NEW YORK STATE BAR ASSOCIATION
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Supremely Divided

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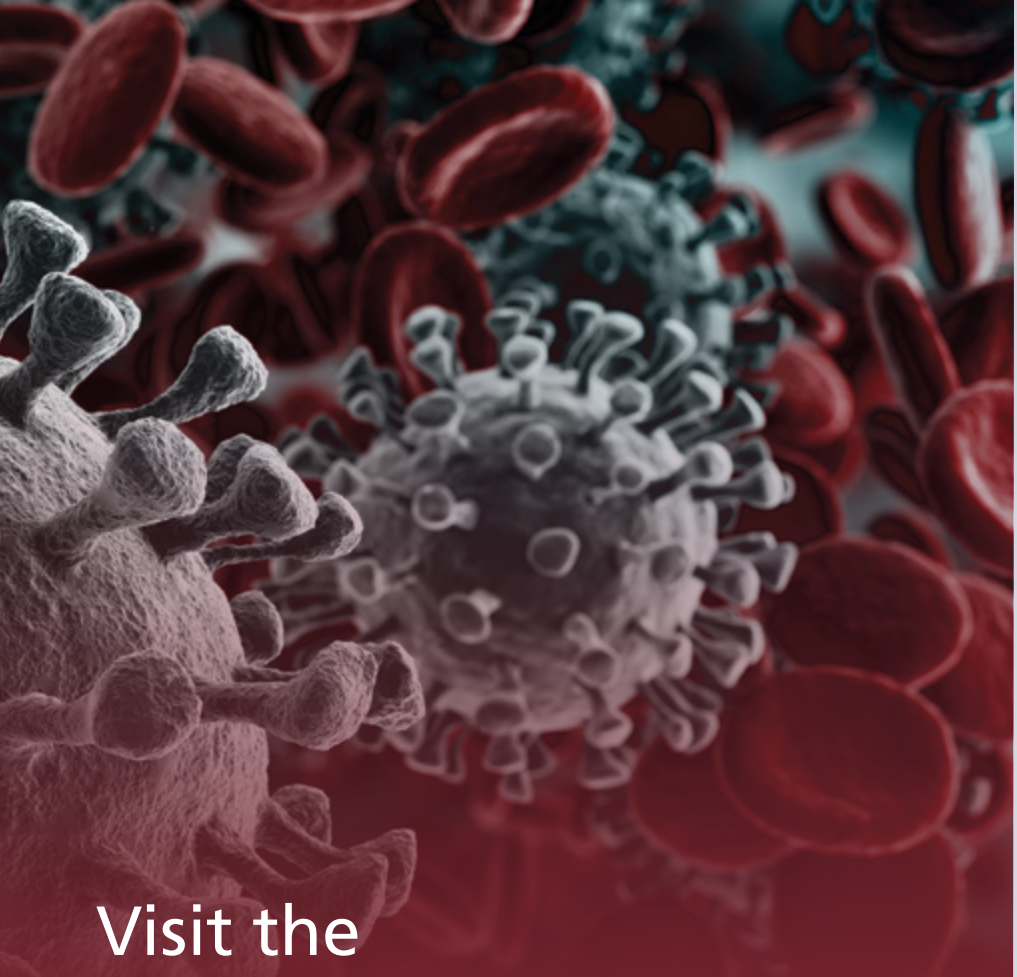

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by Vincent Martin Bonventre

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Why All Lawyers Should Care About Education

As students of all ages return to schools and campuses across the country this fall, we are once again reminded of the many doors in life that are only opened through education.

Despite growing up in a family of little means, I was fortunate to be raised in a household that valued the importance of education and knew that that was the pathway to improve socioeconomic status in life. By high school, I already envisioned becoming a lawyer and fulfilled that goal when I graduated from the University of Michigan Law School. Quite simply, I wouldn't be where I am today without the educational opportunities afforded me.

As many of you already know, prior to becoming NYSBA president I spent nine years on the Board of Regents, including serving as vice chancellor and as acting chancellor. Education is near and dear to my heart. Education is vitally important to maintaining strong and vibrant communities. A strong economy is dependent on good schools at all levels. It lays the groundwork for healthy families, vibrant neighborhoods and thriving communities.

Unfortunately, many people tend to take education for granted. For many others like me, education provided the only equitable way to level the playing field. I never took it for granted. For those who slip through the cracks and never get a sound education, the impact is lifelong, and far greater on society and us, as lawyers, than you may realize.

The downfall is an all-too-familiar script of schoolchildren, especially at-risk youth, going from the classroom to the juvenile and criminal justice systems, often referred to as the school-to-prison pipeline. Our members working in various aspects of the criminal justice system or in the family courts, including judges, see this firsthand every day.

NYSBA addressed this issue through its Task Force on the School to Prison Pipeline in 2019 that issued a report adopted by the House of Delegates. The task force reviewed studies showing that students who are excluded from school face adverse consequences, including lower academic achievement, more truancy, higher dropout rates, and increased involvement with the juvenile justice system.

Suspensions and expulsions and their adverse impacts are experienced more frequently by students of color, students with disabilities, and LGBTQ students. Studies further demonstrate that students who are suspended are three times more likely to have contact with the judicial system and two times more likely to drop out of school than are students who have never been suspended from school. The stark consequences do not end there, as this often leads to a downward spiral that prevents access to other opportunities in life such as safe and decent housing, healthcare, and employment.

Among the task force's recommendations were to urge lawmakers to financially support restorative justice practices in lieu of suspensions to help alleviate the school-to-prison pipeline. This not only benefits at risk students but results in a significant cost savings to taxpayers and society.

The cost of incarceration is staggering. According to the Vera Institute of Justice, New York counties spent more than $225 to incarcerate a single person for a single night, or more than $82,000 per year in 2019. These numbers are considerably higher in New York City and have only gone up since the pandemic began. According to the New York City comptroller in a report issued earlier this year, the New York City Department of Corrections spent a whopping $447,337 per inmate in the 2020 fiscal year, a third more than the previous year and more than double what was spent in 2015.

That amount of money could pay for an education at a prestigious university, and certainly that funding could be better spent improving our education system statewide – a system studies have shown to be the most segregated in the country. Instead, that money is spent on a seemingly never-ending school-to-prison pipeline. Unfortunately, the inequities in the education system at the state and federal level do not end there.

Disparities in accessing an education are also prevalent in rural areas. As the use of online education and virtual learning skyrocketed during the pandemic, many people in rural areas were left behind. NYSBA has urged national, state, and local lawmakers to fund broadband access for rural communities. This was outlined in NYSBA's groundbreaking Task Force on Rural Justice report that was adopted by the House of Delegates in 2020.

> "It is important to remember as we get back to educating our citizens this fall that the fate of our education system should matter to everyone, and the dire consequences of a failing system impact us all, including our members on the front lines who deal with the fallout every day."

That same report also highlighted the role law schools can play in addressing the lawyer shortage in rural areas through clinics, internships, pro bono work and support of law students interested in rural practice.

Education was also at the forefront of a recent recommendation made by NYSBA's Task Force on Racial Injustice and Police Reform in its comprehensive report adopted by the House of Delegates in June. The task force, which I had the privilege of co-chairing along with Taa Grays, recommended enhancing police hiring practices by requiring at least an associate's college degree or its equivalent. This practice is already in place for all applicants seeking to become New York City police officers.

Nationally, most police departments do not require more than a high school diploma. In some parts of New York, you can become a police officer with only 700 hours of training as set by the Municipal Police Training Council. In other words, you need more training to become a cosmetologist and a massage therapist (1,000 hours) in New York than you do to become a police officer.

Police officers with two- and four-year degrees have proven to have fewer constitutional violations and disciplinary actions filed against them. As police officers increasingly encounter individuals with mental health issues, the task force also discovered that police officers with a college education were better able to assist them than their non-college-educated colleagues. And studies show that officers with four-year degrees use significantly less physical force during encounters.

The legal profession's interest in higher education certainly doesn't end there. Of particular note, the Law School Admission Council reports that the number of applications to U.S. law schools has increased by 28% from last year – reaching its highest level since 2011.

NYSBA's Task Force on the New York Bar Examination recommends that the state withdraw from the Uniform Bar Exam and develop its own bar admissions test to ensure that attorneys have a better understanding of state law before being admitted to practice. As such, law schools would increase their emphasis on teaching New York law.

NYSBA is calling on the New York Court of Appeals to appoint a working group that would, in conjunction with the Board of Law Examiners, develop a New York Bar Examination that is fair and equitable and encourages the study of New York law. The task force's report, approved by the House of Delegates in June, also requests consideration of two alternative means to admission: a pathway through concentrated study of New York law while in law school and a pathway through supervised practice of law in New York combined with law school achievements.

It is important to remember as we get back to educating our citizens this fall that the fate of our education system should matter to everyone, and the dire consequences of a failing system impact us all, including our members on the front lines who deal with the fallout every day. The New York State Bar Association will continue to advocate for an educated and informed legal community and society in general. It is the very foundation of our careers and of the legacy we will leave future generations.

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Supremely Divided:

Court's Conservative Bent Intensifies

By Vincent Martin Bonventre

Note: This article is a follow-up to "Supreme Shift: What the 6-3 Conservative Majority Means Going Forward," which appeared in the Jan/Feb 2021 issue.

Vincent Martin Bonventre
is Justice Robert H. Jackson distinguished professor of law at Albany Law School.

Did the Supreme Court shift rightward? Did replacing Ruth Bader Ginsburg with Amy Coney Barrett make much of a difference? Were the "liberal" justices routinely relegated to issuing dissents? Did "conservative" justices sometimes join the liberals?

Well, yes and yes and yes and yes.

This past term was chock full of highly charged issues. The court rendered rulings involving church and state,[1] search and seizure,[2] the death penalty,[3] voting rights,[4] LGBTQ rights,[5] immigrant rights,[6] Obamacare,[7] labor unions[8] and other issues having clear ideologically opposing positions.[9] Not surprisingly, the court's decisional output generated abundant commentary. Also, not surprisingly, the commentary was varied, if not downright contradictory.

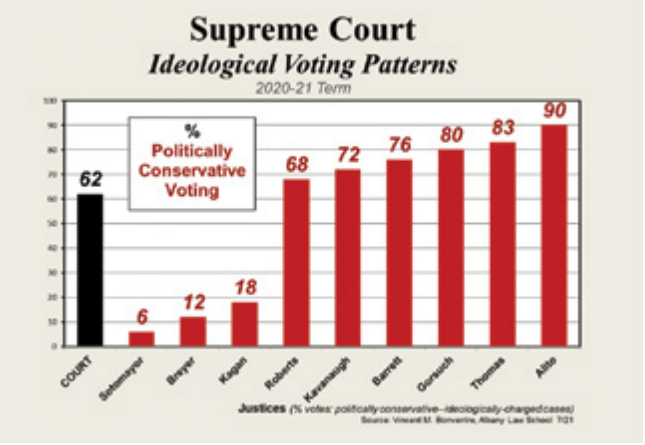
THE COMMENTARY AND THE FACTS

One commentary reported the Supreme Court to be "fluid and unpredictable,"[10] with the justices "deciding cases narrowly, reach[ing] agreement across the predicted partisan divides."[11] Another viewed the court as "both ideologically predictable and unpredictable," but "[t]o be clear . . . more conservative."[12] Many conservative court watchers complained that "the three newest justices lack intestinal fortitude."[13] At the same time, "[l]iberal legal activists say their critiques of the Trump appointees were well-justified and the idea that conservatives should feel buyers' remorse is absurd."[14] One commentator emphasized that "the Justices repeatedly defied expectations, with conservatives and liberals together forming majorities in high-profile cases."[15] And yet another insisted that "the muscular conservatism of the Roberts court was in full flower."[16]

To rephrase an oft-quoted quip of the late Senator Daniel Patrick Moynihan of New York, we may all have our own perspectives, preferences and critiques, but there actually are some facts.[17] To be sure, those facts can be interpreted and extrapolated, highlighted or ignored, celebrated or decried. But being facts, they can't be denied. So, without adornment, let's take a look.

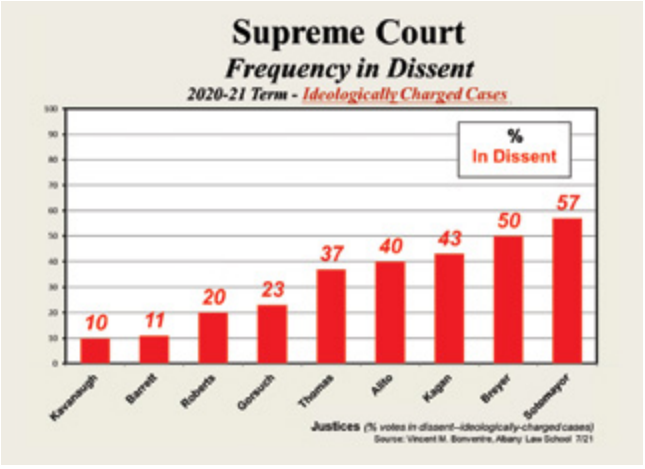
When considering those appeals presenting issues having clearly opposing political or social sides – i.e., "conservative" versus "liberal"[18] – the court's decisional record was more than 60% conservative.[19] Among the individual justices, the ideological spectrum ranged from Justice Samuel Alito, who voted for the conservative position 90% of the time, to Justice Sonia Sotomayor, who did so on only 6% of the issues.[20]

The ideological divide on the court could hardly have been starker. Contrast the voting records of the three liberal justices who remain since the loss of Ruth Bader Ginsburg – Sotomayor, Stephen Breyer and Elena Kagan – with any of the others. The most politically conservative record among the liberals was that of Justice Kagan at 18%. The least politically conservative record among the conservatives on the Court was that of Chief Justice Roberts at 68%.



That ideological chasm is all the more striking when we remember that these justices were considering the very same issues, arising out of the very same facts, in the very same cases. The chasm is especially stark when contrasting the ends of the court's ideological spectrum. The voting of the court's three liberals was Sotomayor at 6% conservative, Breyer 12% and Kagan 18%. Contrast that with the voting of Justices Samuel Alito at 90% conservative, Clarence Thomas 83%, and Neil Gorsuch 80%.

The decisional record of the court as a whole, 62% conservative, is reflected in the respective dissenting rates among the justices.[21] The liberal justices were in dissent far more frequently than the conservatives – from twice as frequently to five times as often, depending on the justices being compared. Consider the least to the most frequently dissenting justices. Among the three liberals, Justice Sotomayor voted against the majority decision on more than half of the ideologically charged issues. Her 57% dissenting rate was followed by Breyer at 50% and Kagan at "only" 43%. The three conservative justices at the other end of the dissenting-rate spectrum were Brett Kavanaugh at 10%, Barrett 11%[22] and Roberts 20%.



THE BARRETT DIFFERENCE

With the change in the court's composition – i.e., the appointment of Amy Coney Barrett to fill the vacancy

arising from the passing of Ruth Bader Ginsburg – the ideological balance shifted from a 5–4 conservative majority to 6–3. The significance of that shift, however, cannot be appreciated simply as a change in numerical balance. The difference in how Justice Barrett voted with how Justice Ginsburg would surely have voted makes the point.

Just consider those cases where Justice Barrett voted one way and the court's remaining three liberals, as a bloc, voted the opposite – and would surely have been joined by Justice Ginsburg. Among Barrett's votes in criminal cases, opposed by all three liberal justices, were those in:

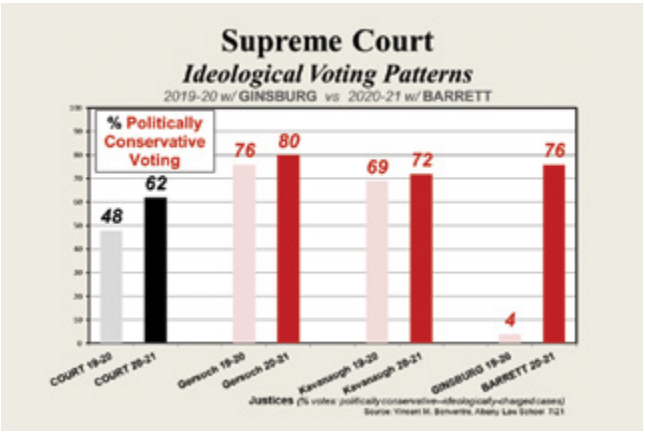
- *Shinn v. Kayer*, to reject the ineffective counsel claim of a death inmate;[23]
- *Jones v. Mississippi*, to uphold a sentence of life without parole for a juvenile defendant;[24]
- *Edwards v. Vannoy*, to deny the retroactive application of the unanimous jury right.[25]

Among Barrett's votes in civil cases, likewise opposed by the three liberal justices, were those in:

- *Roman Catholic Diocese v. Cuomo*, to invalidate pandemic restrictions on church services;[26]
- *Trump v. New York*, to dismiss the challenge to Trump's order to exclude undocumented immigrants from the census;[27]
- *Cedar Point Nursery v. Hassid*, to invalidate California's law expanding union recruitment of agricultural workers on management property;[28]
- *TransUnion LLC v. Ramirez*, to dismiss a class action of private plaintiffs for violations of the Fair Credit Reporting Act;[29]
- *Johnson v. Guzman Chavez*, to deny a hearing to previously removed noncitizens who feared persecution and torture upon deportation;[30]
- *Brnovich v. Democratic National Committee*, to uphold Arizona's voting statute criminalizing "ballot-harvesting" and discarding out-of-precinct votes;[31]
- *Americans for Prosperity Foundation v. Bonta*, to invalidate California's required disclosure of major donors to tax-exempt organizations.[32]

This recitation of Justice Barrett's votes is in no measure intended to suggest that they are legally mistaken, inequitable, misguided, or in any other sense wrong.[33] It is simply to demonstrate the extent to which her voting this past term contrasts so sharply with what the votes of Justice Ginsburg would have been. Perhaps a visual juxtaposition of their respective voting patterns makes the point most emphatically.[34]

The difference between Justice Barrett's voting this past 2020–21 term and the voting of Justice Ginsburg in the



2019–20 term could hardly be more vivid. The voting records being compared take account of all the ideologically charged cases in which the court was divided and in which the justices participated in their respective terms.[35] Significantly, the voting of the two other appointees of President Trump – Justices Gorsuch and Kavanaugh – underwent virtually no change from one term to the next. Gorsuch's voting was 76% conservative the previous term and 80% this one. Kavanaugh's was 69% and 72%. The change, however, between Ginsburg's voting the previous term and Barrett's this past one was truly dramatic.

Justice Ginsburg's voting across the pool of ideologically divided cases was 4% conservative; Justice Barrett's was 76%. Stated otherwise, in her final term on the court, Ginsburg supported the more politically and socially conservative positions in only one of the 27 such cases. Justice Barrett, in her first term on the court, filling the Ginsburg vacancy, supported the more politically and socially conservative positions in 24 of the 27 cases in which she participated. Stating the same thing in terms of liberal positions, Ginsburg supported them in 26 of 27 cases; Barrett did so in only three of the same number.

Considering the drastically contrasting voting of Ginsburg and Barrett, it is no wonder that the court as a whole was more conservative this past term than the term before. An unmistakable shift in the court's decisional record did coincide with Barrett replacing Ginsburg. Albeit not as dramatic as the Ginsburg-to-Barrett difference in voting, the change in the court's record was nevertheless considerable. It shifted from being moderately liberal – i.e., less than half conservative, or 48% so in the previous term – to clearly conservative, at 62% this past term. That decisional record was less conservative than the voting of Justices Alito at 90%, Thomas 83% and Gorsuch 80%[36] – and less than Barrett's own at 76%. But it, nonetheless, represents a shift in a decidedly conservative direction.

ROBERTS PLUS KAVANAUGH FOR LIBERAL VICTORIES

The Supreme Court's 62% conservative decisional record this past term does, of course, mean that there were some liberal rulings – 38%, or on a little more than one-third of those ideologically charged issues on which the justices divided. The two justices at the center of the court's ideological spectrum, Chief Justice Roberts and Justice Kavanaugh,[37] were jointly responsible for many of them.

Among the criminal rulings in which the three liberal justices were joined by Roberts and Kavanaugh were *Torres v. Madrid*, holding that the application of force with the intent to stop, even if the attempt to detain fails, constitutes a 4th Amendment "seizure;"[38] and *Lombardo v. City of St. Louis*, holding that the "prone restraint" of an inmate, even if he is resisting, may constitute excessive force.[39]

Among the civil cases where Roberts and Kavanaugh supported a liberal majority ruling were *Salinas v. United States Railroad Retirement Board*, holding that workers who lost their retirement claims at the board were entitled to judicial review;[40] *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, placing the burden of proof on the securities fraud defendant, even where the alleged misrepresentation is "generic;"[41] and *California v. Texas*, dismissing the latest Republican challenge to the Affordable Care Act.[42] Additionally, Chief Justice Roberts voted in dissent with the three liberals in *Roman Catholic Diocese v. Cuomo*[43] and *Tandon v. Newsom*,[44] supporting the pandemic restrictions against religious liberty challenges.

One final civil ruling should be noted. In *Fulton v. City of Philadelphia*, the court unanimously held that a faith-based agency, with religious objections to placing foster children with same-sex couples, was entitled to an available exemption under the local anti-discrimination civil rights law.[45] The justices were divided, however, on the standard to be applied to religious objections.

The majority, in an opinion by the chief justice, based its decision on the religious discrimination it found in the city's denial of an exemption, which the law itself explicitly permitted. However, three of the justices – Thomas, Alito and Gorsuch – went further and urged reconsideration of the court's governing 1990 precedent, *Employment Division v. Smith*.[46]

Under *Smith*, any "otherwise valid" law that is "generally applicable" defeats religious objections. Strict scrutiny of such laws does not apply. Consequently, for free exercise of religion to prevail, the law in question must be invalid for some other reason, such as discriminating against religion.[47] Overruling *Smith* – a goal of religious conservatives, apparently including the three justices who urged reconsideration – would fortify free exercise claims by reinstating strict scrutiny. It would then be much easier for religious objectors to succeed against civil rights laws, even if those laws were generally applicable.

But Chief Justice Roberts – writing for himself, the three liberal justices, and Justices Kavanaugh and Barrett – chose the narrower route to requiring a religious exemp-

tion in *Fulton*. Roberts' majority declined to reconsider *Smith* and further dilute the effectiveness of civil rights laws. Instead, the religious objectors prevailed in *Fulton*, under Roberts' majority opinion, only because the civil rights law at issue did permit exemptions, and denying one to the objectors was deemed to be discriminatory.

THIS 6–3 CONSERVATIVE COURT

There was little doubt that the appointment of Amy Coney Barrett to replace the deceased Ruth Bader Ginsburg would affect the Supreme Court's decisional direction. There was no doubt – none realistic anyway – that Barrett's voting would be very different from what Ginsburg's had been.

Justice Ginsburg was well-recognized as a liberal icon. Her voting record was socially and politically very liberal, placing her well within the liberal side of the court's ideological spectrum. In fact, her record was consistently at or near that spectrum's liberal extreme.[48]

Justice Barrett's record prior to her appointment, while a federal appellate judge on the 7th Circuit Court of Appeals, was quite socially and politically conservative.[49] Unless she were to experience a dramatic ideological conversion, it could confidently be predicted that her record at the Supreme Court would be similarly quite conservative and, therefore, quite different than the record of the justice she replaced. As we have now seen, Barrett underwent no such conversion. Ginsburg's record of 4% conservative voting was replaced by Barrett's 76%.[50]

Together with Justices Alito, Thomas, Gorsuch, Kavanaugh and Chief Justice Roberts – listed here in descending order of voting-record conservativism – Barrett is part of a formidable conservative super-majority. The impact on the court's decisional leaning should not be underestimated.

