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Michael Miller

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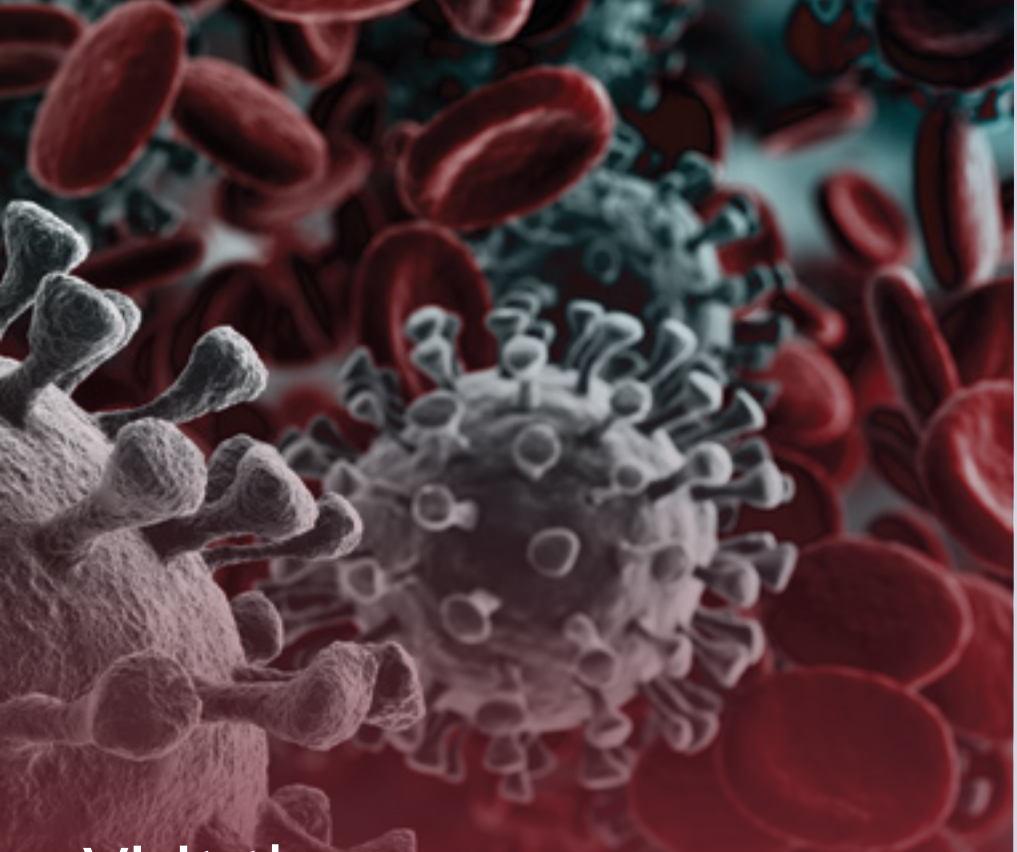

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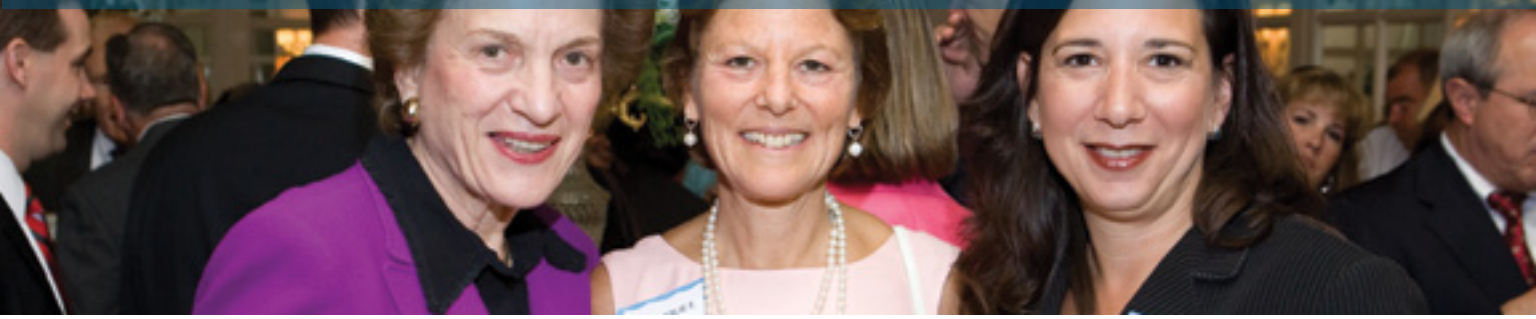

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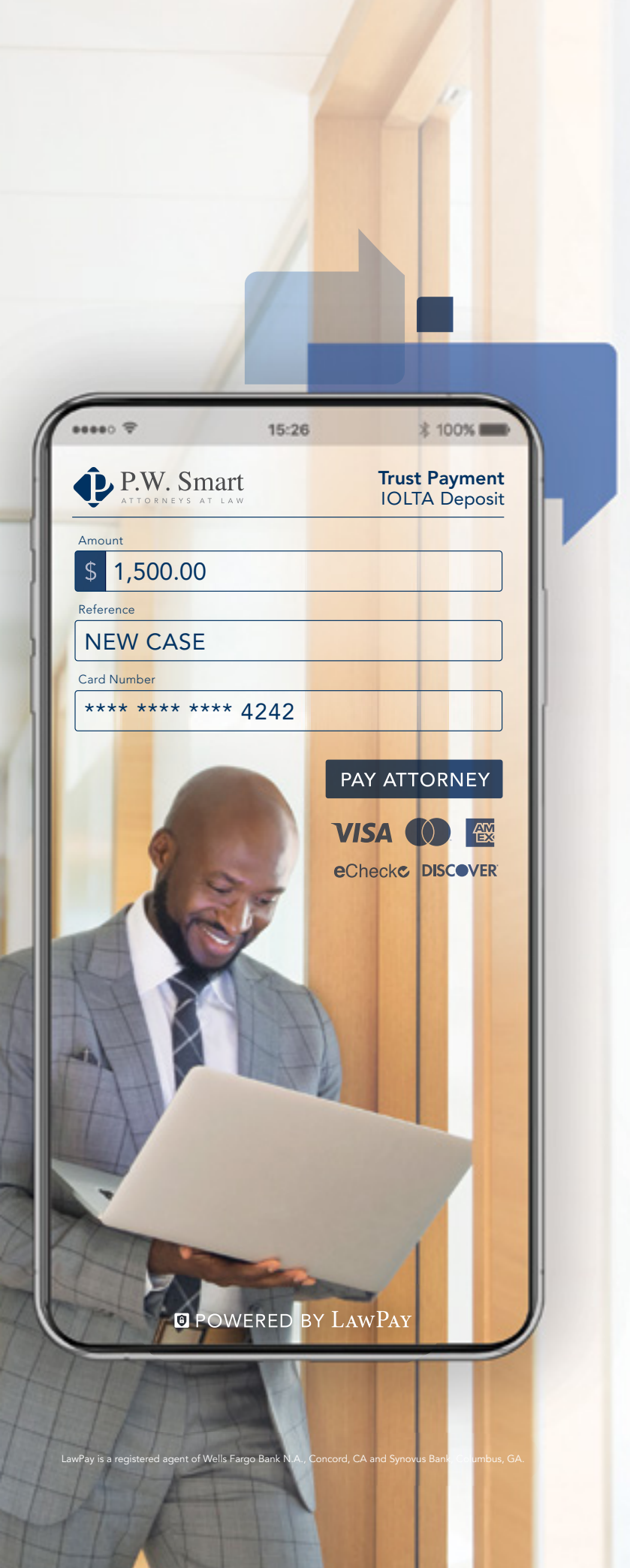

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Our Courts May Be the Last Bastion of Truth and Civility – and Lawyers Have a Duty To Keep It That Way!

Ever since the 2020 presidential election (and I admit to some uncertainty as to when that election actually concluded), I have held out hope that the duly elected members of the executive and legislative branches of our government would finally come together and work in a cooperative, bipartisan manner for the good of our country, especially in our fight against our common enemy: COVID-19.

But, instead of unifying over what should be a joint effort to eradicate a deadly foe, it seems that our elected leaders cannot even agree on what is fact and what is false. Even more alarming, some lawmakers are fearful for their own safety, not only from the extremists such as those who stormed the Capitol on Jan. 6, 2021, but from their fellow elected colleagues as well.

How will they ever reach compromises on important policy issues if they cannot even have a civil conversation on the House or Senate floor? Instead of debating issues, time is spent defending attacks on reality. Falsehoods under the guise of truth impede rational discourse, which is a necessary component of effective governance in a democratic society.

We must look to the example set by so many (but – regrettably – not all) of the members of the legal profession during these tumultuous past few months. While it's not perfect, the court system in which we practice remained the last bastion of truth and civility, serving as a "check and balance" on the fountain of misinformation and hostility polluting our political environment. This is something our profession can be proud of.

It was former President Donald Trump's counselor, Kellyanne Conway, who, shortly after Trump's inauguration, introduced the term "alternative facts" to describe what are nothing more than rank falsehoods. Apparently, it was Ms. Conway's intent to somehow justify and excuse the reference to lies in our political discourse (in that case, the so-called alternative fact was extraordinarily petty and insignificant, i.e., the comparative size of the respective crowds attending the Obama and Trump inaugurations).

Perhaps no lie has had greater consequences on our nation than former President Trump's unfounded claim that victory had been wrongfully stolen from him in the 2020 presidential election by means of widespread election fraud. It was this claim that on Jan. 6 instigated a violent mob, stoked by refusal to accept the results of a certified election, to attempt to impede the lawful processes of government by storming and desecrating our hallowed halls of Congress, causing the tragic deaths of five human beings, including a member of the Capitol Police, and imperiling the health and safety of our Vice President, the Speaker of the House of Representatives and so many others. The toll is even higher when you consider the fact that two Capitol Police officers took their own lives in the week after fighting the mob.

Trump's lawyers, including Rudolph Giuliani, continually perpetuated the big lie of election fraud publicly, even on the day of the insurrection at the Capitol, when Mr. Giuliani infamously exclaimed to a crowd of Trump supporters, "Let's have trial by combat." But in the

weeks leading up to Jan. 6 inside courtrooms across the land, Giuliani sang a much different tune – offering no evidence of election fraud, stating instead, "This is not a fraud case."

Like so often is the case today, our coequal judicial branch of government was able to discern the truth. In 61 cases nationwide, judges – including some Trump appointees – examined the evidentiary record presented to them and failed to discern any evidence of election fraud whatsoever. These cases were dismissed one after the other.

Yet, sadly, millions of people believe the big lie, one of many lies in our era of alternative facts, and the truth continually remains under attack, whether it's about our election, the pandemic that has cost more than 500,000 American lives, or one of the seemingly countless issues that have arisen in the public arena.

People's willingness to buy into alternative facts, whether full-blown conspiracy theories or some other form of misinformation is – to me – unfathomable, and truly frightening. It is simply astonishing that a duly elected member of Congress from Georgia, Marjorie Taylor Greene, reportedly supported an antisemitic conspiracy theory pertaining to California wildfires, supported the shooting of prominent Democrats and even went so far as to believe that school shootings in Sandy Hook, Connecticut and Parkland, Florida were staged and never really happened. So, it comes as no surprise that this same lawmaker voted against certifying the 2020 Electoral College voting results based on the big lie. Sadly, however, 146 other members of the House of Representatives did so as well.

Over these past few months, we learned just how fragile and precarious our rule of law – respected and admired worldwide – really is. Therefore, when it comes to finding truth – and doing so with civility – in our divided nation, lawyers must continue to lead by example. Lawyers are trained to negotiate, compromise and seek out the truth, and it is no coincidence that our Association has long promoted the importance of civility in our profession, and in society as a whole. In 2020, the Association promulgated updated Standards of Civility which, in tandem with our profession's Rules of Professional Conduct, provide a comprehensive source of rules and standards to which we should all adhere. Significantly, truthfulness is an essential component of both.

In the aftermath of the violent deadly riot of Jan. 6 – a horrific event that will undoubtedly influence the way our nation governs itself going forward – our profession must continue to hold truth to power.

We are already seeing victims of the big lie turning to the courts to find justice. Lawsuits have been filed seeking billions of dollars in damages by election technology companies like Smartmatic and Dominion. We are also beginning to see a wave of lawsuits from lawmakers against Trump, his lawyers and extremist organizations pertaining to the events at the Capitol, and it is anticipated that lawsuits brought by law enforcement officers injured during the deadly riot will not be far behind.

Our Association's Committee on Law, Youth and Citizenship will be offering a different antidote to the misinformation plaguing our society: robust public civics education that instills the knowledge and values of our democratic republic to guard against the disrespect and wanton violence such as that which we witnessed on Jan. 6.

Students, as well as educators, and even lawyers and judges, must all become educated to apply critical thinking to what they hear and see, especially on social media. They must be taught media literacy, to learn to discern fact from fiction. They must learn to debate with civility, not violence. Regrettably, our plan to conduct a convocation on civics education, in conjunction with Chief Judge Janet DiFiore, Associate Judge Michael Garcia and the Unified Court System, was derailed by the pandemic, but it remains our hope that the convocation can be rescheduled when circumstances permit.

We pledge to redouble our efforts to promote these education ideals in our state. In the coming weeks, you will hear about webinars addressing these topics co-sponsored by our Committee on Law, Youth and Citizenship, Committee on Media Law, and the Task Force on Free Expression in the Digital Age. We further urge our lawmakers to provide the resources necessary to help our young people become citizens who actively participate in government and who see the value in discerning the truth and respecting the rule of law.

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Why Judge Leslie Stein Is Leaving the Court of Appeals

By Michael Miller

Shock waves ran through the New York legal community on November 3, 2020, at the announcement that Associate Judge of the New York State Court of Appeals Leslie E. Stein will retire from the bench on June 4, 2021, five-and-a-half years before the end of her term. During a wide-ranging recent interview, Judge Stein candidly discussed her path to the judiciary, life before the bench, roads not taken, the profound influences of her parents and paternal grandfather, the impact of her career on her personal life, and her decision to resign from the high court.

MICHAEL MILLER: Judge Stein, thanks so much for agreeing to this interview. I've told a number of people that I was going to conduct this interview with you and consistently there have been comments wondering what prompted you to decide to resign with more than five years left on your term as an associate judge of the Court of Appeals. What were the motivating factors that brought you to your decision?

LESLIE STEIN: It was a very difficult decision and one that I thought long and hard about. I think it was a combination of a number of things. I got married later in life to my current husband and he's a bit older than I am. His upcoming 75th birthday was on my mind because there are a lot of things that we want to do together, as well as some things I want to do for myself. I have suffered some significant losses in my life, and I know that each day we have is a gift. And then along comes COVID and that shook my foundation a bit. So, I started looking ahead and thinking about what was most important to me.

I care deeply about the Court of Appeals. Judge Fahey is up against that [mandatory] retirement age next year, so he will be leaving in December [2021]. I didn't want to leave at the same time because that could potentially leave the court short two judges for a time. It would also mean that two new judges would join the court simultaneously, which would be quite challenging. So, I thought, "I can either retire before he goes, or I can wait until after he goes." But then, I cannot predict what other

Michael Miller is a former president of both the New York State Bar Association and the New York County Lawyers Association. The following are excerpts of a lengthy, wide-ranging and candid interview with Judge Stein; a version of this will appear in *Leaveworthy,* the newsletter of the Committee on Courts of Appellate Jurisdiction.


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changes may occur. So, it just felt like the right time for me to do it. I suppose there really is no right time, but I hope that my timing will allow the culmination of the process of filling my seat to coincide with the time when I leave so there will be little, if any, gap for the court.

What do you think has been the hardest part of the job of being a judge?

In some ways the hardest part is the isolation. People look at you differently. I remember when I first went on the City Court bench, I had a tiny office in the back of the courtroom. I would spend the morning hearing cases and then I would return to my desk to find there wasn't a single telephone message. It was a strange experience and a difficult adjustment after private practice, because I didn't have clients or lawyers calling me almost constantly.

It is also difficult knowing that your decisions may have a profound impact on people's lives. That is what makes it great, but it also makes it a little scary at times. When I was on the trial bench, at least I knew that if I really got it wrong, the litigants could appeal to the Appellate Division. As a judge on the Appellate Division, I was able to share the responsibility with other judges on the panel; I did not have to make every decision alone. However, this also presents a different challenge because you have to negotiate how the decision is written. At the Court of Appeals, there's almost no chance that the litigants will be able to obtain any further review. Also, the cases are more complex, more significant, and have a broader impact.

As a Court of Appeals judge, both the challenge and the benefit are that you're working with other judges who are very smart and hardworking. I listen carefully, because there is something to be learned from every one of them; sometimes they may even listen to me. We work very hard to get it right and the writings are very particular with the edits and the revisions to each decision in order to accommodate how each judge wants to articulate the rule being made and the reasoning therefor. There always is a considerable amount of compromise before a final decision is rendered and published. To me, it has been fun, but it's also a tremendous challenge and it can be difficult at times. The sheer volume of work is daunting. People frequently say, "Oh, the Court of Appeals, you only hear a couple hundred cases a year." However, each of those cases takes an enormous amount of time and, understandably, few people realize what is behind them – particularly, how much time is devoted to reviewing and deciding the applications for leave to appeal to the court. There's also a tremendous amount of work involved in that.

I understand that you began your legal career in 1981 as the law clerk to the Schenectady Family Court judges. How long did you work as a law clerk?

For about two years. Then, in 1983, I went into private practice, concentrating on matrimonial and family law with the Albany law firm McNamee, Lochner, Titus & Williams, where I eventually became a partner.

Leslie Stein with her parents, Samuel and Barbara Stein, at her New York State Supreme Court, Third Judicial District swearing-in ceremony on December 30, 2001. [Photo courtesy of Hon. Leslie Stein]

And when did you begin your judicial career?

I was appointed to fill a vacancy on the Albany City Court in January 1997 and then was elected to a full 10-year term in November of 1997. I also served as an Acting Albany County Family Court Judge. I was elected to the Supreme Court in the Third Judicial District in November 2001 for a term commencing in January 2002.

I heard that attending law school wasn't your first choice, that you thought about pursuing a career in social work but ultimately went to law school.

Yes, that's true. In college, I was a double major in psychology and Spanish. As I was nearing graduation, my first desire was to further my education in psychology or social work. However, I also became interested in the law – no big surprise, I suppose – so I applied to the University of Minnesota's master's degree in social work program and to a couple of local law schools. Believe it or not, I was rejected by the School of Social Work and accepted by the law schools. I enrolled in the University of Minnesota School of Law and the rest, as they say, is history.

Is there anything in particular about any part of your career that you found most satisfying?

I suppose I ultimately was able to apply my social work and psychology background in my matrimonial practice. When I first started practicing matrimonial law in 1983, I was hired by Stanley Rosen, a partner at McNamee, Lochner, Titus & Williams, an established Albany law firm. Stan was a superb matrimonial lawyer and he became my mentor from that point forward. I learned a lot from him. I might add that some lawyers look down on matrimonial attorneys, viewing the area of practice as just a lot of handholding. To the contrary, there is a lot of law involved. As in any field of law, it is complex, you have to be knowledgeable, you have to study, and you have to stay current.

When I joined the firm, Stan sat me down and said, "Leslie, I'm going teach you everything I know about practicing matrimonial law, but I don't want you to be my clone. I would like you to develop an expertise in areas in which I don't have an expertise, like taxes and pensions." I thought, "What did I get into?" But that is exactly what I did and, as a result, I became one of the first lawyers in the area to prepare a qualified domestic relations order. I also learned all about taxation of property distribution, maintenance, child support, and real estate transactions. I enjoyed that practice and I enjoyed the satisfaction of being able to make a difference in people's lives.

Judge Stein shortly after being appointed to the Appellate Division in February of 2008.

Let me tell you a story. Obviously, not too many people are happy going through a divorce; it is often a very difficult time. There is a lot of stress and usually when the case was done, my clients did not want to have anything to do with me; they just wanted to put it behind them. But I recall one particular client who came to me for a consultation. I explained the process, her rights, and her obligations. She was very ambivalent about whether she wanted to get divorced or not. I told her that she didn't have to do anything and that she should just give me a call if she decided that she wanted to proceed. Shortly after that, she called to tell me that she and her husband had decided that they didn't want to go forward right then but asked if I could recommend a marital therapist. That is not something I would usually do but I knew of a few people and I provided a couple of names. About six months later, she called me again and said, "We went to the therapist and we've worked everything out and we're so happy." So, sometimes you don't know what it is you're going to do that's going to change people's lives. That really felt good.

I'm sure it did.

And then City Court . . . I learned so much there. On some days, I would have 25 or 50, or even 100 cases in my courtroom. Clearly, they couldn't all be tried and most of the litigants didn't have lawyers. So, I mediated a lot of disputes. Sometimes I conducted a trial. Sometimes there were lawyers involved and it was more than just a small claim or an eviction. While evictions are certainly very significant matters, I learned that people were often in court because of poor communication between the tenant and the landlord; the tenant wasn't getting what they needed, and the landlord wasn't getting paid. So, in these cases, a resolution could be reached by simply letting them air their differences, listen to each other and figure out a way through it. I also loved small claims because I never knew what was going to come before me, and I had the chance to facilitate personal, but real, justice.

When you were at the trial level, what was the most difficult kind of case for you? I would imagine the matters in Family Court with children had to be pretty compelling stuff.

Well, they are very compelling matters because unlike so many other kinds of situations where you can actually say, "this is the way it's going to be," in cases involving children there are always adults involved who are not so easily changed. The saddest part of that was that the children who were getting into trouble weren't necessarily bad kids; it's just that they weren't well-parented and were acting out. So, there was some frustration in being unable to make the kinds of changes that were necessary, but it was also rewarding at times, challenging, but rewarding. Because I was an Acting Family Court Judge while I had a full calendar as an Albany City Court Judge, I sat in Albany County Family Court only once a week; for me, that was perfect. I give a tremendous amount of credit to those Family Court judges who do it five days a week for a 10-year term or more than one 10-year term.

I read a 2018 *Albany Law Review* article about you entitled "Judge Stein: Neither Left nor Right," by Charlotte Rehfuss.[1] Based upon your practice area and activities, Ms. Rehfuss wrote:

> **Not surprisingly, Judge Stein had a strong record of siding with aggrieved women and their children while on the Appellate Division. She also had a very strong record of deferring to administrative decisions when challenged. Both of these tendencies can likely be attributed to Judge Stein's extensive experience in Family Court, matrimonial law, and serving as an Administrative Judge on the Domestic Violence Part of Rensselaer County. Interestingly, she does not appear to have an "overwhelmingly clear pattern" in criminal cases; however, some of her dissenting opinions showed her to lean towards the sensitive side when dealing with intrusions on a criminal defendant's rights.**

What do you think about all that?

There is probably some truth to that, but I don't think I can be that easily pigeonholed. However, I have enough of a record that someone could go back and possibly extrapolate some trends like that.

Former Presiding Justice of the Appellate Division, Third Department Karen K. Peters, Judge Stein, and Presiding Justice of the Appellate Division, Third Department Elizabeth A. Garry. [Photo courtesy of Hon. Leslie Stein]

I'll start with the administrative law comment: I sat on the Third Department, where we decided a tremendous number of administrative law cases. One of the hardest things for me as an appellate judge was that I was often constrained to defer to administrative decisions, where the standard of review makes it very difficult to reverse them, irrespective of whether I agreed with them. That can be very frustrating but there is a reason for that deferential standard of review. That is, the purpose of this standard is to allow the government agencies with the expertise in a relevant field to determine outcomes and refrain from substituting our judgment for theirs. Therefore, unless they really go off the rails, we leave it to the agencies to administer within their province. So, I learned to respect that and to resist the temptation to be a result-oriented judge.

I think it is generally accurate to say that I look at each case and I ask myself, "What is the right answer here, whether I like it or not?" At the Court of Appeals there are many close cases where there is no bright line differentiating the right answer from the wrong one. Of course, we are all influenced by our experiences and predilections. One of the ways I try to moderate that is to listen to my brilliant law clerks, who do not always share my political or social beliefs. I try to keep an open mind and the proper balance because what is most important to me is the certainty and predictability of the law and the institution that we represent. So, it is critical to be able to put aside my personal beliefs to achieve the correct legal outcome. That is why I hope that if I am predictable at all, it is in my respect for the law and my deference to the principle of stare decisis, recognizing that my position on the outcome of any given case may be unpredictable.

Let's talk a little bit about your life before the law. I understand you grew up in Westchester County and have lived in the Capital District a long time. How did you make your way to Albany?

I started college at Union College in Schenectady where I met a guy who I eventually married. He started law school in Minnesota when I was still in college and I moved there as well. So, I finished college in Minnesota and then also started law school there. After he graduated, he wanted to come back to the Capital District, so I transferred to Albany Law School. I put down my roots here and I never looked back. I love the Capital District.

During my preparation for this interview, I learned that you have been incredibly active in law-related extracurricular activities and held many important leadership roles in the court system.

Well, I take after my parents in a lot of ways and one of them is that they were always doing something in the community.

I understand that both your parents were lawyers, as well as a grandparent.

Yes, my paternal grandfather, Ignatz Russell Stein, graduated from Albany Law School in 1921 and my mother, Barbara Stein, graduated from Columbia Law in 1954, a few years ahead of Ruth Bader Ginsburg. My father graduated from New York Law School and studied for the bar after I was born.

Your mother graduated from Columbia a few years ahead of Judge Ginsburg? That's impressive, a true trailblazer. Did your mother practice?

My mother did a variety of things. She worked for two members of Congress, first for Congressman Ogden Reid, and then later for Congresswoman Nita Lowey. She also worked in the Attorney General's Office in the co-op and condo conversion unit, she spent a few years in private practice at a White Plains law firm, and at the very end of her career she was an Attorney for the Child in Family Court. In addition, she worked for the City of Yonkers for a time, where I believe her work involved public housing.

Your father was also a lawyer. Did he practice?

Yes, my father worked at a firm in New York City, Bondy and Schloss, and that was the firm in which his father, my grandfather, worked. My father worked there for about 25 years and then he left the city and became part of a small practice in Westchester.

What kind of practice did your grandfather have?

I don't know too many details, but I think he did mostly commercial litigation. My grandfather continued to go to the office almost until he died at the age of 90.

And what kind of work did your father do at Bondy?

