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New York State Bar Association

Task Force on the Post-Pandemic Future of the Profession

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Introduction & Executive Summary

The New York State Bar Association’s (NYSBA) Task Force on the Post-Pandemic Future of the Profession (“Task Force”) undertook study in Winter 2021 to review the effects of the pandemic—both short- and long-term—on the legal profession and the practice of law in general. In presenting our report, we must emphasize that this is an account of the New York State Bar Association on the future of our noble profession from the perspective of New York practitioners.¹

The practice of law in New York is unique. New York has more lawyers than most other states; more lawyers work in high-rise office buildings; many

¹ The House of Delegates of the New York State Bar Association has previously adopted several reports containing recommendations on the future of the legal profession, including, inter alia, the 2011 report of the Task Force on the Future of the Legal Profession, the 2021 report of the Emergency Task Force on Solo and Small Firm Practitioners, the 2021 report of the Task Force on Attorney Wellbeing and the 2022 joint report of the Committee on Legal Aid and the President’s Committee on Access to Justice on Access to Justice During the COVID-19 Pandemic. Links to these four reports are provided below. To the extent that any recommendations offered in this report may conflict with specific recommendations previously adopted by the House of Delegates, the specific recommendation offered in those reports would prevail as current established policy of the Association.

Joint Report of Committee on Legal Aid and President’s Committee on Access to Justice on Access to Justice During the COVID-19 Pandemic: https://nysba.org/app/uploads/2022/11/Committee-on-Legal-Aid-and-Presidents-Committee-on-Access-to-Justice_AFTER_web-1.pdf

Report of Task Force on Attorney Wellbeing: <https://nysba.org/app/uploads/2021/10/Report-on-Task-Force-on-WellBeing-APPROVED-HOD-no-comments-or-staff-memo.pdf>

Report of Emergency Task Force on Solo and Small Firm Practitioners: <https://nysba.org/app/uploads/2021/11/8.-Emergency-Task-Force-Solo-and-Small-Firm-Cover-report-comments-for-printing-new-cover.pdf>

Report of Task Force on the Future of the Legal Profession: https://nysba.org/app/uploads/2020/02/Report_FINAL_APR_14_W_COVER-1.pdf.

lawyers and staff have long commutes to the office using public transportation; many courthouses are antiquated; Wi-Fi is spotty in upstate New York; and many litigants do not have internet access necessary for a virtual courtroom.²

The profession is at a multi-level crossroads as the pandemic wanes. “Business as usual” is now better stated as “business can no longer be as usual.” We consider the legacies of COVID-19 in the context of the social issues altering the fabric of our Union. Simultaneously, we must ensure that we live up to our obligation to serve as best we can the residents and companies of New York, without regard to, among other factors, wealth, size, geography, age, ethnicity, race, color, religion, gender, sexual orientation, or disability.

The Rule of Law is essential to the distinctive American social contract. Lawyers, in their everyday legal practice, are essential to upholding the Rule of Law in America.³ We must embrace the understanding that our profession is a public calling requiring fidelity to those we serve as trusted counselors and representatives, while at the same time reflecting our obligation to the Rule of Law. The Task Force charge articulates its purpose rather clearly:

The foundational purpose of the New York State Bar Association is to advocate on behalf of the legal profession and the practice of law. Therefore, in

² See ABA National Lawyer Population Survey, *Lawyer Population Survey by State Year 2022*, AM. BAR ASS'N, https://www.americanbar.org/about_the_aba/profession_statistics; Isha Marathe, *No Easy, Inexpensive Solution to Remote Trials Impeding Litigants Without Internet Access*, LAW.COM, March 29, 2022, <https://www.law.com/legaltechnews/2022/03/29/no-easy-inexpensive-solution-to-remote-trials-impeding-litigants-without-internet-access>; Joshua Solomon, *Thousands Still Can't Get Internet Access. Will Broadband Funding Help?*, TIMES UNION, Sept. 30, 2022, <https://www.timesunion.com/state/article/new-york-internet-acces-solution-17454221.php>.

³ Orison S. Marden Lecture, *Keepers of the Rule of Law*, Louis A. Craco, Feb. 21, 2006.

preparation for the emergence from the COVID-19 Pandemic, the Association on behalf of its member attorneys must reflect on how the crisis has dramatically and determinatively affected the legal profession and anticipate how these changes may further alter the practice of law.

The Task Force on the Post-Pandemic Future of the Profession is thereby established to systematically review the effects of the pandemic, both short-term and long-term, on the legal profession and the practice of law in general. This review shall include study of the remote practice of law, the increased use of technology, the efficacy of virtual courts and tribunals, changes in client interaction, law practice management, access to justice, the delivery of legal services, and the education, training, expectations, and mentorship of law students and newer attorneys. The Task Force shall advise on the anticipated future impact of these changes on the practice of law and on attorneys. It shall make recommendations to ensure practitioner success and to safeguard and strengthen the future of the legal profession.⁴

To that end, the Task Force, chaired by Mark A. Berman, Esq., and John H. Gross, Esq., divided its work into four working groups, whose focused studies address the corpus of issues in our charge. They are:

- Attorney-Client Relations, chaired by Susan L. Harper, Esq.
- Access to Justice, co-chaired by Frederick K. Brewington, Esq., and Professor Joseph A. Rosenberg.
- New Lawyers and Law Students, co-chaired by James R. Barnes, Esq., and Professor Leslie Garfield Tenzer.
- Law Practice Management and Technology, co-chaired by Karen Greve Milton, Esq., and Anne B. Sekel, Esq.

⁴ NYSBA, *Task Force on Post-Pandemic Future of the Profession Mission Statement*, <https://nysba.org/committees/task-force-on-post-pandemic-future-of-the-profession> (last visited Feb. 2, 2023).

The four groups designed a survey that was distributed to NYSBA members, the results of which help form the predicate for this Report. In addition, the Task Force held virtual focus groups in different locations throughout New York, and each Working Group conducted their own virtual public forum. These focus groups and public forums were composed of a broad variety of practitioners and provided insightful anecdotal evidence that likewise served as a basis for this Report.

From the results of the survey, focus groups, and public forums, there are four sections to this Report drafted by each Working Group, addressing their findings and making recommendations for the future of the legal profession. These four sections necessarily overlap because common to each is an analysis of the impact of “good, the bad, and the ugly” through each respective Working Group’s unique perspective of what took place during the COVID-19 pandemic. The throughline is the need for technological “prowess” by the courts, lawyers, and citizens of New York so that the problems of New Yorkers can be effectively and fairly resolved.⁵

The Future Is Now

New York clients have remained as demanding as ever. No matter the type, clients demand instantaneous responses from their attorneys by way of a quickly convened call, Zoom, or a late-evening email. Our Pavlovian response to

⁵ Appendix A of this Report contains the survey sent to NYSBA members. Recordings of the public forums are available at <https://nysba.org/committees/task-force-on-post-pandemic-future-of-the-profession/>.

these communications is antithetical to ensuring attorney well-being and the understanding that our profession requires informed contemplation to arrive at the best client outcomes.

Client acceptance of virtual lawyering differs. Some clients are comfortable with remote conferences and meetings as well as with a hybrid work schedule. Other clients demand in-person meetings and object to hybrid schedules. The latter generally share a belief that “true” training and mentoring of their lawyers only occurs at the office or in court, therefore meetings with counsel need be in-person. Of course, this must be harmonized with lawyers who advocate for a flexible hybrid approach. The struggle for “work-life balance” is endemic in our profession.

Law firms can no longer hide from these issues and need to ensure that junior lawyers receive proper training, and to recognize the critical importance of boundaries and wellness. Junior lawyers now demand a hybrid work environment, whether law firms like it or not. At the same time, firms must devote time and effort to ensure that young lawyers are appropriately mentored.

Access to justice issues were only exacerbated by the pandemic. It is imperative that lawyers understand the fundamental equity issues inherent in addressing legal needs for marginalized communities. This means first to acknowledge and to take action to make their access to legal services easier, and then to make addressing their rights in court available. Ensuring the citizens of

New York have equal access to court proceedings, whether in-person or virtually, through improved court procedures, policies, and training, allows their legal issues to be addressed on a more level playing field. Second, we must urge the government to ensure broadband availability throughout New York State; seek to provide increased access to technology and software to enable better pro se litigants; to have trained individuals who can assist with such technology; and to improve access to easy-to-use forms. Thirdly, we must address the rural New York problem of “no lawyers.”

Law schools must adjust their curricula to teach law students how to practice law virtually and to encourage law students to select available courses in New York Practice. As to remote learning, law schools must ensure that robust student and faculty interaction is not lost. Synchronous instruction requires balance with asynchronous teaching.

Participation in NYSBA and affiliated associations waned dramatically during the age of COVID, borne of an already existing pre-COVID malaise among membership. The redoubling of ongoing efforts of NYSBA to recruit law students and young lawyers into the Association is essential to the future of the legal profession in our State. We must partner with deans of New York’s 13 law schools to infuse the importance of Association membership into students early on in their legal education.

NYSBA's efforts to ensure compliance with new cybersecurity rules and CLE requirements must be continued. Legal employers need to develop office-wide policies and protocols that support remote law practice for all employees, including back-office staff, and to promote a safe, efficient, and effective virtual law practice.

What does this all mean? New York needs to learn from the pandemic to ensure that our noble profession fulfills its mission: to provide the best representation to its citizens of this State, whether an individual or a corporation, and to ensure access to justice needs are met by taking advantage of technology through proper education, mentoring, and sponsorship. We underscore that New York State attorneys, with the assistance of NYSBA, must be educated on the newest technologies to properly represent clients. Recent and rapid developments in generative artificial intelligence (AI), virtual technologies and the use of cryptocurrencies have raised many novel questions for the legal profession that we need to come to terms with, including ethical questions regarding the formation of attorney-client relationships. We discuss these concerns later in this report. We identify some of the issues posed by these technologies and offer some suggestions to smoothly navigate their use.

Technology training only goes so far. The practicing bar requires the technology to service clients while safeguarding sensitive material. As recommended by the Law Practice Management and Technology Working Group,

NYSBA should pursue relationships with technology vendors to offer discounts on hardware and software to reduce the obstacle of cost so attorneys can be technologically prepared to operate in the post-pandemic world. NYSBA should endeavor to create a comprehensive technology resource center to provide advice on best practices relating to virtual technology (from setting up an effective and secure home office to virtual practice), case and/or client management software, technology support, and training. Such a resource will promote success in the post-pandemic practice of law.

The Survey

Nearly 2,000 individuals responded to the Task Force's survey. Summarized below are some of the more salient demographic percentages reflecting those participants. While not reflective of NYSBA's actual membership profile, the conclusions and recommendations contained in this Report need to be analyzed in the context of the below percentage:

- Approximately 70% of the respondents were over age 50;
- Approximately 70% of the respondents had over 20 years of legal experience;
- Approximately 54% of the respondents were males;
- Approximately 40% of the respondents were from the five boroughs of New York City;
- Approximately 44% percent of the respondents were litigators;
- Approximately 26% of the respondents were transactional attorneys;

- More partners than associates responded to the survey;
- Approximately 28% of the respondents were solo practitioners;
- Approximately 14% of the respondents were from law firms of five or fewer attorneys;
- Approximately 11% of the respondents were from law firms of six to 20 attorneys;
- Approximately 7% of the respondents were from law firms of 21 to 50 attorneys;
- Approximately 15% of the respondents were from law firms of over 51 attorneys; and
- Few government attorneys responded to the survey.

The Pandemic's Impact on Attorney Client Relations

Introduction

The future of attorney-client relations in our post-pandemic legal profession requires New York attorneys to be adaptable and supportive of each other, while understanding that the practice of law often occasions an adversarial rather than collaborative model.

During a Task Force focus group, a sage New York attorney reflected on a chat with a colleague long before the onset of the pandemic:

I was coming out of court and was approached by a friend who asked, "Do you still enjoy practicing law?" He was complaining about the difficulties of the business, dealing with difficult judges and clients, and was not sure of his future in the profession. I came away from that interaction asking myself, "Why are so many lawyers unhappy and discontented with their chosen profession?" One possibility is that the law is a wonderful profession but a terrible business. It is also a business that we were not trained for like we were in the law. It seems that conflict does not end at the courthouse exit door. As lawyers, we are constantly in adversarial postures not only with adversaries and judges, but also with our clients, who can turn on us when they are dissatisfied with the result. Moreover, in litigation at least, our competence and sometimes self-worth is determined by a third-party who decides whether we won or lost.

The mission of the Task Force is to help chart the path forward for practitioners in the post-pandemic world. We present this Report based on results of the survey, the attorney client Working Group's research and public forum, and the Task Force focus groups hosted throughout the state. We recognize that effective

attorney-client relations depend on embracing and understanding the impact of the pandemic on attorneys.

Our survey results found that eagerness to return to pre-pandemic practice was tempered by the lingering threat of COVID-19 and the risk of new variants and consequential shutdowns. Attorneys should expect to continue to face the task of balancing the benefits and drawbacks of a hybrid workplace while endeavoring to meet client needs and expectations. Remote work and video conferencing are acceptable in certain situations, but these modalities often are not in the best interest of vulnerable and/or criminal clients and can present challenges for low-income clients and those in rural areas with spotty or no internet. Attorneys are concerned about associate development, building their practice communities, and fostering a sense of belonging. At the same time, attorneys are concerned about increasing cyber threats to their practice. One legacy of the pandemic is the blurring of the line between work and home. Another is the profession's acknowledgment that attorney well-being must be a priority—burnout is now recognized as a real concern. Finally, attorneys express the need to embrace modern marketing approaches to raise their profile in a very competitive client landscape.

The pandemic has challenged attorneys and the legal profession like never before, and the one thing that can be proclaimed as certain is a future of uncertainty. As a participant in the Western New York focus group commented,

I think that there is a foregone conclusion that remote work is going to actually be the future of the profession. I don't think there has been enough consideration about whether or not this is working, whether or not it's working for anyone or whether or not it will work. If the bar association is going to do something . . . I think it should be looked at, when it works and when it doesn't work.⁶

As COVID-19 began its reign of terror, New York attorneys donned masks and socially distanced. We listened to daily reports of transmissions, deaths, and new variants. Face-to-face interactions with clients and the courts turned virtual seemingly overnight, while we hoped we would not appear on screen as a cat.⁷ New York attorneys' patience, creativity, grit, and drive to safely serve the public and our clients and ourselves—while also managing the practice and business of law—will always be remembered as an extraordinary, powerful, and transformative period for the profession.

Challenging deeply entrenched attitudes in the legal profession, we have demonstrated that the “traditional manner” of working from an office is not the only way. Efficiencies can be built into our court system and our law firms, accommodating different working styles that achieve similar or better outcomes for our clients. However, we must recognize that the new virtual world may not work for all clients, creating unique challenges for collaboration. Our

⁶ Western N.Y. Focus Group Transcript at 453–55.

⁷ During a virtual civil forfeiture hearing in Texas, a county attorney was unable to turn off the “cat filter” on Zoom, so an image of a cat appeared instead of the attorney. Daniel Victor, *'I'm Not a Cat,' Says Lawyer Having Zoom Difficulties*, N.Y. TIMES, May 6, 2021, <https://www.nytimes.com/2021/02/09/style/cat-lawyer-zoom.html>.

profession's ethos requires that the path forward must be in the best interest of the client. However, the pandemic has underscored that the best interest of the attorney's and staff's physical and mental health must also be considered.

As we can all attest, developments in our legal practice arising from the pandemic present both pros and cons. Remote conferences and mediations, for example, are more efficient, save clients' money, reduce unnecessary travel, and alleviate temporal stress. However, not being in court robs us of the day-to-day interaction with our clients, colleagues, judges, and court personnel, which negatively impacts collaboration to solve clients' problems in a profession that is often truculent. There is no true virtual equivalent for the physical wooden bench outside a courtroom to host a casual yet consequential conversation with opposing counsel, or privately with a client.

At its ethical core, the legal profession is driven by its mission to serve the public and advance the rule of law and judicial integrity. It is also a self-analytical profession with local and state bar associations engaged in continuous study through task forces and committees addressing problems and formulating solutions. Bar associations across New York State continue to analyze how the profession can improve quality of our citizen's lives while also serving the public and the legal system.

Flexibility Is the Future

The Task Force’s statewide survey of the profession, the Working Group on Attorney Client Relations’ virtual forum, and the virtual focus groups held across the state provide a framework for analysis of the state of post-pandemic attorney-client relations in New York.

In general, many, but not all, New York attorneys demonstrated a desire to move forward with the hybrid model, which grew out of necessity.⁸ This model promotes flexibility and recognizes that the explosion of advanced technology and virtual communications can work to the benefit of lawyers and clients.

Survey participants were asked how the pandemic positively influenced their work. Forty-three percent of respondents noted they could work remotely, and 30.84% said they could more easily attend hearings or meetings because of virtual proceedings.⁹

Next, we asked, “What is the ideal mix of in-office and remote work?”¹⁰ Thirty-two percent selected “In-office 2–3 days a week.”¹¹ The second most popular answer, selected by 27.47%, was “In-office as needed based on a flexible week-to-week schedule.”¹² Slightly fewer respondents (24.61%) selected “In-

⁸ See Survey questions 24 and 25.

⁹ Survey question 40, survey results question 40.

¹⁰ Survey question 25.

¹¹ Survey results question 25.

¹² *Id.*

office 4–5 days a week,” which was followed by “Rarely in the office” at 10.76%.¹³ Only 4.81% of respondents selected “In-office one day a week” as the ideal mix.¹⁴

The top two responses to “What aspects of in-office work have you missed the most?” demonstrate the essential collegial role firms play in our success: 51.97% selected “Being able to walk down the hall to discuss legal issues with my colleagues,” and 50.61% selected “As a result of working remotely, I have lost collegial interaction with attorneys who are members of my organization.”¹⁵

As of Summer 2022, law firms viewed two or three days in the office as the new likely standard, though some were permitting fully remote work.¹⁶ Some large firms had a “remote-only August” with fewer in-person meetings with clients.¹⁷ Another large law firm instituted a “Zoom-free” Wednesday policy “so that colleagues spend time together rather than in meetings on their screens.”¹⁸

The hybrid workplace can pose obstacles for attorneys and staff. As one forum participant noted, an “important part of the problem is that people—staff and associates, even some partners—have become used to working from home.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Survey question 26, survey results question 26.

¹⁶ *Talent is a Top Concern on Law Firm Leaders’ Minds, Says New Report*, THOMSON REUTERS, June 14, 2022, <https://www.thomsonreuters.com/en-us/posts/legal/talent-esg-report-2022>. (“Globally, return to office arrangements are greatly varied, with some regions, such as firms in Asia, returning to the office nearly full time, while law firms in the United States continue to view two or three days per week in the office as the likely new standard. As firms attempt to execute their return-to-office plans, many associates are voicing an increasing desire for continued flexibility in their working arrangements.” *Id.*).