It might well seem that this emphasis on "conservative" versus "liberal" justices is overdone. To be sure, in a given case, the liberal justices might be joined by Roberts and Kavanaugh, or by some other combination of their conservative colleagues, to form a majority. But overall? Consider what the 6–3 conservative-liberal imbalance most likely means.

Consider, for example, issues before the Supreme Court that entail crime control on one side versus more protection for the accused on the other; upholding a death sentence on one side versus severely restricting or abolishing its use on the other; abortion restrictions versus the right to choose; religious liberty versus LQBTQ rights or health restrictions; color-blindness versus affirmative action; gun rights versus gun control; voting requirements versus the right to vote; management prerogatives versus worker rights; unhampered business versus health, safety and wage regulations; immigration restrictions versus immigrant rights; property rights and development versus environmental protection; and, in general, "traditional" values versus social and political change. These and other ideologically charged issues can usually be expected to trigger competing "conservative" versus "liberal" positions among the justices.[51]

Again, to be sure, even with a 6–3 conservative majority, the court will likely render some rulings that strengthen the rights of the accused, reverse a particular death sentence, invalidate some harsh treatment of immigrants, uphold the application of some anti-discrimination law, invalidate some voting restrictions, and uphold some gun regulations, as well as other decisions urged by the three liberal justices.

But make no mistake, the Supreme Court is far different today, and its decisional record has been and will very

GINSBURG REPLACED WITH BARRETT *Ideological Lineup*

The death of Justice Ruth Bader Ginsburg, the indomitable leader of the liberal wing on the U.S. Supreme Court, and the appointment of Justice Amy Coney Barrett, one of the most conservative, led to a major shift to the right on the high court.

likely continue to be far different, than would be true if the court's composition were a 6–3 – or even 5–4 – liberal majority. For better or worse, the current court, with the three conservative Trump appointees, is a far different institution, with a far different ideological tilt, and with predictably far different decisional outputs, than would have been true with liberal appointees.

If Justice Ginsburg had been replaced with a more like-minded appointee, and the remaining liberal justices on the court had been joined with appointees who gave them a liberal majority, the court's decisional record, this past year and in the years to come, would almost certainly be the reverse.

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1. *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63 (2020) (New York's pandemic restrictions discriminate against religion).

2. *Torres v. Madrid*, 141 S. Ct. 989 (2021) (physical force with intent to stop constitutes a seizure).

3. *Shinn v. Kayer*, 141 S. Ct. 517 (2020) (denial below of death inmate's ineffective counsel claim was not clearly erroneous).

4. *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021) (state voting restrictions do not violate the Voting Rights Act).

5. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (religious agency entitled to exemption from state anti-discrimination law).

6. *Johnson v. Guzman Chavez*, 141 S. Ct. 2271 (2021) (illegally reentering alien not entitled to hearing on risk of persecution and torture upon deportation).

7. *California v. Texas*, 141 S. Ct. 2104 (2021) (states challenging Affordable Care Act have no standing).

8. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (state law providing union's right to organize on owner's land constitutes unlawful taking).

9. Regarding the terms "liberal" and "conservative" as representing ideologically opposing positions, see the discussion, *'Liberal' Justices, 'Conservative' Justices*, in my previous article in this journal, *Supreme Shift: What the 6-3 Conservative Majority Means Going Forward*, 93 NYSBA Journal 9 (Jan./Feb. 2021) (hereafter, "Supreme Shift I").

10. Adam Liptak, *A Supreme Court Term Marked by a Conservative Majority in Flux*, NY Times, July 2, 2021, https://www.nytimes.com/2021/07/02/us/supreme-court-conservative-voting-rights.html.

11. *Id.* (quoting David Cole, the national legal director for the American Civil Liberties Union).

12. David Leonhardt, *A Supreme Court, Transformed*, NY Times, July 6, 2021, https://www.nytimes.com/2021/07/06/briefing/supreme-court-donald-trump.html.

13. Josh Gerstein, *Trump's Supreme Court Shrinks From Controversy*, Politico, July 7, 2021, https://www.politico.com/news/2021/07/07/trump-supreme-court-courage-498459.

14. *Id.*

15. Jeannie Suk Gersen, *The Supreme Court's Surprising Term*, The New Yorker, July 5, 2021, https://www.newyorker.com/magazine/2021/07/05/the-supreme-courts-surprising-term.

16. Leah Litman and Melissa Murray, *Opinion: Don't Be Fooled: This Is Not a Moderate Supreme Court*, Washington Post, July 1, 2021, https://www.washingtonpost.com/opinions/2021/07/01/make-no-mistake-this-is-conservative-supreme-court-it-just-sometimes-acts-slowly/.

For a somewhat different view of the Roberts court – or at least of the chief justice as an institutionalist – see, in an earlier issue of this journal, Joseph W. Bellacosa, *'Guardian of the Institution*,' NYSBA Journal (2019), https://archive.nysba.org/Journal/2019/Dec/%E2%80%98Guardian_of_the_Institution%E2%80%99/.

17. In the interest of full disclosure, I am a fairly liberal Democrat who, however, is viewed as somewhat conservative by many other liberals, but a "leftie" by many conservatives. If I were on the court – Lord forbid – I would be aligned most regularly with Justice Elena Kagan and Chief Justice John Roberts.

18. As discussed in *Supreme Shift I*, these are the ideologically charged "hot-button," issues, the issues where, for example, "conservative" Republican politicians and voters would typically support one position, while "liberal" Democratic politicians and voters would typically support the other. Anyone who follows politics and courts can surely identify a list of such issues. Among the most salient are those dealing with the separation of church and state, gun rights, LGBTQ rights, abortion, affirmative action, immigration, the death penalty, business regulation, and in recent years, just about anything involving President Obama or Trump. 93 NYSBA Journal 9 (Jan./Feb. 2021).

19. The court issued a total of 67 decisions in which it resolved the merits, whether substantive or procedural. Source: SCOTUS blog, *Stat Pack for the Supreme Court's 2020-21 term*, July 2, 2021, at 4. Among those 67, I identified 30 that presented "conservative" versus "liberal" sides on which the justices were divided.

Notably, an ideological divide sometimes occurs among justices who vote for the same disposition in a case – e.g., a reversal – and yet the majority and concurring opinions embrace different rules of law where one is more "liberal" and the other more "conservative." For example, in *Goldman Sachs Group Inc. v. Arkansas Teacher Retirement System*, 141 S. Ct. 1951 (2021), involving a class action for securities fraud, the majority and concurring opinions agreed that the case should be remanded. But the majority placed the burden to disprove the alleged generic misrepresentation on the defendant, while the concurring opinion argued that the plaintiffs should bear the burden of proving it.

20. See the graph entitled "Supreme Court, Ideological Voting Patterns, 2020-21 Term."

The focus on ideological patterns – i.e., "conservative" versus "liberal" – might seem overdone. But see the discussion *infra* under "This 6–3 Conservative Court."

21. See the graph entitled "Supreme Court, Frequency in Dissent, 2020-21 Term – Ideologically Charged Cases."

22. Justice Barrett did not participate in several of the early appeals while her nomination was being considered – three of them among the total pool of 30 non-unanimous ideologically charged cases – and, consequently, her total number of cases and corresponding percentages do not align with those of the others on the court.

23. *See supra* note 3. *See also Dunn v. Reeves*, 141 S. Ct. 2405 (2021) (Barrett voting with majority that the state court did not clearly violate federal ineffective counsel law).

24. 141 S. Ct. 1307 (2021) (life without parole may be imposed without finding that the juvenile is permanently incorrigible).

25. 141 S. Ct. 1547 (2021) (the rule announced in *Ramos v. Louisiana* (2020) does not apply retroactively on federal collateral review).

26. *See supra* note 1. See also *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (California's pandemic restrictions discriminate against religious gatherings).

27. 141 S. Ct. 530 (2020) (the predicted injuries from the presidential policy is insufficient to satisfy standing).

28. *See supra* note 8.

29. 141 S. Ct. 2190 (2021) (plaintiffs failed to show concrete injury to satisfy standing).

30. *See supra* note 6.

31. *See supra* note 4.

32. 141 S. Ct. 2373 (2021) (compelled disclosure of the identities of major donors violates the First Amendment freedom of association).

33. Again, I may have my own preferences as much as anyone else (*see supra* note 17), but that is not the point here.

34. See the graph entitled "Supreme Court, Ideological Voting Patterns, 2019-20 w/ Ginsburg vs 2020-21 w/ Barrett."

35. The pool for the past term includes 30 such non-unanimous ideologically charged cases. (*See supra* note 19.) Justice Barrett participated in 27 of them. (*See supra* note 20.) The previous year, the analogous pool totaled 27 cases. (*See* Supreme Shift I, *supra* note 9, at n. 23 and accompanying text.)

36. See the graph above entitled "Supreme Court, Ideological Voting Patterns, 2020-21 Term."

37. *Id.* Roberts's 68% conservative voting record and Kavanaugh's 72% were significantly less conservative, for example, than the records of Alito at 90% and Thomas at 83% – the most conservative records among the Court's 6 to 3 conservative majority.

38. 141 S. Ct. 989 (2021), *supra* note 2. Justice Barrett also joined in the majority.

39. 141 S. Ct. 2239 (2021).

40. 141 S. Ct. 691 (2021).

41. 141 S. Ct. 1951 (2021), *supra* note 19. Justice Barrett joined the majority and authored the court's opinion.

42. 141 S. Ct. 2104 (2021), *supra* note 7. Justices Thomas and Barrett also joined the majority's ruling that the challengers lacked standing.

43. 141 S. Ct. 63 (2020), *supra* note 1.

44. 141 S. Ct. 1294 (2021), *supra* note 26.

45. 141 S. Ct. 1868 (2021), *supra* note 5.

46. 494 U.S. 872 (1990) (free exercise of religion claims do not trigger strict scrutiny where the law in question is "otherwise valid" – e.g., it is "generally applicable" and, thus, does not discriminate against religion).

47. *See generally*, Vincent Martin Bonventre, *Religious Liberty: Fundamental Right or Nuisance*, 14 U. St. Thomas L.J. 650 (2018).

48. For example, in her final year on the court, the 2019–20 term, Ginsburg's voting record was 96% liberal – or, as discussed above, only 4% conservative (*see supra* notes 34–35 and accompanying text) – meaning she supported the more liberal position in 26 of the 27 ideologically charged issues that divided the justices.

The previous year, the 2018–19 term, for the cases I identified at that time as presenting issues with competing ideological positions on which the justices divided, Ginsburg voted for the liberal side 100% of the time, or on every one of 25 ideologically charged issues.

49. *See* Supreme Shift I, *supra* note 9, at 11–13.

50. *See supra* notes 34–35 and accompanying text; see graph entitled "Supreme Court, Ideological Voting Patterns, 2019-20 w/ Ginsburg vs 2020-21 w/ Barrett."

51. *See supra* note 18.

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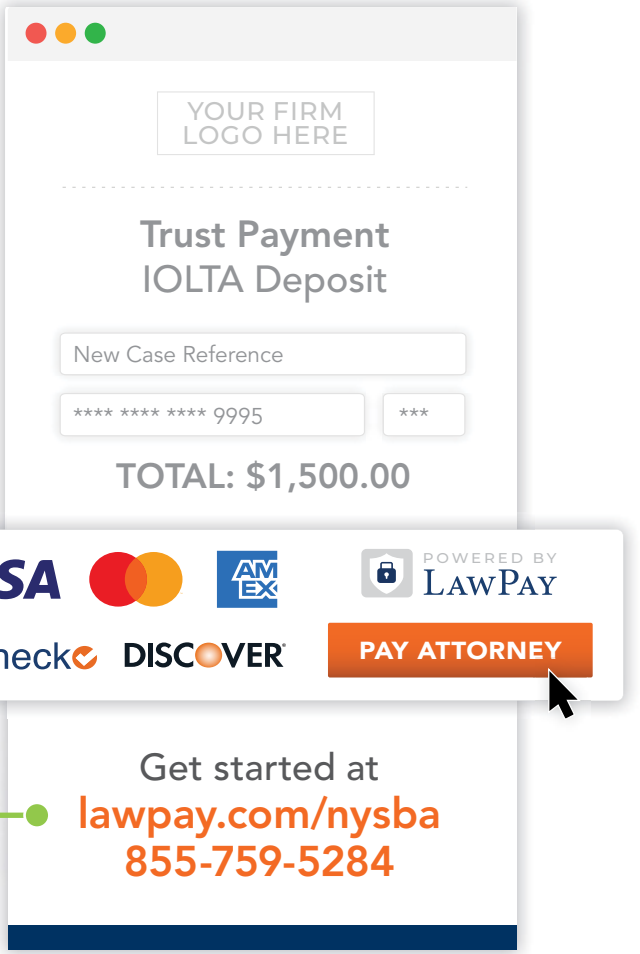

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New York Needs a New Bar Exam

By Hon. Alan D. Scheinkman and Michael Miller

Hon. Alan D. Scheinkman (Ret.) chairs NYSBA's Task Force on the New York Bar Exam. Until his retirement last year, he was the presiding justice of the New York State Appellate Division for the 2nd Judicial Department. Judge Scheinkman serves as a neutral with National Arbitration and Mediation.

Michael Miller is a former president of both the New York State Bar Association and the New York County Lawyers Association. He appointed the Task Force on the New York Bar Exam in 2019 and continues to serve thereon. He is in private practice in Manhattan, focusing primarily on estate and trust matters.

The license to practice law in New York has been the international gold standard for many years. This is so in significant part because, until 2015, New York had arguably the most challenging bar examination in the nation, with robust testing of both New York law and federal law. However, in 2015, New York largely ceded control over bar credentialing to the National Conference of Bar Examiners by adopting the Uniform Bar Examination.[1] With the advent of the UBE, meaningful testing on New York law vanished, followed rapidly by ever-diminishing study of New York law. Today's law students are measured by knowledge of federal law and of principles deemed by the NCBE to be generally accepted in American jurisprudence. In January 2021, the NCBE announced its intention to replace the UBE in four to five years. The NCBE plans to drop testing of family law and trusts and estates – even though those are bread-and-butter areas of practice – and to deliver its test solely by computer without any hard copies. The association's Task Force on the New York Bar Examination, in a report overwhelmingly approved by the House of Delegates, urges that New York return to administering its own test with a component that rigorously tests knowledge of New York law. It is imperative that New York act now or else we will have no choice but to accept the pig that is being developed in the NCBE's poke.

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HOW WE GOT HERE

Bar admission requirements exist for one purpose – to protect the public from ignorance, inexperience and unscrupulousness.[2] Because law schools do not have uniform policies for admission, curricula and grading, candidates for admission are measured for competency by examination. Examinations have been required in New York since 1837, and, since 1894, the Court of Appeals has been tasked with the responsibility of providing for a uniform system of examination of candidates for bar admission, to be implemented by the Board of Law Examiners.[3] New York relied entirely on its own bar examination until 1979, when it adopted the Multistate Bar Examination, prepared by the NCBE, which displaced roughly one-half of the local examination.

From 1979 through February 2016, the New York Bar Examination was administered over two days. The first day consisted of five essay questions and 50 multiple-choice questions prepared by BOLE. This portion of the examination tested New York law exclusively, including such subjects as administrative law, constitutional law, business relationships, contracts, real property, civil practice, criminal law and procedure, torts, conflicts of law, evidence, matrimonial law and Articles 2 and 9 of the UCC. Many of the essay questions were drawn from Court of Appeals and Appellate Division opinions, which meant that candidates were tested on issues and points of law that had actually been confronted by lawyers in practice. Applicants were rewarded for their knowledge of New York decisional law. With 50% of the grade dependent upon retained knowledge of New York law, applicants took great pains to study relevant material either in law school or in bar review classes. The "New York Day" assured that lawyers would not be admitted without a working knowledge of New York law.

In 2001, BOLE began to administer the Multistate Performance Test on the first day for the purpose of examining fundamental skills that lawyers are expected to demonstrate regardless of the area of law in which the skills arise. The MPT accounted for 10% of the candidate's score and reduced the New York Day somewhat.

The second day consisted of the MBE, a six-hour, 200-question multiple-choice test. The use of the MBE reflected that there are some legal principles that apply across state lines and which could be appropriately examined on a test used in multiple jurisdictions. The use of the MBE also mitigated the testing requirements confronted by candidates seeking admission in multiple jurisdictions.

THE UBE ARRIVES IN NEW YORK

In July 2016, New York began to use the UBE. The entire New York Day was eliminated in favor of an additional MPT and the Multistate Essay Examination (MEE), which consists of six 30-minute essays. The MBE makes up 50% of a candidate's score, the MEE 30%, and the MPT 20%. The primary rationale for the adoption of

the UBE was that it would make life easier for test-takers by eliminating the effort associated with taking multiple bar examinations in order to gain admission in different states, and it would maximize employment opportunities by permitting law graduates to pursue job opportunities in multiple jurisdictions.

New York, like some other UBE jurisdictions, imposes additional requirements. New York requires applicants to take the New York Law Course and to pass the New York Law Examination. The NYLC is an online course consisting of roughly 17 hours of recorded lecturers. The NYLC has embedded questions that must be answered correctly before the viewer may continue viewing the lectures. If an incorrect answer is given, the applicant is required to restart from an earlier point. The NYLE is an unproctored, open-book examination. It has 50 questions; 30 correct answers are sufficient to pass.

THE ASSOCIATION'S TASK FORCE

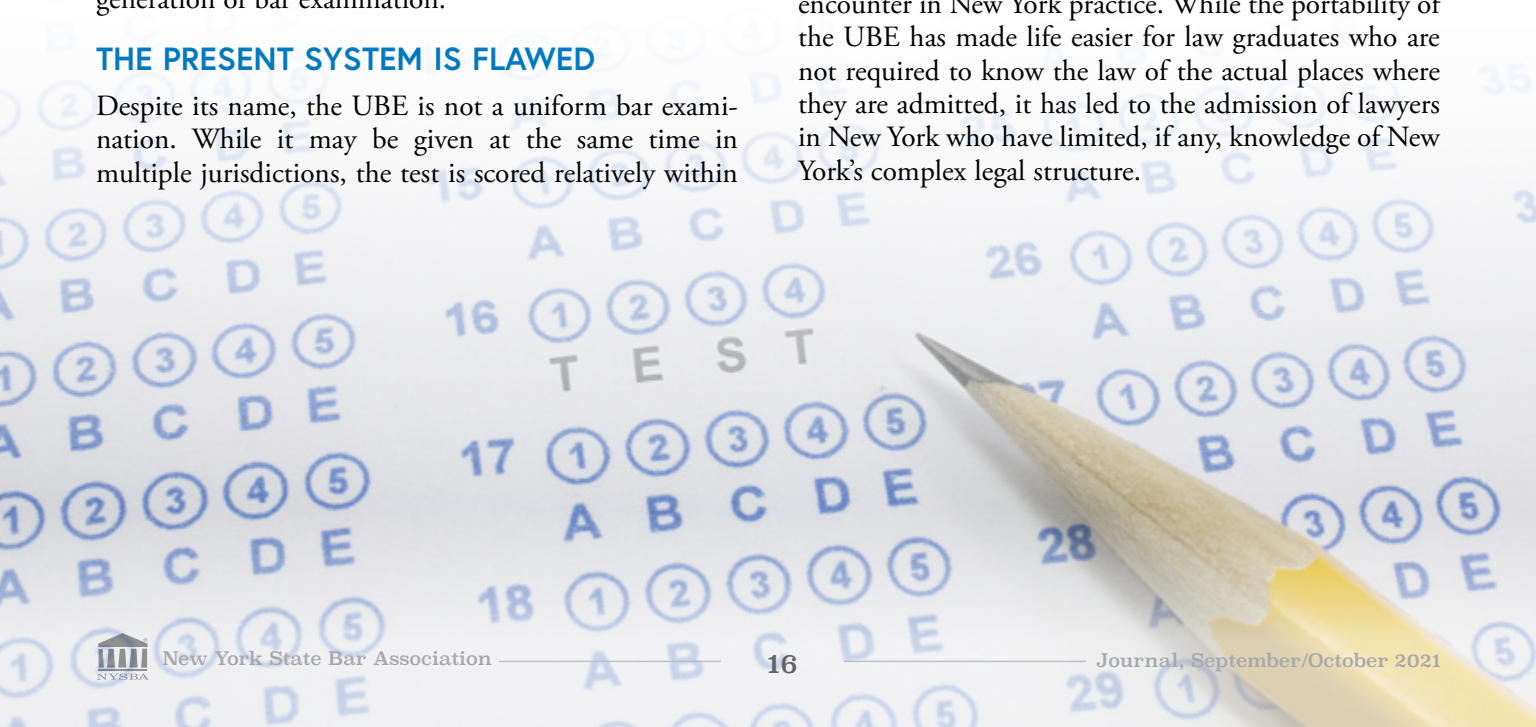
In April 2019, the association established a blue-ribbon task force to review the impact of the adoption of the UBE on applicants, newly admitted attorneys, members of the bar, employers, the courts, diversity in the profession and the public. Members of the task force included past and present bar leaders, legal scholars and bar examination experts. The task force held public hearings, heard from BOLE, academic leaders, law students, bar leaders, community activists and others and issued three reports over the past two years. In its third report, issued in June 2021, the task force studied the impact that the pandemic had on the bar admission process, evaluated the results of a study by Professor Deborah Merritt of the Moritz College Law of the Ohio State University and the Institute for the Advancement of the American Legal System, considered Professor Merritt's recommendation for a future New York bar examination, and reviewed the NCBE's preliminary recommendations for the next generation of bar examination.

THE PRESENT SYSTEM IS FLAWED

Despite its name, the UBE is not a uniform bar examination. While it may be given at the same time in multiple jurisdictions, the test is scored relatively within each jurisdiction. As the NCBE has acknowledged, an examinee may receive a different raw score depending upon which jurisdiction the test-taker sits in. As a result, the same person may be found minimally competent to practice in one state but not minimally competent in another, even though it is the same person with the same skill level writing the same exam. Further, each state sets its own passing score so that a given score may be a pass in one place but a fail in another. This system renders the bar examination arbitrary and unfair. There is nothing about the practice of law that requires attorneys to score more points in one state than another, where the content of the exam is the same.

Further, state laws, whether decisional or statutory, are not uniform and there are significant differences across myriad practice areas. New York has a long tradition of being the nation's leading common law jurisdiction, though it also is known for having a complex court system, unique civil and criminal procedure codes, and largely uncodified rules of evidence. Because law school rankings are dependent upon bar passage rates, and because law students naturally want to pass the bar, the adoption of the UBE has led, in most of New York's law schools, to the teaching of model codes and laws of a hypothetical jurisdiction ("the law of nowhere") and to the significant displacement of courses in New York law. The bar exam certifies that the candidate has the training to practice somewhere in the U.S. without requiring the candidate to demonstrate competence to practice in New York.

