NEW YORK STATE BAR ASSOCIATION

JOURNAL

Reversing the Malcolm X Convictions:

How It Happened,
How Far We've Come,
How Far We Need To Go

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JANUARY/FEBRUARY 2022
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T. ANDREW BROWN

By Prioritizing Our Humanity, We Prioritize Our Profession

On the verge of a new legislative session, the New York State Bar Association is laser-focused on a set of legislative priorities that will advance our profession and help us better serve the public. The year ahead will no doubt be full of drama and gripping developments as the state chooses a governor, but NYSBA must keep the human impact of our legislative priorities in sharp focus.

When I think about our push for the state to provide representation to people in immigration and housing proceedings, I think of the personal stories I've heard from New Yorkers from various regions. Stories about how the services of a lawyer at the right moment would have kept their lives from being turned upside down. It's easy to get caught up in the numbers. It's easy to be blinded by the minutia, distracted by naysayers or lost in the politics. I encourage you to think of the human cost of not demanding change.

I think of Dalila Yeend, a Troy resident and single parent of two who unnecessarily spent two-and-a-half months in an ICE detention center in Batavia after being pulled over for rolling through a stop sign.

Born in Australia, Yeend was only 17 when she and her mother entered America. Soon, Yeend was building a family of her own. She escaped an abusive relationship and focused on raising her two children, one of whom has a developmental disability. Yeend's attempts to secure a green card fell through several times, and she was eventually forced to check in with an ICE agent on a weekly basis, the specter of deportation hanging over her head.

After nearly three months in detention, she was told to gather her things. She thought she was being deported and wondered if she would ever see her children again. Then to her surprise, she was freed. Community members donated funds for Yeend to retain an attorney to help her secure a green card and her efforts were successful. Yeend has since become an advocate on immigration issues.

Her story is remarkable, but the trials she faced were unnecessary. A state-provided attorney could have aided her at any number of points, sparing her from financial hardship and the trauma of spending months in detention and preventing her children from experiencing the terror of their mother's disappearance.

Similarly, there is no good reason for New York not to provide tenants in eviction cases with representation. Being forced out of a home has devastating consequences on families. It can cost jobs, uproot people from support systems, lead to severe mental health consequences and condemn families to a cycle of poverty. Eviction Lab, an organization dedicated to studying the human cost of eviction, states: "The evidence strongly indicates that eviction is not just a condition of poverty, it is a cause of it."

For a better understanding of the human suffering access to a lawyer in eviction proceedings can prevent, I urge you to read "Evicted: Poverty and Profit in the American City" by Princeton sociologist and MacArthur "Genius" Matthew Desmond. Desmond spent a year following eight low-income families in Milwaukee as they struggled

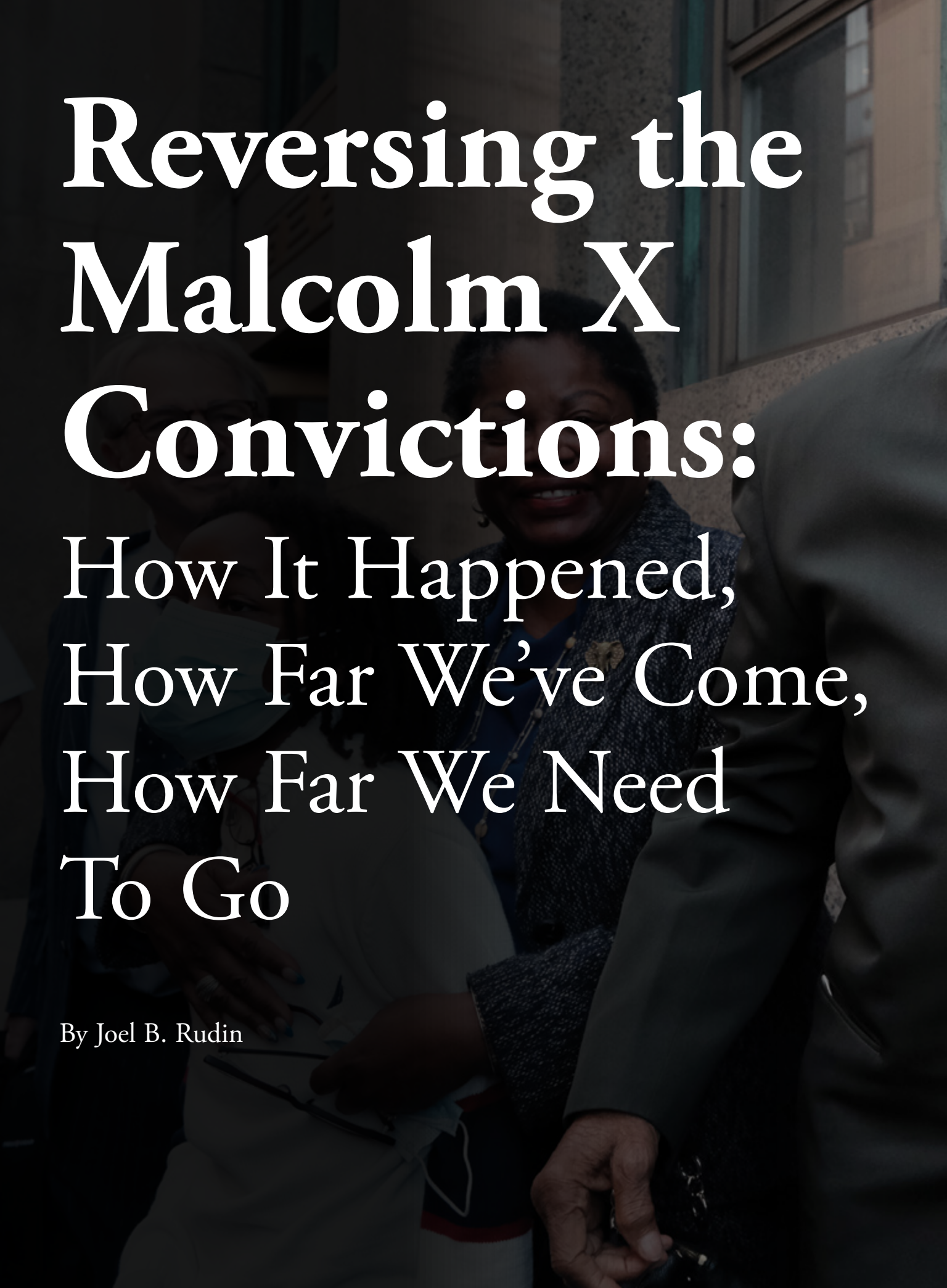
to pay rent, went through eviction and coped with the consequences.

"If incarceration had come to define the lives of men from impoverished black neighborhoods," Desmond writes, "eviction was shaping the lives of women. Poor black men were locked up. Poor black women were locked out."

Attorneys from all fields benefit from working to advance access to justice. Working directly with clients who need our help most keeps us connected to the purest essence of what it means to be a lawyer, to the good we can do.

It is not just our professional duty but part of our obligation as members of the human tribe. We must ensure that the most vulnerable among us aren't forced to suffer dire consequences because no one was there to lend them a hand. No one should have their lives defined by an event that the services of a competent attorney can prevent.

T. Andrew Brown can be reached at abrown@nysba.org.



Reversing the Malcolm X Convictions:

How It Happened, How Far We've Come, How Far We Need To Go

By Joel B. Rudin

Since 2014, when Ken Thompson became Brooklyn district attorney after making wrongful convictions the centerpiece of his campaign, New York City DAs have voluntarily overturned more than 50 homicide, robbery, and rape convictions. An extensive body of knowledge about the causes of wrongful convictions, built by lawyers and experts over the past three decades, has provided the basis for these actions. Late this year saw the most highly publicized reversal of them all: Manhattan DA Cyrus Vance's overturning of the 55-year-old murder convictions of two of the alleged assassins of Malcolm X.

The Malcolm X case has two of the features that pervade wrongful conviction cases: faulty identification procedures and police and prosecutorial misconduct. This case is fascinating to analyze, not only to expose what was done wrong 55 years ago, but also as a basis for showing how far we have come. The procedural safeguards employed back then were primitive compared with what we have now. And yet, a conviction as wrongful as this one could happen again. We have come far, but not far enough.

It was 3 p.m. on Feb. 21, 1965, at the Audubon Ballroom in upper Manhattan, when the brilliant and charismatic Black militant author and orator, Malcolm X, began to speak. "Salaam Alaikum," he said, "peace be unto you," as he greeted his audience of 400 Black followers (whites having been excluded) – which included police undercover agents, FBI informants, and assassins.

Malcolm, less than a year earlier, had broken with the Nation of Islam's militant separatist leader, Elijah Muhammad, over both personal and political differences. No longer rejecting the possibility of coexisting with whites of goodwill, Malcolm now led a new organization, the Organization of Afro-American Unity, and this was its event.

Malcolm had been the subject of death threats and had told journalists and friends he expected to be assassinated. Just a week earlier, his home in Queens had been firebombed and he and his family were living at a midtown Manhattan hotel. Another speaker told the audience that Malcolm was a man "who would lay down his life for you." Now, Malcolm was beginning to speak.

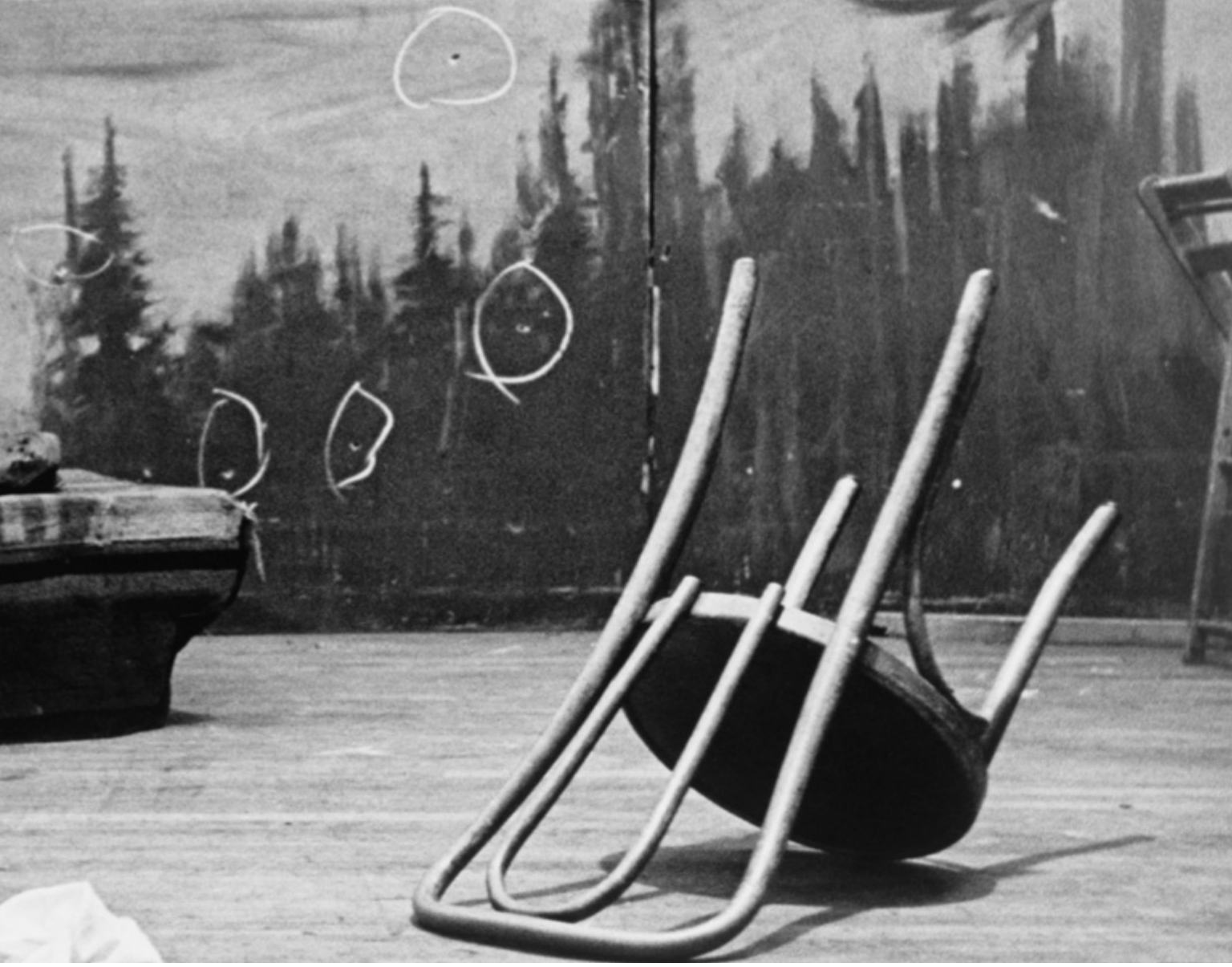
Individuals in the crowd yelled about a fictitious pickpocketing attempt, creating a diversion, and someone threw a smoke bomb into the crowd. Just then, a man wielding a sawed-off shotgun stepped forward and shot Malcolm, knocking him over. At least two other men, armed with a .45 caliber semi-automatic pistol and a 9 mm Luger, rose from the audience and fired continuously into Malcolm's prone body, hitting him at least 15 times. During the bedlam, Malcolm's pregnant wife, Betty Shabazz, could be heard sobbing, "they're killing my husband," as she threw herself on top of her daughters to protect them from the fusillade.

One of the killers, Mujahid Abdul Halim, was shot in the leg by Malcolm's bodyguards and apprehended at the scene, but the other shooters and conspirators escaped. Within a couple weeks, after an extensive FBI and NYPD investigation, the two additional alleged shooters had been apprehended and charged. They were Muhammad A. Aziz, also known as Norman 3X Butler, and Khalil Islam, also known as Thomas 15X Johnson, both members of the Nation of Islam.

The Audubon Ballroom stage after the assassination, with bullet holes marked by circles.

At the three defendants' joint trial one year later in the Supreme Court, New York County, 10 eyewitnesses identified Halim, the man arrested at the scene. His conviction proved easy: he testified at the trial and confessed his guilt. Seven of the same eyewitnesses identified Aziz, Islam or both. Several knew one or both of them or claimed to have had excellent opportunities to observe the shooters. Aziz and Islam were convicted too.

Many who followed the trial and studied it later harbored gnawing doubts. Both men had testified they were elsewhere when the crime occurred. They were supported not only by alibi witnesses but by Halim's own testimony exonerating them and blaming others he refused (at that time) to name. No physical or forensic evidence impli-



cated the defendants or placed them at the crime scene, the eyewitness accounts differed in significant respects, and a key prosecution witness who knew the defendants beforehand was shown to have falsely denied a serious psychiatric history.

Meanwhile, although Malcolm's death seemed to serve the interests of Elijah Muhammad and his top aide, Louis Farrakhan, neither the FBI nor the NYPD ever made a case against any higher-ups. The only one to act against them was Malcolm's own daughter, who in 1995 pled guilty to conspiring to murder Farrakhan to avenge her father.

Over the ensuing five decades, many historians, authors and filmmakers concluded that Aziz and Islam were innocent. Halim signed affidavits, used by Aziz and Islam in an unsuccessful 1978 motion for a new trial, naming the true conspirators and describing the plot in great detail. In the early 1990s, Spike Lee released a movie starring Denzel Washington and wrote a book naming other suspects, while pointing a finger at Elijah Muhammad and Louis Farrakhan for, at the very least, inciting the lethal event through their virulent rhetoric. However, no reinvestigation occurred. Aziz and Islam served out their sentences and were paroled.

See also in this issue Manhattan District Attorney Alvin Bragg on the Malcom X wrongful convictions, page 55.

In January 2020, after a new book and a television documentary again focused on the case, Manhattan DA Vance agreed to reinvestigate their convictions through his office's Conviction Integrity Program, in cooperation with new attorneys for Aziz and Islam (the latter had died in 2009), David Shanies of the Shanies Law Firm and Barry Scheck of the Innocence Project. The 20-month inquiry resulted in Vance's appearance in court on Nov. 18, 2021, together with a leader of his Conviction Integrity Program, Charles King, the defense attorneys and Aziz, to jointly move to vacate Aziz's and his late co-defendant's 55-year-old convictions.

During the proceeding, Vance apologized to Aziz for the actions of his office. Aziz accepted the apology, but stated, "I am an 83-year-old who was victimized by the

criminal justice system. . . . I do not need this court, these prosecutors or a piece of paper to tell me I'm innocent." He added that his story is "all too familiar to Black people, even in 2021." What had gone wrong?

According to the parties' joint motion, the main thing that went wrong was that law enforcement, including the NYPD, the FBI and the DA's office, failed to disclose evidence favorable to the defense, or *Brady* material, the timely disclosure of which might well have led to acquittals. About the myriad *Brady* violations, the joint motion was explicit. Implicit was that investigators had also relied on faulty identification procedures which likely caused the conviction of two innocent men. The written motion was careful to avoid the issue of guilt or innocence, but Vance's apology and the motion's tone certainly implied that the wrong men had been convicted and their lives tragically destroyed.

In 1963, just three years before this trial, the Supreme Court had decided *Brady v. Maryland*.[1] The court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[2] Not until 1972, six years after the trial, did the court clearly announce that impeachment material also had to be disclosed under the *Brady* rule and that a prosecutor was strictly liable to disclose all such evidence in the possession of the police or the prosecutor's entire office.[3] Not until 1976 did the court decide that such material had to be turned over regardless of whether the defense made a specific request.[4] Clearly, when the Malcolm X trial occurred in 1966, the *Brady* rule had not taken hold in law enforcement. Indeed, the obligation to disclose evidence that might defeat a prosecutor's case did not take hold for decades, if it ever has, as dozens of subsequent reversals – the tip of the iceberg of *Brady* violations, most of which remain forever secret – later revealed.

As the joint motion notes, it is an open question whether the post-trial decisions expanding the *Brady* rule would apply retroactively to a trial that occurred in 1966. Had Aziz and the Islam Estate brought a contested post-judgment motion alleging *Brady* violations, Vance's appeals bureau would almost certainly have argued that the relevant Supreme Court decisions were not retroactive. But conviction review units may focus on the integrity of a criminal judgment without hiding behind procedural bars. Here, Vance, knowing of a new witness who had supported Aziz's alibi defense and that Aziz had passed a polygraph test, decided to waive any retroactivity defense. (One might ask why appeals bureaus in a close case don't do the same, but that is a question for another article.)

While noting that the FBI had deliberately concealed crucial information from the NYPD and the DA's office, Vance conceded that the three agencies were "partners" in the prosecution and thus the people were responsible for the contents of all three agencies' files. Collectively, the FBI and the NYPD had largely withheld from the DA's office, and thus from the defense, that police and FBI undercover detectives and informants had been present, had witnessed the events, and had provided accounts which conflicted with the prosecution's theory and supported the defense's. Indeed, one such NYPD undercover officer had infiltrated Malcolm X's security team and had provided an exculpatory account. The failure to disclose that trained law enforcement observers were present also deprived both the DA's office and the defense of the opportunity to interview them and to use their potential testimony.

In addition, FBI and NYPD reports revealed that several witnesses had named third parties as the culprits or had provided descriptions of how the events had occurred, or of the shooters, which favored the defense. The suppression of these reports deprived the defense of the opportunity to investigate these important, potentially exculpatory leads.

Vance's motion also detailed direct suppression of *Brady* material by his own office. It unquestionably had in its file NYPD reports that put the shooters in a completely different position than the men identified by the eyewitnesses as the defendants. One report contained an interview with a witness who knew Aziz and Islam well and said he did not see them in the ballroom. The file also contained letters from the eyewitness with the psychiatric issues, which should have been disclosed as well. While Vance could not say with certainty that these reports were in the people's file at the time of trial, let alone withheld from the defense, his motion essentially assumed this to be the case.

The joint DA/defense motion implicitly criticized the NYPD's identification procedures in this case where identity was the only real issue. The motion noted trial testimony by one witness who identified Aziz that the lineup he viewed consisted of "men of different sizes and complexions," with only two men, one of whom was Aziz, wearing a gray coat similar to the gray coat he had previously described, while the other of the two obviously did not fit the rest of his description.[5] The motion notes that the defense challenged other identification procedures as well. However, the defense was at an impossible disadvantage because, in 1965, the Supreme Court had not yet imposed the constitutionally mandated procedures we now take for granted to combat unduly suggestive and unreliable pretrial identification procedures.

United States v. Wade, which established the right to counsel at station house lineup procedures,[6] and its companion case, *Stovall v. Denno*, which held that unreliably suggestive identifications could be excluded at trial as a

matter of due process,[7] were not decided until a year after the Malcolm X trial (and the court refused to make the new rules retroactive[8]). Police thus were free to conduct showups and lineups without any defense lawyer or independent observer watching and without their procedures being reviewed before trial at what has since become known as a "Wade hearing."

"The assassination of a public figure like Malcolm X in front of 400 people would be recorded now by security cameras and countless smartphones."

In 1965 (and indeed, for nearly half a century afterward), there were no or limited "best practices" in place to minimize the risk of unfair suggestion. Police rarely documented the procedures they used, and any photographs of the lineup generally were small and blurry. They often made no record, before conducting a lineup, of the details of an eyewitness's description of the perpetrator. They made no record of what was said to the eyewitness or what the eyewitness said during or after a lineup. A detective could openly or subtly hint to the eyewitness which individual the suspect was, make no record of a witness's uncertainty, and confirm for the witness the "correctness" of a tentative identification, with virtually no risk of detection. He or she could record all positive identifications while making no record of exculpatory results, such as a statement that "the shooter is not there." As a result, although the Malcolm X trial turned entirely on eyewitness identifications, the identification procedures that were conducted were not then, and are not now, susceptible to meaningful review. We will never know how many exculpatory witness interviews or lineups were conducted that were not documented.

The joint motion notes that, in addition to the seven witnesses who identified Aziz and/or Islam in court, seven more did so out of court from photographs but did not testify.[9] That Vance agreed to vacate the conviction anyway implies that he lacked confidence in the procedures used and that at least 14 individuals made false identifications. If Vance lacked confidence in a conviction with 14 identification witnesses, what confidence can we have in other convictions obtained during that era, many of which, no doubt, rested on one or a couple identifications? The surviving defendants or their families in other criminal cases from this era should now clamor for their cases to be reconsidered too.

Consider this: the Final Report of the New York State Bar Association's Task Force on Wrongful Convictions, chaired by former Supreme Court Justice Barry Kamins, and approved by NYSBA's House of Delegates in April 2009, noted that of 53 reversed convictions it studied where the defendants appeared innocent, 36 involved erroneous identification testimony.[10] An updated Task Force Report, approved by NYSBA's House of Delegates in April 2019, highlighted that 70% of DNA-based exonerations nationally involved at least one misidentification, and 53% of DNA-based exonerations in New York State involved at least one misidentification.[11] Of the 253 New York State-based exonerations listed by the National Registry of Exonerations, 88 also involved at least one misidentification.[12] Of the 192 cases the Innocence Project has gotten overturned since 1992 based on DNA evidence definitively establishing innocence, 63% involved false identifications.[13] Psychologists have conducted controlled studies, under presumably less stressful circumstances than real-life violence, and established that more than a third of eyewitness identifications are wrong with the error rate more than double that where poor fillers make the lineup suggestive.[14]

Meanwhile, convictions based upon eyewitness identifications have not received searching factual reviews. As the State Bar Wrongful Conviction Committee wrote in 2009, the Appellate Division usually defers to the fact-finding of hearing judges and juries, the Court of Appeals lacks factual review jurisdiction, and federal habeas judges are required to defer in virtually all but the most extreme cases to the factual findings of the state courts.[15]

When one considers the procedures and best practices that are followed today, or at least supposed to be followed, we realize how far our system has come. First, we are no longer so dependent upon police-conducted interrogations and identifications, for a wealth of other evidence is now available to investigators. The assassination of a public figure like Malcolm X in front of 400 people would be recorded now by security cameras and countless smartphones. The perpetrators' associations, planning, locations and bragging likely would be detected on social media and in their cellphone records. Their DNA might be detected on objects they left behind or handled on the way out.