¹⁷ Sara Merken, *Summer Means Brief Return to Remote Work Option for Several New York Law Firms*, REUTERS, June 30, 2022, <https://www.reuters.com/legal/government/summer-means-brief-return-remote-work-option-several-new-york-law-firms-2022-06-29>.

¹⁸ Sara Merken, *Saul Ewing Declares Wednesdays ‘Zoom-free’ as Law Firms Plot Office Returns*, REUTERS, March 14, 2022, <https://www.reuters.com/legal/legalindustry/saul-ewing-declares-wednesdays-zoom-free-law-firms-plot-office-returns-2022-03-14>.

And there's a belief that there is an entitlement now to work from home two or three days a week, and not be in the office."¹⁹ Another participant pointed out the pandemic has strained the relationship between attorneys and support staff, as they were and are being treated differently based on different expectations.²⁰ The relationships may have been "irreparably harm[ed]"²¹ and "it's going to take some time before the attorneys and the staff have the relationship they had before[.]"²²

Creating World Class Attorneys: Recruitment and Talent Development Is Vital To Build Firm and Organizational Pipelines

Spending less time in the office may threaten a new attorney's professional development as they have less opportunity to observe senior attorneys interacting with clients, which may have an enduring impact on attorney-client relations. We observe a generational divide, with one managing partner sharing that "senior partners think it's absolutely essential that [young associates] need to be in the office to observe"²³ and to "learn from [older attorneys] how to act as an attorney and learn all the things you can't be taught by books or things like that[.]"²⁴ He shared his impression that younger attorneys believe they can receive the same training and benefits of mentoring by coming in only two or three days a week: "they wanted to have the access to senior people to learn, but

¹⁹ ACR 12/8/21 Transcript at 372-73 (hereinafter "ACR transcript").

²⁰ ACR transcript at 368-71.

²¹ *Id.* at 370;370-71.

²² *Id.*

²³ *Id.* at 380.

²⁴ *Id.* at 381.

they didn't think it had to be [] five days a week.”²⁵ The participant noted that with extra effort, younger attorneys can be mentored. He emphasized “that’s going to be the future so we’re going to need to figure out how to do it better than we have.”²⁶

New York attorneys need to be aware that flexibility can be consequential. A legal employer’s ability to attract and retain talented attorneys, and keep clients, will depend on their ability to offer a hybrid schedule. Further, not all clients appreciate or agree with a flexible approach. For example, the chief legal officer at a major financial firm expressing concerns about the impact of associate development recently warned the firm’s outside counsel to return to the office five days a week.²⁷ He wrote a letter expressing these concerns and “the lack of urgency to return lawyers to the office.”²⁸ The letter expressed that “firms that get lawyers back to the office ‘will have a significant performance advantage over those that do not,’ affecting their work[.]”²⁹ The letter further provided that the company “will not be accommodating Zoom participation in critical meetings.”³⁰

²⁵ *Id.* at 382, 383.

²⁶ *Id.* at 385.

²⁷ Joe Patrice, ‘We Need All Lawyers in the Office’ Says Bank Definitely Not Freaking Out About Commercial Real Estate Portfolio, ABOVE THE LAW, July 19, 2021, <https://abovethelaw.com/2021/07/we-need-all-lawyers-in-the-office-says-bank-definitely-not-freaking-out-about-commercial-real-estate-portfolio>.

²⁸ David Thomas, *Morgan Stanley’s CLO wants you back in the office – for good*, REUTERS, July 19, 2021, <https://www.reuters.com/legal/government/morgan-stanleys-clo-wants-you-back-office-good-2021-07-19>.

²⁹ *Id.*

³⁰ *Id.*

Notwithstanding this, we cannot ignore the fact that flexibility attracts young, talented candidates. When respondents were asked to rank threats to the practice of law going forward, 14.40% felt the biggest threat is the “ability to attract talent because candidates want flexible, hybrid or fully remote work environments.”³¹ According to a recent American Bar Association survey, 44% of young lawyers “would leave their jobs for a greater ability to work remotely.”³² Further, “[m]ost lawyers reported that working remotely or on a hybrid basis has not adversely impacted the quality of their work, productivity or billable hours.”³³

Attorneys participating in the Summer 2022 focus group reiterated the threat flexibility poses for retaining talent:

[E]veryone from our Legal Service agencies to our big firms are struggling to hire people . . . they’re trying to find lawyers to hire . . . [managing partners] are saying to me they don’t feel like they’re in a position where they can tell somebody well you’ve got to be in the office five days a week. Because that person can say look, you know . . . there’s 100 jobs out there, I can go find a job, where I don’t have to be in the office at all.³⁴

³¹ Survey results, question 46. “Ability to attract clients because candidates want flexible, hybrid or fully remote work environments” was the fourth-most-selected option for the greatest threat, following loss of information due to cyber-attacks, inability to keep up with technology changes, and effectiveness of virtual court proceedings for counsel, witnesses, or clients. *Id.*

³² *ABA survey: Most lawyers want options for remote work, court, and conferences*, AM. BAR ASS’N, Sept. 28, 2022, <https://www.americanbar.org/news/abanews/aba-news-archives/2022/09/aba-survey-lawyers-remote-work/#:~:text=Share%3A,and%20legal%20training%20sessions%20remotely>.

³³ *Id.*

³⁴ Western N.Y. transcript at 300–02.

This has led to the poaching of talent from the upstate firms during the pandemic. Bigger firms do so “because they can pay more, they say ‘Oh, you can stay in Rochester and live at the price that it costs to live in Rochester and we’ll pay you a New York [City] salary as well you know that’s hard to turn down.”³⁵ Attorneys face a difficult task in balancing the need for traditional face-to-face mentoring when successful talent recruitment depends on offering greater absence from the office.

Consider the added difficulty with addressing flexible operations for a firm with offices in different states. A focus group attorney from New York City shared that his firm is having difficult conversations about how much time to spend in the office:

We all have extremes[,] people who think we should be here five days a week, particularly in our LA office they’re there all the time. And here we have a lot of people who refuse to come in. . . . [W]e are having trouble training people without having them in-person . . . I think personally that they’re missing out on a lot by not being here to you know, meet with clients with either me on the phone or in person to debrief a court appearance or hearing. . . [T]hey’re also, I think, losing a lot about developing relationship with each other, because those of us [who] have been doing this for a while, know that a lot of our core relationships began when we were young associates, and we met people and those became our friends and they became the source of business and . . . part of the network. On the other hand, I hate commuting an hour and twenty minutes from my house . . . So it’s like it’s crazy and then I come here, and you know there’s three partners here if I’m in the litigation department if I’m lucky on a good day. And, and the secretaries are really pissed off about being here, because they see no reason why they need to be in the office[.]

³⁵ *Id.* at 304.

You know there's obviously a lot of strong feelings about you know what's been going on.³⁶

Engaging new clients

While the pandemic brought a flood of business for some practitioners, others felt an abrupt interference with their very livelihood. The experience has forced attorneys to focus on the best ways to engage new clients.

The Task Force survey gathered useful data regarding client development. We note that participants were strictly socially distancing at this time and recognize that many in-person events have since returned. When asked “I anticipate the following new challenges to developing new clients: (Rank one (1) to eight (8), with (1) being most significant),” 50.65% of respondents ranked “lack of in person networking events” as the most significant challenge to developing new clients.³⁷ Interestingly, two other popular responses were “clients do not want to meet in person” and “clients do want to meet in person[.]”³⁸ The foregoing may be a result of self-imposed client restrictions on social interaction to avoid the risk of transmission of the virus or the need for better service.

Respondents were asked to rank the following in level of significance “to attract clients going forward”: “provide timely or more legal/practice updates electronically to my clients[.]” “speak on webinars or at conferences[.]” “improve online marketing[.]” “write and publish legal articles[.]” “hold client in person

³⁶ NYC transcript at 204–19.

³⁷ Survey question 41, survey results question 41.

³⁸ *Id.*

events[,]” “join industry groups[,]” “join bar association committees[,]” “demonstrate that my firm is technology enabled[,]” and “demonstrate that I am technology enabled[,]”³⁹ The top choice for “most significant” was “provide timely or more legal/practice updates electronically to my clients” with 36.31%.⁴⁰ The second was “improve online marketing” and the third was “speak on webinars or at conferences.”⁴¹

Another question asked survey respondents to rank the most significant or notable development in marketing, business development, and client engagement.⁴² The top choice for “most significant” or “notable development” was “adapting to the lack of in-person meetings with clients” (40.15%), followed by “clients seek a virtual presence” and “firm establishing a presence with blogs and posting content electronically.”⁴³

Our forum participants discussed new and existing client marketing and business development efforts. For some, the pandemic ushered in new and unique marketing techniques. One senior managing partner representing educational institutions shared that his firm has released over 60 unsolicited opinion letters to clients regarding government regulations with masking and vaccinations.⁴⁴ He found that “our opinion letters are all over the place and we’re

³⁹ Survey question 42.

⁴⁰ Survey results question 42.

⁴¹ *Id.*

⁴² Survey question 45.

⁴³ Survey results question 45.

⁴⁴ ACR transcript at 90–93.

getting calls from institutions we don't represent and as a result of that have actually obtained additional new clients[.]”⁴⁵ Since the survey was conducted, the world has reopened, and there are many more opportunities for in-person networking and client development at conferences and events. Visits to clients in the office, however, may still present challenges for attorneys going forward as many clients continue to work remotely or hybrid.

One of the forum presenters shared her experience working at a small office of around nine attorneys with no marketing department.⁴⁶ During the pandemic, her office transitioned to more virtual marketing techniques like “promoting accolades or speaking events on our Facebook page or LinkedIn” and staying consistent with a schedule of postings to stay in the algorithm.⁴⁷ They even began advertising on the radio and received a “tremendous response” from their target audience.⁴⁸ Others pointed to the increased use of informational online videos, webinars, and half-hour “meet and greets” instead of lengthy client lunches. For attorneys to remain competitive in the post-pandemic legal world, they will need to harness a blended modern-day marketing approach, which includes in-person events to develop new relationships, and digital and social media platforms to build their profile and promote their capabilities to existing and prospective clients. Savvy bar associations have an enormous

⁴⁵ *Id.* at 95.

⁴⁶ *Id.* at 107.

⁴⁷ *Id.* at 108–10.

⁴⁸ *Id.* at 111–12.

opportunity to serve their members by helping them develop these skill sets (often not taught in law school) to help attorneys stand out in the evolving digital communications space. Bar associations need to stand ready to fill the social gap to bring people back together again and build a sense of community.

The attorney-client relationship and attorney-client communications

Few—if any—historical events or developments have done more to impact the attorney-client relationship than the COVID-19 pandemic. We faced obstacles at every step in our relationship: from the commencement of representation, to maintaining confidence in one’s continued service, to managing expectations and constructing necessary boundaries. COVID-19 restrictions prevented many of us from meeting with our clients in-person and inevitably resulted in challenges with communications. When an attorney and client meet virtually, communications can be stymied.⁴⁹

The survey results echo these challenges for attorney-client communications. Respondents were asked “What do you consider to be the disadvantages of virtual communications?” and the most selected response was “It is difficult to ‘read’ the reactions of participants in remote proceedings” (62.41%), followed by “Technology glitches undermine the efficiency and

⁴⁹ “Research also suggests that the use of remote video proceedings can make attorney-communications more difficult.” Alicia Bannon & Janna Adelstein, *The Impact of Video Proceedings on Fairness and Access to Justice in Court*, BRENNAN CTR. FOR JUSTICE 2 (2020), <https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court>.

effectiveness of remote communications” (58.87%).⁵⁰ Third, “It is difficult to determine witness credibility” (43.97%).⁵¹ Fourth, “Household or other similar interruptions interfere with or prevent effective and efficient remote communications” (32.06%).⁵² Fifth, “I feel I have less control” (29.79%).⁵³ The remaining 14.26% selected “none of the above.”⁵⁴

Later in the survey, respondents were asked “How has the use of virtual communications impacted your attorney-client relationships?” and 40.80% selected “No impact on my relationships[,]” 28.29% selected “Somewhat enhanced my relationships[,]” 13.89% selected “Diminished my relationships[,]” 9.26% selected “Greatly enhanced my relationships,” and the remainder selected not applicable.⁵⁵

The Working Group’s forum discussed communications extensively. The pandemic overwhelmingly increased reliance on video and email communication, saving attorneys and clients time and money.⁵⁶ Instead of spending time in traffic, an attorney can easily host a virtual preparation session in the minutes leading up to the more formal proceeding. One of the task force co-chairs emphasized the value of these brief meetings, especially before lengthy

⁵⁰ Survey question 23 results.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Survey results question 49.

⁵⁶ *Id.* at 151 (“[S]o overwhelmingly we have video and email [as] now the leading modes of communication.”).

collective bargaining sessions, noting that clients feel much more comfortable this way.⁵⁷ One Long Island participant noted that waiting five hours for conferences is annoying for attorneys and clients—this practitioner’s clients love virtual proceedings because they get to see what they are paying for, which is wonderful for client relations.

Communications with vulnerable clients

The Online Courts Working Group of the Commission to Reimagine the Future of New York’s Courts identified “the ability for clients to meaningfully interact with their counsel” as a “chief challenge[]” to virtual proceedings.⁵⁸ Confidential communications between attorney and client may be jeopardized by the virtual format, with many attorneys reporting “difficulties that arise from not being able to pass notes with their client during a proceedings, or of not being able to explain the judge’s decisions contemporaneously.”⁵⁹ “Even where provisions are made for separate attorney-client breakout rooms, technical limitations and requirements can lessen the ability of attorneys and their clients to freely communicate without court assistance.”⁶⁰

Criminal law practitioners did not have as positive a view from the trenches. Meeting with a client posed difficulty, as the attorney needed to wait

⁵⁷ See ACR transcript at 174–82.

⁵⁸ ONLINE COURTS WORKING GROUP OF THE COMMISSION TO REIMAGINE THE FUTURE OF NEW YORK’S COURTS, *Initial Report on the Goals and Recommendations for New York State’s Online Court System* 13 (2020), <https://www.nycourts.gov/whatsnew/pdf/OCWG-Report.pdf>.

⁵⁹ *Id.*

⁶⁰ *Id.*

days while a quarantine was in place.⁶¹ Next, confidentiality: “the jail tries, they give the clients headsets and the laptop, but it still is not an area that is quiet or confidential in any way, so . . . it is a problem for the initial conversations and interviews and we are very careful to be asking yes and no questions.”⁶² This disadvantages attorneys who are thus unable to get the “full story” from an incarcerated client until much later on during representation.⁶³ Forum attorneys reported that some criminal clients displayed less respect for the courts during virtual hearings, finding that the lack of structure during a virtual hearing may send the message that a proceeding is less serious than it is.⁶⁴

Attorneys representing clients in nursing homes or adult care facilities likewise felt additional pressure regarding their communications. Clients struggled to effectively utilize virtual communication technology (Zoom), devices, or the internet.⁶⁵ Consider situations where an abuser lives in the home with a client. One forum attendee advised taking attendance at the beginning of a proceeding: “whoever’s there has to identify themselves.”⁶⁶

In his article, *Communicating With Clients: Three Lessons From the Pandemic*, author Sateesh Nori asserts that in his experience “during the

⁶¹ One of the ACR forum attorneys described a 10-day waiting period in Westchester County jail. ACR transcript at 189.

⁶² ACR transcript at 191–93.

⁶³ *Id.* at 193.

⁶⁴ ACR transcript at 540–44.

⁶⁵ *Id.* at 574.

⁶⁶ *Id.* at 587, 590.

pandemic, lawyers got better at communicating with their clients.”⁶⁷

Accordingly,

First, we started texting with clients. Many of us realized that emails are too formal, too slow, and often go unread. Emails from lawyers tend to turn into legal briefs or office memos – TLDR (Too Long; Didn’t Read). And phone calls meant endless games of phone tag. Through SMS (Short Message Service) and MMS (Multimedia Messaging Service), clients would send photos of documents, messages about the factual details of their legal issues, and often just check in with us.

...

Second, the frequency of our communications with clients and with each other increased. Because of texting and because of the ease of use of Zoom and other platforms, we were able to chat with clients more often. Clients were able to share information as it arose.

...

Third, eliminating in-person contact as a default restores a power balance to attorney-client relationships.⁶⁸

Navigating client expectations

COVID-19 revealed that clients will continue to rely on counsel’s guidance and availability even if such demands may appear unreasonable. As one of the presenters during the Attorney Client Relations forum noted, “this is now [a] [twenty-four] seven job that you can never get away from because you’re always available to your clients.”⁶⁹ He stressed that going forward, we should focus on whether this is “healthy for the profession” or “healthy for the clients.”⁷⁰ Polls

⁶⁷ Sateesh Nori, *Communicating With Clients: Three lessons From the Pandemic*, REUTERS, Oct. 25, 2021, <https://www.reuters.com/legal/legalindustry/communicating-with-clients-three-lessons-pandemic-2021-10-25>.

⁶⁸ *Id.*

⁶⁹ *Id.* at 239.

⁷⁰ *Id.* at 241.

were conducted in real time during the forum group presentation, and 87% of participants answered that client expectations will not change post-pandemic.⁷¹ The presenter commented, “The answer that 87% think it won’t change post-pandemic is somewhat frightening.”⁷²

A judge involved in the Working Group noted that as the pandemic began, she saw “a lot of motions to be relieved as counsel coming from both clients and attorneys and largely because of lack of communication . . . or problems with communication, so how you all are navigating your communication between yourselves and your clients is obviously, very important.”⁷³ The pandemic’s impact on client communications necessarily impacts the attorney’s ability to navigate client expectations.

The Task Force survey asked, “Increasingly, my clients expect the following from my law firm,” and the top response was “to be available on demand” (39.89%), followed by “more advice and counsel” (25.20%).⁷⁴ Similarly, “During the pandemic, have your client expectations for attorney availability changed?”⁷⁵ 44.82% selected “yes: expected to be available after traditional business hours and on weekends.”⁷⁶ Conversely, 38.89% selected that their client’s expectation for their availability has not changed.⁷⁷ Finally, “Does your firm have a policy to

⁷¹ *Id.* at 243.

⁷² *Id.*

⁷³ *Id.* at 438–40.

⁷⁴ Survey results question 43.

⁷⁵ Survey question 47.

⁷⁶ Survey results question 47.

⁷⁷ *Id.*

manage client expectations as to the timing of access to members of the firm?”⁷⁸ 44.99% selected “no” while 18.88% selected “not applicable[.]”⁷⁹ 16.73% selected “no, but there should be one[.]”⁸⁰ Only 16.48% report having a policy.⁸¹ A mere 2.92% selected “We are currently creating one[.]”⁸² Such results speak strongly as to what the profession needs to implement.

For some participating in the forum, the pandemic has not changed client expectations regarding availability, citing our already-Pavlovian reflexes with our cell phones.⁸³ This attorney emphasized, “We’ve got to just train our clients, that there are certain times that we may not be available to them.”⁸⁴ However, as this attorney later noted, failure to communicate with a client is the biggest grievance complaint.⁸⁵

Managing client expectations is a balancing act of seeking to serve clients, as well as having a life outside the profession. As client expectations change, it will be important for firms to create and institute policies that meet client expectations as to timing and access to attorneys. With only 16.48% respondents⁸⁶ reporting they have such a policy, there is room to develop a reasonable framework (e.g., responding to clients within two hours, by the end

⁷⁸ Survey question 48.