Clients are being prejudiced by the admission of attorneys with less knowledge of New York law. Professor Merritt's study found that new lawyers rely most often on state and local law. The UBE requires extensive memorization of federal rules and of the "law of nowhere." There is no meaningful test of the law that new attorneys will actually use. Instead, law students are trained on matters that bear little relation to the legal issues which they will encounter in New York practice. While the portability of the UBE has made life easier for law graduates who are not required to know the law of the actual places where they are admitted, it has led to the admission of lawyers in New York who have limited, if any, knowledge of New York's complex legal structure.



The NYLE is not taken seriously as a test by anyone and is widely held in disrepute. While BOLE's website publicly represents that the NYLE is "rigorous,"[4] it has conceded that the NYLE is not intended to be a significant barrier to admission and that the first iterations of the test were too easy. Despite the lax nature of the NYLE, candidates have been reported to take the test in groups, sharing their answers between themselves. While instances of cheating have been reported, BOLE has declined to take any meaningful steps to support the integrity of its examination. Applicants attest in affirmations that they did not cheat, with no effective means of either policing the administration of the test or confirming the accuracy of the affirmations.

THE NCBE'S NEW TEST IS NOT THE ANSWER

The NCBE's new test would continue the devaluation of state law by dropping family law, trusts and estates, and conflict of laws from the test. Even if new lawyers do not practice family law, they should be incentivized to study domestic relations and domestic violence, given the importance of addressing the scourge of domestic violence and the high incidence of divorce in our society. Similarly, new lawyers should have a grounding in the basic principles of wills and intestacy. Does it really aid the public to admit a lawyer who does not know the basics of will drafting and execution in New York?

The format of the NCBE's new test is almost as important as the content of the new test. There are serious questions as to the fairness of a test delivered solely by computer, with no hardcopies provided. Exclusive use of computer-based examinations may be unfair to persons with cognitive disabilities. Aspects of the test, particularly performance questions that may contain 25 pages of "library" materials, may be difficult for anyone to answer without access to a physical copy. Applicants with better and more modern computers may have advantages over applicants with older and slower equipment. The examination should not be more a test of one's computer skills than of one's legal knowledge. Scientific studies indicate that reader comprehension is less when reading is done on certain computer screens, as opposed to paper or some other forms. While the use of a digital examination was necessary during the pandemic as an emergency measure, it should not become the routine until the pros and cons are thoroughly considered.

And, importantly, the NCBE has refused to meaningfully address the concerns about its scoring practices – practices that are opaque. The Task Force strenuously objects to a scoring practice that may result in the grant or denial of a law license on grounds other than a determination of individual competency.

NEW YORK IS AT A CROSSROADS

When New York adopted the UBE, it had been used in other jurisdictions and, for better or worse, New York knew what it was getting. The new NCBE examination is an unknown and, unless New York acts now, it will have no choice but to accept whatever final product emerges from the NCBE.

A NEW NEW YORK BAR EXAMINATION

New York needs to act now to develop its own test, working with the law schools to facilitate a transition to a new test that will foster the study of New York law, promote New York law within the broader legal community, and assure the public that attorneys admitted to practice here are competent to do so, with reference to the laws with which they will be working. Ironically, one of the frustrations expressed most strongly by law graduates taking the October 2020 remote examination in New York was that they were being required to study for an examination that did not test them on their ability to practice in New York and, therefore, in their view, there was little to be gained by compelling them to take the test. Having its own test would give New York the ability to test on subjects important to the next generation of lawyers but not tested by the NCBE, such as immigration, health care and cyber law.

Recognizing that a bar examination cannot test the skills that a new lawyer should have, we also urge that consideration be given to two alternate admission pathways – one predicated upon concentrated study of New York law during law school and one based upon supervised practice while in law school. The latter pathway would be an expansion of the existing Pro Bono Scholars program and would have the added benefit of providing additional assistance to underserved populations.

In sum, we believe that passing a standardized, digitized, and purportedly national examination, devoid of meaningful inquiry into important matters of state law, is not a proper measure of minimum competence to practice in New York. We urge the Court of Appeals to authorize a new way forward that will revitalize the study of New York law, better assure the public of the competence of lawyers admitted to practice in New York and assure that the license to practice law in New York continues to be the standard by which all others are measured.

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1. While adopted in 2015, the first administration of the UBE in New York was in July 2016.

2. *See People v. Alfani*, 227 N.Y. 334, 339 (1919).

3. *See* Judiciary Law, § 53 (subd. 3). For a history of bar admission legislation, see *Matter of Brennan*, 230 A.D. 218 (2d Dep't 1930). At one time, candidates were examined in public by Supreme Court Justices or a committee appointed by the court. *Id.*

4. https://www.nybarexam.org/Content/CourseMaterials.htm.

How a Cheerleader's Snapchat Rant Went to the Supreme Court and Its Impact on Schools Going Forward

By Christian Nolan

Christian Nolan is a senior writer at NYSBA.

It reads like the plot of "Mean Girls" or "Ferris Bueller's Day Off" or "The Breakfast Club." Only this time around, Molly Ringwald and Ally Sheedy would have to be cast as the teens' mothers.

"The facts of this case have all the elements of a teen movie. That's what I really like about this case," said Candace Gomez, co-chair of Bond, Schoeneck & King's school law practice. "What do we have? We've got to have a mean high school student who's angry about something in the school environment, who's bordering on the edge of maybe being a bully, and then we've got some people that are subject to this bullying. So, this is our next summer blockbuster here."

The real-life plot goes like this: Brandi Levy was a junior varsity cheerleader at Mahanoy Area High School in Mahanoy City, Schuylkill County, Pa. During her sophomore year, in 2017, she again tried out for the varsity cheerleading team and was again assigned to the JV squad. This time it particularly irritated Levy because a freshman made the varsity team over her.

The next weekend, Levy and a friend, while hanging out at the Cocoa Hut, a convenience store in downtown Mahanoy City, took to Snapchat to vent about the unfairness of it all.

In her first post to her 200-plus followers on Snapchat, she held out her middle fingers with the caption: "F… School F… softball F… cheer F… everything." In a follow-up post, she said, "Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?" The caption also contained an upside-down smiley-face emoji.

School officials learned of the post and suspended her from the JV cheerleading team for the upcoming year. Their rationale was that the post and caption violated team and school rules, namely, respect for school, coaches and others; avoiding foul language and inappropriate gestures; refraining from negative information regarding cheerleading on the internet and the requirement that students "conduct themselves in such a way that the image of the Mahanoy School District would not be tarnished in any manner."

What happened next was a lawsuit that made it all the way to the highest court in the country, the implications of which are still being analyzed as a new school year begins this fall.

School law experts recently addressed the history of student speech, the specifics of the *Mahanoy Area School District v. B.L.* case and the practical effects this new precedent will have on school practices in New York.

"[S]tudents need to be permitted to try out their voices, to speak and even say dumb and obnoxious things. But they also need to be governed and taught," said Seth Gilbertson, associate counsel for the State University of New York's Office of University Counsel. "Sometimes they even need to be taught that the things they say are dumb and obnoxious."

Gilbertson, who recently served as the moderator on a New York State Bar Association CLE webinar entitled "Regulation of Student (and Cheerleader) Speech: 'F--- School'? SCOTUS *Mahanoy Area School District v. B.L.*" added: "And then came the internet."

DISRUPTION STANDARD

Before we can get to the ending of Levy's saga, we must first go back to 1965, when a group of students in Des Moines, Iowa, went to school wearing black armbands in protest of the Vietnam War and in support of a proposed "Christmas truce." This set off a constitutional debate commonly referred to as the "Tinker case" (*Tinker v. Des Moines Independent Community School District*) regarding the regulation of student speech by school administrators that was ultimately decided by the U.S. Supreme Court.

The students who wore the black armbands were suspended. The school board a few days later voted 5–4 to maintain the ban and not to reinstate the students.

Robert Ruggeri, senior managing counsel for the State University of New York, explained that the district court upheld the prohibition on the armbands.

"The court acknowledged that wearing the armband is 'a symbolic act' protected as speech under the First Amendment," said Ruggeri. "However, the judge determined the school district's 'concern for the disciplined atmosphere of the classroom' outweighed the students' free speech rights."

While the district court's ruling was based on the school's "fear of a disturbance from the wearing of the armbands," the Supreme Court had a different take. The decision included the famous line that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

Ruggeri said the Supreme Court ruling determined that the *Tinker* students caused "discussion outside of the classrooms, but . . . no disorder." The majority opinion ruled that the school didn't have reason to anticipate substantial interference with the work of the school or rights of other students. However, the *Tinker* decision doesn't require school officials to wait for a disruption to occur.

Ruggeri noted that it cannot be an "undifferentiated fear of a disturbance" but rather a reasonable fear of a disturbance. The main test of *Tinker* is the "substantial disruption" test, but the speech also cannot interfere with the rights of other students.

Subsequent cases have also mapped out exceptions for permissible regulation of student speech in schools, such as disciplining students for on-campus speech considered

vulgar or promoting drug use, but new questions have arisen in the digital age regarding schools' ability to regulate student speech that occurs off campus.

So the Mahanoy case hinged on whether *Tinker*, which holds that public school officials may regulate student speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus.

Levy, in her lawsuit, argued that her suspension from the team violated the First Amendment and that the school and team rules she allegedly violated are overbroad, their viewpoint discriminatory and unconstitutionally vague.

"The 3rd Circuit Court held that *Tinker* does not apply to off-campus speech – that is, speech that is outside school-owned, operated, or supervised channels and that is not reasonably interpreted as bearing the school's imprimatur," said Gomez. "Because [Levy]'s speech took place off campus, the panel concluded that the *Tinker* standard did not apply, and the school consequently could not discipline [Levy] for engaging in a form of pure speech."

The Supreme Court, in its June 23 ruling, upheld the 3rd Circuit's decision that Levy's First Amendment rights were violated, but noted: "Unlike the Third Circuit, we do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus. The school's regulatory interests remain significant in some off-campus circumstances."

Jay Worona, deputy executive director and general counsel of the New York State School Boards Association, said the familiar 1969 *Tinker* standard remains intact – speech causing substantial disruption or a reasonable forecast thereof, or interfering with the rights of others, is not protected. But, he said, mere criticism of school programs or policies, vulgar venting without disruption or targeting of harm to an individual may not be enough.

Worona noted that threats, bullying and harassment, or even giving out the answers to a test online, if it occurs off school grounds, may be addressed by administrators as long as it impacts the school community.

"You know in this day and age the major way that people are bulled is on the internet," said Worona. ". . . if we weren't able to protect schools with those particular exceptions, I'm not exactly sure how we'd manage to protect students any longer."

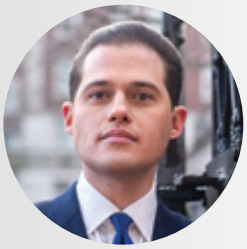
To learn more about this case, please visit nysba.org/cle-programs to purchase the on-demand version of the CLE.

Fulton v. City of Philadelphia: What It Really Means

By Jacqueline J. Drohan, Christopher R. Riano, Joseph R. Williams and Sam Buchbauer

Jacqueline J. Drohan is a partner with Drohan Lee. Her practice includes securities, commodities, and derivatives litigation. Before that, she was a senior capital markets dealer for banks including First Chicago International and Deutsche Bank. Drohan has been a frequent speaker at legal, financial industry and academic conferences, and has published articles on financial economics, federal civil procedure, governmental ethics in enforcement, and commodities regulation. She is chair of the Litigation/Amicus Committee for NYSBA's LGBTQ Law Section.

Christopher R. Riano is president of the Center for Civic Education and a lecturer in constitutional law and government at Columbia University. He is chair of NYSBA's LGBTQ Law Section.



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 cofounder and director of surrogate services for the New York Surrogacy Center, a surrogacy matching program working with prospective surrogates and intended parents.

Sam Buchbauer is chair of Members Recruitment and Programming for the LGBTQ Law Section.

The U.S. Supreme Court's unanimous June 17th ruling in *Fulton v. City of Philadelphia*[1] found that the City of Philadelphia violated the First Amendment's "free exercise" clause by refusing to place foster children through a religious foster care organization that excluded same-sex couples from becoming certified foster parents. While this seems like a major blow to the LGBTQ community, the court's ruling was quite narrow: it hung its hat on interpreting a specific contract provision giving deference to the commissioner of the city's Department of Human Services and rejected the agency's argument that it should discard the standards for analyzing "free exercise" claims as laid out in the 1990 *Employment Division v. Smith*[2] decision. The court declined to otherwise broaden the ability of faith-based employers or other public actors to exempt themselves from LGBTQ anti-discrimination laws based upon claims of religious liberty.

The 1990 *Smith* decision effectively bars parties from claiming that laws violate their free exercise of religion so long as the law is otherwise "neutral" and "generally applicable."[3] The *Smith* standard has raised growing objection from socially conservative groups, who have hung high hopes on SCOTUS' expansion last year of the "ministerial exemption" barring secular courts from determining bias suits by church employees,[4] as well as dicta in *Bostock v. Clayton County*,[5] which signaled the possibility of a case coming up in the near term that might give conservative justices the opportunity to broaden the application of First Amendment religious liberty protection to further relieve adherence to anti-discrimination laws. The court made clear that *Fulton* was not that opportunity, however, despite its ruling against the city under the narrow language of the municipal ordinance in question.

The court based the *Fulton* ruling on its finding that Philadelphia's anti-discrimination ordinance failed the test of "general applicability" because it left room for case-by-case exceptions by city officials. Under *Smith*, therefore, a "strict scrutiny" standard had to apply to the city's refusal to contract with the religious agency for the provision of foster care services unless it agreed to certify same-sex couples as foster parents. Justice Roberts, writing the majority opinion, noted that the city's actions failed to survive that strict scrutiny and, therefore, found they violated the First Amendment, with no need to discard or modify *Smith*.

However, as Justice Samuel Alito's concurrence notes, many laws may be interpreted as failing a test of "general applicability," and such analysis is complex and fact specific. Civil rights advocates argue that municipal, state and federal laws cannot be drafted to encompass all possible real-life applications. Many statutes assign exemptive powers to government agencies with varying levels of discretion to promulgate regula-

tions and take interpretive or no-action positions in furtherance of applying statutory intent on a case-by-case basis. Anti-discrimination laws are, by their nature, exceptionally fact-specific, often assessing such nebulous factors as intent, effect and non-economic damages. *Fulton* may therefore leave the door open to a string of *Smith*-based attacks upon such laws, and judging by the tone of their concurring opinions, if they cannot dispose of *Smith* entirely, conservative justices appear willing to hear them.

Society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.

LGBTQ defenders can find some positives in the ruling, however, beyond its leaving *Smith* nominally intact. Justice Roberts appeared to restate and even underscore the shift toward equality-based public policy and values reflected in recent, more liberal jurisprudence. Despite ruling it defeated by narrow statutory language, he acknowledged the weight of the city's interest in equal treatment of both children and parents in foster care policy, and quoted language from the *Masterpiece Cakeshop* decision stating "society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth."[6] The governmental interest in preventing foster care agencies from discriminating against same-sex foster parents as essential to the welfare of children (especially LGBTQ children) in an already overburdened system was argued heavily by NYSBA in its amicus brief, as well as the city's reliance interest in the well-established *Smith* standard.[7]

On the other hand, dissenting, as well as extensive concurring briefs, left little doubt that differences exist on the court around broader ideological issues. Justice Amy Coney Barrett's concurrence, joined by Justice Brett Kavanaugh and partially by Justice Stephen Breyer, although suggesting that *Smith* should be modified or overturned, seemed supportive of some form of restrictions on a blanket religious exemption. Justice Alito, in contrast, roundly condemned *Smith*, offering what he viewed as various hypothetical negative implications to following religious customs in certain public settings. It is noteworthy, however, that none of Justice Alito's cited hypotheticals may be easily argued to balance against a core human right, such as the freedom to associate and form a family at issue in *Fulton*. Justice Neil Gorsuch, concurring separately and also joined by Justice Clarence Thomas, accused *Smith* of failing "to respect this court's precedents," being "mistaken as a matter of the Constitution's original public meaning," and "proven unworkable in practice."

Fulton, while troubling to civil rights advocates, does not appear to represent the general license to circumvent anti-discrimination protections based solely upon religious beliefs. Future cases may tell a different story.

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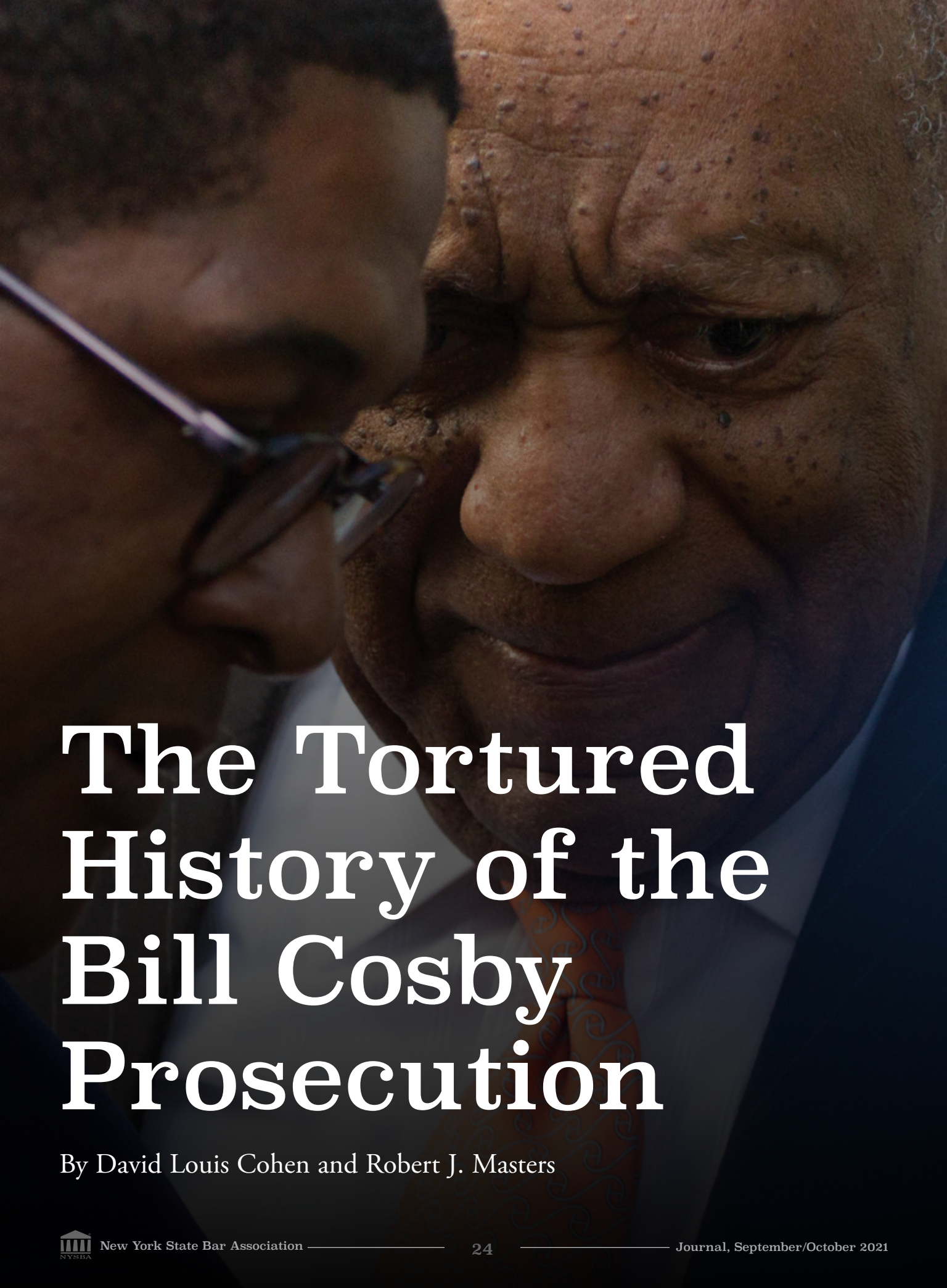
1. 141 S. Ct. 1868 (2021)
2. 494 U.S. 872 (1990).
3. For example, the issue in *Fulton* was that the agency claimed the city violated its free exercise of religion by requiring them to work with same sex couples – something which that they asserted was contrary to their religious beliefs.
4. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) and *St. James Sch. v. Biel*, 140 S. Ct. 2017 (2020), before the U.S. Supreme Court.
5. 140 S. Ct. 1731 (2020).
6. *Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018).
7. *Employment Div. v. Smith*, 494 U.S. 872 (1990).



The Tortured History of the Bill Cosby Prosecution

By David Louis Cohen and Robert J. Masters

On June 30, 2021, the Pennsylvania Supreme Court reversed the conviction and sentence of "America's Dad," Bill Cosby, and barred retrial on the charges of sexual assault. The ruling ignited widespread comment and raised questions about the legal steps leading up to the reversal. There is no question, however, that the Cosby case is an example that "hard cases make bad law," as "The Great Dissenter," Justice Oliver Wendell Holmes, is said to have once observed. To which we might add that if hard cases make bad law, then "celebrity cases make worse law." Experience shows that whether O.J. Simpson, Michael Jackson, Mike Tyson or any number of well-known defendants – Roger Clemens, Barry Bonds, Marv Albert – are the subject of our process, the familiar, the ordinary and the routine are abandoned. And once forsaken, these norms are replaced by the unusual, unprecedented and untested, if not the entirely unique. Once what we know is swapped out for the newly invented, what follows is anything but predictable. Instead, the gross departure from the ordinary results in decisions made by all parties – the prosecution, the defense and the court – being based, not on precedent, but rather on an accommodation reached in the moment, designed to achieve immediate relief from an anxious media, or solve today's legal predicament, without concern for tomorrow's appellate review. Fortunately, for as hard as these celebrity cases always prove, because of their individual uniqueness, if not freakish fact patterns combined with the ramshackle remedies that are jerry-rigged to satisfy a momentary crisis, they rarely provide precedent for our daily practice. Rather, they live on as cautionary tales for practitioners, reminding us not to surrender to the temptations so often presented by such notorious cases.

This article will examine the legal steps leading up to the Supreme Court decision, from the perspective of both an appellant case and one that involved a once-beloved celebrity. But first we must make two disclaimers: we have little familiarity with Pennsylvania's common law or some of the statutory schemes that are peculiar to the commonwealth. Nor do we criticize any of the parties, who were faced with many difficult choices resulting from such serious charges being leveled against one of America's most successful and respected entertainers who, over a half-century, managed to achieve the status of cultural icon. It is our goal merely to demonstrate where these hard choices set the stage for the case's unsatisfying conclusion – one in which the victim can feel neither contentment nor vindication – where Cosby has found liberty in his compromised health and advanced age, but without cleansing the disgrace that shadows him, and the attorneys will be consigned to explain their professional decisions, never made before or repeated since, that appear to be perfectly justified then, but through the prism of hindsight today, were destined to yield a conclusion of controversy.

The three separate opinions – the majority, a partial concurrence and dissent and a dissenting opinion – span 94 pages in length. Surprisingly, there is very little disagreement about what happened in the case and how all the parties came to this present posture. The disagreement from the court turned on the questions of just how unfair the unprecedented procedure of the case was to Cosby, whether it required reversal, and if retrial could remedy it or if equity could only abide terminating the prosecution.

