental nature. But the working group, in consultation with technology, security and psychometric experts, discussed proactive measures to ensure broad access, mitigate security risks and establish a reliable grading methodology.

Additionally, the statement said the working group recommended that the Court of Appeals evaluate the wisdom of reciprocity arrangements that would permit candidates to transfer their remote exam scores across jurisdictions.

The working group rejected a temporary diploma privilege option, noting that the bar exam provides critical assurance to the public that admitted attorneys meet minimum competency requirements, emphasizing New York's immense candidate pool as well as the degree of variation in legal curricula across the country.

"The Court commends the working group for its prompt and thoughtful consideration of how best to address the pressing challenges posed by the health crisis and has accepted these recommendations," said the Court of Appeals' statement.

From Outlaws to In-laws

By Brandon Vogel

As a 16-year old in 1967, William Eskridge, Jr., knew that he was a homosexual, but "gay was not a word then." What that signified was you were a criminal and a psychopath, said Eskridge. "And those were the best that could be said for you." He was not even aware of gay rights, he said.

At a recent CLE webinar, *"Marriage Equality and Beyond 2020,"* Eskridge, the John A. Garver Professor of Jurisprudence at Yale Law School, talked about how far the movement has come. Eskridge and Christopher Riano, chair of NYSBA's LGBTQ People and the Law Committee, discussed the progress made and highlighted in their new book, *Marriage Equality: From Outlaws to In-Laws*.

Liz Benjamin, former host of Capital Tonight and managing director of Marathon Strategies, Albany, moderated the discussion on what Riano said aims to be "the truly definitive work on marriage equality."

"It's not just the story of the movement as a whole, but it's the story of so many of the people in the movement and their parts in the movement," Riano said. "Obviously, you have this incredible journey of not just the case law but these personal stories that Bill and I try very, very hard to make sure that we told."

Eskridge related how during his teens laws banning interracial marriage were struck down in the landmark case *Loving v. Virginia.* This inspired some lesbians and homosexuals to consider marriage, he said. "Our story cannot be told without the Civil Rights Movement," he said.

"The women's rights movement very much inspired me because of its critique of rigid gender roles," said Eskridge. "So it's not just that women should have equal rights, but women and men, and ultimately, gay people, should not be shackled by traditional gender roles."

At first, all the legal challenges failed and then in the 1980s came the AIDS epidemic. By the late 1980s, the AIDS movement stimulated more interest in relationships, including marriage, and it led to premier LGBT legal organizations, such as Lambda Legal, whose executive director, Tom Stoddard, made marriage a priority for LGBT rights.

The "Cinderella moment" came in 2003 when in *Goodridge v. Department of Health,* a Massachusetts Supreme Judicial Court required the state to legally recognize same-sex marriage. After *Goodridge,* support for marriage equality steadily increased each year until 2011 when more than half of Americans supported it and New York became the sixth state to legalize same-sex marriage. President Barack Obama first expressed his support publicly in a May 9, 2012 interview with Robin Roberts.

The "roadmap for marriage equality nationwide" was the June 2013 Supreme Court decision of United *States v. Windsor,* according to Eskridge. Subsequently, the 2015 landmark case of Obergefell v. Hodges required all states to license and recognize same-sex marriage.

So, how did marriage equality prevail as swiftly as it did?

Eskridge said that first LGBTQ+ persons were normalized and a key part of the normalization process was their emergence as committed couples raising children.

"We were now your in-laws!" He noted that "The sky did not fall when Massachusetts approved same-sex marriage." Likewise, successful, emotion-packed campaigns helped the marriage equality movement gain increasing acceptance among heterosexual couples.

On Nov. 11, 2015, Christopher R. Riano (left), and William N. Eskridge, Jr. (seated) interviewed former Chief Judge Judith Kaye (right) for their book. It was Kaye's last interview before her passing two months later.

"Because humans change their minds based on emotional and not cognitive arguments, it is very difficult to change entrenched attitudes and entrenched law," said Eskridge. "Reasons we succeeded in 12 years from 2003–2015 is that we were able to mobilize group awareness and a lot of group activity. We were able to publicize the ill-treatment of couples. We were able to refute stereotypes. We were able to recruit unexpected messengers including the Cheneys and lots of other people you might not expect."

Benjamin asked Eskridge if the opposition kept the fire fueled.

He answered, "We do not see the critics as demons. This is not a book about wonderful lesbians being persecuted by bigots. It's a genuine conversation. That's why it's about America."

