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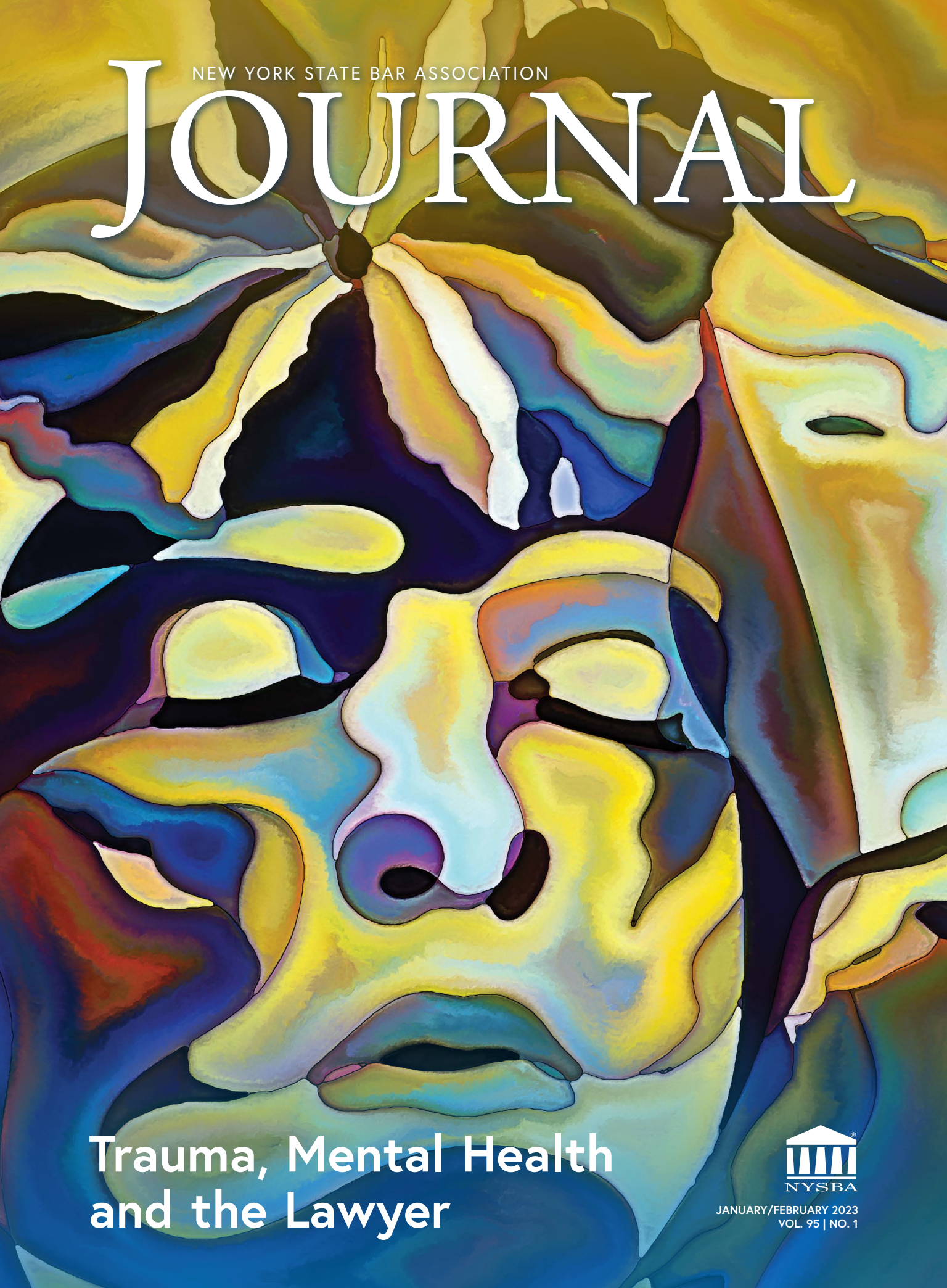

Trauma, Mental Health and the Lawyer

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JANUARY/FEBRUARY 2023
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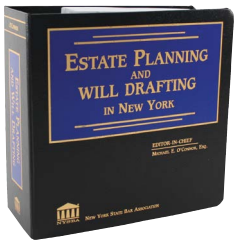

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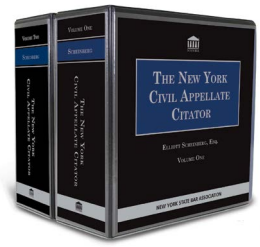

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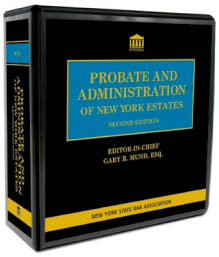

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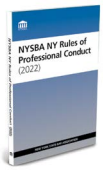

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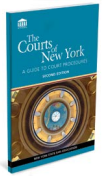

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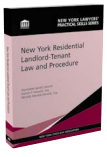

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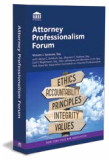

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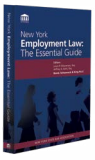

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by Libby Coreno

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SHERRY LEVIN WALLACH

Lawyers Must Address Impact of Mental Health on Criminal Justice System

The COVID-19 pandemic shed a glaring light on our nation's long history of failing to properly care for people with mental health issues. For too long, we have ignored and marginalized people with mental illness, all too readily accepting the reality that too many of such individuals cycle in and out of shelters and jails, never receiving the care they need in the community to live stable lives.

As a profession, we have only recently started to pay attention to mental health issues with which our clients, our colleagues and we ourselves struggle. We are already frustrated because of the lack of resources and support for our clients' mental health needs, and we now have to deal with even more clients suffering from pandemic-related mental illness and trauma. The plight of our clients – and our perceived inability to help – has impacted our own well-being. Yet, attorneys must be well to provide the best and most comprehensive representation to their clients.

This issue is not only affecting lawyers and people diagnosed with a mental illness; it is also affecting our communities, friends and families. To improve our ability as lawyers to serve our clients, we must be prepared to better understand the mental health issues our clients and colleagues face. We must also be prepared to identify and implement changes that enhance the quality of representation we deliver to clients with mental illness while simultaneously being more attentive to our own mental health needs, as well as those of our colleagues. The resources available must be increased so that all communities in our state have access to the support, programs and treatment. Our clients must be treated with understanding and fairness to ensure safety for them and our communities.

I am asking you as members of the New York State Bar Association to join me in addressing and accomplishing the mission of my presidency – to "Invest in the Future of Our Profession."

One of my first acts as president was to establish the Task Force on Mental Health and Trauma Informed Representation to evaluate all areas of the law where clients living with mental illness and trauma need representation and what lawyers need to provide the best possible representation. It will also focus on the challenges and issues that lawyers face when representing clients living with mental illness and histories of trauma, and identify and evaluate the need for additional resources and the impact this work has on attorney well-being. People living with mental illness and trauma touch almost every part of our legal system and, thus, our system must be better positioned to serve people with mental illness justly and with fairness. People must not be marginalized or underserved because they have a mental illness.

To highlight the importance of these issues and to provide a forum to explore them further, I decided to use my presidential summit at our Annual Meeting as an opportunity to discuss the mental health crisis and its

intersection with the law. The purpose of this program is to shed light not only on what it means to live with mental illness and a history of trauma, but to highlight the issues faced by attorneys in practice, the legal community and our system of justice. As a legal community, we are often in the position in which the resources that are needed for our clients either are unattainable or just simply do not exist. Attorneys often see their clients living with mental illness marginalized or treated harshly. In many cases, their illnesses are ignored. As a society, we can and must do better.

Both the task force and the presidential summit also address the impact that representing people with mental illness or living with trauma has on attorney well-being. Attorneys may not fully appreciate how dealing with these challenges to support their clients affects their own lives. And while it is certainly true that we are in the business of helping others, we cannot do so effectively if we fail to take care of ourselves. Attorney well-being is directly impacted by the stress and difficulty of this work.

It is my view that it is the responsibility of the Bar to help build a better, more effective way to address the intersection of law, justice and mental health. The task force's mission statement embodies these principles.

Before we can be successful in improving the manner in which our legal system addresses mental illness and our representation of mentally ill clients, we must remember that people living with mental illness and a history of trauma still confront the stigma attached to these ailments. Many of these individuals have long been entangled in the legal system due to a lack of appropriate care in the community. They are increasingly incarcerated and punished rather than afforded treatment, and too often jails and prisons serve as de facto psychiatric facilities. In addition, adolescents with complex needs are shuffled between an array of public agencies. To change this narrative, we as lawyers and judges must take the time to understand our laws as they apply to people who are mentally ill and figure out what options are at our disposal to support and connect them to treatment. After all, would we lock away a person with a heart condition simply because of illness?

Recent history shows how this pattern has trended in the wrong direction.

Since 2014, the number of hospital beds for those living with mental illness has decreased. Conversely, New York has seen a significant number of people housed in county jails, homeless shelters and state prisons. The state has only 3,000 in-patient beds for adults and fewer than 300 beds for pediatric patients. The gap between the need for and the availability of treatment options is only expected to widen as labor shortages force both in-patient and outpatient facilities to curtail services. Mental illness is just that, an illness. It is our responsibility as lawyers, judges and citizens to help each other and our community and government leaders to understand this fact.

Individuals living with mental illness and trauma are deserving of the same compassion and care afforded a person who suffers from a physical ailment. We don't question or judge individuals when they have a heart attack and need surgery. They are evaluated, treated, supported and accommodated so they may recover. Unfortunately, the same cannot always be said for those who suffer from mental illness. The trend for people with untreated mental illness is too often the criminal justice system. When all else fails, we put them in jail.

In addition, there is ample evidence to suggest inequities in both the behavioral health system and the courts. There is an overrepresentation of members of communities of color in the justice system and a lack of behavioral health providers in those communities. Our correctional facility staff and officers also lack the appropriate training to work with people who are mentally ill or suffering from trauma. Yet, the overwhelming majority of people who spend time incarcerated have suffered significant trauma, and incarceration itself is traumatizing. People living in our jails and prisons are living with trauma, yet in comparison very few of the people working in our correctional facilities are trained to work with victims of trauma.

There is considerable work to be done to ensure equity and fairness in the justice system and the service delivery system for people with mental illness, trauma and disabilities. We need to have a system of care that is set up to the challenging task of serving clients with complex needs.

Our organization must lead and join with others to ensure diversity and equity across all programs designed to improve outcomes for people with mental disabilities who are involved in the justice system.

We must act now. Our task force, comprising more than two dozen leaders across New York State, will publish a report in the coming year. A choir of voices and perspectives is needed in every effort to improve the court and community responses to individuals with mental health disabilities. We need to be among the more prominent voices in that chorus urging reform.

Sherry Levin Wallach can be reached at slwallach@nysba.org.

Trauma, Mental Health and the Lawyer

By Libby Coreno

So, Netflix has this intriguing series called "The Sinner," starring Bill Pullman as an empathetic police detective who is characterized by his ability to see beyond the conventional facts of a crime presented in the opening episode of each season. In Season One, Cora Tennetti (Jessica Biel) is a typical upstate New York mother and wife who is out for a day at the beach with her family. Suddenly, when some young people in front of them begin horsing around on their towels, a song on their radio triggers her into a violent episode where she stabs one of the men to death.

At first blush, there are no facts in dispute. There is a clear case of murder. And Cora denies none of it. What is inexplicable is her motive to commit the act and whether she was aware of her actions. The entire first season centers around the interplay between childhood trauma, complex PTSD and repressed memories, as set against our criminal justice understanding of immorality and right and wrong.

Our criminal defense bar friends will immediately pick up errors in the process and the application of the standards of review, illegal police interview practices, as well as suggestive psychotherapeutic techniques that would not be considered ethical or admissible.[1] "Despite the many misconceptions of forensic psychiatry and the law . . . [the show] does adequately reveal the negative impact of trauma, and it challenges viewers' thinking about how this should affect the disposition of criminal cases. It also allows for a different definition of a 'sinner.'"[2]

So why would challenging our views of what makes a "sinner" matter so much for lawyers, particularly in today's charged and polarized environment? Because the show wants to reveal to us (albeit creatively from a criminal procedure standpoint) that the entrenched and inhumane parts of our legal systems repeatedly fail to consider (or outright deny the relevance of) the impact of trauma (individual, community, intergenerational, marginalized peoples, etc). It also shades in the gray of the continuum that is "mental illness" or "mental health" rather than using those terms in the binary manner so common today. And lawyers should take note because the very training to "think like a lawyer" leads directly to a "no gray zone" – a kind of dehumanized "black and white," all-or-nothing thinking that can cause us to overlook the very human factors that are at the heart of a system – including ourselves.

Trauma and Mental Illness in the Legal System

There is no question that anyone who traverses the legal system – particularly the criminal justice system or our family courts – is at risk for exposure to trauma. Natalie Netzel proposed in the June 2022 edition of Minnesota State Bar Association's "Bench + Bar" that:

> On its most basic level, trauma occurs when an event happens to an individual, or group, over which they have no control, with little power to change their circumstances, and which overwhelms their ability to cope. When the events happen without the buffer of supportive connections, or the availability of healing practices, brain chemistry changes in fundamental ways . . . for many of our clients, their interaction with the legal system represents an event that overwhelms their ability to cope and over which they have little if any control, and that is traumatic in and of itself.[3]

It is also beyond doubt that extensive trauma histories are present in many of the cases handled daily by lawyers across New York. The research into Adverse Childhood

Experiences (ACES) "showed a connection between experiencing specific adverse events in childhood and resulting adverse health and social outcomes."[4] Netzel writes that experiencing the processes of family separation through removal, custody, and immigration policies can diminish communities, resulting adverse community experiences – making certain communities less resilient than others.[5] When clinicians refer to the coupling of individual trauma and community trauma, they call it a "pair of aces," thereby acknowledging that experiencing trauma can be far more than an individual event and that it increases rates of mental illness and addiction throughout a lifetime.[6]

This also true for the lawyers who practice in the system and "often encounter traumatic responses as if they themselves were experiencing the trauma."[7] Vicarious trauma or secondary trauma is breathtakingly common in the legal profession and yet very little information or preventative techniques are provided to its practitioners. Dr. Kerry O'Hara, specializing in "group think" in legal culture and lawyer psychology, has lectured widely to legal audiences about the dangers of vicarious trauma, sharing that witnessing the suffering of others can lead to existential struggles and changes in our world view.[8] Dr. O'Hara says, "The answer is not to create emotional barriers but to accept that our work changes us."[9]

But how many of us were told that our work would fundamentally change us? How many of us were given the education necessary to be on the lookout for such changes and the tools for how to mitigate them? Or even get help outside of ourselves if and when the time came? Unfortunately, the answer is not many. We are responsible as a profession for the chronic failure to adequately prepare law students and lawyers for the occupational hazards endemic in lawyering.[10] Even worse, we wholesale fail to provide the mitigating skills and tools that repeatedly prove to be life-saving in offsetting the impacts to the psyche of lawyering.

A Professional Shift From Self-Care to 'Mutual' Care

Lawyers find themselves in a "hand in glove" relationship with the impacts of the broader systems that implicate suffering and can impede treatment and recovery. That which impacts our clients impacts lawyers, as the research has demonstrated. Acknowledging this relationship is the first step in being able to shift resources, training, education, funding and policy to a more humanized view of the legal system and lawyering.[11] "Merely preaching self-care, in a profession that makes little space for it, makes it a kind of unfunded mandate – one more way lawyers fall short. One more way to fail."[12]

In her call for a more holistic, communal view of healing, Netzel proposes that

> models of communal or mutual care, rather than self-care, are essential in creating institutions and systems that truly understand and work to address trauma. The legal profession needs to adopt an approach to healing that recognizes mutual care . . . [W]e need to work together to create a profession that allows and respects the time and space needed to take care of oneself. We need to celebrate healthy boundaries and stop the glorification of toughing it out.[13]

The New York State Bar Association's Task Force on Attorney Well-Being recognized the need to begin to move from the focus on the individual lawyer's struggle to a broader, more holistic approach. In its October 2021 report, the task force noted:

> While the well-being of lawyers may seem like an individual lawyer's problem, the data has been sounding an alarm for the better part of three decades that the training, culture, and economics of law contribute exponentially to the suffering in our profession. To truly address the systemic issues in law, we must look to the precedent of the profession as a command to take up a collective responsibility – to each other. We must move from striving alone to thriving together if we are to survive the present challenges.[14]

Lawyers deserve the tools and techniques that enable them to stay compassionately present to the suffering of others, while practicing skillful protection. We do not have to armor ourselves like gladiators to be safe in a profession that has inherent risks.[15] To that end, the New York State Bar Association's newly formed Committee on Attorney Well-Being has begun to cultivate new training programs for NYSBA members that focus on issue-awareness and professional skill development – targeting the existential struggles, traumas and isolation that lead to suffering in our profession. We can and should broaden our view of what it means to be "well-trained" as a lawyer – to be in service to our clients and, also, to ourselves.

Libby Coreno is current co-chair of the NYSBA Committee on Attorney Well-Being and served as the co-chair of NYSBA's Task Force on Attorney Well-Being from 2020–2021. Along with Dr. Kerry Murray O'Hara, PsyD, Coreno hosted the first-ever five-part Attorney Well-Being Podcast for NYSBA. In 2022, Coreno and O'Hara launched the Humanized Lawyer Project, a revolutionary five-week program focused on individual and group skill development to target the "emotional amputation" at the root of legal training and practice.

Endnotes

1. Chandler Hicks et al, *Trauma Versus Immorality: A Review of 'The Sinner,'* Journal of the American Academy of Psychiatry and the Law, September 2020, 48(3) 418-19, https://jaapl.org/content/48/3/418.
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4. *Id.*
5. *Id.*
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Unjust Punishment: The Impact of Incarceration on Mental Health

By Patricia Warth

Sadly, a defining feature of our nation is its legacy of punishing rather than humanely caring for people with mental illness. Yet, the solutions needed to break this legacy already exist. It is well past time to pledge ourselves to implementing these solutions so we can meaningfully care for the most vulnerable among us.

As far back as the late 1700s, people with mental illness frequently ended up in poorhouses or jails – much like today.[1] In the 1840s, reformer Dorothy Dix, appalled by the conditions people with mental illness faced in jails, embarked on a campaign urging state legislatures to build publicly funded state hospitals to offer people with mental illness both treatment and more humane conditions.[2] Dix's vision of treating people with mental illness in state hospitals rather than warehousing them in jails was only partially realized – dozens of state mental hospitals were built, but most were not adequately resourced, and while some provided treatment, others merely warehoused people in conditions no better than jails or prisons.[3]

By the 1950s, the number of people with mental illness in state mental hospitals had peaked. But a series of exposés, such as a 1946 Life magazine article by Albert Q. Maisel, led to growing public awareness of the poor conditions and lack of treatment in these facilities.[4] In his article, Maisel described the conditions he observed: "We feed thousands a starvation diet. . . . We jam-pack men, women, and sometimes even children, into hundred-year-old firetraps in wards so crowded that the floor cannot be seen between the rickety cots. . . . Hundreds – of my own knowledge and sight – spend twenty-four hours a day in stark and filthy nakedness."[5]

Media exposés like Maisel's prompted various social movements – including the civil rights movement, the community mental health movement, the evidence-based practice movement and the recovery movement – to coalesce around the goal of deinstitutionalization in favor of community-based treatment as a more humane way to care for people with mental illness.[6] In 1999, in *Olmstead v. L.C.,*[7] the U.S. Supreme Court held that failing to care for people with mental illness in the "least restrictive" environment violated the American with Disabilities Act, cementing the concept that people with mental illness should, whenever possible, receive care in the community rather than an institution.

Three significant changes further accelerated the deinstitutionalization movement in the 1960s. The first was the FDA approval of the drug Thorazine to control the symptoms of psychosis, fostering the belief that we could medicate our way out of mental illness and render inpatient treatment unnecessary.[8] Second was the 1963 enactment of the federal Mental Retardation Facilities and Community Health Centers Construction Act, which allotted money to the states to build community-based care centers to treat people with mental illness and developmental disabilities. But while state legislators pointed to this federal legislation as justification to close state hospitals, "[m]any of the new community care centers either never materialized or ended up serving populations with less severe forms of mental illness or with other disabilities, rather than those with serious mental illness."[9] The year 1965 ushered in the third significant change: the creation of the Medicaid program, which funded health care for low-income people, but which made states rather than the federal government responsible for funding long-term inpatient mental health care.[10] The lack of federal funding for inpatient mental health treatment encouraged states to move people out of institutions to outpatient care so that federal dollars would cover at least some of the cost.[11]

In terms of closing state hospitals and reducing the number of people confined to mental health institutions, the deinstitutionalization movement was an overwhelming success, and "between 1950 and 2000 the number of people with serious mental illness living in psychiatric institutions dropped from almost half a million people to about fifty thousand,"[12] while the number of beds in state and county psychiatric hospitals declined by more than 90%.[13] But the vision of a network of community care centers that would provide meaningful treatment for people with mental illness was never adequately funded and thus never fully realized.[14] Because of the limited availability of treatment options, many people with mental illness do not receive the care they need. Of the "14 million or so people who experience the most debilitating mental health conditions, roughly one-third don't receive treatment," often because they cannot connect with the services they need, they lack insurance or the services are not available.[15] The result is that people with serious mental illness "have been consigned to lives of profound instability" and, lacking proper care in the community, they often cycle through homeless shelters and periods of incarceration.[16]

America Has Made Mental Illness a Crime

In the last quarter of the 20th century, the dramatic reduction of inpatient mental health care was accompanied by an equally dramatic increase in criminalization and incarceration. In 1973, the United States incarcerated adults at a rate of 161 per 100,000 adults; by 2007, this rate had quintupled to 767 per 100,000. In absolute terms, "the growth in the size of the penal population has been extraordinary; in 2012, the total of 2.23 million people held in U.S. prisons and jails was nearly seven times the number in 1972."[17] This increase in incarceration was historically unprecedented, occurring after decades of relatively stable rates of incarceration.[18]

But four decades of "tough on crime" rhetoric led to harsher sentencing policies and the criminalization of more conduct, including drug use and possession and "quality of life" crimes, which in turn led to the U.S.'s overreliance on arrest and incarceration. Today, "[p]olicing, arrest, and criminal punishment have become the default response not only to violence and other harms, but also to poverty, mental health crisis, drug use and addiction, HIV and other health conditions, and school discipline."[19]

Our nation's overreliance on arrest and incarceration, combined with the failure to provide meaningful treatment options for people with mental illness, has resulted in far too many people with mental illness being ensnared in our criminal legal system. As Alisa Roth states in her seminal book, "Insane: America's Criminal Treatment of Mental Illness," America has made mental illness a crime.[20]

The statistics are stark:

- People with mental illness in the U.S. are 10 times more likely to be incarcerated than they are to be hospitalized.[21]
- More than 70% of people in U.S. jails and prisons have at least one diagnosed mental illness or substance use disorder or both, and up to a third of incarcerated people have a serious mental illness.[22]
- The problem is most acute for women who are incarcerated; a 2017 study found that 20% of women in jail and 30% in prisons had experienced "serious psychological distress" in the month before the survey, compared to only 14% of jailed men and 26% of imprisoned men.[23]
- The crisis is worsening. In 2010, approximately 30% of people jailed at Rikers Island had a mental illness; by 2017, it had risen to 40%.[24]

The "tough on crime" rhetoric that fueled mass incarceration also fostered a belief that rehabilitation does not work, often leaving punishment as the primary focus of our criminal legal system.[25] As our jails and prisons filled, the will for a fiscal investment in rehabilitation and treatment programs waned, as did the will to fund mental health care both in and out of prison.[26]

Our Prison System Harshly Punishes People With Mental Illness

By incarcerating so many people with mental illness, "we have re-created much of the same dysfunction that pervaded the asylums of the nineteenth and twentieth centuries and the very abuses we sought to end by shutting them down."[27] To best explain this, this article draws on the expertise of three people with deep experience in New York's carceral system: Tyrell Muhammad,[28] Sharon White-Harrigan[29] and Jack Beck.[30] Muhammad, White-Harrigan and Beck all agree that our prison system is – by design – ill-equipped to humanely care for people with mental illness and that it instead systematically and harshly punishes such individuals.