⁷⁹ Survey results question 48.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ ACR transcript at 248.

⁸⁴ *Id.* at 252.

⁸⁵ *Id.* at 284–85.

⁸⁶ Survey results question 48.

of the day or by the very next day, and relaying your firm’s policy verbally and/or within retainer letters).

Conclusion and recommendations

The pandemic has directly impacted New York’s legal profession. The pandemic forced attorneys and firms to reconsider how and where they work. Survey respondents realized they can work remotely successfully and can more easily attend hearings or meetings because of virtual proceedings. Attorneys seeking more workplace flexibility have used hybrid work for more “work-life balance.” Changing the “work-life balance” requires attorneys to convert working hours to non-work time. This directly clashes with the other pronounced pandemic lesson that clients want nearly 24/7 access to their attorney.

Another consequence is what has been described as the “threat culture.” A recent article in *The American Lawyer*, entitled *The Lawyers Are Not All Right*, included information from Dr. Larry Richard—a lawyer and psychologist viewed as an expert in the psychology of lawyer behavior.⁸⁷ Dr. Richard explained that the area in control of our brain’s fight-or-flight response has grown larger “because typically the fight-or-flight response is called into use for a brief period of time.”⁸⁸ The article articulated this silent COVID impact:

“The pandemic forced us to create a new way of experiencing work that we weren’t prepared for [and happened very quickly] in the shadow of a threat that can kill you [and you can’t see it],” he said.

⁸⁷ *The Lawyers Are Not All Right*, AM. LAWYER, Jan. 30, 2023, <https://www.law.com/americanlawyer/2023/01/30/the-lawyers-are-not-all-right>.

⁸⁸ *Id.*

“The threat sensing circuit in our brain that was designed to protect . . . the mechanism it uses is change,” he added, noting “the threat was invisible and open-ended.” Instead of the stress being “of a moment,” he said, “it’s been constant ... that wears out the circuit.” As a result, Richard said, people have grown sensitive to little things, or “hyper-reactive to things.” It’s distorted people, he said. We’re not using our intellectual horsepower” because it’s being diverted to the threat circuit, he said. “We are diminished.”⁸⁹

The article also reflects upon the diminution of time spent collaborating with fellow attorneys due to the explosion of remote work.⁹⁰

While the pandemic impacted attorney-client communications, nothing has changed our professional duty to respond to client inquiries regardless of how late at night they ask or how many emails they have already sent that day. We must also be mindful of how our increasingly virtual world poses significant threats for practitioners working with vulnerable clients such as the indigent, criminal defendants, or the elderly.

Dealing first with an attorney’s “work-life balance,” firms with younger attorneys and hybrid programs will need to develop new ways to train and mentor associates while fostering community and a sense of belonging. While courts are now open, veteran attorneys must train both themselves and new practitioners to prepare for the realities of in-person, fully virtual, and/or hybrid law practice. They must be prepared to pivot.

⁸⁹ *Id.* (alterations in original).

⁹⁰ *Id.*

By extension, firms must invest in training to help counsel and staff better navigate the new world of virtual meetings and proceedings. Bar associations play a pivotal role in helping solo, small, and mid-size firm attorneys prepare for this new reality going forward by offering training opportunities and mentorship.

Failing to incorporate the lessons we learned from the pandemic will prevent us from training the next generation of world-class lawyers. This impacts our clients and our firms and the New York legal profession.

A junior associate working at a large firm in New York City discussed her experience in completing three virtual internships: “all of the work was the same.”⁹¹ She never made it inside the courtroom and missed opportunities to socialize with other interns, law clerks, and judges.⁹² The virtual format “makes it hard to figure out what you do not know. If you only know what you see on the screen . . . you can’t hear about other people’s successes unless you specifically set up those conversations, so I think that that’s been the biggest challenge[.]”⁹³

It is critical going forward that all attorneys become technologically comfortable and competent with virtual lawyering. Such knowledge is not optional for a successful law practice and is as critical as any other valued skill. Lawyers and firms must also embrace modern-day marketing and

⁹¹ NYC Focus Group transcript at 376–83.

⁹² *Id.*

⁹³ *Id.*

communications to stay competitive. This means learning digital communications, promoting talent and achievements on social media, and moving out of their comfort zones to connect and align with clients and the next generation of attorneys in 21st-century mediums. At the same time, all attorneys must continue to balance the number-one threat to the practice of law identified by survey respondents: cyberattacks and loss of information. Large firms spend a lot of money securing client data; however, they are not immune to breaches, phishing, or other business compromises. Small and mid-sized firms must set aside resources to protect their client and firm data as cyberattacks become more common each day.

Junior attorneys must also take advantage of training, apprenticeship, mentorship, and sponsorship opportunities. Collaboration with other attorneys is part of the essence of lawyering.

Firms must think outside of the box to invest in training and mentorship for recruitment and retention purposes. Attorneys want flexibility, a sense of belonging, and community. Junior attorneys must also keep in mind that their advice and work product can have significant personal, financial, and life-altering consequences for their clients. Adverse consequences may ensue from inadequate training and preparation. Thus, new attorneys should consider hybrid and/or full time in-person work to ensure they develop into world-class

attorneys. Experienced attorneys must commit to such in-person training, while also preparing to work and handle cases virtually.

This Report did not explore the positive opportunities working remotely may have for disabled individuals. Previously, working in-person or appearing in court may have presented a serious challenge due to a person's disability. Virtual meetings and proceedings therefore help in leveling the playing field for disabled attorneys and give them greater opportunities to participate in the profession. Clients should, therefore, not discount participation by Zoom to support disabled attorney participation, where possible.

Finally, it is worth noting that the survey did not address AI-based solutions like ChatGPT and other similar technology. Our recommendation is for NYSBA to study and evaluate AI, as it may have significant legal, business, policy, and ethical implications for attorney-client relationships.

- NYSBA must enhance its efforts to train all attorneys on the proper use of technology so they are able to work virtually to appropriately service the needs of clients. This includes best practices associated with the use of video conferences for depositions, court appearances, client interaction, and “alternate dispute resolution” methodologies. All attorneys should be able to pivot between virtual and in-person proceedings seamlessly.
- NYSBA needs to be a leader in evaluating rule amendments and ethical precepts to account for the prevalence of virtual lawyering, including

where parties certify in advance that they are ready and prepared to participate remotely.

- NYSBA needs to assist lawyers in how to embrace new marketing strategies to remain competitive in the marketplace.
- NYSBA and local bar associations need to increase their in-person social event schedule to encourage development of personal relationships among the New York bench and bar in the community. Junior attorneys require more opportunities to build formative relationships that will help them throughout their entire careers.
- NYSBA needs to prioritize mental health and provide services to help attorneys. Stress is not just pandemic-related—the delineation between work and home life has been considerably blurred.
- NYSBA needs to be a leader in supporting attorneys and promoting best practices to develop policies and frameworks to manage client expectations and increased client demands outside of traditional working hours. Firms need to craft and adopt such policies. Firm leaders need to demonstrate acceptable client-work boundaries.
- We must also be mindful of how our increasingly virtual world poses significant threats for practitioners working with vulnerable clients, such as indigent criminal defendants or the elderly, and that in-person communications are critical when dealing with these clients.

- Attorneys seek a flexible work environment but also crave a sense of belonging and community. Incorporate a “flexible first” work culture approach.
- Create a sense of community and belonging for attorneys both in-person weekly or monthly gatherings. Encourage use of employee resource groups and memberships in groups, including bar associations, to foster community.
- With the increased geographic pool of remote candidates, expect competition for talent to be robust. Emphasize flexibility, mentorship, and training to young attorneys. Set the expectation that the short-term investment of in-person/office with hybrid training and development early in their careers will yield greater professional dividends down the road. Failure to properly train junior attorneys will impact client outcomes, a firm’s reputation, and client services when senior attorneys retire or take a position at another firm.
- Enhance efforts to provide technology support and training to minimize the threat against cyberattacks. Bar associations can support members by offering training, helplines, and membership resource benefit opportunities to ensure solo, small, and medium-sized firm cyber resiliency.

Access to Justice

Introduction

A great deal of attention has been devoted to the study of “access to justice,” with mixed results, before and after March 2020, when COVID-19 transformed society, the legal profession, and the practice of law in New York.⁹⁴ These studies identify with a fairly high degree of specificity the nature and scope of the access to justice problem: mostly poor and working class, vulnerable “everyday people,” particularly in Black, Brown, and Indigenous communities, continue to confront weighty “justice problems” that result in multiplying “legal needs.” These problems require free or *pro bono* assistance that is not accessible or available, and stubbornly defy formal attorney or court interventions or are resolved (or ignored) outside of the formal legal system.⁹⁵

Structural and systemic forces give rise to fundamental socio-economic justice problems: safe and affordable housing, hunger and food insecurity, access to quality health care, voting rights, educational opportunities, and a living wage. Usually, attorneys and the legal profession view access to justice

⁹⁴ N.Y. STATE UNIFIED COURT SYSTEM OFFICE FOR JUSTICE INITIATIVES, *Law Day Report, 2022: Toward a More Perfect Union: the Constitution in Times of Change* (2022), <https://www.nycourts.gov/LegacyPDFS/publications/pdfs/OJI%20Law%20Day%20Report%202022.pdf>; *Center for Court Innovation*, <https://www.courtinnovation.org> (last visited Sept. 18, 2022); N.Y. STATE UNIFIED COURT SYSTEM, *Permanent Commission on Access to Justice*, <https://ww2.nycourts.gov/accesstojusticecommission/index.shtml> (last visited Sept. 18, 2022); LEGAL SERVS. CO., *2017 Justice Gap Report* (2017), <https://www.lsc.gov/our-impact/publications/other-publications-and-reports/2017-justice-gap-report> (last visited Sept. 18, 2022) (estimating 86% of legal problems of low-income people received insufficient or no legal assistance, including more than 50% of people who go to legal services corporation-funded offices due to inadequate staff resources).

⁹⁵ See Rebecca L. Sandefur, *Access to What?*, 148 DÆDALUS 1, 9, 49–55 (2019), https://doi.org/10.1162/daed_a_00534.

primarily from the top down: the court system, government agencies, state legislators, and other “stakeholders.”

Instead, in the age of COVID-19, we recommend that NYSBA and the legal profession approach access to justice questions from the perspectives of those most impacted by the legal system, including, but not limited to: poor people, Black, Brown, Indigenous, women, the LGBTQ+ community, immigrants and non-citizens, those with physical, cognitive, and psychosocial disabilities, the elderly, domestic violence survivors, people living with HIV, the homeless, debt-burdened, low-wage workers, unemployed workers, and veterans, among other marginalized and oppressed individuals and groups. For example, undocumented immigrants and other non-citizens who need counsel are often ineligible for free legal services, cannot afford a private attorney, and may be afraid of the legal system.

The legal profession must ask itself the following questions in planning and implementing access to justice reforms and initiatives:

- Does the proposed reform or initiative empower those most impacted by the legal system?
- Does it consider that vulnerable and marginalized groups often have:
 - limited access to technology and training, and may need to rely on a telephone to access court proceedings;
 - limited means to comply with court procedures (computer devices, internet connectivity, printers, faxes, payment requiring credit cards);

- limited time and ability to take time off from work or caregiving responsibilities; and
- limited quiet, private spaces?
- Does it reflect an understanding of the needs of immigrants, particularly those who are undocumented, who may have:
 - limited English proficiency;
 - limited understanding of systems and rights;
 - limited resources; and
 - fear of the unknown and participation in the legal system?

COVID-19 has revealed and exacerbated the fundamental intersecting structural problems that underlie access to justice, which include, but are not limited to:

- racism, express and implicit bias, xenophobia, and disability discrimination;
- income and wealth disparities;
- poverty and limited safety net support systems, particularly for women, children, and families;
- disproportionate incarceration of Black and Brown people;
- a dysfunctional and inequitable immigration system; and
- an epidemic of gun violence.

The high cost of legal representation, ancillary costs resulting from taking time off work to attend court, and dependent care all impose additional obstacles. Further, the price of legal services may impact the quality of justice a person receives. Outcomes often depend on the quality of representation a

litigant can afford to obtain. Courts and “justice” institutions are often underfunded.⁹⁶

Attorneys and judges try their best to fulfill the legal needs of their clients, particularly those committed to a career in legal service practice, as well as those who willingly provide *pro bono* services. Attorneys and judges endeavor to identify or empathize with such clients or litigants, perhaps because they do not share life experiences and/or have not received adequate training in implicit bias and microaggressions.⁹⁷ This makes it more difficult for attorneys to represent clients effectively and for judges to treat litigants fairly.

We must ensure that judges realize that the lawsuits before them often do not occur on a level playing field. Ongoing training of the judiciary and the practicing bar in explicit and implicit bias is critically required.⁹⁸

From a disability justice perspective, access to justice is a framework used widely in deaf, signing, and disabled communities, but it raises important

⁹⁶ See e.g., Greg B. Smith, *The Bronx Hall of Justice is Falling Apart and No One Knows How to Stop It*, THE CITY, Feb. 20, 2022, <https://www.thecity.nyc/2022/2/20/22942537/bronx-hall-of-justice-falling-apart>.

⁹⁷ See e.g., Derald Wing Sue et al., *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 AM. PSYCH. 4, 271 (2007).

⁹⁸ N.Y. STATE UNIFIED COURT SYSTEM, *Report from the Special Adviser on Equal Justice in the New York State Courts* (2020) <https://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf> (hereinafter “Johnson Report”) (despite progress made by NYS courts, continued racism, bias, and lack of diversity requires additional measures, including training with mandatory policies and protocols on racial bias for judges, court personnel, and jurors); N.Y. STATE UNIFIED COURT SYSTEM, *Equal Justice in the New York State Courts, 2020–2021 Year in Review* (2021) <https://www.nycourts.gov/LegacyPDFS/publications/2021-Equal-Justice-Review.pdf> (affirming that racism is an access to justice issue, noting implementation of some recommendations in the Johnson Report, and recommending reforms that include: a statewide policy of “zero tolerance” for racial bias and discrimination; mandated comprehensive racial bias training for all judges and nonjudicial staff; and a new mission statement for the Unified Court System that incorporates principles of equity, diversity, and inclusion).

questions about the quality of that access. Do disabled people have appropriate access to legal services addressing their needs? The needs of disabled people, including those with intellectual or developmental disabilities, psychosocial disabilities, and age-related cognitive disabilities must be considered in the operation and design of physical courtrooms and virtual proceedings, with the understanding that virtual proceedings can sometimes more effectively meet those needs.⁹⁹

Access to justice also requires attention to language services, both in-person and virtually. Language justice—beyond mere access—makes it essential to provide accurate interpretation in a proceeding to protect a litigant’s due process rights.¹⁰⁰ “Providing language services is essential to upholding the integrity of our justice system. Barriers to language access can interfere with the capacity of state courts to accurately evaluate the facts and fairly administer justice.”¹⁰¹ Language services in the courtroom are important, but they are also needed in court clerk’s offices, self-help centers, on signs, websites, forms, and

⁹⁹ David Allen Larson, *Access to Justice for Persons with Disabilities: An Emerging Strategy*, 4 LAWS 220, 238 (2014) (“We can improve access to justice by removing physical and architectural barriers. We also can carefully examine whether we have created unnecessary cognitive barriers through oversight or simply by habit.”). See also *There is No Justice Without Disability*, FORD FOUNDATION, <https://www.fordfoundation.org/news-and-stories/big-ideas/there-is-no-justice-without-disability> (last visited Dec. 19, 2022).

¹⁰⁰ U.S. DEPT OF JUSTICE CIVIL RIGHTS DIVISION, *Language Access in State Courts* (2016) <https://www.justice.gov/crt/file/892036/download>.

¹⁰¹ *Id.*

other court services, including when the court appoints psychologists, mediators, or counsel.¹⁰²

Unmet legal needs may be due to a lack of meaningful access to lawyers, government agencies, and courts due to fear, language, and cultural barriers, and the limited availability of free or *pro bono* legal representation. Free or low-cost legal representation is only available to a very small percentage of people with legal needs, due to legal aid and legal services eligibility restrictions and limited funding and staffing, including organized bar *pro bono* initiatives. Other barriers to access to justice include the complexity of laws and court procedures, the cost of retaining an attorney, time and travel expenses, and a perception that the legal system is biased and unfair.

For example, even with the right to counsel in eviction cases in New York City for tenants below 200% of the federal poverty level,¹⁰³ eviction cases far exceed the available capacity of legal services organizations whose attorneys already have excessive caseloads.¹⁰⁴ With the lifting of the eviction moratorium in Spring 2022, a growing number of tenants in New York City and throughout the state are facing eviction proceedings without an attorney.¹⁰⁵

¹⁰² *Id.*

¹⁰³ Sam Rabiya, *Less Than 10% of Tenants Facing Eviction Actually Got a Lawyer Last Month, Undermining ‘Right to Counsel’ Law*, THE CITY, Oct. 27, 2022, <https://www.thecity.nyc/2022/10/27/23425792/right-to-counsel-housing-court-tenant-lawyers>.

¹⁰⁴ *Id.*

¹⁰⁵ See Mihir Zaveri, *After a Two-Year Dip, Evictions Accelerate in New York*, N.Y. TIMES, May 2, 2022, <https://www.nytimes.com/2022/05/02/nyregion/new-york-evictions-cases.html>; Chloe Sarnoff & Casey Berkovitz, *From Crisis to Opportunity: Strengthening Housing Stability and Increasing Opportunity for Low-Income Families in New York City*, THE CENTURY FOUNDATION, July 22, 2021,

Another reason why “access” and “justice” remain elusive may be the limitations of the existing architecture of the legal system. While the New York State court system has made strides in modernizing, particularly in response to the COVID-19 crisis, far too many court procedures remain difficult to navigate. Despite the best of intentions, the recommendations of numerous commissions, reports, studies, proposals, and promising initiatives, New York State courts are not yet truly consumer-friendly and service-oriented.

First, some courts have failed to evolve from their stated purpose, while others have evolved in ways that represent a departure from their original purpose. Housing court was originally intended to regulate housing maintenance, but overwhelmed by the number of nonpayment proceedings it has become focused primarily on processing evictions.¹⁰⁶

Second, the court system reinforces the perception of two systems of justice. For example, in Family Court, poor and diverse families are left to the

<https://tcf.org/content/report/strengthening-housing-stability-opportunity-low-income-families-new-york-city>; Oksana Mironova, *Right to Counsel Works: Why New York State’s Tenants Need Universal Access to Lawyers During Evictions*, COMMUNITY SERVICE SOCIETY, March 7, 2022, <https://www.cssny.org/news/entry/right-to-counsel-new-york-tenants-lawyers-evictions>. In the Spring 2022 Session, the New York State Legislature failed to pass bills providing for Right to Counsel Access for tenants outside of New York City and “good cause” protections against eviction for tenants throughout New York State. Jeanmarie Evelly et al., *New York’s Legislative Session Ends, With Mixed Results on Housing. Here’s What Passed & What Didn’t*, CITY LIMITS, June 4, 2022, <https://citylimits.org/2022/06/04/new-yorks-legislative-session-ends-with-mixed-results-on-housing-heres-what-passed-what-didnt>.