Riano said that one of the things that is incredible about LGBTQ+ activism is that it has created a menu of

Clarity and Context: Legal Writing Tips From a Federal Judge

By Brandon Vogel

You can learn a lot about legal writing simply by looking at your phone number.

You are more likely to remember the number when it's broken down by area code, the first three digits, and then the last four digits than if all 10 digits are listed together.

The same principles apply to legal writing. Breaking down your argument into manageable chunks can help your writing stand out and increase momentum for your case.

This was one of several key takeaways from Hon. Robert E. Bacharach – United States Court of Appeals for the Tenth Circuit, on the recent CLE Webinar, "Legal Writing From a Federal Judge's Perspective."

Bacharach recently wrote the book, *Legal Writing: A Judge's Perspective on the Science and Rhetoric of the Written Word.*

"In my view, the most important aspect of legal writing is clarity," said Bacharach. "You can only persuade the judge if they understand what you are saying." He explained that "lost momentum is poisonous to persuasion."

He said that there are four primary ways to achieve clarity in your own legal writing: create context before detail, relax your diction and use simple language, link information in your sentences, and convey information in digestible bits.

The psychological study, Contextual Prerequisites for Understanding: Some Investigations of Comprehension and Recall, concluded that it is better to do few things at once than too many (Bransford and Johnson, 1972).

Your goal is to get the reader the context for the facts before reading the facts, said Bacharach. "Provide the reader the context in advance for all of the factual and legal information that follows."

He said the ways to provide context for arguments is to give your information an introduction that serves one overarching purpose: lay out the entirety of your argument.

"Informative headings inform the reader by providing essential context," said Bacharach, "It will lead to improved recall. Readers tend to focus on the topic that is identified."

Along with effective introductions and meaningful informative headings, use topic sentences, advised Bacharach. Studies show they provide a valuable opportunity to focus the reader on the factual detail in the paragraphs.

Bacaharach recommended that lawyers avoid Legalese, Latin and big words whenever possible.

"The goal is to make it easier for the judge to understand. The easier it is for the judge to understand, the easier it is for you to build momentum for your argument," said Bacharach.

How lawyers link the information in your sentences is key to credibility. Avoid common or empty transitions such as furthermore, moreover, and in addition.

"The function of the transition is to show substantively the info you are about to give the readers," said Bacharach. "Without substantive transitions, readers may stumble and miss the point of why you have linked together particular information."

Enabling the reader to instantly see the relationship between old and new information is essential.

"That linkage that the reader can see is what creates and provides the momentum of your argument," said Bacharach.

Lastly, lawyers need to be mindful of the reader's limited short-term memory.

"Make the chunks easy to spot. Clarity comes only when we break the meaning into discernible bits that can be processed and digested easily by the reader," said Bacharach.

FROM OUTLAWS TO IN-LAWS
continued from page 68

options that now exist. "It's not lost on me that a progressive moment opened up an entire area of law" said Riano. Benjamin, who recalled the first LGBTQ+ divorce in New York when she was a reporter, noted her friend now practices solely in LGBTQ+ divorces.

"Now during the pandemic, we need community generally, but we also need family," said Eskridge. "It's never been more important in American history."

Pro Bono Service Stronger Than the Virus

By Brandon Vogel

Not even COVID-19 could stop lawyers from performing pro bono service as it ravaged New York State during this spring.

The pro bono spirit spread throughout New York positively filling its volunteer attorneys with purpose and dedication to the greater good.

"Our profession has a proud tradition of providing pro bono legal services to those who are otherwise unable to afford a lawyer," NYSBA President Scott M. Karson said. "In this era of COVID-19, our members have stepped up and truly made a difference. We will continue to do so."

We talked to several of New York's attorneys, those who led the effort and those intimately involved with clients, to hear their stories of how they formed NYSBA COVID-19 Pro Bono Network Volunteers.

"These are people who are in terrible grief and that we can assist them in this relatively small way is gratifying," said Past President Michael Miller (Law Office of Michael Miller), who leads the Surrogate Court Volunteers. "We are not first responders, but we lawyers are uniquely qualified to assist these people who lost loved ones in this particular way. This is the front line of an emotionally wrenching time for these financially disadvantaged people who lost loved ones to COVID-19. The enormous response by more than 700 volunteer lawyers says a lot about our profession and its long and noble history of volunteerism."