Jack Beck notes that security is the core mission and concern of prison staff, and thus prisons prioritize custody and control, leaving no room for mental health considerations.[31] Effective mental health treatment focuses on empowering people, but prisons systematically strip people of their humanity, autonomy and agency. Any deviation from prison rules or norms is met with harsh punishment. Correctional staff do not view behaviors symptomatic of a mental illness through a therapeutic lens but instead through the custody and control lens, and prison staff respond to such behaviors punitively instead of therapeutically. Prisons make no special accommodations for a person's mental illness; such persons are expected to adhere to the same rules as everyone else, even when their mental illness impairs their ability to do so. Indeed, when people with mental illness violate prison rules, their behavior is viewed as volitional and manipulative, even when it is clearly connected to their mental illness.[32]

Sharon White-Harrigan views the failure to humanely care for people with mental illness through a trauma-informed care lens, which shifts the focus from "What's wrong with you?" to "What happened to you?" She notes that prison staff focus exclusively on the crime the person committed – i.e., what is wrong with the person – with no regard to what happened to them and the trauma they may have experienced that contributed to their criminal legal system involvement. As a licensed social worker with expertise in trauma, she understands the sheer impossibility of delivering effective treatment and care without learning of a person's history and their experiences of trauma, whether it's the trauma associated with abuse or violence, or institutional and cultural trauma, such as poverty and racism. She also emphasizes that prison staff are not adequately trained in identifying and appropriately responding to mental health issues or experiences of trauma. Indeed, just the opposite, and she recounts how when she was imprisoned, guards would compound people's trauma by using denigrating language and insults – typically in a random manner and with no apparent reason other than a bald assertion of control.

Tyrell Muhammad similarly describes the denigrating and needlessly harsh way correctional staff treat incarcerated people, noting that when he was imprisoned, guards frequently called him the n-word and then expected him to "tolerate and accept it." He believes that "just a little bit of decency, understanding, and patience would go a long way in improving conditions for people with mental

health issues." But in a system that prioritizes control and punishment, these attributes are lacking.

He agrees with White-Harrigan that prisons fail to keep abreast of the treatment strategies like trauma-informed care that have proven most effective, but instead still rely on arcane and punitive ways to address mental health issues. He also agrees that prison staff are not trained to recognize or manage behaviors that are symptomatic of a mental health condition. Punishment is the primary response to a person acting out, even if mentally ill. Muhammad also notes that the physical conditions of confinement – a drab and depressing atmosphere, institutional olive green paint and outdated facilities in disrepair – foster mental illness and impair meaningful treatment.

Beck, White-Harrigan and Muhammad all report that mental health treatment is typically limited to use of medication, with little to no therapy to accompany a medication regime. And even when people receive mental health medication, it is often not well-monitored or managed and, thus, not as effective as it should be.[33] Additionally, there is virtually no discharge planning for people with mental illness, who are often released from incarceration with no meaningful bridge to mental health services.

Both Muhammad and Beck emphasize that there are prison-based programs for people with mental illness that on paper are designed to be therapeutic and rehabilitative, but in practice fall short of these goals and are either underutilized or ineffectively utilized. Their observations are corroborated by a series of articles in New York Focus highlighting the failure of the New York State Department of Corrections and Community Supervision (DOCCS) to meaningfully implement legislation – the landmark Humane Alternatives to Long-Term (HALT) Solitary Confinement Act – designed to reduce the number of people with mental illness confined to solitary confinement.[34]

The result is a system that harshly punishes people because of their mental illness, subjecting them to disciplinary measures, such as loss of privileges, "keep-lock" and solitary confinement, at disturbingly high rates.[35] The problems conforming to rules and protocols – and their perceived danger – also results in people with mental illness typically serving longer sentences.[36]

Beck and Muhammad emphasize that the overreliance on solitary confinement in particular is a significant failure of our prison system. Muhammad spent over seven of his 27 prison years in solitary confinement, which he describes as soul-crushing and destabilizing for even the most mentally resilient person. As he recounts: "You don't even know when you lose your mind, when the reality of your circumstances becomes something of a fantasy world. . . . You are battling yourself for your sanity, and it's a hell of a battle."[37] His experience is corroborated by years of research.

Indeed, it is "well-documented that solitary results in people experiencing psychosis, severe anxiety, panic, paranoia, despair, depression, memory and concentra-

tion loss, and exacerbation and creation of other mental health challenges."[38]

Despite the adverse impact that solitary has on people's well-being, New York's prisons continue to subject people with mental illness to solitary confinement at disproportionately high rates. As of 2017, approximately 28% of all people in solitary confinement in New York prisons had a recognized mental health diagnosis.[39] In response to legislation enacted in 2008, DOCCS created Residential Mental Health Treatment Units to divert people diagnosed with a serious mental illness from solitary confinement to a more therapeutic environment focusing on treatment rather than punishment. But the goals of these units have not been realized, and instead residents of the units are disciplined at much higher rates than others in prison and often with "outrageously long sentences to solitary confinement" for conduct that is a symptom of their mental illness.[40] As one report concluded: Residential Mental Health Treatment Units "have been operating in a punitive, abusive, and racially biased manner."[41]

The impact of solitary confinement is devastating, causing high rates of suicide, suicide attempts and self-harm. The suicide rate in New York's prisons is now at historically high levels, and often higher than the national prison suicide rate. And there is a clear link between suicide and solitary – over a five-year period, the rates of suicide, suicide attempts and self-harm (often in the form of self-mutilation, or "cutting") were significantly higher for people in solitary then the regular prison population. As one report concluded: "Data provided by DOCCS and other state agencies clearly shows a high number of suicides, suicide attempts, and other forms of self-harm in New York prisons, and an undeniable nexus between these desperate actions and the use of solitary confinement."[42]

In terms of affirmatively inflicting harm on incarcerated people, New York State's largest prison, Rikers Island, is at a crisis point. Between Jan. 1, 2022 and Nov. 4, 2022, 18 people have died at Rikers, the largest annual number since 2013, when the jail's population was double what it is now. Of these, 12 were confirmed or suspected suicide or overdose deaths, and seven of these 12 had a known mental health history.[43] Though worse than ever, this problem was predictable, as it has long been known that self-harm is a problem at Rikers, particularly among people with mental illness and those confined to solitary.[44] Moreover, as Kalief Browder's story reveals, these numbers do not capture all the harm that Rikers inflicts on people, and countless people endure or succumb to this harm after being released.[45]

Toward More Humane Care for People With Mental Illness

America must develop a commitment to humanely care for, rather than criminalize, people with mental illness. Doing so requires us to address two questions: *who* are we incarcerating and *how* are we incarcerating them? With regard to *who* we incarcerate, we need to implement a range of reforms to dramatically reduce the number of people with mental illness we confine to jails and prisons, including, for example, reforms aimed at decriminalizing conduct that is often a function of mental illness, such as substance abuse, homelessness, and vagrancy; diverting people from the criminal legal system before charges are filed, at the point of police contact; and for people who are charged, diverting them from prison and jail in favor of treatment options. For the latter, a promising reform is the Treatment Not Jails Act, which would expand Criminal Procedure Law Article 216 to allow treatment courts to accept people with mental health issues, significantly enhancing the availability of therapeutic, rather than punitive, sentencing options for people convicted of a crime whose mental illness contributed to their criminal legal system involvement.[46]

For the second question – *how* we incarcerate – we need to reject the notion that rehabilitation does not work and shift the focus of our prisons and jails from punishment to rehabilitation and treatment. We must also hold jails and prisons accountable for their treatment of incarcerated people by, among other things, requiring accurate reporting and rejecting practices that are not evidence-based, such as solitary confinement.[47] A starting point is acknowledging the failure to fully implement the 2008 SHU exclusion legislation and the 2021 HALT legislation and requiring DOCCS to meaningfully implement these critically important reforms.

Finally, and perhaps most important, we must recognize that the solution to caring for people with mental illness before they become ensnared in the criminal legal system – a network of community mental health centers with a single point of entry – has existed for decades but has never been adequately funded.[48] It is time to commit the fiscal resources necessary to break the cycle of failure that has plagued our nation and to meaningfully care for the most vulnerable among us.

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Endnotes

1. Alisa Roth, Insane: America's Criminal Treatment of Mental Illness 81 (2018).

2. *Id*. at 83–84.

3. *Id.* at 84 (quoting Gerald Grob, The Mad Among Us: A History of the Care of America's Mentally Ill 24 (1994)).

4. *Id*. at 85.

5. Albert Q. Maisel, *Most U.S. Mental Hospitals Are a Shame and a Disgrace*, Life, 1946, *available at* https://mn.gov/mnddc/parallels2/prologue/6a-bedlam/bedlam-life1946.pdf.

6. Johnathon H. Duff, *In Focus: Psychiatric Institutionalization and Deinstitutionalization*, Congressional Research Service, 1 (June 26, 2018).

7. 527 U.S. 581 (1999).

8. Roth, *supra* note 1, at 89.

9. *Id.* at 88.

10. The Institutions for Mental Diseases exclusion states that Medicaid will not cover care for any patient under 65 in an "institution of mental disease," defined as a "hospital, nursing facility, or other institution of more than 16 beds, that is primarily engaged in providing diagnosis, treatment, or care for persons with mental diseases, including medical attention, nursing care, and related services." *See* https://www.sssa.gov/OP_Homes/ssact/title19/1905.htm.

11. Roth, *supra* note 1, at 92.

12. *Id.*

13. Duff, *supra* note 6, at 1.

14. Editorial Board, *The Solution to America's Mental Health Crisis Already Exists*, N.Y. Times, Oct. 4, 2022, https://www.nytimes.com/2022/10/04/opinion/us-mental-health-community-centers.html.

15. *Id*.

16. *Id.*

17. National Research Council 2014, The Growth of Incarceration in the United States: Exploring Causes and Consequences, Washington, DC: The National Academies Press, https://doi.org/10.17226/18613, at 33, 35–36.

18. *Id*. at 36.

19. Andrea J. Ritchie and Beth E. Ritchie, *The Crisis of Criminalization: A Call for a Comprehensive Philanthropic Response*, Barnard Center for Research on Women at 3 (2017), https://bcrw.barnard.edu/wp-content/nfs/reports/NFS9-Challenging-Criminalization-Funding-Perspectives.pdf.

20. *See also* Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, Harvard Civil Rights-Civil Liberties Law Review 41, No.2, 391, 394 ("The nation's aggressive and punitive anti-crime policies, including its "war on drugs," have also contributed to the number of mentally ill in prison . . . Persons with mental illness are among the masses swept behind bars.").

21. National Judicial Task Force To Examine State Courts' Response to Mental Illness, State Courts Leading Change: Report and Recommendations, Oct. 2022, at 9.

22. *Id.*

23. Jennifer Bronson and Marcus Berzofsky, *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011–12*, US Bureau of Justice Statistics, June 2017.

24. Roth, *supra* note 1, at 92.

25. *See, for example,* David Garland, The Culture of Control: Crime and Social Order in Contemporary Society, 9 (2011).

26. The most recent example of this is New York City's focus on enhancing policing while cutting services for people with mental illness. *See* Jeffery C. Mays, *Adams's Efforts To Address Mental Health Crisis Fall Short*, N.Y. Times, Nov. 18, 2022, https://www.nytimes.com/2022/11/18/nyregion/mental-illness-crime-nyc.html. *See also* Roth, *supra* note 1, at 94 (noting that in the wake of the 2008 financial crisis, states cut $4.25 billion in mental health services from their budgets).

27. Roth, *supra* note 1, at 8.

28. Tyrell Muhammad is a senior advocate for the Correctional Association of New York (CANY), working on CANY's prison monitoring program. He is also a founding member of the New York chapter of the Campaign for Alternatives to Isolated Confinement and the Release of Aging People from Prison campaign. His work is informed by his life experience of serving almost 27 years in prison, where he earned a BA from Syracuse University and a master's degree from the New York Theological Seminary.

29. Sharon White-Harrigan is the executive director of the Women's Community Justice Association, a gender-specific, trauma-informed, advocacy-for-justice agency that amplifies the voices of women who are experts by virtue of their life experiences. Prior to this, she was a program director of a temporary residence for formerly incarcerated women at the Women's Prison Association. In her work and advocacy, she draws upon her experiences as a licensed social worker, domestic violence survivor and 11 years of incarceration.

30. Jack Beck has over three decades of experience representing people in New York's prisons and investigating prison conditions, having worked as a senior supervising attorney at the Prisoners' Right Project of the Legal Aid Society and then as director of the Prison Visiting Project at the Correctional Association of New York.

31. Homer Venters, former chief medical officer at Rikers Island, describes prisons and jails as "paramilitary structures" with which local officials and leaders are loathe to interfere, thus allowing these institutions to escape accountability and engage in practices, like solitary confinement, that are not evidence-based and inflict harm on incarcerated people. He emphasizes that this paramilitary structure is directly at odds with how effective health care systems run. *See* Matt Watkins, *Jail-Attributable Deaths*, New Thinking podcast, https://www.courtinnovation.org/publications/homer-venters.

32. *Id.* at 394.

33. *See also* Fellner, *supra* note 20, at 394.

34. *See* Chris Gelardi, *New York's Prison Chief Ordered Guards To Illegally Shackle People to Desks*, New York Focus, Nov. 7, 2022; Gelardi, *Lesser Infractions Aren't Supposed To Land You in Solitary Confinement: They Do Anyway*, New York Focus, Oct. 24, 2022; Gelardi, *Solitary by Another Name: How State Prisons Are Using 'Therapeutic' Units to Evade Reforms*, New York Focus, Oct. 5, 2022; Gelardi, *Prisons Are Illegally Throwing People With Disabilities Into Solitary Confinement*, New York Focus, Sept. 26, 2022; and Gelardi, and Emily Brown, *State Prisons Are Routinely Violating New York's Solitary Confinement Law*, New York Focus, Sept. 12, 2022. This series of articles can be found at https://www.nysfocus.com/tag/halt-implementation/. *See also* Report on Behalf of the #HALTSolitary and MHASC Campaigns, *Punishment of People with Serious Mental Illness in New York State Prisons*, May 2022, *available at* https://drive.google.com/file/d/16yzZ-LJ8-JwVBvG3ptPlfu6kUfJw01CL/view.

35. *See,* for example, Fellner, *supra* note 20, at 396. *See also* Paula M. Ditton, *Special Report: Mental Health and Treatment of Inmates and Probationers*, Bureau of Justice Statistics at 9 (July 1999), https://bjs.ojp.gov/content/pub/pdf/mhtip.pdf.

36. *Id*. at 8.

37. *See* Marshall Project, We Are Witness: Tyrell Muhammad, https://www.themarshallproject.org/witnesses?page=tyrrell.

38. *Punishment of People Serious Mental Illness in New York State Prisons*, *supra* note 34, at 1.

39. *See* Correctional Association of New York, *Fact Sheet: Solitary Confinement in New York's Prisons* (2018), https://static1.squarespace.com/static/5b2c07e2a9e02851fb387477/t/5c5b0007f4e1fc1092af0b30/1549467656168/CANY+Fact+Sheet+-+Solitary+.pdf. CANY defines those with a recognized mental illness as those on the caseload of the Office of Mental Health (OMH), which provides mental health services to people incarcerated in New York's prisons. Notably, in 2017, the percentage of people in solitary confinement (28%) was higher than the percent in New York's prisons overall (21%), which means people with mental illness end up in solitary confinement at higher rates.

40. *Punishment of People Serious Mental Illness in New York State Prisons*, *supra* note 34, at 1.

41. *Id*. at 3.

42. *The Walls Are Closing in on Me: Suicide and Self-Harm in New York State's Solitary Confinement Units, 2015-2019,* A Report of the #HALTsolitary Campaign (May 2020), *available at* http://nycaic.org/wp-content/uploads/2020/05/The-Walls-Are-Closing-In-On-Me_For-Distribution.pdf.

43. Jan Ranson and Jonah E. Bromwich, *Tracking Deaths in New York City's Jail System in 2022*, N.Y. Times, Nov. 4, 2022, https://www.nytimes.com/article/rikers-deaths-jail.html.

44. *See, e.g.*, Fatos Kaba, et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, Am. J. Public Health 442 (March 2014) (finding a high incident of self-harm among people confined to solitary in Rikers).

45. Mr. Browder was jailed at Rikers for three years pre-trial until the charges against him were dismissed. During that time he was subjected to multiple beatings and confined to solitary for long periods of time, during which he frequently attempted to commit suicide. Not long after he was released, he did, in fact, commit suicide. *See* Jennifer Gonnerman, *Kalief Browder, 1993–2015,* The New Yorker, June 7, 2015, https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015.

46. The Treatment Not Jails Act has been introduced as Bill S.2881B/A.8524.

47. See Homer Venters, *supra* note 31 (noting that because of the "paramilitary" structure of prisons and jails, local leaders do not hold them accountable for using evidence-based practices or for accurately reporting information).

48. *See The Solution to America's Mental Health Crisis Already Exists*, *supra* note 14.

50 Years After Willowbrook: Mental Disabilities and the Law in New York

By Sheila E. Shea and Joseph A. Glazer

Fifty years ago, New Yorkers were shocked at television scenes from inside the Willowbrook State School in Staten Island. The images of residents crowded together in squalid conditions, with no access to humane treatment, sparked public outrage and calls for reforms. At the same time, conditions at institutions nationwide were also under attack and advocates pressed for new national policies.

But a half century later, are people with mental disabilities better off? The answer is mixed. While there has been notable progress – through the closure of institutions and the advent of community care – there is also a dark side that demands attention.

Take one example: Months pass as a young adult with complex developmental disabilities sits in a hospital bed in a local general hospital, waiting for housing in the Office for People with Developmental Disabilities (OPWDD) system.[1] Or take these examples: Across New York State, hundreds of people whose mental health needs are so severe that they lack capacity to participate in their own criminal defense face repeated state forensic hospitalization and attempts at "restoration," delaying their overall recovery and justice while costing county government taxpayers a thousand dollars a day for the cost of their confinement.[2] People with severe mental illness are increasingly incarcerated and punished rather than being afforded treatment with jails becoming de facto psychiatric facilities. In family court, adolescents with complex needs are juggled back and forth between the state's mental health and developmental disabilities systems, often with each state agency (Office of Mental Health (OMH) and OPWDD) disavowing responsibility and asserting

the other agency has jurisdiction.[3] In addition, while local health departments strive to ensure the availability of Narcan throughout our communities, the number of people dying from opioid overdoses continues to grow.[4] Fifty years after supposedly turning the corner, the intersection of mental disabilities and the justice system is still chaotic and in need of drastic reform.[5] As stated by the National Judicial Task Force to Examine State Courts' Response to Mental Illness, co-chaired by New York Chief Administrative Judge Lawrence K. Marks, state courts are urged to initiate a thorough examination of the mental health crisis and its impact on fair justice.[6]

Historical Antecedents to the Current Crisis

In New York, a turning point for the deinstitutionalization movement occurred in 1972, with breaking news of the inhumane conditions at Willowbrook, where thousands of children and adults with disabilities resided. Millions watched the news coverage and were horrified by the images.[7] Brave litigants and dedicated attorneys forced dramatic change. Parents of nearly 5,000 residents of Willowbrook filed suit in federal court.[8] The federal court ultimately found multiple failures by the state to protect the physical safety of the disabled children residing there, determined that its condition was deteriorating rather than improving, and deemed the institution "hazardous to the health, safety, and sanity of the residents."[9] Eventually, the court entered a consent judgment, which established guidelines and certain minimum requirements for the institution.[10] Yet, it would be another 12 years before the Willowbrook State School was shuttered in 1987.[11] In that interim period, in 1977, legislation was enacted dividing the Department of Mental Hygiene into three autonomous offices ostensibly to better meet the needs of discrete populations under the auspices of the department.[12]

Federal and state legislation has also advanced the mental health and addiction service system, but with mixed results. As far back as 1963, the federal Community Mental Health Act was adopted with great hope and promise.[13] President John F. Kennedy remarked upon passage of the act that "the mentally ill and the mentally retarded need no longer be alien to our affections or beyond the help of our communities." The Community Mental Health Act accelerated the process of deinstitutionalization, but what was supposed to be a comprehensive, community-based health care system collapsed under the weight of the Vietnam War, the Watergate scandal and shifting federal priorities.[14] As noted by Dr. Thomas Insel, the former director of the National Institute of Mental Health, federal policy following the enactment of the Community Mental Health Act failed people with serious mental illness, contributing to homelessness, incarceration and early mortality for this population.[15]

In 1993, New York State adopted its own Community Mental Health Reinvestment Act[16] in an effort to ensure that funds from steadily closing state psychiatric hospital beds followed people living with mental illness back to the community, but again results were mixed. For example, large numbers of people with mental illness were placed into other types of institutions, including nursing homes and adult homes. This was the result of a "conscious State policy" to discharge patients from psychiatric hospitals into these facilities "due to the absence of other housing alternatives at a time when psychiatric centers were under pressure to downsize."[17] Tragedies also preceded reform efforts. For example, in 1999, following the death of Kendra Webdale, a woman who was pushed in front of an "N" train in New York City's subway system by a man with a long history of ineffectually treated mental health needs, New York enacted an assisted outpatient treatment statute.[18] "Kendra's Law" allows for court-ordered outpatient treatment for adults with serious mental health diagnoses when it is established by clear and convincing evidence that the person is unlikely to survive safely in the community without supervision, based on a clinical determination, and has a history of lack of compliance with treatment for mental illness, among other criteria.[19] In 2007, following the death of Jonathan Carey, a 13-year-old who died in the care of staff while living at an OPWDD-operated developmental center, "Jonathan's Law" was passed.[20] The law established abuse reporting and additional accountability in the OPWDD system. Nonetheless, innumerable commentators and our own observations as lawyers lead us to conclude that the system of care is broken with unsustainable trends, particularly as they relate to workforce shortages. Incredibly, despite mental health expenditures annually in the billions of dollars, OMH maintains that 3.1 million New Yorkers live in federal and/or state designated "mental health shortage areas." [21] OPWDD reports that stakeholder feedback consistently identifies sustaining the direct care workforce as the most critical issue to support people with developmental disabilities.[22]

Creation of Task Force on Mental Health and Trauma Informed Representation

A 50-year period of sporadic reform, founded in the unabated crises and tragedy continuing to this day, has brought New York State Bar Association President Sherry Levin Wallach to see an even greater role for attorneys to join the dialogue and identify solutions to improve the lives of people with mental disabilities. President Levin Wallach's view is that it is the responsibility of the bar to help build a better, more forward-thinking way to address the intersection of law, justice and mental health. The task force's mission statement embodies these principles:

> The Task Force on Mental Health and Trauma Informed Representation is created to explore, study, and evaluate the intersection between the mental

> health crisis and our civil and criminal justice systems. There is a well-documented crisis of mental health care in the United States that has failed to meet the needs of people with mental health challenges and/or histories of trauma. People living with mental health challenges or trauma histories are increasingly incarcerated, homeless, or boarded in hospital emergency rooms. They often bear additional burdens and stigma of racial discrimination, sex or gender identity discrimination, and poverty. The task force will focus on the need for the bar to better serve individuals with mental health challenges and/or trauma histories, both adults and children, through trauma-informed practice, such as informing attorneys and the judiciary of available resources to assist in the representation of clients, by raising awareness of intersectional stigma and trauma and by recommending education on best practices in the representation of these clients. Criminal diversion and civil processes will be examined to ensure that people living with mental health challenges and/or trauma histories are able to fully participate in legal proceedings that impact their liberty and well-being. State policy and budget priorities will be examined and appropriate recommendations made.

Creating the Task Force on Mental Health and Trauma Informed Representation has NYSBA seeking out practice areas and issues where mental health, trauma, lawyers and courts all find themselves connected. Examining the current construct of the intersection of justice and mental health, our association has the benefit of 50 years of medical advancement and research, as well as better prepared attorneys and a broad recognition that the services of these systems need improved and more formal integration.

