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NEW YORK STATE BAR ASSOCIATION

State Bar News

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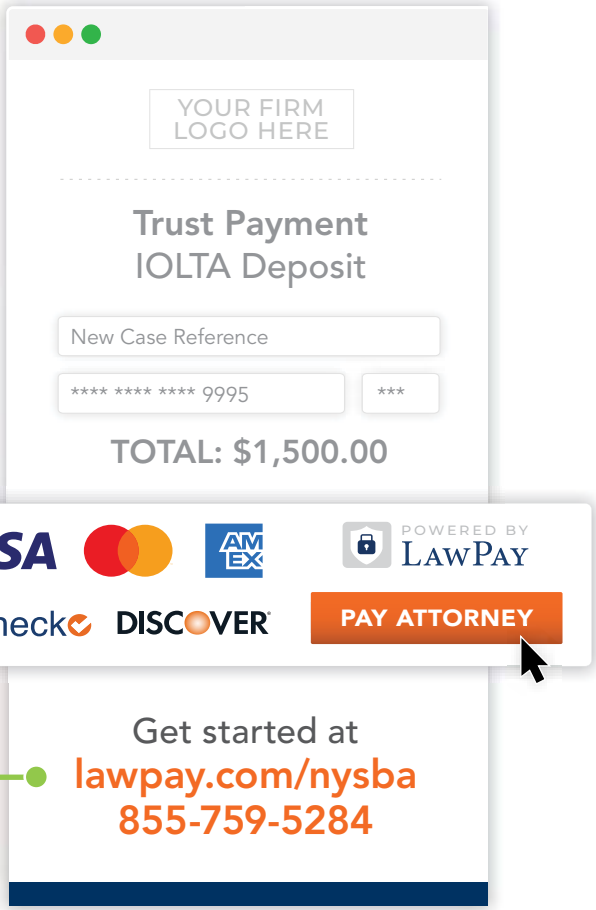

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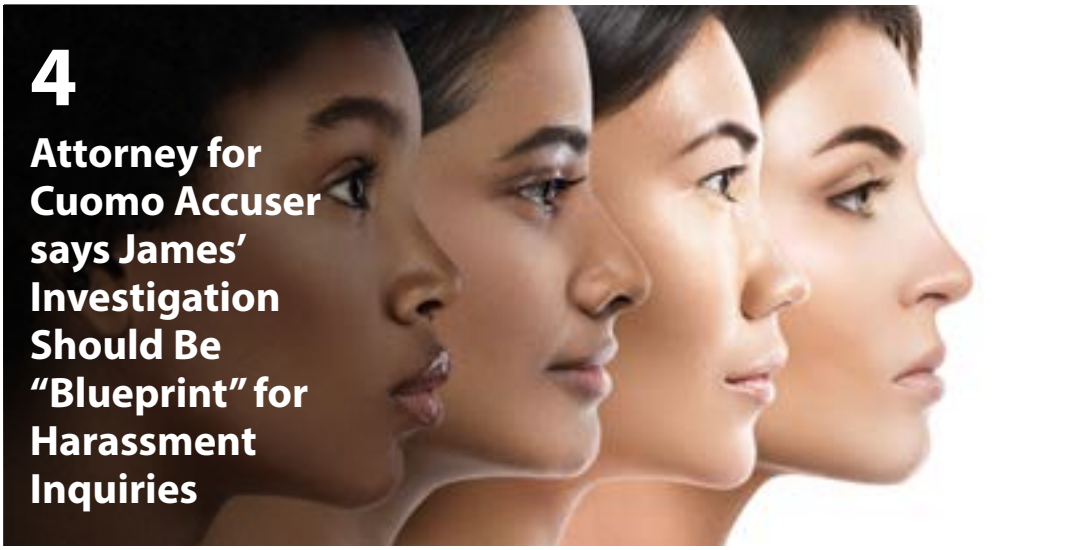


Attorney for Cuomo Accuser says James' Investigation Should Be "Blueprint" for Harassment Inquiries

By David Howard King

Attorney Debra S. Katz, who represents Charlotte Bennett, the former staffer to Gov. Andrew Cuomo who accused him of sexual harassment, said the investigation into the governor should "serve as a blueprint for what we do going forward."

She cited Attorney General Letitia James' use of two independent, veteran investigators and her commitment to transparency as being exemplary. Katz of Katz, Marshall and Bank, made the comments during a panel on the status of the #MeToo movement directly following keynote remarks by James. The panel took place as part of the Presidential Summit, the premier event of Annual Meeting.

Katz, who also represented Christine Blasey Ford who accused U.S. Supreme Court nominee Brett Kavanaugh of sexually assaulting her when they were teenagers, described how an entire system of defenders comes to the rescue when sexual harassment allegations are made against major CEOs and celebrities like Roger Ailes, Les Moonves, Harvey Weinstein and Matt Lauer. Katz referred to her own experience representing Bennett, noting that Cuomo's aides did not report harassment allegations because they decided the claims were not valid.

The panel focused on the legislative successes and still needed reforms to protect employees from harassment in the workplace. Much of the conversation focused on the problem of power dichotomies between employees and employers.

At the start of the panel, moderator Susan L. Harper of the Bates Group played a video from Time Magazine highlighting the women of the #MeToo movement. The testimony of actors like Rose McGowan and journalist Megyn Kelly were interspersed with that of service industry workers and teachers.

Taa R. Grays of MetLife, NYSBA Secretary, and Carrie Goldberg of C.A. Goldberg both made it clear that the #MeToo movement must move forward by focusing on the stories of the less powerful, because they are

still the most often abused and least likely to receive justice.

Goldberg said that laws that try to mandate arbitration between employers and employees over sexual harassment allegations are harmful and disempower victims. Further, she said legislation designed to ban non-disclosure agreements was misguided and hurt victims.

"Silence can be a contagion and can in certain conditions enable serial predators, but we can't single out victims of sexual harm to not have the same contract clauses. It is up to us as attorneys to explain our non-disparagement and non-disclosure clauses, what it means if a harasser become governor, or a Supreme Court justice. Are they still going to be OK being bound by a provision? In some cases, absolutely yes but our job is to let our clients say actually 'no it will take another few million dollars to take away my right to expose that predator.'"

Katz agreed, adding that she had heard from many journalists who were writing pieces suggesting NDAs prevent the outing of serial harassers. But Katz said 70% of harassment victims who responded to one survey said they did not report because "of fear of retaliation. There are systemic reasons harassment exists and persists in the workplace and it doesn't have to do with NDAs at all."

Goldberg said that most of her clients face huge obstacles to having their harassment claims addressed that begin with the fact that many of them are single, Black mothers who live below the poverty line. She detailed how many of the victims are also school-aged girls who feel betrayed repeatedly by the system that is charged with protecting them.

She described how one client who was sexually assaulted at school was suspended by the school administration for having sexual contact on school grounds and detailed how online platforms enable harassment and refuse to take responsibility despite knowing that their products are "defective."

Clockwise: Susan Harper, Kathryn Barcroft, Debra Katz, Carrie Goldberg, Taa Grays

Goldberg said that her goal is to "slay Goliath" and that lawyers should use their power to go after the biggest predators and abusers "including the tech industry."

Goldberg and Katz agreed that one of the most useful tools in holding corporations accountable is the specter that earning the reputation for protecting harassers will hurt their image and cost them money. In some cases, that may prove to be a useful tool for protecting impoverished workers from harassment. But in cases where big names are not involved, it can be harder to deliver justice.

Grays, who co-chairs NYSBA's Task Force on Racism, Social Equity, and the Law, explained the concept of intersectionality, saying that the system only knows how to treat Black women who are abused as either women or Black. And therefore, the system fails to address the larger underlying causes and systemic abuse and corruption. "We have a saying in the Black community," said Grays, "When the white community has a cold, the Black community has the flu."

In other words, racism allows for greater abuses and fewer protections for people of color.

Harper backed up this point by citing an article from The Harvard Business Review that reported that women of color suffer the most. "Studies show that they are more likely than white women to be harassed at work," said Harper. "Because women of color bear the brunt of harassment, as a group they file more complaints, and suffer the most when grievance procedure backfire, leading to more retaliation."

Asked by Harper how this cycle could be addressed, Grays said that it would help if women who are not famous had powerful allies to publicize their stories. "It's up to those in power to get these stories to the forefront as this impacts all women; not just Jane Fonda, Alyssa Milano and Rose McGowan. This happens to dishwashers, housekeepers, people who are on the lower economic spectrum who happen to be women of color."

Creating A Culture of Inclusion Benefits Transgender Students and Their Peers

By Brandon Vogel

Panelists discussed the newest front on the modern civil rights debate on Transgender Rights and Sports: Civil Rights Now and Into the Future at the Presidential Summit.

Instead of widespread efforts to extend legal safeguards for the trans community, many states across the nation are headed in the opposite direction – especially when it comes to youth sports. At least 61 bills in 31 states aim to exclude children and teens who are transgender from participating in school sports programs that are consistent with their gender identity. These measures primarily target K-12 students, and many are now before state, district and U.S. appellate courts.

"This conversation that we are having is so important, because our nation cannot live up to the words of our founding document until we secure the blessing of liberty for everyone," New York State Attorney General Letitia James said in her keynote address. She cited her efforts to protect transgender persons as "some of the most important work my office does."

"Transgender rights are simply human rights," she said. "This is an area where our nation has made tremendous gains but still has a lot of work that needs to be done. And we should all be proud that New York has been at the forefront."