SMALL ESTATES

In response to a concern that Surrogate's Courts would experience a large number of pro se applications for voluntary administration of estates of $50,000 or less, Chief Judge Janet DiFiore asked Miller to organize a pro bono effort to assist financially disadvantaged New Yorkers who lost loved ones to COVID-19. Miller, often called "Mr. Pro Bono," had considerable pro bono experience leading efforts supervising elections in Bosnia after its Civil War and leading pro bono legal efforts after the 9/11 attacks assisting families obtain death certificates for their loved ones.

He said a key difference between the current efforts and the 9/11 aftermath was that in the 9/11 death certificate project, for which Miller received the ABA's Pro Bono Publico Award (its highest honor for pro bono service), then you met with the family members and could provide a small measure of emotional support, "could literally provide a shoulder to cry on . . . It was so raw and painful but gratifying at the same time," said Miller. "From my prior experience, I knew going in that this COVID-19 project would be some pretty emotional work and that it would be unusual, particularly since the client-contact would be virtual.

"Although rewarding, some of the stories are 'heartbreaking' and some volunteers have been affected emotionally by this work. When you hear stories about final farewells, frustration and confusion, the raw emotion on the end of the phone is palpable . . . You have to be very hard not to be affected by it," said Miller. "There is a price that every volunteer pays when they do this kind of work."

In New York City, at the height of the pandemic, it was common for bodies to be stockpiled in freezer trucks. When next of kin could not be readily ascertained, the bodies were temporarily buried in the potter's field on Hart Island. As a result, in addition to assisting with the voluntary administration filings, volunteers were provided with information to assist families in the disinterment process so that their loved one might be buried and mourned in accordance with their religious preferences. Miller noted that Hart Island is governed by the Department of Corrections, but you also need the permission from the Department of Health. "It's a more involved process to obtain the disinterment order than one might think, and we provided the necessary information about how to assist families in doing so," said Miller.

"Imagine losing a loved one and you weren't there to say your last goodbyes, hold their hand, hug them. Imagine someone having died alone and then their loved ones don't hear about the death for a few days – or weeks – during the height of the pandemic, when hospitals were overwhelmed. People weren't always notified as quickly as we would expect."

The Surrogate Court Volunteers steering committee includes N.Y. County Surrogate Rita Mella,, Queens County Surrogate Peter Kelly, N.Y. County Surrogate's Court Chief Clerk Diana Sanabria, Erica Gomez, Director of the New York County Surrogate's Court's Unrepresented Litigants Help Center, Past NYSBA Trusts and Estates Law Section Chair Gary B. Freidman, Past NYSBA Elder Law and Special Needs Section Chair Tara Anne Pleat, and Alfreida B. Kenny.

Together, they pooled resources to determine what information potential clients would need, how to provide it in the most understandable fashion, and with the invaluable assistance of NYSBA's dedicated staff, they created web portals: one for general public that gave basic information, relevant documents and materials, and another with relevant information for attorneys. Once clients provided the necessary information concerning their deceased loved ones, they could be matched with volunteer attorneys.

Developing a program of this nature, the web portals and the training program for volunteers would normally take months. It was done in less than three weeks. "It really was an amazing effort, 7 days a week, working late into the night doing test runs, revis-

ing and refining," said Miller. Staff provided important feedback on how to simplify the language and demystify the process for clients.

Many volunteers had little to no experience in Surrogate's Court matters, so the group developed a training program video to go over the nature of the proceedings, as well as related questions and issues that may arise.

Gary B. Friedman, a member of the steering committee, commented: "It was my pleasure and privilege to be a small part of this worthwhile effort by the State Bar. It was one of the opportunities to help others in their time of need that doesn't come along often and that make me proud to say I am a lawyer."

Erica Gomez, another member of the steering committee who directs the "very, very busy" New York County Surrogate's Court's Unrepresented Litigants Help Center, was instrumental in the development of the training video. "The experience has been very good," said Gomez. "I have absolutely nothing but a positive attitude towards these collaborations."

Miller added that experienced trust and estate practitioners have been assisting less experienced attorneys when they have questions or the case becomes more complicated, such as next of kin determinations or common law spouse issues. "The law doesn't allow for exceptions," said Miller.

He said that this program not only provides needed assistance to financially disadvantaged people who lost loved ones to the pandemic, but it also has been a service to the court system. He explained that if litigants represented themselves, clerks would spend a great deal of time fielding telephone calls as well as reviewing self-prepared documents, which often contain errors resulting in delays and more court staff time. "There would be a greater demand on the courts' resources, if not for our efforts," said Miller. "That's a contribution to the administration of justice in these difficult times. And even more significant is the assistance we are providing to people in their profound time of grief. There but for the grace of God go any one of us."