What Is Trauma Informed Representation?

The American Psychological Association defines "trauma" as "[A]n emotional response to a terrible event like an accident, rape, or natural disaster."[23] It is important to note that comprehensive research has found that multiple childhood traumatic events have lifelong impact on those subjected to them. Known as ACEs (adverse childhood experiences), a study conducted in the mid-1990s by the Centers for Disease Control and the Kaiser Foundation determined the long-term impact of childhood trauma.

The collaborative study of hundreds of thousands of Kaiser Permanente patients, led by pediatrician Dr. Nadine Burke Harris and conducted between 1995 and 1997, was the first to examine the relationship between early childhood adversity and negative lifelong health effects. "The research found that the long-term impact of ACEs determined future health risks, chronic disease, and premature death. Individuals who had experienced multiple ACEs also faced higher risks of depression, addiction, obesity, attempted suicide, mental health disorders, and other health concerns. It also revealed that ACEs were surprisingly common – almost two-thirds of respondents, part of the largely white, well-off sample, reported at least one ACE.[24]

And while the study demonstrated a high prevalence of trauma sustained by children, it must not be forgotten that adults can frequently be traumatized as well. And the impact of trauma manifests for years to come, especially if undiagnosed and unresolved.

Trauma is frequently considered to be connected to behavioral health needs, including "co-occurring disorders." According to the federal Substance Abuse and Mental Health Services Administration, 40% of Americans living with an addiction disorder have a co-occurring mental health disorder. For those whose lives intersect the criminal justice system, the frequency is higher – in some cases, much higher. Formerly known as Mentally Ill Chemically Addicted (MICA) and other less "person-first" terminology, co-occurring disorders are now recognized as common – even more so among young adults and those involved in the criminal justice system.

In few places is this overlap seen more commonly than in the criminal justice system. The American Psychological Association estimates mental illness among today's inmates to be pervasive, with 64% of jail inmates, 54% of state prisoners and 45% of federal prisoners reporting mental health concerns.[25] Substance abuse is also rampant and often co-occurring. According to the National Institute on Drug Abuse, 85% of justice-involved people have a substance use disorder. Many attribute this to "transinstitutionalization," moving a population of people from one institutional setting to another – in this case from state-operated psychiatric hospitals to prisons and jails.[26] Interestingly, this is not a new concept. As far back as 1939, the "Penrose Hypothesis" claimed an inverse relationship between the number of people in prison beds to psychiatric hospital beds. More than 80 years later, that hypothesis has neither been defeated nor confirmed, but the statistics are alarming. In 2012, for example, there were estimated to be over 356,000 people with severe mental illness in prisons and jails in the United States. In contrast, approximately 35,000 people were in state hospitals. Thus, the number of mentally ill people in prison and jails was 10 times the number of people with similar diagnoses in state hospitals.[27]

These indicators all tend toward high prevalence, and practitioners of criminal law, both prosecution and defense bars, would do well for themselves and their clients to develop a thorough and usable understanding of the array of trauma and its associated manifestations, including the litany of mental health diagnoses, treatments and co-occurring disorders. One goal of NYSBA President Levin Wallach's task force is to assist the bar in becoming truly competent in these areas.

Trauma manifestations are not limited to criminal law, or the compendium known as the Mental Hygiene Law. If criminal law is where the flash and fury of the collision of behavioral health and justice is most discernible, the impact of trauma and behavioral health adjacent to, and even remote from that intersection, is both audible and apparent. Distant from criminal law in such practice areas as elder law, contract law, tort and even real estate practices, individuals whose challenging and painful life experiences have affected them to the core will seek legal counsel.

Conclusion

As the co-chairs of the Task Force on Mental Health and Trauma Informed Representation, we are pleased to share the pages of this issue with our colleagues as we strive to help all our colleagues become more trauma-aware for themselves and their practices. Our work is informed by national and state leaders such as Stephanie Marqeusano, founder of the Harris Project. She reminds us that the use of community-based services to deliver clinical and therapeutic support to address a wide range of mental health needs can help stabilize, repair and strengthen our communities. There is considerable work to be done, and as members of the bar, we are dedicated to being part of the solution.

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Endnotes

1. Regrettably, there are abundant national and New York State examples of children and young adults with complex needs, including autism, languishing in emergency rooms waiting for inpatient psychiatric care or access to community services and supports that are not available to them. *See* William Wan, *Autistic Teen in Mental Health Crisis Waited Weeks in ER for Psychiatric Bed*, The Washington Post, Oct. 22, 2022, https://www.washingtonpost.com/dc-md-va/2022/10/20/er-mental-health-teens-psychiatric-beds/; Healthcare Association of New York State, *The Complex Discharge Delay Problem* (2021), https://www.hanys.org/communications/publications/complex_case_discharge_delays/docs/complex_case_discharge_delay_problem.pdf; *see also MHLS v. Delaney*, 38 N.Y.3d 1076 (2022).

2. The New York State statute governing the commitment of defendants who lack capacity to assist in their own defense is codified at Criminal Procedure Law (CPL) article 730. *See People v. Schaffer*, 86 N.Y.2d 460 (1995). The costs of article 730 commitments are a county charge. *See* Mental Hygiene Law § 43.03(c).

3. *See In re Justin L,* 56 Misc. 3d 1167, 1176 (Fam. Ct. 2017). Counsel for OPWDD and OMH appeared separately and "strenuously argued" that the child subject to the juvenile delinquency proceeding should not be placed with their agency.

4. As reported in the New York Times, more people are dying of drug overdoses in the United States today than at any point in modern history. The number of yearly overdose fatalities surpassed 100,000 for the first time ever in 2021. Halfway through 2022, the rate appears to be rising even further (the latest numbers come out to about 300 people per day, or 12 people every hour, on average). *See* Jeneen Interlandi, *Experts Say We Have the Tools To Fight Addiction. So Why Are More Americans Overdosing Than Ever*? N.Y. Times, June 24, 2022, https://www.nytimes.com/2022/06/24/opinion/addiction-overdose-mental-health.html.

5. *See State Courts Leading Change*, Report and Recommendations of the National Judicial Task Force To Examine State Courts' Response to Mental Illness (October 2022).

6. *Id.*

7. *See* John J. O'Connor, TV: *Willowbrook State School, "The Big Town's Leper Colony,"* N.Y. Times, Feb. 2, 1972, 78, *available at* https://timesmachine.nytimes.com/timesmachine/1972/02/02/79417203.html; *See The Minnesota Governor's Council on Developmental Disabilities, The ADA Legacy Project, Willowbrook Leads to New Protections of Rights, Moments in Disability History* 9, 2013, http://mn.gov/mnddc/ada-legacy/ada-legacy-moment9.html.

8. Historical Society of the New York Courts, *Willowbrook State School: How a Lawsuit Closed the Gates of a Notorious Institution and Opened the Doors of Opportunity to Thousands* (Sept. 22, 2022). *See* https://history.nycourts.gov.

9. *New York State Assn. for Retarded Children v. Rockefeller*, 357 F. Supp. 752, 755–56 (E.D.N.Y. 1973).

10. *See id.* at 768–70.

11. On Sept. 17, 1987, Governor Mario M. Cuomo declared the Willowbrook State School on Staten Island "officially and forever closed." *See* https://opwdd.ny.gov/willowbrook. In 1993, the Willowbrook Permanent Injunction was signed, which represents the current standard of services for Cass members.

12. 1977 N.Y. Laws ch. 978 The division of the Department of Mental Hygiene into three autonomous agencies – OMH, OPWDD and the Office of Addiction Services and Supports (OASAS) currently – may have had a laudable purpose, but many argue that the "O" agency silos have hindered the rendition of appropriate services and supports for people with dual or co-occurring diagnoses.

13. Public Law 88-164.

14. Thomas Insel, Healing Our Path From Mental Illness to Mental Health, 28–34 (2022).

15. *Id.* at 35.

16. Subd. (b). 1993 N.Y. Laws ch. 723, § 9 included community mental health reinvestment services in five-year plan and annual implementation plans and budgets. *See* Mental Hygiene Law § 41.55; Swidler RN, Tauriello JV. New York State Community Mental Health Reinvestment Act. Psychiatr Serv. 1995 May; 46(5):496-500. doi: 10.1176/ps.46.5.496. PMID: 7627677.

17. *See Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289 (E.D.N.C. 2009).

18. *See* Mental Hygiene Law § 9.60:

> Assisted outpatient treatment is defined as categories of outpatient services which have been ordered by the court pursuant to this section. Such treatment shall include case management services or assertive community treatment team services to provide care coordination, and may also include any of the following categories of services: medication; periodic blood tests or urinalysis to determine compliance with prescribed medications; individual or group therapy; day or partial day programming activities; educational and vocational training or activities; alcohol or substance abuse treatment and counseling and periodic tests for the presence of alcohol or illegal drugs for persons with a history of alcohol or substance abuse; supervision of living arrangements; and any other services within a local services plan developed pursuant to article forty-one of this chapter,1 prescribed to treat the person's mental illness and to assist the person in living and functioning in the community, or to attempt to prevent a relapse or deterioration that may reasonably be predicted to result in suicide the need for hospitalization)

19. Mental Hygiene Law § 9.60(c).

20. Mental Hygiene Law § 33.25; 2007 N.Y. Laws ch. 24, § 2, eff. May 5, 2007.

21. https://omh.ny.gov/omhweb/planning/straegic-framework/index.html.

22. The OPWDD 2023-2027 strategic plan reports a turnover rate of over 35% of the direct support personnel workforce and a vacancy rate of over 17% in these positions. *See* https://opwdd.ny.gov/strategic planning.

23. http://apa.org/topics/trauma.

24. https://burkefoundation.org/what-drives-us/adverse-childhood-experiences-aces/. Dr. Nadine Harris revitalized the original Kaiser study from the 1990 and brought ACEs into the world's view from a pediatrician lens, but the original authors are adult docs, Vincent Felitti and Robert Anda. https://www.ajpmonline.org/article/S0749-3797(98)00017-8/fulltext.

25. http://apa.org-incarceration nation.

26. Sol Wachtler & Keri Bagala, *From the Asylum to Solitary: Transinstitutionalization*, 77 Alb. L. Rev. 915 (2014).

27. E. Fuller Torrey, et al, The Treatment of Persons with Mental Illness in Prisons and Jails: A State Survey (2014).

It's Time To Take 'Hygiene' Out of the Mental Hygiene Law

By Chris Liberati-Conant

"I'm clean. I'm not supposed to be here. I'm clean." Derek pleaded with me in the doorway of his room on the locked inpatient psychiatric unit at St. Francis Hospital in Poughkeepsie. He pressed on: "I did my laundry this morning. I brushed my teeth. These other people stink. I take care of myself." I tried to explain to him that he was not locked up because of his personal hygiene, but because the doctors at the hospital had determined that he was dangerous to himself or others on account of his mental illness. He shoved his admission paperwork at me. Involuntary admission forms repeat the term "mental hygiene" multiple times.[1] "Hygiene. That means clean. So now you're saying I have a hygiene problem." For a green Mental Hygiene Legal Service attorney like me, the task of explaining to him why he was not allowed to leave the hospital of his own will was already fraught without the additional burden of the archaic, belittling names of the Mental Hygiene Law and the Mental Hygiene Legal Service.

Derek was right to be confused and offended. What the heck is "mental hygiene"? In its current use, it acts as an anachronistic euphemism for "mental health." As obscure as it is now, the mental hygiene movement began as a progressive response to asylum conditions before becoming the dominant force in mental health in the early 20th century. It had its genesis in the idea that, like cholera, mental illness could be eradicated through prophylactic public health practices. It shared with the asylums it sought to reform the fundamental idea that clean living was a key to mental health policy. Worse, it shared fundamental beliefs and associations with the eugenics movement that led to mass sterilization of individuals in state mental hospitals and homes for the developmentally disabled. Because the term "mental hygiene" suggests that people with mental illnesses are unclean and because it comes from a movement that advocated human breeding and was deeply entangled with eugenics, we should remove it from the laws and institutions of New York State.

Asylums Promise To Solve the Problem of Mental Illness

A rough understanding of the asylum system is necessary to understand the mental hygiene movement that the evolution of which would become the Mental Hygiene Law. State-run asylums spread throughout Europe and the United States at the beginning of the 19th century. Before the advent of state-run asylums, non-wealthy individuals with mental illness and developmental disabilities were cared for by family. Failing that, people with mental illnesses, along with people described as "feeble-minded," were confined to jails and poorhouses.[2]

Asylums sought to treat mental illness through "moral treatment," which supposed that fresh air, rural settings, isolation from society and wholesome work and living would return patients to sanity.[3] Treatment could not be targeted toward any particular illness because no good classification of mental illnesses could be conceptualized, partly owing to the absence of any evidence of the causes of the symptoms afflicting asylum residents.[4] To return the patients to a proper relation to society, newly admitted patients and patients with bad behavior occupied the farthest reaches of the asylum wing. They had to earn their way through good behavior to beds closer to the central administrative hub, where the superintendent resided.[5]

Origins of the Mental Hygiene Law

New York's first public asylum for the care of the mentally ill was at the New York Hospital, which built with state funding a separate structure for this purpose in 1808.[6] In 1827, the New York State Legislature passed An Act Concerning Lunatics, which provided in part that

> [n]o lunatic shall be confined in any prison, goal [sic] or house of correction, or confined in the same room with any person charged with or convicted of any criminal offence. But he shall be sent to the asylum in New York, or other place provided for the reception of lunatics by the county superintendent (of the poor).[7]

New York opened its first state-run asylum in Utica in 1843.[8] The, next, Willard, opened in 1869.[9] The state could not add beds quickly enough to provide housing and treatment to its citizens with serious mental illnesses. Responding to the apparent burgeoning mental health crisis, the Legislature created the office of Commissioner of Lunacy in 1873 and codified the law related to mental health, including care and custody of "the insane," management of asylums and the powers and duties of the Commissioner of Lunacy in 1874.[10] Shortly thereafter, the state asylums were renamed and reorganized as state hospitals.[11] In 1908, the state took responsibility from the municipalities for the care of people with mental illness.[12] By 1912, over 30,000 patients were in the custody of 14 state hospitals, "exclusive of Matteawan and Dannemora State Hospitals for the Criminally Insane."[13]

The Eugenics Solution

In New York as elsewhere, the utopian dream that mental illness could be eradicated through benevolent incarceration proved false.[14] Instead of ridding the population of "defectives," asylums filled with patients faster even than the growth of population.[15] Asylum directors and psychiatrists who tracked the supposed causes of each patient's mental illness and compared their data were confounded by the unreliability of their information, which generally came from reports of family members.[16] Heredity, on the other hand, not only matched their preconceptions, but promised more empirical data in the form of family trees, by which they thought they could map the evolution and degeneration of supposed defective and exceptional human stock.[17]

The mainstream "science" of eugenics made the solution to the exploding state hospital censuses obvious to many scientists and policy makers.[18] The better classes should reproduce, and the undesirables should be prevented or discouraged from reproducing.[19] Legislators were persuaded – states could save a lot of money if they no longer had to house and care for the seriously mentally ill and developmentally disabled.[20] Conveniently, the "insane" and "feeble-minded" of the inferior classes were at the disposal of states and counties, locked inside public asylums.[21]

New York enacted a sterilization law in 1912. Under that law, the state had authority to sterilize individuals living in state mental hospitals, the "feeble-minded," confirmed criminals and "the dependent."[22] The state compelled 18 individuals to undergo sterilization before the Supreme Court ruled the statute unconstitutional on the ground of equal protection.[23] After reviewing the arguments and evidence presented by eugenicists in favor of sterilization, the court held that the state violated the rights of state hospital residents to equal protection of the laws by requiring the sterilization of "feeble-minded" in state hospitals but not the "feeble-minded" who resided elsewhere.[24]

Buck v. Bell: Oliver Wendell Holmes' Full-Throated Endorsement of Eugenics

Many other states had sterilization statutes. In former slave-holding states, sterilization efforts were closely linked with racial control as well.[25]

Virginia's sterilization statute empowered the superintendents of state mental hospitals to order the sterilization of "any patient afflicted with hereditary forms of insanity, imbecility, etc." upon a determination by the superintendent that to do so would be in the best interest of the individual and society.[26]

Carrie Buck was a young woman who lived at the Virginia State Colony for Epileptics and Feebleminded.[27] She lost her parents young and, when she was 17, she reported that her foster parents' nephew had raped her. After she had a child, she was placed in the Virginia Colony in 1924.[28] The superintendent of the Virginia Colony, Dr. Albert Priddy, petitioned for Buck's sterilization soon after her admission. Albert Strode represented the state. Irving Whitehead was appointed to represent Buck. It appears the fix was in, as Priddy, Whitehead and Strode were longtime political and business confederates. Strode and Priddy campaigned together for sterilization laws, and Whitehead sat on the board of the Virginia Colony, regularly approving sterilizations in that position.[29] The state's experts, which included a prominent eugenicist, did not examine Buck, and Whitehead failed to submit expert evidence on her behalf. No evidence was produced that her child was an "imbecile."[30]

Holmes brushed aside Buck's due process argument and the same equal protection argument that prevailed in New York, lightly dressing his prejudice in a cloak of utilitarianism:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.

The court relied on *Jacobson v. Massachusetts*,[31] which validated the state's power to compel vaccinations: "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough."[32] A single justice dissented, without opinion.

As many as 28,000 people were sterilized in the United States.[33] Holmes's reasoning foreshadowed the pseudo-scientific Nazi ideology that led to the T4 program, which exterminated "useless eaters" housed in state psychiatric hospitals.[34] In 1942, the Journal of American Psychiatry published a debate on the merits of killing "hopelessly defective" children.[35] Between 1939 and 1945, the Nazis murdered as many as 275,000 "mental defectives."[36] They later employed the same extermination techniques in the Holocaust.[37]

Mental Hygiene Brings Reform but Can't Let Go of Eugenics

The mental hygiene movement sought to reform asylums and to study and prevent mental illness. Two of its early standard-bearers were Clifford Beers, author of the memoir "A Mind That Found Itself," and psychiatrist Adolf Meyer. Beers and Meyer were charter members of the National Committee on Mental Hygiene, founded in 1909.[38] Initially the movement focused on reform of the asylum system, but they soon shifted their focus outside the asylum.[39]

Because proponents of the mental hygiene movement believed mental illness was largely incurable once it manifested, they looked to prevent its emergence in the community.[40] Just as communicable diseases could be wiped out through public health initiatives, so too could mental illness, as if psychosis was carried by a social pathogen.[41] Influenced by the emerging field of psychology, they believed early childhood maladjustment led to the emergence of mental illness, and urged parents and teachers to watch for fidgeting, excessive shyness and stammering as signs of incipient mental illness.[42] They supported juvenile courts, developed programs for parents and advocated for nursery schools.

They pioneered the field of psychiatric social work and trained visiting teachers to train classroom teachers.[43] Progressive as it may have been, the mental hygiene movement had little place in it for people with mental illnesses.[44] Instead, much like the state hospitals, it was an arm of psychiatry, enforcing societal norms by emphasizing moral and social development in children in general and in schools in particular.[45]

Despite believing that heredity was not the most significant determinant of the emergence of mental illness, prominent mental hygienists like Meyer were also eugenicists.[46] It is here that the mental hygiene movement is linked with what became the racial hygiene movement in Germany. Eugenicists believed society was sick, tainted by immigrants and defectives like people with mental illnesses who were degrading Anglo-Saxon stock.[47] The National Committee on Mental Health agreed that the marriage and propagation of immigrants and defectives was an epidemic in need of control.[48] Thus, while the organization did not advocate sterilization, it did advocate for human breeding by discouraging supposedly lower-quality individuals from reproducing and encouraging the better classes to reproduce. Further, Meyer was a board member of the infamous Eugenics Records Office in Cold Spring Harbor, New York, which was the Carnegie-funded hub of eugenics research in this country, and which shared research with the proto-Nazi racial hygiene movement in Germany.[49]

Following World War I, the mental hygiene movement became a dominant voice in public mental health policy.[50] Thus, the Legislature abandoned the outdated term "lunacy" when it created the Department of Mental Hygiene in 1926 and the Mental Hygiene Law in 1927.[51]

The mental hygiene movement faded following the Second World War as new medications and treatment models emerged.[52] The term "mental hygiene" has nevertheless remained embedded in the law, surviving the most recent re-codification of the Mental Hygiene Law in 1973.[53]

Conclusion

Just as people with mental illnesses were long referred to in the law as "lunatics," people with developmental disabilities were described "feeble-minded." That term gave way to the once-progressive term "mental retardation." Over time, the term "retardation" became pejorative. Thus, just a few years ago, the Legislature renamed the Office for People with Mental Retardation as the Office for People with Developmental Disabilities and removed the term "mental retardation" from the law.[54]

And in 2021, the Legislature removed from the law the archaic and offensive terms "lunacy" and "lunatic" and replaced the phrase "mentally ill person" with the person-first phrase "person with a mental disability."[55] As for what should replace "mental hygiene," the phrase "mental health" is an obvious candidate. The best people to ask, though, are the people subject to the law and their advocates.[56]

There are many difficult issues related to mental health. This is not one of them. The mental hygiene movement that gave its name to our law was closely associated with eugenics and promoted the idea that clean living could prevent mental illness. That the mental hygiene movement sought to rid humanity of defectives by education and breeding instead of sterilization and murder does little to mitigate the inappropriateness of our continued use of the term.[57] It is confusing and potentially offensive to anyone who does not know its history, and to who anyone who does, it is an unpleasant reminder of the early 20th century psychiatric establishment that sought to eradicate the individuals to whom it applies.

That we still must refer on a day-to-day basis to the Mental Hygiene Law is an outrage that continually stigmatizes and marginalizes the people on whom the law operates.

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Endnotes

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5. *Id.* at 72.
6. Henry M. Hurd, The Institutional Care of the Insane in the United States and Canada, Vol. III, 112 (Johns Hopkins Press 1916)..
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11. *Id.* at 126.
12. Bonita Weddle, Mental Health in New York State, 1945-1998, An Historical Overview, New York State Archives 1998, Pub. No. 70, *available at* http://www.archives.nysed.gov/common/archives/files/res_topics_health_mh_hist.pdf.
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15. Porter at 79, 94–95, 99.
16. *Id.* at 69.
17. *Id.* at 227, 232.
18. *Id.* at 30, 126–27, 218, 224.
19. Grob at 160–61; Porter at 334–35.
20. Grob, at 160–61.
21. *Id.* at 161.

22. Anne Harrington, Mind Fixers: Psychiatry's Troubled Search for the Biology of Mental Illness (W.W. Norton & Co. 2019); *Osborn v. Thomson*, 103 Misc. 23 (Sup. Ct., Albany Co. 1918).

23. Lutz Kaelber, Presentation: *Eugenics: Compulsory Sterilization in 50 American States*, Presentation at the 2012 So-cial Science History Association, https://www.uvm.edu/%7Elkaelber/eugenics/NY/NY.html (last accessed Dec. 4, 2022).

24. *Osborn*, 103 Misc. 23.

25. Harrington at 52.

26. *Buck v. Bell*, 274 U.S. 200, 205 (1927).

27. *Id.*

28. Phillip Thompson, *Silent Protest: A Catholic Justice Dissents in* Buck v. Bell, The Catholic Lawyer, Vol. 43, No. 1, Spring 2004.

29. *Id.* at 141; Harrington at 53.

30. *Id.*

31. 197 U. S. 11 (1905).

32. *Buck*, 274 U.S. at 207.

33. Harrington at 53.

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36. See Berenbaum, *supra* note 34; Harrington at 53.

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44. Grob at 156; Richardson at 57.

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49. Grob at 160; Porter at 263–64; Harrington at 51–52.