The factual history of the case is thoroughly outlined in the court's majority opinion. The alleged crimes occurred in January 2004 in Montgomery County, Pennsylvania, where Cosby maintained an estate. Andrea Constand, with whom Cosby had been acquainted for several years, claimed that during a visit to the estate, Cosby drugged her, and while she was unable to provide consent, he sexually assaulted her. During the next year, she continued to have telephonic and occasional personal contact with Cosby, but in January 2005, Constand, responding to her deep discomfort, confided to her mother the details of the incident. This set in motion a series of notifications to law enforcement and the district attorney of Montgomery County. Over the next month, an investigation ensued in which Constand was interviewed extensively, as was Cosby in the presence of counsel, during which he described a consensual encounter. At the conclusion of the investigation, the district attorney, troubled by the post-event behavior of Constand, which he considered at best odd or, worse still, inconsistent with a sexual assault when coupled with the absence of any physical or forensic evidence to corroborate the claim, concluded there existed insufficient evidence to successfully mount a prosecution of Cosby.

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Robert J. Masters currently serves as a special assistant district attorney to Rockland County District Attorney Thomas E. Walsh II. From 1990 until 2019, he worked in the Queens County District Attorney's Office, working primarily on homicide prosecutions and eventually serving as an executive assistant district attorney for legal affairs and as counsel to the late District Attorney Richard A. Brown. Previously, he served as a law clerk for various judges of the criminal term of the Supreme Court in both Queens and Kings County. Masters also served as chair of the Criminal Justice Section.

It was then that the district attorney embarked on an alternative course of action in an effort to provide Constand with some measure of justice. That "alternative path" was a civil action seeking monetary damages. To facilitate such a lawsuit, the district attorney publicly stated that no criminal prosecution would be commenced, thereby preventing Cosby from invoking his Fifth Amendment privilege against self-incrimination. Significantly, no non-prosecution agreement was signed by the parties, nor did they avail themselves of the statutory scheme by which "transactional" immunity is ordinarily conferred upon an individual by a court. Instead, a lengthy press release describing the district attorney's decision, without mentioning any potential credibility concerns that had driven his declination of a prosecution, was drafted and released. Notably, at Cosby's counsel's request, the district attorney signed the release, making it the only memorialization of the parties' understanding.

In a case involving a public figure as well-known and revered as Cosby, with evidence so compelling, including his well-publicized admissions under oath of repulsive deeds, a test of the fundamental fairness of our justice system was certainly framed by the media. It is understandable that such considerations might influence any of us and result in discretionary rulings outside what we would ordinarily expect.

In the short term, the alternate path seemed to work exactly as it was conceived. Weeks later, Constand sued Cosby. Discovery led to four depositions of Cosby, who, with counsel present, did not invoke his Fifth Amendment rights and admitted to consensual sexual episodes with Constand and indicated that he had provided her with the antihistamine, Benadryl, to relax her. Additionally, while under oath, Cosby admitted that on other occasions in the past, he had provided women quaaludes prior to engaging in sexual intercourse. The parties settled the lawsuit with Cosby, agreeing to pay $3.38 million in damages with all records of the litigation and the terms of the settlement to be sealed.

For nearly a decade, the alternative path held. However, 2015 media requests to unseal the suit's record were granted by the federal judge who had presided over the civil case. With Cosby's depositions now public, the district attorney's successor reopened the investigation and secured Constand's cooperation, as well as that of several other women who claimed to have endured sexual assault by Cosby.

Just prior to the expiration of the commonwealth's statute of limitations, Cosby was charged with three counts of "aggravated indecent assault." Subsequent motion practice to dismiss the charges based upon the public declaration immunizing Cosby and to suppress his depositions based on his reliance upon the prior district attorney's representations were all denied. The prosecution moved to adduce evidence of "Other Bad Acts of the Defendant," which was comprised of testimony from other victims of Cosby. The trial court granted the application to the extent it permitted the testimony of only one alleged past victim.

In 2017, Cosby's first trial – featuring testimony from Constand and another of Cosby's alleged victims, as well as admissions culled from his civil depositions – ended in a mistrial, occasioned by a hung jury. Prior to the second trial a year later, the prosecution sought re-argument of its *Molineaux*-type application, seeking to admit the testimony of 19 other women's claims of sexual assault by Cosby, despite presenting no change of circumstance in support of the application. The trial court granted the application to the extent that it permitted the testimony of five witnesses – selected by the prosecution – and that the court would provide limiting instructions regarding such evidence to the jury. Cosby was convicted of all counts at the conclusion of his second trial and was sentenced to a term of three to 10 years' incarceration, which was immediately imposed by the court. Additionally, Cosby was deemed by the court to be a "sexually violent predator." Cosby's appeal to Pennsylvania's intermediate appellate court resulted in a unanimous affirmance.

The Supreme Court of Pennsylvania accepted Cosby's appeal on two limited grounds: the first regarding the circumstances surrounding the commencement of the prosecution, years after the district attorney's public statement describing an agreement on which Cosby relied to his detriment; and the second issue regarding the claimed abuse of discretion by the trial court in admitting such extensive uncharged crimes evidence.

The 79-page majority opinion reversed the conviction based upon Cosby's reliance on the district attorney's representation that no prosecution would ever take place. Although critical of the district attorney's unorthodox procedure, and the court indicated that it was less than impressed that competent defense counsel had accepted

such representations, the majority concluded that Cosby was denied due process by the entire chain of events, and he could only be made whole if the conviction was reversed and retrial was barred.

Two judges, concurring in part and dissenting in part, agreed that a due process violation had been inflicted upon Cosby, yet concluded that a retrial without use of the depositions or evidence gathered as a result was an adequate remedy.

A dissenting judge found that the questionable practice did not result in a due process violation. However, he did indicate that he was deeply troubled by the trial court's abuse of discretion in permitting such extensive *Molineaux*-type evidence and would have reversed the conviction on this alternative ground, which was otherwise unaddressed by the court owing to it being rendered moot by the majority holding.

That this is a "hard case" is difficult to debate. That it results in "bad law" largely depends on the eye of the beholder. What is to be learned from the entire episode in examining the motivations for the participants making choices that resulted in such an unsettling conclusion? The authors will attempt to use the benefit of their experience to explain a case so characterized by a departure from all norms.

Why did the original district attorney decline to prosecute the case when he had a cooperative complainant and instead embarked on the alternative path? Clearly, the district attorney concluded that Constand had been victimized. More than a year after the event, she was traumatized but did not satisfy the prosecutor that her explanations for her post-assault behavior would not undermine her credibility. And when compounded by the fact that she had civil lawyers on retainer, he was impressed that she could be easily portrayed as a "gold digger," which would prevent a conviction and thereby subject her to the potential of additional trauma. Persuaded that she could not succeed in a criminal forum, the district attorney was certain she would succeed in a civil one, aware that "America's Dad" – stripped of his Fifth Amendment privilege – would be forced to answer questions under oath that, if untrue, could result in a perjury prosecution, and if true, would incentivize him to generously settle the case to preserve his pristine image, if not his deep pockets. The propriety of a prosecutor insinuating himself into such considerations is hardly routine, and that it ended so poorly for everyone should not be surprising.

Why did the district attorney decide not to issue a standard non-prosecution agreement? Likely because Cosby's receipt of such a document would have been devastating to his long-cultivated image. Such a formal writing would have created enough "smoke" to forever damage Cosby's persona to the extent that no "fire" would have been needed.

Why did the parties elect not to avail themselves of the commonwealth's statutory scheme requiring judicial intervention for a grant of immunity? Surely, no one wanted to answer the question any judge entertaining such an application would pose: "Have you discussed this with the victim?" Were a public proceeding to occur at which the victim contradicted the district attorney, a prosecution that neither party wanted was likely to result. For the alternate path to work, the less said was obviously better.

Why did the successor district attorney proceed with such a tenuous prosecution? Obviously, the subsequent depositions revealed the scope of Cosby's behavior and the dimension of his criminality, and the passing decade and the advent of the #MeToo movement made the paternalistic decision that the victim would be additionally wounded less supportable.

The choices thrust upon defense counsel and the avenues selected are equally vulnerable to the critical analysis, so easily invited by hindsight. For Mr. Cosby's counsel, that this was a "hard" case was clear. His celebrity status not only compounded the risks faced by the client but resulted in the stark reality of the imperfection of any advice that could be provided to the increasingly vulnerable Cosby. Therefore, counsel was forced to represent a client in separate and distinct courts – a court of law, both criminal and civil, as well as in the "court of public opinion," the one in which his fortune was made, in which his reputation had been carefully honed, and in which judgment could be even more harsh and without any avenue of appeal. Accordingly, counsel was compelled to devise strategies for competing interests – sparing Cosby criminal conviction, while simultaneously stage-managing a previously unassailable reputation and public image. It is because these interests are at times antagonistic that devising a strategy that addresses all of his client's vulnerabilities is so daunting. However, counsel must always remain vigilant to prioritize the client's vulnerabilities in charting the strategy that will be deployed. Counsel must be careful not to be seduced by the client's desire to focus exclusively on the court of public opinion. For pursuing victory in that court may set the stage for catastrophic results at the real courthouse.

Emblematic of the competing interests faced by Cosby's counsel are the elections made from the earliest moments of this odyssey in 2005. Immediately, counsel was challenged by the dilemma posed by "two court representation." Constand made allegations of sexual assault against Cosby. Law enforcement quickly corroborated several details of her claim. Her mother provided some weight to the accusation with "outcry evidence." Telephone records, financial records and travel histories provided powerful support for the details of the accusation, certainly proving that a significant opportunity and means

for the crimes existed. It was at that stage that law enforcement invited Cosby to participate in an interview, a critical juncture for all sides in the investigation of charges as serious and sensational as these.

Usually, counsel is appropriately reluctant to allow a client to sit for an interview with prosecutors and investigators. Unless counsel has information that conclusively establishes the client's innocence, the remaining alternative is a complete denial of culpability, something that will do little to dissuade a prosecutor from bringing charges. And the cost of advancing a passionate denial is the likely admission, in counsel's presence, of corroborating details of the alleged crime, such as location, occasion and means, all of which can be skillfully utilized in a subsequent grand jury presentation or trial.

Ordinarily, best practices would dictate that counsel decline the invitation to have the client interviewed. But Cosby's counsel and Cosby himself were clearly worried about the court of public opinion. The media's demand to hear "his side of the story" far outweighed the legal niceties of one's Fifth Amendment right against self-incrimination or the sanctity of the presumption of innocence. Where in a court of law, maintaining one's silence increases one's odds of acquittal, in the court of public opinion it is certain to result in a verdict of guilt. In the case of a celebrity of Cosby's stature, such a verdict at that time seemed every bit as devastating as a conviction after trial. It is apparent to the authors that it was this calculus that drove counsel's decision to permit Cosby's interview and, because it was not based on purely legal considerations but rather concerns related to public relations, it contributed mightily to the result.

Perhaps more subtle, but as significant, was the conundrum faced by counsel when the district attorney concluded that a conviction of Cosby could not be obtained, despite the unsettling facts unearthed during the investigation. Normally, such a decision by a prosecutor is music to the ears of defense counsel. After all, criminal liability and the threat of conviction and sentence have been removed. But in the absence of a formal agreement, how binding was such a decision? What if new evidence came to light? Or new accusations? Or ancient claims of a similar nature? Moreover, with the threat of prosecution removed, and Cosby forced to be deposed during a civil case, no protection from criminality for matters outside Montgomery County was forthcoming. Again, counsel's acceptance of an informal, signed press release as sufficient protection against criminal liability appears to have been driven by strategies to achieve a long-term victory in the court of public opinion, rather than a permanent solution to his increasing criminal exposure. That Cosby was possessed of unlimited financial resources to buy both settlements and silence surely made these decisions seem less dangerous and more appealing to the client and less worrisome to counsel.

Pursuit of a public relations victory by emphasizing the jeopardy faced in the court of public opinion resulted in Cosby's damning admissions regarding a legion of abused women and his resort to drugging some with quaaludes as part of his modus operandi. And, as is now clear, it was this litany of admissions and roster of victims that ensured Cosby's conviction, incarceration and ultimate disgrace. Sound legal judgment supported none of these decisions. Rather, the sad recognition that use of one's right to silence – a criminal suspect's best friend – when embraced in the court of public opinion, is the equivalent of an admission of guilt, and that reality influenced Cosby's representation more than reliance on tried-and-true criminal practice norms.

That the entire house of cards collapsed is not surprising. That experienced and competent counsel advised Cosby throughout is unquestioned. One can only speculate that counsel desperately attempted to dissuade the fabulously successful and wealthy client from countenancing such pronounced legal risk. It is not difficult to imagine a version of the following conversation taking place between the exasperated attorney and the pampered, self-absorbed celebrity client:

LAWYER: "Pal, you have to take the Fifth. You've got big trouble and you can get badly hurt!"

CLIENT: "But then everyone will think I'm guilty."

LAWYER: "I hate to tell you this, but everyone already thinks that you are guilty. All they need is for you to answer their questions to prove it."

CLIENT: "But that will look terrible in the press."

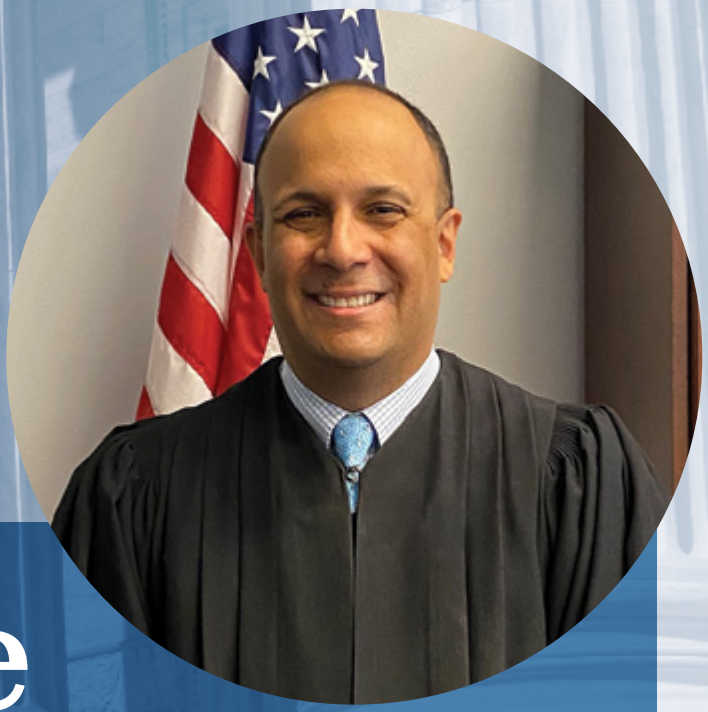
Indeed, it would. But history demonstrates that the answers look even worse in a court of law than in the court of public opinion and contributed mightily to this remarkable legal morality tale.

Because the authors have spent their careers as advocates and have never served as judges, we are reluctant to speculate regarding the basis for the trial court's exercise of discretion and the reconsideration of such significant rulings. However, all practitioners are aware that courts are not only tasked with the fair administration of justice but also with responsibility that the process appears to yield a final product that the public will embrace as a fair one. The oft-expressed notion that the quality of justice for the wealthy and influential is different from that afforded the "common man" is of great concern to all of us, but particularly to the judiciary. In a case involving a public figure as well-known and revered as Cosby, with evidence so compelling, including his well-publicized admissions under oath of repulsive deeds, a test of the fundamental fairness of our justice system was certainly framed by the media. It is understandable that such considerations might influence any of us and result in discretionary rulings outside what we would ordinarily expect.

In conclusion, the proposed addendum to our time-honored maxim about "hard cases" – that "celebrity cases make worse law" – has enormous support in this entire, sad adventure. Because of the celebrity of the accused, who was suspected of unspeakable crimes based upon evidence that was less than overwhelming, a recipe of unique decisions replaced all routine practice by everyone involved in the matter. In retrospect, each unorthodox decision is understandable considering the difficulties presented but, in combination, the serial abandonment of norms and standard practice resulted in a saga littered with "what might have beens."

Had the original district attorney engaged in a more thorough, extensive investigation of the original charges in 2005 and found some of the *Molineaux*-type evidence subsequently adduced more than a decade later and elected to provide a crime victim her day in court, rather than so quickly opting to pursue an alternative path after only three weeks of review, might things have ended differently? If the same prosecutor determined that it was not his place to insinuate himself into a potential civil suit between the parties and followed the time-honored prosecutorial consideration of simply determining whether sufficient admissible evidence existed to establish that a crime had been committed by an identifiable individual – regardless of the celebrity of that person – what might have been the result? Had the procedural statutes been followed requiring judicial intervention before insulating a suspect from criminal liability, would anything have changed? If defense counsel insisted on a formal non-prosecution letter from the district attorney prior to permitting Cosby to answer the damning questions posed during his civil deposition, what might have happened? Or still, because of potential criminal liability extending beyond the border of Montgomery County, if Cosby, pursuant to the advice of counsel, continued to invoke the Fifth Amendment, what would have transpired? Would different answers to these questions and so many others as the result of the parties making decisions grounded in established criminal practice have influenced the trial judge to make different rulings that were more likely to be sustained on appeal?

Of course, we can never know the answer to any of these imponderables. But what does appear to be reaffirmed is the notion that the "best practice" is the familiar practice. That when good lawyers start handling a case differently, based upon considerations that are foreign to their standard practice, no one should be surprised when an unexpected and dissatisfactory result punctuates everything that the lawyers have done.



Meet the New Presiding Justice: Hector LaSalle

By Brandon Vogel

The young boy who idolized Atticus Finch, read voraciously and loved to watch Ironside is now the presiding justice of New York's busiest appellate court. Hector LaSalle was appointed presiding justice of the Appellate Division, 2nd Department on May 25.

Having previously served as associate justice of the 2nd Department since 2014, LaSalle came to this position well-prepared, building upon his diverse experience in the judiciary, in the district attorney's office and private practice.

We recently interviewed Justice LaSalle to learn more about the new presiding justice and the experiences that have shaped him.

Brandon Vogel is a senior writer at NYSBA.

What excites you the most about your new role as presiding justice of the 2nd Department?

The opportunity to work with, in my opinion, some of the best legal minds in the judiciary. The opportunity to serve with them in this role is one that excites me. I have so much respect for the people I work with day to day. I look forward to advocating for the 2nd Department judiciary to get the resources they need to help them be the best judges they can be, which in turn will benefit both the bar and the public.

What is one thing you wish people understood about your job?

The breadth and scope of the job is incredibly large and expansive. Not only is the presiding justice required to oversee and help administer the operations of the appellate court at 45 Monroe Place, he or she is also required to oversee for administrative purposes, two appellate terms, mental health/mental hygiene legal services, three grievance committees, several character and fitness committees and the 18B committees. I think those are aspects and responsibilities of the position that are incredibly important and many people don't know about.

What is the best piece of advice you ever received?

Let your work do the talking. At the end of the day, people react more to what you do more so than what you say. As my dad always said, don't talk about it; be about it. It's about demonstrating your intention through action, not through words.

What book has had the most influence on you?

My favorite novel of all time is Alexandre Dumas' "The Count of Monte Cristo" only because of all the things Edmond Dantes goes through and his very human reactions to them, both good and bad. At my age now, [a book] which I didn't fully appreciate as a young man and has had a growing effect on me, is Ernest Hemingway's "The Old Man and the Sea." I think about Santiago all the time and, as I get older, I relate to this character more and more. Hemingway's description of Santiago and his efforts to complete that final trip reminds me of the importance of resilience and fulfillment a person has in living a life "well-lived."

What led you to the law as a career?

As a kid, it was books and contemporary commercial art. Whether it was watching lawyers on TV like on "Ironside" or reading about the character Atticus Finch, I thought, what better job could there be than to be in the arena of advocating for people? My family didn't know anyone who went to college, let alone became a lawyer, so more than anything else, it was literature and contemporary commercial entertainment. As imperfect an image as it may have been, that gave me my exposure to the law and drove my interest.

What's the best part about your career?

The people I work with and the people I get to come across. I have met with people all over the city and state; people I never would have interacted with in my daily personal life but for my work in the Appellate Division. I have been exposed to so many different things and so many different experiences through not only this position but as an associate justice on the bench, to being in the trial courts. The experiences I've had as an attorney have given me the opportunity to see things beyond where I grew up; it's been wonderful.

Who have been the biggest influences in the legal profession?

Although I have never met her, one of my biggest influences has been Associate Supreme Court Justice Sonia Sotomayor. She has been an incredible source of pride and inspiration for so many of us in New York's Puerto Rican community. While I certainly lack Justice Sotomayor's intellectual brilliance, I recognize many aspects of her life story that are similar to those of my family. Her professional success reminds me what is possible for anyone in our state.

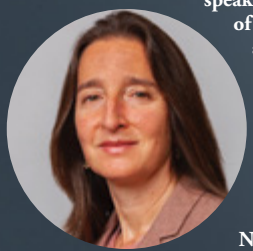
The two biggest influences that I actually do know are former presiding justice and current dean at Hofstra Law School Gail Prudenti and former administrative judge for the 10th Judicial District Randy Hinrichs. Both Judge Prudenti and Judge Hinrichs have been mentors to me since I was a young lawyer. They have both been readily available to share their experiences with me and offer sage advice when appropriate. I was drawn to both judges because I viewed them as incredibly bright problem solvers who were fair, industrious and served with an incredible sense of integrity. They were kind to me when I was a young lawyer and I didn't know a soul in the professional world; I never forgot that. I am grateful to call them friends and fortunate that they are still willing to take my phone calls after all these years.

What do you like to do outside the law?

I love to read for pleasure . . . particularly fiction. I am also an avid sports fan. I really enjoy following and rooting for the Knicks, Yankees, Jets and University of Michigan athletics.

Protecting the Press From Prosecutorial Overreach

By Lynn Oberlander



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The recent disclosure that the Trump administration had secretly subpoenaed the records of journalists and members of Congress has led to the most significant movement to protect confidential sources in years. After President Biden spoke out against the subpoenas, Attorney General Merrick Garland prohibited the Department of Justice from seeking to uncover journalists' sources in almost all circumstances. Members of both the House and Senate have introduced federal shield law legislation that, if passed, would protect journalists from compelled testimony about their sources and would bring the federal government in line with the vast majority of states that recognize such a reporter's privilege. For the Fourth Estate, the movement to enhance protections for confidential sources and its benefit to public knowledge is long-awaited and desperately needed.

In May, the public learned that in its last year the Trump Department of Justice had sought – and in significant part obtained – email and phone records of eight journalists from three premier news organizations – the New York Times, CNN and the Washington Post – as part of investigations into the sources of leaks of classified information. The records requests were initially coupled with gag orders issued under the Stored Communications Act that prevented the third-party service providers that held the records (such as Google and Apple) from disclosing the process to anyone, including the news organizations or the journalists themselves. Because the journalists did not know about the subpoenas, they could not challenge them in court.

Then came the disclosure that the Trump DOJ had also sought the records of Congressmen Adam Schiff and Eric Swalwell in 2017 and early 2018 as part of its leak investigation into media reports about contacts between Trump associates and Russia. The broad subpoenas sent to Apple sought records from accounts that belonged to the congressmen's families, children, and staffers. (Apple claimed that it did not know whose records it was providing; the subpoena sought information on 73 phone numbers and 36 email addresses.) Apple was gagged from telling its clients about the subpoena for three years.