UNEMPLOYMENT INSURANCE

During the early stages of the COVID-19 crisis, NYSBA, in partnership with the Unified Court System, formed a committee chaired by former Chief Judge Jonathan Lippman, who asked John S. Kiernan, past president of the New York City Bar and partner of Debevoise & Plimpton, to be on the COVID-19 Recovery Task Force, created in conjunction with the State Bar. Lippman asked Kiernan to lead the Unemployment Insurance Module.

Within a week, the State Bar launched its online portal to assist the "huge numbers of people who were facing sudden unemployment."

Kiernan said that the need for effective procedures to help New Yorkers with their benefits was "tremendous." He explained that the Department of Labor was "unsurprisingly swamped" by a volume of applications for benefits and inquiries resulting from the crisis.

Through a CLE program, NYSBA trained over 700 volunteers on how to provide brief advice for people in need, and also launched an informational webpage to help New Yorkers take the first step to figure out how to electronically apply for UI benefits.

In the weeks that followed, NYSBA continued to provide this assistance to thousands of New Yorkers. In addition, the task force lined up volunteer lawyers to represent individual applicants on more complicated cases and appeals.

NYSBA has handled close to 1,200 UI referrals in the past two and a half months. Nearly 900 of these clients were referred to volunteer attorneys using Clio Grow while the remainder were helped by seven legal service organizations and the Employment Law Clinic at Brooklyn Law School.

According to Kiernan, there remains a "very large number of volunteers," with a core group of about 300 lawyers who have taken multiple cases and become knowledgeable about pursuing benefits. He noted many of the volunteers are solo practitioners and new attorneys, not necessarily representatives of Big Law, where pro bono efforts have been centered before.

"It has been terrific. There have been massive impressive pro bono efforts before, notably after 9/11, Sandy, the President's first travel ban," said Kiernan. "This accomplishment by the State Bar of lining up so quickly at a time of great need, it ranks among the most impressive coordinations of pro bono and volunteerism by the State Bar and its membership that I have ever seen."

He said that since the network launched, the State Bar has communicated with the Department of Labor regularly about ways to improve its "absolutely stretched UI management process." Another very valuable contribution, Kiernansaid, has been developing and maintaining that dialogue. It has led to concrete results on multiple occasions.

Volunteer Alyson Luftig first learned of the opportunity to volunteer from Governor Andrew Cuomo's press briefing on April 11. "It was something I wanted to help with."

Since joining the network, Luftig has worked with six clients and helped volunteers get through to the Department of Labor. Despite some initial technology glitches, she said the process has moved along. She has helped clients who hadn't received any unemployment benefits and others who received incorrect amounts.

"I like that I am able to help people," said Luftig. "I am happy that the work we have done has paid off for the clients."

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

The Legal Writer continues its series on what we can learn from the great writing teachers. In this column, we continue our focus on William Strunk Jr. and E.B. White's renowned little book, The Elements of Style. Part II of this two-part column addresses White's core principles on effective style and Strunk's recommendations on effective form and correcting commonly misused words and expressions.

FORM

Strunk gave a few principles on effective form. He explained that writers shouldn't use an exclamation point to "emphasize simple sentences" but instead to use it only "after true exclamations or commands."[1]

A writer who uses parentheses in a sentence containing an expression should punctuate "outside the last mark of parenthesis exactly as if the parenthetical expression were absent,"[2] he explained.

When using a colloquialism or slang word or phrase, Strunk told writers "simply use it" without quotation marks.[3]

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Strunk argued that writers shouldn't use a hyphen "between words that can better be written as one word."[4] For example, "wild-life" should be written as "wildlife."[5] Instead, Strunk told writers to use a hyphen when "two or more words are combined to form a compound adjective."[6] Example: "She entered her boat in the round-the-island race."[7]

Strunk warned writers that quotations introduced by that are "not enclosed in quotation marks."[8] Example: "Keats declares that beauty is truth, truth beauty."[9] The phrase after that isn't enclosed in quotation marks; "it's indirect discourse."[10] But when a quotation is the "direct object of a verb," it should be "preceded by a comma and enclosed in quotation marks,"[11] Strunk noted. Example: "Mark Twain says, 'A classic is something that everybody wants to have read and nobody wants to read.'"[12] When using titles of literary works, Strunk advised writers to use "italics with capitalized initials."[13]

WORDS AND EXPRESSIONS COMMONLY MISUSED

Strunk disapproved of the vague and the misleading, both common characteristics of careless writing.