Why New Yorkers should care

New York State and New York City guidelines that encourage full inclusion of transgendered students in sports are generally permissive and inclusive, said Jacqueline J. Drohan, chair of the NYSBA Task Force on the Treatment of Transgender Youth in Sports.

However, these are not mandatory provisions. Guidelines are a little bit loosely enforced. School boards have the right to abridge or modify them to varying degrees. Some districts might have a more affirming approach.

In March 2020, Idaho was the first state to ban transgender athletes from competing in girls sports at the primary, secondary, and college levels.

Opponents of transgender student inclusion in sports have filed suits claiming that Title IX of the Civil Rights Act, which prevents discrimination in educational programming based on gender, should be re-interpreted or rewritten to clarify that it prevents the inclusion of transgender students. Legislation has been introduced that would strip Title IX of the protections afforded to transgender people.

The question of transgender youth and sports has been significantly weaponized to argue against the passage of the Equality Act, she said.

Opportunities for all

Emma Forbes-Jones, a clinical psychologist, said that sports are good for mental and physical health and offer positive benefits that surpass the school experience.

"Sports decrease anxiety, depression, obesity, and body image issues," said Forbes-Jones. "It gives students a sense of purpose. The benefits of participation are real and healthy."

She acknowledged that most student athletes' careers end in high school and that the 5-year-old soccer star is likely not going to be an athlete as an adult.

For trans students, there is an increased risk for depression, anxiety, self-harm, eating disorders and physical health issues.

"The ability to participate in sports is a huge protective factor," said Forbes-Jones. "The experience of trans kids has improved but it's a bit of a patchwork."

Both Forbes-Jones and Drohan emphasized that there is "absolutely no scientific evidence that hormonal levels give a performance advantage."

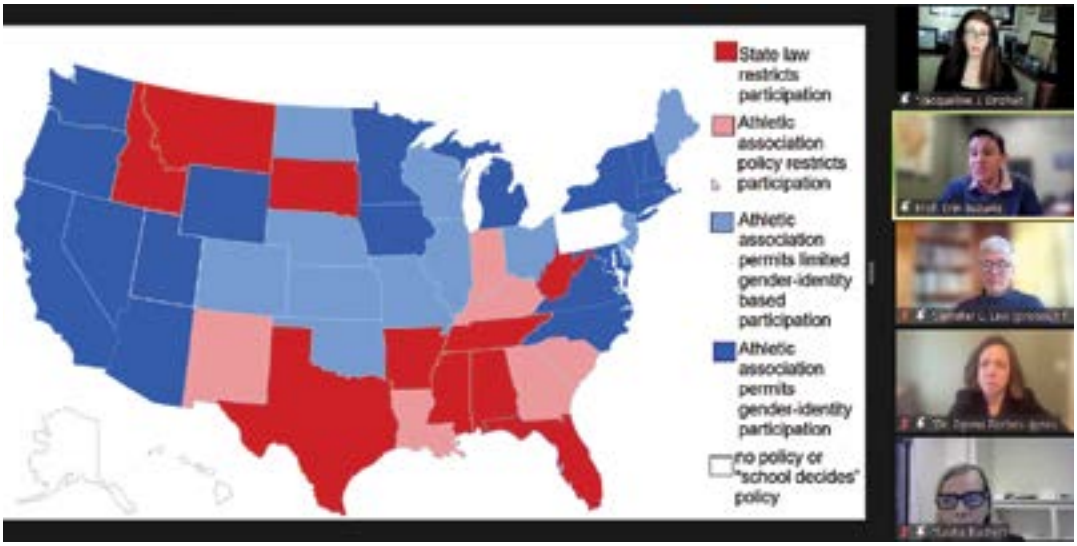
Forbes-Jones said schools that do better on the entire culture have students that are secure enough to try out for a team. Their experience is very similar to their cisgender peers.

"It's the domino effect," said Forbes-Jones. "When schools are safe, everything is safe"

Jennifer L. Levi, (GLAD) agreed. "We are not just talking about sports. We need to talk about the broader context."

Simple activities like using the correct restroom and playing sports have been subject to legislation by politicians who are often unfamiliar with the realities of trans students' experiences.

Seventy-five percent of transgender students felt unsafe at school because of their gender expression. As a result, many LBGTQ students avoid school activities or miss school entirely. Twenty percent of LGBTQ students change schools because of their experiences, said Levi.



At least 61 bills in 31 states aim to exclude children and teens who are transgender from participating in school sports programs that are consistent with their gender identity.

Top to bottom: Jackie Drohan, Prof. Erin Buzuvis, Jennifer Levi, Dr. Emma Forbes-Jones, Sasha Buchert.

T. Andrew Brown: 'Bar Application Question Does Harm to People Who Look Like Me'

By David Howard King

"How many more future presidents of the Bar Association will you never know?" T. Andrew Brown, president of the New York State Bar Association, implored members of the association's governing body.

Brown was referring to a question on the New York State Bar admission application that asks potential lawyers about their encounters with law enforcement and criminal history. The House of Delegates voted to ask that the question be revised, citing how it negatively impacts efforts to diversify the profession and violates the state's Human Rights Law and Family Court Act.

"There is no benefit. It does no good," Brown said from his lectern. "If there is some slight purpose, it is outweighed by the harm it does to the people who look like me especially. How many others who look like me fell into this category and were discouraged? If I was discouraged, I would not be standing here right now!"

The legal profession routinely ranks as one of the least diverse in the country. Recent American Bar Association surveys found only 5 percent of lawyers identify as Black and 5 percent as Latino. Meanwhile, while Blacks make up 15 percent of New York's population, they account for 38 percent of arrests, according to the latest data compiled from the Judicial Friends Report on Systemic Racism in New York Courts.

Eulas Boyd, dean of admissions at Brooklyn Law School, laid out a stunning set of facts to back up his opposition to the question. According to Boyd, the 15 law schools in New York State received nearly 62,00 applications for admissions and offered 15,968 students seats. Out of them, just 335 of the students who attended were Black. That means that fewer than 21 new students for each law school in the state were Black.

"The industry is not diverse enough. We all know that. But neither are its law schools," said Boyd. "Any factor in the pipeline, from elementary school on, that acts as a headwind to the diversity crisis in the legal industry should be removed. Full stop."

Some members of the House of Delegates asked for more data to show how many applicants were discouraged from pursuing a career in law due to the question.

David R. Marshall, who chaired NYSBA's Working Group on Question 26 of the New York Bar Application, which prepared a report on the question for the House of Delegates, rejected that assertion.

"This is a civil rights issue, which doesn't depend on how many people are impacted – typically they address minority rights. We make courthouses accessible to disabilities, not because so many people with impairments want access, but because it is required by law and it's the principled thing to do. It is not a big enough problem? That's the wrong frame."

The report, approved by the House of Delegates and available on the NYSBA website, recommends rewording the question to make clear that sealed criminal records, juvenile delinquency and youthful offender proceedings, dismissed cases and arrests that are no longer pending that did not result in a conviction do not have to be disclosed.

"How many more future presidents of the Bar Association will you never know?" President T. Andrew Brown speaks in favor of the resolution presented by the Working Group on Question 26 of the New York Bar Application.

Question 26 currently reads: "Have you ever, either as an adult or a juvenile, been cited, ticketed, arrested, taken into custody, charged with, indicted, convicted or tried for, or pleaded guilty to, the commission of any felony or misdemeanor or the violation of any law, or been the subject of any juvenile delinquency or youthful offender proceeding?"

NYSBA is asking that Question 26 be revised to conform with the Human Rights Law and the Family Court Act and that all other questions make clear that applicants do not have to disclose conduct protected by the two laws.

NYSBA's working group on the question as well as several of the association's committees —Children and the Law; Legal Aid; Legal Education and Admission to the Bar; and Diversity, Equity and Inclusion — and its Criminal Justice and Young Lawyers Sections supported the report. The Task Force on Racism, Social Equity, and the Law co-sponsored it.

This is not the first time that the association recommended changes in the bar admission application. NYSBA led an effort in 2019 to get questions on mental health removed from the bar admission application based in large part on opposition from law school students, who said the inquiries were stigmatizing and discouraged those who needed treatment from seeking it. Chief Judge Janet DiFiore announced in February 2020 that the questions would be removed.

Admissions to the bar is under the auspices of the Appellate Division of the State Supreme Court, which DiFiore oversees.

'We Can Do Both' District Attorneys Weigh In on Fighting for Racial Justice and Against Gun Violence

By David Howard King

In the face of mounting media criticism over progressive policies during a rise in gun violence, Brooklyn District Attorney Eric Gonzalez and Manhattan District Attorney Alvin Bragg made firm arguments that policies that end racial disparities go hand in hand with combatting gun violence.

Since taking office in 2016 during a spike in gun crime in Brooklyn, Gonzalez says his office has "driven down gun violence and saw fewer homicides all while pursuing a progressive agenda. I believe the two go hand in hand together. We cannot have safety without fairness. We can do both."

Westchester County District Attorney Mimi Rocah

New York County District Attorney Alvin Bragg

Gonzalez made the statement as part of a roundtable discussion hosted by the Task Force on Racism, Social Equity, and the Law.

Four district attorneys—Gonzalez from Brooklyn, Bragg from Manhattan, Mimi Rocah of Westchester County and John J. Flynn of Erie County–acknowledged that the mores of their communities differ and so their approach to justice are not uniform. However, they all spoke of efforts to divert offenders from prison in one way or another.

