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The Business of Law: On the Verge of Disruption

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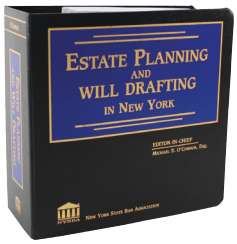

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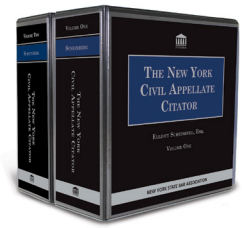

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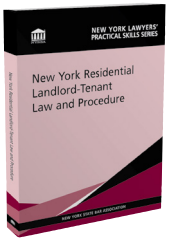

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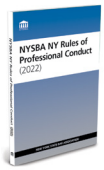

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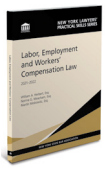

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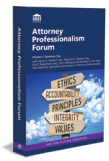

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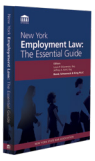

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SCAN ME

SHERRY LEVIN WALLACH

Understanding the Role of Lawyers in a Web3 World

To be leaders and innovators, lawyers must continue to embrace novel technologies and new ways of conducting legal practice. In our ever-evolving world, attorneys must stay at the forefront of change to be best prepared to represent our clients and advance the legal profession.

If the pandemic years have taught us anything, we must keep our minds open to explore, learn and adapt while protecting the sanctity of the legal profession and maintaining our ethics.

When I took office as NYSBA's president, I determined that my term would focus on investing in the future of our profession and our remarkable association. That means studying and evaluating new data, technologies and trends to understand their implications on how we practice law.

I have sought to do this through the task forces I have initiated. Each is different, but they all seek to conduct cutting-edge research that we can employ to create better and fairer outcomes for those whom we represent. At the same time, we want to ensure that the profession rises to the challenges presented by our constantly evolving world.

One of the task forces is concerned with criminal law: the Modernization of Criminal Practice. Another is focused on mental health and trauma-impacted representation. Our Task Force on the U.S. Territories focuses on justice by examining the status of territory residents with an eye toward ensuring that all U.S. citizens are considered equal under the law. And still another task force is evaluating the ethics of local public sector lawyering.

One, however, looks squarely at an area that affects all of us: the Task Force on Emerging Digital Finance and Currency. This edition of the Bar Journal looks at the issues that the task force is studying: blockchain, cryptocurrency, non-fungible tokens (NFTs), digital finance and the nascent world of the metaverse and Web3. These new technologies are already beginning to change everything we do as lawyers and as people.

A blockchain is a decentralized ledger where information is stored; cryptocurrency refers to the myriad digital tokens and currencies available, one of which is bitcoin; and non-fungible tokens are cryptographic assets on a blockchain with unique identification codes and metadata that distinguish them from each other.

The technologies a blockchain uses to collect and store information and the way digital assets are created and exchanged have far-reaching implications. Web3 is a new iteration of the worldwide web, which incorporates blockchains and other technologies, including digital currencies and other non-fungible tokens, such as digital works of art. Web3 is the platform that hosts the metaverse, the virtual world where people can gather to work, play, socialize or collaborate.

These may seem like esoteric concepts, but these technologies already are facts of our lives. And to understand them, we must begin to think about the world in new ways. Their real-life effect cannot be overestimated.

To make matters more complicated, particularly for lawyers, the regulatory landscape is uncertain. State governments are scrambling to devise systems to regulate the industry, but they do not want to discourage the business and other forms of commerce it brings. There also is the issue that cryptocurrency and other digital assets do not exist within state boundaries.

The federal government is beginning to step in. This past June, U.S. Senators Cynthia Lummis (R-WY) and Kirsten Gillibrand (D-NY) introduced the Responsible Financial Innovation Act, which would create a federal regulatory framework for digital assets. One aim is to sort out which digital assets would be considered commodities and which would be deemed securities. Environmental groups have weighed in, urging legislatures to act on their concerns about the energy-intensive nature of blockchain.

We will be in flux for a long time, but waiting for regulation is not an option. The future is here. Cryptocurrency, non-fungible tokens and other digital assets already factor into entertainment law, trusts and estates, real estate and tax practices. Even if we do not currently handle matters involving digital assets, we will do so in the future. Lawyers have already begun to accept payment for services in bitcoin, and it will not be long before payments of fines and court fees can be done in this manner. What place might crypto have in an escrow account?

What do we do to prepare? We do what we do best; we act as lawyers. We are lifelong learners and educators. Our oath and our commitment to our clients require us to teach about these new technologies and the issues they raise. It is incumbent on us to have an understanding of the technologies and the issues in order to best advise our clients and bring our practices into the Web3 universe.

To help enhance your knowledge of the stakes, issues and possibilities of this new world, the Task Force on Emerging Digital Finance and Currency has brought together thoughtful articles for the Journal: Marc Beckman, a consultant to the task force, leads with "The Business of Law: On the Verge of Disruption," where he defines the elements that make up the digital world and enumerates how these technologies will play into various practice areas. In an interview with Liz Benjamin, task force Co-Chair Jacqueline Jamin Drohan discusses "Leading the Way for Lawyers on Crypto," and task force Vice-Chair Dr. Carlos Mauricio Sakata Mirandola tells us about "Crypto Revolution." If you haven't read it already, I also recommend task force liaison Hilary Jochmans' "Taking a Hard Look at Crypto," which appeared in the July/August issue of the Journal. And I urge you to review NYSBA's program archives, which offer a range of informative webinars on these topics.

Some of our members may recall that in their early years as lawyers they spoke with clients on landlines and typed up contracts, making copies using carbon paper. Over the past 50 years, there has been a sea change in how law is practiced. Computers and cellphones upended how we thought about communication and how we did research. Then the pandemic came, which brought the virtual world to the practice of law. Even lawyers who grew up with Zoom and other online meeting technologies found the abrupt shift to all-virtual contact disconcerting.

For the many of us who bridge those generations, we have seen the rapid advance of technology and how each new step has required that we learn new ways to practice. We can rightly be proud of how quickly we adjusted to each change in or disruption to the practice of law and how we were able to do so without compromising our client information or representation. It never is easy to take on new ways of doing things, but it never is as difficult as we fear. And here, too, we will embrace the new tools that will enable us to increase our efficiency and help us better serve our clients.

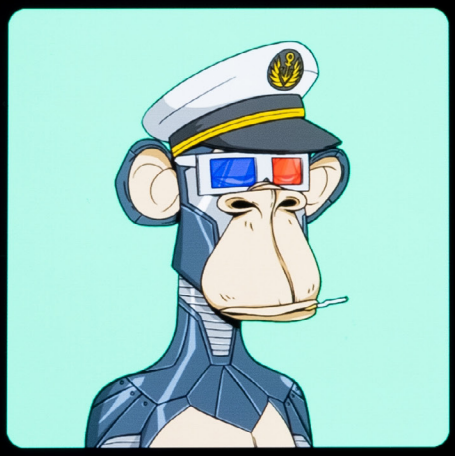
The New York State Bar Association is known in the legal world for being on the cutting-edge of our profession, and it is my honor to share with you the recognition of our work by NYU's School of Professional Studies. I have been appointed to NYU's newly formed NYU Metaverse Collaborative Advisory Board. The 10-member board is bringing together representatives from the student body, industry, the research sector and the legal profession to educate about the impact of these new technologies. With our core values of justice, fairness and doing the public good, and the strong ethical framework of our profession, lawyers are critical to this effort.

I look forward to keeping our members apprised of new developments in Web3. And I look forward to hearing from you about your experiences and thoughts as we continue to work together.

The Business of Law: On

BORED APE #0

BORED APE #1



BORED APE #2

BORED APE #3

BORED APE #4

BORED APE #5

the Verge of Disruption

By Marc Beckman

The latest evolution of the internet, known as Web3, will disrupt all aspects of the legal profession, from drafting contracts and filing documents to storing records and establishing trademarks. As corporate leaders, government entities and philanthropic organizations embrace this technology, tech-savvy attorneys who understand the implications will be rewarded with enormous opportunities to expand their businesses.

Well-known companies are already plunging into the Web3 world to generate new revenue, carry out high-profile marketing campaigns, launch philanthropic initiatives and reach a younger demographic. Popular brands adopting the new technology include Dolce & Gabbana, Tiffany, Gucci, Adidas, Time Magazine, Budweiser, Nickelodeon, McLaren and Pepsi.

These companies have become part of a new world that has been coined the metaverse – a shared digital environment filled with 3D spaces where visitors can socialize through gaming, concerts, academics and other pursuits. McKinsey & Co. estimates that the metaverse, enhanced by virtual reality, augmented reality and social media, will be worth a staggering $5 trillion by 2030.

Here's what to expect as Web3 matures:

Intellectual Property

The biggest issue facing attorneys practicing intellectual property law will be establishing what rights are conferred by the sale of non-fungible tokens (NFTs), a piece of data that is permanently embedded on a blockchain, a decentralized ledger that records all transactions that take place on a peer-to-peer network. NFTs typically hold a digital asset such as artwork, music or film.

For example, do purchasers of an NFT have the right to use it however they see fit? Are they allowed to show, license and sell the NFT to third parties? With this new technology, how are legal rights defined? Is it necessary to use long-form traditional contracts, or is the code embedded in the NFT sufficient to govern?

Deciding whether a company can use an NFT that incorporates the trademark of another entity for marketing purposes is another hot issue. Nike sued StockX, an online secondary-market retailer, in February 2021 for minting NFTs that prominently featured the iconic swoosh mark on StockX's digital artwork. The question of whether StockX misappropriated Nike's protected mark for marketing purposes is central to the case.[1]

StockX argues that the first sale doctrine governs because the digital artwork promotes the resale of the accompanying physical Nike sneaker. The first sale doctrine is a legal principle that generally limits the rights of an intellectual property owner to assert infringement claims in connection with products already sold and being promoted.[2]

Attorneys should keep an eye on this case because it will almost certainly establish guidelines for corporations regarding the use of trademarks as NFTs for advertising purposes.

It is important to note that a lot of money is at stake here. Nike's non-fungible token sales have generated almost $200 million in revenue, but the real money has been made on the secondary market, where there have been close to 68,000 transactions worth almost $1.3 billion.

Even after purchasing digital artwork, some NFT collectors are unsure of what commercial rights they have. Is it possible for the holder of an NFT to further monetize the digital artwork and, if so, how? Where are these rights expressly stated? Is the information only found within coded material?

Significant investments continue to flow into the NFT digital artwork space, yet confusion in the marketplace remains. Owners of NBA Top Shot digital collectibles are frequently surprised to learn that their rights are limited to personal display of the digital artwork, even though they are expensive (LeBron James dunking fetched more than $200,000 in February 2021). Surprisingly, the NBA Top Shot platform has exceeded $1 billion in transactions involving the sale of collectible "moments," which are essentially modern-day digital playing cards with in-game highlights.

Creative entrepreneurs hoping to create this generation's Disney have rushed into the NFT arena with the commercial idea that by granting full usage rights, the property value of the entire community will rise. Enter the Bored Ape Yacht Club, a property with a $1 billion market cap and a current floor price for each NFT trading at nearly $120,000. Notable celebrity owners include Justin Bieber, Jimmy Fallon, Snoop Dogg, Madonna and Paris Hilton.

The parent company of the Bored Ape Yacht Club, Yuga Labs, grants NFT owners unlimited commercial rights to each one-of-a-kind Bored Ape. As a result, the owners of Bored Ape have monetized their digital assets by creating, selling and marketing a variety of physical items, such

as coffee, water, candles, hoodies and CBD cream. One group of Bored Ape owners even signed a recording deal with Universal Music Group to launch a new digital Ape band called "Kingfish."

Andy Warhol's groundbreaking inclusion of iconic corporate trademarks in his artwork, such as Coca-Cola bottles and Campbell's soup cans, paved the way for modern artists and their use of valuable and protected trademarks. However, how does this apply to digital artwork sold as an NFT? Is this a new medium for artwork comparable to a printed edition or an exploitation of a valuable trademark sold as a new type of object? How should a company prepare to protect its intellectual property in Web3?

Mason Rothschild, a digital artist, was sued by Hermes for trademark infringement in January 2022. The suit involving Rothchild's "MetaBirkin" digital artwork collection by the venerable luxury house is compelling for several reasons, including whether an NFT creator can display a brand's protected trademark as a form of artistic expression without the owner's permission or compensation. It was widely reported that Rothschild generated almost $500,000 through the sale of his MetaBirkin digital artwork NFT collection.[3]

Are IP attorneys prepared to protect luxury houses from this form of use in the future?

Contract Law

Attorneys who practice contract law are already experiencing Web3's impact with smart contracts. Effectively, a smart contract defines the rights of the parties and typically provides conditions that automatically execute the agreement when realized.

In Web3, the terms of an agreement are built into the coding of a smart contract and then permanently embedded into a blockchain. Once minted on a blockchain, the smart contracts are secure, transparent and immutable. Because blockchain transaction records are encrypted, they are extremely difficult to hack, limiting the likelihood of alteration and fraud.

Now attorneys and their clients can employ blockchain technology to hold and secure records to land deeds, personal identities such as driver's licenses, voting records, payments such as royalties and charitable donations, wills and trusts, and talent agreements.

It is clear that attorneys are needed to provide sound advice to clients and, in turn, to shape the data entered in each smart contract, even if Web3's process of contract formation, enforcement and dispute resolution is streamlined and more cost-efficient. Indeed, this service can provide attorneys with a new, significant and sustainable revenue stream.

Paperless filing is a game changer and can increase the legal profession's client base by offering more affordable legal services. This streamlined and paperless process can also eliminate costly errors often found with manual filings.

Securities Law

We are still in the early stages of Web3, and, as a result, its elements have yet to be defined as a security. Because Web3 technology-enabled innovation touches multiple business sectors, from art and music to sports, banking and real estate, legal counsel should be involved as early as possible in the planning stage. Without the advice of expert counsel from the start, strong ideas that can create meaningful economic wealth for the American business sector could be at risk.

Indeed, the question of whether NFTs are securities still needs to be settled. The *Howey* Test is being considered by Securities and Exchange Commission Chairman Gary Gensler and the agency's enforcement lawyers to determine whether digital assets should be defined as securities. In the 1946 case *SEC v. WJ Howey Co.,* the U.S. Supreme Court defined a security as an investment with a reasonable expectation of profits derived from the efforts of others.[4]

A class action lawsuit against Dapper Labs and its founder and CEO, Roham Gharegeozlu, began in May 2021 in the Southern District of New York and is likely to be the most high-profile case regarding the issue of whether NFTs are securities. NBA Top Shot, a highly profitable NFT platform, is owned by Dapper Labs. In this case, the defendants invoked the *Howey* Test, arguing that their product is merely a collectible, like a baseball card, and thus NFT owners do not expect to profit from the efforts of others. The outcome of this case will have far-reaching implications because other similar NFT marketplaces may feel less vulnerable to government regulation if Dapper Labs prevails.[5]

In February 2022, the SEC and state regulators levied an unprecedented $100 million fine against BlockFi Lending, a popular cryptocurrency exchange. The crux of the matter surrounds the issue of whether BlockFi illegally offered a product that pays customers high interest rates to lend out their digital tokens.[6]

Similarly, in September, eight states, including New York, announced plans to commence legal action against Nexo and Nexo Capital, a crypto platform that enables consumers to purchase, borrow and trade digital currency.[7]

The Digital Financial Assets Law is expected to be passed soon by California's Legislature and signed into law by Gov. Gavin Newsom. The bill requires crypto asset exchanges and other crypto financial services companies to obtain a license to conduct business in the state. If

passed, this will have far-reaching consequences across the country.[8]

It's worth noting that New York State's "BitLicense" cryptocurrency regulations took effect in 2015. Crypto funds based in New York are now subject to additional regulations in addition to those governing fiat currency.[9]

To navigate this fast-changing Web3 world, new companies entering the space will need legal counsel.

Real Property Law

Lawyers with concentrations in the real estate sector will be enthusiastic about Web3's impact on the process of buying and selling physical real estate. A few key elements include the use of an NFT as a deed, which can provide the public with a true history of ownership and price value. Transactionally, the use of cryptocurrency can validate the existence of buyer's funds in almost real time.

Lawyers are needed to consider innovative investment vehicles that can provide first-time opportunities to individual investors, such as partial ownership of real estate. Furthermore, real estate developers should seek legal counsel to avoid having their new digital assets classified as securities.

Tokenization, smart contracts, NFTs and blockchain protocols significantly change and improve how fractional ownership takes form. For example, AspenCoin is an asset-backed digital token that gives holders part-ownership in the Aspen St. Regis Resort. Depending on how many AspenCoins are owned, guests of the property receive cash back equal to a percentage of the end-of-stay bill at the resort.

Physical real estate legal knowledge will certainly be required in the digital space, too.

Consider the investment potential of prime real estate such as Fifth Avenue and Rodeo Drive a century ago. This is where we are right now in terms of digital real estate in the Web3 space. Investors anticipate valuable community-based metaverse opportunities such as retail, banking, live events, gaming, academics and more.

The two leading digital metaverse real estate platforms, Decentraland and Sandbox, are valued at nearly $1 billion each and have attracted major digital property owners including Sotheby's, Samsung and PricewaterhouseCoopers.

City Initiatives

Cities across the country are using blockchain technology to attract tourism, combat urban decay, create new revenue, secure records and more.

Reno's mayor, Hilary Schieve, is widely considered a visionary in the Web3 space. To date, Reno has leveraged blockchain technology to launch a digital city key that provides owners exclusive access to unique experiences, a public art fund (the Space Whale), and the first record-keeping system providing a register of historic places (the Biggest Little Blockchain).

For obvious reasons, individuals within the lower socio-economic demographic are unable to use traditional banking and, as a result, do not have access to credit, banking cards and saving accounts. Predictably, cryptocurrency payments will provide these citizens a practical, new and affordable way to hold money and transact business in lieu of a credit card. It is interesting to note that Deloitte predicts that 75% of retailers will accept cryptocurrency as a form of payment within two years.

Cryptocurrency Policy and the Case for Regulation

At the federal level, actions taken by the Biden administration provide a snapshot of Web3's future reach. On March 9, President Biden issued the Executive Order on Ensuring Responsible Development of Digital Assets. This set the stage for lawyers to start shaping Web3's federal governance. President Biden's executive order is multifaceted, and, if made legally binding, it will have ramifications for businesses and government agencies across the globe.

Initially, Congress will enact new consumer protection regulations, which may constrain entrepreneurship. Although free-market capitalists will oppose congressional action, the marketplace will benefit from the perception of safety and certainty. As a result, Web3 innovation will attract new investment, and the technology will be more widely adopted.

In fact, the Federal Reserve is considering creating a Central Bank Digital Currency to ensure a "safe and efficient payments system." Theoretically, this will provide a more stable digital currency for consumers but will move power from the individual back to the government, despite Web3's decentralized nature.

The president's executive order also addresses the problem of digitally based financial transactions that are associated with criminal activity. Federal Reserve Chairman Jerome Powell, in a Sept. 27 speech, mentioned a growing concern about money laundering via un-hosted, anonymous digital asset wallets.

The executive order issued by President Biden also addresses the global financial system. It is worth noting that Russia recently established its own digital currency to settle payments with China and ostensibly to avoid SWIFT-related sanctions. Shortly after Russia invaded Ukraine, the United States and the European Union imposed financial sanctions barring Russian banks from membership in the Society for Worldwide Interbank Financial Telecommunication, known as SWIFT.[10]

Not surprisingly, the private sector is attempting to provide Congress with technology-based solutions to the safety and regulation of Web3. In fact, Cardano founder Charles Hoskinson presented the idea of an automated, self-regulating approach to cryptocurrency in June. (Cardano is a well-known blockchain protocol.) Hoskinson believes that regulations can be built into the code because cryptocurrencies store and move data.

In September, Hoskinson argued in favor of congressional action, arguing that "[w]e'd probably see a mega bull market because a huge amount of institutional money would enter and also all of the regulatory risk [with] crypto would disappear."

Still Unconvinced?

Bill Gates, a Harvard University dropout, appeared on the "Late Show with David Letterman" in November 1995. The internet was still in its early stages at the time of the interview, with only 14% of Americans reporting using it, according to a Pew Research Center poll. Gates said he envisioned internet users watching a baseball game on their computer in the future, and he even predicted artificial intelligence.

David Letterman was skeptical. "It's too bad there is no money in [Web1]," he proclaimed.

Marc Beckman is the best-selling author of "Comprehensive Guide: NFTs, Digital Artwork, and Blockchain Technology." He is a senior metaverse fellow and adjunct professor at New York University and a consultant to the New York State Bar Association's Task Force on Emerging Digital Finance and Currency. Beckman earned his J.D. from Hofstra University School of Law (now the Maurice A. Deane School of Law at Hofstra University). As CEO of DMA United, Beckman has launched several Web3 programs for brands worldwide.

Endnotes

1. *Nike v. StockX*, No. 1:22-cv-00983 (S.D.N.Y Feb. 3, 2022).
2. First sale doctrine, 17 U.S.C. § 109.
3. *Hermes v. Rothschild*, No. 22-cv-384 (S.D.N.Y. May 18, 2022).
4. *SEC v. Howey*, 328 U.S. 293 (1946).
5. *Friel v. Dapper Labs*, No. 1:21-cv-05837 (S.D.N.Y. June 7, 2021).
6. SEC BlockFi, https://www.sec.gov/litigation/admin/2022/33-11029.pdf.
7. *New York v. Nexo*, https://ag.ny.gov/sites/default/files/2022.09.26_nexo_complaint_final.pdf.
8. California Digital Assets Law, https://ag.ny.gov/sites/default/files/2022.09.26_nexo_complaint_final.pdf.
9. New York BitLicense, https://govt.westlaw.com/nycrr/Browse/Home/NewYork/NewYorkCodesRulesandRegulations?guid=I7444ce80169611e594630000845b8d3e&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default)&bhcp=1.
10. President Biden Executive Order on Ensuring Responsible Development of Digital Assets, https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/09/executive-order-on-ensuring-responsible-development-of-digital-assets; White House Fact Sheet: United States, G7, and EU Impose Severe and Immediate Costs on Russia, Apr. 6, 2022, https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/06/fact-sheet-united-states-g7-and-eu-impose-severe-and-immediate-costs-on-russia.

Glossary of Terms

Web3 – A catch-all term for the evolution of the internet around new decentralized technology, such as blockchain protocols, NFTs, the metaverse, smart contracts and cryptocurrency. At its core, Web3 decentralizes control away from third-party entities like Google, Netflix and Amazon and returns power to the individual through data ownership.

Blockchain – A blockchain is a decentralized ledger that records all transactions that take place on a peer-to-peer network. Participants can confirm transactions through this technology without the need for a central clearing authority. Potential applications include fund transfers, trade settlements and voting.

Non-Fungible Tokens (NFT) – A single and distinct piece of data that is permanently embedded on a blockchain and typically holds a digital asset such as artwork, music or film. NFTs, despite being one of a kind, can be purchased, sold and traded from entity to entity.

Cryptocurrency – A decentralized, encrypted, digital money that is stored on a blockchain and can be used as currency.

Metaverse – A shared digital environment filled with 3D spaces (galleries, runways, showrooms, stages, homes, etc.) where people can socialize through gaming, concerts, academics and beyond. Today, the most prevalent examples of metaverse environments include Roblox and Minecraft. Metaverse interactions are expected to explode through virtual reality, augmented reality and social media.

Smart Contracts – Coded transaction protocol that automatically executes or controls the terms of an agreement when certain events or actions occur. Effectively, smart contracts allow for the terms of an agreement to be realized without an external centralized enforcement mechanism.

Leading the Way for Lawyers on Crypto

By Liz Benjamin

In financial circles, summer 2022 will go down in history as the summer of the crypto crash – a moment of reckoning for a once high-flying industry when a toxic combination of overheated growth, speculation and risk resulted in crippling losses for thousands of investors.

Crypto naysayers are engaged in a series of "I told you so" conversations, insisting that the crash, coupled with the bankruptcy filing of experimental entities like Celsius Network, proves the digital currency bubble has burst. But supporters insist this moment is merely a temporary setback for a still-emerging and potentially revolutionary technology.

Jacqueline Jamin Drohan, a partner at Drohan Lee and a commodities and banking law expert, has become one of NYSBA's foremost thought leaders on cryptocurrency and digital finance. She is co-chairing the Task Force on Emerging Digital Finance and Currency, established by NYSBA President Sherry Levin Wallach, to educate the legal community on issues related to the digital economy, to review existing and future regulations and to explore opportunities for NYSBA in the digital space.

Drohan sat down recently to share her thoughts about the task force, the current cryptocurrency landscape and what the future might hold for this important industry as well as for NYSBA in the digital space.

Q: How did you get into the crypto space, and – perhaps more importantly – how do you describe what that is?

A: Before I entered legal practice, I was a bank dealer in what we thought was real stuff – fiat currencies and swaps. I was approached early, around 2013, when blockchain companies were first emerging, as I was a well-known currency attorney, and I said, "This is nothing like I've ever seen." The technical part of it is incredible, involving distributed ledger technology that has lots of applications beyond trading. It's broader than just virtual currency at this point; a lot of the financial systems are now supported by blockchain.

Q: What is blockchain, for the uninitiated?

A: Virtual currency is a limited amount of a unitized digital asset that exists on something called the blockchain, which is a globally accessible, globally transparent distributed ledger – a record of people that used it and when they used it and what they used it for. Every modification is recorded and comes with a record of every prior transaction in history. Anyone can look at it. In many ways it's an amazing thing, as it can track taxes, transfer securities, properties, settle trades in commodities and features an infinitely reliable record of everything that occurs. Of course, it can also hide the identity of the user, as the information is all recorded in numbers. It's not owned or controlled by any one person; it's a completely decentralized finance system.

Q: What are your thoughts on the current regulatory structure as it relates to digital currency?

A: At the state level, the regulation is clunky – at best. New York was the first to license bitcoin activity. Its BitLicense is the standard among states, perhaps even globally. But it only regulates New York, and that's a problem because by their very nature virtual currencies are nongeographical. The state's enforcement posture has been aggressive, and licensing has morphed into a six-to-12-month process that can cost up to $500,000 between attorney's fees, first-year compliance compensation, bonding and other costs, as well as minimum capital requirements. That can be unmanageable for many early-stage startups.

There's a lot of lobbying taking place in New York right now regarding changes to the existing law. Ultimately, some operators, even some larger ones, would like to see

less or even no regulation at all in place, and for them, there's a lot of money at stake. Some of them are willing to pay significant fines as a cost of doing business. Bitfinex (a crypto exchange), for example, paid a record fine to the SEC and then simply carried on. No regulation is, of course, not going to happen. But the state does need to find a happy medium, as it wants to grow its digital currency footprint and attract businesses – especially in New York City – and get them to headquarter here, even if they're not marketing to New York residents.