He didn't talk much about his work there. What I remember most is when he left the firm, he joined another lawyer in Larchmont, which is where we lived. His partner held a political position; I believe she was the Town of Mamaroneck Supervisor, and they had a general practice. My father did a combination of trusts and estates, matrimonial law, contract law for small businesses and the like. His sister, my aunt, who just celebrated her 97th birthday, always says that my father never joined an organization that he didn't eventually become president of. He was a real people person.

Well, the apple seems not to have fallen too far from the tree.

People tell me that I got some of the good stuff from both of my parents.

Obviously, your parents had to have been great influences on you as you pursued your legal career. Did you have any idea where you wanted your career to take you?

Talk about focus on the one hand and lack of focus on the other, I really didn't. I frequently tell young law students and young lawyers who worry that they don't know what the future will bring. I lead them through my whole career path, which basically consisted of one thing fortuitously leading to another.

I genuinely loved everything that I did throughout my career. I loved practicing matrimonial law, and I was blessed with a fabulous mentor. I loved City Court and I loved Supreme Court. I never started one position thinking about what I wanted to do next. I just immersed myself in what I was doing; each experience was different. When an opportunity arose, I followed it to the next step. No plan, that's basically the way it was, one opportunity led to another.

I was wondering about any political involvement before the bench.

Well, my mother was very politically active, so as a fairly young child I would be drafted to stuff envelopes and go door to door for various candidates. So, I guess it was kind of in my blood from early on.

Was that in Albany?

No, that was in Westchester County, where I grew up.

I have a number of friends who are judges who once they went on the bench became much more reserved than they were beforehand. Do you think that your career impacted your personal life in any way?

Absolutely! Some of my friends and acquaintances see my judicial license plates and say, "Oh you're so lucky, you can get away with anything," and I tell them, "No, no, you don't understand – if you get stopped for something, you might get a ticket or you might not. But if I get stopped, it may land on the front page of the newspaper, so no, it's not necessarily what you think."

Being a judge has always made me think twice about everything I do and say, because I have a responsibility to the institution to be my best self and to be a good example to other people. It does make me more cautious, and of course it affects my life. But in some ways, I think

Former Chief Judge of the State of New York Judith S. Kaye, Judge Stein, and Michelle Haskin (Whiteman Osterman Hanna), past president of the Capital District Women's Bar Association. [Photo courtesy of the CDWBA]

COURT OF APPEALS ASSOCIATE JUDGE LESLIE E. STEIN

A 1981 Albany Law School graduate, *magna cum laude*, after nearly 18 years on the bench in various judicial and administrative positions, Judge Stein was nominated by Governor Andrew M. Cuomo to serve as an associate judge of the Court of Appeals in October 2014, and her nomination was confirmed by the New York State Senate on February 9, 2015.

Active in local politics from a young age, Judge Stein began her judicial career in January 1997 when she was appointed as an Albany City Court Judge. She was elected to that position in November of that same year. While in that position, she also served as an acting Albany County Family Court Judge. In 2001, Judge Stein was elected to the New York State Supreme Court, Third Judicial District, for a term commencing January 2002.

Previously, among her many activities and accomplishments during her time as a practicing attorney for more than 13 years, Judge Stein was elected a Fellow of the American Academy of Matrimonial Lawyers. While on the bench, Judge Stein served as co-chair of the New York State Unified Court System Family Violence Task Force, Chair of the Third Judicial District Gender Fairness Committee, and was a founding member of the New York State Judicial Institute on Professionalism in the Law. Additionally, she served on the Executive Committee of the Association of Justices of the Supreme Court of the State of New York, as an officer of the New York State Association of City Court Judges, and as a member of the Board of the New York Association of Women Judges.

Judge Stein also has a long commitment to the organized bar. She is a past president of the Capital District Women's Bar Association and was a vice-president of the Women's Bar Association of the State of New York, where she held various important leadership positions. At NYSBA, Judge Stein has been a member of the Task Force on Increasing Diversity in the Judiciary, the Committee on Women in the Law, the Family Law Section Executive Committee, and has been a frequent lecturer at CLE programs. Judge Stein has also been active in the Albany County Bar Association for many years.

it affects my life just as any career to which a person is devoted would affect their life. I have always felt that being a judge also involves a responsibility to give back to others less fortunate or who are simply less advanced in their careers. Part of that is why I have always been involved in Bar Association work and that kind of thing. I also get something back from those activities, so it's a two-way street. Of course, all those activities precluded my doing other things that I might otherwise like to do, which is one reason why I am retiring.

I've often thought that there is a creative aspect to what members of the judiciary do, particularly the writing. Research is one thing, that's academic, but then applying what you've read and heard, especially in the appellate courts, it's about writing a good deal. Have you thought about memoirs or any kind of writing after leaving the bench?

I love to write. It is truly one of my favorite parts of being a judge, particularly an appellate judge. I like the process of how our writings come together. I refer to it as decision-making by committee. It can be fun and it can be challenging. There is a lot of negotiation involved. From time to time, I have thought, "I ought to write a book about this." But I really doubt that I will ever do it. I think more likely than that, I may consider teaching.

I love writing too. I especially enjoy writing personal notes.

Yes, you and I share that; I agree with you. I recently wrote a note to someone, who called me to express their appreciation. It is unusual these days and I take great care with every written word. As we talk about this, I am reminded of former Chief Judge Judith Kaye, who wrote more notes than anybody could probably ever count.

As someone who enjoys writing, and from my modest experience participating in drafting committee reports, I can imagine how difficult drafting as a group can be sometimes. A comma or other punctuation mark like a semicolon can dramatically impact the meaning of a phrase.

I'll tell you a short story about that. When I started in Supreme Court, my administrative assistant (who worked with me in the court system for 17 years) would say, referring to me, "She edits everything; she once redlined a pink slip." That was in the days when you had pink slips on which you would get your phone messages. I just couldn't help myself!

That's hilarious, but I hope you won't find anything to redline when you read this interview. In preparing for this interview, I learned that you studied the piano pretty seriously. Do you still play the piano?

My piano is in a prominent place in my house but, unfortunately, it hasn't been played in many years. However, it is one of the things on my to-do list for after next June. I played pretty seriously throughout high school and I studied with a very accomplished teacher. I considered going to Oberlin College to study music, but ultimately, I decided that I wasn't that good, so I stopped playing while I was in college and in law school. After law school, I learned that the wife of a fellow law clerk in Schenectady was a piano teacher and I took some lessons with her for a while. I was her only adult student, so it was pretty humorous when they had recitals. It was fun, but I really haven't played in a long time.

Musicians have a heightened commitment to certain discipline. . . . you know, rehearsal, practice, practice, and more practice. Do you think that some of that sensibility carried over into your life in the law?

I guess so. It's hard to say . . . I do tend to dive into things, and I like to finish what I start. I also strive to become as proficient at what I'm doing as possible. My husband tells me that he has never seen anyone who is so focused. I can sit at a table for hours and hours and hours working on my cases or whatever I'm doing, rarely look up and have very little awareness of what's going on around me. So yes, I think that's probably part of it.

You said that you never really had any plans, that you just followed the path of life and when opportunities arose you made the most of them. Do you have any plans or hopes for life after the bench or is that, too, going to be just finding where the path leads?

I think the latter. I'm pretty committed to not making any commitments until at least the end of 2021 – and I think a good long nap is in order.

I doubt you'll be able to do that.

[*Laughing*] You're probably right but it's nice to think about anyway. Hopefully we will be able to travel some, if not by next summer certainly by next fall or winter. There are so many places that I want to go, and I want to do other things. Playing the piano is one of them and I have developed an interest in photography. My husband got me a nifty little digital camera a couple of years ago that I have barely figured out how to use. In a nutshell, I would like to get back in touch with who I am and what makes me happy aside from my work.

Judge Stein, thank you so much for this interview, but most especially, thank you for your extraordinary public service for nearly a quarter century, for your dedication to the justice system and the institution in which you have served with such great distinction. You have made real and significant contributions.

Thank you. I hope that I will continue to make contributions.

I'm certain that you will!

1. 81 Albany Law Review 1185 (2018), Charlotte Rehfuss.

What Is the SEC Going To Do About GameStop?

By Joshua F. Bautz

The coronavirus pandemic, a civil rights movement and raging political turmoil marked the year 2020. Now, less than a month into 2021, another societal shift has impacted the financial markets. GameStop Corp., a nearly defunct brick-and-mortar video game retailer, quickly became the center of the financial world when its stock was influenced in a manner never before seen. Internet retail investors publicly joined together in an attempt to undermine a hedge fund that had shorted the GameStop stock (GME). Then unexpectedly, the Robinhood Financial trading platform brazenly restricted the purchase orders of GME, triggering public outcry from politicians, celebrities and government agencies alike. This article is a reflection on the GameStop saga and a look into the potential federal securities law violations of the various players' bizarre and novel actions.

BACKGROUND: GAMESTOP, WALLSTREETBETS AND ROBINHOOD

At the center of the GameStop saga is the website Reddit.com. Reddit is a popular website that self-proclaims it "powers hundreds of thousands of distinct online communities"[1] through the use of small forum-type discussion boards that are referred to as "subreddits." One such subreddit, aptly named "Wallstreetbets,"[2] caters to the stock market investing community.

On the other side of the table from Wallstreetbets sits Melvin Capital Management, a billion dollar hedge fund.[3] For reasons that are not clear, many Wallstreetbets users developed a vendetta against Melvin Capital. On November 16, 2020, Melvin Capital filed a Form 13F disclosure filing with the SEC that revealed it had a short position in GME.[4] Wallstreetbets discovered the disclosure and contrived a plan to enact a "short squeeze"[5] on the Melvin Capital position by raising GME's price through a coordinated stock purchasing campaign. Due to Melvin Capital's short position,[6] any increase in the price of GME could cause losses for Melvin Capital.

By Wednesday, January 27, GME's price had precipitously climbed from roughly $12 per share on November 16, 2020, to roughly $380 per share. As a result of its short position, Melvin Capital started incurring exorbitant losses. It was soon reported that Melvin Capital was having liquidity issues and had to reach out to other hedge funds in order to obtain loans to support its short position.[7] Wallstreetbets' plan was working.

On the morning of Thursday, January 28, Wallstreetbets, along with countless retail investors, once again set out to maintain and increase their GME positions; however, Robinhood restricted the purchasing of GME on its platform.[8] Without the Robinhood investors' ability to purchase additional shares of GameStop, Wallstreetbets could not continue with the short squeeze. Instead, the Robinhood investors were left with only the ability to sell their positions, and the price of GME plummeted.

Robinhood announced that the unprecedented move was done as result of the "extraordinary circumstances in the market" and cited to SEC net capital obligations as one of the contributing motivating factors.[9] However, this announcement was met with furious public outcry claiming that the net capital excuse was a farce. Celebrities, politicians (on both sides of the aisle), Wallstreetbets and retail investors alike all called for the Securities and Exchange Commission to step in and address what had been speculated to be market manipulation and illicit conduct on behalf of Robinhood.

Potential Federal Securities Law Violations of Wallstreetbets

The Wallstreetbets subreddit was responsible for inciting a massive number of retail investors to purchase a specific security, in a coordinated effort, in order to influence the price of the security, all the while undermining a hedge fund. The possible legal implications for these actions are broad, but in the eyes of the SEC, a case could most debatably be made for either market manipulation or a disclosure violation.

Wallstreetbets' Potential Market Manipulation Liability – Manipulating or Influencing?

The SEC addresses this type of pricing market manipulation in § 9(a)(2) of the Securities Exchange Act of 1934 (the "Exchange Act"):

> (a) Transactions relating to purchase or sale of security
>
> It shall be unlawful for any person . . .
>
> (2) To effect, alone or with 1 or more other persons, a series of transactions in any security registered on a national securities exchange . . . creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others. 15 U.S.C. § 78i.

Here, Wallstreetbets was arguably responsible for coordinating a massive GME purchasing campaign, which increased the price of the shares dramatically. Those actions did influence the price of the GME shares. However, these actions alone cannot amount to market

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manipulation without also being accompanied by the requisite state of mind.

Section 9(a)(2) of the Exchange Act is a scienter-based cause of action, which means the actor must have "a mental state embracing intent to deceive, manipulate, or defraud."[10] In this context, intent would also imply intent to create an artificial demand for the stock.[11] Artificial demand can be created through any number of misleading practices including wash sales, matched orders, and rigged prices.[12] These manipulative practices "artificially affect[] market activity in order to mislead investors."[13] Wallstreetbets did not create artificial demand but instead an exorbitant amount of organic demand. Without illicit intent, no illegal market manipulation can occur.

Wallstreetbets' Potential Beneficial Ownership and Disclosure Violation Liability: Group or a Movement?

In addition to evaluating the Wallstreetbets' trading activity as market manipulation, it is also important to consider whether Wallstreetbets' conduct necessitated disclosures. If the Wallstreetbets' traders were considered to be part of a group, then they could be required to make certain disclosures. Section 13(d) of the Exchange Act sets forth this requirement:

> (d) Reports by persons acquiring more than five per centum of certain classes of securities . . .
>
> (1) Any person who, after acquiring directly or indirectly . . . or is deemed to become a beneficial owner of . . . more than 5 per centum of such class shall . . . file with the Commission, a statement. . .

> (3) When two or more persons act as a . . . **group** for the purpose of acquiring, holding, or disposing of securities . . . 15 U.S.C. § 78m (emphasis added).

Section 13(d) disclosures are required when an individual, or a group of individuals, has acquired, in aggregate, more than 5% of a company's shares. If the Wallstreetbets traders total share ownership of GME surpassed 5% at any time, then a disclosure could have been required. Moreover, § 13(d) of the Exchange Act is also a non-scienter-based cause of action, so unlike with market manipulation intent is not required.

Absent an agreement to enter into a group, a determination of a group cannot be made.[14] However, courts have held that the touchstone of a group is that "the members combined in furtherance of a common objective"[15] and that the formation of a group "may be formal or informal."[16] Still, barring the discovery of an agreement between the Wallstreetbets traders, no § 13(d) disclosures are likely to have been necessary. Hypothetically, if the Wallstreetbets traders did enter into agreements, then they could foreseeably face disclosure liability.

POTENTIAL FEDERAL SECURITIES LAW VIOLATIONS OF ROBINHOOD

On Thursday, January 28, 2021, when Robinhood restricted the purchases of GME, it announced that it had done so in an attempt to adhere to SEC net capital requirements.[17] Regardless of these reportedly genuine motives, Robinhood's actions have been met with class action lawsuits and public distrust. The SEC was also pressured to put out a public statement, which noted that "[t]he Commission will closely review actions taken by regulated entities that may disadvantage investors or otherwise unduly inhibit their ability to trade certain securities," seemingly in direct response to Robinhood's actions.[18]

Hypothetically, if Robinhood had restricted the purchase of GME shares as part of a deceptive, manipulative or fraudulent plan to lower its price, then Robinhood could also be looked at for market manipulation. In this hypothetical evaluation, Robinhood's actions could easily be seen as a means to artificially influence the price of GME. This type of conduct could very well result in a violation of Section 9(a)(2) of the Exchange Act as a type of market manipulation. These actions could also likely establish a violation of Section 10(b) of the Exchange Act and Rule 10b-5, which is the federal securities laws broadest anti-fraud provision.

THE GAMESTOP SAGA'S IMPACT ON THE FINANCIAL MARKETS

The SEC has stated that market manipulation could hardly be more serious because it "attacks the very foundation and integrity of the free market system."[19] Only time will tell if the SEC brings an enforcement action against one of the parties discussed above. However, in large part, the damage that has already been done to investor confidence is permanent. Wallstreetbets shows us a glimpse into the future of social- media-fueled investing. We can only hope these market participants weren't scorned by this experience just as quickly as their infatuation began.

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1. *Reddit User Agreement*, Reddit, https://www.redditinc.com/policies.
2. *r/wallstreetbets*, Reddit, https://www.reddit.com/r/wallstreetbets (description states "[l]ike 4chan found a Bloomberg terminal").
3. *Melvin Capital*, https://melvincapital.com (website states "The firm uses a bottom-up, fundamental research-driven process to identify investments employing a long-short equity strategy").
4. *Electronic Data Gathering, Analysis, and Retrieval system*, SEC, https://www.sec.gov/Archives/edgar/data/1628110/000090571820001111/xslForm13F_X01/infotable.xml.
5. *Short Squeeze*, Investopedia, https://www.investopedia.com/terms/s/shortsqueeze.asp ("A short squeeze occurs when a stock or other asset jumps sharply higher, forcing traders who had bet that its price would fall to buy it in order to forestall even greater losses.").
6. *Short (Short Position)*, Investopedia, https://www.investopedia.com/terms/s/short.asp ("A short, or a short position, is created when a trader sells a security first with the intention of repurchasing it or covering it later at a lower price. A trader may decide to short a security when she believes that the price of that security is likely to decrease in the near future.").
7. *Melvin Capital, hedge fund targeted by Reddit board, closes out of GameStop*, CNBC, https://www.cnbc.com/2021/01/27/hedge-fund-targeted-by-reddit-board-melvin-capital-closed-out-of-gamestop-short-position-tuesday.html.
8. *An Update on Market Volatility*, blog.robinhood, https://blog.robinhood.com/news/2021/1/28/an-update-on-market-volatility.
9. *Id.*
10. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976).
11. *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 383 (2d Cir. 1973).
12. *Santa Fe Indus. v. Green*, 430 U.S. 462, 476 (1977).
13. *Green*, 430 U.S. at 477.
14. *Corenco Corp. v. Schiavone & Sons, Inc.*, 488 F.2d 207, 217 (2d Cir. 1973).
15. *Wellman v. Dickinson*, 682 F.2d 355, 363 (2d Cir. 1982).
16. *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 124 (2d Cir. 2001).
17. *An Update on Market Volatility*, blog.robinhood, https://blog.robinhood.com/news/2021/1/28/an-update-on-market-volatility.
18. *Statement of Acting Chair Lee and Commissioners Peirce, Roisman, and Crenshaw Regarding Recent Market Volatility*, SEC, https://www.sec.gov/news/public-statement/joint-statement-market-volatility-2021-01-29.
19. *In the Matter of Pagel, Inc.*, SEC Release No. 34-22280 (Aug. 1, 1985); 33 SEC Docket 1003.

New Surrogacy Law Brings Opportunities, but Practitioners Beware

By Joseph R. Williams

On April 2, 2020 – during the height of the coronavirus pandemic – the New York State Legislature passed the Child Parent Security Act (CPSA), ushering in significant changes to prior New York law regarding gestational surrogacy.

Gestational surrogacy is the process by which a woman agrees to become pregnant via IVF and embryo transfer and to carry and deliver a baby for intended parent(s), who will be declared to be the legal parent(s) of the child immediately upon birth. For many families experiencing fertility struggles and/or LGBTQ families, gestational surrogacy is an important family building option. For some, it is the only option for conceiving a child that is biologically related to them. However, gestational surrogacy in New York has had a complicated and tumultuous history.

Joseph R. Williams, an attorney with the Albany law firm Copps DiPaola Silverman, practices primarily in adoption, assisted reproduction and surrogacy law, and was actively involved in the drafting and lobbying for the CPSA. He is also the co-founder and director of surrogate services for the New York Surrogacy Center, a surrogacy matching program working with prospective surrogates and intended parents.

For decades, "surrogate parenting agreements" were deemed void and unenforceable by our state's Legislature as contrary to New York public policy (DRL § 122). If the surrogacy agreement provided for the surrogate to be compensated, the parties, their attorneys and any other entities involved in the arrangement were also subject to civil and potentially criminal penalties (DRL § 123).

Initially introduced in 2012, the CPSA had languished in the Legislature for nearly a decade, leaving New York in the relative "dark ages" with only two other states nationwide where compensated gestational surrogacy arrangements remain prohibited.[1]

Thankfully, the passage of the CPSA changed all of that, legalizing compensated gestational surrogacy in New

York and creating a statutory framework for establishing parentage of children born through gestational surrogacy and assisted reproduction. However, before family law attorneys hang out their shingle as surrogacy attorneys, they must be aware of the multitude of statutory and regulatory pitfalls that await an inexperienced practitioner.

WHAT THE CPSA DOES (AND DOESN'T DO)

The CPSA adds an entirely new article – Article 5-C – to the New York State Family Court Act, which became effective on February 15, 2021 (FCA § 581). Pursuant to Part 4 of Section 581, entitled "Surrogacy Agreement," parties may now enter into enforceable surrogacy agreements, and such agreements may provide for surrogate compensation, provided that all other statutory requirements have been followed (FCA § 581-401).

The law is clear, however, that this only applies to gestational surrogacy – where the surrogate's own egg is not used to conceive the child. Surrogacy arrangements where the surrogate is biologically related to the child, sometimes referred to as "traditional" or "genetic" surrogacy, remain unenforceable in New York and are statutorily prohibited if the surrogate is being compensated (FCA § 581-401).

WHO IS ELIGIBLE TO ACT AS A SURROGATE?

Before taking on any new surrogacy clients, practitioners should familiarize themselves with the eligibility criteria for gestational surrogacy. Under the CPSA, any woman who is over the age of 21, who is a United States citizen or lawful permanent resident, and who did not contribute her own egg for the pregnancy, is potentially eligible to act as a surrogate (FCA § 581-402). There is no requirement that the surrogate be a New York resident, unless no intended parent resides in New York (FCA § 402).

However, while the statutory text ends there, the lawyer's inquiry does not. In addition to the statutory requirements, New York surrogates must also meet all regulatory requirements mandated by the New York State Department of Health (FCA § 581-402). DOH issued "emergency regulations" on February 16, 2021 – the day after the law went into effect – which, among other things, contain detailed surrogate eligibility guidelines that bor-

row heavily from the American Society for Reproductive Medicine and American Congress of Obstetrics and Gynecologists.

Prior to signing a surrogacy agreement, the prospective surrogate must receive a medical evaluation relating to the anticipated pregnancy from a qualified health care practitioner in order to assess any potential medical risks associated with a surrogate pregnancy (FCA § 581-402). It is essential for practitioners to familiarize themselves with these DOH guidelines before advising clients regarding potential surrogacy arrangements. The surrogate must be informed of any medical, psychological or psychosocial risks of a surrogate pregnancy and must provide informed consent to engage in a surrogacy arrangement (FCA § 581-402). Lest they wish to run afoul of the DOH, practitioners representing surrogates will want to ensure that their clients are being evaluated by reputable health care practitioners who are following all the requirements of the CPSA, including the requirements regarding informed consent and conflict of interest procedures.

The surrogate must be represented in the negotiation and execution of the surrogacy agreement by independent legal counsel of her own choosing who is licensed to practice law in New York. However, the surrogate's legal fees would be paid by the intended parent(s), and the surrogate's attorney must have a separate retainer agreement clearly stating that the attorney-client relationship lies only with the surrogate, not with the intended parent(s), despite the fact that they are paying the legal bill (FCA § 581-402). Practitioners representing surrogates will need to update their existing retainer agreements to include this statutory language.

INTENDED PARENT ELIGIBILITY

In order to enter into an enforceable surrogacy agreement, the CPSA requires that each intended parent be over the age of 18 at the time the surrogacy agreement is signed and requires that at least one intended parent be a United States citizen or lawful permanent resident and a resident of New York State (FCA § 581-402). This means that international surrogacy will not be permissible in New York even if the surrogate is a New York resident – something which practitioners must be aware of when advertising to prospective clients.

An unmarried intended parent can enter into a surrogacy agreement on his or her own, seeking to become the only legal parent to the child, or a married or unmarried couple can pursue surrogacy together (FCA § 581-402). If the intended parents are married to one another, they would both be parties to the surrogacy agreement (and both deemed to be parents of the child) unless the spouses have been living separate and apart for a period of three years or pursuant to an agreement or judgment of separation (FCA § 581-402). In the case of separated spouses, only the petitioning spouse would be a party to the surrogacy agreement and deemed to be a parent of the child, despite the marital presumption of DRL § 24. A married intended parent who is not separated from his or her spouse cannot enter into a surrogacy agreement without the spouse's participation (FCA § 581-402). Matrimonial attorneys advising their clients about the legal impact of a separation agreement should be mindful of this statutory provision, especially in cases where the parties created or obtained frozen gametes or embryos during their marriage.

If the intended parents are unmarried, they can pursue surrogacy together if they are "intimate partners" (FCA § 581-402). While the phrase "intimate partner" is not specifically defined by the CPSA, it presumably draws from the statutory and case law definition of an "intimate partner" as applicable in Family Court Act Article 8 proceedings (FCA § 812).

Practitioners must also be mindful regarding the potential legal consequences of a change in a party's marital status during the pendency of the surrogacy arrangement (i.e., if married intended parents divorce while their surrogate is pregnant, or an unmarried surrogate gets married during her pregnancy). While the CPSA provides guidance on these issues (FCA § 581-404), these topics should be considered and addressed during the contract phase of the surrogacy process.

The intended parents must also be represented by independent legal counsel, licensed in New York, through the duration of the surrogacy process.

THE CONTRACT PHASE – THE ALL-IMPORTANT SURROGACY AGREEMENT

Arguably the most important (and certainly the most complex) of the CPSA surrogacy provisions is Section 403, which outlines the requirements of a surrogacy agreement. This is the part of the CPSA most fraught with minefields for the rookie ART attorney. The surrogacy agreement – the contract entered into between the surrogate and the intended parent(s), which outlines all of the terms of the surrogacy arrangement – is only enforceable if it is in "substantial compliance" with the statutory requirements of Section 403 (FCA § 581-203).

While the legalization of surrogacy agreements likely means more business for New York attorneys, it may also mean more business for our malpractice carrier. On a serious note, surrogacy is not an area of the law that should be "dabbled in," and it is crucial that any practitioner involved in the drafting of a surrogacy agreement be well-versed in the statutory requirements, regulatory requirements and medical/ethical opinions regarding

gestational surrogacy. Surrogacy is an ever-evolving area of practice, and counsel must be informed regarding all aspects of the process, not simply the statutory requirements described in this article. The recent approval of the coronavirus vaccine(s) presents a perfect example of this, as there are currently conflicting views as to whether it is advisable to obtain such a vaccine during or immediately before pregnancy. While counsel will not be providing medical recommendations to either party, you must be prepared to have these conversations with your clients, which means you must be knowledgeable regarding the relevant medical literature and current recommendations of entities such as the CDC and WHO. Contract terms regarding vaccinations, for example, will almost certainly be included in most surrogacy agreements (or at least they should be), but guidance on these topics will not be found in the text of the statute or even in DOH regulations.