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Guardianship's Article 17-A:

Marooned in Time and in Need of Reform

By Sheila E. Shea

In cases where a person is alleged to be unable to make his or her own decisions, the law has traditionally responded by empowering surrogates, including legal proxies or guardians, to act for or on behalf of the individual. Surrogate decision-making regimes have increasingly been scrutinized and criticized, however, for curtailing the rights of people with disabilities to autonomy and self-determination.[1] In 2006, the United Nations Convention on the Rights of Persons with Disabilities recognized legal capacity as a "human right" that persons with disabilities can enjoy "on an equal basis with others in all aspects of life,"[2] and that persons with disabilities should be provided with "the support they may require in exercising their legal capacity."[3] Article 12 of the U.N. convention is widely recognized as the cornerstone for supported decision-making and is regarded by some as a mandate to abolish surrogate decision-making regimes.[4]

In 2016, with a grant from the Developmental Disabilities Planning Council, Supported Decision-Making New York[5] was formed as a five-year pilot project to explore

the use of supported decision-making in New York. In 2021, a bill to codify supported decision-making and a supported decision-making agreement was first proposed by the Office for People With Developmental Disabilities.[6] On July 26, 2022, Mental Hygiene Law Article 82 was enacted,[7] and New York joined 12 jurisdictions in the United States with Supported Decision-Making regimes.[8] Article 82 will be effective upon promulgation of implementing regulations by the Office for People With Developmental Disabilities and will apply to people with developmental disabilities.[9]

The New York State Bar Association Task Force on Mental Illness and Trauma Informed Representation is studying supported decision-making and several other sections and committees of NYSBA have a keen interest in this decision-making model. This article provides an overview of Article 82 and contrasts it with Article 17-A of the Surrogate's Court Procedure Act, the discrete guardianship statute for people with developmental disabilities. The article closes with a call to reform 17-A now that supported and surrogate decision regimes for people with developmental disabilities coexist in New York State. Specifically, Article 17-A should be amended to cross-reference supported decision-making as an available resource, making guardianship unnecessary where it can meet the individual's needs for assistance. Further, because Article 17-A guardianship remains an available remedy in New York, guardians should be informed of supported decision-making principles and the law reformed to ensure that the due process rights of people subject to Article 17-A are protected.

Article 82 of the Mental Hygiene Law

Supported decision-making, as codified in New York, means:

> a way by which a decision-maker utilizes support from trusted persons in their life, in order to make their own decisions about their life, including, but not limited to, decisions related to where and with whom the decision-maker wants to live; decisions about finances; the services, supports, and health care the decision-maker wants to receive; and where the decision-maker wants to work.[10]

The decision-maker is defined as an adult (with developmental disabilities) who has executed, or seeks to execute, a supported decision-making agreement.[11] A supporter is an eligible adult who has voluntarily entered into a supported decision-making agreement with a decision-maker, agreeing to assist the decision-maker in making their own decisions as prescribed by the agreement.[12] A supporter shall not be considered a surrogate or substitute decision-maker for the decision-maker and shall not have the authority to sign legal documents on behalf of the decision-maker or bind the decision-maker to a legal agreement.[13]

A "facilitator" means an individual or entity authorized by the Office for People With Developmental Disabilities who works with and educates the decision-maker and his or her supporter or supporters about supported decision-making.[14] A supported decision-making agreement is an agreement a decision-maker enters into with one or more supporters "that describes how the decision-maker uses supported decision-making to make their own decisions."[15] The agreement can either be an informal arrangement between the decision-maker and his or her supporter or supporters or one that has been reviewed and signed by a facilitator, in accordance with the process that will be prescribed by regulations.[16] Significantly, the supported decision-making agreement is not intended to be "just a piece of paper," but rather a document that memorializes a flexible process for decision-making that can endure for as long as the decision-maker desires.[17]

Approximately 140 people were enrolled in the supported decision-making pilot, and Supported Decision-Making New York continues to operate under new funding streams engaged after the expiration of the original five-year grant.[18] On Nov. 11, 2022, Supported Decision-Making New York reported on its first post-legislation case, where a 31-year-old man (Ryan) living in Fairport, New York, was successful terminating a 17-A guardianship and having his rights restored by the Monroe County Surrogate's Court. Ryan was represented in court by Disability Rights New York, the federal protection and advocacy agency in New York State,[19] and a Supported Decision-Making New York partner. Ryan's legal restoration of rights was preceded in 2021 by the execution of a supported decision-making agreement after a period of facilitation.

Drafting the Supported Decision-Making Agreement

Article 82 does not codify a particular form that must be used in order for a supported decision-making agreement to be valid. However, the law does identify the elements that are required for such an agreement to be effective. A supported decision-making agreement must:

- be dated and in writing;
- designate the decision-maker, and at least one supporter;
- list the categories of decisions with which a supporter is authorized to assist the decision-maker;
- list the kinds of support that each supporter may give for each area in which they are designated as a supporter;
- contain an attestation that the supporters agree to honor the right of the decision-maker to make their own decisions in the ways and areas specified in the agreement, respect the decision-makers' decisions,

and, further, that they will not make decisions for the decision-makers;

- state that the decision-makers may change, amend, or revoke the supported decision-making agreement at any time for any reason:
- be signed by all designated supporters; and
- be executed or endorsed by the decision-maker in the presence of at least two adult witnesses who are not also designated as supporters, or with the attestation of a notary public.[20]

There are permissive aspects of drafting a supported decision-making agreement. For example, the agreement may allow the decision-maker to appoint more than one supporter; authorize a supporter to obtain educational, medical and clinical information; authorize a supporter to share information with any other supporter or others named in the agreement; or detail any other limitations on the scope of a supporter's role that the decision-maker deems important.[21] In order for the supported decision-making agreement to be enforceable and limit liability, it must also be signed by a facilitator or educator, include a statement that the agreement was made in accordance with a recognized facilitation and/or education process and include an attestation by the decision-maker that a particular decision has been made in accordance with the support described in it.[22]

Implementation and Regulations

Within one year of the enactment of the supported decision-making legislation, the Office for People With Developmental Disabilities is required to promulgate the rules and regulations necessary to implement Article 82 for adults who receive, or are eligible to receive, services that the office operates, certifies, funds or approves.[23] The regulations are to define and prescribe a facilitation or education process to precede the execution of a supported decision-making agreement in New York.[24] Limitations of liability only apply where an agreement has been executed following the facilitation process prescribed by the Office for People With Developmental Disabilities.[25] While awaiting regulations, implementation of supported decision-making agreements in other jurisdictions has typically included: (1) identifying the domains of life in which the decision-maker needs and desires help – for example, financial or medical decision-making; (2) identifying the kinds of support that are needed and desired – for example, communication, interpretive, or representational support; and (3) establishing a formal supported decision-making agreement between the decision-maker and supporters where the decision maker retains the right to make decisions and have them recognized by law.[26]

Currently, supported decision-making in New York only applies to people with developmental disabilities. Article 82 contains two provisions signaling the potential for broader application of this decision-making model, however. The intent of the Legislature is to "strongly urge relevant state agencies and civil society to research and develop appropriate and effective means of support for older persons with cognitive decline, persons with traumatic brain injuries, and persons with psychosocial disabilities, so that full legislative recognition can also be accorded to the decisions made with supported decision-making agreements by persons with such conditions, based on a consensus about what kinds of support are most effective and how they can best be delivered."[27] Further, MHL § 81.15 states that "additional regulations related to this article may be promulgated by state agencies whose service populations may benefit from the implementation of supported decision-making."[28]

Presumably, NYSBA sections and committees will continue to study how supported and surrogate decision-making models will be reconciled in New York State, particularly in hospitals and other health care settings.[29] The sustainability of supported decision-making facilitation is another issue being closely scrutinized. Toward this end, a majority of people with developmental disabilities who might desire and benefit from these agreements receive Medicaid-funded services, and authorization currently exists allowing people enrolled in the Self-Directed Services program to use funds from their budgets for facilitation.[30] Finally, an evaluation of the Supported Decision-Making New York pilot is expected to be released by the Burton Blatt Institute at Syracuse University.[31] The SDM Process and Participant Outcomes Evaluation is part of the original supported decision-making grant funded by the Developmental Disabilities Planning Council and is designed to study the pilot and education campaign to determine its strengths and assess replicability.[32] As stated by the council, the final evaluation of the pilot is needed to

> demonstrate that supported decision-making is a functioning alternative to surrogate decision-making and should be exhausted prior to anyone seeking, or being granted, guardianship over an individual with intellectual and/or developmental disabilities (IDD). The goal will be to expand the models statewide and to serve as a model for other states exploring issues of guardianship.[33]

Reform of Guardianship Statutes in New York Remains Imperative

The legislation does not cross-reference or make corresponding amendments to either of New York's existing guardianship statutes – Article 81 of the MHL and SCPA Article 17-A. Professor Nina A. Kohn, who has written extensively on this subject, urges that: "Guardianship statutes should be amended to explicitly prohibit the use

of guardianship where supported-decision-making could meet the individual's needs. Doing so would make it clear that the use of support is not an indication of a need for guardianship, but rather that support can obviate the need for guardianship."[34]

Guardianship in New York

The general adult guardianship statute in New York is codified at Article 81 of the Mental Hygiene Law. The purpose of Article 81 is to satisfy either personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person, which takes in account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life.[35] A discrete statute exists, however, that may be invoked for people alleged to be in need of a guardian by reason of an intellectual or other developmental disability.[36] That statute, codified at Article 17-A of the Surrogate's Court Procedure Act, is a plenary statute the purpose of which at its inception in 1969 was largely to permit parents to exercise continued control over the affairs of their adult children with disabilities. In essence, the statute rested upon a widely embraced assumption that "mentally retarded" people were perpetual children.[37] Under New York law, a person with developmental disabilities can be subject to either guardianship statute, despite the considerable substantive and procedural variations between Article 81 and Article 17-A. An injustice arises, as a result, because a petitioner for guardianship can choose between two statutes and petitioner's choice will determine the due process protections to be afforded to a respondent with developmental disabilities.[38]

Article 17-A is marooned in time and a counterweight to progressive principles that typically emerge in New York State and which are reflected in the newly enacted Mental Hygiene Law Article 82. Last year, the NYSBA Disability Rights Committee issued a report arguing that there is an urgent need to reform Article 17-A.[39] The committee maintained that there are 14 general principles that a guardianship statute for adults with intellectual and developmental disabilities should recognize[40]:–

1. Neither the alleged developmental disability nor the age of the individual alleged to have a developmental disability should be the sole basis for the appointment of a guardian. Rather, the individual's ability to function in society with available supports should be the focus of the court's inquiry into the need for a guardian.
2. The appointment of a guardian must be designed to encourage the development of maximum self-reliance and independence in the individual. The standard for appointment should be that the person is unable to provide for personal needs and/or property management with available supports, and the person cannot adequately understand and appreciate the nature and consequences of such inability.
3. The appointment of a guardian must be necessary and the least restrictive form of intervention available to meet the personal and/or property needs of the individual as determined by a court.
4. A guardianship petition must allege the other available resources for decision-making, if any, that have been considered by the petitioner and the petitioner's opinion as to their sufficiency and appropriateness, or lack thereof. Other resources include, but are not limited to, powers of attorney, health care proxies, trusts, representative and protective payees and supported decision-making.
5. All persons alleged to be in need of the appointment of a guardian are entitled to due process protections including, but not limited to, notice of the proceeding in plain language and right to counsel of their own choosing or the appointment of counsel guaranteed at public expense.
6. A guardian should not be appointed absent a hearing where the person alleged to be in need of a guardian is present. The person's appearance at the hearing may be dispensed with in exceptional

circumstances at the court's discretion and in accordance with statutory standards. The person has the right to a jury trial.

7. The need for the guardianship must be established by clear and convincing evidence of the person's functional limitations that impair the person's ability to provide for personal needs; the person's lack of understanding and appreciation of the nature and consequences of his or her functional limitations; the likelihood that the person will suffer harm because of the person's functional limitations and inability to adequately understand and appreciate the nature and consequences of such functional limitations; and necessity of the appointment of a guardian to prevent such harm.
8. The powers of the guardian should be identified in the order/decree issued by the court and tailored to meet the needs of the individual in the least restrictive manner possible. The person subject to guardianship retains any powers not expressly conveyed to the guardian.
9. The individual must be included in all decisions to the maximum extent possible and practicable, in order to encourage autonomy. The guardian should be encouraging the development of maximum self-reliance and independence in the individual.
10. The duties of the guardian should be specified in the order or decree. Among other things, the guardian's duty is to make decisions that give maximum consideration to the individual's preferences, wishes, desires, and functioning level. A guardian should protect the individual from unreasonable risks of harm, while supporting and encouraging the individual to achieve maximum autonomy.
11. The duration of a guardianship should be determined by the court and conform to the proof adduced at the hearing. For instance, time limited guardianships may be appropriate including where a guardianship is sought for a young adult between the ages of 18 and 25. Where a guardianship of limited duration has been ordered by the court, any application to extend the guardianship should require proof by clear and convincing evidence by the petitioner that it is necessary to continue the guardianship.
12. A person under guardianship has a right to seek review of the guardianship and restoration of rights. There must be a clear process to initiate restoration that permits the person under guardianship to initiate and obtain access to counsel at public expense.
13. The court should retain jurisdiction over the guardianship and entertain modification and termination proceedings where the burden of proof shall be on the person objecting to discharge or seeking increased powers for the guardian rather than on the respondent.
14. The person or entity appointed guardian must be subject to monitoring and oversight by the court. For instance, guardians should periodically file reports as to their activities.

While Surrogate's Court Procedure Act's Article 17-A cries out for reform, it remains a surrogate decision-making remedy in New York State. As stated in the Practice Commentaries to the article, the statute is revered by parents who often commence guardianship applications without the assistance of counsel and at less expense than a typical Article 81 proceeding.[41] Also, many 17-A proceedings are not challenged, causing some to argue that the relative ease in proceeding be retained. Nonetheless, even where a guardianship proceeding is not contested, the relief granted by the court should be informed by the functional abilities of the respondent and constitute the least restrictive form of intervention.[42] Recently reported cases where SCPA Article 17-A guardianships were terminated reveal that the plenary nature of the 17-A adjudication is often not consistent with the lived experience of people with developmental disabilities.[43]

With the enactment of Mental Hygiene Law Article 82, New York now has both supported and surrogate decision-making models for a discrete population: people with developmental disabilities. Surrogate's Court Procedure Act Article 17-A and Mental Hygiene Law Article 82 stand in stark contrast to one another. Article 17-A results in a plenary adjudication of the need for a guardian with a complete loss of civil rights. Article 82, by comparison, recognizes that "a person's right to make their own decisions is critical to their autonomy and self-determination" and that people with developmental disabilities "are often denied that right because of stigma and outdated beliefs about their capability."[44] Given the passage of Mental Hygiene Law Article 82, it is time to amend and modernize Surrogate's Court Procedure Act Article 17-A. The guardianship statute should provide that, where supported decision-making can meet the individual's needs, guardianship is to be avoided as unnecessary. Further, because Article 17-A guardianship remains an available remedy in New York, guardians should be informed of supported decision-making and be guided by its principles. Finally, Article 17-A must be reformed to ensure that the constitutional rights of people subject to the statute are protected.

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Endnotes

1. Emily Largent, Andrew Peterson, *Supported Decision-Making in the United States and Abroad*, 23 J. Health Care L. & Policy 271 (2021).

2. *Available at* https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html.

3. *Id.* Supports will be unique to each individual and may involve "gathering relevant information, explaining that information in simplified language, weighing the pros and cons of a decision, considering the consequences of making – or not making – a particular decision, communicating the decision to third parties, and assisting the person with a disability to implement the decision." Kristin Booth Glen, *What Judges Need To Know About Supported Decision-Making, And Why*, 58 No. 1 Judges' J. 26, 27 (2019).

4. Largent and Peterson, *Supported Decision-Making in the United States and Abroad, supra* note 1, at 283–84.

5. SDMNY was originally composed as a "consortium of Hunter College/CUNY; the New York Alliance for Inclusion and Innovation (formerly NYSACRA), a statewide association of provider agencies; and Arc Westchester, a large provider organization." https://sdmny.org/the-sdmny-project/history-and-goals/.

6. *See* A.8586; S.7107 (2021).

7. 2022 N.Y. Laws ch. 41.

8. *See U.S. Supported Decision-Making Laws*, Supported Decision-Making, https://supporteddecisions.org/resources-on-sdm/state-supported-decision-making-laws-and-court-decisions.

9. Regarding the effective date of MHL Article 82, the chapter amendment provides: This act shall take effect ninety days from the date that the regulations issued in accordance with section one of this act appear in the New York State Register, or the date such regulations are adopted, whichever is later; and provided that the commissioner of mental hygiene shall notify the legislative bill drafting commission upon the occurrence of the appearance of the regulations in the New York State Register or the date such regulations are adopted, whichever is later, in order that the commission may maintain an accurate and timely effective data base of the official text of laws of the state of New York in furtherance of effectuating the provisions of section 44 of the legislative law and section 70–b of the public officers law.

10. MHL § 82.02(i).

11. MHL § 82.02(d).

12. MHL § 82.02(k).

13. MHL § 82.05(d). However, a supporter may, if such authority is expressly granted in the SDMA, provide a co-signature together with the decision-maker acknowledging the receipt of statements of rights and responsibilities in order to permit the decision-maker to participate in programs and services that the decision-maker chooses. *Id*.

14. MHL § 82.02(m). Facilitators are trained to help decision-makers "map" decisions they are already making, from simple to more complicated or impactful, with the basic structure/process of making any decision essentially the same: gathering information; understanding that information; exploring possible alternatives; considering the consequences of making a particular decision – or not making it; weighing alternatives; communicating the decision to third parties; and implementing the decision. *See* Cathy Castanzo, Kristin Booth Glen, Anna Krieger, *Supported Decision-Making: Lessons Learned from Pilot Projects*, 72 Syracuse L. Rev. 99, 147 (2022).

15. MHL § 82.02(j).

16. MHL §§ 82.02, 82.09, 82.11, 82.15.

17. *See* Kristin Booth Glen, *Supported-Decision-Making From Theory to Practice: Further Reflections on an Intentional Pilot Project*, 13 Alb. Gov't L. Rev. 94 (2019–2020).

18. Cathy Castanzo, Kristin Booth Glen, Anna Krieger, *Supported Decision-Making: Lessons Learned from Pilot Projects*, 72 Syracuse L. Rev. 99 (2022).

19. *See* 42 U.S.C. § 15043.

20. MHL § 82.10(b).

21. MHL § 82.10(c).

22. MHL § 82.12.

23. MHL § 82.15(a).

24. MHL § 82.09.

25. A person shall not be subject to criminal or civil liability and shall not be determined to have engaged in professional misconduct for an act or omission if the act or omission is done in good faith and in reliance on a decision made by a decision-maker pursuant to a duly executed SDMA. Further, any health care provider that provides health care based on the consent of a decision-maker, given with support or assistance provided through a duly executed SDMA, shall be immune from any action alleging that the decision-maker lacked capacity to provide informed consent. Finally, any public or private entity, custodian, or organization that discloses personal information about a decision-maker in reliance on the terms of a duly executed SDMA to a supporter authorized by the terms of the SDMA to assist the decision-maker in accessing, collecting, or obtaining that information, shall be immune from any action alleging that it improperly or unlawfully disclosed such information to the supporter unless the entity, custodian, or organization had actual knowledge that the decision-maker had revoked such authorization (*see* MHL § 81.12(a)–(d)).

26. Largent and Peterson, *Supported Decision-Making in the United States and Abroad, supra* note 1 at 276.

27. MHL § 82.01(d).

28. MHL § 81.15; *see* Morgan K. Whitlatch and Rebekah Diller, *Supported Decision-Making: Potential and Challenges for Older Persons*, 72 Syracuse L. Rev. 165 (2022).

29. *See e.g.,* Articles 29-C and 29-CC of the Public Health Law and SCPA 1750-b. Health care agents and other legally authorized surrogates are empowered to act when the principal is deemed to lack capacity upon the examination of a physician or other health care practitioner.

30. Castanzo, Glen, Krieger, *Supported Decision-Making: Lessons Learned from Pilot Projects, supra* note 14, at 157.

31. *See Supported Decision-Making Process and Participant Outcomes Evaluation*, Developmental Disabilities Planning Council, https://ddpc.ny.gov/supported-decision-making-process-and-participant-outcomes-evaluation-0.

32. *Id.*

33. *Id.*

34. *See* Nina Kohn, *Legislating Supported Decision-Making*, 58 Harv. J. Legis. 313 (2021).

35. MHL § 81.01.

36. SCPA 1750, 1750-a. An Article 17-A proceeding may also be commenced for a person alleged to have a traumatic brain injury (*see* SCPA 1750-a(l)).

37. To elaborate, there is an undue emphasis under Article 17-A that people with developmental disabilities are children forever. For example, Article 17-A also incorporates Article 17 (guardians for minors) by reference (*see* SCPA 1761: "To the extent that the context thereof shall admit, the provisions of article seventeen of this act shall apply to all proceedings under this article with the same force and effect"). Further, Article 17-A provides that the standard for appointment of a guardian is "best interests," the same standard applicable to minors in Article 17 (*see* SCPA 1701: "the court may appoint a permanent guardian of a child if the court finds that such appointment is in *the best interests* of the child." (emphasis added)). Finally, there is no required hearing under Article 17 or 17-A of the SCPA (*see* SCPA 1706, 1754).

38. Sheila Shea and Carol Pressman, *Guardianship: A Civil Rights Perspective*, 90 N. Y. St. B. J. 19 (2018).

39. *See* November 2021 Report of the Disability Rights Committee (DRC), Guardianship for People with Developmental Disabilities: Examination and Reform of Surrogate's Court Procedure Act Article 17-A is a Constitutional Imperative. The DRC report has not been reviewed or approved by the NYSBA House of Delegates, but remains a position paper of the Committee.

40. *Id.*

41. *See* Margaret Valentine Turano, Practice Commentaries, McKinney's Cons. Laws of N.Y. SCPA 1750: "Admittedly, the Article 17-A guardianship is not for every disabled person . . . On the other hand, the Article 17-A guardianship gives modest families access to affordable judicial process."

42. *See In re Robert C.B. v. Callahan*, 207 A.D.3d 464 (2d Dep't 2022).

43. *See In re Richard S.H.*, 2022 N.Y. Slip. Op. 22328 (Surr. Ct., Westchester Co. Oct. 26, 2022). The respondent in this case attended college and graduate school and aspired to a career as a social worker to assist children with autism.

44. *See* MHL § 82.01.

Cryptocurrency and M&A Transactions

By Dustin M. Dorsino

If you tuned in to the Super Bowl last year, then you probably saw Coinbase's 60-second commercial featuring a colorful QR code bouncing around on your screen. If you are a normal person, you might have rushed to your phone to scan the QR code and look up what Coinbase is. If you are like me, after your friends screamed "free bitcoin," then you might have thought about the increase in mainstream popularity of cryptocurrency and how it might translate to your job as a mergers and acquisitions attorney. No? Just me? In any event, over the last few years, the rate with which M&A deals have been funded by cryptocurrency has more than doubled – partially due to the COVID-19 pandemic and the shift to a remote working environment. Today, almost all major university endowments and many hedge funds now hold digital assets as part of their portfolios. As the widespread use and ownership of digital assets will only grow from here, the M&A world needs to prepare for cryptocurrency transactions – whether deals are funded by cryptocurrency or the target company owns digital assets itself.

What Is Cryptocurrency?

Though there is no single all-encompassing definition for cryptocurrency, it is generally accepted that cryptocurrency is a digital money that is not issued by a central authority and is built using blockchain technology. Blockchain uses software algorithms and a ledger-like system known as distributed ledger technology (DLT) across multiple computers to manage and record transactions. Each computer on which the transactions are stored has a copy of the main ledger and, if one copy is changed, the whole ledger is so updated. In this way, the technology works similar to a Google Doc. In simple terms, blockchain uses a Google Doc–like system to log transactions that result in changes in ownership of digital money. One example of how this all works is bitcoin, the most widely known cryptocurrency. Bitcoins are created by "mining" them. Miners (most often computers) work to solve a computationally intensive math problem and the one that solves it first is awarded bitcoin. The transaction is then linked with those of similar import, grouped together as "blocks," verified by other users and added to the blockchain. Cryptocurrency allows for secure, peer-to-peer transactions on a blockchain, which could eliminate the need for traditional third-party intermediaries, such as banks, to process electronic funds transfers. This could provide for more efficient execution of traditional third-party processing of electronic funds transfers and may be beneficial to M&A parties who are often transferring very large sums of money.