Q: What is the future of digital currency? Do you see a time when it replaces traditional currency, despite the setbacks we have seen this summer?

A: What's happening is sovereign countries are blockchaining their own currencies – called Central Bank Digital Currencies, or CBDCs. People were talking in '08, '09, when we crashed, that the government should digitize the currency – in other words, there would be one unique number for every dollar, which can be traced. That means no more fraud, tax evasion or black market. CBDCs started with Caribbean nations and are going to spread out from there. This past March, President Biden signed an executive order directing federal agencies to evaluate the risks digital assets might pose to the U.S. economy and financial system. At the same time, the Fed is considering establishing a CBDC – more commonly known as a digital dollar – that would be fully backed by the U.S. And in June, the House Committee on Financial Services held a hearing on the subject of digitizing the dollar. So, there's a lot going on in this space.

There has been incredible speculation. People were sitting home during COVID-19, trading PPP money, not paying rent, and that fueled a lot of investment. And then there was the crash, and all the liquid virtual currencies went down together. But those who were in it early are still ahead of the game, and there's an incredible runup in currencies like Ethereum, which is still doing well, though there are utility features to Ethereum that make it different. Just to be clear, we're not merely talking about a currency. It's a protocol, which gives you access to the metaverse, non-fungible tokens – it's not just something to trade speculatively.

Q: What are some of the legal applications here? For example, we have heard about the possibility of blockchain wills – will these replace traditional wills someday, in your opinion?

A: So, that's a version of a smart contract. It's a protocol of a blockchain – basically, a set of digital code and instructions. You could theoretically program wills in there with contingencies and it would be self-enforcing. Until the contract provisions have been met, the money won't transfer, so it's sort of like a digital custodian.

But the digital applications are still limited. There's a lot that's far too complicated in paper contracts to put into smart contracts, and smart contracts are not tantamount to hundreds of thousands of words of actual writing. There also can be conflicts between smart and written provisions; they're not as smart as you might think – yet. For example, some logic is self-executing only if there is a sufficient balance in a referenced digital wallet to sweep over. If not, some smart contracts I have seen have just frozen up due to the lack of default provision, for example.

Q: Can you talk a bit about the Task Force on Emerging Digital Finance and Currency and the work it is doing?

A: We're really looking to do two things. First, to take a position on what New York law should be related to regulation of virtual currencies and digital assets. Second, we're going to advise the association on what this new technology can do for its operations – in that way [President Levin Wallach] has really been very visionary. Non-fungible tokens, for example, can be linked to access an in-person or online community like NYSBA committees, task forces and Section meetings. This might appeal to younger attorneys in particular, which is important to grow our membership into the future. Global access might also appeal to non-U.S.-based members.

There's a real value to having technology be part and parcel of the way the association and its membership and CLE offerings work. That can be intimidating, of course, but it will help give us a sense of community in a virtual or hybrid space. People exchanging information and documentation and, eventually, perhaps, even a utility token that would allow access to a specific space, would become intrinsically valuable.

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The Crypto Revolution: Will Today's Regulations Stifle Tomorrow's Innovations?

By Carlos Mauricio Mirandola

A Square Peg in a Round Hole

Regulation of capital markets in the U.S. has been challenged by the crypto revolution in very important ways. Take, for example, a recent case the Commodities Futures Trading Commission (CFTC) has decided to pursue. On Sept. 22, 2022, the regulator announced it was seeking relief in courts against Ooki DAO.[1]

Basically, the commission is suing a group of people holding a cryptographic device named Ooki Token. This "token" gives its holder the right to vote to approve changes in a specific computer code – the bZx Protocol, which was renamed Ooki Protocol. This Ooki Protocol is a computer program hosted and maintained in a decentralized way. It allows investors to trade certain "digital assets" (ETH, DAI and others) directly with each other, without interference of merchants – a real marketplace with no intermediaries. Decentralization in this case means that no single person or company owns or is responsible for this Ooki computer program and, consequently, for this Ooki market.

Thus, the CFTC has supposedly identified a marketplace where investors and merchants are trading electronic assets it deems as commodities and the commission thinks this marketplace and the merchants trading therein should have registered. The CFTC wishes to hold Ooki token holders accountable for violations of the Commodity Exchange Act norms.

However: the so-called market is not organized or operated by any single entity; indeed, it can hardly be called an "organized marketplace" given its decentralization (it is not a single place operated by a single entity that imposes organization rules). This non-marketplace is not centrally governed or even centrally hosted. Ooki token holders (the Ooki DAO) do not form a real association; in fact, they are more similar to a community composed of a number of coders and software developers. Furthermore, naming commodities as digital assets (ETH, DAI and others) may be another stretch, since there is not yet a consensus on their nature. Nothing thus seems to fit well in the traditional Commodity Exchange Act analytical framework. As one could say, the commission is maybe trying to fit a square peg into a round hole.

A Polemic Choice at the CFTC and Other Regulators

Why, then, has the CFTC selected such a complex case to mark its debut in the crypto world? Obviously, this is a targeted action, aimed at testing in real life (and maybe in the courtroom, if the case is not settled before trial) the flexibility of legal definitions embedded in the hard words of the

CEA (and perhaps stretching them just enough). Indeed, in the case in view, words have even more power, since what is being discussed is the CFTC's statutory authority over the crypto revolution.

This approach, however, has been polemic since the beginning. The same day the lawsuit was unveiled by the CFTC, Commissioner Summer K. Mersinger published a compelling dissenting statement[2] in which she declares her disappointment with the CFTC for acting outside the bounds of the Commodity Exchange Act. Her main issue was who was blamed: as per the commissioner's view, no authority can be found in the CEA to justify the imposition of liability for breaches of the CEA on Ooki DAO token holders. The CFTC was thus overreaching by (i) imposing liability on token holders only because of their statuses of holders, with no regard to subjective acts; (ii) condemning DAO governance wholesale, without seeing the policy implications; (iii) regulating by enforcement, extending the punitive reach of the commission without clarifying first the applicable rules; (iv) choosing to rely on less-sound grounds instead of using the aiding-and-abetting provisions of § 13(a) of the CEA.

The CFTC is not alone in this square-peg-in-round-hole strategy. Its sister regulator, the Securities and Exchange Commission, joined by the Department of Justice, were the trendsetters some months ago, when they started procedures against Ishan Wahi, an insider at Coinbase, and a group of investors. On July 21, 2022, both SEC[3] and the DOJ[4] filed complaints in the courts based on similar fact patterns but different legal grounds. The authorities' probe on Coinbase's listing and token offering activities uncovered communications between Wahi, who possessed material undisclosed information, and a group of outsiders that included Wahi's brother, Nikhil, and close friends. The outsiders supposedly made great profits in connection with trading crypto assets listed at Coinbase. Breach of confidentiality duties, abuse of trust and making profits from asymmetric information are at the root of insider information violations and should be applicable to the old and new economy alike.

The Justice Department brought charges claiming violations of 18 U.S.C. § 1343, which amounts to criminal violations under the larger umbrella of the wire frauds. In fact, the department described four counts of wire fraud and conspiracy to commit wire fraud that the defendants supposedly committed. Notably, the department did not enter the crypto-as-securities discussion, seeking conviction under the more general theory of the use of artifices and schemes to deceive and defraud to obtain money and property.

The SEC, on the other hand, claimed violation to § 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder, which are the classical provisions used to prosecute insider trading in securities and seek liability on market manipulation enforcement claims. To the SEC, the defendants (i) employed devices, schemes or artifices to defraud, (ii) made untrue statements or omitted material facts, and (iii) defrauded or deceived investors, being liable for civil penalties and subject to disgorgement of unlawful profits.

With this joint action, authorities stated a very plausible claim of authority over the realm of crypto assets, marketplaces and servicers. However, once again excesses and some stretching were pointed out, and dissenting voices could be heard. Commissioner Kathrine Pham of the CFTC[5] released a statement denouncing the inclusion of utility tokens and/or certain tokens relating to decentralized autonomous organizations (DAOs), which in her view was a blatant example of "regulation by enforcement." Instead, she defended the engagement of all authorities in the "notice-and-comment rulemaking pursuant to the Administrative Procedure Act."

Regulatory Conformity

SEC Chairman Gary Gensler has been very vocal in defending more oversight and, consequently, more powers to established authorities. In a series of speeches[6] and public appearances, he presented an extensive agenda that includes new legislation and regulatory powers on crypto assets;[7] bringing crypto trading platforms under the SEC's (preferably) and CFTC's (if inevitable) purview; regulation of custody and settlement of financial transactions, including the use of stable coins and other settlement technologies; oversight and registration of products such as crypto lending and other agreements; actions to "level the playing field" between "traditional" and "new" intermediaries (which seem to mean, to Gensler, making new service suppliers and decentralized protocols to conform to the existing categories of broker-dealers, exchanges, and custodians);[8] mass registration of tokens;[9] and more enforcement actions.

Indeed, Gensler believes that most tokens being offered are securities that should have been registered with the SEC in some kind of capacity.[10] Moreover, he likely identifies gaps in the regulation and opportunities for regulatory arbitrage in numerous instances and is pushing hard to close such gaps. This "nothing new under the sun" approach,[11] whereby innovation is cast aside, brings up a certain impression that new technologies may promote forms to escape from regulation. This fear may seem characteristic of the measures he has privileged.[12]

Probably for this reason the SEC is actively proposing new legislation and seeking enhanced powers from Congress,[13] proposing new rules and extensive reforms to the current regulatory regime for securities, such as the proposed changes in the Regulation ATS;[14] presenting a new definition for "exchange" under § 3(a)(1) of the Exchange Act and current Exchange Act Rule 3b-16(a) that would include decentralized protocols (that created a great deal of controversy even amongst commissioners;[15] and emphasizing enforcement actions, which led to more than 90.[16]

In the end, Gensler's policies and actions reflect an approach to dealing with crypto that one could call "regulatory conformity."[17] This approach may have the effect of putting innovation and adaptation in second place, after ensuring that new business models and innovative ventures conform to the current order. Comply first, try something new next – but only if possible. The underlying objective here is to maintain investor protections and general soundness of the system.[18] The main purpose of rules and protections in place is the creation of the conditions under which markets thrive and prosper.[19] Non-compliant players could thus hamper market development.

Recipes Beyond Regulatory Enforcement and Regulatory Conformity

Regulation by enforcement and regulatory conformity can possibly work for maintaining the soundness and stability of markets, but they are not the only recipes in use. But they likely will cut short promoting (or even dealing minimally well with) innovation. This may be especially true with crypto assets, given their origins as academic experiments, the decentralized and anarchic way the initial computer codes were written, and the chaos and open collaboration their development involves. Regulation by enforcement and regulatory conformity may deal badly with, and hamper, experimentation, since the good qualities of disruptive business models may be visible only a little further down the road. At present, they are destabilizing and bring certain anxiety towards settled protections.

To contribute to this hard task of offering some perspective on regulatory strategies to strike different balances between promotion of innovation and sound development of capital markets, one could mention two other cases of successful approaches to regulation of crypto assets. One is the Swiss Regulatory Experiment, which relies on the improvement of general regulation of distributed ledgers. Another is the Brazilian Regulatory Experiment, in which Brazilian authorities created regulatory sandboxes to test innovative business models and have been using them to learn how to better regulate and promote crypto innovations.

Swiss Regulatory Experiment

Since 2014 the Swiss government has discussed the digitization of financial and capital markets,[20] being one of the first jurisdictions to publish guidelines on initial coin offerings.[21] This head start, the accumulated experience and regulatory knowledge in crypto matters and close interactions with the Zug Crypto Valley companies allowed for Swiss regulators at the Financial Market Supervisory Authority to produce a regulatory regime that welcomed innovation.

The cornerstone to the current regulatory regime was laid with the 2018 report on the legal framework required for the development of distributed ledger technologies (DLT) in the financial markets.[22] One of the greatest achievements of the DLT report was to switch the focus of the regulatory effort at the federal level. Instead of seeking new regulatory powers and discussing allocation of authority amongst government branches, the DLT report embraced the technology as a given and identified the pain points for scaling up its adoption. Surprisingly, the DLT report pointed out relatively fewer changes in the banking, capital markets and AML laws to be made. The approach recommended involved making adaptations to contracts and property laws in order to improve legal certainty and ease of use for transfers of property recorded on DLT.

Based on the recommendations inserted in the DLT report, a DLT bill was drafted in 2019[23] and adopted by parliament in 2020, becoming the DLT Act of 2020.[24] At the heart of the new law were changes to the Swiss Civil Code establishing requirements for the standardization and validity of property transfers in ledgers. The DLT Act authorized the creation of ledgers to record transfers of title in any property deemed suitable, analog or digital assets included, provided two conditions were met.[25] The first was that one ledger should be the sole and single way by which such transfers shall occur and be recognized by the law. The second was that the ledger should fulfill four main requirements: (i) title owners, and title owners only, should be authorized to record property transfers; (ii) the ledger's integrity and certainty should be protected by adequate technical and governance measures, such as (but not limited to) independent validation, so as to avoid unauthorized modifications; (iii) the content of rights, obligations, the functioning of the ledger and conventions associated to records should be contained in the ledger itself; and (iv) title owners must be able to check information on their property and rights directly in the ledger and authenticate the records on their own, without third-party intervention.

As one can notice, the definitions adopted by the DTL Act are neutral from a technological standpoint: they could be applicable to all sorts of ledgers; centralized and distributed; analog/physical or digital/virtual; crypto or non-crypto. Moreover, the DLT Act is neutral also in relation to the nature of the property being recorded in the ledgers, which includes notes, bills, credit instruments and securities in general, as well as other kinds of non-financial property.

In comparison with the regulatory conformity approach, the Swiss approach seems more concerned with leveling up the playing field (allowing new technologies more space to disrupt in a safe way the current order) than with leveling it down (making new technologies conform with requirements that are only suited to old businesses). And in view of the regulation by enforcement approach, the Swiss approach seems to form a more consistent framework for companies to invest in innovation and compete with incumbents, not only in their traditional markets,

but also for new markets with innovative business models (competition for the market as opposed to competition in the market).

Brazilian Regulatory Experiment

Since the 2000s, Brazilian securities and financial authorities took fostering innovation in the markets they regulate as a mandate, and have been experimenting with new innovative business models for regulated activities for some time.[26] Both the Brazilian Securities Commission (CVM) and the Brazilian Central Bank have created differentiated frameworks to deal with new technologies and advancements, which include regimes of lighter regulatory pressure for innovative businesses, such as regulation crowdfunding,[27] issued by the Brazilian Securities Commission or the Regulation Direct Credit Corp,[28] issued by the Brazilian Central Bank. Such regimes are not novel and can be found in other jurisdictions.[29]

Exceptional regimes for new businesses, however, have the disadvantage of sometimes coming too late or being not flexible enough. Authorities issuing special frameworks have to first map out a new concept, model or prototype in the market, understand why current regulation is too heavy for it and decide it should receive special treatment. Then, they will issue rules specifically tailored to avoid regulatory avoidance, setting hard caps, limits or conditions that are often arbitrary in many senses. When introduced, thus, such regimes may have the opposite effect: they could freeze innovation, meaning that they privilege a certain business model that fits the characteristics described in the qualifying regulation. They may "pick winners" (which is bad enough) and do it too early (which is worse).

In order to avoid such perils, a novel approach was introduced in 2020, first by the commission,[30] then by the Brazilian Central Bank:[31] the regulatory sandbox. Sandboxes, in tech lingo, are controlled environments for testing new code or features in software. Brazilian regulators, loosely inspired by this idea and aligned with the growing number of such initiatives around the world,[32] have been using their regulatory sandboxes as calls to seek prototypes of technological crypto businesses that, under regular circumstances, would require exceptions, waivers and consents to rules in force. The process of requesting waivers to rules is ordinarily available but normally demands intense scrutiny prior to authorization. And innovative business models in regulated markets may easily require dozens of them at the same time, which would make the authorization process a nightmare.

The procedures in the commission's and the bank's sandboxes are quite similar, starting with a request for proposals, to which innovative businesses apply. Each request has a definite capacity, which means that proposals compete for a limited number of slots in the sandbox. Each bid is analyzed, including the pertinence of the waivers requested. In the end, a committee picks the most suitable candidates. The elected candidates may, during the period of one year, on average, develop the project as proposed and are granted the waivers requested. The waivers are approved in bulk, which simplifies the whole process.

This latest request included more than three dozen waivers relating to seven different CVM rules, which were granted by the commission for the duration of the regulatory sandbox.[33] Here are some examples: (i) CVM Instruction 31/2020 on central depositaries: waiver of the rule determining prior deposit with central securities depositary of securities listed for trading in a market venues; (ii) CVM Instruction 461/2007 on exchanges and securities markets organization: (a) special authorization for real-time gross settlement of trades; (b) waiver of the determining mandatory settlement with central counterparty of transactions; (c) waiver of the mandatory corporate structure for the market surveillance and self-regulation department; (iii) CVM Instruction 476/2009 on public offerings of securities: authorization for the placement of restricted securities in non-accredited investors; waiver of the maximum limit of 75 investors prospected in a restricted placement; (iv) CVM Resolution 33/2020 on registrar and transfer agents: authorization to issue certificates without prior filing at the CVM.

To balance the concession of the waivers sought and set the bounds for the regulatory test to happen in a controlled environment, the CVM imposed certain operational limits and restrictions. The main one was time; this provisional and exceptional regime of functioning lasts for one year and can be extended for another at the CVM's discretion. It is a temporary monopoly, not accessible to other players, in which period the crypto platform will be the sole institution authorized by the regulator to take in investors and issuers, issue security tokens and provide a market where they trade. In addition, the maximum number of issues was set to 12, which generated scarcity, on the one hand, but aligned the incentives of the newcomer to play safe and pick good experimental cases, on the other.

The analysis of the waivers requested and granted points to a more level playing field between old businesses and new ones. All the rules waived would make sense for traditional capital markets infrastructures, which are centralized and operate a longer chain of processes, with the involvement of central counterparty of transactions and the central securities depositary. Depositing centrally traded assets and central clearing are important measures to reduce counterparty and settlement risk and allow for netting. However, the distributed ledger and smart contracts allow for a more decentralized operation, the de-concentration of risk, real time gross settlement and a compressed, shorter chain of processes, since trades are settled straight on the blockchain, and smart contracts ensure delivery-versus-payment.

In comparison with the regulatory conformity approach, the Brazilian approach seems to allow for more radical

experimentation without losing the safety component. This has been particularly useful for DLT technologies and the regulatory developments it requires. And, in relation to the regulation by enforcement approach, the Brazilian approach seems to be more open to the needs of developers, without exposing investors and the public in general to more aggregated risks. Furthermore, it allows authorities to experiment with waivers and alternative regulatory regimes without losing control of the experiment and harming the public.

Conclusion

So, as it seems, up to now the more frequent responses of the U.S. regulators to the challenges posed by the crypto revolution have been regulation by enforcement, an approach that tries to extend the authority of regulators and preserve old rules by reinterpreting words in laws in force (and seeking a court's help to do this) and regulatory conformity, a strategy that implies reforms focused on inclusion of the new agents, business models and technologies under the regulatory umbrella that sheltered the old ones. This in many ways levels down the playing field.

However, questions related to content of the old rules and their fitness to the needs of the new technological and innovation panorama, and how to use the regulation to promote and embrace what DLT and smart contracts put on the table, seem to be missing from the policy discussions. Leveling up the playing field has been left out of the policy agenda.

Concretely, regulation by enforcement and regulatory conformity have been falling short of answering legitimate questions about the content of the rules applicable to the crypto de-fi marketplace and infrastructure.

Hard crypto challenges should not be answered by hubris in prosecutions and enforcement actions. Neither does it seem appropriate to use legislative and regulatory effort to extend the current market structure to the new business models and technologies. A better way to deal with uncertainties and respond to these legitimate doubts may be contained in the Swiss and Brazilian regulatory experiments. Leveling up the playing field and experimenting by using sandboxes seem to be more advisable ways of advancing regulation for the development of crypto assets and their regulation.

Carlos Mauricio Mirandola is founder and principal of CMSquare Investments. He has an M.A. and Ph.D. from the University of São Paulo and is an LLM and JSD candidate at Columbia University. Mirandola is vice chair of the NYSBA Task Force on Emerging Digital Finance and Currency and co-chair of the Committee on International Banking, Securities and Financial Transactions of the International Section.

Endnotes

1. *See* the complaint at https://www.cftc.gov/media/7681/enfookicomplaint092222/download (last visited on Sept. 25, 2022). As CFTC explains in the lawsuit's complaint, "the Ooki DAO ('Ooki DAO' or 'Defendant') . . . is an unincorporated association comprised of holders of OokiDAO tokens who vote those tokens to govern (e.g., to modify, operate, market, and take other actions with respect to) the bZx Protocol (which the Ooki DAO has renamed the 'Ooki Protocol')." In the view of CFTC, Ooki DAO engaged in illegal activities in violation of the Commodity Exchange Act and Regulations in three ways: (1) by unlawfully engaging in off-exchange leveraged and margined retail commodity transactions involving virtual currencies, namely ETH, DAI and others; (2) by not registering with the CFTC as Registered Futures Commission Merchant; and (3) by not implementing customer information program, and know your customer and anti-money laundry programs.

2. *See* the dissent at https://www.cftc.gov/PressRoom/SpeechesTestimony/mersinger-statement092222#_ftnref1 (last visited on Sept. 25, 2022).

3. *See* SEC complaint at https://www.sec.gov/litigation/complaints/2022/comp-pr2022-127.pdf (last visited on Sept. 25, 2022).

4. *See* the DOJ complaint at https://www.justice.gov/usao-sdny/press-release/file/1521186/download (last visited on Sept. 25, 2022).

5. *See* https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement072122 (last visited on Sept. 25, 2022).

6. *See, e.g.*, Prepared Remarks of Gary Gensler on Crypto Markets, Penn Law Capital Markets Association Annual Conference (April 4, 2022) ("Penn Remarks"), https://www.sec.gov/news/speech/gensler-remarks-crypto-markets-040422, Remarks at Aspen Security Forum (Aug. 3, 2021) ("Aspen Remarks"), https://www.sec.gov/news/speech/gensler-aspen-security-forum-2021-08-03; *see* Gary Gensler, "Kennedy and Crypto" (Sept. 8, 2022) ("Kennedy Remarks"), https://www.sec.gov/news/speech/genslersec-speaks-090822; *and* Testimony of Gary Gensler Before the United States Senate Committee on Banking, Housing, and Urban Affairs (Sept. 15, 2022) ("Testimony before Senate"), https://www.banking.senate.gov/imo/media/doc/Gensler%20Testimony%209-15-22.pdf.

7. In the Aspen Remarks, he stated, "In my view, the legislative priority should center on crypto trading, lending, and DeFi platforms."

8. *See* Penn Remarks: "So I'd like to mention three areas related to the SEC's work in this area: platforms, stablecoins, and crypto tokens."

9. *See* Testimony Before Senate: "Thus, I've asked the SEC staff to work directly with entrepreneurs to get their tokens registered and regulated, where appropriate, as securities."

10. *See, e.g.*, his comments that of the nearly 10,000 tokens in the crypto market, "I believe the vast majority are securities" in the Kennedy Remarks.

11. *See, e.g.,* the Penn Remarks, and "The SEC Treats Crypto Like the Rest of the Capital Markets," at https://www.wsj.com/articles/the-sec-treats-crypto-like-the-rest-of-the-capital-markets-disclosure-compliancesecurity-investment-mutual-fund-protections-blockfi-bankruptcy-bitcoin-11660937246.

12. *See, e.g.*, his remarks in Kennedy and Crypto, which end with Joseph Kennedy's phrase "No honest business need fear the SEC" as an invitation for crypto business to avoid dodging SEC's rules.

13. Gensler is the current chairman of the SEC, and was the chairman of the CFTC between 2009 and 2014. In his appearances before Congress, he has been emphasizing the need for more powers and he recently announced the two agencies are collaborating and sharing information, and an interagency memorandum of understanding is in the making. *See* Stefania Palma and Patrick Jenkins, *SEC Chair Urges 'One Rule Book' for Crypto To Avoid Gaps in Oversight*, June 24, 2022, Financial Times, https://www.ft.com/content/b9466a10-a2a6-412d-acf4-086609283df2.

14. *See* SEC Proposed Rule "Amendments Regarding the Definition of 'Exchange' and Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities" (Release No. 34-94062; File No. S7-02-22), https://www.sec.gov/comments/s7-02-22/s70222.htm (last visited on Sept. 25, 2022).

15. SEC Commissioner Hester M. Peirce filed a dissenting statement à propos the Release No. 34-94062 regretting the short period of time and small opportunity window to consider the contents of the proposal. *See* https://www.sec.gov/news/statement/peirce-ats-20220126 (last visited on Sept. 25, 2022).

16. Since 2017, the number of enforcement actions relating to crypto assets promoted by the SEC reached more than 90. *See* https://www.sec.gov/spotlight/cybersecurity-enforcement-actions (last visited on Sept. 25, 2022).

17. *See* Kennedy Remarks, "I look forward to working with crypto projects and intermediaries looking to come into compliance with the laws. I also look forward to working with Congress on various legislative initiatives while maintaining the robust authorities we currently have."

18. *See* Kennedy Remarks, "As discussed in the President's Working Group Report on Stablecoins, it is important to ensure that we have appropriate safety and soundness protections, investor protections, and safeguards against illicit activity."

19. In Kennedy Remarks, "Let's ensure that we don't inadvertently undermine securities laws underlying $100 trillion capital markets. The securities laws have made our capital markets the envy of the world."

20. *See, e.g.*, The Federal Council (2014) Federal Council report on virtual currencies in response to the Schwaab (13.3687) and Weibel (13.4070) postulates.

21. Financial Market Authority (2017), Regulatory treatment of initial coin offerings (ICOs), https://www.finma.ch/en/~/media/finma/dokumente/dokumentencenter/myfinma/4dokumentation/finma-aufsichtsmitteilungen/20170929-finma-aufsichtsmitteilung-04-2017.pdf.

22. The Federal Council (2018), Legal framework for distributed ledger technology and blockchain in Switzerland – An overview with a focus on the financial sector, https://www.newsd.admin.ch/newsd/message/attachments/55153.pdf

23. The Federal Council (2019), Draft Federal Act on the Adaptation of Federal Law to Developments on Distributed Ledger Technology, https://www.sif.admin.ch/dam/sif/en/dokumente/Blockchain/blockchain_dlt_gesetz.pdf.download.pdf/DLT%20Federal%20Act.pdf.

24. *See* Federal Act on the Adaptation of Federal Law to Developments in Distributed Ledger Technology, Sept. 25, 2020, https://www.sif.admin.ch/dam/sif/en/dokumente/Blockchain/blockchain_dlt_gesetz.pdf.download.pdf/DLT%20Federal%20Act.pdf.