To make things more complicated, the agreement must also comply with the incredibly complex insurance requirements of the CPSA regarding health insurance, life insurance and disability insurance for the surrogate.

To summarize, the surrogate must be provided a life insurance policy (paid for by the intended parent(s)) with a minimum value of $750,000 or the maximum amount the surrogate is able to qualify for. This life insurance must be in effect prior to the surrogate commencing any medications in anticipation of embryo transfer and must remain in effect until 12 months after the conclusion of the pregnancy (FCA § 581-403).

The surrogate must also be provided a health insurance policy (paid for by the intended parent(s))[2] which likewise takes effect prior to commencing medications in anticipation of embryo transfer. The CPSA contains detailed provisions regarding what type of medical coverage must be provided for the surrogate, when the policy must become effective, and the term/duration of coverage (FCA § 581-403). The surrogacy agreement must specify how the surrogate's medical expenses (including medical insurance) will be covered and must include a review and summary of the health insurance policy that will be used to cover such expenses (FCA § 581-403). Practitioners are encouraged to consult with a fertility insurance provider or similar entity to review any potential exclusions or exemptions from the selected insurance policy and to guide the intended parent(s) on the purchase of surrogate-friendly insurance (if necessary), including open enrollment periods when such policies may be acquired. Failing to properly advise your clients about the insurance aspects of a surrogacy journey can not only impact the enforceability of the agreement, but may cost your clients tens of thousands of dollars if the surrogate is not properly insured.

Perhaps the biggest change to prior New York law is the authorization of payment to gestational surrogates. They are now permitted to receive compensation for the medical risks, physical discomfort and inconvenience.

If the surrogate also requests a policy of disability insurance, the intended parent(s) shall provide such a policy (at their expense), and the surrogate may designate a beneficiary or beneficiaries of her choosing (FCA § 581-403).

Practitioners must also be vigilant about the timing of each step in the surrogacy process. The surrogacy agreement must be negotiated, drafted, and executed after the medical and psychological screenings have been completed, but prior to the surrogate commencing any medications or medical procedures in preparation for embryo transfer, and all necessary insurance policies must already be in place at that time (FCA § 581-403). This is especially important if the parties are not using a surrogacy matching program, as the attorneys will be the gatekeepers in an "independent" journey, ensuring that all of the necessary statutory requirements have been met prior to clearing the surrogate for embryo transfer. If your clients are using a surrogacy matching program, you must ensure that the program is licensed by the DOH, as New York is now the only state in the nation to regulate surrogacy agencies.

Given the complexity of the insurance requirements of the CPSA and the specific contractual requirements that must be met for the agreement to be deemed enforceable, it is recommended that practitioners speak with an experienced ART attorney before drafting their first surrogacy agreement. If the agreement is not in substantial compliance with Section 403, it is not enforceable, and the court will be required to determine parentage of the child based on the intent of the parties and the best interests of the child (FCA § § 581-203; 581-407). Aside from any ethical and/or malpractice considerations, this

potentially jeopardizes the intended parent(s)' ability to establish legal parentage for their child and could potentially result in unwanted parental rights being vested in a surrogate or gamete/embryo donor. This would obviously be a disastrous result for the intended parent(s), the surrogate, any donors and potentially the child. In addition to becoming familiar with the CPSA and DOH regulations, practitioners can avoid these types of pitfalls by referring their clients to a reputable New York-based licensed surrogacy matching program that can help ensure that all of the necessary requirements have been met, including the necessary medical evaluations and the purchase of surrogacy-friendly insurance, before the surrogacy agreement is signed.

HOW MUCH DO SURROGATES GET PAID?

Perhaps the biggest change to prior New York law is the authorization of compensation to gestational surrogates. For the first time in our state's history, gestational surrogates are statutorily permitted to receive compensation for acting as surrogates, to compensate them for the medical risks, physical discomfort, inconvenience and responsibilities they undertake in connection with the surrogacy arrangement (FCA § 581-502).

The CPSA does not suggest a dollar amount for surrogate compensation, but rather requires that such compensation be "reasonable" and negotiated in good faith between the parties (FCA § 581-502). Surrogate compensation varies a bit based on geographical location and whether the surrogate is "experienced" (having served as a surrogate in the past) or a first-timer, but national averages typically range between $30,000 and $60,000 for base compensation. Again, a reputable surrogacy matching program will be able to assist the parties in discussing the issue of compensation to establish reasonable surrogate compensation under the statute.

If the surrogacy agreement provides for the surrogate to be compensated, the intended parent(s) must place sufficient funds in escrow, prior to the surrogate commencing medications in anticipation of embryo transfer, to cover her base compensation as well as "reasonable anticipated additional expenses" associated with the pregnancy, which may include maternity clothes, medical expenses, travel expenses, insurance, etc. (FCA § 581-403). Such funds must be held by an independent escrow agent as that term is defined in FCA § 581-102. Obviously, practitioners will want to ensure that the intended parents' escrow account is being properly managed and operated, and that the funds are being allocated properly and not co-mingled by the escrow agent.

ESTABLISHING PARENTAGE UNDER THE CPSA

Ultimately, the entire purpose of the surrogacy process is for the intended parent(s) to have a child that is legally (and sometimes biologically) theirs. Assuming the surrogacy agreement is compliant with Section 403, a judgment of parentage can be obtained, declaring the intended parent(s) to be the legal parent(s) of the child born as a result of the surrogacy arrangement.

This proceeding can be commenced in the Supreme, Surrogate's, or Family Court and, while it will most commonly be filed by the intended parent(s), it can also be commenced by the surrogate, her spouse (if applicable), the child or any gamete/embryo donor (FCA § § 581-201; 581-206). The proceeding can be commenced any time after the surrogacy agreement is signed, even before the child is born, and the judgment of parentage can be issued pre-birth, to take effect immediately upon the birth of the child (FCA § § 581-201; 581-203).

The petition should be filed in the county where either the surrogate or the intended parent(s) reside, or the county where the child was born, and the surrogate and her spouse (if applicable) and all intended parent(s) shall be necessary parties (FCA § 581-203). The petition must be verified and must comply with all of the statutory requirements enumerated in the CPSA. The petition must also contain a certification from the surrogate's attorney and the intended parent(s)' attorney that the surrogacy agreement fully complied with the material requirements of Section 403, described above – hence why strict compliance with the statutory requirements at the contract drafting phase is so important (FCA § 581-203).

If the court finds the petition and the surrogacy agreement to be in compliance with these statutory requirements, the court shall issue a judgment declaring that, upon the birth of the child, the intended parent(s) are the only parent(s) of the child and DOH shall list the intended parent(s) as the child's only legal parent(s) on his or her original birth certificate (FCA § 581-203). Notably, the statute says that the court "shall" issue a judgment (assuming there has been compliance with the CPSA) and does not provide the court with any discretion, nor does it direct the court to assess what would be in the child's "best interests." This further underscores the importance of getting this right, as a party is automatically entitled to a judgment of parentage (akin to a summary judgment proceeding) assuming all statutory requirements have been met. Where attorneys will get into trouble is in failing to strictly adhere to the statutory or regulatory requirements, or failing to adhere to the

proper informed consent procedures, which may result in the judge having to make discretionary parentage determinations based on a host of external factors. No one reading this article wants to be the "test case" for how a court would determine parentage under a non-compliant surrogacy agreement.

As a practical matter, practitioners are encouraged to pursue parentage orders pre-birth (although they can be obtained post-birth) in order to minimize any potential issues with the discharge of the child from the hospital upon delivery and to avoid the necessity of amending the child's original birth certificate after birth. It is anticipated that the pre-birth order can simply be provided to the birth registrar in the hospital where the child is to be born to be forwarded along to Vital Records.

The record of the parentage proceeding shall be sealed, except that the parties and the child shall have the right to inspect the court record, which would include the identity of the surrogate and any known gamete or embryo donors (FCA § 581-205). As such, practitioners should be cautious to avoid telling clients (intended parents, surrogates, or donors) that any of their identities may remain confidential from one another and/or the child.

UNIQUE TO NEW YORK: THE SURROGATE'S BILL OF RIGHTS

One of the most unique aspects of the New York law is the Surrogate's Bill of Rights, contained in Article 6 of the CPSA. Borne from a legislative desire to offer concrete medical, legal and financial protections to surrogates, the Surrogate's Bill of Rights applies to any person acting as a surrogate in New York, and it cannot be waived or limited in any way, even by an agreement of the parties (FCA § 581-601). No other state in the country has a comparable provision in their surrogacy statute, making New York arguably the most surrogate-friendly and surrogate-protective state in the nation.

The Surrogate's Bill of Rights must be provided to every surrogate at the very outset of her surrogacy journey, clearly outlining each of the following rights:

- The right to make all health and welfare decisions regarding herself and the pregnancy, including whether to consent to a c-section or multiple embryo transfer, and whether to terminate/reduce the pregnancy (FCA § 581-602);
- The right to independent legal counsel of her own choosing, licensed in New York, paid for by the intended parent(s) (FCA § 581-603);
- The right to comprehensive health insurance coverage and to have all of her pregnancy-related medical expenses covered by the intended parent(s) (FCA § 581-604);
- The right to supportive counseling to address pregnancy-related issues, paid for by the intended parent(s) (FCA § 581-605);
- The right to a life insurance policy, paid for by the intended parent(s) (FCA § 581-606);
- The right to terminate the surrogacy agreement anytime (and for any reason) prior to becoming pregnant (FCA § 581-607).

The major takeaway from this is that the surrogate has the absolute right to make all medical decisions regarding herself and regarding the pregnancy, including decisions regarding abortion. While it is important for all parties to discuss these topics even before being matched, these rights are absolute and cannot be contracted away in a surrogacy agreement. Any attorney who attempts to abridge these rights in a surrogacy agreement potentially runs the risk of having their agreement (or at least a portion of it) deemed void and unenforceable. Any practitioner representing a prospective surrogate should be sure to advise her of these rights and provide her with a written copy of the Surrogate's Bill of Rights upon their initial consultation – similar to a Statement of Client Rights and Responsibilities in a domestic relations matter.

CONCLUSION

The CPSA brings long-overdue changes to New York law, finally affording all New Yorkers the right and ability to create and expand their families through gestational surrogacy. No longer will intended parents living in New York be told they have to leave the state to pursue surrogacy, nor will surrogates be denied the opportunity to provide the gift of parenthood to those in their community. It also opens the door to an entirely new legal market in New York; but practitioners should be cautious before rushing to expand their practices. While the practice of family building is incredibly rewarding when done properly, there are few cases more disastrous (emotionally, ethically, financially and physically) than a mismanaged surrogacy arrangement.

1. Louisiana law prohibits compensated gestational surrogacy and limits uncompensated surrogacy to heterosexual married couples using their own egg and sperm only (Surrogacy Bill HB 1102). Michigan law declares all surrogacy contracts void and unenforceable as contrary to public policy and imposes criminal penalties if the contract provides for surrogate compensation (Michigan Surrogate Parenting Act MCL § 722.851).

2. If the surrogate is not receiving compensation, she has the option to waive the statutory requirement that the intended parent(s) pay for her health insurance, life insurance, and/or legal fees.

Significant Amendments to Uniform Rules

By David L. Ferstendig

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Effective February 1, 2021, significant amendments were made to the Uniform Rules for the Trial Courts, 22 N.Y.C.R.R. Part 202. The changes were prompted by the successful implementation of rules, procedures and forms in the Commercial Division. The amendments seek to import and adopt appropriate Commercial Division rules into general practice. Some are almost verbatim; others have been adapted to the nature of general civil practice. Practitioners in the Commercial Division should be very familiar already with the amendments.

It is important to note at the outset that many of the Commercial Division rules are patterned after federal practice and were necessitated in some way by the difficulty in passing CPLR legislation on various issues, including expert disclosure. In fact, there are quite a few practitioners who comment on how the CPLR continues to be "replaced" by rules. Statements that the rules are not meant to supplant the CPLR ring a bit hollow when one sees the expansive reach of the various rules.

Ultimately, the effectiveness of the new statewide rules will depend on the attorneys' cooperation and the judges' interest in enforcing them. One of the reasons the Commercial Division rules have seemingly worked so well is because, as noted above, the rule changes were, at least to an extent, motivated by a desire to replicate federal practice, and so many attorneys practicing in the Commercial Division were in favor of the changes. Moreover, the changes have been more incremental in the Commercial Division as opposed to the wholesale adoption process in these amendments. Indeed, consistent themes throughout the rules stress consultation, good faith and informal proceedings. Some of them seem particularly applicable to commercial matters and should be useful in commercial matters that do not meet the Division's monetary thresholds. Some, however, have limited applicability in a large number of cases in general civil practice, that is, personal injury practice. For example, limitations on interrogatories (25) are usually not an issue since in that area interrogatories are generally not used (a demand for a bill of particulars is the normal course of conduct). Furthermore, limitations on the number (10) of depositions will not generally be an issue.

The limitation on the duration of depositions (seven hours) as a one-fits-all presents difficulties, taking into account the vastly varied nature of how depositions are conducted. For example, whether and how many documents are to be identified at the deposition, whether the deposition is a purely factual one or involves technical or scientific issues, and how many parties are there in the action and whether their respective interests differ, to name a few. And this does not even address the current virtual depositions that carry with them their own complications, some of which necessarily lengthen the deposition. One can only imagine what may happen in the initial implementation of the rules with so many attorneys not familiar with the rules and with limited or no opportunity to seek court assistance, for example, to lengthen a deposition, upon good cause shown.

Finally, note that the new rules sometimes overlap with certain existing rules that do not appear to have been repealed (yet).

A further examination of this topic will be published in the May/June edition of the *Journal* and online in the New Center.

Be Prepared and Be on Time! § 202.1: Adding new subdivisions (f) and (g) requiring at each appearance that counsel be familiar with the case and prepared and authorized to resolve issues relevant to the appearance. Failure to comply may result in a default (under Rule 202.27) or a finding of "failure to appear" (under Rule 130.2.1). And counsel should be on time.

Print Type, Margins and Bookmarks. § 202.5(a): Amended by breaking up subsection (a) into subdivisions (1) and (2); adding references to print type and margins (no smaller than 12 point or 8-1/2 x 11 inch papers; margins no smaller than one inch; footnote print size no smaller than 10 point); and requiring electronically filed affidavits, affirmations and memoranda of law with greater than 4,500 words include bookmarks, listing the document's contents and facilitating navigation.

Fax and Email Submissions. § 202.5-a: Replacing the existing section with new subsections (a) and (b) dealing with fax-filing and email correspondence in cases not pending in NYSCEF. Papers and correspondence (complying with § 202.5) may only be submitted by fax with the advance approval of the assigned justice. Unless requested, correspondence sent by fax should not be followed by hard copy. 202.5-a(a). The court may permit communication by counsel (with each other and with the court) via e-mail in cases not pending in the NYSCEF and, in the court's discretion, counsel are to submit memoranda of law by e-mail, or other electronic means (like a flash drive) together with an original and a courtesy copy. 202.5-a(b).

Motions, Relief Sought, Proposed Orders. New § 202.8-a: Entitled "Motion in General." The precise relief sought should be contained in the notice of motion or order to show cause and in the memorandum of law's concluding section. Electronically filed, hard copy or working copy motion papers must include copies of all pleadings, other CPLR-required documents "and as necessary for an informed decision on the motion (especially on motions pursuant to CPLR 3211 and 3212)." Tabs should be used for exhibits to hard or working copies. Copies must be legible. Where relevant portions of a voluminous exhibit are discrete, those portions

only should be attached, and the full exhibit should be submitted separately. Foreign language documents must be translated as per CPLR 2101(b). A decision, or relevant portion of other authority to be relied upon, not readily available to the court, should be submitted with the motion papers. 202.8-a(a). "When appropriate," proposed orders should be submitted with the motion. The section provides examples, such as motions to be relieved, pro hac vice admissions and open commissions, but NOT dispositive motions. 202.8-a(b). Unless otherwise ordered by the court, motions cannot be adjourned on consent more than three times or for a cumulative total of more than 60 days. 202.8-a(c). A substantially similar 60-day rule already exists in 202.8(e)(1).

Word Count Limits – You've Said Enough! New § 202.8-b: Entitled "Length of Papers." Unless otherwise permitted by a court, affidavits, briefs and memoranda of law in chief are not to exceed 7,000 words each; for reply affidavits, affirmations and memorandum, the limit is 4,200 words. Arguments in the reply papers should be responsive or relate to those made in the memorandum of law in chief. 202.8-b(a). The word limit is exclusive of the caption, table of contents, table of authorities and signature block. 202.8-b(b). At the end of every affirmation, affidavit, brief and memorandum of law, counsel is to certify the number of words and compliance with the word count. Counsel can rely on the word processing system word count. 202.8-b(c). On an oral or letter application on notice to all parties, the court can permit papers exceeding the word count above, and in that case, the counsel certification should set forth the number of words and certify compliance. 202.8-b(d).

No Sur-Reply, Please. New § 202.8-c: Entitled "Sur-Reply and Post-Submission Papers." Sur-reply papers (including correspondence) are not permitted without advance express permission. However, counsel can provide a citation to relevant post-submission decisions via letter, without additional argument. Materials submitted in violation of the rule "will not be read or considered" by the court and opposing counsel should not respond to them.

Use the Order to Show Cause Only Where There Is a "Genuine Urgency," a Stay Is Required or a Statute Requires It. New § 202.8-d: Entitled "Orders to Show Cause." Orders to show cause are to be used only where there is a "genuine urgency," for example, on an application for provisional relief, a stay is required or a statute mandates it. Reply papers are not permitted without the court's advance permission.

Avoid Ex Parte TROs, Unless . . . New § 202.8-e: Entitled "Temporary Restraining Orders." A temporary restraining order (TRO) is not to be issued ex parte, unless the moving party demonstrates significant prejudice by giving notice or that notice could not be given despite a good faith effort. Thus, unless excused by the court, the applicant is to provide the opposing parties with notice of the time, date and place of the application and copies of the supporting papers "sufficiently in advance to permit them an opportunity to appear and contest the application." An application for temporary injunctive relief, including (but not limited to) a motion for a stay or a TRO, must contain, in addition to the above, an affirmation demonstrating that notice has been provided, notice could not be provided despite a good faith effort to provide it or there will be significant prejudice to the moving party by giving such notice. The section does not apply to orders to show cause or motions in special proceedings under RPAPL Article 7 or to a DRL 240 request for orders of protection, unless the court orders otherwise. Note that 22 N.Y.C.R.R. 202.7(f), which does not appear to have been repealed, deals precisely with this issue and is similar but not identical to 202.8-e.

Every court or court part must adopt a procedure to request oral argument of motions, including whether oral argument is required on all motions or on a case-by-case basis, how counsel is to request argument and if oral argument is allowed, when counsel is to appear.

Oral Argument. New § 202.8-f: Entitled "Oral Argument." Every court or court part must adopt a procedure to request oral argument of motions, including whether oral argument is required on all motions or on a case-by-case basis, how counsel is to request argument and if oral argument is allowed, when counsel is to appear. If no procedure is adopted, paragraph (b) applies. 202.8-f(a). Subparagraph (b) provides that a party can request oral argument via a letter accompanying the motion. The court is to provide at least 14 days' notice, if practicable, of the oral argument date, at which time counsel is to be prepared to argue the motion, discuss the resolution of the issue(s) presented and schedule a trial or hearing. 202.8-f(b). The court can permit oral argument by

electronic means. 202.8-f(c). Note that this amendment overlaps 202.8(d), which discusses oral argument.

Statement of Material Facts. New § 202.8-g: Entitled "Motions for Summary Judgment; Statements of Material Facts." On a summary judgment motion, excluding a CPLR 3213 motion, "there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried." 202.8-g(a). The opposition papers must include a correspondingly numbered paragraph responding to each statement in the moving papers, and, when necessary, additional paragraphs with its own statements of material facts. 202.8-g(b). The paragraphs in the moving papers are deemed admitted unless the opposing party specifically contradicts them. 202.8-g(c). Each statement (including one that contradicts a statement) must be followed by a citation to evidence submitted in support of or in opposition to the motion. 202.8-g(d).

Appearances at Conferences Via Electronic Means and Adjournments. § 202.10: The existing rule, dealing with appearances at conferences, was amended, removing the reference to telephone conferences but permitting an appearance via electronic means. Adjournments of conferences are permitted upon good cause shown, without impacting any dates in the court order, including preliminary conference orders, unless the court directs otherwise.

In the next edition, we will deal with new rules impacting the efficient discovery of ESI from a nonparty (202.11); the interrogatory limit (25, including subparts) (202.20); privilege logs (202.20-a); the 10/7 rule for depositions (202.20-b); producing documents or objecting with particularity (202.20-c); deposing entities on specific matters (202.20-d); strict compliance with discovery deadlines (202.20-e); resolving disclosure disputes informally (202.20-f); rulings at disclosure conferences by non-judicial personnel (202.20-g); pretrial memoranda, exhibits, binders and jury instructions (202.20-h); non-jury trial direct testimony by affidavit (202.20-i); staggered court appearances to increase efficiency (202.23); good faith consultation before preliminary and compliance conferences (also 202.23); settlement conferences, pretrial conferences and undisputed expert testimony (202.26); informing the court promptly when a case is discontinued or otherwise over (202.28); a settlement conference before a justice other than the assigned one (202.29); agreement on pre-marked exhibits at trial (202.34); and witness lists, order of witnesses and length of testimony (202.37).

Finally, a Consensus Is Near on Who Should Gain From Medical Malpractice Buyouts

By Alexander Paykin

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In 2018, when Berkshire Hathaway bought out the mutual medical malpractice insurer MLMIC for more than $2.5 billion,[1] all the attention focused on the huge purchase price. Little attention was paid to the question of who was entitled to share in the benefits of the buyout – the doctors who held malpractice policies or the medical practices that had been paying the premiums on those policies. It turned out to be a difficult question to answer, as this was the first demutualization case of its kind in New York State, and the First and Fourth Departments of the Appellate Division were of different minds on the matter. Now, however, there are signs that a consensus might be reached, perhaps even by the Court of Appeals. This article examines the legal issues at stake and what the future may hold.

THE DEMUTUALIZATION PROCEEDS

Pursuant to Insurance Law § 7307(e)(3), MLMIC's Conversion Plan provided that anyone who was an MLMIC policyholder from July 2013 to July 2016 would receive a cash consideration in exchange for the extinguishment of the policyholder's membership interest. Who were the policyholders? Well, according to the policy documents and the conversion plan approved by the New York State Department of Financial Services, it was the doctors who maintained policies as the named insured parties – or so the Department of Financial Services and MLMIC believed and agreed to in the conversion plan. However, many medical practices had a different idea. After all, according to the practices, they were the ones that had been paying the policy premiums while their employed

doctors were receiving huge windfalls. Not surprisingly, litigation ensued.

At first, the practices saw a major win in a case known as *Shaffer.*[2] In that case, submitted based on stipulated facts pursuant to CPLR 222(b)(3), the First Department held that the practices were entitled to the payout under an unjust enrichment argument, since the practices had paid the premiums. In the short run, this decision resulted in many doctors, with the advice of counsel, accepting defeat and settling their disputes for pennies on the dollar or even abandoning their actions outright. At that time, some attorneys, including myself, did not believe that *Shaffer* got it right or was even applicable to the majority of cases, and as such, litigation continued in all four departments.

The practices' victory in *Shaffer* was short-lived. It was only a matter of time until the remaining Departments disagreed with the holding in *Shaffer* and the tide turned in favor of the doctors. First, the Fourth Department, in a unanimous ruling by a five-judge panel, ruled in favor of the doctors in *Maple-Gate*.[3]

The Fourth Department cited to the relevant portion of the Insurance Law, pointing out that a plan for conversion of a mutual insurance company to a stock company:

> shall . . . provide that each person who had a policy of insurance in effect at any time during the three year period immediately preceding [a specified date] shall be entitled to receive in exchange for such equitable share, without additional payment, consideration payable in voting common shares of the insurer or other consideration, or both.[4]

Based on the language of the conversion plan and the cited statutory law, the Fourth Department found that the practices "had no legal or equitable right of ownership to the demutualization payments," that "the mere fact that the plaintiff [employer] paid the annual premiums on the policies on the defendant [employee]'s behalf does not entitle it to the demutualization payments" and that "the MLMIC plan of conversion, in accordance with that provision of the Insurance Law, provided that cash distributions were required to be made to those policyholders who had coverage during the relevant period prior to demutualization in exchange for the 'extinguishment of their Policyholder Membership Interests.'"[5]

Then the Third Department followed the Fourth Department's lead and, in two decisions rendered unanimously by five-judge panels, ruled in favor of the doctors in both *Schoch*[6] and *Shoback.*[7] Having decided the two cases concurrently, the Third Department provided most of its substantive analysis in the *Schoch* decision, where it too quoted the same section of the Insurance law, further citing to the following sentences for clarity:

> The equitable share of the policyholder in the mutual insurer shall be determined by the ratio which the net premiums (gross premiums less return premiums and dividend paid) such policyholder has properly and timely paid to the insurer on insurance policies in effect during [those] three years . . . bears to the total net premiums received by the mutual insurer from such eligible policyholders (Insurance Law § 7307[e][3]).[8]

The Third Department then made a straightforward conclusion of law based on the black letter of the conversion plan and the relevant provision of the Insurance Law, as well as the detailed reasoning of the *Maple-Gate* decision from the Fourth Department. Without mincing words, Justice Mulvey, writing for the Court, declared:

> The first quoted sentence of this statute [Insurance Law § 7307(e)(3)] explains who is entitled to receive the consideration, whereas the second quoted sentence explains how the consideration for each eligible person is to be calculated. Consideration is owed to anyone who had a policy of insurance in effect during the relevant time period. Under MLMIC's conversion plan, the consideration is payable to eligible policyholders or their designees. Designee is defined to mean someone who a policyholder specifically designated to receive the proceeds from demutualization; an ordinary designation as policy administrator does not convey the right to receive the cash consideration. The conversion plan defines member of the corporation as a policyholder, which is further defined as the person identified on the policy's declarations page as the insured. Plaintiff was the named insured on the relevant MLMIC policy. Hence, per the relevant statute and the conversion plan's definitions, plaintiff was entitled to the cash consideration *(see Maple-Gate Anesthesiologists, P.C. v. Nasrin*, 182 A.D. 3d 984, 985 [2020]). [9]

This left the Second Department with conflicting precedents to rely on when it took up the question in *Maple Medical.*[10] The Second Department did not consider this a difficult question, unanimously agreeing with the Third and Fourth Departments in holding that "the plain language of Insurance Law § 7307, the plan of conversion, and the DFS decision make clear that the policyholder is entitled to the consideration paid in connection with the MLMIC demutualization," that "in conformity with the statute, the MLMIC plan of conversion also makes clear that the policyholders are the ones entitled to the cash consideration unless there has been a specific designation to an identified policy administrator" and that "it is undisputed that Scott (as well as the other physicians) did not specifically designate Maple Medical to receive the demutualization payments and that, in the cases of Youkeles and Mutic, Maple Medical was never designated policy administrator at all."[11]

The Second Department further noted that the First Department did not address the statutory issues in *Schaffer* and instead only addressed the argument of unjust

enrichment based on stipulated facts. Addressing the First Department's reasoning, the Second Department rejected the unjust enrichment argument, pointing to the fact that the First Department analogized the situation to the federal cases based on the ERISA statute and the Second Department rejected the analogy as inappropriate, given the clear state statutes involved in this controversy.