The major benefits are easy to see, such as immediate execution of transactions, elimination of certain third-party involvement, transparency and security. Additionally, however, adding cryptocurrency M&A to your rep-

ertoire may help reach a new client base as it can appeal to digitally focused clients. Further, this could help firms prepare for a future legal landscape that could involve digital currencies issued by central banking authorities. The use of blockchain technology also offers additional efficiencies and solutions that are critical for the fast-paced world of M&A.

Considerations in M&A Transactions

If a potential client retains an M&A attorney to assist them in a transaction that either involves acquiring a target that owns or deals in digital assets, or uses cryptocurrency as part of the deal consideration, there are many matters unique to such transactions that M&A attorneys should consider. Below is a non-exhaustive list of things to consider if involved in a cryptocurrency-related M&A transaction.

1. Purchase Price

If using cryptocurrency to fund a deal, parties must consider its price volatility when drafting documents and pricing the deal. Cryptocurrencies involve greater risk of price volatility than traditional fiat consideration for M&A transactions (i.e., the U.S. dollar). Large price swings in a matter of hours are still common for cryptocurrencies; thus, M&A attorneys need to consider this when representing parties in a cryptocurrency M&A transaction. Luckily, there are several options at drafters' disposals in order to hedge the risk of price volatility for their clients.

Instead of traditional cryptocurrencies, the parties could agree to fund the deal with stablecoins, which are cryptocurrencies backed by traditional fiat currencies like the U.S. dollar. Since most stablecoins are backed by traditional reserve assets, sellers would not have the need to quickly redeem them post-closing for fiat currency. This is not to say that stablecoins carry no risk. For example, in May 2022, the price of one stablecoin known as TerraUSD fell from $1 to as low as $0.10 in one weekend. TerraUSD is an example of an algorithmic stablecoin, which relies on investor trading activity to keep its price at $1. Its price collapse was the result of a series of large withdrawals resulting in investor panic. On the other hand, the price of asset-backed tokens, another broad type of stablecoin, are much more likely to remain at $1 because they are backed in full by some type of stable asset like the U.S dollar. Therefore, if considering stablecoins as an option, parties should be aware of the risks that come with algorithmic stablecoins and may want to consider using stablecoins backed by reserve assets.

M&A lawyers may choose to include a collar to protect parties from significant price fluctuations. A collar sets the price range to which something may fall before the parties are obligated to agree to certain adjustments. In a cryptocurrency transaction, a collar could be structured to focus on either the (1) target exchange rate; or (2) purchase price. Thus, for example, if the U.S. dollar to bitcoin exchange rate or the value of bitcoin to be used to fund the transaction shifts by a certain percentage, a collar could obligate the buyer to include more bitcoin or supplement the cryptocurrency with regular fiat currency.

Another option is to include a conversion schedule in the main transaction document. The parties could stipulate various options with which to fund the deal (e.g., USD, bitcoin, ethereum, etc.) and specify agreed-upon conversion rates or purchase price values should the buyer choose to use one currency over another. This provides immense flexibility as the parties would be permitted to choose the consideration leading all the way up to closing. Parties could then choose to avoid certain cryptocurrencies if they are exhibiting abnormal price fluctuations.

Building a "pause period" into the deal would also give the parties flexibility. Since the price of cryptocurrencies can change immensely within short periods of time, giving parties the right to pause the scheduled closing for a few days to allow any price fluctuations to subside ensures the transaction will close at the agreed-upon value.

Earn-outs may also be used to help supplement any shortcomings in the purchase price. As these provisions are generally used to bridge gaps between the parties in their respective valuations, they are well-suited for a currency that may be subject to drastic price swings. For example, an earn-out could be structured to require more consideration post-closing if the value of any acquired crypto-assets skyrockets.

Additionally, a material adverse effect carve-out could be drafted to include in its definition of material adverse effect a significant change in the value or trading volume of the relevant cryptocurrency. The parties may also wish to have the ability to terminate the deal completely, which can be accomplished by including the same language in a termination provision.

Further, the parties should consider how the cryptocurrency used as payment would be handled by the seller post-closing. The seller could either keep the cryptocurrency as a store of value or immediately exchange it for fiat currency to avoid the price volatility of cryptocurrency. In any event, sellers should consider the additional obligations, including additional reporting requirements, should they choose to hold onto the cryptocurrency. The transaction document (or a separate agreement agreed to by the parties) should set forth the applicable post-closing conversion to fiat currency should the seller choose this option.

Lastly, M&A sellers' attorneys should consider including a lockup provision in the main transaction document. A lockup provision is most often used in deals involving public companies and securities offerings to prohibit immediate sales of securities following an offering in order to prevent market disruption. In cryptocurrency M&A deals, however, a lockup provision could be employed to prohibit the buyer from trading or otherwise disposing of the cryptocurrencies with which the parties intend to fund the deal. This would give sellers additional protection since buyers would not be able to risk transaction funds on any cryptocurrency exchanges or other potential transactions, which helps preserve the purchase price.

2. Due Diligence

Due diligence is one of the most important considerations in any M&A transaction, and the scope largely depends on the type of company the seller operates. The due diligence process helps both parties confirm the accuracy of information and representations, allowing the parties to be on the same page leading up to closing and ensure the transaction matches up with the parties' expectations. In an M&A transaction involving cryptocurrency, the uncertain regulatory nature and unique considerations surrounding cryptocurrency make the due diligence process all the more important. Thus, M&A attorneys need to be extremely thorough both in the due diligence process itself and in document drafting in order to protect their client's interests.

At a minimum, initial due diligence should tease out both parties' involvement with cryptocurrency and/or digital assets in general. Buyers need to have complete information on whether and to what extent the selling company: (1) holds any cryptocurrency (and if so, in what manner it holds cryptocurrency); (2) has entered into any cryptocurrency-related agreements; (3) accepts any type of payment or exchange of funds in cryptocurrency; and (4) has taken all corporate action necessary to authorize any of the foregoing. Depending on the information provided by the seller, buyers will then want to make sure appropriate provisions are included in transaction documents that confirm compliance with applicable laws. Evidence of compliance may include copies of licenses, policies and procedures used to mitigate risks of regulatory sanctions or penalties.

Where the target is itself a crypto-firm, further due diligence is necessary to ensure that it has complied with all applicable regulations. First, the lack of bright-line guidance on the applicability of federal securities laws (FSLs) to cryptocurrency exposes crypto-firms to potential enforcement from the Securities and Exchange Commission. While FSLs certainly apply to digital assets that qualify as securities, it has been difficult to get a straight answer as to what those may be.[1] As of now, cryptocurrency-related products like bitcoin and ether are not subject to FSLs, while digital tokens are treated as securities.[2] Buyers should ensure deal documents and disclosure schedules address transactions that could potentially be considered sales or offerings of securities and draft appropriate representations and indemnification provisions related thereto.

Second, the Office of Foreign Assets Control, the U.S. agency with primary responsibility for enforcing U.S. sanctions, has taken an interest in cryptocurrency transactions.[3] Crypto-firms face significant risk given most cryptocurrency transactions are anonymous or pseudonymous, which means firms could be unknowingly engaging in sanctioned transactions. To address this risk, acquirer due diligence should include a review of the target's sanctions controls and policies or procedures related to gathering information on transaction participants. If the seller lacks such controls, M&A attorneys representing buyers should include longer indemnification provisions and stronger representations and warranties in transaction documents related to potential sanctions.

Third, the U.S. Commodity Futures Trading Commission considers cryptocurrencies commodities under the Commodity Exchange Act, triggering its anti-fraud and anti-manipulation authority.[4] Therefore, buyers need to confirm targets have appropriate policies addressing matters regulated by the commission. Fourth, the Financial Crimes Enforcement Network (FinCEN) has taken the position that its regulations regarding "money transmitters" apply to administrators or exchangers of virtual currency that accepts, transmits, buys or sells a cryptocurrency for any reason, excluding for the purchase of goods.[5] Therefore, due diligence should also include an analysis of whether the target's activities apply to and require licensing under FinCEN regulations and any other state money transmission laws. Additionally, under FinCEN regulations, money service businesses (MSB) (including those offering currency dealing or exchange) are required to maintain an anti-money laundering (AML) program.[6] Therefore, buyers may need to conduct AML due diligence to determine whether: (1) the target is an MSB; and, if so, (2) its AML program is sufficient; and (3) it complies with any applicable regulations at the state level. For example, the New York State Department of Financial Services has promulgated both AML regulations and a cryptocurrency-specific licensing regime known as the "BitLicense" for New York virtual currency businesses.[7] M&A attorneys representing buyers should strongly consider including AML and licensing-related representations and warranties in transaction documents.

Lastly, due to the mining required to acquire certain cryptocurrencies, buyers' attorneys should consider conducting environmental due diligence on target crypto-firms. As mentioned earlier, cryptocurrency mining is

extremely energy-intensive. Proof-of-work cryptocurrencies, such as bitcoin, require the use of large computers to solve complicated math problems in order to acquire cryptocurrency. This incentivizes using computers that generate higher levels of power, which results in a greater amount of electrical waste. Thus, if you are purchasing a target company that holds or transacts in cryptocurrency assets, environmental due diligence may be prudent to determine whether it has been involved with any mining activities or environmental sanctions or enforcements.

3. Storage and Security

As cryptocurrencies are digital assets, they are often stored in digital wallets. These digital wallets can be either "hot," which are storage sites offered most often by online exchanges like Coinbase, or "cold," which are not linked to online exchanges and house cryptocurrencies offline (e.g., flash drive). Blockchain transactions in which one party receives payment in cryptocurrency can be identified by the parties' wallet addresses. Thus, it is imperative to obtain accurate information about the wallets to confirm successful payment.

Additionally, if you are representing a buyer who is purchasing a company that owns digital assets, you will want to make sure you get specific information about how and where all digital assets are stored and whether there are adequate safeguards in place to protect against the loss, theft or tampering of those assets. Since hot wallets are stored online, they are likely more susceptible to hackers and other malicious actors. In this case, target companies should either have sufficient insurance to cover any loss to these assets or make stronger representations and indemnities to cover the same. Parties should also seek out information on any limitations on hot wallet storage and withdrawal, which can be accomplished in the due diligence period.

Moreover, digital wallets may only be accessed through public and private "keys" (i.e., passwords). Unfortunately, if these passwords are lost, it may be impossible to access the cryptocurrency stored on the wallet. Not only will buyers (if purchasing a company that holds crypto-assets) and sellers (if receivingfunds in cryptocurrency) need to conduct further due diligence on whether these keys have been shared with parties outside the scope of the transaction, but they will also need ensure the keys are securely maintained. Representations can be built into transaction documents that confirms the: (1) keys have not been widely disseminated; (2) keys are saved on backup drives to prevent total crypto-assets loss if one copy of the key is lost; (3) identity of any custodian of the crypto-assets (if not being stored with the target company). Further, due diligence should also focus on the accuracy of all information regarding digital wallet addresses and public and private keys so that sellers make sure they will be paid at the end of the transaction, and buyers can confirm they will be able to access the digital assets post-closing.

4. Ownership of Digital Assets

Since the traditional exchange of wiring instructions and bank account information may be replaced with exchanging digital wallet addresses, parties should consider including a representation that confirms the wallet addresses are correct and the cryptocurrencies and wallets are owned by the respective parties. The wallet addresses must be accurately stated – one small error and you will not be able to access and use the cryptocurrency connected therewith. Another option to ensure the ownership of digital assets is to utilize certificates of verification. Similar to incumbency certificates, these could be used by the parties to verify the accuracy of digital wallet addresses and should be signed by an executive officer of the company making the representation.

5. Tax Implications

According to the Internal Revenue Service, digital assets including cryptocurrencies are treated as property, not currency, for federal tax purposes.[8] Thus, all tax considerations applicable to property apply to cryptocurrencies. Depending on the structure of the transaction and the classification of the digital assets, buyers should be aware of potential transfer tax liabilities that may arise as a result. If the value of a party's cryptocurrency increases before closing, then a gain must be recognized on the acquisition, measured by the difference in tax bases of the cryptocurrency and property received.[9] Further, cryptocurrency is a capital asset, making it subject to capital tax rates depending on the length of ownership.[10]

Since federal tax rules place limits on how much non-equity funds a seller can accept before a deal must be classified as a taxable event, it may be difficult to satisfy such requirements if sellers receive payment in cryptocurrencies, whose values are subject to extreme volatility.[11] Because cryptocurrencies are treated as property, an M&A deal funded by cryptocurrency could be treated as a sale of property – not just selling the seller's assets, but also the buyer's cryptocurrency. Additionally, the U.S. Department of Treasury announced last year that businesses must report all transactions involving cryptocurrency that exceed $10,000 to the IRS.[12] Thus, both parties must loop in tax attorneys to determine the extent to which they need to report details of and recognize capital gains or losses on the transaction, and to ensure they are complying with applicable tax laws.

6. Blockchain

As stated earlier, the term "blockchain" refers to the technology and Google Doc–like system used to track, manage and record transactions involving cryptocurrency. Primarily, blockchains are either public or private

(with some other variations as well). A public blockchain is open to anyone with internet and has no restrictions to access. A private or "permissioned" blockchain includes permission restrictions and is usually only accessible by specific persons within an organization. When and if parties to an M&A transaction involving cryptocurrency hire a software team, they should also consider what type of blockchain to utilize. Permissioned blockchain DLT, which is often used for commercial applications such as banking, may be preferred for M&A transactions because only certain individuals with the requisite permission may access the ledger of transactions.

7. Smart Contracts

Smart contracts, also stored and executed using blockchain technology, are a combination of software code, legal text and transaction parameters that self-execute obligations derived from outside agreements. The "drafter" still must outline the parties' obligations in the smart contract, but once all parties confirm all conditions have been met, the contract executes certain obligations (e.g., payment) without the need for third-party intervention like a bank confirmation of wiring instructions. Smart contracts are useful for all situations except those in which require a large amount of human judgment; for example, the payment structure of a promissory note, post-closing movement of proceeds and offer letters are all ideal situations in which a smart contract would be beneficial. However, major documents such as purchase agreements are still better suited for human drafting. Further, only certain cryptocurrency blockchains allow for the use of smart contracts. Thus, if parties are dead set on utilizing smart contracts, M&A attorneys should be aware that this will limit the cryptocurrencies available to the deal.

Importantly, parties to an M&A transaction need to consider potential vulnerabilities of underlying smart contracts and draft around them to better allocate the risk associated with cryptocurrency M&A transactions. If the parties are interested in employing persons to code smart contracts for their transaction, attorneys will want to make sure they draft ancillary agreements for the coders to sign to allocate the risk to them in the event their smart contract(s) go(es) awry. Such ancillary agreements should include: (1) a provision requiring the smart contract to undergo an independent third-party audit; (2) a fail-safe mechanism so that the parties can terminate the smart contract and regain access to the cryptocurrencies if issues arise; and (3) strong indemnification provisions protecting the parties in case of a data breach or cybersecurity event. Since the development of smart contracts will be mostly out of M&A attorneys' hands, it is imperative to consider drafting traditional, ancillary contractual agreements to mitigate adverse outcomes for the parties involved.

8. Cybersecurity and Data Privacy

The state and federal landscape of cybersecurity and data privacy legislation is changing every day. Laws often give consumers various rights with respect to their personal data, and, in a blockchain transaction, parties would likely need to agree on a data sharing agreement before anything can be processed on the relevant blockchain. If such agreement is unable to be reached, blockchain participants will need to rely on strongly drafted representations that consent to having their data processed on the blockchain was obtained. On the other hand, using a private, permissioned blockchain could remedy these potential concerns. In any event, it would be wise to bring in cybersecurity and data privacy attorneys for both the due diligence and document drafting processes in any cryptocurrency M&A transaction.

While cryptocurrency's usage in M&A transactions has grown exponentially over recent years, it still involves a great deal of risk, especially for larger transactions. Since every M&A deal is unique, there is no one-size-fits-all solution for cryptocurrency-related M&A deals. However, the current regulatory landscape and intricacies of cryptocurrency provide attorneys with a starting point for planning how to protect their clients' interests. As more clients venture into the crypto space, more attorneys will have to acquire knowledge of the industry, and, as of now, it looks like cryptocurrency is here to stay.

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Endnotes

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Bored Apes and Monkey Selfies: Copyright and PFP NFTs

By Alfred David Steiner

What do the monkey selfie and the "Bored Ape Yacht Club" images pictured above have in common? Both depict grinning primates, of course. But less obviously, both may lack copyright.

You may recall a dispute between Naruto the monkey and a photographer whose camera Naruto borrowed to take a selfie. The photographer argued that he owned copyright of the photo, while Naruto argued, through People for the Ethical Treatment of Animals (PETA), that Naruto owned it. The Ninth Circuit ended the dispute by affirming the district court's ruling that monkeys can't sue humans.

For different but related reasons, "Bored Ape" NFTs may also lack copyright. In what follows, I'll explore this and other surprises arising from the collision of copyright law and profile picture NFTs, or PFPs.

Since Larva Labs debuted "CryptoPunks" in 2017, PFPs have been the reigning format for NFTs. Aesthetically, the format permits variation within a standard template on a scale that Andy Warhol would have envied. Economically, it lets creators supply a critical mass of semi-fungible intangible assets capable of sustaining an ecosystem of collecting, trading and speculation. So it's no accident that the most successful NFT projects are PFPs.

Regardless of the merits of PFPs to date, they undoubtedly constitute a new and important artistic medium, with emerging aesthetics, economics and cultures attributable to their form. Aside from making this observation, I won't try to convince anyone of its truth here. Instead, I'll suggest a definition for PFPs and discuss their strange copyright implications.

Definition

By PFP, I mean a collection of NFTs:

- With many images.
- Based on a template.
- Depicting anthropomorphic subjects.
- That vary based on a given set of traits (e.g., background, eyes, mouth).
- That are automatically assembled by selecting layers corresponding to trait types from a digital file.

Here's a stock photo showing several images from the "Bored Ape Yacht Club," NFT collection, the quintessential PFP:

Copyright in PFPs

PFPs raise many copyright questions. For example, artist and legal scholar Brian Frye has questioned whether "CryptoPunks" merit copyright protection at all.[1] Each "CryptoPunk" is a highly simplified, 24 x 24 pixel, 8-bit image. Here's a theoretical "CryptoPunk,"[2] enlarged for easy viewing:

There are several reasons why a "CryptoPunk" may not merit copyright protection:

- It lacks a minimum of creative authorship.
- There are too few ways to express the same idea (the "merger" doctrine).
- It wasn't created by a human, but assembled by code.
- It wasn't independently created; i.e., it's based on an earlier work.

I'll ignore the last reason because it's obvious enough – if Larva Labs based a "CryptoPunk" on an earlier work but didn't add enough original content, then that "CryptoPunk" wouldn't be copyrightable. But I will discuss the other reasons.

Insufficient Creativity and the Merger Doctrine

I have anecdotal evidence that the U.S. Copyright Office is unlikely to refuse to register simple pixel art because it's insufficiently creative or falls prey to the merger doctrine. On April 1, 2022, I received a copyright registration on "CryptoSkull 7347":

Still, we may see this question litigated if copyright owners try to enforce their rights in a "CryptoPunk" or another work of simple pixel art.

Automatically Assembled Works

A more interesting question for PFP copyrightability relates to how they're generated. As I mentioned in my definition, PFPs are created from a set of traits, each of which may have many possibilities whose permutations allow for many unique works. These permutations are generally created by a computer implementing an automated procedure.

For example, the PFP "The Jims" has the following traits, with the number of possibilities for each noted in parentheses: accessory (7), background (15), body (12), eyes (10), head (13), and mouth (10). These traits allow for 1,638,000 permutations, of which the creators gave us 2,048. Here's an example, "Jim #524":

Is "Jim #524" protected by copyright? Certainly, the individual traits may be separately copyrightable if they pass the minimally creative threshold. Here are "Jim #524"'s mouth (underbite) and head (lemur) by themselves:

But is there any copyright to the whole apart from its traits? Only if the procedure for selecting traits suffuses it with human authorship. Because the creators could have generated all 1,638,000 permutations, but chose to generate less than 0.125% of them, human authorship is conceivable, but it might come down to how the selection procedure was written. Even though a small percentage of permutations was created, it isn't apparent how an automated process would result in human authorship.

The NFT Owner's Copyright Interest

Creators grant varying rights to NFT owners in the associated works, but the following four approaches are most common:

- Say nothing, leaving NFT owners with at best an implied license.
- Grant an express license, usually to display the works for non-commercial purposes.
- Transfer all rights in the works to the owners.
- Make the works public domain.

The strangest results arise from the third approach, namely, purported transfers of all rights to PFP owners.

Transfer of Copyright by Transfer of NFT

Can one transfer copyright in a work associated with an NFT solely by transferring the NFT? Without more, the answer is no – there must be a statement that transfer of the NFT constitutes transfer of the associated work. So to refine the question, is it possible to transfer copyright in a work associated with an NFT by (1) stating that copyright ownership is mediated by ownership of the NFT and (2) transferring the NFT?

For example, Yuga Labs (creators of the "Bored Apes") states in its terms, "When you purchase an NFT, *you own the underlying Bored Ape, the Art, completely*."[3] The creators of "CryptoSkulls" are even clearer in their terms:

> It is our opinion that a blockchain transaction satisfies the legal requirement for copyright transfer. So copyright ownership of each individual image is adjudicated by the Ethereum/Polygon address for which the non-fungible token (NFT) of that image is assigned.

But do these statements work? To transfer exclusive rights in a copyrighted work, the Copyright Act requires a written statement signed by the copyright owner. The signature may be of the standard ink variety, but digital signatures also work.

Does a Covenant To Transfer Copyright With the NFT Run With the NFT?

Let's use "Bored Apes" as an example. If I created (or "minted") an "Ape," the question would be whether Yuga transferred the copyright to the "Ape" to me with a written signature. Arguably Yuga did so by making a public statement on its website that the NFT buyer "own[s] the underlying Bored Ape, the Art, completely," but we'll have to wait for a court to opine on that question to be sure.

Things get even more complicated with subsequent transfers. Let's assume that Yuga required me to agree to its terms as a condition to minting my "Ape." Then, arguably, I have agreed that "[o]wnership of the [digital artwork] is mediated entirely by the Smart Contract and the Ethereum network." So when I "sign" the blockchain transaction with my private key to transfer the NFT, I'm arguably transferring all rights in the associated work.

But after that point, things get more contingent and may depend on how the NFT is transferred. For example, assume I sell the "Ape" on OpenSea, and then it is resold

on OpenSea several times. The OpenSea Terms of Service state:

> NFTs may be subject to terms directly between buyers and sellers. . . . For example, when you click to get more details about [an NFT] . . . you may notice a . . . link to the creator's website. Such website may include [t]erms . . . that you will be required to comply with.

Each buyer of the "Ape" on OpenSea would've been directed to consider the BAYC terms via the OpenSea terms and, as a result, is arguably bound by them. So if the blockchain signature constitutes a written signature for Copyright Act purposes, all rights remain with the NFT owner.

But what if the "Ape" were sold on a marketplace lacking such terms or transferred in a private sale? Unless the seller presents the buyer with the BAYC terms, the buyer arguably is not bound by them and, if not, may transfer the NFT without transferring the copyright in the associated work.