25. Swiss Civil Code, Section 973d. *See* English translation at https://www.fedlex.admin.ch/eli/cc/27/317_321_377/en.

26. *See, e.g.*, the concept release and proposed rule the CVM issued in 2016 for a crowdfunding and peer-to-peer platforms ("2016 Crowdfunding Draft Rule") https://conteudo.cvm.gov.br/export/sites/cvm/audiencias_publicas/ap_sdm/anexos/2016/sdm0616edital.pdf (last visited on Sept. 27, 2022).

27. The 2016 Crowdfunding Draft Rule was converted into a crowdfunding regulation in 2017 with the release of the CVM Instruction 588/2017. Crowdfund platforms are defined in Brazilian regulation as electronic platforms offering investments in start-ups and small businesses. *See* https://conteudo.cvm.gov.br/legislacao/instrucoes/inst588.html (last visited on Sept 27, 2022).

28. Direct credit corporations are financial institutions specialized in offering credit lines by means of electronic platforms. *See* the CMN Resolution 4.656/2018, https://www.bcb.gov.br/estabilidadefinanceira/exibenormativo?tipo=Resolu%C3%A7%C3%A3o&numero=4656 (last visited on Sept. 27, 2022).

29. *See, e.g.*, the SEC Regulation Crowdfunding, 80 FR 71537, issued on Nov. 16, 2015, https://www.federalregister.gov/citation/80-FR-71537 (last visited on Sept. 27, 2022).

30. In 2019 the CVM issued for comments a concept release and a draft rule (*see* https://conteudo.cvm.gov.br/audiencias_publicas/ap_sdm/2019/sdm0519.html). In 2020, the Instruction 626/2020 issued after analyzing the comments received (*see* https://conteudo.cvm.gov.br/legislacao/instrucoes/inst626.html) (last visited on Sept. 27, 2022).

31. The BCB regulatory sandbox was established by the BCB Resolution 29/2020. *See* https://www.bcb.gov.br/estabilidadefinanceira/exibenormativo?tipo=Resolu%C3%A7%C3%A3o%20BCB&numero=29.

32. The specialized literature identifies the UK's Financial Conduct Authority (FCA) as the first regulator to adopt the structure of regulatory sandbox to allow experimentation. *See, e.g.*, A. Attrey, M. Lesher and C. Lomax (2020), "The role of sandboxes in promoting flexibility and innovation in the digital age," Going Digital Toolkit Policy Note; *and* Miguel Amaral (2022), "Case 2. Digitalisation in finance: regulatory challenges and regulatory approaches," https://www.oecd-ilibrary.org/sites/433f2a12-en/index.html?itemId=/content/component/433f2a12-en (last visited on Sept. 27, 2022).

33. *See* the CVM decision granting the waivers at https://conteudo.cvm.gov.br/export/sites/cvm/legislacao/deliberacoes/anexos/0800/deli875_consolidada.pdf.

New York State Bar Association Task Force To Examine Emerging Digital Currencies, Association Participation in the Digital Space

By Susan DeSantis

The New York State Bar Association has launched a task force to make recommendations on how New York should regulate virtual currencies and digital assets and advise the association what the new technology can do for its operations.

"The rapid growth of the metaverse/Web3 and the digital economy present a confluence of issues for lawyers," said President Sherry Levin Wallach. "At the same time, this technology has the power to significantly change the way we do business, bank and interact both personally and professionally. It's important that we are in front of the issues and able to engage productively in this quickly evolving space."

The task force will work to educate NYSBA members and the legal community about the impact of the digital economy and the legal issues that are likely to arise in representation of clients. It will also evaluate legislative and regulatory proposals and explore how the metaverse and Web3 can benefit the legal profession and bar associations.

"We are already seeing the effects of this trillion-dollar industry in many areas of practice including entertainment, business, intellectual property, tax, criminal and environmental law and trusts and estates," Levin Wallach said. "The Task Force on Emerging Digital Finance and Currency will ensure that the New York State Bar Association has a voice in this innovative and emerging field."

Jacqueline J. Drohan, partner at Drohan Lee, and Dana V. Syracuse, co-chair of Perkins Coie's Fintech Industry Group, will co-chair the task force. The vice chair will be Dr. Carlos Mauricio Sakata Mirandola, CMSquare, São Paulo, Brazil. Marc Beckman, founding partner of DMA United, New York, NY, and Nancy Chanin, who oversees business development at DMA United, will be consultants to the task force.

New York State Bar Association President-Elect Richard C. Lewis will be the task force's liaison to the association's Executive Committee. Joseph Bizub and Dina Khedr of Brooklyn Law School will be law student members of the task force.

The members of the task force include:

Alyssa Barreiro, head of fiduciary risk, BNY Mellon, Binghamton, NY

Joshua Lee Boehm, partner, Perkins Coie, Phoenix, AZ

Julie T. Houth, staff attorney, Robbins Geller Rudman & Dowd, San Diego, CA

Luca CM Melchionna, managing member, Melchionna, New York, NY

John W. R. Murray, partner, Foley Hoag, New York, NY

Jeffrey D. Neuburger, head of blockchain group, Proskauer Rose; New York, NY

Rory J. Radding, partner, Mauriel Kapouytian Woods, New York, NY

David J. Reiss, professor of law and research director, Brooklyn Law School Center for Urban Business Entrepreneurship, New York, NY

Jason Schwartz, tax partner and co-head of Digital Assets and Blockchain Practice, Fried, Frank, Harris, Shriver & Jacobson, Washington, DC

Robyn T. Williams, associate, Devlin Law Firm, Cleveland, OH

Great Dissents: 'Matters of High Principle' at the Court of Appeals

By Vincent Martin Bonventre

Some of the greatest opinions in Supreme Court history are dissents.[1] To be sure, Justice John Marshall Harlan's lone dissenting opinion in *Plessy v. Ferguson* would be included in any "greatest" list. Protesting the majority's separate-but-equal doctrine, Harlan insisted that "[o]ur Constitution is color-blind and neither knows nor tolerates classes among citizens." As every law student knows, Harlan's view was embraced 58 years later in *Brown v. Board of Education,* when the court condemned racial segregation as a violation of constitutional equal protection.

Justice Louis Brandeis's dissent against warrantless eavesdropping in *Olmstead v. United States* would surely make any such list. His warning against the "pernicious doctrine" that, "in the administration of the criminal law, the end justifies the means," was eventually heeded by the court nearly four decades hence. In *Katz v. United States*, explicitly abandoning the majority ruling in *Olmstead*, the court held that constitutional search and seizure rights protected a person's reasonable expectations of privacy.

And Justice Robert Jackson's dissent in *Korematsu v. United States* must be mentioned. His impassioned disagreement with the majority condemned the wholesale military internment of Japanese-Americans during World War II. As usual, Jackson's invocation of American constitutional principles has few, if any, equals: "[I]f any fundamental assumption underlies our system, it is that guilt is personal and not inheritable."[2]

These and other great dissents by other eminent jurists were, in Chief Justice Charles Evan Hughes' memorable words, "an appeal to the brooding spirit of the law, to the intelligence of a future day."[3]

To be sure, there are partisans of limiting dissents, evading disagreement and acquiescing in a single institutional voice.[4] Others, such as Justice Jackson, decried "a misleading impression of unanimity by avoiding, or confusing, an underlying difference."[5] Stanley Fuld, esteemed New York chief judge and among the most deservedly renowned appellate judges of the last century, set forth criteria for dissents worth writing: "[T]hey stimulate thought as to whether the view of the majority is in conflict with wise and settled legal principle, at odds with justice and fair dealing, out of tune with the life about us or at variance with modern day needs."[6]

Of course, Supreme Court justices are not the only ones to have written great dissents. Judges of New York's high court have likewise penned dissents that "appeal to the brooding spirit of the law." Although less known than their Supreme Court counterparts, they were equally driven by "matters of high principle" and no less roused by majority rulings viewed as intolerably "at odds with justice and fair dealing."

It is no easy task to select, from among the countless dissenting opinions in Court of Appeals history, those that fit the foregoing attributes. It is even more difficult to cull a mere few to classify as "great." But as one who was fortunate to work at the court for several years and reveres that institution, I wanted to give it a try.[7]

To make that task somewhat manageable, I've confined my consideration of "great" candidates to the "modern era." For the purpose here, that limits the pool to dissenting opinions authored by judges who have served on the court since the adoption of the appointment selection system in 1977.[8]

My unquestionably subjective selections are all impassioned pleas for greater justice, decency, and wisdom, and their authors all felt compelled – by principles higher than consensus and unison – to protest publicly what their colleagues had decided.

Juridical Limbo

Judge Matthew J. Jasen in *Tebbutt v. Virostek*[9]

In *Tebbutt*, a negligently performed use of a syringe in amniocentesis caused the death of a child in utero. Worse than that, the physician left the mother unaware until the eventual stillbirth.

The Court of Appeals held that the mother had no cognizable cause of action. The majority reasoned that there was no duty owing to an unborn child who was never born alive, nor was there any duty owing to the mother that was violated, because only the fetus was harmed by the negligent conduct.

Judge Jasen was aghast at the majority's inexplicably heartless ruling:

> By holding that the physician's conduct fails to give rise to any cognizable cause of action, the majority relegates the unborn child to a juridical limbo, where negligent acts, with fatal effect, performed upon the child are neither compensated nor deterred.
>
> [T]he majority renders the mother a bystander to medical procedures performed upon her own body. The practical effect of the majority's view is that the physician bears no duty of care if his negligence causes the death of the unborn child and the concomitant emotional injury to the mother. The unborn and mothers are entitled to greater protection.

Nearly 20 years thereafter, the court acknowledged that *Tebbutt* was wrongly decided, rejected its callous analysis and vindicated Judge Jasen's dissent.[10]

Catechetical Rules

Judge Joseph W. Bellacosa in *Kircher v. City of Jamestown*[11]

In *Kircher*, witnesses alerted the police that a woman had been kidnapped and were assured that appropriate rescue action would be taken. None was. Consequently, the kidnapped woman endured horrific experiences and suffered serious injury. But the majority of the court rejected any "special duty" owed by the municipality and its police to the victim because she, herself, had not contacted the police.

Understandably, Judge Bellacosa was outraged at the cruel rigidity of the majority's ruling:

> [T]he victim of a broad daylight abduction, a harrowing car ride and kidnapping in the countryside, and brutal beating and rape, should not have her personal injury case and that of her husband thrown out of court without a trial because of the inflexible application of catechetical rules.
>
> The victim was isolated by the abduction and by the nature of the crimes involved and, thus, could not personally make direct contact with the police. Under these circumstances, to impose an impossible legal duty on her perverts the jural relationship of the parties and the applicable rules.

Unfortunately, despite considerable agreement with Bellacosa and severe criticism of *Kircher* and the "special duty" rule,[12] the court continues to adhere to the rule to immunize municipalities, even beyond its customary application.[13]

Profound Unfairness

Chief Judge Lawrence H. Cooke in *Fleishman v. Lilly Co.*[14]

In *Fleishman*, a woman who was treated with Diethylstilbestrol (DES) during pregnancy gave birth to a child who, as a result, developed cancer later in life. The Court of Appeals dismissed the lawsuit against the pharmaceutical companies as untimely, holding that the statute of limitations began to run when the mother ingested the drugs many years earlier, not when the cancer was first discovered or even discoverable.

Chief Judge Cooke condemned the majority's inflexible application of prior decisions:

> [T]he law is not and should not be so inflexible that it cannot correct itself from injustice and unfounded concerns espoused in prior decisions. [T]he doctrine [of stare decisis] should not be used as a shield behind which a court may hide as reason for perpetuating unnecessary and profound unfairness.
>
> A grave injustice . . . is worked by the current rule of law which requires . . . causes of action to be brought before a plaintiff could reasonably know of their existence and very likely before any medically cognizable injury has occurred. It is time to abandon that inequitable rule as a mistake of the past that we have a duty to correct.

Two short years later, the state Legislature, siding with Cooke, discarded the so-called "exposure" rule and provided that the statute of limitations runs from the "discovery of the injury."[15]

Fundamental Rights Are Fundamental Rights

Chief Judge Judith S. Kaye in *Hernandez v. Robles*[16]

In *Hernandez*, the court construed various provisions of New York's Domestic Relations Law as restricting marriage to opposite-sex couples. The majority then hypothesized some reasons the Legislature could have decided to preclude

same-sex marriage and then concluded that the reasons it had just imagined justified the restriction.

Chief Judge Kaye was as disappointed with her colleagues as she was passionate that they had done wrong:

> This State has a proud tradition of affording equal rights to all New Yorkers. Sadly, the Court today retreats from that proud tradition.
>
> The Court concludes . . . . that same-sex marriage is not deeply rooted in tradition, and thus cannot implicate any fundamental liberty. But fundamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights. Indeed, in recasting plaintiffs' invocation of their fundamental right to marry as a request for recognition of a 'new' right to same-sex marriage, the Court misapprehends the nature of the liberty interest at stake . . . . Simply put, fundamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them.
>
> I am confident that future generations will look back on today's decision as an unfortunate misstep.

Kaye's dissent – cited countless times throughout the nation in caselaw and scholarly articles[17] – was vindicated in the state a few years later with the legislative overruling of the majority's decision and, nationally, with the Supreme Court's recognition of the constitutional right to marry for same-sex couples shortly after that.[18]

Youthful Suspect Isolated

Judge Vito J. Titone in *People v. Salaam*[19]

In *Salaam*, one of the so-called "Central Park Five" appealed his convictions for the brutal beating and rape of a female jogger in a case that had captured the public's attention. The Court of Appeals upheld the convictions. The majority relied on the factual determinations reached by the lower courts, that the police had abided by all the relevant statutory and constitutional requirements in their interrogation of the defendant.

Judge Titone, in lone dissent, had grave doubts and saw the facts quite differently:

> This case . . . involves police officers and an Assistant District Attorney who obtained a confession from a 15-year-old boy by keeping him in isolation from the three concerned adults who came to the police station to help him . . . . I would reject the holdings of the courts below.
>
> What emerges from these facts is a picture of law enforcement officers who were so anxious to extract a full and complete confession that they did everything within their power to keep this youthful suspect isolated . . . [O]ther than an undisguised intention to exploit this defendant's youthful vulnerability, there was no justification for the authorities' actions in preventing defendant from gaining access to the helpful counsel of the supportive adults who had gathered at the police station to assist him.
>
> [T]he statements the police obtained as a result of their overreaching ought to have been suppressed . . . both to deter the abuse of police authority and to protect the right to counsel of those who are too young and naive to appreciate its importance.

Titone's misgivings were vindicated when the now-"Exonerated Five" had their convictions vacated nine years later. Not only did DNA confirm the identity of the actual attacker, but facts came to light about the lying, manipulation and other abusive conduct used in obtaining the false confessions.[20] New York City ultimately settled with the exonerees for $40 million.[21]

'Incapable of Rational Participation'

Judge George Bundy Smith in *People v. Tortorici*[22]

In another highly publicized case, the Court of Appeals again chose to defer to the determinations of the courts below, and again the result was tragic.

The defendant, with a history of mental illness, held a classroom of college students hostage. The prosecution could not find a psychiatric expert willing to testify that the defendant was sane and, finally, when they did find one willing to cooperate, that expert prepared a detailed report that the defendant was presently too incompetent for any determination to be made and too incompetent to be tried.[23] Nevertheless, without a hearing, the trial judge allowed the prosecution to proceed. A jury found the defendant guilty of multiple crimes, the judge imposed the maximum allowable sentence, and the Appellate Division and Court of Appeals affirmed.

A few years into his incarceration, the defendant, who spent much of the time in psychiatric treatment, hanged himself in his cell.

At the Court of Appeals, Judge Smith had been alone in protesting the trial judge's ruling and the prosecution of this incompetent defendant:

> A defendant who lacks the mental capacity to stand trial and to aid in his or her defense cannot, in harmony with due process principles, be convicted in an American court of law.
>
> [T]he trial record is undisputedly devoid of any indication that the trial court, after having received the nine-page communication from the People's forensic psychiatrist, undertook any further contact, communication with, or observation of defendant prior to rendering its decision.
>
> [T]he nine-page communication from the People's forensic psychiatrist – which concluded that defendant was 'incapable of rational participation in court proceedings' – was sufficient to establish a reasonable

> ground to believe that defendant was incapable of understanding the charges or proceedings against him or of assisting in his defense."
>
> [T]he trial court was required . . . to sua sponte order a further examination of defendant and, if necessary, a hearing on constitutional due process grounds. The failure of the trial court to do so was an abuse of discretion that warrants a reversal.

It is difficult to imagine that not one of Judge Smith's colleagues agreed with him, let alone that his dissent was not the majority decision. A later report to the state bar association was blunt: "It strains credulity to argue that [Tortorici] possessed substantial capacity to understand the nature and consequences of his conduct or that his conduct was wrong."[24] Indeed, as the lead prosecutor acknowledged in a PBS documentary about the case, "I remember thinking that . . . there was something wrong with what we did."[25] And yet, at our high court, only Judge Smith was willing to see that the judicial system had failed.

A Tired and Hungry Child Isolated

Chief Judge Jonathan Lippman in *Matter of Jimmy D.*[26]

Eight years after the ultimate exoneration of the "Central Park Five," the Court of Appeals – but this time with three judges in dissent – again attributed its ruling to the factual conclusions of the courts below and rejected the strong possibility that another juvenile's confession was false. In this case, a 13-year-old, in the absence of his mother, who had previously been present, succumbed to the interrogating detective's promise of "help" in exchange for a confession. The youth's confession led to his being adjudicated a juvenile delinquent for acts of sexual misconduct akin to adult crimes.

Chief Judge Lippman was dismayed by his court's ruling, appalled by the interrogator's trickery and distressed at the risk of a false confession:

> [T]he detective, upon encountering resistance from Jimmy . . . made representations . . . that he would have to provide a written statement before 'help' could be afforded . . . . When pressed as to what she meant by 'help,' the detective indicated psychological counseling or legal assistance. But . . . it was a gross distortion . . . to intimate that legal assistance in any way depended upon the giving of a statement; and . . . a confession to criminal wrongdoing is not a condition of access to psychological counseling.
>
> [I]t does seem clear that the circumstances – i.e., a tired and hungry child isolated with an experienced interrogator in the middle of the night and offered illusory inducements to confess to specifically described allegations of wrongdoing – are precisely the sort that do produce false confessions.
>
> Recognition of the distinct hazard presented by that inherently enormously coercive scenario renders it imperative . . . where children are concerned, [that] we scrupulously adhere to Miranda's requirement that there be a demonstrably valid waiver of rights, unaffected by threats, trickery, or cajolement, to support the admission of a custodial confession.

The commentary, in both academic and bar journals, has embraced Lippman's dissent, rebuked the majority for its analysis and urged *Miranda* rights to be taken more seriously, especially when juveniles are involved.[27]

The Rationale Discarded

Judge Sol Wachtler in *People v. Brosnan*[28]

While some dissents have protested immediately tragic miscarriages, then-Judge Wachtler's dissent in *Brosnan* warned of the long-term consequences of diluting a basic constitutional protection.

In this case, the defendant voluntarily took the police to his vehicle and, thereupon, was arrested and brought to the station house. At least one hour later, the police returned to the vehicle and, without a warrant, conducted a full search. The majority of the Court of Appeals upheld the warrantless search as incident to an arrest.

In a prescient dissenting opinion, Wachtler decried the expanding of exceptions to the warrant requirement, as the Supreme Court had been doing, divorced from the underlying justifications:

> [T]here is a disturbing tendency to enthrone the exception into the rule . . . . Exception follows exception and soon the general rule itself is engulfed.
>
> I believe the only workable and constitutional standard to apply in search and seizure cases is one which states that absent exigent or unusual circumstances, a law-enforcement official must first obtain a warrant to conduct a search. This approach discards the rubrics of the exceptions and looks instead to the reasons underlying those rubrics . . . The exigent circumstances articulated in most of the cases that were the sine qua nons of warrantless searches and seizures, was that there existed a danger to the officer or a danger of the evidence being destroyed and/or spirited away . . . . [S]earch and seizure law became uncontrollable when the rubric was adopted and the rationale discarded.
>
> [A]pplying the standard I favor, the only question which need be asked is, "Was there any reason discernable from the record which would have made it impracticable for the policeman to get a warrant?" Since that question must be answered in the negative, I find this warrantless search of the vehicle to be unconstitutional.

Although the Court of Appeals has never overruled *Brosnan*, it has explicitly embraced Wachtler's dissenting opinion. Refusing to follow Supreme Court decisions that applied exceptions to the warrant requirement in the absence of their original rationales, New York's high court has recalled

Wachtler's warning that "search and seizure law [becomes] uncontrollable when the rubric [is] adopted and the rationale discarded."[29]

Again, this selection of dissenting opinions constitutes a very limited, very subjective list. But what is objectively true about all of these dissents is their plea for fundamental fairness and decency and the wisdom and courage of the judges who authored them.

Vincent M. Bonventre, J.D., Ph.D, is Justice Robert H. Jackson Distinguished Professor of Law at Albany Law School, the director of the Center for Judicial Process and author of New York Court Watcher. Olivia Harvey (Albany Law School, 2022) helped in preparing this article.

Endnotes

1. The title borrows from Hugh R. Jones, *Cogitations on Appellate Decision-Making*, The Thirty-Fifth Benjamin N. Cardozo Lecture, delivered before the Association of the Bar of the City of New York on Nov. 28, 1979 (accessible at https://nycourts.gov/history/legal-history-new-york/documents/History_Jones-Appellate-Decision-Making.pdf): "There are instances . . . in which responsibility to one's own sense of integrity compels that customary guidelines be ignored and that a dissent be filed-on *matters of high principle* or instances of deep, irresistible visceral compulsion." (Emphasis added.)

2. In 2018, in *Trump v. Hawaii*, 138 S. Ct. 2392, 2424, the court expressly sided with Jackson: "*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and – to be clear – 'has no place in law under the Constitution.'"

3. Charles Evan Hughes, The Supreme Court of the United States 68 (1928).

4. On the New York Court of Appeals, Chief Judge Judith Kaye prized such consensus. *See, e.g.*, Sam Roberts, *Judith S. Kaye, First Woman to Serve as New York's Chief Judge, Dies at 77*, N.Y. Times, Jan. 7, 2016 (she "prided herself on nudging her fellow jurists toward a unanimous opinion"). Her successor, Chief Judge Jonathan Lippman, had a different view. *See e.g.*, William Glaberson, *Dissenting Often, State's Chief Judge Establishes a Staunchly Liberal Record*, N.Y. Times, Oct. 9, 2011 ("I am a result-oriented person," Judge Lippman said in an interview last year, "and the result I am looking for is not necessarily unanimity").

5. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentation*, 37 A.B.A. J. 801, 863 (1951). Former Chief Judge Jonathan Lippman has often expressed a similar view. *See, e.g.*, Andrew Denney, *Can the NY Court of Appeals, Comfortable With Debate and Dissent, Foster Consensus?*, N.Y.L.J., Sept. 26, 2018 ("I think strong majorities and strong dissents are healthy, and I think the law revolves better in that motif").

6. Stanley H. Fuld, *The Voices of Dissent*, 62 Colum. L. Rev. 923, 928 (1962).

7. Several years ago, I was recruited to do something similar to help celebrate the 125th anniversary of the New York Law Journal. *See* Vincent Martin Bonventre, *The Best of New York's Court of Appeals*, N.Y.L.J., Oct. 30, 2013.

8. *See Amendment Victory Spurs Court Change*, N.Y. Times, Nov. 10, 1977. This "modern era" does include opinions by those judges who might originally have been elected to the court, but were subsequently appointed or elevated to a new term, e.g., Chief Judges Sol Wachtler and Lawrence Cooke. I have, however, excluded opinions by judges who are still serving on the court – although there are some which might otherwise well qualify.

9. 65 N.Y.2d 931, 933 (1985) (Jasen, J., dissenting). Although I was a law clerk to Judge Jasen at the time, I did not assist him in his dissent in *Tebbutt*; my brilliant co-clerk John J. Halloran did. Then-Judge Judith Kaye also dissented in *Tebbutt*. One of her finest dissenting opinions is highlighted below.

10. *Broadnax v. Gonzalez*, 2 N.Y.3d 148 (2004). This was but one of several vindications of a Judge Jasen dissent. *See, e.g.*, *People v. Ferber*, 52 N.Y.2d 674, 681 (1981) (Jasen, J., dissenting). The Supreme Court unanimously agreed with Jasen that child pornography is not protected by constitutional free speech, *New York v. Ferber*, 458 U.S. 747 (1982).

11. 74 N.Y.2d 251, 262 (1989) (Bellacosa, J., dissenting).

12. *See, e.g.*, Brian T. Cohen, *The Special Relationship Rule: Is It Consistent with the Waiver of Sovereign Immunity? – A Study of* Kircher v. City of Jamestown, 8 Touro L. Rev. 649, 671 (1992) ("grave miscarriage of justice").

13. *See, e.g.*, *Ferreira v. City of Binghamton*, 2022 N.Y. Slip Op. 01953 (2022) (5–2 decision applying the rule to negligent police action as opposed to failure to act). On another contentious legal matter, however, Bellacosa's former court did ultimately come around to his dissenting view on the mens rea requirement of depraved indifference murder, expressed by him in *People v. Roe*, 74 N.Y.2d 20, 29 (1989) (Bellacosa, J., dissenting) (citing a previous dissent on the issue: *People v. Register*, 60 N.Y.2d 270, 281 (1983) (Jasen, J. dissenting)) and adopted in *People v. Feingold*, 7 N.Y.3d 288 (2006).

14. 62 N.Y.2d 888, 890 (1984) (Cooke, C.J., dissenting).

15. N.Y. CPLR 214-c. As many have observed, the unrelenting drive to advance fairness and decency, as reflected in his *Fleishman* dissent and numerous other opinions, was fundamental to Chief Judge Cooke's career. *See, e.g.*, Jay C. Carlisle II & Anthony DiPietro, *The Life and Legacy of Chief Judge Lawrence H. Cooke: "Truly an Exemplary Life. A Life Well Lived,"* 80 Alb. L. Rev. 1233 (2017). Another fervent apostle of fundamental fairness, Judge Stewart F. Hancock, Jr., dissented a few years after *Fleishman* in a pre-conception tort case, *Enright v. Eli Lilly & Co.,* 77 N.Y.2d 377, 389 (1991) (Hancock, J., dissenting) (Disagreeing that "there is any basis in the law or social policy or any principled reason in justice and fairness" for the majority to hold that the granddaughter "has no right to recover, solely because she was not conceived at the time that her mother was exposed to DES in utero," despite the "appalling consequences from which she suffers").

16. 7 N.Y. 3d 338, 380 (2006) (Kaye, C.J., dissenting).

17. *See* Roberta A. Kaplan, *The Dissent that Paved the Way to Equal Dignity: Chief Judge Judith S. Kaye's Dissent in Hernandez*, 92 N.Y.U. L. Rev. 56, 62 (2017).