The Second Department found that "the essence of Maple Medical's unjust enrichment claim is an effort to use the principles of unjust enrichment to overcome the medical professionals' entitlement to the proceeds of demutualization, which entitlement derives from this State's Insurance Law. We therefore conclude that the unjust enrichment claim must be analyzed under New York's common law principles of unjust enrichment. The federal ERISA authorities are of no assistance in this regard."[12]

> ***The First Department also realizes that the holding in* Shaffer *is flawed, or should at least be highly limited. As such, the First Department has agreed to hear a new case,* Dworkin, *where it will have the opportunity to overrule or limit* Shaffer.**

Instead, the Second Department held that to establish a cause of action for unjust enrichment, the plaintiff needs to establish that as a result of a mistake in fact or law, "it conferred a benefit on the other party and that the other party will retain that benefit without adequately compensating the first party therefor." Applying those principles, the court held that:

> Maple Medical has not proven, and cannot prove, a cause of action for unjust enrichment. It has not provided the benefits in question to its employee-physicians—those benefits are provided by the plan of conversion and, ultimately, by the acquiring entity. At most, Maple Medical provided malpractice insurance premium payments, surely a benefit, but a benefit of the employment contracts between Maple Medical and its physician-employees for which the physician-employees paid valuable consideration in the form of their labor. Since the physicians provided their services to Maple Medical in exchange for the benefits paid to them, or for them, under the employment agreements, it simply cannot be said that the employees have not already adequately compensated Maple Medical for the benefits paid. The payment of the medical malpractice insurance premiums was not a gratuitous act; it was part of the bargained-for consideration for the employment services that the physicians provided to the medical group. Moreover, the medical group itself benefitted from the payment of premiums for the malpractice policies to the extent that they covered the group's vicarious liability for the acts of its employees.
>
> Analyzed somewhat differently, we agree with our colleagues in the Third Department that it cannot be said that any benefit was paid here under a mistake of law or fact. The demutualization proceeds are properly payable to the policyholders (or their written designees) based upon the appropriate construction of the governing statute and the conversion plan. No mistake of fact exists. No party changed its position. There was no fraud or other tortious conduct.
>
> The thrust of Maple Medical's argument is that Scott and the other physicians are receiving a windfall as the result of the demutualization of MLMIC. However, as our colleagues in the Third Department have written, the reality is that the consideration would equally be a windfall to Maple Medical if it were to receive it. Neither party bargained for it and neither party can be said to have paid for it.[13]

At this point, the First Department also realizes that the holding in *Shaffer* is flawed, or should at least be highly limited. As such, the First Department has agreed to hear a new case, *Dworkin,*[14] where it will have the opportunity to overrule or limit *Shaffer* and we expect that that is precisely what the First Department will do.

The Second Department then quoted to the Third Department in reaching a very simple conclusion:

> Had [the medical group] selected a different company to provide malpractice insurance to cover [the employee], [the medical group] would have met its contractual obligation to provide and pay for that insurance while [the employee] would have received the benefit of such coverage. Under those circumstances, neither party would receive a cash consideration. Thus, the demutualization proceeds were unexpected and will be a windfall to whichever party receives them. The fact that one party will receive these benefits does not mean that such party has unjustly enriched itself at the other's expense (see *Goel v Ramachandran*, 111 A.D. 3d [783,] 791), i.e., that it "is in possession of money or property that rightly belongs to another" (*Clifford R. Gray, Inc. v. LeChase Constr. Servs., LLC*, 31 A.D. 3d at 988).[15]

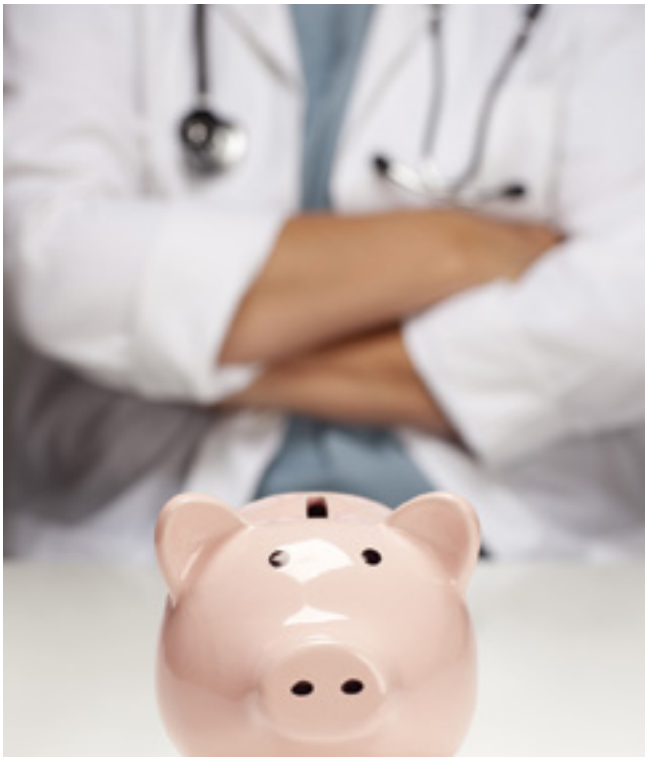
This decision left the First Department alone in its *Schaffer* reasoning. Interestingly, the First Department, in an effort to resolve the conflict, just held oral arguments in another appeal, seeking to overturn *Schaffer*. It was expected by many legal experts that the new action, *Dworkin*, would result in the First Department overturning or limiting *Schaffer* and ending the conflict between the departments.

However, before *Dworkin* could be heard at oral argument, the Court of Appeals agreed to hear an appeal of *Schoch*, now pending under Docket # APL-2020-00169. Upon being made aware of that, the First Department panel hearing *Dworkin* appeared to opt to wait until that matter is argued and decided before issuing its own decision on whether to have *Dworkin* overrule *Schaffer*. And so, all eyes are now on the Court of Appeals.

However, there are much more curious claims that doctors may have against their practices, which are only coming to light as a result of the MLMIC litigation.

THE DIVIDENDS: CONVERSION AND UNJUST ENRICHMENT BY THE PRACTICES

Many practices asserted, as part of their arguments for why they should keep the demutualization windfall, that it would be consistent with the dividend payouts, which are also paid to the policyholders but which they (the practices) have been pocketing for years. While that seems to have (correctly) fallen on deaf ears when it comes to being considered a viable legal argument for them keeping the demutualization proceeds, it also (sadly) fell on deaf ears in those situations where the lawyers for the doctors did not immediately spot a claim that their clients have against the practices.



In some cases, like in *Schoch*, doctors actually "signed a form designating defendant as the policy administrator of the MLMIC policy, thereby appointing defendant as her agent and giving defendant the right to, among other things, make changes to the policy and receive dividends."[16] However, many others did not. Instead, those doctors relied on the practices to act as their fiduciaries in purchasing insurance on their behalf. At no point did those doctors actually designate the practices as the recipients of dividend payments, which, over many years of practice, add up to rather significant sums.

In effect, it can be argued that since the courts (in at least three of the departments) now clearly hold that the policyholder is the doctor and is entitled to all payouts, by the practice's own arguments the doctor is also entitled to all of the dividends paid. Normally, the statute of limitations would limit such recovery to at most six years, on a breach of contract claim. So, a doctor who was aware of the practice can only sue to recover the last six years of dividends.

However, where the practice simply pocketed the money and never mentioned to the doctor that a dividend payment even existed, the recovery would be based on a concealed fraud, and the cause of action would be for the entire period of the dividend payments – provided it is commenced within two years of discovery of the fraud.

So, as a result of the MLMIC litigation, the medical practices have not only solidified the position that the doctors are entitled to the proceeds but further exposed themselves to (and often flat out admitted to) claims against themselves for conversion, unjust enrichment and even fraud. In fact, given this new line of argument, even if a doctor were not insured with MLMIC, he or she may now have a cause of action against his or her past or present employer.

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1. Berkshire Hathaway Inc. 2019 Annual Report, p. K-79, https://www.berkshirehathaway.com/2019ar/2019ar.pdf.
2. *In re Schaffer, Schonholz & Drossman, LLP v. Title*, 171 A.D.3d 465 (1st Dep't 2019).
3. *Maple-Gate Anesthesiologists, P.C. v. Nasrin*, 182 A.D.3d 984 (4th Dep't 2020).
4. *Id.* at 985.
5. *Id.*
6. *Schoch v. Lake Champlain OB-GYN, P.C.*, 184 A.D.3d 338 (3d Dep't 2020).
7. *Shoback v. Broome Obstetrics & Gynecology, P.C.*, 184 A.D.3d 1000 (3d Dep't 2020).
8. *Schoch* at 341-342.
9. *Schoch*, 184 A.D.3d at 342.
10. *Maple Medical, LLP v. Scott*, 2020 N.Y. Slip Op. 07366, 2020 WL 7233649 (2d Dep't 2020).
11. *Id.* at *25.
12. *Id.* at *36.
13. *Id.* at *37-39.
14. *Mid-Manhattan Physician Services, P.C. v. Dworkin*, First Department Docket # 2019-03771, with oral arguments on January 5, 2021 (and available on YouTube).
15. *Schoch*, 184 A.D.3d at 346 (cited by *Maple Medical*).
16. *Id.* at 340.

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Can Private Sector Employers Require Employees To Be Vaccinated for COVID-19?

By Jennifer M. Schwartzott and Theresa E. Rusnak

As the rollout of COVID-19 vaccines continues both in New York and across the country, the question of whether private sector employers can require their employees to be vaccinated has become increasingly pressing. To answer this question, employers must consider pertinent employment laws, including Title VII of the Civil Rights Act, the Americans with Disabilities Act, along with safety considerations raised by the Occupational Health and Safety Administration and Workers' Compensation Commission.

JUDICIAL OPINIONS GOVERNING COVID-19 VACCINATIONS ARE SCANT

As with most COVID-19-related legal predicaments, there are very few guiding judicial opinions to rely upon because we are still in the midst of the pandemic, and judges have not yet had an opportunity to weigh in. As a result, we are left to consider judicial opinions in cases that relate to other communicable diseases (e.g., influenza) not specific to COVID-19. Of that body of cases, most opinions discuss health care employers and vaccination mandates on their health care provider employees. For example, in *Robinson v. Children's Hospital of Boston*, an employee working in the Emergency Department challenged the hospital's mandate requiring her to be vaccinated for influenza, claiming the vaccine violated her religious beliefs. The United States District Court for Massachusetts upheld the hospital's vaccination requirement. The court found it was an undue hardship to allow the employee to remain unvaccinated as a form of religious accommodation.[1]

There are some decisions outside of the health care employer context as well, and those decisions suggest a willingness to allow mandatory employer vaccinations in some circumstances. By way of example, in *Kiel, et al. v. The Regents of the University of California, et al.,* a California superior court denied plaintiffs' request for a preliminary injunction to enjoin the enforcement of a policy mandating students, faculty and staff receive a flu vaccine as a condition to access university property during the 2020-2021 flu season.[2] Although not a dispositive decision in favor of mandatory vaccinations, the court's action at least indicates requiring vaccines is not a closed issue in the non-health care employer context.

As vaccines become more readily available, it is likely that additional legal challenges and subsequent court decisions will be forthcoming in the State of New York and throughout the nation in 2021.

EEOC GUIDANCE SUGGESTS MANDATORY VACCINATIONS ARE PERMITTED IN CERTAIN CIRCUMSTANCES

In anticipation of the COVID-19 vaccine distribution, on December 16, 2020, the Equal Employment Opportunity Commission issued guidance relating to vaccination requirements in the workplace in the context of Title VII and the ADA.[3] The EEOC guidance does not expressly state whether employers are permitted to require vaccines, but a fair interpretation of the guidance suggests employers can do so provided accommodations are made for employees with religious and medical needs.

Employers May Need To Engage in a "Direct Threat" Analysis

In the guidance, the EEOC clarifies the administration of the COVID-19 vaccine itself is not a "medical examination" and, therefore, does not require an employer to inquire about an individual employee's health status (which would otherwise be prohibited).[4] But, the prescreening questions the Centers for Disease Control and Prevention recommends be asked before administering the vaccine to an individual to ensure there is no medical reason the individual should not receive the vaccination are, however, "medical examinations"[5] because they elicit information concerning an employee's medical condition.[6]

As such, according to the EEOC, for an employer to ask the prescreening questions that are necessary to administer the vaccine, the employer must show the questions are "job-related and consistent with business necessity."[7]

To meet this standard, the EEOC explains that an employer must have a reasonable belief, based on objective evidence, and an employee who does not answer the questions (and will consequently be disqualified from being vaccinated) will pose a "direct threat" to the health or safety of her- or himself or other employees in the workplace.[8] This is commonly referred to as a "direct threat" analysis, and it mandates that an employer assess

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several factors, including the duration of the risk; the nature and severity of the potential harm; the likelihood that the harm will occur; and the imminence of the potential harm.[9] In the context of COVID-19, if an employer determines that an unvaccinated employee poses a "direct threat," the employer can require the employee to receive the vaccine. Importantly, though, an employee cannot be excluded from the workplace "unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so that the unvaccinated employee does not pose a direct threat."[10]

Notably, employers can avoid engaging in the "direct threat" analysis and still require employees to be vaccinated against COVID-19 by mandating employees receive the vaccine from a third party not affiliated with the employer, such as a pharmacy or health care provider.[11] The reason for this is because, in that scenario, the employer would not gain access to employees' medical information (revealed in response to the prescreening questions). Employers could also consider making the vaccine voluntary for employees, such that if an employee refuses to answer the prescreening questions (and thus not receive the vaccine), there are no adverse consequences to the employee's employment.[12]

Employers Will Need To Contemplate Medical and Religious Objections

The EEOC guidance also addresses how employers should respond to employees who refuse to participate in a mandatory vaccination program due to medical or religious reasons. Specifically, employers have an obligation to reasonably accommodate employees with medical or religious objections to the extent that such accommodations do not impose undue hardships.[13] Such accommodations could include altering the employee's schedule or work location to minimize contact with others or requiring an employee to wear additional protective equipment when working. If there are no accommodations that can be granted without imposing an undue hardship – meaning having more than a *de minimis* cost or burden on the employer – then the employer may lawfully exclude the employee from the workplace.[14] Additional accommodations, however, may still be warranted when an affected employee can do his or her work duties remotely (which would also be subject to the undue hardship analysis).[15]

The EEOC Considered the FDA's Emergency Use Authorization Process

COVID-19 vaccines were federally approved through the Food and Drug Administration's Emergency Use Authorization (EUA) process.[16] Consequently, the Food, Drug and Cosmetic Act, by which the EUA is authorized, dictates individuals who receive a EUA-approved vaccination must be informed they have the option to accept or refuse administration of the vaccine and of the consequences, if any, of refusing the vaccine.[17]

This statutory requirement adds a complicating wrinkle to the question of whether employers can mandate vaccinations, which the EEOC guidance acknowledges. While more guidance from both the FDA and the EEOC is expected, the EEOC's reference to the EUA process in its guidance can be taken to mean it considered the FDA's position and does not consider it determinative as to whether employers can mandate vaccinations. In other words, an individual's right to refuse the vaccine does not necessarily prohibit employers from requiring its employees who are present in the workplace to be vaccinated.

Employers who wish to mandate COVID-19 vaccinations should develop a vaccination policy outlining the employer's reasons for compelling the vaccine; the details about how and who will administer it; and how religious or medical accommodations will be addressed.

Safety Considerations Required by OSHA and Governed by Workers' Compensation Should Be Contemplated

Under the General Duty Clause of the Occupational Safety and Health Act, employers are required to provide employees with a "safe workplace." Specifically, the OSHA Act requires employers to create a place of employment which is "free from recognized hazards that are causing or likely to cause death or serious physical harm."[18] Given this, a claim could surely be made that the failure to require vaccinations in the workplace violates the General Duty Clause. In response, employers can defend against this by contending its use of distancing, barriers and protective equipment were sufficient to meet its obligations under the General Duty Clause without requiring vaccinations, but OSHA does not prohibit employers from mandating vaccinations. In 2009, the agency published an interpretation letter stating nothing in the OSHA Act prohibited employers from

requiring mandatory influenza vaccinations,[19] but noted the refusal to receive a vaccine due to medical reasons that have the potential to cause serious illness or death would be protected by the Act.[20]

Additionally, adverse reactions to required vaccinations may lead to workers' compensation claims by employees. In *Employer: NYC HHC*, the New York State Workers' Compensation Board upheld benefits for a mandatory influenza vaccination that caused an adverse reaction.[21] Furthermore, workers' compensation benefits may apply even if an employee receives a vaccine voluntary, at least in the health care setting. In *Employer: Mohawk Valley Child & Youth*, the board found that an employee who suffered an adverse reaction to an optional hepatitis B vaccine was entitled to benefits because the vaccination was directly tied to the "quality of danger peculiar to the work and incidental to the business" of the health care employer and was not a "generalized health concerns outside of the employer's workplace."[22] A COVID-19 vaccine, in a health care setting, may well fit these parameters.

Until the judicial opinions begin to roll in, employers who wish to mandate COVID-19 vaccinations should undertake an analysis of the issues discussed herein and consider developing a vaccination policy outlining the employer's reasons for compelling the vaccine; the details about how and who will administer it; and how religious or medical accommodations will be addressed, at a minimum. No question, mandatory vaccinations will be a topic of interest for employers and employees for the foreseeable future and should be considered carefully.

1. *Id.* at *9.
2. 2020 WL 7873525 (Cal. Super. 2020).
3. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, Equal Employment Opportunity Commission, (December 16, 2020); https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.
4. *Id.* at K.1.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *See id.* at K.5.
10. *Id.*
11. *See id* at. K.2.
12. *See id.*
13. *Id.* at K.6.
14. *See id.*
15. *Id.* at K.5.
16. *Id* at K.4.
17. *See Emergency Use Authorization for Vaccines Explained*, Food & Drug Administration (November 11, 2020); https://www.fda.gov/vaccines-blood-biologics/vaccines/emergency-use-authorization-vaccines-explained.
18. *COVID-19: Regulations*, Occupational Safety and Health Administration; https://www.osha.gov/coronavirus/standards.
19. *Standard Interpretations*, Occupational Safety and Health Administration (November 9. 2009); https://www.osha.gov/laws-regs/standardinterpretations/2009-11-09.
20. *See id.*
21. 2012 WL 106430, (N.Y. Work. Comp. Bd. Jan. 9, 2012).
22. 2001 WL 1140311, at *1 (N.Y. Work. Comp. Bd. June 7, 2001).

New York Update: How Force Majeure and Related Common Law Doctrines Are Applied in the COVID-19 Context

By Stephanie L. Denker and Christie R. McGuinness

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As the United States enters the second year of the COVID-19 pandemic, there are still many safeguards in place to minimize the spread of the virus, including, among other things, travel bans and executive orders limiting business operations, indoor dining and the size of gatherings. These measures have led to major conferences being conducted virtually, Broadway keeping its doors shut and the majority of sports arenas and stadiums operating with limited or no fans. Behind each of these events are contracts that parties have been unable to perform as originally contemplated due to the pandemic. New York has seen quite a bit of litigation surrounding these circumstances, with parties citing force majeure and related common law doctrines as bases to avoid liability for failure to perform their contractual obligations. This article provides an update on some recent New York cases impacting these salient legal issues.

COVID-19 IS A "NATURAL DISASTER"

The Southern District of New York recently held that the COVID-19 pandemic qualifies as a "natural disaster."[1] The court noted that "[a]lthough neither the New York Court of Appeals nor the Second Circuit Court of Appeals has yet addressed whether the COVID-19 pandemic should be classified as a natural disaster, the Second Circuit has identified 'disease' as an example of a natural disaster, *Badgley v. Varelas*, 729 F.2d 894, 902 (2d Cir. 1984)," and courts in Pennsylvania have already determined that the COVID-19 pandemic qualifies as a natural disaster.[2]

JN Contemporary Art LLC arose out of a contract to auction a painting at a May 2020 auction, which contained a termination provision that read:

> In the event that the auction is postponed for circumstances beyond our or your reasonable control, including, without limitation, as a result of natural disaster, fire, flood, general strike, war, armed conflict, terrorist attack or nuclear or chemical contamination, we may terminate this Agreement with immediate effect. In such event, our obligation to make payment of the Guaranteed Minimum shall be null and void and we shall have no other liability to you.[3]

The Southern District dismissed the lawsuit, finding that COVID-19 "and the regulations that accompanied it fall squarely under the ambit of" the termination provision, and therefore, the auctioneer was permitted to terminate the agreement and not pay the guaranteed minimum.[4]

In rendering this decision, the Southern District noted that

> a pandemic requiring the cessation of normal business activity is the type of 'circumstance' beyond the parties' control that was envisioned by the termination provision. The exemplar events listed in Paragraph 12(a) include not only environmental calamities events such as floods or fires, but also widespread social and economic disruptions such as 'general strike[s],' 'war,' 'chemical contamination,' and 'terrorist attack.'[5]

The Southern District also looked at the common meaning of "natural disaster" and found that COVID-19 fits within the definitions set forth in *Black's Law Dictionary* and *Oxford English Dictionary*.[6]

The Southern District further found that "where nonperformance is excused by a contract's force majeure provision, the implied covenant [of good faith and fair dealing] does not require substitute performance,"[7] and that there was no breach of fiduciary duty because the scope of the duty of loyalty was modified by the contract, which "unambiguously entitled [the auctioneer] to terminate the consignment arrangement following a force majeure event."[8]

In sum, the Southern District dismissed the entire lawsuit seeking to compel a party's compliance with an agreement because COVID-19 is a natural disaster and fell within the contract's force majeure provision.

THE DOCTRINES OF FRUSTRATION OF PURPOSE AND IMPOSSIBILITY ARE LIKELY NO EXCUSE

Parties seeking to be excused from their contractual obligations can sometimes rely upon the common law doctrines of frustration of purpose and impossibility. However, some New York state courts have found that a tenant cannot rely upon these doctrines to excuse itself from paying rent in the wake of COVID-19.

For example, in *1140 Broadway LLC v. Bold Food LLC*, the court granted summary judgment as to liability in favor of the landlord and found that neither the doctrines of frustration of purpose nor impossibility applied to excuse the tenant's performance under the subject lease for office space on the 12th floor of plaintiff's building.[9] The tenant, which manages and consults for a group of restaurants, stopped paying rent in February 2020, citing COVID-19 as the justification, and then vacated the office space in June 2020.

As to frustration of purpose, the court held that this situation "does not fit into the narrow doctrine of frustration of purpose."[10] The court stated:

> Simply put, defendants could no longer afford the rent because restaurants no longer needed the management help that the tenant provides. This is not a case where the office space leased was destroyed or where a tenant rented a unique space for a specific purpose that can no longer serve that function (such as a factory that was condemned after the lease was signed or a [sic] agreeing to rent costumes for a specific play to be performed at a specific theater on specific dates but the theater burned down before the first rental date).[11]

The court noted that this holding was limited to the subject lease, "where the tenant rented office space, the tenant's industry experienced a precipitous downfall and the tenant . . . [was] no longer . . . able [to] pay the rent."[12]

> impaired or excused because Owner is unable to fulfill any of its obligations under this lease . . . by reason of . . . government preemption or restrictions,' which is the case here.[18]

The tenant was not shut down by any public health directive. Therefore, the court held that neither of these common law doctrines was applicable to excuse the tenant's performance under the lease.

With respect to the doctrine of impossibility, the court stated:

> Many food establishments decided to shut down because of the financial consequences from both the pandemic and the public health orders, but that does not mean there was a 'destruction of the subject matter' contemplated in the contract at issue here, which was for office space on the twelfth floor of an office building.[13]

The tenant "was not shut down by any public health directives" and, thus, "was one step removed from the governor's public health orders relating to restaurants because their business assists restaurants."[14] Therefore, the court held that neither of these common law doctrines was applicable to excuse the tenant's performance under the lease.

Similarly, in *BKNY1, Inc. v. 132 Capulet Holdings, LLC*, the court found that

> [t]he mandatory closure of plaintiff's restaurant business . . . by Executive Order No. 202.3 . . . did not relieve it of its contractual obligation to pay rent. Plaintiff has failed to cite – and the Court's own review has not uncovered – any provision of the lease excusing it from timely and fully paying its rent during (and notwithstanding) the state-mandated closure of its business.[15]

The court further found that the "doctrine of frustration of purpose is inapplicable under the circumstances," noting that "a temporary closure of plaintiff's business for two months (April and May 2020) in the penultimate year of its initial term could not have frustrated its overall purpose."[16] Likewise, the court found that the doctrine of impossibility of performance is not available to the plaintiff, noting that "[n]othing in the lease at issue permits termination or suspension of plaintiff's obligation to pay rent in the event of the issuance of a governmental order restricting the use of the leased premises."[17] The court further stated:

> [T]he lease specifically provides that plaintiff's obligation to pay rent 'shall in no wise be affected,

In short, these two New York state courts have "decline[d] to step in and unilaterally modify the parties' contract and tell the landlord that it should not be able to enforce the agreement it signed with a tenant."[19]

TAKEAWAY

In light of these recent decisions, it is evident that New York courts are looking at each lawsuit on a case-by-case basis. Parties should therefore (1) determine whether the subject contract has a force majeure provision, (2) evaluate whether the force majeure provision contains language that would be triggered by the event at issue, including references to "natural disasters" and (3) assess whether other contractual defenses are available in light of the particular dispute at hand. We will continue to monitor relevant decisions from New York courts as litigation regarding the COVID-19 pandemic shows no signs of waning.