Second, the methods used by police investigators are better regulated and subjected to more searching judicial review. Three months after the Malcolm X trial, the Supreme Court decided *Miranda v. Arizona*,[16] requiring criminal suspects in custody to be warned of their constitutional rights. Because police coercion thereafter still led to numerous wrongful convictions, the New York State Legislature, in 2018, following the State Bar Report's

recommendation, required that police video record interrogations of suspects, in murder and certain other serious felony cases.[17] Police are now also taught other best practices, such as making a detailed, verbatim record of both police and witnesses' statements during identification procedures. Police are required by statute to conduct photo identifications blindly – that is, by a detective who does not know who the suspect is[18] – and the Division of Criminal Justice Services protocol recommends that lineups be conducted blindly as well.[19]

Third, and perhaps most important, the state Legislature in 2020 enacted comprehensive discovery reform, under which the prosecution must disclose, early in the proceedings, virtually everything in its file and the police file. Formerly, state prosecutors had to provide only limited categories of materials enumerated by statute and, just before opening statements, the prior recorded statements of the prosecution's witnesses under the *Rosario* rule. Even the most skilled, conscientious defense lawyers – and many of those assigned to represent indigent defendants were not that – had little opportunity to investigate these materials or plan a defense. As in the Malcolm X case, prosecutors often failed to search law enforcement and prosecutorial files not in their personal possession for exculpatory or impeachment evidence, notwithstanding the Supreme Court's requirement that they do so. Now, however, prosecutors must formally certify they have searched their own and law enforcement files for virtually every imaginable type of impeachment or exculpatory evidence and provide it on a timely basis or else face sanction, including dismissal.[20]

While we have made great progress, the potential for wrongful convictions obviously remains. Single-eyewitness cases still are prosecuted. Some detectives and prosecutors still fail to implement all the constitutional, statutory and administrative rules and protocols meant to keep them honest. Even honest ones often still suffer from tunnel vision, which may cause them to shape witnesses' accounts and other evidence to fit their theory of guilt. Prosecutors still are taught not to take notes, which causes unrecorded exculpatory or impeachment material to be withheld, "open file" discovery or not. Indeed, suspect interrogations must be recorded, but not interrogations of mere witnesses. All this occurs in a legal system still infected by racial prejudice. As Aziz rightly said upon his exoneration, many of the hallmarks of wrongful convictions are "all too familiar to Black people, even in 2021."

One would like to think that today, if a similar crime occurred, surveillance video or other physical evidence would protect a Muhammad Aziz and Khalil Islam from wrongful arrest and prosecution or, at the very least, modernized criminal procedure law would give their lawyers the tools they need to present a meritorious defense. But in a system run by humans, mistakes and misconduct will always occur. We must continue to strive to correct the unspeakably tragic errors of the past, while at the same time learning from them so they don't happen again.

Joel B. Rudin is the principal in a four-attorney criminal defense and plaintiff's civil rights firm based in Manhattan. He has won three cases before the U.S. Supreme Court, numerous 2nd Circuit decisions upholding the rights of former criminal defendants to recover money damages for police and prosecutorial misconduct, and numerous large settlements. The New York State Association of Criminal Defense Lawyers awarded him its prestigious Thurgood S. Marshall Award for his work freeing the wrongfully convicted. He has testified about the lack of accountability of prosecutors before NYSBA's Task Force on Wrongful Convictions and chaired its Subcommittee on Conviction Integrity Units.

Endnotes

1. 373 U.S. 83 (1963).
2. *Id*. at 87.
3. *Giglio v. United States*, 405 U.S. 150 (1972).
4. *United States v. Agurs*, 427 U.S. 97 (1976).
5. Affirmation of Assistant D.A. Charles King dated Nov. 18, 2021, at para. 46.
6. 388 U.S. 218 (1967).
7. 388 U.S. 293 (1967).
8. *Stovall v. Denno*, 388 U.S. 293, 300–01 (1967).
9. Joint Mot. to Vacate Judgments of Conviction and Dismiss Indictment, *People v. Muhammad Aziz and Khalil Islam*, Ind. No. 871/1965, 8 n. 9 (Sup. Ct., N.Y. Co. Nov. 18, 2021).
10. New York State Bar Association, Final Report of New York State Bar Association's Task Force on Wrongful Convictions, 45 (Apr. 4, 2009), https://nysba.org/NYSBA/Practice%20Resources/Substantive%20Reports/PDF/FinalWrongfulConvictionsReport.pdf.
11. New York State Bar Association, Report of New York State Bar Association's Task Force on Wrongful Convictions, 85 (Feb. 8, 2019), https://archive.nysba.org/WorkArea/DownloadAsset.aspx?id=92500.
12. *Id*.
13. *Explore the Numbers: Innocence Project's Impact*, Innocence Project, https://innocenceproject.org/exonerations-data/, last visited Nov. 29, 2021; Alexis Agathocleous, *How Eyewitness Misidentification Can Send Innocent People to Prison*, Innocence Project, https://innocenceproject.org/how-eyewitness-misidentification-can-send-innocent-people-to-prison, last visited Nov. 29, 2021.
14. *See* Gary L. Wells et al, *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence*, Law and Human Behavior, 44(1), 3–36 (2020). Another study demonstrated the shortcomings of stranger identification after roughly one-third of responses turned out to be mistaken identifications. *See* Ahmed M. Megreya, David White, & Mike Burton, *The Other-Race Effect Does Not Rely on Memory: Evidence From a Matching Task*, Quarterly Journal of Experimental Psychology, 64(8), 1473–83 (2011). In 2003, a study demonstrated that participants identified a filler in a target absent array 85% of the time after a 12-second exposure and 45% of the time after a 45-second exposure. *See* Amina Memon, Lorraine Hope and Ray Bull, *Exposure Duration: Effects on Eyewitness Accuracy and Confidence*, British Journal of Psychology, 94, 339−54 (2003). In addition, the use of poor fillers in a lineup can lead to rates of false identification as high as 70%. *See* Steve D. Charman, Gary L. Wells, and Stephen W. Joy, *The Dud Effect: Adding Highly Dissimilar Fillers Increases Confidence in Lineup Identifications*, Law and Human Behavior, 35(6), 479–500 (2011).
15. Final Report of New York State Bar Association's Task Force on Wrongful Convictions, 48–49.
16. 384 U.S. 436 (1966).
17. Video recording is required for interrogations for certain enumerated offenses, including class A-1 felonies, except those defined in article 220 of the penal law; felony offenses defined in Section 130.95 and 130.96 of the penal law; a felony offense defined in Article 125 or 130 of such law that is defined as a class B violent felony offense in Section 70.02 of the penal law. *See* CPL § 60.45(3)(a). The violation of the video-recording requirement does not automatically require suppression, but rather is one factor for the court to consider in assessing the voluntariness of the statement. *See* CPL § 60.45(3)(b). The same is true of CPL § 60.25's rule requiring double-blind identification procedures.
18. *See* CPL § 60.25(1)(a)(ii).
19. *See* New York State Division of Criminal Justice Services, Identification Procedures: Photo Arrays and Line-ups: Model Policy, Municipal Police Training Council (June 2017), https://www.criminaljustice.ny.gov/crimnet/ojsa/standards/MPTC%20Model%20Policy-Identification%20Procedures%20and%20Forms%20June2017.pdf.
20. CPL §§ 245.10(1), 245.20(1)–(3), 245.50(1), 245.80.

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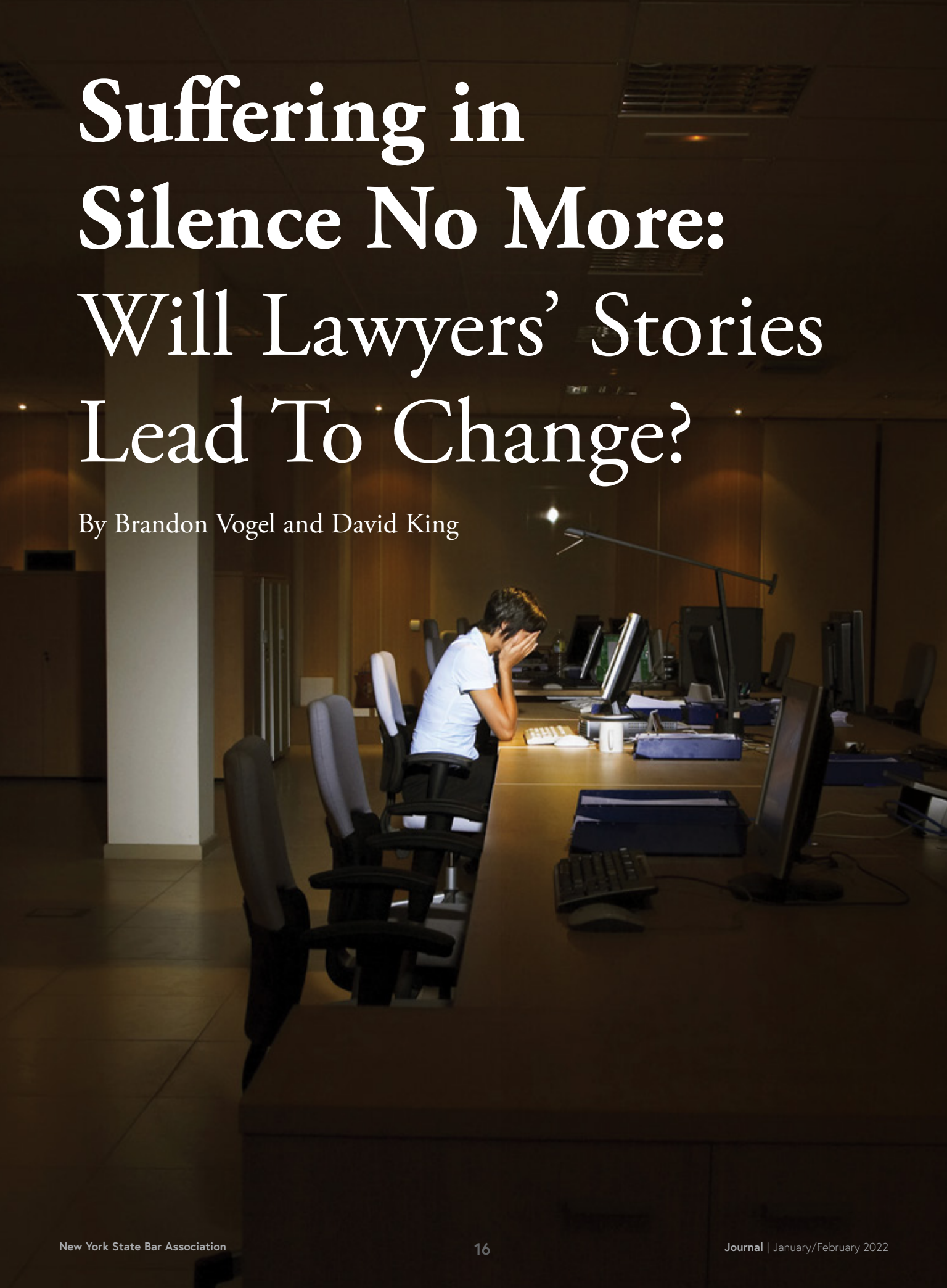
Suffering in Silence No More: Will Lawyers' Stories Lead To Change?

By Brandon Vogel and David King



On paper, Daniel Lukasik had it all: he was the rainmaker and managing partner of his law firm, happily married with children and surrounded by friends.

The reality was that Lukasik was terribly lonely, could not sleep or meet his work deadlines and was extremely depressed. When he went to his partners for help two decades ago, they reacted in the way that was common in the profession at that time, blaming him for his own problems and giving advice Lukasik found to be callous and off base.

"My partners were great people, but they did not know better," Lukasik says now.

Fast forward to today and Lukasik envisions that a conversation about major depression would lead to an entirely different outcome and that his request to take a sabbatical would be quickly granted.

In fact, he says, the legal profession is much more sensitive to the topic of lawyer well-being, and at least part of that increased awareness is due to the New York State Bar Association's report on attorney well-being, "This Is Us: From Striving Alone to Thriving Together," which was released in November. Lukasik, who was on the task force that created the report, hopes it will serve as a step toward a systemic remodeling of the legal profession.

Now, those who have advocated for the transformation of the legal profession to prioritize attorney well-being have a larger, sometimes more skeptical, audience to convince. The argument to put lawyer well-being first will have to change minds in the upper echelons of the legal profession, from the heads of major institutions to the leaders of Big Law.

"The national and state conversation is that you are not solely responsible. We all have a role to play in getting help and support for those who need it," Lukasik said. "I was on an island and now I'm seeing the passion and concerns people have about this topic."

Elizabeth "Libby" Coreno, co-chair of the NYSBA Task Force on Attorney Well-Being, knew full well that issuing the report would not be the end of the struggle, even though her journey had already been a long one.

There was Coreno's initial realization many years ago that standards for conduct in the profession just were not normal. "I don't talk about it very often," says Coreno, "but I was 25 and I held up a closing to get something fixed and a partner wasn't pleased and told me I was dumber than a trained monkey."

That stuck out to Coreno because of how often she'd heard stories about how her colleagues coped with the intense demands of the profession with alcohol.

"It was apparent to me that these patterns of thinking, the system of reinforcement and the common methods lawyers employ to manage their lives are the very pathways that lead to clinical depression, anxiety and addiction," wrote clinical psychologist Kerry O'Hara, who advised the NYSBA task force.

Burnout and a lack of time for basic self-care were cited as top concerns by respondents to NYSBA's survey of over 3,000 attorneys. Finding a solution to burnout is a priority for many of the report's authors, and they believe it should be key for anyone who wants a sustainable legal profession.

But if anything, the COVID-19 pandemic did more to exacerbate those concerns than put them to rest.

For 54 weeks, during the worst of the COVID-19 pandemic, Coreno and O'Hara held a virtual NYSBA support group for lawyers who needed help. It was raw, unflinching and enlightening for those who thought they were suffering alone. People lowered their guard, let others in and shared in ways that might have been previously unthinkable.

The pandemic also, of course, brought a dramatic change in working conditions, making remote work and flexible hours much more acceptable. If all that could happen in a year, then why couldn't the profession adjust to prioritize attorney health, Coreno reasoned. When the NYSBA report was released in November, Coreno was happy to see a wide-ranging discussion of what changes were possible in the profession, although she did encounter skeptics.

Capping Billable Hours

"New York Wants Firms to Cap Attorneys' Billable Hours. HAHAHAHAHAHA [Sad Face] 'I'll take things that will never happen for $100, Alex,'" reads the headline and deck of the "Above the Law" blog's post about the task force's report. The text of the article, however, was a bit more reflective, saying, "High on the list are capping billable hours, encouraging full vacations, and managing client expectation. Now, some of those are doable — hell, Orrick's already doing its part to make sure everyone there is taking a vacation. But stopping attorneys from billing more than 1,800 hours, when that is the dominant way that Big Law makes its money? That seems like an awfully big ask."

It does seem like a big ask, especially given that Big Law firms have seen increased demand and profitability during the pandemic.

Recent studies of law firms during the pandemic found that larger law firms were able to better adapt to utilize new technology, take on more clients and make more profits than smaller firms. A Wells Fargo Legal Specialty Group survey of the highest grossing U.S. firms found that billing rates, productivity and demand had increased 6% in the first part of 2021.

On top of that, industry surveys have found increased retention rates at Big Law firms across the country. And yet stories persist of lawyers swamped with work as their colleagues either leave the profession or abscond to greener pastures.

Lisa Smith of Fairfax Associates told *Reuters* the "proposed cap on lawyer hours is a tough sell in the legal business boom."

She noted in an interview with the Bar Journal that Big Law continues to enlist young recruits who appear to be fully aware that their large salaries and bonuses are tied to working more hours. "We see a movement in that direction where people are aware of the consequences. The question here is about sustainability. Firms continue to recruit people to do this for a while. They can recruit people out of law school, but can they do it for five years, 10? Before their well-being is impacted and they look for something else? Law firms need to answer that."

In some cases, those larger salaries and bonuses are designed to combat "The Great Resignation." The idea that young lawyers, exhausted and aggrieved by their pandemic workloads, are looking for other options has some senior partners and industry analysts concerned. There's growing fear that the pandemic has given lawyers the chutzpah to demand the working conditions they want.

Patrick Krill, head of Krill Associates, which advises law firms on well-being, addiction and mental health, says he sees the 1,800 cap as unlikely to happen anytime soon. However, he does believe law firms will have to take action to prevent burnout sooner than later. "In addition to resignations and turnover, a lot of employers have lawyers taking leave for mental health or general medical leave. That trend began during the pandemic. There are just more people on leave." He notes that the tools firms typically deploy to counteract burnout, such as raises and bonuses, aren't working as well as they once did.

Robert Kamins of Vertex Advisors Group is also skeptical about a cap on billable hours, but he too describes an inflection point – especially in Big Law – where overwhelmed attorneys are beginning to question their investment in the profession. "The pressure under which some of these people are operating is causing them to rethink what they want to do in life. COVID was an existential event that has some veteran attorneys thinking, 'Hey, I had a nice run, things are changing and it's time to pack it in.'"

Under normal circumstances, Kamins imagines these veteran attorneys would continue practicing for another decade or more. But COVID has them reevaluating based on the state of their mental health and well-being.

Asked whether he subscribed to prevailing thinking that The Great Resignation is fueled by a new generation that has drastically different values, Kamins noted that every generation finds some way to be frightened of the next. "What is key here is shaped by experienced veteran attorneys peeling off because they aren't familiar with this landscape." He says that millennials and Gen Xers grew up relying on technology and not feeling wedded to one space. "Their experience is what matters and that comes into play when it comes to what attracts them to the job as well."

He says he is increasingly hearing three questions from prospective hires: Can I work remotely? What is the culture of the firm? And what is the compensation?

"They are not leading with compensation," marveled Kamins. "The almighty dollar seems to be less relevant than ever. Remote access and culture mean everything. Money is not the most important factor and I've never seen that before."

According to Smith and Kamins, there may be a disconnect between NYSBA's well-being survey respondents and those who work in Big Law. They point out that the majority of NYSBA's respondents identified as working in mid- to small-size firms. The expectations for those entering Big Law practices might differ drastically from those who seek work at smaller firms or enter solo practice.

Where To Start?

If a cap on billable hours isn't the obvious place to start, what does make sense? Krill says that it's implementing a curriculum on well-being in law schools. "We start by getting to law students, by providing them with counseling, all the things the report talks about. If you want to foster long-term cultural change in a profession start with newest generation of lawyers and plant those seeds. Alter their world view in a good way. Change the lens through which they view the practice of law and view their career."

Smith suggests that a one-size-fits-all option on an hour cap isn't practical. Instead, she suggests law firms create different tracts so that the attorneys who want the long, involved big cases that demand long hours do that work. But also provide a tract for those who want to apply their skills in a different way and would be more comfortable with a 35-hour week that allows them time for self-care and family.

Kamins says that firms should embrace the report's recommendations on encouraging attorneys to take all the time off and parental leave to which they are entitled. "Too often people try to be tough lawyers and don't take the time they need to care for themselves," he said, noting that firms will need to work harder to implement human resources and career development support structures that make well-being part of the conversation. He also wants to see the New York State court system standardize rules across courtrooms so that attorneys don't have to jump

through hoops depending on which judge they have. "Prepared, unstressed and relaxed attorneys are in the interest of the entire justice system," he added.

Finally, all three of the consultants we spoke to support the idea of creating a roundtable where all stakeholders can come to the table to discuss well-being best practices and strategize implementation.

Coreno says she's not surprised that she's been labeled a "radical" because the changes that she's advocating for will require drastic recalibration and a commitment to continued vigilance. "I see us on the same arc as the discussion about river pollution. We are at the point where we're no longer questioning whether there is pollution. It's been established the river is polluted. The question now is whether we are going to dredge. There is no longer a deafening silence on the topic," she says.

Lukasik has a similar take, cautioning that change takes time. "This might be something that takes another 10 years. Is it going to happen in six months or a year? That is not realistic, but we will start seeing some changes."

Coreno and other members of the task force welcome a dialogue with the critics who say that drastically reducing billable hours is not realistic.

"If the solutions proposed in the report are objectionable, then we invite critics to propose something better," wrote Coreno for the New York Law Journal. "If 1,800 billable hours is too aspirational or law school curricula too entrenched, then we must agree to fund the woefully underfunded Lawyer Assistance Programs tasked with handling the counseling, diversion and rehabilitation of the lawyers impacted by such entrenchment. But we can't both identify a wrong that needs righting and then simply do nothing."

Lukasik suggests a good start would be having law firms adopt well-being task forces to ensure that lawyers are getting the help they need.

"Without the infrastructure at a firm or any organization, unless you have that, things do not get done. A one-time Continuing Legal Education speaker is not enough. A good solution is the creation of a lawyer well-being committee that meets regularly or monthly to discuss monthly challenges. What are the unique challenges? What plans and policies make sense to support lawyer health and well-being?"

While Lukasik and Coreno are the public face of the task force, it also has many members in a position to influence policies on lawyer well-being.

Judge Shirley Troutman, who was recently nominated to the Court of Appeals by Gov. Kathy Hochul, chaired the task force's working group on the judiciary and the court system. Rosemary Queenan, associate dean for student affairs at Albany Law School, chaired the working group on law education, just to name a few of the task force's members who are able to influence major change.

Troutman said in an interview with the Bar Journal that she decided to chair the task force on the judiciary and the court system because she has witnessed the effects of burnout firsthand. She noted that she regularly sees solo practitioners and those from small firms struggling to balance their workload while maintaining a healthy emotional state. A fix, she says, will have to be discussed, and there won't be just one solution.

"We need to bring stakeholders to the table, managing partners to the table, [and] solo practitioners, because our best and brightest enter the profession and suffer burnout in a nanosecond to the point that they are not even able to enjoy the fruits of their labor," Troutman said. "These folks don't even have time in the day to shop online, so they leave the profession for public service or elsewhere where they can put their degree to use. Losing them hurts the justice system. But we can't mandate people prioritize these things; they need to have a voice because it affects them and how they do business. It's not one size fits all."

Transgender Youth in Sports: Questions Remain Unresolved

By Jacqueline J. Drohan

Over the past two years, more than 30 states have considered or passed legislation restricting the rights of transgender and gender-expansive youth to participate in scholastic athletics. For example, H.B. 500 was signed by Idaho's governor in March 2020 implementing a categorical ban on transgender athletes from participation in sports at the high school and college level. The law is currently under injunction by a federal court, noting in its ruling the "compelling evidence that equality in sports is not jeopardized" by permitting transgender women to compete on women's teams.

In November 2021, civil rights organizations filed a federal lawsuit on behalf of a transgender boy prevented by Tennessee law from participating in his high school boys' golf team. The action, *L.E v. Tennessee*, opposes Tennessee state law S.B. 228, which restricts the rights of transgender and gender-expansive students. It requires that, for purposes of sports participation, a middle or high school student's gender be assessed as the student's sex assigned at birth as indicated on the student's birth certificate. The bill passed in March and was signed into law by Gov. Bill Lee. The suit, filed by Lambda Legal

and the ACLU, alleges that the Tennessee law had little to do with protection of girls in sports but was in fact "part of a wave of legislation in Tennessee and across the country targeting transgender people for disapproval and exclusion from full participation in society."[1] Unlike the more limited success of prior similar efforts to restrict the rights of transgender persons to use public bathrooms, these state sports bills have shown significant traction, at least at the legislative level. To date, bills have been approved or signed by governors including those of Alabama, Arkansas, Mississippi, Montana, Tennessee, Texas and West Virginia.