Gonzalez made it clear that his office's approach to combatting racial inequality in the justice system is not a political talking point, but an effort based in analysis and statistics. He detailed his office's partnership with CUNY Institute for State and Local Government to analyze arrests and sentencing to pinpoint unequal decisions made in bail and sentencing.

"We looked at four years of data and examined hundreds of thousands of cases and decision-making points made by prosecutors and judges," said Gonzalez. He says the analysis revealed a major decline in disparities during the time he was in office. "For the first time in the office's history, African Americans and Latinos did as well as whites in off ramps, diversions from the system."

Bragg said he is looking for a similar academic partnership and is particularly concerned with disparities in sentencing for misdemeanors in his office. "In Manhattan, Blacks and Latinos are 10 times more likely to be

incarcerated for a misdemeanor than white individuals," said Bragg.

Lucy Lang, New York State Inspector General, inquired about how the DAs work with victims.

Flynn detailed how his office uses a team of interrupters that identifies young victims of gun violence who have not been caught up in the legal system to help them avoid getting shot again and to prevent them from getting caught up in a life of crime.

Bragg said that he had visited with a high school youth group during a recent weekend and heard about how gun violence impacts their lives. "I'm very concerned with the racial disparity in our system and part of that is also stopping the trauma caused by gun violence," said Bragg. Bragg said the students were talking "about their fears and traumas, and gun violence topped the list. You could hear the anxiety in their voices. It was palpable. Dealing with that trauma of growing up with gun violence has to be part of the racial justice conversation too."

Bragg said he had recently appointed a point person for gun violence prosecution who would work to identify how to target the small groups of perpetrators responsible for gun violence in Manhattan.

Gonzalez detailed how victims play a central role in his restorative justice program. He said many in his community do not think incarceration is the solution to crime. "We involve the victims rather than simply incarcerating people. We have been doing that increasingly with violent cases as well. We do it in cases where you might typically think a DA would seek incarceration, but the decision is made by the victims and their families. We take our cues from them. In a lot of cases, it doesn't serve the victims to send someone to jail."

Kings County District Attorney Eric Gonzalez


Erie County District Attorney John Flynn

Lang inquired about how the DAs deal with a media that has grown increasingly focused on portraying racial justice policies as being responsible for rising crime despite the lack of evidence. Gonzalez said that gun violence is a racial justice because 97 percent of the people it impacts are people of color. He noted that he takes a lot of cues from his community and the standards they support rather than being concerned by the media.

Bragg, who has been the center of a media firestorm following reporting on a memo he issued detailing his office's approach to prosecuting low level crimes, admitted he had imagined a much different first three weeks in office.

Bragg said the memo "led to a lot of disclarity for which I am accountable. I had been anticipating spending the first few months doing community engagement and not doing a lot of media. But for the sake of public confidence, I needed to respond in my own voice." Bragg said he had to clarify "individualized justice" and describe a framework that includes "discretion allowing career prosecutors with great experience and judgment to apply that within our framework. It's been an interesting first three weeks. I hope to move to a process where it's now an internal conversation."

Puerto Rico's Insular Cases

Committee on Equity, Diversity and Inclusion co-chair Mirna M. Santiago moderated the panel, ""What Do the Insular Cases, Voter Suppression Efforts and the Anti-CRT Movement Have in Common?"

By David Howard King

The case of a disabled Puerto Rican man who was sued by the United States government to get back money paid to him in SSI benefits could impact how millions of residents of US-owned territories are treated under the Constitution. The man's troubles began when he moved back to Puerto Rico to take care of his ailing wife — no longer qualifying for benefits, according to the federal government.

For Court of Appeals Judge Jenny Rivera, it's also a very personal case.

Rivera revealed that her mother was, in fact, a Puerto Rican immigrant who utilized SSI after suffering from debilitating arthritis from years of working in Manhattan's garment district.

"If she had moved to the island of Puerto Rico, we would not have had that benefit. I would not have been able to have the life I had," Rivera said during the Constance Baker Motley Symposium.

"These are not inconsequential decisions; they are forever shaping people's lives and to think cases that said 'You are not like us. You are just too alien' will be the basis for denying someone the future ability to live in the country when they've given so much is completely antithetical to the democratic process," Rivera said.

So what are the cases she's referring to? Rivera explained that the "Insular Cases" are a series of U.S. Supreme Court decisions that dealt with the status of territories acquired by America following the Spanish-American War. Rivera explained that the now-derided decisions established justification for American colonialism and claimed that the citizens of these territories were "alien races with differing customs and religions" and that "the way they think is so unlike us, we cannot imagine them being a part of" our nation.

Mirna M. Santiago, founder of Girls Rule the Law and co-chair of NYSBA's Committee on Diversity, Equity, and Inclusion, served as moderator for the panel titled "What do the Insular Cases, Voter Suppression Efforts and the Anti-CRT Movement Have in Common?" She explained that the inspiration for the panel came from the push for voting rights in conjunction with a renewed debate over statehood for Puerto Rico, coming at a time when conservative media and some localities are up in arms over Critical Race Theory.

Questioned about the consequences of the Senate's failure to pass voting rights legislation, Senate Minority Leader Mitch McConnell told reporters, "African-American voters are voting in just as high a percentage as Americans." His answer to a journalist's question about the

concerns of voters of color spurred outrage from many who felt the Senator was referring to Black Americans as less than White Americans. That concept of "real" American vs. "less than" is one that is very much in play in the debate over the United States' treatment of Puerto Rico and other territories and was at the center of the panel discussion.

> *"I do think that certainly this is the most obvious example of denying an entire people federal voting rights,"*
>
> — said Rivera

Natalie M. Gomez-Velez, professor of law at CUNY School of Law, detailed how one case pending before the Supreme Court could overturn the Insular Cases and require the United States to treat residents of U.S. territories equally under the Constitution.

The case that is so personal to Rivera, *United States v. Vaello-Madero,* stems from the legal saga of Jose Luis Vaello-Madero, a Puerto Rican born citizen who started receiving SSI benefits in New York while suffering from a debilitating illness. Vaello-Madero returned to Puerto Rico to care for his ill wife. He continued receiving benefits for several years until SSI discovered he was living in Puerto Rico, the federal government canceled his benefits and the U.S. filed suit to recover the funds. Vaello-Madero's lawyer asserted that denying his client benefits solely because he lives in Puerto Rico violated the 5th Amendment of the Constitution, and a District Court agreed.

The First Circuit extended the benefits and found that the government's argument that it should not pay SSI to residents of Puerto Rico invalid because Puerto Rico contributes billions of dollars in taxes annually. Gomez-Velez noted that Puerto Rico pays more taxes annually than "at least six states in the U.S."

The judge also rejected the government's argument that including Puerto Ricans in SSI was cost prohibitive because fiscal consideration are not applicable when an entire segment of a beneficiary class is excluded.

With the case now in front of the U.S. Supreme Court, the government's lawyers are trying to separate their arguments from the flawed and derided Insular Cases, Gomez-Velez said. During oral arguments, Justice Neil Gorsuch asked, "Why should we just not admit the Insular Cases were improperly decided?" while Justice Sonya Sotomayor scrutinized the government's tax-based argument saying, "I don't understand what the different relationship with Puerto Rico has to do with this program because there's no cost to the government. The money's going directly to the people, not to the government."

Gomez-Velez said that the pushback against Critical Race Theory, McConnell's comment about "Americans" and the Insular Cases are all connected because America is still dealing in a very real way with a history and government that was fueled by a view that some people are less than others.

"I do think that certainly this is the most obvious example of denying an entire people federal voting rights," said Rivera.

Rivera continued that the DOJ's response that the Vaello-Madero case should not be decided as one of the Insular Cases but on the issue of taxes is "basically saying you can buy the vote and, as far as I know, that is a federal crime. That is not the argument DOJ is making here but if we follow through to the logical conclusion with the disparate treatment of the people of Puerto Rico, we're saying they are not worthy of the vote and that in many senses is not so far afield from the way people of color are treated all over."

Partners More On Board For Remote Work; Challenges Remain for Training New Lawyers

By Brandon Vogel

Firm partners in 2022 have embraced remote work as they establish new values and new protocols for their firms.

This is in sharp contrast to 2021 when most partners foresaw a return to the traditional firm environment, with some modifications.

Be it through advances in technology, rethinking priorities or finding improved efficiencies, small firm partners were enthusiastic and optimistic about the future of remote work on the "Managing Partners Small Firm Round Table" during Annual Meeting as part of "LPM Day."

New approach to clients and staff

Colleen Grady of Grady Hunt said that she has taken a more personalized approach to her clients and her staff, cognizant of how some clients have reacted to COVID-19. Some have become more demanding; others have retreated and might need more contact and communication to stay engaged.

She sent care packages to her staff every few weeks during shutdowns and reached out based on their preferences.

She noted how her partner loves the opportunities remote work has given her to see her children more, so she doesn't miss out on milestones.

"Pre-pandemic, we felt there was a lot of value and emphasis placed on being in the office," said Grady. "Now we love the remote environment."

Grady values that she now has a lot of time for herself, having lost her 75-minute commute. "It would be hard for me to go back," she said. "If we can continue to grow while doing it remotely, we will do it remotely."

The biggest challenge that remains is training brand new associates. They may not get the experience they need, she cautioned.

During the pandemic, Marian Rice (L'Abbate Balkan Colavita & Contini) gained a greater respect for technology and the need to invest in technology infrastructure. Clients now ask lawyers about their technology and cybersecurity measures, she said.