Potential Solutions for Keeping Copyright With the PFP Owner

PFP creators who want the copyright to remain with the PFP owner can minimize these problems by associating terms more closely with the NFT. That can be done by including a link to terms (or better, the terms themselves) in the metadata for the NFT, by prominently displaying the terms in comments to the code that generates the NFT (the smart contract) or both. The most careful creators even include the terms in the NFT itself.[4]

Problems for PFP Creators Who Transfer Copyright to PFP Buyers

When a PFP creator purports to transfer copyright to buyers, what happens to the copyrights that exist in the associated works as each PFP is minted? Consider "Apes #ABCD"[5] and "Ape #4485":

Assume that the image on the left represents the first "Ape" to be minted ("Ape #1") and the image on the right represents the second "Ape" ("Ape #2"). These works are substantially similar – the only difference between them is "Ape #1"s earring. According to the BAYC terms, when "Ape #1" is minted, Yuga transfers to the minter ("Minter #1") all rights in the "Art."

So when "Ape #2" is minted (by "Minter #2"), Minter #1 has a claim against Yuga for infringing Minter #1's exclusive rights to reproduce, distribute, prepare derivative works based upon and publicly display either (1) the work as a whole, (2) its traits or (3) both. Minter #2 may also have claims against Yuga for breaching express and implied warranties of non-infringement. And at best, Minter #2 would own the thinnest of copyrights in the image without the earring, which would be subject to Minter #1's superior and all but coextensive rights.

Assuming this analysis holds, some strange results follow. First, Yuga has no rights in the "Apes" at all, having given them away piecemeal to its minters. Second, as each "Ape" was minted, each subsequent "Ape" received exponentially narrower rights.

If correct, Yuga has no right to reproduce, prepare derivative works based upon, distribute or display any "Ape" or any of their copyrightable traits. Moreover, any "Ape" owner who owns a right that is not subject to another "Ape" owner's rights may have a claim for copyright infringement against Yuga.

Commercial ventures featuring "Apes" may also be at risk of copyright infringement suits. Consider KINGSHIP, the musical group consisting of three "Apes" and one "Mutant Ape," signed by Universal Music Group. In particular, consider "Ape #7796," which has an aquamarine background, white fur, striped T-shirt, and laser eyes. "Ape #118" and "Ape #3015" predate "Ape #7796," as do 7,794 other "Apes." "Ape #118" is identical to "Ape #7796" except for its "tan fur" and "bored kazoo" mouth, while "Ape #3015" is identical to "Ape #7796" except for its "short mohawk" and "wide eye[s]."

Arguably, the owner of "Ape #7796" has no copyright in the "Art" or any of its traits, all of which appear in earlier-minted "Apes." Or, assuming copyright exists in the "Art," at best, "Ape #7796"'s owner has a copyright in a compilation of traits that is graphene-thin, subject to many earlier works and all but unlicensable.

On the other hand, the first few "Apes" minted have a relatively broad (though exponentially narrowing) scope of copyright protection, to which all subsequent "Apes" are subject, making them far more valuable from a potential licensing perspective.[6]

Potential Objections

I'm sufficiently confident with my analysis that I have no fear in creating and tweeting my own "Ape" that includes the rarest possible trait in each category:

If you don't like my analysis, what are the alternatives? You might argue that Yuga never intended to transfer copyright to "Ape" minters.[7] But even if that were true with respect to the "Apes," it doesn't apply to other PFPs that clearly intend to transfer all copyright to buyers (e.g., "CryptoSkulls").

You might also argue that PFPs haven't met the written signature requirement for copyright transfer, giving buyers only non-exclusive rights in the associated works and leaving the PFP creator with all copyright.

Another objection would be that all the players here – PFP creators and buyers alike – understand that thousands of similar, overlapping works are going to be minted, and that as a result, PFP buyers have no claim against PFP creators for copyright infringement based on later-minted PFPs. For experienced players, that may be fair enough, but even so, I know of no basis in copyright law that would support such an outcome absent appropriate language in the transfer agreement.

Potential Solutions

PFP creators who want to transfer copyright in their PFPs to buyers should draft the transfer language carefully. One solution would be to limit the copyright transferred to the specific configuration of traits in each work and exclude any transfer of rights in the traits themselves. Of course, this means that if there is no copyright in automatically assembled works, the buyers receive no copyright.

If the creators retain copyright in the traits, they should consider granting buyers a broad non-exclusive, transferable (with transfer of the PFP only), revocable (automatically upon transfer of the PFP) license to the traits appearing in each PFP, solely for use as incorporated in the associated work. And, in any case, the creators should consider reserving any rights necessary to conduct their business.

Creators should also avoid warranting that they have rights in automatically assembled works and should consider expressly disclaiming any warranty of title.

CC0: PFPs in the Public Domain

Another approach to copyrights in PFPs that has become popular is to release the works directly into the public domain – the so called "CC0" approach. "Nouns," "mfers," and "CrypToadz" are all examples of successful CC0 PFPs. The idea seems to be that universally available rights will spur viral adoption. I could, for example, use "Noun 1" on packaging for a line of spectacles:

But so could anyone else, at least from a copyright perspective.

The CC0 approach has become so popular that, in an apparent rush to jump on the bandwagon, the creator of "Moonbirds" – one of the most popular and valuable PFPs – announced in August 2022 that it was making all "Moonbirds" public domain, despite originally promising each buyer full commercial rights in their "Moonbird." Whether the attempt to make "Moonbirds" public domain was effective after making such a promise to buyers remains to be seen.

Trademarks

That is why trademark rights are so important for PFPs. For example, I could obtain exclusive rights to use "Noun 1" on spectacles by being the first to file a trademark application on it, or in first-to-use jurisdictions, by featuring the image as a source identifier on packaging for the spectacles.

I may also have the right to use the word mark "NOUNS" on my goods unless that use would be likely to confuse consumers. At this point, the Nouns creators' rights to the "NOUNS" mark may not extend far beyond NFTs, which provides an opportunity for enterprising firms to adopt and use the mark on sufficiently unrelated goods and services. To the extent Nouns' CC0 strategy leads to mass adoption and exposure, such firms would benefit accordingly.

PFP creators who transfer copyright in their PFPs or make them public domain need to consider whether they'd like to take the same laissez-faire approach with trademarks. If not, PFP creators should consider a filing strategy to protect non-NFT goods and services in keeping with their plans, which could of course include use by licensing the mark to third parties. That strategy should consider both the name of the PFP (e.g.,

"Nouns") and the works in the PFP, although the PFP creator would have to choose a particular work or works to protect because, at least in the U.S., it's not possible to file on a "templatized" design (or "phantom mark") that includes many possibilities.

PFP creators also need to ensure that their trademark and copyright strategies are consistent. For example, if the creator purports to transfer copyright in a particular PFP to a buyer, the PFP creator cannot then expect to use that particular PFP as a trademark.

Conclusion

Attempting to transfer copyright in a PFP to its buyer has its problems. For one thing, there may be no more copyright in a PFP than there is in a monkey selfie. And even if there were, ensuring there's a written signature for each transfer isn't easy. Moreover, PFP creators who purport to transfer copyright to buyers without drafting the transfer language carefully may be left without rights in the project's artwork and may also be exposing themselves to claims from aggrieved PFP buyers. But given the Ninth Circuit's holding in the monkey selfie case, there is at least one thing Yuga and other PFP creators don't have to worry about – PETA bringing suits on behalf of "Bored Apes."

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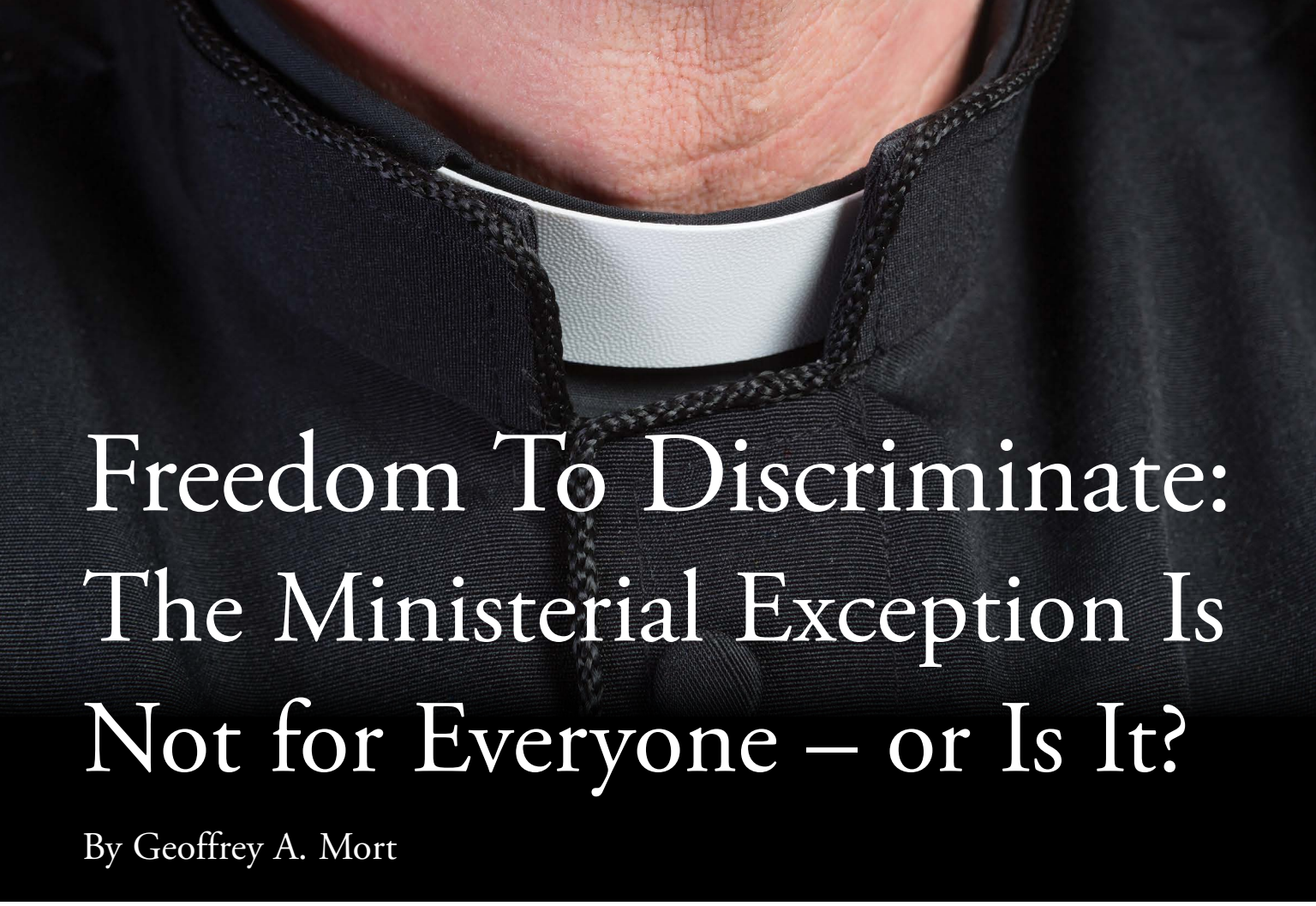
This article was previously posted at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4116638.

Endnotes

1. Brian L. Frye, *Are CryptoPunks Copyrightable?* Pepperdine L. Rev. (Feb. 8, 2022), https://ssrn.com/abstract=4029323.
2. Due to rights clearance issues, I was unable to include an actual "CryptoPunk." I created the image myself in an attempt to determine the rarest conceivable "CryptoPunk."
3. *See* https://boredapeyachtclub.com/#/erms (emphasis added).
4. *See, e.g., Your Story*, https://yourstory.wtf.
5. "Ape #ABCD" doesn't actually exist. To avoid rights clearance issues, the author paired this invented "Ape" with "Ape #4485," which entered the public domain by operation of the BAYC terms when the NFT's owner sent it to an inaccessible "burn address." For a pair of "Apes" that were analogous to this pair for purposes of this argument, see "Ape #6578" and "Ape #7065."
6. Not surprisingly, the first four apes are owned by Yuga's four founders.
7. After the BAYC terms say "you own the underlying Bored Ape, the Art, completely," they go on to provide personal and commercial licenses to the Art. One might argue that Yuga's grant of these licenses means there was no intent to transfer copyright, and that "you own . . . the Art, completely" has a meaning analogous to when one purchases a painting ("you own the painting") but receives no copyright in the underlying work. But that analysis, which is based on 17 U.S.C. § 202, would seem to require that Yuga convey some material object, which they have not. In other words, what is it that the buyer "owns" if not the copyright? Physical space on a server somewhere?



Freedom To Discriminate: The Ministerial Exception Is Not for Everyone – or Is It?

By Geoffrey A. Mort

In the years following passage of the 1964 Civil Rights Act, courts took the first steps toward creating a legal doctrine now known as the "ministerial exception." The ministerial exception provides that the government is barred from interfering with a religious institution's ability to hire and fire ministers,[1] including by prohibiting it from enabling employees of religious entities to sue their employers for employment discrimination under antidiscrimination laws.

The exception has become increasingly controversial in recent years as courts have repeatedly expanded its use and scope. Widespread application of the exception has reached the point where there is growing concern about it potentially eviscerating the civil rights of employees of organizations with even tenuous ties to religion.

Development of the Ministerial Exception

The ministerial exception, which operates as an affirmative defense, is grounded in the First Amendment's clause stating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." In using the First Amendment's freedom of religion clause to justify the ministerial exception, courts have reasoned that "matters touching the relationship between an organized church and its ministers . . . must necessarily be recognized as of prime ecclesiastical concern" because a church's "minister is the chief instrument by which it seeks to fulfill its purpose."[2] Accordingly, "[b]y imposing an unwanted minister [on a religious entity as a result of a discrimination suit], the state [would infringe] the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments."[3] The doctrine was first recognized in a 1972 Fifth Circuit decision which required that the ministerial exception be applied to Title VII claims,[4] and during the ensuing decades other circuits also adopted the doctrine, including the Second Circuit in 2008.[5]

Litigation involving the ministerial exception for the most part has hinged on two questions: (1) is the employee a minister, and (2) is the employer a religious organization? In the first few decades after the 1972 *McClure* case, a number of courts expressed reluctance to adopt too broad a definition of the exception. For example, the New York State Court of Appeals in *Scheiber v. St. John's University*[6] cautioned that a "religious employer may not discriminate against an individual for reasons having nothing to do with the free exercise of religion and then invoke the exemption as a shield against its unlawful conduct."[7] As will be discussed below, that is essentially what has happened – particularly in the last 10 years.

Other courts articulated similar misgivings. In *EEOC v. Roman Catholic Diocese,*[8] the Fourth Circuit cautioned that the "ministerial exception does not derogate the profound state interest in assuring equal employment opportunities for all, regardless of race, sex or national origin."[9] *Rayburn v. Gen. Conf. of Seventh-Day Adventists*[10] held that the ministerial exception "does not exempt [religious entities] from claims based on race, gender or national origin."[11] And in *Petruska v. Gannon University,*[12] the Third Circuit observed that "a narrow [ministerial] exception to prevent the unconstitutional enforcement of Title VII is the proper remedy."[13] Although the Second Circuit adopted the ministerial exception in *Rweyemamu v. Cote,* it stressed that lay employees of a church alleging a non-religious wrong are "surely not forbidden [their] day in court."[14]

The *Hosanna-Tabor* Case and Its Implications

The scope and impact of the ministerial exception changed significantly a decade ago, however, with the Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*[15] In *Hosanna-Tabor*, the Supreme Court not only recognized the ministerial exception but also went a good deal further. The Court found that a judicial remedy for any minister seeking to bring a claim of employment discrimination against his or her religious organization is prohibited regardless of the organization's reason for its adverse employment action. The basis of this ruling was that it "ensures that the authority to select and control who will minister to the faithful – a matter strictly ecclesiastical – is the church's alone."[16]

The court also pointed out that whether the ministerial exception bars an employment discrimination claim against a religious group largely depends on whether the employee asserting it is a minister. (Another factor discussed by the court is whether the employer is a religiously affiliated institution.) In making a determination regarding ministerial status, the court said, four factors should be considered: "(1) the formal title given [to the employee] by the Church, (2) the substance reflected in that title, (3) her own use of that title, and (4) the important religious functions performed for the Church."[17] In his concurrence, Justice Alito stated that the term "'minister' or the concept of ordination" were not critical to deciding if an employee is a minister or not.[18] Indeed, the *Hosanna-Tabor* plaintiff, a Catholic school principal with no religious title, was not allowed to pursue her Title VII gender discrimination claim.

Application of the Ministerial Exception Since *Hosanna-Tabor*

Since the Supreme Court's *Hosanna-Tabor* decision, courts have steadily expanded the reach of the ministerial exception. Perhaps the most significant respect in which they have done so, as suggested above, is interpreting who is a minister.

The term "minister" has come to encompass a far broader range of occupations than rabbis, Catholic priests and Protestant ministers. The court in *Brandenburg v. Green Orthodox Archdiocese of North America,*[19] for example, held that nuns are ministers, much as this might seem to run counter to the structure and hierarchy of the Roman Catholic and Orthodox churches. Additionally, teachers, a press secretary, a video producer, a choir director, a university vice president of student life, a Salvation Army rehabilitation center administrator and even the staff of a Jewish nursing home have been deemed ministers by courts. Despite the fact that the *Hosanna-Tabor* court stated that it was "reluctant"[20] to adopt a strict formula for deciding which employees qualify as ministers, the lower courts have demonstrated little such forbearance. In *Cannata v. Catholic Diocese of Austin,*[21] the Fifth Circuit ruled that a church music director was a minister, reasoning that "it [was] enough that . . . [he] played an integral role in the celebration of Mass and . . . play[ed] the piano during services."[22] Further, the Connecticut Supreme Court, in *Dayner v. Archdiocese of Hartford,*[23] anticipating *Hosanna-Tabor*, determined that a principal was a minister because she headed a Catholic school.

In *Stabler v. Congregation Emanu-El,*[24] the Southern District addressed the question of whether a school librarian in a Jewish school is a minister. In part because the librarian organized reading groups, she was considered to be a minister. The court sought to clarify the basis for its decision by stating that one "qualified as a minister by performing important religious functions on behalf of the Congregation."[25] A liberal enough definition of "religious functions," the meaning of which is a contested issue, can lead to a wide range of employees being considered ministers.

Also at issue in a number of cases involving the ministerial exception is the question of whether a particular employer is a religious institution at all. To be covered by the exception, an employer "need not be a traditional religious organization such as a church, diocese or synagogue" or even "an entity operated by a traditional religious organization."[26] Rather, a religious institution may be any entity whose "mission is marked by clear or obvious religious characteristics."[27]

In the decade since *Hosanna-Tabor,* and to a limited extent even before, courts have embraced a broad definition of what a religious institution is. The court in *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*[28] – concluding that a religious institution could be any entity whose "mission is marked by clear or obvious religious characteristics" – found that a retirement home was a religious institution for purposes of the excep-

tion. In *Penn v. N.Y. Methodist Hospital,* decided a year after *Hosanna-Tabor,* the court reasoned that a religious institution could be any "religiously affiliated group."[29] In other cases, courts have held that schools, health care facilities and hospitals are religious institutions.[30] The tendency, however, toward treating any organization affiliated in some way with a church or synagogue as a religious institution is not without its limits. In *Penn,* the court observed that the defendant hospital had earlier "removed [from its certificate of incorporation] provisions relating to its relationship with the United Methodist Church"[31] and denied its motion to dismiss.

Eight years after *Hosanna-Tabor,* the Supreme Court addressed the exception a second time in *Our Lady of Guadalupe School v. Morrissey-Berru.*[32] The court in *Our Lady of Guadalupe* expanded the exception still further, holding that employers need only demonstrate that an employee exercises important religious functions for the exception to apply. Thus, not only is a ministerial title unnecessary to bring an employee within the exception, but so are religious education or training. The court also determined that all teachers who engage in the "religious education and formation of students"[33] fall within the exception.

One additional issue pertaining to the ministerial exception that remains unresolved is whether it bars all or only some discrimination and retaliation claims. The exception has long been interpreted as having the purpose of preserving religious institutions' ability to "select, supervise, and if necessary remove a minister without interference by secular authorities."[34] Application of the exception to such "tangible employment actions"[35] leaves unresolved the question of whether it also applies to hostile work environment claims that do not involve tangible employment actions. Neither the Supreme Court nor the Second Circuit have yet ruled on this question, and those circuits that have are split, with the Ninth Circuit holding that the exception does not apply to sexual harassment or other hostile work environment claims,[36] while the Tenth Circuit arrived at the opposite conclusion.[37]

Pushback Against the Ministerial Exception

As the trend toward expansion of the exception continues seemingly unchecked, a growing number of legal experts and commentators – though very few courts – are raising concerns about what they see as the loss of workplace protections for many employees as well as the potential for the exception to dangerously encroach on our basic civil rights. Because of its breadth, the ministerial exception has been labeled "the exception that swallowed the rule."[38] Two objections to the exception and its evolution in particular have been raised. The first is that civil rights protections for employees of religious-affiliated organizations are being continually eroded by the ongoing expansion of the exception, and the second is that the broadening of the exception has given religious employers the opportunity to push the envelope with regard to applying the doctrine and thus eviscerate anti-discrimination protections for their employees. Also of concern is the fact that, to some, the courts seem to recognize no boundaries when it comes to increasing the reach and interpretation of the exception.

The first objection has garnered the most attention. One legal expert put it succinctly: "When a religious organization seeks the protection of [the ministerial] exception, the organization is asking for the state to limit its employees' civil rights."[39] This outcome is seen as particularly problematic because the "overwhelming priority that the exception grants to the religious liberty of employers is hard to reconcile with . . . the principle that liberty may only be restricted for the sake of a more meaningful, equal liberty for all."[40] In support of this notion, critics note that in *Hosanna-Tabor* the Supreme Court only mentions the value of employment law once and there merely states that the "interest of society" in enforcing anti-discrimination laws "is undoubtedly important."[41] Commentators who oppose the exception stress that it is difficult to take issue with the conclusion that, for many employees, it has essentially eliminated their right not to be discriminated against in the workplace.

Echoing this sentiment, one commentator declared that "working in a religious institution now means living in fear for your job at all times and knowing that no one will protect you."[42] Another, looking at the larger picture, stated that "the Supreme Court appears to be moving in the direction of accommodating religious exercise and providing more rather than fewer religiously based exemptions from laws of all kinds."[43]

The second major objection to the development of the exception is that it has encouraged employers to interpret and apply it ever more broadly and to push the boundary of the exception well beyond its current reach. Some religious employers are arguing that all parochial schoolteachers, even those that teach only classes unrelated to religion, should be categorized as ministers, and this position will probably soon be before the courts. This notion, of course, goes beyond the Court's treatment of this issue in *Our Lady of Guadalupe School.* Other religious employers have gone even further, asserting that all of their employees – including janitors and computer technicians – are ministers.

Moreover, some religious employers have argued that claims under a wider range of employment laws should be barred by the exception. This view could encompass wage and hour disputes, Equal Pay Act violations and leave denial under the Family and Medical Leave Act, among others. (Courts in several cases, in fact, have agreed that the ministerial exception applies to claims arising under minimum wage laws and federal labor standards laws.[44])

Finally, an increasing number of employers are attempting to characterize themselves as religious institutions in order to take advantage of the exception and avoid coverage by antidiscrimination statutes. In light of the increasing number of institutions deemed to be religious – now including hospitals, schools, nursing homes, charities and other entities with some link to a more formal religious organization – it is perhaps not surprising that many "gray area" and even commercial entities are now claiming to be religious and testing the waters to see if the exception might be applied to them.[45] These include religious publishers and bookstores, media outlets, student associations, advocacy groups and museums.[46]

Conclusion

The concern that courts, certainly including the Supreme Court, will continue to broaden the ministerial exception to apply to a wider range of institutions with more tenuous connections to religions, an increased number of civil rights statutes and more kinds of employees is not without support considering decisions after and even before *Hosanna-Tabor.* Nonetheless, courts have to date recognized at least a few limits on application of the exception. Most courts to consider the issue have not applied the exception to secretarial or back-office workers with few or no religious responsibilities. In *David v. Baltimore Hebrew Congregation*[47] and *Barrett v. Fontbonne Academy*[48] courts declined to apply the exception to a facilities manager and a food service director, respectively. Close cases continue to involve administrators and others whose duties do not involve teaching religion or performing other duties that might be considered religious in nature.