Many of these laws are now before state, district and U.S. appellate courts as violative of the anti-discrimination protections of Title IX of the U.S. Civil Rights Act of 1964.[2] Contrary challenges have also been brought under Title IX opposing the inclusion of transgender athletes in school sports in states with permissive policies. These include the Connecticut case of *Soule v. CIAC*,[3] currently on appeal to the 2nd Circuit. Connecticut's position in the case is supported by an amicus brief filed by New York Attorney General Letitia James.

NYSBA earlier this year created its Task Force on the Treatment of Transgender Youth in Sports to study and make recommendations to its House of Delegates regarding the unprecedented number of laws that have been proposed and introduced at both the federal and state level to ban, criminalize and otherwise severely limit transgender youth from participating in school sports, targeting primarily children in kindergarten through grade 12 schools.

NYSBA has a history of advocating for child welfare and inclusion and equality for all girls, women and LGBTQ+ persons (especially those of color). For example, this past year, NYSBA filed an amicus brief in the case of *Fulton v. City of Philadelphia*[4] before the U.S. Supreme Court in support of the rights of same-sex couples to provide foster child care.

Recently, NYSBA joined more than 600 national associations in putting forward its public support for H.R. 5 – the Equality Act – which would explicitly extend the ban contained in Title IX of the Civil Rights Act of 1964 to discrimination based on sexual orientation or gender identity and clarify the alignment of federal law with the position of the U.S. Supreme Court set out last year in *Bostock v. Clayton County, Ga.*[5] *Bostock* remains vulnerable given the current conservative composition of the Court.

New York State and City Policies

New York State, as well as local schools and athletic associations in many states,[6] already have guidelines of varying effectiveness intended to protect the civil rights of transgender students while ensuring a level playing field for all athletes. The NYSBA task force has noted that these policies, including those across New York State, have resulted in no harm to the welfare of cisgender girls or women or any competitive disadvantage in girls' or women's sports. On the contrary, where these policies are lacking, distinct and well-documented harm is caused to transgender, gender non-conforming and intersex youth, a population of children already at a severely elevated risk of social exclusion, educational failure, violence and self-harm.[7]

Guidelines enacted by the New York State Public High School Athletic Association recommend that students wishing to participate in sports notify the superintendent and athletic director of the district if their gender identity does not conform with the sex listed on their birth certificate. The school is advised to use such gender identity for school registration and other purposes, including medical documentation and in determining a student's eligibility for sports participation. It should be carefully noted that these are only guidelines; New York state public schools are not legally mandated by the guidelines to permit athletic participation based upon gender identity, and compliance varies regionally across the state.

New York City's Department of Education has also issued a statement on discrimination and harassment which comprises protections for gender identity and expression. The statement calls generally for an inclusive policy, with case-by-case review for competitive and contact sports. It puts forth that "[t]ransgender students are to be provided the same opportunities to participate in physical education as are all other students. Generally, students should be permitted to participate in physical education and sports in accordance with the student's gender identity that is consistently asserted at school. Participation in competitive athletic activities and contact sports will be resolved on a case-by-case basis."[8] As with the state guidelines, the statement does not require schools to permit students to use facilities or participate in sports programs in accordance with their gender identity.

Some measure of legal "teeth" behind these policy guidelines may be manifesting in New York under the 2019 Gender Expression Non-Discrimination Act (GENDA). An amendment to the New York State Human Rights Law, GENDA explicitly added gender identity or expression as a protected category. The plain language of the law prohibits discrimination on the basis of gender identity or expression in all areas covered by the Human Rights Law, including employment, housing, places of public accommodation and non-religious schools. What practical protection this may extend to the experience of transgender youth in school sports is evolving, but the law's language would appear to stand against intrusive sex testing, barring "equal access" from "public accommoda-

tions," and school facilities, presumably including public school locker rooms.

Federal Legislative Efforts

Title IX of the U.S. Civil Rights Act has been the primary battleground for both sides of the issue, and New York's friendly guidelines and supportive legislation could easily be preempted should exclusion of transgender participants be reframed as a federal civil right vested in cis-gender women athletes. Rep. Tulsi Gabbard, D-Hawaii, introduced the "Protect Women's Sports Act" into the U.S. House of Representatives in December of 2020, co-sponsored by a Republican representative. Gabbard stated that the proposed bill "protects Title IX's original intent" by preempting laws in "states who are misinterpreting Title IX, creating uncertainty, undue hardship and lost opportunities for female athletes" by allowing males to "dominate and displace" them.[9] It should be noted that with over two decades of data, there is absolutely no evidence that transwoman athletes have or are ever likely to "dominate" women's sports at the scholastic or adult levels.[10] Similar legislation was introduced earlier in 2020 in the Senate. The Protection of Women and Girls in Sports Act of 2020 would amend the definition of sex in Title IX of the Education Amendments of 1972 to exclude gender identity and provide that any state school that "operates, sponsors, or facilitates athletic programs or activities" found in violation of its redefined Title IX will be stripped of federal funding. The bill was sponsored by Georgia Senator Kelly Loeffler and co-sponsored by fellow Senate conservatives like Utah's Mike Lee, Tennessee's Marsha Blackburn and Arkansas' Tom Cotton, all of whom have a notable anti-LGBTQ legislative record. The bill remains in committee.

Contrary efforts to shore up Title IX to explicitly clarify its protection against attacks on civil rights based on gender identity appear to have greater support. The Equality Act would clarify the alignment of federal law with the position of the U.S. Supreme Court set out last year *in Bostock v. Clayton County, GA*, a definitional ruling which held that the term "sex" is inclusive, for federal civil rights purposes, of gender identity and sexual orientation. President Biden issued an executive order in March of 2021 effectively enacting the *Bostock* ruling in federal employment and federally regulated areas.[11]

The issue of transgender youth in sports has a potentially much broader impact upon the future of civil rights at the federal level. Alleged concerns about the impact of inclusion of transgender youth upon fair competition and safety for cisgender girls in school sports have been weaponized by opponents of the Equality Act, as well as proponents of the competing conservative efforts to excise protections for LGBTQ Americans from the Civil Rights Act altogether. For this and other reasons, states like New York, despite their own relatively permissive policy profile, cannot afford to ignore the debate, and for this reason alone, NYSBSA should weigh in.

Conclusion

The right of transgender and gender-expansive students to participate fully in youth sports on the basis of their gender identity remains an active legal and political dispute, both federally and at the state level. This includes states with generally permissive guidelines such as New York. NYSBA's Task Force on the Treatment of Transgender Youth in Sports will host a CLE panel on the topic at NYSBA's Presidential Summit on Jan. 19, 2022. Those with interest are encouraged to attend.

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 Task Force on the Treatment of Transgender Youth in Sports.

Endnotes

1. As quoted in M. Tyler Gillet, *Civil Rights Groups File Lawsuit Against Tennessee Transgender Sports Ban*, Jurist, Nov. 6, 2021, https://www.jurist.org/news/2021/11/civil-rights-groups-file-lawsuit-against-tennessee-transgender-sports-ban.

2. *See, e.g., Hecox v. Little*, 479 F. Supp. 3d 930 (Idaho Dist. Ct. 2020); *B.P.J. v. West Virginia*, No. 2:21-cv-00316 (S.D. W.Va. July 21, 2021).

3. No. 20CV0021 (D. Ct. Apr. 25, 2021).

4. 141 S. Ct. 1868 (2021).

5. 140 S. Ct. 1731 (2020).

6. *See* Survey of state law and policy in TRANSATHLETE: High school transgender athlete policies. https://www.transathlete.com/k-12.

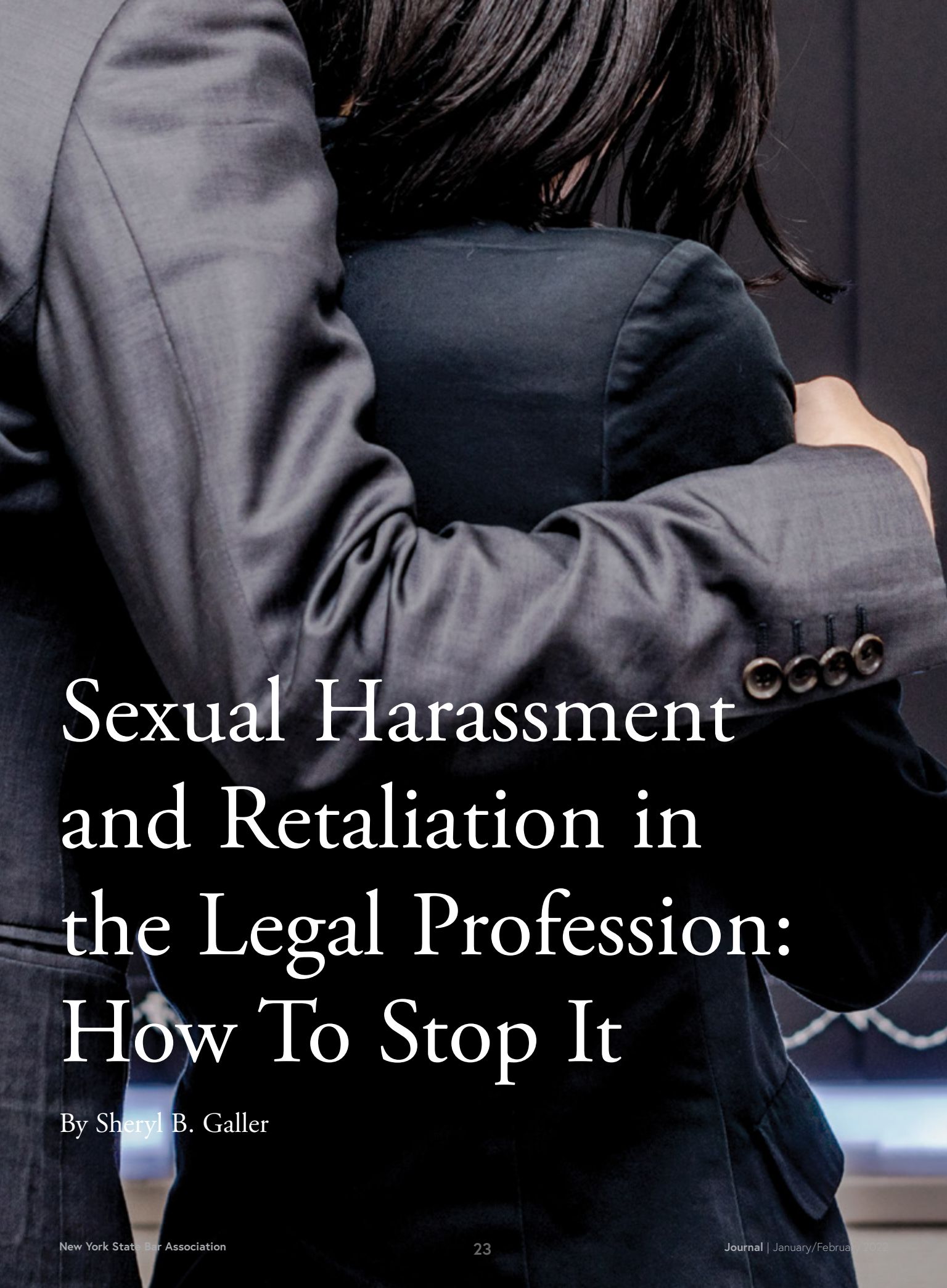
7. Fair Play - Center for American Progress. *See also* Erin Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletes*, Seton Hall J. Sports & Ent. Law 21:1 (2011).

8. NYC's Department of Education Guidelines to Support Transgender and Gender Expansive Students, https://www.schools.nyc.gov/school-life/school-environment/guidelines-on-gender/guidelines-to-support-transgender-and-gender-expansive-students.

9. *Tulsi Gabbard Stands Up for Women's Sports*, National Review, Dec. 19, 2020, https://www.nationalreview.com/2020/12/tulsi-gabbard-stands-up-for-womens-sports.

10. *See, e.g.* National Collegiate Athletic Ass'n, NCAA Inclusion of Transgender Student-Athletes 13 (Aug. 2011), https://www.transathlete.com/policies-college.

11. Executive Order 14021 on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity (Mar. 11, 2021), https://www.govinfo.gov/content/pkg/FR-2021-03-11/pdf/2021-05200.pdf.



Sexual Harassment and Retaliation in the Legal Profession: How To Stop It

By Sheryl B. Galler

"Hi. I'm working as a temp while paying my way through law school. If I were to be sexually harassed there, I would report it and quit. But once I start work at a law firm, well . . . that's my career. If I experience harassment there, what should I do?"

I have heard this question many times, in one form or another, after presenting workplace anti-harassment trainings. You would hope the question wouldn't need to be asked about the legal workplace. After all, any lawyer should know that sexual harassment is illegal under federal, state, and local law, violates the rules of professional conduct, and may violate criminal law.[1]

And yet, the question needs to be asked because sexual harassment is pervasive in the legal world. A national survey in 2019 found that "[a] broad spectrum of sexual misconduct and harassing behaviors – from criminal or civilly actionable to simply unconscionable – continues to plague all walks of the legal profession."[2] The American Bar Association reported in 2019 that sexual harassment "is widespread throughout the profession."[3] A global survey conducted in 2018 found that "bullying and sexual harassment are rife in the legal profession."[4] Sexual harassment is one reason attorneys suffer from anxiety, depression, trauma, and reduced productivity and focus at work.[5] Sexual harassment, whether by a partner, judge, colleague, or client, is a "core reason" women leave their law firms and even the practice of law.[6]

The question needs to be asked because our current attempts to address sexual harassment in the legal profession, including reports, surveys, policies, and training, are not enough. Note that the law student and her peers are not asking *how* to respond to sexual harassment in the workplace. They know their rights. They know they have the right to tell the harasser to stop, the right to intervene or disrupt the harassment of others, the right to report the harassment to their employer, and the right to file a charge or complaint with federal, state or local agencies, the courts, or the police.

The question really being asked above is whether one *should* respond to sexual harassment in the legal workplace. The law student's question stems from their fear that, despite years of studying and hard work, reporting sexual harassment could mean risking their careers.

They are not alone in their concern. Surveys on sexual harassment in the legal profession consistently find that most attorneys who experience harassment do not report it, and an oft-cited reason is the fear of retaliation.[7] Attorneys fear that if they report sexual harassment, or support a colleague reporting harassment, their employers will take adverse action against them – such as terminating their employment, taking them off the partnership track, transferring them to a less prestigious team, banning them from high-profile cases, reducing their salary or bonus, or damaging their personal or professional reputation.

Yes, retaliation is illegal.[8] It is unlawful to retaliate against applicants or employees for engaging in protected activity such as resisting or objecting to harassing conduct, reporting workplace harassment, participating in an employer's investigation of alleged harassment, and filing a charge or lawsuit alleging harassment.

But retaliation happens. Of the charges filed with the EEOC in 2020, 55.8% alleged retaliation and 41.5% alleged retaliation under Title VII of the Civil Rights Act.[9] Within the legal profession, when attorneys do report sexual harassment, the "actual consequences of reporting the harassment proved these fears [of retaliation] to be warranted."[10]

Attorneys fear, with data to support that fear, that employers will use their own financial interests to justify retaliation. One law firm may seek to maintain a lucrative relationship by acceding to a client's demands to remove certain attorneys from their team. Another firm may seek to retain a rainmaking partner by agreeing not to promote certain associates. Partners may use the supposed best interests of their clients as a pretext to avoid working with attorneys who asserted harassment. Managers may cite economic considerations as an excuse to derail the career of associates who alleged harassment and advance the careers of their peers.

Employers may also seek to cover up their retaliatory actions by disparaging their employees' job performance, knowing they have a valid defense if they can establish legitimate, nondiscriminatory reasons for their adverse action.[11] Employers may claim that employees were passed over for promotion, or given a smaller than expected bonus, or terminated only because they aren't meeting workplace demands, aren't measuring up to peers, or violated company policies, not because they complained of harassment.

Given these facts, advising someone on what they "should" do when facing sexual harassment is complicat-

ed. We know what the law says, but we also know there is risk. We can only make recommendations:

1. Document any actual or suspected incidents of harassment and retaliation. Keep contemporaneous records with details of who said or did what, and when.
2. Continue to fulfill the responsibilities of your position or seek job-protected leave. Do not give an employer justification for an adverse employment action.
3. Report even suspected incidents of harassment and retaliation. The law protects employees who have a reasonable, good-faith belief that the activity they are reporting violates the law.
4. File an external charge or complaint, if necessary. If the employer fails to respond to an internal complaint, file a complaint with the EEOC, state or local agencies, courts, or the police.
5. Seek advice from mentors, advisors, trusted friends, or legal counsel. Seek help from the people who can provide advice on employee rights, who can provide guidance on how to handle difficult situations at work, and who can provide emotional support during a stressful period.

Even following all these recommendations, however, harassed employees cannot prevent retaliation and we cannot expect them to do so.

Rather, as members of the legal profession, it is our legal, moral and ethical responsibility to end sexual harassment and retaliation in our workplaces. We must not engage in such behavior, and we should do what we can to stop others from engaging in such behavior. If we are bystanders or witnesses to sexual harassment, we can document and report what we witness, and participate in any investigation. If we can act without risking our personal safety, we can interrupt harassment or divert the harasser. And we can support the mental health and well-being of employees who are harassed.

We can also help change the culture of our workplaces by insisting on true leadership and accountability. Laws and policies are not enough. The leaders of our firms and organizations – that is, the partners, counsel, officers, directors, and managers – must be role models for proper behavior. They must make it clear throughout their organizations and by their own actions that harassment and retaliation are not acceptable, and that complaints will be taken seriously. They must establish multiple avenues for employees to report harassment and retaliation. They must ensure that the firm or organization will act in response to any such reports, regardless of whether the accused is a rainmaker or important client. They must enforce discipline against anyone who engages in harassment or retaliation and against any supervisor who becomes aware of such behavior and allows it to continue.

We, and the leaders of our firms and legal workplaces, must make our workplaces safe for everyone, so that no one will have reason to fear sexual harassment or retaliation in the legal profession.

Sheryl B. Galler counsels both employers and employees on a wide range of employment law and compliance matters. She is chair of the Women in Law Section and a member of the Labor and Employment Law Section's Executive Committee. She has contributed previous articles to the Journal on handling sexual harassment and New York State's paid family leave benefits law. Galler conducts training on sexual harassment prevention and frequently speaks on panels about employment law and professional practice. She earned her J.D. from the Columbia University School of Law, where she was a Harlan Fiske Stone Scholar.

Endnotes

1. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (sexual harassment is a violation of § 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2); 29 C.F.R. §1604.11(a) (2016) (defining sexual harassment under federal law); N.Y. Executive Law §§ 296.1(h), 296-d (2021); Administrative Code of the City of New York, § 8-107(1) (2021); American Bar Association, Model Rules of Professional Conduct, Rule 8.4(g); New York Rules of Professional Conduct, 22 N.Y.C.R.R. Part 1200, Rule 8.4(g) (2021); N.Y. Penal Code Article 130 (2021).

2. Women Lawyers on Guard Inc., *Still Broken: Sexual Misconduct and Harassment in the Legal Profession, A National Survey*, 2020, https://womenlawyersonguard.org/wp-content/uploads/2020/03/Still-Broken-Full-Report-FINAL-3-14-2020.pdf ("more than 70% of respondents reported that sexual misconduct was a part of the culture of their workplace or there were significant parts of the workplace where people got away with these behaviors").

3. Roberta D. Liebenberg and Stephanie A. Scharf, *Walking Out the Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice*, American Bar Association, 2019 at 8–9, n. 43, https://www.americanbar.org/content/dam/aba/administrative/women/walking-out-the-door-4920053.pdf (50% of women surveyed had experienced sexual harassment).

4. Kieran Pender, International Bar Association, *Us Too? Bullying and Sexual Harassment in the Legal Profession*, 2019, https://www.ibanet.org/bullying-and-sexual-harassment (one in two female respondents had been bullied and one in three female respondents had been sexually harassed in a workplace).

5. *Still Broken* at 21.

6. *Walking Out the Door* at 9.

7. *Still Broken* at 20 (finding that 86% of sexual harassment incidents were not reported; "significant barriers to reporting" include "fear of job loss or other forms of retaliation and other negative career repercussions"); *Walking Out the Door* at 8 ("16% of women versus 1% of men have lost work opportunities as a result of rebuffing sexual advances . . . . At the same time, more than a quarter of all women (28%) avoided reporting sexual harassment due to fear of retaliation").

8. 42 U.S.C. § 2000e-3; N.Y. Executive Law § 296.7; Administrative Code of the City of New York § 8-107(7).

9. U.S. Equal Employment Opportunity Commission, Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2020, https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2020.

10. *Still Broken* at 20.

11. *E.g.*, *Burke v. Jose Luis Villa, Sadrac Louis, Bonefish Grill et al.*, No. 19-CV-2957, 2021 WL 5591711 (E.D.N.Y. Nov. 30, 2021).

How COVID-19 Has Affected the Practice of Tort Law in New York State

By A. Craig Purcell

For how long will we in the legal community be dealing with the fallout from the COVID-19 pandemic? Although the answer to this question is uncertain, the end does not appear to be in sight, especially with the detection of the omicron variant, which has now reached U.S. shores. While the new variant is a concern, health leaders in the U.S. stress that this is a time for caution, not panic.[1] Leaders across the U.S. are heeding this call for caution, travel bans have been implemented against eight countries traveling to the U.S.[2] On Nov. 26, 2021, Gov. Kathy Hochul declared a state of emergency, and on Dec. 10, 2021, she announced a new mandate that masks be worn in all public spaces unless visitors show proof of vaccination. Executive Order No. 11 authorizes all state agencies "to take appropriate action to assist local governments and individuals in containing, preparing for, responding to and recovering from this state disaster emergency, to protect state and local property, and to provide such other assistance as is necessary to protect public health, welfare, and safety."[3] This order is to remain in effect through Jan. 15, 2022.[4]

Presently, New York is experiencing COVID-19 transmission at rates the state has not seen since April 2020; further, the rate of new COVID-19 hospital admissions has increased over the past month to more than 300 new admissions a day.[5] The consequences of the COVID-19 pandemic and its related shutdowns (which began on Jan. 31, 2020, when a public health emergency was declared for the entire U.S.),[6] continue to be felt throughout the legal community, across each discipline. However, this article will narrow its focus to tort practitioners in New York State.

As a result of the COVID-19 pandemic, there have been various issues that both plaintiff and defendant tort practitioners have confronted, as they relate to important statutory time periods, immunity and/or limitation of liability. What follows is a discussion of these issues, which will hopefully be beneficial to the members of NYSBA.