Clifford R. Ennico (Law Offices of Clifford R. Ennico) found that "turbocharged" technology changed how he receives payment. "Six months ago, I had never heard of Venmo. Now, it's how clients pay me."

Like Grady, Ennico is experiencing his best and busiest years as a lawyer. For the first time in his three decades as a solo practitioner, he is considering adding staff to keep up with demand.

"Everyone is starting their own business and exploring their Plan B that has been sitting on the shelf," Ennico said.

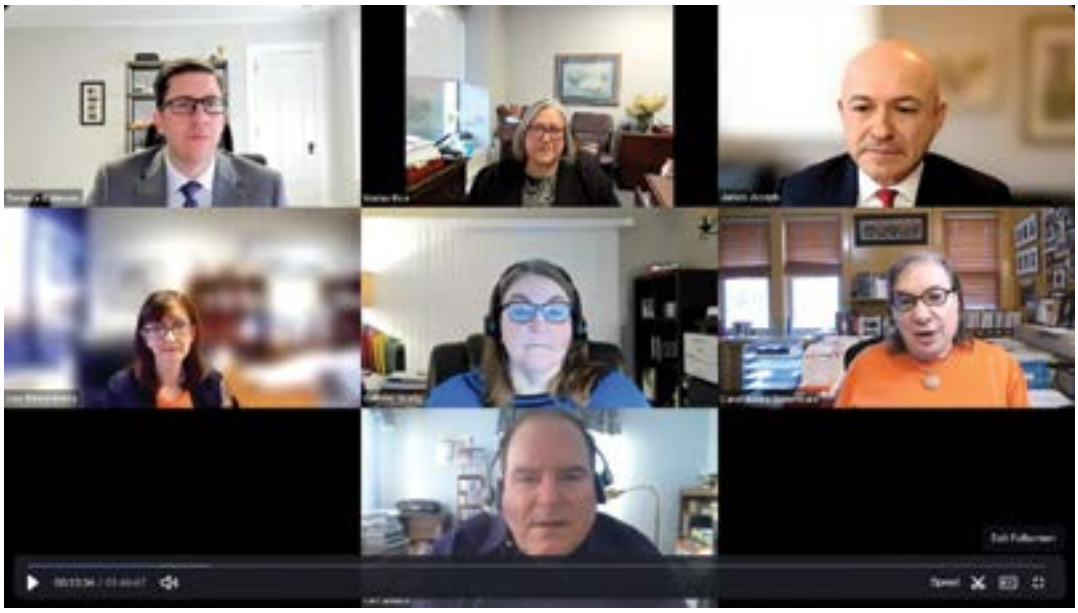
It has not been without challenges though

Ennico is working longer hours than ever and becoming a "prisoner of the house." He has established some clear boundaries to better control his time.

Secondly, his home office is now on full display with clients through Zoom meetings. He suggested that lawyers be mindful of their surroundings.

Carol Schiro Greenwald (MarketingPartners) agreed and added that lawyers must prepare for Zoom meetings as they would for an in-person meeting.

"The leader of the meeting is totally responsible for how the meeting feels. The rest of us are responsible for making the meeting work," Greenwald said.



Top Row: Terence Robinson, Marian Rice, James Joseph
Middle: Lisa Shrewsberry, Colleen Grady, Carol Schiro Greenwald.
Bottom: Clifford Ennico

New values

A common assessment of panelists during the roundtable was an increased need for firms to have greater flexibility for both staff and clients. It was common for attorneys to ask themselves hard questions about their practices and lives during the pandemic and what they truly valued.

Greenwald said that employees want flexibility, autonomy and respect.

Lisa L. Shrewsberry (Traub Lieberman Straus & Shrewsberry) added that firms must put their words into actions.

"A firm's culture is its values. Its values are actions," said Shrewsberry, "You can't say your firm is family friendly if no one is acting."

She suggested that partners have to get buy-in from everyone and commit to the culture.

Panelists agreed that they must establish new processes for their well-being.

> *"Pre-pandemic, we felt there was a lot of value and emphasis placed on being in the office. Now we love the remote environment."*
>
> — Colleen Grady

James Joseph (Joseph Law Group) said that having a daily routine can create boundaries for the attorney. He recommended that lawyers commit to something other than the practice of law in the morning. Checking email should not be the first priority.

"We must set time for ourselves to stay healthy," said Joseph. "Our mental and physical health is critical to our ability to practice."

Terence Lee Robinson (Muehe Maue & Robinson), a father of six children, wanted more control over his life and future and to get away from the "2400 billable hours per year" cycle.

"You have to have a plan for your own career," said Robinson." For succession planning, you need a plan for short-term, mid-term and long-term."

He recommended that lawyers ask themselves: What do you want for your own life?

"Have a plan. Start early. Focus on your brand. Focus on your clients," said Robinson.

How New Federal Law Protecting Patients From Surprise Bills Works With NY Law

By Kathleen Lynn

The federal No Surprises Act took effect Jan. 1, protecting patients nationwide from being hit by surprise medical bills when they are unexpectedly treated by a health care provider outside their insurance network.

In New York State, a similar law has been in effect since 2015. Figuring out how the state and federal regulations will work together to protect consumers was the topic of a panel discussion at the Health Law Section Annual Meeting.

"New York had extensive existing protections," said Harold N. Iselin of Greenberg Traurig in Albany, counsel to the New York Health Plan Association, which represents managed care plans and prepaid health service plans. "In many ways, our law in New York was a model for some of the federal provisions."

But there are some differences, Iselin said. When the laws disagree, the standard that prevails is the law that gives more protection to the consumer, he said. "In analyzing the law and the overlap between the state law and the federal law, it's most helpful if you put yourself in the shoes of the consumer and think, 'What benefits me the most?' That will generally take you to the right result," Iselin said.

For example, the federal law does not offer protection against surprise charges related to an ambulance ride on the ground, but New York's law does, so the New York rules apply. (On the other hand, New York has no protections related to air ambulances, but the federal law does, so the federal law will apply in those cases.)

And New York law only covered surprise bills from doctors and hospitals. The new federal law covers such bills from all health care providers, so that protection will now apply in New York.

Another difference: New York's law said that pregnant patients could continue with the same health care provider if the provider left the health plan in the patient's second trimester or later. Federal law extends this protection to the entire pregnancy.

One of the challenges of the No Surprises Act is calculating how much insurers should compensate out-of-network health care providers, now that patients won't be required to pay more than the in-network rates.

"There has been considerable legislative and policy debate on how to determine the amounts that plans should pay to compensate [out-of-network] providers," said Robin Gelburd, president of FAIR Health, a not-for-profit that provides data on medical costs nationwide. Gelburd also spoke on Tuesday's panel.

Under the No Surprises Act, if insurers and providers cannot agree on a reimbursement amount, they can turn to an independent arbitrator to determine the payment. The arbitrator is expected to take into consideration the in-network median rates in a geographic area.

The American Medical Association, American Hospital Association, and several other organizations have sued the federal government, saying the arbitration process favors health insurance companies.

FAIR recently announced a new product in response to the No Surprises Act, FH NSA Reference File, that provides data on median in-network rates. FAIR has collected information on more than 35 billion private medical claims over the past two decades, and its pricing data is already used as a benchmark by five states, including New York, that have surprise billing laws, Gelburd said.

The No Surprises Act is considered a major victory for consumers. The surprise bills would sometimes arise out of medical emergencies, even at in-network hospitals, where the patients were unexpectedly treated by out-of-network specialists. According to the Kaiser Family Foundation, about one in five emergency room visits resulted in a surprise bill.

Harold N. Iselin of Greenberg Traurig in Albany, counsel to the New York Health Plan Association, examines the continuity of care during the Health Law Section Annual Meeting.

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2022 Annual Meeting Award Winners

Daniel D. Shonn Jr., Coughlin & Shonn

Emilia Rodriguez

50+ Section: Jonathan Lippman Pro Bono Award

Kathleen Scott, New York State Department of Financial Services
Business Law Section: David S. Caplan Award for Meritorious Service

Ira Salzman, Goldfarb Abrandt Salzman
Elder Law and Special Needs Section Lifetime Achievement Award

Hon. Kathie E. Davidson, dean of the New York State Judicial Institute
Judicial Section Advancement of Judicial Diversity Award

Hon. Robert G. Main, Jr., Franklin County Judge
Judicial Section: Distinguished Jurist Award

Dennis W.H. Kwok
International Section: Distinction in International Law and Affairs

Skadden, Arps, Slate, Meagher & Flom

Paul, Weiss, Rifkind, Wharton & Garrison

Hogan Lovells US

Phillips Lytle

Barclay Damon

Bond, Schoeneck & King

Copps DiPaola Silverman

Justice for All Law Firm Honorees

Michele Kahn, Kahn & Goldberg
LGBTQ Law Section Vanguard Award

Dennis Greenstein, Seyfarth Shaw
Real Property Law Section Professionalism Award

Katherin M. Crossling, Heidell, Pittoni, Murphy & Bach
Women in Law Section: Kay Crawford Murray Memorial Award

Hon. Leslie E. Stein, Albany LawSchool
Women in Law Section: Ruth G. Schapiro Memorial Award

J'Naia Boyd
Young Lawyers Section: Outstanding Young Lawyer Award

Elissa Hecker

Lauren Hammer Breslow

Outstanding Pro Bono Volunteer Award

This is not a complete list of winners. NYSBA sections and committees give out additional awards throughout the year.