¹⁰⁶ Judith S. Kaye & Jonathan Lippman, *Housing Court Program: Breaking New Ground* (1997), https://nycourts.gov/courts/nyc/ssi/pdfs/housing_initiative97.pdf.

informality of a “poor person’s court,” while litigants who can afford lawyers pay for a higher-quality court experience.¹⁰⁷

Third, court procedures and forms are unnecessarily complex and do not appropriately serve all the needs of the public.¹⁰⁸

Some attempts to address structural problems in the New York State court system have been made including, *inter alia*, Justice Courts, Integrated Courts, and Problem Solving courts. A recent proposal for a constitutional amendment to modernize and simplify New York State courts is a long overdue step in the right direction.¹⁰⁹ In the Seventh Judicial District in Upstate New York, Special COVID Intervention Parts (“SCIP courts”) consolidated all landlord-tenant cases in Rochester City Court and Monroe County’s village and town courts into a much smaller number of SCIP courts, which enabled legal service providers across a broad geographical area to represent their clients more effectively.¹¹⁰

COVID-19 illuminated the pervasive impact of three connective threads, which are critical to understand to more effectively address the access to justice

¹⁰⁷ Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People’s Courts*, 22 GEORGETOWN J. POV. L. & POL’Y 473 (2015); Jonah E. Bromwich, *Family Court Lawyers Flee Low-Paying Jobs. Parents and Children Suffer*, N.Y. TIMES, April 29, 2022, <https://www.nytimes.com/2022/04/29/nyregion/family-court-attorneys-fees.html>.

¹⁰⁸ See *e.g.*, The Fund for Modern Courts, <https://moderncourts.org> (last visited Dec. 19, 2022) (“The Fund for Modern Courts is a non-partisan, statewide organization committed to ensuring that the New York State judiciary is independent and that our courts are just and equitable for all.”).

¹⁰⁹ See Chief Judge Janet DiFiore, *State of Our Judiciary 2022*, Feb. 16, 2022, https://www.nycourts.gov/whatsnew/pdf/22_SOJ-Speech.pdf; Luis Ferré-Sadurní, *Can New York Overhaul its Complex, Antiquated Court System?*, N.Y. TIMES, Feb. 16, 2022, <https://www.nytimes.com/2022/02/16/nyregion/new-york-court-system.html>.

¹¹⁰ Press Release, Monroe County, NY: *Local Leaders Announce Community Effort to Assist in Eviction Cases*, Sept. 17, 2020, <https://www.monroecounty.gov/news-2020-09-17-evictions>.

gap: (1) racism, implicit bias, and inequity; (2) poverty, wide income and wealth disparities, and the lack of an adequate social safety net for poor and working class people; and (3) the “digital divide” and the need for digital justice that will provide litigants access to computers, broadband internet, and the necessary training and support to achieve more widespread digital literacy.

New York attorneys, paralegals, judges, court personnel, and other members of the legal profession practice in extraordinarily diverse subject matter areas and work in rural, suburban, and urban regions. Suffice it to say, “one size does not fit all.” The pandemic confirmed and heightened our understanding of the true extent of preexisting access to justice problems and the future challenges facing the legal profession; our ongoing experience with COVID-19 should continue to inform and serve as a catalyst for innovation.

To speak to the vast needs of those most impacted by our legal system, this report of the Access to Justice Working Group includes the following sections:

1. A framework for understanding access to justice.
2. COVID-19 revealed and exacerbated the preexisting access to justice crisis.
3. The “digital divide” prevents access and justice in virtual proceedings and communities.
4. Recommendations.

This report incorporates research and fact-gathering, including the results of the NYSBA Task Force Survey and the information gathered by the Access to Justice Working Group of the Task Force, including at our public forum.

A framework for understanding access to justice

Access to justice has different meanings and interpretations that can obscure the reality of injustice in society and within the New York legal system. As a result, it is necessary to define and “unpack” what “access” and “justice” mean to understand and frame the nature of the problems and propose meaningful solutions.

Historically, the access to justice community has focused on meeting the legal needs of individuals with low incomes who have trouble accessing a complicated legal system.¹¹¹ Access to justice advocates have observed that the legal profession has prioritized the need for lawyers rather than resolving the problems lawyers have been sent to address.

Despite the extensive efforts of the organized bar, including NYSBA and the New York State Bar Foundation, to address access to justice by supporting the matrix of legal service organizations in this state and by providing and supporting *pro bono* legal services, many litigants in civil proceedings remain

¹¹¹ THE HAGUE INSTITUTE FOR INNOVATION OF LAW (HIIL) & THE INSTITUTE FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (IAALS), *Justice Needs and Satisfaction in the United States of America* (2021), <https://www.hiil.org/wp-content/uploads/2019/09/Justice-Needs-and-Satisfaction-in-the-US-web.pdf>.

unrepresented by counsel.¹¹² There remains a complicated intersection of needs. There is an overwhelming need for effective and competent representation and legal advice for those faced with desperate legal circumstances, without the financial means to obtain legal assistance.

“Access” generally encompasses what attorneys think of as “legal issues” that require intervention by attorneys and the legal system.¹¹³ This view leads to solutions that inevitably require more, rather than less, involvement by attorneys and the system. This is at least in part why the access-to-justice gap remains stubbornly large despite many laudable initiatives that invest large amounts of financial resources and human capital.

In contrast to access problems, “justice problems” encompass a broader range of challenges faced by everyday people that are inextricably linked to structural and systemic forces, such as racism, bias, and economic inequities. This includes, for example, employment, wages, and work conditions; housing; debt and other financial obligations or issues; health care and medical treatment; family matters; disability and inclusion; education; discrimination; and lack of legal status.¹¹⁴ If those working in the legal profession widen their perspective to center justice problems as the framework to view and address legal needs, the role of communities becomes pivotal, and a greater range of

¹¹² See generally David Freeman Engstrom, *Post-COVID Courts*, 68 UCLA L. REV. DISC. 246 (2020) (exploring the toll of COVID-19 on our courts).

¹¹³ Sandefur, *supra* note 95.

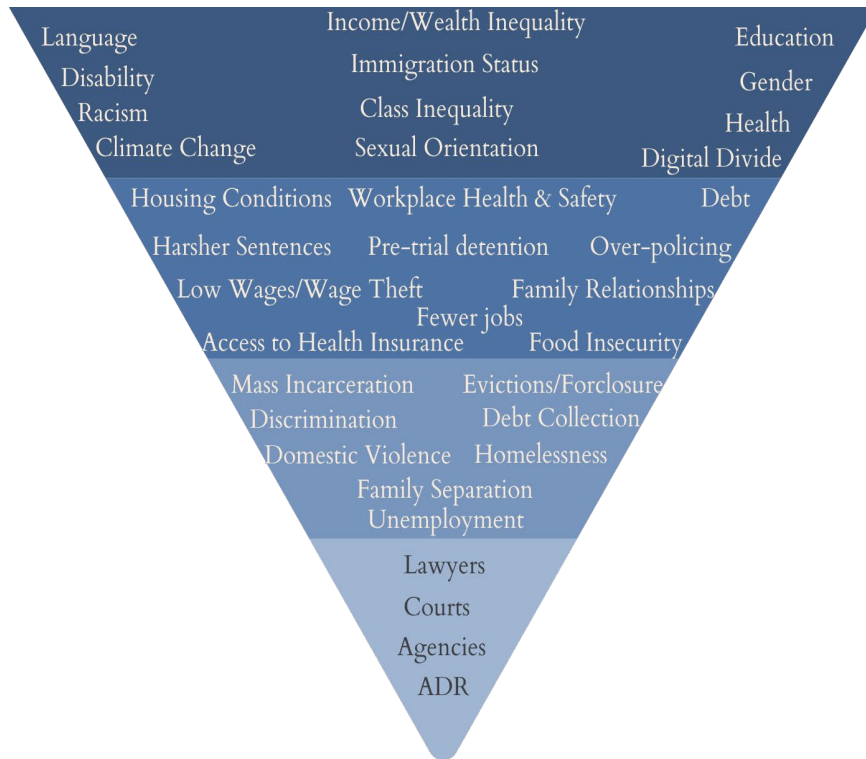
¹¹⁴ *Id.*

solutions and remedies emerge beyond those available through the legal system.¹¹⁵

Increasing access without fundamentally reevaluating what justice is within and outside the legal system—for example, addressing racial disparities and inequities, providing the means to effectively avoid, prevent, and resolve legal issues, and reducing unnecessary involvement with the legal system—will perpetuate the ongoing access to justice “crisis” in which: (i) legal needs that are tied to greater socioeconomic inequities are unmet, (ii) court resources remain stretched to the breaking point, and (iii) underlying access to justice problems continue to escalate.

To better visualize the relationship between access and justice, we constructed the “Justice Pyramid” below, which is upside down to reflect the actual scope of each of the tiers from top to bottom: system obstacles, justice problems, legal needs, and the legal system.

¹¹⁵ The Justice Index provides “a snapshot of the degree to which each US state has adopted best practices for ensuring access to justice for all people. NCAJ has identified policies in four key areas—attorney access, support for self-represented litigants, language access and disability access—that we believe every state should have in place to ensure meaningful access to justice for everyone.” NAT’L CTR. FOR ACCESS TO JUST., *Justice Index*, <https://ncaj.org/state-rankings/justice-index> (last visited Dec. 20, 2022).



Summary of survey data related to access to justice

The access-to-justice framework helps contextualize the relevant results of the Task Force survey. Responses reflect the legal profession’s traditional view that the access-to-justice crisis can be addressed predominantly by legal aid and legal services, pro bono representation by the private bar, and law school clinics. This traditional notion of access to justice in the legal profession focuses on legal needs and representation. In contrast, a broader view of justice problems requires a greater role by non-lawyers in the community. Notably, although respondents did not view technology as critically important, they believed access to information—including through technology—would make the biggest difference for the clients and communities they serve.

The first survey question regarding access to justice was question 31, which asked respondents to rank seven different descriptions of access to justice.¹¹⁶ 35.63% of respondents answered that the best description for access to justice was “Providing more legal representation through legal aid and civil legal services and law school clinics”; 17.52% selected “Supporting legislation and other actions that will simplify court procedures, forms, and rules”; 16.79% selected “Educating people about their legal rights and making other information about legal issues more readily available and accessible”; 14.48% selected “Restructuring the court system to better meet the needs of litigants”; 13.32% selected “Providing legal representation through increased involvement of attorney pro bono services, assigned counsel or pro bono programs”; 7.4% selected “Expanding the use of alternative dispute resolution to the unrepresented, including mediation and arbitration”; and 4.3% selected “Improving the use of technology to help the unrepresented and under-represented litigants.”¹¹⁷

Question 33 asked, “To increase ‘access to justice,’ how important are free legal services to those without means to pay legal fees?”¹¹⁸ 60.93% of respondents selected “Very important”; 22.41% selected “Important”; 13.33% selected “Somewhat important” and 3.33% selected “Not important.”¹¹⁹ The

¹¹⁶ Survey question 31.

¹¹⁷ Survey results question 31.

¹¹⁸ Survey question 33.

¹¹⁹ Survey results question 33.

following question asked respondents to identify the services from question 33 that should be free, and the written responses indicate a tension between the inability of most low-income people to afford an attorney and the economic pressure attorneys have to earn enough to pay bills, including student loans, and make enough to support themselves and their families.

Question 35 asked, “To increase ‘access to justice,’ how important is it to provide more affordable legal services to those who are not indigent, but who still need legal assistance?”¹²⁰ 44.61% of respondents selected “Very important”; 31.77% selected “Important”; 19.59% selected “Somewhat important” and 4.03% selected “Not important.”¹²¹

Question 37 asked respondents to rank four changes to improve access and justice in the courts for the unrepresented or under-represented. 40.88% of respondents ranked as most significant “Changes in court rules, procedures, and forms to improve quality, efficiency, and public information to seek to make it easier for litigants to better understand and participate in court proceedings.”¹²² Next, 25.22% of respondents ranked as most significant “Training of judges and court personnel on the impact of the court system (for example, on housing, income, health care, employment, family matters, and incarceration),” followed closely with 22.69% of respondents selecting

¹²⁰ Survey question 35.

¹²¹ Survey results question 35.

¹²² Survey results question 37.

“Legislation that would seek to prevent legal problems that require court resolution.”¹²³ 16.97% of respondents ranked as most significant “Better understanding, design, and use of technology by courts to enable virtual appearances (i.e., computers, mobile devices, printers, and connectivity) and facilitate access to information by litigants.”¹²⁴

Question 38 asked, “From an ‘access to justice’ perspective, what changes would make the biggest difference to the clients and communities you serve?”¹²⁵ In reviewing the written answers, respondents tend to believe that through technology and public education an increase of accessible information would make the biggest difference in access to justice to the clients and communities they serve.

COVID-19 revealed and exacerbated the pre-existing access to justice crisis

As the Honorable Edwina G. Mendelson wrote in her July 2020 report entitled *Ensuring Access to Justice for Unrepresented Court Users in the Virtual Court Era—and Beyond*,

[T]he impact of COVID-19 will lead to a greater number of unrepresented litigants entering the court system—either to initiate a claim, to defend against one, or both. The unrepresented are often at a disadvantage in even the best of times, and this crisis has exacerbated many of the hardships, including the digital divide between those with access to technology and those lacking such access. Yet, this crisis comes with an opportunity—it has provided the [Unified Court System] with the impetus to design and implement

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Survey question 38.

a virtual extension of our existing Access to Justice program. A system that works well during a pandemic will work exceedingly well as the crisis subsides. Our response must be immediate; we simply do not have the luxury of delay.¹²⁶

The impact of COVID-19 on the legal profession has been profound. As the National Center for Access to Justice describes in its 2021 report “*Working With Your Hands Tied Behind Your Back*”: *Non-lawyer Perspectives on Legal Empowerment*:

Every year, millions of Americans who need help with their legal problems find out that there is no such help or offer. Some are left to go it alone in court, where they may stand little chance against a better-equipped adversary. Some lose their homes, their savings and their children in cases they might have won with the right kind of help. Others avoid the legal system altogether, in situations where it could help vindicate their rights or win reparation for abuse.¹²⁷

The following statistics provide a snapshot of the access to justice gap for civil legal problems:

- In 2017, “86% of the civil legal problems reported by low-income Americans received inadequate or no legal help.”¹²⁸ At the same time, “71% of low-income households experienced at least one civil legal problem in the last year, including problems with health care, housing conditions, disability access, veterans’ benefits, and domestic violence.”¹²⁹

¹²⁶ HON. EDWINA G. MENDELSON, *Ensuring Access to Justice for Unrepresented Court Users in the Virtual Court Era—and Beyond* 3 (2020), <https://www.nycourts.gov/LegacyPDFS/ip/nya2j/Unrepresented-Court-Users-Report-July-1-2020.pdf>.

¹²⁷ *Working With Your Hands Tied Behind Your Back*, NAT’L CTR. FOR ACCESS TO JUST., *Non-lawyer Perspectives on Legal Empowerment* 3 (June 2021), <https://ncaj.org/sites/default/files/2021-06/NCAJ%20Working%20With%20Your%20Hands%20Tied%20Behind%20Your%20Back.pdf>.

¹²⁸ LEG. SERVS. CORP., 2017 JUSTICE GAP REPORT, *supra* note 94.

¹²⁹ *Id.*

- Each year, 55 million Americans experience 260 million legal problems.¹³⁰ “A considerable proportion of these problems—120 million—are not resolved or are concluded in a manner which is perceived as unfair.”¹³¹
- The national benchmark for civil legal aid attorney count per 10,000 people is 10, whereas the New York score count is 4.39 per 10,000.¹³²

As COVID-19 forced courts to close their physical doors, technology opened virtual doors, enabling court services to remain available to the public.¹³³ The New York State court system pivoted to virtual proceedings using the Microsoft Teams platform.¹³⁴ Virtual proceedings will no doubt continue to be an essential part of what has become a hybrid court system.¹³⁵

Many attorneys and legal services/legal aid organizations were creative and resourceful in this pivot and deployed digital tools and platforms to respond to the needs of their clients.¹³⁶ They maintained communication with their clients and, wherever necessary and possible, provided them access to technology they needed to communicate and/or appear in court. Some implemented community education such as “know your rights” workshops.

¹³⁰ *Justice Needs and Satisfaction in the U.S.*, *supra* note 111, at 222.

¹³¹ *Id.*

¹³² *Attorney Access: State Scores and Rankings*, NAT’L CTR. FOR ACCESS TO JUST., <https://ncaj.org/state-rankings/justice-index/attorney-access> (last visited Dec. 20, 2022).

¹³³ *How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations*, THE PEW CHARITABLE TRS. (2021), <https://www.pewtrusts.org/-/media/assets/2021/12/how-courts-embraced-technology.pdf>.

¹³⁴ NYSUCS, Microsoft Teams – Virtual Court Appearances, <https://portal.nycourts.gov/knowledgebase/article/KA-01071/en-us> (last visited Dec. 12, 2022).

¹³⁵ *Creating an Archive: Responding to the 2020-2021 Pandemic*, HIST. SOC’Y OF THE NEW YORK CTS., <https://history.nycourts.gov/pandemic-response> (last visited Dec. 12, 2022).

¹³⁶ *See, e.g.*, Law Help NY, <https://www.lawhelpny.org/> (last visited Dec. 12, 2022); *Lawyering in the Digital Age*, Projects, COLUMBIA LAW SCH., <https://blogs.law.columbia.edu/ldaclinic/projects> (last visited Dec. 12, 2022).

COVID-19 illuminated the importance of community-based projects and resources beyond individual representation. For example, Legal Hand is a project where trained non-lawyer community volunteers provide free legal information, assistance, and referrals to help resolve issues with employment, housing, family, immigration, domestic violence, and benefits, aiming to prevent these problems from turning into cases.¹³⁷ Legal Hand offices were conceived as one-stop legal information centers, accessible and connected to legal and other service providers, with a community volunteer training program and located in low-income communities.