Executive Order 202.8

First and foremost, it is important to understand Gov. Cuomo's Executive Order 202.8, issued on March 20, 2020, which suspended and tolled the statute of limitations and various other time limits under the Procedural Laws of the State of New York.[7] This executive order was extended for 30 days three subsequent times, by further executive orders, with the tolling period ceasing on Nov. 3, 2020. The cessation of the tolling periods was contained in Executive Order 202.67, signed by Gov. Cuomo on Oct. 4, 2020. Additionally, on Nov. 3, 2020, Gov. Cuomo confirmed that the tolling period would no longer be in effect beginning Nov. 4, 2020, with the issuance of Executive Order 202.72.[8]

Legislative Action

The New York State Legislature then passed a bill in March 2021 that revoked the immunities enjoyed from lawsuits against hospitals, nursing homes, health care centers, health care providers and most other health care workers. That legislation passed the Legislature almost unanimously and was signed by Gov. Cuomo on April 6, 2021, effectively repealing Executive Order 202.10, which had granted the above mentioned entities immunities from tort liability.[9] This legislation, Assembly Bill A03397, did not state whether it is to be applied retroactively or to injuries that occurred in the year after the governor's Executive Order 202.8 but had not yet been the subject of a lawsuit. Nor is there anything in the legislative history that definitively makes the bill retroactive.[10] In this regard, the Supreme Court, Appellate Division, Second Department, found in *People v. Dyshawn B.*[11] that

> "[T]wo axioms of statutory interpretation" are relevant in determining whether a statute should be given retroactive effect. "Amendments are presumed to have prospective application unless the Legislature's preference for retroactivity is explicitly stated or clearly indicated." However, "remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose." "Remedial statutes are

> those designed to correct imperfections in prior law, by generally giving relief to the aggrieved party." While these principles serve as guides, ultimately, the court must attempt to discern the legislative intent either from the particular words used or, barring that, from the nature of the legislation.[12]

Consequently, it cannot be deemed to be retroactive. Thus, we believe that the legislation should be interpreted to allow lawsuits only when the injury occurred after April 6, 2021, the effective date of the bill. Whether this legislation strips away all tort immunities that were covered by Executive Order 202.8, and with respect to the important issue of whether it provides for a toll of the affected time limits (or a suspension thereof), will ultimately be decided by the courts. Indeed, the NYSBA CPLR Committee had previously decided to recommend that the Legislature enact an amendment to CPLR 218 to add a new paragraph "C," which would provide that Gov. Cuomo's executive orders "shall be considered a toll and not be part of the time within which any action must be commenced, or other prescribed act taken." That proposal was approved by NYSBA's Executive Committee and has been discussed by the appropriate committees of the Legislature. However, even with lobbying by NYSBA, the amendment to CPLR 218 has not been approved by the Legislature.

Brash v. Richards

In the interim, the courts, as anticipated, have started to weigh in on this important issue. On June 2, 2021, the Supreme Court, Appellate Division, Second Department, held that the governor's executive orders must be interpreted to mean that the statute of limitations and other time periods involved are tolled and, therefore, suspended. This means that statutes of limitations that were in place during this time ceased to run for the duration of the toll. These time limits resumed when the period of the toll ended.[13] The court noted that Gov. Cuomo's March 20, 2020 Executive Order, "expressly and plainly provided that the subject time limits were 'hereby tolled,' and two of the subsequent executive orders referred to the temporary alternation of the subject time limits as a 'toll.'"[14] Although the governor's subsequent executive orders did not expressly use the word "toll," the court reasoned that:

> those executive orders all either stated that the Governor "hereby continue[s] the suspensions, and modifications of law, and any directives, not superseded by a subsequent directive," made in the prior executive orders (Executive Order [A. Cuomo] Nos. 202.14, 202.28, 202.38, 202.48 [9 NYCRR 8.202.14, 8.202.28, 8.202.38, 8.202.48]) or contained nearly identical language to that effect (see Executive Order [A. Cuomo] Nos. 202.55, 202.55.1, 202.60 [9 NYCRR 8.202.55, 8.202.55.1, 8.202.60]). Since the tolling of a time limitation contained in a statute constitutes a modification of the requirements of such statute within the meaning of Executive Law § 29–a(2)(d), these subsequent executive orders continued the toll that was put in place by Executive Order (A. Cuomo) No. 202.8 (9 NYCRR 8.202.8).[15]

The Second Department, therefore, explicitly interpreted the language of the executive order as a toll. Thus, the days during which the executive orders were in effect do not count in determining statutory time periods. As stated above, time periods ceased running the day Executive Order 202.8 was signed, March 7, 2020, and did not begin to resume until the expiration of the order and its subsequent extensions on Nov. 3, 2020.[16] Alternatively, if the court determined that the executive order merely suspended the statutory period, the time period would simply be delayed until the end date of the suspension.

The tolling of statutory time limits made a great deal of sense considering the circumstances of the COVID-19 pandemic, which has lasted almost two years. When the executive orders were enacted, no one knew when the shutdown would come to an end. Not only were the courts basically shut down, but nearly all aspects of everyday life came to a halt for an extended period of time. Under these circumstances, litigants would be extremely disadvantaged if the statutory period continued to run.[17] Statutory periods of limitations furnish complainants with the necessary opportunity and time to pursue, investigate and discover legal claims. The claimant's ability to meaningfully prepare for litigation was significantly impaired by the COVID-19 pandemic's resulting shutdowns. During this time, it was fair and reasonable for statutes of limitations to be tolled in order to prevent individual's legal rights from being impaired as a result of the disruptions caused by the pandemic.[18] In addition to the Appellate Division, Second Department case referred to above, several lower courts throughout the state have since addressed the issue and held that Executive Order 202.8 and its subsequent provisions tolled the statutes of limitations.[19]

Although at least one lower court held that the governor lacked the power to toll statutes of limitations, and that the executive order resulted in a suspension rather than a toll,[20] this case was essentially overturned by the Second Department's decision in *Brash.* The prevailing view is to treat the governor's executive order as a toll; however, there are some areas where the toll may not apply:

> (1) The tolling language does not appear to include the time to serve an answer to a complaint, though this may have been an oversight and not an intentional exception.[21]
>
> (2) The toll does not apply to the time to serve answering papers to a motion.[22]
>
> (3) The toll may not apply to discovery deadlines.[23]

(4) Certain election law deadlines are exempt from tolling.[24]

Nonetheless, an amendment to CPLR 218 is still necessary to protect lawyers and litigants whose COVID-19 causes of action may have accrued during the pendency of Executive Order 202.8 but have not yet been put to into suit.. In the absence of such legislation, and in spite of the recent enactment by the Legislature and signed by Gov. Cuomo, such an amendment would serve to prevent judges from the around the state ruling that the executive order was not a toll, but just a suspension of the various affected time limits. This would in effect codify what the Second Department held in *Brash* and prevent any discrepancies among the departments. It would also make it clear as to exactly what time limits were encompassed by the executive order.

Appellate Time Limits

The court determined that the governor's executive orders applied to the Appellate Division. As the executive order is no longer in effect, it is likely that there were or will be no more automatic extensions without a court order with respect to the 30-day requirement for filing a notice of appeal, or the number of days that a practitioner must perfect his or her appeal. Practitioners should therefore adhere to the pre-COVID-19 time limit rules as of April 6, 2021, the date the governor signed the repeal legislation.[25] Although it has been reported that all the Appellate Departments have been very liberal in granting extensions of time to perfect appeals and answer to an appellant's briefs, despite backlogs in at least the Second and First Departments, the Court of Appeals determined that the Appellate Division, Third Department, erred in denying a pro se litigant extra time to perfect his appeal.[26]

Immunity for Health Care Workers

Shortly after the governor's original executive order, the issue of immunity for health care workers, including employees of hospitals, nursing homes and other health care facilities, became a primary issue. It was pointed out that most health care workers who themselves become ill or are otherwise injured would be covered under the N.Y. Worker's Compensation Law except in certain cases. In March 2021, the Legislature passed additional legislation that purports to provide that the indemnity protections of Public Health Law § 17 should be available for certain physicians.[27] This legislation would apply to claims pending at the time the bill was signed into law (also in April 2021). However, it should be noted that this legislation "shall apply when a claim or proceeding arises while the physician was acting on behalf of the State within the scope of such physician's public employment or duties."[28] Thus, this legislative provision applies to physicians only, and indeed only certain physicians who are acting on behalf of the state or within the scope of their public employment or duties.

A parallel issue that needs to be addressed is immunity from legal actions, granted by Executive Order 202.10, which protected any facility, physician or other health care worker from malpractice allegedly committed while Executive Order 202.8 was in effect.[29] This includes whether immunity should be conferred for a claim involving failure to treat individuals for other conditions because hospitals were not accepting patients during various parts of the pandemic. The two legislative acts mentioned above do not appear to directly answer that question. However, based on the following language contained in the legislation, the legislation must be interpreted broadly:

> The immunity provided by subdivision one of this section shall not apply if the harm or damages were caused by an act or omission constituting willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm by the health care facility or health care professional providing health care services, provided, however, that acts, omissions or decisions resulting from a resource or staffing shortage shall not be considered to be willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm.[30]

The two legislative acts mentioned above do not appear to directly answer that question and we believe that it needs to be clarified. Consistent with the recommendations that the new law passed by the Legislature stripping many immunities be interpreted as not to be retroactive the Executive Order 202.10 should be likewise interpreted to protect against malpractice actions where the causes of action arose before the April 2021 legislation was enacted.

Immunities Conferred in Neighboring Jurisdictions

The final issue pertaining to tort practice that must be addressed are actions taken by neighboring states. In Pennsylvania, a broad tort immunity bill was passed in November 2020, only to be vetoed by its governor.[31] The New Jersey Legislature has at the same time introduced several bills that would have rescinded protections previously provided in a March 2020 enactment.[32] These bills to rescind were not enacted, and the broad protections contained in the prior bill remained in effect throughout the state of emergency. Conversely, Florida has codified immunity from litigation, as a result of COVID-19, allowing business entities, educational institutions, government entities and religious institutions to "enjoy heightened legal protections against liability"; however, this law failed to extend such protections to health care workers.[33]

Moreover, our neighboring states must analyze the broad implications surrounding COVID-19 emergency orders. An important ruling from the Massachusetts Supreme Judicial Court, decided on Sept. 3, 2021, suggests that the tolling of statutory filing deadlines in civil suits could affect litigation in that state over the next six years.[34] Here, the issue involved a claimant who, on Sept. 24, 2020, commenced a personal injury action regarding an incident which occurred on Sept. 3, 2017, after the expiration of the three-year filing period for tort actions. The question was whether she could take advantage of the state's emergency order tolling this period from March 17, 2020 through June 30, 2020, due to the COVID-19 pandemic.[35] The court emphasized the plain language of the statute which unambiguously tolled "all civil suit actions."[36] Consequently, the justices rejected the defendant's argument that the emergency order should only apply to civil actions that expired within that three-month period; instead, the court held that the tolling provision simply meant that the claimant had approximately 100 more days to file. The Massachusetts decision acknowledges the unique challenges that face plaintiff's attorneys amidst a global pandemic. Commencing tort litigation requires adequate preparation in advance of filing, including interviewing witnesses and obtaining medical records, which was highly impracticable during the height of the COVID-19, and continues to remain a challenge.

Conclusion

It will be interesting to follow how our courts, and those of our neighbors, rule on the many COVID-related cases already in the pipeline and yet to be decided. Absent further action by the New York State Legislature, and from the legislature in neighboring jurisdictions, it will be up to the courts to rule on policy issues raised by many types of civil lawsuits.

A. Craig Purcell is partner at Glynn, Mercep and Purcell. He is the co-chair of NYSBA's Task Force on COVID-19, has served on the House of Delegates for over 20 years and was a member of the Executive Committee for three years. He is the immediate past co-chair of the Commission on the Tort System and was chairman of the New York State Conference of Bar Leaders from 1998-1999. Purcell is a past president of the Suffolk County Bar Association and has been a guest lecturer at Touro Law Center and Hofstra University's School of Law, and frequently lectures for the Academy of Law of the SCBA.

Shannon Lynn Malone, an associate at Glynn, Mercep and Purcell, contributed to this article. She is awaiting admission to the New York State bar.

Endnotes

1. Melina Delkic & Giulia Heyward, *Governors Urge Caution in the United States on the Omicron Variant*, N.Y. Times, Nov. 28, 2021, https://www.nytimes.com/2021/11/28/us/governors-omicron-covid.html.

2. On Monday, Nov. 29, 2021, President Biden implemented travel bans against Botswana, Eswatini, Lesotho,

Malawi, Mozambique, Namibia, South Africa, and Zimbabwe. *See The U.S. Restricts Travel From 8 countries as Omicron Variant Spreads*, NPR, Nov. 29, 2021, https://www.npr.org/2021/11/29/1059772335/us-restricts-international-travel-over-omicron-variant.

3. N.Y. Exec. Order No. 11 (Nov. 26, 2021), https://www.governor.ny.gov/executive-order/no-11-declaring-disaster-emergency-state-new-york.

4. *Id*.

5. *Id*.

6. *Id.*

7. N.Y. Exec. Order No. 202.8 (Mar. 20, 2020), https://nycourts.gov/whatsnew/pdf/EO-202.8-ocr.pdf.

8. N.Y. Exec. Order No. 202.72 (Nov. 3, 2020), https://www.governor.ny.gov/sites/default/files/atoms/files/EO%20202.72%20new.pdf.

9. The legislation was introduced on Jan. 26, 2021 and signed into law on April 6, 2021. *See* N.Y. Assemb. B. A03397. Reg. Sess. 2021-2022 (2021), https://www.nysenate.gov/legislation/bills/2021/a3397.

10. *Id*.

11. 196 A.D.3d 638 (2d Dep't 2021).

12. *Id.* at 639–40. Internal citations omitted.

13. *See Brash v. Richards*, 195 A.D.3d 582 (2d Dep't 2021).

14. *Id*.; *see* N.Y. Exec. Order Nos. 202.67, 202.72 (9 N.Y.C.R.R. §§ 8.202.67, 8.202.72); *see also Foy v. State of New York*, 71 Misc. 3d 605 (N.Y. Ct. Cl. 2021); *Kugel v. Broadway 280 Park Fee LLC*, 2021 NYLJ LEXIS 25, at 17, col 2 (Sup. Ct., N.Y. Co. Jan. 28, 2021).

15. *Brash*, 195 A.D.3d at 585.

16. *See* N.Y. Exec. Order No. 202.72, *supra* note 2.

17. Thomas A. Moore & Matthew Gaier, *Update on COVID-19 Issues*, N.Y.L.J., May 28, 2021, https://www.law.com/newyorklawjournal/2021/05/28/update-on-covid-19-issues.

18. *Id*.

19. *See Bastell v. Village of Rye Brook*, 71 Misc. 3d 1216(A) (Sup. Ct., Westchester Co. 2021); *Matter of 701 River Street Associates*, 72 Misc. 3d 302 (Sup. Ct., Rensselaer Co. 2021); *Foy v. State of New York*, 71 Misc. 3d 605 (N.Y. Ct. Cl. 2021).

20. *McLaughlin v. Snowlift Inc.,* 71 Misc. 3d 1226(A) at *2 (Sup. Ct., Kings Co. 2021).

21. *See* D. Siegel, *New York Practice § 33,* cumulative supplement (6th ed.).

22. *See* § 8:8. Plaintiff's failure to timely serve process, 2 N.Y.Prac., Com. Litig. in New York State Courts § 8:8 (5th ed.*); Solomon v. Gun Hill Assocs. Tr.,* 143 N.Y.S.3d 813 (Sup. Ct., Bronx Co. 2021).

23. *See* D. Siegel, *New York Practice § 353*, cumulative supplement (6th ed.); Suppl. Practice Commentary to McKinney's CPLR 3124.

24. *See Echevarria v. Bd. of Elections in City of New York*, 122 N.Y.S.3d 904, 905 (2d Dep't 2020).

25. *See*, N.Y. Assemb. B. A03397, *supra* note 3.

26. *Miller v. Annucci*, 37 N.Y.3d 996 (2021).

27. N.Y. Pub. Off. Law § 17.

28. *Id.*

29. N.Y. Exec. Order No. 202.10.

30. *See* Article 30-D of the Emergency or Disaster Treatment Protection Act.

31. Molly E. Flynn & Rebecca Trela*, A Year into the Pandemic, a Review of State, Federal COVID Tort Immunities*, Task Force on COVID-19 Immunity and Liability (Jan. 18, 2021).

32. *Id.*

33. Husch Blackwell, *50-State Update on COVID-19 Business Liability Protections* (updated: March 18, 2021), https://www.huschblackwell.com/newsandinsight/50-state-update-on-covid-19-business-liability-protections.

34. *Shaw's Supermarkets, Inc. v. Melendez*, 488 Mass. 338 (Sup. Ct. 2021).

35. *Id.*

36. *Id.* at 360.

The Supreme Court, the Constitution and 'Misleading' Arguments

By Jonathan Knowles

In 2016, Darrell Hemphill was convicted of second-degree murder in the 2006 shooting death of a child, who had been riding in a van that happened upon a street brawl in the Bronx. The Court of Appeals upheld his conviction. Now, 15 years after the killing, this conviction has reached the U.S. Supreme Court. The outcome could become a landmark ruling involving the constitutional right of defendants to be confronted by the witnesses against them.

At Hemphill's trial, his defense attorney introduced evidence that police had found a 9-millimeter cartridge in the apartment of Nicholas Morris – the same type of bullet that killed the child. But the prosecution then introduced Morris' guilty plea to possession of a .357 caliber revolver at the shooting scene – even though Morris was unavailable and could not be cross-examined by Hemphill's lawyer. The trial court agreed to allow the prosecution's exhibit on the ground that New York law allows such evidence when it is necessary to correct a misleading impression.

The Significance of the Court's Decision

Most obviously, the Supreme Court's decision will determine whether some out-of-court statements are admissible at trial to contradict a criminal defendant. Presumably, prosecutors would argue that admitting such evidence is necessary to reveal the truth, while defense attorneys would assert that doing so undermines a defendant's constitutional rights.

Some defense attorneys have gone further, writing to the Supreme Court that a decision for the state would prevent innocent defendants from testifying on their own behalf or even from pleading not guilty.[1] To understand these attorneys' concerns, one must understand the nature of guilty pleas. In New York, as throughout the United States, the overwhelming majority of criminal defendants plead guilty.[2] In most criminal cases, then, there is likely to be a plea statement that could be used against a defendant.

There are many reasons that guilty pleas are so prevalent,[3] of which *Hemphill* itself provides an example. "In May 2008, after having served two years in prison, Morris pleaded guilty, against his counsel's advice, to possessing a .357 caliber gun on the day of the shooting, in exchange for his immediate release from prison."[4] An unfortunate consequence of such pressures is that guilty pleas, which are often written by the prosecution, may be incorrect.[5] A small but significant minority, estimated at 2–8%, are completely false.[6] It isn't clear how many others contain inaccuracies that could harm innocent defendants.

This case may again provide an example. According to counsel for Hemphill, there was no evidence that Morris ever possessed a .357 caliber firearm.[7] According to the state, however, law enforcement had recovered three .357 caliber bullets from Morris' apartment.[8]

The Law on Testimonial Hearsay

The Supreme Court established its current understanding of the confrontation clause in *Crawford v. Washington*.[9] The court held that testimonial hearsay – which it did not define – may not be introduced against a criminal defendant, unless the speaker is unavailable and the defendant had a previous opportunity to cross-examine that speaker.[10] The only exceptions to this rule are common-law exceptions that were "established at the time of the founding."[11]

There is no national agreement as to whether, when, or why a defendant "opens the door" to statements that would otherwise be inadmissible under the confrontation clause. New York's doctrine was established in *People v. Reid*.[12] In *Reid*, the defense tried to pin the blame on a third party, demonstrating that the police had received information of this party's involvement. The prosecution then introduced a federal agent's testimony that an eyewitness to the murder (implied to be a codefendant) had told the agent that said third party was not present at the murder.[13]

The Court of Appeals unanimously reversed the Third Department's grant of a new trial, holding that testimonial hearsay became admissible when reasonably necessary to correct misleading evidence or argument. The Court of Appeals reasoned that doing otherwise would allow a defendant to misrepresent testimonial statements by reading out only the favorable parts. It also considered its decisions necessary "to preserve the truth-seeking goals of our courts." The court was not clear about when a defendant opened the door, establishing instead a case-by-case inquiry, but held that admission of the testimony was permissible given the facts at issue.[14]

The Trial

In 2013, Darrell Hemphill was charged with murder. At least three witnesses had previously informed the police that the shooter was Nicholas Morris. A police search of Morris' apartment also revealed a 9-millimeter cartridge. The shooting was carried out using a 9-millimeter gun.[15] At his own trial for the murder, Morris argued that the cartridge found at his apartment was not the same brand as the bullets used in the shooting.[16] After a mistrial and imprisonment for two years, Morris pleaded guilty to possessing a .357 caliber firearm.

At Hemphill's trial, the state introduced testimony that Morris had possessed a .357 caliber gun, because the 9-millimeter gun was Hemphill's.[17] This testimony was, itself, the result of a plea agreement.[18] Hemphill argued that Morris was the real killer. Among the ways that he

did so was by establishing, through cross-examination, that police had found the 9-millimeter cartridge at Morris' apartment.

In response, the prosecution received permission to introduce Morris' plea allocution.[19] The prosecution could not call Morris as a witness, because he was unable to return to the United States. Hemphill claims that the prosecution could have secured his presence by seeking a special visa from the federal government, but made no effort to do so.[20] The state claims that Hemphill conceded unavailability at trial and that the federal government was unwilling to grant the visa.[21]

The jury found Hemphill guilty.

The Decisions on Appeal

From the decisions below, the confrontation issue doesn't seem to have been particularly controversial. The First Department devoted only a paragraph to the issue, with its reasoning limited to the following:

"[T]he admission of portions of Morris's plea allocution did not violate defendant's right of confrontation because defendant opened the door to this evidence. During the trial, defendant created a misleading impression that Morris possessed a 9-millimeter handgun, which was consistent with the type used in the murder, and introduction of the plea allocution was reasonably necessary to correct that misleading impression."[22]

Justice Manzanet-Daniels, focusing primarily on the denial of a separate request to introduce a trial witness' prior testimony, dissented and granted leave to appeal.[23]

The Court of Appeals devoted even less attention to the issue. After ordering letter briefs under Rule 500.11, it addressed the issue in a single sentence: "The trial court did not abuse its discretion by admitting evidence that the allegedly culpable third party pled guilty to possessing a firearm other than the murder weapon."[24] The dissent, by Judge Fahey, again argued that the error was the denial of Hemphill's request to introduce prior testimony of a witness.[25]

The Arguments to the Supreme Court

Under *Crawford*, testimonial hearsay may be introduced against the defendant only under two conditions. First, the author of that hearsay must be unavailable. Second, the defense must have had a previous opportunity to cross-examine that author.

Hemphill and his attorney certainly had no opportunity to cross-examine Morris. The Supreme Court has strongly indicated that a plea allocution would qualify as testimonial,[26] although Justice Breyer seemed concerned about the limits of testimonial hearsay.[27] Justice Thomas seemed doubtful that this testimony was even against the defendant.[28]

New York asserts that the Supreme Court needn't reach whether *Reid* is permissible under the confrontation clause. It argues that the issue is not before the court, because Hemphill failed to present the constitutional issue to the Court of Appeals, and that any error is rendered harmless by other evidence showing Morris to have possessed a .357 caliber firearm.[29] Hemphill disputes these arguments.[30] At oral argument, Justices Thomas and Alito seemed particularly concerned that Hemphill had not preserved the issue.[31] Justice Sotomayor, by contrast, pointed out that the Court of Appeals had ruled on the same issue only a few year earlier.[32]

Main Arguments

Reciting the historical analysis in the Supreme Court's decisions on the confrontation clause, Hemphill argues that there was no common-law exception based on opening the door.[33] Several professors of evidence and criminal procedure set forth this argument at greater length.[34] Hemphill also argues that such a doctrine would have changed the outcome in many (perhaps most) of the Supreme Court's previous decisions.[35]

New York contends that opening the door is not an exception to the confrontation clause. Citing the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*,[36] it asserts that defendants may relinquish their rights under the confrontation clause. According to the state and its *amici*, opening the door is simply one way a defendant can do so.[37]

In many other cases, the Supreme Court has found defendants' conduct to sacrifice their constitutional protections. Hemphill argues that the only comparable cases are those in which the court permitted the introduction of evidence. Hemphill asserts that these cases are not applicable because they address rules developed by judges to enforce constitutional mandates, rather than rights established directly by the Constitution.[38] Hemphill also argues that those cases are inapposite because Hemphill did not introduce any testimony by the declarant.[39] New York cites a broader range of cases, arguing that a defendant may waive constitutional rights by undermining the trial.[40]

The state also argues that an opening-the-door exception is necessary to the pursuit of truth.[41] This reasoning is difficult to reconcile with Justice Scalia's statement that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[42] The chief justice raised this issue at oral argument.[43]

Can Defendants Open the Door Without Introducing Statements by the Same Declarant?