A majority of commentators suggest that the current trend of courts perceiving the exception more and more broadly is likely to continue for at least the immediate future. Measures such as requiring religious organizations to advise employees as to whether the exception is considered to apply to them have been proposed as a way to blunt the trend toward continued expansion of the exception. Nonetheless, individuals who are considering employment by religious organizations of any kind would be well-advised to take into account that they may well be waiving their right to protection by antidiscrimination laws by doing so.

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Endnotes

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4. *McClure v. Salvation Army*, 460 F.2d 553.
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6. 84 N.Y.2d 120 (1994).
7. *Id.* at 127.
8. 213 F.3d 795, 801 (4th Cir. 2000).
9. *Id.*
10. 772 F.2d 1164 (4th Cir. 1985).
11. *Id.* at 1166.
12. 462 F.3d 294 (3d Cir. 2006).
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16. *Id.* at 194–95.
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21. 700 F.3d 169 (5th Cir. 2012).
22. *Id.* at 177.
23. 23 A.3d 1192 (Conn. 2011).
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25. *Id.* at *17.
26. *Hollins v. Methodist Healthcare, Inc.,* 474 F.3d 223, 225 (6th Cir. 2007).
27. *Penn v. New York Methodist Hospital,* 884 F.3 416, at *19.
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31. *Penn,* 884 F.3d 416, at *26.
32. 140 S. Ct. 2049 (2020).
33. *Id.* at 2055.
34. *Id.* at 2060–61.
35. *Fratello v. Archdiocese of N.Y.,* 863 F.3d 190, 202–03 (2d Cir. 2017).
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37. *Skrzypczak v. Roman Catholic Diocese of Tulsa,* 611 F.3d 1238 (10th Cir. 2010).
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42. Jamie Mason, *After the Supreme Court's Latest Decision, Who Would Want to Work in a Church?* Nat'l Cath. Rep., July 14, 2020, https://www.ncr.online.org/news/opinion/grace-margins/after-supreme-courts-latest-decision-who-would-want-to-work-church.
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How To Create the Flexible Work Environment That Lawyers Want

By Jack Newton

Burnout is high in the legal industry, and the competition for talent is fierce. If the past year has taught us anything, it's that times are changing and many lawyers will not stay in a work environment that doesn't support their needs as professionals and individuals.

As uncovered in the most recent Legal Trends Report, nearly 1 in 5 lawyers left a job over a period of 12 months, and nearly 1 in 10 still planned to leave a role. Work-life-balance was one of the most significant factors (reported among 37% of lawyers who moved jobs) that drove firm members to leave a role.

It's now more important than ever that law firms take a coordinated approach to understand what today's legal professionals are looking for in an employer. There is no question that the practice of law is a busy and demanding profession. But one of the more recent confounding factors for legal professionals is that in the last few years, the boundaries between work and life have blurred, threatening to take over more time and space in the personal realms of many.

Overall, based on aggregated and anonymized data from tens of thousands of legal professionals studied for the report, lawyers spend fewer days in the office – roughly 12 working days in a given month. In fact, 49% of lawyers say they prefer to work from home, and 45% say they prefer to meet clients virtually.

We see similar preferences among clients: 35% say they prefer to meet virtually, compared to 28% who prefer in-person, and the remainder have no strong preference either way.

While the complexities of work and life can often feel like trying to put two square pegs into a round hole, it's time that lawyers stop thinking about work-life balance as binary. The goal will always be to find balance, but for many, this will mean less of a separation between the personal and professional, and instead, more of coexistence between the two.

There's evidence that lawyers may already be thinking in this way. Three out of four lawyers say they want the flexibility to choose which hours of the day they work – no doubt to make room for other priorities in life. The question is, how are law firms providing this flexibility for their lawyers? Flexibility should come from a company's culture, but needs to be supported through technical capabilities.

One way that law firms can ensure they're set up to meet the needs of both their lawyers *and* their clients is to adopt a cloud-based approach to how they work. The data here is significant.

Lawyers using cloud software are 29% more likely to report being happy with their professional life, 60% more likely to report positive relationships with clients, and 44% more likely to have positive relationships with colleagues.

Cloud technology lets lawyers work wherever they want. It keeps them in touch with the firm and their clients, and makes them more responsive. Lawyers have always worked out of office, whether in court or visiting clients where they are – now they have a way to keep connected, no matter where they are.

If firms *don't* find ways to create the type of space and flexibility that lawyers are looking for, those lawyers will seek out and find other firms that do. All firms should be taking stock of what their people want in a workplace, and finding ways to make their work environments better for everyone.

To learn more about how the work of legal professionals is fundamentally changing, and the trends in hybrid legal work environments, download the latest Legal Trends Report at clio.com/legal-trends.

Jack Newton is the CEO and founder of Clio and a pioneer of cloud-based legal technology. Jack has spearheaded efforts to educate the legal community on the security, ethics, and privacy issues surrounding cloud computing, and is a nationally recognized writer and speaker on the state of the legal industry. Jack is the author of "The Client-Centered Law Firm," the essential book for law firms looking to succeed in the experience-driven age, available at clientcenteredlawfirm.com.

Internet Sensation Alex Su and the Transformative Power of Humor

By Jennifer Andrus

If you watch videos of Alex Su on TikTok or YouTube, you might expect him to have a bigger-than-life personality. Not so. What you will find is a soft-spoken, down-to-earth lawyer who speaks frankly about his career change from Big Law attorney to software salesperson to internet sensation.

His quirky videos found @legaltechbro poking fun at the legal industry garner him just shy of 100,000 followers. In addition to his work at contract software maker Ironclad, he writes for Above the Law and his own online newsletter "Off the Record."

The theme of this edition of the Bar Journal is attorney well-being. We are taking a closer look at humor and the lighter side of life as we explore how to take care of ourselves so we can take care of our clients. Alex Su has a "road less traveled" story demonstrating his work to find the best path for himself and his family while showing us how to enjoy a laugh along the way.

An Epiphany at the Crossroads

To understand Su's journey, we need to start at his beginnings. After graduating from Northwestern University Pritzker School of Law, where he was an editor of the law review, he spent a few years as an associate at Sullivan & Cromwell and clerked for a federal judge.

At age 33, just six years out of law school, Su found himself at a crossroads. Following a layoff from a large firm, Su tried his hand at a small firm and then as a solo practitioner. All three positions left him feeling hollow and yearning for a different kind of work experience. He was single with no children, and that's when he had an epiphany.

"It was a fork in the road. Working in law turned out to be not what I expected. So, I had to say, 'What am I good at? What am I bad at?'" That soul searching led to the pivot that would change his life.

Su liked working with people and had a knack for explaining technology and software programs to people. He used his understanding of the legal profession to sell practice management software while using humor to relate to his clients.

"My experience as a lawyer helped me communicate how small firms could compete with big firms with the right technology," he says. He started making comedy sketch videos for fun and to drum up new business. When the pandemic hit in 2020 and more lawyers were working remotely, Su's comedy sketches took off. He says it was a bit of luck coupled with impeccable timing and that other software companies took notice.

Enter software maker Ironclad, who saw the confluence of his skills and offered him a new job created just for him: community developer. It's neither marketing nor sales of a product. Su calls it his "unicorn job," designed with his personality in mind. His job is to engage the community in the hopes it will generate interest in software makers' products.

Humor Opens Doors to Dialogue

Su says joking about a sensitive topic lessens its taboo nature. "I talk about things that are serious, but with humor it opens the door to dialogue. At first, I was afraid of being scorned," he said. "But I found that the vulnerability of sharing a serious topic publicly invites support and community."

One early example of success came in a video about being one of a few Asian Americans in his firm and what it's like to be a first-generation lawyer dealing with demanding parents.

Sus's postings about topics like burnout, depression and imposter syndrome are cloaked in humor, and have helped people feel more connected to others with similar experiences. A community sprang up in the comment section of those posts where viewers made connections with others who were also struggling.

"As lawyers we live on outward signs of success, the prestige and the status. We don't like to admit when we are wrong or when we are hurting. Now we are creating tribes where you can find comfort in sharing the struggle, knowing that you are not the only one."

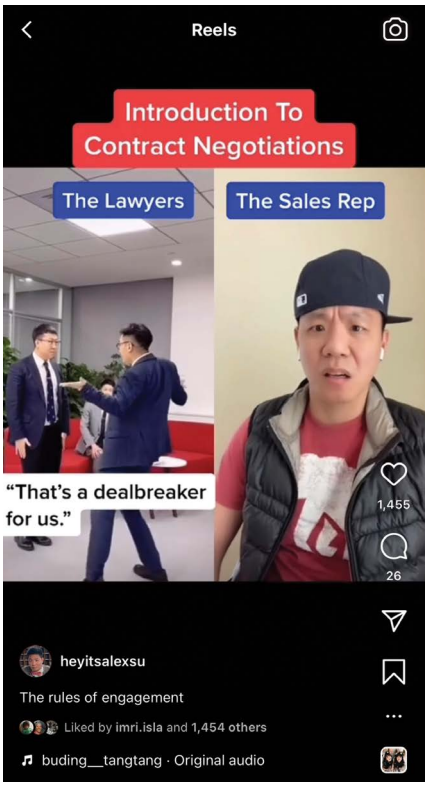
Finding Balance

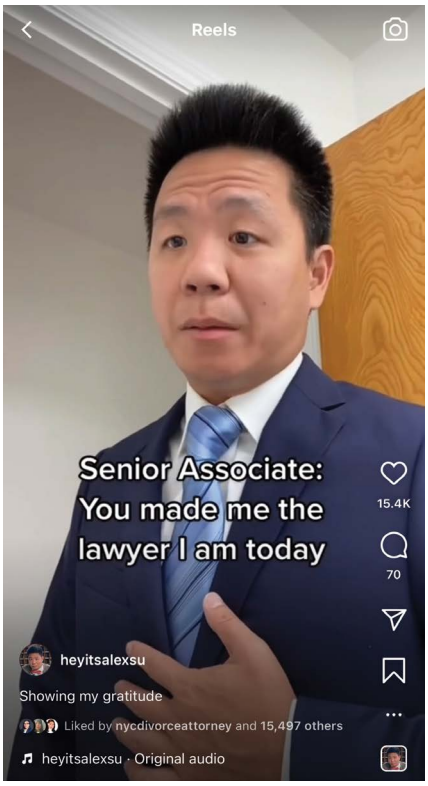
The success of his online videos helps Su maintain a balance between work and family life. Now a married father with a young child, he enjoys being able to create a community through his work at Ironclad while also caring for his family.

"I love what I do, I love my job and I feel like, because of the internet, I've been able to both contribute to the community and to work. I have the flexibility to take care of my three-year-old and excel at work."

He talks about maybe writing a book someday about his journey, but for now he is content to help Ironclad succeed and continue to make people laugh in the legal community. As a young lawyer, Su says he had strict goals and timelines in every aspect of his life. Now he takes a more laid-back approach.

"I'm trying to take things more one step at a time and see what happens."





Jennifer Andrus is a content specialist at NYSBA.

Addressing Incivility

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 ac tual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimu late 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 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 his 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

Dear Riley S.O. Offended:

Your question implicates rules governing civility standards typically set forth by the New York State Bar Association, the American Bar Association, local courts and specific judges. Lawyers are held to a higher standard when it comes to how they conduct themselves both in the courtroom and in society. As you and all lawyers well know, we must go through character and fitness assessments, background checks and demonstrate certain moral standards just to obtain our licenses to practice. Not only are lawyers responsible for keeping their *own* conduct in check, they are also responsible for ensuring that those under their supervision – their clients – conduct themselves properly as well.

Civility Guidelines

According to the New York State Standards of Civility, "lawyers should be courteous and civil in all professional dealings with other persons."[1] This includes other lawyers despite the adversarial nature of our profession. The standard specifically states that "lawyers can disagree without being disagreeable" and they should avoid using vulgar language or ridiculing other lawyers, witnesses or parties. Regarding depositions specifically, New York courts advise that lawyers should "conduct themselves with dignity and refrain from engaging in acts of rudeness and disrespect."

As a general rule, if you wouldn't say or do something before a judge, you shouldn't say or do that thing in a deposition. This includes the expectation that lawyers not obstruct questioning during a deposition or object to questions unless necessary. Further, lawyers "should refrain from asking repetitive or argumentative questions and from making self-serving statements."[2]

It is safe to say that defense counsel's comments constitute "self-serving statements." In making these comments and preventing defendant from answering your questions, he distracted you from your questioning, making it difficult for you to complete the deposition. It appears he also attempted to humiliate and ridicule you to the parties and other participants of the deposition, which is behavior that the Standards of Civility explicitly advise against.

The American Bar Association has its own civility standards, which it collectively refers to as "Guidelines for Conduct."[3] The guidelines are modeled after the Standards for Professional Conduct used by the United States Court of Appeals. Comment 1 of Rule 1.3 states that "the lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect." This includes opposing counsel.

It is safe to say that defense counsel's behavior was rude and disrespectful and does not abide by the civility standards laid out both by New York State courts and the ABA. In this instance, whether defense counsel agreed with your questioning or not, he should have acted in a professional manner rather than making disparaging comments to you and ridiculing the questions you were asking. If defense counsel disagreed with a question you asked during a deposition, he should have respectfully noted his objection on the record, rather than adding his rude commentary and seemingly objecting just to be disruptive. If he truly had a legal issue with your questioning that he felt could not be resolved by simply noting his objection, he could have requested to confer with the judge to express his grievances.

Improper Objections During Depositions

According to the Uniform Rules for the Conduct of Depositions Rule 221.1, objections during a deposition must be made "succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity." This rule also provides that those in attendance at the deposition "shall not make statements or comments that interfere with the questioning."

Defense counsel clearly interfered with the questioning by making derogatory comments to you, interrupting you while you asked questions and advising his client not to answer even basic questions. While during the course of a deposition, objections are typically only marked by the transcriber for later ruling and not argued at that time, lawyers must still have a reasonable and lawful basis for objecting; they can't just throw spaghetti at the wall to see what will stick. It is hard to believe that in this instance, defense counsel actually had such a basis for objecting to nearly all of your questions – especially being that he objected to your inquiry as to the defendant's occupation.

Rule 221.3 states that "an attorney shall not interrupt the deposition for the purpose of communicating with deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules, and, in such event, the reason for the communication shall be stated for the record succinctly and clearly."[4] Attorneys are otherwise prohibited from directing a deponent not to answer questions except where the questions are so improper that to answer them will substantially prejudice the parties.[5] However, this is a high standard and, assuming the questions you asked the deponent did not meet this standard, defense counsel should not have directed the deponent not to answer your questions. Defense counsel violated these rules when he advised his client not to answer your questions regarding his occupation and persistently interrupted your questioning.[6]

What You Can Do

According to the New York Rules of Professional Conduct, the Standards of Civility are not intended to be enforced by sanctions or disciplinary action. However, some states try to enforce these standards of civility using their local rules of professional conduct.

The ABA shares the same sentiment; its guidelines for professional conduct are "purely aspirational" and not intended to be used as a basis for discipline or sanctions. According to Americanbar.org, the "Guidelines are designed not to promote punishment but rather to elevate the tenor of practice – to set a voluntary, higher standard."[7]

However, there are instances in which attorneys might be sanctioned for failing to fulfill their duties of civility and professionalism during a deposition. In *Hindlin v. Prescription Songs LLC,*[8] N.Y. County Supreme Court Judge Andrea Masley ordered that two attorneys who had behaved improperly during a deposition – interjecting during questioning, making improper speaking objections, instructing witnesses not to answer, etc. – were required to take a NYSBA-sponsored CLE on attorney civility. These attorneys had a history of uncivil behavior throughout the case, which might be why they received such sanctions.[9]

Because in most states it is requisite for licensing that attorneys maintain good moral character and a general fitness to practice law, some attorneys will be sanctioned for uncivil behavior as a violation of the local rules of professional conduct. A sort of catchall included in the ABA's Model Rule of Professional Conduct is that lawyers are obligated to "improve the administration of justice."[10]

In New York, lawyers must abide by Rule 3.3(f), which requires, when appearing before a tribunal, that lawyers comply with known local customs of courtesy or practice. Conduct before a tribunal that is "undignified" or "discourteous" may violate this rule.[11] As previously mentioned, lawyers should not act differently in a deposition than they would before a judge or a tribunal. Furthermore, conduct in a proceeding that serves merely to harass or maliciously injure another would be frivolous in violation of Rule 3.1.[12]

It is difficult to assign any reasoning to defense counsel's comments toward you other than to harass or "maliciously injure" your case against the defendant. Defense counsel's inappropriate comments regarding your politics, the quality of your questions and legal skill made in such a rude manner would likely fall within the meaning of "harassment" for purposes of Rule 3.1, and defense counsel may be found to have violated this rule.

During a deposition, counsel can always request to contact the judge if opposing counsel's behavior becomes so inappropriate that the deposition cannot properly proceed. If there is a judge "on call," he or she may be able to resolve the dispute over the phone or may choose to deal with the issues at a future court appearance. In instances such as these where opposing counsel's conduct becomes so out of hand that the deposition is nearly impossible to complete, contacting the judge may be a necessary step.

Conclusion

Lawyers must balance zealous advocacy with upholding the standards of civility and maintaining their status as one of good moral character and fitness to practice law. This includes conducting themselves in a professional and respectful manner whether they are before a judge or speaking with opposing counsel's receptionist. As emphasized in many of the model rules of professional conduct of different jurisdictions and legal organizations, lawyers should be working to improve the legal system, rather than perpetuating bad habits.

Sincerely,
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QUESTION FOR THE NEXT FORUM

I am an attorney involved in a case against a large biotechnology company accused of defrauding investors and patients. My client was the chief scientist at this company and told me that none of its devices were functional despite investors and health care professionals believing they were. This put hundreds of thousands of patients at risk as they received false test results which either led them to believe they had a disease they do not have or provided them a false sense of relief allowing their underlying conditions to go untreated. After noticing the devices were producing inaccurate results, my client approached the CEO to warn him. The CEO was dismissive and insisted that the devices worked despite evidence to the contrary. He was then removed from his position as chief scientist and placed in a clerical role.

Once legal action commenced, my client was called to testify against the company as to his knowledge surrounding the devices' inaccuracy and the CEO's awareness of such. He was distraught about testifying because he was sure that the company would sue him for breaching a nondisclosure agreement all employees were forced to sign upon hiring. While I assured him not to worry, he was not assuaged and felt there was no way out.

Devastatingly, my client committed suicide the day before he was to testify against the company. Rumors swirled that his death was not a suicide but a murder to prevent his testifying. The prosecutor issued a subpoena for my testimony regarding what my client would have testified about. However, while I am being ordered to testify, I do not want the breach confidentiality.

Does attorney-client privilege survive a client's death? What defenses do I have to defying the subpoena to uphold the privilege I am bound by?

Sincerely,

V.R. Scared

Endnotes

1. New York State Standard of Civility, https://www.nycourts.gov/LegacyPDFS/RULES/jointappellate/Jan%202020%20-%20civility%20standards%20CLEAN.pdf.
2. *Id.*
3. Jayne R. Reardon, *Civility as the Core of Professionalism*, American Bar Assoc., Sept. 18, 2014, https://www.americanbar.org/groups/business_law/publications/blt/2014/09/02_reardon/.
4. There are only a few grounds for objecting to a question asked during a deposition according to Rule 221.2. Generally, deponents must answer all questions asked at a deposition, "except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis thereof. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition."
5. *Spatz v. Wide World Travel Serv.*, 70 A.D.2d 835 (1st Dep't 1979).
6. https://ww2.nycourts.gov/rules/trialcourts/221.shtml.
7. Reardon, *supra* note 3.
8. No. 651974/18, 2022 N.Y. Slip Op. 32601(U) (Sup. Ct., N.Y. Co. July 30, 2022).
9. *Id.*
10. *Id.*
11. *New York Rules of Professional Conduct,* Rule 3.3(f): In appearing as a lawyer before a tribunal, a lawyer shall not:

> Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;
>
> Engage in undignified or discourteous conduct;
>
> Intentionally or habitually violate any established rule of procedure or of evidence; or
>
> Engage in conduct intended to disrupt the tribunal.

12. *New York Rules of Professional Conduct,* Rule 3.1(b): A lawyer's conduct is "frivolous" for purposes of this Rule if:

> The lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;
>
> The conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or
>
> The lawyer knowingly asserts material factual statements that are false.

New York's New Congressional Delegation: Fewer Numbers, but More Influence

This has been a tumultuous year in New York congressional politics. The 2020 Census, conducted entirely during the height of the COVID-19 pandemic, revealed a diminished population in the state resulting in New York losing a congressional seat. A drawn-out and contentious redistricting process resulted in bitter intra- and inter-party campaigns where senior congressional leaders were ousted from their long-held seats. A red ripple swept across Long Island and upstate, placing many Republicans as freshman members of the House of Representatives. Pundits predicted the decline of New York's influence in Washington. But is that really the case, or is New York poised to benefit from a new political landscape and be a contender in both bodies and on both sides of the aisle because of the leadership and new rank-and-file members?

In the 117th Congress, which comes to a close on Dec. 31, New Yorkers chaired the powerful Judiciary, Oversight and Small Business committees, as well as several subcommittees in the Democratic-controlled House. When Congress convenes in January 2023, those positions will be gone. Republicans will hold the gavel, and none of the committees will be helmed by New Yorkers.

But there is some good news for New York in the new political landscape. New York is in a unique position,

which few states have enjoyed, to have leadership in both bodies. In addition to the many roles the leaders play, they can advance floor consideration of key bills, block measures contrary to state interests and generally have the clout to look out for their home state.

"Fifteen Democrats and 11 Republicans will make up the 26-member House delegation from New York next year."

Hakeem Jeffries will take the reins as House Minority Leader, the most senior position for the party not in power. Representative Jeffries has represented Brooklyn in Congress since 2013. As an attorney, he has served as a senior member of the House Judiciary Committee. NYSBA leadership has had the opportunity to meet with him and his office many times over the years on Washington lobby days and to work with them on issues important to the Association. He has long championed issues key to access to justice, including policing reform and immigration.

On the Republican side of the aisle, the number three leadership spot in the Republican-controlled House will be held by North Country Representative Elise Stefanik. The conference chair is responsible for guiding the messaging of the party in the House.

Across the Capitol in Washington, the leadership of the Senate will continue to be held by long-time Senator Chuck Schumer.

In addition to having leaders who are New Yorkers, there are new rank-and-file Republican members. There were 19 Democrats and eight Republicans representing the state in the 117th Congress. Next year, there will be 15 Democrats and 11 Republicans in the 26-member House delegation. This is key, since the House is now controlled by the Republican Party. While many of these Republican members are not in leadership positions yet, their votes are important to advance measures that are critical to the state. There is an old ad saying, "membership has its privileges." I would add that "congressional membership has its privileges" and "being in the majority has its advantages." It is their bills that will move through committees and come to the floor for a vote. It is their agenda that gets in advanced.

There are no guarantees how issues will play out next year. There are many factors to consider. Democrats will narrowly control the Senate. Republicans will have the slimmest of majorities in the House. Republicans will not necessarily vote en bloc on every issue. It will only take a few members to vote with Democrats to derail a Republican agenda. President Biden, looking to cement his legacy – or build his reelection campaign – will seek wins either through compromises with Congress or through executive action. For example, he could pursue a ban on assault weapons, which he championed as a senator, or provide student loan relief or forgiveness, which is favored by many of his former Senate colleagues. Of note, these are also two federal legislative priorities of the Association.

It is imperative that all legislators, particularly newly elected representatives, hear from their constituents on issues of importance to them. That is why the New York State Bar Association will continue to advocate for its members and the legal profession. Early in 2023, the association will deliver its federal legislative priorities to Congress. The government relations department will work with association leadership to advocate and inform Congress on the topics. The association also serves as a resource for members of Congress as they develop their legislative agenda and key bills. NYSBA has experts across over 70 sections, committees and task forces that stand ready to assist the members of the congressional delegation.