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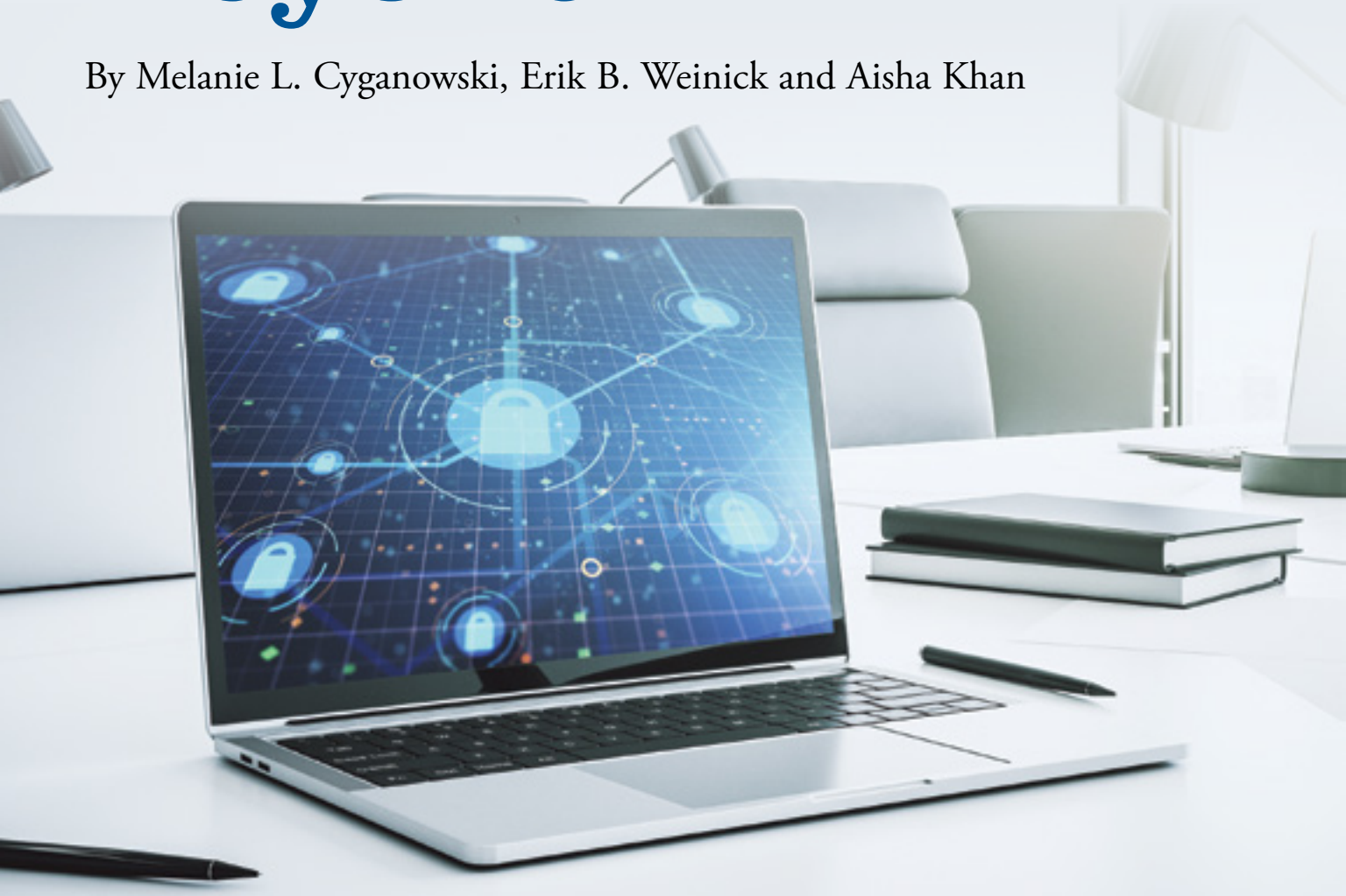
1. *See JN Contemporary Art LLC v. Phillips Auctioneers LLC*, No. 20-cv-4370, 2020 WL 7405262, at *7 (S.D.N.Y. Dec. 16, 2020).
2. *Id.* at n. 7 (citing *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 370 (Pa. 2020); *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 889 (Pa. 2020)).
3. *JN Contemporary Art LLC*, 2020 WL 7405262, at *2.
4. *Id.* at *7-8.
5. *Id.* at *8.
6. *Id.* at *7.
7. *Id.* at *10.
8. *Id.* at *12.
9. *1140 Broadway LLC v. Bold Food LLC*, 2020 N.Y. Misc. LEXIS 10358 (Sup. Ct., N.Y. Co. Dec. 3, 2020).
10. *Id.* at p. 3.
11. *Id.*
12. *Id.*
13. *Id.* at p. 4.
14. *Id.*
15. *BKNY1, Inc. v. 132 Capulet Holdings, LLC*, No. 508647/2016, 2020 NYLJ LEXIS 1589, at pp. 2-3 (Sup. Ct., Kings Co. Sept. 23, 2020) (directing plaintiff to pay rent).
16. *Id.* at p. 3.
17. *Id.* at p. 4.
18. *Id.*
19. *1140 Broadway LLC*, 2020 N.Y. Misc. LEXIS 10358 at p. 6.

Protecting Privilege in Cyberspace: The Age of COVID-19 and Beyond

By Melanie L. Cyganowski, Erik B. Weinick and Aisha Khan



The COVID-19 pandemic has accelerated companies' reliance on outside consultants to secure their virtual workspaces and has ushered in a new reliance on a different set of consultants to secure their physical workspaces from the virus and other threats. Unfortunately, even the most diligent organizations may still encounter a breach of those defenses, and litigation will surely follow. Counsel for plaintiffs in those lawsuits will almost certainly seek discovery of any analysis or reports performed by outside counsel in advance of, or following, such incidents. When that litigation reaches the discovery phase, a critical question will arise – are the reports prepared by those outside consultants, either before or after the precipitating event, discoverable? Or, are they instead protected by attorney-client privilege or the work-product doctrine? This article seeks to answer that question through an examination of relevant case law and a discussion of recommended best practices for the engagement of outside technical consultants in both the cyber and health spheres.[1]

It is often said that it is not a question of if, but rather a question of when, an individual or entity will be the victim of a cyber-intrusion,[2] and unfortunately, that same maxim may hold true when it comes to populations that remain unvaccinated against COVID-19. As to their electronic systems, organizations should conduct routine pre-breach assessments of their hardware and software systems, organizational systems, policies and governance in order to maintain resilience and minimize the risk or severity of cyberattacks (while maximizing the speed and extent of post-incident recovery).[3] These investigations produce documents and communications containing valuable information regarding a company's cybersecurity posture.[4] Likewise, with respect to physical spaces, outside consultants are guiding organizations on how to reshape their environments and processes so as to limit the spread of not only COVID-19 but other contagions as well. These pre-incident recommendations take written form, as will post-incident analyses developed following an outbreak, cyber-incident or other type of adverse event.

Unfortunately, these proactive analyses can be a double-edged sword. On the one hand, companies that fail to conduct pre-breach assessments can be accused of failing to engage in a bare minimum of cybersecurity vigilance.[5] On the other hand, companies that routinely conduct pre-breach assessments run the risk of having their assessments exposed in court if litigation following a breach ensues.[6] While there is no bright-line nationally accepted rule on whether privileges may attach to these reports, caselaw does provide insight as to how companies can maximize the chances that their assessments will remain shielded by the work-product doctrine and/or the attorney-client privilege (sometimes referred to by technology professionals as "legal shield"). These principles are applicable in the physical realm as well, such as when companies engage health care or environmental experts to advise how to protect workers and others returning to physical spaces.

RELEVANT CASE LAW AND KEY TAKEAWAYS

The Development of Work-Product Doctrine and Attorney-Client Privilege Principles

Courts confronting work-product doctrine questions often begin their analysis with *United States v. Adlman*.[7] There, the Internal Revenue Service sought production of a document that had been ordered by Adlman, Sequa Corporation's attorney and vice president of taxes. Specifically, Adlman had directed an outside accountant and lawyer to evaluate the tax implications and potential for litigation concerning a possible restructuring. The documents in question analyzed legal challenges the IRS would likely bring against the reorganization and resulting tax refund claim.[8] In considering the protection afforded to dual-purpose documents, meaning those serving both business and litigation purposes, the Second Circuit held that a document created because of anticipated litigation that revealed information regarding the potential litigation would not lose work-product protection simply because it was intended to assist business decision-making which depended upon the likely out-

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come of anticipated litigation.[9] Importantly, the Second Circuit held that application of a "because of" test is the appropriate standard for determining whether a document should be shielded from production.[10] Specifically, "[w]here a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation, it falls within Rule 26(b)(3)" meaning it is protected by the work-product doctrine.[11] On the other hand, documents prepared in the ordinary course of business, or those that would have been prepared in a substantially similar form, regardless of the potential for litigation, are not protected by the work-product doctrine.[12]

As in non-cybersecurity cases, courts will assess whether the document was prepared in anticipation of litigation and would not have been prepared in that form except for the prospect of litigation.

In addition to work product, reports by retained consultants or experts may also be entitled to protection as an attorney-client communication. In the seminal case on attorney-client privilege, *Upjohn Co. v. United States*, the Supreme Court held that the privilege applies to communications between counsel and retained experts assisting counsel in providing legal advice to their clients.[13] The Court noted that "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[14] *Upjohn* built upon the ruling of an earlier case, *United States v. Kovel*. In *Kovel*, the Second Circuit held that the privilege could be extended to an accountant hired by an attorney to assist the attorney in understanding their client's complex tax story; the attorney subsequently relied upon the accountant when providing legal advice to the client.[15] The Second Circuit concluded that "the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege was designed to permit."[16] Therefore, the attorney-client privilege is not waived by disclosure to a third party – if transmission to the third party facilitates an attorney's ability to provide legal advice to his or her client.

These principles were seen again in *United States v. Schwimmer* and *In re Grand Jury Subpoenas*. In *Schwimmer*, the Second Circuit noted that the attorney-client privilege may cover "communications made to certain agents of an attorney . . . hired to assist in the rendition of legal services," such as the communications at issue between a client and an accountant retained by counsel to assist in rendering legal services to a pair of co-defendants.[17] In *In re Grand Jury Subpoenas,* the defendant's counsel hired a public relations firm to garner favorable publicity for the client in the hopes of prosecutorial leniency.[18] The court determined that retaining the firm was necessary for lawyers "to perform some of their most fundamental client functions," notably seeking to narrow charges brought against their client.[19] Ultimately, the court held that communications between the lawyer and the retained consultants were protected by the attorney-client privilege because the public relations role was necessary to achieve a legitimate litigation goal and the attorneys' ability to advocate for their client would have been undermined if the attorneys could not engage in candid conversations with their consultant-agents. Thus, in order for the consultant's and lawyer's communications to be privileged, the consultant's role must be to assist the lawyer in providing informed client advice or achieving a litigation goal.

Work-Product Doctrine and the Attorney-Client Privilege in the Context of Cybersecurity

In the cybersecurity context, while there is not as yet a bright-line rule on when the work of retained technical consultants is protected from disclosure in litigation, a recent string of cases has provided guidance. First, in *In re Premera Blue Cross Customer Data Sec. Litigation,* the court considered whether a document prepared by Premera's retained consultant, Mandiant, would have been created in substantially similar form "but for" the prospect of litigation.[20] Mandiant had already been working for Premera when it discovered malware in Premera's system.[21] Premera subsequently hired outside counsel, which entered into a new agreement under which Mandiant's work would be supervised by that outside counsel.[22] The court applied the "because of" test and held that the documents were discoverable because the amended statement of work did not otherwise change the scope of Mandiant's work from what was described in the original pre-malware discovery services agreement between Mandiant and Premera.[23] As in non-cybersecurity cases, courts will assess whether the document was prepared in anticipation of litigation and would not have been prepared in that form except for the prospect of litigation.[24]

Mandiant's pre-breach activities and services were also at issue in *In re Dominion Dental Servs. USA, Inc. Data Breach Litigation*.[25] There, Dominion Dental had retained Mandiant before a cyber-incident which led to litigation. Following discovery of the intrusion, outside counsel entered into a new statement of work with Mandiant, which included essentially the same deliverables and duties as the pre-breach statement of work.[26] The court held that the defendants failed to demonstrate that the Mandiant report would not have been produced in substantially the same form but for the prospect of the present litigation. The key factor in this outcome was that the new, post-breach statement of work was nearly identical to the original, pre-incident statement of work.[27]

As in *Premera*, the third-party expert's analyses were not protected from discovery because of the lack of distinction between the consultant's pre- and post-incident work. This distinction between pre- and post-incident work is critical and was further highlighted by *Genesco, Inc. v. Visa U.S.A., Inc.*, where the defendants prevailed in keeping documents created by a consultant following an incident protected from discovery. The court denied Visa's discovery requests for the analyses, reports and communications between Genesco and the cybersecurity firms it retained following a data breach. There, Genesco's outside counsel retained a forensic firm to assist with an investigation into how a cyber attack occurred.[28] The court held that the report in question was protected as work-product because it was prepared by the outside consultant at the direction of the breached company's outside counsel and also constituted attorney-client communications because it was prepared to assist the company's counsel in providing legal advice – comparable to the protections afforded to communications with accounting consultants helping attorneys translate complex topics for their clients and enabling them to provide their clients with informed advice. As a result, the communications and documents served a primarily legal purpose.[29]

Similarly, in *In re Experian Data Breach Litigation*, documents created by a consultant following a breach were protected from disclosure. As in other cases, the court began its analysis with the "because of" test, paying particular attention to "factors such as the timing of the retention of the non-testifying expert in relation to the litigation at issue and the existence of evidence including . . . engagement letters."[30] While the consultant, Mandiant, had been retained prior to the breach, the court noted that the consultant's pre-breach work for the defendant was distinct from the post-breach work it was performing for Experian's outside counsel following the breach. Furthermore, the retention of outside counsel immediately followed discovery of the breach, further supporting a determination that this retention was in anticipation of post-breach litigation. Importantly, the consultant's report was used by the party's in-house and outside counsel to develop its litigation strategy. This highlights the value in drawing a distinction between the use of a consultant's reports for legal, as opposed to routine, business purposes.

A widely reported and different outcome was seen recently in *In re Capital One Consumer Data Security Breach Litigation.* In July 2019, Capital One learned that a hacker stole sensitive information from its cloud platform, impacting about 100 million customers.[31] Following the incident, Capital One hired outside counsel to help prepare for an expected onslaught of litigation.[32] As part of its litigation plan, Capital One's outside counsel hired Mandiant, a firm the reader will now be familiar with.[33] However, Capital One (like Premera and Dominion Dental before it) had already retained Mandiant, in the normal course of its business, prior to the breach.[34] Following the breach, outside counsel and Mandiant entered into a new services agreement, whereby Mandiant would investigate the breach and issue a report detailing the specifics of the breach.[35] Mandiant conducted its investigation and sent a report to outside counsel, which then sent the report to Capital One's legal team and its Board of Directors.[36]

During discovery, the plaintiffs moved to compel production of the Mandiant report, arguing that Mandiant had been retained for business purposes and, therefore, the report was not shielded from production. The district court judge affirmed the magistrate judge's ruling that the report must be disclosed to the plaintiffs.[37] The district court judge emphasized that the post-breach engagement letter between Capital One's outside counsel and Mandiant did not require Mandiant to perform work that was substantially different from the work it had already undertaken as part of its ongoing business relationship with Capital One, which dated back to 2015.[38] The court noted that Capital One would likely have asked for such a report to be prepared, even if it was not anticipating litigation, thus failing the "because of" test. Additionally, the retention of outside counsel was not, by itself, enough to turn a document into work product.[39] In addition, the plaintiffs were also seeking a root cause analysis (RCA) conducted by PwC following the breach.[40] Capital One argued that this RCA was protected as work product, because it was prepared to assist Capital One in responding to the onslaught of litigation stemming from the breach.[41] Capital One also argued that plaintiffs did not demonstrate a "substantial need" for the RCA, especially considering the voluminous productions already made by Capital One – which included their own internal RCAs.[42] Ultimately, the court denied the plaintiffs' request for the RCA, finding that the primary purpose of commissioning the RCA was to provide legal advice to Capital One's executives

in the context of litigation.[43] Other courts have since taken consistent positions. In *Wengui v. Clark Hill, PLC*, currently pending before Judge Boasberg in the District of Columbia, the plaintiff is suing his former law firm for failing to take sufficient precautions to protect his data.[44] The plaintiff moved to compel production of "'all reports of its forensic investigation into the cyberattack' that led to the public dissemination of Mr. Guo's confidential information."[45] Judge Boasberg determined that the defendant law firm had failed to meet its "burden to demonstrate that a substantially similar document [to the report at issue] would not have been produced in the absence of litigation" and thus denied work-product protection for the document sought by the plaintiff.[46] Relatedly, the court determined that because the defendant's goal in having the report produced was gleaning the technical consultant's "expertise in cybersecurity" as opposed to legal advice from its lawyers, it was also not entitled to protection by the attorney-client privilege.[47]

IMPLICATIONS BEYOND THE CYBERSECURITY CONTEXT

While some may view the *Capital One* decision concerning Mandiant as a watershed moment and inconsistent with prior decisions regarding post-breach analysis, further review demonstrates consistency with prior decisions such as the line of cases discussed above. The decisive factor in *Capital One* was the "because of" test, as the court concluded that the Mandiant report would have been generated even in the absence of litigation, which can be reconciled with the court's later decision to not allow access to the RCA prepared by PwC. This highlights the need for organizations to consciously and explicitly segregate their ongoing cyber vigilance (and COVID-19 vigilance) from their post-incident response. That segregation between pre- and post-incident work may include, if necessary, retention of different consultants for each task even though one of the benefits of utilizing an existing consultant is their built-in familiarity with the company's systems and processes. Thus, for organizations that are large enough, they might consider having two sets of consultants – one for ongoing work and one on standby for post-incident response (but which has already familiarized itself with the organization ahead of time so as to be able to "hit the ground running" once the alarm is sounded). If that is not possible, at minimum, outside counsel should retain its usual consultant under a new statement of work in which the consultant's duties are clearly and substantially distinct from the consultant's pre-incident services for the company, although, as the cases make clear, simply having the attorney serve as a conduit for retention does not suffice to invoke the work-product or attorney-client protections.

As discussed, the foregoing considerations are not necessarily limited to cyberspace, as the COVID-19 pandemic has highlighted another important role for outside consultants advising on the mitigation of virus spread in the physical realm. While the litigation trajectory for COVID-19-related claims is in its infancy, it is not premature to begin to consider potential discovery issues by examining analogous cases. For example, the pandemic has already given rise to workplace safety litigation, with allegations of employers failing to adequately protect their employees from on-the-job coronavirus transmission.[48] Large employers such as Walmart and Trader Joe's have already experienced outbreaks of COVID-19 among their employees.[49] There are also pending putative class actions in which plaintiffs seek injunctions requiring employers to adopt and enforce specific safety protocols before expecting employees to return to work, and the advice provided to companies by outside consultants regarding these issues can certainly impact the outcome of those litigations.[50]

RECOMMENDATIONS AND CONCLUSION

In sum, practitioners should give careful consideration to the discoverability of reports and analyses created by

their clients' outside consultants, both before and after an incident has occurred. While such consultants can play vital roles, such as in dealing with the cybersecurity and health issues discussed herein, their work can become critical evidence against the very organization they were intended to help, should litigation arise following a negative incident. Despite some "conventional wisdom" to the contrary, simply copying counsel on correspondence is far from sufficient to ensure availability of some type of privilege or "legal shield." At minimum, regardless of whether the work is proactive or reactive, consultants should be retained through outside counsel (not just in-house counsel) and their work parameters should be clearly defined. Where possible, the proactive work should be part of counsel's effort to provide the organization with legal advice on compliance with legal obligations (such as regulations or contractual covenants). Should a negative incident (such as a cyber intrusion or a COVID-19 outbreak) occur, and reactive work becomes necessary, a new and distinct engagement agreement should be created if the incident might give rise to litigation. Most important, the services under the engagement should be as closely geared toward the anticipated litigation as possible, and not simply be an analysis that the organization would have undertaken if it did not contemplate litigation.

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1. As part of economic stimulus legislation, Congress was considering so-called COVID-19 liability shields for businesses, but the provision for such protections was excluded from the measures passed at the end of 2020.

2. For purposes of this article, a cyber-intrusion or cyber-incident shall be considered any unauthorized access to an organization's electronic systems or information.

3. Gurpreet Dhillon, *What To Do Before and After a Cybersecurity Breach?*, American University (2015), https://www.american. edu/kogod/research/cybergov/upload/what-to-do.pdf.

4. *Commentary on Application of Attorney-Client Privilege and Work-Product Protection to Documents and Communications Generated in the Cybersecurity Context*, 21 Sedona Conf. J. 1 (2020).

5. *Id.*

6. *Id.*

7. *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998).

8. *Id.* at 1195.

9. *Id.*

10. *Id.* at 1202.

11. *Id.* at 1195.

12. *Id.* at 1202.

13. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

14. *Id.* at 390.

15. *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961).

16. *Id.* at 922.

17. *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989).

18. *In re Grand Jury Subpoenas Dated Mar. 24, 2003*, 265 F. Supp. 2d 321 (S.D.N.Y. 2003).

19. *Id.* at 330.

20. *In re Premera Blue Cross Customer Data Breach Sec. Litig.*, 296 F. Supp. 3d 1230 (D. Or. 2017).

21. *Id.* at 1245.

22. *Id.*

23. *Id.*

24. *Id.* at 1246.

25. *In re Dominion Dental Servs. USA, Inc. Data Breach Litig.*, 429 F. Supp. 3d 190 (E.D. Va. 2019).

26. *Id.* at 191.

27. *Id.* at 192; *Courts Caution That Not All Data Breach Investigation Reports Are Privileged*, Bass, Berry & Sims (July 6, 2020), https://www.bassberry.com/news/not-all-data-breach-investigation-reports-are-privileged.

28. *Genesco, Inc. v. Visa U.S.A., Inc.*, 302 F.R.D. 168 (M.D. Tenn. 2015).

29. *Id.* at 190.

30. *In re Experian Data Breach Litig.*, 2017 WL 4325583, at *2 (C.D. Cal. May 18, 2017).

31. *In re Capital One Consumer Data Sec. Breach Litig.*, No. 1:19MD2915 (AJT/JFA), 2020 WL 2731238, at *1 (E.D. Va. May 26, 2020), *aff'd*, No. 1:19MD2915 (AJT/JFA), 2020 WL 3470261 (E.D. Va. June 25, 2020).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 2.

37. *In re Capital One Consumer Data Sec. Breach Litig.*, No. 1:19MD2915 (AJT/JFA), 2020 WL 3470261 (E.D. Va. June 25, 2020).

38. 2020 WL 3470261 at *6.

39. 2020 WL 2731238, at *5.

40. Ben Kochman, *Capital One says PwC Data Breach Report Should Stay Private*, Law360, August 17, 2020, https://www.law360.com/articles/1301846/capital-one-says-pwc-data-breach-report-should-stay-private.

41. *Id.*

42. *Id.*

43. Khorri Atkinson, *Capital One Need Not Turn Over PwC Data Breach Report*, Law360, August 21, 2020, https://www.law360.com/banking/articles/1303479/capital-one-need-not-turn-over-pwc-data-breach-report.

44. *Wengui v. Clark Hill, PLC*, No. 19-3195 (JEB), 2021 WL 106417 (D.D.C. Jan. 12, 2021).

45. *Id.* at 1.

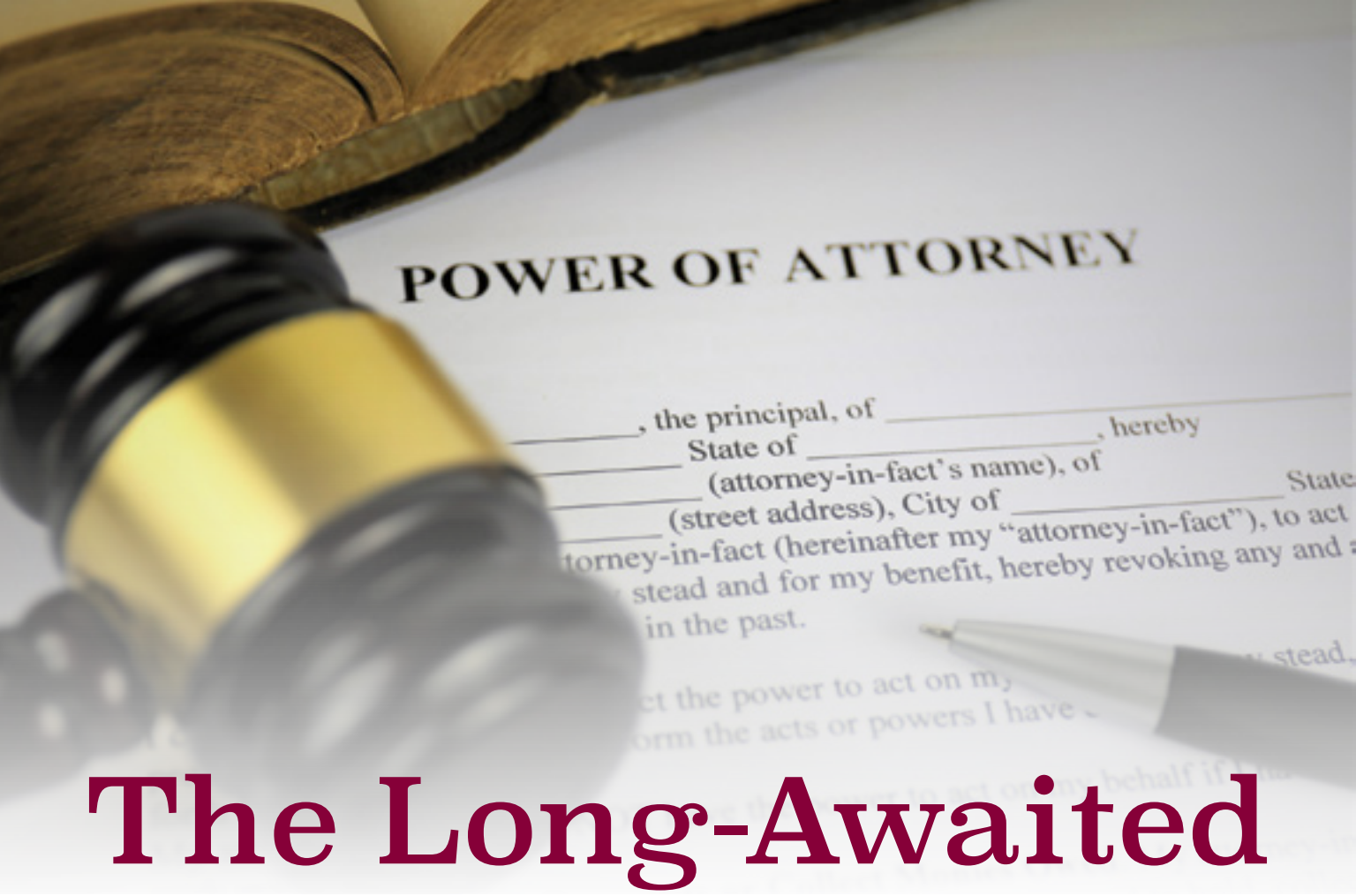
46. *Id.* at 10.