Arguably, there was no conflict between defense counsel's argument and the testimony at issue. Defense counsel argued that Morris possessed a 9-millimeter gun; the testimony showed that Morris had pleaded guilty to possessing a .357 caliber firearm. It is entirely possible that Morris possessed a 9-millimeter firearm but, to secure his release from prison, agreed to issue the prosecutor's preferred statement of facts.

Hemphill did not attempt to introduce any other statement by Morris. Hemphill argues that, even if he had, the "rule of completeness" could never undermine the confrontation clause.[44] Some of the *amici* supporting his position disagree.[45] Seemingly, so do Justices Alito and Barrett.[46] Regardless, Hemphill further argues (with agreement from his *amici*) that the rule of completeness applies only when the defendant has introduced other statements by the same speaker or writer.[47] Merely presenting evidence that contradicts the declarant's statements is not sufficient. This difference was discussed extensively at oral argument.

New York responds that presenting such evidence would not be "misleading" under New York law. According to the state, the evidence that Morris possessed a 9-millimeter weapon was not what opened the door. Rather, what was "misleading" was defense counsel's persistent implication – despite repeated admonition by the trial court – that the government believed Morris to be the killer. It asserts that the trial court admitted the plea allocution to demonstrate that the prosecution believed Morris was innocent of the killing.[48] Many justices questioned this interpretation.[49]

Hemphill objects that, by allowing judges to decide what evidence is "misleading," the New York rule enables judges to withdraw rights because they consider a defendant guilty.[50] These arguments are likely directed to similar concerns previously expressed by the court.[51] Justice Barrett raised this issue at oral argument.[52] Justice Gorsuch similarly asked about the subjectivity of what is misleading.[53] Practically, however, a greater concern is that the *Reid* doctrine potentially nullifies the confrontation clause on rebuttal. According to the professors supporting Hemphill, the common law enforced the same standards for rebuttal as for the prosecution's case-in-chief.[54]

Are Less Severe Penalties Available?

Assuming that Hemphill's conduct was misleading, does it follow that admission of unconfronted testimonial hearsay is necessary? Could this misleading conduct have been prevented? If not, would a lesser sanction cure any harm?

A related issue is whether declarants must be unavailable to permit introduction of their statements. Fourteen states have argued that they must be, or the prosecution could correct any falsehoods by calling them to testify.[55] A declarant is considered unavailable only if the prosecution makes a good faith effort to secure the declarant's attendance.[56] Throughout their briefs, the parties dispute whether Morris was unavailable, on which the trial court did not rule.[57]

Morris' availability, and the significance thereof, was not addressed at oral argument. The issue of alternative remedies, however, was discussed at length. Hemphill argued that the trial court could prevent the worst abuses from arising.[58] Justices Sotomayor and Alito seemed to agree, although they recognized that there would be important exceptions.[59] Justice Alito suggested that other remedies would often be available, such as testimony about what happened during the prosecution of Morris.[60]

Conclusion

Hemphill does not present a simple, yes-or-no question. There are a number of different ways that the Supreme Court may resolve the case. How it does so, however, will have an enormous impact on criminal trials. From oral argument, it is difficult to anticipate how the court will rule. Criminal law attorneys should pay close attention to the court's decision when issued.

Jonathan Knowles is an associate at Burnham & Gorokhov, a firm that represents criminal defendants in federal court around the country. He is licensed to practice in New York, including the U.S. courts for the Southern and Eastern districts, and is a graduate of Columbia Law School.

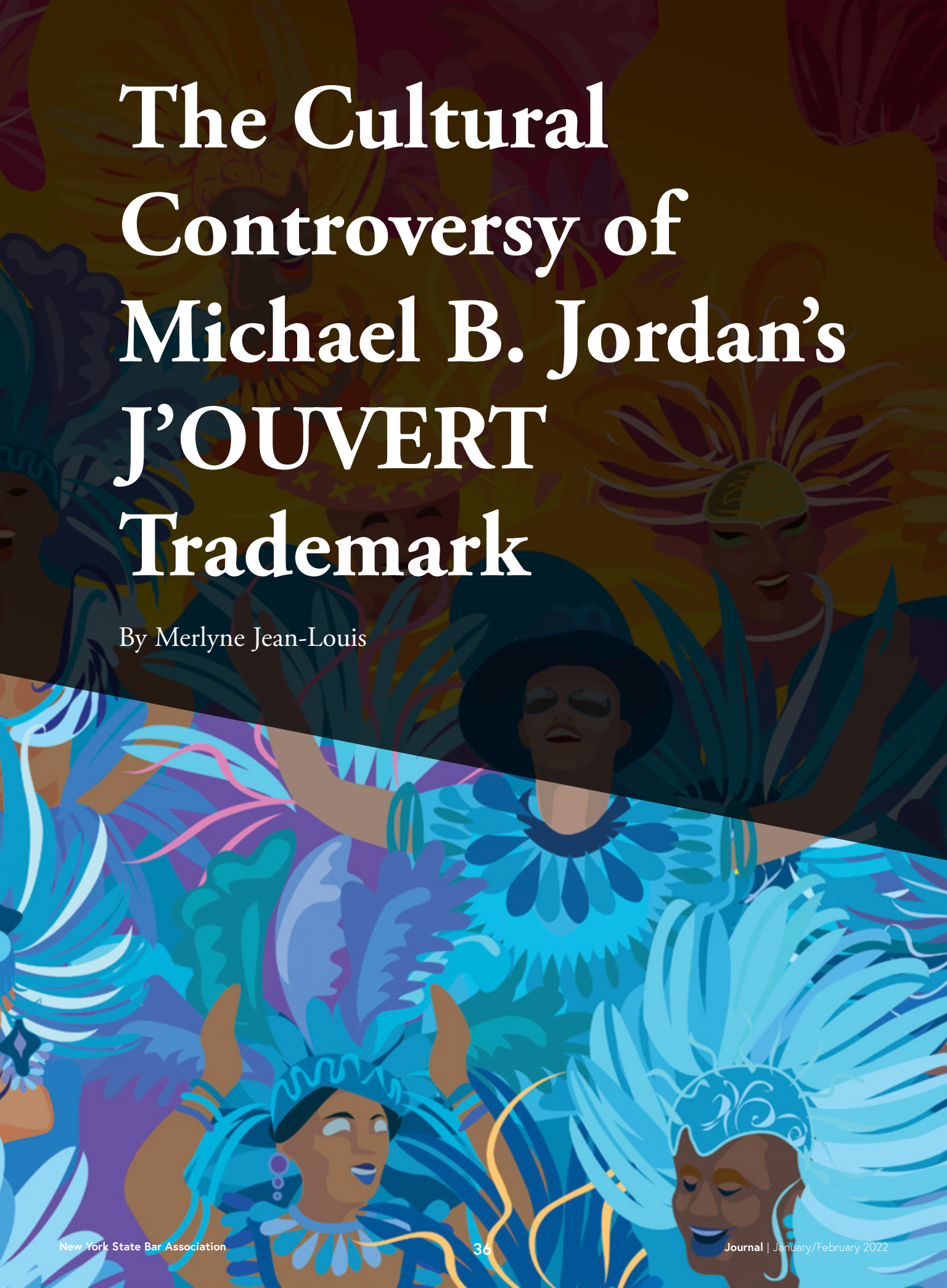
Endnotes

1. National Association of Criminal Defense Lawyers *Amicus* Br. at 4–12.
2. *People v. Tiger*, 32 N.Y.3d 91, 114 (2018) (Wilson, J., dissenting) ("In New York State in 2016, less than three percent of nearly 50,000 criminal dispositions went to trial."); *Missouri v. Frye*, 566 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").
3. *See generally Tiger*, 32 N.Y.3d at 115–16 (Wilson, J., dissenting).
4. *People v. Hemphill*, 173 A.D.3d 471, 472 (1st Dep't 2019).
5. *Tiger*, 32 N.Y.3d at 114, 116–18 (Wilson, J., dissenting); Innocence Project and Innocence Network *Amicus* Br. at 14–18.
6. Jed Rakoff, *Why Innocent People Plead Guilty*, The N.Y. Review of Books (Nov. 20, 2014).
7. Hemphill Br. at 8.
8. New York Br. at 11–12.
9. 541 U.S. 36 (2004).
10. *Id.* at 57–59.
11. *Giles v. California*, 554 U.S. 353, 358 (2008) (quoting *Crawford,* 541 U.S. at 54).
12. 19 N.Y.3d 382 (2012).
13. *Id.* at 385–86.
14. *Id.* at 388–89.

15. *People v. Hemphill*, 173 A.D.3d 471, 472 (1st Dep't 2019).
16. New York Br. at 9.
17. *Hemphill*, 173 A.D.3d at 474; Hemphill Br. at 9.
18. *People v. Hemphill*, 35 N.Y.3d 1035, 1037 (2020) (Fahey, J., dissenting); Hemphill Br. at 9; New York Br. at 10.
19. Hemphill Br. at 10–11.
20. *Id.* at 10.
21. New York Br. at 43.
22. *People v. Hemphill*, 173 A.D.3d 471, 477 (1st Dep't 2019).
23. *Id.* at 480–84 (Manzanet-Daniels, J., dissenting); *People v. Hemphill*, 34 N.Y.3d 985 (2019) (granting leave to appeal).
24. *People v. Hemphill*, 35 N.Y.3d 1035, 1036 (2020).
25. *Id.* at 1037–40.
26. *See Crawford v. Washington*, 541 U.S. 36, 52–53 (2004) (describing "confessions" as testimonial); *id.* at 63–65 (criticizing previous decisions for admitting accomplice confessions, including plea allocutions); *see also Bruton v. United States*, 391 U.S. 123 (1968) (holding that admission of one defendant's confession at a joint trial violated codefendants' rights under the confrontation clause).
27. Oral Argument Tr. at 8:21–10:1, 35:15–38:10.
28. *Id.* at 31:24–35:12.
29. New York Br. at 15–16, 17–23, 49.
30. Reply Br. at 2–8.
31. Oral Argument Tr. at 5:24–6:10, 24:20–31:23, 44:12–16.
32. *Id.* at 53:13–24.
33. Hemphill Br. at 18–20, 25–27.
34. Professors of Evidence and Criminal Law *Amicus* Br. at 5–19 ("Professors' Br.").
35. Hemphill Br. at 20–21; *see also* Professors' Br. at 21–23, 26–27.
36. 557 U.S. 305 (2009).
37. New York Br. at 23–37; Utah *et al. Amicus* Br. at 4–16; District Attorneys Associations *Amicus* Br. at 3–6.
38. Hemphill Br. at 28–29, 30–32; see also American Civil Liberties Union *et al. Amicus* Br. at 11–14.
39. Hemphill Br. at 32–34.
40. New York Br. at 24–29.
41. *Id.* at 32–37.
42. *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004).
43. Oral Argument Tr. at 67:7–12.
44. Hemphill Br. at 36–40.
45. *See* Association of Criminal Defense Lawyers of New Jersey *Amicus* Br. at 3, 18–21; Richard D. Friedman *Amicus* Br. at 17–21.
46. *See* Oral Argument Tr. at 11:5–12:11, 19:17–20:10.
47. Hemphill Br. at 35–36.
48. New York Br. at 37–48; Oral Argument Tr. at 55:1–57:7.
49. Oral Argument Tr. at 48:20–49:10, 51:20–54:25, 58:18–59:13, 61:19–62:25, 69:13–17.
50. Hemphill Br. at 14, 29; see also American Civil Liberties Union *et al. Amicus* Br. at 18–20.
51. *See Giles v. California*, 554 U.S. 353, 365 (2008).
52. Oral Argument Tr. at 50:7–16.
53. *Id.* at 72:18–74:8.
54. Professors' Br. at 17.
55. Brief of *Amici Curiae* Utah *et al.* at 2, 5, 19–20.
56. *Barber v. Page*, 390 U.S. 719, 724–25 (1968) (cited with approval in *Crawford*, 541 U.S. at 57).
57. Reply Br. at 16 n.6.
58. Oral Argument Tr. at 12:3–6, 17:3–9.
59. Oral Argument Tr. at 12:7–11, 51:9–18, 64:2–5.
60. *Id.* at 65:2–23.

The Cultural Controversy of Michael B. Jordan's J'OUVERT Trademark

By Merlyne Jean-Louis



In June 2021, actor Michael B. Jordan found himself in hot water after the public discovered that he and his business partners tried to gain trademark protection for the word J'OUVERT. They were to use the term as the name for a new rum brand. It caused controversy in the Caribbean community.

Some may be asking, "What does the trademark registration process look like?" while many may be asking, "What does J'OUVERT mean and what does it have to do with the Caribbean?" Do not fret! As a person who is of Caribbean descent, who speaks French and Creole (the languages relevant to this story), and who is a trademark attorney, I can answer those questions while providing cultural context.

What Are the Trademark Basics?

A trademark or service mark[1] is anything that distinguishes one's goods or services from that of another. To be clear, anything (including a word, logo, sound, color or smell) can serve as a trademark. In essence, a trademark is a source identifier. Under the Lanham Act,[2] which is the primary federal statute that governs trademarks and service marks in the United States, a party must follow certain procedures in order to qualify for federal trademark protection.

What Happens During the Trademark Registration Process?

Application

To register a trademark on the Principal Register[3] of the U.S. Patent and Trademark Office, one must a file a trademark application. Depending on the information an applicant wishes to provide, one would either file a Trademark Electronic Application System Plus or a TEAS Standard application.[4] The application must contain certain information, including the following:

- information about the applicant
- the trademark (usually a word mark or design mark)
- the classes of goods and services with which the applicant to desires to use the trademark in association[5]
- the filing basis of the trademark

Basis

For applicants who are domiciled in the United States, there are two filing bases under which a trademark application can be submitted.[6] First, there is the use in commerce basis (also called Section 1(a) basis). If an applicant files this type of application, it is attesting that at the time the application is filed, it is using the trademark in commerce[7] in association with the goods and services listed in the application. A Section 1(a) applicant would have to provide proof, which is called specimen, that it is currently using the trademark in commerce.[8]

Second, there is the intent-to-use basis (also called Section 1(b) basis). Under this basis, at the time the application is filed, the applicant is attesting that it has a bona fide intention to use the trademark in commerce in association with the goods and services listed in the application in the near future.

Office Action or Examiner's Amendment

After an application is filed, the applicant may receive an office action, which is a letter from an examining attorney at the USPTO stating the reasons as to why the applicant's application may not be able to proceed.[9] An applicant has six months to respond to an office action.

Sometimes the office action is issued due to a minor issue (i.e., a disclaimer is required for a certain word in the mark because it is descriptive of the goods and services in the application).[10] However, sometimes an office action is issued because of a substantive issue (i.e., the applicant's mark is likely to be confused with a mark that has already been registered[11]) that requires an attorney to conduct legal research and write a legal memorandum.

In order to expedite the application process, sometimes if an examining attorney finds an issue, he or she will issue something called an examiner's amendment. This is where the examining attorney would contact the applicant, or the applicant's attorney, directly via phone or email to resolve the issue. Then, instead of issuing an office action, the examining attorney would go into the applicant's file and create an examiner's amendment, which states the application will be amended in a particular way.[12]

Publication

If the applicant does not receive an office action, is able to overcome an office action or is issued examiner's amendment, the application will move on to the next step in the application process, which is publication. For 30 days, the applicant's trademark will be published in the USPTO's Trademark Official Gazette. During this publication phase, anyone in the world can oppose the trademark. This is important, because one of the responsibilities associated with trademark registration is that registrants must enforce their trademarks to make sure that no other party uses a similar mark in a manner that could cause a likelihood of confusion. Any party who believes that the ultimate registration of a trademark would harm its trademark rights can oppose a trademark application.[13]

Registration or Notice of Allowance

If there is no opposition to the trademark, the application will proceed in the registration process. The next step depends on the basis of the application. If an applicant filed under the Section 1(a) basis, the application would proceed to registration. The applicant will ultimately have its trademark registered on the Principal Register,[14] receive a registration certificate and be granted the rights that come with federal trademark registration.

If an applicant filed under the Section 1(b) basis, the application would be issued a Notice of Allowance. Initially, the applicant has six months to use the trademark in commerce in association with the goods or services listed in its application and provide to the USPTO a specimen to prove that it is doing so. However, if the applicant is not able to provide the specimen at the end of the six-month period because it has not started using the trademark in commerce in association with the goods and services listed in the application, it can extend the time needed to submit the specimen[15] every six months for up to three years after the date when the Notice of Allowance was issued by filing an extension for each six-month term. Once the specimen is provided to the USPTO with a Statement of Use, the applicant will proceed to registration (like the Section 1(a) applicant).

What Happened With the J'OUVERT Application?

Filing of a Section 1(b) Application for J'OUVERT

On Sept. 25, 2020, Michael B. Jordan's business partner, Louis Ryan Shaffer, filed a Section 1(b) application to use the trademark J'OUVERT in association with "alcoholic beverages, except beer; distilled spirits; rum-based beverages; and rum."[16] These goods are classified under Trademark International Class 30. Thus, as of the date of filing the application, Shaffer had a bona fide intention to use J'OUVERT in commerce in association with alcohol in the near future.

The application also included the following additional statement related to transliteration: "The non-Latin characters in the mark ['J'OUVERT'] transliterate to daybreak and this means morning in English."

Issuance of Examiner's Amendment Related to Translation

On Feb. 26, 2021, the examining attorney issued an examiner's amendment. The examining attorney found no substantive issues with the application. However, after communicating with Shaffer, the attorney amended the application and added the following statement to the record: "The wording "J'OUVERT" has no meaning in a foreign language."

As a result, the aforementioned transliteration was deleted from the application.

Publication and Issuance of Notice of Allowance

On April 6, 2021, the trademark was published in the Trademark Official Gazette. Thus, within 30 days of the publication date, any party who believed it would have been harmed by the registration of the mark could have filed a notice of opposition (or extension of time) with the Trademark Trial and Appeal Board.

On June 1, 2021, because there was no opposition, the application was issued a Notice of Allowance. Thus, Shaffer had until Dec. 1, 2021 to file a Statement of Use or a Request for Extension of Time to file a Statement of Use.

Announcement on Instagram

On June 19, 2021, Lori Harvey (Jordan's romantic partner) congratulated Jordan on the impending launch of the J'OUVERT rum brand via an Instagram story.

What Were the Controversies Surrounding This Application?

As soon as the general public became aware of Jordan's association with the J'OUVERT application, several controversies emerged.

Controversy 1: Accusations of Cultural Appropriation Due to the Use of the Term J'OUVERT

Some people of Caribbean descent were upset and accused Jordan of cultural appropriation for naming the alcohol brand J'OUVERT, because the term has historical significance to many in the Caribbean diaspora and Jordan is not Caribbean.

The term "j'ouvert" (or jouvay) is a term that refers to a large street party held annually as part of Carnival celebrations across the Caribbean and the diaspora. Some popular carnivals include the Trinidad and Tobago Carnival, Toronto's Caribana and New York's West Indian/Labor Day Carnival. On actual Carnival day (i.e., Mardi Gras for the Trinidad and Tobago Carnival), many participants dress up in elaborate costumes or "play mas."[17]

J'ouvert takes place before the Carnival parade. It is directly linked to the Canboulay emancipation celebrations in Trinidad, where former slaves (who could not participate in the French colonizers' masquerades) injected African folklore into their own celebrations.[18]

Rapper Nicki Minaj weighed in on this controversy, stating in an Instagram post that she was "sure [Michael B. Jordan] didn't intentionally do anything he thought Caribbean [people] would find offensive," but "[n]ow that [he was] aware, [he should] change the name and continue to flourish and prosper."[19]

Controversy 2: J'OUVERT Has No Meaning in a Foreign Language

There was also controversy due to the meaning of the term J'OUVERT. As stated above, the initial application stated that it meant daybreak/morning. After the examiner's amendment, the application stated that J'OUVERT had no meaning in a foreign language.

I initially thought that J'OUVERT was a French mistranslation of JOU OUVÈ, the Antillean Creole term meaning "dawn" or "daybreak," into JOUR OUVERT. Before dawn is the time at which J'ouvert celebrations are normally held.

Technically, the term J'OUVERT does not have a meaning. In French, even if one was to take the literal words of "day" and "open" and although not grammatically correct, it would be "JOUR OUVRE." OUVERT is the past participle of the word open.

In Creole, JOU OUVÈ literally means "the day is open." For these reasons, I likened J'OUVERT to be a fanciful mark, because the terms JOUR and OUVERT are combined to create a new word.

"There is a misconception that if one trademarks a word, that party has complete control over the use of the word. In essence, some people confuse ownership of a trademark with ownership of the actual word itself."

I discussed this with several trademark attorneys on a Facebook forum. One attorney showed me a dictionary related to a language called Trinidadian Creole.[20] The entry for "J'ouvert" defined the term to mean "day open." Another attorney stated that J'OUVERT could be deemed to be a slang word. Due to this information, I concluded that the initial application was correct and that the examiner's amendment was incorrect.

However, many would not know that the initial application stated that the term translated into daybreak/morning. Thus, the backlash made it appear as if Jordan and his business partners stated that the term had no meaning in a foreign language, when in fact it did.

Controversy 3: Belief That One Could Not Use the Term J'OUVERT

There is a misconception that if one trademarks a word, that party has complete control over the use of the word. In essence, some people confuse ownership of a trademark with ownership of the actual word itself.

Jordan's use of the word J'OUVERT in association with rum would not have prevented use of the term

J'OUVERT by others as it has always been used. However, some believed that this was not the case.

How Did Jordan Respond to the Controversies?

On June 23, 2021, Jordan posted an Instagram story apologizing and stating that he and his partners never intended to "offend or hurt a culture ([they] love and respect) & hoped to celebrate & shine a positive light on."[21] They ultimately decided to change the brand's name and will presumably abandon the J'OUVERT application.

What Are Your Thoughts on the Controversies?

Important lesson: just because you can do something does not mean that you should do it. As we can see here, news about Jordan's connection to the J'OUVERT application was not made public until it was granted a Notice of Allowance. Jordan and his business partners could absolutely have continued using the term in association with rum. However, it was a good idea for them to rebrand, because it showed that Jordan and his team actually listened to the feedback they received from the Caribbean community. Their future brand may fare well because of this.

What Should Trademark Attorneys Do When Advising Clients Regarding the Registration of Foreign Words?

Trademark attorneys must take into account the potential response/backlash of the public when it comes to their client's trademark usage of terms that have a meaning in a foreign language. First, you should ask your client what the term means in the foreign language. Second, conduct your own research to determine if the term is culturally significant. Third, if you cannot make this determination, keeping confidentiality obligations in mind, consult with a legal colleague or friend. In the end, trademark attorneys should help their clients to consider cultural importance when it comes to the trademark process.

Endnotes

1. "Trademark" is for goods and "Servicemark" is for services. As the application and registration processes are identical for both, and as applicants often apply for goods and services concurrently, this article will use "trademark" to represent both trademarks and servicemarks.

2. Trademark Act of 1946, 15 U.S.C. §§ 1051 *et seq*.

3. Registration on the Principal Register gives a trademark registrant certain rights, including the right to sue for trademark infringement. This is not the case for a trademark that is registered on the Supplemental Register. *See* Trademark Manual of Examining Procedure (TMEP) § 801.02(a). The TMEP is an excellent resource for all issues related to trademarks.

4. To file an initial trademark application and to see the differences between the TEAS Plus and TEAS Standard applications, visit https://www.uspto.gov/trademarks/apply/initial-application-forms.

5. For a complete list of the 45 classes under which any good or service can be classified, visit https://www.uspto.gov/trademarks/trademark-updates-and-announcements/nice-agreement-current-edition-version-general-remarks.