Before and during the COVID-19 pandemic, Legal Hand was a physical space, and then became a virtual space where people with different kinds of justice problems were able to obtain information. There are many unmet legal needs, including problems that are outside the scope of what legal services typically provide. For example, according to Jennie Kim, immigration attorney with Queens Legal Services and former attorney for Legal Hand:

We think about housing in terms of tenants and landlords, housing conditions, and affordability. But, as a result of the affordable housing shortage, a tenant may be renting out their rooms. People came into Legal Hand needing to resolve conflicts with the tenant over who is entitled to a particular room and how much they must pay as the ‘room rental’ arrangements are not in writing. The court system couldn’t really handle that situation and even when we were trying to develop some kind of method of dealing with conflicts that arise in that situation and it’s not just about . . . personal conflicts, but we’re talking about actually fighting over one room, and the

¹³⁷ Legal Hand, <https://www.legalhand.org> (last visited Dec. 19, 2022).

tenant of the apartment had actually decided to put someone else in that room. And so, the person who was there was kicked out into the living room, without any partitioning. There are a lot of people who are coming in with these issues.¹³⁸

The New York State courts and many organizations developed creative and new methods, including emergency procedures and protocols, to make courts and information available. There were “delays in justice,” but perhaps they were actually justice initiatives from which we can learn, for example, the eviction moratorium.

At the beginning of the pandemic, online proceedings were essential for the safety of clients and legal staff, including judges and court personnel. What did not change is that “disparities in healthcare, employment, and housing place communities of color at great risk of being targeted by the legal and court systems, and places them at a great risk of illness and death.”¹³⁹

Virtual proceedings have had different impacts, both positive and negative, depending on the type and procedural posture of a particular case. Virtual proceedings have made court appearances much more accessible for many litigants, including working parents, older adults, people with disabilities, and others with caregiving responsibilities. Interpreters can more easily provide services merely by signing into the virtual proceeding. The option to appear in

¹³⁸ On file with Access to Justice Working Group.

¹³⁹ Written testimony of Lisa Schreibersdorf, Executive Dir. of Brooklyn Defender Servs. (Dec. 14, 2021), <https://bds.org> (on file with Access to Justice Working Group).

court remotely, particularly for appearances without testimony, evidence, and final decisions, can provide easier and more efficient access to the courts and brings substantial benefits, including relieving litigants, often relying on public transportation, of the burden to travel. Outside of New York City, litigants may have to travel long distances to law offices and courts, adding a great deal of time and expense.

However, virtual proceedings can amplify preexisting inequities. For example, as Family Court turned virtual, Brooklyn Defender Services reported an increase in dehumanizing language used to speak to both families in the court system and their staff.¹⁴⁰

A disproportionate percentage of litigants in New York City Family Court and Housing Court are people of color, who often do not have access to adequate computer devices, internet connectivity, or the digital literacy necessary to fully participate in virtual proceedings.¹⁴¹ This compromises their due process rights and their attorneys' ability to zealously advocate. During virtual court appearances, it was difficult for attorneys and their clients to communicate privately, which prevents attorneys from incorporating a client's personal knowledge and opinions into litigation decisions. This also prevents counsel

¹⁴⁰ Johnson Report, *supra* note 98, at 2–5.

¹⁴¹ NEW YORK CITY FAMILY COURT COVID WORKING GROUP, *The Impact of Covid-19 on the New York City Family Court: Recommendations on Improving Access to Justice for All Litigants* 3–5 (2022) <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/nyc-family-court-covid-19-impact>.

from being able to answer a client's real-time questions and ensure that they understand what is happening in court.

Former US Secretary of Homeland Security Jeh Johnson recently examined institutional racism in the New York State court system.¹⁴² Johnson reported repeatedly hearing about “‘dehumanizing’ and ‘demeaning cattle-call culture’ in New York City’s highest volume courts.”¹⁴³ Accordingly, “[t]he picture painted for us was that of a second-class system of justice for people of color in New York State.”¹⁴⁴

The United States immigration court system was suffering from a significant backlog of cases prior to COVID-19, among other inefficiencies, and a lack of fairness. Because removal proceedings are deemed civil matters, immigrants facing removal do not have a right to an attorney like a criminal defendant. This leads to a high percentage of *pro se* respondents in immigration courts. There is also no right to language interpretation during a removal hearing, which deprives respondents of the right to understand the entire proceedings, even though these proceedings determine their fate. As immigration courts increase their reliance on virtual proceedings, due process is adversely impacted in depriving respondents access to their attorney(s) and prejudicing the rights of *pro se* respondents. Immigrants are deprived the

¹⁴² *Id.* at 3. See also Johnson Report, *supra* note 98, at 54.

¹⁴³ Johnson Report, *supra* note 98, at 54.

¹⁴⁴ *Id.*

opportunity to have meaningful participation in their hearings or present their defenses in removal cases.

While the primary focus of this report is on civil access to justice, we recognize that the criminal justice system in New York State has had, and continues to have, a devastating impact on Black and Brown communities with far-reaching collateral consequences.

In 2021, there were 76,021 individuals incarcerated in federal, state, and local jails and prisons in New York.¹⁴⁵ Approximately 96,000 adults are on probation, and 43,000 are on parole.¹⁴⁶ Despite the current perception of an increase in crime, racism, bias, and inequality continue to exist throughout New York State, including within the legal system.¹⁴⁷

The “digital divide” prevents access to justice in virtual proceedings and communities

COVID-19 accelerated the pace of lawyering in the digital age, including expanded e-filing and virtual proceedings. Virtual proceedings were initially

¹⁴⁵ PRISON POL’Y INITIATIVE, *States of Incarceration: The Global Context 2021*, Appendix 1: State Data (Sept. 2021), https://www.prisonpolicy.org/global/appendix_states_2021.html.

¹⁴⁶ PRISON POL’Y INITIATIVE, *New York Profile*, <https://www.prisonpolicy.org/profiles/NY.html> (last visited Dec. 18, 2022).

¹⁴⁷ See e.g., NEW YORK ADVISORY COMM. TO THE U.S. COMM. ON CIV. RTS., *Racial Discrimination and Eviction Policies and Enforcement in New York* (2022), <https://www.usccr.gov/files/2022-03/New-York-Advisory-Committee-Evictions-Report-March-2022.pdf> (within the broad context of the nationwide eviction crisis, lack of affordable housing, and homelessness, together with historical housing segregation, redlining, and zoning policies; examining impact of racism in housing courts in Albany, Buffalo, and New York City); Johnson Report, *supra* note 98 (noting some progress, but proposing urgent additional measures to address persistent racism and bias in the court system that is “dehumanizing, over-burdened and under-resourced”). New York State has implemented some of the recommendations in the Johnson report. Press Release, NYSUCS: *New Report Documents Significant Progress Made, Efforts Underway to Advance Equal Justice in the NYS Courts*, Nov. 17, 2021, https://www.nycourts.gov/LegacyPDFS/press/pdfs/PR21_29.pdf.

used as a stopgap measure, but now are a permanent part of the New York State court system. The accelerated transition to online practice and proceedings necessitated by the pandemic highlighted the deep “digital divide,” which creates obstacles for many litigants who are forced to rely on technology as never before. “For instance, users without high-speed internet services or computers faced significant hurdles when trying to access courts using the newly available tools.”¹⁴⁸

The move to virtual proceedings revealed another preexisting problem: the “digital divide” largely corresponds to the broader socioeconomic disparities that disproportionately impact marginalized groups. The digital divide separates those with access to broadband internet, computer devices (including tablets and smartphones), and the necessary training enabling meaningful participation. These problems are also pervasive in the New York State administrative hearing system that presides over a vast government benefit system that impacts a substantial number of the most vulnerable people.

For over 250,000 New Yorkers, broadband service is unavailable in their neighborhood, and more than 1 million households do not have access or a subscription to broadband as of 2019.¹⁴⁹ According to Professor Conrad Johnson, Founder and Director of Columbia Law School’s Lawyering in the

¹⁴⁸ PEW, *supra* note 133.

¹⁴⁹ OFFICE OF NYS COMPTROLLER, *Availability, Access and Affordability: Understanding Broadband Challenges in New York State* (2021), <https://www.osc.state.ny.us/files/reports/pdf/broadband-availability.pdf>

Digital Age Clinic, the digital divide consists of three main components: (1) lack of internet access, cost, and broadband infrastructure; (2) lack of computer devices and software; and (3) lack of understanding how to access services online, which requires training on digital literacy.¹⁵⁰

An early pandemic housing case provides a glimpse at a providing approach to overcome the digital divide: the “Justice Tablet” project pioneered by Professor Johnson’s Lawyering in the Digital Age Clinic at Columbia Law School, in partnership with the Legal Aid Society of New York City.¹⁵¹ Using low-cost computer tablets that are preloaded with essential software programs (e.g., Microsoft Teams to access New York State virtual proceedings, WhatsApp to facilitate communication with counsel, CamScanner to copy documents, and a suite of Google programs, including Google search and Gmail), clinic students worked with Legal Aid in representing an 83-year-old client in an eviction proceeding alleging that her rent-controlled apartment was not her primary residence. Clinic students served as “digital navigators” and spent a substantial amount of time helping the client learn how to use the justice tablet prior to the proceeding. Clinic students and Professor Johnson “second seated” the Legal

¹⁵⁰ Testimony of Professor Conrad Johnson, Chief Judge’s Hearings on Civil Legal Services in New York, Sept. 19, 2022, <https://nycourts.gov/ctapps/civil.html>.

¹⁵¹ Lawyering in the Digital Age, *Projects*, <https://blogs.law.columbia.edu/ldaclinic/projects> (last visited Dec. 20, 2022).

Aid attorneys during the successful four-day trial, one of the first virtual proceedings in the State.

Justice Tablets can be loaned to litigants when they need them. Because they are relatively compact, they can be mailed with a self-addressed, stamped return label, and returned at the conclusion of the virtual proceeding. The Justice Tablet concept requires that a multi-pronged approach be used, including “Digital Navigators” who can assist litigants at home or in the community.

Justice Tablets also have great potential for use in public libraries and other community facilities, in addition to any existing computers in these settings. For example, while libraries may have computers, users may be limited to one hour, which may not be enough time for a litigant in a virtual proceeding, a client who needs to access information in a court-mandated program (e.g., to be trained as an adult guardian), or a client who needs more time to communicate with their attorney or access other information. In addition, the library or other community settings may not have a private space for the person to use the computer and may lack staff to provide any necessary assistance to the person. Beyond physical confidentiality, litigants need confidentiality and trust in those providing support, along with problems litigants may have in traveling to community sites (due to physical or cognitive limitations or child or elder care responsibilities).

While landline telephones, cell phones and smart phones can be used for routine and limited communications with attorneys and courts—for example, for scheduling or information—they are not adequate for virtual proceedings. As a result, when we consider how to overcome the digital divide, it is essential that each component—an adequate computer device, sufficient internet connectivity, and digital literacy or support—be part of any initiative.

In the digital age, access to information for the general public, and actual or potential litigants, can and should be made readily available in plain language. For example, Lawhelp.org provides legal information and resources in collaboration with local legal service providers.¹⁵² The New York State court system has numerous “do it yourself” (“DIY”) forms and guided interview programs.¹⁵³ JustFix provides building an owner information, forms for tenants, and other resources.¹⁵⁴ Immi is a web-based program that provides important legal information and preparation packets for immigrants in English and Spanish.¹⁵⁵

Despite its benefits, DIY technology has limits in that a substantial number of people do not have computer devices, lack access to reliable internet, and perhaps most important, do not have the necessary digital literacy to

¹⁵² LAWHELP, <https://www.lawhelp.org> (last visited Dec. 20, 2022).

¹⁵³ NYSUCS Court Help, *DIY Forms*, <https://www.nycourts.gov/courthelp/DIY/index.shtml> (last visited Dec. 21, 2022).

¹⁵⁴ JUSTFIX, *Tools*, <https://www.justfix.org/en/tools> (last visited Dec. 21, 2022).

¹⁵⁵ IMMI, *About Immi*, <https://www.immi.org/en/Info/About> (last visited Dec. 21, 2022).

navigate computer platforms and programs without assistance. “Techno-optimism” refers to the idea that DIY programs and related digital tools will be available and usable by most people who have a particular legal need but are not represented by an attorney.¹⁵⁶ However, while digital tools certainly can and should be designed to be DIY, a more promising “use case” involves using digital tools with training advocates and trusted intermediaries in the community.

The New York State court system has made a significant commitment to creating spaces where legal information is accessible (broadly defined) and easy to understand, providing services intended for court users who are indigent or low income, and offering opportunities to file papers without attorneys.¹⁵⁷

A promising approach to these issues is the Office for Justice Initiatives (“OJI”).¹⁵⁸ The OJI framework centers on court access, community outreach and prevention, and family and juvenile justice through various means including “[d]eveloping and coordinating region specific community outreach initiatives designed to broaden access to and improve public understanding of the legal system” and “[g]aining legislative and public support for the New York State Judiciary’s proposals relating to access-to-justice matters.”¹⁵⁹

¹⁵⁶ Tanina Rostain, *Techno-Optimism & Access to the Legal System*, 148 DÆDALUS 1, 93–97 (2019).

¹⁵⁷ See generally NYSUCS OFF. JUST. INITIATIVES, *Law Day Report: Advancing the Rule of Law Now* (2021), https://www.nycourts.gov/LegacyPDFS/ip/nya2j/OJI_LawDayReport_2021.pdf.

¹⁵⁸ NYSUCS OFF. JUST. INITIATIVES: *About Us*, <https://ww2.nycourts.gov/ip/oji/about.shtml> (last visited Dec. 21, 2022).

¹⁵⁹ *Id.*

Our legal system broadly includes the administration of justice through administrative adjudication. One case study of the impact of the pandemic at the administrative level is New York City’s due process procedures to deny, discontinue, or curtail public assistance. New York City’s Human Resources Administration (“HRA”) decides the actions that deny, discontinue, or limit public assistance. New York State’s Office of Temporary and Disability Assistance (“OTDA”) administers hearings that challenge HRA’s actions. HRA established the Advocates Inquiry System, which allows advocates (not *pro se* respondents) to resolve matters without the need for a fair hearing. This also helped reduce the number of baseless hearings. However, it has meant that those hearings that are held now typically involve more complex issues, often requiring the submission by the respondent of evidence or corroborating testimony.

With COVID-19 came telephonic administrative hearings. This pilot project was extended through 2021 and 2022 and may become permanent.¹⁶⁰ The goals were to reduce the number of people who had to physically travel to offices for hearings, create efficiencies, and not violate the due process protections of recipients. Procedures were enacted to provide evidence packets in advance to recipients, to receive evidence from recipients by mail, email, or fax, and for connection to the hearings by telephone. Litigants are expected to

¹⁶⁰ See *Hearing by Phone*, NYC OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, <https://www.nyc.gov/site/oath/hearings/hearing-by-phone.page> (last visited Feb. 28, 2023).

submit digital evidence prior to the hearings (challenging at best) or during the hearing. ALJs often need to evaluate the credibility of witnesses. All of this makes a hearing by phone (even a smartphone) inappropriate.

Clearly, there are potential benefits to a virtual hearing system, even absent a pandemic. The elderly, disabled, certain working people (i.e., people whose wages still leave them unable to meet the cost of rent, food, and are therefore eligible for public assistance), and those with eldercare or childcare responsibilities could benefit from a virtual option. Even from within New York City, travel to 14 Boerum Place can be onerous; outside the city, travel challenges may be even worse. Adding the pandemic to the mix further necessitated the need for a virtual hearing option, beyond telephonic, so long as participation in the hearing could be meaningful.

The bottom line is the same for administrative hearings as it is for court proceedings: if virtual proceedings can provide litigants with viable due process protections and assistance from advocates, then these hearings can be useful. Until that is a reality, virtual hearings of the type that currently occur via the fair hearing "pilot project" will continue to deprive under-resourced communities from meaningful access to justice. It is therefore imperative that consideration be given to require a judicial decision process with appropriate criteria as a prerequisite for virtual proceedings, along with litigant consent to virtual processes.

Recommendations

These recommendations build on efforts to address the ongoing impediments to ensure access to justice and are designed consistent with the mandate of the Task Force to safeguard and strengthen the future of the legal profession.

Court proceedings

- Courts should review existing policies and procedures and develop criteria and procedures with the goal of improving accessibility and equity that is responsive to the case.
- In virtual proceedings, certain norms, expectations, and best practices for respectful behavior need to be reinforced so that litigants, counsel, judges, and court personnel treat each other with dignity and respect.
- Support authorization of virtual court proceedings throughout New York State, whether by an Order of the Chief Judge of the Court of Appeals or legislation. Establish criteria for judicial approval of the use of remote litigation forums.
- Support training and creation of protocol for judges and court personnel on racism and bias (explicit and implicit) generally and in conducting in-person and virtual proceedings to promote a culture of service, respect, and dignity. Support training for court clerks and personnel that is

designed to treat members of the public, including *pro se* litigants, with respect and dignity as consumers of court services.

- Immigration proceedings should be presumptively in-person, but if the proceeding is virtual, safeguards should be in place to assure that the detainee is in a private area outside the presence of ICE or corrections officers, but with sufficient protection for the court, support personnel, litigants, and counsel.
- Provide a means for attorneys to communicate privately with clients during a virtual proceeding.
- Tenants in housing court at their initial appearance, and prior to the issuance of any judgments or warrants, as appropriate, should be advised that they have a right to an attorney; cases should be adjourned to provide tenants with the reasonable opportunity to retain an attorney; and safeguards should be established to prevent default judgments when an unrepresented litigant with good cause does not appear in court or is unable to connect to a virtual proceeding.
- Support consolidation of housing cases outside of New York City that are adjudicated in city, town, and village courts based on the Special COVID Intervention Parts (“SCIP courts”) project in Monroe County.

- Support placement of private internet portals or stand-alone kiosks in court and other public buildings throughout the State to allow respondents to appear who are otherwise unable to access remote proceedings.
- Support expansion of presumptive mediation in all appropriate matters.

Administrative hearings

- Administrative hearing notices should be accessible and in plain language. Hearing notices should have separate forms for in person, telephonic, or video hearings.
- Hearings involving individuals with limited English proficiency should be presumptively in person, with the option to opt-in to a telephone or video hearing.
- Individuals who request a hearing by telephone should be asked for their hearing venue preference (i.e., in person, telephone, video). There should be an option to an online form to allow individuals to select which hearing venue (i.e., in person, telephone, video) they prefer.
- Provide training to administrative law judges on remote hearings, with the input of advocates, including how to conduct a remote hearing with an interpreter, how to securely send documents and evidence in a timely

manner prior to a hearing, and how to address issues relating to credibility determinations in this context.

Access to remote proceedings: use technology to benefit individuals and communities

- Support funding and initiatives to increase access to electronic devices, broadband internet, and digital literacy support and training.
- Support funding for new and existing initiatives to increase the availability of technology for appearance in virtual proceedings.
- Increase use of technology and universal design principles to create uniform plain language court forms.
- We base this recommendation on the seriously deficient delivery of legal services to those most desperately in need of assistance that the pandemic has laid bare. Our system is unable to provide sufficient help to those with very elemental legal needs such as housing, family law matters and immigration concerns. Existing access to justice initiatives, which frequently focus on an attorney-centered solutions, require a fresh look.

Empower communities to identify, prevent, and resolve legal issues

- To reduce involvement with the court system, communities must receive the necessary support and resources to identify, prevent, and resolve legal problems “upstream” before they become court cases. For example,

through easy-to-understand legal information in a variety of forms, DIY forms, and continued expansion of presumptive ADR.

Increase free and low bono representation and diversify the legal profession.