While there is much uncertainty about next year in Washington, one thing you can count on is that NYSBA will be there fighting for access to justice and the integrity of the legal profession.

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.

RISK MANAGEMENT INFORMATIONAL SERIES

Some Practical Tips When Applying for Professional Liability Insurance

In recent years, buyers of lawyers' professional liability (LPL) insurance have enjoyed a "soft market" (many competing carriers and lower premium costs due to price competition). But it doesn't necessarily feel that way when the bill is paid each year. Malpractice premiums are still a large overhead item for most firms and with some signs that the market is "hardening" it may be even larger in the next few years.

However, there are some simple steps you can take to reduce your malpractice insurance premium without compromising the coverage you need. By presenting your firm in the best light on the insurance application you may be able to achieve significant savings on your malpractice premium. There are several important areas asked about on virtually all LPL applications, including: 1) firm areas of practice; 2) internal procedures the firm uses to track deadlines, check conflicts and ensure effective client communication; 3) whether the firm sues for fees; 4) and, most critical, has the firm reported any claims or is it aware of any unreported claims or potential claims.

Areas of Practice

Anyone who has filled out an LPL application is familiar with the grids that ask the applicant for a breakdown of its overall practice into the percentages of specific areas of law being practiced. But you may not have thought about the effect these percentages might have on the firm's premium. LPL underwriters see certain areas of practice as riskier than others. Some insurance companies will include extensive AOP factors in their rate filings to reflect these differences while others will file for broad underwriting discretion to adjust the premium depending on the applicant's practice mix. Either way, overestimating the percentage of riskier AOP's or underestimating the safer ones, can result in a firm paying more than necessary for its LPL coverage.

If the application does not specify whether the percentage is to be calculated on hours worked or gross revenue, use the hourly calculation. This is usually to an applicant's advantage because the safer practice areas tend to be straight billable hour work while some of the riskier areas might include contingent fee or bonus arrangements, and this could inflate the riskier practice area percentages if the firm has a great outcome in a particular matter one year.

Tip: Review the firm's current practice by percentage every year if it has a mixed AOP profile and make sure it is accurate.

Fee Suits

Suing a client to recover fees should be avoided if possible. This has become a serious concern for LPL insurance companies – some carriers are declining to insure firms that sue clients while others are putting endorsements onto their policies excluding malpractice claims that arise out of fee suits. Moreover, an underwriter may charge additional premium to cover the enhanced risk.

The firm should adopt procedures to minimize the need for fee suits: by vigilant billing, obtaining adequate retainers or even terminating the representation. Sometimes fee suits may be a business necessity. If the firm has made a business decision that a fee suit can't be avoided, then this needs to be explained on the application. The firm should have a specific (ideally written) procedure for deciding whether a particular fee suit should be undertaken, and it should involve more than just the billing partner whose fees are unpaid. If the firm has an executive committee or similar steering group, the issue should be brought before them. The file should also be carefully reviewed (by a firm peer) to make certain that there are no potential grounds for a claim of malpractice that might have merit.

Tip: If the firm has sued for fees, provide a description of the careful way in which the firm approaches a prospective fee suit and the steps it takes to minimize the need to sue clients at all.

Claims

The single biggest impact on what a firm pays for LPL insurance is whether it has had claims, how many, and how severe. An adverse claims experience might mean that a firm cannot find LPL coverage in the "admitted" market (admitted carriers are those whose rates and forms are fully regulated by the New York Department of Financial Services).

The best way to keep your LPL premium down is obvious – do not have any claims. But that isn't much help. Most firms will have on occasion the need to report a lawsuit against them or a matter that might develop into a claim. How should this be dealt with on the application?

First, does the matter have to be revealed on the application? If it is a renewal application and your current carrier is handling the claim (or knows of it from earlier applications) then it generally does not have to be included on subsequent renewal applications, which only ask about previously unreported claims.

Most applications for a new LPL policy (i.e., new to that company) will have a 5-year "look back" period for any reported claims. This generally means that claims reported more than 5 years before do not have to be included.

If you do have a claim(s) within the 5-year window you will have to answer the claims question "Yes" and do a Claim Supplement. This presents another opportunity to advocate for your firm. The underwriter will want to know the facts underlying the claim and be particularly concerned with the remedial steps the firm has taken to avoid similar claims from recurring. So, take the time to fully explain the matter and include any facts that might mitigate the firm's liability or otherwise make it unlikely that the claimant will succeed. If the claim has closed and money was paid out to settle or even just to defend the matter, explain with specificity what the firm has done to avoid a similar claim in the future (Fox example, instead of saying that no remedial steps were possible because the client is "irrational" discuss how the firm has revised its client screening procedures to avoid problem clients).

Tip: If your firm is applying to a new carrier and must reveal actual or potential claims, advocate for your firm. Prepare a persuasive narrative for the Underwriter telling why the firm is a good risk despite the claim.

For more information on potential ways you may be able to reduce your firm's LPL insurance costs, please visit www.nysbainsurance.com.

USI Affinity Resources

For over 70 years, the divisions of USI Affinity have developed, marketed, and administered insurance and financial programs that offer affinity clients and their members unique advantages in coverage, price, and service. Our programs offer clients, from associations and unions to financial institutions, the edge they need to both retain existing and attract new members and customers. As the endorsed provider of affinity groups representing over 20 million members, USI Affinity has the experience and know-how to navigate the marketplace and offer the most comprehensive and innovative insurance packages available.

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NYSBA Files Lawsuit To Raise 18-B Rates

By Susan DeSantis

Children and indigent adults are being deprived of their constitutional rights to meaningful and effective representation in the criminal and family courts because pay for assigned counsel in the state has not been increased in 18 years, the New York State Bar Association contended in a lawsuit filed today.

The sole exception is in New York City where Supreme Court Justice Lisa Headley issued a preliminary injunction on July 25, 2022 to raise pay to $158 an hour retroactive to Feb. 2, 2022, in response to a suit filed by the New York County Lawyers Association and nine other bar associations. The court found "that severe and irreparable harm to children and indigent adult litigants would occur without an injunction" and said protecting their constitutional rights is of "paramount importance."

Through this legal action, the New York State Bar Association is seeking a pay rate of $158 per hour retroactive to Feb. 2, 2022 in the 57 counties outside of New York City for what is commonly referred to as 18-B lawyers. Pay has remained at $60 per hour for misdemeanors and $75 for felonies since 2004. By comparison, assigned counsel rates in the federal courts in New York in those same years have been raised 14 times to the current rate of $158 per hour.

"The New York State Bar Association has long supported sufficient pay for assigned counsel," said Sherry Levin Wallach, president of the association. "Failing to provide adequate compensation for representation to children and indigent adults is a flagrant violation of the U.S. and New York State constitutions."

"Rates have only been increased once in 35 years, which is a travesty. While we welcome the higher rates in New York City as a result of Justice Headley's decision, it should be applied statewide. There is now a significant discrepancy in pay across the state for assigned counsel resulting in attorneys not being able to accept court-appointed assignments. Ultimately, it is the clients – children and indigent adults – who suffer because their constitutional rights are not being protected," she said.

The failure to raise rates in 18 years has led to fewer attorneys who are willing to take on the cases. Those who remain are overburdened and don't have sufficient time to devote to each case.

"Inadequate funding, along with the excessive caseloads it causes, compromises the quality of legal representation that even the most qualified assigned private counsel in the counties can provide to their indigent clients," the suit contends. "Excessive caseloads prevent assigned private counsel from performing basic pre-trial and pre-hearing tasks that are necessary and fundamental to the provision of meaningful and effective legal representation.

"Those tasks include, but are not limited to, meeting with, interviewing, and counseling their clients; conveying basic information to their clients about the nature and purpose of upcoming court proceedings; spending adequate time reviewing their clients' files, including volumes of case records, social media, and/or electronic evidence; conducting necessary legal and factual research; preparing witnesses to testify; filing evidentiary and procedural motions; and otherwise preparing their cases for trial."

Michael J. Dell, a partner at Kramer Levin Naftalis & Frankel who is representing the New York State Bar Association, said, "In *NYCLA v. State*, the state did not and could not dispute that every single day, more children and indigent adults are deprived of their constitutional right of access to justice, and this calamity is visited most heavily and disproportionately on people of color." Dell also represented the bar associations in the NYCLA suit.

"The state's cavalier treatment of this issue and its constitutional obligation to children and indigent adults is unconscionable," Dell said.

Acting Chief Judge Addresses Judicial Impartiality, Need for Civility

By Susan DeSantis and David Alexander

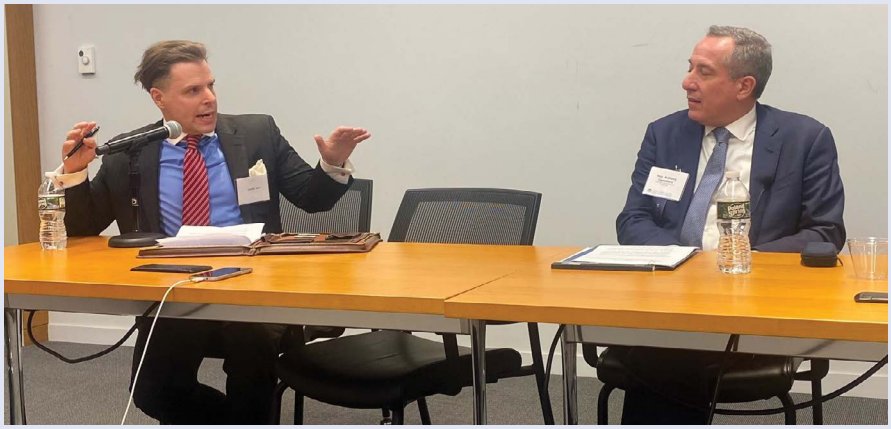
Acting Chief Judge Anthony Cannataro said that while judges "are not at liberty to engage" with critics who question the impartiality of the judiciary, "the best thing we can do is model the values that are accorded to us."

"We have spent years honing our craft, deciding cases based on time-honored principles. I am absolutely certain everyone I know that is on the bench has the ability and the desire to decide cases based on their merits, through careful application of the principles that have been with us for very many years," he said.

The conversation, which took place Nov. 21 at a New York State Bar Association event in New York City, touched on many aspects of legal practice, including alternative dispute resolution, the civil courts, the use of virtual courtrooms, Commercial Division practice, and Judge Cannataro's appointment to the Court of Appeals.

The event, which was sponsored by the association's Commercial and Federal Litigation Section and held at Foley & Lardner on Park Avenue, was designed as an informal exchange between Judge Cannataro and the association's members. Dan Wiig, immediate past chair of the section and podcast host of "Amicus Curiae," moderated the event.

The judge was asked, "In a time where political and legal discourse have often resulted in violent words or acts, what can the bench and the bar do to elevate the conversation to responsibility?"



Dan Wiig, immediate past chair of the Commercial and Federal Litigation Section and podcast host of *Amicus Curiae* and Acting Chief Judge Anthony Cannataro touched upon several issues including the need for civil discourse within the justice system.

While the bench is limited in its ability to confront such criticism, the judge said that bar associations could speak freely.

NYSBA President Sherry Levin Wallach, who attended the event, said that bar associations must demand that judges be protected, and civility maintained.

"We as a legal community must do everything in our power to put civility and the protection of the judiciary ahead of partisan ideology," she said. "We believe that all views must be heard and shared in a respectful manner and in an appropriate setting."

On virtual courtrooms, Cannataro said he recognized the limitations. He said that he worried about the impact of a lack of participation of jurors on the wrong side of the digital divide but that he can't see the court system "putting the genie back in the bottle."

"We certainly don't want to create skewed jury pools," he said. "But I have faith we can figure it out."

In response to a question about his return to the Court of Appeals, Judge Cannataro reminisced about his early days as a clerk to Court of Appeals Judge Carmen Beauchamp Ciparick. "I felt so honored to be among these legal giants" who were "so generous with their time and intellect," he said.

Then he turned to what his life has been like since being named acting chief judge on Aug. 25.

"It's an all-consuming job," he said. "Obviously, I have my 13 or 14 months as an associate judge in the Court of Appeals before I became acting chief. I have my five or six years as an administrative judge before that. I had each of those jobs separately for the past few years, now I'm doing both at the same time, so my life has become consumed by the court. But I love it; it's exciting."

There's Something for Everyone at First In-Person Annual Meeting in Three Years

By Jennifer Andrus

The New York State Bar Association Annual Meeting is returning to the Hilton Midtown for the first time in three years, and the six-day conference is jam-packed with a variety of panel discussions and social gatherings, including a gala dinner at the Rainbow Room and the week's premier educational event – the Presidential Summit.

Presidential Summit

The summit will focus on "Mental Health and the Justice System: Impacts, Challenges, Potential Solutions" and be held on Wednesday, Jan. 18. Untreated mental illness and the inability to access treatment and a lack of funding have created a crisis at every level of the criminal justice system. It impacts everyone from attorneys and their clients to judges, courthouse staff, incarcerated individuals and more. This issue has been exacerbated by the multi-year COVID crisis and compounded by deepening societal inequities.

During the panel entitled "Mindfulness and Mental Health," professionals in the legal and mental health industries will discuss the importance of creating a work environment that recognizes and promotes mental wellness.

The effects of mental illness on the criminal justice system is the focus of a third panel during the summit. The "Criminalization of Mental Illness: Incarceration's Effects on Mental Health and Trauma" panel will be about how people with mental health disorders have not been deinstitutionalized but have been shifted to another, less-humane form of institutionalization – jails and prisons. Panelists will also discuss the dehumanizing and often arbitrary environment in most jails and prisons.

Constance Baker Motley Symposium and Diversity Awards Program

The symposium will focus on the fight for constitutional rights for residents of the U.S. territories, which is one of the association's legislative priorities. Following the symposium, the President's Reception: A Celebration of Diversity will highlight the work of the Task Force on the U.S. Territories and the Committee on Diversity, Equity and Inclusion.

Presidential Gala: Building A Stronger Future and the Gold Medal Award

The signature event at Annual Meeting is the Presidential Gala. The 2023 event will be held at the Rainbow Room atop 30 Rockefeller Plaza on Friday, Jan. 20. The flagship event is a black-tie dinner with live entertainment and an auction to benefit The Bar Foundation. The evening's highlight is the presentation of the Gold Medal Award, the New York State Bar Association's highest honor.

The 2023 recipient is nationally recognized civil rights attorney and law professor Sherrilyn Ifill. She is a senior fellow at the Ford Foundation, a position she began in early 2022 following 10 years as the president and director-counsel of the NAACP Legal Defense Fund. In addition to her work on the board of the Mellon Foundation, she is a trustee at New York University School of law.

Section Meetings and Events

Each section hosts practice-specific panels and workshops during Annual Meeting. Members are welcome to register to attend section events that are not in their area of practice.

Many members say the best part of Annual Meeting is the networking with other attorneys and learning new information. "I have a very niche practice and it's nice to commiserate with other property tax or real property attorneys in getting different viewpoints," says Amy D'Ambrogio, a member of the Real Property Law Section.

"You learn a lot by coming to these events that you might not ordinarily learn about what's going on with the judiciary, what's going on in the courts," says NYSBA member Richard A. Klass.

New in 2023, six sections will be holding virtual programming during Annual Meeting There will be no in-person events for these sections and their programs will take place on Jan. 23 and 24.

The virtual-only sections are:

- Business Law
- Food, Drug and Cosmetic Law
- Intellectual Property Law
- International Law
- LGBTQ Law
- Local and State Government Law

With more than 30 programs offered, in addition to special events and receptions included with the general registration, there is something for everyone. For up-to-the-minute schedules and registration information, visit NYSBA.ORG/AM2023.

New York State Bar Association Calls for Equal Treatment for People Who Live in U.S. Territories

By Susan DeSantis

The New York State Bar Association's House of Delegates voted Nov. 5 to approve a resolution declaring that all people who live in the United States — including residents of the U.S. territories — be treated equally and afforded the same rights.

"Our bar association has been engaged in advocating for equal treatment for the residents of the U.S. territories," said Sherry Levin Wallach, president of the New York State Bar Association. "We are disappointed that the U.S. Supreme Court did not grant certiorari in *Fitisemanu v. United States*, which would have been a wonderful opportunity to overturn the jurisprudence that allows the people of the U.S. territories to be treated as second-class citizens. The court's disappointing decision misses the mark and forgoes a significant opportunity to usher in a new era that separates this nation from racist policies and attitudes."

The cases that established second-class citizenship for the people of the U.S. territories, known as the Insular Cases, have been relied upon by the U.S. Supreme Court and lower courts to justify unequal treatment of the residents of the territories that the United States gained in the Spanish American War and in the early 20th century — the U.S. Virgin Islands, American Samoa, Guam, the Northern Mariana Islands and Puerto Rico.

Anthony Ciolli, a past president of the Virgin Islands Bar Association and a special assistant to the chief justice of the Virgin Islands, worked alongside the New York State Bar Association to craft the resolution, which was first approved by NYSBA's Executive Committee on July 19.

"This is one of the biggest diversity issues of our time," Ciolli said. "We cannot truly say that as a nation we're committed to diversity, equity and inclusion until all the citizens of the United States are treated equally. After all, our Constitution guarantees it."

The rulings have been challenged in multiple legal venues, and last spring the U.S. Supreme Court refused to overrule the Insular Cases and denied Jose Louis Vaello-Madero, a Puerto Rican New Yorker, his Social Security benefits when he became a resident of Puerto Rico. In his concurring opinion, Associate Justice Neil Gorsuch made it clear that he believes the court should make amends for its mistakes regarding the territories.

"A century ago in the Insular Cases, this court held that the federal government could rule Puerto Rico and other territories largely without regard to the Constitution," Gorsuch wrote in April. "It is past time to acknowledge the gravity of this error and admit what we know to be true: The Insular Cases have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law."

Associate Justice Sonia Sotomayor, who called the Insular Cases "odious and wrong," said in the sole dissenting opinion on the case that "Congress' decision to deny to the U.S. citizens of Puerto Rico a social safety net that it provides to almost all other U. S. citizens is especially cruel given those citizens' dire need for aid. Puerto Rico has a disproportionately large population of seniors and people with disabilities."

On June 1, the first day of Levin Wallach's presidency, NYSBA launched a task force to review the laws and court decisions that have led to second-class citizenship and unequal treatment for the people who live in the U.S. territories.

At the urging of the New York State Bar Association and the Virgin Islands Bar Association, the American Bar Association on Aug. 9 approved a resolution supporting the overruling of the Insular Cases.

Experts on NYSBA's Task Force on the U.S. Territories had hoped that the U.S. Supreme Court would grant certiorari in *Fitisemanu* because the Insular Cases are an affront to the Constitution and the case directly addressed the citizenship question. But on Oct. 17, the court announced it wasn't hearing *Fitisemanu*, a case in which the plaintiffs argued that the people of American Samoa should have the same rights and privileges as residents of the 50 states.

"Accepting the case would have given the court the chance to formally denounce the second-class citizenship for the people of all U.S. territories and take another step toward removing racism from our jurisprudence," Levin Wallach said. "Even though the Supreme Court is not going to hear the case, we are going to continue to educate and advocate for change."

New York State Bar Association Calls on U.N. To Investigate War Crimes in Illegal Invasion of Ukraine

By Jennifer Andrus

The New York State Bar Association is calling on the United Nations to investigate whether the Russian Federation and its officials violated international law in the Ukraine war. The tribunal would be similar to the courts that investigated war crimes in Sierra Leone, Rwanda and Cambodia.

The House of Delegates, the association's governing body, voted Nov. 5 to call for the establishment of the tribunals. On July 19, the association's Executive Committee approved a resolution calling for an investigation into Russian war crimes. At the urging of the New York State Bar Association, the American Bar Association condemned Russia's invasion of Ukraine on Aug. 9.

"During our nearly 150-year history, the New York State Bar Association has been a champion of the rule of law and human rights. We must make certain that justice is served," said NYSBA President Sherry Levin Wallach.

With tensions growing between Russia and Ukraine in late 2021, NYSBA established a Ukraine chapter, partnering with the Ukrainian Bar Association. Early this year, the association's International Section launched a task force to help collect evidence of war crimes, assist refugees, provide humanitarian relief and aid displaced lawyers.

"Every lawyer in the United States and around the globe has a stake in making sure that the rule of law is upheld in Ukraine," said Scott M. Karson, a past president of the association and co-chair of the Ukraine Task Force along with Serhiy Hoshovsky. "We must hold leaders and soldiers accountable for war crimes."

Anna Orgenchuk, chair of NYSBA's Ukraine chapter and president of the Ukrainian Bar Association, has seen the devastating impact of the invasion on her homeland.

"This is one of the challenges we as international lawyers encounter — to leave no immoral and unlawful deed legally unpunished," Orgenchuk said. "With the support of NYSBA experts, we believe we can show to international judicial institutions the scale and depth of Russia's crimes in Ukraine. I strongly believe that the future of not only Ukraine but of Western civilization depends on our success in bringing perpetrators to justice."

The New York State Bar Association has a long history of standing up for the rule of law both in the United States and internationally. In 1896, the association proposed the creation of a global court to settle disputes among nations. That court is now called the Permanent Court of Arbitration at the Hague. In 1992, the association called for the creation of the International Criminal Court, which was established in 1998. Its purpose is to investigate and prosecute war criminals. The court prosecuted leaders from 17 nations including the Democratic Republic of the Congo, Darfur, Sudan and Uganda.

Legal Innovation Tournament Winners Apply for Patent for App Design

By Jennifer Andrus

The winning team of Ramona Miller and Michael Quintman from the annual National Legal Innovation Tournament are applying for patent protection of their winning app design.

"Help Decide" is the 2022 winning design in the competition co-hosted by the New York State Bar Association and the Maurice A. Deane School of Law at Hofstra. It is a free social media platform where users can share concerns, ideas and get feedback on community disputes. The inventors, who are third-year students at St. John's University School of Law, say the app will also connect users with mediation services already available in the community. Once their patent is approved, the pair will continue working on building the prototype.

The Innovation Competition is unique in that law student teams are paired with students from Hofstra's engineering and business programs along with legal advisers who are experts in the field of dispute resolution. Each team designs an app to tackle a problem affecting lawyers and the people they serve.

Hofstra Law School Dean Judge Gail Prudenti says the tournament is an example of collaboration that solves real-world problems. "We thank the New York State Bar Association and our sponsors for their visionary leadership in helping to advance our profession and train the next generation of attorneys," she said.

NYSBA President Sherry Levin Wallach says the tournament shows how new technologies can benefit the legal profession. "Collaboration and mutual support are key to building better and smarter outcomes as we wrestle with the problems of the day and try to anticipate those of the future," she said.

Quintman and Miller say the tournament was a new and different outlet for them to test their skills.

"There are so few opportunities as a law student to contribute to the pool of ideas involving access to justice and getting our court system and our justice system up to date post-COVID," said Miller. "This is a great way to brainstorm and contribute substantially to how we can increase access to justice and solve issues specifically in alternative dispute resolution."

Quintman says the work he is doing now will help him pursue a career in litigation after graduation. "I've seen the power and the importance of alternative dispute resolution. It inspired me both in practice and in class to want to learn how to improve available ADR and how to be the best practitioner I can be in those settings."

NYSBA Committee on Technology and the Legal Profession Chair Mark Berman served as co-chair of the National Legal Innovation Tournament. He led the endeavor along with John Tsiforas, director of law and technology at Hofstra Law, and Richard Hayes of Hofstra's Institute of Innovation and Entrepreneurship.

"We are in a high-tech world and we need to embrace technology to bring it to the people in order to help them with their everyday problems," Berman said. "Students left to their own devices saw the need to improve mediation processes using an app so that our citizens can seek to resolve their disputes virtually in a fair and efficient way."

Both Miller and Quintman encourage law students to take full advantage of the tournament next year.

"The solutions to the problems in our world have to come from someone, and oftentimes young people have amazing ideas," said Miller. "It takes years, if not decades, to climb up in the ranks at an organization to try to get your idea heard. But here you can do it as early as your second year of law school. "

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Periodicals

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