6. For more information about filing basis, visit https://www.uspto.gov/trademarks/apply/basis.

7. The power of the federal government to register trademarks comes from commerce clause of the Constitution, TMEP § 901.01; 15 U.S.C. § 1127. To see the what the USPTO considers to be use in commerce, *see* TMEP §§ 900 and 901.1.

8. For example, if an application is selling items of clothing, the applicant will have to provide an acceptable specimen like a tag containing a trademark or a website where the trademark is prominent and customers have the ability to place the clothing in a shopping cart.

9. For more information about office actions, visit uspto.gov/trademarks/maintain/responding-office-actions.

10. Descriptive marks fall on the lower end of what is commonly known as the "spectrum of distinctiveness." For more information about distinctiveness, *see* TMEP § 1209.01.

11. Likelihood of confusion is one of the most common issues in office actions. *See* TMEP § 1207.01.

12. For more information about Examiner's Amendments, *see* TMEP § 707.

13. This includes those who have common law/state trademark rights.

14. This article assumes that the hypothetical applicant is seeking registration on the Principal Register.

15. An applicant must provide the specimen in what is called a Statement of Use.

16. Information submitted during the trademark process is public. I used the Trademark Electronic Search System (TESS) to find the J'OUVERT application (Serial No. 90210764). *See* tess2.uspto.gov. From there, I went to the Trademark Status Document Retrieval (TSDR) to look at the entire trademark prosecution history. *See* tsdr.uspto.gov.

17. Jeffrey Thomas, *The Changing Role of the Steel Band in Trinidad and Tobago: Panorama and the Carnival Tradition*. Studies in Popular Culture, vol. 9, no. 2, 1986, pp. 96–108. JSTOR, www.jstor.org/stable/23412941.

18. Patricia Tamara Alleyne-Dettmers, *Political Dramas in the Jour Ouvert Parade in Trinidad Carnaval*, Caribbean Studies, vol. 28, no. 2, 1995, pp. 326–38. JSTOR, www.jstor.org/stable/25613310. Accessed Sept. 5, 2021.

19. Keishel Williams, *Michael B. Jordan Is Apologizing After Fans, Nicki Minaj Call Out His New Rum for Caribbean Appropriation — Here's What the Sacred Ritual of 'J'ouvert' Is All About*, businessinsider.com/nicki-minaj-weighs-in-on-michael-b-jordan-appropriation-controversy-2021-6.

20. "jour ouvert, j'ouvert." In Dictionary of the English/Creole of Trinidad & Tobago: On Historical Principles, edited by Winer Lise, 1-990. McGill-Queen's University Press, 2008, http://www.jstor.org/stable/j.cttq491v.7.

21. Keishel Williams, note 19, *supra*.

There was no attorney of record on the J'OUVERT application.

Merlyne Jean-Louis is the founder of Jean-Louis Law, a virtual business and entertainment law firm. She has spoken about copyright law as it relates to choreography and social media on CBS, Bloomberg, and The Verge. She is also the founder of Gambit Academy for Lawyers, which provides coaching and advice to lawyers who want to start their own virtual law firms.

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What Will It Take To Reform New York's Class Action Procedures?

By Richard J. Schager, Jr.

New York's class action procedures are antiquated. It's time – past time, really – to update them. New York State traditionally was the leader in the United States in developing class action procedures. Contrary to a popular misconception that class actions are a 20th century device, New York's first class action statute was enacted as an amendment to the Field Code in 1849,[1] drawing on Justice Story's writings on equity practices and English Chancery Court antecedents dating back to the 17th century.[2] Until the 1938 adoption of a predecessor to the current Federal Rule 23, the New York approach was a model for state statutes, "the American standard provision for class actions."[3] A revision developed in New York in the 1950s, oddly both enacted and repealed in the same year in its home state,[4] was the basis for the first modern federal class action statute, Federal Rule 23 as adopted in 1966.[5]

New York enacted its current Article 9 for class actions in 1975.[6] While Rule 23 of the Federal Rules of Civil Procedure has been amended several times since its adoption in 1966, with major amendments in 2003 and again in 2018, CPLR Article 9 has not been updated since enactment.

Every year since 2016, the Office of Court Administration (OCA) has encouraged the Legislature to amend New York's class action procedures,[7] and in 2016, 2017, and 2019 bills were introduced. The 2019 bill, A.8034,

is summarized in Part 1 below.[8] The Office of Court Administration noted its importance because New York State's class action procedures "were last revised in 1975 and should be amended to reflect the significant improvements to the administration of class actions now available to litigants in federal courts but not in New York's courts."[9] But even if the OCA bill is passed, CPLR Article 9 would benefit from additional amendments to Federal Rule 23 promulgated by the Supreme Court in 2018, after the OCA bill was written, discussed in Part 2 below. Part 3 notes the role played by the judicial conference in getting Article 9 enacted in 1975 and suggests that doing so again is consistent with its statutory mandate.

CPLR 901(b) on Class Recovery of Statutory Penalties

CPLR 901(b) precludes class certification for actions demanding a statutory penalty or minimum measure of recovery. The rule is unique among state class action statutes. Before 2010, the rule had been applied by federal courts as a substantive rule of law, but the U.S. Supreme Court then held that CPLR 901(b) is a procedural rule that does not govern actions in federal courts, a decision that has encouraged forum shopping and the diversion of class claims to federal courts.[11] Recent state court decisions also have led to uncertainty in the law over (i) what constitutes a penalty and (ii) whether it can be waived

"The votes suggest that the Assembly saw the need for reform of New York's class action procedures as outweighing the special interests of a lobbyist group for potential defendants. "

Maintaining New York's outdated and often confusing class action procedures has led to, among other things, (i) New York courts missing opportunities to entertain complex class actions due to forum shopping in the federal courts, (ii) wasteful briefing because of artificial deadlines for certification motions not suitable for contemporary practice, (iii) arbitrary decisions regarding class counsel due to lack of statutory guidance,[10] and (iv) difficulty in concluding settlements because of a rule requiring notice even where a class has not been certified and no non-party would be bound. With nearly half a century having passed since the enactment of Article 9, modernizing the administration of class actions by the New York courts is long overdue.

Summary of the 2019 OCA Bill

The OCA bill, introduced as A.8034 in the Assembly and S.6334-A in the Senate, proposed the following amendments, listed here in the order in which changes would be made to Article 9.

to permit class certification.[12] To discourage forum shopping and to provide for greater certainty in administration of the law, section 1 of the OCA bill proposes removing the current CPLR 901(b).

Class Actions Against Governmental Entities

A common law doctrine predating the enactment of Article 9 disfavors class actions against governmental entities. This judicially developed rule, once again unique to New York, has been steadily eroded over the past 15 years. The most recent decisions of the Court of Appeals and Appellate Division evaluate motions for class certification in such cases under the general criteria laid out in Article 9 without considering whether governmental operations are involved.[13] Section 1 of the OCA bill proposes a new CPLR 901(b) to rescind the common law rule.

When A.8034 was reported out to the Assembly floor on July 22, 2020, a single page Memorandum in Opposition also appeared from a lobbying organization for

city and village governments called the New York State Conference of Mayors and Municipal Officials. The NYCOM letter did not address the muddying of the governmental operations rule waters over the last 15 years, and it was not submitted to any of the legislative committees that studied the bill. While NYCOM conceded that "the public must be given a reasonable opportunity for legal recourse against local governments," it made a strictly defense-oriented argument that the interests of the public "must be balanced against the need to protect taxpayers from excessive, frivolous legal action" and that application of a right of joinder to any such legal recourse would "incentivize and encourage lawsuits. . . ." Since the OCA bill addressed only procedural issues, and not substantive law, it is no more likely to incentivize and encourage frivolous claims than the absence of certification incentivizes and encourages assertion of frivolous defenses. There is no support for NYCOM's argument and, indeed, no examples are provided.

In those last few days of a COVID-dominated legislative session, the Assembly was passing only bills that had no opposition, so the presence of this letter was enough to prevent A.8034 from being put to a vote in the Assembly. There was no indication of how much weight Assembly members gave to it. The votes reported on the Assembly website of the Assembly Judiciary Committee (21–1 in favor) and the Codes Committee (22–0) suggest that the Assembly saw the need for reform of New York's class action procedures as outweighing special interests of a lobbyist group for potential defendants.

Timing for Class Certification Motions

CPLR 902 presently requires that a motion for class certification is to be made within 60 days after a responsive pleading. This 60-day rule does not reflect the complexity of contemporary class action practice, where substantial discovery is often necessary on the feasibility and suitability of class certification, as discussed by the Court of Appeals in its recent decision in *Maddicks v. Big City Props.*[14] In addition, the rule often results in a *pro forma* motion just to meet the deadline, and in complex cases deprives the court of a substantive supporting brief. Section 2 of the bill adopts the language from Rule 23(c)(1)(A) of the Federal Rules, stating that motions shall be made "at an early practicable time. . . ."

Adequacy of Counsel

The adequacy of class counsel is addressed in the current Article 9 of the CPLR only indirectly, in CPLR 901(a)(4), which states a prerequisite to certification that "the representative parties will fairly and adequately protect the interests of the class." Federal studies recognized the inadequacy of this language (in Rule 23(a)(4) of the Federal Rules), and in 2003 a new Rule 23(g) was adopted that specified factors to be considered in appointing class counsel. Section 2 of the bill proposes a new CPLR 902(b) to provide guidance comparable to that now provided by Federal Rule 23(g). Such guidance will aid the court, the parties and the attorneys. (As noted below, the 2018 amendments to Federal Rule 23 go further.)

Notice of Dismissal of Complaints Pleading Class Claims but Not Certified

The current CPLR 908 is construed to require notice to the class of dismissal or compromise of a class action even if no class has been certified. In *Desrosiers v. Perry Ellis Menswear*,[15] the Court of Appeals acknowledged the unnecessary difficulties present by this reading of the rule. Class notice imposes substantial and often unnecessary expenses and, as the dissent in *Desrosiers* noted, such notice "would essentially inform putative class members that an individual claim – of which they received no prior notice – was being resolved by an agreement that was not binding on them."[16] While acknowledging criticism of the rule and contrary readings of the same language in other jurisdictions, the majority noted that in New York the rule had been read to require notice since 1982 and referred to the City Bar Report,[17] a 2003 report of City Bar advocating a change to the rule and the OCA bill as introduced in 2016 that had not been passed.[18] Bowing to "the persuasive significance of legislative inaction," the Court concluded that this widely recommended change to the notice rule should be accomplished by the Legislature.[19]

Section 3 of the OCA bill proposes more flexible notice provisions, derived from F.R.C.P. 23(e) and (e)(1) and CPLR 904(a). A new CPLR 908(a) would impose an affirmative requirement of notice of settlement where a class has been certified and members of the class would be bound by the proposed settlement. A new CPLR 908(b) – parallel to the discretion to order notice of pendency under CPLR 904(a) – would reserve for trial courts the discretion to order notice in all other circumstances when "necessary to protect the interests of such [class] members."

Notably, the OCA bill retains the longstanding New York rule requiring judicial approval of cases pleaded as class action, a rule designed to prevent abuse of the class action device. This is contrary to the federal approach adopted in 2003, which removed the requirement of judicial approval of pre-certification settlements.

Authorization of Attorneys' Fees

Section 4 of the OCA bill added to CPLR 909 the phrase "to the extent not otherwise limited by law" to confirm that where a specific statute authorizes or imposes limits on a fee award to be paid by a defendant, the standards of that more specific statute govern eligibility for and the amount of any award. This provision was added by

OCA's Civil Practice Advisory Committee prior to OCA endorsing the bill.

2018 Amendments to Federal Rule 23 Should Be Considered for Adding to CPLR Article 9

If passed, the OCA bill would bring New York class action practice up to where the Federal Rules were after amendments in 2003. Amendments to Federal Rule 23 promulgated in 2018 highlight additional needed changes. As the Advisory Committee noted, most of the 2018 amendments were to Rule 23(e) and "address issues related to settlement. . . ."

Criteria for Approving a Class Action Settlement

The current CPLR 908 provides only that class action settlements must be "approved by the court." Following the lead of the 2003 amendments to Federal Rule 23(e), the OCA bill proposes a new CPLR 908(d) to require a finding, after notice and a hearing, that the settlement is fair, reasonable, and adequate. But the 2018 amendments to Federal Rule 23(e)(2) set forth specific criteria for the supervising court to consider in making that finding, including that:

1. Representation was adequate;
2. Negotiations were at arm's length;
3. The relief is adequate, considering
   (a) Trial risks,
   (b) Effectiveness of the proposed method of distribution of the relief,
   (c) The terms of award for attorneys' fees, including timing of payment,
   (d) And side agreements made in connection with the proposed settlement; and
4. Whether the treatment of class members relative to each other is equitable.

The Advisory Committee on Federal Rule 23 noted that different courts had lists of factors to consider, and stated that the new Rule 23(e) "is not intended to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision. . . ."[20]

Similarly, incorporating these criteria into the CPLR would not displace any criteria New York courts have applied in the past, but would benefit judges by providing more explicit statutory guidance.

Criteria for Giving Class Notice

The current CPLR 908 provides simply that "[n]otice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs." The OCA Bill would amend the rule by providing a new CPLR 908(a) requiring class notice of settlements only to "class members who would be bound by" the settlement, a standard derived from Federal Rule 23(e)(1)(B) as amended in 2003. However, as amended in 2018 the Federal Rule adds that the court is to approve notice only where the parties have made a preliminary showing "supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object."[21]

While under existing law and under the OCA bill the court's substantive review of the settlement to confirm that it is fair, reasonable, and adequate comes only after notice is provided to the class,[22] New York trial judges once again would benefit from statutory guidance on considering the proposed settlement prior to approving notice to the class.

Two other changes made by the 2018 amendment to Federal Rule 23 seem unnecessary in New York. Federal Rule 23 requires court consent to the withdrawal of objections only if payment is involved, but the OCA bill follows longstanding New York policy of requiring court approval for the withdrawal of any objection. The 2018 Amendments to the Federal Rules are also designed to recognize contemporary methods of giving notice to class members, but New York's rule was already more liberal than the Federal Rule, providing that notice "shall be given to the class in such manner as the court directs."[23]

Should the Judicial Conference Take a Leadership Role in Class Action Reform?

The New York Assembly website reported in 2020 that the OCA bill was reported out to the Assembly floor by the Rules Committee, after approval by its Judiciary, Codes and Rules Committees with only one dissenting vote. The Senate website did not report the votes taken, but indicated that the bill was given three readings in the Judiciary Committee and then reported to the Rules Committee. After this substantial support in the Legislature, and after being proposed by OCA for five successive years, and supported by a 40-page Report of the New York City Bar and careful vetting by OCA's Advisory Committee on Civil Practice, the NYSBA, NYCLA and the New York State Trial Lawyers, the OCA bill was tabled based on a one-page letter from a lobbying organization.

NYCOM's letter created a straw man out of a balanced bill addressing issues of judicial administration, to which it then moved to set fire as plaintiff's bill designed to "mak[e] it easier for litigants to sue New York's cities, town, villages, and counties . . ." The OCA bill was the result of several years of detailed study, earning the

endorsements described above. NYCOM provided no legal analysis and cited no cases as examples of frivolous litigation against any of its unnamed clients. This casual and unsigned letter, expressing strictly a non-analytical defense position, provides no justification for disregarding the years of work that have gone into the OCA bill.

Given this sequence of events, the question then becomes: How are New York's class action procedures to be brought into the 21st century? Class actions have been an element of judicial administration since 1849, with a history that extends back to 17th century Chancery Court practice.[24] New York, after being a leader for a century, now has among the most antiquated procedural rules for class actions in the country, and the efforts of OCA's Advisory Committee on Civil Practice and various bar groups seem insufficient.

As the Court of Appeals has noted, after prior attempts failed (including one reform bill that was passed and repealed in the same year[25]) in 1975 it was "*the Judicial Conference* [that] proposed a new class action statute . . . designed 'to set up a flexible, functional scheme whereby class actions could qualify without the present undesirable and socially detrimental restrictions.'"[26] The Judicial Conference is established by Section 214 of the Judiciary Law, and consists of the chief judge of the Court of Appeals, the presiding justice of each of the four Appellate Divisions of the Supreme Court, and a selection of trial court justices, with the chair and the ranking member of each of the Judiciary Committees of the Assembly and the Senate as *ex officio* members. The statutory mandate of the Judicial Conference was consistent with its statutory mandate to "study and recommend changes in Laws, statutes and rules relating to civil . . . law practice which, in its opinion, will promote simplicity in procedure, the just determination of cases, and the elimination of unjustifiable expense and delay. . . . Jud. L. § 214-a(1)."

Addressing class action reform is as much a part of the Judicial Conference's mandate today as it was in 1975. As suggested by the court in *Sperry*, it may be the time for the Judicial Conference to stress to the Legislature the importance of reforming class action procedures.

Richard J. Schager, Jr. practices corporate and insurance law and commercial litigation at Stamell & Schager in New York City. He sits on NYSBA's Committee on Civil Practice Law and Rules and City Bar's Council on Judicial Administration. He co-chaired working groups of the New York City Bar Association that prepared reports in 2015 and 2003 proposing reforms to CPLR Article 9, which were cited by the Court of Appeals in the *Desrosiers* decision and are discussed in the text.

Endnotes

1. 1849 N.Y. Laws, ch. 438 § 119. The early rule read:

   > [A]nd when the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the Court, one or more may sue or defend for the benefit of the whole.

2. A. Homburger, *State Class Actions and the Federal Rule*, 71 Col. L. Rev. 609, 611–13 (citing J. Story, *Commentaries on Equity Pleadings* § 97 (1838)) ("Homburger, State Class Actions"). This article is the de facto legislative history of CPLR Article 9, cited in both the 10th (1972) and 12th (1975) Annual Reports of the Judicial Conference to the Legislature. *See* Report of the Administrative Board of the Judicial Conference of the State of New York, Legis. Doc. No. 90, at 206 (1975).

3. Homburger, *State Class Actions*, at 613.

4. 1962 N.Y. Laws, chs. 301 & 318.

5. A. Homburger, *Private Suits in the Public Interest in the United States of America*, 23 Buff. L. Rev. 344, 357 (1974) (hereinafter, "Homburger, Public Interest Suits").

6. 1975 N.Y. Laws, chs. 207 & 474. *Sperry v. Crompton*, 8 N.Y.3d 204, 210 (2007) describes the role of the Judicial Conference.

7. The proposed legislation was based on a Report of the New York City Bar (the "City Bar Report") available at http://www2.nycbar.org/pdf/report/uploads/20072985-ClassActionsProposedAmendsArt9CPLRJudicialAdminLitigationStateCourtsReportFINAL11515.pdf.

8. A.8034 was introduced by Assembly Member and then Judiciary Committee Chair Jeffrey Dinowitz. The bill was introduced in the Senate as S.6334-A by Senator and Judiciary Committee Chair Brad Hoylman.

9. The OCA Memorandum is attached to Assembly Bill A.8034.

10. *Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 201–02 (1st Dep't 1998) (1st Department found counsel qualified and skilled and certified a class, reversing a trial court that had sanctioned the same counsel for making the motion).

11. *Shady Grove Orthopedic Associates, PA. v. Allstate Insurance Company*, 559 U.S. 393, 397 (2010). Shady Grove was described as a "game changer" in T. Dickerson, *State Class Actions: Game Changer*, N.Y.L.J., Apr. 6, 2010.

12. *Borden v. 400 East 55th St. Assocs*., 24 N.Y.3d 382 (2014); *Sperry v. Crompton Corp*., 8 N.Y.3d 204, 212 (2007).

13. *City of New York v. Maul*, 14 N.Y.3d 499, 509 (2010); *Hurrell-Haring v. State*, 81 A.D.3d 69, 75 (3d Dep't 2011) (citing Maul, reversing application of the government operations rule, holding that a class action was superior to other methods of adjudication); *Watts v. Wing*, 308 A.D.2d 391, 392 (1st Dep't 2003) (government operations rule inapplicable where an individual precedent "would be of no assistance to the remaining plaintiffs."

14. 34 N.Y.3d 116 (2019). In *Maddicks* the Court of Appeals held that the class action provisions of a complaint should not be addressed on a motion to dismiss, but rather on a certification motion with supporting affidavits and evidence, and that plaintiffs should have an opportunity to move for fact-based subclasses or for certification on specific issues under CPLR 906. 34 N.Y.3d at 126. *See* R. Schager, *Court of Appeals Holds Class Certification Should be Denied on Certification Motion and not a Motion to Dismiss*, N.Y.L.J., Nov. 26, 2019 (noting different legal standards for motions to dismiss and to certify a class).

15. 30 N.Y.3d 488 (Ct. App. 2017).

16. *Id*. at 503 (Stein, J., dissenting).

17. *See* n. 7 above.

18. The 1982 precedent is *Avena v. Ford Motor Co*., 85 A.D.2d 149 (1st Dep't 1982). *See* R. Schager, *Judicial Approval, Class Notice Required for Settlement of Uncertified Class Actions*, N.Y.L.J., January 24, 2018 (comparing state and federal rules).

19. Desrosiers, 30 N.Y.3d at 497–99.

20. Adv. Comm. Note re Fed. R. Civ. P. 23(e)(2).

21. Fed. R. Civ. P. 23, Advisory Committee Note to Rule 23(e)(1).

22. Second clause of CPLR 908 as it now exists and CPLR 908(a) & (d) in the OCA bill.

23. CPLR 904(b).

24. *See* n. 2 *supra*.

25. *See* n. 4 *supra*.

26. *Sperry v. Crompton*, 8 N.Y.3d 204, 210 (2007) (emphasis added).

Second Circuit Reverses Fair Use Decision in *Warhol v. Goldsmith*

By Joel L. Hecker

On March 26, 2021, in a much-anticipated decision, the Second Circuit reversed the Southern District of New York decision, which found that Andy Warhol's creation of 16 silkscreen prints and pencil illustrations of the musical artist Prince, which was based upon a 1981 photograph created by photographer Lynn Goldsmith, was fair use under the United States Copyright Act.[1] The case is *The Andy Warhol Foundation for the Visual Arts v. Lynn Goldsmith and Lynn Goldsmith Ltd*[2] (the parties are reversed as The Andy Warhol Foundation (AWF) sought a declaratory judgment of non-infringement and Goldsmith counterclaimed for copyright infringement).

The Facts

On Dec. 3, 1984, Goldsmith, on assignment from Newsweek magazine, created a series of photographs in her studio of the musical artist Prince. Goldsmith owns the copyright to these photographs. In 1984, her stock photography agency, defendant Lynn Goldsmith Ltd. (LGL), which at the time was known as Lynn Goldsmith Inc. or LGI, submitted a negative of one of her Prince photos to Vanity Fair magazine at Vanity Fair's request for use as an artist reference in connection with an upcoming article about Prince. Goldsmith did not know that Andy Warhol was the artist Vanity Fair had commissioned to create the illustration of Prince.

Vanity Fair selected Goldsmith's image to be the artist reference. That term, according to trial testimony, meant that an artist would create a work of art based on the image reference.[3] LGL then granted Vanity Fair a license to use Goldsmith's copyrighted photo for artist reference only, and further required a copyright credit in the name of Lynn Goldsmith to appear on the printed use in the magazine. This photo (the Goldsmith photo) is reproduced here, in figure 1.

Figure 1

Unbeknownst to Goldsmith, Warhol did not stop with the illustration that Vanity Fair had commissioned him to create, which is the following illustration (The Warhol Illustration) figure 2.

Figure 2

Warhol also created an additional 15 works, which together with the Warhol Illustration became known as the Prince Series. Copies of three of the Prince Series that were included in the panel's opinion appear in figure 3.

Figure 3

The Warhol Illustration was published in the November 1984 Vanity Fair magazine together with the required credit to Goldsmith alongside the Warhol Illustration. In addition, there was also a separate attribution to Goldsmith crediting her with the source photograph for the Warhol Illustration.