The following are words and expressions Strunk believed are commonly misused in the English language.

Strunk criticized the word *utilize*; he preferred *use*. He preferred *all right* to *alright*. He urged writers not to confuse *disinterested* for "not interested in" or

"uninterested."[14] *Disinterested* means impartial.[15] *Farther* and *further* shouldn't be used interchangeably. The former is best used as a distance word; the latter, a time or quantity word.[16] He found the use of *personally* unnecessary. He disapproved of *one of the most*; "the formula is simply threadbare."[17] He cautioned that starting a sentence with the pronoun *this* to refer to a preceding sentence or clause is misleading because "it can't always carry the load . . . and may produce an imprecise statement."[18]

To ensure definitive language and avoid vagueness, Strunk told writers to use *very* only when emphasis is warranted.[19] He warned that *nor* shouldn't be used for *or* after negative expressions.[20] He expressed his disdain with using *will* instead of *shall*. He insisted that *shall* be used in the future tense when referring to the first person and *will* when referring to the second and third persons.[21] He urged writers to avoid using *etc.* at the end of a list introduced by *such as, for example,* or any similar expression.[22]

STYLE

"The approach of style is by way of plainness, simplicity, orderliness, sincerity."[23]

White's chapter on style draws from lessons he gained from writing. White noted that although The Elements of Style serves as a rulebook on proper English usage, style can't be taught, because it "is something of a mystery."[24] There's no strict rule or "key that unlocks the door" to good writing or style.[25] That's because a writer's style "reveal[s] something of their spirits, their habits, their capacities, and their biases."[26] Style reveals a writer's identity. White insisted that his chapter on style not be perceived as "rules" but rather as "gentle reminders" about what he believes makes writing distinguished.

Place Yourself in the Background

White argued that a writer must "write in a way that draws the reader's attention to the sense and substance of the writing."[27] A writer shouldn't focus on drawing attention "to the mood and temper of the author." That'll be uncovered if the writing is good.[28] With practice, White noted, writers will become better with "the use of language," and "[one's] style will emerge."[29] Thus, to achieve effective style, a writer must "begin by affecting none — that is, place yourself in the background."[30]

Write in a Way That Comes Naturally

White suggested that writers "[w]rite in a way that comes easily and naturally to you, using words and phrases that come readily to hand."[31] But White warned that writers shouldn't "assume that because you have acted naturally your product is without flaw."[32]

Revise and Rewrite

White said that every writer's work might be "in need of major surgery."[33] Even the best writers might not produce a flawless piece of writing. A writer will always find serious flaws such as the organizational structure of the material, typographical errors, or grammatical issues.[34] The rewriting process might simply ask the writer to rearrange sections or abandon a piece of the material. This is no sign of weakness or defeat; it's part of the writing process that every good writer experiences.[35] According to White, writers shouldn't be "afraid to experiment with what [one] has written." Experimenting improves writing.[36]

Don't Overstate

"Overstatement is one of the common faults,"[37] White explained. Readers question the judgment of writers who overstate. "A single overstatement, wherever or however it occurs, diminishes the whole."[38]

Avoid Qualifiers

White urged writers to avoid qualifiers like rather, very, little, or pretty. Or in Strunk's words, "these are the leeches that infest the pond of prose, sucking the blood of words."[39]

Avoid Fancy Words

"Do not be tempted by a twenty-dollar word when there is a ten-center handy, ready, and able."[40] White urged writers to "avoid the elaborate, the pretentious, the coy, and the cute."[41] Using fancy words isn't grammatically wrong, but White advised writers to let "one's ear . . . be one's guide."[42] "[T]he ear not only guides us through difficult situations but also saves us from minor or major embarrassments of prose."[43]

Don't Take Shortcuts at the Cost of Clarity

Writers should avoid shortcuts such as initials for the names of an organization, company, government agency, or movement, "unless you are certain the initials will be readily understood."[44] Instead, White recommended to "[w]rite things out."[45] In most situations, it's uncertain who your audience is, and it's likely that your readers will be unfamiliar with what the initials are supposed to represent. And it wastes a reader's time trying to ascertain the meaning of an initial. Therefore, according to White, "always start your article by writing out names in full and then when your readers have got their bearings to shorten them."[46]