18. N.Y. Domestic Relations Law § 10-a Parties to a Marriage; *Obergefell v. Hodges*, 576 U.S. 644 (2015). In a related vindication, Kaye's dissent in *Alison D. v. Virginia M*, 77 N.Y.2d 651, 657 (1991) (Kaye, J., dissenting), that a de facto parent of her same-sex partner's child should have a right to seek visitation, was adopted by the court 15 years hence in *Brooke S.B. v. Elizabeth A.C.C.,* 28 N.Y.3d 1 (2016).

19. 83 N.Y.2d 51, 58 (1993) (Titone, J., dissenting).

20. *See People v. Wise*, 194 Misc. 2d 481 (Sup. Ct., N.Y. Co. 2002); Sharon L. Davies, *The Reality of False Confessions – Lessons of the Central Park Jogger Case*, 30 N.Y.U. Rev. L. & Soc. Change 209 (2006).

21. Benjamin Weiser, *5 Exonerated in Central Park Jogger Case Agree to Settle Suit for $40 Million*, N.Y. Times, June 19, 2014. More recently, Judge Rowan Wilson, in dissent, decried the rigidity of the majority for refusing even to consider the actual innocence claim of a defendant on the grounds that she had pleaded guilty at trial – even though the defendant was exonerated of any wrongdoing in an intervening civil case. *People v. Tiger*, 32 N.Y.3d 91, 110 (2018) (Wilson, J. dissenting) ("Natascha Tiger pleaded guilty but is innocent . . . Ms. Tiger is neither the first nor last innocent person to plead guilty"). On remand, the Appellate Division, "as a matter of discretion in the interest of justice," vacated the guilty plea and conviction. *People v. Tiger*, 207 A.D.3d 574 (2d Dep't 2022).

22. 92 N.Y.2d 757, 769 (1999) (Smith, J., dissenting).

23. *A Case of Insanity: The Story of Ralph Tortorici*, Frontline, Oct. 17, 2002, https://www.pbs.org/wgbh/pages/frontline/shows/crime/ralph/summary.html.

24. Report to the Executive Committee of the New York State Bar Association (2019), 10, https://nysba.org/mandatedrep0419/.

25. A Case of Insanity, *supra*, Interview: Cheryl Coleman: "No mental health professional wanted to be involved having his or her name attached to someone who was part of the prosecution of Ralph Tortorici . . . . They believed, first of all, that he was not responsible . . . . [A] few of them expressed to me that they thought they would lose respect in their profession if they took on a position like that . . . . We couldn't find anybody who had even the remotest interest in it [participating in the prosecution]. I remember thinking that . . . there was something wrong with what we did . . . . I felt really ashamed. I felt really responsible, and I felt like that we had to really seriously take a look at what we did." https://www.pbs.org/wgbh/pages/frontline/shows/crime/interviews/coleman.html.

26. 15 N.Y.3d 417, 425 (2010) (Lippman, C.J., dissenting).

27. *See, e.g.*, Justin Ashenfelter, *Coming Clean: The Erosion of Juvenile Miranda Rights in New York State*, 56 N.Y.L. Sch. L. Rev. 1503, 1514–15 (2012); John Brunetti, *Re-visiting* In re of Jimmy D.*: What a Great Idea!*, NYSBA New York Criminal Law Newsletter, Spring 2019, Vol. 17, No. 1, 17. Some lower courts are assiduously avoiding a strict application of the ruling in *Jimmy D. See, e.g.*, *In re P.G.*, 945 N.Y.S.2d 532 (Family Court, Queens County, 2012). Chief Judge Lippman, committed to correcting and preventing wrongful convictions, created the New York State Justice Task Force to address the causes, such as false confessions. New York State Justice Task Force website, www.NYJusticeTaskForce.com.

28. 32 N.Y.2d 254, 263 (1973) (Wachtler, J., dissenting).

29. *See People v. Belton*, 55 N.Y.2d 49, 53 (1982) (rejecting the Supreme Court rule that the arrest of a driver always allows a warrantless search of the vehicle's passenger compartment; quoting *People v. Brosnan*, 32 N.Y.2d 254, 267 (Wachtler, J., dissenting)); *see also People v. Torres*, 74 N.Y.2d 224, 229 (1989) (rejecting the Supreme Court decision allowing a warrantless "pat-down" of the passenger compartment even after a pat-down of the driver uncovered neither weapon nor contraband).

Notably, several state high courts across the country have adopted the strict exigency requirement Wachtler prescribed in *Brosnan*. *See, e.g.*, *State v. McCarthy*, 369 Or. 129 (2021) ("the state must prove that exigent circumstances actually existed at the time"); *State v. Tibbles*, 169 Wn.2d 364 (2010) ("the existence of probable cause, standing alone, does not justify a warrantless search"); *State v. Elison*, 302 Mont. 228 (2000) ("unlike the United States Supreme Court, we have continued to require a showing of exigent circumstances").

How TikTok Can Revolu Your Legal Practice

By Cecillia X. Xie

Jane[1] was nervous. She had recently opened up her own law firm and switched practice areas. Whereas her peers seemed to have extensive networks to leverage for referrals, Jane had none. Wracking her brain for what to do, she came up with an unconventional but brilliant idea. She would start a TikTok account.

TikTok – isn't that just a teens' app for dancing and lip syncing? Well, yes and no. While the platform certainly has its fair share of dancing and lip syncing, it is also home to numerous educational videos, including about the law. The #lawtok hashtag alone has 1.6 billion views, and lawyers have been seeing unprecedented success on the app. Kevin Kennedy, who is the face of The Kennedy Law Firm on TikTok,[2] only started making videos on TikTok in February and has now grown his audience to 484,500 followers. Limor Mojdehiazad,[3] a family law litigator in Los Angeles County, covered the Amber Heard/Johnny Depp trial on her account, growing at least 200,000 followers over the course of the trial alone.[4] She now has 476,400 followers on the app.

Clearly, there is an appetite for legal content on TikTok, but lawyers are often already swamped by their to-do lists. Adding TikTok to one's legal marketing strategy seems like a large ask. Jane toyed around with the idea of more traditional attorney advertising – billboards, print ads and the like – but was drawn to TikTok because of how personal and authentic she found the app. Plus, it was free.

Jane's leap of faith paid off. While not every video went viral, the ones that did helped her not only build her fledgling legal practice but also build her online community. She got more eyeballs on some videos than she would ever have hoped for on a billboard or print ad. She started receiving business inquiries and meeting with potential clients. She continued posting, and the inquiries began flowing in. To date, two of her biggest cases have come from TikTok.

While unconventional, TikTok is fertile ground for attorneys exactly *because* it is unconventional. Being one of the first lawyers on TikTok gives you incredible first-mover advantage – early adopters of any social media platform tend to reap outsized rewards when compared to later adopters. New creators join the app every day, and the number of lawyers on the app today is much larger than two years ago. By taking advantage of TikTok's relative nascency, you can propel your personal brand and legal practice by leaps and bounds – just like Jane did.

Below are five tips to help guide you in your #lawtok journey.

Treat the Invisible Audience as if They Are Already Your Clients

What are the most frequently asked questions that you get from clients and prospective clients? What do you wish your clients and prospective clients knew before they sat down in your office? These topics are prime fodder for TikTok content.

Your existing clients and prospective clients are a great sample for what the broader world is curious about with respect to your legal practice. If they had a question, many others on TikTok also likely have the same question – they just don't have you (yet) to answer them. The more you're able to demonstrate that you're an authority on a legal topic, the more trust you'll build with your audience in that area and more generally. Just as you would research and prepare for a panel or pitch, research and prepare for your videos in the same way – after all, a TikTok video has far more potential reach than most panels and pitches.

When crafting your video, remember to avoid legalese and jargon, unless you plan on dedicating the video to explaining those terms (another great category of content!). Pretend like a friend of a friend has reached out to you about something, and be sure to utilize titles and storytelling techniques (i.e., who, what, when, where, why, how) to engage the audience, particularly in the crucial first three seconds of the video. A simple "What NOT to say to cops" immediately engages the viewer, tees up the rest of the video and offers informational value to the viewer that will keep them coming back to you for more.

utionize

Stitch, Duet and Innovate

One of the aspects that makes TikTok different from other social media platforms is the ability to easily react and build upon existing videos through the "Stitch" or "Duet" features. "Stitch" allows you to cut a five-second excerpt from someone else's video and then record your own addition after it; "Duet" permits you to record yourself in parallel with another video playing and is often used to record real-time reactions.

As you watch videos, think about if there's anything you could add to the discussion. Do you think someone's take was incomplete? Missing key facts? When popular trials are being litigated, particularly involving celebrities, take advantage of the subject's popularity to give your own take on the proceedings (being mindful of legal ethics and professionalism) and establish yourself as an authority. You don't have to limit yourself only to legal videos either. If someone's doing a story time about how they got fired from their job, you can give your legal analysis of the situation (but be sure to clarify that it's not legal advice!).

For more inspiration on how legal content can translate successfully on TikTok, see what similar law practices are posting in terms of information, style and trends. Once you have a few successful videos of your own, innovate on those successes – perhaps "What NOT to say to cops, part two," or the opposite, "Three things to say to cops during a traffic stop." Let your creative juices flow!

Cause Controversy

Like it or not, law is a controversial profession. A lot of people have preexisting conceptions of lawyers as being money-hungry or callous and uncaring. Be prepared for negative comments, but also don't be afraid to use those negative conceptions to your advantage. Debunk the myth

that all personal injury lawyers are ambulance chasers. Challenge the traditional notion that attorneys are boring. Ask yourself whether any of the stereotypes that you have faced in the real world or online can be teaching moments for your online audience. Sure, it might stir the pot, but controversy drives engagement.

Controversial topics work well on TikTok because they are more likely to prompt other creators to Stitch, Duet or otherwise innovate on your video as well, which drives more traffic to your content. The goal isn't to be controversial for the sake of controversy – rather, the goal is to generate questions from your audience as you think through a controversial topic together. Was it appropriate to exclude certain evidence from the Heard/Depp trial? Walking people through a legal decision and being a legal translator for the public is an invaluable skill.

Don't Forget To Be Human

Remember that at the end of the day, you're human before you're a lawyer. Viewers want to be able to feel like they can connect to the person behind the law firm. What other passions do you have? What other information do you want to put out into the world? Building a strong personal brand enhances your legal practice, and the two go hand-in-hand on a platform like TikTok.

You don't even have to get wildly personal. Even simple things such as telling the story of your favorite case or the first mistake you made as a lawyer can be impactful and humanizing. Be authentic – don't just follow the crowd or the trend, unless the crowd or trend actually resonates with you. Viewers can tell the difference. The idea is to be a real person in the eyes of viewers, with a real backstory, so that viewers remember you and keep you on the top of their mind as they go about life. And when they do need legal representation, you'll be the first lawyer that they think of.

Disclaimers and Attorney Advertising

TikTok can feel casual, but legal ethics are anything but. Always add an appropriate disclaimer when posting about a past case or case result.[5] If making a video about a general legal tip, make sure to convey to viewers that the video is attorney advertising and is not intended to create an attorney-client relationship.[6] When in doubt, add a disclaimer. Familiarize yourself with the layout of TikTok posts to ensure that the disclaimer is easily seen, whether on the video itself or in the caption for the video.

As you build your audience on TikTok, users will also start tagging you in videos of creators in potentially thorny legal situations. It may be tempting to comment to offer your services or let them know that you're there if they have any questions – but don't do it! Legal ethics rules prohibit solicitations through real time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client.[7]

Cecillia Xie is a writer, content creator and lecturer at Yale University. She is a former associate at Morrison & Foerster and Simpson Thacher & Bartlett and has over 400,000 followers on TikTok.

Endnotes

1. Jane is a pseudonym.
2. https://www.tiktok.com/@kennedylawfirm.
3. https://www.tiktok.com/@lawyerlimor.
4. Lindsay Dodgson and Charissa Cheong, *The Depp v. Heard Trial Has Propelled Legal Experts Into TikTok Fame, Turning Them Into the Internet's Go-To Lawyers*, Insider, May 20, 2022, https://www.insider.com/depp-v-heard-trial-lawyers-experts-tiktok-media-fame-2022-5.
5. N.Y. Rules of Professional Conduct, Rule 7.1(d)-(e).
6. *See* Rule 7.1(a).
7. Rule 7.3(a).

What To Do on LinkedIn in 2023

By Allison C. Johs

With nearly 850 million users as of July 2022, close to 200 million of whom are in the United States, LinkedIn is a valuable – and in many cases still underutilized – marketing tool for lawyers. Even if your potential clients aren't using LinkedIn to search for lawyers (and some of them most certainly are), your referral sources may very well be.

For individual lawyers, LinkedIn is a great way to build your personal brand and highlight your activities and accomplishments while building both your professional reputation and your network. Similarly, for law firms, establishing a LinkedIn company page helps expand the firm's reach and brings attention to its content and its activities. LinkedIn pages are indexed on Google and LinkedIn has high domain authority, which may mean that your content gets more attention on LinkedIn than it does on your own website.

As 2023 approaches, now might be a good time to revisit your LinkedIn profile and activity. LinkedIn has rolled out some newer features that can help bring attention to your content and drive business or referrals. Although these strategies focus on individual LinkedIn profiles as opposed to company pages, some of these features will work for both.

Some features are being rolled out slowly, so you may not have access to them yet, but stay on the lookout for them when you visit LinkedIn. Others are only available on the LinkedIn app. Lawyers can implement each of these tips themselves, although in a few instances, it might be helpful to have the assistance of a marketing professional, graphic designer or a more tech-savvy individual. If you need additional instruction, LinkedIn's help feature (which can be found under "Me" in LinkedIn's navigation bar) is easily searchable and provides step-by-step instructions for how to perform various functions in LinkedIn.

7 Ways To Improve Your LinkedIn Profile

Your LinkedIn profile does your networking for you online, so you will want to make sure that it is up to date and presents you in the best light possible.

1. Update Your Headshot

If your headshot doesn't look like you, it won't do you much good. Use a professional-looking photo (not one with a silly background or with other people, pets or props in the shot). Ideally, you want a head and shoulders shot rather than a full-length or torso shot, since photos on LinkedIn can be quite small.

2. Add a Background Image

A background image adds visual interest to your profile and can help convey your marketing message. It can include your contact information or some visual representation of what you do. You can use a product like Canva to easily create a high-quality image with the correct dimensions or seek the assistance of a graphic designer or other individual familiar with creating these kinds of images.

3. Record Your Name Pronunciation

When you are meeting someone new, whether virtually or in person, it can be awkward if one person mispronounces the other's name. LinkedIn has a feature that can help you avoid that awkwardness by allowing you to record and display the pronunciation of your name on your LinkedIn profile. Currently, you can only record and edit your name pronunciation through the LinkedIn app, although it can be played and displayed on any device. If you click "edit" in your introduction section on your mobile device, you will see the option to record your name pronunciation. For best results, make sure that your recording is less than 10 seconds long, speak slowly and avoid background noise.

4. Add a Profile Video

In addition to your photo, LinkedIn allows you to go one step further and add a video to your profile, which lives "behind" your profile photo. You can only record and upload a video to your profile from the LinkedIn mobile app, although it will be visible to users on all devices. The video must be between three and 30 seconds. This is a perfect place to introduce yourself and let potential clients and referral sources know what you do.

Once you have created your video, you can see analytics to see how many people viewed your video, you can add captions and more.

5. Showcase Your Services

Services can be found under the "Open to" link in your introduction card. This feature is available to "freelancers and small business owners," so most solo practitioners should qualify, but lawyers working in firms may not.[1] If this is available to you but you have not yet completed it, click "Add services" and fill out the form with all of your details. Filling out this section will not only highlight the services you provide on your profile but will help you rank in the search results when LinkedIn members search for those services on LinkedIn.

Using this feature creates a service page for your LinkedIn profile, which is a landing page dedicated to the services you provide. If you have a LinkedIn company page for your firm, you can link the company page to your service page. Potential clients can contact providers with service pages regardless of the degree of connection. Share your service page with your network, and invite clients to leave a review on your service page. You can then share those client reviews in your feed.

6. Revamp Your About/Summary Section

So many lawyers overlook this section, but it's a great way to personalize your LinkedIn profile and make it stand out. You can talk about why you went into the law or your area of practice, what kinds of clients you work with, what your personal mission or goals are and more. You can now also add hyperlinks to your about/summary section to make it easy for LinkedIn members to get to your website, blog, YouTube channel or other content on the internet.

Don't forget to add any disclaimers that might be required by your jurisdiction's ethical rules. In New York State, it might be a good idea to add attorney advertising to your LinkedIn profile, and the about/summary section is a good place to do it.

7. Feature Your Best Content

The "featured" section is a place to highlight your best posts, articles, or other content, including images, documents, links, presentations and video. If you ever added media to your about section, LinkedIn moved it to the featured section. You can always add, remove, delete or re-order content in this section to keep it current.

6 Ways To Participate More Effectively on LinkedIn

In the same way that simply handing out business cards or attending a meeting will only take you so far, just having a profile on LinkedIn isn't enough to build relationships with your audience. You need to engage with your followers and connections, both in groups and one-on-one. Create posts that prompt people to engage with you in return.

Here are a few ways to make your activity on LinkedIn more engaging and interactive.

1. Consider Creator Mode

If you are using LinkedIn to post and promote your content – articles, infographics, videos, presentations, blog posts, etc. – "creator mode" may help you build your audience and increase your visibility.

Turning creator mode on will change the order the sections of your profile are displayed to focus more on your content. Instead of seeing the about/summary section beneath the basic introduction card at the top of your profile, the activity and featured sections will appear above the about section. In addition, instead of displaying the number of connections you have, LinkedIn will display the number of followers, and "follow" will be the primary button on your profile, rather than "connect."

Creator mode also provides users with additional tools to create and share content on LinkedIn to help drive engagement. Some of those tools include:

- LinkedIn Live
- LinkedIn Audio Events
- LinkedIn Newsletters
- Analytics that show how your content performs over time

LinkedIn creator mode will also allow you to add a link to your website right in your introduction card. If you meet the following criteria, you may be able to change your profile to creator mode on LinkedIn:

- You have more than 150 followers and/or connections.
- You have recently shared some original content (as opposed to content created by others). The original content can be anything from a short form post, an image, a video, event, poll or article.
- You have a good standing record with LinkedIn and have abided by their professional community policies.

2. Go Live

LinkedIn Live

LinkedIn Live lets LinkedIn members or pages broadcast live video content on LinkedIn profiles, pages or events. The criteria to be approved to broadcast live on LinkedIn are similar to those for creator mode. Turning on creator mode automatically submits your access request for LinkedIn Live.

If you don't have creator mode, you can also find out if you are eligible for LinkedIn Live by creating an event on LinkedIn; if you are eligible, you will be able to choose LinkedIn Live as the format for your event. You can also use a third-party broadcast tool such as Zoom (with a Pro account) by connecting it to LinkedIn.[2]

All LinkedIn Live events are public and will be recorded. After a stream is complete, it will remain on your LinkedIn feed as a "previously recorded live" video.

According to LinkedIn, going live results in 24 times more comments and seven times more reactions.

LinkedIn Audio Events

Earlier this year, LinkedIn launched another tool in its creator hub, LinkedIn Audio Events, which are essentially live audio broadcasts. Like LinkedIn Live, Audio Events are always public; LinkedIn members can ask questions and interact during live audio events, and live captioning is available.

Currently, pages are not able to host audio events – they must be hosted on a LinkedIn personal profile, although LinkedIn plans to allow LinkedIn page administrators to host audio events in the future. Unlike LinkedIn Live broadcasts, Audio Events cannot be recorded or replayed.

3. Share Your Expertise With LinkedIn Newsletters

Only available to those using LinkedIn in creator mode, "Newsletters" allows you to publish a newsletter through LinkedIn, invite your followers or connections to subscribe and send in-app, push and email notifications when you publish a new newsletter. If the Newsletters feature is available to you, when you click "Write an article" on your homepage, you'll see an option to create a newsletter in the publishing tool.

4. Tell Your Story Through LinkedIn Stories

If you are familiar with Instagram stories, LinkedIn Stories are similar. LinkedIn stories are 10-second video or photo clips that can be seen for only for 24 hours. They are great for time-sensitive content or content that you don't want to stay on your profile for an extended period of time.

This feature is only available for premium users, as of this writing.

5. Create a Poll

Polls are a good way to generate engagement with your LinkedIn feed. Click on "Create a Poll" in the Create a Post box and then ask a question and provide between two and four options for your followers to choose from. Then do a follow-up post and talk about the results.

6. Build a Carousel Post

A carousel post (as distinguished from a carousel ad) is essentially a series of documents or slides that you share to your LinkedIn feed, but users can scroll through the document without leaving LinkedIn. They are more interesting and interactive than a typical static post, so they can help increase awareness and drive engagement. For example, if you do presentations for clients or for CLE, you might consider taking a few of your slides and creating a carousel post with them. Or post your latest article, blog post or firm newsletter.

For best results, use visuals to keep it interesting; instead of posting the article itself, turn the article into a series of images or an infographic and save them as a PowerPoint

presentation or PDF. Take photos from your latest firm event and turn them into a carousel post.

Carousel posts should have a file size less than 100 MB. You can upload Word documents, PowerPoint slides or PDFs to your post, but once uploaded, you cannot change or edit the document. While you can certainly create them on your own, carousel posts are another area where enlisting a marketing or design professional might be helpful if you are not confident in your design or editing skills.

Build and Nurture Your Network

If you agree that networking and building connections are important to your development and your legal career, don't neglect your LinkedIn network.

5 Easy Ways to Add New Connections

If you haven't been active on LinkedIn for a while, your network may be a little stale. And if you are new to LinkedIn and don't have many connections, your content won't have nearly the reach that it could. Here are five easy ways to add new connections to your LinkedIn network.

1. Connect With Current and Former Colleagues

Find your current or former employer on LinkedIn and search for employees of the organization, then invite those you work(ed) with to connect.

2. Find Your Classmates

Everyone loves to connect with people they went to school with. Look for your undergraduate and law school institutions on LinkedIn and click on Alumni to search for your classmates.

3. Use People You May Know

LinkedIn uses the information from your profile and your LinkedIn activity to suggest people to connect with.

4. Invite LinkedIn Group Members

If you belong to any groups on LinkedIn, you can see all of the other members of the group and send them invitations to connect. If you don't currently belong to any groups, search first for groups you already belong to outside of LinkedIn (for example, your state or local bar association, or your law school or undergraduate alumni group).

5. Mine Your Connections' Networks

People in your target audience are usually connected to other people just like them who might be great connections for you. Look at the profiles of the people in your target audience who you are already connected to and click on the number of their connections in their introduction card at the top of their profile. Then you can see their connections. You can ask your connection to make an introduction either through LinkedIn or outside of the platform. Or, if they are a second-level connection, you can send them an invitation directly, perhaps mentioning your mutual LinkedIn connection.

Don't forget to personalize those invitations to connect. Make it easy for the other person to accept your invitation by telling them how you know one another or what your connection is. Make sure that if the person is someone you have not met that you give them a good reason to connect with you.

The More You Give, the More You Receive

In order to truly participate and build your network, your LinkedIn activity shouldn't be all about you. Promote your colleagues, clients and referral sources and help boost their content. Engage with other people on the platform. Send messages to your connections or interact with the content they post.

While liking and sharing are great, the real engagement value comes from leaving a comment. It shows both the original poster and others viewing the post that you took the time to not only scroll through their content, but to say something meaningful about it or to provide your perspective. Commenting is another way to demonstrate you know what you're talking about.

There is an added benefit to all of that engagement as well: increased visibility for you and your content. When you engage with people who have a large or devoted following, those followers or connections will see your comments as well. The more thoughtful comments you leave, the more visible you'll be on LinkedIn, and the more comments you're likely to receive in return.

Implementing just a few of these suggestions into your marketing strategy in 2023 will make LinkedIn a much more effective marketing platform for you and your law firm.

Allison C. Johs, president of Legal Ease Consulting, provides marketing, social media, business development, productivity and practice management coaching and consulting services for lawyers and law firms. She is a frequent lecturer for bar associations, law schools, law firms and other legal associations, and is the co-author of "Make LinkedIn Work for You: A Practical Handbook for Lawyers and Other Legal Professionals."

Endnotes

1. If you don't see the option to add your services, you can try requesting access by going to https://business.linkedin.com/grow/openforbusiness and clicking on "Get started."
2. https://business.linkedin.com/marketing-solutions/linkedin-events/getting-started.

Annual Review of New Criminal Justice Legislation

By Barry Kamins

This article contains the annual review of new legislation amending the Penal Law (PL), Criminal Procedure Law (CPL) and related statutes. The discussion that follows will highlight key provisions of the new laws, and, as such, the reader should review the legislation for specific details. In some instances, where indicated, legislation enacted by both houses is awaiting the governor's signature, and, of course, the reader should check to determine whether the governor has signed or vetoed the bill.

Among the many new laws enacted by the Legislature in the last session, there were three important areas in which substantive legislation was passed: bail reform, discovery reform and new weapon-related laws in response to the Supreme Court's decision in *New York State Rifle and Pistol Ass'n v. Bruen*.[1]

Bail Reform

In the area of bail reform, the Legislature expanded the number of bail-eligible offenses, added new factors that judges must consider when setting bail, added a mental health assessment as a non-monetary condition of release, and added three circumstances in which a desk appearance ticket can be denied to a defendant.

In expanding the number of bail-eligible offenses, legislators were responding to a concern that some individuals who are arrested on larceny or criminal mischief charges are then rearrested on the same type of charges and released again.