After Warhol's death, AWF acquired title to and copyright in the Prince Series illustrations. Between 1993 and 2004, AWF sold or otherwise transferred 12 of the Prince Series illustrations to third parties, and in 1998 transferred the other four to the Andy Warhol Museum. However, AWF retained copyright in the Prince Series illustrations and began licensing these illustrations for editorial, commercial, and museum usage.

Prince died on April 21, 2016. The next day Conde Nast (CN), the parent company of Vanity Fair, contacted AWF to determine whether AWF still had the Warhol Illustration that had run in the 1984 issue of Vanity Fair, as CN hoped to use it in connection with the planned special magazine edition of Vanity Fair commemorating Prince's life. CN then learned from AWF that AWF had the entire Prince Series. CN ultimately obtained a commercial license from AWF for a different illustration from the Prince Series, which was used for the cover of the tribute magazine, published in May 2016. No credit or attribution was given to Goldsmith in the tribute magazine for the source image. Instead, the credit was given to AWF.

Goldsmith first became aware of the Prince Series when she saw this commemorative May 2016 issue of Vanity Fair magazine. Goldsmith then contacted Vanity Fair and AWF to discuss this infringement of her copyright.

The parties began negotiations to resolve the matter but on April 7, 2017, AWF sued Goldsmith and LGL in the United States District Court for the Southern District of New York for declaratory judgment of non-infringement or, in the alternative, for fair use. Goldsmith countersued for copyright infringement, based upon the above facts, under 17 U.S.C. Sections 106 and 501.

Fair Use Factors

The district court had found that the first, third, and fourth statutory non-exclusive fair use factors favored AWF and the second factor was neutral. The Second Circuit panel disagreed and concluded that all four factors actually favored Goldsmith. The four factors, set forth in 17 U.S.C. Section 107, are:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

The First Fair Use Factor

The principal takeaways from the Second Circuit panel decision on the first factor, which are instructive for those who deal with copyright fair use matters, are:

- The panel noted that recent court decisions have placed undue reliance upon the transformative aspect of the first factor, often determining that a transformative use was sufficient for a fair use finding irrespective of the other three factors. The panel limited the Second Circuit 2013 *Cariou v. Prince* decision[4] to its facts and went out of its way to write that "our review of the decision below persuades us that some clarification is in order."[5] The *Cariou* decision has, as the panel noted, "not been immune from criticism."[6] That is an understatement, to say the least, and this reversal in Goldsmith goes a long way to correct what many have perceived to be *Cariou*'s flawed fair use analysis.

- The panel stated that "the district court appears to have read *Cariou* as having announced [a single bright-line] rule, to wit, that any secondary work is necessarily transformative as a matter of law."[7] However, held the panel, it does not follow that any secondary work which adds a new aesthetic or a new expression to its source material is necessarily transformative. This is particularly instructive as to derivative works, since that category is specifically excluded from the scope of fair use.
- Courts typically consider the purpose of the primary and secondary works in determining if the secondary was transformative. The panel pointed out that the common thread in those cases, "where the secondary work does not obviously comment on or relate back to the original or use the original for a purpose other than that for which it was created,"[8] the bare assertion of a "higher or different artistic use "is insufficient to render a work transformative."[9]

On this point, the panel held that the secondary work "must, at a bare minimum, comprise something more than the imposition of another artist's style on the primary work such that the secondary work remains both recognizably derived from, and retaining the essential elements of, its source material."[10] That is, the panel found the district court's conclusion that, "each Prince Series work is immediately recognizable as a Warhol" is irrelevant to the transformative analysis, since that logic "inevitably creates a celebrity-plagiarist privilege."[11]

The Second Fair Use Factor

This factor considers the nature of the copyrighted work. The district court held the Goldsmith Photo to be both unpublished and creative, but nonetheless concluded that the second factor could favor neither party because LGL had licensed it to Vanity Fair and because the Prince Series was highly transformative. The panel concluded that this was error and reversed, holding that once the district court recognized the Goldsmith Photo as both creative and unpublished, it should have held that this factor favored Goldsmith, "irrespective of whether it adjudged the Prince Series transformative."[12]

The Third Fair Use Factor

The district court weighed this factor, the amount and substantiality of the use, in favor of AWF, because it found that Warhol removed nearly all of the Goldsmith Photo's copyrightable elements. The panel reversed, holding that this district court analysis missed the mark since, while Goldsmith had no monopoly on Prince's face, the law granted her a broad monopoly on his image as it appeared in her photographs of him.[13]

The panel concluded that the Prince Series borrowed significantly from the Goldsmith Photo both quantitatively and qualitatively. It looked at the other photographs by other photographers that AWF had submitted as part of its motion for summary judgment in support of its proposition that the Prince pose captured by Goldsmith was not unique to the Goldsmith Photo.[14] The panel concluded that these other photos had the opposite effect – "that the Prince Series would be quite different had Warhol used one of them instead of the Goldsmith Photo to create it."[15] In fact, the Warhol illustration copied many details of the Goldsmith Photo, including "the glint in Prince's eyes where the umbrellas in Goldsmith's studio reflected off his pupils."[16]

The Fourth Fair Use Factor

The panel unequivocally stated that, as to the fourth factor analysis of effect on the market for the original, the test is not whether the secondary work would damage the market for the first, but whether it usurps that market by offering a competing substitute. The panel rejected the district court's rationale that the market for licensing Warhol's works (or by extension any famous artist) is a market for "Warhols," since this would permit this aspect of the fourth factor always to weigh in favor of the alleged infringer when there is an active market for such works. The panel had no problem reversing the district court on this factor, finding that the markets for licensing Goldsmith's work and the Prince Series overlap in both the existing market, the potential market, and the derivative markets for Goldsmith's Photo. (The case did not involve the sales of the original 16 Warhol works, as they were sold or donated to museums prior to the running of the statute of limitations.)

Substantial Similarity

The district court did not analyze the issue of substantial similarity, which it found unnecessary, since it found in favor of fair use. The panel ruled on the procedural issue that it did not have to remand the case, because it could determine that there was substantial similarity between the Goldsmith Photo and the Prince Series as a matter of law. The panel reached this conclusion because: (1) Warhol did not create the Prince Series by taking his own photograph of Prince in a similar pose; (2) Warhol did not attempt to merely copy the idea conveyed in the Goldsmith Photo; and (3) in fact, Warhol copied the Goldsmith Photo itself, which was Goldsmith's particular expression of that idea.[17]

Warhol Files Petition After *Google v. Oracle*

Following the decision by the Second Circuit, The Andy Warhol Foundation filed a Petition for Panel Rehearing

and Rehearing En Banc, on the mistaken belief that the intervening U.S. Supreme Court decision in *Google LLC v. Oracle America, Inc.*[18] somehow required a different result. In order to consider the impact, if any, of the *Google* decision, the Second Circuit panel granted the petition for rehearing, but came to the same conclusion in an amended opinion dated Aug. 24, 2021,[19] which incorporated its prior (now withdrawn) decision with an analysis of *Google*. The lack of any impact of the *Google* decision on the Second Circuit conclusion that AWF infringed Goldsmith's copyrighted photograph was summarized by the panel as follows:

> AWF's argument that Google undermines our analysis rests on a misreading of both the Supreme Court's opinion and ours, misinterpreting opinions as adopting hard and fast categorical rules of fair use. To the contrary, both opinions recognize that determinations of fair use are highly contextual and fact specific, and are not easily reduced to rigid rules. As the Supreme Court put it, both the historical background of fair use and modern precedent 'make clear that the concept [of fair use] is flexible, that courts must apply it in light of the sometimes conflicting aims of copyright law, and that its applications may vary depending upon context'. (at 55).

The panel went on to hold that copyright law does not provide either side to any dispute with absolute trumps based on simplistic formulas. Instead, explained the panel, it requires a contextual balancing based upon principles that will lead to close calls in particular cases. The panel then concluded that, like the Supreme Court in *Google*, the Second Circuit panel did apply those well-established principles to the particular facts in the AWF-Goldsmith case, and concluded that AWF's fair use defense fails.

Joel L. Hecker, principal of the Law Offices of Joel L. Hecker, practices in every aspect of photography and visual arts law, copyright, licensing, publishing, contracts, privacy rights, trademark and other intellectual property issues, as well as real estate and estate planning matters. He has acted as general counsel to the hundreds of professional photographers, stock photo agencies, graphic artists and other photography and content-related businesses he has represented nationwide and abroad. He also lectures and writes extensively on issues of concern to these industries.

This article first appeared in the Entertainment, Arts and Sports Law Journal, a publication of the Entertainment, Arts, and Sports Law Section. For information on joining this Section, please go to NYSBA.ORG/EASL.

Endnotes

1. Disclaimer: The author was co-counsel for Lynn Goldsmith on the district court level proceedings, but not on the appeal.
2. *The Andy Warhol Foundation for the Visual Arts, Inc. v. Lynn Goldsmith et al*, United States Court of Appeals, 2d Circuit, Docket No. 19-2420-cv, filed March 26, 2021 ("Opinion"). The district court opinion can be found at 382 F. Supp. 3d 312 (S.D.N.Y. 2019).
3. Opinion at 8; district court opinion at 783.
4. *Cariou v. Prince* (714 F. 3d 694).
5. Opinion at 18.
6. *Id.*
7. Opinion at 18–19.
8. Opinion at 25.
9. *Id.*
10. Opinion at 28.
11. Opinion at 31.
12. Opinion at 37.
13. Opinion at 39.
14. Opinion at 41.
15. *Id.*
16. Opinion at 43.
17. Opinion at 55.
18. *Google LLC v. Oracle America, Inc.*, 141 S. St. 1183 (2021).
19. Docket No. 19-2420-cv, amended Aug. 24, 2021.

Are a Judge's Social Media Posts Ethical?

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To the Forum:

A few months ago I appeared before a judge in a matter that has become highly contentious over the years with a lot of bad blood between counsel and the parties. As a result, over the course of the last year we have appeared before the judge numerous times to argue various discovery and sanction motions. Although we are in the process of settling the case and have not appeared before the judge in a few months, the case is still active. However, the particular judge whom the case is before is well-known for her strong online social media presence. The judge posts weekly videos on YouTube opining on courtroom etiquette and the dos and don'ts of practice. In doing so, she uses real-life anecdotes of attorneys and cases before her and changes any personal identifying information in order to preserve the privacy of the parties and attorneys involved.

Yesterday, I was extremely displeased to hear from my colleagues that the judge had recently posted a video discussing the importance of civility between counsel and apparently used facts and circumstances of my case as an example. Despite her attempt at disguising the identity of the parties and counsel, it was abundantly clear to me and my colleagues that she was referencing our case. To make matters worse, it seemed as though she indicated that my client had the weaker position in the matter, which I fear, if seen by opposing counsel, may hurt our chances of settlement. Are the judge's social media posts ethical? Is there anything that I can do to salvage my reputation and settlement at this point?

Sincerely,
Mads Tagram

Dear Mads Tagram,

It is no secret that social media has become a ubiquitous part of contemporary interaction and communication in our profession. In today's digital age, there has been a substantial increase by professionals – including judges and judicial officers – in the use of social media as a way of creating an online presence. Several of our prior Forums have discussed at length the various sections of the Rules of Professional Conduct (the RPC) that apply when lawyers use social media.[1] As noted in one prior Forum, the ethical implications of judges using social media are governed by 22 N.Y.C.R.R. Part 100 (the "Rules"), and many of those Rules have to be referenced as we answer your question.[2]

In 2008, the New York State Advisory Committee on Judicial Ethics (the "Committee") noted that if a judge otherwise complies with the Rules governing judicial conduct, he or she may join or make use of an internet-based social network but should exercise an appropriate degree of discretion in doing so.[3] A decade later, the Committee opined that "the question is not whether a judge may participate in blog posts, podcasts, social media or the like, but how he/she does so."[4]

While there is no rule explicitly prohibiting judges from using social media platforms such as YouTube, important ethical considerations arise when judges do so, and each scenario should be evaluated with respect to its unique circumstances. As a general warning, the American Bar Association cautioned that judges who use electronic social media should "assume that comments posted [on such forums] will not remain within the circle of the judge's connections."[5]

In that regard, Rule 100.2 explicitly reminds us that judges must always strive to avoid impropriety and the appearance of impropriety. The Rules further provide that in order to avoid impropriety – or, perhaps, better said – the appearance of impropriety, judges should refrain from posting anything to their social media accounts that could be viewed as an offer of legal advice or comments on a matter before their court.[6] Applying this rule, the judge in your case should not have used social media as a forum for comments on your matter which was still pending and, most certainly, should not have suggested that your client had the weaker position.

Disguising names of the parties in an apparent attempt to preserve confidentiality does not save the day. Lawsuits and legal proceedings are generally a matter of public record and any individual with access to the internet is likely able to figure out which matter the judge is referencing in her YouTube video. And, while 22 N.Y.C.R.R. Section 100.3(B)(8) does not, to be sure, prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court, posting a video to the judge's personal YouTube page is certainly not part of a judge's official duties.

The judge's video may also contaminate the jury pool as it also potentially creates a risk that it may influence potential jurors in the event your settlement negotiations fail and your case goes to trial. As noted in comment [3.13][3B(7)] to Rule 100.3:

> [a] judge should encourage and seek to facilitate settlement, but the judge should not take any action or make any comment that might reasonably be interpreted by any party or its counsel as (a) coercion to settle, or (b) impairing the party's right to have the controversy resolved by the court in a fair and impartial manner in the event settlement negotiations are unsuccessful. In matters that will be tried without a jury, a judge who seeks to facilitate settlement should exercise extreme care to avoid prejudging or giving the appearance of prejudging the case.

In addition, the judge's use of her YouTube page to make an example out of your case appears to violate Rule 100.3(C)(3), which provides, in pertinent part, that a

judge shall avoid nepotism and favoritism. Certainly, making a statement that could in any way indicate that one party has a stronger position in a case that is still pending before the court can be seen as the judge exercising favoritism. If you are able to demonstrate that the judge exhibited favoritism in her posting of the YouTube video, it may be appropriate for the judge to recuse herself from the proceeding pursuant to 22 N.Y.C.R.R. Section 100.3(E)(1)(a)(i). However, as a practical aside, you should now strongly consider whether the judge in your case actually demonstrated partiality or favoritism sufficient to warrant her disqualification. As attorneys we are required to advance the goals of our clients. Because you have indicated that your case has been before this judge for "years" and may potentially settle, we believe that you must now analyze whether the judge's appearance of partiality is significant enough warrant a disqualification motion. Whether such a motion should be made must be should be weighed against the risk of blowing up the potential settlement and/or substantially delaying the matter by bringing in a new judge who would need to get up to speed on the issues.

Another question is whether the judge is receiving any form of compensation for posting her YouTube videos. If the judge were to receive compensation, it could place her in further violation of Rule 100.4(D), which specifically provides that a judge shall not engage in financial and business dealings that may reasonable be perceived to exploit the judge's judicial position.[7] In today's digital era, individuals with a strong online presence are often paid by companies to endorse their products. If this is the case, the judge's impartiality may be further called into question. For example, if the judge were to receive compensation from YouTube to post her videos, and she later has a case before her involving YouTube, her impartiality may be called into question because others may reasonably assume that YouTube is in a special position to influence the judge in violation of the applicable code of judicial conduct.

In conclusion, while we are sure that the judge meant well in endeavoring to use your case as an example of the importance of civility among lawyers, the problem here is that the use of a YouTube video commenting on the behavior of the lawyers in your case may not have been the best way of addressing the issue. And, as a general matter, while a YouTube channel featuring a judge discussing dos and don'ts of the practice of law can certainly be a benefit to litigants and clients alike, the line between an appropriate post and a violation of the Rules is so thin we recommend that judges steer clear to avoid any appearance of partiality.

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

QUESTION FOR THE NEXT FORUM:

I am a junior associate and was tasked with defending a defendant witness deposition on a typical personal injury case. Plaintiff's counsel made good points and got some pretty damaging (depending on your perspective) testimony. The client's general counsel was present and seemed a bit concerned and anxious. During a break, the GC and I counseled the witness on how to rehabilitate testimony along with some points to make during the remainder of the deposition.

Once we went back on the record opposing counsel questioned the witness on any communications they had with me and the GC during the break. I strenuously objected to any details about the conversation because it was clearly privileged. Opposing counsel disagreed and marked the transcript for a ruling and was visibly frustrated by what they said was a clear "breach of deposition protocol."

I debriefed the deposition with my senior partner who told me that I had nothing to worry about, and I was right to counsel the witness on how to rehabilitate their testimony. According to the senior partner I had done well and that is "the way it has always been done."

I am now confused, the plaintiff's attorney seemed so confident in their position, but the senior partner has been practicing for so long. Was I right, was I wrong?

Sincerely,
Waverly E. Squire

Endnotes

1. *See* Vincent J. Syracuse, Carl F. Regelmann and Alexandra Kamenetsky Shea, *Attorney Professionalism Forum,* N.Y. St. B. J. January 2018, Vol. 90, No. 1; *see also* Vincent J. Syracuse, Maryann C. Stallone and Hannah Furst, *Attorney Professionalism Forum,* N.Y. St. B. J. February 2016, Vol. 88, No. 2.
2. *See* Vincent J. Syracuse, Carl F. Regelmann and Maxwell W. Palmer, *Attorney Professionalism Forum,* N.Y. St. B. J. April 2019, Vol. 91, No. 3.
3. *See* N.Y. Adv. Comm. on Jud. Ethics, Op. 08-176 (2008).
4. *See* N.Y. Adv. Comm. on Jud. Ethics, Op. 18-126 (2018).
5. *See* American Bar Association, Formal Op. 462 (2013).
6. *See* 22 N.Y.C.R.R. §§ 100.3(b)(8), 100.4(G).
7. *See* 22 N.Y.C.R.R. § 100.4(D).

Combating Human Trafficking: NYSBA Recommendations Become Law

By Cheyenne Burke

Few crimes in our country are as insidious and misunderstood as human trafficking. Frequently, when people think of human trafficking, they picture a scared young girl being abducted and held against her will and then forced into unspeakable situations. While this can be the case, the reality is that more commonly human trafficking situations are as subtle as they are tragic. In a system that commonly refers to the victims as "hidden in plain sight," these individuals may not view themselves as victims at all due to manipulation and coercion, may simply think they are working off debt, or believe their situation is, in fact, a legal means to better themselves.

A young woman named Tonya developed a relationship with a man who soon became her trafficker. The relationship began casually and eventually turned romantic. As time went on, he asked her to have sex with other men to make some extra money. She recalls at the time being taken aback at first by the request and refusing, but eventually, "[h]e made me feel like I was doing it because I loved him and, in the end, we'd have a really good [financial] reward."[1] She recalls feeling helpless, like she deserved what was happening, and really believing she was doing it for love. Eventually, Tonya was expected to have sex every night with different men.

Maria,[2] the sole financial support for her children, took a housekeeping job to provide for her family. Although the job was more hours than she expected and far less than minimum wage, she continued to work to support her family. Over several years, Maria's employer restricted her movements, controlled whom she spoke with, referred to her as his "wife" while sexually abusing her, and regularly threatened to have her deported. Maria endured years of

abusive behavior at the hands of her "employer" that left her feeling isolated and alone.

These stories demonstrate the complexities of human trafficking and underscore how traffickers can successfully exploit individuals in vulnerable positions, while remaining undetected by law enforcement. In 2007, lawmakers established the New York State Interagency Task Force on Human Trafficking to better understand and educate on human trafficking activity within the state, coordinate services for victims and law enforcement for perpetrators, and generally provide ongoing review and recommendations to policy changes. Since that time, New York State Bar Member Peggy Finerty has been appointed to the task force, and the task force has authored reports on the prevalence of human trafficking in the state. Using this information, the task force has worked diligently to educate front line workers on identifying victims and shepherding them to available supports.

In 2013, the New York State Bar Association also endeavored to learn more about trafficking within the state and made legislative recommendations to address this epidemic. The Special Committee on Human Trafficking offered a report[3] detailing many issues and loopholes within the legal system that failed to properly address human trafficking. The report called for lawmakers to enact legislation that further provided civil remedies to make victims whole and to stop the criminalization of victims. Though it took eight long years of negotiation and tireless advocacy, these recommendations finally became law this past legislative session. While some critics said enactment should have come years before, the final result was applauded, nonetheless.

Criminal Conviction Vacatur Law Expansion

In 2010, New York became the first state in the country to enact legislation allowing trafficking victims to vacate criminal convictions resulting from their trafficking. The law at the time only provided for vacatur of certain prostitution charges and other sex-related offenses. While sex trafficking is the most discussed form of human trafficking, the new law recognizes that the term is much boarder and cannot fit neatly into a box. Trafficking victims experience hells our readers cannot imagine, ones where committing a crime is not a choice but an act of survival.

In November, Gov. Hochul signed into law legislation (S.674, Ramos/ A.459, Gottfried)[4] that expands the types of criminal convictions an individual may apply to have vacated. Victims of human trafficking can now make a motion for vacatur for any criminal conviction, if they can show at the time of the offense it was a result of their trafficked status. This new law moves away from the stereotypical view of human trafficking and reflects the realities that individuals are trafficked as children, labor, or for sex, and may be forced or manipulated to commit a variety of crimes at the direction of their captor. The expansion of these vacatur provisions will remove the unwarranted collateral consequences of criminal convictions and take steps to sever themselves from their traumatic past.

Civil Cause of Action for Human Trafficking Expansion

Lawmakers also expanded an existing private right of action to allow victims of human trafficking to sue their perpetrator in civil court. The bill (S.672, Sanders/A.3186, Hevesi)[5] expands the civil remedies available to an individual to include punitive damages and injunctive relief within the discretion of the court. The legislation also extends the statute of limitations to 15 years and contains several tolling provisions that considers the troubling dynamic between a trafficker and victim. The bill was signed into law in July and has been in effect since July 28, 2021.

An analysis done by the association's Special Committee on Human Trafficking found providing a civil right of action can provide individuals with distinct advantages over criminal recourse alone. A private right of action provides victims who have wrongly suffered with compensation that comes directly from the person who harmed them. This empowers victims and allows them to proceed with their case and story, even in circumstances where the state may not proceed with criminal charges. Moreover, allowing for punitive damages and injunctive relief sends a message directly to the traffickers that New York will not allow these actions, and they will not benefit from operating these "businesses" within our state.

NYSBA applauds the Legislature's continued diligence and response to human trafficking within the state. January is Human Trafficking Awareness Month. As practitioners regularly interacting with the public, there are several resources[6] available to learn more about the signs of human trafficking victims may exhibit and the services currently available for those in need.

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. She is a graduate of Pace University and Albany Law School.

Endnotes

1. https://www.ice.gov/features/human-trafficking-victim-shares-story.
2. https://ips-dc.org/a-labor-trafficking-survivor-speaks-out/.
3. https://nysba.org/app/uploads/2020/01/FINAL-Human-Trafficking-Report-with-Cover.pdf.
4. https://www.nysenate.gov/legislation/bills/2021/s674.
5. https://www.nysenate.gov/legislation/bills/2021/s672.
6. https://otda.ny.gov/programs/bria/trafficking.asp.

Manhattan DA Alvin Bragg Talks Malcolm X, Trump, and Eric Adams on 'Miranda Warnings'

The future of the investigation into the assassination of civil rights leader Malcolm X will be in the hands of Alvin Bragg, the first Black man elected to be Manhattan District Attorney's office.

"I watched the documentary; I spoke to the family as someone who's a Harlem resident and a student of the civil rights movement. I know the significance of the matter," said Bragg, who takes office in January. "It is important to do these looks back. Some will say, 'Oh well, that was so long ago,' but the wounds remain, and it is so important to address the wrongs and set the record right and not just in these high-profile matters, it means a lot obviously here, but across the board it is important."