Be Clear

"[W]riting is communication, [so] clarity can only be a virtue."[47] White recognized that obscurity might be more

effective than clarity only if it serves a literary purpose. If writers choose obscurity over clarity, White urged them to "[b]e obscure clearly!"[48] White, however, perceived ambiguity as a "disturber of prose" and "destroyer of life, of hope."[49] It distracts readers from the writer's underlying message or leads readers to misinterpret the writer's main objective, White explained. In all instances, White insisted, "when you say something, make sure you have said it."[50] "Clarity, clarity, clarity."[51]

IMPACT

Since its publication, The Elements of Style has been influential in outlining core principles of the English language. A New York Times book reviewer described it as "a splendid trophy for all who are interested in reading and writing."[52] Its impact hasn't been limited to English writers, however. For example, Senior Judge Rhesa H. Barksdale of the United States Court of Appeals for the Fifth Circuit requires her new law clerks to read The Elements of Style on the first day of their clerkship.[53] The late Judge Eugene H. Nickerson of the Eastern District of New York recommended The Elements of Style to lawyers who filed wordy complaints.[54] The United States Court of Appeals for the Eleventh Circuit provides newly admitted lawyers a copy of The Elements of Style with their certificate of admission.[55] The Elements of Style has also been cited as binding authority in published opinions[56] and assigned as recommended material in first-year legal-writing curriculums in law schools around the country.[57]

Strunk and White have helped lawyers improve their writing style to achieve accuracy, brevity, and clarity and to ensure that "every word tells." The little book is indispensable to lawyers who strive to master the art of persuasion.

Every lawyer should read and follow Strunk and White's guidelines.

The Legal Writer will continue its series on what we can learn from the great writing teachers — lawyers and non-lawyers.

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1. William Strunk Jr. & E.B. White, *The Elements of Style* 34 (4th ed. 2000).
2. *Id.* at 36.
3. *Id.* at 34.
4. *Id.* at 35.
5. *Id.*
6. *Id.* at 34.
7. *Id.* at 35.
8. *Id.* at 37.
9. *Id.*
10. *Id.*
11. *Id.* at 36.
12. *Id.*
13. *Id.* at 38.
14. *Id.* at 44.
15. *Id.*
16. *Id.* at 46.
17. *Id.* at 55.
18. *Id.* at 61.
19. *Id.* at 63.
20. *Id.* at 53.
21. *Id.* at 58.
22. *Id.*
23. *Id.* at 69.
24. *Id.* at 67.
25. *Id.* at 66.
26. *Id.* at 67.
27. *Id.* at 70.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 72.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 73.
38. *Id.*
39. *Id.*
40. *Id.* at 76–77.
41. *Id.* at 77.
42. *Id.*
43. *Id.* at 78.
44. *Id.* at 80.
45. *Id.*
46. *Id.* at 81.
47. *Id.* at 79.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. Sam Roberts, *"The Elements of Style" Turns 50*, N.Y. Times (Apr. 21, 2009), https://www.nytimes.com/2009/04/22/books/22elem.html.
53. Christopher R. Green, *Some Themes from Judge Rhesa H. Barksdale's Published Opinions*, 79 Miss. L.J. 261, 283 n.77 (2009).
54. *Quat v. Horowitz*, 882 F. Supp. 1296, 1297 (E.D.N.Y. 1995).
55. Stephen Senn, *Serve Your Audience Strunk and White, and Legal Writing*, 56 No. 5 DRIFTD 78 (2014).
56. *See, e.g., U.S. v. Bass*, 404 U.S. 336, 340 n.6 (1971); *U.S. v. Transocean Deepwater Drilling, Inc.*, 767 F.3d 485, 494 (5th Cir. 2014); *U.S. v. Taylor*, 258 F.3d 815, 819 (11th Cir. 2001).
57. *Legal Writing Program*, http://law.nccu.edu/academics/legal-writing-program/ (last visited Jan. 13, 2020); *An Introduction to American Legal Writing*, https://www.bu.edu/law/current-students/llm-student-resources/legal-research-writing/ (last visited Jan. 13, 2020); *Academic Support Program*, https://law.utah.edu/students/academic-support-program/ (last visited Jan. 13, 2020); Lucia A. Silecchia, *Designing and Teaching Advanced Legal Research and Writing Courses*, 33 Duq. L. Rev. 203, 237 n.111 (1995).

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