To address the above concern, legislators amended CPL § 530.40(4)(t), which permits a judge to set bail when a defendant is arrested for a crime involving "harm to an identifiable person or property" after the defendant has been released on an earlier crime involving "harm to an identifiable person or property." The amendment defines "harm" as "including, but not limited to theft or damage to property."[2]

Second, a judge can now set bail when an individual is issued a desk appearance ticket (DAT) for a "harm" crime and then rearrested on a second "harm" crime before being arraigned on the DAT. A judge can now set bail on the later crime.[3]

In addition, the crime of possession of a firearm (PL § 265.01-b, a class E felony) is now treated as a "harm" crime for purposes of setting bail. Accordingly, if an individual is given a DAT for PL § 265.01-b and then rearrested for a larceny before being arraigned on the DAT,

a judge can set bail on the larceny charge. Similarly, if a person is given a DAT for a "harm" crime and then rearrested for PL § 265.01-b before being arraigned on the DAT, a judge can set bail on the weapons charge.[4]

When a defendant is being arraigned on a second "harm" crime, a judge can still release a defendant without bail depending on the presence or absence of additional factors. A judge may set bail if *either* a theft is *not* negligible, *or* it was in furtherance of other criminal activity. If neither factor is present, however, the judge must release the defendant without bail. Finally, if a court has the discretion to set bail, it still must first determine whether there was reasonable cause to believe that the defendant committed the crime. The statute is silent on whether the prosecutor can satisfy that burden when a complaint has not yet been converted into an information.[5]

The Legislature also added two nonviolent crimes to the current list of bail-eligible crimes: criminal sale of a firearm to a minor (PL § 265.16, a class C felony), and criminal possession of a defaced weapon (PL § 265.02(3), a class D felony).[6]

Under the prior bail reform statute, the Legislature expanded the issuance of desk appearance tickets but also created a number of exceptions under which a police officer could still make a custodial arrest. In the latest version, the Legislature added three new circumstances in which a police officer is not required to issue a DAT: (1) where an individual, who is 18 years or older, is charged with criminal possession of a weapon on school grounds (PL § 265.01-a, a class E felony); (2) where an individual, who is 18 years or older, is charged with a hate crime pursuant to PL § 485.05; and (3) where an individual is charged with a qualifying offense involving harm to an identifiable person or property under CPL § 510.40(4)(t), as amended above.[7]

In the prior reform legislation, the Legislature amended the factors that a court must consider when determining whether monetary or non-monetary bail conditions should be set. In this year's legislation, three additional factors were added. Two of these factors were previously considered only when a charge involved a member or members of the same family or household: violation of an order of protection and a defendant's history of use or possession of a firearm. Those two factors must now be considered when an individual is arrested for any qualifying offense. And judges must now also consider whether the charge is alleged to have caused serious harm to an individual or group of individuals.[8]

The final part of the new bail reform package adds two non-monetary conditions of release, which address concerns a court may have about the mental health of a defendant. Last year, the Legislature added a condition by which a court may, where applicable, direct a defendant to be removed to a hospital pursuant to Mental Hygiene Law § 9.43 that provides for at least a 72-hour period of emergency hospitalization for immediate observation, care and treatment.

This year two additional conditions were added that expand upon the current section and provide more explicit directions to judges who wish to address any concerns about a defendant's mental health. The conditions provide for both a voluntary and involuntary psychiatric assessment of a defendant (CPL § 500.10 (3-c)).[9]

If a judge were to find by clear and convincing evidence that a defendant is mentally ill such that, if left unattended, his or her conduct may result in harm to himself, herself or others, a court may order, as a condition of release, that the defendant seek a voluntary psychiatric assessment under § 9.13 of the Mental Hygiene Law. This condition can only be imposed if the defendant consents and he or she has a recently documented history of mental illness or psychiatric hospitalization.

A court can also now order an involuntary psychiatric assessment at a local hospital pursuant to Mental Hygiene Law § 9.43. This can be done if the court finds, by clear and convincing evidence, that a person is mentally ill such that, if left unattended, his or her conduct may result in immediate serious harm to himself, herself or others, and if the defendant is acting in such a manner which, in a person who is not mentally ill, would be deemed disorderly conduct that is likely to result in immediate serious harm to himself, herself or others.

If an involuntary assessment is ordered, to ensure that the defendant arrives at the hospital, the court may order that a police officer, sheriff or peace officer transport the defendant, and an ambulance service may be utilized.

Once the defendant is at the hospital, a defendant must be examined within 48 hours and may not be held more than 15 days unless a determination is made that the defendant should be admitted. Once the defendant is admitted, a process is commenced by which a defendant is entitled to a hearing to determine whether he or she should be retained for further treatment. The statute places a greater responsibility on pre-trial service agencies to provide the court with the status of a defendant's psychiatric assessment and an update on his or her placement, treatment or discharge.

Discovery

The Legislature also enacted a number of minor changes in the area of discovery in an effort to improve the efficiency of discovery practice. One amendment clarifies the standard to evaluate supplemental certificates of compliance. When the discovery statute was revised in 2019, it provided for a supplemental certificate, but did not provide much guidance on its usage. Since that time, prosecutors have filed them infrequently.

The amendment clarifies that when a supplemental certificate is filed, the prosecutor is required to explain the reason for the delayed disclosure of materials so that the court may determine whether the delayed disclosure affects the propriety of the original certificate (CPL § 245.50 (1-a)). Thus, a prosecutor must demonstrate either that the belatedly disclosed material did not exist at the time of the filing of the original certificate, or it existed but was not in the possession, custody or control of the prosecutor despite diligent efforts to learn of and obtain the items.[10]

The filing of a supplemental certificate will not negate the validity of the original certificate if it was filed by the prosecutor in good faith, and after exercising due diligence, or if the additional discovery did not exist at the time the original certificate was filed. Thus, if belatedly disclosed material was gathered by the police, it would be difficult to argue that the prosecutor exercised due diligence in filing the original certificate, as items in the possession of the police are deemed in possession of the prosecutor. Thus courts will now have a factual record upon which to assess the reasons for the belated disclosure of material, which will enable them to rule on the propriety of the initial certificate of compliance.

A second change in the discovery process addresses the procedure by which a party can challenge or question a certificate of compliance or a supplemental certificate of compliance. Last year the Legislature enacted CPL § 245.50(4), which was ambiguous in that it permitted "questions" related to a certificate to be raised in a motion. The amendment adds clarifying language, although it inadvertently did not delete the above existing language.

Under the amendment, either party (although it will more frequently be defense counsel) has an obligation to raise known potential defects in a certificate "as soon as practicable" (CPL § 245.50(b)). The defect that will normally be raised is that one or more items of discovery had not been disclosed. This section was added to address concerns by prosecutors that some defense counsel had engaged in gamesmanship, intentionally waited too long to notify them about material that was missing, and then challenged the certificate for the first time in a speedy trial motion. The requirement that counsel act quickly will actually be to their advantage; should a prosecutor ignore such timely notice it could support a later argument that the prosecutor was not "diligent" in obtaining the missing item(s). There is no time limit, however, by which defense counsel must notify a prosecutor under this section.[11]

It is expected that, by imposing this obligation on defense counsel, any disputes over purportedly missing information can be resolved through discussions with the prosecutor. In the event the notification process does not resolve a dispute, defense counsel can make a motion to challenge the sufficiency of a certificate or supplemental certificate and must do so "as soon as practicable."

While courts have always had the authority to dismiss a charge as a sanction for a discovery violation, the people have never had the right to appeal that order. An amendment now provides prosecutors with a right to appeal.[12] In addition, where a judge dismisses only some of the charges against a defendant based upon a discovery violation, the prosecutor will now have a right to an interlocutory appeal since the remaining charges cannot be tried until the appeal is decided. A defendant is also now permitted to apply for bail pending this new interlocutory appeal.[13]

Lastly, the amendment clarifies that this type of dismissal is a discretionary and drastic remedy and must be "proportionate to the prejudice suffered by the party entitled to disclosure."[14] This codifies case law (see *People v. Kelly*).[15] One must distinguish this discretionary type of dismissal, however, from a dismissal under CPL § 30.30, which is mandatory when based on a failure of the prosecutor to file a valid certificate of compliance.

Finally, a new amendment relieves prosecutors of automatic discovery obligations in three types of matters: (1) a simplified information charging only traffic infractions under the Vehicle and Traffic Law; (2) an information that charges only petty offenses, as defined by the municipal code of a village, town, city or county, that do not authorize a jail sentence; and (3) any matter where a defendant stands charged under a local ordinance that carries no jail penalty nor any fine. In these matters the court must advise the defendant, at the first appearance, that he or she can file a motion for discovery.[16]

Possession of Weapons

The Legislature enacted substantive legislation in a third area, i.e., possession of weapons. It enacted a legislative package of 10 weapon-related laws in reaction to the Supreme Court's decision in *New York State Rifle and Pistol Ass'n Inc. v. Bruen*.[17] In *Bruen*, the court held that there is a constitutional right for "law-abiding" citizens to carry a firearm outside the home for purposes of self-defense. In addition, the court held that the New York statute (Penal Law § 400.00(2)(f)) impermissibly infringed upon that right because "it required a showing of particularized need in order to obtain such license, rendering the exercise of the right by ordinary citizens a near-impossibility."[18] As a result, the statute's requirement that compelled an applicant to demonstrate a special need for self-defense purposes, distinguishable from that of the general community, was held to be unconstitutional.

The centerpiece of the weapon-related legislative package is the Concealed Carry Improvement Act,[19] which creates a new licensing procedure designed to comport with

Bruen. Among the 15 eligibility criteria for a gun permit that an applicant must now meet is a requirement that an applicant be at least 21 years old with "good moral character"; that term is defined as having the temperament and judgment necessary to be entrusted with a weapon and to use it only in a manner that does not endanger oneself or others. In order to establish the applicant's good character, he or she must provide a list of former and current social media accounts for the prior three years.

Among other criteria, an applicant cannot have a prior conviction for a felony or "serious offense" as that is defined in Penal Law § 265.00(17); must not be an "addict" as defined under 21 U.S.C. § 802 (habitually uses a narcotic drug); and must not have been previously committed to a facility for being a danger to oneself or others or "ever suffered from a mental illness" (Penal Law § 400.00, L. 2022, Ch. 371, eff. September 1, 2022). In addition, a license will be denied to an applicant who has been convicted within the prior five years of assault in the third degree; misdemeanor driving while intoxicated or menacing as defined in Penal Law § 120.15. Finally, an applicant must not be convicted of any misdemeanor that has to do with domestic violence.

Prior to the issuance of a license, an applicant must complete an in-person firearms safety course. This must include a minimum of 16 hours of curriculum and a minimum of two hours of a live-fire range training course. The license must be renewed after three years. The law also creates an appeal process for applicants who are denied a license, but that system will not be effective until April 1, 2023.

The bill also requires, for the first time, that anyone seeking to purchase a semiautomatic rifle must be at least 21 years of age and must first obtain a license.[20]

Even if an individual has a license to carry a weapon, the bill creates a comprehensive list of 20 "sensitive locations" in which the possession of a firearm, rifle or shotgun constitutes an E felony.[21] These locations include schools, hospitals, places of worship, parks, mass transit systems, bars, theaters, stadiums and "the area commonly known as Times Square." While the statute does not define "Times Square" with any specificity, the city council subsequently passed a measure that designated the boundaries of "Times Square" for purposes of the statute. The boundaries are West 40th Street (south border); West 53rd Street (north border); 9th Avenue (west border); and 6th Avenue (east border).

It should be noted that on the day before the statute was to take effect, a federal court dismissed a challenge to the new law seeking to prevent its enforcement. In *Antonyuk v. Bruen*,[22] the court dismissed the action, citing a lack of subject matter jurisdiction. The court did, however, identify two areas in the statute that were problematic.

First, the court found that, in requiring an applicant to disclose social media content in order to obtain a license, an applicant is being required to surrender his or her Fifth Amendment right in order to exercise a Second Amendment right. Second, the statute's list of "sensitive locations" impermissibly includes locations that went beyond the type of locations approved by the United States Supreme Court in *Bruen*.

The bill also provides that, with respect to private businesses, unless a property owner displays a sign conspicuously stating that a gun is permitted on the property, or gives express consent, possession of a weapon will constitute a class E felony despite the fact that a person has a license to carry a weapon.[23] This section will not apply to certain individuals including law enforcement officers, peace officers and security guards.

Finally, the bill replaces the term "body vests" with "body armor," which is defined as a personal protective body covering intended to protect against gunfire and includes hard body armor. This definition will apply to a broader array of protective equipment that is bullet resistant. Another bill creates two new related crimes: the unlawful purchase of body armor and the unlawful sale of body armor.[24]

Another bill in the legislative package expands the availability and use of an extreme risk protection order (ERPO), the result of the institution of the "red flag" law. This law authorizes a court to issue an order, allowing the police to temporarily confiscate firearms from people who are found by a judge to be a danger to themselves or others. After a deadly mass shooting in Buffalo this past spring, there has been a 93% increase in the number of applications by state police.

The new bill requires police and prosecutors to apply for an ERPO if credible information is received that an individual is likely to engage in conduct that would result in serious harm to others. In addition, the category of those eligible to apply for an ERPO has been expanded to include health care professionals.[25] It should be noted that on May 18, 2022, Governor Hochul issued Executive Order 19, which requires the New York State Police to train its members on filing an ERPO and requires a police officer to file an ERPO when he or she has the requisite information to do so.

Another bill in this package opens the door for microstamping technology to be applied to firearms. This technology utilizes lasers to make precise engravings on the internal portion of a gun. These engravings can be used like a serial number to identify the make and model of the gun. The technology imprints the identifying characteristics of a firearm onto every cartridge ejected from the gun; as a result, investigators need only recover the cartridges at the scene of a crime to be able to identify the gun used in the commission of the crime. The bill requires the Division of Criminal Justice Services to certify, or decline to certify, that microstamping-enabled pistols are technologically viable

and, if certified, to establish processes for the implementation of such technology.[26]

Three other bills in this legislative package have closed certain loopholes relating to the use of weapons. First, the Legislature has enacted two new crimes: making a threat of mass harm (a class B misdemeanor) and aggravated threat of mass harm (a class A misdemeanor). These crimes supplement the current crime of making a terrorist threat (a class D felony) that can only be committed when there is a reasonable expectation of the imminent commission of such offense.[27] The new crimes do not contain that element.[28]

Second, another bill expands the definition of a "firearm" to include any weapon not defined in the Penal Law that is designed or may readily be converted to expel a projectile by action of an explosive. This is intended to capture firearms that may have been modified to be shot from an arm brace which, up to now, have not been included in the current definition of firearms and rifle.[29] Finally, another bill eliminates the grandfathering of large capacity ammunition feeding devices that were, in the past, lawfully possessed.[30]

The Legislature enacted several weapon-related laws that were not in the legislative package mentioned above. First, a new law strengthens the current state law defining "toy guns" or "imitation weapons," by making it consistent with the more expansive definition in the New York City Administrative Code.[31] Two other bills give courts more authority, after issuing an order of protection, to determine whether the defendant possesses a weapon and to ensure the seizure of that weapon when it is determined that continued possession poses a danger.[32]

Finally, the Legislature lowered the threshold for charging two violent firearm offenses involving the sale of weapons. Criminal sale of a firearm in the first degree is now committed when an individual illegally sells three guns in a period of one year; previously, the threshold was 10 weapons (PL § 265.13, a class B felony). Criminal sale of a firearm in the second degree is now committed when an individual sells two firearms in a period of one year; previously the threshold was five weapons.[33]

Several new weapon-related crimes that were enacted last year became effective this year. First, it is now a class A misdemeanor to possess a "major component of a firearm, rifle or shotgun." This includes the barrel, slide, cylinder, finished frame or receiver. This bill was designed to close a loophole that permits untraceable parts of weapons to be converted into a fully functional weapon.[34]

Second, it is a misdemeanor to possess an "unfinished frame or receiver" – commonly referred to as an 80% lower receiver – that is a component critical to completing the manufacture of a ghost gun.[35] Third, the term "ghost gun" has been added to the Penal Law, and its possession constitutes a class A misdemeanor.[36]

Other Legislation

Each year the Legislature enacts new crimes and expands the definition of others; this year was no exception. This year the Legislature responded to an unfortunate consequence of modern technology: the dissemination of crime images for improper purposes. For example, in 2009, an EMT worker took a photograph of a young woman who had been murdered and posted it on his Facebook page.

In response to that and other inappropriate conduct, the Legislature has enacted two new crimes: unlawful dissemination of a personal image in the first and second degree; an A and B misdemeanor, respectively. A person commits those crimes when he or she disseminates an image that depicts a person who is the victim of an assault, homicide, sex offense or kidnapping without the victim's consent. The person disseminating the image must intend to degrade or abuse the victim or otherwise cause harm to the emotional, financial or physical welfare of the victim or must do so for the actor's amusement, entertainment or profit. The law does not apply to the reporting of unlawful conduct; sharing of images by law enforcement; or sharing of images made for a legitimate public purpose, e.g., news reporting.[37]

The Legislature has now aligned "boating while intoxicated" offenses with New York's current Leandra's Law, which provides increased penalties for persons who operate motor vehicles while intoxicated, when a child 15 years of age or under is a passenger in a car. As a result, it is a Class E felony to operate a vessel on the water while intoxicated and while a child who is 15 years of age or under is a passenger in the vessel.[38]

A number of bills have expanded the definition of existing crimes. The crime of aggravated sexual abuse in the third degree (a class D felony) has been amended to include two new elements. First, it can be committed by the insertion of a finger in addition to a foreign object. Second, it can be committed when the victim is younger than 11 years old and the defendant is 18 years of age or older.[39]

The crime of assault in the second degree (a class D felony) has been expanded to include, among the class of victims, employees of transit agencies who work at transportation terminals.[40]

The Legislature has addressed fraudulent criminal activity related to COVID-19 vaccination cards. First, for purposes of forgery-related crimes, a vaccination card is now considered a "written instrument."[41] In addition, computer tampering in the third degree (a class E felony) can now be committed by entering false information in a computer related to a vaccination card.[42]

Corporations and their agents who fail to follow safety protocols in the workplace are now subject to increased monetary penalties. If a corporation is found guilty of an offense involving the death or injury of a worker, a maximum fine for a felony can be $1 million.[43]

As a result of an increase in hit and run accidents in New York City, the Legislature has increased the fines for leaving the scene of an accident for a first violation to a range of $750–$1,000 and for a repeat violation to $1,000–$3,000.[44]

A number of procedural changes were enacted in the last legislative session. One bill requires judges to read one sentence prior to the entry of a guilty plea: "If you are not a citizen of the United States you *may* become deportable, ineligible for naturalization or inadmissible to the United States based on a conviction by plea or verdict" (emphasis added). It should be noted that, while certain convictions mandate the deportation of an individual under federal immigration law, the seemingly questionable advice to be given by the court would only require a judge to tell the defendant that he or she *may* be subject to deportation. The legislation does provide, however, that if a court fails to give the above warning to a defendant, any plea will be rendered involuntary, requiring vacatur of the conviction. In addition, if a defendant requests time to consider the plea in view of possible immigration consequences, a court must grant that request.[45]

The Legislature has provided protection for health care practitioners against attempts by other states to impose restrictions on legal abortions performed within New York State. In one amendment, new legislation creates a statutory exception for the extradition of abortion providers. In addition, a police officer may not arrest any person for performing an abortion in accordance with Public Health Law Article § 25A.[46]

The Legislature has also expanded the use of electronic appearances in criminal cases. Courts in 27 counties have the authority to conduct electronic appearances in a criminal action, separate from a hearing or trial. New legislation permits an additional eight counties to do so (Sullivan, Steuben, Rockland, Saratoga, Seneca, Chemung, Schuyler and Yates).[47]

Finally, in an effort to remove the stigmatization of incarceration, the Legislature enacted legislation that replaces the word "inmate" in various statutes and replaces it with the term "incarcerated individual."[48]

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Endnotes

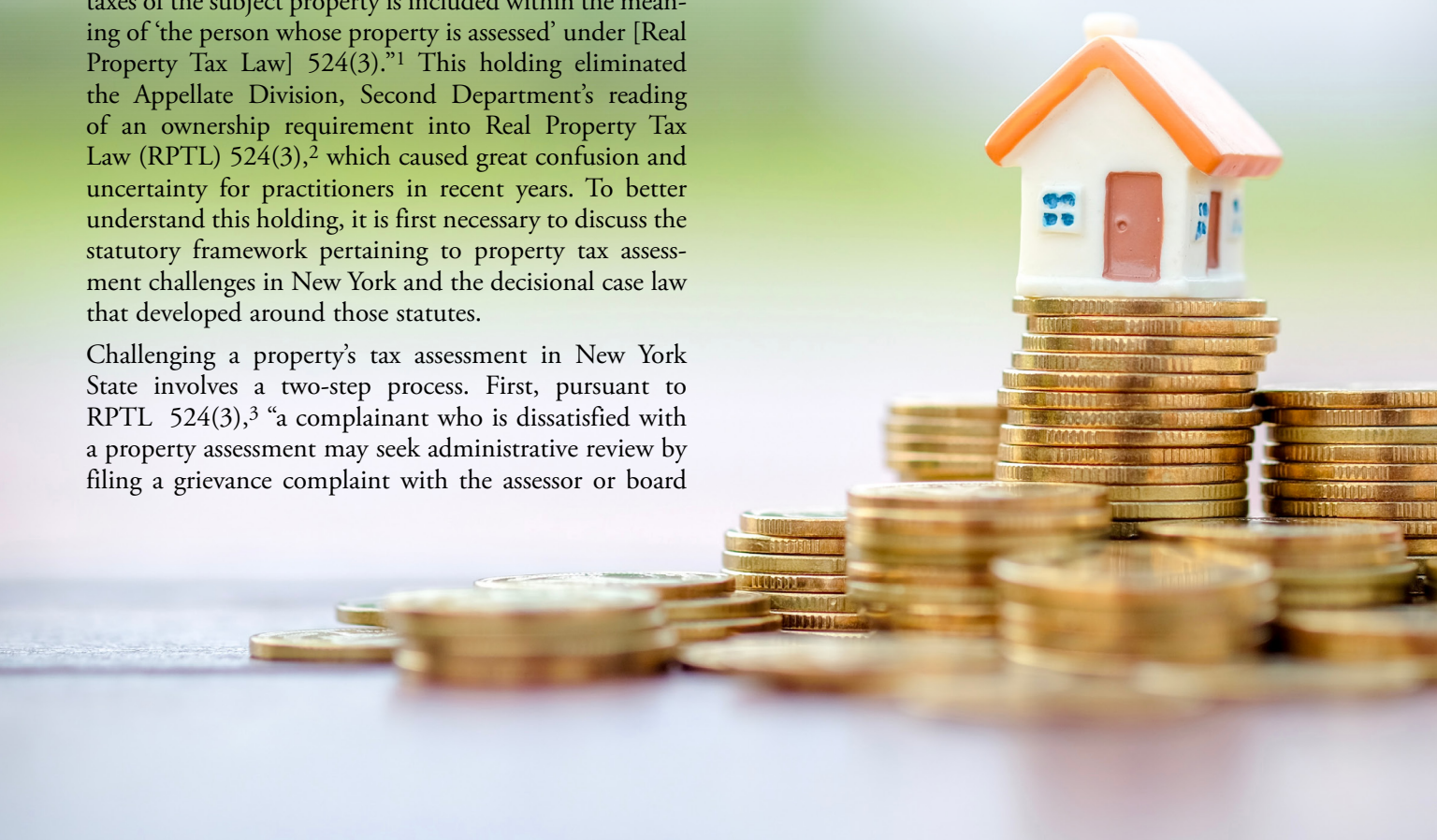
1. *New York State Rifle and Pistol Assn. v. Bruen*, 142 S. Ct. 211 (2022).
2. 2011 N.Y. Laws, Ch. 56 (amending CPL § 530.40 and § 510.10, eff. May 9, 2022).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. 2022 N.Y. Laws, Ch. 56 (amending CPL § 150.20(1)(b), eff. May 9, 2022).
8. 2022 N.Y. Laws, Ch. 56 (amending CPL § 510 and § 530, eff. May 9, 2022).
9. 2022 N.Y. Laws, Ch. 56 (amending CPL § 500.10, eff. May 9, 2022).
10. 2022 N.Y. Laws, Ch. 56 (amending CPL § 245.50, eff. May 9, 2022).
11. 2022 N.Y. Laws, Ch. 56 (amending CPL § 245.50, eff. May 9, 2022).
12. 2022 N.Y. Laws, Ch. 56 (amending CPL § 450.20(12), eff. May 9, 2022).
13. 2022 N.Y. Laws, Ch. 56 (amending CPL § 530.50, eff. May 9, 2022).
14. 2022 N.Y. Laws, Ch. 56 (amending CPL § 245.80, eff. May 9, 2022).
15. *People v. Kelly*, 62 N.Y.2d 515 (1984)).
16. 2022 N.Y. Laws, Ch. 56 (amending CPL § 245.10, eff. May 9, 2022).
17. 142 S. Ct. 211 (2022).
18. *People v. Rodriquez*, 2022 N.Y. Slip Op. 22217, at 2 (Sup. Ct., N.Y. Co. 2022).
19. 2022 N.Y. Laws, Ch. 371, eff. Sept. 1, 2022.
20. 2022 N.Y. Laws, Ch. 371 and 212 (amending CPL 400, eff. Sept. 1, 2022).
21. 2022 N.Y. Laws, Ch. 371 (amending PL § 265.01-e, eff. Sept. 1, 2022).
22. *Antonyuk v. Bruen*, 1:22 CV-0734 (N.D.N.Y. 2022).
23. 2022 N.Y. Laws, Ch. 371 (adding PL § 265.01-d, eff. Sept. 1, 2022).
24. 2022 N.Y. Laws, Ch 210 (adding PL § 270.21, § 270.22, eff. July 6, 2022).
25. 2022 N.Y. Laws, Ch. 208 (amending CPLR 6340, eff. July 6, 2022).
26. 2022 N.Y. Laws, Ch. 205 (adding PL § 265.00(33), (34) and (35) and other sections, eff. four years after certification by DCJS or one year after an entity can ensure compliance, whichever is earlier).
27. *See People v. Hulsen*, 150 A.D.3d 1261 (2d Dep't 2017).
28. 2022 N.Y. Laws, Ch. 206 (adding PL § 240.78 and § 240.79, eff. June 6, 2022).
29. 2022 N.Y. Laws, Ch. 211 (amending PL § 265.00(3), eff. July 6, 2022).
30. 2022 N.Y. Laws, Ch. 209 (amending PL § 265.00, eff. July 6, 2022).
31. 2022 N.Y. Laws, Ch. 501 (amending General Business Law § 871, eff. Nov. 14, 2022).
32. S. 6363, S. 6443, awaiting signature of the governor.
33. 2022 N.Y. Laws, Ch. 56 (amending PL § 265.12, § 265.13, eff. May 9, 2022).
34. 2021 N.Y. Laws, Ch. 519 (adding PL § 265.00), eff. Apr. 29, 2022).
35. 2021 N.Y. Laws, Ch. 519 (adding PL § 265.00(32), eff. Apr. 29, 2022).
36. 2021 N.Y. Laws, Ch. 520 (adding PL § 265.00(32), eff. Apr. 26, 2022).
37. S. 7211, awaiting signature of the governor.
38. A. 911, awaiting the signature of the governor.
39. A. 7079, awaiting the signature of the governor.
40. 2022 N.Y. Laws, Ch. 233 (amending PL § 120.05(11), eff. Sept. 25, 2022).
41. 2021 N.Y. Laws, Ch. 784 (amending PL § 156.25, eff. Dec. 22, 2021).
42. 2022 N.Y. Laws, Ch. 24 (amending PL § 156.25, eff. Dec. 22, 2021).
43. A. 4947, awaiting the signature of the governor.
44. 2022 N.Y. Laws, Ch. 497 (amending Vehicle and Traffic Law § 600(2), eff. Nov. 11, 2022).
45. A. 9877, awaiting the signature of the governor.
46. 2022 N.Y. Laws, Ch. 219 (adding CPL § 570.17, eff. June 13, 2022).
47. 2022 N.Y. Laws, Chs. 246, 351, 252, 254, 321 and 242 (amending CPL § 182.20, eff. June 30, 2022).
48. 2022 N.Y. Laws, Ch. 486 (amending numerous statutes, eff. Aug. 8, 2022).