News broke the morning Bragg appeared on the New York State Bar Association's "Miranda Warnings" podcast that incumbent Manhattan District Attorney Cy Vance would seek to exonerate Muhammad Aziz and Khalil Islam, who both served more than 20 years in prison for the murder of Malcom X, though they insisted that they were innocent.

Vance announced the move after an investigation with the Innocence Project revealed that law enforcement officials withheld evidence that benefited the defense. The departing DA began the initial investigation that exonerated the pair two years ago after the Netflix documentary "Who Killed Malcolm X?" garnered worldwide interest.

Asked whether he thought there might be room to expand the investigation, Bragg noted the importance of the work that Vance's office had already accomplished. He also pointed out that finding justice past the exoneration of Aziz and Islam may be difficult as Vance told reporters that the investigation was hampered by the amount of time that has lapsed since the assassination.

"Our search for the truth was severely impacted by the passage of time. In the decades since the tragic afternoon at the Audubon Ballroom, every police investigator and trial attorney on the case has died," said Vance at a press conference announcing the exonerations. "In a case that rested entirely on eyewitness testimony, every single eyewitness that testified at trial has died. All of the physical evidence, including the shotgun used in the murder, is gone. No telephone records were obtained at the time, and there is no way to get them now."

It will be up to Bragg to determine if there is a way forward. But it won't be the only high-profile case on his plate. Bragg will also take up the DA's office's ongoing investigation into the Trump organization. Another challenge facing Bragg, an outspoken proponent of police accountability and who ran on ending enforcement of a host of low-level crimes, is newly elected Mayor Eric Adams. Adams, who served on the New York Police Department for 22 years, ran on a law-and-order platform during his successful mayoral campaign and has indicated he wants to tweak bail reform legislation to give judges more discretion in deciding which offenders should be jailed before trial. He wants to undo new bail reform laws.

Asked by Miranda about Adams' comments that bail reform is allowing "extremely dangerous" people to be "released the next day" and that he would like to change the law, Bragg responded that he would like to work with Adams on improving the law, adding: "I really want to listen to ways in which he wants to improve it."

Bragg said that he has already found common ground with Adams and hopes to expand on that as the incoming elected officials prepare to take office.

"We met for the first time this year . . . and he talks a lot about his early experience with the police and the way he was treated as a driver. I talked a lot about my early experience with the police and how that informed my decision to become a prosecutor. We've obviously both worked on cases involving public safety but also care deeply about fairness and police accountability, he's also talked a lot about the front-end equation – diversion investment, investment for

continued on page 57

Confronting Implicit Bias in the Courtroom

By David King

Implicit bias and its insidious influence on the justice system was the subject of a NYSBA webinar during a week when the country watched nervously as two trials with major racial connotations came to a head.

At the time of the CLE, a jury asked a judge in Wisconsin to rewatch footage taken from the scene where Kyle Rittenhouse shot and killed Black Lives Matter protesters with an AR-15 style rifle. Experts on criminal defense noted that Rittenhouse's treatment by the court system was drastically different from how young Black men are treated in similar situations. His association with white supremacist groups also led to questions about his motivation for attending the rally armed.

Just the day before, prosecutors in Georgia rested their case against three white men accused of chasing down and killing a 25-year-old Black man who was out for a jog.

The presenters of the CLE, "Addressing Implicit Bias in the Criminal Justice System – Two Strategies," made it clear that implicit bias is inherent in any case where race is an issue – especially when the defendant is not white.

Andrea Miller, clinical assistant professor of psychology and a senior court research associate at the National Center for State Courts, explained that implicit bias exists in our minds regardless of how we might identify politically, or how sensitive or insensitive we might be to race and gender.

"Implicit stereotypes and attitudes form through repeated exposure to stereotypes in everyday life. These implicit biases develop in memory even if you don't personally endorse them," said Miller.

These biases can color decisions made in police work such as how witnesses identify suspects, how defendants are sentenced, how judges rule and how juries reach verdicts.

The CLE examined two bills endorsed by the New York State Bar Association that are designed to ensure the appellate court can review cases for implicit bias even when a defendant has agreed to an appeal waiver as part of a plea deal.

The first, S.1281, would mandate that the Appellate Division modify sentences that are determined to be illegal or unduly harsh or severe.

The second, S.1280, would require the court to review a denial of a motion to suppress evidence on appeal, even in cases where an appeal waiver was signed.

Robert Dean, attorney-in-charge of the Center for Appellate Litigation, noted that this legislation is necessary because more than 95% of cases are settled outside of the courtroom.

In those settlements, prosecutors push defendants to sign appeal waivers, thereby nullifying the intent of New York law and sidelining the Appellate Division. Furthermore, Black people are more likely to face criminal charges while having the cases against them shaped by implicit bias.

"Studies show that Black people are more likely to be wrongfully identified, improperly stopped, and more likely to have their car, belongings, and bodies searched," said Megan Byrne, director of the Racial Justice

Andrea Miller presented this image to demonstrate how our minds are trained to make assumptions through various societal cues. She noted that while the color levels on each one of the individual heads remain the same, the features are ordered, from the left to the right, to go from stereotypically Black to stereotypical white features. Most people will assume the color of the images goes from dark to light despite the color remaining consistent throughout.

Project, Center for Appellate Litigation. She pointed to a 2019 study by the New York Civil Liberties Union that showed 59% of people stopped by New York state police were Black while 29% were Latinx. Meanwhile, a nationwide study found that Black people were more likely to be pulled over than white people but less likely to have illicit drugs on them.

"All these bills do is reclaim these rights. We're taking the final word out of the prosecutor's hands and into the hands of the appellate courts where the legislature intended them to be," Dean said.

Byrne echoed Dean, saying that appeal waivers mean that the appellate court can't review actions in cases where the process was tainted by bias. She pointed to a study by the Manhattan district attorney's office and the Vera Institute of Justice that reviewed 220,000 cases from 2010 to 2011 to see what role race played.

Among the study's findings were that Black defendants were 19% more likely than whites to be offered plea deals that included jail or prison time and that Black people and Latinos were both much more likely to be offered plea deals that included time behind bars for misdemeanor drug offenses.

Dealing with Implicit Bias in Juries

The second half of the CLE began with Miller explaining how implicit bias can impact jury selection. She demonstrated that attorneys are just as affected by implicit biases during jury selection as the potential jurors may be during the case. She pointed to a cognitive confirmation bias that can lead attorneys and jurors alike to look for details that affirm their beliefs or stereotypes while ignoring the ones that don't.

"Jurors hearing evidence are more likely to seek out info that aligns with preconceived notions of stereotypes," Miller said.

Even more striking was evidence Miller presented showing that people are simply unable to evaluate their own level of bias or open-mindedness. She referred to a study that asked Americans to rate how open they are to misinformation. "They all agreed that the average American is highly susceptible but rated themselves as much less likely to be fooled."

Miller conducted her own study asking judges to rate their ability to avoid gender and racial bias. "They all saw themselves at being better at avoiding biases than they are at the core skills of associated with being a judge," said Miller.

That leads to quite a conundrum for jury selection. If even judges can't admit they have bias, then how can we expect lawyers to get jurors to admit their biases during voir dire? According to Andre Vitale, first assistant deputy public defender with the Hudson County office of the New Jersey Office of the Public Defender, lawyers should not try to get potential jurors to admit bias because it is impossible.

Instead, he says, the focus should be on introducing the idea of implicit bias and making sure jurors know that their judgment can be clouded by stereotypes they don't realize they have.

He proposed several ways to do this, including asking judges to play instructional videos about implicit bias, asking jurors if they understand the concept of implicit bias and introducing the concept of race and bias into cases where it clearly exists. He pointed to the trial of George Zimmerman for the killing of teen Trayvon Martin, slamming the prosecution for not introducing race and bias into the trial. He played Zimmerman's initial call to 911 where he notes Martin's race without any further explanation of why he's concerned Martin is in the neighborhood.

"Educate jurors about implicit bias, talk about racism. If we don't talk about bias, we're not doing our jobs. If you're not making it part of your defense, you still should be talking to jurors about it in the course of jury selection," Vitale said.

There should be no illusion that jurors' beliefs about race will change by talking about race, but the discussion can lead to more robust debate in the jury room. Citing a study that shows that defendants with darker complexions get higher sentences for similar crimes, Vitale stressed that lawyers and their Black clients are facing overwhelming negative assumptions that lead to the disproportionate punishment of Black people.

Vitale stressed that by introducing the concept of bias and race to a jury and how it can influence perceptions it encourages jurors to more carefully consider what is behind their assumptions and judgments in a case. When that concept is not introduced, jurors tend not to challenge their own biases, research has found.

"You have to be willing to take on institutional racism. We know it exists in the court system. We also know that when race is an issue, jurors try to be fairer. When race is not an issue, jurors tend to be much less careful," Vitale said.

Manhattan DA Alvin Bragg Talks Malcolm X, Trump, and Eric Adams on 'Miranda Warnings'
continued from page 55

education, about the rate of dyslexia of those who are in Rikers. There's a lot of common ground."

To hear more about Bragg's plans to address gun violence, revamping the sexual assault crimes unit and his thoughts on "Defund the Police," check out the first episode of the latest season of Miranda Warnings streaming on all major podcast platforms including Apple Music and Spotify.

Prosecutor Defends Decision To Charge Rittenhouse With Murder

By David King

If Assistant District Attorney Thomas Binger had it to do all over again, he thinks he would confront Kyle Rittenhouse with the images of Gaige Grosskreutz "with his arm nearly blown off" and video of Joseph Rosenbaum "gasping out his last breath."

Binger said he would hold the photos of Rosenbaum and Anthony Huber inches from Rittenhouse's face and say, "You're telling us that these people deserve to die; well, here they are. Now look at them in the eye, unflinching, and own what you did. If you can't, if you're scared, you're grossed out, you can't confront that, I think that says something about your conscience, I think that says something about your beliefs here. And I think if you are not man enough to own up to what you did, then don't you dare come in here and tell us that these people deserve to die, and you're legally justified and doing all this."

Binger, who prosecuted Rittenhouse on murder charges stemming from the two shooting deaths and the wounding of Grosskreutz at a Black Lives Matter protest in August of 2020, has kept a low profile and avoided interviews since a Kenosha, Wisconsin, jury found Rittenhouse not guilty Nov. 19. That changed this week when he sat down for a wide-ranging discussion with New York State Bar Association past president David Miranda on the Miranda Warnings podcast.

Miranda asked Binger about a major criticism of his handling of the case – that he should have charged Rittenhouse with second degree murder rather than trying to satisfy the higher threshold of proof for first degree murder. Binger stressed that he wanted to send a message that Rittenhouse's actions were deeply damaging to society by pursuing the more severe charges.

"I think the very intentional homicide is obviously a stronger charge; it carries with it a mandatory life in prison. I think it's the appropriate charge here, and I think it better crystallizes the real issue here, which is I'm not sure that I believe that defendant when he says that he had a genuine belief that he had to defend his life in that situation. I think that there's credible evidence that suggests that he was out there essentially, looking for trouble, you know, bringing a gun into a violent situation to escalate, having his own political agenda. So, I think that he was willing to kill that night going in and willing to accept that, so I think there's some element of no matter what was going on around him, this was potentially going to happen."

Binger said Rittenhouse showed up to protect a business that he had never heard of before in a part of town that is home to multiple churches, a daycare and a school. "And he's going to protect the used car lot? And no offense to used car lots; they serve a valuable purpose but, really, if you, if you're concerned about the community that might have been like the sixth or seventh highest priority location in that area."

Binger, who clashed repeatedly with Judge Bruce Schroeder during the trial, explained that he felt his case was weakened by pretrial decisions made by the judge. Schroeder ruled that Binger could not introduce Rittenhouse's association with the white supremacist group the Proud Boys or a 29-second video in which Rittenhouse declares, "Bro, I wish I had my (expletive) AR. I'd start shooting rounds at them," while watching a video of men exiting a CVS.

That video was a key part of one of the most dramatic moments in the trial, and Miranda delved into that subject on the podcast. During Binger's questioning of Rittenhouse about whether he felt lethal force was acceptable in response to destruction of property, Binger brought up his comments captured on that video. Rittenhouse's defense team objected. Schroeder was livid and asked the jury to leave the courtroom, chastising Binger. The defense team raised the issue of a mistrial.

According to Binger, his question was spurred by prior experience in Schroeder's courtroom. He said the judge previously allowed evidence if questioning opened the door to that evidence.

"He made it clear, the door was still slightly open, and when there was testimony from the defendant that I felt was opening the door and allowing . . . it, I felt that it was appropriate to go there." Binger said he felt Schroeder's "biggest issue" was that he didn't raise the issue before asking the question.

"But, of course, I'm in the middle of cross examination. I can't just pause and say, 'Judge I need a five-minute recess, so I can ask you whether or not I can go down this line of questioning.' And I think it can't

continued on page 59

Christopher Riano Named to NYSBA Executive Committee

By Brandon Vogel

Christopher R. Riano has been named to the Executive Committee of the New York State Bar Association.

Riano will serve as a member-at-large. He replaces Sandra Rivera, who was recently named senior adviser for legislative affairs to Gov. Kathy Hochul. The press release noted her variety of leadership roles at the New York State Bar Association.

The 30-member Executive Committee has the authority to speak and act on behalf of the association. It is comprised of the officers of the association, together with vice presidents from each of the 13 judicial districts in the state (the first district has two vice presidents), eight members-at-large, and the immediate past president. All officers are elected to serve one-year terms.

The inaugural chair of the NYSBA LGBTQ Law Section, Riano also is the first openly LGBTQ member named as a commissioner to the New York State Gaming Commission. He previously was the first openly LGBTQ person to serve as general counsel of the New York State Liquor Authority.

Riano is the president of the Center for Civic Education, a position he assumed in June 2020. He previously served as assistant counsel to former Gov. Andrew Cuomo.

He is co-author of "Marriage Equality: From Outlaws to In-Laws," with Professor William Eskridge of Yale Law School, which presents the 50-year history of same-sex marriage equality in the United States from 1967 to 2017.

Christopher Riano Named to NYSBA Executive Committee

Prosecutor Defends Decision To Charge Rittenhouse With Murder
continued from page 59

be over-emphasized that we're talking about a cross examination in a double homicide case. I'm sorry but there's a lot of leeway in that type of situation, this is a defendant who's taking the stand and is testifying about two killings that he committed. I'm entitled to a little leeway," said Binger.

Both Schroeder's and Binger's every move were scrutinized during the trial. Binger faced threats of violence, and his privacy and safety were compromised when his home address was posted online. Schroeder's peculiarities, such as answering his cell phone mid-trial, giving impromptu history lessons and falling into histrionics at the drop of a hat were criticized in the media.

"Off the bench, he is one of the nicest human beings you could ever meet," Binger says. "But when he puts the robe on, like some judges, he changes, and I've been in his court, I've been yelled at before. So that was not unusual for being in that courtroom."

Binger does take issue with Rittenhouse's testimony – specifically Rittenhouse's emotional breakdown on the stand where he appeared moved to tears by the supposed threat he faced from the men he eventually shot. "I think the tears were manufactured crocodile tears, and I think the jury saw right through them. And there was no remorse for anything. He was unapologetic, no concern about the lives that he took, none of that."

Member Spotlight: Edwina Frances Martin

Why did you become a lawyer?

My parents taught my siblings and me as we were growing up that a life well lived is a life in service to others. They grew up in a segregated world, with limited opportunities, and they worked hard to change society so that their children would have the world opened to them. My purpose in life has been to do the same, and I made the decision to attend law school, to be a "guardian of the law."

What is it about public interest law that attracted you?

Public interest law and public service attracted me because, as a "guardian of the law," I care passionately about the fair administration of justice.

You are actively involved with NYSBA and other bar associations and organizations. How come and how do you find the time?

After graduating from law school and completing judicial clerkships, I began my career in the litigation department of a large, white shoe law firm. One day, a partner in the department asked if I would be willing to join the Legal Referral Service Committee of the New York City Bar Association. I am forever grateful to him for that invitation because it opened up the doors to other opportunities in the city bar, the state bar, women's bar, etc. I love bar service because of the people you can meet and become friends with from across the state, the many writing and leadership development opportunities you may not have in a regular practice setting, the opportunities to explore different practice areas, the excellent training and CLE opportunities, and because I feel that by embracing bar leadership I am playing a (small) role in improving and uplifting the profession, and by extension, our communities.

In terms of finding the time, what can I say? You find the time for the things you care about. And you need to be focused and organized.

What is something that most people don't know about you?

I dabble in the creative arts, making and designing a number of items in my house, and I'm currently working on my first art project in a number of years.

What is the best life lesson that you have learned?

To keep an open mind and be open to new experiences. I believe my personal and professional growth have blossomed when I have allowed myself to step outside of my comfort zone.

Lawyers should join the New York State Bar Association because . . .

. . . of the people, the opportunities for personal and professional growth, and because you never know where it could lead you to!

NYSBA Task Force Issues New Guide for Solo and Small Firm Practitioners To Manage Emergencies

By Brandon Vogel

A new blueprint for solo and small firm lawyers to best navigate times of crisis has been issued by the New York State Bar Association's Emergency Task Force for Solo and Small Firm Practitioners.

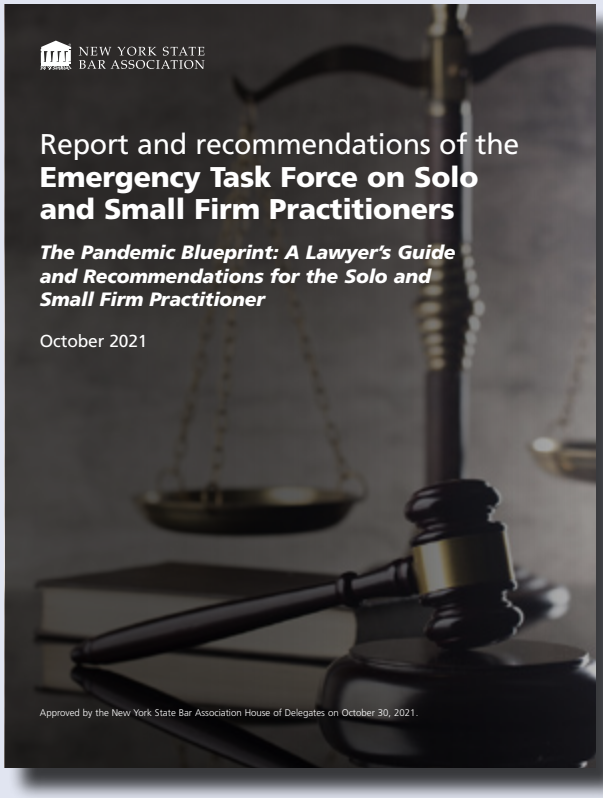
The task force's review of the impact of COVID-19 on solo and small-firm practitioners found that the pandemic exponentially increased day-to-day stresses on the operations of law firms, especially solo and small firm practices.

"No part of society escaped COVID's reach, including New York's legal system. Lasting changes will occur," said NYSBA President T. Andrew Brown, of Rochester (Brown Hutchinson). "This timely report expertly details how solo and small firm practitioners can navigate a crisis and continue to serve clients."

Created in March 2020 by Past President Hank Greenberg (Greenberg Traurig), the task force's mandate was to comprehensively examine the effects of the COVID-19 crisis on all aspects of solo and small firm practices, and to make meaningful recommendations as to how solo and small firm practitioners can maintain their practices in times of crisis.

Among the task force's recommendations and best practices:

- Since access to the judicial system is critical, consider waiving in-person appearances and improve the submission and presentation of evidence during a virtual trial.
- Mandate statewide e-filing and the enabling of electronic online access to entire case records for all courts.
- Establish uniform rules for the administration of virtual hearings and trials and develop a uniform statewide electronic policy.
- Classify the practice of law as an essential occupation.
- Provide streamlined procedures for the payment of vouchers to attorneys who perform assigned work during a crisis that results in disrupted court operations.
- Keep office safety and sanitization procedures in place to reduce the severity of future outbreaks.
- Screen courthouse participants for symptoms of infection prior to entering buildings.



"As a result of the COVID-19 crisis, lawyers must know the steps to take in the event of a future crisis," said Domenick Napoletano of Brooklyn (Law Office of Domenick Napoletano). "We have learned a lot and this report showcases how we can safeguard our practices for the future."

"There is no one-size-fits all solution for solo and small firm lawyers, but we have outlined daily actionable steps that can help meet lawyers' needs," said co-chair June M. Castellano of Rochester (Law Office of June Castellano). "Many COVID changes, including remote court appearances, do appear to be here to stay."

The report, approved by the NYSBA House of Delegates on Oct. 30, can be viewed on the NYSBA website.

How NYSBA Helped Secure the Right to Clean Air and Water for New Yorkers

By David King

When he was president of NYSBA in 2015, David Miranda formed a committee on the state constitution in anticipation of a public question on whether New York should hold a constitutional convention.

NYSBA backed the idea but several prominent environmental groups opposed it, fearing a rollback of environmental protections in the wake of President Donald Trump's election.

In 2017, voters overwhelmingly decided against holding the constitutional convention, leaving the question of whether the committee's two years of work and five reports were all for nothing. Fast forward to 2021 and NYSBA finally has the answer it was hoping to hear.

"What we did had a dual purpose–to address the convention question, and then assuming it didn't happen or wasn't successful, the committee would have a means to address these questions going forward through referendum," Miranda explained.

Henry M. Greenberg, who chaired the committee before becoming NYSBA president, elaborated.

"We looked back at the history of our constitution and saw that when railroad barons were burning down forests to build their tracks, we did a forever wild clause to protect the Adirondacks," said Greenberg. "In the 1960s when the environmental movement gained popularity with Rachel Carson and Lake Eerie was bursting into flames, they passed an amendment called the Conservation Bill of Rights. So, we thought, we can do something in light of climate change."

Expanding on the committee's work, NYSBA's Environmental & Energy Law Section studied the issue and recommended that the New York Constitution "clearly articulate and provide a means for citizens to insist upon respect for core environmental principles through the addition of an environmental right."

"As we confront existential questions of sustainability and the human impact on life systems, there is value in stating a right understood to exist–that New Yorkers have a right to an environment capable of supporting and sustaining life," the committee said.

Shortly after voters rejected the constitutional amendment, environmental groups such as Environmental Advocates of New York began looking for ways to shore up New York's environmental protections against President Donald Trump's deregulation efforts. They looked at pollution issues in upstate New York such as the water contamination in Hoosick Falls and air pollution in Albany's poorer neighborhoods and thought about how a constitutional amendment might help abate them and prevent environmental hazards going forward.

Kate Kurera, deputy director of Environmental Advocates of New York, says that it was a combination of the NYSBA report and interest in the Assembly's Committee on Environmental Conservation that spurred the discussion on passing a constitutional amendment.

The language was finalized, a right to clean air and water and a healthful environment would be added to the Bill of Rights contained in Article 1 of the state constitution. The state's constitutional amendment process requires that the bill pass both the Assembly and Senate in two consecutive years and only then go before voters as a ballot proposal for final ratification.

In 2018, the initial attempt at passage failed in light of opposition from the Republican-controlled Senate but when Democrats gained control of the body in 2019, the bill passed both houses with little fight. It passed both houses again in 2020 and then last week voters approved the amendment 1,904,636 to 859,723 even while other progressive reforms failed.

Miranda said it's gratifying to know that the committee influenced a major change to the constitution. "I'm very happy. These things take time, but they came to fruition. Its also good to know that other organizations are out there paying attention to the work we do here."

However, the hard part is yet to come. Kurera notes that the amendment remains up for judicial interpretation and the real impact of the amendment won't be felt until it is tested in the courts.

"The community that pushed so hard for this amendment, their job isn't over, they need to help figure out the best way forward so that precedent isn't set by those who don't want to give it a good start. We also need the government to give their agencies guidance to they can properly execute their duties based on this right," she said.

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