By going directly to the phone and email service providers for the records, and gagging the providers from informing the account holders, the Trump administration led an end-run around the traditional check provided by the judicial system. The government is able to secretly bypass targeted journalists in this way only due to an accident of technology. If news organizations kept their records in file cabinets instead of in the cloud, it would be impossible for the DOJ to seek those records without notice. And prior notice would enable journalists to seek judicial review from an Article III judge, to challenge the government's purported rationales for seeking the information and the breadth of information sought.

Why does this matter? American history provides ample evidence that the information the press provides to the public – including information originally provided by confidential sources – is vital to the operation of our democracy and the oversight of our most powerful public and private institutions. For example, reporting on Watergate, Enron, Harvey Weinstein, and President Trump's tax returns, to name just a few award-winning works, was all originally based on information from confidential sources. If there is no assurance that journalists will be able to protect their sources, those with newsworthy information will hesitate to come forward, and the public will be weaker for it. As Justice Black wrote 50 years ago in the Pentagon Papers case: "The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government."[1]

Recognizing that that "freedom of the press can be no broader than the freedom of members of the news media to investigate and report the news,"[2] the Department of Justice has long limited when prosecutors could seek journalist records. Its policy was last tightened in 2015, following disclosures in 2013 that the Obama administration had secretly sought several months of office and home phone records of Associated Press reporters and had issued a search warrant for Fox News reporter James Rosen's records, alleging that Rosen was an "aider, abettor and/or co-conspirator" in a potential violation of the Espionage Act. (The government took this approach specifically to get around the broad prohibition on search warrants for newsrooms and journalists contained in the Privacy Protection Act of 1980. One exception in the PPA is if a journalist is suspected of being involved in the alleged underlying criminal conduct.)

The 2015 revisions clarified that the policy applied to news organizations and their service providers and emphasized that the affected media should receive prior notice of any attempt to access their material, so that they could then challenge the process in court. The policy noted that subpoenas and warrants to the media are "extraordinary" measures and require approval from the attorney general or another senior official. However, the policy also provided an out: the government could choose not to tell the affected media if the attorney general determined that notice would "pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm."[3]

In these most recent leak investigations, the government claimed that it complied with its obligations under the

DOJ policy. It is hard to fully credit the government's argument that disclosure would have threatened the integrity of its investigation, though, as the subpoenas were issued in 2020, sought information from 2017 and, at least in the case of the New York Times, the apparent underlying leak investigation had been public for a year. Moreover, the records sought were being held by a third party, so there was no risk of the Times destroying them. (Full disclosure: I am one of a team of attorneys representing the Times in a motion to unseal the application materials.)

Why does this matter? American history provides ample evidence that the information the press provides to the public – including information originally provided by confidential sources – is vital to the operation of our democracy and the oversight of our most powerful public and private institutions. For example, reporting on Watergate, Enron, Harvey Weinstein, and President Trump's tax returns, to name just a few award-winning works, was all originally based on information from confidential sources.

These disclosures of secret government subpoenas have now spurred investigations and spawned a congressional hearing, draft bills, and a new, stricter policy for the Department of Justice. In the immediate wake of the disclosures, President Biden said that seeking to uncover journalists' confidential sources was "simply, simply wrong" and that he "will not let that happen." In mid-July, Attorney General Garland issued a policy memorandum that prohibits the Department of Justice from seeking journalists' sources, in almost all cases in which the journalist is acting within the scope of newsgathering activities. (The new policy does not apply if the journalist is being investigated for activities unrelated to newsgathering or – perhaps in a nod to the prosecution of Julian Assange – if the journalist used "criminal methods" to obtain government information. It also contains limited exceptions for terrorism and imminent bodily harm). Attorney General Garland's memo makes clear that the government can still try to uncover leaks; it just can't go to the media for information as to the source.

This policy change has been received with plaudits from the press but also calls to codify the policy legislatively, so that the next attorney general can't just change it again.

Of course, even if the journalists had been able to go to court to try to quash or limit the subpoenas, they might not have been successful. In 1972, the Supreme Court ruled in *Branzburg v. Hayes* that there is no absolute right under the First Amendment for a reporter to refuse to testify before a grand jury.[4] Nevertheless, in the years since, many federal courts have recognized some level of protection from forced disclosure, but the varying standards and balancing tests can all be overcome in certain instances.

The federal approach differs from that of the states, which by and large recognize a reporter's privilege to refuse to testify either grounded in the state's constitution or in statutory law. New York has one of the strongest statutory shield laws around – it provides an absolute privilege for confidential sources – meaning that a journalist cannot be compelled to disclose confidential source information even to a criminal grand jury. As the Court of Appeals found in its 2013 case *Holmes v. Winter*:

> New York public policy provides a mantle of protection for those who gather and report the news – and their confidential sources – that has been recognized as the strongest in the nation. And safeguarding the anonymity of those who provide information in confidence is perhaps the core principle of New York's journalistic privilege, as is evident from our colonial tradition, the constitutional text and the legislative history of the Shield Law.[5]

In *Holmes*, the Court of Appeals quashed a subpoena for a Fox news reporter to appear in a Colorado court to testify about her source for a leaked document about the mass murderer James Holmes, noting that Colorado's balancing test was not as protective as New York's absolute privilege.

Without a federal shield law, the scope of protection for a confidential source can differ dramatically from state to state or even district to district. For example, if a New York-based reporter receives a subpoena seeking the identity of a confidential source issued out of the New York Supreme Court at 60 Centre Street, the reporter can refuse to comply, relying on New York's absolute privilege for confidential sources (found in New York Civil Rights Law § 79-h). If, on the other hand, the subpoena comes from 40 Centre Street, the federal courthouse next door, the journalist will face a "qualified" privilege based on

common law, meaning that it could be overcome by a compelling government interest. These varying standards make it impossible for a journalist to act with any certainty when dealing with potential sources.

To remedy this, federal shield laws have been proposed before by Republicans and Democrats alike. In 2007, then-Congressman Mike Pence was one of the sponsors of the Free Flow of Information Act, testifying before the House Judiciary Committee that "[c]ompelling reporters to testify and, in particular, compelling them to reveal the identity of their confidential sources is a detriment to the public interest. Without the promise of confidentiality, many important conduits of information about our Government will be shut down."[6] After months of discussion and negotiation, the act languished. There was another attempt in 2017, but it too went nowhere.

But a federal shield law may now be back on the table. Democratic members of both the House and Senate have introduced almost identical bills that would protect journalists from being compelled to produce their confidential source material. The PRESS Act ("Protect Reporters from Exploitative State Spying" in the House version) would limit any federal entity from compelling the disclosure of confidential sources and other journalist work product and material obtained during newsgathering in almost all circumstances. (There are narrow exceptions for terrorism investigations or to prevent imminent violence or significant injury.) And the protections of the PRESS Act extend to the email, telephone and cloud storage providers for the media as well – unless a court finds "a reasonable threat of imminent violence." Where subpoenas are permitted, the bills require prior notice and an opportunity to be heard, and that the government informs the court that the information sought belongs to a covered journalist – answering one of the critiques of the recent forays. Only if a court determines by clear and convincing evidence that notice would pose a substantial threat to the integrity of a criminal investigation or risk serious harm can the service provider be gagged from informing their client.[7]

With the previous bills, there were questions over who would qualify for protection: Did citizen journalists count or just those who worked for traditional media? How about bloggers? The PRESS Act defines those who will receive protection broadly – a "covered journalist" is "a person who gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public." Unlike the 2017 bill, there is no requirement that the journalist be paid for their work.

The PRESS Act does not apply to civil defamation claims, nor to anyone suspected of being an agent of a foreign power or a terrorist. It also does not prevent the government from investigating a journalist suspected of committing a crime, or if the journalist was a witness to a crime unrelated to engaging in reporting.

Congress introduced the PRESS Act the same week that the House Judiciary Committee held a hearing on potential legislative responses to "deter prosecutorial abuse of power," at which I was a witness. In addition to calling for the codification of the Department of Justice policies and a federal shield law, other proposals for legislative solutions included requiring judicial review for Department of Justice subpoenas; enhancing the standard of review for gag orders issued under the Stored Communications Act; restricting how long parties could be gagged; and providing an advocate for the press in cases where service providers were prohibited from telling journalists about the process.

But these new policies and bills are not yet laws, and much remains to be done to ensure that newsworthy reporting makes its way to the public.

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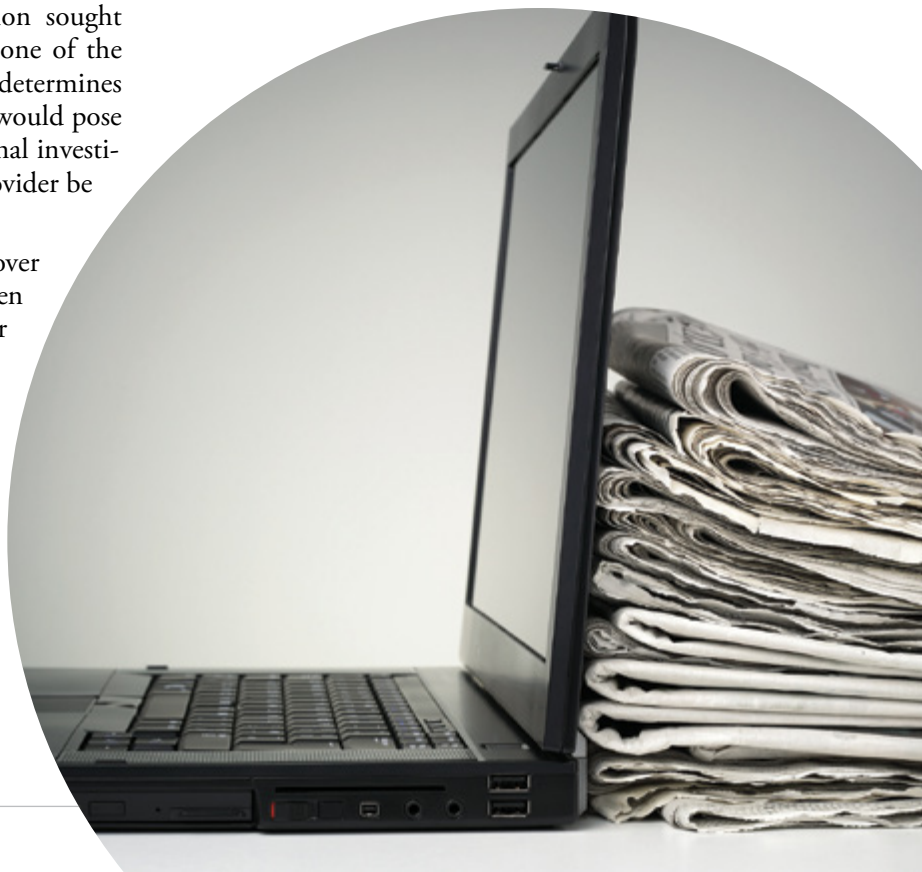
1. *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971).
2. 28 CFR § 50.10 (a)(1).
3. 28 CFR § 50.10 (a)(4).
4. 408 U.S. 665 (1972).
5. 22 N.Y.3d 300, 316 (2013), *cert. denied*, 572 U.S. 1135 (2014).
6. Free Flow of Information Act of 2007: Hearing Before the H. Comm. on the Judiciary, 110th Cong. 32–34 (June 14, 2007) (Rep. Mike Pence), https://www.gpo.gov/fdsys/pkg/CHRG-110hhrg36019/html/CHRG-110hhrg36019.htm.
7. The text of the act can be found here: https://raskin.house.gov/_cache/files/0/c/0c416d20-4525-4578-bb81-52072342f9e2/893511E622B285B8219155C4BF2957D0.press-act.pdf.



What To Do When a Judge Won't Allow Your Leading Questions

By Glenn Greenberg

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Every trial attorney faces critical decisions as to which witness or witnesses will best tell his client's story. Calling an adverse party or a person identified with an adverse party in one's case can be incredibly effective because one can often, through leading questions, force the other side to tell your story. Like every critical decision at trial, however, this strategy is risky. One risk, emanating from the language of the Federal Rules of Evidence itself, is that the court may not allow you to ask leading questions.

Attorneys have been, and continue to be, surprised when courts do not allow them to ask leading questions of witnesses identified with an adverse party. Hopefully, by reading this article, you will not be among those poor unfortunate souls. Instead, you will enhance the likelihood of a successful appeal by being prepared to provide a proffer of what information you would have elicited if you had been allowed to ask leading questions

In federal court, attorneys generally can ask leading questions to adverse parties and those identified with adverse parties. Rule 611, which governs the "Mode and Order of Examining Witnesses and Presenting Evidence," states as follows:

> (c) **Leading Questions**. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. *Ordinarily*, the court *should* allow leading questions:
>
> (1) on cross-examination; and
>
> (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.[1]

The rule does not specify what constitutes "ordinary" circumstances such that a court will, in fact, allow one to ask leading questions. The only point that seems to be expressed with clarity in Rule 611(c), through use of the word "ordinarily" and "should," is that the court may not always allow attorneys to ask leading questions to adverse parties or witnesses identified with adverse parties. While the rule itself does not provide any guidance as to when a court should deny an attorney the opportunity to ask leading questions to an adverse party or a witness identified with an adverse party, the Advisory Committee notes state that it included the word "ordinarily" to "furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact."[2] Despite this note, courts have sometimes denied an attorney the opportunity to ask leading questions to an adverse witness when the cross-examination would be in fact. Even worse, appellate courts have refused to reverse district courts as a result of this error.

A BRIEF ANALYSIS OF FEDERAL RULE OF EVIDENCE 611

On its face, Federal Rule of Evidence 611(c) generally can be relied upon for the proposition that an attorney can ask adverse witnesses leading questions. This subdivision allows a party's attorney to ask leading questions to an adverse witness both on cross-examination, under Rule 611(c)(1), and on direct examination, under Rule 611(c)(2). As the Notes to the Advisory Committee on the Proposed Rules state, "[t]he final sentence deals with categories of witnesses *automatically* regarded and treated as hostile."[3] As stated, the inclusion of the word "ordinarily" in the rule indicates that there are exceptions to when leading questions should be used against adverse parties or witnesses identified with adverse parties. Again, the Advisory Committee Notes provide the rationale for this limitation:

> The purpose of the qualification "ordinarily" is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the "cross-examination" of a party by his own counsel after being called by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff.[4]

Thus, Rule 611(c) was intended to ensure that counsel can ask leading questions against adverse witnesses unless the cross-examination is in form only and not in fact.

The history of Rule 611 comports with the conclusion that attorneys should be allowed to ask leading questions to truly adverse witnesses. Rule 611(c) did not always exist. Before Rule 611(c) came into being, leading questions were only allowed on direct examination if counsel could demonstrate that the witness was hostile or that there was "a determination that the witness being examined was an adverse party, or an officer, director, or managing agent of such an adverse party."[5] "The drafters of Rule 611(c), however, determined that these limitations represented 'an unduly narrow concept of those who may safely be regarded as hostile without further demonstration.'"[6] As a result, the Rules Committee created Rule 611(c)(2) to ensure that attorneys could ask leading questions to adverse parties and witnesses identified with adverse parties without the witness demonstrating any actual hostility.[7]

COURTS' INTERPRETATION OF FEDERAL RULE OF EVIDENCE 611

Despite the plain language and history of Rule 611(c), courts sometimes have denied attorneys the opportunity to ask leading questions to adverse parties or witnesses identified with adverse parties. For example, in *Rosa-Rivera v. Dorado Health, Inc.*, plaintiffs sued the doctor who delivered their child and the hospital at which he was born because, they alleged, their child suffered trauma, shoulder dystocia, and Erb's palsy as a result of the doctor's negligence during delivery.[8] Plaintiffs called a nurse who worked at the defendant's hospital at trial.[9] The judge refused to allow plaintiffs' counsel to ask

leading questions because she was not hostile.[10] When counsel noted that she was identified with the adverse party, the judge stated, "I don't agree . . . If she becomes hostile, you can lead all the way."[11] The 1st Circuit held that "it seems likely that the judge's ruling [that counsel could not ask leading questions] was based on an error of law and therefore an abuse of discretion."[12] Nevertheless, the 1st Circuit did not reverse the judgment because, it held, "[p]rejudice is required for a party to prevail on a claim of improper exclusion of leading questions. For starters, this would require a proffer on Plaintiffs' part, in other words, a showing of some specific information that counsel might have elicited if permitted the use of leading questions."[13] The court did not reverse despite the error because plaintiffs did not provide such a proffer.

Attorneys have been, and continue to be, surprised when courts do not allow them to ask leading questions of witnesses identified with an adverse party. Hopefully, by reading this article, you will not be among those poor unfortunate souls.

Courts have also seemingly ignored the principle provided for under Rule 611(c) by reference to the fact that Rule 611(a) says that the court should exercise reasonable care over the examination of witnesses. Rule 611(a) states "[t]he court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment." Fed. R. Evid. 611(a). Occasionally, courts have used Rule 611(a) as a basis for refusing to allow leading questions against a truly adverse witness.

For example, in *Jaffe v. Bank of America, N.A.*, the plaintiffs intended to call a former Bank of America employee.[14] The district court did not allow them to ask leading questions to the former Bank of America employee. *Id.* Plaintiffs appealed. The 11th Circuit agreed with plaintiffs that the former Bank of America employee was a witness identified with adverse party, thus falling under Rule 611(c)(2), even though he no longer worked for the defendant. *Id.* at 588. However, the 11th Circuit held that Rule 611(c)

> does not give the calling party an absolute right to ask leading questions.[15] Instead, "[t]he district court has the discretion to allow or disallow leading questions of a witness identified with an adverse party, and once the district court exercises [its] discretion in that regard, the movant must establish an abuse of discretion to obtain a reversal."[16]

The court gave three reasons for refusing to reverse and remand the case. First, the court noted that the trial court had "explained that its decision was necessary to keep the trial moving along in an orderly fashion."[17] This argument is not persuasive, since the trial court always needs to keep the trial moving in an orderly fashion. One would also note that leading questions generally are more time-efficient since, if done well, the witness's answers are succinct: "Yes" or "No."

Second, the 11th Circuit held that the district court found that the witness harbored no animosity toward the plaintiffs and testified in a "forthright and direct manner."[18] This argument is irrelevant since Fed. R. Evid. 611(c)(2) is designed to "deal[] with categories of witnesses automatically regarded and treated as hostile."[19] The witness is automatically deemed hostile under the rule, so no showing of animosity is required under it. There is nothing in Rule 611 that says that 611(c)(2) does not apply if the witness does not appear to be lying or sidestepping questions.

Third, the court held that it will only reverse on the basis that the court violated Rule 611(c)(2) if the plaintiffs show that they were prejudiced by this error and, in this case, the court held they failed to do so. It is this rationale against which the attorney must protect.

Other decisions comport with the general pattern exemplified by *Rosa-Rivera* and *Jaffe*: appellate courts often defer to the district court whether leading questions were appropriate and argue that reversal due to Rule 611(c)(2) is inappropriate unless the aggrieved party can demonstrate what information they would have been able to obtain but for the court's error.[20] Therefore, the attorney should be prepared to demonstrate what information they would have obtained but for the court's denying them the opportunity to ask leading questions.

CONCLUSION

Attorneys should prepare before the trial for the possibility that the court denies them the opportunity to ask leading questions to opposing parties or witnesses identified with opposing parties. If you plan on calling an adverse party or witness identified with an adverse party, you should write down exactly what information

you expect to elicit from that witness before the trial and, as you are doing your examination, cross out the information that you have elicited. Then, at the end of your examination, you can make an offer of proof of any information that you were unable to elicit because the court denied you the opportunity to ask leading questions. The information that you did not elicit must be material to a claim or defense in order to demonstrate prejudice. This procedure will put you in the best position to convince an appellate court to reverse and remand the case since you can not only identify the rule that was violated but how that violation prejudiced your client.

In addition, the Rules Committee should consider changing the language in Rule 611(c)(2) to incorporate the Advisory Committee notes regarding that rule. Thus, the rule would say:

> Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. However, unless the Court determines that the cross-examination is cross-examination in form only and not in fact, the Court shall allow leading questions . . . (2) when a party calls . . . an adverse party, or a witness identified with an adverse party.

This change would ensure that the concerns in Advisory Committee Notes for Rule 611 are maintained, clarify that the court should not require a party to demonstrate actual prejudice under Rule 611(c) or use Rule 611(a) to trump the rights created by Rule 611(c), and help ensure that the court allow leading questions when a party calls a truly adverse witness.

1. Fed. R. Evid. 611(c) (emphasis added).
2. Fed. R. Evid. 611 Advisory Committee's Notes.
3. Fed. R. Evid. 611 Advisory Committee's Notes (emphasis added).
4. *Id.*
5. *Ellis v. City of Chicago*, 667 F.2d 606, 612 (7th Cir. 1981).
6. *Id.*, citing Fed. R. Evid. 611(c) Advisory Committee's Notes.
7. *Ellis*, 667 F.2d at 612–13.
8. 787 F. 3d 614, 616 (1st Cir. 2015).
9. *Id.* at 616–17.
10. *Id.* at 617.
11. *Id.*
12. *Id.*
13. *Id.* (citations omitted).
14. 395 Fed. App'x 583, 587–88 (11th Cir. 2010).
15. *See* Fed. R. Evid. 611(a) & (c).
16. *Jaffe*, 395 Fed. App'x at 588.
17. *Id.*
18. *Id.*
19. Fed. R. Evid. 611 Advisory Committee's Notes.
20. *See, e.g.*, *Ellis*, 667 F.2d at 613; *Haney v. Mizell Memorial Hosp.*, 744 F.2d 1467, 1477–78 (11th Cir. 1984); *Perkins v. Volkswagen of America, Inc.*, 596 F.2d 681, 682–83 (5th Cir. 1979); *cf. Scenic Holding, LLC v. New Board of Trustees of Tabernacle Missionary Baptist Church, Inc.*, 506 F.3d 656, 664 (8th Cir. 2007).

How the Dormant Commerce Clause Can Fight Zoning Discrimination

By Michael D. Diederich, Jr.

Land use regulation is a vital governmental tool for safeguarding the health and safety of the citizenry, as has been well-recognized since early last century. However, it has become increasingly clear that zoning regulations may have exclusionary effects, whether intentional or not. The nation's history of intentional exclusion is fully described in Richard Rothstein's *The Color of Law*.[1] Rothstein describes how government has systemically discriminated against minorities in housing, with exclusion only getting worse, notwithstanding statutory remedies that have long existed. The result is racially, ethnically and religiously segregated housing and schools.

This article proposes a solution. Because real estate developers have a financial interest in providing residential housing, and state attorneys general have a public interest in fighting exclusionary zoning, both can deploy the commerce clause[2] to combat exclusionary land use regulations, resulting in more residential housing being built on a less segregated landscape.

The commerce clause has been an underutilized legal weapon, yet may be the "silver bullet" needed to remedy systemic discrimination. It does not require proof of unlawful discrimination. All that is needed for a viable commerce clause claim is regulation that burdens commerce without a justifiable regulatory basis. Since exclusion of outsiders

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is not a legitimate basis for land use regulation in New York State and elsewhere, an injured developer will have a *prima facie* case against the offending municipality under the commerce clause whenever a local regulation serves to exclude outsiders by unreasonably obstructing residential development.