How a Housing Project, a Pancake House and a Car Dealership Impacted Tax Certiorari Practice in the State of New York

By Matthew S. Clifford

In *DCH Auto v. Town of Mamaroneck*, the New York State Court of Appeals unanimously reversed the Appellate Division, Second Department, and held that a "net lessee contractually obligated to pay the real estate taxes of the subject property is included within the meaning of 'the person whose property is assessed' under [Real Property Tax Law] 524(3)."[1] This holding eliminated the Appellate Division, Second Department's reading of an ownership requirement into Real Property Tax Law (RPTL) 524(3),[2] which caused great confusion and uncertainty for practitioners in recent years. To better understand this holding, it is first necessary to discuss the statutory framework pertaining to property tax assessment challenges in New York and the decisional case law that developed around those statutes.

Challenging a property's tax assessment in New York State involves a two-step process. First, pursuant to RPTL 524(3),[3] "a complainant who is dissatisfied with a property assessment may seek administrative review by filing a grievance complaint with the assessor or board



of assessment review."[4] Second, once the board of assessment review has made a determination, any "'aggrieved party' may seek judicial review of the assessment pursuant to RPTL article 7."[5] A taxpayer is "aggrieved" under RPTL article 7 when the tax assessment has a "direct adverse effect on the challenger's pecuniary interest."[6] An RPTL article 7 petition "must show that a complaint was made in due time to the proper officers to correct such assessment."[7]

For over a century, New York courts had recognized that a person aggrieved by a property tax assessment (including persons other than the property owner) had standing to file a tax certiorari proceeding.[8] Prior to 2012, it was understood by counsel for petitioners and municipalities alike that a party who had standing to file an RPTL article 7 petition possessed the requisite standing necessary to file the predicate grievance complaint with the municipal board of assessment review. This understanding evolved not only from the aforementioned case law, but from state guidance issued following the passage of RPTL 524(3) in 1982. This new provision tasked the commissioner of the Department of Taxation and Finance with preparing the complaint form to be used by complainants throughout the State of New York (with exception to cities having a population over 5 million people).[9] In conjunction with drafting the complaint form, the State Board of Equalization and Assessment (now known as the Office of Real Property Tax Services, and hereinafter referred to as ORPTS) also drafted the accompanying instructions, which provided that "[a]ny person aggrieved by an assessment (e.g., an owner, purchaser or tenant who is required to pay the taxes pursuant to a lease or written agreement) may file a complaint (RP-524)."[10]

In addition, shortly after RPTL 524 was drafted, ORPTS was asked to opine "if a lessee in a shopping center has standing to bring a complaint before the board of assessment review and, subsequently, an Article 7 proceeding for judicial review of the assessment of the property containing the leased premises[?]"[11] After thoroughly analyzing existing case law, ORPTS concluded that "[a] shopping center lessee who is obligated by lease to pay taxes has the right to administrative and judicial review of the assessment of the property leased."[12]

Circulo Housing Dev. Fund Corp. v. Assessor of City of Long Beach

In 2012, the Appellate Division, Second Department decided *Circulo Housing Dev. Fund Corp. v. Assessor of City of Long Beach (Circulo)*,[13] a tax exemption case arising under RPTL article 4. Exemptions under RPTL article 4 are available exclusively to property owners, and only a property owner has standing to apply to the municipal assessor for those exemptions.[14] In *Circulo,* the petitioner utilized three parcels identified as "East Market Street," "West Fulton Street," and "East Hudson Street," as a collective unit to operate a housing project for homeless individuals.[15] The petitioner's application for a property tax exemption pursuant to RPTL 420-a,[16] as well as its grievance complaints, were denied by the City of Long Beach.[17] Subsequently, the petitioner filed an RPTL article 7 petition challenging the denial of the exemption. The Supreme Court granted the city's motion to dismiss, finding, inter alia, that the petitioner, who did not own the "East Hudson Street" property, lacked standing to commence the RPTL article 7 proceedings.[18]

The Second Department agreed with the Supreme Court, finding that because the petitioner did not own the "East Hudson Street" property, and there was no evidence before the court that the entity listed on the deed to that property filed a complaint, the petitioner "did not 'show that a complaint was made in due time to the proper officers to correct such assessment,' as is required (RPTL 706 [2])."[19] However, instead of citing to the ownership requirement found in RPTL 420-a pertaining to the exemption sought, the Second Department relied upon RPTL 524(3), which "requires that the property owner file a complaint or grievance to obtain administrative review of the tax assessment."[20] This was the first time that an ownership requirement had been applied to RPTL 524(3), and the Second Department gave no reasoning and cited no rules of statutory construction to reach this result and did not reference the complaint instructions form or Opinion of Counsel prepared by ORPTS.

Larchmont Pancake House v. Board of Assessors

Five years later, in *Larchmont Pancake House v. Board of Assessors and/or the Assessor of the Town of Mamaroneck* ("*Larchmont Pancake House I*"),[21] the Appellate Division, Second Department applied this new ownership requirement to dismiss tax certiorari petitions filed by a non-owner occupant of the property. The property at issue was owned by Susan Carfora, and the business that operated on the property (an International House of Pancakes) was owned by Carfora and her daughters, Irene Corbin and Portia DeGast.[22] There was no lease agreement between the property owner and the business owners; instead, the property owner and business operated under an informal agreement whereby the business paid the property taxes and occupied the property rent-free.[23] When Carfora died in 2009, the property was temporarily transferred into a trust before being transferred to its beneficiaries (her daughters).[24]

Relying upon *Circulo*, the Town of Mamaroneck moved to dismiss the RPTL article 7 petitions, arguing that the Supreme Court lacked subject matter jurisdiction because the family business, and not the property owner,

filed the predicate grievance complaints and, consequently, petitioner failed to satisfy a condition precedent pursuant to RPTL 706(2).[25] The town also argued that the petitioner was not an aggrieved party and thus lacked standing to sue under RPTL 704(1). The petitioner opposed the motion, which the Supreme Court denied. The Town of Mamaroneck subsequently appealed.[26]

The Appellate Division, Second Department reversed the Supreme Court's order and dismissed the petitions, finding that the condition precedent under RPTL 706(2) was not met because the family business, and not the property owner, filed the grievance complaints. Because the petitioner did not satisfy the condition precedent requirement, the Appellate Division concluded that Supreme Court "lacked subject matter jurisdiction to review the assessments[.]"[27]

The petitioner sought, and the Court of Appeals granted, leave to appeal. In *Larchmont Pancake House v. Bd. of Assessors* ("*Larchmont Pancake House II*"),[28] the Court of Appeals focused on the issue of standing under RPTL 704(1). Although the petitioner paid the property taxes directly to the taxing authorities, the Court of Appeals concluded that the petitioner was not an aggrieved party within the meaning of RPTL 704(1), and thus lacked standing because it had "no legal authorization or obligation to pay the real property taxes[.]"[29] In so finding, the Court of Appeals noted that it had "no occasion to consider the parties' dispute concerning the scope of appropriate challengers under RPTL 524."[30]

After Larchmont Pancake House I was decided, motion practice ensued throughout the 9th Judicial District and beyond, with municipalities seeking to dismiss RPTL article 7 petitions where the predicate grievance complaint was filed by a non-owner aggrieved party. In many instances, these motions were made notwithstanding the fact that at the time the grievance complaints were filed, petitioners' attorneys and the municipalities agreed that such filings were permissible pursuant to RPTL 524(3). As a result, net tenants whose leases obligated them to pay all of the property taxes and authorized them to challenge the real property tax assessments faced the real prospect of having the petition they filed dismissed and leave them with no possibility for judicial review.

DCH Auto v. Town of Mamaroneck

DCH Auto v. Town of Mamaroneck ("*DCH Auto*")[31] involved the precise question left open by Larchmont Pancake House II: who may file a grievance complaint pursuant to RPTL 524(3)? Pursuant to its lease with the property owner, DCH was obligated to pay all of the property taxes and was authorized to challenge the real property tax assessments upon which the taxes were based.[32] DCH timely filed grievance complaints challenging the property's assessments with both the Town and Village Boards of Assessment Review.[33] At the time, the town's website stated that "[a]ny person aggrieved by an assessment, including a tenant who is required to pay the real estate taxes pursuant to a lease may file a complaint."[34] The town's website also directed taxpayers to the ORPTS website, which "similarly instructed that '[a]ny person who pays property taxes' including "tenants who are required to pay property taxes pursuant to a lease or written agreement" may file an assessment challenge."[35]

Upon receiving Notices of Determination from the Town and Village Boards of Assessment Review denying relief, DCH timely filed RPTL article 7 petitions challenging the town and village assessments.[36] Subsequently, and relying upon *Circulo*, the town and village jointly moved to dismiss all of the petitions, claiming a lack of subject matter jurisdiction due to DCH's "failure to satisfy a condition precedent for challenging the assessments," namely "[t]he failure of the [o]wner to submit [the] RP-524 [c]omplaints."[37] In opposition, DCH argued, inter alia, that the grievance complaints were properly filed because RPTL 524(3) did not provide that only an owner may file a complaint and that the plain text of RPTL 524(3) and Court of Appeals case law recognizes the right of a non-owner tenant who is responsible for paying the real property taxes to seek both administrative and judicial review of the assessment.[38]

Based upon a stipulation of facts and documentary evidence jointly submitted by the parties, the Supreme Court granted the joint motion to dismiss the petitions, finding that it lacked subject matter jurisdiction because DCH "did not satisfy a condition precedent to the commencement of these proceedings because the owner did not file the complaints pursuant to RPTL 524(3)."[39] The court further held that "the failure of the owner to raise the RP-524 Complaint in the administrative process is a fundamental error which the courts cannot cure because of a lack of subject matter jurisdiction."[40]

The Appellate Division, Second Department, affirmed, concluding that DCH "failed to satisfy the condition precedent to the commencement of an article 7 proceeding since it was neither the owner, nor identified in the complaints as an agent of the owner."[41] The Appellate Division relied almost entirely upon its prior decision in *Circulo*.

The Court of Appeals granted DCH's motion for leave to appeal.[42] The court began its analysis with the plain language of RPTL 524(3), and determined that the statute presented an ambiguity because the clause "person whose property is assessed" was not defined by the RPTL and was susceptible to more than one reasonable interpretation.[43] Recognizing that RPTL 524(3) did not require that a complaint be filed by the property owner, the court explained:

> Had the legislature intended to require that only "owners" (or agents of owners) could initiate a grievance under RPTL 524(3), it would have been simple to use that word. Indeed, in RPTL article 5, the legislature used the word "owner" myriad times (RPTL 500; 502; 504[6]; 510–a; 510[1]; 511; 512[4]; 518; 520; 522[4][b]; 523[3]; 523–b; 524[4]; 525[4]; 543; 551–a; 553; 554; 556[2][b]; 556–b; 560[1]; 562; 564[1]; 566[1]; 574[1]; 575–a [3]; 575–b; 582; 586; 588[2]; 589[1]; 592[1][c]; 594; 596[3]). "We have firmly held that the failure of the Legislature to include a substantive, significant prescription in a statute is a strong indication that its exclusion was intended" (*People v. Finnegan*, 85 N.Y.2d 53, 58, 623 N.Y.S.2d 546, 647 N.E.2d 758 [1995] [citations omitted]). Here, the statutory language is broader – it provides that a complaint must contain a statement "by the person whose property is assessed" (RPTL 524[3]).[44]

Additionally, the Court of Appeals noted that if a complaint is not filed by the "person whose property is assessed," it nonetheless may be filed by "some person authorized in writing by the complainant."[45] The court also observed that the legislature used the broad term "complainant" rather than the word "owner," and "the statute gives no indication that the class of people who can authorize a third party to make the complaint is different from the class of people who may themselves file a grievance complaint."[46] Moreover, the word "whose" "could reasonably be used and understood as denoting possession, not just ownership."[47]

The Court of Appeals next examined the legislative history regarding the clause "person whose property is assessed," which demonstrated that a net lessee obligated to pay the real estate taxes of the leased real property may file a grievance under RPTL 524(3).[48] The court concluded that the legislative history and its own precedent made it clear that the legislature did not intend to limit the meaning of "person whose property is assessed" to "owners of real property."[49]

The court next explained that its interpretation construed the RPTL as a whole and harmonized RPTL 524 and 704:

> Interpreting the RPTL such that a net lessee may both file the RPTL 524(3) complaint and (as is undisputed) the RPTL 704(1) petition, given that the complaint is a prerequisite to filing a petition, harmonizes the two statutory steps of our tax assessment scheme. Such a result ensures that the party with the economic interest and legal right to challenge an assessment will not be unable to raise a challenge because an out-of-possession landlord that lacks economic incentive fails to file an administrative complaint. It also avoids an inequitable result by which a net lessee may be precluded from obtaining full review of its assessment if the complaint was brought by an owner with different interests, because a petitioner in an RPTL article 7 proceeding may not add grounds for review beyond those specified in the original RPTL 524(3) complaint (*see Matter of Sterling Estates, Inc. v. Board of Assessors of Nassau County,* 66 N.Y.2d 122, 127, 495 N.Y.S.2d 328, 485 N.E.2d 993 [1985]).[50]

The Court of Appeals also recognized that its interpretation was "consistent with guidance from the New York State Department of Taxation and Finance, which instructs that lessees who are contractually obligated to pay real estate taxes are eligible to grieve tax assessments."[51]

Finally, the Court of Appeals discussed the Appellate Division's "restrictive" interpretation of RPTL 524(3), which held that "person whose property is assessed" only includes the property owner.[52] This "restrictive" interpretation was based primarily upon the *Circulo* decision, which "was grounded on a misapplication of . . . *Matter of Sterling Estates* (66 N.Y.2d 122)."[53] As the Court of Appeals explained:

> In *Circulo*, the Appellate Division interpreted RPTL 524(3) and announced that it contained an ownership requirement: "RPTL article 5 requires that the property owner file a complaint or grievance to obtain administrative review of the tax assessment" (*id.* at 1056, 947 N.Y.S.2d 559 [emphasis in original]). The Court gave no reasoning and cited no rules of statutory construction or legislative history to reach its holding, but instead cited only our decision in *Sterling*. In *Sterling*, however, we did not suggest – much less decide – that the owner of a property must file the administrative complaint. Instead, we emphasized that "it is essential that sufficient facts detailing the taxpayer's complaint be presented to the assessors so that realistic efforts at adjustment can be made" (*Sterling*, 66 N.Y.2d at 125, 495 N.Y.S.2d 328, 485 N.E.2d 993). Our holding in Sterling turned on the substantive incompleteness of the administrative petition, not the identity of the filer (*id.* at 127, 495 N.Y.S.2d 328, 485 N.E.2d 993). Thus, to the extent that *Circulo* is inconsistent with our holding today, it should not be followed.[54]

Accordingly, the Court of Appeals unanimously reversed the judgment and order of the Appellate Division brought up for appeal and denied the joint motion to dismiss.[55]

Conclusion

The *DCH Auto* opinion is significant because it clarifies that a net tenant, who is contractually obligated to pay the landlord's undivided interest in real estate taxes or if the lease confers to the tenant the right to challenge the real property taxes, has the right to file an administrative grievance complaint pursuant to RPTL 524(3). *DCH Auto* restored the law to its state of existence pre-*Circulo* and eliminated the Second Department's reading of an ownership requirement into to RPTL 524(3) where none

existed. As a result, net tenants contractually obligated to pay the real estate taxes can continue to file the administrative grievance complaints without the risk of dismissal solely because the tenant, and not the owner, filed the administrative grievance complaint.

Matthew S. Clifford is counsel to Griffin, Coogan, Sulzer & Horgan, which represented DCH Auto in this litigation.

Endnotes

1. 2022 N.Y. Slip Op. 03929, at *14 (June 16, 2022).

2. *See Circulo Housing Dev. Fund Corp. v. Assessor of the City of Long Beach*, 96 A.D.3d 1053 (2d Dep't 2012).

3. RPTL 524(3), entitled "Complaints with respect to assessments" provides, in relevant part:

Notwithstanding the provisions of section five hundred twenty-eight of this title, and except in cities with a population of five million or more, a complaint with respect to an assessment shall be on a form prescribed by the commissioner and shall consist of a statement specifying the respect in which the assessment is excessive, unequal or unlawful, or the respect in which real property is misclassified, and the reduction in assessed valuation or taxable assessed valuation or change in class designation or allocation of assessed valuation sought. Such statement shall also contain an estimate of the value of the real property. Such statement must be made by the person whose property is assessed, or by some person authorized in writing by the complainant or his officer or agent to make such statement who has knowledge of the facts stated therein.

4. *Larchmont Pancake House v. Bd. of Assessors*, 33 N.Y.3d 228, 235 (2019).

5. *Id.* The operative statute is RPTL 704(1), entitled "Commencement of proceeding" which provides, in pertinent part:

> Any person claiming to be aggrieved by any assessment of real property upon any assessment roll may commence a proceeding under this article by filing a petition described in section seven hundred six of this chapter in the manner set forth in section three hundred four of the civil practice law and rules together with a notice in writing of an application for review under this article returnable not less than twenty nor more than ninety days after service of such petition and notice, except that in a city having a population of one million or more, such a proceeding shall be commenced by filing of a petition alone.

6. *Larchmont Pancake House*, 33 N.Y.3d 228 at 237 (quoting *Waldbaum, Inc. v. Finance Adm"r of City of N.Y.*, 74 N.Y.2d 128, 132 (1989)).

7. RPTL 706(2).

8. *See, e.g.*, *In re Burke*, 62 N.Y. 224, 228 (1875) ("Either the owner whose title may be clouded by an illegal assessment, or a lessee who is under covenant to pay an assessment, is aggrieved when an invalid assessment is made . . ."); *In re Walter*, 75 N.Y. 354 (1878) (mortgagee was an aggrieved party following foreclosure where there was a deficiency upon sale and there was no proof that the mortgagor was personally liable for the deficiency); *EFCO Prods. v. Cullen*, 161 A.D.2d 44, 46-47 (2d Dep't 1990) (a nonfractional lessee who was contractually obligated to directly make payments in lieu of taxes levied against the lessor's undivided parcel was an aggrieved party with standing to maintain an article 7 proceeding); *McLean's Dep't Stores, Inc. v. Comm'r of Assessment of the City of Binghamton*, 2 A.D.2d 98, 100 (3d Dep't 1956) (lessee who was obligated to pay all property taxes under the terms of a lease was an aggrieved party under former Tax Law article 13 and had standing to file an administrative complaint); *Big "V" Supermarkets, Inc., Store # 217 v. Assessor of the Town of E. Greenbush*, 114 A.D.2d 726, 727–28 (3d Dep't 1985) (a fractional lessee of a shopping center who was contractually obligated to make payments in lieu of taxes levied against the entire property was an aggrieved party); *Ames Dep't Store, Inc., No. 418 v. Assessor*, 261 A.D.2d 835 (4th Dep't 1999) (fractional lessee obligated to pay a proportionate share of the real property taxes and which had a contractual right to contest said property taxes, was an aggrieved party within the meaning of section 704(1)).

9. *See* RPTL 524(3).

10. *See* https://www.tax.ny.gov/pdf/current_forms/orpts/rp524ins.pdf (last visited Aug. 5, 2022). ORPTS Publication 1114, entitled "Contesting Your Assessment In New York State," similarly advised that "[a]ny person who pays property taxes can grieve an assessment, including property owners, purchasers, [and] tenants who are required to pay property taxes pursuant to a lease or written agreement." *See* https://www.tax.ny.gov/pdf/publications/orpts/grievancebooklet.pdf (last visited Aug. 5, 2022).

11. 7 Opinion of Counsel SBEA No. 123 (Sept. 7, 1982).

12. *Id.* This Opinion of Counsel relied, in part, upon *McLean's Dep't Stores, Inc. v. Comm'r of Assessment of the City of Binghamton*, 2 A.D.2d 98, 100 (3d Dep't 1956), which involved the challenge to a property tax assessment brought under a local law. There, the Appellate Division, Third Department held that a lessee who was obligated to pay all property taxes under the terms of a lease was an aggrieved party under former Tax Law article 13 and had standing to file an administrative grievance complaint under the local law.

13. 96 A.D.3d 1053 (2d Dep't 2012).

14. *See Charter Dev. Co., LLC v. City of Buffalo*, 6 N.Y.3d 578 (2006); *Hebrew Free Sch. Ass'n v. Mayor, Aldermen & Commonalty*, 99 N.Y. 488 (1885); *Al-Ber, Inc. v. N.Y. City Dep't of Fin.*, 80 A.D.3d 760, 761 (2d Dep't 2011); *Young Israel of Far Rockaway, Inc. v. N.Y.*, 33 A.D.2d 561 (2d Dep't 1969).

15. *Circulo*, 96 A.D.3d at 1054.

16. *Id.* RPTL 420-a, entitled "Nonprofit organizations; mandatory class" provides, in pertinent part:

Real property owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children purposes, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes either by the owning corporation or association or by another such corporation or association as hereinafter provided shall be exempt from taxation as provided in this section.

17. *Id.*

18. *Id.* at 1055.

19. *Id.*

20. *Id.* at 1056 (emphasis in original).

21. 153 A.D.3d 521 (2d Dep't 2017).

22. *Id.* at 521.

23. *Larchmont Pancake House v. Bd. of Assessors*, 33 N.Y.3d at 239 n.1.

24. *Larchmont Pancake House I*, 153 A.D.3d at 521.

25. *Id.*

26. *Id.*

27. *Id.*

28. 33 N.Y.3d 228 (2019).

29. *Id.* at 240.

30. *Id.*at 240–41.

31. 2022 N.Y. Slip Op. 03929 (June 16, 2022).

32. *See id.* at *2.

33. *Id.*

34. *Id.* (internal quotations omitted).

35. *Id.* (quoting N.Y. State Dep't of Taxation & Fin., Office of Real Prop. Tax Servs., *Contesting Your Assessment in New York State* (Feb. 2012), https://www.tax.ny.gov/pdf/publications/orpts/grievancebooklet.pdf (last accessed June 9, 2022)).

36. *Id.*

37. *Id.* (internal quotations omitted).

38. *Id.*

39. *Id.* (internal quotations omitted).

40. *DCH Auto*, 2022 N.Y. Slip Op. 03929, at *2 (internal quotations omitted).

41. *Id.*

42. 37 N.Y.3d 903 (2021).

43. *DCH Auto*, 2022 N.Y. Slip Op. 03929, at *4.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *DCH Auto*, 2022 N.Y. Slip Op. 03929, at *6.

50. *Id.*

51. *Id.* (citing N.Y. State Dep't of Taxation & Fin., Off. of Real Prop. Tax Servs., "Contesting Your Assessment in New York State" (Feb. 2012) ("Any person who pays property taxes can grieve an assessment, including . . . tenants who are required to pay property taxes pursuant to a lease or written agreement"), https://www.tax.ny.gov/pdf/publications/orpts/grievancebooklet.pdf.

52. *Id.*

53. *Id.*

54. *DCH Auto*, 2022 N.Y. Slip Op. 03929, at *6.

55. *Id.*

Chipping Away at New York's Housing Crisis: Revisiting Legislative Discretion for Rezonings

By David S. Steinmetz and Lee J. Lefkowitz

In the year preceding the 2006 housing crash, home prices in 40% of metro areas experienced a spike of more than 10%. That proved to be unsustainable, and what followed was a years-long recession and the collapse of the housing market.

Last year, 2021, was twice as extreme. Eighty percent of metro areas saw the same 10% spike; 25% saw home prices rise more than 20%.[1] Despite the trend today being twice as alarming as it was in 2006, little has been done to address what is increasingly looking like a crisis. Housing is scarce and unaffordable, and the dream of homeownership (and even finding affordable rentals) is slipping away for many. There are many reasons. One, especially in New York, is the aversion of many local municipalities to permitting development of more affordable, diverse (usually multi-family) housing stock. New York law, for decades, has afforded municipalities broad leeway to constrain developments to large-lot single-family homes. The result is low supply and high demand for fewer, more expensive homes. But that leeway could be changed. This article will analyze the New York housing crisis and the paucity of multi-family housing available in the state and offer a solution.

As land use attorneys who frequently represent developers striving to build multi-family, diverse and affordable housing in New York, we offer our perspective on the uphill battle. The most prevalent problem is the vast legislative discretion afforded to municipalities.

Many efforts to build these homes require a rezoning of a site to allow multi-family housing. And a municipality's discretion to deny a developer's rezoning application is, quite simply, too powerful. That discretion enables the municipality to reject multi-family housing without fear of a meaningful court challenge. It creates a chilling effect on development. A developer might be willing to undertake the many other risks of building diverse, affordable housing in New York, but the fact that a municipality can shut down the months- (or years-) long application process for any reason, at any time, is too great a risk to bear. New York should abandon this unchecked legislative discretion. Instead, New York should require local officials to examine and rely upon data, demographics and demand. New York should allow a rezoning applicant to invoke the court system. There should be judicial oversight to evaluate whether a municipality's decision to reject multi-family housing was based on substantial, empirical evidence.

Background

New York was trending for an affordable housing shortfall decades ago, but the pandemic fueled that crisis. At the beginning of the pandemic, rents plummeted while prices skyrocketed as residents fled apartments and rentals for more space in the suburbs.[2] Two years later, those home prices remain high, the market remains competitive and single-family homes have become unaffordable to many.[3]

From Q4 2019 to Q4 2021, median sale prices in every New York City borough experienced at least a 16.5% increase.[4] Meanwhile, rental prices have now returned and surpassed pre-pandemic levels and, in some cases, have seen their own meteoric rise.[5]

Again, this is nothing new; the pandemic only accelerated an already concerning trend. Both Westchester County and Long Island, in particular, had been dominated by unaffordability for years.[6] Meanwhile, in New York City, affordable units have been systematically replaced by unaffordable ones. From 2005 to 2017, 76,000 rental units were added, while 88,000 rent-stabilized units were lost. During that same period, the number of homes renting for more than $2,700 a month grew by 238,000, and apartments renting for $900 or less decreased by a million.[7]

The solution may seem simple: build more homes.[8] Increase supply. Respond to the demand. But it is harder than it looks, because New York needs not just any kind of supply. It needs more affordable, multi-family homes. That presents a challenge.

Multi-Family Housing as a Solution

New York State, especially areas outside New York City, is awash in large-lot and single-family zoning, which presents few opportunities to develop more affordable housing complexes.[9] Indeed, multi-family housing has been judicially recognized as more affordable and inclusive.[10] And municipalities' preference for single-family zoning to multi-family zoning is no secret, nor is it new. This sort of zoning has been used to exclude lower-income homebuyers for decades.[11] Indeed, it is codified in New York constitutional law that municipalities cannot zone away from multi-family zoning to single-family zoning in an effort to preclude diversity.[12] But rarely is zoning toward "affordable" housing incentivized, as opposed to extracted.