47. *Id.* at 11.

48. Jeffrey Horton Thomas, *Trends in COVID-Related Employment Actions*, JD Supra (July 10, 2020), https://www.jdsupra.com/ legalnews/trends-in-covid-related-employment-39948.

49. Shawn Goggins, *Coronavirus Outbreak at Wenatchee Walmart Forces Shutdown of Store until Saturday* (July 23, 2020), http://www.ifiberone.com/columbia_basin/coronavirus-outbreak-at-wenatchee-walmart-forces- shutdown-of-store-until-saturday/article_ebe2b2e2-cd2d- 11ea-b814-5fa828514646.html; Fiona Kelliher, *San Jose Trader Joe's Coronavirus Outbreak Grows to Eight Cases* (July 23, 2020), https://www.mercurynews.com/2020/07/23/san-jose-trader-joes-coronavirus-outbreak-grows-to-8-cases.

50. *Id.*



The Long-Awaited Modifications to the Statutory Short Form Power of Attorney Have Been Enacted!

By Anthony J. Enea

The changes to the New York Statutory Short Form Power of Attorney (POA) are long overdue. The last revision occurred nearly 10 years ago, and the present POA form has been regarded as unduly complicated and burdensome to both prepare and execute (especially for seniors).

The following is a summary of the major modifications, along with a subsequent review of each revision.

Logically, the revisions to the New York Statutory Short Form POA and certain provisions of Sections 5-1501 through 5-1514 of the General Obligations Law (GOL), which will be effective for all POAs signed on or after June 13, 2021,[1] are intended to simplify the current POA as it has been deemed "prone to improper execution."[2] Senate Bill Section 3923, which was passed on December 15, 2020, states the objectives of the modifications to be the following:

a. To permit substantially compliant language, as requiring exact wording is an undue burden;

b. To provide "safe harbor" provisions for those who in good faith accept an acknowledged POA without actual knowledge that the signature is not genuine;

c. To permit sanctions against any individual or entity (banks, financial institutions, etc.) that unreasonably refuses to accept a valid POA;

d. To allow a person to sign at the direction of the principal, if the principal is physically unable to sign;

e. To permit the agent to make gifts of up to $5,000 per year (increased from the previous limit of $500) without requiring a modification to the form;

f. To remove all of the provisions that apply to the Statutory Gifts Rider (SGR);

g. To clarify the obligations of the agent under the POA to keep records and receipts; and

h. To clarify the agent's authority related to financial matters concerning the principal's health care.[3]

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The following constitutes a summary of the major specific statutory revisions made to the POA statute in New York:

A. REVISIONS TO SECTION 5-1501 OF THE GOL

1. Section 5-1501(j) has been revised so that the definition of a POA includes both the Statutory Short Form POA and non-statutory POAs;[4]

2. Section 5-1501(n) has been revised to delete the definition of the SGR.[5] Under the newly modified form, all gifting in excess of the permitted $5,000 per year would need to be delineated in the "Modifications Section" of the POA.[6]

3. Section 5-1501(o) (now 5-1501(n)) changes the requirement of "exact wording" to "substantially conforms" and provides that substantial conformity can occur notwithstanding an insignificant mistake in wording, spelling, punctuation, formatting, or the use of bold or italic type, or the presence or absence of a particular clause.[7] Previously, the "exact wording" provision required that the language in the POA (with the exception of the Modifications Section and the gifting powers delineated in the SGR) be identical to that in the Statutory Short Form including all typographical errors. It was an absurd requirement. This provision also allows optional sections of the form (such as the "Designation of Monitor(s)" and "Compensation of Agent") to be deleted and replaced with the words "Intentionally Omitted."[8] It is my experience that clients generally do not want to appoint individuals to be "monitors" for their spouse and/or children (who are normally the agents) nor have they been inclined to compensate their children or other family members for acting as their agents.

B. REVISIONS TO SECTION 5-1501(B) OF THE GOL

1. Section 5-1501(b) allows the POA to now be signed, initialed and dated by a principal with the mental capacity to do so, or in the name of a principal who has the mental capacity to do so by another person in the presence of and at the direction of the principal.[9] This revision acknowledges that a principal who is mentally competent and is not physically able to sign, initial and date the POA form should not be deprived of having a POA because of his or her physical infirmities. When a person signs at the direction of the principal, he or she must sign by writing or printing the principal's name and printing and signing his or her name.[10] The signatures of the principal, the person signing on his or her behalf, and the agent must all be

acknowledged. While this change appears to be well-intended, it does open the door for possible issues, such as whether the principal, in fact, gave direction to another person to sign on his or her behalf. In order to address these issues and protect the elderly and disabled population from fraud and abuse, Governor Cuomo has reached an agreement with the New York Legislature to make several amendments in early 2021, including requiring two disinterested witnesses to sign the POA form, one of whom may also be the notary public notarizing said form.[11]

2. Section 5-1501(d) changes the requirement of "exact wording" within the "Caution to the Principal" in 5-1513(a) and "Important Information for the Agent" in 5-1513(n) to "substantially conforms" and allows for "insubstantial variation" in the wording of those sections.[12]

C. REVISIONS TO SECTIONS 5-1502A, 5-1502(B), 5-1502(C), 5-1502(D), 5-1502(F), 5-1502(I), 5-1503, 5-1505, AND 5-1514 OF THE GOL

These revisions remove all provisions that apply to the SGR.[13] As is stated below, and as per the revisions to Section 5-1513, all gifting authority over and above the allowable $5,000 per annum, including the agents' authority to gift to themselves, must be stated in the Modifications Section of the POA.[14]

D. REVISIONS TO SECTION 5-1502(D) OF THE GOL

This revision provides that changes to joint bank accounts (e.g., adding a new joint tenant or deleting an existing joint tenant) and changes to beneficiary designations in Totten trusts are not authorized by the POA unless such changes are expressly stated in the Modifications Section.[15] Additionally, if agents under a POA are required to act together, one agent may delegate to the co-agent the authority to conduct banking transactions if the principal initialed subject (o) in the grant of authority provisions of paragraph (f) of the form.[16]

E. REVISIONS TO SECTION 5-1502 (I) OF THE GOL

This revision allows gifts by the agent of up to $5,000 (as opposed to the previous limit of $500) per calendar year to individuals and charitable organizations, provided that those gifts were customarily made by the principal prior to the creation of the agency.[17]

The major revisions to Section 5-1504 provide banks, financial institutions and others relying upon the POA with safe harbor provisions that are beneficial for all parties involved.

F. REVISIONS TO SECTION 5-1502(K) OF THE GOL

This modification pertains to the granting of authority to the agent to deal with financial matters relating to the principal's health care: It does not grant the agent the authority to make medical and/or health care decisions for the principal; however, the agent is now permitted to take responsibility for the financial matters that are associated with the principal's health care, including, but not limited to, benefit entitlements and payment obligations.[18] Additionally, notwithstanding any law to the contrary, the agent is entitled to receive from any health care provider and health plan information that is relevant to the legitimacy and accuracy of the health care charges.[19] As part of that entitlement, the agent is also able to receive "protected health information" as defined by federal and state law.[20] Finally, the agent is entitled to receive information about the health care benefits to which the principal is entitled in order to meet the principal's financial obligations and pay the bills due and owing.[21]

This modification specifically expands the agent's role vis-à-vis the principal's financial rights and obligations relevant to health care matters.

G. REVISIONS TO SECTION 5-1502L OF THE GOL

This modification specifies that changes to designation of beneficiaries are not authorized by the POA unless expressly stated within the Modifications Section.[22]

H. REVISIONS TO SECTION 5-1504 OF THE GOL

For many years our clients have endured endless obstacles and delays when attempting to utilize a properly execut-

ed and valid POA with a bank or financial institution. The excuses given for refusing to recognize the POA ran the gamut from "It's not on our own form" to "We don't allow POAs with multiple agents." Sadly, there has been an endless and varied parade of excuses to reject the POA.

In reality, these types of excuses were poorly disguised subterfuges for their true concern – that if they were relying on a POA that was not properly executed or a product of fraud, they would expose themselves to potential liability if they allowed the agent to act thereunder.

In summary, the major revisions to Section 5-1504 provide banks, financial institutions and others relying upon the POA with safe harbor provisions that are beneficial for all parties involved.[23] The key aspects of those provisions are as follows:

1. Section 5-1504(1*)* allows a party to rely in good faith upon an acknowledged (and, following Governor Cuomo's anticipated amendment, properly witnessed) POA and to request an agent's certification and opinion of counsel.[24] If an opinion of counsel is requested, the cost thereof is borne by the principal unless the request is made more than 10 business days after the POA is presented for acceptance.[25]
2. Section 5-1504(2) allows as a reasonable cause for refusing to honor a POA, either the agent's refusal of the party's request that the agent provide a certification under the penalty of perjury of any factual matter concerning the principal, or the agent's refusal of the party's request to provide the opinion of counsel as to any matter of law concerning the POA if the person making the request provides in a writing or other record the reason for the request.[26]
3. Section 5-1504(3) allows a third party to reject the Statutory Short Form POA in a writing that sets forth the reasons for the rejection, allows for the proponent of the POA to respond, and allows for the third party to either honor the POA or provide a written rejection stating the reasons therefor.[27]

The revisions to Section 5-1504(3)(a) provide that no later than the 10th business day after the presentation of an original or certified copy of the POA, the POA shall either be honored or rejected[28] (with the reasons for the rejection being set forth in writing to the agent). If the third party rejects the POA, the agent must then respond to the rejection, after which the third party then has seven business days to finally honor or reject the POA.[29] If the third party rejects the POA for a second time, as per Section 5-1510, the agent can then commence a special proceeding to have the Statutory Short Form POA honored.[30] The court may award damages, including reasonable attorneys' fees and costs, if the third party acted unreasonably in refusing to honor the POA or failed to provide a statement in a timely manner (subject to certain exceptions if a proposed chapter amendment the Legislature is considering passes and is approved by the governor).[31]

These revisions provide the third party that accepted the POA in good faith and without any actual knowledge that the POA was invalid or terminated, or that the agent was exceeding or improperly exercising his or her authority, with the requisite protection and safe harbor from any claims that could ensue against the third party as a result.

The revisions to Section 5-1504(4)(a) specifically provide that "once reasonably accepted, if a third party conducts a transaction in reliance upon a properly executed [S]tatutory [S]hort [F]orm Power of Attorney, the third party shall be held harmless from liability for the transaction."[32]

I. REVISIONS TO SECTION 5-1513 OF THE GOL

1. Section 5-1513(1) allows a Short Form Statutory POA that substantially conforms; it also allows any section indicated as "optional" that is not used to be omitted and replaced by the words "Intentionally Omitted."[33] This relates to the section above describing provisions that are relevant to Designation of Monitor(s) and Compensation for Agent.
2. Section 5-1513 (1)(b)(c) modifies the POA form so that if the principal wants his or her agents to act together, the principal must initial the provision that states "My agents must act together."[34] Additionally, the principal must specify whether he or she wishes for the successor agents to act together or separately. The principal's failure to select either option will default to the requirement that the successor agents act together.[35]

   These revisions, in my opinion, may create confusion, as was the case in the first iteration of the POA form in 2010, insofar as they require initialing by the principal. It doesn't make the election of the options any easier for the principal, especially a principal with physical infirmities. It would have been easier to just leave it so that, unless the principal indicates otherwise, the co-agents and successor co-agents must act together. It has always been my belief that requiring one's agents to act together creates a built-in system of checks and balances against the potential abuse of the POA by one agent acting alone. With the advent of DocuSign, Federal Express, and email, having people sign documents who reside at opposite ends of the Globe is no longer a monumental undertaking.

3. Section 5-1513(g), as revised, specifically provides that the authority to make gifts to the agent must be stated in the Modifications Section of the POA.[36]

   This is an excellent revision, as it completely eliminates the need for the SGR and the onerous description of the gifts and initialing of the gift provisions and the witnessing required. It was a veritable nightmare for seniors. Over the last 10 years I have seen numerous SGRs that were neither appropriately executed nor did they contain adequate descriptions of the gifting and transactions that were permitted.

4. Section 5-1513(j) allows for compensation to the agent to be specified in the Modifications Section of the POA.[37]

5. Section 5-1513(n)(4) requires the agent to keep records and receipts of all transactions conducted.[38]

In conclusion, the revisions to the Statutory Short Form POA are in many ways positive. What remains to be seen is whether the utilization and execution of the form will be easier for the practicing bar to draft, and our clients to execute, and whether the bar as a whole will understand and implement the modifications to their full extent. Without the existence of the SGR, there remains the possibility that, rather than delineating specific and significant gifting powers in the Modifications Section, attorneys will totally ignore gifting powers and the opportunity to delineate them altogether. This would limit the agent to gifting the maximum of $5,000 per year, which could be detrimental to seniors and others who may need their assets gifted for estate tax and elder law planning purposes.

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1. S.B. S3923A, 2019-2020 Leg., Reg. Sess. § 19 (N.Y. 2020).
2. Sponsor's Mem, The New York State Senate (2020, December 15). Summary: S.B. S3923A: https://www.nysenate.gov/legislation/bills/2019/s3923.
3. *Id.*
4. S.B. S3923A, 2019-2020 Leg., Reg. Sess. § 1 (N.Y. 2020); see also Sponsor's Mem, The New York State Senate (2020, December 15). Summary: S.B. S3923A: https://www.nysenate.gov/legislation/bills/2019/s3923.
5. S.B. S3923A, 2019-2020 Leg., Reg. Sess. §§ 2-3 (N.Y. 2020); see also Sponsor's Mem, The New York State Senate (2020, December 15). Summary: S.B. S3923A: https://www.nysenate.gov/legislation/bills/2019/s3923.
6. Governor's Approval Memo, Bill Jacket, L 2020, Chapter 323 at 32.
7. S.B. S3923A, 2019-2020 Leg., Reg. Sess. § 3 (N.Y. 2020).
8. *Id.*
9. S.B. S3923A, 2019-2020 Leg., Reg. Sess. § 4 (N.Y. 2020).
10. *Id.*
11. Governor's Approval Memo, Bill Jacket, L 2020, Chapter 323 at 32.
12. S.B. S3923A, 2019-2020 Leg., Reg. Sess. § 4(1)(d) (N.Y. 2020); see also Sponsor's Mem, The New York State Senate (2020, December 15). Summary: S.B. S3923A: https://www.nysenate.gov/legislation/bills/2019/s3923.
13. Sponsor's Mem, The New York State Senate (2020, December 15). Summary: S.B. S3923A: https://www.nysenate.gov/legislation/bills/2019/s3923; *see also* S.B. S3923A, 2019-2020 Leg., Reg. Sess. §§ 2, 4-8, 10, 12-15.
14. Governor's Approval Memo, Bill Jacket, L 2020, Chapter 323 at 32.
15. S.B. S3923A, 2019-2020 Leg., Reg. Sess. § 8 (N.Y. 2020).
16. *Id.* at § 8-a.
17. S.B. S3923A, 2019-2020 Leg., Reg. Sess. § 10 (N.Y. 2020).
18. *Id.* at § 11.
19. *Id.*
20. *Id.*
21. *Id.*
22. S.B. S3923A, 2019-2020 Leg., Reg. Sess. § 10 (N.Y. 2020) at § 12.
23. *Id.* at § 14.
24. *Id.*
25. S.B. S3923A, 2019-2020 Leg., Reg. Sess. § 14 (N.Y. 2020) at § 14.
26. *Id.*
27. S.B. S3923A, 2019-2020 Leg., Reg. Sess. § 14 (N.Y. 2020) at § 14.
28. *Id.*
29. S.B. S3923A, 2019-2020 Leg., Reg. Sess. § 14 (N.Y. 2020) at § 14.
30. *Id.*; *see also* § 16.
31. S.B. S3923A, 2019-2020 Leg., Reg. Sess. § 14 (N.Y. 2020) at § 14.
32. *Id.*
33. *Id.* at § 17.
34. *Id.*
35. S.B. S3923A, 2019-2020 Leg., Reg. Sess. § 14 (N.Y. 2020) at § 17.
36. *Id.*; see also Governor's Approval Memo, Bill Jacket, L 2020, Chapter 323 at 32.
37. S.B. S3923A, 2019-2020 Leg., Reg. Sess. § 14 (N.Y. 2020) at § 17.
38. *Id.*

Why Has the National Mood Turned So Nasty and Is There a Remedy?

Judicial Restraint May Be the Solution

By Hon. Charles E. Ramos (Ret.)

In his book *The Economic Consequences of the Peace*,[1] published at the end of World War I, the noted economist John Maynard Keynes argued to the victorious powers that they should refrain from punishing Germany. His rationale was that the only way to guarantee that another war would not follow would be to foster trade and economic cooperation between the previously warring powers in order to achieve a state of economic interdependence between them.[2] His reasoning was that as nations traded with each other, they had a greater interest in building a mutually profitable relationship that arises from trade.[3]

Keynes believed that economic power was at least as formidable as military power, but that it was a force for peace which, unlike an army, paid for itself.[4] In the simplest of terms, Keynes argued that if Germany's principal trading partner after World War I was France, killing French citizens in a subsequent war would be understood as being very bad for business.[5] Hence, a powerful motivation for peaceful relations would be the result of economic interdependence.[6]

We know that Keynes's theory was largely ignored by world leaders. World War II followed in predictable due course with almost exactly the same participants as World War I. That mistake resulted in the deaths of 85 million people.[7]

Having learned a painful lesson from history, the Marshall Plan,[8] which was put in place at the end of the Second World War, applied the reasoning of Keynes. The United States assisted in the rebuilding of Western Europe as a single commercial enterprise with the warring parties in a state of economic interdependence. This has largely resulted in 75 years of relative peace in Western Europe, from 1945 until today. Such a period of sustained peaceful cooperation is unprecedented and difficult to find elsewhere in history.

Keynes's vision of interdependence has become relevant yet again, but not the economic interdependence that arises out of trade. Rather it is relevant in the form of political interdependence arising out of compromise.

Of course, today we do not face the prospect of war in Europe, but we are experiencing a level of domestic struggle that threatens American democracy more than any military adversary ever did.

We are at risk of becoming tribal. We are losing a united sense of purpose which has manifested itself in, among other things, a lack of civility in our public discourse on nearly every social issue. Our political leaders treat one another as enemies rather than as colleagues. No one on either side of the political divide gives an inch when we no longer appear to share common interests. The polarization in Congress is leading us into this new national mood.

This breakdown of our national mood has been blamed on individual politicians and their political parties. That is the blame game that is typical of American politics. But what is happening is more fundamental. We feel we do not need each other and much of the cause is institutional.

We, as members of the bar, need to consider that one of the contributing, if not principal, causes of this breakdown may be our own judicial system, right up to the Supreme Court of the United States.

Without intending to do so, our modern judiciary may be undermining many of the opportunities for political compromise that used to typify politics. Republicans no longer feel they need support from Democrats and vice versa. Consider for a moment a hot button issue such as reproductive rights. In *Roe v. Wade*,[9] the U.S. Supreme Court held that, although the Constitution does not explicitly mention any right of privacy, reproductive rights are founded in the Fourteenth Amendment's concept of personal liberty and encompasses a woman's decision whether or not to terminate her pregnancy.

The late Hon. Ruth Bader Ginsburg herself was critical of the leap that *Roe v. Wade* represented, and publicly opined that the decision "seemed to have stopped the momentum on the side of change."[10] She remarked that she would have preferred that abortion rights be secured more gradually, in a process that included the legislatures and the courts.[11] She was also troubled by the fact that the focus in *Roe v. Wade* was on the right to privacy, rather than on women's rights.[12]

Putting aside those who favor or oppose a woman's right to choose, one needs to concede that judicial resolution of this issue came at a steep political cost, namely, the loss of the societal benefit that arises out of mediating a political compromise on such an issue, and a missed opportunity to reach a political solution, difficult and time-consuming as it might have been. Particularly after *Roe v. Wade*, there appears to be a limited need to reach compromise on key issues that could have promoted a sense of shared purpose, civility and even friendship among the members of Congress. After *Roe v. Wade*, the right to an abortion has become a political issue focused on a physician's right to perform the procedure rather than about women's right to choose.

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Multiply the effect of the judicial resolution of *Roe v. Wade* by the number of controversial issues determined by the courts over the years and you have a nation increasingly ruled by judicial fiat rather than the democratic process. Simultaneously with the erosion of this process is the rise of social media and the growing reliance upon such platforms as primary news sources. On social media, anyone can post their ideas, and everyone is entitled to their own version of the facts.

Why should politicians compromise with members of the opposition when a lawsuit will settle the issue? No need for members of Congress to work with each other . . . just vilify. If members of Congress are unable to compromise, why should the people? If we also cannot agree upon what is true, we have completely lost the sense that we are politically interdependent and a unified country.

The consequences of this lack of political interdependence is the creation of a culture that indeed must be "canceled."

Of course, there are issues that demand judicial determination. However, take the issue of the right of women to vote, which was ultimately resolved in the political arena. Both women and men were elevated by amending the Constitution because we emerged more united as a nation. The true marker of political interdependence is a sense of a shared benefit that arises from working together.

When *Roe v. Wade* and similarly divisive issues are decided by the courts, that erodes the need to find common purpose. Instead, these opportunities are struck aside and the public concludes that national policy is set by a majority of the U.S. Supreme Court. Notwithstanding the fact that most of us do not quarrel with the determination in *Roe v. Wade*, the obvious loss we suffer as a nation is the erosion of the political process.

The judiciary is the only branch of government that retains a modicum of respect and esteem from broad swaths of America. Many trust only the judicial branch to be a (mostly) fair arbiter of controversies and have little faith in either of the other two branches of government. It is sad to note that many would rather rely on an activist court than on "the best Congress money can buy."

The members of Congress must again come to the realization that they need to deal with one another to reach consensus in order to achieve anything resembling progress. But it is clear that Congress needs help. Only the judiciary can supply what is needed by being far more circumspect with regard to the issues chosen for determination.

Some advocates for social justice may not agree with this call for judicial restraint. After all, activist judges tend to be liberal, so social justice prevails. Putting aside that the judicial branch of government is the most undemocratic of the three branches, those who disagree should consider that if Donald Trump had won re-election, the Supreme Court could have become, in his last term, conservative seven to two. What if even only five of the seven conservative justices decided to be activists for right-wing causes? We must all consider that activism in the law is a sword that can cut both ways.

The best solution is more of the judicial restraint that many in the judiciary already practice every day. Judges at all levels have resisted the temptation to impose whatever their notion of justice is and have referred matters for legislative action unless there exists in law or the Constitution a clear mandate to determine that dispute.

Notwithstanding the fact that cases dealing with issues such as reproductive rights are rare, the impact of their judicial determination has been a factor in destroying our national unity. Every time issues like these are decided by the judiciary, the opportunity for political compromise is lost, as is the realization of political interdependence.

There is an ominous story I wish to share out of my own wife's family. She had a great-great-grandfather who was born in England but had emigrated to Ohio as a young man. He was a builder and was sent to Louisiana to work on a project in the late 1840s. He was an abolitionist and, unfortunately for him, an outspoken one. For his views against slavery that he voiced while residing in New Orleans, he was murdered, and his body was sent back to Ohio in a box. He might be considered one of the earlier casualties in what soon after became the Civil War.

Could history be in the process of repeating itself, yet again? Could this division we are in the midst of lead to a much larger violent conflict?

It is sad that some in America seem to want it.

It is time for the judiciary, at every level, to resist the temptation to legislate and to thereby force Congress to engage in the game of tug of war that breeds compromise, civility and a renewed appreciation of the wondrous document that our Constitution is.

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1. John M. Keynes, The Economic Consequences of the Peace 211-12 (1919).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. "International Programs – Historical Estimates of World Population – U.S. Census Bureau," https://www.census.gov/popclock/.
8. The Marshall Plan – Summary and Significance, Encyclopedia Britannica, Hogan (1987), https://www.britannica.com/event/Marshall-Plan.
9. *Roe v. Wade*, 410 U.S. 113, 152-153 (1973).
10. M. Heagney, *Justice Ruth Bader Ginsburg Offers Critique of* Roe v. Wade *During Law School Visit* (May 15, 2013), https://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit.
11. *Id.*
12. *Id.*

App Permissions, Shadow Profiles and Other Potential Risks to Client Confidentiality

By Tyler S. Rexhouse

It's a familiar routine: You download an app, a small window pops up on your phone screen and asks if you will grant it permission to access your contacts, and you agree because – well, why not? We do this all the time as mobile communications devices, such as tablets and smartphones, have become nearly ubiquitous in both our personal lives and our workplaces. Moreover, mobile applications, such as Waze or the Gmail app, are increasingly common fixtures on both personal and work phones. Increased prevalence and reliance on these apps normalize their day-to-day use. Who would think twice about putting an application on their phone?

Lawyers, of course. Attorneys have ethical obligations under New York's Professional Rules of Responsibility Rule 1.6 to "not knowingly reveal" their clients' "confidential information," which includes privileged information, information that is likely to be embarrassing or detrimental to the client, or information that the client has requested remain confidential. It is no secret that mobile devices collect extraordinary amounts of data on individuals, much of which we voluntarily give in exchange for free services. But what happens when companies use data collected through one person to create a detailed mosaic of another person's life? In that case, is it possible that an attorney may be inadvertently disclosing confidential client information to private corporations?