UNLAWFUL BIAS, EXCLUSIONARY ZONING AND WILBUR FRIED

Black Americans have been segregated from white society since well before our nation's founding. This was the product of slavery, and, except briefly during Reconstruction, left unchanged after the Civil War, with the Supreme Court judicially blessing segregation in 1896 in its infamous *Plessy v. Ferguson*[3] decision. The Supreme Court provided some justice in *Buchanan v. Warley*,[4] holding unconstitutional a city ordinance's regulation of housing sales based upon race. It was not until 1954 that it issued its watershed *Brown v. Board of Education*[5] decision, rejecting "separate but equal." The history of race discrimination in housing is tragic and continuing.

Nor is human bias limited to race. For example, in 2019, an Orthodox Jewish real estate developer filed a federal lawsuit alleging unlawful religious discrimination in a subdivision approval. The developer alleged in his *Greens at Chester*[6] lawsuit that over several years, the Town of Chester, located in Orange County, engaged in regulatory action to exclude Hasidic Jews. This lawsuit followed decades of town obstruction by the prior developer, Wilbur Fried. The regulatory obstruction by Fried (who is not Orthodox) seemed intended to exclude outsiders generally.

The New York State attorney general intervened in *Greens at Chester* in early 2020 to stop what appeared to be egregious anti-Hasidic discrimination. A consent decree was concluded in mid-2021.[7] Yet the consent decree did nothing to stop the town's parochialism and general exclusion of outsiders, even though state law prohibits exclusionary zoning. The town's parochial ordinances – local laws that hinder Hasidics, Blacks, other minorities and outsiders from relocating into this town – were left unchanged.

BIAS OR NIMBYISM?

Greens at Chester is a case study in land use regulation as a tactic for exclusion. It shows why, 50 years after the Fair Housing Act (FHA)[8] was enacted, there exists widespread exclusion of Blacks and other minorities from the housing marketplace in New York's suburbs[9] and nationally.[10] One reason this exclusion still exists is unlawful discrimination, usually based upon how people look or sound. State and federal laws that try to prevent discrimination in land use regulation are largely ineffectual because too often, intentional discrimination either cannot be proven or involves subconscious "implicit bias." The tendency of humans to harbor bias is founded in biological science and human psychology.[11] Society can try to tackle the conscious and subconscious prejudices that human beings harbor, but these prejudices still often find expression in exclusionary zoning practices.

Another reason for exclusionary zoning, perhaps even more prevalent, is "NIMBYism" – the desire to keep newcomers out and "not in my backyard."

The reality that both unlawful bias and NIMBYism influence municipal land use regulation creates a difficult societal and legal problem. Unconscious bias and NIMBYism may result in unfair land use regulation but generally civil rights lawsuits succeed only against intentional discrimination not unintentional (disparate impact[12]) discrimination. Civil rights laws, such as the FHA and RLUIPA,[13] are most effectively used to redress disparate treatment against a specific minority group. These laws do not easily remedy unconscious bias disfavoring a lower caste[14] or lower class of potential buyers or simply all outsiders.

The decades-long history of the *Greens at Chester* subdivision proposal is a case study in both (1) the attempted intentional exclusion of the Hasidim and (2) the preceding decades of obstruction by Wilbur Fried's desire to sell to anyone in the marketplace. Fried experienced local regulation to exclude all newcomers, presumably due to NIMBYism and not animosity toward any particular racial, ethnic or religious group. Yet the byproduct of exclusion is segregation, whether motivated by unlawful animosity or not. This hurts Americans. It hurts the economy. It burdens interstate commerce.

THE DORMANT COMMERCE CLAUSE AS A SWORD TO FIGHT EXCLUSIONARY ZONING

Enter the commerce clause as an effective weapon for combating exclusionary land use regulation. Developers injured by exclusionary zoning can serve as a private attorney general to vindicate their right to develop land and also achieve a public good. They have a financial incentive to succeed in reasonably developing land and to sell their product: residential housing. This benefits them and also people of all socioeconomic strata in need of housing. Where in the past, governments "redlined" communities to exclude people of color, private developers today will see a financial incentive to help "green line" areas suitable for sound residential development and growth. Using the commerce clause, developers can fight the local parochialism, insularity and exclusionary zoning that is depriving so many Americans of needed housing.

Thus, where equal protection-related claims by developers would be viewed as too risky, and perhaps fail for lack a sufficient ("plausible"[15]) evidentiary support, the commerce clause will fare much better because there is

no need to prove discriminatory intent. Municipal exclusion based upon race, ethnicity, religion, caste or class is irrelevant.

The commerce clause has been interpreted to protect all Americans in their right to a functioning national economy. Thus, a developer who does not directly engage in interstate merchandizing will nevertheless have standing to pursue a commerce clause lawsuit if the nation's commerce is burdened and an injury sustained.[16] He or she could assert the commerce clause through an Article 78 proceeding to enjoin the exclusionary regulation, and if that fails, sue for the civil rights violation and recover damages and attorney's fees if he or she prevails.[17]

ELEMENTS OF AN EXCLUSIONARY ZONING COMMERCE CLAUSE CLAIM

The commerce clause provides that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States."[18] As Justice Cardozo wrote in *Baldwin v. G.A.F. Seelig, Inc.*:[19] "The Constitution . . . was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

The Supreme Court has long interpreted the commerce clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute.[20] In determining whether a law violates this so-called "dormant" aspect of the commerce clause, the court first asks whether it discriminates on its face against interstate commerce. [21] "Discrimination" means treating in-state and out-of-state economic interests in a manner that benefits the former and burdens the latter.[22] A state or municipal government engaged in "economic protectionism" is subject to a "virtually *per se* rule of invalidity."[23] To overcome invalidity, the government must show that the state has no other means to advance a legitimate local purpose.[24] As Justice Jackson wrote in *H. P. Hood & Sons, Inc. v. Du Mond*:[25]

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation . . . . , *that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders*; such has been the doctrine of this Court which has given it reality (*emphasis added*).[26]

Yet despite Justice Jackson's formulation, consumers are deprived of housing because producers are constrained by the protectionism of local governments. Many interstate real estate developers will not even attempt to develop land in New York state because of its burdensome local land use regulation and local governments' efforts to exclude. Yet the Supreme Court teaches that the commerce clause guarantees a national marketplace. Localities do not have the right to unduly burden interstate commerce by protectionism.

There are two common types of dormant commerce clause violations. One type is protectionism against out-of-state interests. A state or local regulation that discriminates against a neighboring state is subject to essentially a *per se* rule of illegality.[27] The second type is undue burden upon interstate commerce, which claim the courts analyze using the so-called "*Pike* balancing test."[28] Under *Pike*, the court weighs the legitimate local (state) interests against the burden imposed on the interstate marketplace.

Because most state-level governmental regulation has legitimate, articulated reasons, a challenger asserting that a state law has an undue burden on commerce most often loses under *Pike* balancing. However, local governments' regulation is a different beast, as it very often is without state-sanctioned legal authority. Zoning to exclude outsiders as such is likely unauthorized in most, if not all, states, as it would violate equal protection principles.[29] Zoning to exclude is not only unauthorized in New York but affirmatively prohibited. New York's home rule law does not allow exclusionary zoning. The Court of Appeals made this unequivocally clear in its holdings in *Golden v. Planning Bd. of Town of Ramapo*[30] and *Berensen v. Town of New Castle*.[31] Municipalities cannot permissibly zone to exclude or to insulate themselves from regional housing needs. New York statute provides for reasonable land use development, not municipal isolation.

Based on the U.S. Supreme Court precedent discussed below, if a land use regulation is burdensome to commerce and has no legitimate purpose, or if it discriminates against out-of-state interests, it should be viewed as presumptively violating the commerce clause. Under the teachings of *Philadelphia v. New Jersey*[32] and *Pike v. Bruce Church, Inc.,*[33] a fair formulation of a presumptive commerce clause violation for exclusionary zoning involves these two prongs:

1. the land-use regulation involved is unauthorized by or contravenes state law; and
2. the regulation either discriminates against interstate commerce, *or* burdens interstate commerce.

When an ordinance is shown to be exclusionary, establishing the two prongs above should be much easier than, for example, proving a case of housing discrimination under the FHA. Abusive local land use regulation likely can be shown to be unauthorized or unlawful. The burden upon interstate commerce need be only slight, as interstate commerce has been broadly defined ever since the Supreme Court held in *Wickard v. Filburn*[34] that subsistence farming will suffice. A real estate developer's activities certainly meet *Wickard*'s interstate commerce threshold.[35]

Municipalities employ some common tactics to exclude. One is the use of development moratoria. When a municipality enacts a land use moratorium to single out an out-of-state business seeking a land use approval, the moratorium may reasonably be viewed as (1) discriminatory against interstate commerce and (2) arbitrary and unsupported by law (and thus not a legitimate governmental purpose). Either ground supports a commerce clause claim.

Another common tactic for exclusion is obstruction through burdensome land use ordinances or by repeatedly amended or abusively administrating such ordinances.[36] A third tactic is using environmental review statutes such as SEQRA[37] to obstruct a development proposal. If the motivation is NIMBYism, rather than bona fide environmental protection, the *Pike* balancing will weigh in favor of the developer.

As to municipalities that are in close proximity to a state border, the enactment of exclusionary zoning will likely discriminate against interstate commerce, by producing the cross-border rivalries and jealousies that the commerce clause was designed to prevent. If towns and villages bordering New Jersey adopt exclusionary local land-use ordinances to ensure "open space" and "community character" in order to maintain "high property values" and "keep out criminal elements," these New York municipalities invite adjoining townships in New Jersey to follow suit[38] – to be equally spacious, upscale and safe. One result is to exclude minority and low-income families. Another is interference in the interstate housing marketplace, with lower numbers of homes being constructed and reduced housing availability, on both sides of the New York-New Jersey state border.

Hoarding local land (e.g., "open space") and its ability to be economically used is akin to hording other types of natural resources that the Supreme Court has held violates the commerce clause.[39] If viewed as discrimination against interstate commerce, this would result in a per se commerce clause violation, and if not, a presumptively undue burden under *Pike* if the land use regulation contradicts state law.

EXCLUDING TRASH, EXCLUDING PEOPLE

Many recent commerce clause cases involve solid waste management. In *C & A Carbone, Inc. v. Clarkstown*,[40] a local municipal ordinance required trash haulers to deliver solid waste to a competitor's local waste processing facility. The Supreme Court struck down the local regulation as violating the commerce clause. The ordinance discriminated against interstate commerce by "hoard[ing] solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility."[41] As the court stated:

> While the immediate effect of the ordinance is to direct local transport of solid waste to a designated site within the local jurisdiction, its economic effects are interstate in reach.[42]

The hoarding of trash in *Carbone* is akin to hoarding the right of private landowner to develop and sell their land. In both instances, the municipal ordinance was designed for the benefit of local residents, enacted at the expense of the regional market for trash or for housing. Quarantining local trash or local land is unconstitutionally protectionist. The town in *Carbone* burdened out-of-state solid waste managers. Exclusionary local zoning burdens out-of-state people seeking homes and developers seeking to build and sell homes. Hoarding trash or land burdens commerce by preventing the product (trash or homes) from entering the stream of interstate commerce.

Resource protectionism is forbidden by the dormant commerce clause. The above can be summed up in the Supreme Court's instruction in *New England Power Co. v. New Hampshire*.[43] There, in invalidating New Hampshire's attempt to hoard in-state hydroelectric power for its residents, the court wrote:

> Our cases consistently have held that the Commerce Clause . . . [of the Constitution, Art. I, § 8, cl. 3,] precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom.[44]

RACE, RELIGIOUS AND SOCIOECONOMIC LAND USE ABUSE

The *Greens at Chester* case involved NIMBYism that evolved into anti-Hasidimism. The Town of Chester sought to protect itself from Fried, and then his Hasidic successor, in both instances at the expense of the interstate marketplace in housing. The town argues that its intent was and is to maintain the town's character and property values. However, higher property values (and thus increased wealth) inure to the benefit of the locals by limiting housing stock. Based upon simple supply and demand economics, exclusionary zoning results in higher home values (for the local residents) and higher housing prices (for potential purchasers) in the localities that exclude. This favors the locals and disfavors outsiders, out-of-staters when near a state border, and interstate commerce.

The exclusionary zoning seen nationally often appears akin to governmentally sponsored "gated communities." It increasingly excludes middle-class and lower-class Americans and disproportionately Blacks and other minority groups. It amounts to a reverse "race to the bottom," where zoning allows the wealthy to "race to the top" to reside in high-priced enclaves, with everyone else left out. Equality of opportunity to reside in such places becomes non-existent as segregation increases. It is paradigmatic parochial protectionism, violating the central commerce clause tenet against protectionism – laws

that "excite those jealousies and retaliatory measures the Constitution was designed to prevent."[45]

CONCLUSION

Wealth is not a suspect class. Favoring current residents and the wealthy through police power regulation does not deny equal protection of the law to nonresidents and the less wealthy. Yet it creates socioeconomic structural inequality in American society. The commerce clause can be employed to help reduce such inequality where other civil rights statutes cannot.[46]

When land use regulation prevents reasonable residential real estate development, it burdens the interstate housing marketplace. If the regulation is unsupported by state law, it is susceptible to a commerce clause challenge. Developers injured by unjustified local land use regulation can obtain redress under the commerce clause for being denied the opportunity to provide housing in the national housing marketplace. In this, they will also serve as private attorneys general vindicating the Founding Fathers' vision for a national economic union. When a municipality uses its regulatory power to exclude outsiders, either the developer or the state attorney general may find the commerce clause to be the most efficacious and practical means of opening up a housing market, particularly when intentional discrimination based upon race, ethnicity or religion cannot likely be established. The time is ripe to deploy the commerce clause to fight exclusionary zoning.

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1. Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America (2017).

2. U.S. Constitution, Art.1, § 8, cl. 3.

3. 163 U.S. 537 (1896).

4. 245 U.S. 60 (1917).

5. 347 U.S. 483 (1954).

6. *See Greens at Chester, LLC v. Town of Chester,* 19 Civ. 06770, 2020 U.S. App. LEXIS 81547 (S.D.N.Y. May 8, 2020).

7. *Id.* Local news stories are available at: https://www.recordonline.com/story/news/local/2021/05/04/ny-settles-hasidic-bias-claims-against-chester-over-home-project/4919524001 and https://www.recordonline.com/story/news/local/2020/11/02/judge-approved-partial-settlement-greens-chester-lawsuit/6120839002.

8. Title VIII of the Civil Right Act of 1968, 42 U.S.C. §§ 3601 *et seq*.

9. *See Editorial, The Jim Crow South? No, Long Island Today*, N.Y. Times, Nov. 21, 2019, https://www.nytimes.com/2019/11/21/opinion/long-island-real-estate-discrimination.html.

10. *See* Rothstein, *supra* note 1; *see also* Edward L. Glaeser, *How Biden Can Free America From Its Zoning Straitjacket*, N.Y. Times, April 12, 2021, https://www.nytimes.com/2021/04/12/opinion/biden-infrastructure-zoning.html.

11. *See* Keith Payne, Laura Niemi, John M. Doris, *How to Think about 'Implicit Bias,'* Scientific American, March 27, 2018, https://www.scientificamerican.com/article/how-to-think-about-implicit-bias.

12. *See Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc*., 576 U.S. 519 (2015). Disparate impact is much more difficult to prove, for example, that the local zoning resulted in the exclusion of a protected minority, to a statically significant degree, and if so, that the regulation lacks a legitimate basis or a legitimate basis that cannot be revised to mitigate the impact. *See also Griggs v. Duke Power Co.,* 401 U.S. 424 (1971) and *MHANY Management, Inc. v. County of Nassau*, 819 F.3d 581 (2d Cir. 2016).

13. *Religious Land Use and Institutionalized Persons Act, codified as* 42 U.S.C. §§ 2000cc *et seq.*

14. *See* Isabel Wilkerson, Caste: The Origins of Our Discontents (2021).

15. A federal complaint, to be legally sufficient, must allege "plausible" claims. *See, e.g., Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

16. *See Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 183 (1st Cir 1999), *citing General Motors Corp. v. Tracy*, 519 U.S. 278, 286 (1997). As stated in *Houlton*: "In Commerce Clause jurisprudence, cognizable injury is not restricted to those members of the affected class against whom states or their political subdivisions ultimately discriminate. *See General Motors Corp. v. Tracy,* 519 U.S. 278, 286, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997). Thus, an in-state business which meets constitutional and prudential requirements due to the direct or indirect effects of a law purported to violate the dormant Commerce Clause has standing." *Id.* A developer's injury, and thus his argument for standing, is much stronger than the generalized injury of low-income potential buyers from a neighboring municipality. *Cf., Warth v Seldin*, 422 U.S. 490 (1975) (no standing).

17. *See, e.g., Dennis v. Higgins*, 498 U.S. 439 (1991); 42 U.S.C. §§ 1983, 1988.

18. *See* note 2 *supra*.

19. 294 U.S. 511, 523 (1935).

20. *See Case of the State Freight Tax,* 15 Wall. 232, 279, 21 L.Ed. 146 (1873); *Cooley v. Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots,* 12 How. 299, 318, 13 L.Ed. 996 (1852).

21. *See American Trucking Assns., Inc. v. Michigan Pub. Serv. Comm'n,* 545 U.S. 429, 433 (2005); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources,* 504 U.S. 353, 359 (1992).

22. *See Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.,* 511 U.S. 93, 99, (1994); *New Energy Co. of Ind. v. Limbach,* 486 U.S. 269, 273 (1988).

23. *See Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978).

24. *See, e.g., Maine v. Taylor,* 477 U.S. 131, 138 (1986).

25. 336 U.S. 525 (1949).

26. *Id*. at 538–39.

27. *See Philadelphia v. New Jersey,* 437 U.S. 617 (1978).

28. *See Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970) (directed at laws directed to "legitimate local concerns, with effects upon interstate commerce that are only incidental").

29. The Supreme Court allowed zoning to preserve "community character" in *Nectow v. City of Cambridge,* 277 U.S. 183, 188 (1928) and "character of the neighborhood*" in Village of Euclid, Ohio v. Ambler Realty Co*., 272 U.S. 365 (1926). *Plessy*'s "separate but equal" was then good law. Today, if these are code words for racial bias the courts may deem such an illegitimate basis for regulation. *See, e.g., MHANY Management, Inc. v. County of Nassau*, 819 F.3d 581 (2d Cir. 2016) (*see* note 12 *supra*).

30. *See Golden v. Planning Bd. of Town of Ramapo*, 30 N.Y.2d 359, 378 (1972), *app. dismissed*, 409 U.S. 1003 (1972).

31. *See Berenson v. Town of New Castle*, 38 N.Y.2d 102 (1975); *Continental Bldg. v. N. Salem*, 211 A.D.2d 88 (2d Dep't 1995) (applying "Berenson doctrine").

32. 437 U.S. 617 (1978).

33. 397 U.S. 137, 142 (1970).

34. 317 U.S. 111 (1942).

35. The land use approval process may include out-of-state professionals, and construction, financing and sales that includes out-of-state vendors, lenders and purchasers, each of which involves the interstate marketplace.

36. *See Sherman v. Town of Chester*, 752 F.3d 554 (2d Cir. 2014) (the author is plaintiff's counsel in the *Sherman* case).

37. N.Y.S. Environmental Quality Review Act, codified at article 8 of the N.Y.S. Environmental Conservation Law, with implementing regulations found at 6 N.Y.C.R.R. Part 617 (State Environmental Quality Review).

38. New Jersey's Supreme Court has prohibited exclusionary zoning in *Mount Laurel I* and its progeny. *See Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975) (*Mount Laurel I*) and *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 92 N.J. 158, 456 A.2d 390 (N.J. 1983) (*Mount Laurel II*); *see also, John R. Nolon, A Comparative Analysis of New Jersey's Mount Laurel Cases with the Berenson Cases in New York*, 4 Pace Envtl.. L. Rev 3 (1986), https://digitalcommons.pace.edu/pelr/vol4/iss1/2.

39. *See, e.g., New England Power Co. v. New Hampshire,* 455 U.S. 331, 338 (1982); *Hughes v Oklahoma*, 441 U.S. 322, 325 (1979); *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.,* 520 U.S. 564, 576-77 (1997) ("Commerce Clause . . . precludes . . . a preferred right of access . . . to natural resources."); *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 217–18 (2d Cir. 2004) ("the Commerce Clause . . . precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom," citing *New England Power)*.

40. *See C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994).

41. *Id.* at 392.

42. *Id*. at 389.

43. 455 U.S. 331 (1982).

44. *Id.* at 338.

45. *See Carbone*, 511 U.S. at 390.

46. *See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).

PUBLICATIONS

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Tackling the Closed File Beast

By Marian C. Rice

An attorney's obligation to maintain closed client files has been on my mind a lot recently. My firm moved offices two months ago. We had a lot of client files. And while we thought we had a fairly robust file retention and destruction policy, when we began to plan our move, we realized our intentions, while good, may not have been compliant.

Fortunately, we also had sufficient time to address the problem and a goal date by which we had to complete our review, assessment and, where appropriate, return or purge. We all know attorneys never address issues without deadlines. Finishing a 15-year lease and the move to a new office provided a drop-dead date with no wiggle room. Our mission was accomplished, but the obvious lesson learned was that life would have been easier had we kept to the original game plan all along.

While ethics opinions generally state that "with certain important exceptions" an attorney has no ethical duty to retain closed files for an indefinite period, it is the "important exceptions" that make the process difficult. An attorney's ethical obligation to properly retain and dispose of closed client files transcends the closure of an attorney's law practice,[1] the dissolution of a law firm,[2] natural disaster,[3] inheriting a law firm's closed files by joining the firm[4] – even death.[5] In other words – you can't avoid it. And ignoring the problem just increases the dilemma of what to do with the closed files. Before addressing how you can keep up with your obligations to retain or purge client files, some background on the related court rules, case law and ethical obligations in order.

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THE BRIGHT LINES

Lawyers like bright lines. Unfortunately, the only crystal-clear delineation of record retention obligations an attorney or law firm must meet applies to certain bookkeeping records and escrow obligations. Under Rule 1.15 of the New York Rules of Professional Conduct, the following documents must be kept by the law firm:

- the records of all deposits into and withdrawals from the escrow and operation bank accounts maintained in the attorney's practice of law, specifically identifying the date, source and description of each item deposited, and the date, payee and purpose of each withdrawal or disbursement;
- a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed;
- all retainer and compensation agreements with clients;
- all statements to clients or other persons showing the disbursement of funds to them or on their behalf;
- all bills rendered to clients;
- all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed;
- copies of all retainer and closing statements filed with the Office of Court Administration; and
- checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips regarding the special accounts specified in RPC 1.15 (B) and any other bank account which records the operations of the lawyer's practice of law.

Attorneys must also maintain accurate, contemporaneous entries of all financial transactions in their records of receipts and disbursements, in their special accounts,

in their ledger books or similar records, and in any other books of account kept by them in the regular course of practice. Luckily, given our digital capabilities these days, these requirements may be satisfied by maintenance of original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

These records must be contemporaneously maintained and must be available for production for seven years. Violation of Rule 1.15 results in mandatory disciplinary action. Vigilant adherence to these bright-line requirements is critically important.

In addition, various statutes and court rules may also have an effect on a law firm's obligation to retain files. For instance, in lawsuits seeking damages for (1) personal injury or for property damages; (2) death or loss of services resulting from personal injuries; (3) condemnation; or (4) change of grade proceedings, the 1st and 2nd Departments require the attorneys for both plaintiff and defendant to maintain their files for seven years.[6] Attorneys need to determine whether their specific areas of practice mandate specific file retention obligations.