For this reason, building affordable homes remains an uphill battle. More affordable developments – even when good for the community – often face public opposition. Under New York law, developers can petition a municipality to rezone a site from single-family to multi-family, but whether to grant the petition is discretionary. Therein lies the problem: unbridled legislative discretion impedes progress, stunts diversification and blocks affordability.

Legislative Discretion

Municipal legislative bodies, when faced with an application from a developer seeking to rezone a site to multi-family, are vested broad discretion in assessing the application. Sadly, when reviewing such applications, local governments can disregard empirical data – even from their own experts. Indeed, the municipality need not entertain the application at all.

It is worth pausing here to note that this is different from other types of land use applications. Applications for variances, subdivisions, site plan approvals, SEQRA review, or

special permits are all subject to a greater level of intellectual honesty and judicial scrutiny. In other words, they are not entirely discretionary – there are legal standards that govern the municipality's decision-making when faced with these applications. For example, when presented with a variance application, the municipality must apply a five-factor balancing test, and if a court later finds that the municipality "arbitrarily or capriciously" denied such an application, a judge will reverse the municipal decision.[13] In other words: on all land use applications besides rezonings, the municipality has a court looking over its shoulder. But an application for a rezoning is not exposed to the same kind of legal challenge. A local government presently retains broad powers to either approve or deny an application for a proposed rezoning without fear that a judge will subject it to scrutiny.

As a result, there is little downside for a municipality to deny an application, but municipal board members often perceive downsides to granting one. A few vocal constituents can easily sway public opinion. Even well-meaning municipalities that recognize the need for affordable housing, and at first view a multi-family project favorably, often face immense pressure from local residents who do not want to see affordable homes in their neighborhood. Thus, there is tremendous uncertainty in the process. From the perspective of a developer, that uncertainty yields risk that is hard to overcome. The application process is both lengthy and costly. And worse, the municipality is able to deny the application for any reason, at any point in the process, even after much of those time and financial resources are sunk. The municipality can initially respond favorably and then about-face midway through when slammed with public opposition. This creates a widespread chilling effect on housing supply – let alone affordable and diversified units.

A developer stepping in and commencing a rezoning application should be viewed as a boon to the municipality. Zoning changes often involve multiple levels and years of protracted regulatory review (spanning successor administrations), as well as enormous upfront administrative review costs before a shovel ever gets in the ground. The developer can drive the process and bear many of those costs and much of the legwork for the municipality. Were a municipality to instead undertake a rezoning on its own (rather than developer driven), it would have to bear the costs, like retention of experts – engineers, architects, and planners – and undertake a complex environmental review. While many developers would be willing to spearhead this process, and attempt to aid New York's housing crisis by redeveloping blighted, vacant or underutilized properties into multi-family or affordable housing, it is a tall order to expect them to undertake massive upfront costs while not knowing if the current administration will ultimately adopt the rezoning needed for the project or even if that administration will still be there when it comes time to vote. Asking the developer to bear the costs presents a major gamble.[14] Yet another problem: in addition to its broad discretion, the municipality is legally precluded from making any promises to the developer, a prohibited act known as contract zoning.[15]

Thus, in sum, the law is set up to discourage developer-driven rezonings. Municipalities have few tools to draw developers into the process to steer (and pay for) redevelopment.

In recognition of this problem of legislative discretion and the oversaturation of single-family zoning throughout the state, New York (briefly) tried to resolve the problem, but the solution proposed was not well-considered. The New York Legislature contemplated mandating multi-family housing statewide in many areas.[16] This would have overridden local zoning. But, just as developers are challenged with persuading boards to adopt multi-family zoning over local opposition, public outcry against the state Legislature was swift. The moment word of this potential state-wide law reached the media, opposition quickly shut down the law. A similar measure – which would have permitted accessory dwellings to exist statewide on single- and multi-family homes – was recently scrapped.[17] Perhaps for good reason. The solutions were unpalatable, as they painted with too broad a brush and thrust multi-family zoning on localities without any location-by-location consideration. They lacked the nuance local municipalities and zoning codes are designed to foster.

Yet there may still be another path, more of a middle ground, to encourage (rather than require) more municipalities to adopt multi-family housing. Guardrails could be placed around a municipality's discretion to rezone. Municipalities could be required to evaluate rezoning petitions based on "substantial evidence": empirical data, facts and experts.

The Solution: Circumscribe Legislative Discretion

Today, there are few options and almost no recourse available to a developer who undertakes this onerous rezoning process and comes away with nothing to show for it. The developer might accept the burden of the rezoning application, having consultants with experience in zoning, planning, engineering and community design perform extensive studies. Those studies might reveal empirical data indicating that multi-family is appropriate, and indeed encouraged, in the particular location. The municipality's own experts might agree and reach that same conclusion. Yet, the developer can still be left empty-handed if the municipality decides, in its discretion, to decline to rezone.

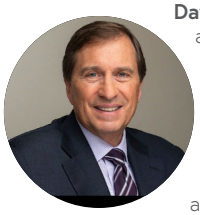
A simple solution is to give the developer recourse in that situation. Notably, if the municipality grants the developer's application, and adopts the rezoning to multi-family, the opponents already have recourse and can challenge the rezoning on a number of grounds. The playing field should be leveled. Allow the developer to challenge the

municipality's decision in court and permit the courts to make a judicial determination as to whether the municipal decision-making was sound, based on "substantial evidence" and "empirical data." Permit the court to reverse or vacate the municipality's outcome if it finds that outcome to be an improvident abuse of discretion. Local governments should not be allowed to ignore even their own experts. Again, it is worth noting that courts already do this for other land use applications. And some states already extend this standard to rezonings.

Connecticut, for example, has already taken this step.[18] Massachusetts has a similar rule.[19] Florida, too.[20] New York could adopt such a rule, whereby courts are enabled to examine a municipality's motives and reasons and require that a decision on whether to rezone, or not rezone, is in fact based on the substantial evidence.

Imposing a similar standard for rezonings that already occur for other land use entitlements need not lead to significantly more litigation than already occurs. It would merely extend an already existing legal mechanism to the only land use application currently excluded from it. The mere prospect of there being judicial scrutiny of a municipal decision on a rezoning application might just be the encouragement local legislative boards need to give multifamily housing its fair shake.

A municipality should not be permitted to make zoning and planning decisions that wholly ignore economic reality, demographics, changed circumstances and market conditions, without an ounce of judicial oversight or scrutiny. Injecting some degree of judicial review could give municipalities the nudge they need to make the changes all New Yorkers need: more affordable and/or diverse housing options. Giving the court a role would make the municipality accountable to someone other than the few vocal local opponents who don't want to see change – let alone affordable housing. And it would give developers the confidence they need to undertake the process in the first place, knowing that they would have some recourse if the facts were on their side but ignored by the municipality. Most important, developers could be assured that the ultimate decision will be predicated on facts, not politics.



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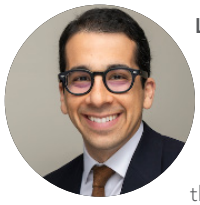

Lee J. Lefkowitz litigates municipal and zoning matters, environmental cleanup lawsuits, religious and civil rights actions, as well as contract, commercial, property and business disputes. He has made submissions and argued cases before federal and state courts of all levels, including the Supreme Court of the United States.

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SPONSORED ARTICLE

How To Add Elder Law to Your Existing Practice

By Jill Roamer, J.D., CIPP/US
Law & Privacy Specialist at ElderCounsel, LLC

There are many areas of law an attorney can focus on. Some areas are probably more familiar to practitioners, such as family or criminal law, but some legal realms remain a mystery for both the layperson and attorneys alike. Elder law is one such area. As a result, many attorneys shy away from adding elder law to their existing practice and thus are missing out on a profitable and gratifying opportunity.

What Is Elder Law?

Elder law focuses on issues that affect the aging population. While estate planning focuses on what happens when the individual passes away, elder law focuses on what happens while the individual is still alive. This can include guardianship issues, addressing elder abuse claims, handling discrimination claims, planning for long-term care, and obtaining government benefits.

Many seniors will need long-term care. The U.S. Department of Health and Human Services claims[1] "Someone turning age 65 today has almost a 70% chance of needing some type of long-term care services and supports in their remaining years." What kind of care will the senior need? Who is going to provide this care? How is the senior going to obtain and pay for this care?

The average monthly cost[2] for semi-private nursing home care in New York is $12,775 per month; a private room will run $13,233 per month. While a few may have saved enough money to pay for their care, most would exhaust their life savings quickly. Rather than spend all of their money on care, an elder law attorney can help get the senior qualified for public benefits that will pay for the care.

Most folks are surprised to learn that Medicare will only cover long-term care costs in limited situations and for a very short time. However, Medicaid will pay for long-term care for individuals who meet certain income and asset thresholds. Navigating these rules and getting the senior qualified for Medicaid benefits is a huge part of elder law. An elder law attorney can help the client protect their life savings while getting the client needed care. In many cases, trusts are used to protect assets, plan for wealth transfer after death, and retain many tax benefits.

Why Add Elder Law to Your Practice?

First and foremost, elder law attorneys make a difference in their clients' lives! Clients come in with a daunting problem and you solve that problem for them. You help preserve what they have worked so hard for all their lives so that they can pass those assets along to their loved ones after their passing.

Many lawyers want to provide services that make people happy. Helping people brings personal satisfaction to the lawyer and betters the community. Are you tired of litigation or working in an area of law that breeds constant conflict? While elder law isn't entirely conflict-free, it is oftentimes much less stressful than many other areas of law.

Elder law can also be profitable. *Forbes* estimates[3] that planning for the "spouse of someone with Alzheimer's disease who has $1.7 million in" various assets would cost $8,000 to $16,000 in legal fees. Imagine the extra revenue you could bring into your firm if you incorporated elder law into your practice.

Steps To Get Started on Your Elder Law Journey

It can be daunting to delve into a new practice area. But don't let that stop you! With risk can come great reward, for both you and your clients. Here are a few key steps:

Step 1: Education

As with any area of law, you are going to need to know the rules. Read pertinent federal statutes, your state Medicaid eligibility manual, and learn about trusts, wills, and powers of attorney. Attend CLE events specifically for elder law and join organizations that specialize in this niche so you can learn from the best in the industry. It is also extremely helpful to find a mentor in your state with

whom you can co-counsel and ask questions of to really dive into a case.

Step 2: Focus

Now that you know all about elder law, decide what services you would like to offer at your firm. You can choose to practice in all elder law areas or just some. This decision will involve knowing your skills, the types of cases you would like to work on, and the client demographic in your area.

Step 3: Pricing

How is your firm going to charge elder law clients? Will it be a flat fee, by the hour, or hybrid? One way some practitioners choose to charge clients is to charge a flat fee for analyzing the client's case and creating the case roadmap and then if the client chooses to proceed to implement that roadmap, additional fees will be incurred. This way, the attorney isn't giving advice for free and the client can rest easy knowing exactly how their case will proceed before incurring the larger charges.

Step 4: Marketing

Now it's time to let people know! Make posts to all your firm's social media accounts, update your website, send mailers to current clients, contact referral sources, and market to new clients. You could even go on a radio show, start a podcast, or submit a press release to a local newspaper. Many practitioners also find that making good connections with nursing homes and care facilities in your area is a great way to get referrals. These businesses also benefit from getting the client qualified for care.

Conclusion

Adding elder law to your existing practice can be very rewarding, but will take some effort. Just like with any new endeavor, there will be a learning curve. But elder law is usually an under-tapped market in most areas, with plenty of clients needing services. Instead of referring these types of cases out, take them on and keep those clients (and the revenue) in your firm.

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To learn more, visit eldercounsel.com or email info@eldercounsel.com.

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Marketing Technology Makes It Easier To Meet Client Expectations

By Carol Schiro Greenwald

Marketing includes all activities that link a lawyer or law firm to clients, colleagues and friends for the purpose of creating a reputation that invites businesses and individuals to become clients. Futurist Jordan Furlong says, "The market is changing from a dormant, low-tech, individualistic system to a dynamic, high-tech, collaborative one."[1]

Effective marketing messages create an environment that responds to these changes and expectations. Marketing technology makes it possible for even overworked solo lawyers to meet – even exceed – clients' expectations. This article highlights a few key technologies that match marketing activities with clients' requirements.

Modern Client Expectations

Speed

Two years at home made people into internet mavens, clicking for everything from groceries to meetings. It has also dragged attention spans down to nanoseconds by almost immediately providing whatever the user wants. This expectation of an instantaneous reward system is now a client expectation in non-internet activities such as working with lawyers.

Clients no longer want to wait for a call back tomorrow or even a few hours later. Prospects tend to hire the lawyer that reaches them first. Clients expect immediate attention whenever they call. These expectations can be managed with rules of engagement written into the engagement letter and followed by everyone who works with your clients. Technology can also help. Websites often offer the first impression of you and your firm. Use technology to produce speedy responses:

- Have a chatbot available to answer basic questions about your legal process, your legal knowledge and areas of practice, your background, etc.
- Have a phone number on every page that, when dialed, is answered by a real person in your office or a virtual assistant or call center operator trained to provide immediate answers.
- Make it easy to make a date by providing calendaring software for date/time selection and confirmation right there on your site as they think of it.

Personalization

Clients also want you to know them, to understand their particular world, lifestyle, issues, problems, successes and concerns. Marketing does this by focusing on narrow niches, slices of the larger market that contain the specific kinds of clients you want to work with. Marketers then create client personas that include the major characteristics – tangible and intangible – of your preferred client. Thinking small and specific will root your practice responses in language these clients understand about common problems and legal solutions.

Technology helps you begin a personal conversation in an online client intake form. Clients fill it out before meeting with you. It saves meeting time and meets their demands for speedy meetings focused directly on their issues. This is especially true if the meeting is held via online conferencing technology; like Zoom. More clients want to save time by employing these online options.

Speed comprehension by including videos, diagrams and pictures that convey information faster and often more effectively.

Marketing CRM (client relationship management) systems are invaluable memory assists that help you personalize. Assuming you input the data and updates, the technology lets you recall a client's personal details, likes and dislikes, recent conversations, meeting/call dates, etc. Depending on the software package you buy, CRMs can also create and manage marketing campaigns. CRMs offer tracking data so you can calendar future activities.

Knowledge

Clients want to understand how the relevant legal process will work, the conditions necessary to win, the costs and the time commitment. The website offers the first technological opportunity to meet this expectation.

- Write an "About Us" page that tells your story and focuses on your values, experience, client service guidelines. When relevant, discuss your firm culture, what kinds of behavior are rewarded, how this impacts clients' experiences with the firm.
- Tell them what to expect when they hire you.
- Spell out the payment options you offer from Venmo to extended payment plans.

Post-COVID-19, people want to reconnect – not necessarily in person, but with people. Technology makes this easy to do because it provides information and access when and where people want it.

Use ongoing blogs, email newsletters, etc. to become their thought leader on topics relevant to their relationship with and need for your services. Never be irrelevant. Once you break the personal link by sending them extraneous information, it is very hard to rebuild the connection. Use marketing technology to manage the process; for example, use Constant Contact for email campaigns and websites like Hootsuite to schedule your content across social media sites such as Instagram, Facebook, Twitter, etc.

Clients also want anytime access to their own documents. Add a client portal via your website or an app so they can access their materials, including invoices, whenever they want in a secure, private environment. "A client portal is the landing pad for your customers' entire service experience. It's a digital gateway where clients can access all the information they need during their customer journey."[2] It provides flexibility, freedom to access information as they wish, some transparency and dialogue with you or others in your firm. Typically, part of a firm's cloud-based technology it can be accessed anytime from anywhere.

Collaboration and Conversation

Post-COVID-19, people want to reconnect – not necessarily in person, but with people. Technology makes this easy to do because it provides information and access when and where people want it. Clients can connect to legal information, their lawyers and their materials using law firm apps designed for that purpose.

Clients can answer surveys that use artificial intelligence to give them the precise questions they need. For example, a colleague with an immigration practice creates AI-enabled forms that allow interested people to see how the latest rulings impact them.

Summary

Using a combination of online and in-person connection opportunities creates a client experience that shows them how valued they are. "A successful marketing strategy is all about doing the simple things the right way."[3] Use technology to address client expectations regarding speed, personalized knowledge and connection. Make these linkages your brand, and you will differentiate yourself from other colleagues.

Carol Schiro Greenwald, Ph.D., is a networking, marketing and management strategist, coach and trainer. She is the author of "Strategic Networking for Introverts, Extroverts and Everyone In-Between" (American Bar Association Law Practice Division, 2019) and "Build Your Practice the Logical Way – Maximize Your Client Relationships" with Steven Skyles-Mulligan (American Bar Association, First Chair Press, 2012).

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Did General Counsel Violate Client Confidentiality?

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

This column is made possible through the efforts of NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

To the Forum:

I am a shareholder in Newtide Corporation and have recently encountered an issue with regard to the company's general counsel, whom I will refer to as Ms. Weaver. In addition to serving as the company's general counsel, Ms. Weaver has also represented me individually in matters unrelated to Newtide. A few months ago I discovered that the majority managers of Newtide were stealing funds from the corporation for their own personal use. I reached out to Ms. Weaver to seek advice as to an appropriate resolution for the shareholders. We were never able to resolve the issue and ended up at an arbitration hearing to litigate the issue. The other shareholders and I sued the majority managers derivatively and obtained separate litigation counsel to represent our interests. The majority managers also retained separate litigation counsel to represent them at the hearing.

During the arbitration hearing I learned that Ms. Weaver had been blind copying the majority members and managers of the company on communications between her and me where I sought counsel on how to resolve the issue. I also learned that she had produced private email communications between her and me to counsel representing the majority managers for use at the hearing. I never gave Ms. Weaver my consent to waive privilege or a conflict waiver and was very upset to learn that communications that I had thought were confidential attorney-client communications were divulged to my adversary.

Are Ms. Weaver's actions ethical? Do I have any recourse to deal with her conduct, assuming it is improper?

Sincerely,
Carla Conflicted

Dear Ms. Conflicted,

Your question about Ms. Weaver's actions gives us an opportunity to address an interesting and important ethical topic. Lawyers must at all times have a clear understanding as to whom they are representing – i.e., who their client is. Ms. Weaver is general counsel to Newtide Corporation but previously represented you on unrelated personal matters. These facts alone create a potential conflict for Ms. Weaver, since it is unclear who she would represent in the event an issue arises between you and Newtide.

First, in order to determine whether there is a conflict, we must assess whether Ms. Weaver may represent you and the corporation simultaneously. The answer depends on a few facts that were not contained in your question. That said, the Rules of Professional Conduct (RPC) give us clear guidance. Specifically, RPC 1.13(a) states: "When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer serves as counsel for the organization

and not for any of the constituents."[1] This also has been colloquially referred to as the corporate Miranda warning stemming from the seminal 1981 case *Upjohn Co. v. United States*.[2] An organization's constituents may include, but are not limited to, officers, directors, employees and shareholders.[3] We have discussed client identification and its vital importance in a previous Forum.[4]

One factor that is central to our analysis is whether Ms. Weaver told you that she was a lawyer for the organization, rather than for you, the shareholder. It is not clear from your question whether this occurred. As a practical matter, the mere fact that Ms. Weaver is general counsel for Newtide does not automatically mean that she is a lawyer for shareholders or other constituents of the company, including yourself.[5] Instead, Ms. Weaver solely represents Newtide since it is clear that your interests differed from the managing members of Newtide.[6]

So, what should have Ms. Weaver told you when you approached her for legal advice? The New York State Bar Association's Committee on Standards of Attorney Conduct added Comments [2A] and [2B] to Rule 1.13 to address this question:

> [2A] There are times when the organization's interests may differ from those of one or more of its constituents. In such circumstances, the lawyer should advise any constituent whose interest differs from that of the organization: (i) that a conflict or potential conflict of interest exists; (ii) that the lawyer does not represent the constituent in connection with the matter, unless the representation has been approved in accordance with Rule 1.13(d); (iii) that the constituent may wish to obtain independent representation; and (iv) that any attorney-client privilege that applies to discussions between the lawyer and the constituent belongs to the organization and may be waived by the organization. Care must be taken to ensure that the constituent understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent, and that discussions between the lawyer for the organization and the constituent may not be privileged.
>
> [2B] Whether such a warning should be given by the lawyer for the organization to any constituent may turn on the facts of each case.

Rule 1.13(d) referred to in Comment [2A] permits a lawyer to represent both an organization and any of its constituents subject to certain conditions, pursuant to RPC 1.7.[7] These conditions are met when the lawyer can provide competent representation, the representation is not prohibited by law, the clients are not involved in the same litigation and each client gives informed consent in writing regarding the representation.[8]

As you can see, the determination of whether Ms. Weaver should have warned you that she was the lawyer for just Newtide is fact-specific. Merely acting as general counsel for a corporation does not automatically mean that such counsel may act as the constituent's attorney.[9] Rather, based on the above, general counsel for an organization may only represent one or more of the organization's constituents at the same time as the organization if certain circumstances are met, such as gaining consent from the corporation and the attorney providing diligent representation to all clients.[10]

In our view, and based on the facts provided, when you approached Ms. Weaver about the majority managing members stealing funds from the corporation for their own personal use, the RPC suggests that Ms. Weaver should have given you an *Upjohn* warning and informed you that she represents Newtide and not you personally for that matter since your interests appear to be in conflict with Newtide's.[11] Although she had represented you personally in matters unrelated to Newtide in the past, the circumstance at issue is different since it appears to put you directly at odds with Newtide. RPC 1.13, Comment [2A] tells us that Ms. Weaver should have disclosed that anything you say to her may not be privileged and that she cannot advise or provide legal representation to you. Thus, by failing to advise you that she only represents Newtide, Ms. Weaver's actions run afoul of RPC 1.13.

Additionally, Roy Simon mentions that when a lawyer for a corporation communicates with the corporation's constituents, those constituents are not considered to be represented by counsel.[12] Rather, these constituents are deemed to be "unrepresented" within the meaning of RPC 4.3, which provides that when a lawyer communicates with an unrepresented person who misunderstands the lawyer's role in the matter, the lawyer has a duty to make reasonable efforts to correct the misunderstanding.[13] Moreover, the lawyer is not permitted to give legal advice to the unrepresented person if it is possible that there is a conflict with the lawyer's client.[14] The circumstances presented in your question appear to mirror the prohibitions of RPC 4.3. Thus, Ms. Weaver should have treated you as "unrepresented" and provided you with the warnings required by RPC 1.13(a) and 4.3 to ensure she complied with her ethical obligations.

As you can tell, there is much overlap between RPC 1.13(a) and 4.3. RPC 4.3 necessitates that a lawyer correct an unrepresented person's misinterpretation about whom the lawyer represents. The main takeaway is that RPC 1.13(a) applies even if the constituent does not display a misunderstanding; instead, the lawyer has a duty to recognize the differences between the corporation's interests and the constituent's interests.[15] When this becomes apparent, the lawyer must advise the constituent that the lawyer represents the organization and does not represent the individual constituent.[16]

Additionally, in our view, the fact that Ms. Weaver previously represented you in unrelated personal matters raises the bar even higher for her to be clear about who she represents. Ms. Weaver's failure to advise you that she did not represent you when you clearly were seeking legal advice concerning Newtide's managing member was most likely unethical. Put simply, Ms. Weaver has an obligation to explain to you, a lay person and shareholder, exactly what her role is with respect to the company and its individual constituents, and her failure to appropriately inform you of that role may have resulted in a violation of her ethical obligations under several provisions of the RPC.[17]

As stated briefly above, RPC 1.7(b) provides that a lawyer is allowed to represent the client even if there is a concurrent conflict of interest if "(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing." We briefly discussed the application of RPC 1.7 in a prior Forum.[18]

Pursuant to RPC 1.7, assuming Ms. Weaver believed that she could competently represent both you and Newtide, and that representation was not prohibited by law, it may be permissible under the RPC for Ms. Weaver to represent you individually on matters unrelated to Newtide so long as she obtained informed written consent from both Newtide and yourself. However, this is a matter that is not unrelated to Newtide, and further you stated in your question that you did not consent to waive privilege or provide a conflict waiver. Nor does it appear that Ms. Weaver ever raised the issue of her potential conflict. Nonetheless, pursuant to Rule 1.7, it appears that Ms. Weaver could not have reasonably believed that she would be able to competently and diligently represent you and Newtide simultaneously regarding the majority managers stealing funds from the corporation.[19] We see this as an unwaivable conflict; Ms. Weaver should have immediately told you that she could not represent you.

Whether Ms. Weaver's actions were improper also depends on whether you were acting as a representative of Newtide at the time. Here, you appear to have notified Ms. Weaver when you found out the majority managers were stealing from the corporation in your capacity as a shareholder to seek redress of the situation, thus, acting as a constituent of the corporation. Your communications with Ms. Weaver seeking legal advice concerning possible recourse against the officers of Newtide would generally be protected under RPC 1.6. Under RPC 1.6, Ms. Weaver should not have revealed information that was confidential without your informed consent, which you stated you did not provide.[20] Additionally, Ms. Weaver could only provide your communications to the majority members and their counsel if the disclosure advanced the best interests of Newtide and was reasonable or customary, or the disclosure would prevent reasonable certain death or a crime.[21] Since none of these factors applied, the communications between you and Ms. Weaver were confidential.[22]

In response to the second part of your question, generally the attorney-client privilege covers confidential communica-

tions even between a prospective client seeking legal advice and an attorney. Although there are many exceptions to the attorney-client privilege – such as the crime/fraud exception, testamentary exception, breach of duty, intention or competence of a client and the common interest exception – we do not see any of them being applicable to the facts you describe. Ms. Weaver should have given you the corporate Miranda warning and should have told you that she does not represent you and instead represents solely Newtide. Her failure to do so may allow you to claim that a prospective attorney-client relationship was established.

After you approached Ms. Weaver for legal advice regarding the stealing of funds, Ms. Weaver blind copied the majority members and managers of Newtide on communications between you and her where you were asking her for legal advice. Ms. Weaver also provided those emails to counsel that was representing the majority members for use at the hearing. We will assume for the purposes of answering your question that the email communications Ms. Weaver shared with the majority members included privileged communications, since what was described above constitutes seeking legal advice. A privileged communication is a protected conversation between a certain relationship, such as an attorney and a client. Privileged communications cannot be used as evidence in court.[23] Therefore, assuming your communications with Ms. Weaver were privileged, it was unethical and impermissible for her to provide them to counsel representing the majority managers for use at the arbitration hearing.

When a lawyer divulges communications between them and their client to a third party, the client can seek to disqualify their lawyer and/or sue for damages.[24] However, disqualification of general counsel is not something that one sees every day and is a subject perhaps for another Forum.