'It Was Like Building a Plane in Flight.' Health and Legal Experts Look Back on Pandemic Policy

By David Howard King

When looking back at his work before the COVID pandemic, Joseph Fins, chief of the Division of Medical Ethics at New York Presbyterian Hospital and Weill Cornell Medical College, says he is haunted by one regret.

In 2015, the New York State Task Force on Life and Law published a report on ventilator distribution in the event of an avian flu. The report examined the 2003 SARS outbreak in Toronto and looked at how New York could be better prepared. "It looked at the scarcity of ventilators and how they should be allocated and developed a scoring system to prioritize ventilators." According to Fins, the governor's office never took this issue on. "It wasn't politically viable because it would scare people," says Fins.

Fins made the comments as part of a panel of the Health Law Section program, "Law and Ethics during the Pandemic: Individual Rights vs. the Common Good," moderated by Laura M. Alfredo, senior vice president and general counsel for the Greater New York Hospital Association.

Along with Kapil Longani, who served as counsel to the mayor of New York City during the pandemic, the panel looked back at the ways the health and government sectors could have worked better together during the early days of the COVID-19 pandemic and examined how the outbreak has impacted our democracy.

Fins explained that because things moved so quickly in the early days of the pandemic it is easy to look back and second guess or assume mistakes were made, if you do not understand how science works.

"In the early days of the pandemic we didn't give steroids, but it turned out steroids were the silver bullet to decreasing mortality," said Fins. "It was like building an airplane in flight; that's how science evolves.

Fins said veteran physicians were suddenly in the position of being novices. "In the interface of medicine and the law we like bright line distinction," said Fins. "But we were in blurry states with dotted lines."

However, the blurry lines of developing science had major interplay with the considerations and restraints of the political and legal arenas.

Longani detailed the impact of the state legislature's decision to give former Gov. Andrew Cuomo far ranging emergency powers to deal with the pandemic. "That became very frustrating to people in New York City," said Longani, who recalled working with the state counsel on tweaking and interpreting executive orders issued at midnight to make sure he was able to convey them properly to the public by 8 a.m.

"How you treat people in Poughkeepsie should not be the same as you treat people in New York City," said Longani. "There were real issues with that dichotomy. On the other hand, the federal government gave us absolutely no guidance and arguably that's consistent with the constitution, but, as a practical matter, we could have used more advice."

Longani relayed how the founding fathers decided not to directly address emergency powers in the Constitution and instead left response efforts to localities. "Hamilton and Jefferson went back and forth on this, and they avoided it," said Longani. "The word 'emergency' isn't in the Constitution."

Longani and Fins agreed that it would have been helpful to have more "bright lines" to guide both the medical and public

service fields through the pandemic, rather than leaving all the decisions to one powerful politician. Fins noted that more work could have been done in some areas to ensure that there were clear paths forward, including the ventilator plan as well as other vaccination strategies.

"We don't want to lose our democracy to a pandemic," said Fins, who drew comparisons between the emergency we currently face and that of the plague of Athens as described by Thucydides where the once revered democracy falls into anarchy and disarray when faced with mounting pestilence and death.

Longani complemented Fins' ancient Roman theme with his own, discussing how in the face of emergency the Roman Senate would appoint an apolitical leader tasked with steering the empire for six months. "For hundreds of years there were only three occasions when the Senate extended those powers. Here, the governor had powers longer than six months– that was emblematic of the value our society put on emergency powers," said Longani.

Both Longani and Alfredo say they believe the courts are going to begin to start being more skeptical of mandates the longer the pandemic continues. "I would keep thinking courts were going to push back more robustly," said Longani. "There were several times I thought the state and city had gone to a place the courts were going to push back via a restraining order, but the courts instead deferred to public health experts. I think the courts over time, if we continue in the pandemic much longer, we will see more that they are going to restrict the authority of state governments to issue these mandates."

Kapil Longani, Dr. Joseph Fins and Laura Alfredo discussed the COVID-19 epidemic, ethical issues in looking at individual rights versus the common good, the impact on the health care system in New York, and implications for the future.

Alfredo says she believes that some of the twists and turns of developing science, new strains and vaccine efficacy may further strain how the courts perceive new mandates on vaccinations or other public health initiatives. "How far are the courts willing to tolerate government intrusion as some people describe it?" asked Alfredo. "Mandates that may have been easily upheld a year ago the courts may look at very differently now that we are dealing with a different animal in Omicron. So where does it end?"

Fins stressed that he believes vaccine mandates are working and are necessary for the public good. He advocated for increased public education around science and public health as well as moral appeals. He said that getting vaccinated speaks to the moral teaching included in almost every religion that you should treat your neighbor as you want to be treated. "Not being vaccinated endangers life. We need to look at this in a utilitarian manner, the lifesaving needs of a vaccine overwhelm the right to refusal. We need to have a little more communitarianism and less libertarianism when it comes to the common good," said Fins.

What Lawyers Must Understand About Cloud Computing and Ethics While Working Remotely

By Brandon Vogel

When having a conversation with a client while working at home, take a close look at your surroundings. Is there a smart device, like an Amazon Alexa, in your presence?

If so, move immediately or shut it off, because a third-party could have access to your client's sensitive information.

More than 600 lawyers listened to Niki Black, legal technology evangelist at MyCase, as she described the pitfalls of working from home on the Annual Meeting program, "The Ethics of Working Remotely During The Pandemic And Beyond." She focused on three core issues: technology competence, secure communications and the unauthorized practice of law.

Technology competence

The COVID-19 pandemic pushed lawyers into the cloud.

According to the MyCase Legal Industry Survey, 88 percent of respondents shared that their firms used cloud computing software in 2001, up from 76 percent pre-COVID.

Eighty percent reported that remote working tools were part of their firm's long-term business continuity strategy.

Because we have all been working remotely, bar association ethics committees have stepped up their game with practical guidance, Black said.

She explained that part of attorney competence is technology competence.

Michigan Bar Ethics Opinion EI-381 states that: Lawyers have ethical obligations to understand technology, including cybersecurity, take reasonable steps to implement cybersecurity measures, supervise lawyer and other firm personnel to ensure compliance with duties relating to cybersecurity, and timely notify clients in the event of a material data breach.

She credited the NYSBA Guide for Virtual Court Appearances for helping to fill in "the Zoom gaps" when the pandemic started, which included dressing as if appearing in court, one person speaking at a time, and avoiding food and drinks on camera. Water is OK, but nothing else, she advised.

"We are more forgiving of dogs barking or kids showing up on camera," said Black. "We've all been there."

Secure communication

The Pennsylvania Bar Association Formal Opinion 202-03 said that it is ethical to use cloud computing. American Bar Association Opinion 477 affirmed that lawyers may need to use a secure client portal option over "inherently insecure" email.

Black suggested that lawyers note the use of client portals in their engagement letters, as patients do to communicate with their doctors and nurses securely. She has advocated for lawyers to embrace client portals since 2009.

Benefits include a centralized location for all communications, the ability to review all changes and edits, and the ease of use for clients.

The Pennsylvania Bar also recommended that Zoom links should not be shared publicly, certainly not on social media. Hosts should require a password and remind guests to update the latest versions of software.

Niki Black, legal technology evangelist at MyCase, informed lawyers on what to know about cloud computing and ways to stay safe.

Black recommended to use strong passwords; avoid public wifi; secure all remote locations; save data on the office network rather than the device; and update software regularly.

"Any account that you have online should have MFA," said Black, on two-step authentication.

She advised not to have work-related conversations in the presence of smart devices such as Alexa or Siri. "It is unclear how much they are listening, but they absolutely are listening," said Black. "You will likely see ads after you mention a product. You do need to be aware of your phones in that respect."

Attorneys should also opt for professional versions of email over AOL or Gmail, as well as file storage systems like Dropbox.

Unauthorized practice of law

"Where technology goes, the business world follows," said Black. She cited the examples of Xerox and Kodak not adapting to technology advances that sealed their fate.

ABA Formal Opinion 495 states that lawyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted. There are some conditions, though. The lawyers must not hold themselves out as being licensed to practice in the local jurisdiction and the local jurisdiction must not consider it the unlicensed or unauthorized practice of law. Lawyers cannot advertise in the local jurisdiction and cannot provide or offer to provide legal services in the local jurisdiction.

Black also said that New York's Judiciary Law 470, which requires lawyers admitted to practice in New York – but residing in other states – to maintain a physical law office in New York State, is outdated and antiquated.

How NY Lawyers Can Help Curb Human Trafficking

By Paula L. Green

New York lawyers can help curb human trafficking in the state's labor market by tapping into a wide range of existing laws and social services meant to help trafficking victims take back their lives. Yet lawyers need to recognize the telltale signs surrounding these victims and understand how to use the laws and resources that can help pull victims out of the labor and sex trafficking quagmire.

The New York State Bar Association gave lawyers guidance through a CLE program, "The Impact of COVID-19 On Human Trafficking In The Labor Market." The session also commemorated the U.S. government's designation as January as National Human Trafficking Prevention Month, a recognition made since 2010.

"Traffickers thrive in the shadows," said panelist Nora Cronin, adjunct professor, John Jay College of Criminal Justice in New York City. With expanded awareness of victims' plights, lawyers, along with health workers, are in a unique position to extend help to these traumatized workers. "We need to use any moment we can, when they are away from their traffickers, to help them," she said.