WHAT DATA DO COMPANIES COLLECT AND HOW DO THEY DO IT?

Imagine you request all of the data that Facebook or Google has on you. In less than a week, you may receive anything from a few megabytes to tens of gigabytes of data on yourself. This data may include, among other things, locations of places you've frequented, pictures of your friends and yourself, and even estimates of your weight. It is quite common that people find out that Facebook or Google has a detailed consumer profile on them.

Unseen, however, is the data collected from you about third persons in your network. For example, if you post a picture of a friend and yourself on Facebook, Facebook associates that picture with both users. This is done in a variety of complex ways, such as through contact chaining. In the case of contact chaining, granting Facebook your permission to access your phone's contact database allows Facebook to collect data on both you and all of your contacts: their names, phone numbers, addresses, emails and whatever else you have stored on them. Thus, data collected on us may affect other people in our social and occupational networks.

To continue using Facebook as an example, this data collection practice even extends to people who do not use Facebook's services. This practice of creating consumer profiles for non-users is called shadow profiling.[1] By voluntarily giving companies access to your contacts, Facebook can begin to identify and collect data on people who do not use Facebook.

Through methods like contact chaining, downloading an app on a mobile device may lead to inadvertent client disclosures. Even the Supreme Court acknowledged the dangers posed by invasive data collection through mobile phones. The "Mosaic Theory" of the Fourth Amendment protections from Supreme Court jurisprudence illustrates the problem that big data can lead to in people's lives: "[A] cell phone collects in one place many distinct types of information – an address, a note, a prescription, a bank statement, a video – that reveal much more in combination than any isolated record."[2] Similarly here, the aggregation of a person's data can paint a comprehensive and nuanced portrait of that person's life.

Privacy policies of major technology companies provide little comfort on this front and demonstrate that they typically collect and share user data liberally. TikTok's privacy policy, for example, includes, under "Information we collect automatically": "We collect information about the device you use to access the Platform, including your IP address, unique device identifiers, model of your device, your mobile carrier, time zone setting, screen resolution, operating system, app and file names and types, keystroke patterns or rhythms, and platform."[3]

Therefore, by merely downloading TikTok's mobile application, the company may collect sensitive information, including your location, what kind of phone you use, whether you use AT&T or Verizon, and even typing patterns. And even more disturbing is TikTok's collection of file names. What if TikTok collects a file name, such as "Client.name_breach.of.contract_complaint"? A wealth of information can be gleaned from the file name alone, namely, that the client is communicating with an attorney, the attorney has drafted a complaint, and even the nature of the complaint. If the action wasn't yet filed, this would not be public information. Such information could plausibly be considered "embarrassing" and, therefore, confidential under Rule 1.6.

While most attorneys are unlikely to have the TikTok app on their work phones, it is a good bet that they have a Microsoft application downloaded. In its privacy policy, Microsoft discloses that it processes personal

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data with methods that "include[] both automated and manual (human) methods of processing" and that "[t]his manual review may be conducted by Microsoft employees or vendors who are working on Microsoft's behalf."[4] Because of the ease of de-anonymizing data, Microsoft's privacy policy raises concerns that other people are reviewing data that can be used to identify clients and to make inferences about them that may relate to representation. And because acknowledging and consenting to an app's privacy policy is required to use it, it can be argued that attorneys are knowingly revealing their clients' confidential information to private companies. Attorneys may be voluntarily and irreversibly surrendering data to private companies where there is no expectation that that data will remain private, and there are few, if any, mechanisms for retrieval or control of data once released to the app developer.

Unfortunately, there is little ethical guidance on this topic. And while the risks are distinct from the risks of using remote storage (such as iCloud or DropBox) to store confidential information, ethics opinions addressing these issues may be informative. For example, attorneys may use electronic storage means where communications are substantively monitored by non-humans.[5] While it is generally acceptable to use unencrypted email services to transmit client information, even though the emails are reviewed by automated algorithms, the same practice would be impermissible if the emails were "reviewed by human beings or if the service provider reserved the right to disclose the e-mails or the substance of the communications to third parties without sender permission."[6] Using this rationale, it may be considered a violation of Rule 1.6 to use Microsoft applications under Microsoft's current privacy policy if client information can be reviewed by humans.

This is not an alarmist call to dispense with using mobile devices, mobile applications, and other forms of digital storage and communication and to return to pen and paper. The legal field obviously cannot halt using Microsoft products and services because of the mere speculation that other humans may be viewing some of our data. But raising these issues is the best way to begin creating transparency in a notoriously opaque system. And while companies are currently using contact chaining and creating shadow profiles for relatively benign reasons, attorneys should be aware of the potential hidden risks that data collection, storage, review and sharing poses to client confidentiality. This is especially important because the landscape of threats to client confidentiality changes drastically every year as new techniques, uses and data collection methods emerge. Data that is collected now may be exploited in unimaginable ways in a few years, and the data that we unintentionally give companies on our clients today could create issues for them in the future.

1. Simon Batt, *What Are Facebook Shadow Profiles?* Make Use Of (April 21, 2020), https://www.makeuseof.com/tag/facebook-shadow-profiles.
2. *Riley v. California*, 134 S. Ct. 2473 (2014).
3. *TikTok's U.S. Privacy Policy*, https://www.tiktok.com/legal/privacy-policy.
4. *Microsoft Privacy Statement*, https://privacy.microsoft.com/en-us/privacystatement.
5. Committee on Professional Ethics, Opinion 820 (Feb. 28, 2008).
6. *Id.*

NYSBA's Federal Priorities for 2021

The Jan. 6th armed insurrection left the Capitol building riddled with broken glass and a shattered sense of peace, leaving the members of the 117th Congress to deal with the physical and emotional aftermath. A new president was inaugurated, and another president was impeached.

So, it is no surprise that Congress only recently turned its attention to its usual work of passing the nation's laws. And when that happened, the New York State Bar Association's legislative priorities were ready for Congress' consideration.

After consultation with the sections, committees and task forces, NYSBA's legislative policy committee works with the government relations department to come up with its priorities, which are then approved by the Executive Committee. The association advocates for provisions that will ensure access to justice, the integrity of our justice system and equal access to justice.

The federal priorities this year include student loan relief, funding for broadband, support for Legal Services Corporation funding, firearms, immigration representation, cannabis and sealing records of criminal conviction.

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.

PROVIDE GREATER STUDENT LOAN RELIEF FOR ATTORNEYS AND NON-ATTORNEYS IN RURAL, SUBURBAN AND URBAN AREAS

More than 40 million Americans, mostly people under age 35, have student loan debt. COVID-19 has exacerbated the financial challenges these individuals face. While Congress did provide relief, more needs to be done, including extending the moratorium on payments, expanding the program to private loans and providing targeted monetary relief in cases of economic hardship.

Student loan forgiveness was a key plank in President's Biden's election platform, as well as a top priority for key members in the House and Senate. Advocates were waiting to see if the COVID-19 relief package would include student loan relief but the bill has no such provisions. Canceling student loan debt faces an uphill battle in the House and the Senate, and it is unclear if the president would have the authority to act unilaterally.

FUNDING FOR BROADBAND

The pandemic and resulting stay-at-home orders left millions of Americans working, educating and socializing in a virtual world. It has become abundantly clear that broadband service is an important communications tool that has become vitally necessary for educational purposes and medical care, as well as access to justice.

There is a lack of technology infrastructure in vast portions of New York State and limited or no broadband availability. Appropriate funding is critical for the expansion of a 21st-century digital infrastructure sufficient to provide adequate broadband access to all areas of the nation. Funding was included in the House version of the COVID-19 relief package. It is unclear if it will remain in the Senate version.

SUPPORT FOR THE LEGAL SERVICES CORPORATION

LSC is an independent nonprofit corporation established by Congress in 1974 to provide financial support for civil legal aid to low-income Americans. LSC promotes equal access to justice by providing funding to 133 independent nonprofit legal aid programs.

LSC grantees serve low-income individuals, children, families, seniors and veterans in 813 offices in every congressional district. It is critically important that Congress provide adequate funding for LSC to provide access to justice for those who need assistance. NYSBA consistently advocates for this funding each year, and Congress has been supportive.

FIREARMS AND MASS SHOOTINGS

The United States has more mass shootings and more casualties from mass shootings than any other developed country in the world. NYSBA believes lawyers have a special role to play in addressing gun violence in America.

In 2018, NYSBA created the Task Force on Mass Shootings and Assault Weapons to understand the incidence and causes of mass shootings, to describe the role of assault-style weapons and to make recommendations to reduce the number of mass shootings and casualties.

The non-partisan report makes recommendations to address this national crisis without running afoul of the Second Amendment. They include bans on assault weapons, large-capacity magazines, bump stocks and "ghost guns"; enacting universal background checks; extending the time for background checks to be completed before finalizing the sale of a firearm; expanding the category of individuals who are prohibited from purchasing or possessing firearms; ensuring all disqualifying events for gun ownership are reported to National Instant Criminal Background Check System; passing extreme risk protection laws, also known as red flag laws; imposing penalties for failure to notify the authorities of stolen or lost guns; imposing penalties for unlocked and unsecured guns; and requesting federal funding for agencies to collect, maintain and analyze data on the causes of mass shootings.

New York Congresswoman Carolyn Maloney has introduced legislation addressing many of these recommendations.

LEGISLATIVE REFORM TO ADDRESS THE CRISIS IN IMMIGRATION REPRESENTATION

The position of immigrants who face civil immigration detention, removal and likely permanent expulsion from the United States is often undermined by the lack of competent counsel to navigate the complexities of immigration laws.

Without competent counsel, a vast majority of noncitizens are ill-equipped to know where to turn for help or how to proceed in an immigration matter. NYSBA is committed to enactment of a statutory right to appointed counsel to ensure justice for immigrants in legal proceedings.

This priority might be considered in the context of broad comprehensive immigration reform, which is one of the first major policy issues Congress will consider this year. On Feb. 18, the president's immigration plan was introduced in Congress. This 300+ page bill, called the U.S. Citizenship Act of 2021, does not have bipartisan support, but elements do have backers on both sides of the aisle and they may be considered individually.

CANNABIS

As states seek to regulate adult use of marijuana, the conflict with existing federal regulations hinders the

ability of states to craft effective and legal policies. Congress should enact legislation that: (1) exempts from the Controlled Substances Act any production, distribution, possession or use of marijuana carried out in compliance with state laws; (2) removes marijuana from Schedule 1 of the Controlled Substances Act; and (3) encourages scientific research into the efficacy, dose, administration and side effects of commonly used and commercially available cannabis products in the U.S.

These provisions were endorsed by the American Bar Association in 2019. Last year, the House passed the Marijuana Opportunity Reinvestment and Expungement Act to remove cannabis from the U.S. Controlled Substances Act. The legislation was not acted on in the Senate before the end of the year and, as of the writing of this column, has not been introduced this year.

SEALING RECORDS OF CRIMINAL CONVICTION

The collateral consequences of criminal convictions are numerous and profound, perpetuating a cycle of unemployment and disenfranchisement that can lead to recidivism. While New York and a majority of states have some form of record sealing or expungement, there is still no federal law that allows for those convicted of federal crimes to seek the sealing of their criminal records. Federal law should allow those convicted of nonviolent federal offenses to petition the court to have records of their conviction sealed.

In addition to these specific policy requests, NYSBA also advocates for three public policy priorities: support for the legal profession; support for states' authority to regulate the tort system; and integrity of the justice system.

As we have experienced this year, we live in a fast-changing world in which the state Legislature and Congress must act quickly to respond to health, safety and political events. NYSBA's priorities are intended to serve as a blueprint for NYSBA action for 2021, but we will need to be responsive to events and adjust priorities as necessary throughout the year. Flexibility may be critical.

However the year develops, NYSBA will continue to be a staunch advocate for policies that promote our core values and mission to promote equal access to justice for all. Please check the Government Relations page on the NYSBA website for updated legislation information.

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

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TO THE FORUM:

I have been asked to represent XYZ Corporation in connection with a corporate investigation into allegations of fraud and corporate mismanagement against three high-level executives at the company. XYZ Corporation became a client of the firm through a relationship with the managing partner of my firm and we have represented them for over a decade. XYZ Corp. is one of our firm's most valuable and economically lucrative clients.

Last week, when I was at XYZ Corporation preparing for trial, one of the high-level employees, not involved in the instant suit, pulled me aside to ask my opinion on a matter that was personal to him. I quickly cut him off and reminded him that I was retained to represent the company and not him as an individual employee and advised him to seek private counsel for any questions not related to the XYZ matter. He was so outraged by my refusal to give him legal advice that he stormed away.

Later that week, the managing partner of my firm called me into his office and reprimanded me for not providing legal counsel to the employee. He informed me that from here on out I should do whatever the high-level employees ask because they comprise the corporation that is the client. Essentially, they call the shots and we do not want to lose them as a client. When I tried to push back, he informed me that if I did not please the client, my job would be in jeopardy.

I don't want to lose my job, but I can't shake the feeling that what he is asking me to do is unethical and wrong. What are my ethical obligations with respect to XYZ Corporation and its individual employees? Do I have a general obligation to do whatever the client asks? Was the managing partner of my firm out of line? If so, what, if anything, can I do?

Very Truly Yours,
Inn A. Bind

DEAR INN A. BIND,

Your inquiry raises several important questions that lawyers need to keep in mind at all times. First, who is your client? Here, it is clearly the corporation. Second, can you simultaneously represent executives or employees of your corporate client on unrelated personal matters? The quick answer is that it depends. Third, what are the risks in doing so and, most important, what steps can you take to avoid disqualification that would prevent your firm from representing the corporation on future matters should a dispute occur between the corporation and that executive or employee? As always, the Rules of Professional Conduct (RPC) are our guide in answering your question.

RPC 1.13 sets forth an attorney's ethical obligations when the client is an organization and provides that: "when a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents." RPC 1.13(a). This is often referred to as the Corporate Miranda Warning or the Upjohn Warning. A "constituent" of the corporate organizational client includes officers, directors, employees and shareholders but also equally applies to positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations. *See* RPC 1.13, Comment [1].

Comment 3 to RPC 1.13 tells us that "when constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer, even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province." In any case, RPC 1.13(b) makes clear that a lawyer's obligation is to

act in the best interests of the organization. Thus, if the lawyer knows that the actions of an executive or other corporate constituent are in violation of law that might be imputed to the organization or are otherwise adverse to the interests of the corporation, the lawyer must proceed as is reasonably necessary in the best interest of the organization. *See* RPC 1.13(b), Comment [3]. RPC 1.0(k) tells us that a lawyer's knowledge can be inferred from the circumstances and a lawyer cannot ignore the obvious. *See* RPC 1.0(k).

The RPC outlines the circumstances where representation of the corporation's executives, directors, employees or other constituents would not violate an attorney's ethical obligations. For example, RPC 1.13(d) states: "a lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the concurrent representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders." RPC 1.7 discusses conflicts of interests that arise during the representation of a current client and we briefly discussed its application in our prior *Forum*. *See* Vincent J. Syracuse, Maryann C. Stallone, Carl F. Regelmann & Alyssa C. Goldrich, *Attorney Professionalism Forum*, N.Y. St. B.J., May 2020, Vol. 92, No. 4.

As a general matter, RPC 1.7 provides that a concurrent conflict of interest exists, thereby barring the attorney's representation of the client, if a reasonable lawyer would conclude that either: "(1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." It is fundamental that loyalty and independent judgment are essential aspects of a lawyer's relationship with a client and that the professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. *See* RPC 1.7, Comment [1]. Subsection (b) of RPC 1.7, however, provides a carve-out that permits a lawyer to represent the client even in the presence of a concurrent conflict of interest if: "(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing." RPC 1.7(b).

Therefore, if your firm believes that it can provide competent representation to both XYZ Corporation and the employee on a matter that obviously does not involve a claim by the employee against the corporation, or vice versa, and the matter is unrelated to the firm's representation of XYZ Corporation, the firm may properly

represent the employee so long as it has obtained the informed written consent of both XYZ Corporation and the employee. *See* RPC 1.7. The conflict waiver or written consent should provide, *inter alia*, that the firm believes that there is currently no conflict between XYZ Corporation and the employee that would preclude concurrent representation of both. As part of the waiver, XYZ Corporation and the employee should agree to waive in advance any and all conflicts of interest that may arise in the future. We suggest language stating that in such event the firm would not be able to continue to represent the employee but would continue as counsel to XYZ Corporation.

Another issue that your question raises – perhaps of greater concern – is your managing partner's demand that you should "do whatever the high-level employees ask." First, as you have correctly noted, XYZ Corporation is your client, not the employee. Generally speaking, lawyers do not owe a duty to non-clients nor do they have an obligation to render free legal advice whenever solicited. In any case, even assuming that the employee was your client, with the exception of certain carve-outs, attorneys do not have an obligation to do "whatever" the client asks. While it is true that RPC 1.2 confers upon the client the ultimate authority to determine the purposes to be served by the lawyer's legal representation of the client, such as whether to settle a matter in civil cases, this authority it not absolute. *See* RPC 1.2(a). In fact, blindly taking action at the client's behest can place the lawyer at odds with his or her ethical obligations and, in some circumstances, cause the lawyer to violate the law.

The RPC recognizes that as a practical matter, lawyers are often faced with situations where the client insists that the lawyer take certain actions that the lawyer believes are improper; in such circumstances, withdrawal from the representation may be the lawyer's only choice. Breakdowns in the attorney client relationship is an issue addressed in several prior *Forums. See* Vincent J. Syracuse, Maryann C. Stallone & Alyssa C. Goldrich, *Attorney Professionalism Forum*, N.Y. St. B.J., September/October 2020, Vol. 92, No. 7; Vincent J. Syracuse, Maryann C. Stallone & Alyssa C. Goldrich, *Attorney Professionalism Forum*, N.Y. St. B.J., April 2020, Vol. 92, No. 3.

Although your managing partner's reaction does not, in our view, violate any of the applicable ethical rules, he certainly could have handled the situation better. In fact, both you and the managing partner should have discussed the high-level employee's request before reacting one way or the other. When the high-level employee approached you, it might have been better for you to tell the employee that you would discuss his request for legal advice with your partners rather than outright telling him to hire separate legal counsel. And in turn, the managing partner and you should have had a conversation about a variety of issues, including the facts relating to the high-level employee's request for legal advice, payment of fees, whether a separate engagement letter and written conflict waiver should be obtained for the personal representation, and whether that representation would create the risk of ultimately jeopardizing the firm's relationship with the corporation if a conflict were to arise with that high-level employee. Depending on how these questions are answered, separate representation of the employee may or may not be required. While the managing partner's focus is, to be sure, on the retention of XYZ Corporation as a client and to that end, keeping the executives/high-level employees of XYZ Corporation happy, it is important to keep in mind that lawyers are hired to be counselors and advisors and must perform such duties with the best interests of the client in mind, even if that means at times pushing back when the client's representative suggests an approach that may not be in the corporate entity's best interests. Here, if after asking some important questions, performing the above analysis and understanding the risks associated with concurrent representation of the corporate client and its employee, the managing partner makes an informed decision that the concurrent representation is appropriate, such a decision would be a common judgment call regularly made by firms.

Regardless of whether your firm decides to take on the concurrent representation, the lesson to be learned here is that communication, and the specific facts involved, are key. We can debate the existence of a few bright line rules; most decisions fall in the gray category and require thoughtful analysis, rather than knee jerk reactions. You should endeavor to have a better line of communication with the managing partner at your firm, especially when you believe that you are being asked to take actions that may arguably run afoul of your ethical and professional obligations. Even if your gut instinct is wrong and the action does not actually violate any ethical rule, the worst that could happen is you refresh your knowledge of the RPC. And that's not a bad thing!

Sincerely,
The Forum by
Vincent J. Syracuse
(syracuse@thsh.com)
Maryann C. Stallone
(stallone@thsh.com) and
Alyssa C. Goldrich
(goldrich@thsh.com)
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

I am an attorney of 12 years, admitted to practice in New York State, and about five years ago I became a sole practitioner. In order to reach potential clients, I created a website to promote my services and to showcase my biography, *pro bono* work, testimonials and more. Recently, however, it came to my attention that a former client had posted an extremely negative review of me and my staff on the Yelp website:

> Attorney Stones and her staff are rude and beyond incompetent. They overcharged for 'legal' work that I could have done myself – and honestly should have – because I am no better off than I was before their 'help' if anyone would even dare to call it that! It really makes me wonder if she actually went to law school. She needs to be cancelled immediately. Highly do not recommend!! – Ms. Inda Limbo

I have suspicions about who the client may be. I narrowed it down to two individuals; one client owes me a great deal of money, while the other client possesses a criminal record. Yet, both discharged me as their attorney without explanation.

Needless to say, no matter who posted the negative review, I am worried that my previously unblemished reputation is going to be subject to disparagement forever. Continuing to work has been difficult during the age of COVID. With the pandemic shutting everyone in, I rely now more than ever on my website, as well as my internet presence, to obtain business and grow my reputation. I am concerned about these statements – they pop up whenever my name is run through a search engine.

I would like to resolve this without getting myself involved with the Grievance Committee. Am I ethically permitted to respond in defense of my reputation? What can I do and how do I counter this negative review?

Very truly yours,
Styx N. Stones

NEW YORK STATE BAR ASSOCIATION
State Bar News

80 Attorneys Contribute to NYSBA's Landmark Guide on Labor and Employment Law

By Susan DeSantis

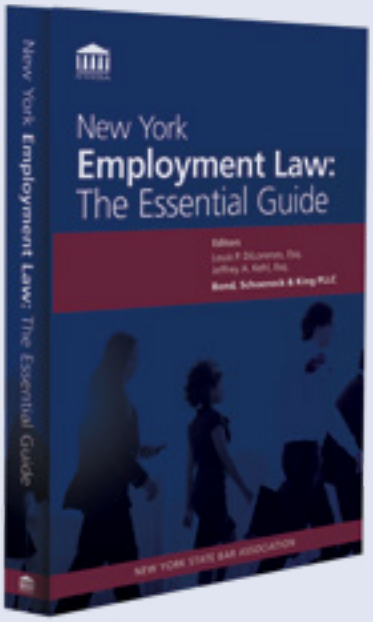
The New York State Bar Association has published a new comprehensive guide on employment law in New York with answers to more than 450 frequently asked questions for attorneys, human resources professionals and laypersons.

Edited by Louis P. DiLorenzo and Jeffrey A. Kehl of Bond, Schoeneck & King and written by more than 80 attorneys from the firm's Labor and Employment, Employment Benefits Group, the 435-page *New York Employment Law: The Essential Guide* addresses such wide-ranging issues as contract law, tort law, discrimination law, employee benefits law, worker's compensation law, unemployment insurance law, New York State Department of Labor regulations and wage and hour requirements.

"The book provides in-depth advice on a wide range of employment-related topics and crucially covers many New York City specific and complex regulations," said Madelyn F. Wessel, vice president and general counsel at Cornell University.

Topics include criminal history inquiries, arbitration agreements, overtime pay requirements, time off to vote, crime victim and crime witness leave, bone marrow and organ transplants, domestic workers' bill of rights, employees of not-for-profit entities, protection of off-premises activities by employees, romantic relationships, photographs and recordings in the workplace, social media issues, union activities, use of employee names and likenesses, surveillance of employees and biometric time clocks.

The book covers New York State, New York City and Westchester



County law. While it is primarily a New York State reference book, it also discusses federal law when relevant.

"New York employment law is important for historical as well as practical reasons," DiLorenzo wrote in the introduction. "New York is home to important financial and other markets; contains one of the largest cities in the United States; and has been a leader in addressing workplace issues and problems since long before the terrible Triangle Shirtwaist Factory fire of 1911."

Of course, some of the questions answered in the book have evolved quite a bit since 1911. For instance, at the beginning of the 20th century, no one would have even thought to ask: May an employer use artificial intelligence programs to screen employment applications? What is domestic violence victim discrimination? What obligations do employers have to protect employee's Social Security numbers? Are undocumented workers entitled to job protection?

For those who can't wait to read the book, here is a sample of some of the questions and answers:

Must a New York employer provide employees with vacation? No. Under New York law there is no requirement that a New York employer provide vacation or pay for time not worked unless the employer has voluntarily established a policy to grant such pay.

Are victims of, or witnesses to, crimes entitled to time off from work? Yes. Section 215.14 of the New York Penal Law requires employers to provide unpaid time off to employees who are absent from work in connection with the employee's obligations and duties performed as a victim of, or witness to, a crime.

What inquiries may be made about arrests and convictions? Executive Law § 296(16) prohibits employers from asking job applicants about prior arrests (or criminal accusations) that are not currently pending against the individual, or which have been resolved in favor of the individual, resolved by a youthful offender adju-

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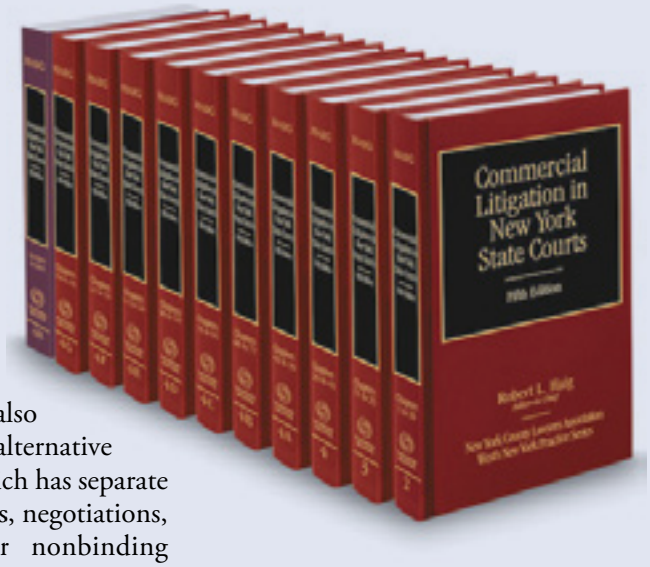
The Only New York State Commercial Litigation Book Gets a New Edition

By Christian Nolan



The only book on commercial litigation in the New York State courts is back. This time, the Fifth Edition of *Commercial Litigation in New York State Courts* features two new volumes, 28 new chapters and 2,888 more pages than the previous Fourth Edition.

Robert L. Haig, partner at Kelley Drye & Warren in New York City, once again serves as editor-in-chief. Haig, the founder and first chair of the New York State Bar Association's Commercial and Federal Litigation Section and also a past NYSBA Executive Committee member, has reviewed and commented on every chapter in all five editions as well as the Pocket Parts.