THE CASE-BY-CASE ANALYSIS

Excepting the bright line examples cited above, the analysis of what must be kept by the attorney from the files maintained in the representation of a client must be decided case-by-case – not the most encouraging response one wants to hear when formulating a standardized file retention policy. The Court of Appeals has broadly held that the client has a presumptive right to access the file maintained in the client's representation except for documents that might violate a duty of nondisclosure owed to a third party, a duty imposed by law, or firm documents intended only for internal law office use.[7] As a result, a client's right to some or all of what is broadly termed the "client file" is a question of law.

Let's start with the premise that, under Rule 1.15(e)(4), an attorney must promptly deliver to a client, upon request, any property of the client in the lawyer's possession. Essentially, the ethics opinions divide the components of a closed file into four categories: (1) documents belonging to the attorney; (2) documents the attorney is under a legal duty to keep; (3) documents the client must keep; and (4) the remaining majority of documents found in an attorney's file.[8]

The opinions state that documents belonging to the attorney may be disposed of in a fashion that honors the client's privilege, provided the lawyer has no other legal duty to keep the materials and there is no apparent indication the client has a need for the file. The problem with this subjective analysis is evident. If one employs the analysis utilized by most ethics opinions, there is little in a file that may be unqualifiedly categorized as materials belonging to the attorney.

Documents that the attorney is legally obligated to keep refers to the bright-line items noted above: generally, the documents identified in RPC 1.15(d)(1), various appellate rules, and those documents mandated by one's specific area of practice.

The analysis of those documents the client must keep is difficult. To get it right, you must know your client's business/personal issues. If original documents that cannot be replaced exist, for example wills, the originals must be kept virtually ad infinitum unless returned to the client. The best rule is to return to the client all original documents and filings, keeping a copy (scanned) for the attorney's file. If the documents cannot be returned to the client, the attorney must keep the documents for at least the period required by the client's business or longer if it appears the client might have a need for the document after the legal period has expired.

The last category, the majority of documents likely to be found in a client's file, may be destroyed consistent with the client's instructions. If no such instructions exist, the attorney must make reasonable efforts to return the file to the client. The first step toward that process is to send a letter to the client indicating that destruction of the file is intended, offering to return the file, and describing any documents the client may want or need in the file. If the client cannot be located or does not respond, the attorney may discard the file except for those documents that the client must retain and documents the client may foreseeably need. Remember that substantive emails are part of the client's file and the attorney's ethical obligations extend to that part of the client's closed file as well.[9]

All this is of little assistance to the attorney who would like to practice law for his or her current clients rather than spending precious time closing the files on already completed matters. However, there is no bright-line date sanctioned by ethics opinions beyond which an attorney may discard a file with impunity. Common sense must

be used given an attorney's area practice with a view toward exceeding by a significant margin the statute of limitations for legal malpractice or other claims that may be made against an attorney arising out of the representation of a client.[10] If one's practice regularly involves the representation of infants, care must be taken to consider that the infancy toll would extend the ordinary limitations period. A review of the ethics opinions, combined with securing the client's instructions for the disposition of a file in the original retention letter, should provide a law firm with guidelines suitable to its practice.

DEVELOPING YOUR PLAN

You have miles of closed files you pay dearly to store. Where do you start? Do not let the huge backload of long-closed files paralyze you into taking no action. Start the process by putting your document retention plan into place with the next file that walks in the door.

First, state your policy clearly in your engagement letter.[11] If you are at a point where you are virtually paperless, tell the client the files are maintained electronically.

Second, scan incoming and outgoing documents as a matter of daily practice. This ensures that your current files will be much less of a problem once they are closed. And any attorney living through the past 15 months of the global pandemic knows the value of accessing your files (securely) from remote locations. NYSBA offers seminars on how to convert your office to an orderly paperless environment.

Third, establish a protocol on how to close a file. Develop standard procedures, geared to your practice, setting forth what steps must be taken before a file may be closed. Common procedures include:

1. Sending a letter to your client documenting the termination of the representation, reminding the client of the firm's retention policy before destruction and returning any original documents they may need or they provided during the representation.
2. Checking to ensure that all necessary orders or judgments have been filed.
3. Ensuring all security interests have been properly docketed and calendared for renewal, if necessary.
4. Determining whether any documents properly belong in the firm's form system or brief bank.
5. Confirming that all parties were entered in the firm's conflict system.
6. Removing any duplicate documents and filing any loose papers.
7. Calendaring the file for destruction, if appropriate. A perpetual inventory of all files destroyed by the firm, with the date of destruction, must be kept.

Fourth, make sure everyone follows the plan. Start with requiring the attorneys in your practice to send a single group email stating the date the file is closed. The email should alert your accounting department to make sure a final invoice is generated; calendaring to make sure that any necessary dates are recorded; and administration to make sure the file is reviewed, the originals segregated and returned, duplicates disposed of and the balance of the file scanned and closed.

THE BACKLOG

How do you tackle the backlog? The first step is to survey the problem. Set realistic goals for each month of closed files starting with the most recent matters. Lists should be generated for attorneys to mail or email the clients about the firm's destruction policy. A form letter or email makes the odds of it being sent to the client greater but, if you tailor it to the client's representation, you can also make it a marketing opportunity. From recent experience, many clients will ask for copies of the document that reflects how the engagement terminated: e.g., a closing statement, court decision or settlement agreement, but most will wholeheartedly agree that the file should be destroyed. If you can do so, scan the balance of the file. Our firm made significant progress having a dedicated scanner manned by hourly workers who saved the files in an orderly fashion. At the end of the day, it was less expensive than renting the real estate to house the closed files.

If a law firm has not been monitoring its possession of client's files at the conclusion of the representation, addressing the backlog can be a mammoth, but essential, undertaking. Ignoring the backlog of closed files will not make the problem go away – the black hole of improperly closed client files will only multiply as time goes by. The time to close files properly and under your ethical obligations begins with the next matter you open. You must start someplace, so start with the next client you take on.

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1. N.Y. Cnty. Lawyers' Ass'n Comm. on Prof'l Ethics, Formal Op. 725 (1998).
2. NYSBA Comm. on Prof'l Ethics, Op. 623 (1991).
3. N.Y. City Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2015–6 (2015).
4. NYSBA Comm. on Prof'l Ethics, Op. 1192, ¶ 12 (2020).
5. Bar Ass'n of Nassau Cnty. Comm. on Prof'l Ethics, Op. 43–89 (1989).
6. E.g., 22 N.Y.C.R.R. § 603.25 (1st Dep't); 22 N.Y.C.R.R. § 691.20(f) (2d Dep't).
7. *See Sage Realty v. Proskauer Rose,* 91 N.Y.2d 30 (1997).
8. NYSBA Comm. on Prof'l Ethics, Op. 623 (1986).
9. N.Y. City Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2008–01 (2008).
10. While the period of limitation for legal malpractice is three years, (CPLR 214(6)), the period of limitations for a claim under Judiciary Law § 487 is six years. *Melcher v. Greenberg Traurig, LLP*, 23 N.Y.3d 10 (2014).
11. *See* N.Y. City Bar Ass'n Comm. on Prof'l Ethics, Op. 2010–01 (2010), for a discussion on the use of engagement letters to manage the lawyer's file retention obligation and sample engagement letter provision.

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 am a mid-level associate at a small general practice litigation firm where I am routinely tasked with helping clients fight traffic violations. While I enjoy representing clients before the Traffic Violation Bureau because it allows me to hone my litigation skills, my firm has recently encouraged me to generate business and expand my practice, but I have no idea how to do that.

A colleague told me about a lawyer-matching service called Legal Lynk, which matches potential clients facing traffic violations with attorneys willing to represent them. The way the Legal Lynk platform works is that the potential client uploads his or her traffic ticket and pertinent information relating to the violation. Then, Legal Lynk's proprietary algorithm matches the potential client with the "best local traffic lawyer" for that case based on a variety of factors such as geographic location, fee schedules, success rates, local competition, and customer service. In addition, Legal Lynk quotes a legal fee that is determined by the lawyer selected by the algorithm. Once the fee is paid, the client is paired with the lawyer, who has 24 hours to accept the case or the client is referred to another lawyer determined by the algorithm. If the lawyer accepts the case, the legal fee is transferred by Legal Lynk to the lawyer minus a service charge, which is retained by Legal Lynk for providing the service.

When I mentioned the idea to my mentor she recommended that I review the Rules of Professional Conduct to make sure that such a service is ethically permissible. Specifically, she expressed concern with respect to the service charge retained by the company. Is there any ethical rule that would prohibit me from using Legal Lynk's service?

Sincerely,
Ann E. Bitious

DEAR ANN:

We have experienced significant developments in legal technology in recent years which often create many interesting issues with respect to an attorney's compliance with various ethical obligations. Your question invites a discussion about your ethical responsibilities, the most significant of which is whether the service charge payable to Legal Lynk constitutes an impermissible referral fee under the Rules of Professional Conduct (RPC).

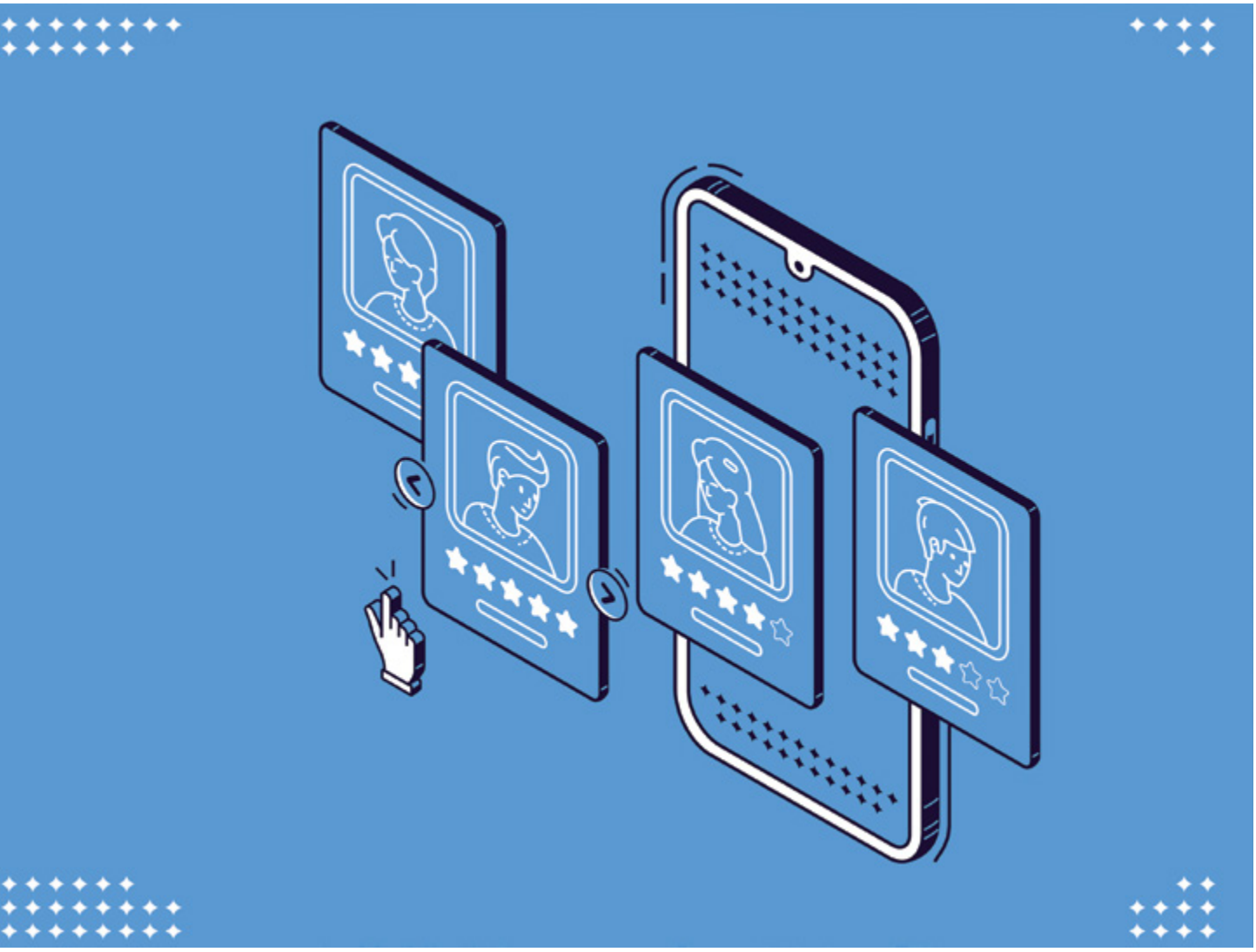
RPC 7.2(a) explicitly reminds us that "[a] lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client . . . ." Comment [1] to RPC 7.2 states that paragraph (a) "does not prohibit a lawyer from paying for advertising and communications permitted by these Rules" and, insofar as is relevant, that a lawyer "may pay others for generating client leads such as Internet-based client leads, as long as . . . the lead generator does not recommend the lawyers." Comment [1] to RPC 7.2 elaborates on the prohibition regarding recommendations by noting that in order to comply with RPC 7.1, which prohibits false, deceptive, or misleading lawyer advertising, "a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, . . . or has analyzed a person's legal problems when determining which lawyer should receive the referral."

From our reading of your question, it appears that Legal Lynk acts as a "lead generator" wherein participating lawyers pay Legal Lynk a fee to generate leads and connect them with clients. The question then becomes whether Legal Lynk is receiving such fee for "recommending" lawyers to prospective clients. As the New York State Bar Association Committee on Professional Ethics (the "Ethics Committee") observed in a 2013 ethics opinion, this analysis generally turns on whether the lawyer is paying a fee for the advertisement of its services or whether the

fee is paid for a referral. *See* New York State Bar Association Prof'l Ethics Comm. Op. 979 (2013). If the latter, the RPC explicitly prohibits lawyers from paying fees for client referrals. *Id.* We addressed the prohibition on payment of fees for referrals at length in a prior *Forum. See* Vincent J. Syracuse, Amanda M. Leone & Carl F. Regelmann, Attorney Professionalism Forum, N.Y. St. B.J., March/April 2018, Vol. 90, No. 3. However, as noted in the Ethics Committee opinion, the prohibition on payments for referrals is not meant to keep "a lawyer from paying for advertising and communications permitted by the RPC." *Id.*

NYSBA Opinion 979 gives us further guidance on this issue by using an example which is akin to the facts posed in your question. In NYSBA Opinion 979, a group of lawyer mediators paid to have their biographies advertised on a website where potential clients could locate and contact attorneys. *Id.* The Ethics Committee concluded that such action constituted payment for joint advertising, rather than paying for prohibited referrals, because the format of the website was "reasonably designed to encourage the consumer to select the member with the expertise appropriate to the consumer's needs, rather than to trigger a consumer to call for a referral." *Id.* Essentially, because the consumer used the information provided on the website to make an informed decision regarding which lawyer would best suit their legal needs, the lawyers' payment of a fee to be featured on the website constituted advertising rather than a referral fee.

A recently issued ethics opinion provides a further illustration of the line between a lawyer ethically participating in internet marketing services and a lawyer unethically paying for a referral. For instance, the for-profit service at issue in NYSBA Op. 1131 charged lawyers participating in the service a fixed monthly fee, and those lawyers submitted their names, contact information, geographic locale and areas of practice to be included in the services database. Potential clients wishing to be contacted by a



lawyer sent the service their names and contact information, their geographic locale and the practice area in which they sought legal advice. *See* NYSBA Op. 1131 (2017). The service then searched its database of participating lawyers to identify all lawyers who stated that they engaged in the requested practice area in the requested geographic locale and selected a lawyer meeting those criteria in the order in which the lawyers had registered with the service, i.e., on a first come, first served basis. *Id.*

The Ethics Committee ultimately determined that this lawyer matching service did not violate the prohibition against paying for a recommendation because of the service's use of "neutral" and "mechanical" factors that connected potential clients with attorneys. *Id.* In making such determination, the committee noted:

> [T]o "recommend also includes identifying a particular lawyer or lawyers to a potential client as 'a right' or 'the right' lawyer for the client situation after an analysis of either the potential client's legal problem or the lawyer's qualifications to address that problem. We believe identifying 'a right' or 'the right' lawyer implies some qualitative comparative assessment of the lawyers available to perform the services the potential client requires." *Id.*

Following this interpretation, the service would not constitute a "recommendation" as long as its advertising does not state or imply that the service is making a recommendation and makes clear that: (1) being included on its list of participating lawyers requires only a payment and the service does not vet the qualifications of such lawyers, other than, for example, confirming the lawyer's good standing with the licensing authority, if that is the case; (2) the service's selection of a participating lawyer from that list is the result of a neutral process that involves no evaluative judgment; and (3) when a lawyer is chosen by the service, it does not mean the selected lawyer is the "best" or "right" lawyer for the client's needs or that the lawyer is otherwise preferred over other lawyers. As we see it, if these three conditions are met, a lawyer's payment for participation in its matching service as a lawyer available to contact potential clients would be permissible under RPC 7.2(a). *Id.*

Finally, in addition to RPC 7.2(a), there are two additional ethical concerns that are relevant to your question and should not be ignored. First, you must consider whether participating in Legal Lynk would result in improper fee sharing with a non-lawyer under RPC 5.4(a). As discussed in our prior *Forum*, RPC 5.4(a) prohibits attorneys from sharing legal fees with non-lawyers. *See* Vincent J. Syracuse, Maryann C. Stallone & Carl F. Regelmann, Attorney Professionalism Forum, N.Y. St. B.J., March/April 2017, Vol. 89, No. 3. Second, as noted in Comment [1] to RPC 7.1(a), you must consider whether your use of Legal Lynk's services would violate your duty under RPC 7.1(a) not to participate in the use or dissemination of advertisements containing statements or claims that are false, deceptive or misleading. *See* RPC 7.2, Comment [1] (noting that a lead generator's communications must be "consistent with" RPC 7.1).

Adopting the rationale noted above, in our view, your use of Legal Lynk is more likely to be considered attorney advertisement rather than an impermissible fee for referral. However, it is important to ensure that Legal Lynk does not express an opinion as to your competence or ability to competently represent the client in the matter. There may be a fine line here, but crossing into impermissible referral territory is something that should be avoided.

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

QUESTION FOR THE NEXT FORUM

TO THE FORUM:

I am a commercial litigator who recently relocated from Georgia to New York. In my nearly 25 years of practice, I have counseled clients on a wide variety of matters related to business and personal needs. Recently, however, many clients have sought my counsel on issues related to recreational marijuana use and sales in an effort to comply with the recent improvements in state law. When practicing in Georgia, we were warned not to advise clients on this issue as it violated federal narcotics law.

A new and valuable client of mine in my New York practice recently sought my counsel on establishing a recreational marijuana business. In exchange for my advisement, the client offered me a 5% equity ownership interest in his cannabis business in lieu of payment for my legal fees. In addition, the client recommended that I sample the product prior to agreeing to the deal to ensure that I am fully informed and adequately invested. As I am new to this area of practice, I am hoping you can opine as to my ethical obligations with respect to this potential business venture to ensure that I do not run afoul of any of my obligations.

Sincerely,
Mary Jane Dazzled

The 'Big Lie' and COVID-19: Catalyst for Election Reform

By Cheyenne Burke

It is hard to look at the news, social media or television without seeing coverage about the "big lie" and the state of the election process. There is no doubt that the 2020 election has polarized the country around voting rights and access to fair elections. The polarization of this topic is only exacerbated by partisan politics that can leave people confused and disheartened about the state of law. Election reform takes the stage against the backdrop of a world reeling from the initial impact of the COVID-19 pandemic.

Since the start of 2021, states have enacted 84 new laws concerning voter access, according to the Brennan Center for Justice.[1] Eighteen of these states enacted reforms that have made voting more difficult, while 25 states enacted provisions to expand voter access. To complicate things even more, some of these laws contain provisions that both expand and restrict voter access. With states enacting laws that restrict or expand or both, it is clear the states are scrambling to find the best method to administer elections for all levels of government.

New York, which has been considered a progressive state in the voting rights arena, has seen substantial changes in its election law since the Democratic Party took control of the Senate in November of 2018. Since that time, long- stymied election reforms, such as online voter registration, early voting and, most recently, the New York Automatic Voter Registration Act, have been enacted. While the state continues to work out many of the logistics of these reforms, that has not stopped lawmakers from pushing the (ballot) envelope.

In the 2021 state legislative session, 511 bills were introduced into the elections committees of the Assembly and Senate. Of those bills, 22 passed both houses. At the time of this writing, 16 of them have been enacted into law and six remain to be acted on by the governor. The legislation enacted thus far ranges from temporary measures in response to COVID-19 to statewide changes to the entire elections structure.

COVID-19 RESPONSE

A number of laws were enacted in response to the COVID-19 pandemic to provide election boards and individuals with flexibility to ensure safe and fair elections. On a temporary basis, individuals are now able to request an absentee ballot through electronic means to minimize contact. Similarly, the requirement for a "wet signature" on an absentee ballot is temporarily suspended.

Election officials and candidates are also seeing changes in their operations. Board of Elections officials are prohibited from visiting or delivering ballots to nursing homes until January 2022, and poll workers now have the option for online training. Politicians similarly have seen relaxed requirements in campaigning. To minimize in-person petitioning, the number of signatures for various elections documents has been reduced.

These laws are scheduled to "sunset," or automatically be repealed, on December 21, 2021 or January 1, 2022. However, with the rise of the delta variant, it is possible the Legislature will extend these provisions.

Cheyenne Burke is an associate in NYSBA's Department of Governmental Relations advocating for policy changes on behalf of the membership. Prior to joining NYSBA, she served as counsel for the Codes and Corrections committees in the New York State Assembly drafting, analyzing, and negotiating legislation. She is a graduate of Pace University and Albany Law School.

ACCESS AND EDUCATION

The number of individuals eligible to vote is about to increase significantly in September of 2021. Individuals who are awarded parole will now have their voting rights restored at the time of their release. According to the Department of Correction and Community Supervision website, approximately 15,000 individuals were released to community supervision in 2020. Facilities releasing individuals are also mandated to notify individuals of their rights, to provide them with a voter registration form and to assist individuals in transmitting their application to the Board of Elections should they wish.

Ease of access to voting also continues to see changes within the state. Although the implementation of the enacted Automatic Voter Registration Act of 2020 (a law aimed to expedite voter registration and ensure greater participation) was delayed to 2024, lawmakers passed a number of bills that make more modest changes to the laws. Specifically, requiring the Board of Elections to provide absentee ballots requested by mail to be received no later than 15 days before an election. This change will provide voters with an additional eight days to cast their vote.

For those mailing in their ballots, they will now have an additional day to get to the post office. Ballots postmarked on the day of the election will now be considered timely. The commonsense change conforms the deadline to mail in the ballot with those delivered by hand. For those who prefer the trip to the polls to cast their votes, a law was also enacted requiring the Board of Elections to leave postage signs at any old polling locations advising of the change and new address to vote.

CONSTITUTIONAL AMENDMENTS

Changes to the New York State Constitution may be on the horizon. The Legislature passed two resolutions that will appear on the November ballot that, if approved by the voters, would make lasting changes to the New York State Constitution and the election process. One resolution proposes to remove the 10-day requirement for voter registration. This amendment would open the door for same-day voter registration. The second resolution removes the narrow list of circumstances that allows an individual to apply for an absentee ballot and would allow "no-excuse" absentee ballots in any election.