Margaret J. Finerty, panel moderator and a partner at Getnick & Getnick in New York City, said 2007 was a watershed moment with the creation of the New York State Interagency Task Force on Human Trafficking. "Yet many sex and labor trafficking victims are hiding in plain sight," said Finerty, who is NYSBA's representative on the task force. "COVID has exacerbated the problem."

The task force is co-chaired by the commissioners of the Division of Criminal Justice Services and the state Office of Temporary and Disability Assistance. It aims to ensure that law enforcement agencies and social service organizations have the necessary training and education to coordinate and implement the significant changes in Penal Law and Criminal Procedure Law that led to the New York State Anti-Trafficking Law in 2007. It created the crimes of labor trafficking and sex trafficking and provides immunity for victims and benefits and services. There are also regional task forces.

Estelle Davis, counsel to the Division of Immigrant Policies and Affairs in the New York State Department of Labor, said labor trafficking victims face many obstacles that keep them from leaving their employers or reporting horrid working conditions to authorities. While many workers are undocumented, others cross the border with valid work visas only to have their employers confiscate their passports. Workers are threatened with violence or physically abused. They are locked in the basements of restaurants and laundries. Threats are made against family members living in the state or even in the worker's home country. The most common situation are threats made to call the police about a worker's immigration status.

"Why do they stay?" Davis asked. "The employer is their primary source of information in the United States. They don't speak English. They've experienced trauma. It is a rational belief for them to believe these threats."

She added that New York State labor laws apply to workers regardless of their immigration status and employers that do not pay minimum wage or overtime pay, force workers to clock out, yet still keep them working, or appropriate their tips are violating these workers' rights.

One tool lawyers can use when they suspect a trafficking situation is the New York State referral process. This simple form can be filed by any social or legal service provider to alert authorities to an illegal trafficking condition. Staff from the Division of Criminal Justice Services, consulting with the Office of Temporary and Disability Assistance, review the referrals to determine an individual's eligibility for assistance.

Another tool lawyers now have to help trafficking victims recover and create new lives is the Survivors of Trafficking Attaining Relief Together Act (START). Signed by New York State Gov. Kathy Hochul in November 2021, the law clears the records of human trafficking victims for convictions resulting from the period of exploitation. Before the act's passage, survivors could only petition the courts to clear convictions for prostitution.

Gabrielle Masih, a social worker and referral manager at Restore NYC, said the nonprofit agency works with lawyers and helps human trafficking victims rebuild their lives and access safe housing, food, financial help, support in obtaining visas and mental health services. The START Act will help a private criminal defense attorney, for example, expunge the criminal charges a labor trafficking victim acquired while working as a drug mule. "That will help the person find safe work," she added.

The pandemic, with its large-scale layoffs, heightened the vulnerability of trafficking survivors and handed traffickers more opportunities. Masih said 80% of the organization's clients lost their jobs when the pandemic hit in March 2020. These people lost their financial resources and traffickers took advantage.

"Traffickers don't look at people as people. They look at survivors as vulnerabilities and how they can exploit them," Masih said, adding the agency's goal for 2022 is to keep helping these survivors find safe work.

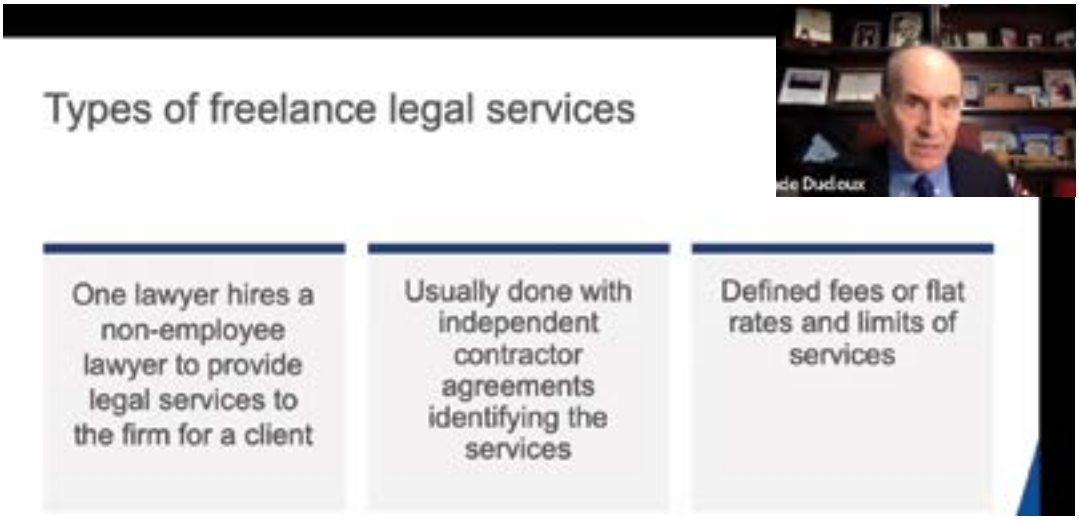
This article is about a CLE program that ran prior to Annual Meeting.

How Freelance Legal Work Can Be Handled Ethically

By Kathleen Lynn

If a law firm pays a contract lawyer $125 an hour to write a brief, can the firm ethically bill the client $300 an hour for that lawyer's time?

That's the kind of question that can arise when law firms use freelance or contract lawyers, according to Claude E. Ducloux, director of Education, Ethics and State Compliance at LawPay and former chair of the Texas Center for Legal Ethics. Ducloux gave a talk on the ethics of freelance hiring during Annual Meeting.



Claude E. Ducloux, director of Education, Ethics and State Compliance at LawPay and former chair of the Texas Center for Legal Ethics, discusses the ethics of freelance work.

The answer to the billing question is no, Ducloux said. Most ethics rulings have found that it's OK to add a surcharge to reflect the hiring firm's overhead and its work supervising the contractor, he said. "But to double it – that's probably unethical," he said. "And you have to tell your client if they ask how much you paid the lawyer."

Freelance work can have benefits for hiring firms, offering them help or specialized expertise on a given case without committing to a new employee. For contractors, freelancing lets lawyers work flexible hours, which can be valuable to those with young children or other family obligations, Ducloux said.

But, he said, both hiring firms and freelancers should protect themselves by signing a contract spelling out the scope of the work, as well as specifying that the freelancer is an independent contractor.

"If you are a freelance lawyer, you need to very carefully define what the scope of representation is," he said. And he advised freelancers to make their bills very detailed to protect against fee disputes. "You get to tell the story of what you did through your billings," he said. In addition, he said, freelancers should ensure that the agreement provides that they will be paid for their work, no matter how the case is resolved.

Freelancers have attorney-client relationships with the underlying client, and they are bound by the rules of confidentiality, Ducloux said. He advised both hiring firms and freelancers to make sure the freelancer has no conflict of interest involving another client.

Ducloux also advised freelancers to have malpractice insurance and said they can often be added to the hiring firm's insurance policy. And he advised freelancers to be very cautious about charging a flat rate for their services, because sometimes there's more work than expected.

"It is a real danger to try to do a flat rate agreement, unless you really know what you're talking about and you write down the services that will be covered – with the implication that additional services are not included in the price," he said.

He also advised hiring firms to tell their clients if they use freelance lawyers. "Why would you not want to do that?" Ducloux asked. When he uses a freelancer, he discloses to the client how much he is paying for those services, he said.

Other advice for hiring firms: Evaluate the freelancer's education and experience. Make sure their license is in good standing. Check references. Ask about any possible conflicts. Clearly communicate, in writing, the responsibility for deadlines, filings and so on. Be available for a freelancer's questions.

Ducloux closed by reminding the audience of the need for lawyers to stand up for justice and democracy.

"It's our job as defenders of the rule of law to support the fair administration of justice, make sure that people understand that the judiciary is the third branch [of government] and speak out as true professionals," Ducloux said. "We have to continue this wonderful experiment in democracy, and the only ones who can help us through it are you, the members of the legal profession."

Two Years Into COVID, Trends on Litigation Are Emerging

By Kathleen Lynn

Vaccine mandates, insurance claims, unpaid rents, workplace contagion – COVID-19's fallout has been felt throughout the business world. And after nearly two years of legal battles, trends are emerging in how COVID-related commercial cases are being argued and decided, a panel of lawyers said during the Commercial and Federal Litigation Section's Annual Meeting.

The panelists discussed COVID litigation in New York State that involved real estate, insurance, employment, and securities.

When disputes have arisen over COVID-related insurance claims, courts have tended to side with insurance companies, said Benjamin I. Bassoff of Foley & Lardner in New York. He said judges have generally decided that first-party property insurance policies covering physical losses do not cover loss of use of properties (such as restaurants and hotels) to comply with state executive orders and restrictions in response to COVID-19.

And in specialty insurance, such as travel insurance policies, plaintiffs have tried to argue that a government closure mandate or "stay-at-home" order amounts to a "quarantine" (which is sometimes included in such policies as a covered event). But, Bassoff said, courts have generally rejected that argument on the ground that "an order aimed generally at the public for the purpose of limiting the spread of disease is not you, a person, being quarantined within the [meaning] of the policy."

COVID has led to securities litigation involving companies that had outbreaks in their facilities, such as Tyson Foods, and companies whose profits were affected, said James J. Beha II of Morrison & Foerster in New York, who usually represents defendants in securities litigation.

For example, a lawsuit against an operator of private prisons alleged that the company didn't properly disclose the costs of complying with COVID safety measures, or the risk of losing government contracts if it didn't. A motion to dismiss that case was denied.