- Increase funding for free legal aid/services, *pro bono*, and *pro bono* incubator projects.
- Increase expenditures for access to justice initiatives.
- Support the continued efforts of the New York State Bar Foundation to fund legal services to those in need.

New Lawyers and Law Students

Introduction

The COVID-19 pandemic significantly impacted new lawyers. Working and learning environments were disrupted, forcing change in the way in which they are assimilated into the legal profession, learn, conduct their practice, and interact with colleagues and clients.¹⁶¹

For law students, an abrupt switch to online learning took place overnight, and opportunities for professional development and academic engagement withered.¹⁶² Some students struggled to meet basic needs for housing, financial stability, and food insecurity.¹⁶³ All of these factors contributed to increased reports of anxiety, depression, emotional exhaustion, and loneliness experienced by law students during the pandemic.¹⁶⁴

The COVID-19 pandemic caused many new lawyers to question the traditional practice of law.¹⁶⁵ New attorneys learning how to litigate for the first time had to try cases and present at hearings via online platforms.¹⁶⁶ Rather than walking down the hallway of a law office to seek mentorship and advice

¹⁶¹ For purposes of the survey data analyzed, a “new attorney” is defined herein as an attorney practicing for seven years or less.

¹⁶² *The COVID Crisis in Legal Education*, INDIANA CTR. FOR POSTSECONDARY RESEARCH, Oct. 28, 2021, <https://lssse.indiana.edu/wp-content/uploads/2015/12/COVID-Crisis-in-Legal-Education-Final-10.28.21.pdf>.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Elaine McArdle, *Practicing Law in the Wake of a Pandemic*, HARVARD LAW BULLETIN, July 15, 2022, <https://hls.harvard.edu/today/practicing-law-in-the-wake-of-a-pandemic>.

¹⁶⁶ *Id.*

from a more senior lawyer, new attorneys had no choice but to seek guidance and support in creative ways such as virtual meetings.

Newly admitted attorneys entering the practice of law were forced to navigate an uncertain job market, some having their associate job offers revoked as a result of the pandemic.¹⁶⁷ Building a reputation, learning how to be a lawyer, finding a job as well as maintaining mental health amid a pandemic were challenges not faced by any recent generation of new attorneys. The careers and attitudes of thousands of new practitioners and law students were profoundly impacted, beginning in 2020 with the onset of the pandemic, during their early period of formative experience.¹⁶⁸

Drawing upon statewide focus groups and the Survey measuring the attitudes and experiences of new attorneys and law students, the New Lawyers and Law Students Working Group has analyzed how law students and new attorneys were affected by the COVID-19 pandemic and how these experiences will shape the future of the legal profession.

Background and Methodology

The Survey included 12 questions specifically designed for attorneys in practice for seven years or fewer. A separate 20-question survey was designed for law students enrolled in New York State law schools. The questions allowed

¹⁶⁷ Michele Gorman, *COVID-19 Forcing Firms to Rescind Job Offers to Grads*, LAW 360, July 16, 2020, <https://www.law360.com/articles/1292522/covid-19-forcing-firms-to-rescind-job-offers-to-grads>.

¹⁶⁸ *Pandemic: Mental Health Impact on Young Lawyers*, AM. BAR ASS'N, Jan. 29, 2021, https://www.americanbar.org/groups/health_law/section-news/2021/01/pan-men/.

for narrative responses, asked respondents to rank their preferences, or solicited a yes or no answer.

Summary of Findings

Overall, law students and new attorneys reported that a virtual learning and/or working environment negatively impacted them in some way. Law students found it harder to forge relationships with classmates and learn from professors in a virtual environment. Gone were informally organized student study groups. New attorneys believe that the virtual working environment hindered their ability to conduct certain activities. Notwithstanding the negative impact felt by new lawyers and law students, the Survey results demonstrated that both groups are overwhelmingly in support of the continuation of some aspects of virtual education and the virtual practice of law.

For example, while a majority of law students believe that virtual law school hindered their ability to build relationships with others, thwarted their advocacy skills, and was less effective than in-person instruction, almost two-thirds of the law students surveyed indicated law students should have the option to choose virtual instruction for *all* classes.

This new penchant for continued reliance on virtual interaction born during the pandemic was reflected in the overwhelming majority response that new lawyers and law students will not consider job opportunities that do not include some form of a remote working option.

The Survey results highlighted the significant disagreement between law students and new attorneys concerning whether law schools should require a course dedicated to New York Practice. Many law students did not think that a New York Practice course in law school should be required, while new attorneys overwhelmingly believed it should be a required course.

The following is an analysis of the questions the New Lawyers and Law Students Working Group found most relevant to the Task Force’s mission.

New York Law Practice Course & the Bar Exam

In response to the question of whether law schools should require a New York Practice course, only 45% of those law students surveyed thought that this course should be a required course.¹⁶⁹ Nearly as many students had an opposing view. The way this question was posed to law students was offered in the context of a yes/no answer, while also allowing for an expanded response. A comprehensive review of these narrative responses provides insight into why so many students felt the course should not be required. Reasons included, “I don’t plan to practice in New York after school,” “it should not be required, but highly recommended,” and “it would be most useful only for litigators.” These responses may very well be caused by a lack of exposure to the actual practice of law through summer associate jobs and internships during nearly three

¹⁶⁹ Survey question 16.

summers of the pandemic or a lack of appreciation for how such a course can positively impact the knowledge base of new attorneys.

Interestingly, new lawyers were posed the same question of whether they think law schools should require a New York Practice course. The strong majority (70%) responded that schools should require the course. The chasm between law students and new attorneys is most probably due to the experience that new attorneys have facing complex procedural issues involving New York law. Understandably, law students having not yet practiced law may not see the value of a New York Practice course in law school.

Recently, the New York State Bar Association Task Force on the New York Bar Exam recommended the state withdraw from the Uniform Bar Exam and develop its own bar admission test so that attorneys have a better understanding of New York State law before being admitted to practice.¹⁷⁰ Specifically, the Task Force on the New York Bar Exam proposed that the state use a “four-to-five year period to develop its own New York Bar Exam and allow law schools, law students, and bar preparation courses to prepare for the New York test.”¹⁷¹ The reason being that the “current bar exam fails to protect New Yorkers by not requiring attorneys seeking the right to practice within this state to demonstrate

¹⁷⁰ Susan DeSantis, *New York State Bar Association Calls for State To Withdraw From the Uniform Bar Exam*, N.Y. STATE BAR ASS'N, June 12, 2021, <https://nysba.org/new-york-state-bar-association-calls-for-state-to-withdraw-from-the-uniform-bar-exm>.

¹⁷¹ N.Y. STATE BAR ASS'N, *Third Report and Recommendations of the Task Force on the New York Bar Examination* 12 (June 2021), <https://nysba.org/app/uploads/2021/06/9.-Task-Force-on-the-New-York-Bar-Examination-with-staff-memo.pdf>.

minimum competence in this state’s law.”¹⁷² Though law students and attorneys seeking admission to practice law in New York are required to take the New York Law Course (“NYLC”) and pass the New York Law Exam (“NYLE”), the Task Force on the New York Bar Exam believes the NYLC and NYLE are insufficiently rigorous to test that an applicant has meaningful knowledge of New York law.¹⁷³ We find it likely that the amount of law students and new attorneys who believe New York Law Practice should be a required course in law school would increase if New York follows the recommendations of the Task Force on the New York Bar Exam to divest from the Uniform Bar Exam in favor of a New York-specific bar exam.

Aligned with the Task Force on the New York Bar Exam’s disfavor for the Uniform Bar Exam, there seems to be acknowledgement by the National Conference of Bar Examiners (“NCBE”) that the current iteration of the Uniform Bar Exam could use reform to test minimum competency.¹⁷⁴ NCBE formally launched the development of a new bar exam titled the “NextGen Bar Exam,” which will be offered for the first time in the third quarter of 2026.¹⁷⁵ The revamped exam will test examinees in seven skills areas, including client counseling and advising, client relationships and management, legal research,

¹⁷² *Id.* at 78.

¹⁷³ *See id.* at 78–79.

¹⁷⁴ *See* Karen Sloan, *Old bar exam or new one? States will have a choice in 2026*, REUTERS, Jan. 19, 2023, <https://www.reuters.com/legal/government/old-bar-exam-or-new-one-states-will-have-choice-2026-2023-01-19>.

¹⁷⁵ NAT’L CONFERENCE OF BAR EXAM’RS, *NextGen Bar Exam of the Future*, <https://nextgenbarexam.ncbex.org> (last visited Feb. 28, 2022).

legal writing, and negotiations, and will get rid of several subject areas.¹⁷⁶ As of the date of this report, no states have formally expressed that they will administer NCBE’s new bar exam come 2026. Regardless, it does not appear that NCBE’s development of a NextGen Bar Exam will sufficiently address the Task Force on the New York Bar Exam’s concerns about testing the minimum competency of New York State specific laws.

Notwithstanding the Task Force on the New York Bar Exam’s recommendations or the NCBE’s development of a new bar exam, the majority (59%) of law students surveyed do not believe the bar exam should remain a path to licensure at all.¹⁷⁷ This is not entirely consistent with the conclusion of the Task Force on the New York Bar Exam, which maintains that New York should once again have its own bar exam that would be the “primary pathway to practice” and would be used to “evaluate whether an individual possesses minimum competency for law licensure.”¹⁷⁸

We do not know the reasons why surveyed law students believe so strongly that the bar exam should not remain a path to licensure. However, during the COVID-19 pandemic, discussions erupted across the nation concerning the necessity of the bar exam. Some law students during the COVID-19 pandemic demanded they be admitted to practice based solely upon their having graduated

¹⁷⁶ See Sloan, *supra* note 183.

¹⁷⁷ Survey question 13.

¹⁷⁸ Third Report and Recommendations of the Task Force on the New York Bar Examination, *supra* note 180, at 11 and 13.

from law school, known as “diploma privilege.”¹⁷⁹ Others called the bar exam outdated, cumbersome, privileged, and racist.¹⁸⁰ Regardless of whether New York wholly divests from the Uniform Bar Exam in favor of a New York State-specific exam or it adopts the NCBE’s NextGen Bar Exam, one point is certain: a majority of law students surveyed believe the current iteration of the bar exam must evolve or be eliminated altogether.

Virtual Learning Environment

In response to the question of whether the virtual learning environment enhanced, hindered, or did not affect students’ law school experience, overall students felt that virtual learning was less effective than in-person instruction and that it also hindered their ability to master their advocacy skills.¹⁸¹ More than half (52%) of the students surveyed believe that the virtual learning environment diminished their ability to connect and build relationships with others in the law school.¹⁸² This is no surprise, as a significant part of the law school experience—interacting with other students about cases and exams—was lost for upwards of two to three years with the need to pivot to virtual instruction. During a focus group session of the Task Force, a third-year law student described that the lack of familiarity with her classmates resulted in a

¹⁷⁹ *Id.* at 4.

¹⁸⁰ See Johanna Miller, *COVID Should Prompt Us To Get Rid Of New York’s Bar Exam Forever*, ABOVE THE LAW, July 31, 2020, <https://abovethelaw.com/2020/07/covid-should-prompt-us-to-get-rid-of-new-yorks-bar-exam-forever>.

¹⁸¹ Survey question 8.

¹⁸² Survey question 7.

loss of opportunistic student interaction. This, in turn, made the first year of law school significantly harder compounded with the depressing nature of the pandemic.

Many law students surveyed had been attending law school in person for one to two years when COVID-19 forced the emergency closure of law schools in New York with little to no preparation to begin virtual instruction. Unsurprisingly, even if professors displayed “heroic levels of creativity,” law students were dissatisfied with the emergency remote instruction in the face of a global pandemic.¹⁸³ After all, for the classes of 2020, 2021, and 2022, online law school was not what those students anticipated. Nonetheless, the insights of the students surveyed provides helpful clues for how law schools can effectively deliver distance learning in the future.¹⁸⁴

Distance education, commonly known as distance learning, is an educational process in which more than one-third of the course instruction involves the use of technology to support regular and substantive interaction amongst students and faculty.¹⁸⁵ As we transition into a post-pandemic future when distance learning is optional rather than being thrust upon students due

¹⁸³ Susan D’Agostino, *Gap Between Online and In-Person Learning Narrows*, INSIDE HIGHER ED, July 13, 2022, <https://www.insidehighered.com/news/2022/07/13/law-school-gaps-between-online-and-person-learning-narrow>.

¹⁸⁴ Gallup, *Law School in a Pandemic: Student Perspectives on Distance Learning and Lessons for the Future*, ACCESS LEX INST., [https://www.accesslex.org/sites/default/files/2021-06/Law%20School%20in%20a%20Pandemic_Student%20Perspectives%20on%20Distance%20Learnin](https://www.accesslex.org/sites/default/files/2021-06/Law%20School%20in%20a%20Pandemic_Student%20Perspectives%20on%20Distance%20Learning%20and%20Lessons%20for%20the%20Future.pdf)

¹⁸⁵ 22 N.Y.C.R.R. § 520.3(c)(6).

to a global health emergency, law students may experience a greater appreciation for and satisfaction with distance learning options.¹⁸⁶ In fact, law schools across the nation seem to be unphased by the general distaste of the classes of 2020, 2021, and 2022 toward their remote learning experiences. Many of the nation’s law schools are expanding distance learning opportunities for law students.¹⁸⁷ As of the date of this Report, 14 ABA-approved law schools offer distance education J.D. programs, including New York’s Syracuse University College of Law.¹⁸⁸

Deans of several New York law schools commented that “schools can be highly successful using remote instruction to add flexibility to evening and part-time law programs,” which provides “students from a range of backgrounds with enhanced educational access and other benefits, while maintaining high educational standards and quality.”¹⁸⁹ Until recently, New York’s rules concerning eligibility for bar admission were in lock step with the American Bar Association’s accreditation requirements, including recommendations on distance learning.¹⁹⁰ In 2020, the American Bar Association revised its

¹⁸⁶ *Id.*

¹⁸⁷ ABA News, *Law schools plan virtual learning expansion post-pandemic*, AM. BAR ASS’N, <https://www.americanbar.org/news/abanews/aba-news-archives/2022/02/law-schools-plan-virtual-expansion>.

¹⁸⁸ *ABA-Approved Law Schools With Approved Distance Education J.D. Programs*, AM. BAR ASS’N, https://www.americanbar.org/content/aba-cms-dotorg/en/groups/legal_education/resources/distance_education/approved-distance-ed-jd-programs.

¹⁸⁹ *New York Will Enhance Access to the Profession by Easing Limits on Remote Learning*, N.Y. LAW JOURNAL, May 4, 2022, <https://www.law.com/newyorklawjournal/2022/05/04/new-york-will-enhance-access-to-the-profession-by-easing-limits-on-remote-learning/>.

¹⁹⁰ *Id.*

accreditation standards to permit up to one-third of the credits required for a J.D. degree to be offered through distance learning.¹⁹¹ Then, in February 2023, the American Bar Association Council on Legal Education and Admissions to the Bar voted unanimously to advance changes to its accreditation standards, which would allow J.D. programs to offer 50% of credits via distance learning.¹⁹² New York, on the other hand, has distance learning credits capped at 15 out of 83 (18%) credit hours required for graduation.¹⁹³ Though the 15 distance learning credit hours can be applied toward the 64 classroom credit hours required by New York rules, they cannot be used until students complete their first year of law school.¹⁹⁴ Such limitations create a “substantial gap between ABA accreditation standards and the requirements of the New York bar.”¹⁹⁵

Although most law students reported that remote law school instruction during the COVID-19 pandemic was far less effective than in-person instruction, almost two-thirds (62%) of the law students indicated that they believe they should have the option to choose virtual instruction for *all* classes.¹⁹⁶ This

¹⁹¹ *Id.*

¹⁹² Christine Charnosky, *ABA Council Sends Proposal to Increase Distance Learning to Notice & Comment*, Feb. 17, 2023, LAW.COM, <https://www.law.com/2023/02/17/aba-council-sends-proposal-to-increase-distance-learning-to-notice-comment/>.

¹⁹³ 22 N.Y.C.R.R. § 520.3(c)(6)(i).

¹⁹⁴ 22 N.Y.C.R.R. § 520.3(c)(6)(ii)–(iii).

¹⁹⁵ *New York Will Enhance Access to the Profession by Easing Limits on Remote Learning*, *supra* note 198.

¹⁹⁶ Survey question 11. Our survey did not distinguish between synchronous instruction where students engage in learning in the remote presence of a professor in real time provided through digital video-based technology, from asynchronous instruction. The latter is when students engage in learning without the direct presence (remote or in-person) of a professor. The degree of contemporaneous synchronous interaction between a professor and the amount of asynchronous course work may be a factor in law student satisfaction with virtual instruction. Law schools should study the composition of virtual instruction to determine its effect on student satisfaction.

perhaps suggests recognition among law students that distance learning has cognizable benefits unrelated to the instructional process—it just needs improvement. The temporal efficiency of distance learning undoubtedly has allure for caregivers and parents pursuing a law degree and to those who need an income in the first instance to afford attending law school. By not having to be on campus to attend class, one gains time for expanded childcare or to work part-time jobs to make money. Distance learning provides access to legal education for individuals who are not in proximity to a law school, which further diversifies the legal profession.¹⁹⁷

Furthermore, the Survey asked students entering their last year of law school how prepared they felt for practice in light of learning virtually for one or more years.¹⁹⁸ Of the responding impacted law students, the majority felt “somewhat” prepared to enter their first year of practice despite possibly having spent multiple semesters in a virtual or hybrid learning environment. Similarly, the Survey asked new attorneys whether law school adequately prepared them to practice law in New York.¹⁹⁹ Nearly 50% of new attorneys surveyed answered that they did not feel adequately prepared.

The sentiment that law school did not adequately prepare law students and new attorneys for the practice of law is not new. A survey conducted in 1978

¹⁹⁷ Mike Stetz, *Distance learning gets ABA bump*, THE NAT’L JURIST, Sept. 8, 2022, <https://nationaljurist.com/national-jurist/news/distance-learning-gets-aba-bump>.

¹⁹⁸ Survey question 12.

¹⁹⁹ Survey question 54.

of “mid-career lawyers, two-third said that their legal education had been ‘not helpful’ or ‘played no role’ in their ability to develop critical practice skills like interviewing, counseling clients, and negotiating.”²⁰⁰ Similar sentiments were expressed by new attorneys again in 2009.²⁰¹ Seemingly law students and new attorneys feeling only “somewhat” prepared to enter the practice of law is attributed less to the COVID-19 pandemic and more to the significant changes law schools need to undergo to better prepare future attorneys.²⁰²

Virtual Working Environment

The Survey asked new lawyers to respond to questions regarding the virtual work environment.²⁰³ Prior to the COVID-19 pandemic, trials, oral arguments, depositions, and other activities largely took place in person. The COVID-19 pandemic forced significant changes to litigation practices and moved entire appearance calendars to remote conferencing platforms.²⁰⁴ The Survey

²⁰⁰ Martin Pritikin, *Are Law School Curriculums Preparing Students to Succeed?*, THE NAT’L JURIST, May 8, 2018, <https://nationaljurist.com/national-jurist-magazine/are-law-school-curriculums-preparing-students-succeed>; see also Leonard L. Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL EDUC. 264 (1978), <https://perma.cc/73XH-WKHE>.