LOOKING FORWARD

Proposals that would create a statewide online absentee ballot tracking system, an electronic absentee ballot application and transmittal system, as well as increased access to early voting, are awaiting action by Gov. Kathy Hochul.

Politics aside, it is undeniable that voting is the cornerstone of our country's democracy and that it deserves considerable attention and study. NYSBA President T. Andrew Brown has assembled a blue-ribbon Task Force on Voting Rights and Democracy which will review the state of the election process across the country and make recommendations and provide expert analysis to lawyers, policymakers, legislators and journalists on how to safeguard the very foundation of this country's democracy.

"Hilary on the Hill" is on hiatus and will resume next year.

NYSBA Launches Task Force To Protect Voting Rights and Democratic Institutions

By Susan DeSantis

With over two dozen states making it more difficult for voters to cast a ballot and some states installing partisans with the authority to overturn election results, the New York State Bar Association has launched a blue-ribbon Task Force on Voting Rights and Democracy to make recommendations and provide expert analysis to lawyers, policymakers, legislators, and journalists on how to safeguard the very foundation of this country's democracy.

The task force, chaired by veteran election lawyer Jerry H. Goldfeder, special counsel at Stroock, Stroock & Lavan, will review voting laws across the United States and make recommendations for reform. The panel will pay particular attention to those who have the most trouble exercising this right, including people of color, residents of urban areas, disabled individuals, those with limited access to transportation, and workers who hold more than one job.

"The right to vote is fundamental and establishes a benchmark for public participation; it must be protected and preserved," said T. Andrew Brown, who made the issue one of his top priorities when he took over as NYSBA president June 1. "This hallmark of our democracy is under siege, particularly for disenfranchised individuals whose interests are already underrepresented and whose voices are too often silenced. We cannot sit idly by while this occurs and must ensure we're doing everything possible to deliver on the promise of free and fair elections."

"We have assembled an impressive panel of highly regarded legal scholars and voting rights advocates," Goldfeder said. "We will tap into their collective expertise to analyze the issues before us and help policymakers, the legal profession, and the public combat the restrictive laws that are being adopted or are under consideration in many states."

The members of the task force are:

- Jerry H. Goldfeder is special counsel at Stroock & Stroock & Lavan, specializing in election and campaign finance law, public integrity investigations, and regulatory compliance. Prior to joining Stroock, he served as special counsel for public integrity to former New York State Attorney General Andrew M. Cuomo. He is a special adviser to the Standing Committee on Election Law of the American Bar Association and has served as chair of the Election Law Committee of the New York City Bar Association. He chaired NYSBA's 2020 Task Force on the Presidential Election. Since 2003, he has taught election law at Fordham Law School, where he was voted Adjunct Professor of the Year in 2015 and 2019.

Jerry H. Goldfeder

- Kwame Akosah is a senior counsel in the New York City Law Department's Legal Counsel Division where he advises the mayor's office and city agencies on public policy initiatives, regulatory agendas, local, state, and federal legislation, including drafting and reviewing proposed legislation, regulations, executive orders, and memoranda. Prior to joining the city, Akosah worked at the Brennan Center for Justice at NYU School of Law, where he served as an Equal Justice Works Fellow in the Voting Rights and Elections Program. He authored and contributed to Brennan Center publications, including reports, analyses, and testimony, and engaged in statewide legislative advocacy campaigns to pass voting reforms. Akosah received his J.D. from Fordham University School of Law.

- Ava Ayers is an associate professor of law and former director of the Government Law Center at Albany Law School. She teaches classes in administrative law, law of government, and professional responsibility.
- Wilfred Codrington III is a constitutional law scholar who focuses on constitutional reform, election law, and voting rights. He is an assistant professor of law at Brooklyn Law School and is a fellow at the Brennan Center for Justice at NYU School of Law. The co-author of "The People's Constitution: 200 Years, 27 Amendments, and the Promise of a More Perfect Union" (The New Press 2021), his work has been featured in the *NYU Law Review, Columbia Law Review Forum*, The Atlantic, Slate, The American Prospect, and The Hill, among other publications. He was recently a member of the New York State Bar Association's 2020 Task Force on the Presidential Election.
- Arthur Eisenberg is executive counsel to the New York Civil Liberties Union. Previously, and for more than 25 years, he served as the NYCLU's legal director where he specialized in free speech, voting rights and racial discrimination litigation. He has also written law review articles and essays on these matters. And, for approximately 40 years, he has been an adjunct professor at the Cardozo Law School and the University of Minnesota Law School where he has taught courses in constitutional litigation, constitutional law, civil rights law and election law.
- James A. Gardner is Bridget and Thomas Black SUNY Distinguished Professor of Law and Research, professor of political science at the University at Buffalo School of Law, State University of New York. His research focuses on election law, federalism, and democratic theory.
- Steven Leventhal is an attorney and CPA and managing member of the Roslyn general practice firm of Leventhal, Mullaney & Blinkoff. He serves as counsel to the boards of ethics of two counties, four towns, and two villages. Leventhal is the associate village justice, an arbitration chairperson for the Financial Industry Regulatory Authority and a hearing officer for the New York State Joint Commission on Public Ethics. Leventhal is second vice-chair of NYSBA's Local and State Government Law Section, and co-chair of the section's Ethics Committee. He has lectured and written extensively on government, legal, corporate, and medical ethics. Leventhal is co-author and editor of "Municipal Ethics in New York: A Primer for Attorneys and Public Officials," published by NYSBA. He is frequently engaged to provide ethics advice, training and continuing professional education programs to municipal officers and employees throughout the state, municipal associations, bar associations, law firms and universities.
- Joshua L. Oppenheimer, a shareholder at Greenberg Traurig, focuses his practice on New York state governmental affairs and issues relating to governmental ethics, lobbying laws and campaign finance. He represents clients before the New York state legislative and executive branches, focusing on legislation and regulation involving health, environmental, labor, and transportation policy, as well as racing and gaming issues.
- Deborah Pearlstein is professor of law and co-director of the Floersheimer Center for Constitutional Democracy at Cardozo Law. She specializes in constitutional law, international law, and U.S. national security law.
- Saniya Suri is a recent graduate of Fordham University School of Law, where she was the editor-in-chief of the *Fordham Law Review*, a Stein Scholar for Public Interest, and a member of the Moot Court Board. After graduating, she will be working at Arnold & Porter Kaye Scholer in its litigation group and following that will be clerking for Judge Cathy Seibel in the Southern District of New York. She attended college at Washington University in St. Louis.
- Wendy Weiser directs the Democracy Program at the Brennan Center for Justice at NYU School of Law, a nonpartisan think tank and public interest law center that works to revitalize, reform, and defend systems of democracy and justice. Her program focuses on voting rights and elections, money in politics and ethics, redistricting and representation, government dysfunction, rule of law, and fair courts. She founded the program's Voting Rights and Elections Project, directing litigation, research, and advocacy efforts to enhance political participation and prevent voter disenfranchisement across the country.

NYSBA Convenes Emergency Task Force on Mandatory COVID-19 Vaccination

By Susan DeSantis and Christian Nolan

With the number of cases of the highly transmissible delta variant of the coronavirus rising precipitously around the country, the New York State Bar Association has convened an emergency task force to determine whether COVID-19 vaccination mandates should be considered in the interest of protecting the greatest possible number of people and preventing another virus wave.

NYSBA's House of Delegates in November 2020 approved a resolution urging state authorities to consider a decisional framework for mandating a COVID-19 vaccine upon determination that inoculations would be both safe and effective. The resolution also called for culturally appropriate public education campaigns to urge voluntary vaccination by all eligible New Yorkers.

Eight months later, multiple coronavirus vaccines have been approved for emergency use and are widely available, and considerable scientific evidence has been compiled supporting their safety and efficacy. But a significant number (about 59%) of people living in the United States – including approximately 30% of adult New Yorkers – are not fully vaccinated, and data show that the highly contagious delta variant is spreading quickly among this population.

Public education campaigns have thus far failed to convince vaccine-hesitant individuals and communities to protect themselves and others – particularly children who are too young to be eligible for inoculation. This effort has been further complicated by political infighting and persistent spreading of misinformation.

NYSBA's Emergency Task Force on Mandatory Vaccination and Safeguarding Public Health will examine whether the significant step of mandating vaccines is required for the greater good. The task force will also consider vaccine hesitancy among vulnerable populations – including people of color and Indigenous communities – who have a long history of mistreatment and, as a result, a deep-seated mistrust of government.

"Government has no more pressing responsibility than to protect the public's health and safety," said NYSBA President T. Andrew Brown. "Those who don't get vaccinated are not only endangering themselves, but also putting those around them at risk – including some of our most vulnerable residents who, through no fault of their own, cannot protect themselves. Our state and nation are at a dangerous tipping point. It is time to consider all possible options to protect the largest number of individuals and communities against this highly contagious and fast-moving virus."

Task Force Chair Dr. Mary Beth Morrissey, who also served as chair of the November 2020 Task Force, has agreed to lead the emergency effort, and stressed that it will be moving forward with a sense of urgency as the threat posed by the delta variant grows graver by the day. Already, officials in California and New York City have issued vaccine mandates for public employees, and the Department of Veterans Affairs has become

Mary Beth Morrissey

the first federal agency to require vaccination for health care workers.

"It is well established that rights are not absolute and public health authorities have the legal authority to mandate a vaccine if there is a significant threat to the public's health," said Morrissey, a public health law attorney, a research fellow at Fordham University's Global Health Care Innovation Management Center and a faculty member in the graduate schools. "We intend to work swiftly so that we can advise policymakers, legislators, the public and journalists what steps must be taken to protect the public's health, with a critical eye toward achieving equity and eliminating disparities when it comes to access to vaccines and public health protections."

The timeline for the task force to complete its work is approximately four weeks.

The members of the task force are:

- Mary Beth Morrissey, PhD, fellow, Fordham University Global

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Remembering Bob Ostertag: A Champion for Lawyers

By Christian Nolan

The New York State Bar Association was saddened by the loss of longtime Poughkeepsie attorney Robert L. Ostertag, who served as its president from 1991 to 1992.

"Bob Ostertag was a tremendous leader of our association for decades," said NYSBA President T. Andrew Brown. "He understood better than anyone how bar associations can serve solo and small-firm lawyers. During his presidency, he created a statewide conference, which developed 100 recommendations to help solo and small firm practitioners in New York. He was also the first chair of our General Practice Section."

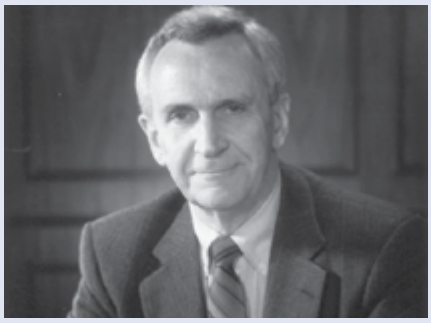
"Bob was known throughout the legal community for his wit, empathy, and dedication to the profession he loved," added Brown. "On behalf of the association, I extend our sincerest sympathies to his family and friends."

Past NYSBA President David P. Miranda also remembers Ostertag as a vigorous advocate for solo and small-firm lawyers across New York State.

"I recall Bob as a champion for the little guy, the underdog," said Miranda. "As past president, Bob would often rise in the association's House of Delegates to speak out eloquently about a cause of injustice involving a person or group that needed a voice."

Ostertag's passion for the underdog was evident in his private life too, as he was a devoted New York Mets fan. In 2018, at age 87, Bob was recognized for having attended every Mets home opener for 55 years and was allowed to throw out the first pitch at an August game.

A partner at Ostertag O'Leary Barrett & Faulkner, Ostertag was an active member of NYSBA since the 1950s. He also served on the House



Robert L. Ostertag

of Delegates, as a vice-president, and member-at-large of its Executive Committee. He chaired the Special Committee on Solo and Small Firm Practice, Special Committee on Judicial Campaign Monitoring, Special Committee on the Future of the Profession, Committee on the Unlawful Practice of Law, Special Committee on Courthouse Facilities, and the Law Office Economics and Management Committee.

The New and Improved New York State Human Rights Law Must Be Enforced To Work

By Brandon Vogel

New York State's new human rights law was exactly what New York needed. But it can't work if it isn't followed. That was what Nina R. Frank of Outten & Golden said to those attending NYSBA's webinar Aug. 13 on "Harassment and Hostile Work Environment Law."

On Aug. 3, Attorney General Letitia James unveiled her 165-page report that found that Gov. Andrew M. Cuomo engaged in conduct constituting sexual harassment under federal and New York state law. The governor announced his resignation on Aug. 10.

Frank examined the differences between the existing and previous laws on the CLE program, "Harassment and Hostile Work Environment Law" and spoke about how the new law encourages victims to come forward with harassment claims.

THE REPORT

The attorney general's "extremely comprehensive" report contained 1,371 footnotes, 179 interviews, 74,000 pieces of evidence, and 11 complainants, who were all found to be credible.

The report concluded that the governor violated the law through sexual harassment, failure to report and retaliation. She said the most damning allegation was that the governor groped his executive assistant's breast under her shirt and touched a state trooper. The executive assistant filed a criminal complaint against him.

"This captured what you need to prove a toxic work environment. It really touches on every aspect on what you would need to prove in a hostile work environment sexual harassment claim," said Frank. "This was certainly gender-based; he wasn't touching men this way."

Other notable findings were that a victim's "confidential and privileged" personnel records were leaked and that people outside of the governor's office had reviewed a letter intended to discredit an accuser.

Frank noted that as a plaintiffs' attorney, she knows how difficult it is for people to come forward and open themselves up to scrutiny.

Studies have shown that people often say that they would come forward if they were sexually harassed. But the opposite is true, with most people failing to confront their harassers or make a formal complaint, Frank said.

Frank said that the governor's resignation press conference highlighted "the unconscious bias that harassers have that they're just nice or touchy-feely people."

NOT A HARVEY WEINSTEIN

The previous New York State Human Rights Law standard "used to be a big joke in my office," said Frank, who described it as "pretty toothless and very difficult to meet."

Under the law, the harassment must have been "severe and pervasive" and retaliation must have been "materially adverse." Employers must have had at least four employees. The law didn't require harassers to pay attorney's fees or punitive damages, which adversely affected women in low-paying industries. "They really did not have victims in mind when they drafted it."

Frank said that the "severe and pervasive" requirement made it very difficult for plaintiffs to ever reach a jury. Also of concern was the Faragher/Ellerth Defense, established by the Supreme Court in 1998, which could get an employer out of liability if it could show that it took reasonable steps to prevent sexual harassment in the workplace or show that the victim of sexual harassment didn't complain or file a complaint properly.

The new law, signed on Aug. 12, 2019, eliminated the restriction that harassment be "severe or pervasive" in order for it to be legally actionable.

For claims after Oct. 11, 2019, employees must only show that an employer subjected them to "inferior terms, conditions or privileges of employment because of the individual's membership in one or more protected categories."

The new law does include attorneys' fees and punitive damages. It covers both employees and non-employees, such as interns, independent contractors and gig workers. Employers may face stricter liabilities if the harasser is a supervisor.

It mandated that all employee contracts with non-disclosure agreements include language allowing employees to file a complaint of harassment or discrimination. It also extended the statute of limitations for employment sexual harassment claims filed from one year to three years.

The new law, however, is not retroactive. "I think that a lot more cases are going to survive motions to dismiss

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NYSBA President T. Andrew Brown spoke at the Amistad Long Island Black Bar Association's 25th Anniversary Garden Reception on July 29 at the Oheka Castle in Huntington. Brown is pictured here at the event with New York State Attorney General Letitia James.

NYSBA President T. Andrew Brown, right, with Suffolk County Supreme Court Justice Derrick Robinson, left, and Valerie Singleton, assistant attorney general in charge, Nassau County Regional Office, center.

NYSBA recently met in Brooklyn with the Appellate Division, 2nd Department, and the Brooklyn Bar Association. Armena Gayle, Hon. Hector LaSalle, T. Andrew Brown, and Domenick Napoletano.

From left to right: Hon. Matthew D'Emic, administrative judge of the Kings County Supreme Court, Criminal Term; Andrea Bonina; Christina Golkin; Hon. Paul Wooten; Hon. Cheryl Chambers; Brooklyn Bar Association President Armena Gayle; Hon. Hector LaSalle, presiding justice of the Appellate Division, 2nd Judicial Department; NYSBA President T. Andrew Brown; Richard Klass; NYSBA Treasurer Domenick Napoletano; Joseph Rosato; Anthony Vaughn, Jr.; Anthony Lamberti; Hon. Barry Kamins; Hon. Lawrence Knipel, administrative judge of the Kings County Supreme Court, Civil Term; and Aimee Richter.

NYSBA Receives Prestigious Harrison Tweed Award From ABA

By Christian Nolan

For its extensive pro bono efforts during the coronavirus pandemic, the New York State Bar Association was honored with the American Bar Association's prestigious Harrison Tweed Award.

The award, which is given by the ABA's Standing Committee on Legal Aid and Indigent Defense and the National Legal Aid and Defender Association, celebrates the extraordinary achievement of a state or local bar association that develops programs to increase access to civil legal services for the indigent. NYSBA shared the award with the Iowa State Bar Association, Iowa Legal Aid and the Polk County Bar Association's Volunteer Lawyer Project. The Iowa associations were honored for developing a free COVID-19 Legal Advice Hotline.

NYSBA was nominated for the award by Chief Judge Janet DiFiore, and legal luminaries such as New York State Attorney General Letitia James, former Chief Judge Jonathan Lippman, and James Sandman, former president of the Legal Services Corporation, sent letters of support. The initiative was launched by former NYSBA President Henry M. Greenberg, expanded by Immediate Past President Scott M. Karson, and has continued to serve clients during the presidency of T. Andrew Brown.

"The need for pro bono assistance was greater than ever in 2020 due to the fallout from the COVID-19 pandemic including record unemployment," said Brown. "When times are tough, the heart and soul of the legal profession is at its strongest. Our volunteer attorneys did not shy away from distress, instead they rolled up their sleeves and got to work helping New Yorkers who were impacted most by the pandemic. I am greatly honored to accept this award on behalf of the association."

"It was vital that NYSBA do everything in its power to get legal assistance to those New Yorkers who suffered the most during the pandemic," Greenberg said. "I am grateful to all the attorneys who gave selflessly of their time, as well as the legal tech companies, Clio and Paladin, and NYSBA's extraordinary staff. They were the ones that connected our attorneys to those who desperately needed their help."

"It is the highest calling of our profession to take on pro bono work and ensure that all New Yorkers have access to justice," said Karson. "Whether it was assisting residents with housing problems, uncontested estate claims or unemployment issues, it was an incredibly rewarding feeling during my presidency to see hundreds of volunteer attorneys answer the call when it was needed most. I feel honored and privileged to share in the acceptance of this prestigious award."

Among NYSBA's ongoing efforts that led to being honored with this award are:

- COVID-19 Pro Bono Network: In partnership with the New York State Unified Court System, the association recruited and trained over 1,250 volunteers to assist with landlord/tenant matters, representation of domestic violence victims, and drafting life planning documents, and referred these trained volunteers to statewide legal service providers where they could be of immediate assistance.
- Unemployment Insurance Initiative: Connects trained volunteer attorneys with New Yorkers who need legal assistance on COVID-19-related unemployment insurance claims. Many initial clients needed help navigating the overwhelmed unemployment insurance application system while others needed assistance in gathering documents and contacting the state Department of Labor. The program trained 1,332 volunteer lawyers who have helped over 2,600 clients.
- Surrogate's Court Small Estates Administration Initiative: Connects volunteer attorneys with families of New Yorkers who passed away from COVID-19. The program assists with small uncontested estate administration only (less than $50,000 in assets). To date, the program has trained 749 lawyers and has helped 109 clients.

This is not the first time that NYSBA has been honored with the prestigious Harrison Tweed Award. NYSBA previously received the award in 1996 and 2005 for its support of funding for civil legal services as well as programs to increase access to legal services for the poor, including adults and children in family court and indigent criminal defendants.

NYSBA would like to thank tech companies Clio and Paladin for developing an integrated digital platform to support the volunteer attorneys. Clio developed the client intake and referral software and provided access to Clio Manage to handle cases, while Paladin developed the volunteer recruitment platform. NYSBA handled all training of volunteers.

NYSBA Hires New International Relations Manager

By Brandon Vogel

Carra Forgea

With more than 25% of NYSBA members residing out of state and unlimited growth potential on the horizon, the time has come for a new staff person tasked with managing this burgeoning segment of membership.

Carra Forgea is NYSBA's new International Relations Manager. She began her position in June after having previously served as a section and meetings liaison and member resource center representative.

Forgea is responsible for helping build and execute NYSBA's non-domestic membership recruitment strategy. She also will serve as liaison for the International Section and be responsible for planning and facilitating all internationally focused continuing legal education programs.

Forgea first came to the United States as an exchange student from the Philippines when she was 14. She was part of the Kennedy-Lugar Youth Exchange and Study (YES) Program, which was designed for high school students from countries with significant Muslim populations. The idea was that while living and studying in the United States, the exchange students would also help "build bridges of peace" between the U.S. and their native country.

"I liked the idea of being able to represent my culture [and] my beliefs to the U.S., to my American colleagues," said Forgea. The experience, she says, has served her well in her new role.

Upon returning to the Philippines, Forgea majored in international relations at Ateneo de Davao University, where she also studied law. She came back to the United States in 2019.

Although no two days are exactly the same, a typical day for her involves lots of emails and contacting venues and vendors for conferences. "I'm constantly thinking of how I can grow our membership globally, as well as new initiatives and improving our current strategies."

More than anything, Forgea is looking forward to creating a bigger impact in the global legal community. "There is so much potential to grow our membership and for the international community to see the value in being a member," she says. The International Section has dozens of chapters and collaborates frequently with bar associations in other countries.

NYSBA has now entered into numerous cooperation agreements, officially called memorandums of understanding, with bar associations around the world, including recent collaborations with the Philippines, Milan, Osaka, Dai-Ichi Tokyo, Seoul, Nigeria and Bucharest bar associations.

Outside of her busy job, Forgea plays ultimate frisbee, cooks, visits with family and friends and takes dance classes. She also volunteers with Maddie's Mark, which organizes events for children with serious illnesses.

NYSBA Convenes Emergency Task Force on Mandatory COVID-19 Vaccination

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Health Care Innovation Management Center, and adjunct professor, Fordham University Gabelli School of Business and Graduate School of Social Services

- Kathleen Burke, senior counsel, New York-Presbyterian Hospital
- Hermes Fernandez, chair, Bond, Schoeneck & King Health Law Group
- Candace Gomez, co-chair, Bond, Schoeneck & King School Law Practice
- Lisa Hayes, associate general counsel, One Brooklyn Health System, and adjunct professor, John Jay College of Criminal Justice
- Brendan Parent, assistant professor, Division of Medical Ethics, with joint appointment in surgery at NYU Grossman School of Medicine
- Michael Passarella, partner, labor and employment law, Olsha

The New and Improved New York State Human Rights Law Must Be Enforced To Work

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and summary judgment," said Frank, "People are going be able to get a chance to get a fair hearing."

She frequently hears, "'Well, this isn't a Harvey Weinstein.' I get that a lot. It's not going to cut it anymore in New York state."

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