On the other hand, a case against Norwegian Cruise Lines, alleging that it lied in January 2020 — two months before the pandemic was declared a public health emergency in the United States in March 2020 — about the impact of COVID, was dismissed.

"The big question in these cases is whether the company is doing its best to make predictions, or whether they are misrepresenting present, known risks to their business," Beha said. He quoted Yogi Berra: "It's tough to make predictions, particularly about the future."

Commercial real estate was hit hard when stay-at-home orders kept workers out of offices and shoppers out of stores. Many tenants stopped paying their rent because of the pandemic. However, New York courts held that notwithstanding the damage that the tenants may have suffered, their leases should be enforced as written, according to Luise A. Barrack of Rosenberg & Estis in New York.

Now that COVID has been a reality for close to two years, tenants and landlords are both seeking to add clauses to new leases protecting their interests if the pandemic disrupts business again. "It's very much on people's minds," Barrack said. "This was something that was unanticipated which now we can anticipate."

Judge Margaret A. Chan of the Commercial Division of New York State Supreme Court, New York County, discussed a case in which a family had booked the Edison Ballroom in New York City for their daughter's April 2020 bat mitzvah. When the state shut down large gatherings, the venue returned only part of the deposit. Judge Chan awarded the full deposit amount to the family, because the contract had provided for a refund if the event couldn't take place because of "acts of a governmental authority."

In employment law, "the hot topic of the moment" is the Supreme Court's decision to stay a Biden administration OSHA mandate that large employers require vaccines, according to Riane F. Lafferty of Bond Schoeneck & King in Buffalo.

But other vaccine mandates have largely been upheld, including state and federal mandates affecting health care workers, she said.

And employers in New York can require vaccines on their own, Lafferty said. She is seeing an increase in employees seeking religious exemptions from vaccines. As for employees who are infected with COVID at work, they are generally limited to workers' compensation benefits, Lafferty said.

With more employees working from home, she said she is working with clients to set up policies to monitor performance remotely.

The panel was moderated by Stephen P. Younger of Foley Hoag in New York.

First Department Presiding Justice Rolando Acosta speaks during the Commercial and Federal Litigation Section's Annual Meeting program.

More Than Half of New York's Municipalities Have Decided To Keep Marijuana Dispensaries Out

By Paula L. Green

More than half of New York State's 1,520 municipalities have decided to keep marijuana dispensaries or consumption lounges out of their communities.

The Marijuana Opt-Out Tracker, created by the Rockefeller Institute of Government, shows that 771 communities are not allowing marijuana dispensaries for adults to open for business within their borders, while 879 communities have chosen to keep out consumption sites.

These are the only two types of facilities that communities can opt out of under the provisions of the New York Marijuana Regulation and Taxation Act, which was signed into law on March 31 of last year. Lawmakers gave cities, towns, and villages until the end of December to opt out if they didn't want dispensaries or consumption lounges – or both – to set up shop.

During the Cannabis Law Section's panel discussion, Heather Trela, the Rockefeller Institute of Government's director of operations, said that some of the communities that opted out might change their minds. If a community did not take action by Dec. 31, those two types of facilities will automatically be allowed. Communities cannot weigh in on other types of activities governed by the legislation, such as production facilities, delivery services, medical marijuana and possession of cannabis.

While updated regularly, the tracker does not represent real-time, official information on municipalities' opt-out decisions. The Albany based institute, the public policy research arm of the State University of New York, gathered the information from municipal board minutes, public notices and town hall videos.

"We're going to follow this process all the way through," said Trela, referring to other provisions that will come into play such as how communities might use zoning laws to govern the placement of these facilities. Some of the reasons behind opting-out included a lack of state guidance; concern about the location of these facilities near schools or churches; and concern that users of consumption sites may leave the premises and drive under the influence.

Yet, with time and guidance, some communities may consider revising local zoning laws and place these facilities, for example, in industrial zones. "Communities have some control. It's not the Wild West," said Trela.

In response to a question posed by Cristina Buccola, the moderator of the panel, Trela said that villages and towns opted out at a higher rate than cities but there were no noticeable geographic trends. "Some urban areas opted out while some very rural communities opted in because they saw it as an economic development opportunity to fill empty store fronts," she said.

Trela said the institute will continue to monitor trends, such as what criteria the state uses to select the dispensary and consumption sites; where the licenses end up; how these operations affect a community's economic development; and the evolution of any permissive referendums. [Unique to New York State, a permissive referendum lets voters petition for an authorized resolution to appear on a ballot. Once on the ballot, registered voters decide the fate of the resolution, support or overturn, by majority.] The institute will also track the development of the regulations governing growing cannabis at home, which are to come into play 18 months after the first dispensary opens.

The first part of the panel, also moderated by Buccola, focused on how the community reinvestment funding options of the act work. In introducing the panel, Lynelle Bosworth, chair of NYSBA's new Cannabis Law Section, said the goal behind the legislation was to empower and reinvest in communities that have been disproportionally affected by the misguided War on Drugs. The act earmarks 40% of the tax revenue generated through legalization into the Community Grants Reinvestments Program.

Experts in California and Illinois, where the use of marijuana is legal, spoke about their experiences with community programs. Viewers heard from Alejandro Raygoza, a grants specialist and program lead in the community and local equity grants unit of the California Governor's Office of Business and Economic Development (known as GO-Biz), and Delrice Adams, executive director of the Illinois Criminal Justice Information Authority.

Top row: Section Chair Lynelle Bosworth, NYSBA President T. Andrew Brown, Neil Wilner.
Bottom: Connecticut House Majority Leader Jason Rojas, New York Cannabis Control Board Chair Tremaine Wright, Jeremy Unruh.

New Cannabis Law Section Formed

By Brandon Vogel

The New York State Bar Association has created a new Cannabis Law Section for lawyers looking for guidance in this emerging market and practice area.

The decision to convert the Committee on Cannabis Law to a section was approved at the Jan. 22 virtual meeting of the House of Delegates – the association's governing body. The change will enable more members to participate in the section's work and also allocate additional resources to expand its initiatives. Members can join sections in their fields of practice or interest while committee membership is limited.

Established in 2017, the committee served as the NYSBA panel of experts regarding the emerging body of law related to cannabis, both on the state and federal level. The committee drafted legal comments, proposed legislation, pushed for the adoption of policies and created CLEs.

"Converting the committee into a section will expand the resources of the committee to better respond to the rapidly emerging area of law, and thereby increasing the influence of the section and the value of membership in the association," wrote Section Chair Lynelle K. Bosworth of Albany (Greenberg Traurig).

Cannabis law is wide-ranging and affects business law, criminal law, environmental and employment law, among others. Cannabis legalization will also impact other practice areas such as state and local government law; food, drug and cosmetic law; intellectual property; and trusts and estates.

The recent enactment of the Marijuana Regulation and Taxation Act legalized adult-use cannabis, expanded the state's medical cannabis and cannabinoid hemp programs and implemented a number of criminal law reforms.

The MRTA also created the Cannabis Control Board and Office of Cannabis Management, a new regulatory agency charged with implementing the provisions of the law, promulgating regulations, issuing licenses for operation, and pursuing enforcement actions. Lawyers throughout the state are advising their clients on how to navigate this new and evolving frontier.

In addition, cannabis is not legal in all 50 states nor on the federal level, creating a complex patchwork of laws and presenting a broad spectrum of challenges for attorneys and their clients. In the last several years, the committee has sought to give attorneys the information that they need to navigate this area of law by sharing updates, resources, and best practices to set the highest possible legal and business standards for licensed entities and their cannabis products.

NYSBA recently launched a new Cannabis Institute, an ongoing series of programs on the MRTA, which has been widely hailed as one of the most progressive cannabis laws in the nation. The institute will educate attorneys, policy makers, and members of the public on the implications and impact of the new law, touching on topics such as equity, labor law, social justice and more. Recent programs included "Expungement of Cannabis Convictions" and "Cannabis Conviction on Your Record? What You Need to Know Now about Expungement."

Members can now join by visiting the NYSBA website at NYSBA.ORG/CANNABIS.

New York State Bar Association and Bar Foundation Launch Attorney Well-Being Fundraising Campaign

By Susan DeSantis

The New York State Bar Association and the New York Bar Foundation have launched a new fundraising campaign to address attorney well-being.

Contributions will help provide relief to those struggling with a wide variety of mental health and well-being challenges – from physical illness to substance misuse.

"In my decades of practice, I have found that people who can be their true selves are the most successful. Healthy lawyers lead to better outcomes for everyone involved," said President T. Andrew Brown. "The State Bar Association is fully committed to ending the stigmatization of those who seek help. Partnering with The New York Bar Foundation is an important step as we continue to create a culture of support and inclusion for our members."

"The pandemic has taken a toll on all of us," said Carla Palumbo, president of The New York Bar Foundation. "As lawyers, it is critical that we stay healthy to maintain the public trust and provide legal counsel to our clients in a professional and ethical manner. We believe that all of our members will want to give to this worthwhile cause."

In October 2021, the Task Force on Attorney Well-Being released a far-reaching report on the status of the industry's collective mental and physical health entitled, "This is Us: From Striving Alone to Thriving Together," which is available on the NYSBA website.

"The report makes clear that many New York attorneys are in crisis," Brown said. "This was the case prior to COVID-19, but the stress and challenges of nearly two years of the coronavirus pandemic has exacerbated an already troubling situation."