²⁰¹ *Id.*

²⁰² *Id.* See also Matthew Diller and Joseph Landau, *New York Law Journal: Law Schools Must Implement Meaningful Adjustments*, FORDHAM LAW NEWS, June 29, 2021, <https://news.law.fordham.edu/blog/2021/07/01/new-york-law-journal-law-schools-must-implement-meaningful-adjustments>; Stephanie Hunter McMahon, *What Law Schools Must Change to Train Transactional Lawyers*, 43 PACE LAW REV. 106 (2022), <https://digitalcommons.pace.edu/plr/vol43/iss1/>; Marc Cohen, *Law Schools Must Restructure. It Won’t Be Easy.*, FORBES, May 15, 2017, <https://www.forbes.com/sites/markcohen1/2017/05/15/law-schools-must-restructure-it-wont-be-easy>.

²⁰³ In analyzing these questions, it is important to consider the practice area of the respondents. The top three categories of new attorneys who responded are litigators, followed by transactional attorneys, and then legal services providers. See Survey question 6.

²⁰⁴ FUTURE TRIALS WORKING GROUP OF THE COMMISSION TO REIMAGINE THE FUTURE OF NEW YORK’S COURTS, *Report and Recommendations of the Future Trials Working Group* (April 2021), <https://www.nycourts.gov/whatsnew/pdf/future-trials-working-grp-april2021.pdf>.

asked respondents to rank the effectiveness of specific legal events and activities taking place virtually, based on a scale of 1 through 7, with 1 being the most effective and 7 being the least effective.²⁰⁵ Not surprisingly, trial/arbitration was ranked as the least efficient activity to be conducted virtually (6.38 out of 7) and conferences with colleagues or adversaries were ranked the most efficient (1.91 out of 7).

Most experienced attorneys agreed with new attorneys that trial/arbitration is the least effective activity conducted virtually (ranked 6.10 out of 7).²⁰⁶ They believed that the most effective virtual activity is non-motion conferences with the court (1.96 out of 7), an opinion that differed from new attorneys, who believed that conferences with colleagues or adversaries was the most effective virtual activity. While not asked, the obvious advantages of virtual witness preparation for trial or virtual preparation for transactional activities, like mediation, cannot be denied. When it came to scoring the disadvantages of virtual activities, practicing attorneys agreed with new attorneys that virtual communication hinders their ability to “read” participants’ reactions and that technology glitches undermine the effectiveness of virtual proceedings.

It is recognized that virtual court appearances and the virtual practice of law will continue to be commonplace.²⁰⁷ During a weekly COVID-19 update,

²⁰⁵ Survey question 31.

²⁰⁶ Survey question 18.

²⁰⁷ See Nicole Black, *Are Virtual Court Proceedings Here To Stay? All Signs Point To Yes.*, ABOVE THE LAW, June 30, 2022, <https://abovethelaw.com/2022/06/are-virtual-court-proceedings-here-to-stay-all->

former Chief Judge Janet DiFiore commented that “COVID-19 compelled us to transform court operations overnight, virtual proceedings are no longer an ‘experiment’ but have proven to be an effective method of moving cases closer to resolution while ensuring that litigants and lawyers can have their matters heard in a convenient, time and cost-effective manner.”²⁰⁸ The Commission to Reimagine the Future of New York’s Courts extensively examined the ways in which evolving technologies effect trial practice in New York State and how the New York State Unified Court System can best prepare for and benefit from such technologies.²⁰⁹ The Commission noted that remote conferencing technology enhances “access to the courts by those who lack the flexibility in their work or caregiving arrangement to easily secure time to travel, or who live far from their nearest courthouse.”²¹⁰ However, the Commission shared the same concerns of new attorney Survey respondents, such as “increased potential for prejudicial disruptions to trial proceedings caused by technical malfunctions” and “diminished ability of counsel to observe contemporaneously the full body language and reactions of each juror.”²¹¹

signs-point-to-yes; Jon David Kelley, *Virtual Courts Are Not Going Away*, BLOOMBERG LAW, Oct. 13, 2022, <https://news.bloomberglaw.com/us-law-week/virtual-courts-are-not-going-away>; Christian Nolan, *Some Virtual Court Proceedings To Become Permanent*, N.Y. STATE BAR ASS’N, May 10, 2021, <https://nysba.org/some-virtual-court-proceedings-to-become-permanent>.

²⁰⁸ *Id.*

²⁰⁹ Future Trials Working Group, *supra* note 213.

²¹⁰ *Id.*

²¹¹ *Id.*

Recognition by the New York State Unified Court System that the virtual practice of law is here to stay mirrors the sentiment expressed by new lawyers about remote and virtual work environments. The Survey shows that almost two-thirds of new attorneys find it very important that an employer offer a hybrid work environment.²¹² Similarly, more than half of the responding attorneys with more than seven years of practice felt it was “very important” that a potential employer offer some form of a hybrid working environment.²¹³

In fact, the American Bar Association found that new lawyers feel so strongly about remote work that 44% said they would leave their current jobs for a greater ability to work remotely elsewhere.²¹⁴ This seems to be buttressed by the fact that a majority of lawyers feel that remote work does not adversely impact the quality of their work, productivity, or ability to hit billable hour quotas.²¹⁵

While most (54%) new attorneys did not believe the COVID-19 pandemic occurring early in their career would negatively impact their professional progression, more than half (52%) of the new attorneys surveyed felt that taking advantage of hybrid work may negatively impact their career growth.²¹⁶ This sentiment was not shared by non-new attorneys who overwhelmingly were “not

²¹² Survey question 56.

²¹³ Survey question 57.

²¹⁴ Amanda Robert, *Working remotely is now a top priority, says new ABA report highlighting lasting shifts in practice of law*, ABA JOURNAL, Sept. 28, 2022, <https://www.abajournal.com/web/article/new-aba-report-highlights-lasting-shifts-in-practice-of-law-and-workplace-culture>.

²¹⁵ *Id.*

²¹⁶ Survey question 58 and 59.

at all” concerned about a hybrid working environment negatively impacting their career progression (58%), nor did they indicate that they were concerned about the pandemic affecting their legal career (81%). This, however, is not surprising as experienced attorneys are more established in their practices.

Conclusion and Recommendations

While the worst of the COVID-19 pandemic is in the rearview mirror, law students and new lawyers faced a unique set of challenges and struggled with great instructional and practice adversity. Despite negative experiences surrounding virtual education and the remote practice of law, the Survey results and testimony of new lawyers and law students unequivocally show that new lawyers and law students want and require virtual education and the remote law practice to continue, albeit on a carefully selected basis. We recommend consideration of the following:

- New York Practice should be a required class in New York law schools.
- Law schools need to take a hard look at their curriculum to ensure that law students intending to practice in New York have sufficient New York-centric course options and properly educate their student body on virtual lawyering.
- Law schools should continue to improve the quality of distance learning and work to provide a variety of distance learning course modalities into the curriculum.

- The Office of Court Administration needs to ensure that virtual proceedings are effective for all participants, particularly those less than financially able as described in the Access to Justice portion of this report.
- Hybrid work options need to remain, must be offered by law firms, and consideration needs to be given whether to offer a fully remote option under the appropriate practice circumstances. The beneficial effect of hybrid work is the expansion of work opportunities to lawyers with parenting obligations. However, law firms bear the responsibility to ensure the proper training for the practice of law for those young lawyers opting for expanded hybrid work environments.

Law Practice Management and Technology

Introduction

Overview

It is an understatement to simply say that the COVID-19 pandemic necessitated rapid changes to the technology used to practice law. Overnight, home offices were created, virtual meeting platforms proliferated, and the judiciary adopted measures to ensure that proceedings continued to be secure, fair, and effective. These changes, amongst others, have raised a multitude of questions about efficient allocation of technology, the means available to develop client and professional relationships, and effective delivery of legal services.

The Task Force’s Law Practice Management and Technology Working Group (the “LPMT Working Group”) sought to: (i) identify the scope and impact of pandemic-related changes to law practice management and technology, (ii) gauge the general sentiment of the New York Bar towards these changes, and (iii) determine what additional technological changes and other resources are needed to further facilitate the practice of law in a post-pandemic setting.

The LPMT Working Group’s Survey Questions

The LPMT Working Group crafted targeted questions that were included in the Survey sent to members of the New York State Bar Association by NYSBA’s Task Force on the Post-Pandemic Future of the Profession. The questions posed by the LPMT Working Group focused on four primary topic areas:

1. **Technology Hardware and Software** (e.g., respondents' proficiency, comfort level, and attitude toward the equipment and software used in most work-from-home scenarios);
2. **Cybersecurity Protocols and Training** (e.g., the level of security—perceived and actual—in place to protect confidential and privileged information while working remotely);
3. **Impact of Technology on the Social Aspect of Law Practice** (e.g., respondents' attitudes towards the in-person practice of law versus remote working environments and the impact that remote practice has on managing a law firm); and
4. **Virtual Meeting Platforms** (e.g., respondents' experiences using electronic meeting platforms).

Respondents' answers to the Survey questions were aggregated and then analyzed by the LPMT Working Group to inform the observations, conclusions, and recommendations set forth herein.

Survey Respondents' Demographic Information

Of the more than 2,000 respondents who responded to the LPMT Working Group's Survey questions, most were attorneys over the age of 50 with more than 10 years of experience. With respect to the nature of the responding attorneys' practices, nearly half reported working in litigation, with approximately one-quarter indicating that they were transactional lawyers.

Almost half of the respondents practiced in law firms of fewer than 20 attorneys, with 26% of these lawyers engaged in solo law practice.

The respondents' demographics are particularly relevant to the LPMT Working Group's analysis of the survey results. Generally, attorneys in their later years of practice are primarily responsible for managing law firms and other attorneys. Further, recently admitted attorneys may have familiarity and more comfort with technology than more senior attorneys. Finally, small firms often have a more limited IT infrastructure and fewer technological resources at their disposal. The LPMT Working Group recognizes the dearth of Survey responses from attorneys who graduated law school after 2000.

Executive Summary of Survey Results and Analysis

As discussed in detail below, the Survey results show that most New York practitioners have embraced technological changes spurred by the COVID-19 pandemic and feel competent and secure in the virtual environments in which they now practice. Nonetheless, to ensure ongoing competence with these technologies, and to fully protect client confidences and data from cybersecurity risk, enhanced trainings and continuing legal education are necessary.

Further, legal employers should allocate significant resources towards technologies that facilitate remote work and properly train users on those technologies. This in turn creates an opportunity for NYSBA and other bar

associations to provide valuable training and resources to practitioners geared toward the competent and secure use of technology in the practice of law.

Finally, there is a consensus amongst New York lawyers that certain aspects of the virtual practice of law result in significant time and cost savings. However, Survey respondents were clear that other aspects of their practice are better performed in person. Therefore, going forward, legal employers and attorneys should carefully and strategically choose the best forum in which to proceed based on the work to be performed. To the extent that events and activities must proceed remotely, lawyers should be highly skilled at using the remote platforms on which these events take place.

Analysis of the Survey Results & Recommendations

Technology, Hardware and Software

Proficiency with Technology

Respondents were asked to characterize their proficiency with technology.²¹⁷ Whether respondents' proficiency with technology originated prior to the COVID-19 pandemic or developed because of the COVID-19 pandemic, respondents rated themselves as generally proficient in using technology to practice law. 70% of respondents rated their proficiency with technology as “moderately to very proficient,” and 25% rated their proficiency

²¹⁷ Survey question 13.

level as “adequately proficient.” Fewer than 5% of responding attorneys indicated they were not proficient with technology.

Importance of Ability to Work Remotely

Respondents were asked to rank the following types of training in order of importance to the respondent’s ability to work remotely: (1) how to use a computer, monitor, printer, and/or other hardware at home; (2) use of remote meeting software platforms (e.g., Zoom, Microsoft Teams, etc.); (3) effective communication using remote platforms; and (3) cyber security protocols and best practices.²¹⁸

Forty-two percent of respondents ranked training on use of computers, printers, and other hardware components as their greatest need. An almost equal number of respondents reported a desire for training on the use of remote meeting platforms as their next most important priority. Thirty-five percent of respondents identified obtaining training in effective communication over remote meeting platforms as their third most-needed training. Slightly more than 31% of respondents indicated a need for training in cybersecurity protocols and best practices.

While a majority of respondents rated themselves as at least “adequately proficient” in their use of technology during the COVID-19 pandemic, it is revealing that many practicing attorneys responded that they require training in

²¹⁸ Survey question 14.

use of computers, monitors, and other hardware to effectively work from home. This disparity may be due to the fact that some respondents did not have the necessary technical support from their law office information technology staff or colleagues to assist them in handling computer hardware issues in a remote environment.

Moreover, the Survey results indicate that 75% of attorneys desire further training on various remote meeting software such as Zoom and Microsoft Teams. It is imperative that lawyers are adept in using these programs for effective client and other communications (e.g., break-out meeting rooms, screen sharing functions, etc.).

*Significant Obstacles to Implementing New Technology*²¹⁹

Reliance on technology for the virtual practice of law requires attorneys and law offices to be vigilant in upgrading, implementing, and learning new technologies. Lawyers and law offices need to dedicate sufficient resources to upgrading and modernizing technology. The costs of IT upgrades, including setting up home offices for employees, hardware (e.g., dedicated laptops, printers, scanners, copiers, web cameras, etc.), and firm-sanctioned software (e.g., Zoom, Microsoft Teams, Microsoft Office Suite, etc.), as well as training on the use of such firm-provided hardware and software, can be prohibitive. In fact, slightly more than 57% of respondents rated the cost of technology as their

²¹⁹ Survey question 15.

primary concern in implementing new technology. In fact, lawyers who rated themselves as “adequate” or “not proficient” with technology indicated costs constituted a barrier to implementing or upgrading technology.²²⁰ The COVID-19 pandemic caused lawyers and law firms to shift priorities to fund home offices so that employees could work from home effectively and safely with regard to protecting law firm and client data. Accordingly, lawyers and law firms must build technology costs into their law practice expenditures to account for the continued remote practice of law.

An almost equal number of respondents reported that learning new technologies is a major barrier for implementation. From learning how to use a new app on an iPhone to navigating cloud computing, lawyers must embrace and learn new technologies to engage in the safe and effective remote practice of law. Although the majority of practitioners report being competent with technology, there is undoubtedly a learning curve when new technologies are implemented. As such, lawyers must engage in significant training to become proficient in these new IT technologies.

Notwithstanding the degree to which lawyers are or are not familiar with IT hardware and software, all lawyers require appropriate training in the use and implementation of both existing and new IT technologies. Not only is it a best practice for lawyers to be trained on any technology implemented, but it is

²²⁰ See Survey question 13.

an ethical obligation for lawyers to be competent in the use of existing and newly implemented IT technologies.²²¹

*Technology at Home Versus in the Office*²²²

Respondents were asked to identify whether the level of technology available to them at home is equivalent to or better than those technologies available in their place of employment.²²³ Nearly 46% of respondents indicated that they have the same or better access and availability to technology at their home offices as in their places of employment. Nineteen percent of respondents provided a neutral response to this question indicating that, although they did not have the same level of access to technology in their remote location, they were able to adapt adequately to working from home. Less than 10% of respondents indicated that they do not have adequate access to necessary technologies in their remote work environment.

Respondents also were asked to elaborate on missing or deficient IT technologies in their home or remote work environment.²²⁴ The overwhelming majority of responses indicated that the deficiencies in their home or remote environment were with IT hardware, such as computer monitors and printers. Thus, in order for lawyers to work effectively in a remote environment, employers should ensure there are adequate technological resources, especially IT

²²¹ See New York Rules of Professional Conduct Rule 1.1, Comment 8.

²²² Survey question 16.

²²³ Specifically, telephone, printing, and other technologies including internet connection.

²²⁴ Survey question 17.

hardware. However, the LPMT Group is mindful that the cost of implementing new technologies is a major obstacle for many lawyers. Nonetheless, if lawyers continue to work from home as the pandemic wanes, then remote IT setups need to be the equivalent of working in the office. Absent a financial commitment from law offices to recreate the office environment at home, lawyers working remotely will be at a disadvantage and less productive.

Conclusions and Recommendations

1. The post-pandemic practice of law will continue to include aspects of law practice management that is virtual. Legal employers must develop office-wide policies and protocols that support remote law practice for all their employees, including back-office staff, that include providing the hardware and software necessary to promote safe, efficient, and effective virtual law practice.
2. Legal employers need to allocate adequate financial resources to support the cost of regularly upgrading, maintaining, and implementing new technology at the office and at home.
3. Legal employers need to provide regular training to employees in both existing and new technology to ensure that lawyers and staff working remotely are competent in the use of the firm's technologies and systems.

4. Legal employers are responsible for providing regular training on data privacy and cybersecurity.²²⁵
5. NYSBA should act as a resource to its members in finding ways to reduce the costs of purchasing, upgrading, and replacing IT hardware and software through contractual relationships with technology providers, as it does with rental car agreements and other similar member benefits.
6. NYSBA should provide regular CLEs to its members on the remote use of IT hardware and software, including the setup and maintenance of remote home law offices and the use of virtual meeting platforms.
7. NYSBA should offer its members a Law Practice Management and Technology Resource Center (“LPMT Resource Center”) that provides advice on best practices relating to practicing law remotely, virtual mediation practice, case management software, technology support, setting up an effective home law office, training in IT hardware and software, and other issues related to the virtual practice of law. The LPMT Resource Center could offer recommendations for law practice-related IT technologies and negotiated discounts for IT technology products related to a virtual home law office. Finally, the LPMT Resource Center could provide access to an IT technology consulting firm at a discounted rate for

²²⁵ See e.g., N.Y. STATE CONTINUING LEGAL EDUC. BD., *Guidance Relating to the New Cyber Security, Privacy and Data Protection* Category CLE Credit, <https://www.nycourts.gov/LegacyPDFS/attorneys/CLE/Cybersecurity-Privacy-and-Data-Protection-Guidance-Document.pdf>.

members, e.g., a NYSBA “Geek Squad” that could provide immediate technology support and assistance.

Cybersecurity Protocols and Training

As sophisticated cyber and ransomware attacks across all sectors of society become increasingly common, a lack of cybersecurity training creates an intolerable level of risk for courts, firms, and practitioners who are concerned about the confidentiality of their data and client data as well as the stability of their finances given the high cost of recovering data after a ransomware attack. Around 50% of lawyers indicated they had received some form of cybersecurity training for in-office and/or remote work. Alarming, about 49% of respondents received neither cybersecurity training nor refreshers for in-office work.