As always, the devil is in the details and, while we may not have all the necessary facts to fully answer your question, in our view Ms. Weaver crossed the proverbial line.

Sincerely,
Vincent J. Syracuse
syracuse@thsh.com
Alyssa C. Goldrich
goldrich@thsh.com
Lillianna R. Iorfino
iorfino@thsh.com

QUESTION FOR THE NEXT FORUM

To the Forum:

I recently conducted a virtual deposition of the defendant in a case in which I was plaintiff's counsel. Given that this was a virtual deposition, it seemed that defense counsel felt that this was an informal encounter and did not have to abide by any sort of professional standards and appeared dressed only in, as far as I could tell, a t-shirt. Additionally, throughout the deposition, defense counsel repeatedly interjected or made improper objections to almost every question I asked the defendant. Defense counsel also instructed their client not to answer nearly 30 questions without any true, lawful basis. Countless times throughout the deposition, defense counsel made inappropriate comments including "you're a joke," "that was a horrible question," and "well, I can tell who you voted for with that question," all while laughing and scoffing at almost everything I said. At one point, counsel stated that "this must be your first deposition, since it is obvious that you don't know what you are doing." In one exchange in which I forgot to unmute my microphone, defense counsel groaned and stated that it would have been better had I'd stayed on mute so that no one would have to listen to my "dumb" questions. Throughout the deposition, defense counsel objected to even the most standard questions on the (improper) grounds that it was an effort to protect the defendant from my "harmful" questioning. Defense counsel even went so far as to advise the defendant not to answer my questions regarding their occupation.

Is the behavior of defense counsel unethical and/or sanctionable and, if so, should I move for sanctions? What about the civility guidelines that I have heard so much about?

Sincerely,
Riley S.O. Offended

Endnotes

1. RPC 1.13(a).
2. 449 U.S. 383 (1981).
3. *See* New York State Bar Association's Committee on Standards of Attorney Conduct Comment [1] on Rule 1.13.
4. *See* Vincent J. Syracuse, Maryann C. Stallone & Alyssa C. Goldrich, *Attorney Professionalism Forum*, N.Y. St. B.J., March/April 2021, Vol. 93, No. 2.
5. *See* RPC 1.13(a).
6. *See id.*
7. *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* Volume 1, at 837 (2020–21 ed.).
8. *See* RPC 1.7(b).
9. *See* RPC 1.13(a).
10. *See* RPC 1.7(b).
11. *See* RPC 1.13(a).
12. *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* Volume 1, at 235 (2020–21 ed.).
13. *See* RPC 4.3.
14. *See id.*
15. *See* RPC 4.3.
16. *See id.*
17. *See id.*
18. *See* Vincent J. Syracuse, Maryann C. Stallone, Carl F. Regelmann & Alyssa C. Goldrich, *Attorney Professionalism Forum*, N.Y. St. B.J., May 2020, Vol. 92, No. 4.
19. *See* RPC 1.7.
20. *See* RPC 1.6.
21. *See id.*
22. *See id.*
23. *See* New York Civil Practice Law and Rules 4503(a)(1).
24. *See* RPC 1.18.

Pandemic Fatigue: A Threat to Health and Economic Progress

By Hilary Jochmans

On Sept. 18, President Biden announced that the COVID-19 pandemic was over. For some, it had been over since their first vaccine shot, their latest booster shot, or when they took their masks off and returned to their offices. But for many, the pandemic and its resultant economic hardships and health challenges are very much still ongoing. At the time of this writing, thousands of small businesses throughout the country were still suffering financially and 400 Americans were still dying every day. Can Congress and the Biden administration provide relief in this environment and work to prevent or alleviate the next crisis? Or, are we suffering from a new malady – pandemic fatigue – that will prevent us from successfully closing this chapter in our history?

The World Health Organization defines pandemic fatigue as "demotivation to follow recommended protective behaviors, emerging gradually over time and affected by a number of emotions, experiences and perceptions." In Washington, pandemic fatigue is manifesting as a demotivation to provide federal money to assist businesses impacted by the virus and the mandated shutdowns and to continue to purchase and provide vaccines and testing materials. This is also impacting future health crises with a bipartisan reluctance to provide federal money.

Small businesses were disproportionately affected by the mandatory shutdowns of 2020 and the de facto shutdowns of 2021 when a surge in COVID-19 forced many people to return to a more isolated existence. While Congress did provide federal funding relief to many small businesses, but not all, the pandemic outlasted that relatively meager assistance.

Acting through several coalitions to build awareness and support, small businesses gained the recognition of the chairs of the House and Senate Small Business Com-

mittees. Chairwoman Velazquez of New York supported HR 3807. This measure would establish the Hard Hit Industries Award Program for small businesses that suffered a pandemic-related revenue loss of 40% or more. The federal funding could be used for expenses including mortgage, rent, utility payments and payroll. The Small Business Administration would have to prioritize entities that have experienced significant pandemic-related revenue loss, with first priority going to those that experienced a loss of at least 80%, and second priority going to those that experienced a loss of at least 60%.

This year U.S. Senate Committee on Small Business & Entrepreneurship Chair Ben Cardin introduced S.4008, the Small Business COVID Relief Act of 2022. The bill would provide grants to hard-hit small businesses that could demonstrate substantial losses in 2020 and 2021 due to the COVID-19 pandemic. Senator Cardin acknowledged that small businesses are, "struggling under unsustainable debt, ongoing supply chain delays, and workforce challenges that inhibit their ability to operate and grow their businesses." While the Small Business Administration would have authority to define eligibility, the bill clarifies that sole proprietorships, independent contractors and self-employed individuals are eligible. This would be good news for the many lawyers who are sole proprietors who were also impacted by the pandemic and represented other small businesses.

But despite the support of these two powerful chairs, the measures could not gain traction. While the House passed its bill, the Senate version languished because it could not garner enough Republican support to overcome a filibuster. It is surprising that bills that are designed to help struggling small businesses, a key demographic of the electorate, did not move. This would normally be the type of bill that elected officials would love to campaign on in their home districts on the eve of an election. In the House, all 435 members are up for re-election as are one-third of the Senate. The Democrats hold the slimmest of majorities in both chambers. A month out from Election Day, political pundits believe the outcome is too close to call. But regardless of which party controls Congress next year, it is doubtful if any relevant measure would move in the 118th Congress, which begins January 2023. It appears that small relief measures have fallen victim to pandemic fatigue.

In addition to looking in the rearview mirror, Congress needs to be looking ahead to keep the momentum going on fighting COVID-19 and to the public health crisis on the horizon. More money is needed. A program that provided free rapid tests at home through the U.S. Postal Service was suspended on Sept. 2. The government will run out of federal money to purchase and distribute COVID-19 vaccines by January 2023. The Biden administration is seeking $22.4 billion in supplemental funding to help combat COVID-19 through research and development of the next-generation vaccines and medicines. According to Office of Management and Budget Director Shalanda, "funding is vital to our ability to protect and build on the progress we've made." But, there is little appetite for relief on the hill, from either side of the aisle, to provide this money. Nor is there interest in appropriating the $4.5 billion that the administration has requested in the fight against monkeypox.

Pandemic Fatigue in New York

Pandemic fatigue is striking in New York State and New York City as well. In September, Governor Kathy Hochul ended the statewide mass transit mask mandate. This pronouncement was met with mixed reviews from the population. In the same month, New York City Mayor Adams announced that the strict and controversial COVID-19 vaccine requirements for private businesses will end on Nov. 1. Interestingly, the same rule for the municipal employees that report to, and work with, the mayor, will remain in place. In one recent case, a New York Police Department detective challenged the vaccine mandate for municipal workers. Arguing that he did not qualify for religious or medical exemptions, he should be allowed to make his own choice on vaccinations since he said he had immunity from his time as a first responder. His case has worked its way through state and federal court. The Second Circuit Court of Appeals denied his request for a stay of the vaccine mandate, so he appealed to the Supreme Court to grant him an injunction or strike down the city's policy altogether. The Supreme Court declined to hear the case. There have been other similar cases in the courts, but they have generally upheld the city's broad power to enact vaccine requirements.

So as we close out 2022, where does that leave us?

Small businesses and their owners and employees are still suffering. They need relief. COVID-19 is still around and probably will be for the foreseeable future. Congress has a role to play in facilitating mitigation and health and safety efforts. But, will they find the political will and way? Or is pandemic fatigue the virus that will dominate 2023?

Hilary Jochmans, policy director for NYSBA, writes about legislation of interest to members. Previously Jochmans was the director of the New York State governor's office in Washington for both Andrew Cuomo and David Paterson and has spent a dozen years on Capitol Hill working in the House and Senate.

'I Didn't Know': Overcoming Religious Bias To Better Serve Clients

By Jennifer Andrus

What attorneys don't understand about the religious practices and customs of their clients can hurt their ability to best represent them. How to overcome that challenge was the subject of a recent program sponsored by the New York State Bar Association's Committee on Children and the Law and the Family Law Section.

The program focused on understanding culture and customs for those of the Islamic, Hindu and Hasidic Jewish faiths.

"We come from over 50 countries and occupied territories worldwide. There is not a single Islamic culture," said Sareer Fazili, an attorney and practicing Muslim in Rochester whose family came from Kashmir.

But the five pillars of the faith do remain constant throughout the world, said Fazili, one of the presenters. All Muslims believe in one God, prayer five times daily, fasting during the month of Ramadan, giving based on income and a once-in-a-lifetime pilgrimage to the holy city of Mecca.

As far as customs, Fazili says attorneys should know that men will not look a woman in the eye, keeping a downward gaze as a sign of respect. Women generally won't shake hands with men who are not relatives.

In a courtroom, a defendant may look downward and speak softly as a sign of respect. This may be interpreted as acting evasive, which is not the intent. If an attorney doesn't know what is proper, Fazili says it's fine to ask questions. "Every time, I tell people just ask and I will tell you if I can or can't do something," he said.

Anindita Chetterjee Bhaumik, a licensed clinical social worker and a practicing Hindu, detailed the pillars of her faith, including belief in one God with several manifestations, reincarnation and karma. She explained that there are many Hindus who may not practice the faith by regularly attending temple but still celebrate holidays.

Bhaumik says karma is the theory of cause and effect, meaning that good behavior is rewarded and evil deeds punished in this life or the next. Abusers may use the belief in karma to silence victims in cases of domestic violence and sexual assault.

"The abuser implies that the victim deserved it, and the survivors feel that they must have done something egregious in past lives to warrant the abuse," she said.

The shame associated with bad karma may prevent victims from seeking help because they fear that the shame will extend to the entire family.

Julie Kay, a senior legal strategist with Footsteps, a group providing services for those who choose to leave ultra-Orthodox Jewish communities, said the Hasidic Orthodox sect grew in followers after World War II and the Holocaust. Followers wanted to maintain traditional dress and customs of the faith. Marriages are often arranged, and women are praised for having large families. Kay represents women who are seeking divorce, which is complicated by the conflict between religious and secular law.

"Even in cases of domestic violence, there is a lot of pressure to resolve this within the community," she said. "Don't go to the police; instead go to the rabbi. Some of that is changing, but there is still pressure not to shame your family by getting law enforcement involved. Local police are more aware of the situation now."

Kay says both men and women who choose to leave struggle with their Jewish identity and often are cut off from family and work. Many of her clients are young adults with little education for whom English is not a first language.

"It's becoming more widely recognized that Hasidic schools do not provide much by secular education and that is a struggle for a lot of people who are leaving," she said. "On average, boys have a third-grade level in secular studies and girls have a fifth-grade education. It can be very hard when you are leaving the community because the community supports itself. Those supports evaporate when somebody leaves."

The panelists offered several tips for court officers and attorneys to better understand cultural differences:

- Don't schedule home visits or court dates during holidays.
- No home visits unless both husband and wife are present.
- Client may avert eyes, speak quietly out of respect.
- Clients may be suspicious or fearful of the outside world.

The entire 90 minute event is available on demand at https://nysba.org/products/combatting-religious-biases-for-the-family-law-practitioner.

Member Profile:
Richard J. Washington

Richard J. Washington is a solo practitioner in labor & employment law and criminal defense. He entered private practice following a career in the Manhattan District Attorney's office. He is active in the NYSBA Diversity, Equity and Inclusion Committee and the Cannabis Law Section.

You are a member of both the Diversity, Equity and Inclusion Committee, and the Cannabis Law Section. How are these two interests related?

My work on the DEI committee and on the cannabis committee are inextricably intertwined. I've been working on the social equity and community reinvestment portion of the cannabis committee. I think my work with the diversity equity and inclusion committee complements the work that I'm doing and the cannabis committee because, as everybody knows, now there is a big push to diversify this industry given the injustices that have taken place in the past as it related to the prosecution and enforcement of the illegal marijuana prior to the legalization of it.

We are still in the early stages of the legal cannabis industry in New York. What is coming soon and how will it affect lawyers?

There is a lot of interest right now in the cannabis industry. A lot of people who, up until now, were hesitant to get involved in this area of practice are now saying that it's going to be a tremendous opportunity for anyone in any practice of law. The coolest thing about cannabis law is that you don't have to be a specialist. You can just do whatever your practice is and there's going to be a space for you with entrepreneurs that end up in this new industry.

How does NYSBA allow you to have a voice in the public policy process?

The New York State Bar is very active in trying to shape policy. We have a voice and a platform to advocate on certain issues both within the New York State Bar Association, the state and the profession as a whole.

One thing that I worked on that was really great was changing question 26 on the on the application for admission to the bar. There is a reality that people in certain communities are more likely to have interaction with the police and the chilling effect that comes with having to disclose that information. It may not be relevant to an individual's competency or efficacy in practicing law, and we worked to prove why that question was no longer necessary.

How has the pandemic impacted your practice in labor and employment law?

Covid really altered the landscape in labor and employment law. Most of the work that I do is representing unionized employees, so at the beginning of the pandemic, we saw a lot of issues with remote working and negotiating contracts. I also do some management work in which we had to create remote working agreements for employees. Once people returned to the workplace, there were the issues involving vaccination. People that really were opposed to vaccination were seeking accommodations. It's still a difficult time.

What advice do you have for new lawyers?

I would say, for someone who's fresh out of law school, joining NYSBA gives you an opportunity to network and connect with individuals that are knowledgeable in whatever section or committee you find yourself. It's going to make you a better lawyer and a better advocate.

Why did you join the New York State Bar Association and what benefit do you get from membership?

When I came into the New York State Bar Association, I really wanted to join areas of law that interest me, like cannabis law. I wasn't even concerned so much with my personal practice, which is one of the reasons why I didn't go directly to, you know, labor and employment or the criminal law section. I thought cannabis was an incredibly interesting place to be.

Finish this statement: "I would join the NYSBA because . . ."

Joining and getting involved with a committee in an area of the law that interests you is going to pay dividends down the road. You're going to have access to information that's going to make you a better practitioner in the State of New York.

NYSBA President Participates in Chief Judge's Public Hearing on Civil Legal Services

By Tom Richards

New York State Bar Association President Sherry Levin Wallach joined Acting Chief Judge Anthony Cannataro, Chief Administrative Judge Lawrence Marks and three of the presiding justices of the appellate divisions for the 13th annual Chief Judge's Public Hearing on Civil Legal Services on Sept. 19.

The hearing, held each fall at the Court of Appeals in Albany, is an opportunity for the Unified Court System to assess the extent and nature of unmet civil legal services needs throughout New York State. The findings from the hearing help to form the recommendations included in the annual report submitted by the chief judge to the Legislature and executive branch on the level of public resources needed to meet unmet civil legal needs statewide.

Judge Cannataro, in his capacity as acting chief judge, presided over the hearing, which featured testimony from Deborah Enix-Ross, president of the American Bar Association; David F. Levine, chief legal officer of Bloomberg; Hon. Meredith A. Vacca, a county court judge in Monroe County; and Elizabeth R. Benjamin, vice president for health initiatives at the Community Service Society of New York. Clients and providers of legal services also gave testimony.

Presenters spoke about the barriers to access to justice facing low-income New Yorkers and members of vulnerable communities, including the elderly, persons with disabilities, immigrants, victims of domestic violence, persons with heavy medical debt and those at risk of losing their homes.

The lingering effects of the COVID-19 pandemic – amplified for some court users by rising inflation and natural disasters in parts of the state and country – increased the need for public civil legal services, presenters testified.

With reference to the association's 2020 report of the Task Force on Rural Justice, presenters commented on the profound justice gaps in rural areas of the state and discussed strategies, including the use of centralized parts and other methods to encourage young lawyers to practice in rural areas.

Focusing on progress made to bridge the access to justice gap during and after the COVID-19 crisis, testimony also highlighted collaboration between the courts, legal service providers, law firms and the business community to improve the delivery of civil legal services, including through new technologies.

The New York State Bar Association is committed to access to justice for all New Yorkers and diligently works with the courts, legal services providers and other stakeholders, including the members of the association's Committee on Legal Aid and President's Committee on Access to Justice, to fill the need for civil legal services.

Support for the Legal Services Corporation is a perennial federal legislative priority for the association, and student loan debt relief and funding for broadband – both topics of discussion during the hearing – are also policy goals.

Testimony also touched on the need for increased pro bono service. The National Celebration of Pro Bono is held annually in October and many stakeholders, including NYSBA, hold events during the month to commend the importance of pro bono service as a hallmark of the legal profession.

NYSBA actively encourages pro bono service by its members, supporting several pro bono programs through its Department of Public Interest and facilitating pro bono service statewide. You can learn more about the association's pro bono programs, or look for other pro bono opportunities, at https://www.probono.net/ny/nysba_oppsguide.

For More Information:

Link to hearing: https://ww2.nycourts.gov/accesstojusticecommission/publichearings-2022.shtml

Link to hearing: https://www.nycourts.gov/legacypdfs/accesstojusticecommission/22_CLS-Hearing_Notice.pdf

Link to list of presenters: https://nycourts.gov/ctapps/news/22_CLS_Hearing-Presenter_List.pdf

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

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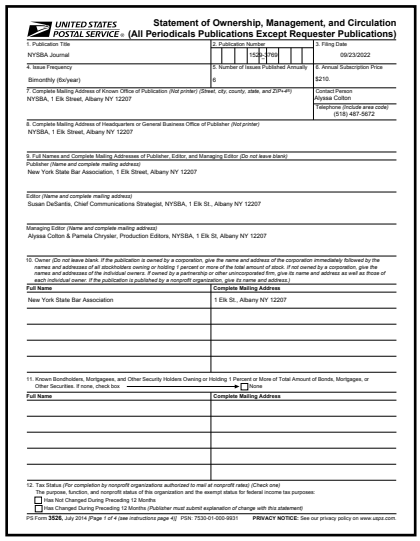

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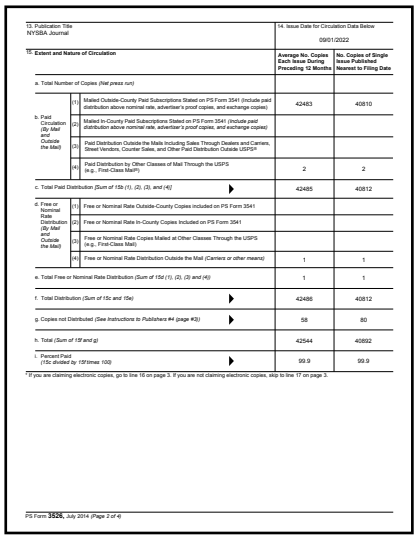

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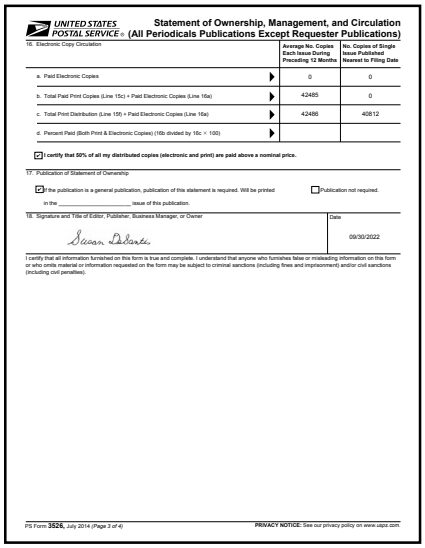

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Filemyr, Edward J.
Finerty, Margaret J.
* Forger, Alexander D.
Fox, Glenn
Grays, Taa R.
Griffin, Mark P.
Haig, Robert L.
Hecker, Sean
Himes, Jay L.
Hoffman, Stephen D.
Holder, Adriene L.
Jaglom, Andre R.
†* James, Seymour W.
Kaufman, Gary G.
Kenney, John
Kiernan, Peter
Klugman, Scott
Kobak, James B.
Koch, Adrienne Beth
Kohlmann, Susan
* Lau-Kee, Glenn
* Leber, Bernice K.
Lenci, Edward
Lessard, Stephen Charles
Livshits, Aleksandr B.
Lustbader, Brian G.
Maroney, Thomas J.
Mazur, Terri A.
McElwreath, Suzanne
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Minkoff, Ronald C.
Minkowitz, Martin
Morrissey, Mary Beth Quaranta
O'Connor, James P.
Parker, Jessica D.
Paul, Deborah L.
† Petterchak, Jacob Wade
* Pruzansky, Joshua M.
Quaye, Rossalyn
Radding, Rory J.
Ravala, M. Salman
Riano, Christopher R.
Rothberg, Peter W.
Russell, William T.
Safer, Jay G.
Sargente, Alfred J.
Sen, Diana S
Silkenat, James R.
Sonberg, Michael R.
Stephenson, Yamicha
Stoeckmann, Laurie
Swanson, Richard P.
Treff, Leslie C.
Watanabe, Tsugumichi
Waterman-Marshall, Kathleen C.
Wesson, Vivian D.
Whittingham, Kaylin L.
Wiig, Daniel K.
†* Younger, Stephen P.

Second District

Aidala, Arthur L.
Bonina, Andrea E.
Finkel, Fern J.
Klass, Richard A.
Moreno, Angelicque M.
Napoletano, Domenick
Quiñones, Joanne D.
Richter, Aimee L.
Schram, Luke Christopher
Stong, Elizabeth S.
Sunshine, Nancy T.
Vaughn, Anthony
Wan, Lillian
Yeung-Ha, Pauline

Third District

Bosworth, Lynelle
Burke, Jane Bello
Clouthier, Nicole L.
Davidoff, Michael
Gold, Sarah E.
†* Greenberg, Henry M.
Johnson, Linda B.
Kean, Elena DeFio
Kelly, Matthew J.
Ko, Andrew Zhi-yong
Kretser, Rachel
Mandell, Adam Trent
†*◊ Miranda, David P.
Montagnino, Nancy K.
Richardson, Jennifer
Silverman, Lorraine R.
Woodley, Mishka
* Yanas, John J.

Fourth District

Betz, Edward
Carter, J.R. Santana
Coreno, M. Elizabeth
Gilmartin, Margaret E.
Harwick, John F.
Loyola, Guido A.
Meyer, Jeffrey R.
Nielson, Kathleen A.
Sciocchetti, Nancy
Sharkey, Lauren E.
Simon, Nicole M.
Sise, Joseph

Fifth District

Bray, Christopher R.
Fernandez, Hermes
Fogel, Danielle Mikalajunas
* Getnick, Michael E.
Gilbert, Gregory R.
Hobika, Joseph H.
LaRose, Stuart J.
Lynn, Martin Anthony
McCann, John
Murphy, James P.
Randall, Candace Lyn
* Richardson, M. Catherine
Spring, Laura Lee
Westlake, Jean Marie

Sixth District

Adigwe, Andria
Barreiro, Alyssa M
Buckland, Jake
Duvall, Jeri Ann
French, Natalie S.
Jones, John E.
† Lewis, Richard C.
Mack, Jared
* Madigan, Kathryn Grant
May, Michael R.
McKeegan, Bruce

Seventh District

Bascoe, Duwaine Terrence
* Brown, T. Andrew
Buholtz, Eileen E.
* Buzard, A. Vincent
Jackson, LaMarr J.
Kammholz, Bradley P.
Kellermeyer, William Ford
Kelley, Stephen M.
McFadden, Barry D.
McFadden, Langston D.
* Moore, James C.
Moretti, Mark J.
* Palermo, Anthony Robert
Ryan, Kevin F.
* Schraver, David M.
Schwartz-Wallace, Amy E.
* Vigdor, Justin L.

Eighth District

Beecher, Holly
Bond, Jill
Bucki, Craig
* Doyle, Vincent E.
Effman, Norman P.
Feal, Sophie I.
* Freedman, Maryann Saccomando
†* Gerstman, Sharon Stern
Graber, Timothy Joseph
Kimura, Jennifer M.
LaMancuso, John
Nowotarski, Leah Rene
Redeye, Lee M.
Riedel, George E.
Russ, Hugh M.
Sweet, Kathleen Marie
Washington, Sarah M.

Ninth District

Battistoni, Jeffrey S.
Beltran, Karen T.
Braunstein, Lawrence Jay
Caceres, Hernan
Carbajal-Evangelista, Natacha
Cohen, Brian S.
Degnan, Clare J.
Fiore, Keri Alison
Fox, Michael L.
Gauntlett, Bridget
†* Gutekunst, Claire P.
Jamieson, Linda S.
Lara-Garduno, Nelida
† Levin Wallach, Sherry
Milone, Lydia A.
Mukerji, Deepankar
Muller, Arthur J.
Seiden, Adam
* Standard, Kenneth G.
Starkman, Mark T.
Triebwasser, Jonah
Ward, Denise P.

Tenth District

Berlin, Sharon N.
Bladykas, Lois
Block, Justin M.
* Bracken, John P.
Bunshaft, Jess A.
Cooper, Ilene S.
Glover, Dorian Ronald
Good, Douglas J.
Gross, John H.
Islam, Rezwanul
Joseph, James P.
* Karson, Scott
Kartez, Ross J.
Leo, John J.
Leventhal, Steven G.
* Levin, A. Thomas
Lisi, Gregory Scot
Markowitz, Michael A.
Mathews, Alyson
Messina, Vincent J.
Mulry, Kevin P.
Penzer, Eric W.
* Rice, Thomas O.
Tambasco, Daniel John

Eleventh District

Abneri, Michael D.
Alomar, Karina E.
Cohen, David Louis
Dubowski, Kristen J.
Jimenez, Sergio
Katz, Joshua Reuven
Samuels, Violet E.
Terranova, Arthur N.

Twelfth District

Braverman, Samuel M.
Campbell, Hugh W.
Cohn, David M.
Hill, Renee Corley
Marinaccio, Michael A.
Millon, Steven E.
* Pfeifer, Maxwell S.
Santiago, Mirna M.

Thirteenth District

Cohen, Orin J.
Crawford, Allyn J.
Martin, Edwina Frances
McGinn, Sheila T.
Miller, Claire C.

Out of State

Bahn, Josephine M.
Choi, Hyun Suk
Filabi, Azish
Heath, Helena
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