Data provided by the Centers for Disease Control reveals that prior to COVID-19, 11% of adults reported symptoms of anxiety or depression. As of December 2020, that number had risen to a staggering 42%. And the legal profession is not immune to this phenomenon. A 2021 ALM study found 70% of practicing attorney respondents said the pandemic has worsened their mental health.

To learn more or make a contribution, please visit https://givetnybf.swell.gives/

How Lawyers Can Make Sure LGBTQ Clients Don't Face Discrimination

By Paula L. Green

When working with LGBTQ clients, attorneys need to arm themselves, not only with the latest anti-discrimination laws and ethical codes, but with first-hand knowledge of their client's legal goals and personal perspectives.

To avoid unnecessary courtroom confrontations, lawyers should learn their clients' stance on relevant issues – such as the use of gender identity pronouns – before a case begins, several speakers said at the opening panel "LGBTQ Lawyering: Representing Our Communities," of the LGBTQ Law Section Annual Meeting.

Hon. Lewis A. Silverman urged attorneys to talk with their clients about the individual's goals if gender discrimination does emerge during a hearing. "You need to have a good conversation with your client beforehand. Some are interested only in the lawsuit at hand. Others are willing to make a public display…to raise a gender identity issue," said Silverman, a judicial hearing officer in the Suffolk County District Court.

Silverman also suggested sending a letter, which defines the pronouns a client wants to be used, to the judge and other counsel to avoid a public confrontation. Attorneys need to be ready to handle a judge's bias as not all judges are aware of the rules regarding gender identification. "Over the years, judges have been somewhat hostile to gender identity," Silverman said. "Some can still be hostile."

Attorneys can have a small folder on hand, filled with copies of ethical rules, to use during a bench conference with the judge and other counsel. Yet Silverman cautioned to avoid a public on-the-record confrontation that could alienate a judge.

Assessing which party in a courtroom is creating a problem might be necessary. Judicial rules, such as Sections 100.2 and 100.3 of the Rules of the Chief Administrative Judge (22 N.Y.C.R.R. Part 100), govern a judge's activities and responsibilities regarding lawyers, staff and court officials. Yet while these rules encompass court personnel, judges at times can have little control over these officials and offensive language can be used repeatedly.

Erin Harrist, supervising attorney at the Legal Aid Society Law and Policy Unit in Brooklyn, said she has heard court officers use language such as "here comes the he/she case." She agrees it is important to talk with a client – before a case begins – about how to handle gender discrimination in the courtroom. "The person might have family members in the courtroom," said Harrist, explaining why a client doesn't want to focus on offensive language. Speaking to court officers after a hearing can be helpful as can be appealing to administrative court officials for training for the offenders.

Harrist said lawyers must follow Rule 8.4 (g) of the New York State Rules of Professional Conduct, which governs misconduct in the practice of law. A lawyer or law firm cannot unlawfully discriminate in the practice of law because of numerous factors, including sexual orientation, gender identify or gender expression. The rule draws from the New York City and New York State anti-discrimination laws, also known as the human rights laws.

Respecting a client's chosen gender identity for people who are detained in county jails or the Rikers Island jail is extremely important. Court and police paperwork can carry the birth gender identity and that can determine in which facility a client will be housed. "It can be an extremely dangerous situation," Harrist added.

Sarah M. Telson, deputy director of legal services at the LGBTQ Anti-Violence Project in New York, urged lawyers to consider the practices and perspectives about the LGBTQ community that exist in their own law firms or organizations. The company website should create a welcoming atmosphere, such as inclusive language in the mission statement. Hiring practices, dress codes and clear procedures for dealing with improper language and gender slurs spoken in the office should be laid out. There should also be practical procedures for staff members changing their names.

Samuel W. Buchbauer, an attorney in the New York City law offices of David A. Caraway, served as moderator of the opening panel, "Representing LGBTQ Clients and Ethical Considerations." He also laid out the red flags that trust and estate attorneys need to watch for when working with LGBTQ clients.

Clients need wills, for example, drafted with careful language to protect the rights of a client's long-term partner if the couple is not married. Guardian plans for non-biological children need to be detailed. Beneficiary forms need to be updated with the names of current partners. Medical directives, health care proxies and living wills must be considered. "Wills can be contested by unsupportive family members," said Buchbauer, adding that some family members can be "downright homophobic."

Christopher R. Riano, chair of the state bar association's LGBTQ Section, president of the Center for Civic Education and a lecturer in constitutional law and government at Columbia University, gave opening remarks before the start of the program, followed by Richard Saenz, senior attorney, criminal justice and police misconduct strategist, at Lambda Legal, in New York City.

Tax Laws Lag Behind COVID Reality

By Brandon Vogel

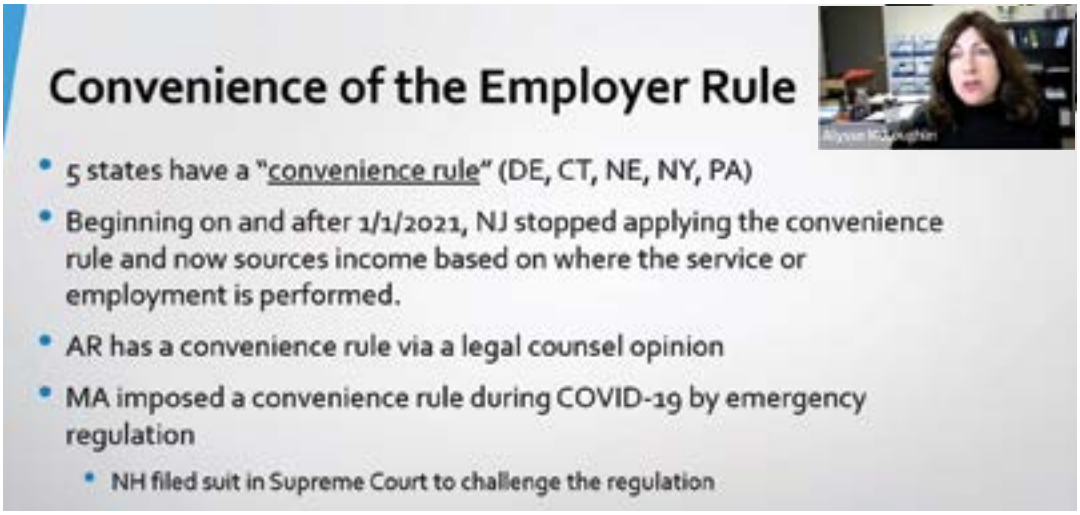
Tax laws must catch up with what has happened with the world as a result of COVID-19.

This was the assessment of panelists at the Tax Section Annual Meeting, "An Update on New York's Pass-Through Entity Tax and the State Tax Implications of Remote Work."

With employees telecommuting from a variety of locations during COVID — including their permanent addresses, vacation homes in other states and relatives' homes — the lines have blurred between where people are working and to which office they are assigned.

"This has exploded since the pandemic. As practitioners, we have seen this for years," said Alysse McLoughlin of Jones Walker. "This is affecting many more people because of people working from home."

Some individuals may end up becoming statutory residents of the states where they are sheltering.



Alyssa McLoughlin examines the "Convenience of the Employer Rule" during the Tax Section Meeting.

Convenience Rules

New York has the most recognized "convenience of the employer test," although McLoughlin argued that it is "to some extent, antiquated, because this seemed to have more relevance in a time period where people really did work from one office all the time."

Convenience has been broadly defined in New York cases. Required out-of-state work is permitted. But if the work could be done in New York, there could be trouble, said McLoughlin.

When non-resident telecommuters are assigned to a New York office but perform their services out of state for their convenience rather than the employer's necessity, New York will require the employers to withhold income tax on all of these employees' wages. Employers can establish the taxpayer's home office as a bone fide employer office and count days worked at that office as non-New York days, but New York imposes a strict factor-based test to these arrangements.

Even if the state of residence does allow a credit for the other state taxes, an incremental tax increase may occur when the resident state rate is lower than the state in which the employee's work office is based. Whether a new or existing employee job is classified as in-office or a remote job, or is in commutable distance or not is irrelevant. Connecticut, Delaware, Nebraska and Pennsylvania also apply the convenience rules. New Jersey stopped after Jan. 1, 2021 and now sources income based on where the service or employment is performed.

Convenience of the employer rules can result in double tax for a telecommuter when the employee's state of residence does not provide any credit paid to the state of the employee's work office for services performed while working from home.

In general, if the employee works from home for their own convenience, the workdays at home will be treated as days worked as the assigned work location.

Connecticut's rule is more generous than New York's. It only applies if a taxpayer's home state also applies the test.

Massachusetts applied an emergency regulation during COVID and continued to tax out-of-state residents teleworking for a Massachusetts employer. It also allowed residents working from home in Massachusetts for an out of state employer a credit for taxes paid to that state under a convenience rule.

States generally require employers to withhold tax based on where an employee performs services (may be the employee's "residence" state). States may also require withholding if an employee travels for work purposes to another state.

As employers begin to consider "work from anywhere" arrangements, they will need to put procedures in place to know where employees are working to ensure proper withholding.

What is an employer's obligation to determine the employee's location or residence? Can the employer rely on information provided by the employee?

Most of the time they can, unless they have knowledge or reason to believe it's wrong, said McLoughlin. "There are ways to eliminate the abuse. Companies wouldn't let people work from home if they thought the job wasn't getting done."

Some employers might prefer remote options because they can downsize offices and reduce costs, noted McLoughlin, but it might not be enough. Answering emails on the train ride home to another state or on the weekends can create issues about what constitutes working from home.

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