With the proliferation of hybrid work policies and remote workspaces, lawyers and other staff in the legal field must be appropriately trained on how to prevent and respond to malicious actors. The switch from in-office to remote work occasioned by the pandemic should have triggered additional training for all staff working in courts, firms, and legal services agencies. While there was little time for training on the special cybersecurity risks associated with remote working arrangements in March of 2020, now is the time to make a course correction. A workforce that is untrained or undertrained in current cybersecurity best practices places legal employers and practitioners, as well as their clients, directly at risk. A damaging attack is much more likely to take

place when lawyers and their staff are untrained in spotting or reporting cybersecurity issues. Remote legal work should be conducted only through secure private networks, i.e., VPNs, to protect these communications with clients, adversaries, colleagues, and the courts. All employees should be trained to use secure private networks or provided VPNs, and protocols for reporting the occurrence of anomalous events should be well-known to all employees and clearly identified in an employee handbook. Additionally, employees should be trained in cybersecurity protocols relevant to their position, as well as educated regarding the many potential repercussions of poor cybersecurity practices.

Cybersecurity and Confidentiality

Respondents were asked to describe their ability to preserve confidential information with the increased use of technology and virtual meetings. Specifically, with the advent of virtual conferences and client meetings, it is necessary to ensure that no unauthorized individuals are present (on- or off-screen) to maintain attorney-client privilege. In addition, given that only about 50% of respondents have received cybersecurity training for in-office and remote work, it is unclear whether respondents' apparent confidence in their ability to preserve confidential client information is based on a lack of accurate information about the nature and true risk to which confidential firm and client information is subject. If adequate cybersecurity training is not provided to

nearly half of all attorneys utilizing a virtual setup, then their ability to preserve confidential firm and client information would be inadequate.

As a best practice, it is recommended that legal employers review existing confidentiality policies and update them to incorporate current cybersecurity protocols. This practice could be done on a biannual basis to ensure the highest levels of security.

Conclusions and Recommendations

1. While practitioners seem confident that they are adequately protecting client information, the seemingly widespread lack of cybersecurity training is a great risk factor. All attorneys and staff must be educated on a regular basis regarding the security risks associated with any online work, whether at home or in the office. Further, attorneys should be trained to take adequate precautions to secure their online activities and electronic data.
2. NYSBA and other bar associations must offer cybersecurity CLEs as required by the new cybersecurity CLE requirement and other practical trainings designed to raise attorneys' awareness of the ever-changing cyber-risk landscape, how to mitigate that risk, as well as best practices, industry protocols, and referrals available for cybersecurity specialists and

cyber insurance and other insurance to protect against social engineering scams.²²⁶

The Impact of Technology on the Social Aspect of the Practice of Law

Several survey questions focused on the social effect of lawyers working from home or in hybrid arrangements and the way attorneys conduct life and legal practice in virtual settings.

The LPMT Working Group sought information about attorneys' current and ideal working arrangements.²²⁷ The Survey responses reflect that approximately 75% of attorneys at the time were working remotely at least some of the time with more than 50% reporting that they were in a hybrid practice setting split between home and office. Most attorneys want at least hybrid arrangements to continue in the future.

The Survey results demonstrated that attorneys appreciate meaningful fiscal savings in remote work arrangements. Unsurprisingly, the greatest of these is time and funds saved on travel expenses, followed by savings in office supplies, office space, and utilities. To a lesser extent, lawyers report certain savings on CLE expenses, marketing and advertising, computer and related hardware, research, subscriptions, and bar dues.

Notwithstanding the reported advantages, respondents recognize there are disadvantages associated with virtual court proceedings, arbitrations,

²²⁶ *Id.*

²²⁷ Survey questions 24 and 25.

mediations, and other meetings.²²⁸ Foremost on the list of respondents' criticisms was the inability to "read" witnesses or others, such as judges, arbitrators, and negotiating counterparties. Next was technology glitches, followed by interruptions by family members, pets, etc., and a general lack of control.

Looking into the future, these responses demonstrate a need for training programs that teach remote meeting participants skills to help provide a sense of control, as well as ways to identify body language and facial expressions that are visible during online meetings, like Zoom. One of these might be Paul Ekman's well-known studies on six universal human facial expressions, which has grown in popularity in the ADR field.²²⁹ In fact, remote meeting platform features that enable a viewer to enlarge and focus on a single person's image may facilitate consideration of facial expressions. A "gallery" view enables a user to see the faces of all on the screen. This provides an image of the entire array of participants and, as such, provides a view that rivals even sitting at a conference table during a live gathering, where participants tend, at times, to lean in ways that block a full view of others in the room.

The challenges of addressing the social aspects of practice and use of technology provide opportunities for bar associations to be relevant to member

²²⁸ Survey question 23.

²²⁹ See *Are Facial Expressions Universal?*, PAUL EKMAN GROUP, <https://www.paulekman.com/resources/universal-facial-expressions> (last visited Feb. 26, 2023).

needs. NYSBA can offer CLEs to train members in the use of online technology, including online video conferencing platforms. NYSBA can foster ways to enhance firm management and culture, with and without technology. NYSBA can address the socialization deficit highlighted in Survey question 26 and provide ways to address it. For instance, NYSBA meetings—ranging from meetings of its Executive Committee and House of Delegates, to meetings of its Task Forces, Committees, and Sections—should have a full chat function permitting each participant in the meeting to chat with every other participant. While the meeting is underway, this enables participants to raise questions with friends and colleagues. The possible downside of a lack of attention to this issue during remote interaction is offset by the social benefit of providing an opportunity to connect, as well as the potential that a side chat can develop richer thinking. For this reason, the “Everyone” chat should include all participants. Side chat also can be a good source of creativity and provide for the refinement of ideas.

Conclusions and Recommendations

1. While it is clear that there are certain benefits associated with remote working, and that hybrid working arrangements will continue even after the pandemic has receded, such arrangements do have disadvantages. These can be mitigated through education, training, and thoughtful programming by bar associations and legal employers. For example:

- a. Legal employers and NYSBA need to offer CLE and other trainings that highlight the functionality of online meeting platforms to assist practitioners in gaining a sense of control over virtual meetings and to better judge the non-verbal communication of meeting participants;
- b. Legal employers and NYSBA can foster social interactions, even in a remote environment, by, among other things, holding regular online meetings and employing fuller use of the chat functions on virtual meeting platforms.

Virtual Meeting Platforms

Arguably, and as discussed in prior sections, the most prolific adoption and utilization of new technologies during the pandemic has been the implementation of virtual meeting platforms. Indeed, if video meeting software had not existed, the effective practice of law could not have occurred. However, as restrictions eased, courts reopened, and with expectations that staff return to an in-office or hybrid arrangement, questions have arisen pertaining to practitioners' preference or aversion to the use of virtual meeting platforms—in particular, to what extent they should be utilized at all.

Respondents were asked to rank, in order of importance, the issues they confronted in being able to work effectively from home. Over 75% of practitioners identified training on how to utilize and effectively communicate over virtual

meeting platforms as their primary concern in connection with their use of such platforms. Specifically, the Survey results reflect that a significant portion of responding attorneys believe additional training for either themselves or other practitioners is necessary, indicating that they likely have or will continue to have difficulty communicating with others over virtual meeting platforms.

Effective use of virtual meeting platform software from a home office also requires that lawyers invest in the necessary IT hardware such as webcams, microphones, speakers, headsets, etc. It is not enough to know how the software works; practitioners must also know how their hardware interacts with the software and its settings. Although not addressed specifically in the Survey, it follows that cybersecurity protocols require any virtual meeting platform software selected by lawyers to include end-to-end encryption protections. Further, other cybersecurity best practices should be observed when using a remote meeting platform, e.g., holding the virtual meeting in a secure location to prevent conversations being overheard by unauthorized participants.

Notwithstanding the need for training in the use of virtual meeting platforms, the Survey results revealed that practitioners recognize there is a time and a place for virtual meetings. Specifically, 82% of respondents selected conferences—with adversaries, clients, colleagues, or the court—as most effectively performed virtually.²³⁰ Further, only 13.46% of respondents stated

²³⁰ Survey question 18.

that they have difficulty navigating remote videoconferences needed for court appearances, depositions, or ADR.²³¹

This result contrasts starkly with the few respondents who preferred to conduct depositions, oral arguments, trials/arbitration, or alternative dispute resolutions virtually. In light of the perceived importance of assessing the credibility of parties, witnesses, and adversaries in person, it is understandable that respondents believed themselves to be hindered by current virtual meeting platforms, which we understand the Office of Court Administration is in the process of significantly updating. Indeed, the responses indicate that 62% of respondents ranked “reading reactions of participants in remote proceedings” and 44% of respondents who reported “difficulty determining credibility of a witness.” Both observations were identified as the first and third biggest disadvantages of utilizing virtual meeting platforms, the second highest being “glitches,” as 59% identified.²³²

Conclusions and Recommendations

1. Practitioners should take time to familiarize themselves with any virtual meeting software they elect or agree to use within a professional setting. Before agreeing to a virtual meeting, practitioners should confirm it will take place on a platform with which all parties are familiar and have the appropriate skills to navigate.

²³¹ Survey question 19.

²³² Survey question 23.

2. Regardless of the platform, it is a best practice to advise that the platform must have end-to-end encryption to ensure confidentiality is maintained. To further maintain confidentiality, the physical room where virtual meetings take place should be a private room.
3. Remote meeting platforms have been embraced by practitioners for court conferences, day-to-day meetings with colleagues, and informal discussions with opponents. In fact, the benefits of virtual conferences, which save time, money, and resources for law firms and clients alike, are undeniable. Therefore, remote activities will become a permanent feature to the practice of law.
4. Training on the use of virtual meeting software must take place regularly to keep pace with these rapidly changing technologies. For example, Zoom and Teams continually change and are updated and will continue to incorporate new features. In order to utilize the software and effectively communicate using the technology, it is not enough to simply learn how to use the platforms; one must also routinely keep abreast of changes to the platforms.
5. Training should not be exclusive to the virtual meeting software. It should include edification on hardware such as cameras, headsets, microphones, and speakers, which are necessary to effectively utilize and communicate on the platforms. Further, practitioners must understand how their

hardware directly interacts with each platform, and then amend their settings if necessary.

6. One common thread that each of the Working Groups uncovered is the need for increased training in technology for litigants, attorneys, and court personnel. This Working Group recommends that, in addition to, but part of NYSBA's continuing legal education programs, NYBSA annually devote a day to free virtual technology training throughout the State. The training should provide a firm elemental footing for all practitioners. Such a day would enable NYSBA to strengthen its commitment to promoting access to justice. The need for this training has been underscored in the Pandemic Practices Working Group of the Commission to Reimagine the Future of New York's Courts recently released report.²³³

New Technologies

We must address the fact that recent and rapid developments in generative artificial intelligence (AI), virtual technologies and the use of cryptocurrencies have raised many novel questions for the legal profession. President Lewis has appointed a task force to study the impact of AI on our profession.

With the growth and development of a “metaverse,” lawyers must grapple with ethical questions regarding the formation of attorney-client relationships.

²³³ PANDEMIC PRACTICES WORKING GROUP OF THE COMMISSION TO REIMAGINE THE FUTURE OF NEW YORK'S COURTS, *New York Courts' Response to the Pandemic: Observations, Perspectives, and Recommendations*, 47-48 (2023), <https://www.nycourts.gov/LegacyPDFS/press/pdfs/NYCourtsPandemicPracticesReport.pdf>.

Generative AI has raised questions regarding the preservation of client confidentiality and ensuring that AI “hallucinations” do not generate false precedents and other fictional legal authority which, ultimately, could threaten the integrity of our legal system.

The Metaverse

The “metaverse” is a hypothetical version of the internet as a single, universal, and immersive virtual world that would be facilitated using virtual reality headsets.²³⁴ While we are far from having one world called a “metaverse,” attorneys and potential clients currently can meet on a variety of virtual platforms—creating a vast uncharted territory for the legal profession. There are no rules that explicitly govern attorney conduct in this space. However, as discussed in the Legal Intelligencer, existing rules of ethics and professional conduct should apply in a metaverse, just as they do in the physical world.²³⁵ Accordingly, the formation of an attorney-client relationship in a metaverse should focus on whether a party “reasonably relies” on what they believe to be the attorney’s legal advice. As with other online activities and social media, attorneys should speak only in generalized terms and provide disclaimers to avoid inadvertently forming an attorney-client relationship.

²³⁴ See <https://en.wikipedia.org/wiki/Metaverse>.

²³⁵ See Abraham C. Reich and Hala Zawil, *The Metaverse for the Risk-Averse: Legal Ethics in the Virtual World, Part I*, The Legal Intelligencer, Oct. 20, 2022.

Generative AI

Among the most pressing concerns regarding the use of generative AI by attorneys is how to safeguard client information and confidences. The generative AI tools that are available in the public domain, like ChatGPT, create written content based on information that is publicly available and to which users provide the tool access. Attorneys using generative AI must take caution to safeguard client information pursuant to Rule 1.6. As reported by Bloomberg Law, attorneys should review the terms and conditions of any tool used to understand what happens to data—including client information—put into the tool.²³⁶ Recently, a judge on the U.S. Court of International Trade issued an order requiring attorneys to disclose their use of generative AI in preparing legal documents, citing concerns related to confidential information.²³⁷ The order explained that AI “challenge[s] the Court’s ability to protect confidential and business proprietary information from access by unauthorized parties.”²³⁸ For example, OpenAI advises that it is “not able to delete specific prompts from your history. Please do not share any sensitive information in your conversations.”²³⁹ Thus, before using AI technology, attorneys should get consent from their

²³⁶ See Stephanie Pacheco, *ANALYSIS: Three Considerations for Attorneys Using Generative AI*, BLOOMBERG LAW, June 16, 2023, <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-three-considerations-for-attorneys-using-generative-ai>.

²³⁷ See Sara Merken, *Another US judge says lawyers must disclose AI use*, REUTERS, June 8, 2023, <https://www.reuters.com/legal/transactional/another-us-judge-says-lawyers-must-disclose-ai-use-2023-06-08>.

²³⁸ *Id.*

²³⁹ See *What is ChatGPT?*, OpenAI, <https://help.openai.com/en/articles/6783457-what-is-chatgpt>.

clients, review the relevant terms and conditions, and refrain from providing client information.

Generative AI also has created growing concerns for the legal profession regarding the tools' validity and reliability. However, once again, looking to the established ethical and other rules of conduct for attorneys is instructive and prudent. Of particular importance are rules of conduct regarding competence, such as New York's Rule of Professional Conduct 1.1. If attorneys choose to use generative AI, they must both have a minimum level of competence with the tool and verify the work product that the tool produces. The concern of hallucinations—incorrect or false results presented by the AI platform as real, correct and accurate—is acute and legitimate as illustrated recently in New York when two attorneys used ChatGPT to prepare legal briefs and provided the court with fabricated case law.²⁴⁰ Consequently, attorneys should be intentional in how they use ChatGPT (or other similar platforms) and should make sure to independently review any work product the tools provide.

Furthermore, the research and development into specialized AI tools for lawyers by various legal services companies should further facilitate the safe and careful use of generative AI by attorneys. For instance, NetDocuments Software Inc. and Everlaw recently have released platforms with integrated

²⁴⁰ See generally *Mata v. Avianca, Inc.*, No. 22-CV-1461 (PKC), 2023 U.S. Dist. LEXIS 95664 (S.D.N.Y. May 26, 2023).

generative AI, ndMAX and EverlawAI, respectively.²⁴¹ ndMAX is designed to assist with culling business intelligence from data and documents, and EverlawAI is designed to assist case teams in reviewing documents.²⁴² Additionally, Thompson Reuters recently acquired Casetext, which uses OpenAI's GPT-4 to assist with document review, legal research memos, contract analysis, etc.²⁴³ These companies claim to protect client information and provide reliable results that can allow attorneys a measure of comfort. As with all AI tools, however, attorneys are best advised to conduct their own diligence to ensure that they are treating client information appropriately.

Cryptocurrency

Past President Levin appointed a Task Force on Cryptocurrency. We await its report.

Cryptocurrency is a “digital currency, which is an alternative form of payment created using encryption algorithms. The use of encryption technologies means that cryptocurrencies function both as a currency and as a virtual accounting system. To use cryptocurrencies, you need a cryptocurrency wallet.”²⁴⁴ In recent years, law firms have had to address the question of whether

²⁴¹ See Steven Lerner, *NetDocuments, Everlaw Release Generative AI Tools*, LAW360, July 25, 2023, <https://www.law360.com/pulse/articles/1701388/netdocuments-everlaw-release-generative-ai-tools>.

²⁴² *Id.*

²⁴³ See *Thomson Reuters to acquire legal AI firm Casetext for \$650 million*, REUTERS, June 27, 2023, <https://www.reuters.com/markets/deals/thomson-reuters-acquire-legal-tech-provider-casetext-650-mln-2023-06-27>.

²⁴⁴ See *The Basics About Cryptocurrency*, SUNY Oswego, <https://www.oswego.edu/cts/basics-about-cryptocurrency>.

to accept payment from clients in cryptocurrency. The New York City Bar Association (NYCBA) published a formal opinion on this issue in 2019, in which it advised that accepting or requiring payment by cryptocurrency is governed by Rules 1.8(a) and 1.5(a) of the New York Rules of Professional Conduct.²⁴⁵

Specifically, if law firms *require* payment in cryptocurrency by the terms of an agreement, rather than an optional method of payment, such a requirement is a “business transaction” under Rule 1.8(a) as the firm and client have varying, if not opposing, interests in negotiating the terms of the agreement.²⁴⁶ Accordingly, the law firm must comport its conduct with Rule 1.8(a) such that:

- (1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client.
- (2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.

²⁴⁵ See NYCBA, Comm’n on Prof’l Ethics, Formal Op. 2019-5.

²⁴⁶ It should be noted that there has been some opposition to this position. See Nika Gigashvili, *The Ethics of Accepting Cryptocurrency as a Payment*, ABA, Nov. 21, 2019.

Additionally, any agreement for payment in cryptocurrency is also subject to Rule 1.5(a), which forbids lawyers from charging an illegal or excessive fee. However, where a client is merely given the *option* to pay in cryptocurrency and does so, such a transaction would not be considered a “business transaction” and thus would not be governed by Rule 1.8(a), only Rule 1.5(a).

Further, New York lawyers intending to hold cryptocurrency in trust for clients are subject to 23 N.Y.C.R.R. § 200, which requires individuals and entities “storing, holding, or maintaining custody or control of Virtual Currency on behalf of others” to obtain virtual currency, or “BitLicenses.”

Consequently, lawyers must educate themselves and proceed with caution when dealing in cryptocurrency.

Conclusions and Recommendations

1. Practitioners need to fully familiarize themselves with these new technologies and platforms before using them.
2. Regardless of the technology or platform, consideration should be given to consulting with the client and advising the client on the implication of its use on the attorney-client relationship.
3. These new technologies and platforms implicate New York’s Rules of Professional Conduct in ways that are often not self-evident, and practitioners must review the current state of ethical opinions on their use to ensure that they are complying with their ethical obligations. Likewise, we trust that the

Association will charge its Committee on Ethics to study the concerns raised in this Task Force report.