Like its predecessors, published periodically since its inception in 1995, the Fifth Edition analyzes both New York procedural law and substantive commercial law and then explores strategies designed to produce a favorable outcome by utilizing both.

"This is not only a law book that is valuable as a research tool and a source of legal knowledge and citations, it is an idea book filled with nuggets of wisdom and perspective that could only have been gained by years of experience in handling cases from the most simple to the most complex," Haig writes in the book's foreword.

The Fifth Edition contains 64 substantive law chapters that cover the subjects common to commercial litigation, including contracts, insurance, sale of goods, banking, securities, antitrust, intellectual property, professional liability, business torts and franchising. Compensatory and punitive damages and other remedies are also covered, along with alternative dispute resolution, which has separate chapters on settlements, negotiations, mediation and other nonbinding ADR, arbitration and international arbitration.

Additional chapters address the business of litigation practice, such as marketing to potential business clients, third-party litigation funding, litigation management by law firms and corporations, and litigation avoidance and prevention. Professional growth and development of commercial litigators are also addressed with chapters on career and practice development, teaching litigation skills, pro bono, and diversity and inclusion.

Among the 28 new chapters in the Fifth Edition are several topics that have become dramatically more important in recent years, according to Haig in the foreword, including artificial intelligence, attorney discipline, civil justice reform, cross-border litigation, deceptive and misleading business practices, gaming, joint ventures, limited liability companies and valuation of businesses and real property.

The treatise has 256 principal authors, including 29 distinguished judges and commercial litigators at the top of their profession. Carrying on the tradition from prior editions, Chief Judge Janet DiFiore penned the first chapter. The late Chief Judge Judith S. Kaye and former Chief Judge Jonathan Lippman wrote the first chapter in the First, Second, Third and Fourth Editions.

Court of Appeals Judges Eugene M. Fahey, Victoria A. Graffeo (ret.) and Robert S. Smith (ret.), as well as Chief Administrative Judge Lawrence K. Marks, are among the many other noteworthy judges contributing their insights as authors.

Haig explains in the foreword that the various authors' work on the book was largely done during the coronavirus pandemic, but that quality was in no way compromised; in fact, it had the opposite effect.

"Because most court operations in New York State were suspended during much of the period our authors were working on their chapters, they had more time to devote to their chapters and their chapters reflect that additional time," wrote Haig. "I am profoundly grateful for the fact

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State Bar Association Elects New Officers

By Brandon Vogel

The House of Delegates, the governing body of the New York State Bar Association, elected a new slate of officers at its 144th Annual Meeting in New York City on January 30. The new leadership is as follows:

- Current president-elect T. Andrew Brown of Rochester will commence the one-year term of his presidency on June 1, 2021.
- Sherry Levin Wallach, of White Plains, has been elected president-elect designee of the New York State Bar Association. Her term in this post also starts on June 1, and she will become president on that same date in 2022.
- Taa R. Grays, of New York City, was elected secretary of the Association. Domenick Napoletano, of Brooklyn, was elected treasurer for a third term.

T. ANDREW BROWN

T. Andrew Brown of Rochester is founder and managing partner of Brown Hutchinson.

A 29-year member of the State Bar Association, he is co-chair of the Task Force on Racial Injustice and Police Reform. He has chaired the Trial Lawyers Section and Finance Committee, was vice-president for the Seventh Judicial District, served as a member-at-large of the Executive Committee and co-chaired the Task Force on the Future of the Legal Profession in 2010 and 2011.

Brown entered law practice as an associate with Nixon, Hargrave, Devans and Doyle (now Nixon Peabody). He has also served as Rochester's corporation counsel – the city's chief legal officer and head of its law department – and as deputy county attorney for Monroe County. He has been a mediator and an arbitrator on the commercial, employment and complex case panels of the American Arbitration Association for more than two decades.

Brown is a former general counsel of the National Bar Association, the largest association of attorneys and judges of color in the world. He is a past president of the Monroe County Bar Association and the Rochester Black Bar Association. He has served on many other boards and commissions and has also held adjunct teaching positions with the State University of New York.

Brown is a 1984 graduate of the University of Michigan Law School and a 1981 graduate of Syracuse University.

SHERRY LEVIN WALLACH

Levin Wallach, serving her fourth one-year term as NYSBA secretary, is the deputy executive director of the Legal Aid Society of Westchester County.

A former chair of the Criminal Justice and Young Lawyers Section, Levin Wallach has served as vice president from the Ninth Judicial District to the Executive Committee, chaired the Membership Committee and co-chaired the Task Force on Incarceration Release Planning and Programs. Levin Wallach serves on the Committee on Professional Discipline, the Committee on Mandated Representation and the Task Force on Parole Reform. She is chair of the Resolutions Committee and a member of the new LGBTQ Law Section.

Levin Wallach is co-founder of the NYSBA Young Lawyers Section Trial Academy, an annual program offering five days of intensive trial training, where she is a team leader and lecturer. She has assisted NYSBA CLE on expanding the Trial Academy to have a series of virtual lectures on Trial Practice that run live from June to December. She chaired this year's inaugural Virtual Trial Academy.

Levin Wallach organizes and lectures at continuing legal education programs for NYSBA, the New York State Association of Criminal Defense Lawyers and the Westchester County Bar Association on the topics of criminal and civil trial practice, ethics and DWI. She has written a chapter on DWI defense, "Best Practices for Defense Attorneys in Today's DWI Cases," in "Inside the Minds: Strategies for Defending DWI Cases in New York," as well as articles on criminal justice issues and trial practice.

Levin Wallach concentrates her practice on criminal defense. She has also practiced in the areas of estate planning, probate and estate administration, real estate and general civil litigation in the state and federal courts. She is admitted to practice in New York, the U.S. District Courts for New York's Southern and Eastern districts and the U.S. Supreme Court. She serves on Westchester and Putnam counties' 18B panels under their assigned counsel plans, which provide criminal defense for indigent people.

She is a former assistant district attorney of Bronx County. Levin Wallach was principal at her law firm Wallach & Rendo for approximately 14 years and of counsel to Bashian Law, formerly Bashian & Farber, and Brown Hutchinson.

Levin Wallach earned her law degree from Hofstra University School of Law, now the Maurice A. Deane School of Law at Hofstra University, and her undergraduate degree from George Washington University.

TAA R. GRAYS

Grays is co-chair of the NYSBA Task Force on Racial Injustice and Police Reform. She is a member of the Business Law, Corporate Counsel and Women in Law sections, as well as the Task Force on Autonomous Vehicles and the Law. She previously served as vice president of the First Judicial District on the Executive Committee. She previously chaired the New York State Conference of Bar Leaders and the Committee on Women in the Law (now the Women in Law Section). She received the State Bar's Diversity Trailblazer Award in 2008.

Grays is vice president and associate general counsel of information governance at MetLife Legal Affairs. As the lead of information governance, Grays is responsible for the strategic management of MetLife's global Information Lifecycle Management Program. She leads an eight-person team that develops, implements and manages the Information Governance strategic plan.

Prior to this role, Grays served as the chief of staff to the general counsel since 2010. She started with MetLife in 2003 in the litigation section. Prior to MetLife, Grays was an assistant district attorney with the Bronx District Attorney's Office in its rackets bureau for five-and-a-half years.

Grays has been recognized as one of 100 Leading Women Lawyers in New York by Crain's New York Business in 2017, a Visionary Leader in Litigation by Inside Counsel in 2016, among the Most Influential Black Lawyer in 2015, and R3 – 100: Ready to Rise to become a general counsel in 2013 and 2015.

Within the legal community, the New York City Bar Association recognized her as a Diversity Champion in 2015. The Metropolitan Black Bar Association recognized her dedication and leadership to the bar in 2010 by honoring her with its inaugural Bar Leaders of the Year Award.

Grays earned her law degree from Georgetown University Law Center and received her undergraduate degree from Harvard College.

DOMENICK NAPLOLETANO

Napoletano is a solo practitioner focusing on complex commercial litigation and appellate work while maintaining a general practice. A number of his cases have appeared in published decisions, most involving real property, and tenancy and occupancy issues. He has also spearheaded various state and federal class action lawsuits, including one against the New York City Department of Finance for its imposition of "vault taxes."

Among his NYSBA activities, Napoletano is chair of the General Practice Section and co-chair of NYSBA's Emergency Task Force for Solo and Small Firm Practitioners as well as the Committee on Civil Practice Law and Rules. He is a member of NYSBA's Restarting the Economy Work Group and the COVID-19 Recovery Task Force working group on landlord-tenant disputes. He has served on many NYSBA committees, including Finance, Leadership Development, Bar Leaders of New York State, Animals in the Law, the President's Committee on Access to Justice, Task Force on the Evaluation of Candidates for Election to Judicial Office and the Task Force on Mass Shootings and Assault Weapons.

Napoletano also served on NYSBA's Executive Committee as vice president from the Second Judicial District, and the House of Delegates representing the Brooklyn Bar Association. He is a past president of the Brooklyn Bar Association, the Columbian Lawyers Association of Brooklyn, the Confederation of Columbian Lawyers of the State of New York and the Catholic Lawyers Guild of Kings County.

While in college, and throughout law school, Napoletano worked for then-New York State Assemblyman Michael L. Pesce, who recently retired as presiding justice of the state Supreme Court Appellate Term for the Second, Eleventh and Thirteenth Judicial Districts. Napoletano earned his law degree from Hofstra University School of Law and his undergraduate degree from Brooklyn College.

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80 Attorneys Contribute to NYSBA's Landmark Guide on Labor and Employment Law

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dication, or which resulted in a sealed conviction. In general, New York law does not prohibit employers from asking whether an applicant has been convicted of a crime or if the applicant has a pending (open and unresolved) arrest.

Does New York State have a law that permits nursing mothers to express breast milk in the workplace? Yes. Section 206-c of the New York Labor Law requires employers to provide nursing mothers with reasonable breaks during the workday for lactation purposes. This break time is unpaid.

Are New York employers required to provide employees with bereavement leave? No. There are no laws that currently require employers to provide their employees with time off from work for bereavement purposes.

To get answers to the other 445 questions, you'll have to buy the book. The cost is $95 for members and $130 for non-members. For more information on the Essential Guide, please visit: https://nysba.org/products/new-york-employment-law-the-essential-guide.

NYSBA Announces New Section Chairs

By Brandon Vogel

Six of the New York State Bar Association's sections have elevated new chairs this month to oversee efforts to improve laws, address professional development and sponsor continuing legal education courses in a variety of substantive fields. NYSBA has 27 sections, which range in size from 300 to more than 4,500 members.

ANTITRUST LAW SECTION

Benjamin Sirota of New York City, who handles white collar criminal matters, regulatory enforcement and internal investigations at Kobre & Kim, is the new chair. A 15-year NYSBA member, Sirota, who focuses on global competition issues, most recently served as the section's vice-chair.

Sirota graduated from Princeton University and earned his law degree from the University of Chicago Law School.

CORPORATE COUNSEL SECTION

Yamicha Stephenson of Brooklyn is a manager in the anti-money laundering and sanctions practice of the Deloitte Risk & Financial Advisory group (Deloitte Transactions and Business Analytics). She was previously an assistant district attorney with the Kings County District Attorney's Office.

An eight-year member of NYSBA, Stephenson was chair-elect of the section before being elevated to chair. She is a former treasurer and secretary of the section. She has chaired the section's diversity internship committee.

Stephenson graduated from Boston College and earned her law degree from Brooklyn Law School.

TAX SECTION

Gordon Warnke is a principal at KPMG in New York City. He concentrates his practice in U.S. federal income tax considerations relating to domestic and cross-border mergers, acquisitions, spinoffs, divestitures, joint ventures, restructurings, bankruptcy and non-bankruptcy workouts, consolidated returns, and foreign tax credit, basis, earnings and profits and other tax attribute matters.

A 36-year member of NYSBA, Warnke most recently served as first vice-chair of the section. Within the section, he has been a member of the consolidated returns, corporations, debt-financing and securitizations, financial instruments, inbound U.S. activities of foreign taxpayers, outbound foreign activities of U.S. taxpayers committee and reorganizations committees.

Warnke graduated from the University of Alberta and earned his law degree from Harvard Law School.

TORTS, INSURANCE AND COMPENSATION LAW SECTION

Michael P. O'Brien, a solo practitioner in New York City, is the new chair of the section. He concentrates his practice in civil litigation, primarily insurance defense/personal injury defense, as well as commercial litigation.

An 18-year member of NYSBA, O'Brien most recently served as vice-chair of the section. He also is a member of the Dispute Resolution and Trial Lawyers Sections. O'Brien graduated from Providence College and earned his law degree from Suffolk University Law School.

TRIAL LAWYERS SECTION

William S. Friedlander of Ithaca, a partner at Friedlander & Mosher, concentrates his practice in school violence and misconduct litigation, environmental litigation and nursing home abuse.

A 46-year member of NYSBA, Friedlander most recently served as vice-chair of the section. He also is a member of the 50+ Section and Elder Law and Special Needs Section, as well as the Task Force for Nursing Home and Long-Term Care, serving as co-chair of its nursing home subcommittee.

Friedlander graduated from Boston University and earned his law degree from Stetson College of Law.

TRUSTS AND ESTATES LAW SECTION

Jennifer F. Hillman of Uniondale is a partner of Ruskin Moscou Faltischek. Her practice includes all manner of Surrogate's Court proceedings, including accounting proceedings, probate contests, discovery proceedings and commercial litigation related to estates.

A 17-year member of NYSBA, Hillman most recently served as chairperson-elect of the section. Within the section, she served as chair of the estate litigation committee and co-chair of the government relations and legislation committee.

Hillman graduated from Marist College and earned her law degree from St. John's University School of Law.

Lawyers Resource Directory

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I review for the New York State Office of Professional Medical Conduct and have had over ten years of experience in record review, determinations of standard of care, deposition and testimony in medical malpractice cases.

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Attorneys – refer stockbroker fraud or other securities and commodities matters to a law firm with a history of obtaining significant recoveries for investors. Christopher J. Gray, P.C. has substantial experience representing investors in arbitration proceedings before the Financial Industry Regulatory Authority and the National Futures Association and in litigation in the state and federal courts. Cases accepted on contingent fee basis where appropriate. Referral fees paid, consistent with applicable ethics rules. Call or email Christopher J. Gray to arrange a confidential, no-obligation consultation.

The Only New York State Commercial Litigation Book Gets a New Edition

continued from page 69

that our authors have been willing to devote their extra time to making what was already a superb treatise even better."

Haig also noted that a conservative estimate from the authors and their law firms is that they have invested more than $60 million of their own billable time, calculated at their regular hourly billing rates, in working on the First, Second, Third, Fourth and Fifth editions of this treatise and its annual Pocket Parts.

The publication of these five editions has been a joint venture between Thomson Reuters and the New York County Lawyers Association with all royalties from the sales of this treatise and its annual Pocket Parts going to NYCLA. For those not interested in the print version, the entire series is available on Westlaw.

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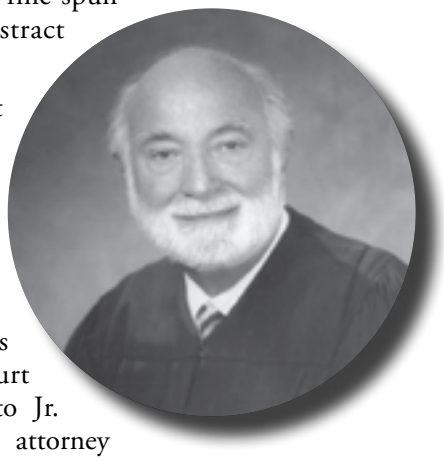
Thoughts on Legal Writing from the Greatest of Them All: Ruggero J. Aldisert

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

"[L]egal writing is not designed to describe something like a journalist, to report what is true or false. . . . [I]t is designed to convince, to deter, or to persuade."[1]

Judge Ruggero J. Aldisert was a renowned writer of judicial opinions, law journal articles, and books on legal writing.[2] He graduated from the University of Pittsburgh with a B.A. and J.D. before serving as a Marine for four years during World War II.[3] After his service, Aldisert began his legal career as a sole practitioner handling civil and criminal cases in Pennsylvania.[4] He was elected a Pennsylvania state judge in 1961 and later nominated by President Lyndon B. Johnson in 1968 to serve on the U.S. Court of Appeals for the Third Circuit, for which he served as Chief Judge from 1984 to 1986.[5] Aldisert assumed senior status in 1986 and heard cases until he died in December 2014.[6] Supreme Court Justice William J. Brennan Jr. described him as a leader who "promot[ed] the shift of justice away from fine-spun technicalities and abstract rules."[7]



One of Aldisert's most popular books is *Winning on Appeal*, a guide to appellate brief writing and oral argument. In a foreword to the third edition, published after Aldisert's death, Supreme Court Justice Samuel A. Alito Jr. wrote that "[f]or any attorney who wants to know how to win on appeal, this is where to look."[8] Aldisert also published a novel, a memoir, and other works on law and jurisprudence.[9]

The expanding academic literature on judicial opinion writing includes general handbooks[10] and works on judicial ethics,[11] writing style,[12] thinking,[13] and the role of law clerks,[14] to name a few. Aldisert published the first edition of *Opinion Writing* in 1990 as both a teaching manual and source of reference for judges and their clerks.[15] He drew for inspiration upon his many years on the bench, as well as discussions held at the Institute of Judicial Administration at New York University and the Federal Judicial Center in Washington.[16] The first edition was for many years given to all newly commissioned federal judges but was otherwise limited in its distribution.[17]

Aldisert published the second edition of *Opinion Writing* in 2009 with the help of his law clerks.[18] Because this was the first time the book would be available publicly, Aldisert and his clerks published a law-review article the same year about the relationship between opinion writing and opinion readers.[19] The article contains much of the same advice given in *Opinion Writing*, but with a focus on the interactions between "readers and users of judicial opinions."[20]

Opinion Writing is now in its third (2012) edition. This version expanded its audience from trial and appellate judges to administrative law judges, arbitrators, and law clerks.[21] According to Third Circuit Judge Michael Chagares, it remains a "go-to book" for judges.[22]

In his introduction to *Opinion Writing*, Aldisert wrote that he intended his book for judges — new or veteran

— and their law clerks.[23] But his suggestions on writing style and usage benefit all legal writers.

Opinion Writing contains sections on the theoretical concepts underlying an opinion, the anatomy of an opinion, and writing style. In this column, we discuss Aldisert's framework for opinion writing and then focus on his advice on writing style and usage.

CONCEPTS UNDERLYING AN OPINION AND ITS ANATOMY

"If a judge wants to write clearly and cogently, . . . the judge must first think clearly and cogently, with thoughts laid out in neat rows."[24]

Aldisert opened *Opinion Writing* noting the progress jurisprudence has made from 500 years ago, when one prominent English jurist justified an opinion by writing only this: "Sir, the law is as I say it is, and so it has been laid down ever since the law began . . . though we cannot at present remember the reason."[25] Aldisert also noted the many problems that plague the judicial system and opinion writing, including the rise of unnecessary appeals and a rapid growth in unpublished opinions in the last decades.[26]

He separated his opinion-crafting advice into the theoretical and the practical. After discussing how a judge should decide whether to write an opinion at all,[27] he distinguished between the processes of decision making and decision justifying, noting that at the appellate level the opinion-writing process involves several judges and that decisions are often built upon fragile compromise.[28]

Aldisert argued that in the crucial category of cases in which neither the rule nor the application of the law is clear, the court faces five recurring questions:

1. "When confronted with competing statutes or constitutional clauses, which should prevail (and why)?
2. "Which of several competing legal precepts should prevail (and why)?
3. "Should we extend one precept by analogy while restricting another to its four corners (and why)?
4. "Should we meet the question of statutory construction in the abstract (and why)? What is the legislative intent (and how do we divine it)?
5. "Is an element of a previous decision binding precedent or dictum (and why)?"[29]

The book then describes in detail the seven parts of an opinion: the orientation paragraph(s),[30] the statement of jurisdiction,[31] the summary of issues to be discussed,[32] standards of review,[33] the facts,[34] reasons for a decision,[35] and a disposition.[36]

WRITING STYLE

"When addressing a jury or a court, great advocates develop a rhythm that commands attention and persuades. Yet many eloquent speakers — judges, lawyers and law professors — abandon this style when it comes to writing."[37]

Find the "middle ground" of footnoting. Footnotes have "proliferated to intolerable levels," particularly in the federal courts, argued Aldisert.[38] He suggested that writers strike a balance between the overwhelming "show-and-tell" style common in U.S. Supreme Court opinions and the Illinois Supreme Court's minimalist practice of abstaining from footnotes altogether. Aldisert noted that it's improper to use footnotes to respond to arguments not made by the parties or to distinguish a case that could have been cited but wasn't.[39]

Avoid "law review syndrome." Aldisert cautioned against stilted writing of "the pedantic style used by academics."[40] He observed that recent graduates serving as law clerks tend to be overly timid in their writing. That's why their drafts include unnecessary footnotes and counterpoints, he wrote.[41]

Establish an effective rhythm to your writing. Aldisert argued that just as in spoken argument, a strong command of rhythm will bolster legal writing.[42] As with any great composition or speech, preparation and revision are the keys to creating the proper "beat" in a work of legal writing.[43]

Read the greats. *Opinion Writing* includes excerpts from opinions of renowned jurists past and present. Aldisert began with the trio of Holmes, Cardozo, and Hand and included examples by several other legal-writing greats.[44] In brief introductions to their writings, he praised their expressiveness, style, and ability to make complex legal concepts clear. From the nearly 30 pages of excerpts included, it's clear that Aldisert saw value in studying the greats.[45]

Write to be clear and interesting. Effective writing must be clear, lean, and excite the reader's interest, Aldisert advised.[46] He included with this advice some suggested rules to follow, with the goal to avoid "undesirable reactions in the reader, ranging from boredom to hostility."[47]

Avoid the scissors-and-paste approach to quotations. Is each quotation in a written opinion necessary and pertinent? Aldisert cautioned against the tendency to plop down lengthy block quotations lest a judicial opinion transform into a law lecture. In that case, the quotation might only confuse readers.[48]

Vary sentence length and structure. Here, Aldisert returned to beat and rhythm. He advised judges to modulate the length and types of sentences in their opinions, citing the advice of famed architect Garrett Eckbo: "Never put two stones the same size next to each other."[49]

Master the trick of anastrophe. Anastrophe refers to the writing technique of inverting word order for rhetorical or poetic effect.[50] Although Aldisert cautioned that this technique should be used sparingly, he suggested that writers use it "where it will achieve the effect you want better than a straightforward construction would do."[51] He provided alternative versions of the same sentence as an example of effective anastrophe.

1. "Gone are the days when my heart was young and gay."
2. "The days when my heart was young and gay are gone."[52]

Let your sentence unfold in the way that serves you best. Even when the effect isn't poetic, every English sentence has an optimal word order. Aldisert compared the importance of selecting the right order to a comedian's delivery of a punchline, advising that selecting the perfect word or reordering a sentence will make writing much more effective.[53]

Lighten your citations and authorities. Aldisert urged judges to confine citations to their own jurisdiction before referring to decisions from other courts.[54] Additionally, he recommended that they confirm in each draft opinion that (1) the law cited is current and in the appropriate citation format, (2) every quotation is accurate down to the punctuation mark, (3) style is consistent from page to page, and (4) all typos are fixed.[55]

JUDGE ALDISERT'S PET PEEVES

Pet peeves vary from judge to judge. But all legal writers would be wise to consider Aldisert's advice on grammatical slipups to avoid.

Don't use "since" and "because" interchangeably. Although it's not grammatically incorrect to use "since" in place of "because," Aldisert advised that legal writers to avoid confusing their readers by limiting the use of "since" to a temporal sense: "from then till now."[56]

Use "due to" only as an adjectival phrase. "Right: 'The crop failure was due to continuing drought.' Wrong: 'Due to the continuing drought, the crop failed.'"[57] Aldisert believed that legal writers should use "due" to mean owed or owing, payable, suitable, fitting, or "as much as required."[58]

Limit the use of "despite." "Despite" should be used as a noun, argued Aldisert. Although "despite" is commonly used as a preposition in place of "notwithstanding," dictionary definitions (spite, injury, insult, malice) refer to nouns.[59]

"Posit" is law-school jargon. Aldisert suggested that when an opinion wishes to "assume as fact," it should use those words. Seeing terms of academic jargon in academic opinions is a clear sign that the writer is "a law clerk, not a judge."[60]

SUGGESTIONS FOR GOOD WRITING AND EDITING

"There is no such thing as good writing. There is only good rewriting."[61]

Opinion Writing also dedicates a chapter to the proper role of judicial law clerks. The chapter provides helpful editing and writing tips.

Write succinctly, clearly, and precisely. Writers should, beyond all else, ensure that readers will understand their point. Accordingly, suggested Aldisert, legal writers should avoid flowery language, literary devices, and "unnecessarily abstract or complex words and phrases."[62] He also suggested that law clerks leave any embellishment to the judge's discretion.[63]

Conduct a proper final edit. Before presenting a final draft to their boss (the judge), Aldisert told law clerks to conduct a thorough edit.[64] Specifically, he recommended a "reading rainbow" procedure in which more than one clerk reads every word of the document aloud. This way, issues of spelling, citation, and usage will be caught before the draft reaches the judge's desk.[65]

Be accurate; give appropriate references. The parties' briefs must be checked for accuracy and exaggeration. Especially when they incorporate citations from the parties into a statement of facts, Aldisert said, law clerks should cite-check all references to depositions and other exhibits.[66]

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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3. *Id.*
4. Joseph F. Weis Jr., *Ruggero J. Aldisert, Longtime Colleague and Friend*, 48 U. Pitt. L. Rev. xviii (1986-1987).
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18. *Id.*
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25. *Id.* at 3.
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29. *Id.* at 35.
30. *Id.* at 81.
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37. *Id.* at 239.
38. *Id.* at 231-32.
39. *Id.*
40. *Id.* at 239.
41. *Id.*
42. *Id.*
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49. *Id.*
50. Frank Gibbard, Historical Perspectives, *Guard Your Pistols and Your Pronouns*, 48 Colo. Law. 20, 21 (Dec. 2019).
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52. *Id.*
53. *Id.*
54. *Id.* at 273.
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57. *Id.*
58. *Id.*
59. *Id.* at 277.
60. *Id.*
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63. *Id.*
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66. *Id.* at 166.

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